CHAPTER VI

OF THE EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE

91. Evidence of terms of contracts, grants and other dispositions of property reduced to form of document..—When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

Exception 1.—When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.

Exception 2.—Wills [1][admitted to probate in [2][India] may be provided by the probate].

Explanation 1.—This section applies equally to cases in which the contracts, grants or dispositions of property referred to are contained in one document, and to cases in which they are contained in more documents than one.

Explanation 2.—Where there are more originals than one, one original only need be proved.

Explanation 3.—The Statement, in any document whatever, of a fact other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact.

Illustrations

(a) If a contract be contained in several letters, all the letters in which it is contained must be proved.

(b) If a contract is contained in a bill of exchange, the bill of exchange must be proved.

(c) If a bill of exchange is drawn in set of three, one only need be proved.

---

1. *Subs by Act* 18 of 1872, S. &, for "under the Indian Succession Act".
2. *Subs* by Act 3 of 1951, S. 3. and Sch., for "The States."

(d) A contracts, in writing, with *B*, for the delivery of indigo upon certain terms. The contract mentions the fact that *B* had paid *A* the price of other indigo contracted for verbally on another occasion.

Oral evidence is offered that no payment was made for the other indigo. The evidence is admissible.

(e) *A* gives *B* a receipt for money paid by *B*.

Oral evidence is offered of the payment.

The evidence is admissible.

COMMENTARY

Principle.—This section is an illustration of what in English law is known as "the best evidence rule" which requires that the best evidence of which the case in its nature is susceptible should always be presented. This rule does not demand that the greatest amount of evidence which can possibly be given of any fact should be offered; it is designed to prevent the introduction of such evidence as, from the nature of case, allows room for supposing that better evidence is in the possession of that party, and to prevent fraud. For when better evidence that which is offered is withheld, it is only fair to presume that the party has some sinister motive for not producing it, which would be frustrated if it were offered.[1] It is a cardinal rule of evidence, not one of technicality but of substance, which is dangerous to depart from that where written documents exist, they shall be produced as being the best evidence of their own contents.[2] It is likewise a general and most inflexible rule that wherever written instruments are appointed, either by the requirements of the law, or by the compact of parties, to be the repositories and memorials of truth, any other evidence is excluded from being used either as a substitute for such instruments, or to contradict or alter them. This is a matter both of principle and policy; of principle, because such instruments are in their nature and origin entitled to much higher degree of credit that parole evidence; of policy, because it would be attended with great mischief, if those instruments upon which men's rights depended were liable to be impeached by loose collateral evidence. Where the terms of the parties as the expositor of their intentions, is the only instrument of evidence in respect of that agreement, which the law will recognize, so long as it exists. for the purpose of evidence.[3] The rule with regard to writings is that oral proof cannot be substituted for the written evidence of any contract which the parties have put into writing. And the reason is that the writing is tacitly considered by the parties themselves as the only repository and the appropriate evidence of their agreement.[4]

Section 10—A of the Deccan Agriculturists' Relief Act overrides section 91.—The object of section 10-A of the Deccan Agriculturists' Relief' Act being to set out the real nature of a transaction by admission of oral evidence which otherwise would be ex-

1. Taylor, § 391.
2. *Dinomoyi* v. *Roy*, 6 CLR 101, 108, 7 IA 8 (PC).
3. Stark Ev., 648 *Kasheenath Chatterjee* v. *Chuny Churn Banerjee*, 5 WR 68 (FB); *U Sin* v. *Tun Si*, 1935 R 473.
4. Per Couch, CJ in *Kedarnath Dutt & another* v. *Sham Lall Khettry*, 20 WR 150, 153; 11 BLR 405; approved by the Privy Council in *Subramanya* v. *Lutchman*, 50 IA 77; 50 C 338; 1923 PC 50; 71 IC 650; *Rachpal Maharaj* v. *Bhagwandas Daruka*, 1948 P 251; 26 P 260.

cluded by the ordinary law, it may be taken that the legislature intended that the section should override not merely Section 92 but also, where necessary, section 91 of the Evidence Act.[1]

Section 91 is applicable to third parties.—Whereas in section 92 of the Evidence Act the Legislature has prevented oral evidence being adduced for the purpose of varying a contract as between the parties to the contract, no such limitations. are imposed under section 91 of the Act. Under section 91 even a third party, if he wants to establish a particular contract between certain others, either when such contract has been reduced to a document or where under the law such contract has to be writing can prove such contract only by the production of such writing.[2]

Distinction between the provisions of section 64 and those of section 91.—There is a subtle but real distinction between the rule enacted by section 64 of the Evidence Act and that enacted by the present section. Section 64 deals with the mode of the proof of a document itself; but the present section deals with the mode of proof of certain transaction which have been either actually reduced to writing, or are required by law to be reduced to writing. It is necessary to bear in mind that the contents of all documents, whatever be their nature, must be proved by the production of the document, itself, except in those case in which secondary evidence is admissible.[3] "If, however, the question is not primarily as to the contents of a document, but as to the existence of matters of fact of which documents form the record and proof, other considerations come into play, which are the peculiar subject-matter of the portion of the Act. The question then arises whether the fact of such record excludes other evidence of the matters which are so recorded, and whether these matters can, and if so, in what manner, be affected by such other evidence".[4]

Three classes of cases where oral evidence is excluded by documentary evidence.—Reading Section 91 with Section 64 the rules as to the exclusion of oral evidence by documentary evidence may be stated as follows :—

The first class of cases in which oral evidence cannot be substituted for the writing are those in which there exists any instrument which the law requires to be in writing. The law having required that the evidence of transaction should be in writing, no other proof can be substituted for that, so long as the writing exists and is in the power of the party.[5] In this class of cases it is immaterial whether the matter has been reduced to writing or not ; even if the matter has not been reduced to writing, it cannot be proved by oral evidence as a duly prepared document is the only permissible from the proof.

The second class of cases falling within the rule requiring the contents of a document to be proved by the document itself, if its production be possible, consists of those in which the parties have of themselves chosen to put their contract into writing. Here also oral proof cannot be substituted for the written evidence. The instrument may indeed be regarded, in some measure, as the ultimate fact to be proved, and has tacitly been treated by the parties themselves as the only repository and the appropriate evidence of their agreement. The written contract is not collateral, but is of the very

1. *Dasappa Gurubasappa Kittur* v. *Tawaya Virupavappa*, 31 Bom LR 1266.
2. *Meenakshisundaram Pillai* v. *S. T. Chencha Mudaliar and another*, 1928 M 459 ; 109 IC 18.
3. See Sections 61-65.
4. Woodroffe, Ev., 9th Ed., 609.
5. Taylor, § 399 ; Section 91, Ev., Act.

essence of the transaction, and consequently, in all proceedings, civil or criminal in which the issue depends in any degree upon the terms of a contract, the party whose witnesses show that it was reduced to writing must either produce the instrument, or give some good reason for not doing so.[1]

The third class of cases falling within the rule that a written document can only be proved by the instrument itself embraces every writing not falling within the two classes already discussed, as to the existence of contents of which there is a dispute and which is material to the issue between the parties, and which is not a mere memorandum of some other fact.[2]

Oral evidence is not excluded where the fact to be proved is neither the contents of a document, nor the terms of a contract, grant or disposition of property, nor a matter required by law to be reduced to writing.—The section contemplates a "document" which means something purporting to have been executed by a party and therefore signed by him in token of execution. In the absence of a document legally so called none of the provisions relating to the proof of documents need be considered.[3] If the fact to be proved is neither the contents of a document nor the terms of a contract grant or disposition of property nor a matter required by law to be reduced to writing, oral proof of it is not excluded. Where a matter does not fall within any of the three classes already discribed, no reason exists why it should not be proved by oral evidence. For instance, if a written communication be accompanied by a verbal one to the same effect, the latter may be received as independent evidence though not to prove the contents of the writing, nor as a substitute for it ; the payment of money may be proved by oral testimony though a receipt be taken, a verbal demand of goods may be shown, though a demand in writing was made at the same time; the admission of a debt is provable by oral tersionay though a written promise to pay was simultaneously given.[4] Section 91 does not apply to a will as it is neither a contract nor a grant, nor a disposition of property, until the death of the testator makes it operative.[5] Under Mahomedan law a divorce, except in cases where the husband and the wife agree to dissolve the marriage for consideration, is not a contract within the meaning of Section 91. It may, therefore, be proved by oral evidence even if it was reduced to writing and the writing is inadmissible for want of stamp or is not produced.[6]

Explanation III; other evidence not excluded if the fact to be proved is a fact other than facts referred to in the section.—The statement, in any document whatever, of a fact other than the facts referred to in this section shall not preclude the admission of oral evidence as to that fact.[7] The facts referred to the section are, (i) the terms of a contract, grant or other disposition of property, and (ii) matters required by law to be reduced to writing. Where, therefore, the evidence tendered does not relate the terms of a contract, grant or disposition of property, or to a matter required by law to be reduced to writing, it will not be inadmissible. A contracts, in writing with B, for the delivery of indigo upon certain terms. The contract mentions the fact that B had paid A the price of

1. Taylor, § 401; Ssection 91, Ev., Act.
2. Talyor, § 409, Section 64, Ev., Act.
3. *Mohammed Tahir* v. *Sardar Bano*, 1952 A 782 ; 1952 AWR HC 7.
4. Taylor, § 415.
5. *Mohammad Yoonus* v. *Abdul Sattar Ismail*, (1936) 11 MLJ 444.
6. *Msl. Haliman* v. *The Crown*, (1946) 48 PLR 532.
7. Expt. 3 to section 91.

other indigo contracted for verbally on another occasion. Oral evidence is offered that no payment was made for the other indigo. The evidence is admissible,[1] as it does not relate to any of the terms of the written contract. A gives B a receipt for money paid by B. Oral evidence is offered of the payment. The evidence is admissible,[2] as it does not relate to the terms of a contract, grant or disposition of property. Similarly, though a receipt be given for the money, it may be proved that the money was not paid.[3] The fact of birth, baptism, marriage, death or burial may be proved by parole testimony ; for though the law requires a narrative or memorandum of the events to be entered in registers, the existence or contents of these registers form no part of the fact to be proved, and the entry is no more than a collateral or subsequent memorial of that fact, which may be used to furnish a satisfactory and convenient mode of proof, but cannot exclude other evidence, while the non-production of a register at most does no more than afford grounds for scrutinizing such evidence with more than usual care.[4] Where a contract of marriage is not signed by either of the contracting parties but is in the nature of a memorandum prepared by *nikah-khwan*, it is open to one of the parties to prove by other evidence, oral or documentary, that he or she had been married and also the terms.[5] A deed of relinquishement of occupancy rights is not a document of the kind mentioned in Section 91, and, therefore, does not prevent the Court from basing its finding upon other evidence, should any such evidence exist.[6] When a loan has been taken and is evidenced by a document, oral evidence is not excluded to show what the purpose of the loan was, especially when the document is silent on the point.[7] See notes to Section 65 under the heading "Section 64 and 91; facts evidenced by documents may, in some cases, be proved by independent oral evidence."

The date of document.—The date of a document is not a term of a contract[8] therefore, neither oral evidence to prove the date on which a document was written, nor oral evidence to prove that the document was not written on the date it bears, is inadmissible. The date of a partition deed which is inadmissible for want of registration may be looked at to starting point of adverse possession.[9]

Endorsement of payment on the back of a bond.—See notes to Section 92.

Endorsement on a deed of alienation, not a record of contract.—Endorsement by a reversioner on the deed of alienation by a Hindu widow reciting that he knew the contents of the deed, is not record of contract entered into by the alienee with the suversioner for obtaining him consent to the transanction. Therefore oral evidence of the alienee regarding the consent of the reversioner is not inadmissible.[10]

Oral proof of payment or non-payment of money for which a receipt has been taken is admissible.—Section 91 of the Evidence Act excludes oral evidence of the terms of a contract, grant or disposition of property or of the terms of a matter required

1. Ill. (d) to Section 91.
2. Ill (e) to Section 91.
3. Section 92, ill. (i) : *Sripat Singh & others* v. *Naresh Chandra Bose and others* 1932 P 332: 140 IC 104 : Hukum Chand v. Shambhu Nath 1935 A 346 (1) : *Mohammad Taki Khan* v. *Jang Singh*, 1935 A 529 ; 156 IC 362 (FB).
4. Taylor, § 416.
5. *Mst. Amna* v. *Lakhmi Chand and Others*, 1934 L 705 ; 154 IC 979.
6. *Venkata* v. *Sengoda*, 2 M 117.
7. *Kistur Chand Tewari* v. *Rajani Kanta Mukherjee*, 70 CLJ 201 ; 1940 C 137.
8. *Punjab National Bank, Ltd.* v. *Mathra Das*, 1933 L 194 ; 143 IC 634. For a document bearing two dates, see *Movarak Kandi Achutan* v. *Thanaiyatuthial Achuthan*, 1941 M 587.
9. *Punjab National Bank, Ltd.* v. *Mathra Das*, 1933 L 194 ; 143 IC 634.
10. *Vishnoodhar* v. *Bishnoo Prasad*, 1951 N 390 ; 1951 NLJ 202.

by law to be reduced to writing. Oral evidence of the payment of money, for which a receipt has been taken, is not, therefore, inadmissible if the receipt is not produced, or is not admissible owing to its not having been registered or owing to any other similar reason.[1] A mere receipt for payment of money is not a contract, grant or disposition of property; oral evidence in proof of the payment of money evidence by the receipt is, therefore, admissible.[2] Conversely where a receipt for money has been given, it may be shown by oral evidence that the money was, in fact, not paid.[3]

In the case of a contract, grant or disposition oral evidence is excluded only if the transition has been actually reduced to writing; but in the case of a matter required by law to be reduced to writing oral evidence is excluded whether the matter has been reduced to writing or not.—The section deals with the proof of two distinct matters: (i) the terms of a contract, grant or disposition of property; and (ii) the terms of matter required by law to be reduced to writing. In the case of the former, to exclude oral evidence it is necessary to show that the terms of the contract, grant or disposition of property were reduced to writing; but in the case of the latter, the language of the section seems to lend itself to the construction that oral evidence is excluded whether the matter has or has not been reduced to writing . "When a particular transaction is required by law to be in a particular form, then it follows that no one setting up such a transaction can seek to prove it except by showing that it was done in that form."[4] Therefore, where a contract, grant or disposition of property is itself a matter required by law to be reduced to writing, oral evidence in proof of the term of that contact, grant or disposition will be inadmissible whether it has been actually reduced to writing or not. Thus, in the provinces where their Transfer or Property Act[5] is in force, certain transfers, e.g., sales, mortgages, gifts, etc, are required to be in writing and oral evidence in proof of the terms of such transfers is inadmissible whether such transfers have or have not been reduced to writing: but in the provinces where the Transfer of Property Act is not in force, oral evidence of such transfers will be inadmissible only when such transfers have been actually reduced to writing. For instance, oral evidence of a sale or a mortgage will be admissible in the Punjab[6] as well as in Burma, if the sale or a mortgage has not been actually embodied in a document.[7] Oral evidence to prove the contents of the unregistered *ekrarnama* creating a further charge on a mortgaged property is not admissible.[8]

---

1. *Abdul Rahman* v. *Kripa Ram* , 1928 L 51 (1) ; 104 IC 585 ; *Chodhari Ramprasad and others* v. *Nathuram*, 1923 N 32 ; 68 IC 494 ; *Sharaf Ali Khan* v. *Jogandar Singh and Narajan Singh*, 98 PR 1916 ; 87 IC 132 ; *Appamna Nayuralu and others* v. *Ramanna*, 23 M 92 ; *Waman Ramchandra and others* v. *Dhondiba Krishnaji*, 4 B 126. p 137 (FB) ; *Muhammad Khan* v. *Ghulam Rasul*, PLD 1952 L 40. *Y. Ganganaidu* v. *M. Surkantam*, AIR 1993 AP 130.
2. *Sardar Singh and others* v. *Iqbal Narain and others*, 1925 O 257 (2) ; 80 IC 57.
3. Section 92, ill (i) : *Sripat Singh and others* v. *Naresh Chandra Bose and others*, 1932 P 332 ; 140 IC 104 ; *Hukum Chand* v. *Shambhu Nath*, 1935 A 346 (1) ; *See Mohammad Taki Khan* v. *Jang Singh*, 1935 A 529 ; 156 IC 362 (FB).
4. Per Ayyangar, J., in *Meenakshisundaram Pillai* v. *S. T. Chenchu Mudaliar and another*, 1928 M 459 ; 109 IC 18.
5. Act IV of 1882 ; *See Dammulal Babulal Jain* v. *Mohammad Bhai Hali Suleman Kacchi*, 1955 N 306.
6. But see Notification No. 183-St. dated April 27, 1935, whereby Sections 54 (Mortgages) and 107 (sales) , T. P. Act, have been declared to be in force in all Municipalities and Notified Areas of the Punjab .
7. *Ma Saw* v. *Maung Ba*, 5 R 650 ; 1925 R 32 ; 106 IC 476.
8. *Sheobachan Pandey* v. *Madho Saran Choubey*, 1952 P 73.

Oral evidence is excluded only if all the terms of the contract, grant or disposition have been reudced to writing.—In order to attract the application of the section the contract must contain all the terms. If some of the terms are oral and some written, the writing would not be the final depository of the condition agreed to and would not, therefore, be hit by the section . But if all the terms are there, the section would apply even if there are no signature and no proposal and acceptance or date embodied in the document. The section contemplates "all the terms" and not whole of the contract, in the sense of signature, dates, etc.[1] The burden of proving that the terms of a contract, grant or disposition of property have been reduced to a document is on the party who asserts it.[2] If the parties intend to reduce all the terms of the contract to writing then no parole, evidence will be admissible; but if they intend to reduce to writing only a portion of the terms of the contract, then they will be entitled to give parole evidence of the terms which they do not intend to reduce to writing.[3] When the whole contract has not been reduced to writing, e.g., where the writing is merely a memorandum, other evidence can be adduced to prove the contract.[4] Where a memorandum, evidencing an equitable mortgage by deposit of title-deeds is simply a record of a completed transaction and does not constitute the bargain thereof it does not require registration. In such a case, oral evidence as to the deposit of title-deeds is admissible.[5] A *pyatpaing* in Burma is signed not for the purpose of recording a contract but for the purpose of reporting to the revenue authorities for revenue purposes what has been done; it cannot be described as a document recording the terms of a contract.[6] From the mere fact that a bill of exchange or a *hundi* has been executed it does not necessarily follow that the whole of the contract between the parties has been reduced to the form of such a document.[7] Where a contract of marriage is not signed by either of the contracting parties but is in the nature of a memorandum prepared by a *nikah-khwan* belonging to the Sharaih Department of Musal, it is open to one of the parties to prove by other evidence, oral or documentary, that he or she had been married and also the terms.[8]

When a document is inadmissible by reason of its not having been registered, it cannot be admitted in evidence for the purpose of showing that it embodies all the terms of the contract between the parties so as to introduce the restrictions of Section 91 of the Evidence Act.[9]

Whether bought and sold notes constitute a contract so as to exclude other evidence?—A broker is a middleman or negotiator between the vendor and the purchaser and he frequently acts as the agent of both.[10] A broker's bought and sold notes

1. *Balram Baoji Nasare* v. *Mahadeo Panduji*, 1949 N 389 ; ILR 1949 N 849 .
2. *U. Sin* v. *U. Tua Si*, 1935 R 473 ; 160 IC 314.
3. *Mohammad Akbar Khan* v. *Attar Singh*, 17 L 557 ; 1936 PC 171 ; *Lalmani Pande* v. *Gopal Sah*, 1945 A 221; *Sheonath Prasad* v. *Sarju Nonia*, ILR (1943) A 610 ; 1943 A 220 *Jadu Rai and others* v. *Bhubotranh Nandy and others*, 17 C 173 p. 176. 177.
4. *Sunder Singh and others* v. *Ram Saran Das*, 14 L 137 ; 1933 L 61 ; 142 IC 754 ; *Chimanram Motilal* v. *Divanchand Govidram*, 56 B 180 : 1932 B 151 ; 137 IC 478 ; *Co-operative Company Limited, Sharanpur* v. *Bhagwan Das and Co.* 1930 A 615 ; 128 IC 229 ; *Kundan Lal* v. *Sahu Bhikari Das*, 51 A 530 ; 1929 A 254 ; 116 IC 293.
5. *Rakhal Das Chattopadhaya* v. *Indubala Basu*, (1935) 61 CLJ 473 ; *Rachpal Maharaj* v. *Bhagwandas Daruka*, 1948 P 251 ; 26 P 260 *Ramchandra Laxman* v. *The Bank of Kolhapur*, 1952 B 315 ; 54 BLR 245 ; ILR 11952 B 775.
6. *Maung Kin Lay and another* v. *Maung Tun Thaing and another*, 5 R 679 ; 1928 R 53 ; 106 IC 503.
7. *Kundan Lal* v. *Sahu Bhikhari Das*, 51 A 530 ; 1929 A 254 ; 116 IC 293 .
8. *Mst. Ainna* v. *Lakhni Chand and others*, 1934 L 705 ; 154 IC 979.
9. *Datto Shivram Gosavi* v. *Babasaheb Malhar Deshpande*, 58 B 419 ; 1934 B 194 ; 150 IC 555.
10. *The Municipal Corportion of Bombay* v. *Cuverji Hirji and others*, 20 B 124, 129 ; Story on Agency. p.

do to always constitute the whole contract, and may sometimes be merely sent notes to his employers to give them information. In such a case the contract between the vendor and the purchaser may be proved by other evidence.[1] When the bought-and-sold notes do not agree, they will not be treated as constituting the contract; but when they agree, as a rule, they will be presumed as constituting the contract.[2] In Calcutta, once the authority of the broker is established, bought-and-sold notes will presumably be treated as constituting the contract.[3] Where the purchaser alters the terms of a sold note before signing it, and this alteration is not assented to by the vendor, there is no completed contract.[4] When the bought-and-sold notes constitute the contract, the contract must be proved by the notes; other evidence will be inadmissible to prove the terms of the contract,[5] and evidence inconsistent with the terms embodied in the notes will be excluded by Section 92 of the Evidence Act;[6] though, of course, the fact the name of a party was inserted in the notes by mistake,[7] or that another party not disclosed in the notes is liable as principal[8] or that any term of the notes was altered by fraud,[9] will be provable by other evidence.

Other evidence is inadmissible in proof of the terms of a contract, grant or disposition of property, if such terms have been reduced to writing.—If a transaction amount to a contract, grant or other disposition of property, and it has been reduced to the form of a document, no evidence can be given in proof of the terms of such contract, grant or disposition of property except the document itself or secondary evidence of the contents of the document where such evidence is properly admissible under the provisions of section 65 of the Act,[10] It is doubtful whether the word "grant " is limited to grants of property only or includes other grants as well.[11] The expression "disposition of property " includes all cases of transfer of property. An agreement to refer to arbitration is not a contract, grant or disposition of property;[12] nor is a receipt, acknowledging payment of a money, any one of these matters.[13] Oral evidence is proof of such agreement or payment of money is not, therefore, excluded by Section 91.[14] Section 91 of the Evidence Act applies to an agreement to sell, and it excludes oral

---

29 ; Fairlie v. *Fenton*, LR 5 Ex., p. 169.

1. *Jadu Rai and others* v. *Bhubotaran Nundy and others*, 17 C 173 , 185-6, 194 ; *Sievewright* v. *Archibald*, 20 LJQB 529 ; 17 QB 115 ; *see also* 2 CLR 245.
2. See *Jadu Rai and others* v. *Bhubotaran Nundy and others*, 17 C 173 , 194-5.
3. *Jadu Rai and others* v. *Bhubotaran Nundy and others*, 17 C 173 See *John Cowie and others* v. *William Remfry and others*, 5 MIA 448.
4. *Ali Shain Shoke and others* v. *Mothia Chetty and others*, 27 IA 30 ; 27 C 403 (PC).
5. *S.A.. Ralli and others*, v. *Caramalli Razal*, 14 B 102.
6. *Jadu Rai and others* v. *Bhubotaran Nundy and others*, 17 C 173
7. *Mohomed Bhoy Puddumsee* v. *Chutterput Singh and another*, 20 C 854.
8. *E. Hoe Chau* v. *Babu Chotalal Ujamsi*, 1939 R 139.
9. *Durga Prosad Sureka*, etc. v. *Bhajan Lal*, etc., 31 IA 122 ; 31 C 614 (PC).
10. *Janardan Parida* v. *Prandhan Das*, 1940 P 245 ; *Harihar Pandey* v. *Vindhayachal Rai* 1949 P 170 : 29 PLT 48 ; 27 P 114 ; *Dalmia Jain & Co. Ltd.* v. *Kalyanpore Lime Works Ltd.*, 1952 P 393.
11. *Somasundara Mudaly* v. *Duraisami Mudaliar*, 27 M 30, 32, where this point was raised but not decided.
12. *Babu Ram* v.*Lala Ram*, 1929 A 415 : 116 IC 853 ; *See Gadula Rami Naidu* v. *Meesala Seethan Naidu*, 1935 M 276.
13. *Sardar Singh and another* v. *Iqbal Narain and others*, 1925 O 257 (2) : 80 IC 57.
14. *Babu Ram* v. *Lala Ram* , 1929 A 415 ; 116 IC 853 ; *Sardar Singh and another* v. *Iqbal Narain and others*, 1925 O 257 (2) ; 80 IC 57 .

evidence of such agreement as well as of what took place when the agreement was made, if the agreement has been reduced to writing and the writing is not produced.[1] Terms of a contract between the parties cannot be ascertained by allowing parole evidence as to what transpired antecedent to the contract or what the parties did subsequent to the contract.[2] Under Section 91 of the Evidence Act no evidence can be given in proof of the terms of a compromise or agreement,[3] grant,[4] sale,[5] mortgage,[6] equitable mortgage,[7] lease,[8] sub-lease,[8] partition,[10] or any other disposition of property, where the transaction has been embodied in a document and the document is either inadmissible in evidence for some reason or is not produced, and party seeking to prove the terms of the transaction is unable to establish his right to give secondary evidence of the contents of the document. Where it is clear on consideration of a memorandum accompanying a deposit of title deeds that it is nothing more than a record of the transaction which took place between the parties, and creates evidence of the circumstances in which the title deeds were deposited, and there is no provision which can be described as an operative provision, it does not require registration, and it does not exclude oral evidence of the mortgage transaction.[11] By a document purporting to be an agreement the defendants agreed to vacate the houses in which they were then living and to construct their buildings on another part of the land. As regards the site, they agreed to vacate half of it and on account of this relinquishement they agreed to pay rent at Rs. 2 instead of Rs. 4, which they had been previously paying. They further stipulated that in the event of their not making the above changes by a certain date, the plaintiff should have the right to eject them. Held, that the document was compulsorily registrable and that the relationship between the parties could not be proved by oral evidence apart from the deed.[12] a

1. *Vyankatesh* v. *Ganesh*, etc., 61 IC 896.
2. *Dinkerrai Lalit Kumar* v. *Sukhdayal Rambilas*, 1947 B 293 ; 48 BLR 821.
3. *Trimbak Narayan* v. *Yadorao*, 1940 N 116 ; *Jagwanti* v. *Uditnarain* and *others*, 1927 A 587 ; 102 IC 8 ; *Bishunath Ojha* v. *Sheo Prakash Ojha and others*, 1924 A 842 ; 78 IC 1043 .
4. *Muhammad Khan and another* v. *Sheo Bhikh Singh and another*, 1929 O 447.
5. *Maung Ba and another* v. *Maung Kywe and another*, 6 R 125 ; 1928 R 124 ; 110 IC 735 ; *Safar Ali etc.* v. *Mahesh Lal Chowdhury etc.*, 34 IC 956 ; *Mst. Permeshri Devi* v. *Autar Singh*, 1921 L 113 ; 67 IC 144 ; 3 LLJ 173 .
6. *Manug Tun* v. *Manug Khan*, 2 R 441 ; 1925 R 61 ; 84 IC 987 ; *Ma Saw* v. *Maung Ba*, 5 R 650 ; 1928 R 32 ; 106 IC 476.
7. *Subramanya and another* v. *Lutchman and others*, 50 IA 77 ; 50 C 338 ; 1 R 66 ; 1923 PC 50 ; 71 IC 650 ; *see Chunilal Someshwar Bhatt* v. *Vithaldas Karsandas*, 1922 B 440 ; 68 IC 1005 ; *Rachpal Maharaj* v. *Bhagwandas Daruka*, 1948 P 251 ; 26 P 260.
8. *Datto Shivram Gosavi* v. *Babasaheb Malhar Desphande* 58 B 419 ; 1934 B 194 ; 150 IC 55; *Rajaramaji* v. *Ganesh*, 42 IC 629 ; 630 ; *Niadar Mal, etc.*, v. *J. Rank*, 63 IC 90 ; *Firm Karim Bakhsh Tajuddin* v. *Natha Singh and others*, 66 IC 904 ; 3 LLJ 14 ; *Budhan Teli and* others v,. *Madan Mohan Lal*, 1923 P 111; 68 IC 653.
9. *Ganesh Mondol* v. *Thanda Namsundrani and others*, 38 IC 489 ; *Jarit Khan and another* v. *Durfa Bewa, etc*, 15 IC 476 ; 16 CLJ 144.
10. *Ninsukhdas Sheonarayuan* v. *Gowaredhandas Bindrabandas*, 1948 N 110 ; ILR 1947 N 510 ; *Jiji Bai* v. *Chowdhary Ratan Singh* , 1927 N 113 ; 99 IC 448 ; *Narsingh Das* v. *Uttam Chand and others*, 1923 L 392 ; 76 IC 852 ; *Ma. Po Lun and others* v. *Ma E. Mai and others*, 1923 R 57 ; 74 IC 47 ; *Chandu Lal* v. *Daulat Ram and others*, 1924 L 286 (2) ; 69 IC 859 ; *Chhotaala Aditram Travedi* v. *Bai Mahakore, etc*, 41 B 466, 472- 474 : 40 IC 83. (This case brings out the distinction that separation in the sense of a change of legal relations as distinct from the terms upon which partition was effected may be proved by parol ; See also *Jairam Das* v. *Raj Narain*, 45 A 21 : 1922 A 493 : 70 IC 953.
11. *Rachpal Maharaj* v. *Bhagwandas Daruka*, 1948 P 251 : 26 P 260 ; *Rakhal Das Chattopadhaya* v. *Indubala Basu*, 61 CLJ 473 ; *Ramchandra Laxman* v. *The Bank of Kolhapur*, 1952 B 315 ; 54 BLR 245 ; ILR 1952 B 775.
12. *Mohammad Din* v. *Sardara, etc* 1934 L 743 (1) ; 148 IC 558 (1).

waif may be created orally; but if the terms of the disposition have been reduced to the form of a document under Section 91 of the Evidence Act no evidence can be given in proof of the terms of such disposition except the document itself, or secondary evidence of the document where secondary evidence is admissible under Section 65.[1] Where an *amalnamah* evidencing a settlement of land is inadmissible in evidence for want of registration no evidence is admissible on the question as to the persons for whom the settlement was made, or as to the extent of their shares settled.[2] If in an action to recover land against a tenant holding over, or in an action for the use and occupation of real estate, it should appear, either on the direct or cross-examination of the plaintiff's witnesses, that a written contract of tenancy has been signed, plaintiff must either produce it or account for its absence : and in an action by a landlord against a tenant for rent and non-repair, if it should appear that the parties had agreed by parole that the tenant should hold the premises on the terms contained in a former lease between the landlord and a stranger, a non-suit would be directed, unless the lease could be produced. The same strictness prevails where the question at issue is simply what amount of rent was reserved by the landlord, or who was the actual party to whom a demise had been made; or under whom the tenant came into possession.[3]

Evidence of original oral agreement preceding the written contract is inadmissible.—Section 91 of the Evidence Act applies not only to cases where the contract is brought labour or concluded by the writing, but also where the contract having been originally made by parole, is subsequently reduced to writing. There is always a completed oral agreement between the parties before it is reduced to writing. When the parities reduce the terms, orally agreed upon, to writing, then the document becomes under Section 91, the only means by which the terms can be proved in a Court of law. It is not open to any of the parties thereafter to seek to prove the terms of the contract by referring to the original oral agreement.[4]

Other evidence is admissible in proof of the factum or existence of a transaction as distinguished from its terms.—There is a distinction between proof of the terms of contract or grant and proof of the fact that a grant was made or a contract was entered in o The fact of a grant or contract as distinct from the terms of the grant or contract can be proved by other evidence.[5] Section 91 of the Evidence Act excludes other evidence in proof of the terms of a contract, grant or disposition of property, and not in proof of the *factum* or existence of any such transaction. Thus the fact of the existence of the particular relationship may be shown by parole evidence, though the terms which

---

Muhammad Ibrahim and others v. *Bibni Mariam*, 8 P 484 ; 1929 P 410 p. 412 ; 117 IC 628.

2 *Hem Chandra Roy*, etc. v. *Sashi Bhusan Sil*, etc., 63 IC 863, 864.

3 Taylor, § 401-402.

4 *The Punjab National Bank* v. *Choudhry*, 1943 O 392 ; *Nazir Khan, etc.* v. *Ram Mohan Lal, etc.*, 53 A 114 ; 1931 A 183 ; 133 IC 307 (FB); *Diwan Singh* v. *Gurbachan Singh etc.*, 1932 L 276 ; 137 IC 41 ; *Kuppuswami Goundan* v. *Chinnaswamy Goundan*, 1928 M 546, 548-49 : 111 IC 677 ; *Jawala Prasad* v. *Govind Das*, 1955 VP 41 ; *See also Jagwanti* v. *Udit Narain, etc.*, 1927 A 587 ; 102 IC 8 ; *Mst. Raj Rani* v. *Hukam Chand Jagdhar Mal*, 1930 L 675, 677; 125 IC 618 ; *Vyankatesh* v. *Ganesh etc.*, 61 IC 896 ; *Jairam Das* v. *Raj Narain*, 45 A 21 ; 1922 A 493 ; ; 70 IC 953 ; *Dula Meah* v. *Moulavi Abdul Rahman*, 1924 C 452 , 454 ; 81 IC 641 ; *Harichand Mancharam* v. *Govind Luxman Gokhale*, 50 IA 25 ; 47 B 355 ; 1923 PC 7 : 71 IC 763 ; *Dinkerrai Lalit Kumar* v. *Sukhdayal Rambilas*, 1947 B 293 ; 48 BLR 821.

5. *Parbhu Narain Singh* v. *Jitendra Mohan Singh*, 1948 O 307 ; 22 Luck 522 ; *West Punjab Government* v. *Akbar Hussain* PLD 1952 L 430 ; *Muhammad Khan* v. *Ghulam Rasul*, PLD 1952 L 40.

govern such relationship appear to be in writing.[1] The rule contained in section 91 applies to the terms and not to the *factum* of a contract. Evidence in disproof of the *factum* of a contract is not excluded.[2] If the fact of the occupation of land is alone in issue without respect to the terms of the tenancy, the fact may be proved by any competent parole evidence, such as payment of rent, or the testimony of a witness who has seen the tenant occupy, notwithstanding it appears that the occupancy was under an agreement in writing.[3] The fact of partnership may be proved by parole evidence of the acts of the parties without producing the deed; and the fact that a party has agreed to sell goods on commission may be established by oral testimony, though the terms respecting the payment of the commission have been reduced into writing. Similarly,[4] division status and the fact that there has been a partition may be proved either by direct oral evidence or by circumstantial evidence, e.g., by evidence of the acts and conduct of the parties, and of separate possession, when the partition deed is inadmissible in evidence owing to its not having been registered,[5] where an award creating a charge on a portion of the joint immovable property in favour of some members of the family is inadmissible for want of registration, oral evidence is not excluded to prove that at or about the time the charge was created there had been a disruption in the joint family.[6] An unregistered partition deed may be looked at to ascertain the nature of possession, as such use of an unregistered partition deed is not prohibited by section 49 of the Registration Act.[7] But evidence to show that certain debt realized by one of the parties was not a joint debt is not admissible, as such evidence relates to a term of the partition.[8] It is permissible to look at the date of an unregistered partition deed in order to ascertain the date on which possession of certain property commenced.[9] Where the terms of the

1. Taylor, § 405.
2. *Deep Chandra* v. *Sajjad Ali Khan*, 1951 A 93 ; 1951 ALJ 81 ; ILR 1950 A 1033 (FB).
3. Taylor, § 405 , See also *Narendranath Sen* v. *Mahasay Ganesh Prasad Roy*, 1946 P 408.
4. Taylor, § 405.
5. *Suleiman Tigg* v. *Cyril Tigg*, 1938 P 603 ; *Maung Pe* v. *U. Tun Hlaing* , 157 IC 974 ; *Kishan Chand etc.*, v. *Dina Nath etc.* 1933 L 574 ; 141 IC 487 ; *Punjab National Bank Ltd.* v. *Mathra Das* etc., 1933 L 194 ; 143 IC 634 ; *Munna Lal*, etc, v. *Narayan, etc.*, 1933 N 270 ; 144 IC 312 ; *Mg. Khin*, etc. v. *Mg Ba. etc.*, 1933 R 249 ; 145 IC 833 ; *Maung Tan Sein* v. *Ko Tu, etc.*, 6 R 337 ; 1928 R 196 ; 111 IC 47 ; *Ma Pwa Zon, etc.* v. *Ma Pan, etc.*, 5 R 154 ; 1927 R 203 ; 102 IC 696 ; *Jiji Bai* v. *Chowdhary Ratan Singh*, 1927 N 113 ; 99 IC 448 ; *Ahobilachariar, etc.* v. *Thulasi Ammal*, etc., 1927 M 830 ; 103 IC 281 ; *Jai Ram Das* v. *Raj Narain*, 45 A 21 ; 1922 A 493 ; 70 IC 953 ; *Sheo Karan, etc.* v. *Chiranji Lal, etc.* 98 IC 940 ; 28 PLR 88 ; *Ramu Chetty etc.* v. *Panchamnal*, etc. 1926 M 402 : 92 IC 1028 ; Narsingh Das v. Uttam Chand, etc., 1923 L 392 ; 76 IC 852 ; *Nand Lal Mahtorn etc.*, v. *Dhanukdhari Mahtron*, 1924 P 244 ; 76 IC 42 ; *Bishan Das etc.*, v. *Ram Singh, etc.*, 61 IC 399 ; *Chhotalal Aditram Travadi* v. *Bai Mahakore*, 41 B 466 ; 40 IC 83 ; *Sukhdial*, etc. v. *Mani Ram*, etc, 29 PR 1915 ; 27 IC 489 ; 12 Mys LJ 236 ; *Parmanand* v. *Laxminarain*, 1955 MB 129 ; *Tejraj* v. *Mohanlal*, 1955 Raj 157
6. *Mst. Kusmi* v. *Sadasi Mahto*, 1942 P 432.
7. *Subbu Naidu* v. *Varadarajulu Naidu*, 1947 MWN 66 ;*Punjab National Bank Ltd.* v. *Mathra Das, etc.*, 1933 L 194 ; 143 IC 643 ; *Sheo Karan, etc.*,v. *Chiranji Lal, etc.*, 98 IC 940 ; *Qadar Bakhsh, etc.*, v. *Mangha Mal, etc.*, 4 L 249 ; 1923 L 495 ; 73 IC 889 ; *Maharani Janki Kuer* v. *Brji Bhikhan Ojia*, etc., 3 P 349 ; 1924 P 641 : 79 IC 26 ; *Varatha Pillai*, etc.. v. *Jeeva Rathammal*, 46 IA 285 ; 43 M 244 ; 1919 PC 44 ; 53 IC 901 *Rachpal Maharaj* v. *Bhagwandas Daruka*, 1948 P 251 ; 26 P 260 ; *Purusottam Dass* v. *S. M. Desouza*, 1950 Orissa 213 ; *Girja Nandan Singh* v. *Girdhari Singh*, 1951 P 277 ; *Ramjugeshwar* v. *Gajadhar*, 29 P 980 ; *Tara Pada Ray* v. *Shyama Pada Ray*, 1952 C 579 ; *Ram Rattan*, v. *Parma Nand*, 1946 PC 51.
8. *Kishan Chand etc* v. *Dina Nath, etc.*, 1933 L 574 ; 141 IC 487 ; *see also Subbu Naidu* v. *Varadarajulu Naidu*, 1947 MWN 66.
9. *Punjab National Bank* Ltd v. *Mathra Das, etc.*, 1933 L 194 ; 143 IC 634.

lease are in question it is necessary to prove them by the production of the document. Where this is not the case, oral evidence of the *patta* is admissible.[1] Similarly, the *factum* of sale is distinguished from the terms of sale may be proved by oral evidence, where the sale deed is not produced or is inadmissible in evidence.[2] If a sale deed is inadmissible in evidence for want of registration, it may still be referred to for the purpose of understanding the nature of the contract and to prove delivery of possession.[3] Where a deed of surrender is unregistered the fact of surrender can be proved by other evidence.[4] It has, however, been held in Burma that where possession of certain property has been transferred under an inadmissible mortgage-deed, oral and other evidence in proof of the fact of mortgage is barred, and all that can be proved is the fact of transfer of possession. A mortgage is a contract and a particular kind of disposition of property to which certain recognized incidents or terms invariably attach. It is a transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced by way of a loan. These are all terms of the contract, and all these terms are conveyed by the one word "mortgage". None of these terms can, therefore, be proved under section 91 except by the production of the mortgage-deed, or by secondary evidence of the contents of such deed.[5] Where a contract of marriage is not signed by either of the contracting parities, but is in the nature of a memorandum prepared by a *nikah-khwan* belonging to the Shariah Department of Musal, it is open to one of the parties to prove by other oral or documentary evidence that he or she had been married as well as the terms of the contract of marriage,[6] for it cannot in such a case be said that the terms of the marriage contract were reduced to writing by the parties.

Instrument not registered according to law, other evidence in proof of the terms of the transaction is inadmissible.—The law makes the registration of certain instruments compulsory.[7] If a document required by law to be registered has not been registered it cannot be received as evidence of any transaction affecting immovable property.[8] The question whether a document requires registration or not and whether, not having been registered as required by law, it is receivable as evidence of any particular matter, is a pure question of the Registration law, and has nothing to do with the provisions of Section 91 of the Evidence Act. It, however, follows from the combined operation of the provisions of Section 49 of the Registration Act and Section 91 of the Evidence Act that if a document is not receivable as evidence of a particular matter by reason of its not having been registered as required by law, other proof of the matter, oral or otherwise, will be excluded in the document is a contract, grant or disposition of property, and the proof tendered relates to the terms of the transaction.

---

1. *Kedar Nath Joardar, etc.*, v. *Shurfoonnissa Bibee*, 24 WR 425 ; *Pokuri Viraraghavalu, etc.*,v. *Pokuri Yellamanda, etc.*, 95 IC 584 (2).
2. *Pokuri Viraraghavalu, etc.* v. *Pokuri Yellamanda, etc.*, 95 IC 594 (2) ; but see *Safar Ali* v. *Mohesh Lal Chowdhury*, etc., 34 IC 956.
3. *Keshwar Mahton, etc.*, v. *Sheonandan Mahton*, 1929 P 620.
4. *Singheshwar Jha* v. *Ajab Lal*, 1941 P 142 ; 190 IC 756.
5. *Maung Tun* v. *Maung Khan, etc.*, 2 R 441; 1925 R 61 ; 84 IC 987.
6. *Mst. Aimma* v. *Lakhmi Chand etc.*, 1934 L 705 ; 154 IC 979.
7. See Section 117 of the Registration Act, and Sections 54, 59, 107 and 123 of the Transfer of Property Act.
8. Section 49 of the Registration Act.

Thus, where a deed of grant,[1] deed of sale,[2] deed of mortgage,[3] deed of lease[4] or agreement to lease,[5] deed of partition,[6] deed of waif [7] or a deed relating to any other disposition of property,[8] has not been registered as required by law, no other evidence will be permitted to be given in proof of the terms of the transaction embodied in the document. If a family arrangement is arrived at orally and information of its terms is given in writing to a Court, that writing would not be deemed to be a deed of family arrangement and would not require to be registered. But if the writing is intended to be a document of compromise or family arrangement having the legal effect of binding both the parties and does not merely convey information to the Court of the terms of a previously completed compromise, the document ought to be registered. If it is not registered the oral evidence of its contents is not allowed.[9] Secondary evidence of a document which is inadmissible in evidence for want of registration, is not admissible.[10] But where there has already been a valid oral transfer the fact that the parties excuted a

1. *Muhammad Khan, etc.*, v. *Sheo Bhikh Singh, etc.*, 1929 O 447.
2. *Mohammad Din* v. *Sardara etc.*, 1934 L 743 (1) ; *Datto Shivram Gosavi* v. *Babasaheb Malhar Deshpande*, 1934 B 194 ; *Diwan Singh* v. *Gurbachan Singh*, 1932 L 276 ; 137 IC 41 ; Maung *Ba, etc.* v. *Maung Kywe, etc.*, 6 R 125 ; 1928 R 124 ; 110 IC 735 ; *Mst. Parmeshri Devi* v. *Autar Singh*, 1921 L, 113 ; 67 IC 144; 3 LLJ 173 ; *Gangabisan, etc.* v. *Tukaram*, 2 IC 244 ; *Ram Chunder Haldar, etc.* v. *Govind Churn Sen*, I CLR 542.
3. *Hindu Singh* v. *Khet Singh*, 1938 NLJ 123 ; *Seth Pratapsing Moholalbhai* v. *Keshvalal Hari Lal*, 59 B 180 ; 1935 PC 21 ; 153 IC 700 ; *The Bank of Northern India, Rawalpindi, etc.* v. *Narain Singh, etc.*, 138 IC 247 ; *The National Bank of India, Ltd.* v. *R. C. Nazir & Co.* 1932 B 401 (2) ; 139 IC 745 ; *Halka* v. *Nannhon*, 1932 A 259 ; 140 IC 42 ; *Ma Saw* v. *Maung Ba*, 5 R 650 ; 1928 R 32 ; 106 IC 476; *Maung Tun* v. *Maung Khan, etc.*, 2 R 441; 1925 R 61 ; 84 IC 987 ; *Subramanya, etc.* v. *Lutchman*, 50 IA 77 ; 50 C 338 ; 1923 PC 50 ; 71 IC 650 ; *see Chunilal Someshwar Bhatt* v. *Vithaldas Karsandar*, 1922 B 440 ; 68 IC 1005.
4. *Nagaraja Rao* v. *Koothappan*, 1941 M 602 ; *Atul Krishna* v. *Zahed Mondal*, 1941 C 102 ; 193 IC 635 ; 45 CWN 129 ; *Ram Autar Singh* v. *Juthi Satma*, 18 Pat LT 1012 ; *Mrs. J. H. Mathews* v. *Mirza Ismail Beg*, 1938 OWN 1080 ; *Badal Chandra Sadhukhan* v. *Debendra Nath Dey*, 1933 C 612 ; 145 IC 892 ; *Ramjoo Mahomed* v. *Haridas Mullick, etc*, 52 C 695 ; 1925 C 1087 ; 91 IC 320 ; *Changan Lal, etc.* v *Kashiram*, 1923 N 76 ; 71 IC 33 ; *firm Karim Baksh Taj-ud-Din* v. *Natha Singh*, etc., 66 IC 904 ; 2 LLJ 14 ; *Niadar Mal* v. *J. Rank*, 63 IC 90 ; *Rajaramji* v. *Ganesh*, 42 IC 629 ; *Ganesh Mondal* v. *Thanda Namsundarni*, 38 IC 489 ; *Jarip Khan, etc.*, v. *Durfa Bewa*, 15 IC 476 ; 16 CLJ 144; *Ramchandra Shivjiram* v. *Tama Ragho Manglya*, 36 B 500 ; 15 IC 330 (2).
5. *C. Streeramulu Naidu* v. *T. Ramswami Mudaliar, etc.*, 42 IC 948 ; 33 MLJ 596; *Mst. Raj Rani* v. *Hukam Chand Jagadhar Mal*, 1930 L 675 ; 125 IC 618.
6. *Subbu Naidu* v. *Varadarajulu Naidu*, 1948 M 26 ; ILR 1947 M 694 ; (1947) 1 MLJ 90; 1947 MWN 66 ; 60 MLW 135 ; *Nalam Ramayya* v. *Nalam Achamma*, 1944 M 500 ; 1944, 2 MLJ 164 ; 57 MLW 472 ; 1944 MWN 612 ; 216 IC 255 (FB) ; *Kandakuri Papamma* v. *Kandakuri Narayana*, 1948 M 54 ; 1947, MLJ 274 ; 60 MLW 241 ; 1947 ; MWN 364 ; *Girija Nandan Singh* v. *Girdhari Singh* 1951 P 277 ; 29 P 628 ; *Ramjugeswar* v. *Gajadhar*, 29 P 980 ; *Maung Pe.* v. *U. Tun Haling*, 157 IC 974 ; *China Surya Rao* v. *Surya Chandra Rao*, 1937 M 638 ; *R. N. Samuvier*, etc., *R. N. Ramsubbier*, 55 M 72 ; 1931 M 580 ; 132 IC 305 ; *Munna Lal, etc.*, v. *Narayan, etc.*, 1933 N 270 ; 144 IC 312 ; *Jiji Bai* v. *Chodhary Ratan Singh*, 1927 N 113 ; 99 IC 448 ; *Narsing Das* v. *Uttam Chand*, 1923 L 392 ; 76 IC 852 ; *Mg. Po Lun*, etc, v. *Ma E. Mai, etc.*, 1923 R 57 ; 74 IC 47 ; *Chandu Lal* v. *Daulat Ram etc.*, 1924 L 286 (2) ; 69 IC 859 ; *Chhotalal Aditram Travedi* v. *Bai Mahakore*, 41 B 466 ; 40 IC 83 ; *Kachubhai Bin Gulabachand, etc*, v. *Krishnabai Kom Babiji*, 2 B 685 ; *Upendra Nath Banerji* v. *Umesh Chandra Banerji*, 6 IC 346 ; 6 CLJ 25.
7. *Muhammad Ibrahim etc. Bibi Mariam*, 8 P 484 ; 1929 P 410 ; 117 IC 638.
8. *Nemthullah* v. *Safiabu*, 1935 B 208 ; 156 IC 779 ; 37 Bom LR 82 ; *Hem Chandra Roy* v. *Sashi Bhusan Sil*, 63 IC 863.
9. *Jileba* v. *Parmesra*, 1950 A 700; 1950 ALJ 477.
10. *Pratap Singh Mohola Bhai* v. *Keshav Lal Hari Lal Setalvad*, 62 IA 23; 59 B 180 ; 1935 PC 211 ; 153 IC 700.

deed of transfer which is inadmissible for want of registration will not exclude oral evidence of the prior valid transfer.[1] If the evidence sought to be given does not relate to the terms of a tranaction but relates merely to the *factum* or existence of the transaction, the evidence will be properly receivable, not being excluded by Section 91 of the Evidence Act. The date of a partition deed which is inadmissible in evidence for want of registration may be looked at to ascertain the date on which possession of certain properties commenced,[2] and an unregistered deed may be looked at to ascertain the nature of possession under the deed.[3] The use of a document to prove the *quantum* of interest and the character of the possession thereunder is not the use of the document for enforcing it.[4]

A memorandum wherein is recorded a description of the properties partitioned and the *modus operandi* adopted to ascertain which of the properties would be possessed by one or the other of the parties, is not a deed of partition. It is, however, admissible as piece of evidence to prove that partition had already taken place, and to explain the position of the parties.[5]

Registration Act Section 17 (1) (b) and 49 T. P.A. Section 5.–Family arrangement and partition. Partition of ancestral properties. Subsequent memorandum of partition. It was held that registration was not necessary .[5a]

Mortgage-deed inadmissible, independent proof of title not excluded.–Where a deed of a mortgage required by law to be registered has not been registered, though oral evidence of the transaction of mortgage will be inadmissible, the mortgagor is not precluded from proving his title to the property by other evidence independent of the deed.[6]

Oral proof of payment where receipt for money has not been registered as required by law.–See notes to this section under the heading "oral proof of payment or non-payment of money for which a receipt has been taken is admissible".

Document inadmissible for want of proper stamp; other evidence in proof of the terms of the transaction is inadmissible if the transaction is a contract, grant or disposition, or is a matter required by law to be reduced to writing.–If a document containing the terms of a contract, grant or other disposition of property is not properly stamped, it is not admissible in evidence[7] and other evidence in proof of the terms of such contract, grant or disposition of property is also excluded by Section 91 of the Evidence Act.

Promissory note, bill or hundi not properly stamped, whether the transaction of loan may be proved by other evidence?–Where an instrument of loan is inadmissible in evidence on account of its not being properly stamped, all the High Courts are agreed

---

1. *Chinnasami Chetty* v. *Manickam Mal*, 1937 M 265 ; 168 IC 681.
2. *Punjab National Bank, Ltd.* v. *Mathra Das*, 1933 L 194 ; 143 IC 634.
3. *Narendranath* v. *Mahasay Ganesh Prasad Roy*, 1946 P 408 ; *Kishori Lal* v. *Banu Mal*, 134 IC 1106 (1) ; 32 PLR 637 (1) ; *Bhusan Sutradhar, etc.*, v. *Guhiram Sutradhar, etc.*, 146 IC 4.
4. *Purusottam Dass* v. *S. M. Desouza*, 1950 Orissa 21.3 ; *See also Girja Nandan Singh* v. *Girdhari Singh*, 1951 P 277 ; 29 P 628 ; *Ramjugeshwar* v. *Gajadhar*, 29 P 980.
5. *Tara Pada Ray* v. *Shyama Pada Ray*, 1952 C 579 ; *See Varada Pillai* v. *Jeeverathnammal*, 46 IC 285 ; 1919 PC 44 ; *Ram Rattan* v. *Parma Nand*, 1946 PC 51. ; 50 CWN 367 ; *Ramjugeswar* v. *Gajadhar*, 29 P 980 : *Brahma Nand* v. *Roshani Devi*, AIR 1989 H.P. 11.

5a. *Roshan Singh* v. *Zile Singh*, AIR 1988 S.C. 881.

6. *Halka* v. *Nannhon*, 1932 A 259 ; 140 IC 42.
7. Section 35 of the Stamp Act ; *Lal Khan* v. *Allah Ditta*, PLD 1950 L 196.

that no suit will lie on the instrument. There is, however, conflict of opinion on the question whether in such circumstances a suit will lie on the original consideration, if the transaction of loan and the execution of the instrument be simultaneous. *In Nazir Khan* v. *Ram Mohan Lal*, [1] it was held by a Full Bench of the Allahabad High Court that it is not open to a party who has lent money on terms recorded in a promissory note, which turns out to be inadmissible in evidence for want of proper stamp duty, to recover his money by proving orally the terms of the contract, as such evidence is inadmissible under Section 911 of the Evidence Act. This Full Bench decision had the effect of overruling earlier cases of that Court in which a contrary view was taken and the transaction of loan was held provable, though the promissory note was inadmissible owing to its not being properly stamped.[2] But though this Full Bench case was rightly decided on the question referred, the authority of this case has been considerably shaken and the decision of the Full Bench practically overruled by a later Full Bench decision of five Judges in *Sheonath Prasad* v. *Sarjoo Nonia*,[3] in which it has been held that when a promissory note is given in consideration of a sum of money, it is a question of fact in each case whether the sum of money is given as a loan or not as a loan, that in the absence of all evidence the presumption is that it is given as a loan, that there is a further presumption that the promissory note is given on conditional payment of the loan, that if by reason of defective stamping the promissory note by giving other evidence including that furnished by a contemporaneous receipt, if there be any, and that it will be for the defendant to prove that the promissory note was given for a sum of money which was not given as a loan or that it was given in absolute discharge of the loan. According to this Full Bench Section 91 of the Evidence Act is not applicable to such cases because the making of the loan and the making of the promissory note though simultaneous, are two distinct transactions and the promissory note does not contain all the terms of the contract. The Full Bench has, however, expressly recognized the position that the receiver of the promissory note may in certain cases be left without a remedy, as for instance, accepts the promissory note in absolute discharge of the liability created by the loan or where the promissory note is passed as part of a transaction which is not a transaction of loan. In a subsequent Division Bench decision of that Court it has been remarked that both these Full Bench decisions can stand together and that the true test to determine whether the loan can be proved by other evidence is whether the promissory note embodies all the terms of the transaction between the parties. Where the promissory note contains substantially all the terms of the contract but being improperly stamped it is not admissible in evidence, the creditor is without a remedy as there is no cause of action independently of the promissory note.[4] The Lahore High Court,[5] has been generally acting upon the view adopted by the

1. *Nazir Khan, etc.*, v. *Ram Mohan Lal, etc.*, 53 A 114 ; 1931 A 183 ; 133 IC 307 (FB) ; followed in *Karan Singh* v. *Lal Singh, etc.*, 1933 A 109 ; 140 IC 177 ; *see also Ghulam Murtazu* v. *Mst. Fasih-un-Nisa*, 1935 A 129 ; 152 IC 370 ; *Sheo Navok* v. *Babau*, 1937 A 439 ; 169 ; IC 780.
2. For such cases, see *Chedu Singh* v. *Jagan Nath Prasad*, 1928 A 297 ; 108 IC 912 ; *Ram Sarup* v. *Dasoda Kunwar*, 34 A 158 ; 13 IC 138 ; *Banarsi Prasad* v. *Fazal Ahmad*, 28 A 298 ; *Sri Nath Das* v. *Angud Singh* 6 IC 126. Observations in In the matter of Section 25, Paper Currency Act (10 of 1923), 50 A 839 ; 1928 A 371 , which supported a contrary view were also disapproved in the Full Bench Case. *Kundan Lal, etc.* v. *Sahu Bhikhari Das Ishwar Das, etc.*, 51 A 530 ; 1929 A 254 ; 116 IC 293 and *Balbhadar Prasad* v. *The Maharaja of Betia*, 9 A 351 were not referred to in the FB case, though they laid down a rule which was inconsistent in some respects with the Full Bench decision.
3. 1943 A 220 ; followed in *Major Mistri* v. *Binda Debi*, 1946 A 126 ; 228 IC 551 (FB).
4. *Ram Nath* v. *Bhagwati Prasad*, 1945 ALJ 483 ; 1946 A 150 ; *Lila Singh* v. *Chajju Singh*, 1952 A 877 ; 1952 ALJ 303 ; *but see Lakshmi Narain* v. *Aparna Devi*, 1953 A 535.
5. *Bharpura* v. *Diwanchand*, 1940 L 329 ; *Sri Chand Sheo Parshad* v. *Lajjiaram*, 1939 L 31 ; *Sohan Lal*

Allahabad High Court in *Nazir Khan's* case, though there are some earlier decisions which are inconsistent with this view.[1] The Patna High Court holds that where money is advanced under a promissory note which is not sufficiently stamped, the lender is entitled to maintain a suit for the recovery of the money lent and to adduce evidence, other than the instrument itself, in order to prove the loan, even in cases where the lending of the money and the execution of the promissory note are simultaneous.[2] The same is the view of the Oudh,[3] Sindh[4] and Nagpur[5] Courts. The Bombay High Court and the Rangoon High Court regard the passing of a promissory note as a sort of conditional payment of the loan, and therefore, hold the transaction of loan to be actionable and provable part from the promissory note which, owing to its not having been properly stamped, does not discharge the debt.[6] In a Bombay case a suit on the original consideration has been held to be maintainable for the reason that the transaction of loan creates a cause of action independently of the promissory note.[7] There has been considerable divergence of opinion on this point in the Madras High Court, and though the general trend of its decisions in conformity with the Allahabad view in *Nazir Khan's case*,[8] some Judges of that Court have, expressly or impliedly, expressed them-

---

Nihal Chand v. *Raghu Nath Singh,* etc., 1934 L 606 ; 153 IC 1076 ; *Chanda Singh* v. *Amritsar Banking Co.,* 2 L 330 ; 1922 L 307 ; 66 IC 201 ; *Ramji Das* v. *Shujaddin,* etc., 95 IC 704 ; 1927 L 89 ; *Guudas Mal Singh* v. *Ishar Das, etc.,* 60 IC 107 ; *Mst. Bhag Bhari* v. *Gujar Mal, etc.,* 63 PR 1917 ; 38 IC 623 ; *G. O. Gorman* v. *Mahtab Singh,* 92 PR 1898 ; *Sheo Das and others,* v. *Kanhaya Lal,* 61 PR 1888.

