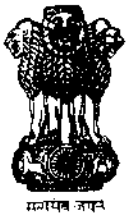

LAW COMMISSION OF INDIA

SIXTY-NINTH REPORT

ON THE

INDIAN EVIDENCE ACT, 1872

MAY, 1977

P. B. GAJENDRAGADKAR
Chairman

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May, 9, 1977

MY DEAR MINISTER,

I have great pleasure in forwarding herewith the Sixty-ninth Report of the Commission on the Indian Evidence Act, 1872.

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

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

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

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

While studying the provisions of the Act, the Commission has fully borne in mind the respect which they have universally received; but it may not be inappropriate to mention that even in regard to adjective law like the Evidence Act, respect for its excellence should not amount to blind adoration bordering on reverence. Since we feel that, even in regard to the branch of law covered by the Evidence Act, compulsion of the changing needs of socio-economic considerations has given rise to new concepts which, after critical examination, have received acceptance from the jurists, and

its working for over a century has posed some vexed problems, the Commission thought that the Act needs a careful study with a view to find out whether any recommendations should be made to change some of its provisions. After examining the provisions of the Act from this point of view, we have decided to make recommendations for amendment of some of them only where we thought that it was necessary to do so. That is the approach which we have adopted in making this Report and, indeed, that has been our approach in dealing with all the subjects whose study we have undertaken.

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

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

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

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

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

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

The law relating to hearsay has been the subject-matter of much debate and controversy during recent times. While we have not considered it necessary to suggest any radical amendment in this branch of the law in view of the present conditions in India, we have, nevertheless, dealt with the relevant sections at length, particularly, sections 32 to 35 and 60.

Similarly, the sensitive topic of what is known as Crown privilege has, as all of us are aware, come up before the courts in various contexts in India in reference to sections 122 and 163; and the same problem has faced the higher judiciary in other countries as well. It, therefore, became necessary for us to sift and examine in depth the material—judicial as well as academic—which indeed is voluminous. In this case, we have recommended certain amendments which, we think, will hold the scales even between the rights of citizens to lay before the courts all factual material relevant to the issues in a pending judicial proceeding against the Government and the legitimate considerations of security of the State. Our recommendation on this particular subject, it is hoped, will be conducive to justice in the broadest sense.

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

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

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

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

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

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

At present, the Commission is engaged on the study of the Transfer of Property Act; and this task again is arduous and exacting. But let me assure you that the Commission has undertaken this task with the full confidence that it will be able to forward to the Union Government its report on this subject before its tenure expires on the 31st of August this year.

I am happy to note that you agree with the suggestion which I have been repeatedly making for some time past that the Commission's reports should be printed as early as possible and circulated to all academic bodies like the Bar Associations in the whole of India, the Judges of the Supreme Court and the High Courts, the Bar Council of India and the State Bar Councils, and other institutions interested in the study of law. If the course suggested by me is adopted, it will stimulate an intellectual debate on the propriety or otherwise of the approach adopted by the Commission and the merits of the recommendations made by it in regard to specific Acts which are the subject-matter of the reports.

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

Yours sincerely,

(P. B. Gajendragadkar)

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CHAPTER 1

INTRODUCTORY

Introductory.

1.1. This Report deals with the Indian Evidence Act, 1872. The Law Commission has taken up the subject *suo motu;* but, it may be noted, that numerous suggestions for amending the Act[1] have also been received by the Commission from diverse sources, from time to time.

Experience of adjective law.

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

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

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

Law is classified as substantive or adjective. Substantive law[2] is that which has an independent standing, and determines the rights and obligations of persons in particular circumstances. Adjective law is dependent or subsidiary, and prescribes the procedure for obtaining a decision according to substantive law. Procedural law is often regarded as including both procedure proper and evidence, for evidence is concerned with establishing the facts to which substantive law is applied. Though procedure is only a means, in practice, it often assumes as great an importance as questions of substantive law.

Interest in reform of the law.

1.3. Over the last half a century or so, increasing interest has been shown in the reform of the law of Evidence. In those countries where the law was not codified, many of the topics belonging to the Law of Evidence were regarded as complex and confused, and sometimes even considered to be "absurdly technical".[3] In the United States, for example, two leading writers commented in 1937 that "a picture of the hearsay rule with its exceptions would resemble an old fashioned crazy quilt, made of patches out from a group of paintings by cubists, futurists and surrealists."[4]

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

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[1]The Act will hereafter be referred to as the Act.

[2]Nokes, Introduction to Evidence (1967), page 30.

[3]*Myers* v. *Director of Public Prosecutions,* (1965) A. C. 1001, 1019 (per Lord Reid).

[4]Morgan and Maguire, (1937), 50 Harvard Law Review, 909, 921, "Looking backward and forward at evidence."

Elsewhere in the Commonwealth, until very recently, attempts to secure a comprehensive code of evidence[1] were not successful, owing to considerable prejudice against codes that is natural to persons who are unfamiliar with their operation. This is not the position now. In India, there never prevailed any such prejudice.

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

Two postulates.

1.4. Any statute relating to evidence is based on two fundamental postulates. The first is that in the judicial process, facts come up for determination. The second is that in such determination of facts, certain rules are required. It is obvious that the Evidence Act deals with a vital part of the judicial process—the determination of facts. The necessity for determination of facts arises in a judicial proceeding because[2]—

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

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

Need for guidelines.

1.5. Archbishop Whateley, in his Rhetoric,[3] has made certain observations as to the need for guidelines in certain intellectual processes, which apply with equal force to rules of evidence:—

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

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[1] *See* Keeton and Lloyd, The United Kingdom (1955), i, 343; Nokes, "Codification of the Law of Evidence in Common Law Jurisdictions" (1956) 5 I. C. L. Q. 347; Cross, "Some Proposals for Reform in the Law of Evidence" (1961), 24 M. L. R. 32 at 60.

[2] Tomkin and Jenckin, Modern Roman Law, page 92, cited by Field, *Introduction to* the Evidence Act, page xi.

[3] Whateley, Rhetoric, Preface, page vi.

The definition of "evidence" that was contained in some of the American Codes—"evidence is the means sanctioned by the law of ascertaining in a judicial proceeding the truth respecting a question of fact"—aptly brings out this aspect.[1-2]

Substantive and adjective law.

1.6. While substantive law, as already stated,[3] defines the rights, duties and liabilities, adjective law regulates the pleadings, procedure and proof by which the substantive law is applied in practice.

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

One of the objects of the law of evidence, then, is to "restrict the investigations made by courts within the bounds prescribed by general convenience.[4]"

Every fact need not be proved.

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

Negative rules forming the part of the law of evidence.

1.8. Since, principally, the law of evidence restricts the scope of inquiry, a part of the law of evidence consists of *negative rules* declaring what "is not evidence". Of this negative aspect, a striking illustration is found in section 5 of the Act, which provides that "evidence may be given of all facts in issue and all such other facts as are hereinafter declared to be relevant *and of no others*."[6] Evidence tendered must be shown to be admissible under one or other of the sections of the Act[7]—or the provisions of some other Act previously passed and not repealed, or an Act enacted subsequent to the Act.[8]

1.9. The nature and basis of the particular restriction laid down in the law of evidence may vary. But, broadly speaking, the law excludes "certain kinds of evidence as having too remote a bearing on the issue, or as incapable of being satisfactorily tested or as coming from a suspicious quarter[9].

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

[2]New Jersey Rules of Evidence.

[3]Para. 1.2, *supra.*

[4]*R.* v *Prabhulal,* (1874) 11 Bom. High Court Reports 91.

[5]Holland Jurisprudence (1910), referring to Thayer's, A Preliminary Treatise on Evidence at the Common Law (1898).

[6]*Cf.* Lord Mansfield's observations in the *Berkley Peerage Case,* 4 Camp. 414.

[7]See *Collector* v. *Palakhdhari,* (1899) I. L. R. 12 All. 1, 43.

[8]See *Lekhraj* v. *Mahipal,* 7 Ind. Appeals 70, explained in *Abinash* v. *Parash,* 9 Cal. Weekly Notes 402, 406.

[9]Holland Jurisprudence (1910), referring to Thayer's, A Preliminary Treatise on Evidence at the Common Law (1898).

History.

1.10. After this discussion of the essential nature of the law of evidence, it will be convenient to give a brief history of the law of evidence in India since the commencement of the British rule. For this purpose, it would be desirable to deal separately with the position in the Presidency towns and the position elsewhere.

Presidency Towns.

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

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

Rankin states:[1]

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

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

Modification by Central Acts based mostly on English Statutes.

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

At common law, "The oath of an infamous person is not accepted."[2] In 1837, Act 19 abolished the incompetence of convicts to give evidence. This reform seems to have been enacted in England later—in 1843.

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

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

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[1]Rankin, Background to Indian Law (1946), page 1.

[2]Coke on Littleton, 158a.

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

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

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

In *Tilley* v. *Tilley*,[2] Denning L. J. (as he then was) gave a brief historical survey of the English legislation on the subject—

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

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

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

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

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

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

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[1]Lord Brougham's Act No. Evidence Act, 1845, related to official documents and copies of Acts.

[2] *Tilley* v. *Tilley*, (1948) 2 All. E. R. 1113.

Elaborate provisions dealing with evidence were made[1] by Act 2 of 1855. In fact, between 1835 and 1855, there were eleven enactments touching the law of evidence and, by Act 2 of 1855, all the enactments were consolidated.

Position in the Mofussil.

1.14. In the mofussil, however since the Courts were neither required to follow nor debarred from following the English law, a very vague customary law of evidence prevailed.[2] Courts sometimes relied on the Hedaya, sometimes on English text-books, sometimes on lectures given in India and the like. Some Regulations made between 1793 and 1834 dealt sporadically with some rules of evidence in Bengal and in Madras, and somewhat more elaborately in Bombay. But these Regulations touched only the fringe of the subject.

Bengal Regulation 9 of 1793 directed the Magistrates to be careful to cause the witnesses on the part of the accused to be in attendance by the time of the arrival of the court of circuit. The same Regulation provided that the religious persuasions of witnesses were not to be considered as a bar to the conviction of a prisoner. If, in any case, the evidence of a witness would be considered inadmissible under the Muhammedan Law, on the ground only that the witness was not a Muslim by religion, the courts were directed to give validity to that evidence, by a circuitous way, on the supposition that the witness was of the Muhammedan persuasion.[3]

Bengal Regulation 9 of 1796 directed that a prisoner was to be questioned at the time of his being committed or held to bail, and his answer was to be recorded on the Magistrate's proceedings, with the specification of any witness named by him. And the courts of circuit were expected to ascertain that all due measures had been taken to cause the attendance of all witnesses both for the prosecution and for the defence[4].

Bengal Regulation 4 of 1797 prohibited leading questions to witnesses, but allowed cross-examination either by the Judge or by the opposite party for the purpose of extracting the information they possessed and the discovery of the truth. The court of circuit was directed to take note of any variations in the depositions of the same witnesses before them and the Magistrates, but depositions taken before the Magistrates were not to be read until the witnesses were re-examined.[5]

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

Central Acts applying to Courts outside Presidency Towns.

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

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[1]See *infra*.

[2]First Report of the Commissioners appointed to consider the reforms of the judicial establishments in India, Appendix B No. 3, page 739.

[3]Sections 12 and 56 of the Regulation.

[4]Sections 2 and 4.

[5]Section 7. clauses iii and vii.

1.16. The position outside the Presidency towns may be summarised as under— Position summarised.

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

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

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

1.17. In *Banwari Lal* v. *Hetnarain Singh*[1], before the Privy Council, on the 22nd February, 1858, Dr. Lushington remarked: "It is unfortunately too much the habit of those Courts to receive documents without that just discrimination which would prevail, were the rules of evidence known and established, but their Lordships are of opinion that they cannot in these cases take upon themselves to determine what ought or ought not to have been received in the Courts in India. They may lament the great latitude with which documentary evidence is received, but it would be contrary to justice, in any particular case, to visit upon an individual penal consequences, because the administration of justice was not more strictly conducted with reference to the admission of evidence." Observations of Privy Council.

1.18. The law thus rested in a state of great indefiniteness. In a Full Bench decision of the Calcutta High Court[2-3], it was held that the English law of evidence was not the law of the Mofussil; that at the time the Mahommedan criminal law, including the Mahommedan law of evidence, was no longer the law of the country, and that by the abolition of the Mahommedan law, the law of England was not established in its place. The Mofussil Courts were, thus, not required to follow the English law, although they were not debarred from following it where they regarded it as the most equitable. Criticism by High Courts.

1.19. We may, now refer to some of the Central Acts relating to evidence, enacted before 1872, which introduced a modicum of certainty in the law. Central Acts—Acts of the Governor-General-in-Council between 1835 and 1872.

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

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[1]*Banwari Lal* v. *Hetnarain Singh*, (1858) Moo I. A., 148; 4 W. R. P. C. 148.

[2]*Queen* v. *Khyroolah*, (1866) B. L. R. Supp. Vol. App. 11; 6 W. R., Cr. 21; Field, Ev., 16—18.

[3]See *R.* v. *Ramaswami*, (1869) 6 B. H. C. R. Cr. 49.

and applied, to the Courts in India, several of the reforms in the law of evidence made in England. We have mentioned a few of them while dealing with the position in Presidency Towns. We shall now refer to them in detail.

These Acts were as follows:

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

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

"An Act for improving the Law of Evidence:

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

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

question in the cause, shall not be deemed a just exception to the testimony of such defendant, but shall only be considered as affecting or tending to affect the credit of such defendant as a witness."

1.20. In 1855, Act 2 was passed for the further[1] improvement of the law of evidence.

Act 2 of 1855. Important provisions of the Act of 1855.

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

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

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

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

1.23. Except in the case of treason, the evidence of one witness was made sufficient proof by section 28. But there was no provision abrogating the common law rule relating to corroborative evidence in support of the testimony of an accomplice or of a single witness in the case of perjury. It may be noted that the exception as regards treason was based on the English law as it was then in force, and as it remained in force for a long time until abrogated during recent times[2].

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

[1] As to this Act, see *R.* v. *Gopal Dass*, I.L.R. 3 Mad. 271, 282.

[2] Treason Act, 1945.

the English law, whereunder, to render a dying declaration admissible, the declarant must have abandoned all hopes of recovery. The English case law on the subject upto 1888 is reviewed in *R.* v. *Glossler*[1]. In this connection, section 371 of the Code of Criminal Procedure, Act 25 of 1861, may also be seen, as well as the under-mentioned case[2].

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

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

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

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

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

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

Acts passed after Act 2 of 1855.

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

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

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[1]*R.* v. *Glosser*, (1888) 15 Cox 471.

[2]In the matter of Tenoo, (1871) 15 Weekly Reports Criminal 11.

Act 15 of 1869 dealt with the evidence of prisoners,—provisions which were later placed in the Prisoners Act, 1890 and then in the Attendance of Prisoners Act, 1955, and now in the Code of Criminal Procedure, 1973 (so far as they concern criminal courts).

Applicability English Law.

1.27A. These Acts did not affect the applicability of the English law. While, therefore, within the Presidency Towns, the English law of evidence was in force, modified by certain Acts of the Indian Legislature, (of which Act 2 of 1855 was the most important), the Mofussil Courts, on the other hand, had, down to 1872, hardly any fixed rules of evidence, save those contained in scattered Regulations and Acts

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

Position re-capitulated.

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

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

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

Lax Character of the law.

1.28. The lax character of the law of evidence in the Mofussil Courts was the subject[1] of frequent judicial comment[2].

This was the state of things found by the Legislature when the Indian Evidence Act was undertaken as a legislative measure having, for its object, the consolidation of the rules of evidence and repeal of all others that had prevailed before. This appears from the express words of section 2 of the Act; and the saving clause contained in the last paragraph of that section may be taken, in fact, to have an extremely limited operation. The Act became law on the 15th March, 1872, at a time when the Legislature had also in hand an equally important measure connected with the consolidation of the rules of Criminal Procedure[3].

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[1]See observations in—
(a) *Unide* v. *Pemmasamy*, (1858) 7 M.I.A. 128, 137;
(b) *Hureehur* v. *Majhee*, (1874) 22 W.R. 355, 356, 357;
(c) *Naragunty* v. *Vengamma*, (1861) 9 M.C.A., 90;
(d) *Gujju* v. *Fatteh*, (1880) I.L.R. 6 Cal. 193.

[2]*Phul* v. *Surijan*, I.L.R. 4 All. 249, 250.

[3]*Queen Empress* v. *Babu Lal*, 1889, I.L.R. 6 All. 509; 4 A.W.N. 229.

Bill by Commissioner.

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

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

The first Bill—outline of.

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

Stephen's Bill.

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

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

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

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

Systems.

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

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[2]Nokes, "Codification of the Law of Evidence", (1965) 5 I. C. L. Q. 347, 350.

[3]Jennings and Tombish, The Dominion of Ceylon (1952), pages 236, 281, 297, referred to in Nokes, "Codification of the Law of Evidence", (1956) 5 I. C. L. Q. 347, 350.

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

[4]Morris, Evidence in East Africa.

[5]Law of Kenya in force.....1948 (n.n.), i. 109; Law of Nigeria (1948), iii, 42; Laws of the Uganda Protectorate (1951), i. 92; See also Laws of the Zanzibar Protectorate (1935), i. 353.

are, in the continental system, provisions designed to ensure a pre-recording of facts to a larger extent than the common law system. The greater use of notaries and the fuller opportunity for a record of the statements of the accused illustrate this. Incidentally, it may be mentioned that the provision in section 164 of the Code of Criminal Procedure, 1973, is reminiscent of the continental system of recording statements—though, of course, this does not imply that a statement under section 164 is substantive evidence.

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

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

1.34. In the Encyclopaedia Britannica[1], the systems of evidence have been briefly described.

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

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[1]Article on Evidence from the new Encyclopaedia Britannica Macropaedia Volume 7, page 6.

CHAPTER 2

HISTORY OF RULES OF EVIDENCE IN ENGLAND

I. INTRODUCTORY

Introductory

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

Origin in the 17th Century.

2.2. In England, the system known in practice by the title of "The Law of Evidence", began to form about the middle of the seventeenth century. Noting this fact, Best[1] comments—

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

II. DOCUMENTS

The rules governing the effect of documentary evidence.

2.3. It will be convenient to begin with documentary evidence. In modern law[2], it is the rule that, if the parties to any transaction have embodied their intentions in a document or a series of documents, no evidence may be given of the terms of the transaction except the document itself, or secondary evidence of its contents, when such evidence is admissible. Nor can the terms of the document be contradicted, altered added to, or varied, by oral evidence[3]. This is not a primitive principle. In fact, it was not fully established before the latter half of the svenenteenth century; and the provisions of the Statute of Frauds had something to do with the modern scope of the rule[4].

Sealed documents

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

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[1]Best, Principles of Evidence (1922), page 100, para. 116.

[2]Holdsworth, H. E. L., Vol. 9, page 173.

[3]Stephen, Digest of the Law of Evidence, 95.

[4]Wigmore, iv., 2411, 2426, referred to by Holdsworth, H. E. L. Vol. 9, page 173.

If those documents were adduced as a *conclusive* proof, they were much more than mere evidence. The party who was not prepared to deny their genuineness was absolutely bound—he was estopped[1].

Estoppel by deed-related documents.

2.5. A statement made by the parties to a sealed writing was conclusive proof of the facts contained therein[2]. If, therefore, one of the parties to a litigation could produce a sealed writing which showed that the other was bound, he produced a proof as conclusive as a record[3]. The other party was estopped by his deed.

Deed and record.

2.6. The old custom of summoning the attesting witnesses with the jury[4], illustrates the transition from the older idea that the deed properly attested is a form of proof, to the newer idea that the proof is to be made by the verdict of the jury. The other party was estopped by his deed. That estoppel by deed grew naturally out of estoppel by matter of record is very clearly explained by Professor Wigmore[5]. He says: "the legal value of the seal was the result of a practice working from above downwards, from the king to the people at large. It is involved, in the beginning, with the Germanic principle that the King's word is indisputable..... The King's seal to a document makes the truth of the document incontestable. This leads.....to the modern doctrine of the verity of judicial records..... For private men's documents, its significance is that the indisputability of a document sealed by the king marked it with an extra-ordinary quality, much to be sought after. As the habitual use of the seal extends downwards, its valuable attributes go with it.....this extension of the seal (from the king to private persons) begins in the eleventh and is completed by the thirteenth century." The effect of the rule that the party is estopped by his deed, had no small influence upon the growth of the law as to documentary evidence in general[6].

Variation of written by oral evidence.

2.7. The rule that written documents cannot be varied by oral evidence had its origin in the days when the summoning of witnesses to testify before the jury was a new thing. In the beginning, evidence was stated in the pleadings, and that is why a written document could not be varied by a mere averment[7]. This rigid approach gave rise to certain rigid rules as to the relationship between documentary and oral evidence, and this rigid approach gave rise to the evolution of strict rules in the construction of written documents[8]. Even the illegality of a transaction was not, initially, recognised as a defence which could be pleaded to a bond, and lawyers tried to interpret a deed with as little reference to outside facts as possible.

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

Three leading rules excluding certain evidence.

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

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[1]Holdsworth, History of English Law, Vol. 9, page 173.

[2]Holdsworth, History of English Law, Vol. 9, page 154.

[3]"Anything contained in the writing cannot be any exception of the parties be removed", Y. B. 21, 22 Ed. I (R. S.) 436; cp. Y. BB. Im. 2 Ed. II (S. S.) 68-69; 3 Ed. II (S. S.) 171 per Herle agr; Salmond, Essays in Jurisprudence 51-52.

[4]Holdsworth, History of English Law, Vol. 1, page 334.

[5]Evidence iv. 3414, 2426.

[6]Holdsworth, H. E. L. Vol. 9, pages 163 and 177.

[7]Holdsworth, History of English Law, Vol. 9, pages 176 and 219.

[8]Holdsworth, History of English Law, Vol. 7, pages 392 and 394.

and the rule that "hearsay" is not evidence[1]. As regards the first of these rules, we have already discussed the history.[2]

OPINION

History of rule as to opinion evidence.

2.9. The rule as to opinion evidence has a long history. It was an old rule of the civil and canon law that a witness should speak as to matters which had come under the personal observation of his own senses.—"*de visu et auditu*"[3]. This rule made for the exclusion of mere opinion. The main exception was in the case of experts, to whose opinion courts had recourse as early as the 14th century. For example, in 1353, surgeons were summoned by the court to give their opinion on the question whether a wound amounted to a mayhem[4] (crime of maiming the person so as to render him partly or wholly defenceless.

History of expert evidence—Learned Hand quoted.

2.10. It may, in this connection, be of interest to note that as early as the 14th century[5], experts with no personal knowledge of the facts in issue used to advise the English Courts about matters of science that would be helpful in determining the facts in issue. In this connection, we may quote Learned Hand, who has observed[6]—

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

First method

2.11. In 1345, before the jury system[7] developed fully, the court summoned surgeons to rule whether or not a wound was fresh. This practice illustrates the established fourteenth century procedure of having qualified people decide the issues. The special jury, in this connection, means a jury of persons especially fitted to judge of the peculiar facts upon which the particular issue at bar turns[8]. The practice is certainly old, at least in one instance of like kind—the jury of matrons *de ventre inspiciends*[9].

2.12. In this connection, it is pertinent to quote Learned Hand again. He has stated[10]—

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

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[1]Holdsworth, History of English Law, Vol. 9, page 211.

[2]See *supra*.

[3]Salmond, Essays on Jurisprudence, pages 81-83, cited in Holdsworth, History of English Law, Vol. 9, page 211.

[4]Holdsworth, H. E. L. Vol. 9, page 21.

[5]See Learned Hand, "Historical and Practical considerations regarding expert testimony" (1901) 15 Har. Law. Rev., page 40.

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

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

[8]See generally L. Hand, "Historical and Practical considerations regarding Expert Testimony", (1901) 15 Harv. L. Rev. 40, 48.

[9]*Cf Beg* v. *Wycherly*, 8 C. & P. 262.

[10]Learned Hand, in 15 Harv. L. Rev. 40, 42.

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

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

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

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

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

HEARSAY

Rule against hearsay.

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

(1) First, there was the old rule, applied in civil and canon law, that witnesses should testify only to matters under the personal observation of their own senses. No doubt, this older rule is somewhat different from the modern hearsay rule. According to the older rule, once a witness gives evidence as to matters which he has himself heard, an assertion of a person who is not called as a witness could be given in testimony, but the modern rule would reject[4] it. The modern rule might have developed separately, but its development was helped by the memory of this older rule.

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

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[1] *Alsep* v. *Bowtrell*, Cro, Jac. 541.

[2] Trial of Sidnay, (1683).

[3] Common Law Procedure Act, 1854, extended to criminal courts by the Criminal Procedure Act 1865 (17-16 Victoria Chapter 125), section 27.

[4] Holdsworth, History of English Law, Vol. 9, page 214.

[5] Holdsworth, History of English Law, Vol. 9, page 218.

(3) During the 16th century, it was gradually coming to be evident that juries based their verdicts neither upon their own knowledge nor upon enquiries, but upon the *oral evidence* of witnesses given in open court[1] and the statute of 1562-1563 provided for the first time a compulsory process for witnesses. More attention was, therefore, paid to the nature of the evidence by which the juries were led.[2]

(4) There was a strong condemnation of hearsay by Coke in his third institute (1641)—a statement which was at once accepted as an authoritative statement of law.[3] This might have fixed the attitude of the post-Restoration judges in relation to criminal cases, and, obviously, the rule for criminal cases would easily be applied to civil cases also.[4]

Expansion of the rule against hearsay.

2.17. Once the general rule of exclusion of hearsay was established, there was logical expansion of its scope. The first such expansion was the emergence of the view that hearsay was not admissible *even as corroborative evidence.*[5] In this connection, it should be noted that at least upto 1683, the view seems to have been canvassed that hearsay evidence was admissible as corroborative evidence.[6] In fact, the utility of hearsay at least as corroborative evidence survived for a long time, in the rule that a witness's own prior statement could be proved to show that he had always told the same story and, therefore, ought to be believed.

2.18. The next expansion of the rule against hearsay is illustrated by the establishment of the rule that the bar applied even to previous statements made on oath[7] which are *res inter alios acta.*

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

Exceptions to the rule against hearsay.

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

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

2.22. The courts, it is said, "seem to be satisfied with a showing of circumstances in which a normal man in the situation of the declarant would have desired to tell the truth, and in which the dangers from deficiencies in his perception, memory and narration are not incapable of intelligent appraisal by the trier of fact."[9]

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[1]Holdsworth, History of English Law, Vol. 2, pages 335-336.

[2]Holdsworth, History of English Law, Vol. 9, page 216.

[3]Holdsworth, History of English Law Vol. 5, pages 471-472.

[4]Holdsworth, History of English Law, Vol. 9, page 216.

[5]Holdsworth, History of English Law; Vol. 9, page 217.

[6]See discussion between the Chief Justice Pemberton and the Attorney General in *R.* v. *Lord Russell,* (1683) 9 State Trials, at p. 613.

[7]Case of Penwick, (1696) 13 State Trials 618.

[8]*R.* v. *Paine,* (1696) 5 Mad. 163, 165, referred to in Holdsworth History of English Law, Vol. 9, pages 218-219.

[9]Edmond M. Morgan, "Hearsay and preserved memory", (1926-27) 40 Harvard Law Rev. 712, 714.

Exceptions based on absence of danger of inaccuracy.

2.23. In the various exceptions to the hearsay rule, the dangers of deliberate or inadvertent departure from the ideal, as regards perception, memory and narration, though not eliminated, are usually reduced to a manageable proportion. The following illustrations[1] would bear this out[2]:—

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

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

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

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

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

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

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

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

(i) *Contemporaneous declarations* (Res gestae):

There is little danger of fabrication or faulty memory, though not sufficient means of checking the accuracy.

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

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

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

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[1]Some of the reasons are taken from Edmond Morgan, "Hearsay and preserved memory", (1926-27) 40 Harvard Law Review 712, 714.

[2]The illustrations deal with exceptions in force in England or elsewhere.

(m) *Ancient documents:* Where declarations in ancient documents are accepted for the truth of the matter and accepted without qualifications, there is a danger of their being untrue.

Statements of conspirators.

2.24. In this connection, the position as to conspiracy is of interest. The special evidentiary rule that permits out of court statements of one conspirator to be used against another, has some cogent reasons in support thereof. On the subject of the evidentiary advantages of a conspiracy trial to the prosecution, considerable literatures has come into being during the last half a century.[1] Nevertheless, it is obvious that such statements are exceptions to the rule against hearsay. The important pre-requisite to their admissibility is that, speaking broadly, the statements made by one conspirator, in order to be admissible against others, must be made *in furtherance of the criminal purpose.* The rationale of admitting this evidence is that the common purpose having been established, the acts and observances of one conspirator can be used against the other in evidence because of the common purpose. The aspect of common purpose was brought out in a working definition of conspiracy which was supplied by Mr. Justice Holmes, who said, "A conspiracy is a partnership in criminal purposes."[2] There may be a practical reason also, namely, that every conspiracy is, by its nature, secret. "A case can hardly be supposed where men concert together for crime and advertise that purpose to the world[3].".

Bar against admission of previous convictions.

2.25. The hearsay rule did not present any obstacle to the admission of a prior conviction in a civil case.[4] But the bar against admitting a conviction seems to be an illustration of the opinion rule or, at least, an illustration of the rule that transactions not between the parties to the present case are not, in general, admissible. The position is different if the parties are the same. For example, where the State is a party to the civil action, a previous acquittal would be conclusive[5-6].

IV. CORROBORATION

Need for corroboration in certain cases.

2.26. Coming to corroboration, we may state that English criminal law still requires that certain testimony should be corroborated. Statutory examples of such requirement as to perjury[7], and the requirement of corroboration of the evidence of the plaintiff in suits based on breach of a promise to marry.[8] The last mentioned illustration has now no practical value, because the cause of action for breach of promise to marry does not now survive in England. Judicial requirements as to corroboration exist—to mention two important cases—in regard to the testimony of accomplices[9] and certain sexual offences[10].

V. WITNESSES

Documentary earlier than oral evidence.

2.27. A few observations about witnesses may now be made. In this connection, it may be stated that documentary evidence came into existence earlier than witnesses in England.[11] It has been said[12]

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[1]See note, "The Conspiracy Dilemma" (1948) 62 Harvard Law Review 276.

[2]*U.S.* v. *Kissel*, 218 U. S. 601, 608.

[3]*Grunewald* v. *U.S.*, (1957) 353 U. S. 391, 402.

[4]See Ghaffee, "Progress of the Law—Evidence" (1922) 35 Harv. L. R. 302, 440.

[5]*Coffes* v. *U. S.* (1886) 16 U. S. 436.

[6]See note, "Admissibility of Evidence in a prior conviction in a subsequent suits" (1927-28) 41 Harv. L. R. 241, 241.

[7]Section 13, Perjury Act, 1911.

[8]Section 2, Evidence (Further Amendment) Act, 1869.

[9]*Davis* v. *D.P.P.*, (1954) A.C. 378.

[10]*R.* v. *Zielinski*, (1950) 2 All. E. R. 524.

[11]See also *supra.*

[12]Holdsworth, H. E. L. Vol. 9, para. 163.

"The record authenticated by the King's seal was conclusive..... This naturally led to the establishment of the doctrine of estopped by deed. Other matters stated under the seal, either of the King, or of private persons, were equally conclusive. In other words, both matters of record and documents under seal were proofs—proofs as conclusive as the older proofs by which in former days men were won't to try the truth of their respective allegations. It may thus be said that the efficacy of these kinds of estoppel was derived, partly from the new fashion of recording pleas and of authenticating the record by the King's seal, and partly from the application of this new idea to the old conception of a trial, it gradually came to be seen that these sealed documents might have another effect. The jury was a body of reasonable men, whose verdict could be guided by the evidence put before them.

And so the difference between the jury and these older modes of trial, which, as we have seen, had a decisive influence on the development of the common law system of *pleading*[1], had an influence equally great on the law of evidence, for, it gradually gave rise to the idea that these sealed documents could be used, not only as providing an *absolute proof* by creating an estoppel, but also as evidence. Hence we get the growth of the idea that a deed can be used, not only to estop the party as against whom it is produced, but also to give the jury evidence as to the truth of the matters in issue. Gradually this idea that a deed can be used as evidence, is applied to other writings, and so we get the modern conception of documentary evidence."

No witnesses.

2.28. There was, thus, no place for the witness as known to us in the old system of procedure, according to which trials were conducted by means of fixed methods of proof. And this fact was emphasised by two connected principles which rendered the modern use of witnesses legally impossible. The first of these principles was that no one ought to be convicted of a capital crime by mere testimony.[2] The second was that a witness was neither competent nor compellable to testify to a fact, "unless when that fact happened, he was solemnly taken to witness."[3] Both these principles profoundly influenced the development of the mediaeval common law on this topic.

Oral evidence later.

2.29. Oral evidence was a later-comer. Maintenance and champerty were crying evils of the time[4]; and, by these practices, persons were able to use the law courts, instead of the arms of their retainers, to prosecute their feuds whenever they thought this course desirable.[5] Nothing was easier than to get a partial jury; and, as the verdict of the jurors was given as the result of their own knowledge or inquiries, it was natural that they should get their instructions from the side whom they favoured.[6] The remedy for this state of things, suggested in a Parliamentary petition of 1354, was that all the evidence should be openly produced at the bar, and that, after the jury had been charged and had departed from the bar, no person should be allowed to confer with them.[7] But this remedy was plainly insufficient. In the first place, it did not prevent the jury from giving a verdict in accordance with its pre-conceived ideas. In the second place, it did not prevent persons, who were in a position to intimidate the jury, from coming forward and giving evidence at the bar in such a way as to make it quite plain

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[1]Holdsworth, H. E. L. Vol. 3, 613, 63.

[2]"Nemo de capitalibus placitis testimonio convicatur, Leg. Henr. xxxi, 5.

[3]P. and M. ii 599; Wigmore, iv. 2190.

[4]Holdsworth H. E. L. Vol. 3, 394-407; Vol. 5, 201-203; Vol. 7, 524-525.

[5]Holdsworth Vol. 2, page 416.

[6]R. P. ii 259 (27 Ed. III. No. 30).

[7]*Imid.* cited Thayer, Preliminary Treatise on Evidence, 124-125.

to the jury what the consequences of a hostile verdict might be. To meet this difficulty the courts so stretched the conception of maintenance, that a witness who, without having any interest or cause to meddle in the litigation, volunteered, his testimony, rendered himself liable to be proceeded against for this offence.[1]

How change effected.

2.30. The method by which the Legislature effected this change, was suggested by the existing state of the law[2] and as Wigmore has said[3]: "The lead as furnished by the existing qualification already noted that 'what a man does by compulsion of law cannot be called maintenance' ..... Let an order of the judge commanding such a person's appearance be obtainable as of course before the trial, and the risk of a charge of maintenance would be removed, and no man need fear to come forward as a witness."[4]

Statute of 1562-1563.

2.31. This was the course adopted in England. The Act of 1562-1563[5], which created the statutory offence of perjury[6], enacted that witnesses served with process to attend and testify should be liable to penalty if they did not appear[7]. And, though the common law courts had no compulsory process, the weapon of subpoena, which had been used by the Council and the Chancery for upwards of a century, was ready to hand, and was adopted by them.

VI. COMPETENCE AND COMPELLABILITY

Development of rules as to competence and compellability.

2.32. When it became permissible to summon witnesses and to compel them to give evidence under the Act of 1562-63, two questions arose, namely, (a) competency, and (b) compellability of witnesses under which their testimony could be admitted[8].

2.33. As to the competency of witnesses, it would be noted that the canon law had developed a number of detailed rules[9] as to the class of persons who were not competent to become witnesses. Some of these rules had been adopted by the common law in relation *to jurors*, when it became permissible to summon *witnesses*. As such, the rules as to competency at canon law filtered into common law in relation to witnesses also.

Rules as to competency developed on native lines.

2.34. Of course, the rules were not adopted wholesale or without modifications, but were developed on native lines[10]. As a result of this process, rules developed as to (a) the natural, and (b) artificial, incapacity of witnesses. "Natural" incapacity was of witnesses who were insane or (subject to certain qualifications) infants. The rule as to disqualification of women; which prevailed in canon law was not, however, adopted[11].

Natural and artificial incapacity.

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

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[1]Holdsworth H. E. L. Vol. I 335; Vol. III 398; Thayer, 125-129.
[2]Holdsworth H. E. L. Vol. 9, page 185.
[3]Wigmore, Vol. 4, 2961, 2190.
[4]Wigmore, iv. 2961, 2190
[5]5 Elizabeth c. 9 (1562).
[6]Holdsworth H. E. L. Vol. 4, page 518.
[7]5 Elizabeth c. 9, section 12 (1562).
[8]Holdsworth, History of English Law, Vol. 9, page 185
[9]See also chapter I, *supra*.
[10]Holdsworth, History of English Law, Vol. 9, p. 186-187.
[11]Holdsworth, History of English Law, Vol. 9, p. 187-189.

Case[1]. As to moral grounds, the idea that the commission of such crimes rendered a man so infamous that his testimony should be excluded, had its roots in Roman law, which, in its turn, had borrowed the rule from canon law[2]. The operation of this disqualification was complicated by the intricacies of the criminal law as then in operation—for example, the benefit of clergy (which operated as a pardon), and other complications. The rule was largely swept away in 1843[3] As to the disqualification of the party and other persons interested in litigation, the rule is stated by Coke in *Slade's case*[4] where he said that experience rules that men's conscience "grows so large" that the respect of their private advantage rather induces men to perjury.

2.36. By the 17th century, this disability was established in civil cases, and, in criminal cases, it was established later in the latter half of the 17th century[5] Gradually, by the process of *legislation* in the 19th century, this disqualification was abolished in respect of :—

(a) persons interested.[6]

(b) parties in civil cases.[7]

(c) parties in criminal cases[8]

Children

2.37. At one time[9] the unsworn evidence of children of tender years was not admissible except in special circumstances. The rule no longer prevails.

The rule of compulsion and its exceptions.

2.38. When the statute of 1562-63 had established[10] the general rule that all competent persons could be compelled to testify,[11] the question soon arose whether there were any, and, if so, what exceptions to the general rule of compulsion. It is obvious that there is no necessary connection between the causes which render a witness incompetent, and the causes which may make it fair that he should be exempted from the general rule of compulsion. But in some cases these two very different sets of exceptions to a general rule seem to have exercised some influence upon one another. This influence is most marked in the case of husband and wife. The rule that the husband or wife cannot be compelled to testify against the other is stated by Coke in the same sentence as that in which he states their incompetence to testify on one another's behalf;[12] and, it would seem, that the privilege is better attested in the earlier cases than the disability[13]. It was justified—as the rule of incompetence was justified—on the ground that any other rule "might be a cause of implaceable discord and dissension between the husband and the wife". From that time onwards it was accepted as an absolute rule in civil cases, and, subject to one or two exceptions, as the general rule in criminal cases.

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[1]See *Omichand* v. *Barker*, (1744), 1 Atk. 21, 48, 50.

[2]Salmond, Essays in Jurisprudence, page 34-37, referred to in Holdsworth, History of English Law, Vol. 9, p. 191.

[3]Statutes 6-7, Vict. Chap. 85.

[4]*Slade's case* (1602) 4 Co. Rep. at folio 95a.

[5]Holdsworth, History of English Law, Vol. 9, p. 155.

[6]6-7 Vict. Chap. 85 (1843).

[7]14-15 Vict. Chap. 99 (1851) section 2.

[8]61-62 Vict. Chap. 36 (1898).

[9] (a) *R.* v. *Powell*, (1755), L. Leach 110, and
(b) *R.* v. *V. Brasier*, (1779), 1 Leach 199.

[10]Holdsworth, H. E. L. Vol. 9, p 197.

[11]Holdsworth, H. E. L., Vol. 9, page 195.

[12]Co. Litt. 6b.

[13]Wigmore, iv. 3034-3035, 2227.

2.39. While it became possible to compel witnesses to give evidence, privilege in respect of certain particular kinds of questions survived. One such privilege will now be discussed.

VII. SELF-INCRIMINATION

Privilege against self-incrimination.

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

The older modes of proof, such as compurgation and ordeal, forced the accused to a direct denial of the charge under oath; and, in the sixteenth century the Legislature had no hesitation in sanctioning forms of procedure which involved an examination of accused persons. The Act Pro Camera Stellata of 1487[2] and many other Acts[3] sanctioned such an examination; and Acts of 1553 and 1555 required accused persons to submit to examination by justices of the peace.[4]

Lilburne's case.

2.41. The case of Lilburne is instructive[5] in this context. The following is Lilburne's account of the oath he was asked to take in the Star Chamber :—

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

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

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

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

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

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[1]Holdsworth, H. E. L. Vol. 9, page 198.

[2]3 Henry VII. c. 1 (1487).

[3]13 Elizabeth c. 7 x. 5—bankrupts; 35 Elizabeth c. 2, II—Jesuits; 43 Elizabeth c. 6, I—those who abused warrants.

[4]I, 2 Phillip and Mary c. 13; 2, 3 Phillip and Mary c. 10; Vol. i 296; Vol. iv. 529.

[5]Trial of Hon. Lilburne, (1697) 3 State Trials 1315, 1320-21, 1329-1332 (G. B. Star Ch. 1637), cited by Helen Silving, "The Oath", (1959) 68 Yale L. J. 1329, 1366.

[6]Genesis 3.11, 4:9-10.

[7]*Escobedo* v. *Illinois*, 378 U. S. 478, 483.

[8]See *infra*, under "The Accused".

in 1679[1]. It is not till the Commonwealth period that this privilege to refuse to answer incriminating questions is accorded to accused persons.[2] Existence of this privilege of the accused was established after the Restoration[3]; and it was then extended to ordinary witnesses.[4]

VIII. THE ACCUSED

Judicial questioning of the accused in England.

2.44. The history of *judicial questioning* of the accused in England is of interest. By statutes[5] enacted in the middle of the sixteenth century (1554-1555), justices of the peace, before committing to goal admitting to bail a person charged with a felony, were required to question him and to record their examination in writing. The Act passed in 1554 required the justice of the peace to conduct the examination *only if the accused was applying for bail.* Its purpose seems to have been to prevent collusion between criminals and justices, who were allegedly granting bail too easily and sometimes as the result of bribes.[6]

2.45. The Act passed in 1555 extended the requirement for a judicial examination to those persons who were committed to jail. It was apparently passed because the examination of the accused proved to be a useful proceeding *for all cases.*[7] It has been stated in one study—[8]

> "The office of Justice of the Peace goes back over six centuries—to the statute 1 Edw. 3, Stat. 2, c. 16, passed in the year 1327, which provided that 'for the better keeping and maintenance of the peace, the king will that in every country good men and lawful, which be in the country, shall be assigned to keep the peace'. At first the duties of a justice *were, generally speaking,* very much like those of a constable'—to arrest suspects and to see that they were held in custody or to bail until they could take their trial. Various important administrative functions, however, devolved upon him, and these necessitated regular meetings with his colleagues. These meetings took place 'in session's four times a year,—the origin, no doubt, of the courts of quarter session as we know them today.
>
> **2.46.** Gradually, the justices were empowered to try minor offences—such as, drunkenness, swearing and vagrancy—'out of sessions' Side by Side with this work *they held preliminary examinations in relation to major offences.* Their duty was to examine accused persons about their alleged offences in much the same way as is done in France and other countries by a *juge d'instruction.* They also examined the witnesses, but not in the presence of the accused, who were not permitted to know the case which was to be alleged against them on their trial. Such was the effect of a statute passed in 1555 in the reign of Philip and Mary—2 & 3 Ph. & M. C. 10 (an Act to take the examination of prisoners suspected of manslaughter or felony)."

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

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[1]R. v. *Reading,* (1679) 7 S. T. at p. 296, Wigmore, iv 3089, cited by Holdsworth, H. E. L., Vol. 9, page 198.

[2]King Charles Trial, (1649) 4 S. T. at p. 1101; Lilburne's Trial, (1649) 4 State Trials at pp. 1292-1293, 1341.

[3]R. v. *Screen,* (1660) 5 S. T. at p. 1039.

[4]R. v. *Reading,* (1679) 7. S. T. at p. 296; R. v. *Rosewall,* (1684) 10 S. T. at p. 169.

[5](1554) 1 & 2 Phil. & M., c. 13, section 4; (1555) 2 & 3 Phil. & M., c. 10, section 2.

[6](a) Plucknett, A Concise History of the Common Law (1956) 432;

(b) Stephen, History of Criminal Law, Vol. 1, pages 237, 238.

[7]Holdsworth, History of the English Law (3rd Ed. 1945), Vol. 4, page 529.

[8]J. P. Eddy, "Justices of the Peace" (1949) 65 L. Q. R. 51, 52.

[9]Emphasis supplied.

Lord Goddard, has, said 'effected a complete revolution in the position of justices of the peace in regard to indictable offecnces'.

2.47. The earlier statutes contemplated an inquisitorial examination of the accused rather than a *judicial inquiry* into the strength of the case of the prosecution against the accused[1]. This examination was conducted without putting the accused upon oath[2]. By these statutes the justices performed the functions of police, detective, prosecutor, and chief complaining witness at trial, as well as examining magistrate. Following the interrogation, the justice transmitted his record of the evidence to the trial judge, and the compulsory examination of the accused was read to the jury. Stephen noted[3]: "I do not think any part of the *old procedure operated more harshly upon prisoners than the summary and secret way* in which justices of the peace, acting frequently the part of *detective officers*, took their examinations and committed them for trial."

This practice of questioning the accused, prior to trial fell into gradual disuse *during the eighteenth century, and, by the beginning of the nineteenth*, the practice had become limited to the recording of any voluntary statements that the accused wished to make. The accused was being advised that such statements would be used against him at the trial[4]. By statute enacted in 1848[5], to which we have already referred[6] the change from *inquisitorial examination to preliminary inquiry was completed; the accused could be asked no questions; he was* invited to make a statement if he wished and was cautioned that it would be taken down and might be given in evidence against him; the witnesses were examined in the accused's presence and could be cross-examined by him or his counsel.

Case of Socrates.

2.48. In his work on "Historical Trials",[7] in the Chapter on Socrates, Sir John Mcdonnell, Quain Professor of comparative law, University College, London, has picturesquely described what would have been the fate of socrates if he would have been in modern Europe. He points out that instead of secluded and uninterrupted colloquies with his philosophic friends until his painless end, Socrates would have been cut off from his disciplies by the "Inquisition", and delivered over, shattered and crushed in body, to an excruciating death. According to Sir John Mcdonnell, "In Tudor or Stuart reigns he would have been browbeaten by the law-officers *prosecuting, scolded by the presiding judge as a pestilent* nuisance in the State, and his last words might have been cut short or drowned in the roll of drums beneath the scaffold."

IX. NUMBER OF WITNESSES

The rule that a certain number of witnesses is requisite for proof.

2.49. *The rule that at least two witnesses[8] were needed for the proof of* certain facts is found in the classical Roman Law[9]; but it gained its great authority in mediaeval Europe from the fact that it became a rule of the canon law[10], justified, not only by the authority of the Old[11] and New Testaments[12].

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[1](a) *Holdsworth, H. E. L. (1945), Vol. 4, p. 529;*
(b) Stephen, H. C. L., Vol. 1, page 228.

[2]Stephen, H. C. L. Vol. 1, page 441.

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

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

[5]Jorwis's Act, (1848) 11 & 12 Vic., c. 42.

[6]See *supra*.

[7]See Book Review of McDonnell, "Historical Trials" by Zecharich Chafee Jr. in (1927—1928) 41 Harv. Law Rev. 410, 412.

[8]Holdsworth, H. E. L., Vol. 9, pages 203-204.

[9]*Dig. 22.3.12; Code 4.28, 4; 4.20.9.*

[10]Decret. Greg. 2.20c, 23; Decret. pars. ii causa iv qu. ii and iii c. iv, 26; both passages cited by Wigmore, iii 2696, note 5.

[11]Deut. xvii 6, and xix 12.

[12]Mat. xviii 16; John viii 17.

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

Evidence of one witness.

2.50. The idea that the evidence of one witness is not enough to prove the fact in issue emerges[2] during the sixteenth and seventeenth centuries, sometimes in the provisions of statutes, and sometimes in argument and judicial dicta. Various statutes of the sixteenth and seventeenth centuries, which required the evidence of two witnesses for a conviction of the offences created by them, show that the Legislature was convinced[3] of the danger of allowing a conviction on the unsupported testimony of one person.

But, by 1551, the common law (vide *Reniger* v. *Fogossa*[4]), had come to the conclusion that it would reject any rule requiring more than one witness as a general rule of the law of evidence. As Professor Wigmore[5] points out[6], the decision in *Reniger* v. *Fogossa* was in favour of the defendant, though he only produced one witness. Coke's speech in the proceedings on Becon's impeachment shows that he rejected it[7]; and, even in the Star Chamber the rule requiring more than one witness was not invariable. After the Restoration, the rule that one witness is sufficient is stated as a positive rule of law.

Two witnesses for treason.

2.51 The only two exceptions recognised, other than exceptions introduced by express statutes, were in the case of high treason[8] and in the case of perjury.

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

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[1]De Laudibus c. 31.

[2]Holdsworth, H. E. L., Vol. 9, page 205.

[3]Statutory references omitted.

[4]*Reinger* v. *Fogossa* (1551) Plowden 1.

[5]Wigmore, iii 2702, note 22.

[6]Holdsworth, H. E. L., Vol. 9, page 206.

[7]*R.* v. *Tong*, (1662) Kelyng at page 18; *R.* v. *Vaughan*, (1696) 13 S. T. at page 535; Hale, History of The Common Law (6th Ed.) 346—"they (the jury) may and do often pronounce their verdict upon one single testimony; which thing the civil law admits not of."

[8]For treason, the rule is now different in England.

reign, and was not wholly freed from doubt till it was put upon a statutory basis by the statute of 1696[1]. The requirement of two witnesses in the case of perjury is due to two main causes. In the first place, the offence was developed in the court of Star Chamber, where the tendency to the adoption of the civil and canon law rule had always been stronger[2]. In the second place, the requirement of more than one oath against another oath is a particularly obvious measure of justice[3], and it was a requirement which in the shape of the attaint procedure against a perjured jury,[4] had a native tradition behind it.

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[1]Holdsworth, H. E. L., Vol. 4, page 499.

[2]Wigmore, Vol. iii, 2720-2722, 2040.

[3]"He that travaileth to convince witnesses of perjury must of necessity bring forth many more than they were, so that the testimony of two or three men shall not ever be judged true," De Leubidus c. 32.

[4]Holdsworth, H. E. L., Vol. 1, page 339.

CHAPTER 3

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

Nature of law of evidence.

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

As already stated,[1] the law of evidence is a law of procedure.[2] It deals with the means or the process of the law, as distinct from the substantive law, which deals with rights and liabilities. We have already referred to some of the American codes,[3] which define evidence as the means sanctioned by law of ascertaining in judicial proceeding the truth respecting a question of fact. The nature of the means so prescribed by the law bears examination.

Scope of the rules of evidence.

3.2. It is to be noted that the law of evidence is distinct from the logical processes of reasoning; but it based upon, and assumes, the existence of these processes. Because of this assumption, as Holdsworth[4] has pointed out, three consequences follow: In the first place, the rules of the law of evidence sometimes take the *negative* form of exceptions to these assumed processes of reasoning by laying down that this or that fact, which, on the general principles of reasoning, has an evidential value shall not be admissible in a court of law. Secondly, the court takes *judicial* notice of certain obvious facts. In this context, we are concerned with defining the matters which are so notorious that the court can notice and act upon them without further proof and the like[5]. Thirdly, the existence of certain facts creates a *presumption* as to the existence of other facts; but, as cases are decided and the law gets more elaborate, a large number of these presumptions arise in connection with different branches of the law, sometimes conclusive, sometimes not conclusive, but in both cases giving rise to a inference as to the facts in issue[6].

Presumption.

3.3. Coming to presumptions we may state that in essence, presumptions are rather rules of substantive law. However, because they are applied in the conduct of litigation, and because of the form in which these presumptions are expressed, they have been supposed to be part of the law of evidence.[7] Though belonging primarily to those particular branches of the substantive law with which they are concerned, these presumptions are connected with that part of the adjective law which is concerned with evidence, because they direct the court to deduce particular inferences from particular facts till the contrary is proved. Ever irrebuttable presumptions of law, though they belong more properly to the substantive law, are rules of substantive law which borrow the terminology and adopt the disguise of that branch of law which deals with evidence. There is much in common between an irrebuttable presumption of law and an estoppel.

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[1]Chapter 1, *supra.*

[2]*Gardner* v. *Lucas,* (1878) 3 A. C. 582, 603 (H. L.).

[3]Chapter 1, *supra.*

[4]Holdsworth, History of English Law, Vol. 9, pages 128-129.

[5]Holdsworth, History of English Law, Vol. 9, p. 135.

[6]Holdsworth, History of English Law, Vol. 9, p. 139.

[7]Holdsworth, History of English Law, Vol. p. 129, 139.

[8]Thayer, Law Magaine, vi, 348 (1831), printed as App. A to Thayer, Evidence (pp. 539, 540), cited by Holdsworth, H. E. L. Vol. 9, p. 128.

In Thayer's Essay on Presumption of Law and *Presumptive* Evidence,[1] it is said that, 'in some cases of conclusive legal presumption a party is said to be estopped, and to have created an estoppel against himself. An estoppel is when a man has done some act which affords a conclusive presumption against himself in respect of the matter at issue'; so too Stephen in his Digest of the Law of Evidence, devotes one Chapter (Chapter 14) to 'Presumptions and Estoppels'.

Rules concerned with selection of material.

3.4. In relationship to the rules of the logical process of reasoning, it can be said that sometimes the law of evidence adopts them, sometimes it modifies them and sometimes it supplements them. The doctrine of 'relevance' represents the area common to both. However, the rules of evidence with which the law has been concerned all through its history, have never been *solely dependent upon* the doctrine of relevancy.[2] They are concerned primarily with the selection of the material on which these processes operate. As Thayer observed,[3] "In giving evidence, we are furnishing to a tribunal a new basis for reasoning. This is not saying that we do not have to reason in order to ascertain this basis; it is merely saying that reasoning alone will not, or at least does not, supply it. The new element thus added is what we call the evidence." In this sense, the term 'evidence' is a term of "forensic procedure", and "imports something put forward in a court of justice.[4]"

Object of rules.

3.5. To spell out this function of the law of evidence, it may be stated that rules as to evidence and proof are intended to attain one or more of the following objects,[4] with a view to the ascertainment of truth, namely,

(1) to limit the discretion of judges in declaring facts as proved or disproved,[5]

(2) to provide for speedy decisions and, at the same time, to guard the judges from error,[6]

(3) to preclude needless vexation and expense in coming to decisions' and

(4) to preclude injury to the State or the public.[8]

Judicial evidence of species of evidence.

3.6. The term "evidence" is not a term peculiar to the law. We employ it in every-day life. "Evidence is that which tends to render evident or to generate proof of a fact. The fact which is sought to be proved may be called the principal fact, and the fact which tends to establish it may be called the evidenciary fact."[9] Judicial evidence is a species of evidence.

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[1]THAYER, Law Magazine, vi, 348 (1831), printed as App. A to Thayer, Evidence (pp. 539, 540), cited by Holdsworth, H. E. L. Vol. 9, p. 128.

[2]Holdsworth, History of English Law, Vol. 9, page 128.

[3]Thayer, Preliminary Treatise on Evidence at the Common Law, pages 263-264, cited in Holdsworth, History of English Law, Vol. 9, page 128.

[4]Best on Evidence (7th Edition), paragraphs 38, 41, 47 and 49.

[5]E.g. provisions as to "relevant facts".

[6]E.g. rule against hearsay.

[7]E.g. rule as to judicial notice.

[8]E.g. provisions as to affairs of the state etc.

[9]Senthem, Judicial Evidence, Vol. 1, page 18, cited in the Best, Principles of Evidence (1922).

"Judicial" evidence may be used as indicating the evidence received *by courts of justice* in proof or disproof of facts, the existence of which comes in question before them[1]. In general, it is evidence modified by rule of positive law. Some of these rules are of an exclusionary nature and reject, as legal evidence, facts which are in themselves entitled to consideration. Others are of an "investitive" character, inasmuch as they invest natural evidence with an artificial weight, and may even attribute the property of evidence to that which, speaking in the abstract, has no probative force at all.

Need for limitations.

3.7. Doubtful and disputed facts come up for determination in judicial proceedings, what then, is the need for limiting the sphere of judicial evidence to a narrower one than that permitted by logic? The need for imposing some limitations on the process of such determination arises for several reasons. In the first place, while the relations of cause and effect are innumerable, the power of a tribunal in relation to the determination of questions of fact cannot remain unrestrained, because there must be some stability and uniformity in the principles followed in the determination of questions of fact. This restraint is illustrated by the rules which prevent judges from deciding facts on their own personal knowledge.[2]

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

Judicial evidence is evidence connected with any matter of fact, the effect, tendency or design of which (connection) is to produce in the mind a persuasion, affirmative or disaffirmative, of the existence of some other matter of fact.[3] The law seeks to define the nature of this connection.

Imperfections of judicial fact-finding.

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

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

As has been pointed out by Best on evidence,[4] if things are traced up to their ultimate source, the remote but chief cause of the appearance of a criminal at the bar might be found in his parents, his education, and the examples of others, but the tribunal must look at the proximate cause,—his own act.

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

This aspect has been well explained by Bonnier, a foreign jurist, in French, of which the following is a translation :[5] "The determining to what extent a certain known element renders probable the existence of such or such an unknown cause, governed, as it necessarily is, by the light of reason, in general

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[1]Best, Principles of Evidence (1922), p. 22, paragraph 33.

[2]*Cf.* section 165, first proviso.

[3]Bentham, Judicial Evidence, Vol. 1, page 17, cited in Best, Principles of the Law of Evidence (1922), page 6, paragraph 11.

[4]Best, Principles of Evidence (1922), page 26.

[5]Bonnier. Traite des Preuves, 710, 2nd Ed. cited in Best, Principles of Evidence (1922), page 29.

depends wholly on the discrimination of the judge. But, in the most important cases, the law, desirous of insuring the stability of certain positions, and of cutting short certain controversies, has established PRESUMPTIONS to which the judge is obliged to conform."

In an English case[1] an emient judge observed : "The laws of evidence as to what is receivable or not are founded on a compound consideration of what, abstract considered, is calculated to throw light on the subject in dispute, and of what is practicable. Perhaps if we lived to the age of a thousand years, instead of sixty or seventy, it might throw light on any subject that came into dispute, if all matters which could by possibility affect it were severally gone into; and inquiries carried on from month to month as to the truth of everything connected with it. I do not say how that would be, but such a course is found to be impossible at present."

Process of determination of facts in judicial proceedings.

3.10. Thus, while facts which are in dispute in courts of justice are enquired into and determined in the same way as doubtful or disputed facts are enquired into and determined by making in general, positive law interposes with artificial rules to secure impartiality and accuracy of decision or to exclude collateral mischiefs likely to result from the investigation.[2]

Meaning of "evidence".

3.11. So much as regards the function of legal rules of evidence. Some attentain may now be paid to the term "evidence". The word "evidence" is derived from the Latin "evidentia", and signifies the state of being evident, that is, plain, apparent or notorious. But, as has been pointed out,[3] it is applied to that which tends to render evident or to generate proof. In *R. v. Earl of Banbury*[4] Hold C.J. observed : "All causes..... consist more of matters of fact than of law, and it is beneath the dignity of their Lordship to be troubled with matters of fact."

The history of this reluctance of the appellant courts has been dealt with exhaustively by Dixon C.J.[5] in an Australian case. It is for these reasons that facts as are taken for purposes of a *particular judicial proceeding* can, at best, only have an approximate relation to the actual facts.

Judgment to be based upon facts relevant and duly proved.

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

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

Limitations of reform.

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

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[1] *Attorney-General* v. *Hitchcock*, (1849) 11 Jurist, 478, 482; S. C. 1 Exch. 91, 105; 74 R. R. 592 (Rolfe B.).

[2] Best, Principles of the Law of Evidence (1922), page 2, paragraph 2.

[3] Best, Principles of the Law of Evidence (1922), page 6, paragraph 11.

[4] *R. v. Earl of Banbury, (1695) Skin. 517, 523.*

[5] *Paterson* v. *P.*, (1953) 89 C. L. R. 212, 219.

[6] Thayer, Preliminary Treatise on Evidence (1898), cited in "Evidence" (1937) 50 Harvard Law Rev 909, 923.

that about eighty years ago, "(1) that nothing is to be received which is not logically probative of some matter requiring to be proved; and (2) that everything which is thus probative should come in, unless a clear ground of policy or law excludes it.".

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

Difficulty of application.

CHAPTER 4

SCHEME OF THE ACT

Object of legal proceedings — determination of rights and liabilities.

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

Basic principle—facts in issue and relevant facts.

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

Relevant facts.

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

(a) connected with the issue ;[7]

(b) admissions ;[8]

(c) statements by persons who cannot be called as witnesses ;[9]

(d) statements under special circumstances ;[10]

(e) judgments in other cases ;[11]

(f) opinions ;[12]

(g) character.[13]

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[1]Section 3.
[2]Section 3.
[3]Section 3.
[4]Stephen, Digest of Evidence, Article 1.
[5]Section 5.
[6]*Managers Asylum Districts* v *Hill*, 47 Law Times, House of Lords 29, 34 (Lord O'Hagan).
[7]Sections 5 to 16.
[8]Sections 17 to 31.
[9]Sections 32 and 33.
[10]Sections 34 to 39.
[11]Sections 40 to 44.
[12]Sections 45 to 51.
[13]Sections 52 to 55.

4.4. Stephen's work on the Law of Evidence was originally undertaken in connection with the drafting of the Indian Evidence Act. Sections 6 to 11 of the Act contain the most important provisions as to relevancy. We need not quote these sections; but the emphasis on "highly probable" found in section 11, is noteworthy. Section 11 reads— Stephen's views.

> "Facts not otherwise relevant are relevant:
>
> (1) if they are inconsistent with any fact in issue or relevant fact;
> (2) if, by themselves or in connection with other facts, they make the existence or non-existence of any fact in issue, or relevant fact highly probable or improbable".

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

> "Facts, whether in issue or not, are relevant to each other when one is, or probably may be, or probably may have been—
>
> The cause of the others;
>
> The effect of the other;
>
> An effect of the same cause;
>
> A cause of the same effect;
>
> Or when the one shows that the other must or cannot have occurred, or probably does or did exist, or not;
>
> Or that any fact does or did exist, or not, which in the common course of events would either have caused or have been caused by the other:
>
> Provided that such facts do not fall within the exclusive rule contained in Chapters 3, 4, 5, 6; or that they do fall within the exceptions to those rules contained in those Chapters".

4.6. In the Introduction to the first edition of his Digest, Stephen stated the meaning of "relevance" in the following terms:

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

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

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

4.7. It will be noted that at first—vide section 11, Indian Evidence Act,[1]— Stephen was disposed to emphasise cases in which the existence of one fact was rendered 'highly' probable or improbable by reason of the existence of

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[1]See *supra*.

another. But, in his later views that he expressed on the matter—vide the later editions of the Digest—he was content to refer merely to probability.[1]

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

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

Important relevant facts.

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

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

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

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

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

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

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

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

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

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

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

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

Materials by which facts can be proved.

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

4.11. The topic of proof of facts in issue and relevant facts is dealt with in sections 56 to 100 of the Act. Certain facts are judicially noticed and need not, therefore, be proved.[3] Facts which require to be proved may be proved by oral evidence,[4] or they may be proved by documentary evidence.[5]

4.12. Oral evidence must be direct.[6] This is the general rule, but exceptions thereto are found in a few sections[7]

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[1]See *supra*.

[2]This aspect will be discussed in detail under section 3, *infra*.

[3]Chapter 3, sections 56 to 58.

[4]Chapter 4, sections 59-60.

[5]Chapter 5, sections 61-90.

[6]Section 60.

[7]E.g., sections 21-31 and 32-33.

The inter-relationship of oral and documentary evidence is dealt with in ten sections.[1]

Documentary evidence, in its turn, may be—

(a) primary or secondary,[2]

(b) attested or unattested,[3]

(c) public or private,[4]

(d) sometimes presumed to be genuine,[5]

(e) exclusive or not exclusive.[6]

Burden of proof.

4.13. The Act then deals with the party who has to produce proof. The proof may, and must, be produced by the parties on whom the burden of proof lies,[7] but, in certain cases, the party may be estopped from doing so.[8] If the proof is given through witnesses,[9] they must testify in court in accordance with the rules as to examination, cross-examination and re-examination.[10] These are the detailed rules, but they have to be administered in a liberal spirit. Hence, the effect of mistakes in the reception and rejection of evidence on the result of the trial is dealt with by a specific provision[11] of the Act.

Source of the sections.

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

Some of the sections are taken from the Code of Criminal Procedure, 1861,[15] which was the Code then in force.

Other Acts relating to rules of evidence.

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

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[1]Sections 91-100.
[2]Sections 61 to 66.
[3]Sections 67 to 73.
[4]Sections 74 to 78.
[5]Sections 79 to 90.
[6]Sections 91-100.
[7]Chapter 7.
[8]Chapter 8.
[9]Chapter 9.
[10]Chapter 10.
[11]Section 167.
[12]For example, sections 9 and 13, sections 18 and 37, and section 57, clauses 1, 2, 7, 13, sections 81, 83, 84, 118, 120, 123, 124, 126, 129, 131 and 162.
[13]*E.g.* Section 92.
[14]I.L.R. 4 Bombay 581 (West J.).
[15]Sections 25 to 27, corresponding to sections 148 to 150 of the Code of Criminal Procedure, 1861.
[16]Section 2 has since been repealed.

"2. *Repeal of enactments.*—On and from that day[1], the following laws shall be repealed:

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

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

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

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

Oaths.

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

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[1]The date of commencement of the Act.

[2]The Oaths Act, 1963.

[3]Constitution, Seventh Schedule, Concurrent List, entry 12, "Evidence and oath".

CHAPTER 5

PRELIMINARY PROVISIONS

Section 1 — Introduction.

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

Courts Martial.

5.2. As originally enacted, the section[1] was much simpler, and read:

> "1. This Act may be called the Indian Evidence Act, 1872:
> It extends to the whole of British India, and applies to all judicial proceedings in or before any court, including courts martial, but not to affidavits presented to any court or officer, nor to proceedings before an arbitrator;
>
> and it shall come into force on the 1st day of September, 1872."

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

Courts-martial.

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

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

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

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

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[1]See *infra*.

[2]See *infra*.

[3]See Holdsworth, History of English Law, Vol. 1, pages 573-580.

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

Exception regarding courts martial constituting a modification of lex fori.

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

5.7. The Army Act, the Naval Discipline Act and the Air Force Act referred to in the present section are statutes of the British Parliament. The exception in regard to courts constituted under these statutes was made for the purpose of European courts martial, on the basis that these courts were governed by the English law of Evidence,[1] as already stated.[2]

British Statutes already repealed.

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

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

Indian Courts martial.

5.9. So far as Indian courts-martial are concerned, the Evidence Act applies to them, first, because section 1 so provides and, secondly, because the relevant provisions of the Indian statutes applicable to the Defence Forces expressly provide that the Indian Evidence Act shall, subject to the provisions of those Acts, apply to all proceedings before a court-martial.[3]

Court and Judicial proceedings.

5.10. The Evidence Act applies to 'judicial proceedings' before all 'courts'. Points arising out of these two expressions will be dealt with later,[4] when considering the definitions in the Act.

Section 1 — Affidavits.

5.11. The Act does not apply to affidavits ; but it may be noted that the Code of Civil Procedure contains rules as to the facts which can be mentioned in an affidavit.[5] The Code allows a person to mention, in an affidavit, facts on

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[1]See sections 127, 128, Army Act, 1881 (Eng.) read with sections 163-165.

[2]Para. 5.6 *supra*.

[3]See, for example,— (i) The Army Act, 1950 (46 of 1950), section 133; (ii) The Air Force Act, 1950 (45 of 1950), section 132; and (iii) The Navy Act, 1957 (62 of 1957), section 130.

[4]See discussion under section 3—'Court', and Section 3—'Judicial proceeding', *infra*.

[5]Order 19, rule 3, Code of Civil Procedure, 1908.

information and belief. In interlocutory applications, the Court acts on evidence given on information and belief, because no other evidence is obtainable at so short a notice.

Arbitrators.

5.12. As regards arbitrators, they are not, in matters of procedure, bound by technical rules of court, and they are also unfettered by technical rules of evidence[1]. The expression 'court', as defined in the Act,[2] also excludes arbitrators.

Recommendation as to section 1.

5.13. In the light of the above discussion, we recommend that section 1 should be amended so as to delete that portion of the section which excludes the courts martial mentioned above, i.e. those constituted under British Statutes, now repealed.[3]

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

CHAPTER 6

DEFINITIONS

I. INTRODUCTORY

Introductory

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

Importance of definitions in the Act.

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

II. COURT—THE GENERAL CONCEPT

Section 3 — Definition of 'court'.

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

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

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

6.4. It is to be noticed that 'court' has been defined with reference to "evidence" and the expression "evidence" has been defined with reference to "court". Strictly speaking, this is not satisfactory. Since we are recommending a redraft of the definition[4], this difficulty will now recur, and we need not concern ourselves with this defect in the present law.

6.5. The definition is inclusive and courts have been called upon to lay down some test or the other. Several tests—statutory and others— have been formulated for defining the expression "court". It would be convenient to refer

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[1]Section 2 is repealed.

[2]See discussion at the end of this Chapter, as to "relevance".

[3]Section 5.

[4]See *infra*.

to a few of them, before considering the question whether the definition in the Act should be revised.

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

(i) Test of exercise of judicial functions under authority derived either immediately or mediately from the sovereign[1];

(ii) Test of definitive judgment[2];

(iii) Test of legal power to take evidence[3];

(iv) Test of judicial power, or of being a part of the judiciary[4];

(v) Test of exercise of a power otherwise exercisable by Civil and Revenue Courts[5];

III. SOVEREIGNTY

Exercise of functions under authority of sovereignty.

6.7. As regards the first criterion (exercise of judicial functions under authority derived from the sovereign), it may be mentioned that the administration of justice is a primary function of sovereignty. In England, it is accepted that the administration is one of the prerogatives of the Crown, though it is a prerogative which has long been exercisable only through duly appointed courts and judges[6]. In earlier times, the King himself might sit in court, and he was presumed to be present in the King's Bench, though the judgment was given by the court. Henry IV, and even Edward IV, occasionally sat in court; by the end of the fourteenth century, however, the opinion prevailed[7] that though the King might be present with his Judges, *he could not himself* give judgment[8].

Earlier, Henry II rendered justice in his own presence[9]. But the court which was held before him had no regular staff, no regular records, no regular procedure, and when he left the country, the court went overseas with him. The Kings of England had not been Englishmen since 1066, and would not be Enlishmen for many generations to come. They were Frenchmen, French in language, French in culture, French in interests, and though naturally they prised their power in England, they left their hearts in France. Thus, Henry II spent 13 years in England and 21 years in Normandy; Richard I spent only eight months of his ten years as King in England. The novel problem of how the king was to govern England and Normandy, when absent from one or the other, was solved by creating a Justiciar in both the kingdoms and the duchy, who held the most exalted office that man could conceive of as existing under the king. So this court began to sit in bane at Westminster; it became a sedentary court, and the single central court of law, through the accident of the king's absences. King John had, however, after the deprivation of Normandy, to stay at home, and he reversed the process, keeping the court *coram rege* with him and allowing the 'bench' at Westminster to wither away.

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[1]See discussion as to exercise of functions under sovereignty, *infra*.

[2]See discussion as to definitive judgment (Penal Code), *infra*.

[3]Present definition of 'Court', in the Evidence Act.

[4]See discussion as to section 195, Code of Criminal Procedure, *infra*.

[5]See the Contempt of Courts Act.

[6]Hood Phillips, First Book of English Law (1955), page 16.

[7]Hood Phillips, First Book of English Law (1955), page 1.

[8]See case of Prohibitions, *infra*.

[9]Professor G. O. Sayles, History of Court of King's Bench, Address to Salden Society, 19 March 1959 (1959) 227 Law Times, 229.

6.8. Chief Justice Coke relates that he "greatly offended" James I, when that monarch wished to revive the earlier practice, by saying[1]: "The King in his own person cannot adjudge any case, cause..... but this ought to be determined and adjudged in some court of Justice, according to the law and custom of England..... Thus it was that God had endowed His Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an art which requires long study and experience, before that a man can attain to the cognizance of it."

Halsbury's view.

6.9. According to Halsbury[2], "Originally, the term "court" meant, among other meanings, the Sovereign's palace; it has acquired the meaning of the place where justice is administered and, further, has come to mean the persons who exercise judicial functions *under authority derived either immediately or mediately from the Sovereign*[3]." All "Tribunals, however, are not courts, in the sense in which the term is here employed, namely to denote such tribunals as exercise jurisdiction over persons by reason of the sanction of the law, and not merely by reason of voluntary submission to their jurisdiction. Thus, arbitrators, committees of clubs, and the like, although they may be tribunals exercising judicial functions, are not 'courts' in this sense of that term."

6.10. Utilising one of the points made in the discussion in Halsbury[4], we may say that since all tribunals are not courts, it becomes desirable to indicate, in each statute, or by case law, how far a particular tribunal is or is not to be regarded as 'court' for the purposes of the particular statute.

IV. DEFINITIVE JUDGMENT

6.11. The second test is the test of definitive judgment. In the Indian Penal Code[5], section 20, "Court of Justice" is defined as meaning a Judge or body of Judges empowered by law to act judicially, when such Judge or body of Judges is acting judicially. In the same Code, section 19, the expression "Judge" is defined in terms which require a power to give a *definitive judgment*.

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

V. LEGAL POWER TO TAKE EVIDENCE

Definition of "court" in the Evidence Act.

6.12. The next statutory test is to be found in the Evidence Act, where the definition of "court" includes all judges and magistrates and all persons except *arbitrators legally authorised to take evidence*. The emphasis in the Penal Code[6] is on the power to give definitive judgments — that being an essential ingredient of the definition of "judge" in the Code. In the Evidence Act, on the other hand, the emphasis is on the authority to take "evidence".

VI. JUDICIAL POWER OR BEING PART OF THE JUDICIARY

Section 195, Code of Criminal Procedure — Judicial power and being a part of the judiciary.

6.13. Section 195 of the Code of Criminal Procedure (so far as is material)[7], enacts that certain offences against public justice, which are alleged to have been committed in or in relation to any proceeding in any "court", cannot be taken cognizance of except on the complaint in writing of the court or some other court to which it is subordinate. But Section 195(2) in the Code of 1898

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[1]*Prohibitions del Roy*, (1607) 12 Co. Rep. 63.
[2]Halsbury, 34d Ed. Vol. 9, page 342.
[3]Emphasis supplied.
[4]Para. 6.9, *supra*.
[5]Sections 19-20, I.P.C.
[6]Sections 19-20, I.P.C. (*supra*).
[7]*Nand Lal* v. *Khetra Mohan*, (1918) I. L. R. 45 Cal. 585.

enacted that the term "court", *for the purposes of that section*, includes a civil revenue or criminal court, but does not include a Registrar or Sub-Registrar under the Registration Act, Because of this wording of the old Code, controversy used to arise whether a particular tribunal or officer was or was not a court within the meaning of section 195. Since the expression "court" is a generic expression, this controversy was unavoidable, as also because of the inclusive nature of the definition in the old Code. Some of the High Courts adopted the test of performance of quasi-judicial functions and duty to act fairly and impartially. Some of them went further, and required power to regulate legal rights by the delivery of definitive judgments and a power to enforce its orders by legal sanction, coupled with a procedure judicial in character[1].

The test approved by the Supreme Court in 1963 with reference[2] to section 195, in a case which related to a sales tax officer under the U.P. Sales Tax Act, was different. The Supreme Court held that a sales tax officer was not regarded as a court for the purpose of section 195 of the Code of Criminal Procedure. In the view of the Supreme Court, though the Sales tax officer was required to perform some quasi-judicial functions and to act fairly and impartially, *he was not a part of the judiciary*[3]; he was merely an instrumentality of the State for the purposes of assessment and collection of tax. The nature of his functions and the manner prescribed for the purpose showed that he could not be equated with a court.

6.14. As regards income-tax officers, the same question arose, but the question was not decided by the Supreme Court, in the case of Lalji Haridas[4].

A person to whom the judicial power is not entrusted and who is merely an arbitrator authorised within the limits of the power conferred to adjudicate upon the dispute before him, would not be a court[5] within section 195 of the Code of Criminal Procedure.

6.15. The Supreme Court has also pointed out, in a case decided under the Code of Criminal Procedure[6] of 1898 that the true test for finding out whether a tribunal is a court is whether it has judicial power, that is, as was observed in the case of *Shell Co. of Australia*[7], the exercise of judicial power does not begin until some tribunal, which has power to *give a binding and authoritative decision*, is called upon to take action.

As we have noted, the meaning of the expression "Court" for the purposes of s. 195 of the Code of Criminal Procedure, 1898, (complaint regarding offences against public justice committed in relation to proceedings in a court), created considerable uncertainty, and in view of the obscurity that was felt in this regard, the new Code of Criminal Procedure has the following definition of court in the corresponding provision[8]: "Court" means a civil, revenue or

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[1] *Y. Mahabateswarppa* v. *Gopalswamy Mudaliar*, A.I.R. 1935 Mad. 673; 69 Madras Law Journal 589.

[2] *Jagan Nath Parshad* v. *State of U. P.* (1963) 2 S.C.R. 850.

[3] Emphasis supplied.

[4] *Lalji Haridas* v. *State of Maharashtra*, (1964) 6 S. C. R. 700.

[5] *Rama Rao* v. *Narain*, (1969) 1 S.C.J. 945, 954.

[6] *Rama Rao* v. *Narain*, (1969) 1 S.C.J. 945, 953, (reviews cases under s. 195, Code of Criminal Procedure, 1898).

[7] *Shell Co. of Australia* v. *Federal Commissioner of Taxation* (1931) A. C. 275 (P.C.).

[8] Para. 6.13, *supra*.

Criminal Court, and includes a tribunal constituted by or under a Central, Provincial or State Act if declared by that Act to be a Court for the purposes of this section[1].

VII. POWER OTHERWISE VESTED IN COURTS

Contempt of Courts Act — Exercise of power otherwise falling on civil and revenue courts

6.16. With reference to the Contempt of Courts Act, it may be that on the terms of that particular statute, an officer or a tribunal not forming part of the ordinary judicial hierarchy may be held to be a court, when he exercises a power which would otherwise have fallen on the ordinary civil and revenue courts of the land.[2]

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

Right of Appeal.

6.16A. We are not concerned in this Report with the question whether there is a right of appeal when a court is vested with certain special jurisdiction.[3] That aspect need not, therefore, be considered.

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

VIII. ADMINISTRATIVE COURTS

Administrative Courts.

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

Administrative Tribunals – evolution of.

6.18. It was in the fifties of the last century that Britain — and the world with her — became the creature of the railway age. Disputes relating to Railway rates and the like were put under administrative agencies, and thus started the trend away from the courts, — a trend which is still continuing.[4] Almost with each successive Act is created a special tribunal. Their number is legion. They vary in standing, function and powers, but they are all vested with judicial or quasi-judicial functions.

In India, the number of such courts (administrative courts) is fairly large, and many more are certain to come into existence in future. Various industrial tribunals, tribunals dealing with compensation, tribunals dealing with matters relating to taxation, tribunals dealing with railway rates and claims in respect of motor accidents, are important examples. Moreover, quasi-judicial powers have been conferred on agencies which are labelled not as tribunals but as boards, such as, The Press Registration Appellate Board[5] the Copyright Board[6], and the Central Board of Indirect Taxes[7]. Some of them are even described as "courts" — for example, the Employees' State Insurance Court.[8]

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[1]Section 195(3), Cr. P. C. 1973.

[2]*Thakur Jugal Kishore* v. *Sitammarhi Central Cooperative Bank Ltd.*, (1969) 1 S.C.J. 559.

[3]The case-law on this subject is reviewed in *S. D. Transport Company* v. *Madan Lal*, A.I.R. 1968 Punj. 277.

[4]*Cf.* the recent constitutional amendments.

[5]Section 80, Press and Registration of Books Act, 1867

[6]Section 6, Copyright Act, 1958.

[7]The Customs Act 1962.

[8]The Employees' State Insurance Act, 1948.

Some of them are described as Commissioners — e.g. the Settlement Commissioners dealing with claims of displaced persons[1], or the Appellate Assistant Commissioners under the Income-tax Act[2].

IX. WHETHER ACT SHOULD APPLY TO ADMINISTRATIVE TRIBUNALS

Act not necessarily applicable to administrative tribunals.

6.19. While many of these tribunals, boards and other authorities certainly perform judicial functions, must observe the rules of natural justice and are subject to the special appellate jurisdiction of the Supreme Court under article 136 of the Constitution, that does not conclude the matter as regards the need for applying or not applying the Evidence Act to them. Nor does the power conferred on them to summon witnesses and examine them on oath conclude the matter, because that only means that persons who make false statements before them could be prosecuted for the offence of giving false evidence, having regard to the legal obligation imposed on them by the oath to state the truth. The essence of the matter is that these tribunals are not necessarily places where "justice is judicially administered", and even if they very nearly resemble courts— to borrow the language used by Kania, C.J., in the *Bharat Bank* case,[3] they cannot, merely on that ground, be equated to courts *for the purposes of the Evidence Act*. This is apparent from the fact that the relevant statutes, or rules made thereunder, usually contain provisions deeming them to be civil courts *for certain purposes only*, and deeming their proceedings also to be judicial proceedings *for certain purposes only*. It is for this reason that in the absence of specific provision, a general provision which would apply the Act automatically to them is not required.

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

Position in U.S.A.

6.20. We may briefly refer to the position in the U.S.A. and in England as to administrative tribunals. In the U.S.A., the Federal Administrative Procedure Act[4] contains the following rules as to evidence:—

> "(c) *Evidence.*—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. *Any oral or documentary evidence may be received,*[5] *but every agency shall as a matter of policy* provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as and as supported by and in accordance with the reliable, probative and substantial evidence. Every party shall have the right to present his case or defence by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule-making or determining claims for money or benefits or applications for initial licences any agency may, where the interest of any party will not be prejudicial thereby, adopt procedures for the submission of all or part of the evidence in written form."

Recommendation of Frank's Committee.

6.21. In England, the Committee on Administrative Tribunals and Enquiries (the Franks Committee)[6] plainly stated that it would be a mistake to introduce

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[1]Displaced Persons (Compensation and Rehabilitation) Act, 1954.

[2]Income-tax Act, 1961.

[3]*Bharat Bank* v. *Employees of Bharat Bank*, A.I.R. 1950 S.C. 188.

[4]Section 7(c), Administrative Procedure Act (U.S.A.).

[5]Emphasis supplied.

[6]Report of the Committee on Administrative Tribunals and Enquiries (Frank's Committee), page 22.

the strict rules of evidence of the courts into proceedings before administrative tribunals.

XI. SOME STATUTORY PROVISIONS IN INDIA AS TO ADMINISTRATIVE COURTS

Local laws.

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

It may be noted that many local laws have often provided for the adjudication of claims in respect of taxation or valuation by tribunals. For example, the Bombay Municipal Corporation Act,[1] provides for the hearing of various proceedings — such as, election enquiries, references to the judge, appeals against valuation and taxes, appeals against certain orders of the Municipal Commissioner to the Judge or the District Court, references to magistrates in respect of certain matters, and the like. The Act[2] makes specific provisions as to the application of the Code of Civil Procedure, the law of limitation, execution of orders and, when appropriate, the application of the Code of Criminal Procedure, to enquiries and proceedings before magistrates.

Similarly, the Bombay Public Trusts Act[3] empowers the Charity Commissioner appointed under the Act to frame certain schemes for the governance of public trusts. He has power to summon and examine witnesses etc. on oath. The Act also contains provisions as to, for what purposes, such enquiries shall be deemed to be *judicial proceedings within the Penal Code.*[4]

Power to make rules as to evidence conferred by parent Act.

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

The Unlawful Activities Tribunal Rules, made under the Unlawful Activities Act, 1967, provide that in respect of inquiries and proceedings concerning the disposal of applications, the Tribunal should follow, "as far as practicable", the rules of evidence set out in the Evidence Act, 1872.[5] It has also been provided that *the Tribunal may require the Central Government to produce documents* claimed to be confidential.[6]

6.24. The Railway Rates Tribunal[7] is governed by the rules made under the parent Act.[8] Rules 43 and 44 of the Rules read:

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

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[1]Sections 403 to 437, Bombay Municipal Corporations Act (Bombay Act 59 of 1949).

[2]Sections 434 to 437, Bombay Municipal Corporations Act (Bombay Act 59 of 1949).

[3]Section 50-A and section 73, 74, Bombay Public Trusts Act, 1950 (Bombay Act 29 of 1950).

[4]Section 74, Bombay Public Trust Act, 1950.

[5]Rule 3(1), Unlawful Activities (Prevention) Rules, 1968.

[6]Rule 3(2), Unlawful Activities (Prevention) Rules, 1968.

[7]The Railway Rates Tribunal Rules, 1959.

[8]See sections 34-44, Indian Railways Act, 1890.

"44(i) The evidence at the hearing of a complaint may be taken either *by affidavit* or by *viva voce;* or partly by affidavit and partly by viva voce: Provided that if either party intends to rely on any evidence, he shall send or deliver to the other party a copy of the affidavit, failing which he shall not be allowed to use the same except by special leave of the Tribunal.

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

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

XII. JUDICIAL AND QUASI-JUDICIAL

Discussion in Report of Committee on Ministers' Powers.

6.25. The Donoughmore Committee (Committee on Ministers' Powers) in England formulated the following distinctions between judicial and administrative powers:[1]

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

(1) the presentation (not necessarily orally) of their cases by the parties;

(2) the ascertainment of any disputed facts by evidence adduced by the parties, often with the assistance of argument on that evidence;

(3) the submission of argument on any disputed question of law;

(4) a decision which disposes of the whole matter by a finding upon disputed facts and "an application of the law of the land to the fact so found, including where required a ruling upon any disputed question of law."

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

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

The analysis of "judicial" and "quasi-judicial" functions as made by the Donoughmore Committee[2] came to be recorded judicially in the case of *Cooper* v. *Wilson,*[3] in the judgment of Scott L.J., who had taken a leading part in the Donoughmore Committee. He described the Watch Committee in the case before him as obliged to make a "quasi-judicial approach" which meant that they were "exercising nearly judicial functions", though "not tied to ordinary judicial procedure."

XIII. NATURAL JUSTICE

Natural justice.

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

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[1]Committee on Ministers' Powers Report (1932), (Cmd. 4060), pages 73 and 81.

[2]Committee on Ministers' Powers, Report (*see supra.*).

[3]*Cooper* v. *Wilson,* (1937) 2 All. E.R. 726, 740 (C.A.).

means of excluding the application of the rules.[1] But this approach is inconsistent with the actual decisions, and with dicta in numerous cases. Lord Denning M.R., has said[2]: "That heresy was scotched in *Ridge* v. *Baldwin*[3]."

In the Australian case of *Banks* v. *Transport Regulation Board*[4], Barwick, C.J., expressed entire agreement with Lord Reid's judgment in *Ridge* v. *Baldwin* and also indicated that the prerogative writs may, in appropriate circumstances, be available in respect of an administrative discretion, if the discretion is not an "absolute and unfettered" one.

As Parker J. observed in *R.* v. *Manchester Legal Aid Committee*[5]:

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

Evidence not based on surmises

6.28. For example, decisions of tribunals will not be on surmise. As the Mysore High Court observed:[6]

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

XIV. INDUSTRIAL TRIBUNALS

6.29. The question of industrial tribunals may be considered in some detail It has been held by the Calcutta High Court[7] that it is a "Court" within the Evidence Act. We may, however, point out with respect that the Industrial Tribunals Act, 1947, contains limited provisions,[8] which do not make the tribunal a court. This aspect (the provisions of the Act) was not fully discussed in the Calcutta case. That case relied partly, if not mainly, on the judgment in the *Bharat Bank case*.[9] But it may be pointed out that in the Bharat Bank case itself, Kania C.J. observed that the Industrial Tribunal is not *technically a court*, though it has all the essential attributes of a court of justice.

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

As regards article 136, the jurisdiction of the Supreme Court is discretionary. As the Supreme Court pointed out in the case of *Dhakeshwari Cotton Mills* v. *C.I.T.*,[10] it is not possible to define with any precision the limitations on the exercise of this discretionary jurisdiction.

Coroners.

6.29A. The question may arise whether the present definition of "court" covers Coroners appointed under the Coroners Act.[11] Coroners have powers to administer oath and take "evidence" (section 19, Corners Act). Coroners are "magistrates" for the purposes of section 26, Evidence Act (section 20, Coroners Act).

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[1] *Nakkuda Ali* v. *Jayaratne*, (1951) A.C. 66; *Testro Bros. Pty. Ltd.* v. *Tait*, (1963) 109 G.L.R. 353.

[2] *R.* v. *Gaming Board for Great Britain: Ex parte Benaim*, (1970) 2 All E.R. 528, 533.

[3] *Ridge* v. *Baldwin*, (1964) A.C. 40 (H.L.).

[4] *Banks* v. *Transport Regulation Board*, (1968) 42 A.L.J.R. 64, 67, 68.

[5] *R.* v. *Manchester Legal Aid Committee*, (1952) 1 All. E.R. 480, 489.

[6] *E. Aswathiat* v. *I.T.C.*, (1965) 1 Mys. L.J. 76; judgment approved in A.I.R. 1968 Mys. 36, 38, para. 5-6.

[7] *Raghu Singh* v. *Burrakur Coal Co.*, A.I.R. 1966 Cal. 504 (Bose and B. C. Mitra JJ.).

[8] Particularly, sections 11(5), 15, 17, 38B etc., Industrial Disputes Act, 1947.

[9] *Bharat Bank case*, A.I.R. 1950 S.C. 188.

[10] *Dhakeshwari Cotton Mills* v. *C.I.T.*, A.I.R. 1955 S.C. 65, 69 para. 7.

[11] Coroners Act, 1871 (4 of 1871).

But they need not be termed as "courts" for the present purpose. They hold merely an "inquest" (section 21, Coroners Act), and draw up an inquisition (sections 23-24, Coroners Act). It should be noted that they do not give any definitive judgement and, in that sense, are not analogous to courts. They may be "courts of investigation", but they do not give final decisions affecting the liability of the citizen. It may be noted that under the Coroners Act, proceedings before Coroners are judicial proceedings only for limited purposes.

XV. NEED FOR AMENDMENT

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

XVI. RECOMMENDATION AS TO COURT

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

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

Effect of proposed definition on existing Acts —Interpretation.

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

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

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

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[1] *A.C.C.* v. *P. N. Sharma*, (1965) 1 S.C.A. 723.

[2] See, *supra*.

[3] Section 87(3), Representation of the People Act, 1951.

[4] Check up as to provisions "under law".

Recommendation.

6.33. In the light of the above discussion our recommendation is to confine the definition of court to "civil, criminal or revenue court"[1], and, as regards tribunals, we would include only such tribunals as may be declared by or under Central or State or Provincial Acts to be tribunals for the purposes of the Evidence Act.[2]

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

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

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

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

XVII. & XVIII. DOCUMENT

Section 3 — Definition of "document".

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

Definition in General Clauses Act, 1897.

6.36. In our Report on the General Clauses Act[3], the following re-draft of the definition of "document" in that Act has been recommended:

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

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

XIX. EVIDENCE

Section 3 — "Evidence".

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

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

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[1]*Cf.* section 195(2), Cr.P.C., 1973.

[2]Shri Dhavan has a reservation in the matter.

[3]60th Report (Report on the General Clauses Act), Para. 3.40, recommendation as to section 3 — "document".

(2) all documents produced for the inspection of the Court; such documents are called documentary evidence.

The definition is not exhaustive of all matters which a Court can consider in determining questions of fact. The expression "matters before it", in the definition of the expression "proved", obviously includes matters which do not fall within the definition of "evidence". This is pointed out in a Calcutta case[1].

6.39. The definition of evidence has been objected[2] to for incompleteness, in so far as, by its terms, it does not include the whole material on which the decision of the Court may rest. Thus, in so far as a statement by a witness only is "evidence", the following are not "evidence" according to it, (a) the oral statements of parties and the accused in Court by way of admission or confession or in answer to questions by the Judge[3], (b) a confession by an accused person affecting himself and his co-accused[4], (c) "real evidence[5]", and (d) the presumptions to be drawn by reason of the absence of producible witness or evidence[6]. But it should be pointed out that this clause is an interpretation clause, and is only meant to indicate what is intended to denote whenever the word "evidence" is used in the Act[7]. The definition must be considered together with the definition of "proved[8]". When it is so considered, we have a certain measure of elasticity and the apparent incompleteness becomes immaterial. As Jackson J. has observed[9], "it seems to follow therefore that if a relevant fact is proved and the law expressly authorises its being taken into consideration, that is considered for a certain purposes or against certain persons, in a certain situation, the fact in question is 'evidence' for that purpose, or against such persons, although the result has not been expressed in these words by the Legislature: and, being evidence, it must be used in the same way as everything else that is 'evidence'. Thus, an oral admission in Court is a matter before the Court which may be taken into consideration[10]". **Objection to incompleteness of the definition.**

The confession of a prisoner affecting himself and another person charged with the same offence is[11], when duly proved, also one of such matters, as the law now stands[12], although in actual practice courts are reluctant to rely on it.

