CHAPTER V

OF DOCUMENTARY EVIDENCE

"Document" means any matter expressed or described upon any substances by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used for the purpose of recording that matter.[1] Documents produced for the inspection of the Court are called "documentary evidence."[2]

Having dealt with the question what facts may be proved by oral evidence and by what kind of oral evidence, the Act proceeds to deal with the subject of "documentary evidence." This subject is dealt with in the next two Chapters and from three different points of view, namely (i) how are documents to be proved ;[3] (ii) what are the presumptions about the various kinds of documents ;[4] and (iii) when is oral evidence excluded by documentary evidence.[5]

61. Proof of contents of documents.—The contents of documents may be proved either by primary or by secondary evidence.

COMMENTARY

Section 61 is subject to the provisions of Section 64 and 65.—This section, like Section 59, must be read subject to the provisions of Sections 64 and 65. Read with Sections 64 and 65, the rule laid down by the Section comes to this: that the contents of a document must be proved by primary evidence, unless secondary evidence becomes admissible for any of the reasons mentioned in Section 65, in which case such contents may be proved by secondary evidence.

Section 61 —Where the report of a doctor is relied upon, it is primary evidence and ought to be produced.[6] If no witness is examined to prove documents, there is procedural infirmity.[6a]

Section 61.—Scope —consent to admission of document if bar to challenge its genuineness.

Consent by a party to exhibit a document does not amount to an admission of its contents. A party has a right, by cross-examination, to show that the document is not genuine.[7]

Section 52, 61, 64 & 65 —Scope and applicability.—Admissibility of documents which require to be stamped.

The Evidence Act does not purport to deal with the admissibility of documents in evidence which are required to be stamped under the provisions of the Stamp Act.[8]

---

1. Section 3.
2. Section 3.
3. Sections 61-78.
4. Sections 79-90.
5. Sections 91-100.
6. *Mohammad Ikram Hussain* v. *State of U.P.*, 1968 SCD 328.

6a. *Rajwati Devi* v. *Jt. Dir., Consolation*, AIR 1989 Pat. 66.

7. *Sanjay Cotton Co* v. *Omprakash Shivprakash*, AIR 1973 Bom. 40.
8. *Jupudi Kesava Rao* v. *V.P. Subba Rao*, 1971 (1) SCC 545.

62. Primary evidence.—Primary evidence means the document itself produced for inspection of the Court.

Explanation. 1.—Where a document is executed in several parts , each part is primary evidence of the document.

Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

*Explanation.*2.—Where a number of documents are all made by one uniform process, as in the case of printing, lithography, or photography, each is primary evidence of the contents of the rest; but where they are all copies of a common original, they are not primary evidence of the contents of the original.

Illustration

A person is shown to have been in possession of a number of placards, all printed at one time from one original. Any one of the placards is primary evidence of the contents of any other, but no one of them is primary evidence of the contents of the original.

COMMENTARY

Primary evidence.—Primary evidence means the document itself produced for the inspection of the Court.[1] The rule that "the best evidence must be given of which the nature of the case permits" has often been regarded as expressing the great fundamental principle upon which the law of evidence depends.[2] The general rule requiring primary evidence of litigated documents is commonly said to be based on the "best evidence" principle, and to be supported by the so-called presumption that if inferior evidence is produced where better might be given, the letter would tell against the withholder. The rule, however, existed long before that principle was formulated, being in fact a survival of very ancient practice; and the above presumption has title, if any, application in the present day.[3]

Explanation I : Document executed in several parts of counterparts.—An instrument is said to be executed in several parts when it is written out and executed, that is signed or sealed, as the case may be, by all the parties to the instruments as many times over as there are parties, each party retaining one writing thus signed.[4] Thus, where agreement between two parties is written twice over, and each writing is signed by both the parties and each party retains one part of the agreement, the agreement is said to be executed in duplicates originals. "Where there are duplicate originals-i.e., two documents both fully executed by each party-both are considered primary evidence."[5] If an

1. Section 62.
2. Phipson Ev., 7th Ed., 45.
3. Phipson, Ev., 7th Ed., 514.
4. See Taylor, § 426.
5. Phipson, Ev., 7th Ed., 516 ; Forbes Samuel 1913 (3) KB 706 721 ; Section 22.

instrument is executed in the above manner thrice, the three parts are called triplicate originals. When each of the instruments is signed by one party only, and delivered to the other, the documents are termed counterparts.[1] Where a document is executed in counterparts, each part is primary evidence against the executing party and his privies;[2] but, as against the non-executing party and his privies, it is only secondary evidence.[3] "Execution in counterparts is a method of execution adopted when there are two parties to the transaction. thus, if the transaction is a contract between A and B the document is copied, out twice, and A alone signs one document, while B alone signs the other. A then hands to B the document signed by himself and B hands to A the document signed by himself. Then as against A the document signed by A is primary evidence; Whilst as against B the document signed by B is primary evidence.

Explanation II. Printed lithographic, Photographic and other reproductions made by a uniform process — Printed, lithographic, photographic and other reproductions made by one uniform process are primary evidence of each other, but if, in the circumstances of a particular case, the original be not a reproduction but the document from which the reproduction was made, the reproduction would be merely secondary evidence of the original. "For instance, if it is desired to prove the publication of a libel in a newspaper, any copy of the issue in which libel appeared would be primary evidence of the publication in all the other copies of that issue. But if it were necessary to prove the original libel from which the article was set up, the printed paper would not be primary, but only secondary, evidence of the manuscript and admissible only under the conditions, which render the reception of secondary evidence admissible."[4] In the latter case there is no more guarantee of a printed copy being a true copy than of a written copy. One specimen of a newspaper is not a copy of another specimen of the same newspaper of the same date. There is no relation between them of copy and original. They are all originals, each primary evidence of the contents of the rest under the second *Explanation* to Section 62.[5] Carbon copies, being made by one uniform process, are originals.[6]

Where several letters are prepared by one uniform process e.g., typing on a type writer, and one of them alone is afterwards signed separately, and the rest are only initialled, it cannot be said that the signature on the one and the initials on the rest have been made by one uniform process. The copies, therefore, cannot be held to be primary evidence of the letter.[7] But copies made on carbon paper ordinarily used cannot generally be relied upon for purposes of comparison of signatures, because the impression made upon is generally irregular and blotched.[8]

Constitution of India — Arts 133, 136 and 226 — Admission of additional documents by the High Court, in writ jurisdiction is an exercise of discretion with which the Supreme Court does not normally interfere. But the genuineness of the documents is an aspect which goes to the root of the matter.[9]

---

1 Phipson, Ev., 7th Ed., 516; Taylor 426.
2 Section 62.
3 Section 63, Phipson, Ev., 7th Ed., 516.
4 Norton, Ev., 242.
5 *Ram Chandra* v. *E*, 120 IC 798; 1930 L 371; 31 Cr LJ 168.
6 *Fed. Co.* v. *Ind Co.*, 176 Ind. 328 Cr 890 of 1934 (Lah); See also *Nityananda Roy* v. *Rashbehari Roy*, 89 CLJ 204; *Prithi Chand* v. *State of H.P.*, AIR 1989 SC 702.
7 *Sivasankaram Pillai* v. *Narayana Rao*, 1937 M 807.
8 *Nityananda Roy* v. *Rashbehari Roy*, 89 CLJ 204.
9 *Govt. of A.P.* v. *Karvi Chinnya Venkata Reddy*, 1995 Supp (1) SCC 462, para 2.

63. Secondary evidence.—Secondary evidence means and includes.—

(1) certified copies given under the provisions hereafter contained;

(2) copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;

(3) copies made from or compared with the original;

(4) counterparts of documents as against the parties who did not execute them;

(5) oral accounts of the contents of a document given by some person who has himself seen it.

Illustration

(a) A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original.

(b) A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter if it is shown that the copy made by the copying machine was made from the original.

(c) A copy transcribed from a copy, but afterwards compared with the original, is secondary evidence; but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original.

(d) Neither an oral account of a copy compared with the original, nor an oral account of a photograph of machine-copy of the original, is secondary evidence of the original.

COMMENTS

Definition and admissibility of secondary evidence ; Section 63 and 65.—This section defines the *Kinds* of secondary evidence permitted by the Act ; whereas Section 65 defines the *circumstances under which* secondary evidence of the kind mentioned in the present section becomes admissible. When the question is whether secondary evidence of the contents of a document can or cannot be given, the question must be decided with reference to the provisions of Section 65 ; but when the question is whether evidence sought to be given in a particular case is or is not the right kind of secondary evidence, the question must be decided with reference to the provisions of the present section.

Section 63—**Proof of Report of speech.**—In *Khilumal* v.*Arjun Das*, it was said that a report of speech made in a newspaper is not admissible in evidence to prove the speech. The person who made the speech, or a person in whose presence the speech was made, or a reporter of the newspaper in whose presence the speech was made, and who

sent evidence, no reliance can be placed on the version of speeches given in the newspaper.[1] Newspaper report are mere hearsay and cannot in law be relied upon.[2]

Section 63-Photograph.—The East Pakistan High Court has held that a photograph not proved to be original was inadmissible as secondary evidence under Section 63.[3]

Certificate as to date of birth on the basis of entry in register of certain Church is not admissible.[4]

Clause (1); certified copies.—Certified copies are defined by Section 76; Section 63 declares certified copies to be a permissible form of secondary evidence; Section 65, cl (e) and Section 77 make certified copies of public documents[5] admissible in proof of the contents of such documents; and Section 79 requires every document purporting to be a certified copy to be presumed to be genuine. Public documents other than those mentioned in Section 76 and 77 may be proved by copies certified in the manner described in Section 78. The Court may presume that any documents purporting to be a certified copy of any foreign judicial record is genuine and accurate.[6]

Certified copies are, under law, to be treated as secondary evidence and once they have acquired such a status, the marking of such documents at the trial without objection result in such documents and their contents being evidence in the case.[7]

A certified copy is a copy signed and certified as true by the officer to whose custody the original is entrusted, and it is admitted upon the credit of such officer without comparing with the original.[8]

Certified copy is not proof of the execution of the document.—As there is no mention of secondary evidence being given of the execution of a document in Section 65, a certified copy is only evidence of the existence, condition and contents of a documents and not of its execution. Section 67 which requires every document to be proved follows the mention of primary and secondary evidence in Section 61 to 66, and therefore governs both kinds of evidence.[9] A party producing secondary evidence of a documents is not relieved of the duty of proving the execution of the original.[10]

Copies of registered documents obtained from the Registration Office.—See notes to Section 65(f).

Clause (2); copies made by mechanical processes, and copies compared with machine-made copies.—Where a number of documents are all made by one uniform process, as in the case of printing, lithography or photography, each is primary evidence of the rest; but where they are all copies of a common original, they are not primary evidence of the contents of the original.[11] This clause supposes the document from which a mechanical reproduction is made to be the original document. Therefore, according to this clause and the second *Explanation* to section 62, the mechanical

---

1. *Khilumal* v. *Arjun Das*, ILR 1959 Raj. 524.
2. *S.A. Khan* v. *Ch. Bhajan Lal*, (1993)3 SCC 151 Para 22.
3. *Gustad Shekdar* v. *State*, PLD 1959 Dacca 756.
4. *Harendra Nath* v. *Suprova*, AIR 1989 Cal. 120.
5. For definition of a public Document, See Section 74 and notes thereto.
6. Section 86.
7. L.A.O, *Vijayawada Thermal Station* v. *Natulapati Venkata*, AIR 1991 A.P. 31 P. 38 (F.B.)
8. Phipson Ev. 7th Ed., 519.
9. *Karimullah* v. *Gudar Keori*, 82 IC 306 ; 1925 A 56 ; See also *Appathura Pattar* v. *Gopala Panikkar*, 25 M 674 ; *Sookram Sookul* v. *Ram Lall Sookul*, 9 WR 248 ; *Bajraj Singh* v. *Yogendrapal Singh*, 1952 MB 146.
10. *Chuha Mal* v. *Rahim Bakhsh*, 71 IC 568 ; 1924 L 303.
11. Expl. 2 to section 62.

reproduction is merely secondary evidence of the original document from which the mechanical reproduction is made. If, however, any mechanical reproduction itself is the original, other similar reproduction would, under the second *Explanation* to section 62, be primary evidence. Thus, a photograph of an original is secondary evidence of its contents if it is proved that the thing photographed was the original;[1] but if, in a particular case, a printed placard is the original document, any one of the other placards printed at the same time would be primary evidence of the former.[2] Since the process of mechanical reproduction insures the accuracy of the reproduction, a copy compared with a compared with a mechanical reproduction of the original is good secondary evidence. Thus, a copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter, if it is shown that the copy made by the copying machine was made from the original.[3] A copy made from a machine-made copy, and compared with it, cannot be rejected as being copy of a copy; because the mechanical process of making the copy in itself insures the accuracy of the machine-made copy, and the copy from the machine-made copy, having been compared with the latter becomes good secondary evidence of the original. This clause applies to blue prints. A copy which is not a carbon copy and is not proved to have been compared with the original cannot be treated as secondary evidence.[4] Copies made from original by mechanical processes which in themselves ensure the accuracy of the copy and copies compared with such copies: "copies made from or compared with the original." The very fact that the Notary had given the certificate that he compared these copies from the original photocopies could be admitted into evidence.[5]

Clause (3); copies made from the original or compared with the original.—To be admissible under clause 3, the copy to be given in evidence must be shown either to have been made from the original or to have been compared with the original.[6] Therefore, when the copy to be given in evidence has neither been made from the original nor compared with the original, it will be inadmissible. Where in the case of an uncertified copy the person who is alleged to have made the copy and also the person who compared with the original are both dead, and their signatures only are proved by a person acquainted with their handwriting, it cannot be said that the uncertified copy has been proved to have been made from or compared with the original.[7] A copy of a copy, but afterwards compared with the original is good secondary evidence;[8] but when not compared with the original it is inadmissible even if the copy from which it was made was compared with the original.[9] A document being merely a copy of a copy, the original not having been satisfactorily accounted for, is inadmissible and must be rejected.[10]

1. Ill. (a) ; also see the illustration to section 62.
2. Ill. to Section 62.
3. Ill. (b) to Section 63.
4. *R.M.Pandey* v. *Automobile Products of India*, 1956 B 115.
5. *Banarsi Dass* v. *Maman Chand*, AIR 1992 P & H 145.
6. *Abul Bari Dewan* v. *Hrishkesh Mittra*, 152 IC 552 : 1929 C 459 ; *Maung Po Ni* v. *Ma Shwe Kyi*, 2 R 397 : 84 IC 373 : 1925 R 7 see also *Krishna Kishori Chaodhrani* v. *Kishori Lal Roy*, 14 C 487, 491 : 14 IA 71 (PC) ; *Mohammad Khan* v. *Ghulam Rasul*, PLD 1952 L 40.
7. *Narendra Chandra De* v. *Rajendra Chandra Chanda*, 1941 C 506 : 197 IC 45 : 73 CLJ 159 ; see *Deputy Commissioner of Partabgarh* v. *The Universal Film Co. Ltd.*, 1950 A 696.
8. Ill. (c) to Section 63.
9. *Ram Prasad* v. *Raghunandan Prasad*, 7 A 738 ; *The Secretary of State for India in Council* v. *Manjeshwar Krishnayya*, 28 M 257, 299 ; *Abdul Ghani Shah* v. *Mohammad Raza*, 54 IC 941 : Ill. (c) to Section 63.
10. *Raja Mahadeva Royal Y.B.* v. *Raja Virabasava Chikka Royal*, 1948 PC 114 : 1948 ALJ 21 6 : 50 BLR 638

A copy transcribed from a copy of an original document, but not compared with the original, is not secondary evidence of the original.[1] An ordinary copy of sale deed is not a secondary evidence.[1a] The criteria of secondary evidence is laid in *Harijiwan Sahu* v. *Jairam Sahu*.[1b]

The copy to be given in evidence must be proved to be a correct copy[2] by the evidence of some one who can swear to its being a true copy.[3] It is not necessary that the scribe of the copy should be produced. What is required to be proved is that the document produced is a true copy of the original. Any one who has heard the original and the copy read out to him may swear that the contents of the two were indentical.[4] An examined copy is a copy sworn to be a true copy by a witness who has himself examined it line by line with the original.[5] A printed copy of the deposition of a party to a former suit, which come up to the High Court in appeal, can be admitted as secondary evidence under the second portion of second 63, clauses (3), only if it is proved that it was compared with the original deposition.[6] Where the original document was an order issued by a public officer, and, in the usual course of business, all orders issued by the public officer used to be entered in a register, it was held that the entry in the register should, under section 114, illustration (f), be presumed to be a correct copy of the particular order issued.[7] Where a Judge ordered a copy of a deed of gift to be filed in a suit and endorsed the copy "copy in accordance with the original," the Privy Council held that the copy must be taken to have been compared by the Judge with the original deed and that therefore it was admissible in evidence.[8] Where a Sub-Registrar prepared a copy of the will presented to him for registration and submitted the copy to the Registrar, the copy so prepared was held admissible under clause (3) of section 63.[9] The requirements of this clause are satisfied if the witness states that the copy produced is a copy from the original and that he has personal knowledge of it.[10] Thus, copies of prescriptions made in the register of a firm of druggists are good secondary evidence of the contents of the prescriptions if the person who copied the prescriptions has been called to prove them.[11] Counterfoils of original receipts are admissible in evidence only if proof of the loss of the original has been given.[12]

: 61 MLW 454 : ILR 1949 M 72.

1. *Rajendra Narayana Singh Deo* v. *Bihari Lal Chakravarthy*, 11 P 569 : 138 IC 419 : 1932 P 157.

1a. *Kalyan Singh* v. *Chhoti*, AIR 1990 SC 396.

1b. AIR 1989 Pat. 96.

2. *Manug Po Ni* v. *Ma Shwe Kyi*, 2 R 397 : 84 IC 373 : 1925 R 7 ; *Appathura Pattar* v. *Gopala Panikar*, 25 M 674 ; *Mst. Ameeroonnissa Khatoon* v. *Mst. Abendoonnissa Khatton*, 23 WR 208 ; 2 I A 87 (PC) ; *Sookram Sookul* v. *Ram Lall Sookul*, 9 WR 248 ; See *Krishna Koshori Chaodhrani* v. *Kishori Lal Roy*, 14 C 487, 491 : 14 IA 71 (PC).

3. See *Krishna Chaudhrani* v. *Kishori Lal Roy*, 14 C 487, 491 : 14 IA 71 (PC).

4. *Babu Lal* v. *Ganga Saran*, 1952 A 48 : 1951 ALJ 746.

5. *Phipson*, Ev., 7th Ed., 519, *Reid* v. *Margison*, 1 Camp 469.

6. *Alapati Narasimham* v. *Ailoori Babu Rao*, 1930 M 40 ; *Ganpati Aiyar* v. *Sakkarayappa Mudaliari*, 115 IC 147 : 1929 M 187.

7. *Krishna Rao Bahadur* v. *Muthangi Buchi Rammanyya Guru*, 28 IC 808.

8. *Luchman Singh* v. *Puna*, 16 C 753 ; 16 IA 125 (PC) ; See also *Chudasama Kholuba Sartansang* v. *Chudasama Takhatsang Narsingji*, 46 B 32 : 76 IC 155 : 1922 B 177, where the copy produced was a certified copy of the compared copy of the original placed on the record of a case of about a hundred years previously.

9. *Baya* v. *Bhaurao*, 78 IC 865 : 1924 N 375.

10. *Rali* v. *Gau Kim Swee*, 9 C 939.

11. *Chandrani Kuer* v. *Sheo Nath*, 6 Luck. 619 : 132 IC 337 : 1931 O 146.

12. *Hafiz Mohammad Suleman* v. *Hari Ram*, 1937 L 370.

Judgment, whether good secondary evidence of the pleadings, admissions, depositions, documents filed, etc.?—Where the document to be proved is the deposition of a witness, an abstract of the deposition given in the judgment is not the correct kind of proof of the deposition;[1] but a recital in an order of the Court of the terms of an application is good secondary evidence of the terms of the application, if the application has been destroyed.[2] For further notes to this subject, see notes to Sections 43 and 17.

Copies obtained from the Registration Office.—See notes to Section 65, Clause (f).

Proof of copy is no proof of the execution and genuineness of the original.—"It is scarcely necessary to observe that proof of a copy being a correct copy is no proof of the execution and genuineness, etc., of the original."[3] As there is no mention of secondary evidence being given of the execution of a document in Section 65, a copy admitted by way of secondary evidence is only evidence of the existence, condition and contents of a document, and not of its execution.[4] Section 67 which requires every document to be proved follows the mention of primary and secondary evidence in Section 61 to 66 and, therefore, governs both kinds of evidence.[5] A party producing secondary evidence of a document is not relieved of the duty of proving the execution of the original[6] even if the document be more than thirty years old.[7] Where the original document is found to be a forgery, there can be no question of the secondary evidence of its contents.[8]

Section 63.—Copies of original documents would not be admissible in evidence when the originals were not produced at any time nor was any foundation laid for the establishment of the right to give secondary evidence.[9]

Clause (4); **counterparts of documents.**—Simultaneous execution of a lease and a *qabuliat* is a well-known form of the execution of a document in counterparts. But the rule that a counterpart is primary evidence as against the parties executing it and secondary evidence as against the parties who did not execute it has no application when neither the lease nor the *qabuliat* is complete in itself, but each supplements the other.[10] For further notes on "counterparts," see notes to Section 62 under the heading "Explanation I; documents executed in several parts of counterparts."

Clause (5); **oral accounts of the contents of a document, given by a person who has himself seen it.**—The oral account of the contents of a document must be given by a person who has not himself seen the original but only a compared copy, photograph or machine-copy of the original is in admissible.[11] Contents of a will can be proved by the oral statements of witnesses who had attested the original. That evidence is a good secondary evidence.[12] A written statements as to the contents of a document is quite

1. *Nanduri Saradambo* v. *Parakala Pattabhiramayya*, 53 M 952 : 129 IC 463 : 1931 M 207.
2. *Kundan Bibi* v. *Magan Lal*, 139 IC 718 : 1932 A 710.
3. Woodroffe, Ev., 9th Ed., 525.
4. *Karimulla* v. *Gudar Koeri*, 82 IC 306 : 1925 A 56 : see also *Appathura Paatar* v. *Gopala Panikar*, 25 M 674 ; *Sookram Sookul* v. *Ram Lall Sookul*, 9 WR 248 : *Brajraj Singh* v. *Yogendrapal Singh*, 1952 MB 146.
5. *Karimulla* v *Gudar Koeri*, 82 IC 306 : 1925 A 56.
6. *Chuha Mal* v. *Rahim Bakhsh*, 71 IC 568 : 1924 L 303.
7. See notes to Section 90.
8. *Kalliani Amma* v. *Narayana Nambiar*, 28 IC 69.
9. *The Roman Catholic Mission and others* v. *The State of Madras and others*, 1967 SCJ 605.
10. See *Baidya Nath Dutt* v. *Kaminikant Gupta*, 6 CLJ 572.
11. Ill, (d) to Section 63 : *Kanayalal* v. *Pyarabai*, 7 B 139, 144.
12. *Deorao Amrita* v. *Raibhan Sambhaji*, 1954 N 357.

different from an oral account of its contents; the former is not an admissible form of secondary evidence.[1] A certified copy of a judgment containing references to the plaint is not an oral account of the contents of the plaint,[2] nor is an entry as to the date of birth of a minor, in an extract from the register of applications in respect of minor, secondary evidence of any statement as to the date of birth made in the application of a guardian.[3]

Oral account of the contents of a document by a person who has seen but not read the original is inadmissible.—The Privy Council has held that oral accounts of the contents of a document must be given by someone who has read the document so as to be able to speak *de visu* to its contents.[4] This means that the oral evidence of the contents of the document can be given only by a person who has himself read the document. Evidence that the witness saw the documents and heard it read out by someone else is only hearsay, so far as the contents are concerned, and does not fulfil the requirements of Section 60 as to oral evidence generally.[5] This decision of the Privy Council, which affirmed the judgment of Young and Baguley, JJ.,[6] must be taken to have overruled the decision of Walsh and Sulai, JJ., in *Mehilal* v. *Ramji Das* [7] and to have endorsed the opinion of Tudball, J., in *Ghure* v. *Chatrapal Singh*[8] and of Daniels J., in *Ramji Das* v. *Mihin Lal*.[9] It also follows from this Privy Council decision that oral accounts of contents of a document given by an illiterate person to whom the document was read over, or by a person to whom the document was translated are inadmissible.[10] Where the witness produced to prove a deed by secondary evidence is an illiterate person, he cannot be said to be one who has "seen" the deed, and his evidence is therefore not admissible under cl.(5) of Section 63.[11] When an oral account of the contents of a document which was in Persian was given by a witness who was unable to read Persian, it was held that the account given by the witness was admissible.[12] When a decree-holder wishes to obtain execution of a decree the record of which has been destroyed, he must prove the contents of that decree, and this can only be done by means of secondary evidence. For this purpose statements of persons who merely heard the judgment pronounced are not admissible in evidence. What is required is an oral account of the contents of the judgment or decree by someone who had read the one or the other.[13] Oral evidence of the contents of a document must be by a person who had read the document and not by one who was merely present at the time of the transaction

1. See *Kanayalal* v. *Pyarabai*, 7 B 139, 144. In *Bahadur Singh* v. *Madho Singh*, 36 IC 969, evidence given as to the contents of a mortgage in a previous suit was held admissible under cl. (5) of Section 63.
2. *Jaigopal Misir* v. *Sheo Sagar Singh*, 4 IC 579.
3. *Gokhula Nand* v. *Baldeo Narain Singh*, 86 IC 681 : 1924 P 796.
4. *Ma Miv. Kallanther Ammal*, 5 R 18 : 54 IA 61 : 100 IC 1 : 1927 PC 15 ; See also *Ram Piaray* v. *Ram Raghubr Lal*, 112 IC 310 ; *Lalan Bibi* v. *Muhamad Asafaq*, PLD 1951 L 467.
5. *Kalenther Ammal* v. *Ma Mi*, 2 R 400 : 84 IC 175 : 1924 R 363.
6. *Kalenther Ammal* v. *Ma Mi*, 2 R 400 : 84 IC 175 : 1924 R 363 ; *Trimbak Narayar Moghe* v. *Yaadrao Shankar Rao Jamdar*, 1940 N 116.
7. *Mehi Lal* v. *Ramji Dass*, 47 A 13 : 80 IC 930 : 1924 A 792.
8. *Ghure* v. *Chatrapal Singh*, 23 IC 11.
9. *Ramji Das* v. *Mehi Lal*, 71 IC 654 : 1923 A 441.
10. See also *Ram Piaray* v. *Ram Raghubir Lal*, 112 IC 310. The contrary decisions in *Mehi Lal* v. *Ramji Dass*, 47 A 13 : 80 IC 939 : 1924 A 792 and *Pudai Singh* v. *Brij Mangal*, 73 IC 654 : 1923 A 612 must be taken to have been overruled by this PC decision.
11. See also *Ramji Das* v. *Mihin Lal*, 71 IC 654 ; 1923 A 441 ; *Janki* v. *Ram Kishore*, 66 IC 557 : 1922 A 232 ; *Ghure* v. *Chatrapal Singh*, 23 IC 11.
12. *Ramji Das* v. *Mihin Lal*, 71 IC 654 : 1923 A 441.
13. *Maung Chit U* v. *Maung Tha Ku* 77 IC 258 : 1923 R 113.

embodied in the document.[1] It is not necessary, however, that the witness deposing to the contents of the deed should be an attesting witness.[2] Oral accounts of the contents of certain books of accounts seen by a witness many years before giving evidence are not of much value.[3] A Settlement Officer's report on the survey and settlement of a district is not secondary evidence of the contents of the *jamabandi* statement, under Section 63 (5) of the Evidence Act.[4]

The section is exhaustive of the kinds of secondary evidence permitted by the Act.—This section is exhaustive of the kinds of secondary evidence which can be let in[5]. Thus, it has been held that a translation of a will contained in a judgment in another suit is not secondary evidence of the contents of the will.[6] Similarly, a paper-book of a High Court containing translations of certain documents filed in the suit is not secondary evidence of the contents of those documents in another suit,[7] though it may become so in conjunction with the requisite oral evidence to prove the translation contained in the paper-book.[8] A certified copy of the translation of a judgment made under Section 185 of Act VIII of 1859 is not secondary evidence of any acknowledgment of liability made in the plaint.[9] An " abstract translation," which does not purport to be a copy or even a full and complete translation of the document, but is merely a summary of its terms, produced in a case where the point in support of which the document is sought to be produced was of no importance, does not come within the terms of Section 63 and is inadmissible.[10] A register kept by a person, of the names of the executants of certain bonds, the matter in respect of which the bonds had been given, the amounts due thereunder, and the names of the attesting witnesses is not secondary evidence of the contents of the bonds; but it may be legitimately referred to by the person keeping it for the purpose of refreshing his memory while giving evidence with respect to the contents of the bonds entered by him in the register.[11] Where the original records of a suit in which a compromise decree had been passed were lost, and a *vakalatnama* containing certain terms, which was filed in the suit before the date of the compromise, was put forward as secondary evidence of the alleged terms of the compromise decree, it was held that the *vakalatnama* was not admissible as secondary evidence to prove the terms of the compromise decree.[12] A translation of a grant forming an enclosure to the report of a public officer is not secondary evidence of the contents of the grant.[13]

---

1. *Nga Kyin Ya* v. *Mi Tok*, 14 IC 818.
2. *Syud Lotfoolah* v. *Mst. Nuseebun*, WR 24.
3. *Phulwanti Kunwar* v. *Janeshar Das*, 46 A 575 : 83 IC 782 : 1924 A 625.
4. *Surendra Nath Karan Deo* v. *Kamakhya Narain Singh*, 123 IC 145 : 1930 PC 45.
5. *Hafiz Mohammad Suleman* v. *Hari Ram*, 1937 L 370; *Jagannatha Naidu* v. *Secretary of State*, 70 IC 107 ; 1922 M 334 ; see *Hota Veerabhadrayya* v. *Kocherla Kota Ramchandra Venkatakrishna Rao*, 73 IC 66 : 1923 M 674 ; *Jaigopal Misir* v. *Sheo Sagar Singh*, 4 IC 579 ; but see *Kalliani Amma* v. *Narayana Nambiar*, 28 IC 69, 71 ; *Kayasth Scholarship Trust, Allahabad* v. *Shankar Din*, 11 OC 285.
6. *Jagannath Naidu* v. *Secretary of State*, 70 IC 107 : 1922 M 334 ; See also *Ambalavana Pandarasannadhi* v. *Kuppachi Janaki Ammal*, 35 IC 201 ; *Ambalavana Pandara Sanadhi* v. *Kuppachi Janaki Ammal*, 26 IC 618.
7. *Ramanuj Rai* v. *Dakshineswar Rai*, 93 IC 101 : 1926 C 752.
8. *Ramanuj Rai* v. *Dakshineswar Rai*, 93 IC 101 : 1926 C 752, per Mukerji, J.
9. *Jaigopal Misir* v. *Sheo Sagar Singh*, 4 IC 579 ; but see *Hari Chand* v. *Phiraya Ram*, 11 IC 377 : 180 PLR 1911.
10. *Hafiz Mohammad Suleman* v. *Hari Ram*, 1937 L 370.
11. *Taruk Nath Mullick* v. *Jeamat Nosya*, 5 C 353.
12. *Jankinath Roy* v. *Mohendra Narain Roy Chaudhury*, 57 C 775 : 126 IC 550 : 1930 C 94.
13. *Ambalavana Pandarasannahi* v. *Kuppachi Janaki Ammal*, 33 IC 201.

A judgment may be secondary evidence of the pleadings of the parties thereto, and of any statement, admission or acknowledgment.–See notes to Sections 43 and 17.

Objection to the form of secondary evidence cannot be taken for the first time in appeal.–When a copy of a document has been admitted in the Court of first instance without any objection, the appellate Court is not entitled to allow any objection to be taken to its admissibility at the appellate stage. When a document is admitted as secondary evidence by the trial Court without any objection, that is to say, it is admitted as being a true copy, it is not open to an appellate Court to consider whether, in fact, the provisions of Section 63 of the Evidence Act were complied with or not when it was admitted, and the Court is not entitled to take evidence offered to prove that the document is not a true copy of the original.[1] Even where the contents of a document are proved by oral evidence without objection in the trial Court, though the only permissible form of secondary evidence is a certified copy, the appellate Court will not entertain the objection.[2] Objection to the form of secondary evidence should be taken at the time the evidence is offered in the trial Court.[3] When a litigant takes no objection to the method of proving a document, it is clearly wrong that he should be permitted in the appellate Court to insist upon strict proof which he did not require in the trial Court.[4] If secondary evidence is allowed to be marked for one party without objection at the trial, no objection can be permitted to be raised by the opposite part at any later stage in the same court or in appeal.[5] For further notes on this subject, see commentary to Section 5 under the heading "objection to evidence; at what stage may objection to relevancy or mode of proof be raised." See also notes to Section 65 and 67.

Admission of improper secondary evidence by consent.–Even if a document is admitted to the record by consent, that alone will not enable either party to prove by that document anything which under the Evidence Act cannot be proved. But if the parties consent that for the purposes of the case it shall be treated as showing the contents of some other document, then, although the contents of that other document could not be proved under the Act by the document produced, it will be admissible in evidence even if it purports to be merely copy of a copy.[6] Where relevant evidence has been brought on the record in wrong manner, the defect can be cured by consent, but not where the evidence is entirely irrelevant.[7] See notes to section 5.

64. Proof of documents by primary evidence.–Document must be proved by primary evidence except in the cases hereinafter mentioned.

COMMENTARY

Principle.–Primary evidence of a document means the document itself produced

1. *Konchada Latchayya Subudhi* v. *Velupula Seetharamayya*, 84 IC 921 : 1925 M 257 ; *Ramlocha Missra* v. *Harinath Misra*, 1 P 606 : 67 IC 628 : 1922 P 565 ; *Ziauddin* v. *Fatima*, 14 IC 539 ; *Kishori Lal Goswami* v. *Rakhal Das Banerjee*, 31 C 155 ; *Chimnaji Govind Godbole* v. *Dinkar Dondev Godbole*, 11 B 320 : 5 MLJ 81.
2. *Hasmatullah* v. *Hari Mohan Sarma*, 34 IC 942.
3. *Uppara Hanumanthu* v. *Peddapalle Samacharlu*, 33 IC 188 ; see also *Bhudhe Ram* v. *Hira*, 1953 HP 52.
4. *Gopal Das* v. *Sri Thakurji*, 1943 PC 83 : 207 IC 553 ; *Janakinath Roy* v. *Mohendra Narain Roy Chaudhury*, 57 C 775 : 126 IC 550 : 1930 C 94 see *Hasmatullah* v. *Hari Mohan Sarma*, 34 IC 942.
5. *L.A.O. Vijayawada Thermal Station* v. *Nutalapati Venkata*, AIR 1991 A.P. 31 p. 38 (F.B.).
6. *Marri Narasayya* v. *Peruri Krishnamurthi*, 115 IC 509 : 1928 M 1255.
7. *Badrul Islam Ali Khan* v. *Mst. Ali Begum*, 1935 L 251 ; *Lachhu* v. *Mela Ram*, 119 IC 734 : 1929 L 583 ;

for the inspection of the Court.[1] When a party seeks to put in evidence the contents of a document, the "best evidence rule" requires that he shall produce the original, the ordinary primary evidence thereof.[2] The original document must be produced whenever there is a question as to its contents or terms unless, for special reasons secondary evidence is allowed.[3] A party ought not to be allowed to defeat his opponent on the strength of a document which he has in his possession and will not produce. Therefore, where a document is in the possession of a party, he will not be permitted to put any question as to its contents to his adversary or the witnesses.[4] Where employee involved in case gave petition to his superiors narrating entire facts, is not admissible.[5]

Medical Report — In *Mohammad Ikram Hussain* v. *State of U.P.*, as against the other evidence led to show that a girl was a minor the party interested relied upon the report of a doctor which mentioned that she was over 18 years of age, but the report was not put in; only reference was made to it in affidavits filed. It was held that primary documentary evidence ought to have been filed, and in the absence of the report the direct evidence was not rebutted.[6]

Unregistered lease — An unregistered lease or *kiryanama* is admissible for a collateral purpose, e.g., to prove the nature of the defendant's possession to the amount of rent.[7] Sale deed registered and copied in Book under Registration Act. is Public document.[8]

Objection to admissiblity of document — if can be raised in appeal — Where the several documents embodying impugned agreements without formal proof, have been admitted without objection by the appellant in the Court below, it is not open to the appellant to raise any objection in this regard in appeal.[9] and the appellant cannot to allowed to challenge its inadmissibility in appeal.[10]

65. Cases in which secondary evidence relating to documents may be given — Secondary evidence may be given of the existence, condition or contents of a documents in the following cases;

(a) When the original is shown or appears to be in the possession or power—

of the person against whom the document is sought to be proved or,

of any person out of reach of, or not subject to, the process of the Court, or

of any person legally bound to produce it.

C 94.

1 Section 62.

2 Cockle's Cases and Statutes on Evidence, 4th Ed., 326.

3 Cockle's Cases and Statutes on Evidence, 4th Ed., 329.

4 *Sivasubramania Thevar* v. *T.N.S. Theerthopathi*, 144 IC 27: 1933 M 451; see also *Bhudhan Teli* v. *Madan Mohan Lal*, 68 IC 653: 1923 P 111; *Domai Bara Medhi* v. *Kereo Kalita*, 62 IC 444.

5 *State of U.P.* v. *Pheru Singh*, AIR 1989 SC 1205.

6 AIR 1964 SC 1625.

7 *Ram Kishore* v. *Ambika Prasad*, 1966 AWR (HC) 57.

8 *Rama Chandra Majhi* v. *Hambia Majhi*, AIR 1989 Ori 27.

9 *Kanchangang Co. Ltd* v. *State*, AIR 1973 Cal 325.

10 *Vijay Kumar* v. *State*, 1995 Cr LJ 2599.

and when, after the notice mentioned in Section 66, such person does not produce it;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents, cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of Section 74;

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in [1][India]: to be given in evidence[2];

(g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.

In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.

In case (b), the written admission is admissible.

In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case of (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

[3][**65-A. Special provisions as to evidence relating to electronic record.**—The contents of electronic records may be proved in accordance with the provisions of Section 65-B.

65-B. Admissibility of electronic records.—(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or produc-

1. *Substituted* for the "States" by Act III of 1951.

2. Cf. the Bankers' Book Evidence Act 1891 (18 of 1891), Section 4.

3. **Sections 65-A and 65-B inserted by Information Technology Act, 2000 (Act 21 of 2000), S. 92 and Sch. II (w.e.f. 17-10-2000).**

tion of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

(2) The conditions referred to in sub-section (1) in respect of a computer output shall be the following, namely—

(a) the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;

(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in any respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in clause (a) of sub-section (2) was regularly performed by computer, whether—

(a) by a combination of computers operating over that period; or

(b) by different computers operating in succession over that period; or

(c) by different combinations of computers operating in succession over that period; or

(d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers,

all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say—

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate,

and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this section—

(a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

(b) whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a computer output shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

Explanation.—For the purposes of this section any reference to information being derived from other information shall be a reference to its being derived therefrom by calculation, comparison or any other process.]

COMMENTARY

Section 65—Scope.—It must, in the first place, be shown that there is, or was a document in existence capable of being proved by secondary evidence, and, secondly, that the circumstances are such that secondary evidence may be given, or, to use the technical expression, a proper foundation must be laid for the reception of such evidence.[1] Where the original is not produced at any time nor is any foundation laid for the establishment of the right to give secondary evidence, the document ought to be rejected.[2]

Section 65 and 91; facts evidenced by documents may, in some cases, be proved by independent oral evidence.—When the terms of a contract, or of a grant, or of any

1. *Sital Das* v. *Sant Ram*, AIR 1954 SC 606.
2. *Roman Catholic Mission* v. *The State of Madras*, AIR 1966 SC 1457.

other disposition of property, have been reduced to that 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 provision of the Act.[1] This rule enacted by Section 91 of the Act is only a corollary from the wider provisions of Sections 64 and 65. The only difference between Section 91 and Section 65 is that whereas the former is restricted in its application to proof of the terms of a contract, grant or other disposition of property, and to proof of matters required by law to be reduced in writing, the latter is quite general in its terms and is not restricted in its application to proof of matters mentioned in Section 91. The result obtained by the combined operation of these two sections may be thus stated :—If the fact to be proved is a terms of a contract, or other disposition of property, and is shown that the terms of the contract, grant or other disposition of property were reduced to writing, or if the fact to be proved is some other matter required by law to be reduced to writing, whether it has actually been reduced to writing or not,—oral evidence is proof of the terms of the contract, grant or other disposition of property, or in proof of such matter, will be inadmissible. If, however, the fact to be proved is not of the description mentioned in Section 91; independent oral evidence as to that fact will be admissible even if that fact is also mentioned in a document. Thus, although a certain legal relation or position has been created by a written document, yet the mere fact of such relation or position may be proved by oral evidence.[2] There may be a written instrument between a landlord and a tenant defining the terms of the tenancy, yet the fact of the tenancy may be proved by parole without proving the terms of it.[3] 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;[4] 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 testimony, though a written promise to pay was simultaneously given.[5]

In applying the rule stated above, the fundamental rule must not be lost sight of that the contents of a document cannot be proved by secondary evidence, unless a proper case is made out for its reception under Section 65. The mere fact that the evidence does not relate to any such matter as is mentioned in Section 91 does not justify a party to prove the contents of a document by oral evidence in contravention of the rule which requires primary evidence. Though a fact, not being any such fact as is mentioned in Section 91, may be proved by oral evidence, the evidence produced to prove it must be independent evidence and must not amount to oral evidence of the contents of a document. Therefore, the admissibility of oral evidence in proof of this class of facts depends on the answer to the question : Does the evidence sought to be given amount

---

1. Section 91.
2. Cockle's Cases and Statutes on Evidence, 4th Ed., 331.
3. *R.* v. *Holy Trinity*, Hull, 31 RP 267; *Ameer Ali* v. *Yakub Ali Khan*, 25 IC 509.
4. *See* Ill. (e) to Section 91; *Dalip Singh* v. *Durga Prasad*, 1 A 442.
5. Taylor, § 415.

to an attempt to prove by oral evidence the contents of a document? If it does, it is inadmissible; if it does not, it is admissible. thus, if a written communication be accompanied by a verbal one to the same effect, the latter can be received only as independent evidence but not to prove the contents of the writing nor as a substitute for it.[1] Best states the rule as follows:—"Where the contents of any document are in question, either as a fact in issue or a subalternate principal fact, the document is the proper evidence of its own contents, and all derivative proof is rejected until its absence is accounted for. But where a written instrument or document of any description is not the fact in issue, and is merely used as evidence to prove some fact, independent poof *allunde* is receivable. Thus, although a receipt has been given for the payment of money, proof of the fact of payment may be given by any person who witnessed it.....So, although where the contents of a marriage are in issue, verbal evidence of these contents is not receivable, yet the fact of the marriage may be proved by the independent evidence of a person who was present at it."[2] An oral divorce under Mohammedan law may be proved by parole even if it was reduced to writing which has not been produced. The case is however other wise where the divorce amounts to a contract of dissolution of marriage which has been reduced to writing and what is sought to be proved is one or more of the terms of the contract without producing the writing.[3] Where a promissory note is not the contract out of which the defendant's liability arises, but is merely a collateral security for the defendant's fulfilment of his promise to pay the debt, the suit on the verbal promise to pay is maintainable and the plaintiff is entitled to give oral evidence of the consideration if the promissory note be inadmissible in evidence for want of stamp.[4] A contract in writing with B or 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. This payment of the price of other indigo may be proved by oral evidence without the document being produced, as the evidence does not relate to the terms of a written contract, and the evidence does not amount to proof of the contents of a document.[5]

A document need not be proved or produced when its execution and contents have been admitted in pleading.—"Facts admitted need not be proved.[6] Where the execution and contents of a document have been admitted in pleadings, no question of proving the document by primary or secondary evidence arises. Therefore, when a document has been admitted in a party's pleadings and its contents are not in dispute, the party relying on the document is under no obligation to produce it. See notes to section 58 under the heading "admission of the execution and its terms of a document renders proof of the document unnecessary, even though the document be inadmissible for want of registration, sufficient stamp or proper attestation."

Written admission as to the contents of a document, made otherwise than in pleadings, also dispenses with the production of the original.—Even if the admission

1. *Ibid.*
2. Best, Principles of Evidence, 2nd Ed., 282; *Balbhadar Prasad* v. *The Maharaja of Betia*, 9 A 351; *Parbhu Narain Singh* v. *Jitendra Mohan Singh*, 1948 O 307 : 22 Luck. 522.
3. *Mst. Haliman* v. *The Crown*, (1946), 48 PLR 532.
4. *Balbhadar Prasad* v. *The Maharaja of Betia*, 9 A 351; Reference under Stamp Act, 4 Bom. LR 912; but see notes to section 91.
5. Compare this hypothetical case with illustation (d) and explanation (3) to section 91.
6. Section 58.

as to the contents of a document was not made in the pleadings with a view to dispense with the proof of the document in a particular litigation, but was made other wise, the document need not be produced, as the admission would be sufficient proof of the document, provided the admission was in writing[1] but an oral admission would not be relevant, unless the party relying on the oral admission can show that the case is a fit one for the reception of secondary evidence under the provisions of section 65, or unless the genuineness of the document is in question.[2]

Admission as foundations of a claim.—Where admissions are available to the plaintiff which go to prove his claim, he can rest on admissions alone and need not produce or prove the original document or its copy.[3]

Secondary evidence can be admitted only on the grounds mentioned in section 65.—As section 63 is exhaustive of the forms of secondary evidence, so section 65 is exhaustive of the grounds on which secondary evidence may be admitted. Of course, it is for the person rendering the evidence to show that the case is a fit one for the reception of secondary evidence and that one or more of the six clauses to section 65 are applicable to the circumstances of the case.[4] A secondary evidence of the contents of a document cannot be admitted without the non-production of the original being first accounted for in such a manner as to bring the case within one or more of the clauses to section 65 of the Evidence Act.[5]

Section 65—Producing during arguments.—This section cannot be invoked, in cases, where the party wilfully fails to produce the document at all relevant periods, but puts it at the time of the arguments in the court of the last resort.[6]

The section is applicable to criminal cases also.—The section is applicable to civil as well as to criminal cases.[7] and also in respect of matters in Revenue Law, such as the proof of mutation in the landlord's rent roll, a certified copy of which is admissible to prove the fact of mutation.[8]

Appellate Court will not ordinarily interfere with the discretion of the first Court in the admission of secondary evidence.—The question whether sufficient grounds have or have not been made out for the admission of secondary evidence is a question properly to be decided by the trial Court, and is treated to be depending very much on its discretion. The conclusion of the trial Court on this point should not be over-ruled by the Court of appeal except in a clear case of miscarriage of justice.[9] But this rule does not apply where the Judge who rejected the secondary evidence as inadmissible was not the presiding Judge of the Court when the document was admitted in evidence

---

1. See Section 65, cl. (b).
2. Section 22.
3. *Pearey Lal* v. *Kunwar Rani*, 1941 A 150; see also *Udhao Nanaji Gadewar* v. *Narayan Vithoba Mangilwar*, 1941 N 95.
4. See section 104, Ill. (b) ; *Rasdhari Lal* v. *Nand Lal Mahton*, 148 IC 444 : 1933 P 468 ; *Bhagwati Prasad* v. *Marjad Singh*, 129 IC 331 : 1931 O 136 ; *Sital Das* v. *Sant Ram*, 1954 SC 606.
5. *Anand Bihari Lal* v. *Messrs. Dinshaw & Co.*, 1946 PC 24 ; *Krishna Kishori Chaodhrani* v. *Kishori Lal Roy*, 14 C 486 : 14 IA 71 (PC) ; *Bhubaneswari Debi* v. *Harisaran Surma Moitra.*, 6 C 720 (PC).
6. *Brahmananda* v. *Kanduri*, AIR 1959 126.
7. *Jhabwala* v. *E.*, 145 IC 481 : 1933 A 690 ; 34 Cr. LJ 967 ; See also *Manabendra Nath Roy* v. *E.*, 148 IC 833 : 1933 A 498 : 35 Cr. LJ 768.
8. *Chandranath* v. *Tushadika*, 1958 SCJ 874.
9. *Pandappa Mahalingappa* v. *Shivlingappa*, 47 Bom. LR 962 ; *Maung Ba U* v. *Daw Kha*, 1935 R 502 ; *Mohammad Hassan* v. *Safdar Mirza*, 14 L 473 ; 144 IC 45 : 1933 L 601 ; *Vishvanath Ramji Karale* v. *Rahibai Ramji Karale*, 55 B 103 : 128 IC 901 : 1931 B 105 ; *Gaya Prasad* v. *Jaswant Rai*, 125 IC 460

without objection, and in such a case the appellate Court may interfere with the order rejecting the evidence.[1] Where a lower appellate Court has allowed secondary evidence of a document, the High Court will not ordinarily interfere,[2] assuming the lower appellate Court was justified to admit additional evidence under O. 41, r. 27 C.P. Code. Copy of insurance policy though exibited but not proved, appellate court can exclude the same.[2a]

Secondary evidence admitted without objection in the Court of first instance, appellate Court cannot raise or recognise an objection to its admissibility.—Where secondary evidence of the contents of a deed alleged to have been destroyed is admitted by the Court of first instance without objection, but without any foundation for the reception of secondary evidence having been laid, the opposite party is estopped from taking an objection to the admissibility of such evidence in the appellate Court.[3] If no objection is taken in the Court of first instance to the reception of a copy of a document in evidence, it is not within the province of the appellate Court to raise or recognise it in appeal.[4] A party cannot lie by until the case comes before a Court of appeal and then complain for the first time of the mode of proof.[5] The rule is firmly established that no objection should be allowed to be taken in an appellate Court to the admissibility of a copy of a document which was admitted in the Court of first instance without any objection.[6] Where a party gives in evidence a certified copy without proving the circumstances entitling him to give secondary evidence, the objection to its admissibility must be taken at the time of its admission, as no such objection will be entertained at a later stage.[7] When a litigant takes no objection to the method of proving a document, it is clearly wrong that he should be permitted in the appellate Court to insist upon strict proof which he did not require in the trial Court.[8] The rule disentitling a party to object to the admissibility of secondary evidence in appeal, when no objection was taken in the Court of first instance, is based on principles analogous to those of estoppel. If

---

: 1930 A 559 ; *Chuha Mal* v. *Rahim Bukhsh*, 71 IC 568 : 1924 L 303 ; *Mangra* v. *Bedi Ram*, 35 IC 328 ; *Ma Paik* v. *Ma Nwai Pauk*, 34 IC 153 ; *Ningawa Kom Ningangavda Mantur* v. *Ramappa*, 28 B 94 : 5 Bom. LR 708 ; *Haripria Debi* v. *Rukmini Debi*, 19 C 438 : 19 IA 79 (PC).

1. *Mohammad Hassan* v. *Safdar Mirza*, 14 L 473 ; 144 IC 45 : 1933 L 601.
2. *Bashiruddin Khan* v. *Mahadeo Singh*, 79 IC 663 : 1924 O 306.

2a. *O.F. & G.I. Co. Ltd.* v. *Chandrawati*, AIR 1989 P & H 300.

3. *Ma The Nu* v. *Mg. Ni Ta*, 84 IC 486 : 1925 R 113. following *Chimnaji Govind Godbole* v. *Dinkar Djondev Godbole*, 11 B 320, 324 ; *Akbur Ali* v. *Bhyea Lal Jha*, 6 C 666, 670, and *Kissen Kaminee Dassee* v. *Ram Chunder Mitter*, 12 WR 13 ; *Harnam Singh* v. *District Official Receiver*, 1941 L 400.
4. *Ziauddin* v. *Fatima*, 14 IC 539 ; *Chimnaji Govind Godbole* v. *Dinkar Dhondev Godbole*, 11 B 320 ; *Akbar Ali* v. *Bhyea Lal Jha*, 6 C 666, *Budhe Ram* v. *Hira*, 1953 HP 52 ; see also *Biswambhar Singh* v. *State*, 1954 SC 139.
5. *Gopal Das* v. *Sri Thakurji*, 1943 PC 83.
6. *Suraj Bhan* v. *Hafiz Abdul Khaliq*, 1944 L 1 ; *Muhammad Yusuf* v. *Hafiz Abdul Khaliq*, 1941 L 9 ; *Ranchandra* v. *Rahganayaki*, 1941 M 612 ; *Badrul Islam Ali Khan* v. *Mst. Ali Begum*, 1935 L 251 ; 16 L 782 ; *Jiwan Lal* v. *Jiwan*, 88 IC 541 : 1925 L 347 ; *Bashiruddin Khan* v. *Mahadeo Singh* 79 IC 663 : 1924 O 306 ; *Jawala Singh* v. *Teja Singh*, 71 IC 801 : 1924 L 273 ; *Ramlochan Misra* v. *Harinath Misra*, 1 P 606 : 67 IC 628 : 1922 P 565 ; *Hardeo Ram* v. *Parbati*, 31 IC 600 ; *Padman* v. *Hanwanta*, 93 PR 1915 : 29 IC 807 : 1915 PC 111 ; *Ziauddin* v. *Fatima*, 14 IC 539 ; *Shahzadi Begam* v. *Secretary of State for India*, 34 C 1059 : 34 IA 194 (PC) ; *Kishori Lal* v. *Rakhal Das*, 31 C 155 ; *Lakshman Govind* v. *Amrti Gopal*, 24 B 591 ; *Mahadeo Prasad* v. *Ghulam Mohammad*, 1947 A 161 : 1946 ALJ 411 : ILR 1946 A 649 ; *Kundanbai* v. *Venubai*, 1951 NLJ 523 : 6 DLR Nag 147 ; *Bacharbhai Narabhai* v. *Mohanlal Ranchhoddas*, 1956 B 196.