1. *Mani Ram* v. *Kala Ram,* 4 PR 1881 ; *Samad Mir* v. *Brij Lal, etc.,* 73 PR 1886 ; *Bakshi Ram Lobhaya* v. *Kaka Ram,* 42 PR 1895.
2. *Dumoo Khan* v. *Agha Arshad Khan,* 12 P 862 ; 1933 P 575 ; 146 IC 471 (FB) ; *Balbhadra Singh,* etc. v. *Bhagwat Pande,* 1933 P 584 (1) ; 147 IC 706 ; *Tasaduq Hussain* v. *Basawan Rai,* 1933 P 159; 141 IC 767 ; *Brijbhusan Pande, etc.* v. *Ramjanam Kuer,* 1932 P 324 ; 142 IC 163 ; *Abdul Mohammad Khan* v. *Mahananda Upadhyaya,* 11 P 135 ; 1931 P 293 ; 133 IC 685 ; *Dhaneshwar Sahu* v. *Ram Gir,* etc., 7 P 845 ; 1928 P 426 ; 111 IC 482 ; *Barham Deo Rai* v. *Ram Kishen Mehton,* 60 IC 652 ; *Rai Saheb Suraj Mal,* etc., v. *Anant Lal, etc.,* 55 IC 556 ; contra *Choto Lal Sahu* v. *Gumani Chaudhury,* 11926 P 432 ; 95 IC 348.
3. *Babulal* v. *Durga Prasad,* 1940 O 308 ; *Bhirgu Dutt, etc.,* v. *Gaya Prasad,* etc., 1934 O 57 ; *Kunwar Bahadur* v. *Suraj Bakhsh,* 7 Luck . 666 : 1932 O 235 ; 139 IC 298 (FB) ; *Nankhoo Singh* v. *Girja Bux Singh,* 1929 O 399 ; 119 IC 865 ; *Dwarka* v. *Idu,* 1924 O 249 ; 74 IC 813 ; 6 OC 16.
4. In re *Assaram Moti Ram Insolvent,* 1929 S 164 (1) ; 116 IC 111 ; *Narain Das,* etc., v. *Jassomal,* 1921 S 30 ; 65 IC 37.
5. *Mahadeo Tukaram Mahajan* v. *Ramchandra Deoyya Yalami,* 1940 N 215 ; *Ananda Namdev* v. *Pundalik Tukaram,* 1936 N 225 ; *Raja Lal Bahadur Singh Rajpal* v. *Sheikh Ghulam Yisin,* 1933 N 57 (2) ; 144 IC 745 ; *Chhedilal* v. *Udaram Magniram* v. *Laxman Marwari,* 1927 N 241 ; 104 IC 470 ; contra *Jawanmal Balcjand* v. *Akaji Anand Rao,* 1940 N 214.
6. *Jacob and Co.* v. *A. P Vicumsey, etc.,* 1927 B 437 : 102 IC 138 ; For other Bombay cases, see *Ranchhod Raghunath Patel,* etc., v. *Ravilbhai Nathabhai Patel,* 1926 B 357 ; 95 IC 847 ; *Virbhadrapa bin Adrashapa Gavil* v. *Bhimji Balaji Saraff,* 28 B 432 ; *Krishnaji* v. *Rajmal,* 24 B 360 ; *Chenbasapa, etc.* v. *Lakshman Ramchandra,* 18 B 369 ; *Damodar Jagan Nath* v. *Atma Ram Babaji,* 12 B 443; For Rangoon cases, See *Muang Chit, etc.* v. *Roshan N. M. A,. Kareem Oomer and Co.* 12 R 500 ; 1934 R 389 ; 152 IC 1088 ; *Ma Shwe Hpaw, etc.* v. *Owa Hpaw,* 1933 R 161 ; 145 IC 378 ; *Ram Raghubir Lal* v. *The United Refineries, Ltd.,* 9 R 56 ; 1931 R 139 ; *Mung Kyi* v. *Ma Ma Gale,* 54 IC 84 (FB).
7. *Somabhai Narambhai Patel;* v. *Kalyan Bhai Kashibhai Patel,* (1938) 40 Bom LR 174.
8. *Ramswamy* v. *Murugiah Padayachi,* 1936 M 179 ; 161 IC 273 ; 59 M 268 ; *At. N. At. Chockalingam* 23 : 155 IC 184 ; *Chandrasekaran Pillai* v. *Srinivasa Pillai* 1933 M 71 ; 140 IC 193 ; *Alimane Saheba* v. *Kolisetti Subbarayudu,* 1932 M 693 ; 139 IC 486 ; *P, Somaraju* v. *M. Venkalasubbarayudu,* 1925 M 351 (2) ; 85 IC 389 ; *Muthu Sasrtigal* v. *Visvanatha Pandarasannadhi,* 38 M 660 ; 21 IC 864 ; *Mallayya* v. *Tarigopala Ramayya,* 10 IC 177 ; *Chinnappa Pillai* v. *M. R. C. Muthuraman,* 10 IC 669 ; *Pothi Reddi* v. *Velayudasivan,* 10 M 94.

selves in favour of the opposite view.[1] In its latest Full Bench decision it has held that the answer to the question whether a person who has lent money on a promissory note, which is inadmissible in evidence owing to a defect in the stamping, can sue to recover the debt apart from the note, depends on the circumstances under which the instrument was executed. If the note was given in respect of an antecedent debt, or as collateral security, or by way of conditional payment, or if the note does not embody all the terms of the contract, the true nature of the transaction can be proved. But if the promissory note embodies all the terms of the contract, no suit on the debt will lie as Section 91 of the Evidence Act and Section 35 of the Stamp Act bar the way. The fact that the execution of the promissory note is contemporaneous with the borrowing cannot, however, exclude the possibility of the instrument having been given as collateral security or by way of conditional payment.[2] The decisions of the Calcutta High Court are not unanimous. The basic authority on the point is the judgment of Garth, C.J., in *Sheikh Akbar* v. *Sheikh Khan*,[3] wherein he held that when the original cause of action is the bill or note itself, and does not exist independently of it, as for instance, when, in consideration of A depositing money with B,B, contracts by a promissory note to repay it with interest at six months' date, there is no cause of action for money lent or otherwise, than upon the note itself; because the deposit is made upon the terms contained in the note and no other. In such a case the note is the only contract between the parties, and if for want of a proper stamp or some other reason the note is not admissible in evidence the creditor must lose his remedy.[4] But in a later decision of the same Court it has been remarked that an implied contract to repay money lent arises from the fact that the money is lent, even though no express promise, either written or verbal, is made to repay it. Therefore, in a case where the defendant admits the loan, and has not repaid it, plaintiff may maintain an action against him for breach of his implied promise or contract entirely independent of any security which may have been given for the advance.[5] The rule enunciated in the decision last cited[6] has been treated as justifying proof, by other evidence, of the transaction of loan, where the promissory note is not admissible by reason of its not being property stamped.[7] In a subsequent case of this Court it has been held that if the cause of action with regard to the original consideration is one which is complete in itself and the debtor then gives a bill or note to the creditor for payment of the money at a future date, the plaintiff may ignore the promis-

1. *Chinnayya Naidu* v. *Srinivasa Naidu*, 160 IC 1069 ; *Chinnayya Naidu* v. *Srinivasa Naidu*, 1935 M 206 ; 67 MLJ 912 ; *Murugappa Chetty* v. *Nachippa Chetty, etc.*, 1934 M 503 ; *Alapati Achutaramana* v. *Vasireddi Jagannadham*, etc, 1933 M 117 ; 140 IC 833 ; *Gopala Padayachi, etc.*, v. *Rajagopal Naidu*, 1926 M 1148 ; 98 IC 75 ; *Chokkalingam Chetty* v. *Annamali Khetty* etc., 34 IC 417 ; *Yarlagadda Veera Ragavayya etc.*, v. *Gorantala Ramayya*, 29 M 111 ; *Ramchandru Rao*, etc., v. *Venkataramane, Ayyar*. 23 M 527 ; *Krishnasami Pillai*, etc. v. *Rangasami Chetty*, 7 M 112 ; *See also Shanmuganatha Chettiar, etc.*, v. *Sriniva Ayyar*, 40 23 M 727 ;*V. C. T. N. Chidamabaram Chettiar* v. *Ayyasawmy Thevan*, 40 M 585.
2. *Perumal Chettiar* v. *Kamakshi Ammal*, ILR (1938) M 933 : 177 IC 236 : 1938 M 785 (FB).
3. *Sheikh Akbar* v. *Sheikh Khan, etc.*, 7 C 256.
4. The decision in *Sheikh Akbar* v. *Sheikh Khan*, 7 C 256, was followed in *Radhakant Shaha, etc.* v. *Abhoy Churn Mitter, etc.*, 8 C 721.
5. *Pramatha Nath Sandal, etc.* v. *Dewarka Nath Dey*, 23 C 851.
6. *Ibid.*
7. See *Sudhir Chandra Das* v. *Govinda Chandra Roy*, 45 C 538 : 41 IC 503. For an earlier case, see *Golap Chand Marwaree* v. *Thakurani Mohokoom Kooaree*, 3 C 314 ; see also *Gobinda Kumar Sur* v. *Ram Chandra*, 51 IC 945 ; *Ram Bahadur* v. *Dasuri Ram*, 19 IC 840 ; *Dula Meah* v. *Moulvi Abdul Rahaman*, 1924 C 452 : 81 IC 641 : 5 CWN 56.

sory note and sue upon the original debt. But where the original cause of action is a bill or note itself and does not exist independently of it, then the plaintiff cannot disregard the note and sue on the original consideration.[1] The Peshawar Court has held that where the suit is founded on an admissible promissory note, the suit must fail;[2] but that where it is possible to find for a creditor a cause of action apart from the inadmissible security, the creditor's suit will succeed.[3]

Whether the mere fact of payment of money gives a cause of action; meaning of "suit on the consideration".—The phrase "suit on the consideration" is misleading inasmuch as it may be understood to me is that the mere fact of payment of money gives a cause of action. This is not so : for when money is paid the presumption of law is that it is paid in liquidation of an antecedent debt.[4] There is no presumption that the payment is a loan.[5] But payment of money as a loan carries with it the promise and the liability to repay.[6] Mere payment on money by the plaintiff and its receipt by the defendant is not, therefore, sufficient to charge the defendant, as the transaction, in the absence of a promise to repay, is not actionable. In order to make the payment actionable, it must further be shown that the payment was by way of loan, *i.e.*,that the payment was made on condition of the receiving party promising to repay it. It is when oral evidence of this express or implied promise to repay is sought to be given that the question of its admissibility where the instrument of loan is ruled out as inadmissible arises. Where there is no promissory note but only a receipt or memorandum of loan, a suit on the loan will be competent.[7] Where a hand note is not admissible as a pronote by reason of its not being made payable to a certain person or to the bearer, a suit on the loan independently of the note is competent according to the Patna view.[8]

Insufficiently stamped note or bill given for antecedent liability, suit on the antecedent liability is maintainable.—Where an insufficiently stamped note or bill is given, not at the time and as part of the transaction of loan itself but in consideration of an antecedent debt or liability, the question whether on the document turning out to be unenforceable a suit on the antecedent debt or liability would lie or not depends upon whether the document is taken is substitution of the antecedent debt or liability, or merely by way of conditional discharge or collateral security. If the former, the antecedent liability disappears and merges in the document, the acceptance of which operates as an accord and satisfaction of the debt or liability for which it is given, and there remains nothing to sue upon except the document;[9] if the later, the antecedent liability is not extinguished and still remains actionable if the security given in the form of a

1. *Ranendra Mohan Tagore* v. *Keshu Chandra Chanda*, 61 C 433 1934 C 554 : 150 IC 982.
2. *Radhu and Co.*v. *Mathra Das*, 1936 Pesh 146 ; *Sarab Dial* v. *Nanda Mal Wazir Chand*, 1936 Pesh 143.
3. *Sarab Dial* v. *Nanda Mal Wazir Chand*, 1936 Pesh 143.
4. Welch and Seaborn (1816) 1 Stark, 474 ; see also *Ananda Namdev Kharde* v. *Pundalik Tukaram Choudhury*, 1936 N 225.
5. *Bihari Lal* v. *Chandu Lal*, 1939 L 386 ; *Laku Mal* v. *The Sind Bank*, 57 IC 386 : but see *Pramatha Nath Sandal, etc.* v. *Dwarka Nath Dey* 23 C 851 ; *Krishnaji Narayan Parkhi* v. *Rajmal Manickchand Marwadi*, 24 C 360.
6. *Ganesh Prasad Singh* v. *Bechu Singh*, 1934 A 271 ; 147 IC 443 ; *Moung Chit. etc.* v. *Roshan N.M.A. Kareem Oomer & Co.*, 12 R 500 : 1934 R 389 (FB) ; *Abdul Mohammad Khan* v. *Mahananda Upadhyaya*, 11 P 135 : 1931 P 293 : 133 IC 685.
7. *Ganesh Prasad Singh* v. *Bechu Singh*, 1934 A 271 : 147 IC 443.
8. *Tasadaq Husain* v. *Basawan Rai*, 1933 P 159 : 141 IC 767.
9. *Parbati Charan Mukherjee* v. *Amarendra Nath Bhattacharjee*, 53 C 418 : 1926 C 831 : 96 IC 97 ;

note or bills turn out to be unenforceable.[1] Whether a given document in lieu of a pre-existing liability is given in absolute discharge or in conditional discharge of an antecedent liability is a question of fact in each case, the presumption being that it was intended by the parties as a conditional discharge of the liability.[2] Thus, where a *hundi* is renewed on an insufficiently stamped paper, the new *hundi* does not operate as an absolute discharge of the obligation under the old *hundi* and the creditor may still sue on the *hundi* if new *hundi* is for any reason not enforceable.[3] Authorities are unanimous that a suit on the antecedent liability is maintainable where security given in the form of a promissory note or bill turns out to be unenforceable for insufficiency of stamp or for some other similar reasons.[4] The suit on the antecedent liability must, however, be instituted within the period of limitation prescribed for it, though in some cases the insufficiently stamped promissory note itself, if bearing sufficient stamp for an acknowledgement, may serve as an acknowledgement so as to extend the period of limitation of a suit on the original liability.[5] When a cause of action for money is once complete in itself, whether for goods sold or for money lent or for any other claim, and the debtor then gives a bill or note to the creditor for payment of the money at a future time, the creditor, if the bill or note is not paid at maturity, may always, as a rule, sue for the original consideration, provided that he has not endorsed or lost or parted with the bill or note under such circumstances as to make the debtor liable upon it to some third person.[6] To such a case the reasoning that the promissory note is no more than a

---

Pandit Salig Ram v. *Radhey Shyam*, 1931 A 560 ; 134 IC 254 ; *Mst. Bhag Bhari, etc.* v. *Gujar Mal, etc.*, 63 PR 1917 : 38 IC 623 ; *Sheikh Akbar* v. *Sheikh Khan, etc.*, 7 C 256 ; *Babu Ram Bahadur* v. *Babu Dasuri Ram*, 19 IC 840.

1. *Pandit Salig Ram* v. *Radhey Shiam*, 1931 A 560 : 134 IC 254 ; *Parbati Charan Mukherjee* v. *Amarendra Nath Bhattacharjee*, 53 C 418 : 1926 C 831 : 96 IC 97 ; *Inayat Ullah* v. *Mst. Hoshyari*, 170 IC 117 : 1937 ALJ 360 ; *Nuthu Ram* v. *Dogar Mal*, 1924 L 144.
2. *Firm Rahmat Ali Muhammad Faizi* v. *Firm Dewa Singh Man Singh*, 4 L 151 : 1923 L 396 : 75 IC 827 ; see *Ramaswamy Pillai* v. *Murugiah Padayachi*, 59 M 268 : 1936 M 179 : 161 IC 273 ; *Pandit Salig Ram* v. *Radhey Shiam*, 1931 A 560 : 134 IC 254.
3. *Firm Rahmat Ali Muhammad Faizi* v. *Firm Dewa Singh Man Singh*, 4 L 151 : 1923 L 396 : 75 IC 827 ; *Sundar Das, etc.* v. *Puran Singh*, 1922 L 56, 67 IC 856 ; *Jaggan Prasad* v. *Indar Mal*, 36 A 259 : 23 IC 589 ; *Sundar Lal* v. *Nanhu*, 1942 O 388.
4. Halsbury, Vol. 7 242-243 (Hailsham's Ed) ; *Perumal Chettiar* v. *Kamakshi Ammal*, ILR 1938 M 933 : 177 IC 236 : 1938 M 785 (FB) ; *Inayatualla* v. *Mst. Hoshiyari*, 1937 ALJ 360 : 170 IC 117 ; *Ananda Namdev* v. *Pundalik Tukaram*, 1936 N 225 ; *Pandit Salig Ram* v. *Radhey Shiam*, 1931 A 560 ; 134 IC 254 ; *Kundan Lal, etc.* v. *Sahu Bhikhari Das Ishwar Das*, 51 A 530 : 1929 A 254 : 116 IC 293 ; *Jacob & Co.* v. *A.P. Vicumsey, etc.*, 1927 B 437 ; 102 IC 138 ; *Firm Budhu Mal Parma Nand* v. *Gokul Chand, etc.*, 7 L 113 ; 1926 L 328 : 92 IC 1015 ; *Firm Rahmat Ali Muhammad Faizi* v. *Firm Dewa Singh Man Singh*, 4 L 151 : 1923 L 396 : 75 IC 827 ; *Nathu Ram, etc.*, v. *Dogar Mal etc.*, 4 L 198 1924 L 144 : 75 IC 535 ; *Krishnaji Narayan Parkhi* v. *Rajmal Manickchand Marwadi*, 24 B 360 ; *Jaggan Prasad* v. *Indar Mal*, 36 A 259 : 23 IC 589 ; *Yarlagadda* v. *Grorantala*, 29 M 111 ; see also *Parbati Charan Mukherjee* v. *Amarendra Nath Bhattacharjee*, 53 C 418 : 1926 C 831 : 96 IC 97 ; *Nazir Khan, etc.* v. *Ram Mohan Lal, etc.*, 53 A 114 : 1931 A 183 : 133 IC 307.
5. See Section 19 of the Limitation Act ; *Kanhaya Lal* v. *Stowell*, 3 A 581 ; *Vancheswara Sastri* v. *Narayana Ayyar*, 1933 M 251 (2) : 141 IC 169 ; *V.R. Rakkappan Ambalam* v. *Suppiah Ambalam*, 1930 M 485 ; 124 IC 53 ; *Udaram Magniram* v. *Laxman Marwari*, 1927 N 241 : 104 IC 470 ; *Pandit Salig Ram* v. *Radhey Shiam*, 1931 A 560 : 134 IC 254, a case of endorsement on the previous promissory note ; Contra *Bishunath Singh* v. *Ishri Dayal*, 1928 O 408 : 112 IC 247 ; *Mahadeo Tukaram Mahajan* v. *Ramchandra Deoyya Yelami*, 1940 N 215 ; *Jawanmal Balchand* v. *Akaji Anand Rao*, 1940 N 214.
6. Per Garth, C.J., in *Sheikh Akbar* v. *Sheikh Khan*, 7 C 256 ; *Ranendra Mohan Tagore* v. *Keshab Chandra Chanda*, 61 C 433 : 1934 C 554.

conditional discharge of the antecedent liability is clearly applicable.[1] The discharge not having become absolute by payment of the note, the original liability subsists and may be enforced if a suit in respect of it is brought within the period of limitation. What is an antecedent liability is a question of fact in each case. Cases are legally possible where the transaction of loan though contemporaneous with the passing of the promissory note, may in fact be independent of and separate from it. Where such is the case, a suit on the oral transaction of loan apart from the promissory note would, no doubt, be legally possible.[2]

Insufficiently stamped promissory note need not be proved if the transaction of loan is admitted by the defendant in his pleadings.—Where the terms of a contract relied on by the plaintiff are admitted by the defendant in his pleadings or in some other writing before the hearing, they need not be proved.[3] Therefore, where the plaintiff sues on a transaction of loan mentioned in an insufficient stamped promissory note, and the defendant admits the loan but pleads payment, no question of the admissibility of the promissory note will arise, as the loan sought to be proved by the promissory note is admitted, and the plaintiff will be entitled to a decree if the payment is not proved.[4] In some other cases, however, it has been held that such admission would not avail the plaintiff,[5] and that nothing short of an admission of liability would justify the Court to decree the claim.[6] If a promissory note is not properly stamped, admission or no admission of the loan, there can be no decree on the basis of such a promissory note.[7] Where the suit is on an inadmissible note as distinguished from a suit on a transaction of loan independent of the promissory note, mere admission of execution of the promissory note by the defendant will not help the plaintiff, as no decree can be made on a note which is not sufficiently stamped.[8] See notes to section 58.

Rate of interest in an inadmissible promissory note.—The rate of interest mentioned in an inadmissible promissory note is not provable by oral evidence, as the reception of such evidence would amount to the admission of evidence of proof of the terms of a contract reduced to writing.[9]

Documents inadmissible by reason of its not having been properly attested or by reason of its having been materially altered, oral evidence of the transaction

---

1. *Jacob & Co.* v. *A.P.Vicumsey, etc.*, 1927 B 437 : 102 IC 138 ; *Firm Rahmat Ali Muhammad Faizi* v. *Firm Dewa Singh Man Singh*, 4 L 151 : 1923 L 396 & 75 IC 827 ; *Dhaneshwar Sahu* v. *Ramrup Gir, etc.*, 7 P 845 ; 1928 P 426 : 111 IC 482 : *Lokumal* v. *The Sind Bank, Ltd.*, 57 IC 386.
2. *Sheikh Ghulam Murtaza* v. *Mst. Fasih-un-Nisha Bibi*, 1935 A 139 : 152 IC 370 ; see *Ramaswamy* v. *Murugiah Padayachi*, 59 M 268 : 1936 M 179 ; *Ananda Namdev* v. *Pundalik Tukaram Chaudhary*, 1936 N 225 ; *Damoo Khan* v. *Agha Arshad Khan*, 12 P 862 : 1933 P 575 ; 146 IC 471 ; *Alapati Achutaramana* v. *Vasireddi, Jagannadham, etc.*, 1933 M 117 ; 140 IC 833 ; *Kunwar Bahadur* v. *Suraj Bakhsh*, 7 Luck 666 : 1932 O 235 : 139 IC 298.
3. Section 58 As to oral admissions, see Section 22.
4. *Prahatha Nath Sandal, etc.* v. *Dwarka Nath Day*, 23 C 851 ; *Krishnaji Narayan Parkhi* v. *Rajmal Manickchand Marwadi*, 24 B 360 ; *Alapati Achutaramana* v. *Vasireddi Jagannadham, etc.*, 1933 M 117 : 140 IC 833.
5. *Lokumal* v. *The Sind Bank, Ltd.*, 57 IC 386 ; *Damodhar Jagannath* v. *Atmaram Babaji*, 12 B 443 ; *Chenbasapa* v. *Lakshman Ram Chandra*, 18 B 369 ; *Thaji Beebi* v. *Tirumalaippa Pillai*, 30 M 386.
6. *Damodar Jagannath* v. *Atmaram Babaji*, 12 B 443.
7. *Sohan Lal Nihal Chand* v. *Raghu Nath Singh, etc.*, 1934 L 606 : 153 IC 1076.
8. *Alapati Achutaramana* v. *Vasireddi Jagannadhan, etc.* 1933 M 117 : 140 IC 833.
9. *Ananda Namdev Kharde* v. *Pundalik Tukaram Chaudhary*, 1936 N 225 ; *Balbhadra Singh, etc.* v. *Bhagwat Pande*, 1933 P 584 (1) : 147 IC 706 ; *Kunwar Bahadur* v. *Suraj Bakhsh*, 7 Luck 666 ; 1932 O 235 : 139 IC 298.

inadmissible.—If a document is inadmissible in evidence by reason of its not having been attested as required by law,[1] or becomes void by reason of its having been materially altered,[2] oral evidence of the terms of the contract grant or disposition embodied in the document will be admissible.

Object of agreement to stifle prosecution, other evidence of the agreement whether admissible.[3]

Matters required by law to be reduced to the form of a document.—If a matter is required by law to be reduced to the form of a document, no other evidence of that matter except the document or secondary evidence of its contents, where permissible, can be given. "Where a particular transaction is required by law to be in a particular form, then it follows that no one setting up such a transaction can seek to prove it except by showing that it was done in that form".[4] The language of the section seems to show that other evidence of the matter required by law to be reduced to the form of a document will be excluded, even if the matter has not actually been reduced to the form of a document.[5]

Instance of matters required by law to be reduced to the form of a document.—In the provinces where the Transfer of Property Act is in force, sales and exchanges of immovable property,[6] mortgages where the principal money secured is one hundred rupees and upward,[7] leases of immovable property from year to year or for any term exceeding one year or reserving a yearly rent,[8] gifts of immovable property,[9] and transfers of actionable claims,[10] are required by law to be reduced to the form of a document A partition is not a matter required by law to be reduced to writing.[11] Wills made under Section 63 of the Indian Trusts Act[12] or the Indian Succession Act,[13] agreements made without consideration,[14] and contracts for reference to arbitration,[15] are other instances of matters which are required by law to be reduced into writing. Judgments[16] and decrees[17] of civil Court, judgments of criminal Courts,[18] and depositions of witnesses in

---

1. *Dhana Mohammed, etc.* v. *Nastulla Molla, etc.*, 1926 C 637 : 92 IC 948.
2. *Chaudari Janardhan Parida* v. *Parandhan Das*, 1940 P 245 ; *Dala Mean* v. *Moulvi Abdul Rahman*, 1924 C 452 : 81 IC 641 ; see *Probadha Gaolini* v. *Banka Behari Mondal*, 1933 C 196 : 142 IC 520. As to the effect of material alteration of a document, see *Probadha Gaolini* v. *Banka Behari Mondal*, 1933 C 196 ; 142 IC 520 ; *Parbati Charan Mukherjee* v. *Amarendra Nath Bhattacharjee*, 53 IC 418 : 1926 C 831 : 96 IC 97 ; *Sheikh Diljan* v. *Maqbool Khan*, 107 IC 475 (2) ; *Atmaram* v. *Umed Ram* 25 B 616 ; see also *Lachmi Rai* v. *Srideo Rai*, 1939 AWR (HC) 79.
3. *Probadha Gaolini* v. *Banka Behari Mondal*, 1933 C 196 : 142 IC 520.
4. *Meenakshisundaram Pillai* v. *S.T.Chenchu Mudaliar*, 1928 M 459 : 109 IC 18 (*per* Ayyangar J). These remarks were made with regard to the rule requiring attestation of a deed, but are equally applicable to the rule requiring a transaction to be in writing. See also *Nazir Ahmad*, v. *E.*, 17 L 629 (PC).
5. *Maung Tun Pe, etc.* v. *Maung Sein Myt, etc.*, 7 R 414 : 1929 R 293 : 120 IC 232 ; *Maung San Min* v. *Maung Po Hlaing, etc.*, 4 R 1 ; 1925 R 291 : 94 IC 567.
6. Sections 54 and 118 T.P.Act.
7. Section 59, T.P.Act.
8. Section 107, T.P.Act.
9. Section 123, T.P.Act.
10. Section 130, T.P.Act.
11. *Munna Lal etc.* v. *Narayan etc.*, 1933 N 270 : 144 IC 312.
12. Section 5, Indian Trusts Act, II of 1882.
13. Act XXXIX of 1926.
14. Section 25, Contract Act.
15. Section 28, Contract Act.
16. O. 20, rr. 3, 4, and O 41, r. 31, C.P.Code.
17. O. 20, r. 6, C.P.Code.
18. Sections 367 and 424, Cr. P.Code.

civil or criminal cases[1] also must be in writing. Section 39 of the U.P.Agriculturalists' Relief Act, 1934, requires that if a debt is borrowed by an agriculturist, it should be evidenced by a written document.[2] Though section 114 of the C.P.Municipal Act requires permission for connecting a private drain with the Municipal drain to be in writing, yet it has been held that section 90 of the Evidence Act does not exclude oral evidence of such permission.[3] A private reference to arbitration need not be in writing.[4] Sub-section (3) of section 153 C of the Indian Companies Act [sub-section (3) of section 399 of the Act 1 of 1956] requires that the consent of members should be in writing, i.e., in the form of a document. Therefore, the document itself should prove that the consent has been given. No evidence, either by way of affidavit or of oral sworn statement in Court, can be given to prove that such consent was given.[5]

A contract of sale is not required by law to be reduced to writing.—A contract of sale as distinguished from the sale itself need not be in writing,[6] and, if in writing, need not be registered.[7] A contract of sale can be enforced by specific performance, and if the contract has not been reduced to writing, oral evidence of the terms of the contract will be admissible,[8] but such evidence will not be admissible if the terms of the contract have been reduced to writing.[9] Where a contract of sale has been acted upon, e.g., by delivery of possession to purchaser and the passing of consideration, the contract is a good defence to a suit for possession by the vendor,[10] even if the period of limitation for a suit for specific performance has expired.[11] The Rangoon High Court has held that even where the contract of sale has been superseded by a regular sale deed, but the sale deed has not been registered, and is, for that reason, inadmissible as evidence of title, there is nothing in the provisions of section 91 of the Indian Evidence Act to prevent oral evidence being given in proof of the oral agreement to sell, which must always precede the execution of a sale deed.[12] In a subsequent decision of the same Court, this rule has been extended further and if has been held that the in admissible sale deed itself is good evidence of the terms of the contract of sale.[13] Now see section 10 of Act XXI of 1929 which gives statutory recognition to this rule.

Whether oral evidence of a confession to a Magistrate is admissible when the

1. *See* O. 18, rr. 5-14, C.P.Code and Ch. XXV, Cr. P.Code.
2. *Naubat Rai* v. *Jugal Kishore*, 1949 A 606 : 1949 ALJ 102 : 1949 AWR 202.
3. *Abdulla* v. *Ambadas*, 1930 N 130 : 120 C 221. The correctness of this decision is doubtful.
4. *Gadula Rami Naidu* v. *Meesala Seetham Naidu*, 1935 M 276 : 154 IC 821 ; *Chella Bhai Atma Ram* v. *Nandu Rai*, 21 B 335, 345.
5. *Makhan Lal Jain* v. *Amrit Vanaspati Co. Ltd.*, 1953 A 326 : 1952 ALJ 749.
6. *See* section 54, Transfer of Property Act.
7. Section 17 (2) of the Registration Act.
8. *Ma Myat Tha Zan, etc* v. *Ma Dun, etc.*, 2 R 285 : 1924 R 214 : 81 IC 857.
9. *Vyankatesh* v. *Ganesh*, 1921 N 166 : 61 IC 896.
10. *Ma Myat Tha Zan, etc.* v. *Ma Dun, etc.*, 2 R 285 : 1924 R 214 : 81 IC 857 (FB) ; *Venkatesh Damodhar Mokashi* v. *Malappa Bhimappa Chikati, etc.*, 46 B 722 : 1922 B 9 : 66 IC 868 ; *Bapu Anaji* v. *Kashinath Sadhoba*, 41 B 438 : 39 IC 103 ; *The Vizagapatam Sugar Development Co., Ltd.* v. *T.Muthuramareddi*, 46 M 919 : 1924 M 271 : 76 IC 886 (FB) ; *Akbar Fakir* v. *Intail Sayal*, 29 C 707 ; *Begum* v. *Mohhammad Yakub*, 16 A 344.
11. *Venkatesh Damodhar Mokashi* v. *Malappa Bhimappa Chikati, etc.*, 46 B 722 : 1922 B 9 : 66 IC 868.
12. *Ma May Tha Zan* v. *Ma Dun etc.*, 2 R 285 : 1924 R 214 : 81 IC 857, Carr, J. Dissenting, *See* observations of the Privy Council in *Immudipattam Therugana S.O. Kondama Naik* v. *Periya Dorasami*, 28 IA 46 : 24 M 377 at pp 384, 385. See also *Koramat Khan* v. *S.P.L. Latchmi Achi*, 61 IC 675 (FB). *Bibi Anwarunnisa* v. *Daulat Rai*, AIR 1988 Pat 229.
13. *Maung Tun Pe, etc.* v. *Maung Sein Myi, etc.*, 7 R 414 : 1929 R 293 : 120 IC 232 ; see also *Herlalsa, etc.* v. *Babu*, 1922 N 58 : 56 IC 382 ; *Keshwar Mahton, etc*, v. *Sheonandan Mahton*, 1929 P 620 ;

Magistrate has made no record of the confession or when the record is defective.—A confession made to a Magistrate in the course of a trial or inquiry or in the course of police investigation is a matter required by law to be reduced to writing. Where, therefore, the Magistrate has neither acted nor purported to act under Section 164 or Section 664 of the Code of Criminal Procedure, and nothing has been tendered in evidence as recorded or purporting to be recorded under either Section 164 or section 364 of the Code, oral evidence of the Magistrate is not admissible.[1] If any of the provisions of Section 164 and 364, Cr.P.Code, have not been complied with by the Magistrate in recording the confession, the Court shall take evidence that the prisoner duly made the statement recorded.[2] But where the defect in the mode of recording the confession is one of substance, it cannot be cured by the oral evidence of the Magistrate and the confession will be inadmissible.[3] The statement of the Magistrate as to what was said by the Sub-Inspector to the accused and what the accused did in his presence does not amount to proof of any confession, and the evidence is not barred under Section 91 of the Act,[4] For further notes to this subject, see the commentary on sections 24, 25, 26, 27 and 80 where this subject has been fully discussed.

Oral evidence in proof of a deposition.—Generally a deposition, whether in a civil or in a criminal case, a matter required by law to be reduced to writing. The rules with regard to the recording of deposition are contained in Order XVIII of the Civil Procedure Code and Sections 353 to 365 of the Criminal Procedure Code. These rules provide that the deposition must be read over to the witness and that, where a deposition is made in a language different from the one in which it is recorded, it must be interpreted to the witness. If a deposition is not read over or interpreted to the witness in the manner provided, the deposition loses the benefit of the presumption of Section 80 of the Evidence Act; but the rulings are by no means unanimous on the question whether or not it is thereby rendered entirely inadmissible. The question whether a defective deposition is rendered entirely inadmissible or not is important from the point of view of Section 91 of the Evidence Act inasmuch as if the deposition is held to be entirely inadmissible, no oral evidence in proof of the deposition will be admissible by reason of the provisions of the present section, a deposition being a matter required by law to be reduced to the form of a document;[5] If, however, the deposition is not rendered entirely inadmissible but merely loses the benefit of the presumption of Section 80 of the Evidence Act, oral evidence in proof of the fact that the deposition

---

Brajaballav Ghose, etc. v. *Akhoy Bagdi, etc.*, 1926 C 705 : 93 IC 115 ; *Parikhit Thapa* v. *Nidhi Thapa*, 1954 Orissa 31.

1. *Nazir Ahmad* v. *E.*, 17 L 529 : 1936 PC 523 : 63 IA 372 ; *Rishi* v. *State*, 1955 P 425 ; *Abdul Rahim* v. *E.*, 1945 L 105 (FB) ; *Sharif Jio* v. *E.*, ILR 1943 Kar 371 ; but see *Chhutkonnoo Singh* v. *Rex.*, 1949 O 84 : 51 Cr LJ 219 followed in *State* v. *Modan Mohan*, 1953 Pepsu 182 ; see also *King Emperor* v. *Sheo Shankar Singh*, 1954 P 109 : 32 P 243 : 1954 Cr LJ 171.
2. S. 533, Cr. P. Code.
3. *See* notes to Section 24 under the heading "Proof of a judicial confession ; oral confession to Magistrates".
4. *Jagannath Gupta* v. *Rex.*, 1950 A 9 : 51 Cr LJ 229.
5. *Eusaf Ali* v. *E.*, 1933 C 190 : 142 IC 653 ; 34 Cr LJ 430 ; *E.v. Nabab Ali Sarkar*, 51 C 236 : 1924 C 705 : 81 IC 803 : 25 Cr LJ 1027 ; *Nalluri Chenchiah* v. *E.*, 42 M 561 : 50 IC 987 : 25 Cr LJ 1027 ; *Imam Din* v. *Namatullah*, 1 L 361 : 58 IC 830 : 21 Cr LJ 830 ; *Ramdhari Singh* v. *E.*, 43 IC 585 : 19 Cr LJ 169 : *Mahendra Nath Misser* v. *E.*, 8 Cr LJ 116 ; *Kamaichinathan Chetty* v. *E.*, 28 M 308 : 2 Cr LJ 756 , In the matter of the petition of *Mayadeb Gossami*, 6 C 762.

contained in the document was made by the deponent will be admissible.[1] In the latter case oral evidence is not given in substitution of a document, but merely in proof of a document; and such course does not in any way offend against the provisions of Section 91. If, however, oral evidence refers to the terms of a deposition which are not embodied in the document or which are inconsistent with the document, different considerations will arise and the question will have to be decided with reference to the provisions of the next section.[2] Where the Court has recorded all that the witness stated, the record is the only evidence of what the witness said. But where this is not the case, what has been omitted by the Court to be recorded may be proved by other evidence.[3] The Privy Council decision in *Abdul Rahman* v. *King Emperor*[4] supports the view that a defective deposition is not rendered entirely inadmissible. It follows, therefore, that where the record of a deposition is defective, oral evidence to prove that the statement contained in the record was made may be given. The act of deposing, as distinguished from the terms of the deposition, is a physical fact which may be proved by the evidence of anyone who saw and heard the witness make the statement. Where the act of deposing is to be proved, it is immaterial whether the record containing the deposition is produced or not. But if the terms of the deposition are sought to be given in evidence, it is submitted that the only proper proof of it would be the record of the deposition, proved either presumptively under Section 80 or by the evidence of someone in whose hearing the evidence was given.[5] The section does not stand in the way of proving the *factum* of a statement hoxing been made by a certain person.[6]

Acknowledgement of liability; payment of interest on, and part payment of the principal of a debt.—So that it may start a fresh period of limitation, an acknowledgement of liability must be in writing signed by the party against whom that liability is sought to be enforced, or by his duly authorized agent.[7] Such acknowledgement can, therefore, be proved only by the production of the writing containing the acknowledgement, and oral evidence of its contents is admissible[8] if the acknowledgement is not properly stamped.[9] If however, the writing is lost or destroyed, or the party relying on the acknowledgement otherwise establishes his right to give secondary evidence of the writing under Section 65 of the Evidence Act, such secondary evidence will be properly admissible under the provisions of Section 65 and 91 of the Evidence Act.[10] Where the

1. *Padam Prasad Upadhyaya* v. *E.*, 1929 C 617 : 119 IC 193 : 30 Cr LJ 993 ; *Mst. Feroza Jan* v. *Mirza Amir Ali*, 1923 O 119 : 74 IC 445 : 24 Cr LJ 781 ; *Pittomal* v. *E.*, 1921 S 151 : 86 IC 33 : 26 Cr LJ 657 ; *Miranbux* v. *E.*, 1923 N 39 : 23 Cr LJ 500 : 68 IC 36 ; *Elahi Baksh Kazi* v. *E.*, 45 C 825 : 45 IC 258 : 19 Cr LJ 498 ; *Tun Ya* v. *E.*, 51 IC 666 : 20 Cr LJ 506.
2. *See* notes to Section 92 under the headings "the section applies only to dispositive instruments and excludes parole evidence only as between the parties to such instruments and their representatives in interest" and "evidence to contradict a recital in a record."
3. *Sheo Karan Lal* v. *Bandi Prasad*, 1943 P 117.
4. *Abdur Rahman* v. *E.*, 5 R 53 : 1927 PC 144.
5. *Ganapati Aiyar* v. *Sakharayappa Mudaliar, etc.*, 1929 M 187 : 115 IC 147.
6. *Mohammad Farooq* v. *Rex.*, 1950 A 501 : 1950 ALJ 277 : 51 Cr LJ 1346.
7. Section 19 of the Limitation Act.
8. Section 19 of the Limitation Act, and Section 91 of the Evidence Act ; *Mohammad Haidarali Khan* v. *Brojendra Kumar*, 45 CWN 208.
9. *Mulji Lal* v. *Lingu Makaji*, 21 B 201 (FB) ; *Sita Ram* v. *Thakur Das*, 50 IC 781 ; *Ram Das* v. *Inayatuallah, etc.*, 45 A 374 : 1923 A 297 : 71 IC 1027 ; *Bishunath Singh* v. *Ishri Dayal*, 1928 O 408 : 112 IC 247 ; *Alapati Achutaramana* v. *Vasireddi Jagannadham etc.*, 1933 M 117 : 140 IC 833.
10. *Chathu* v. *Viararyan*, 15 M 491 : *Wajibun* v. *Kadir Bukhsh*, 13 C 292 ; *Shambhu Nath* v. *Ram Chandra Shaha*, 12 C 267.

writing containing the acknowledgement is undated, or evidence may be giving of the time when it was signed.[1] Oral evidence is admissible also to prove the true date on an acknowledgment, though it purports to have been written on some other date.[2] It is not necessary that the writing which is relied on as on acknowledgment should specify the exact nature of the property or right in respect of which liability is acknowledgement and there is no bar to extrinsic evidence being admitted for the purpose.[3] Where a receipt for money was executed on a certain date, but no money was received on the date, it was held permissible to show extrinsic evidence that the receipt was in fact an acknowledgment of a loan advanced some three years before the date of the receipt.[4] Where the terms of on acknowledgment are applicable to more debts than one, it is for the plaintiff to show by proof of surrounding circumstances to which of these debts the acknowledgment refers; but oral evidence of the intention of the writers is not admissible for the purpose of construing the acknowledgement.[5] External evidence is admissible to show that an unstamped acknowledgment was not signed to supply evidence of the debt referred to in it.[6] Parole evidence may be given to show that the name of A was written by mistake for the name of B in an acknowledgment.[7]

To give a fresh start to the period of limitation for a suit, the fact of the payment of interest on, or of part payment of, the principal of a debt must appear in the handwriting of the debtor or his duly authorized agent.[8] Oral evidence is not, therefore, admissible to prove the fact of such payment so as to give a fresh start to the period of limitation. The Allahabad High Court has held that the term "in proof of such matter" in Section 91 carries with it the term "in disproof of it"; and, on his assumption, it has ruled that where the parties make an endorsement on an instrument of loan that a part payment of the loan has been made, oral evidence to show that no payment has, in point of fact, been made is admissible under Section 91.[9] It is submitted that the assumption employed in the decision of the case last mentioned is not justified. Section 91 deals with the *proof* of certain matters which are specified in that section and declares that evidence, other than the document itself, is admissible in proof of such matters. But where a document relating to any matters specified in Section 91 is produced and proved, and evidence is sought to be given to contradict something mentioned in the document, the proper section that governs the case is Section 92 which may be said to deal with the disproof of matters mentioned in a document which has been proved in accordance with Section 91. Assuming that a fictitious endorsement of payment does not save limitation, oral evidence contradicts merely a recital of a fact and not the terms of a contract, grant or deposition or property.[10] Illustration (d) to Section 91 seeks to *disprove* a fact mentioned in a document; but this illustration is a more apt illustration to Section 92 than to Section 91. See notes to Section 92 under the headings "Distinction between Section 91

1. Section 19 (2) of the Limitation Act.
2. See *Jago* v. *Mahadeo*, 1921 N 94 : 59 IC 709.
3. *Nihalu Ram Chetla Ram* v. *Radhu Ram Hukmi Ram* 1934 L 835.
4. *Ram Chaube* v. *Sheo Harakh Tewari*, 8 Luck 195 : 1933 O 80. 141 IC 298.
5. *Betia Maharani* v. *The Collector of Etawah*, 22 IA 31 : 17 A 198 (PC) ; *Mohammad Haidarali Khan* v. *Brojendra Kumar*, 45 CWN 208.
6. *V.R. Venkatachalapathi Chettiar* v. *Lakshman Chettiar*, 1921 M 71.
7. *Aijaz Hussain* v. *Ram Sarup, etc.* 1931 O 54 : 130 IC 347.
8. Section 20 of the Limitation Act (as amended by Act I of 1927).
9. *Rambohar Misir* v. *Chaturghun Raj*, 1935 A 58 : 154 IC 1070.
10. *Mohammed Taki Khan* v. *Jang Singh*, 1935 A 529 : 156 IC 362 (FB).

and Section 92" and "Oral evidence contradicting recitals of facts which are not terms of a contract, grant or disposition is admissible."

Provious conviction must be proved by documentary evidence.—Having regard to the provisions of section 511 of the Criminal Procedure Code and section 91 of the Evidence Act, a previous conviction should be proved by copies of judgments or extracts from judgments or by any other documentary evidence of such conviction.[1]

Oral evidence of a dying declaration.—A dying declaration is not a matter required by law to be reduced to the form of a document. A complaint or the examination of a complainant under Section 200 of the Criminal Procedure Code, which amounts to a dying declaration, may, therefore, be proved by oral evidence.[2]

Statements to the police.—Section 161 of the Cr. P. Code does not make it obligatory on a police officer conducting an investigation to reduce to writing the statement of witness whom he examines under that section. Section 91 of the Evidence Act does not, therefore, exclude oral evidence of such statement. [3] It has however, been held under the amended Section 162 of the Criminal Procedure Code that statements made to the police cannot be used either for or against the accused unless they have been reduced to writing, and that, even when reduced to writing, they can only be used for the limited purpose of contradicting the prosecution witnesses.[4] When a statement made to the police is used to contradict a prosecution witness, the record of the statement must be proved, and oral evidence of the statement, except, an admission by the maker of the statement, is inadmissible. See notes to section 145.

Oral evidence in proof of a search, whether admissible?—Section 103 of the Criminal Procedure Code provides that when a search is made under Chapter VII of the Code, a list of all things seized in the course of the such search and of the places in which they are found shall be prepared by the officer conducting the search and signed by at least two respectable inhabitants of the locality in which the place searched is situated. It would seem to follow from this section of the Code that the fact of certain things having been found from a certain place on search is a "matter required by law to be reduced to the form of a document" and that other evidence in proof of this matter would, by reason of section 91 of the Evidence Act, be inadmissible, where no search list has been made, or where the search list made has not been produced. This view of the matter was taken in an early case;[5] but in a subsequent Full Bench decision of the Madras High Court it has been held that the words in Section 91 of the Evidence Act "any matter required by law to be reduced to the form of a document" could not have been intended by the Legislature to mean observation of physical facts which under the ordinary law have to be proved by testimony in Court, and that, when a search has been made under section 103 of the Criminal Procedure Code, evidence can be given regarding the things seized in the course of the search, and regarding the places in which they

1. *Yasin* v. *E.*, 28 C 689.
2. *Gouri Das Namasudra* v. *E.*, 36 C 659 ; 2 IC 841 ; 10 Cr LJ 186.
3. *Reg.* v. *Uttam Chand Kapur Chand*, (1874) 11 BHCR 120 ; *see also Noor Mohomed* v. *E.*, 42 IC 766 ; 18 Cr LJ 1022.
4. *Daya Ram* v. *E.*, 7 L 264 ; 1926 L 367 ; 95 IC 467 ; 27 Cr LJ 803 ; *Chinna Thirmmappa*, etc. v. *Talukanta Timmappa*; 51 M 967 ; 1928 M 1028 ; 112 IC 682 ; 29 Cr LJ 1098 (FB) ; *Labh Singh* v. *Crown*, 6 L 24 ; 1925 L 337 ; 88 IC 513 ; 26 Cr LJ 1153 ; *Rakha* v. *Crown*, 6 L 171 : 1925 L 399 ; 93 IC 230 ; 27 Cr LJ 438.
5. *Abdul Khadir, etc.*, v. *Q. E. Weir's* "Criminal Rulings", 4th Ed. Vol. 2 p. 515

were respectively found, other than the list which the law directs in the section to draw up containing those particulars.[1] In the Madras Full Bench decision last cited and from which the observations quoted above are taken, the search list was as a matter of a fact produced, but, the search being irregular, it was contended that the search list made was for that reason inadmissible and that no other evidence in proof of the search could, under section 91 of the Evidence Act, be given. This contention was hardly correct, inasmuch as the inadmissibility of a search list does not follow as a matter of course from the irregularity of the search.[2] If the memorandum of a regular search is made, produced and duly proved, the provisions of Section 91 of the Evidence Act are complied with; because what the section requires is that a document must be made containing the matter required by law to be reduced to writing, and produced. The case, is, however, different where the officer making the search either does not prepare a list at all as required by Section 103, Cr.P. Code , or the list, having been made, is not produced at the trial, and the things found on search are sought to be proved by oral evidence to have been so found. There is no reason why oral evidence in such a case should be more admissible than oral evidence in proof of a transaction of sale where such transaction is a matter required by law to be reduced to the form of a document. Of course mere absence of witnesses at a search does not make the search, as a matter of law, incapable of proof, though it may weaken and may sometimes destroy the acceptance of the evidence as to the findings of the articles.[3]

Exception I: appointment of a public servant may be proved by proof of his having acted as such.—It is another *prima facie* presumption of law that a person has been duly appointed, if he has in fact acted in an official capacity. For it cannot be supposed that any man would venture to intrude himself into a public situation which he was not authorized to fill.[4]

Exception II : wills may be proved by the probate.—Probate means the copy of a will certified under the seal of a Court of competent jurisdiction with a grant of administration to the estate of the testator.[5] A will admitted to probate in British India may, under *Exception II to* this section, be proved by the production of the probate; and wills admitted to probate in England or Ireland may be proved by the probate under Section 82 of the Act.

Explanation I; transaction contained in more documents than one.—If a contract, grant or disposition of property is contained in more documents than one, all documents must be produced to prove the terms of the contract, grant , all the letters in which it is contained must be proved[6] by primary evidence, or by secondary evidence where secondary evidence is properly admissible.

Explanation II : only one original need be proved.—Where there are more originals than one, one original only need be proved, Instances of the case dealt with by this

1. *Solai Naik* v. *E.*, 34 M 349 ; 8 IC 178 ; 11 Cr LJ 576 (FB) ; *See also Public Prosecutor* v. *Sarabu Chennayya*, 33 M 413 ; 8 IC 809 ; 11 Cr LJ 716 ; *Elamathan* v. *E.*, 33 M 416 ; 5 IC 438 ; 11 Cr LJ 136. The Madras Full Bench decision in *Solai Naik* v. *E.*, 34 M 349 ; 8 IC 178 ; 11 Cr LJ 576 has been followed by the Lahore High Court in *Bachan* v. E., 99 IC 49 ; 1927 L 149 ; 28 CLJ 17.
2. See section 537 of the Cr. P. Code; *Ramesh Chandra Bannerjee* v. *E.*, 41 C 350 ; 23 IC 985 ; 15 Cr LJ 385 ; *Abdul Hafiz Khan* v. *E.* 1926 A 188 ; 27 Cr LJ 265 ; 92 IC 441.
3. *Malak Khan* v. *The King-Emperor*, 1946 PC 16 ; 1945 (2) MLJ 486.
4. Taylor, § 171.
5. Section 2 (f), Act XXXXIX of 1925.
6. III, (a) to section 91.

Explanation are bills of exchange of which three are usually executed; called that first, second, and third of exchange, and bills of lading which are usually in duplicate, and often in triplicate.[1] Where a document list executed in several parts each part is primary evidence of the document.[2]

Explanation III.—See notes to this section under the heading "Explanation III; other evidence not excluded if the fact to be proved is a fact other than the facts referred to in the section".

Illustration (b)—The illustration does not refer to a contract of loan of money and it can only apply when the bill of exchange is in consideration of a sum of money which is not given as a loan.[3]

92. Exclusion of evidence of oral agreement.—When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms :

Proviso (1).—Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, [4][want or failure] or consideration, or mistake in fact or law.

Proviso (2).—The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved, In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

Proviso (3).—The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

Proviso (4).—The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

---

1. Woodroffe, Ev., 9th Ed., 631.
2. Section 62, Expl. 1.
3. *Sheo Nath Prasad* v. *Sarjoo Nonia*, 1943 A 220 ; 206 IC 578 ; ILR 1943 A 610.
4. *Subs* by Act 18 of 1872 , S. 8, for ' want of faliure."

Proviso (5).—Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved :

Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.

Proviso (6).— Any fact may be proved which shows in what manner the language of a document is related to existing facts.

Illustrations

(a) A policy of insurance is effected on goods " in ships from Calcutta to London ". The goods are shipped in particular ship which is lost. The fact that particular ship was orally excepted from the policy, cannot be proved.

(b) *A* agrees absolutely in writing to pay **B** Rs. 1,000 on the 1st March, 1873. The fact that, at the same time, an oral agreement was made that the money should not be paid till the thirty-first March, cannot be proved.

(c) As estate called "the Rampore tea estate" is sold by a deed which contains a map of the property sold. The fact that land not included in the map had always been regarded as part of the estate and was meant to pass by the deed, cannot be proved.

(d) *A* enters into a written contract with *B* to work certain mines, the property of *B*, upon certain terms. *A* was induced to do so by a misrepresentation of *B's* as to their value. This fact may be proved.

(e) *A* institutes a suit against *B* for the specific performance of a contract, and also prays that the contract may be reformed as to one of its provisions, as that provision was inserted in it by mistake. *A* may prove that such a mistake was made as would by law entitle him to have the contract reformed.

(f) A orders goods of *B* by a letter in which nothing is said as to the time of payment, and accepts the goods on delivery. *B* sues *A* for the price. *A* may show that the goods were supplied on credit for a term still unexpired.

(g) *A* sells *B* a horse and verbally warrants him sound. *A* gives *B* a paper in these words "Bought of *A* a horse for Rs. 500" *B* may prove the verbal warranty.

(h) *A* hires lodgings of *B*, and gives *B* a card on which is written— "Rooms, Rs. 200 a month". *A* may prove a verbal agreement that these terms were to include partial board.

A hires lodgings of *B* for a year, and a regularly stamped agreement, drawn up by an attorney, is made between them. It is silent on the subject of board. *A* may not prove that board was included in the terms verbally.

(i) *A* applies to *B* for a debt due to *A* by sending a receipt for the money. *B* keeps the receipt and does not send the money. In a suit for the amount, *A* may prove this.

(j) *A* and B make a contract in writing to take effect upon the happening of a certain contingency. The writing is left with *B*, who sues *A* upon it. *A* may show the circumstances under which it was delivered.

COMMENTARY

Principle.—This section is based on the same principle as the preceding section. namely, superiority of documentary evidence to oral evidence, The grounds of exclusion of oral evidence are; (i) that to admit inferior evidence when the law requires superior would be to nullify the law; and (ii) that when the parties have deliberately put their privies that they intended the writing to form a full and final settlement of their intentions, and one which should be placed beyond the reach of future controversy, bad. faith, or treacherous memory.[1]

Distinction between Section 1 and Section 92.—Section 91 excludes extrinsic evidence in proof of the terms of contract, grant or other disposition of property, or in proof of a matter required by law to be reduced to the form of a document, and requires the production of the document itself except where secondary evidence becomes properly admissible. Section 92, on the other hand, says that when the terms of any such contract, grant or other disposition of property, or of any matter required by law to be reduced to the form of a document, have been proved by the production of the document, or by secondary evidence where such evidence is admissible, evidence of any oral agreement or statement shall not be given for the purpose of contradicting,varying, adding to or subtracting from, the terms of the document. Both sections are deductions from what in English law is called the "parole evidence, rule" ; but whereas Section 91 deals with the exclusiveness of documentary evidence, Section 92 deals with the conclusiveness of such evidence; in other words, Section 91 deals with the proof of matters mentioned in that section, but Section 92 deals with what may, in a sense, be called disproof of such matters.

Oral evidence is not excluded if the terms of the contract, grant or disposition have been reduced to writing.—The section excludes other evidence only if the contract, grant or disposition have been reduced to the form of a document. Where, therefore, there is no document or the document does not constitute the contract between the parties, oral evidence is not excluded. Thus, a letter written to the mortgagor by a person who was the agent of both the mortgagor and the mortgagee, giving the particulars of the security, will not exclude oral evidence as to the scope of the security, for the letter does not represent the contract between the mortgagor and the mortgagee.[2]

1. Phipson Ev., 7th 552.
2. *Miss J.J. Villa* v. *C.A. Petley*, 1934 R 51 ; 148 IC 721.

Oral evidence is admissible to show that, notwithstanding a written agreement there was no real agreement between the parties – The production of a paper purporting to be an agreement by a party, with his signature attached, affords a strong presumption that it is his written agreement, and if in fact he did sign the paper *animo contrahedi*, the terms contained in it are conclusive and cannot be varied by parole evidence. But if it be proved that in fact the paper was signed with the express intention that it should not be an agreement. The other party cannot fix it as an agreement upon those so signing. The distinction in point of law is that evidence to very the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible.[1] Under Section 92, Evidence Act, the parties to a contract may not very a written statement, but they may show that they never came to an agreement at all and that the signed paper was never intended to be a record of the terms of the agreement, or they may show that a written contract which has no date was not intended to operate from its delivery but from a future uncertain period, or they may show that the parties never intended the signed paper to be an agreement until a condition precedent was fulfilled.[2] Section 92 will operate as a bar only when oral evidence to very or modify the terms of an agreement is sought to be let in. Oral evidence is admissible to prove that an agreement in writing was really no agreement at all but was only a sham, as it was not intended to be operative,[3] or that it was brought into existence solely for the purpose of creating evidence about some other matter,[4] or was only a fictitious or colourable device which cloaked something else. Benami Transactions are a common illustration of the latter type of cases.[5] Whether a sale deed was a sham and simulated one not intended to convey any title, or whether it was real one intended to pass title to the transferee thereunder, depends upon the *animus transferendi* at the time when the parties entered into the transaction, and each has to be decided with reference to the documents and the surrounding circumstances.[6] Hence, it is open to a Hindu widow to prove that an agreement which purported to provide for her maintenance was not meant to be acted upon but its execution was brought about only to secure an acknowledgement from her that her deceased husband was an undivided member of a joint Hindu family, by inserting a clause to that effect as a preamble to

---

1 *Deep Chandra* v. *Sajjad Ali Khan*, 1951 A 93 (FB); *Bhawanbhai Prembhai* v. *Bai Vahali*, 1955 B 320; *Pym* v. *Campbell*, 6 El & Bl 370; 25 LJQB 227; 2 Jur N.S. 641; 4 WR 528; *Rai Satyendranath Roy Chowdhury* v. *Pramananda Haldar*, 39 CWN 888; *Guddalur Ruthna* v. *Kunnatur*, 7 MHC 189; *Ramdhani Singh etc.* v. *Kewal Mani Bibi*, 1926 P 156; 90 IC 929; *Abdul* v. *Arlin*, 1926 R 94; 95 IC 512; *Bishambar Das* v. *Ram Chandra*, 1937 ALJ 1352.

2 *Radhakissen Chamaria* v. *Durgaprasad Chamaria*, 59 C 106; 1932 C 328; 143 IC 159.

3 *Ram Bharose* v. *Rameshwar Prasad Singh*, 71 IC 481; *Mohammad Sultan Begum* v. *Suraj-ud-Din Ahmad*, 1936 L 183; 161 IC 300; *Rai Satyendranath Roy Chowdhury* v. *Pramananda Haldar*, 39 CWN 888; Ram Lal Dhian Singh etc., 1933 L 222; 145 IC 689; *Thiagaraja Mudaliar etc.* v. *Vedathanni*, 1933 M 48; 141 IC 456; *Mohammad Azim Khan etc.* v. *Raja Saiyed Mohammad Sadaat Ali Khan etc.*, 1931 O 177; 136 IC 642; See also *Hukum Chand* v. *Shambhu Nath*, 1935 A 346 (1); 158 IC 121; *Kundan Das etc.*, v. *Radhika Singh etc.*, 1929 P 717 *Ramti Devi* v. *Union of India*, (1995) 1 SCC 198.

4 *Tyagaraja Mudaliar* v. *Vadathanni*, 64 IA 126; 59 M 446; 1936 PC 70; 160 IC 384; *Bishambar Das* v. *Ram Chandra*, 1937 A 1352; 1938 AWR 8 (HC).

5 *Asa Ram* v. *Ludheswar*, 1948 N 335 (FB); *A. Rakkiyana Goundar* v. *Chinnu Gounden*, 1954 M 84; 66 ML W 760; 1953 2 MLJ 450.