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

6.41. It may be of interest to note that the Bill, as originally drafted, contained a third sub-division included in the definition of "evidence", namely— **Real or material evidence.**

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

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[1]*Joy Comar* v. *Bindu Lal*, (1882) I.L.R. 9 Calcutta 363, 366.
[2]Thayer's Preliminary Treatise on Evidence (1898), 263, referred to by Woodroffe.
[3]Section 165.
[4]Section 30.
[5]See *infra*.
[6]Section 114, illustration (g).
[7]*R.* v. *Ashootosh*, (1877) I.L.R. 4 Cal. 492 (F.B.).
[8]*Joy* v. *Bundhoolall*, (1882) I.L.R. 9 Cal. 366.
[9]*R.* v. *Shootosh*, (1877) I.L.R. 4 Cal. 492 (F.B.).
[10]*Joy* v. *Bundhoolall*, (1882) 9 Cal. 366.
[11](a) *R.* v. *Ashootosh*, I.L.R. 4 Cal. 483.
(b) *R.* v. *Krishna Bhat*, (1885) I.L.R. 12 Bom. 386.
(c) *R.* v. *Dada*, (1889) I.L.R. 15 Bom. 459.
[12]Section 30.

such things are called material evidence".

However, this part of the definition did not find a place in the Act as enacted. Stephen[1], regarded the definition as unnecessary, on the ground that material objects will, in any case, have to be produced by witnesses who give oral evidence.

Academic discussion.

6.42. There is considerable academic discussion about real evidence. Phipson[2], in an article in the Yale Law Journal, defined real evidence as "material objects other than documents provided for the inspection of the court".

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

Categories, of real evidence.

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

Inspection.

6.44. There are, in the two procedural Codes[3], appropriate provisions for the inspection of premises of property; but these provisions are usually interpreted not as furnishing a fresh species of evidence, but as useful for appreciating evidence already given.

However, if the view of the place is accompanied by a *demonstration by the witness,* it is regarded as a part of the evidence[4]. The witness, if taken to the spot, to make his evidence intelligible, may start to give his evidence all over again. As Shakespeare said[5] "Old man forget, yet all shall be forgot; but he'll remember with advantages what feats he did that day;"—that is to say, if he is taken to the place.

Photograph of object.

6.45. Sometimes, the real object is not produced in Court and only its photograph is produced. In *Lucas* v. *Williams*[6] the production of the photograph of an engraving of a picture was admitted as evidence, in an action infringing the copyright of the picture by selling the photograph.

Again, the appearance of a person who is not a witness may have value as evidence when identity or age or physique is in issue. Thus, the resemblance of an infant to an alleged parent may be relevant (though not cogent) evidence of paternity[7], and the alleged similarity or dissimilarity[8] may be observed by as comparison of the child and the adult in court[9].

No change is needed.

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

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[1]Stephen, Introduction to Indian Evidence Act (1872), page 11. See G. D. Nokes, "Real Evidence" (1949), 65 Law Quarterly Review 57.

[2]Phipson, "Real Evidence" (1920) 29 Yale Law Journal 717.

[3](a) Order 18, rule 18, Code of Civil Procedure, 1908.

(b) Section 310, Code of Criminal Procedure, 1973.

[4]See discussion in *Tameshwar* v. *R.*, (1957) 2 All. E.R. 683, 686 (P.C.), following *Karamat* v. *Reg.*, (1956) 1 All. E.R. 415.

[5]Shakespeare, Henry the Fifth, Act 4, Part 3.

[6]*Lucas* v. *Williams*, (1892) 2 Q.B. at page 116 (G.A.) (per Lord Esher).

[7](a) *Burnoby* v. *Ballie*, (1889) 42 Ch. D. 282, 290, 297, 298.

(b) *Russell* v. *Russell*, (1923) 129 L.T. 151, 153 (this point was not discussed in the appellate courts; see (1924) A.C. 687 at 705, 749).

[8]See Kenny, "Physical Resemblance as Evidence of Consanguinity" (1923) 39 L.Q.R. 297.

[9]See note in 102 Law Times Journal 188.

material can be produced for the inspection of the court and is, in that sense, not unknown to the scheme of our law. This is, in a sufficient measure, established by the provisions for production of the material objects before the court which are contained in the two procedural Codes and which are also indirectly referred to in section 60. The extent to which the courts can rely on such real or material evidence or local inspection and the like is a matter not dealt with in the Act and would, in fact, seem to be a topic rather difficult of legislative codification. Moreover, the fact that a court can, in coming to a conclusion, have regard not only to what is strictly speaking "evidence" as defined in the Act, but also to matters which are properly for its consideration is, as already stated, a proposition implicit in the definition of the expressions relating to proof. In the circumstances, we do not consider it necessary to recommend any change on this point.

XX. FACT

6.47. The next definition to be considered is that of the expression "fact". Section 3 — "Fact". defined in section 3 *as meaning and including*—

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

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

The first clause of the definition of "fact" refers to external facts which are the subject of perception by the five senses[1], and the second clause refers to internal facts, which are the subject of consciousness[2]. Illustrations (a), (b) and (c) are illustrations of the first clause; illustrations (d) and (e) of the second. Facts are, thus, (adopting the classification of Bentham)[3], either physical,—e.g., the existence of visible objects, or *psychological*,—e.g., the intention or animus of a particular individual in doing a particular act. The psychological facts are incapable of direct proof by the testimony of witnesses; their existence can be ascertained only by the confession of the party whose mind is their seat or by presumptive inference from physical facts[4]. This constitutes the only difference between physical and psychological facts.

6.48. The expression "fact" has a comprehensive connotation. The definition in the Act, taking this into account, is also comprehensive enough. The concept of "fact" is itself wide enough to cover not only things at rest, but also things in motion—acts and events[5].

The concept of "thing" is not confined to objects of right. As in metaphysics, it covers whatever is capable of being perceived by the senses or being contemplated by the mind. All phenomena are covered. As Immanuel Kant has said[6].

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

[1] *Rama* v. *Hœrakdhari*, 47 L.C. 710.
[2] Steph. Dig., Article 1.
[3] Bentham, Judicial Evidence, Vol. 1, page 45.
[4] Best, Evidence (1922), pages 6 and 7.
[5] Bentham, Works, Vol. 6, page 217.
[6] Kant, Critique of Pure Reason, Introductory Chapter, first paragraph.

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

Psychological facts.

6.48A. Bentham gave the following as important examples of psychological facts[1]:—

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

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

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

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

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

5. *Volitions:* or acts of the will etc."

Meaning of thing.

6.48B. "Thing" — an expression used in the definition — is defined[2] in the Oxford English Dictionary as — "That with which one is concerned (in action, speech or thought); an affair, business, concern, matter, subject;. . . That which is done or to be done; a doing, act, deed, transaction; an event, occurrence, incident; a fact, circumstance, experience . . . . . That which is said; a saying, utterance, expression, statement; with various connotations e.g. a charge or accusation made against a person, a form of prayer, a story, tale; a part or section of an argument or discourse; a witty saying, a jest. Formerly used *absol;* (without article or qualifying word) also a thing, *in indefinite sense* — anything, something. An entity of any kind. That which exists individually (in the most general sense, in fact *or in idea*); *that which is or may be in any way an object of perception, knowledge or thought*[3], *a being*, an entity. (Including persons, when a personality is not considered." It is not thus confined to static phenomena.

In Webster's Dictionary[4], "Thing" is defined to include; assembly, reason a matter of concern, affairs; a particular state of affairs; situation, complication; . . . . . Deed, act, accomplishment, used commonly as cognate object of do; . . . . . a product of work or activity . . . the end or aim of effort or activity. *Whatever exists or is conceived to exist as a separate entity or as a distinct and individual quality, fact or idea; a separate or distinguishable object of thought . . . . . something that is said, told or thought.*

Legal meaning of "thing".

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

The word 'occurrence' has been judicially defined as that which occurs — an event, incident or happening[5] — and as that which occurs especially adversely — an appearance of happening[6]. Incidentally "occurrence", to the lay mind, and

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[1]Bentham, Works, Vol. 6, page 236.

[2]The Oxford English Dictionary, (1933), Vol. 11, page 308-309

[3]Emphasis supplied.

[4]Webster's Third New International Dictionary (1966), Vol. 3, page 2376.

[5]*Jones* v. *Kansas City*, 243, S.W. 2d 318, 320 (Mo. 1951).

[6]*Portaro* v. *American Guarantee & Liaba. Ins. Co.*, 210 F. Suppl. 411, 415 (N.D. Ohio 1962).

more so to the legal mind, has a much broader meaning than the word "accident". "As these words are generally understood, accident means[1] *something* that happened in a certain way, while an occurrence means[2] *something* that came about in any way."

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

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

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

XXI. RELEVANT

6.50. Then we come to the definition of "relevant". One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts. The expression[3] "relevant" occurs mainly in sections 5-55. Expressions cognate thereto occur in sections 8, 32, clause (8), 132, 135, 137, 148 and 153. The expression "irrelevant" occurs in sections 24, 29, 43, 52, 54 and 165. Section 3 — "relevant".

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

6.51. The expression "facts in issue", as defined, means and includes— Section 3 — "facts in issue".

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

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

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

Illustrations to the definitions are as follows:—

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

That A caused B's death;

That A intended to cause B's death;

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[1]*See Aerial Agricultural Eerv. Inc.* v. *Till*, 207 F. Supp. 50, 57 (N.D. Miss. 1962) referred.

[2]Vincent Veldorate, "Corpus Delicti", (1965) 39 Temple Law Quarterly 1, 3.

[3]The enumeration is not exhaustive.

That A had received grave and sudden provocation from B;

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

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

XXII. PROVED

Section 3 — Definitions of "proved", "disproved", and "not proved".

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

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

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

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

Proof.

6.55. Whether an alleged fact is a fact in issue or a relevant fact, the Court can draw no inference from its existence, till it believes it to exist. "Evidence" of a fact and "proof" of a fact are not synonymous terms. A judgment is to be based on facts duly proved[1]. "Proof", in strictness, marks merely the effect of evidence Proof considered as the establishhment of material facts in issue in each particular case by proper and legal means to the satisfaction of the Court is effected[2] by (a) evidence of statements of witnesses,[3] admissions or confessions of parties, and production of documents[4] and also previous statements;[5] (b) presumptions;[6] (c) Judicial'-[7] notice; (d) inspection, — which has been defined as the substitution of the eye for the ear in the reception of evidence,[8] — as in the case of observation of the demeanour of witness,[10] local investigation,[11] or the inspection of instruments used for the commission of a crime.[12]

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

We may point out that the words "matters before it" in the definition of 'proof' are wide enough to cover matters which are not 'evidence', as defined[13] in the Act. Those words are not confined to 'oral' and 'documentary evidence'.

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[1]Section 165.
[2]Stephen, Digest, Article 58.
[3]Sections 3, 5-55, 58, 60 (oral proof).
[4]Sections 61-100 (documentary proof).
[5]Sections 157-158, sections 32-33; *R.* v. *Ashootosh*, (1878) I.L.R. Cal. 492
[6]Sections 4, 79-90, 112-114.
[7]Sections 56, 57
[8]See *R.* v. *Ashootosh*, (1878) I.L.R. 4 Cal. 492.
[9]Wartoh, Evidence, section 345, quoted by woodroffe.
[10]Order 18, Rule 12. Code of Civil Procedure, 1908.
[11]*Joy* v. *Bundhoolall*, I.L.R. 9 Cal. 363.
[12]See discussion as to real evidence under sec. 'evidence'.
[13]See discussion as to section 3, 'evidence', *supra*.

6.57. "India" is defined in the Act as meaning the territory of India excluding the State of Jammu & Kashmir. The definition of 'India' should be deleted. Section 3 — 'India'

In the substantive sections, the expression "territories to which this Act extends" should be substituted with such consequential changes, if any, as may be required. The reasons which have been set out in our Report on the Stamp Act[1] are applicable to the definition in the Act under consideration also.

XXIII. JUDICIAL PROCEEDING

A. INTRODUCTORY

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

B. CASE LAW UNDER THE EVIDENCE ACT

6.59. So far as cases under the Indian Evidence Act are concerned, it has been held, under section 80 of the Evidence Act,[2] that the record of a statement made by a witness to a police officer in the course of a police investigation is not a record of "evidence", and such statement does not prove itself. Meaning for the Evidence Act.

On principle, the statements recorded by Magistrates during investigation should also not be regarded as made in "judicial proceedings", as the Magistrate does not intend to give any judgment or to determine any question of law or fact, and records the statements merely in order to preserve evidence. The object of the power conferred on the Magistrate is to provide a convenient machinery whereby a witness whose evidence is of some importance may be asked to record his immediate recollection of the facts. Such a statement can be used to corroborate, refresh or contradict the witness, but is not substantive evidence at the trial or inquiry.[3] The relevant section in the Code appears in the Chapter on Investigation; the Explanation to that section makes it clear that the Magistrate receiving and recording a confession or statement need not be a magistrate *having jurisdiction in the case*. All this would seem to support the view that it is not a *judicial proceeding*.

6.60. But the above discussion is academic for the Evidence Act. The definition of 'evidence' has been interpreted[4-5] as excluding statement recorded by Magistrates during investigation in general. It is not intended that the Evidence Act should be applied to such statements; the question of relevancy of facts or admissibility of evidence cannot, in the very nature of things, be of any importance in such statements, and such statements would be of no use so far as section 33 is concerned. As regards section 80 of the Act, an express provision can be made, if necessary[6] to mention these statements specifically.

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[1] Report on the Stamp Act, discussion as to the definition of "India".

[2] *Roghuni Singh* v. *Emperor*, (1882) I.L.R. 9 Cal. 455, 458.

[3] *Bhuboni Singh* v. *The King*, A.I.R. 1949 P.C. 257, 259; 76 I.A. 147.

[4] (a) See observations of Bose J. in *Rambharose* v. *Emperor*, A.I.R. 1944 Nag. 105, 110, 111; I.L.R. 1944 Nag. 274.

(b) However, *Paramanand* v. *Emperor*, A.I.R. 1940 Nag. 340, 344; I.L.R. 1940 Nag. 110 apparently seems to take a contrary view, as the Court relied more upon section 32 than upon section 33.

[5] See discussion of case law in *Sheo Raj* v. *The State*, A.I.R. 1964 All. 290 (F.B.)

[6] To be considered under section 80.

Coroners.

6.61. In a Bombay case[1], one of the question to be considered was whether proceedings before the coroner are judicial proceedings. Tulzapurkar J., after referring to some of the case law on the subject, said:

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

Proceedings before Income-tax Officer.

6.62. It has been held[2] that proceedings before the Income-tax authorities are not "judicial proceedings" under the Evidence Act.

Industrial Tribunals.

Regarding Industrial Tribunals appointed under the Industrial Disputes Act, 1947, it has been held by a Division Bench of the Allahabad High Court[3] that the Evidence Act does not apply to such Tribunals.

It may be noted that section 11(3)(a) of the Industrial Disputes Act, 1947, gives power to examine witnesses on *oath*, but that has not come in the way of the Court holding as above. There was a single judge decision of the Calcutta High Court[4] to the effect that the Evidence Act applies to Industrial Tribunals; this is based on the definition of "court" in the Evidence Act, which includes all persons legally authorised to take evidence. The reasoning of the High Court was that the Act (the Industrial Disputes Act) authorises the Tribunal to take evidence, and the Tribunal has the power as a civil court of examining witnesses on oath. In a subsequent case,[5] the Calcutta High Court held that the Evidence Act does not apply to such Tribunals. The High Court relied upon the Supreme Court decision in *Union of India* v. *D. R. Verma*[7] where Venkatarama Aiyar J. made the following observations with reference to a Tribunal holding an enquiry for the purpose of disciplinary action against a Government servant —. presumably an enquiry under the Public Servants (Inquiries) Act, 1850 (37 of 1850): —

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

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

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[1] *Tanajirao* v. *H. J. Chinoi*, (1969) 71 Bom. L.R. 732, 736 (Tulzapurkar J.).

[2] *Anraj Narain* v. *C.I.T.*, A.I.R. 1952 Punj. 48, para. 12, following *Seth Gurumukh Singh* v. *C.I.T.*, A.I.R. 1944 Lah. 353(2) (F.B.).

[3] *Mehnga Ram* v. *Indian Labour Appellate Tribunal*, A.I.R. 1956 All. 644, 652, para. 43.

[4] See also *Electro Mechanical Industries* v. *Industrial Tribunal*, A.I.R. 1950 Mad. 839, 840, para. 5 holding that rules of evidence do not apply to them.

[5] *Burrakar Coal Co.* v. *Labour Appellate Tribunal*, A.I.R. 1950 Cal. 226, 228, para. 4 (Sinha J.).

[6] *Hachura Tea Estate* v. *Labour Appellate Tribunal*, A.I.R. 1959 Cal. 650, 652 (P. B. Mukherjee J.).

[7] *Union of India* v. *D. R. Verma*, A.I.R. 1957 S.C. 882 (1958) S.C.R. 110.

[8] See discussion as to "Court".

C. DEFINITIONS IN OTHER ACTS

Definition in the Code of Criminal Procedure.

6.63. Definitions in other Acts may now be seen. To begin with, we may state that the expression "judicial proceeding" is defined in the Code of Criminal Procedure,[1] as "including any proceeding in the course of which evidence is or may be legally taken on oath[2]."

History of definition in the Code of Criminal Procedure.

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

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

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

6.65. The words "proceedings in which evidence is or may be taken" (in this definition in the Code of 1882), were interpreted[3] to mean a proceeding in which evidence is or may be legally taken. The Code of 1898 added the word 'legally' apparently to implement this interpretation. The requirement of "oath" was also added in the definition in 1898, and the latter limb of the definition (in relation to judgment etc.) was removed. In one of the Allahabad cases[4], decided with reference to the old Criminal Procedure Code, 1872, it was held that where, after an appeal is preferred to the High Court against the judgment of acquittal of the Court of Session, the persons acquitted are arrested by the police and brought before the Magistrate, and the Magistrate illegally directs that they should be detained in custody pending decision of the appeal, the High Court could not interfere in revision under section 297 of the old Code (under which the court could interfere in a proceeding if there was a material error in any "judicial" proceeding of a subordinate court).

Whether the definition could include statements recorded by Magistrates.

6.66. With reference to the Indian Penal Code, the question whether the expression "judicial proceeding" includes, for the purposes of sections 191 to 193(1) of that Code, (punishment for giving or fabricating false evidence in a judicial proceeding), a statement recorded by a Magistrate in the course of investigation, has given rise to difficulty, as appears from decisions under the Penal Code. The view taken by the Madras High Court[5] is that such proceedings are judicial proceedings for the purposes of section 193, Indian Penal Code[6]. One of the Madras[7] cases stresses two points, viz., (i) the Magistrate is empowered by law to administer oath, and (*ii*) the statement is one which the law (section 164) permits to be made before the Court by a "witness" and is, therefore,

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[1]Section 2(j), Code of Criminal Procedure, 1973; section 4(1)(m), Code of Criminal Procedure, 1898.

[2]The following sections of the Code use the expression "judicial proceeding";

Section 343(2), Section 344(1), Section 345(3), } 1973 Code.

[3]*Queen* v. *Cholam Ismmail*, (1875) I.L.R. 1, 6 All. 1, 6 (Turner C. C. J.).

[4]*Queen* v. *Cholam Ismail*, (1875) I.L.R. 1 All. 1, 6.

See — (a) 28th Report of the Commission (Oaths Act), pp. 29-30.

(b) 37th Report of the Law Commission (ss. 1 to 176) (Criminal Procedure Code), para. 466.

(c) 41st Report of the Commission (Criminal Procedure Code), Vol. I, page 75.

[5]*Maromma* v. *Emp.*, A.I.R. 1933 Mad. 125, following *Queen-Empress* v. *Alagu*, I.L.R. 16 Mad. 421, and *Suppa* v. *Emp.*, I.L.R. 29 Mad. 89.

[6]*Q. E.* v. *Alagu*, I.L.R. 16 Mad. 421.

"evidence" within the definition in the Evidence Act. The later Madras case stresses a further point, namely, that the Magistrate is acting in the discharge of a duty imposed upon him by law. The High Court also observed, that an investigation is a "stage of a judicial proceeding".

6.67. The Allahabad High Court[2] once took the view that if the Magistrate who recorded the statement has himself authority to complete the trial, the statement becomes a judicial proceeding, for the purposes of the Penal Code. But, in a later case,[3] it took a different view with respect to section 80, Evidence Act.

A decision of the Bombay High Court[4], in a matter which also arose under section 193 of the Indian Penal Code, may be noted. The question at issue was, whether a statement recorded by a Magistrate in the course of a police investigation was "evidence in a stage of judicial proceeding" within section 193 of the Indian Penal Code. The High Court held that such a statement cannot be said to be made in the course of a "judicial proceeding", for the reason that the statement is recorded during a police investigation, and a police investigation cannot be a stage of a judicial proceeding. In the course of the discussion, the High Court observed that though a Magistrate examining a witness during investigation does *so on oath*, the definition of "judicial proceeding" in the Criminal Procedure Code is "limited to that Code and does not apply to that phrase as used in the Indian Penal Code.

The Lahore High Court[5], following the Bombay decision summarised above, held that such a statement is not "evidence" in a stage of judicial proceeding within the meaning of the Explanation to section 193, Indian Penal Code. The Court saw no reason to dissent from the Bombay decision.

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

The expression occurs also in section 228 of the Penal Code[6], (*Intentional* insult to a public servant sitting in a stage of judicial proceeding).

No definition in the Code of Civil Procedure.

6.69. There is no definition of the expression "judicial proceeding" in the Code of Civil Procedure, 1908. In fact, the expression itself does not occur at many places in that Code. In one Bombay case,[7] the question arose whether an order under section 244 of the old Code of Civil Procedure (corresponding to section 47 of the existing Code), was passed in a judicial proceeding so as to entitle a party to an appeal (since an appeal lay from all "decress"). The definition of "decree" in the old Code was as follows:

> "Decree" means the formal order of the court in which the result of the decision of the suit or *other judicial proceeding* is embodied.

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[1] *Suppa* v. *Emp.*, I.L.R. 29 Mad. 89.

[2] *Q.E.* v. *Khem*, (1900) I.L.R. 22 All. 115, 117.

[3] *Sheo Raj* v. *State*, A.I.R. 1964 All. 290 (F.B.) holding that such statements are not judicial proceedings, and section 80, Evidence Act does not apply to them.

[4] *Purshottom Ishwar Amin* v. *Emp.*, A.I.R. 1921 Bom. 3; I.L.R. 45 Bom 834 (F.B.).

[5] *Mohammad* v. *Emperor*, A.I.R. 1932 Lah. 254(1) (*Dalip Singh J.*).

[6] The enumeration is not exhaustive.

[7] *Dalpat Bhai* v. *Amarsing*, I.L.R. 2 Bom. 553, 556.

The Court did not follow the definition of "judicial proceeding" given in the Code of Criminal Procedure then in force, on the reasoning that in the definition of the term "decree" in the Code of Civil Procedure, the expression "suit or other judicial proceeding" must, according to a common rule of construction, be understood as meaning a suit or other judicial proceeding of *the same nature as a suit*. Moreover, "decree" is limited to a formal order, i.e., cases where a decision is recorded in a particular formal manner.

Confessions recorded in executive capacity.

6.70. It has been held[1] in Madras that if a confessional statement of a person is recorded by a Magistrate in an executive capacity, it is not receivable in evidence under section 80 of the Evidence Act, the document not having been taken in accordance with law.

D. DEFINITION SUGGESTED BY MAYNE

Definition by Mayne.

6.71. We may now refer to the definition suggested by Mayne. The definition of "judicial proceedings" suggested by Mayne[2] is—*"any step in the lawful administration of justice in which evidence may be legally recorded for the decision of the matter in issue in the case, or on a question necessary for the decision or final disposal of such matter."*

The definition given by Mayne is, in substance, satisfactory, *for the purpose of the Evidence Act*. The definition given in the Code of Criminal Procedure[3] is, no doubt, satisfactory so far as *that Code* is concerned. But it is of no use in the Evidence Act, in view of section 1 of the Act, which makes the very applicability of the Act dependent on the existence of a 'judicial proceeding'.

Test of step in the lawful administration of justice.

6.72. It has been said in one earlier Bombay case[4] that 'judicial proceedings' mean nothing more or less than a step taken by a court in the course of administration of justice in connection with a case. This agrees, in substance, with the definition given by Mayne.

In a Madras case, *Queen* v. *Venkatachalam Pillai*[5], Scotland C. J. accepted the definition of 'judicial proceeding' given by Mayne. In *Question-Empress* v. *Tulja*[6] though the Bombay High Court was principally concerned with the question as to whether a sub-Registrar of Assurances was a 'Court' within the meaning of section 195 of the Criminal Procedure Code, the Court has explained what is meant by 'Judicial inquiry' :

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

E. QUERIES RAISED WITH REFERENCE TO MAYNE'S DEFINITION

6.73. We shall now deal with several queries raised with reference to Mayne's definition of "judicial proceeding".

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

[2] Mayne, Criminal Law of India, 2nd ed. page 565, cited in Woodroffe and Ameer Ali, Law of Evidence (1957), Vol. I, page 108 and also in *Tanaji Rao's case*, 71 Bom. L.R. 732, 733.

[3] Cited above.

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

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

[6] *Q.E.* v. *Tulja*, (1887) I.L.R. 12 Bom. 36, 42.

Difficulty if likely in criminal trials.

First, it is stated, if the definition is incorporated in the Evidence Act, it is to be carefully considered whether that might create some difficulty in criminal trials, in view of the existing inclusive definition of the expression "judicial proceeding" in the Code of Criminal Procedure, 1973 where it has been defined as follows:

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

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

Affidavits.

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

Prior steps.

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

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

Hall-marks of judicial proceeding.

6.74A. It has next been stated that the hall-marks of a judicial proceeding are not exhausted by mere recording of evidence. The Committee on Minister's powers[1] laid down four essential characteristics of the judicial process:

(a) a presentation either orally or in writing of the case for each side i.e. joinder of issue;

(b) right of each party to adduce and examine evidence to prove its case (the recording of evidence will come within this characteristics);

(c) arguments by the parties on facts and law; and

(d) a decision disposing of the matter in hand, the findings being based on stated conclusions concerning facts.

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

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

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

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[1]Donoughmore Committee.

6.75A. A query is also raised as to the expression "administration of justice". It has been used in the Constitution, State List, entry 3 and the expression "judicial proceedings" has been used[1] in entry 5 and entry 12 of the Concurrent List, but neither of these expressions (it is stated) has been defined in the Constitution. In this connection, we would state that the absence of a definition in the Constitution should not be a material consideration when reviewing an Act where the expression needs, on the merits, to be defined. A statute defines expressions for its own purposes. Use of various expressions in the Constitution.

6.76. It has been stated that it should be considered whether any definition of "judicial proceeding" is at all necessary; it is stated that the Act has worked quite well without such a definition during the last 103 years. In dealing with this query, we may point out the case law on the subject of statements under section 164, Code of Criminal Procedure and also the judgment of Tulzapurkar J. In Bombay case[2] illustrate the obscurity as to "judicial proceeding". Hence there is need for a definition. Necessity of amendment.

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

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

We have, in this context, to make a distinction between—

(a) (i) justice in the abstract; and

(ii) justice according to law, and also between

(b) (i) administration of justice by a private tribunal, and

(ii) administration of justice by a public agency.

6.78. Justice in the abstract reminds one of natural law. The view that natural law is written on the hearts of men, is traced back to St. Paul and his letter to the Romans[3] where he says,—

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

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

F. ENGLISH ACT OF 1968

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

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[1]Constitution, 7th Schedule, State List, entry 3; Concurrent List, entries 5 and 12.

[2]*Tanaji Rao* v. *H. J. Chinoy*, (1969) 71 Bom. L.R. 732.

[3]St. Paul's letter to the Romans, II, 14.

Civil Evidence Act (Eng.). The principal object of the Civil Evidence Act, 1968, was to modify the rules of hearsay in civil proceedings. The expression "civil proceeding", as defined in that Act,[1] in section 18, in a positive form, really covers (so far as tribunals are concerned), only proceedings *before those tribunals where the strict rules of evidence apply.*

Having so defined the expression "civil proceedings", the draftsman of the Act was faced with a problem, namely, while the proceedings to which the important sections of the Act applied would, in view of this definition of civil proceedings, cover proceedings before those tribunals where the strict rules of evidence applied, the substantive sections of the Act[2] used only the expression "court", and not the expression "court or tribunal".

6.80. To meet this situation, the draftsman of the English Act has defined "court" as meaning, in relation to proceedings before a tribunal not being one of the ordinary courts of law, the tribunal. The last mentioned definition (of "court") is a verbal device, intended to dispense with the use of the cumbersome expression "court or tribunal" in the main sections. Far from equating all tribunals to courts, this device implicitly recognises the fact that there is a distinction between the two. The words "not being one of the ordinary courts of law", in the definition of "court"[3] may be seen.

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

G. CONCLUSION

Function of administration of justice essential.

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

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

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

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

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

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[1]Section 18(1)(a), Civil Evidence Act, 1968 (See Appendix to this chapter).

[2]Sections referring, for example, to "rules of court" or using other phrases containing the word "court".

[3]Section 18(2), Civil Evidence Act, 1968 (See Appendix).

XXIII. "ADMISSIBLE"

6.83. For reasons which will be indicated later[1], when we discuss the distinction between "relevant" and "admissible", we recommend that the expression "admissible" should be defined as meaning "admissible in evidence".

XXIV. SECTION 4

Section 4 — Definitions of 'may presume', 'shall presume', 'conclusive proof'.

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

Scheme.

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

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

(i) rebuttable and discretionary presumption — "may presume";

(ii) rebuttable but mandatory presumptions— "shall presume", and

(iii) irrebuttable and mandatory presumptions — 'conclusive proof'.

6.86. The first paragraph of section 4 provides that whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it. In such a case, as is evident from the words used in the section, it rests with the discretion of the court whether or not to draw the presumption, and even if it is drawn in a particular case, it is rebuttable. Such presumptions are essentially inferences formed not by virtue of any law but by the spontaneous operation of the reasoning faculty. They correspond to what Stephen described as 'bare presumptions of fact'.[2]

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

6.88. The third and last paragraph of section 4 provides that when one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it. Usually, in illustrating the expression "conclusive proof", sections 112 and 113 of the Act are referred to. These sections do use the expression "conclusive proof". However, it may be noted that section 113 has been declared *ultra vires*. For reasons to be given later[3], we propose to recommend its deletion. Section 112 provides that birth during

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[1]Para. 6.99, *infra*.

[2]Stephen, Introduction to the Evidence Act, page 174.

[3]See recommendations as to section 113.

marriage is conclusive proof of paternity; but the section does leave scope for rebutting this presumption by showing that the parties to the marriage had no access to each other at any time when the person in question (i.e. the person born during marriage) could have been begotten.

It may also be pointed out that section 41 uses the expression "conclusive proof"; that section provides that a final judgment, order or decree of a competent court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers or takes away any legal character etc., is conclusive proof, *inter alia*, that any legal character which it confers accrued at the time when such judgment, order or decree came into operation. In this section, the word 'conclusive' seems to have been suggested by the discussion by Peacock C. J. in *Kanhya* v. *Radha*[1] where it is said of a decree of divorce — "It is *conclusive* upon all persons that the parties have been divorced and that the parties are no longer husband and wife: but it is not conclusive, nor even prima facie evidence against the strangers that the cause for which the decree was pronounced existed." The expression "conclusive evidence" occurs also in one of the leading English cases on *res judicata — the Duchess of Kingstons case*.[2]

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

XXV. "RELEVANT" AND "ADMISSIBLE"

Question of terminology employed in other sections.

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

Section 3 — Relevancy and admissibility — Three propositions.

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

(1) Facts sought to be proved must be connected with *facts in issue*.

(2) The connection must amount to *relevance* as provided in the Act.

(3) There should be no rules of *exclusion* applicable to the particular evidence.

Connection requisite.

6.92. The first proposition stresses the importance of facts in issue and of a connection between the fact in issue and the collateral fact. The collateral fact must be relevant to a *fact in issue*. It must, in other words, be 'material' for the purpose of the particular dispute. According to Nokes,[3] "Materiality" indicates that a fact is adequately related to a party's case; in other words, that a fact constitutes or relates to some element of his claim or defence, without which he cannot establish the right asserted, or resist the claim. The element of 'materiality' has been stressed in other writings[4] also.

Nature of the connection.

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

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[1]*Kanhya* v. *Radha* 7 Weekly Report 339 (Calcutta).

[2]Dutchess of Kingstons Case, 11 State Trials 262.

[3]Nokes, Introduction to Evidence (1967), page 83.

[4]See, for example, J. L. Montrose, "Basic Concepts of the Law of Evidence" (1954) 70 L.Q.R. 527.

order to indicate, broadly, the circumstances in which one fact is regarded as of probative value to another fact which is to be proved. This part of the Act, — that is to say, mainly (but not exclusively) sections 5 to 16 — is really a codification of rules about probative value based on ordinary principles of common sense.

To quote Stephen[1] again,[2] "The word 'relevant' means that any two facts are so related to each other that according to the common course of events one, either taken by itself or in connection with other facts, proves or renders probable the past, present or future existence or non-existence of that other."

6.94. As Montrose has observed[3], "The concept of relevance is concerned with the relationship which the tendered evidence has to the fact it is sought thereby to prove because of *the order of nature;* it posits a natural connection between *factum probans* and *factum probandum*." Thayer[4] often used, as a synonym for 'relevant', the phrase 'logically probative', and Wigmore used the phrase 'rationally probative'.[5]

Rules of exclusion.

6.95. The third proposition really relates to the 'admissibility' of evidence, and not to its relevance. A fact otherwise relevant may be excluded, because of some policy of the law,—e.g. hearsay, opinion, character, privilege, State secrets etc. The reason for excluding hearsay evidence, evidence of opinion, character, privilege, State secrets and the like is not that the fact concerned is not relevant. Hearsay may be relevant.[6] As has been often pointed out, in a trial for murder the fact that B (non-witness) told A (witness) that B saw the accused stabbing the victim, is 'relevant' in the logical and rational sense. The relationship between the two facts the fact in issue and what B told he saw— is such that according to the common course of nature, one fact does render the other probable. What B saw is, if not a fact in issue, at least a collateral fact. If the collateral fact is true, its truth tends to show the existence of the fact in issue. The real reason for excluding the evidence in question is the policy of the law. Relevance is a 'pre-legal' concept.[7] Admissibility is legal concept. The two should be kept apart.

Example — Hearsay not admissible though relevant.

6.96. The logical relevance of hearsay, can hardly be doubted, and its exclusion must, in our view, rest on the infirmities inherent in second-hand information. In fact, it has been held in Australia[8] that it is proper to pay regard to hearsay, if, by accident or design, the party entitled to object to it lets it in. This shows that hearsay would be 'relevant', though this does not imply that it is admissible.

Another example — Character and opinion.

6.97. The same reasoning applies to character. In *Brown v. Eastern & Midlands Rly. Co.*,[9] Stephen J. said, "you must not prove.....that a particular engine driver is a careless man in order to prove that a particular accident was caused by his negligence on a particular occasion". This is because the law excludes evidence of character as shown by habit,—except in special cases, as a matter of policy.

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[1]Stephen, Digest of the Law of Evidence.

[2]See also *supra.*

[3]J. L. Montrose, 'Basic Concepts of the Law of Evidence', (1954) 70 L.Q.R. 527, 537.

[4]Thayer, quoted in J. L. Montrose, 'Basic Concepts of the Law of Evidence', (1954) 70 L.Q.R. 527, 538.

[5]Wigmore, cited in J. L. Montrose, "Basic Concepts of the law Evidence", (1954) 70 L.Q.R. 527, 528.

[6]See para. 6.96, *infra.*

[7]The expression 'pre-legal' is suggested by J. L. Montrose, "Basic concepts of the Law of Evidence", (1954) 70 L.Q.R. 527, 538.

[8]*Walker* v. *Walker*, 57 Commonwealth Law Re. 630 (Australia).

[9]*Brown* v. *Eastern & Midlands Rly. Co.* 22 Q.B.D. 391, 393.

The position regarding opinion is the same. The fact that a person holds a particular opinion as to the facts in issue may be relevant; but, in general, the opinions of non-experts are excluded. Generally speaking, it is for the tribunal of fact to formulate its own opinion on facts presented by witnesses who perceived them by the exercise of their physical senses. Nevertheless, logically, the opinion of an eye-witness who perceived the fact in issue might be of value, even though the witness had no recollection of the fact perceived, but only a recollection of an opinion formed at the time. In fact, in some cases, evidence is allowed to be given of an opinion formed by a non-expert. Age, identity, speed, and intoxication are, for example, subjects on which non-expert opinion is admissible.[1-2]

Flaw in the present wording.

6.98. Now, the terminological flaw in the Evidence Act, in this respect, lies in its using the expression 'not relevant', where[3] what is really meant is 'not admissible'. According to Nokes[4]: "Relevance depends on reasoning, but admissibility depends on law; and, to be received in evidence, facts must be both relevant and admissible. Admissibility denotes that there is no rule of law or practice by which facts must or may be excluded. It is, thus, necessary to bear in mind the distinction between relevance and admissibility; or, more clearly, the distinction between relevance and inadmissibility."

Recommendation to substitute 'admissible' in certain sections and to define 'admissible'.

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

Confessions and character.

6.100. The sections relating to confessions and character require some discussion in this connection. One of us was of the view[6] that in section 24, the confession is, logically also, *not relevant*. In sections 52-55 also, according to him, character evidence is excluded because logically, it is not relevant.

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

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

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

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[1]*R. v. Davies*, (1962) 1 W.L.R. 1111.

[2]"Hudson Opinion evidence in Intoxication" (1963) 79 L.Q.R. 31.

[3]E.G. Sections 51 to 55 etc.

[4]Nokes, Introduction to Evidence (1967), page 83.

[5]Section 3 to be amended to insert a definition of 'admissible' See para 6.83 *supra*.

[6]Shri Sen-Varma.

It could be argued that Stephen's scheme is that in the definition in the Act of 'relevant', the scope of 'irrelevant' includes what is inadmissible. It should, however, be pointed out that 'relevance' must be based on a logical connection. Section 5 provides that evidence may be given of facts 'hereby declared to be relevant'. But that does not mean that rules of admissibility are disregarded. It only shows that logical and legal relevance are not the same. The mere fact that a fact is relevant does not make evidence of it admissible. The crucial question is, whether facts, which are relevant, should, when they are excluded on grounds of policy, be described as 'irrelevant' or whether they still remain relevant and would be better described as inadmissible. We take the latter view.

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

6.102. In the light of the above discussion, we recommend that the sections concerned should be amended accordingly,[1] and also that a definition of "admissible" should be added, as suggested above. *Recommendation.*

(a) Section 3 (a definition of 'admissible' to be inserted).

(b) Section 5 (Explanation to be added). (Expression 'relevant' to be replaced by the expression)

(c) Sections 21-23 (Admissions)
Section 24, 28, 29 (Confessions)
Sections 32-36 (Statements out of court). 'admissible' where the context so justifies, for sections in group (c)

Section 38 (Law Reports)
Sections 40-44 (Judgments)
Sections 45-51 (Opinions)
Sections 52-55 (Character).

Appendix

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

"*General interpretation and savings*

18. (1) In this Act "Civil proceedings" includes in addition to civil proceedings in any of the ordinary courts of law—

(a) civil proceedings before any other tribunal, *being proceedings in relation to which the strict rules of evidence apply*; and

(b) an arbitration or reference, whether under an enactment or not,

but does not include civil proceedings in relation to which the strict rules of evidence do not apply.

(2) In this Act—

"Court" does not include a court martial, and in relation to an arbitration or reference, means the arbitration or umpire and, in relation to proceedings before a tribunal (not being one of the ordinary courts of law), means the tribunal.

"Legal proceedings" includes an arbitration or reference, whether under an enactment or not;"

[1]The list is tentative.

CHAPTER 7

RELEVANT FACTS—THE GENERAL PROVISIONS SECTIONS 5 TO 11

Facts in issue

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

Grouping.

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

(1) Facts in general[1];

(2) Facts in particular case[2];

(3) Statements (of facts)[3];

(4) Opinions[4]; and

(5) Character[5].

Sub-divisions.

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

FACTS IN GENERAL

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

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

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

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

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

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

FACTS IN PARTICULAR SITUATIONS

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

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

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

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

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

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

STATEMENTS

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

(1) Admissions (sections 17—23).

(2) Confessions (sections 24—31).

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

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

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

OPINIONS

Opinions of third parties (sections 45—51).

CHARACTER

Section 5.

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

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

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

Recommendation to amend section 5, Explanation.

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

Section 6 — Facts forming part of the same transaction.

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

There are four illustrations to the section. Illustration (a) puts these facts. A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by-standers at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact.

That the accused need not be present, is illustrated by another illustration. A is accused of waging war against the Government of India by taking part in an armed insurrection in which property is destroyed, troops are attacked, and gaols are broken open. The occurrence of these facts is relevant, as forming part of the general transaction, though A may not have been present at all of them.

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

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

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

Principle of section 6.

7.6. The principle of section 6 is clear. If the connected facts form part of the same transaction as the fact which is the subject of enquiry, manifestly evidence of those facts ought not to be excluded, because, to view a fact in isolation would be to have only a partial or incomplete view[1]. Moreover, such facts,—i.e. facts forming part of the same transaction,—could not often be excluded without rendering the evidence unintelligible.

Formulation in other countries.

7.6A. There have been several attempts to formulate the[2] exceptions recognised under the head of *res gestae*. The phrase itself has been criticised as a "bubble of verbiage[3]". But the concept is fairly intelligible.

The California Evidence Code[4] deals with the matter under the head of "spontaneous statement" and "contemporaneous statement" in these terms.

"1240. *Spontaneous statement*

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

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

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

"1241. *Contemporaneous statement*

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

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

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

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[1]See Norton, Evidence, 101, referred to in Woodroffe, Evidence (1941), Comment on section 6.

[2]See rules 512-513 of the Model Code and rule 63(4) and 63(12) of the Uniform Rules.

[3]Pollock in Pollock-Holmes Letters (Cambridge, 1942), Vol. II, pages 284-85 (Letter dated 23rd April, 1931).

[4]Sections 1240-1241, California Evidence Code.

7.7. In England, acts, declarations and circumstances which constitute or accompany, and explain the fact or transaction in issue, are admissible as forming part of the *res gestae*[1]. The section deals with a substantial[2] part of this topic. The point for decision under the section will always be whether the facts sought to be adduced do form part of the same transaction, or are too remote to be considered really part of the "transaction" before the Court. Position in England.

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

Illustration (b) indicates that the nature of a crime may be such that the acts of several other persons could be relevant as parts of the same transaction, even though the person charged as the principal offender was not present at any of them. The illustration relates to waging war—an offence which usually, if not invariably, requires the participation of numerous persons. In fact, these occurrences are part of the waging of war—a fact in issue. Incidentally, the facts are reminiscent of a celebrated English treason trial[3].

Illustration (c), relating to a suit for tort, is useful as making it clear that the section applies as much to documents as to acts and declarations and also that it is not confined to criminal proceedings[4]. The correspondence is admissible, because the letter cannot be viewed in isolation.

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

In an English case[5], the question was whether A sold goods to B personally, or to B as C's agent, the sale being made subject to inquiry from D, B's referee. A letter written by A to his own agent, asking him to "inquire from D as to the credit of C and also of B, who is making large purchases for C", was held admissible for A as part of the transaction and in corroboration of other evidence, though there was no proof *per se* that B's purchase was for C. In that case also, the transaction was the cumulative result of a number or arrangements.

7.9. According to Cross and Wilkins[6]— English law.

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

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

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[1]As to the history of this "catch all" phrase, see Phipson in 19 Law Quarterly Review 435.

[2]See discussion as to "English Law and Section 6", *infra*.

[3]*R.* v. *Lord George Cordon*, 21 Howard State Trials 535.

[4]See *K. N. Singh* v. *Karmapara Dev Co. Ltd.*, A.I.R. 1950 Pat. 134, 166.

[5]*Milne* v. *Leisler*, (1862) 7 H.&N. 786; the action was by A, who gave evidence, against a third party to whom B had pledged the goods.

[6]Cross and Wilkins, Outlines of Evidence (1971) pages 139, 140, Article 51.

3. Facts forming part of the transaction under investigation are also said to form part of the *res gestae.*

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

English law and section 6.

7.10. The phrase *"res gestae"* has often been criticised in England. In *Homes* v. *Newman*[1], Lord Tomlin, sitting as an additional Judge in Chancery, suspected that "the phrase *'res gestae'* had been adopted to provide a respectable legal cloak to a variety of cases to which no formula of precision can be applied."

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

Declarations.

7.11. Academic writers in England and elsewhere, when discussing *res gestae*, usually concentrate on declarations or utterances[2], because, in practice, they figure frequently.

Three senses of *res gestae.*

7.12. The expression *"res gestae"*, in the context of the law of evidence, may be used in at least three different ways, as has been pointed out in the judgment of Lord Wilberforce in *Ratten* v. *R.*[3]

1. When a situation of fact (e.g. a killing) is being considered, the question may arise when does the situation begin, and when does it end. It may be arbitrary and artificial to confine the evidence to the firing of the gun or the insertion of the knife without knowing, in a broader sense, what was happening. Thus, in *O'Leary* v. *The King*[4], evidence was admitted of assaults, prior to a killing committed by the accused during what was said to be a continuous orgy.

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

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

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

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[1] *Homes* v. *Newman*, (1931) 2 Ch. 112; (1931) All E.R. Reprint 8587.

[2] For example, see Morgan, "A suggested classification of utterances admissible as *res gestae*" (1922) 31 Yale Law Journal 229.

[3] *Ratten* v. *R.*, (1971) 3 W.L.R. 930 (H.L.).

[4] *O' Leary* v. *The King*, (1946) 73 C.L.R. 566, 577 (Australia).

3. A hearsay statement is made either by the victim of an attack or by a bystander—indicating directly or indirectly the identity of the attacker. The admissibility of the statement is then said to depend on whether it was made as part of the *res gestae*.

7.13. The following discussion by Taylor, on the subject, will also be found to be very useful[1]:

> "Certain other declarations and acts are admitted as original evidence, being distinguished from hearsay by their connection with the principal fact under investigation. The affairs of men consist of a complication of circumstances, so intimately interwoven as to be hardly separable from each other. Each owes its birth to some preceding circumstances, and, in its turn, becomes the prolific parent of others; and each, during its existence, has its inseparable attributes, and its kindred facts, materially affecting its character, and essential to be known, in order to a right understanding of its nature. These *surrounding circumstances* may always be shown to the jury along with the principal fact, provided they constitute parts of what are termed the *res gestae;* and whether they do so or not must, in each particular case, be determined by the Judge in the exercise of his sound discretion, according to the degree of relationship which they bear to that fact[2]. Thus, on the trial of Lord George "Gordon for treason, the cry of the mob, who accompanied the prisoner on his enterprise received in evidence, as forming part of the ***res gestae***, and showing the character of the principal fact[3]."

7.14. It has often been pointed out[4] that statements which are otherwise excluded would be admissible if they fall within section 6 or, in England, the doctrine of *res gestae*. In particular, evidence which may be excluded by virtue of the hearsay rule, the opinion rule, rule against self-corroboration[5] or rule against evidence showing bad character[6], may be admissible as providing the circumstances in which the statement was made.

Time and place how far material under section 6.

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

***Bedingfield's* case.**

7.16. In this respect, the position in England is somewhat controversial. In *Bedingfield's case*[7], a man who had cut a woman's throat was tried for murder. It was proved that the deceased, with her throat cut, came suddenly out of a room, in which she had left the prisoner. Evidence was tendered to show that immediately after coming out of the room, and shortly before she died, she had made a remark was something like "Oh: See what Harry's done". It

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[1]Taylor on Evidence, cited in Field on Evidence (1964), Vol. I, page 263.

[2]Per Parke, J., in—
Rawson v. *Haigh*, 2 Bing., 104;
Ridley v. *Cyde*, 9 Bing. 349, 352;
Pool v. *Bridges*, 4 Pick 379;
Allen v. *Duncan*, 11 Pick. 3099.

[3]*Lord George Gordon*, 21 How. St. Tr. 14, 529.

[4]*R.* v. *Hardy*, 24 Howard State Trials, pages 1066 to 1096.

[5]*Spittle* v. *Spittle*, (1965) 3 All. E.R. 451.

[6]*R.* v. *Egerton*, R. & R. 375, approved in *R.* v *Sims*, (1946) King's Bench 531, 542.

[7]*R.* v. *Bedingfield*, (1879) 14 Cox CC 34.

was held that her statement was not admissible in evidence, either as a dying declaration, as it did not appear that she was in fear of death, or as *res gestae* as it was made *after the transaction* was complete.

7.17. This was a judgment[1] of Cockburn C.J. and the case gave rise to considerable comment. Writing extra-judicially, Cockburn[2] (whose view is phrased with Bedingfield in mind), enunciates the principle as follows:—

> "Whatever act, or series of acts, constitute, or in point of time *immediately*[3] accompany and terminate in, the principal act charged as an offence against the accused, from its inception to its consummation or final completion, or its prevention or abandonment—whether on the part of the agent or wrongdoers, in order to its performance, or on that of the patient or party wronged, in order to its prevention—and whatever may be said by either of the parties *during the continuance of the transaction*[3], with reference to it, including, herein, what may be said by the suffering party, though in the absence of the accused, during the continuance of the action of the latter, actual or constructive—as, e.g., in the case of flight or application for assistance—*form part of the principal transaction*, and may be given in evidence as part of the *res gestae*, or particulars of it; while, on the other hand, statements made by the complaining party, *after all action on the part of the wrong-doer*, actual or constructive, has ceased, through the completion of the principal act or other determination of it by its prevention or its abandonment by the wrong-doer—such as, *e.g.*, statements made with a view to the apprehension of the offender—do not form part of the *res gestae*, and should be excluded."

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

Thayer's view.

7.18. Thayer, who was one of the first to intervene in the *Bedingfield* controversy[4], considered that Cockburn should have received the declaration. He observed[5]:

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

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

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[1]*R. v. Bedingfield*, (1879) 14 Cox C. C. 34.

[2]Cockburn, writing extra-judicially in (1880) 15 L.J. 16, 17, quoted by R. N. Gooderson, "*Res Gestae* in Criminal Cases", (1956) Cambridge L.J. 199, 201 to 203.

[3]Emphasis supplied.

[4]Para. 7.17, *supra*.

[5]Thayer, (1881) 15 American L. R. 107, cited in R. N. Gooderson "*Res gestae* in Criminal Cases" (1956) Cam L.J. 199, 201, to 203.

should be continuing, either actually or constructively, while Thayer does not demand this, provided that the statement is substantially contemporaneous with such action.

Wigmore's view.

7.19. Wigmore[1] rejects both these views. He regards the element of contemporaneity as properly applicable only to what he calls the "verbal act" doctrine, where the utterance is offered irrespective of its truth as accompanying and explaining a material equivocal act[2]. His other main head of *res gestae* evidence is "spontaneous exclamations"—a statement of exclamation, by a participant, immediately after an injury, declaring the circumstances of the injury, or by a person present at an affray, or rail road collision, or other exciting occasion, asserting the circumstances of it as observed by him[3]. Instead of the requirement of contemporaneity, there is, according to Wigmore, a "liberal time-allowance" which is exhausted only when the influence of the exciting cause has been dissipated[4].

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

7.20. Wigmore's reasoning, however, ignores psychological considerations put forward over a quarter of a century ago by Hutchins and Slesinger[5], who pointed out that the exciting event might very well prevent or limit accurate observation, so that the assumption of *truthfulness* in Wigmore's argument might, for reason not considered by him, be very dubious. The criticism of Wigmore's position did not, however, lead the authors to conclude that such utterances should be excluded under the hearsay rule; but that they should be admitted on more satisfactory grounds.

English authorities.

7.21. So far as the English authorities are concerned, the admission of such statements has often been inadequately explained in the cases: quite often, *res gestae* is relied on. A brief but important discussion of the problem is to be found in the judgment of Dixon J. (as he then was) of the High Court of Australia in *Adelaide Chemical and Fertilizer Co. Ltd.* v. *Carlyle*[6]. There a question for the court was whether a statement made by a deceased person shortly after an accident was admissible. The Court held it to be inadmissible. In the course of deciding this point, it was necessary to review some of the cases which Wigmore classifies under "spontaneous declaration". Dixon J. observed that the general tendency of English law was not to explain the cases in this way. While the cases provided some support for the view that spontaneous and unreflecting statements were more trustworthy, Dixon J. pointed out that the question which the courts normally asked in considering admissibility was whether the statement formed *an integral part of a transaction*.

Position under section 6 — Unity of action required.

7.22. On this point, — *i.e.* on the question of contemporaneity — the section is specific. As we have already pointed out[7], the section (last fifteen words) make it clear that the declaration need not be literally contemporaneous with

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[1]Wigmore, referred to in R. N. Gooderson, "*Res Gestae* in Criminal Cases", (1956) Camb. L.J. 199, 201 to 203.

[2]Wigmore (1940) vi, para. 1756, pages 162-164, 197.

[3]Wigmore (1940) vi, para. 1746, page 134.

[4]Wigmore (1940) vi, para. 1750, page 142.

[5]Hutchins and Slesinger in (1928) 28 Columbia L.R. 432.

[6]*Adelaide Chemical and Fertilizer Co. Ltd.* v. *Carlyle*, (1940), 64 Commonwealth L.R. 514, 531-2.

[7]See *supra*.

the principal fact. Nor need it be made at the same place. The test, and the only test, is whether the declaration and the act form part of the same transaction. Of course, this does not mean that the interval of time between the two can be immaterial. As is often pointed out, a few minutes can make a difference in deciding whether the two form part of the same transaction: but this aspect is not conclusive One could make use of the classification, popularly attributed to Aristotle, of the three "dramatic unities", and say that section 6 does not place so much emphasis on unity of time and unity of place, as on 'unity of action'.

Meaning of 'transaction' in section 6.

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

'Meaning of the word 'transaction' in section 13.

7.24. As occurring in section 13, the word received judicial construction in the Calcutta High Court in a case where the question was whether a judgment is a transaction. According to R. C. Mitter J., the word 'transaction' in section 13 means 'that which is done'[2]. A 'transaction', in its ordinary sense, is, according to Garth, C.J., one business or dealing which is carried on or transacted between two or more persons[3]. A 'transaction', as the derivation denotes, is something which has been concluded *betwen persons* by a cross or reciprocal action as it were, whereas the judgment of a court is something imposed by the authority of the tribunal[4]. This interpretation of section 13 is not, it seems, conclusive for interpreting the word 'transaction' in section 6.

Origin of the word 'transaction' in connection with *res gestae*.

7.25. The principle that acts which are part of the same transaction as the fact in issue form part of the *'res gestae'* can be traced at least to *R.* v *Ellis*[5]. The prisoner in that case was charged with stealing six shillings, marked money, from a till. Evidence was allowed of the taking not only of that amount, but also of other moneys taken during the same day. Bayley J. said:

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

Under the Code of Criminal Procedure,[6] offences committed by several persons "in the course of the same transaction" can be tried together. With reference to this provision, the general consensus is that where the transaction consists of different acts, those acts, in order that the chain of such acts may constitute the same transaction, must be connected together by proximity of time, proximity or unity of place, continuity of action and community of purpose or

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[1]The list is not intended to be exhaustive.

[2]*Gujja Lal* v. *Fatteh Lal*, (1879) I.L.R. 6 Cal. 171, 175 (F.B.) (per Mitter, J.).

[3]*Gujja Lal* v. *Fatteh Lal*, (1879) I.L.R 6 Cal. 171, 186 (F.B.) (per Garth, C.J.)

[4]*Gujja Lal* v. *Fatteh Lal*, (1879) I.L.R. 6 Cal. 171, 185 (F.B.) (per Jackson, J.).

[5]*R.* v. *Ellis* (1826) 108 E.R. 406 (K.B.).

[6]Section 223(a), Code of Criminal Procedure, 1973.

design.[1] But, it should be noted that under section 6 of the Evidence Act, statements, to be admissible as substantive evidence of the truth of the facts stated therein, must themselves be 'part of the transaction', and not merely uttered 'in the course of the transaction'.[2]

Area of events dependent on circumstances.

7.26. The area of events covered by the term *'res gestae'* or by the term 'part of the transaction', depends on the circumstances of each case. Murphy J. said in *Emperor* v. *Ring*[3], that while all acts and events are linked together, and while, in reality, there is no independent act or event, yet, on the other hand, "there is a practical unity in men's actions which enables us to draw a *mental circle* round an act or event, or a series of them and to call it, for practical purposes, a single transaction, though theoretically this may not be a true description." These observations were made with reference to the Code of Criminal Procedure, but they are quoted here to illustrate how every case involving interpretation of the word 'transaction' in section 6 requires the court to draw 'mental circle'. The question to be considered is, where exactly the line should be drawn in each particular case. The answer must, to a large extent, depend on the facts of each case.

R. v. *Foster.*

7.27. In the English case of *R.* v. *Foster*[4], for instance, the accused was charged with man-slaughter by the dangerous driving of a carriage. A witness was allowed to narrate what the deceased said immediately after he had been run down, and the report makes it plain that the statement was received as evidence of *the the cause of the deceased's injuries.* The statement was not received as a dying declaration, because there was no evidence that the deceased was aware of his impending death; nor was there any question of the statement being made *in the presence* of the accused, in which case it might have been received on certain other principles. The statement was allowed to be proved *as evidence of the truth of its contents.* With this case, the case of *Bedingfield*[5] may be contrasted. In *Bedingfield* the utterance of the women was excluded, on the ground that the 'transaction was over'. The conclusion thus depends on the facts of each case.

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

Selected Indian cases — Statements by the accused.

7.29. We shall now refer to selected Indian decisions which illustrate the application of the section. In a murder trial[7], the question was whether the accused, who had some injuries on his body, had those injuries self-inflicted, the prosecution case being that he, the accused, had declared his decision to finish the deceased and then to finish himself. A threat uttered by the accused *on the morning of the day* of occurrence (murder) that he would finish off the

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[1]See *Amritlal Hazara* v. *Emperor*, A.I.R. 1916 Cal. 188, 196.

[2]*Hadu* v. *State*, A.I.R. 1951 Orissa 53, 58.

[3]*Emperor* v. *Ring*, A.I.R. 1929 Bom. 296, 303.

[4]*R.* v. *Foster*, (1834), 6 C.&P. 325. The case is referred to *in the matter of Surat Dhobini*, (1884) I.L.R. 10 Cal. 302, 304 (*infra*).

[5]*R.* v. *Bedingfield*, (Para. 7.16, *supra*.).

[6]Stephen's Digest of Law of Evidence, Article 3, p. 4, cited in *Chain Mahto* v. *Emperor*, 11 C.W.N. 266, 270.

[7]*Wasu Pillai* v. *The State*, A.I.R. 1961 Bom. 114, 117 (Gokhale & Kotwal JJ.).

deceased and then finish off himself was held admissible on the ground that evidence as to the manner in which the injuries came to be sustained by the accused was closely connected with the offence of murder as to form part of the evidence of murder and part of the transaction.

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

Statements by the deceased.

7.30. The same is the position regarding *statements by the victims*. In an Assam case[1], injuries had been inflicted by the accused on the person of the deceased, resulting in a fracture of his ribs. Soon after the incident, the deceased was questioned as to the injuries, and he stated that it was the accused who had inflicted the injuries. This statement, having been made *very shortly* after the deceased sustained the injuries, was held admissible under section 6 (besides section 32), in view of the fact that the doctor's evidence established that the injuries to the ribs were contributing factor to the death.

Complaints.

7.31. Particularly in respect of complaints of sexual and other offences, the question whether the statement was made spontaneously or whether it was merely the narrative of a past transaction comes up for consideration. A statement which does not explain the physical act, and is not spontaneous but is a mere narrative, is generally regarded as not covered by action 6, and it is for this reason that a statement by a ravished woman to her mother-in-law, or other relative, made *some time after the alleged* rape, is regarded as not forming part of the same transaction[2]. Whenever recollection comes in and whenever there is opportunity for reflection and explanation, then the statements cease to be part of the *res gestae*[3]. Such statement may, on the facts, amount to a complaint[4] and thus be admissible under section 8.

Statements by witnesses.

7.32. Somewhat on the same line of reasoning, statements made by witnesses *which are not spontaneous* are excluded from use under section 6. For example, in a trial under section 294 of the Indian Penal Code, for teasing a girl on the road and using obscene language towards her[5], the prosecution relied solely on the testimony of a witness who had reached the spot after the incident and was told by the girl about the words used. This evidence was regarded, on the facts of the case, as outside the scope of sections 6 and 8, and inadmissible as hearsay.

How far statements admissible in proof of truth of the Contents—Position in England.

7.33. The question whether a statement falling within the general requirements of section 6 is admissible as evidence of the truth of those facts or alegations of which the statement consists, has been debated in England, and judicial pronouncements on the subject are conflicting. The case of *R.* v. *Foster*,[6] to which we have already made a reference, takes a wide view in the matter. The discussion in a judgment of the House of Lords[7] would seem to support the view that the statements are evidence of the truth of the matter stated. The discussion in a judgment of the Privy Council[8], on the other hand, suggests a narrower view on this point. In that case, at the trial of the appellant on a charge of indecently assaulting a girl just under the age of four years, the trial judge held to be admissible evidence by the child's mother of a statement

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[1]*Krishna Ram* v. *State*, A.I.R. 1964 Assam 53, 54, para. 3.
[2]*Sreehary* v. *Emperor*, A.I.R. 1930 Calcutta 132, 133.
[3]*Raman* v. *Emperor*, A.I.R. 1921 Lahore 258, 259.
[4]*Raman* v. *Emperor*, A.I.R. 1921 Lahore 258.
[5]*Kashmira Singh* v. *State*, A.I.R. 1965 Jammu & Kashmir 37, 38, para. 3.
[6]*R.* v. *Foster*, Para. 7.27, *supra*.
[7]*R.* v. *Christie*, (1914) A.C. 545, 553 (H.L.).
[8]*Sparks* v. *R.*, (1964) A.C. 964 ; (1964) 2 W.L.R. 566, 575, 576 (P.C.).

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

7.34. In a recent judgment of the House of Lords,[1] the statement, though admitted, was not tendered in proof of the truth of the matter stated, and hence the judgment is not conclusive on his point.

Statements sometimes part of *res gestae* even in England.

7.35. It may, however, be stated that even in England, statements accompanying acts are sometimes treated as part of the *res gestae*—see *R.* v. *Foster, supra.* They could be conveniently styled as "verbal acts".[2] In the *Mersey Docks Board case*,[3] for eaxmple, A sued B for damages for negligently causing a fire on A's landing stage. One of B's workmen, as he was escaping from a manhole just after the fire occurred and near the place where it was first seen, said : 'Oh! my God. The stage is on fire. I did it. I am a ruined man"! This was held admissible as part of the *res gestae*, not as narrative but as conduct relevant to the issue.

Julius Stone[4] has pointed out that the American view is that statements admissible as res gestae constitute an exception to the hearsay rule. Stone takes the three situations about which most of these problems revolve, namely, (i) statements as to bodily or mental feelings; (ii) spontaneous statements in the face of an emergency, and (iii) statements of intention. He says that all these are exceptions to the rule against hearsay.

Position under the Evidence Act.

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

In a Calcutta case,[5] the only evidence against the accused woman who was charged with having voluntarily caused grievous hurt to her daughter-in-law with a pair of tongs which had been heated, was a statement made in the presence of the accused by the person injured to a neighbour immediately after

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[1]*Ratten* v. *R.*, (1971) 3 W.L.R. 930 (H.L.).

[2]Compare *Bateman* v. *Bailey*, (1794) 5 T.R. 512; *Hyde* v. *Palmer*, (1863) 32 Law Journal Queen's Bench 126; *Bennison* v. *Cartwright*, (1864) 33 Law Journal Queens Bench 137.

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

[4]Julius Stone, "*Res Gestae* Resigitata", 55 L.Q.R.

[5]*In the matter of Surat Dhobini*, (1884) I.L.R. 10 Cal. 302, 304 (C.D. Field and R.C. Mitter JJ.).

the infliction of the injuries. The accused did not deny the allegation (contained in this statement) that she had inflicted the injuries. It was held that this statement was admissible under section 6, as *res gestae* and also under illustration (g), section 8, as conduct influenced by a relevant fact (acquiescence in a charge).

In this case, the statement was made in the presence of the accused. But that aspect, it is suggested, was not material for the purpose of application of section 6. It was emphasised to show relevance under section 8—the conduct of the accused by remaining silent. In fact, the High Court referred to the English case of *R.* v. *Foster*,[1] as in point, though the court took care to observe that English cases could be taken merely as illustrations and not as binding. It may be noted that in *R.* v. *Foster*, the accused was not present when the statement was made.

Aspect of spontaneity.

7.37. In this connection, it should be pointed out that statements in the nature of spontaneous exclamations are really statements through which the transaction speaks. Although physically they come from the mouth, they really come from the heart. The will is subsidiary, the emotion paramount. They express the inner commotion of the soul. No doubt, such utterances or, for that matter, any other utterances—are not conclusive; but they render probable the existence of the fact asserted (which is the general test of relevance)[2] and, for that reason, it seems to be legitimate to regard them as admissible *not* only for proof of the factum of the statement, but also in proof of the truth of the contents. In a recent English case,[3] Lord Wilberforce vividly described such statements as made under the 'pressure of the drama'.

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

Statements also falling under section 8.

7.39. Incidentally, it may be stated that some of the later sections in the Act deal specially with statements which are discussed in English text-books under *res gestae*. Discussion in the under-mentioned[4 5 6 7 8] decisions show that the evidence covered by section 8 etc. is of the nature usually referred to as *res gestae*.

No amendment suggested.

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

SECTION 7

Introductory.

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

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[1] *R.* v. *Foster*, (1934) 6 C.&P. 325, para. 7.27, *supra*.
[2] See Chapter 4, *supra*.
[3] *Ratten* v. *R.* (1971) 3 W.L.R. 930 (H.L.).
[4] Particularly, section 8.
[5] *Yusufalli* v. *The State*, A.I.R. 1968 S.C. 147, 149 (section 8).
[6] (1879) I.L.R. 3 Bom. 17, 18 (Section 8).
[7] (1951) All. L.J. 49, 50.
[8] *Chhotka* v. *The State*, A.I.R. 1958 Cal. 482, 487, para. 23.

There are three illustrations to the section. Illustration (a) takes these facts. The question is whether A robbed B. The facts that, shortly before the robbery, B went to a fair with money in his possession, and that he showed it, or mentioned the fact that he had it, to third persons, are relevant.

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

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

Illustrations analysed.

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

Reason for admission.

7.43. The reason for the admission of facts of this nature is that[1], if it is desired to decide whether a fact occurred or not, almost the first natural step is to ascertain whether there were facts at hand, which were calculated to produce it or afford opportunity for its occurrence. It is a natural human tendency to look to the cause when an effect is visible, or to look for the effect if the cause is known. Moreover, in order to the proper appreciation of a fact, it is necessary to know the state of things under which it occurred. Knowledge of the circumstances enabling a person to do the act is also relevant. All these facts can be conveniently summed up as "contributory or consequential factors."[2]

Section 7 compared with section 6.

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

Principle of relevance.

7.45. In permitting evidence of these facts, the section is, no doubt, faithful to the general principle[3] underlying the scheme of the provisions of the Act—the principle of probability. The various contributory and consequential factors.[3] rendered admissible under section 7, are admitted on the assumption that they render probable the existence of the fact in issue, and their absence may render it improbable.

Opportunity — evidence of

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

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[1]Woodroffe.

[2]See Chapters 3-4, *supra*.

[3]Para 7.57, *supra*.

against a hasty inference from opportunity for a crime to the commission of a crime. As Norton pointed out,[1] there can be no crime without the opportunity, but there is a wide gulf, to be bridged over by evidence, between opportunity and commission.

7.47. On the other hand, no circumstances can be more destructive of a criminal charge than that the accused had no opportunity of committing the crime.[2] On the strength of this proposition rests the froce of a defence founded on an alibi, which is admissible under section 11 read with section 7.

Wide language.

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

Variety of uses — Footprints.

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

Position in England.

7.50. In England also, finger-prints or footmarks[3] of an accused found near the scene of the crime are admissible in evidence. In *Callis* v. *Gunn*[4], evidence of the defendant's finger-prints was admitted although he had not been cautioned by a police officer when asked to provide his prints. The Court of Criminal Appeal has upheld convictions where the only evidence against the defendant was that of finger-prints.[5]

Scientific evidence — Tape records.

7.51. In fact, the potentiality of section 7 as regards scientific evidence is vast. Dealing with recorded tapes, the Supreme Court has held that the imprint on the magnetic tape is the direct effect of the relevant sounds, and, like all photographs of a relevant incident, a contemporaneous tape record of a relevant conversation is a relevant fact and admissible under section 7— though, of course, the evidence must be received with caution[6]. This aspect was also brought out in a Punjab case.[7]

Utility of section 7.

7.52. The utility of section 7 was demonstrated in a Saurashtra case.[8] The accused was a Clerk in the office of the Chief Minister, and his duty was to receive remittances addressed to the Chief Minister's Office towards

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[1]Norton, Evidence, 104; cited by Woodroffe, Evidence Act, commentary on section 7.

[2]Woodroffe.

[3](a) *R.* v. *Shav*, (1830) 1 Law. C.C. 116, per Parke B;
(b) *R.* v. *Heaton* (1832) 1 Lew. C.C. 116, per Alderson, B.

[4]*Callis* v. *Gunn*, (1864) 1 Q.B. 495.

[5]*R.* v. *Castleton*, (1909) 3 Cr. App. R. 74.

[6]*Yusufulli* v. *The State*, A.I.R. 1968 S.C. 147, 149, Para 5.

[7]*Dial Singh* v. *Rajpal*, A.I.R. 1969 Punjab 350, 351, Para 4.5.

[8]A.I.R. 1955 Saurashtra 68, 70.

the Scarcity Relief Fund and send them to the Treasury or hand them over to a superior officer. A particular amount, which had been received from an overseas donor, was not so credited, and the superior officer of the accused wrote two letters to the overseas donor for particulars relating to the remittance. The accused was himself entrusted with posting these letters. When no reply was received, the superior officer wrote to the overseas donor another letter, which was despatched by a different Clerk, and a reply was received in due course. On the prosecution of the accused under section 409 of the Indian Penal Code for breach of trust, the letter received in reply was given in evidence for the prosecution. It was held that, although the contents of the letter could not be received against the accused under section 32, because there was no proof that the writer of the letter was the same person as the overseas donor, yet the letter was admissible under sections 7 and 11, to prove the fact that when letters were given to the accused for despatch, no reply was received from the addressee, while a reply purporting to be from the same addressee was received when the letter was given to despatch to some other person,—thus leading to the inference that the accused had suppressed the letters entrusted to him.

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

SECTION 8

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

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

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

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

7.55. There are eleven illustrations. Illustrations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

As corroborative evidence under section 157.

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

The fact that, soon after the alleged robbery, he made a complaint relating to the offence, the circumstances under which, and the terms in which, the complaint was made, are relevant.

The fact that he said that he had been robbed, without making any complaint, is not relevant as conduct under this section, though it may be relevant—

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

As corroborative evidence under section 157.

Section 8 and section 7.

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

Classes of relevant facts under section 8.

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

Motive

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

Motive, a fact in issue.

7.58. In some cases, motive may have an importance of its own, being an ingredient of the crime or tort,—e.g., motive on a privileged occasion in relation to defamation. When motive is such an ingredient, it is not merely a relevant fact, but is a part of the "fact in issue" as defined in the Act[1], because on motive depends the *existence* of the liability in such cases. Then, there may be cases where motive may affect the *extent* of the liability, and is, therefore, a fact in issue. In all these cases, evidence of motive can be given under section 5, and recourse to section 8 is not needed. However, even where section 5 does not apply, motive may be relevant under section 8.

It has been said[2] that the section embodies, in a statutory form, the rule of evidence that the testimony of *res gestae* is always allowable when it goes to the root of the matter concerning the commission of the crime.

Importance of motive and preparation explained.

7.59. In a consideration of the cause or occasion of a fact, or the state of things under which it happened, nothing can be more material than to know whether any person had an interest in its happening, or took any measures calculated to bring it about. For this reason, motive and preparation become of the utmost importance. If A is found murdered, the fact that B had a strong motive for wishing A dead is, so far as it goes, a piece of evidence against B. So, if A is poisoned with arsenic, the fact that B, shortly before, procured arsenic, or made arrangements by which he would have access to A's food, points, in a measure, to B being the poisoner, and would be relevant fact at his trial[3].

Preparation.

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

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[1]See section 3, definition of "fact in issue".

[2]*Kalijiban* v. *Emperor*, A.I.R. 1936 Cal. 316, 318; I.L.R. 63 Cal. 1015.

[3]Cunningham, pages 93-94, cited by Woodroffe, Evidence (1941), commentary on section 8.

also by appropriate preparations.[1] The existence of a design or plan is usually employed evidentially to indicate the subsequent doing of the act planned or designed.

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

> "The preparation consists in devising or arranging the means or measures necessary for the commission of the offence. On the other hand, an attempt to commit the offence is a 'direct movement' towards commission after preparations are made.
>
> In order that a person may be convicted of an attempt to commit a crime, he must be shown to have had an intention to commit the offence, and secondly to have done an act which constitutes the *actus reus* of a criminal attempt."

Term 'conduct'.

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

Illustrations.

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

Illustration (a) elaborated.

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

Illustration (e)

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

Illustration (g)

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

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[1]See the case of Patch, cited in Stephen, Introduction sections 99-106.

[2]*Malkiat Singh* vs. *State of Punjab*, (1969) 1 S.C.R. 157 (Ramaswami, J.).

[3]Wigmore, Vol. I, section 190 page 640, cited by Woodroffe, Evidence (1941), page 343.

[4]*Himachal Pradesh Administration* v. *Mst. Shiv Devi*, A.I.R. 1959 H.P. 3 11 (1959) Cr. L.J. 448.

[5]*The State* v. *Debnu*, A.I.R. 1957 H.P. 52, 57.

[6]*In the matter of the petition of Surat Dhobini* (1884) I.L.R. 10, Cal. 302, 304.

woman inflicted them, and the accused did not contradict the statements of the injured. These statements were held to be admissible under illustration (g). In England[1], it is a general rule that a statement made in the presence of the prisoner, which he might have contradicted, if untrue, is evidence against him.[2]

7.66. The case law as to offences of corruption furnishes interesting illustrations of conduct as a relevant fact. In a Mysore[3] case, at the time when the Inspector of Police, Anti-Corruption Branch, called upon the accused to produce the money which had been received as a bribe, the accused hesitated, and was trembling and perspiring. It was held that the conduct of the accused under such circumstances was a relevant fact which could be taken into consideration by the Court. In *Shiv Bahadur Singh's case*[4] the Supreme Court took into consideration the reaction and confusion on the part of the appellant in that case, at the time when he was called upon by the police to explain his possession of the bribe money. In the case of *State of Madras* v. *Vaidyanatha*[5] also, the Supreme Court took into consideration evidence to the effect that when the accused was caught, he was seen to be trembling. Cases relating to corruption.

7.67. There is also a Calcutta case[6] illustrative of conduct. The accused was charged with the murder of his wife, S, who was missing for some time. A photograph of the dead body was published in the newspaper for establishment of the identity of the dead woman. With the publication of the photograph in the newspaper, the matter moved swiftly towards identification. On seeing the photograph, the members of the wife's family had no doubt in their mind that this was the body of S. Soon after the photograph was published, the accused was the first to speak to B about the photograph appearing in the newspaper and told him—"people are saying that the photograph is that of S, please go and see". When the accused spoke to B, the accused appeared to be in a disturbed state of mind and tried to go away, taking leave. It was held that the statement which the accused made to B, clearly came under the second paragraph of section 8, as showing the conduct and was a relevant fact. The particular statement by the accused accompanied and explained acts showing his reaction of a disturbed mind on the publication of the photograph in the newspaper, coupled with the suggestion that the photograph was of his dead wife. The statement by the accused to B, immediately on the publication of the photograph of S, was an incriminating circumstance against the accused.

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

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[1] *R.* v. *Mallory*, 15 Cos. 456, 458 (Per Field J.).

[2] See also discussion as to 'silence', *infra*.

[3] *M. M. Gandhi* v. *State of Mysore*, A.I.R. 1960 Mys. 111, p. 129.

[4] *Shiv Bahadur Singh*, A.I.R. 1954 S.C. 322.

[5] *State of Madras* v. *Vaidyanath*, A.I.R. 1958 S.C. 61.

[6] *Arun Kumar Banerjee* vs. *The State*, A.I.R 1962 Cal. 504, 508.

The degree of weight to be attached to the silence of an accused person in such circumstances depends upon the nature of the case. Many factors must be taken into account in assessing it, and no hard and fast rule can be laid down. Illustrations which may afford guidance can be found in the cases.[1-2-3] Care must be taken in all cases not to put too high a value on the absence of an immediate denial unless the surrounding facts point unequivocally to the conclusion that any accused person, whether educated or ignorant, cautious or impulsive, voluble or taciturn, would have felt bound to make a rejoinder in view of the particular charge against him and in the particular circumstances prevailing when he was made aware of it. It is not permissible to arrive at an adverse verdict on the strength of the opinions formed as to conduct of an accused person to supplement a case for the prosecution which, at the conclusion of the evidence heard on both sides, is too weak to justify conviction.[4]

Silence as consent.

7.69. The admissibility of silence in such circumstances is usually based upon the Latin maxim *"qui tacet, consentir videtur"* -silence indicates consent; thus, the silence is thought to be a tacit admission. The alternative justification is that, since "it is the nature of innocence to be impatient of a charge of guilt whenever seriously made and distinctly understood, an innocent person will usually spontaneously deny the accusation,"[5] the failure to make a denial is unnatural in an innocent man, and therefore evidence of a guilty conscience.

Thus, the inference from silence is based on the assumption that it is *natural* for the person against whom the allegation is made to repudiate it. This assumption is as old as the Bible,[6] where we find the following passage:

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

7.70. The assumption that silence indicates consent is not always valid. No doubt, sometimes this assumption is justified. For example, *in Egan v. United States,*[7] the accused, his lawyer, other company officers, and their lawyers, were the only persons present at a meeting. The attorney for one of the other officers read a statement made by his client to the Securities Exchange Commission, about a matter then under investigation, admitting the client's guilt and *implicating also the accused.* In those circumstances, it might well have been natural for an innocent man to reply.

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

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[1]*Rex* v. *Feigenbaum,* (1919) 1 K.B. 431.

[2]*Rex* v. *Whitehead,* (1929) 1 K.B. 99.

[3]*Rex* v. *Tate,* (1908) 2 K.B. 680.

[4]*Stephen Seneviratne* v. *The King,* A.I.R. 1936 P.C. 289; 41 C.W.N. 65, 78 (Lord Roche).

[5]*People* v. *Nitti,* (1924) 312, 111, 73, 94, 143, N.E. 448, 455, cited in (1965-1966) 79 Harvard Law Rev at p. 1036.

[6]Mathew 27; 11-14.

[7]*Egan* v. *U.S.,* 137 F. 2d 369 (8th Cir). cert. denied, (1943) 320 U.S. 788.

7.71. It follows that when the silence of the accused is readily explained by special circumstances negating the inference of guilt, it cannot constitute an admission.[1] Thus, the silence of a person under the influence of narcotics or at a formal hearing before a magistrate, is inadmissible. **Silence when explained.**

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

7.72. Similar comments apply to conduct by way of absconding—Illustration (h). Even innocent persons may evade apprehension owing to the instinct of self-preservation.[2] **Absconding.**

7.73. We shall now deal in detail with *illustrations (j) and (k)*, which are concerned with statements accompanying and explaining the conduct of a person an offence against whom is alleged to have been committed—i.e. the victim. Under these illustrations, the terms in which the complaint was made are relevant. A distinction is to be made here between a bare statement of the fact of rape or robbery, and a complaint. The latter evidences conduct; the former has no such tendency. There may sometimes be a difficulty in discriminating between a statement and a complaint. It is conceived that the essentials difference between the two is that the latter is made with a view to redress or punishment, and must be made to some one in authority—the police, for instance, or a parent, or some other person to whom the complainant was justly entitled to look for assistance and protection. For instance, a petition impugning the conduct of a police officer and begging that he may be put on trial is a complaint within the meaning of the Code of Criminal Procedure.[3] ***Illustrations (j) and (k)* — Complaint as distinct from bare statement.**

7.74. The distinction is of importance, because, while a complaint is always relevant as conduct, a statement not amounting to a complaint will be relevant only under particular circumstances,—e.g., if it amounts to a dying declaration,[4], or as a corroborative evidence.[5] Section 8, in so far as it admits a statement as included in the word "conduct", must be read in connection with sections 25 and 26, and cannot admit, as evidence, a statement which would be shut out by those sections.[6] **Importance of distinction.**

7.75. A complaint, as we have already stated[7], is one made with a view to redress or punishment, and must be made to some authority or some person to whom the complainant is justly entitled to look for assistance and protection.[8] In a Lahore case,[9] a woman who was raped, was questioned by a relative of her husband. The woman told him that the accused had raped her and asked him to tell her father-in-law in his field, which the relative did. When her father-in-law came home, she made the same statement to him. It was held that while the above statements could not be regarded as forming part of the same transaction as the offence and so section 6 would not apply, the statements were admissible under section 8 as evidencial conduct. **Essence of a complaint.**

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[1]See (1965-1966) 79 Harvard Law Review at page 1037.

[2](a) *Thimma* v. *State of Mysore*, A.I.R. 1971 S.C. 1871, 1877, para 11;
(b) *Rahman* v. *State of U.P.*, A.I.R. 1972 S.C. 110, 116, para 21.

[3]*Gangadhar* v. *Emperor*, (1915) I.L.R. 43 Cal. 173.

[4]See the illustrations to section 8.

[5]See — (a) *Apurba* v. *R.*, (1907) I.L.R. 35 Cal. 141;
(b) *R.* v. *Shamlal*, (1889) I.L.R. 14 Cal. 707.

[6]*R.* v. *Nana*, (1889) I.L.R. 14 Bom. 260.

[7]Para 7.73, *supra*.

[8]See — (a) *Gangadhar* v. *Emperor*, I.L.R. 43 Cal. 173;
(b) *Emperor* v. *Phulel*, I.L.R. 35 All. 102.

[9]*Raman* v. *The Crown*, A.I.R. 1921 Lah. 258.

Complaint when hearsay.

7.76. If a statement does not amount to a complaint and is outside section 8, it is inadmissible unless some other section covers it. In the Patna case of *Emperor* v. *Phagunia Bhuian*,[1] it was observed:

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

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

Statements by ravished female.

7.77. It should be noted that a statement by a ravished female after the commission of the offence, though not covered by section 6, is admissible, not only as explanation of her conduct under section 8, but also under section 157 by way of corroboration.[2] Thus, where the statement of the girl to her mother (if she had made any) does not *form part of the transaction,* viz. the raping of the girl, or occur during it, but is made after this transaction, and the rape of the girl was over when the perpetrator had gone away and the girl came away from the scene of occurrence to her mother's house, the statement is not relevant under section 6.[3] But it may be relevant under section 8. A statement made to the mother by the raped girl is also relevant[4] under section 8, if the girl is a witness, as she usually is, section 157 would also be relevant. If, however, owing to any circumstances, she is not a witness, section 157 would not apply.

The statement should not, however, be made in answer to question.[5]

Reason for making a distinction between mere statement and complaint.

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

Position in England.

7.79. It may be noted that the position under the section is, in some respects, wider than the English law on the subject. In England, complaints are (according to the usually accepted view), admissible only in sexual cases and in matrimonial proceedings based on adultery. They are admissible to confirm the story of the complainant to prove its intrinsic credibility, and also to prove non consent. They need not, however, be literally contemporaneous. According to one English writer[9]—

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

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[1]*Emperor* v. *Phagunia Bhuian*, A.I.R. 1926 Pat. 58.

[2]*Sorsalal* v. *Emperor*, A.I.R. 1925 Nag. 74, 76.

[3]*Sreehari* v. *Emperor*, A.I.R. 1930 Cal. 132, 133.

[4]A.I.R. 1930 Cal. 132, 133.

[5]A.I.R. 1963 Orissa 58, 59.

[6](a) A.I.R. 1926 Pat. 58-60;

(b) (1961) 2 Cr. L.J. 137, 138, 139.

[7]See Stephen's Introduction, cited in Woodroffe, (1941), page 91.

[8]See, however, Gooderson's view, "*Res Gestae* in Criminal Cases", (1956) Cam. L.J. 198, 209.

[9]R. N. Gooderson, '*Res Gestae* in Criminal Cases", (1956) Cam. L.J. 198, 209.

'Thus, in charges of rape and similar sexual offences against women, and children of either sex (even though they consented, where consent is no defence), evidence may be given that the victim made a "spontaneous complaint on the first opportunity which reasonably offered itself after the offence. This need not be to the first person she saw.[1] In this case, the words said may be given in evidence.[2] Such evidence is given to show the consistency of the conduct of the victim with the story told by him or her in the witness box" '.

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

Use in evidence — Purpose.

7.80. If it be held that those statements were in the nature of a complaint and are thus relevant and admissible under section 8, the next point for consideration will be as to what would be the value of those statements; could they be used as the basis for conviction of the appellant? In this connection, it would be useful to refer to the observations of Lord Porter in *Gillie* v. *Posho Ltd.*[3]

> "In certain cases as, *e.g.*, in the cases of sexual offences against women, statements made to third parties are in some circumstances admissible. But the careful limits placed upon the admissibility of such statements is evidence of the jealousy with which their admission is regarded. They must be complaints made voluntarily and at the earliest convenient moment, and even then they are received not as evidence or corroboration of the facts complained of, but as evidence of the credibility of the complainant's testimony to the fact alleged, and where consent is a defence, to negative consent. They are inadmissible in any other class of cases".

A similar view was expressed by the Madras High Court in the case of *Kappinaiah* v. *Emperor.*[4] It was held in that case that—

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

Limits to the rule.

7.81. In England, the Court has a discretion to exclude prejudicial evidence which may influence the jury. In *R.* v. *Parker,*[5] the accused was charged with wounding his wife by shooting.[6] A neighbour testified for the prosecution that after the shooting, the wife had come to him, showed him her face which was bleeding, and complained that her husband had shot her. The judge directed the jury to attach no weight to the words of the neighbour. Nevertheless, the jury convicted the accused. The Court of Criminal Appeal allowed the appeal against the conviction, on the ground that the evidence was prejudicial and likely to influence the jury. In India, under section 8, the evidence would be relevant and the court has no discretion to exclude it.

Position in England.

7.82. In England, it is now well settled[7] and held that in prosecutions for rape and offences of similar character, the statement in the *nature of a complaint* made by the prosecutrix to a third person, need not be *in the presence*

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[1] *R.* v. *Cummings,* (1948) 1 A.E.R. 551.

[2](a) *R.* v. *Osborne,* (1905) 1 K.B. 551.

(b) *R.* v. *Camelleri,* (1922) 16 C.A.R. 162.

(c) *R.* v. *Wannell,* (a boy of 19), (1922) 17 Cr. App. Rep. 53. — all cited in Coddington's Laws of Evidence, Constable's Guide, (1962) pages 11-12.

[3] *R. Gillie* v. *Posho Ltd.,* A.I.R. 1939 P.C. 146; (1939) 2 All. E. R. 196, 200 (P.C.).

[4] *Kappinaiah* v. *Emperor,* A.I.R. 1931 Mal. 233(2).

[5] *R.* v. *Parker,* (1961) 45 Cr. App. Rep. 1.

[6] For earlier cases, see Cross, "Scope of Rule against hearsay", (1956) 72 L.Q.R. 91.

[7] *R.* v. *Osborne,* (1905) 1 K.B. 551.

of the accused, provided such statement is shown to have been made at the first opportunity which reasonably afforded itself after the commission of the offence. The particulars may be so given in evidence in this class of cases,—but only in this class,- not as being evidence of the *truth of the charge against* the accused. but as evidence of the consistency of conduct of the prosecutrix with the story told by her in the witness-box and as negativing consent on her part.[1] It was, at one time, thought that this evidence was only admissible in cases where non-consent was a material element.[2] But that is not so.

But the complainant must be called. Thus, if the victim of indecent assault is unable to give any evidence of it, evidence by another witness of a complaint *made to her by the alleged victim shortly after the incident becomes* inadmissible[3] in England.

Matrimonial cases.

7.83. Corroboration may be required in England in some civil cases also, *e.g.* matrimonial proceedings based on adultery and the like. Although Lord MacDermott, *in Preston Jones v. Prestone Jones,*[5] *expressly recognised that the* jurisdiction of the Divorce Division must be regarded as entirely distinct from that of a Criminal Court and declared that his conclusions in this respect were not based on any analogy drawn from the criminal law, it is clear that, where adultery is relied on *in* support of a petition for divorce, the fact that this is a quasi-criminal offence cannot be overlooked. Asking himself what could be the reason why strict proof and corroboration of the adultery were required, Vaisey J., in *Ginesi* v. *Ginesi,*[6] observed; "the finding that the offence has been committed may be far more serious in its consequences both to the individual *and to society than* conviction of a crime. That is true even in these days when its gravity is not so widely appreciated and accepted as it used to be."[7]

History of rule requiring corroboration.

7.84. History of the rule permitting such evidence is intimately connected with the history of criminal procedure. The rule could, in its ultimate origin, *be traced to the doctrine of hue and cry. It is a survival of the ancient require*ment that the woman should raise "hue and cry" as a preliminary to an "appeal" of rape, the "appellee" being allowed, *in* defence, to deny that hue and cry had been raised.

In its origin, the process of accusation which the common law evolved was a private one. The accusation could be made either by a single individual, or by a group. Accusation by a single individual was known as *an appeal* (of treason or felony, as the case may be), and when the accused appeared before the Court and answered to the charge, the appropriate method of trial was by battle. These "appeals" of treason and felony had largely become absolete in England by the end of the 16th century, but their formal abolition took time. In a case reported in 1818,[8] an abortive effort was made to revive these proceedings, and this led to the formal abolition of "appeals".

7.85. As society began to develop, some more effective means of bringing persons suspected of crime to trial had to be found. This led to the practice

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[1](a) *R. v. Osborne,* (1905) 1 K.B. 551;
(b) *R.* v. *Lillyman* (1896) 2 K.B. 167;
(c) *R.* v. *Rowland* (1898) 62 J.P. 459.

[2]*R.* v. *Kingham,* (1902) 66 J.P. 393.

[3]R. v. Osborne (1905) 1 K.B. 551; *R.* v. *Lillyman,* (1896) 2 Q.B. 167.

[4]*R.* v. *Wallwork,* (1958) 42 Cr. App. R. 153.

[5]*Preston Jones* v. *Prestone Jones* (1951) All. E.R. 124, 138.

[6]*Ginesi* v. *Ginesi,* (1948) 1 All. E.R. 373, 376.

[7]See Note "Corroboration in Civil Cases" (1954) 218 L.T. 182.

[8]*Ashford* v. *Thorton,* (1818) 106 England Reports 149.

of the Kings' Justices, when visiting various countries and in hundreds, assembling men from the locality who would be sworn to state what persons were, to their knowledge, suspected of crime.[1]

In the beginning, the trial was by ordeal, but later,—somewhere between the 13th and 15th century,—it developed into the procedure of indictment. An "indictment" was a written charge of crime made by a body of men known as the grand jury. If the grand jury found a *prima facie* case, they could present a "true bill" (*billa vera*) which provided the formal accusation upon which a court of appropriate jurisdiction would try the charge. It was in the above context that "hue and cry" had an importance.

7.86. Afterwards, "appeals" became obsolete, and rape was dealt with on indictment. The woman was then an admissible witness, and her testimony was corroborated or not, according as she made, or failed to make, fresh complaint and pursuit of the offender. At this period, when rules of evidence were in their infancy, it was generally allowable to corroborate *all witnesses* by proof of their prior similar statements;[2] but, later on, the rule permitting corroboration by proof of former statements was reversed.[3] Complaints, however, survived as an exception to the changed rule.[4]

Statements by victims.