7. *Uppara Hanumanthu* v. *Peddapalle Samacharlu*, 33 IC 188.
8. *Janakinath Roy* v. *Mahendra Narain Roy Chaudhury*, 57 C 775 : 126 IC 550 : 1930 C 94.

objection to the admission of secondary evidence is taken at the time it is sought to be introduced, it may be within the power of the party tendering the evidence to correct the irregularity and prove the original, or to show that the secondary evidence is really admissible in the circumstances of the case.[1] Want of objection in such circumstances is likely to mislead that party tendering the evidence and to prevent him from producing primary evidence, or from showing that the secondary evidence offered is admissible.[2] Therefore, where a party does not object to an improper mode of proof of a document adopted by his opponent, the former will not be permitted to object to that mode of proof at a time when the latter is not in a position to rectify the defect,[3] See notes to section 5 under the heading "objections to evidence, at what stage may objection to relevancy or to mode of proof be based."

Section 65-Registered deeds-Proof in the absence of original deeds.—The sale deeds themselves, if registered, are primary evidence of the interest sold. If those sale-deeds which are said to be registered documents, were not available for any reasons, certified copies thereof could be adduced as secondary evidence, but foundation must have been laid in the pleadings for the reception of other evidence which must always be of a very weak character in place of registered documents evidencing those transaction.[4]

A document inadmissible for want of registration, cannot be proved by secondary evidence.—Secondary evidence, as a general rule, is admissible only in the absence of primary evidence. If the original itself is found to be inadmissible, the party relying on it is not entitled to introduce secondary evidence of its contents.[5] Section 65 presupposes that, but for one or more of the barriers to its production stated in the section, the document would have been capable of proving its contents under section 64 read with section 62. It would, therefore, be a manifest absurdity to hold that secondary evidence may be given to establish a fact, proof whereof by primary evidence is forbidden. Under no circumstances can secondary evidence be admitted as a substitute for inadmissible primary evidence.[6] "Where a party comes into Court resting his claim on a written title which the law requires to be registered, he cannot, when he has failed to register, and is, in consequence, unable to use his title-deed turns round and say "I can prove my title by secondary evidence'. It would be useless to have a compulsory Registration Act if such a course were open to the suitors."[7] On the principle stated above, that what cannot be proved by primary evidence must not be allowed to be proved by secondary evidence, it has been held in a large number of decisions that the contents of a document which is inadmissible in evidence owing to its not having been

1. See *Janakinath Roy* v.*Mohendra Narain Roy Chaudhury*, 57 C 775 : 1926 IC 550 : 1930 C 94 ; *Abdul Samad* v. *Gunendra Krishna Roy*, 82 IC 974 : 1925 C 432 ; *Kesho Prasad Singh* v. *Parmeshri Prasad Singh*, 2 P 414 : 71 IC 902 : 1923 P 276.
2. See *Kissen Kaminee Dassee* v. *Ram Chunder Mitter*, 12 WR 13.
3. See *Chhatra Kumari Debi*,v. *Mst. Parbati Kuer*, 1936 P 600 : 17 PLT 709 ; *Gopaldas* v. *Sri Thakurji*, 1943 PC 83.
4. *Nani Bai* v. *Gita Bai*, 1959 SCR 479 : 1958 SCA 925.
5. *Kalliani Amma* v. *Narayanan Nambiar*, 28 IC 69, 71.
6. *Muhammad Din* v. *Allah Ditta*, 95 IC 444 ; *Jhanda Singh* v. *Harnam Singh*, 94 IC 75 : 1926 L 415 ; *Gangabisan* v. *Tukaram*, 2 IC 244.
7. Per Loch, J., in *Monmohinee Dossee* v. *Bishen Moyee Dossee*, 7 WR 112, quoted with approval in *Ruhmutoollah* v. *Shuriatoolah*, 10 WR 51 (FB) and *Gangabisan* v. *Tukaram*, 2 IC 244.

registered as required by law cannot be proved by secondary evidence.[1] The rule has been so strictly enforced that, even where a party has admitted the contents of the unregistered document otherwise than under Section 58 of the Evidence Act, the party relying on the document has not been allowed to give the admission in evidence by way of secondary evidence under Section 65, clause (b).[2] Of course, where a document is admissible for a particular purpose without its being registered, secondary evidence will be admissible if the document is lost.[3] Where a transaction can be effected by a registered instrument or by delivery of possession, e.g., a mortgage for a sum of less than Rs. 100, and the transaction has been completed by delivery of possession and an unregistered document containing the terms of the mortgage has also been written, secondary evidence of the contents of the document can be admissible only if the document cannot, for any valid reason, be produced.[4] See notes to Section 91.

Secondary evidence of an unregistered mortgage-deed is admissible to establish the personal liability of mortgagor.—Where the plaintiff seeks to enforce only the personal liability of the mortgagor, secondary evidence of a lost registered mortgage-deed is admissible.[5]

Secondary evidence cannot be given of the contents of a document which is inadmissible by reason of its not having been sufficiently stamped.—Just as unregistered document requiring compulsory registration cannot be proved by secondary evidence, the contents of a document which is not stamped or is insufficiently stamped cannot be proved by secondary evidence[6] even on payment of stamp duty or penalty when the original document has been lost or destroyed or cannot, for any other reason, be produced.[7] The provisions of Section 34 of the Stamp Act apply to documents which are not stamped or are insufficiently stamped; they have no application when the original instrument, which ought to have been but has not been stamped, has not been produced. The clauses of that section deal with, and exclusively refer to, the admission in evidence of the original document, which has not been stamped at all or has been insufficiently stamped.[8] Secondary evidence cannot be given of a document which has

1. *Tjanarden Kashinath* v. *Tjanarden Vishwanath*, 101 IC 830 : 1927 N 214 : *Muhammad Din* v. *Allah Ditta*, 95 IC 444 ; *Safar Ali* v. *Mohesh Lal Chowdhury*, 34 IC 956 : 23 CLJ 122 ; *Nataraja Sarma* v. *Ramabhadra Naidu Garu*, 28 IC 852 ; *Kanduru Venkata Seshayya* v. *Adam Saib*, 25 IC 661 ; *Gangabisan* v. *Tukaram*, 2 IC 244 ; *Sambayya* v. *Gangayya*, 13 M 308, 312 ; *Divethi Varada Ayyangar* v. *Krishnasami Ayyangar*, 6 M 117 ; *Ruhmutoolah* v. *Shuriatoolah*, 10 WR 51 (FB) ; *Monmohinee Dossee*, v. *Bishen Moyee Dossee*, 7 WR 112.
2. *Kanduru Venkata Seshayya* v. *Adam Saib*, 25 IC 661 ; *Sambayya* v. *Gangayya*, 13 M 308, 312 ; *Divethi Varada Ayyangar* v. *Krishnasami Ayyangar*, 6 M 117 ; see *Safar Ali* v. *Mohesh Lal Chowdhury*, 34 IC 956 : 23 CLJ 122 ; *Kalliani Amma* v. *Narayanan Nambiar*, 23 IC 69, 71.
3. *Ma Ngwe Hmon* v. *Maung San Yauk*, 1929 R 181.
4. *Maung Po Din* v. *Maung Po Nyein*, 66 IC 360.
5. *Francis* v. *Muhammad Akbar*, 7 P 99 : 105 IC 502 : 1928 P 134.
6. *Maung Po Htoo* v. *Ma Ma Gyi*, 4 R 363 : 101 IC 198 : 1927 R 109 ; *Doraiswami Mudaliar* v. *Doraiswami Iyengar*, 87 IC 382 : 1925 M 753 ; *Muhammad Ayub* v. *Rahim Bakhsh*, 3 L 282 : 69 IC 723 : 1922 L 401 ; *Ramprasad* v. *Nathuram*, 68 IC 494 : 1923 N 32 ; *Rahim Baksh* v. *Mohammad Ayub*, 66 IC 153 : 1922 L 354 *Hiralal Ramnarayan* v. *Sankar Hirachand*, 45 B 1170 ; 62 IC 637 : 1921 B 401 ; *Pentaya* v. *Kesheorao*, 56 IC 249 ; *Chami* v. *Ana Pattar*, 33 IC 661 ; *Thaji Beebi* v. *Tirunalaiappa Pillai*, 30 M 386 ; *Raja of Bobbili* v. *Inuganti China Sitaramasami Garu*, 23 M 49 : 26 IA 262 (BC) ; *Bakshi Ram Labhaya* v. *Kaka Ram*, 42 PR 1895 ; *Sennandan* v. *Kollakiran* 2 M 208 : see also *Francis* v. *Muhammad Akbar*, 7 P 99 : 105 IC 502 : 1928 P 134 ; *Kalliani Amma* v. *Narayanan Nambiar*, 28 IC 69 ; *Lal Khan Sultan Ahmad* v. *Allah Ditta*, 1950 L 154.
7. *Mst. Haliman* v. *The Crown*, (1946) 18 PLR 532 : *Kopasan* v. *Sharma*, 7 M 440.
8. *Raja of Bobbili* v. *Inuganti China Sitaramasami Garu*, 23 M 49 : 26 IA 262 (PC) ; *Maung Po Htoo* v. *Ma*

not been properly stamped, as, under the provisions of the Indian Stamp Act, such document is admissible in evidence only when the Collector has assessed and charged the penalty on the production of the original document and when he has written an endorsement upon the document submitted to him. Therefore, it is not open to a party to prove by secondary evidence an unstamped document even upon payment of the penalty.[1] The procedure for validating unstamped instruments prescribed by Chapter IV of the Stamp Act has no application to a copy of the lost original, as under Section 35 of the Stamp Act, it is only an original unstamped instrument which can be validated by payment of stamp duty and penalty.[2] An admission of the contents of a document which is inadmissible owing to its being unstamped or insufficiently stamped, made otherwise than under Section 58 of the Evidence Act, cannot be proved as secondary evidence under clause (b) of Section 65 of the Act.[3] But when once a document has been admitted, on payment of penalty or otherwise, as secondary evidence of the contents of the original unstamped or insufficiently stamped document, that admission cannot, under Section 36 of the Stamp Act, be called in question in the same suit on the ground that the instrument was not duly stamped.[4] Mere production and presentation of a document in Court is in no way identical with the admission of the document in evidence. Thus, where the plaintiff sued on an unstamped bond entered in his book of accounts, and presented the original book with the plaint along with a copy of the bond, and, after the copy had been compared with the original and certified to be correct, the plaintiff took away the book, which was subsequently stolen from his house before the first hearing of the suit, it was held that the production and presentation of the book did not amount to its admission in evidence, even if the trial Court made an order directing the payment of penalty.[5] See notes to section 91.

When may a document be presumed to have been stamped?—A document which has been lost may under section 114, be presumed to have been properly stamped.[6]

Secondary evidence of an unstamped document executant out of India.——Sub-clause (a) of the first part of section 3 of the Stamp Act excludes by inference documents executed in places other than India from the provisions of the Stamp Act. Secondary evidence of an unstamped document which has been executed out of India and has been lost is, therefore, admissible.[7]

Documents, not produced after notice, to be presumed to have been duly stamped.——The Court shall presume that every document called for and not produced after notice, was attested stamped and executed in the matter required by law.[8]

Ma Gyi, 4 R 363 : 101 IC 193 : 1927 R 109 ; *Muhammad Ayub* v. *Rahim Bakhsh*, 3 L 282 : 69 IC 723 : 1922 L 401 ; *Kallu* v. *Halki*, 18 A 295.

1. *Hiralal Ramnarayan* v. *Shankar Hirachand*, 45 B 1170 : 62 IC 637 : 1921 B 401.
2. *Pentaya* v. *Kesheorao*, 56 IC 249.
3. *Thaji Beebi* v. *Tirumalaiappa Pillai*, 30 M 386 : *Domodar Jagannath* v. *Atmaram Babaji*, 12 B 443 ; see *Kalliani Amma* v. *Narayanan Nambiar*, 28 IC 69, 71.
4. *Maung Po Htoo* v. *Ma Ma Gyi*, 4 R 363 : 101 IC 193 : 1927 R 109 ; see *Francis* v. *Muhammad Akbar*, 7 P 99 : 105 IC 502 : 1928 P 134.
5. *Muhammad Ayub* v.. *Rahim Bakhsh*, 3 L 282 ; 69 IC 723 ; 1922 L 401.
6. *Manavikraman* v. *Nilambur Thacharakapil Manavikraman*, 31 IC 579 ; *See also Ahmad Raza* v. *Abid Husain*, 38 A 494 ; 43 IA 264 ; 39 IC 11 ; 1916 PC 41.
7. *Francis* v. *Muhammad Akbar*, 7 P 99 ; 105 IC 502 ; 1928 P 134.
8. Section 89.

Section 65—Original documents not produced —Copies are not admissible.—Where the originals are not produced at any time nor is any foundation laid for the establishment of the right to give secondary evidence, copies of the documents would not be admissible.[1]

Section 65——Secondary evidence —Admissibility when original available.—When original account is available it should be produced. Instead of producing original, copies were produced, it being a secondary evidence they are not admissible.[2]

Section 65——Secondary evidence ——Admissibility —In case original itself inadmissible.—No secondary evidence can be permitted to be led of a document, which itself is not admissible in evidence. Any document which requires stamp duty will not be admitted to be led in evidence, by reason of section 35 of the Stamp Act of 1899.[3]

Secondary evidence of an acknowledgment of liability under Section 19 of the Limitation Act is admissible.——"Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but, subject to the provisions of the Indian Evidence Act, 1872, oral evidence of its contents shall not be received.[4] These words in section 19 (2) of the Limitation Act do not make oral evidence of an acknowledgement inadmissible in all cases, and their true meaning is that, where oral evidence is, by way of secondary evidence, admissible under Section 65 of the Evidence Act, such evidence may be given, in other words, that in cases falling under section 65 of the Evidence Act the contents of an acknowledgment may be proved by secondary evidence.[5] If, however, the original acknowledgment was inadmissible, owing to its not having been properly stamped under Article 1, Stamp Act, 1899, secondary evidence of it would be inadmissible.[6]

Secondary evidence of a document is no proof of its genuineness or execution.—See notes to Section 63.

Section 65—Certified copy of will.—Where the original will is in the custody of one of the parties and is suppressed by him, a certified copy produced from proper custody by the opposite party would be admissible as secondary evidence under Section 65 of the Evidence Act.[7]

Section 65—Uncertified copy is useless.— In the instant case what is sought to be used is an unverified copy which has not been certified to be true copy by any official nor does it purport to have been compared with the original by any one. Such a copy is not even secondary evidence and is thoroughly useless.[8]

Section 65——Draft of notice issued by party—Admissibility in evidence.——If it is only a draft, it can be accepted in evidence only if there is proof that the original

1. *Roman Catholic Mission* v. *The State of Madras*, AIR 1966 SC 1457.
2. *Narain Das* v. *Smt. Zubeda Khatoon*, AIR 1972 All 494.
3. *Kartar Singh . M. Mohinder Singh*, 1971 Cur LJ 212.
4. Section 19 (2) of the Limitation act.
5. *Harimurat* v. *Ramhit*, 63 IC 490 ; *Mohay-ud-Din* v. *Now Roz*, etc, 16 PLR 1915 ; *Jaigopal Misir* v. *Sheo Sagar Singh*, 4 IC 579 ; *Cahathu Virarayan*, 15 M 491 ; *Wajibun* v. *Kadir Buksh*, 13 C 292 ; *Shambhu Nath* v. *Ram Chandra Shah 12* C 267.
6. This follows from the decision in *Mulji Lal* v. *Lingu Makaji*, 21 B 202 (FB). see also notes to this section under the heading "secondary evidence cannot be given of the contents of document which is inadmissible by reason of its not having been sufficiently stamped."
7. *Kalidindi Venkata Surbbaraju & Others* v. *Chintalapati Subbarju & Others*, 1968 SCJ 513.
8. *Kalyan Singh* v. *Smt. Chhoti*, AIR 1973 Raj. 263.

has been prepared without any corrections and that it is exactly a true copy of the draft. When no such evidence is shown the draft cannot be relied on.[1]

CLAUSE (a)

Section 65 (a)——Scope of Section 65 (a) —Case falling under section 65 (a) Secondary evidence is admissible.—Under Section 65 (a) of the Evidence Act Secondary evidence may be given of the existence of contents of a document when the original is shown or appears to be in the possession of power of the person against whom the document is sought to be proved, and when after the notice mentioned in section 66, such person does not produce it. Where the case falls under section 65 (a) any secondary evidence of the contents of document is admissible.[2]

When the original is or appears to be in the possession or power of the person against whom it is sought to be proved.—When a document is in the possession of the adverse party[3] or someone bound to give up possession thereof to him e.,g., his solicitor,[4] banker,[5] agent or sergeant,[6] and such party refuses to produce it either after notice or when notice is excused,[7] the other party may, provided the document was duly stamped,[8] give secondary evidence of its contents.[9] Where a document of title is not produced by a party after notice, secondary evidence of the document of title is not produced by party after notice, secondary evidence of the document becomes admissible.[10] The Act does not require that in all cases it must be definitely proved that the document is in the possession of the party against whom it is sought to be proved; it is sufficient if it is proved that the document *appears to* be in his possession.[11] Presumptive proof of the document being in the possession or power of the adversary, e. g., that the document exclusively belongs to him, or would, in the ordinary course, be in his custody,[12] is sufficient to lay a foundation for the reception of secondary evidence under this part of the clause. Thus, where a deed of gift was in favour of three persons, plaintiff being one of them, the Court inferred that the deed was in the possession of the plaintiff as alleged by the defendant in his written statement.[13]

Section 65 (a).—Where there is satisfactory evidence to show that the document was in the possession of the defendant and he fails to produce it, the plaintiff is within his right to produce secondary evidence, not only about the existence of the document but also about its contents.[14]

Notice.—Notice to the adversary to produce the document is necessary to render

1. *P. Kunhammad* v. *Moosankutty*, 1972 KLT 328.
2. *Mst Bibi Aisha* v. *Bihar B. S. Majlis Avaqaf*, (1969) 1 SCJ 347 ; 1969 All LJ 290.
3. *Narsidas Jekisondas* v. *Ravishankar Prabhiashanker*, 128 IC 891 ; 1931 B 33 *Maneklal Mansukhbahi* v. *Hormusji Jamshedji Ginwalla*, 1950 SC 11 ; 1950 ALJ 396 ; 63 MLW 495 ; 52 BLR 521 ; 1950 SCR 75 ; 1950 SCJ 317 ; 1950 2 MLJ 344.
4. *Irwin* v. *Lever*, 2 F & F 296 ; *R.* v. *Hunter*, 4 C & P 218.
5. *Patridge* v. *Coates*, R. & M 156.
6. *Baldney* v. *Ritchie*, 1 Stark, 338 contra *R,.* v. *Pearre Peake*, NP 75.
7. *Maneklal Mansukhahai* v. *Hormusji Jamshedji Ginwalla*, 1950 SC 11 ; See section 66.
8. *Sennadan* v. *Kollakiran*, 2 M 208.
9. *Phipson*, Ev., 7th Ed., 523.
10. *Narsidas Jekisondas* v. *Ravishankar Prabhashankar*, 128 IC 891 ; 1931 B 33.
11. *Zibunnisa* v. *Irshad Hussain*, 89 IC 284 ; 1925 O 504 ; *see Saliman* v, *Mukhdum Bux*, 116 IC 277 ; 1928 A 394.
12. *Henry* v. *Leigh*, 3 Camp, 502 ; *Robb* v. *Starkey*, 2 C & K 143 ; Taylor, § 440 ; Phipson, Ev., 7th Ed., 523.
13. *Zaibunnisa* v. *Irshad Hussain*, 89 IC 284 ; 1925 O 504.
14. *Baboo Lal* v. *Nathmal*, 1956 Raj LW 241.

secondary evidence admissible under this part of the clause, unless notice be excused under the provisions of section 66.[1] If secondary evidence is sought to be given without serving a notice to produce, objection to the reception of secondary evidence should be taken at the time it is given. If the evidence is admitted without objection in the trial Court, the appellate Court will not entertain the objection.[2]

Section 65 (a).——The secondary evidence of documents can be given only when, after the notice mentioned in Section 66, the person having the original does not produce it.[3]

Any kind of secondary evidence is admissible under this part of the clause.—— Where a document is in the possession or power of the adversary and is not produced on notice, any kind of secondary evidence of its contents, subject to the provisions of section 63 may be given. Thus, where the deed is a registered one, a certified copy may be given in evidence.[4] See notes to this section under the heading " degrees in secondary evidence."

Section 65——Any secondary evidence will be admissible.——Secondary evidence of a will which is in the possession of a Notaire in the French Territory, who is not subject to the process of the Indian Court, and he himself deposes to that effect, may be admitted both under Section 65 (a) as well as under clauses (2) and (3).[5]

Section 65 (a)—Terms of lease contained in correspondence Original not produced —Secondary evidence admissible .——Where the terms of lease are contained in correspondence and the original is not forth-coming, secondary evidence would be admissible.[6]

When the original is or appears to be in the possession or power of any person out of reach of, or not subject to, the process of the Court secondary evidence becomes admissible without notice to produce the original.—Secondary evidence of the existence, condition or contents of a document is admissible also when the original document is or appraise to be in the possession or power of a person out of reach of, or not subject to, the process of the Court. The condition as to notice imposed by section 65, clause (a), is related by section 66, clause (b), when the person in possession of the document is out of reach of, or not subject to the process of the Court.[7] An Income-tax officer is subject to every process of the Court. Therefore secondary evidence of the contents of an income-tax return would not be admissible if no notice to produce has been given.[8]

When the original is or appears to be in the possession or power of a person who is legally bound to produce it.—This part of clause (a) has not so far been judicially interpreted and there is a divergence of opinion among the commentators as to its true scope and meaning. A witness is justified in refusing to produce a document where the document is one on which he has a lien for money lent, or which is his title-

1. See section 66 and notes thereto.
2. *U po Kin* v. *U So Gale*, 1936 R 277.
3. *Krishnarao* v. *State of A. P.* AIR 1962 AP 249.
4. *Saliman* v,. *Mukhdum Bux*, 116 IC 277 : 1928 A 394.
5. *Muni Ammal* v. *Govindarajan*, ILR 1958 Mad 415.
6. *Maneklal Mansukbhai* v. *Hormusji Jamshedji Ginwalla*, 1950 SCR 75 ; 1950 SCJ 317 ; 52 BLR 521.
7. *Ralli* v. *Gau Kim Swee*, 9 C 939 ; *Bishop Mellus* v. *Vicor Apobar* 2 M 295.
8. *Varadarajam Chetty* v. *Kanakaya*, 1939 M 546 ; (1939) 1 MLJ 791 ; 1939 MWN 377.

deed, or an incriminating document. or one which he holds as a trustee, solicitor or mortgagee for another, and which that other would himself be justified in withholding.[1] If the original is in the possession of a person who not being entitled to any such lien or privilege in respect of it as is mentioned above, is legally bound to produce is, secondary evidence of the original will clearly be admissible under this part of the clause.[2] According to English law, in such circumstances secondary evidence will not be admissible. but the person refusing to produce the document will be punishable for disobedience.[3] Again, this part of the clause does not seem to be applicable when the original is in the possession of a person who is entitled to claim in respect of it a lien or privilege of the kind mentioned above and who, in exercise of that privilege, refuses to produce it in evidence. Thus, if this part of the clause be strictly interpreted, secondary evidence in the case mentioned would not be admissible. This however, would be a curious result, as secondary evidence in such circumstances would be admissible under the English law,[4] and it is difficult to see on what ground or principle the Legislature enacted differently for India. Messrs Woodroffe and Amir Ali think that though the Act does not make provision for the case mentioned, it may nevertheless be held upon the English cases and general principles that, where a person is justified in refusing to produce a document on the ground of privilege, secondary evidence may be given by the party calling for the document, for he has, in the words of Parke, B.[5] done everything in his power to obtain it.[6] An Indocme-tax officer who has the custody of income-tax return is subject to the process of Court but is not a person legally bound to produce the returns. Therefore secondary evidence of such returns cannot be given under section 65 (a).[7]

If no notice is given to the person in whose possession a document is, secondary evidence of its contents will not be admissible. Where the document is presumably in the possession of hostile person, and a summon has been taken out to procure his attendance but the summon has not been served the Court may allow secondary evidence of the document to be given.[8] Such evidence may also be allowed where the person in possession of the document is in collusion with the other party and does not produce it after notice.[9]

Section 65 (a)—Clause (a) of section 65 is not controlled by clause (f), thereof.——The contention was that in the instant case clause (f) of section 65 of the Evidence Act was applicable and as the certified copy of the document in question was admissible, a certified copy alone was admissible in evidence. It was held that there is no substance in this contention. If the case falls under clause (a) any secondary evidence of the document is admissible, though the case may also fall under clause (f). Clause (a) is not controlled by clause (f),[10]

---

1. Phipson Ev., 7th Ed., 525 ; Sections 130, 131.
2. *Narsidas Jekisondas* v. *Ravishankar Prabhasahankar*, 128 IC 891 : 1931 B 33 ;*Bashiruddin Khan* v. *Mahadeo Singh*, 79 IC 663 ; 1924 O 306 (so assumed).
3. *See R.* v. *Lalanfaethly*, 2 E & B 940 ; Phipson Ev., 7th Ed., 525.
4. *Doe* v. Ross, 7 M & W 102 ; *Marston* v. *Downes*, 1 A & B 940 ; Phipson , Ev., 7th Ed., 525.
5. *See Hibbered* v. *Knight*,. 2 Ex. 12.
6. *See Vasanji* v. *Haribhai* 2 Bom LR 533.
7. *Mythilal Ammal* v. *Janaki Ammal*, 1940 M 161.
8. *Abdul Rahman* v., *Kishen Chand*, 125 IC 63 ; 1930 L 213.
9. *Bashiruddin Khan* v. *Mahadeo Singh*, 79 IC 663 ; 1924 O 306.
10. *Shiv Shankar Bharthi* v. *Beni Ram*, 22 Pat LT 200.

Section 65 (a) and (f).——Under section 65 (a) of the Evidence Act secondary evidence may be given of the existence, or contents of a document when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved. and when after the notice mentioned in section 66, such person does not produce it. Where the case falls under Section 65 (a) any secondary evidence of the contents of the document is admissible. If the case falls under clause (a) any secondary evidence of the document is admissible, though the case may also fall under clause (f). Clause (a) is not controlled by clause (f).[1]

CLAUSE (b)

When the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is to be proved, or by the representative in interest of such person.[2]—Where the existence, condition or contents of a document are admitted by party for the purposes of a particular litigation, the admission will be conclusive and no question of proving the document by primary or secondary evidence will arise.[3] But where the existence, condition or contents of a document are admitted otherwise than for the purposes of a particular litigation, the admission of the original, will, under clause (b) of this section, be dispensed with and the admission will be good proof of the existence, condition, or contents of a bond are admitted in writing the suit can proceed on a copy without the loss of the original being proved.[4] If, however, the admission is oral, it will not be admissible in proof of the contents of the document, unless; the party relying on the admission shows that he is entitled to give secondary evidence of the contents the documents under section 65, or unless the genuineneness of the document is of in question.[5] An oral admission can only be proved in the cases stated in section 65, clause (a), (c) and (d).

If a sale deed is not proved to be lost, an admission by the vendor of the execution of the deed cannot be admitted as secondary evidence against a person other than the vendor.[6] Where the predecessor in interest of the defendant admitted in a wazibularz the existence, condition and contents of a mortgage-deed, the mortgage was held to be sufficiently proved against the defendant under section 65 (b).[7] Where in a suit to enforce a claim on a mortgage, admissions made in the course of pleadings or outside pleadings are available to the plaintiff which go to prove his claim, he can rest on admission alone and need not produce and prove the original document or its copy.[8]

In order to avail of the provisions of this clause the written admission of the contests of the document sought to be proved, has to take the admission of the person against whom it is sought to be proved.[9]

Written admissions as to the contents of inadmissible documents are themselves inadmissible.——Where an original document is inadmissible in evidence by reason of its not having been registered as required by law, or by reason of its not

1. *Mst. Bibi Aisha* v., *Bihar S. S. Majlis Avaqaf*, (1969) (11) SCJ 347.
2. *Mst. Bibi Aisha* v. *Bihar S. S. Majlis Avaqaf*, 1969 (1) SCJ 347.
3. See section 58 and notes thereto.
4. *Mulu* v. *Deokaran*, 20 IC 955.
5. Section 22.
6. *Safar Ali* v. *Mohesh Lal Chowdhury*, 34 IC 956 ; 23 CLJ 112.
7. *Bhairon Prasad* v. *Abalak Singh*, 148 IC 1172 ; 1934 A 529.
8. *Pearey Lal* v. *Hira Devi*, 1941 A 150 ; 195 IC 50.
9. *Hira Lal* v. *Ram Prasad*, 1949 A 677.

having been properly stamped, secondary evidence of its contents is inadmissible. Therefore, written admission of the contents of any such document cannot be given as secondary evidence under clause (b) of section 65.[1]

What constitutes admission of the existence, condition or contents of a document.—An admission, in order, to be availed proof of the existence, condition or contents of an original document, must have been made by the person against whom it is intended to be proved, or by the representative in interest of such person. Thus, an admission of a mortgage bond contained in a letter written to the mortgagor by a person who is not proved to be the mortgegee's agent is insufficient.[2] The admission need not, however, be express. Thus, where in a suit on a money bond, the defendant without expressly admitting the bond pleaded payment and endorsement of this payment on the deed, it was held that the suit could proceed on the copy without the loss of the original being proved.[3] But a denial of the execution of a bond, though accompanied by an alternative plea of payment, does not constitute an admission under section 65, clause (b);[4] nor an admission in a written statement, which is subsequently withdrawn in the oral statement before the Court.[5] A statement contained in the debtor's application to the Debt Conciliation Board is not an admission within the meaning of the clause.[6]

Denial of execution of a bond, coupled with a plea of payment.—If in a suit based upon a bond said to be lost, the execution of the bond is denied by the defendant, the alternative plea that the bond was paid, does not amount to an admission of its execution, so as to relieve the plaintiff from proving the loss of the original deed and to entitle him to sue upon a copy of it.[7]

Section 65 (b).—Question of admissibility of a document cannot be raised for the first time in Supreme Court.——Secondary evidence was admitted in the High Court. No objection as to the admissibility of the document was raised in the memo of appeal or Supreme Court. The objection cannot be raised at the time of the arguments.[8]

CLAUSE (c)

When the original has been destroyed or lost, or when it cannot be produced in reasonable time.——Secondary evidence of the existence, condition of contents of the original is admissible when the original has been destroyed or lost, or when, for any other reason not arising from the default or negligence of the party offering secondary evidence of its contents, cannot be produced in reasonable time. The rule applies not only to documents which are sought to be enforced in a suit, but also to documents which are merely produced as evidence.[9] The *onus* of showing, that it has been lost or

1. For admission of the contents of unregistered deeds, see *Kanduru Venkata Seshayya* v. *Adam Saib*, 25 IC 661; *Sambayya* v. *Gangayya*, 13 M 308; *Divethi Varada Ayyangar* v. *Krishnasami Ayyangar*, 6 M 117; For admission of the contents of unstamped documents see *Thaji Beebi* v. *Tirumaloaippa Pilla*, 30 M 386; *Damodar Jagannath* v. *Atmaram Babaji*, 12 B 443; *See also Kalliani Amma* v. *Narayanan Nambiar*, 28 IC 69.
2. *Gajraj Singh* v. *Muhammad Baker Ali Khan*, 20 IC 62.
3. *Mullu* v. *Deokaran*, 20 IC 955.
4. *Sri Ram* v. *Ram Lal*, 18 IC 878.
5. *Muhammad Altaf Ali Khan* v. *Hamiduddin*, 21 IC 81.
6. *Udhao Nanaji Gadewar* v. *Narayan Vithoba Mangilwar*, 1941 N 95; 194 IC 120.
7. *Muhammad Zafar* v. *Zahur Hussain*, 49 A 78; 97 IC 82; 1926 A 741.
8. *Biswambar Singh* v. *State of Orissa*, 1954 SCR 842; 1954 SCJ 219.
9. *Maqbul Ahmad* v. *Brijdeo Tewari*, 122 IC 751; 1930 A 529.

destroyed, or that it cannot be produced in reasonable time, is on the party who wishes to give secondary evidence of its contents,[1] though it is not necessary that the loss should be "specially pleaded."[2] An oral evidence of the contents of the original document is competent when the original is admitted to have been lost or not preserved by the opposite party.[3] Evidence that the original has been lost should ordinarily be given before secondary evidence is introduced.[4] Before secondary evidence can be lot in, the party tendering secondary evidence must prove the existence and execution of the original, directly or presumptively.[5] When the existence and execution of the document have been proved, the tendering party must then prove its destruction, positively or presumptively, or establish its loss, either by the admission of the adversary or his solicitor, or by proof that it cannot be found after diligent search.[6] When the original document which was proved in a previous suit is proved to have been lost, a copy of its transliteration is admissible and can be proved by the signatory of the original.[7] If the destruction or loss of the document has not been proved and its non-production has not been satisfactorily accounted for, secondary evidence will not be admissible.[8] A pedigree table which is merely a copy of another is not admissible as independent evidence. unless the loss of the latter has been proved.[9]

If a document, after being produced and exhibited, disappears from the record, secondary evidence of its contents becomes admissible.[10] When a document has been lost in these circumstances, formal proof of the fact that the document has been lost is not necessary, as the Court will take judicial notice of the fact.[11]

Section 65(C).—Document in Defendant's Possession.—Where the plaintiff alleges that the document is in the possession of the defendant and his allegation is not challenged, it is a proper cause in which notice, as required under clause (a), should be dispensed with, and even if the document is not in the possession of the defendant also, it must be deemed to have been lost.[12]

Secondary evidence of previous conviction.—Where the records of the previous

---

1. Section 104 ill. (b).
2. *Kamod Singh* v. *Khemkaran*, 103 IC 186 ; 1927 N 269.
3. *Pearey Lal* v. *Nanak Chand*, 1948 PC 108 ; 1948 ALJ 231 ; 61 MLW 437 ; 52 CWN 785 ; 50 BLR 643.
4. *Suratsingh* v. *Rani*, 59 IC 461 ; but see Section 136 ill. (b).
5. Phipson, Ev., 7th Ed, 525-26 ; *Chuha Mal* v. *Rahim Baksh*, 71 IC 568 ; 1924 L 303.
6. Phipson Ev., 7th Ed,., 525-26.
7. *Munshi Ram* v. *Baisakhi Ram*, 1947 L 335 ; 49 PLR 79.
8. *Mst. Hava* v. *Lokunal*, 1944 S 61. *Gaya Prasad* v. *Jaswant Rai*, 125 IC 460 ; 1930 A 550 ; *Muhammad Khan* v. *Sheo Bhikh Singh*, 5 Luck. 377 124 IC 358 ; 1929 O 447 ; *Briji Raj Saran Singh* v. *Bsant singh*, 118 IC 154 ; 1929 A 561 ; *Rangappa Nayakan* v. *Rangaswami Nayakan*, 88 IC 249 ; 1925 M 1005 ; *Hukum Chand* v.. *Shahab Din*, 4 L 90 ; 71 IC 4 ; 1924 L 40 ; *Ram Saran Das* v. *Tulsi Ram*, 67 IC 565 ; 1922 L 417 ; *Domai Bara Medhi* v. *Kereo Kolita*, 62 IC 441 ; *Thakur Das* v. *Gowardhan*, 56 IC 940 ; *Safar Ali* v. *Mohesh Lal Chowdhury*, 34 IC 956 ; 23 CLJ 122 ; *Luchman Singh* v. *Puna*, 16 C 753 ; 16 IA 125 (PC) ; *Krishna Kishori Chodhrarni* v. *Kishori Lal Roy*, 14 C 486 ; 14 IA 71 (PC) ; *Bhubaneswari, Debi* v. *Harisaran Surma Moitra*, 6 C 720 (PC) ; *Krishna Kishori Chaodharni* v. *Kishori Lal Roy*, 14 C 486 ; 114 IA 71 (PC) ; *Bhubaneswari Debi* v. *Harisharan Surma motra*, 6 C 720 (PC); 3 Bom HCR 160 ; 1 CLJ 155 ; *Mst Ustoorun* v. *Mohan Lall*, 21 WR 333 ; *Sookram Sookul* v. *Ram Lal Sookul*, 9 WR 248 ; *Ishen Chunder Chowdry* v. *Bhyrub Chander Chowdry*, 5 WR 21 ; Greesh *Chunder Lohooree* v. *Ramlal Sircar*, 1 WR 145 FB.
9. *Hazarilal* v. *Har Govind* 48 IC 375.
10. *Tulsi Ram* v. *Ram Saran Das*, 86 IC 552 ; 1925 PC 80 ; *Ram Singh* v. *Pat Ram*, 1933 L 782 (111) ; *Harijiwan Sahu* v. *Jairam*, AIR 1989 Pat 96.
11. *Chattra Kunari Devi* v. *Mohan Bikram Shah*, 121 IC 337 ; 1931 P 114.
12. *Vishwanath Vithoba* v. *Gonu Kisan*, AIR 1956 B 555.

convictions of an accused have been destroyed, they can be proved by secondary evidence.[1]

Sufficiency and admissibility of the evidence of search for the document.—The section is not intended to be utilised for the benefit of persons who deliberately or with sinister motives refuse to produce in Court a document which is in their possession power or control. It is designed only for the protection of persons who, in spite of best efforts, are unable from circumstances beyond their control to place before the Court primary evidence as required by law.[2] There must be sufficient proof of search for the original to render secondary evidence admissible; where there is no such proof, secondary evidence will not be admissible.[3] The sufficiency of the search necessary to let in secondary evidence is a preliminary question for the Judge, which will vary with the importance of the document and the circumstances of the case.[4] Whether or not sufficient proof of search for, or loss of, an original has been given is a question which depends mostly on the discretion of the Court of first instance, and its conclusions will not be overruled by the appellate Court except in a clear case of miscarriage of justice.[5] Every deed being the best evidence of its own contents, its non-production raises the presumption that it contains some defeasance, that is, there was some endorsement on document which the plaintiff did not like ; trial Courts should, therefore, exercise the greatest circumspection and care in deciding the fundamental questions of fact as to whether there really has been a *bona fide* loss.[6] The loss of a document such as a deed of mortgage or a special power-of-attorney authorizing the creation of mortgage must be strictly proved.[7] Strict proof, is however, not necessary where the document is of little or no value.[8] It is not necessary to prove the exact mode and time of loss; it is sufficient to show that the loss was not due to the party's own default or neglect.[9] It is enough if the party, in order to trace the document, has exhausted all the sources and means which the nature of the case suggested and which were reasonably accessible to him.[10] Where there is one person chiefly interested in a document. inquiry should be made of him ; where two person have an equal title to its custody, inquiry should be made of both.[11] Where inquiry was only made of one out of three persons likely to have the document, it was held to be insufficient.[12] whose family was extinct at the time the

---

1. *Pokar Chuharmal* v. *E.*,1941 S 173 ; ILR 1941 K 308 ; 197 IC 98.
2. *Hira Lal* v. *Ram Prasad,* 1949 A 677.
3. *Bhubaneswari Debi* v. *Harisaran Surma Moitra,* 6 C 720 , 724 (PC) ; *See* also *Harripria Debi* v. *Rukmini Debi,* 19 C 438 ; 19 IA 79 (PC) ; *Maung Ba U* v. *Daw Kha,* 1935 R 502.
4. Phipson, Ev., 7th Ed, 526.
5. *Maung B U* v. *Daw Kha,* 1935 R 502 ;*Harriparia Debi* v. *Rukmini Debi,* 119 C 438 ; 19 IA 79 (PC) ; *Tulsi Ram* v. *Ram Saran Das,* 86 IC 552 ; 1925 PC 80 ; *Vishwanath Ramji Karale* v. *Rahibai Ramji Karale,* 55 B 103 ; 128 IC 901 ; 1931 B 105 ; 32 Bom LR 1385 Profulla *Kumar Bose* v. *E.,* 57 C 1074 ; 125 IC 656 : 1930 C 209 : 31 Cr LJ 903 : *Pandu* v. *Bapudas,* 121 IC 33 : 1929 N 288 ; *Jas Karan Singh* v. *Ram Tahal,* 114 IC 307 ; *Chitram* v. *Khemchand,* 113 IC 370 ; 1929 S 7 ; *Chuha Mal* v. *Rahim Bakhsh,* 71 IC 568 ; 1924 L 303 ; *Mangra* v. *Bedi Ram,* 35 IC 328 ; *Ma Paik* v. *Ma Nwai Pauh,* 34 IC 153 ; *Naingawa Kom Ningangavda Mantur* v. *Ramapa,* 28 B 94 ; 5 Bom LR 708.
6. *Muhammad Zafar* v. *Zahur Hussain,* 49 A 78 ; 97 IC 82 ; 1926 A 741 ; *See Hira lal* v. *Ram Prasad,* 1949 A 677.
7. *Jaspat Rai* v. *Devi Dayal,* 32 IC 399 .
8. See Phipsion Ev, 7th Ed, 526 ; Taylor 429.
9. *Manavikraman* v. *Nilambur Thacharakavil Manavikraman,* 31 IC 579.
10. *R.* v. *Saffron Hill,* 22 LJMC 22 ; *Atal Behary Keora* v. *Lal Mohan Singha Roy,* 49 IC 507 ; *Raj Bahadur Lal* v. *Bindeshari,* 45 IC 344, Phipson Ev, 7th Ed, 526.
11. Phipson Ev, 7th Ed, 526.
12. *Hawker* v. *King,* 103 LTJ 540 ; Phipson Ev, 7th Ed, 526.; but see *Zaibunnisa* v. *Irshad Hussain,* 89 IC 284 ;

document was sought to be proved, it was held that there was sufficient justification for letting in secondary evidence.[1] When a document should, in the normal, course, be with a person, and that person denies its possession, secondary evidence of the contents of the document may be given under section 65 (c), even if no specific notice to produce has been given to the person in whose possession the document should normally be.[2] Where the document is an old one and it is not known what happened to it, secondary evidence becomes admissible.[3] Where a document is traced to the possession of the associates of the accused, but on search it is not found in the house of such associates, it is reasonable to presume that the document has been destroyed or lost.[4] Ordinarily, if a witness, in whose custody a deed should be, deposes to its loss, then, unless there is some motive suggested for his being untruthful, his evidence should be accepted as sufficient to let in secondary evidence of the deed, and this result should follow all the more readily where the witness is not cross-examined.[5] Plaintiff's uncontradicted testimony as to the vain search for a document is sufficient to let in secondary evidence.[6] Where a party took out a summons for the attendance of a hostile persons in whose possession the document personally was, but the summons was not served, the party was allowed to put in a certified copy as secondary evidence of the deed.[7] Judicial notice may be taken to the fact that original telegrams are destroyed by the Telegraph Department after three months. Therefore, secondary evidence of telegrams thus presumed to have been destroyed is admissible.[8] A report of loss recorded in a police diary,[9] or in a police file, coupled with the statement of the *thanedar* in another case[10] is not good evidence of the loss of the document.

A conclusion that the loss of a document is or not proved is a question of fact,[11] and is not open to revision,[12] nor can such conclusion be challenged in second appeal. The word " product" in section 65 (c) does not mean production out of the custody of the party concerned; it only means "procure the production of or give it in evidence." The question whether the non-production is due to any other sufficient reason not arising from the party's own default or neglect of fact, and depends mainly on the discretion of the Court.[13]

Document on the record of another case, secondary evidence whether admissible?.—The mere fact that a document is on the file of another case is not sufficient to dispense with its production.[14] In a defamation case the Court should have

---

1925 C 504, where the document was presumed to be in the custody of one out of three joint donees, see also *Saliman* v. *Mukhdum Bux*, 116 IC 277 ; 1928 A 394.

1. *Ram Charan Lal* v. *Raghubir Singh*, 45 A 618 ; 75 IC 387 ; 1923 A 551.
2. *Narsidas Jekisondas* v. *Ravishankar Prabhshakar*, 128 IC 891 ; 1931 B 33.
3. *Mangra* v. *Beli Ram*, 35 IC 328.
4. *Manabendra Nath Roy*, v. *E.*, 148 IC 833 ; 1933 A 408 ; 35 Cr LJ 768.
5. *Ehtisham Ali* v. *Jamna Prasad*, 48 IA 365 ; 64 IC 299 ; 1922 PC 56.
6. *Muhammad Kamil* v. *Habibullah*, 37 IC 794.
7. *Bashiruddin Khan* v. *Mahadeo Singh*, 79 IC 663 ; 1924 O 306.
8. *Bishambar Nath* Tandon v. *E.*, 90 IC 706 ; 1926 O 161 ; 26 Cr LJ 1602.
9. *Asa Ram* v. *Sukha Singh*, 1921 L 336 ;
10. *Baru* v. *Sukha Singh*, 1921 L 332 (1) ;
11. *See Gaya Prasad* v. *Jaswant Rai*, 125 IC 460 ; 1930 A 550 ; *Ma Yin* v. *Ma Boak*, 123 IC 129 ; 1929 R 277 ; *Pandu* v. *Bapudas*, 121 IC 33 ; 1929 N 228 ; *Choithram* v. *Khemchand*, 113 IC 370 ; 1929 S 7.
12. *Pandu* v. *Bapudas*, 121 IC 33 ; 1929 N 288.
13. *Gaya Prasad* v. *Jaswant Rai*, 125 IC 460 ; 1930 A 550.
14. *Sreemutty Gour Monee* v. *Huree Kishore Roy*, 10 WR 338 : see also *Hureehur Majoomdar* v. *Churu Majee*, 22 WR 355.

the original libels before it when evidence is being given; it is not right to try the action on the basis of certified copies of the libels taken from the record of another case where they were filed.[1] But where the document cannot be produced without unreasonable delay, a certified copy of it may be admitted as secondary evidence under Section 65(c) of the Act.[2] In a Nagpur case the copy of an award was allowed to be filed when the original award was on the files of the office of the Gwalior High Court, and the rules of the High Court did not allow the removal of the original award.[3] Where the original document was produced in a suit about 100 years previously and a compared copy of the original was retained on the file of that suit, it was held that a certified copy of the compared copy was admissible.[4] A copy of a list attached to a plaint in a revenue suit is not admissible, as secondary evidence is not, in such circumstances, justified under any clause of Section 65.[5] The original of a written statement being more than 30 years old can be admitted in evidence if produced from the office of the Court. If that cannot be done in spite of best efforts secondary evidence can be given. But production of certified copy without any further evidence will not be sufficient secondary evidence.[6]

Hearsay is inadmissible to prove loss or destruction of the document, but is admissible to prove reasonableness of the search.—Answers given by persons likely to have had the document in their custody are admissible, not to prove the facts stated, but to show the reasonableness of the search.[7] A statement by a witness in a suit that a third person had told him that a document was lost during a fire, though mere hearsay evidence as to the loss, may be treated as offering reasons for holding that the original cannot be produced in reasonable time and thus for admitting secondary evidence.[8] Where direct evidence of the loss of a document is available hearsay evidence of its being lost is inadmissible.[9]

Suit on a bond alleged to be lost; loss of bond must be proved even if payment is pleaded.—See notes to clause (b) under the heading "denial of execution of bond coupled with a plea of payment.

Reconstruction of a lost record.—Where the record of a case is destroyed the Court can reconstruct the record. Affidavits, counter-affidavits, hearing of witnesses, and admissions of copies are methods which can properly be employed in reconstructing the record.[10]

Probate may be granted of a lost will.—If a will has been lost after the death of the testator, but its substance can be *distinctly* ascertained by the original instructions, copy of the will, or even by the recollection of witnesses who heard it read, probate may be

---

1. *Burke* v. *Skipp*, 81 IC 129 : 1924 M 340 : 25 Cr LJ 641.
2. *Jobeda Khatun* v. *Monabali* 130 IC 865 : 1930 C 479.
3. *Yeshwantrao Ganpatrao* v. *Dattaravarao Ramchandrao*, 1948 N 162.
4. *Chudasama Kholuba Sartansanga* v. *Chudasama Takhatsang Narsinghji*, 46 B 32 : 76 IC 155 : 1922 B 177.
5. *Bhagwati Prasad* v. *Marjad Singh*, 129 IC 331 : 1931 O 136.
6. *Akshoy Kumar Bose*. v. *Sukumar Dutta*, 1951 C 320.
7. *R.v. Braintree*, 1 E & E, 51 : *R.v. Kenilworth*, 7 QB 642 : *Smith* v. *S.*, 10 Ir Rep Eq 237 ; Phipson,Ev., 7th Ed., 526 ; *Dol Gobonda Das* v. *Mukubul Sheikh*, 61 CLJ 588.
8. *Telikacherla Kandalai Venkata Ramanujacharyulu* v. *Telikacherla Kandalai Appalacharyulu*, 97 IC 785 : 1926 M 1003.
9. *Telikacherla Kandalai Appalucharlulu Venkatacharyulu* v. *Telikacherla Kandalai Venkata Ramaniacharyulu*,85 IC 524 : 1925 M 345 . As to the admissibility of a report of loss to the police, see *Asa Ram* v. *Sukha Singh*, 1921 L. 336 : 4 LLJ 416 : *Baru* v. *Sukha Singh*, 1921 L. 332 (1) : 4 LLJ 418.
10. *Marakkaruti* v. *Veeram Kutty*, 64 M 679 : 73 IC 1050 : 1923 M 647.

granted of a copy embodying such substance.[1]

Section 65(c). Secondary Evidence as to the contents of the original.—It can be admitted in evidence only when the original is either deliberately held by the person in whose custody it was, or its proof to have been lost.[2]

Any secondary evidence may be given when the original is lost or destroyed or cannot be produced.—When the original document is lost or destroyed, or cannot be produced in reasonable time, and secondary evidence, for that reason, becomes admissible under clause (c) of Section 65, any kind of secondary evidence recognized by Section 63 may be given. Even if the original was a public document, or one which could only be proved by a certified copy under the penultimate paragraph of this section any secondary evidence would be admissible, and it is not necessary that a certified copy only should be produced in proof of its contents.[3] When the certificate sanctioning prosecution is lost the original file maintained in the office of the authority granting sanction can be produced as secondary evidence.[4]

Section 65(c)-Any secondary evidence is admissible.—Any secondary evidence may be given. That clause of this section which provides that in case of (e) or (f) a certified copy of the document but no other kind of secondary evidence is admissible'' seems to apply to a case in which a public document is still in existence on the public records, and that provision appears to have been intended to project the originals of public records from the danger to which they would be subject by constant production of such documents in Courts in evidence, and the said clause does not interfere with the general rule of evidence given in clause (c) i.e., in cases where the original is destroyed or lost.[5]

CLAUSE (d)

When the original is of such a nature as not to be easily movable.— When production of the original is physically impossible or highly inconvenient, secondary evidence of its contents may be given. Instances of such documents are inscription on walls, tombstones, monuments, surveyor's marks on boundary, trees, and the like.[6] Any secondary evidence would be admissible in proof of the contents of documents mentioned in this clause.

CLAUSE (e)

Public documents may be proved by certified copies.—Section 74 defines public documents and section 76 authorises every public officer having the custody of a public document,. which any person has a right to inspect, to give that persons on demand a certified copy of it on payment of the legal fees therefore. Such certified copies may be produced in proof of the contents of the public document of which they purport to be

---

1. Taylor, § 436.
2. *Ram Chand* v. *Wazir Chand*, 64 PLR 203.
3. *Chandreswar Prosad Narain Singh* v. *Bisheswar Pratap Narain Singh*,5 P 777 : 101 IC 289 : 1927 P 61 ; *Ananda Kumar Bhattacharjee* v. *Secretary of State*, 43 C 973 : 32 IC 774 ; *Kunneth Odangat Kaladan* v. *Vayoth Palliyil Kunnhnni Kidavu*, 6 M 80 ; *Hurish Chunder Mullick* v. *Prosunno Comnar Banerjee*, 22 WR 303 ; *Chikka Veerasetty* v. *Nanjundachari*, 1955 Mys 139.
4. *Public Prosecutor* v. *G.Sadagopan*, 1953 M 785 : 1953 1 MLJ 636.
5. *Chikka Veerasetty* v. *Nanjundachari*, 1955 Mys 139.
6. Phipson,Ev., 7th Ed., 526 ; see Taylor § 438.

copies.[1] The object of the rule is to prevent the originals of public records from the danger to which they would be exposed by constant production in evidence.[2]

Instances of the public documents held provable by certified copies.—The probate of a will granted in Australia is a public document which may be proved by a properly certified copy,[3] so is an order of the probate Court granting letters of administration, with a copy of the will annexed, to a particular person.[4] A settlement record is a public document and entries therein may be proved either by the original or by a certified copy, oral statement of the *Kanungo* as to its contents being inadmissible.[5] A *robkari* issued by a Commissioner showing that a fishery is not included in a *khas mahal* is a public document and may be proved by a certified copy.[6] A summary of share capital and shares, filed with the Registrar of Joint Stock Companies,is a public document and may be proved by a certified copy;[7] and so may an Income Tax Return,[8] An order of a District Magistrate under Rule 56 or Rule 81 of the Defence of India Rules is a public document. The only manner in which such a document may be legally proved is by production of the original or by a certified copy of the original.[9] A sale certificate, however, is not a public document and cannot be proved by a certified copy.[10] A report made to the police under Section 144 or Section 155, Cr. P. Code, or Section 4 of the Police Act, is a public document provable by secondary evidence, but not a mere report by a lady that she is the wife of a particular person.[11] An entry in the Register of Motor Vehicles may be proved either by the production of the Register or by a duly authenticated copy of it. A mere statement by an officer of the Motor Vehicles Department made in answer to a letter from the plaintiff is not the right kind of secondary evidence.[12] An entry in the Register of firms and sale deed registered under Registration Act,[12a] can be proved by its certified copy,[13] see notes to Sections 35 and 74.