6 *K. Tirupathi Mudali* v. *T. Lakshmana Mudali*, 1953 M 545; 1953 1 MLJ 123; see also *Ouseph Chacko* v. *Raman Nair*, AIR 1989 Ker 317.

what was alleged to be a deed of maintenance.[1] A person may admit that he executed a deed of gift and yet plead that he had no intention to divest himself of the ownership of the property gifted.[2] Where a person who has executed a document seeks to show that the document is a mere sham deed and represents nothing, he is not seeking to vary or contradict any of the terms of a document and oral evidence is admissible to prove that there was no such agreement between the parties as is represented by the document.[3] If a tenant executes a *kabuliyat* on a representation by the landlord that one of the terms mentioned therein will not be enforced, the *kabuliyat* is not really the agreement between the parties, as the tenants cannot be said to have assented to that term.[4] In a Calcutta case, however, it has been ruled that oral evidence is inadmissible to show that the mortgagor signed the mortgage-deed only on his being assured by the mortgagee that one of the stipulations in the mortgagee-deed, e.g., stipulation as to compound interest, would not be enforced.[5] The Allahabad High Court[6] has held, that parties to a sale deed cannot be allowed to adduce oral evidence to show that they never intended that ownership should pass and that conseqently there was no sale notwithstanding the execution of a sale deed,[7] and this view is supported by some observations in a Privy Council decision.[8] The Madras High Court also has held that proof of any oral agreement to show that a document which purports to be a sale deed was not intended to confer an absolute title but only to afford security for the maintenance of the purchaser as long as she lived with the vendor is excluded under Section 92 of the Evidence Act.[9] Where a person transfers certain property by deed of gift, it is not open to him to say that when he gave the property, he did not intend that ownership of the gifted property should pass to the donee at once.[10] In a Lahore case where the plaintiff sued for recovery of Rs. 1,25,000 as dower alleging that the amount was fixed at the time of her marriage and entered in the *Kabinnama*, the Judges differed on the question whether the defendant could lead oral evidence to prove his plea that the amount sued had been entered in the *kabinnama* merely for purposes of show.[11] Where the defence taken is that a writing which purports to be a contract is really not the contract between the parties, the defence, even if not contrary to the terms of section 92 of the Evidence Act,

1. *Thiagaraja Mudaliar, etc.*, v. *Vedathanni*, 1933 M 48 ; 141 IC 456.
2. *Mohammad Azim Khan etc.* v. *Raja Saiyid Mohammad Saadat Ali Khan*, etc., 1931 O 177 ; 136 IC 642.
3. *Abdul* v. *Arlin*, 1926 R 94 ; 95 IC 512 ; *Ratanlal Kesarachand* v. *Bandulal Radhakishen*, 1953 Hyd. 174.
4. *Nadir Chandra Saha* v. *Birendra Nath Dutt Chowdhury*, 37 IC 126 ; *See also Hon Maharaja Manindra Chandra Nandi Bahadur* v. *Srimati Durga Sundari Dasya*, 32 IC 185 ; 20 CWN 680 ; *Puplin Behari Deb* v. *Rama Kanta Mahata Kurmi*,ILR (1938) 1 C 48 ; *But see Maheshchandra Shaha* v. *Ananda Chandra Shaha*, 61 C 344; 1934 C 564 ; 151 IC 511.
5. *Maheshchandra Shaha* v. *Ananda Chandra Shaha*, 61 C 344; 1934 C 564 ; 151 IC 511; *see also Hara Kumar Saha* v. *Ram Chandra Pal*, 47 IC 943.
6. *Lachman Das, etc.*, v. *Ram Prasad etc.*, 49 A 680 ; 1927 A 422 ; 100 IC 1029 ; *But see Deep Chandra* v. *Sajjad Ali Khan*, 1951 A 93 : 1951 ALJ 81 ; ILR 1950 A 1033 (FB).
7. *See also Kunwar Ram Krishna* v. *Anand Krishna*, 1929 A 578 : (2) ; 118 IC 589 ; *Krishnapal Singh* v. *Sri Raj Kuar*, 1927 O 278 ; 104 IC 299 ; but see *Hon Maharaja Manindra Chandra Nandi Bahadur* v. *Srimati Durga Sundari Dasya*, 32 IC 185 ; 20 CWN 680 ; *Narendra Lal Khan* v. *Bhola Nath Bhuya, etc.*, 1923 C 417 ; 77 IC 154.
8. *Tsang Chen* v. *Li Po Kwai*, 1932 PC 255 ; 139 IC 891.
9. *Dasari Lakshmiayya* v. *Koppolu Murahari, etc.*, 1930 M 547 ; 128 IC 512.
10. *U. Thin* v. *Daw Hmu*, 1937 R 142 ; 171 IC 702.
11. *Mohammad Sultan Begum* v,. *Siraj-ud-Din Ahmad*, 1936 L 183 ; 161 IC 300.

looked on with suspicion.[1] Oral evidence to show that one of the items of property included in a conveyance was not intended to be conveyed and was included in the deed merely to give the Sub-register of a particular district jurisdiction to register the deed is not barred.[2]

Oral evidence is admissible to show that a writing does not represent a completed transaction.—Parties to a document may show by other evidence that a writing signed by them does not represent a completed transaction. Thus, where during the progress of a transaction of loan a promissory note was given merely as provisional security for the money, the Court admitted parole evidence to show that a higher rate of interest than the one mentioned in the promissory note was agreed upon, on the ground that the promissory note did not, in the cirucmstances disclosed, represent a completed contract.[3] If an advance is made under an oral agreement for the sale the promissory note does not shut out proof of the terms of the agreement.[4] Whether an agreement is a completed bargain or merely a provisional arrangement depends on the intention of the parties as deducible from the language used by the parties on the occasion when the negotiations took a concrete shape.[5] The burden of proving that a document does not represent a completed transaction is on the party who alleges it, and in determining this question the degree of formality of the document is an important factor.[6]

The section is not applicable where the whole contract has not been reduced to writing.—The rule excluding evidence extrinsic of the document applies only where the parties to an agreement reduce it to writing and agree or intend to agree, that the writing shall be their agreement.[7] The rule is not, therefore, applicable where the parties do not agree, or intend to agree, that the writing should contain the whole agreement between them,[8] and in such a case the terms left unembodied in the writing may be proved by parole evidence.[9] In determining the question whether the writing is or is not complete, the writing as well as the degree of formality of the document have to be considered and the burden of proving want of completeness is always on the party who alleges it.[10] If on the face of a document it appears that there are other conditions agreed upon between the parties which go to make up the whole contract, e.g., where, the agreement of sale refers to the sale as on "conditions agreed upon" such conditions are

1. *See Pym* v. *Campbell*, 6 El & Bl. 370 : 25 LJQB 277 ; 2 Jur. N. S. 641 4 WR 528 ; *Guddalur Ruthna* v. *Kunnattur Arumaga*, 7 MHC 189 ; Ramdhani Singh v. *Kewal Mani Bibi, etc.*, 1926 P 156 ; 90 IC 929.
2. *Ramnanda Prasad Narayan Singh* v. *Chandradip Narain Singn*, 1940 P 504 .
3. *Guddalur Ruthna* v. *Kunnattur Arumaga*, 7 MHC 189.
4. *Ba Shein* v. *E.*, 1922 Low. Bur. 10 : 64 IC 33 ; 22 Cr LJ 721.
5. *Harichand Mancharam* v. *Govind Luxman Gokhale*, 50 IA 25 ; 47 B 335 ; 1923 PC 47 ; 71 IC 763.
6. 12 Mys LT 11 ; Phipson Ev., 7th Ed., 556.
7. *Harris* v. *Rickett*, 28 LJ Exch. 167 ; *See also Tukaram Mahadappa Rajmane* v. *Jaganath Savlaram Kathle, etc.*, 1923 B 236 : 76 IC 215.
8. *Lalmani Pande* v. *Gopal Sah*, ILR 1945 A 387 ; *Sunder Singh etc.*, v. *Ram Saran Das*, 14 L 137 : 1933 L 61 : 142 IC 754 ; *Chimanram Motilal* v. *Diwanchand Govindram*, 56 B 180 : 1932 B 151 : 137 IC 478 ; *Beharee Lall Dev* v. *Kaminee Soonduree*, 14 WR 319 ; *Bholanath Khettry* v. *Kaliprasad Agurwalla*, 8 Beng. LR 89 ; *See Nathu Khan* v. *Mst. Sewak Koeri*, 9 IC 161 (portion of the contract not embodied in the sale deed).
9. *Coalfields of Burma Ltd.* v. *H.H. Johnson*, 2 R 575 : 1925 R 128 : 48 IC 1021 ; *See Thakursey Hjansraj* v. *Kishandas Rewachand, etc.*, 1925 S 9 : 76 IC 282 ; *Champaran Jain* v. *Sripathi Nath Deb*, 1938 C 430.
10. 12 Mys. LJ 11 : Phipson, Ev, 7th Ed, 556.

provable by parole evidence.[1] Section 92 applies only to cases where all the terms of a contract have been intended to be reduced into writing. This is shown by the words "adding to" which appear in the section.[2] The section contemplates all the terms of the contract, and not the signature, date, etc.[3]

Whether endorsement on a promissory note embodies all the terms of the contract ?—A bill or note is required by law to be in writing; and so is the supervening contract thereon, such as acceptance or endorsement. It, therefore, follows that the contacts between the immediate parties to them are subject to the ordinary rule as to written contract. A contract by endorser of a bill or note, however, stand on a different footing. It is not fully expressed in writing on the document itself and certain terms affixed to it either by the Law Merchant or by Statute, There is, therefore, more room for admission of parole evidence as to what is the contract represented by the transaction. Where the endorsement is silent, it undoubtedly raises a *prima facie* presumption of the law that the liabilities, *inter see*, of successive endorsers are that every prior endorser must indemnify a subsequent one. But this is only a presumption and not an express term of the contract reduced to writing. And, therefore, the rule as to exclusion of parole evidence crystalized in Section 92 of the Evidence Act does not apply. Thus, it is open to the endorser of a negotiable instrument to show that the endorsee has agreed orally that he will recover the amount of the instrument from the estate of the drawer only.[4] Similarly, oral evidence can be adduced to prove that a person signed on the back of a negotiable instrument with the object of making liable merely as a guarantor.[5]

The rule enacted by Section 92 of the Evidence Act is relaxed by Section 10.—A of the Deccan Agriculturists' Relief Act.--By Section 10-A of the Deccan Agriculturists' Relief Act, Section 92 of the Evidence Act is no bar to the admission of oral evidence to show the real nature of the transaction where, at the date of the transaction, one of the parties to it was an agriculturist.[6] Section 92, will, however, be applicable where the executant of an ostensible sale deed, though described in the deed as an agriculturist, is proved not to be an agriculturist.[7]

Oral evidence of the intention of the parties to a document is inadmissible.—The Privy Council has distinctly ruled that in construing a document oral evidence of the intention of the parties to the document is inadmissible[8] and that the express terms of a document cannot be contradicted by any oral evidence of the intention of the parties.[9]

---

1. *G.M. Cutts* v. *T.F. Brown*, 6 C 328.
2. See the judgment of Trevelyan J, appended as a footnote to *Jadu Ram* v. *Bhubotaran Nundy*, 17 C 173 ; *See also Ba Shein* v. *E.*, 1922 Low Bur. 10 : 64 IC 33 : 22 Cr. LJ 721.
3. *Balram Baoji Nasare* v. *Mahadeo Pandujni* 1949 N 389 : ILR 1949 N 849
4. *Sunderji Gaurishanker* v. *Abigail*, etc., 1928 S 50 : 105 IC 747.
5. *Thakursey Hansraj* v. *Kishandas Rewachand*, 1925 S 9 : 76 IC 282.
6. *See Section* 10 (A) of Act XVII of 1879 ; *Gopal Ghela* v. *Rajaram Amtha*, 36 B 305 : 13 IC 851 ; *Sawantrava Kom Fakirapaa* v. *Giriappa Fakirappa*, 38 B 18 : 21 IC 4.
7. *Milkimal* v. *Totomal*, 1939 S 200.
8. *Bulkishan Das* v. *Legge*, 27 IA 58 : 22 A 149 (PC) ; *Moung Kyin* v. *Ma Shwe Law*, 44 IA 236 : 45 C 320 : 1917 PC 207 : 42 IC 642 ; *Raja Bahadur Narasingerji Gyanagerji* v. *Raja Panuganti Parthsaradhi Rayanim Garu*, etc., 51 IA 305 : 47 M 729 : 1924 PC 226 : 82 IC 993 ; *See also Mst. Kishwar Jahan Begum* v. *Zafar Mohammad Khan*, 55 A 164 : 1933 A 186 : 146 IC 733 ; *Ma Shin* v. *Ma Thin Kyi*, 1934 R 129 : 150 IC 966 ; *U. Thin* v. *Daw Hmu*, 1937 R 142 : 171 IC 702 ; *Sait Balumal Dharamdas* v. *Gollapudi Venkata Chelpathi Rao*, 1955 M 78.
9. *K.S. Mian Feorz Shah* v. *Sohbat Khan*, etc., 60 IA 273 : 14 L 466 : 1933 PC 178 : 143 IC 659.

"The general rule," says Chief Justice Trindal in *Shore* v. *Wilson*,[1] "I take to be that where words of any written instruments are free from ambiguity in themselves and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument or the subject matter to which the instrument relates, such instrument is always to be construed according to the strict and plain common meaning of the words themselves, and that in such case evidence *dehors* the instrument for the purpose of explaining it according to the surmised or alleged mention of the parties to the instrument is utterly inadmissible. If it were otherwise, no lawyer would be safe in advising upon the construction of the written instrument not any party in taking under it, for the ablest advice would be controlled and the clearest title undermined if, at some future period, parole evidence of the particular meaning which the party affixed to his words, or of his secret intention in making the instrument, or of the objects he meant to take benefit under it, might be set up to contradict or vary the plain language of the instrument itself".[2] Where the terms of a contract are unambiguous and clear, there can be no question that the evidence to prove that the terms of the contract were used in a different sense must be excluded under Section 92 of the Evidence Act, nor is the Court in such a case entitled to speculate as to the meaning of words in the contract. But where the wording of the contract is capable of different interpretations. the Court is justified, and it is its duty, to put a proper construction upon the terms of the contract and is justified in finding with what intention a particular expression was used as a matter of pure construction.[3] Where a document purports to create expressly a possessory mortgage, it is not competent to the Court to admit oral evidence to find that the parties intended to create merely a simple mortgage.[4] Extrinsic oral evidence is inadmissible to explain the expression "interest" occurring in a mortgage-deed.[5] In a suit by beneficiaries under a *waqfnama* against the *waqif*. the *waqif* cannot be allowed to give in his evidence an explanation of what he meant by the provisions of the *waqfnama*.[6] Where a surrender by an occupancy tenant and lease to a third person are perfectly clear in their terms, oral evidence that the intention was to effect by his mode a sale of the occupancy holding is not admissible.[7] The intention of the parties to a compromise decree must be deduced from the language used in the compromise without any aid from oral evidence.[8] But where a document is designed only by one of the parties to it, it does not amount to a written agreement and hence oral evidence is admissible to prove that the real intention of the parties was different from that expressed by the terms of the document.[9]

Oral evidence of the intention or of the acts and conduct of the parties whether admissible to show that an instrument was intended to parties to be different from

---

1. (1843) 9 Cl & Fin. 355.
2. *Quoted in Tsang Chuen* v. *Li Po Kwai*, 1932 PC 255 at P 261 : 139 IC 891.
3. *Juran Mandal, etc.*, v. *Ram Mandal, etc.*, 55 C 808 : 1928 C 737 : 113 IC 37 ; *See also Radhamohan Thakur* v. *Bipin Behari Mitra*, ILR 1938 P 318 ; *Narayan* v. *Co-operartive Central Bank of Malakpore*, 1938 NLJ 82 : 1938 N 434.
4. *K.S. Mian Feroz Shah* v. *Sohbat Khan*, etc., 60 IA 273 : 14 L 466 : 1933 PC 178 : 143 IC 659.
5. *Bhadu, etc.*, v. *Ganpati etc.*, 1931 N 25 : 130 IC 103.
6. *Ahmad Ali Khan* v. *Mohamnad Aitzad Ali Khan*, 1936 A 704 : 165 IC 15.
7. *Vinayakrao Damodhar Rao* v. *Bhondu*, 1942 N 103.
8. *Sardar Autar Singh* v. *Raja Sir Mohamnad Ejaz Rasool Khan*, 1944 O 106.
9. *Egged Co-operative Society* v. *Levy Geffen*, 1947 PC 32.

what it purports to be or to show that there was a contemporaneous oral agreement varying the terms of the instrument; mortgage or sale ?—There has been considerable confusion and conflict of opinion on the question whether oral evidence of the intention or of the acts and conduct of the parties is admissible to show that what an instrument was intended by the parties to be different from what it purports to be or to show that there was a contemporaneous oral agreement between the parties varying the terms of the instrument. But it is submitted that, in view of certain decisions of the Privy Council to which reference will presently be made, the subject now admits of a simple treatment and that certain definite rules can be deduced from the mass of case law that has accumulated round the subject. The Privy Council decision in *Balkishan* v. *Legge*,[1] which have been approved and acted upon by the Board on several subsequent occasions,[2] is a clear authority for the proposition that oral evidence for the purpose of ascertaining the intention of the parties to a deed is not admissible, as such evidence is directly within the scope of the rule which excludes evidence of an oral agreement or statement varying, contradicting, adding to, or subtracting from, the terms of an instrument. In the case mentioned above,[3] a deed of sale of land was accompanied by a deed of agreement between the parties for his purchase back of the land by the vendor on payment by him of money to the vendee on a future date fixed. The deeds were followed by transfer of possession to the vendee and his receipt of the profits. The vendor did not exercise his rights of purchase; but after many years gave notice of his intention to redeem and brought a suit to enforce his right of redemption as upon a mortgage by conditional sale. On the question arising whether the transaction embodied in the two documents was intended by the parties to be a sale with a contract of resale, or to be a mortgage by conditional sale, the vendor tendered oral evidence to prove that the parties intended the transaction to a mortgage with conditional sale. Lord Davey who delivered the judgment of the Board held the evidence to be inadmissible and observed as follows: "Evidence of the respondent and of a person named Man was admitted by the Subordinate Judge for the purpose of proving the real intention of the parties, and such evidence was to some extent relied on in both courts. Their Lordships do not think that oral evidence of intention was admissible for the purpose of construing the deeds or ascertaining the intention of the parties. By Section 92 of the Indian Evidence Act (Act 11 of 1872) no evidence of any oral agreement or statement can be admitted, as between the parties to any such instrument or their representative in interest, for the purpose of contradicting, varying adding to, or subtracting from, its terms, subject to the exceptions contained in the several provisos. It was conceded that this case could not be brought within any of them. The cases in the English Court of Chancery which were referred to by the learned Judges in the High Court have not, in the opinion of their Lordships, any application to the law of India as laid down in the Acts of the Indian legislature. The case must, therefore, be decided on a consideration of the contents of the documents is related to existing facts". Before this Privy Council decision, the Calcutta High Court had in several cases admitted evidence of the acts and

1. *Bakishan Das* v. *Legge*, 27 IA 58 : 22 A 149 (PC).
2. *Maung Kyin* v. *Ma Shwe Law*, 44 IA 236 : 45 C 320 : 1917 PC 207 : 42 IC 642 ; *Raja Bahadur Narasingerji Gyangerji* v. *Raja Panuganti Rayanim Garu*, 51 IA 305 : 47 M 729 : 1924 PC 226 : 82 IC 993.
3. *Balkishan Das* v. *Legge*, 27 IA 58 : 22 A 149 (PC).

conduct of the parties[1] and even after this decision it continued admitting such evidence,[2] as distinguished from evidence of oral agreements or statements, to show the real nature of a transaction embodied in a document. This view was sought to be justified on the assumption that in *Balkishan* v. *Legge*[3] The Privy Council did not lay down any rule of exclusion of evidence over and above that contained in section 92, and that section 92 excludes only evidence of any oral *agreement or statement* and does not exclude evidence of the *acts and conduct or the parties* to a document.[4] The Chief Court of the Punjab also adopted this view of the Calcutta High Court.[5] The Bombay, Madras and some other Courts, on the other hand, took the Privy Council decision in *Balkishan* v. *Legge*,[6] as including within the rule of exclusion not only direct evidence of any oral agreement or statement but also all indirect evidence of such agreement, e.g., the acts and conduct of the parties. These Courts remarked that the object of giving in evidence the acts and conduct of the parties is to establish by presumptive proof a contemporaneous oral agreement varying the terms of the transaction as embodied in the document, and that, since direct evidence of any such agreement is expressly excluded by the Privy Council decision in *Balkishan* v. *Legge*,[7] there is no reason to suppose that indirect evidence of its would stand on a different footing.[8] This precise question was raised before the Privy Council in *Maung Kin's case*[9] in which the vendor, in order to prove that a transaction embodied in a deed of out and out conveyance was intended to be acted upon as a mortgage, tendered, as against the ostensible vendee evidence of the following facts: (i) that the value of the property far exceeded the amount of the sums specified as the consideration moneys in the conveyance; (ii) that interest was paid on those moneys and that they were in part repaid, thus showing that they were loan only; (iii) that possession of the property remained with the alleged vendor; (iv) that the alleged vendee knew that the vendor himself was merely a mortgagee of the property under an ostensible deed of conveyance; and (v) that the alleged vendee himself treated the transaction as if it were a mortgage.

The Privy Council described this evidence as relating to the acts and conduct of the parties, as distinguished from evidence of oral statements and conversations constituting in themselves some agreement between them, and remanded the cause for evidence to be recorded as to these facts without deciding the "difficult" and "important" questions under section 92 of the Evidence Act that this evidence gave rise to. When the case again came up before the Privy Council,[10] Lord Shaw definitely disapproved of the

1. *See Henm Chunder Soor* v. *Kally Churn Das*, 9 C 528 ; *Kashi Nath Das* v. *Hurrihur Mookerhjee*, 9 C 898 ; *Kasheenath Chatterjee* v. *Chundy Churn Banerji*, 5 WR 68 ; *Preonoth Shaha* v. *Madhu Sudan Bhuiya*, 25 C 603 ; *Shyama Charn Mandal* v. *Heras Mollah*, 26 C 160.
2. *See Khonkar Abdur Rahman* v. *Ali Hafez*, 28 C 256. ; *Mahomed Ali Hossein* v. *Nazar Ali*, 28 C 289 ; *Ali Sheikh* v. *Imam Ali Sarkar & Imaml Ali Sarkar* v. *Kalam Sheikh* 35 IC 102 ; *Abdul Gaffur* v. *Sh. Jamal*, 21 IC 90 : 17 CWN 1053.
3. 27 IA 58 : 22 A 149 (PC).
4. *Khonkar Abdur Rahman* v. *Ali Hafez*, 28 C 256.
5. *Abdul Ghafur Khan* v. *Abdul Kadir*, 72 PR 1901 ; *Bulaki Mal* v. *C.J. Floyd*. 27 PR 1911 : 10 IC 1004 : 191 PLR 1911.
6. 27 IA 58 : 22 A 149 (PC).
7. Ibid.
8. *Datto* v. *Ramchandra Totaram*, 30 B 119 ; *Abaji Annaji* v. *Laxman*, 30 B 426 ; *Achutaramaraju* v. *Subbarju* 25 M 7 ; *Maung Bin* v. *Ma Haling*, (1905) 3 Low. Bur. R 100 : 2 UBR (1907-09) Ev., 15.
9. *Maung Kyin* v. *Ma Shwe Law*, 38 IA 146 : 38 C 892 : 12 IC 39 (PC) ; *Maung Kyin* v. *Ma Shwe Law*, 44 IA 236 : 45 C 320 : 1917 PC 207 : 42 IC 642.
10. *Maung Kyin* v. *Ma Shwe Law*, 44 IA 236 : 45 C 320 : 1917 PC 207 : 42 IC 642.

view which had been taken by the Calcutta High Court[1] of the Privy Council, decision in *Balkishan* v. *Lagge*,[2] and held that decision of the Board was rightly followed and applied by the High Courts of Bombay and Madras, Thus, the important and difficult question of the admissibility of evidence of the acts and conduct of the parties, for the purpose of showing that a transaction purporting to be an out and out conveyance was in fact intended to be a mortgage, may be taken to have been decided by the Privy Council adversely to the reception of such evidence. After the Privy Council decision in *Mung Kin's case*[3] the Calcutta High Court changed its view;[4] and the Lahore[5] and Patna[6] High Courts followed suit. The Bombay, Madras and some other Courts, as mentioned above, had already been acting upon the view confirmed by the Privy Council in *Maung Kin's case*.[7] It may, therefore, be taken now as generally settled that neither oral evidence of intention nor evidence of the acts and conduct of the parties to a document is admissible between them or their representatives in interest to show that the document was not meant what it purports to be, and that neither direct evidence nor indirect evidence e.g., evidence of the acts and conduct of the parties to an instrument, is admissible to prove a contemporaneous orals agreement varying the terms of the instrument.[8] A contemporaneous oral agreement to reconvey, or allow redemption of property conveyed by a deed of absolute sale is inadmissible to show that the transaction was one of mortgage.[9] It is, however, apprehended that the Privy Council decision in *Maung Kin's case*[10] does not set at rest the controversy in all its aspects. Firstly, however considered the decision of the Privy Council on this point in *Maung Kin's* case may be, it is no more than an *obiter dictum*, as the actual decision of the case proceeded on another ground, namely, that section 92 does not apply to a transaction with a third party. The Calcutta High Court has described the decision of the Privy Council on this point as merely an "expression of opinion"[11] which is another name for an *obiter dictum*. *Secondly*, whilst, according to the Privy Council decision, evidence of the acts and conduct is inadmissible between A and B when A, intending merely to mortgage his property to B, conveys it to him by a deed of out and out conveyance, the

1. *Khonkar Abdul Rahman* v. *Ali Hafez*, 28 C 256.
2. 27 IA 58 : 22 A 149.
3. *Maung Kyin* v. *Ma Shwe Law*, 44 IA 236 : 45 C 320 : 1917 PC 207 : 42 IC 642.
4. *Lakshmi Charan Majumdar* v. *Nabadwip Chandra Pandit*, 56 C 201 : 1929 C 437 : 116 IC 733 ; *Mohammad Usman* v. *Abdul Rahman*, 1925 C 1151 : 90 IC 100 ; *Kamala Kanta etc.*, v. *Ananda Chandra Chakrabarty, etc.*, 1924 C 357 : 71 IC 1030 ; *See also Sisir Kumar Mallik etc.*, v. *Naran Chandra Mallik*, 1929 C 548 : 119 IC 803 ; *Halima Khatun* v. *Sashi Kumar Banik*, 1947 C 453.
5. *Fitzholmes* v. *The Bank of Upper India*, Ltd., 4 L 258 : 1923 L 548 : 77 IC 523 ; *Milkhi Ram* v. *Gujar Mal*, 1933 L 104 : 141 IC 494.
6. *Sukhan Rai* v. *Chakowri Singh*, 56 IC 752 ; *Bhagwat Rai* v. *Ramasis Rai*, 1952 P 431 ; *Ram Narain Prasad Singh* v. *Manki Singh*, 1954 P 562.
7. *Maung Kyin* v. *Ma Shwe Law*, 44 IA 236 : 45 C 320 : 1917 PC 207 : 42 IC 642 ; *Sutharsana Chariar, etc.*, v. *S. Samarapuri Chettiar*, 1928 M 690 : 110 IC 837.
8. *See Rai Satyendra Nath Rai Chowdhury* v. *Pramananda Holdar*, 39 CWN 888 ; *Dagdu* v. *Sadu*, 35 B 93 : 8 IC 644 ; *Halima Khatun* v. *Sashi Kumar Banik*, 1947 C 453 ; *Somana Basappa* v. *Godigeya Kornaya*, 35 B 231 : 9 IC 941 ; *but See Gopichand* v. *Mohammad Umar*, 1935 Pesh. 176, where evidence of intention and conduct was admitted to show that a deed of mortgage with possession was in fact a contract hypothecating the land by way of collateral security.
9. *Milkimal* v. *Totomal*, 1939 S 200 ; *Putti Sesha Aiyar* v. *Kuppachar*, 49 IC 699 ; *Muhammad Mir, etc.*, v. *Faiz-ul-Hasan, etc.*, 74 PR 1918 : 47 IC 418.
10. *Maung Kyin* v. *Ma Shwe Law*, 44 IA 236 : 45 C 320 : 1917 PC 207 : 42 IC 642.
11. *Madhab Charan Das* v. *Rajani Mohan Das*, 64 IC 583.

result is otherwise in proceedings between A and C, or B and C, when A grants to B an out and out conveyance intending it to be a mortgage and C accepts from B an out and out conveyance knowing that the transaction between A and B was merely that of mortgage.[1] Thirdly, the rule of evidence in Section 92 is subject to the rule of estoppel contained in Section 115 of the Evidence Act, and where a transaction, though clothed in the form of an absolute conveyance, has been treated by the parties as if it were a mortgage, difficult question of estoppel may arise not only between parties to the transaction but also between the parties and strangers.[2] Fourthly, though the Privy Council has definitely held the equitable doctrine of *Lincoln* v. *Wright*[3] to be inapplicable to India, it has clearly recognized the posibility of such cases falling within the first Proviso to Section 92. In a Bombay case decided after the Privy Council decision in *Maung Kin's case*, Shah J., was inclined to hold that it would amount to fraud on the part of a person to maintain a transaction to be a sale when it was intended to be a mortgage,[4] and if this view is correct, the first Proviso to Section 92 becomes at once applicable to such cases, and not only evidence of the acts and conduct of the parties but direct evidence of intention becomes admissible to support a charge of fraud.[5] Fifthly, in both the Privy Council decisions[6] there is express reservation in favour of the admissibility of evidence of the surrounding circumstances to explain a document, and it is not clear what this expression may or may not include. In two subsequent cases,[7] the Privy Council itself took into consideration the fact that the consideration for a conveyance was much below the value of the property, in determining the question whether a transaction was a sale or a mortgage, and this was precisely one of the pieces of evidence the admissibility of which was in question in *Maung Kin's case* when it first went to the Privy Council[8] and which seems to have been held to be inadmissible when the case again came up before the Board.[9]

Oral evidence to contradict the terms of a lease.—When under a *kabuliyat two hals of* land were settled with a tenant at a certain rate, a separate oral agreement that one of the *hals* would be given rent free is not admissible in evidence.[10] Where it is clear from the terms of the *kabuliyat* that the contract was that the lessee should get *khas* possession of the lands oral evidence to show that there was a different arrangement

---

1. *See Ganu* v. *Bhau*, 42 B 512 : 46 IC 662 ; *Maung Than Gyaung* v. *Maung Pyu, etc.*, 5 R 836 : 1928 R 61 : 108 IC 734 ; *Malakyi* v. *Ko Po Nyein, etc.*, 6 R 741 : 1929 R 86 : 114 IC 676 ; *Ma Mi* v. *Maung Aung Dun, etc.*, 6 R 376 : 1928 R 244 : 111 IC 832 ; *See however Talakchand Bheraji* v. *Atmaram Khesav Vaidya etc.*, 1924 B 58 : 77 IC 342.
2. *Bulaki Mal* v. *C.J. Floyd*, 27 PR 1911 : 10 IC 1004 : 191 PLR 1911 ; *Dhanna Ram* v. *Chhabil Das*, 72 IC 931.
3. 4 De G & J 16.
4. *Ganu* v. *Bhau*, 42 B 512 : 46 IC 662 ; *See also Somana Basappa* v. *Gadigeya Kornaya*, 35 B 231 : 9 IC 941.
5. See notes to Proviso (1) and notes to this section under the heading "oral evidence is admissible to show that notwithstanding a written agreement there was no agreement between the parties."
6. *Balkishan Das* v. *Legge*, 27 IA 58 : 22 A 149 (PC) ; *Maung Kyin* v. *Ma Shwe Law*, 44 IA 236 : 45 C 320 : 1917 PC 207 : 42 IC 642.
7. *Raja Bahadur Narsingerji Gyanagerji* v. *Raja Panuganti Parthasaradhi Rayanan Garu*, 51 IA 305 : 47 M 729 : 1924 PC 226 : 82 IC 993 ; *Baijnath Singh* v. *Hajee Vally Mahomed Haji Abba*, 3 R 106 : 1925 PC 75 : 86 IC 332.
8. *Maung Kyin* v. *Ma Shwe Law*, 38 IA 146 : 38 C 892 : 112 IC 39 (PC).
9. *Maung Kyin* v. *Ma Shwe Law*, 44 IA 236 : 45 C 320 : 1917 PC 207 : 42 IC 642.
10. *Pulin Beharee Deb* v. *Rama Kanta Mahata Kurmi*, ILR (1938) IC 48.

between the parties is not admissible.[1]

Where one of the partners of a firm had individually agreed to certain terms of tenancy of a shop in his own name individually, by an unregistered rent note, the Supreme court held that it was open to the partners of the firm even after its reconstitution and his ceasing , to be a partner, to show under the fourth Proviso to Section 92 that there was apart from the rent note, a distinct subsequent oral agreement under which the terms of the original contract or grant were modified and that the partners of the firm both before and after its reconstitution, were the real tenants of the shop.[2]

Oral evidence to contradict the terms of a mortgage-deed is inadmissible.—Where an instrument purports to create a possessory mortgage, oral evidence is inadmissible to show that the mortgage intended to be created was simple mortgage.[3] Where the mortgage-deed provides that compound interest will be payable on the principal money, an oral agreement between the parties that only simple interest will be paid cannot be given in evidence.[4] Where a person who has holding grants it by way of usufructuary mortgage to another person and the *ijara* provides that the mortgagee should pay rent, a subsequent oral agreement to the effect that the mortgagor had agreed to the rent is inadmissible.[5] A party to mortgage-deed, cannot be alloued to prove that although according to the terms of mortgage deed the whole of the mortgage money was payable on demand with interest, there was a contemporaneous oral agreement between the parties that the amount would not be payable on demand that it would be accepted in instalments.[6] If in the case of a mortgage the mortgagors have undertaken certain obligations, as for instance, that the severally owned items of the hypotheca shall be rateably liable, one mortgagor can no more set up an oral agreement against his fellow mortgagors for the purpose of varying the terms of the document than he could as against his mortgagee.[7] But a mortgagor may show that one of the items of property included in the mortgage-deed was not intended to be mortgaged and was included in the deed merely to give the sub-registrar of a particular district jurisdiction to register the deed.[8]

Inadequacy of consideration may be taken into consideration in determining the question whether a transaction is a sale or a mortgage ?—When the question is whether a transaction is a mortgage by way of a conditional sale or an absolute sale with a clause for reproaches, the court may take into consideration facts which show in what manner the language of the document is related to existing facts, and may refer to the contrast between the value of the property and the consideration that passed in money.[9]

---

1. *Nabin Chandra Roy* v. *Rajendra Kumar Nag*, 1936 C 302 : 166 IC 567.
2. *Niranjan Kumar* v. *Dhyan Singh*, 1976 SC 2400 (Para 6).
3. *K.S. Mian Feroz Shah* v. *Sohbat Khan, etc.*, 60 IA 273 : 14 L 466 : 1933 PC 178 : 143 IC 659 ; *Mst. Manohari* v. *Khalil Khan*, 165 IC 510 ; *Mohammad Ashraf Ali Khan* v. *Behari Lal*, 1936 RD 2 ; but *see Gopi Chand* v. *Mohammad Umar*, 1935 Pesh. 176.
4. *Behari Lal* v. *Abdul Aziz*, 119 IC 92.
5. *Sheikh Budhu* v. *Sital Singh*, 1939 P 142. It is submitted that the oral agreement in this case being a distinct agreement, the question should have been decided with reference to the terms of the fourth proviso.
6. *Mohammad Ahmad Saeed Khan* v. *Kishori Lal*, 1932 A 375 : 141 IC 114.
7. *Muthukumaraswami Mudaliar* v. *Govinda Padayachi, etc.*, 1932 M 218 : 137 IC 285.
8. *Ramananda Prasad Narayan Singh* v. *Chandradip Narian Singh*, 1940 P 504.
9. *Abdul Gaffur* v. *Sh. Jamal*, 21 IC 90 : 18 CLJ 228 ; *See also Surayya* v. *Mangayya*, 1941 M 345 ; *Thakar Das* v. *Tekchand*, 1944 L 175 ; *Raja Bahadur Narasingerji Gyanagerji* v. *Raja Panuganti Parthasaradhi Rayanim Garu, etc.*, 51 IA 305 : 47 M 729 : 1924 PC 226 : 82 IC 993 ; and *Bainjath*

Evidence of the acts and conduct of the parties is admissible to construe a document.—A distinction exists between a case where the acts and conduct of the parties are sought to be given in evidence for the purpose of setting up a contemporaneous oral agreement inconsistent with the terms of the written agreement and a case where such evidence is given for the purpose of construing and interpreting a document, the rule being that whereas in the former case the evidence will be excluded, it will be admitted in the latter.[1] Extrinsic evidence to determine the effect of an instrument is permissible where there remains a doubt as to its true meaning. Evidence of acts done under it is a guide to the intention of the parties in such a case and particularly when acts are done shortly after the date of the instrument.[2]

Evidence of conduct is admissible when the document is ambiguous or obscurely framed.—Where a document is obscurely framed,[3] or any of its clauses contains a real ambiguity, evidence of the conduct of the parties is admissible to construe the document.[4] If the intention of the parties to a document cannot be determined from the terms of the document with absolute certainty, the conduct of the parties under the document during a long course of years is a very material element for consideration.[5] The subsequent conduct of the parties to a document can be legitimately looked at under section 92, Proviso (6), of the Evidence Act, for the purpose of ascertaining to what person and things the expressions used therein were intended to apply.[6] Where the ambiguity covers geographical and pecuniary extent or an admittedly ambiguous grant, it is legitimate to consider what was the footing upon which the grantor, from the date of the grant, proceeded.[7] Evidence of the conduct of the parties is admissible to show the real nature of a transaction, e.g., whether a document is a will or a gift.[8] Where a document creating a tenancy is ambiguous, evidence as to the mode of enjoyment of the tenancy is admissible.[9] Given an ambiguity in a document, evidence of user under it may be received in order to show the sense in which the parties used the language employed.[10] But if the terms of a document are not ambiguous, they cannot be controlled by evidence of the conduct of the parties.[11] as it is only when the terms of a

---

Singh v. *Hajee Valee Mahomed Hajee Abba*, 3 R 106 : 1925 PC 75 : 86 IC 322, where inadequacy of consideration was one of the facts taken into consideration when determining the question.

1. See the next paragraph.
2. *Abdulla Ahmed* v. *Animendra Kissen Mitter*, 1950 SC 15 : 1950 SCJ 153 : 1950 SCR 30.
3. *Hebbart* v. *Purchas*, (1871) 3 PC 605 p. 650 ; *Kiransashi Debi* v. *Ananda Chandra Mukerjee*, 58 IC 841.
4. *B. Nand Kishore* v. *Behari Lal, etc.*, 1932 A 600 : 140 IC 470 ; *Raja Bhupendra Narayan Singh* v. *Midnapore Zamindari Co. Ltd.* 1922 C 300 : 68 IC 937.
5. *Umesh Chandra Roy* v. *Surendra Chandra Dutta*, 49 IC 8 ; *See also Sanker Roy Chowdhury* v. *Secretary of State*, 1925 C 346 : 84 IC 478 ; *Eugene Hugh Conrad Lecun* v. *May Julia Lecun*, 2 R 353 : 1924 R 283 : 82 IC 686 ; *Ali Abbas* v. *Sher Bahadur Singh*, 1925 O 264 : 75 IC 267.
6. *Thulijaram Tawker* v. *Raja Rajeswara Sethupathi*, 38 IC 627 : 40 M 1016.
7. *Raghojirao Saheb* v. *Laksmanrao Saheb*, 16 IC 239 : 36 B 639 : 39 IA 202 (PC).
8. *Beli Ram* v. *Devi Chand*, 1929 L 875 (2) ; 117 IC 907.
9. *Lal Ghose* v. *Nilkantha Das*, 1925 C 340 : 80 IC 898
10. *Secretary of State for India* v. *Kumar Narendra Nath Mitter*, 61 IC 91 ; *Guru Prosanna Bhattacharjee* v. *Madhusudan Chowdhury*, 1921 C 574 : 64 IC 824 826.
11. *Bisheshwar Singh* v. *Achhaibadin*, 1941 O 507 ; *Raja Nirod Chandra Singha Sarma* v. *Harihar Chakravarti Chowdhury*, 58 IC 867 ; *Kiransashi Debi* v. *Ananda Chandra Mukerjee*, 58 IC 841 ; *Gopal Ojha, etc.*, v. *Ramadhar Singh etc.*, 1925 P 228 : 82 IC 204 ; *The Secretary of State for India in Council* v. *Gobinda Prasad Barik*, 39 IC 934 ; *Bhabani Nath Roy* v. *Purna Chandra Sarkar*, 1921 C 212 : 61 IC 818 ; *Haji Rahim Baksh Mandal* v. *Sajjad Ahmad Chowdhary*, 26 IC 466 ; *President Taluq Board, Peddapur* v. *Chilakamaney Garu*, 12 IC 146 (1) ; *Haji Khan Gul Khan* v. *Chotu Ram* , 1939 Persh. 41.

document are ambiguous that evidence of conduct becomes receivable.[1] Where the words in a deed are clear, the subsequent conduct of the parties is an irrelevant consideration.[2] No amount of acting by the parties can alter or qualify words which are plain and unambiguous.[3] Apart from any question of ambiguity, the mere fact that parties have acted on an erroneous construction of an instrument furnishes in itself no reason why the Courts should not follow the general rule that an instrument should be construed according to its natural meaning in the light of the circumstances in which it was executed.[4] A document plain in itself cannot be taken to mean something different from what its words imply, merely because the parties have gone on so long acting upon it without understanding it.[5] The construction of a document must depend upon the interpretation of all the terms of the instrument, and except in a case of ambiguity, extrinsic evidence is not admissible. Each case must be considered on its own facts. In order to ascertain the effect of the document recourse must be had to the terms of the document itself and to all the circumstances so far as they can be ascertained.[6] Further the decisions cited in this paragraph must not be taken to qualify the rule which is enacted in Section 93 of the Act that when the language used in a document is *on its face*, ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects. Evidence extrinsic of the document is not admissible where the language used in a document is so vague or imperfect that to admit extrinsic evidence would be not to interpret the document but virtually to make a new one.[7] Evidence of conduct is not, therefore, admissible to remove a patent ambiguity; but where the ambiguity is latent, such evidence may properly be received.[8]

Contemporanea expositio; acts of the parties are admissible to explain but not contradict documents.– In order to explain but not to contradict, ancient document whose meaning is doubtful, the acts of the parties, even before the execution of the instrument, or the mode in which property has since been held and enjoyed thereunder, as well as constant modern user, may be given in evidence.[9] Such evidence, however, seems now admissible not only in the case of ancient, but also of modern documents, and whether the ambiguity be a curable patent ambiguity or a latent ambiguity.[10] On the other band, where the meaning of the words is not ambiguous, the subsequent acts of

---

1. *Punjab National Bank, Ltd.*, v. *S.B. Chaudhry*, 1943 O 392 ; *Raja Nirod Chandra Singha Sarma* v. *Harihar Chakravarti Chowdhury*, 58 IC 867 ; *See also Abninas Chandra Das, etc.*, v. *Majub Ali Chowdhury*, 1922 C 461 (2) : 70 IC 273.
2. *Baraboni Coal Concern Ltd.* v. *The Servitors & Shebaits of Sri Sri Gopinath Jiu, Gokulnanda Mohanta Thakur, etc.*, 61 IA 35 : 61 C 313 : 1934 PC 58 : 114 IC 884 ; *Ma Shin* v. *Ma Thin Kyi*, 1934 R 129 : 150 IC 966.
3. *North Eastern Railway Co.* v. *Hastings*, 1900 AC 260, 263 ; *Krianshashi Debi* v. *Ananda Chandra Mukherjee*, 58 IC 841 ; *Midnapore Zamindari Co*, v. *Jogendra Kumar Bhoumik* 1921 C 750 : 62 IC 491 ; *Haji Rahim Bakhsh Mandal* v. *Sajjad Ahmad Chowdhury*, 26 IC 466.
4. *Raja Bhupendra Narayan Sinha* v. *Midnapore Zamindari Co. Ltd.*, 1922 C 300 : 68 IC 937.
5. *Haji Rahim Bakhsh Mandal* v. *Sajjad Ahjmad Chowdhury*, 26 IC 466 : 19 CWN 1311.
6. *Abinas Chandra Das, etc.*, v. *Majub Ali Chowdhury, etc.*, 1922 C 461 (2) : 70 IC 273.
7. *Re De Rosaz*, 2 PD 66 ; *King* v. *Badeley*, 3 Myl. & K 417 ; Phipson, Ev., 7th Ed 591.
8. See as to this notes to sections 93-97 & *Secretary of State for India* v. *Kumar Narendra Nath Mitter*, 61 IC 91.
9. *Attorney General* v. *Vandeleur*, 1907 AC 369 ; *Sadlier* v. *Biggs*, 4 IILC 435 ; *Van Dieman's Land Co.* v. *Table Cape Board*, 1906 AC 92 ; Phipson, Ev. 7th Ed., 605 ; Taylor, §§ 1204-1205.
10. *Van Dieman's Land Co.* v. *Table Cape Board*, 1906 AC 92 ; *Watchman* v. *Attorney General*, 1919 AC 533 ; as to patent and latent ambiguities, see Sections 93 to 97.

the parties are not admissible to construe it, whether the document be ancient or modern.[1]

Course of dealing.—Where the meaning of a document is doubtful,[2] but not when it is clear,[3] the sense in which both, but not one only, of the parties have acted on it is admissible in explanation.[4]

Subsequent acts and declarations of a parent purchasing property in the name of a child are inadmissible.[5]—Properties could be presumed to be acquired by father for his own benefit and transaction were benami transactions, under Sec. 114.[5a]

Preliminary negotiations, conversations, correspondence, etc., not admissible to contradict or vary the terms of a document but admissible to identify the subject-matter of the agreement.—Prior, conversations negotiations, conditions of sale, draft agreements and deleted clauses cannot be proved directly to enlarge or restrict a concluded contract, since they are presumed to be superseded thereby' yet where the language of the contract is vague or general, the state of facts in the knowledge and contemplation of the parties at the time, and about which they were negotiating, may be proved by their conversations or correspondence,. as circumstantial evidence, in order to apply the words and to show whether their narrow or wider meaning was intended.[6] When a compromise is arrived at by means of correspondence the final document executed is the result of negotiations which preceded it, and the whole must be considered to determine what the compromise is. In such a case there is no question of varying the terms of a document but only of determining the circumstances under which it came into existence.[7] It is not open to a Court to admit antecedent documents and maps for the purpose of contradicting the terms of a settlement. Such documents and maps may, however, be referred to for the purpose of identifying the thing demised.[8] Where a contract between the parties has been embodied in a formal document, letter between the parties written several months before the document are not admissible to contradict, vary, or add to, the terms of the document.[9] Where a lease does not contain a description of the property leased sufficient for its indemnification, a Court is at liberty to refer to the correspondence which passed between the parties leading up to the lease in order to determine the question.[10] When the parties have expressed a contract in a formally drawn up instrument, evidence of preliminary negotiations, conversations etc., ceases to be admissible to vary the true construction of the document,[11] or to contradict or vary

---

1. *N.W. Rly.* v. *Hastings*, 1900 AC 260 ; See Phipson, Ev. 7th Ed. 605 ; *Mohammad Afzal* v. *Din Muhammad*, 1947 L 117 ; *Somar Puri* v. *Shyam Narian Gir*, 1954 P 586.
2. *Bourne* v. *Gatliffe*, 11 C & F 45 ; *Forbes* v. *Watt*, LR 2 Sc. & D14 ; Phipson, Ev. 7th Ed. 605.
3. *N.W. Rly Co.* v. *Hastings*, 1900 AC 260 ; *Marshall* v. *Berridge*, 19 Ch. D. 233.
4. Phipson, Ev., 7th Ed. 605.
5. See *Alice Georgina Paschaud* v. *Emma Bertha Paschaud Nizon*, 1930 O 441 : 128 IC 721, cited in the notes to this section under the heading "proof of benami character of a transaction".

5a. *Girindra Nath Mukherjee* v. *Soumen Mukerjee*, AIR 1988 Cal. 375.

6. Phipson. Ev. 7th Ed. 592.
7. *U.P. Government* v. *Church Missionary Trust Association*, 1948 O 54 : 22 Luck. 93 : 229 IC 421.
8. *Tilakdhari Singh etc.*, v., *Maharaja Kesho Prasad Singh*, 1925 PC 122 : 88 IC 103.
9. *Punjab National Bank, Ltd.*, v. *Dr. A.B. Arora*, 1933 L 1024.
10. *Sital Prasad* v. *Badri Prasad*, 1923 A 53 : 69 IC 647.
11. *Nawbajada K. Atikulla* v. *Mohd. Mobarak Hossein*, A 1949 C 174 : 52 CWN 304 ; *Kaluram, etc.*, v. *Gajasa*, 1928 N 182 : 107 IC 201 ; *Bomanji Ardeshir Wadia* v. *Secretary of State*, 56 IA 51 : 53 B 230 : 1929 PC 34 : 114 IC 1 : 12 Mys. LJ 11.

its terms.[1] And when a written agreement is carried into effect by a conveyance the conveyance becomes the final evidence of the intention of the parties and is not liable to be varied by reference to the agreement.[2] A draft deed prepared before the execution of a document is inadmissible to construe a document which is not ambiguous.[3] Oral evidence to show what took place on the occasion when an agreement for sale was drawn up is inadmissible under Section 92 of the Evidence Act.[4] Similarly, statements made at the time of execution cannot be admitted for the purpose of varying the terms of a will.[5] Where the meaning of a document is not clear, it is open to see what preceded the execution of the document in order to determine what the expression used in the document means, or in what sense the persons who were parties to the document used the expressions which the Court is asked to construe.[6] Preliminary correspondence which resulted in the grant of a *sanad by* the Government to a grantee is admissible to *construe the sanad*,[7] though it will not be admissible to contradict the clear terms of the grant. Where, however, oral evidence becomes admissible in proof of a mistake under the first Proviso to Section 92, evidence of preliminary negotiations also becomes admissible.[8] The fact of a subsequent agreement being prepared may be evidence that the previous negotiations did not amount to an agreement, but the mere fact that person wish to have a formal agreement drawn up does not establish the proposition that they cannot be bound by a previous agreement[9] if the formal document contemplated by the parties has not been drawn up Previous correspondence may be admissible if it specifically refers to certain stipulations in the formal instrument and can therefore be said to be a part of that instrument.[10] See also notes to Section 91 under the heading "Evidence of original agreement preceding the written contract is inadmissible.

The section does not apply to offers made., It follows offers to be varied at the time of acceptance and of being turned into regular contract. Evidence can be admitted to prove the varying of the terms of offer at the time of concluding the contract.[11]

Evidence of oral agreement to vary terms implied by law in a written contract.–Incidents which are impliedly contained in a written contract, whether by construction of the terms or by implication of law, cannot be varied by extrinsic evidence. Thus, evidence of the course of previous dealings between the parties to show that, though the contract between the parties was on C.I.F. terms, the buyer was not entitled either to a bill of lading or to a policy of insurance, and was bound to pay against the delivery telegram, is inadmissible under Section 92 of the Evidence Act, as

1. *Vindayakrao Damodharrao* v. *Bhondu*, 1942 N 103 ; *Abdullah Khan* v. *Basharat Husain*, 40 IA 31 : 35 A 48 : 17 IC 737 PC ; *Durga Prasad Singh* v. *Rajaindra Narayan Bagchi*, 40 IA 223 : 41 C 493 : 21 IC 750 ; *See also Secretary of State* v. *Abdul Rahim, etc.*, 1928 M 1246 : 114 IC 626 ; *Chapsey Cooverji* v. *Jethabhai Nursey*, 9 Bom. LR 514.
2. *Punjab National Bank* v. *Chaudhry*, 1943 O 392.
3. *Narasama Hegadthi* v. *Billa Kesu Pujari*, 31 IC 543.
4. *Harichand Mancharam* v. *Govinda Moha Gokhale*, 50 IA 25 : 47 B 335 : 1923 PC 47 : 71 IC 763.
5. *Govind, etc.*, v. *Chintaman*, 1928 N 55 : 105 IC 480.
6. *Secretary of State* v. *Abdur Rahim, etc.*, 1928 M 1246 : 114 IC 626 ; *See also Punjab National Bank* v. *Chaudhry*, 1943 O 392.
7. *Baswant Gowdappa Patil* v. *Abasalli Gajabarsaheb Desai*, 1943 B 145.
8. *Punjab National Bank* v. *Choudhury*, 1943 O 392 ; *Bepin Krishna Ray* v. *Jogeshwar Ray*, 1921 C 730 : 66 IC 345.
9. *Harichand Mancharam* v. *Govind Mohan Gokhale*, 50 IA 25 : 47 B 335 : 1923 PC 47 : 71 IC 763.
10. *Agra Electire Supply Co. Ltd.*, v. *Firm Bansidhar Prem Sukh Das*, 1946 A 406.
11. *Bindeswari Singh* v. *K.K. Dutta*, 1954 C 361.

its effect would be to vary the incidents of a C.I.F. contract.[1] Under Section 55(2) of the Transfer of Property Act, the seller is deemed to contract with the buyer that the interest which the seller professes to transfer subsists and that he has power to transfer the same. Therefore, evidence of an oral agreement that the seller did not give any warranty of title to the buyer is not admissible.[2] In the case of a sale of immovable property, ownership passes to the vendee on registration. But the parties can determine by mutual agreement as to when ownership is to pass, and where they do so, oral evidence in contradiction or variation of that agreement will be inadmissible.[3]

Oral agreement as to the discharge or satisfaction of liability arising out of a written instrument.—See notes to Proviso (4) to this section under the heading "Subsequent oral agreement in discharge or satisfaction of the obligations created by a registered instrument or by a contract required by law to be reduced to writing is admissible: discharge of a mortgage or pronote debt".

Whether the ostensible executant of a written contract can show that he signed otherwise than as an executant, e. g., as an agent, partner, surety, witness or a benamidar?—A recital as to the names of contracting parties is a term of the contract. Therefore, evidence cannot be led to show that some other person intended to incur obligations under the contract instead of the parties designated therein.[4] Parole evidence is not admissible to show that a person who has signed a contract in his own name acted only as an agent and therefore cannot sue or be sued upon it.[5] Oral evidence may, however, be given to show that, in addition to the person signing the written contract, another person not signing the contract is liable under or entitled to the benefit of, the contract either as principal,[6] or as partner.[7] When a loan is made to a firm but a promissory note is taken from one of the partners, which does not disclose that anyone but he is liable on it, the lender can sue the partner on the note which he has given and alternatively the firm on the loan itself. But if the firm is to be made liable in such a suit, the lender must not only allege and prove that the loan was really taken for the firm by the partner who made the promissory note but must also base the suit on the loan to the firm. The real question at issue in such a case is not whether the firm was benefited by to transaction, but whether the firms did enter into the contract.[8] Where a

---

1. *Steel Brothers and Co. Ltd.*, v. *Daya Khata and Co.* 47 B 924 : 1924 B 247 : 87 IC 67.
2. *Muhammad Siddiq, etc.*, v. *Muhammad Nuh*, 52 A 604 : 1930 A 771 : 124 IC 185.
3. *Radhamohan Thakur* v. *Bipin Behari Mittra*, 17 P 318 : 1938 P 505 ; *Mohammed Murtaza Hussain* v. *Abdul Rahman*, 1949 P 364 : 27 P 122.
4. *Shankar Bandu* v. *Shankar Babaji*, 1956 B 165.
5. *Ebrahimhoy Pabaney Mills Co., Ltd.*, v. *Hasan Mamooji*, 45 B 1242 : 1921 B 81 : 63 IC 482 ; *South Indian Indstrials* v. *Mindi Ramajogi*, 26 IC 822 : 27 MLJ 501 ; *Soopromonian Setty* v. *Heilgers*, 5 C 71 ; *See Sadasukh Janki Das* v. *Maharaja Sir Kishan Prasad*, 46 IC 33 : 46 C 663 : 1918 PC 146 : 50 IC 216 ; *Balthazar and Son* v. *Firm and M. Abowath*, 5 R 1 : 1921 PC 129 : 63 IC 521 ; *Bipin Behari Chowdry* v,. *Ram Chandra Roy*, 5 Beng. LR 234, 242 , 243.
6. *Higgins* v. *Senior*, 1841 58 RR 884 ; *E. Ho Chou Co.*, v. *Babu Chotalal Ujamsi*, 1939 R 139 ; *R. K. Banerjee, Official Receiver* v. *S.M.N. Ahmed*, 1935 R 327 : 158 IC 570 ; *Ebrahimbhoy Pabaney Mills Co., Ltd.* v. *Hasan Mamooji*, 45 B 1242 : 1921 B 81 : 63 IC 482 ; (F.O.) *Ladhomal* v. *Chandumal Rattunchand*, 1931 S 4 : 130 IC 548.
7. *Lalmani Pande* v. *Gopal Sah.*,. 1945 A 221 ; *Ebrahibhoy Pabaney Mills Co., Ltd.* v. *Hasan Mamooji*, 45 B 1242 : 1921 B 81 : 63 IC 482 ; *Chettiyar Firm* v. *Mahmoo*, 1935 R 81 : 13 R 87 ; *Venkata Subbiah Chetty* v. *Govindarajulu Naidu*, 31 M 45 ; *Butto Kristo Roy* v. *Gobindaram Marudari*, 1939 P 540 ; *Raghunath Tewari* v. *Budhoo Ram Tewari*, 1932 A 112 : 133 IC 897 ; *Muniswami Naidu* v. *Thandvarya Mudaliar*, 1936 M 5 : 159 IC 1005.
8. *Pynda Venkatachalapati Garu* v. *Pynda Ramakrishnayya, etc.*, 1930 M 168 : 123 IC 358 ; *See also*

lease is taken in the name of a member of a joint family, there is nothing in law to prevent the other members of the family from showing that it was a lease taken by the joint family, although the name of only one of its members was entered in the document.[1] An agent can perform acts on behalf of his principal either disclosing or concealing the fact that he is an agent, and there is nothing in Section 92, Evidence Act, to prevent an agent in a suit for compensation from his principal from leading evidence to prove that contracts entered into in the agent's name were entered into on the principle's behalf.[2] A contract note is not conclusive of the real relation of the parties to the contract, and evidence can be given to prove whether a party contracted as agent or in the capacity of seller or buyer in the transaction.[3]

In proceedings between the creditor and one of the executants of a promissory note or bond, oral evidence is not admissible to show that one of the executants of the document signed it not as a debtor but merely as surety for the other executant.[4] The rule is, however, otherwise in proceedings between the co-executants themselves.[5] Oral evidence to show that a co-executant signed a promissory note merely as a surety is not admissible if it would affect the right of the creditor to demand immediate payment from either or both of the co-executants.[6] It is not open to a person who has executed a promissory note to show that his liability could arise only in the event of the other executant not paying.[7] In the absence of fraud, oral evidence to show that one of the co-executants of a bond signed it only as a surety to the knowledge of the creditor is not admissible under Section 92 of the Evidence Act.[8] Where two of three judgment debtors, parties to a compromise decree, set up, on an execution application being made, an oral agreement with the decree-holder that they were to be treated as sureties for the third judgment debtor, it was held that the separate oral agreement was not admissible under Section 92, Evidence Act.[9] It has, however, been held in the decisions cited

---

Lalmani Pande v. *Gopal Sah*, 1945 A 221.