7.87. At this stage, it would be convenient to sum up the position regarding statements by victims of offences in India, in the form of a table as follows :—

(a) *Statements as to the offence, other than complaints—*

Admissible under—

(i) section 6, if forming part of the same transaction;

(ii) section 32, if amounting to a dying declaration;

(iii) section 157, for corroboration, if the maker of the statement is called as a witness, and if the other conditions of that section are satisfied;

(iv) section 159, to refresh the memory, if the maker is called as a witness and if the other conditions of that section are satisfied;

(v) section 145, for contradicting the maker when called as a witness.

But the statement may be excluded by virtue of section 162 of the Code of Criminal Procedure, 1973 or some other specific provision of the law.

(b) *Statements as to offence when amounting to complaint.*

Admissible under —

(i) section 6, if forming part of the same transaction;

(ii) section 8, as showing conduct influenced by a fact in issue (regarding the alleged offence);

(iii) section 9, as negativing consent where consent is material;

(iv) the other sections mentioned in (a)(ii) to (a)(v) above, where applicable,—including section 32.

But the complaint may be excluded if it falls within section 162 of the Code of Criminal Procedure, 1973 or some other exclusionary provision.

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[1]Assize of Clarendon of King Henry the 2nd (1166).

[2]*Lutterell* v. *Reynell*, (1670) Mod. 282, 283.

[3]*R.* v. *Parker*, (1783) 3 Doug. 242.

[4]*R.* v. *Osborne*, (1905) 1 K.B. 551.

No change needed.

7.88. The above discussion reveals no need for a change in the law as enacted in section 8.

SECTION 9

Introductory.

7.89. Under section 9, "facts necessary to explain or introduce a fact in issue or relevant fact, *or which* support or rebut an inference suggested by a fact in issue, or relevant fact, or which establish the identity of anything or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose."

There are 6 illustrations appended to the section, which we shall discuss later.

Grammatical error in opening words — Amendment recommended.

7.90. The opening 13 words of the section—"Facts necessary to explain or introduce a fact in issue or relevant fact", are not in symmetry with the subsequent full clause beginning with "or which". The proper form should be—"Facts *which are* necessary to explain or introduce a fact in issue or relevant fact *or which* support" etc.

The quoted words should be so amended, and we recommend accordingly.

Illustrations.

7.91. Illustration (a) to the section provides that where the question is whether a given document is the will of A, the state of A's property and of his family at the date of the alleged will 'may be relevant facts'. These are facts which are necessary to explain or introduce the fact in issue,—the document supposed to be the will. As is apparent from the last nine words of the section, such facts are relevant in so far as they are *necessary* for that purpose. This, apparently, is the reason why, in this illustration and also in illustration (b), the words "may be" are used. It should also be noted that in illustration (a), only the *factum* of the will is in issue.

7.92. Illustration (b) deals with a case where A sues B for a libel imputing disgrace to A; B affirms the matter alleged to be libellous to be true. The position and relations of the parties at the time when the libel was published "may be" relevant facts under this illustration. The reason is that they introduce the facts in issue—the libel and the disgraceful conduct imputed thereby. The illustration also provides that the fact that there was a dispute between the parties, if it affected the relations between the parties, may be relevant; but the particulars of a dispute about the matter unconnected with the alleged libel are irrelevant. The existence of the unconnected dispute, though not the particulars thereof, would be relevant either as introducing the alleged libel (section 9), or as constituting a motive for the libel (section 8), or as showing the conduct which influenced the libel (section 8) or as showing facts which are the cause of the libel (section 7.).

7.93. In cases of libel, malice may be inferred not only from the transaction itself (*i.e.*, the nature of the libel, with its mode and extent of publication), but also from previous ill feeling or disputes between the parties, the repetition of the libel, the publication of similar ones on other occasions[1] and, in fact, from the defendant's whole conduct down to, or even at, the time of libel.

7.94. Illustration (c) relates to leaving one's house by a person accused of crime, soon after the accusation. The fact that he had some sudden and urgent business is relevant. This refers to facts which are explanatory of conduct which may otherwise appear to be incriminating or wrongful. The presumption or inference which would otherwise arise from the act of absconding

[1] *Praed* v. *Graham*, 24, Q.B.D. 53 (C.A.); *Simposon* v. *Robinson*, 12 Q.B. 511.

(section 8) is rebutted. The fact that the accused had sudden and urgent business, rebuts the inference suggested by his suddenly leaving home after the crime was committed.

Illustration (d) refers to alleged breach of contract. A statement by the person alleged to have committed the breach, explaining why he left, is relevant.

7.95. Illustration (e) not only illustrates section 9, but also throws some light on the meaning and scope of section 6.[1] The illustration is as follows:—

> "(e) A, accused of theft, is seen to give the stolen property to B, who is seen to give it to A's wife. B says as he delivers it—'A says you are to hide this'. B's statement is relevant as explanatory of a fact which is part of the transaction."

Illustration (f) takes the case where A is tried for a riot and is proved to have marched at the head of a mob. The cries of the mob are relevant as explanatory of the nature of the transaction.

Both illustrations (e) and (f) make it clear that statements made by *a person other than the accused* may be tendered in evidence as explanatory of the transaction which comprises the alleged crime.

Rationale of section 9.

7.96. While sections 7 and 8 provide for the admission of facts causative of a fact relevant or in issue, section 9 generally provides for facts *explanatory* of any such fact. There are many incidents which, though they may not strictly constitute a fact in issue, may yet be regarded as forming a part of it, in the sense that they accompany and tend to explain the main fact, such as identity,[2] names, dates, places, description, circumstances and relations of the parties and other explanatory and introductory facts of a like nature.[3]

The particulars receivable will necessarily vary with each individual case; it is not all the incidents of a transaction that may be proved; for the narrative might be run down into purely irrelevant and unnecessary detail. It should be noted that the facts are relevant, "in so far as they are necessary for that purpose".

Questions raised by illustrations (d) and (e) as to statements.

7.97. Both these illustrations raise an important question as to whether the statements which are made relevant by those illustrations are receivable only as evidence that such statements were made, or whether they are receivable as evidence of the truth of the facts declared. It would be obvious, on a close reading of the section and the wording of the illustrations, that the former is the correct view. Under illustration (d), for example, the statement made by the person leaving the service as to a better offer made by another person, is relevant only as explanatory of the *conduct of the person leaving*, and does not, it is suggested, amount to any evidence that B did, in fact, make such a better offer. That fact has to be independently proved. This view has the support of Norton.[4] Since the conduct of the person leaving is a relevant fact,—or rather, a fact in issue,—whatever explains that conduct, is admissible under section 9. Such explanatory facts are relevant, as the section says, "in so far as they are necessary for that purpose".

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[1]See also discussion below.

[2]See—

(a) *R.* v. *Richman*, 2 East, P.C., 1035;

(b) *R.* v. *Rooney*, 7 C. & P. 517.

[3]See *R.* v. *Amir Khan*, (1871) 9 B.L.R., 36, 50, 51.

[4]Para 7.99, *infra*.

7.98. The same comment applies to illustration (e). Though, at first sight, it may appear that, by virtue of this illustration, what a person said is going to be made evidence against the accused, it is not in reality so. Before the illustration can apply, two facts, postulated in the illustration, must exist, namely, that the accused was seen to give stolen property to B, and B was seen to give the stolen property to the wife of the accused. If these two facts are proved, then, in explanation or elucidation of the conduct of B (giving stolen property to the wife of the accused), what B said at the time becomes relevant. It is, however, relevant only for the purpose of explaining his conduct, and his statement that "A says you are to hide this" cannot be used to prove that A said so, but can be used to prove only why B gave the property to the wife of the accused.

Comments by Norton on illustrations (d) and (e).

7.99. Commenting on illustrations (d) and (e), Norton,[1] in his work on Evidence, expresses the opinion that this section introduces a dangerous innovation. Statements explanatory under this section are admissible, irrespective of the English "hearsay" rule, which requires the presence of the person against whom the statement is made. It is necessary to distinguish the purpose for which such statements are admitted, and Norton's suggestion that the statements made by C in the one case and B in the other are receivable only as evidence of the fact that they were made and not of their truth as affecting B or A respectively, appears to be justified. No doubt, if such a statement be once admitted and the Court believes that it was in fact made, it may be difficult to exclude its purport from consideration. But the law does require the court to do so. On this interpretation of the scope of the section, there is no need to object to the illustrations under discussion.

Illustration (f).

7.100. Illustration (f) to the section is taken from the case of *Gordon*.[2] In the case put in this illustration, the cries would be made in the presence of the leader though they were the cries of third parties, and the silence of the leader would be equivalent to an admission that he acquiesced in those cries as explanatory of the *common object* of himself as well as of the persons whom he led. His presence, and the fact of his having led the mob, are essential pre-conditions for the application of the illustration, which also assumes that he did not protest or object to the cries. They are also declarations accompanying the transaction.

Identity and similar facts.

7.101. Quite a number of cases relate, in practice, to that part of section 9 which declares, as relevant, facts which establish the identity of anything or person whose identity is relevant. The most troublesome problem which has arisen in this context, both in England and in India, is that relating to evidence of similar facts. The law on the subject in England is still in a fluid condition. It cannot be said that similar facts are always relevant. There must be a nexus between those acts and the offence charged which helps to identify the accused. The leading statement of the law is still that of Lord Sunner,[4] in *Thompson* v. *R.* which is to the effect stated above.

7.102. Another very commonly cited judicial statement of the rule is that of Lord Herschell in *Makin* v. *A. G. for New South Wales*.[5]

> "It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment for the purpose of leading to

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[1]Norton, Evidence, page 116, cited by Field.

[2]*R.* v. *Lord George Gordon*, (1781) 21 How. State Trials 535, 536.

[3]Norton, Evidence 119 cited by Woodroffe, Evidence (1941), page 159, footnote 5.

[4]*Thompson* v. *R.*, (1908) A.C. 221, 234.

[5]*Makin* v. *A.G. for New South Wales*, (1894) A.C. 57 (C.P.C.) (P.C.).

the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried.".

In the House of Lords in *Harris* v. *Director of Public Prosecutions*,[1] it was stated that the jury must be directed that they can only make use of the conduct on other occasions in determining the question of the accused's guilt on the occasion in question, if satisfied beyond reasonable doubt of the occurrence of the former conduct that similar facts *should be connected in some* relevant way with the accused and his participation in the crime.

Case of *R.* v. *Beck.*

7.103. How difficult a decision of this question could be is illustrated by the celebrated English case of *R.* v. *Beck*,[2] which led to a famous public inquiry.[3] In that case, Beck was charged with obtaining money by false pretences in 1895. An expert gave opinion that the handwriting of the letters which contained the false pretence was, though disguised, the same as that of a list, which had been written by Beck, and had been found in his luggage when he was arrested. In cross-examining the expert, the defence proposed to ask a question whether the handwriting of the letters was not the same as that of certain other documents which the prosecution had previously submitted to the witness for examination, being exhibits in the trial of X for a similar offence in 1877. The defence was also prepared to show that while X was undergoing his sentence for such offence, Beck was in America.

This was held to be inadmissible, as involving a collateral issue likely to mislead the jury, namely, whether Beck was or was not the man convicted in 1877 under the name of X. There was, at that time, no provision for a right of appeal in criminal cases. But there was a public agitation and a public inquiry after the conviction of Beck.

7.104. The public inquiry presided over by Collins M.R., exonerated Beck. The names, handwriting and methods employed in the two crimes (1877 and 1895) were remarkably similar, and the defence of Beck was that they must have been committed by the same man. If, therefore, Beck proved that he could not have committed the crime of 1877, it went far to show that he had not committed the crime of 1895, and that the crime was committed by X. This evidence, as already mentioned, was rejected at the trial, but was considered in the public inquiry as clearly relevant and admissible for Beck.

It was this case which led to the establishment of the Court of Criminal Appeal[4] under the Criminal Appeal Act, 1907.

General rule.

7.105. Broadly speaking, it may be stated that evidence of similar facts is not admissible if its effect is only to show generally bad character or good character. But, if the evidence has rational probative value otherwise than as showing bad and good character,—for example, as showing identity—it is admissible. The question whether it renders the fact in issue highly probable, cannot be disregarded. In an Australian case,[5] McTiernan J. said that "there is that degree of probative force in the evidence of similar acts which qualifies it to be the basis for judicial inference concerning the existence of the fact in issue."

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[1]*Harris* v. *Director of Public Prosecutions*, (1952) A.C. 694; (1952) 1 All E.R. 1044, (H.L.).

[2]*R.* v. *Beck*, (1897) 31 Law Journal 197.

[3]For later developments, see 47 Law Journal 379; 133 Law Times Journal 157.

[4]Now the Court of Appeal (Criminal Division).

[5]*Martin* v. *Osborne*, (1936) 55 C.L.R. 367, 404.

7.106. One attempt to state the English rule, for legislative purposes, was as follows:[1]

"Evidence which merely shows that a person has a propensity to do acts of a certain kind, or that his disposition, character or antecedents makes or make it probable that he will act in a certain way or with any particular intention, is not admissible to prove that he did any such act or acted in such way or with such intention on any particular occasion: Provided that nothing herein shall be deemed to exclude evidence tending to show such matters if it is otherwise relevant, and, in particular (without prejudice to the generality of this proviso), the foregoing provision shall not render inadmissible any evidence which is adduced to show—

(a) that any occurrence is one of a series of two or more similar occurrences, and that the facts of the occurrences comprised in the series indicate some system, plan, or design on the part of any person; or

(b) that any person implicated by any evidence in the commission against or in respect of another person of any particular act has committed other acts indicative of some passion, emotion or feeling in regard to the other person, which would naturally lead or dispose to the commission of the particular act aforesaid with a view to establishing —

(i) that the occurrence or act was the act of, or was caused or committed by, the person concerned in such system, plan or design or so implicated as aforesaid;

(ii) that, being his act or caused or committed by him, it was done, caused or committed by him intentionally or with any particular intent."

7.107. The legal position is realistically described by Stone in the following words[2] while discussing evidence of similar facts:—

"Evidence must be excluded which indicates that the prisoner is *more likely than* most men to have committed it, but evidence must be admitted which tends to show that no man but the prisoner, who is known to have done these things before, could have committed it. There is a point in the ascending scale of probability when it is so near to certainty, that it is absured to shy at the admission of the prejudicial evidence."

Position in India summed up.

7.108. Position in India is as follows :—

Evidence that a person committed an offence or civil wrong on a specified occasion is inadmissible to prove his disposition to commit an offence or civil wrong as the basis for an inference that he committed an offence or a civil wrong on another specified occasion. But such evidence may be admissible to prove some other fact in issue, or relevant, fact, including motive,[3] intent,[4] plan,[5] knowledge,[6] identity,[7] or absence of mistake or accident.[8]

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[1]Stow in (1922) 38 L.Q.R. 63, 72.

[2]Stone in 46 Harvard Law Review, pages 983-984.

[3]Section 8.

[4]Section 14.

[5]Section 11.

[6]Sections 5 and 14

[7]Section 9.

[8]Sections 14 and 15

Evidence of identity — Motion pictures as evidence.

7.109. Coming to identity, the type of evidence which can be used as ancillary to identity is varied. For example, where a fact is relevant, scientific records thereof would be relevant. Hence, when relevant and properly authenticated, motion pictures would be admissible, apparently to establish the scenes or events they depict and would not be subject to the objection of hearsay. They must be 'relevant', in the sense that they must tend to prove or disprove some fact in issue or relevant fact. They must be authenticated, in the sense that the persons, objects or places pictured should be identied by witnesses. As a motion picture describes more fully and accurately the event than a witness can describe, it may be valuable in many cases, particularly when the relative positions of various objects or the *detailed conditions* under which an event took place, are of importance.[1]

Verbal changes recommended.

7.110. The importance of section 9 has rendered necessary a discussion of the above points which do not call for any substantial modification of the section. The only change to be made in section 9 is a verbal improvement in the opening words, namely the section should read-- "facts *which are*....."

SECTION 10

I. INTRODUCTORY

Section 10 — Introductory.

7.111. Section 10 provides that *where there is a reasonable ground to believe* that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons *in reference to the common intention*, after the time when such intention was first entertained by any one of them is a relevant fact, as against each of the persons believed to be so conspiring : and this relevancy is as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that such person was a party to it.

Illustration to the section.

7.112. The illustration to the section emphasises certain propositions, namely, that the statement of a conspirator X or Y is admissible against a conspirator Z, "although he (Z) may have been ignorant of all of them and although the persons by whom they were done were strangers to him and also they may have taken place before he (Z) joined the conspiracy or *after he left it*." It may be pointed out that the proposition emphasised in the illustration, namely, that the statement is admissible even though it was made after the other conspirator (against whom it is sought to be proved) left it, is a departure from the English law.[2]

The occasion for applying the section may arise in a criminal prosecution, as also in a civil suit, —that, in practice, most of the cases relate to the former. It will be convenient to examine the relevant provisions of the substantive criminal law, and also the position with reference to the law of torts.

II. CRIMINAL CONSPIRACY—INDIAN LAW

Two aspects of criminal conspiracy.

7.113. Under Indian Criminal law, conspiracy has two aspects — (a) it is a species of abetment[3] and (b) it is offence by itself.[4] As a species of abetment, it is governed by section 107 of the Indian Penal Code. The terms of that section are restrictive : an overt act is required, and this is essentially an instance of an auxiliary criminal liability, as is clear from the provisions in the connected sections--sections 108 and 109—of that Code.

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[1]See the note, "Motion Pictures as evidence" (1962), 64 Bom. Law Reporter, (Journal), 184, 186, reproduced from "C and C".

[2]*R.* v. *Blake* (1844) 6 Q.B. 126; 115 E.R. 49.

[3]Section 107, I.P.C.

[4]Sections 120A, and 120B, I.P.C.

Section 107 of the Code classifies abetment under three heads, namely, abetment by instigation, abetment by conspiracy and abetment by intentional aid. The second paragraph of the section defines abetment by conspiracy, by stating that "a person abets the doing of a thing who engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy and in order to the doing of that thing."

Definition of 'criminal conspiracy'.

7.114. The other important aspect of criminal conspiracy is conspiracy as a substantive offence. This is governed by sections 120A and 120B of the Indian Penal Code. Section 120A defines the offence of criminal conspiracy as follows:

"120A. When two or more persons agree to do, or cause to be done,—

(1) an illegal act, or

(2) an act which is legal by illegal means such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation.—It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object."

Punishment of criminal conspiracy.

The punishment is prescribed as follows in the same Code.

"120B. (1) Whoever is party to a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.

(2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine, or with both."

History.

7.115. For more than half a century, the Penal Code recognised only abetment by conspiracy as defined in clause secondly of section 107, and not the offence of criminal conspiracy as such. The latter notion was introduced in the Penal Code by the Criminal Law Amendment Act of 1913 (which inserted a separate Chapter 5A consisting of two sections 120A and 120B). Thus, if a person is engaged with another or others in a conspiracy to commit an offence and if some act or illegal omission takes place in pursuance of that conspiracy and in order to the doing of the criminal act, he is liable to be punished as an abettor directly under the relevant section in Chapter 5. But, whether or not such act or illegal omission takes place, he is guilty of a criminal conspiracy as soon as he becomes a party to the agreement to commit the offence and is punishable under sub-section (1) or sub-section (2) of section 120B, as the case may be, in Chapter 5A.

III. CRIMINAL CONSPIRACY—ENGLISH LAW

History.

7.116. In England, conspiracy originated in the 13th century as a crime punishing[1] conduct equivalent to that which is now covered by the action for

[1]Sayre, "Criminal Conspiracy" (1922) 35 Harv. Law Rev. 393, 395 and by Holdsworth "Conspiracy and Abuse of Legal Process" (1929) 37 Law Quarterly Review 462, 467 (Book Review of Winofield, History of Conspiracy and Abuse of Legal Procedure).

malicious prosecution. By the early 17th century, it had become an inchoate crime, encompassing the malicious agreement alone, even if its object had not been attained.[2] Later, the Judges of the King's Bench extended the conspiracy concept to make criminal *all agreements* which had crimes as their objects.[3]

By the early 18th century conspiracy came to be used as a means to punish "all confederacies whatsoever, wrongfully to prejudice the third person".[4] Finally, in 1832, Lord Denman defined 'conspiracy' as "an agreement to do an unlawful act, or a lawful act by unlawful means".[5] But the word "unlawful" was found to be vague. It is well-known that because of the vagueness of the word "unlawful", acute controversy arose. The law of conspiracy even became an economic and political weapons directed against groups threatening the *status quo*.[6]

Criminal conspiracy — English law at present.

7.117. At present, in England, while it is well established that conspiracy to commit an indictable offence is itself a crime, the question how far conspiracy to commit (i) an offence triable summarily, or (ii) a tort, or (iii) a breach of contract is punishable has been the subject matter of controversy for some time. Ever since the famous work by R S Wright on Conspiracies was published, this topic has engaged the attention of courts and writers, not only because Wright was a Judge of the High Court with great reputation for his knowledge of criminal law, but also because of the scholarly and penetrating analysis presented in the book.

Criminal conspiracy in English law.

7.118. It can be said, however, that in England, the law of conspiracy is not so widely drawn as in India. While the commission of a crime, even a non-indictable crime—is naturally recognised as an unlawful purpose, with reference to criminal conspiracy, there are no precise or clear rules in regard to "non-criminal" unlawful purposes. Conspiracy is a common law misdemeanour, punishable with fine or imprisonment at the discretion of the court, except in the case of murder where, by statute there is a maximum punishment of ten years imprisonment.

Conspiracies to defraud, to commit a tort involving malice, or to commit a public mischief are, broadly speaking, indictable. A conspiracy to commit or induce breach of contract is probably not indictable at the present day in England.

7.119. Where the agreement is not to commit a crime but other illegal act, the position in England as to the exact scope of the crime of conspiracy is thus in a fluid state. However, we are not concerned with the details of that debate. The law of criminal conspiracy in England was dealt with in some detail in *Kamara's*[7] *case*, where Lord Hailsham, Lord Chancellor, discussed at length the offence of criminal conspiracy. As Lord Diplock said in another case,[8] "the least systematic, the most irrational branch of English penal law (criminal conspiracy) still rests upon the legal fiction that the offence lies not in the overt acts themselves which are injurious to the common weal, but in an inferred anterior agreement to commit them."

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[1]Ordinance concurrent Conspirators (1305) 33 Edward 1, reproduced by Sayre "Criminal Conspiracy" (1922) 35 Harv. Law Rev 393, 395.

[2]*Poultere's case* (1611) 77 English Rep. 813.

[3]Wright, Criminal Conspiracy & Agreements (1887) page 26, referred to in Goldstein, "Conspiracy to defraud the United States", (1959) 68 Yale Law Journal 405, 416.

[4]Hawkins, Pleas of the Crown (1787) Vol. 1, page 348, cited by Goldstein, "Conspiracy to defraud the U.S.", (1959) 68 Yale L.J. 405, 416.

[5]*The King* v. *Jones*, (1832) 110 English Rep. 485, 487; and see *Pettibone* v. *U.S.*, (1893) 148 U.S. 197, 203.

[6]Holdsworth: History of English Law, Vol. 8, pages 381 to 384; Nelles, "The First American Labour case" (1931) 41 Yale Law Journal 165, 193; Sayre, "Labour and the Court", (1930) 39 Yale Law Journal 682, 684.

[7]*Kamara* v. *D.P.P.* (1973) 3 W.L.R. 198 (H.L.)

[8]*D.P.P.* v. *Bhagwan*, (1972) A.C. 60, 79, (H.L.).

Conspiracy complete before an offence committed.

7.120. That a conspiracy is complete before any offence is actually committed, was established long ago in England. In a case in which judgment was delivered by Lord Ellenborough, Chief Justice,[1] De Berenger and others were convicted on an indictment which averred that they conspired to circulate false rumous of the death of Napolean, with the intent that it would be thought that peace would soon be concluded between England and France so that the market price of government stock would rise. After conviction, they moved for arrest of judgment, on the ground that it was no crime to raise the price of public funds and that the indictment was defective in that it did not name the alleged victims. Rejecting this motion, the court said that it was not necessary to specify the persons who become purchasers of the stock. Apart from the fact that the persons to be affected by the conspiracy would, at the time of the conspiracy, not be known because the accused "could not except by a spirit of prophecy, divine who would be purchasers on a subsequent day," such a statement was wholly unnecessary, *"the conspiracy being complete independently of any persons being purchasers".*[2]

Mens rea.

7.121. The mens rea in conspiracy consists in the intention to execute the illegal elements in the conduct contemplated by the agreement in the knowledge of those facts which render the conduct illegal.[3]

The agreement represents actualisation of the intent, the assumption being that the individual merely thinking evil thoughts is not punishable, the requirement as to agreement is intended to ensure that the evil intent of the man branded as a criminal has been expressed in a manner signifying harm to society, that is, the threat represented by the agreement. However, it must be recognised that punishing conspiracy means punishing conduct which may nowhere come near to the carrying out of the supposed threat.

Overt act.

7.122. Even where there is a statutory requirement as to an overt act, it does not mean that the overt act itself must be harmful. The overt act may be completely harmless and may indicate little or nothing of the kind of injury to society which the conspiracy seeks to bring about.[4] It is well established that it need not itself be criminal, excepting that it must stem from the agreement.[5] The agreement to accomplish the prohibited purpose furnishes, without more, the basis for criminal liability.[6]

Various types of criminal conspiracies.

7.123. An agreement with a common (criminal) design may take various shapes. Howart C. J. in Mevrick,[7] had occasion to deal with this aspect. The facts were as follows:—

Between the years 1924 and 1928, in London, a racket existed with regard to the conduct of night clubs in the West End. The police in this district consistently turned a blind eye to the activities of these clubs, which were carried on in a manner involving breaches of the law, particularly of the licensing laws. Ultimately, the matter was investigated, and it was found that one Sergeant Coddard of the Metropolitan Police Force had been bribed by a number of night club operators, including Mrs. Moyrick, Luigi Ribuffi, Anna Gadda, and others. Mrs.

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[1] *R. v. De Berenger* (1814) 105 E.R. 536.

[2] Emphasis added.

[3] *Kamara, D.P.P.* (1973) 3 W.L.R. 198 (H.L.).

[4] *Fiswick v. U.S.*, (1946) 329 U.S. 211, 216, footnote 4.

[5] *U.S. v. Rabiowick*, (1915) 238 U.S. 78, 86.

[6] *Braverman v. U.S.* 317, U.S. 49, 53, 54.

[7] *R. v. Moyrick* and Ribuffi (1929) 21 Criminal Appeal Report 94.

Moyrick and Ribuffi were charged, together with Sergeant Coddard, on an indictment containing several counts. They were convicted and sentenced to imprisonment, and Mrs. Moyrick and Ribuffi appealed. Describing the variety of such crimes, Hewart C.J. said: —

> "Such agreements may be made in various ways. There may be one person, to adopt the metaphor of counsel, round whom the rest revolve. The metaphor is the metaphor of the centre of the circle and the circumference. There may be a conspiracy of another kind, where the metaphor would be rather that of a chain; A communicates with B, B with C, C with D, and so on to the end of the list of conspirators. What has to be ascertained is always the same matter: is it true to say, in the words already quoted, that the acts of the accused were done in pursuance of a criminal purpose held in common between them."?

Advantages of the prosecution.

7.124. So much as regards the nature of the crime. It is well-known that the prosecution in a trial for conspiracy bears some advantage in contrast with other criminal trials. The general rule of the law of evidence is that actions or statements of X are not admissible against the accused, unless they are done or made either in his presence or by his authority. This limitation does not, however, apply to conspiracy trials. The prosecution is permitted to enter evidence which could not be regarded as having adequate probative value to be admissible for trial in any other offence. We shall have occasion to revert to this aspect later.

IV. CONSPIRACY AS A TORT

Civil liability.

7.125. Conspiracy to injure is itself a tort, if certain conditions are satisfied.

In the law of torts, a conspiracy is "a combination of several persons against one, with a view to harming' him"—to adopt the language of Bowen L.J. In criminal law the classical definition of conspiracy is that given by Willes J. in advising the House of Lords in *Mulcahy* v. *R*[2]: "A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means." This was with reference to criminal law. The civil right of action is not, however, complete unless the conspirators do acts in pursuance of their agreement to the damage of the plaintiffs. The concept of civil conspiracy to injure has, in the main, been developed in the course of the last half a century, particularly since the great case of the *Mogul Steamship Co.* v. *McGregor & Co.* Its essential character is described by Lord Macnaghten in *Quinn* v. *Leathen*, basing himself on Lord Watson's words in *Allen* v. *Flood*: "a conspiracy to injure might give rise to civil liability even though the end were brought about by conduct and acts which by themselves and apart from the element of combination or concerted action could not be regarded as a legal wrong." In this sense, the conspiracy is the gist of the wrong, though damage is necessary to complete the cause of action.

Civil and criminal conspiracy.

7.126. The identity between criminal and civil law in this regard is denied by Lord Porter in *Crafter's case*[3] though it has been later suggested by Lord Reid in his dissenting speech in the famous case of Shaw[4]. The difference between tortious and criminal conspiracy is that conspiracy giving rise to an action

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[1] *Moghul Steam Shipping Co.* v. *McGregor*, (1889), 23 Q.B. Div. 598, 617 (Bowen L.J.).

[2] *Mulcahy* v. *R.*, L.R. (1868) 3 H.L., 306, 317.

[3] *Crafter Handwoven Harris Twed* v. *Veitch* (1942) A.C. 435, 488 (H.L.).

[4] *Shaw* v. *D.P.P.* (1962) A.C. 220 (H.L.).

for damages, being an action on the case, must have been put into execution, and must have given rise to actual damage, whereas, in a criminal conspiracy, the agreement[1], and not the execution of the agreement, is the gist of the indictment.

Principle.

7.127. Thus, so far as the tort of conspiracy is concerned, it occurs where there is an agreement between two defendants to effect an unlawful purpose which results in damage to the plaintiff. The tort was fully considered in *Crafter's case*[2], where the following principles were laid down:—

(i) The tort covers acts which would be lawful if done by one person;

(ii) The combination will be justified if the predominant motive is self-interest or protection of one's trade rather than the injury of the plaintiff,

(iii) Damage to the plaintiff must be proved. There are statutory exceptions, particularly in legislation relating to Trade Disputes and Industrial Regulations, which need not be gone into for the present purpose.

History.

7.128. Conspiracy as an offence, like libel, was developed by the Star Chamber, and when taken over by the Courts in the common law, came to be regarded by them not only as a crime, but also as capable of giving rise to civil liability[3].

7.129. The persons combining should have acted in order that the plaintiff should suffer damage[4].

V. CERTAIN IMPORTANT ASPECTS OF SECTION 10

Present section considered.

7.130. We may now proceed to examine certain important aspects of section 10.

On an examination of the section in the Evidence Act, the first thing that strikes the reader, is its provision for admitting out of court statements of one person against another. If the conditions given in the section are satisfied, a person becomes subject to a special rule of evidence, namely,—the evidence admissible against him may include acts and admissions of another person. This is a departure from the ordinary rule.

Ordinary rule modified in relation to conspiracies.

7.131. Ordinarily, on the trial of A for an offence other than conspiracy, what B said or wrote to C about A would normally be inadmissible to prove, as against A, the truthfulness of the statement. So, if A, a public officer, is charged with taking bribes from B and C, a letter from B to C stating that A was asking for his monthly cheque and that he wished the matter to be kept confidential would, on the trial of A, be inadmissible to prove the truthfulness of its contents, i.e., that A was taking bribes. The rationale for this is that A cannot cross-examine B and this evidence is, therefore, potentially very dangerous. But, if A is charged with a conspiracy with B and C to take bribes, then, once "there is reasonable ground to believe in the existence of a conspiracy", the letter would be admissible against A to prove the truness of its contents.[5] However, in England, this exception applies only to acts or statements of any of the conspirators in *furtherance of the common design*.[6] So, if B and C then

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[1]*Poulter's case*, 9 Co. Rep. 55B, referred to by Lord Hailsham L.C. in *Kamara* v. *D.P.P.* (1973) 3 L.R. 198, 212.

[2]*Crafter Handwoven Harris Twed* v. *Veitch* (1942) A.C. 435.

[3]Friedman "Mens rea in Conspiracy" (1956) 19 Modern Law Review 27.

[4]Para 7.127(iii), *supra*

[5]See *R.* v. *Whitakar*, (1914) 10 Cr. App. R. 245

[6]*R.* v. *Blake*, (1844) 6 Q.B. 126, 115 E.R. 49.

confessed to the police that A had received bribes from them, that confession would be inadmissible in England to prove that A had conspired with B and C, because the confession would not be in furtherance of the common design.[1]

Justification for departure from ordinary rule.

7.132. No doubt, there is a justification for this departure from the ordinary rule. That justification is furnished by the identity of interest -the combination to act for an unlawful purpose. In *Mirza Akbar's case*[2], the Privy Council observed :

> "Where the evidence is admissible, it is, in their Lordships' judgment, on the principle that the thing done, written or spoken, was something done in carrying out the conspiracy and was receivable as a step in the proof of the conspiracy. The words written or spoken may be a *declaration accompanying an act* and indicating the quality of the act as being an act in the course of the conspiracy: or *the words written or spoken may* in themselves be acts done in the course of the conspiracy."

7.133. This approach was approved by the Supreme Court in *Sardul Singh's case*.[3-4] If two or more persons combine to commit an offence, each must share liability for whatever is done by the other *in pursuance of the combination.*

VI. SECTION 10 AS COVERING ACTS BEYOND COMMON PURPOSE

Injustice of present wide provision.

7.134. What is the position where a person travels beyond the common purpose and where acts not done in pursuance of the combination (or, as the English decisions put it, not in furtherance of the object of the conspiracy), are sought to be rendered admissible. It is not fair that acts and statements not so made should bind or be admissible against the co-conspirators. As it stands, the section admits acts or statements made or done "in reference to the common design," and does not contain the further requirement that they must be made *in furtherance of the common design.*

Wide scope of offence.

7.135. It should, in this connection, be remembered that in 1872, the general *offence* of criminal conspiracy as a *substantive offence* was not recognised in India, and conspiracy appeared only as a species of abetment in section 107, clause second of the Indian Penal Code, whereunder an overt act is required.[5] As a substantive offence, it appears only in section 121 of the Penal Code which refers to conspiracy to wage war against the Government of India, or to overawe by force the Government (inserted in 1870). Thus conspiracy to wage war was, practically, the only offence of conspiracy punishable as a substantive offence.

7.135A. The position now is different. Section 120A of the Penal Code (inserted in 1913) covers—

(i) an agreement to commit any offence, and

(ii) an agreement to commit an illegal but not a criminal act, and

(iii) an agreement to commit a legal act by illegal means.

Position in England as to admissibility.

7.136. It may be noted that in England, admissions of the conspiracy, made after failure of its objects, or after accomplishment of its objects, *if not made in pursuance of the conspiracy,* are admissible only against the party making the admission.[6]

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[1] *R.* v. *Pepper,* (1921) 16 Cr. App. R. 12.

[2] *Mirza Akbar* v. *Emperor,* A.I.R. 1940 P.C. 176, 180.

[3] *Sardul Singh* v. *The State,* A.I.R. 1957 S.C. 749, paragraphs 38-42.

[4] But see *Bhagwan* v. *State of Maharashtra,* A.I.R. 1965 S.C. 682, 687.

[5] Section 107, second para., and section 108, Explanation 5, I.P.C.

[6] *Blake,* (1844), 6 Q.B., 126, 115, English Reports 49.

Acts done in *pursuance of the conspiracy* are evidence of the objects of conspiracy against all the conspirators[1]. The main application of the rule is where all the accused have done acts tending towards on obvious purpose.[2] But acts not done in pursuance of the common purpose are excluded.

Illustration from O'Connell's case.

7.137. Pennefeather, C. J., in *R.* v. *O'Connell,*[3] observed:

"When evidence is once given to the jury of a conspiracy against A, B and C, whatever is done by A, B or C in *furtherance of the* common criminal object is evidence against A, B and C though no direct proof be given that A, B, or C knew of it or actually participated in it ..... If the conspiracy be proved to have existed, *or rather if evidence be given to the jury of its existence,* the acts of one in furtherance of the common design are the acts of all; and whatever one does in furtherance of the common design, he does as the agent of the co-conspirators."

Stephen's view.

7.138. In Stephen's Digest, he states the English law thus;[4]

"When two or more persons conspire together to commit any offence or an actionable wrong, everything said, done or written by one of them *in the execution or furtherance of their common purpose,* is deemed to be so said, done or written by every one and is deemed to be a relevant fact as against each of them, but statements made by individual conspirators as to measures taken in the execution or furtherance of any such common purpose are not deemed to be relevant as such as against any conspirator except those by whom or in whose presence such statements are made. Evidence of acts or statements deemed to be relevant under this article may not be given until the judge is satisfied that apart from them there are *prima facie* grounds for believing in the existence of the conspiracy to which they relate."

Difference between English and Indian law.

7.139. The difference between English and Indian law, as given in the text of section 10, can be thus illustrated. A letter written by one of the conspirators to a friend, giving the details of the conspiracy, will not be admissible under English law, as it does not further the cause of conspiracy of common design, nor is the letter written with that object; but it would certainly be admissible under our law, as it has a "reference" to the common intention as is provided by section 10 of the Act, *if taken literally.*

7.140. Even in England where the scope is narrower, the Court of Criminal Appeal has observed,[5] that unnecessary conspiracy counts in a complicated case "imposed a quite intolerable strain both on the Court and on the jury".

Stage at which conspiracy punishable.

7.141. The stage at which a person becomes liable to be punished for criminal conspiracy is also much earlier than the stage when an attempt becomes punishable. A mere agreement to commit an offence is enough. No physical act need take place. Even preparation—the devising and arranging of the means for committing the offence—is not required.

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[1] *Esdale,* (1858) 175 E.R. 196; see para 7, 149, *infra.*

[2] *Shellard,* (1840) 173 E.R. 834.

[3] *R.* v. *O'Connell,* 5 St. Tr. N.S. 1.710.

[4] Article 4, Stephen's Digest of Evidence.

[5] Dawson (1960) 44 Criminal Appeal Reports 87, 93, 95, 96; *Griffith* (1955) 3 W.L.R. 405.

7.142. The aspect of "common purposes" is recognised in the U.S.A. Judge Learned Hand said in one case,[1] "Nobody is liable for conspiracy except for the full import of the concerted purpose of agreement *as he understands it;* if later—coners change that, he is not liable for the change." Position in U.S.A. as the common purpose.

7.143. Logically, the test followed in the English law is more satisfactory, for the reason that it brings out the element of "association" and "common purpose". The law makes the acts and declarations of a conspirator admissible against his associates, *for the reason that he is an agent of the associates in carrying out the object of the conspiracy*[2]. In India, however, on a literal reading of section 10, an account given by one of the conspirators would be relevant *even though it is not in furtherance of the* conspiracy. English test preferred.

VII. POSITION IN U.S.A.

7.144. The position in the U.S.A. may be noted briefly.

In the federal law,[3] a conspiracy is punishable only if it is to commit any offence against the United States, or to defraud the United States or any agency thereof, in any manner or for any purpose. Typical States enactments[4] punished conspiracy to commit a crime or conspiracies to punish certain other specified acts, most of which are in the nature of fraud or preventing another person from doing any lawful act and the like.

The attribution of the statements made by the alleged conspirator to another conspirator is, in the U.S.A. dependent on the scope of the agreement. Such statements are attributable to the co-conspirators within the limits of the principle that each member is liable for the act of other members which are within the scope of the agreement among them, and only while that agreement is still operative.[5]

7.145. The Supreme Court of the U.S.A. had stated the rule as to evidence of such acts as follows:—[6]

> "It is firmly established that *where made in furtherance of the objectives of a going conspiracy,* such statements are admissible as exceptions to the hearsay rule. This pre-requisite to admissibility, that hearsay statements by some conspirators to be admissible against others must be *made in furtherance* of the conspiracy *charged,* has been scrupulously observed by federal courts.".

7.146. It should be noted that there has been extensive criticism in the U.S.A. even of the limited rule permitting evidence of such statements of co-conspiators. In the leading U.S. case[6] on the subject, is a trenchant criticism of the wide scope of the offence of conspiracy, as also of the special rules of evidence. Jackson J. observed in that case— Criticism in U.S.A.

"The co-defendant in a conspiracy charge occupies an uneasy seat".

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[1] *U.S.* v. *Peony,* (1938) 100 F 2nd 401 (per Learned Hand, J.).

[2](a) *Cf. Vishendas* v. *Emperor,* I.L.R. (1944) Ker. 449; A.I.R. 1944 Sind 1.

(b) *Emperor* v. *Vaishampayan,* I.L.R. 55 Bom. 839; A.I.R. 1932 Bom. 56.

(c) *Bholanath* v. *Emperor,* A.I.R. 1939 All. 567.

[3] U.S. Code, Vol. 18, section 371.

[4] See Note in (1955) 68 Harv. Law Rev. 1056.

[5] *Delhi Poli* v. *U.S.,* (1957) 352 U.S. 232, 237.

[6] *Krulewitch* v. *United States,* (1949) 336 U.S. 440.

It has also been pointed out that while the basis for admitting in evidence the statements of a co-conspirator made in furtherance of the conspiracy is that there is a conspiracy—which would postulate the prior proof of the existence of conspiracy by independent evidence,—the rule permits statements of co-conspirators to be used for the *purpose of proving the conspiracy itself*. Thus, there is a movement in circle.

Incidentally, we may observe that this criticism can apply to the Indian section also, because section 10 operates once there is "reasonable ground to believe that two or more persons have conspired together to commit an offence".

7.147. Judicial pronouncements spelling out the rationale of the rule in the U.S.A. emphasize the aspect of agency.[1] "Having joined in an unlawful scheme, having constituted agents for its performance, until full fruition be secured, until he does some act to disavow or defeat the purpose, he is in no situation to claim the delay of the law". "As the offence has not been terminated, or accomplished, he is still offending.".

It has been said:[2] "*And so long as the partnership in crime continues*, the partners act for each other in carrying it forward." It is settled that "an overt act of one partner may be the act of all without any new agreement specifically directed to that act.[3] Motive or intent may be proved by the acts or declarations of some of the conspirators in furtherance of the common objective.[4] A scheme to use the mails to defraud, which is joined in by more than one person, is a conspiracy, and all members are responsible, though only one did the mailing.[5]

VIII. PRESENT POSITION

Need for amendment.

7.148. It was suggested to us that the section, as now worded, is not defensible on principle,[6] and should be narrowed down.

Rational justification furnished by common purpose.

7.149. Although the section is expressed in terms of conspiracy, the real principle and the rational justification, as we have already indicated above, is the common purpose which leads to their being engaged in a common enterprise.

In England, for example, where A and B, employed in a Customs House, are charged with conspiring to pass through Custom goods without paying duty, false entries made by A are admissible against B also, since these entries are made in furtherance of the purpose of the conspiracy.[7] But, an entry made by A on the *counterfoil of his own cheque book*, saying how he had shared the proceeds of the transaction with B, is not admissible against B, not being in furtherance of the common purpose.[8]

Similarly, if A and B are charged with conspiracy, a letter written by A to a third person (not a member of the conspiracy) describing the proceedings already taken and enclosing the songs composed by A and sung in the proceedings, is not admissible against B, not being in furtherance of the conspiracy.

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[1] *Hyde* v. *United States*, 225 U.S. 347, 369.
[2] *Pinkerton* v. *U.S.* (1946) 90 L.Ed. 1489.
[3] *United States* v. *Kissell*, 218, U.S. 601, 608.
[4] *Wiborg* v. *United States*, 163 U.S. 632, 657-658.
[5] *Pinkerton* v. *United States*, (1946) 90 L. Ed. 1489.
[6] See "Injustice of present wide provision", *supra*.
[7] *R.* v. *Blake*, (1844) 6 Queens Bench 126.
[8] *R.* v. *Hardy*, (1794) 24 Howard State Trials 200, 451, 453.

7.150. Again, in a trial for illegal abortion, a diary kept by B, incriminating A, and a letter intended for A but not sent to him, both written after the abortion, would be rejected in the absence of conspiracy.[1] In this case, A was charged with causing B's death by an illegal operation, and statements made by B, the woman, to a doctor during her illness that A had operated upon her and that her illness was caused thereby, were held to be inadmissible. The rejection of the first mentioned evidence was on the ground that there was no conspiracy.[2]

7.151. In England, it is well established by *R.* v. *Blake*[3] that acts not done in furtherance of the conspiracy are not admissible. This is in harmony with the rule in substantive criminal law that a party is not, in general and in the absence of special considerations, criminally responsible for the acts or declarations of others, unless they have been expressly directed or assented to by him[4].

7.152. It should also be noted that in England, the husband and wife cannot be guilty of conspiracy. This is not so in India. In *Queen Empress* v. *Butch*[5], it has been held that there is no presumption that a wife and husband constitute one person in India for the purpose of the criminal law[6]. Thus, the Indian law in section 10 is wider than the English law in other respects also. Husband and wife.

7.153. The reason for the wording of the section is a matter of conjecture. A mere statement made by one conspirator to a third party or any act, not done in pursuance of the conspiracy, is not evidence for or against another conspirator. Possible reasons for present wording in section 10.

Patterson, J. described it in *Q.E.* v. *Blake*[8] as a statement "made after the conspiracy was effected".

Williams J. said that it merely related "to a conspiracy at that time completed". Coleridge J. said that it "did not *relate to the furtherance of the common object*". The words used in section 10, Evidence Act, are—

> "in reference to their common intention". These words were perhaps chosen as having the same significance as the word "related" used by Williams and Coleridge JJ. If so, the choice was not happy. In *Mirza Akbar*[9], the Privy Council observed:
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> "Where the evidence is admissible, it is in their Lordships' judgment on the principle that the thing done, written or spoken, *was something done in carrying out the conspiracy and was receivable as a step in the proof of the conspiracy*. The words written or spoken may be a declaration accompanying an act and indicating the quality of the act as being an act in the course of the conspiracy; or the words written or spoken may in themselves be acts done *in the course of the conspiracy*.".

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[1] *R.* v. *Closter*, (1888) 16 Cox 471.

[2] *Q.* v. *Blake*, (1844), 60B, 126. The case is discussed in *R.* v. *Thomson*, (1912) 3 Kings Bench 19.

[3] *R.* v. *Blake*, (1844) 6 *Queens Bench* 126, 115 E.R. 49.

[4] (a) *Hugging*, (1730) 2 Stra. 883.

(b) *Vane* v. *Vjanauapoulos*, (1965) A.C. 486 (H.L.).

[5] *Queen Empress* v. *Butch*, (1894) I.L.R. 17 Mad. 401.

[6] See also *Tirurangada Madalai* v. *Triprasundariammal*, I.L.R. 49 Mad. 738, A.I.R. 1926 Mad. 906;

[7] *Abdul Khader* v. *Taib Begum*, A.I.R. 1957 Mad. 339, 340 para. 5.

[8] *Queen Empress* v. *Blake*, (1844) 6 Queens Bench 126.

[9] See *Mirza Akbar*, A.I.R. 1940, P.C.

Agency in relation to corporations.

7.154 to 7.156. A reference has been made to the aspect of agency. It may be noted, in this connection, that the attribution of criminality to a corporation originated in the principle of agency. *In Mackay* v. *Commercial Bank of New Burnswik*[1], the opinion of the Privy Council (given by Sir Montague Smith) includes this passage, quoted from the judgment of Lord Cranworth, L.C., in *Ranger* v. *Great Western Rly. Co.*[2]—

> "Strictly speaking, the corporation cannot itself be guilty of fraud. But where a corporation is formed for the purpose of carrying on a trading or other speculation for profit, such as forming a railway, these objects can *only be accomplished by the agency of individuals:* and there can be no doubt that if the agents employed conduct themselves fraudulently, so that if they had been acting for private employers the persons for whom they were acting would have been affected by their fraud, the same principles must prevail where the principal under whom the agent acts is a corporation.".

Agency in section 10.

7.157. This aspect of agency, as relevant to section 10, has been noticed in Indian cases. In *Indra Chandra's* case[3], Courtney Terrell, C.J., commenting on section 10, said:

> "Now, the object of this section is merely to ensure that one person shall not be made responsible for the acts or deeds of another until some bond *in the nature of agency*[4] has been established between them and the act, words, or writing of another which it is proposed to attribute vicariously to the person charged. The Act, words or writing must be in furtherance of the common design and after such design was entertained.".

IX. NO CHANGE

7.158. Having carefully considered all aspects of the matter, we are of the view that though according to decision, section 10 is narrowed down so as to limit it to acts and declarations made in furtherance of the common intention of the persons concerned[5], yet it is not desirable to amend the section.

Judicial decision had taken the narrow view. Since there may be extraordinary cases where special considerations apply, a wider view is not ruled out.

Section 10 brings out the following points:—[6]

(a) Section is an exception to hearsay;

(b) Rationale of the section is agency;

(c) Prima facie case to be proved even under the section, i.e., reasonable ground for belief in conspiracy should be first proved;

(d) Distinction between reasonable ground and proof;

(e) Reasonable belief may be elevated into proof by use of the material allowed under the section;

(f) Taylor, in dealing with the corresponding English doctrine, has used the formula "in furtherance of". The section has used the expression "in reference to".

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[1]Mackay v. Commercial Bank of New Burnswick, (1874) L. R. 5 P. C. 394.

[2]*Ranger v. Great Western Railway Co.*

[3]*Indra Chandra* v. *Emperor*, A.I.R. 1929 Pat. 145, 146 (F. B.).

[4]Emphasis supplied.

[5]See case of *Mirza Ali Akbar, supra*

[6]Chairman's suggestion accepted.

(g) The words used in the section are wider than the English law, but have been judicially narrowly construed, as already noted in the draft report of Shri Bakshi.

(h) In all ordinary cases, the narrower construction of these words will be applied. In extraordinary situations, the scope for a wider view does not appear to be ruled out. Even then, the evidence to be admissible under the section should be of such direct and proximate act or statement as would prove the fact of conspiracy or participation therein.

There is also a minor point to be noted with reference to section 10. Curiously, the section does not link up the relevance of the facts mentioned in the section with another "fact in issue or relevant fact", — as do sections 6 to 9 and section 11 *et seq.* Strictly speaking, the section should have the following words at an appropriate place :

> *"Where the existence of the conspiracy, or the fact that any such person was a party to it, is a fact in issue or a relevant fact".*

We recommend that these words, or some similar words, should also be added at an appropriate place in the section.[1]

Section 10 and the words 'reasonable ground'.

7.159. As to those words in section 10, which refer to "reasonable ground to believe in the existence of a conspiracy, etc.", the question may be considered whether the standard of proof should not be expressed in more stringent terms than at present. Occasionally, the matter is discussed, in some text books, by stating that the Judge must be satisfied of the existence of an agreement between A and B — the alleged conspirators. But this does not accurately reflect the true position even in England.

Differing views.

7.160. It appears that there are differing points of view in this regard. The English case of *R.* v. *Griffith*[2] stands at one extreme. In that case, the Court of Criminal Appeal deprecated the practice of "rolled up conspiracy counts" and emphasised, that in order to prove one conspiracy, there had to be evidence from which it could be inferred that each alleged conspirator knew that there was, or was coming into existence, a scheme to which he was attached — a scheme to which there were other parties, and which scheme went beyond the act that he had agreed to do. Where these conditions are not satisfied, the various persons would not be acting in pursuance of a common criminal purpose. In this case, *there was no evidence* of the conspiracy existing between one farmer or any other farmer, and none was connected with the other.

7.161. At the other extreme, are cases where there is such proof of the existence of the conspiracy as it required by the definition of "proved"[3] in the Act, which is as follows :

'Proved'.

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

In between the two extremes lies the situation which frequently presents itself, namely, that there is reasonable ground to believe that there is a conspiracy, though the material is not yet of that quality as would satisfy the test required by the definition of "proved". In such circumstances, section 10 comes into play, as is clear from the opening words of the section.

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[1] A re-draft of section 10 is given, *infra*.

[2] *R.* v. *Griffiths*, (1965) 2 All E. R. 448, 451, 453, 454.

[3] See section 3.

7.162. In the absence of any serious hardship arising from the present position as regards the aspect discussed above, we are not inclined to suggest any change in this regard in section 10.

Recommendation.

7.163. In the light of the above discussion, we recommend that section 10 should be revised as follows:—

Revised section 10 (without the illustrations)

10. Where—

(a) *the existence of a consipracy to commit an offence or an actionable wrong, or the fact that any person was a party to such a consipracy, is a fact in issue or a relevant fact*[1]; and

(b) there is reasonable ground to believe that two or more persons have *entered into such conspiracy.*

anything said, done or written by any of such persons in reference to their common intention, after the time when such intention was first entertained by any of them, is a relevant fact as against each of the persons believed to be so comprising, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.

(Illustrations as a present, with such consequential changes as may be required).

SECTION 11

I. INTRODUCTORY

Introductory.

7.164. Section 11 provides that facts not otherwise relevant are relevant—

(1) if they are inconsistent with any fact in issue or relevant fact: or

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

There are two illustrations to the section. The first deals with a plea of alibi. The second deals with facts which eliminate possible alternatives.

Discretion of courts as to collateral facts.

7.165. The scope of the section is, apparently, very wide [1A]. Clause (1) takes within its sweep facts inconsistent with facts in issue, or relevant facts—Clause (2) emphasises the high degree of probability suggested by the fact sought to be given in evidence thereunder. But a certain amount of elasticity is introduced by the words "by itself or in connection with other facts". There must always be room for the exercise of discretion when the relevancy of testimony rests upon its effect towards making the affirmative or negative of a proposition "highly probable",[2] and with any reasonable use of discretion, the Court of appeal ought not to interfere.[3] It has been held[4] that in order that a collateral fact may be admissible as relevant under this section, the requirements of the law are—(a) that the collateral fact must itself be established by "normally conclusive evidence", and (b) that it must, when established, afford a reasonable presumption or inference as to the matter in dispute.

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[1]We have not dealt with consequential changes in the illustrations.

[1A]—A.R. v. *Prabhu Das* (1874) 11. B.H.C.R. 94 (Per West, J.).

[2]See also *Naro* v. *Narhari* (1891) I.L.R. 16 Bom. 125.

[3]See also *Buriya* v. *Ram Kali* A.I.R. 1971 Punj. 9, 11. para. 5.

[4]*Sultan Khaver* v. *Sultan Rukha*, (1904) 6 Bom. L.R. 983, 985.

The expression "highly probable or improbable" in the section is, thus, very significant. It indicates that the connection between the facts in issue and the collateral facts sought to be proved must be immediate[1] as to render to co-existence of the two highly probable or improbable. The relevant facts under this section either (i) exclude, or (ii) imply more or less distinctly the existtence of the facts sought to be proved.[2]

7.166. The theoretical justification for the section is easy to explain; it has a part to play in the scheme of the Act. The topic of 'relevant facts', in general, has been treated in sections 6, 7, 8, 9 and 10. Section 11 concludes this treatment, by making a residuary provision[3] as to relevant facts. But the practical application of the section is not so easy. The position can be best understood from the decided cases. Theoreticol justification.

II. ILLUSTRATIVE CASES

7.167. We may now take a few illustrative cases under the section. In a suit for rent of land due from the defendant, the plaintiff alleged that he had bought the land from the defendent, and had thereafter leased it to him year by year. The defendant totally denied the sale and the lease. It was held that though the fact in issue was the lease alone, evidence might be given of the fact of the sale also, as a relevant fact, corroborative of the fact of the lease.[4] Illustrative cases.

In a Rangoon case,[5] it was stated that the admissibility of a particular evidence under section 11 in each case must depend on how near is the connection of the facts sought to be proved with facts in issue, to what degree do they render facts in issue, probable or improbable, when taken with other facts in the case and to what extent the admission of the evidence would be inconsistent with principles enunciated elsewhere in the Act. In that case, A was charged with entering into a conspiracy to bring false evidence against B and C. All the previous acts of which evidence was to be given were acts in which A acted against B or C, or both. It was held that such evidence was admissible under section 11 (but not under section 10 and 15). The connection was held not to be too remote.

The evidence in question indicated the state of mind of A against B and C, and added to the probability of his having taken part in concerted action against them. The High Court specifically decided that whether or not section 8 was applicable, section 11 did apply to such evidence.[6]

We may also refer to an Irish case. In an action for money lent, the poverty of the alleged lender was a relevant fact to disprove the loan.

7.168. In a Nagpur case[7], where an oral tenancy was denied and the sale deed in favour of the person suing as landlord was alleged to be bogus, evidence as to the nature of the sale deed was held to be relevant on the question of existence or non-existence under section 11. In a Calcutta case[8] a statement in a scheme to an arbitration award as to certain deposits made by third persons was

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[1]Para 7.167, *infra*.

[2]*S. H. Jhabrala* v. *Emp.*, A.I.R. 1933 All. 691, 705.

[3]In support of the proposition that the section is a residuary provision, see *Rangayya* v. *Innasimuthu*, A.I.R. 1956, Mad. 226, 230, para. 14 (Ramaswami J.).

[4]*Kaung* v. *Sen*, 3 L.B.R. 90.

[5]*Htin Gyaw and Others* v. *Emp.*, A.I.R. 1928 Rangoon 118, 121, 122.

[6]*Dowling* v. *Dowling*, (1860) 10 Irish C.L.R. 244.

[7]*Sikander Rashid* v. *Hussain*, A.I.R. 1943 Nagpur 265, 266.

[8]*Hrishikesh* v. *Kantamani Dasi* A.I.R. 1959 Cal. 257, 259, para. 17.

held to be relevant in a suit by the depositors on the basis of the award, the suit being for directions on the receivers to pay them the sums of money which the arbitrators found as belonging to them, though the depositors were not parties to the proceedings before the arbitartor.

Calamity.

7.169. Section 11 could be utilised in cases of calamity, where two or more persons perish at the same time, and the question is who[1] survived. In England, before the law on the subject was regulated by statute,[2] there was no legal presumption of survivorship or of contemporaneous death, but such a presumption could, on the facts, be raised, having regard to the comparative age, strength and skill of the parties.[3] Incidentally, we may add that on this particular point, we are going to recommend the insertion of a specific provision[4].

Where the question at issue was about the religion of a person, a solemn declaration by that person as to his religion has been held to be relevant under section 11.[5] The dangers of admitting hearsay under section 11 are also stressed by a Madras case[6], where a witness's statement as to what a deceased person had told him regarding the ownership of the property alleged to have been stolen was held to be inadmissible, since it did not fall under section 32. We shall discuss this aspect in detail later.[7]

7.170. In a Calcutta case[8], the proceedings were for the taking of security from certain persons, who were alleged to be members of a gang of swindlers, the allegation being that they habitually committed cheating and extortion, being members of a gang formed for this purpose. It was held that the fact that the person proceeded against was a member of an organisation formed for habitual cheating, was relevant under section 11.

III. FACTS SUGGESTING AN INFERENCE

Facts suggesting an inference.

7.171. In many of these cases, the decision as to the applicability of section 11 may be said to agree with common sense. Difficult question, however, arise concerning facts suggesting an inference. The Calcutta case of *Booth* v. *Emp*[9] is interesting in this context. On January 13, 1913, one Kali Charan, handed over to Cox & Co. (Shipping agents in Calcutta), a bill of lading and invoice relating to certain goods then on board the steamship, "Borneo", and paid them Rs. 30/- on account of clearing charges. The invoice described the goods covered by it as 6 bales of old wearing apparel, shipped by C. Potter & Co. of London, to one Ram Prasad at Darjeeling, containing 900 ladies' jackets. The bill of lading stated the goods to be 6 packages of old wearing apparel "R.P., Darjeeling Via Calcutta Nos. 479 to 484" and purported to bear the endorsements of C. Potter & Co. and Ram Prasad. The goods arrived in Calcutta by the ship "Borneo" and were seized in the Customs House before clearance. They were opened on the same day to Cox & Co. to receive delivery, but was taken to the Customs House and was ultimately made over to the police, placed on trial and convicted by the Chief Presidency Magistrate of unlawfully importing and being in possession of the cocaine in violation of section 46 and 52 of the Bengal Excise Act, 1909. On revision, the High Court altered the conviction to one of *attempting to import cocaine* under section 61 of that Act.

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[1]Woodroffe.
[2]Section 184, Law of Property Act, 1925.
[3]*Sillira* v. *Booth*, (1841) 11 Law Journal Chancery 41.
[4]See sections 107-108 and 108-A, *infra*.
[5]*Leong Hone Waing* v. *Leon Ah Foon*, A.I.R. 1930 Rangoon 47
[6]*In re Doraswami Iyer*, 16 Criminal Law Journal 640
[7]See "Statements how far relevant", *infra*.
[8]*Kalu* v. *Emperor*, I.L.R. 37, Calcutta 91.
[9]*Booth* v. *Emp.* (1914) I.L.R. 41 Cal. 545 (Mookerjee and Beachcroft JJ.)

7.172. It appears that the appellant, Booth, was also suspected by the customs authorities in connection with the above transaction, and, before Kali Charan was convicted, the customs authorities had obtained an order to detain all letters addressed to G. Potter & Co., London, and, later on, also obtained an order to stop the delivery of all letters addressed to the appellant, Booth. A letter addressed to C. Potter & Co. dated 28th January, 1913, was, accordingly, intercepted at the Post office and was found to be entirely in the hand-writing of the appellant, Booth. Two telegrams purporting to have been sent by C. Barker, 71, Canning Street - the business place of the appellant Booth - were also intercepted by the authorities. Of these, one was addressed to the telegraphic address of C. Potter & Co. and the other to some other name, each containing the single word "Mi.la". The other addressee was, or had been, a partner of the appellant. The handwriting of the name and address of the sender in the telegram was found to have been that of the appellant. Two letters posted in England and addressed to the appellant, of which one stated "your mills received", were also intercepted at the post office and delivery withheld.

The appellant was tried before the Second Presidency Magistrate for unlawfully importing cocaine, and convicted. There was an appeal to the High Court. The principal argument on behalf of the appellant was that the only evidence on which the conviction could be based was the letter dated 28th January, 1913, addressed by the appellant to C. Potter & Co. The letters posted in England and addressed to the appellant never came into his possession. They were not, therefore, admissible against him, according to his contention. As regards the letter dated 28th January, 1913, written by the appellant, it was contended that it was not written by him, and even if it was written by him, it only showed partnership with consignor of the goods. The consignors were the exporters from London, but they were not importers into Bengal. The importer under the Bengal Act is the buyer in India. The property in the goods passed to Ram Prasad, and no connection was shown between Ram Prasad and the accused, and, therefore, there was no importation into Bengal on behalf of the accused.

7.173. Dismissing the appeal, the Calcutta High Court held, first : that the letter was written by the appellant; secondly, that even though the letter was not signed, it was well-settled that a letter written by the accused person, when self-disserving, is *prima facie* evidence against him, if it relates distinctly to a relevant point. It is enough if it is traced to the writer (in this case, the handwriting was proved to be that of the appellant on the expert evidence of Mr. Hardless and other evidence). Thirdly, it was immaterial that the accused was not the consignee; he was certainly an importer, and he did attempt to import cocaine in contravention of the law, even though it was not possible to determine with precision the benefit that might have accrued to him under a successful venture. Fourthly — and this is the point most material for the purpose of section 11—"the fact that a reply from Potter & Co., posted immediately after the telegram purporting to be sent by C. Barker and referring to the telegram, was addressed to Booth, *would be a relevant fact under section* 11 *of the Evidence Act*[1] and cogent evidence to show that Booth was the sender of the telegram". The High Court followed the English case of *Queen* v. *Cooper*[2] on this point. In that case, A was charged with obtaining and attempting to obtain money by false pretences from four persons by an advertisement offering employment to all who sent him one shilling in stamps. Letters from 282 other persons expressed to be in answer to the advertisement, and each enclosing twelve one

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[1]Emphasis supplied.

[2]*Queen* v. *Cooper*, (1875) 1 Queen's Bench Division 19.

penny stamps, were held to be admissible, although the letters had been intercepted at the post office and had never, in fact, reached A and could consequently be deemed at best, only constructively in his possession.

7.174. While the above Calcutta case is one where section 11 was applied, we may refer to another Calcutta case,[1] where the section was regarded as inapplicable. A and B were charged with theft committed in 1914 in the house of a prostitute; evidence was brought forward to show that C and D committed a theft in the *house of another prostitute* in 1918, in *somewhat similar circumstances*. It was held that the evidence was not admissible either under section 9 or under section 11 to prove that A and B were the same persons as C and D. Presumably, the court did not regard the earlier theft as rendering the fact in issue in the present case "highly probable".

IV. STATEMENT HOW FAR RELEVANT

Statements how far relevant.

7.175. It is now time to examine the question whether section 11 can be pressed into service for admitting into evidence statements which are not admissible under section 32 or other specific provision of the Act. This has been the subject matter of considerable controversy.[2] From the judicial decisions on the subject, several shades of view can be discerned.

Different shades of view—First view.

7.176. The first view on the subject is that *section 11 must be read subject to the other provisions of the Act*, and a statement not satisfying the conditions laid down in sections 32-33 cannot be admitted, merely on the ground that it may render highly probable or improbable a fact in issue or a relevant fact. This view is represented by the Madras[2-a] and earlier Allahabad cases.[3],[3-a] The view is based on the reasoning that section 32-33 are *exhaustive* of the law relating to relevancy of statements made by persons mentioned in sections 32 and 33.

7.177. In the Madras case,[4] the defendant relied on certain documents between third parties showing that the limits of an estate extended to certain property. It was contended that these documents had been wrongly rejected by the trial court, and one of the sections under which the documents were admissible was section 11. Rejecting this contention, Varadhachariar J. observed: "As regards section 11, it seems to us that section 11 must be read subject to the other provisions of the Act and that a statement not satisfying the conditions laid down in section 32 cannot be admitted *merely on the ground that, if admitted, it may probabilise or improbabilise a fact in issue or relevant fact.*"

Second view.

7.178. The second view, which is a slight variation of the first, is represented by a Mysore case.[5] It is based on the reasoning that section 11 deals with facts, while section 32 deals with statements. This view does not agree that section 32 controls section 11. According to the second view, on a proper construction, statements falling under section 32 are excluded from the scope of section 11. Recitals found in documents which are not between the parties are not, according to this view, "facts", within the meaning of that word in section 11[6]

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[1] *R. v. Panchu Das*, (1920) I.L.R. 47 Cal. 671; A.I.R. 1920 Cal. 500 (F. B.) (Chaudhuri J. dissenting), followed in Katabuddin, A.I.R. 1927 Cal. 230.

[2] *Ravjappa v. Nilakanta Rao*, A.I.R. 1962 Mysore 53, 61. (Hedge and Mir Iqbal Hussain JJ.) (reviews case-low).

[2-a] *Sevugan Chettair v. Raghunatha*, A.I.R. 1940 Mad. 273.

[3] *Bela Rani v. Mahabir Singh*, (1912) I.L.R. 34 All. 341.

[3-a] *Naima Khalim*, A.I.R. 1934 All. 406, 409 (Sulaiman C. J. and Young J.).

[4] *Sevugan Chettiar, v. Raghunath*, A.I.R. 1940 Madras 273, 278 (Varadachariar and Abdur Rehman JJ.).

[5] *Royjappa v. Nilakanta Rao*, A.I.R. 1962 Mysore 53, 61, para. 35

[6] *Kalappa v. Bhima Govind*, A.I.R. 1961 Mysore, 160.

There is also a Calcutta ruling[1], substantially to the same effect.

7.179. According to the third view[2], such recitals are inadmissible because they cannot have such probative force. A recent Punjab[2-a] case gives this as one of the reasons for not applying section 11. **Third view.**

7.180. The fourth view is that statements can be admissible under section 11 even when they are not admissible under section 32. This is represented by certain Bombay,[3] Calcutta,[4] and, later, Allahabad[5] cases. The reasoning on which this view is based was lucidly stated by Desai J. in an Allahabad case:[6] **Fourth view.**

> "There is no connection between the provisions of sections 11 and 32 and there is no justification for saying that one section is dependent on the other. As a matter of fact, each section creates new relevant facts; if a fact is relevant under section 11, evidence about it can be given as permitted by section 5 even though it may not be relevant under section 32. If there is one provision under which a fact becomes a relevant fact, it can be proved regardless of whether it is made relevant under some other provision or not.
>
> "If a fact is relevant under section 32, it can be proved notwithstanding that it is not relevant under section 11 and to say that a fact relevant under section 11 cannot be proved unless it is covered by the provisions of section 32 is nothing short of striking out section 11 from the Evidence Act. When section 32 itself is sufficient to allow a fact to be proved, it would have been futile for the legislature to enact section 11, if a fact made relevant by that section would not be proved unless it was also relevant under section 32".

7.181. This question,—i.e. the question whether statements made by a third person can be relevant under section 11—is, thus, a difficult one. In our opinion, on the present wording, the fourth view[7] is the most cogent. No doubt, the court must exercise a sound discretion and see that the connection between the fact to be proved and the fact sought to be given under section 11 to prove it is so immediate as to render the co-existence of the two highly probable.[8] But it is legitimate to read sections 11 and 32 independently of each other. The section, it should be remembered, makes admissible only those facts which are of great weight in bringing the court to a conclusion one way or the other as regards the existence or the non-existence of the fact in question. The admissibility under this section must, in each case, therefore, depend on how near is the connection of the facts sought to be proved with the facts in issue when taken with other facts in the case. **Question a difficult one.**

Subject to this observation, section 11 does not exclude *statements* as such on its present wording.

7.182. A similar controversy exists as to *recitals* in documents. In the case of *Dwarka Nath* v. *Mukunda Lal*,[9] it was held that documents though not *inter partes*, which contain recitals that a particular land belongs to a particular tenure **Whether recitals in documents not *inter partes* are admissible.**

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[1]*Radha Krishna* v. *Sarbeswad*, A.I.R. 1925 Cal. 684(2).

[2]*Bhuriya* v. *Ram Kale*, A.I.R. 1971 Punj. 9, 11, para. 5 (A. D. Koshal, J.).

[2-a] *Bhuriya* v. *Ram Kale*, *supra*.

[3]*R. D. Sethana* v. *Mirza Mohd.* (1907) 9 Bom. Law Reporter 1047 (Beaman J.) (Factum of statement).

[4]*Ambica Charan* v. *Kumar Mohan*, A.I.R. 1928 Cal 893, 895, see Factum of statement.

[5]*Hakurji* v. *Parmeshwar Dyal*, A.I.R. 1960 All. 339 (Ray J.).

[6]*State* v. *Jagdeo* (1955) All. Law Journal 380.

[7]Para. 7.180, *supra*.

[8]*Rangaayyan* v. *Innasimuthu*, A.I.R. 1954 Mad. 226, 230, para. 14.

[9]*Dwarka Nath* v. *Mukunda Lal*, (1906) 5 C.L.J. 55 cited in Field on Evidence.

which is in question, are admissible in evidence under either section 11(b) or section 13, although they are not conclusive or binding evidence, and may be very weak evidence or even of no weight at all.[1]

A contrary view was, however, taken in the Calcutta case of *Abdul Ali* v. *Syea Rajan*[2] and in the later case of Ketabuddin.[3]

In at Patna case[4], a statement by a lady witness was held admissible "at least under section 11", though the statement was in her favour and in a document not *inter partes*. In that case, however, it was used as explaining her other statements.

Calcutta cases.

7.183. The difficulty of the subject is illustrated by the fact that **Dr. Justice** Mookerjee, who, in *Bisheswar Dayal* v. *Harbans Sahay*[5] had apparently held that a document of this nature was admissible in evidence under the provisions of sections 11 and 13, altered his view in *Abdullah* v. *Kunj Behari Lal*[6], where he held that a document of this nature was not admissible in evidence under the provisions of sections 11 and 13,—thus differing from the view which he had previously expressed. In *Saroj Kumar* v. *Umed Ali*[7], again, the question was regarded as not free from doubt, by two other judges.

In *P. N. Choudhury's case*[8], it was definitely held that recitals in documents between third parties were not admissible under section 11 or section 13.

Recitals as to boundaries.

7.184. The same controversy exists on the more particular question whether recitals *as to boundaries* of other lands in documents between third parties are admissible.

Some of the cases referred to above,[9-11] related to recitals about boundaries.

In the Calcutta case of *Brajeswari Prasad* v. *Budhanudhi*,[11] it was held:

> "A recital in a deed or other instruments is in some cases conclusive, and in all cases evidence, as against the parties who make it. But it is no more evidence as against third persons than any other statement would be."

In another Calcutta case,[12] a statement appearing in the Schedule attached to the order for delivery of possession as to the rent payable for the holding was held inadmissible in evidence in a suit between the landlord and the tenant in which the rent payable is in dispute.

7.185. In a Calcutta case reported[13] in 1923, it has been held that when a document has been admitted in evidence as evidence of a 'transaction',

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[1]See also—
(a) *Chhatradhani Mahton* v. *Akhaishwar Mahton*, A.I.R. 1952 Pat. 382;
(b) *Raghu Nath* v. *Bindershri*, A.I.R. 1924 All. 526;
(c) *Katori* v. *Om Parbash*, A.I.R. 1935 All. 351;
(d) *Thakur* v. *Lalji*, A.I.R. 1934 Pat. 81.

[2]*Abdul Ali* v. *Syea Rajan*, (1913) 19 C.W.N. 468.

[3]*Ketabuddin* v. *Nafar Chandra*, A.I.R. 1927 Cal. 230.

[4]*Inder Deo* v. *Deon Karan*, A.I.R. 1955 Pat. 292, 294 (D.B.).

[5]*Bisheshwar Dayal* v. *Harbans Sahay*, (1907) 6 C.L.J. 659.

[6]*Abdullah* v. *Kunj Behari Lal*, (1911) 16 C.W.N. 252, 257.

[7]*Saroj Kumar* v. *Umed Ali*, A.I.R. 1922 Cal. 251.

[8]*P. N. Choudhury* v. *K. C. Bhattacharjee*, A.I.R. 1924 Cal. 1067.

[9]*Abdullah* v. *Kunj Behari Lal*, (1911) 16 C.W.N. 252.

[10]*Saroj Kumar* v. *Umed Ali*, A.I.R. 1922 Cal. 251, 253 (Question not free from difficulty).

[11]*Brajeshwari Prasad* v. *Budhanudhi*, (1880) I.L.R. 6 Cal. 268.

[12]*Pramatha Nath Choudhri* v. *Krishna Chandra Bhattacharjee*, A.I.R. 1924 Cal. 1067; *Chandra Mohan Talikdar* v. *Shaikh Elim*, A.I.R. 1926 Cal. 415.

[13]*Nihar* v. *Kador*, A.I.R. 1923 Cal. 290.

the recitals therein are not evidence, especially if they are not used as assertions by a person *who is alive* and who might *have been brought before the court as a witness*. In the same year, however, there is another case[1] in which a statement by a party, in a document not *inter partes*, was admitted.

Recitals as to boundaries — Position briefly summed up.

7.186A. Keeping the judicial decisions in mind, it would be convenient to state briefly the position in regard to recitals of boundaries, in documents. Cases falling under this head may be divided into three classes:

(a) When the recital is in a document '*inter partes*'. In such a case, the recital is a joint statement made by the parties to the document and, therefore, relevant against all of them as an admission[2].

(b) When the recital is in a *document between a party and a stranger*. In such a case, the recital is relevant against the party as an admission, but is not *admissible in his favour*,[3] unless the fact recited is deposed to in court by the executant of the document, in which case the recital will become admissible[4] to corroborate the evidence of the executant[5] or to contradicts[6] such evidence[7]:

(c) *When the recital is in a document between strengers.* It is well-settled that a recital as to boundaries in documents between third parties is not ordinarily admissible to prove possession or title as against a person who is not a party to the document. However, if the recital can come within the relevancy and admissibility contemplated by (a) section 11; (b) section 13; (c) section 32(3); and

(d) sections 155 and 157, then an exception may arise. The scope of section 11 in this regard is controversial, as already stated[8]. The scope of section 32(3) is also controversial in this regard.

V. QUESTION OF AMENDMENT CONSIDERED

Present language wide enough to cover statements.

7.187. Having taken note of the above controversy, we have addressed ourselves to the question whether any amendment in the section is needed and, if so, on what lines. We have already expressed our opinion[9] that on the present language of th section[10], the fourth view is the most cogent. On the present language, we find it difficult to reconcile ourselves to the view that the section (as it now stands) excludes statements as to facts. In many other sections of the Act, "facts" are taken as including statements. In section 6, for example, illustration (a) makes this clear. Section 9, illustrations (d) and (e), may also be seen. It is well-known that most of the reported decisions under section 6 (*res gestae*), have been concerned with statements spontaneously made in connection with a dramatic event. Same is the position as regards section 8, whereunder complaints are specifically relevant as facts influenced by conduct—*vide* illustrations (j) and (k) to that section. The position with reference to sections 7 and many other sections is not, in its essence, different. We may also add

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[1]*Saeruddin* v. *Sanuruddin*, A.I.R. 1923 Cal. 378.

[2]Section 21.

[3](a) *Radha Krishna* v. *Saradeswar*, A.I.R. 1925 Cal. 684(2)(A);

(b) *Daulat Shah* v. *Bishan Das*, A.I.R. 1934 Cal. 750.

[4]Section 157.

[5]*Ketabudin* v. *Nafar*, A.I.R. 1927 Cal. 230.

[6]*Ambicacharan* v. *Kumud Mohun*, A.I.R. 1923 Cal. 893

[7]*Dasmal* v. *Sunder Singh*, A.I.R. 1937 Lah. 480.

[8]Para. 7.182 to para. 7.184, *supra*

[9]See para 7.181, *supra*.

[10]Para. 7.180, *supra*.

that section 11 begins with the words "Facts not otherwise relevant", and these words show beyond doubt that the section, as it now stands, is not controlled by any other section making certain facts relevant.

Judicial reluctance to admit statements.

7.188. Nevertheless, we do not recognise judicial reluctance to allow section 11 to be used for proving statements. This reluctance shows that courts have considered it unwise to construe section 11 widely, and have, in the interests of justice, considered it essential to read some limitations therein, though such limitations do not flow from the literal text of the section. We are, therefore, of the view that the matter should be put beyond doubt, and that the section should, in its wording, be brought nearer to what has in practice been its interpretation by some of the most eminent of Indian Judges,[1] by excluding statements from its ambit by an express provision.

Stephen's suggestion to exclude statements.

7.189. Stephen seems to have anticipated the problem. We find[2] that he suggested that the meaning of the section would have been more fully expressed, if words to the following effect had been added to it:—

> "No *statement* shall be regarded as rendering the matter stated highly probable within the meaning of this section, unless it is declared to be a relevant fact under some other section of the Act.".

Need for amendment.

7.190. We have, after careful consideration, come to the conclusion that statements should be excluded for the reasons already mentioned.[3] The form in which the amendment should be couched, however, requires some consideration. If the form suggested by Stephen[4] is adopted, the section would become somewhat otiose, because, if a statement is also relevant under some other section, there is no point in treating it as relevant under this section. We are, therefore, of the view that the amendment should be as suggested below:

Recommendation.

7.191. Our recommendation is that section 11 should be amended by inserting an Exception on the following lines:—

> *"Exception—Evidence shall not, by virtue of this section, be given of a statement, whether by a party or by any other person; but nothing in this Exception is to affect the relevance of a statement under any other section.".*

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[1]Varadachariar J. and Mookerjee J.

[2]Stephen, Introduction to the Evidence Act, pages 160-161.

[3]Para. 7.188, *supra.*

[4]Para. 7.189, *supra.*

CHAPTER 8

RELEVANCY IN PARTICULAR CASES

Introductory.

8.1. Sections 5 to 11, which were dealt with in the previous Chapter,[1] were concerned with certain facts that would be relevant in the generality of cases. With section 12 begins a group of sections dealing with facts that are relevant in particular cases.

Section 12.

8.2. Section 12 provides that in suits in which damages are claimed, any fact which will enable the court to determine the amount of damages which ought to be awarded, is relevant. The section, of course, postulates the existence of the liability to pay damages. It does not deal with the principles of liability to pay damages.

8.3. According to Mayne[2], damages are the pecuniary satisfaction obtainable by success in an action.

8.4. Facts which show the extent of the loss are relevant under section 12. Sometimes, actual damages—often called special damage[3]—must be proved in order to show a cause of action in a tort not actionable *per se*. In such cases, it is a fact in issue, since the existence of the liability depends thereon.

Points relevant for limitation as well as damages.

8.5. There are some points which may be relevant both for the purposes of limitation and for the purpose of damages. For example, the distinction between continuing and other torts is important, both with regard to damages and with regard to limitation for suits.[4] As regards limitation, a fresh period of limitation begins to run at every moment of time during which the breach of contract or the tort continues.

8.6. Where the defendant has committed a continuing tort, (such as, a private nuisance), the damages are assessed so as to compensate the plaintiff for the harm suffered until the date of the trial. If the defendant continues the tort after that, the plaintiff can bring fresh proceedings, to obtain compensation for the further injury suffered until the second trial. He can sue "from day to day" or *do die in diem*, until the defendant discontinues the tort.

8.7. On the other hand, where the tort is not a continuing tort,[5] the plaintiff can sue only once. He does not get a fresh starting point for limitation. The damages have also to be assessed once and for all. The future consequences of the tort have to be assessed and evaluated, as well as the losses actually suffered already.

Evidence of damages under section 5.

8.8. It may be noted also that the definition of "fact in issue" in the Act[6] covers facts from which, *inter alia, the extent* of any liability asserted in any suit or proceeding necessarily follows. In suits in which damages are claimed, therefore, *the amount of the damages* is a fact in issue. So long as the evidence pertaining to damages is confined to arithmetical calculations to indicate the

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[1]Chapter 7.

[2]Mayne on Damages, cited in Kameshwar Rao, Damages (1953), page 15.

[3]*Iverson* v. *Moore*, (1699) 1 Ld. Ray 486, 488 (per Gould J.).

[4]Section 22, Limitation Act, 1963.

[5]*Abdulla* v. *Abdulla*, A.I.R. 1924 Bom. 290.

[6]Section 3—"fact in issue".

extent of the harm caused by a breach of contract or tort such evidence would be admissible under section 5, being directly related to a fact in issue, and recourse to section 12 is not necessary for admitting such evidence.

Questions of detail.

8.9. However, very often, questions of detail may arise in relation to damages. The principles on which damages are to be assessed belong to the domain of the substantative law applicable to the case,—for example, the question as to when damages may be recovered, the amount of damages recoverable in particular suits, the defence which can be pleaded, and the like. The facts necessary for applying these principles, however, could be of wide variety. It is, apparently, for this reason that section 12 does not specify *how* the facts made relevant by the section are to be related with the interest injured by the civil wrong that constitutes the cause of action. It lays down, in general words, that evidence which will enable the court "to determine" the amount of damages, is admissible. This would certainly include evidence which tends to increase or diminish the damages.[1]

Suits for defamation as illustrative aggravating factor.

8.10. Thus, for example, in a suit for damages for defamation, where injury to the feelings is an element to be considered in computing the quantum of damages, this aspect is of importance. The circumstances of time and place—the time when, and the place where, the defamatory insue was given—require different damages. As has been said[2] by Bathurst J., "it is a greater insult to be beaten upon the Royal Exchange than in a private room".

Principles of damages matters of substantive law.

8.11. We have already stated[3] that the principles on which damages may be awarded are outside the law of evidence. These are matters of substantive law, and may not necessarily be the same in all countries. German law, for example, does not deny some element of retribution or satisfaction as a motivation for the award of damages. Somewhat similar is the position in Swiss law.[4] The principle in these two continental countries—in respect of non-material injury—is that of "mollifying" or giving satisfaction to the plaintiff.

8.12. The principle of full compensation for the wrong committed could include not only out-of-pocket damages (*danum emergens*) and loss of profits (*lucrum cessans*), but also those outlays and expense which are the inevitable consequences of the wrong complained of. What should and should not be regarded as such consequence, is for the substantive law.

8.13. Factors which are, and which are not, — to use Lord Denning's phrase[5] "uncompensatable", are matters for the substantive law. For example, even in proprietary actions, there is (in England) a disinclination to grant compensation for sentimental attachment of the plaintiff to a piece of property damaged by the defendant.[6]

8.14. As we have already stated, section 12 pre-supposes the existence of the relevant principles, and provides, in effect, that evidence is admissible of facts which may bring those principles into play. We shall indicate the principles below.

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[1] See Norton, page 124, cited by Woodroffe.

[2] *Tullidge* v. *Wade*, (1769) 3 Wills 19.

[3] Paragraph 8.2.

[4] Stoll, "Penal purposes in the Law of Torts", (1970) 18 American Journal of Comparative Law 3.

[5] *Hinz* v. *Berry*, (1970) 2 Queen's Bench 40 (Court of Appeal).

[6] *Daorbishire* v. *Waren*, (1963) 1 Weekly Law Reports 1067 (C.A.).

8.15. The application of the section will vary according to the nature of the cause of action, as well as according to the other circumstances. In actions for breach of contract, for example, apart from the damages which would be awarded for the loss arising naturally from the breach of contract,—i.e., according to the usual course of things—damages can be claimed for such loss as may reasonably be supposed to have been in the contemplation of the parties as the probable result of this breach. Hence, the special circumstances under which the contract was made, *if communicated by one party to the other*, might be relevant under section 12.[1] Application will vary.

8.16. As to the consequences of breach of contract, the Indian Contract Act[2] provides as follows:— Consequences of breach of contract.

> 73. When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, *compensation* for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.
>
> "Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.
>
> "When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the *same compensation* from the party in default, as if such person had contracted to discharge it and had broken his contract.
>
> *EXPLANATION.*—In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account".

8.17. According to this section, in estimating the loss or damage for which compensation is made recoverable in cases of breach of contract, the following broad rules are to be followed as guidelines. Section 73, Contract Act analysed.

(1) Damages recoverable must be such as naturally arise in the usual course of things from the breach of contract; or

(2) It must be damage which the parties knew, when they made the contract, to be likely to result from the breach;

(3) Such damage must in neither case be remote or indirect; and

(4) In both cases, the means which existed of remedying the inconvenience caused by the non-performance of the contract, that is to say, from the breach, must be taken into account.

8.18. In actions for tort also, apart from general damages, special damages can be sought. Evidence required to assess special damages will be particularly relevant under section 12. Torts.

8.19. Evidence useful for determining the amount of damages under section 12 could, therefore, be of wide variety. In cases where a claim is for compensation for death, specialised evidence may, for example, be useful. Preparation of the analysis of gross and net earnings of a deceased person may require the help of accountants. An actuary can give evidence of the life Variety of evidence.

[1]Compare *Victoria Laundry Windson* v. *Newman* (1946) 2 All. E. R. 806.

[2]Section 73, Indian Contract Act, 1872.

expectancies of the deceased and beneficiaries. Evidence of ordinary witnesses might be required to show the prospects of the deceased increasing or decreasing his income, and the probable benefits that would flow to his family. Even the evidence of economists as to the cost of living and similar factors may be useful.[1] While the court cannot compel a physical examination of a claimant, the health of claimants may be relevant.[2] In an English case,[3] Phillimore J., while refusing to speculate on the likelihood of the re-marriage of a widow, suggested that the statistics of the various ages at which women re-marry might be appropriate.

Awards in similar cases.

8.20. In assessing the amount of damages, the court can also take into consideration awards in similar cases.[4]

Breach of contract of marriage.

8.21. Similarly, in an action for breach of contract of marriage, injury to feelings would enter into the realm of damages.[5]

Character.

8.22. In certain cases, character of the parties may be relevant in regard to damages; this is specifically dealt with by another section.[6] In actions for seduction or enticement, the character of the woman may be relevant for mitigating the damages.

Statements

8.23. Statements may be admissible under section 12, on the facts. Where a defamatory statements,[7] imputing misconduct to a man in relation to his step-daughter, is the foundation of the suit, and, in defence, truth is pleaded, evidence that the step-daughter herself had been spreading rumours abroad that her step-father had been making improper advances to her, is relevant under section 12 in order to assist the court in assessing the damages awarded,[8] though it is mere hearsay as regards the truth of the libel.

Non-material losses.

8.24. In cases of grave personal injury, the level of awards for pain and suffering is often high, particularly in Western countries. This is because there cannot be any precise and objective yardstick for translating non-material losses into monetary terms.

Reason for compensation.

8.25. The question may be asked why the law should measure, in monetary terms, losses which have no monetary dimension. In 1900, Lord Halsbury said[9] "What manly mind cares about pain and suffering that is past." The answer is that monetary compensation is the best that the law can afford. It is often pointed out that in assessing "general" damages, the law usually purports to give compensation and not restitution.[10]

Mental anguish and breach of contract.

8.26. In recent times, the question how far damages can be awarded for mental anguish as a result of breach of contract has also come up prominently, —for example, in cases when promised accommodation in a hotel or elsewhere has not been given by travel agencies or others undertaking such obligation by contract,[11] and this failure on their part has spoiled a holiday.

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[1]*Mallett* v. *Mc onagle*, (1969) 2 All. E. R. 178.
[2]*Baugh* v. *Delta Water Fittings Ltd.*, (1971) 3 All. E. R. 258.
[3]*Buckley* v. *John Allen etc. Ltd.*, (1967) 1 All. E. R. 539.
[4]*Waldon* v. *War Office*, (1956) 1 W.L.R. 51.
[5]*Hamson* v. *Great Northern Railway Company*, 36 Law Journal Exchequer 20.
[6]Section 55.
[7]*Me Sein Tin* v. *U. Kyaw Maung*, A.I.R. 1936 Rang. 332.
[8]Apparently as increasing the extent of herm owing to repetition of the libel.
[9]The Medina (1900) A.C. 113, 117.
[10]*British Transport Commission* v. *Curley*, (1956) A.C. 185, 208, 212 (House of Lords).
[11]*Urvis* v. *Swan Tours*, (1973) 1 All. England Reports 71.

Judge Wymanski's charge to the jury.

8.27 In an action on an alleged libel appearing in the Saturday Evening Post, the jury, returning after 11 hours, was unable to agree and was excused. Judge Wymanski's careful and detailed charge[1] to the jury is a classic. He said--

"In a libel suit[2] the appropriate measure of damages is the loss of reputation suffered by the plaintiff, the physical pain which he has suffered, and the mental anguish which he has suffered.

"You will note that I have said the suffering must be by him, not by others.

"You cannot, under any circumstances, include punitive damages. You may, however, properly take into account malice, if you find that there is malice, and you may enhance damages on account of malice.

"You are entitled to take into account the standing of the plaintiff in the community and group in which he moves. You are entitled to take into account the extent of the publication of which complaint is made. All those are proper elements.

"Under the pleadings in this case, no special damage of a technical nature is alleged, and so you cannot consider any pecuniary loss which the plaintiff may have suffered, nor can you consider the loss of an election, if the loss of the election was in any way attributable to the publication. You must forget that entirely.....

"As to damages--damages are an element about which a Judge has no better knowledge than a jury. You are practical men. You know what the consequences practically are of articles which are defamatory and not true or privileged, and articles which are defamatory and are malicious.

"I do not suggest that this article is defamatory or malicious or untrue or unprivileged. I take no position on that matter. That is for you. But if you should decide that you have to consider the question of damages, then, gentlemen, your experience is sufficient to decide the matter, and twelve of you are much better estimators than I alone would be.".

Damages and compensation.

8.28. According to some English cases, there is an evident distinction, almost etymological in nature,—between the terms "damages" and "compensation". While the term "damages" is used in reference to pecuniary recompense awarded in reparation for a loss or injury caused by a wrongful act or omission, the term "compensation" is used in relation to a lawful act which caused the injury in respect of which an indemnity is obtained under the provisions of a particular statute.

8.29. Thus, Esher M.R. said,[3] "The expression compensation is not ordinarily used as equivalent for damages. It is used in relation to a lawful act which has caused injury. Therefore, that word would not, I think, include damages at large."[4-5] We shall revert to this aspect later.

Damages and compensation.

8.30. It may be noted that so far as the expression "damages" is concerned, it is confined to civil cases, but the legal system of many countries imposes an obligation on the criminal court to deal with claims for compensation. The

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[1]*Curley* v. *Curtis Pub. Co.*, 48 F. Supp. 29 (D. Mass. 1942).

[2]Gregory and Kelven, Cases and Materials on Torts (1969), page 1039.

[3]Per Esher, M. R., in *Dixon* v. *Calcraft*, (1892) 1 Q.B. 458; 61 L.J.Q.B. 529; 66 L. T. 554.

[4]See also Mookerjee, J. in *Muhammad Mazaharal Ahad* v. *Muhommad Azimuddin*, A.I.R. 1923 Cal. 507, 511.

[5]See also per Fazl Ali, J. in *Ram Rachhya Singh* v. *Raghunath Prasad*, A.I.R. 1930 Pat. 46, 49, 50.

provision may be framed in terms of "punishment", or as a direct one for *compensation*. But whatever be the form adopted, the principal idea is prompt payment of reparation to the victims for the injury caused by the offender.

Compensation in criminal court.