Sec. 65 (e) Grant of Probate.—The grant of a probate is conclusive of the validity and the execution of the will and of the testamentary capacity of the testator.[14] An income-tax return accompanied by a statement by the assessee is a public document under Section 74, and hence a certified copy thereof which would be admissible under this section, even though the Court may be prohibited from requiring a public servant to produce the documents mentioned in Section 56 of the Income Tax Act. Certified

---

1. Section 77, Section (65) (e).
2. *Kunneth Odangat Kalandan* v. *Vayoth Palliyil Kunnhuni Kidavu* 6 M 80.
3. In the matter of Adija, 11 IC 261. For presumption of correctness of certified copies of foreign records, see Section 86.
4. *Habiram Dass* v. *Hem Nath Sarma*, 30 IC 690 : 19 CWN 1068.
5. *Ram Lal* v. *Ghanisham Das*, 71 IC 825 : 1923 L 150.
6. *Radhanath Kalibarta* v. *E.*, 46 IC 689 : 19 Cr LJ 769.
7. In the matter of Tarit Kanti Biswas, 45 C 169 : 45 IC 338 : 19 Cr LJ 533 (FB).
8. *Katikineni Venkata Gopala Narsimha Rama Rao* v. *Chitluri Venkataramayya*, 1940 M 768 (FB) ; but see *Mythili Ammal* v. *Janaki Ammal*, 1940 M 161 : *Devidatt Ramniranjandas* v. *Shirram Narayandas*,56 B 324 : 137 IC 381 : 1932 B 291 ; *Anwar Ali* v. *Fazal Ahmed*, 2 R 391 : 84 IC 487 : 1925 R 84.
9. *Ram Prasad* v. *E.*, 1945 P 210 ; *Ganeshi Potidar* v. *E.*, 1946 P 123.
10. *Vasanji* v. *Haribhai*,2 Bom LR 533.
11. *Nawab Bibi* v. *Sher Zaman*, 123 IC 285 : 1930 L 1067.
12. *Baij Nath Shaw* v. *Corporation of Calcutta*, 141 IC 248 : 1933 C 178.

12a. *Rama Chandra* v. *Hambai*, AIR 1989 Ori. 27.

13. *Chhotelal Darbarilal* v. *Mohammad Hussain*, 1955 VP 44.
14. *Satyacharan* v. *Hrishikesh*, 63 CWN 615.

copies, even though not containing any endorsement as to person obtaining them, are nevertheless admissible. Being a certified copy of the public document in the custody of a public officer, it is not necessary to prove the signature of the persons appearing on the original.[1] A notification by the Government by its department, is a public document and a certified copy thereof is admissible, if it is certified by the head of the department.[2]

Form of secondary evidence admissible in proof of the contents of a public document.—The only form of secondary evidence permitted in proof of the contents of a public document is a certified copy granted under Section 76, if the original public document exists.[3] Where, however, the original document is lost or destroyed, any other form of secondary evidence permitted by Section 63 may, under clause(c) of Section 65, be given.[4]

Where the original dying declaration was stated to have been lost, a copy of it prepared by the head constable and proved by him to be a correct copy, was held to be admissible.[5]

A certified copy of a public document obtained before the document was lost or destroyed is admissible.[6] When the public document is in the custody of a person who is out of reach of, or not subject to, the process of the Court, e.g., when the document is in a Native State, any other secondary evidence than a properly certified copy may be given.[7] When the original public document consists of numerous documents which cannot be conveniently examined in Court, and the fact to be proved is the general result of the whole collection and not the contents of any particular document, it may be proved by the evidence of a person who has examined the whole collection.[8] A warrant of arrest is a public document and may be proved by a certified copy; a proclamation under Section 87 Cr. P. Code, is not the right kind of secondary evidence of it.[9] A notification issued by the Government can be proved by the production of the Gazette or its certified copy.[10]

CLAUSE (f)

When the original is a document of which a certified copy is permitted by law to be given in evidence.—For enactments permitting certified copies to be given in evidence in the first instance without any foundation for secondary evidence having been laid, see Section 4, Bankers's Books Evidence Act. Act XVIII of 1891 ; Section

1. *Somanna* v. *Subba Rai*, (1957) 2 Andh. WR 499.
2. *Janu Khan* v. *State*, 1960 BLJR 12.
3. *Krishna Kishori Choadhrani* v. *Kishori Lal Roy*, 14 C 486, 491 : 14 IA 71 (PC) ; *Ram Lal* v. *Ghanisham Das*, 71 IC 825 : 1923 L 150 ; *Syad Pir Shah* v. *Gulab Shah*, 63 PR 1878 ; see the penultimate paragraph of Section 65.
4. *Chandreswar Prosad Narain Singh* v. *Bisheshwar Pratap Narain Singh*, 5 P 777 : 101 IC 289 : 1927 P 61 ; *Ananda Kumar Bhattacharjee* v. *Secretary of State*, 43 C 973 : 32 IC 774 ; *Krishna Rao Bahadur* v. *Muthangi Buchi Rammayya Garu*, 28 IC 808 ; *Kunneth Odangat Kalandan* v. *Vayoth Palliyil Khunhunni Kidavu*, 6 M 80 : *Syad Pir Shah* v. *Gulab Shah and others*, 63 PR 1878 : *Harish Chunder Mulofick* v. *Prosunno Coomar Banerjee*, 22 WR 303 ; *Chikka Veerasetty* v. *Nanjundachari* 1955 Mys. 139.
5. *Aher Rama* v. *State of Gujarat*, 1979 SC 1567 (Para 2).
6. See *Krishna Rao Bahadur* v. *Muthangi Buchi Rammayya Garu*, 28 IC 808.
7. *Haranand Chetlangia* v. *Ram Gopal Chetlangia*, 27 IC 639 : 27 IA. 1 (PC).
8. See *Sundar Kaur* v. *Chandreshwar Prasad Narain Singh*, 34 C 293.
9. *Easwaramurthi Goundan* v. *K.E.*, 254 IC 1 (PC),
10. *Jai Gopal Singh* v. *Divisional Forest Officer*, 1953 P 310 ; See also *Pannalal* v. *State*, 1953 MB 84.

4, clause (d), Powers-of-Attorney Act, (Act VII of 1882); Civil Procedure Code, O. XI, r.19.

Income-tax documents –See notes to Sections 74 and 75.

Copies obtained from the registration office are inadmissible unless a case for the reception of secondary evidence under Section 65 of the Evidence Act is made out.–It is well settled that certified copies of registered deeds evidencing private transactions are admissible only when a case for the reception of secondary evidence has been made out.[1] A deed of sale is not a document of which a certified copy is permitted by law to be given in evidence in the first instance. Section 57 of the Registration Act only means that when secondary evidence has in any way been introduced as by proof of the loss of the original document, a copy certified by the Registrar shall be admissible for the purpose of proving the contents of the original; that is to say, it shall be admitted without other proof that the Registrar's certificate of the correctness of the copy, and shall be taken as a true copy. But that does not make such copy a document which may be given in evidence without other evidence to introduce it.[2] The production of a certified copy of a registered deed is sufficient proof where the original deed is in the possession of the other party and has not been produced.[3]

Form of secondary evidence admissible in proof of a document falling under clause (f).–When a document falls under clause (f), only a certified copy is admissible in proof of its contents;[4] but when the original document is lost or destroyed, any other form of secondary evidence recognized by Section 63 may be given.[5] In an Allahabad case,[6] a copy of the abstract of a power-of-attorney executed before, and authenticated by, the Sub-Registrar under Section 33 (1) of th Registration Act was admitted as secondary evidence, the original power-of-attorney not having been produced by the party against whom it was sought to be proved. It is not, however, clear from the reported facts of the case that other evidence was given in the case to prove the contents of the original power-of-attorney. In the absence of other evidence, it is submitted, mere production of a copy of the abstract was not admissible, as such secondary evidence is not within the purview of any clause of Section 63. See notes to clause (e) under the heading "form of secondary evidence admissible in proof of the contents of a public document."

CLAUSE (g)

"Under this clause, when the original consists of numerous accounts or other documents which cannot be conveniently examined in Court and the fact to be proved is the general result of the whole collection, evidence may be given as to the general result of the document by any person who has examined them and who is skilled in the examination of such documents. This provision is for the saving of public time. If the point to be ascertained were, for instance, the balance in a long series of accounts in a merchant's

1. *Gopal Das* v. *Shri Thakurji*, 1943 PC 83 ; *Ma Yin* v. *Ma Bok*, 123 IC 129 : 1929 R 227 ; *Safar Ali* v. *Mohesh lal Chowdhury*, 34 IC 956 : 23 CLJ 122.
2. *Ma Yin* v. *Ma Bok*, 123 IC 129 : 1929 R 277 ; *Badhawa Ram* v. *Akbar Ali*, 103 IC 752 : 1927 L 817 ; *Munnan* v. *Najmun*, 11 IC 50 ; *Naresh Chandra Bose* v. *State*, *1955 C 398: Hurish Chander Mullik* v. *Prosunno Coomar Banerjee*, 22 WR 303 ; See also *Vithoba Saularam* v. *Shrihari Narayan*, 1945 B 319.
3. *Saliman* v. *Makhdum Bux*, 116 IC 277 : 1928 A 394.
4. *Krishna Kishori Choadhrani* v. *Kishori Lal Roy*, 14 C 486, 491 : 14 IA 71, (PC).
5. In re the collision the "Ava" and the "Brenhilda", 5 C 568.
6. *Bishan Sarup* v. *Abdul Samad*, 136 IC 273 : 1931 A 649.

books, evidently great inconvenience would arise and much public time be wasted, if a witness were compellable to go through the whole of the books and to make his examination and calculations before the Court. He is allowed, therefore, to do this before he comes to be sworn, and then to give the general result of his scrutiny. He can, of course, be tested by cross-examination and the books should always, where it is practicable be in Court and open to the opposite side's inspection and to that of the Court'.[1] Where, for the purpose of proving the history of certain properties, the general result of an examination of collectorate records and that Collectorate register was stated by two witnesses who were skilled in the examination of those registers being public document, it was admitted in evidence, and the argument that, the registers being public documents, only certified copies thereof were admissible was rejected, and it was held that clause (g) clearly renders such evidence admissible even though the documents, the general result of which is to be stated are public documents.[2] An abstract from mutation records, showing the number of alienations of land which have taken place in a particular tribe, is admissible in evidence under this clause of the section in order to prove that members of that tribe have unrestricted powers of alienation. One of the functions of a special *kanungo* is to assist the Court in the examination of revenue records as well as to give evidence under (g) of Section 65 when the circumstances are such as to justify it. Another function of his is to put the records before the Court in order that the Court may examine them for itself; and, when directed to do so, to draw attention to those parts of the records which the Court ought to examine. But it is an abuse of his functions to require him to give oral evidence of the contents of a document, e.g., the record of a *muafi* inquiry, which ought to be examined in original by the Court.[3] Similarly, an abstract statement prepared by a *patwari*, even though based on papers in his possession,is not a public document and cannot, therefore, be proved by a certified copy.[4] Secondary evidence under this clause cannot be given by a person who has not examined the documents.[5]

Section 65 (g) When originals consist of numerous documents etc. –This clause deals with cases, where there are too many documents, whether books of accounts or other documents, which are available to the Court, but which it is convenient for the Court to examine. Clause(g) has nothing to do with documents which are not available to the Court. The very fact that clause(g) provides secondary evidence of the result, because the documents cannot conveniently be examined in Court shows that the documents are there for the Court to examine, if it so likes to do.[6]

Degrees of secondary evidence ; last four paragraphs of the section.–The general rule is that there are no degrees in secondary evidence, and that a party is at liberty to adduce any admissible description he may choose.[7] But to this general rule the Act creates exceptions which are mentioned in the last three paragraphs of the section. Thus, where the ground for the reception of secondary evidence is that which is mentioned in clause(6), secondary evidence may be given only by proof of the written

1. Norton, Ev., 248 : See also *Krishna Dayal* v. *E.*,1946 A 227.
2. *Sunder Kuar* v. *Chandreshwar Prasad Narain Singh*, 34 C 293.
3. *Gilani Shah* v.*Mst. Hassan,etc*, 2 LLJ 714.
4. *Sheo Das* v *Sheo Dayal Singh*, 128 IC 770 : 1930 A 712.
5. *Krishna Dayal* v. *E.*, 1946 A 227.
6. *Krishna Lal* v. *Sohan Lal*, ILR 1955 Raj. 191.
7. Phipson, Ev.,7th Ed., 522 ; Taylor § 550-553 : Best, § 483.

admission; where the original is a public document, or one of which a certified copy is permitted by law to be given in evidence, a certified copy is only form of secondary evidence permitted; and , in the case mentioned in clause(g), only the general result of the documents can be given in evidence. If, however, the public document, or a document, of which a certified copy is permitted by law to be given in evidence, has been lost or destroyed any secondary evidence recognized by Section 63, and not only a certified copy of it, may be given in evidence.[1] Similarly, where the document to be proved is a public record in the custody of a person who is out of reach of, or not subject to, the process of the Court, e.g., when the document is in a native State, it may be proved by evidence other than a certified copy.[2] Where both clause (e) and clause(g) are applicable, secondary evidence may be given by stating the general result of the collection of documents, even if the documents be public documents which, under the penultimate paragraph of the section, are provable by certified copies only.[3]

Scope : Section 65 and 63 : definition and admissibility of secondary evidence.–Section 63 defines the kinds of secondary evidence permitted by the Act, while Section 65 defines the circumstances under which secondary evidence of the kinds mentioned by Section 63 becomes admissible. When the question is whether secondary evidence of the contents of the document can or cannot be given, the question will be decided by referring to Section 65, but when the question is whether evidence sought to be given in a particular case is or is not the right kind of secondary evidence Section 63 comes into play. When no foundation is laid for the reception of secondary evidence Sections 65 and 63, such evidence should be excluded from consideration.[4]

Section 65 & 66 –**Applicability –Agreement of sale entered into with the defendant –Sale to plaintiff –Agreement of sale with vendor –Failure to produce on notice sent by defendent –Admissibility -Evidence of contents.**–The vendor who entered into an agreement of sale with the defendant, later sold the property to the plaintiff who filed the suit for declaration and recovery of possession. The agreement of sale was with the vendor. On the objection of the plaintiff oral evidence of the contents of the agreement of sale was held admissible. Held, the order of the oral Court excluding oral evidence of the contents of the agreement of sale was wrong and liable to be set aside. The vendor who sold the property to the plaintiff and the defendant is common and is not a party to the suit. Oral evidence of the contents of the agreement of sale which is in the possession of the vendor is admissible in evidence when the defendant issued a notice under Section 66 of the Act to the vendor and he failed to produce the same.[5]

Sections 65, 67—Object.–Under this section, secondary evidence is admissible only of the existence or the contents of a document which is lost, but the execution of a document must be proved by primary evidence under Section 67. Section 67 prescribed

---

1. *Chandreswar Prosad Narain Singh* v. *Bisheshwar Pratap Narain Singh*, 5 P 777 : 101 IC 289 1927 P 61 : *Ananda Kunar Bhattacharjee* v. *Secretary of State*, 43 C 973 : 32 IC 774 : *Krishna Rao Bahadur* v. *Muthangi Buchi Rammayya Garu*, 28 IC 808 ; *Kunneth Odangat Kalandan* v *Vayoth Palliyil Kunnuhuni Kidavu*, 6 M 80 : In re, collision the "Ava" and the "Brenhilda ", 5 C 568 : *Hurish Chunder Mullick* v. *Prosunno Coomar Banerjee* 22 WR 303 ; *Chikka Veerasetty* v. *Nanjundachari*, 1955 Mys. 139.
2. *Haranand Chetlangia* v. *Ram Gopal Chetlangia*, 27 C 639 : 27 IA 1 (PC).
3. *Sunder Kuar* v. *Chandreshwar Prasad Narain Singh*, 32 C 293.
4. *Sitaldas* v. *Santram*, AIR 1954 SC 606.
5. *Muthu Venkatarma Reddiar* v. *Varadaraja Kounder*, (1971) 2 MLJ.

that if a document is alleged to be signed by a person, proof must be given of the signature of that person. Section 47 describes the various methods of proving the handwriting of a person. The combined result of these provisions is that the signature of a person on a document may be proved either (a) by examining another person who is acquainted with the handwriting of the executant and can prove his signature by his opinion.[1]

Section 65 –Testimonial Compulsion –Attempt to adduce secondary evidence –If can amount to testimonial cumpulsion.–An attempt by a party to a proceeding, to comply with the provision of Evidence Act, so as to enable him to adduce secondary evidence in a case cannot possibly amount to compelling a person to give evidence against himself.[2]

66. Rules as to notice to produce.–Secondary evidence of the contents of the documents referred to in Section 65, clause (a), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, [3][or to his attorney or pleader,] such notice to produce it is prescribed by law; then such notice as the Court considers reasonable under the circumstances of the case:

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it –

(1) When the document to be proved is itself a notice;
(2) When, from the nature of the case, the adverse party must know that he will be required to produce it;
(3) when it appears or proved that the adverse party has obtained possession of the original by fraud or force;
(4) when the adverse party or his agent has the original in Court
(5) when the adverse party or his agent has admitted the loss of the document.;
(6) when the person in possession of the document is out of reach of, or not subject to, the process of the Court.

COMMENTARY

Notice to produce is necessary whether the document be in the possession of a party or a stranger.–Clause(a) of Section 65 applies to cases where the document is in the possession of a party as well as to those where it is in the possession of a stranger.[4] The last two cases contemplated by clause (a) of Section 65 will ordinarily apply to

1. *Akshya Narayan* v. *Maheshwar*, AIR 1958 Orissa 207.
2. *S. Hasim Raza Abidi* v. *Ved Parkash*, 1971 ALJ 1389.
3. *Ins* by Act 18 of 1872, S. 6.
4. See *Subbarayulu Naidu* v. *Vengama Naidu*, 123 IC 197 : 1930 M 742 ; *Mani Devi* v. *Anpurna Dei*, 1943 P 218.

strangers only. When the document is in the possession of a party, notice to produce must, in the Mofussil, be served through Court;[1] but on the original side of the High Court it might be served directly by a party or his solicitor on the opposite party or his solicitor. If however, the document is in possession of a stranger, both in the Mofussil, and on the original side of High Court an ordinary summons (*subpoena duces tecum)* has to be served on the person having the possession of the document to produce it in Court.[2] A person summoned to produce a document does not become a witness by the mere fact that he produces it and cannot be cross-examined, unless and until he is called as a witness.[3] Omission to give notice is fatal to the admissibility of secondary evidence.[4]

Application of the section to criminal cases. –This section applicable to civil cases as well as to criminal trials.[5]

Form of notice.–The notice must be such as is prescribed by law, [6] and, where no notice has been prescribed by law, such as is reasonable under the circumstances of the case. The object of a notice to produce is to enable the adversary to have the document in Court, and, if he does not, to enable the party to give secondary evidence thereof, so as to exclude the argument that the latter has not taken all reasonable means to procure the original.[7] The form of notice may unlike that of a *subpoena duces tecum,* be general, e.g. to produce "all accounts relating to the matters in question in this cause"[8] or "all letter written by the plaintiff to the defendant relating to the matterrs in dispute in the action."[9] A notice to produce "a letter purporting to enclose an account "will let in secondary evidence of the account.[10] But a notice to produce "all letters"[11] or "letters and copies of letters and all books relating to the cause"[12] has been held to be too vague to admit secondary evidence of the letters; as also a notice to produce "all plaintiff's books of accounts containing entries of dealings between him and defendant for September, 1896, and all letters from defendant or others to plaintiff relating to relevant matters."[13] Similarly, a notice to produce all documents of title of a date earlier than those which a party had admitted to be in his possession or power in his affidavit of documents is not a good notice, though it may be sufficient to let in secondary evidence under Section 65(c).[14] Of course, if the notice has not been served at all or has not been served properly or in sufficient time, secondary evidence will not be admissible.[15]

Service of notice.–Where the adverse party is a *pardanashin* lady the notice may be served in the manner prescribed by Order 5, rule 15, C.P.Code, e.g., upon her brother if

1. See C.P. Code, O. 11 rr. 12-14, 15-18 & O.5,r.7, New Cr. P. Code, Section 91-94, 349.
2. Woodroffe, Ev., 8th Ed., 545.
3. Section 139.
4. *Subbarayulu Naidu* v. *Vengama Naidu,* 123 IC 197 : 1930 M 742.
5. *Manabendra Nath Roy* v. *E.*, 148 IC 833 : 1933 A 498 : 35 Cr LJ 768 : *Jhabwala* v. *E.*, 145 IC 481 : 1933 A 690 : 34 Cr LJ 967 : *Profulla Kumar Bose* v. *E.*,57 C 1074 : 125 IC 616 : 1930 C 209 : 31 Cr LJ 903.
6. See C.P. Code, O. 11, rr. 12-14, 15-18 & O. 5. r. 7 ; New Cr. P. Code Sections 91-94. 349.
7. *Dwyer* v. *Collins,* 7 Ex. 639 , 647 Phipson, Ev.,7th Ed., 523.
8. *Rogers* v. *Custance,* 2 M & Rob. 179.
9. *Jacob* v. *Lee* , 2 M & Rob. 33 ; *Morris* v. *Houser,* 2 M & Rob. 392.
10. *Engall* v. *Druce,* 9 WR 536.
11. *Gardner* v. *Wright,* 15 LT 325.
12. *Jones* v. *Edwards,* M'CL & Y 139.
13. 44 SJ 95, per Kekewich, J., Phipson,Ev., 7th Ed., 523-24.
14. See *Narsidas Jekisondas* v. *Ravishankar Prabhashankar,* 128 IC 891 : 1931 B 33.
15. See Taylor, § 445.

he is living with her.[1]

Estoppel by notice.—When a party calls for a document which he has given the other party notice to produce, and such document is produced, and inspected by the party calling for its production, he is bound to give it as evidence if the party producing it requires him to do so.[2] When a party refuses to produce a document which he has had notice to produce, he cannot afterwards use the document as evidence without the consent of the other party or the order of the Court.[3] The Court shall presume that every document called for and not produced after notice was attested, stamped and executed in the manner required by law.[4]

Omission to object to the admissibility of secondary evidence tendered without giving notice to produce.—Where, when secondary evidence is given, no objection is taken to its admission on the ground that notice to produce the original has not been given, the admissibility of the evidence will not be liable to be called in question in appeal.[5] See notes to Section 5 and Section 65.

Section 66—Scope—Certified copies admitted and marked as exhibits without objection—Objection at late stage—If open.— The principle of law being that once secondary evidence by way of certified copies of registered document is admitted without objection and the documents are marked as exhibits, it is not open to the party against whom they are offered in evidence to raise any objection that the proper procedure has not been followed or the proper foundation was not laid for admission of such secondary evidence.[6]

PROVISO (1)

When the document is itself a notice.— No notice to produce is necessary when the document to be proved is itself a notice to produce some other document.[7] This exception appears to have been originally adopted in regard to notice, to produce, for the obvious reason that, if a notice to produce such a document were necessary, the series of notices would become infinite. The Judges, have, however, subsequently extended the exception to many other notices, e.g., notice, to quit ; notices of dishonour, provided the action be brought upon the bill, but not otherwise and to all such notices of action or written demands as are necessary to entitle the plaintiff to recover.[8]

PROVISO (2)

Where the adverse party must know that he will be required to produce the document.—Before notice to produce is dispensed with under this clause it must be shown that the document is in the possession of the adverse party.[9] Where from the nature of the case the adverse party must know that he will be charged with the

---

1. *Durgawati Kunwar* v. *Jagannath Prasad*, 118 IC 663 : 1929 A 630 .
2. Section 163.
3. Section 164.
4. Section 89.
5. *Gopaldas* v. *Sri Thakurjee*, 1943 PC 83 : *U Po Kin* v. *U So Gale*, 1936 R 377 ; but see *Kameshwar Parshad* v. *Amanatulla*, 26 C 53.
6. *Coolector* v. *Rajib Bhol*, (1971) 37 Cut LT 848 ; AIR 1989 P & H 300.
7. *R.* v. *Taylor*, (1910) 1 KB 346.
8. Taylor, § 450.
9. *Mangra* v. *Bedi Ram*, 35 IC 328, per Walsh J.

possession of the instrument, no notice to produce the instrument need be given.[1] Where a document is in the possession or under the control of a party and he fails to produce it, it should be taken that from the very nature of the case he knew that he would be required to produce it.[2]

In a redemption suit notice to the mortgagee defendant to produce the mortgage-deed is not necessary.—In a suit for redemption the defendant from the nature of the case must know that he will be required to produce the mortgage-deed, and, if the defendant does not himself produce the mortgage-deed, the plaintiff may put in a certified copy as secondary evidence of the mortgagee-deed without serving notice on the mortgagee defendant to produce the deed.[3] Where, in a suit for redemption, the defendant in his written statement denies that there was or ever had been a mortgage-deed at all, it is idle for the plaintiff to give notice to the defendant to produce a document the existence of which he denies and the Court may well dispense with notice in such a case.[4]

Proforma defendant, whether adverse party?—It is doubtful whether a *pro forma* defendant who has no interest in the decision of the case is an "adverse party" within the meaning of section 66, Proviso (2).[5]

PROVISO (3)

When the adverse party has obtained possession of the original by force or fraud.—Notice to produce is not necessary when it appears or is proved that the adverse party has obtained the original by force or fraud, e.g., where, after the action has been brought, he has received it from a witness in fraud of a *subpoena duces tecum*.[6]

PROVISO (4)

When the adverse party or his agent has the original in Court.—The object of the notice is not to give the opposite party an opportunity of producing the proper testimony to support or impeach the document, but merely to enable him to produce it, if he likes, at the trial and thus to secure the best evidence of its contents.[7] Therefore, when a document is shown to be in Court, a request to produce it immediately is sufficient.

PROVISO (5)

When the adverse party or his agent has admitted the loss of the document.—Notice to produce may be dispensed with when the loss of the original has been admitted by the adverse party or his agent, as notice to produce in such a case would be

1. Phipson Ev., 7th Ed., 524 ; *Muhammad Kamil* v. *Habibullah*, 37 IC 794 ; *See also Narsidas Jekinsondas* v. *Ravishankar Prabhoshanker*, 128 IC 891 ; 1931 B 33.
2. *Sudhakar Misra* v. *Nilkantha Das*, 1936 P 129 ; 161 IC 465 ; *Lalan Bibi* v. *Muhammad Ashfaq*, PLD 1951 L 467.
3. *Dwarika Singh* v. *Rama Nand Upadhya*, 41 A 592 ; 51 IC 275 ; *Mi Amin Nissa* v. *Mi Sura Bi*, 31 IC 892 ; *see also Bahadur Singh* v. *Madho Singh*, 36 IC 696 ; contra *Maung Po Ni* v. *Ma Shwe Kyi*, 2 R 397 ; 84 IC 373 ; 1925 R 7.
4. *Dinanath Rai* v. *Rama Rai*, 6 P 102 ; 97 IC 348 ; 1926 P 512 ; *Bahadur Singh* v. *Madho Singh*, 36 IC 696.
5. *Durgawati Kunwar* v. *Jagannath Prasad*, 118 IC 663 ; 1929 A 680.
6. Taylor, § 433 ; *Leeds* v. *Cook*, 4 Esp. 256.
7. Taylor, § 456.

nugatory.[1] A party cannot, however, prove the destruction of a document traced to his adversary's possession and then tender secondary evidence thereof, unless he has first given notice to produce, for the adversary may dispute the destruction.[2] Notice may rightly be dispensed with where a party denies that the document ever existed,[3] or that it is in his possession.[4]

PROVISO (6)

When the original is in the possession of a person who is out of reach of, or not subject to, the process of the Court.—Notwithstanding clause (a) to Section 65 notice to produce is, under this Proviso, not necessary when the original is in the possession of a person out of reach of, or not subject to, the process of the Court.[5] Where a commission to take evidence is issued to any place beyond the jurisdiction of the Court issuing the commission, it is not necessary, in order to admit secondary evidence of the contents of a document, that the party tendering it should have given notice to produce the original; nor is it necessary for him to prove a refusal to produce the original.[6]

Notice may be dispensed with in any other case in which the Court thinks fit to dispense with it.—The Provisos to this section are not exhaustive of the case in which notice to produce may be dispensed with. Besides the cases mentioned in the Provisos, the second paragraph of the section gives the Court power to dispense with notice "in any other case in which the Court thinks fit to dispense with it". Thus, where the *existence* of a document is denied by a party in his pleadings, it is idle for the adversary to serve on him a notice to produce a document the existence of which is not admitted.[7] Where a notice to produce would be a mere formality, the Court may dispense with the notice.[8] Where a document has been traced to the possession of the associates of the accused, it is absurd to require the prosecution to give notice to such associates to produce the document before allowing the prosecution to give secondary evidence.[9] Notice may be dispensed with where the accused denies the possession of the document.[10] Under this section the Court has absolute power, when it thinks fit, to dispense with notice.[11]

Section 66 (6).—Where the plaintiff states that the original documents are in the possession of the defendant, and the latter does not deny the statement, notice under clause (a) of Section 65 can be dispensed with.[12]

Sections 66 and Section 65.—Section 65, read with this section, permits the plaintiff to produce the copy of the notice without summoning the original. It is for the

---

1. Taylor, § 455.
2. *Doe* v. *Morris*, 3 A & E 46; Phipson, Ev., 7th Ed., 525.
3. *Dinanath Rai* v. *Rama Rai*, 6 P 102 : 97 IC 348; 1926 P 512; *See also Bahadur Singh* v. *Madho Singh*, 36 IC 696.
4. *Profulla Kumar Bose* v. *E.*, 57 C 1074; 125 IC 656, 1930 C 209, 311 Cr LJ 903.
5. *Haramund Chetlangia* v. *Ram Chetlangia*, 27 C 539; 27 IA 1 (PC).
6. *Ratti* v. *Gau Kim Swee*, 9 C 939.
7. *Dinanath Rai* v. *Rama Rai*, 6 P 102; 97 IC 348; 1926 P 512; *Bahadur Singh* v. *Madho Singh*, 36 IC 696.
8. *Gopaldas* v. *Sri Thakurjee*, 1943 P 83.
9. *Manabendra Nath Roy* v. *E.*, 148 IC 833; 1933 A 496, 35 Cr LJ 768.
10. *Profulla Kumar Bose* v. *E.*, 57 C 1074; 125 IC 656, 1950 C 209, 31 Cr LJ 903.
11. *Surendra Krishna Roy* v. *Mirza Mohammaed Syed Ali Mutawali*, 63 IA 85, 1936 PC 15; 160 IC 29.
12. *Vishwa Nath Vithoba* v. *Genu Kisan*, AIR 1956 Bom 555.

defendant to show, by production of the original, that the document does not amount to a notice according to Section 80, C.P.C. Where the defendant fails to produce the original, he cannot have any grievance when its copy is produced by the plaintiff.[1]

67. Proof of signature and handwriting of person alleged to have signed or written document produced.—If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that persons handwriting must be proved to be in his handwriting.

[2][**67-A. Proof as to digital signature.**—Except in the case of a secure digital signature, if the digital signature of any subscriber is alleged to have been affixed to an electronic record the fact that such digital signature is the digital signature of the subscriber must be proved.]

COMMENTARY

Sections 61 to 66 deal with the mode of proof of the contents of a document; the present set of sections deals with the mode of proof of the execution of a document. When a document is given in evidence, in addition to the question of its contents, there is always the question, "Is it what it purports to be ? In other words, is it genuine,"[3] *i.e.*, signed or written by the person by whom it purports to have been signed or written.

Principle and Scope.—The person who makes an allegation must prove it. Where a document is written by one person and signed by another, the handwriting of the former and the signature of the latter have both to be proved in view of the section. Signature and handwriting may be proved in various ways. What this section refers to is the signature of a person who has signed a document as a person making the document. It does not refer to signature of a witness who countersigns a document as a person who was present at the time the document was signed by another person. What the section requires is that the signature of the person who is alleged to have signed or made the document, must be proved.[4] The section does not lay down any particular mode of proof for proving that a particular writing or signature is in the hand of a particular person. The proof may be made by the direct evidence of those persons who have seen him making the writing on the particular document irrespective of whether or not they can read the writing. To prove a thumb-mark, it is not necessary that the person proving the affixation, of the thumb-marks should be able to indentify the thumb-mark. All that is required is that he should be able to identify the document in which he states that the thumb-mark was affixed. Though an illiterate person since he cannot identify a document on which he has seen someone writing, cannot ordinarily prove writing or signature made by another person but a person acquainted with the language in which a document is written, can identify the document and when he has seen another person making a writing on it, he can prove that writing although he does not know the language in which the writing by that person was made.[5]

Meaning of execution of a document.—Though this section does not use the

---

1. *Lokchand* v. *Union of India*, ILR (1958) Raj 855.
2. Section 67-A inserted by Information Technology Act, 2000 (Act 21 of 2000), S. 92 and Sch. II (w.e.f. 17-10-2000).
3. Markby, 60.
4. *Hasan Abdulla* v. *State of Gujarat*, 1962 Guj LR 107, *Rukmanand Ajitsaria* v. *Usha Sales Pvt. Ltd.*, AIR 1991 NOC 47
5. *Bheek Chand* v *Parbhauji*, ILR 1963 Guj 84.

word" execution", there can be no doubt that it is intended to lay down generally the mode of proof of execution of documents. This is clear from the language of sections 68 to 71 in which the word "execution" is used. "Execution means signed."[1] The ordinary meaning of executing a document is signing a document as a consenting party thereto.[2] Where the document is required by law to be attested, execution designates the whole operation including both the signature by the executant and the attestion thereof by the subscribing witnesses.[3] Sealing is not, generally speaking, necessary in India but the execution of a document must still mean something more than the mere signing by the parties. It must certainly include delivery, and it also includes signing in the presence of witnesses where witnesses are necessary.[4] Execution consists in signing a document written out and read over and understood, and does not consist in merely signing a name upon a blank sheet or paper. So that a document may be executed, it must be in existence; where there is no document in existence, there can be no execution.[5] When applied to a document the term "execution" means the last act or series of acts which completes it. It may be defined as "formal execution". The contract on a negotiable instrument until delivery is incomplete and revocable. Until delivery a *hundi* is not clothed with the essential characteristics of a negotiable instrument.[6] The word "executing" in the expression "person executing the document". in section 35 of the Registration Act does not only mean "actually signing". A document is executed, when those who take benefits and obligations under it have put or have caused to put their names to it. Personal signature is not required and another person duly authorized may, by writing the name of the party executing, bring about his valid execution and put him under the obligation involved. Hence, the words 'person executing" in the Registration act cannot be read merely as "person signing". They mean something more, namely, the person who by a valid execution, enters into obligations under the instrument.[7] A document may therefore be signed by the executant himself or by his duly constituted attorney for that purpose.[8]

A document not proved is inadmissible in evidence unless strict proof was waived; omission to object to proof.—Every document given in evidence, unless its proof is dispensed with under some special provision, must be proved. Therefore, a document which is not proved as required by section 677 of the Evidence Act is inadmissible in evidence.[9] A certificate from the secretary of a club, stating that the defendant was in the service of the club on a certain date,[10] or a certificate granted by a Professor in a Medical College,[11] is not admissible unless proved by the evidence of the person giving it. Entries, made in a bed-head ticket are not admissible if the doctor who made the entries is not examined.[12] Similarly, the report of a Public Analyst[13] or of an

1. Section 2, Stampt Act.
2. *Manmotho Nath Mukerjee* v. *Puran Chand Nahatta*, 88 IC 33 ; 1925 C 703.
3. *Jaikarandas* v. *Protap Singh*, 1940 C 189 ; *Baliram* v. *Kamalija*, 78 IC 330 ; 1924 N 367.
4. *Arjun Chandra Bhadra* v. *Kailas Chandra Das*, 70 IC 532 ; 1923 C 149 ; *see Bhawanji Harbhum* v. *Devji Punja*, 19 B 635.
5. *Ebadut Ali* v. *Muhammad Fareed*, 35 IC 56.
6. *Bhawanji Harbhum* v. *Devji Punja*, 19 B 635.
7. *Puran Chand Nahatia* v. *Monmotho Nath Mukerjee*, 55 C 532 ; 55 IA 81 ; 108 IC 342 ; 1928 PC 38.
8. *See Puran Chand Nahatia* v. *Monmotho Nath Mukerjee*, 55 C 532 ; 55 IA 81 ; 108 IC 342 ; 1928 PC 38.
9. *See Banke Lal* v. *Swami Dayal*, 56 IC 328.
10. *Piter* v. *Mahomed Idoo Miah*, 22 IC 654 ; 19 CWN 1148.
11. *Ahila Manaji* v. *E.*, 47 B 74 ; 84 IC 643 ; 1923 B 183 ; 26 Cr LJ 339 ; 51 Cr LJ 153.
12. *Bechu* v. *The King*, 1949 C 613.
13. *Raghunath Mody* v. *Kurseong Municipality*, 76 IC 394 ; 1932 C 561 ; 25 Cr LJ 170.

expert in handwriting[1] or finger prints[2] is inadmissible, unless the person whose opinion is embodied in the report appears as a witness. In such cases the fact to the proved is not the contents of the document, but the fact mentioned in the document. The document, on its being proved becomes admissible merely as corroborative or contradictory of evidence given in Court. Where no proof of a document has been given the document will be inadmissible. But the mode of proof of a document is a question of procedure and is capable of being waived. When the objection as to the manner of proof of a document is not taken at the time the document is sought to be proved in the Lower Court and the document is freely referred to by the parties before the lower Court, it cannot be raised in second appeal.[3] Where the objection to be taken is not that the document is in itself inadmissible but that the mode of proof put forward is irregular or insufficient, it is essential that the objection should be taken at the trial before the document, is marked as an exhibit and admitted to the record. A party cannot lie by until the case comes to a Court of appeal and then complain for the first time of the mode of proof.[4] The provisions of section 67 of the Evidence Act are applicable to the record prepared by the police, of a statement made in the course of investigation, and such record, if intended to be used under section 162, Cr. P.Code. must, be duly proved.[5]

Mode of proof of signature or writing.—The execution of every document produced in evidence must be proved, unless its execution is admitted under section 58, or presumed under section 90 or some other section of this or any other enactment. A document does not prove itself, nor is an unproved signature on it proof of its having been written by the person whose signature it purports to bear.[6] This section, therefore, provides that if a document is alleged to be signed or to have been written by any person, the signature or writing must be proved to be in that person's handwriting. The section does not, however, lay down any particular mode of proving the signature or the writing ; it merely requires the signature or the writing to be proved. Any mode of proof recognized by the Act may, in the discretion of the Judge and the circumstances of the case, be considered sufficient.[7] Of course, a litigant is expected to produce the best evidence available, and if the best evidence is withheld, it will be a matter for legitimate comment against the proof offered. Presence of suspicious circumstances concerning execution of will amounts to invalidity of will.[8]

The following are the modes of proving a signature or writing recognized by the Act:—

---

1. *Peary Lal* v. *E.*, 75 IC 148 ; 1923 A 601 ; 24 CR LJ 900.
2. *Pitain* v. *Baboosingh*, 79 IC 641 ; 1924 N 183.
3. *Dogar Mal* v. *Sunam Ram*, 1944 L 58 ; *See also Ayyavar Thevar* v. *Secretrary of State*, 1942 M 528 ; *Girindra Chandra Ganguli* v. *Rajendra Nath Chatterjee*, 1 CWN 530 ; *Dil Muhammad* v. *Sain Das*, 100 IC 922 ; 1927 L 396 ; *but see Kanto Prashad Hazari* v. *Jagat Chandra Dutt*, 23 C 335.
4. *Gopal Das* v *Sri Thakurji* 11943 PC 83 ; *Yaggana Obanna* v. *Kutugulla Gangaiah*, 1945 M 361 ; *Abdul Samad* v. *Gunendra Krishn Roy*, 1925 C 452 ; 82 IC 974 ; *see also Laduram* v. *S.O. S.*, 1934 C 834 ; *Mahadeo, Prasad* v. *Ghulam Mohammad*, 1947 A 161 ; 1946 ALJ 411 ; ILR 1946 A 649.
5. *Vithu Balu Kharat* v. *E.*, 83 IC 1007 ; 1924 B 510; 26 Cr LJ 233.
6. *Srojini Dasi* v. *Haridas Ghosh*, 49 C 235 ; 66 IC 774 ; 1922 C 12.
7. *Ram Jassa Kunwar* v. *Sahu Narain Das*, 1946 A 178 ; *Ponnuswami Goundan* v. *Kalyanasundra Ayyar* 57 M 662 ; 149 IC 257 ; 1934 M 365 ; *Ponnusawami Goydan* v. *Kalvanasundra Iyer*, 125 IC 231 ; 1930 M 770 ; *Lahini* v *Bala*, 77 IC 798 ; 1922 N 227 ; *Jagannath* v. *Dhiraja*, 46 IC 279 ; *Barindra Kumar Ghose*, v. *E.*, 37 C 467 ; 7 IC 359 ; 11 Cr LJ 453; *Abdulla Paru* v. *Gannibai*, 11 B 690 ; *Abdool Ali* v. *Abdoor Rahman*, 21 WR 429 ; 12 BLR App 818 : *See Laduram Hiralal* v. *Secretary of State*, 1934 C 834.
8. *Vijayben Vashram* v. *State*. AIR 1989 Guj. 75.

(i) By calling the person who signed or wrote the document.[1]
(ii) By calling a person in whose presence the document was signed or written.[2]
(iii) By calling a handwriting expert.[3]
(iv) By a calling a person acquainted with the handwriting of the person by whom the document is supposed to be signed or written.[4]
(v) By comparing in Court the disputed signature or writing with some admitted signature or writing.[5]
(vi) By proof of an admission by the person who is alleged to have signed or written the document that he signed or wrote it.[6]
(vii) By the statement of a deceased professional scribe, made in the ordinary course of business, that the signature on the document is that of a particular person.[7]
(viii) A signature is proved to have been made if it is shown to have been made at the request of a person by some other person eg., by the scribe who signed on behalf of the executant.[8]
(ix) By other circumstantial evidence.[9]

Presumptive proof of the execution of a document.—It will be noticed from what has been said above that proof of the execution of a document need not in all cases be direct, in the sense that somebody in whose presence the document was signed or written should depose that it was signed or written by a particular person in his presence, nor is it necessary that the writer himself should be examined, or the subscribing witnesses called,[10] When the document is one that is not required by law to be attested. Thus, a rent receipt may be proved by the evidence of the tenant by whom the rent was paid, notwithstanding that the person whose signature it bears has not been

---

1. *Sarup Singh* v. *E.*, 88 IC 22 ; 1925 L. 299 ; 26 Cr LJ 1078 ; *Sarojini Dasi* v. *Haridas Ghosh* 49 C 235 ; 66 IC 774 ; 1922 C 12 ; *Pulin Behary Das* v. *E.*, 16 IC 257 ;' 13 Cr LJ 609 ; *Barindra Kumar Ghose* v. *E.*, 37 C 467 ; 7 IC 359 ; 11 Cr LJ 453.
2. *Sarup Singh* v. *E.*, 88 IC 22 ; 1925 L 299 ; 26 CR LJ 1078 ; *Sarojini Dasi* v. *Haridas Ghosh* 49 C 235 ; 66 IC 774 ; 1922 C 12 ; *Pulin Behary Das* v. *E.*, 16 IC 257 ;' 13 Cr LJ 609 ; *Barindra Kumar Ghose* v. *E.*, 37 C 467 ; 7 IC 359 ; 11 Cr LJ 453
3. *Section 45 ; Ganpatro Khanderao Vijakar* v. *Vasantrao Ganpatrao Vijakar*, 141 IC 747 ; 1932 B 588 ; *Khjiruddin* v. *E.*, 53 C 372 ; 92 IC 442 ; 1926 C 139 ; 27 Cr LJ 266.
4. *Section 47, Ganpatro Khanderao Vijakar* v. *Vasantrao Ganpatrao Vijakar*, 141 IC 747 ; 1932 B 588 ; *Khjiruddin* v. *E.*, 53 C 372 ; 92 IC 442 ; 1926 C 139 ; 27 Cr LJ 266. *Sarup Singh* v. *E.*, 88 IC 22 ; 1925 L 299 ; 26 Cr LJ 1078 ; Sarojini *Dasi* v. *Haridas Ghosh* 49 C 235 ; 66 IC 774 ; 1922 C 12 ; *Pulin Behary Das* v. *E.*, 16 IC 257 ;' 13 Cr LJ 609 ; *Barindra Kumar Ghose* v. *E.*, 37 C 467 ; 7 IC 359 ; 11 Cr LJ 453 *Hiraluxmi Pandit* v. *Income-Tax Officer*, 1955 P. 404.
5. Section 73; *Ganpatro Khanderao Vijakar* v. *Vasantrao Ganpatrao Vijakar*, 141 IC 747 ; 1932 B 588 ; *Khjiruddin* v. *E.*, 53 C 372 ; 92 IC 442 ; 1926 C 139 ; 27 Cr LJ 266. *Sarup Singh* v. *E.*, 88 IC 22 ; 1925 L 299 ; 26 CR LJ 1078; *Sarojini Dasi* v. *Haridas Ghosh* 49 C 235 ; 66 IC 774 ; 1922 C 12 ; *Dhare Co.* v. *Sib Narayan Singh.*, 59 I C 188 : 42 A 262. *Pulin Behary Das* v. *E.*, 16 IC 257 ;' 13 Cr LJ 609 ; *Barindra Kumar Ghose* v. *E.*, 37 C 467 ; 7 IC 359 ; 11 Cr LJ 453
6. Karali Prosad Dutta v. *E.*, I Ry, 111 IC 792 ; 1928 C 498 ; *Sarojini Dasi* v. *Haridas Ghosh* 49 C 235 ; 66 IC 774 ; 1922 C 12 ; *Pulin Behary Das* v. *E.*, 16 IC 257 ;' 13 Cr LJ 609 ; *Barindra Kumar Ghose* v. *E.*, 37 C 467 ; 7 IC 359 ; 11 Cr LJ 453 ; *Neel* v. *Jagobunbhoi*, 12 BLR App 18 ; contra *Bulakidas Hardas* v. *Chotu Paikan*, 1942 N 84.
7. *Lahini* v. *Bala*, 77 IC 798 ; 1922 N 227 ; *Haria* v. *Manakchand*, 27 IC 866 ; *Abdulla Paru* v. *Gannibai*, 11 B 690 ; *See Ponnuswami Goundan* v. *Kolyanswndra Iyer*, 125 IC 2311 ; 1930 M 770.
8. Bhutnath v. *Jagat Tarini Desai*, 71 CLJ 200 ; *Ram Charan* v. *Bhairon*, 53 A 1; 131 IC 241 ; 1931 A 101 ; *Deo Narain Rai* v. *Kukur Bind*, 24 A 319.
9. *Dal Chand* v. *Hasan Bai*, 176 IC 315 ; *Govardhan Das* v. *Ahmadi Begam*, 1953 Hyd 181.
10. *Lahini* v. *Bala*, 77 IC 798 ; 1922 N 227 ; *Abdool Ali* v. *Abdoor Ruhman*, 21 WR 429 ; *Neel* v. *Jugobunbho*, 12 BLR App 18.

examined.[1] Presumptive or circumstantial evidence is good proof of the genuineness and execution of a document.[2] But the definition of the word "proved" in section 3 of the Evidence Act, must when applied to documents, be read in conjunction with Section 67 of the Act. A document cannot be held to be proved, as required by the Evidence Act, where there is no evidence that the signature purporting to be that of the executant is in the handwriting of the executant, even if the Court considers the execution so probable that a prudent man ought, under the circumstances of the case, to act upon the supposition that there had been execution.[3] Where execution is challenged, appellate court is entitled to weigh evidence.[3a]

May a document be considered to be proved merely on proof of the signature of an attesting witness.—If a document is required by law to be attested, the signature of the attesting witnesses and the signature of the executant have both to be proved.[4] In the case of document not required by law to be attested, e.g., a Hindu will in the Punjab, it has also been held by the Lahore High Court that mere identification of the signatures of the witnesses does not amount to proof of the execution of the document.[5] But in an exhaustive judgment on the subject, Mr. Justice Iyer of the Madras High Court has held that in cases where the attesting witnesses to a document, not required by law to be attested, are dead or hostile, or not available, proof of the handwriting of the attesting witnesses is sufficient evidence from which the Court may draw the conclusion that the executant executed the document.[6] This decision may be supported on the ground that the statement of the deceased writer of the deed "this is the mark of Chellapa Goundan, executant of the *muchilika*" was relevant under section 32(2), and therefore, the case fell within the rule which has been followed in several cases, that proof of a statement made by a deceased deed writer in the ordinary course of his business, that a document was signed or marked by a particular person is good circumstantial proof of the signature or mark of executant.[7] If, however, this decision intends to laydown the rule that mere proof of signature of an attesting witness without other direct or presumptive proof of the signature of the executant is sufficient proof of the execution of a document; the decision, it is submitted, though in accordance with English Law, is opposed to the scheme and the principle of this set of Sections[8] and not supported by any Indian authority.[9] Even in the case of a document required by law to be attested, proof of execution in addition to proof of attestation is necessary;[10] and there is reason why proof of execution, as distinguished from mere proof of the signature of the attesting

1. *Abdul Samad* v. *Gunendra Krishna Roy*, 82 IC 974 ; 11925 C 452.
2. *Raghubir Singh* v. *Thakurain Sukh Raj Kuar*, 1939 O 96 ; *Ponnuswami Goundan* v. *Kalyanasundara Iyer*, 125 IC 231 ; 1930 ; M 7770 ; *Karali Prasad Dutta* v. *E. I. Ry.* 111 IC 792 ; 1928 C 498 ; *Ajudhia Prasad* v. *Jagannath Boksh Sihngh*, 38 I C 605 : *Barinda Kumar Ghose* v. *E.*, 37 37 C 4678 ; 7 IC 359 ; 11 Cr LJ 453 ; *Neel* v. *Jugobunbho*, 12 BLR App 18.
3. *Salaik Chand* v. *Tamiz Bano*, 107 IC 564 ; 1928 A 303 ; *But see obsrvations in Ponnuswami Goundan* v. *Kalyanasudara Iyer*, 125 IC 231; 1930 M 770.

3a. *Bhaiyalal* v. *Ram Din*, AIR 1989 All 130.

4. Sections 68 and 69.
5. *Kahan Chand* v. *Jawandi*, 79 IC 500 ; 1923 L 174.
6. *Ponnuswami Goundan* v. *Kalyanasundara Iyer*, 125 IC 231 ; 1930 , M 770, confirmed in LP appeal reported as *Ponnuaswami Goundan* v. *Kalyanasundara Iyer*, 57 M 662 ; 149 IC 257 ; 1934 M 365.
7. See *Lahini* v. *Bala*, 77 IC 798 : 1922 N 227 ; *Haria* v. *Manakchand*, 27 IC 866 ; *Abdulla Paru* v. *Gannibai*, 11 B 690.
8. *See* Sections 68-71.
9. *Girja Dutt Singh* v. *Gangotri Dutt Singh*, 1955 SC 346 ; *Kahan Chand* v. *Jawandi*, 79 IC 500 : 1923 L 174; *Gobardhan Das* v. *Hori Lal*, 35 A 364 : 19 IC 121.
10. Section 69.

witnesses, should not be necessary when the document is not required by law to be attested. Further, where the attendance of the attesting witnesses is excused under the Proviso to Section 68, the Act requires other proof of "execution".[1] This also shows that the Act does not treat the proof of attestation as tantamount to the proof of execution of a document.

Proof of a registered document.—When a document is admitted to registration, the registering officer has to endorse and certify on the document that the execution of the document is admitted by the executant.[2] This endorsement or certificate does not require any proof, as it is proved on the mere production of the original registered document.[3] The admission of the endorsement and the certificate in evidence establishes an admission of the document by the executant; and since an admission of the execution, of a document is presumptive proof of its execution, a registered document may, according to this argument be taken to be proved without any independent proof of its execution being given. This result has had the approval of the Bombay High Court.[4] and is deducible also from the Privy Council decision in *Gangamoy Debi* v. *T.N. Chowdhury*.[5] The view receives support from some earlier cases as well.[6] In a more recent case the Privy Council has definitely held that the evidence of due registration may itself be evidence of the execution of a document.[7] In view of this decision of the Privy Council the Allahabad,[8] Calcutta,[9] Nagpur[10] and Oudh[11] cases, where the registration endorsement on a document was held to be a legally insufficient proof of that document, must be held to have been wrongly decided. The Bombay High Court has held that a certified copy of a registered document containing the registering officer's endorsement is sufficient proof of the original. It[12] should, however, be noted that the document which was held by the Privy Council to be proved by the registration endorsement on it in *Gopaldas's case*[13] was not a document required by law to be attested. In the case of a document required by law to be attested, the Act specifically provides that at least one attesting witness must be called to prove the execution of the document, unless the case comes within the Proviso to Section 68,[14] or unless none of the

1. See *Kartar Singh* v. *Didar Singh*, 149 IC 1109 : 1934 L 282 ; *Chettiar Firm* v. *U. Staw* ; 11 R 26 : 141 IC 700 : 1933 R 6.
2. Sections 58-60, Registration Act.
3. *Radha Mohan Dutt* v. *Nripendra Nath Nandy*, 105 IC 422 : 1928 C 154 ; *Theresa* v. *Misquita*, 45 B 989 : 61 IC 587 : 1921 B 156 ; see also *Ajudhia Prasad* v. *Jagannath Bakhsh Singh*, 38 IC 605.
4. *Vishwanath Ramji Karale* v. *Rahibai Ramji Karale*, 55 B 103 : 128 IC 901 : 1931 B 105 : 9 Bom. LR 401.
5. *Gangamoyi Debi* v. *T.N. Chowdry*, 33 C 537 (PC); see also *Shankar Das* v. *Dhan Devi*, 145 IC 241 : 1933 L 53.
6. *See Harnam Singh* v. *District Official Receiver*. 1941 L 400 ; *Brij Raj Saran* v. *Alliance Bank of Simla*, 17 L 686 : 1936 L 946 ; *Piara* v. *Fattu*, 1929 L 711 ; *Walayat Shah* v. *Mt. Mahbub*, 1942 Pesh 83 ; *Ganpat Rao* v. *Nagarao*, 1940 N 382 ; *Mst. Shamsunnissa* v. *Ali Asghar*, 1936 O 87 ; *Sarja* v. *Murlidhar*, 42 IC 715 (Nag) ; *Ajudhia Prasad* v. *Jagannath Baksh Singh*, 38 IC 605 (Oudh) ; *Sri Ram* v. *Muhammad Abdul Rahim Khan*, 1938 O 69 : 172 IC 822 ; *Hanuman Sahu* v. *Abbas Handi Bibi*, 8 Luck 452 : 1929 O 193 ; 120 IC 387.
7. *Gopaldas* v. *Sri Thakurjee*, 1943 PC 83.
8. *Gopal Das* v. *Sri Thakurji*, 1936 A 422 reversed by the Privy Council.
9. *Salimatul Fatima* v. *Koyleshpoti Narain Singh*, 17 C 903.
10. *Bulaqidas Hardas Mahesari* v. *Chotu Paikan*, 1942 N 84.
11. *Rani Huzur Ara Begum* v. *Deputy Commissioner Gonda*, 1941 O 529.
12. *Pandappa Mahalingappa* v. *Sheolungappa*, 47 Bom. LR 962.
13. 1943 PC 83.
14. See Section 78.

attesting witnesses is available, in which case the signature of the executant and the handwriting of at least one of the attesting witnesses must be proved.[1] Where a document is not required by law to be attested, the Act requires the signature of the executant to be proved,[2] but prescribes no particular mode of proof of the signature.[3] Therefore there is nothing to prevent a Court from holding a registered document to be proved merely on the strength of the endorsement and certificate of the registering officer. Of course the Court is bound to treat the registration endorsement to be sufficient proof of execution in every case. The Lahore High Court[4] as well as Rangoon High Court[5] has held that, even where the Proviso to Section 68 is applicable and a party is relieved of the duty of calling an attesting witness, other proof of the execution of the document must be given. See notes to the Proviso to Section 68 and notes to Section 70.