1. *Raghunath Tewari* v. *Budhoo Ram Tewari*, 1932 A 112 : 133 IC 897.
2. *Firm of Totaldas* v. *Khiomal Diwandas*, 1933 S 34 : 142 IC 52.
3. *Sohanlal Pachisia & Co.*, v. *Bilsary Khemani*, 1954 C 179.
4. *U. Pe* v. *U. Chit Hmun*, 1937 R 82 : 168 IC 477 ; *Venkata Krishtnayya* v. *Kernedan Kothari*, 1935 M 643 : 156 IC 827 ; *Khumji Gajaji & Co.* v. *Damaji Korsey*, 1934 B 39 : 148 IC 260 ; *Abdul Hamid Khan* v. *Punjab National Bank*, 1933 L 965 : 147 IC 785 ; *Maung Kya* v. *A.P.R. Peria Kurpan Chetty*, 1923 R 15 (2) : 70 IC 872 ; *Harek Chand Basu* v. *Bishun Chandra Banerji*, 8 CWN 101 ; *Durga Charan Bose* v. *Lakhi Narian Bera*, 47 IC 917 ; but see *Mohammad Hussain* v. *Hanoman Prasad*, 1942 O 273 ; *J.M. Maneckji* v. *Maung Po Han*, 2 R 482 : 1925 R 83 : 84 IC 1012 ; *Sheo Prasad Ram Prasad* v. *Gobind Prasad*, 49 A 464 : 1927 A 292 : 100 IC 332 ; *Central Bank of India*, v. *Nadirshaha Mehta*, 1924 S 13 : 79 IC 445 : *Thakursey Hansraj* v. *Kishandas Rewachand, etc.*, 1925 S. 9 : 76 IC 282.
5. *Shams-ul-Jahan Begum* v. *Ahmad Wali Khan*, 25 A 337 ; *Moolji Muranji Sundarji* v. *M.C. Pinto, etc.*, 1926 S 156 : 92 IC 667 ; *Central Bank of India* v. *Nadirshaha Mahta*, 1924 S 13 : 79 IC 445. *See notes to* this section under the heading "parol evidence not admissible where the proceedings are between strangers, or between a party and a stranger, or between con-obligors, or between co-obligees".
6. *Moolji Maurarji Sundarji* v. *M. C. Pinto, etc*,. 1926 S 156 : 92 IC 667 ; *Central Bank of India* v. *Nadirshaha Mehta*, 1924 S 13 : 79 IC 445 ; *Narasimhamurthi Sastri* v. *Rqamaswamy Chetty*, 18 IC 696 ; *but see J.M. Maneckji* v. *Maung Po Han*, 2 R 482 : 1925 R 83 : 84 IC 1012.
7. *Radhakissen Chamaria* v. *Durgaprasad Chamria*, 59 C 106 : 1932 C 328 : 143 IC 159 ; *Maung Ko Gyi* v. *U. Kyaw*, 5 R 168 : 1927 R 199 : 103 IC 79 ; *Nandlal Chogalal* v. *Surajmal Gangaram, etc.*, 1932 N 62 : 138 IC 879 ; *T.R. Narasimhamurthi Sastri* v. *A.T.V. Ramaswamy Chetty*, 18 IC 696 : 8 CWN 101.
8. *Maung Ko Gyi* v. *U. Kyaw*, 5 R 168 : 1927 R 199 : 103 IC 79.
9. *Radhakissen Chamaria* v. *Durgaprasad Chamaria*, 59 C 106 : 1932 C 328 : 143 IC 159.

below that where a person executes a joint and several promissory note with others, but the promisee knows at the time of taking his signature that he signs only as a surety, Proviso (1) will operate to let in such evidence.[1] A and B signed a promissory note. B put the word "witness" before his signature. In a suit upon the Promissory note B contended that he was not an executant of the note but only a witness. The plaintiff sought to adduce oral evidence to prove that the money and been borrowed by both the defendants and that B was one of the executants of the document and not a witness. Held, that there was nothing in Section 92 of the Evidence Act to exclude such evidence.[2] Though it is not open to the executant of promissory notes to escape liability on the ground that in signing the note he was merely acting as agent of his principal, he is not prevented from saying that there was not presently an operative contract between the parties as is embodied in the note.[3] See notes to Proviso (3) and (2).

Benami Promissory note.—The effect of Section 78 of the Negotiable Instruments Act read with Section 8 of the same Act is that a promissory note can be discharged only by payment made to the holder of the note. Therefore, in a suit upon such note evidence cannot be allowed to be given to show that the note was not really executed in the plaintiff's favour, or that it has been discharged by payment to the person who was the real payee of the note.[4] Oral evidence is, however, admissible as to the identity of the payee mentioned in the note.[5]

Whether an instrument containing an absolute promise to pay on demand may be shown by oral evidence to be not enforceable on demand.[6]—See notes to Provisos (3) and (2).

Endorsement of payment on the back of a bond.—Where a endorsement of payment has been made on the back of a bond and it does not specify whether it was towards principal or interest, Section 91 and 92 would stand in the way of the admission of any oral evidence to show that the payment was in fact made towards interest.[7]

Whether a hiba (gift) may be shown to be a hiba biliwaz (gift for consideration) and vice versa?—A deed of pure and simple gift cannot, by reason of Section 92 of the Evidence Act, be shown by oral evidence to be a deed of what under the Muhammadan Law is known as *hiba bilibaz* (gift for consideration).[8] But it has been held in another case that a deed may be given effect to as a simple gift, even though the deed recites the gift to have been for consideration.[9]

Gift cannot be shown to be a will.—Where an instrument purports to be a gift taking effect at once, oral evidence is inadmissible to show that it was intended to take effect only on the death of the donor.[10]

---

1. *Maung Sein* v. *Ma Saw*, 1924 R 360 : 82 IC 816 ; *Mohammad Hussain* v. *Hanuman Prasad*, 1942 O 273.
2. *Muhammad Ahmad Khan* v. *Jai Chand Lal, etc.*, 1930 A 709 : 128 IC 768.
3. *Umrao Singh* v. *Raunak Singh*, 1939 P 495.
4. *Madan Lal* v. *Lal Chand*, 49 A 457 : 1927 A 463 : 100 IC 703 ; *See Subba Narayana Vathiyar* v. *Ramaswami Aiyar*, 30 M 88 : 16 MLJ 508 (FB) ; *Ghansiam Das Baijnath* v. *Mithan Lal Tandan*, 1930 A 529 : 124 IC 763.
5. *Abdul Hakeem Ear Mohamed* v. *Ebrahim Solaiman Salehji*, 1921 C 480 : 62 IC 210.
6. *See Ill. (b) to* Section 92 ; *Parmeshwari Das* v. *Lachhman Prasad*, 1930 A 824 : 129 IC 439.
7. *Zaman Khan* v. *Ganga*, 1939 CWN 201 : 1939 O 142.
8. *Hafiz Ferozuddin Ahmad* v. *Sardar Shah, etc.*, 1924 L 562 : 79 IC 81.
9. *Sirajuddin Haldar* v. *Isab Haldar*, 49 C 161 : 1922 C 258 : 70 IC 203.
10. *U. Thin* v. *Daw Hmu*, 1937 R 142.

Absolute gift cannot be shown to be revocable.—Where an absolute gift is made by a written instrument, oral evidence that the gift was to be revocable if the donee did not render future services to the donor is in admissible.[1]

A gift cannot be proved to be a conveyance.—It is not open to the parties when consideration is mentioned, to prove that there was no term as to consideration or that the consideration was different from the one mentioned in the document. Equally, in a deed of gift it would not be open to a party to prove that, although the term of the deed was that there was to be no consideration, still the term was different from what was mentioned in the document and that there was consideration for the document. It cannot be proved that a deed of gift was not a deed of gift but a conveyance of property for consideration.[2]

Parole evidence is admissible to show that a joint tenancy has been converted into a tenancy-in-common.—Parole evidence to prove that a joint tenancy has been served and converted into a tenancy-in-common is not inadmissible under Section 92 of the Evidence Act, inasmuch as the evidence is tendered in such case not for the purpose of contradicting or varying the terms of conveyance but of proving facts from which it may be inferred that accepting the conveyance as creating a joint tenancy, the purchasers have subsequently so dealt with their respective interests thereunder that the joint tenancy has become a tenancy-in-common.[3]

Oral agreement as to the date of delivery of goods arriving by a specific steamer.—Where in an entry constituting a contract to buy and sell goods, after describing the goods and stating the rate, the name of the steamer is mentioned, the meaning is that the goods are to arrive by that steamer and would be delivered by the seller to the buyer on the arrival of the steamer. Oral evidence cannot, therefore, be given to prove that goods were to be delivered within a certain number of days from the date of the contract.[4]

Oral agreement to waive a default clause in a bond.—Where a bond which is payable by instalments provides that on default of payment of two instalments the whole bond will become payable, evidence of an oral agreement that the default clause will not be enforced on default of payment of two instalments is inadmissible.[5]

Evidence in variation or contradiction of bought-and-sold notes.—See notes to Section 91 under the heading "Whether bought-and-sold notes constitute a contract so as to exclude other a evidence"?

Deposit or pledge.—Where a certain amount of jade was deposited by A with B, and the nature of the deposit is in dispute, oral evidence is admissible to show whether it was put there for safe custody only or as a pledge.[6]

Oral evidence to show that two documents embody one transaction.—Where two deeds on their face appear to be separate transactions another agreement which was not evidenced by any writing cannot be proved to show that the deeds, though apparently two separate transactions, were agreed to be treated as one.[7]

---

1. *Ranga Rao* v. *Kithori Ammal*, 42 IC 265.
2. *Bai Hiradevi* v. *Official Assignee*, 1955 B 122 ; relied on in *Kanak Sundar Bibi* v. *Ram Lakhan Pandey*, 1955 P 458.
3. *Tan Chew Ho Nea* v. *Chee Swee Cheng*, 56 IA 112 : 1929 PC 72 : 116 IC 385.
4. *Firm of Jiwanji and Co.*, v. *Firm of Mahtabrai Chuhamal*, 1924 S 127 : 76 IC 286.
5. *Hara Kumar Saha* v. *Ram Chandra Pal*, 47 IC 943.
6. *Kyan Win Ya* v. *Das Khin*, 1938 R 38.
7. *Deonandan Tewary* v. *Draupadi Kuer*, 1938 P 242.

Disposition in favour of A and "others"; oral evidence admissible to establish the identity of "others".–Where a vendor agrees to sell land to several persons, and in the agreement only one name is given with the word "others", other evidence is admissible to prove the identity of the "others".[1]

Oral evidence contradicting recitals of facts which are not "terms" of a contract, grant or disposition is admissible.–There is a distinction between evidence to show that a recital of a fact in a written contract or grant is erroneous and evidence to vary the terms of the contract or grant.[2] There is nothing in Section 92 of the Act to exclude evidence of an oral agreement which contradicts, varies, adds to, or abstracts from, not the terms of the contract but some recitals in the contract.[3]

In *Krishna* v. *A.T. Nimbalkar*, the question was whether one of the two brothers had brought about a division of the joint family status, or a partition by intimating the other brother in clear terms his intention to separate and enjoy his share in severally, and the answer depended on the inferences which may reasonably be drawn from the contents of a deed and the subsequent conduct of the parties.

The Supreme Court observed:

> "Firstly, in this process, which is essentially one of construction of the deed..... no question of contradicting, varying, adding to or subtracting any term of the disposition is involved. The deed.....falls into two distinct parts: The first of them, comprises the preamble or the preliminary recital of a past fact. This part does not contain any term of disposition of property. Such terms are confined only to the second part. Section 92 prohibits only the varying of terms of the documents, not the memoranda or recital of facts, benefit of dispositive terms, particularly when the correctness of the whole or any part of the recital is in question.....The bar in Section 92, against the admissibility of extrinsic evidence for the purpose of showing that the insertion of the words 'for your maintenance' in the recital is wrong, unreal, unmeaning and the coinage of the executant's own brain, is not attracted, Secondly, there is ample authority for the proportion that when there is a dispute in regard to the true character of a writing evidence dehors the document can be led to show that the writing was not the real nature of the transaction, but was only an illusory, fictitious, and colourable device which cloaked something else, and that the apparent state of affairs was not the real state of affairs."[4]

A contracts in writing with B for the delivery of indigo upon certain terms. The contract mentions the fact that B had paid A the price of other indigo contracted for verbally on another occasion. Oral evidence is admissible,[5] as it does not contradict any term of the contract but only a recital of a fact. The section does not enact that no statements of fact in a written instrument is to be contradicted by oral evidence;[6] all that it says is that the terms of the written contract, grant or disposition of property are not to be contradicted, varied, added to, or sub-tracted from, by oral evidence. Thus,

---

1. *Veda Murthi Mudaliar* v. *Raghvacharlu, etc.*, 1922 M 100 : 65 IC 973.
2. *Achutaramaraju* v. *Subbaraju*, 25 M 7 p 14.
3. *Mukhi Singh* v. *Kishan Singh*, 51 C 320.
4. *Krishna* v. *A. T. Nimbalkar*, 1979 SC 1880 (Paras 26 and 27).
5. III. (d) to Section 91, Ev. Act.
6. *Sah Lal Chand* v. *Indrajit*, 27 IA 93 : 22 A 370.

notwithstanding the recital of payment of consideration in a deed, oral evidence is admissible to show that the recital as to the payment of consideration is erroneous.[1] Notwithstanding a recital of payment of money in a receipt, oral evidence may be given to show that no money in fact was paid.[2] A declaration or recital in a sale deed that there is no encumbrance on the property, or that the vendor has a good title to convey, is not one of the terms of the contract of sale, and evidence to prove that the vendee was aware of such defect cannot be said to vary or contradict the terms of the contract and is not inadmissible in evidence under section 92 of the Evidence Act.[3] A recital of relationship in a document may be contradicted by oral evidence as it is not a term of the contract embodied in the document.[4] In a suit for recovery of rent, oral evidence cannot be given to contradict recitals in receipt for rent granted by the plaintiff specifying the period for which the payments were made, as such recitals do really constitute terms of the contract.[5] Evidence is admissible to contradict a recital in a document that the plaintiff was related to the defendant.[6] When a loan is evidenced by a document, oral evidence is not excluded to show what the purpose of the loan was.[7] The date of a document is not a term of the transaction recorded therein. It is, therefore, permissible to show that a writing was executed on a date different from that appearing on its face.[8] Where in a contract for sale of agricultural land for building purposes the seller made a representation that the permission of the authorities for conversion of the land to building sites was expected to be received, the representation cannot be regarded as a term of the contract.[9]

The section applies only to dispositive instruments and excludes parol evidence only as between the parties to such instruments and their representatives in interest.—The words of the section "no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest" indicate that the section applies only to contracts, grants and other dispositions of property which have been reduced to writing either by consent of parties or by requirement of law, and that it is not applicable to a matter which, though required by law to be reduced to writing, is not a contract, grant or disposition of property, as the words "as between the parties to any such instrument or their representatives in interest" are inapplicable to a document embodying any such matter. In other words, the section is limited in its application to documents which are of a dispositive character.[10]

---

1. *Sah Lal Chand* v. *Indarjit*, 27 IA 93 : 22 A 370 ; *Mohammad Taki Khan* v. *Jang Singh*, 1935 A 529 : 156 IC 362 (FB) ; *Kshetra Nath Adhikari* v. *Durgapada Mandal*, 52 IC 902. See notes to Proviso (1) under the heading "want or failure of consideration".
2. *Mahalaxmi Amma* v. *Krishna Holla*, (1938) 1 MLJ 236 ; *Hukum Chand* v. *Shambu Nath*, 1935 A 346 : 158 IC 1121 : III. (i) section 92 ; *see* 10 RCL 1025.
3. *Gonda Ramasubbu Iyer* v. *Muthiah Kone, etc.*, 1925 M 968 : 85 IC 999.
4. *Mahalakshmi Amma* v. *Krishna Holla*, (1938) 1 MLJ 236 ; contra *Obdul Aziz* v. *Maung Pe Tint*, 1940 R 152.
5. *Kunwar Behari Lal* v. *Kalka, etc.*, 1923 O 45 : 77 IC 695.
6. *Mahalaxmi Amma* v. *Krishna Holla*, (1938) 1 MLJ 236.
7. *Kisturchand Tewari* v. *Rajani Kant Mukherjee*, 70 CLJ 201.
8. 10 RCL 1040.
9. *Anant Shamrao* v. *Nensukh Bherulal*, 1956 B 252.
10. *Kalyanji* v. *Dharamsey*, 1935 B 363 : 157 IC 646 : *Adappa Papamma* v. *Darbha Venkaya*, 58 M 994 : 1935 M 863 : 158 IC 187 ; *Hotchand Tolaram* v. *Premchand, etc.*, 1931 S 42 : 131 IC 710 ; *Chhedilal* v. *Manohar Lal*, 1930 N 298 ; 127 IC 894 ; *Ganga Dihal Rai* v. *Ram Oudh*, 1929 A 79 : 113 IC 760 ; *Ananda Priya Baishnavi* v. *Vijoy Krishna Roy*, 1926 C 463 : 91 IC 705 ; *Rang Lal* v. *Chunni Lal*, 60 IC 316 ; *Debendra*

Thus, an acknowledgment of a debt is not a contract, grant of disposition of property; and therefore, section 92 does not render inadmissible a contemporaneous oral agreement to pay.[1] A decree is not an instrument between parties in the sense in which that expression is used in section 92. Section 92 is inapplicable to a decree as a decree derives its binding force or validity from the authority of the Court and not from any agreement or contract between the parties. Though therefore, section 92 does not have the effect of excluding oral evidence in variation of a decree, the variation itself cannot be brought about by the parties themselves and is therefore ineffective.[2]

Evidence to contradict a recital in a record.—Evidence is admissible to show that a Judge's note on the record is wrong. Thus, a party may give evidence that he was present when a petition was presented by this Counsel, or that he himself presented the petition, though the record states to the contrary.[3] Evidence is admissible to show that no consideration was paid to vendor.[3a]

Oral agreement adjusting or varying a decree, whether provable?—Where the oral agreement set up amounts to an adjustment of the decree within the meaning of O. 21, r. 2, C.P.Code, the agreement is undoubtedly provable in proceedings for its certification, taken within the time limited, under O. 21, r. 2, C.P.Code.[4] But where the alleged adjustment has not been recorded and certified as required by O.21. r. 2, C.P.Code, it will not be taken notice of by the executing Court, and other evidence of such adjustment will be admissible under section 91 of the Evidence Act, as such adjustment is required by law to be reduced to the form of a document.[5] If an application is made for the execution of an orally adjusted or satisfied decree, and an application for certification of the adjustment is not barred by time, the judgment-debtor may allege and prove the oral adjustment or satisfaction in the very proceedings.[6] Where a decree has been orally adjusted, but the decree-holder has got the decree executed in violation of such adjustment, the judgment-debtor may bring a suit for damages and prove the oral adjustment,[7] as in such a case the suit is based on the breach of an oral

---

Narain Sinha v. *Sourindra Mohan Sinha*, 24 IC 391 ; *Gaja Nand* v. *Haribux*, 1943 C 634 ; Woodroffe, Ev., 9th Ed., 336, 637 ; see also Field, Ev., 8th Ed. 501 ; *Adappa Papamma* v. *Darbha Venkayya*, 158 IC 117 (FB) ; overruling *Venkatalingama Nayanim Bahadur Varu, Raja of Kalahasti* v. *Rao Muni Venkatadri Varu*, 50 M 897 : 1927 M 911 : 105 IC 248, and *Gopala Krishna Iyer* v. *Sankara Iyer*, 1930 M 673.

1. *Chhedilal* v. *Manoharlal*, 1930 N 298 : 127 IC 894 ; but see *Rambohar Misir* v. *Chaturghan Rai*, 1935 A 58 : 154 IC 1070 and notes to section 91.
2. *Adappa Papamma* v. *Darbha Venkayya*, 58 M 994 : 1935 M 863 : 158 IC 187 ; see also *Kalyanji* v. *Dharamsey*, 1935 B 303 ; *Nazi Mohammad Khan* v. *Abdul Ghani*, 1937 L 168 ; *Behari Lal* v. *Tulsi Das*, 1943 Pesh. 29 ; *Gaja Nand* v. *Haribux*, 1943 C 634 ; see *Narain* v. *Basudeo*, 1950 A 437 : 1950 ALJ 261 : 1950 AWR 351.
3. *Mst. Jiwan* v. *Umar Din*, 1934 L 452 (1) : 151 IC 370 (1).

3a. *Savitri Devi* v. *State*, AIR 1989 Pat 327.

4. *Abdul Karim* v. *Hakim Maltani Mal*, 14 L 668 : 1933 L 806 : 145 IC 924 : *Hotchand Tolaram* v. *Premchand, etc.*, 1931 S 42 : 131 IC 710 ; *Ganga Dihal Rai* v. *Ram Oudh, etc.*, 1929 A 79 : 113 IC 760 ; *Ananda Priya Baishnavi* v. *Bijoy Krishna Roy*, 1926 C 643 : 91 IC 705 ; *Rang Lal* v. *Chunni Lal*, 60 IC 316 ; *Lachhmi Das* v. *Ram Nath*, 44 A 258 : 1922 A 13 : 64 IC 990.
5. See O 21, r. 2, C.P.Code ; *Abdul Karim* v. *Hakim Maltani Mal*, 14 L 668 : 1933 L 806 : 145 IC 924 ; *Gopala Krishna Iyer, etc.* v. *Sankara Iyer*, 1930 M 673 : 125 IC 543 : *Raja of Kalahasti* v. *Venkatadri Rao*, 50 M 897 : 1927 M 911 : 105 IC 248 ; *Kulatha Iyer* v. *Vaithilingam Aiyar*, 1927 M 876 : 105 IC 163.
6. *Udham Singh* v. *Atma Singh*, 1941 L 149 (FB) ; *Ganga Dihal Rai* v. *Ram Oudh etc.*, 1929 A 79 : 113 IC 760 ; *Kamakashi Chettiar* v. *Thanga Muthu Nadar*, 1935 M 424 : 156 IC 834 : *Kalyanji* v. *Dharamsey*, 1935 B 303.
7. *Ma Shwe Pee* v. *Maung San Myo*, 6 R 573 : 1928 R 316 ; *Ganga Dihal Rai* v. *Ram Oudh, etc.*, 1929 A 79 : 113 IC 760.

contract. Where in execution of a decree the parties effect a compromise and in consequence certify the adjustment of the decree in Court, whereupon the execution case is struck off on the ground that the decree is fully satisfied, the order of Court is binding on the parties and there is no longer an operative decree in existence. The fact that the liabilities under the decree from the consideration for the compromise does not prevent that compromise from being a new and independent contract which may form the basis of a suit and which may be proved by oral evidence. Such evidence is not evidence of an agreement "contradicting, varying, adding to, or subtracting from" the terms of the decree.[1] An uncertified discharge of a decree may also be alleged and proved by a third person in a separate suit.[2] If, however, the oral agreement set up seeks to vary the terms of the decree the question whether such agreement is provable or not is governed more by the rules of civil procedure than by section 92 of the Evidence Act; and the true rule seems to be that a Court executing a decree cannot inquire into an oral agreement between a judgment-debtor and a decree-holder, if the agreement does not relate to the time or manner of enforcement of the judgment-debtor's liability under the decree, inasmuch as an execution cannot substitute a different decree for the one which it is called upon to execute, or give the decree-holder in place of the decree under execution some sort of a decree for specific performance of a contract orally entered into.[3] It is open to a judgment-debtor to plead a pre-decretal agreement which does not attack the decree, but which states that the decree cannot be executed under a certain condition or it can be executed in part.[4] But if the agreement relates to the time or manner of enforcement of the liability under the decree, as for instance where the decree-holder agrees to grant time for payment or accept payment by instalments, the agreement can be inquired into under Section 47, C.P.Code.[5] The point arose before the Privy Council in *Oudh Commercial Bank* v. *Thakurani Bind Basni Kuer*,[6] and was answered by Sir George Rankin thus: "The purpose of providing a limitation of six months for such applications to the Court which passed the decree is not altogether plain and the objects may be more than one; but this provision, like the rule itself, affords no sufficient ground for holding that the Code makes parties wholly incompetent to come to an arrangement for time enforceable in execution proceedings. Such bargains may take different forms and it is not possible to prejudge the individual case. If it appears to the Court, acting under Section 47, that the true effect of the agreement was to discharge the decree forthwith in consideration of certain promises by the debtor, then no doubt the Court will not have occasion to enforce the agreement in execution proceedings, but will have the creditor to bring a separate suit upon the contract. If, on the other hand,

1. *Ratan Lal* v. *Anwar Khan*, 53 IC 527 ; see also *Oudh Commercial Bank* v. *Thakurani Bind Basni Kuer*, 1939 PC 80 ; 14 Luck 192.
2. *Kulathu Ayer* v. *Vaithilingam Aiyar, etc.*, 1927 M 876 : 105 IC 163.
3. *Lachhmi Das* v. *Ram Nath*, 44 A 258 : 1922 A 13 : 64 IC 990 ; *Adappa Papamma* v. *Darbha Venkayya*, 58 M 994 : 1935 M 860 : 158 IC 187 ; *Raja of Kalahasti* v. *Venkatadra Rao*, 50 M 897 ; 1927 M 911 : 105 IC 248 : *Gopala Krishna Iyer v. Sankara Iyer*, 1930 M 673 : 125 IC 543 ; but see *Hotchand Tolaram* v. *Prem Chand*, 1931 S 42 : 131 IC 710 ; *Ganga Dihal Rai* v. *Ram Oudh, etc.*, 1929 A 79 : 113 IC 760, in which *Lachhmi Das* v. *Ram Nath*, 44 A 258 : 1922 A 13 : 64 IC 990 was doubted ; *Debendra Narain Sinha* v. *Sourindra Mohan Sinha*, 24 IC 391 ; where an oral agreement to give 12 years' time to the judgment-debt was held provable though the decree provided only 2 years' time : *Narain* v. *Basdeo*, 1950 A 437 : 1950 ALJ 261 : 1950 AWR 351.
4. *Perumalswami Chettiar* v. *Rajammal*, 1955 M 339.
5. *Behari Lal* v. *Tulsi Das*, 1943 Pesh 29.
6. 14 Luck 192 : 1939 PC 80.

the agreement is intended to govern the liability of the debtor under the decree and to have effect upon the time or manner of its enforcement, it is a matter to be dealt with under Section 47. In such a case to say that the creditor may perhaps have a separate suit is to misread the code, which may require all such matters to be dealt with in execution discloses a broader view of the scope and functions of an executing Court".[1] If there is a completed contract, which immediately extinguishes and takes the place of the decree, that contract is an adjustment within the meaning of O. 21, r. 2, C.P.Code. If on the other hand, there is only an agreement to adjust the decree on the fulfilment of a future condition and the decree is still left in existence pending the fulfilment of the condition, then there is no adjustment. It is, of course, a question to be decided in each case by the executing Court whether there has been a completed contract or not.[2]

Parol evidence is not inadmissible where the proceedings are between strangers, or between a party and a stranger; or between co-obligors or between co-obligees.—The rule excluding parol evidence varying, contradicting and adding to or subtracting from, the terms of an instrument applies only to the parties to an instrument and their representatives in interest. Persons who are neither parties to a document, nor their representatives in interest, may give evidence of any fact tending to show a contemporaneous agreement varying the terms of the document.[3] Section 92 does not apply when the question in respect of the construction of an agreement arises between persons who are not parties to it.[4] Where a transaction has been reduced into writing merely by agreement of the parties, extrinsic evidence to contradict or vary the writing is excluded only in proceedings between such parties or their privies, and not in those between strangers, or a party and a stranger, since strangers cannot be precluded from proving the truth by the ignorance, carelessness, or fraud of the parties;[5] nor, in proceedings between a party and a stranger, will the former be estopped, since there would be no mutuality.[6] The language of Section 92 of the Evidence Act with regard to a contract, grant or disposition reduced to writing in terms applies and applies only "as between the parties to any such instrument, or their representatives in interest". Wherever, accordingly, evidence is tendered as to a transaction with a third party, it is not governed by the section or by the rule of evidence which it contains.[7] Thus, a stranger to a deed may

1. *Oudh Commercial Bank* v. *Thakurani Bind Basni Kuer*, 1939 PC 80 : 14 Luck 192.
2. *Udham Singh* v. *Atma Singh*, 1941 L 149 (FB).
3. Section 99, Ev., Act ; *Surayya* v. *Mangoyya*, 1940 MWN 19 ; *Milkimal* v. *Totomal*, 1939 S 200 ; *Baswant Gowdappa Patil* v. *Abasalli Gajabarsaheb Desai*, 1934 B 145 : 150 IC 635 ; *(Mahant) Har Narain Das* v. *Mst. Bibi Rup Kaur*, 1932 O 168 : 138 IC 128.
4. *E.Hoe Chau* v. *Babu Chotalal Ujamsi*, 1939 R 139 ; *Baswant Gowdappa Patil* v. *Abasalli Gajabarsaheb Desai*, 1934 B 145 : 150 IC 635 ; see also *Egged Co-operative Society* v. *Levi Geffen*, 1947 PC 82 ; *Rangubai* v. *Govind Laxman*, 1949 N 243 : ILR 1949 N 78 : 1948 NLJ 378.
5. *R.v. Cheadle*, 3 B & Ad 833.
6. Phipson, Ev., 7th Ed., 555.
7. *Maung Kyin* v. *Ma Shwe Law*, 44 IA 236 : 45 C 320 : 1917 PC 207 : 42 IC 642 ; *Maung Kyin* v. *Ma Shwe Law*, 38 IA 146 : 38 C 892 : 12 IC 39 : 15 CWN 958 (PC) ; *Surayya* v. *Mangayya*, 1941 M 345 ; *Munnswami Mudaliar* v. *Govindaraja Chettiar* 58 M 371 : 1935 M 113 : 153 IC 668 : *Baswant Gowdoppa Patil* v. *Abasalli Gajabarsaheb Desai*, 1934 B 145 : 150 IC 635 ; *Troilokya Nath Ghose* v. *Jajneswar Pal, etc.*, 1934 C 821 : 152 IC 933 ; *Sabhaji* v. *Nawal Singh, etc.*, 1928 N 4 : 104 IC 736 ; *Ganu* v. *Bhau*, 42 B 512 : 46 IC 662 ; *Malakyi* v. *Ko Po Nyein, etc.*, 6 R 741 : 1929 R 86 : 114 IC 676 ; *Sukumari Devi* v. *Kalipada Mukherjee*, 45 IC 13 ; see also *Ram Sundar Mal, etc.* v. *Collector, Gorakhpur, etc.*, 52 A 793 : 1930 A 797 : 126 IC 237 : *Gopi Nath, etc.* v. *Rup Ram, etc.*, 1930 A 786 ; *Suraj Prasad* v. *Maheshwari Prasad*, 96 IC 276 ; *Taluk Chand Bheraji* v. *Atmaram Keshav Vaidya*, 1924 B 58 : 77 IC 342 ; *Krishnaswamy Aiyar* v.

prove by oral evidence that a document was not executed with the knowledge and consent of another as mentioned in the document;[1] or that what purports to be an absolute conveyance was in fact a mortgage;[2] or that a conveyance was subject to a condition of repurchase,[3] or merely a gift;[4] or that a gift was in fact a sale;[5] or that a lease was in fact a sale.[6] A person who is not the representative in interest of the settlor is entitled to challenge the validity of a *waqf* on the ground that it was merely an illusory transaction never intended to be acted upon;[7] and a stranger to a mortgage-deed may question the mortgagor's right to mortgage the land, though such plea is not open to the mortgagor himself.[8] Where a mortgagee of a series of lots of landed properties validily released some of them by word of mouth and the released lots were then sold by the mortgagor to a third party, it is not open to a second mortgagee whose mortgage was executed subsequent to this sale, to contend that Section 92 precluded any evidence being led to show that an oral release had, in fact, been granted by the first mortgagee. The second mortgagee is not a representative in interest of either of the parties to the first mortgagee, and their only representatives in interest are the purchasers of the lots sold.[9] Similarly, a pre-emptor may prove against the vendee that what purports to be a mortgage was in fact a sale.[10] Since a stranger may, by parol evidence, prove as against a party to the deed the true nature of the transaction, it follows by necessary implication that a party to a deed should have a similar right as against a stranger to the deed.[11] Thus, in a suit for pre-emption a party may prove that what purports to be a sale was in fact a mortgage[12] or a mere relinquishment.[13] Similarly, a vendor may prove against the transferee of his vendee that the sale by him was subject to a condition of repurchase in his favour.[14] An ostensible vendee may prove as against a stranger that the sale in his favour was in fact a gift to him.[15] It is open to the pre-emptor to show the nature of the transaction and he is not bound by the apparent form in which the transaction takes place.[16]

The words in Section 92 of the Evidence Act "between the parties to any such instrument" refer to the persons who on the one side and the other came together to

---

Mangdlathammal, 53 IC 243 ; *Rangubai* v. *Govind Laxman*, 1949 N 243 ; *Parattakath Mayan* v. *Palakkotaneakatte Mammad Kunhi*, 1949 M 852 : 1949 1 MLJ 295 : 1949 MWN 136 : 62 MLW 221.

1. *Maung Hyane* v. *Maung Aung Nyun*, 1935 R 122.
2. *Ganu* v. *Bhau*, 42 B 512 : 46 IC 662 ; *Hiraii* v. *Vishnu*, 1923 B 429 : 79 IC 186.
3. *Maung Than Gyaung* v. *Maung Pyu, etc.*, 5 R 836 : 1928 R 61 : 103 IC 734 ; *Ma Mi* v. *Maung Aung Dun*, 5 R 376 : 1928 R 244 : 111 IC 832.
4. *Alla Baksh* v. *Mst. Hajjin Imdadi*, 21 IC 60 ; *Ashfaque Husain* v. *Syed Nazir Husain*, 53 IC 961.
5. *Jagat Mohini Dasi* v. *Rakhal Das Bisoyi*, 2 CLJ 338.
6. *Troilokya Nath Ghose* v. *Jajneswar Pal, etc.*, 1934 C 821 : 152 IC 933.
7. *Minnat Ali* v. *Nobendra Kishore Roy*, 1928 C 253.
8. *(Kalakatharam) Rukmani Ammal* v. *Ka Ki Aniama Naidu, etc.*, 1926 M 744 : 96 IC 26.
9. *Chattyar Firm* v. *Chettyar Firm*, (1937) Rang LR 13 : 1937 R 220 : 171 IC 168.
10. *Megha Ram* v. *Makhan Lal*, 13 IC 667 : 67 PR 1912 ; *Baldeo Singh* v. *Puttu Lal*, 21 IC 69 ; *Sheikh Usman, etc.*, v. *Mohammad Shafi Khan*, 1927 A 204 : 98 IC 989 ; *Mohammad Ishaq, etc.* v. *Mst. Fahim-un-Nisa, etc.*, 4 Luck 68 : 1928 O 472 : 113 IC 263.
11. 4 NLR 115.
12. *Bishunath Singh* v. *Baldeo Singh*, 47 IC 194 ; *Hiraii* v. *Vishnu*, 1923 B 429 : 79 IC 186.
13. *Bhullen Singh* v. *Kashi Ram*, 1924 A 229 (2) ; 89 IC 320.
14. *Malakyi* v. *K.P.Nyein*, 6 R 741 : 1929 R 86 : 114 IC 676.
15. *Pathammal* v. *Syed Kalai Ravuthar*, 27 M 329.
16. *Meri Mal* v. *Sharifar*, 1949 A 194 : 1948 OWN 382.

make the contract or disposition of property, and would not apply to questions raised between the parties on the one side only of a deed, regarding their relations to each other under the contract. The words do not preclude one of two persons in whose favour a deed of sale purported to be executed, from proving by oral evidence in a suit by the one against the other, that the defendant was not real but a nominal party only to the purchase, and that the plaintiff was solely entitled to the property to which it related.[1] It is open to one of two joint transferees to prove what interest, if any, is taken by the other where the document does not specify the extent of the shares.[2] As in a dispute among the co-obligees under a document so in a dispute among the co-obligors *inter se*, parol evidence in contradiction of a document is not excluded. Thus, a person who is shown as one of the co-mortgagors in a deed of mortgage is not, in a suit by him against the other co-mortgagors, precluded from showing that the was not in fact a co-mortgagor but a surety for the other mortgagors.[3] It has, however, been held in a Madras case that if, in the case of a mortgage, the mortgagors have undertaken certain obligations, as for instance, that the severally owned items of the hypotheca shall be rateably liable, one mortgagor can no more set up an oral agreement against his fellow mortgagors for the purpose of varying the terms of the document then he could as against his mortgagee.[4] A person who is shown as the hirer of a machine in a hire-and-purchase agreement may, in a suit against a person shown in the agreement as a guarantor, prove that the latter was the real hirer.[5] Where a person executes a mortgage of property on behalf of his minor children as their guardian, he is not precluded from adducing evidence of oral arrangement with the mortgagee whereby the mortgage was to be discharged.[6] Husbands executing a sale deed on behalf of their wives are not parties to the sale deed.[7]

Members of a joint Hindu family are parties to a deed executed by the manager of the family.—Where a sale is effected by a person acting as the manager of a joint Hindu family, other members of the family are deemed to be party to the transaction and cannot be permitted to dispute the nature of the transaction.[8] Where a lease is taken in the name of a member of a joint family, there is nothing in law to prevent the other members of the family from showing that it was a lease taken by the entire joint family, although the name of only one of its members was entered in the document.[9]

Later oral agreement between only some representatives of the original parties to the deed.—If only some of the representatives in interest of the parties to an instru-

1. *Mul chand* v. *Madho Ram*, 10 A 421 ; see *Lakshmana Sahu* v. *Simachala Patra*, 1941 P 211 ; *Mohd. Sultan Mohiuddin Ahmad Ansari* v. *Amthul Jalal*, 1927 M 1102 (2) : 101 IC 653 ; *Rajib Husain* v. *Zingraji*, 54 IC 962 ; *Munna Singh Rajput* v. *Narain Singh, etc.*, 1929 N 91 : 107 IC 658 ; *Pathammal* v. *Syed Kalai Ravuthar*, 27 M 329 ; but see *Maung Tun Gyaw* v. *Maung Po Thwe*, 1922 Low. Bur 37 : 77 IC 923 and *Ma Aye Tin* v. *Daw Thaut*, 1941 R 99, in which a different view of this matter seems to have been taken.
2. *(Illur) Ramayya Chetti* v. *Mannaru Chetty*, 1930 M 590 : 126 IC 492 ; *Mohammad Sultan Mohiuddin Ahmad Ansari* v. *Amthal Jalal*, 1927 M 1102 (2) ; 101 IC 653.
3. *Shams-ul-Jahan Begum* v. *Ahmed Wali Khan*, 25 A 337.
4. *Muthukumaraswami Mudaliar* v. *Govinda Padayachi*, 1932 M 218 : 137 IC 285, dissented from in *Lakshman Sahu* v. *Simachala Patra*, 1941 P 211.
5. *Lakshman Sahu* v. *Simachala Patra*, 1941 P 211.
6. *Parattakath Mayan* v. *Palakkotanteakatte Mammad Kunhi*, 1949 M 842 : 1949, 1 MLJ 295 : 1949 MWN 136 : 62 MLW 221.
7. *Roddam Bhagyalakshmamma* v. *Sriram Kamalamma*, 1954 M 94 : 1953 MWN 504 : 1953 2 MLJ 249.
8. *Ramchandra Hanmant* v. *Kashinath Laxman*, 87 IC 804 ; see also *Narsingdas Takhatmal* v. *Radhakisan Rambakas*, 1952 B 425 : 54 BLR 492.
9. *Raghunath Tewari* v. *Budhoo Ram Tewari*, 1932 A 112 : 133 IC 897.

ment are parties to a later oral agreement, Section 92 of the Evidence Act is inapplicable and the later oral agreement is provable.[1]

Proof of the benami character of a transaction.—A *benami* transaction may take any of the following different forms;—(i) When the real purchaser is not shown at all as a purchaser of the *benami* character of the transaction is not excluded in such a case, as the real purchaser is not a party to the deed at all.[2] (ii) When the real purchaser and the ostensible purchaser are both shown in the deed as joint purchasers. Here also Section 92 does not bar evidence being let in to prove the extent and quantum of interest intended to be taken by the purchasers in the property.[3] (iii) Where a purchase is made in the name of only person, but in fact there are others also interested in the purchase. In such a case, those whose names are not mentioned as purchasers in the deed are not precluded from showing their interest in the transaction, as they cannot be said to be parties to the deed.[4] (iv) When a fictitious transfer is made by a person in another's favour to defraud the creditors. Here also, it seems, oral proof to show the real nature of the transaction is not excluded by section 92,[5] though the question whether a party is entitled to any relief in those circumstances has to be decided apart, from the provisions of Section 92.[6] (v) Where a purchase is made by a parent in the name of a child, the contemporaneous acts and declaration of the parent are evidence to show that the child shall take as a trustee only; but subsequent acts and declaration of the parent are inadmissible for that purpose.[7]

Oral evidence as to secret trusts in wills.—In English law it is open to those who claim the benefit of a secret trust to show that a gift by will say to A, is really given to A on a secret trust for B. But it is an undoubted element in this class of cases that the party setting up such a secret trust must show that the trust was communicated to A by the testator, and that A agreed to accept the property on those terms.[8] Under the English law, where a testator disposes of property of a legatee and, at the time of such disposition or at any subsequent period during his lifetime, the testator informs the legatee that the disposition is in his favour, although apparently for his benefit, was so made in order that he may carry into effect certain wishes of the testator which are communicated to him, and the legatee expressly or impliedly undertakes to carry out the wishes so expressed to him by the testator, the legatee will be treated as a trustee and will be compelled to carry out the instructions so confided to him. In such a case the instructions of the testator are given effect to not as a part of the will but by fastening on the conscience of the legatee a personal obligation to carry into effect the wishes of the testator in order to prevent the perpetration of fraud. The title of the beneficiaries is one *dehors* the will and not under the will,[9] A testator provided by his will as follows;—"In

1. (*Narra*) *Sri Sailam* v. *Koganti Bhushayya*, 1925 M 775 ; 87 IC 246.
2. *Laxmibai* v. *Keshav Annaji Pokharkar*, 33 IC 396 ; *Nathu Khan* v. *Mst. Sewak Koeri*, 9 IC 161 ; see *Bipin Behari Chowdhry* v. *Ram Chandra Roy*, 5 Beng. LR 234, 248, 249.
3. *Mohammad Sultan Mohiuddin Ahmad Ansari* v. *Amthul Jalal*, 1927 M 1102 (2) ; 101 IC 653 ; *Rajib Husain* v. *Mst. Zingraji* 54 IC 962 ; *Mul Chand* v. *Madho Ram*, 10 A 421 ; see also *Pathammal* v. *Syed Kalai Ravuthar*, 27 M 329.
4. *Raghunath Tewari* v. *Budhoo Ram Tewari*, 1932 A 112 ; 133 IC 897.
5. *Abdul* v. *Arlin*, 1926 R 94 : 95 IC 512 ; but see *Laxmibai* v. *Keshav Annaji Pokharkar*, 33 IC 396.
6. As to this ; see *Pether Permal Chetty* v. *Muniandy Servai*, 35 IA 98 : 35 C 551 (PC).
7. *Alice Georgina Paschand* v. *Emma Bertha Paschand Nixon*, 1930 O 441 : 128 IC 721.
8. *Kali Charan Ghosal* v. *Ram Chandra Mandal*, 30 C 783 ; *Jones* v. *Badley*, (1868) LR 3 Ch. AC 362.
9. *Manuel Louis Kunha* v. *Jnana Coelho*, 31 M 187.

accordance with directions that I am going to give in private to trustee No. 1 out of the trustees appointed by me, my trustee should entrust to Haridas Rs. 5, 000 that may be received from may life-policy, and the shares of Tata and Co. also should be transferred to the person whose name will be disclosed by Haridas.[1] In a suit by B claiming the benefit of the bequest, it was held that evidence was admissible to show that the request was intended to be for the benefit of B.

Plea as to intention to lead oral evidence.–If evidence is proposed to be led to vary or modify the terms of a document or a writing there must be a proper plea raised which brings the case within any of the proviso to the section.[2]

PROVISO (1)

The rule of evidence embodied in Section 92 presupposes the validity of the transaction evidenced by the document to which that rule has to be applied. If, therefore, the validity of the transaction is impeached, it is no defence to point to the apparent rectitude of the document evidencing it and to claim protection from inquiry under a rule which exists against the contradiction and variance of the terms only of those instruments the validity of which is not in question. In such cases, the Court is not bound by the mere paper expressions of the parties and is not precluded from enquiring into the real nature of the transaction between them. The first Proviso to this section, therefore, declares that any fact may be proved which would invalidate any document.[3] The facts mentioned in the Proviso render an instrument, void or voidable;[4] but the section is not exhaustive of the facts which have this effect on the validity of instruments.[5] Thus, undue influence and misrepresentation have the same effect on instruments as fraud or intimidation[6] and agreements which are uncertain,[7] or in restraint of marriage,[8] trade[9] or legal proceedings,[10] or by way of wager,[11] are void. When an instrument is void or voidable against a person, he may sue to have the instrument declared void or voidable.[12] A party may take proceedings for the rectification of an instrument when, through fraud or mutual, mistake, the instrument does not truly express the intention of the parties.[13] Similarly, a party may take proceedings for the rescission of an instrument where the contract embodied in it is voidable, or unlawful

1. *Bayabai Sakalkar* v. *Haridas Ranchhordas*, 40 B 1 ; 27 IC 946.
2. *Shankar Bandu* v. *Shankar Babaji* 1956 B 165.
3. Per Woodroffe, J., in *Beni Madhab Das* v. *Sadasook Kotary*, 32 C 437 (FB) ; see also *Gopi Nath* v. *Rup Ram*, 1930 A 786.
4. As to the effect of fraud or intimidation on instruments, see Section 19 of the Contract Act, and Section 61 of Indian Succession Act, 1925 ; as to illegality, see Section 24 of the Contract Act; as to want of capacity, see Section 10 & 11 of the Contract Act, and section 59 of the Indian Succession Act, 1925 ; as to want or failure of consideration, see Section 25 of the Contract Act; as to mistake in fact or law, see Sections 21 and 22 of the Contract Act.
5. *Pandurang* v. *Jishwanath*, 1939 N 20 ; *Rai Satyendra Nath Roy Chowdhury* v. *Pramananda Haldar*, 39 CWN 888 ; *Beni Madhab Das* v. *Sadasook Kotary*, 32 C 437 (FB) ; *Nadir Chand Saha* v. *Binendra Nath Dutt Chowdhury*, 37 IC 126.
6. See Section 19 (A) and 19 of the Contract Act.
7. Section 29 of the Contract Act.
8. Section 26 of the Contract Act.
9. Section 27 of the Contract Act.
10. Section 28 of the Contract Act.
11. Section 30 of the Contract Act.

of Act.

for causes not apparent on the fact of the instrument.[1] Proviso(1) to the section, therefore, provides that the rule excluding evidence to contradict, vary, add to, or subtract from, the terms of a contract, grant or disposition of property is not to be taken as excluding evidence of such facts as render a transaction void or voidable, or which entitle a party to some relief in respect of the instrument under Chapter III of IV of the Specific Relief Act. Even a contemporaneous oral agreement which contradicts the terms of the instrument may be given in evidence if the Proviso is otherwise applicable to the facts of the case.[2] Oral evidence can be led to show that due to a mistake common to all the parties, the written document does not correctly express the agreement which the parties had really entered into.[3] But the proviso has no application where the instrument represents what the parties intended to put down in writing, though it might not be in accordance with what they intended to do and with the legal effect that they secretly wanted to bring about, but which, for some reason, they did not want to put in writing.[4]

Separate suit for rectification or rescission of the instrument is not necessary.—The first Proviso merely renders possible, irrespective of any question of limitation, proof of facts which entitle a party to have an instrument adjudged void or voidable, or which entitle him to have it rescind or rectified under the Specific Relief Act. A party is not under the obligation of taking steps to have an instrument adjudged void or voidable or to have it rescinded or rectified within the time prescribed for a suit for this purpose. When any such instrument is sought to be enforced against a party, he may, under this section of the Evidence Act, prove that the instrument is void or voidable, or liable to rescission or rectification.[5] Similarly, if by fraud or mistake, or any other similar cause, an instrument does not truly represent the terms of the transaction, the party relying on the transaction may prove its nature and enforce it against the other party notwithstanding the instrument.[6] A institutes a suit against B for the specific performance of a contract and also prays that the contract may be reformed as to one of its provisions, as that provision was inserted in it by mistake. A may prove that such a mistake was made as would by law entitle him to have the contract reformed.[7] A plaintiff in a suit for possession of a plot of land is entitled to show by oral evidence; even if the period of limitation for a suit for rectification of the sale deed has expired, that the plot sued for was sold to him and that the sale deed by mistake mentions another plot as having been sold.[8] Where a vendee's name is omitted from the conveyance by fraud, he can recover possession of his share, even though the period of limitation fixed for a suit for rectification of the conveyance has expired.[9]

Fraud.—Fraud means and includes any of the following acts mentioned by a party to a contract, or with his connivance, or by his agent, with intent to deceive another

---

1. Sections 35 and 36 of the Specific Relief Act.
2. *Mohammad Araj* v. *Abdul Gofur*, 63 IC 368 ; see also *Asa Ram* v. *Ludheshwar*, 1938 N 235.
3. *Sateri Shiddappa Gadkari* v. *Rudrappa Shetteppa Bachenhatti*, 1954 B 463.
4. *U Thin* v. *Daw Hmu*, 1937 R 142.
5. *Janardan* v. *Venkatesh*, 41 Bom LR 191 ; *Raja Ram* v. *Manik*, 1952 N 90 : ILR 1951 N 948 ; *Sateri Shiddappa Gadkari* v. *Rudrappa Shetteppa Bachenhatti*, 1954 B 463.
6. *Madhorao Narayanrao* v. *Harinath Bhikaji*, 1938 N 259.
7. Illustration (e) to Section 92.
8. *Kesho Singh* v. *Roopan Singh*, 1927 A 355 : 100 IC 568.
9. *Asatulla* v. *Sadatulla*, 41 IC 747.

party thereto or his agent, or to include him to enter into the contract:-

(1) the suggestion, as to a fact, of that which is not true, by one who does not believe it to be true;

(2) the active concealment of a fact by one having knowledge of belief of the fact;

(3) a promise made without any intention of performing it:

(4) any other fact fitted to deceive;

(5) any such act or omission as the law specifically declares to be fraudulent.[1]

If consent is caused to an agreement by fraud, the agreement is a contract voidable at the option of the party whose consent was so caused.[2] Where one party induces the other to contract on the faith of representations made to him any one of which is untrue, the whole contract is in a Court of Equity considered as having been obtained fraudulently.[3] Thus, if at the time of execution of a document a representation is made that the document, though in the form of a sale deed, will not be enforced as such, and if, on the faith of such representation, the executant executes the sale deed, the sale deed will be unenforceable and the true nature of the transaction may be proved by oral evidence.[4] Where the promisee of a promissory note induces a surety to sign it as a principal debtor by representing to him that the promissory note would not be enforced against him except as a surety, the case falls within the Proviso and oral evidence in proof of the fraud is admissible.[5] A *Kabuliyat* contained a stipulation to pay 75 percent interest on default of payment of rent. The tenant pleaded an oral agreement that the covenant would not be enforced and this was found to be true. Held, that the *kabuliyat* was not the real agreement between the parties as the landlord was guilty of fraud.[6] In another case, however, it has been held that where a mortgage bond provides for payment or compound interest it is not permissible to show that, at the time the bond was signed by the mortgagor, the parties had agreed that the stipulation as to compound interest would not be enforced.[7] Section 92 of the Evidence Act does not prevent proof of the fraudulent character of a transaction by oral evidence,[8] nor does it prevent proof of a fraudulent dealing with a third person's property, or proof of notice that property purporting to be absolutely conveyed in fact belonged to a third person who was not a party to the conveyance.[9] If a transaction of mortgage between A and B by mutual arrangement

1. Section 17 of the Contract Act.
2. Section 19 of the Contract Act.
3. *Abaji Annaji* v. *Laxman Tukaram*, 30 B 426.
4. *Navalbai Fulchand* v. *Swubai Genu Korpe*, 8 Bom LR 761 ; *Rai Satyendra Nath Roy Chowdhuri* v. *Pramananda Haldar*, 39 CWN 888. But see notes to this section under the heading "oral evidence of the intention or the acts and conduct of the parties, whether admissible to show that an instrument was intended by the parties to be different from what it purports to be, or to show that there was a contemporaneous oral agreement varying the terms of the instruments, mortgage or sale?"
5. *U.Pe.* v. *U.Chit Hmun*, 1937 R 82 : 168 IC 477.
6. *Nadir Chand Saha* v. *Birendra Nath Dutt Chowdhury*, 20 CWN 1067 : 37 IC 126 ; See also *Pulin Behari Deb* v. *Rama Kanta Mahata Kurmi*, ILR (1938) IC 48 ; but *see Abdul Aziz Mia* v. *Amanmal Bathra*, 1925 C 276 (1) : 78 IC 742.
7. *Maheshchandra Shaha* v. *Anandachandra Shaha*, 61 C 344 : 1934 C 564 : 151 IC 511. See also *Hara Kumar Saha* v. *Ram Chandra Pal*, 47 IC 943 ; *Muthu Erulappa Pillai* v. *Vunuku Thathayya Maistry*, 36 IC 957.
8. *Kashi Nath Chukerbati* v. *Brindabun Chukerbati*, 10 C 649 ; *Kunwar Behari Lal* v. *Kalka*, 1923 O 45 : 77 IC 695 ; See also *Maung Kyin* v. *Ma Shwe Law*, 38 C 892 (PC) ; *Balaramireddigari Soma Reddi* v. *Gowkanapalie Thippa Reddi*, 1949 M 301 : 61 MLW 595 : 1948 MWN 619 : 1948, 2 MLJ 282.
9. *Maung Kyin* v. *Ma Shwe Law*, 42 IC 642 : 45 C 320 : 1917 PC 207 : 44 IA 236 ; *See* also *Maung Kyin* v. *Ma Shwe Law*, 38 C 892 (PC0.

takes the form of a deed of out and out conveyance, and C, with knowledge of this arrangement, takes a mortgage of the property from B in the form of a deed of out and out conveyance, it will amount to fraud on the part of C to insist upon the apparent character of the deed, and the case will fall within the first Proviso to Section 92 of the Evidence Act.[1] A party whose case is that a certain document has been obtained fraudulently is compelled in most cases to go outside the document to prove the alleged fraud. Where, therefore, a surrender deed has been executed, the same can be challenged on the ground of fraud and oral evidence is admissible to prove the fraudulent nature of the transaction.[2] The word "fraud" used in the Proviso is wide enough to include a fraud on the registration law. Thus, a party can show that an item of property was fraudulently included in a deed with a view to get the deed registered in a particular district.[3]

When there is a document which conclusively establishes a party's right the Court should not permit the other party to put forward a case in explanation of that document, which depends upon the admission of the other party that his conduct was dishonest and fraudulent.[4]

Fraud must be contemporaneous and not subsequent.—The proviso is applicable to cases where evidence is sought to be given to show that an instrument is void or voidable or subject to reformation upon the ground of fraud, duress illegality, etc., in its inception, and not to cases where the agreement being in itself perfectly valid and free from any taint of that kind, one of the parties attempts to make a fraudulent use of it as against the other.[5] The fraud must be such as invalidates an instrument,[6] and an instrument is invalidated on the ground of fraud only when its *execution* was brought about by fraud. Fraud contemplated in proviso (1) is at the very inception a fraud which vitiates the transaction itself, any subsequent conduct or representation, however, reprehensible it may, be, is not enough to vitiate the transaction.[7] It has, however, been held in a Bombay case that the words of this proviso are wide enough to let in evidence of such subsequent conduct as in the view of a Court of Equity would amount to fraud.[8]

A party may be estopped from insisting on the apparent character of a document.—The rules of evidence and the law of estoppel forbid any addition to or variation from, deeds or written contracts. The law, however, furnishes exception to its own salutary protection, one of which is, when one party for the advancement of justice is permitted to remove the blind which hides the real transaction, as for instance, in cases of fraud, illegality, etc. In such cases the maxim applies, that a man cannot both affirm and disaffirm the same transaction show its true nature for his own relief, and insist on its apparent character to prejudice his adversary.[9]

---

1. *Maung Kyin* v. *Ma Shwe Law*, 44 IA 236 : 45 C 320 : 1917 PC 207 : 42 IC 642 ; *Ganu Ramji Patil* v. *Bhau Bapuji Patil*, 46 IC 662 : 42 B 512.
2. *Ullasmoni Dasi* v. *Sukhomani Dasi*, 1945 P 311 ; *Niranjan Samal* v. *Trilochan Kuar*, 1956 Orissa 81.
3. *Ramnanda Prasad Narayan Singh* v. *Chandradip Narain Singh*, 1940 P 504 ; *Gopi Nath* v. *Rup Ram*, 1930 A 786 ; but *see Ram Sundar Mal* v. *Collector of Gorakhpur*, 52 A 793 : 1930 A 797 : 126 IC 237
4. *Mohan Lal Sohan Lal* v. *Panna Lal Janki Das*, 1948 B 133 ; 49 BLR 736.
5. Per Garth, C.J.in *G.M.Cutts* v. *T.F.Brown*, 6 C 328 ; See also *Peronath Shah* v. *Madha Sudan Bhuiya*, 25 C 603 (FB) ; *Chaudhri Mehdi Hasan*, v. *Mohammad Hasan*, 33 IA 68 : 28 A 439 : 8 Bom IR 287 (PC) ; *Banapa* v. *Sundar Das*, 1 B 333.
6. *Dagdu Sadu Nahavi* v. *Nama Salu*, 8 IC 644 : 45 B 93 ; *Maung Shwe Hla* v. *Maung Chet*, 42 IC 113.
7. *Narsingdas Takhatmal* v. *Radhakishan Rambakas*, 1952 B 425 : 54 BLR 492.
8. *Baksu Lakshman* v. *Govinda Kanji*, 4 B 594 ; See also *Rakhan* v. *Alagappudayan*, 16 M 89.
9. *Shah Makhun Lal* v. *Baboo Sri Kishen Singh*, 12 Moo IA 157 : 2 BLR 41 (PC) ; *Lala Himmat Sahai Singh* v. *Liewhellen*, 11 C 486.

Intimidation.—Where consent is caused to an agreement by coercion, the agreement is a contract voidable at the option of the party whose consent was so caused.[1] A will, or any part of a will, the making of which has been caused by coercion, is void.[2] Under the first proviso to Section 92 oral evidence is admissible to show that an instrument is void or voidable by reason of its having been executed under duress.

Illegality.—The consideration or object of an agreement is unlawful, if (i) it is forbidden by law; or (ii) is of such a nature that if permitted, it would defeat the provisions of any law; or (iii) is fraudulent: or (iv) involves or implies injury to the person or property of another ; or (v) the Court regards it as immoral, or opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.[3] If any part of a single consideration for one or more objects or any one or any part of any of several considerations for a single object is unlawful, the agreement is void.[4] Under this Proviso oral evidence may be given to show that a transaction embodied in a document is illegal by reason of the fact that its object or consideration is unlawful.[5] Though a contract is apparently valid in form or matter, extrinsic evidence is always admissible in variance of or in addition to the contract to show that the transaction is illegal and therefore void even in the case of a covenant or contract under seal.[6] It is open to an insurance company to prove that the contract of insurance on which it is sought to be made liable was against public policy and a wagering contract.[7] In a suit for the recovery of the unpaid portion of the consideration of a sale deed executed by the plaintiff the defendant can challenge the validity of the document on the ground of illegality of the transaction and show that the sale deed was executed in consideration of his withdrawal of a pending criminal prosecution against the plaintiff.[8]

Want of due execution.—The law requires certain instruments to be executed in certain forms, e.g., wills,[9] certain mortgages,[10] and gifts[11] must be attested by at least two witnesses. Under the first Proviso to Section 92 facts which affect the due execution and consequently the legality of an instrument may be given in evidence.

Want of capacity.—A person who is a minor, or who is not of a sound mind, is incompetent to make a contract,[12] or a will.[13] Therefore, oral evidence may be given to show that a contract or a will is void by reason of its maker being a minor or of unsound mind.