8.31. Briefly, the position in this regard[1] is as under: (i) some countries *require* the court to deal with claims for damages against the accused,—e.g. Cuba, Mexico, Peru, Portugal, Colombia, Uruguay, even if the victim has not applied; (ii) some countries *permit* the court to deal with such claims, if made by the victim—e.g., France, Spain, Chile, Venezuela, and some Provinces of Argentina; (iii) some countries relegate the claim for damages to civil courts. This is the traditional position in most common law countries, apparently because the Crown's right to forfeit the property of the felon had, in ancient times, precedence over private claims; (iv) some countries empower the criminal court to award compensation, but without a *right* to demand compensation to any person. India is in this last category;[2] (v) In some countries, the State undertakes to pay compensation. Such a scheme is in force in England (non-statutory) since 1964, and in some other countries (by statute—e.g. in some States of the U.S.A.).

Provisions for compensation in criminal Codes.

8.32. In the Criminal Codes of some countries, there is a mandatory provision for compensation. For example, the provision in Peru[3] is as follows:—

> "In case of rape, seduction, abduction or *indecent assault upon* a woman, the offender shall also be sentenced to pay a *special compensation* to the victim if she is a single woman or a widow, according to his means and to support any offspring which may result in the same cases, the offender shall be exonerated from the effects of the sentence "if he marries the victim with her full consent after she is returned to the custody of her father, guardian or some other place."

Ancient Hindu Law.

8.33. In ancient Hindu law, the law-givers were fully aware of the necessity of directly compensating the victim of the crime. Thus, Manu[4] says—

> "If a limb is injured, a sound (is caused) or blood (flows, the assilant) shall be made to pay (to the sufferer) the expenses of the cure, or the whole (both the usual amercement and the expenses of the cure as a) fine (to the King)."

Manu also says:

> "He who damages the goods of another, be it intentionally or unintentionally, shall give satisfaction to the (owner) and pay to the king a fine equal to the (damages)."

Manu, thus, provides for direct reparation to the victim of the crime apart from payment or fine to the king (the State). Brihaspati says:[5]

> "He who injures a limb, or divides it, or cuts it off, shall be compelled to pay the expenses of curing it: and (who forcibly took an article in a quarrel) restore his plunder."

> "A merchant who conceals the blemish of an article which he is selling, or mixes bad and good articles together, or sells (old articles) after repairing them, shall be compelled to give the double quantity (to the purchaser) and to pay a fine equal (in amount) to the value of the article."

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[1]John G. Fleming, in Book Review in (1973) 21 A.J.C.L. 614, 615.

[2]See section 357, Cr. P.C., *infra*.

[3]Article 204, Criminal Code of Peru, H.H.A. Cooper "Sexual offiences in Peru", (1973) 21 Am Journal Comp. Law 113, footnote 133.

[4]The Laws of Manu in "Sacred Books of the East" by Max Muller, Vol. 25, Chapter 8, Verse 287-288.

[5]Brihaspati in the "Sacred Books of the East", by Max Muller, Vol. 33, Chapter 21, Verse 10, and Chapter 22, Verse 7.

8.34. Section 357(1) of the Code of Criminal Procedure, 1973 is as follows :— **Order to pay compensation.**

"357. (1) When a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied—

"(a) in defraying the expenses properly incurred in the prosecution;

(b) in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the court, recoverable by such person in a Civil Court;

(c) when any person is convicted of any offence for having caused the death of another person or of having abetted the commission of such an offence, in paying compensation to the persons who are, under the Fatal Accidents Act, 1855, entitled for the loss resulting to them for such death;

(d) when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or cheating, or of having dishonestly received or retained, or of having voluntarily assisted in disposing of, stolen property knowing or having reason to believe the same to be stolen, *in compensation* any bona fide purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto."

8.35. Section 357(3) of the same Code provides—

"(3) When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment, order the accused person to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced."

8.36. It is obvious that in proceedings where issues relating to such compensation arise, whether or not section 12 applies, facts necessary in order to enable the court to determine the amount of compensation would be relevant. **Facts necessary to determine compensation.**

8.37. In many countries, the victim is permitted to request the prosecution to include his claim in the criminal case against the accused. Amongst such countries are Austria, Colombia, Italy, Norway, Spain and Sweden[1]. In France, a special action known as "actionecivile" can be started by the injured person, and it is heard along with the criminal case[2].

8.38. We have referred above to the use of the word "compensation" in some context. Dixon J. in an Australian case[3], dealing with compensation for the acquisition of property, said that it means "recompense for loss", and explained that the purpose of compensation in this context is to place in the hands of the owner expropriated the full money equivalent of the *thing of which he has been deprived.* **Compensation and damage.**

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[1]Articles 234, 85 to 91, 371 to 375, 418 to 426, 497, French Code of Criminal Procedure.

[2]Note, "Crime and Punishment—Reparation to the Victim," (1959) 227 Law Times 117.

[3]*Nelungaloo Property Ltd.* v. *Commonwealth,* (1948) 75 Commonwealth Law Reports 495, 571.

8.39. In another Australian case[1], Lathan C.J., interpreting a provision in the Seamen's Compensation Act which barred the right of a seaman to recover "compensation" both independently of and also under the Act, said that the word "compensation" was wide enough, in its ordinary significance, to include compensation by way of damages for the injuries suffered by the seaman, whether or not some default by the employer was part of the seaman's cause of action.

Recommendation to add compensation.

8.40. Having regard to the fact that Indian legislative practice — *vide* the Indian Contract Act[2] and also the Limitation Act—frequently uses the word "compensation", it is desirable[3] to substitute the word "compensation" for the word "damages" in section 12. We recommend that the section should be so amended.

SECTION 13

1. INTRODUCTORY

8.41. Section 13 reads—

> "13. *Facts relevant when right or custom is in question*:—Where the question is as to the existence of any right or customs, the following facts are relevant:
>
> (a) any transaction by which the right or custom in question was created, claimed, modified, recognised, asserted or denied, or which was inconsistent with its existence;
>
> (b) particular instances in which the right or custom was claimed, recognized, or exercised, or in which its exercise was disputed, asserted or departed from.".

8.42. The illustration to the section deals with a right to fishery, and enumerates certain transactions or instances as relevant facts. Since these are of a non-controversial nature, the illustration is not of much help in solving the controversy that has arisen under the section[4].

Extent and scope of the section.

8.43. It may be pointed out that clause (a) of the section is not confined to evidence of a grant *creating the right*. It includes transactions and instances as evidence of facts relevant to the fact in issue in any particular case[5], and it thus makes these transactions and instances relevant for the purpose of establishing any right or custom.

Similarly, clause (b) of the section is not confined to particular instances in which the right *was asserted*. The clause speaks of the particular instances in which the right was (i) claimed, or (ii) recognised, or (iii) exercised, or (2) in which its *exercise* was disputed or departed from.

Significance of section 13.

8.44. The need for such a provision can be explained without much difficulty. Rights or customs are intangible facts or invisible phenomena; they are abstractions; and they are static. Their existence can, in general, be ascertained, only from concrete instances,—e.g. transactions by which they were created, claimed, modified, recognised, asserted or denied, or which are inconsistent with their existence, or from particular instances evidencing such claim, recognition or exercise or the contrary thereof. In other words, the right can, in general,

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[1] *Joyce* v. *Australian United Steam Navigation Co. Ltd.* (1930) 62 Commonwealth Law Reports, 160, 165.

[2] Section 73, Contract Act, *supra*.

[3] One of us—Shri Sen Verma—regards such change as unnecessary.

[4] See *infra* under "Judgments" and "statements".

[5] *Secretary of State* v. *District Board, Rangpur*, A.I.R. 1939 Cal. 758, 762.

be conveniently proved by cumulative instances and transactions, and not by a single document or fact or an isolated transaction or instance—except where the single document itself *creates the right.* This is the assumption on which the section is founded. Dominion or ownership is characterised by particular acts of enjoyment[1], these acts being fractions of that sum total of enjoyment which characterises dominium.

8.45. The most cogent evidence of rights and customs would be judgments between the parties. But such evidence is rarely available.

The least cogent evidence of rights would be the expression of opinion. The examination of actual instances and transactions in which the alleged custom or right has been acted upon or not acted upon, or of acts done, or not done, involving a recognition or denial of their existence, lies in the middle. Such evidence is usually available without much difficulty.

> "In the absence of direct title-deed, acts of ownership are the best proofs of title."[2]

8.46. Acts of ownership, when submitted to, are analogous to admissions or declarations by the party submitting to them that the party exercising them has a right to do so, and that he is, therefore, the owner of the property upon which they are exercised. But such acts are also admissible, of themselves, *proprio vigore,* for they tend to prove that he who does them is the owner of the soil[3]. The section is applicable for the latter purpose. *Admissions.*

8.47. The principle of the section is, thus, sound enough. But the phraseology in which it is couched—particularly, the word "transaction"—has proved to be a fruitful source of controversy. It will be necessary to discuss this aspect of the matter in detail.

8.48. The facts made relevant by section 13 are (a) transactions, and (b) instances. Neither of these terms is defined by the Act. *"Transactions" and "Instances".*

A "transaction" is the doing or performing of any business; management of any affairs, performance; that which is done; an affair, as the transactions on the exchange. A transaction is something already done and completed; a "proceeding" is either something which is now going on, or, if ended, is still contemplated with reference to its progress or successive stages.[4] "We use the word 'proceeding' in application to an affray in the street, and the word 'transaction' to some commercial negotiations that have been carried on between certain persons. The 'proceeding' marks the manner of proceeding, as when we speak of proceedings in a Court of law." The "transaction marks the business transacted, as the transactions on the exchange."[5]

A "transaction", as its derivation denotes, is something which has been concluded *between persons* by a cross or reciprocal action as it were.[6]

> "Transaction", in its largest sense, means that which is done' Garth, C.J. said:[8] "A transaction", in the ordinary sense of the word, is some

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[1] *Jones* v. *Williams,* 2 M. & W., 326. Followed in *Subram* v. *Odoy,* (1922) I.L.R. 1, Pat. 375.

[2] *Collector* v. *Deorga,* (1865) 2 W.R. 212 (Cal.) (Jackson J.).

[3] Starkie, Evidence, page 470, cited by Woodroffe.

[4] Webster's Dictionary, "Transaction".

[5] Grabb's Synonyms, cited in Woodroffe.

[6] *Gujju* v. *Fatteh,* (1880), I.L.R. 6 Cal. 171, 185, (per Jackson, J.)

[7] *Gujju* v. *Fatteh,* (1880) I.L.R. 6, Cal. 171, 175 (per Mitter, J.).

[8] *Gujju* v. *Fatteh,* (1880) I.L.R. 6, Cal. 171, 186, (per Garth, C. J.).

business or dealing which is carried on or transacted between two or more persons."

8.49. The qualifying character of the "transaction" spoken of in the section are (a) creation (b) claim, (c) modification, (d) recognition, (e) assertion, (f) denial, (g) inconsistency. Of these, (b) and (d) are also qualifying characters of "instances."[1]

8.50. An "instance" is that which offers itself, or is offered, as an illustrative case; something cited in proof or exemplification: a case occurring; and example.[2]

Statements how far admissible.

8.51. The section distinguishes between a claim and an assertion. Under clause (b), however, instances are admissible in which the exercise of a right or custom was asserted. The word "assertion" includes both a statement and enforcement by act. Ordinarily, the evidence tendered under this section will be evidence of acts done, but a verbal statement not amounting to, and not accompanied by, any act would also be admissible if it amounted to a "claim". We shall revert to this aspect later.

II. JUDGMENTS

Judgments.

8.52. How far the word "transaction" in this section includes a judgment not *inter partes* is a matter on which serious controversy has arisen. The case law on the subject is legion, and it will not be practicable even to mention the innumerable decisions of the various High Courts on the subject. We shall, therefore, confine ourselves to important judgments of the Privy Council and the Supreme Court, and very important rulings of the High Courts.

8.53. A brief analytical summary of the pronouncements of the Privy Council and the Supreme Court would be useful. We shall begin with the decisions of the Privy Council relating to relevancy of judgments under section 13.

Privy Council decisions as to admissibility of judgments under section 13.

(a) A wide view has been taken by the Privy Council in certain decisions, in which judgments not *inter partes* have been taken into account. To this category belongs *Ram Ranjan* v. *Ram Narain*,[3] where the question was whether the defendants were mukarraridars, and, therefore, not liable to ejectment by the plaintiff. Previous judgments not *inter partes*, in which the defendants had been found to be mukarraridars, were admitted, though section 13 was not expressly referred to.

8.54. *In Dino Mony* v. *Brojo Mohin*,[4] the section was expressly referred to, and reports forming part of prevarious proceedings under section 145 of the Code of Criminal Procedure, 1882 (disputes as to possession of immovable property), were held to be admissible in evidence. The following observations in the judgment may be noted:—

> "These police orders are, in their Lordships' opinion, admissible in evidence on general principles as well as under *the thirteenth section*[5] of the Indian Evidence Act to show the facts that such orders were made..... Reports not referred to in the orders may be admissible as hearsay evidence of reputed possession..... To begin a report within that section, the report must be 'a transaction in which the right or custom in question

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[1]Woodroffe.
[2]Webster's Dictionary, "instance".
[3]*Ram Ranjan* v. *Ram Narain*, (1895) I.L.R. 22 Calcutta 533, 22 Indian Appeals 60.
[4]*Dino Mony* v. *Brojo Mohini*, (1901) I.L.R. 29, Calcutta 187; 29 Indian Appeals 24.
[5]Emphasis added.

was created, claimed, modified, recognized, asserted or denied or which was inconsistent with its existence.' These words are very wide and are wide enough to let in the reports forming part of the proceedings in 1867, 1876 and 1888....."

(b) On the other hand, there are certain decisions of the Privy Council which seem to lay emphasis *on the proceedings*. In *Maharaja Sir Kesho Prasad Singh* v. *Pahuria Mst. Bhag Jogna Kuer*[1], Sir George Rankin, delivering the judgment of the Privy Council, made the following observations:—

"The admissibility of the decree of 1916 is the next question. Whether based upon sound general principle or merely supported by reasons of convenience, the rule that so far as regards the truth of the matter decided in a judgment is not admissible evidence against one who is a stranger to the suit has long been accepted as a general rule in English law. That the same rule applies in India, though it is not expressly formulated in these terms, may be seen from a reference to section 43 of the Evidence Act, and the illustration given thereunder. On the other hand, apart from all discussion whether a judgment is or is not a *transaction*[2] *within the meaning of section* 13 Evidence Act Cf. 6 Cal. 171[3] and 29 IA 243,[4] the judgment of 1916 *together with the plaint which preceded it* and the steps in execution which followed are evidence of an assertion by the Raj of the right which it claims to have acquired in 1903 and are thus admissible evidence of the right..... But the fact that a person not in possession of the land now in suit claimed in 1911 to have been entitled to it since 1903 is not by itself serious evidence of its right.... Serious consequences might ensue as regards titles to land in India if it were recognised that a judgment against a third party altered the burden of proof as between rival claimants, and much indirect lying might be expected to follow therefrom."

8.55. These observations seem to regard the judgment—

(i) as admissible when *read with the proceeding*, but as (ii) not constituting such serious evidence as would displace the burden of proof.

8.56. In a case from Calcutta,[5] it was held by the Privy Council that the Court is not entitled to refer to, or rely upon, a judgment given in proceedings to which neither the plaintiff nor the defendant was a party, as proving the facts stated therein.

(c) *In Collector of Gorakhpur's*[6] *case*, two pedigrees filed with a previous suit were sought to be given in evidence. Section 13 was discussed by the Privy Council incidentally. The pedigrees were found with the decree in the previous suit, and the decree recited that the pedigrees had been filed by both the parties; the decree also set out the descent of the persons concerned, according to the pedigrees. The Privy Council held, that the statement in the decree that the pedigrees were filed was admissible, either under section 35 as an entry in a public record, or under section 13 as evidence in the course of proceedings in a suit, and that the particular pedigree was admissible as a relevant admission. Referring to the observations made by Sir John Woodroffe

[1]*Maharaja Sir Kesho Prasad Singh* v. *Pahudia Mst. Bhag Jogna Kuer*, A.I.R. 1937 Privy Council 69; I.L.R. 16 Patna, 258.

[2]Emphasis supplied.

[3]*Gulje Lal* v. *Eatteh Lal*, I.L.R. 6. Calcutta 171.

[4]*Dinomoni* v. *Brojo Mohini*, (1910), I.L.R. 29. Cal. 187, 29 I.A. 24.

[5]*Coca Cola Co. of Canada Ltd.* v. *Pepsi Cola. Co. of Canada*, A.I.R. 1942 P.C. 40 (Case from Canada)

[6]*Collector of Gorakhpur* v. *Ram Sunder Mal*, A.I.R. 1934 P.C. 157, 164, 51 I.A. 286, I.L.R. 56, All. 468.

in his Commentary on the Evidence Act (1931 Edition), where the view had been expressed that judgments and decrees were not admissible under section 13, their Lordships pointed out that this view was not in accordance with the decisions of the Board in *Ram Ranjan's case*[1] and *Dino Mony's case*.[2]

(d) Thus, a judgment being admissible under section 13, the use to which the judgment can be put is, according to certain decisions of the Privy Council, a limited one. Findings of facts arrived at in one case do not constitute evidence of that fact in another case. This was decided in *Gopika Raman* v. *Atal Singh*.[3] In a later case,[4] in which partibility of the Pandara estate was an issue, Sir George Lowndes made the following observations: –

> "The judgment in question is only admissible under the provisions of sections 13 and 32, Evidence Act, as establishing a particular *transaction* in which the partibility of the Pandara estate was asserted and recognized, viz., the partition resulting from the 1793 suit. The *reasons* upon which the judgment is founded are no part of the transaction and cannot be so regarded nor can any transaction itself, be relevant in the present case....."

Privy Council decisions summarised.

(e) The sum and substance of the decisions of the Privy Council, referred to above, appears to be, that a judgment in a previous case is relevant under section 13 by virtue of the portion referring to "transaction", but not the reasons behind the judgment, nor the findings of facts on which it is based. Much weight may not, however, attach to such judgment, though it is admissible.

8.57. We shall now refer to two relevant decisions of the Supreme Court bearing on the point.

(a) In *Srinivas* v. *Narain*,[5] the point at issue was whether certain properties were joint family properties. In a previous litigation, maintenance had been claimed by a female member, with a prayer for charging the maintenance on the family property. This prayer had been granted, and the judgment was being tendered in evidence; the objection raised was that in the previous litigation, no question of title was directly involved. The Supreme Court, however, regarded the Judgment as admissible under section 13 as an assertion of the female member that the property belonged to the joint family. It was pointed out that the amount of maintenance would depend on the extent of joint family property; that an issue as to extent was actually framed in the previous litigation, and that the prayer for charging the maintenance on the family property had also been granted.

Sital Das v. *Sant Ram*,[6] again, involved the question of succession to the office of a Mahant, and a previous judgment was admitted under section 13 as a "transaction" in which a person from whom one of the parties derived his title, asserted his right as a spiritual collateral of a previous Mahant and got a decree accordingly.

(b) The Supreme Court decisions referred to above show that a judgment can be treated as a "transaction" in which a right was asserted. It may,

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[1]*Ram Ranjan's case, supra.*

[2]*Dino Mohini's case, supra.*

[3]*Gopika Raman* v. *Atal Singh*, A.I.R. 1929 Privy Council 99, I.L.R. 56, Cal. 1006, 56 I.A. 119.

[4]*Gobind Narain* v. *Shuam Lal*, A.I.R. 1931, P. C. 89; I.L.R. 58, Cal. 1187, 58 Indian Appeals, 125.

[5]*Srinivas* v. *Narain*, A.I.R. 1954 S.C. 379; (1955).

[6]*Sital Das* v. *Sant Ram*, A.I.R. 1954 S.C. 606.

incidentally, be noted that in neither of the two cases before the Supreme Court, the decisions of the Privy Council or any other case on this point was discussed.

Rulings of High Courts.

8.58. Decisions of the High Courts are conflicting as to whether previous judgments and decrees not *inter partes*, are, or are not, included in the term "transaction". Difference of opinion has arisen in the same High Court also.[1-2]

Remarks of Sargent, C.J., in *Ranchhoddas* v. *Basu*,[3] were—"former judgments are not themselves transactions."

Decisions of High Courts as to "instances".

8.59. On the allied question whether previous judgments and decrees not *inter partes*, are, or are not, included in the words "particular instances", the decisions of the High Courts are, again, conflicting. In some cases, it has been held that[4] judgments and decrees are not themselves "transactions" or "instances", *but the suit in which they were passed* and made is a "transaction" or "instance".

Logical position.

8.60. While it is too late in the day to say that a judgment is never admissible under section 13, it must be stated that in order that the admissibility of a judgment under section 13 can be justified, a slightly complicated process of reasoning has to be undergone. On a literal construction of the word "transaction", a judgment would not be covered by it. A judgment is an act of the court embodying its opinion, and is not easy to see how an act of a Court can constitute a "transaction" in which a party asserted etc. a right. It will be more accurate to say that the *litigation* amounts to an assertion of a right etc. and that the judgment is admissible as evidence of the litigation.

8.61. As was pointed out by Sir Gurudas Banerji J. in the referring judgment in a Calcutta case,[5] litigation may itself come within the meaning of section 13. His observations were as follows:—

> "If the existence of the judgment is not a transaction within the meaning of clause (a) of section 13, it proves that a litigation terminating in the judgment took place: and the litigation comes well within the meaning of the clause as being a transaction by which the right now claimed by the defendants was asserted. So again, the litigation which is evidenced by the existence of the judgment was a particular instance within the meaning of clause (b) of section 13, in which the right of possession now claimed by the defendant was claimed."

Chain of relevance.

8.62. The chain of relevance can be demonstrated thus:—

(i) The judgment proves the litigation.

(ii) The litigation amounts to a transaction or instance.

(iii) The transaction or instance is relevant under clause (a) or (b) of section 13, if it is one *by which* the right etc. was created etc. or *in which* the right etc. was claimed, etc.

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[1](a) Neamul v Cooro, (1874) 22 W. R. 365;
(b) *Gujju* v. *Fatteh*, (1880) I.L.R. 6, Cal. 175.
(c) *Collector of Gorakhpur* v. *Palakdhari* (1889) I.L.R. 12, All. 1, 43;
[2](a) *Gujju* v. *Fatteh*, (F. B.) I.L.R. 6 Cal. 183, 185, 187.
(b) *Collector* v. *Palakdhari*, I.L.R. 12, All. 14, 27, 28.
[3]*Ranchhodas* v. *Basu*, (1876) I.L.R. 10 Bom. 459.
[4](a) *Koondo* v. *Dheer*, (1873) 20 W.R. 345 (Cal.);
(b) *Jianotulla* v. *Ramani*, (1887) I.L.R. 15, Cal. 233;
(c) *Ramaswami* v. *Appavu*, (1887) I.L.R. 12, Mad. 9.
[5]*Tepu Khan* v. *Rajani Mohum Das*, (1896) I.L.R. 25 Cal. 522, 527, 2 C.W.N. 501, 504.

Judgment why not to be regarded as a transaction.

8.63. It seems to be an incorrect use of language to describe a judgment as a "transaction". In any case, *a Court* does not claim or assert or deny or exercise a right or custom. Nor does it dispute, or assert, or depart from the exercise of a right or custom. The parties do that What the court does is to determine the cause presented to it for trial and for that purpose it considers the claims, assertions, denials, exercise and so forth of the litigants before it or of those persons whose acts and statements the law treats as their own.[1]

8.64. Even assuming that a judgment is a transaction, it cannot be said to create or modify a right or custom. The right or custom either exists, or it does not, before the cause comes to trial. The Court merely finds, that before and at the date when the suit was instituted, the right or custom did or did not exist. If the parties litigating had no right, the Court cannot give it to them. And, if a right or custom exists, the Court has no jurisdiction to modify either.

8.65. The only portion of the section which may, with any show of reason, be made applicable to judgments is the word "recognised" in clauses (a) and (b), and the phrase "which was inconsistent with its existence" in clause (a).

But it seems that neither was, in fact, intended to apply to judgments since in the context all other acts mentioned in the section refer to acts of parties The "recognition" *referred to in the section* appears to be, like the other acts mentioned, *an act of a person* and not of a tribunal. In that context, it is an act of admission. A Court does not admit a right, but adjudicates upon it. As Garth C. J.[2] has said: "If the parties to a suit were to adjust their differences *inter se*, the adjustment would be a transaction and, by a somewhat strained use of the word, the proceedings in a suit might also be called transactions, but, to say that the *decision of a Court of Justice* is a transaction appears to me a misapplication of the term.".

8.66. Straight J. said[3] that a judgment is not itself an instance. "but the suit in which it was made is an instance."

8.67. In this connection, the observations in the Allahabad case of *Collector of Gorakhpur* v. *Palakdhari*[4] may also be referred to.

> (a) "In my opinion, a previous litigation, although not between the same parties, may be a particular instance within the meaning of section 13(b) in which the right or custom in question or the subsequent litigation "was claimed", etc. (Edge, C.J.)—
>
> (b) "It seems to me that the true point is not that the judgments and decrees themselves are the "transactions", but that the suit in which they were made was a transaction, and that to establish that such a transaction took place, they are the best evidence." (Straight J.).

8.68. The observations in a Calcutta case[5] may also be compared. It was pointed out that the thing to be proved is the right, the transaction evidences the right; and the transaction may need to be proved, for which purpose the judgment may be used as proving the transaction.

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[1]**Woodroffe.**

[2]*Gujju* v. *Fatteh*, (1880) I.L.R. 6 Cal. 171, 186.

[3]*Collector of Gorakhpur* v. *Palakdhari*, I.L.R. 12 All. 14, 25 (per Straight, J.).

[4]*Collector of Gorakhpur* v. *Palakdhari*, (1899) I.L.R. 12 All. 1, 14 (Edge, C. J.), 25 (Straight J.) 28 (Tyrell J. who agreed entirely with Edge, C. J.).

[5]*Gafanafar Ali Khan* v *Province of Assam*, A.I.R. 1944 Calcutta 57; I.L.R. (1944) 1, Calcutta 203, 213, 214 (Pal, J., Mukherjee J. agreeing).

8.69. From the above discussion, it would appear that— Conclusion as to need for clarification in regard to judgments.

(i) it is desirable to clarify the relevancy of judgments with reference to section 13;

(ii) the clarification, however, should be made in a manner consistent with the meaning of "transaction", because it is only by a chain of reasoning[1] that a judgment becomes relevant as proving the litigation which proves the transaction which is equivalent to an assertion etc. of the right;

(iii) an Explanation should, therefore, be added to section 13, to the effect[2] that a previous legal proceeding, whether between the same parties or not, may be relevant as a 'transaction' or 'instance' within the meaning of the section, and a judgment delivered in such proceeding, is admissible as evidence of such legal proceeding, but not the findings of facts or the reasons contained in it. This is not to affect the relevance of a judgment under any other section.

8.70. A judgment in another suit not between the same parties is, of course, admissible to show the fact of the judgment and who were parties thereto and what was the subject matter of the suit and facts of the decision, and the like,[3] where these matters are relevant under any other section. However, the finding of the facts in the judgment or the reasons upon which the judgment is formed, cannot be admitted, even under section 13.[4] If the judgment can be brought under some specific provision of the Act,[5] then it would be admissible. This is fairly clear from the words "unless the existence of the judgment is relevant under some other provision of this Act," used in section 43. Judgments admissible in general to show the fact of the judgment.

III. ENGLISH LAW AS TO JUDGMENTS

8.71. In England, in general, a judgment which is not a judgment *in rem* and which is between strangers or between a party and a stranger, and which does not relate to questions of public and general interest or raise issues based on contract, admission or acquiescence, is not evidence of the truth of the decision or of its grounds, though there is a limited exception in bankruptcy, administration, divorce and patent cases. This rule was settled long ago in the *Duchess of Kingston's case,*[6] and elaborated in *Natal Land Company's case.*[7] As regards its existence and legal effect—as distinct from the findings and reasons—even a judgment *in personam* is evidence. English Law, as to admissibility of judgments.

8.72. This inadmissibility of judgments between strangers, is sometimes attributed to the rule against opinion evidence or the rule against hearsay, but it is usually based on the ground of *res inter alios acts alteri noceri non debet.* It is unjust that a man should be affected by proceedings in which he could not make defence, cross-examine or appeal. Reasons for inadmissibility of judgments.

8.73. In *Collector of Gorakhpur* v. *Palakdhari*[8] Mahmood J. said, — "Now, as I understand the English law, that system of the law of evidence has by itself special technicalities rendered judgments such as those involved in this case inadmissible in evidence for reasons better known to English lawyers who

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[1] See discussion as to chain of reasoning, *supra.*

[2] This is not a draft.

[3] *Harihar Prasad* v. *Munshi Narhar Prasad,* A.I.R. 1956 S.C. 305, 309.

[4] *Govindan Narain Singh* v. *Sham Lal,* A.I.R. 1932 P.C. 89, 92.

[5] *Roop Chand* v. *Har Kishan,* 23 Weekly Reports 162 (Calcutta).

[6] *R.* v. *Kingston (Duchess),* 20 Howard State Trials 355; 168 E.R. 175.

[7] *Natal Land Company* v. *Good,* (1868) Law Reports 2 Privy Council 121 (1889).

[8] *Collector of Gorakhpur* v. *Palakdhari,* I.L.R. 12 All. 14.

have founded the doctrine than to me who can only claim a slight knowledge of those doctrines. But, however slight that knowledge may be, I know enough of that system to feel sure that it does not permit of the admissibility of the evidence furnished by judicial adjudications except when such previous adjudication operates either as *res judicata* or relates to a custom or right of a public nature. Judgments of that character cannot, of course, operate as *res judicata* in the English system of law or any other unless they are between the same parties or those whom they present. But the question arises as to judgments which are not between the same parties but which represent solemn adjudications by Courts of justice as to the facts in issue in the trials which result in the judgments sought to be produced as evidence in later trials where the same or similar questions arise, but where the absolute identity of the opposing parties is wanting.

> "The English law says as to the admissibility of judgments what the Latin adage intends—*aut Caesar aut mullus*, i.e., either the judgments sought to be produced is evidence should be conclusive *inter partes*, or they should not be admitted in evidence at all, unless they relate to a public custom or right, or the factum of judgment be a matter in issue.".

Two English cases illustrating rule against admission of judgments.

8.74 and 8.75. The rule against admissibility of judgments between strangers is illustrated by two English cases. Both the cases were of actions based on the same motor car accident, and the earlier judgment, being in relation to a stranger, was regarded as inadmissible.[1] We are not concerned with details of the English law as to judgments. In the present context, it will suffice to say that in England there is no specific rule, corresponding to section 13, allowing judgments between strangers to be admitted in evidence on the ground that it represents a "transaction or instance" by or in which a right is asserted, recognised etc.—except where, as already stated, the judgment refers to matters of public or general right.[2] In particular, it may be stated that English decisions referring to acts and documents showing ownership or possession do not, in general, involve the use of judgments as such proof. There are, no doubt, decisions holding that a stranger to a judgment may be indirectly estopped by his acquiescence therein.[3] But the relevancy of the judgment in such cases, is, strictly speaking, based not on the judgment, but *on the conduct of the party* in the nature of acquiescence.

IV. STATEMENTS

Receipts to be boundaries.

8.76. As regards statements to or by third parties, including recitals as to boundaries, the same controversy that has arisen under setcion 11[4] has arisen in connection with section 13, namely, whether recitals of boundaries in document not between the same parties may become relevant under section 13, which states that where the question is as to the existence of any right or custom, any *transaction* by which the right or custom was recognised etc. and particular *instances* in which the right was recognised etc. are relevant. Emphasis is often laid on the words "by which" and the words "in which"[5] in the two parts of the section. But this distinction does not seem to be very material, since a transaction by which the right was recognised is expressly covered, and the relevant wording is not confined to transactions *which create a right.*

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[1] *Townsend* v. *Bishop*, (1939) 1 All. England Reports 805; and *Johnson* v. *Cartledge*, (1939) 3 All England Reports, 654.

[2] See sections 40 to 44.

[3] See, for example, *Mohan* v. *Broughton* (1900) Probate 56.

[4] See discussion as to section 11.

[5] *Venkotaraya Gopala* v. *Narsayya*, A.I.R. 1915 Madras 746.

8.77. We are of the view that such statements should not be relevant under section 13.

In the first place, it will not be right to hold a party as bound or affected by a recital as to the making of which he could have no control whatever, and which has been completely behind his back.

In the second place, such third parties have no particular reasons to be accurate as to who is the owner of the land adjoining their own, and, therefore, a mistake may easily creep in, in the mentioning of such boundaries. Boundaries may often be mentioned on imperfect knowledge, or merely on hearsay information.

There is no reason why the ordinary rule[1] that recitals in a deed are not evidence against third parties, should be departed from.

8.78. To remove the obscurity on the subject, we recommend that a suitable Exception should be added below section 13. Recommendation.

V. RIGHTS

8.79. There existed for some time a controversy as to the word 'right' in section 13. Meaning of 'right'.

After the decision of the Privy Council in *Ram Ranjan*,[2] it is clear that the section is not confined (as the law is confined in England) to the proof of *incorporeal rights*.[3] The section applies to all kinds of rights, whether rights of full ownership, or falling short of ownership, e.g. rights of easement, etc. A right may be public or general or private. Further, a right may be (i) incorporeal, e.g. a right of way; or (ii) corporeal, e.g. right of ownership.[4]

It may be noted that the word 'right' occurs only once in the Code before *section 13*,—in the definition of "facts in issue"—where it must necessarily have been used in its largest sense. In the absence, therefore, of any qualification,—such as is to be found in section 48,—the expression "rights and customs" in section 13 must be understood as comprehending all rights and customs recognised by law, and, therefore, including a right of ownership.[5] Other supporting decisions of Bombay High Court.

On this point, a clarification is not needed.

VI. RECOMMENDATIONS

8.80. Our recommendations relating to section 13, then, are as follows: Recommendations

(a) The following Explanation should be added to the section:

"*Explanation.*—A previous legal proceeding, whether it was or it was not between the same parties or their privies, may be relevant as a transaction or instance, within the meaning of this section; and, when a legal proceeding so becomes relevant under this section, a judgment delivered in that proceeding is admissible as evidence of such legal proceeding, but not so as to make relevant the findings of facts or the reasons contained in the judgment; but nothing in this Explanation is to affect the relevance of a judgment under any other section.".

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[1] *Karuppanna* v. *Rangaswami*, A.I.R. 1928 Mad. 105 (2), 107.
[2] *Shri Nivas Das* v. *Meheybar*, A.I.R. 1916 P. C. 5.
[3] *Ram Ranjan Crakerbati* v. *Ram Narain Singh*, I.L.R. 22 Cal 533; 22 I.A. 60.
[4] *Raghupat Tewari*, v. *Pandit Narbadeshwar Prasad Tewari*, A.I.R. 1938 Pat. 103.
[5] (a) *Tepu Khan* v. *Rajani Mohun Das*, I.L.R. 25 Cal. 5221.
(b) *Ramkrishna* v. *Niranjan Pande*, A.I.R. 1933 Pat. 285.
(c) *Rangayyan* v. *Innasimuthu Mudali*, A.I.R. 1956 Mad. 226, 229.
[6] See cases, *supra*.

(b) An Exception excluding recitals of boundaries should be added on the following lines:

"*Exception.*—Nothing in this section shall render relevant recitals of boundaries in documents which are not between the same parties or their privies.".

Section 14.

8.81 to 8.86. Section 14 is an important section and may be quoted:

"14. *Facts showing existence of state of mind, or of body or bodily feeling.*—Facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling, are relevance, when the existence of any such state of mind or body or bodily feeling, is in issue or relevant.

Explanation 1.—A fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists, not generally, but in reference to the particular matter in question.

Explanation 2.—But, where, upon the trial of a person accused of an offence, the previous commission by the accused of an offence is relevant within the meaning of this section, the previous conviction of such person shall also be a relevant fact.

"(a) A is accused of receiving stolen goods knowing them to be stolen. It is proved that he was in possession of a particular stolen article.

The fact that, at the same time, he was in possession of many other stolen articles is relevant, as tending to show that he knew each and all of the articles of which he was in possession to be stolen.

(b) A accused of fraudulently delivering to another person a counterfeit coin which, at the time when he delivered it, he knew to be counterfeit.

The fact that, at the time of its delivery, A was possessed of a number of other pieces of counterfeit coin is relevant.

The fact that A had been previously convicted of delivery to another person as genuine a counterfeit coin knowing it to be counterfeit is relevant.

(c) A sues B for damage done by a dog of B's which B knew to be ferocious.

The facts that the dog had previously bitten X, Y and Z, and that they had made complaints to B, are relevant.

(d) The question is, whether A, the acceptor of a bill of exchange, knew that the name of the payee was fictitious.

The fact that A had accepted other bills drawn in the same manner before they could have been transmitted to him by the payee if the payee had been a real person, is relevant, as showing that A knew that the payee was a fictitious person.

(e) A is accused of defaming B by publishing an imputation intended to harm the reputation of B.

The fact of previous publications by A respecting B, showing ill-will on the part of A towards B, is relevant, as proving A's intention to harm B's reputation by the particular publication in question.

The facts that there was no previous quarrel between A and B, and that A repeated the matter complained of as he heard it, are relevant, as showing that A did not intend to harm the reputation of B.

(f) A is sued by B for fraudulently representing to B that C was solvent, whereby B, being induced to truct C, who was insolvent, suffered loss.

The fact that, at the time when A represented C to be solvent, C was supposed to be solvent by his neighbours and by persons dealing with him, is relevant, as showing that A made the representation in good faith.

(g) A is sued by B for the price of work done by B, upon a house of which A is owner, by the order of C, a contractor.

A's defence is that B's contract was with C.

The fact that A paid C for the work in question is relevant, as proving that A did, in good faith, make over to C the management of the work in question, so that C was in a position to contract with B on C's own account, and not as agent for A

(h) A is accused of the dishonest misappropriation of property which he had found, and the question is whether, when he appropriated it, he believed in good faith that the real owner could not be found.

The fact that public notice of the loss of the property had been given in place where A was, is relevant, as showing that A did not in good faith believe that the real owner of the property could not be found.

The fact that A knew, or had reason to believe, that the notice was given fraudulently by C, who had heard of the loss of the property and wished to set up a false claim to it, is relevant as showing that the fact that A knew of the notice did not disprove A's good faith.

(i) A is charged with shooting at B with intent to kill him. In order to show A's intent, the fact of A's having previously shot at B may be proved.

(j) A is charged with sending threatening letters to B. Threatening letters previously sent by A to B may be proved, as showing the intention of the letters.

(k) The question is, whether A has been guilty of cruelty towards B, his wife.

Expressions of their feeling towards each other shortly before or after the alleged cruelty, are relevant.

(l) The question is, whether A's death was caused by poison.

Statements made by A during his illness as to his symptoms, are relevant facts.

(m) The question is, what was the state of A's health at the time when an assurance on his life was effected.

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

(n) A sues B for negligence in providing him with a carriage for hire not reasonably fit for use, whereby A was injured.

The fact that B's attention was drawn on other occasions to the effect of that particular carriage, is relevant.

The fact that B was habitually negligent about the carriages which he let to hire, is irrelevant.

(o) A is tried for the murder of B by intentionally shooting him dead.

The fact that A, on other occasions shot at B is relevant, as showing his intention to shoot B.

The fact that A was in the habit of shooting at people with intent to murder them is irrelevant.

(p) A is tried for a crime.

The fact that he said something indicating an intention to commit that particular crime is relevant.

The fact that he said something indicating a general disposition to commit crimes of that class, is irrelevant.".

Principle.

8.87. The principle of the section is that if the existence of a mental or bodily state or bodily feeling is in issue or relevant, then acts from which the existence of such mental or bodily state or bodily feeling *may be inferred,* are also relevant. This may be described as the positive aspect. The first Explanation stresses the negative aspect, and is in the nature of a restriction.

Five parts of the section.

8.88. The section could be analysed into five parts — (a) the provision permitting evidence, (b) the conditions for applying the section, (c) the restriction on the scope, (d) the use of the evidence and (e) mode of proof.

Proof of mental state.

8.89. First, as to the proof of the mental state admissible under the section. A man's intention or, for that matter, any mental state, is a matter of fact capable of proof. "The state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is; but, if it can be ascertained, it is as much a fact as anything else."[1] Intention can, thus, be proved like any other 'fact', by the evidence of conduct and surrounding circumstances. The state of mind is not only relevant, but a fact in issue, in many criminal cases where the offence under trial requires a mental element. Often, it may be in issue in civil suits also, where the suit is in tort and the liability is not absolute.

Proof of mental and physical condition.

8.90. Now, the mental and physical condition of a person may be proved either by that person speaking directly to his own feelings, motives, intentions and the like, or by the evidence of another person describing facts from which the given condition may be inferred.[2]

8.91. A person may himself give evidence about his mental state. So, in an English case[3] for malicious prosecution, where the defendant himself was called and was asked in examination-in-chief, "Had you any other object in view, in taking proceedings, than to further the ends of justice?", the question was admitted.

8.92. And, on a question of domicile, a person may state what his intention was in residing in a particular place.[4]

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[1] *Edingto* v. *Pitzmauricé*, (1885) 29 Ch. D. App., 483 (Bowen, L.J.).
[2] *Balmakand* v. *Ghansam*, (1894) I.L.R. 22 Cal. 391, 406.
[3] *Hardwick* v. *Coleman*, 1 F. & F., 531.
[4] *Wilson* v. *Wilson*, L.R. 2 P. & D., 435, 444.

8.93. However, there are certain shortcomings in a person testifying as to his own state of mind. If a person's acts and conduct are shown to be at variance and inconsistent with the intent he swears to, then his own testimony in his own favour would ordinarily obtain very little credit.

8.94. Moreover, it is obvious that in many cases the evidence of the person himself may not be available. Hence, it is open to other witnesses also to testify as to state of mind. But other person may not, in general, testify directly to the state of mind of the first, and may state only those external and perceptible facts which may form the material of the Court's decision. In general, witnesses must speak to facts and let the inference from those facts be drawn by the Court or jury.[1]

8.95. Section 14 is in accordance with the principles mentioned above — principles laid down in numerous English case,[2]—namely, that, to explain a state of mind, evidence is admissible, though the evidence does not otherwise bear upon the issue to be tried. As regards this principle, there is no difference between civil and criminal cases.[3]

8.96. While on this question, a reference may be made to *mens rea,* Archbold[4] states: *Mens rea.*

> "It has always been a principle of the common law that *mens rea* is an essential element in the commission of any criminal offence against the common law..... In the case of statutory offences, it depends on the effect of the statute .....There is presumption that *mens rea* is an essential ingredient in a statutory offence, but this presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals. Unless a statute clearly or by implication rules out *mens rea,* a man should not be convicted unless he has a guilty mind. In finding whether *mens rea* is excluded, the court should consider whether the offence consists in doing prohibited acts or in failing to perform a duty which only arises if a particular state of affairs existes."[5]

8.97. *In State* v. *Lakshman Das,*[6] Patel J. observed:

> "Section 14 next relied upon on behalf of the prosecution makes facts relevant if (1) they show the existence of any state of mind or (2) the state of body or bodily feeling, such such state of mind or body is in issue or is relevant. Explanation 2 says that the prior conviction of a person for an offence is relevant if the offence itself is relevant under this section. It would seem that it only means that if the prosecution brings forth the evidence of a prior offence as being relevant under this section, then it may also prove the conviction, which would make the evidence of previous offence more effective in its being accepted. It is also true that the general tendency of an accused cannot be proved as that would amount to proving his bad character, but the facts offered in proof must show the state of mind in reference to a particular matter in question."[6]

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[1]Swift, Ev., 111 (cited in Woodroffe) "A witness must swear to facts within his knowledge and re-collection and cannot swear to mere matters of belief".

[2]*R.* v. *Richardson,* 2 F. & F., 346 (Williams, J.).

[3]*Blake* v. *Albion Life Assurance Society,* 4 C.P.D. 102.

[4]Archbold's Criminal Pleadings, Evidence and Practice in Criminal Cases, 33rd Ed., pages 23-24.

[5]The quotation is to be found at page 398 of Vol. 1 of Woodroffe II Ed.

[6]*State* v. *Lakshman Das,* (1966) 69 Bom. L.R. 808, 827, 828.

I. PROVISION PERMITTING EVIDENCE

Provision permitting evidence.

8.98. The section declares, as relevant, facts "showing the existence of any state of mind, state or body or bodily feeling". A few examples of the state of mind are given in the section, we need not quote them again.

Difficulty of application.

8.99. The provisions of the section are simple in form, but not always easy to apply.

In *Srinivasmal's case*,[1] for example, A was a salt agent and B was his employee. A was entrusted with the duty of allotting appropriate quantity of salt to each retail dealer. B was convicted of having sold salt to certain dealers, at a price exceeding the statutory maximum. A was convicted of abetting B in this offence. It appears that the statutory maximum was circumvented in the following manner. The lawful price was paid to another employee of A, and the excess charged was paid to B. The argument of the defence was that the excess paid to B went into B's pocket, and did not form part of the purchase price. At the trial, evidence was given by several dealers who spoke of other transactions (not the subject matter of the present proceeding), with the accused, shortly before and after the period covered by the offence. The evidence showed that the *accused A knew of the illegal transactions of B*, but connived at them. The Privy Council held that this evidence was relevant, both on the charge for the principal offence and on the charge of abetting. The evidence was relevant to the charge of abetting, because it showed an *intention* to aid the commission of an offence and an intentional omission to put a stop to an illegal practice.

8.100. The facts in another case which went upto the Privy Council[2] are also interesting. At the trial of the appellants for the murder of Karnail Singh, the approver gave evidence that he and the appellants had murdered Bhan Singh a few days before the murder of Karnail Singh, and that they proposed to conceal the murder of Bhan Singh by causing injuries to Karnail Singh and getting themselves arrested for so doing. That is to say, the evidence of the approver was that the motive, or at any rate one of the motives, for the injuries caused to Karnail Singh was a desire to conceal the murder of Bhan Singh. The Privy Council observed: The suggested motive is, no doubt, a singular one, but however improbable an alleged motive may be, the prosecution is entitled to call evidence in support of it, and none the less so because such evidence may suggst that the accused has committed some crime other than that with which he is charged [see illustration (a) to section 81, Evidence Act].

8.101. It may be noted that in this case, if evidence that the appellants had murdered Bhan Singh had been given with a view to showing that they were persons likely to have committed murder of Karnail Singh, the evidence would have been inadmissible, but it was admissible to establish the motive for the murder with which they were charged now.

8.102. To some degree, of course, the intentions of parties to a wrongful act must be judged by the event.[3] The presumption of intention depends upon the facts of each particular case.[4] A guilty knowledge is not usually a matter on which direct evidence can be afforded. It is a matter of conscience, and it is connected with the secret motives of a man's conduct; it must be inferred from facts.[5]

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[1] *Srinivasmal* v. *Emperor*, A.I.R. 1947 P.C. 135.
[2] *Natha Singh* v. *Emp.*, A.I.R. 1946 P.C. 187, 189.
[3] *R.* v. *Gookeel*, (1866) 5 W.R., Cr. 33, 38
[4] *R.* v. *Gora*, (1866) 5 W.R., Cr. 45, 46.
[5] *R.* v. *Shurfuffooddeen*, (1870) 13 W.R., Cr., 26.

8.103. Intention may thus be presumed from conduct. But the rule that a person is presumed to intend the ordinary and natural consequences of his acts is not taken as one in the nature of a conclusive presumption. As is well-known, this aspect became the subject matter of acute controversy in England, and a decision of the House of Lords[1] was taken as holding that there was an *irrebuttable presumption* of law that a person foresees and intends the natural consequences of his acts. The matter is now settled by a statute, and it is now provided[2] as follows in England: Principle as to intent.

> "A court or jury in determining whether a person has committed an offence,
>
> (a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but
>
> (b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances."

8.104. In regard to facts relevant under the section, it is to be noted that the application of the section is dependent on an important condition being satisfied. The crucial question to be considered is—Is a state of mind a relevant fact, having regard to the nature of the charge, or cause of action? This question cannot be answered without a reference to the substantive law. In civil proceedings, it would require an examination of the essential ingredients of the cause of action, in order to determine whether, and if so, how far, a mental element is required. Ordinarily, this question will have to be discussed with reference to sections 5 to 12; section 5 deals with facts in issue, sections 6 to 12 deal with other relevant facts.

8.105. In a criminal case, the question of state of mind may assume importance either in a general way, or in a particular manner. In the general way, state of mind may become important if the accused pleads one of the general defences to criminal liability given in the Indian Penal Code.[3] Many of these defences are based on the absence of a criminal state of mind—the factors justifying exemption being such as to affect the freedom of will or the cognitive faculties, or to mitigate the criminality in the particular circumstances of the case. Defences to liability.

8.106. Broadly speaking, the various defences to criminal liability could be classified into three main groups, namely, justification, excuse and mistake or ignorance or constraint. Justification is illustrated by the defence of duty to act, judicial duty, justification by law and justification on the basis of an act done to avoid other harm.[4] Excuse exists where the harm was inflicted with consent or in good faith for the benefit of the sufferer or was very slight.[5] Both the categories of justification and excuse assume that the injurious event is the consequence of the conduct of the individual; but, in the circumstances of the case, the conduct is not criminal, because the mind was innocent. Defences to criminal liability classified.

8.107. Even where justification or excuse does not apply, innocence may be established on the ground of mistake or ignorance or constraint. Under the category of mistake or ignorance, we can put the defence of insanity,—the accused being "incapable of knowing the nature of the act", and the defence of intoxication, as also the defence of mistake of fact.[6]

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[1] *D.P.P.* v. *Smith*, (1960) 3 All England Report 161.
[2] Section 8, Criminal Justice Act, 1967 (Eng.).
[3] Sections 76 to 106, I.P.C.
[4] Section 76 to 79 and 81, Indian Penal Code
[5] Sections 87 to 92, 93 and 95, Indian Penal Code.

8.108. Under the category of constraint, we can put the sections of the Penal Code relating to self-defence,[1] compulsion by threat[2] and the like. In cases of mistake or ignorance or constraint, either the conduct is not voluntary (thus the will is not free), or the consequences are not known, or, if the consequences were known, they were not known to be wrong. To sum up the discussion, in most of the general defences to criminal liability, either the mental element was absent or, *though it was apparently present, it was not criminal in the circumstances of* the case.

8.109. We may illustrate what is stated above. An infant under seven years is free from criminal responsibility, because "he knoweth not of good and evil."

8.110. The Indian law on the subject of infancy as a defence in criminal cases is contained in two sections of the Penal Code.[3] Section 82 provides :

> "Nothing is an offence which is done by a child under seven years of age"

Section 83 of the Penal Code provides:

> "Nothing is an offence which is done by a child above seven years of age and under ten who has not attained sufficient degree of maturity of understanding to judge the nature and consequences of his conduct on that occasion."

8.111. The immunity for children under seven years is absolute. However, where the accused stands between childhood and maturity, criminal liability depends upon whether or not the accused *in fact possessed a guilty state of mind*. This principle is the basis of the provisions quoted above.

8.112. The exemption from criminal liability on the ground of mental incapacity, which is to be found in section 84 of that Code, has its foundation in the view that criminal punitive responsibility pre-supposes a basic common frame of reference,— a frame of reference shared by the community and the accused. If the accused, by reason of insanity, is unable to think and feel within a frame of reference that is of the vast majority, he ought not to be punished for failing to conform to its demands and rules. That is the general principle underlying the defence of insanity.

8.113. Then, there is the defence of consent or acts done for the benefit of a person. Sections 87, 90 and 91, I.P.C. deal with the subject of consent. The act done is excused, because the sufferer had consented to its being done. In cases of a beneficial act, it is excused because it was done for the benefit of the sufferer. Most of these sections require "good faith", thus involving a determination of a state of mind. Moreover, in so far as they rest on consent, an inquiry into the state of mind of the *victim* is also needed.

8.114. It is of interest to note what Macaulay[4] observed as to consent :

> "We conceive the general rule to be that nothing ought to be an offence by reason of any harm which it may cause to a person of ripe age, who, undeceived, has given a *free and intelligent consent* to suffer that harm or to take the risk of that harm. The restrictions by which the rule is limited affect only cases where human life is concerned."

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[1]Sections 84, 85, 86, 76 and 79 I.P.C.

[2]Sections 96 to 106, I.P.C.

[3]Sections 82-83, I.P.C.

[4]Draft Penal Code, Note B, page 106 (1837).

[5]Sections 94, I.P.C.

8.115. The above discussion deals with the mental element in a general sense. In addition, the state of mind in a particular sense may become relevant. When the statutory definition of a crime makes a particular intent a necessary ingredient, such intent must be proved by the prosecution, and there is no onus on the accused.[1-2-3]

8.116. In this connection, it may be noted that this is not always an easy question to determine. In a Bombay case,[4] for example, a serious difference arose, on this very point, between Chandavarkar J. and Jacob J. which had to be resolved by referring the matter to Aston J. In that case, the precise question to be considered was whether, for the offence of keeping a common gambling house under section 4 of the Bombay Prevention of Gambling Act, 1887, a previous conviction under the Act would be relevant. Chandavarkar J. considered it to be relevant on the ground that, since the section uses the word "keeping", it presupposes something habitual, and the previous conviction was, by virtue of explanation 2 to section 14, relevant because the user of a place or keeping it for a particular purpose necessarily connotes the existence of a state of mind—intention to use the place for that purpose and knowledge that it is so used. To "keep" a common gambling house is, according to Chandavarkar J., to hold the house and manage it with the intention of using it as such habitually. To prove knowledge or intention and habitual course of dealing with the house or place, previous convictions are relevant under section 14. Crucial question —state of mind.

With this view, Aston J. agreed, but, according to Jacob J. the relevance of such previous convictions would be excluded by the terms of the first Explanation to section 14 read with illustration (p) to the section, and he did not regard the offence charged in the case as concerned with any such states or conditions as are specified in section 14 of the Evidence Act.

8.117. A recent Supreme Court case,[5] though it did not relate to section 14, illustrates how difficult it is to determine whether or not a mental state is an ingredient of an offence. In that case, construction of sections 9 and 10 of the Opium Act, 1878 was in issue. Those sections read as follows:—

> "9. Any person who, in contravention of this Act, or of rules made and notified under section 5 or section 8,—(a) possesses opium, or (b) transports opium, or (c) omits to ware-house opium or removes or does any act in respect of warehouse opium and any person who otherwise contravenes any such rule, shall, on conviction before a magistrate, be punishable for each such offence with imprisonment which may extend to three years, with or without fine: and, where a fine is imposed, the convicting magistrate shall direct the offender to be imprisoned in default of payment of the fine for a term which may extend to six months, and such imprisonment shall be in excess of any other imprisonment to which he may have been sentenced.
>
> "10. In prosecutions under section 9, it shall be presumed, until the contrary is proved, that all opium for which the accused person is unable to account satisfactorily is opium in respect of which he has committed an offence under this Act."

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[1] *Rex* v. *Dart*, 14 Cox, 143.

[2] *Rex* v. *Gary*, 17 Cox., 299.

[3] *Reg.* v. *Sleep*, L. and C., 44.

[4] *Emperor* v. *Allomiya*, (1904) I.L.R. 28 Bombay 129, 135, 143, 151 (F. B.).

[5] *Inder Sain* v. *State of Punjab*, (1974) 1 S.C.R. 215; A.I.R. 173 S.C. 2309.

8.118. After a review of the English cases and Indian cases on the subject of possession, the Supreme Court[1] held, in the first place, that by reason of section 10 of the Opium Act, the prosecution need not prove conscious possession before it could resort to the presumption in section 10; secondly, however, it does not follow from this proposition that the word "possessed" in section 9 did not connote conscious possession. The Supreme Court observed—

> "Knowledge is an essential ingredient of the offence as the word 'possess' connotes, in the context of section 9, possession with knowledge. The legislature could not have intended to make mere physical custody without knowledge an offence. A conviction under section 9(a) would involve some stigma and it is only proper then to presume that the legislature intended that possession must be conscious possession."

8.119. The conviction was, however, confirmed on the facts.

Requirement of intent implied.

8.120. Even where there is no such provision as to intent, in a statute, the court might hold one to be implied. In *Sweet* v. *Parsley*,[2] for example the House of Lords seems to agree with a doctrine developed in Australia—[3]

> "When a statutory prohibition is cast in terms which at first sight appear to impose strict responsibility, they should be understood merely as imposing responsibility for negligence but emphasising that the burden of rebutting negligence by affirmative proof of reasonable mistake rests upon the defendant."

8.121. Thus, the most important question that arises in each case where section 14 is sought to be invoked is—Is the charge or cause of action such that a state of mind is a relevant fact?

Use of facts relevant as showing state of mind.

8.122. It should be noted that evidence under this section is not admissible when the case depends on the proof of actual facts and not upon the state of mind.[4] In a Mysore case,[5] Hedge J. pointed out—

> "The principle on which evidence of similar acts is admissible is not to show (that) because the accused has committed already some crimes, he would therefore be likely to commit another, but to establish the animus of the act for which he is charged and rebut, by anticipation, the defence of ignorance, accident, mistake, or innocent state of mind. In this case (under section 477A, I.P.C.—falsification of accounts,) it is not sufficient for the prosecution to prove that the entries which are subject matter of the second charge are wrong entries and that they were made by the accused: the prosecution must go further and prove that those entries are false entries and the accused made those entries wilfully and with intent to defraud the State. Therefore, the prosecution can prove similar instances to prove that the accused made the entries in question wilfully and with intent to defraud the State. Those instances can also be proved to rebut the accused's plea that he innocently made those entries at the behest of his superiors. But that evidence cannot be used to show that the accused was guilty of temporary misappropriations in past or to probabilise the charge levelled

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[1]Mathew and Dua JJ.

[2]*Sweet* v. *Parsley*, (1969) 1 All E.R. 347 (per Lord Reid), 357 (per Lord Pearce), 362 (per Lord Diplock)

[3](a) *Maher* v. *Musson*, (1934) 52 C.L.R. 100;
(b) *Proudman* v. *Dayman*, (1941) 67 C.L.R. 536.

[4]*Gokul* v. *R.*, (1924) 29 C.W.N. 483.

[5]*Krishna Murthy* v. *Abdul Subhan*, A.I.R. 1965 Mys 128, 133, para. 8.

against him by proving his past bad conduct, if any. To the extent the trial Court has relied on that evidence in support of its finding that the accused was now and then temporarily misappropriating certain sums of money in the Treasury, the finding in question is vitiated."

II. THE RESTRICTION

Restrictions.

8.123. We now come to that part of the section which lays down an important restriction in regard to its application.

First Explanation

8.124. The first Explanation to the section emphasizes that the state of mind must exist in reference to the particular matter in issue. Thus, for example, in a charge for rash driving, evidence regarding similar previous occurrences resulting from rashness of the accused is not admissible, as it must be proved that the rashness existed in relation to the particular incident.[1] To illustrate the first Explanation, we may state that if the charge was of belonging to a gang of dacoits, evidence as to habitual commission of *thefts* (as opposed to dacoity) is inadmissible. But, as was held in a Patna case[2], in order to prove the association of an accused with a gang of dacoits, –association in the abstract,– evidence of previous convictions may be relevant.

Character evidence -- similar facts.

8.125. One of the exclusionary rules of the law of evidence relates to evidence of character and previous convictions,—a rule primarily designed to avoid undue prejudice. Where the object of evidence of character is to persuade the court that it is likely or unlikely that a party acted in a particular way, then, as a general rule, such evidence is excluded if it relates to bad character. This general rule was, however, on proper grounds, modified, and evidence allowed to go in of previous occurrences ("similar facts"), even though, incidentally, it might reveal bad character. In section 14, we are concerned with that aspect of character which reveals a state of mind, if the state of mind is itself of relevance in the facts of the case. Evidence might have rational probative value in other respects, and may indirectly reveal bad character; but we are not concerned with that aspect. Nor are we concerned with the question of character as establishing identity.[3] The field of reception of evidence within section 14, so far as it relates to similar facts, is limited. But, even in this limited field, the section is not an easy one to administer.

8.126. To borrow an illustration from the facts of an English case,[4] if a person is charged with the murder of a child and takes up the defence of insanity (sudden mania), evidence of a voluntary confession by the accused as to how the accused killed another child, is receivable, in rebuttal to show the state of mind.

8.127. On the other hand, if the question is merely of the factum of the offence, the fact that the accused had committed similar other crimes, would be irrelevant. In England, in the Brides in the Bath case,[5] the accused was charged with the murder of his wife, who was found dead in her bath. Evidence that subsequently to the wife's death, two other women with whom the accused had contracted bigamous marriages had also been found dead in the baths under very similar circumstances, and that in all the three cases the accused had benefited by their death, was held admissible, to rebut *the plea of accident or innocent intent*. This case is also relevant with reference to section 15; but, in so far as it relates to intent, it belongs to the field covered by section 14.

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[1](1929) Madras Weekly Notes, 395, 397, cited in the Digest.

[2]*Lalchand* v. *State*, A.I.R. 1961 Pat. 260, 266, para. 16 and *Bhima Shaw*, A.I.R. 1956 Orissa 777.

[3]See discussion as to section 9.

[4]*R.* v. *Wells*, 123 C.C.C. Sessional Paper 1203 (Collins J.), cited by Phipson.

[5]*R.* v. *Smith*, (1915) Criminal Appeal Reports 259.

Sexual offences.

8.128. Cases relating to sexual offences often present problems in this context. Where a question of intent or passion or guilt is not material.[1] the evidence of prior sexual assaults cannot be admitted under section 14. For example, A is charged with house-breaking with intent to commit rape on B; evidence that an hour later, he entered another house down the chimney and had connection with another woman with her consent, is inadmissible.[2-3] It would make no difference that his intercourse with the other woman was without her consent.

8.129. On the other hand, where a person is charged with carnal knowledge of a girl under 16 years, evidence that he had sexual connection with that same girl seven months prior to the charge, would be admissible, not to prove that he committed the second offence, but to show sexual passion[4] for the particular girl.

Illustration (a) and Explanation 2.

8.130. Upon the trial of a person charged with being in dishonest[5] possession of stolen property, evidence could be given of a previous conviction of the accused for attempting to receive stolen property, and of the same person knowing it to be stolen, under sections 511 and 411 of the Indian Penal Code.

Previous conviction — Explanation 2.

8.131. There was not, in the law of this country, any such special provision[6] as was made in England in 1871, relating to the admission in evidence, against a person charged with having received stolen goods knowing them to be stolen, of previous conviction of such person, for any offence involving fraud or dishonesty. The question was, however, answered in the affirmative, because section 54 (as it then stood) made previous conviction *relevant in every case.*

By the amendment of 1891, the scope of section 54 was severely restricted, but, in section 14, Explanation 2 was added. The amendment also made a verbal change in section 14, Explanation 1, but that change is not material for the present purpose.

Second Explanation—Scope of.

8.132. Explanation 2 to the section, if properly construed, has a very limited scope. It does not provide that the previous conviction is always a relevant fact,—not even where the state of mind is in issue. If, however, the *previous commission* by the accused of an offence is relevant within the meaning of the section—i.e., as showing the state of mind when relevant—then the previous conviction of such person (of that offence)[7] is also a relevant fact under the Explanation. In order that the Second Explanation may apply, the prosecution must establish, first, that state of mind is relevant, and secondly, that in order to show that the state of mind, the previous commission of an offence is relevant. These two things being established, the Explanation clears the way for giving evidence of a previous conviction. The Explanation thus makes the conviction relevant where previous commission is relevant.

8.133. Evidence of the previous conviction of the accused person amounts to evidence of bad character and is not admissible under section 54, unless and until the accused produces evidence of good character nor are convictions admissible to show the state of mind of accused. As Sultan Ahmed J. said :[8] "the whole principle of British criminal jurisprudence condemns the prejudice which

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[1]Para. 8, 129, *infra.*

[2]*R.* v. *Rodley*, (1913) 3 K.B. 468.

[3]Compare section 14, illustrations (n) and (o).

[4]*R.* v. *Shellaker*, (1914) 1 K.B. 414, C.C.C. followed in *R.* v. *Rogers*, (1914) 10 Criminal Appeal Report 276.

[5]Cf. s. 14, illustration (a) and Explanation 2.

[6]Prevention of Crimes Act, 1871, (34 and 35 Vic., c. 112), section 19.

[7]These words do not occur in the Explanation, but are implied.

[8]*Teka Ahir* v. *Emp.*, A.I.R. 1920 Pat. 351, 353.

"may be caused to the accused by the admission of previous conviction before he has been found guilty of the offences on which he has been arraigned." This general rule is modified by Explanation 2.

8.134. Under the law before 1891, evidence of previous conviction was admissible in evidence both to show the reputation and disposition of the accused, however unconnected it may be to the present trial.[1] This[2] was altered in 1891, as already stated.

III. ILLUSTRATIONS

8.135. The illustrations to the section are very important. Illustration (a) which allows evidence to be given of the possession by the accused of other stolen property, makes no reservation as to ownership or time of theft in relation to the various stolen articles in possession. It is not required that the other stolen property must belong to the person whose property is now alleged to be stolen. However, it must first be proved that the particular stolen article was in the possession of the accused. It may be noted that, in England,[3] on the trial of an indictment for receiving stolen goods, evidence may be given that other property stolen within a period of 12 months preceding the date of the offence charged was found with, or had been in possession of, the prisoner, although such other property is the subject-matter of another indictment against him to be tried at the same assizes. Illustration (a).

8.136. The history of the offence of receiving is of interest. The old "appeal of larceny" was the early ordinary method of recovering stolen goods in another's possession, and this ancient procedure was not yet obsolete in the thirteenth century.[4] It lay against anyone, even though not the thief or wrongful taker,[5] who might be in possession of stolen goods not retain on immediate pursuit. Consequently, the "appeal" could be successfully waged without proof of any mental element on the part of the appellee; and, the English *actio furti*, closely linked to the appeal for larceny, "can be effectually used against one who is not thief, but an honest man."[6] Bracton, however, defining larceny, borrows from the Roman law the definition of the ancient *actio furti*, and makes much of the mental element, the *animus furandi*. "Theft", he says, "is according to the law the fraudulent taking of another's property with an *animus furandi* against the will of the owner. I say with intent, because without an *animus furandi* the crime is not committed."[7] History.

8.137. Thus, *animus furandi* is the appropriate *means rea* for the thief. For the receiver, the knowledge that it is stolen property is the requisite *mens rea*.

8.138. It should be noted that the case quoted in illustration (a) represents a rule which was previously applied in an earlier case in England;[8] but, later, the evidence of possession of the other goods, stolen at other times from different people, whether found in the possession of the accused at or before the finding

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[1](1887) I.L.R 14 Cal. 721, 729 (F.B.).

[2]See section 54 before 1891.

[3]Section 27(3), Theft Act, 1968, replacing section 43(1), Larceny Act, 1916.

[4]Sayre, "Mens Rea" (1931-1932) 45 Harv. L. Rev. 974, 987.

[5]Pollock and Maitland, H.E.L. Vol. 2, p. 161-62. See the interesting case of *Moor* v. *Piggun*, *Selden* Society, Select Pleas of the Crown No. 192.

[6]Pollock and Maitland, op. cit. supra note 6 at 162.

[7]Bracton, De Legibus 150 b. The definition of furtum is taken from Institutes 4, 1, 1. See 2 Pollock and Maitland, op. cit. supra note 6, at 498, No. 4; 3 Holdsworth, op. cit. supra note 6, at 360, No. 5.

[8]R. v. *Blessdale*, (1848) (2 C & K 765).

of the property in question, was regarded as inadmissible.[1] The reasoning for over-ruling the earlier decisions, was that possession of stolen property merely went to show that the accused was a bad person, and not that he had received the stolen property on a particular date with guilty knowledge. This position had to be altered by a statute.[2]

Illustration (b).

8.139. *Illustration (b) to section 14* renders admissible a previous conviction of delivering, to another person as genuine, a counterfeit coin known to be counterfeit, in a later prosecution for similar fraudulent delivery of a counterfeit coin. It also renders admissible against the accused his possession of a number of pieces of counterfeit coins.

In either case, the evidence is admissible to prove guilty knowledge. The assumption is that delivery of a counterfeit coin is likely to have resulted in a questioning of the counterfeit article by the person to whom it was presented, and thus drawn the attention of the accused to its suspicious nature. In *Rex* v. *Whitley*,[3] Lord Ellenborough, Chief Justice, explained that if the previous utterings of the counterfeit coin are, in point of time, more detached, they will bear "the less relation" to the particular uttering stated in the indictment, but this would not render the evidence (about the previous utterances) inadmissible.

Illustration (c).

8.140. *Illustration* (c) to the section relates to the case of a suit by **A** against B for damage done by a dog of B, which B knew to be ferocious. The illustration assumes the substantive rule of law,[4] that where animals, such as dogs—belong to a species which is ordinarily harmless, liability for harm caused by the animal does not generally arise until the defendant knew, or had reason to know of, the dangerous propensity of the particular animal in question.

8.141. Illustration (d) is adapted from an English case.[5]

8.142. Illustration (e) reminds one of another English case,[6] where libellous hand bills were carried backward and forward before the plaintiff's house, and it was held that the mode of publication was relevant to show the intent of the defendant.

8.143. Illustration (f) to section 14 is appropriate, because the gist of action in such cases is fraud, and where there is *bona fides*, there can be no fraudulent intention. The illustration is based on an English case,[7] where Cockburn, C. J., pointed out that it was important to ascertain the state of mind of the defendant when he made the representation complained of; and that the state of mind could be shown only by inference. Just as the plaintiff could prove certain facts necessarily leading to an inference of falsehood—for example, calling every tradesman in the town to say that the person in question was insolvent—similarly, it would be proper if, after the plaintiff had established a *prima facie* case, the defendant calls a number of tradesmen to say that the person in question was believed by them to be perfectly solvent.

8.144. Illustration (g) is also an actual case.[8] Normally, such evidence would be of no consequence in a suit for the price of work which is essentially based on contract, inasmuch as the absence or presence of "good faith", referred to in the illustration, is ordinarily irrelevant in case of contract. However,

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[1] *R.* v. *Oddy*, (1851) 5 Cox Criminal Cases 210.

[2] Section 43, Larceny Act, 1916, now Theft Act, 1968, section 27(3).

[3] *Rex* v. *Whitley*, 2 Leach Criminal cases 983, cited in *Queen* v. *Vajeram*, I.L.R. 16 Bombay 414, 431.

[4] *May* v. *Burdett*, 9 Q.B. 212.

[5] *Gibson* v. *Hunter*, 2 H.B.L. 288.

[6] *Bond* v. *Douglas*, 7 C. & P. 626.

[7] *Sheen* v. *Bompstad*, 2 H. & C. 193.

[8] *Cowish* v. *Chartier*, 1 Con B. 13, referred to by Woodrolfe.

it appears that in the actual case which we have mentioned, a considerable body of evidence had been given by the plaintiff to show that C interferred in the matter as the agent of the defendant, and it was necessary to rebut this evidence by showing the good faith of the defendant. In an action for goods sold and delivered, a general defence is that the defendant is liable to pay for the goods to another person, and since the jury might come to the conclusion that the defendant wants to keep the goods without paying for them, it becomes material for the defendant to show the *bona fides* of his defence, by proving payment to such third person.

Illustration (h).

8.145. Illustration (h) is similar to an English case.[1]

Mental element in theft.

8.146. It may be noted that both under the Indian Penal Code — definition of theft — and in English Criminal law, dishonest intention is required. In the English common law offence of larceny, both the act and the intent must concur. At common law, larceny was the taking and removing, *by trespass*, of personal property which the trespasser knew to belong either generally or specially to another person, with the felonious intent of depriving the other person of his ownership therein.[2]

8.147. Since the act of trespass and the intent to steal are both required, the offence is not committed if there is no dishonesty. In the Indian Penal Code, this requirement is expressed in terms of "dishonesty", which is defined—so far as is relevant—as the intention to cause wrongful gain or wrongful loss. In England, as early as 1849, the specific situation which is referred to in the illustration was dealt with in these words by Parke B.[3]

> "If a man finds goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them, with intent to take the entire dominion over them, really believing, when he takes them, that the owner cannot be found, it is not larceny; but if he takes them, with the like intent, though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny."

Illustration (h) and abandoned property.

8.148. In this connection, it may be noted that though, in general, things which are abandoned are not capable of being stolen, yet sometimes there may be special situations whereby even in property abandoned some person may have a special property.

8.149. In *Hibbert* v. *McKiernan*,[4] the Divisional Court held that a golf club, which intended to exclude the general public from its land, had a special property in golf balls lying on the course after being lost and abandoned by their original owners; that the property was sufficient to support an indictment for larceny against a trespasser who picked up the balls *animo furandi*; and that it was immaterial that at any given moment the officials of the club did not know the exact number or position of the abandoned balls lying on the course.

Recommendation to amend illustration (h).

8.150. Illustration (h), where it says that the fact *that public notice* of the loss of the property had been given in the place where A was, is relevant, assumes that some evidence would be given to show that the notice was within the knowledge of A, the accused.[5] It would, therefore, be desirable to add

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[1] *R.* v. *Thurborn*, (1849) 1 Den. 387.

[2] Bishop, Criminal Law (1923), page 412, para. 566.

[3] *R.* v. *Thurborn*, (1849) 1 Den. 387; approved by the Court of Criminal Appeal in *R.* v. *Mortiner*, 1 Cr. App. R. 20.

[4] *Hibbert* v. *McKiernan*, (1948) 2 K.B. 142, (1948) 1 A.E.R. 860.

[5] Compare Stephen's Digest, article 11, illustration (j).

the words *"and in such a manner that A knew or probably might have known of it"*, after the words "in the place where A was" in illustration (h). We recommend accordingly.

Illustration (i).

8.151. Illustration (i) is based on the English case of *R.* v. *Voke.*[1] It is different from illustration (c), which is a case of murder outright, while illustration (*i*) is a case of shooting with intent to kill. Of course, so far as section 14 is concerned, the facts made admissible are admissible only to show the existence of the particular state of mind. This is clear from the last 17 words of the section.

8.152. In *R.* v. *Voke*[2] previous attempts at shooting were given in evidence to rebut the theory of accidental killing.

Illustration (j).

8.153. Illustration (j) to the section is taken from the case of *R.* v. *Robinson.*[3]

The remaining illustrations need no comments

No change needed except in illustration (h).

8.154. The above discussion does not show any need for amendment of section 14, except in illustration (h) to the extent indicated above.

Section 15. Introductory.

8.155. According to section 15, when there is a question whether an act was accidental or intentional, or done with a particular knowledge or intention, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant.

There are three illustrations to the section.

In illustration (a), A is accused of burning down his house in order to obtain money for which it is insured.

The facts that A lived in several houses successively, each of which he insured, in each of which a fire occurred, and after each of which fires A received payment from a different insurance office, are relevant as tending to show that the fires were not accidental.

In illustration (b), A is employed to receive money from the debtors of B. It is A's duty to make entries in a book showing the amounts received by him. He makes an entry showing that on a particular occasion he received less than that he really did receive.

The question is, whether this false entry was accidental or intentional.

The facts that other entries made by A in the same book are false, and that the false entry, is in each case in favour of A, are relevant.

In illustration (c), A is accused of fraudulently delivering to B a counterfeit rupee.

The question is, whether the delivery of the rupee was accidental.

The facts that, soon before or soon after the delivery to B, A delivered counterfeit rupees to C, D and E are relevant, as showing that the delivery to B was not accidental.

General rule why qualified.

8.156. In general, it is not permissible to give evidence of similar occurrences with which a party is concerned, because that would protract the proceedings without much corresponding benefit.

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[1] *R.* v. *Voke,* (1823) Rus and Ry. 531.

[2] *R.* v. *Voke,* (1823) Rus and Ry. 53.

[3] *R. v. Robinson,* 2 East Pleas of the Crown.

It has been aptly stated[1]—"Although some people intentionally err and others systematically err, there are yet others who never make the same mistake twice, and it is a wise principle of our jurisprudence which provides that a person shall not be condemned on account of his previous mistakes. Thus, in *Hollinghan's case*,[2] Willes J. observed: "I do not see how the fact that a man has once or more in his life acted in a particular way makes it probable that he so acted on a given occasion". In another civil case,[3] which was an appeal from a County Court, the Divisional Court delivered a reserved judgment on a point which Swift J. characterised as of "great importance", as it constantly arose in actions for damages in personal injuries sustained in street collisions. In the County Court, the plaintiff had succeeded in obtaining damages for negligent driving by the defendant of a motor bicycle which had ran on to the pavement and struck the plaintiff. In cross-examination, the counsel for the plaintiff asked the defendent whether he had, at about the same time, another accident in the same street, whether the results were fatal and whether he had told the jury at the inquest that exonerated him that he had had this accident. The answer to the first two questions was "yes", and to the third question the answer was "no". On appeal, the defendant contended that these questions ought not to have been asked, that they were irrelevant to the issues and that they were unfair and prejudicial to the defendant. The Divisional Court held that where a defendant was charged with negligence in a particular case, it was not competent to ask him a question to obtain an answer which would show that he had been negligent on some other occasion. In this case, however, the questions were directed towards the defendant's credibility and his general skill as a driver and were relevant to that extent. The appeal was dismissed.

To the general rule referred to above, section 15 constitutes a qualification, for the limited purpose provided in the section.

8.157. In Stephen's Digest,[4] in the general rule corresponding to section 14, there is added a clarification as follows:— "But such acts or words may not be proved merely in order to show that the person so acting or speaking was likely on the occasion in question to act in a similar manner." Some such limitation is to be read in section 15 also, although it is not expressed. This is because the section has a limited application.

The restriction is of the utmost importance. Two English cases in the Court of Criminal Appeal show its importance.

In *R.* v. *Dunnico*,[5] the appellant was sentenced, at the Lanchshire Quarter Sessions, to three years' penal servitude, for obtaining money by false pretences. The false pretences alleged were untrue statements to the effect that he had been sent to interview the defrauded man about an advertisement, and that he was carrying on a genuine business. Two other counts of the indictment alleging similar false pretences, were abandoned, but the evidence of four witnesses as to those *charges* was admitted "to show system". The Court of Criminal Appeal regarded this as wrongly admitted, saying, in effect, that one could not drag in evidence as to other charges by alleging them as part of a system.

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[1]Note in (1932) Solicitor's Journal, extracted in note, "Evidence of previous conduct" (1932) 34 Bombay Law Reporter (Journal) 98, 99.

[2]*Hollingham* v. *Head*, C. B. New Series 388.

[3]*James* v. *Audigier*, 76 Solicitor's Journal 528.

[4]Stephen's Digest, Article 11, last paragraph.

[5]*R.* v. *Dunnico*, (1931) 23 Cr. App. Rep. 77.

The statements alleged to have been made in the case being tried were either made or not made; they were either true or untrue. Their making and their untruth could be proved or not proved, entirely without recourse to other occasions. The repetition of a statement neither makes it true or false. It is the old fallacy that nought plus nought can, in some circumstances, amount to more than zero. A system of noughts, a series of noughts to infinity, is still nothing. This self-evident truth received amusing illustration in the bastardy case of *Thomas* v. *Jones*,[1] where a number of facts,—no one of which by itself amounted to corroboration, was wrongly considered to amount to corroboration. "Zero plus zero cannot produce a plus quantity," said Lord Hewart, re-affirming the truism which had been lost sight of.

8.158. The other case as to similar facts was *R.* v. *Tidmarsh*.[2] In that case, a man was charged with house breaking on one date. On a later date, he was arrested under the wide provision of the Vagrancy Act, under which, as re-inforced by the decision in *Hartley* v. *Ellnor*,[3] suspicion in a police officer's mind justifies arrest.

The evidence of this suspicious loitering was admitted on the trial for house-breaking *on the earlier date*, on the ground that, "it becomes evidence because it is evidence of system, showing what he was doing". This was held to be a mis-direction by the court of criminal appeal which quashed the conviction. "This evidence and this direction to the jury tended to show that this was the kind of man who would commit this particular crime of house-breaking. That was a misdirection which vitiates this conviction."

Why departure justified.

8.159. This rule is, however, properly qualified, where the question is whether an act was *accidental* or *intentional*, or whether *an act was done* with a particular knowledge or intention. That the act formed part of a series of similar occurrences in each of which the person doing the act was concerned, is relevant, because the assumption is that if there is a repetition of similar occurrences, the theory of accident would be rebutted.

In *Makin* v. *Attorney-General for New South Wales*,[4] Lord Herschell, L. C. delivering the judgment of the Board, laid down two principles which must be observed in a case of this character. Of these, the first was that:

> "It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried."

8.160. In 1934, this principle was, by Lord Sankey, Lord Chancellor, with the concurrence of all the noble and learned Lords who sat with him, said to be 'one of the most deeply rooted and jealously guarded principles of our criminal law' and to be 'fundamental in the law of evidence as conceived in this country'.[5]

8.161. The second principle stated in *Makin's case*[6] was that—

> "the mere fact that the evidence adduced tends to show the commission of other crimes does not render it unadmissible if it be relevant to

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[1] *Thomas* v. *Jones*, (1921) 1 K. B. 22.
[2] *R.* v. *Tidmarsh*, (1931) 23 Cr. App. Rep. 79.
[3] *Hartley* v. *Ellnor*, (1917) 86 L.J.K. B. 938.
[4] *Makin* v. *Attorney-General for New South Wales*, (1894) A.C. 57, 65.
[5] *Maxwell* v. *The Director of Public Prosecutions*, (1935) A.C. 309, 317, 320.
[6] *Makin's case*, (1894) A.C. 57 (*supra*).

an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

8.162. Similarly, the evidence that the accused had been connected with similar cases as the one under charge, is admissible on the *question of knowledge* and intention.[1]

8.163. Evidence of similar facts may have probative value. Nevertheless, the policy of the law is that in general all evidence tending to show a disposition towards a particular crime must be excluded, unless a specific justification is available—in the present case, the justification is that it tends to rebut a defence otherwise open to the person charged. Similar facts.

It may be noted that in the case of *Brides in the Bath*, the prisoner Smith raised the defence that his wife had died in a fit—these were the words used in the telegram to the uncle after the death, and the prisoner even quoted the doctor as saying that his wife had fit in the bath. However, it so happened that some person who read in the newspapers about the circumstances of her death had noted the similarity between this death and another death, and informed the police about it. This put the police on the track. The theory of natural death was disproved, because, if the girl had died a natural death in the bath, she would have dropped the soap. As it was, she was killed suddenly, her hand had immediately stiffened and she held on to the soap which she was using. This point was used by Dr. Spilsbury to show that the death was not accidental. The similarity of this incident and other incidents in which the accused was involved, also rebutted the theory of accidental death.

8.164. It may be stated that not only the mode of committing the murder, but also the defences advanced by the accused, or rather the false defences advanced, were similar. He would pretend that at the time of the death, he was out for purchasing fish or tomatoes or eggs. The landlady would tell the woman that the bath was ready. Then she would hear someone go upstairs, and the sound of splashing in the bath-room, the noise of someone putting hands against the side of the bath and the long-drawn sigh would be heard.

8.165. The evidence of similar facts is not admissible where its only effect is to show that a person is of general bad character or good character and therefore likely to have behaved in the way alleged. But such evidence is admissible to show his intention or knowledge, and the fact that it incidentally reveals good or bad character does not make it inadmissible. That is the general principle on which section 15 is based.

8.166. Section 15 is a specific application of the principle of section 14. Compared with section 14, section 15 has, however, a narrower application. In the first place, while any state of mind brings section 14 into operation (apart from a state of body or bodily feeling), section 15 is confined to the specified states of mind. Secondly, any kind of evidence can become relevant under section 14, subject, of course, to the other requirements of section while section 15 concentrates on evidence of similar facts. The similarity makes the probability of an innocent explanation so remote that the law provides that the evidence ought to be received. Comparison between sections 14 and 15.

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[1] *Emperor* v. *Harjivan Valji*, A.I.R. 1926 Bom. 231, 234.

Similar facts.

8.167. Similar facts or acts may have been committed before[1] or after the offence[2] charged. But they must be similar transactions which do not merely tend to show a general criminal disposition, but show an intention which is relevant in the particular case.

Two situations covered by section 15.

8.168. It should be pointed out that there are two kinds of cases which fall within section 15. In the first place, the section may come into operation where the question is whether an act was *accidental or intentional.* In the second place, the section may come into operation where the question is whether an act was done with a *particular intention or knowledge.* In the first case, the defence that is taken by the person charged would be that there was no intention at all, while, in the second case, the defence would be that *a particular intention or knowledge* was absent. The basis of admissibility of the evidence on the issue of accident is the improbability of the coincidence of many identical or similar accidents. As was observed in *R.* v. *Sims*,[3] "a series of acts with the same characteristics is unlikely to be produced by accident or inadvertance". In the second case, on the other hand, the relevance of the evidence in question on the issue of a particular intention or knowledge is to show not only the existence of a state of mind in the abstract, but also the existence of a *particular state of mind.*

Same transaction not necessary

8.169. The words of the section, as well as the language of *illustration* (a), show that it is not necessary that all the acts should form parts of one transaction. But it is necessary that such acts should form parts of a series of similar occurrences, and also—as the opening words require—that "there is a question whether an act was accidental or intentional or done with a particular knowledge or intention."[4]

This section, as already stated, is an application of a rule laid down in section 14 to a particular set of circumstances. It will always be a matter of decision of the Court whether there is a sufficient and reasonable connection between the fact to be proved and the evidentiary fact. If there is no common link, they cannot form a series[5] as observed by Norton.

Illustrations.

8.170. The illustrations to the section are important. Illustration (a) is founded on an English case.[6] The authority of this case, is doubted by Stephen,[7] but the principle of the illustration seems to have been approved in a Bombay case,[8] and in a Calcutta case.[9]

In Queen-Empress v. *Vajiram*,[10] Telang J., observed,

> "And, further, I may point out that in India we have what may be called a legislative approval of the decision of Willes, J., for illustration (a) to section 15 of the Evidence Act is really a statement of the case of *Reg.* v. *Gray*.".[11]

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[1](a) *R. v. Mason,* (1914) 10 Criminal Appeal Reports 169;
(b) *R.* v. *Armstrong,* (1922) 2 King's Bench 555.
[2]*Cf. the Brides in the Bath case.*
[3]*R.* v. *Sims,* (1946) K.B. 531, 537.
[4]See—
(a) Stephen, Digest, Article 12 ; and
(b) *S.* v. *Debendra,* (1909) I.L.R. 36 Cal. 573 (P. C.).
[5]Norton, Evidence, 140, cited in Woodroffe.
[6]*R.* v. *Grey* 4 F & F. 1102 (see *infra*).
[7]Stephen, Digest, Article 12, Note.
[8]*R.* v. *Vajiram,* I.L.R. 16 Bom. 433 (see *infra*).
[9]*R.* v. *Devendra,* (1909) I.L.R. 36 Cal. 573.
[10]*R.* v. *Vajiram,* I.L.R. 16 Bom. 414.
[11]*Reg.* v. *Gray,* 4 F & F 1102.

8.171. Illustration (b) to section 15 is, in principle, identical with the English case of *Reg.* v. *Richardson*[1] the only difference being that the English case was one of swelling debits, and the illustration is a case of reducing credits.[3] It is well established[2] that the gist of the section is that, unless there is a sufficient and reasonable connection between the fact to be proved and the evidentiary fact, that is, unless, there is in substance some common link, they cannot form a series.[4]

Illustration (c) is comparable to section 14, illustration (b). The presumption in both the cases is the same. In section 14, the illustration refers to possession, while, in section 15, the illustration refers to delivery.

Caution to be exercised.

8.172. In general, it may be stated that the caution to be exercised in applying section 14 should also be exercised in applying section 15. It is only when there is a question whether the act (now under consideration) was accidental or intentional, or done with a particular knowledge or intention, that the section applies. In particular, what is relevant under section 15—the fact that an act formed part of a series of such occurrences in each of which the person doing the act was concerned—is so relevant only to show that the act now under consideration was not accidental but intentional, or that it was done with a particular knowledge or intention. While discussing section 14,[5] we have pointed out that the application of that section is dependent on an important condition, and also that the use of that section is subject to a restriction. The same comments apply in relation to section 15 also.

Difficulty of applying.

8.173. The section is, therefore, not an easy one to apply. The difficulty of applying the section is illustrated by a Calcutta case,[6] where, on a charge involving thefts from rich prostitutes, certain facts were sought to be given to establish that A and B had, in several instances, taken part in thefts from rich prostitutes in a series of incidents from 1914 to 1918, and that they had lived together and had transactions together, that a system had been followed by them and that they used to go about together under different names and had associated together with the evil motive of committing such thefts. By a majority judgment, the evidence was held to be inadmissible under section 14 or under section 15, there being no question involved of a criminal object.

8.174. With this case, we may contrast a Bombay case.[7] The accused was a shopkeeper at Bhiwani, and used to get goods by lorries from Bombay through the limits of the Kalyan Municipality. The lorry-driver, instead of paying octroi duty on the goods at Kalyan, rapidly drove past at the octroi post of the Kalyan Municipality. The accused was prosecuted under section 77(2) of the Bombay District Municipal Act, 1901, for introducing the goods within the octroi limits without paying the octroi dues, in three instances in August and September, 1923. The accused was convicted and was sentenced to pay a fine of Rs. 15 or, in default, to undergo simple imprisonment for 7 days, by the trial court. The trial court admitted, as evidence, the similar complaints which were made against the accused in the year 1921.

The matter came up before the High Court, on a reference by the Sessions Judge for quashing the conviction of the accused. One of the points for consideration before the High Court related to the admission of evidence

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[1]*Reg.* v. *Richardson*, 2 F & F 343.

[2]*Q.E.* v. *Vajiram*, I.L.R. 16 Bom. 414, 433 (par Telang, J.).

[3]*Emperor* v. *Panchu Das*, A.I.R. 1920 Cal. 500; Stephen Digest, Article 12, page 20.

[4]*Emp.* v. *Panchu Das*, A.I.R. 1920 Cal. 500.

[5]See discussion as to section 14, *supra*.

[6]*R.* v. *Panchu*, (1920) I.L.R. 47 Cal. 671.

[7]*Emperor* v. *Harjivan Valji*, A.I.R. 1926 Bom. 231.

of similar complaints of the year 1921. The High Court held that this was admissible *to prove the intention of the accused*, under sections **14 and 15.** Reliance was placed on the summary of law, given in two cases[1-2] of the Calcutta High Court, in the following words:-

> "In general, whenever it is necessary to rebut, even by anticipation, the defence of accident, mistake, or other innocent condition of mind, evidence that the defendant has been concerned in a systematic course of conduct of the same specific kind as that in question, may be given."

The conviction of the accused was upheld by the High Court.

Acts of same kind necessary.

8.175. To admit evidence under this head, however, the other acts tendered must be of the same specific kind as that in question, and not of a different character, and the acts tendered must also have been proximate in point of time to that in question.[3]

In *Noor Mohomed* v. *The King*,[4] the accused was tried before the Court of British Guiana, on a charge of murdering a woman commonly known as Ayesha, by poisoning her. Evidence was admitted to show that the accused had earlier murdered another woman—his wife, Gosiah—in similar circumstances. It was held that the admission of such evidence was not justified, there being no issue as to whether the act was intentional or accidental.

No change needed.

8.176. The above discussion is intended to elucidate various aspects of the section. However, no change in the law is recommended.

Section 16.—Introductory.

8.177. Section 16 provides that when there is a question whether a particular act was done, the existence of any recourse of business according to which it naturally would have been done is a relevant fact. Illustration (a) to the section relates to the case where a particular letter was despatched, and provides that the fact that it was the ordinary course of business for all letters put in a certain place to be sent by post, and that that particular letter was put in that place, would be relevant. This corresponds to one of the English cases.[5-6] It may also be noted that the Evidence Act, 2 of 1855, sections 50 and 51, to some extent dealt with this situation.

Illustrations

8.178. While illustration (a), mentioned above, mainly deals with private business (though it is not so confined,—illustration (b) is mainly relevant for public business. That illustration provides that where the question is whether a particular letter reached A, the fact that it was posted in due course and was not returned through the dead letter office, is relevant. This illustration may be compared with an English case[7-8] *Warren* v. *Warren*, where Parke B. observed,—

> "If a letter is sent by post, it is *prima facie* proof until the contrary be proved that the party to whom it is addressed received it in due course."[8]

Cognate provisions of the Act.

8.179. The matter dealt with by section 16 is usually dealt with in English text-books under the subject of "presumptions". In this connection, we may refer to the observations of the Privy Council in a case decided before

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[1] *Amrita Lal Hazara* v. *Emperor*, (1915) I.L.R. 42 Cal. 957.
[2] *Emperor* v. *Panchu Das*, (1920) I.L.R. 47 Cal. 671.
[3] *Amrit Lal Hazara* v. *Emperor*, A.I.R. 1916 Cal. 188, 202; I.L.R. 42 Cal. 957.
[4] *Noor Mohomed* v. *The King*, A.I.R. 1949 P.C. 161, 164, para. 17.
[5] *Hetherington* v. *Kemp*, (1815) 4 Camp 193; 16 E.R. 773.
[6] See *Ningawa* v. *Bharamanna*, (1897) I.L.R. 23 Bom. 63, 65.
[7] *Warren* v. *Warren*, (1834) 1 C. M. & R. 250.
[8] See also *British American Telegraph Co.* v. *Colson*, (1871) L.R. 6 Exch. 108.

the Evidence Act,[1] to the effect that "it is reasonable to presume that that which was the ordinary course was pursued in this case."