Proof of correctness of a document.—Where the issue before the Court is as to whether the contents of a document are correct, it is not enough to prove the signatures or the handwriting of the person who signed or wrote the document by calling a person acquainted with the handwriting of the person signing or writing the document. It can be done only by calling the person who can depose as to the correctness of the contents of the document and who has a personal knowledge of the contents of the document.[6]

But in the case before it, the Supreme Court observed, the averments contained in a letter and cable were held to be satisfactorily proved by the circumstances that the receipt of the letter and cable were admitted, or proved, and even after the dispute arose and before the suit was filed the other side did not in the correspondence that ensued, made any overt or covert reference to the subject matter or even reply to the letter and the cable and controvert the averments made therein.[7]

Original Sale Deed not filed.—No Justification for filing such application especially when there is no material before appellate court for comparison.[7a]

Proof of signature includes proof of mark or thumb-impression.—In India a great number of persons are marksmen,[8] and where the executant is an illiterate person, the execution of a document by affixing a thumb-impression or some other form of mark is a common phenomenon.[9] "Sign" with its grammatical variations and cognate expressions, with reference to a person who is unable to write his name, includes "mark" with its grammatical variations and cognate expressions.[10] As, according to this definition, the words "signed" includes "marked", it follows that, where a document is executed by a person by affixing a mark, e.g., a thumb-impression, proof of the mark will, under this section, be necessary, and when given, sufficient.[11] Such proof may be

1. Sections 68 and 69.
2. Section 67.
3. *Jagannath* v. *Dhiraja*, 46 LC 279.
4. *Kartar Singh* v. *Didar Singh*, 149 IC 1109 : 1934 L 289.
5. *Chettiar Firm* v. *U. Htaw*, 11 R 26 : 141 IC 700 : 1933 R 6.
6. *Madholal Sindhu* v. *Asian Assurance Co. Ltd.*, 1954 B 305.
7. *Ramji Dayawala & Sons (P.) Ltd.* v. *Invest. Import*, 1981 SC 2085 (para 16).
7a. *Mohd. Koiry (deceased)* v. *Smt. Dhanjaji*, 1987 ALJ 1380.
8. Woodroffe Ev., 9th Ed., 453.
9. *See Ponnuswami Goundan* v. *Kalyanasundara Iyer*, 125 IC 231 ; 1930 M 770.
10. Section 3 (56), General Clauses Act, X of 1897.
11. See *Ponnuswami Goundan* v. *Kalyanasundara Iyer*, 125 IC 231 : 1930 M 770 ; *Kanneganti Ramamanemma* v. *Kanneganti Basavayya*, 151 IC 990 : 1934 M 558 ; but see *Shahzadi* v. *Beni Prasad*, 154 IC 405 ; 1934 A 390 where it has been held that the definition of "sign" in Section 3 (56) of the General

given by calling the person who made the mark, or a person who saw it affixed. But a mark cannot be proved by opinion evidence under Section 47.[1] A mark may take the form of a thumb-impression.[2] in which case expert evidence also would be relevant under Section 45 of the Act. But a mark by person who is able to write his name is not a "signature."[3] In Oudh in old times documents not infrequently bore an expression like *"sahi"* instead of the signature of the executant. The Court may presume that an ancient document so executed was validly executed.[4] Where a document is required by law to be attested at least one attesting witness must be called to prove the execution of the document if such witness is available, unless the document is a registered one and its execution is not specifically denied.

68. Proof of execution of document required by law to be attested.— If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence :

[5][Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.]

COMMENTARY

Documents required by law to be attested.— There are very few documents in India required by law to be attested. The Transfer of Property Act[6] does not apply to the whole of India. In the States where the Transfer of Property Act is in force, mortgages, where the principal sum secured is one hundred rupees or upward,[7] and all gifts of immovable property[8] must be in writing, registered and attested at least by two witnesses. A document creating a charge on immovable property is not required by law to be attested and, therefore, section 68 of the Evidence Act is not applicable to such a document.[9] The Transfer of Property Act is not in force in the Punjab, and though its principles are applicable in that province, the technical rules as to attestation of documents do not involve any question of principle. Therefore, a mortgage-deed in the Punjab need not be attested[10] nor a sale deed;[11] nor a gift of movable or immovable

---

Clauses Act does not apply to questions arising under Section 67 : Evidence Act.

1. *Shahzadi* v. *Beni Prasad*, 154 IC 405 : 1934 A 390 ; *Ponnuswami Goundan* v. *Kalyanasundara Ayyar*, 57 M 662 : 149 IC 257 : 1934 M 365.
2. See *Shahzadi* v. *Beni Prasad*, 154 IC 405 : 1934 A 330.
3. *Sadananda Pal* v. *E*, 32 C 550.
4. *Raghubir Singh* v. *Thakurain Sukh Raj Kuar*, 1939 O 96.
5. *Ins.* by Act 31 of 1926, S. 2.
6. Act IV of 1882.
7. Section 59, T.P. Act ; *Jiwan Singh* v. *Dalip Singh*, 115 IC 450 : 1929 A 389.
8. Section 123 T.P. Act.
9. *Rumaswami Iyengar* v. *Kuppasami Iyer*, 66 IC 554.
10. *Maru Singh* v. *Mohru*, 116 IC 610 : 1929 L 495 ; *Kanwar Ram* v. *Ghugi*, 108 IC 57 : 1928 L 148.
11. *Maharaja of Faridkot* v. *Anant Ram*, 10 L 447 : 114 IC 62 : 1929 L 1 ; *Kanwar Ram* v. *Ghugi*, 108 IC 57 : 1928 L 148.

Property.[1] Sections 54 (mortgages), 107 (sales) and 123 (gifts) of that Act have, however, been declared to be in force in all Municipalities and Notified areas of the Punjab.[2] A mortgage of movable property,[3] or of an interest in a turn of worship,[4] is no where in India required to be attested. A bond is not a document required by law to be attested.[5] All wills made by Hindus, Buddhists, Sikhs or Jains, on or after the first day on 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 Court of Judicature at Madras and Bombay, and all such wills made outside those territories and limits, so far as they relate to immovable property situated within those territories or limits, and all wills made by persons other than Hindus, Muhammadans, Buddhists, Sikhs or Jains after the first day of January, 1866, are required by section 63 of the Indian Succession Act (Act XXXIX of 1925), to be attested at least by two witnesses:[6] A will of an Indian Christian is a document required by law to be attested.[7] There is no legislative provision requiring a Muhammadan will[8] or gift[9] to be attested. An account book[10] is not required by law to be attested. A document required by law to be attested is invalid if it has not been attested. Where a document, e.g., a deed of gift is required by law to be attested by two witnesses, but has been attested by only one witness, the document is invalid.[11] In the North-West Frontier Province a conveyance of property does not require to be attested and therefore section 68 has no application to such documents.[12]

Document executed in England and required by the English law to be attested.—See notes to section 69 under the heading "documents executed in England".

A document required by law to be attested cannot be used as evidence, unless at least one attesting witness has been called.—The terms of this section are most uncompromising. So long as there is an attesting witness alive, capable of giving evidence, and subject to the process of the Court, no document which is required by law to be attested can be used in evidence until such witness has been called. The omission to call an attesting witness is fatal to the admissibility of the document.[13] The fact that, when called, the witness would prove hostile does not relieve the party producing the document of this duty.[14] Even if the only living attesting witness is a defendant, the plaintiff is bound to call him.[15] But it is not incumbent on a party who wants to prove a

1. *Nand Lal* v. *Mst. Lakhmi*, 1939 L 414.
2. Notification No. 183-SL, dated April 27, 1935.
3. *Musar Ali Khondkar* v. *Goru Churan Sen*, 7 IC 917 : 112 CLJ 419.
4. *Jatu Kar* v. *Mokund Deb.*, 39 C 227 : 11 IC 884.
5. *Ramchandra* v. *Tibal*, 1940 NLJ 70 : 1940 N 240 ; *Ram Dat Ram* v. *Lalta Prasad*, 1949 O 258 ; *Motiram Kalaram* v. *Ranta Mukundi*, 1953 MB 158.
6. See sections 57, 58 and 63 of Act XXXIX of 1925 ;
7. *Talluri Peda Manikyam* v. *Vantabattina Perigadu*, 135 IC 532 : 1932 M 148.
8. *Aba Satar Haji Abookuker*, In re, probate of the will of, 77 Bom LR 558.
9. *Karam Ilahi* v. *Sharfuddin*, 38 A 212 : 35 IC 14.
10. *E. v. Nurbada Prasad*, 51 A 864 : 121 IC 819 : 1930 A 38 : 31 Cr LJ 356; see also *Kanwar Ram* v. *Ghugi*, 108 IC 57 : 1928 L 148.
11. *Balbhadar Singh* v. *Laksmi Bai*, 125 IC 507 : 1930 A 669.
12. *Walayat Shah* v. *Mst. Mahbub*, 1942 Pesh. 83.
13. *Karimullah* v. *Gudar Koeri*, 82 IC 306 : 1925 A 56 ; *Thunneru Gangayya* v. *Bommadevara Subbamma*, 69 IC 284 ; *Benari Das* v. *Collector of Saharanpur*, 1936 A 712 : see also AIR 1989 Ker. 163.
14. *Kali Charan* v. *Suraj Bali*, 1941 O 89 ; *Talluri Peda Manikyam* v. *Vantabattina Perigadu*, 135 IC 532 : 1932 M 148 ; *Gobinda Chandra Pal* v. *Pulin Behari Banerjee*, 98 IC 147 : 1926 C 102 ; *Dhira Singh* v. *Moti Lal*, 63 C 266 ; *Tula Singh* v. *Gopal Singh*, 38 IC 604.
15. *Dhira Singh* v. *Moti Lal*, 63 IC 266.

document to call all the attesting witnesses who are alive, before resorting to other evidence to prove the document. When one of the attesting witnesses is called and he resiles, it is open to the party calling him to adduce other evidence.[1] No adverse inference can be drawn from the mere fact that the other attesting witnesses have not been called.[2] Merely taking out a summons or a warrant is not enough to comply with the requirements of Section 68 of the Evidence Act; the processes mentioned in O XVI, r. 10 C.P. Code, must all be exhausted.[3] The expression "Called" in the section is not used in the sense of "Summoned". It means "tendered" for the purpose of giving evidence.[4] of course, a document may be proved by other evidence of the attesting witness is not within the jurisdiction of the Court, inasmuch as the witness, in such a case, cannot be said to be subject to the process of the Court.[5] Where an attesting witnesses has been called and his evidence has not been accepted as reliable further evidence of the due execution and attestation of the deed if necessary.[6] What is required is that an attesting witness, if available, should be called. If he is not able to prove the document, there is no bar to its being proved by other evidence.[7] It is not necessary that the attesting witness should prove execution of the document.It is sufficient that he is called and if he does not recollect or denies the execution, the document can be proved by other evidence.[8] In a Rangoon case it has been held that where the attesting witness called does not prove execution, the remaining attesting witnesses if available must be produced.[9] but it is submitted that thought this would be a wise course to adopt, it is not necessary as a matter of law to call the other witnesses and that the document may be proved by other reliable evidence.

Failure to comply with the provisions of section 68 does not make the document admissible even if no objection is taken to its admissibility – Where a piece of evidence not proved in the proper manner has been admitted without objection, it is not open to the opposite party to challenge it at a later stage of the litigation. But where evidence has been received without objection in direct contravention of an imperative provision of the law, the principle on which unobjected evidence is admitted, be it acquiescence, waiver or estoppel, none of which is available against a positive legislative enactment, does not apply.[10]

Though more than one attesting witness need not be called, the document must be proved to have been properly attested by the requisite number of witnesses – The question as to the mode in which a transaction may be legally effected should be

---

1 *Bashiran* v. *Mohammad Husain*, 1941 O 284; *Jaikaran* v. *Pratap Singh*, 1940 C 189; *Avnati Shikdar* v. *Muhammad Esmail*, 122 IC 554: 1929 C 441; *Hason Ali* v. *Gurudas Kapali*, 116 IC 726: 1929 C 188; *Lachchmi Narain* v. *Zahirul Said Alvi*, 76 IC 772: 1923 N 322.

2 *Lachchmi Narain* v. *Zahirul Said Alvi*, 76 IC 722; 1923 N 322.

3 *Govinda Chandar Pal* v. *Pulin Behari Banerjee*, 98 IC 47: 1926 C 102; *Piyari Sundari Dasi* v. *Radha Krishna Datta*, 27 CWN LX (notes).

4 *Ruprao Ranoli* v. *Ramrao Bhagwantrao*, 1952 N 88: 1952 NLJ 86: ILR 1952 N 189.

5 *Asoomeah* v. *Chetty*, 1 IC 637.

6 *Surendra Bahadur Singh* v. *Behari Singh*, 1939 PC 117; followed in *Thakkar Vrajlal Bhimjee* v. *Thakkar Jammandas Valjee*, (1994) 4 SCC 723.

7 *Bashiran* v. *Mohammad Husain*, 1941 O 284; 16 Luck 615: 198 IC 161.

8 *Sarjoo* v. *Jagatpal Singh*, 1942 O 201.

9 *Mirza Mahommad Usman* v. *Jambuligam Chettyar*, 1941 R 122; See also *Vishnu Ramkrishna* v. *Nathu Vithal*, 1949 B 266; 51 BLR 245.

10 *Banwari Prasad Singh* v. *Bigni Kuer*, 101 IC 277; 1927 P 131; *Shib Chandar Singha* v. *Gour Chandra Paul*, 68 IC 86: 1922 C 160; but see *Baijnath Singh* v. *Brijraj Kuer*, 2 P 52; 68 IC 383: 1922 P 514; *Pounammal* v. *Kalithitha Mooedilly*, 13 MLJ 143; *Gopaldas* v. *Sri Thakurji*, 1943 PC 83.

kept distinct from the question as to how the deed embodying that transaction may be proved.[1] The provision in section 68 of the Evidence Act which requires that at least one of the attesting witnesses to a mortgage-deed, if alive, should be called does not in any way affect the requirement of section 59 of the Transfer of Property Act, that a mortgage-deed, in order to be valid, must be executed in the presence of two attesting witnesses.[2] Therefore, a deed which is required by law to be attested must, apart from the rule enacted in section 68 of the Evidence Act, be proved to have been validly attested. What section 68 requires is that at least one of the attesting witnesses must be called to prove the document, if it is a document required by law to be attested. When an attesting witness has been called, it is competent for him or for any other witness to prove that the execution was in the presence of two attestors, and it is not necessary to call two attestors for this purpose. But the fact that the document was in fact properly attested by two witnesses must be proved.[3] It is not enough for an attesting witness to merely state that the executant had signed in his presence and that he witnessed the execution of the document. In addition to this, there must be some more evidence to show that the other attesting witness was also present when the executant signed the document or at least he attested the document after he had received from the executant a personal acknowledgement of his signature.[4] It cannot be presumed from the presence of the signatures of two persons, appearing at the foot of the registration endorsement, that they had appended their signatures as attesting witnesses. They must be called to prove the execution and attestation of the deed.[5] In some cases, however, a contrary view has been taken and it has been held that what section 68 requires is that only one attesting witness need be called, and that it is not necessary either to call the second attesting witness or to prove that the deed was properly attested by the second attesting witness, if the deed on the face of it purports to have been attested by two witnesses.[6] This point has been the subject matter of a Full Bench decision in the Allahabad High Court where it has been ruled as followed:—Where a mortgagee sues to enforce his mortgage, and the execution and attestation of the deed are not admitted, the mortgagee need prove only this much, that the mortgagor signed the document in the presence of an attesting witness and one man attested the document; provided the document on the face of it bears the attestation of more than one person. But if the validity of the mortgage is specifically denied and it is pleaded that the document did not effect a mortgage in law, then it must be proved by the mortgagee that the mortgage deed was

1. *Balbhadar Singh* v. *Lakshmi Bai*, 125 IC 507 : 1930 A 669 ; *Paban Khan* v. *Badal Sardar*, 66 IC 906 : 1921 C 276.
2. *Namberumal Chettiar* v. *Raghava Chariar*, 71 IC 390 : 1921 M 701 ; *Thanneru Gangayya* v. *Bommadevara Subbamma*, 69 IC 284.
3. *Vishnu Ramkrishna* v. *Nathu Vithal*, 1949 B 266 : 51 BLR 245 ; *Roda Framroze Mody* v. *Kantavarjivandas*, 47 Bom LR 709 ; *Mirza Mahomed Usman* v. *Jambulingam Chettiyar*, 1941 R 122 ; *Jaikaran* v. *Protap Singh*, 1940 C 189 ; *Bam Jassa Kanwar* v. *Sahu Narain Das*, 1946 A 178 ; *Namberumal Chettiar* v. *Raghava Chariar*, 71 IC 390 : 1921 M 701 ; *Thanreru Gangayya* v. *Bommadevara Subbamma*, 69 IC 284 ; see *Kesho* v. *Sitlu*, 39 IC 274 ; see also *Aung Rhi* v. *Ma Aung Krwa Pru*, 1 R 557 : 77 IC 362 : 1924 R 139 ; *Tulsi Mahato* v. *Chethree Lal Roy*, 16 IC 379 : 18 CLJ 43 ; *Hari Nath Ghose* v. *Nepal Chandra Rai Chowdhury*, ILR (1937) IC 507.
4. *Zaharul Hussain* v. *Mahadevo Rami Deshmukh*, 1949 N 149 : ILR 1948 N 621 : 1949 NLJ 340 ; *Vishnu Ramkrishna* v. *Nathu Vithal*, 1949 B 266 : 51 BLR 245.
5. *Girja Datt Singh* v. *Gangotri Datt Singh*, 1955 SC 346.
6. *Venkata Reddi* v. *Muthu Pambulu Naik*, 60 IC 554 ; *Venkata Reddi* v. *Muthulu Pambulu Naik*, 58 IC 801 ; *Shib Dayal* v. *Sheo Ghulam*, 39 A 241 : 38 IC 694 ; *Ram Dei* v. *Munna Lal*, 39 A 190 : 38 IC 175.

attested by at least two witnesses.[1] Where one attesting witness has proved execution and attestation, the mere fact that the second attesting witness, though examined as a witness in the case, does not formally prove attestation, does not lead to the inference that the latter has not in fact attested the deed.[2] When attestation is not specifically challenged and when a witness is not cross-examined regarding the details of the attestation, it is sufficient for him to say that it was attested by the other witness and himself.[3] Where the validity of a deed of gift is not specifically denied on the ground that it had not been attested in the manner required by law, it is unnecessary to prove due attestation.[4] When all the attesting witnesses are dead, the requirements of the law would be satisfied by any evidence which would show that the document bears the signatures of the executant and of two attesting witnesses.[5] Where it is impossible to call any attesting witnesses and where all that can be proved is their handwriting, it will be presumed that the persons who purported to sign were in fact attesting witnesses.[6] In the case of a mortgage-deed, one of the attesting witnesses deposed that he saw the execution and signed as an attesting witness at the request of the mortgagor but was unable to recollect whether he actually saw the execution of the document. Further, it appeared that when the document was presented for registration, the second witness identified the executant, who, in his presence, admitted execution before the registration officer. It was held that, under the circumstances, an inference might fairly be drawn that the requirements of the law were fulfilled.[7] Where one of the several attesting witnesses, who was called to give evidence, stated that the executant and the other attesting witnesses signed in his presence, it was held that the execution and attestation of the document was properly proved. The rule that a signature is proved to have been made if it is shown to have been made at the request of the person in question by some other person who signed on behalf of the first person as executant of the document, is applicable to the signatures of attesting witnesses as well as to those of executants.[8]

When attesting witnesses need not be called.—None of the attesting witnesses to a deed required by law to be attested need be called in the following cases:—

(i) When the document is thirty years old and the Court, under section 90, presumes it to have been duly executed and attested.[9]

(ii) When a party to the document against whom it is sought to be used admits its execution by himself.[10]

(iii) When the document is a registered one and its execution is not specifically denied by the executant against whom it is to be used.[11]

---

1. *Lachman Singh* v. *Surendra Bahadur Singh*, 54 A 1051 : 139 IC 1: 1932 A 527 FB followed in *Amir Hussain* v. *Abdul Samad*, ILR 1937 A 723 : 1937 A 646 : 171 IC 73.
2. *Jai Gobind Singh* v. *Pachkauri Ram*, 181 IC 572.
3. *Kuwarlal Amritlal* v. *Rekhlal Koduram*, 1950 N 83 : 1950 NLJ 197 : ILR 1950 N 321 : see also *Dashrath Prasad Bajooram* v. *Lallosingh Sanmansingh*, 1951 N 343 : 1951 NLJ 616.
4. *Azizunnisa* v. *Siraj Husain*, 152 IC 146 : 1934 A 507.
5. *Namberumal Chettiar* v. *Raghava Chariar*, 71 IC 390 : 1921 M 701 ; see *Uttam Singh* v. *Hukam Singh*, 39 A 112 : 38 IC 651.
6. *Mirza Mohamed Usman* v. *Jambulingam Chettyar*, 1941 R 122 ; 195 IC 221.
7. *Benoy Bhusan Roy* v. *Dhirendra Nath De*, 74 IC 178 : 1924 C 415.
8. *Ram Charan* v. *Bhairon*, 53 A 1 : 131 IC 241 : 1931 A 101.
9. But see *Gobinda Chandra Pal* v. *Pulin Behari Banerjee*, 98 IC 147 : 1926 C 102.
10. See Sections 70 and 58 ; see also *Thayyullathil Kunhikannan* v. *Thayyullathil Kalliani*, AIR 1990 Ker. 226.
11. Proviso to section 68.

(iv) When the document is not produced on notice[1] and secondary evidence of its contents is given under section 65, clause (a)[2]

(v) When the document is a will which has been admitted to probate and is proved by the probate, the production of the original having been dispensed with under the second *Exception* to section 91.

Formal proof of Will.—Where the execution of Will or its attestation is not challenged, formal proof of the Will by examination of an attesting witness is not necessary.[2a]

One attesting witness must be called even if the document is lost and secondary evidence is given.—The rule requiring the production of the attesting witnesses, provided their names are known, holds, although the document is lost or destroyed.[3] If the document is lost and the names of the attesting witnesses are unknown,[4] or if, though known, no proof of their handwriting, can be given,[5] the document may be proved as if unattested.[6] Field considers it doubtful whether the attesting witness when producible, must be called if the document itself is not forthcoming and secondary evidence is given of its contents under the provisions of sections 65 and 66.[7] It is submitted, however, that this matter is concluded by authority. It has been held that sections 67 to 72 of the Evidence Act deal with both primary and secondary evidence and that an attesting witness must be called even when secondary evidence of a document is given.[8]

Where a document required by law to be attested has been properly attested, it cannot be used as evidence even for a collateral purpose, unless one attesting witness has been called.—The law, as laid down in Section 68 of the Evidence Act, is imperative and does not on the face of it, admit of any relaxation except in the cases provided in Sections 69, 70 and 71 of the Act. The strict mode, prescribed in Section 68 of the Evidence Act, of proving an attested document by calling at least one of the attesting witnesses applies not only to cases where the document is attempted to be enforced to prove the legal right or relation it creates, but also to a case where such document is sought to be proved for a collateral purpose.[9] The direction in Section 68 is mandatory and the section draws no distinction between a case where a document is sought to be used as the basis of a suit and one where its production is required for a collateral purpose.[10] Therefore, a properly attested mortgage-deed is inadmissible even to prove an admission or a statement contained in the deed,[11] or the existence of an antecedent debt,[12] unless one of the attesting witnesses has been called. It has however been held in a recent Allahabad case that if a document required by law to be attested is used merely to prove an admission or acknowledgment of liability under Section 19 of

---

1. Section 89.
2. But see *Karimullah* v. *Gudar Koeri*, 82 IC 306 ; 1925 A 56.
2a. *Thayyullathi Kunhikanan* v. *Thayyullathil Kalliani*, AIR 1990 Ker. 226 (D.B.).
3. *Keeling* v. *Ball*, Peake Add. Cas. 88 ; *Gillies* v. *Smither*, 2 Stark 528.
4. *Keeling* v. *Ball*, Peake Add. Cas 88.
5. *R.* v. *St. Giles*, 1 E & B 642, per Erle J.
6. Phipson, Ev., 7th Ed., 502.
7. Field, Ev., 8th Ed., 453.
8. *Jadunath Mitra* v. *Isar Jha*, 1939 P 47 : 178 IC 198 ; *Karimullah* v. *Gudar Koeri*, 82 IC 306 : 1925 A 56.
9. Taylor § 1844 ; *Bharath Singh* v. *Sheodat Sharma*, 91 IC 189 : 1926 O 266 ; *Manners* v. *Paston*, 1 Leach CC 174, followed in *Shib Chandra Singha* v. *Gur Chandra Paul*, 68 IC 86 : 1922 C 160.
10. *Awadh Ram Singh* v. *Mahbub Khan*, 79 IC 725 : 1924 O 255.
11. See *Shib Chandra Singha* v. *Gur Chandra Paul*, 68 IC 86 : 1922 C 160.
12. See *Awadh Ram Singh* v. *Mahbub Khan*, 79 IC 725 : 1924 O 255.

the Limitation Act, it is unnecessary to call an attesting witness.[1] Attestation cannot be taken to be evidence of consent.[2]

Purposes for which a document not proved in accordance with Section 68 is admissible.—Non-compliance with the provisions of this section does not prevent the document from being used in evidence for any other or collateral purpose.[3] A mortgage not properly attested may be admissible for a purpose not connected with the mortgage.[4] An attested document not proved in accordance with Section 68 is admissible to prove the handwriting of the scribe.[5] If a document, which is required by law to be attested but which has not been proved in accordance with Section 68, has been referred to and partly incorporated in a later document of similar import duly executed between the parties, it is admissible for the purpose of explaining and amplifying the terms of the latter and of arriving at a correct conclusion as to the true nature of the transaction into which the parties have entered;[6] the first document is admissible also where the party objecting has derived some benefit from the later document which has treated the earlier one as valid.[7]

A mortgage deed, if properly attested, cannot be used to create a charge, or as evidence of personal debt, unless one attesting witness has been called; but if the deed is not properly attested, it may be used as evidence of a personal debt without calling an attesting witness.—If a mortgage-deed is not attested or is not properly attested, it cannot be used to create a charge upon the property within the meaning of Section 100 of the Transfer of Property Act.[8] If the mortgage-deed is not attested in accordance with Section 59 of the Transfer of Property Act, it cannot be treated as a mortgage-deed; but it may be given effect to as a simple money bond, as such bond does not require attestation.[9] There is, however, no authority for the proposition that, a mortgage-deed, properly attested but not proved in conformity with the provisions of Section 68, can be received in evidence to prove the personal obligation created thereby.[10] On the other hand, there is authority for the contrary proposition in *Shamu Patter* v. *Abdul Kadir*[11]——a case which was taken to the Privy Council and affirmed by the

1. *Shyam Lal* v. *Lakshmi Narain*, 1939 ALJ 142 : 1939 A 269.
2. *V. M. Mathew* v. *Eliswa*, AIR 1989 Ker. NOC 27.
3. *Mahadeo Prasad* v. *Ghulam Mohammad*, 1947 A 161 : 1946 ALJ 411 : ILR 1946 A 649.
4. *Husain Ali Mirza* v. *Muhammad Azim Khan*, 31 IC 728.
5. *Moti Chand* v. *Laita Prasad*, 40 A 256 : 44 IC 596.
6. *Ibid.*
7. *Ibid.*
8. *Arjun Chandra Bhadra* v. *Kailas Chandra Das*, 70 IC 532 : 1923 C 149 ; *Anantarama Aiyar* v. *Yussuffi Oomer Sahib*, 36 IC 903 ; *Ram Narayan Singh* v. *Adhindra Nath Mukhurji*, 34 IC 900 : 25 CLJ 115 (PC); *Collector of Mirzapur* v. *Bhagwan Prasad*, 35 A 164 : 18 IC 311 ; *Royzuddi Sheik* v. *Kali Nath Mookerjee*, 33 C 985 ; *Pran Nath Sarkar* v. *Jadu Nath Saha*, 32 C 729 ; *Tafaluddi Peada* v. *Mahar Ali Shaha*, 26 C 78 ; *Narayan Babaji* v. *Lakshmandas Harachand*, 7 Bom LR 934 ; see *Mithiram Bhat* v. *Somanatha Naickar*, 24 M 397.
9. *Ghansham Singh Tirath Singh* v. *Mahomed Yacoob*, 146 IC 694 : 1933 S. 257 ; *Dhana Mohammed* v. *Nastulla Molla*, 92 IC 948 ; 1926 C 687 ; *Quah Cheng Gwan* v. *Maung Po Myi*, 66 IC 589 ; *Radhe Shiam* v. *Chuni*, 35 IC 192 ; *Mathra Pershad* v. *Cheddi Lal*, 29 IC 363 ; *Pulaka Veetil Muthalakulangora Kunku Midu* v. *Thiruthipalli Madhava Menon*, 32 M 410 ; 1 IC 1, overruling *Madras Deposit & Benefit Society Ltd* v. *Oonamalai Ammal*, 18 M 29 ; *Sada Kavaur* v. *Tadepally Basaviah*, 30 M 284 ; *Sonatun Shaha* v. *Dino Nath Shaha*, 26 C 222 ; *Tofaluddi Peada* v. *Maha Ali Shaha*, 26 C 78; *Ethel Georgina Kerr* v. *Clara B. Ruxton*, 4 CLJ 510.
10. *Shib Chandra Singha* v. *Gour Chandra Paul*, 68 IC 86 : 1922 C 160 ; *Veerappa Kavundan* v. *Ramasam Kavundan*, 30 M 251.
11. *Shamu Patter* v. *Abdul Kadir Rowthan*, 31 M 215.

Board.[1] The contention that such a document could be used as a bond was negatived by the Madras High Court; it was urged by counsel for the appellant at the Bar of the Privy Council but was presumably not pressed, and there is no direct finding of the Judicial Committee on the question, though the dismissal of the suit indicates that in their Lordships' opinion there was no ground on which the plaintiff in that case was entitled to any relief.[2] In some cases, however, it has been held that where a deed of mortgage purporting to be attested is sued upon as a simple money bond, proof of attestation is dispensed with.[3]

Meaning of attestation; attestation of wills governed by the Indian Succession Act.—A will governed by the Indian Succession Act must be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will, or has seen some other person sign the will in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of the witnesses must sign the will in the presence of the testator; but it is not necessary that more than one witness be present at the same time, and no particular form of attestation is necessary.[4]

S. 45. Corroboration of the signature of testator.—Proof of the signature of the testator in a Will is a vital matter which requires to be proved. Evidence insisted by law is that of the attestors. But that is not to say that other kinds of evidence is shut out by law.[5] In the absence of suspicious circumstances and undue influence, the will is held validly executed.[5a]

It cannot be laid down as a matter of law that because the witness did not state in examination-in-chief that they signed the will in the presence of the testator, there was no due attestation. It will depend on the circumstances elicited in evidence whether the attesting witness signed in the presence of the testator. It is pure question of fact depending on appreciation of evidence.[6]

Meaning of attestation; attestation of instruments required by the Transfer of Property Act to be attested.—The Transfer of Property Act, Act IV of 1882, though it required a mortgage, where the principal sum secured was one hundred rupees or upward,[7] or a gift of immovable property,[8] to be effected by a registered instrument attested by at least two witnesses, did not define "attestation". In *Shamu Patter* v. *Abdul Kadir*,[9] where the attesting witnesses to a mortgaged were not present at the time of the execution of the deed but had put their names on the document on receiving from the

1. *Shamu Patter* v. *Abdul Kadir Rowthan*, 35 M 607 : 39 IA 202 : 16 IC 250 (PC).
2. *Shib Chandra Singha* v. *Gour Chandra Paul*, 68 IC 86 : 1922 C 160.
3. *Ghansham Singh Tirath Singh* v. *Mohamed Yacoob*, 146 IC 694 : 1933 S. 257 ; *Mahadeo Prasad* v. *Gajraj Singh*, 34 IC 397.
4. Section 63 (c) of the Indian Succession Act (Act 39 of 1925) ; *Beni Chand* v. *Kamla Kunwar*, 1977 SC 63 (Para 8).
5. *Sumangala T. Pai* v. *S. Sundaresa Pai*, AIR 1991 Ker 259 (para18).

5a. *Manorama* v. *Saroj*, AIR 1989 All 17.

6. *Naresh Charan Das Gupta* v. *Paresh Charan Das Gupta*, 1955, SC 363.
7. Section 59 of Act IV of 1882.
8. Section 123 of Act IV of 1882 ; *Balbhadar Singh* v. *Lakshmi Bai*, 125 IC 507 : 1930 A 669 ; *Baijnath Singh* v. *Brijraj Kuer*, 2 P 52 : 68 IC 383 : 1922 P 514 ; *Amarappa Sanabasappa Gumalpur* v. *Rachava Sugappa*, 44 B 231 : 55 IC 355.
9. *Shamu Patter* v. *Abdul Kadir Rowthan*, 35 M 607 : 39 IA 202 : 16 IC 250 (PC) ; referred to in *Kishore Chandra Singh Deo* v. *Ganesh Prasad Bhagat*, 1954 SC 316.

executant a personal acknowledgment of the execution of the deed, the Privy Council held the attestation to be invalid, and ruled that the attestation of a mortgage-deed within the meaning of Section 59 of the Transfer of Property Act must be made by the attestation witnesses signing their names after seeing the actual execution of the deed, and that mere acknowledgment of his signature by the executant was not sufficient. The Privy Council decision last cited was followed in India in a large number of cases,[1] and continued to be the authoritative interpretation of "attestation" till 1926 when by Section 2 of Act XXVII of 1926, Transfer of Property (Amendment) Act, the Legislature defined the word "attested" as follows :—"Attested", in relation to an instrument, means attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other persons,and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary". Thus, the Transfer of Property (Amendment) Act of 1926 gave to the word "attested" the same meaning as had previously been given to it by the Indian Succession Act[2] when used in relation to wills governed by that enactment. The obvious object of this amendment was to render the Privy Council decision in *Shamu Patter* v.*Abdul Kadir*,[3] and other cases, in which a similar view was taken, obsolete, and to put a wider construction on the word "attested". Therefore, as the law now stands, it is not necessary that the executant himself, or somebody else by his direction, should sign or mark the instrument in the presence of the attesting witnesses, and if the attesting witnesses put their names on the instrument on receiving from the executant a personal acknowledgment of the execution of the instrument, the attestation will not be open to any objection. The attesting witnesses should, however, sign in the presence of the executant.[4] The Privy Council have held that where a document executed by a *pardanashin* lady is attested by the witnesses while the lady is sitting behind a thin curtain and it is clear enough that, if she had been minded to see the witnesses sign she could have done so, even if she did not actually see them through the curtain, the document is properly attested.[5] A witness cannot be said to have attested the instrument who, though he signed it as an attesting

1. *Dharamdas Premchand* v. *Ramoomal*, 101 IC 715 : 1927 S. 118 ; *Krishna Iyer* v. *Ponappa Nadar*, 97 IC 676 : 1926 M 1060 : *Pribhdas* v. *Sahib Khan*, 1926 S. 88 ; 93 IC 660 ; *Vedla Nagiah* v. *Valuru Divakara Mudaliar*, 41 IC 585 : *Radhe Shiam* v.*Chunni*, 35 IC 192 ; *Subedha Koeri* v. *Raja Ram*, 21 IC 83 ; *Badri Prasad* v. *Abdul Karim*, 35 A 254 : 19 IC 451. For cases before the Privy Council decision in which a similar view was taken, see *Ranu* v. *Laxmanrao Krishna Limaye*, 33 B 44 : 1 IC 464 ; *Shamu Patter* v. *Abdul Kadir Rowthan*, 31 M 215 ; *Abdul Karim* v. *Salimun*, 27 C 190 : *Girindra Nath Mukerjee* v. *Bejoy Gopal Mukerjee*, 26 C 246.
2. See Section 63 (c) of Act XXXIX of 1925, and Section 50 of Act X of 1865.
3. *Shamu Patter* v. *Abdul Kadir Rowthan*, 35 M 607 : 39 IA 202 : 16 IC 250 (PC).
4. *Gurcharan* v. *Ram Bharose Singh*, 1943 O 218 ; *Surendra Bahadur Singh* v. *Behari Singh*, 1939 PC 117 ; *Murari Lal* v. *Muhammad Samiuddin Ahmad Khan*, 1937 A 273 :*Benarsi Das* v. *Collector of Saharanpur*, 1936 A 712 : 165 IC 498 : *Chandrani Kuar* v. *Sheo Nath*, 6 Luck. 619 : 132 IC 337 : 1931 O 146 ; *Banwari Lal* v. *Gopi Nath*, 131 IC 557 : 1931 A 411.
5. *Kundan Lal* v. *Musharrafi Begam*, 63 IA 326 : 11 Luck 346 : 1936 PC 207 : 164 IC 156 , reversing *Musharrafi Begum*, v. *Kundal Lal*, 1933 O 365 : 144 IC 860 ; see also *Murari Lal* v. *Muhammad Samiuddin Ahmad Khan*, 1937 A 273.

witness, neither saw the executant sign,[1] nor himself signed it on receiving from the executant a personal acknowledgment of execution.[2] Where the mortgagee states in the presence of the mortgagor that the mortgage document has been executed by the latter and asks the attesting witness to attest it and the witness attests it without any dissent having been expressed by the executant mortgagor, the mortgage-deed is duly attested on acknowledgment received from the mortgagor.[3] Where a document bears the signature of an attesting witness, there is a presumption under Section 114 that the witness signed after the document was signed by the executant.[4]

There is nothing in the Evidence Act which indicates that it is necessary for the attesting person in order to prove execution to point to the signature or mark made by the executant. Therefore, if a witness is unable to point to the signature on a document of the person whose signature he purports to have attested, it does not necessarily follow that he has failed to prove that signature.[5]

Amendment, whether retrospective?—The question whether the amended definition of the word "attested" is retrospective is not free from difficulty. The Allahabad[6] and the Calcutta[7] High Courts held that the amendment was not retrospective in its effect and that the validity of the attestation of instruments executed before the Amending Act came into force had still to be judged by the rule laid down by the Privy Council in *Shamu Patter* v.*Abul Kadir*,[8] the Madras High Court, however, took a contrary view and held the Amending Act to be retrospective.[9] The Legislature had again to step in, and by Act X of 1927 and Act XXVII of 1927 it made the definition of the word "attested" in Section 2 of Act XXVII of 1926 expressly retrospective.[10] But the Madras High Court went back upon its view that the amendment was retrospective, found fault with the Amending Acts of 1927, and came to the conclusion that the Legislature had failed in its object of making the amendment retrospective.[11] The matter had to be referred to a Full Bench which has now definitely held that the Amendment is retrospective.[12] The Sindh Court also has held the amendment to be retrospective.[13]

It is not necessary that both the attesting witnesses should be present at the same time.—The words "attesting witness" in Section 68 of the Evidence Act have the same meaning as in Section 59 and 123 of the Transfer of Property Act.[14] Under the amendment definition of the word "attested" as used in the Transfer of Property Act, it

1. *Surendra Bahadur Singh* v. *Behari Singh*, 1939 PC 117 ; *Chandrani Kuar* v. *Sheo Nath*, 6 Luck. 619 : 132 IC 337 : 1931 O 146 ; *Banwari Lal* v. *Gopi Nath*, 131 IC 557 : 1931 A 411 ; *Zaharul Hussain* v. *Madadeo Ramji Deshmuki* 1949 N 149 : ILR 1948 N 621 : 1949 NLJ 340.
2. *Surendra Bahadur Singh* v. *Behari Singh*, 1939 PC 117 ; *Chandrani Kuar* v. *Sheo Nath*, 6 Luck 619 : 132 IC 337 : 1931 O 146 : *Zaharul Hussain* v. *Mahadeo Ramji Deshmukh*, 1949 N 149.
3. *Amir Husain* v. *Abdul Samad*. 1937 A 646.
4. *Radha Nath Chakrabarti* v. *Nagendra Nath Chakrabarty*, 134 IC 767. 1931 C 806.
5. *Riazul Nisa Begum* v. *Puran Chand*, 1944 O 40 : 19 Luck 443 ; 210 IC 300.
6. *Girja Nandan* v. *Hanuman Das*, 49, A 25 : 99 IC 161 : 1927 A 1 (FB).
7. *Nepra* v. *Sajer Pramonik*, 55 C 67 : 103 IC 662 : 1927 C 763.
8. *Shamu Patter* v. *Abdul Kadir Rowthan*, 35 M 607 : 39 IA 202 : 16 IC 250 (PC)
9. *Balaji Singh* v. *Chaka Gangamma*, 99 IC 143 : 1927 M 85.
10. *Motilal Hirabhai* v. *Kasambai Hasanbhai*, 105 IC 864 : 1928 B 16 ; *Yakub Khan Daimkhan Serguro* v. *Guljarkhan Abdulkhan*, 52 B 219 : 111 IC 287 : 1928 B 267.
11. *Palaniappa Chettiar* v. *Rajagopala Pandarathar*, 111 IC 407 : 1928 M 773.
12. *Veerappa Chettiar* v. *Subbrahmanya Ayyar*, 52 M 123 : 116 IC 367 : 1929 M 1 (FB).
13. *Thakurdas* v. *Topandas*, 120 IC 499 : 1929 S 217.
14. *Jagannath Khan* v. *Bajrang Das Agarwala*, 48 C 61 : 62 IC 97 : 1921 C 28.

is not necessary that the attesting witnesses should be present at the same time; in other words, it is not necessary that the attesting witnesses should simultaneously attest the deed.[1] No particular form of attestation is necessary.[2]

Attestation of deeds executed by pardanashin ladies.—In the case of deeds executed by *pardanashin* ladies, the rigour of the rule laid down by the Privy Council in *Shamu Patter* v.*Abdul Kadir*[3] that the attesting witnesses should actually see the executant sign the deed has been somewhat relaxed. It has been held that it is not essential that the attesting witness should actually see the executant sign or make a mark, and that attestation is sufficiently proved if there is evidence that the lady admitted that she was the executant, that the deed was taken behind the *purdah* for her signature, and that, after it was signed by her the signatures of attesting witnesses who were present there were made.[4] If the witness is unable to see the face of the executant sign the deed the attestation is sufficient.[5] A mortgage-deed was alleged to have been executed by a *pardanashin* lady in the following manner. At the time of the execution of the deed, she was behind the *purdah* and her son took the deed inside the *pardah* and then came out and told those outside that she had signed the deed. After this, the witnesses who had not seen the executant sign the deed, put their names on the deed as attesting witnesses. It was held by the Privy Council, following an earlier similar decision,[6] that the deed had not been properly attested and was therefore invalid.[7] Where a deed is not signed by a *pardanashin* lady in the presence of persons attesting the deed, nor is an acknowledgment of her having signed the deed made to the witnesses, the deed cannot be said to have been properly attested.[8]

A party to a deed is not a competent attesting witness.—A party to a deed is not a competent attesting witness.[9] Thus, where there are more mortgagors than one, one of the mortgagors cannot attest the mortgage bond as against the other mortgagors,[10] even if he himself be the scribe of the deed.[11] But a person who is not a party to the mortgage-deed, though he is interested in the mortgage money, is a competent attesting witness.[12] Similarly, the real mortgagee is a competent attesting witness to a mortgage-deed executed in favour of his *benamidar*.[13] A person executing a document as a power-

---

1. Section 2 of the Transfer of Property Amendment Act, Act XXVII of 1926.
2. Section 2 of Act XXVII of 1926.
3. *Shamu Patter* v. *Abdul Kadir Rowthan*, 35 M 607 : 39 IA 202 : 16 IC 250 (PC).
4. *Kasidambi* v. *Gangulal*, 56 IC 247 ; *Zakir Raza* v. *Madusudan Das*, 45 IC 691 ; *Sarurjigar Begum* v. *Baroda Kant Mitter*, 37 C 526 : 5 IC 539 : *Ishri Prosad* v. *Rai Gunga Prosad Singh*, 3 IC 311 : 14 CWN 165 :*Hormongal Narain Singh* v. *Ganaur Singh*, I C 300 : 13 CWN 40 ; see also *Rukmini Koeri* v. *Nilmani Bandyopadhyaya*, 32 IC 170 : 19 CWN 1309.
5. *Padarath Halwai* v. *Ram Narain Upadhia*, 37 A 474 : 42 IA 163 : 30 IC 366 : 1915 PC 21 : *Radha Kishun* v. *Jag Sahu*, 60 IC 173.
6. *Ganga Pershad Singh* v. *Ishri Pershad Singh*, 45 C 748 : 45 IA 94 : 45 IC 1 : 1918 PC 3.
7. *Hira Bibi* v. *Ram Hari Lal*, 5 P 58 : 52 IA 262 ; 89 IC 659 : 1925 PC 203.
8. *Chandrani Kaur* v. *Sheo Nath*, 6 Luck 619 : 132 IC 337 : 1931 O 146.
9. *Seal* v. *Claridge*, 7 QBD 516 ; *Gomathi Ammal* v. *V.S.M.Krishna Iyer*, 1954 M 126 : 1953 , 2 MLJ 303.
10. *Debendra Chandra Roy* v. *Behari Lal Mukherjee*, 15 IC 666 : 16 CWN 1075 : *Peary Mohan Matti* v. *Sreenath Chandra Matti*, 7 IC 735 : 14 CWN 1046 ; *Jaikarandas* v. *Protap Singh*, 1940 C 189 : ILR (1939) 2 C 479 : 187 IC 718.
11. *Debendra Chandra Roy* v. *Behari Lal Mukherji*, 5 IC 666 : 16 CWN 1075 ; *Peary Mohan Maiti* v. *Sreenath Chandra Maiti*, 7 IC 735 : 14 CWN 1046.
12. *Balu Ravji Gharat* v. *Gopal Gangadha Dhabu*, 12 IC 531 ; 13 Bom. LR 944.
13. *Durga Din* v. *Suraj Bakhsh*, 7 Luck, 41 : 134 IC 402 : 1931 O 285 (FB).

of-attorney agent cannot be an attesting witness.[1]

Can the writer of a document be treated as an attesting witness?—An attesting witness is one who not only sees a document being executed but also signs it as a witness.[2] This definition of an attesting witness has been adopted by the Privy Council in *Shamu Patter* v.*Abdul Kadir*.[3] It is not enough that a witness should see the actual execution; he must further sign the document as a witness.[4]A document required by law to be attested is not duly executed unless it is in fact signed by the executant in the presence of witnesses who sign the document as attesting witnesses.[5] There is no inherent incompetency in the writer of a document to be an attesting witness to it. Therefore, if the writer of a document signs it as a witness, there can be no objection in principle to his being treated as an attesting witness,[6] even if he has already signed the document as its scribe.[7] If the scribe has attested the mark of an illiterate executant, he should be taken to have acted as an attesting witness.[8] But if a scribe, though he has in fact witnessed the execution of a deed has signed it merely as a scribe and not as a witness, he cannot be treated as an attesting witness according to the decisions of the Allahabad,[9] Bombay,[10] Patna,[11] Burma,[12] and Oudh[13] Courts. The Madras[14] and Sindh[15] Courts, on the other hand, hold that scribe can, in the circumstances mentioned, be properly treated as an attesting witness. The Calcutta High Court in some of its earlier

---

1. *Gomathi Ammal* v. *V.S.M. Krishna Iyer*, 1954 M 126.
2. *Burdett* v. *Spilsbury*, (1842) 10 Cl & F 340 ;*Wright* v. *Wakeford*, (1912) 4 Taunt, 213 . See *Abinash Chandra Baidyanidhi Bhattacharjee* v. *Dasrath Malo*, 56 C 598 : 114 IC 84 : 1929 C 123 : 32 CWN 1228 : *Dharamdas Premchand* v. *Ramoomal*, 101 IC 715 : 1927 S 118 ; *Quah Cheng Gwan* v. *Maung Po Myi*, 66 IC 589 ; *Maung Po Thaugh* v. *Muthia Chetty*, 65 IC 64 ; *Sristidhar Ghosh* v. *Rakshakaly Dassi*, 49 C 438 : 63 IC 507 : 1922 C 168 ; *Dalichand Shivaram Marwari* v. *Lotu Sakharam Pardhi*, 44 B 405 : 55 IC 616 ; *Badri Prasad* v. *Abdul Karim*, 35 A 254 : 19 IC 451 ; *Ranu* v. *Laxmanrao Krishna Limaye*, 33 B 44 : 1 IC 464 ; *Timmavva Dundappa Budihal* v. *Channava Appaya Kanasgeri*, 1948 B 322.
3. *Shamu Patter* v. *Abdul Kadir Rowthan*, 35 M 607 : 39 IA 202 : 16 IC 250 (PC).
4. *Ram Samujh Singh* v. *Mainnath Kuer*, 91 IC 176 : 1925 O 737 .
5. *Benoy Bhusan Roy* v. *Dhirendra Nath De*, 74 IC 178 : 1924 C 415, relying on *Ganga Pershad* v. *Ishri Pershad Singh*, 45 C 748 : 45 IA 94 : 45 IC 1 : 1918 PC 3 and *Shamu Patter* v. *Abdul Kadir Rowthan*, 35 M 607 : 39 IA 218 : 16 IC 250 (PC).
6. *Ghansham Singh Tirath Singh* v. *Mohomed Yacoob*, 146 IC 694 : 1933 S 257 ; *Dharamdas Premchand* v. *Ramoomal*, 101 IC 715 : 1927 S 118 ; *Ram Samujh Singh* v. *Mainath Kuer*, 91 IC 176 :1925 O 737 ; *Aung Rhi* v. *Ma Aung Krwa Pru*, 1 R 557 : 77 IC 362 : 1924 R 139 ; *Dalichand Shivram Marwadi* v. Lotu *Sokharam Pardhi*, 44 B 405: 55 I C 616: *Ram Bahadur Singh* v. *Ajodhya Singh*, 34 IC 370 ; *Ranu* v. *Laxmanrao Krishna Limaye*, 33 B 44 : 1 IC 464 ; *Timmava Dundappa Budihal* v. *Channava Appaya Kanasgeri*, 1948 B 322 : 50 BLR 260 ; *Nirode Mohan Roy* v. *Charu Chandra Mazumdar*, 1950 C 401 : 54 CWN 455.
7. *Ram Samujh Singh* v. *Mainath Kuer*, 91 IC 176 : 1925 O 737 ; *Nirode Mohan Roy* v. *Charu Chandra Mazumdar*, 1950 C 401.
8. *Yaubkhan Dalmkhan Serguro* v. *Guljarkhan Abdulkhan*, 52 B 219 : 111 IC 287 : 1928 B 267 : *Raja Ram* v. *Jagannath*, 1926 O 209 : 91 IC 507 ; *Govind Bhikaji* v. *Bhau Gopal*, 41 B 384 : 39 IC 61.
9. *Badri Prasad* v. *Abdul Karim*, 35 A 254 : 19 IC 451.
10. *Amardas Mangaldas* v. *Harmanbhai*, 1942 B 291 ; *Dalichand Shivram Marwadi* v. *Lotu Sakharam Pardhi*, 44 B 405 : 55 IC 616 ; *Ranu* v. *Laxmanrao Krishna Limaye*, 33 B 44 : I IC 464.
11. *Nageshwar Prasad* v. *Bachu Singh*, 65 IC 79 ; *Ram Bahadur Singh* v. *Ajodhya Singh*., 34 I C 370.
12. *Maung Po Thaung* v. *Muthia Chettty*, 65 IC 64 ; *Chetty* v. *Po Mya*, 56 IC 945 ; *Mg. So* v. *Ramaswamy Chetty*, 24 IC 375.
13. *Ram Sahu* v. *Gouri Shankar*, 39 IC 153.
14. *Paramasiva Udayan* v. *Krishna Padayachi*, 41 M 535 : 43 IC 983 ; *Ayyasami Iyengar* v. *Kylasam Pillai*, 26 IC 409.
15. *Ghansham Singh Tirath Singh* v. *Mahomed Yacoob*, 146 IC 691 : 1933 S 257 ; *Thakurdas* v. *Topandas*, 120 IC 499 : 1929 S 217.

cases,[1] took the same view as a the Madras High Court; but it subsequently changed its opinion.[2] Ordinarily the scribe writes out the document and signs his name before the executant signs the document. It is, therefore, not consistent with the Privy Council decision in *Shamu Patter* v.*Abdul Kadir*[3] to treat the scribe as an attesting witness.[4] A document which is required by law to be attested cannot be proved merely by calling the scribe and getting the signature of the executant identified by him.[5]