Want or failure of consideration.—An agreement without consideration is void, unless it is made on account of natural love and affection between parties standing in a near relation to each other, or unless it is a promise to compensate a person who has

1. Section 19 of the Contract Act.
2. Section 61 of the Indian Succession Act, 1925.
3. Section 24 of the Contract Act.
4. Section 24 of the Contract Act.
5. *Alice Mary Hill* v. *William Clarke*, 27 A 266.
6. *Asa Ram* v. *Ludheshwar*, 1938 N 335 (FB).
7. *Mani Shankar* v. *Allianza Und Stutlagarter*, 1941 L 33 : 193 IC 155 : 42 PLR 801.
8. *Brahmdeo Narayan* v. *Brojballabh Prasad*, 1940 P 573 : 19 P 424 : 188 IC 859.
9. Section 63 of the Indian Succession Act.
10. Section 59 of the Transfer of Property Act.
11. Section 123 of the Transfer of Property Act.
12. Section 11 of the Contract Act.
13. Section 59 of the Indian Succession Act, 1925.

already voluntarily done something for the promisor or something which the promisor was legally compellable to do, or unless it is a promise to pay a time-barred debt.[1] It is settled law that, notwithstanding an admission of receipt of consideration in a sale deed it is open to the vendor to give evidence that no consideration was actually paid,[2] unless the position of third parties has been altered in consequence of this admission so as to found a case of estoppel.[3] The recital of payment of consideration contained in a deed is merely the recital of a fact, which may be shown to be wrong as Section 92 of the Evidence Act does not enact that no statement of fact in a written instrument may be contradicted by oral evidence.[4] Oral evidence is, therefore, declared admissible by this Proviso to show want or failure of consideration.[5] Where there is no reference to consideration in a document, it may be shown by oral evidence that the transaction incorporated in the document was for consideration.[6] An acceptor of a bill may show that he was merely an accommodation acceptor, i.e., an acceptor without consideration.[7] Where one party to a deed alleges and proves that the whole of the consideration, the receipt of which is acknowledged in the deed, did not pass, the case falls within the first Proviso to Section 92 of the Evidence Act, and the other party is at liberty to show that the real consideration was, and parol evidence can thus be given of the real nature of the transaction. What the first party tries to prove in such a case is failure of consideration, and what brings the case within the first Proviso to the section: the second party can then prove in rebuttal of the first party's case that there was in truth no failure of consideration and for that purpose show what the real consideration was.[8] On the

---

1. Section 25 of the Contract Act.
2. *Sah Lal Chand* v. *Indarjit*, 27 IA 93 : 22 A 370 (PC) ; *Mahalaxmi Amma* v. *Krishna Holla*, (1938) 1 MLJ 236 ; *Hukam Chand* v. *Shambu Nath*, 1935 A 346 (1) : 158 IC 1121 ; *Mohammad Taki Khan* v. *Jang Singh*, 1935 A 529 : 156 IC 362 (FB) ; *Gokal Chand* v. *Harcharan Das*, 32 PLR 577 : 134 IC 102 : *Irpan Ali Laskar* v. *Jogendra Charan Das Patni*, 59 IC 1111 : 1932 C 708 : 143 IC 241 : *Savitri Devi* v. *State*, AIR 1989 Pat 327.
3. *Tsang Chuen* v. *Li Po Kwai*, 1932 PC 255 : 139 IC 891 (PC).
4. *Mohammad Murtaza Husain* v. *Abdul Rahman*, 1949 P 364 : 27 P 122 ; *Panchoo Sahu* v. *Janki Mandar*, 1952 P 263 ; *Bai Hiraevi* v. *Official Assignee*, 1955 B 122 ; *Bibi Haliman* v. *Umadatunnisa*, 1939 P 506 ; *Sah Lal Chand* v *Indarjit*, 27 IA 93 : 22 A 370 (PC) ; *Radha Mohan Thakur* v. *Bipin Behar Mitra* (1938) 17 P 318 ; *Mohammad Taki Khan* v. *Jang Singh*, 1935 A 529 : 156 IC 362 (FB) ; *Hukum Chand* v. *Shambhu Nath*, 1935 A 346 (1) : 158 IC 1121 ; *Ram Jash Goshain* v. *Markande Pathar, etc.*, 1934 A 1068 : 153 IC 611 ; *Ganga Dwar Chaubey* v. *Tilok Dhari Rao*, 1934 A 496 : 148 IC 1124 ; *Faiz-un-Nisa* v. *Hafiz-un-Nisa*, 27 A 612 ; *Motiram* v. *Radhabai*, 55 IC 53 ; *Hajee Lin* v. *Maung Ba*, 5 R 822 : 1928 R 79 : 109 IC 189 ; *Nabin Chandra Chakravarti* v. *Shm. Shuna Mala Ghose*, 1932 C 25 : 133 IC 568 ; *Irpan Ali Laskar* v. *Jogendra Chandra Das Patni*, 59 IC 1111 : 1932 C 708 : 143 IC 241 ; *Gokul Chand* v. *Harcharan Das*, 134 IC 102.
5. *Mahalaxmi Amma* v. *Krishna Holla*, (1938) 1 MLJ 236 ; *Hukum Chand* v. *Shambu Nath*, 1935 A 346 (1) : 158 IC 1121 ; *Nabin Chandra Chakravarti* v. *Shm Shuna Mala Ghose*, 1932 C 25 : 133 IC 568 ; *Irpan Ali Laskar* v *Jogendra Chandra Das Patni*, 59 C 1111 : 1932 C 708 : 143 IC 241 ; *Gokul Chand* v. *Harcharan Das*, 134 IC 102 ; *Mothey Krishnayya* v. *Mohammad Galeb Saheb*, 1939 M 659 : 124 IC 508 ; *Chaman Lal* v. *Hira Lal*, 108 IC 158 ; *Baldeo Prasad* v. *Ram Autar*, 47 A 7 : 1924 A 865 (1) : 82 IC 347 ; *Ananda Charan Sil* v. *Hargobinda Sil*, 1923 C 570 : 75 IC 557 : *Krishna Kishor De* v. *Nagendralsala Chowdhurani*, 1921 C 435 : 66 IC 694 ; *Mo Pogose* v. *The Bank of Bengal*, 3 C 174.
6. *Somepalli Matyulu* v. *Chittinevi Verrayya*, 1946 M 452.
7. *Mo Pogose* v. *The Bank of Bengal*, 3 C 174.
8. *Pandurang Ganpatrao Tidke* v. *Vishwanath Pandurang*, 1939 N 20 ; *Firm Ganga Ram Shewaram* v. *Malik Nur Ahmad*, 1935 S 48 : 153 IC 635 ; *P.M.A.M. Ramaswami Chettiar* v. *Lodd Govindoss Krishnadoss Viaru*, 1926 M 35 : 91 IC 612 ; *Chuni Bibi* v. *Basanti Bibi*, 24 IC 661 ; *Kailash Chandra* v. *Harish Chandra*, 5 CWN 158 ; but *see Mohammad Taki Khan* v. *Jang Singh*, 1935 A 529 : 156 IC 362 (FB).

principle stated above, oral evidence has been admitted in a number of cases to show that the consideration for a contract was different in kind from the one stated in the deed.[1] Oral evidence may be given to show that the consideration for a promissory note was losses in gambling, on proof of which fact the suit on the promissory note will fail.[2] Oral evidence may be given to show what the consideration for an endorsement of a promissory note was;[3] but such evidence is inadmissible to prove that the consideration for a promissory note was advanced by a person other than the payee of the note.[4] Oral evidence is admissible to show that the consideration for a pro-note was not sugar as stated in the note, but cash.[5] Where a promissory note stated that the entire consideration had been paid in cash, but the promisee subsequently stated that a part of consideration was on account of the pre-existing debts due to him, it was held that the promise could prove that the actual consideration was something different from that recited in the document.[6] It may be proved by oral evidence that the consideration for a promissory note was a time-barred debt.[7] Where consideration is not stated in the document, oral evidence may be given to show what the real consideration for the contract or grant was.[8]

It should, however, be noted that, though want or failure of difference in kind of consideration may be proved, evidence of oral agreements to vary the amount of consideration mentioned in a registered instrument is not admissible.[9] Where one party to a document alleged the consideration stated in the document to have passed did not really pass and the other party set up an agreement to the effect that consideration was not to be paid until a particular contingency happened, it was held that evidence of the agreement would be given and received under the first, though not under the third, Proviso to Section 92.[10] The fourth Proviso to Section 92 must be read with Section 44

---

1. *Mahafazul Rahim* v. *Babulal*, 1949 N 113 : 1948 NLJ 259 : ILR 1948 N 431 ; *Pandurang Ganpatrao Tidke* v. *Vishwanath Pandurang*, 1939 N 20 ; *Sandhura Singh* v. *Kehr Singh*, 1936 L 1016 ; *Firm Ganga Ram Shewaram* v. *Malik Nur Ahmad*, 1935 S 48 : 153 IC 635 ; *Nimmagadda Satyanarayana* v. *Adusumilli Anjaneyulu*, 1935 M 310 ; *Harbans Dube* v. *Sita Ram*, 1933 A 576 : 146 IC 607 ; *Nabin Chandra Chakrabarti* v. *Shm. Shuna Mala Ghose*, 1932 C 25 : 133 IC 568 ; *Adullakin* v. *Maung Ne Dun, etc.*, 7 R 292 : 1929 R 240 : 119 IC 738 ; *Hajee Lin* v. *Maung Ba*, 5 R 822 : 1928 R 79 : 109 IC 189 ; *Krisna Kisor De* v. *Nagendra Bala Chaudhurani*, 1921 C 435 : 66 IC 694 ; *Ananda Charan Sil* v. *Hargobinda Sil*, 1923 C 570 : 75 IC 557 ; *Nara Reddiar* v. *Doraiswami Reddi*, 35 IC 301 ; *Chuni Bibi* v. *Basanti Bibi*, 24 IC 661 ; *Ganapathy Mudaly* v. *O. Muniswamy Mudaly*, 5 IC 754 : 33 M 159 ; *Kumara* v. *Srinivasa*, 11 M 213 ; *Vasudeva Bhatlu* v. *Narasamma* 5 M 6 ; *Lala Himmat Sahai Singh* v. *Llewhellen*, 11 C 486 ; *Kailash Chandra Neogi* v. *Harish Chandra Biswas*, 5 CWN 158 ; *Hukumchand* v. *Hiralal*, 3 B 159 ; *Gopal Singh* v. *Laloo Lall*, 2 IC 953 ; but *see Mohammad Taki Khan* v. *Jang Singh*, 1935 A 529 : 156 IC 362 (FB).
2. *Balgobind* v. *Bhaggu Mal*, 35 A 558.
3. *Ayyathurai Ayyar* v. *Sivarama Pattar*, 32 IC 233.
4. *Maung Saw* v. *Ingraswamy*, 5 IC 259.
5. *Firm of Gangaram Shewaram* v. *Nur Ahmed*, 153 IC 635 : 1935 S 48 ; *A. Rakkiyana Gounder* v. *Chinnu Goundan*, 1954 M 84 : 66 MLW 760 : 1953 2 MLJ 450.
6. *Sandhura Singh* v. *Kehr Singh*, 1936 L 1016 ; See also *Kishan Ram* v. *Godawari Debi*, 1940 P 379.
7. *Mantazuddin* v. *Nazar Mohammad Khan*, 63 C 759 : 40 CWN 474.
8. *Kumar Kaj Krishna Prasad Lal Singh Deo* v. *Baraboni Coal Concern, Ltd.*, 62 C 346 : 1935 C 368 : 159 IC 98 ; *Somepalli Mutyalu* v. *Chittineni Veeraya*, 1946 (1) MLJ 346.
9. *Mohammad Taki Khan* v. *Jang Singh*, 1935 A 529 : 156 IC 362 ; *Adityam Iyer* v. *Rama Krishna Iyer*, 38 M 514 : 21 IC 458 ; *Annandra Charan Sil* v. *Hargobinda Sil*, 1923 C 570 : 75 IC 557 ; *Nokhelal* v. *Kisanlal Ridhkarandas*, 1950 N 44 : 1950 NLJ 28.
10. *Irpan Ali Laskar* v. *Jogendra Chandra Das Patni*, 59 C 1111 : 1932 C 708 : 143 IC 241.

of the Negotiable Instruments Act. Where in a suit on a promissory note a plea of contemporaneous agreement is inadmissible under Section 92, it does not follow that the case cannot be dealt with as one falling under Section 44 of the Negotiable Instrument Act, which provides that to the extent to which consideration was originally absent, the liability on the promissory note is proportionately reduced. Section 92 is no bar to the consideration of this question. Where a promissory note was executed in discharge of the defendant's liability under an earlier promissory note and the costs of a suit brought on it, and, in a suit filed on the second promissory note, the defendant alleged that he had paid a certain sum to the plaintiff in partial reduction of the previous promissory note before the institution of the suit on the previous promissory note but this fact was not taken into consideration at the time of executing the second promissory note, and that there was an agreement to take accounts subsequently and to determine his liability accordingly on the second promissory notes it was held that the subsequent withdrawal of the suit brought on the previous promissory note was not part of the consideration for the second promissory note but was the result of the discharge of the claim and that the case fell under Section 44 of the Negotiable Instruments Act and the defendant could prove his payments and the agreement to have the liability under the promissory note reduced to that extent.[1]

The want or failure of consideration sought to be proved under this Proviso must be such as invalidates an instrument, i.e., complete want or failure of consideration.[2] Oral evidence is not, therefore, admissible to show that the consideration agreed to be paid for a contract was more or less than what is stated in the document,[3] as this would amount to contradicting or varying, the terms of the instrument, consideration being one of the essential terms of a contract.[4] Where, under a written document, there is some amount still outstanding which under its terms have to be paid by the transferee, then it is not open to the transferee to produce oral evidence to show that there was a separate contemporaneous oral agreement under which it was agreed that this sum would not be payable, for such a course would be allowing him to contradict the terms of the document and would be contrary to the provisions of Section 92.[5]

Recital of receipt of consideration may operate as an estoppel.—If a man acknowledges that he has received the whole of the purchase money from the person to whom he transfers property, he voluntarily arms the purchaser with the means of dealing with the estate as the absolute legal and equitable owner, free from any encumbrance or adverse equity, and he cannot be heard to say that he has not received such purchase money.[6]

Mistake of fact or law.—Where both parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.[7] A contract is not,

1. *Balasubramania Chettiar* v. *Venkatarama Chettiar*, 1935 M 253.
2. *Mehdi Hasan* v. *Muhammad Hasan*, 28 A 439 ; 8 Bom LR 287 (PC).
3. *Nagendra Nandini Dassi* v. *Bholanath Khamaru*, 169 IC 1002 ; *Mohammad Taki Khan* v. *Jang Singh*, 1935 A 529 : 156 IC 362 (FB) ; *Mothey Krishnayya* v. *Mohammad Galeb Sahib*, 1930 M 659 : 124 IC 508 ; *Annanda Charan Sil* v. *Hargovinda Sil*, 1923 C 570 : 75 IC 557 ; *Lala Singh* v. *Basdeo Singh*, 1923 A 429 (2) : 71 IC 768 ; *Nokhelal* v. *Kishanlal Ridhakarandas*, 1950 N 44 : 1950 NLJ 28.
4. *Mohammad Taki Khan* v. *Jang Singh*, 1935 A 529 : 156 IC 362 (FB) ; *Adityam Iyer* v. *Rama Krishna Iyer*, 38 M 514 : 21 IC 458.
5. *Mohammad Taki Khan* v. *Jang Singh*, 1935 A 529 : 156 IC 362 (FB).
6. *Tsang Chuen* v. *Li Po Mwai*, 1932 PC 255 : 139 IC 891.
7. Section 20 of the Contract Act.

however, voidable merely because it was caused by one of the parties to it being under a mistake as to matter of fact[1] or because it was caused by mistake as to any law in force in India.[2] But a mistake as to a law not in force in India has the same effect as a mistake of fact.[3] If a contracting party who cannot read has a written contract falsely read over to him and the contract as written differs from that pretended to be read, the signature on the document is of no force because the party never intended to sign the terms of the written contract, and therefore in contemplation of law did not sign the document.[4] Where, through fraud or mutual mistake of the parties, a contact or other instrument in writing does not truly express their intention, either party may institute a suit to have the instrument rectified so as to express that intention.[5] The mistake which can be proved by oral evidence under this Proviso is such as would found a claim for rectification or cancellation of the instrument. Since a unilateral mistake is not always a ground for rectification or cancellation, evidence of such mistake is not admissible under the Proviso.[6] It has been recently held by the Bombay High Court that the proviso refers to both unilateral as well as a mutual mistake.[7] A mistake induced by an innocent misrepresentation of the opposite party is sufficient to bring a case within the Proviso. Thus, where a memorandum written in a language which the defendant could not read was signed by him on an assurance by the plaintiff that it contained all the terms orally agreed upon between them, but in fact the memorandum contained only some of the terms, it was held that the case was covered by the first Proviso and that the defendant was entitled to prove the terms agreed upon and not contained in the memorandum.[8] Under the Proviso it is always open to a party to prove by oral evidence such mistake as invalidates an instrument. The combined effect of this Proviso and Section 31 of the Specific Relief Act is to entitle either party to a contract to protect his right by proving a mistake in the contract, as for example, a mistake relating to a survey number in a sale deed,[9] and a separate suit for rectification of the instrument is not necessary.[10] A plaintiff may sue on a document and in the same action claim rectification of the document on the ground of mistake.[11] Where a portion of the property sold has been left out in a sale deed by a clerical mistake, it is not necessary that the mistake should be

---

1. Section 22 of the Contract Act.
2. Section 21 of the Contract Act.
3. Section 21 of the Contract Act.
4. *Dagdu Valad Jairam* v. *Bhana Valad Jairam*, 28 B 420.
5. Section 31 of the Specific Relief Act ; *Janardan* v. *Venkatesh*, 41 Bom LR 191.
6. (*Marappuredigari*) *Sayamma* v. *Vekata Reddy*, 54 M 793 : 1931 M 785 : 134 IC 1208 ; *Janardan* v. *Venkatesh*, 41 Bom LR 191.
7. *Sateri Shiddappa Godkari* v. *Rudrappa Shetteppa Bachenhatti*, 1954 B 463.
8. *Chimanram Motilal* v. *Divanchand Govindram*, 56 B 180 : 1932 B 151 : 137 IC 478.
9. *Sabhaji* v. *Nawal Singh*, 1928 N 4 : 104 IC 736 ; *Rangaswami Ayyangar* v. *Suri Ayyangar*, 39 M 792 ; 29 IC 588 (PC) ; *Karuppa Goundan* v. *Periaihambi Gounan*, 30 M 397 ; *Rajaram* v. *Manik*, 1952 N 90 : ILR 1951 N 948 ; *Malaprasad Asaram* v. *Asmabi*, 1954 M 328.
10. *Sabhaji* v. *Nawal Singh*, 1928 N 4 : 104 IC 736 ; *Sukhdeo Rai* v. *Ram Narain Rai*, 1930 A 387 (1) : 127 IC 577 ; *Kesho Singh* v. *Roopan Singh*, 1927 A 355 ; 100 IC 568 ; 3 LBR 227 ; *Mahendra Nath Mukherjee* v. *Jagendra Nath Roy Choudhury*, 2 CWN 260 ; *Rangasawami Ayyangar* v. *Suri Ayyangar*, 39 M 792 : 29 IC 588 (PC) ; *Mahendra Iyer* v. *Gopala Iyer*, 8 IC 390 : 24 M 51 ; *Nandiram* v. *Jogendra Chandra Dutta*, 1923 C 53 ; 70 IC 960 ; *Asitulla* v. *Sadatulla*, 41 IC 747 ; *Palanivelappa Goundan* v. *Nachappa Goundan*, 53 IC 379 ; See also *Kurpal Hemraj* v. *Shamrao Raghunath Taole*, 47 B 589 : 1923 B 211 : 72 IC 321 ; *Raja Ram* v. *Manik*, 1952 N 90 ; *Balaprasad Asaram* v. *Asmabi*, 1954 N 328.
11. (*Marappuredigari*) *Sayamma* v. *Venkata Reddy*, 54 M 793 ; 1931 M 785 ; 134 IC 1208.

corrected within the period of limitation allowed for such correction, before the purchaser can be permitted to take possession of the area actually sold. A suit may be brought for possession of such property and the mistake proved within 12 years of the transfer.[1] On the same principle, a defendant can resist a suit for possession, on the ground that he is in possession of what was sold to him, though the sale deed by mistake mentions a different property as having been sold.[2] Oral evidence is admissible under this Proviso to fill a blank which has been left in a document by fraud or mistake.[3] to supply inadvertent omissions or errors in the clause relating to the rate of interest of bond,[4] or to prove a mistake in the statement of consideration.[5] Where a mistake has crept into a document, it is open to a party to prove the mistake, and evidence of such mistake is admissible under Section 92, Proviso (1), of the Evidence Act.[6] A mistake in the description of property in a registered mortgage-deed can be proved by oral evidence[7] or by reference to the previous mortgage-deed.[8] Where the suit property was described in a partition deed as being included in survey No. 145 which was allotted to the defendant, oral evidence was held admissible to show that notwithstanding this description the parties to the partition deed intended that the suit property should be included in survey No. 143 which was also allotted to the defendant.[9] Oral evidence is admissible to prove that the *khasra* numbers of the land sold were entered in the sale-deed by mutual mistake.[10] A mistake in the statement of consideration in a mortgage-deed may be proved under this Proviso.[11] Oral evidence is admissible to show that, owing to the ignorance of the scribe, a document does not truly express the real intention of the parties,[12] or that the name of A has been written in a document by mistake for the names of B.[13] Where a bond by a survey provided for the payment of the decretal amount on the judgment-debtor's failure to pay the same, but it was proved that the surety signed the bond under the mistaken belief that it was a bond for the production of the judgment-debtor whenever he was required to do so, the Court held that the case fell within the first Proviso to Section 92 and that, oral evidence was admissible to prove mistake.[14] Courts of Equity do not rectify contracts, but they may and do rectify instruments purporting to have been made in pursuance of the terms of contracts. A plaintiff who seeks the assistance of a Court under Section 31 of the Specific Relief Act for the rectification of a written instrument must clearly prove that

1. *Sukhdeo Rai* v. *Ram Narayan Rai*, 1930 A 387 (1) ; 127 IC 577.
2. *Rangasami Ayyangar* v. *Suri Ayyangar*, 93 M 792 ; 29 IC 588 (PC).
3. *Maung Pe Gyi* v. *Hakim Ally*, 2 R 113 ; 1924 R 235 ; 80 IC 759.
4. *Bisseser Singh* v. *Bhagaban Das*, 1885 AWN 41 ; *Ladha Singh* v. *Munshiam Aggarwala*, 1927 C 605 : 104 IC 559 ; *Ram Bharosay Lal* v. *Janki Prasad*, 1930 O 95 ; 125 IC 175 ; See *Muthusami Iyer* v. *Varada Vyroyan*, 56 IC 476 ; *Teja Singh* v. *Sant Singh*, 1930 L 144 ; 121 IC 75 ; *Mamomed Maser Mohamed Mea* v. *Zafar Mohamed*, 62 IC 702 : *Kamla Prasad Ram Pandy* v. *Hasan Ali Khan*, 1939 ALJ 196 ; but *see Sarju Shau* v. *Sukhi Lal*, 1924 P 96 ; 79 IC 420.
5. *Partap Singh* v. *Balwant Singh*, 48 IC 550.
6. *Abdul Hakim Khan* v. *Ram Gopal*, 44 A 246 : 1922 A 42 ; 64 IC 961.
7. *Kota China Mellayya* v. *Kannekanti Veeriah*, 31 IC 671.
8. *Abdul Hakim Khan* v. *Ram Gopal*, 44 A 246 ; 1922 A 42 ; 64 IC 961 ; See also *Mahabir Prasad* v. *Muhamnad Mashiyat Ullah*, 32 IC 174 ; 38 A 103.
9. *Janardan* v. *Venkatesh*, 41 Bom LR 191.
10. *Arya* v. *Daundi*, 1950 L 236 ; 188 IC 813 : 42 PLR 222.
11. *Partap Singh* v. *Balwant Singh*, 48 IC 550.
12. 13 C.P.L.R. 33 : 6 Mys. LJ 103.
13. *Aijaz Husain* v. *Ram Sarup*, 1931 O 54 ; 130 IC 347.
14. *Po Naw* v. *Maung Ba Chit*, 1929 R 262 ; 125 IC 265.

there was a prior complete agreement which according to the common intention was embodied in writing, but by reason of mistake in framing the writing this did not express or give effect to the agreement, it being immaterial by whom the actual oversight or error was made which caused the expression to be wrong.[1] When oral evidence is given under Proviso to prove a mistake, the evidence has to be tested by the same standards and the claim is open to the same defences as if the action claimed rectification. One test which equity applies in a suit for rectification is "Is the proof of error clear and conclusive"? One defence equity allows in laches. One bias equity always shows in such matters, viz., a bias in favour of the evidence given by the other party to the instrument; that is to say, the burden of proof lies; heavily on the person seeking rectification.[2] If there is a mutual mistake in a mortgage-deed in the description of property and the same mistake is reproduced in the decree passed in a suit upon the mortgage, equity may go back to the original transaction and reform both the mortgage and the decree so as to make them conform to the intention of the parties concerned.[3] Where through a mistake of an official of the Court a wrong from is used by an appellant furnishing security, the document does not correctly represent the contract. The case being one of palpable error, oral evidence is admissible to prove the error.[4]

PROVISO (2)

Separate oral agreement.—If there is a separate oral agreement as to a matter on which a document is silent, the agreement is provable under this Proviso, provided the agreement is not inconsistent with the terms of the document, In considering whether this Proviso applies regard should be had to the formality of the document.[5]

Distinction between cases where the whole contract has not been reduced to writing and the cases within this Proviso.—A separate oral agreement on a distinct and collateral matter, although a part of the same transaction, is provable under the Proviso if the original instrument is silent on the point.[6] There is a distinction between the cases where the whole contract not having been reduced to writing, oral evidence of those terms which are not reduced to writing becomes admissible,[7] and the cases contemplated by this Proviso. In the former case, there is really one contract, though some terms of it have not been embodied in the document; and, therefore, oral and perhaps inconsistent evidence is admissible. Thus in a case relating to a promissory note where the oral part of the contract which was inconsistent with the written part of it was sought to be proved, Subramania Ayyar, J., said "Of course parties to what purports to be a mere promissory note may, on the one hand, be so inconsistent with the terms of the document purporting to be a promissory note, as to render it clear that the parties never intended to invest what seems a promissory note with the attributes of an instrument really of that description. On the other hand, the terms of the agreement may go to show that it was not intended that the document, which on the face of it is a promissory

1. *Bepin Krishna Ray* v. *Jogeshwar Ray*, 66 IC 345.
2. *(Marappuredigari) Sayamma* v. *Venkata Reddy*, 54 M 973 : 1931 M 785 ; 134 IC 1208.
3. *Bepin Krishna Ray* v. *Jogeshwar Ray*, 66 IC 345.
4. *Madhorao Narayanrao* v. *Harinath Bhikaji*, 1938 N 259.
5. *Kesla Mal Nand Kishore* v. *Cooper Allen & Co.*, 1936 A 717 : 165 C 473.
6. *Kunja Behari Das* v. *Raman Behari Das*, 1937 C 619.
7. See notes to this section under the heading "the section is not applicable, where the whole contract has not been reduced to writing".

note, should not operate as such. In the former class of cases, the two agreements must be construed to be parts of but two one contact, not severable by the Court for the purpose of giving to one of the two parts an effect which it would have had if such part alone formed the whole contract. In the latter class of cases the agreements are treated as distinct contracts capable of standing side by side"[1] In the case contemplated by this Proviso, the fact to be proved by oral evidence is a separate oral agreement which must not, therefore, be inconsistent with the terms of the document.[2] It is allowable under this Proviso to urge oral agreement which will have the effect of leaving matters otherwise than if they had depended on the written agreement alone, but such oral agreement must be clearly proved, and the *onus* lies on him who sets it up.[3] The parties to a deed are not prevented from proving that, either contemporaneously or as a preliminary measure, they entered into a distinct oral agreement on some collateral matters on which the deed is silent.[4]

Separate oral agreement as to a matter is admissible where the document is not a formal deed or instrument and contains no provision as to that matter.—Where a contract not required by law to be in writing purports to be contained in a document which the Court infers was not intended to express the whole agreement between the parties, proof may be given of any omitted or supplemental oral term, expressly or impliedly agreed between them before or at the time of executing the document, if it be not inconsistent with the documentary terms.[5] The rule excluding parole evidence to vary or contradict a written document is not infringed by proof of any collateral parole agreement which does not interfere with the terms of the written contract, though it may relate to the same subject-matter.[6] Thus, a lessee who has taken under a written lease may prove that his lessor had orally agreed to give him the right to buy in preference to others in the event of his selling the property leased.[7] Where a document contains only some of the terms of a contract of tenancy, evidence of a separate oral agreement containing other terms which were not reduced to writhing can be given.[8] The English case *Harris* v. *Rickett*,[9] is an authority for the proposition that there the whole of a contract is not contained in written document, it may be supplemented by parole evidence of a collateral agreement. Collateral agreement means in effect not inconsistent with the terms of the agreement in question. The second Proviso to Section 92 gives effect to this rule, or at least to so much of it as the Indian Legislature desired to incorporate in the Indian Evidence Act.[10] The inference that the writing was or was not intended to contain the full agreement, may be drawn not only from the document itself, but from extrinsic circumstances; it is a question of fact for the jury, and the burden of proof is upon the party alleging non-completeness.[11] In consideration whether

1. *Simon* v. *Hakim Mahomed Sheriff*, 19 M 368 ; *J. M Manceckji* v. *Maung Po Han*, 2 R 482 : 1926 R 83 : 95 IC 44.
2. *See* Woodroffe, Ev., 9th Ed. 665.
3. *Bibi Fakrubibi* v. *Saiyad Mohommadmiya Badamiya*, 139 IC 221 : *Matabhoy Mulla Essabhoy* v. *Mulji Harielas* 29 IC 223 : 42 IA 103 : 1915 PC 2 : 29 B 399 (PC).
4. *Nagendra Nandini Dassi* v. *Bholanath Khamaru*, 169 IC 1002.
5. Phipson Ev. 7th Ed. 556 : Steph Art 90 ; Ros, Civ Ev, 16. As to the admissibility of evidence of a subsequent agreement, see Proviso (4).
6. Taylor, § 1147 ; *Kasheenath Chatterji* v. *Chuny Churn Banerjee*, 5 WR 68 (FB).
7. *Jehangir Shapoorji Taraporevala* v. *Rev. Savarkar*, 1932 OC 231 : 138 IC 774.
8. *Champaran Jain* v. *Sripathi Nath Deb*, 1938 C 430.
9. (1859) 28 LJ Ex 197.
10. *Lachhman Das* v. *Ram Prasad*, 49 A 680 : 1927 A 422 : 100 IC 1029.
11. Phipson Ev, 7th Ed, 556 : See 12 Mys. LJ 11.

a separate oral agreement is provable under this Proviso, regard should be had to the degree of formality of the document. The greater the degree of formality of the document, the stronger the presumption that it was intended to contain the full agreement. On the other hand, the lesser the degree of formality of the document, the weaker the presumption that it contains the full agreement, and therefore, the stronger the case for the reception in evidence of a collateral oral agreement as to a matter on which the document is silent. Thus, A orders goods of B by a letter in which nothing is said as to the time of payment and accepts the goods on delivery. B sues A for the price. A may show that the goods were supplied on credit for a term still unexpired.[1] If the document is a mere contract, it does not require any great formality and the document cannot be considered as a particularly formal document at all, and oral evidence is admissible to prove the existence of a separate oral agreement as to any matter of which the document is silent and which is not inconsistent.[2] In a contract for sale of goods, the vender in acknowledging the receipt of an advance of money towards the contract, executed a *varthamanam* expressing only the varying terms of the contract, such as the number of bags, the amount of money and the time with which the goods were to be delivered. The vendee did not sign it, nor were the corresponding obligations on his part expressed. In a suit by the vendee for damages for breach of contract on account of non-delivery, the defendant pleaded an agreement by which he has to supply goods only after the whole price was paid. Held, that the document was only a voucher or acknowledgment of money and not a detailed record of the contract and that oral evidence of the agreement set up by the defendant was admissible under Section 92, Proviso (2), of the Evidence Act.[3] Where a document containing a contract is of an informal character and is silent as to the place where payment of the goods contracted for is to be made, evidence of an oral agreement that payment will be made in a particular place is admissible.[4] A hires lodgings of B and gives B a card on which is written 'Rooms Rs. 200 a month". A may prove a verbal agreement that these terms were to include partial board.[5] A sells B a horse and verbally warrants him sound. A gives B a paper in these words "Bought of A horse for Rs. 500". B may prove the verbal warranty.[6] On the analogy of illustration (g) to this section, oral evidence of an express collateral warranty as to the soundness of a motor car is admissible under this Proviso.[7] Where a document containing a contract is a formal deed or instrument, evidence of a collateral verbal agreement will be inadmissible. Thus if a suit has been compromised by a written agreement and the terms are set forth therein in great detail and with care and elaboration, evidence of any additional or separate oral agreement will be inadmissible.[8] A contemporaneous oral agreement giving a party a right of way over one of the properties partitioned is inadmissible if the partition deed specifically mentions other properties to be subject to a right of way but is silent as to the grant or otherwise of a right of

1. Ill. (f), Section 92.
2. *Kesla Mal Nand Kishore* v. *Cooper Allen & Co.*, Cownpore, 1936 A 717 : 165 IC 473.
3. *Vairavan Chettiar* v. *Kannappa Mudaliar*, 1925 M 1029 : 86 IC 436.
4. *Jodhraj* v. *Byram*, 83 IC 309.
5. *Ill.* (h), Section 92.
6. Ill. (g), Section 92.
7. *Herbert John Amies* v. *Jal P. Virji*, 1924 B 41 : 77 IC 150.
8. *Jagjiwan Mulji* v. *Nathji Jageshwar*, 32 IC 938 ; *Abdul Hamid* v. *Abdul Majid*, 21 IC 305 ; *Rajaram Rao* v. *Tuljaram Rao*, 17 IC 43.

way over the particular property,[1] Where the express contract is silent about a sample shown at the time of the contract, no evidence can be allowed to determine whether the contract was by sample.[2] Where a written reference to arbitration provides that the parties will be bound by the award of the arbitrator evidence of an oral agreement will mot be admissible to show that the parties agreed to be bound by the award of only a majority of the arbitrators.[3] The parties to a conveyance are not prevented from proving the existence of a separate oral agreement to the effect that the vendee would proceed no further in the prosecution of his claim for certain money debts not specified in the deed of conveyance, and the vendor cannot be prevented from attempting to prove that there was such an agreement.[4]

Onus of proving collateral oral agreement.—Although there are cases where it is allowable to urge an oral agreement which would have the effect of leaving matters otherwise than if they had depended on the written agreement alone, the oral agreement must be clearly proved and the *onus of* doing so is on him who sets it up.[5]

Separate written agreement.—The Section does not exclude proof of a separate agreement in writing that one of the terms embodied in a formal written agreement, executed or to be executed, will not be enforced[6] if the former is otherwise admissible under the law relating to registration.

Document of loan silent as to interest; whether oral agreement as to interest is provable—A contemporaneous oral agreement to pay a certain rate of interest is not admissible under this Proviso if the document embodying the transaction of loan is a formally drawn up instrument, e.g., where the instrument is a promissory note.[7] or a *hundi*,[8] and is silent on the point. But in another case it has been held that, in the absence of any stipulation as to interest in a bond, oral evidence is admissible to prove a separate agreement about it. The evidence must, however, be very satisfactory and strong in order to establish such separate oral agreement when the bond is silent about it.[9] If the document is not a formally drawn up instrument but is a mere memorandum e.g., where the document is a *hathchitha*,[10] or an entry in *a bahi*,[11] or a *sarkhet*[12] an oral agreement to pay interest is admissible. It should, however, be noted that evidence of a contemporaneous oral agreement contradicting or varying the rate of interest mentioned in a document is inadmissible,[13] as such agreement is inconsistent with the terms of the

1. *Krishnamarazu* v. *Marraju*, 28 M 495.
2. *Mahadev Ganaga Prasad* v. *Gouri Shanker Sanganaria*, 1950 Orissa 42.
3. *Gur Baksh Singh* v. *Chutta Singh*, 47 IC 900 : but See *Pyarelal* v. *Ghanram*, 83 IC 22 ; *Gadula Rami Naidu* v. *Meesala Seethan Naidu*, 1935 M 276 : 154 IC 821 : 40 MLW 914.
4. *Ranbahadur Singh* v. *Awadbehari Prasad*, 181 IC 184.
5. *Motabhoy Mulla Essabhoy* v. *Mulji Haridas*, 29 IC 233 : 42 IA 103 : 1915 PC 2 : 39 B 399.
6. *Agra Electric Supply Co. Ltd*, v. *Banshidhar Premsukhdas*, 233 IC 365.
7. *Gopal Madhorao* v. *Achutsadasheo*, 1941 N 271 ; *Moti Biswas* v. *Haripada Pal*, 1923 O 402 : 70 IC 790 ; *Kadir Baksh Hazir Bakshi* v. *Shaikh Srajuddin*, 49 C 716 : 1922 C 513 : 70 IC 130 ; *Yado* v. *Beharilal*, 53 IC 242 : *Lachmi Chand Jhowar* v. *Hemendra Prasad Ghosh*, 26 IC 736 : 26 IC 93 : 18 CWN 1260 ; *Pentaya* v. *Kasherorao*, 56 IC 249.
8. *Kishore Chand* v. *Gurditta Mal*, 10 IC 315 : 52 PR 1911 ; *Banwari Lal* v. *Jaggar Nath Prasad*, 35 IC 431 ; *Ram Gopal* v. *Sita Ram*, 20 IC 319.
9. *Rozario* v. *Hariballabh Onkarji Trivedi*, 1927 N 195 : 100 IC 794.
10. *Nabin Chandra Nath* v. *Debendra Mohun Mukhopadya*, 36 IC 612 ; *Umesh Chunder Baneya* v. *Mohini Mohun, Das*, 9 CLR 301.
11. *Bhan Singh* v. *Gokal Chand*, 1 L 83 ; *Khairati Shah* v. *Diwan Singh*, 1932 L 652 : 141 IC 190.
12. *Lachmi Rai* v. *Srideo Rai*, 1939 AWR (HC) 79.
13. *Gopal Madhorao* v . *Achut Sadasheo*, 1941 N 271 ; *Mir Mohhamad Husain* v. *Muhammad Asghut*, 37 IC

document. Thus, where a mortgage-deed contains a stipulation to pay compound interest, evidence of a contemporaneous oral agreement that only simple interest will be charged is inadmissible.[1] But where a letter in a printed form merely contained a stipulation to pay interest, it was held by the Privy Council that Section 92 did not prevent the creditor from proving that the agreement was to pay compound interest.[2] Under Section 92, Proviso (2) of the Evidence Act, the existence of a separate oral agreement may be proved only when it is not inconsistent with the terms of the written instrument, or when the subject of the alleged oral agreement is a matter on which the document is silent. Where a bond declared that the money was to be repaid with interest at a certain rate, and a simultaneous oral agreement to the effect that no interest was to be paid but the creditor was to be put in possession of a certain piece of land in lieu of interest was sought to be proved, it was held that the oral contract set up was inconsistent with the bond and could not be proved.[3] The oral agreement made admissible by the second Proviso is a contemporaneous but separate agreement and is not a part of the contract expressed in the writing.[4] A subsequent agreement reducing, enhancing or fixing interest is governed by the fourth Proviso, and is admissible if the written contract has not been registered and the contract is one which is not required by law to be reduced to writing.[5] If, therefore, the clause as to interest is contained in a registered mortgage-deed subsequent oral agreement varying the terms of the clause would be inadmissible.[6] A contemporaneous written agreement to pay interest on a loan taken under a promissory note which is separate from the promissory note, is admissible.[7]

Evidence of a separate oral agreement is admissible only if it is not inconsistent with the terms of document, and the document is silent on the point.—The separate oral agreement is provable under this Proviso only if the document is silent as to the matter and the agreement is not inconsistent with the terms of the document.[8] Thus, in the absence of any stipulation in a lease deed fixing the place of payment of rent, it is open to one of parties to the deed to show, without contravening the provisions of Section 92 of the Evidence Act, that it was subsequently agreed orally between the parties that the rent was to be paid at a particular place.[9] Similarly, in the absence of a stipulation to the contrary in the deed, oral evidence is admissible to show on which date the lease was to commence.[10] Where a mortgage decree was sold free from all encumbrances and a portion of the purchase money was left with the purchaser who gave a receipt embodying the real contract between the parties with regard to the deposit, it

---

23 ; *Habib Ali Khan* v. *Ram Narayan*, 1922 O 270 : 68 IC 570 ; *Muthu Erulappa Pillay* v. *Vunuku Thathayya Maistry*, 36 IC 357.

1. *Abdul Aziz Mia* v. *Amannal Bathra*, 1925 C 276 (1): 78 IC 742 ; *Meheshchandra Shaha* v. *Anandachandra Shaha*, 61 C 344.
2. *Haridas Rachordas* v. *Merchantile Bank of India Ltd*, 1920 PC 61 : 44 B 474 : 55 IC 522 : 47 IA 17 ; *Sital Prasad Jagmohan Singh* v. *Kurban Hussain*, 1952 N 25 : ILR 1951 N 858.
3. *Kali Din Singh* v. *Jagdat Pathak*, 1930 A 440 : 1922 IC 894.
4. *Kadir Baksh Hazir Bakhsh* v. *Sh. Sirajuddin*, 49 C 716 : 1922 C 513 : 70 IC 130.
5. *See In* the matter of *Sowdomonee Debya, etc.*, 12 CLR 163, and notes to the fourth Proviso.
6. *Naryana Singh* v. *Keshosa*, 1930 N 235 : 122 IC 436 ; *Sayrat Saha* v.*Sader Saha*, 61 IC 241.
7. *Ghanshiam Lalji* v. *Ram Narain*, 29 A 33 : 34 IA 6 (PC); *Rangappa* v. *Bismila Khan*, 32 IC 238.
8. *Bibi Fakrubibi* v. *Saiyad Mohamnadmiya Badamiya*, 139 IC 221 ; See also *A.V. Thomas & Co. Ltd.*, v. *M.P. Fernandez*, 1952 TC 117 (FB).
9. *Omkarparasdad Nandlal* v. *Badri Das*, 1925 N 281 : 89 IC 273.
10. *Ambica Prosad Dass* v. *J.C. Galstaun*, 4 IC 85 : 13 CWN 326.

was held that evidence was not admissible to prove a separate oral agreement empowering the purchaser to pay off an attaching creditor of the decree, though evidence could be admitted to prove the object for which the deposit was made, or to explain the meaning of a sentence in the receipt.[1] Oral evidence is admissible to determine what the consideration for an agreement in writing was,[2] though such evidence is not admissible to prove that the consideration was more or less than that stated in the written agreement.[3] Where a sale deed is silent as to the share of each of the joint vendees, oral evidence is admissible to prove the extent of their shares.[4] Where a partition deed recited that all movable property has been partitioned, oral evidence was held admissible to prove that one particular property, *viz.*, paddy, had not been divided by the partition deed.[5] Where the plaintiff lent Rs. 100 to the defendant on a bond by which the latter under took to do work for the plaintiff in lieu of interest on the said amount in a suit to recover the amount alleged to be due under the bond it was held that the plaintiff was entitled to prove without infringing the provisions of Section 92 of the Evidence Act that the plaintiff had paid wages to the defendant for the work done.[6] If in a suit for portion of the *zamindari* property the dispute as to whether the property is joint is referred to arbitration in consequence of an agreement between the plaintiff and the principal defendant (the second defendant who is only a *pro forma* defendant not joining in the agreement), and the arbitrators at the request and with the consent of the plaintiff and both the defendants divide the property into three lots and give one lot to each party, the arbitrators do not exceed the terms of reference; nor is the arrangement as to the method of division of the property and to bring *the pro forma defen*dant in the division *inconsistent with the agreement* of reference.[7] A person entered into a contract with another for the supply of a certain amount of steam coal, undertaking "to make up all this quantity of coal during two months" from the date of contract. After the expiry of the two months the latter filed a suit against the former for damages alleging that he had failed to deliver the full quantity. It was urged on behalf of the seller that there was a separate oral agreement between the parties that the consignments were to be sent as and when ordered and that he had failed to send the full quantity of coal for want of such orders. Held, that the oral agreement set up was not inconsistent with the document and could be proved under Section 92 of the Evidence Act.[8] A person was a partner in a firm and as such had some interest in certain shares of a mill and in the commission earned by the first as agents of the mill. On his retirement from the firm entries were made in the firm's books from which it appeared that 35 of such shares were appropriated to him and that he from the date of the entery ceased to have any interest in the firm. It was held that evidence was admissible under this Proviso as well as under Proviso (4) to show that in fact the arrangement was that he should continue to

1. *Khetsidas* v. *Shib Narain*, 9 CWN 178.
2. *Seth Kishan Lal* v. *Bapu*, 1926 N 363 : 94 IC 371 ; See notes to the first Proviso under the hearing "want or failure of consideration."
3. *Ramkrishna Iyer* v. *Adityam Iyer*, 21 IC 463 ; See notes to the first Proviso under the heading "want or failure of consideration."
4. *Mohmmad Sultan Mohiuddin Ahmad Ansari* v. *Amthul Jalal*, 1927 M 1102 (2): 101 IC 653.
5. *Duraiswami Reddair* v. *Rajagopala Reddiar*, 34 IC 712.
6. *Karuppanna* v. *Pambayan*, 1927 M 531 : 101 IC 39.
7. *Tulsi Ram* v. *Basdeo*, 1926 A 567 : 96 IC 531.
8. *Seth Lakshmichand* v. *Shikh Shaikh Shahab-ub-Din*, 1923 N 46 : 70 IC 844.

be entitled to his share in the commission.[1] Where an agreement of partnership is silent as to the liability to pay income-tax due in respect of the profits of the partnership, evidence for proving the intention of the parties would be allowed.[2] A verbal stipulation that a party would refund a certain amount out of the money recited as the consideration for a contract, on account of a debt due from a relative of such party to the other party, is provable, as such stipulation is not inconsistency with the recital of the consideration in the written contract.[3] Where A and his brothers enjoyed certain property by turns, and A, while enjoying his turn of the property, gifted away his share to one of his brothers who passed a deed of settlement agreeing to pay Rs. 12 per month for life to A, and A instituted a suit against his brother's widow to recover from her the profits of the last year of his term alleging that at the time of passing the gift deed he had agreed with his brother to receive profits till expiry of his term, it was held that this alleged oral agreement referred to some thing on which the deed of gift was silent and was not inconsistent with its terms, and that consequently the oral evidence was admissible.[4] Evidence relating to an oral agreement by the mortgagee to accept a conveyance in satisfaction of the mortgage, although such agreement has relation to the mortgage transaction, is admissible if the mortgage-deed is silent as to the mode of payment of the mortgage-debt. A clause in a mortgage-deed, providing for payment of the mortgage money within a certain date and for payment of interest after the said date if the money be not paid within the specific date, does not deal either with the mode of payment or satisfaction of the debt due under the deed.[5] The parties to a conveyance are not prevented from proving the existence of a separate oral agreement to the effect that the vendee would proceed no further in the prosecution of his claim for certain money debts not specified in the deed of conveyance and the vendor cannot be prevented from attempting to prove that there was such an agreement.[6]

If the oral agreement is inconsistent with the terms of the writing, it is not admissible under this Proviso.[7] Thus, where a lease is for a fixed term, it is not open to lessee to prove that it had been verbally agreed between himself and his lessor that he should be entitled to a renewal of that lease for a further period after the expiry of the period mentioned in the deed as the period of the lease.[8] A deed of absolute release cannot be proved by oral evidence to be a qualified one;[9] nor a deed of gift to be a *donatio mortis causa*.[10] Where a rate of interest is mentioned in a document, evidence of an oral agreement, that rate will not be charged will be admissible.[11] Oral evidence is not admissible to show that, in addition to the consideration mentioned in a sale deed, the vendee had

1. *Narrondas Ramji* v. *Narrondas Ramji*, 31 B 418.
2. *Manilal Becharlal* v. *Keshobji Pitambar*, 6 DLR (Pat) 140.
3. *Lala Himmat Sahal Singh* v. *Llewhellen*, 11 C 486.
4. *Bibi Fakrubibi* v. *Saiyad Mohammadmiya Badamiya*, 139 IC 221.
5. *Kunja Behari Das* v. *Raman Behari Das*, 1937 C 619 : 41 CWN 1053.
6. *Rambahadur Singh* v. *Awadhbehari Prasad Singh*, 18 P 318 : 1939 P 411.
7. *Ebrahim Pir Mahomed* v. *Cujrsetjhi Sorbji De Vitre*, 11 B 644 ; *Cowasji Rustomji Limboowalla* v. *Burjorji Rustomji Limboowalla*, 12 B 355 ; *Moran* v. *Mittu Bibee*, 2 C 58.
8. *Ebrahim Pir Mahomed* v. *Cujrsetjhi Soraji De Vitre*, 11 B 644
9. *Cowasji Rustomji Limboowalla* v. *Burjoriji Rustomji Limboowala*, 12 B 335.
10. *Banode Kishore Goswami* v. *Astosh Mukhopadhua* 16 CWN 666.
11. *Muthu Erulapa Pillay* v. *Vunuku Rustomji Maistry*, 36 IC 957 ; *See also Maheshchandra Shaha* v. *Anandachandra Shaha*, 61 C 344 : 1934 C 564 : 151 IC 511 ; *Hara Kumar Saha* v. *Ram Chandra Pal*, 47 IC 942.

also agreed to discharge a prior encumbrance.[1] Oral evidence is admissible under this Proviso to show that a person not mentioned in a lease is a co-sharer with the person who is mentioned as he lessee.[2]

Whether a promissory note payable on demand can be proved by oral evidence not to be so.—The usual import of the words "on demand" in a promissory note is that the debt is due and payable immediately.[3] Where a promissory note is payable on demand, an oral agreement providing for a different mode of satisfaction is inadmissible in evidence.[4] In the absence of any such condition as would, under Proviso (3), have the effect of preventing the attaching of any obligation under a promissory note, it is not open to a person to prove by oral evidence that the note which purports to be payable on demand is not so payable.[5] Where it is stated in the body of a promissory note that the sum mentioned in it has been arrived at after taking accounts between the parties and that it is payable on demand, the executant of the note cannot give evidence to prove that, as a matter of fact, the document was not executed after the settlement of account and that the undertaking to pay was subject to the further condition that accounts were at some subsequent period to be reopened between the parties and that payment was not to be demanded till this further settlement of accounts had taken place.[6] The executant of a promissory note cannot be permitted to prove a separate agreement according to which the sum specified in the note is not, as expressed therein, payable on demand but represents merely a portion of the capital of a partnership into which the parties had entered for the purposes of a certain business.[7] If a person executes a promissory note payable on demand, a verbal agreement to the effect that the liability of the executant should cease on a specified future date is inadmissible. But if the verbal agreement be that on the specified future date the advance which was to become due by the creditor to another person on that date should be held as made by the moneys paid on the date the promissory note was executed, and that the liability under that promissory note should be held as satisfied by a fresh note to be granted by that other person for the advance which was to fall due on the specified future date, the

---

1. *Mohey Krishnayya* v. *Mohammad Galeb Sahib*, 1930 M 659 : 124 IC 508 ; *Nokhelal* v. *Kishanlal Ridhkarnandas*, 1950 N 44 : 1950 NLJ 28 ; *See notes to* Proviso (1) "want or failure of consideration."
2. *Butto Kristo Roy* v. *Govindaram Marwari*, 1939 P 540.
3. *SK. Jamu* v. *Mohammad Ibrahim, etc.*, 1926 N 194 : 90 IC 378.
4. *The Bharat National Bank, Ltd., Delhi* v. *The Firm Mohan Lal Bhagwan Das*, 63 IC 748.
5. *See note to Proviso 3.*
6. *Sri Ram* v. *Firm Sobha Ram Gopal Rai*, 44 A 521 : 1922 A 213 : 67 IC 513 ; *Maung Kyan Naga* v. *Arunchalam Pillai*, 5 R 520 : 1927 R 327 : 105 IC 476 ; *Ghanshiam Das Bajnath* v. *Mithan Lal Tandon*, 1930 A 529 (2): 124 IC 763. The correctness of these decisions is doubtful, as the evidence seems to have been admissible under the third Proviso. The decision in *Sri Ram* v. *Firm Sobha Ram Gopal Rai*, 44 A 521 : 1922 A 213 ;: 67 IC 513 : though followed in some cases, e.g., *Hira Lal* v. *Banarsi Das*, 6 L 411 : 1925 L 576 : 90 IC 982 ; *Ghanshiam Das Bainjnath* v. *Mithan Lal Tandan*, 1930 A 529 (2): 124 IC 763 ; *Parmeshwari Das* v. *Lachhman Prasad*, 1930 A 824 : 129 IC 439 and *Central Bank of India*, Ltd. v. *Nadirshaha Metha*, 790 IC 445 , has been doubted in two subsequent decisions of the same court viz., *Bhogi Ram* v. *Kishori Lal*, 50 A 754 : 1928 A 289 : 115 IC 771 *and Sheo Prasad Ram Prasad* v. *Govind Prasad*, 49 A 464 : 1927 A 292 : 100 IC 332. *See* also notes to Priviso (3) under the heading " Oral agreement making the operation of a promissory note payable on demand conditional on the fulfilment of a condition is provable".
7. *Hira Lal* v. *Banarsi Das*, 6 L 411 : 1925 L 576 : 90 IC 982 ; *Sri Ram* v. *Sobha Ram Gopal Rai*, 44 A 521 : 1922 A 213 : 67 IC 513, which, as noted in the preceding footnote, has not been followed in two subsequent decisions of the same Court. For a contrary view, See *Firm Sheo Prasad Ram Prasad* v. *Govind Prasad*, 49 A 464 : 1927 A 292 : 100 IC 332, followed in *Bhogi Ram* v. *Kishori Lal*, 50 A 754 : 1928 A 289 : 115 IC 771.

agreement will be provable under the second Proviso to Section 92.[1] See notes to Proviso (3) under the headings "Oral agreement making the operation of a promissory note payable on demand conditional on the fulfilment of a condition is provable", and 'Promissory note; oral agreement held not constituting a condition precedent", and notes to this section under the heading "Whether the ostensible executant of a written contract can show that he signed otherwise than as an executant, e.g., as an agent, partner surety, witness or *benamidar*".

Mortgage, money payable on demand, oral agreement that the money would be paid by instalments is inadmissible.[2]

PROVISO (3)

Conditional instruments.—When, at the time of the execution of a written contract it is orally agreed between the parties that the written agreement shall not be of any force or validity until some condition precedent has been performed, parole evidence of such agreement is admissible to show that the condition has not been performed and that consequently the written contract has not become binding.[3] A condition precedent within the meaning of Proviso (3) to Section 92 is a condition precedent without the fulfilment of which there is in effect no written agreement at all and no contractual obligation of any description.[4] The rule against the contradiction of the terms of a written contract by oral evidence is not infringed by evidence of an oral agreement which amounts to a condition precedent subject to which the written agreement has been entered into and subject to which the performance of the written agreement is to depend.[5] The Proviso is based on the English case *Pym* v. *Campbell*,[6] which is an authority for the rule that parole evidence is admissible to prove any collateral verbal agreement to the effect that a document apparently complete and operative on its fact, should be conditional upon and not operate until, the happening of a certain event.[7] Thus, evidence may be given to show that a deed was delivered, or a contract signed, by both or one of the parties merely as an escrow and subject to a condition through the non-fulfilment or suspended fulfilment of which no contract has ever arisen.[8] The parties to a contract may not vary a written agreement, but they may show that they never intended the signed paper to be an agreement until a condition precedent was fulfilled.[9] A party to a contract who entered into it as an agent is entitled to show under this Proviso that the contract was to be considered binding only when confirmed by the principal.[10] If a customary fee in addition to the rent is payable for the renewal of a

1. *Motabhoy Mulla Essabhoy* v. *Mulji Haridas*, 29 IC 223 : 39 B 399 : 1915 PC 2 : 42 IA 103 ; *See Pannuswami Chetty* v. *The Vellore Commercial Bank*, 56 IC 384.
2. *Mohammad Ahmad Saeed Khan* v. *Kishori Lal*, 1932 A 375 : 41 IC 114.
3. *Jagtanund Missir* v. *Nerghan Singh*, 6 C 433 ; *Ram Singh* v. *Ibrahim*, 1925 S 136 : 78 IC 418 ; *The Central Bank of India* v. *Nadirshah R. Metha*, 1924 S 13 : 79 IC 445 ; *Abdul Hassan* v. *Wajih-un-nissa*, 1948 P 186.
4. *Shivlal Bhurabhai Vora* v. *Bai Sankli*, 1931 B 297 : 132 IC 444.
5. Taylor, § 1135.
6. *Pym* v. *Campbell*, (1856) 6 El & Bl 370 ; *Sahdeo Shrawan* v. *Namdeo Atmaram Mankar*, 1949 N 15 : 1948 NLJ 328 : ILR 1948 N 900.
7. *Per* Ashworth, J., in *Lachhman Das* v. *Ram Prasad*, 49 S 680 : 927 A 422 : 100 IC 1029.
8. Phipson, Ev., 7th Ed., 560 Taylor, § 1135.
9. *Radhakissen Chamaria* v. *Durgaprasad Chamaria*, 59 C 106 : 1932 C 328 : 143 IC 159.
10. *Dina Nath Law* v. *Metharam Navalrai & Co.*, 64 IC 785.

lease for a fixed period, the evidence as to the payment of such fee will be admissible under this Proviso.[1]

Oral agreement making the operation of a promissory note payable on demand conditional on the fulfilment of a condition is provable.—The maker of a promissory note containing an absolute promise to pay is entitled to show that the note was executed in pursuance of an arrangement which constituted a condition precedent to the attaching of any obligation under the contract evidenced by the note.[2] A sues B on a promissory note. B may prove that he delivered the note to A on condition that it was only to operate if he should procure B to be restored to a certain office and that B was not restored.[3] Similarly B may prove that the note was given to A on a parole condition that it was only to be enforced if a balance of account was found due from B to A and that none was found due.[4] Although a promise to pay is stated in a promissory note to be unconditional and upon demand, the maker of the note may prove that he only delivered it upon terms inconsistent with payment being unconditional and upon demand. Thus, in a suit for recovery of money on the basis of a pronote it is open to the defendant to plead and prove that the amount mentioned in the pronote did not represent any loan but that the instrument was only intended to be an additional security for advances made on the security of goods in case the latter security proved insufficient.[5] Where in a suit on a promissory note the defendant pleads that the note was only a receipt for the earnest money for a contract of purchase by the plaintiff, that purpose of the receipt of money has been wrongly stated in the note and that it was not intended to attach any obligation to the instrument as such, he is entitled to adduce oral evidence in support of such plea.[6] The liability in relation to a negotiable instrument attaches by or from delivery and Section 46 of the Negotiable instrument Act provides that as between the immediate parties to an instrument it may be shown that the instrument was delivered conditionally, or for a special purpose only, and not for the purpose of transferring absolutely the property therein. In answer to a suit on a promissory note it is open to the defendant to lead evidence to show that the promissory note was given merely as a security for the plaintiff's share of the capital advanced towards a partnership and that the promissory note can be enforced only when such capital becomes payable to the plaintiff.[7] It is open to a defendant to plead that a promissory note was not executed for cash or equivalent consideration but as a security to cover the advance to be made by the payee to the third party and that the defendant was liable only for such sums as may be found due on taking account between the payee and the third party. Such plea in substance amounts to a plea of absence of consideration and is

1. *Damodaran Nair* v. *Achuthan Nair*, 1935 M 190 : 157 IC 1040.
2. *Rowland Ady* v. *Administrator-General of Burma*, 1938 PC 198 : 175 IC 449 ; *Bachan Singh* v. *Dharmarth Bank, Nabha*, 1933 L 456 : 143 IC 348.
3. *Jefferies* v. *Austin*, (1725) 1 Stra. 674 ; Phipson, Ev., 7th Ed., 576.
4. *Kearns* v. *Durell*, (1848) 6 C & B 596 ; Phipson, Ev., 7th Ed., 576.
5. *Bhogi Ram* v. *Kishori Lal*, 50 A 754 : 928 A 289 : 115 IC 771, approving *Firm Sheo Prasad Ram Prasad* v. *Govind Prasad*, 49 A 464 : 1927 A 292 : 100 IC 332, and disapproving *Sri Ram* v. *Firm Sobha Ram Gopal Rai*, 44 A 521 : 1922 A 213 : 67 IC 513.
6. *Umrao Singh* v. *Raunak Singh*, 1939 PWN 200.
7. *Firm Sheoprasad Ram Prasad* v. *Govind Prasad*, 49 A 464 : 1927 A 292 : 100 IC 332, followed in *Bhogi Ram* v. *Kishori Lal*, 50 A 754 : 1928 A 289 : 115 IC 771 ; But see *Sri Ram* v. *Firm Sobha Ram Gopal Rai*, 44 A 521 : 1922 A 213 : 67 IC 513 ; *Hira Lal* v. *Banarsi Das*, 6 L 411 : 1925 L 576 : 90 IC 982 ; *Manug Kyan Naga* v. *Arunchalam Pillai*, 5 R 520 : 1927 R 327 : 105 IC 476 ; *Ghanshim Das Baijnath* v. *Mithan Lal Tandan*, 1930 A 529 (2) : 124 IC 763.

provable under the first Proviso to Section 92.[1] It is open to a defendant to plead and to prove by oral evidence that the real consideration for a promissory note was not payment of money as recited in the note but the construction of a sluice, which not having been sanctioned, the liability under the note did not come into existence.[2] In a suit a promissory note executed by a subscriber to a chit fund, it is open to the defendant to prove that the note was executed and delivered only as security for the payment of future instalments to the chit fund.[3] In answer to a suit on a promissory note the defendant pleaded that he had executed a mortgage in favour of the plaintiff and that the promissory note in the suit was passed to secure the plaintiff against any claim that might be made by a prior mortgage who had been paid off but from whom the defendant had failed to obtain a re-conveyance. Held, that the alleged agreement was not one to postpone an existing liability, but amounted to a suspension of the obligation attaching under the note until the necessity for enforcing the indemnity arose and could be proved orally under Proviso (3) to Section 92 of the Evidence Act.[4] A person who has executed a promissory note in favour of another may show that it was without consideration and payable only if the executant's children lived up to a certain age.[5] It is necessary to distinguish a collateral agreement which alters the legal effect of the instrument from an agreement that the instrument should not be an effective instrument until some condition is fulfilled, or, to put it in another form, it is necessary to distinguish an agreement in deference of the contract from an agreement suspending the coming into force of the contract contained in the promissory note. As an illustration, reference may be made to the case of *New Credit Syndicate, Ltd* v. *Neale*,[6] where it was sought to prove an oral agreement to renew a promissory note payable at three months' date, and that was held to be an agreement altering the terms of the written contract. In the earlier case of *Free* v. *Hawkins*,[7] the evidence which was excluded was of a parole agreement said to have been made at the time of making a note. The note was expressed to be payable eight months after the date. The evidence which was rejected was that payment should not be demanded until after the sale of certain assets. Where the promissory note is, by its express terms, payable on demand, the obligation under it attaches immediately. But the agreement not to make a demand until the specified condition is fulfilled has the intention and effect of suspending the coming into force of that obligation, which is the contract in the promissory note. Thus oral agreement constitutes a condition precedent to the attaching of the obligation and is within the terms of Proviso 3 of Section 92. Therefore where a promissory note is executed subject to the condition that no liability is to attach under it unless that executant "receives the next distribution from Ashe's Minerals Ltd." oral evidence is admissible to prove the condition and not the happening of it in answer to a suit on the promissory note.[8] A case like the one just cited is to be distinguished from a case like *Ramjibun Scrowgy* v.