Reference may also be made to section 32, second clause, where the expression "ordinary course of business" is used, and to section 114, illustration (f), under which the Court may presume that the common course of business has been followed in particular cases. Similar expressions occur in sections 34 and 48. The distinction between section 16 and section 114, illustration (f), is that the former makes the course of business relevant,[2] and the latter then empowers the Court to draw a presumption that the course of business was followed *in the particular case*.

Postal business.

8.180. Of course, illustration (b) to section 16 does not deal with the question of the time when the letter may be presumed to have reached the addressee. Stephen, in his Digest,[3] has a specific illustration on this point—"A letter is presumed to have arrived at its destination at the time at which it would be delivered in the ordinary course of postal business."[4]

8.181. Nor does the section deal with any presumption as to post-marks on letters as furnishing *prima facie* evidence that letters were in post at the time and place therein specified.[5] As to such matters, the Court is free to draw a suitable presumption, having regard to the facts of each case, under the general provisions in section 114.

Other statutory provisions — section 27, General Clauses Act (Post).

8.182. Besides the Evidence Act, there are other statutory provisions relevant to the subject of "course of business" in relation to post. There is, for example, a rule of construction in section 27 of the General Clauses Act, 1897. It relates to service by post, and consists of two limbs, dealing, respectively with (i) the mode of service, and (ii) the time of service. Under the first part of the section, for the purposes of an Act authorising or requiring a document to be served by post, *service* shall be deemed *to be effected* by properly addressing, pre-paying and posting *by registered post* a letter containing the document. This deeming provision, of course, applies unless a different intention appears from the Act under construction. At present, there is *no express saving for cases* where the contrary is proved; an amendment in this regard has been recommended by us in our Report on this Act.[6]

8.183. Although the presumption under section 27, General Clauses Act, can arise only when the notice is sent *by registered post*,[7] there may arise a presumption under section 114, Evidence Act, when notice is sent by ordinary post. But the presumption to be drawn under section 114 is not mandatory.

8.184. Under the second part of section 27—General Clauses Act, 1897, the service shall be deemed to have been effected *at the time* at which the letter would be delivered in the ordinary course of post. This deeming provision applies, *unless the contrary is proved*, and unless a different intention appears from the context.

Section 106—Transfer of Property Act.

8.185. Reference should also be made to section 106 of the Transfer of Property Act, 1882. Under that section, the lessor can determine the lease by a notice to quit, and one of the modes of service of such notice is sending

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[1] *Dwarka* v. *Jankee*, (1855) 6 M.I.A. 90 (P. C.).

[2] *Cf. Mobarak Ali* v. *State of Maharashtra*, A.I.R. 1957 S. C. 8.

[3] Stephen's Digest, Article 13, illustration (a).

[4] Compare *Stocken* v. *Collin*, (1841) 7 M. & W. 515.

[5] Compare *Stocken* v. *Collin*, (1841) 7 M. & W. 515.

[6] See 60th Report (General Clauses Act), para. 16, & cl. 3 *ante*.

[7] Contrast: section 26, Interpretation Act, 1889 (Eng.).

it by post to the party intended to be bound by it. There are similar provisions in certain other Central Acts.

Illustrations of various presumptions under section 114, concerning post.

8.186. We have already referred to section 114. A number of presumptions can be drawn by virtue of this section. A few relevant matters concerning letters sent by post may be referred to, by way of illustrations:

(i) In a Calcutta case,[1] a notice was sent by a registered letter, the posting of which was proved, and which was produced in Court in the cover in which it was despatched. That cover contained the notice, with an endorsement upon it, purporting to be by an officer of the post office, stating the refusal by the defendant to receive the document served. It was held, having regard to two earlier cases[2] and also to section 16, illustration (b), that the notice was sufficiently served.

(ii) In England, the posting of a letter may be proved by showing that it was handed to, or left with, the clerk, whose duty it was in the ordinary course of business, to carry it to the post, and who, though he had no recollection of the particular letter, habitually and invariably took all the letters delivered to him to the post office.[3] The position would be substantially similar in India under section 114.

(iii) In England, the post-mark on a letter has been held to be *prima facie* evidence that the letter *was in the post* at the time and place therein specified.[4] The position in India would be the same under section 114.

(iv) The post-marks on letters are considered as evidence of the dates and places mentioned therein.[5]

Thus, on the question whether a letter was sent on a given day, the postal mark on it was held to be a relevant fact.[6]

(v) The possession by a person of a letter with the address torn off *prima facie* shows that it was addressed to him.[7]

No change needed.

8.187. The above discussion does not disclose any need for amendment of section 16.

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[1] *Jogendra Chunder Ghose* v. *Dwarka Nath Karmoker*, (1888) I.L.R. 15 Cal. 681, 683 (Pigot & Rampini, JJ.).

[2](a) *Papillon* v. *Bruton*, 5 H & N 518.

(b) *Lootf Ali*, 16 W. R. 223 (Cal.).

[3] *Skilback* v. *Garbett*, 14 L.J.Q.B. 338; 115 E.R. 706, discussed in *Bank of Bihar* v. *T. S. D. C. (Cal.) Ltd.*, A.I.R. 1960 Cal. 475, 476.

[4] *Fletcher* v. *Braddy*, 1, 3 Stark, R. 64.

[5] *R.* v. *Johnson*, 7 East, 65.

[6] *R.* v. *Cunning*, 198, Law Times, 370.

[7] *Curtis* v. *Richards*, 1 M. & G. 47.

CHAPTER 9

ADMISSIONS AND CONFESSIONS—SECTION 17

Introductory.

9.1. Sections 17 to 31, which we shall now proceed to consider, deal with admissions in general, and more elaborately with a particular species of admissions, namely, confessions. Although, in popular language, the expression "admission" is used to connote a statement against one's interests, that is not the meaning given to it in the Act. Nor is the expression, as defined, confined to civil cases.[1]

Definition.

9.2. An admission has been so defined as to cover, *inter alia*, any statement by a party, and it is not necessary that at the time when a statement was made, the statement was against the interests of the person making it.

Some fundamental points.

9.3. A few fundamental points may be noted at the outset. First, as already stated, admissions as dealt with in these provisions are not confined to civil cases. This is clear from the definition given in section 17, and also from the reported cases.[2-3]

Secondly, admissions by way of conduct are not dealt with, in the relevant sections, they having been already covered by section 8.

9.4. Thirdly, admissions constitute an exception to the rule against hearsay.

9.5. Juristically, therefore, the importance of sections 17 to 31 lies in their covering all kinds of proceedings, and in making *statements* by the parties and other specified persons relevant, thereby creating an exception to the rule against hearsay. At the same time, it is made clear[4] that admissions are not conclusive proof of the matters admitted; but they may operate as estoppel under the provisions hereinafter contained.

Principle.

9.6. The principle on which these sections are based is that what a person states, may be presumed to be true *as against himself*. The general rule, therefore, is that an admission can be given in evidence against the party making it,[5] and not against any other party.[6] In other words, they are admitted if tendered by the opponent. In this sense, they are adverse to the maker of the statement.

Justification.

9.7. Admissions are admissible even though, when made, they were not against the party's interests,[7] and even though the party did not have personal knowledge of the fact which he admits. Of course, he can show that he was mistaken—section 31. The justification for regarding them as relevant lies in this,—that a party cannot be heard to say that his own statements should have been subjected to the usual tests of truth,—oath and cross examination. This is the ground for departure from the general rule against hearsay.

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[1]Para. 9.18, *infra*.

[2](a) *Sahoo*, A.I.R. 1966 S. C. 46;
(b) *Bishen Das*, (1915) P.B. No. 106 of 1915 (Civil);
(c) *Azimuddin*, (1926) I.L.R. 54 Cal. 237.

[3]See *infra* para 9.18.

[4]Section 31.

[5]*In Re Whitely*, (1891) Law Reports 1 Ch. 558, 563, 564.

[6]*Stanton* v. *Percival*, 5 House of Lords Cases 273.

[7]*Falcon* v. *Famous Players Film Co.*, (1926) 2 K.B. 474, 489

Identity of Interest.

9.8. It may be noted that the rule permitting admissions to be given in evidence takes in statements not only of parties, but also of persons who have, what may be called, an "identity of interest" with a party. It is for this reason that admissions made by certain persons who share the identity of interest, are made relevant; the relationship creating such identity includes (a) agency;[1] (b) proprietary interest or pecuniary interest;[2] and (c) derivative interest.[3] On the other hand, where there is no identity of interest, the reason for admitting the statement disappears and, therefore, statements by strangers are not, in general, relevant.[4] The case is different where the strangers are persons to whom a reference is made by a party himself.[5]

9.9. The rationale of treating as relevant, admissions made by an agent is that if the principal constitutes the agent his representative in a certain transaction, then whatever the agent does in the lawful prosecution of the transaction, is the act of the principal.

9.10. American usage occasionally describes admissions made by agents as "authorised admissions", and admissions made by a person whose statement a party adopts are referred to as "adoptive admissions". In the scheme of the Act, these two are covered by sections 18 and 19, respectively.

Scheme of the sections.

9.11. The scheme of the sections is as follows. Every statement suggesting an inference as to a fact in issue or a relevant fact is, subject to certain qualifications, an admission by virtue of section 17, provided it is made by the parties or other persons specified, and under the circumstances specified, in sections 18 to 20. If a statement amounts to an admission by virtue of the provisions just now referred to, its relevancy is provided for by section 21—unless, of course, there are provisions excluding it from evidence either in the Act or in any other law. The Act itself furnishes examples of such exclusionary rules—in section 22 (oral admission as to contents of documents) which applies in all cases; in section 23, which, in civil cases, excludes an admission made on the express condition that evidence of it is not to be given; and in sections 24 to 26, which apply to confessions. The exclusionary rules in sections 24 to 26 are, however, themselves subject to certain qualifications, which are contained in sections 27 to 29. In section 30, there is a provision for "taking into consideration" the confession of a co-accused, in certain cases. Section 31 provides that admissions are not conclusive proof, but may operate as estoppels.

We may now consider each section in detail.

Section 17 analysed.

9.12. Section 17 defines an admission as "a statement, oral or documentary, which suggests any inference as to any fact in issue or a relevant fact, and which is made by any of the persons and under the circumstances, hereinafter mentioned".

9.13. Thus, this section lays down three requirements. It must be a statement; secondly, it must suggest any inference as to a fact in issue or a relevant fact; and thirdly, it must be made by the specified person and under the specified circumstances.

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[1]Sections 18 and 20.
[2]Section 18, clause (1).
[3]Section 18, clause (2).
[4]Stephen, Digest, Article 18.
[5]Section 19.

9.14. The first requirement presents no problems. The statement must be oral or documentary—so that admissions by conduct do not fall under this section, though they can become relevant under section 8 or other section applicable on the facts[1].

9.15. As regards the second requirement, it is enough if the statement suggests an inference as to a fact in issue or a relevant fact. The words referring to "suggesting an inference" are obviously intended to include statements which do not amount to a direct admission of a fact in issue or a relevant fact, but which suggest an inference about it. Of course, when one turns to confessions, the scope of "confession", in the scheme of the Act, is restricted. Stephen's definition of "confession" as an "admission made at any time by a person charged with crime *stating or suggesting the inference* that he committed the crime",[2] is not applicable to the Indian Evidence Act[3].

9.16. Thirdly, the statement must be made by the specified person and under the specified circumstances.

9.17. Apart from the cases specifically mentioned in section 17 read with sections 18 to 20, it may be noted that statements made by a person may bind others. One such example is furnished by section 10, under which declarations etc. of a co-conspirator, when made in reference to the common intention of the conspirators, are relevant against the co-conspirators.

Admission in criminal cases.

9.18. In the scheme of the Act, the expression "admission" is applicable to criminal cases also. In *Sahoo's case*[4], it was observed that statement is a genus, admission is the species and confession is the sub-specie. It was also observed that admissions and confessions are exceptions to the hearsay rule. In the same case, it was held that it was not necessary that a statement, in order that it may amount to an admission, should have been communicated. Words not addressed to others but uttered in soliloquy, or uttered in confidence, would be admissible against the person uttering them, if independently proved. The Supreme Court gave the following hypothetical illustration:—

> "A kills B; enters in his diary that he had killed him, puts it in his drawer and absconds. When he places his act on record, he does not communicate to another; indeed, he does not have any intention of communicating it to a third party. Even so, at the trial, the said statement of the accused can certainly be proved as a confession made by him. If that be so in the case of a statement in writing, there cannot be any difference in principle in the case of an oral statement."

Of course, with reference to oral statements put in the illustration given by the Supreme Court; independent proof will be required.

Admissions and confessions.

9.19. It may be noted that "confession" is narrower than "admission". Under the Act, acknowledgement of a subordinate fact, though incriminating, would not be a confession, though it would be an admission. Every confession is an admission, but every admission is not a confession.[5] This is obvious from the fact that sections 24 to 30 deliberately use the word "confession", as distinct from "admission". If the two were identical, there was no need to use the expression "confession"—an aspect which has been dealt with elaborately in one

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[1]See introduction, *supra*.
[2]Stephen, Digest, Article 22.
[3]*Pakala Narainaswamy* v. *Emperor*, A.I.R. 1939 Privy Council 47, 52.
[4]*Sahoo* v. *State of U.P.*, A.I.R. 1966 S.C. 40, 42, paragraph 5.
[5]*Neetai Chandra* v. *Emperor*, A.I.R. 1937 Cal. 433, 445.

of the earlier Punjab cases[1]. It is for this reason that there is no bar to the admissibility of an admission of any relevant fact made by an accused person to a police officer prior to the commencement of an investigation[2]. The statement may be admissible in evidence as an admission[3], if it is not hit by the excluding sections of the Evidence Act relating to confession, or by section 162 of the Code of Criminal Procedure[4].

9.20. Reference may also be made to a case[5] decided by the Privy Council, which related to a trial for murder.

9.21. The Ceylon Evidence Ordinance came up for construction in that case[6]. By section 25 of the Ceylon Evidence Ordinance: "No confession made to a police officer shall be proved as against a person accused of any offence".

9.22. By section 17: "(1) An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, . . . (2) A confession is an admission made at any time by a person accused of an offence stating or suggesting the inference that he committed that offence".

9.23. The Privy Council had to consider the question whether certain statements made by the accused to a police officer were admissions or confessions. Those statements narrated the relationship between the accused and the murdered woman; but they did not admit guilt as such. The Privy Council held that with reference to section 25, quoted above, the correct view was that taken by Acting Chief Justice Garvin in a Ceylon case[6] where he stated, after quoting section 17. "The term 'admission' is the genus of which 'confession' is the species. It is not every statement which suggests any inference as to any fact in issue or relevant fact which is a confession, but only a statement made by a person accused of an offence whereby he states that he committed that offence or which suggests not any inference but the inference that he committed that offence".

9.24. Any doubt in this regard would disappear if one bears in mind the fact that confessions become relevant only because they fall within sections 5, 17, and 21. Section 21 constitutes the provision, and the only provision, that makes admissions relevant. If that section is kept aside, there is no other section providing for the relevancy of confessions specifically.

No change recommended.

The above discussion does not disclose any need for amending the definition.

SECTION 18

Introductory

9.25. Section 17 having laid down that admissions must be made by the persons and under the circumstances "hereinafter mentioned", section 18 deals with the persons whose statements are to be regarded as admissions. The section consists of three paragraphs, of which the first is of general application and deals with parties and agents. The second paragraph introduces certain qualifications as regards parties to suits who are suing or have been sued in a representative character. The third paragraph deals with statements made by persons having a proprietary or pecuniary interest in the subject-matter of the proceedings or by persons from whom the parties to the suit have derived their interest in the subject-matter of the suit. Somehow, the various paragraphs do

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[1] *Illahi Bux* v. *Emperor*, (1886) Punjab Record No. 16, Crim. Pages 28—31.
[2] *Lachhuman* v. *State of Bihar*, A.I.R. 1964 Pat. 210, 212.
[3] *Harnam Kisha* v. *Emperor*, A.I.R. 1935 Bom. 26.
[4] *Akbal Sahu* v. *Emperor*, A.I.R. 1948 Pat. 62.
[5] *Anandagoda* v. *The Queen*, (1962) 1 W.L.R. 817, 821, 823 (P.C.).
[6] *The King* v. *Cooray*, (1926) 28 N.L.R. 74 (Ceylon).

not use identical language while describing the nature of the legal proceeding. The first paragraph speaks of "proceedings". The second paragraph speaks of "suits". In the third paragraph, sub-paragraph (1) speaks of the "proceeding", while sub-paragraph (2) speaks of "suit". We shall revert to this aspect later[1].

Amendment needed—Admissions.

9.26. The general principle of the section is sound enough. Statements made by a party are admissions, and so are statements of persons with identity of interest[2] in the subject-matter. But certain changes appear to be desirable in the section. The discussion that follows will indicate that the changes which we contemplate are partly of expression, partly of substance and partly of structure and arrangement. The changes of substance are needed so that the section may be brought into conformity with the correct principle—identity of continuance of interest.

Use of the expression "civil proceedings" recommended.

9.27. We may first refer to a verbal point of a general nature. Some paragraphs of the section use the expression "suit", while some employ the expression "proceeding", as already stated.[3] There is, in our view, no reason why the various paragraphs of this section which apply to "suits" should not apply to all civil proceedings. We, therefore, recommend that the expression "civil proceeding" should be used in those paragraphs which speak of "suits".

Changes of substance may now be dealt with.

Section 18, first paragraph.

9.28. The first paragraph of the section deals with admissions by parties and agents. No change is required in its substance. We propose to split it up into two, in accordance with the changes in structure to be indicated later[4].

Section 18, second paragraph.

9.29. The second paragraph relates to statements made by parties to suits "suing or sued" in a representative capacity. It provides that statements made by such parties are not admissions unless the statements were made while the parties making them held that character. No changes of substance are needed in this paragraph. We have already indicated[5] the need to substitute "civil proceedings" in place of "suits" in the section.

Section 18 — Second paragraph and suits in a representative character.

9.30. It may be stated that the legal concept of "suit in representative character" is wide enough to cover several situations—e.g. suits by trustee[6] Mutawalli, or executor. In this connection, Order 7, Rule 4 and Order 7, Rule 9 of the Code of Civil Procedure etc. may be seen, and also a Bombay case[7] and a Calcutta case[8]. These provisions and cases show the general understanding of the expression "suit in representative character". In our opinion, it is desirable, having regard to the illustrations of representative suits which have been mentioned above, to extend section 19, second paragraph to *civil proceedings other than suits* also. A trustee may, for example, have to file applications (and not merely suits). Such a situation should be covered.

Section 18, third paragraph, sub-paragraph (1).

9.31. The Third paragraph of section 18 consists of two sub-paragraphs. According to sub-paragraph (1), statements made by persons who have "*any* proprietary or pecuniary interest" in the subject-matter of the proceeding, and who make the statement in their character of persons so interested, are admissions.

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[1]Paragraph 9.27, *infra*.

[2]See introductory discussion before discussion as to section 17, *supra*.

[3]Para. 9.25, *supra*.

[4]Para. 9.43, *infra*.

[5]See para. 9.27, *supra*.

[6]Order 31, Rule 1, Code of Civil Procedure.

[7]*Gurushidappa* v. *Gurushidappa*, A.I.R. 1937 Bom. 238, 239, 240 (Rangnekar, J.).

[8]*Upendranath*, I.L.R. 42 Cal. 440 (Mookerji J.).

The application of this paragraph is usually illustrated by referring to 'joint contractors'. It is to be pointed out that this provision appears to be too loosely worded. In the first place, it covers persons who have *any proprietary or pecuniary interest*, though, really, it should have covered only persons having a joint interest. If two or more persons are jointly interested in the subject-matter, the admission of any one may be receivable against the other; but this does not mean that *any kind of interest* in the subject-matter, should entitle a person to make an admission that may bind any other person having a *different kind of interest*.

Principle.

9.32. The principle of this part of the section was thus stated in a Calcutta case,[1] where Garth C.J. observed:

> "The principle of the rule is that for the purpose of making these statements with reference to the joint concern or common subject of interest, one partner or co-contractor is considered to be the agent of the other."

Having so stated the reason of the Rule, Garth C.J. further observed:

> "and this rule, as I take it, is enacted, *though in a somewhat concise form*, in section 18 of the Indian Evidence Act."

9.33. The following discussion will show, how, in the process of a concise statement of the rule, some important requirements have been left to be inferred, and not expressed, in this paragraph of the section.

Joint interest.

9.34. We first take up the question of joint interest. In the Calcutta case already referred to, the following rule laid down by Taylor[2] was quoted:—

> "When several persons are jointly interested in the subject matter of the suit, the general rule is that the admissions of any one of those persons are receivable against himself and fellows, whether they be all jointly suing or sued, provided the admission relates to the subject-matter in dispute and be made by the declarent in his character of a person jointly interested with the party against whom the evidence is tendered."

Joint interest.

9.35. Thus, where two or more persons have a *joint*, as apposed to common[3] interest, an admission by one of them may be used against the other or others, provided it is made during the continuance of the joint interest. The principle of identity of interest is properly applied where there is a joint interest, but not where there is *any* interest[4].

Recommendation as to third paragraph first sub-paragraph.

9.36. The above discussion will show that besides the requirements mentioned in the section, it is, as a matter of principle, necessary that:—

(a) the person making the statement must have a *joint* interest in the subject-matter, and

(b) the statement must relate to the subject-matter[5].

9.37. In a subsequent Calcutta case[6] the rule was thus stated — "when several persons are jointly interested in the subject-matter of the suit, an admission of any one of these persons is receivable not only against himself but also

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[1] *Howsulliah* v. *Mukta*, (1885) I.L.R. 11 Cal. 588, 591.

[2] Taylor on Evidence, Vol. I, 1st edition, page 489, 525.

[3] *Dan* v. *Browne*, 4 Comen 483, 492.

[4] See para. 9.31, *supra*.

[5] *Jaggers* v. *Binnings*, (1815) 1 Stark 64.

[6] *Meajan Mathar* v. *Alimuddin Mis.* (1916) I.L.R. 44 Cal. 130, 143.

"against the other defendant, whether they be all jointly suing or sued, *provided that the admission relates to the subject-matter in dispute,* and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered."

Recommendations to amend section 18 third paragraph, sub-paragraph (1).

9.38. For the reasons stated above, we recommend that in the third paragraph, the first sub-paragraph should be revised *so as to introduce these requirements*, which are reasonable and have been judicially recognised.

Section 18, third paragraph, sub-paragraph (2).

9.39. The third paragraph, second sub-paragraph, which relates to privies, needs no change of substance.

Section 18, second paragraph.

9.40. We recommend a redraft of the second paragraph, so as to cover civil proceedings other than suits. As regards criminal proceedings, no change is needed.

Section 18, third paragraph.

9.41. In the third paragraph, in the first sub-paragraph the word "proceeding" may be retained.

9.42. The third paragraph, second sub-paragraph, will not cover criminal proceedings, while the third paragraph, sub-paragraph (1) would (as at present) extend to criminal cases also. We do not, as a matter of policy, wish to extend the third paragraph, second sub-paragraph, to criminal cases.

Structural changes needed in section 18.

9.43. Apart from the points of expression and points of substance discussed above, it is desirable that the structure of section 18 should be revised. In the first place, it would obviously be convenient if the paragraphs are numbered in the usual form.

9.44. Then, the first paragraph of the section mixes up parties and agents. These should be kept separate, for the sake of convenience and neatness.

9.45. The third paragraph of the section deals with two situations,—persons with (joint) interest, and privies. These two should be dealt with separately, since the two stand in categories different from each other.

Recommendation.

9.46. In the light of the above discussion, we recommend that section 18 should be revised as follows:—

"18. (1) Statements made by a party to the proceeding are admissions. **[Ex. section 18, first para. in part].**

(2) Statements made by an agent to a *party to the proceeding*, whom the court regards, under the circumstances of the case, as expressly or impliedly authorised by him to make them, are admissions. **[Ex. section 18, first para., in part].**

(3) Statements made by parties *to a civil proceeding*, where the *proceeding is instituted by or against* them in their representative character, are not admissions, unless they were made while the party making them held that character. **[Ex. section 18, second para. 6]**

(4) Statements made by persons who have a *joint* proprietary of pecuniary interest in the subject-matter of the proceeding are admissions, *provided the following conditions* are satisfied: **[Ex. section 18, third para., sub-para (1).]**

(a) such statements are made by such *persons* in their character of persons so interested, and during the continuance of the interest of the persons making the statements;

(b) such statements relate to the subject-matter of the proceeding.

[Ex. section 18, sub-para. (2).]

(5) Statements made by persons from whom the parties to the *civil proceeding* have derived their interest in the subject-matter of the proceeding are admissions, if they are made during the continuance of the interest of the persons making the statements."

SECTION 19

Section 19—Introductory.

9.47. Section 19 deals with statements made by persons whose position or liability it is necessary to prove as against any party *to the suit*. Statements made by such persons are admissions if such statements satisfy two conditions, namely,—(a) such statements should be relevant as against such persons in relation to such position or liability for a suit brought by or against them, and (b) such statements are made whilst a person making them occupies such position or is subject to such liability.

9.48. For understanding the section, it is necessary to refer to the illustration.

9.49. The illustration given by the legislature below the section says, in effect, that where a person who has undertaken to collect rents from a third person is sued for not collecting the rent due from the third person and takes the defence that no rent was due from the third person, a statement by the third person that he owed rent to the plaintiff in the suit is an admission, and is a relevant fact as against the person so sued if he denies that the third person did owe rent to the plaintiff. This is not the precise wording of the illustration; but we have put it in a language which will bring out the working of the section. The principal significance of the section lies in this, that a statement made by a *third person* becomes an admission, in the limited circumstances mentioned in the section.

Statements by strangers.

9.50. In general, statements by strangers are not relevant as against the parties.[1] To this general rule, an exception made, apparently for the reason that if the person whose position or liability is in dispute, though a stranger, has himself made an admission, his statement should be relevant. Of course, a very important condition is that,—as the section provides,—"such statements would be relevant *as against such persons* in relation to such position or liability in a suit brought by or against them." This requirement in the section implies that generally, statements made by the third person *in his favour* would not fall within the section.

Position in England.

9.51. It would appear that, in England, admissions of a bankrupt made before the act of bankruptcy are receivable in proof of the debt of the petitioning creditor, as against the trustee in bankruptcy.[2] The position would be the same in India under section 19. Similarly, in England, in an action against the Sheriff, for not executing a process against the debtor, statements of the debtor, admitting his debt to the executing creditor, are relevant, as against the Sheriff.[3] The position would be the same in India.

Verbal change recommended.

9.52. The above discussion does not reveal need for any change in the section, in its substance. But we are of the view that the section should apply to all "civil proceedings", and we, therefore, recommend that for the word "suit", the word "civil proceeding" should be substituted.

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[1] *Coole* v. *Braham*, (1848) 3 Exchequer 183.

[2] *Coole* v. *Braham*, (1848) 3 Exchequer 183.

[3] Stephen's Digest, article 18; *Kempland* v. *Macaulay*, Peake, 95, cited in Woodroffe.

SECTION 20

Introductory.

9.53. Under section 20, statements made by persons to whom a party to *the suit* has expressly referred for information in reference to a matter in dispute, are admissions. The illustration to the section puts the case where the question is whether a horse sold by A to B is sound. A says to B—"Go and ask C, C knows all about it". C's statement is an admission.

English law.

9.54. The position in this regard in England is, in substance, the same. Persons to whom one of the parties has asked another party to refer, are described in English text-books as "referees". Stephen[1] even says that admission by a person referred to by a party comes very near to the case of arbitration. Some of the earlier English cases even go to the length of saying that the admission of the referee would be conclusive; but opinion on the subject is not settled. In this respect, section 31 of the Indian Evidence Act is quite clear, and the admission is not conclusive as such, though it can operate as an estoppel. Of course, if the parties *agree* to be *bound* by any statement which a third person may make, on a reference, then the statements of such referees may be binding.[2-3] But this would be *by reason of contract*, and not by reason of the law of evidence, concerning stolen property, and the list in question was a list of stolen articles which the accused had bought. From certain later cases,[4-5] however, it would appear that the absence of the accused would not affect the admissibility of the statement of the referee in such cases.

9.55. Reverting to English cases which specifically deal with the admissions of a referee, we may mention an action against executors, where the defendants (executors) had written[6] to the plaintiff that if the plaintiff wished for further information as to the assets, it could be ascertained from a certain merchant. The reply of the merchant was held to be receivable against the executors.

9.56. The section is confined to suits. The principle may not be different in the case of criminal proceedings. The matter arose, but was not conclusively decided, in an English case.[7] The accused told a constable that his wife would make out a list of certain property. A list which was afterwards made out by the wife and handed over to the constable *in the presence of the accused* was held to be evidence against the accused, Coleridge C.J. however expressly refrained from giving an opinion upon the question if the position would have been different if the accused had been absent. This case related to a trial concerning stolen property, and the list in question was a list of stolen articles which the accused had brought. From certain later cases,[4-5] however, it would appear that the absence of the accused would not affect the admissibility of the statement of the referee in such cases.

Recommendation.

9.57. While occasions for applying section 20 in criminal cases are rare, it is proper that for the expression "suit", the expression "civil proceeding" should be substituted.[8] We recommend that the section should be so amended.

SECTION 21

Introduction.

9.58. Section 21 consists of two branches, namely, the positive branch and the negative branch. The positive deals with the persons against whom admissions are relevant and may be proved. It provides that admissions are relevant

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[1]Stephen's Digest, Article 19, note.

[2]See discussion in *Himaanchal* v. *Jatwar*, I.L.R. 46 Allahabad 710.

[3]See also discussion in *Akhari Begum* v. *Rahmat Hussain* A.I.R. 1933 All. 861, 880; (1933) Allahabad Law Journal 1127.

[4]*R.* v. *Gray* (1911) 6 Criminal Appeal Reports 242.

[5]*R.* v. *Campbell*, (1912) 8 Criminal Appeal Reports 75.

[6]*Williams* v. *Innes*, 1 Camp 364.

[7]*R.* v. *Mallory*, (1884), 15 Cox 458; 13 Q.B.D. 33.

[8]Compare recommendation as to section 19.

and may be proved as against the person who makes them or his representative in interest. The negative provides that admissions cannot be proved by or on behalf of the person who makes them or by his representative in interest, except in the specified cases.

The excepted cases are three in number. Of these, the first covers admissions made under special circumstances, where if the maker of the admission were dead, the case would fall within section 32. The special circumstances are supposed to be a guarantee of truth, so as to make the admission relevant. The second exception covers the case where the admission consists of a statement of the existence of any state of mind or body, and is accompanied by conduct rendering its falsehood improbable. What justifies this exception is the fact that *there is conduct*, and not merely a statement—and that conduct renders the falsehood improbable. The third exception covers cases where the admission is relevant *otherwise than as an admission*. This is only a formal exception.

Illustrations.

9.59. The following illustrations are appended to the section :

"(a) The question between A and B is, whether a certain deed is or is not forged. A affirms that it is genuine, B that it is forged.

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

(b) A, the captain of a ship, is tried for casting her away.

Evidence is given to show that the ship was taken out of her proper course.

A produces a book kept by him in the ordinary course of his business, showing observations alleged to have been taken by him from day to day, and indication that the ship was not taken out of her proper course. A may prove these statements, because they would be admissible between third parties, if he were dead, under section 32, clause (2).

(c) A is accused of a crime committed by him at Calcutta.

He produces a letter written by himself and dated at Lahore on that day, and bearing the Lahore post-mark of that day.

The statement in the date of the letter is admissible, because, if A were dead, it would be admissible under section 32, clause (2).

(d) A is accused of receiving stolen goods knowing them to be stolen.

He offers to prove that he refused to sell them below their value.

A may prove these statements, though they are admissions, because they are explanatory of conduct influenced by facts in issue.

(e) A is accused of fraudulently having in his possession counterfeit coin which he knew to be counterfeit.

He offers to prove that he asked a skillful person to examine the coin, as he doubted whether it was counterfeit or not, and that that person did examine it and told him it was genuine.

A may prove these facts for the reasons stated in the last preceding illustration".

Opening part in complete.

9.60. The opening portion of the section provides that "admissions are relevant and may be proved as against the person who makes them, or his representative in interest". This statement of the law is somewhat incomplete, inasmuch as, under the preceding sections, statements made by certain other

persons are also admissions, in certain situations. For example—(i) statements made by an agent to any party are admissions under section 18, 1st paragraph; (ii) statements made by persons having a joint interest are admissions under section 18, 3rd paragraph, sub-paragraph (1); (iii) statements made by persons whose position must be proved as against a party to the suit, are admissions under section 19; and (iv) statements made by a referee are admissions under section 20.

Recommendation as to opening part.

9.61. All these situations are left uncovered by the opening portion of section 21, because the words "the person who makes them or his representative-in-interest," if taken literally, would not (for example) cover the principal, or the person jointly interested (not the maker). This part of section 21 should, therefore, be revised in a suitable manner.

Recommendation to split up the section.

9.62. Incidentally, such revision could be more conveniently done, if the section is split up so as to deal, first, with the positive branch—when the use of admissions is permitted—and then with the negative branch—when their use is not permitted. Of course, the negative branch is subject to certain exceptions, which are contained in clauses (1), (2) and (3) of the existing section.

Recommended redraft of opening portion.

9.63. It would therefore be convenient if the opening words of section 21 are revised as follows:—

"21. (1) Admissions are relevant and may be proved against the *following persons, that is to say,*—

(a) the person who makes them, or his representative in interest;

(b) *in the case of an admission made by an agent where the case falls within section* 18, *first paragraph,*[1] *the principal of the agent;*

(c) *in the case of an admission made by a person having a joint proprietary or pecuniary interest in the subject-matter of the proceeding, where the case falls within section* 18, *third paragraph,*[2] *sub-paragraph* (1), *any other person having a joint proprietary or pecuniary interest in that subject-matter;*

(d) *in the case of an admission made by a person whose position or liability it is necessary to prove as against a party, where the case falls within section* 19, *that party;*

(e) *in the case of an admission made by a person to whom a party has expressly referred for information, where the case falls within section* 20, *the party who has so expressly referred for information*".

Recommended redraft of latter portion.

9.64. The latter portion of the section may be revised as follows:—

"(2) *Admissions* cannot be proved by or on behalf of the person who makes them or by his representative in interest, except in the following cases:—

(a) An admission may be proved by or on behalf of the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under section 32.

(b) An admission may be proved by or on behalf of the person making it, when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable.

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

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[1]If the paragraphs of section 18 are re-numbered as recommended, this should be altered.

[2]Reference to be altered if section 18, paragraph third is renumbered.

[3]Illustrations as at present.

SECTION 22

Introduction.

9.65. Under section 22, oral admissions as to the contents of a document are not relevant, unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such documents "under the rules hereinafter contained", or unless the genuineness of a document produced is in question.

General rule.

9.66. The general rule in the Act is that the contents of a written instrument, which is capable of being produced, must be proved by the instrument itself and not by parol evidence.[1] The substance of the section is, thus, in conformity with the other provisions of the Act, which lay down the general rule referred to above. Briefly speaking, these other provisions, so far as is material, require that the party must give notice to produce and must account for the absence of the original, in general.

Rule in England different.

9.67. In England, the rule laid down in *Slatterie* v. *Pooley*[2] is that admissions are receivable to prove the contents of documents *without notice to produce and without accounting for* the absence of the originals. The principle on which such evidence is received, in England, is that what a party himself admits to be true may reasonably be presumed to be so, and such evidence is not open to the same objection that applies to other parol evidence.

Reasons for departure from English law.

9.68. Thus, the corresponding exception in England, to the rule prohibiting the substitution of oral testimony for the document itself, is wider. The admissions being primary evidence against a party (and also against those claiming under him), are receivable to prove the contents of documents *without notice to produce*, or *without accounting for the absence of the originals.*[3]

9.69. However, recognising that such a wide attitude may lead to dangerous consequences, the section, departing from the English law, adopts only a modified rule, and oral admissions are not relevant until the general conditions for the admission of secondary evidence are satisfied.

9.70. The consequences which are liable to follow on the reception of such evidence without there being a case for secondary evidence, were pointed out in an Irish case,[4] where the English rule was criticised. Section 22 is based on the principle underlying this criticism. The section modifies the English law, inasmuch as the admissions in question are admissible *only if the conditions for secondary evidence exist.* In the Irish case,[5] Pennefather, C.J. observed while commenting on the case of *Slatterie* v. *Pooley*[6]—

> "Is there no danger of untruth or misrepresentation when used against the party making the admission? That is the ground put by Parke B. in *Slattery* v. *Pooley*, and in which I cannot agree, when I know by experience how easy it is to fabricate admissions and how impossible to come prepared to detect the falsehood. Why are writings prepared at all but to prevent mistakes and misrepresentation and why, having taken that precaution, with such writing at hand and capable of being produced, is the same to be laid aside, and inferior and less satisfactory evidence resorted to?"

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[1] Sections 59, 64, 91.

[2] *Slatterie* v. *Pooley*, (1840) 6 M & W 669, 151 E. R. 579.

[3] See discussion in *Muttukaruppa* v. *Rama*, (1866) 3 Mad. H.C.R. 158.

[4] See the observations of Pennefather, C. J., in *Lawless* v. *Quesale*, 8 Ir. Law R. 382, 385 (*infra*).

[5] *Lawless* v. *Quesale*, 8 Ir. Law R. 382, 385.

[6] *Stattrie* v *Pooley*, *supra*.

Dangers of admitting oral admissions without establishing case for secondary evidence.

9.71. In a case which went upto the Privy Council[1], the plaintiff sued for a settlement of account, and the plaintiff, instead of producing and proving the account current between himself and the defendant, produced evidence to prove the oral admission of the debt. The Privy Council rejected the evidence and held—

> "They consider that it is a very dangerous thing to rest a judgment upon verbal admissions or a sum due, without very clear evidence, especially when there are other means of proving the case, if a true one."

9.72. There is a parallel provision[2] in the Act under which, when the existence, conditions or contents of the original document have been proved to be admitted *in writing* by the person against whom it is proved or by his representatives in interest, such *written admission* is admissible. But, we are not concerned with that provision.

Last part of the section.

9.73. Where the question is of genuineness, the last part of the section permits oral admissions. Although this portion is somewhat cryptically worded, its true meaning is what Norton[3] has stated, which is in these words:

> "Or, unless the genuineness of a document produced is in question. The effect of the last clause of this section seems to be that if such a document is produced, the admissions of the parties to it that it is, or is not, genuine may be received."

Recommendation.

9.74. No changes of substance are needed in the section, but the last portion of the section could be made more clear, by spelling out its true intent as mentioned above.[4] To carry out this object, we recommend that the section should be re-drafted as follows:—

> "22. Oral admissions as to the contents of a document are not relevant—
>
> (a) unless ..... the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document under the rules hereinafter contained; or
>
> (b) *except where* a document is ***produced*** and ***its*** genuineness is in question."

SECTION 23

Admission in civil cases, when relevant.

9.75. Section 23 provides that in civil cases, no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given.

Under the Explanation to the section, nothing in this section shall be taken to except any barrister, pleader, attorney or vakil from giving evidence of any matter of which he may be compelled to give evidence under section 126.

Principle as to offers without prejudice.

9.76. One of the most important applications of the section is in relation to offers made "without prejudice". It should, of course, be pointed out that the section is not confined to cases of offers "without prejudice". The section comes into play whenever there is an express condition or implication that evidence of the matter stated is not to be given.

Principle as to offer without prejudice.

9.77. In regard to an offer without prejudice, the principle of the section may be thus stated[5]—"Confidential overtures of pacification and any other offer or proposition between litigating parties, expressly or impliedly made *without*

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[1] *Sheo Parshad* v. *Jaggar Nath*, (1884) 10 Indian Appeals 79 (P.C.)

[2] Section 65, clause (5).

[3] Norton cited by Field on Evidence.

[4] Para. 9.73, *supra*.

[5] Taylor on Evidence, page 795, cited in Woodroffe.

prejudice,[1] are excluded on ground of public policy. Now, if a man says his letter is without prejudice, that is tantamount to saying, "I make you an offer which you may accept or not, as you like; but if you do not accept it, the having made it is to have no effect at all". As has been said do not 'without prejudice' mean, 'I make you an offer; if you do not accept it, this letter is not to be used against me'.

Rule narrow in the present section.

9.78. The section is sound enough so far as it goes. We would, however, like to point out that the rule in the section is narrow in one respect. It requires—(i) an express agreement prohibiting the giving of evidence, or (ii) circumstances from which such an agreement can be implied. This requirement may not cover *all statements made for negotiations*. It would, we think, be fair to provide that statements made with a view to, or in the course of, negotiations for a settlement should always fall within this section. At present, in the absence of any express or strongly implied restriction as to confidence, an offer of compromise is admissible.

But it should be noted that the essence of compromise is that the party making it is willing to submit to a sacrifice, or to make a concession, though nothing at the time was expressly said respecting its confidential character. The offer might have been made for the sake of purchasing peace, and without any intention to admit liability as to the extent of the claim.

Old law wider.

9.79. It may also be noted that the old law in India was, to some extent, wider than the present section. In the observations of Mr. Justice Phear in the case of *Mohabeer Singh* v. *Dhujjoo Singh*,[2] the following statement will be found: "It is a rule which all Courts of Justice find it right to observe that nothing that passes between *the parties to a suit in any attempt at arbitration or compromise*,[3] should be allowed to effect the slightest prejudice to the merits of their case as it eventually comes to be tried before the Court; unless this were so, the only thing which could be prudently recommended to suitors would be never to listen for one moment to any proposal to settle the matter or to compromise it, after it had come into Civil Court".

Question to be considered.

9.80. This proposition was enunciated in respect of a case not governed by the provisions of the Indian Evidence Act, 1872. The question now to be considered is not whether the above statement was a correct enunciation of the law, but whether that ought not to be the law.

Views expressed by Denning, L. J.

9.81. In order to appreciate the need for a change in the law, it is first desirable to consider the rationale underlying the legal provisions. Denning L.J. (as he then was) said in an English case[4] relating to matrimonial relief:

> "The rule as to 'without prejudice' communications applies with special force to negotiations for reconciliation. It applies whenever the dispute has got to such dimensions that litigation is imminent.
>
> "In all cases where the entrangement has reached the point where the parties consult a probation officer, litigation is imminent. It is clear that there is a dispute which may end either in the Magistrates' court or the divorce court. The probation officer has no privilege of his own from disclosure...".

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[1] *In re River Steamer Co.*, (1871) L.R. 6 Ch. 822, 831, 833.
[2] *Mohabeer Singh* v. *Dhujjoo Singh*, (1873) 20 W. R. 172 (Cal).
[3] Emphasis added.
[4] *McTaggart* v. *McTaggart*, (1948) 2 All. E.R. 754.

9.82. In a later English case,[1] the principle stated in *McTaggart's case*[2] was applied to proceedings before a probation officer in connection with matrimonial relief. It was observed "It is essential, if a reconciliation is to be attempted, with the probation officer as intermediary, that statements made by either party, as soon as the probation officer is asked to act in that capacity, should be treated as privileged. Counsel for the wife suggested that if one applies that principle at such an early stage as in the present case, it tends to prejudice the working of another principle, viz., that a spouse is no longer in desertion if he or she has made a *bona fide* attempt to be taken back, and he argued that if such a *bona fide* attempt is made through a probation officer, it ought to be taken into account. **English case**

> "There is some force in that argument, but one must bear in mind that, in matrimonial disputes, the State is also an interested party and is more interested in reconciliation than in divorce, and if the rule as to privilege tends to promote the prospects of reconciliation, I think it ought to be applied, although it may make it difficult for the spouse in some ways to prove a *bona fide* attempt to return home. That difficulty can always be got over by the deserting spouse writing a suitable and *bona fide* letter and sending it by registered post to the deserted one."

9.83. The observations were made in the context of matrimonial relief; but there is, in our opinion, justification for adapting the same approach in other fields also.

9.84. There is, in our view, a fundamental aspect of social policy which should justify the exclusion of any admission made during negotiations for settlement. The general policy of the law is to favour and encourage the amicable settlement of disputes out of court. For that reason, it should not allow, in evidence, as admissions of liability, settlements or offers for settlement. Many such offers would never be made if they were to be treated as admissions of liability. The present narrow provision in section 23 is, as a matter of social policy, somewhat inadequate. One who makes an offer for settlement should at least have an assurance that the offer which he makes will not prejudice his case later, if a settlement is not reached. Without such a protective rule, it would often be difficult to take any effective steps toward an amicable compromise or adjustment. **Amendment why needed.**

Men should be permitted to buy their peace without prejudice to them, should the offer not succeed. It is most important that the door should not be shut against compromises. When a man offers to compromise a claim, he does not thereby necessarily admit it, but simply agrees to pay so much so as to be rid of the impending proceeding. There is, therefore, a justification for making a specific provision in regard to settlement or offers for settlement.

9.85. For the reasons stated above, we recommend that the following Explanation should be inserted[3] as Explanation 2, below section 23:— **Recommendation.**

> *"Explanation 2.—Where an admission is made for the purposes of or in the course of negotiation of a settlement of compromise of a disputed claim, the parties shall be deemed to have agreed together that evidence of that admission shall not be given."*

We may note that this does not affect the operation of Order 23, Rule 3, Code of Civil Procedure, 1908 (as recently amended)[4] since the compromise in writing can be proved.

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[1] *Mole* v. *Mole* (1950) 2 All. E.R. 328, 329.

[2] *McTaggart's case, supra.*

[3] Existing Explanation may be re-numbered as Explanation 1.

[4] Act 106 of 1976.

CHAPTER 10

CONFESSIONS — GENERAL DISCUSSION AND SCHEME

Introductory.

10.1. With section 24 begins a group of sections dealing with confessions, and we propose to devote this chapter mainly to the scheme of the sections concerning confessions.

10.2. There is no statutory definition of the expression "confession" in the Act. Nor is there a separate provision specially making confessions relevant, because relevancy, as such, is in fact dealt with, and is governed, by the general provision in section 17 (and the succeeding sections), whereunder "admissions" are relevant. In the scheme of the Act, confessions are treated as a species of admissions, so far as the basis of their relevance is concerned. The principal object of the sections dealing with the subject (sections 24-30) is to lay down certain special rules regulating the use of confessions. Of course, the above comment relates to relevance, and not to weight. Nor does it deal with the quantum of proof in criminal cases,—an aspect which may bring certain special considerations into play.

Relevance of admissions.

10.3. Any admission by an accused of an incriminating fact falls within the scope of sections 18 to 21, Evidence Act, and is, therefore, relevant.[1] In *Pakala Narayanswami's case*,[2] the Privy Council observed that a confession is an admission, in terms, of the offence itself, or at any rate, substantially, of all the facts which constitute the offence. In this sense, a confession is more restricted than an admission. What we want to point out is that the relevancy of confessions having been provided for by sections 17-21, it was not necessary to provide for it again. But special rules of irrelevance had to be provided for. The circumstances under which a confession becomes irrelevant, are, therefore, elaborately dealt with in sections 24, 25 and 26. These are followed by sections 27 to 30, which impose some limitations on the operation of sections 24 to 26, or otherwise make certain provisions by way of clarification or other provisions appropriate for confessions.

10.4. The entire group is followed by section 31 — a section dealing with admissions. We may also mention that confessions recorded by Magistrates must comply with the Code of Criminal Procedure.[3]

Result of the scheme.

10.5. The result of this scheme is that a statement, in order that it may be admissible in evidence with reference to the group of sections now under discussion, must satisfy the following conditions, or possess the special features mentioned below:—

(i) it must amount to an admission (sections 17-21).

(ii) if it amounts to a confession (an expression not defined), it must not be excluded by sections 24 to section 26. But this is subject to (iii) below.

(iii) certain restrictions or doubts as to the admissibility of confessions are removed by section 27 to 29.

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[1] *Ghulam Hussain* v. *The King*, 77 I.A. 65 (P.C.).

[2] *Pakala Narayanswami* v. *Emperor*, A.I.R. 1939, P.C. 47, 52.

[3] Section 164, Code of Criminal Procedure, 1973.

(iv) certain special rules are given in section 30, Evidence Act (confession of a co-accused), and section 164 of the Code of Criminal Procedure, 1973.

Every admission not a confession.

10.6. It is clear that[1] every admission made by an accused person is not, in the view of the law, a confession; for, if that were so,—that is, if the expression "admission made by an accused person" were identical in meaning with "confession made by an accused person",—then there would be no occasion for the legislature to change the form of expression, and, after using the word "admission" in sections 17 to 23, to use the word "confession" in sections 24 to 30. Further, it is impossible to hold that admissions mean only statements made by parties to *civil proceedings* and do not include statements made by parties accused in criminal proceedings, without restricting the language of sections 17 to 23 in a manner at variance with its natural meaning and import, and especially (at variance) with the illustrations (b), (c), (d) and (e) to section 21, all of which refer to statements by accused persons as being admissions.

Confession an exception to hearsay rule.

10.7. Confessions (like all admissions) are an exception to the rule against hearsay. As a general proposition, the rules of evidence exclude most out-of-court statements—either oral or written—if they are offered *to prove the truth* of the matters asserted in them. However, there are several exceptions to the "hearsay" rule, one of the most important of which permits the prosecution to introduce, in a criminal trial, any relevant out-of-court statement made by the accused[2]. In this sense, confessions constitute an exception to the rule against hearsay.

10.8. There is some controversy as to the theoretical basis in support of admitting such statements. Wigmore, in adopting the approach first put forth by Professor Morgan[3], grouped, in one exception to the hearsay rule, all statements made by an accused and those made by a party to a civil litigation[4]. So far, he was logical. But he claimed that the major justification for the hearsay rule was to ensure that the side not offering the evidence has an *opportunity to cross-examine the original declarant.* And, (he added), whenever the declarant was the *party against whom* the evidence is being offered, the reason for invoking the hearsay rule was absent: If the defendant wishes to contradict the truth of his former assertion, he has only to take the stand. But, this argument could not provide a satisfactory *historical* explanation for the exception, because, until the 19th century, a party to a civil litigation was not competent to testify, and the opportunity for the defendant to refute his earlier statement was, thus, limited to the possibility of presenting the full story to the court *through other witnesses.* In criminal cases, again, the accused was not a competent witness until the law was altered by a specific statutory provision-- in England (1898) and in India (1955)[5].

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[1]*Illahi Baksh*, (1886) 21 P.R. Cr. No. 16, pages 28, 31.

[2] & [3](Plowden J.).

[3]Morgan, "Admissions as an exception to the Hearsay Rule" (1921) 30 Yale L.J. 355.

[3]Morgan, "Admissions" etc. (1921) 30 Yale L.J. 355.

[4]Wigmore, Evidence (3rd Ed. 1940), 1048.

[5](a) The Criminal Evidence Act, 1898 (Eng.).

(b) The Code of Criminal Procedure (Amendment) Act, 1955, inserting section 342-A of the Code of Criminal Procedure, 1898: *See*, now, the Code of 1973, section 315(1).

10.9. In one of the American cases,[1] a fairly satisfactory explanation for admitting statements by an accused appears: "Basically, these statements, being relevant, material, and competent, are admissible. The problem is whether any specific rule excludes them, whether there is some idiosyncrasy which denies to them the general basic rule of admissibility otherwise applicable."

Importance of voluntary character.

10.10. Two principles form the basis of the provisions relating to confessions in England. First, confessions, like other admissions, are received on the presumption that no person will voluntarily make a statement which is against his interest unless it be true[2].

10.11. But, secondly, the force of the confession depends upon its voluntary character[3]. The object of the rules relating to the exclusion of confessions in England is to exclude all confessions which may have been procured by the prisoner being led to suppose that it will be better for him to admit himself to be guilty of an offence which he really never committed[4].

10.12. In *R.* v. *Baldry*[5], Lord Campbell C.J. observed—

> "The reason is not *that the law* supposes that the statement will be false, but that the prisoner has made the confession under a bias, and that, therefore, it would be better not to submit it to the jury."

10.13. The admission of such evidence would naturally lead the agents of the police, "while seeking to obtain a character for activity and zeal, to harass and oppress prisoners, in the hope of wringing from them a reluctant confession[6]."

Provision in Cr. P. C.

10.14. It should be also noted that the Code of Criminal Procedure specifically prohibits[7] the police from offering threats, inducements or promises to induce confessions. Of course, a substantially similar result is achieved in practice by the Judges' Rules in England, though those rules have no statutory force.

Classification of confessions.

10.15. It will help to a clear understanding of the relevant provisions of the Act if confessions are classified as—(a) those made to Magistrates (briefly, "Magisterial" confession);[8] (b) those made to a person in authority; (c) those made to the police; (d) those made while in police custody; and (e) others. Classes (c) and (d) overlap, to some extent; but they are not identical. For example, a confession made while the accused is in police custody, to a person other than a police officer, falls only within class (d).

(a) Confessions before Magistrates are specifically dealt with in section 164 of the Code of Criminal Procedure, 1973. The effect of the corresponding section of the Code of 1898, as interpreted by the Privy Council in *Nazir Ahmed's case*[9], is that if a confession is sought to be admitted in evidence, it can be proved only if it is a valid record of the confession under that section.

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[1] *Jones* v. *U. S.* 296 P. 2d 398, 403-04 (D.C. Cir. 1961), cert. denied, (1962) 370 U.S. 913.

[2] Taylor, Evidence, section 865, cited in Woodroffe.

[3] *R.* v. *Thompson*, L.R. (1893), 2 Q.B. at page 15.

[4] *R.* v. *Court*, 7 C. & P. 486 (Littledale J.).

[5] *R.* v. *Baldry*, 2 Den., C.C. 430.

[6] Taylor, Evidence, section 874, cited in Woodroffe.

[7] The Code of Criminal Procedure, 1898, section 1631; also see the 1973 Code, section 163.

[8] *Cf. Nazir Ahmed*, A.I.R. 1936, P.C. 255, 258.

[9] *Nazir Ahmed*, A.I.R. 1936 P.C. 255.

(b) As to confessions made to a person in authority, section 24 must be especially complied with.

(c) As to confessions made to the police, section 25 is of special importance.

(d) As to confessions made while the maker is in the custody of the police, section 26 is of special importance.

(e) Other confessions, e.g., confessions made to a private person not in authority, have no special rules applicable to them.

Scheme of the sections.

10.16. A few more words about the scheme of the sections would be useful. Section 24 is a somewhat general provision, and is intended to ensure that only voluntary confessions are admitted in evidence. Sections 25 and 26 are special rules, relating respectively to a confession *made to a police officer* and a confession made in the *custody of the police officer*. The former is completely excluded. But, as regards the latter, a confession made in the immediate presence of the Magistrate is made provable under section 26, even though the accused is, at the time, in the custody of the police.

10.17. The position, therefore, is that confessions, other than confessions to the police, are admissible,—subject to their being excluded by the "appearance" of the vitiating circumstances mentioned in section 24.

10.18. Under section 27, when a fact is deposed to as discovered in consequence of information received from an accused person in the custody of a police officer, the information, in so far as it relates distinctly to the fact so discovered, may be proved, whether it amounts to a confession or not. The fact so discovered is taken as showing that so much of the confession as immediately relates to it is true. Under section 28, if a confession referred to in section 24 is made after the impression caused by the inducement, threat or promise had been fully removed, it is relevant. Section 29 makes it clear that a confession which is otherwise relevant, does not become irrelevant because of promise of secrecy, or because it was made in consequence of deception practised on the maker, or because it was made when he was drunk, or because it was made in answer to questions which he need not have answered or because he was not warned that he was not bound to make the confession. Section 30 empowers the Court "to take into consideration" the confession of a co-accused, in certain cases.

10.19. "Magisterial" confessions[1] are specifically dealt with in section 164 of the Code of Criminal Procedure, 1973.

Scope of sections 24—27.

10.20. The scope and applicability of sections 24-27 were lucidly explained in *State of U.P.* v. *Deoman Upadhyaya*[2], by Shah J. (as he then was). He observed—

> "Section 27 of the Indian Evidence Act is one of a group of sections relating to the relevancy of certain forms of admissions made by persons accused of offences. Sections 24 to 30 of the Act deal with admissibility of confessions, i.e., of statements made by a person stating or suggesting that he has committed a crime. By section 24, in a criminal proceeding against a person, a confession made by him is inadmissible if it appears to the Court to have been caused by inducement, threat or promise having reference to the charge and proceeding from a person in authority. By section 25, there is an absolute ban against proof at the trial of a person accused of an offence, of a confession made to a police officer. The ban which is partial under section 24 and complete under section 25 applies

[1]For this word, see *Nazir Ahmed*, A.I.R. 1936 P. C. 253, 258 (Lord Roche)

[2]*State of U. P.* v. *Deoman Upadhyaya*, A.I.R. 1960 S.C. 1125.

"equally whether or not the person against whom evidence is sought to be led in a criminal trial was at the time of making the confession in custody. For the ban to be effective the person need not have been accused of an offence when he made the confession. The expression, 'accused person' in section 24 and the expression 'a person accused of any offence' have the same connotation, and describe the person against whom evidence is sought to be led in a criminal proceeding. As observed in *Narayanswami* v. *Emperor*,[1] by the Judicial Committee of the Privy Council. 'Section 25 covers a confession made to a police officer before any investigation has begun or otherwise not in the course of an investigation.' The adjectival clause 'accused of any offence' is therefore descriptive of the person against whom a confessional statement made by him is declared not provable, and does not predicate applicability of the ban. Section 26 of the Indian Evidence Act by its first paragraph provides 'No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against a person accused of an offence'. By this section, a confession made by a person who is in custody is declared not provable unless it is made in the immediate presence of a Magistrate. Whereas section 25 prohibits proof of a confession made by a person to a police officer whether or not at the time of making the confession, he was in custody, section 26 prohibits proof of a confession by a person in custody made to any person unless the confession is made in the immediate presence of a Magistrate. Section 27 which is in the form of a proviso states 'provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved'. The expression, 'accused of any offence' in section 27, as in section 25 is also descriptive of the person concerned, i.e. against a person who is accused of an offence. Section 27 renders provable certain statement made by him while he was in the custody of a police officer, section 27 is founded on the principle that even though the evidence relating to confessional or other statements made by a person, whilst he is in the custody of a police officer, is tainted and therefore inadmissible, if the truth of the information given by him is assured by the discovery of a fact, it may be presumed to be untainted and is therefore declared provable in so far as it distinctly relates to the fact thereby discovered. Even though section 27 is in the form of a proviso to section 26, the two sections do not necessarily deal with evidence of the same character. The ban imposed by section 26 is against the proof of confessional statements.

"Section 27 is concerned with the proof of information whether it amounts to a confession or not, which leads to discovery of facts. By section 27, even if a fact is deposed to as discovered in consequence of information received, only that much of the information is admissible as distinctly relates to the fact discovered. By section 26, a confession made in the presence of a Magistrate is made provable in its entirety.

"Section 162 of the Criminal Procedure Code also enacts a rule of evidence. This section in so far as it is material for purposes of this case, prohibits, but not so as to affect the admissibility of information to the extent permissible under section 27 of the Evidence Act, use of answers by any person to a police officer in the course of an investigation under Chapter 14 of

[1] *Narayanswami* v. *Emperor*, 66 Ind. App. 66, A.I.R. 1939 P. C. 47.

the Code, in any enquiry or trial in which such person is charged for any offence, under investigation at the time when the statement was made

"On an analysis of sections 24 to 27 of the Indian Evidence Act, and section 162 of the Code of Criminal Procedure, the following material propositions emerge:

(a) Whether a person is in custody or outside, a confession made by him to a police officer or the making of which is procured by inducement, threat or promise having reference to the charge against him and proceeding from a person in authority, is not provable against him in any proceeding in which he is charged with the commission of an offence.

(b) A confession made by a person whilst he is in the custody of a police officer to a person other than a police officer is not provable in a proceeding in which he is charged with the commission of an offence unless it is made in the immediate presence of a Magistrate.

(c) That part of the information given by a person whilst in police custody whether the information is confessional or otherwise, which distinctly relates to the fact thereby discovered but no more, is provable in a proceeding in which he is charged with the commission of an offence.

(d) A statement whether it amounts to a confession or not made by a person when he is not in custody, to another person, such latter person not being a police officer, may be proved if it is otherwise relevant.

(e) A statement made by a person to a police officer in the course of an investigation of an offence under Chapter 14 of the Criminal Procedure Code cannot, except to the extent permitted by section 27 of the Indian Evidence Act, be used for any purpose at any enquiry or trial in respect of any offence under investigation at the time when the statement was made in which he is concerned as a person accused of an offence.

"A confession made by a person not in custody is, therefore, admissible in evidence against him in a criminal proceeding unless it is procured in the manner described in section 24, or is made to a police officer. A statement made by a person, if it is not confessional, is provable in all proceedings unless it is made to a police officer in the course of an investigation, and the proceeding in which it is sought to be proved is one for the trial of that person for the offence under investigation when he made that statement. Whereas information given by a person in custody is to the extent to which it distinctly relates to a fact thereby discovered, made provable, by section 162 of the Criminal Procedure Code, such information given by a person not in custody to a police officer in the course of the investigation of an offence is not provable. This distinction may appear to be somewhat paradoxical. Sections 25 and 26 were enacted not because the law presumes the statements to be untrue but, having regard to the tainted nature of the source of the evidence, the law prohibited them from being received in evidence. It is manifest that the class of persons who needed protection most were those in the custody of the police, and persons not in the custody of police did not need the same degree of protection. But by the combined operation of section 27 of the Evidence Act and section 162 of the Code of Criminal Procedure, the admissibility in evidence against a person in a criminal proceeding of a statement made to a police officer leading to the discovery of a fact depends for its determination on the question whether he was in custody at the time of making the statement. It is provable if he was in custody at the time when he made it, otherwise it is not.

There is nothing in the Evidence Act which precludes proof of information given by a person not in custody which relates to the facts thereby

discovered; it is by virtue of the ban imposed by section 162 of the Criminal Procedure Code, that a statement made to a police officer in the course of the investigation of an offence under Chapter 14 by a person not in police custody at the time it was made, even if it leads to the discovery of a fact, is not provable against him at the trial for that offence. But the distinction which, it may be remembered, does not proceed on the same lines as under the Evidence Act, arising in the matter of admissibility of such statements made to the police officer in the course of an investigation between persons in custody and persons not in custody, has little practical significance. When a person not in custody approaches a police officer investigating an offence and offers to give information leading to the discovery of a fact, having a bearing on the charge which may be made against him, he may appropriately be deemed to have surrendered himself to the police. Section 46 of the Code of Criminal Procedure does not contemplate any formality before a person can be said to be taken in custody; submission to the custody by word or action by a person is sufficient. A person directly giving to a police officer by word of mouth information which may be used as evidence against him, may be deemed to have submitted himself to the 'custody' of the police officer within the meaning of section 27 of the Indian Evidence Act.[1] Exceptional cases may certainly be imagined in which a person may give information without presenting himself before a police officer who is investigating an offence. For instance, he may write a letter and give such information or may send a telephonic or other message to the police officer".

History.

10.21. The principal sections of the Act relating to confessions can be traced to the Code of Criminal Procedure of 1861.[2] That Code itself was largely based on an earlier Regulation of 1817; but we shall concentrate on the Code of 1861. Section 146 of the Code of 1861, repeating an earlier provision, provided as follows:—

> "146. No police officer or other person shall offer inducement to an accused person by threat or promise or otherwise to make any disclosure or confession".

Section 147 of the Code of 1861, markedly reversing the law, as it stood in the earlier Regulation[3], provided as follows:—

> "147. No police officer shall record any statement, or any admission or confession of guilt, which may be made before him by a person accused of any offence".

The section was subject to a proviso, allowing a police officer to reduce into writing any statement or admission or confession "for his own information or guidance".

10.22. But the most important change consisted in the introduction *of a new provision*, contained in section 148 of the Code of 1861, which, in the most imperative terms, laid down as follows:

> "148. No confession or admission of guilt made to a police officer shall be used as evidence against a person accused of any offence."

Section 149 of the Code of 1861, going even further in the same direction, laid down—

> "149. No confession or admission of guilt made by any person whilst he is in the custody of a police officer, unless it be in the immediate presence of a Magistrate, shall be used as evidence against such person."

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[1] *Legal Remembrancer* v. *Lalit Mohan Singh*, I.L.R. 49, Cal. 167; A.I.R. 1922 P.C. 342; *Santokhi Beldar* v. *Emperor*, I.L.R. 12 Pat. 241; A.I.R. 1933 Pat. 149 (S. B.).

[2] The Code of Criminal Procedure, 1861 (25 of 1861).

[3] Section 19(1), Regulation 20 of 1817.

Then followed a distinct proposition of law, contained in a separate section 150, which was as follows:—

"150. When any fact is deposed to *by a police officer* as discovered by him in consequence of information received from a *person accused of any offence*, so much of such information, whether it amounts to a confession or *admission of guilt* or not, as relates distinctly to the fact discovered by it, may be received in evidence."

10.23. Sections 146 and 147 of the Code of 1861 were purely administrative prohibitions to police officers against employing any inducement, threat or promise for obtaining any disclosure or confession,[1] and against reducing to writing any statements or confessions made by *accused persons*. The next three sections 148, 149 and 150, however, contained important rules, which perhaps did not properly belong to the province of Criminal Procedure, but to that of Evidence. Sections 148 and 149 must not be understood to contain *identical* propositions of law. Section 148 laid down a general proposition, against the admissibility of confessions *made to police officers*. Section 149 carried the principle further, by rendering similar confessions inadmissible, *even though not* made to a police officer, but made by a person "whilst he is in the custody of a police officer". Then came a general proposition, which extended *over an area covered by both the preceding sections*, and, under certain conditions, rendered such confessions admissible as would otherwise be inadmissible under these two sections. This general proposition appeared in the form of a separate and independent section 150, laying down that a police officer might "depose to" any confession made by an accused person so far as such confession led to discovery of some fact. The words of the section were general, and could be understood to govern confessions contemplated by both the preceding two sections. For example, suppose the accused said to the policeman: "I concealed the articles which I got in the dacoity A under my stack of straw, and those which got in dacoity B under the floor of my cow-house". As long as the information related distinctly to the fact discovered in consequence of it, it might be received in evidence under section 150 of the Criminal Procedure Code of 1861, even though the confession was made to the police officer and by a person in his custody.[2] But an essential feature of the section was, that the confession must be proved by the *deposition of the police officer* himself, in order to render it admissible in evidence. In the case of *Bishoo Manjee*[3], Jackson J. observed: "The police officer to whom the statement was made was not examined at all, and, therefore, it seems that the admission, so far as it was an admission, is not taken out of the general terms of section 148, which exclude such admissions generally." But, in the same case[3], another important rule was also laid down, which has a bearing upon the interpretation of section 150, as it originally stood in the Code of 1861. It was held that an admission obtained by a *police officer* from a prisoner by persuasion and promises of immunity, in contravention of section 146 of the 1861 Code, was not admissible in evidence, even if it led to the discovery of facts. The view had already been previously adopted by a Division Bench of the Calcutta High Court in the case of *Queen* v. *Dharam Dutt Ojha*.[4] These two cases, therefore, are distinct authorities for the proposition that, notwithstanding the general terms of section 150, it was never taken to qualify the prohibition contained in section 146 (concerned with involuntary confessions.)

10.24. Such was the the law before 1869, when Act 8 of that year was passed. The Act amended the Code of 1861, by revising section 150. It substituted, **Act of 1869.**

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[1] *Cf.* section 163, Cr. P. C. 1973.

[2] S.W.R. 16 Cr. **Letters.**

[3] *Bishoo Manjee*, 9 W.R. 16 (Cr. R) (Calcutta).

[4] *Queen* v. *Dharam Dutt Ojha*, 8 W.R. 13 (Cr. R.).

in its place a section in which the change of language is noticeable. The revised section 150 run as follows:

> "150. Provided that, when any fact is deposed to *in evidence* as discovered in consequence of information received from a person accused of any *offence*[1], *or in the custody of a police officer*, so such of such information, whether it amounts to a confession or admission of guilt or not, as relates distinctly to the fact thereby discovered, may be received in evidence."

Comparative Chart.

10.25. For convenience of reference, sections 148, 149 and 150 of Act 25 of 1861, section 150 as amended by and Act 8 of 1869, and sections 25, 26 and 27 of Act 1 of 1872, are quoted below:

Act 25 of 1861 (Criminal Procedure Code).	Act 8 of 1869.	Act 1 of 1872 (Evidence Act).
1	2	3
S. 148. No confession or admission of guilt made to a police officer shall be used as evidence against a person accused of any offence.	Amending the Act of 1861.	S. 25. No confession made to a police officer shall be used as evidence against a person accused of any offence.
S. 149. No confession or admission of guilt made by any person whilst he is in custody of a police officer, unless it be made in the immediate presence of a Magistrate, such be used as evidence against shall person.		Sec. 26. No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.
S. 150. When any fact is deposed to by a police officer discovered by him in consequence of information received from a person accused of any offence, so much of such information, whether it amounts to a confession or admission of guilt or not, as relates distinctly to the fact discovered by it, may be received in evidence.	S. 150. *Provided that* when any fact is deposed to *in evidence* as discovered in consequence of information received from a person accused of any offence, *or in the custody of a police officer* so much of such information, whether it amounts to a confession or admission of guilt or not, as relates distinctly to the fact discovered, may be received in evidence.	S. 27. Provided that where any fact is disposed as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discoeered may be proved.

This much of historical discussion will be enough for the present purpose.

English law.

10.26. We now proceed to a brief discussion of the English law.

The position in England may be very briefly stated[2] in the form of these propositions—

> "1. A confession of guilt in a criminal case is only admissible if it was not made in consequence of an unlawful threat, or inducement of a temporal nature made or held out by a person in authority.

[1]Note the word "or".

[2]Cross. Evidence (1971), pages 115-116, Article 40.

2. Confessions obtained in contravention of the judges' rules or by means of other improper questions, may be excluded by the judge in the exercise of his discretion, although the conditions mentioned in clause 1 were fulfilled."

Statements must be voluntary in English law.

10.27. The law of confessions in England has thus two important aspects — (1) Involuntary confessions are excluded in England. (2) Confessions made by the accused in police questioning, where the questioning was in breach of the Judges' Rules, are, at the discretion of the court, excluded.

The English law as to first aspect was laid down in *Ibrahim* v. *The King*,[1] in the following terms. This was a judgment of the Privy Council, but has been universally cited as authoritative:—

> "It has long been established as a positive rule of English Criminal Law, that *no statement*[2] *by an accused* is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by person in authority."

Basis of exclusion —various theories in England.

10.28. Several theories have prevailed in England as to the basis for excluding involuntary confessions:

(i) The motion that the rule relating to the inadmissibility of such confessions is based on considerations of their possible or probable *untruth*, was supported by Wigmore. According to him, the question to be asked was, "Was the inducement such that there was any fair risk of a false confession?"[3]

(ii) The other theory rests on a *breach of faith or confidence;* that is, that a false promise of favour or reward had been made.

(iii) The third theory is concerned with illegality in the *method* of obtaining the confession.

(iv) The fourth theory is based on the privilege against self-incrimination.

Historical roots of the two doctrines are separate[4], but, there is a view e.g. dictum of White J. in *Bram* v. *U.S.*[5]—that the privilege against self-incrimination was but a crystallisation of the doctrine as to confessions'.

10.29. In *R.* v. *Baldry*,[6] decided in the middle of the nineteenth century, the court discussed at some length the policy of the confession rule, and said:

> "The ground for not receiving such evidence is that it would not be safe to receive a statement made under any influence or fear. There is no presumption of law that it is false or that the law considers such statements cannot be relied upon; but such confessions are rejected because it is supposed that it would be dangerous to lead such evidence to the jury."

This statement has been cited with approval in subsequent decisions, notably by Lord Summer in *Ibrahim* v. *R.*[7] It rejects the view that *testimonial untrustworthiness* is at the root of the confession rule.

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[1] *Ibrahim* v. *The King*, (1914) A.C. 599, 609; A.I.R. 1914 P.C. 155 (P.C.).
[2] Emphasis added.
[3] Wigmore, Evidence (3rd ed. 1940), Vol. 3, section 824, page 252.
[4] Holdsworth, History of English Law, Vol. 9, page 198-210.
[5] *Bram* v. *U.S.*, (1897) 168 U.S. 532, 543.
[6] *R.* v. *Baldry*, (1852) 2 Den. C.C. 430, 441, 442 (Pollock C. B.).
[7] *Ibrahim* v. *R.* (1914) A.C. 599, 611, A.I.R. 1914 P.C. 155, *supra*.

Truth or falsity not decisive.

10.30. The actual English cases in which the courts have excluded statements made by persons in custody, show that the question 'Is the confession likely to be true?' is not decisive The approach seems rather to be one of defining proper police practices, and is also affected by considerations which suggest the strong influence of the privilege against self-incrimination, although the language used is that of the confession rule. This is brought out very clearly in a decision of the High Court of Australia, *McDermott* v. *The King*.[1] This was an application for leave to appeal from a New South Wales conviction. The police, having decided to charge the prisoner with murder, took him into custody, administered a caution, and then questioned him for an hour, after which he confessed. The prisoner was then formally charged. Counsel for the prisoner argued that the common law doctrine as to the exclusion of confessions was not founded upon nor concerned with the likelihood of falsity or unreliability of the confession..... The doctrine was founded upon broad policy. His submission was that the confession should be excluded, as it had been procured by cross-examination of a prisoner in custody by the *police in violation of the Judges' Rules*. A further point that was taken was the argument that the custody was unlawful, as it was the duty of the police, having decided to charge the prisoner before the interrogation, to take him before a magistrate. It was argued that a confession obtained from person *in illegal custody* was inadmissible.

Dixon J.'s observations as to self-incrimination.

10.31. The High Court of Australia, on the facts, held the confession to be admissible, and held that the confession was voluntary. It was observed that in any even the Judges' Rules did not bind Australian Courts. But Dixon J's observations are of interest in regard to the principle to be applied—

> "It is apparent that rule of practice has arisen, deriving almost certainly from the strong feeling for the wisdom and justice of the traditional English principles expressed in the precept *nemo tenetur se ipsum accussare*. ....."

10.32. The English cases on the subject of what is an illegal inducement to confess, are very numerous, and far from consistent with each other. But there can be little doubt that the rule which excludes confessions unlawfully obtained, is regarded as a very salutary one.

Burden of proof of voluntariness on the prosecution.

10.33. It must be taken to be settled by *Reg.* v. *Thompson*,[2] that, in order that evidence of a confession may be admissible, it must be *affirmatively proved* that such confession was free and voluntary, that is, was not preceded by any inducement to the prisoner to make a statement held out by a person in authority, or that it was not made until after such inducement had clearly been removed; but it is also clear that in the absence of inducement, the answers of a person charged to the questions of a police constable, are admissible, subject to the discretion of the Court to exclude answers obtained without compliance with the Judges' Rules All questions relating to the admissibility of extra-judicial confessorial statements are of course, to be decided at the trial by the Judge, and not by the jury; and such questions may now be appealed, or reserved for the decision of the Court of Criminal Appeal.[3]

Confessions—Some English cases.

10.34. It is well recognised in England that admissions and confessions are exceptions to the rule against hearsay. If a statement or confession is made by the accused (the statement may be relevant as an admission), evidence of such statement or confession may be given at the trial, if the prosecution is able to prove affirmatively that it was made freely and voluntarily.

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[1] *McDermott* v. *The King*. (1948) 76 Commonwealth L.R. 501, 504, 513.

[2] *Reg.* v. *Thompson*. (1893) 2 Q.B. 12 (C.C.R.). affirming the ruling of Parke, B., in *R.* v. *Warringham*, 15 Jur. 318; 2 Den. C.C. 430, 447, note; *R.* v. *Rose*, 18 Cox, 717.

[3] The Criminal Appeal Act, 1907.

The Courts draw a distinction between a moral exhortation and temporal fear. Thus, it has been held,[1] that where an employer advised his suspected employee to tell the truth "so that if you committed a fault you may not add to it by stating what is untrue", the advice was of a moral character, and not sufficient to render a subsequent confession inadmissible.

10.35. In another English case of *Rex* v. *Wild*,[2] a boy of 13 years was charged with murder, and was told: "Now, kneel you down, I am going to ask you a very serious question and I hope that you will tell me the truth in the presence of the Almighty". In consequence, the boy made certain statements. These were held not to render it inadmissible.

In the case of *Richards*[3] a girl had been accused of poisoning, and was told by her mistress: "If you don't tell me all about it, I will send for a constable". The confession made subsequently was rejected, since the threat would have made obvious, to the girl's mind, the desirability of making a confession.

10.36. The accused has long been entitled[4] to demand that an involuntary confession should be excluded, and the Introduction to the Judges' Rules takes care to state that, "The principle (that voluntariness is a fundamental condition of admissibility).....is overriding and applicable in all cases. Witihin that principle the following rules are put forward as a guide to police officers conducting investigations."

10.37. Statements by accused persons have been considered involuntary, not only when resulting from an explicit threat, such as - "you had better tell the truth". **Implicit threats.**

But there seems to be little case law defining the precise scope of "involuntariness", - especially that resulting from tacit intimidation. Judges are known to take a dim view of coercion in any form, and the prosecution consequently does not attempt to make direct use of arguably involuntary statements[5]. If there has been no intimidation or promise, but the accused has been *tricked into speaking*, the statement will be considered "voluntary",[6] but case-law indicates that the judge may exclude it as matter of discretion, if the tactics seem, in some sense, "unfair".[7]

10.38. We shall now deal with the Judges' Rules. Police investigating a crime, when they wish to question someone held on a charge, must comply with the Judges' Rules,[8] which define the right to question at the various stages of investigation. **Judges' Rules—violation of.**

There is no direct judicial control over the initiation or supervision of police activities or conduct in England. But judicial control is exercised indirectly, through the rules which the judges apply to determine the admissibility of evidence at the trial, and some additional protection is clearly afforded by the law governing the civil wrongs of unlawful imprisonment and malicious prosecution.

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[1] *Reg.* v. *Jarvis*, (1867) Law Reports 1 C.C.R. 96.

[2] *Rex* v. *Wild*, (1935) 1 Mood C. C. 452.

[3] *Rex* v. *Richards*, (1832) 5 C & P 318.

[4] *Ibramim* v. *Rex*, (1914) A.C. 599.

[5] See discussion in *Culombe* v. *Connecticut*, (1961) 367 U.S. 568, 598, 599 (opinion of Frankfurter, J.).

[6] (a) *Rex* v. *Firth*, (1913) 6 Crim. App. R. 152; (dictum).

(b) *The King* v. *Robinson*, (1917) 2 K. B. 108.

[7] See *Reg.* v. *Hinted*, (1898) 19 Cox Crim. Cas. 16 (South-Eastern Cir.).

[8] For Judges' Rules, see Appendix 4 to this note.

Principle of the Rules.

10.39. The fundamental principle underlying the rules applied by the courts is that answers and statements made during the course of police inquiries are admissible only if they have been made voluntarily— "in the sense that they have not been obtained by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression. To assist themselves and provide guidance to the police in applying this principle, the judges have devised their own set of Rules, which are officially known as "the Judges' Rules".

Judges' Rules do not have the force of law.

10.40. Evidence obtained in violation of the Judges' Rules will not always be rejected. It was made clear from the beginning that "these rules have not the force of law; they are administrative directions the observance of which the police authorities should enforce upon their subordinate as tending to the fair administration of justice."[1]

Discretionary basis.

10.41. During the late nineteenth century, the Courts had shown great distrust of the police, and were apparently inclined to reject automatically any confession made in police custody.[2] But, in 1909, the Court of Criminal Appeal decisively rejected a strict exclusionary rule,[3] and since that time, despite the adoption of the Judges' Rules, the courts have adhered to the principle of excluding confessions only on a *discretionary basis.*

Where the basis of exclusion is discretionary, it is natural that there will be a diversity—apparent or real—in approach. In some cases, confessions have been admitted even though the circumstances under which they were obtained prompted strong disapproval.[4] On the other hand, in some cases confessions have been excluded, because the caution was omitted.[5] But courts have often admitted statements even when the caution was lacking, either as a matter of discretion,[6] or on the ground that the rules were not violated, — when, for example, a suspect was "invited" to the police station and therefore not technically "in custody".[7] In one study the proposition[8] was stated that "it is no longer the practice to exclude evidence obtained by questioning in custody." Nevertheless, now that the rules have been clarified, one may expect that the judges will become less willing to overlook violations[9] of the rules.

Law in the U.S.A. —Various sources.

10.42. In the United States, the rules under which a confession is to be excluded are derived not from one, but from several sources. At one time or other, each of these has assumed prominence.

(a) In the first place, there is the constitutional privilege against self-incrimination.[10] Historically, this has some importance, it being a view widely held that the rule against "coerced confessions" is fundamentally linked up with the privilege against self-incrimination. This is of importance in relation to cases coming from Federal courts.

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[1] *The King* v. *Voisin*, (1918) 1 K. B. 531, 539.

[2] See, e.g., *Reg.* v. *Male*, 16 Cox Crim. Cas. 689 (Oxford Cir.); *Reg.* v. *Gavin*, (1885) 15 Cox Crim. Cas. 656 (Northern Cir.).

[3] *The King* v. *Best*, (1909) 1 K. B. 692 (C.C.A.).

[4] See, e.g., *Rex* v. *Mills*, (1947) 1 K. B. 297; *Rex* v. *Gardner*, (1915) 11 Crim. App. R. 265.

[5] Eg., *Rex* v. *Dwyer*, (1932) 23 Crim. App. R. 156.

[6] *R.* v. *Smith*, (1961) 3 All. E.R. 972 (Ct. Crim. App.).

[7] *Regina* v. *Wattan*, 36 (1952) Crim. App. R. 72.

[8] Williams, Questioning by the police : Some Practical Considerations (1960), Crim. L. Rev. (Eng.) 325, 331.

[9] J. C. Smith. "The New Judges' Rules—A Lawyer's View" (1964) Crim. L. Rev. (Eng.) 176, 182.

[10] Fifth Amendment.

(b) In the second place, there is the due process clause of the Constitution.[1] This has proved to be the most fertile source of controversies in the last decade or so,[2] in cases coming from State Courts.

(c) In the third place, there is the constitutional right to counsel, as judicially interpreted.[3] [4]

(d) In the fourth place, there is the guarantee against unreasonable search and seizure.[5]

(e) In the fifth place, there is the equality clause of the Constitution, which is of some relevance where counsel was not provided by the State.

(f) Sixthly, there are the Federal Rules of Criminal Procedure imposing the requisite safeguards.

In many cases, more than one of these constitutional and other provisions co-operate, and their combined effect may have to be considered.

10.43. Thus, a number of constitutional proscriptive directives to protect the accused, become relevant. For example, the rule excluding from evidence the fruit of unlawful searches or seizures is implied from the fourth and fifth amendments.[6] The protections furnished by the due process clause of the fourteenth amendment against the use of "coerced" confessions[7] and against the use of evidence obtained through brutality which offends a sense of justice[8], are made available by the fifth amendment[9] to the accused on trial in a federal court.

10.44. In addition to these constitutional provisions, there is, of course, the general rule that [10] a confession must be excluded from evidence, if it is not voluntary. It is a cardinal principle of American criminal justice that the accused cannot be forced to aid the Government in making the case against him. The guarantees in the Bill of rights emphasise this principle in the constitutional sphere, but the principle would be valid even apart from the constitutional provisions.

Supreme Court decisions (U.S.A.).

10.45. The case law in the U.S.A. as to confessions is so prolific — particularly, recent cases—that even a short review of the decisions of the Supreme Court of the United States would occupy pages. And it must be remembered that the Supreme Court is not a court of general appellate jurisdiction.

10.46. Decisions of the Supreme Court of the U.S.A. in regard to confessions, fall under two broad heads. One line of cases arises from the supervision exercised by the Court over *federal* officers and inferior federal courts. The second line of cases concerns *State Courts*. The distinction was important for sometime, though its *practical* importance has now diminished because of the decisions on the Due Process Clause and its application to the States.

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[1]14th Amendment (cited, *infra*), read with 5th Amendment.

[2]Set *Malboy* v. *Hogan*, and later cases.

[3]Sixth Amendment.

[4]See *Gideon's case*, *infra*.

[5]Fourth Amendment.

[6]*Weeks* v. *United States*, (1914) 232 U.S. 383.

[7]*Brown* v. *Mississippi*, (1936) 297 U.S. 278 (1936).

[8](a) *Rochin* v. *California*, 1952, 342 U.S. 165;

(b) Cf. *Schmerber* v. *California*, 1966, 384 U.S. 757, 770-771 (1966) (blood test could deprive the accused of due process).

[9]*Lane* v. *United States*, 321 F. 2d 573, 576 (5th Cir. 1963) (dictum), cert. denied, 1964, 377 U.S. 936; *Blackford* v. *United States*, 247 F. 2d 745, 753 (9th Cir. 1957) (dictum), cert. denied (1958), 356 U. S. 914.

[10]*Cf.* legislative recognition of this principle in a federal statute passed recently—18 U.S. Code section 3501 (a) and (b). (See, *infra*).

Cases from Federal Courts.

10.46A. So far as cases coming from the Federal Courts are concerned, a confession might be rendered inadmissible because of violation of the Federal Rules of Criminal Procedure one of which[1] requires the arresting officer to take such suspects to the magistrate without unnecessary delay. Confessions secured by Federal officers during the periods of detention were held to be inadmissible in Federal criminal trials, in the case of *Mc Nabb* v. *U.S.*[2] This was followed in the later case of *Mallory* v. *U.S.*[3] For a long time, the "Mc Nabb-Mallory" rule was a favourite topic of discussion.

Cases from State Courts.

10.47. As to cases from State Courts, the Supreme Court began to deal with the problem of coerced confessions from the point of view of the Due Process Clause (Fourteenth Amendment), and the first important case in this context was of *Brown* v. *Mississippi*,[4] where the confessions had been secured through physical torture and beating. In *Ashcraft* v. *Tennessee*,[5] the confessions were obtained through psychological coercion, and the same principle was applied. In *Brown* v. *Mississippi*,[6] the Supreme Court quashed the conviction of three negroes by a Mississippi Court. The confession which had been admitted by the trial court had been obtained by physical torture. Hughes C.J. stated that a trial was a mere pretence when the State authorities secured a conviction depending entirely on confessions obtained by violence. The Supreme Court[7] has also quashed convictions in cases where confessions had been obtained by other techniques inspiring fear, such as the threat of mob violence.

The invocation of the due process clause in such cases has been explained on the footing that the admission of confessions so obtained would violate 'the fundamental fairness essential to the very concept of justice'.[8] Confessions obtained in this manner carry a very real risk of untrustworthiness,[9] but the Supreme Court does not, in such cases, inquire into the effect that the violence or threat had upon the particular prisoner. Demonstration of the means used to extract the confession suffices to exclude it.[10]

10.48. In 1964, the Fifth Amendment was held[11] to apply to the States by virtue of the Fourteenth Amendment. In the famous case of *Gideon* v. *Wainwright*[12] the Sixth Amendments' guarantee of the right to counsel was also held to be applicable to the States, under the Fourteenth Amendment. After these developments, the scope of interference is expanded.

Thus, the second line of decisions rests upon the constitutional control of the Supreme Court over State tribunals,— in cases in which it is argued that the admission of a confession violates the due process clause of the Fourteenth Amendment[13] to the United States Constitution, in relation to cases from State Courts.

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[1]Rule 5(a), Federal Rules of Criminal Procedure.

[2]*Mc Nabb* v. *U. S.*, (1943) 318 U. S. 332.

[3]*Mallory* v. *U.S.*, (1957) 354 U. S. 449.

[4]*Brown v. Mississippi*, (1936) 297 U.S. 278 (see *infra*).

[5]*Ashcraft* v. *Tennessee*, (1944) 322 U.S. 143.

[6]*Brown* v. *Mississippi* (1936) 297 U.S. 278.

[7]*White* v. *Texas* (1940) 310 U.S. 530.

[8]*Lisemba* v. *California* (1941) 314 U.S. 219, 236.

[9]*Stein* v. *New York* (1953) 346 U.S. 156, 182 (Jackson J.).

[10]*Stein* v. *New York* (1953) 346 U.S. 156.

[11]*Malloy* v. *Hogen* (1964) 378 U.S. 1.

[12]*Gideon* v. *Wainwright*, (1963) 372 U.S. 335.

[13]14th Amendment — '..... nor shall any State deprive any person of life, liberty, or property without due process of law.'

10.49. There have been a number of important developments in recent years in the U.S.A., bearing on the admissibility of a pre-trial confession in a criminal case. Two decisions *Escobedo*[1] and *Miranda*[2]—were pronounced during the sixties. The case of *Miranda*[3] required, as an absolute federal constitutional pre-requisite of the admissibility, in a criminal case, of a confession or other incriminating statement made by an accused in custody to the police, that the police must inform him, prior to interrogation, (i) that he has a right to remain silent, (ii) that any statement which he makes may be used as evidence against him, and (iii) that he has a right to engage counsel. There were four dissenting judgments. It was one of the first rulings of the Warren Court to be slightly modified later. But a substantial part of the propositions laid down still holds good. We shall discuss these cases in some detail. **Recent developments.**

10.50. In the case of *Escobedo* v. *Illinois*,[4] the accused was taken into custody by the Chicago police, and interrogated about the murder of his brother-in-law. Permission to consult his attorney, though requested, was refused. Subsequently, the accused confessed; and this confession was admitted at the trial, where he was convicted of murder. On appeal to the Supreme Court, the conviction was reversed on the ground that the refusal to allow him to consult his attorney had denied him his right to counsel under the Sixth and Fourteenth Amendments. The confession was, therefore, inadmissible. Speaking for the majority of the Court, Goldberg, J. observed:—

> "Where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogation that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as made obligatory upon the States by the Fourteenth Amendment' ..... and that no statement elicited by the police during the interrogation may be used against him at a ciriminal trial."

10.51. Due process of law has become, through judicial interpretation, "a broad umbrella" which covers most of the specific guarantees in First to Ninth Amendments, including the protection against self-incrimination, (Fifth Amendment), guarantee against unreasonable searches and seizures, (Fourth Amendment) and representation by a lawyer when accused of a crime (Sixth Amendment). **Due process a broad umbrella.**

In *Miranda's case*,[5] the Supreme Court brought together several constitutional guarantees. The facts were as follows:

On March 2, 1963, an eighteen-year-old girl employed at the Paramount Theatre in Phoenix, Arizona, was walking to a bus after leaving her job. She was accosted by a man who shoved her into his car, tied her hands and feet, drove to the edge of the town, and raped her. He then drove her back to a street near her home, where he let her out of the car. After hearing the girl's story and patching together pieces of evidence, the police asked Ernesto Miranda if he would consent to answering questions about the case. He agreed to do so voluntarily.

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[1] *Escobedo* v. *Illinois*, (1964) 12 Lawyers' Ed. 2nd 977 (see *infra*).
[2] *Miranda* v. *Arizona* (1966) 16 Lawyers' Ed. 2nd 694 (see *infra*).
[3] *Miranda* v. *Arizona*, (1966) 16 Lawyers' Ed. 2nd 695.
[4] *Escobedo* v. *Illinois* (1964) 378 U.S. 478, 12 Law Ed. 2nd 377.
[5] *Miranda* v. *Arizona*, (1966) 384 U.S. 436.

Miranda was a twenty-three-years-old eighth grade drop-out, with a police record, including several previous arrests as well as convictions for assault and automobile theft. He consented to appear in a police line up (identification), and, although the girl could not positively identify him, in a subsequent interrogation the police told Miranda that she had named him as her assailant. Miranda then confessed and, when confronted with the girl, acknowledged that she had been his victim. In a written statement, Miranda said that the confession had been made voluntarily and with full knowledge of his legal rights. At his trial, both the oral and the written confessions were admitted into evidence by the judge, over the objections of Miranda's lawyer. Miranda was convicted and sentenced to serve from twenty to thirty years in prison. On appeal, the Supreme Court of Arizona held that Miranda's constitutional rights had not been violated.

10.52. A majority of the Supreme Court of the United States, however, disagreed. In summarising the decision of the Supreme Court, Warren C. J. declared that the government may not use statements obtained from "custodial interrogation" of a defendant unless it can show that his right against self-incrimination had been carefully secured by effective "procedural safeguards".

The two key phrases, "custodial interrogation" and "procedural safeguards", were then defined. The former, ("custodial interrogation") meant "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom in any significant way." The latter ("procedural safeguards"), as a minimum include: a warning prior to any questioning (i) that a person has a right to remain silent, (ii) that any statement made by a suspect might be used against him, and (iii) that he has a right to the presence of an attorney, appointed or retained.

These rights may be waived; but the waiver, must be made "voluntarily, knowingly and intelligently."