A scribe cannot attest his own act.—A scribe cannot be an attesting witness of what he has himself written out. Where no mark, seal or thumb impression of the executant appears on the document, the scribe who executes the document for or on behalf of the executant is not competent to become an attesting witness to attest the signature he himself has written out.[6] Where a person wrote the body of a document purporting to be a mortgage-deed, wrote the name of the executant, wrote the name of one of the attesting witnesses, and signed his own names as an attesting witness, it was held that he could not be treated as an attesting witness.[7] Where a person writes on a mortgage-deed the name of the executant who is illiterate and then his own name by way of attestation, there is no proper attestation of the deed.[8] A scribe who signs on a document the name of the executant on the latter's behalf is not a competent attesting witness.[9] But where an illiterate mortgagor purports to execute a mortgage bond by making his mark on the deed, and the scribe thereafter attaches an explanatory note to the mark and also attests the mark, the attestation is perfecty valid.[10]

Whether a Sub-Registrar or a witness identifying the executant before a Sub-Registrar can be treated as an attesting witness.—When a document is presented for registration to the Sub-Registrar, and its execution is admitted by the executant, the Sub-Registrar has to endorse on the document the fact that its execution has been admitted by the executant.[11] This endorsement of admission of execution has to be signed by the Sub-Registrar.[12] Since the Sub-Registrar in such cases receives from the executant a personal acknowledgment of his signature or mark, he has, in several cases, been treated as an attesting witness within the meaning of Section 63 of the Indian Succession Act (Act XXXIX of 1925).[13] By Act XXVII of 1926. Transfer of Property (Amendment) Act, the word "attested, when used in relation to documents other than

---

1. *Jagannath Khan* v. *Bajarang Das Agarwala*, 48 C 61 : 62 IC 97 : 1921 C 208; *Dinamoyee Debi* v. *Bon Behari Kapur*, 7 CWN 160; *Raj Narain Ghosh* v. *Abdur Rahim*, 5 CWN 454.
2. *Abinash Chandra Baidyanidhi Bhattacharjee* v. *Dasrath Malo*, 56 C 598 : 114 IC 84 : 1929 C 123 : 32 CWN 1228. But see *Nirode Mohan Roy* v. *Charu Chandra Mazumdar*, 1950 C 401.
3. *Shamu Patter* v. *Abdul Kadir Rowthan*, 35 M 607 : 39 IA 202 : 16 IC 260 (PC).
4. See *Ram Samujh Singh* v. *Mainnath Kuer*, 91 IC 176 : 1925 O 737.
5. *Jiwan Singh* v *Dalip Singh*, 115 IC 450 : 1929 A 389.
6. *Dharamdas Premchand* v. *Ramoomal*, 101 IC 715 : 1927 S 118; *Rajani Kanta Bhadra* v. *Panchananda*, 46 C 522 : 48 IC 720.
7. *Sristidhar Ghose* v. *Rakshakaly Dassi*, 49 C 438 : 63 IC 507; 1922 C 168.
8. *Ram Samujh Singh* v. *Mainnath Kuer*, 91 IC 176; 1925 O 737.
9. *Paban Khan* v. *Badal Sardar*, 66 IC 906 : 34 CLJ 498.
10. *Raja Ram* v. *Jagannath*, 91 IC 507 : 1926 O 209; See *Dharamdas Premchand* v. *Ramoomal*, 101 IC 715 : 1927 S 118; *Ram Samujh Singh* v. *Mainnath Kuer*, 91 IC 176 : 1925 O 737.
11. Section 58, Registration Act.
12. Section 59, Registration Act.
13. *Mohammad Hasan* v. *Ali Hyder*, 85 IC 509 : 1925 O 337; *Sarda Prasad Tej* v. *Trigunia Charan Ray*, 1 P 300 : 70 IC 402 : 1922 P 402; *Theresa* v. *Misquita*, 45 B 989 : 61 IC 587 : 1921 B 156, per Fawcett, J.; *Mir Syed Hasan* v. *Taiyaba Begam*, 26 IC 547, *Amarendra Nath Chaterjee* v. *Kashi Nath Chaterjee*, 27 C 169; *Tofaluddi Pedda* v. *Mahar Ali Shah*, 26 C 78.

wills, has been given the same meaning[1] as by Section 63 of the Indian Succession Act[2] when used in relation to wills. Therefore, a Sub-Registrar signing the endorsement on a document relating to the admission of its executant has, in several cases, been treated as an attesting witness of the document.[3] It is, however, submitted that the position of a Sub-Registrar is analogous to the position of a scribe, the only difference being that the latter comes in at the instance of a party or both the parties, whereas the former comes in under the authority of a Statue. If a scribe, though he has in fact witnessed the execution of a document, cannot be treated as an attesting witness unless he has signed as such,[4] it is difficult to see how a Sub-Registrar can be treated as an attesting witness when he does not sign as a "witness", and who comes in only when the execution stage of the document is over.[5] In any case, a Sub-Registrar cannot be treated as an attesting witness under the amended definition of "attestation", unless he signs the endorsement in the presence of the executant.[6]

A witness who identifies the executant before the Sub-Registrar cannot be treated as an attesting witness,[7] if the does not sign the endorsement by the Sub-Registrar in the presence of the executant.[8]

Endorsement of admission of execution made by the Sub-Registrar does not require proof.—The endorsement on a document made by the Sub-Registrar is admissible for the purpose that the facts mentioned in the endorsement occurred as therein mentioned.[9] The endorsements made at the time of registration are relevant to the matter of registration only. It is doubtful if they can be considered to determine the

---

1. Section 2 of Act XXVII of 1926.
2. Act XXXIX of 1925.
3. *Ganpat Rao Yado Rao Pande* v. *Nago Rao Vinayak Rao*, 1940 N 382; *Pilwasao* v. *Mst. Khairunnissa*, 1935 N 1; *Neelima Basu* v. *Jaharlal Sarkar*, 61 C 525 : 151 IC 1063 : 1934 C 772; *Ram Charan* v. *Bhairon*, 53 A I : 131 IC 241 : 1931 A 101 : *Thakurdas* v. *Topandas*, 120 IC 499 : 1929 S 217 : *Radha Mohun Dutt* v. *Nripendra Nath Nandy*, 105 IC 422 : 1928 C 154 : *Veerappa Chettiar* v. *Subramania Ayyar*, 52 M 123 : 116 IC 367 (FB).
4. See *Maug Po Thaung* v. *Muthia Chetty*, 65 IC 64; *Chetty* v. *Po Mya*, 56 IC 945; *Dalichand Shivram Marwadi* v. *Lotu Sakharam Pardhi*, 44 B 405 : 55 IC 616 : *Nageshwar Prasad* v. *Bachu Singh*, 53 IC 79; *Ram Sahu* v. *Gouri Shankar*, 39 IC 153; *Ram Bahadur Singh*, v *Ajodhya Singh* 34 IC 370 : *Mg. So.* v. *Ramaswamy Chetty*, 24 IC 375 : *Badri Prasad* v. *Abdul Karim*, 35 A 254 : 19 IC 451 : *Ranu* v. *Laxmanrao Krishna Linaye*, 33 B 44 : I C 464.
5. *Amir Husain* v. *Abdul Samad*, 1937 A 646; *Mohammad Ziaulla Khan* v. *Rafiq Mohammad Khan*, 1939 O 213; *Lachman Singh* v. *Surendra Bahadur Singh*, 54 A 1051 : 139 IC 1 : 1932 A 527 (FB); *Chandrani Kuer* v. *Sheo Nath*, 6 Luck. 619; 132 IC 337 : 1931 O 146.
6. *Mohammad Ziaulla Khan* v. *Rafiq Mohammad Khan*, 1939 O 213; *Surendra Bahadur Singh* v. *Behari Singh*, 1939 PC 117; *Neelima Basu* v. *Jaharlal Sarkar*, 61 C 525 : 151 IC 1063 : 1934 C 772; *Abinash Chandra Baiyanidhi Bhattacharjee* v. *Dasrath Malo*, 56 C 598 : 114 IC 84 : 1929 C 123 : 32 CWN 1228; *Sakharam Sriniwas* v. *Sushilabai Namdeo*, 1953 N 339; *Timmavva Dundappa Budihal* v. *Channava Appaya Kanasgeri*, 1948 B 322; but see *Ruprao Ranoji* v. *Ramrao Bhagwantrao*, 1925 N 88 : 1952 NLJ 86 : ILR 1952 N 189.
7. *Amir Husain* v. *Abdul Samad*, 1937 A 646; *Surendra Bahadur Singh* v. *Behari Singh*, 1939 PC 117; *Lachman Singh* v. *Surendra Bahadur Singh*, 54 A 1051 : 139 IC 1 : 1932 A 527 (FB); *Chandrani Kuar* v. *Sheo Nath*, 6 Luck 619; 132 IC 337 : 1931 O 146 : contra, *Chunnibai Madhoram* v. *Girdhari Lal Chunnilal*, 150 IC 1007 : 1934 N 1; See also *Ram Charan* v. *Bhairom*, 53 A 1 : 131 IC 241 : 1931 A 101 : *Pertap Bahadur Singh* v. *Ram Das*, 60 IC 234; *Timmavva Dundappa Budihal* v. *Channava Appaya Kanasgeri*, 1948 B 322.
8. *Surendra Bahadur Singh* v. *Behari Singh*, 1939 PC 117.
9. Section 60 Registration Act; *Theresa* v. *Misquita*, 45 B 989 : 61 IC 587 : 1921 B 156, per Fawcett, J.,; *Gopaldas* v. *Sri Thakurji*, 1943 PC 83.

question of due attestation.[1] A Sub-Registrar's endorsement does not require any proof, as a Court can take judicial notice of it and of the signature of the Sub-Registrar.[2]

Proof of thirty years old documents.–Though a document proved to be thirty years old may, subject to the other conditions of Section 90, be presumed to have been properly executed and attested still where direct evidence satisfying the requirements of Section 68 is available, the proof of the document should not be left to the presumption of Section 90.[3] Two provisions do not mitigate against each other.[3a] See notes to Section 90.

Proviso: in the case of a registered document other than a will an attesting witness need not be called.–The Proviso was added by Act XXXI of 1926. Under the amended section, it is not necessary to call an attesting witness in proof of the execution of a registered document, not being a will unless its execution by the person by the whom it purports to have been executed is specially denied.[4] Mere non-admission of execution and attestation does not amount to specific denial but an averment that the document did not effect a mortgage in law does amount to such denial.[5] Due attestation of a deed need not be proved where the validity of the deed has not been specifically denied on the ground that it had not been attested, in the manner required by law.[6] The execution of a registered document, even where the document is required by law to be attested, may be proved by any evidence if the execution of the document is not specifically denied.[7] The last sentence in the proviso contemplates a specific denial by the opposite party, i.e., the party against whom the document is sought to be proved, irrespective of whether he is or is not the executant of the document.[8] Even where the executant is a party and admits execution, a third party, that is a party to the suit but not to the deed, can deny execution and thus put the party relying on the document to proof of its execution by calling an attesting witness, unless he found his title to the property in suit upon a document which contains an admission of execution of the document by the party from whom he derives his title.[9] Of course an admission by one defendant does not relieve the party relying on the document from the obligation of proving of the execution of the document against the other defendants.[10] Where the execution of the

1. *Surendra Bahadur Singh* v. *Behari Singh*, 1939 PC 117.
2. *Radha Mohun Dutt* v. *Nripendra Nath Nandy*, 105 IC 422 : 1928 C 154, but see *Abinash Chandra Baidyanidhi Bhattacharjee* v. *Dasrath Malo*, 56 C 598 : 114 IC 84 : 1929 C 123 : 32 CWN 1228.
3. *Raghubar Singh* v. *Sanwal Singh*, 61 IC 125.

3a. *Prabhat Chandra* v. *Smt. Rani Bala*, AIR 1989 Cal. 202.

4. *Sheo Ratan Singh* v. *Jagan Nath*, 1937 O 149 : 165 IC 404 : *Gobinda* v. *Charan Singh*, 147 IC 847 : 1933 L 378 : *Somasundaram Chettiar* v. *Mahibala Muthirulappa Pillai*, 147 IC 464 : 1933 M 432 : *Ram Charan* v. *Bhairon*, 53 A 1 : 131 IC 241 : 1931 A 101 ; *Thakurdas* v. *Topandas*, 120 I C 499 : 1929 S 217 : *Yakubkhan Daimkhan Serguro* v. *Guljarkhan Abdulkhan*, 52 B 219 : 111 IC 287 : 1928 B 267 : *Lakho Tewari* v. *Lalit Koeri*, 104 IC 622 : 1927 P 403 ; *Basdeo Upadhya* v. *Raj Behari Singh*, 104 IC 344 : 1927 O 535.
5. *Amir Husain* v. *Abdul Samad*, ILR 1937 A 723 : 1937 A 646 : 171 IC 743.
6. *Azizunnissa* v. *Siraj Husain*, 152 IC 146 : 1934 A 507 : but see *Benarsi Das* v. *Collector of Saharanpur*, 1936 A 712.
7. *Hari Nath Ghose* v. *Nepal Chandra Rai Chowdhury*, ILR (1937) IC 507 : *Parumal Thawerdas* v. *Abdul Rauf*, 120 IC 91 : 1929 S 235 : See also *Nand Lal* v. *Mst. Lakhmi*, 1939 L 414 ; *M.P.A.K.Firm* v. *Ma Mya Thein*, 1940 R 184.
8. *Chandra Kali* v. *Bhabhuti Prasad*, 1943 O 416 ; *Zaharul Husain* v. *Mahadeo Ramji Deshmukh*, 1949 N 149 : ILR 1948 N 621 : 1949 NLJ 340 : *Thakurdas* v. *Topandas*, 1929 S 217 : 120 IC 499 ; but see *Mst. Hova* v. *Lokumal*, 1944 S 61, where it has been held that the denial must be by the executant and that the section is not applicable where the executant is not party to the suit.
9. *Chandra Kali* v. *Bhabhuti Prasad*, 1943 O 416.
10. *Mst Hova* v. *Lokumal*, 1944 S 61.

deed is denied by any one of the defendants, whether such defendants is the executant of the deed or not,the party relying on the document must call at least one attesting witness.[1] The Proviso merely extends the principle of Section 70, and, in the case of registered instruments, make an admission by non-traverse as effective as an express admission under Section 70. But whereas under Section 70 a party is relieved of the duty of proving the execution of the document, under the Proviso to Section 68 he is relieved only of the duty of calling an attesting witness and not of the duty of proving the execution of the document.[2] The Rangoon High Court has ruled that in such cases not merely the execution but also proper attestation must be proved by other evidence.[3] The Calcutta High Court, however, has taken a different view of the matter and has ruled that the Proviso has the effect of relieving the party relying on the document of the duty of proving the execution as well as attestation of the document.[4] But where the attestation of a document is expressly denied, it is incumbent on the party relying on the document to prove the attestation.[5] Where signature on the document is admitted but attestation is denied, due execution of the document must be proved by examining an attesting witness.[6] The word "execution" as used in the Proviso means and includes not only the signature of the executant but the whole series of acts or formalities which are necessary to give the document validity, e.g., attestation. Therefore if attestation is expressly denied, the plaintiff must, under Section 68, call an attesting witness.[7] Denial of execution includes denial of attestation. Hence where execution is denied, not only execution but also attestation must be proved by calling an attesting witness.[8] A plea that the party does not admit the genuineness of the bond does not amount to a specific denial of the execution of the bond so as to put the plaintiff to proof of attestation.[9] The denial in question should relate to the specific document which is sought to be denied and the denial should be unqualified so as to leave no doubt that the execution of the particular document is denied by the person against whom it is sought to be used. It is not necessary that its attestation also should be specifically denied.[10] The proviso does not lay down that the denial should be contained in the written or oral pleadings. A mere denial noted on the back of the document or on the list accompanying the document on the date of issue is enough.[11] A mere averment that the document represent a sham and nominal transaction does not amount to a specific denial of the document.[12] When the defendant states that he is not aware of the fact of the mortgage in suit, the

1. *Radha Ballab* v. *Deoki Nandan*, 140 IC 115 : 1932 A 320; *Ebrahim Mandal* v. *Akshay Konar*, 62 CLJ 25.
2. *Kartar Singh* v. *Didar Singh*, 149 IC 1100 : 1934 L 282.
3. *Chettiar Firm* v. *U Htaw*, 11 R 62 : 141 IC 700 : 1933 R 6 : See also *Ebrahim Mondal* v. *Akshay Konar*, 62 CLJ 25 ; but see *Gobinda* v. *Chanan Singh*, 147 IC 847 : 1934 L 378.
4. *Ebrahim Mondal* v. *Akshay Konar*,62 CLJ 25 : 40 CWN 151.
5. *Ebrahim Mondal* v. *Akshay Konar*, 62 CLJ 25 : 40 CWN 151.
6. *Harinath Ghose* v. *Nepal Chandra Rai Chowdhury*, ILR (1937) IC 507 ; *Rajani Kanta Barui* v. *Bonbehari Sarkar*, 1952 C 7 : 56 CWN 9.
7. *Harikrishan Panigrahi* v. *Gogneswar Ponda*, 69 CLJ 454 : 1930 C 688 ; *Kali Charan* v. *Suraj Bali*, 1941 C 89 ; *Rajani Kanta Barui* v. *Bonbehari Sarkar*, 1952 C 7 ; See also *Jaikarandas* v. *Protap Singh*, 1940 C 189.
8. *Kali Charan* v. *Suraj Bali*, 1941 O 89.
9. *Biswanath Singh* v. *Kayastha Trading & Banking Corporation Ltd.*, 8 P 40; 119 IC 405 ; 1929 P 422 ; but see *Kali Charan* v. *Suraj Bali*, 1941 O 89.
10. *Abdul Rahman* v. *Ghuru Khan*, 1944 O 99 ; 209 IC 622.
11. *Gurcharan* v. *Ram Bharose Singh*, 1943 O 218.
12. *Vedachaal Chettiar* v. *Ameena Bi Ammal*, 1944 M 121 ; 212 IC 379 ; 57 MLW 7 (FB).

plea would not amount to specific denial.[1] Where on the production of a certified copy of a registered deed of gift the party challenging it does not specifically deny that it is the copy of the deed, the production of an attesting witness to prove execution and attestation, is not essential.[2]

When a document is registered under Section 74 of the Registration Act, the finding of the Registrar as to its execution is not a judicial finding, and the execution, if denied in the civil Court, must be proved under the present section.[3] The execution can be challenged by persons who are not parties to document.[3a]

Wills.—The Proviso is not applicable to wills and, irrespective of whether the execution of a will is admitted or denied, it is the duty of the party propounding the will to call at least one attesting witness.[4] Although, in order to prove due execution of an instrument requiring attestation, it is, in general, where several witnesses have subscribed, sufficient to call one of them, in the case of a will it is desirable that all capable of being called should be examined to remove all suspicion of fraud. The mere fact, however, that one of the attesting witnesses to a will is not called would not invalidate the will, provided there were two attesting witnesses as required by law.[5] Although the Indian Succession Act requires that a will has to be attested by two witnesses, yet the present section, permits the execution of the will to be proved by only one witness being called. But that one witness should be in a position to prove the due execution of the will. If that one attesting witness cannot prove the execution, then his evidence has to be supplemented by the other attesting witness being called to prove the execution.[6] Where the attesting witnesses are dead, the Will can certainly be proved in the manner provided for proof of a document.[6a] The strict compliance of Sec. 68 is mandatory.[6b]

Succesison Act sections 61, 63, Execution of Will, Genuineness. Propounder has to prove that there is no *unconscionability Testatrix.*[7]

Verification of a petition for probate by an attesting witness does not dispense with the requirement of proof of execution of the will as required by Section 68 of the Act.8

Succession Act-Sections 276, 213, 63.—Petition for probate of Will by legatee. Respondents brothers of petitioner. One of respondents filing no objection affidavits. Three attesting witnesses supporting genuineness of Will. Petitioner entitled to grant of probate.[8a]

One cannot presume from the mere signatures of two persons appearing at the foot of the endorsement of registration on a will that they had appended their signatures to the document as attesting witnesses. In order that they be treated as attesting witnesses, they must be called as witnesses to prove the execution and attestation of the will.[9] Where there are suspicious circumstances the onus would be on the propounder to

---

1. *Bhimasing Kishorsing* v. *Fakirchand Nandlal*, 1948 N 155 ; ILR 1947 N 649 ; *Dashrath Prasad Bajooram* v. *Lallosingh Sanmansingh*, 1951 N 343 ; 1951 NLJ 616.
2. *Nand Lal* v. *Mst. Lakhmi*, 187 IC 865.
3. *Muhamnad Cherag* v. *Dullav Khan*, PLD 1954 Dacca 134.
3a. *Krishnan Assari* v. *Parameswaran Pillai*, AIR 1989 Ker. 163.
4. Section 68 ; *See Ruparo Ranoji* v. *Ramarao Bhagwantrao*, 1952N 88 : 1952 NLJ 86 ; ILR 1952 N 89.
5. *Surendra Krishna Mondal* v. *Runce Dassi*, 47 IC 1043 : 591 C 814. See also *M.S. Thanigachala* v. *Rukmani* Ammal Ammal, AIR 1989 Mad 99
6. *Vishnu Ramakrishna* v. *Nathu Vithal*, 1949 B 266 : 51 B L R 245.
6a. *Balwant* v. *Mainabai*, AIR 1991 MP 11 PP. 13.
6b. *Paramu Radhakrishnan* v. *Bhag Bhathan*, AIR 1990 Ker 146.
7. *Dinesh Kumar* v. *Khazan Singh*, AIR 1988 Del 273.
8. *Edwin Carlow Marcelline*, In the Goods of, 56 CWN 650.
8a. *Tilak Raj Kakkar* v. *Shambhu Nath Kakkar*, AIR 1987 Del. 360.
9. *Girja Datt Singh* v. *Gangotri Datt Singh*, 1955 SC 346.

explain them to the satisfaction of the Court before the Will could be accepted as genuine.[1] until contrary is proved.[2]

The proviso is retrospective in its operation – The words "Indian Registration Act, 1908" in the Proviso means "the law relating to registration".[3] The Proviso is retrospective, in the sense that documents executed before the Proviso came into force may be proved in the manner laid down by the proviso.[4] The Proviso is not, however, applicable to cases tried before it came into force.[5]

69. Proof where no attesting witness found – If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom,it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.

COMMENTARY

Principle – The rule enacted in Section 68 – that where the document to be proved is one which is required by law to be attested, at least one attesting witness must be called to prove the execution of the document is relaxed when none of the attesting witnesses can be found or when the document is executed in the United Kingdom. Proof of the attestation of one of the witnesses being in his handwriting and of the signature of the executant is, in the circumstances mentioned, considered sufficient proof of the execution of the document. This is on the principal that, if the handwriting of the attesting witness has been proved, the presumption is that he actually witnessed the execution of the deed.[6]

If no attesting witness can be found – Under Section 68 it is necessary to call an attesting witness if one is alive, subject to the process of the Court, and capable of giving evidence. Section 69, however, provides a mode of proof when none of the attesting witnesses can be found. Under the English Law, the rule enacted in Section 69 must be observed when the witness is dead, out of the jurisdiction, or insane, as well as when the witness, though alive, within jurisdiction, and capable of giving evidence cannot be found after diligent search.[7] In India also it seems that, on the principle of the English rule, the case will be treated as falling within the meaning of Section 69 if the witness is dead,[8] or out of jurisdiction,[9] or insane, or physically incapable to depose.[10] It is, in such cases, possible for the Court, without unduly straining the language of the

---

1 *Ajit Kumar* v. *Mukunda Lal*, AIR 1988 Cal. 196

2 *Bhagya Wati Jain* v. *General Public*, AIR 1995 P & H 201.

3 *Jadunath Mitra* v. *Ishar Jha*, 1939 P 47.

4 *Samasundaram Chettiar* v. *Mahibala Muthirulappa Pillai*, 147 IC 464; *Muthuraman Chettiar* v. *Subramanian Chettiar*, 144 IC 89; 1933 M 612; *Thavommal* v. *Muthukmaraswami Chettiar*, 53 M 119; 121 IC 858; 1929 M 881; contra, *Balbhadar Singh* v. *Lakshmibai*, 125 IC 507; 1930 A 669.

5 *Banwari Lal* v. *Gopi Nath*, 131 IC 1557; 1931 A 411.

6 *Ponnuswami Goundan* v. *Kalyanasundara Ayyar*, 125 IC 231; 1930 M 770; *Venkataramayya* v. *Kamisetti Gottayya*, 101 IC 498; 1927 M 662; *Uttam Singh* v. *Hukum singh*, 39 A 112; 38 IC 651.

7 See Phipson, Ev., 7th Ed., 501.

8 *Deorao* v. *Dhondirao*, 109 IC 576; 1928 N 244, *Venkataramayaya* v. *Kamisetti Gottayya*, 101 IC 498; 1927 M 662; See *Ponnuswami Goundan* v. *Kalyanasundara Ayyar*, 125 IC 231; 1930 M 770; *Assoomeath* v. *Chetty*, 61 IC 637.

9 *Assoomeath* v. *Chetty*, 61 IC 637.

10 *Ram Jassa Kunwar* v. *Sahu Narain Das*, 1916 A 178.

section, to hold that the witness "cannot be found". Where a party has made all reasonable efforts to procure the attendance of the attesting witness who is alive, but the witness is not found, the execution and attestation of the document may be proved by other evidence.[1]

Proof of unavailability of the attesting witness necessary.—It is for the party resorting to the provisions of Section 69 in derogation of the provisions of Section 68 to show that the case is within the terms of Section 69. It must, therefore, be shown that none of the attesting witnesses can be found, and the absence of all the attesting witnesses must be accounted for.[2] The degree of diligence required in seeking for the attesting witness to a document is the same as that required for the search of a lost paper. The inquiry must be strict, diligent, honest and satisfactory to the Court. It should be made at the residence of the witness, if known, and at all other places where he may be expected to be found, and also, in general, of his relatives and others who may be able to give information concerning him.[3] A mere statement by Counsel that the whereabouts of the witness cannot be ascertained is not sufficient.[4] Merely taking out a summons or a warrant is not enough to comply with the requirements of the law, and all the processes mentioned in O. XVI, r. 10 C.P. Code, must be exhausted.[5] Section 69 may, however, be applied where the Court refuses the process asked for.[6] If the witness is dead, the death must be formally proved by admissible and not merely hearsay evidence.[7] For analogous cases decided under Section 33, see notes to that section under the heading "when the witness cannot be found".

Proof of the handwriting of the attesting witness and of the signature of the executant is necessary.—If a case falls within Section 69, two things must be proved, (i) that the attestation is in the handwriting of the attesting witness, and (ii) that the document was signed by the executant; neither of these alone is sufficient proof of the document. Therefore, where there is no proof of the signature of the executant, or of the handwriting of the attesting witness, the document cannot be said to have been properly proved.[8] Mere proof of the attestation being in the handwriting of the attesting witness is no proof of the document having been signed by the executant.[9] In a leading Madras case, where the subject has been fully discussed with reference to English and American authorities, it has been held that where the attesting witnesses are dead or unavailable, the document is sufficiently proved if the signature of an attesting witness is proved to be in his handwriting,[10] but it is submitted that this rule, so far as proof of a document required by law to be attested is concerned, is inapplicable as Section 69

1. *Muthuraman Chettiar* v. *Subramanian Chettiar*, 144 IC 89 ; 1933 M 612.
2. *Swamidin Singh* v. *Kaniz Fatima*, 11 IC 225.
3. *Assoomeath* v. *Chetty*, 61 IC 637.
4. *Swamidin Singh* v. *Maniz Fatima*, 11 IC 225.
5. *Amal Shankar Sen* v. *The Dacca Co-operative Housing Society*, 1945 C 350 ; *Shahzadi Begum* v. *Muhammad Qasim*, 7 P 312 ; 110 IC 756 ; 1928 P 356 ; *Gobinda Chandra Pal* v. *Pulin Behari Banerjee*, 98 IC 147 ; 1926 C 102 ; *Piyari Sundari Dasi* v. *Radha Krishna Datta*, 27 CWNLX (Notes) ; *Hari Krishna Panigrahi* v. *Ganeswar Ponda*, 69 CLJ 454 ; 1939 C 688.
6. *Amal Shankar Sen* v. *The Dacca Co-operative Housing Society*, 1945 C 350.
7. *See Assoomeah* v. *Chetty*, 61 IC 637.
8. *Deorao* v. *Dhondirao*, 103 IC 576 ; 1928 N 244.
9. *Kahan Chand* v. *Jawandi*, 79 IC 500 ; 1923 L 174 ; contra, *Ponnuswami Goundan* v. *Kalyanasundara Iyer*, 125 IC 231 ; 1930 M 770.
10. *Ponnuswami Goundan* v. *Kalyanasundara Iyer*, 125 IC 231 ; 1930 M 770 *confirmed in L. P.*, appeal reported as 57 M 662 ; 149 IC 257 ; 1934 M 365.

clearly requires proof of execution in addition to that of attestation and does not leave the former to be inferred from the latter. If it is shown that somebody else signed for the attesting witness at his request the attestation is properly proved.[1] In a suit on a mortgage, the execution of the mortgage-deed was denied by the defendant appellants. The mortgagor, the mortgagee and all the attesting witnesses had died before the institution of the suit. The only evidence which the mortgagee produced to prove due execution of the mortgage-deed was that of the son of the mortgagee, who stated :—

> "I was present at the time of the execution of the mortgage-deed, R.S. and R.A. attested the deed. The scribe was A, the petition-writer, Ram Singh (executant) signed in my presence and that of the attestating witnesses."

The witness also identified the signatures of the attesting witnesses, but he did not say that they had signed in his presence. Held, that all the requirements of Section 69 were made out and that the mortgage was proved.[2] In cases governed by Section 69 its not necessary to prove attestation of the deed by all the attesting witnesses; all that is needed is proof of the signature of the executant and of the handwriting of one attesting witness.

Proof of signature of the executant.—It is not necessary that the signature of the executant should be proved by direct evidence. In a case in the Allahabad High Court it has been held that mere presumptive proof of the execution of a document is not sufficient;[3] but this Allahabad case has not been approved by the Madras High Court,[4] and is, it is submitted, opposed to the trend of decisions in which it has been held that the executant's signature may be proved by circumstantial evidence.[5] Thus, an admission of execution made before a Sub-Registrar is sufficient proof of the signature of the executant.[6] The term "signature" includes a mark when the executant is unable to write.[7] But a mark by a person who is able to write his name is not a signature.[8] Where the signatures of the attesting witnesses are made by the scribe the requirements of Section 69 are sufficiently complied with if proof of execution of the documents by the executant is given and the signatures of the attesting witnesses are proved to have been made by the pen of the scribe.[9] The signature of the executant is said to have been proved when it is shown that the document was signed by somebody else at the request of the executant.[10]

Proof of the handwriting of the witness.—If a witness is literate and has signed, his handwriting may be proved by any mode of proof of handwriting recognized by the

1. *Ram Charan* v. *Bhairon*, 53 A 1 ; 131 IC 241 ; 1931 A 101.
2. *Bhairon Singh* v. *P. Ganga Narain*, 1935 A 527 ; 157 IC 693.
3. *Gobardhan Das* v. *Hori Lal*, 35 A 364 ; 19 IC 121.
4. *Ponnuswami Goundan* v. *Kalyanasundara Iyer*, 125 IC 231 ; 1930 M 770.
5. *See* notes to section 67 under the heading "mode of proof of signature or writing" and "presumptive proof of the execution of a document."
6. *Ajudhia Prasad* v. *Jagonnath Baksh Singh*, 38 IC 605.
7. Section 3 Cal. (52) of the General Clauses Act, X of 1897 ; *Govind Bhikaji Mahajan* v. *Bhanu Gopal Lad*, 411 B 384 ; *See* notes to section 67 under the heading "proof of signature includes proof of mark of thumb-impression."
8. *Sadananda Pal* v. *E.*, 32 C 550.
9. *Krishna Jiva Tewari* v. *Bisnnath*, 34 A 615 ; 16 IC 392 ; *See Ram Charan* v. *Bhairon*, 53 A 1 ; 131 IC 241 ; 1931 A 101.
10. *Ram Charan* v. *Bhairon*, 53 A 1 ; 131 IC 241 ; 1931 A 101.

Act.[1] The words of this section "it must be proved that the attestation of one attesting witness at least in his handwriting" seem to show that the attesting witness must be one who can sign his name. But it has been held that this is not necessary and that an illiterate marksman can validly attest a deed.[2] Where a document purports to be attested by an illiterate marksman, it must be proved that the document bears the mark of the alleged attesting witness.[3]

Objection to the sufficiency of proof under Section 69 cannot be entertained in appeal.—Where a Court finds that a document has been legally proved as required by Section 69, the finding should not be interfered with in appeal, especially when no objection was taken in the Court below to admissibility.[4]

Document executed in England.—Where a deed relating to immovable property is executed in England, and the document is such as is required by the English law to be attested but is not required by the Indian law to be attested, it may be proved in an Indian Court as if it were a document not required by law to be attested. The execution of such document may be established merely by proof of the executant's signature.[5] But if the document is such as is required by the Indian law also to be attested, it must, under Section 69, be proved both by proof of its attestation by a witness and of its execution by the executant.

70. Admission of execution by party to attested document.—The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested.

COMMENTARY

Where the execution of a document is admitted, no attesting witness need be called.[6]

Meaning of admission of execution.—The term "execution" as applied to documents has been explained in the notes to Section 67.[7] Ordinarily the term "execution" designates the whole operation including both the signature by the executant and the attestation thereof by the subscribing witnesses where the document is required by law to be attested.[8] As the Privy Council has held that Section 70 applies only to documents which have been properly attested[9] the expression "admission of execution" must be taken to have been used in Section 70 in a limited sense. The word "execution" in

1. *See* notes to section 67 under the heading "mode of proof of signature or writing". *See* also *Bhairon Singh* v. *P. Ganga Narain*, 1935 A 527 ; 157 IC 693 ; 1935 AWR 542.
2. *Pran Krishna Tewary* v. *Jadu Nath Trivedy*, 2 CWN 603.
3. *See* notes to Section 67 under the heading "proof of signature includes proof of mark or thumb-impression".
4. *Manchukonda Appadu* v. *Atchi Apalaswamy*, 32 IC 760.
5. *Toomey* v. *Bhupendra Nath Bose*, 7 P 520 ; 111 IC 57 ; 1928 P 304.
6. *Somasundaram Chettiar*, v *Mahibala Muthirulappa Pillai*, 147 IC 464 ; 1933 M 432.
7. *See* notes to Section 67 under the heading "meaning of execution of a document."
8. *Jaikarandas* v. *Protap Singh*, 1940 C 189 : 43 CWN 1034 ; *Balirm* v. *Kamalja*, 78 IC 330 ; 1924 N 367 ; *Arjun Chandra Bhadra* v. *Kailas Chandra Das*, 70 IC 532 ; 1923 C 149 ; 2 NLR 18 ; 2 NLR 10 ; *Sheikh Dawood Rowther* v. *Ramanathan Chettiar*, 1938 MWN 1203.
9. *Hira Bibi* v. *Ram Hari Lal*, 5 P 58 ; 52 IA 362 ; 89 IC 659 ; 1225 PC 203.

Section 70 means "that the party by affixing his signature or mark has signified his assent to the contents of the document, and if a party admits that he has done this then he admits execution. I do not think that the admission of execution can be taken to mean an admission not only of the signature or mark in token of assent by him, but also that all the legal formalities connected with the document have been complied with."[1] Therefore, if the question of attestation is put in issue, it is incumbent on the plaintiff to prove that the document has been duly attested before Section 70 can be relied on.[2] A person who alleges to have signed a document purporting to be mortgage-deed in the belief that it was a power-of-attorney cannot be said to admit the execution of the document.[3] A mere admission of the thumb impression or the signature on a blank sheet of paper does not mean an admission of execution.[4]

To dispense with the proof of execution, the admission must have been made for the purposes of the suit; merely evidentiary admissions do not dispense with the proof of execution.—As in English law,[5] so under the Act, an admission, in order to dispense with the proof of execution of a document by calling an attesting witness, must have been made for the purposes of the suit, *i.e.*, in the course of the trial of the suit, for example, in the pleadings, or in the examination of a party.[6] Therefore, an admission of an execution of a document required by law to be attested, made before a Sub-Registrar in registration proceedings,[7] or before an attesting witness,[8] or in some other transaction of the party[9] does not dispense with the proof of execution of the document. An admission of execution in the written statement, however is sufficient.[10] But it has been held in some cases that Section 70 is not limited in its application to admissions in pleadings and that admissions made before the institution of legal proceedings are also within the Section and do away with the necessity of proving the execution of the document by calling an attesting witness.[11] Thus an admission in a deed of further charge of the

1. *Jagannath Narsingdas Marwadi* v. *Ravji*, 47 B 137 ; 76 IC 73 ; 1923 B 90 . per Crump. J. ; See also *Hari Nath Ghose* v. *Nepal Chandra Rai Chowdhury*, ILR (1937) IC 507 ; *Narain Singh* v. *Deputy Commissioner of Partabgarh*, 55 IC 501 ; *Vadla Nagiah* v. *Valura Divakara Mudaliar*, 41 IC 585.
2. *Sheikh Dawood Rowther* v. *Ramnathan Chettiar*, 1938 MWN 1203 ; *Hari Krishna Panigrahi* v. *Jogneswari Ponda*, 69 CLJ 454 ; *See also Ebrahim Mondal* v. *Akshay Kumar*, 62 CLJ 25 ; *Hari Nath Ghose* v. *Nepal Chandra Rai Chowdhury*, ILR (1937) IC 507.
3. *Ayenati Shikdar* v. *Madhusudan Senapaty* 122 IC 554 ; 1929 C 441.
4. *Radhanath Swain* v. *Madhusudan Senapaty* 1956 Orissa 56.
5. *Whyman* v. *Garth*, 8 Ex. 803 ; Taylor, § 1049, Phipson, Ev. , 7th Ed., 503.
6. *Deorao* v. *Dhondirao*, 109 IC 576 ; 1928 N 244 ; *Banwari Prasad Singh* v. *Bigni Kuer*, 101 IC 277 ; 1927 P 131 ; *Sarja* v. *Murlidhar*, 42 IC 715 ; *Hori Lal* v. *Bhagwan Bakhsh*, 34 IC 281 ; *Rajmangal Misir* v. *Mathura Dubain*, 38 A 1 ; 30 IA 576 ; *Budh* v. *Sarwan*, 11 IC 689 ; *Abdul Karim* v. *Salimun*, 27 C 190 ; *Sheikh Dawood Rowther* v. *Ramanathan Chettiar*, 1938 MWN 1203.
7. *Thimmavva Dundapa Budihal* v. *Channava Apparya Konaesgeri*, 1948 B 322, *Amal Sankar Sen* v. *The Deccan Cooperative Housing Society*, 1945 C 350 ; *Sheikh Dawood Rowther* v. *Ramanthan Chettiar*, 46 L W 610 ; *Deorao* v. *Dhondirao*, 109 IC 576 ; 1928 N 244 ; *Pribhadas* v. *Sahibkhan*, 93 IC 660 ; 1926 S. 88 ; *Sarja* v. *Murlidhar*, 42 IC 715 ; *Rajmangal Misir* v. *Mathura Dubain*, 38 A 1 ; 30 576 ; *Budha* v. *Sarwan*, 11 IC 689 ; but see *Ajudhia Prasad* v. *Jagannath Bakhsh*, 38 IC 605 . As to proof of documents, not required by law to be attested, by the registration endorsement, See notes to Section 67 under the heading "Proof of a registered document."
8. *Abdul Karim* v. *Salimun*, 27 C 190.
9. *Sheikh Dawood Rawther* v. *Ramanathan Chettiar*, 46 LW 610.
10. *Ram Gulam Raut* v. *Harjan Mehra*, 42 IC 91.
11. *Gurcharan* v. *Ram Bharose Singh*, 1943 O 218 ; *Aung Rhi* v. *Ma Aung Krwa Pru*. 1 R 557 ; 77 IC 362 ; 1924 R 139 ; *Asharfi Lal* v. *Nanhi*. 64 IC 11 ; 1922 A 153 ; 44 A 127 (obiter') ; *Nageshwar Prasad* v. *Bachu Singh*, 53 IC 79, per Atkinson J., See also *Priyanath Chatterjee* v. *Bissessur Dass Harrish*, 1 CWN 222 (notes).

execution of the mortgage-deed has been held to be sufficient proof of the mortgage.[1]

The admission is binding only on the admitting executant and not on his co-executant or representative in interest.—Section 70 makes the admission sufficient proof only as against the particular party who admits execution. As against other parties to the suit who do not admit execution, the document must be proved by calling at least one attesting witness.[2] Though an admission of the execution of a document is sufficient proof as against the admitting executant, there is no authority for the proposition that the document is, for that reason, binding upon the other defendants who were not parties to it.[3] Therefore, an admission of execution is not binding on the legal representative of the admitting executant.[4] *e.g.*, on the admitting executant's transferee[5] or son.[6] An admission of the executant does not bind his successors-in-interest for the purpose of Section 70 in all cases. The admission is, however, binding on the executant's successor-in-interest when the latter finds his title to the property in suit upon a document which contains such admission.[7] An admission by the representative of a party to an attested document of its execution by the party cannot be treated as an admission of the party, and such an admission is clearly outside the plain terms of Section 70.[8]

Provisions of the law requiring certain instruments to be attested are not affected by Section 70 of the Evidence Act, which applies only to properly attested instruments.—Provisions of the law requiring for the validity of certain instruments their attestation by a certain number of witnesses[9] are rules of law and not mere rules of evidence.[10] These provisions are not, therefore, affected or controlled by Section 70 of the Evidence Act,[11] which, as has been held by the Privy Council, applies only to documents which are properly attested.[12] Therefore, if a document, on the face of it, does not purport to have been properly attested,[13] or if the evidence in the case discloses a document not to have been properly attested,[14] the document will be invalid, notwithstanding an admission of its execution by the executant. Where a document is admitted

---

1. *Gurchran* v. *Ram Bharose Singh*, 1943 O 218.
2. *Mst. Hava* v. *Lokumal*, 1944 S 61 ; *Ebrahim Mondal* v. *Akshay Konar*, (1935) 62 CLJ 25 ; 40 CWN 151 ; *Satish* Chandra *Mitra* v. *Jogendra Nath Mahalanobis*, 44 C 345 ; 34 IC 862.
3. *Mst. Hava* v. *Lakumal*, 1944 S 61 ; *Bulakidas Hardas Malhesri* v. *Chotu Paikan* 1942 N 84 ; *Arjun Sahu* v. *Kelai Rath*, 2 P 317 ; 74 IC 150 ; 1923 P 436 ; *Nabaran Chandra Sen* v. *Nagendra Chandra Sen*, 44 IC 984 : 22 CWN 444 ; *Satish Chandra Mitra* v. *Jogendra Nath Mahalanobis*, 44 C 345 ; 34 IC 862.
4. *Benoy Bhusan Roy* v. *Dhirendra Nath De*, 74 IC 178 ; 1924 C 415.
5. *Arjun Sahu* v. *Kelai Rath*, 2 P 317 ; 74 IC 150 ; 1923 P 436.
6. *Nageshwar Prasad* v. *Bachu Singh*, 53 IC 79.
7. *Chandra Kali* v. *Bhabhuti Prasad*, 1943 O 416.
8. *Benoy Bhusan Roy* v. *Dhirendra Nath De*. 74 IC 178 ; 1924 C 415.
9. *See* Sections 59 and 123 of the Transfer of Property Act, and section 63 of the Indian Succession Act.
10. *Banwari Prasad Singh* v. *Bigni Kuer*, 101 IC 277 ; 1927 P 131 ; *Paban Khan* v. *Badal Sardar*, 66 IC 906 ; 34 CLJ 498 ; *See observation of Das J., in Hira Bibi* v. *Ramdhan Lal*, 62 IC 540 ; 1922 P 70, which seem to have been approved by the Privy Council in *Hira Bibi* v. *Ram Hari Lal*, 5 P 58 ; 52 IA 362 ; 89 IC 659 ; 1925 PC 203.
11. *Arjun Chandra Bhadra* v. *Kailas Chandra Das*, 70 IC 532 ; 1923 C 149, per Suhrawardy, J., See also *Benoy Bhusan Roy* v. *Dhirendra Nath De*, 74 IC 178 ; 1924 C 415.
12. *Hira Bibi* v. *Ram Hari Lal*, 5 P 58 ; 52 IA 362 ; 89 IC 659 ; 1925 PC 203.
13. *See Jagannath Narsingdas Marwadi* v. *Ravji*, 47 B 137 ; 76 IC 73 ; ; 1923 B 90.
14. *Hira Bibi* v. *Ram Hari Lal*, 5 P 58 ; 52 IA 362 ; 89 IC 659 ; 1925 PC 203 ; *Sheikh Kochu* v. *Mohammed Ali Mamud*, 105 IC 28 ; 1927 C 926 ; *Mg. Po Gyi* v. *Mg. Min Din*, 5 R 561 ; 104 IC 386 ; 1927 R 233 ; *Jagannath Narsingdas Marwadi*, v. *Rajiv*, 47 B 137 : 76 IC 73 : 1923 B 90 : Baijnath Singh v. Brij Kuer, 2 P 52 : 68 IC 383 : 1922 P 514 : *Dalichand Shivram Marwadi* v. *Lotu Sajharam Pardhi*, 44 B 405 ; 55 IC 616 ; *Ganga Pershad Singh* v. *Ishri Pershad Singh*,. 45 C 748 ; 45 IA 94 ; 45 IC 1 ; 1918 PC 3.

at the trial without objection but the appellate Court finds that it was not properly attested, the document will not be accepted as valid proof of the transaction embodied in it.[1] In this view of the matter, the cases referred to below[2] must be taken to have been wrongly decided, as they are inconsistent with the rule laid down by the Privy Council in *Mst. Hira Bibi* v. *Ram Hari Lal*.[3] In *Aung Rhi* v. *Ma Aung Krwa Pru*[4] it had been proved that the deed was properly attested; if it had not been shown that the deed was properly attested, then on the authority of the Privy Council decision in *Mst. Hira Bibi* v. *Ram Hari Lal*[5] it would have been invalid, notwithstanding an admission of its execution.

Admission of the execution of a document does not dispense with the proof of its attestation, if its attestation is denied.—In *Jogendra Nath Mukhopadhya* v. *Nitai Churn Bundopadhya*,[6] it has been held that the only effect of Section 70 of the Evidence Act is to make the admission of the execution of a document sufficient proof of its execution and that the admission does not dispense with the necessity of proof of attestation of the document if it is required by law to be attested.[7] This decision has been adversely commented upon by Messrs. Woodroffe and Amir Ali in their Commentary on the evidence Act,[8] and the former actually differed from this decision in a subsequent case which came up before him as Judge of High Court of Calcutta.[9] Referring to *Jogendra Nath's case*,[10] Mr. Justice Woodroffe observed as follows: "That decision is open to this construction that even when the executant admits execution, his admission is proof of execution, or signing only and does not dispense with proof of attestation. If this be the meaning of that judgment, I am unable to agree with it, as I think that the admission of the executant has the effect of dispensing with the proof of attestation as against him."[11] This dictum of Woodroffe, J., in the Calcutta case last cited has been accepted as correct and acted upon in several cases.[12] It is however, submitted that the proposition is not correct in the broad and unqualified form in which it is stated. Proof of the execution of an attested document by the admission of the executant, with which Section 70 of the Evidence Act deals, in an entirely different thing from proof of its attestation in accordance with the provisions of the enactments requiring its attestation.[13] Attestation of a document is an essential legal formality

1. *Baijnath Singh* v. *Brijaraj Kuer*, 2 P 52 ; 68 IC 383 ; 1922 P 514.
2. *Ram Lal Singh* v. *Septi*, 94 IC 558 ; 1926 P 295 ; *Hira Bibi* v. *Ramdhan Lal*, 62 IC 540 ; 1922 P 70 ; *Ashrafi Lal* v. *Nanhi*, 44 A 127 ; 64 IC 11 ; 1922 A 153 (obiter).
3. *Hira Bibi* v. *Ram Hari Lal*, 5 P 58 : 52 IA 362 : 89 IC 659 : 1925 PC 203.
4. *Aung Rhi* v. *Ma Aung Krwa Pru*, 1 R 557 : 77 IC 362 : 1924 R 139.
5. *Hira Bibi* v. *Ram Hari Lal*, 5 P 58 : 52 IA 362 : 89 IC 659 : 1925 PC 203.
6. *Jogendra Nath Mukhopadhya* v. *Nitai Churn Bundopadhya*, 7 CWN 384.
7. See also *Narain Singh* v. *Deputy Commissioner of Partabgarh*, 55 IC 501.
8. *See* Woodroffe, Ev., 9th Ed., 558.
9. *Satish Chandra Mitra* v. *Jogendra Nath Mahalanobis* ,44 C 345 : 34 IC 862.
10. *Jogendra Nath Mukhopadhya* v. *Nitai Churn Bundopadhya*, 7 CWN 384.
11. *Satish Chandra Mitra* v. *Jogendra Nath Mahalanobis*, 44 C 345 : 34 IC 862.
12. *Gurcharan* v. *Ram Bharose Singh*, 1943 O 218 ; *Somasundaram Chettiar* v. *Mahibala Muthirulappa Pillai*, 147 IC 464 : 1933 M 432 ; *Ram Lal Singh* v. *Septi*, 94 IC 558 : 1926 P 295 : *Aung Rhi* v. *Ma Aung Krwa Pru*, 1 R 557 : 77 IC 362 : 1924 R 139 ; *Jagannath Narsingdas Marwadi* v. *Ravji*, 47 B 137 : 76 IC 73 : 1923 B 90 ; *Asharafi Lal* v. *Nanhi*, 44 A 127 : 64 IC 11 : 1922 A 153 ; *Nageshwar Prasad* v. *Bachu Singh*, 53 IC 79 : *Dhanna Lal* v. *Shambhu*, 47 IC 9 ; *Nibaran Chandra Sen* v. *Nagendra Chandra Sen*, 44 IC 984 : 22 CWN 444 : *Hira Bibi* v. *Ramdhan Lal* 62 IC 540 : 1922 P 70 , reversed by the Privy Council in *Hira Bibi* v. *Ram Hari Lal*, 5 P. 58 ; 52 IA 362 : 89 IC 659 : 1925 PC 203.
13. See *Paban Khan* v. *Badal Sardar*, 66 IC 906 : 34 CLJ 498.

which affects its validity; the document has no operative effect unless it is attested in the manner prescribed by law for its attestation.[1] A party may admit the execution of a document and deny that it was properly attested,[2] and an admission of execution be taken as containing in it an admission of execution cannot necessarily be taken as containing in it an admission of proper attestation.[3] The question whether an admission of the execution of a document is sufficient to dispense with the proof of its attestation may present itself in the following sets of circumstances:

(i) The party against whom an attested document is sought to be used may admit its execution but deny that it was properly attested. In such a case, though the party relying on the document is, under Section 70 of the Evidence Act, relieved of the duty of proving the execution of the document by calling an attesting witness, yet there can be no doubt that he is not relieved of the duty of showing that the document was properly attested.[4] In such a case, it is, however, not necessary as a matter of law that the attestation should be proved by calling an attesting witness, though such course would be preferable.[5] Attestation of a document, i.e., the fact of the attesting witness putting his name on the document in the presence of the executant on seeing the executant sign the document, or on receiving from the executant a personal acknowledgement of signature,[6] is a physical fact and may be proved by the evidence of any person who has seen it, provided such evidence is believed by the Court.

(ii) The party against whom a document is sought to be used may admit the execution as well as the attestation of the document. In such a case the party relying on the document is, under Section 70 of the Evidence, Act, relieved of the duty of proving the execution of the document, as also of the duty of proving its attestation.[7] But proof of attestation is dispensed with in the circumstances mentioned, not by reason of Section 70, but by reason of Section 58. If the evidence disclose the fact that the document was not properly attested, an admission will not render valid what is declared by the law to be invalid.[8]

---

1. See *Banwari Prasad Singh* v. *Bigni Kuer*, 101 IC 277 : 1927 P 131 : *Baijnath Singh* v. *Brijraj Kuer* 2 P 52 : 68 IC 383 : 1922 P 514 ; *Paban Khan* v. *Badal Sardar*, 66 IC 906 : 34 CLJ 498 : *Arjun Chandra Bhadra* v. *Kailash Chandra Das*, 70 IC 532 : 1923 C 149 ; observations of Das, J. in *Hira Bibi* v. *Ramdhan Lal*, 62 IC 540 : 1922 P 70, which seem to have been approved by the Privy Council in *Hira Bibi* v. *Ram Hari Lal*, 5 P 58 : 52 IA 362 : 89 IC 659 : 1925 PC 203.
2. This was the position in *Mg Po. Gyi* v. *Mg. Min Din*, 5 R 561 : 104 IC 386 : 1927 R 233 ; *Benoy Bhusan Roy* v. *Dhirendra Nath De*, 74 IC 178 : 1924 C 415 ; *Arjun Chandra Bhadra* v. *Kailash Chandra Das*, 70 IC 532 : 1923 C 149 : *Paban Khan* v. *Badal Sardar*, 66 IC 906 : 34 CLJ 498.
3. *See* the judgment of Crump, J., in *Jagannath Narsingdas Marwadi* v. *Ravji*, 47 B 137 : 76 IC 73 : 1923 B 90 ; See also *Bindeshari Prasad* v. *Panchayati Akhara*, 1936 A 169.
4. *Hari Nath Ghose* v. *Nepal Chandra Rai Chowdhury*, ILR (1937) IC 507 ; *Bindeshari Prasad* v. *Panchayati Akhara*, *1936 A 169 ; *Sheikh Dawood Rowther* v. *Ramanathan Chettiar*, 46 LW 610 ; *Lachman Singh* v. *Surendra Bahadur Singh*, 54 A 1051 : 139 IC 1 : 1932 A 527 (FB) ; *Mg. Po Gyi* v. *Mg. Min Din*, 5 R 561 : 104 IC 386 : 1927 R 233 : *Benoy Bhusan Roy* v. *Dhirendra Nath De*, 74 IC 178 : 1924 C 415 ; *Arjun Chandra Bhadra* v. *Kailas Chandra Das*, 70 IC 532 : 1923 C 149 ; *Paban Khan* v. *Badal Sardar*, v 66 IC 906 : 34 CLJ 444 ; *Sarja* v. *Murlidhar*, 42 IC 715 ; *Vadla Nagiah* v. *Valuru Divakara Mudaliar*, 41 IC 585.
5. See *Sheikh Dawood Rowther* v. *Ramanathan Chettiar* 46 LW 610 ; but see *Hari Nath Ghose* v. *Nepal Chandra Rai Chowdhury*, ILR (1937) IC 507 ; *Bindeshari Prasad* v. *Panchayati Akhara*, 1936 A 169.
6. *See* the definition of "attestation" in Section 2 of the Act XXVII of 1926.
7. See *Arjun Chandra Bhadra* v *Kailash Chandra Das* , 70 IC 532 : 1923 C 149. .
8. See *Arjun Sahu* v. *Kelai Rath*, 2 P 317 : 74 IC 150 : 1923 P 436 ; *Baijnath Singh* v. *Brijraj Kuer*, 2 P 52 : 68 IC 383 : 1922 P 514.