1. *Sundaram Chetty* v. *Damodaram Chetty*, 1924 M 850 : 84 IC 146.
2. *Satya Narayana* v. *Anjaneyulu*, 1935 M 310 : 157 IC 278.
3. *Panchapakesa Ayyar* v. *Ayyaswami Ayyar*, 1107 IC 510.
4. *Agmad Saheb Bapu Saheb Kofre* v. *Ubhaiya Harsi*, 1924 B 44 : 87 IC 37 ; *But see Subramania Aiyar* v. *Narayanasami Aiyar*, 1925 M 1240 : 90 IC 1020.
5. *Lallu Mal* v. *Pandit Reoti Ram*, 45 A 679 : 1924 A 70 : 74 IC 353.
6. (1898) 2 QB 487.
7. (1817) 9 Taunt 92.
8. *Rowland Ady* v. *Administrator-General, Burma*, 1938 PC 198

Aghore Nath Chatterjee,[1] in which the promissory note though absolute in its terms, was said to be subject to an oral agreement, providing that it was not to be enforceable by suit until the happening of a particular event. The Proviso is inapplicable to a case in which an obligation under the contract has attached. But it is permissible to adduce evidence of a contemporaneous oral agreement under which the parties to the written contract agree that until the happening of a certain event no obligation whatever under the written agreement should attach, or, in other words, that until the condition precedent has been fulfilled, the written agreement should be and remain inoperative and of no effect. Where the defendant gave a post-dated cheque to the plaintiff on the understanding that the cheque was not to be presented for payment until and unless a certain dispute between the parties had been decided in a certain manner and the plaintiff brought a suit to recover the amount of the cheque from the defendant without taking steps to have the dispute decided, it was held that the effect of the agreement between the parties was not to contradict or to vary the terms of the cheque but to create a condition precedent to the attachment of any obligation under the cheque which would remain inoperative until after the adjudication of the dispute had taken place and that, therefore, the agreement fell within the Proviso and could be proved.[2] If A contracting to purchase some property from B, pays some earnest money to B, who gives a hand note to A purporting to be payable on demand, A would be entitled to show that, according to the agreement between the parties, the liability under the hand note was intended to be enforced only if B failed to complete the contract of purchase.[3] See notes to Proviso (2) under the heading "Whether a promissory note payable on demand can be proved by oral evidence not to be so," notes to this section under the heading "Whether the ostensible executant of a written contract can show that he signed otherwise than as an executant, e.g., as an agent, partner, surety, witness or a *benamidar*".

Promissory note; oral agreement held not constituting a condition precedent.—The maker of a pronote is entitled to prove that the note was executed in pursuance of an arrangement which constituted a condition precedent to the attaching of any obligation under the contract evidenced by the note.[4] Distinction must be made between an agreement that no obligation shall be attached to a written transaction and an agreement that, though such obligation does attach, it shall be postponed to some future date.[5] While the former is within the terms of the Proviso, the latter is not. Thus, the executant of a promissory note payable on demand cannot in a suit on the note be allowed to lead evidence to prove a contemporaneous oral agreement by the person in whose favour the note was executed that the note would not be presented until the latter had discharged a certain encumbrance on certain property,[6] or that the note would not be enforced until the executant has recovered his share in certain compensation money.[7] Oral evidence is not admissible to show that, at the time of making a promissory note which purports to be payable on demand, it was agreed that it should not be payable till

1. 25 C 401 : 2 CWN 188.
2. *Walter Mitchell* v. *A.K. Tennent*, 52 677 : 90 IC 59.
3. *Umrao Singh* v. *Raunak Singh*, 1939 P 495.
4. *Bachan Singh* v. *Dharmarth Bank*, 1933 L 455 : 143 IC 348.
5. *Central Bank of India* v. *Nadirshoh R. Metha*, 1924 S 13 : 79 IC 445 : *See also Ramjibun* v. *Ogharnath*, 25 C 401.
6. *Vishnu Ramchandra Joshi* v. *Ganesh Krhisna Sathe*, 45 B 1155 : 1921 B 449 : 63 IC 673.
7. *Ramjibun* v. *Ogharnath*, 25 C 401

a particular event happened,[1] e.g., till the promisee delivered possession of a house to the executant,[2] or till accounts were settled between the parties,[3] Where a promissory note, on the face of it, purports to be payable on demand, parole evidence is not admissible to show that, at the time of making it, it was agreed that it should not be payable till after the decease of the maker.[4] Where a note expressly provides that the amount due therein is payable on demand, an oral agreement that the said amount was to be set off against the amount due to the executant of the pronote on some other account is not a condition precedent to the enforcement of liability under the note within the meaning of this Proviso.[5] Where there is an absolute and unconditional promise to pay a certain amount as liquidated damages, oral evidence of a contemporaneous agreement which has the effect of making it conditional and defensible is inadmissible.[6] Where, in a suit on certain promissory notes, the defendant set up an agreement binding a third party to act in a certain way after the defendant had spent the money on contemplated litigation, and that circumstances prevented the third party from fulfilling the obligation he had undertaken, and therefore there was a condition precedent to the attaching of the obligation under the pronotes, it was held that on these facts the condition was not precedent but subsequent to the obligation and that Proviso 3 to Section 92 would not apply and consequently the defendant was debarred from leading evidence on the point.[7] Oral evidence is not admissible to show that a promissory note which purports to be payable on demand is not so payable but represents merely a portion of the capital of a partnership into which the parties had entered for the purposes of a certain business.[8] Where a promissory note is payable at three months' date, evidence of an oral agreement to renew it at that date and not to demand payment under it is inadmissible.[9] Similarly where a promissory note is payable eight months after the date, evidence of an oral agreement that payment is not to be demanded until after the sale of

---

1. *Subramania Aiyar* v. *Narayanasami Aiyar*, 1925 M 1240 : 90 IC 1020 : 05 IC 476 ; *Hira Lal* v. *Benarsi Das*, 6 L 411 : 1925 L 576 : 90 IC 982 ; *Parmeshwari Das*. v. *Lachhman Prasad*, 1930 A 824 : 129 IC 439 ; *Ramjibun* v. *Ogharnath*, 25 C 401.
2. *Subramania Aiyar* v. *Narayanasami Aiyar*, 1925 M 1240 : 90 IC 1020 : 105 IC 476.
3. *Dowlatram Mohandas* v. *Vasudeo Manghumal*, 1943 S 67 ; *Maung Kyan Naga* v. *Arunchalam Pillai*, 5 R 520 : 1927 R 327 : 105 IC 476 ; *Hira Lal* v. *Benarsi Das*, 6 L 411 : 1925 L 576 : 90 IC 982 ; *Ghanshim Das Baijnath* v. *Mithan Lal Tandan*, 1930 A 529 (2) : 124 IC 763. The decision in *Ghanshim Das Baijnath* v. *Mithan Lal Tandan*, is based on *Sri Ram* v. *Firm Sobha Ram Gopal Rai*, 44 A 521 : 1922 A 213 : 67 IC 513, which has been disapproved in two subsequent decision i.e., *Firm Sheo Prasad Ram Prasad* v. *Govind Prasad*, 49 A 464 : 1927 A 292 : 100 IC 332 and *Bhogi Ram* v. *Kishori Lal*, 50 A 754 : 1928 A 289 : 115 IC 771.
4. *Woodbridge* v. *Spooner*, (1819) 3 B & Ald,. 233.
5. *Ram Singh* v. *Ibrahim*, 1925 S 136 : 78 IC 418.
6. *Doorvas J. Subbayyar* v. *The Firm of K.M. Subbararayalu Iyer & Son, Madura*, 68 IC 758 ; *See also Ramjibun* v. *Ogharnath*, 25 C 401 ; *Cohen* v. *The Bank of Bengal*, 2 A 598, 602 ; *Jaimal Ram* v. *Nand Lal*, 1932 L 549 : 138 IC 371 ; *Motabhoy Mulla Essabhoy* v. *Mulji Haridas*, 29 IC 223 : 39 B 399 : 1915 PC 2 : 42 IA 103.
7. *Jaimal Ram* v. *Nand Lal*, 1932 L 549 : 138 IC 371 ; *See Ramjiban Serowgy* v. *Oghur Nath Chaterji*, 3 CWN 188.
8. *Hira Lal* v. *Benarsi Das*, 6 L 411 : 1925 L 576 : 90 IC 982 ; *Maung Kyan Nga* v. *Arunchalam Pillai*, 5 R 520 : 1927 R 327 : 105 IC 476 ; But see *Firm Sheo Prasad Ram Prasad* v. *Govind Prasad*, 49 A 464 : 1927 A 292 : 100 IC 332, followed in *Bhogi Ram* v. *Kishori Lal*, 50 A 754 : 1928 A 289 : 115 IC 771.
9. *New London Credit Syndicate, Ltd.* v. *Neale*, (1898) 2 QB 487, referred to in *Rowland Ady* v. *Administrator-General, Burma*, 1938 PC 198.

certain assets is inadmissible.[1] A co-executant of a promissory note may show that he signed merely as a surety for the other,[2] but not that there was an oral agreement that the note would not be enforced against him in the first instance.[3] Where the purpose of adducing oral evidence is not merely to prove contemporaneous oral agreement whereby the liability under a promissory note is to be suspended until the happening of a particular event, but to show that the promissory notes is not binding at all, oral evidence is not admissible.[4] See the preceding note, notes to Proviso (2) under the heading "Whether a promissory note payable on demand can be proved by oral evidence not to be so". and notes to this section under the heading "Whether the executant of a written contract can show that he signed otherwise than as an executant, e, g., as an agent, partner, surety, witness, or *benamidar*".

Distinction between an agreement which constitutes a condition precedent and one which operates as a defeasance.—A distinction must be between the cases where the matter sought to be introduced by extraneous evidence is a condition precedent and those where it is defeasance. It may be shown by parole evidence that the agreement was not meant to operate until the happening of a given condition; but it cannot be shown that it was to be defeated on the happening of a given event.[5] The oral agreement contemplated by Proviso (3) to Section 92 is one which neither varies nor contradicts the writing but merely suspends the operation of the obligation. If, however, the oral agreement be a defeasance, it would be in contradiction of the written agreement and therefore not admissible.[6] The condition contemplated by the Proviso is a condition precedent and not subsequent to the obligation.[7] Thus, where, in a suit brought by the plaintiff to recover maintenance due under annuity bond executed by the defendants the latter sought to prove a contemporaneous oral agreement that the plaintiff would forfeit her rights under the bond if she became unchaste, it was held that the oral agreement could not be said to be a condition precedent to the operation of the written agreement within the meaning of the Proviso and therefore was not admissible in evidence.[8] The proviso is inapplicable to a case in which an obligation under the contract has attached. But it is permissible to adduce evidence of a contemporaneous oral agreement under which the parties to the written contract agree that until the happing of a certain event

1. *Free* v. *Hawkins*, (1817) 8 Taunt 92, referred in *Rowland Ady* v. *Administrator-General, Buurma*, 1938 PC 198.
2. *Central Bank of India* v. *Nadirshah*, 1924 S 13 : 79 IC 445 ; *Firm Sheo Prasad Ram Prasad* v. *Govind Prasad*, 49 A 464 : 1927 A 292 : 100 IC 332.
3. Central Bank of India, Ltd. v. *Nadirshah R. Metha*, 1924 S 13 : 79 IC 445 ; *Moolji Murarji Sunderji* v. *M.C. Pinto*, 92 IC 667 ; *Narasimhamurthy Sastry* v. *Ramaswamy Chetty*, 18 IC 696 ; *but see J.M. Maneckji* v. *Maung Po Han*, 2 R 482 : 1925 R 83 : 84 IC 1012.
4. *Tyabi Trading Co.* v. *Gulamali T. Mandiwala*, 1939 S 299 : ILR (1939) Ker. 523.
5. *See also Rowland Ady* v. *Administrator-General, Burma*, 1938 PC 198 ; *Ali Jawad* v. *Kulanjan Singh*, 44 A 421 : 1922 A 262 : 66 IC 131 ; *Doordas J. Subbayyar* v. *The Firm of K.M. Subbaryalua Iyer & Son, Madura*, 68 IC 758 ; *Vithu Jairam* v. *Akaram*, 42 IC 372 ; *Harek Chand Babu* v. *Bishun Chandra Banerjee*, 8 CWN 101 ; *Sahedeo Sharwan* v. *Namdeo Atmaram Mankar*, 1949 N 15 : 1948 NLJ 328 : ILR 1948 N 900.
6. *Vithu Jairam* v. *Akaram*, 42 IC 372 ; *Sahedeo Shawan* v. *Namdeo Atmaram Mankar*, 1949 N 15 ; *T.V. Kochuvareed* v. *V. Mariappa Gounder*, 1954 TC 10.
7. *Jaimal Ram* v. *Nand Lal*, 1932 L 549 : 138 IC 371.
8. *Shivlal Bhurabhai Vora* v. *Bai Sankli*, 1931 B 297 : 132 IC 444.

no obligation whatever under the written contract should attach, or, in other words that until the condition precedent has been fulfilled, the written contract should be and remain inoperative and of no effect.[1] An oral agreement that if, within a month from the date of execution, money was not recovered from one of the co-executants of a romissory note, the liability of the other co-executant under the promissory note would cease, is not an agreement by way of condition precedent and therefore not admissible.[2]

Condition precedent must be such as prevents the attaching of any obligation whatever and not any particular obligation under the instrument.—The true meaning of the words "any obligation" in Proviso (3) is "any obligation whatever under the contract" and not some particular obligation which the contract may contain.[3] The Proviso is not, therefore, applicable to a case where the written agreement has not only become binding but has actually been performed as to a large portion of its obligations.[4] It is permissible to adduce evidence of a contemporaneous oral agreement under which the parities to the written contract agree that until the happening of a certain event no obligation whatever under the written agreement should attach, or, in other words, that, until the condition precedent has been fulfilled, the written agreement should be and remain inoperative and of no effect. But the Proviso is not applicable to a case in which an obligation under the written contract *has attached.* If the object of the alleged contemporaneous oral agreement is merely to suspend the performance of the obligation contained in the written contract, evidence of such oral agreement cannot be admitted.[5]

Condition precedent must not be inconsistent with any stipulation in the deed.—Proviso (3) is merely a proviso and not an exception to the section; the general rule enacted by the section is not, therefore, affected by it. The condition precedent to which the Proviso refers is a condition the subject-matter which *dehors* the contents of the instrument, and, therefore, if effect be given to this condition, it cannot affect the terms of the document itself.[6] An oral agreement which constitutes a condition precedent to the attaching of any obligation under a bond may be proved under the Proviso, but not an oral agreement inconsistent with, and contradicting the terms of, the written agreement.[7] Thus, whereas it is permissible to prove that a post-dated cheque was agreed not to be presented until and unless a certain dispute had been decided in a particular manner,[8] it is not permissible to prove that a promissory note payable on demand was agreed to enforce by suit until the happening of a particular event.[9] A

1. *Walter Mitchell* v. *A.K. Tennent*, 52 C 677 : 90 IC 59.
2. *Harek Chand Babu* v. *Bishnu Chandra Banerjee*, 8 CWN 101.
3. *Radhakissen Chamaria* v. *Durgaprasad Chamaria*, 59 C 106 : 1932 C 328 : 143 IC 159 ; *Irpan Ali Laskar* v. *Jogendra Chandra Das Patni*, 59 C 1111 : 1932 C 708 : 143 IC 241 ; *Tennent* v. *Mitchell*, 6 C 433 ; *Tiruvengada Ayyangar* v. *Rangasami Nayak*, 7 M 19.
4. *Tennent* v. *Mitchell*, 6 C 443 ; *Tiruveengada Ayyangar* v. *Rangasami Nayak*, 7 M 19.
5. *Walter Mitchell* v. *A. K. Tenant*, 52 C 677 : 1925 C 1007 : 90 IC 59 ; *See Central Bank of India*, Ltd. v. *Naidrashah R. Mehta*, 1924 S 13 : 79 IC 445 ; *Ramjibun* v. *Ogharnath*, 25 C 401.
6. *Rapi Reddy* v. *Narayana Reddy*, 1936 M 841 : 165 IC 669 ; *Chhaganlal Kalyandas Shah* v. *Jagijiwandas Gulabadas*, 1940 B 54 : 187 IC 41.
7. *Tatia* v. *Sawania*, 1923 N 135 : 71 IC 477 ; Vithu *Jairam* v *Akaram*, 42 IC 372 ; *Ali Jawad* v. *Kulanjan Singh*, 44 A 421 : 1922 A 262 : 66 IC 131.
8. *Walter Mitchell* v. *A. K. Tennent*, 52 C 677 : 1925 C 1007 ; 90 IC 59.
9. *Ramjibun* v. *Ogharnath*, 25 C 401. See notes to this Proviso under the heading "promissory note ; oral agreement held not constituting a condition precedent" and "oral agreement making the operation of a promissory note payable on demand conditional on the fulfilment of a condition precedent". See also notes

vendee under a written instrument cannot give evidence of an oral agreement that a part of the consideration for the sale was to be paid only on the vendor delivering possession of the property conveyed.[1] An oral agreement that the consideration would be paid only on the happening of a certain event, which is inconsistent with the terms of a document, is not within this Proviso and therefore a not admissible.[2] It is not open to the parties to a registered sale deed to plead or prove that the deed was to be null and void unless the vendee executed an agreement to reconvey the property.[3] Oral agreement that a promissory note was not to be enforced that the amount thereof was to be adjusted in the making up of partnership accounts is inadmissible.[4] Where the terms of an arrangement between the parties have been reduced to the form of a mortgage deed, it is not open to one of the parties to adduce oral evidence to show that the arrangement as embodied in the deed is not what it purports to be but something different.[5] Where the plaintiff, who was the purchaser of the equity of redemption at a Court sale, and the defendant mortgagee agreed in writing that the defendant would, as plaintiff sold the property to third parties, execute a deed of release of the sold property in the plaintiff's favour, and the defendant, when sued for specific performance of the agreement, pleaded an oral agreement to the effect that the deed of release was to be executed only if the entire mortgage money was paid, it was held that the evidence in proof of the oral agreement was not admissible under the Proviso.[6] A condition precedent to a legacy cannot be imported from outside, e.g., from a previous agreement between the testator and the legatee, into a will which gives the legacy. When the will is absolute in its terms, it cannot be held to be conditional merely because the legatee promised to pay some *guzara* to the testator if he executed the will.[7]

Contracts subject to approval or sanction.—A agrees in writing to buy B's interest in a certain patent. In an action by B to enforce the agreement A may prove that it was orally agreed at the time that no sale was to take place unless A's engineer approved the patent, and that he did not approve.[8] So a party to a contract, who entered into it as agent, is entitled to show that the contract was to be considered as binding only when confirmed by the principal.[9] A written contract by A to transfer land to B may be proved orally to be conditional upon A's obtaining his landlord's licence to assign within a certain time, since this evidence operates in suspension, and not in deference of the agreement.[10]

Conditional instruments; escrows.—B signs an agreement in writing to take a lease of A's house. A afterwards signs the agreement but hand it to his solicitor with instructions not to part with it until B obtains a responsible person to join her in the lease. In the action against A, he may prove these facts to show that there was no concluded

---

to Proviso (2) under the heading "whether a promissory note payable on demand can be proved by oral evidence not to be so".

1. *Muthusami Iyer* v. *Dharma Raja*, 1926 M 495 : 94 IC 302.
2. *Irpan Ali Laskar* v. *Jogendra Chandra Das Patni*, 59 C 1111 : 1932 C 708 : 143 IC 241.
3. *Veerappa Chettyar* v. *Ko Ba Kin*, 1933 R 310.
4. *Chhaganlal Kalyandas Shah* v. *Jagjiwandas Gulabdas*, 1940 B 54 : 41 Bom. LR 1263.
5. *Papi Reddy* v. *Narayana Reddy*, 1936 M 841 : 165 IC 669.
6. *Rami Reddi* v. *Pattabhirami Reddi*, 44 LW 749 : 71 MLJ 599.
7. *Thakurain Raj Rani* v. *Dwarkanath Singh*, 223 IC 206.
8. *Pym* v. *Campbell*, 6 E & B 370.
9. *Dina Nath Law*, v. *Methram Navalrai and Co.* 41 IC 785.
10. *Wallis* v. *Littell*, 11 CD (NS) 369 ; *Rogers* v. *Hadely*, 32 LJ Ex 241 ; Phipson, Ev., 7th Ed., 577.

contract between them.[1] So, where A orally agreed to take a lease of a house from B, if B did certain repairs, and a lease was accordingly signed, and A let into possession, the date of the lease being left blank and only to be filled in when the repairs were done—these facts were allowed to be proved by A in an action for illegal distress against B.[2] Oral evidence is admissible to show that a sale was to take effect only if a party succeeded in getting possession of the property,[3] or paid the consideration for the sale;[4] or to show that a lease was to be operative only if the lessee was able to obtain possession,[5] or the lessor to pay a debt.[6] An oral agreement to make a payment as a condition precedent to the enforcement of a registered deed of relinquishment can be proved under this Proviso.[7] If the document or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain, or whether it is a mere expression of the desire of the parties as to the manner is which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract, either because the conditions are unfulfilled, or because the law does not recognize contract to make a contract. In the latter case there is a binding contract, and the reference to the more formal document may be ignored.[8] Whether an agreement is a completed bargain or merely a provisional arrangement depends on the intention of the parties as deducible from the language used by the parties on the occasion when the negotiations took a concrete shape.[9] Where an agreement for the sale of certain property contains the condition that the bargain paper in respect of the sale shall be made through a *vakil* it does not mean that it is a condition to which the bargain is subject, but that it is only one of the terms of the contract.[10] In case of a written contract for sale of property which was subject to a mortgage an oral agreement that the ascertainment of the exact amount due under the mortgage was a condition precedent to the execution of the deed of sale can be proved.[11] The consideration for a lease is the rent to be paid, and the payment of the *avakasam*, a kind of premium or renewal fee paid by the tenant to the landlord, is clearly in the nature of a condition precedent, evidence as to which is permitted by the third Proviso to Section 92.[12]

PROVISO (4)

Subsequent oral agreement rescinding or varying a contract.—Where an agreement has been reduced to writing, it is competent to the parties, at any time before

1. *Pattle* v. *Hornibrook*, (1897) 1 Ch 25.
2. *Davis* v. *Jones*, 17 CB 625.
3. *Mahalinga Iyer* v. *Hyder Saheb*, 11 IC 384.
4. *Maung Mon* v. *Ma Kin On*, 5 R 536 : 1928 R 47 : 106 IC 358.
5. *Kafiluddin Biswas* v. *Sabdar Ali Biswas*, 51 IC 918.
6. *(Srimati) Giribala Dasi* v. *Kalidas Bhanja*, 1921 PC 71 : 57 IC 626.
7. *Badal Ram* v. *Jhulai*, 44 A 53 : 1922 A 165 : 63 IC 861.
8. Hukum Chand v. *Raja Ram Bahadur Singh*, 53 IC 833 ; *See also Harichand Mancharam* v. *Govind Luxman Gokhale*, 50 IA 25 : 47 B 335 : 1923 PC 47 : 71 IC 763.
9. *Harichand Mancharam* v. *Govind Luxman Gokhale*, 50 IA 25 : 47 B 335 : 1923 PC 47 : 71 IC 763.
10. *Harichand Mancharam* v. *Govind Luxman Gokhale*, 50 IA 25 : 47 B 335 : 1923 PC 47.
11. *Parshotam Prashad* v. *Taimur Ali Shah*, 1945 A 39
12. *Paniyil Kalliani Amma's Thavazhi Karnavan Damodaran Nair* v. *Valvor Tarwad Karnavan Achuthan Nair*, 1935 M 90 : 157 IC 1040 : 68 MLJ 648.

breach of it, by a new contract not in writing, either to annul the former agreement altogether, or in any manner to add to, subtract form, vary, or qualify, the terms of it, and thus to make a new contract which is to be proved partly by the written agreement, and partly by the subsequent oral terms engrafted upon what will thus be left of the written agreement.[1] This general rule, however, is subject to this limitation that the new oral contract is not provable if the original written agreement is such as is required by law to be reduced to writing, or if it has in fact been registered, whether it required by law to be registered or not. Under this Proviso oral evidence of a subsequent oral agreement is excluded not only in cases in which the orignal contract, grant or disposition of property is required by law to be in writing, but also in cases where such contract,grant or disposition of property has been registered.[2] A subsequent oral agreement rescinding or modifying a transaction is, therefore, admissible only in cases where the transaction, though actually reduced to writing, is such as is not required by law to be reduced to writing, and has not been registered.[3] Therefore, where the transaction reduced to writing is a contract, grant or disposition of property within the meaning of Section 92 of the Evidence Act and is such as is either required by law to be reduced to writing or has in fact been registered, evidence of a subsequent oral agreement rescinding or modifying the terms of the transaction will not be admissible under the fourth Proviso to Section 92. The rule is based on the principle that proof of the rescission or modification of the original contract must be by an instrument of the like formality.[4] If a lease requires registration, a document varying its terms for all time also requires registration. Therefore, an oral or unregistered agreement to vary the terms of a registered lease or mortgage is inadmissible.[5] The Proviso is inapplicable to contemporaneous oral agreements varying the terms of the written contract.[6]

"Distinct subsequent oral agreement"; agreement inferred from the acts and conduct of the parties.—The agreement made admissible by this Proviso is an agreement which is subsequent to, and not contemporaneous with, the written contract. An agreement to rescind or modify a contract presupposes a completed contract and can only be subsequent to the contract which it seeks to rescind or modify. The word "oral" is used in Section 92, Proviso (4), in the sense of being not committed to writing and the words "oral agreement" in the section include all unwritten agreements, arrived at by word of mouth of otherwise.[7] An agreement is nonetheless oral because it is inferred from the acts and conduct of the parties.[8]

Evidence of a subsequent oral agreement rescinding or modifying a transaction is inadmissible if the transaction is required by law to be reduced to writing.—In the provinces where the Transfer of Property Act is in force, sales and exchanges of

---

1. See Phipson, Ev., 7th Ed., 564 ; Section 62 of the Indian Contract Act.
2. *Chander Has* v. *Akbar*, 110 IC 261.
3. *Durga Dutt Jagan Nath* v. *R J. Wood & Co.*, 1933 L 453 : 142 IC 413 ; *Deviprasad Ramdayal* v. *Manohar Sundarpal*, 1953 MB 157.
4. *Goseti Subba Row* v. *Varigonda Narasimham*, 27 M 368 ; *Maung Ba Kyaw* v. *Nanigram Jagannath*, 13 R 22 : 1934 R 316 : 154 IC 189.
5. *Notoboro Chowdary Mahapatrao* v. *Dasari Khambayya Dora*, 1931 M 751 : 135 IC 345 ; *Maung Ba Kyaw* v. *Nanigram Jagannath*, 13 R 22 : 1934 R 316 : 154 IC 189.
6. *Chunilal Mansaram* v. *Sheoprasad Benarsidas*, 1943 A 370 : ILR 1943 A 752 : 210 IC 55.
7. *Mayandi Chetti* v. *Oliver*, 22 M 261.
8. *Sarat Chandra Sinha* v. *Nritya Gopal Biswas*, 8 IC 47 ; *Shyama Charan Mandal* v. *Heras Mollah*, 26 C 160 ; *Nandi Bahadur* v. *Durga Sundari Dasya*, 32 IC 185 : 20 CWN 680 ; *Lakhutullah Sheikh* v. *Bishambar Roy*,6 IC 577 : 12 CLJ 646 ; *Radha Raman Chowdhury* v. *Bahabani Prosad Bhowmik*, 8 IC

immovable property,[1] mortgages where the principal money secured is one hundred rupees and upwards,[2] leases of immovable property from year to year or for any term exceeding one year or reserving a yearly rent,[3] gifts of immovable property,[4] and transfers of actionable claims,[5] are required by law to be reduced to writing. Wills made under Section 63 of the Indian Succession Act, trusts,[6] agreements made without consideration,[7] and contracts for references to arbitration,[8] are other instances of transactions which are required by law to be reduced to writing. A bill or a note also is required by the Negotiable Instruments Act to be in writing.[9] Therefore, a subsequent oral agreement varying the terms of a promissory note as regards its eligibility on demand or the mode of its payment is inadmissible in evidence and cannot be proved under Section 92 of the Evidence Act.[10] Under Proviso (4) to Section 92 of the Evidence Act, oral evidence is admissible to prove subsequent modification made in a written private reference to arbitration as such reference is not required by law to be reduced to writing.[11]

Evidence of a subsequent oral agreement rescinding or varying the terms of a transaction is inadmissible if the document embodying the transaction has been registered.—Evidence of an oral agreement rescinding or modifying the terms of a written contract, grant or disposition of property is not admissible where the document has been registered. To exclude evidence of such oral agreement, what is necessary is that the document should in fact have been registered; it is not necessary that the document should be one which is required by law to be registered.[12] Section 91 and 92 do not apply to a will as it is neither a contract, nor a grant, nor a disposition of property until the death of the testator makes it operative. Proviso 4 to Section 92 does not, therefore, prevent the revocation of a registered will by an unregistered document.[13] Where a contract, by which the plaintiffs were appointed sole agents of the defendants for the sale of their goods on commission basis, itself provided that the parties would be at liberty to reduce the rate of the commission by mutual consent, and the rate of commission was subsequently reduced by an oral agreement, it was held that the oral agreement to reduce the commission was not a distinct subsequent oral agreement

---

790 : 12 CLJ 439 ; *See Narbadi* v. *Gopal*, 1925 N 459 : 87 IC 29 ; Phipson Ev., 7th Ed., 564 ; but see *Lal Ghose* v. *Nilkantha Das*,1925 C 340 : 80 IC 898,

1. Section 54 and 118, T.P. Act.
2. Section 59, TP Act.
3. Section 107, TP Act.
4. Section 123, TP Act.
5. Section 130, TP Act.
6. Section 5, Indian Trusts Act.
7. Section 25, Indian Contact Act.
8. Section 28, Indian Contract Act.
9. *Sundarji Gourishankar* v. *Abigail* 1928 S 50 : 105 IC 747 ; *Jamu* v. *Mohammad Ibrahim*, 1926 N 194 : 90 IC 378.
10. *Nachiappa Chettyar* v. *Theivanai Achi*, 1934 R 228 : 151 IC 398 ; *Jamu* v. *Mohammad Ibrahim*, 1926 N 194 : 90 IC 378 ; *Chhedilal* v. *Manohar Lal*, 1930 N 298 : 127 IC 894 ; *Muthuraman Chetiyar* v. *Venkata Reddy*, 1937 R 521.
11. *Pyarelal* v. *Ghanaram*, 1925 N 203 : 83 IC 22. The decision proceeds on the assumption that an agreement to refer a pending suit to arbitration otherwise than by an order of the Court is not required by law to be in writing ; See also *Gadula Rami Naidu* v. *Meesala Seethan Naidu*,1935 M 276 : 154 ICV 821 : 40 MLW 914 ; *Babu Ram* v. *Lala Ram*, 1929 A 415 : 116 IC 853. But see Section 28 of the Indian Contract Act.
12. 9 CWN ccxiv.
13. *Mohamnad Yoonus* v. *Abdus Sattar Ismail* (1938) 1 MLJ 444.

modifying the terms of the contract but was in compliance with the terms of the contract and could therefore be proved by oral evidence if the original contract was contained in a registered document.[1]

Subsequent oral agreement rescinding or modifying the terms of a sale deed or a deed of exchange is inadmissible where the sale or exchange is required by law to be reduced to writing or has been registered.—Where a sale is required by law to be reduced to writing,[2] or the deed of sale has been registered, evidence of a subsequent oral agreement rescinding the sale,[3] or relinquishing claim to the property sold,[4] or varying the terms of the sale[5] is inadmissible under this Proviso. The same rules applies to transaction of exchange, as an exchange also is a matter required by law to be reduced to writing.[6] Where the document as executed is a sale deed, but the parties, when they appear before a Sub-Registrar, convert it into a mortgage-deed and the Sub-Registrar registers the document as a mortgage deed, the registered document will be treated as a mortgage-deed, and other evidence modifying the terms of the original sale deed will not be shut out by this Proviso.[7] An oral agreement that a registered sale deed shall be null and void until the vendee executes an agreement to reconvey the property is not admissible.[8] Where a person sells his property by a registered sale-deed and on the same day the vendee executes an agreement to re-convey the property to the vendor, the agreement is provable as it does not in any way rescind or modify the sale but, on the other hand, affirms it.[9]

Vendee attesting a sale deed of the same property by his vendor in favour of another person. Estoppel or rescission?—Where a vendee of property subsequently attests a sale deed relating to the same property executed by his vendor in favour of another person, he holds out that the sale deed in his own favour was inoperative, and that he is willing that the property should be dealt with as if it were at the absolute disposal of his vendor. Therefore, if a third person, on the faith of this representation purchases that property from the vendor, the vendee making the representation is estopped from claiming title to the property. In a case such as the above, there is no conflict between Section 92 and Section 115 of the Evidence Act. There is no question of the admission of any oral evidence to rescind the earlier sale. The question simply is whether or not there was a representation made and acted upon.[10] Section 92 and 115 of the Evidence Act deal with two entirely different topics. When a party seeks to give evidence of a subsequent oral agreement modifying the terms of the written grant, he puts forward the agreement as true and relies upon the truth of that agreement. In the case of estoppel, the party who pleads it does not profess to show that the representation made is true. On the contrary, his case very probably is that the representation is false but that the person who made it, should not be allowed to show that it is false.[11]

1. *Mirza Najm Effindi* v. *Firm Kohinoor Footwear Co.*, 1946 A 489.
2. Section 54, TP Act.
3. *Umedmal Motiram* v. *Davu Bin Dhondiba*, 2 B 547; *Bijjukallu Papakka* v. *Yeddula Rosi Reddi*, 15 IC 282.
4. *Pichammal* v. *Ponnambala Bhatter*, 15 IC 326.
5. *Rai Adhar* v. *Lalbhai Hiracl and*, 1922 B 41 : 66 IC 865.
6. Section 118. TP Act.
7. *Ganga* v. *Phoga*, 1933 L 318 : 145 IC 697.
8. *Veerappa Chettyar* v. *Ko Ba Kin*, 1933 R 310.
9. *Chinnakkal* v. *Chinnathambi Goundan*, 1934 M 703 : 152 IC 634.
10. *Mohammud Batcha Sahib* v. *Arunanchalam Chettiar*, 1926 M 39 : 90 IC 875.
11. *Ibid.*

Variation or rescission of a lease, where the lease is required by law to be in writing or has been registered, is not provable.–If a lease is required by law to be reduced to writing,[1] or has been registered, evidence of a subsequent oral agreement rescinding the lease or varying its terms is not admissible under this Proviso.[2] A registered lease can be cancelled,[3] or its terms varied,[4] only by a registered instrument; and evidence of an oral agreement which subsequently varies the rights and liabilities of the parties as explicitly set out in the registered instrument is inadmissible.[5] Thus, a subsequent oral agreement altering the rent payable under a registered lease[6] or dispensing with an express stipulation as to notice of renewal,[7] or notice to quite[8] is not admissible in evidence. Oral evidence is not admissible to prove a verbal surrender and abatement of rent of a holding held under registered lease;[9] nor is the conduct of the parties, for instance, payment of rent at a reduced rate, admissible to prove the same,[10] for an agreement is none the less oral because it is to be inferred from the conduct of the parties.[11] Mere acceptance of reduced rent by the lessor is not by itself proof of a subsequent oral agreement to reduce the rent fixed by a registered lease, as such acceptance may be purely concessional,[12] though the evidence that since the execution of the lease the tenant paid rent at a lower rate than that stated in the deed may be

---

1. *See* Section 107, T.P.Act.
2. *Jadunandan Das* v. *Mst. Maho*, 1939 P 428 ; *Janka Kuer* v. *Anant Singh*, 1937 O 341 : 168 IC 263 ; *Mangladha Shah* v. *Abdul Ghani*, 1933 L 278 ; 145 IC 176 ; See also *Ghanaya Lal* v. *Rallia Ram*, 9 L 597 : 1928 L 873 : 110 IC 424 ; *Mallapa* v. *Matum Naga Chetty*, 24 M 41 : 48 IC 158 ; *Jagannath* v. *Shankar Valad Ganpat Shimpi*, 44 B 55 : 54 IC 689.
3. *Narbadji* v. *Gopal*, 1925 N 459 : 87 IC 29.
4. *Shiba Prasad Roy* v. *Samarendra Nath Bose*, 41 IC 431 ; *Banku Behary Sanyal* v. *Shama Churn*, 8 IC 792 : 12 CLJ 442 ; *Nandi Bahadur* v. *Durga Sundari Dasya*, 32 IC 185 : 20 CWN 680 ; *Bagha Mowar* v. *Ram Lakhan Misser*, 41 IC 804.
5. *Afar* v. *Surja Kunar Ghose*, 7 IC 842 : 12 CLJ 649 ; See also *Manglada Shah* v. *Abdul Ghani*, 1933 L 278 : 145 IC 176.
6. *Radha Raman Chowdhuri* v. *Bhabani Prosad Bhowmik*, 8 IC 790 : 12 CLJ 439 ; *Lakharullah Sheikh* v. *Bishambar Roy*, 6 IC 577 : 12 CLJ 646 ; *Nandi Bahadur* v. *Durga Sundari Dasya*, 32 IC 185 : 20 CWN 680 ; *Mayandi Chetti* v. *Oliver*, 22 M 261 ; *Kalis Chandra Saha* v. *Darbaria Sheikh*, 32 IC 251 ; *Beni Madhub Gorani* v. *Lalmoti Dassi*. 6 CWN 242 ; *Sadulla Mridha* v. *Joynabunnessa Bibi*, 32 IC 703 ; See also *Bihari Lal* v. *Abdul Aziz*, 119 IC 92 ; but see *Jhabba Singh* v. *Chajjoo*, 1926 A 445 : 94 IC 169, where an arrangement to give credit to the extent of a certain amount out of the rent owing to certain groves having been cut by the lessor was held provable.
7. *Mark D'Cruz* v. *Jitendra Nath*, 53 IC 684 : 46 IC 1079.
8. *Ebrahim Pir Mohammad* v. *Crusetji Sorabji De Vitre*, 11 B 644.
9. *Sarat Chandra Sinha* v. *Nritya Gopal Biswas*, 8 IC 47 ; following *Dwarka Nath* v. *Bhogoban Pande*, 7 CLR 577 ; *Banko Behari Sanyal* v. *Shama Churn*, 2 CWN cclxv : 25 C 692 (FB) ; *Radha Raman Chowdhry* v. *Bhowani Prasad Bhowmik*, 5 CWN ccxcvi ; *Mayandi Chetti* v. *Oliver*, 22 M 261 ; *Korampah Unni Kurup* v. *Thekku Vettil Muthorakutti*, 26 M 195 ; *Lakshmi Charan Majumdar* v. *Nabadwip Chandra Pandit* 56 C 201 : 1929 C 437 : 116 IC 733 ; but see *Jhabba Singh* v. *Chhajjoo*, 1926 A 445 : 44 IC 169.
10. *Shiva Prasad Singh* v. *Lalit Kishore*, 1943 P 152 ; *Sarat Chandra Sinha* v. *Nritya Gopal Biswas*, 8 IC 47 ; See *Lakshmi Charan Majumdar* v. *Nabadwip Chandra Pandit*, 56 IC 261 : 1929 C 437 ; 116 IC 733 ; *Mayandi Chetti* v. *Oliver*, 22 M 261.
11. *Kuman Das* v. *Raukika Singh*, 1929 P 717 ; *Sarat Chandra Sinha* v. *Nritya Gopal Biswas*, 8 IC 47 ; *Shyama Charan Mandal* v. *Heras Mollah*, 26 C 160 ; *Nandi Bahadur* v. *Durga Sundari Dasya*, 32 IC 185 : 20 CWN 680 ; *Lakhatullah Sheikh* v. *Bishamber Roy*, 6 IC 577 : 12 CLJ 646 ; See also *Narbadji* v. *Gopal*, 1925 N 459 : 87 IC 29 ; but see *Lal Ghose* v. *Nilkantha Das*, 1925 C 340 : 80 IC 898.
12. *Durga Prasad Singh* v. *Rajendra Narayan Bagchi*, 21 IC 750 : 41 IC 493 : 40 IA 223 ; *Nandi Bahadur* v. *Durga Sundari Dasya*, 32 IC 185 : 20 CWN 680 ; *Radha Raman Chowdhuri* v. *Bhabani Prosad Bhowmik*, 8 IC 790 : 12 CLJ 439.

admissible to show that the intention of the parties was that the lease from the very first was not to be acted upon, or to show that there had been a waiver by the parties as to some or one of its terms.[1] The Proviso is a bar to the proof of an oral agreement by the lessor to release the lessee from the liabilities under the personal convenants contained in a registered lease.[2] Where a contract to pay rent in kind is evidenced by a *pattah* of 1830, it is open to the defendants to show that the contract evidenced by it had been varied by a subsequent oral agreement, since a contract of the kind is not required by law to be in writing.[3]

Evidence of surrender or relinquishment of tenancy evidenced by a registered lease is admissible.—In the case of an agricultural tenancy created by a registered *patta* the fact that the tenancy has been put an end to can be proved by an unregistered document,[4] or by parol evidence,[5] as such evidence is really not tendered to prove any variation or modification of the terms of the tenancy.[6] But where the original ease is registered the surrender of a portion of tenancy with an abatement of rent can only be effected by a registered instrument, as in such a case the surrender involves a variation of the original contract of tenancy and oral evidence as to such variation is inadmissible under Section 92 of the Evidence Act.[7] The admissibility of oral evidence of an assignment of a lessee's interest under a deed of lease is not governed by Section 92 at all.[8]

Variation or rescission of a mortgage which is required by law to be in writing or which has been registered is not provable.—Where a mortgage is required by law to be reduced to writing,[9] or where a mortgage-deed has in fact been registered, a subsequent oral agreement to take less than is due under the mortgage deed, being an agreement modifying the terms of a written contract, is admissible in evidence under the present Proviso.[10] A mortgage, being desirous of getting in his outstanding debts, made an oral offer to the mortgagor that he would accept the principal money in full sanction of the mortgage debt, foregoing the interest that had accrued for some three years. The mortgagor accepted the offer and took steps to raise the money, but he did not actually raise the money and no tender of the principal money was made to the mortgagee. Held, that as no payment of the principal money was made, the provisions of Section 63 of the Indian Contract Act, did not apply and that the oral arrangements

---

1. *Nandi Bahadur* v. *Durga Sundari Dasya*, 32 IC 185 : 20 CWN 680 ; *Beni Madhub Gorani* v. *Lalmoti Dassi*, 6 CWN 242 ; but see note to this section under the heading "oral evidence is admissible to show that notwithstanding a written agreement there was no real agreement between the parties".
2. *Abdul Rahman* v. *Sir Phiroz Cursetji Sethna*, 60 B 394 : 1936 B 88 : 161 IC 57.
3. *Amar Nath* v. *Trilochan Dass*, 1943 C 565 : 209 IC 292 : 76 CLJ 251.
4. *Akhoy Kumar Gous* v. *Eradatullah Kazi*, 64 IC 883.
5. *Gopal Chandra Das* v. *Harendra Nath Datta*, 63 IC 483 ; *Puran Chandra* v. *Inder Seni*, 54 IC 752 : 47 C 129.
6. *Akhoy Kumar Gous* v. *Eradatullah Kazi*, 64 IC 883.
7. *Gopal Chandra Das* v. *Harendra Nath Datta*, 63 IC 483 ; *Sarat Chandra Sinha* v. *Nritya Gopal Biswas*, 8 IC 47 ; but see *Jhabba Singh* v. *Chhajjo*, 1926 A 445 : 47 IC 169.
8. *Butto Kristo Roy* v. *Gobindaram Marwari*, 1939 P. 540.
9. *See* Section 59 T.P. Act.
10. *Collector of Etah* v. *Kishori Lal*, 1930 A 721 : 127 IC 443 (FB) ; *Sukhlal Ramkabas Pardeshi* v. *Jetha Opajishet Marwadi*, 1928 B 522 : 115 IC 382 ; *Balasundara Naicker* v. *Ranganatha Ayyar*, 1929 M 794 ; *Ghanaya Lal* v. *Rallia Ram*, 9 L 597 : 1928 L 873 : 110 IC 424 ; *Yegnanarayana Ayyar* v. *Suptt an Chetty*, 100 IC 54 *Mallappa* v. *Mattam Naga Chetty*, 48 IC 158 : 42 M 41 ; *Jagannath Kashiram* v. *Shankar Ganpat*, 54 IC 689 : 44 B 55 ; See *Namagiri Lakshmi Amma* v. *Ko Srinivasa Aiyangar*, 27 IC 269.

were not admissible in evidence.[1] A subsequent oral agreement which purports to modify the terms of a registered mortgage-deed by reducing the amount recoverable thereunder by taking away the right of sale and by proving for the payment of this reduced amount by a sale of other property is not provable under this Proviso.[2] Where a mortgage-deed contains a forfeiture clause that the mortgagor would be debarred from redeeming the property after the expiration of a certain time, a subsequent oral agreement the property would allow redemption at any time is admissible.[3] A subsequent oral agreement whereby some other property is substituted for the mortgaged property as security for the debt,[4] or whereby the property mortgaged is vested absolutely in the mortgage,[5] is likewise admissible; so is an agreement that in full satisfaction of the mortgage money the mortgagee had agreed to take a conveyance of some shops and a certain amount in cash.[6] But there is nothing in law to prevent the parties from coming to a settlement, for the purposes of determining the amount of sale consideration, as to the amount of money which would be due to the mortgagee under the mortgage-deed when accounts are taken on an agreed basis. That settlement in no manner contradicts, varies, added to, or substracts, from, the deed of mortgage and does not contravene the provisions of section 92 of the Evidence Act and is admissible in a suit for sale to prove the amount due on the mortgage.[7] An oral agreement converting the joining and several liability of the mortgagors into several liabilities to the extent of their shares of the debt is inadmissible.[8] If in the case of a mortgage, the mortgagors have undertaken certain obligations, as, for instance, that the severally owned items of the hypotheca shall be rateably liable, one mortgagor can no more set up an oral agreement against his co-mortgagors for the purpose of varying the terms of the document than he could as against his mortgagee.[9] An oral agreement between the parties to a mortgage-deed to release from mortgage the property mortgaged[10] or the share or one of the co-mortgagors cannot be proved under this Proviso.[11] But one of several mortgagors can enter into an oral agreement with the mortgagee for the redemption of his share only of the mortgage, and proof of such agreement by which money is paid and the share of that mortgagor redeemed is not excluded by this Proviso.[12] An agreement not to charge

---

1. *Maung Shwe Min* v. *The Chetty Firm of A.M.*, 43 IC 913.
2. *Maharaj Singh* v. *Balwant Singh*, 28 A 508, 514.
3. *Ma Hin Tha* v. *Ma Thet Su*, 76 IC 624 ; *U Kyo* v. *Mg Pan Yo*, 1923 R 102 (1) : 74 IC 154.
4. *Shaikh Musi Kazim* v. *Shaikh Haji Mutasaddi*, 90 IC 841 ; See also *Maharaj Singh* v. *Balwant Singh*, 28 A 508 ; but see *Baidram* v. *Tika Ram*, 39 IC 528 : 39 A 300 where it has been held that an oral agreement under which a mortgagee takes possession of property other than that mentioned in the registered deed is admissible to show that the mortgagee's possession of the other property is as a mortgagee and consequently not adverse to the mortgagor.
5. *Maung Myat Tun Aung* v. *Maung Lu Pu*, 3 R 243 : 1925 R 322 : 89 IC 875 ; *Thatakura Govinda* v. *Pepakayala Mallayya*, 31 IC 678.
6. *Mohammad Niaz Ahmad Khan* v. *Nanhe Mal*, 1929 A 615 : 119 IC 107.
7. *Hari Krishen Das* v. *Ch. Nazir Hasan*, 1934 O 115 : 151 IC 531.
8. *Krishna Charan Burman* v. *Sanat Kumar Das*, 34 IC 609 : 44 C 162 ; See also *Muthukumaraswami Mudaliar* v. *Govinda Padayachi* 1932 M 218 ; 137 IC 285 ; but see *Rangasami Aiyangar* v. *Soma-Sundaram Chettiar*, 1928 M 173 ; 107 IC 646.
9. *Muthukumarasawami Mudaliar* v. *Govinda Padayachi*, 1932 M 218 ; 137 IC 285.
10. *Munuswami Mudaliar* v. *Govindaraja Chettiar*, 1935 M 113 ; 153 IC 668 ; 68 MLJ 91 ; 58 M 371.
11. *Rajeshwar* v. *Magniram Gangabisan*, 1933 N 89 : 142 IC 242.
12. *Kandaswami Chettiar* v. *Pakkiriswami Pillai*, 1928 M 1050 : 112 IC 559 ; *Guseti Subba Row* v. *Varigonda Narasimham*, 27 M 368.

compound interest where the mortgage-deed provides for compound interest,[1] or to charge compound interest in a manner different from the one contemplated in the deed;[2] or an agreement to relinquish the mortgagee's right to interest or to accept a lower rate of interest,[3] is inadmissible. The acceptance of a lower rate of interest than the one fixed in the deed is not admissible evidence of an agreement to receive interest on a rate other than the contract rate.[4] An agreement whereby the rate of interest payable on a mortgage for an amount exceeding one hundred rupees is modified requires to be registered, and where such agreement is not admissible in evidence for want of registration, oral evidence of the terms of such agreement is shut out by this Proviso.[5] Where the parties have provided in a registered mortgage-deed for performance in a particular way, e.g., by repayment of the debt in a particular manner, an agreement whereby a lessor amount is agreed to be taken in full discharge, or whereby the period of the mortgage is altered, will be a variation of the terms and will fall within the rule of exclusion.[6] An oral agreement whereby the time of repayment is extended and the mode of repayment is changed is inadmissible if the mortgage has been registered.[7] An oral agreement whereby a registered mortgage is cancelled,[8] or a mortgage required by law to be in writing is attempted to be rescinded,[9] is inadmissible in evidence under this Proviso. A mortgage having been created by a registered document cannot be canceled or rescinded either orally or by an unregistered endorsement on the mortgage-deed, reciting either orally or by an unregistered endorsement on the mortgage-deed, reciting that the bond was canceled and returned as the amount due was paid.[10]

Subsequent oral agreement in discharge or satisfaction of the obligations created by a registered instrument or by a contract required by law to be reduced to writing is admissible; discharge of a mortgage or pronote debt.—The acceptance of a substituted mode of performance or the postponement of performance at the request of one party does not amount to a new contract rescinding or varying the old.[11] Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit.[12] It is therefore, competent to adduce oral evidence to show that the liability of a debtor under a *hundi* has been satisfied in pursuance of a

---

1. *Jogendra Nath Banerjee* v. *Khoda Buksha Biswas*, 1924 C 380 : 72 IC 554 ; *Maheshchandra Shaha* v. *Anandachandra Shaha*, 61 IC 344 : 1934 C 564.
2. *Venkatachalam Aiyar* v. *Duraiswami Chetti*, 1927 M 1158 : 102 IC 141.
3. *Jwala Prasad* v. *Mohan Lal*, 48 A 705 : 1926 A 693 : 97 IC 162 ; *Narayan Singh* v. *Keshosa*, 1930 N 235 ; 122 IC 436.
4. *Ramalingam Chettiar* v. *Subramanya Chettiar*, 50 M 614 : 1927 M 620 ; 103 IC 394.
5. *Kasturchand* v. *Singhai Ratanchand*, 1925 N 321 ; 93 IC 95 ; See *Maung Ba Kyaw* v. *Nanigram Jaganath*, 13 R 22 : 1934 R 316 : 154 IC 189.
6. *Namagiri Lakshmi Ammal* v. *Ko Srinivasa Aiyangar*, 27 IC 269 ; See *Maung Ba Kyaw* v. *Nanigram Jaganath*, 13 R 22 : 1934 R 316 : 154 IC 189.
7. *Maung Ba Kyaw* v. *Naingram Jaganath*, 13 R 22 : 1934 R 316 : 154 IC 189.
8. *Srinivasa Swami Aiyangar* v. *Athmama Iyer*, 2 IC 612 : 32 M 281 : See *Munuswami Mudaliar* v. *Govindraja Chettiar* ; 1935 M 113 : 153 IC 668 ; 68 MLJ 91 : 58 M 371.
9. *Iyetaly Surayya* v. *Nalamilli Venkanna*, 9 IC 340 ; See *Munuswami Mudaliar* v. *Govindaraja Chettiar*, 1935 M 113 : 153 IC 668 : 68 MLJ 91 ; 91 M 371.
10. *Namagiri Lakshmi Ammal* v. *Ko. Srinivasa Aiyangar*, 27 IC 269 ; See *Maung Ba Kyaw* v. *Naingram Jaganath*, 13 R 22 : 1934 R 316 ; 154 IC 189.
11. Phipson Ev., 7th Ed., 565 ; *Dina Nath Law* v. *Metharam Navalrai & Co.*, 64 IC 785.
12. Section 63 of the Indian Contract Act.

composition between the debtor and his creditors by which he is to pay twelve annas in the rupee, four annas in cash,and the balance by means of fresh *hundies* executed by the debtor.[1] When an oral agreement is made which in respect of the manner of payment rescinds or modifies a registered contract and any payment is made in accordance with the oral agreement, section 92 of the Evidence Act does not exclude evidence of that payment or of the oral agreement that explains it. Therefore, it is open to a partner to adduce oral evidence to prove that a partnership, which had been formed for a fixed period under a registered deed, had, in spite of the term, been dissolved within the period and that he had paid the share of the other partners.[2] There is nothing in law to exclude oral evidence of the discharge of a mortgage bond when it is pleaded that the discharge has been effect partly by payment of money and partly by release of the debt,[3] inasmuch as a plea of satisfaction of a debt evidenced by a registered document does not amount to a plea that contradicts, varies, adds to, or subtracts from, the terms of the document.[4] The discharge of mortgage debt by payment and receipt of a smaller amount than was due can be proved as a fact, if it is separable from any oral agreement to vary the terms of the mortgage contract, and if it can be proved without evidence of such an agreement.[5] There is no law in India, whereby a release of mortgage should be in writing and registered. A contract of release between the mortgagor and the mortgagee may require registration under the Registration Act. But the case is different when the contract to release is between the mortgagee on the one hand and the stranger who purchases the property released after the contract. Such oral release is valid.[6] Where a mortgage bond is silent as to how the money due on it is to be paid and the mortgagee executes a *kistbandi* which merely provides that the mortgagor is to pay the amount then found due in certain instalments the *kistbandi* does not alter or vary of the terms of the mortgage bond and is admissible in evidence though unregistered[7]. But where in a registered mortgage-deed there is an express term that the payment should not be regarded as payment at all, the mortgagor will not be allowed to prove discharge of the mortgage by subsequent oral agreement which goes to vary the terms or the mortgage.[8] But it is always open to a mortgagor to prove that on a certain day he paid the sum due under the mortgage. Where it was stipulated in a mortgage bond that all repayments shall be endorsed on the back of the bond and any other receipt or oral or documentary evidence regarding payment will not be entertainable in Court and will be null and void, oral evidence was allowed to prove payment. Rowland, J., observed, "If evidence is tendered what the Court is to see is whether it is admissible under the Evidence Act and not whether in tendering it some breach of contract has been committed. If in tendering the evidence, the mortgagor has committed a breach of his undertaking the

1. *Kalumal Devandas* v. *Kessumal Naraindas*, 1929 S 143 : 144 IC 97.
2. *Nurul Hasan* v. *SK. Imambux*, 1932 N 42 ; 136 IC 874..
3. *Ramchandra Sau* v. *Kailashchandra Patra*, 58 C 532 : 1931 C 667 : 133 IC 701 : *Mahim Chandra Dey* v. *Ram Dayal Dutta;* 1926 C 170 : 91 IC 757 ; *Sm. Bhaba Sundari* v. *Ram Kamal Dutta*, 1927 C 27 : 98 IC 860 ; *Collector of Etah* v. *Kishori Lal*, 1930 A 721 : 127 IC 443 (FB).
4. *Collector of Etah* v. *Kishori Lal*, 1930 A 721 : 127 IC 443 (FB); *see also Ram Ranjan Roy* v. *Jayanti Lal Patra*, 1926 C 906 : 96 IC 11 : *Parattakath Mayan* v. *Polakkotanteakate Mammad Kunhi*, 1949 M 852 : 1949 1 MLJ 295 : 1949 MWN 136 : 62 MLW 221.
5. *Suppan Chetti* v. *Yegananarayana Ayyar*, 1932 M 141 : 136 : 136 IC 317 ; *Balasundara Naicker* v. *Ranganatha Ayyar*, M 127 ; 1929 M 794 ; 122 IC 641 ; but see *Muthuraman Chettyar* v. *Venkata Reddy*, 1937 R 521 ; *Jagannath Kashiram* v. *Shankar Ganpat*, 44 B 55 : 54 IC 689.
6. *Munuswami Mudaliar* v. *Govinda Raja Chettiar*, 58 M 371 : 1935 M 113 ; 153 IC 668.
7. *Sasi Bhushan Das* v. *Ram Chandra Das*, 1932 C 136 : 135 IC 871.
8. *Khub Lal Chaudhri* v. *Bechan Mandal*, 1940 P 49 : *Parakath Mayan* v. *Polakkotanteakatte Mammad Kunhi*, 1949 M 852.

plaintiff's remedy is to sue for damages for the breach".[1] One of several mortgagors can enter into an oral agreement with the mortgagee for the redemption of his share only of the mortgage and proof of such oral agreement by which money is paid and his share is redeemed is not precluded by Section 92.[2] An oral agreement between the mortgagor and the mortgagee, subsequent to the execution of a simple mortgage, providing for payment of the mortgage debt from the usufruct of the land is only a means of discharging the debt by putting the simple mortgagee in a possession and does not amount either to a lease or a usufructuary mortgage, and is consequently admissible.[3] In the case cited,[4] an oral lease for 6 years granted in satisfaction or discharge of a registered mortgage debt was held provable. Where, according to the terms of a registered usufructuary mortgage, the mortgagor was entitled to a fixed sum annually out of the income of the property, and where, by a verbal arrangement, the mortgagor was put in possession of a part of the mortgaged property the income whereof was sufficient to wipe out the annual debt, the verbal arrangement, being in satisfaction of the annual claim, was held admissible.[5] When a subsequent oral agreement relates merely to the mode of payment of mortgage money, evidence with regard to it is admissible;[6] but when the subsequent oral agreement has the effect of converting a simple mortgage without possession into a usufructuary mortgage, it cannot be said that the change effected has been with regard to the mode of payment of mortgage money.[7] When a mortgagor sets up an oral agreement with the mortgagee that the latter agreed to allow him credit on account of white-washing, repairs, etc., he is not in any way producing evidence for contradicting, varying, addition to, or sub-tracting from, the terms of the mortgage. He is merely showing an agreement relating to the payment and consequent discharge of the mortgage debt, and Section 92 is no bar to his doing so.[8] Section 92 does not preclude evidence being adduced in a suit for sale on a mortgage in proof of an oral agreement, otherwise valid and enforceable, under which the mortgagee orally agreed that the mortgage amount should be settled at a figure less than the amount actually due on the mortgage, and that in full discharge of his claim under the mortgage, the mortgagee would purchase certain properties included in the mortgage. Such an agreement does not contradict, vary, add to, or subtract from the mortgage document.[9] Where in answer to a suit on a pronote the defendant pleads that the amount was agreed to be treated as an advance towards the pay and bonus of the defendant while in plaintiff's service, and that, as the pay and bonus had fallen due before the date of suit, the note had been discharged, proof of the

1. *Sago Rai* v. *Rawjee Singh*, 1942 P 105 ; See *Ram Kirpal* v. *Baleswar*, 1941 P 246.
2. *Kandaswami Chettiar* v. *Pakkiriswami Pillai*, 1928 M 1050 : 112 IC 559 following *Subba Row* v. *Narasimham*, 27 M 368 ; but see *Tin Shew* v. *Alagappa Chettiar*, 1935 R 197 : 157 IC 126.
3. *Balam Nookamma* v. *Sadireddi Dharmayya*, 1928 M 233 (1) : 107 IC 417 ; *Jagat Pal Singh* v. *Harnam Singh*, 34 IC 745 ; *Kamla Sahai* v. *Babu Nandan Mian*, 2 IC 13 ; *Lakshminarasimha Rao* v. *Raghavamma*, 1936 M 380 : 162 IC 53 (2) ; *Sahib Din* v. *Shri Dhanush Dharji Bhagwan Brajram Bara Asthan*, 1948 O 129.
4. *Krishnaji* v. *Kashi Rao*, 1926 N 220 : 90 IC 450.
5. *Ram Awatar* v. *Tulsi Prosad Singh*, 11 IC 713 : 16 CWN 137.
6. *Chandar Has* v. *Akbar*, 110 IC 261 following *Balam Nookamma* v. *Sadireddi Dharmayya*, 1928 M 233 (1) : 107 IC 417 ; *Afsak Shaik* v. *Saurava Sundari Dasi*, 40 IC 371 , *Kamla Sahai* v. *Babu Nandan Mian*, 2 IC 13 ; *Ram Bakhsh* v. *Durjan*, 9 A 392 ; *Ariyaputhira Padayachi* v. *Muthukumaraswamy Padayachi*, 15 IC 343 : 37 M 423.
7. *Chandar Has* v. *Akbar*, 110 IC 261.
8. *Sukh Lal* v. *Murari Lal*, 1 Luck. 160 : 1926 O 273 : 95 IC 1019.
9. *Krishnaswami Rao* v. *Srinivasa Desikan*, 44 LW 944 : 71 MLJ 850.

agreement is not excluded by Section 92 of the Evidence Act inasmuch as in the circumstances, it is merely a method of payment of discharge provable and enforceable as such.[1]

On analysing the cases in which this rule has been laid down that a subsequent oral agreement in discharge of a liability created by a registered instrument, or by a contract required by law to be reduced to writing, is admissible, it will be found that the agreement relied on in such cases amounted to an actual discharge effected by the agreement itself which brought the relation of the obligor and the oblige in respect of that contract to an end.[2] The question, whether an oral agreement when does not bring to an end the relation of obligor and obligee but substitutes in place of the old contract a new contract to be performed in future is provable or not, presents some difficulty. In Rangoon the legality of such contracts has been judged from the point of view of their being for or without consideration. Thus, where, in a suit on a promissory note, the defendant pleaded an oral agreement to accept a lesser sum and to accept payment instalments, the Court considered Section 92 to be no bar to the admissibility of such agreement, but held it to be a mere *nudum pactum* and therefore not enforceable. The Court, however, observed that the result might well have been otherwise if even one instalment had actually been paid.[3] The Bombay High Court holds that where the plea is that a new contract has been made, the effect of which is to rescind or alter the terms of the original transaction, oral evidence of such a contract is within the rule of exclusion enacted by Section 92. But, on the other hand, where all that the defendant wishes to prove is some fact or facts tending to show that the obligation has been discharged, the evidence is admissible, as it does not relate to any oral agreement rescinding or altering the terms of the original contract. In other words, according to the Bombay view, while a completed discharge is provable, a new oral executory contract yet to be performed is not. Thus, where, in a suit to recover a sum of money due to the plaintiff under a mortgage-deed executed by the defendant in favour of the plaintiff, the defendant pleaded that the plaintiff had agreed to accept a lesser amount than what was due towards interest and that, as the defendant had subsequently paid this amount to the plaintiff, the latter was not entitled to recover anything by way of interest, this Court held that the discharge of interest pleaded could not be established, as it was based upon an alleged oral agreement which could not be proved under Section 92, Proviso (4), Evidence Act.[4] The Madras and the Allahabad High Courts also deal with such cases on the same principle and, while admitting evidence of actual remission and satisfaction of the debt, they reject evidence of an agreement to accept less at some future time.[5] A mortgagee, being desirous of getting in his outstanding debts, made an oral offer to the

1. *Satheappa Chettiar* v. *K. Muthusami Pillai*, 1926 M 537 : 92 IC 393 ; but see *Murhuraman Chettyar* v. *Venkata Reddy*, 1937 R 521, where discharge of a promissory note on payment of a smaller amount was held not to be provable.
2. See *Kalumal Devandas* v. *Kessumal Naraindas*, 1929 S 153 : 114 IC 97.
3. *Maung Pu* v. *Maung Po Thant*, 6 R 191 : 1923 R 144 ; See *Kalumal Devandas* v. *Kessumal Naraindas*, 1929 S 153 : 114 IC 97.
4. *Sukhlal Rambakas Pardeshi* v. *Jetha Opajishet Mawadi*, 1928 B 522 : 115 IC 382 ; See also *Jagannath* v. *Shankar*, 44 B 55 : 54 IC 689.
5. *Vaiyanatha Rao* v. *Kandappa Chetty*, 54 M 889 : 1931 M 636 : 132 IC 292 ; *Balasundra Naicker* v. *Ranganatha Ayyar*, 53 M 127 : 1929 M 794 ; *Krishnaswami Rao* v. *Srinivasa Desikan*, 44 LW 944 ; *Mohammad Niaz Ahmad Khan* v. *Nanhe Mal*, 1929 A 615 : 119 IC 107.

mortgagor that he would accept the principal money in full satisfaction of the mortgage debt, foregoing the interest that had accrued for some three years. The mortgagor accepted the offer and took steps to raise the money but he did not actually raise the money and no tender of the principal money was made to the mortgagee. Held, that as there was no payment of the principal money, the provisions of Section 63 of the Contract Act did not apply and that the oral agreement was not provable under Section 92 of the Evidence Act.[1] Similarly, the Lahore High Court has held that where a promissory note is payable on demand, an oral agreement, contemporaneous or subsequent, providing for a different mode of satisfaction is inadmissible in evidence.[2] Where, in a case of mortgage with possession, the deed provides that redemption would be effected on payment of the "entire mortgage money" by the mortgagor, evidence of a subsequent oral agreement for delivery of possession of the property to the mortgagor on payment by him of a portion of the mortgage-money is inadmissible.[3] Oral evidence to prove an agreement to take less than what is due under a promissory note is not admissible. The criterion does not lie in whether the subsequent agreement is by law required to be in writing, but it lies in whether the original contract, grant or disposition of property, the terms of which the subsequent is to rescind or modify, is by law required to be in writing.[4] The Calcutta High Court holds that a promisee can by a unilateral act of grace on his part dispense with the performance of an obligation and that since such dispensation is one sided its proof is not barred by Section 92, Proviso 4. Thus a debtor may show by oral evidence that the creditor by an oral agreement subsequent to the execution of a hand-note payable with interest, remitted the interest that had accrued or was to accrue in future under the hand-note.[5]

Oral agreement to postpone the right of causing the mortgaged property to be sold.—A voluntary postponement of performance at the request of the other party does not amount to a new contract rescinding the old.[6] Therefore, evidence of an oral agreement to forbear for four days from exercising the power of sale given by a mortgage-deed is admissible, as the agreement does not modify any of the terms of the mortgage.[7]

A contemporaneous oral agreement as to the mode of discharge of an obligation created by a written instrument is admissible.—Proviso (4) to Section 92 deals with subsequently oral agreements and it has already been noticed that a subsequent oral agreement in discharge or satisfaction of liability created by a written instrument which has been registered, or by a contract which is required by law to be reduced to writing, is not excluded by the Proviso.[8] Even if the oral agreement be contemporaneous with the written contract, evidence of it is not excluded by the section if the agreement merely relates to the mode of discharge of a liability created by the written instrument.