10.53. For the purposes of satisfying the above-mentioned requirement that the accused must be in custody before there is a duty to warn him, it does not matter whether he is in custody for the offence under investigation or for an unrelated offence. This was laid down in subsequent case.[1]

10.54. A later case,[2] *Harris*, modified the ruling in *Miranda* to a very limited extent. Harris had been indicated in New York for selling heroin to an under-cover police officer on two different occasions. Testifying in his trial, Harris said that he had only made one transaction and that he had sold baking soda, not heroin. The prosecuting attorney for the State, *in seeking to impeach the credibility of Harris*, read a statement that Harris had made to the police after his arrest, which was at odds with his testimony in court. Under police interrogation, he had admitted to both sales, maintaining that: (1) he was acting as a middle man for the police; (2) he had received money and heroin for the service performed; (3) he had not claimed that he had sold only baking soda. In permitting the prosecutor to read the statement, the trial judge informed the jury that the information contained therein could not be used as evidence of guilt *but might be used to impeach Harris's credibility.*

10.55. After being adjudged guilty, Harris claimed that the use of the statement violated his rights as outlined in *Miranda v. Arizona*,[3] and, for a majority of five, Chief Justice Burger wrote an opinion upholding the use of the statement for purposes of impeachment.

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[1] *Mathis* v. *United States*, (1968) 20 Lawyer's Edition 2nd 381.

[2] *Harris*, (1971) 401 U. S. 222.

[3] *Miranda* v. *Arizona*, (1966) 16 Law Ed. 2nd 694.

The case of Miranda was distinguished. It prohibited the use of an illegally obtained *confession as evidence of guilt*, but permitted the use of such statements to impeach a defendant's credibility so long as the jury was properly instructed.

Voluntariness required.

10.56. It has also been held,[1] in the U.S.A. that the admission of a pre-trial confession may depend on whether or not it was voluntary. In determining whether the confession made by a person under trial before a State Court is voluntary, the Supreme Court would consider "the totality of circumstances" from an independent examination of the whole record.[2] [3]

Thus, in *Bouldon's case*,[4] a *Habeas corpus* proceeding had been taken to attack the conviction for murder. The Supreme Court pointed out that two confessions were, in fact, obtained,—although only the second was actually produced in evidence, and that the question was whether the second confession was properly admitted. The Court said that it would consider the voluntariness of *the first confession* also, since the second confession must have been the end-product of the earlier one, inasmuch as the accused may have been acutely aware that he had earlier made an admission against his interests, and was, therefore, repeating his ostensibly "unreasonable words of confession."

10.57. *And, in Boyking* v. *Alabama*,[5] the Court noted that the admissibility of confession in evidence at a criminal trial must be based on are liable determination on the issue of voluntariness which satisfies the defendant's constitutional rights.

Truth or falsity not the criterion.

10.58. A defendant's constitutional rights are violated if his conviction, in a federal or state court, is based, in whole or in part, on an involuntary confession, *regardless of its truth or falsity*. A number or cases[6] have held or recognized, either expressly or by necessary implication that the voluntariness of a defendant's pre-trial confession was the determinative factor in its admissibility in evidence against that defendant in a criminal prosecution.

10.59. Thus, for example, in *Sims* v. *Georgia*,[7] the Supreme Court said that a confession produced by violence or threats of violence is involuntary, and cannot be constitutionally used against the person making it.

Statutory provision in 18 U. S. Code, section 350i.

10.60. Attention may also be drawn to a recent federal statute,[8] which provides[9] that in any federal criminal prosecution, a confession is admissible in evidence if voluntarily given; that it is for the trial judge to determine any issue as to the voluntariness of the confession, and that in so determining, he must take into consideration all the surrounding circumstances, including the time

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[1] *Brooks* v. *Florida*, (1967) 19 Lawyer's Edition 2nd 643.
[2] *Bouldon* v. *Holman*, (1969) 22 Lawyer's Edition 2nd 433.
[3] *Darwin* v. *Connecticut*, (1968) 20 Lawyer's Edition 2nd 630.
[4] *Bouldon* v. *Holman*, (1969) 22 Lawyer's Edition 2nd 433.
[5] *Boyking* v. *Albama*, (1969) 395 U. S. 238, 23 L Ed. 2d 274.
[6] (a) *Garrity* v. *New Jersey*, (1967) 385 U. S. 493, 17 L Ed 2d 562;
(b) *Sims* v. *Georgia*, (1967) 385 U.S. 538, 17 L Ed. 2d 593;
(c) *Olewis* v. *Texas*, (1967) 386 U.S. 707, 18 L Ed. 2d 527;
(d) *Pinto* v. *Pierce*, (1967) 389 U. S. 31, 19 L Ed 2d 31, reh den 389 U.S. 997, 19 L Ed 2d 499;
(e) *Beecher* v. *Alabama*, (1967) 389 U. S. 35, 19 L Ed 2d 35, *Sims* v. *Georgia*, (1967) 389 U. S. 404, 19 L Ed 2d 634.
(f) *Brooks* v. *Florida*, (1967) 389 U. S. 413, 19 L Ed 2d 643;
(g) *Greenwald* v. *Wisconsin*, (1968) 390 U. S. 519, 20 L Ed 2d 77;
(h) *Darwin* v. *Connecticut* 1968, 391 U.S. 346 20 L Ed 2d 630.
[7] *Sims* v. *Georgia*, (1967) 385 U. S. 538, 17 L. Ed 2d 593.
[8] 18 U. S. Code, Sections 3501 (a) and (b).
[9] See 22 L. Ed. 2d 872, 879, for details.

elapsing between the arrest and the arraignment of the accused, if the confession was made after arrest and before arraignment, whether the accused knew the nature of the offence with which he was charged or of which he was suspected at the time of making the confession, whether he was advised or knew that he was not required to make any statement and that any such statement could be used against him, whether he had been advised prior to questioning of his right to the assistance of counsel, and whether he was without the assistance of counsel when questioned and when giving such confession. It is further provided that the presence or absence of any of these factors need not be conclusive on the issue of voluntariness of the confession.

With these general observations, we now proceed to consider the sections in our Act relating to confessions.

APPENDIX 1

Section 162, *Cr. P. C.*, 1973

Statements to police not to be signed: Use of statements in evidence.

162. (1) No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made :

Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872, and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of section 32 of the Indian Evidence Act, 1872, or to affect the provisions of section 27 of that Act.

Explanation.—An omission to state a fact or circumstance in the statement referred to in sub-section (1) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact

APPENDIX 2

Section 163, *Cr. P. C.*, 1973

No inducement to be offered.

163. (1) No police officer or other person in authority shall offer or make, or cause to be offered or made, any such inducement, threat or promise as is mentioned in section 24 of the Indian Evidence Act, 1872.

(2) But no police officer or other person shall prevent, by any caution or otherwise, any person from making in the course of any investigation under this Chapter any statement which he may be disposed to make of his own free will :

Provided that nothing in this sub-section shall affect, the provisions of sub-section (4) of section 164.

APPENDIX 3

Section 164, *Code of Criminal Procedure*, 1973

Recording of confessions and statements.

164. (1) Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any time afterwards before the commencement of the inquiry or trial :

Provided that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.

(2) The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily.

(3) If at any time before the confession is recorded, the person appearing before the Magistrate states that he is not willing to make the confession, the Magistrate shall not authorise the detention of such person in police custody.

(4) Any such confession shall be recorded in the manner provided in section 281 for recording the examination of an accused person and shall be signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record to the following effect :—

"I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

(Signed) A. B.

Magistrate".

(5) Any statement (other than a confession) made under sub-section (1) shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate, best fitted to the circumstances of the case; and the Magistrate shall have power to administer oath to the person whose statement is so recorded.

(6) The Magistrate recording a confession or statement under this section shall forward it to the Magistrate by whom the case is to be inquired into or tried.

APPENDIX 4

Judges' Rules (England)

In 1964, at the sitting of the court, the revised edition of the Judges' Rules,[1] coming into operation on January 27, 1964, dealing with the admissibility in evidence at the trial of any person of answers and statements made by him to police officers, were announced.

Origin.

Lord Parker C. J.—The origin of the Judges' Rules is probably to be found in a letter dated October 26, 1906, which the then Lord Chief Justice, Lord Alverstone, wrote to the Chief Constable of Birmingham in answer to a request for advice in consequence of the fact that on the same circuit one judge had censured a member of his force for having cautioned a prisoner, whilst another Judge had censured a constable for having omitted to do so. The first four of the present rules were formulated and approved by the judges of the King's Bench Division in 1912 the remaining five in 1918. They have been much criticised, *inter alia,* for alleged lack of clarity and of efficacy for the protection of persons who are questioned by police officers; on the other hand it has been maintained that their application unduly hampers the detection and punishment of crime. A committee of judges has devoted considerable time and attention to producing, after consideration of representative views, a new set of rules which has been approved by a meeting of all the Queen's Bench Judges.

Control by Judges.

The judges control the conduct of trials and the admission of evidence against persons on trial before them they do not control or in any way initiate or supervise police activities or conduct. As stated in paragraph (c) of the introduction to the new rules, it is the law, that answers and statements made are only admissible in evidence if they have been voluntary in the sense that they have not been obtained by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression. The new rules, do not purport, any more than the old rules, to envisage or deal with the many varieties of conduct which might render answers and statements involuntary and therefore inadmissible. The rules merely deal with particular aspects of the matter. Other matters such as affording reasonably comfortable conditions, adequate breaks for rest and refreshment, special procedures in the case of persons unfamiliar with the English language or of immature age or feeble understanding, are proper subjects for administrative directions to the police.

JUDGES' RULES

Rules.

These rules do not affect the principles :

(a) That citizens have a duty to help a police officer to discover and apprehend offenders;

(b) That police officers, otherwise than by arrest, cannot compel any person against his will to come to or remain in any police station;

(c) That every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor. This is so even if he is in custody provided that in such a case no unreasonable delay or hinderance is caused to the processes of investigation or the administration of justice by his doing so;

(d) That when a police officer who is making inquiries of any person about an offence has enough evidence to prefer a charge against that person for the offence, he should without delay cause that person to be charged or informed that he may be prosecuted for the offence;

(e) That it is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police officer and of any statement made by that person, that it shall have been voluntary, in the sense that it has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression.

[1]Judges' Rules as revised in England; (1964) 1 Weekly Law Reports, 152 under Practice Note.

The principle set out in paragraph (e) above is overriding and applicable in all cases. Within that principle the following rules are put forward as a guide to police officers conducting investigations. Non-conformity with these rules may render answers and statements liable to be excluded from evidence in subsequent criminal proceedings.

RULES

I. When a police officer is trying to discover whether, or by whom, an offence has been committed he is entitled to question any person, whether suspected or not, from whom he thinks that useful information may be obtained. This is so whether or not the person in question has been taken into custody so long as he has not been charged with the offence or informed that he may be prosecuted for it.

II. As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions, relating to that offence.

The caution shall be in the following terms:

"You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence."

When after being cautioned, a person is being questioned, or elects to make a statement, a record shall be kept of the time and place at which any such questioning or statement began and ended and of the persons present.

III. (a) Where a person is charged with or informed that he may be prosecuted for an offence he shall be cautioned in the following terms:

"Do you wish to say anything? You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence."

(b) It is only in exceptional cases that questions relating to the offence should be put to the accused person after he has been charged or informed that he may be prosecuted. Such questions may be put where they are necessary for the purpose of preventing or minimising harm or loss to some other person or to the public or for clearing up an ambiguity in a previous answer or statement.

Before any such questions are put the accused should be cautioned in these terms:

"I wish to put some questions to you about the offence with which you have been charged (or about the offence for which you may be prosecuted). You are not obliged to answer any of these questions, but if you do the questions and answers will be taken down in writing and may be given in evidence."

Any questions put and answers given relating to the offence must be contemporaneously recorded in full and the record signed by that person or if he refused by the interrogating officer.

(c) When such a person is being questioned, or elects to make a statement, a record shall be kept of the time and place at which any questioning or statement began and ended and of the persons present.

IV. All written statements made after caution shall be taken in the following manner:

(a) If a person says that he wants to make a statement he shall be told that it is intended to make a written record of what he says. He shall always be asked whether he wishes to write down himself what he wants to say; if he says that he cannot write or that he should like someone to write it for him, a police officer may offer to write the statement for him. If he accepts the offer the police officer shall, before starting, ask the person making the statement to sign, or make his mark to, the following:—

"I, ..., wish to make a statement. I want someone to write down what I say. I have been told that I need not say anything unless I wish to do so and that whatever I say may be given in evidence."

(b) Any person writing his own statement shall be allowed to do so without any prompting as distinct from indicating to him what matters are material.

(c) The person making the statement, if he is going to write it himself, shall be asked to write out and sign before writing what he wants to say, the following:

"I make this statement of my own free will. I have been told that I need not say anything unless I wish to do so and that whatever I say be given in evidence."

(d) Whenever a police officer writes the statement, he shall take down the exact words spoken by the person making the statement, without putting any questions other than such as may be needed to make the statement coherent, intelligible and relevant to the material matters; he shall not prompt him.

(e) When the writing of a statement by a police officer is finished the person making it shall be asked to read it and to make any corrections, alterations or additions he wishes. When he has finished reading it he shall be asked to write and sign or make his mark on the following certificate at the end of the statement:

"I have read the above statement and I have been told that I can correct, alter or add anything I wish. This statement is true. I have made it of my own free will."

(f) If the person who has made a statement refuses to read it or to write the above mentioned certificate at the end of it or to sign it, the senior police officer present shall record on the statement itself and in the presence of the person making it, what has happened. If the person making the statement cannot read, or refuses to read it, the officer who has taken it down shall read it over to him and ask him whether he would like to correct, alter or add anything and to put his signature or make his mark at the end. The police officer shall then certify on the statement itself what he has done.

V. If at any time after a person has been informed that he may be prosecuted for an offence a police officer wishes to bring to the notice of that person any written statement made by another person who in respect of the same offence has also been charged or informed that he may be prosecuted, he shall hand to that person a true copy of such written statement, but nothing shall be said or done to invite any reply or comment. If that person says that he would like to make a statement in reply, or starts to say something, he shall at once be cautioned or further cautioned as prescribed by rule III(a).

VI. Persons other than police officers charged with the duty of investigating offences or charging offenders shall, so far as may be practicable, comply with these rules.

[His Lordship added:] it will be seen that these rules, which apply in England and Wales, and which will come into force on Monday, January 27, 1964, are designed to secure that only answers and statements which are voluntary are admitted in evidence against their makers and to provide guidance to police officers in the performance of their duties. The admissibility of answers and statements obtained before next Monday will continue to be governed by the old rules.

Copies of these rules are being sent to all judges, recorders, chairman and deputy chairmen of quarter sessions and the clerks of all criminal courts. It is understood that Her Majesty's Secretary of State for Home Affairs is sending copies together with administrative directions, to the police. These rules and the administrative directions will be on sale at the Stationery Office from 11.45 A.M. today."

CHAPTER 11

CONFESSIONS AND ADMISSIONS — SECTIONS 24 TO 31

Section 24.

11.1. In this Chapter, we shall consider in detail the provisions as to confessions, and also section 31.

Under section 24, a confession made by an accused person is irrelevant in a criminal proceeding, if certain conditions are satisfied. The conditions are as follows:

(1) The confession appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person;

(2) The inducement, threat or promise proceeds from a person in authority; and

(3) The court is of the opinion that the inducement, threat or promise is sufficient to give the accused person grounds which would appear to him reasonable for supposing that he would gain an advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

Conditions.

11.2. The first condition deals with subject matter of the inducement, threat or promise. It must have reference to the charge.

The crucial word in this ingredient is the expression "appears". The appropriate meaning of the word "appears" is "seems". It imports a lesser degree of probability than proof.[1] Even so, the laxity of proof permitted does not warrant a court's opinion based on pure surmise. A *prima facie* opinion based on evidence and circumstances may be adopted as the standard laid down. This deviation from the normal standard of proof has been designedly accepted by the Legislature with a view to excluding forced or induced confessions which sometimes are extorted and put in when there is a lack of direct evidence.[2]

Secondly, the threat, inducement or promise must proceed from a person in authority. It is a question of fact in each case whether the person concerned is a person of authority or not.

Thirdly, the mere existence of the threat, inducement or promise is not enough, but, in the opinion of the court, the threat, inducement or promise should be sufficient to cause a reasonable belief in the mind of the accused that by confessing he would get an advantage or avoid any evil of a temporal nature in reference to the proceedings against him: "while the opinion is that of the Court, the criterion is the reasonable belief of the accused.[3]

Burden of proof under section 24.

11.3. The terms in which section 24 is couched, seem to indicate that in the case of an ordinary confession, there is no initial burden on the prosecution to make out the negative, viz., that the confession sought to be proved or admitted is no vitiated by the circumstances stated in the section. However, where the suspicion of the Court is aroused, the standard of proof required to render it irrelevant is indicated by the word "appears" and not by the usual word "proved". Subject to this, the burden of proving that the confession is involuntary is on the accused, though the burden is light.

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[1] *Pyare Lal* v. *State of Rajasthan*, A.I.R. 1963 S.C. 1094, 1095.
[2] *Pyare Lal* v. *State of Rajasthan* A.I.R. 1963 S.C. 1094, 1095.
[3] *Pyare Lal* v. *State of Rajasthan* A.I.R. 1963 S.C. 1094, 1095.

11.4. The position as to burden of proof is different in England. The question of voluntariness of a confession is for the Judge; and it is now settled that it *lies upon the prosecution to establish*,[1] and not upon the accused to negative this element, it being the duty of the prosecution to satisfy itself thereon before putting the statement in evidence.

Burden of proof in England.

11.5. One of the conditions of the applicability of section 24 is that the inducement, threat or promise should—to put the matter in non-legal words—persuade the accused that he would gain an advantage or avoid any evil in "reference to the proceeding against him." In England, the restriction that the inducement should have *reference to the* proceedings, does not apply. If pressure is put upon an accused person which affects his freedom of will, such pressure is a ground for making the confession inadmissible even where the threat is of harm otherwise than in relation to the proceeding.

Inducement having reference to charge.

In England, it is not necessary that the threat or inducement must threaten harm or promise benefit with reference to the particular proceedings or contemplated proceedings. Of course, a promise suggesting that the outcome of a confession will procure some beneficial result in connection with the prosecution will certainly render the confession inadmissible. But it is not, as a matter of law, necessary that the improper inducement or threat must relate to that prosecution. This was laid down by the House of Lords,[2] holding that on a prosecution under the Purchase Tax Act, a confession ought to have been excluded as having been made on account of a threat to prosecute for failure to answer questions at an interrogation which the customs officers to whom the confession was made were not authorised to conduct.

Even apart from this case, the Judges' Rules[3] also lay down that "it is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police officer and of any statement made by that person, that it should have been voluntary, in the sense that it has not been obtained from him by fear of prejudice or hope of advantage exercised or held out by a person in authority, or by oppression."

11.6. The above brief discussion does not indicate any need for amending the section.

No change needed.

SECTION 25

11.7. Section 25 bars the proof of a confession made to a police officer as against a person accused of any offence.

Introductory.

This section creates an absolute bar against the admission of such confessions. We are separately making certain recommendations[4] to exclude, from this bar, confessions made after informing the accused of his right to counsel and after complying with certain other safeguards. No textual amendment of section 25 is involved.

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[1] *R.* v. *Thompson*, (1893) 2 Q.B. 12.

[2] *Customs & Excise Commissioner* v. *Harz.*, (1961) 1 All. E.R. 177; 111 Solicitors Journal 15.

[3] Judges' Rules, 1964, Principle (e), quoted with approval in *Customs & Excise Commissioner v. Harz.*, (1967) 1 A.C. 760, 818, 821.

[4] See section 26-A (proposed, *infra*).

History of section 25.

11.8. It would be useful to deal with the history of the section having regard to its importance. The following extract[1] from the First Report of the Indian Law Commission is of interest, in this connection:

> "The police in the Province of Bengal are armed with very extensive powers. They are prohibited from inquiring into cases of a petty nature, but complaints in cases of more serious offences are usually laid before the police darogah, who is authorised to examine the complainant, to issue process of arrests; to summon witnesses, to examine the accused and to forward the case to the Magistrate or submit a report of his proceedings, according as the evidence may, in his judgment, warrant the one or the other course. The evidence taken by the Parliamentary Committees on Indian Affairs, during the Sessions of 1852 and 1853 and other papers, which have been brought to our notice, abundantly show that the powers of the Police are often abused for purposes of extortion and oppression; and we have considered whether the powers now exercised by the police might not be greatly abridged.
>
> "We have arrived at the conclusion that, considering the extensive jurisdiction of the Magistrate, the facilities which exist for the escape of the parties concerned in serious crimes, and the necessity for the immediate adoption in many cases of the most prompt and energetic measures, it is requisite to arm the police with some such powers as they now possess; and we have accordingly adopted many of the provisions in the Bengal Code on this head.
>
> *"In one material point, we propose a change in the duties of the Police.*
>
> "By the existing law, the darogah or other police officer presiding at any inquiry into a crime committed within his division is required, upon apprehension of the accused, to "question him fully regarding the whole of the circumstances of the case and the persons concerned in the commission of the crime and if any property may have been stolen or plundered, the person in possession of such property, or the place where it has been deposited. In the event of the accused making free and voluntary confession, it is to be immediately written down."
>
> "Then follow other provisions for preventing any species of compulsion or maltreatment with a view to extort a confession or procure information. But we are informed, and this information is corroborated by the evidence we have examined, that, inspite of this qualification, confessions are frequently extorted or fabricated. A police officer, on receiving intimation of the occurrence of a dacoity or other offence of a serious character, failing to discover the perpetrators of the offence, often endeavours to secure himself against any charge of supineness or neglect by getting up a case against parties whose circumstances or characters are such as are likely to obtain credit for an accusation of the kind against them. This is not infrequently done by extorting or fabricating false confession; and, when this step is once taken, there is of course impunity for real offenders, and a great encouragement to crime. The darogah is henceforth committed to the direction he has given to the case; and it is his object to prevent a discovery of the truth, and the apprehension of the guilty parties, who, as far as the police are concerned, are now perfectly safe. We are pursuaded that any provision to correct the exercise of this power by the police will be futile; and we accordingly propose to remedy the evil, as far as possible,

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[1]Extract from the Indian Law Commission's First Report.

by the adoption of a rule prohibiting any examination whatever of any accused party by the police, the result of which is to constitute a written document. This, of course, will not prevent a police officer from receiving any information which any one may voluntarily offer to him; "but the police will not be permitted to put upon record any statement made by a party accused of an offence."

No change.

11.9. This shows the background in which the section came to be enacted. After careful consideration, we do not think it necessary to disturb the section, except to the extent indicated above.[1]

Section 26.

11.10. Section 26 provides that no confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

The Explanation to the section, provides that "Magistrate" does not include the head of a village discharging magisterial functions in the Presidency of Fort St. George or elsewhere, unless such headman is a Magistrate exercising the powers of a Magistrate, under the Code of Criminal Procedure, 1882.

Negative Form.

11.11. It is to be noticed that section 26 is in negative terms. It does not provide that every confession made in the immediate presence of a magistrate can be proved as against the accused. There is only a saving for such confessions. Since there is a special statutory provision[2] prescribing how a magistrate is to record the confession, it is only a confession so taken that can be proved and received and admitted in evidence, if the bar under the section is dispensed with.

Confessions in presence of a Magistrate.

11.12. It has been stated that confessions made in the immediate presence of a Magistrate may be of two kinds: the confession may be recorded by a competent Magistrate in accordance with the procedure provided in section 164 of the Code of Criminal Procedure, 1973; or it may not be so recorded. It would seem to follow from the decision of the Privy Council in *Nazir Ahmad* v. *Emperor*,[3] that Magistrates should not associate themselves with the police as regards confessions, unless they record the confession after observing the provisions of section 164 of that Code. Otherwise, the provisions of that section would be rendered nugatory, and a confession not recorded under that section would become admissible by virtue of a wider interpretation of section 26 of the Evidence Act.

Recommendation regarding confessions before Magistrate.

11.13. To give effect to the above view, it is desirable to narrow down section 26, by making it clear that only a confession made to a competent Magistrate and recorded by him under section 164 of the Code of Criminal Procedure, would fall within the section. For this purpose, it would be necessary to replace the words "unless it be made in the presence of a Magistrate", by the words "unless it is recorded by a Magistrate under section 164 of the Code of Criminal Procedure, 1973". We recommend accordingly.

Recommendation regarding the Explanation.

11.14. The Explanation to the section 26 speaks of the "Presidency of Fort St. George". These words are obsolete. In fact, if our recommendation[4] to mention section 164 of the Code of Criminal Procedure is carried out, the Explanation can be safely deleted, as under the new Criminal Procedure Code, the power to record confessions is vested only in Judicial Magistrate, or, in metropolitan areas, in Metropolitan Magistrates.

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[1] Para. 11.7, *supra*.

[2] Section 164, Cr. P. C., 1973.

[3] *Nazir Ahmad* v. *Emperor*, I.L.R. 17 Lahore 629 (P.C.).

[4] Para. 11.13, ***supra***.

11.15. For the above reasons, we recommend that section 26 should be revised as follows—

REVISED SECTION 26

"26. No confession made by any person whilst he is in the custody of a police officer, shall be proved as against such person, *unless it is recorded by a magistrate under section* 164 *of the Code of Criminal Procedure,* 1973."

(Explanation to be omitted)

Section 26A (New) Confessions to certain police officers.

11.16. At this stage we should deal with one point on which a new section requires to be inserted. A suggestion has been made in the 14th Report of the Law Commission[1] that as the superior officers of the police are today recruited from the same social strata as officers of other departments, a confession made to the officer of the status of the Deputy Superintendent of Police and above should be acceptable in evidence. This relaxation was to be restricted to cases in which such officers themselves investigate and was to be introduced as an experimental measure only in the Presidency towns or places of like importance where investigations can be conducted by superior police officers and where the average citizen would be more educated and conscious of his rights. The change, it was suggested, should be introduced in the three Presidency towns, because the magistracy there is directly under the control of the High Court; as regards the introduction of the change in other areas, it was observed that it should be preceded by the separation of the judiciary from the executive.

Recommendations as to confessions in an earlier Report.

11.17. In a later Report of the Law Commission, on the Cr. P. C.[2] the question of confessions made to the police was considered at length, and the recommendations as to confessions were thus stated in the form of propositions.[3]—

"(1) In the case of a confession recorded by a Superintendent of Police or higher officer, the confession should be admissible in the sense that the bar under sections 25-26, Evidence Act, should not apply if the following conditions are satisfied:—

(a) the said police officer must be concerned in investigation of the offence;

(b) he must inform the accused of his right to consult a legal practitioner of his choice, and he must further give the accused an opportunity to consult such legal practitioner before the confession is recorded;

(c) at the time of the making and recording of the confession, the counsel for the accused, if he has a counsel, must be allowed to remain present. If the accused has no counsel or if his counsel does not wish to remain present, this requirement will not apply;

(d) the police officer must follow all the safeguards as are now provided for by section 164, Cr. P. C. in relation to confessions recorded by Magistrates. These must be followed whether or not a counsel is present;

(e) the police officer must *record* that he has followed the safeguards at (b), (c) and (d) above.

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[1]14th Report, Reform of Judicial Administration, Vol. 2, Page 748, paragraphs 38 and 39.

[2]48th Report on the Cr. P. C. Bill, pages 6-7, Para. 21-22.

[3]Member, Sh. S. P. Sen Verma has a reservation.

(2) In the case of a confession recorded by an officer lower than a Superintendent of Police, the confession should be admissible in the above sense if the following conditions are satisfied:—

(a) the police officer must be concerned in investigation of the offence;

(b) he must inform the accused of his right to consult a legal practitioner of his choice, and he must further give the accused an opportunity to consult such legal practitioner before the confession is recorded;

(c) at the time of the making and recording of the confession, the counsel for the accused must be present. If the accused has no counsel or if his counsel does not wish to remain present, the confession should not be recorded;

(d) the police officer must follow all the safeguards as are now provided for by section 164, Cr. P. C. in relation to confessions recorded by Magistrates;

(e) the police officer must record that he has followed the safeguards at (b), (c) and (d) above."

It was stated in that Report that the above amendments should apply to the whole of India, and an amendment of the Evidence Act and of sections 162 and 164; Cr. P. C. on the above lines was recommended.

11.18. In so far as these recommendations concern the Evidence Act, a suitable amendment should be made by inserting a new section—say, as section 26A. We recommend that such a section should be inserted.[1] **Recommendation.**

I. INTRODUCTORY

11.19. Under section 27, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. **Section 27.**

11.20. Before we proceed to consider the problems that have arisen in regard to the section, we would like to discuss the scheme of the section. For this purpose, the discussion in a judgment[2] of the Supreme Court, to which we have already referred[3], is helpful. In that case—*State of U.P.* v. *Deoman Upadhaya*[4]—Shah J. (as he then was,) after analysing the scheme of the Act, observed: **Scheme of the section.**

"Section 27 renders provable certain statements made by him while he was in the custody of a police officer; section 27 is founded on the principle that even though the evidence relating to confessional or 'other statements' made by a person, whilst he is in the custody of a police officer, is tainted and therefore inadmissible, if the truth of the information given by him is assured by the discovery of a fact, it may be presumed to be untainted and is therefore declared provable in so far as it distinctly relates to the fact thereby discovered. *Even though section 27 is in the form of a proviso to section 26*[5], the two sections do not necessarily deal with evidence

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[1]Section not drafted.

[2]*State of U. P.* v. *Deoman Upadhyaya,* A.I.R. 1960 S.C. 1125 (1961) 1 S.C.R. 14.

[3]See general discussion, *Supra.*

[4]*State of U. P.* v. *Deoman Upadhyaya,* A.I.R. 1960 S.C. 1125 (1961) 1 S.C.R. 14.

[5]Emphasis supplied.

of the same character. The ban imposed by section 26 is against the proof of confessional statements. Section 27 is concerned with the proof of information whether it amounts to a confession or not, which leads to discovery of facts. By section 27, even if a fact is deposed to as discovered in consequence of information received, only that much of the information is admissible as distinctly relates to the fact discovered. By section 26 a confession made in the *presence of a Magistrate* is made provable in its entirety."

11.21. Later, in the same judgment, Shah J. observed:

"Sections 25 and 26 were enacted not because the law presumed the statements to be untrue, but having regard to the tainted nature of the source of the evidence, prohibited them from being received in evidence."

And still later, Shah J. observed:

"When a person not in custody approaches a police officer investigating an offence and offers to give information leading to the discovery of a fact, having a bearing on the charge which may be made against him, he may appropriately be deemed to have surrendered himself to the police. Section 46 of the Code of Criminal Procedure does not contemplate any formality before a person can be said to be taken in custody: submission to the custody by word or action by a person is sufficient. A person directly giving to a police officer by word of mouth information which may be used as evidence against him, may be deemed to have submitted himself to the 'custody' of the police officer within the meaning of section 27 of the Indian Evidence Act[1]. Exceptional cases may certainly be imagined in which a person may give information without presenting himself before a police officer who is investigating an office. For instance, he may write a letter and give such information or may send a telephonic or other message to the police officer."

Problems stated in brief.

11.22. These observations explain the broad scheme of the section. We may now mention, in brief, the problems arising on the section.

The section begins with the words,—"Provided that". There were no such words in the corresponding section 150, as it stood, in the Code of Criminal Procedure, 1861 (as originally enacted). But these words were introduced (in that Code) by the Amending Act of 1869. Since the 'proviso' is not attached to any other section, difficult problems of interpretation have arisen. The constitutional privilege against self-incrimination has also necessitated an examination of some aspects of the section. We shall deal with all these points at the proper place.

II. DOCTRINE OF CONFIRMATION

Confirmation by subsequent facts.

11.23. The section is based on what is usually called the doctrine of confirmation by subsequent facts. This doctrine might be more felicitously called the doctrine of confirmation by subsequently *discovered facts*. It is as old as the modern confession rule was first clearly enunciated in *Warickshall's case*[2]. That case also raised the problem of the admissibility of facts discovered in consequence of an inadmissible confession. In that case, as the result of a confession otherwise inadmissible, stolen property concealed in the prisoner's lodgings

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[1] *Legal Remembrancer* v. *Lalit Mohan Singh*, I.L.R. 49 Cal. 167; A.I.R. 1922 P. C. 342; *Santokhi Beldar* v. *Emperor* I.L.R. 12 Pat. 241; A.I.R. 1933 Pat. 149 (S.B.)

[2] *Warrickshall's case* (1783) 1 Leach C. C. 283, 284.

was found. It was contended that as the property was discovered as the result of an inadmissible confession, the evidence of the actual discovery ought also to be excluded. The contention was rejected by the court, which observed—

> "This principle respecting confessions has no application whatever as to the admission or rejection of facts, *whether the knowledge of them be obtained in consequence of an extorted confession or whether it arises from any other source*;[1] for a fact, if it exists at all, must exist invariably in the same manner whether the confession from which it is derived be in other respects true or false. Facts thus obtained, however, must be fully and satisfactorily proved without calling in the aid of any part of the confession from which they may have been derived; and the impossibility of admitting any part of the confession as a proof of the fact clearly shows that the fact may be admitted on other evidence; for, as no part of an improper confession can be heard, it can never be legally known whether the fact was derived through the means of such confession or not".

Comment of the Reporter and difficulty of applying the test.

11.24. It should be noted, however, that in *Warickshall's case*[2] it was held that no part of the *otherwise inadmissible evidence* could be let in by reason of the discovery of the property. This particular point has given rise to an uncertain body of case law in England. In *R.* v. *Mosey*[3], it was held, as in *R* v. *Warrickshall*,—that no part of *the confession* was admissible, although facts discovered in consequence were admissible. There is a comment in Leach's Criminal cases[3], following his note on *R.* v. *Mosey*,[3] in which he states that it would seem that *so much of the confession as relates strictly to the fact discovered* should be admitted, as the reason why improperly induced confessions are excluded is the danger of falsity, and the fact that property or some other material fact is discovered shows that so much of the confession *as immediately relates to that property or fact is true.*

III. HISTORY

11.25. The section, like the preceding sections, is derived from the Code of Criminal Procedure, Act 25 of 1861. We have already traced in detail the history of all the sections.[4] But it will be convenient to reproduce the earlier section again. We therefore cite below sections 148, 149 and 150 of Act 25 of 1861, Section 150 of Act 8 of 1869, and sections 25, 26 and 27 of Act 1 of 1872 in juxtaposition.

Act 25 of 1861	Act 8 of 1869	Act 1 of 1872 (Evidence Act)
S. 148. No confession or admission of guilt made to police officer shall be used as evidence against a person accused of any offence.		S.25. No confession made to a police officer shall be used as evidence against a person accused of any offence.
S.149. No confession or admission of guilt mady by any person whilst he is in custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be used as evidence against such person.		S.26 No. confession made by any person whilst he is in the custody of police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

[1] The underlined words will be discussed later.
[2] para. 11.23 *supra.*
[3] *R.* v. *Mosey*, (1783) 1 Leach C. C. 265 n.
[4] See General discussion.

Act 25 of 1861	Act 8 of 1869	Act 1 of 1872 (Evidence Act)
S.150. When any fact is deposed to by a police officer as discovered by him in consequence of information received from a person accused of any offence, so much of such information, whether it amounts to a confession or admission of guilt or not, as relates distinctly to the fact discovered by it, may be received in evidence.	S.150. *Provided* that any fact that is deposed to in evidence as discovered in consequence of information received from a person accused of any offence, or in the custody of a police officer, so much of such information, whether it amounts to a confession or admission of guilt or not, as relates distinctly to the fact thereby discovered, may be received in evidence.	S.27. Provided that any fact is to depose discovered in consequence of information received from a person accused of any offence in the custody of a police officer[f] so much of such information, whether it[s] amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.

IV. CONSTITUTIONAL ASPECTS

Section 27— Validity with reference to Article 14.

11.26. We may now consider the constitutional aspects of the section. So far, section 27 has come up for consideration with reference to two of the articles of the Constitution dealing with fundamental rights—Articles 14 and 20(3). Article 14, deals with equality; Article 20(3) deals with the privilege against self-incrimination As regards Article 14 of the Constitution, the validity of section 27 was attacked on the ground that the section makes an arbitrary distinction between persons in custody and persons not in custody. However, its validity on this point was upheld by the Supreme Court[1], on the ground that a person who is not in custody, but has committed an offence, would not normally give information to the police without surrendering himself to the police, and that the possibility of an offender who is not in custody (because the police has not been able to get at any evidence against him), giving information to the police leading to the discovery of an important fact, but without surrendering himself, would be rare.

Section 27 considered with reference to Article 20 (3) of the Constitution.

11.27. We may next refer to the provision in Article 20(3) of the Constitution. It provides, "No person accused of an offence shall be compelled to be a witness against himself".

11.28. The most important ingredient required for the application of this article is of compulsion, denoted by the word "compelled". The other important ingredient is that indicated by the words "to be a witness against himself". There is a third ingredient—"person accused of an offence".

11.29. Now, as to the ingredient indicated by the word "compelled", it is to be pointed out that section 27, if taken literally, would cover even confessions obtained by compulsion, because,—at least on one interpretation[2],—section 27 overrides section 24.

11.30. As regards the words "to be a witness against himself", Article 20(3) applies at the stage of investigation also,—as is shown by the discussion in *State of Bombay* v. *Kathi Kalu*[3] [4]. It would, therefore, be a reasonable view to take,

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[1] *State of U. P.* v. *Deoman Upadhyaya* A.I.R. 1960 S. C. 1125, (1960) 2 S.C.A. 371, 381; (1961) S.C.R. 14 (Das, Kapur, Hidayatullah and Shah JJ., Subba Rao J. dissenting).

[2] See *infra*.

[3] *State of Bombay* v. *Kathi Kalu*, A.I.R. 1961 S.C. 1808.

[4] See *infra* para. 11.32A.

that the validity of section 27 is maintainable only as regards confessions not obtained by compulsion, and that confessions obtained by compulsion would be hit by Article 20(3). Even "Statements" of the accused (not confessions) obtained by compulsion would be hit by Article 20(3). The case law which we discuss below, though not conclusive on this point, can be said to indicate this with reasonable certainty.

11.31. The question obviously could not have arisen in this form before the commencement of the Constitution. Discoveries could, then, prove the truth of a confession, and to admit an involuntary statement violating the standards of section 24 could not raise any question of unconstitutional action. The question could only be one of construction of the scope of section 27 and its relationship with other sections.

The constitutional guarantee, however, made a difference.

Allahabad case.

11.32. In 1958, the High Court of Allahabad held that the Constitution prohibited the use of a coerced confession even though the confirmation requirements of section 27 had been met[2].

Supreme Court case.

11.32A. The issue was raised in the Supreme Court for the first time in 1961, in the *State of Bombay* v. *Kathi Kalu*[3]. One of the accused in that case had revealed, under interrogation; the location of several stolen rifles, and after finding the rifles, the prosecution used section 27 to introduce, the statement at the trial. The Supreme Court held, on the facts that the use of section 27 in the particular case was not unconstitutional, since the interrogation alone had not rendered the statement *involuntary*. The Court took the view, that if the self-incriminatory information by an accused had been given *without any* threat, that would not be hit by the provisions of Article 20(3), as there was no 'compulsion'. It observed—

> "Thus, the provisions of section 27 of the Evidence Act are not within the prohibition aforesaid, *unless compulsion had been used*[4] in obtaining the information."

High Court decisions relevant to article 20(3).

11.33. We shall now refer to decisions of the High Courts relevant to Article 20(3) and section 27. In an Allahabad case[5], it was pointed out that the phrase used in Article 20(3) is "to be a witness", and not "to appear as a witness". It follows that the protection aforded to an accused, in so far as it relates to the phrase "to be a witness", is not merely in respect of testimonial compulsion *in the Court room*[6], but may well extend to compelled testimony previously obtained from him. For this conclusion, the High Court relied on an earlier Supreme Court case[7], construing Article 20(3). The High Court, therefore, held that Article 20(3) does apply to discoveries under section 27, Evidence Act, if these discoveries are the results of compulsion. The scope of section 27 is, thus, restricted by Article 20(3) of the Constitution, and the discoveries which follow a confession *brought about by compelling an accused person*[8] cannot be used against him.

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[1] *Amin* v. *The State*, I.L.R. (1957) 2 Allahabad 110; A.I.R. 1958 All. 293, 302 (Chaturvedi & A. N. Mulla, JJ.) (see *infra*).

[2] See e.g.—
(a) *Neharoo Mangtu Satnami* v. *Emperor*, A.I.R. 1937 Nagpur 220;
(b) *Emperor* v. *Misri* (1909) I.L.R. 31 Allahabad 592.

[3] *State of Bombay* v. *Kathi Kalu* A.I.R. 1961 S.C. 1803.

[4] Emphasis supplied.

[5] *Amin* v. *The State*, A.I.R. 1958 All. 290, 302, 303, para. 47, 48 (Chaturvedi & A. N Mulla JJ.).

[6] Emphasis supplied.

[7] *Sharma* v. *Satish*, A.I.R. 1954 S.C. 300.

[8] Emphasis supplied.

11.34. In a Gujarat case[1] also, it was observed that proof of the confession under section 27 would be barred by the Constitution, if coercion were proved. On the facts, however, coercion was not proved.

11.35. In most of the cases decided by the other High Courts, the statements were considered voluntary on the facts. Nevertheless, it was recognised that in some situations, section 27 may conflict with article 20(3).

11.36. Thus, the principle that, after the coming into force of the Constitution, the evidence which may otherwise be admissible under section 27 of the Evidence Act may be inadmissible by virtue of Article 20(3) of the Constitution, if it could be established that such evidence was obtained under compulsion, appears now to be accepted.

11.37. Of course, there must be evidence of compulsion. Mere police custody in the absence of further evidence to show that force or compulsion was used, will not suffice to show that the statement was made under compulsion[2] so as to attract Article 20(3).

Accused entitled to give information.

11.38. Also, it is not disputed that an accused is certainly *entitled* to give any information or evidence against himself. Article 20(3) only lays down that he shall not be *compelled to do so*, and if he has given the information voluntarily and has not actually been compelled to give the *same*, the provisions of Article 20(3) are not infringed. Where there is no evidence at all of any compulsion having been resorted to, for the purpose of obtaining an information from the accused leading to discovery, the information given by the accused is not hit by Article 20(3)[3].

11.39. Article 20(3) does not contemplate the suppression of truth simply because the information is *given by the accused*. Information given by the accused under section 27 is, not in every case,[4] compelled testimony.

Accused.

11.40. Again, where the person making the confession does not stand in the character of an accused person, Article 20(3) does not apply[5]—for example, where a person is examined under the general provision in section 108, Sea Customs Act, 1879, conferring power[6] on a gazetted officer of customs to summon and examine persons in connection with an inquiry into smuggling. But, where the ingredients of Article 20(3) are satisfied, section 27 cannot be availed of. This is clear from the discussion in the various rulings cited above.

Point under Article 20(3) considered.

11.41. In view of the position discussed above, a suggestion was made to us that it is advisable to exclude, from section 27, cases of *coerced confessions* by an express amendment. It was stated that Article 20(3) bars statements other than confessions also, and even as regards statements (other than confessions) obtained by compulsion, Article 20(3) could be relevant.

We have, however, come to the conclusion that no such express provision is required. Section 27 will, after the Constitution, be construed in conformity with the Constitution.

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[1] *Ahmedmiyan* v. *The State* A.I.R. 1963 Gujarat 159.
[2] *Ramamurthy* v. *Pani* A.I.R. 1959 Orissa 22, 36, 37 para. (D.B.).
[3] *Radha Kishan* v. *The State* A.I.R. 1960 Punj. 294, 295.
[4] *Jethiya* v. *The State* A.I.R. 1955 Raj. 147, 150, 151.
[5] *Ramesh Chandra* v. *State of West Bengal* (1969) 2 S.C.R. 461 ; (1970) 72 Bom. L.R. 787.
[6] See now the Customs Act, 1962.

V. RELATIONSHIP WITH OTHER SECTIONS

Section 27—Exception to which section.

11.42. The next question to be considered under section 27 concerns the inter-relationship of this section with others. Is section 27 an exception to sections 25 and 26, or is it an exception to sections 24, 25 and 26, or to section 24 only, or to sections 24 and 26? This question has been troubling the courts for years. Several views have been expressed on the subject.

Various views—Relationship of Section 27 and section 26. (i) Section 27 an exception to section 26.

(i) According to one view, the section, being placed in Juxtaposition to section 26, is an exception *only to that section.*[1] The words "in the custody of a police officer", which appear both in section 26 and in section 27, also lend support to this view.

A similar view had been expressed by Mahmood J. in his dissenting judgment in an Allahabad case,[2] with some plausible reasoning.

11.43. From the observation made by the Privy Council in *Pakala Narayanaswami's* case[3], it appears that the Privy Council was inclined to that view.

In *Pakala Narayanaswami's case,*[4] the main question was whether section 27 of the Act overrides section 162 of the Code of Criminal Procedure. In the course of the discussion of the question, the Privy Council observed—

> "It would appear that one of the difficulties that has been felt in some of the Courts in India in giving the words (of section 162) their natural construction has been the supposed effect on sections 25, 26 and 27, Evidence Act, 1872. Section 25 provides that no confession made to a police officer shall be proved against an accused. Section 26—No confession made by any person whilst he is in the custody of a police officer shall be proved as against such person. Section 27 is a proviso that when any fact is discovered in consequence of information received from a person accused of any offence whilst in the custody of a police officer, so much of such information whether it amounts to a confession or not, may be proved. It is said that to "give section 162 of the Code, the construction contended for, would be to repeal section 27, Evidence Act, for a statement giving rise to a discovery could not then be proved. It is obvious that the two sections can, in some circumstances, stand together.
>
> "Section 162 is confined to statements made to a police officer in course of an investigation. Section 25 covers a confession made to a police officer before any investigation has begun or otherwise not in the course of an investigation. *Section 27 seems to be intended to be a proviso to section 26 which includes*[5] any statement made by a person whilst in custody of the police and appears to apply to such statements to whomsoever made, e.g., to a fellow prisoner, a doctor or a visitor. Such statements are not covered by section 162. Whether to give to section 162 the plain meaning of the words is to leave the statement still inadmissible even though a discovery of fact is made such as is contemplated by section 27 *it does not seem necessary to decide.*"

11.44. In the case before the Privy Council, the declarant was not in the custody of the police, and no alleged discovery was made in consequence of his statement. Hence no final opinion as to section 27 and section 162 was expressed.

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[1] *Devi Ram* v. *The State* A.I.R. 1962 Punj. 70, 72 para. 6 (Khosla C. J. and Shamsher Bahadur J.).

[2] *Queen Empress* v. *Babulal,* I.L.R. 6 All. 509 (per Mahmood J. dissenting).

[3] *Pakala Narayanaswami,* A.I.R. 1939 P. C. 47.

[4] *Pakala Naranaswami* v. *Emperor,* A.I.R. 1939 P. C. 47, 52.

[5] Emphasis supplied.

11.45. In *Udai Bhan's case*,[1] the Supreme Court observed that section 27 is in the nature of a proviso to section 26, which interdicts the admission of confessional statements made by a person in custody of the police. Section 27 partially removes the ban placed on the reception of confessional statements under section 26. But the removal of the ban is not of such an extent as to absolutely undo the object of section 26. So much of the statement made by a person accused of offence and in custody of a police officer, whether it is confessional or not, as relates distinctly to the fact discovered, is provable. This was the proposition emphasised in that case. It was held, that, the evidence in regard to the discovery of the key as well as the box which the accused handed over to the police, was admissible in evidence under section 277. The "confession" lay in the fact that with the key, the shop of the complainant was opened and, therefore, that portion was inadmissible in evidence and only that portion which distinctly related to the fact discovered, i.e., the finding of the key, was admissible. Similarly, the recovery of the box was provable because there was no statement of a confessional nature in the recovery memo relating to it.

Relationship of section 27 and sections 25-26.

11.46. Another view on the subject is that section 27 can be regarded as an exception to both sections 25 and 26.[2] In one case[3] the Supreme Court observed[4] that section 27 is a proviso to sections 25-26.

(iii) section 27 and sections 24-26.

11.47. The third view is that the section is a proviso to all the three sections preceding it.[5-6]

The point was touched, but not decided, in one case in the Supreme Court[7] Shah J. (as he then was) though not specifically dealing with the point, observed that even though section 27 is in the form of a proviso to section 26, the two sections do not necessarily deal with evidence of the same character. Section 27 is concerned with the proof of information leading to the discovery of facts, *whether it amounts to a confession or not*. Moreover, only that much of the information is admissible as distinctly relates to the facts discovered.

11.48. Hidayatullah J., however, observed in that case, as follows[8]:—

"Section 27, which is framed as an exception, has rightly been *held as an exception to sections 24—46 and not only to section* 26. The words of the section were taken bodily from *Lockhart's case*[9] and foot-note to (1783) 1 Cr. Cases, 283, where it was stated:

"But it would seem that so much of the confession as relates directly to the fact discovered by it may be given in evidence, for the risk of rejecting (an) extorted confession is the apprehension that the prisoner may have been thereby induced to say what is false; but the fact discovered shows that so much of the confession as immediately relates to it is true."

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[1] *Udai Bhan* v. *State of U.P.*, (1962) Suppl. S.C.R. 830; A.I.R. 1962 S.C. 1116, 1118, para. 7 and 11.

[2] *Mst. Jamunia Partap* v. *Emperor* A.I.R. 1936 Nag. 200; I.L.R. (1936) Nag. 78.

[3] *Chinnaswami* v. *Andhra Pradesh* A.I.R. 1962 S.C. 1788, 1793 (Wanchoo J.).

[4] See also *Delhi Admn.* v. *Balkrishnan* A.I.R. 1972 S.C. 3.

[5] (a) *Emperor* v. *Remis*, A.I.R. 1947 Punj. 152;
(b) *Mathura* v. *Emperor* A.I.R. 1946 Punj. 210;
(c) In re *Kataru Chinna Papiah*, A.I.R. 1940 Mad. 136.
(d) *Q. E.* v. *Babulal*, I.L.R. 6 All. 609 (F.B.) (Majority view).

[6] *State of A. P.* v. *Nagesu* A.I.R. 1966 S.C. 119, 123 Para. 9; (1965) 2 S.C.A. 367, 371.

[7] *State of U.P.* v. *Deoman Upadhyaya* (1961) S.C.R. 14; A.I.R. 1960 S.C. 125.

[8] *State of U.P.* v. *Deoman Upadhyaya* A.I.R. 1960 S. C. 1125; 1146; para 65.

[9] *Lockhart's case*, 1 Leach 386; 168 E.R.

11.49. We need not consider the question which of these views is correct. But, as a matter of policy, the question arises whether a *confession* caused by an undesirable inducement, threat or promises,—and hence inadmissible under section 24,—should become admissible under section 27, because a fact was discovered in consequence thereof. We are of the view that the paramount rule of policy embodied in section 24 must override section 27. In this connection we would state that the position regarding confessions dealt with in section 24 differs from that under sections 25—26. Section 24 enacts a rule which should have universal application. That rule is not based on any artificial or peculiar considerations relatable to the supposed excesses of the police. It is intended to discourage the tendering of hopes or promises or the exercise of coercion, in order to induce or compel the making of confessions. These considerations weigh against section 27 overriding section 24. Section 24 is not based merely on the criterion of truth. It is intended to discourage coercion in the wide sense for securing confessions.

Section 27—Why it should not override section 24.

11.50. In this connection, we may refer to the observations made by Rankin C. J. in *Durlay* v. *Emperor*[1], which point out how a paradox would arise on the contrary view.

> "But, though it is now well held that it is an exception to sections 24 and 25, there are elements of *paradox* in that connection.
>
> "The first consequence is that a part of the statement may be given in evidence, although *it is under section* 24 *induced by threat or promise*—if something has been discovered in consequence of that part of the statement".

11.51. It is necessary to go to the root of the matter, namely, what is the fundamental policy on which section 24, is based. The Privy Council observed in *Ibrahim's case*[2]—

Policy of section 24.

> "The rule excluding evidence of statements made by a prisoner when induced by hope held out or fear inspired by a person in authority *is a rule or policy*".

These observations apply with great force to section 24.

11.52. The subjective pressure referred to in section 24, which operates on the mind of the person making the confession, may not lead to *the creation* of facts discovered under section 27. But, in view of the policy underlying section 24, no valid reason remains for admitting in evidence confessions excluded from section 24 even where they fall under section 27.

11.53. The facts of an Allahabad case[3] may be utilised, to illustrate the effect of the view which is taken on the question of the inter-relationship of sections 24 and 27. In that case, a girl named *Misri* was murdered, and certain ornaments which she was wearing were not found on her dead body. The accused woman, whose name was also *Misri*, was suspected and arrested, and kept in custody for 24 hours. She then took the police to a certain place, and pointed out a spot where certain ornaments were found. The Sessions Judge found that while she was in police custody, an inducement was held out *to her by a police officer that she would be let off if she produced the ornaments.* The Sessions Judge found her guilty, and sentenced her to death. The appeal to the High Court came up before the two Judges, who made a reference to the Full Bench for deciding the question whether evidence was admissible to show that

Allahabad case as illustrating the matter.

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[1] *Durlay* v. *Emperor* A.I.R 1932 Cal. 297, 300; I.L.R. 59 Cal. 1040, 1045.

[2] *Ibrahim* v. *King Emperor* A.I.R. 1914 P.C. 155, 160.

[3] *Emperor* v. *Misri* (1909) I.L.R. 31 Allahabad 592, 597, 598.

the accused woman, as a matter of fact, did go to a certain place and there produced the ornaments in question. Counsel for the accused appellant argued, that section 27 could not override section 24, while counsel for the State argued to the contrary. The Full Bench held, that section 27 qualified sections 24 and 25 also; and, on this view, the evidence in question was admissible. With this expression of opinion on the reference, they sent the case back to the Division Bench, which then dismissed the appeal and confirmed the conviction and sentence. No detailed reasons are given by the Full Bench for the view that section 27 qualifies sections 24 and 25 also, except that it rejected the argument of the appellant that in construing section 27, recourse should also be had to section 163 of the Code of Criminal Procedure (Prohibition against torture).

11.54. For the reasons already stated,[1] we take a different view, namely, that section 27 cannot override section 24.

In brief—

(i) on the merits, section 24 should override section 27; and

(ii) whenever external pressure of the nature mentioned in section 24 operates, the whole statement should be excluded.

No amendment of section 24 is required on this point, but the position is as stated above.

Recommendation regarding section 27.

11.54A. There is, however, one point on which section 27 should be revised. It is desirable to make it clear that the section is an exception to sections 25—26. This aspect is not now brought out clearly. We recommend that section 27 should be re-drafted so as to provide that it constitutes an exception to sections 25 and 26.

Section 27 also overrides the provisions of sections 162, code of Criminal Procedure, 1973, under which certain statements made to the police during investigation are excluded. But that is already provided in that code.

We may note that, as section 27 now stands, it leaves scope for the view that it overrides *only section* 26. This is because it is placed immediately after section 26, and uses words reminiscent of that section. However, for practical reasons, it should override section 25 also, because, in practice, statements made under section 27 are always *made to police officers*, and if section 25, which relates to confessions made to police officers, is not over-ridden, section 27 will have very little to operate on.

11.55. It should also be provided that information given to a police officer is also within the section.

VI. OTHER POINTS

Section 2,— "so much of such information".

11.55A. A few other points arising out of the section may now be dealt with. The words "so much of such information" in section 27 occasionally present problems of application. But the principle underlying those words is clear enough. The words "relates" and "distinctly", which occur in the section, avoid undue vagueness. No verbal formula will, so far as can be seen, succeed in improving the position in this regard.

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[1]Para 11.50 *supra*.

Section 27—to be excluded for confessions made to high police officers.

11.56. It was pointed out in the 14th Report of the Law Commission that, consequential on the recommendation made in that Report to admit confessions made to superior police officers in the presidency towns and other specified local areas, there will be no room for the application of the exception embodied in section 27 in such cases. The recommendation in that Report was to exclude such cases, i.e. confessions to senior police officers, in the specified areas.

Recommendation to modify section 27 in consequence of recommendation regarding confessions to high police officers.

11.57. We are now recommending a different section[1] for admitting confessions made to certain police officers. Geographically, our scheme has a wider application than that recommended in the 14th Report, inasmuch as the amendment will not be confined to specified areas. But our proposal visualises certain other requirements, relating to the right to consult a lawyer and, in some situations, his presence at the time when the confession is recorded by the police officer. Where those requirements are complied with, the confessions will become admissible irrespective of section 27. But, where those requirements are not complied with, the confession made to a police officer or while in police custody will not become admissible, and the present bar under sections 25—26 will continue to apply. To override that bar, section 27 will be needed. We do not, therefore, propose to modify section 27 in this regard.

VII. RECOMMENDATION

11.58. In the light of the above discussion, we recommend that section 27 should be revised as follows:

REVISED SECTION 27

27. *Notwithstanding anything to the contrary contained in sections* 25 *and* 26, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, *being information given to a police officer or given whilst such person* is in the custody of a police officer, so much of such information whether it amounts to a confession or not, and relates distinctly to the fact thereby discovered, may be proved.

Section 28.

11.59. According to section 28, if such a confession as is referred to in section 24 is made after the impression caused by any such inducement, threat or promise has, in the opinion of the court, been fully removed, it is relevant.

Recommendation to renumber section 28 as section 24-A.

11.60. This section, thus, forms an exception to the law laid down in section 24.[2] [3]Since section 28 is a qualification of section 24, its proper position in the Act should have been immediately after that section. We, therefore, recommend that section 28 should be renumbered as section 24A and placed after section 24.

SECTION 29

I. INTRODUCTORY

Introductory.

11.61. According to section 29, if 'such a confession' is otherwise relevant, it does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been

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[1]See section 26-A (proposed).

[2]*Empress of India* v. *Pancham* I.L.R. 4 All. 198, 201 (per Stuart, C. J.).

[3]See also *Queen Empress* v. *Babu Lal* I.L.R. 6 All. 509, 539 (per Mahmood, J.).

the form of those questions, or because he was not warned that he was not bound to make such confession, and that the evidence of it might be given against him.

II. MEANING OF "SUCH CONFESSION"

11.62. The section begins with the words :
"*if such a confession* is otherwise relevant; it does not become irrelevant.....". These words raise an important question, because they are capable of different interpretations :—

(i) They might be taken as referring to the confession referred to in section 24. This is on the reasoning that the preceding section,—section 28 contains the words "such a confession as is referred to in section 24."

(ii) In the alternative, they may be taken as referring to confessions, not contemplated in sections 24, to 28, that is to say, extra-judicial confessions not made to the police or other person in authority.

11.63. It has been observed in a Patna case,[1] that the section is meant to dispel doubts with regard to extra-judicial confessions made under circumstances similar to those which make judicial confessions inadmissible. According to this view, repugnancy between sections 24 to 28 on the one hand, and section 29 on the other hand, has to be avoided, and such repugnancy "can be avoided only if section 29 is construed not so as to cover the field occupied by sections 24 to 28 of the Act. Section 29 must, therefore, refer to such confessions only as *are not governed by or contemplated in the preceding* sections, i.e., confessions made not to Magistrates or police officers, or to persons in authority having some relation to the charge against him."

11.64. This view, which was elaborated in detail by Ray, J. in the Patna case, cites in its support the following discussion contained in the Law of Evidence by Chamberlain:[2]

> "The rule (rejecting confessions induced by threats and promises by those in authority) assumes that those in authority over legal proceedings ought, in the public interest, to refrain from placing pressure upon the free will of their prisoners. What injury he may suffer at the hands of *private persons*[3] is none of its concern. So long as the accused is not influenced *by a person in authority* in certain specified ways, he may be deceived, flattered, whittled, tricked or betrayed into a perfectly admissible confession".

11.65. In a Bombay case,[4] it was observed that the opening clause 'if such a confession', refers to confessions which have been dealt with in the preceding sections. The clause 'postulates that they are admissible under the said sections and that it is with such confessions that section 29 deals'.

It was also observed that before the provisions of section 29 could be invoked, it must appear that the confession in question is admissible under the preceding sections. In other words, it must not have been caused by inducement, threat or promise. The confession, if made by a person while in police custody, must have been made in the immediate presence of the Magistrate, and if

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[1] *Emperor* v. *Jamuna Singh* A.I.R. 1947 Pat. 305; I.L.R. 25 Pat. 612, 635, 636, 637 (Ray. J.).

[2] Chamberlain, Law of Evidence.

[3] Emphasis added.

[4] *Rangappa* v. *State* A.I.R. 1954 Bom. 285, 289, righthand column (Gajendragadkar, J.).

any inducement, threat or promise was held to the confessor, the confession must have been made after the impression has been removed. Section 29, therefore, assumes that there is no bar to the admissibility of the confession in question arising from the earlier provisions, and the section then proceeds to negative other possible objections and bars that may be raised against its admissibility. This, in effect, means that section 29 applies only to confessions which have not become irrelevant under sections 24 to 28.

Questions for consideration.

11.66. In view of the different shades of view expressed on the subject, two questions arise for our consideration—

(a) what is the correct interpretation of the section? and

(b) How should that interpretation be incorporated, in the opening words of the section, which seem to have caused difficulty?

Bombay view preferred.

11.67. It is considered that the approach in the Bombay case,[1] just now referred to, is the correct one, namely, that section 29 comes into operation only in respect of a confession which is 'otherwise relevant',– that is to say, which is not excluded by sections 24 to 27 or by any other provisions of law, and which is made by an accused person. This interpretation gives accurate and full meaning to the words "such a confession" (which are the equivalent of "a confession made by an accused person"), and to the words "otherwise relevant" (which are the equivalent of "a confession not excluded by sections 24 to 27 or by any other provision of law"). It is in harmony with the policy of the exclusionary rules contained in the other sections. At the same time, it tells us what are the non-vitiating factors of a confession, in general. Apart from the special situation of confessions made before Magistrates,[2] this view helps us to bear in mind that the factors enumerated in the section are not to be considered as vitiating factors in themselves.

Recommendation as to earlier half.

11.68. In conformity with the interpretation for which we have indicated our preference above,[3] the words 'if such a confession is otherwise relevant' should be replaced by some such words as—*"If a confession made by an accused person is not irrelevant or incapable of being proved under sections 24 to 27"*. Or, a simpler course would be to omit the word 'such'. We recommend that the section should be suitably amended, by adopting either of the two alternatives just now mentioned. We prefer the second alternative, being the simpler of the two.

III. RELATIONSHIP WITH SECTION 164 CODE OF CRIMINAL PROCEDURE

Section 29, later half, and section 164, Cr. P. C.

11.69. It remains now to deal with the latter half of section 29, which possesses certain special features. The latter half provides that a confession, otherwise relevant, does not cease to be so merely because..... "the accused was not warned that he was not bound to make such confession and that the evidence of it might be given against him".

At the first reading, this part of the section would seem to conflict with section[4] 164 of the Code of Criminal Procedure, 1898—now section 164, Code of Criminal Procedure, 1973. Section 164 lays down, *inter alia*, an elaborate procedure for warning the accused where the confession is recorded by the Magistrate.

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[1] *Rangappa* v. *The State* A.I.R. 1954 Bom. 285 Para. 11.65, *supra*.

[2] See discussion as to section 164, Cr. P.C. *infra*.

[3] Para. 11.67 *supra*.

[4] The conflicting decisions are collected in *Rangappa* v. *The State* A.I.R. 1954 Bom. 285, 291, 292.

The material part of section 164 of the Code reads[1]—

> "(2) The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that if he does so, it may be used as evidence against him, and no Magistrate shall record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily".

Diverse views.

11.70. In judicial decisions, different views have been expressed on the question whether section 29 of the Evidence Act over-rides section 164 of the Cr.P.C. The decisions were rendered with reference to section 164 of the Code of 1898, but, in this respect, the section in the Code of 1973 makes no difference.

(i) The first view on the subject is that section 29 is an overriding provision. This is the Bombay view.[2] It was observed in the Bombay case that the Legislature, fully aware of the clear and unambiguous words used in section 29 of the Evidence Act, while introducing section 164(3) in the Criminal Procedure Code (by amendment Act 18 of 1923), did not think it necessary to provide for the supersession or modification of section 29. According to the Bombay view, therefore, non-compliance with section 164(3) [now section 164(2)] does not exclude the confession, and the court is free to accept or reject the confession, if it is voluntary or involuntary, as the case may be.

To the same effect are decisions of the Madras[3] and Rajasthan[4] High Courts, and also of the Allahabad High Courts.[5]

(ii) The opposite view was taken by Ray C. J. and Narasimham J. (as he then was), in the Orissa High Court.[6] The judgment of the Orissa High Court contains a full discussion of all aspects.

(iii) The Mysore High Court[7] takes a middle view, treating the confession recorded without the statutory warning as inadmissible *only if the accused is prejudiced thereby.*

It is desirable that the matter should be clarified, one way or the other. We are of the view that *as a matter of policy*, section 164 of the Code of Criminal Procedure must prevail, because it embodies a rule inherently good, and it should not be open to a trial court to disregard non-compliance therewith and admit, a confession recorded in circumstances; showing such non-compliance. Hence an exception saving section 164(2), Cr. P.C.[8] should be introduced in section 29.

Reason for giving overriding effect to sec. 164.

11.71. We have come to this conclusion for the reason that while the absence of a warning by itself may not, in general, be treated as a non-vitiating factor (in regard to a confession which is extra-judicial), the case of a confession purporting to be recorded under section 164 of the Code of Criminal Procedure is different. The confession is recorded judicially. We have in this section, a statutory provisions specifically providing for warning. The whole object of the section is to ensure, as far as is practicable, the voluntariness, or

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[1]Section 164 (2), Cr. P.C. 1973.

[2]*Rangappa* v. *The State* A.I.R. 1954 Bom. 285, 290, 292, para. 14, 21.

[3]*Re Vellamoonii Goundan*, A.I.R. 1932 Mad. 431.

[4]*Dhuda* v. *The State* A.I.R. 1957 Raj. 141, 143, Para. 9.

[5]*Emp.* v. *Nanua*, A.I.R. 1941 All. 145, 147.

[6]*Bala Majhi* v. *The State of Orissa*, A.I.R. 1951 Orissa 168, 169, 175, 177, Para. 1 and para 26, 34.

[7]In re *Madegowden* A.I.R. 1957 Mys. 50, 52, para. 8 (section 29, however, was not considered).

[8]Para 11.69 *supra*.

at least circumstances conducive to voluntariness, in the making of confessions and of these circumstances, the requisite warning is an integral part. Irregularities in the *record of compliance* with the statutory requirements will, no doubt, be taken care of by the provision in this regard in the Code of Criminal Procedure.[1] But the broad requirement of warning under section 164 is no idle formality. It symbolises the dis-interestedness which one has come to associate with the judicial Magistracy.

Section 29 should override sec. 164.

11.72. We, are therefore, of the view that it would be better to amend section 29, so as to provide that it will be subject to section 164(2), Cr. P. C. which deals with the requirement of warning. Such an amendment will be faithful to the proper import of section 164 as interpreted by the Privy Council. The Privy Council in *Nazim Ahmed* v. *K. E.*,[2] observed,—

> "Where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all.
>
> Other methods are necessarily forbidden.....
>
> "Although the Magistrate acting under this group of sections is not acting as a court, yet he is a judicial Magistrate and both as a matter of construction and of good sense there are strong reasons for applying the rule in question to section 164. Upon the construction adopted by the Crown, the only effect of section 164 is to allow evidence to be put in a form in which it can prove itself under sections 74 and 80 of the Evidence Act. Their Lordships are satisfied that the scope and extent of the section is far other than this and that it is a section conferring powers on Magistrates and delimiting them. It is also to be observed that if the construction contended for by the Crown be correct, all the precautions and safeguards laid down by sections 164 and 364 would be of such trifling value as to be almost idle..... The range of Magistrate confessions would be so enlarged by this process that the provisions of section 164 would almost inevitably be widely disregarded in the same manner as they were disregarded in the present case".

11.73. It may be noted that the actual judgment in the Privy Council case cited above was delivered by Lord Roche, and the other members of the Judicial Committee in this case were Sir John Wallis, Ex-Chief Justice of the Madras High Court, Sir Lancelot Sanderson, Ex-Chief Justice of the Calcutta High Court, Sir Shadi Lal, Ex-Chief Justice of the Lahore High Court, and Sir George Rankin, Ex-Chief Justice of the Calcutta High Court.

REVISED SECTION 29

11.74. In consonance with the above approach, we recommend that a suitable amendment should be made in section 29, so as to ensure that the section does not render relevant a confession which is recorded by a Magistrate which is inadmissible by virtue of non-compliance with section 164(2) of the Code of Criminal Procedure.

We, therefore, recommend that section 29 should be revised as follows:—

REVISED SECTION 29

"29. If.....a confession is otherwise relevant, it does not become irrelevant merely because—

(a) it was made—

(i) under a promise of secrecy, or

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[1]Section 463, Cr. P.C. 1973 (see *infra*).

[2]*Nazir Ahmed* v. *K. E.* A.I.R. 1936 P.C. 253.

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

(iii) when he was drunk, or

(iv) in answer to questions which he need not have answered, or

(b) *the accused person was not* warned that he was not bound to make such confession and that the evidence of it might be given against him.

Exception. - Nothing in this section shall affect the provisions of sub-section (2) of section 164 of the Code of Criminal Procedure, 1973, as to the recording of confessions by Magistrates."

Recommendation in 14th Report, as to retracted confession.

11.75 & 11.76. It is now necessary to refer to a recommendation made in the 14th Report[1] of the Law Commission, to the effect that the rule of practice and prudence which requires corroboration of a retracted confession, should be given statutory recognition, since the rule has achieved the status of a principle of law and has been universally recognised and acted upon. We quote below the relevant passage from that Report.

> "41. There is no statutory requirement that the confession of an accused person, later retracted should be corroborated before it is acted upon. In a large number of cases, prisoners who have made lengthy and detailed confessions duly recorded under section 164, Criminal Procedure Code, and have reiterated them in the committing magistrate's court, resile from these confessions in the court of session. The task of the Judges in such cases is made very difficult. Judicial decisions have therefore laid down the rule that while a conviction on a retracted confession is not illegal, yet prudence dictates that a conviction should be "based on such a confession, only if it is corroborated by independent testimony. The rule of practice and prudence requiring corroboration of a retracted confession has achieved the status of a principle of law and has been universally recognised and acted upon. We would suggest that this rule might be given statutory recognition".

11.77. We have, however after careful consideration, come to the conclusion that it is better to leave the matter as it is, so that the court may decide the matters on a consideration of all evidence before it, giving such credence to the confession as it thinks fit in the circumstances of the case.

SECTION 30

Introductory.

11.78. Section 30 provides that, when more persons than one are jointly tried for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is 'proved', the court may "take into consideration" such confession *against such other person also.* The section is obviously a departure from the general rule (section 21) applicable to all admissions, whereunder an admission is evidence only against the person who makes it. The reason which is said to have justified this departure, is that, if a person implicates himself (while implicating others), there is some guarantee that the implication is true. It is also said that it is difficult in such a situation to require the court to exclude the statement altogether from its mind, when it comes to consider the case against the other accused.

Principle.

11.79. The theory is that when a person admits his guilt and exposes himself to the pains and penalties provided for it, there is a guarantee for his truth.

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[1] 14th Report (Reform of Judicial Administration) Vol. 2, Page 751, paragraph 41.

Thus, the assumption underlying the section is, that self-implication takes the place of the sanction of oath, and serves as a guarantee of the truth of the accusation against the other.

Reasoning not convincing.

11.80. We do not, however, find this reasoning convincing. The present provision, in our view, suffers from several major defects. In the first place, self-implication may be a substitute for oath, but it is not *an adequate substitute for cross-examination.* It is to be remembered that when A and B are tried together and a confession by A implicating both of them is admitted under section, B has no opportunity of cross-examining A on so much of his confession as implicates B also. It is impossible for B to effectively rebut what A has said, because most of the rebuttal evidence will have to be in the negative, and it is difficult to prove the negative without cross-examination. The difficulty of proving the negative has been the main foundation for the importance which the law has attached to cross-examination. Since B cannot compel A to enter the witness box (A being an accused person himself), cross-examination is ruled out. Thus, the present section practically leaves B in the hands of A so far as A's confession is concerned.

Moreover, a confession may be true as regards the maker, but untrue as far as it affects others. Such untruth may arise from malice, or revenge or from other circumstances, which one cannot readily catalogue or recount.

Suggestions received on the point.

11.81. It may be noted that with reference to section 30, a number of suggestions have been received from time to time for its deletion. One of the High Courts made such a suggestion,[1] a few years ago. The High Court pointed out that as the law now stands, there can be no conviction under section 30 without the fullest and strongest corroboration on material particulars.[2]

A suggestion for the repeal of section 30 was made by a Bar Association.[3] Such a suggestion was also made long ago by a Chief Presidency Magistrate[4], a District and Session Judge,[5] and a State Law Commission.[6] The suggestion by the Chief Presidency Magistrate refers to the fact that section 30 has been described as a needless tampering with the wholesome rule of English Law.

11.82. It may be of interest to note that the Ministry of Law itself forwarded to the Law Commission a note by one of its officers for the repeal of section 30[7]. The note quotes judicial criticism describing the evidence as dangerous material and as needless tampering with the wholesome rule of the English law. It criticises the principle in section 30 as "extraordinary" and as only prejudicing fair trial.

Judicial criticism.

11.83. It may be noted that judicially also, the section has not escaped criticism. It has been described as "a needless tampering with the wholesome rule of the English law",[8] and as a "most unsatisfactory section"[9] by Courts Troutter C. J. In an Oudh case[10], such evidence was described as "exceptionally dangerous".

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[1]F. 3(1)/55-L. C. Serial No. 56 (High Court of Andhra Pradesh).

[2]*Ram Prakash* v. *State of Punjab* (1959) S.C.A. 524 referred to.

[3]Serial No. 29, File No. 3(1)/55 L.C. Collection No. 1 page 78 (Tripura Bar Association).

[4]Sr. No. 8 File No. 3(1)/55 L.C. Part I, page 76 Col. No. 2 (Chief Presidency Magistrate, Madras).

[5]Sr. No. 8 File No. 3(1)/55 L. C. Part I, page 103, Col. No. 2 (District Judge, Coimbatore).

[6]Sr. No. 22, File No. 3(1)/55-L.C. Part I, page 153, Col. No. 2 (State Law Commission, West Bengal).

[7]File 3(1)/55-L.C. Part I, Sr. No. 6, Copy of the Notes by Shri S. P. Chatterjee, Attache, dated 23rd June, 1958 received through the Min. of Law, File No. 80/52/54-L.

[8]In *re : Lilaram* A.I.R. 1925 Mad. 805, 807 (Coutts Troutter C. J.).

[9]In re : Lilaram A.I.R. 1925 Mad. 805, 807.

[10]*Baboo Singh* v. *Emperor* A.I.R. 1936 Oudh. 156, 159 (King C. J. and Nanavatty J.).

Reilly J. observed in a Madras case[1]—

> "Section 30, Evidence Act, is a very exceptional, indeed an extraordinary, provision, by which something which is not evidence may be used against an accused person at his trial. Such a provision must be used with the greatest caution and with care to make sure that we do not stretch it one line beyond its necessary intention".

Logical basis not sound.

11.84. We have already pointed out[2] that the logical basis on which the section is based is not sound. Apart from this defect, the section, in practice, creates a complication, namely, while the confession covered by the section can be "taken into consideration", it is not technically regarded as "evidence"[3], and the section does not declare it to be relevant within the meaning of section 5, although it is one of the factors which fall within the definition of 'proof'. In view of this weakness, courts have insisted on independent evidence against the accused, and have held that a conviction based merely on the confession of a co-accused would be bad in law[4]. The confession of the co-accused is regarded merely as a *material* for corroborating other evidence,—and that too a weak material. As has been explained by the Supreme Court[4], if the other evidence is capable of belief independently of the confession, then, of course, it is not necessary to call the confession for aid; but where the judge is not prepared to act on the other evidence as it stands (even though, if believed, it would be sufficient to sustain a confession), he may call in aid the confession and use it "to lend assurance to the other evidence" and thus fortify himself in believing that which he would not accept without such aid.

Position in England.

11.85. In England, unless there is some common object or conspiracy between them, there is no privity between co-defendants[5], nor between prisoners jointly indicted[6]. And, the confession of a co-accused is not admissible against the other accused.

Position in the U.S.A.

11.86. The question has been discussed in the U.S.A. Where two or more of the co-criminals are tried jointly as co-defendants, and the statement of one of them is offered against the maker, even though its contents implicate others than the maker, is it admissible? The question was discussed in *Delhi Paoli case*[7], where the Supreme Court held that there was no objection to this, as long as the jury was given a *precautionary instruction* to consider the confession *as evidence only against the defendant who made it.*

11.87. However, in 1968, the Supreme Court took a different view in *Bruton* v. *United States*[8] even on this narrow use. The basic constitutional doctrine invoked in this case was the right *to confrontation.* The court held that if the precautionary instructions referred to in the earlier judgment *Delhi Paoli* case are ignored by the jury, the result is that evidence against the second defendant is offered in the form of the first defendant's confession, and this is so even though, because of the privilege against self-incrimination, the second defendant cannot call the first defendant to the stand. Therefore unless the jury

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[1] *Periyaswami* v. *Emperor* A.I.R. 1931 Mad. 177, 178.

[2] *Bhuboni Sahu* v. *King* (1949) 76 I.A. 147, 155; A.I.R. 1949, P.C. 257.

[3] See the judgment of Jenkins, C. J. in *Emperor* v. *Lalit Mohan,* (1911) I.L.R. 38, Cal. 559.

[4] Kashmira Singh v. The State A.I.R. 1952 S.C. (1952) S.C.R. 526, 530 (Fazl Ali, Mukherjea and Bose, JJ.).

[5] *Daniels* v. *Potter* (1830) 4 C.&P. 262.

[6] *R.* v. *Gunewardene,* (1951) 2 K.B. 600, 610; (1951) 2 All. E.R. 290 overruled on another point in Toohey (1965) A.C. 595.

[7] *Delhi Paoli* v. *United States* (1957) 352, U.S. 232.

[8] *Bruton* v. *United States* (1968) 391, U.S. 123.

could be expected to abide by the precautionary instructions, the receipt of one defendant's confession would impair the right of confrontation and cross-examination on the part of others who are implicated in that confession. This was the basis of the later decision.

11.88. As was pointed out in *Barber* v. *Page*,[1] one of the important objects of the right of confrontation was to guarantee that the fact finder had an adequate opportunity to assess the credibility of witnesses.

Recommendation to repeal the section.

11.89. Having taken into account all aspects of the matter, we have come to the conclusion that section 30 should be repealed. Soundness of the principle on which it is based is debatable. The supposed substitute for oath is self-implication. Assuming that self-implication is an acceptable substitute for oath, it is, in our view, no substitute for effective cross-examination. And, as we have discussed above, the co-accused can hardly rebut the incrimination against him effectively. This position is a potential source of great injustice in many cases, and practically amounts to a violation of the principle that no man ought to be condemned unheard. The person incriminated by the confession of a co-accused is in a dilemma. If he enters the witness box, he does so at the risk of losing his privilege against self-incrimination by being exposed to cross-examination without restrictions. If he does not enter the witness box, there will be injustice. He may be unable to rebut the allegations made by the confessing accused, since the latter (unless he enters the witness box) would not be available for cross-examination.

11.90 and 11.91. We are, therefore, of the view that even the limited use to which the confession can be put under the section is not justifiable, and we recommend that the section should be repealed.

Expression 'proved'.

11.92. One of the requirements of section 30 is that a confession made by one accused affecting himself and some other accused should be 'proved'. Some controversy appears to exist on the point whether a confession in *the course of the trial* would come under the section. The word 'proved' would seem to indicate a contrary position and justify a narrow view. This narrow view is, in fact, supported by the decisions of some High Courts[2].

A contrary view has, however, been taken in some decisions[3].

11.93. On the present language, the narrower view is correct, that is to say, the section does not apply to a *confession made in the course of the trial*. However, the point will be academic after reference.

Recommendation.

11.94. In short, our recommendation as to section 30 is that it should be Repealed, for the reasons given above[4].

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[1] *Barber* v. *Page*; 390 U.S. at 721 20 L Ed. 2d, at 758.

[2](a) *Emp.* v. *Mahadev* I.L.R. 45 All. 323; A.I.R. 1923 All. 322, 325 (Walsh J.).

(b) *R.* v. *Ashootosh* (1878) I.L.R. 4 Cal. 483 (F.B.).

(c) In re *Maharumathu* A.I.R. 1931 Mad. 820, 821 (Beasley C. J. and Sundaram Chetty J.).

(d) *Mrs. V. Sumitra* v. *Emp.* A.I.R. 1940 Nagpur 287, 288, 291 (Niyogi and Grover JJ.).

(e) *Kunwar Sen* v. *Emp.* A.I.R. 1933 Oudh 86; I.L.R. 8 Luck. 286.

(f) *Des Raj* v. *State* A.I.R. 1951 Punjab 14, 17 Paragraph 21 (Harnam Singh J.).

[3](a) *Cooper* v. *Emperor* I.L.R. 54 Bom. 531; A.I.R. 1930 Bom. 354; 358 (Mirza & Broomfield, JJ.).

(b) *Emperor* v. *Valu* A.I.R. 1939 Mad. 737 (Burn & Stoddart, JJ.).

(c) *Dial Singh* v. *Emperor* A.I.R. 1936 Lah. 337 (Yung C. J. & Rangilal J.),

(d) *Rijhumal* v. *Emperor* A.I.R. 1937 Sind 218 (Davis, J. C.).

[4]Para. 11.91, *supra*.

SECTION 31

Section 31— Admissions not conclusive proof, but may estop.

11.95. Section 31 provides that admissions are not conclusive proof of the matters admitted, but they may operate as estoppel under the provisions hereinafter contained. It follows that an admission may be rebutted in appropriate circumstances.

In allowing such rebuttal, the law favours the investigation of truth by all expedient methods[1]. The doctrine of estoppels, by which further investigation is precluded, being an exception to the general rule, and being adopted only for the sake of general convenience, and for the prevention of fraud, will not be extended beyond the reasons on which it is founded. Therefore, admissions, whether written or oral, which do not operate by way of estoppel, constitute only *prima facie* and rebuttable evidence against their makers and those claiming under them, as between them and others.

No change is needed in the section.

APPENDIX I

Section 164, Cr. P. C. 1973.

Recording of confessions and statements.

164(1). Any Metropolitan or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any time afterwards before the commencement of the inquiry or trial;

Provided that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.

(2) The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that *it is being made voluntarily*.

(3) If at any time before the confession is recorded, the person appearing before the Magistrate states that he is not willing to make the confession, the Magistrate shall not authorise the detention of such person in police custody.

(4) Any such confession shall be recorded in the manner provided in section 281 for recording the examination of an accused person and shall be signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record to the following effect:—

> "I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.
>
> (Signed) A. B.
> Magistrate".

(5) Any statement (other than a confession) made under sub-section (1) shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate, best fitted to the circumstances of the case; *and the Magistrate shall have power to administer oath to the person whose statement is so recorded.*

(6) The Magistrate recording a confession or statement under this section shall forward it to the Magistrate by whom, the case is to be inquired into or tried.

APPENDIX II

Section 463 Cr. P.C. 1973.

Non-compliance with provisions of section 164 or section 281.

463(1). If any Court before which a confession or other statement of an accused person recorded, or purporting to be recorded under section 164 or section 281, is tendered, or has been received, in evidence finds that any of the provisions of either of such sections have not been complied with by the Magistrate recording the statement, it may, notwithstanding anything contained in section 91 of the Indian Evidence Act, 1872, take evidence in regard to such non-compliance, and may if satisfied that such non-compliance has not injured the accused in his defence on the merits and that he duly made the statement recorded, admit such statement.

(2) The provisions of this section apply to Courts of appeal, reference and revision.

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[1]See woodroffe.

CHAPTER 12

STATEMENTS MADE UNDER SPECIAL CIRCUMSTANCES BY PERSONS WHO CANNOT BE CALLED AS WITNESSES

I. INTRODUCTORY

Introductory.

12.1. Admissions (including confessions) which we have discussed so far, constitute a species of exceptions to the rule against hearsay. We shall now deal with statements made under certain special circumstances by persons who cannot be called as witnesses, these being another species of exceptions to the rule against hearsay. These statements form the subject-matter of sections 32 and 33.

General rule—Oral evidence to be direct.

12.2. It is a general rule of evidence that a witness cannot give evidence based on what some other person told him. To this general rule, the Act (as does the English common law of evidence), makes certain exceptions. We are, in this chapter, concerned with an important group of sections embodying such exceptions.

12.3. In general, oral evidence must be direct[1], in other words, if the evidence refers to a fact which could be seen, it must be the evidence of a witness who says he saw it; if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it; and if it refers to a fact which could be perceived by any other sense or in any other manner, it must be evidence of a witness who says he perceived it by that sense i.e. the organ of sense or in that manner.

Exceptions when justified.

12.4. It may happen, however, that a witness who has to be present before the Court to give this direct evidence, is dead, or cannot be found or has become incapable of giving evidence by reason of physical or mental injury or disease; or it may be that his attendance cannot be procured without an amount of delay or expense, which, having regard to the circumstances of the case, would be unreasonable.

Two conditions.

12.5. The existence of one or the other of such circumstances — briefly, the non-availability of the witness—is a condition precedent for the admission of what could be technically hearsay—a statement made out of court.

12.6. It is, however, also necessary that one other condition should be fulfilled before such statement made out of court can be testified to; and that condition requires the existence of one or the other of certain circumstances, from which the *truth* of the statement made by the person who is unavailable may reasonably be presumed. When these two conditions co-exist, the law dispenses with direct oral evidence of the fact. That is the rationale of sections 32 and 33—In some form or other, these two conditions are satisfied in most of the 8 cases dealt with in section 32[2], and also in the case dealt with in section 33.

These two sections contain the most important exceptions to the rule against hearsay. Statements made by persons who cannot be called as witness fall into the following categories:

(1) those made as to the cause of death;

(2) those made in the course of business;

(3) those against the interest of the maker;

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[1]See section 60.

[2]As to section 32(1), see *infra*.

(4) those giving an opinion as to a public right or custom or matters of general interest ;

(5) and (6) those relating to the existence of relationship, or those made in a will or deed relating to family affairs ;

(7) those relating to any transaction by which a right or custom in question was created, modified, denied, etc ;

(8) those made by several persons expressing feelings or impressions ;

Section 33 adds another category—

(9) those given as evidence in earlier judicial proceedings.

We are not concerned in the present Chapter with sections 34 and 35.

Section 32 and 33—independent provisions.

12.7. Of course, the two sections (sections 32 and 33) are independent provisions, and it has been specifically held[1] that section 32 is not controlled by section 33. For the present, however, it will suffice to say that circumstantial probability of trustworthiness of the statement made out of court, coupled with the consideration of necessity, would seem to constitute the two principal considerations on which sections 32 and 33 are based. The first condition removes, to a reasonable degree, the possible source of untrustworthiness and inaccuracy that may normally lie underneath the bare untested assertion of a person *not in court.* The second condition recognises the fact that the usual guarantees of truth—the tests of cross-examination and oath—are impossible of being, applied, where the declarant is dead or otherwise not available.

II. SECTION 32(1), OPENING PARAGRAPH—VARIOUS SITUATIONS

12.8. After this introductory discussion, we shall examine some salient points common to all clauses of section 32. The eight classes of hearsay,[2] written or verbal, falling under this section, are relevant, when made by a person (a) who is dead, or (b) who cannot be found, or (c) who has become incapable of giving evidence, or (d) whose attendance cannot be procured without unreasonable delay or expense. These alternative situations may be considered ;

(a) *Death*—Death must be strictly proved[3].

(b) *Statement by persons who cannot be found.*

12.9. As regards a statement made by a person who cannot be found, it must be shown that the person cannot be found *after reasonable exertion has been* made to find him[4]. Where all that is known is that the witness has failed to attend, it cannot be said that the witness cannot be found[5]. Where a person suddenly disappeared and the summons could not be personally served, and an enquiry was made in his native village, and it had been found impossible to serve him with the summons, it may be held that he cannot be found[6].

(c) *Incapacity of the person—Nature of.*

12.10. The third alternative situation relates to incapacity. The incapacity must be of a permanent character, and not of a temporary character—it was so held in an early Calcutta case[7]. But this case has been dissented from in *In re*

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[1] *Shyama Nand* v. *Ramakant,* (1904) I.L.R. 32, Cal. 6.

[2] See para. 12.6, *supra.*

[3] *Queen* v. *Gozalao,* 12 W.R. Cr. 80 (Cal.).

[4] *Queen* v. *Luckhy Narain,* 24 W.R. (Cr.) 18, Cal.

[5] *E.* v. *Nanhe Khan,* 2 Cr. L.J. 518 (All.).

[6] *E.* v. *Rochia Mohato,* (1880) I.L.R. 7, Cal.

[7] *In re. Pyare Lal,* 4 C.L.R. 504, cited in Woodroffe.

Asgur Hossain[1], where it has been held that the incapacity need not be of a permanent character, and something short of permanent incapacity might satisfy the words of the section. However, the fact that a person was ill and was confined to his house, does not make him incapable to give evidence within the meaning of this section. This view is supported by the wide wording of the section, and no change is recommended on this point.

(d) *Expenses and delay in securing presence of witness.*

12.11. Where the last alternative situation — expense and delay — is relied upon, it ought to appear that the presence of the witness could not be obtained without an amount of delay or expense which the Court considers *Unreasonable.* To consider a delay and expense as simply useless, is not enough, it must further be found that it is reasonable[2]. In a case in Madras[3], it was held that the mere fact that a witness happens to live at Rangoon is not a sufficient ground.

Section 32—opening para—case of witness who is kept out of the way by the adverse party.

12.12. In enumerating the persons whose statement becomes admissible under section 32, the opening paragraph of the section 32 mentions persons who are—

(i) dead ; or

(ii) who cannot be found ; or

(iii) incapable of giving evidence ; or

(iv) whose attendance cannot be procured without an amount of delay or expense which appears to the court unreasonable.

Recommendation to include the case of a witness kept out of the way.

12.13. The section, however, *omits to include* the case of a person who is kept out of the way *by the adverse party.* We may, in this connection, contrast section 33 (dealing with the relevancy of evidence given by a witness in a previous judicial proceeding) ; that section specifically includes such a case. There is no reason why such a statement should not be included under section 32 also. We, therefore, recommend that the opening paragraph of section 32 should be amended for the purpose, so as to include such cases.

Section 32 and the words "whose attendance cannot be secured" Recommendation.

12.14. There is one other difference in the wording of the two sections, which should also be noted. Section 32 speaks of a person "whose *attendance* cannot be procured without an amount of delay and expense, which, under the circumstances of the case, appears to the court unreasonable". Section 33 speaks of a person whose "*presence* cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the *court considers* unreasonable". There is no reason why the language of the two sections should differ on this point. We, therefore, recommend that section 32, opening para, should be brought into line with section 33, on this point also.

III. SECTION 32(1) — OPENING PARAGRAPH — OTHER POINTS

Section 32 Opening paragraph—"verbal".

12.15. So far, we have dealt with the situations in which the opening paragraph of section 32 applies, or should apply. We shall now deal with certain other points arising out of the opening paragraph. The first point relates to the kind of statements made admissible by the section. The opening paragraph classifies them by using the terms "written" and "verbal". Strictly speaking, the contrast with "written" is more accurately indicated by the word

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[1] *In re. Asgur Hossain*, I.L.R. 6, 774.

[2] (a) *Queen* v. *Kukhan Santhal*, 21 W.R. (Cr.) 56 (Cal.).

(b) *Noshai Mistri* v. *E.*, I.L.R. 5, Cal.

[3] *Kadappa* v. *Thirpathi*, 86, I.C. (Mad.).

"oral" rather than by the word "verbal". In fact, the Act itself uses the word "oral" at various places,[1] e.g. in section 59 (which allows all facts except the contents of documents to be proved by oral evidence), section 63(5) (which says that secondary evidence means and includes oral accounts of the contents of the documents), and section 92 (which provides that if the terms of any contract etc., are proved under section 91, no evidence of any "oral agreement" or "statement" shall be admitted).

12.16. However, it should be noted that the word "verbal", as used in this context, has received judicial interpretation. The Privy Council has, in a case[2] which arose under section 32 of the Ceylon Evidence Ordinance (14 of 1895), which section was identical with section 32 of the Indian Act,—held that where a woman with her throat half cut, answers questions put to her by signs and nods, such signs are "verbal" statements. The Privy Council observed that the case resembled that of a person who is dumb and is able to converse by means of finger alphabet. The Privy Council pointed out that the section used the word "verbal", and not the word "oral", observing that it was unnecessary to decide whether the nods of assent would have constituted an "oral" statement.

In this position, the wording of the section need not be altered on this point.

Section 32—Opening paragraph—"Relevant Facts".

12.17. Yet another point arises out of the opening paragraph of section 32. The point is common to all clauses, but, since it has arisen in connection with clause (4), we shall first refer to that clause. Clause (4) provides that the statement of a person not available as a witness may be admitted in evidence, if the statement gives the opinion of the person concerned as to the existence of any public right or customs or matter of public or general interest of the existence of which, if it existed, he would have been likely to be aware and when such statement was made before any controversy as to such right, custom or matter has arisen.