(iii) The party against whom a document is sought to be used may admit its execution but neither admit nor deny its attestation. In such a case the party who puts forward a document required by law to be attested will be taken to assert its proper attestation,[1] and if the party against whom the document is sought to be used does not specifically allege its invalidity on the ground of its not having been properly attested, he will be taken to have admitted its attestation.[2] In this case the result will be the same as in No.(ii) above, *i.e.*, the Court, acting on the maxim *ommia praesumuntur rite esse acta*,[3] will not put the party relying on the document to proof of its attestation. But if, in the case supposed, the party does not rely solely on the admission and adduces evidence which shows that the document was not properly attested, the document will be rejected,[4] if, however, there be no proof one way or the other about attestation and there be nothing on the face of the document to show that it has not been properly attested, the admission of execution would be sufficient proof of its execution and attestation.[5]

(iv) The Court is not bound by the admission of a party, and may require admitted facts to be proved otherwise than by such admission.[6] Legislative provisions relating to the attestation of documents are enacted on high grounds of public policy and the Court will not allow such provisions to be defeated by the admissions of the parties.[7] Rules Nos.(i) and (ii) above are, therefore, subject to this proviso that if the document, the execution and attestation of which has been admitted by a party, appears on the face of it not to have been properly attested,[8] or if the evidence in the case discloses such document not to have been properly attested,[9] the Court will reject the document notwithstanding the admission of its execution and attestation. This result clearly follows from the Privy Council decision in *Mst.Hirabai* v. *Ram Hari Lal*,[10] and if it was ever held otherwise in India, the Privy Council decision aforesaid must be taken to have overruled such view. In all the four cases mentioned above, it is assumed that the document has been referred to in the pleadings of the parties. But this is not always the case. It often happens that a document required by law to be

---

1. *Jagannath Narsingdas Marwadi* v. *Ravji*, 47 B 137 : 76 IC 73 : 1923 B 90.
2. *Komalsingh Kuwarsingh* v. *Krishnabai*, 48 Bom LR 83 : 1946 B 304 : *Bam Jassa Kunwar* v. *Sahu Narain Das*, 1946 A 178 : *Jagarnath Narsingdas Marwadi* v. *Ravji*, 47 B 137 : 76 IC 73 : 1923 B 90 ; *Dhanna Lal* v. *Shambhu*, 47 IC 9 ; *Ram Ghulam Raut* v. *Harjan Mehra*, 42 IC 91 ; *See* O. 8, rr. 5 and 2 ; O. 6 r.8, C.P. Code ; Section 58, Evidence Act.
3. *Dhanna Lal* v. *Shambhu*, 47 IC 9,.
4. *Gurcharan* v. *Ram Bharose Singh*, 1943 C 218 ; *Sheik Kachu* v. *Mohammad Ali Mamud*, 105 IC 28 : 1927 C 926.
5. *Gurcharan* v. *Ram Bharose Singh*, 1943 O 218 ; *Raja Ram* v. *Rameshwar Bakhsh Singh*, 1936 O 270.
6. Section 58, Evidence Act, O 8, r. 5, C.P.Code.
7. *Kotamreddi Seetamma* v. *Vannelkanti Krishnaswamy Row*, 35 IC 18.
8. *Jagannath Narisingdas Marwadi* v. *Ravji*, 47 B 137 : 76 IC 73 : 1923 B 90, *per* Crump, J.
9. *Sheik Kachu* v. *Mohammad Ali Mamud*, 105 IC 28 : 1927 C 926 ; *Mg. Po Gyi* v. *Mg. Min Din*, 5 R 561 : 104 IC 386 : 1927 R 233 : *Jagannath Narsingdas Marwadi* v. *Ravji*, 47 B 137 : 76 IC 73 : 1923 B 90, *per* Crump, J. *Dalichand Shivram Marwadi* v. *Lotu Sakharam Pardhi*,44 B 405 : 55 IC 616 : *Dhanna Lal* v. *Shambu*, 47 IC 9.
10. *Hira Bibi* v. *Ram Hari Lal*, 5 P 58 : 52 IA 362 : 89 IC 659 : 1925 PC 203 ; See also *Raja Ram* v. *Rameshwar Bakhsh Singh*, 1936 O 270 : *Ganga Pershad Singh* v. *Ishri Pershad Singh*, 45 C 78 : 45 IA 94 : 45 IC 1 : 1918 PC 3 ; *Sheik Kachu* v. *Mohammad Ali Mamud*, 105 IC 28 : 1927 C 926.

attested is produced for the first time at the evidence stage of the case. In such a case it is clear that the document cannot be made the subject of a denial or admission in the pleadings, and, therefore, the party relying on it will have to prove its execution by calling an attesting witness under Section 68 as well as its attestation.

71. Proof when attesting witness denies the execution.—If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by the other evidence.

COMMENTARY

Execution of a document may be proved by other evidence, if the attesting witness called denies or does not recollect its execution.—This section is a sort of safeguard to the mandatory provision of Section 68 of the Act, where it is not possible to prove the execution by calling attesting witnesses, though alive.[1] Section 71 has no application where the attesting witness is summoned but does not appear.[2] If any of the attesting witnesses of a document required by law to be attested is alive, subject to the process of the Court, and capable of giving evidence, he must be called to prove the execution of the document.[3] Where the witness has no recollection of the execution, but from seeing his signature has no doubt that it took place, this is sufficient proof.[4] The testimony of an attesting witness is not conclusive and the fate of a document is not at the mercy of the attesting witnesses.[5] The mere fact that the attesting witnesses to a document have repudiated their signatures does not invalidate the document, if it can be proved by evidence of a reliable character that they have given false testimony. The principle is well settled that when the evidence of the attesting witnesses is vague doubtful or even conflicting upon some material point, the Court may take into consideration the circumstances of the case and judge from them collectively whether the requirements of the Statute were complied with, in other words, the Court may, on consideration of the other evidence and the circumstances of the case, come to the conclusion that their recollection is at fault, that their evidence is of a suspicious character, or that they are wilfully misleading the court. When that is the case, the Court may disregard the testimony of the attesting witnesses and pronounce in favour of the document.[6] The evidence of an attesting witness who, while admitting his signature, denies that he signed it in the manner required by law can always be rebutted by other evidence showing that the document was properly witnessed and attested.[7] But it

1. *Vishnu Ramakrishna* v. *Nathu Vithal*, 1949 B 266.
2. *Harikrishna Panigrahi* v. *Jogneswar Panda*, 69 CLJ 454 : 1939 C 688.
3. Section 68.
4. Phipson, Ev., 7th Ed., 502 ; see also *Benoy Bhusan Roy* v *Dhirendra Nath De*, 74 IC 178 : 1924 C 415 : *Jogendra Nath* v *Nitai Churun Bundopadhya*, 7 CWN 384.
5. *Jaikarandas* v. *Protap Singh*, 1940 C 189 : *Maharaj Lal Bihari* v. *Anjumanunnisa*, 48 IC 538.
6. *Sarsuit Prasad* v. *Lala Baijnath Singh*, 1939 O 233 ; *Sashimukhi Dasi* v. *Manmohini Dasi*, 67 IC 87 : *Maharaj Lal Bihari* v. *Anjumanunnisa*, 48 IC 538 : *Brahmadat Tewari* v. *Chaudan Bibi*, 34 IC 686 : 20 CWN 192 : *Nubo Kishore Dass* v. *Joy Doorga Dossee*, 22 WR 189 · but see *Kunwar Surendra Bahadur Singh* v. *Thakur Behari Singh*, 1939 PC 117, where the Privy Council doubted the applicability of this section to a case where the evidence of the attesting witness is held to be unreliable.
7. *Basdeo Upadhya* v. *Raj Behari Singh*, 104 IC 344 : 1927 O 535 : *Thanneru Gangayya* v. *Bommadevara Subbamma*, 69 IC 284 : *Sashimukhl Dasi* v. *Monmohini Dasi*, 67 IC 87.

has been held by the Allahabad High Court that if the only attesting witness called to give evidence states in his evidence that in fact he did not sign after seeing the executant sign or after receiving a personal acknowledgment of execution from the executant, other evidence of the execution of the document is inadmissible.[1] The fact that the witness cannot remember where the executant signed the bond and which of the attesting witnesses signed first is no reason for disbelieving his evidence which is otherwise formally sufficient to prove execution and attestation.[2] The provisions of Section 71 are at once attracted when any one of the attesting witnesses has been called and examined and has denied execution, or stated that he does not recollect the execution of the document: and it is not necessary before restoring to other evidence to call all the attesting witnesses.[3] However, it has been held by a Division Bench of the High Court of Bombay that Section 71 has no application when one attesting witness has failed to prove execution, and the other attesting witnesses are available who can prove the execution if called.[4] Section 71 becomes applicable if the attesting witness, when called and examined, stated that the executant signed a blank paper.[5] When Section 71 becomes applicable, any other evidence to prove the execution of the document may be given, e.g., the writer of the document[6] or any other person may be examined, or any other evidence direct or circumstantial given to prove the execution.[7] Thus, an admission of execution.[8] Where the attesting witness gives one story as to attestation and execution in his examination-in-chief and a different one in cross-examination, the Court may accept his story as given in the examination-in-chief.[9] Where it is proved by the evidence of attesting witnesses that the deed was not properly attested, evidence of other witnesses who say that the deed was properly attested should not be considered sufficient.[10] The word "execution" in Section 71 not only means signing by the executant but it means and includes attestation as well. Therefore, if an attesting witness called by the plaintiff turns hostile, the plaintiff is entitled to prove attestation of the instrument by other evidence.[11]

When the execution of a document is sought to be proved under Section 71, proof of attestation is not necessary.—Where an attesting witness of a document denies its execution, all that is necessary to be proved by other evidence is the execu-

1. *Banwari Lal* v. *Gopi Nath*, 131 IC 557 : 1931 A 411 : but see *Murari Lal* v. *Muhammad Sami-ud-Din Ahmad Khan*, 1937 A 273 : 168 IC 938.
2. *Biswanath Singh* v. *Kayastha Trading & Banking Corporation Ltd.*, 8 P 450 : 119 IC 405 : 1929 P 422.
3. *Manki Kuar* v. *Hansraj Singh*, 173 IC 983 ; *Ayenati Shikdar* v. *Mohammad Esmail*, 122 IC 554 : 1929 C 441, per Jack J. ; *Hason Ali* v. *Gurudaas Kapali*, 116 IC 726 ; 1929 C 188 ; *Lakshman Punju Shet* v. *Krishnaji Maharu Bhoi*, 105 IC 769 : 1927 B 655 ; *Basedeo Upadhya* v. *Raj Behari Singh*, 104 IC 344 : 1927 O 535 : *Karimullah* v. *Gudar Koeri*, 82 IC 306 : 1925 A 56 : *Baliram* v. *Kamalja*, 78 IC 330 : 1924 N 367 ; *Lachchmi Narayan* v. *Zahirul Said Alvi* 76 IC 722 : 1923 N 322 : *Paleshwari Prasad* v. *Shankar Dayal*, 74 IC 969 : 1924 A 217 : *Badri Prashad* v. *Gumbhir Kunwar*, 26 IC 500.
4. *Vishnu Ramkrishna* v. *Nathu Vithal*, 1949 B 266 : 51 BLR 245.
5. *Dinabandhu Patra* v. *Sanatan Dandpat*, 48 IC 624.
6. *Lakshman Punju Shet* v. *Krishnaji Maharu Bhoi*, 105 IC 769 : 1927 B 655 ; *Dhirajuddin Bepari* v. *Baharulla Sheikh*, 90 IC 680 : 1926 C 318 ; *Paleshwari Prasad* v. *Shankar Dayal*, 74 IC 969 : 1924 A 217.
7. See *Manki Kuar* v *Hansraj Singh*, 173 IC 983 : *Saleha Bibi* v. *Oudh Commercial Bank Ltd.*, 36 IC 673 ; *Jaikaran Das* v. *Protap Singh*, 43 CWN 1084 : ILR (1939) 2 C 479 : 1940 C 198. For modes of proof of handwritting, see notes to section 67.
8. See *Sarja* v. *Murlidhar*, 42 IC 715.
9. *Sundra Bai* v. *Jagannath*, 69 IC 284.
10. See *Mahadeo Prasad* v. *Gajraj Singh*, 34 IC 397 .
11. *Jaikaran Das* v. *Protap Singh*, 43 CWN 1084 : 1940 C 189 : ILR (1939) 2 C 479.

tion of the document; it is not further necessary to prove execution before the attesting witnesses.[1] It is, however, submitted that if the attestation of a document has been specifically denied by the party against whom the document is sought to be used, it will be necessary to prove that the document was attested according to law, even if the mode of proof adopted to prove the execution of the document be one that is given in Section 71. *See* notes to Section 68 under the heading "though more than one attesting witness need not be called, the document must be proved to have been properly attested by two witnesses.

72. Proof of document not required by law to be attested.—An attested document not required by law to be attested may be proved as if it was unattested.

73. Comparison of signature, writing or seal with others admitted or proved.—In order to ascertain whether a signature, writing, or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing, or seal has not been produced or proved for any other purpose.

The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

[2][This section applies also, with any necessary modifications, to finger-impressions.]

[3][**73-A. Proof as to verification of digital signature.**—In order to ascertain whether a digital signature is that of the person by whom it purports to have been affixed, the Court may direct—

(a) that person or the Controller or the Certifying Authority to produce the Digital Signature Certificate;

(b) any other person to apply the public key listed in the Digital Signature Certificate and verify the digital signature purported to have been affixed by that person.

Explanation.—For the purpose of this section, "Controller" means the Controller appointed under sub-section (1) of Section 17 of the Information Technology Act, 2000.]

COMMENTARY

Section 73 lays down an additional mode of proving handwriting.—This section lays down another mode of proving handwriting,[4] finger impressions and seals. Under this section, in order to ascertain whether a signature, writing, finger impression

---

1. *Paleshwari Prasad* v. *Shankar Dayal*, 74 IC 969 : 1924 A 217; *Lalta Prasad* v. *Darshan Singh*, 74 IC 839 : 1924 A 149; *Lakshman Sahu* v. *Gokul Maharana*, 1 P 154 : 70 IC 298 : 1922 P 415; *Narain Das* v. *Dilawar*, 41 A 250 : 52 IC 830.

2. Inserted by the Indian Evidence Act, 1899 (5 of 1899)

3. Section 73-A inserted by Information Technology Act, 2000 (Act 21 of 2000), S. 92 and Sch. II (w.e.f. 17-10-2000).

4. *Khijiruddin* v. *E.*, 53 C 372 : 92 IC 442 : 1926 C 139 : 27 Cr LJ 266; *Balak Ram* v. *Muhammad Said*, 77 IC 872 : 1923 L 695; *Sarojini Dasi* v. *Haridas Ghosh*, 49 C 235 : 66 IC 774 : 1922 C 12; *Pasupulletti Venkamma* v. *Shaik Hamid*, 14 IC 741. For other modes of proving handwriting, *see* notes to Section 67 under the heading "mode of proof of signature or writing".

or seal is that of the person by whom it purports, or is alleged to have been written or made, it may be compared by the Court with another signature, writing, finger impression or seal which is admitted or proved to have been written or made by that person.[1] A specimen of the signature, written or finger impression with which the disputed signature, writing or finger impression has to be compared may, under the second paragraph of the section, be taken under the direction of the Court.

The admitted or proved writing, signature, etc., may be compared with the writing signature, etc., which either purports, or is alleged to have been written or made by a particular person.—It was remarked by Jenkins, C.J., in *Brindra Kumar* v. *E.*,[2] that this section requires that the disputed writing must "purport" to have been written by the person to whom it is attributed, that is to say, the writing itself must state or indicate that it was written by that person.[3] According to this interpretation of the section, it is not competent to a Court under the first paragraph of the section, to compare with an admitted or proved writing another writing which does not "purport" to have been written by a particular person, but is alleged to have been written by that person; and a disputed writing which does not "purport", but is alleged, to be in a person's handwriting cannot be compared with an admitted or proved writing, but only with the words or figures which, under the second paragraph of the section, the alleged writer is made to write in Court. This narrow interpretation of the section though followed in subsequent Calcutta cases[4] and by the Oudh Court in another case,[5] has not found favour with the Bombay and the Madras High Courts where it has, in substance, been held that the word "purports", in the first paragraph of the section is equivalent to "is alleged" and that a Court is competent to compare with an admitted or proved writing not only a writing which "purports" to be in the alleged writer's handwriting but also a writing which is alleged to be in his handwriting without expressly purporting to be so.[6]

Disputed writing can be compared only with an admitted or proved writing.—The section does not sanction the comparison of any two documents, but requires that the writing with which the disputed writing is to be compared must be admitted or proved to be the writing of the alleged writer of the disputed writing.[7] Therefore, the disputed writing or impression cannot be compared with a writing which is not before the Court, or the authenticity of which is itself in dispute[8] or *sub judice*,[9] or as to which there is no evidence to show that it is that of the alleged executant.[10] No one in a criminal trial can admit anything on behalf of an accused person except the accused himself. If signatures of an accused are to be taken as admitted for the purpose of comparison, they must be admitted by the accused himself.[11]

Comparison may be made by the Judge, the jury, or an expert.—The first paragraph of the section does not specifically state by whom the comparison may be made,

---

1. *Ganpatrao Khanderao Vijaykar* v. *Vasantrao Ganpatrao Vijaykar*, 141 IC 747 : 1932 B 588, *Gondu* v. *Tulsiram*, 120 IC 335 : 1930 N 27.
2. *Barindra Kumar Ghose* v. *E.*, 37 C 467 : 7 IC 359 : 11 Cr LJ 453.
3. *Ibid*
4. *Sarojini Dasi* v. *Haridas Ghosh*, 49 C 235 : 66 IC 774 : 1922 C 12; *Pulin Behary Das* v. *E.*, 16 IC 257 : 13 Cr LJ 609.
5. *Latafat Hussain* v. *Onkar Mal*, 152 IC 1042 : 1935 O 41.
6. *E.* v. *Ganpat Balkrishna Rode*, 15 IC 649 : 13 Cr LJ 505 (Bombay), *Veeraghava Aiyangar* v. *Souri Aiyangar*, 48 IC 68 (Madras).
7. *Barindra Kumar Ghose* v. *E.*, 37 IC 467 : 7 IC 359 : 11 Cr LJ 453 : followed in *Sarojini Dasi* v. *Haridas Ghosh*, 49 C 235 : 66 IC 774 : 1922 C 12 and *Latafat Hussain* v *Onkar Mal*, 152 IC 1042 : 1935 O 41; *Vembu Amal* v. *Esakkia Pillai*, 1949 M 419 : (1949) 1 MLJ 71 : 1949 MWN 47.
8. *Gurumutti Nayudu* v. *Pappa Nayadu*, 1 MHCR 164.
9. *See Puran Chunder Chatterjee* v. *Grish Chunder Chatterjee*, 9 WR 450.
10. *Gaffar Baksh Khan* v. *E.*, 101 IC 187 : 1927 P 408 : 28 Cr LJ 411.
11. *Taru Bala Roy* v. *State*, 56 CWN 738.

though the second paragraph of the section dealing with a related subject expressly provides by way of contrast that in that particular connection the Court may make the comparison.[1] The comparison may be made by the Court.[2] the jury,[3] or a competent witness called for the purpose.[4] A witness may be competent to make the comparison either because he is an expert or because he is acquainted with the handwriting.[5] In all cases of comparison of handwriting, the witnesses, the jury and the Court may respectively exercise their judgment on the resemblance of the writings produced.[6] But comparison should not be made by the Sessions Judge out of Court, after the conclusion of the arguments, and without the assistance of the assessors and such guidance as might be derived from the arguments of Council and the evidence of experts[7] so as to ascertain whether handwriting is of same persons.[7a]

Comparison of handwriting is a dangerous mode of proof when the Court is not guided by the evidence of an expert.—Comparison of signatures is a mode of ascertaining the truth which ought to be used with very great care and caution.[8] In an English case, Mr. Justice Blackburn refused to allow a comparison to be made without the help of experts.[9] But though this section does not expressly prohibit comparison of signatures in the absence of expert evidence, such mode of proof of handwriting has been regarded as hazardous and inconclusive, and the practice of a Judge, not conversant with the subject, himself acting as an expert in handwriting has been deprecated in a series of decisions.[10] The Privy Council has observed that it is not always safe to stake a decision on the correct determination of the genuineness of a signature by mere comparison with admitted signatures, especially without the aid in evidence of microscopic enlargements or any expert evidence.[11] "A comparison of handwriting is at all times as a mode of proof hazardous and inconclusive, and especially when it is made by one not conversant

1. *Latafat Husain* v. *Onkar Mal*, 152 IC 1042 : 1935 O 41 : *Sarojini Dasi* v. *Haridas Ghosh*, 49 C 235 : 66 IC 774 : 1922 C 12 ; *Barindra Kumar Ghose* v. *E.*, 37 C 467 : 7 IC 359 : 11 Cr LJ 453.
2. *Latafat Husain* v. *Onkar Mal*, 52 IC 1042 : 1935 O 41 ; *Khijiruddin* v. *E.*, 53 C 372 : 92 IC 442 : 1926 C 139 : 127 Cr. LJ 266 : *Gupta* v. *E.*, 1 R 290 : 76 IC 425 : 1924 R 17 : 25 Cr. LJ 185 ; *Sarojini Dasi* v. *Haridas Ghose*, 49 C 235 : 66 IC 774 : 1922 C 12 : see AIR 1989 Gau. 42.
3. *Khijiruddin* v. *E.*, 53 C 372 : 92 IC 442 : 1926 C 139 : 27 Cr. LJ 266.
4. *Khijiruddin* v. *E.*, 53 C 372 : 92 IC 442 : 1926 C 139 : 27 Cr. LJ 266 ; *State (Delhi Adm.)* v. *Pali Ram*, 1979 SC 14 (Para 24).
5. Sections 45 and 47 ; Taylor, § 1870 ; *Cobbet* v. *Kilminster*, 4 F & F 490 ; Phipson, Ev., 7th Ed., 105 ; *State (Delhi Adm.)* v. *Pali Ram*, 1979 SC 14 (Para 24).
6. *Khijiruddin* v. *E.*, 53 C 372 : 92 IC 442 : 1926 C 139 : 27 Cr. LJ 266 ; Taylor, § 1871.
7. *Barindra Kumar Ghose* v. *E.*, 37 C 467 : 7 IC 359 : 11 Cr. LJ 453 ; see also *Suresh Chandra Sanyal* v. *E.*, 39 C 606 : 14 IC 753 : 13 Cr. LJ 289.

7a. *Smt. Shanta Trivedi* v. *L.I.C. of India*, AIR 1988 Del. 39.

8. *Ambika Charan Barua* v. *Nareswari Dasi*, 85 IC 525 : 1925 C 145 ; *Gupta* v. *E.*, 1 R 290 : 76 IC 425 : 1924 R 17 : 25 Cr. LJ 185 ; *Sarojini Dasi* v. *Haridas Ghose*, 49 C 235 : 66 IC 774 : 1922 C 12 ; *Barindra Kumar Ghose* v. *E.*, 37 C 467 : 7 IC 359 : 11 Cr. LJ 453 ; *Sreemurty Phodee Bibee* v. *Govind Chunder Roy*, 22 WR 272.
9. *R.* v. *Harvey*, 11 Cox CC 546 ; *Barindra Kumar Ghose* v. *E.*, 37 C 467 : 7 IC 359 ; 11 Cr. LJ 453.
10. *Latafat Husain* v. *Onkar Mal*, 152 IC 1042 : 1935 O 41 ; *E.* v. *Ramrao Mangesh Burde*, 56 B 304 : 138 IC 708 : 1932 B 406 : 33 Cr. LJ 666 ; *Ambika Charan Barua* v. *Nareswari Dasi*, 85 IC 525 : 1925 C 145 ; *Galastaun* v. *Sonatan Pal*, 78 IC 668 : 1925 C 485 ; *Gupta* v. *E.*, 1 R 290 : 76 IC 425 : 1924 R 17 : 25 Cr. LJ 185 ; *Bibi Kaniz Zainab* v. *Mobarak Hussain*, 72 IC 748 : 1924 P 284 ; *Balak Ram* v. *Muhammad Said*, 77 IC 872 : 1923 L 695 ; *Sarojini Dasi* v. *Haridas Ghosh*, 49 C 235 : 66 IC 774 : 1922 C 12 ; *Batahu Jha* v. *Parmeshwari Rai*, 64 IC 234 ; *Barindra Kumar Ghose* v. *E.*, 37 C 467 : 7 IC 359 : 11 Cr. LJ 453.
11. *Kessarbai* v. *Jethabhai Jivan*, 111 IC 169 : 1928 PC 277 ; see also *Azmat Ullah Khan* v. *M. Shiam Lal*, 1947 A 411 : 1947 ALJ 110.

with the subject and without such guidance as might be derived from the argument of Counsel and the evidence of experts.[1] It is undesirable that a judge should take upon himself the task of comparing signatures in order to find out whether forgery has been committed in a case.[2] A Court is not justified to give the entire go-by to the other evidence and to rely merely upon its own impression of the signature.[3] Where a question of handwriting is involved, a judge can form an opinion by making a comparison of the handwritings of the documents which form the subject of controversy, but it is necessary for him to be extremely cautious before he takes away a man's liberty on the strength of an opinion formed by him merely on comparison of handwriting.[4] Although it is true that under the Indian Evidence Act comparison of handwriting is quite a legitimate method of supporting evidence, and the views of persons competent to express opinions may be in many cases of considerable value, the opinions of those who have not carefully studied the art of calligraphy is not, as a rule, of very great utility. Indeed, so uncertain and inexact is the science of the study of calligraphy that there has been for some years past of a tendency to regard evidence even of experts as of somewhat inconclusive character[5] Where there is no conflict of evidence, the Court is entitled to form its own opinion after comparing the signatures on the documents produced in Court and the admitted signatures.[6]

In *Murari Lal* v. *State of U.P.*,[7] the Supreme Court observed:

> "The argument that the Court should not venture to compare writings itself, as it would thereby assume to itself the role of an expert is entirely without force. Section 73 .... expressly enables the Court to compare disputed writings with admitted or proved writings to ascertain whether a writing is that of the person by whom it purports have been written. If it is hazardous to do so as sometimes said .... It is one of the hazards to which judge and litigant must expose themselves whenever it becomes necessary. There may be cases where both sides call experts and the voices of science are heard. There may be cases where neither side calls an expert being not able to afford him. In all such cases, it becomes the plain duty of the Court to compare the writings and come to its own conclusion. The duty cannot be avoided by recourse to the statement that the Court is no expert, where there are expert opinions, they will aid the Court, where there is none, the Court will have to seek guidance from some authoritative text book and the Court's own experience and knowledge. But discharge it must, its plain duty, with or without expert, with or without other evidence".

Evidence of similarity of signatures whether evidence of genuineness – Resemblance of two signatures afford no safe foundation of the inference that one of them is genuine. On the contrary, if two signatures are exactly identical there is room for suspicion that the one in question may be a copy or careful imitation of the genuine signature. The

---

1 Per Jenkins, CJ in *Barindra Kumar Ghose* v. *E*, 37 C 467: 7 IC 359: 11 Cr LJ 453; see *Sarojini Dasi* v. *Haridas Ghose*, 49 C 235; 66 IC 774: 1922 C 12; *Balak Ram* v. *Muhammad Said*, 77 IC 872: 1923 L 695; *Ambika Charan Barua* v. *Nareswari Dasi*, 85 IC 525 : 1925 C 145.

2 *Galstaun* v. *Sonatan Pal*, 78 IC 668: 1925 C 485.

3 *Anbika Charan Barua* v. *Nareswari Dasi*, 85 IC 525: 1925 C 145.

4 *Gupta* v. *E*, 1 R 290: 76 IC 425: 1924 R 17: 25 Cr LJ 185.

5 *Batahu Jha* v. *Parmeswari Rai*, 64 IC 234.

6 *Narayanaswami* v. *E*, 17 P. 15.

7 *Murari Lal* v. *State of U.P.*, AIR 1980 SC 531 (para 12): (1980) 2 SCR 249 relied on, *A. Neelalohithadasan Nadar* v. *George Mascrene*, 1994 Supp (2) SCC 619, para 15.

character of a person's signature is generally of uniform appearance, and the resemblance between one and another signature of the same person is thus apparent; but the coincidence is seldom known where a genuine signature of a person, superimposed over another genuine signature of the same person, is such a facsimile that one perfectly matches the other in every respect. Therefore, the fact of one signature being perfectly identical with another in every respect may be evidence of one of them being an imitated or traced forgery.[1] The test of genuineness is the resemblance not to the formation of the letters in some other specimens, but to the general character of the writing, which is impressed on it as the involuntary and unconscious result of constitution, habit or other permanent cause, and is therefore itself permanent.[2] It is most unsafe to convict a man solely on the evidence afforded by the similarity of thumb-marks or finger prints.[3] See notes to Section 45.

Evidence of dissimilarity of handwriting, whether evidence of forgery?—Evidence relating to dissimilarity of signature is peculiarly fallacious, where the dissimilarity relied upon is not that of a general character, but merely in particular letters; for the slightest pecularities of circumstances or position, as, for instance, the writer sitting up or reclining, or the paper being placed upon a harder or softer substance, or on a place more or less inclined-nay, the materials, as pen, ink, etc., being different at different times-are amply sufficient to account for the letters being made variously at different times by the same individual. Independently of all this, few individuals write so uniformly that dissimilar formations of particular letters are grounds for concluding them not to have been made by the same persons.[4] It is unfair to compare free handwriting spread over a full folio page, with plenty of space, with the writing on a post-card in which the writer has to condense all he wishes to say in the exiguous space provided by the Post Office.[5] But the admitted abnormality of a signature is at least some evidence that it is not the handwriting of the person who purports to have written it[6]; and from the dissimilarity of two signatures a Court may legitimately draw the inference that one of these signatures is not genuine because it varies from the other admittedly genuine signature.[7] Where a Court is satisfied that the signature on a will is not that of the testator, there is nothing to prevent the Court from acting upon its conviction and pronouncing against the document; but where witnesses have positively affirmed that the testator did not infact sign the will in their presence, the Court will be slow to hold the document to be a forgery unless evidence is to be found *aliunde* which tends to confirm the conclusion at which the Court has arrived.[8]

Finding based on a comparison of handwriting cannot be set aside in second appeal.—Comparison of signatures is a perfectly legal mode of proving handwriting, and however hazardous or inconclusive such proof may be, it cannot be regarded as an error of law to base a conclusion on such proof alone, and a Court of second appeal has

1. *Sarojini Dasi* v. *Haridas Ghosh*, 49 C 235 : 66 IC 774 : 1922 C 12 ; see also *Batahu Jha* v. *Permeswari, Rai*, 64 IC 234.
2. *Deo d. Mudd* v. *Suckmore*, 5 A & E 703, 705 ; *Sarojini Dasi* v. *Haridas Ghosh*, 49 C 235 ; 66 IC 774 : 1922 C 12.
3. *Bazari Hajam* v. *E.*, 1 P 242 : 68 IC 958 : 1922 P 73 : 23 Cr. LJ 638.
4. *Galastaun* v. *Sonatan Pal*, 78 IC 668 : 1925 C 485.
5. *Irabasappa* v. *Bhadrawa*, 80 IC 189 : 1922 B 296.
6. *Lila Sinha* v. *Bijoy Protap Deo Singh*, 87 IC 534 : 1925 C 768.
7. *Sarojini Dasi* v. *Haridas Ghosh*, 49 C 235 : 66 IC 774 : 1922 C 12.
8. *Lila Sinha* v. *Bijoy Protap Deo Singh*, 87 IC 534 : 1925 C 768.

no power set aside a finding based on such comparison.[1]

Comparison of the disputed writing with the specimen of writing taken in Court is less satisfactory than comparison of it with approved or admitted previous signature – In order to show that a document is in the handwriting of a particular person, a party may request the Court to direct,[2] and the Court may itself direct, a person present in Court to give a specimen of his handwriting to be compared with the disputed writing. But in such a case the result of the comparison will "be less satisfactory", as a person may feign or alter the ordinary character of his handwriting with the very view of defeating a comparison.[3]

Power to Court to direct accused to give his specimen handwriting – A Court holding an inquiry under the Code of Criminal Procedure 1898 in respect of an offence triable by itself or the Court of Sessions could direct an accused to give a specimen of his writing for purposes of comparison by a handwriting expert chosen or approved by it, and whether suggested by the prosecution or the defence, the purpose being to enable the Court before which the accused is ultimately put up for trial to compare the disputed writing with the admitted writing of the accused, and to reach its own conclusion with the assistance of the expert.[4]

Court can order an accused person to give his finger impression for purposes of comparison – Under Section, 5 read with Section (2) (a) of the Identification of Prisoners Act, Act XXXIII of 1921, it is competent to a Magistrate to order any person to allow his finger impressions to be taken for the purpose of any investigation or proceeding under the Code of Criminal Procedure, provided that such person has at some time been arrested in connection with such investigation or proceeding. In view of the provisions of this recent legislation, it is not wrong on the part of a Court to take the finger prints of the accused to have them compared by an expert with the disputed finger prints.[5] Apart from the provisions of this special legislation, a Court has power, under Section 73 of the Evidence Act, to order an accused person to give his finger impression or specimen of his writing for the purpose of its being compared with the disputed impression or writing.[6] The Section applies to a person accused of an offence.[7]

In *State of U.P.* v. *Ram Babu*,[8] The Supreme Court considered the scope of Section

---

1 *Gondu* v. *Tulsiram*, 120 IC 335: 1930 N 27; *Balak Ram* v. *Muhammad Said*, 77 IC 872: 1923 L 695; *Pasupuleti Venkamma* v. *Shaik Hamid*, 14 IC 741; but see *Ambika Charan Barua* v. *Nareswari Dasi*, 85 IC 525; 1925 C 145.

2 See *Khijiruddin* v. *E*, 53 C 372: 92 IC 442: 1926 C 139: 27 Cr LJ 226.

3 Norton, Ev., 256: See *Vijay* v. *State of M.P.*, (1994) 6 SCC 308.

4 *State (Delhi Admn)* v. *Pali Ram*, AIR 1979 SC 14, (Paras 25 & 32).

5 *Zahuri Sahu* v. *E*, 6 P 623: 106 IC 212: 1928 P. 103: 28 Cr LJ 1028: *Basgit Singh* v. *E*, 6 P 305: 104 IC 626: 1928 P 129: 28 Cr LJ 850; *Supt. & Remembrance of Legal Affairs* v. *Kiran Bala Dasi*, 93 IC 73: 1926 C 531: 27 Cr LJ 409; *Golam Rahman* v. *The King*, 1950 C 66: 83 CLJ 397.

6 *E* v. *Ramrao Mangesh Burde*, 56 B 304: 138 IC 708: 1932 B 406: 33 Cr LJ 666; *Public Prosecutor* v. *Kandasami Thevan*, 50 M 462: 98 IC 99: 1927 M 696: 27 Cr LJ 1251: *E* v. *Nga Tun Hlaing*, 1 R 759: 83 IC 668; 1924 R 115: 26 Cr LJ 108 (FB); *Sailendra Nath Sinha* v. *State*, 1955 C 247; but see *Kishori Kishore Mishra* v. *E*, 1935 C 308.

7 *Sailendra Nath Sinha* v. *State*, 1955 C 247; see also *Sukhvinder Singh* v. *State of Punjab*, (1994) 5 SCC 152-A).

8 1980 SC 791; *Farid Ahmad* v. *State*, 1960 Cal 32 (at page 32); *Priti Ranjan Ghose* v. *State*, (1973) 77 Cal WN 865: *Dharamvir Singh* v. *State*, 1975 Cr LJ 884; *Brij Bhusan Raghunandan Prasad* v. *The State*, 1957 MP 106: *Srikant* v. *State of Orissa*, (1972) 2 Cut WR 1332: Approved: *T. Subbiah* v. *S.K.D. Ramaswamy Nadar*, 1970 Mad 85; *Gulzar Khan* v. *State*, 1962 Pat 255: *Ram Reddy* v. *State of Andhra Pradesh*, 1971 Cr LJ 159, overruled.

73 as also that if Section 5 read with Section 2 (a) of the Identification of Prisons Act 1920. It observed : "The second paragraph of Section 73 enables the Court to direct any person present in Court to give specimen writings for the purpose of enabling the Court to compare such writings with writings alleged to have been written by such person. The clear implication of the words.....is that there is some proceeding before the Court to compare such writings....and not for the purpose of enabling the investigating or other agency to compare". If the case is still under investigation there is no present proceeding before the Court in which or as a consequence of which it might be necessary to compare the writings. The language of Section 73 does not permit a Court to give a direction to the accused to give specimen writings for anticipated necessity for comparison in a proceeding which may later be instituted in the Court. Further, Section 73....makes no distinction between a Civil Court and a Criminal Court. Could it be open to a person to seek the assistance of the Civil Court for a direction to some other person to give sample writing under Section 73....on the plea that it would help him to decide whether to institute a Civil suit in which the question would be whether certain alleged writings are those of the other person or not? Obviously not. If not, why should, it make any difference if the investigating agency seeks the assistance of the Court under Section 73.....on the plea that a case might be instituted before the Court where it would be necessary to compare the writings."

".....Section 5 of the Identification of Prisoners Act, 1920....provides :

'If a Magistrate is satisfied that for the purposes of any investigation or proceeding under the Code of Criminal Procedure, 1898, it is expedient to direct any person to allow his measurements or photograph to be taken, he may make an order to that effect, and in that case for person to whom the order relates shall be produced or shall attend at the time and place specified in the order and shall allow his measurements or photograph to be taken, as the case may be, by a public officer.

'Provided that no order shall be made directing any person to be photographed except by a Magistrate of the first class:

'Provided further, that no order shall be made under this section unless the person has at some time been arrested in connection with such investigation or proceedings.'

Section 2(a) of the Act defines 'measurements' as including 'finger impressions and foot-prints impressions'. There are two things to be noticed here. First, signature and writing are excluded from the range of Section 5 of the .....Act and, second, 'finger impressions' are included in both Section 73 of the Evidence Act and Section 5 of the Identification of Prisoners Act. A possible view is that it was thought that Section 73 of the Evidence Act would not take in the stage of investigation and so Section 5 of the Identification of Prisoners Act made special provision for that stage, and even while making such provision, signature and writings were deliberately excluded...This is a possible view but not one on which we desire to rest our conclusion. Our conclusion rests on the language of Section 73...

Section 73 was considered by the Supreme Court in *State* v. *Pali Ram*,[1] where it held that a Court holding an enquiry under the Code of Criminal Procedure, 1898, was

1. State v. Pali Ram., 1979 SC 14.

entitled to direct an accused person appearing before it to give specimen of his handwriting to enable the Court by which it may be tried to compare it with the disputed handwriting in question in that case. According to an earlier decision of the Supreme Court in *State of Bombay* v. *Kathi Kalu Oghad*, a direction to give specimen signature or handwriting for the purpose of comparison did not involve testimonial compulsion under Article 20 (3) of the Constitution.[1]

If the accused refuses to give his thumb-impression, the Court may draw an inference adverse to him.[2] In view of the decision cited above, the earlier decisions in which it was held that finger, impressions of the accused cannot be ordered to be taken in the course of the trial for the purpose of their being compared by the Court or by an expert with the disputed impression[3] should be taken to be no longer good law. The Court cannot send the accused to give a specimen of his handwriting to another Magistrate who has no, jurisdiction over him.[4]

Value of the evidence of similarity of finger impressions.—It is most unsafe, without any corroborative evidence, to convict a person of a serious crime solely and entirely upon the similarity of thumb-marks of finger prints.[5] See notes to Section 45.

Section not applicable to a mark, not being a thumb-impression.—This section, though application to thumb-impressions, does not apply to a mark made by an illiterate executant of a document.[6]

PUBLIC DOCUMENTS

74. Public documents.—The following documents are public documents-

(1) documents forming the acts of records of the acts—

(ii) of official bodies and the tribunals, and

(iii) of public officers, legislative, judicial and executive, [7][of any part of India or of the Commonwealth], or of a foreign country;

(2) public records kept [8][in any State] of private documents.

75. Private document.—All other documents are private.

COMMENTARY

Public documents.—A public document is a document that is made, where there is a

1. 1961 SC 1808.
2. *E.v. Ramarao Mangesh Burde*, 56 B 304 : 138 IC 708 : 1932 B 406 : 33 Cr. LJ 666 : *Zahuri Sahu* v. *E.*, 6 P 623 : 106 IC 212 : 1928 P 103 : 28 Cr. LJ 1028.
3. *Jassu Ram* v. *E.*, 4 L 246 : 77 IC 433 : 1923 L 622 : 25 Cr. LJ 375 : *Bazari Hajam* v. *E.*, 1 P 242 : 63 IC 958 : 63 IC 958 : 1922 P 73 : 23 Cr. LJ 638 : *Maung Po Nyun* v. *Mutu Kurpen Chetty*, 35 IC 492 : 17 Cr. LJ 316.
4. *Kishori Kishore Mishra* v. *E.*, 1935 C 308 ; explained in *Satlendra Nath Sinha* v. *State*, 1955 C 247.
5. *Bazari Hajam* v. *E.*,1 P 242 : 68 IC 958 : 1922 P 73 : 23 Cr. LJ 638.
6. *Shahzadi* v. *Beni Prasad*, 154 IC 405 : 1934 A 390 ; see *Ponuswami Goundan* v. *Kalyanasudara Ayyar*, 57 M 662 : 149 IC 257 : 1934 M 365.
7. The original words "whether of British India or of any other part of Her Majesty's dominions" have successively have been amended by the A.O. 1948 and the A.O. 1950 to read as above.
8. *Subs.* by the A.O. 1950 for "in any Province".

judicial or *quasi* judicial duty to inquire, for the purpose of the public making use of it and being able to refer to it.[1] Public documents are the acts of public functionaries, in the Executive, Legislative and Judicial Departments of Government, including under this general head the transactions which official persons are required to enter in books or registers in the course of their public duties and which occur within the circle of their own personal knowledge and observation.[2] A document cannot be said to be a public document within the meaning of Section 74 of the Evidence Act unless it is shown to have been prepared by a public servant in the discharge of his official duty. The mere fact that it is kept in a public office does not lead to the inference that it is a public document..[3]

Section 74 : Whether original of a public document can be admitted in evidence without proving its execution in accordance with law.–It is not correct to say that the original of a public document should be presumed to be genuine and should not be required to be proved in the manner in which private documents are required to be proved in law.

In all cases of secondary evidence under Sec. 65 read with Section 63 of the Evidence Act when a copy or an oral account of a document is admitted as secondary evidence, the execution of the original is not required to be proved, but if the original itself is sought to be tendered, it must be duly proved and there is no reason for applying a different rule to public documents. Secondly, in the case of a certified copy, before a presumption of its genuineness can be raised under Section 79, as laid down by the Supreme Court in *Bhinka* v. *Charan Singh*,[4] it must be shown that the certified copy was executed substantially in the form and in the manner provided by law. There would, therefore, be a check or safeguard in so far as the officer certifying it in the manner required by law would have to satisfy himself in regard to the authenticity of the original thereof. On the other hand, if the original of a public document is to be admitted in evidence without proof of its genuineness, there would be no check whatsoever, by way of scrutiny or examination of that document by an officer, or by the Court. The third, and perhaps the most important reason is that neither Section 67 nor Section 68 lay down that the signature and the handwriting on a document must be duly proved make any exception in the case of public documents. Therefore all documents must be proved in the manner provided by Sections 45, 47 or 73 or in the case of certain types of documents, by the intrinsic proof afforded by their own contents as laid down by the Supreme Court in the case of a *Mobarik Ali* v. *Bambay*.[5]

Sections 74 and 65-Scope -Certified copy of a registered document-If admissible in evidence-Proof of original-Necessity.–In this case, no attempt has been made to establish any ground which will entitle the defendants to lead secondary evidence. What is sought to be proved by production of the certified copy is not any original entry, but copy of a document, the original of which must be in the custody of either the executant or some other person, in case it is proved to have been made over to the latter by the executant. Such a document is not admissible in evidence by simply producing a certi-

1. Per Lord Blackburn in *Sturla* v. *Freccia*, 5 App. Cas 639.
2. Greenleaf, Ev.,Section 470 ; *Abdul Halim Khan* v. *Saadat Ali Khan*, 108 IC 817 : 1928 O 155.
3. *Mahtab Din* v. *Kasar Singh*, 107 IC 618 : 1928 L 640.
4. AIR 1959 SC 960.
5. (1957) 61 Bom. LR 58 p. 66-67.

fied copy from the registration office without taking any steps for production of the original or laying the foundation for secondary evidence.[1]

Documents forming the acts or records of the acts.—Under Section 74 of the Evidence Act only such documents are considered to be public documents as form the acts or records of the acts of public officers.[2] The word "acts" in the phrase "documents forming the acts or records of the act" is used in one and the same sense. The act of which the record made is a public document must be similar in kind to the act which takes shape and form in a public document. The kind of acts which Section 74 has in view indicated by Section 78 of the same Act. The acts there mentioned are all final completed acts as distinguished from acts of a preparatory or tentative character.[3] A circular issued by the Director General of Posts and Telegraphs that stamps of a particular kind would be issued by Post Offices for sale to the public is not an act or record of an act of a public officer within the meaning of Section 74 of the Evidence Act.[4] Where a Civil Surgeon reports about the probable age of a person to a Magistrate on the latter's requisition, he is merely giving his expert opinion and is not making a record of his act in his official capacity for the public, and the report so made by him is not a public document.[5] Officers of the Education Department of a State are executive officers within the meaning of Section 74, and, therefore, the records of the acts of such officers are made documents.[6] An entry in the Registrar of Powers-of-attorney is a public document forming the act or record of the act of an executive public officer. Therefore a certified copy of the entry is admissible as proof of the original entry by virtue of Section 65(e) of the Evidence Act.[7] Official records like an order of the Court are much too sacrosanct to be brought into controversy by adducing evidence pro and con as to what they mean.[8] See notes to Section 35.

Foreign public documents.—The section includes public documents of foreign countries.[9] The probate of a will granted by an Australian Court is a public document which may be proved by a properly certified copy.[10]

Acts or records of the acts of the sovereign authority.—This class of public documents is presumably intended to refer to those public documents which are treated in English text-books on Evidence under the heading "Statutes, State papers, and Gazettes, etc."[11]

Records of the acts of an official body; record of the proceedings of a municipal body.—The record of the proceedings of a Municipal Board in India is a record of the

---

1. *Paramananda Sahu* v. *Babu Sahu*, (1970) 36 CLT 1211.
2. *Abdul Halim Khan* v. *Saadat Ali Khan*, 108 IC 817 : 1928 O 155.
3. Per Shepherd, J., in *Q.E.* v. *Arumugam*, 20 M 189 (FB), followed in *Abdul Halim Khan* v. *Saadat Ali Khan*, 108 IC 817 : 1928 O 155.
4. In re *Veluayudam Pillai*, 115 IC 509 : 30 Cr. LJ 483.
5. *Abdul Halim Khan* v. *Saadat Ali Khan*, 108 IC 817 : 1928 O 155.
6. *Bhanudas Narayanboa Gosavi* v. *Krishnabai Chintaman Deshpande*, 50 B 716 : 99 IC 307 : 1927 B 11 ; 12 Mys. LJ 133.
7. *Pattu Kunvi* v. *Nirmal Kumar*, 43 CWN 907 ; 1939 C 569 ; Distinguished in *Naresh Chandra Bose* v. *State*, 1955 C 398.
8. *Kripashankar Mishra* v. *Anupsingh Bedi*, 1953 N 288 : 1953 NLJ 367.
9. *Bhanudas Narayanboa Gosavi* v. *Krishnabai Chintaman Despande*, 50 B 716 : 99 IC 307 : 1927 B 11 ; See also *Haranund Chetlangia* v. *Ram Gopal Chetlangia*, 27 C 689 : 27 IA 1 (PC).
10. In the matter of Adija, 11 IC 324.
11. *See* Phipson, Ev., 7th Ed., 324.

acts of an official body within the meaning of clause (1) (ii) of Section 74.[1]

Municipal registers of death and births.–Municipal registers of deaths and births are public documents and, therefore, certified copies of entries in them are admissible.[2] A register of births and deaths kept in a police station is a public document,[3] but not a *chaukidar*'s register of birth and deaths.[4] For further notes on the subject, see notes to Section 35.