---

1. *Maung Shwe Min* v. *The Chetty Firm of A.M.*, 43 IC 913.
2. *Bharat National Bank, Ltd., Delhi* v. *Mohan Lal Bhagwandas*, 63 IC 748.
3. *Aziz-ud-Din* v. *Arifa Begum*, 12 Luck, 563 : 1937 O 1 : 165 IC 718.
4. *Ma On Baw* v. *Chettyar Firm*, 1935 R 188 ; *Muthuraman Chettyar* v. *Venkota Reddy*, 1937 R 521.
5. *Jitendra Chandra* v. *S.N. Banerjee*, 1943 C 181. See also *Ram Kumar Missir* v. *Ram Nath Missir*, 1942 P 315.
6. Phipson Ev., 7th Ed., 565.
7. *Trimbak Gangadhar Ramade* v. *Bhagwandas Mulchand*, 23 B 348.
8. *See* notes to this section under the heading, "subsequent oral agreement in discharge or satisfaction of the obligations created by a registered instrument or by a contract required by law to be reduced to writing, is admissible, discharge of a mortgage or pronote debt".

Thus, where, in defence to a suit upon a hypothecation bond payable by instalments, it was pleaded that, at the time of the execution of the bond, it was orally agreed that the obligee should, in lieu of instalments, have possession of part of the hypothecated property until the amount due on the bond should have been liquidated from the rents, and that, in accordance with this agreement, the plaintiff obtained possession of the land, and that he had thus realised the whole of the amount due, it was held that the oral agreement was not one which detracted from, added to, or varied, the original contract, but only provided for the means by which the instalments were to be paid, and that it was therefore admissible in evidence.[1] But where a written contract expressly stipulates the manner in which the obligation arising out of it has to be discharged, it seems that the oral evidence of any contemporaneous or subsequent agreement providing for a different and inconsistent mode of discharge will be inadmissible.[2] Thus, an oral agreement by the executant of a promissory note that instead of money being paid payment shall be made in the form of a transfer of land is not in itself satisfaction, but is an agreement modifying the terms of the original contract by substituting payment by means of a transfer of immovable property for payment in cash, Proviso 4 to Section 92 debars the proof of any such agreement by means of oral evidence.[3]

An independent contract which does not purport to rescind or modify the original written contract is not governed by the Proviso; subsequent oral agreement to re-convey property sold by a registered deed.—The Proviso deals with the admissibility or otherwise of a subsequent oral agreement or which purports to rescind or modify the original transaction reduced to writing. Where, therefore, the agreement sought to be proved does not rescind or modify the original transaction but is an entirely new transaction, its admissibility is not governed by the rule in the Proviso.[4] From this point of view there is an essential distinction between a conveyance and an ordinary contract. When A has conveyed certain property to B by a registered instrument, the contractual relation between A and B comes to an end, and any subsequent transaction between A and B concerning this property will be presumed to be a new and independent transaction and no rescission or modification of the original conveyance by A in favour of B. Where the contract is partially executory, as in the case of a mortgage or a lease, it may be difficult to decide whether a subsequent agreement between the mortgagor and the mortgagee, or the lessor and the lessee, concerning the property mortgaged or leased, amount to an agreement rescinding or modifying the original transaction, or whether it is an entirely new transaction; but in the case of completed contract such difficulty can hardly arise.[5] The fourth Proviso to Section 92 cannot mean that once a grant or disposition of property has been reduced to writing and registered, an oral contract or disposition of it is barred for all time.[6] There is nothing to prevent the parties from substituting another contract in place of the original contract;[7] but if the

1. *Ram Bakhsh* v. *Durjan*, 9 A 392, approved in *Inderjit* v. *Lal Chand*, 18 A 168.
2. See *Mohammad Nazir Ahmed Khan* v. *Nanhe Mal*, 1929 A 615 : 819 IC 107.
3. *N.V.N. Nachiappa Chettyar* v. *Theivanai Achi*, 1934 R 228 : 151 IC 398.
4. See *Rakhmabai* v. *Tukaram*, 11 B 47 ; *Herambdev Dharnidhardev* v. *Kashinath Bhasker*, 14 B 472. As to a new contract supperseding a decree, see *Ratanlal* v. *Anwar Khan*, 53 IC 527, and notes to this section under the heading "oral agreement adjusting or varying a decree, whether provable".
5. *See* the judgment of Chaterjee, J., in *Bhagwan Singh* v. *Narain Singh*, 129 PWR 1908.
6. *Per* Chaterjee, J., in *Bhagwan Singh* v. *Narain Singh*, 129 PWR 1908.
7. *U. Kyo* v. *Mg. Pan Yo*, 1932 R 102 (1) : 74 IC 154.

law requires that a new contract shall be made with certain formalities then, unless it is so made, the court cannot recognize it.[1] Where, therefore, there is a subsequent new contract between the parties to an instrument such as does not amount to a rescission or modification of the original transaction, its admissibility will not be governed by the Proviso, and will depend upon whether the new contract is or is not required by law to be in writing, and, if it is required by law to be in writing, on the further questions whether it is required by law to be registered or not. The question whether the new contract is for or without consideration will also affect its validity. Thus, in the case of an out and out sale by a registered deed, an independent contract to re-sell, either oral or by an unregistered, deed, can be proved; but where the contract is not an independent transaction and forms part and parcel of the original transaction.[2] Where, however, a mortgage debt was sought to be discharged by oral sale of the equity of redemption of a portion of the mortgaged property in favour of the mortgagee, this evidence of discharge of the mortgage debt was held inadmissible on the ground that the sale was not in the form prescribed for it by law.[3] Similarly, a written agreement to deal with the rents and profits of the mortgaged property in a manner contrary to the terms of the registered mortgage-deed, being an agreement which requires registration, is admissible in evidence if it is not registered, and the terms of the registered mortgage-deed are not affected by it.[4] Where A transferred some property containing a latrine to B by means of a registered deed reserving to himself the right to use the latrine, but by a subsequent oral agreement the latrine was removed from B's part of the property to that of A, and A was allowed to make a door on the side where the latrine had originally stood and to use that portion for the passage of sweepers and flow of water, it was held that the new agreement was an entirely independent agreement and not one in variation of the terms of the sale deed and was therefore provable, not being required by law to be in writing or to be registered.[5]

PROVISO (5)

Incident annexed by usage to contracts.—Usage is admissible to annex unexpressed incidents (provided they are not inconsistent with those which are expressed) to oral or written contracts, grants or wills, it being presumed that the parties have not intended to express the whole of their meaning in words but tacitly to adopt the usages of the particular market or place. This rule is not confined to mercantile transactions, but applies to all others in which established usages prevail. Independent matters however, not in any way incidental to a contract cannot be annexed by usage.[6] The reason of the rule on which this Proviso is based was explained with great lucidity by Parker, B., in delivering the judgment of the Exchequer Chamber in *Hutton* v. *Warren*.[7] "It has

1. *See* observations of Ayyangar, J., in *Meenakshi Sundaram Pillai* v. *S. T. Chenchu Mudaliar*, 1928 M 459 : 109 IC 18 ; *U. Kyo* v. *Mg. Pan Yo*, 1923 R 102 (1) : 74 IC 154.
2. *Ma Nan Shein* v. *U. Yaing*, 1927 R 314 : 105 IC 428 ; *Chinnakkal* v. *Chinnathambi Goundan*, 1934 M 703 : 152 IC 634 (FB) ; see *Harkishandas Bhagwandas* v. *Bai Dhanu*, 50 B 566 : 1926 B 497 : 98 IC 634 (FB) ; *Kadappa Bapurao Desai* v. *Lingappa Ramchandra Desai*, 1949 PC 35 : 62 MLW 35 : 75 IA 259 : 51 BLR 173 ; but see *Meenakshisundaram Pillai* v. *S.T. Chenchu Mudaliar*, 1928 M 459 : 109 IC 18.
3. *Ariyayuthira Padayachi* v. *Muthukumaraswamy Padayachi*, 15 IC 343 : 37 M 423.
4. *Abdulla Khan* v. *Basharat Hussain*, 17 IC 737 : 35 A 48 : 40 IA 31.
5. *Suraj Prasad* v. *Maheswari Prasad*, 96 IC 276.
6. Phipson, Ev., 7th Ed., 102.
7. *Hutton* v. *Warren*, 1 M & W 474.

been long settled," said His Lordship, "that in commercial transactions extrinsic evidence of custom and usage is admissible to annex incidents to written contracts in matters with respect to which they are silent. The same rule has been applied to contract in other transactions of life in which known usages have been established and prevailed; and this has been done on the principle of presumption that in such transactions the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages."[1] Where a contract is silent in respect of some incidental term or condition which, according to the course of business established in a particular trade, it is customary to find included in such a contract, evidence of custom is admissible to prove that such term or condition formed part of the contract, unless the incorporation of the term or condition in the contract will have the effect of introducing something repugnant to or inconsistent with the tenor of the written agreement.[2] The law recognizes the fact that men assume that the words of their contract will be understood in their trade meanings and that the terms of their agreement will be governed by the well reconized usages of the calling to which they relate, and it necessarily looks to these usages to ascertain the real thought of the contract. It finds that merchants do not write all the terms of their contracts but rely upon the knowledge and good faith of one another as to matters so well known that special reference to them would be burdensome and unnecessary, and they accordingly agree upon many of the terms of their contract by mere silence. What these terms are must, therefore, be shown by parole evidence.[3]

Meaning and proof of customs or usage.—The standard of proof of a mercantile usage is that it does not need the antiquity, the uniformity, or the notoriety of the custom which becomes a local law. The usage may still be in the course of growth, it may require evidence for its support in each case; but in the result it is sufficient if it appears to be so well known and acquiesced in that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract.[4] In order to be legal, a custom or usage must be, firstly, certain; secondly, invariable, thirdly, reasonable, and fourthly, such as to render it fair to presume that both the parties had knowledge of it and made the particular agreement with reference to it—a matter not of opinion but of universal acquiescence.[5]

Distinction between evidence of usage and evidence of practice.—The evidence made admissible by this Proviso is that of a custom or usage and not the practice of a particular individual or institution. In the case of a custom or usage, the Courts are at liberty to import into a contract incidents not excluded by the terms of such contract even though a party to the contract was not actually cognizant of the custom or usage, but in the case of a practice it must be shown that it actually constituted a part of the

1. See *Smith* v. *Ludha Ghella Damodar*, 17 B 129 ; *Bejoy Krishna Saha* v. *North Bengal Sugar Mills Co. Ltd.*, 1949 C 490 : ILR 1945, 2 C 173.
2. *Holmes Wilson & Co. Ltd.* v. *Bata Kristo De*, 54 C 549 : 1927 C 668 : 104 IC 268.
3. Per Mukerji, J., in *Lakurka Coal Co. Ltd.* v. *Jumnadass Bhagwandass*, 33 IC 838 ; See also *Tacki* v. *Dharamsey*, 1947 B 98.
4. *Goverdhadass* v. *Rawji Hirji & Co.*, 76 IC 62, following *Juggomohan* v. *Manickchand*, (1859) 7 Moo IA 263 (PC) ; *Chandanmal Benganey* v. *National Bank of India*, 51 C 43 : 1924 C 552 : 79 IC 757 ; *Kasiram Pania* v. *Hurnundroy Fulchand*, 1921 C 809 : 58 IC 396.
5. *Goverdhandass* v. *Rowji Hirji & Co.*, 76 IC 62 ; See also *Lakurka Coal Co. Ltd.* v. *Jumnadass Bhagwandass*, 33 IC 838 ; In the matter of the *Indian Arbitration Act* v. *Monomotha Nath Mullick*, 35 IC 3.

contract.[1] Thus, in order, that the practice on a particular estate may be imported as a term of the contract into a contract in respect of land in that estate, it must be shown that the practice was known to the person whom it is sought to bind by it, and that he assented to its being a term of the contract, and when the person sought to be bound by the practice is an assignee for value of rights under that contract, it must also be shown that he and all prior assignees for value knew that the practice was a term of the original contract.[2]

The annexing of the incident must not be inconsistent with the terms of the document.—The incidents which are annexed to a contract by custom or usage may be expressly excluded from the contract, in which case evidence of custom or usage will be inadmissible, being inconsistent with the terms of the written contract. Though evidence of known usage is receivable to supplement the provisions of the written agreement on the hypothesis that the contract is in truth partly expressed and in writing, and partly implied or understood or unwritten, the evidence cannot be admitted to contradict the positive stipulations in the written contract.[3] The usage of which evidence is received must not be repugnant to or inconsistent with the written contract.[4] The evidence of custom or usage is receivable only when the incident which it is sought to import into the contract is consistent with the terms of the written instrument. If inconsistent, the evidence is not receivable, and the inconsistency may be evinced (a) by the express terms of the written instrument, or (b) by implication therefrom.[5] Where the parties to a contract have expressed the agreement at which they have arrived in a written document the terms of which are capable of a reasonable interpretation according to the natural meaning of the words that are used, a trade usage which, if it regulated the rights and obligations of the parties, would alter fundamentally the nature and character nor affect the rights and obligations of the parties engaged in the transaction, and it is inconsistent with the terms of the written instrument, evidence of such a usage is inadmissible both under the provisions of the Evidence Act and the principles of the common law. Such a usage will not bind the parties, or become admissible in evidence merely because the parties intended that their rights and obligations should be controlled by the usage, when they had concluded a contract, the terms of which are fundamentally inconsistent with the usage that it is sought to incorporate in the contract.[6] Thus, a usage that, where goods are ordered by dealer at a fixed price "C.I.F., commission nill", the merchant is entitled to make and retain a profit by buying from the supplier at one price and selling to the dealer at the indent price, is fundamentally inconsistent with the terms of the contract of indent and is inadmissible in evidence whether the dealer is aware of it or not.[7] Similarly, where the parties have contracted for a shipment on board or a ship or steamer, or allow evidence of a usage that delivery to a Railway Company at an inland town should be regarded as equivalent to shipment on board a vessel at a seaport town would be to allow evidence of a usage repugnant to,

1. See *Mana Vikram* v. *Rama Patter*, 20 M 275.
2. *Mana Vikram* v. *Rama Patter*, 20 M 275.
3. *Chandanmal Benganey* v. *National Bank of India*, 51 C 43 : 1924 C 552 : 79 IC 767 ; See *Majidan Bewa* v. *Basanta Kumar Basu*, 1933 C 772.
4. *Kasiram Pania* v. *Hurnundroy Fulchand*, 1921 C 899 : 58 IC 396.
5. *Smith* v. *Ludha Ghella Damodar*, 17 B 129, per Farran, J.
6. *Holmes Wilson & Co.*v. *Bata Kristo De*, 54 C 549 : 1927 C 668 : 104 IC 268.
7. *Holmes Wilson & Co.* v. *Bata Kristo De*, 54 C 549 : 1927 C 668 : 104 IC 268.

or inconsistent with, the express terms of the contract.[1] The defendant bank under instructions from M.G. & Co. opened a "confirmed irrevocable" credit in favour of the plaintiff, but expressly stipulated not to release the plaintiff from the liability attaching to the drawer of a bill of exchange. In a suit brought by the plaintiff against the defendant bank, the plaintiff sought to adduce evidence of a custom that the bank should be taken to have acted as guarantors for M.G.& Co. The Court, however, held that evidence of such custom was inadmissible being inconsistent with the express stipulation that the plaintiff was not released from the liability attaching to the drawer of a bill of exchange.[2] Where, in a *kabuliyat* creating a tenancy for a term of years, there was an express statement that the tenant had no right of sale, gift or transfer without the landlord's consent and there was also an implied agreement of the tenancy not being heritable, it was held that evidence of custom by which it was sought to be shown that the tenancy was transferable and heritable; was inadmissible, being repugnant to the written agreement.[3] Where tenants make themselves jointly responsible for the payment of rent under a written lease it is not open to any of them to give evidence of a usage that each of them is responsible only for the payment of his share of rent, as it would amount to converting one joint tenancy into several tenancies.[4]

Test of admissibility of the evidence of usage.–The mere fact that the usage varies the apparent contract is not of itself sufficient to exclude the evidence. The test is whether the incident, if expressed in written contract, would make it insensible or inconsistent or thoroughly unreasonable.[5]

Evidence of a custom extending due date.–Evidence of a custom by which due date mentioned in a written contract is extended is not inadmissible, if the extension is not absolutely repugnant to the express terms of the contract. In such a case the *onus* of proving a date different in meaning from that specified in the contract is heavier than in the case of a point on which the terms of the contract are silent, and the evidence must, in order to affect the meaning of the date, be very clear and consistent.[6] Similarly, evidence of a custom that when due date falls on a holiday, the contract may be performed on the next working day is admissible, but the party relying on such evidence must establish that the usage, when read into the written contract, does not make it insensible or inconsistent.[7] When an award makes a certain sum of money payable within 60 days, evidence that, according to the usage of the place, 60 days means two months or 62 days is inadmissible, the words of the award being perfectly clear.[8]

Custom as to the rights and liabilities of brokers acting for undisclosed principals.–Evidence that there is a custom in a certain trade that brokers acting for disclosed principals are liable upon contracts made by them is admissible.[9] But whereas evidence of usage making the broker in such cases liable is admissible as being consis-

1. *Smith* v. *Ludha Ghella Damodar*, 17 B 129.
2. *Chandanmull Benganey* v. *National Bank of India, Ltd.*, 51 C 43 : 1924 C 552 : 79 IC 757.
3. *Mohamed Ayejuddin Mea* v. *Prodyot Kumar Tagore*, 48 C 359 : 1921 C 741 : 61 IC 503.
4. *Morris* v. *Panchananda Pillay*, 5 MHC 135.
5. *Kasiram Pania* v. *Hurnundroy Fulchand*, 1921 C 809 : 58 IC 396.
6. *Goverdhandas* v. *Rowji Hirji & Co.*, 76 IC 62 ; *Edmund Bowes, J.B.Martin* v. *Charles Shand*, etc., 2 AC 455.
7. *Kashiram Pania* v. *Hurnundroy Fulchand*, 1921 C 809 : 58 IC 396.
8. *Kesho Ram* v. *Thakur Das*, 1925 L 180 (2) : 78 IC 80.
9. In the matter of the *Indian Arbitration Act* v. *Monmotha Nath Mullik*, 35 IC 3.

tent with the contract, evidence of a usage inconsistent with the terms of the contract is not. If a contract is signed by a person as a broker for an undisclosed principal, evidence that the broker is by the custom of the trade treated as principal is inadmissible, being inconsistent with the terms of the written contract.[1]

Custom of drawing without disclosing the drawer's agency.—Where a *hundi* is drawn by an agent without the drawer's agency being disclosed in the *hundi*, evidence of custom that the drawer is not liable on such a *hundi* is admissible.[2] But see notes to this section under the heading. "Whether the ostensible executant of a written contract can show that he signed otherwise than as an executant, e.g., as an agent, partner, surety, witness or a *benamidar*."

Usage as to the payment of interest.—Interest, where not expressly stipulated for in a written contract, may be claimed on the ground of usage.[3]

Evidence of usage to show that words are used in a special sense.—See notes to Section 98 under the heading "Evidence of usage".

PROVISO (6)

Surrounding circumstances.—The principle on which this Proviso is based is that, as most documents refer expressly or impliedly to the circumstances under which they were written, the Court,when called upon to interpret them, should be placed as nearly as possible in the same situation as the writer.[4] Therefore, where a written contract is doubtful in its meaning, the surrounding circumstances existing at the creation of the contract and the subject-matter to which it was designed and intended to apply can be looked into.[5]

Surrounding circumstances admissible to show the identity or extent of the subject-matter or meaning of terms of identity of a person.—In order to ascertain the identity or extent of the subjects referred to in a document, or the sense in which particular terms have been used, or to clear up any other doubt that may arise in applying the document to the case, evidence not only of the circumstances surrounding the writer but of his knowledge, treatment and habits of speech with reference thereto (though not of his direct declarations of intention) may in general be received. Such evidence, however, is not admissible : (i) where the words are unambiguous, or the difficulty is merely a grammatical one; nor (ii) where the language is so vague or imperfect that to admit extrinsic evidence would be not to interpret the document, but virtually to make a new one; nor (iii) where the meaning or application sought to be proved would conflict with some rule of law or construction.[6] The Court can look into the evidence of surrounding circumstances to establish the identity of an endorser.[7]

---

1. *Nanda Lal Roy* v. *Gurupada Haldar*, 51 C 588 : 1924 C 733 : 81 IC 721. See however, In the matter of the *Indian Arbitration Act* v. *Monmotha Nath Malik*, 35 IC 3.
2. *Hari Mohan* v. *Krishna*, 9 BLR App 1.
3. See *Juggomohan Ghose* v. *Kaisree Chand*, 9 MIA 260.
4. Phipson, Ev., 7th Ed., 592.
5. *Nand Kishore* v. *Behari Lal*, 1932 A 600 ; 140 IC 470 ; see also *Tacki* v. *Dharamsey*, 1947 B 98 ; *Munna Singh Rajput* v. *Narain Singh, etc.*, 1929 N 91 : 107 IC 658 ; *Asa Ram Ludheshwar*, 1938 N 335 ; *Sukumar Banerjee* v. *Hiralal Chatterjee*, 1954 C 48 : 1954 Cr LJ 13.
6. Phipson, Ev. 7th Ed., 591.
7. See *Punjab Co-operative Bank, Ltd.* v. *Muhammad Yusuf*, 1939 L 225 ; *Syed Sayeed Hasan Razvi* v. *Mohammad Sultan-uddin Khan* 1951 Hyd. 79(2).

Admissibility of surrounding circumstances to explain or interpret written contracts, grants and instruments other than wills.—Evidence of surrounding circumstances may be given to ascertain (i) who and what the parties to a written contract are, and their legal relation to each other; so, (ii) to identify the subject-matter of the contract, the existence of any specific property or thing answering the written description may, on the same principle, be proved. Thus, evidence of surrounding circumstances has been admitted to identify land sold,[1] furniture assigned by a deed to which no schedule was attached,[2] the amount of a debt left blank in a deed of release,[3] the locality over which an agent had been employed to travel,[4] or the identity of a document referred to in a written contract.[5] And the extent as well as the identity of the subject-matter may be similarly shown.[6] Where an agreement is ambiguous, the object of the parties is generally relevant to determine its scope,[7] and, if not expressed in the document, may be proved extrinsically.[8] Extrinsic evidence of every material fact which will enable the Court to ascertain the nature and qualities of an instrument, or, in other words, to identify the persons to whom and the things to which the instrument refers, must of necessity be received.[9] Thus, where a letter containing an acknowledgement of debt was addressed to a Mrs. W., evidence to show that the letter was in fact addressed to Mrs. S., who also known as Mrs. W., as well as evidence to identify the debt acknowledged in the letter, was held admissible.[10] Though parol evidence is not admissible to contradict, vary add to, or subtract from, the terms of the submission to arbitration which has been reduced to writing by the parties, such evidence is admissible to show in what manner the language of it is related to existing facts. Thus, if an undescribed dispute is referred to arbitration, evidence is admissible to show what the actual dispute was at the time of the submission.[11] Where a decree based on an award is ambiguous in its terms, the evidence of the arbitrator is admissible for the purpose of interpreting the decree.[12] Where, by a deed of settlement, almost the whole of the settlor's immovable property was transferred to trustees together with buildings and appurtenances thereto and the question was raised as to whether certain specific properties were included in the deed, it was held that the ambiguity in the deed being latent, it construing the deed the subsequent conduct of the parties thereto could be legitimately looked into under this Proviso for the purpose of ascertaining to what persons and things the expressions used therein were intended to apply.[13] Similarly, where the question is whether a certain village is or is not included in a lease which does not specifi-

1. *Parrott* v. *Watts*, 47 LJCP 79 ; *Plant* v. *Bourne*, (1897) 2 Ch 281.
2. *England* v. *Downs*, 2 Beav 522.
3. *Harrhy* v. *Wall*, 1 B and Ald 103.
4. *Mumford* v. *Gething*, 7 CB (NS)305.
5. *Shortrede* v. *Cheek*, 1 A & E., 57 ; *Janson* v. *Poole*, 31 TLR 336.
6. Phipson, Ev., 7th Ed., 592.
7. *Hari* v. *Standard Co.*, 22 QBD 499.
8. Phipson, Ev., 7th Ed., 593.
9. Taylor, § 1194 ; *Subramania Iyer* v. *Rajeswara Sethupathi*, 38 IC 627 : 40 M 1016 ; *Dhunput Singh* v. *Sheikh Jawahur Ali*, 8 WR 152.
10. 5 BLR 633.
11. *Ghellabhai Atmaram* v. *Nandubai*, 21 B 335, 345, Per Farren, J.; see also *Gadula Rami Naidu* v. *Meesala Seethan Naidu*, 1935 M 276 : 154 IC 821 : 40 MLW 914 ; *Babu Ram* v. *Lal Ram*, 1929 A 415 : 116 IC 853 ; *Pyarelal* v. *Ghanaram*, 1925 N 203 : 83 IC 22.
12. *Nazir Mohammad Khan* v. *Abdul Ghani*, 1937 L 168 : 165 IC 429.
13. *Subramania Iyer* v. *Rajeswara Sethupathi*, 38 IC 627 : 40 M 1016.

cally mention it, evidence extrinsic of the document is admissible on the point.[1] Where a deed recites that the property is sold 'subject to the payment of all taxes, rates, charges, and assessments leviable or chargeable," extrinsic evidence is admissible to show the sense in which the parties understood the words of the deed.[2] Where a deed of transfer raises an ambiguity as to the nature of the interest in the property it purports to convey, extrinsic evidence (including evidence as to the course of dealing with the property) may be taken into consideration in construing the deed.[3] If the question is whether a lease is perpetual or not, evidence as to the surrounding circumstances is admissible, because it explains what, standing alone, is incapable of explanation-whether the grant is only to the person named in the lease or to him and his heirs.[4] Where the document creating the tenancy is equivocal or ambiguous in its terms, the attendant circumstances must be taken into consideration.[5]

Sale or mortgage?—Where a deed taken by itself is a deed of sale out and out, it cannot be held to be a mortgage unless it was the intention of the parties that the transaction should be only a mortgage.[6] But oral evidence of intention, or of a contemporaneous oral agreement, or of the acts and conduct of the parties is inadmissible to show that what on the face of it purpose to be out and out conveyance was intended by the parties to be a mortgage, though evidence of the surrounding circumstances is admissible to show how the language of the document is related to existing facts.[7] The question whether a transaction embodied in a deed is a mortgage by conditional sale or an out an out sale depends upon the intention of the parties. Oral evidence of intention is not admissible for the purpose of construing the deed or ascertaining the intention of the parties. The case has to be decided on a consideration of the contents of the document with such extrinsic evidence of surrounding circumstances as might be required to show in what manner the language of the document is related to existing facts.[8] This Proviso makes admissible only those surrounding circumstances which show how the language of a document is related to existing facts, and the Court has no unfettered power to consider all the surrounding facts and circumstances.[9] In other

1. *Dhanput Singh* v. *Sheikh Jawahur Ali*, 8 WR 152 ; see also *Ram Lal* v. *Harrison*, 2 A 832 (identity of the property mortgaged).
2. *Dadoba Janardhan* v. *The Collector of Bombay*, 25 B 714, 751.
3. *Dinabandhu Nandi* v. *Manilal Parik*, 52 IC 443.
4. *Sambhushet Teli* v. *Sitaram Hari Prabhu*, 3 Bom LR 768.
5. *Lal Chose* v. *Nilkantha Das*, 1925 C 340 : 80 IC 898.
6. *Sisir Kumar Mallik* v. *Naran Chandra Mallik*, 1929 C 548 : 119 IC 803.
7. *Maung Kyin* v. *Ma Shwe Law*, 42 IC 642 : 45 C 320 : 1917 PC 207 : 44 IA 236 ; *(Raja Bahadur) Narasingerji Gyanagerji* v. *Raja Panuganti Parthasardhi Rayanim Garu* 51 IA 305 : 47 M 729 : 1924 PC 226 : 82 IC 993 ; *Baijnath Singh* v. *Hajee Vally Mahommed Hajee Abba*, 3 R 106 : 1925 RC 75 : 86 IC 332 ; *Balkishan Das* v. *Legge*, 27 IA 58 : 22 A 149 (PC) ; *Venkataratnam* v. *Venkataswami* 1929 M 807 : 127 IC 202 ; *Sutharsana Chariar* v. *S. Samarapuri Chettiar*, 1928 M 690 : 110 IC 837 ; see *Thaker Das* v. *Tekchand*, 1944 L 175. As to the inadmissibility of a contemporaneous oral agreement, see *(Dasari) Lakshmiayya* v. *Murahari*, 1930 M 547 : 28 IC 512 ; *Talakchand Bheraji* v. *Atmaram Keshaw Vaidya*, 1924 B 58 : 77 IC 342. See notes to this section under the heading "Oral evidence of the intention or the acts and conduct of the parties whether admissible to show that an instrument was intended by the parties to be different from what it purports to be, or to show that there was a contemporaneous oral agreement varying the terms of the instrument ; mortgage or sale"?
8. *Thakar Das* v. *Tekchand*, 1944 L 175 : 214 IC 105 : 46 PLR 101.
9. *Sisir Kumar Mallik* v. *Naran Chandra Mallik*, 1929 C 548 : 119 IC 803 ; *Ram Narain Prasad Singh* v. *Manki Singh*, 1954 P 562.

words, evidence of circumstances surrounding a document is admissible only for the purpose of throwing light on its meaning, and it is not permissible to consider such surrounding circumstances in order to hold that a document is different in its nature from what it actually purports to be, for instance, to hold that a document, which on the face of it is a sale deed, was intended to operate as a mortgage.[1] Where a document is a perfectly plain, straightforward document, no extrinsic evidence is required to show in what manner the language of the document is related to existing facts. It is only when the terms of a document require explanation that evidence can be led within the restrictions laid down by Proviso (6) to Section 92 of the Evidence Act.[2]

Evidence of surrounding circumstances is not admissible where there is no ambiguity in the document, or where the ambiguity is a "patent" ambiguity as distinguished from a "latent" ambiguity.–Evidence of surrounding circumstances is not admissible (i) where the words are unambiguous, or the difficulty is merely a grammatical one, nor (ii) whether language is so vague or imperfect that to admit extrinsic evidence would be not to interpret the document, but virtually to make a new one,[3] nor (iii) where the meaning or application sought to be proved would conflict with some rule of law or construction.[4] The surrounding circumstances referred to in the Proviso are circumstances which enable the Court to ascertain and give effect to the full intention of the parties as expressed in the document. If, therefore, the object of giving the surrounding circumstances in evidence is to contradict the terms of the document, the evidence will be rejected.[5] It is a well known rule of interpreting that extraneous matter should not be taken into consideration in interpreting a deed, unless the surrounding circumstances are required to show in what manner the language of the document is related to existing facts.[6] Where, therefore, a document is a perfectly plain, straightforward document, no extrinsic evidence is required to show in what manner the language of the document is related to existing facts.[7] It is only where the terms of a document require explanation,[8] or the document is of a doubtful tenor,[9] that evidence may be led within the restrictions laid down by Proviso (6) to Section 92 of the Evidence Act. In construing a deed, evidence, so far as it relates to prove how the language of the document is related to the existing facts and surrounding circumstances, is admissible, but the Court has no unfettered power to consider all the surrounding facts and circumstances to determine the nature of the document.[10] Where the terms of a contract are unambiguous and clear, there can be no question that the evidence to prove

1. *Kaluram* v. *Gajasa*, 1928 N 182 : 107 IC 201 ; *Martand Trimbak Gadre* v. *Amritrao Raghojirao Damale*, 49 B 662 : 1925 B 501 ; 93 IC 924 ; *Ganpatrao Apajijagtap* v. *Bapu Tukaram*, 58 IC 574 : 44 B 710.
2. *Milkimal* v. *Totomal*, 1939 S 200 ; *Ganpatrao Apajijagtap* v. *Bapu Tukaram*, 58 IC 574 : 44 B 710.
3. *See* Section 93.
4. Phipson, Ev., 7th Ed., 591.
5. *(Raja Bahadur) Narasingerji Gyanagerji* v. *Rajah Panuganti Pathasaradhi Rayanim Garu*, 1921 M 498 ; *Afshar M.M. Tacki* v. *Dharamsey Tricamdas*, 1947 B 98 : 48 BLR 661.
6. *Irfan Ali* v. *Official Receiver, Agra*, 52 A 748 : 1930 A 837 : 130 IC 631.
7. *Punjab National Bank, Ltd.* v. *S B. Chaudhry*, 1943 O 392 ; *Milkimal* v. *Totamal*, 1939 S 200 ; See *Haji Khan Gul Khan* v. *Chottu Ram*, 1939 Pesh 41 ; *Ganpatrao Apaji Jagtap* v. *Bapu Tukaram*, 58 IC 574 : 44 B 710 ; *Basanti Devi* v. *Official Receiver*, 1936 L 508 : 164 IC 463.
8. *Punjab National Bank, Ltd.* v. *S.B. Chaudhry*, 1943 O 392 ; *Ganpatrao Apaji Jagtap* v. *Babu Tukaram*, 56 IC 574 : 44 B 710.
9. *Lakshmiayya* v. *(Koppolu) Murahari*, etc., 1930 M 547 : 128 IC 512.
10. *Sisir Kumar Mallik* v. *Naran Chandra Mallik*, 1929 C 548 : 119 IC 803, *per* Suhrawardy, J., *Darbar Saheb* v. *Bare Lal Kandrap Nath Sah Deo*, 1936 P 275 : 162 IC 797.

that the terms of the contract were used in a different sense must be excluded under Section 92 of the Evidence Act, nor is the Court in such a case entitled to speculate as to meaning of words in the contract. But where the wording of the contract is capable of different interpretations, the Court is justified, and it is its duty, to put a proper construction upon the terms of the contract and it is justified in finding with what intention a particular expression was used, as a matter of pure construction.[1] See notes to Section 94 under the heading "Extrinsic evidence not admissible to construe an unambiguous document."

Construction of printed documents.—Where printed forms are filled in with written words and ambiguity arises in the meaning, it is a rule of construction that greater effect is to be given to the written matter, as being the immediate language selected by the parties, than to the printed, which is intended for general application.[2] In the construction of written or printed documents it is legitimate in order to ascertain their true meaning, if that be doubtful, to have regard to the circumstances surrounding their creation and the subject-matter to which it was designed and intended they should apply.[3]

Court's power to construe and interpret a document in the light of surrounding circumstances is not affected by the rule in Section 92.—As between the parties to an instrument, oral evidence of intention is not admissible for the purpose either of construing the deed or of proving the intention of the parties. Section 92, however, merely prescribes a rule of evidence, it does not fetter the Court's power to arrive at the true meaning and effect of a transaction in the light of all the surrounding circumstances.[4] Thus, the Privy Council held a document, which purported to be a deed of sale, to be a deed of gift, on a consideration of the circumstances under which it came to be executed.[5] Similarly, in another case the Allahabad High Court has held that extrinsic evidence is admissible to show that two separate sale deeds executed on the same day were part and parcel of the same transaction which was one of exchange.[6]

Admissibility of surrounding circumstances to explain wills.—In the case of wills, the ambit of surrounding circumstances is necessarily wider than in that of contracts, for in the former the testator is dealing not with a single transaction, but with the whole of his affairs, and the sale of facts at various periods and with regard to different persons may, therefore, become material, on the other hand, the rule excluding direct declarations of intention is perhaps more strictly enforced here than in cases of contract.[7] The principle upon which extrinsic evidence to explain a will is admitted is thus stated by Lord Abinger, C.B., in *Deos Hiscocks* v. *Hiscocks*.[8] "The object, in all cases, is to

1. *Juran Mandal* v. *Ram Mandal*, 55 C 808 : 1928 C 737 : 113 IC 37.
2. *Glynn* v. *Margetson*, (1893) AC 351.
3. *Sri Rajah Vatsavaya Venkata Subhadrayyamma Jagatpati Bahadur Garu* v. *Sri Poospati Venkatapati Raju Garu*, 52 IA 1 : 48 M 230 : 1924 PC 162 : 80 IC 807.
4. *Baijnath Singh* v. *Hajee Vally Mahomned Hajee Abba*, 3 R 106 : 1925 PC 75 : 86 IC 332 ; *Munna Singh Rajput* v. *Narain Singh*, 1929 N 91 : 107 IC 658.
5. *Ismail Mussajee Mookerdum* v. *Hafiz Boo*, 33 C 773 : 10 CWN 570 : 33 IA 86 (PC) ; *Hanif-un-Nissa* v. *Faiz-un-Nissa*, 33 A 340 : 11 IC 398 : 38 IA 85 ; *Serajuddin Haldar* v. *Isab Haldar*, 49 C 161 : 1922 C 558 : 70 IC 203.
6. *Kishen Lal* v. *Ram Lal*, 50 A 59 : 1927 A 696 : 103 IC 399 ; But see *Deonandan Tewary* v. *Droupadi Kuer*, 1938 P 242.
7. Phipson, Ev., 7th Ed., 593.
8. *Doed Hiscocks* v. *Hiscocks*, 5 M and W 363.

discover the intention of the testator. The first and most obvious mode of doing this is to read his will as he has written it and collect his intention from his words. But as his words refer to facts and circumstances respecting his property and his family, and others whom he names or describes in his will, it is evident that the meaning and application of his words cannot be ascertained without evidence of all those facts and circumstances.....All the facts and circumstances, therefore, respecting persons or property to which the will relates are undoubtedly legitimate, and often necessary evidence, to enable us to understand the meaning and application of his words." In all cases the primary duty of a Court is to ascertain from the language of a testator what was his intention. It is true that in so doing they are entitled and bound to bear in mind matters other than merely the words used. They must consider the surrounding circumstances, the position of the testator, his family relationship, the probability that he would use words in a particular sense, and many other things which are often summed up in the somewhat picturesque figure. "The Court is entitled to put itself into the testator's armchair." Among such surrounding circumstances which the Court is bound to consider, none would be more important than race and religious opinions, and the Court is bound to regard as presumably (and in many cases certainly) presented to the mind of the testator, influences and aims arising therefrom....That native testators may be ignorant of the legal phrases proper to express their intention or of the legal steps necessary to carry them out is one of the most important of the surrounding circumstances which the Court must bear in mind.[1]

In the case of wills, the following facts are usually as surrounding circumstances:–

(i) **Persons.**–In order to ascertain the object of the testator's bounty; the condition of his family both at the time of his will and death, the fact of the legitimacy or otherwise of any of its members, and the names and circumstances of his beneficiaries, with his respective knowledge of and relations towards each, may, where necessary, be proved.[2]

(ii) **Subject-matter.**–So, to ascertain the identity or extent of the property devised, all facts known to the testator as to his possession of and mode of acquiring it, together with its local situation and distribution, may, where the words are ambiguous, be proved.[3] as also his habitual mode of describing it is distinguished from his specific declarations at the time of will.[4]

(iii) **Meaning of terms and other ambiguities.**–Subject to the provisions of sections 94 and 95 of the Evidence Act, evidence of surrounding circumstances is admissible to show the meaning of, or what was intended to be included in particular terms used in a will, e.g., "money",[5] securities"[6] "widowhood".[7] So, the fact that the will was drawn up by a layman is relevant to rebut the presumption of a technical user of terms.[8] Proof that the will was executed for

1. *Venkata Narasimha Appa Row Bahadur* v. *Parthasarathy Appa Row*, 23 IC 166 ; 19 CLJ 369 ; 37 M 199 ; 41 IA 51 (PC) see also *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick*, 6 MIA 526 : *Chunilal Parvati Shankar* v. *Bai Samrath*, 23 IC 645 ; 19 CLJ 563 ; 1914 PC 60 ; 38 B. 399.
2. Phipson. Ev., 7th Ed., 593.
3. *Doe* v. *Martin*, 4 B. & Ad., 771, 785.
4. *Doe* v. *Hubbard*, 15 QB 227 ; Phipson, Ev., 7th Ed., 594.
5. *Re. Cadogan*, 25 Ch. D 154 ; *Re. Bramley*, (1902) P. 106.
6. *Re. Rayner*, (1904) 1 Ch. 179.
7. *Re. Hammond*, (1911) 12 Ch. 342.
8. *Hall* v. *H.*, (1892) 1 Ch. 361 : *Hamilton* v. *Ritchie*, (1894) AC 310, 313.

valuable consideration may also be given and will influence a construction favourable to the party giving it.[1] Where the will is founded an erroneous assumption of fact, the surrounding circumstances are receivable to show whether the gift was intended to be absolute, or conditional upon the assumption being true.[2]

General rules governing the construction of wills.—In construing a will by an Englishman in the English language drawn up by a solicitor and bristling with highly technical expressions and clauses, it, must be assumed that the technical expressions employed were employed with the meaning and significance generally understood to attach to them in the particular branch of the law.[3] But in the case of a vernacular will drawn up and executed in the *mufussil*, a Court should take care not to apply wholesale the principles of construction which are applicable to the wills executed in the Presidency Towns and drawn up by solicitors or *vakils*. In construing a will of this kind, the intention of the testator should be gathered from the tenor of the whole will, and artificial rules of construction should not be applied without due regard to the habits, prejudices, and customs of the people among whom the testator lived and the circumstances under which the will came to be executed.[4] In construing a will written in the vernacular and executed by a villager, the Court has to see what the language of the will is and in what sense the words in the will were used by the testator. Where no terms of art are used, the Court should understand the words of the will as the testator understand them or intended they should be understood.[5] Of course, the most important thing is to ascertain the intention of the testator; but where the language of the will is clear and unambiguous, the question of finding out the intention of the testator does not arise, and the will has to be construed according to its plain language,[6] without the aid of artificial rules of construction.[7] Oral evidence is admissible to show that a document, though styled as a gift, was really a will.[8]

Subsequent circumstances.—Each will must be interpreted according to its own language and the circumstances attending its conception. A circumstance which takes place long after the execution of a will and the death of the testator can afford no assistance in the interpretation of the will.[9] The Privy Council has remarked that what takes place after the execution of a document is not admissible on the question of its construction.[10]

AMBIGUITIES IN DOCUMENTS

General principles governing the admission of extrinsic evidence to interpret documents.—Two opposing theories are maintained as to the object of interpretation. The first and by far the most widely held asserts that the question is, not what the writer

1. Underhill, Wills, 3rd Ed., 27.
2. Phipson, 7th Ed., 595.
3. *Ernest William Adams* v. *Mrs. Gray*, 1925 M. 599 ; 90 IC 5.
4. *Manikam Pillai* v. *Venkatesa Chetty*, 1927 M 494 ; 99 IC 705.
5. *Piramu Ammal* v. *Serunatha Ammal*, 1925 M. 1175 ; 86 IC 737.
6. *Jio* v. *Rukuram*, 1927 L 126 ; 8 L 219 ; 100 IC 54.
7. *Manikam Pillai* v. *Venkatesa Chetty*, 1927 M 494 ; 99 IC 705 *Piramu Ammal* v. *Serunatha Ammal*, 1925 M. 1175 ; 86 IC 737 ; *Ernest William Adams* v. *Mrs. Gray*, 1925 M 599 ; 90 IC 5.
8. *Beli Ram* v. *Devi Chand*, 1929 L 875 (2) : 117 IC 907.
9. *Mst. Shera Khatun* v. *Muhammad Ali Shah*, 1923 L 559 ; 77 IC 538 :
10. *Vissaji, Sons & Co.*, v. *Shapurji Burjorji Bharoocha*, 16 IC 98 ; 36 B 387 : 39 IA 152 (PC) but see notes to this section under the heading "Evidence of conduct is admissible when the heading is ambiguos or obscruely framed."

meant, but simply what is the meaning of his words. The second regards the intention of the writer as the chief object of concern, and the mere grammatical and lexicographical meaning of the words are not strictly interpretation at all, since it is only (it is said) after the meaning of the words has been ascertained and has failed to explain the meaning of the writer, that interpretation properly so called begins i.e., that the gap left by the partial failure of language to express the intention has to be filled by an inquiry into other indications thereof. This, in effect, is the old controversy between the Proculians and the Sabinians, between the logical, inferential or liberal school of interpreters, and the grammatical or literal; and, as often happens, the correct view appears to lie between the extremes".[1] The true rule seems to be as stated in the following quotations:–

> "What is it that the judicial expositor seeks to ascertain ? Is it the meaning of the words, or the meaning of the writer? The question is frequently put in this way, as if the disjunction were complete and the answer must be one or the other. We answer, neither. Not the meaning of the words alone, nor the meaning of the writer. It is not the meaning of the words in the abstract, for the meaning of the words varies according to the circumstances under which they were used; and not the meaning of the writer apart from his words, for the question is not of interpretation, and what he meant to say, but did not, is foreign to the inquiry. We must seek the meaning of the writer, but we must find his words; and we must seek the meaning of the words, but they must be his words, the words as he has used them, the meaning which they have in his mouth."[2]
>
> In all cases the object is to see what is the intention expressed by the words used. But for the imperfection of language, it is impossible to know what that intention is without inquiring further, and seeking what the circumstances were with reference to which the words were used.....[3] "The general rule," says Chief Justice Trindal, in *Shore* v. *Wilson*[4] "I take to be, that where words of any written instrument are free from ambiguity in themselves and where external circumstances do not create any doubt or difficulty as to the proper application of those words, to which, to claimants under the instrument or the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict plain common meaning of the words themselves, and that in such case evidence *dehors* the instrument for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument is utterly inadmissible. If it were otherwise, no lawyer would be safe in advising upon the construction of a written instrument, nor any party taking under it, for the ablest advice would be controlled and the clearest title undermined if, at some future period, parol evidence of the particular meaning which the party affixed to his words, or of his secret intention in making the instrument, or the objects he meant to take benefit under it might be set up to contradict or vary the plain language of the instrument itself".[5]

---

1. Phipson, Ev., 7th Ed., 583.
2. Graves, 28 Am L Rev., p 323 quoted in Phipson, Ev., 7th Ed., 586.
3. Per Lord Blackburn, in *The River Wear Commissioners* v. *Adamson*, (1878) 2 AC 743 *followed* by the Privy Council in *Royal Bank of Canada* v. *Joseph Salvatori*, 1927 PC 272 ; 107 IC 346 ; *see also Manindra Chandra* v. *Durga Prashad Singh*, 38 IC 929 ; 1927 PC 23.
4. *Shore* v. *Wilson*, (1843) CI & Fin. 355.
5. *Quoted in Tsang Chuen* v. *Li Po Kwai*, 1932 PC 255 ; 139 IC 891.

Construction of a document, whether a question of law or of fact; competency of a second appeal.—The word "construction", as applied to a document, includes, first, the meaning of the words used in the document; and secondly their legal effect, or the effect which is to be given to them. The former is in all cases a question of fact, while the latter is a question of law. A decision, therefore, as to the meaning of words, and apart from their legal effect, used in a mortgage deed describing in the property mortgaged cannot be challenged in second appeal.[1]

Ambiguities in document; "patent ambiguities" and "latent ambiguities"-Section 93 to 98 deal with the admission of extrinsic evidence to remove ambiguities in documents. There are two kinds of ambiguities in document; (i) patent ambiguities and (ii) latent ambiguities. If the document is on the face of it ambiguous, i.e., unintelligible or uncertain, the ambiguity is "patent". If the document is not uncertain or unintelligible on the face of it, but is ambiguous when read in the light of external circumstances, the ambiguity is "latent". A patent ambiguity is subjective, inasmuch as it is due either to the writer having no definite conception of the subject, or to his failure to express himself by appropriate language; whereas a latent ambiguity is objective, inasmuch as it is an ambiguity in the description of the thing to which the document relates. This classification of ambiguities is taken from Lord Bacon who describes a patent ambiguity as "that which appears to be ambiguous upon the deed or instrument, and a latent ambiguity as "that which seemeth certain and without ambiguity that appeareth upon the deed or instrument, but there is some collateral matter out of the deed that breedeth the ambiguity."[2]

Parol evidence is not admissible to explain a patent ambiguity, but is admissible to explain a latent ambiguity.—The general rule governing the admission of extrinsic evidence to explain ambiguities in a document is that extrinsic evidence is not admissible to explain a patent ambiguity in a document,[3] but it is admissible to explain a latent ambiguity, as, in the latter case, extrinsic evidence, having raised the doubt, should be received also to remove it.[4] From this general rule the following deductions may be drawn:—

(i) When the language used in a document is, on its face, ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects,[5] as the ambiguity is a patent ambiguity.

(ii) When the language used in a document is plain in itself, and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts,[6] as there is, in such a case, no ambiguity in the document, patent or latent.

(iii) When language used in a document is plain in itself, but is unmeaning in refer-

---

1. *Badri Prasad* v. *Raj Kumar*, 1923 A 337 ; 75 IC 686, following the decision of Lindley, J., in *Chatenay* v. *Brazilian Submarine Telegraph Co.*, (1891) 1 QB 79.
2. Phipson, Ev., 7th Ed., 589.
3. *Maharashtraya Inan Kosh Mondal, Ltd.* v. *Bijju Lal*, 1923 N 182 ; 71 IC 436 ; *Mst. Dhanpatti* v. *Badri Singh*, 156 IC 53 ; Powell Ev., 9th Ed., 555 ; Beale on Interpretation, 83, 135 ; Phipson, Ev., 7th Ed, 589. The rule, as thus stated must now be read subject to certain qualifications. *See* notes to section 93 under the heading "Patent ambiguities which cannot be explained by parol evidence".
4. *Great Western Railway Co., Bristol Corporation*, 87 LJ Ch HL 414, 429.
5. Section 93, Evidence Act.
6. Section 94, Evidence Act.

ence to existing facts, evidence may be given to show that it was used in a peculiar sense,[1] as in such a case, there is a latent ambiguity in the document.

(iv) When the facts are such that the language used might have been meant to apply to any one and could not have been meant to apply to more than one, of several persons or things, evidence may be given of facts which show which of those persons or things it was intended to apply to,[2] as, in such a case, there is a latent ambiguity in the document.

(v) When a language used applies partly to one set of existing facts and partly to another set of existing facts, but the whole of it does not apply correctly to either, evidence may be given to show to which of the two of it was meant to apply,[3] as in such a case, there is a latent ambiguity in the document.

Inaccuracies in documents.—Inaccuracies are, strictly speaking, distinguishable from ambiguities for language may be inaccurate without being ambiguous-e.g., where a testator having only one house, a leasehold, devises it at his "freehold"; or it may be ambiguous without being inaccurate, as in the above case of a legacy to his "niece Jane", where he had two nieces of that name; or it may be both ambiguous and inaccurate, as where a testator, having only two nephews, John Smith and James Smith, leaves a legacy to his nephew William Smith. The term "latent ambiguity", however, is now generally employed to designate all cases of doubtful meaning raised by extrinsic evidence, whether from the words being so vague or general as to be susceptible of a wide or narrow sense, or from their being inaccurate or equivocal, or from their bearing some peculiar signification whether individual, local, or foreign.[4]

93. Exclusion of evidence to explain or amend ambiguous document.—When the language used in the document is, on its face, ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects.

Illustrations

(a) *A* agrees, in writing, to sell a horse to *B* for "Rs. 1,000, or Rs. 1,500".

Evidence cannot be given to show which price was to be given.

(b) A deed contains blanks. Evidence cannot be given of facts which would show how they were meant to be filed.