12.18. In relation to this clause, a controversy exists as to the meaning of the expression "all relevant facts", which is used in the opening paragraph of section 32. The precise question is, whether the expression "relevant facts" includes facts in issue.

12.19. To this question, a negative answer was given in a Bombay case[3]. The point at issue was whether, by custom, a widow could adopt a son without the express authority of her husband. A statement by the widow to the effect that she could do so under a custom, was held to be inadmissible, the reason of the court being that the *very fact in issue* was the alleged custom, and the section applied only to *statements of relevant facts.*

Position not satisfactory.

12.20. It appears to us, with due respect, that this is not a satisfactory position, for several reasons. In the first place, such a view will lead to an anomaly, as the very function of a court is to decide questions about facts in issue; relevant facts are used merely as supplying the material for the decision of facts in issue. Secondly, many of the illustrations to the section— for example, illustrations (a), (i) and (k)—deal with facts in issue, and those illustrations suggest wider rather than a narrower construction on the point under discussion. Thirdly, it may be noted that the Bombay case referred to above has been

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[1]Section 59, 63(5), 92, etc.

[2]*A. P. Chandrasekhara* v. *The King*, A.I.R. 1937 P.C. 24; 26.

[3]*Patel Vandravan* v. *Patel Manilal*, (1891) I.L.R. 15 Bom. 565, 579.

doubted in a later Bombay case,[1] where Chagla J., (as he then was) raised a query on the point. He pointed out that the Privy Council, in *Biro* v. *Atma Ram*,[2] admitted a statement of fact in issue under section 32.

12.21. In view of the consistent usage of the Act in specifically mentioning "facts in issue" and "relevant" facts, it is desirable that the language of section 32 should also be made clearer on this point. The more specific language of sections 7 to 9, 11(1), 17, 35, 36 etc., may be compared.

All these sections speak of facts in issue *and relevant facts*. An amendment of section 32(1) for this purpose will also secure harmony with the scheme of the Act, as contained in section 5.—the basic section of the Act,—which provides that evidence can be given of facts in issue *and* of such other facts as are declared to be relevant. Section 5 would seem to indicate a dichotomy between facts in issue and relevant facts; and, in order to prevent a controversy from arising, it is desirable to widen the wording of section 32(1), opening paragraph so as to cover facts in issue as well as relevant facts. We recommend that the paragraph should be amended accordingly.

Competence as witness.

12.22. Section 32 (1) does not provide that the person whose declaration becomes relevant under this section, should be a person who would have been *competent as a witness*.

In English law, the declarant (in the case of a dying declaration) must have been competent as a witness; thus, tender age or imbacility will exclude a dying declaration in England[3]. In India, however, it is doubtful whether this rule is applicable[4]. We do not propose any amendment on this point.

Summary of recommendations as to opening paragraph.

12.23. As a result of the above discussion, it will be necessary to amend the opening paragraph of section 32, so as to incorporate the following points:

(i) addition of the case where the witness is kept out of way[5]—compare section 33; and

(ii) verbal change regarding that portion of the opening paragraph which deals with the case of a witness whose "attendance" cannot be obtained;—compare the wording of section 33.

(iii) facts in issue should be added[6].

Redraft of section 32, Opening paragraph.

12.24. The following revised draft of the opening paragraph of section 32 is therefore recommended.

IV. REVISED SECTION 32—OPENING PARAGRAPH

32, Statements, written or verbal, of *facts in issue* or relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose *presence* cannot be procured without an amount of delay or expense which, under the circumstances of the case, the court *considers unreasonable, or who is kept out of the way by the adverse party*, are themselves relevant facts in the following cases.

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[1]*Yadav Kumar* v. *Pushpa Bai*, A.I.R. 1944 Bom. 29, 30 (Chagla J.).

[2]*Mst. Biro* v. *Atma Ram*, A.I.R. 1937 P.C. 101.

[3]*R.* v. *Pike* (1829) C & 598.

[4]Cunningham, Law of Evidence, page 161-162, cited in Monir, Evidence, (4th Edition), para. 220.

[5]Para 12.13, *supra*.

[6]Para. 12.20, *supra*.

V. SECTION 32 (1)

Section 32(1).

12.25. Having disposed of the opening paragraph of section 32, we are now in a position to consider the various clauses of the section.

12.26. Under section 32(1), statements made by a person as to the cause of his death, or as to the circumstances of the transaction which resulted in his death, are relevant, where the cause of the person's death comes into question. This is the first exception to the rule against hearsay created by the section. Where a legal system, in its law of evidence, recognises the rule against hearsay, any exception to that rule must be based on some rationale.

Rationale.

12.27. Juristically, the justification in a legal system for admitting such statements is the assumption that a dying man does not die with a falsehood on his lips. Shakespeare had occasion to allude to this aspect. In King John[1], when the wounded Melun finds himself disbelieved while announcing the intended treachery of the Dauplin Lewis, he exclaims:—

> "Have I not hideous death within my view, retaining but a quantity of life, which bleeds away, even as a form of wax, Resolveth from his figure, 'gainst the fire? What in the world should make me now deceive, *Since I must lose the use of all deceit?* Why should I then be false, since it is true, *That I must die here*, and live hence by truth?"

12.28. We shall revert to this aspect later.[2]

It should be stated, however, that a person may lose his mental faculty when death is approaching. Thus, in King John[3] Prince Henry is made to say:

> "Death's siege is now
>
> against the mind, which he picks and wounds,
> With *many legions of strange fantasies:*
> Which, in their throng and press to the last hold.
>
> Confound themselves."

12.29. It is, apparently, for this reason that the statements are made relevant only for certain purposes.

We now proceed to consider the clause in detail.

Conditions in England.

12.30. to 12.33. In England, the conditions on which dying declarations are admitted in evidence[4] are—(i) the death of the declarant, (ii) that the trial should be for his murder or manslaughter, (iii) that his statement should relate to the cause of his death, (iv) that he should have been under a settled hopeless expectation of death, and (v) that he could have been a competent witness.

Cases in which statements under sub-section (1) admissible.

12.34. It has been pointed out with[5] reference to the second condition required in England that the first clause of section 32 is widely different from the English law upon the subject of "dying declaration", according to which, this description of evidence is not admissible in a civil case; and even in criminal cases, it is admissible only in the single instance of homicide, that is, murder or manslaughter[6], where the death of the deceased is the subject of the charge and the circumstances of the death are the subject of the dying declaration.

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[1]King John, Act 5, Scene 4.
[2]See "Expectation of death" *infra*.
[3]King John, Act 5, Scene 7.
[4]Cross on Evidence.
[5]See *Shivabhai* v. *R.*, (1926) I.L.R. 50 Bom. 683.
[6]There is no English authority as to causing death by reckless driving.

12.35. In India, however, the declaration is admissible even *where the case is not one of homicide.*[1] Moreover, under the Indian Act, the statement is relevant *whatever may be the nature of the proceeding* in which the cause of the death of the person who made the statement comes into question. Illustration (a) to section 32(1) gives an example of a civil, as well as of a criminal case, and, as an example of the latter, it mentions a charge of rape. Even under the previous law, as contained in section 371 of Act 25 of 1861. (The Code of Criminal Procedure), and section 20, Act 2 of 1855, it was held that[2] the rule of English law restricting the admission of this evidence to cases of homicide had no application in India; and that the dying declaration of a deceased person was admissible in evidence on a charge of rape. We do not suggest any change in this regard.

Circumstances of the transaction.

12.36. The statement under clause (2) may relate not only to the cause of death, but also to the circumstances of the transaction which resulted in death. The words "circumstances of the transaction" are wide, and have been considered by the courts on a number of occasions. This was decided in *Pakala Narayanaswami* v. *Emperor.*[3]

Statements as to motive.

12.37. That the words "circumstances of the transaction" are not very precise, is illustrated by several controversies that have arisen. Thus, there is some controversy *as to how far a statement as to the motive of the person* who caused the death can be given in evidence under section 32(1), which allows evidence of a statement as to the "cause of death" or "circumstances of the transaction which resulted in death". One view on the subject is that such statements are admissible; this view has been taken by the High Court of Patna[4] and by the erstwhile courts of Judicial Commissioners of Nagpur and Himachal Pradesh.[5] In the PATNA case,[6] it was observed : —

> "What he has said regarding motive is at two places : firstly in his first information report and secondly in the dying declaration. In the first information report (Ex. 4/1) he says—
>
> "Somra Bhuian is a wizard and cultivator. Nagwa and Sukna are his comrades. They did not want that I should act as a wizard there. This was the cause of the dispute; and in the dying declaration (Ex. 3) he says, "*They assaulted me on account of enmity caused by my acting as a wizard.*" I do not see how any reasoning can make these statements to be anything other than statements as to the circumstances of the transaction which ended in Kudrat's death.".

12.38. and 12.39. The High Court of Madras has taken a different view.[7] The facts were thus stated :

> "The appellant who is the Karnam of the village of Gangachollapentha was charged before the learned Sessions Judge of Visagapatam together with three other persons for murdering one Thalada Ramaswami on the night of 2nd August last. The murder must have taken place on the main road between Gajapatinagaram and Mentada very near to Mentada. There

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[1] *R.* v. *Bissorunjun*, (1866) 6 W.R., Cr. 75 (1866), followed in *Lalji* v. *R.*, (1927) I.L.R. 6 Pat. 747.

[2] *R.* v. *Bissoorunjun* (1866) 6 W.R. Cr., 75 (1866).

[3] *Pakala Narayanaswami* v. *Emperor* (1939) 1 All. E.R. 396 (P.C.).

[4] *Emperor* v. *Somra*, A.I.R. 1938 Pat. 52.

[5] (a) *Chunilal* v. *R.*, A.I.R. 1924 Nag. 115(2);
(b) *Findal* v. *The State*, A.I.R. 1954 H.P. 11.

[6] A.I.R. 1938 Pat. 52 (Rowland and Varma JJ.).

[7] *In re. Beggam Appalanarassayya*, A.I.R. 1941 Mad. 101 (Burn & Mockett JJ.).

is ample evidence on the record to show that the appellant and the deceased were on terms of friendship. That has been proved by the village Munsif and there are circumstances in this case which strongly bear that out. But the learned Sessions Judge has relied on certain evidence in this case as proving motive on the part of the appellant to murder the deceased. That motive is derived from statements made by the deceased to his wife and to his wife's sister to the effect that in relation to a law suit in which the deceased's wife's sister, one Pydithalli was concerned, the appellant had accepted a bribe from the plaintiff one Narayanamma in the suit against Pydithalli. The motive is thus entirely derived from statements made by the deceased. These statements are wholly inadmissible. There is nothing in section 32, Evidence Act, which makes them admissible. They are not statements made by the deceased as to the cause of his death or to circumstances of the transaction which resulted in his death. The Judicial Committee in (1939) 1 M.L.J. 756[1] has considered the provisions of section 32(1), Evidence Act, in relation to statements of deceased persons who have been murdered. Lord Atkin at p. 763, (1939) 1 M.L.J. points out that *the circumstances must be circumstances of the transaction, general expressions indicating fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of death will not be admissible.*

In this appeal, the deceased's statements provide nothing more than grounds for supposing that the deceased suspected the accused of having betrayed his wife's sister in a civil case. They in no way are to be associated with the actual murder. Evidence of these statements should have been excluded.

12.40. In the second Madras case,[2] the statement that was sought to be tendered in evidence was that the accused was on intimate terms with the deceased's sister and the deceased wanted to arrange the sister's marriage to some other person. This was held to be inadmissible.

Whether amendment needed.

12.41. We do not propose an amendment on this point, leaving it to be dealt with by the case law.

Section 32(1) How far Statements can be used in respect of death of other persons.

12.42. to 12.44. Another controversy, traceable to the words "circumstances of the transaction", may be noted. The precise question is whether a dying declaration made by A can be used for the *proof of facts relating to the death of B*. The controversy has assumed practical importance, and an illustration may be drawn from the facts of a case which was decided by the Rangoon High Court.[3] Simplying the facts, we may state the main circumstances in the case as follows:—

12.45. A, a husband, and B, his wife, were both murdered at the same time, and it was said that accused X murdered the husband and accused Y murdered the wife. A dying declaration made by the wife was put in evidence against the accused, who were charged with being concerned in the murder of both the persons. The objection taken on behalf of the accused was that the dying declaration which was to the effect that accused X murdered the husband A, and accused Y murdered the wife B, was admissible *only against the accused Y*, who actually attacked the wife, as it can only be admissible in a case where the cause of the wife's death is in question. This argument was rejected by the court, holding that as both the accused were charged with being concerned in the murder of

[1] *Pakala Narayanaswami* v. *Emperor*, A.I.R. 1939 P.C. 47.

[2] *Public Prosecutor* v. *Munigan*, A.I.R. 1941 Mad. 359, 360.

[3] *Nga Hla Din* v. *Emperor*, A.I.R. 1936 Rangoon 187 (D.B.).

both the persons, the fact (if it be true) that accused X attacked the husband, A, was part of the *transaction which resulted in* the death of wife B. The court observed— "it could naturally be said, for example, that had the husband not been attacked, he would have gone to his wife's assistance". Apart from this, and even if the accused had not been charged under section 34, Penal Code (acts done in furtherance of a common intention), the Court thought that the evidence would have been admissible against both. The Court distinguished a number of cases cited on behalf of the accused, the first being a case where in a faction fight two men were tried at the same trial for murdering two men of the opposite side, there being *no other connection between the two.* The second case cited was one in which a police informer was killed by the police in the course of a dacoity, and the informer made a *statement incriminating* certain persons as his companions. It was held that the cause of the death of the informer *was only indirectly in question between the two* and that his dying declaration was not admissible against the other dacoits so as to convict them.

12.46. Kernan and Brandt JJ., observed : "As to its not being admissible except as against the person who actually caused the deponent's death, we are of opinion that this is not so in the case before us. The wording of section 32 of the Indian Evidence Act is comprehensive..... Here one of the questions was whether the accused, other than P, could be convicted of having been concerned in committing a dacoity in the committing of which murder was caused, and we have no doubt that statement as to what was done by those concerned in the dacoity in which the murder was caused was relevant against those concerned in the dacoity".

12.47. This wide view of the section is shared by the Patna High Court also [1]

12.48. The Lahore High Court[2] has refused to admit a dying declaration of a person in evidence against members of his own party, in cross-cases for the death of persons of either party, even though the question was which party was the aggressor and who acted in self-defence. This case can, however, be distinguished on the ground that the two cases were tried separately and, therefore, the "cause of that person's death" did not come into question within the meaning of section 32(1). That is to say, a declaration made by A cannot be used in a case in which the issue is not regarding the declarant A's death, but regarding the death of B, a member of the opposite party.

To the same effect is an earlier decision of the Allahabad High Court[3].

12.49. An earlier Punjab case,[4] holding that a dying declaration is admissible only where the death of the deceased is the subject of the charge and the circumstances of the death are the subject of the dying declaration, decided that the statement of the deceased person, to the effect that another person who had died was stabbed by the accused, is inadmissible under section 32(1). If the death of the declarant is not in issue, the declaration cannot be admitted. **Punjab case.**

12.50. The controversy, however, becomes acute in a later case of the Allahabad High Court[5]. **Allahabad case.**

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[1] *State* v. *Ramprasad*, A.I.R. 1953 Pat. 354.

[2] *Saudagar Singh* v. *Emperor*, A.I.R. 1944 Lah. 377, (Din Mohammad and Sale JJ.).

[3] *Dhanu Singh* v. *Emperor*, A.I.R. 1925, All. 227.

[4] *Fakir* v. *Empress*, 17 Punjab Reports 1901 discussed, in Woodroffe, Evidence (1957), Vol. I, P. 461.

[5] *Kunwar Pal Singh* v. *Emperor*, A.I.R. 1948 All. 122.

In that case it was held that the statement of one dead person is not a relevant fact with respect to the question about the death of another. This view has been dissented from by the erstwhile Travancore-Cochin High Court,[1] on the ground that this would limit the word of the section ("transaction") in an unjustified way. It may be noted that in the Allahabad case already cited[2], Raghbur Dayal J., rejected the dying declaration of one brother, Girwar Singh, with respect to the attack on Megh Singh, his brother, though the transaction in which both the persons were killed, was, one, as is evident from the following extracts of the dying declaration :

> ".....I was sleeping in my field.....Megh Singh went and slept in the field (to keep watch over) Bajra crops. K. R. and B. came and pressed down my younger brother, Megh Singh. When he cried out, I started.....the aforesaid four persons surrounded me and attacked me.....thereafter I got unconscious.....they murdered my younger brother, Megh Singh."

12.51. The case related to *the murder of both the brothers*. The Court observed that section 32 makes a statement of a person relevant only when the statement is made as to the cause of his death or as to any of the circumstances of the transaction etc., and that "it follows that the statement of one dead person is not a relevant fact with respect to the question about the death of another person".

Questions to be considered.

12.52. In view of the above state of the case-law, two questions arise — first, what is the true position and secondly, does the section require any clarification to embody the true position.

12.53. As to the first question, it is suggested that the language of the section is comprehensive enough to justify a wider interpretation. It is true that the proceeding must be one in which the death of the declarant is a matter in issue. But, once this condition is satisfied, the statement is admissible not only for one purpose (cause of his death), but also for another and wider purpose, namely, proof of circumstances of the *transaction* which resulted in *his death*. It is well-known that the word "transaction" has always been interpreted widely, not only in general legal phraseology, but also in the parallel language of section 235 of the Criminal Procedure Code, 1898 (section 220 of the Code of 1973). The word "circumstances" has the effect of widening, and not narrowing, the scope of the section. Therefore, undue emphasis should not be laid on the words "his death", in connection with the transaction. As was pointed out in a Lahore case[3], the word "transaction" does not mean merely the fact of death, but all the circumstances connected with it.

English cases.

12.54. The English cases that are cited in this connection did not actually lay down a narrower view. In one of the cases[4], a person was accused of perjury, and what was sought to be given in evidence was a dying declaration by a person who was shot by the accused after conviction. The declaration gave an account of the shooting, and then proceeded to state certain facts relevant to the charge of perjury. This was sought to be given in evidence, in opposition to the order for new trial obtained by the Attorney General. The court held it to be inadmissible, because evidence of this declaration is admissible only where the death of the deceased is subject of the charge, and the circumstances

[1] *Lukka* v. *Travancore-Cochin State*, A.I.R. 1955 Trav. Cochin 104.
[2] *Kanwar Pal Singh's case*, A.I.R. 1948 All. 170 *supra*.
[3] *Emperor* v. *Faiz*, A.I.R. 1916 Lah. 106.
[4] *King* v. *Mead*, (1824) 2 B.C. 605.

of the death are the subject of the dying declaration. This case does not necessarily mean that the dying declaration can be used only in so far as it deals with the central fact of the death of the declarant. It only means that the dying declaration is admissible only in a trial for murder or manslaughter,—where death is the subject of the charge.

12.55. In another English case,[1] A was charged for procuring the miscarriage of a woman B. A dying declaration by the woman B as to the circumstances of the case was held to be inadmissible. In this case, also, the rule laid down in simple, namely, that where the charge does not *involve the homicide of the declarant*, the dying declaration is not admissible.

12.56. Apart from this aspect, namely, that the English case law is not conclusive, the matter could be approached from the point of view of logic also. Logical approach.

12.57. Now, logically speaking, there is no reason why the section should be confined in the manner suggested by the narrower view. Sense of impending death and the necessities of the case, which are the principal reasons for admitting dying declarations, apply as much to the death of the declarant as to the death of any other person.

12.58. Though it would appear that the language of the section is even now capable of a wider construction yet, in order to resolve the controversy, it is desirable to make the necessary clarification on the above point. This could be achieved by adding a suitable Explanation. Recommendation.

We recommend that the section should be so amended.

12.59. Under the Act, the statement is admissible whether or not the person who made it was under expectation of death[2]. This is expressly provided in the clause. Expectation of death.

12.60. It may be noted that under the law which was in force prior to the Evidence Act[3] it was held that before a dying declaration could be received in evidence, it must be distinctly found that the declarant knew, or believed, at the time he made the declaration, that he was dying, or was likely to die.[4] This requirement is not found in the section. Previous law as to expectation of death.

12.61 to 12.63. While recording[5] that the various restrictions imposed by the English law, *inter alia*. On dying declarations had not been adopted, the Select Committee on the Indian Evidence Bill gave the reason that these restrictions should rather go to the weight of the evidence in question than to its admissibility. As to English law, we may refer to the case of *R.* v. *Woodcock*[6]. A man was charged with the murder of his wife, and her statement concerning the cause of her injuries, given on oath to a magistrate, was received in evidence against the accused. The deceased said nothing of her impending death, but the court was satisfied that she must have known that *she was on the point of dying*. Eyre, C.B., said : Reasons given by Select Committee.

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[1]*R.* v. *Hind* (1860) 8 Cox Criminal Cases 300.

[2](a) *R.* v. *Premananda*, (1925) I.L.R. 52 Cal. 9871;

(b) *R.* v. *Degumber*, (1873) 19 W.R. Cr. (Cal.).

[3]Section 371, Act 25 of 1861, and section 29, Act 2 of 1855.

[4](a) *In the matter of Tenco*, (1871) 15 W.R., Cr. 11 (Cal.).

(b) *R.* v. *Bissonunjun*, (1868) 6 W.R., Cr. 75, 76 (Cal.).

(c) *R.* v. *Symber*, (1868) 9 W.R., Cr., 2 (Cal.).

[5]Gazette of India, Extraordinary 1st July, 1871, Part 1, page 253, Report, Under II. Relevancy of facts.

[6]*R.* v. *Woodcock*, (1789), 1 Leach 500.

> *"The principle on which this species of evidence is admitted is,*[1] *that they are declarations made in extremity, when the party is at the point of death,* and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so awful is considered by law as creating an *obligation equal to* that which is imposed by a positive oath administered in a court of justice".

Redraft

12.64. As a result of the above discussion, it will be necessary to revise clause (1) as follows :—

VI. REVISED SECTION 32(1)

(1) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Explanation 1.—Such statements are relevant whatever may be the nature of the proceedings in which the cause of death of the person who made them comes into question.

Explanation 2.—*The circumstances of the transaction which resulted in the death may include facts relating to the death of another person.*

Declarations in course of business.

12.65. Declarations made in the course of business are dealt with by Section 32(2) in these terms.

> "When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money goods, securities or property of any kind or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him."

Different phraseology of business.

12.66. It may be noted that expressions referring to the "course of business" occur also in sections 16, 34, 47, 114 and in the illustrations to section 114. Section 16 speaks of a "course of business" according to which "naturally an act would have been done"; section 34 speaks of books regularly kept in the "ordinary course of business". Section 114 speaks merely of "common course of.....public and private business". The phraseology, thus, differs in the various sections. The difference in phraseology does not appear to have caused any difficulty. The applicability of clause (2) depends entirely on the exact meaning of the words "course of business".[2]

Duty not Necessary.

12.66A. Clause (2) does not, in terms require that it must be *the duty* of the person who made the statement to make that statement. The broad category with which the clause begins is expressed by the words—"in the ordinary course of business". What follows is an enumeration of particular situations, of which one relates to statements made "in the discharge of professional duty". This may be described as the illustrative part of the clause. The object of this illustrative part, in reciting the particular cases, is obviously not to restrict the general applicability of the clause.

English rule.

12.67. The English rule of evidence, of which the case of *Brain* v. *Preece*[3] is the best illustration, is briefly and clearly stated in Stephen's Digest of the

[1] Emphasis supplied.
[2] *Hingava* v. *Bharamappa*, I.L.R. 23 Bombay 63.
[3] *Brain* v. *Preece*, 11 and W. 773.

Law of Evidence[1]. "A declaration is relevant when it was made by the declarant in the ordinary course of business, *or* in the discharge of professional duty, at or near the time when the matter stated occurred, and of his own knowledge."

The word "or" should now be read[2] as, "and"

English law—Declarations in the course of duty.

12.68. The subject is usually dealt with, in England, (under the corresponding rule of the common law)— under "Declarations in course of duty". A declaration is relevant when it was made— (i) by a declarant who is dead, and (ii) in the discharge of his professional duty, (iii) at or near the time when the matter stated occurred, (iv) on personal knowledge, and (v) there was no motive to misrepresent.

12.69. It now seems to be accepted in England that the existence of a duty is necessary. The statement of the law, by Stephen[3], requires modification on this point.

12.70. Thus, in an English case, a certain entry ran thus[4]: "April 4th 1825, W. Worsell came as farm-hand; and to have for the half-year 40 s. "Lord Denman, C.J. observed :

> "The book here does not show any entry operating against the interest of the party. The memorandum could only fix upon him a liability on proof that the *Services had been* performed."

English law requirement of contemporaneity.

12.71. Again, under English law, as already stated[5] entries in the course of business must be shown to have been made *contemporaneously*[6] with the facts to which they relate. Amid the hurry and distraction of business, it is argued, the particulars of matters not entered at the time may be forgotten or misstated. The provisions of the Indian Act contain no similar restriction as to the admissibility of this kind of evidence. However, in determining the weight to be allowed to it in particular cases, it will always be important to consider how far the statement or entry was contemporaneous with the fact to which it relates. "The sale of a valuable Cashmere shawl might be entered a day or two after, without any risk of error, while a retail shopkeeper would have some difficulty in remembering on the following morning the particulars of a couple of dozen articles sold at different prices—this single transaction being one or fifty of a hundred similar sales made on the same day[7]".

Nature of the duty required in England.

12.72. With reference to the second requirement of English law, — the requirement of duty—it has been said[8] that the duty must not be a *general* one, involving a variety of acts that may change from time to time, but *specific* and *two-fold*— i.e. to do a particular act and to record or report it when done. There must have been a duty *to record or otherwise report the very thing*[9][10]. The duty must also be to do the very thing to which entry relates, and then to make a report or record of it.

Finally, the duty must have been actually performed

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[1]Stephen's Digest, quoted in *Reg.* v. *Hanmanta*, I.L.R. 1 Bom., at p. 616.
[2]See "English Law—Declarations in the course of duty" *infra*.
[3]Stephen's Digest, quoted *supra*.
[4]*Inhabitants of R.* v. *North*, 4 Q.B. 132, 134.
[5]See *supra*.
[6]The *Henry Coxon* 3 FD 156 (2 days' delay fatal).
[7]Woodroffe.
[8](a) *Sturla* v. *Freccia*, 5 App. Cas. 347. (Lord Blackburn);
(b) *Mercer* v. *Denna*, (1905) 2 Ch. 538, 558. (C.A.).
[9]*Chambers* v. *Bernasconi*, (1834) 1 C. M. & R. 347; *Trotter* v. *Mc. Lean*, 13 Ch. D. 579.
[10]*Smith* v. *Blackey*, (1867) L.R. 2 Q.B. 326, 332 (per Blackburn, J.).

English law—Exclusion of collateral matters.

12.73. In English law, as already stated, entries made in the course of business are evidence only of those things which, according to the course of business, it was the duty of the person to enter, they are no evidence of independent collateral matters. In the case of *Chambers* v. *Bernasconi*[1], Lord Denman, delivering the unanimous opinion of the Exchequer Chamber, said: "We are all of opinion that whatever effect may be due to an entry made in the course of any office, reporting facts necessary to the performance of a duty, the statements *of other circumstances*, however naturally they maye be thought to find a place in the narrative, is no proof *of those circumstances*."

12.74. This restriction on admissibility is also not to be found in the Indian Evidence Act. The statement or entry, in order to be admissible under the Act, must relate to a relevant fact. But it is immaterial whether this fact is connected with the performance of a duty, or is merely an independent collateral matter.

Personal knowledge necessary in English law.

12.75. Under English law,[2] it is essential that the declarant should have had personal knowledge of the matters stated. The Indian section simply requires that entries in accounts should, in order to be relevant, be regularly kept in the course of business; and although it may, no doubt, be important to show that the person making or dictating the entries had, or had not, a personal knowledge of the facts stated, this is a question which, according to the Indian rule of Evidence, affects the value and not the admissibility, of the entries[3].

Whether statements sufficient to charge with liability.

12.76. It may be of interest to consider the question whether, under section 32(2), the statements in books of account kept in the ordinary course of business *are sufficient evidence to charge* any person with liability. In this respect, section 34 may be contrasted; that section specifically provides that while entries in books of account regularly kept in the ordinary course of business are relevant, such entries "shall not alone be sufficient evidence to charge any person with liability." Under that section, thus, there has to be evidence to prove the transactions which may appear in the books of account[4].

12.77. Of course, the testimoney of the plaintiff himself on oath in support of the entries could corroborate the entries, and suffice to fix the defendant with liability under section 34. In fact, it has been held [5-6] that such corroboration as is required by section 34, would be best afforded by the evidence of the person who knows the books of account and in whose presence the transaction took place.

12.78. This difference between section 32(2), on the one hand, and section 34, on the other hand, has been noticed by the courts[7] which have, in general, held that while the entries under section 32(2) do not suffer from any statutory disability such as is provided in section 34, the court is not bound to accept them without corroboration, that being a matter on which it must exercise a discretion as a fact. [8-9]

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[1] *Chambers* v. *Bernasconi* (1834), Crompton, Meeson and Roscoe's Reports, 347, 368.
[2] See Stephen—quoted *supra*.
[3] *Reg.* v. *Hanmanta*, (1877) I.L.R. 1 Bom. 610, 616, 617
[4] *Chandradhar* v. *Gauhati Bank*, A.I.R. 1967 S.C. 1058.
[5] *Kaka Ram* v. *Thakur Das Mathra Das* A.I.R. 1962 Punjab 27.
[6] *Ram Gobind* v. *Gulab Chand*, (1940) I.L.R. 20 Pat. 273.
[7] See also *Duverka Dass* v. *Babu Jankidass*, (1855) 6 Moore Indian Appeals 88,98.
[8] *Ramnvari Bai* v. *Balaji*, I.L.R. 28 Bom. 294.
[9] *Kachrulal* v. *Nand Lal*, I.L.R. (1955) Nag. 618.

12.79. Having regard to the fact that the person who made the entry under section 32(2) is not available as a witness at the final. We would not like to disturb the present position in this regard by inserting any such disability as attaches to entries under section.

Change not needed to declare the entries to be insufficient.

12.80. In this connection, we have taken note of the learned and illuminating discussion by Mukerji J. in *Gopeswar's case*[1]. He observed--

Suggestion of Mookerjee, J.

"Section 43 of Act II of 1855 was as follows: "Books" proved to have been kept in the course of business "shall be admissible as corroborative and not as "independent proof of the facts therein stated". In section 34 of Act I of 1872, the words "regularly kept" are substituted for the words "proved to have been regularly kept" and in the illustration to the section the word used in "shows" and "proves". It is apparent, therefore, that the law embodied in section 34 of Act I of 1872 is not quite the same as was contained in section 43 of Act II 1855, and this seems to be conceded on all hands. The expressions "corroborative evidence", "independent evidence" and "substantive evidence" that are found in many of the reported decisions bearing upon section 34 of Act I of 1872 are somewhat out of place in view of the wording of that section and have been handed down to us from the words "corroborative" and "independent" that appeared in section 43 of the old Act and those words as well as the word "substantive" that were used in the decisions thereunder. The present Act deals, amongst others, with the relevancy of evidence and in some instances with the probative value. The plain words of section 34 indicate that the section deals with all entries in books of accounts regularly kept in the course of business; in the first place, making them relevant whenever they refer to a matter into which the Court has to enquire, and next, providing that when such entries are sought to be used as statements for a particular purpose, namely, to charge any person with liability, they shall not alone be sufficient evidence for that purpose. Section 32 clause (2), makes relevant a statement, consisting of an entry, made by a person, who is not a witness before the Court, in books,—not necessarily books of account but—kept in the ordinary course of business. A book of accounts may be one of such books, and where an entry appears in a book of accounts it comes both under section 32, clause (2), and section 34. The illustration to section 34 makes it plain that, if the book of accounts is regularly kept in the course of business, the entry will be relevant notwithstanding that the person who made the entry has not been examined to prove the truth of the transaction to which the entry relates and notwithstanding that he is available as a witness. The only material difference as between an entry relevant under section 34 and one relevant under section 32 clause (2), is that in the former case the person who made the entry may be available as a witness, while in the latter case he is not. *I find it*[2] *very difficult to appreciate on what ground the legislature could intend to exempt entries relevant under section 32, clause (2) from the disability that it imposes on entries relevant under section 34 by the second part of that section, and personally I have always felt inclined to take the view that such entries, no matter whether they are relevant under one section or under the other, are not to be considered as alone sufficient to charge any person with liability.* The other view, however, namely that the letter part of section 34 applies only to such entries which are relevant only under section 34 and not under section 32, clause (2) is backed by the high authority of Sir Lawrence Jenkins C. J. in the case *Rampyarabai* v. *Balaji Shridhar*[3] and has been accepted as correct in other cases (e.g. *Daji Abaji Khare* v. *Gobind Narayan*[4] *Bapat*

[1]Gopeswar Sen v. Bejoy Chand Mahatar (1928) I.L.R. 55 Cal. at p. 1175:
[2]Emphasis added.
[3]*Rampyarabhai* v. *Balaji*, (1904) I.L.R. 28 Bom. 294.
[4]*Daji Abaji* v. *Gobind Narayan*, (1908) 10 Bom. I.L.R. 81.

Kukha Mandal v. *W. N. Grant*[1], *Aktowli* v. *Tarak Nath Ghose*[2]) and it is perhaps too late to contest it. If this other view is adopted, it should be held that it was intended by the Legislature that where the maker of the entry is available as a witness the entry alone will not be sufficient proof to charge a person with liability but, where the maker is not available as a witness but the entry is relevant by reason of one or other of the conditions mentioned in the opening paragraph of section 32 being present, there is no statutory obligation to look for anything else to find the liability.

> "Personally, I entertain grave doubts as to whether this could have been the intention of the Legislature or, if it was, it would not have been declared in much clearer terms. Fortunately, however, in practice we seldom come across a case in which the entry which comes under section 32 clause (2) is really sought to be used alone to charge any person with liability."

12.81 to 12.83. Though we recognise the weight of this comment of Mukerjee J, we think that section 32(2) was intended to leave the matter to the discretion of the trial Judge and, having regard to all aspects of the matter, it is not in our view desirable to amend it by inserting a provision such as is to be found in section 34.

Section 32(2)—"Ordinary course of business"—Controversy.

12.84. In regard to the question whether the requirement of the statement having been made "in the ordinary course of business" must be fulfilled even as regards the species of statements which are specifically enumerated in clause (2), there is some obscurity.

12.85. A little analysis will show that the clause is not well-constructed on this point. Entries in books kept in the discharge of "professional duty" are, for example, specifically referred to in the clause. Do they add to "ordinary course of business", or do they not? It is also not clear whether an acknowledgement etc. (specifically mentioned in the latter part of the clause), must be in the ordinary course of business.

Case law.

12.86. Most of the cases approach the problem by interpreting the words "ordinary course of business". They do not analyse the structure of the clause. In an Oudh case[3], for example, a receipt executed by a deceased person, and stating that the disputed property formed the boundery to an adjacent plot, was, without specific discussion, described as a "statement made by a deceased person in the ordinary course of business", and it was stated that though it was week type of evidence, yet it was admissible. The person who made this statement was a cousin of the parties. The document was admitted to prove the "reputed ownership" of a certain property.

12.87. In a Madras case,[4] this approach finds a more positive illustration. A person wrote a letter to his wife, making a reference to a family settlement, such as, to tell his uncle that he would execute a mortgage deed in favour of the uncle. This letter was filed to prove the family settlement. It was held that section 32(3) did not apply, because the admissions of liability were only parts or a larger statement asserting a settlement, but section 32 clause (2) would apply, because the statement was made to his wife "in the ordinary course of business". The point was described as difficult, but the view taken was that the

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[1]*Kukha Mandal* v. *W. N. Grant*, (1912) 16 C.L.J. 24.

[2]*Aktowli* v. *Tarak Nath*, (1912) 17 C.W.N. 774: 16 C.L.J. 328.

[3]*Ahmed Shaji* v. *Zail Ahmed*, A.I.R. 1928 Oudh 248 (Fulton, J.).

[4]*Ramamurthi* v. *Subbarao*, A.I.R. 1937 Mad. 19, 20.

expression "in the ordinary course of business" means "in the way that business, which may be even *private* or of a trivial nature, is conducted", and has no connection with a course of business which *suggests a series of acts* of business.

12.88. The view expressed in a Bombay case[1], that the exception extends only to statements made during the course not of any particular transaction of an exceptional kind such as execution of a deed of mortgage, but to transactions of business or professional employment in which the declarant was ordinarily or habitually engaged, was dissented from in the Madras case.

Entries made in the discharge of duty.

12.89. The clause, it may be noted, also mentions entries etc. made in books kept in the discharge of professional duty. The significance of this portion is obscure.

12.90. In a case decided by the Supreme Court[2], Panaji's registers maintained by professional generalogists and containing tables of pedigree, were held to fall within section 32. But the question of "duty" was not involved, and it would appear that the court emphasised the fact that "it is the business of these 'panjikars' to collect this evidence about pedigrees".

12.91. Rejecting the contention that the entry should have been made before a controvarsy arose, the Supreme Court pointed out that section 32(2) did not contain any such limitation. "It is enough if it was made in the ordinary course of business".

12.92. An Allahabad case[3] is more specific on this point. In that case, an entry in a diary made by a Sub-Inspector of Police then dead, was regarded as falling within section 32(2), and the High Court observed that "there could be no doubt that the Sub-Inspector made these entries in the discharge of his professional duties".

12.93. In a case decided by the Privy Council,[4] an entry made by a Muslim priest in the Marriage register was regarded as relevant under section 32 (precise clause of the section was not referred to), as having been made by the Murtzad in the discharge of his professional duty (the point at issue related to the amount of the dower).

12.94. Theoretically, the clause is capable of various interpretations, so far as the requirement of ordinary course of business is concerned. The first possible interpretation is that these words are not applicable to the specifically enumerated cases. A textual approach to the clause would support this interpretation, because the requirement is not expressely mentioned in those enumerated cases, and also because the specific mention of an entry or memorandum made in a book kept *in the discharge of professional duties*, in addition to such entry etc. made in books *kept in the ordinary course of business*, would suggest that at least that part of the clause is intended to travel beyond documents in the ordinary course of business.

12.95. The second possible interpretation of the clause is that (a) the whole clause is subject to the opening portion, which emphasises the necessity of "ordinary course of business," but (b) that expression is to be given a wide

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[1]*Ningamma*, (1898) I.L.R. 23 Bom. 53, 63, 65, 66, 70 (Candy and Fulton, JJ.) followed in *Soney Lall* v. *Darbdeo*, A.I.R. 1935 Pat. 167, 168.

[2]*Sitaji* v. *Vijendra Narain*, A.I.R. 1954 S. C. 601, 604, paragraph 18.

[3]*Abdul Aziz* v. *Emperor*, A.I.R. 1932 All. 442, 443 (Young and Bajpai, JJ.).

[4]*Zakir Begum* v. *Sakhina Begum*, (1892) I.L.R. 19 Cal. 689, 693 (P.C.).

meaning, so as to cover not only commercial activities, but all transactions which a person *usually* enters into. This was the view taken in the Oudh and Madras cases. Above referred to.

12.96. While the first and the second interpretations have both the effect of giving a wide scope to the section, their mode of operation varies.

Besides these two interpretations, there is a third possible interpretation, namely, (a) that the whole clause is subject to the opening portion and only statements made in the ordinary course of business are admissible, and further, (b) that the transactions must not be an isolated one, and must be a mercantile one. This was, in substance, the view aken in the Bombay case, already referred to. Under this interpretation, the expression "ordinary course of business" receives a narrow construction.

12.97. The illustrations to section 32 seem to support the first interpretation, as also section 21, illustration (c).

Need for clarification.

12.98. It is obvious that apart from the fact that there is a veiled conflict between the Bombay and Madras views, there is a reasonable possibility of further conflict developing on the point discussed above. Therefore, a clarification of the position is desirable.

12.99. The question now to be considered is, whether the clarification should be by way of adopting the first interpretation, or whether it should be by way of adopting the second interpretation, or whether it should be by way of adopting the third interpretation. Much can be said on all sides. The first interpretation has the merit of stating the position in fairly clear terms, and avoiding the rather artificial approach which has to be adopted under the second interpretation as to the expression "ordinary course of business". In normal parlance, one does not think of private transactions in family matters as undertaken in the "course of business".

12.100. The second interpretation has the merit of introducing one *common thread,* so that the specifically enumerated cases will still be subject to the requirements of "course of business".

12.101. The third interpretation has the merit of simplicity, inasmuch as the expression "ordinary course of business" would be used in the natural sense commonly understood.

12.102. It is desirable to remove the obscurity on the subject discussed above, by suitable amendment. But, before suggesting the precise amendment, we have to decide which of the possible interpretations, as listed above, should be adopted. We prefer the first alternative which has the merit of clarity and avoiding artificiality.

12.103. If, it is decided to adopt the first interpretation — and we recommend its adoption — it would be conveniant to confine clause (2) to statements made in the ordinary course of business, and to carve out a new clause (2A) to deal with the statements (enumerated in the present clause) which are to be regarded as relevant whether or not they are in the ordinary course of business.[1]

The following is a rough re-draft for the purpose of implementing the first alternative:

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[1] If necessary, corresponding clarifications may be made in illustrations (e), (g) and (h).

[Proposed re-draft of s. 32(2)i].

"(2) When the statement was made by such a person in the ordinary course of business; and, in particular, and *without prejudice to the generality of the foregoing provisions of this clause,* when it consists of any entry or memorandum made by him in books kept in the ordinary course of business;

"(2A) When the statement consists of an entry or memorandum made by *such person* in the discharge of professional duty or of an acknowledgement written or signed by *such person* of the receipt of money, goods, securities or property of any kind, or of a document used in commerce, written or signed by him or of the date of a letter or other document usually dated, written or signed by him."

VII. SECTION 32(3)

A. INTRODUCTORY

Section 32(3)—Declarations against interest.

12.104. to 12.107. Section 32(3) makes a statement relevant — when the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages.

The basis of this clause is the principle that a statement asserting a fact distinctly against one's interest is unlikely to be deliberately false or needlessly incorrect, and carries its own sanction, even though the other usual sanctions of truth are wanting.

Declarations against interest in English law.

12.108. While English law also recognises this principle, the clause in the Act is wider than the English law, inasmuch as it also incorporates a proposition which English Courts have refused to adopt, namely, the inclusion of statements which would have exposed the *maker to a criminal prosecution or to a suit for damages.* At common law, the rule on the subject is narrow, and dose not include statements which would have exposed the maker to a prosecution or penalty. It was held in the *Sussex Peerage case*[1] that a declaration by a deceased clergyman, concerning a marriage at which he had officiated,— a marriage where the person celebrating would be liable to punishment under the Royal Marriage Act, 1772—was inadmissible as evidence of the marriage. Lord Brougham, who is otherwise known to have been an advocate of a liberal approach in the law of evidence, said, "The rule as understood now is that the only declarations of deceased persons receivable in evidence are those made against the proprietary or pecuniary interest of the maker."

Grounds of admissibility.

12.109. The ground on which a statement made by a witness who is dead or otherwise not available, which would have exposed him to a criminal prosecution, is admitted, is that a man is not likely to accuse himself falsely of a crime. Of course, it is not possible to state that in every case the statement is more likely to be true then false. This is shown by the conduct of approvers in criminal cases, who, while charging themselves with complicity in a crime, take care to ensure that the major blame is thrown on the other alleged co-participents. However, these are matters which can be taken into account by the court in considering the weight to be given to the particular statement.

Admissible for all purposes.

12.110. There is, of course, no restriction either in England or in India that the declaration is admissible only where it is against the maker's interest. If admissible, the declaration is admissible as evidence for all purposes.[2] The principle underlying the clause is, as already, stated, the improbability of a statement against interest being false.

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[1] *Sussex Peerage case,* (1844) 11 Cl. & Fin. 85 (House of Lords).

[2] *Taylor* v. *Witham* (8176) 3 Chancery Division 605.

B. RECITALS OF BOUNDARIES

12.111. So much as regards the principle of the clause, we shall now proceed to consider certain matters of detail, arising out of the clause.

Section 32(3)—Recitals of boundaries in documents between third parties.

There exists a controversy as to whether recitals of boundaries in documents not *inter partas* would be admissible under section 32(3) as statements "against the proprietary interest" of the declarant. One view on the subject is that such recitals are admissible, because—

(a) If the deed is one of mortgage of conveyance, the deed amounts to a statement against the pecuniary interests of the mortgagor (being an admission that he is indebted in a certain sum of money and that money is charged on his property) or against the proprietary interests, of the vendor (being an admission that he is extinguishing his interest in the property sold); the argument being that the whole document, and not merely the precise fact being against interest becomes relevant, on the principle applied in the English case of *Higham* v. *Ridgway*.[1] The leading case based on such a reasoning is a Bombay one-*Ningava* v. *Bharmappa*.[2]

(b) A statement by a person that his land is limited by certain boundaries is an admission that his proprietary interest does not extend over any land beyond the boundaries in the deed. The undermentioned cases support this view.[3]

12.112. A contrary view has been taken in some cases, on the ground that —

(i) Under section 32(3), it is not the document, *but the statement* that must be against the interest of the maker.[4]

(ii) A statement that the declarant's property is bounded in certain directions with certain other man's *property is not against the declarant's interest, unless* one assumes that every person is presumed to own the whole universe in the absence of a statement circumscribing his title.[5] A person may really be presumed to own nothing until he has evidence to show his ownership.

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[1] *Higham* v. *Ridgway* (1863) 10 East 109 (see infra).

[2] *Ningava* v. *Bharmappa* (1899) I.L.R. 23 Bom. 63, followed in *Haji Bibi* v. *H. H. Sir Sultan Mohomed Shah*, (1909) 11 Bom. L.R. 409.

[3] (a) *Tika Ram* v. *Moti Lal*, A.I.R. 1938. All. 299; 301, 302 (Recognition of another's title is against interest);

(b) *Haji Bibi* v. *Aga Khan* (1909) 11 Bom. Law Rep. 409, (following *Ningava* v. *Bharmappa*, I.L.R. 23 Bom. 63).

(c) *Katabuddin* v. *Nafar Chandra* A.I.R. 1927 Cal. 230, 231, 232 (B. B. Ghose & Panton JJ.). This was an obitor since the declarants were examined in the cases);

(d) *Thyagarajan* v. *Narayan*, A.I.R. 1948 Mad. 450 (Wadsworth J.) (Obiter and no conclusive discussion);

(e) *Rangayyan* v. *Innesimuthu*, A.I.R. 1956 Mad. 226, 228, Para. 7. 229, Para 11 (reviews cases);

(f) *Trimbak* v. *Ganesh*, A.I.R. 1923 Nag. 22 (Prideau A. J. C.);

(g) *Ramnaddan* v. *Jelay Tilakdhari*. A.I.R. 1933 Pat. 636, 638 (Dhavle J.) (other).

[4] (a) *Karupanna* v. *Rangaswami*, A.I.R. 1928 Mad. 105, 106 (Jackson, J.);

(b) *Re. Paddagam*, (1910) M.W.N. 668;

(c) *S. Venkataraja* v. *Narasayya*, (1914) M.W.N. 779, there cited.

[5] See the observations of Krishnaswami Iyer J. in *In re. Daddapanali Narayanamma*, 8 Indian cases 228 cited in woodroffe and Amir Ali, Law of Evidence, (1957) Vol. I. page 492, and the observations of Jackson J. in A.I.R. 1928 Mad. 105, 106 and the discussion in A.I.R. 1935 (Patna 167, 168 (F.B.).

C. SELECTED CASES AS TO RECITALS OF BOUNDARIES

12.113. We do not propose to summarise all decisions; a few cases which reveal the nature of controversy may be mentioned. Thus, in *Abdullah* v. *Kunj Behari Lal*,[1] it was decided that recitals of boundaries in deeds of sales and mortgages executed by owners of adjoining plots of land, and describing the disputed land as the *tenanted land* of the defendents or their predecessors, were relevant under section 32(3), though not under section 32(2) or section 11 or section 13.

With this we could contrast *In re Daddapeneni Narayenappa*.[2] A single Judge of the Madras High Court held that erecital in a document dealing with neighbouring land, that the land in question belonged to the plaintiff, was not admissible.

And two Judges of the Madras High Court differed in *Saripalli Venkatarayagopala Raju* v. *Foto Narasayya*.[3]

12.114. In a Calcutta case,[4] it was observed—

"The question to be decided is whether the statement by the grantor in the schedule to the lease, that on the boundary of the land demised was the holding of the predecessor of the present plaintiff can be used in evidence against the Defendents although *they were not parties to the transaction evidenced by that document*. In our opinion the document is admissible in evidence on the principle explained by this Court in the case of *Abdullah* v. *Kunj Behari*[5]. In fact the case before us is stronger than the case then before the Court, because it is alleged here that the statement was made by the landlord of the Plantiff who might be expected to know who was in occupation of the land as his tenant. The case is, therefore, completely covered by the decision in these cases of *Ningava v. Bharmappa*.[6] *Abdul Aziz Mollah* v. *Ebrahim Molla*,[7] and *Burba Mandari Meghanath*."[8]

12.115. *In Abdul Ali* v. *Syed Hajan Ali*.[9]—Another Calcutta case, it was held that such recitals were inadmissible in evidence against a party who was stranger to them, and that the ruling as to the admissibility of the documents in one earlier case—*Dwarka Nath* v. *Mukundu Lal*[10]—was obiter.

In another Calcutta case[11] again, it was decided that recitals of boundaries of other lands in documents between their parties were not admissible in evidence.

It was held in the Allahabad case of *Natwar* v. *Alkhu*,[12] that such a document is admissible in evidence under section 32(b).

12.116. These reported cases will suffice to show the conflict of decisions. It may also be noted that the controversy exists not only amongst the several High Courts, but also within each individual High Court. Thus, the Calcutta

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[1] *Abdullah* v. *Kunj Behari Lal*, (1911) 14 C. L. J. 467 (Cal).
[2] *In re Daddapeneni Narayanappa*, (1910) M.W.N. 268.
[3] *Saripalli Venkatarayagopala Raju* v. *Foto Narasayya*, (1914) M.W.N. 779.
[4] *Imrit Chamar* v. *Jibothary Pandey*, 17 O.W.N. 108, 110 (Mookerjee & Cornduff, JJ.)
[5] *Abdullah*, 14 C.L.J. 467; (1911) 16 O.W.N. 108.
[6] *Ningawa*, (1897) I.L.R. 23 Bom. 63.
[7] *Abdul Aziz Mollah* v. *Ebrahim Molla*, (1904), I.L.R. 31 ctal. 965.
[8] *Burba Mandari* v. *Meghnath*, (1905) 2 C.L.J. 4n.
[9] *Abdul Ali* v. *Syed Hajan Ali*, (1914) 19 C.W.N. 468.
[10] *Dwarka Nath* v. *Mukundu Lal*, (1907) 5 Col. L.J. 55
[11] *Surai Kumar Acharji Chowdhuri* v. *Umed Ali Howaldar*, A.I.R. 1922 Cal. 251.
[12] *Natwar* v. *Alkhu*, (1913) 11 A.L.J. 139.

High Court, has, in some decisions, excluded such statements, but, in other cases, it has held them to be admissible.[1] The Madras High Court has expressed different views on different occasions.[2]

The Patna High Court admitted such statements in some cases, but excluded them in other cases.[3]

D. COMMENTS ON THE CASE LAW

Recitals of boundaries.

12.117. We shall later indicate our own view in the matter. But we may first refer to some important points relevant to an appreciation of the value of the judicial decisions. If the ancestry of the judicial decisions taking a view in favour of the admissibility of recitals of boundaries under section 32(3) is carefully analysed, it will be found that almost all the decisions can be traced either to the Bombay case of *Ningaya*, or to the Calcutta case of *Leela Nand*.

For example, the Bombay case of *Ningaya* was followed. In the Calcutta case of *Abdullah* v. *Kunj Behari Lal*.[4] The Calcutta case of *Leela Nand* and the Bombay case Ningaya were followed in the Allahabad case of *Natwar* v. *Alkhu*[5]. All these cases were subsequently followed in Calcutta in *Imrit Chamar* v. *Sirdhari Pandey*,[6] and in *Ambar Ali* v *Lutfa Ali*[7] and in certain other cases, some of which will be referred to.

12.118. Now, the Calcutta and Bombay cases (*Leela Nand* and *Ningaya*) are themselves subject to comment on the ground of principle,[8] and we shall later give our comments as to the principle. But without meaning any disrespect to the other High Courts, we may state that some of the decisions of the other High Courts, are based on a misconception of what was in issue in *Leela Nand's case* and what was decided in *Ningaya's case*. Thus, in one of the Calcutta cases[9], it was stated that documents which dealt with land lying on different boundaries of the land in dispute were admissible under section 32 After noting the uncertainty on the subject in English law, it was stated— "whether such evidence is admissible under the Evidence Act was considered in favour of its admissibility in several cases, the earliest was *Leela Nand's case*". The Court with respect overlooked the fact that *Leela Nand's case* was not directly concerned with *recitals of boundaries at all*. The statement in issue in *Leela Nand* related to the amount of rent.

12.119. In another Calcutta case,[10] the High Court observed—

> "The statement, though not relevant as on admission may, however, be relevant under section 32(3) as a statement against interest which has been held as evidence against strangers. It was so held in the case of *Leela Nand*.....". Here also, it was not noted that *Leela Nand* was a case concerning the amount of rent.

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[1] *Contrast Katabuddin's case*, A.I.R. 1927 Cal. 230, (Cuming & M. N. Mukherjee JJ.) with *Ambica Charan's case*, A.I.R. 1928 Cal. 893 and *Kumud Kumari*, A.I.R. 1927 Col. 918 (Duval and Mitter JJ.).—

[2] *Contrast Karuppanna's Case*, A.I.R. 1928 Mad. 105, with *Rangayyan's case*, A.I.R. 1956 Mad. 226.

[3] See *Soney Lall's case*, A.I.R. 1935 Pat. 167, 168 (F. B.) and *Hari Ahir's case*, A.I.R. 1934 Pat. 617(2) 619 (Wort, J.).

[4] *Abdullah* v. *Kunj Behari Lal*, (1911) 16 C.W.N. 252.

[5] *Natwar* v. *Alkhu*, (1913) 11 A.L.J. 139; 18 I.S. 752.

[6] *Imrit Chamar* v. *Sirdhari Pandey*, (1911) 17 C.W.N. 108.

[7] *Ambar Ali* v. *Lutfa Ali*, (1918) I.L.R. 45 Cal. 159.

[8] See, "Mater discussed on the basis of principle", *infra*.

[9] *Qutabuddin* v. *Nafre Chandra*, A.I.R. 1937 Cal. 230, 231

[10] *Kanjali Mala* v. *Beni Madhava*, A.I.R. 1916 Cal. 278.

In a Madras case,[1] it was stated

"Another ground on which recitals of boundaries of the land are held to be against, is that a statement by the vendor that his land is limited by certain boundaries is an admission that his proprietary interest does not extend over any land beyond the boundaries mentioned in the deed."

Now, in so far as this observation refers to the Bombay Case (the case of *Ningawa*),[2] it may be stated that the Bombay case is not based on the reasoning that a statement limiting boundaries is an admission that the proprietary interest does not extend over other lands. The Bombay case is based on the reasoning that since a mortgage-deed, as a whole, is against proprietary interest, a statement about boundaries, which is a part of the mortgage-deed, is also against interest The observation in the Madras case, in so far as it seeks to summarise the Bombay case, is, therefore, debatable, with respect.

12.120. In some of the judicial decisions, there is a misconception about the general trend of previous cases. This is illustrated by a Nagpur case,[3] where, after referring to some of the earlier cases, it is stated, "the weight of authority, therefore, seems, to be that such admissions containing recital as to boundaries are admissible under section 32, clause (3) of that Act".[4]

12.121. Now, It should be pointed out with respect, that out of the nine cases referred to in the judgment as to recital were *held to be not relevant*: in five they were held to be relevant, and in one, two judges of the same High Court differed.[5]

Further, the discussion in the Nagpur judgment itself notes that the later Madras and Calcutta cases were against the admissibility of such recitals. The only other High Courts taking a view in favour of admissibility were Bombay and Allahabad.

12.122. This view was criticised in a later Madras case,[6] where Ramaswami J observed—

"But, with respect to Jackson J. his observation seems to miss the real point. Section 32(3) states that when the statement is against the pecuniary or proprietary interest of the person making it, it is relevant when the person making it is dead, or cannot be found or has become incapable of giving evidence or whose attendence cannot be procured without an amount of delay or expense which under the circumstances of the case, appears to the court unreasonable.

"First of all, recitals of boundaries of property, contained in deeds not "inter partes' have been held to be admissible to prove the ownership or possession of adjoining property, on the ground that, when the deed is a mortgage deed, it amounts to a statement against the pecuniary or proprietary interest of the mortgagor, inasmuch as he admits therein that he is indebted in a certain sum of money and that this money is a charge on his property (cases cited) and when the deed is a deed of conveyance, on the ground that it amounts to a statement against the vendor's interest, inasmuch as he admits therein that he is extinguishing his interest in the property conveyed.

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[1] *Rajayon* v. *Injui Muthu*, A.I.R. 1956 Mad. 226, 229, Para. 11

[2] *Ningawa*, I.L.R. 23 Bom. 63.

[3] A.I.R. 1923 Nagpur 23.

[4] The judgment as printed in the A.I.R. mentions clause (2), which is a misprint for clause (3).

[5] This was the case reported in 1914 Madras Weekly Notes 179

[6] *Rangayan* v. *Innasimuthin*, A.I.R. 1956 Mad. 224 (Ramaswami J.).

"The mortgage deed or the deed of conveyance having thus been held to be a statement against the pecuniary or proprietary interest of the executant of the deed, on the authority of—'*Righam* v. *Pidgway*', (1508) 10 East 109 (7), the document is made evidence not only of the precise fact against interest, but of all the collateral facts mentioned therein, and consequently of the possession or ownership of persons who are mentioned in the deed as possessing or owning the land adjoining the property mortgaged or conveyed '*Rajahaddi Sarkar* v. *Ganga Charan*' A.I.R. 1919 Cal. 499 A.I.R. 1918 Cal. 971; 12 Ind Cas 149 (Cal) — '*Ramsarup v. Bhagwat Prosad*', A.I.R. 1920 Pat 696.

Another ground on which recitals of boundaries of the land conveyed is held to be against interest is that a statement by the vendor that his land is limited by certain boundaries is an admission that his proprietary interest does not extend over any land beyond the boundaries mentioned in the deed." (Cases cited).

Question of "relevant fact" should be considered.

12.123. We have quoted in full the passage in the judgment, for convenience of reference. We may, however, state, with respect to Ramaswami J. that we are unable to see how he has answered Jackson J.'s point[1]. The point made by Jackson J., was, that unless one assumes that every one claims the whole world, recitals of boundaries are not against the interest of the maker. This point has not been answered by Ramaswami J. Rather, the point missed in the *exposition* by *Ramaswami J.* is that a *mortage* of land A is not a relevant fact at all, when the question is as to land B. In order that any clause of section 32 may apply, the first condition to be satisfied is that that statement must be of a relevant fact.[2] It is only when that condition is satisfied.[3] that an occasion for considering the applicability of a particular clause arises.

E. STATEMENT OF BOUNDARY NOT AGAINST INTEREST

12.124. Not only in a recital of boundary not *against* interest, but it would also appear that a statement by a person that there is a certain boundary of his land is in his favour, if at all, rather than against his proprietary interest, because he is thereby limiting the amount of land which he is selling. This aspect was referred to by Wort J. in the Patna Full Bench Case,[4] where he said :

"In coming to the decision on the question, apart from the authorities to which I have referred, I think I can do no better than to repeat the language of Jackson J. of the Madras High Court when he says that such a statement can be construed as against the proprietary interest only on the assumption that there are no boundaries to the property of the person who is the maker of the deed and he is the owner of the universe. There must of necessity be some boundary to a man's land: and the statement that there is a certain boundary of the land which is the subject-matter of the deed, namely, circumscribes the interest which he is selling and therefore circumscribes the interest which the purchaser obtains in a sense that the vendor says : "I sold you this much and no more" and that if that is a true statement of the boundaries, it seems to me it is rather in favour of the person who makes it than against his proprietary interest."

Or, — to approach the matter in a different light, — when a person says that a certain other person has got land north or south or east or west of his land, he

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[1] *Karuppanna* v. *Ranganswami*, A.I.R. (1928) Mad. 105 (Jackson J.) (supra).

[2] Section 32, opening paragraph.

[3] See further discussion, *infra*.

[4] *Soney Lall* v. *Darbden*, A.I.R. 1935 Patna 167, 170 (full Bench).

does not more than describe his own land. As Mohammad Noor J. observed in the Patna case.[1] "Every man's land is circumscribed by some boundary. Every man has a limit to his land." The same Judge pointed out, with reference to the English Case of Higham v. Ridgway, that the statement of the date of birth would, in India, be admissible under section 32(2) as a statement made in the ordinary course of business in books of account, but not necessarily under section 32(3).

F. STATEMENT MUST BE OF RELEVANT FACT — CRITICISM OF BOMBAY CASE

12.125. Apart from our comments on the case law, and apart from the principle, we would state that on the terms of the section also, the narrower view *appears to be correct,* because it is only statements of *relevant facts, (which statements themselves are against the pecuniary interest etc. of the maker),* that are admissible under the section. To regard a mortgage deed, which is not, in itself, relevant, as admissible under the section, would not, with respect, be consistent with the terms of the section.

G. ENGLISH LAW

12.126. It should be pointed out that some of the reported cases seem to have been under a mis-conception as to the English law. The general rule of English law is that a statement made by a third person is not relevant. We are not discussing the admissibility of a statement against the maker or his representative-in-interest; but a statement as to boundaries made not *inter partes* is not relevant in England as a *statement against interest.*

In fact, in English law, it is an essential ingredient of the relevancy of statements against proprietary interest that the statement *must be known to be against the interest of the person* who made[2] it, at the time when he made it. A recital of boundaries would seem to fail to satisfy this requirement.

12.127. We cannot help observing that this aspect of the matter seems to have been overlooked in the Bombay case of Ningawa.[3] In that case, the deed was one of mortgage, and contained certain recitals as to boundaries. The deed was construed as amounting to a statement against the proprietary or pecuniary interest of the mortgagor, and it was held that the statement of boundary, *which was a part of that deed,* was admissible under section 32(3). But, as we have pointed out in the above discussion, before clause (3) of section 32 can be invoked — or, for that matter, before any other clause of section 32 can be invoked it must first be established that the statement sought to be admitted is a statement of a relevant *fact.* **Comment on Bombay case.**

Now, the mortgage deed as a whole was not a statement of a relevant fact at all, and, for that reason, the fact that the deed was against the proprietary interest of the executant, became of no consequence in attracting section 32(3).

Assuming that the mortgage deed was a document against the proprietary interest of the maker, what requires to be pointed out is that the deed (as a whole) did not constitute a statement as to a relevant fact. The general rule that if a part is relevant, the whole is relevant, was not really applicable. The part, in this case, *was a statement* of boundaries. We may assume that if a statement in a deed is a *statement of a relevant fact,* then certain other portions of the deed, which are necessary for understanding that statement, may be brought into evidence, — on the principle that the part renders the rest admissible.

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[1] *Soney Lall* v. *Darbdeo,* A.I.R. 1935 Patna 167, 172 (F.B.).
[2] *Tucker* v. *Urban District Council,* (1912) 2 K.B. 317.
[3] *Ningawa* v. *Bhermappa,* (1899) I.L.R. 23 Bom. 63.

But, in this case, *the whole,* that is to say, the document of mortgage itself, did not relate to a relevant fact and, with respect to the Bombay High Court, it is not possible to apply a different rule, namely, that if the whole is against the pecuniary interest *though not about a relevant fact,* then the part thereby becomes a statement against proprietary interest and so becomes admissible.

12.128. In other words, in the Bombay case, that which was regarded admissible as a statement against the interest — the mortgage deed — was not a statement *about a relevant fact.* The statement as to relevant fact — the recital of boundaries in the mortgage deed — was not (in itself) a statement against interest. Thus, an important condition of section 32 was not satisfied in the Bombay case.

This aspect will be further evident from the facts of the case, which we may now state in detail. The facts were as follows :

In 1893, the plaintiff brought this suit to recover possession of certain land. The defendants denied the plaintiff's title. The plaintiff tendered, as evidence of his ownership, a registered mortgage — deed relating to adjacent land, executed in 1877 by one Ninga Talwar to one Govind, in which the land now in question was mentioned as one of the boundaries of the land comprised in the mortgage and was described as the property of the plantiff. Ninga Talwar was dead at the date of this suit. It was admitted that in 1877 there was no litigation between the plaintiff and defendants, and it did not appear that there was any motive on the part of the adjacent owner Ninga to make this statement in the deed on the plaintiffs' behalf.

On appeal the question was, whether the statement in the mortgage deed was rightly admitted in evidence. The High Court answered the question in the affirmative, for reasons already stated.

12.129. So much as regards the Bombay case. As regards the Calcutta case of *Leelanund*[1], the question before the Court was whether the rent payable to the zamindar by the Ghatwal during a certain period was Rs. 75 or Rs. 175. The zamindar relied upon a statement, prepared by the then zamindar many years previously, of the Ghatwali villages in the mahal, in which there was a recital against the name of the property in question that the original rent was so much and the increased rent so much. Mr. Justice Markby held that this statement was inadmissible, he said :

> "I cannot bring it under any of the rules of evidence which allow a statement of a deceased person to be put in evidence. It does not appear to me to be a statement in any way detrimental to his interest: on the contrary so far as regards the rate of rent, of course, it would be his interest to state it to be as high as possible."

In appeal, Couch C.J., and Ainalie, J., said :

> "We cannot concur in the opinion of the learned Judge that this statement was not admissible in evidence. It is a statement by which the interest in the mahal of the person making it is reduced or affected; it is against his interest and against his proprietary right. *The effect of it is to cut down the proprietary right, to subject it to the tenure or incumbrance which is mentioned.* It is true that in one part of it there is what may be said to be not against his interest but in his favour, namely, the amount of the original rent and increased rent payable to him. But when a document of this kind is tendered in evidence, it is not to be divided into parts, and the part which is

[1] *Rajah Leelanand Singh* v. *Mst. Lakhputse Thakoorain,* (1874) 22 Cal. W.R. 231.

in favour of the person making it rejected, and that which is against his interest accepted. The question, is whether, taking the document as a whole it is against the interest of the proprietary right of the person making it. In estimating the value of any particular part of it, that may be looked at; but the principle upon which the admissibility of it is determined is whether it has been made under such circumstances as makes it reasonable to suppose that it was done bonafide, and the statements are true."

This case thus, did not relate to recitals of boundaries at all. Moreover, if we may say, with respect, this reasoning also suffers from one infirmity. The entire document was not a statement of *a relevant fact*, even if it be assumed that it was against the interest of the maker.

English case of *Higham* how far relevant.

12.130. Some of the Indian cases rely on the English case of *Higham*. Illustration (b) to section 32, whose facts recall Higham's case,[1] is really an illustration under section 32(2), and not under section 32(3), because the illustration does not make any mention of payment of charges, and expressly mentions the requirement of "regularly kept in the course of business". The question in *Higham's case* was whether one Willian Fowden Jr. was born before or after the 16th April, 1768. To prove that he was born after that date, the plaintiff tendered in evidence entries from the day book and ledger of a man-midwife who had attended the mother of Fowden on his birth and who was since deceased. The entries under 22nd April, 1768 in the day book detailed the charges which were due, and in the ledger entry under 25th October, 1768 the payment of the charges was recorded.

The Court rejected the argument that the word "paid" only should be admitted without the context which explained the circumstances to which it refers. The court, therefore, looked to the rest of the entry including the entry on 22nd April, 1768 to see what demand was discharged by the entry in account. The case does not relate to recitals of boundaries at all.

12.131. It would be interesting to note that even in England, for proving that a certain sport was not within the "waste" of a manor, a declaration by the deceased lord (third person) that he was entitled to the waste up to a certain point (which did not include the place in question) but no further, was regarded *as inadmissible*,[2] for two reasons, viz., the lord was not in possession of the place and the declaration was not against proprietary interest because, though disclaiming as to one part, he affirmed as to the other.

H. OTHER POINTS

Statements possessing a dual character.

12.132. It is often found that a particular statement bears a dual character, inasmuch as, in one respect, the statement is against the interest of the maker, but, in another respect, it is in his favour, as likely to advance his proprietary or pecuniary interest.

Part payment as a statement against interest.

12.133. In this connection, we may refer to statements recording payment of interest or of part of a debt as a statement against interest. Previously, *part payment of interest* or *principal* did not, under the Indian Law of Limitation,[3] revive the right to sue for the remainder of a debt. The consideration of the present question was, therefore, of importance only in connection with one class of cases, namely, where a money-bond contained a stipulation—(i) that the

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[1]*Higham* v. *Ridgway*, (1808) 12 East 109.

[2]*Crease* v. *Burnett* (1935) I C.M.L.R. 919 cited by Phipson (1963), para 9.22 40 RR 779.

[3]Indian Limitation Act, 1859.

sum secured thereby shall be payable by instalments, and (ii) that, on default being made in the payment of any one instalment, the whole amount or the aggregate of all the instalments shall become due and payable. Where default was made in the payment of one instalment, the cause of action in respect of the whole amount accrued, and limitation therefore began to run. The obligee of a bond (the creditor), which had become barred by limitation in consequence of the whole amount having become payable on default, might attempt to evade limitation *by endorsing the payment of one or more instalments.*

Such endorsement had the semblance of being *against interest,* but was, in reality, quite the contrary. In cases of this nature, if the endorsement was *offered* as an entry against interest, it ought not to be admitted unless and until it is shown to have been made at a time when it was against the interest of the obligee to make it.

12.134. According to the provisions of the later Limitation Acts,[1] and also under the present Act,[2] the period of limitation for a suit on a promissory note or bond payable by instalments, which provides that if default be made in payment of one instalment the whole shall be due, begins to run when the first default is made, except where the payee or obligee waives the benefit of the provision, in which case limitation begins to run when fresh default is made in respect of which there is no such waiver. Even under[3] these Acts, therefore, it may be often *to the interest of the obligee* to offer proof of such endorsements (recording payment), so as to make it appear that a debt in regard to which limitation has begun to run, is not barred.

12.135. There is another rule of the law of limitation, relevant to the present topic. Part-payment of interest or of principal revives the right to sue for the remainder of the debt. This rule was first introduced in India by the Limitation Act of 1871.[4]. The existing law is in section 19 of the Limitation Act of 1963,[5] which enacts as follows :—

> "19. When interest on a debt or legacy is *before the expiration of the prescribed period,* paid as such by the person liable to pay the debt or legacy, or by his agent duly authorised in this behalf, or when part of the principal of a debt is, *before the expiration of the prescribed period,* paid by the debtor or his agent duly authorised in this behalf, a new period of limitation, according to the nature of the original liability, shall be computed from the time when the payment was made :
>
> Provided that in the case of part-payment of the principal of a debt, the fact of the payment appears in the handwriting of the person making the same."

12.136. To adopt what Lawton J. said with reference to the corresponding English provision, the sub-section does not change the nature of the right; "it provides that, in the specific circumstances of an acknowledgement or payment, the right shall be given a notional birthday and on that day, like the Phoenix of the fable, it rises again in renewed youth — and also like the phoenix, it is still itself."

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[1]Limitation Acts of 1871, 1877, 1908.

[2]Article 37, Limitation Act, 1963.

[3](a) *Sethu* v. *Navana,* I.L.R. 7 Mad. 577;

(b) *Gapala* v. *Paramma,* I.L.R. 7 Mad. 383;

(c) *Chani Bash Shah* v. *Kadam Mandal* I.L.R. 5 Cal. 97;

(d) *Nobodin Chandra Saha* v. *Ram Krishna Rai Chowdhri,* I.L.R. 14 Cal. 397.

[4]Section 21, Limitation Act, 1871 (9 of 1871).

[5]Section 19, Limitation Act, 1963.

The express provision that the payment, whether of interest or of principal, must, in order to create a new period of limitation, have been made *before the right to sue had become barred*. Appears to require proof of the *time of payment*. Where the payment is of part of the principal, the proviso to the section of the Limitation Act[1] (regarding handwriting of the debtor), will, in most cases, afford a security against fraud. But, where the payment is of interest only, the endorsement could be made fraudulently.

12.137. It would, from the above discussion, appear that such statements would become relevant under clause (3), though, in another respect, they help the maker. Presumably, the court will look to the substance of the matter, in deciding whether they fall within clause (3).

Statements as to rent.

12.138. Another illustration of a statement having a dual character may be considered. The question before the Court in *Rajah Leelanund Singh* v. *Mst. Tulsamal Luckpattee Thakoorain*[2] was whether the rent payable to the zamindar by the Ghatwal during a certain period was Rs. 75 or Rs. 175. The zamindar relied upon a statement, prepared by the then zamindar many years previously, of the Ghatwali villages in the mahal, in which there was a recital against the name of the property in question that the original rent was so much and the increased rent so much. Markby J. held, that this statement was inadmissible. He said: I cannot bring it under any of the rules of evidence which allow a statement of a deceased person to be put into evidence.

> "It does not appear to me to be a statement in any way detrimental to his interest; on the contrary so far as regards the rate of rent, of course, it would be his interest to state it to be as high as possible." In appeal, however, Couch, C.J., and Ainslie, J., said: "We cannot concur in the opinion of the learned Judge that this statement was not admissible in evidence. It is a statement by which the interest in the mahal of the person making it is *reduced or affected;* it is against his interest and against his proprietary right. The effect of its is to cut down the proprietary right, to subject it to the tenure or incumbrance which is mentioned. *It is true that in one part of it there is what may be said to be not against his interest but in his favour, namely, the amount of the original rent and increased rent payable to him.* But when a document of this kind is tendered in evidence, it is not to be divided into parts, and the part which is in favour of the person making it rejected, and that which is against his interest accepted. The question is, whether, taking the document as a whole, it is against the interest of the proprietary right of the person making it. In estimating the value of any particular part of it, that may be looked at; but the principle upon which the admissibility of it is determined is whether it has been made under such circumstances as makes it reasonable to suppose that it was done *bona fide*, and the statements are true."

12.139. Just before this passage, there is mentioned of the provisions of the Evidence Act. The judgment of Markby J. was given in April, 1874, and though the evidence had been recorded in or before 1869, it appears that the admissibility of the statement in question was considered with reference to the Act of 1872. And even if Act 2 of 1855 be taken as the Evidence Act then applicable, there is no difference in the principle to be applied. Act I of 1872 made no change in the law in this respect.

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[1]Section 19, Limitation Act, 1963 (*supra*).

[2]*Rajah Leelanund Singh* v. *Mst. Tulsamal Luckpattee Thakoorain*, 1874, 22 W.R. 231 (Calcutta).

Amendment needed.

12.140. In the result, the only change needed is an amendment to the effect that recitals as to boundaries should not be admissible under section 32(3). The clause should be amended for the purpose.

I. RECOMMENDATION

Recommendation to make inadmissible recitals as to boundaries in documents not *inter partes*.

12.141. The above discussion shows that a clarification is needed on the question whether recitals of boundaries are admissible. We are of the view that recitals of boundaries should not be admissible under section 32(3). Such recitals cannot, without straining the natural meanings of words, be said to be "against interest". They are inserted merely as descriptions.

Moreover, they are not, at the time when they are made, *known to be adverse* to the maker's interest. This consideration, even if it is not implicit in the section, should not be disregarded when taking a decision as to what the law ought to be.

We, therefore, recommend that the following Explanation should be inserted below section 32(3).

"Explanation.- Recitals of boundaries containing statements as to the nature or ownership of adjoining lands of third persons are not statements against pecuniary or proprietary interest within the meaning of this clause."

VIII. SECTION 32(4)

Section 32(4) — Statements as to public right etc.

12.142. Section 32(4), makes relevant a statement which gives the opinion of any such person, as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, when such statement was made before any controversy as to such right, custom or matter had arisen.

Common law as to public and general rights.

12.143. The section broadly follows the common law rule on the subject; though not in every detail. At common law, an oral or written declaration by a deceased person concerning the reputed existence of a public or general right is admissible as evidence of the existence of such right, provided the declaration was made before the dispute in which it is tendered, and, in the case of a statement concerning the reputed existence of a *general* right, provided the declarant had competent knowledge. The requirement of competent knowledge, as stated in the above proposition, concerning the reputed existence of a general right, was laid down in a case decided in 1835[1].

12.144. In this context, a "public right" is one affecting the entire population, while a "general right" is one that affects classes of persons, such as the inhabitants of a particular district, the tenants of a manor or the owners of certain plots of land.

Examples of public rights are — a claim to tolls on a public highway[2], a right of ferry[3] or the right to treat a part of a river bank as a public landing place[4].

Examples of a general right are — rights of common[5], and customs of mining for a particular district[6].

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[1] *Crease* v. *Barrett*, (1835) 1 Cr. M. & R. 919.
[2] *Brett* v. *Beales*, (1830) 10 B. & C. 508.
[3] *Pim* v. *Gurell*, 6 M. & W. 234.
[4] *Drinkwater* v. *Porter*, (1835) 7 C. & P. 181.
[5] *Evans* v. *Merthyr, Tydfil Urban District Council*, (1899) 1 Chancery 241.
[6] *Crease* v. *Barrett*, (1835) All E.R. Reprint 30.

The distinction between public or general rights on the one hand, and private rights on the other hand, becomes crucial in this context, because private rights cannot be proved by evidence of reputation. This was established long ago[1], and has been re-stated recently[2].

Different phraseology used in sections 32(4), 48 and 49.

12.145. Both section 32(4) and section 48 admit evidence of opinion in matters of usage. So does section 49. There are, however, slight difference of phrascology in the various sections. Thus, section 32(4) speaks of a "public right or custom or matter of public or general interest"; section 48 speaks of "general custom or right" (which has been defined in the Explanation to the section); and section 49 speaks of "usages and tenets of any body of men or family". We shall deal with this aspect when we come to section 48[3].

Indian cases

12.146. Decided cases in India on clause (4) do not furnish many examples of public rights or customs; but one instance of the admission of such statements is to be found in the case of *Sivasubramanya* v. *Secretary of State for India*.[4] That was a suit brought by a zamindar to recover certain forest tracts from the Government, on the ground that the tracts were included within the limits of his Zamindari. Both the plaintiff and the defendant relied on certain ayakut accounts, as containing statements of boundaries and furnishing proof of the inclusion of the disputed tracts in the Zamindari limits or in the limits of Government villages respectively.

These accounts were made for revenue purposes to show the sources of revenue in each village. Inasmuch as they were, from time to time, prepared for administrative purposes by village officers, they were said to be admissible as evidence of reputation, provided they are produced from proper custody and otherwise sufficiently proved to be genuine.

12.147. However, a letter of the Collector containing a summary of the statements by zamindars as *to the right of inheritance to a zamindari in* the district, was rejected as inadmissible[5] as it did not relate to a public right.

The order of the Government or of the executive head of a district is often accepted as conclusive concerning public rights or customs. In large zamindaries, however, questions occasionally did arise somewhat analogous to those which occur in *manors in England* — for example, as to the zamindar's right to take dues on the sale of trees[6] or to receive one-fourth of the sale proceeds in cases of involuntary sale, as in execution[7]; or in case of a house sale privately[8]. With the abolition of zamindaries, such questions have lost their importance.

Evidence to prove a fact in issue.

12.148. The Bombay High Court has held[9] that evidence of the nature referred to in clause (4) is admissible to prove only a fact in issue and not a merely relevant fact. In the Bombay case, the question at issue was whether there was a custom amongst a certain caste of Hindus prohibiting the widow from adopting a son, and a statement signed by several members of this caste to the effect that the widow cannot adopt, was sought to be given in evidence. It was held that the statement cannot be admitted.

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[1] *Talbot* v. *Lewis*, (1834) 4 Law Journal Exchequer 9.

[2] *White* v. *Taylor*, (1969) 3 All. E.R. 349.

[3] To be considered under section 48.

[4] *Sivasubramanya* v. *Secretary of State for India*, I.L.R. 9 Mad. 285.

[5] *Ramalakshmi Ammal* v. *Sivananatha Perrumal Sethurayer*, 14 Moo. I.A. 570; 12 B.L.R. 396; 17 W.R. 553 (P.C.).

[6] *Paul Rai* v. *Ram Hit Panday*, 1 N.W.P. Rep. 139, cited in Woodroffe.

[7] *Baijnath Pershad* v. *Mahomed Fazul Hossain*, 3 N.W.P. Rep. 204, cited in Woodroffe.

[8] *Kalian Das* v. *Bhagirathi*, I.L.R. 6 All 47.

[9] *Patel Vandravan* v. *Patel Manilal Chunilall*, I.L.R. 15 Bom. 565.

This case was dissented from by the Madras High Court in *Raghubhushana* v. *Vidiavaridihi*[1], where it was held that a fact in issue is always a relevant fact, and statements of deceased persons, relating to a fact in issue are admissible under section 32, clause (4).

We have already dealt with this point[2] while discussing the opening paragraph of section 32. The amendment recommended in the opening paragraph will take care of the matter.

No change needed.

12.149. In the above position, no changes are needed in clause (4).

IX. SECTION 32(5) AND 32(6)

Section 32(5).

12.150. Section 32(5) makes a statement relevant when the statement relates to the existence of any relationship by blood, marriage or adoption between persons as to whose relationship by blood, marriage or adoption, the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised.

Section 32(6).

12.151. Section 32(6) makes a statement relevant when the statement relates to the existence of any relationship by blood, marriage or adoption between *persons deceased*, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised.

Matters of Pedigree.

12.152. The two clauses deal with the relevancy of two classes of statements. These are usually treated by English text-writers under a single head, in discussing the admissibility of certain kinds of evidence in "matters of pedigree". There is however, a distinction between the kinds of evidence to which each clause refers.

Distinction between the two sub-sections.

(i) The statement declared relevant by clause (5) is a statement delating to the existence of any relationship between persons, *alive* or *dead*.[3] The statement declared relevant by clause (6) is a statement relating to the existence of relationship *between deceased persons* only.

(ii) Under clause (5), special means of knowledge is a requisite. Under clause (6), it is not necessary that the statement should have been made by *a person who had special means of knowledge*.

(iii) But it is necessary under clause (6), that the statement must be *contained in a will or deed* relating to the affairs of the family to which any such deceased person belonged, or in a family pedigree, or upon a tombstone, family portrait or other thing on which such statements are usually made. This is not necessary under clause (5).

12.153. Thus, in some respects, clause (6) is narrower than clause (5) while, in some respects, it is wider. Both the statements, in order to be relevant, must have been made before the question in dispute was raised.

Illustrative documents and materials.

12.154. Besides the documents and other material things specifically mentioned in clause (6), family bibles, coffin-plates, mural tablets, hatchments, rings armorial bearings and the like, amongst Christians, and books kept up by

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[1]*Raghubhushan* v. *Vidiavaridhi*, 34 I.C. 875 (Mad.).

[2]See discussion as to section 32, opening paragraph.

[3]The language of clause (5) imposes no restriction in this respect.

family bonds of domestic events in the families to which they are attached,[1] and horoscopes among Hindus,[2] are examples of other documents and things on which such statements are usually made.[3]

Horoscopes.

12.155. There seems to be some obscurity with reference to the precise position under section 32 as to horoscopes. Some of the cases seem to lay down that the maker of the horoscope must be called in court,[4] but such a view would seem to overlook the fact that section 32 applies only where the maker is not available as a witness.

12.156. It has been held by the Madras High Court[5] that a horoscope is inadmissible where the witness producing it was not its writer or a person with special means of knowledge of its correctness. With respect, this reasoning overlooks the fact that what section 32(5) postulates is merely that the *maker* must have special means of knowledge.

12.157. It will, in no way, affect the admissibility of evidence under section 32(5) and (6) that there are living witnesses who can depose to the same fact : nor is it necessary that the statements should have been contemporaneous with the events to which they relate. On this latter point, Lord Brougham remarked that such a restriction would defeat the purpose for which hearsay in pedigree is let in, by preventing it from going back beyond the life time of the person whose declaration is to be adduced in evidence.

12.158. Of course, the non-availability of the maker must be proved. In a Calcutta case,[6] the chief ground of rejection of the horoscope was the fact that it was not shown that the attendance of the writer was not procurable. In another Calcutta case,[7] which was a suit to set aside a decree on the ground of minority, the horoscope was held to be inadmissible, because it was not shown that the maker could not be called. This reasoning, with respect, is sound[8].

In a later Calcutta case,[9] a horoscope was admitted under section 32, the other conditions of section 32 being satisfied.

12.159. It appears that sometimes courts do not seem to have noticed the distinction between clauses (5) and (6), namely, that under clause (6), it is not requisite that the maker of the statement should have any special means of knowledge.

12.160. Finally, it may be noted that a horoscope which is not admissible under clauses (5) and (6) of section 32 may be admissible under section 17, if it contains an admission (as defined in section 17) by the parent of the child, which is recorded in the horoscope.

Section 32(5) — Statements as to age.

12.161. As to the expression "relationship by blood", occurring in section 32(5), it is well-established by the decision of the privy Council in *Mohamed Syedol Ariffin bin Mohamed Ariff* v. *Yeoh Ooi Gark*,[10] that the time of one's

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[1]*Ananda* v. *Nand*, (1924) I.L.R. 46 All. 665.

[2]As to horoscopes, see *infra*.

[3]woodroffe.

[4]A.I.R. 1957 Kerala 103, 105.

[5]*Krishnamacharier* v. *Krishnamacharier*, (1915) I.L.R. 38 Mad. 166, 171; A.I.R. 1915 Mad. 815 (White C.J.).

[6]*Ram Narain* v. *Monee* (1883) I.L.R. 9 Cal. 613.

[7]*Satish Chandra* v. *Mohendra*, (1890) I.L.R. 17 Cal. 849 (No special means of knowledge).

[8]See *Raja Goundan* v. *Raja Goundan*, (1894) I.L.R. 17 Mad. 134.

[9]*Nirmala Nalini Devi* v. *Kamla Bala Dasi*, A.I.R. 1933 Cal. 41, 51, 52 (Mitter and Bartley, JJ.).

[10]*Mohamed Syedol Ariffin Bin Mohamed Ariff* v. *Yeoh Ooi Gark*, A.I.R. 1916 P.C. 242 (Decision from the Straits Settlements on a similar provision).

birth relates to the commencement of one's "relationship by blood", and, therefore, a statement of one's age, made by a person having special means of knowledge, relates to the existence of such relationship as is referred to in section 32(5). Clearly, therefore, the entry of date of birth in the school register, made on the statement of the mother of a boy, would be admissible[1] under clause (5) of section 32.

Section 32(5) — Restriction imposed on admissibility by English law.

12.162. With reference to section 32(5), it may be noted that there is one important restriction on the admissibility of this kind of evidence imposed by English law, which finds no place in the Indian Evidence Act. In England, the evidence is not admitted in every case in which the birth, marriage, or death of a person forms the subject of controversy, but only in those cases which directly or indirectly involve some *question of relationship*, and in which the fact sought to be established is required to be proved *for some genealogical purpose*. Under the Indian Act, however, the statement is admissible, provided it relates to a fact relevant to the case.

Declarations under English law — scope.

12.163. Under English law, the declaration of an *illegitimate* member of the family would be inadmissible. In India, it would seem to be admissible, since section 32 contains no such restriction. Section 47 of the Act 2 of 1855 rescinded the English rule[2] on this subject, and admitted the declarations, not only of illegitimate members of the family, but also of persons who, though not related by blood or marriage, were yet intimately acquainted with the members and state of the family. Finally, section 32(5) would include servants, friends, and neighbours, who are excluded under English law.

12.164. The propriety of the extension of the rule at least to illegitimate members of the family cannot be doubted[3], and the whole section was a strong instance of the tendency of modern reform, which, making admission the rule and exclusion the exception, leaves it to the Court to estimate the weight to be allowed to particular kinds of evidence in individual cases. The rule now laid down in the Evidence Act is still more general in its terms than the section of the Act of 1855, which was directed merely to modify the strict rule of English law.

12.165. The Section renders admissible the statements not merely of persons deceased (whose statements only are admitted in England), but also of persons who cannot be found, or who have become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay and expense which, under the circumstances of the case, appears to the Court unreasonable, if such persons had special means of knowledge of the relationship to which the statement relates.

Personal knowledge not necessary under section 32(5).

12.166. It has, with reference to section 32(5), been held[4] that a member of the family can swear in the witness box of what he has been told and what he has learnt about his own ancestors, provided that what he says is an expression of his own opinion, (even though it is based on hearsay derived from dead persons), and is not merely a repetition of the hearsay opinion of others: and provided further, the opinion is expressed by conduct.

No change needed in sub-sections (5) and (6).

12.167. The above discussion does not disclose any need for a change in clauses (5) and (6).

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[1] *Bhim Mandal* v. *Magaram Corain*, A.I.R. 1961 Pat. 21, 26

[2] Section 47, Act 2 of 1855.

[3] See Woodroffe.

[4] *Sitaji* v. *Vijendra Narain*, A.I.R. 1954 S.C. 601, followed in S. M. *Daud Bibi* v. *A. B. Puravar*, A.I.R. 1972 Madras 228, 229, paragraph 7.

X. SECTION 32(7)

Section 32(7)

12.168. Under section 32(7), when the statement is contained in any deed, will or other document which relates to any such transaction as is mentioned in section 13, clause (a), it becomes relevant.

Section 13(a) refers to "any transaction by which the right or custom in question was created, claimed, modified, recognised, asserted or denied or which was inconsistent with its existence". Under the opening paragraph of that section, evidence of such transaction is relevant where the question is as to the existence of any right or custom.

Section 13 analysed — Non-applicability of opening paragraph.

12.169. For facilitating an understanding of the various points, it will be convenient to split up section 13. Section 13, opening paragraph, provides for the *situation* in which the section applies, namely, when the question is as to the existence of any right or custom. Clause (a) of that section deals with the *evidence* which is admissible if the opening paragraph applies, and admits evidence as to transaction of the nature in question. The question that may arise is whether, for the purposes of section 32(7), the opening paragraph of section 13 — dealing with the *situation* in which evidence of the transaction becomes admissible is also to be satisfied. Clause (a) of section 13 is referred to in section 32(7). But the question as to the position in this respect, i.e., the applicability or non-applicability of section 13, opening paragraph, has created controversy, in view of the case-law on the subject, which we shall discuss in due course.

12.170. There have been several decisions where section 32, clause (7), has been in issue. Thus, in a Madras case[1], a recital made in a will that the property dealt with thereunder was the property of the testator, was treated as relevant against third parties.

In a Calcutta case[2], the plaintiffs claimed recovery of possession of certain lands as their *niskar brahmoatter*, and also by right of adverse possession. They relied, *inter alia*, upon a recital of brahmoatter title in the will of their father, and a recital in a judgment in a previous case which was not inter partes. It was held that the recital in the will was not admissible in evidence under section 32(7) read with section 13(a), and that the recital in the judgment not *inter partes* was also not evidence. There is no detailed discussion, but apparently what weighed with the Court was the fact that it was sought to be used against a third party.

In another Calcutta case[3], a statement made by an arbitrator in a previous criminal case between the parties, *was held to be relevant under section* 32(7). In that case, the previous case also related to the same property.

In yet another Calcutta case[4], the nature of the tenancy mentioned in a will of the claimant's predecessor was regarded as falling under section 32(7). This Calcutta case does not refer to an earlier one[5], which seems to take a different view on the point.

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[1]*Periasami* v. *Verandappa*, A.I.R. 1950 Mad. 486 (Ragav Rao J.), dissenting from A.I.R. 1915 Mad. 740, 747.

[2]*Satindra Kumar Choudhary* v. *Krishna Kumari Choudarani*, A.I.R. 1917 Cal. 805.

[3]*Keshav Prasad* v. *Secretary of State*, A.I.R. 1938 Cal. 150, 151 (M. C. Ghosh J.).

[4]*Pramatha* v. *Champa Dasi*, A.I.R. 1929 Cal. 473, 475 (D. N. Mitter & S. C. Mallik, JJ.).

[5]*Satindra Kumar* v. *Krishna Kumari*, A.I.R. 1917 Cal. 805 (Chatterjee & Newbould, JJ.).

In a Madras case[1], a statement of fact made in a will, to the effect that the property was self-acquired, was held to be relevant, although, it was pointed out, that the evidence of this kind required scrutiny in the light of other evidence.

Patna case

12.171. At this stage, we should refer to a Patna case[2] where several aspects of section 32(7) were dealt with. In a document extending the terms of an usufructuary mortgage, M, the mortgagor, stated that the money under the mortgage was required for the purpose of *shraddha* of S. The mortgagee was already in possession. The statement of M was held to be admissible in evidence under section 32(7), in order to prove that S was dead by the time that the document was executed. The proceeding now before the Court was *not between the same parties*, and did not involve the *right to mortgage*. It is not clear from the judgment whether the same property was involved.