Section 74 : Memorandum of association of a company.–The memorandum of association of a company, though a private document form part of public records in the State kept by the Registrar of Joint Stock Companies. It is therefore a public document within the meaning of sub-section (2) of the present section and secondary evidence of the document can be received under Section 65 (e) under which no foundation even is required for the admission of such secondary evidence.[5]

Records of the acts of judicial officers and tribunals.–Records of Courts of Justice and other judicial writings are public documents.[6] A final or interlocutory, order, judgment or decree of an officer exercising judicial functions, being a public document, is provable by a certified copy.[7] The deposition of a witness is part of the records of the acts of a tribunal within the meaning of Section 74, and a statement in it can be proved by a certified copy.[8] The identity of the deponent must, however, be proved independently of the copy.[9] Similarly, the record of a confession is a record of the act of a judicial officer and as such, is provable by a certified copy, through the identity of the confessor, like the identity of a deponent, has to be proved by independent evidence.[10] A recorded order for the issue of a search warrant by a Magistrate is a public document.[11] Where the copy of a deposition is not certified, it must be proved to be a correct copy to make it admissible.[12] The delivery of possession in execution of a decree is an act of a tribunal, and a report made to Court by an officer of the Court that its order has been carried out and possession delivered to the decree-holder, which report is preserved as one of the Court records, is a public document within the meaning of Section 74 of the Evidence Act and can be proved by the production of the certified copy as permitted by Section 77 of the Act.[13] A *dakhalnama* is a public document and is admissible without proof.[14] Reports of process servers are admissible under Section 35

1. Reference under Section 46 of Act No. 1 of 1879, 19 A 293 (FB).
2. *Anis-ul-Rehman Khan* v. *Beni Ram*, 59 PR 1901.
3. *Tamizuddin Sarkar* v. *Taju*, 46 C 152 : 46 IC 237 ; *Mankirao Jairamji* v. *Deorao Baliram*, 1955 N 290.
4. *Bisheshar Dayal* v. *Hira Lal*, 36 IC 941.
5. *Financial Properties Private Ltd.* v. *M. Gulamali Abdul Hossain & Co.* AIR 1967 Cal. 391 (400).
6. Taylor, § 1534.
7. *Haranund Chetlangia* v. *Ram Gopal Chetlangia*, 27 C 639 : 27 IA 1 (PC) ; See *Ladli Parsad Zutshi* v. *E.*, 53 A 724 : 132 IC 327 : 1931 A 364 : 32 Cr. LJ 864 ; *Sakina Khaunum* v. *Laddan Saheba*, 2 CLJ 218 ; *Nand Kumar* v. *E.*, 1937 P 534 : 172 IC 237 ; *Kishanlal* v. *Ramchandermal Jagannath*, 1953 Raj. 216.
8. See *Karapaya Servai* v. *Mayandi*, 6 R 164 : 147 IC 414 : 1933 R 212 ; *Chandreswar Prosad Narain Singh* v. *Bisheshwar Pratap Narain Singh*, 5 P 777 : 101 IC 289 : 1927 P 61 ; *Haranund Chetlnagia* v. *Ram Gopal Chetlangia* 27 C 639 : 27 IA 1 (PC) ; *Sakina Khanum* v. *Laddan Saheba*, 2 CLJ 218.
9. See *Karapaya Servai* v. *Mayandi*, 6 R 164 : 147 IC 414 : 1933 R 212 ; *Brajaballav Ghose* v. *Akhoy Bagdi*, 93 IC 115.
10. *Mohammad Ali* v. *E.*, 147 IC 390 : 1934 A 81 : 35 Cr. LJ 385 (FB).
11. *Kalinga Tubes, Ltd.* v. *D. Suri*, 1953 Orissa 49.
12. *Karapaya Servai* v. *Mayandi*, 6 R 164 : 147 IC 414 : 1933 R 212.
13. *Balka* v. *E.*, 81 IC 533 : 1925 O 183 : 25 Cr. LJ 917.
14. *Sita Ram* v. *E.*, 98 IC 471 : 1927 A 52 : 27 Cr. LJ 1351 ; *Satnarain Dube* v. *Narain Bargah*, 30 IC 830 ; *Muhammad Nasir* v. *Ram Karan Singh*, 25 IC 529.

of the Evidence Act as evidence of the facts reported by them.[1] A *robkari* is a public document.[2] A sale certificate, however, is only a document of title and is not a public document;[3] nor is a plaint or written statement a public document.[4] But if no objection has been taken to the proof of a written statement by a certified copy at the time the certified copy is tendered in evidence, it will not be permitted to be taken at a subsequent stage.[5] An affidavit or an application for execution is not a public document.[6] Where a suit, is compromised, and a petition is presented in the usual way, and the Court makes an order confirming the agreement which with the order, as well as the agreement and power-of-attorney, are all entered upon record, these papers become as much a part of the record in the suit as if the case had been tried and judgment given between the parties in the ordinary way; and that record is a public document provable by an office copy.[7] An application for a compromise with an order of the Court on it is provable by a certified copy under Section 77 of the Act.[8] An application filed by the police before a Magistrate, for issue of search warrants is a public document.[9] The order of a probate Court that letters of administration be granted to the person named with a copy of the will annexed is a public document, a certified copy of which is admissible.[10] A certified copy of a probate granted in Australia is a copy of the will and of the endorsement made thereon by the Registrar of probate showing that the will has been filed and proved in the Court granting the probate. The will when so recorded and endorsed is a public document under Section 74 (iii) of the Evidence Act, which may be proved by secondary evidence under Section 65(e).[11] But a certified copy of a will made from the Protocol of Record in Ceylon is not admissible in the absence of evidence that the copy was made from and compared with the original.[12] Records of confessions of accused persons made by Magistrates outside India are probably public documents within the meaning of Section 74.[13] Statements recorded by a Magistrate in a departmental inquiry are not public document, as such inquiry is not a judicial one.[14]

Pleadings.—According to Section 74(2) Public records kept in India of private docu-

---

1. *Abdul Khadir* v. *Ajiyur Ahammad*, 35 M 670 : 12 IC 679 ; but see *Fateh Muhammad* v. *Hakim Khan*, 8 L 52 : 96 : IC 825 : 1926 L 629, where it was held that the report of a process server is not admissible unless the process server is examined, and *Heramba Nath Bandopadhya* v. *Surendra Nath Mittra*, 53 IC 20, where proof of the signature of the process server seems to have been considered necessary.
2. *Radhanath Kaibarta* v. *E.*, 46 IC 689 : 19 Cr. LJ 533.
3. *Vasanji Bhimbhai* v. *Haribhai Monbhai*, 2 Bom. LR 533.
4. *Manbodh* v. *Hirasai*, 93 IC 650 : 1926 N 339 ; *Tarkeshwar Prasad Tewari* v. *Devendra Prasad Tewari*, 92 IC 184 : 1926 P 180 ; *Ahmad* v. *Hurmuzi Khanam*, 61 IC 177 ; *Usuf Hassan* v. *Raunaq Ali*, 1943 O 54 : 203 IC 391 ; *Mata Prasad* v. *Brij Kishore Singh*, 1942 O 303 ; *Akshoy Kumar Bose* v. *Sukumar Dutta*, 1951 C 320 ; but see 10 BLR App. 31, where a plaint was held to be admissible as a public document but not a written statement. In the Madras (FB) case, *Katikineni Venkata Gopala Narasimha* v. *Chitluri Venkataramayya*, 1940 M 768, a plaint and a written statement have both have been assumed to be public documents.
5. *Durga Dat Jagan Nath* v. *Ram Pratab Sukh Dayal*, 79 IC 221 : 1923 L 138.
6. *Venkatalingama* v. *Parthasarathy*, 1942 M 558.
7. *Bhagain Megh Ranee Kooer* v. *Goorco Pershad Singh*, 25 WR 68.
8. *Mangal Sen* v. *Hira Singh*, 1 ALJ 369.
9. *Kalinga Tubes, Ltd.* v. *D. Suri*, 1953 Orissa 49.
10. *Habiram Das* v. *Hem Nath Sarma*, 30 IC 690 : 19 CWN 1068.
11. In the matter of Adija, 11 IC 261.
12. *Ponnammal* v. *Sundaram Pillai*, 23 M 499.
13. *Govinda* v. *E.*, 69 IC 257 : 23 Cr. LJ 673 ; *Q.E.* v. *Sunder Singh*, 12 A 595.
14. *Government of Bengal* v. *Santiram Mondal*, 58 C 96 : 127 IC 657 : 1930 C 370 : 32 Cr. LJ 10.

ments are considered to be public documents for purpose of proof. There has been difference of opinion as to whether plaints and written statements are such records, and doubt as to whether petitions and affidavits filed in the course of the progress, of a suit are public documents. Inconvenience is felt in sending for the originals of these documents, and when the originals are sent for, they in most cases serve no better purpose than the certified copies. The mere fact that a document comes from a Government department and bears its seal does not make it a public document so as to dispense with the need of formal proof.[1]

Sanction for prosecution.–Sanction for the prosecution accorded by the officer competent to do so in a public document. The original or its certified copy is admissible without formal proof.[2]

Election papers.–The check memo required to be maintained by the officer in charge of the counting table is a document forming record of the acts of a public officer and is a public document.[3] Electroral rolls are public documents.[4]

Complainant's statements under Section 200 Cr. P.C.–It is a record of a judicial act and is a public document.[5]

Compromise Deed.–A private document does not become a public document simply because it is filed in court. The compromise of private parties filed in a criminal courts is not a public document and cannot be proved except by a certified copy.[6]

Sale deed registered under Registration under Act register is a public document.[6a]

Confession recorded by a Magistrate not specifically empowered during investigation of a case.–Admission.–Question as to whether a confession recorded during the investigation of a case by a second class Magistrate not specially empowered was admissible in evidence was considered by the Supreme Court in the case of *Uttar Pradesh* v. *Singhara Singh*.[7] It was held that the record of such a confession could not be put in evidence under Sections 71 and 80 of the Indian Evidence Act. Reliance in this connexion was placed upon the decision of Judicial Committee in the case of a *Nazir Ahmed* v. *King Emperor*.[8]

Warrant and others papers of criminal courts.–A warrant is a public document and it can be proved only by a certified copy.[9] Statements recorded in commitment proceedings 33 years back would be public document; and Sections 74, 76, 77 and 80 would apply.[10]

Translated copy.–If there is no statutory duty to make translation of original documents (wills) the translated copy is not a public document.[11]

Acts or records of the acts of a revenue officer; revenue records, settlement records, survey and settlement reports, jamabandis, accounts registers, etc.–Revenue

1. *Kunti Devi* v. *Radhey Shayam*, AIR 1978 All 185.
2. *Prem Prakash* v. *Rajasthan*, 1971 WLN 408 (Raj).
3. *Banmali Das* v. *Rajendra*, AIR 1975 SC 1863.
4. *Kirtan* v. *Thakur*, AIR 1972 Orissa 158 (FB).
5. *Laxmanna* v. *Hanamappa*, (1967) 1 Mys. LJ 553.
6. *Gujarat* v. *Ambalal*, 1966 Cr. LJ 967 (1).

6a. *Ramchandra* v. *Hambai*, AIR 1989, Ori. 27.

7. (1964) 4 SCR 485 : AIR 1964 SC 358.
8. 63 IA 372 see also *Nika Ram* v. *State of H.P.*, AIR 1972 SC 2077 at P 2081.
9. *Kantilal Ambalal* v. *Gujarat*, 1968 Cr. LJ 758.
10. *Saudagar Singh* v. *Punjab*, (1974) 75 PLR 57.
11. *Sri Thakur Krishna* v. *Kanayalal*, AIR 1961 All 205.

records and settlement records are prepared by public officers in the discharge of their official duty; entries therein are, therefore, relevant under Section 35. Such records are public documents and they may be proved by certified copies.[1] A *wajubularz* is a public document provable by a certified copy.[2] *Chittahs* prepared for the purposes of distributing the public revenue or of partition of an estate are public documents.[3] Certified copies of the papers in the Collectorate which *prima facie* appear to be the record of a partition made in a proceeding under Regulation XIX of 1814, are admissible quite apart from anything contained in Section 35.[4] But *chittahs* made by Government for its own private purposes are nothing more than documents prepared for the information of the Collector, and are not by themselves evidence against private persons for the purposes of proving that the lands described therein are or are not of a particular character or tenure.[5] A *jamabandi* prepared by a Deputy Collector engaged in the settlement of land is a public document.[6] Accounts prepared by a public officer for revenue purposes showing the sources of revenue in each village, are public documents.[7] Where, in the preparation of accounts in the ordinary course, a public officer finds after inquiry that a certain area is cultivated, the accounts would be admissible to prove the factum of cultivation to the that area.[8] Records from the Collectorate giving details of the area of villages and the revenue charged thereon at the time of the statement are public documents.[9] The history of a district attached to a settlement record is complied by, or by the direction of the Settlement Officer. It is, therefore, a public document provable by a certified copy.[10] A pedigree table is properly a part of revenue records, and constitutes an entry in a public document, which is *prima facie* evidence of the truth of its contents.[11] A register of tenures prepared by a Special Commissioner under Act II of 1869 (Chota Nagpur Tenures Act),[12] registers kept under the Land Registration Act, e.g, a quinquennial or mutation register,[13] a crop cutting report by the Collector under Section 40 of the Bengal Tenancy Act[14] and copies of index register kept under Bombay Land Revenue Code[15] have been held to be public documents. A *Khasra girdawari* prepared by the *patwari* of a village is a public document,[16] and so is a *patwari* slip granted in survey proceedings.[17] But an abstract prepared by a *patwari*, though based on

1. *See* notes to Section 95 under the heading "records of rights, settlement survey and other revenue records."
2. *Faiju* v. *Sirya*, 170 IC 392.
3. *Nobendra Kishore Roy* v. *Durga Charan Chowdhry*, 10 IC 287 : 15 CWN 515 : see also *Nobendra Kishore Roy* v. *Rahima Banu*, 31 IC 695 : 19 CWN 1015.
4. *Khetra Nath Mandal* v. *Mahomed Alla Rakha*, 45 IC 921 : 23 CWN 48.
5. *Ram Chunder Sao* v. *Bunsedhur Naick*, 9 C 741.
6. *Taru Patar* v. *Abinash Chunder Dutt*, 4 C 79 ; but see *Ram Chunder Sao* v. *Mahomed Allah Rakha*, 9 C 741 & *Akshaya Kumar Dutt* v. *Shama Charan Patitanda*, 16 C 586.
7. See *Sivasubramanya* v. *Secretary of State*, 9 M 285, 293.
8. *Narayanswami Naidu* v. *Chintalapati Subbaraju*, 14 IC 1007.
9. *Lal Mohan Thakur* v. *Nanda Lal*, 14 IC 461 : 15 CLJ 191.
10. *Muhammad Khan* v. *Sultan Azam*, 75 IC 1040 : 1924 L 639.
11. *Sheo Shankar* v. *Mst. Ram Dei*, 1935 O 231 ; *Gurdit Singh* v. *Kartar Singh*, 103 IC 182 : 1928 L 214.
12. *Pertap Udai Nath Sahi Deo* v. *Masi Das*, 22 C 112.
13. *Ramnandan Sahay* v. *Jaogovind Pandey*, 2 P 839 : 75 IC 955 : 1924 P 213 ; *Sreemutty Oodoy Monee Debee* v. *Biscnath Dutt*, 7 WR 14.
14. *Kishun Deyal Gope* v. *Ishwarnath Singh*, 102 IC 391 : 1927 P 167 ; *Hargovind Singh* v. *Kishun Deyal Gope*, 95 IC 966 : 1926 P 436.
15. *Secretary of State* v. *Chunan Lal*, 1942 B 161 : ILR 1942 B 357.
16. *Mohammad Din* v. *Fateh Din*, 151 IC 786 : 1934 L 698 ; 2 OC 205.
17. *Ram Bhagwan* v. *E.*, 47 IC 82 : 19 Cr. LJ 886.

papers in his possession, is only a private document a certified copy of which does not prove itself. The original papers should, therefore, be summoned and duly proved.[1] *Fards bachh* are public document; they are, therefore, provable by certified copies.[2] A register of *sarsikan* papers is a public document and entries therein are provable by certified copies.[3] Papers and records prepared or kept by a village *patwari* in pursuance of rules framed under the Punjab Land Revenue Act are public documents.[4] A register *(takhta)* of information regarding the *pargana watandars*, prepared by an Assistant Collector under the directions given by the Collector under the orders of the Indian Committee, comes within the definition of a public document.[5] A survey and settlement report is a public document.[6]

Record of rights, Entries in the Records of Rights under Chapter V of the Manipur Land Revenue and Land Reforms Act 33 of 1960 are admissible in evidence though the Records has not been finally published. The weight to the entry therein is a different matter.[7]

Revenue documents: Mutations.–Mutation, quinquennial and settlement registers are public documents.[8] Mutation entries are relevant only so far as they indicate the nature and contents of reports of revenue authorities made at the time of mutation but they do not prove relationship between the person mutated and the person in whose place he is so mutated.[9]

Pariwarik register.–The Pariwarik register prepared under the provisions of the Bihar Panchayat Election Rules, 1959, is a public document within the meaning of Section 74 of the Evidence Act.[10]

Income-tax documents.–It would be putting an unwarranted restriction on the words "documents forming the acts or records of the acts" to say that they should be confined to those parts of an income-tax record which the income-tax officer has himself prepared and to exclude documents which he has himself called for or which have been admitted to the record for the purpose of the assessment. The record of an income-tax case must be regarded as the record of the acts of the income-tax officer in making his assessment and, therefore; any document properly on the record is just as much a public document as the final order of assessment.[11] Accordingly an order of assessment to income-tax,[12] an income-tax return,[13] in a statement recorded by an

---

1. *Sheo Das* v. *Sheo Daya Singh*, 128 IC 770 : 1930 A 712.
2. *Malik Mahumd* v. *Khushi Ram*, 131 IC 638 : 1931 L 605.
3. *Rajendra Narayan Singh Deo* v. *Bihari Lal Chakravarthy*, 11 P 569 : 138 IC 419 : 1932 P 157.
4. Section 151, Punjab Land Revenue Act, XVIII of 1887.
5. *Mallappa* v. *Tukko*, ILR 1937 B 464 : 1937 B 307 : 170 IC 801.
6. *Brajasunder Deb* v. *Rajendra Narayan Bhanj Dev*, 1941 P 260 : 195 IC 313.
7. *Tronglaobi Pisciculture Co-Operative Society, Ltd.*, v. *Chief Commissioner of Manipur*, AIR 1969 Manipur 84 (87, 88).
8. *G.C.Khan* v. *West Bengal* (1971) 2 Cal. 119.
9. *Parkash Chand* v. *Durgi Devi*, (1971) 1 Sim LJ (HP) 423.
10. *Toral Mahto* v. *Chandeshwar Mehto*, AIR 1972 Pat 13, 15.
11. *Katikineni Venkata Gopala Narasimha Rama Rao* v. *Chitluri Venkatara* Mayya 1940 M 768 : ILR 1940 M 969 (FB).
12. *Buchibai* v. *Nagpur University*, ILR 1946 N 433 : 1946 N 377 ; *Suraj Narain* v. *Seth Jhabbulal*, 1944 A 114 ; *Devidatt Ramniranjandas* v. *Shriram Narayandas*, 56 B 324 ; *Mythili Ammal* v. *Janaki Ammal*, 1940 M 161 ; *Katikineni Venkata Gopala Narasimha* v. *Chitluri Venkataramayya*, 1940 M 768 (FB) ; but see *Promatha Nath* v. *Nirode Chandra*, 1940 C 187.
13. *Katikineni Venkata Gopala Narasima* v. *Chitluri Venkataramayya*, 1940 M 768 (FB) ; overruling *Mythili*

income-tax officer[1] have been held to be public documents which may, subject to the provisions of Section 54 of the Income-tax, Act, be proved by certified copies. Under section 54 of the Income-tax Act, income-tax documents inadmissible and the prohibition contained therein to disclose income-tax documents only applies to the officers of the income-tax department.[2]

Acts or records of the acts of a police officer.—The police charged with the duty of investigating an officer is a public officer and his acts or records of the acts can be inspected.[3]

A first information report recorded by a police officer under Section 154, Cr. P. Code, is recorded by him in the discharge of his official duty and Section 35 of the Evidence Act, has been held to be applicable to such report.[4] A report made to the police, to be a public document under Section 74(1) (iii) of the Evidence Act, must be covered either by Section 154 or by Section 155, Cr. P. Code, or by Section 44 of the Police Act. Therefore, a report made to the police by a lady merely to the effect that she is the wife of particular person is not a public document.[5] A report made by an officer in charge of a police station to a Magistrate, under Section 157 of the Cr.P.Code, and a report made by a subordinate police officer to an officer in charge of a police station, under Section 160 of the Cr. P.Code, are not public documents within the meaning of Section 74 of the Evidence Act. Consequently an accused person is not entitled, before trial, to get copies of such reports.[6] The same rule applies to a charge-sheet prepared under Section 173 of the same Code.[7] A police report referred to in a preliminary order under Section 144, Cr. P. Code must be treated as a complaint submitted in discharge of a duty enjoyed by law on the police officer concerned; it is, therefore, a public document.[8] An application filed by the police before a Magistrate for issue of search warrants is a public document.[9]

A record of statements of witnesses made by a police officer in the course of investigation is not a public document.[10]

Other public documents.—The Loan Register of the Public Debt Office in the Bank of Bengal is a public document;[11] so is a Register of Inventions kept under the Inven-

---

Ammal v. *Janaki Ammal*, 1940 M 161 and dissenting from *Anwar Ali* v. *Tafozi Ahmad*, 2 R 391 : 1925 R 84 and *Devidatt* v. *Shriram Narayandas*, 56 B 324 ; *Naim Singh* v. *Tikam Singh*, 1955 A 388. In *Ali Khan Bahadur* v. *Inder Parshad*, 23 C 950, the income-tax returns were considered by the Privy Council though they had been held inadmissible by the Judicial Commissioner.

1. *Pentopati Venkataramana* v. *Varahalu*, 1940 M 308 ; *Buchibai* v. *Nagpur University*, ILR 1946 N 433.
2. *Katikineni Venkata Gopala Narasimha* v. *Chilluri Venkataramayya*, 1940 M 768 ; *Suraj Narain* v. *Seth Jhabbu Lal*, 1944 A 144 ; *E.* v. *Osman Chotani*, 1942 B 289 ; but see *Promotha Nath* v. *Nirode Chandra*, 1940 C 187.
3. *V.J.Thomas* v. *Kerala*, 1970 Cr. LJ 1499.
4. *Chittar Singh* v. *E.*, 47 A 280 : 85 IC 650 : 1925 A 303 : 96 Cr. LJ 554 ; *Mohan Singh* v. *E.*, 85 IC 647 : 1925 A 413 : 26 Cr. LJ 551 ; *Gansa Oraon* v. *E.*, 2 P 517 : 73 IC 561 : 1923 P 550 : 24 Cr. LJ 641 ; but see *Ajadhya Prasad* v. *Mst. Tarabai*, (1934) 18 NLJ 333.
5. *Nawab Bibi* v. *Sher Zaman*, 123 IC 285 : 1930 L 1067.
6. *Q.E.* v. *Arumugam*, 20 M 189 (FB).
7. *Q.E.* v. *Arumugam*, 20 M 189 (FB), per Collins, C.J.& Benson, J., *contra*, Shephered & Subramania Ayyar, JJ., but now see amended Section 173 of the Code.
8. 12 Mys LJ 197.
9. *Kalinga Tubes, Ltd* v. *D. Suri*, 1953 Orissa 49.
10. *Natabar Jana* v. *State*, 1955 C 138.
11. *Chandi Charan Dhar* v. *Boistab Charan Dhar*, 31 C 284.

tions and Designs Act (Act V of 1888).[1] Letters which passed between various Government officials are public documents, as they form records of the acts of public documents;[2] but they are not proof of all the facts to which they refer.[3] A letter by a military officer acknowledging the receipt of an order of attachment by a civil Court is a public document.[4] A notice issued under Section 107, Cr. P. Code, is a public document; but independent proof that the parties mentioned therein are the parties concerned is necessary.[5] A finger print slip taken after a convict enters the jail is an act of the executive and therefore a public document. So also the jail register which is written up by the jail authorities in the ordinary course of their duty as soon as a convict is admitted into jail, is a public document.[6] See notes to Section 65, clause (e).

Documents held not to be public document.—A certificate of the Board of Trade is not a public document,[7] nor a Census Register;[8] nor a warrant issued under Section 46 of the Calcutta Police Act;[9] nor a *Teiskhana* Register prepared by a *Patwari* under the rules framed by the Board of Revenue under Section 16 of Regulation XII of 1817.[10] A letter to the Collector of a district forwarding proceedings of a public meeting is not a public document.[11] A plan not shown to have been prepared by a public servant, nor forming the act or record of the act of a public officer, is not a public document.[12] A *parcha* slip granted in survey proceedings is not a public document.[13] A record copy of a lease for the private use of Government officers which it is not the duty of Governments to maintain is not a public document.[14]

Public records kept in any State or private document.—According to Section 74(2) public records kept in India of private documents are considered to be public documents for purposes of proof. There has been difference of opinion as to whether petitions and affidavits filed in the course of the progress of a suit are public documents. Inconvenience is felt in sending for the originals of these documents, and when the originals are sent for, they in most cases serve no better purpose than the certified copies. The mere fact that a document comes from a Government department and bears its seal does not make it a public document so as to dispense with the need of formal proof.[15]

Section 51 of the Registration Act directs all registration offices to keep certain books in which all documents that have been registered are to be entered Section 57 of the same Act directs the registration officer to give certified copies of all documents entered in such books. The copies thus given are admissible for the purpose of proving

1. *Sarnath Sanyal* v. *W. Butter*, 1907 AWN 23.
2. *Rupa* v. *Bhairon Prasad*, 105 IC 353 : 1928 N 93 ; *Prithee Singh* v. *The Court of Wards*, 23 WR 272.
3. *Rupa* v. *Bhairon Prasad*, 105 IC 353 : 1928 N 93.
4. *Edu* v. *Hira Lal*, 114 IC 502 : 1928 O 488.
5. *Sheikh Amjad* v. *Lachmi Kant Jha*, 23 IC 529 : 18 CWN 644.
6. *Arumugam* v. *E.*, 1938 MWN 595 ; *Rama Rao* v. *E.*, 1943 O 1.
7. In re collision The "Ava" and "Brenhilda", 5 C 568.
8. *E.* v. *Bhavanrao Vithalrao*, 6 Bom LR 535.
9. *Walvekor* v. *E.*, 53 C 718 : 96 IC 264 : 1926 C 966 : 27 Cr. LJ 920. For a notice under Section 107, Cr. P. Code, see *Sheikh Amjad* v. *Lachmi Kant Jha*, 23 IC 529 : 18 CWN 644.
10. *Samar Dasadh* v. *Juggul Kishore*, 23 C 366 ; *Baij Nath Singh* v. *Sukku Mahton*, 18 C 534.
11. *Collector of Dacca* v. *Ashraf Ali*, 143 IC 367 : 1933 C 312.
12. *Gauri Shankar* v. *E.*, 120 IC 547 : 1930 A 26 : 31 Cr. LJ 133.
13. *Ram Bhagwan* v. *E.*, 47 IC 82 : 19 Cr. LJ 886.
14. *Secretary of State* v. *Chimanlal*, 1942 B 161 : 201 IC 420 : ILR 1942 B 357.
15. *Kunti Devi* v. *Radhey Shyam*, AIR 1978 All 185.

the contents of the original documents.[1] It should, however, be noted that registered documents evidencing merely private transactions are not public documents[2] and must be proved in the ordinary way like other documents. But where a case for the reception of secondary evidence is made out under the provisions of Section 65, a certified copy of the registered document becomes admissible in proof of the contents of the original document under the provision of Section 57 (5) of the Registration Act.[3] Section 74(2) refers to private documents made by private persons and kept as record in public offices to which the public generally have access.[4] An entry in the Register of Powers-of-attorney is a public document within the meaning of Section 74 (1) (iii), a certified copy of which is admissible as proof of the original entry by virtue of Section 65(e), Evidence Act.[5] The original receipt executed by an individual and registered under the Registration Act is not a public record of a private document.[6] A certified copy of the entry of registration of a deed is admissible in evidence under Section 74 and 77 as proof of the entry, but not of the contents of the deed.[7] Therefore, a summary of share capital and shares, etc., of a company kept in the office of Registrar of Joint Stock companies is a public record of a private document of which a certified copy is admissible.[8]

Trust Deed.–The original Trust Deed executed by an individual and registered is not a public record of a private document.[9]

Specific Relief Act 1963 Section 38–Plaintiff failing to establish exclusive right of possession of plot in dispute. Permanent injunction cannot be granted.[9a]

76. Certified copies of public document.–[10]Every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and authorized by law to make use of a seal; and such copies so certified shall be called certified copies.

Explanation.–Any officer who, by the ordinary course of official duty, is authorized to deliver such copies, shall be deemed to have the custody

1. Section 57 (5), Registration Act.
2. *Gopaldas* v. *Sri Thakurji*, 1943 PC 83 ; but see *Vithoba Savlaram* v. *Shrithar Narayan*, 1945 B 319 : 219 IC 427.
3. See notes to Section 65(f) under the heading "copies obtained from the registration office are inadmissible, unless a case for the reception of secondary evidence is made out".
4. In the matter of *Tarik Kanti Biswas*, 45 C 169 : 45 IC 338 : 19 Cr LJ 530 (FB).
5. *Pattu Kumari* v. *Nirmal Kumar*, 43 CWN 907 : 1939 C 569 ; but see *Bishen Sarup* v. *Abdul Samad*, 1931 A 649.
6. *Gopaldas* v. *Sri Thakurji*, 1943 PC 83.
7. *Hemanta Kumar Das* v. *Aliantc Insurance Co.*, 1938 C 120.
8. In the matter of the *Tarik Kanti Biswas*, 45 C 169 : 45 IC 338 : 19 Cr Lj 530 (FB).
9. *R.N.Das* v. *S. Kumar* ,AIR 1975 Cal 381.

9a. *Chander Bhan* v. *Prahlad*, AIR 1988 Del. 177.

10. A Village Officer in the Punjab has been declared for the purposes of this Act to be a Public Officer having the custody of a public document –See the Punjab Land Revenue Act, 1887 (17 of 1887) Section 151 (2).

of such documents within the meaning of this section.

77. Proof of documents by production of certified copies.—Such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies.

COMMENTARY

The fact of a document being a public document and the fact of its being open to inspection are not Co-extensive.—The question whether a document is or is not a public document within the meaning of Section 74 is distinct from the question whether or not the public have a right to inspect it. It is only of public documents the public have a right to inspect that certified copies may be given in evidence: but it may well be that a document is "public" within the meaning of this Act, and also one which is not open to the inspection of the public, and of which, therefore, no proof by certified copy may be given.

Public document–Proof of–Nature of evidence required–The primary evidence of a document is the document produced for the inspection of the Court and secondary evidence means and includes certified copies given under Section 76 of the Evidence Act. Under Section 64 of that Act documents must be proved by primary evidence except in cases mentioned in Section 65. Under Section 65(e) a certified copy of a public document but no other kind of secondary evidence is admissible to prove the original.[1]

The right to obtain certified copies.—The right to obtain certified copies of documents is in some cases regulated by special enactments.[2] Where there is no special enactment applicable, the right is regulated by the provisions of Section 76 of the Evidence Act. Under Section 76 the right to obtain certified copy of a document depends upon whether or not the applicant for the copy is entitled to inspect the public document copy of which asked for. The section allows a certified copy of a public document only to a person who has a right to inspect the documents. It does not authorize the issue of a certified copy of a document which a person has no right to inspect, and a certified copy of any such document unlawfully issued is inadmissible in evidence.[3] The right of inspection of a public document, however, automatically gives rise to the right of demanding a certified copy of it. An application under Section 76 of the Evidence Act for a certified copy of a document pre-supposes that the document of which copy is asked for is a public document which the applicant has a right to inspect. A copy of a general power-of-attorney, executed before, and authenticated by a Sub-

1. *Union of India* v. *M/s. Bharadia Brothers*, (1971) 1 CWR 29.
2. See e.g., C.P.Code, O.XX, r. 20 ; O.XII, r. 36 r. O. XIV 15 . Rules and Orders of the Lahore High Court, Volume V, Chap. XXV ; General Rules, and Circular Orders, Part IV ; Chap XV ; Section 57 of the Registration Act, (Act XVI of 1908) Cr P Code, Section 210, 219,371, 511 and 548.
3. *Promatha Nath Pramanick* v. *Nirode Chandra Ghose*, 1940 C 187 : *Anwar Ali* v. *Tafazal Ahmad*, 2 R 391 : 84 IC 487 : 1925 R 84 : but see *Pentapati Venkataramana* v. *Pentapati Varahalu*, 1940 M 308. (certified copies of public document are to be marked as exhibit, *Thatithoi Chiru* v. *Ningampao Kabui*, AIR 1990 Gau 7.

Registrar under Section 33 (1) of the Registrar Act cannot be obtained by a person who is not a party to the deed.[1]

Test of right to inspect.—Under this section the interest of the person applying for a certified copy should be a direct and tangible interest and if a person has made out sufficient interest showing that such inspection is reasonable and necessary for the protection of his interests, he would be entitled to obtain a certified copy.[2]

Notes of evidence.—A defeated litigant who has initiated a proceeding in a superior court has a tangible interest to inspect the proceedings of the lower court within the meaning of the present section. The Notes of Evidence recorded in a suit by the Court of Small Causes is a public document and the defeated litigant is entitled to certified copies of the Notes of Evidence.[3]

Remands reports.—An accused is entitled to inspect the report made by the public for remand or extension of remand, though no charge-sheet may have been filed yet, because any person who has an interest, for protection of which inspection is necessary, should be given the right to inspect. An accused is entitled to know the reason for his being sent to prison. So he is also entitled to a copy of the same.[4]

Food adulteration and Money Lenders' Act.—The resolution of Improvement Trust for allotment sites is a public document. Any applicant who has not been allotted a site by such resolution has a right to see that his interest was not prejudicially affected by non-observance of any rules and as such he has a right to inspect the records so far as they are necessary for protection of his interest.[5] A money-lenders' register maintained by the Sub-Registrar is a public document : any one who is interested in showing that a particular person was a professional money-lender may inspect it and obtain copy for that purpose.[6]

Dhatu Neet.—Where the copy of a *Dhatu Neet* confirming an adoption by the ruler of a convenanting State is issued by a person who, at the time of its issue, was on the personal staff of the Rajapramukh of the convenanting State the person who issued the copy was a public officer. In this case,as the right to get the copy was conceded, the right to inspect was also taken to be conceded.[7]

The right to inspect depends on the interest which the person applying for inspection has in the document.—The question whether any person has a right to inspect a public document is outside the scope of the Evidence Act.[8] There is no general enactment regulating the right of inspection of public documents in this country, though there are special enactments which allow inspection of certain documents.[9] In England, when the right to inspect and to take a copy is not expressly conferred, the extent of such right depends on the interest which the applicant has, in what he wants to copy,

1. *Bishen Sarup* v. *Abdul Samad*, 136 IC 273 : 1931 A 649.
2. *State of Madras* v. *Krishnan*, ILR 1961 Madras 1 ; *A. Annamalai Trading Co.* v. *Haribaran Transports*, 1965 MLJ (Cr) 702.
3. *A. Annamalai Trading Co.* v. *Haribaran Transports*, 1965 MLJ (Cr) 702.
4. *Raman - Velu, In re*, 1972 Ker LT 922 : ILR (1975) 1 Ker 50.
5. *M.N.Krishna Rao* v. *Board of Trustees*, (1972) 1 Mys LJ 101.
6. *D.P.Agarwal* v. *Lakhand*, AIR 1974 Pat 103.
7. *S.Kesawan* v. *Narayana Pillai*, 1969 Ker LJ 326 (328) : 1969 Ker LT 110.
8. *E.v. Muthia Swamiyar*, 30 M 466.
9. *See* section 67 of Act XVII of 1867 (The Oudh Land Revenue Act) ; section 151 of Act XVII of 1887 (The Punjab Land Revenue Act) ; section 55 of Act VI of 1882 (Indian Companies Act) ; section 44 of Act III of 1913 : section 610 of the Indian Companies Act, 1956.

and on what is reasonable necessary for the protection of such interest. the common law right to inspect and take copies of public documents is limited by this principle,[1] and it seems that the mater will be governed by similar considerations in India.[2] Inspection may be refused on the grounds of State policy, privileged communication and other similar grounds.[3] Income-tax papers in the custody of an income-tax officer are not open to public inspection.[4] A judgment for a criminal Court is open to inspection to any member of the public and, therefore, anyone may obtain a certified copy of such judgment.[5]

Remedy of the aggrieved person where inspection or copy has been wrongly refused.—The Statutes which specially confer the right of inspection of public documents do not provide any remedy to which recourse may be had when inspection of copy is refused.[6] But an aggrieved person may in a proper case get a writ of *mandamus* from the High Court under section 45 of the Specific Relief Act.[7]

Defect in the form of certificate.—The section prescribes a particular form of certificate in respect of certified copies but that form is not necessary in every case.[8] Thus, it has been held that copies of income-tax assessment orders can be called certified copies when they bear the seal of the Income-tax department and an endorsement that they were duly copied and compared even though it is not known who actually signed that endorsement.[9]

Officer signing certified copy must also mention his official designation on public documents and records.[10]

Copy of a deposition not certified in the manner prescribed by section 76 and 86; deposition may be proved otherwise.—If a copy of a deposition is not certified in the manner prescribed by section 76 and 86 of the Evidence Act, other proof of the deposition may be given;[11] and, in proper cases, a document purporting to be a true copy of a deposition but not certified as required by sections 76 and 86 may be presumed under section 114 to be a correct copy of the deposition.[12]

Copy unlawfully issued or not properly certified is inadmissible.—If the copy is not certified as required by section 76, it will be inadmissible in evidence.[13] and the same will be the result if the copy is of a document of which a certified copy cannot be granted to the party under section 76 e.g., the copy of an income-tax return,[14] or an

1. *Muller* v. *The Eastern & Midlands Railways Co.*, (1888) LR 38 Ch D 92, 106 ; *Rex.*v. *Justice of Staffordshire*, 6 Ad. & 84, 99, 101.
2. *See* the order of reference by Subramania Ayyar & Davies, JJ., and the judgment of Shepherd, J. in *Q.E.* v. *Arumugam*, 20 M 189 (FB) ; *see also the* judgment of Henderson, J., in *Chandi Charan Dhar* v. *Boistab Charan Dhar, 31 C 284.*
3. *Devidatt Ramniranjandas* v. *Shriram Narayandas*, 56 B 324 : 137 IC 381 : 1932 B 291.
4. *Promatha Nath Pramanick* v. *Nirode Chandra Ghose*, 1940 C 187 ; *Davidatt Ramniranjandas* v. *Shriram Narayandas*, 56 B 324 : 137 IC 381 : 1932 B 291 contra *Katikineni Venkata Gopala Narasimha* v. *Chitluri Venkataramayya*, 1940 M 768.
5. *Ladli Prasad Zutshi* v. *E.*, 53 A 724 : 132 IC 327 : 1931 A 364 : 32 Cr LJ 864.
6. *But see* section 55 of the Indian Companies Act (Act VI of 1882).
7. See *E.*v. *Dinonath Roy*, 8 C 166.
8. *Suraj Narain* v. *Seth Jhabbu Lal*, 1944 A 114: ILR 1944 221 : 214 IC 232.
9. *Suraj Narain* v. *Seth Jhabbu Lal*, 1944 A 114.
10. *Amar Nath* v. *Badri*, (HC) 1985 (II) ALR 627.
11. *Haranund Chetlangia* v. *Ram Gopal Chetlangia*, 27 C 639 : 27 IA 1 (PC) ; *Vallabhadas Mulji* v. *Pranshankar Narbheshankar*, 113 IC 313 : 1929 B 24.
12. *Vallabhdas Mulji* v. *Pranshankar Narbheshankar*, 113 IC 313 : 1929 B 24.
13. *Khadim Ali* v. *Jagannath*, 1941 O 77 ; *Ram Prasad* v . *E.*, 1945 P 210 : *Krishna Kishori Chaodhrani* v. *Kishori Lal Roy*, 14 C 486 : 14 IA 71 (PC).
14. *Devidatt Ramniranjandas* v *Shriram Narayandas*, 56 B 324 : 137 IC 381 : 1932 B 291 : *Anwar Ali* v.

assessment order.[1] It has, however, been held by the Madras High Court that section 76 is merely an enabling section and that if a certified copy of a public document has in fact been given where it could not have been given, the copy is admissible in evidence.[2]

Unsealed copies.—It there is no evidence to the effect that the keeper of a public document is authorized to make use of a seal the Court cannot make such a presumption. Accordingly, a copy of a *sanad* which complies with other formalities but is not sealed cannot be treated as uncertified and is admissible in evidence.[3]

Certified copy must be a public document.—Section 76 and 77 refer to public documents only and are not applicable to private documents, e.g., *Kobalas, etc.*, filed as exhibits in a suit.[4] The certified copies of public documents are admissible in evidence without calling any witness to prove them, they are to be marked as exhibits.[5] A plaint is not a public document and, therefore, a certified copy of it is not admissible in proof of the age of the person signing it.[6]

Oral evidence of a kanungo not admissible to prove the contents of settlement record.—A settlement record is a public document which may be proved by the production of the original or by a properly certified copy thereof; but the oral statement of a *kanungo* is not admissible evidence of what is contained in a settlement record.[7]

Copying fees.—Certified copy of judgment -State for paying court fee.—Section 76 of the Evidence Act provides for furnishing of certified copies on an application by any person to the officer who has custody of the records or on payment of legal fees. The expression "legal fees" at once takes us to the provisions of the Court-fees Act with the Schedule prescribing various court-fees and Art 9 of the First Schedule will then apply. However an accused is entitled to a free certified copy under Sec. 371 Cr. P. C.[8] Necessary court-fees have to be ordinarily paid when applying for certified copies for a judgment under Sec.76 read with the relevant provisions of the Court-fees Act.[9]

Objection with regard to the admissibility of document.—The admissibility in evidence of a document which has been admitted without objection before the Lower Appellate Court cannot be questioned at the stage of the second appeal.[10]

Birth certificate.—The certified copy of a birth certificate over the signature of the Executive Officer, Municipal Corporation, is automatic evidence under the conjoint effect of Sections 35 and 71. It is conclusive unless it is disproved.[11]

78. Proof of other official documents.—The following public documents may be proved as follows.—

Tafazal Ahmed, 2 R 391 : 84 IC 487 : 1925 R 84 : *but see Katikneni Venkata Gopala Narsimha Rama Rao* v. *Chitluri Venkataramayya*, 1940 M 768 (FB).

1. *Promotha Nath Pramanick* v. *Nirode Chandra Ghose*, 43 CWN 1469 : 1940 C 187 : contra, *Pentapati Venkataramana* v. *Pentapati Varahalu*, 1940 M 308 : see also *Kaitikneni Venkata Gopala Narsimha Rama Rao* v. *Chitluri Venkataranmayya*, 1940 M 768 (FB).
2. *Pentapati Venkataramana* v *Pentapati Varahalu*, 1940 M 308.
3. *Sri Ram* v. *Mohammad Abdul Rahim Khan*, (1938) 172 IC 882.
4. *Hureehur Mojoomdar* v. *Churn Majee*, 22 WR 355.
5. *Thatitoi Chru* v. *Ningampao Kabui*, AIR 1990 Gau. 7(p.9.).
6. *Tarkeshwar Prasad Tewari* v. *Devendra Prasad Tewari*, 92 IC 184 : 1926 P 180.
7. *Ram Lal* v. *Ghanisham Das*, 71 IC 825 : 1923 L 150.
8. *U.P.* v. *G. Tobit*, AIR 1958 SC 414.
9. *Prasanna Gogoi* v. *State*, AIR Assam 55 at p. 57.
10. *Toral Mahto* v. *Chandeshwar Mahto* AIR 1972 Pat 13 at p. 15.
11. *Dalim Kumar* v. *Nandarani Dassi*, AIR 1970 Cal 292.

(1) acts, orders or notifications of [1][the Central Government] in any of its departments,[2][or of the Crown Representative] or of any [3][State Government] or any department of any [3][State Government]–

by the records of the departments, certified by the heads of those departments respectively,

or by any document purporting to be printed by order of any such Government [4][or, as the case may be, of the Crown Representative:].

(2) the proceedings of the Legislatures,–

by the journals of those bodies respectively, or by published Acts or abstracts, or by copies purporting to be printed [5][by order of the Government concerned];

(3) proclamations, orders or regulations issued by [6][Her Majesty] or by the Privy Council, or by any department of [6][Her Majesty's] Government.–

by copies or extracts contained in the London *Gazette,* or purporting to be printed by the Queen's Printer;

(4) the Acts of the Executive or the proceedings of the Legislature of a foreign country,–

by journals published by their authority, or commonly received in that country as such, or by a copy certified under the seal of the country or sovereign, or by a recognition thereof in some [7][Central Act];

(5) the proceedings of a municipal body in [8][a State]–

by a copy of such proceedings, certified by the legal keeper thereof, or by a printed book purporting to be published by the authority of such body,

(6) public documents of any other class in a foreign country,–

by the original, or by a copy certified by the legal keeper thereof, with a certificate under the seal of a Notary Public, or of [9][an

1. *Subs.* by the A.O.1937 for "the executive Govt. of British India".
2. *Ins.*by Ibid.
3. *Sub.* by the A.O. 1950 for "Provincial Government".
4. *Ins.* by the A.O. 1937.
5. *Subs.* by the A.O. 1937 for "by order.
6. The words "Her Majesty" stand unmodified. See the A.O. 1950 of Govt".
7. *Sub.* by *Ibid.*, for "Public Act of the Governor General of India in Council".
8. *Subs.* by the A.O. 1950 for "a Province".
9. *Subs.* by *Ibid.*, for "a British Council".

Indian Consul or diplomatic agent, that the copy is duly certified by the officer having the legal custody of the original, and upon proof of the character of the document according to the law of the foreign country.

LOCAL AMENDMENT

West Bengal. After Section 78 the following new section shall be inserted:

"78-A. *Copies of public documents, to be as good as original documents in certain cases.*—Notwithstanding anything contained in this Act or any other law for the time being in force, where any public documents concerning any areas within West Bengal have been kept in Pakistan, then copies of such public documents shall on being authenticated in such manner as may be prescribed from time to time by the State Government by notification in the Official Gazette, be deemed to have taken the place of, and to be, the original documents from which such copies were made and all references to the original documents shall be construed as including references to such copies". (Vide West Bengal Act XX of 1960, Sec., dated 5th January, 1961).

COMMENTARY

Section 78 Provides as alternative mode of proving certain public documents.—It has been held by the Calcutta High Court that the mode of proof of public documents mentioned in section 78 is permissive and that the Court is not precluded from having recourse to other modes of proof.[1] A public document may be proved by the production of the original, or by a certified copy under section 77, or in the manner prescribed by section 78. Some of the documents mentioned in section 78 are also judicially noticeable, in reference. An order of the Governor-in-Council signed by an Under Secretary and affixed with the official seal of the Provincial Government is an original document which proves itself and cannot be required to be proved in the manner laid down by present section.[2] Where a document is admitted as a public document it should be marked as an exhibit in the case.[3] A printed copy of an order signed by the President of India, not purporting to be published by the Government,is no proof of the order under Section 78. Such an order can be proved by production of the original or its certified copy or even by an affidavit of a responsible official.[4]

CLAUSE (1)

Acts.—Acts of the Executive Government may be proved by a certified record, or by any document purporting to be printed by the order of the Government.

Acts, orders of notifications; Clause(1).—The section indicates with precision how official document of the nature mentioned in it are to be proved. A notification issued by the Government or by a department of the Government is a public document and a certified copy thereof may be produced to prove the existence, conditions or contents of that document under Section 65. Under this section such a copy has to be certified by the head of department which issued the notification. Extract from a Gazette certified

1. *Kalijiban Bhattacharjee* v. *E.*,63 C 1053 : 163 IC 441 : 37 Cr LJ 775 : *Sheodoyal Khemka* v. *Joharmull Marmul*,50 C 549 : 75 IC 81 : 1924 C 74.
2. *Kalijiban Bhattacharjee v. E.*,63 C 1053 : 1936 C 316 : 163 IC 441 : 37 Cr LJ 775.
3. *Sahdon Singh* v. *Balam Singh*, 1937 P 334 : 170 IC 61.
4. *Brahmeshwar Prasad* v. *State*, 1950 P 265 : 51 Cr LJ 1081.

by the District Medical Officer is not admissible: only a true copy certified by the head of the department concerned would be admissible.[1] Copy of notification declaring certain area as reserved forest under Travancore Forest Act duly certified by the Chief Conservator of forests is admissible under this section.[2]

Conflict between the text of an Act as printed in the Gazette of India and as printed in book form by the Government.—The version of Act published by the Government in the Gazette of India must be taken to be the authorized text of the Act, and must be followed even though it does not carry out the intention of the legislature owing to an accidented mistake.[3] It has, however, been held by the Calcutta High Court that, in consideration the terms of an Act of the Legislature, the version of the Act contained in the Acts printed and published by order of the Government, and not the version set out in the Gazette, is the accurate and true version of the Act which the Legislature enacted.[4]

Notification.—Section 78 of the Evidence Act indicates with precision how official documents mentioned in that section are to be proved. An extract from a newspaper of standing is not admissible as proof of a Government notification,[5] which must be proved by producing a copy of the Gazette.[6] A notification published in the Gazette by the order of the Government is proof, under section 78 of the Evidence Act, of the order of the Government fixing the date of an election,[7] or of a province having been declared a notified area under the Unlawful Instigation Ordinance of 1930.[8] But section 78 of the Evidence Act applies only to proof of documents; in other words, it is only a provision for the notification being proved by the production of a copy of the Gazette and cannot prove that the authority promulgating a notification was the Governor or the Minister when the notification does not purport to say so.[9] In a Subsequent case, however, it has been remarked that under section 114 of the Evidence Act there is a presumption that the notification was promulgated regularly namely, in accordance with law. [10] A Court is not authorized under section 57 of the Evidence Act to take judicial notice of a notification.[11] Where a notification has not been published in the N.W.F.Government Gazette, as required by sections 4(36) and 26, N.W.F.General Clause Act, such notification is not one that has been "made" and is in fact not a "notification". It cannot be proved under section 78 (1) of the Act by producing revenue records of the Province, because a notification which does not exist cannot be proved.[12] The High Court has, in revision, the power to admit in evidence a Gazette notification and a presumption of

1. *Sarjang Sah* v. *State of Bihar*, 1973 B LJR 790.
2. *Kerala* v. *Adichan Sasi*, 1975 Ker LT 839.
3. *Rai Brinondan Parshad* v. *Mahabir Prasad*, 97 IC 316 : 1927 P 142 : *Subramania Iyer* v. *Shunmugam Chettiar*, 92 IC 566 : 1926 M 65 : *Gobind Das* v. *Rupkishore*, 4 L 367 ; 77 IC 409 ; 1924 L 65.
4. *Seodoyal Khemka* v. *Joharmull Manmull*, 50 C 549 : 75 IC 81 : 1924 C 24.
5. *Moti Lal Nehru* v. *E.*,129 IC 443 : 1931 A 12 : 32 Cr LJ 311.
6. *Nanak Chand* v. *E.*,134 IC 769 : 1931 L 273 : 32 Cr LJ 1227 : *Moti Lal Nehru* v. *E.*,129 IC 443 : 1931 A 12 : 32 Cr LJ 311 : *Collector of Cawnpore* v. *Jugal Kishore*, 107 IC 578 : 1928 A 355 ; *Commissioner, Corporation of Madras* v. *Ekambara Naicker*, 106 IC 144 : 1927 M 980 (FB) ; *Mathuradas* v. *State*, 1954 N 296.
7. *Commissioner, Corporation of Madras* v. *Ekambara Naiker*, 106 IC 144 : 1927 M 980 (FB).
8. *Nanak Chand* v. *E.*, 134 IC 769 : 1931 L 273 : 32 Cr LJ 1227.
9. *Ekambara Naicker* v. *Commissioner of the Madras Corporation*, 96 IC 18 : 1927 M 22.
10. *Commissioner, Corporation of Madras* v. *Ekambara Naicker*, 106 IC 144 1927 M 980 (FB).
11. *Collector of Cawnpore* v. *Jugal Kishore*, 107 IC 578 : 1928 A 355.
12. *E.*v. *Fazal Rahman*, 1937 Pesh 52 : 170 IC 772 : 38 Cr LJ 1042.

genuineness will arise in respect of a notification thus admitted.[1]

Departmental circulars.—A department circular which is not certified by the head of the department and which does not purport to be printed by order of the Government as required by section 78 is not admissible.[2] A Police Gazette published by the authority of the State Government is a public document and the Court can take judicial notice of it.[3]

Orders of the Government; order sanctioning prosecution.—A letter issued from the office of the Chief Secretary to the Government conveying sanction under section 196, Criminal Procedure Code to a prosecution under section 294-A of the Penal Code, which is not signed by the Chief Secretary but by some other officer on his behalf, is no legal proof that the State Government has ordered or authorized the prosecution. The capacity of the Chief Secretary in such a case being that of a delegate c the head of the State Government, the order cannot be certified on his behalf. In such a case the order must be proved according to the provisions of section 78 of the Evidence Act.[4] If, however, the order is signed by the Chief Secretary, it would be sufficient proof of the prosecution having been ordered by the Government.[5] An order sanctioning prosecution is a public document and can always be proved by production of a certified copy.[6] When the original order is produced it is presumed to be genuine and it is not necessary to call for the proof of the signature of the officer sanctioning prosecution.[7] See notes to section 114(e) under the heading "Presumption as to the regularity of a sanction to prosecute and as to the method of its communication to the prospecting officer".

CLAUSE (2)

The proceedings of the Legislatures.—The proceedings of the Legislatures may be proved by the journals of those Legislatures, or by published Acts or abstracts, or by copies purporting to be printed by order of Government. In England, Parliamentary Journals signed by the Speaker are provable either at Common law by production of the originals or examined copies, or under Statute by copies purporting to be printed by the printers to the Crown, or by the printers to either House of Parliament; or perhaps by authority of H.M. Stationery Office. Hansard's Debates are not admissible as Parliamentary Journals.[8] Hansard's Reports are not admissible for the purpose of proving what was said in the House of Commons, without the evidence of the person who reported the speech, or of any person who was present when the speech was made.[9] The White Book, a publication edited by the Vatican in 1930, containing documents relating to the maltese Question cannot be used as evidence. The proceedings of Parliament fall under either the second or fourth of the categories of the Section 78. The Legislatures to which the second category refers are intended to include all the Legislatures which have

---

1. *Nanak Chand* v. *E.*,134 IC 769 : 1931 L 273 : 32 Cr LJ 1227.
2. In re.*Veluayudam Pillai*, 115 IC 509 : 30 Cr LJ 483.
3. *Maqbool Husain* v. *Govt. of U.P.*, 1947 O 210.
4. *Mahammad Oziullah* v. *Beni Madhab Chowdhury*, 50 C 135 : 71 IC 239 : 1922 C 298.
5. See *Mahammad Oziullah* v. *Beni Madhab Chowdhury*, 50 C 135 ; 71 IC 239 : 1922 C 298.
6. *State* v. *Sagar Mal*, 1951 A 515 ; *Sagar Mal* v. *State*, 1951 A 816.
7. *Sagar Mal* v. *State*, 1951 A 816.
8. Phipson, Ev. ,7th Ed., 531.
9. *The Englishman Ltd* v. *Lajpat Rai*, 37 C 760 : 6 IC 81, *per* Harington, J., *contra*, Woodroffe, J.

the power to make laws for India or for any part thereof. Therefore, the volumes of the official Parliamentary Debates afford adequate legal proof of the passing of a resolution by the House of Parliament.[1] The expression 'journals" is plainly to be given a broad and general meaning, since it is not confined to the journals of the House of Parliament, but includes journals of other Legislatures also; and there is no reason, therefore, why in its application to Parliament, it should necessarily the confined to only the copies of the official journal of the two Houses. It includes the official record of such proceedings printed under the authority of Parliament.[2] Reports when they become admissible under this clause can only be evidence of what was stated by the speakers in the Legislature and are not evidence of any fact contained in the speeches.[3] Reports of speeches in Parliament are generally inadmissible, but the legal position may be different if the *bona fides of* the Parliament are challenged.[4]

CLAUSE (3)

Proclamations, orders or regulations issued by His Majesty or by the Privy Council.—Proclamations, and orders and regulations issued by the Government or the Privy Council, may be proved, like other public documents, by the production of the originals, or by copies contained in the London Gazette or purporting to be printed by the printers to the Crown.[5]

CLAUSE (4)

The Acts of the Executive, or the proceedings of the Legislature of a foreign country.—The facts of the Executive, or the proceedings of the Legislature, of a foreign country may be proved by the official journals of that country, or by a copy certified under the seal of the country or sovereign, or by a recognition thereof in some public Act.

CLAUSE (5)

Proceedings of a Municipal body.—A record of the proceedings of a municipal body is a public document,[6] and a copy of such record certified by the legal keeper thereof is admissible under Section 78 (5) in proof of the proceedings of the body.[7]

In a case, a copy of a resolution of a Municipal Corporation authorising its Assistant Municipal Prosecutor under Section 20 of the Prevention of Food Adulteration Act, 1954, to institute and conduct prosecution for an offence under that Act which was not certified by the legal keeper of records but by the Head Clerk of the Central Office, was received in evidence as the Head Clerk had been authorised by the Commissioner to certify copies of municipal records as true copies as shown by the Book Manual of Paper.[8]

---

1. *Niharendua Dutt* v. *E.*, 1942 FC 22 : 200 IC 289 : 42 Cr LJ 504.
2. *Ibid.*
3. *Strickland* v. *Carmalo Mifsud Bonnici*, 153 1, IC 1 ; 1935 PC 34 ; *E.* v. *Mohammad Hussan*, 1943 L 298 ; *Bhagawati Charan Shukla* v. *Provincial Government C. P.*, 1947 N 1.
4. *K.C. Gajapati Narayana Deo* v. *State*, 1953 Orissa 185.
5. *See* Phipson, Ev., 7th Ed., 529.
6. Reference under section 46 of Act No. 1 of 1879, 19 A 293 (FB).
7. *Akshay Kumar Chand* v. *Commissioner of Bogra Municipality*, 75 IC 506 ; 1923 C 675.
8. *Tillo Ram Karam Chasnd* v. *State of Punjab*, 69 Punj. LR (D) 22 : 1967 Cr. LJ 1295.