COMMENTARY

Patent ambiguities which cannot be explained by extrinsic evidence.—Though it is still commonly said that parol evidence may not be given to explain a patent ambiguity,[5] yet this is not generally true.[6] Indeed the only patent ambiguities that are not open

1. Section 95, Evidence Act.
2. Section 96, Evidence Act.
3. Section 97, Evidence Act.
4. Phipson, Ev., 7th Ed., 590.
5. Powell, 9th Ed., 555 ; Beale on Interpretation, 83, 135 ; Phipson, Ev., 7th Ed., 589.
6. *Watchman* v. *Attorney-General*, (1919) AC 533 ; *Re. Atlay*, 56 SJ 444 ; Phipson, Ev., 7th Ed., 589, 590.

to explanation by extrinsic evidence appear to be those which, in the nature of things, are incapable of explanation; as for example, where the name of a legatee is left wholly blank,[1] or where a bequest is to "a son of L or G".[2] or bill names one sum in words and a different one in figures.[3] But this does not apply to other patent ambiguities, e.g., partial blanks;[4] nor to that of a legatee referred to merely by a term of endearment or an initial;[5] nor where the amount of a legacy is expressed by a cypher;[6] nor where property is conveyed by inconsistent description;[7] nor where a document beginning "I, A" is signed B",[8] nor where a legacy is left to "one of the children of A by her late husband B", since it might be proved that A had, to the knowledge of the testator, only one son by B;[9] nor where a gift is made to "my nephew John or Thomas", for the evidence might show that the nephew was known to the testator by both these names.[10]

Extrinsic evidence to explain a patent ambiguity in a document can be given only when the language used in the document is not, on its face, ambiguous or defective. Where the language is so vague or imperfect that to admit extrinsic evidence would be not to interpret the document but virtually to make a new one, extrinsic evidence would be excluded.[11] If the words of a document are so defective or ambiguous as to be unmeaning, no evidence can be given to show that the author of the document intended to say.[12] Where a deed is ungrammatical and cannot be read literally so as to give any clear meaning without adding to or removing some words from it there is a patent ambiguity in the deed, and under Section 93 of the Evidence Act no evidence can be given to supply the defect.[13] Where a deed of partnership gives one party the right to specify the share or profits to be assigned to the other, but does not afford the slightest indication as to the proportion of losses which the other party is to bear, the deed is void for uncertainly and no oral evidence is admissible.[14] If the ambiguity in a decree is apparent on the face of it, no extrinsic evidence is admissible to construe it, but the case is otherwise where the ambiguity is a latent one.[15]

Ambiguous language.—The question whether language is ambiguous depends upon the question whether it is ambiguous when addressed to a person competent to interpret language. Words cannot be ambiguous because they are unintelligible to a man who cannot read, and within the same reason words cannot be ambiguous merely because the Court which is called upon to explain them may be ignorant of a particular fact, art, or science which was familiar to the person who used the words, and a knowledge of

1. *Baylis* v. *Attorney-General*, 2 Atk. 239.
2. *Nakshetramali Dei* v. *Brajasundar Das*, 12 P. 708 : 1933 P. 647 : 146 IC 865.
3. *Saunderson* v. *Piper*, 5 Bingl. NC 425 ; Phipson, Ev., 7th Ed., 590,
4. *Harrhy Wall*, 1 B & Ald. 103 ; *Re De Rosaz* 2 PD 66 ; *Re Hubbuck*, (1905) P 129.
5. *Sullivan* v. *S.*, IR 4 Eq., 457 ; *Abbot* v. *Massie*, 3 Ves. 148.
6. *Kell* v. *Charmer*, 23 Beav. 195.
7. *Booth* v. *Ratte*, 15 AC 188.
8. *Summors* v. *Moorehouse*, 13 QBD 388 ; *R.v. Wooldale*, 6 QB 549.
9. Wigram, 79.
10. Elphinstone, Deeds, 104 ; See Phipson, Ev., 7th Ed., 590.
11. *Re. De Rosaz*, 2 PD 66 ; *King* v. *Badeley*, 3 Myl. & R 417 ; *Re Hetley*, (1902) 2 Ch 866 : Phipson, Ev., 7th Ed., 591.
12. Steph, Dig, Art. 91 ; See also *Rajah Bahadur Narasingerji Gyanageri* v. *Rajah Panuganti Parthasaradhi Rayanim Garu*, 1921 M 498 ; *Dhanpati* v. *Badri Singh*, 1935 A 729 : 156 IC 53.
13. *Ram Ganesh Rai* v. *Rup Narain Rai*, 1925 A 34 : 80 IC 944.
14. *Barkat Ram* v. *Anant Ram*, 31 IC 632.
15. *Jahuri Lal* v. *Kandhai Lal*, 1935 P 123 : 155 IC 302.

which is therefore necessary to a right understanding of the words he has used.[1] Mere difficulty in interpretation is not synonymous with vagueness.[2]

Insufficient description of property.—In a case where certain persons describing themselves as residents of J gave a bond for the payment of money in which as collateral security they charged "their property" with such payment, it was remarked by the Allahabad High Court that the case was governed by Section 93 of the Evidence Act, and therefore oral evidence was inadmissible to show what property was charged.[3] These observations as to the applicability of Section 93, were, however, *obiter*, and the true view seems to be that insufficient description of property of merely a latent ambiguity which can be removed by entrinsic evidence. Thus, where a deed of simple mortgage described the property as "our *zamindari* property" and gave no further specification or description, and it was proved that at the date of the mortgage the mortgagors had a definite and ascertained fractional share in two *zamindaris*, it was held that the words "our *zamindari* property were sufficiently certain, at the date of the mortgage-deed, the owners of specific *zamindari* interest, and that the mortgage was not, therefore, void for uncertainty.[4] Similarly, where A, to whom Government had made a grant of certain villages, executed an instrument in favour of his brother charging the payment of an annual allowance to him and his heirs for ever on the 'granted villages," and the instrument did not name the villages which had been granted to A, but there was no doubt as to the particular villages which had been granted to him, it was held that the fact that such instrument did not specify the villages which had been granted to A did not constitute such an ambiguity in the instrument as to render the charge created thereby invalid.[5]

Ambiguity in the clause relating to interest.—It has been held by the Calcutta High Court,[6] as well as by the Patna High Court,[7] that where a deed mentions interest to be payable at "one anna per rupee," evidence is not admissible to show that the parties intended it to be a monthly or a yearly rate. But, according to the view taken by the Lahore High Court, there is, in such a case, a presumption that the rate mentioned as a monthly rate, and extrinsic evidence is admissible under Section 95 and Section 98.[8] Where a deed mentions a certain sum to be payable as interest, but does not specify whether the sum represents interest on the whole amount or one per cent of the whole amount, and this omission is due to a mistake, the case will be governed by the first Proviso to Section 92, and oral evidence will be admissible.[9] The Court may also, without the aid of extrinsic evidence and merely by looking at the trend and context of a document, holds that the words "per cent" have been inadvertently omitted from the clause relating to interest.[10]

---

1. *Kandamath Cine Enterprises (Pvt.)* Ltd. v. *John Philipose*, AIR 1990 Ker 198.
2. Wigram, Extrinsic Evidence, 105.
3. *Deoji* v. *Pitamber*, 1 A 275 ; See also *The Collector of Etawah* v. *Beti Maharani*, 14 A 162.
4. *Shadi Lal* v. *Thakur Das*, 12 A 175.
5. *Kanhia Lal* v. *Muhammad Hassain Khan*, 5 A 11.
6. *Protap Chandra Saha* v. *Mohamnad Ali*, 41 C 342 : 20 IC 443 ; but see *Manmatha Nath* v. *Nabin Chandra Sanyal*, 7 IC 214 : 14 CWN 1100 ; *Mahamud Masor Mahmud Mea* v. *Zafur Mahmud*, 62 IC 702.
7. *Sarju Sahu* v. *Sukhi Lal*, 1924 P 96 : 79 IC 420.
8. *Teja Singh* v. *Sant Singh*, 1930 L 144 : 121 IC 75.
9. *Kamla Prasad Ram Pandey* v. *Hasan Ali Khan*, 1939 ALJ 196 ; *Ram Bharosey Lal* v. *Janki Prasad*, 1930 O 95 : 125 IC 175 ; See also *Mohammad Masor Mahmud Mea* v. *Zafur Mahmud*, 62 IC 702 ; *Indro Deb Das* v. *Azizur Rahaman Sarkar*, 17 IC 9 : 16 CWN 957.
10. *Indro Deb Das* v. *Azizur Rahaman Sarkar*, 17 IC 9 : 16 CWN 957.

Mistakes may be corrected, and blanks and omissions filled by the Courts by the ordinary rules of construction.—The present section makes extrinsic evidence inadmissible to fill the blanks and omission in a document; but it does not affect the Court's power to correct mistakes and fill blanks and omissions by the ordinary rules of construction and without the aid of extrinsic evidence.[1] Notwithstanding the rule enacted by the present section mistakes in deeds and wills may sometimes be corrected,[2] blanks filled,[3] or words supplied,[4] by construction, without resort to extrinsic evidence.[5]

Blanks left in a document by mistake or fraud.—Under Section 93 of the Evidence Act, oral evidence is not admissible to fill a blank; but, where the blank has been left by mistake or fraud, oral evidence is admissible under the first Proviso to Section 92.[6]

Inconsistency between printed and written matter, or between words and figures.—Where printed forms are filled in with written words and an ambiguity arises in the meaning, it is a rule of construction that greater effect is to be given to the written matter, as being the immediate language selected by the parties, than to the printed, which is intended for general application.[7] And where there is a discrepancy between the sum expressed in words and that expressed in figures, the former will prevail.[8]

94. Exclusion of evidence against application of document to existing facts.—When language used in a document is plain in itself, and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts.

Illustration

A sells to *B*, by deed, "my estate at Rampur containing 100 bighas". *A* has an estate at Rampur containing 100 bighas. Evidence may not be given of the fact that the estate meant to be sold was situated at a different place and of a different size.

COMMENTARY

Extrinsic evidence is not admissible where there is no ambiguity in a document.—In the case contemplated by this section, there is no ambiguity in the document, either patent or latent, and extrinsic evidence is, therefore, declared inadmissible. If the language used in a document is plain in itself and applies accurately to existing facts, admission of extrinsic evidence to construe the document would amount to contradicting the document by such evidence, and this is contrary to the general rule enacted by Section 92 of the Act.

---

1. See *Ibid.*
2. *Greenwood* v. *G.* 5 Ch. D 954 ; *Re. Northens Estate*, 28 Ch. D 153.
3. *Mourmand* v. *Le Clair*, (1903) 2 KB 216 ; *Re. Harrison*, 30 Ch. D 390 ; *Re. MacDuff*, (1896) 2 Ch. D 451 ; *Chamberlain* v. *Young*, (1893) 2 QB 206.
4. *Talhurst* v. *Associated, etc.*, (1903) AC 414.
5. Phipson, Ev., 7th Ed., 600.
6. *Maung Pe Gyi* v. *Hakim Ally*, 2 R 113 : 1924 R 235 : 80 IC 759.
7. *Glynn* v. *Margetson*, (1893) AC 351 ; *The Nifa*, (1892) P 411 ; *Scrutton* v. *Childs*, 36 LT 212 ; Phipson, Ev., 7th Ed., 590, 591.
8. *Sounderson* v. *Piper*, 5 Bing. NC 425 ; Phipson, Ev., 7th Ed., 591.

Words of a document must be understood in their primary or ordinary sense.—When the words of a document, in their primary or ordinary sense, are applicable to the facts, and are not modified by the context, extrinsic evidence cannot be given to show that they were not used in that sense.[1] "Where there is nothing in the context of a will", says Wigram, from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so interpreted are sensible with reference to extrinsic circumstances, it is an inflexible rule of construction that the words of the will shall be interpreted in their strict and primary sense and in no other, although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered".[2] The general rule is to give the words their natural meaning unless, when applied to the subject-matter, they produce...an absurdity or inconvenience so great as to convince the Court that the words could not have been used in their proper signification".[3] It is a dangerous thing to allow outside evidence to show the intention of the writer which is not disclosed by the authorised channel, namely, the words which he himself selected.[4]

Primary meaning of words when applied to persons.—In the case of persons, words of relationship *prima facie* import legitimate relationship; if, therefore, legitimate members exist, evidence cannot in general be given that illegitimate were intended;[5] but, if none do, or can, exist,[6] or if, though some exist, the context may include the latter, such evidence will be receivable.[7] Again, if a given person, known to the testator, accurately fulfils the words in the will, and there is no one else in competition, evidence cannot be given to show that such person was not intended.[8] And if one of two claimants accurately fulfils the words and the other does not, evidence in favour of the latter will, save in very exceptional circumstances, be rejected.[9]

Primary meaning of words when applied to property.—In the case of property, where proof has been given of a subject-matter satisfying all the terms of a written description, the maxim *non accipi debent verba in demonstrationem falsam quae competent in limitationem veram* applies, and extrinsic evidence cannot be given to show that something more or less extensive was intended.[10] Thus where in a mortgage-deed the mortgaged property was described as a 'five pies *zamindari* share situated in Mahal No. 4", the mortgage was not allowed to show that the intention of the mortgagor was to mortgage his entire *zamindari* property in Mahal No.4.[11] This applies not only to de-

1. Phipson, Ev., 7th Ed., 596 ; See *Mst. Dhanpati* v. *Badri Singh*, 156 IC 53 : 1935 A 729.
2. Wigram, Extrinsic Ev. quoted in Phipson, Ev., 7th Ed., 597. But see observations of Lord Loreburn, in *National Society, etc.* v. *Scottish National Society, etc.*, (1915) AC 207.
3. Per Blackburn, J., in *Allgood* v. *Blake*, LR 8 Ex 160, 163.
4. *Manmatha Nath Kar* v. *Probodh Chandra Patarhi*, 1923 C 102 : 73 IC 416 ; *Great Western Railway* v. *Bristol Corporation*, (1918) 87 LJ Ch 414.
5. *Hill* v. *Crook*, LR 6 HL 265 ; *Refish*, (1894) 2 Ch 83 CA ; *Re Pearce* (1914) 1 Ch 254, CA cited in Phipson, Ev., 7th Ed., 598.
6. *Hill* v. *Crook*, LR 6 HL 265 ; *Dorin* v. *D.*, LR 7 HL 568 ; *Re Pearce*, cited in Phipson, Ev., 7th Ed., 599.
7. Phipson, 7th Ed, 598.
8. *Sherrat* v. *Mountford*, LR 8 Ch 928 ; *Re Woolverton*, 7 Ch D 197, 199 ; *M. Hugh* v. *M.Hugh*, (1908) 1 Ir R 155, cited in Phipson, Ev., 7th Ed., 598, 599.
9. *National Society, etc.*, v. *Scottish National Society*, (1915) 1 AC 207 ; *Re. Peel*, LR 2 P & D 46 ; *Re. Parker*, 17 Ch. D 262 ; *Re. Chenoweth* 45 SJ 520 ; *Holmes* v. *Customs*, 12 Ves 279, cited in Phipson, Ev. 7th Ed., 599.
10. *Horwood* v. *Griffith*, 4 De GM & G 700, 708 ; *Hardwick* v. *H.L.R.*, 16 Eq 168, 175 ; *Re. Seal*, (1894) 1 Ch 316 ; Norton, Deeds (2nd Ed.), 231-239, cited in Phipson Ev. 7th Ed. 599.
11. *Uma Shankar Rai* v. *Ram Agyan Thakur*, 1939 A 231.

scription in the deed itself, but to those in a map or schedule referred to therein,[1] though it is otherwise than such map is clearly erroneous,[2] or on too small a scale to be effective,[3] or where, though attached to the deed, it is not referred to therein.[4] So with regard to personal property. Thus, where there is a specific bequest and proof of property correctly answering the description, evidence is not admissible to extend it to other property.[5] The words "sir lands" as used in a sale deed are not unambiguous and therefore extrinsic evidence cannot be allowed to show that sir lands were not meant but *sir rights* were meant to be sold.[6]

Extrinsic evidence not admissible to construe an unambiguous document.—The rule in Section 92, Proviso (6), is subject to the rule enacted by the present section.[7] Extrinsic evidence is not, therefore, admissible to construe a document which is plain and unambiguous, and the intention of the parties to such a document must be gathered from the language of the document itself. Where a mortgage-deed is clear and unambiguous and actually applies to existing facts, parol evidence is inadmissible.[8] If the order of Court is applicable to the subject-matter specified by the order itself, extrinsic evidence is not admissible to show that the order was intended to be applied to another subject-matter.[9] See notes to Section 92, Proviso (6), under the heading "Evidence of surrounding circumstances not admissible where there is no ambiguity in the document, or where the ambiguity is a patent ambiguity as distinguished from a latent ambiguity.[10]

Evidence of conduct is not admissible to construe an unambiguous document.—While the true construction of an obscurely framed document may be determined by reference to the conduct of the parties, no such procedure is admissible when the terms of the instrument are unambiguous, for no amount of acting by the parties can alter or qualify words which are plain and unambiguous.[11] If there is no ambiguity in a document, the mere fact that parties have acted on an erroneous construction of an instrument furnishes in itself no reason why the Courts should not follow the general rule that an instrument should be construed according to its natural meaning in the light of the circumstances in which it was executed.[12] See notes to Section 92, under the holding "Evidence of conduct is admissible where the document is ambiguous or obscurely framed".

---

1. *Lyall* v. *Richards*, LR 1 HL 222; *Barton* v. *Dawes*, 10 CB 261; *Llewellyn* v. *Jersey*, 11 M & W 183; *Boyle* v. *Mulholland*, 10 Ir CL 150, cited in Phipson, Ev.7th Ed. 599.
2. *Lyall* v. *Richards*, and *Re. Boulter*, 4 Ch D 241, cited in Phipson, Ev 7th Ed. 599.
3. *Taylor* v. *Parry*, 1 Scott NR 576; *St. Leonards* v. *Ashburner*, 21 LT 5[illegible], cited in Phipson, Ev. 7th Ed. 599.
4. *Wyse* v. *Leahy*, Ir R 9 CS 384; *Re. Otway*, 13 Ir Ch R pp. 233, 234, cited in Phipson, Ev. 7th Ed. 599.
5. *Harwood* v. *Griffith*, 4 De GM & G 700, 708 cited in Phipson Ev. 7th Ed. 599.
6. *Dhanpatti* v. *Badri Singh*, 1935 A 729 : 156 IC 53.
7. *Ghellabhai Atmaram* v. *Nandubai*, 21 B 335, 344.
8. *Mst. Dhanpatt* v. *Badri Singh*, 156 IC 53; *Velappa Goundan* v. *Palani Gounden*, 29 IC 201; *President, Taluq Board, Peddapur* v. *Chilakamani Dharmacharlu Garu*, 12 IC 146; *Dhanpatti* v. *Badri Singh*, 1935 A 729 : 156 IC 53.
9. *Shujaatmand Khan* v. *Govind Behari*, 1934 A 100 (2) : 147 IC 633; *Mst. Ram Rakhi* v. *Gauri Shankar*, 36 PLR 61; 150 IC 363; *Govind Behari* v. *Shujaatmand Khan*, 1938 ALJ 477.
10. See *Benode Behari Mookerji* v. *Raj Narain Mitter*, 30 C 699.
11. *Punjab National Bank* v. *S.B. Choudhry*, 1943 O 392; *Bisheshwar Singh* v. *Achhaibir Din*, 1941 O 507; *Midnapore Zamindari Co. Ltd.* v. *Jogendra Kumar Bhaumik*, 1921 C 750 : 62 IC 491; *Kiransashi Debi* v. *Ananda Chandra*, 58 IC : 841; *Haji Rahim Bakhsh Mandal* v. *Sajjad Ahmad Chowdhary*, 26 IC 466; *North Eastern Railway* v. *Hastings*, (1900) AC 260, p 263.
12. *Raja Bhupendra Narayan Sinha* v. *Midnapore Zamindari Co. Ltd.*, 1922 C 300 : 63 IC 937.

Mutual mistake of the parties to a document may be proved even if the document as executed is plain and unambiguous.–Where both the parties to a document were under a mistake of fact and the document does not correctly record what was originally intended by them then, under Section 92,Proviso (1), Evidence Act, it is open to the Court, in spite of Section 94 of the Evidence Act, to allow the parties to prove what the original intention was, and to give relief accordingly.[1] See notes to Section 92, Proviso (1).

95. Evidence as to document in unmeaning reference to existing facts.–When language used in a document is plain in itself, but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense.

Illustration

A sells to *B*, by deed, "my house in Calcutta".

A had no house in Calcutta, but it appears that he had a house at Howrah, of which *B* had been in possession since the execution of the deed.

These facts may be proved to show that the deed related to the house at Howrah.

COMMENTARY

Evidence is admissible to show that the words in a documents are used in a secondary or special sense and in their primary or ordinary sense.–The ambiguity contemplated by the present section is a "latent" ambiguity and extrinsic evidence is, therefore, according to general rule,[2] admissible to clear such ambiguity. Ordinarily the words of a document must be understood in their primary or ordinary sense;[3] but when, so understood, they become unmeaning in reference to existing facts, it becomes permissible to show that the writer used them, not in their primary or ordinary sense, but in their secondary or special sense. This section reproduces part (b) of Rule II which is thus stated by Phipson:–

"Rule.II.–(a) When the words of a document, in their primary or ordinary sense, are applicable to the facts and are not modified by the context, extrinsic evidence cannot be given to show that they were not used in that sense.[4]

(b) But where it is clear, either from the context or the facts, that such meaning cannot have been intended' extrinsic evidence (including surrounding circumstances, treatment and habits of speech, but not direct declarations of intention) may be given to show that they were used in some secondary or less ordinary sense, provided it is one which the words can properly

1. *Dalip Singh* v. *Dalip Singh*, 1930 L 446 : 122 IC 493 ; *Arya* v. *Daundi*, 1940 L 236 : 188 IC 813 : 42 PLR 222.
2. See notes under the heading "Parol evidence is not admissible to explain a patent ambiguity but is admissible to explain a latent ambiguity" in the general notes to Sections 93-97.
3. See notes to section 94.
4. This corresponds to section 94 of the Evidence Act.

bear".[1]

As applied to wills, Wigram states the rule as follows:–

"Where there is nothing in the context of a will which it is apparent that the testator has used the words in any other than their strict primary sense, but his words, so interpreted, are insensible with reference to existing circumstances, a Court of law may look into the existing circumstances of the case, to see whether the meaning of the words be sensible in any popular or secondary sense of which with reference to these circumstances, they are capable".[2]

"The general rule is," says Blackburn, J.,"to give the words their natural meaning unless, when applied to the subject-matter, they produce....an absurdity or inconvenience so great as to convince the Court that the words could not have been used in their proper signification."[3]

Incorrect names and description ; distinctions between section 95 and section 97.–The Act does not specifically deal with that important class of cases where the words of a document apply in part correctly and in part incorrectly to some single subject-matter; but it seems that such cases fall within the scope of the present section. Cases of this type are entirely outside the scope of section 97, inasmuch as that section deals only with cases where the words of a document apply partly to one subject-matter and partly to another, but correctly to neither. These two classes of cases are treated together in some text books on the law of evidence.[4] and commentators on the Indian Evidence Act have observed that the rule regulating the admission of extrinsic evidence in the former class of cases i.e. cases falling within section 95.[5] Section 95 of the Evidence Act "formulates the general rule with regard to imperfect descriptions embodies in the maxim *falsa demonstration non nocet* (a false description does not vitiate the document), while the former (section 97) deals with a particular form of imperfect description, namely, when such description applies to a double and not to a single set of facts".[6]

Misdescription of property ; partial misdescription does not render an instrument inoperative ; falsa demonstration no nocet.–When the language of a document is plain but is unmeaning in reference to existing facts, evidence is admissible to show that language is used with reference to the notorious facts.[7] When a description in a document is party correct and partly incorrect, and the former part is sufficient to identify the subject-matter intended while the latter does not apply to any subject, the erroneous part will be rejected on the maxim that a false description will not hurt when it can exist with the subject itself.[8] If, after rejecting so much of the description as is false, the reminder will enable the Court to ascertain with legal certainty the subject-matter to which the instrument really applies, it will be allowed to take affect. The rule of the civil law, *falsa demonstration non nocet cum de corpore constat)* (a false

1. Phipson, Ev., 7th Ed., 596.
2. Wigram Extrinsic Ev. cited in Phipson, Ev. 7th Ed. 597.
3. *Allgood* v. *Blake*, LR 8 Ex. 160, 163.
4. See Wigmore, §§ 2476 ; Phipson, Ev. 7th Ed. 600.
5. Cunningham, Ev. 276.
6. Woodroffe, Ev. 9th Ed., 689.
7. *Ramlakhan Pandey* v. *Digbijoy Narain Singh*, 1948 P. 274.
8. *Narain Das* v. *Tek Chand*, 1923 S.24 : 84 IC 137.

description will not hurt when it can co-exist with the subject itself) is followed in such cases.[1] "It is clearly settled that, when there is a sufficient description set forth of premises, by giving the particular name of a close, or otherwise, we may reject a false demonstration, but that if the premises be described in general terms and a particular description be added, the latter controls the former,[2] and it matters not which part of the description is placed first and which last, in the sentence.[3] Of two descriptions, that which is more definite and particular will control the one which is more general,[4] e.g. description of the property by extent and the assessment payable on that extent will prevail on the description that the land sold is that which is in the possession of the vendor.[5] A mortgage-deed of certain *bhagdari* lands stated that "all the properties appertaining to the entire *bagh*' were thereby mortgaged to the plaintiff. The *bagh* comprised (*inter alia*) for building sites. But the clause which set fourth the particulars of the property mortgaged thereby specified only two building sites, one only of which belonged to the *bagh* and the other did not. Held, that the particulars were 'the leading description" and the supplementary description of them as constituting the entire *bagh* should be regarded as *false demonstratio*, and that, therefore, out of the four building sites which belonged to the *bhag* one only should be taken to have been mortgaged.[6] But where the devise was of "all my farm, called Trogues now in the occupation of C", it was held that the whole farm passed, though farm it was not all in C's occupation.[7] Where a sale deed purported to convey an upstair house standing on a certain site, which site also was described and conveyed by the sale-deed, and the vendor had no upstair house on that site but had one on opposite side of the same site and no other elsewhere it was held that parol evidence was admissible to show that the house intended was the latter house.[8] Where a deed of release did not describe the claim released, it was held that, under section 95 of the Evidence Act, extrinsic evidence could be given to show what claim was intended to be released by the deed;[9] and where a *mowroosl ijarah* was described in a sale certificate as a *putnee talook*, it was held that misdescription of the nature of the property did not prejudice the purchaser's title.[10] Where it is not clear from the terms of a sale deed whether the vendor who held the property as a mortgage sold merely his mortgages rights, or made an absolute sale of the property, oral evidence may be given to show what was in fact sold.[11]

Extrinsic evidence to explain a decree or a security bond.—Oral evidence is admissible to explain a latent ambiguity in a decree.[12] In order to explain a decree one can look at the judgment and the pleadings of the parties. Ordinarily these are sufficient to clarify the issue and there is no need to go further. But when the boundaries and the

1. Taylor, § 1218, 1219.
2. Per Park, J. In *Doe* v. *Golloway*, (1833) 5 B and Ad, 43.
3. Taylor, § 1220.
4. *Velappa Gounden* v. *Palani Gounden*, 29 IC 201.
5. *Ibid.*
6. *Tribhovandas Jeiksandas* v. *Krishnaram Kuberan*, 18 B 283.
7. *Goodtitle* v. *Southern*, (1813) 1 M & S. 299 ; Taylor, 1221 : 5 BLR 633.
8. *Annathuri Iver* v. *Ramanuja Chariar*, 15 IC 233 ; see also *Cowen* v. *Truefit*, (1898) 2 Ch. 551.
9. *Mathew Henry Abraham* v. *The Lodge "Good Will"* No. 465, 6 IC 158 ; 34 M 156.
10. *Taranath Chuckerbutty* v. *Joy Soonduree Debee*, 21 WR 93 ; see also 19 WR 276, where a *shikmi tallok* was described as a *jotedari* interest.
11. *Daulat* v. *Baliram*, 1929 N. 267 ; 118 IC 682;
12. *Jahuri Lal* v. *Kandhai Lal*, 1935 P. 123 ; 156 IC 302.

area are wrongly given and the matter is not least advanced from the position of the decree by looking at the judgment and the pleading, oral evidence can be led to explain the fact and circumstances of the case from which the Court will determine not what was actually mortgaged which led to the decree, but as to what all the misleading descriptions in the decree are to convey.[1] Where a decree based on an award is ambiguous in its terms, the evidence of the arbitrator is admissible on the purpose of interpreting the decree.[2] Where there is an ambiguity or contradiction in the terms of a security bond, section 95, Evidence Act,allows a reference to antecedent circumstances. Thus, where there is any doubt about the true construction of a security bond, the bond must be considered in the light of the order directing the security to be given.[3]

Generic description whether controlled by accumulative description.?—Whenever there is, in the first place, a sufficient certainty and demonstration, and afterwards an accumulative description which fails in point of accuracy, the latter will be rejected.[4] The maxim *falsa demonstratio non nocet* is applicable to a case where some subject-matter is devised as a whole under a demonstration which is applicable tc the entire land, and then the words of description that include and denote the entire subject-matter are followed by words which are added on the principle of enumeration, but do not completely enumerate and exhaust all the particulars which are comprehended and included within the antecedent universal or generic denomination. The ordinary principle and of the rule of law, which is perfectly consistent with common sense and reason, is this, that the entirety which has been expressly and definitely given shall not be prejudiced by an imperfect and inaccurate enumeration of the particulars of the specific gift.[5]

Discrepancy between field numbers and other description, or between area and other description, of property.—Where a property is otherwise correctly described but wrong field numbers are given to it, description by field numbers will be rejected and the more particular description prevail.[6] Ordinarily, when property is transferred with definite boundaries, unless it is very clear from the circumstances surrounding the transfer that a smaller or greater extent than what is covered by the boundaries was intended to be transferred, the rule of inter-pretation is that the boundaries must prevail as against the measurements.[7] Where there is a conflict between the area given in a

1. *Allah Bakhsh* v. *Punjab & Sind Bank*, 1934 L 181 ; 147 IC 23.
2. *Nazir Mohammad Khan* v. *Abdul Ghani*, 1937 L 168.
3. *Mohendra Nath Banerjee* v. *Roy Satish Chandra Choudhury*, 61 C 890 ; 1934 C 569 ; 150 IC 985.
4. *Kumar Kalikanand Singh* v. *Raja Shiva Nandan Prasad Singh*, 1922 P 122 : 63 IC 625.
5. Per Lord Westbury. L.C. in *West* v. *Lawday* ; (1865) 11 HLC 375 ; cited in *Kumar Kalikanand Singh* v. *Raja Shiva Nandan Prasad Singh*, 1922 P 122 : 63 IC 625 ; see also *The Lodna Collery Co. Ltd.*, v. *Bepin Behary Bose*, 55 IC 113.
6. *Karuppa Gounden* v. *Periathambi Gounden*, 30 M 397 : *Radhe Lal* v. *Angne*, 21 IC 429 : 16 OC 213 : *Palanivelappa Gounden* v. *Nachappa Gounden*, 53 IC 379 ; see also *Narain Dass* v. *Tek Chand*, 1923 S 42 : 84 IC 137 ; *Dalip Singh* v. *Dalip Singh*, 1930 L 446 , 448 : 122 IC 493. For a case where the description by field number, acreage and assessment was applicable to the property and yet oral evidence was held admissible to show that the parties intended the property to be included in another field number see *Janardan* v. *Venkiaesh*, 41 Bom LR 191.
7. *Subbayya Chakkiliyan* v. *Manjan Muthia Goundan* , 1924 M 493 ; 78 IC 414 : *Narain Dass* v. *Jawahir Singh*, 1924 L 74 : 69 IC 827 ; *Linton Molesworth & Co.* v. *Jagannath Supakar*, 1924 P 226 : 77 IC 403 ; *Durga Prasad Singh* v. *Rajendra Narayan Bagchi*, 21 IC 750 : 41 C 493 : 40 IA 223 (PC) ; *Virjivandas Madhavdas* v. *Mahomed Ali Khan Ibrahim Khan*, 5 B 208 ; *Esan Chunder Ghose* v. *Protab Chunder Roy*, 20 WR 224 : *Zeenut Ali* v. *Ram Dayal Poddar*, 18 WR 25 ; *Kazee Abdool Mennah* v. *Buroda Kunt Banerjee*,

deed and the boundaries which are firm, ascertained and definite, the boundaries must prevail;[1] and the Privy Council has held that extrinsic evidence is not admissible to show that the land which a deed purported to demise was less than the area mentioned in the schedule to the lease as falling within the boundaries specified therein.[2] If, however, the boundaries are uncertain, the intention should be taken to be to demise the specific quantity of land within those boundaries.[3] In the case of the sale of a house, there was a description of its boundaries as well as of the quantity of land conveyed. The buyer did not make a thorough inspection before entering into the agreement, the seller giving a warranty to the effect that he would satisfy the buyer in every way in connection with the sale. The area of the house was found to be short by a quarter of the described quantity. The buyer wanted to resile from the contract and sued for the return of the earnest money. Held (i) that although, in a conflict between the description of the boundaries and that of the quantity of the land conveyed, the description of the boundaries, if precise and accurate, dominates the description of the quantity, in every case the question of the intention of the parties must be taken into consideration; (ii) that in this case, the very wide terms of the warranty included a guarantee that the measurement stated was correct and that the buyer was justified in withdrawing from the agreement and demanding back the earnest money.[4]

Variance between description or measurements as given in the deed and as given in the plan or schedule.—Where there is a variance between the description in the deed and the map or plan annexed, there is no general rule as to which is to be preferred, but the whole facts must be considered;[5] though in the under mentioned case[6] it has been held to be a well recognized rule to prefer the plan to measurements in the case of variance between the two. In a Privy Council case,[7] statement of area in the schedule was, in the light of extrinsic evidence which was held to have been properly admitted, held to be a mere misdescription of the property described in the deed. If the map contradicts the unambiguous text of the deed, the map must give way to the text, as the text is not in such a case subordinate to the map, which may elucidate but cannot contradict the text.[8]

Extrinsic evidence admissible to prove identity of property in cases of ambiguous description.—Where there is an ambiguity in the description of the land mortgaged, extrinsic evidence is admissible to prove what land was as a matter of fact mortgaged.[9] Where in a deed there is a discrepancy between the description of property by boundaries and its description by field numbers and area, other evidence is admissible to show

---

15 WR 394 ; *Moodee Huddin Jawardar* v. *F. Sandes*, 12 WR 439 ; *Sheeb Chunder Mohnedah* v. *Brojonoth Aditya*, 14 WR 301.

1. *Hanuman Mahasit* v. *Shillingford*, 57 IC 2 : *Sheikh Bara Kalim* v. *Rajendranath Roy*, 64 IC 751 ; *Hari Mohan Modak* v. *Rameswar Das*, 64 IC 737 ; see also *Banaphal Singh* v. *Noor Mohammed*, 155 IC 634 ; *Rajlu Naidu* v. *Malak*, 1939 N 197.
2. *Durga Prasad Singh* v. *Rajendra Narayan Bagchi*, 21 IC 750 ; 41 C 493 : 40 IA 223 (PC).
3. *Hanuman Mahasit* v. *Shillingford*, 57 IC 2 ; *Hari Mohan Modak* v. *Rameswar Das*, 64 IC 737.
4. *Narain Das* v. *Jawahir Singh*, 1924 L 74 ; 69 IC 827.
5. *Eastwood* v. *Ashton*, (1915) AC 900.
6. *Johri* v. *Jowahra*, 58 IC 67 ; see also *The Lodna Colliery Co., Ltd.*, v. *Bepin Behari Bose*, 55 IC 113.
7. *Hussorally Sulleman ji* v. *Tribhowandas Mangaldas Nathubhai*, 1921 PC 40; 61 IC 361 ; see also *Durga Prasad Singh* v. *Rajendra Narayan Bagchi*, 21 IC 750 : 41 C 493 ; 40 IA 233 (PC).
8. *The Lodna Colliery Co., Ltd.* v. *Bepin Behary Bose*, 55 IC 113.
9. *Ram Charan Das* v. *Arsad Ali*, 43 IC 721.

what land was conveyed by the deed.[1] Where a language used in a document and the decree following it in describing the subject-matter, is not on its face ambiguous or defective and is plain in itself, but the description is somewhat unmeaning in reference to existing facts, evidence is admissible to show to which of the properties the document and the decree relate.[2]

Misdescription may be pleaded as a defence.—Where property is transferred to a person and the deed of transfer gives a wrong number of description of the property conveyed which does not belong to the transferor, the transferer is entitled to treat his title to the property that was really intended to be conveyed as complete at the time of the execution and registration of the document, and to plead misdescription as a defence in an action against him or for recovery of the property, invoking in aid the provisions of section 95 to 97 of the Evidence Act.[3] It is submitted that Proviso(1) to Section 92 is more appropriate to be applied to such a case, the defence being one of a mutual mistake of fact.[4]

Misdescription of persons.—Persons executing, or referred to in, deeds or wills may be named or described in any way the parties select, there being no need to give a Christian name, a surname, or in fact any particular name. An error in name or description, or both, will not, therefore, invalidate the instrument and extrinsic evidence is admissible to identify and ascertain the persons intended.[5] Where a bequest was made to a person whom the testator wrongly described as his *aurasa* or "*naturally-born*" son, it was held that the false description as legatee did not invalidate the bequest to the designed person.[6]

Other instances of misdescription.—Where a single subject-matter only is involved, the inquiry, in cases of incorrect description, will often be confined to the mere sufficiency of the expression. Thus, where the name of a legatee is correct, but the description incorrect, and there is no one answering the description, the person answering the name will take, and *vice versa*.[7] So, a devise of "freeholds" will carry leaseholds, if that is all the testator had;[8] a bequest of "shares" in a company, debenture stock therein, provided he had no shares;[9] and of money on "current account", those on deposit, if that was the only account open,[10] Where the identity or extent of the subject-matter is in question, extrinsic evidence is admissible not merely that a person or thing exists to which the document might refer, but also that such person or thing was in fact intended by the writer, and this applies whether a single subject-matter only is involved or where there are several in competition, e.g. two legatees answering different part of the same name or description, or one answering the name and the other description.[11] Where a

1. *Banaphal Singh* v. *Noor Mohammad*, 155 IC 634.
2. *Abhoy Kanta* v. *Gopi Nath Deb*, 1943 C 460 : 209 IC 71 : 76 CLJ 183.
3. *Palanivelappa Goundan* v. *Nachappa Goundan*, 53 IC 379.
4. Also see *Dalip Singh* v. *Dalip Singh*, 1930 L 446 : 122 IC 493 and notes to Proviso (1) to section 92 under the heading "mistake of fact or law".
5. Phipson, Ev., 7th Ed., 600, citing *Simmons* v. *Woodward*, (1892) AC 100 ; *Wray* v. *W.*, (1905) 2 Ch. 349 ; *Maughan* v. *Sharpe*, 17 CB (NS) 443.
6. *Venkata Surya. etc.* v. *The Court of Wards*, etc. 22 M 383 : 26 IA 83 (PC).
7. Theobld, Wills 8th Ed., 296.
8. *Day* v. *Trig*, 1 P Wms 286, cited in Phipson, Ev. , 7th Ed., 600.
9. Re. Weeding, (1896) 2 Ch. 364 : Re Bodman, (1891) 3 Ch. 135.
10. Re. Vear, 62 SJ 159, cited in Phipson, Ev. , 7th Ed., 600.
11. Phipson, Ev. , 7th Ed., 609.

testator, who had no Consols but had some Bank of England Annuities, devised all his cash in Bank, Consols and Shares to B, evidence was held admissible to show that by Consols the testator meant Bank of England Annuities.[1] Where a receipt for money was executed on a certain day but no money was actually received on the day of the receipt, it was held permissible to show by extrinsic evidence that the receipt related to money received some three years earlier and that the receipt was no more than an acknowledgement of the earlier loan.[2] Where a document does not specify whether the rate of interest mentioned therein is a monthly or yearly rate, oral evidence is admissible to show that the rate fixed was monthly rate.[3]

Misdescription due to mistake.—Where misdescription of the subject-matter is due to such mistake as entitles a party to sue for the rectification of the instrument, evidence of the mistake may be given under the first Proviso to Section 92 of the Evidence Act.[4] Thus, where the name of one village is entered in the deed for the name of another village by mistake, other evidence is admissible to show such mistake.[5] Similarly, where an acknowledgement stated that a debt was due to A, oral evidence was held admissible to prove that the name of A was entered by mistake for that of B who was the real creditor, the case being one of latent ambiguity covered by Section 95 of the Evidence Act.[6] See notes to Section 92, Proviso (1).

Direct declarations of intention, whether admissible to remove a latent ambiguity under Section 95 and 97?—According to English Law, in cases of ambiguity of the kind mentioned in Sections 95 and 97 of the Evidence Act, evidence of direct declarations of intention is not admissible, though other extrinsic evidence is.[7] The Indian Evidence Act, however, does not draw any distinction between evidence of direct declarations of intention and other evidence, and it seems that evidence of the kind excluded by the English law will, under the Act, be properly admissible to clear such latent ambiguities.

96. Evidence as to application of language which can apply to one only of several persons.—When the facts are such that the language used might have been meant to apply to any one, and could not have been meant to apply to more than one, of several persons or things, evidence may be given of facts which show which of those persons or things it was intended to apply to.

Illustrations

(a) *A* agrees to sell to *B*, for Rs. 1,000, "my white horse". *A* has two

1. *Re Windsor*, (1918) 47 Jr. LTR 344, cited in Phipson, Ev. , 7th Ed., 628.
2. *Ram Chaube* v. *Sheo Harakh Tewari*, 8 Luck 195 : 1933 O 80 : 141 IC 298.
3. *Teja Singh* v. *Sant Singh*, 1930 L 144 : 121 IC 75. *But see* notes to Section 93 under the heading "ambiguity in the clause relating to interest."
4. *Dalip Singh* v. *Dalip Singh*, 1930 L 446 :122 IC 493 ; *Palanivelappe Goundan* v. *Nachappa Goundan*, 53 IC 379 ; *see* notes to Proviso (1) to Section 92 under the heading "mistake of fact or law."
5. *Mahabir Prasad* v. *Muhammad Massihiyatullah*, 32 IC 174 : 38 A 103.
6. *Aijaz Hussain* v. *Ram Sarup*, 1931 O 54 : 130 IC 347.
7. *See* Phipson ,Ev. , 7th, Ed., Rule II, 596 Rule III, 600 ; Taylor, § 1218-19.

white horses. Evidence may be given of facts which show which of them was meant.

(b) *A* agrees to accompany *B* to Hyderabad. Evidence may be given of facts showing whether Hyderabad in the Dekkhan or Hyderabad in Sind was meant.

COMMENTARY

Language of the document equally applicable to more than one person or thing; equivocations.–The present section differs from Section 94 in this : that whereas in the case contemplated by Section 94 the language of the document accurately applies to existing facts, in the case contemplated by the present section the language of the document does not accurately apply to existing facts, inasmuch, though intended to apply to only one persons or thing, in fact it applies to more than one person or thing. The section deals with that kind of latent ambiguity which in English law is described as an 'equivocation'. When the language of a document, though intended to apply to one person or thing only, is equally applicable in all its parts to two or more, and it is impossible to gather from the context which was intended, an equivocation arises, and extrinsic, evidence including direct declarations of the writer's intention, may be given to solve the ambiguity.[1] When an instrument appears on the face of it to be free from ambiguity, but, upon an endeavour being made to apply it to the persons or things indicated, it transpires that the words are equally applicable to two or more persons, or to two or more things, there is what is called a latent ambiguity. This class of ambiguity, sometimes called an equivocation, is not discovered till the instrument comes to be applied to external circumstances. In such a case, as extrinsic evidence has created the ambiguity, extrinsic evidence is admissible to resolve it, and direct evidence of intention may be given for the purpose of ascertaining which of the several persons or things to whom the words are applicable was intended to be denoted.[2] As applied to wills, Wigram states the rule as follows:-

Where the object of testator's bounty, or the subject of disposition, *i.e.*, the person or thing intended, is described in terms which are applicable indifferently to more than the one person or thing, evidence is admissible to prove which of the persons or things so described was intended by the testator.''[3]

The following are other instances of equivocations in wills and other documents:-

Where the words of a will are unambiguous, but it is bound by extrinsic evidence that they admit of applications, one only of which can have been intended by the testator, extrinsic evidence may be taken to show which of these applications was intended.[4] A man, having two cousins of the name of Mary, bequeaths a sum of money to "my cousin Mary". It appears that there are two persons, each answering the description in the will. That description, therefore, admits of two application, only one of which can have been intended by the testator. Evidence is admissible to show which of the two applications was

1. Phipson, Ev., 9th Ed., 602.
2. *The Chairman, Seraigunj Municipality* v. *The Chittagong Company Ltd* 1923 C 32 : 72 IC 696.
3. Wigram, Extrinsic Ev., cited in Phipson, Ev., 7th Ed., 602, Prop. VII.
4. Section 80 of the Indian Succession Act.

intended.[1] A, by his will, leaves to B "my estates called Sultanpur Khurd." It turns out that he had two estates called Sultanpur Khurd. Evidence is admissible to show which estate was intended.[2] If a testator devises his manor of S to AB and has two manors of North S and South S, it being clear that he means to devise one only, extrinsic evidence is admissible to show whether the testator meant to devise the manor of North S or that of South S.[3] Extrinsic evidence is admissible to show to which of the two debts an acknowledgment was intended to apply.[4] Where a usufructuary mortgage-deed provides for the payment of revenue by the mortgagee, but fails to indicate whether the parties meant the revenue as assessed at the date of the deed or as it might be re-assessed from time to time, evidence may be given, under the present section of facts to show what was meant. An express declaration of the parties, subsequent to the execution of the mortgage-deed, as to what they meant when the deed was executed, is admissible in evidence.[5] Where a Government notification purports to apply to "Hossainpur" and the map of the place mentions two places, "Hossainpur" and the "land of Hossainpur Mauza", there is a latent ambiguity of the kind contemplated by this section, and extrinsic evidence is admissible to show which place was intended.[6] Where a deed is in favour of A and "others", extrinsic evidence is admissible to show to whom the words "others" was meant to apply.[7] An equivocation has been held to arise not only where the same name or description fits two persons or things accurately; but also where it fits one accurately and the other popularily though less accurately e.g., the same name borne by father and son;[8] or by one accurately and the other in a transported order;[9] or by one person bearing the name given solely, and the other bearing additional names;[10] or, perhaps, in the case of a nephew or niece, where one is related by blood, and the other by marriage.[11]

Document bearing two dates.—Where a document bears two dates, Indian and non-Indian, the question as to which of the two dates is correct is a simple question of fact to be decided by evidence according to Section 96 of the Act.[12]

Direct declarations of intention.—As in English law, so under the Act, evidence of direct declarations of the intention of the writer is admissible to solve a latent ambiguity of the kind contemplated by the present section.[13]

Evidence of conduct.—As every kind of relevant evidence is made admissible by

---

1. III (i) to Section 80 of the Indian Succession Act, XXXIX of 1925.
2. III (ii) to Section 80 of the Indian Succession Act, XXXIX of 1925.
3. *Deo* v. *Hiscocks*, 5 M & W 363.
4. *Nithalu Ram Chela Ram* v *Radau Ram Hukmi Ram*, 155 IC 1074 ; *see* the case cited as a note to 25 BLR at p. 633 ;
5. *Farzand Alli* v. *Sadiq Husain Khan*, 54 IC 264.
6. *Chairman Seraigunij Municipality* v. *The Chittagong Company, Ltd.*, 1923 C 32 : 72 IC 696.
7. *Vedamurthi Mudaliar* v. *Raghavachalu*, 1922 M 100 : 65 IC 973.
8. *Jones* v. *Newman*, 1 WBL 60.
9. *Henderson* v. *H*, (1905) 1 Ir. R 353, 362.
10. *Bennett* v. *Marshall*, 2 K & G 740 ; but see *National Society* v. *Scottish National Society*, (1915) AC 207.
11. *Grant* v. *G.L.R.*, 5 CP 727 ; Phipson Ev., 7th Ed., 602.
12. *Mavarakhandi Achuthan* v. *Thanaiyatuthial Achuthan*, 1941 M 587 : 53 MLW 449.
13. As to Engish law on the point, see Phipson, Ev., 7th Ed., 603. For Indian authorities See *Chairman Seraigunj Municipality* v. *The Chittagong Co. Ltd.*, 1923 C 32 : 72 IC 696 ; *Frazand* v. *Keniz*, 54 IC 264.

the Act to solve an ambiguity of the kind mentioned by the present section, it follows that evidence of conduct would not only be admissible but of high evidentiary value, as it is a well known rule of interpretation that in a case of ambiguity in the terms of a document there is no safer guide to come to a true conclusion than to see how the parties have acted under that document.[1] Where an agreement of reference to arbitration does not mention the disputes referred to arbitration, extrinsic evidence, *e.g.*, the conduct of the parties is admissible to ascertain what disputes were referred.[2]

97. Evidence as to application of language to one of two sets of facts, to neither of which the whole correctly applies.—When the language used applies partly to one set of existing facts, and partly to another set of existing facts, but the whole of it does not apply correctly to either, evidence may be given to show to which of the two it was meant to apply.

Illustration

A agrees to sell to *B* "my land at *X* in the occupation of *Y*", *A* has land at *X*, but not in the occupation of *Y*, and he has land in the occupation of *Y*, but it is not at *X*. Evidence may be given of facts showing which he meant to sell.

COMMENTARY

Distinction between Sections 95, 96 and 97.—Section 96 deals with a latent ambiguity where the language of the document is accurately applicable to two or more persons or things, but the present section deals with a latent ambiguity where the language of the document is partly applicable to one person or thing and party applicable to another person or thing, but correctly to neither. Again, this section differs from Section 95, inasmuch as under Section 95 there is only one person or thing to which the language of the document is partially applicable, no other person or thing being in competition; but in the case contemplated by the present section there are two or more persons or things in competition, part of the description applying to one and part to the other, but the whole not being applicable to either.

Extrinsic evidence is admissible where part of the document applies to one subject-matter and part to another.—The rule enacted by the present section is that where the words of a document apply partly to one subject-matter and partly to another, but correctly to neither, extrinsic evidence is admissible to show which subject-matter was intended. Thus, A agrees to sell to B "my land at X in the occupation of Y." A has land at X, but not in the occupation of Y, and he has land in the occupation of Y, but it is not at X. Evidence may be given of facts showing which he meant to sell.[3] Where the boundaries given in a deed show that the whole grove was sold, but the description of the grove given by number and area indicates that only a part of the grove was sold,

1. *Ali Abbas* v. *Sher Bahadur Singh*, 1925 O 264 : 75 IC 267. *See* notes to Section 92 under the heading "evidence of conduct is admissible when the document is ambiguous or obscurely framed."
2. *Gadula Rami Naidu* v. *Messala Seethan Naidu*, 1935 M 276 : 154 IC 821 : 40 MLW 914 ; *Ghellabhai* v. *Nandubai*, 21 B 335, 345.
3. Illustration to Section 97.

other evidence is admissible to establish the identity of the land sold.[1] A leaves a legacy to ``my dear wife Caroline.'' Upon evidenced that A's wife's name was Mary, but that she had separated from him, and that he had then bigamously married a woman called Caroline, who was living with him at the date of his will and death, it was held that the latter took the legacy.[2] A left a legacy to ``my cousin Harsiet Cloak.'' A had at the date of the will no cousin strictly answering that name, but had (i) a cousin whose name had been Harrier Cloak but who had since married and become Harriet Crane, and (ii) a cousin's wife whose name was Harriet Cloak: Held, that "cousin", though primarily meaning be consanguinity, might in a secondary sense mean by affinity, and that evidence that A was more intimate and (ii) than with (i), and knew at the date of the will that (i) was married and no longer called Cloak, was admissible and sufficient to give the legacy to (ii).[3] A testator devised an estate to his nephew for life, with remainder over to ``Elizabeth Abbott, a natural daughter of Elizabeth Abbott, of Gilingham, single woman, who had formerly lived in his service.'' It appeared that, at the date of the will in 1798, Elizabeth Abbott, the mother, was the wife of John Caddy, and had two children only, both of whom were then living. One was a natural son named John, who was born in 1791, before his mother's marriage, and shortly after she had left the testator's service, and of whom the testator's nephew was the purative father, the other, born in 1795, was a legitimate daughter by John Caddy, named Margaret. It further appeared that the testator had wished his nephew to marry his servant, that he was aware she had a natural child and that he had treated her kindly since its birth and up to the date of the will, but no proof was given that he knew whether the natural child was a boy or a girl. The claimants of the estate were the son of John, the daughter Margaret, and the heir at law. In these circumstances, Lord Langdale, after much doubt, came to the conclusion that the testator meant to provide for his nephew's natural child by Elizabeth Abbott, his servant, and that the mistake of the name and sex was not sufficient to defeat the devise.[4]

Direct declarations of intention, whether admissible to remove a latent ambiguity under Section 97 ?—See notes to Section 95, under this heading.

98. Evidence as to meaning of illegible characters, etc.—Evidence may be given to show the meaning of illegible or not commonly intelligible characters, of foreign, obsolete, technical, local, and provincial expressions, of abbreviations and of words used in a peculiar sense.

Illustration

A, a sculptor, agrees to sell to *B*, "all my mods". *A* has both models and modelling tools. Evidence may be given to show which he meant to sell.

COMMENTARY

Principle.—Evidence of the kind mentioned by this section is admitted on prin-

1. *Banaphal Singh* v. *Noor Mohammad*, 155 IC 634.
2. *Doe* v. *Rouse*, 5 CB 422.
3. *Taylor Cloak* v. *Hammond*, 34 Ch D 255 CA.
4. Taylor, § 1216, citing *Ryall* v. *Hannam*, (1874) 76 RR 201.

ciples similar to those governing the admission of expert testimony, and in some text books on English law the subject-matter of this section is dealt within the same chapter as the opinion of experts.[1]

Evidence to show the meaning of illegible or not commonly intelligible characters.—If the characters in which the instrument is written are in shorthand, or are otherwise difficult to be deciphered, the testimony of persons skilled in deciphering writing is admissible to interpret the characters. In several cases wills, written in a scarcely legible hand, have been interpreted by Courts of equity with the assistance of persons skilled in writing.[2]

Evidence to show the meaning of foreign obsolete, technical, local and provincial expressions, of abbreviations, and of words used in a peculiar sense is admissible.—The ordinary rule is that the words of a document are to be understood in their ordinary sense. But where it is clear, either from the context or the facts, that such meaning cannot have been intended, extrinsic evidence may be given to show that they were used in a peculiar sense.[3] If the language of a document is foreign, obsolete, technical, local or provincial, and for that reason is not understood by the Court, or is capable of bearing two or more interpretations, the testimony of persons who understand the language in which the instrument is written, or the ancient, technical, local, or provincial meaning of the terms employed therein, is admissible to translate the instrument, or to comprehend the proper meaning of the expressions used therein. The practice of proving translations of foreign documents is so notorious as to require no authority to support.[4] In a case relating to the infringement of a patent the Privy Council has remarked that the question whether a prior specification describes the invention claimed by a subsequent inventor is a question of construction, and that parol evidence is only admissible for the purpose of explaining words or symbols of art and other such like technical matters, and of informing the Court of relevant surroundng circumstances.[5] The illustration appended to the section is taken from *Goblet* v. *Beeche*[6] where the question being whether a legacy of a sculptor's "mod tools for carving" meant modelling tools for carving or, moulds or models, the opinions of statuaries were admitted to prove that there were no such tools known as modelling tools for carving, and that the word "mod" would be understood by a sculptor as an abbreviation for models.

Code expression.—If the language of a writing has a secret meaning, it is proper to show the fact. Ciphers play an important part in business affairs, and there is no reason why they are not as proper subjects for translation as foreign languages.[7]

Evidence of usage.—Witnesses conversant with the business, trade or locality to which the document relates may be called to testify that, according to the recognized practice and usage of such business, trade or locality, certain expressions contained in the writing have in similar documents a particular conventional meaning.[8] Evidence of

1. *See* Phipson, Ev., 7th Ev., 376.
2. Taylor, § 1159.
3. *See* notes to Section 95 ; *Muhammad Ajzal* v. *Din Muhammad*, 1947 L 117.
4. Taylor, § 1159.
5. *Canadian General Electric Co. Ltd.* v. *Fada Radio, Ltd.*, 1930 PC 1 : 124 IC 569.
6. *Goblet* v. *Beecy*, 3 Sim 24.
7. 10 RCL 1075.
8. Taylor, § 1160.

Northern University NUB Library Bangladesh

usage to explain the meaning of particular words in a written instrument may either go to show that the words employed are purely local or technical, that is, words which are not of universal use, but familarly known and employed either in a particular district, or in a particular science or trade, or by a particular class of persons, or to show that such words have two meanings, the one common and universal, the other technical, peculiar or local. In either case it will be admissible to define and explain the meaning of language employed. Where, however, words have by usage two meanings, in addition to giving evidence of this it will also be necessary to prove such additional circumtances as will raise a presumption that the parties intended to use the words in what logicians call their "second intention" unless this can be inferred from reading the instrument itself,[1] and if the words employed in a written instrument have a known legal meaning, parol evidence that the parties intended to use them in some different, though popular, sense will be rejected, unless such words, if interpreted according to their strict legal acceptation, be wholly insensible with reference either to the context or to the extrinsic facts.[2] Evidence of usage has been held admissible to interpret the following words, the usages of the House of Commons, to explain the meaning of, and formalities involved in taking an oath "solemnly and publicly" pursuant to the Parliamentary Oaths Act, 1866,[3] a theatrical usage, to show that the words "year" in a contract meant those parts of the year during which the theatre was open,[4] a mercantile usage, to show that "months" in a charter-party meant calendar and not lunar months,[5] or that "October" in a contract of marine insurance meant from the 25th to the 31st of that month.[6] So usage is admissible to show that in a lease of a rabbit warren, the words "thousand rabbits" meant in that particular part of the country twelve hundred,[7] or that "18 pockets of Kent hops at 100s" meant at 100s per cent.[8] Where a rate of interest is mentioned in the document but it is not specified whether the rate is monthly or annual, oral evidence is admissible to show that the rate intended was a monthly rate.[9]

Custom or usage annexing incidents to contracts, etc.—See notes to Section 92, Proviso (5).

99. Who may give evidence of agreement varying terms of document.—Persons who are not parties to a document, or their representatives in interest, may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document.

Illustration

A and *B* make a contract in writing that *B* shall sell A certain cotton, to be paid for on delivery. At the same time they make an oral agreement

1. Taylor, § 1161.
2. Taylor, § 1165.
3. *Attorney General* v. *Bradlaugh*, 14 QBD 667, CA.
4. *Grant* v. *Maddox*, 15 M & W 737.
5. *Jolly* v. *Young*, 1 Esp. 186.
6. *Chaurand* v. *Angerstein*, (1791) 1 Peake R 43.
7. *Smith* v. *Wilson*, 3 B & Ad 728.
8. *Spicer* v. *Cooper*, 1 QB 424.
9. *Teja Singh* v. *Sant Singh*, 1930 L 144 : 121 IC 75. But see notes to Section 93 under the heading "ambiguity in the clause relating to interest."

that three months' credit shall be given to *A*. This could not be shown as between *A and B*, but it might be shown by *C*, if it affected his interests.

COMMENTARY

The section is superfluous.—This section is superfluous, as the rule enacted by this section can clearly be deduced from the provisions of Section 92 of the Act. The prohibition to give evidence of an oral agreement or statement to contradict, vary, add to, or subtract from, the terms of a document applies only to the parties to the document or their representatives in interest,[1] and this section does no more than reiterate that rule. The word "varying" in Section 99 is used in the same sense as the words "contradicting, varying, adding to, or subtracting from" in Section 92.[2]

100. Saving of provisions of Indian Succession Act relating to wills.—Nothing in this Chapter contained shall be taken to affect any of the provisions of the Indian Succession Act (X of 1865)[3] as to the construction of wills.

COMMENTARY

Special rules of construction of wills.—Chapter VI of the Indian Succession Act[4] enacts certain special rules for the construction of wills governed by that enactment. These special rules, according to this section of the Indian Evidence Act, are not affected by anything in Chapter VI of the Indian Evidence Act. Therefore, the rules as to the exclusion of evidence by documentary evidence given in Chapter VI of the Evidence Act apply to all non-testamentary instruments, and to such wills as are not governed by the Indian Succession Act.

Hindu wills.—The special rules of construciton of wills given in Chapter VI of the Indian Succession Act,[5] are made applicable to all wills and codicils made by any Hindu, Buddhist, Sikh or Jaina, or after the first of September 1870, within the territories which at the said date were subject to the Lieutenant Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay, and to all such wills and codicils made outside those territories and limits so far as they relate to immovable property situated within those territories or limits.[6]

---

1. *See* notes to Section 92 under the heading "parol evidence not admissible where the proceedings are between strangers or between a party and a stranger, or between co-obligors or between co-obligees."
2. *Pathamma!* v. *Syed Kalai Ravathar*, 27 M 329 ; *Krishnaswami Iyar* v. *Mangalathamma!*, 53 IC 243.
3. *See* now the Indian Succession Act, 1925 (39 of 1925), Pt. VI, Ch. VI.
4. Act XXXIX of 1925, Sections 74-111.
5. Act XXXIX of 1925.
6. Section 57, Indian Succession Act, XXXIX of 1925.