An objection was taken to the admission of this evidence, on the ground that the plaintiffs, against whom the document was not sought to be used as evidence, were not parties, to the transaction. The argument was rejected by the High Court, in these words "..... so far as clause (7) of section 32 is concerned, it only takes the help of section 13(a) in order to indicate the nature of the transaction to which the document containing the statement relates. Not that it (the proceeding) will necessarily be in relation to what can be called to be a transaction as between the parties for the purpose of its admissibility without the help of section 32."

12.172. The High Court further observed :

"*The whole of section* 13 *is never intended to be read for the purpose of interpretation of this clause*[3]. Had that been so, then the legislature could have simply stated section 13 which would have necessarily included section 13(b) as well. There is certainly a point in referring to clause (a), but not to (b)."

Conditions to be fulfilled before applying section 32(7), according to the Patna case.

12.173. If the above judgment of the Patna High Court is analysed, it will be found that it requires that a statement admissible under section 32(7), should fulfil the following conditions :

(a) the statement is contained in a document;

(b) the statement is made by a person who is not available by reason of death, etc.

(c) the document relates to what can be regarded as a transaction within the meaning of section 13(a).

These three conditions have been actually enunciated in the judgment of the Patna High Court.

Other points laid down in Patna case.

12.174. The Patna judgment[4] can be regarded as also laying down the following points—

(i) the transaction need not be one to which the present parties were parties;

This point has been explicitly discussed and decided in the judgment.

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[1]*Venkataramayya* v. *Sesharmml*, A.I.R. 1937 Mad. 538, 547 (Varadachariar and King, JJ.).

[2]*Khudiram* v. *Amodebala*, A.I.R. 1948 Pat. 426, 427, 428 (Ray, J.).

[3]Emphasis supplied.

[4]*Khudiram* v. *Amodebala*, A.I.R. 1948 Pat. 426, 427, 428 (Ray, J.).

(ii) the right or custom to which the *transaction relates need not be in issue in the proceeding.* In other words, section 13, opening paragraph is not attracted.

This point follows from the facts of the case.

(iii) if the *document* relates to a transaction governed by section 13(a), then any statement, being a statement of a relevant fact, is admissible, even if the *statement* does not relate to a custom or right etc.

This point follows from the Patna judgment, because the fact sought to be proved by the document in question was the date of the death of S, and the existence of the right or custom was not sought to be proved by the document.

12.175. It should also be noted, in this context, that the opening paragraph of section 32 provides that statements about "relevant facts" are relevant under the section, and no further limitation is laid down.

Case law on point (iii).

12.176. The observations of the Madras High Court in another case,[1] which seem to imply a wider view of section 32(7), may also be compared, though they were *obiter.*

12.177. As against this wide view, there is an Oudh decision,[2] which seems to limit section 32(7) to statements *directly relating to the right or custom.* In the Oudh case, a statement, in a deed of family settlement, to the effect that partition had been effected among brothers, was rejected, on the ground that the statement did not fall within section 13(a). The Court also added that, "the statement is obviously in the interest of the person who made it. R, if alive, could not have made use of such an admission in his favour, nor could his sons so do."

Amendment in which direction.

12.178. It appears to us that as a matter of policy, some restrictions need to be placed on the relevance of statements under clause (7). In the first place, the right must be in issue and the statement should relate thereto, in order that the statement may be relevant. To this extent, our recommendation takes an approach contrary to what was held in the Patna case[3].

Secondly, we think that recitals as to boundaries ought to be excluded[4] from admissibility under this clause, if they are not between the parties. Thirdly, the statements should have been made before the controversy arose. Fourthly, however, the proceedings need not be between the parties to the document.

Recommendation.

12.179. We, therefore, recommend that section 32, clause (7), should be revised as below :—

Revised section 32(7).

(7) When the statement is contained in any deed, will or other document, *being a deed, will or other document* which relates to any transaction by which *a right or custom was created claimed, modified, recognised, asserted or denied, or which was inconsistent with its existence.*

Explanation—Such statement is relevant where the question in the proceeding now before the court is as to the existence of the right or custom; but it is not necessary that the parties to the document must be the same as the parties to the proceeding or their privies.

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[1] *Subbarayulu* v. *Vengama*, A.I.R. 1930 Mad. 742 (Curgenven J.) (Obiter).

[2] *Rajnarayan* v. *Maharaj Narayan*, A.I.R. 1937 Oudh 133, 137, 138 (Nanavatty and Smith, JJ.).

[3] Para ' supra.

[4] *Cf* as to section 13 and section 32(3).

Exception—Nothing in this clause shall render relevant—

(a) *a recital as to boundaries containing a statement as to the nature or ownership of adjoining lands of third persons; or*

(b) *any statement made after the question in* dispute was raised.

XI. SECTION 32 (8)

Introductory.

12.180. Section 32(8) renders relevant a statement made by a number of persons, which expressed feelings or impressions on their part relevant to the matter in question.

Number of persons required.

12.181. Illustration (n) to the section illustrates this clause. The relevancy of *individual feelings* is dealt with by sections 6, 8 and 14, and the relevance of individual opinions by sections 45-51. Section 32(8) on the other hand, relates to statements expressing feelings or impressions, not of an individual, but of an *aggregate of individuals* — as the exclamations of a crowd.

12.182. The exception to hearsay embodied in this clause is justified on the hypothesis that what a number of people said, may be true, if spontaneous and contemporaneous. The word "statement", as used in the singular, — though not grammetically accurate, — implies that a number of persons must have reacted *simultaneously*.

It has been observed[1] that "when a number of persons assemble together to give vent to one common statement, which statement expresses the feelings or impressions made in their mind at the time of making it, that statement may be repeated by the witnesses, and is evidence." Moreover, the expression must be of feelings or impressions *on their* part, which means that the expression is more in the nature of conduct rather than in the nature of a statement of fact.

12.183. Besides the Spontaniety of the declaration, there is another consideration—the practical difficulty or impossibility of procuring the attendance of *all the individuals* who composed such crowd or aggregate of persons[2].

Illustration (n).

12.184. Illustartion (n) is based on the leading English case on the subject of *Du Bost* v. *Beresford*[3]. In that case, the plaintiff painted a picture, which he designated, "The Beauty and the Beast", and caused it to be exhibited for money in a public gallery, upon which crowds went to see it. The defendant went and hacked the picture to pieces. The plaintiff sued to recover the full value of the picture as a work of art, and compensation for the loss of the exhibition. The defendant alleged that the picture was a scandalous libel upon his sister and her husband, and, in order to show whether the painting was made to represent these persons, the declarations of the spectators, made while looking at the picture in the exhibition; were admitted in evidence.

Markby's comment.

12.185. Markby has, with regard to illustration (n) to section 32, observed[4] that the case does not belong to section 32 at all. The evidence, he says, would be equally admissible, whether the by-standers could be called or not as witnesses. When the by-standers, on seeing a caricature, call out "there's X," and evidence is given of their words, what is relied on is, not their statements, but *the fact of recognition*: the fact, that is that the caricature at once recalls the person X to the minds of those who see it. This is Markby's comment.

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[1] *R.* v. *Ram*, (1874) 23 W.R., Cr. 35, 38 (per Jackson, J.).

[2] *Norton*, Ev., 193, cited by Woodroffe.

[3] *Du Bost* v. *Beresford*, (1810) 2 Cam bell's Reports 511, 512: 11 ITR 782.

[4] Markby's Evidence, page 34, quoted by Field.

12.186. With reference to this comment, we would like to state that though what the by-standers said may amount to recognition, yet their statements represent their *impressions*, and *in that sense*, the illustration is connected with section 32. What is referred to is a statement of opinion (though collective), out of court, and this situation had to be provided for expressly as an exception to hearsay -- which is the topic dealt with in section 32. No doubt, the statements or cries expressing recognition may also become relevant as part of the same[1] transaction or on the question of identify.[2] But their appropriateness under section 32 is not thereby affected.

12.187. Incidentally, we note that in the English cases, it does not seem to have been proved that the persons who make the observations could not be called[3].

12.188. Doubtless, the difficulty, if not the impossibility, of ascertaining the names of all the persons who expressed their feelings or impressions, and of calling them all as witnesses, will, in the great majority of cases, be held to occasion an amount of delay or expense, which under the circumstances of the case, will appear to the court to be unreasonable[4].

12.189. The above discussion does not disclose any need for amending the clause. **Change not needed.**

12.190. Another exception to the rule against hearsay is to be found in section 33. That section makes the evidence given by a person as a witness in a previous judicial proceeding admissible, if the person who gave the evidence is not now available as a witness. This is the gist of this part of the section, not its exact terms. *We have no comments on this part.* We may note that we have referred to it earlier[5], while discussing section 32. The admissibility of such evidence is subject to certain important conditions. **Evidence given in previous proceeding where witness not available.**

12.191. The first condition requires that the parties must be the same. This is enacted on the grounds of reciprocity, because the *right* to use evidence, other than admissions, is co-extensive *with the liability* to be bound thereby. The adversary in the second suit had no power to offer evidence in his own favour in the first suit, and the evidence shou'd not, therefore, be used against him. **Other conditions.**

12.192 and 12.193. The second condition requires an opportunity to cross examine.

It is the right of every litigant, unless he waives it, to have the opportunity of cross-examining witnesses, whose testimony is to be used against him: it follows that evidence given when the party never had the opportunity to cross-examine is not legally admissible as evidence for or against him, unless (in civil cases) he consents that it should be so used[6].

12.194. The principle involved in the third condition in requiring identity of the matter in issue; is to secure that in the former proceeding the parties were not without the opportunity of examining and cross-examining *as to the very point upon* which their evidence is adduced in the subsequent proceedings.[7]

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[1]See section 6.

[2]Section 9.

[3]Cunningham's Evidence, 11th Edn. page 95, cited by Field.

[4]Field.

[5]See discussion as to section 32, opening para.

[6](a) *Gorachand* v. *Ram*, (1968) 9 W.B. 587 (Cal.);
(b) *Gregory* v. *Dooley*, (1870) 14 W.R. 17 (Cal.).

[7](a) *R.* v. *Rani*, (1881) I.L.R. 3 Mad. 48, 52.
(b) *Bal* v. *Shriniwas*, (1915) I.L.R. 39 Bom. 441.

Evidence not taken according to law.

12.195. We may now consider a few points arising out of the section. While making evidence given by a witness in a previous proceeding relevant, the section does not provide that the *evidence should have been taken in accordance* with law. This requirement has, however, been implied by judicial decisions.

Thus, in a Patna Case[1], a deposition sought to be put in evidence under section 33 was excluded, because—

(i) it was not read over in the manner required under section 360 of the Code of Criminal Procedure, 1898; and

(ii) the accused had no liberty to cross-examine the witness.

12.196. The case related to a statement made in the court of the Inquiring Magistrate, and was governed by section 350 read with section 360 of the Criminal Procedure Code, 1898, and section 208 read with Chapter 25 of that Code.

12.197. As has been held in a Calcutta case[2], the intention underlying section 360 of the Criminal Procedure Code is that evidence should be recorded in such a manner that the accused can hear what is being read and take objection to it.

Change not necessary.

12.198. The question is, whether it is necessary to add this requirement expressly in section 33. We have come to the conclusion that it is not necessary. Primarily, the section is aimed at "the evidence" i.e. the statement, — and concentrates on the simple proposition that, in certain circumstances, the previous statement of a dead, etc. witness is admissible. The section need not be complicated by bringing in procedural matters as to *the recording of the evidence.*

Competent court.

12.199. It has been held[3] that a proceeding before a Judge or a Magistrate who has no jurisdiction is *coram non judice*, and evidence given in such a proceeding cannot, on a retrial before a competent court, be used under section 33. This is also a principle well-recognised in respect of all proceedings, and need not be given statutory effect.

Heading of the deposition.

12.200. It is well-known that the heading of a deposition given by a witness usually gives the name, parentage, age, residence and occupation of the witness. The question has arisen whether the particulars so given in the heading can be regarded as a part of the evidence so as to be capable of being used in subsequent judicial proceedings under this section.

This question has received the attention of the Privy Council in one case[4], where the description of the female witness, containing the name of her husband, which appeared at the head of the deposition, was excluded, for reasons which are stated as follows :—

> "As regards the description of the witness in the heading of the deposition, their Lordships agree with the subordinate Judge *that it is no part of the deposition proper*[5], that is, no part of evidence given by the witness in solemn affirmation. It may have been elicited by questions put by the Magistrate. It is just as likely that it was filled in by a subordinate official and on the paper when put into the hands of the Magistrate for him to take

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[1]*Emperor* v. *Phagunia*, A.I.R. 1926, Patna 58, 60.

[2]*Dargahi* v. *Emperor*, A.I.R. 1925, Calcutta 831.

[3](a) *Buta Singh* v. *Emperor*, I.L.R. 7 Lahore 396; A.I.R. 1926 Lahore 582

(b) *Rami Reddy*, I.L.R. 3 Madras 48, 51.

[4]*Macbulan* v. *Ahmad Hussain*, (1904) I.L.R. 26 All. 108, 118 (P.C.)

[5]Emphasis added.

down the evidence of the witness. Again, it may have been read over to the witness by the Magistrate when the evidence of the witness was completed or the Magistrate may have contented himself with reading over the narrative embodying the evidence, which was all he was bound to do under the Act."

"In these circumstances, even assuming that there was no slip or accidental omission in the heading of the document, and that there was no confusion between the two husbands in the mind of the person who took down the heading and assuming that the document is admissible ....., their Lordships are of the opinion that it is not entitled to any weight."

Importance of oath.

12.201. Now, it would have been noticed that the reasoning underlying the above decision is that the heading of the deposition is not on affirmation and, in fact, it does not represent *any statement* on a matter usually contained in the heading, there is no reason why such a statement cannot be taken as part of the evidence.

12.202. An analysis of the language of the section would also seem to yield the same result. What the section provides is that "evidence" given by a witness (in a judicial proceeding) is relevant. Now, "evidence" as defined in section 3, means and includes all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry. Though the age of a witness may be a matter of fact directly under an enquiry, it is indirectly a matter under enquiry, because a court would be very much interested in knowing these particulars; otherwise, the court would not record them at all. If the oath is administered *before the particulars* are recorded, they can be reasonably regarded as part of the "evidence". The answer, therefore, seems to depend on the time when the oath is administered.

No change needed on the question of heading of the definition.

12.203. In the above position, no change is recommended in the language of the section on this point.

Section 33 — proviso — "representatives in interest."

Amendment recommended.

12.204. Under the proviso to section 33, one of the conditions to be satisfied before the section can be applied, is that "the proceeding was between the same parties or their representatives-in-interest". The expression "proceeding", in this part of the proviso, refers to the first proceeding, as has been settled by the Privy Council[1]. It is advisable to give effect to this interpretation, by adding the word "first" before the word "proceeding". This will make the language uniform with the second and the third conditions in the proviso, which use the specific expression "first proceeding".

12.205. It may be noted that the proviso to section 33 inverts the requirement of English law, which requires that the parties to the second proceeding should legally represent the parties to the first proceeding or by their privies in estate. As observed by the Privy Council[2], this inversion is not accidental.

Instead of saying that the parties to the second proceeding should represent-in-interest the parties to the first proceeding, the proviso employs different language.

12.206. As the departure from the English law has been held to be deliberate by the Privy Council, the language of the proviso should be altered for bringing into line with the English rule, on this point.

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[1] *Krishnayya* v. *Raja of Pittapur*, I.L.R. 57 Mad. 11 A.I.R. 1933 Privy Council 202, which reversed I.L.R. 51 Madras 893; A.I.R. 1928 Madras 994.

[2] *Krishnayya* v. *Rajah of Pittapur*, I.L.R. 57 Mad. 11 A.I.R. 1933 P.C. 202, 60 I.A. 336.

Recommendation.

12.207. In the result, the only change recommended is in the proviso, on the point discussed above.

Section 33 explained.

12.208. The Explanation to section 33 is intended to do away with the objection that, in criminal cases, the State is the prosecutor[1-2]. The effect of the Explanation is that the deposition taken in criminal proceedings may be used in a civil suit, and *vice versa*, if the specified conditions are satisfied.

12.209. In this connection it is to be noted that the general theory of English law, which is followed in India also, is that a prosecution is always on behalf of the Crown or State, and, in that sense, the Crown or State is a party to every criminal trial or inquiry into an offence. It is on this theory that the Attorney-General's power to enter a *nolle prosegui* rests. Of course, public officials are not *the only persons* conducting prosecutions. But all prosecutions are theoretically on behalf of the State.

The general rule in England is that where the statute provides that there shall be no prosecution as to particular classes of offences created by statute without the consent of the Attorney-General or the Director of Public Prosecution[3], then only the specified officer can sanction the prosecution. But, in the absence of such provisions, any private citizen can set the criminal law in motion[4].

While the initiation of prosecution is governed by the rules stated above, the position that all prosecutions are theoretically at the suit of the Crown remains unaffected. In this respect, the position is different in Scotland where a private person cannot institute proceeding unless he has a personal and peculiar interest and gets the permission of the High Court—which is the reason why, when a private person sought to prosecute sellers of the book "Lady Chatterley's Lover", the court refused, saying "No private complainer can be the keeper of the public conscience"[5]. That the Crown is the nominal prosecutor becomes a matter of practical importance, since the Attorney-General can stop a criminal case by entering a *nolle prosequit.*[6]

Therefore, if the Explanation is read as meaning that a criminal trial or an inquiry into an offence is a proceeding between *the State and the accused*, it would be superfluous, since there has never been any doubt about that theory for a long time. The real purport of the Explanation is to deal with cases where the prosecution is conducted by a private person, who has instituted the criminal proceedings.

The Explanation is intended to obviate any argument to the effect that even in such a case the State is a party and not the private person mentioned above. Though the utility of the Explanation can be contemplated even in relation to cases where the later proceeding is also a criminal one, its more frequent application would be found where the later case is a civil one. For example, where a complainant who was permitted to conduct the prosecution of an accused person is now the plaintiff or defendant, and the accused in the previous prosecution is now the defendant or plaintiff, the Explanation would be useful. Of course, the other conditions mentioned in the section, including the proviso thereto, have to be satisfied in this case, as in every other case.

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[1]*Soojan Bibee* v. *Achmut Ali*, (1874) 14 Beng. L.R. (Appx.) 3.

[2]Norton, Evidence 197, 198, cited by Woodroffe.

[3]For example, section 2, Official Secrets Act, 1911.

[4]Statement by Sir Hartley Shawcross, Attorney-General, in House of Commons Debates Vol. 483, 5th Series, Column 681, dated 29-1-1951.

[5]The Times 4th February 1961, cited in Jackson Machinery of Justice (1972), page 155, footnote 1.

[6]R. v. *Allen*, (1862) 121 English Reports 929.

12.210. The point to be noted is that the system of prosecution that is followed, in general, is "public prosecution". Though the Code of Criminal procedure[1] has a provision which empowers the Court to permit a private person to conduct the prosecution, that provision is an exceptional one, and resort thereto is comparatively infrequent. Apart from that, even a private complainant, where he is permitted to conduct the case, is not ordinarily described as the "prosecutor". For this reason, the expression "prosecutor" is not very happy in this context[2]. It would, therefore, be desirable to substitute some other expression in its place.

12.211. Moreover, the expression "prosecutor" is a vague one. We have, for example, to decide whether the benefit *of the Explanation to section 33* should be confined to "complainants"—i.e. persons who make a "complaint" as defined in the Code of Criminal Procedure, — or whether it should also extend to other persons who set the law in motion — e.g. the person who filed the First Information Report.

It is suggested that first informant, as such, has no *locus standi in the Court.* He is a witness, like any other person, even though he is a very important witness. He cannot be raised to the status of a party, *for the purposes of section* 33. The fact that he may, in certain cases[3], be liable for malicious prosecution (civil liability) or for instituting false proceedings under section 211, I.P.C. (criminal liability), is immaterial for the present purpose. Even in a suit for malicious prosecution, *a mere informant* is not regarded as a prosecutor. He must have specifically named the present plaintiff in the previous prosecution.

12.212. Let us see the legislative usage on this point. Under the Code of Criminal Procedure[4], evidence is produced by the "prosecution—a neutral word. Under the same Code, the[5] absence of the complainant (in proceedings instituted upon complaint) on the day fixed for hearing, may lead to certain consequences. Further under the same Code[6], in a summons case instituted upon a complaint, the complainant has, with the Magistrate's permission, power to withdraw the complaint. These provisions should not be considered as material for the purposes of section 33. Under the same Code[7], a Magistrate inquiring into and trying *a case may permit* the prosecution to be conducted by any person (other than certain excluded persons). But, so far as section 33 of the Evidence Act is concerned, even mere permission to conduct the prosecution should not suffice, and it is suggested that it is also necessary that that person must have instituted the proceedings[8]. Then only the expression "prosecutor" would be apt in the context of section 33.

12.213. The position as *to the conduct of prosecution* may be briefly stated. Under the code[9] of Criminal Procedure, where a private person instructs a pleader to prosecute a person in any court, the conduct of the prosecution is, nevertheless, by the Public Prosecutor or Assistant Public Prosecutor in charge of the case, and the Pleader has to act under his directions, although he is given power (with the permission of the Court), to submit written arguments after the

Conduct of Prosecution.

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[1]Sections 301 and 302, Code of Criminal Procedure, 1973.

[2]As to malicious prosecution, see *Mohammad Amin* v. *Jogendra.* A.I.R. 1947 P.C. 108.

[3]See discussion in *Gaya Prasad* v. *Bhagat Singh,* (1908) I.L.R. 30 All. 525, 533 (P.C.) and case law reviewed in *S. T. Sahib* v. *Hasan Gani,* A.I.R. 1957 Mad. 640, 653.

[4]Sections 244 and 254, Code of Criminal Procedure, 1973.

[5]Sections 249 and 256, Code of Criminal Procedure, 1973

[6]Section 257, Code of Criminal Procedure, 1973.

[7]Section 302(1), Code of Criminal Procedure, 1973.

[8]*Cf.* section 211, I.P.C.

[9]Section 301(2), Code of Criminal Procedure, 1973.

close of the evidence. This provision is also not material for the purposes of section 33, because the private pleader has to act subject to the control of the Public Prosecutor.

It would, therefore, appear that the only material provision is that empowering the court to permit a private *person to conduct the prosecution*[1]; and, here also, so far as section 33 is concerned, it should be necessary that he instituted the proceedings[2].

Recommendation to substitute "complainant".

12.214. In our view, the test for the purpose of section 33 should be the fact that the private person has instituted the proceedings *plus* the fact that he has *the potential* capacity of conducting the prosecution. In view of what is stated above, we recommend that for the expression "prosecutor", in section 33, Explanation, suitable words indicating the above test should be substituted.

Redraft.

12.215. A rough revised draft of section 33 is recommended below, in the light of what is stated above.

REVISED SECTION 33

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

33. *In a judicial proceeding before a court,* evidence given by a witness—

(a) in a *previous* judicial proceeding, or

(b) in *an earlier stage* of the same judicial proceeding, or

(c) in *any proceeding* before any person authorised by law to take *evidence.*

is relevant for the purpose of proving the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable:

Provided—

(i) that the *first* proceeding was between the same parties or their representatives in interest;

(ii) that the adverse party in the first proceeding had the right and opportunity to cross-examine;

(iii) that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation.—A criminal trial or inquiry shall,

(a) *Where the criminal proceedings are instituted by a private person,* be deemed to be proceeding between *that person* and the accused within the meaning of this section, *if that person is permitted by the court to conduct the prosecution under section* 302 of the Code of Criminal Procedure, 1973;

(b) *in other cases, be deemed to be a proceeding between the State and the accused.*

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[1]Section 302(1), Code of Criminal Procedure, 1973.

[2]As to the expression 'institute' criminal proceedings, see section 211 I.P.C.

CHAPTER 13

ENTRIES IN BOOKS OF ACCOUNT

I. INTRODUCTORY

13.1. We propose to devote this chapter to an examination of section 34, which deals with entries in certain books of account.

13.2. Section 34 provides that entries in books of account, made regularly in the course of business, are relevant, whenever they refer to a matter into which the court has to inquire; but "such statements" shall not alone be sufficient evidence to charge any person with liability. There is only one illustration to this section, which is as follows :—

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

Section examined with reference to scheme of the Act.

13.3. Examining this section in the context of the general scheme of the Act, we may state that, in a sense, it qualifies the rule in section 21 to the effect that admissions are not relevant in favour of the persons making them. It may also be pointed out that this section is one of the very small number of sections in the Act which specifically provide for the *insufficiency* of a particular type of evidence. This safeguard seems to have been introduced in view of the consideration that sometimes a party may impose a liability on the other by entries made fraudulently.

13.4. As a general rule, a man's own statement is not evidence for him, though, in certain cases, it may be used as corroborative evidence.[1] The section is an exception to this rule, — an exception created on the basis of a principle discussed below.

Principle.

13.5. The principle of admissibility of these entries is the same as the the principle underlying the various exceptions contained in section 32,[2] namely, the principle of necessity and the principle of circumstantial trust-worthiness. The principle of necessity, in this context, could be explained by stating that it would be inconvenient if, to begin with, proof in another form was insisted upon, because, in many cases, the maker of the entry, or the person who witnessed the transaction, may not be available, or it may be that different persons witnessed the different transactions — all recorded in one book, — and it would be inconvenient to summon them all for proving the facts recorded in each individual entry. The principle of circumstantial trustworthiness can be explained by referring to two aspects, namely, the difficulty of committing fraud and the ease with which the fraud, if committed would be detected, and the improbability of inaccuracies in such entries.

13.6. As regards fraud, where the books are regularly kept in the course of business, the system of making such entries in the account books with regularity counter-acts the casual temptation to commit a fraud. Moreover, without a systematic and comprehensive plan of false manipulations, it is difficult to make false statements in such books. As regards inaccuracies, the influence of habit prevents inaccuracies. Moreover, often the person making the entry is

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[1] *Ishan* v. *Haran* (1869) 11 W.R., 526 (Cal.)

[2] See discussion as to section 32

under a duty to an employer or some other person, so that mistakes would normally be detected. As Tindal C. J. observed in *Poole* v. *Dicas*.,[1] "*It is easy to* state what is true than what is false; the process of invention implies trouble."

The entries being acts of the party himself, must be received with caution.[2]

13.7. Where it was said that "an account-book is nothing : it is one's private affair and he may prepare it as he likes; the Privy Council remarked,[3]— "It is true that there may be accounts to which that description would apply. Other accounts may be so kept, and may so tally with external circumstances, as to carry conviction that they are true."

Other provisions.

13.8. It will be noted that such entries could be relevant under certain other provisions of the Act also, — for example, section 32(2) as statements made by a person in the ordinary course of business, — or under section 159, to refresh the memory of a witness, if the entry has been made by that witness himself and relates to some transaction concerning which he is now giving evidence.

II. PREVIOUS LAW

Previous law in India.

13.9. The previous law on the subject was contained in section 43 of Act 2 of 1855, which was as follows :—

> "43. Books proved to have been regularly kept in the course of business shall be admissible as corroborative, but not as independent, proof of the fact stated therein."

13.10. It has been stated[4] that the present provision in section 34, which declares that the entries shall not alone be sufficient to charge any person with liability, follows the Roman Law under which such entries were deemed *semi-plena probatio* and the suppletory oath of the party was admitted to make it the *full proof* necessary to obtain a decree.

Comparison with previous law.

13.11. We have, while discussing[5] section 32, already referred to this section of the Act of 1855. In section 34 of the present Act, the words "regularly kept" have been substituted for the words "proved to have been regularly kept" which occurred in the Act of 1855. It is evident that the Law embodied in section 34 of the present Act is not quite the same as was contained in section 43 of Act 2 of 1855. The expressions "corroborative evidence", "independent evidence" and "substantive evidence", which are found in many of the reported decisions bearing upon section 34 of the present Act, are somewhat out of place in view of the wording of that section, and have been handed down from the words "corroborative" and "independent" that appeared in section 43 of the Old Act (1855) and from those words as well as the word "substantive" that were used in the decisions thereunder. The plain words of section 34 indicate that the section deals with all entries in books of accounts regularly kept in the course of business; in the first place, making them relevant whenever they refer to a matter into which the court has to enquire, and secondly, providing that, when such entries are sought to be used as statements *for a particular purpose*, namely, to charge any person with liability, then they shall not alone be sufficient evidence for that purpose.

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[1] *Poole* v. *Dicas*, 1 Bingam N.C. 649.

[2] *Eheero* v. *Bejoy* (1867) 7 W.R. 533 (Cal.).

[3] *Jaswant Singh* v. *Sheo Narain* (1894) I.L.R. 16 All. 157, 161 (P.C.).

[4] Field, Commentary on the Evidence Act, (1966) Vol. 3, page 1926.

[5] See discussion as to section 32(2).

13.12. Under the previous Act, account-books would not have been admissible to prove a fact, unless some other evidence tending to establish the same fact had also been given. "But the language" of that Act, as Markby has said,[1] "differs very materially from that of the present Act. That language has not been adopted in the present Act. The only limitation in section 34 is that statements contained in documents of this kind shall not alone be sufficient to charge any one with liability. It appears to me that this change of expression has made substantial alteration in the law." Position under 1855 Act.

III. ENGLISH LAW AND ROMAN LAW

13.13. As a general rule, in English common law, books of account are not admissible[2], except when the entries are (a) against the interests of the maker, or (b) are made in the course of business, *and* in the discharge of duty. The further condition in both cases is that the maker of the entry must be dead. The Courts of Equity, however, used to act upon such entries, and, in 1852, the Chancery Practice Amendment Act[3] empowered courts of Equity to direct, in cases where they should think fit, in taking accounts, that the books of account in which the accounts required to be taken had been kept, or any of them, "shall be taken as *prima facie* evidence of the truth of the matter therein contained, with liberty to the parties interested to take such objections thereto as they may be advised." English law.

13.14. Thus, in England, if A sues B for the price of goods sold, an entry in A's shop-books, debiting B with the goods, is not evidence for A to prove[4] the debt. But an entry debiting C and not B with the goods, is evidence *against A* to disprove the debt[5], as an admission.

13.15. It may be noted that, under Roman law, the production of the account books of a merchant or tradesman, provided the account books were regularly and fairly kept in the usual manner, was deemed to afford evidence of the justice of the claim. (A similar principle was followed in France and in Scotland). The evidence was supplemented by the "Suppletory oath."

Under the Roman "Suppletory oath", the Judge, in his discretion, may tender this oath *ex-officio* to either party- usually the one in whom the judge has greater confidence — on the theory that when the evidence thus for submitted is entitled to some weight, but is *insufficient to form a judicial persuation*, the oath will afford the missing portion of proof[6].

IV. CORROBORATION

13.16. We may now consider the aspect of corroboration required under the section. Books of account when not used to charge a person with liability (civil or criminal)[7] may be used as independent evidence requiring no corroboration. But, when sought to be so used, they must be corroborated by other substantive evidence[8]. Corroboration.

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[1]*Belaci* v. *Rash*, (1874) 22 W.R. 549 (Per Markby J.).

[2](a) *Price* v. *Torrington*, (1703) 1 Salk 283;

(b) *Brockle-bank* v. *Thompson*, (1933) 2 Ch. 344, 352.

[3]Section 54, Chancery Practice Amendment Act, 1852 (Statute 15 and 16 Victoria).

[4]*Savth* v. *Anderson*, (1849) 7 C.B. 21. Best on Evidence (1922) page 79, para 91,

[5]*Storr* v. *Scott*, (1833) 6 C&P 241.

[6]Pr. Code Civil, art. 1367, Ital Codice Civile, art. 2736, No. 2

[7]*R.* v. *Hurdeep*, (1875) 23 W.R., Cr.. 27 (Cal.).

[8]*Dwarka* v. *Sant*, (1895) I.L.R. 18 All. 92.

13.17. And in this sense, books of accounts *under the present Act, as under the repealed Act,* — cannot be used as sufficient evidence of the payment or other items to which the entry refers. Section 34 only lays down that a plaintiff cannot obtain a decree by merely proving the existence of certain entries in his books of account, even though those books are shown to be kept in the regular course of business. He will have to show further, by some evidence, that the entries represent real and honest transactions.

Corroborative evidence required.

13.18. As to the nature of the evidence required to corroborate the entries that become relevant under section 34, decided cases furnish some illustrations. It would appear on a study of those cases that there is hardly any scope for laying down hard and fast rules on the subject. Although, in some of the cases, the expression "independent evidence" is met with in this context, that does not seem to be the intention of the section, and all that can be said with reference to the present section is that no presumption of correctness attaches to the entries taken by themselves.

13.19. Thus, no particular form or kind of evidence in addition to the entries is required. Any relevant facts which can be treated as evidence within the meaning of the Evidence Act would be sufficient corroboration of the evidence furnished in the books of account, if true[1].

Evidence of Plaintiff.

13.20. It has been held by several High Courts—e.g., Allahabad[2], Rajasthan[3] and Andhra Pradesh[4] and Punjab[5] — that the evidence of the plaintiff himself on oath can suffice to corroborate the entries relevant under section 34. Of course, no categorical rules can be laid down, and regard has to be had to the circumstances of each case when determining the sufficiency of the plaintiff's statement — or, for that matter, the sufficiency of any other relevant fact — as corroborative evidence under section 34. But the point to be made is that the plaintiff's evidence can also qualify and suffice as corroborative evidence.

V. INTERPRETATION AND PROCEDURE

Case-law as to important ingredients.

13.21. Case law on the section illustrates and elaborates what is meant by some of the important ingredients of the section, — such as, "books of account", "regularly", and so on. These judicial decisions do not, however, seem to require any modification in the form or substance of the section.

Proper procedure.

13.22. There seems to be a misconception in some of the subordinate courts as regards the procedure for utilising the entries to which section 34 applies. In this connection, we may refer to a Nagpur judgment[6], where it is pointed out that if the witness producing the entry cannot supplement it with his personal knowledge, then it is a waste of time to have its contents repeated out of his mouth. On the other hand, if, after refreshing himself with an entry, the witness is able to remember the details of the transaction, he may certainly read the entry for the purpose of refreshing his memory; but this is not a case of evidence under section 34; it would fall under section 159, so far as his oral evidence is concerned.

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[1] *Yesuvadivan* v. *Subba*, 52 I.C., 704 (Mad.).

[2](a) *Narain Das* v. *Firm Ghasi Ram*, A.I.R. 1938 All. 353.

(b) *Mt. Kar Dei* v. *Sri Kishan*, A.I.R. 1932 All. 60 (D.B.).

[3] *Balmukand* v. *Jagannath*, A.I.R. 1963 Raj 212, 216, para 13.

[4] *D. K. Aswathanarayana* v. *Md. Hussain*, 1965 A.P. 33, 36, para 36.

[5] *Kaka Ram* v. *Firm Thakar Das*, A.I.R. 1962 Punj. 27, 30, para 11.

[6] *Mukunda Ram* v. *Daya Ram*, A.I.R. 1914 Nagpur 44, 47.

13.23. The question of *absence of entries* may be discussed. It has been held in Calcutta in *R.* v. *Grees Chunder*[1] that though the actual entries in books of account are relevant to the extent provided by the section, such a book is not by itself relevant to raise an inference from the absence of any entry relating to a particular matter. Absence of entry.

13.24. With respect, it is suggested that this decision, if it is to be taken to have ruled that *the fact of the absence of an entry is not evidence at all* under any section of the Act, is not correct. It has not, in such sense, been followed[2].

13.25. In *Ram Persad* v. *Lakpati Koer*,[3] during arguments. Lord Davey referred to the above case — *R.* v. *Grees Chunder*[4], — and Lord Robertson said: "The Act applies to entries in books of account, but no inference can be drawn from the absence of an entry relating to any particular matter." But this remark of Lord Robertson must be taken to have been made with reference to the preceding argument of Counsel, where Counsel was discussing *section* 32(2) *and section* 34.

13.26. Obviously, section 34 does not apply where there is no entry in the books. Evidence that there is no entry is not, therefore, admissible under this section. However, such evidence may be admissible under other sections of the Act, — as for instance, sections 9 and 11. Thus, in a Calcutta case[5], evidence having been given of the visit of M to Calcutta, which he denied, the latter's son was called by the other party to corroborate M's statement. He deposed that it was usual when a partner of his firm (to which both he and M belonged) made a journey on the firm's business, to enter in the account-book the expenses of such journey, and he was allowed to produce the account-books of his firm and to state that there was no entry of expenses relative to such alleged visit. Absence of entry — effect of.

VI. CONCLUSION

13.27. In view of the position discussed above, it is not necessary to amend section 34 in substance. However, a verbal change is required in the section. Only verbal change needed.

Where the section contains the words "such statement", the proper words are "such entries", and we recommend that this drafting change should be made.

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[1] *R.* v. *Grees Chunder Banerjee*, (1883) I.L.R. 10 Cal. 1024

[2] *Sagurmull* v. *Manraj*, (1900) 4 C.W.N. ccvii.

[3] *Ram Persad* v. *Lakpati Koer*, census (1903) I.L.R. 30 Cal. 231, 247 (P.C.).

[4] *R.* v. *Gress Chunder*, (1883) I.L.R. 10 Cal. 1024.

[5] *Sagurmull* v. *Manraj*, (1900) 4 C.W.N., ccvii.

CHAPTER 14

ENTRIES IN PUBLIC RECORDS AND OTHER PUBLISHED WRITINGS

I. INTRODUCTORY

14.1. An entry in any public or other official book, register, or record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or record is kept, is itself a relevant fact, under section 35.

14.2. The principle upon which the entries mentioned in section 35 are received in evidence is the official or statutory duty of the person who keeps the book, register or record to make such entries after *satisfying himself of their truth.*

14.3. It is not that the writer makes the entries contemporaneously, or of his own knowledge[1]. The entry is admissible irrespective of knowledge[2]. In *Saraswati Dasi* v. *Dhanpat Singh*[3], it was observed by the Calcutta High Court (Garth C. J.) that the section is confined to the class of cases where the public officer has to enter in a register or other book some actual fact which is known to him, but this view has not been approved of in *Shoshi Bhooshan Bose* v. *Girish Chander Mitter*[4], where it was held that entries in a register kept by a public servant under a statute are admissible irrespective of personal knowledge.

14.4. The real reason for admitting these entries is that no person in a private capacity can make such entries. They are admissible, though not confirmed by oath or cross-examination, partly because, in some cases, they are required by law to be kept, and in all cases they are made by authorised and accredited persons appointed for the purpose and under the sanction of the official duty, partly on account of the publicity of the subject matter, and, in some instances, of their antiquity. Where it is not shown that it is so made, the entry is in admissible[5]. Moreover, though the facts stated in these entries are of a public nature, it would often be difficult to prove them by means of sworn witnesses.

14.5. With reference to public documents Lord Blackburn said in *Sturla* v. *Freccia*[6].—

> "I understand a public document to mean a document that is made for the purpose of the public making use of it and being able to refer to it. I think the very object of it must be that it should be made for the purpose of being kept public, so that the persons concerned in it may have access to it afterwards."

14.6. Records, says Lord Chief Baron Gilbert[7], "are the memorials of the legislature, and of the King's courts of justice, and are authentic beyond all

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[1]*Doe* v. *Andrews*, 15 Q.B. 756 (Erle J.).

[2]*Wraham* v. *Phanindra Nath*, (1915) 19 C.W.N. 1038 (copy of another entry).

[3]*Saraswati Dasi* v. *Dhanpat Singh*, (1882) I.L.R. 9 Cal. 434.

[4]*Shoshi Bhooshun Bose* v. *Girish Chunder Mitter*, I.L.R. 20 Cal. 940.

[5]See—

(a) Remarks of the Privy Council in *Raja Bommarauze* v. *Rangassamy*, (1885) 6 M.I.A. at page 249;

(b) *Samar Dasadh* v. *Jugal Kishore*, (1897) I.L.R. 23 Cal. 370, 371.

[6]*Sturla* v. *Freccia*, L.R. 5 App. Cas. 623.

[7]Gilbert, Evidence 7, 4th Ed.

manner of contradiction"; they are said to be *"monuments veritatis at vetustatis vestigia"* as also "the treasure of the king[1-3]".

Indian Registers admitted in England.

14.7. It may be noted that these rules of evidence are not confined to a particular country. Indian registers of baptism have been admitted as evidence in English Courts[4]. Indian registers of marriages and deaths, kept under the authority of the East India Company, have been admitted in English Courts[5]. Registers of marriages compiled by the Secretary of State for India, from periodical reports transmitted to him by the various religious denominations in India, have also been admitted in the English Courts[6].

II. ENGLISH LAW

English and Indian law — Difference.

14.8. We may now refer to a few points of difference between English and Indian law on the subject.

(a) In England, it is essential to the admissibility of this evidence that the entries should have been made promptly, or at least without such long delay as to impair their credibility, and in the mode required by law, if any mode has been prescribed[7].

The Evidence Act contains no such rule, although these points may be of importance in estimating the value of the evidence.

(b) In India, as well as in England, the entry must have been made by a person whose duty it was to make it. The entry will be none the less admissible, even though the person who made it, being alive and capable of giving evidence, is not called as a witness.

(c) The English law speaks only of "official" registers or books. To render any document admissible in evidence as an official register in England, it must be one which the law requires to be kept for public benefit. In India, the book or register might be either a public or an official one, under section 35.

14.9. The Indian Act does not contain any definition of the "public or other official book". But reference may be made to section 74 of the Act, which states what are public documents[8].

A "public document" has been defined in England[9] to be a document that is made for the purpose of the public making use of it — especially where there is a judicial or quasi-judicial duty to inquire. Its very object must be that the public or all persons concerned in it, may have access to it. Registers kept under private authority for the benefit or information of private individuals are therefore inadmissible[10].

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[1]Co. Litt. 118 a; 293 b.

[2]11 Edw. IV. I.

[3]Best, Evidence (1922), page 202, paragraph 218.

[4]*Queen's Proctor* v. *Fry*, 4 P.D. 230.

[5]*Ratcliffe* v. *Ratcliffe*, (1859) 1 Sw. & Tr. 467.

[6]*Regan* v. *Regan*, 69 L.T. 720.

[7]Taylor's Evidence, 10 Ed., Sec. 1594; Whitley Stokes, Anglo-Indian Codes, Vol 2, page 829.

[8]*Samar Dosadh* v. *Jugal Kishore Singh*, (1897) I.L.R. 23 Cal. 366, 369.

[9]*Sturla* v. *Freccia*, 5 App. Cases 643.

[10]See *Baji Nath* v. *Sukhu Mahton*, (1891) I.L.R. 18 Cal. 534.

III. TWO CLASSES OF ENTRIES

14.10. Reverting to section 35, two classes of entries are contemplated by this section. (a) entries by public servants, (b) entries by persons other than public servants. In the case of the latter, the duty to make the entry must be specially enjoined by the law of the country in which the book, register, or record is kept (the section thus includes British, foreign or colonial registers[1]), in the case of entries by the former, it is sufficient for their admissibility that they have been made in the discharge of official duty.

But, in either case, the entry must have been made by *a person whose duty it was to make it.*

14.11. In England, it has been held[2] that the entries should be made promptly, or at least without such long delay as to impair their credibility. Thus, an entry made more than a year after the event has been rejected. In India, such delays will go to the weight of the evidence.

IV. ILLUSTRATIONS

It may be useful to take a few illustrations from decided cases.

Register of the school — date of birth.

14.12. The Education Code in various States requires the Headmaster of each recognised school to prepare and maintain an admission register of the pupils admitted to that particular school. Of the several particulars to be entered in such a register, the date of birth of the pupils, as stated by the parent or guardian, is an important item. Thus, the admission register is a public record, maintained by the head of the institution, who is in duty bound to maintain such a register containing certain particulars relating to each pupil as required by the Education Code. In making such entries in the admission register the head of the institution, *who is a public servant*, is merely discharging his official duty. Such entries, therefore, made by a public servant in a public or official register in the discharge of his official duty would be relevant under section 35. The date of birth as entered in such an official record is, therefore, a relevant fact, and can be proved by production of that record. It has been so held in a Patna case[3].

A similar view was taken by the Kerala High Court[4].

14.13. Certified copies from a school register, showing that on 20th June, 1960, K was under 17 years of age, and the affidavit of the father stating the date of her birth, and the statement of K to the police with regard to her own age, all amount to evidence under the Evidence Act. An extract from the register of the school is admissible in evidence to prove the age[5].

Matriculation Certificate.

14.14. Entries in the school registers as to age are admissible under section 35, as entries made by *a public servant in a public or official register* in the discharge of his official duty. When he had any special means of knowledge so

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[1]With regard to the books recognised as official registers public documents in England, see *Rateliffe* v. *Rateliff*, (1819) 1 Sw. & Tr., 467; *Queen's Proctor* v. *Fry*, 4 P.D. 230.

[2]*Doe* v. *Bray*, 8 B.&C., 813.

[3]*Bhim Mandal* v. *Magaram Gosain*, A.I.R. 1961 Pat. 21, 24, 26, para 13 and 41.

[4]*Vishnu Maheswaran Nampoothiri* v. *Kuravilla Kochitry Kuruvilla*, A.I.R. 1957 Ker. 103, 104.

[5](a) *Maharaj Bhanudas* v. *Krishna Bai*, A.I.R. 1927 Bom. 11, 99;

(b) *Indian Cotton Company Ltd.* v. *Raghunath Hari Deshpande*, A.I.R. 1931 Bom. 178, 181.

as to make the entry relevant itself does not affect the admissibility of the entry, though it may affect its value. Section 35 stands itself independently of section 32(5).[1]

On the question of age, a Matriculation Certificates is also clearly admissible[2] under section 35.

14.15. Entries in a death register kept at a police station in accordance with the police Regulations made under section 12 of the Police Act (5 of 1861) are also relevant, even though the entries are made in chronological order and not in the prescribed form.[3] A register of death kept by police officers at thanas, under the rules made by the local Government, is a public document within the meaning of section 74 and under section 114, a court is entitled to presume that an entry made in such register was properly made, and a certified copy of such entry is admissible in evidence.[4]

Birth and death register is a public document.

14.16. In the English case of *Ratcliffe* v. *Radcliff and Anderson*[5], it was pointed out that a register of births and deaths kept under the orders of the East India Company was a public document. Lord Campbell in that judgment speaks of the register having been kept in *obedience to directions given by the East India Company in its sovereign capacity*. No legislation of the company is referred to as having authorised the keeping of such a register.[6]

V. OTHER PROVISIONS

14.17. Sometimes, special statutory provisions confer a presumptive value on certain entries. Entries in records-of-rights, for example, are covered by specific provisions. The decision of Sir Dinshah Mulla, in *Mahant Krishna Dayal* v. *Rani Bhubaneswari*,[7] may be seen, which has laid down that the entry in the records-of-rights is presumed to be correct until it is proved to be incorrect by evidence. Such a presumption would arise only as to the entries recorded as authorised by some Act or the rules framed thereunder, and not otherwise.

14.18. The same principle would apply in regard to the presumption of correctness of the records-of-rights finally prepared under West Bengal Estates Acquisition Act, 1953, because of a specific statutory provision.[8]

VI. RECOMMENDATION

14.19. The section requires modification only in one point of form. The requirement that the entry must be made in performance of a statutory duty is applicable only to the latter-half of the section. Under the earlier half, the emphasis is on public or official character of the entry and not on its statutory character. We recommend that the section should be suitably split up to bring out this difference between the first-half of the section and the latter-half.

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[1] *Aga Jan Khan Rahimkhan* v. *Kesho Rao Nathuram Maratha*, A.I.R. 1940 Nag. 217.

[2] *Hrishkesh* v. *Sushil Chandra Maulik*, A.I.R. 1957 Cal. 211, 214; 60 C.W.N. 1053.

[3] *Shib Deo Misra* v. *Ram Prasad*, I.L.R. 46 All. 637.

[4] *Tamijuddin Sarkar* v. *Taju*, I.L.R. 46 Cal. 152.

[5] *Ratcliffe* v. *Radcliffe and Anderson*, (1859) 1 Sw. & Tr. 467.

[6] See—

(a) *Secretary of State* v. *Kasturi Reddi*, (1908) I.L.R. 26 Mad. 268;

(b) *Devarapalli Ramalinga Reddi* v. *Srigiriraju Kotayya*, A.I.R. 1918 Mad. 451, 452.

[7] *Mahant Krishna Dayal* v. *Rani Bhubaneswari*, A.I.R. 1931 P.C. 221.

[8] *Jatindra Nath Malik* v. *Sushilendra Nath Palit*, A.I.R. 1965 Cal. 328, 331.

14.20. The revised section should be as follows:

"35. *Relevancy of entry in public record, made in performance of duty.*— An entry in any public or other official book, register, or record stating a fact in issue or relevant fact, and made by—

(a) a public servant in the discharge of his official duty, or

(b) any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or record is kept.

is itself a relevant fact."

VII. OTHER PUBLISHED WRITINGS—SECTION 36

Introductory.

14.21. While section 35 was concerned with statements in public records and reports, the next three sections are devoted to certain other documentary materials. These materials are of various speices, but they all share one feature in common, the feature of publicity and of official authority.

14.22. The subject of relevancy of statements in maps, charts and plans is dealt with by section 36, in these terms—

"36. Statements of facts in issue or relevant facts, made in published maps or charts generally offered for public sale, or in maps or plans made under the authority of the Central Government or any State Government, as to matters usually represented or stated in such maps, charts or plans, are themselves relevant facts."

Maps comparable to statements.

14.23. Maps are really statements. In *Dwijesh Chandra Roy* v. *Naresh Chandra Gupta*,[1] it was observed by S. R. Das, J.—

"A map by itself is nothing but statement made by the maker by means of lines and pictorial representations instead of by word of mouth as to the state or configuration of a particular site and the objects standing thereon. To admit in evidence a map without calling the maker thereof is the same as admitting in evidence statements made by a third party who is not called as a witness. In other words, it amounts to admitting hearsay."

Classes of maps.

14.24. The section deals with two classes of documents: (a) published maps or charts generally offered for *public* sale; and (b) maps or plans made under the *authority of Government*. The admissibility of the first class of documents is justified on the ground that the publication being accessible to the whole community and open to the criticism of all, the probabilities are in favour of any inaccuracy being challenged and exposed. These are similar to dictionaries etc., to which the court may refer under another provision.[2]

The admissibility of the second class of documents depends on the ground that, being made and published under the authority of Government, they must be taken to have been made by and to be the result of, the study or inquiries of competent persons: and further (in the case of surveys and the like), they contain or concern matters in which the public are interested.

Section 83 and presumption of accuracy.

14.25. It may be noted that under section 83,[3] there is a statutory presumption of the accuracy, authority and authenticity in favour of the maps or plans

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[1]*Dwijesh Chandra Roy* v. *Naresh Chandra Gupta*, A.I.R. 1945 Cal. 492, 494 (Biswas & S. R. Das, JJ.).

[2]Section 57, penultimate paragraph.

[3]Charts are left out by section 83.

purported to be made under the authority of the Central Government or the State Government, unless they are made for a particular cause.

Maps, charts and plans — No need to make a distinction.

14.26. We shall now deal with a few points on which an amendment may be required. Section 36, in its first half, does not mention "charts". We have not been able to understand why there should be a distinction in this respect between maps, charts and plans. No doubt, one can make a distinctioin, for other purposes, amongst the three; but the principle on which their relevance is justified, under section 36, namely, that they are published and generally offered for public sale (the first half) or that they are made under the authority of the Government (the second half), should apply equally whether the document is a map or a chart or a plan. Dealing more particularly with "chart", we may state that a chart is of various kinds. Originally, this expression was used more frequently in marine navigation, to denote navigational charts which were used for guiding marines.

14.27. Such a chart was in issue in *In re S. S. Drachenfels*[1], a case relating to a chart issued under the authority of the Government. The chart was of the river Hooghly, and the court said that the notes thereon may be referred to as "authoritative". In this case, the note which was material relating to the dangers to be avoided by vessels awaiting orders at the "Sandheads", between the months of April and December, both inclusive.

14.28. The nautical chart, essential to marine navigation, informs the mariner of the nature and form of the sea bottom, and gives the location of channels, aids to navigation, reefs and shoals and sand bars[2]. It affords an accurate graphical guide to hidden dangers and safe channels—knowledge which is necessary for efficient and safe ship navigation. The nautical chart is usually supplemented by official publications called coast pilots or by other types of sailing directions which provide pertinent descriptive details that cannot be shown conveniently on the chart itself.

14.29. Much more recent than the nautical chart is the aeronautical chart,[3] which is essential to air navigation. Whereas a nautical chart is a graphic representation of an area consisting chiefly of water, the aeronautical chart, like a map, most often represents an area that is predominantly land.

14.30. Marine charts mainly indicated under-water conditions, and were similar to what are known as weather charts. Later usage, however, has given a wide meaning to the expression "chart". The expression now indicates many representations; for example, (a) aeronautical charts,[4] (b) a record by curves etc. of fluctuations in temperature etc. (one of the meanings referred to in some of the dictionaries)[5], and, in fact (c) any tabulated information[6].

14.31. If the important requirement of publicity or authority, indicated by the first, or second half of the section (whichever is applicable), and also the further important requirement that the statement should have been made as to matters usually represented or stated in such maps, charts or plans, are both satisfied, we do not see any reason why, for the purposes of section 36, it

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[1]*In re S. S. Drachenfels*, (1900) I.L.R. 27 Cal. 860, 867, 871 (Ameer Ali, J.).

[2]Encyclopaedia Britannica, Vol. 5, page 329.

[3]Encyclopaedia Britannica, Vol. 5, page 329.

[4]Encyclopaedia Britannica, Vol. 5, page 329.

[5]See, for example, Concise Oxford English Dictionary.

[6]These are mere illustrations.

should matter whether the document is a map or a chart or a plan—and, if it is a chart, whether it is a marine navigation chart or aerial navigation chart or a weather chart or other tabulated information.

Recommendation to amend Section 36 to cover charts and plans.

14.32. We, therefore, recommend that in both the parts of section 36, there should be an amendment so as to ensure that all these three clauses of documents are covered. This aspect will also require consideration under sections 83 and 87, which deal with maps, etc.[1]

Matters usually represented — Change recommended.

14.33. An important condition is indicated by the words "as to matters usually represented or stated in such maps, charts or plans". This condition appears to be applicable whether the documents falls under the first half of the section, or whether it falls under the second half of the section. In our view, it is desirable to bring this aspect out more clearly, by a splitting up of the section, and we recommend a suitable amendment.

14.34. Then, there is a verbal change needed to bring out more clearly the connection between the opening words "statements" and the words "as to matters etc.". The principal object in inserting the requirement expressed by "as to matters usually represented", etc., is to indicate that a statement made gratuitously by the draftsman of the map etc. as to a matter which does not normally or ordinarily fall to be dealt with while preparing the map etc. in question, should not be admitted by virtue of section 36. This should be brought out.

VIII. SECTION 37

Introductory.

14.35. Another class of public facts is dealt with in section 37, which is concerned with the relevancy of statements as to facts of a public nature, contained in certain Acts or notifications. It reads—

> "37. When the court has to form an opinion as to the existence of any fact of a public nature, any statement of it made in a recital contained in any Act of Parliament of the United Kingdom or in any Central Act, Provincial Act, or a State Act or in a Government notification or a notification by the Crown Representative appearing in the Official Gazette or in any printed paper purporting to be the London Gazette or the Government Gazette of any Dominion, colony or possession of His Majesty is a relevant fact."

Scope of the section.

14.36. It may be stated, at the outset, that this section does not deal with the proof of the Acts and orders referred to in the section. It deals with their relevance for establishing a fact (of a public nature as mentioned in the section).

Position in England.

14.37. In England,[2] statements contained in any public statute, speech from the throne,[3] royal proclamation,[4] parliamentary journal,[5] government gazette,[6] or state paper,[7] are admissible, even against strangers, to prove facts of a *public*, but not of a private, nature.

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[1] To be considered under sections 83 and 87 also.
[2] Halsbury, Laws of England. (3rd Ed.), Vol. 15, page 367, para. 658.
[3] *R.* v. *Francklin*, (1731) 17 State Tr. 625, 636, 639.
[4] (a) *R.* v. *Sutton*, (1816) 4 M. & S. 532;
(b) *R.* v. *De Berenger*, (1814) M. & S. 67.
[5] (a) *A. G.* v. *Bradlaugh*, (1885) 14 Q.B.D. 667 (C.A.).
(b) *Forbes* v. *Samuel*. (1913) 3 K.B. 706, 721.
[6] (a) *R.* v. *Holt*, (1793) 5 Ter. Rep. 436;
(b) *A. G.* v. *Theakstone*, (1820) 8 Price 89.
[7] E.G. an official despatch; see *Thelluson* v. *Cosling*, (1803) 4 Ep. 266

14.38. Such statements, however, are only prima facie evidence of the facts asserted unless it is enacted that they are to be conclusive.[1]

Acts and Notifications of the U.K. etc, Amendment needed.

14.39. We have no points of major importance concerning the section. But a few changes are required in the section. It may be pointed out that amongst the Acts and notifications mentioned in the section, are: (i) "any act of Parliament of the United Kingdom;" (ii) "notification by the Crown Representative appearing in the Official Gazette etc." and (iii) "Government notification..... appearing ..... in any printed paper purporting to be the London Gazette or the Government Gazette of any Dominion, colony or possession of His Majesty".

Change required in view of constitutional position.

14.40. In view of the constitutional changes that have taken place in the country, the provision relating to Acts of the United Kingdom Parliament should be confined to Acts passed before the 15th August, 1947.

14.41. As regards notifications issued by the Crown Representative, it appears desirable to confine it similarly to notifications issued before that date.

14.42. As regards Government notifications appearing in the London Gazette or in the Government Gazette of any Dominion, colony or possession of His Majesty also, the provision should be similarly confined.

Recommendation.

14.43. In the light of the above discussion, we recommend that section 37 should be revised as follows:—

REVISED SECTION 37

"37. (1). When the court has to form an opinion, as to the existence of any fact of a public nature, any statement of it made in a recital contained—

(a) in any Central Act, Provincial Act, or a State Act, or

(b) in a Government notification appearing in the Official Gazette, or

(c) *as respects the period before the 15th day of August*, 1947—

(i) in any Act of Parliament of the United Kingdom, or

(ii) in a Government notification appearing in any printed paper purporting to be the London Gazette or the Government Gazette of any Dominion, colony or possession of His Majesty, or

(iii) in a notification by the Crown Representative appearing in the Official Gazette, is a relevant fact."

IX. SECTION 38

Introductory.

14.44. While section 37 was concerned with published *legislation* and Governmental acts, section 38 is concerned with the relevancy of statements as to "a law",—i.e., any law, contained in certain officially published law-books. Under the section, when the Court has to form an opinion as to "a law of any country", any statement of such law contained in a book purporting to be printed or published under the authority of the Government of such country and to contain any such law, and any report of a ruling of the courts of such country in a book purporting to be a report of such rulings, is relevant.

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[1](a) *R.* v. *Greene*, (1837) 6 Ad. & El. 548;

(b) *R.* v. *Francklin*, (1721) 17 State Tr. 625

[2]This is not a draft.

Amendment needed as to Indian law.

14.45. So far as laws of foreign countries are concerned, the section needs no comments. But, so far as Indian law is concerned, the section, in our opinion, is not appropriate. We shall presently set out our reasons for this comment.

Indian law not a matter of evidence.

14.46. The first observation which we would like to make is, that a question of Indian law is not a matter of evidence, and therefore the terminology of "relevant fact" is not appropriate for such questions. It is well established that evidence cannot be given of the general law, although evidence can be given of customs which derogate from the general law. Even if it be assumed, for the sake of argument, that what has been stated officially on a matter of law can be used for persuading the court, it is obvious that official expression of views on a matter of Indian law can have no binding effect.

14.47. Foreign law is a question of fact, and therefore, a matter for evidence. We are not, at the moment, concerned with the mechanics of proof of foreign law, nor with the question as to the materials to be used for proof of foreign law.[1] But it cannot be denied that a question of Indian law is a question to be decided by the judge, "Jura novit curia" (The Judge knows the law).

Duty of judge in deciding questions of the law.

14.48. For deciding questions of Indian law, the Judge must refer to the materials that are recognised in the Indian legal system as the source of law. These materials—except in the case of custom—cannot be the subject-matter of proof. A book published under official authority is not, according to the Indian legal system, a source of law.

Judge and Jury.

14.49. A question of law is, thus, for the judge and is not subject to evidence. This is precisely the reasoning on which juries in England, which are final judges of fact, are not empowered to determine questions of law. The judge sums up the evidence, spells out the main issues and explains the relevant rules of law which the jury is to apply. In fact, in India, the Code of Criminal Procedure[2] made express provision for such a demarcation of the functions of the judge and the jury, the former being exclusively vested with jurisdiction to determine questions of law.

14.50. Generally speaking, matters of law are determinable by the Judge, and matters of fact by the jury.[3] According to Phipson,[4] in English Courts, although the existence of English law is a question of law to be *determined by authorities and* argument, the existence of Scots, colonial or foreign law is treated as a question of fact, to be determined by evidence.[5]

Judicial evidence not including questions of law.

14.51. In this connection, we may also refer to the analysis of "judicial evidence" as given by Best. He says[6]—

> "'judicial evidence' may be defined as the evidence received by courts of justice in proof or dis-proof of facts, the existence of which comes in question before them. By fact, here, must be understood the *res gestae* of some suit, or other matters, to which when ascertained, the law is to be applied; for, although, in logical accuracy, the existence or non-existence of law is a question of fact, it is rarely spoken of as such, either by jurists

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[1]See Nussbaum, "The Problem of Proving Foreign Law" 50 Yale Law Journal.
[2]Section 292, Code of Criminal Procedure, 1898 (repealed).
[3]*Mechanical Inventions* v. *Austin*, (1935) A.C. 346.
[4]Phipson, Evidence (1963), paragraph 29.
[5]See also *Hartman* v. *Kong*, 50 Times Law Reports 114.
[6]Best, principles of Evidence (1922), page 22, para. 33

or practitioners. By 'law' here, we mean the general law of each country, which its *tribunals are bound to know without proof;* for they are not bound, at least in general, to take judicial cognisance of local customs, or the laws of foreign nations,—the existence of both of which must be proved as facts."[1]

Best has pointed out that courts are bound to know the 'general law' without proof.

Duty of the Court to decide questions of law.

14.52. Secondly, as was pointed out in Aziz Banu's case,[2] by Sulaiman J.—whose observations were approved in a later case[3] by the Privy Council,—it is the duty of the courts themselves to find the law of the land and apply it, and not to depend on the opinion of the witnesses, however reliable they may be. Foreign law, on the other hand, is a question of fact, with which the courts in India are not supposed to be conversant.

Judicial notice to be taken of Indian law.

14.53. We may also point out, in this context,[4] that under section 57(1), a *court is bound* to take judicial notice of all laws in force in the territory of India[5]. The Judge can on matters of which he can take judicial notice; consult certain materials. But an Indian law cannot be the subject-matter of "evidence". Expert evidence may be given[6] of foreign law, but not of Indian law.

14.54. We may add that for some time, there was a practice of consulting pundits in matters relating to Hindu law. But this practice was discontinued long ago, and has never been revived. In fact, when a particular subordinate court resorted to any such practice, the higher courts came down upon it, and this was for the reason that Hindu law, being the law of the country, could not be a matter of evidence or of expert opinion.

14.55. In the *Shahid Ganj case,*[7] Sir George Rankin, sitting in the Judicial Committee of the Privy Council, observed—

> "But it would not be tolerable that a Hindu or a Muslim in a British Indian Court should be put to the expense of proving by expert witnesses the legal principles applicable to his case and it would introduce great confusion into the practice of the Courts if decisions upon Hindu or Muslim law were to depend on the evidence given in a particular case, the credibility of the expert witnesses and so forth."

Rulings of Indian Courts.

14.56. Thirdly, coming to the latter half of the section, we may state that so far as the rulings of Indian Courts are concerned, that, again, is a matter not of evidence. It is a question of authority. The Indian Law Reports Act[8], section 3, provides that no court shall be bound to hear cited, or shall receive or treat as an authority binding on it, the report of any case decided by any High Court for any State, *other than a report published under the authority of any State Government.* We are not, in the present context, concerned with non-official reports. But the use of official Indian law Reports is *impliedly* dealt with by this provision in the Indian Law Reports Act,—if a provision were at all needed on the subject.

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[1]Emphasis added.

[2]*Aziz Banu* v. *Mahomed Ibrahim Hussain*, (1925) I.L.R. 47 All. 823, 835 (Sulaiman, J.).

[3]*Shahid Ganj case, infra.*

[4]See *S.P.P.* c. *Thipayya*, A.I.R. 1949 Mad. 459, 460 (Subba Rao, J.).

[5](a) *Mazhar Ali*, A.I.R. 1965 Pat. 489, 490 para. 3.

[6]Section 45.

[7]*Shahid Ganj* v. *S.G.P. Committee*, A.I.R. 1940 P.C. 116, 120.

[8]Section 3, Indian Law Reports Act, 1875 (18 of 1875).

Calcutta case.

14.57. The view taken above may be regarded as obvious; but it appears that the proper scope of the section requires to be clarified. In a Calcutta case,[1] for example, the question arose whether a newspaper report of a judgment of the Supreme Court could be relied upon for deciding a point of law. The High Court held that the report would not be *relevant under section 38*, because the newspaper could not be regarded as "a book published under the authority of Government". However, the High Court relied on it on the basis of a precedent, in which a report in the "Statesman" has been relied upon in an earlier case.

14.58. It should be pointed out, that in the Calcutta case cited above, the question whether section 38 is appropriate in relation to Indian law, was not examined. But there is a reference to section 38 in the judgment.

Recommendation.

14.59. In the circumstances, a clear statement of the scope of the section is needed, and it is desirable that the section is narrowed down, so as to exclude Indian law from its application. To achieve this object, we recommend that in section 38, after the words "any country", the words "other than India" should be added.

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[1] *State* v. *Sardar Bahadur*, A.I.R. 1969 Cal. 451, 457.

CHAPTER 15

HOW MUCH OF A STATEMENT TO BE PROVED

SECTION 39

Introductory.

15.1. Section 39 reads—

> "When any statement of which evidence is given forms part of a longer statement, or of a conversation or part of an isolated document, or is contained in a document which forms part of a book, or of a connected series of letters or papers, evidence shall be given of so much and no more of the statement, conversation, document, book, or series of letters or papers as the Court considers necessary in that particular case to the full understanding of the nature and effect of the statement, and of the circumstances under which it was made."

Principle.

15.2. The principle on which this section is based is that, it would not be just to take a part of a conversation, letters, etc. as evidence against a party, without giving to the party at the same time the benefit of the entire residue of what he said or wrote on the same occasion.[1]

15.3. It can also be stated that since the Court expect a witness making a statement not only to state the truth but the *whole truth*, some such principle is implicit in the obligation undertaken by the witness.

15.4. Distinct matters, of course, cannot be so introduced,[2] even though relevant to the case as a whole, if they are not connected with the part given in evidence.

English law.

15.5. The principle in English law is that when an admission is tendered against a party, he is entitled to have proved, *as a part of his adversary's case*, so much of the whole statement, document or correspondence containing or referred to in the admission, and, this is so although such other parts may be favourable to himself;[3] but the jury may attach different degrees of credit to the different parts In particular, in relation to interrogatories, the rule is that any party may, at the trial of a cause, matter or issue, use in evidence any one or more of the answers or any part of an answer of the opposite party to interrogatories, without putting in the others or the whole of such answers; provided, always, that, in such a case, the Judge may look at the whole of the answers, and if he shall be of opinion that any others of them are so connected with those put in, that the last-mentioned answers ought not to be used without them, he may direct them to be put in.[4]

Reasons as explained in American case.

15.6. The reason for the admission of evidence explaining the part of the statement was lucidly explained in the American case of *Com* v. *Keyes*[5], in these words:

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[1] *Cf. The Queen's case*, (1820) 2 B & B 297 (per Abbot, C. J.).

[2] (a) *Prince* v. *Samo*, 7 A & E. 627;
(b) *Davies* v. *Morgan*, (1831) 1 Cr. & J. 587.

[3] (a) *Thomson* v. *Austen*, (1823) 2 Dowe & Ry. 358, 361.
(b) *R.* v. *Gray*, (1911) 6 Cr. App. Rep. 242.
(c) *Burnell* v. *B.T.C.*, (1955) 3 All. E.R. 822.

[4] *Lyell* v. *Kennedy*, (1883) 27 Ch. D. 1, 15, 29.

[5] *Com.* v. *Keyes*, 11 Gray 323, 325 in (Merrick, J.), Wigmore's Evidence 1905 Ed., section 2113, page 2861, cited in Field.

"Every remark or observation made upon those topics is to be received as competent evidence, because they may *essentially modify the character and purport*[1] of the whole conversation, and vitally affect what might otherwise appear to be explicitly asserted or denied."

Limitation.

15.6A. Of course, the rule has limitations. As has been observed in another American case,[2]—

"Ten subjects may be talked about in one conversation. When one of the ten is the subject of litigation, it is not competent to put in evidence the conversation about the other nine."

15.7. Again, as Merrick, J in *Com* v. *Keyes*, observed:[3]

"There is an important limitation to the rule in giving evidence of conversations or of oral statements and declarations. The proof in such case is to be confined to what was said upon or concerning those matters which are made subjects of enquiry or investigation. Every remark or observation made upon those topics to be received as competent evidence, because they may essentially modify the character and purport of the whole conversation, and vitally affect what might otherwise appear to be explicitly asserted or denied. But, if, during the same interview between the witnesses and the party, other subjects of conversation or discussion are introduced, remote and distinct from that which is the object of enquiry or investigation, it is obvious that whatever may be said concerning them can have no tendency to illustrate, vary or explain it. Everything pertaining to these additional and extraneous matters should therefore be rejected as irrelevant and useless."

Wigmore's view — Emphasis on subject.

15.8. According to Wigmore,[4] three general corollaries may be deduced from the principle referred to above—

(i) No utterance irrelevant to the issue is receivable.

(ii) No more of the remainder of the utterance than concerns the same subject and is explanatory of the first part, is receivable.

(iii) The remainder thus received merely aids in the construction of the utterance, as a whole, and is not in itself testimony.

Mode of proof of oral conversations, statements and declarations.

15.9. The aspect of relevance of the utterance is discussed in the American case of *Garay* v. *Nicholson*[5], where Cowen, J. observed—

"The rule about the whole being admissible must obviously mean that the additional conversation called for should be relevant to the matter in issue. All evidence is received under the qualification (mentioned above), and, if not so restrained, might operate as a waste of time; other subjects might be introduced having no connection with the subject-matter of the suit."

Scope for improvement.

15.10. While the principle has been adequately reflected in section 39, the section could be improved in one respect, namely, *by an express provision spelling out the rights of the opposite party*.

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[1]Emphasis supplied.

[2]*Antherton* v. *Defreeze*, 129 Mich. 364; 88 N.W. 886; Wigmore's Evidence, 1905 Ed., section 2113, page 2860, cited in Field.

[3]*Com.* v. *Keyes*, 11 Gray 323, 325 (Merrick, J.); Wigmore's Evidence, 1905 Ed., section 2113, page 2861, cited in Field.

[4]See Wigmore's Evidence, 1905 Ed., Section 2113, page 2860, cited in Field.

[5]*Garay* v *Nicholson* 24 Wend 350, 351 (Cowen, J.); Wigmore's Evidence, 1905 Ed. Section 2113, page 2860, cited in Field.

15.11. It may be mentioned in this connection that in some American States, there are interesting statutory provisions which deal with the procedure somewhat elaborately. For example, the provision on the subject in California says[1]— Statutory provisions in the U.S.A.

> "When part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the same subject may be enquired into by the other; thus, when a letter is read, the answer may be given, and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation or writing which is necessary to make it understood may also be given in evidence."

Then, the Georgia Code[2] provides—

> "Where either party introduces part of a document or a record, the opposite party may read so much of the balance as is relevant." "When an admission is given in evidence, it is the right of the other party to have the whole admission and all the conversation *connected therewith*."[3]

The Louisiana Code provides that the opponent using a party's confessions "must not divide them; they must be taken entire."[4]

According to the Montana law,[5]—

> "When part of an act, declaration, conversation or writing is given in evidence by one party, *the whole on the same subject* may be enquired into by the other; thus, when a letter is read, all other letters on the *same subject between the same parties may be given*."

The need for the proposed provision could be discussed from several points of view. Need.

15.12. In the first place, the fact that no difficulty has been found in practice is not conclusive, because the suggestion for amendment is not made for meeting any difficulty pointed out in any case law, but because of the obscurity of the position as regards the right of the *adverse party*. This obscurity is primarily due to the fact that in the present section, there is no mention of the adverse party. Obscurity.

15.13. Secondly, the proposed amendment is essential in the interest, of justice, because, if one party uses a statement without referring to the other portions which explain or qualify it, justice requires that the opposite party should have a right to insist that the remainder, in so far as it is necessary for the purpose mentioned above (elucidating the statement already used), should be given in evidence. Essential in the interest of justice.

15.14. Thirdly, it is not as if the present section gives a discretion to the court which the proposed section takes away. The word "discretion" in this context is not quite appropriate. When the present section provides in effect that the remainder of the statement shall be given in evidence, the use of the words "the court considers necessary" does not indicate an *unfettered* discretion. If it is a case of unfettered discretion, that is all the more reason, why discretion Point as to discretion.

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[1]Cal. Code of Civil Procedure (1872), Section 1854; Wigmore's Evidence, 1905 Ed. Section 2113, page 2859, cited in Field.

[2]Georgia Code, (1895), Section 5241; Wigmore's Evidence, 1905 Ed., Section 2113, page 2859, cited in Field.

[3]Georgia Code, (1895), Section 5196; Wigmore's Evidence, 1905 Ed., Section 2113, page 2859, cited in Field.

[4]Louisiana Code Pr., (1894), Section 356; Wigmore's Evidence 1905 Ed., Section 2113, page 2859, cited in Field.

[5]Montana C.P.C. (1895), Section 3130; Wigmore's Evidence, 1905 Ed., Section 2113, page 2859, cited in Field.

should not be continued. However, the proper view is that the power of the court under the present section is to decide not as a matter of interpretation —how much of the remainder of the statement is necessary for understanding what is admitted.

Police diaries used for refreshing memory.

15.15. Fourthly, we may examine the special situation of police diaries. Under the Code of Criminal Procedure[1] (reference will be made to the old Code since most of the reported decisions relate to the old Code), a special diary is, in general, privileged, and it may be used by the court *not as evidence in the case*, but to aid the court in the inquiry or trial. Neither the accused nor his agent is *entitled* to call for such diaries or to see them. But, if the police diary is used by the court to contradict the witness or if the police officer uses it for refreshing his memory, then the provisions of certain sections of the Indian Evidence Act apply. Those sections are (a) section 161, which provides that such writing must be produced and shown to the adverse party who may cross-examine the witness on it, and (b) section 145, which provides that a witness may be cross-examined as to previous statements made by him in writing or reduced into writing without such writing being shown to him or being proved; but if it is intended to *contradict* him by the writing, his attention must, before the writing can be proved, be called to those parts which are to be used for the purpose of contradicting him.

15.16. Thus, police diaries cannot be used for contradicting, (for example), a defence witness, and it is precisely because they were sought to be so used that the Privy Council had to criticise the lower courts in 1917[2]. This judgment of the Privy Council approves the proposition laid down in an Allahabad Case[3], to the effect that police diaries cannot be used as evidence (except to the extent indicated in section 172, Cr. P.C.).

15.17. What is to happen if the police officer does use the police diary to refresh his memory? Section 172, Criminal Procedure Code, provides that the provisions of the Evidence Act shall apply in such a case. The provisions of the Evidence Act as to refreshing memory are to be found in sections 159 to 161.

15.18. For our purpose, the material section is 161, which is quoted as follows: –

> "161. *Right of adverse party as to writing used to refresh memory.*— Any writing referred to under the provisions of the two last preceding sections must be produced and shown to the adverse party if he requires it; such party may, if he pleases, cross-examine the witness thereupon."

15.19. It is obvious that neither section 172, Code of Criminal Procedure, nor section 161 of the Evidence Act, contemplates that the court should delegate to the counsel for the accused the power to decide how much of the diary shall be seen or used by the defence[4]. The defence is entitled to inspect only that portion of the diary from which the witness refreshed his memory, and not the entire diary. This was proposition laid down in an Allahabad case[5]

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[1]Section 172, Code of Criminal Procedure, 1898.

[2]*Dar Singh* v. *Emperor*, A.I.R. 1917 P.C. 25.

[3]*Queen Empress* v. *Mannu*, (1897) I.L.R. 19 All. 390 (F.B.).

[4]*Queen Empress* v. *Mannu*, (1897) I.L.R. 19 All. 390, 393, 394.

[5]A.I.R. 1933 Lahore 498, 500.

15.20. With these propositions one can hardly have any reason to disagree. It would seem, however, that in discussing the law on the subject, Edge C. J. in the Allahabad High Court, spoke of the "discretion" of the court. Now, with respect, the use of the expression "discretion", in this context, is not intelligible. None of the sections in the Code of Criminal Procedure or the Evidence Act gives an unfettered discretion. The combined effect of section 172, Code of Criminal Procedure, 1898 and section 161 Evidence Act is, that the accused person is entitled to see the "writing". Whatever that expression may mean, so much of the special diary as is necessary to the full understanding of the portion used, should certainly be allowed to be seen. These sections, in any case, do not contemplate any discretion in the unfettered sense.

No discretion under section 161.

15.21. On the question of discretion, it may be pointed out that section 161 of the Evidence Act is couched in mandatory terms. The section provides that the writing referred to "*must* be produced and shown to the adverse party, *if he required it;* such party may, *if he pleases,* cross-examine the witness thereupon." Thus, the adverse party has *the right* to inspect the document. The discretion is not of the court but of the party, as is indicated by the words "if he requires it".

15.22. In fact, literally speaking, section 39 of the Evidence Act is not applicable to documents used to refresh the memory, because the document used for refreshing memory is not "evidence", at least in so far as the cross-examination in respect of the portions referred to by the witness is concerned.

15.23. The position in England on this point is as follows :—

English law as to refreshing memory.

(a) The opponent may inspect the document in order to check it, without making it evidence.

(b) Moreover, he may cross-examine upon it without making it evidence, *provided his cross-examination goes no further than the parts which are used for refreshing the memory of the witness*[1].

(c) But, if he cross-examines *on other parts,* he makes them part of his evidence[2], the docment becomes an exhibit which may be inspected by the jury[3]; and any statement in the document is admissible as evidence of any fact of which direct oral evidence by the witness would be admissible. As to civil cases, this rule is confirmed by Civil Evidence Act, 1968, section 3(2).

15.24. It should be pointed out that the document used by a witness for refreshing his memory is not evidence in the strict sense, even in the scheme of the Evidence Act. Thus, for example, where a medical witness refreshes his memory by the postmortem examination report, the substantive evidence is the oral testimony given by him before the court on oath and in giving such evidence, he refers to the report which he had made[4].

Document not evidence.

15.25. If there is any difficulty as regards the use of police diaries by the defence consequential on the use by the prosecution for refreshing the memory of the police, the difficulty arises not from section 39 (or its proposed amendment), but from section 161.

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[1] *Gregory* v. *Tavernor* (1853) 6 C. & P. 280-281.

[2] *Senat* v. *Senat,* (1965) Probate 172 (1965) 2 All. E.R. 505, 51.

[3] *Wareham* v. *Routledge,* (1805) 5 Esp. 235.

[4] *State* v. *Jawahar Singh,* (1971) Criminal Law Journal 1656, 1661 (Rajasthan), following A.I.R. 1938 Mad. 336.

Practical utility.

15.26. Fifthly, it may be stated that the practical utility of the proposed provision lies in this, that it will make it clear that if the party relying on a statement does not use the whole thereof (i.e. what is relevant for explaining what is used), the adverse party is not left at its mercy.

Comment on the Allahabad case.

15.27. We would with great respect to the Allahabad High Court Full Bench decision, offer the following comments on that judgment :-

(i) The discussion in the judgment about section 39 of the Evidence Act was *obiter*. The principal question at issue in the case was[2], whether the accused was entitled to copies of statements recorded by the police, which were recorded in the police diary, or whether the fact that the statements happened to be recorded in the police diaries, made them confidential. The question at issue was not *whether a police officer could refresh his memory* (or, if he did so, what are the legal consequences). The question at issue was as to production of statements recorded under section 161, Code of Criminal Procedure, but contained in the police diary. Refreshing the memory was not a matter in issue.

(ii) Edge C. J. in the majority judgment, when discussing section 39, observed[3]—

> "From section 39 of the Indian Evidence Act, 1872, *may be inferred* how much—how much only—of the police diary may be seen by the accused, or his agent when the diary is used to refresh the memory by the officer who made it.....".

He said that the accused is entitled to see only the particular entry and so much of the said diary as is, in the opinion, of the court, necessary in that particular matter to the understanding of the matter so used and no more. He added, "in such cases, the court must be careful to see that *the discretion entrusted to it in deciding what may or may not be seen* by the accused or his agent is not abused." Unfortunately, no detailed reasons were given by way of analysing the phraseology of section 39, nor was there any discussion of the English law as to the extent of inspection and cross-examination on the basis of a document used to refresh memory[4].

(iii) In particular, the view taken as to whether a document is "admitted in evidence" merely because it is used for refreshing memory, was not referred to. There are specific English rulings[5] holding that the document thereby does not become evidence.

(iv) It would also appear that the full implications of section 161 of the Evidence Act, were also not discussed in the judgment. Section 161 of the Evidence Act is not even mentioned in that part of the judgment where section 39 is discussed.

(v) The reasons for applying section 39 of the Evidence Act are not set out in detail.

(vi) It may be noted that in holding that section 39 could be taken as a basis of inference for construing section 172 of the Criminal Procedure Code, Edge C. J. unfortunately did not consider the aspect, namely, that section 162

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[1]*Queen Empress* v. *Mannu*, (1897) I.L.R. 19 All. 390, 405 (F.B.).

[2]The main question in issue is so described in the dissenting judgments of Aikman J. at page 416 and Bannerji J. at page 424 in the I.L.R.

[3]Judgment, page 405.

[4]In England, whole document is open to inspection.

[5]*Burgess*, (1872) 20 W.R. 20 (Eng.).

of the Criminal Procedure Code (even as it stood then,—that is in the 1882 Code) expressly prohibited statements to the police from being "used as *evidence* against the accused", subject to section 27 of the Evidence Act. Section 172, second paragraph, did not make any change in so far as statements under section 162 were concerned. Use of the statements in favour of the accused was, of course, not prohibited by section 162, but, then, section 172 second paragraph, provided then (as it provides now) that the police diaries may not be used as "evidence in the case". This aspect could at least have been considered before regarding section 39 as applicable.

(vii) Unfortunately, it was also not noticed that in England, when a document is used to refresh the memory, the whole was allowed to be seen by the opposite party. No doubt, the English law did not contain a provision prohibiting the use of police diaries. But, on this point, once the police officer uses the diary to refresh his memory, the law in India would not be different, because all that is to be construed is section 161 of the Evidence Act, the construction whereof cannot be controlled by section 172, Criminal Procedure Code. Once the legislature has, in section 172, Cr. P.C., referred us to section 161 of the Evidence Act, it is section 162, –and only that section—that will govern the right of the opposite party to see and use the document. Such limitations as flow as regards the area of inspection and cross-examination under section 161, Evidence Act would flow from *that section only*, and not from section 172 of the Code.

It is in this respect that the use of the word "discretion" in the Allahabad case was, at least, avoidable, because section 161 of the Evidence Act gives no *discretion to the court*. It gives a right to the party, which he may exercise if he chooses. It is the party's discretion. This point was missed—perhaps because section 161 was not analysed in the judgment.

(viii) The reasons for the view that the court has a "discretion", are not given in brief or in detail. This may be because this part of the judgment is *obiter*.

(ix) Incidentally, it may be noted that in so far as the judgment holds that the statements recorded under section 161 become priviledged, if they *happen to be recorded in the police diaries*, it suffers from a weakness. The majority judgment fails *to discuss* a series of Calcutta cases[1]—all to the contrary and cited before it. It says that it prefers an earlier Calcutta case[2]. But that case merely decided that a witness cannot be compelled to refresh his memory.

On this point, the minority view of P. C. Banerji, J. that such a statement does not legitimately form part of the diary and is not entitled to privilege under section 172, agrees with the Calcutta view[3].

In one of the Calcutta cases[4], Trevelyan J., *in arguendo* observed

> "I do not know of anything more disastrous to the administration of criminal law than that the accused should be debarred from having access to information to which he has a right, and to which he is not absolutely debarred from having access, by some express provision of the Legislature."

The actual decision was also the effect that the accused was not debarred.

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[1]*Sheru Sha*, I.L.R. 20 Cal. 642 (reviews cases).

[2]*Emp.* v. *Kali Churun*, I.L.R. 8 Cal. 154.

[3]For legislative developments, see—

(a) A.I.R. 1928 Pat. 215.

(b) A.I.R. 1935 Rang. 370.

(c) I.L.R. 33 Cal. 1023.

(d) A.I.R. 1935 Sind. 145.

[4]*Sheru Sha*, (1893) I.L.R. 20 Cal. 642, 644, (Trevelyan and Rampini, JJ.).

Recommendation.

15.28. Having considered all aspects of the matter, we recommend that section 39 should be revised as under:

REVISED SECTION 39

(1) When any statement of which evidence is given-

(a) forms part of a longer statement or of a conversation or of an isolated document, or

(b) is contained in a document which forms part of a book or of a connected series of letters or papers,

then, *subject to the provisions of sub-section (2), the party giving evidence* of the statement *shall give in evidence* so much, and no more, of the statement, conversation document, book or series of letters or papers *as is* necessary in that particular case to the full understanding of the nature and effect of the statement and of the circumstances under which it was made.

(2) *Where such party has failed to give in evidence any part of the statement, conversation, document, book or series of letters or papers which is necessary as aforesaid, the other party may give that part in evidence.*

CHAPTER 16

JUDGEMENTS—SECTION 40

Introductory

16.1. We shall now proceed to consider the provisions relating to judgments. These are contained in sections 40 to 44.

Basic principles

16.2. The basic principles underlying these sections are as follows :

(1) It is a matter of public policy that subject to statutory rights of appeal and the like, the judgments of a competent court of law, acting within the scope of its jurisdiction, should be final and *conclusive as between the parties concerned.*[1]

(2) A judgment, besides being conclusive, may bar fresh proceedings on the same matter[2].

(3) While the first proposition is concerned with the parties, certain types of judgments which pronounce upon status are *conclusive against all persons*[3]. Briefly, these are judgments in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction.

(4) Other judgments, orders and decrees relating to matters of public nature *are admissible,* but they are not *conclusive proof* of what they state[4].

(5) In other cases, the judgments, orders and decrees are inadmissible[5], except where the existence of such judgment, order or decrees is a fact in issue or is relevant under some other specific provision of the Evidence Act[6].

As regards the "other provisions" of the Act, the provision most often discussed in this context is section 13 of the Evidence Act, but that is also confined to "transactions" showing the exercise of a right and the like.

(6) Certain vitiating factors can, however, be proved to destroy the effect of judgments which are conclusive or relevant[7].

Section 40.

16.3. We shall now discuss the individual sections in this group. Under section 40—

> "The existence of any judgment, order or decree which by law prevents any Court from taking cognisance of a suit or holding a trial, is a relevant fact when the question is whether such Court ought to take cognisance of such suit, or to hold such trial."

Two-fold application of section 40.

16.4. The section has a two-fold application. In civil cases, it becomes applicable usually when a specific statutory provision precludes the Court from trying a suit. This could be for a variety of reasons, e.g.—*res judicata,* and numerous procedural provisions in the Code of Civil Procedure relatable to previous judgments. In criminal cases, the pleas of previous conviction, previous

[1]Section 11, Code of Civil Procedure, 1908.
[2]Section 40, Evidence Act.
[3]Section 41, Evidence Act.
[4]Section 42, Evidence Act.
[5]Section 43, Evidence Act, earlier half.
[6]Section 43, Evidence Act, later half.
[7]Section 44, Evidence Act.

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acquittal, and other pleas in bar, contained in the Code of Criminal Procedure or Special Acts, may bring the section into play.

Issue estoppel in criminal cases.

16.5. It may be noted that even in criminal cases there may be judgments which bar the trial not of the whole case, but of a particular issue, known as issue estoppel.

Section 40 — "holding a trial". Trial of issues.

16.6. The principle of the section does not need further comments, and we shall now proceed to deal with a point of detail. While providing that the existence of any judgment, order or decree, which, by law, prevents any court from taking cognizance of a *suit* or *holding* a trial is a relevant fact when the question is whether such court ought to take cognizance of such suit or to hold such trial, section 40 does not, in terms, deal with the case where a subsequent court, though not precluded from trying a *suit*, is *precluded from trying a particular* issue. But, obviously, the section should be construed widely, so as to cover such cases also. The section has to be read along with the provisions relating to *res judicata*, as embodied in the Code of Civil Procedure,[1] and other provisions where relevant. That Code bars the trial, not only of suits, but also of issues which have been previously decided between the same parties. We have also referred above to "issue stoppel" in criminal cases.[2]

16.7 to 16.11. In view of what is stated above, it appears desirable to make the language of section 40 clear on this point, by providing that "suit" and "trial" in the section include part of a trial or part of a suit. *In Gujju Lal* v *Fateh Lal*[3], Garth C.J. gave an extended meaning to the words "holding a trial", and made these observations: "But I cannot doubt that it was intended to include all judgments which by law operate to prevent a court, whether civil or criminal from taking cognizance of suit or trying any particular issue. The words "holding a trial" are amply large to admit of this construction .....". At the same time, he criticised the language of the section in these words: "It is true, that section 40 might *have been clearly worded*[4]. It has, in fact, much the same defect as section 2 of Act VIII of 1859, which was pointed out by the Privy Council in the case of *Soorjo Monee* v. *Saddanund*[5].

Recommendation.

16.12. In view of this judicial criticism of the language of the section it is desirable that the section should be widened by suitable amendment on the above point. Accordingly, we recommend that section 40 should be suitably revised. The following is a rough redraft.

REVISED SECTION 40

"The existence of any judgment, order or decree which by law prevents any Court from taking cognizance of a suit *or issue* or holding a trial or *determining a question,* is a relevant fact when the question is whether such Court ought to take cognizance of such suit *or issue,* or to hold such trial *or determine such question, as the case may be.*"

SECTION 41

I. INTRODUCTORY

16.13. Section 41 reads—

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

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[1]Section 11, Code of Civil Procedure, 1908.

[2]See Discussion as to "issue estoppel" *supra*.

[3]*Gujju Lal* v. *Fateh Lal*, (1880) I.L.R. 6 Calcutta 171, 190.

[4]Emphasis added.

[5]*Soorjo Monee* v. *Saddanund*, 12 B.L.R. 304 (P.C.).

confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant.

16.14. Such judgment, order or decree is conclusive proof—

that any legal character which it confers accrued at the time when such judgment, order or decree came into operation.

that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment, order or decree declares it to have accrued to that person;

that any legal character which it takes away from any such person ceased at the time from which such judgment, order or decree declared that it had ceased or should cease;

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

Expression "judgment" *in rem* why not used.

16.15. The topic to which this section relates is dealt with under the head of "judgments *in rem*" in many text books and commentaries, but that expression, which is even otherwise not very appropriate, has been deliberately avoided by the legislature.

16.16. In an early Madras case,[1] Holloway J., and in a Calcutta case,[2] Barnes C.J., elaborately reviewed the law regarding judgments *in rem* and how far they were admissible in evidence. Peacock, C.J. observed—

"..... the effect of a decree in a suit for a divorce, *vinculo matrimoni* is to cause the relationship of husband and wife to cease. It is conclusive upon all persons that the parties have been divorced, and that the parties are no longer husband and wife; but it is not conclusive or even *prima facie* evidence against strangers that the cause for which the decree was pronounced existed. For instance, if a decree between A and B were granted upon the ground of adultery of B with C, it would be conclusive as to the divorce, but it would not be even *prima facie* evidence against C that he was guilty of adultery with B, unless he were a party to the suit."

16.17. The Calcutta case[3] was followed with approval in a Madras case.[4] Stone J., as he then was, observed:

"Though it be necessary as a step to making a declaration which will operate *in rem* to find a fact, that finding will not bind third parties in subsequent proceedings."

"This statement has my respectful concurrence. Applying the principle stated therein, it follows that the order of adjudication of a debtor as insolvent operates *in rem*, but the finding on which it is based is not binding on third parties in subsequent proceedings even though that finding was necessary and formed the basis of the order."

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[1] *Yarakalamma Nagamma* v. *A. Naramma*, (1864-65) 2 M.H.C.R. 276.
[2] *Kanyalal* v. *Radha Churn*, (1867) 7 W.R. 338, 344 Beng. L.R. Sup. Vol. 662 (F.B.)
[3] *Kanyya Lal* v. *Radha Churn*, (1867) 7 W.R. 338, Beng. L.R. Supp. Vol. 662 (F.B.).
[4] *In re an Advocate*, A.I.R. 1931 Mad. 441.