CLAUSE (6)

Foreign public documents.—A foreign public document may be proved by the original or by a certified copy, but, in the latter case, the copy must be certified by the legal keeper to the document, and there must be a certificate by a notary public, Indian Consul or diplomatic agent, to the effect that the copy is certified by the legal keeper of the original. Proof must be given of the character of the document according to the law of the country in which the document is kept. If the copy is not certified, it would be inadmissible in evidence. Thus, copies of an attendance register or a leave register kept by the officers of a Foreign Government are not admissible, if they, are not certified in the manner prescribed by Section 778 (6).[1] Where a suit is brought on the basis of a foreign judgment, the copy of the judgment sued upon must be accompanied by a certificate as required by Section 778 (6).[2]

Proof of foreign judicial records.—Foreign Judgment.—Clause (6) makes it clear that apart from the two certificates—one by the legal keeper of the original documents, and the other by the Consul General there shall also be proof of the character of the document according to the law of the foreign country before the document is admitted. Proof can be by direct or circumstantial evidence, and it can also be made by placing before the Court facts giving rise to presumption, rebutable or irrebutable. While this clause lays down three conditions for admitting the document in evidence, the admission of the judicial record is not a condition precedent for drawing the requisite presumption under Section 86. If the three conditions laid down in this clause are fulfilled the document can legitimately be admitted.[3]

A foreign judicial record is a public document and may be proved by a copy certified in the manner prescribed by Section 78 (b) and 86 of the Evidence Act. If, however, the copy is not properly certified and the document to be proved is a deposition, it may be proved by an official deposing to what took place in his presence, or to an uncertified record of the deposition.[4] Sections 4 and 115 of the English Extradition Act (33 and 34 Vic., c. 52) are applicable to India and, therefore, the records of a foreign Court authenticated in the manner prescribed therein are admissible even if they are not certified as required by Section 78 and 86 of the Evidence Act.[5]

PRESUMPTIONS AS TO DOCUMENTS

Certain presumptions arise in regard to some documents produced as evidence in Court. These presumptions are dealt with in the following set of sections.[6] Some of the presumptions are "obligatory", in the sense that the court is bound to raise them, e.g., the presumptions mentioned in Sections 79 to 85, and Section 89; others are merely "permissive", in the sense that the Court may or may not raise them, e.g., the presumptions mentioned in Sections 86 to 88, and Section 90. Where the presumption is "obligatory", the Act directs that the Court shall *presume* a certain fact in regard to a document; and where it is "permissive", the Act provides that the Court *may presume* a

---

1. *Shamsher Narain Singh* v. *Mohammad Sale*, 90 IC 329 ; 1926 P 29.
2. *Santa Singh* v. *Ralla Singh*, 14 PR 1919 ; 49 IC 383.
3. *Badat & Co.* v. *East India Trading Co.*, (1964) 2 SCA page 1.
4. *Harnund Chetlangia* v. *Ram Gopal Chetlanga*, 27 C 639 ; 27 IA 1 (PC).
5. *In re Rudolph Stallman*, 39 C 164 ; 12 IC 273 ; 12 Cr. LJ 505.
6. Sections 79 to 90.

certain fact in regard to a document. In addition to the presumptions specifically mentioned in this set of sections, other presumption in regard to certain documents might arise under Section 114, which is a residuary section dealing with permissive presumptions.

The presumptions mentioned in Sections 779 to 90 are not conclusive but rebuttable. Though the Court may, and in some cases shall, presume certain facts about certain documents, evidence may be given by the party, against whom the presumption operates, that the facts presumed did not or do not, in fact, exist. These presumptions are founded upon, and are deductions from, the principle embodied in the maxim *omnia praesumuntur rite esse acta*. For a full discussion of the subject of presumptions, see notes to Section 3.

79. Presumption as to genuineness of certified copies.—The Court shall presume [1][to be genuine] every document purporting to be a certificate, certified copy, or other document, which is by law declared to be admissible as evidence of any particular fact and which purports to be duly certified by any officer [2][of the Central Government or of a State Government, or by any officer [3][in the State of Jammu and Kashmir who is duly authorised thereto by the Central Government]:

Provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf.

The Court shall also presume that any officer by whom any such document purports to be signed or certified, held, when he signed it, the official character which he claims in such paper.

COMMENTARY

Certificates and certified documents must be presumed to be genuine.—This section is based on the maxim *omina praesumuntur rite esse acta*. The section applies only to certificates and other documents certified by the officers mentioned in the section. "The presumption that the document itself is genuine of course includes the presumption that the signature and the seal, where a seal is used, are genuine." The presumption, however, arises only if the document is substantially in the form, and purports to be executed in the manner, prescribed by law. Under the section there is also a presumption that the signing or the certifying officer held the official position or character which he claims in the paper. A certificate of the visitors of Lunatic Asylum or Mental Hospital, comes within the in the prescribed form and signed by the visitors and by the Superintendent of the Hospital, provisions of Section 79 of the Evidence Act and is a public document, the genuineness of which is to be presumed in view of Section 473 of the Code of Criminal Procedure. No formal proof of such document is

1. *Ins by the* A. O. 1948.
2. The original words beginning from "In British India " and ending with the words ' to be genuine" have been successively amended by the A. O. 1937, A. O. 1948 and A. O. 1950 to read as above.
3. *Subs*. by Act 3 of the 1951, S 3 and Sch. for "in a Part B State".

necessary under the law.[1] So also a letter of plaintiff to Nazul department filed becomes a public document.[1a]

The Section applies to original documents.[2]

Presumption as to the original.—The only question which remains for consideration is whether a presumption of the genuineness of the original of a public document should be drawn by reason of Ilus. (e) to Section 114 of the Evidence Act to the effect that official acts have been regularly performed. It is no doubt true that it has been held by a Division Bench of the Bombay High Court in the case of a *East India Trading Co.* v. *Badat & Co.*,[3] that Section 114 of the Evidence Act is wide enough to permit the Court to raise a presumption not only with regard to oral evidence but also with regard to documentary evidence. It may be mentioned that the decision of the Division Bench in the said case was reversed on appeal by the Supreme Court by a majority in *Badat & Co.* v. *East India Trading Co.*,[4] but in the judgment of the majority that Supreme Court has not referred to the point mentioned above. Apart from the undesirability of taking a view which would let in any and every document tendered by Government in suits to which it is a party without proof of genuineness, no presumption under Section 114 can be drawn in view of the mandatory and unqualified term of Section 67 and 68 of the Evidence Act. Section 114 which, to put it in popular language, merely empowers the court to use its commonsense, cannot be used to contravene an express provision of the Act itself. It would, therefore, be held that if the original of a public document is sought to be tendered in evidence, it must be proved in the manner required by law.[5]

Proof of the original.—If the original itself is tendered in evidence it must be proved like any other document. Its photostat copy not admissible to prove the document.[5a]

Presumption of genuineness of a certificate of registration.—The genuineness of a certificate of registration must be presumed under Section 79 of the Evidence Act, and the evidence of the registering officer is not necessary to prove it.[6]

Letter signed by the Chief Secretary ordering the prosecution of a person is sufficient proof of the order of prosecution.—A letter, issued from the office of the Chief Secretary to the Government, and signed by the Chief Secretary, directing the prosecution of person is sufficient proof of the order of prosecution by the State Government but not if the letter has been signed by some other officer for the Chief Secretary.[7]

A certified copy of revenue record.—It raises a presumption of correctness of the record and genuineness of the copy unless contrary is proved.[8] Correctness of copies of *birth* and death registers of local bodies shall be presumed under Section 79.[9]

Sections. 77, 79, and Allahabad High Court Rules, R. 260 and Limitation Act, (1963) S. 12.—The Precise object of R. 260 apparently is to exclude all possibility of

1. *Kalidas Sarkar* v. *E.*, 63 C 425.
1a. *Manorama* v. *Saroj*, AIR 1989 All 17.
2. *Bishnath Prasad* v. *E.*, 1948 O 1: 48 Cr. LJ 542 ; 230 IC 144.
3. 61 Bom. LR 333 at P 340.
4. AIR 1964 SC 538.
5. *G. H. Shah* v. *S. S. Malpathak*, AIR 1973 Bom 14, 17.
5a. *G.H. Shah* v. *S. S. Malpathak*, AIR 1973 Bom 14 : Smt. Monorma v. Sarok, AIR 1989 All. 17.
6. *Muhammad Hassan* v. *Sohara etc.*, 71 IC 805 ; 1924 L 389.
7. *Md. Oziullah* v. *Beni Madhab Chowdhury*, 50 C 135 ; 1922 C 298 ; 71 IC 239 ; 24 Cr. LJ 111 ; but see *Kalijiban Bhattacharjee* v. E., 63 C 1053 ; 1936 C 316.
8. *Budhu Abhir* v. *I. C. Pandey*, 1972 Cr. LJ 1377.
9. (1974) 1 Cr LT 550 Punjab.

tampering with these dates which play a crucial role in computing the period of limitation. When relevant dates are shown both in words and figures the possibility of interpolation in dates is almost eliminated (para 1).[1]

Objection in appeal.–In a case it was said that the original sale deed was eaten away by white-ants and a certified copy of that document was marked as an exhibit in the trial court without objection from the other side. It was held that no objection could be taken to the mode of proof in the appellate Court.[2]

80. Presumption as to documents produced as record or evidence.–Whenever any document is produced before any Court, purporting to be a record or memorandum of the evidence, or of any part of the evidence, given by a witness in a judicial proceeding or before any officer authorised by law to take such evidence, or to be a statement or confession by any prisoner or accused person, taken in accordance with law, and purporting to be signed by any Judge or Magistrate, or by any such officer as aforesaid, the Court shall presume–

that the document is genuine; that any statement as the circumstances under which it was taken, purporting to be made by the person signing it, are true, and that such evidence, statement or confession was duly taken.

COMMENTARY

Principle.–This section, like that preceding one, merely gives sanction to the maxim *omna praesumuntur rite esse acta* with regard to documents taken in the course of a judicial proceeding. It does not render admissible any particular kind of evidence, but only dispenses with the necessity of formal proof in the case of certain documents taken in accordance with law.[3] The section only applies to two classes of documents, (i) a documents purporting to be the record of the evidence of a witness given in a judicial proceeding, and (ii) a document purporting to be the record of the statement or confession of a prisoner or an accused person.

Evidence must be given in the course of a judicial proceeding or before an officer authorized to take it; police investigation under Chap. XIV, Cr. P. Code, is not a judicial proceeding.–So that the presumptions mentioned in Section 80 may arise in respect of a document purporting to be the record of the evidence of a witness, the evidence must be shown to have been given in the course of judicial proceeding or before an officer authorized by an officer who had no jurisdiction or whose own appointment was *ultra vires*.[4] The expression "judicial proceeding " is not defined by the Evidence Act, though it also occurs in some other sections of the Act.[5] The Criminal Procedure Code defines a judicial proceeding as including any proceeding in the course

1. *U. P., S.R. T.C.* v. *Kedar Singh*, AIR 1991 Alld. 317 (para 11).
2. *Bahadar Munda* v. *Dhuchra Oraon*, AIR 1970 Pat. 209 (211).
3. *Q. E.* v. *Viram*, 9 M 224 ; *Padam Prashad Upadhyaya* v. *E.*, 119 IC 193 ; 1929 C 617 ; 33 CWN 1121 (FB).
4. *E.* v. *Ajit Kumar Ghosh*, 1945 C 159 ; *Anwarali Sarkar* v. *State*, 1955 C 535.
5. See Sections 1 and 33.

of which evidence is or may be legally taken on oath.[1] But this definition of a judicial proceeding has been held to be limited to the Criminal Procedure Code only.[2] In the case last cited, a Full Bench of the Bombay High Court has ruled that the statement of a witness recorded, in the course of police investigation under Section 164 of the Criminal Procedure Code is not evidence in a stage of a judicial proceeding within the meaning of Section 193, I. P. Code.[3] It is, therefore, doubtful whether such statement will be treated as evidence given in a judicial proceeding for purposes of Section 80 of the Evidence Act. "Evidence" means and includes all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry.[4] Therefore, the record of a statement made by a witness to a Police Officer in the course of police investigation under Chap. XIV of the Criminal Procedure Code is not record of the "evidence" or a witness; nor in such police investigation a judicial proceeding within the meaning of Section 80 of the Evidence Act. Such statement does not, therefore, prove itself.[5]

A confession or a statement by an accused person need not have been made in a judicial proceeding.—The condition of its having been made in the course of a judicial proceeding applies only to the statement of a witness, and not to the statement or confession of an accused person. Therefore, even if proceeding under Section 164, Cr. P. Code, be held not to be judicial proceedings as ruled by the Bombay High Court,[6] the record of the confession or statement of an accused person made under Section 164 Cr. P. Code, would still be within the terms of Section 80 of the Evidence Act, provided the confession or the statement was taken according to law.

This section make it unnecessary to examine the Magistrate, who has recorded a confession. It authorises the Court to presume that the document containing the record of the confession, is genuine, that any statements as to the circumstances under which, it was taken are true and that such confession was truly taken in accordance with law, in a case where the Magistrate had put to the accused all the necessary questions to satisfy himself that the confession was voluntary and he had appended the necessary certificate to that effect.[7]

To give rise to any presumption under Section 80 the evidence must have been taken in accordance with law; effect of not interpreting or reading over a deposition to a witness.—The presumptions mentioned in Section 80 arise only in respect of the record of evidence which has been taken in accordance with law.[8] The section contemplates the deposition which it is proposed to use as evidence should have all the guarantees of authenticity which the law prescribes.[9] The mode of recording evidence is regulated by the Civil Procedure Code in civil cases and by the Criminal Procedure Code in criminal cases.[10] In all civil cases the evidence must be taken orally in open Court in the presence and under the personal direction and superintendence of the Judge.[11] In appealable case the evidence must be taken down in writing in the

1. Section 4 (m) Cr. P. Code.
2. *Purshottam Ishwar Amin* v. *E.*, 45 B 834 ; 1921 B 3 ; 60 IC 593 : 22 Cr L J 241 (FB).
3. Ibid.
4. Section 3.
5. See *Roghuni Singh* v. E., 9 C 455, 458.
6. *Purshottam Ishwar Amin* v. *E.*, 45 B 834 ; 1921 B 3 ; 60 IC 593 : 22 Cr L J 241 (FB).
7. *Madi Ganga* v. *State of Orissa*, 1981 SC 1165 ; 1981 Cr. LJ 628.
8. *Eusuf* Ali v. *E.*, 142 IC 653 ; 1933 C 190 ; 34 Cr. LJ 430.
9. *Tun Ya* v. *E.*, 51 IC 666 ; 20 Cr. LJ 506.
10. *See* O XVIII rr, 4, 5 and 6, C. P. Code ; Sections 353 -363, Cr. P. Code
11. O XVIII r. 4 C P Code.

language of the Court by, or in the presence and under the personal direction and superintendence of the Judge; and, when completed, must be read over in the presence of the Judge and of the witness and signed by the Judge.[1] Where the evidence is taken down in the language different from that in which it is given, and the witmen does not understand the language in which it is taken down the evidence as taken down in writing must be interpreted to him in the language in which it is given.[2] In all non-appealable cases, and in appelable cases where evidence in not taken down in writing by the Judge, the Judge must with his own hand, make a memorandum of the substance of what the witness deposes, and sign the memorandum.[3] In criminal cases, if any Magistrate other than a Presidency Magistrate tries a summons case, or if a magistrate of the first or second class tries an offence mentioned in clauses (b) to (m) of Section 260, Cr. P. Code, he must, with his own hand, make and sign a memorandum of the evidence of the witness, unless, he is prevented from doing so, in which case he must cause such memorandum to be made in writing from his dictation in open Court and sign it.[4] In other inquiries and trials the evidence of each witness must be taken down in writing in the language of the Court by the Magistrate or the Sessions Judge, or in his presence and hearing and under his personal direction and superintendence, and must be signed by him,. If the evidence is not taken down in writing by the Magistrate or the Session Judge, he must, with his own hand make and sign a memorandum of the substance of what the witness deposes.[5] As the evidence of each witness taken under Section 356 or Session 357 of the Cr.P. Code is completed, it must be read over to him in the presence of the accused if in attendence or of his pleader if he appears by pleader. If the evidence is taken down in a language different from that in which it is given, and the witness does not understand the language in which it is taken down, the evidence so taken down must be interpreted to him in the language in which it is given, or in a language which he understands.[6] Whenever any evidence is given in a language not understood by the accused, and he is present in person it must be interpreted to him in open Court in a language other than the language of the Court and not understood by the pleader, it must be interpreted to such pleader in that language.[7] The question whether the record or memorandum of the evidence of a witness, not taken strictly in accordance with above-mentioned rules, is or is not admissible and whether the proceedings are or are not vitiated by the defect is a pure question of procedure and has nothing to do with the Evidence Act,. There are cases in which non-complaince with these rules has been held to vitiate the proceedings, the rules being mandatory in their character.[8] On the other hand, there are case in which a contrary view has been taken.[9] A Privy Council decision

1. O XVIII, r. 5 C. P. Code.
2. O XVIII, r. 6 C. P. Code.
3. O XVIII, rr. 8. 13, C. P. Code.
4. Section 355, Cr. P. Code.
5. Section 356, Cr. P. Code.
6. Section 360, Cr. P. Code.
7. Section 361, Cr. P. Code.
8. *Abdul Bari Mallick* v. *E.*, 92 IC 877 : 1926 C 157 : 27 Cr. LJ 375 ; *In re Kuppa Mudli*, 49 M 71 : 90 IC 659 : 1925 M 1206 : 26 Cr. LJ 1587 ; *Manik* v. *E.*, 88 IC 1043 : 1925 C 933 : 26 Cr. LJ 1267 ; *Dargahi* v. *E.*, 52 C 499 : 88 IC 733 : 1975 C 831 : 26 Cr. LJ 1213 ; *Mohammad Yasin* v. *F.*, 52 C 431 : 88 IC 602 : 1925 C 782 : 26 Cr. LJ 1178 ; *Hira Lal Ghosh* v. *E.*, 52 C 159 ; 83 IC 905 ; 1924 C 889 : 26 Cr LJ 201 : Haro Nath Malo v. Ala Bux, 76 IC 961 : 1924 C 182 ; 25 Cr. LJ 289 *See also Amrit Lal Hazra* v. *E.*, 42 C 957 : 29 IC 513 : 16 Cr. LJ 497.
9. *Mayeth* v. *E.*, 3 R 612 ; 95 IC 937 ; 1926 R 78 ; 27 Cr. LJ 857 ; *Jagwa Dhanuk* v. *E.*, 5 P 63 : 93 IC 884 : 1926 P 232 : 27 Cr. LJ 484 ; *Mohiuddin* v. *E.*, 4 P 488 : 86 IC 459 : 1925 P 414 : 26 Cr. LJ 811.

supports the view that a failure to comply with these rules is a mere irregularity which, in the absence of a probable suggestion of a failure of justice, does not vitiate the trial in a criminal case.[1] Section 80 of the Evidence Act has apparently no bearing on this question. From the point of view of Sections 80 of the Evidence Act, the proper or defective mode of recording evidence is material only inasmuch as it affects the presumptions which, under that section, the Court is required to raise in respect of a document purporting to be the record or memorandum of the evidence of a witness. The presumptions mentioned in Section 80 will arise only if the deposition has been taken in accordance with law. Where a deposition has not been taken in accordance with the rules laid down in the C.P. Code, or the Cr. P. Code, it will lose the benefit of the presumption of Section 80 : and authority is not wanting for the proposition that, in such a case, no other evidence will be admissible to prove the deposition. Thus, where a deposition has not been read over to the deponent, or having been given in a language different from the one in which it is recorded, has not been interpreted to him, it will be inadmissible against the deponent at his subsequent trial for perjury, and no other evidence in proof of the deposition will, by reason of Section 91 of the Evidence Act, be admissible, it being a matter required by law to be reduced to writing.[2] But the more correct view seems to be that, in the circumstances mentioned above, the deposition merely loses the benefit of the presumptions of Section 80 of the Evidence Act, and is not rendered entirely inadmissible.[3] It may, therefore, be properly proved by other evidence, e. g., by the evidence of the person to or before whom the deposition was made or by the admission of the deponent.[4] The Privy Concil decision in *Haranund Chetlangia* v. *Ram Gopal Chetlangia*,[5] is an authority for the proposition that the fact of a person having given evidence is a fact which may be proved by the evidence of a person in whose presence the evidence was given.[6] Therefore, even if a deposition has not been properly recorded, there is nothing in Section 80 or Section 91 of the Evidence Act to prevent it from being proved by other evidence. The difference between a deposition properly recorded and a deposition not properly recorded is merely this : that whereas the former proves itself by the mere force of the presumption of Section 80, the latter does not prove itself but requires proof.[7] There is nothing in the Civil Procedure Code or in the Criminal Procedure Code which requires the Judge to certify at the end of a deposition that it has been read over to the witness, and the absence of such

1. *Abdul Rahman* v. *E.*, 5 R 53 : 54 IA 96 : 100 IC 227 : 1927 PC 44 : 28 Cr. LJ 259 (PC).
2. In the matter of petition of Mayadeb Gossami, 6 C 762 ; *E.*, v. *Nabab Ali Sarkar*, 51 C 236 ; 81 IC 803 ; 1924 C 705 ; 25 Cr. LJ 102 ; *Imam Din* v. *Nimat Ullah*, 1 L 361 ; 58 IC 830 ; 21 Cr. LJ 830 ; *Nalluri Chenchiah* v. *K. E.*, 42 M 561 : 50 IC 987 ; 20 Cr. LJ 379 ; *Reamdhari Singh* v. *E.*, 43 IC 585 : 19 Cr. LJ 169 ; *Mohendra Nath Misser* v,. *E.*, 8 Cr. LJ 116 ; *Kamatchinathan Chetty* v. *E.*, 28 M 308 ; In the matter of the petition of Mayadeb Gossami, 6 C 762 ; See also *E* v. *Jogendra Nath Ghosh*, 42 C 240 : 24 IC 571 : 15 Cr. LJ 483 : *But See Ramesh Chandra Das* v. *E.*, 46 C 895 ; 50 IC 660 ; 20 Cr. LJ 324 ; 16 C 895.
3. *Mohammad Farooq* v. *Rex*, 1950 A 501.
4. *Mohammad Farooq* v. *Rex*, 1950 A 501 ; 1950 ALJ 277 ; *Pitoomal* v. E., 86 IC 33 ; 1921 S 151 ; 26 Cr. LJ 657 ; *Mirabux* v. *E.*, 68 IC 36 ; 1923 N 39 ; 23 Cr. LJ 500 ; *Tun Ya* v. *E.*, 51 IC 666 ; 20 Cr. LJ 506 ; *Elahi Baksha Kazi* v. *E.*, 45 C 825 ; 45 IC 258 ; 19 Cr. LJ 498 ; *See also Feroza Jan* v. *Amir Ali*, 74 IC 445 ; 1923 O 119 ; 24 Cr. LJ 781.
5. *Haranund Chetlangia* v,. *Ram Gopal Chetlangia*, 27 C 639 ; 27 IA (PC).
6. *See Harnund Chetlangia* v. *Ram Gopal Chetlangia*, 27 C 639 ; 27 IA 1.
7. *Padam Prasad Upadhyaya* v. *E.*, 119 IC 193 ; 1929 C 617 ; 30 Cr. LJ 993 (FB); *Pitoomal* v. *E.*, 86 IC 33 ; 1921 S 151 ; 26 Cr. LJ 657 ; *Feroza Jan* v. *Amir Ali*, 74 IC 445 ; 1923 O 119 : 24 Cr. LJ 781 : Mirabax v. E., 68 IC 36 : 1923 N 39 ; 23 Cr. LJ 500 ; *Tun Ya* v. *E.*, 51 IC 666 ; 20 Cr. LJ 506 ; *Ramesh Chandra Das* v. F., 46 C 895 ; 50 IC 660 ; 20 Cr. LJ 324 ; *Elahi Baksha Kazi* v. *E*, 45 C 825 ; 45 IC 258 ; 19 Cr. LJ 498.

certificate does not deprive a deposition of the presumption of Section 80.[1] What the law requires is that the deposition should, in fact, have been read over to the witness. The essential requirements for raising the presumption under Section 80 of the Evidence Act as to the genuineness of a document purporting to be the record of the evidence given by a witness in a judicial proceeding, appear to be that the witness should be duly sworn and examined and that the deposition should be signed by the Judge. It is doubtful whether the words "taken in accordance with law" have any reference to the reading over of this evidence to the witness.[2] In any case, a substantial compliance with the rule requiring the reading over of a deposition to the witness is sufficient to entitle the deposition to the benefit of the presumptions mentioned in Section 80 of the Evidence Act.[3] Thus, where a deposition was not read over to the witness but was read by the witness himself, it was held to be a sufficient compliance with the rule.[4]

No presumption under Section 80 if the deposition is not signed by the Judge.—The signing of a deposition by the Judge is made essential to the application of section 80—by the Section itself.[5]

No presumption under Section 80 as to the attestation of the deposition of a medical witness sought to be admitted under Section 509, Cr. P. Code.—There is no provision of law which makes obligatory on a committing Magistrate to attest the deposition of a medical witness in the presence of the accused. Section 80 of the Evidence Act, therefore, does not warrant the presumption that the deposition of a medical witness taken by a committing Magistrate was taken and attested in the presence of the accused, so as to make such deposition admissible in evidence at the trial before the Court of Session under section 509, Cr. P. Code. In order to make such deposition admissible under the provisions of Section 509, Cr. P. Code, there must be either a note on the deposition, or other evidence, to show that it was taken and attested in the perence of the accused.[6] The Lahore High Court has, however, held that the failure of committing Magistrate to append a certificate to the deposition of a medical witness that it was taken and signed by him in the presence of the accused person does not have the effect of making the evidence of the medical witness recorded by the committing Magistrate inadmissible if it otherwise appears that the statement was recorded and attested by the Magistrate in the presence of the accused.[7]

Presumption under Section 80 arises also in respect of a certified copy of a deposition.[8]—The deposition of a witness is a public document which may be proved by

1. *Arjun Kurmi* v. *E.*, 99 IC 109 ; 1927 P 100 ; 28 Cr. LJ 77 ; *Bhagwat Singh* v. *E.*, 4 P 231 ; 86 IC 996 ; 1925 P 378 ; 26 Cr. LJ 932 ; *Ramesh Chandra Das* v. *E.*, 46 C 895 ; 50 IC 660 ; 20 Cr. LJ 324 ; *E.* v. *Jagat Ram*, 28 PR 1918 Cr : 47 IC 872 ; 19 Cr. LJ 972.
2. *Ramesh Chandra Das* v. *E.*, 46 C 895 ; 50 IC 660 ; 20 Cr. LJ 324
3. *Ramesh Chandra Das* v. *E.*, 46 C 895 ; 50 IC 660 ; 20 Cr. LJ 324
4. *Ramesh Chandra Das* v. *E.*, 46 C 895 ; 50 IC 660 ; 20 Cr. LJ 324 ; but see *Mohammad Yasin* v. *E.*, 52 C 431 ; 82 IC 602 ; 1925 C 782 ; 26 Cr. LJ 1178.
5. *Ramesh Chandra Das* v. *E.*, 46 C 895 ; 50 IC 660 ; 20 Cr. LJ 324 ; *see* also In the matter of the petition of Mayadeb Gossami, 6 C 762 ; but see *Sarabijit* v. *Mata Din*, 60 IC 437 ; where the omission to sign has been held no to be sufficient to preclude Court from raising a presumption under Section 80.
6. *Kachali Hari* v. *Q. E.*, 18 C 129 ; *Q. E.* v. *Pohp Singh*, 10 A 174 ; *Q. E.*, v. *Riding*, 9 A 720.
7. *Nawab* v. *E.*, 142 IC 577 ; 1933 L 131.
8. *Haranund Chetlagia* v. *Ram Gopal Chetlangia*, 27 C 639 ; 27 IA 1 (PC) ; *Chanderswar Prosad Narain Singh* v. *Bisheswar Pratap Narain Singh* 5 P 777 ; 101 IC 289 ; 1927 P 61 ; *Sakina Khanum* v. *Laddan Saheba*, 2 CLJ 218.

a certified copy. When a certified copy of the deposition of a witness is produced, the Court shall presume it to be genuine.[1] Therefore, the same presumption would arise in respect of the certified copy of a deposition as would, under Section 80 of the Evidence Act, arise in respect of the original document.[2]

Presumption of genuineness is available to certified copies of depositions of witness recorded in commitment proceedings.[3]

Recital of deposition in a judgment.—The recital in a judgment of a statement made by a witness in the case cannot take the place of a record of the deposition of the witness, nor can such recital be accepted as evidence under Section 80 of the Evidence Act. It cannot, therefore, form the basis of a prosecution under section 193 of the Indian Penal Code.[4] See notes to sections 43, 13 and 63.

Is there my presumption under section 80 as the identity of the deponent or the confession?—The Privy Concil has held that the heading of a deposition in which the name, age, residence, etc., of the witness is stated is only descriptive of the witness and does not form part of the evidence given by him on solemn affirmation.[5] A certified copy of the deposition of a witness or the confession of an accused person would not come in by itself; it is necessary to adduce evidence proving the identity of the person who gave the evidence or made the confession.[6] Under Section 80 of the Evidence Act no presumption can be made regarding the identity of the deponent.[7] When a person denies having made the statement contained in the deposition, no presumption arises under section 80 of the Evidence Act of his having made the statement.[8]

The correctness of the rule as stated above is open to doubt. If the rule were as stated above, it would be practically impossible to prove the identity of the deponent where the deposition was made before living memory, and cases are easily conceivable where no such evidence might be available.[9] It has been held by the Oudh Court that the mere fact that there is no oral evidence to identify the deponent of a deposition made more than 60 years previously is not sufficient to render the provisions of section 80 of the Evidence Act inapplicable thereto.[10] The presumption as to the identity of the deponent is, it is submitted, justified both by the reason and the language of section 80 as well as by section 114 of the Evidence Act, and this view is supported by authority.[11]

---

1. Section 79, Ev. Act.
2. *See Sarabjit* v. *Mata Din*, 60 IC 437.
3. *Saudagar Singh* v. *Punjab*, (1974) 76 Punj LR 57.
4. *Nirghin Mohton* v. *E.*, 56 IC 660 ; 21 Cr. LJ 500 ; *see also Nanduri Saradamba* v. *Parakala Pattabhiramyya*, 58 M 952 ; 129 IC 468 ; 1931 M 207 ; *Asa Singh* v. *Mansha Ram* , 121 IC 509 ; 1930 1 237.
5. *Maqboolan* v. *Ahmad Husain*, 26 A 108 ; 31 IA 38 (PC) followed in *Lukhan Chandra Mondal* v. *Takin Dhali*, 80 IC 357 ; 1924 C 558 ; see also *Ma Tin* v. *Ma E. Nyun*, 1938 R 81 ; but see *Ch. Jadunath Singh* v. *Th. Besheshar Singh*, 1939 O 17.
6. *Mohammad Ali* v. *E.*, 147 IC 390 ; 1934 A 81 ; 35 Cr. LJ 385 (FB)) ; *Brajaballav Ghose* v. *Akahoy Bagdi*, 93 IC 115 ; 1926 C 705 ; *Q. E.* v. *Durga Sonar*, 11 C 580 ; *see Sulaiman* v. *E.*, 1941 R 301 ; *Lambu Krishnaveenamma* v. *Niriki Hanumantha Rao*, 146 IC 1093 ; 1933 M 860.
7. *Bhagwat Prasad* v. *Sher Khan*, 94 IC 985 ; 1926 O 489 ; *Abbasali Shah* v. *Mohammad Shah*, 1951 MB 92 ; but see *Hari Ram* v. *E.*, 89 IC 897 ; 1926 L 122 ; 26 Cr. LJ 1425.
8. *The Queen* v. *Nussurddin*, 21 WR 5 Cr.
9. See *Lambu Krishnavenamma* v *Niriki Hamumantha Rao*, 146 IC 1093 : 1933 M 860.
10. *Sarabjit* v *Mata Din*, 60 IC 437.
11. *Hari Ram* v. *E.*, 89 IC 897 : 1926 L 122 : 26 Cr LJ 1425 ; *see* notes to section 33 under the heading "mode of proof of a deposition", notes to section 32 (1) under the heading "how dying declaration are to be proved", and notes to section 80 under the heading "presumption as to the record of a dying declaration when taken as a deposition".

The Privy Council has held that the Court may under section 114 presume the identity of a person, who appears before a sub-registrar, on the mere production of a registered document having an endorsement that the person appeared before him and admitted execution of the document.[1] In law there is a strong presumption against fraud and impersonation, and it is submitted the identity of the deponent maybe presumed on the principle of the Privy Council decision last cited. In any case, where the document containing the deposition is an old one, the Court can turn to the deposition itself to find out whether there is inherent evidence of the identity of the deponent.[2]

The presumptions of section 80 arise in respect of the record of the statement or confession of an accused person only if it has been taken according to law.—As in the case of a deposition, so in the case of a statement or confession of an accused person, the presumptions mentioned in section 80 of the Evidence Act arise only if the statement of confession has been taken in accordance with law. The law relating to the mode in which the statement or confession of an accused person has to be taken down is contained in sections 364 and 164 of the Cr. P.Code. The examination of an accused person including every question put to him and every answer given by him shall be shown or read to him and, if he does not understand the language in which it is written, shall be signed by the accused and the Judge, and the Judge shall certify under his own hand that the examination was taken in his presence and hearing, and that the record contains a full and true account of the statement made by the accused.[3] A confession recorded by a Magistrate under the provisions of section 164, Cr. P. Code, in the course of police investigation also shall be recorded and signed in the aforesaid manner. The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that if he does so, if may be used as evidence against him. No Magistrate shall record any such confession unless, upon questioning the person making it, he has reasons to believe that it was made voluntarily. The Magistrate shall append to the record of such confession a certificate that he has complied with these requirements that the confession has been taken in his presence and hearing, and that it has been read over to the person making it and that he admitted it to be correct.[4] If the confession has been recorded in accordance with these directions, it proves itself under the present section on its mere production, and it is not necessary to examine the recording Magistrate.[5] The remarks of Fforede. J., in *Kheman* v.*E.*, about section 164 of the Criminal Procedure Code that the section is an exception to the main principle of evidence that a document recording a confession may not be given in evidence when the witness to the statement can be produced and can prove it by oral testimony, are equally applicable to section 80 of the Evidence Act.[6] When a document purporting to be the record of a confession is tendered in evidence and is found to contain the memorandum, required by section 164 (3), Cr.P.Code, a presumption arises

1. *Gopaldas* v.*Sri Thakurji*, 1943 PC 83.
2. *Bhagwat Prasad* v.*Sher Khan*, 94 IC 985 : 1926 O 489 ; see *Sarabjit* v.*Mata Din*, 60 IC 437.
3. Section 364 , Cr P.Code.
4. Section 164, Cr.P.Code.
5. *Bakhshan* v.*E.*,1936 L 247 : *Mahammad Ali* v.*E.*, 147 IC 390 : 1934 A 81 : 35 Cr LJ 385 (FB) : Cr A 1341 of 1934 (Lah); *Pratap Singh* v.*E.*, 6 L 415 : 93 IC 978 : 1925 L 605 : 27 Cr LJ 514 : *Kheman* v.*E.*, 6 L 58 : 88 IC 18 : 1925 L 315 : 26 Cr LJ 1074 , *per* Fforde, J : *E.*,v *Panchkari Dutt*, 52 C 67 : 86 IC 414 : 1925 C 587 : 26 Cr LJ 782 : *Guja Majhi* v.*E.*, 38 IC 1005 : 18 Cr LJ 445 : 2 Pat LJ 80.
6. *Kheman* v.*E.*, 6 L 58 : 88 IC 18 : 1925 L 315 : 26 Cr LJ 1074 ; see *Reg* v.*Shivya*, 1 B 219, 222.

under section 80 of the Evidence Act that all the necessary formalities purporting to have been performed have in fact been performed, and the document becomes admissible in evidence without further proof.[1] A mere admission of the Magistrate in cross-examination that he filled up the form of questions, and answers in recording confession as a matter of routine is not sufficient to displace the presumption arising under section 80 of the Act, and cannot throw doubt on the statement, which the Magistrate certified by his signature to the prescribed memorandum, that he had given the prescribed warning.[2] But if in spite of the fact that a confession is recorded in accordance with the provisions of sections 164 and 364 of the Code of Criminal Procedure, the Court comes to a conclusion that it was not voluntary and had been induced by torture, it should be excluded from consideration.[3] If, however, the requirements of section 364 and 164 of the Cr. P. Code have not been complied with in recording a confession, the confession comes before the Court without any presumptive force of its own, and section 80 of the Evidence Act not being applicable, the confession must be proved by other evidence.[4] If the confession was recorded in gross disregard of precaution prescribed by section 164 of the Code of Criminal Procedure, it will be entirely inadmissible.[5]

Sections 80 & 164 and 364 & 533 Cr. P. C.–Proof of confession deposition.–Section 80 of the Evidence Act says that when a recorded confession bears such a certificate, the Court before which the record is produced shall presume the genuineness and correct recording of such confession. The combined effect of above provisions is that when a certificate issued under Section 164 clearly shows that the provisions of Section 164 have been duly complied with, it is not necessary to call the Magistrate who recorded the confession as a witness for the purpose of proving it, and the confession should be taken on record. The practice of calling a Magistrate as a witness to prove the truth of his certificate duly made by him below an official record, merely because the accused challenges the authority of the record, is most undersirable and should be avoided as far as possible.[6] Even if the fact be true that a deposition recorded by a committing Magistrate, which was used in the Sessions Court for the purpose of contradiction or corroboration of a witness,. was not read over as required by Section 360 Cr. P. C., there is no point in taking an objection on that score in appeal, unless the appellant can satisfy the Court that he was prejudiced in his defence as a result of such omission. An omission in this behalf that in itself cannot be a ground for prejudice, and before prejudice can be substantiated on this score, it must further be disclosed by affidavit that the record is inaccurate and unfaithfull by pointing out exactly where it departs from what the witness actually said, and that the departure was in substantial particulars. Unless the appellant succeeds in establishing prejudice on these

1. Cr A 1341 of 1934 (Lah); *Pratap Singh* v.*E.*, 6 L 415 : 93 IC 978 : 1925 L 605 (2) : 27 Cr LJ 514 ; see *Mohammad Ali* v.*E.*, 147 IC 390 : 1934 A 81 : 35 Cr LJ 385 (FB) ; *E.v Panchkari Dutt*, 52 C 67 : 86 IC 414 : 1925 C 587 : 26 Cr LJ 782.
2. *E.v Jamuna Singh*, 1947 P 305 : 25 P 612.
3. *Based Sheikh* v.*The King*, 1950 C 331 : 85 Cr LJ 93 : 51 Cr LJ 1282.
4. *Mohammad Ali* v.*E.*, 147 IC 390 : 1934 A 81 : 35 Cr LJ 385 (FB) : Cr A 1341 of 1934 (Lah) ; *Partap Singh* v.*E.*, 6 L 415 : 93 IC 978 : 1925 L 605 (2) : 27 Cr LJ 514 ; *Kheman* v. *E.*, 6 L 58 : 88 IC 18 : 1925 L 315 : 26 Cr LJ 1074 ; *E.v.Panchkari Dutt*, 52 C 67 : 86 IC 414 : 1925 C 587 : 26 Cr LJ 782 : *Bawar* v.*E.*, 6 Cr LJ 94 ; *E.v.Radhe Halwai*, 7 CWN 220 ; *See* Section 533, Cr. P.Code.
5. See *Nazir Ahmad* v.*E.*, 63 IA 372 : 17 L 629 ; *Komnoju Brahman* v.*E.*, 1940 P 163 ; *Punia* v.*E.*, 24 P 646 ; *Jagmal* v.*E.*, 1948 A 211 : 1948 ALJ 106 : 49 Cr LJ 243.
6. *Kashmira Singh* v.*M.P.*, 1952 Cr LJ 839 : 1952 SCJ 201.

lines, an irregularity arising from a defect in the observance of the procedure prescribed under Section 360 Cr.P. C.is cured by 537 of the Code.[1]

Confession.—The confession of any prisoner or accused person in accordance with law is admissible without examining the Magistrate who recorded it.[2] The use of the expression "statement or confession" in the section in juxta-positio to any prisoner or accused person and the context in which those words occur, point to the conclusion that a statement as well as a confession of any prisoner or accused person duly taken by Magistrate is presumed to be genuine.[3]

Confession recorded without jurisdiction or otherwise than under any statutory direction.—Section 80 is not applicable to a confession recorded otherwise that under a statutory direction.[4] If the confession was recorded by a Magistrate who had no jurisdiction to record it, the confession, it is submitted, would be entirely inadmissible and no presumption under Section 80 would arise in respect of it. See notes Sections 24, 26 and 91.

Certified confessions will be presumed under Section 80 to be voluntary.—Under Section 80 of Evidence Act, there is a presumption that a properly certified and duly recorded confession was made voluntarily. The certificate appended to the confession is *prima facie* evidence of the voluntary character of the confession.[5] But see notes to Section 24 under heading " Burden of proving the voluntary or involuntary character of a confession".

Presumptions that arise under Section 80.—There are three presumptions that arise under Section 80 in respect of a duly recorded deposition of a witness of a statement or confession of an accused person. Firstly, that the document is genuine; secondly, that any statements as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and thirdly, that the deposition or the statement or confession was duly taken.

Presumption that the document is genuine.—Under Section 80,the Court shall presume against the document being a forgery and shall presume it to be what it purports to be ; that is, the Court shall presume that the document is a genuine record of the deposition of the witness or the statement or confession of the accused person, and that the signature on the document is of the person who purports to have signed it.[6]

Presumption as to the existence of the circumstances mentioned in the document.—The Court shall presume that any statement as to the circumstances under which the document was taken, purporting to be made by the person signing it, are true. "The memorandum endorsed upon or appended to the record of evidence or confession is to be taken as evidence of the facts stated in the memorandum itself."[7] If a fact is

---

1. *Bhagwan Singh* v.*Punjab*, 1952 Cr LJ 1132 : 1952 SCJ 284.
2. *Bandhu* v.*State*, 1976 Cr Lj 325.
3. *Ram Sanchi* v.*State*, AIR 1965 All. 308.
4. *Q.E.* v.*Viran*, 9M 224.
5. Cr. A 1341 of 1934 (Lah.) ; *Nayed Shahana* v.*E.*, 61 IC 399 : 152 IC : : 1934 C 636 : 35 Cr LJ 1479 ; *Pharho* v.*E.*, 141 IC 392 : 1932 S 201 : 34 Cr LJ 147 ; *E*.v.*Panchkari Dutt*, 52 C 67 : 86 IC 414 : 1925 C 587 : 26 Cr LJ 782 : See also *King Emperor* v.*Sheoshankar Singh*, 1954 P 109 : 32 P 243 : 1954 Cr LJ 171 ; contra *E* v.*Thakur Das Malo*, 1943 C 625.
6. See *Hari Ram* v.*E.*, 89 IC 827 : 1926 L 122 : 26 Cr LJ 1425.
7. *Q.* v.*Gonowri*, 22 WR 2 Cr.

mentioned in the memorandum or endorsement as having existed or occurred at the time of recording the deposition or confession, the Court shall presume it to have so existed or occurred whether law requires or does not require it to be expressly stated in the memorandum or endorsement. Thus, if the document mentions the fact that it was made at a certain time or place, or in the presence of certain persons, there shall be a presumption of its having been made at the time and place, and in the presence of the persons mentioned therein. Similarly, if the document states that it was read over or interpreted to the witness or the accused, the Court shall presume that the document was read over and interpreted to the witness or the accused.[1] A report by a Commissioner appointed to record evidence, stating that the defendant failed to appear in spite of service and therefore statements of witnesses were recorded *ex parte*, is admissible in evidence.[2] If a Magistrate records at the foot of the deposition of a medical witness that it was taken and attested in the presence of the accused, the deposition will be admissible in evidence under Section 509 of the Cr. P. Code, as there will be a presumption of the deposition having been taken and attested in the presence of the accused, even though the law neither requires the Magistrate to attest the deposition in the presence of the accused, nor requires him to mention this fact at the foot of the deposition.[3]

Presumption as to the document having been duly taken.—Under Section 80 there is a presumption that the deposition or confession was duly taken. If the law requires a certain act to be done, but does not require it to be mentioned in the memorandum as having been done, the Court shall presume it to have been done. Whether it is mentioned in the document or not. Thus, the law requires that the deposition of a witness shall be recorded on oath and shall be read over to the witness, but it does not require either of these facts to be expressly mentioned in the document. The Court shall, therefore, presume that oath was administrated to the witness and that the deposition was read over to him even if these facts have not been expressly mentioned in the document.[4] But if the law not only requires an act to be done, but also requires it to be mentioned as having been done,[5] and the document does not mention it to have been done, there will be presumption of its having been done. Where there is nothing on the record to show that the Magistrate, while recording the confession, questioned the accused to ascertain that he was making his confession voluntarily, and the defect was not remedied by examining the Magistrate, the confession was not admissible.[6] Similarly, where the law imposes no obligation to do an act, and it is not stated in the memorandum that the act was done, there is no presumption of its having been done. Thus the law does not require the committing Magistrate to attest the deposition of a medical witness in the presence of the accused; the Court will not, therefore, when asked to admit the deposition in evidence under Section 509 of the Criminal Procedure Code presume that the deposition was attested in the presence of the accused.[7] A deposition cannot be considered to have been duly taken if it does not contain what the

1. *Q* v. *Goswami*, 22 WR 2 Cr.
2. *Mohan Lal Kajrimal* v. *Sunder Lal Nand Lal Saraf*, 1949 EP 295 : 51 PLR 57.
3. *Kachali Hari* v. *Q.E.*, 18 C 129.
4. See *Arjun Kurmi* v. *E.*, 99 IC 109 : 1927 P 100 : 28 Cr LJ 77 ; *Bhagwat Singh* v. *E.*, 4 P 231 : 86 IC 996 : 1925 P 378 : 26 Cr LJ 932 ; *Ranesh Chandra Das* v. *E.*, 46 C 895 : 50 IC 660 : 20 Cr LJ 324 ; *E.* v. *Jagat Ram*, 28 PR 1918 Cr : 47 IC 872 : 10 Cr LJ 972 ; *Provincial Government C.P.* v. *Charundas*, 1939 NLJ 396.
5. See e.g. Sections 164 and 364, Cr. P. Code.
6. *Ondi Baro* v. *E.*, 1948 C 193 : 49 Cr LJ 294.
7. *Kachali Hari* v. *E.* 18 C 129 ; *Q E* v. *Pohp Singh*, 10 A 174 ; *Q.E.* v. *Riding*, 9 A 720.

witness actually stated. There is, therefore, a presumption under Section 80 that the witness actually stated what is recorded in the disposition.[1]

Presumption regarding the record of a dying declaration when taken as a deposition.—When a dying declaration is taken as a deposition in the course of judicial proceedings, or before an officer authorised by law to take it, *e.g.*, under Section 164 of the Cr. P. Code, the presumption of Section 80 is applicable to it and the declaration is admissible without further proof.[2] If there is a certificate appended to a dying declaration recorded as a deposition that it was read over to the deponent, and is signed by the Magistrate who recorded it, there is a presumption under Section 80 that the circumstances under which it is stated to have been taken are true, the investigation by the Magistrate being a judicial proceeding.[3]

A memorandum of identification proceeding.—Held by a Magistrate under Section 164, Cr. P.C. 1973, is not admissible without proof. This section does not apply to such a memorandum and it cannot be presumed to be genuine and must be proved to be so by evidence. In order that such memorandum may be governed by this section the following conditions must be fulfilled : (a) the memorandum must be a memorandum of evidence : (b) the evidence must be given by a witness; and (c) the evidence must be given in a judicial proceedings or before an officer authorised by law to take it.[4]

A memo of test identification is not record of evidence of witnesses.[5] Presumption of contents of identification memo would arise only if the memo amounted to evidence within the meaning of Section 3 (2).[6]

Declaration.—Declaration made under proviso to clause (2) of the Goa, Daman and Diu (Citizenship) Order-Section 80 applies to (i) any document produced before any court, purporting to be a record or memoranda of evidence or of any part of the evidence given by witness in judicial proceedings; or (ii) to a document produced before any officer authorized by law to take such evidence, or (iii) to statement of confession by any prisoner or accused person, taken in accordance with law and purporting to be signed by any Judge or Magistrate, or by any such officer as aforesaid. Declaration made under the proviso to clause 2 of Goa, Daman and Diu (Citizenship) Order, 1962 does fall under Section 80. Hence a presumption cannot be drawn under Section 80 (1).[7]

81. Presumption as to Gazettes, newspapers, private Acts of Parliament and other documents.—The Court shall presume the genuineness of every document purporting to be the London *Gazette* or [8][any Official *Gazette*, or the Government *Gazette*] of any colony, dependency or possession of the British Crown, or to be a newspaper or journal, or to be a copy of a private Act of Parliament [9][of the United Kingdom] printed by the Queen's printer and of every document purporting to be a document directed by any law to be kept by any person, if such document is kept substantially in the form required by law and is produced from proper custody.

---

1. *Q.E.* v. *Samiappa*, 15 M 63 : *See* also *Q.* v. *Gonowri*, 22 WR 2 Cr.
2. *See* notes S to 32 (1) under the heading "How should dying declarations be proved".
3. In re, *Koruppan Samban*, 31 IC 359, 16 Cr LJ 759.
4. *Shivraj* v. *State*, AIR 1964 All 290.
5. *Gopi* v. *State of Rajasthan*, 1974 WLN 78 (Raj).
6. *Pritamsing* v. *State*, AIR 1971 Raj 184.
7. *G.V. Bhandare* v. *Erasmo de Sequeira*, AIR 1972 Goa 25.
8. Subs. by the A.O. 1937 for "the *Gazette* of India, or the Govt. *Gazette* of any L.G. or".
9. Ins. by the A.O. 1950.

[1][**81-A. Presumption as to Gazettes in electronic forms.**—The Court shall presume the genuineness of every electronic record purporting to be the Official Gazette, or purporting to be electronic record directed by any law to be kept by any person, if such electronic record is kept substantially in the form required by law and is produced from proper custody.]

COMMENTARY

Gazettes, newspapers, private Acts, etc.,—This section creates a presumption of genuineness in respect of the following documents :—

(i) an Official Gazette, being-
  (a) the London Gazette,
  (b) the Gazette of India,
  (c) the Gazette of any State Government,[2] or
  (d) the Gazette of any colony, dependency or possession of the British Crown;
(ii) a newspaper or journal;
(iii) a copy of a private Act of Parliament of the United Kingdom printed by the Queen's Printer; and
(iv) a document directed by any law to be kept by any person, if such document is kept substantially in the form required by law and is produced from proper custody.

The section does not make any particular kind of evidence admissible but assuming the admissibility of the documents mentioned therein dispenses with the necessity of their being formally proved. The High Court, in appeal or revision, can admit in evidence an Official Gazette, and when such Gazette is admitted in evidence in this manner, the Court is bound to presume its genuineness.[3] The presumption arising under this section is rebuttable.[4]

Newspapers.—A report of a speech made in a newspaper is not admissible in evidence to prove the speeches. The person who had made the speeches, of the persons in whose presence the speeches were made, or the report of the newspaper, who heard the speeches and sent the report to be published in the newspaper, must be produced. In the absence of such evidence the Court cannot presume that the speech, as reported in news paper was in fact made.[5] Where the accused is charged of publication of defamatory matter in newspaper, the production of the newspaper raises presumption of the publication by him and the onus shifts on him to disprove it.[6] The presumption of a genuineness attached to a newspaper cannot be treated as proof of the facts reported therein as a statement of a fact contained in a newspaper is only hearsay and therefore inadmissible in evidence, unless the maker of the statement of a fact contained in a newspaper is only hearsay and therefore inadmissible in evidence, unless the maker of the statement deposes in Court to have perceived the facts reported.[7]

---

1. Section 81-A inserted by Information Technology Act, 2000 (Act 21 of 2000), S. 92 and Sch. II (w.e.f. 17-10-2000).
2. *Nanak Chand* v. *E.*, 134 IC 769 : 1931 L 273 : 32 Cr LJ 1227, *Sarup Singh* v. *E.*, 88 IC 22 : 1925 L 299 : 26 Cr LJ 1078.
3. *Ibid*
4. *Trimbak Shivrudra* v. *State*, 1950 N 203 : 51 Cr LJ 1372 : 1951 NLJ 1.
5. *Khilumal* v. *Arjundas*, ILR 1959 Raj 524
6. *Dilip Chakarbarty* v. *Public Prosecutor*, 1976 Cr LJ 1300.
7. *Harbhajan Singh* v. *State of Punjab*, AIR 1961 Punj 215.

Gazetters.—Statement in Gazetters cannot be relied on as evidence of title but do provide historical material. Statements in them can be relied on as providing historical material, and the practice followed, *e.g.*, by a Math and its head Gazetters can be consulted on matters of public history.[1] A final report of settlement operation based on specific data on which entries are made in the record of rights should be taken as more reliable and authentic than the statements in that regard made in District Gazetters.[2]

Electoral roll.—The electroal roll is a public record made in performance of duty specially enjoined by the law and an entry made thereunder would directly come under Section 35 of the Evidence Act. The electroal roll is a public document as contemplated under Section 74 (i) (iii) of the Evidence Act, because it is a document forming the act of public officers. To such a public document the presumption under Section 81 of the Evidence Act has application. When a public document is produced before the Court, it shall presume the genuineness of such document. Therefore, when the electroal roll which is a public document is produced before the Court, the Court is required to presume its genuiness.[3]

Report of Court of Enquiry.—The report of the Court of Enquiry, appointed under rule 75 of the Airdraft Rules, 1937, is the report of a statutory enquiry relating to the causes of the accident. It bears all the authentic marks of official recognition. and must be held properly and duly proved under Section 81. But the evidence tendered before the Court of Enquiry is not necessarily admissible evidence, unless certain conditions are fulfiled.[4]

Record of rights.—An entry in the records of rights is presumed to be correct and the record of rights is presumed to be genuine. The onus is on the dependant to prove that the entry in favour of the plaintiff in the record of rights is not correct.[5]

A newspaper is not proof of the facts reported.—Though a presumption of genuineness attaches under this section to a document purporting to be a newspaper,[6] it cannot be treated as proof of the facts reported therein. A statèment of a fact contained in a newspaper is merely hearsay and consequently inadmissible in evidence, unless the maker of the statement appears in Court and deposes to having perceived the fact reported.[7] The presumption of the genuineness of a newspaper does not include a presumption that it was printed and published by the person by whom it purports to be. Such apparently is not the English law. According to that law, the proper way to prove the publication of a libel, where evidence is not given that a particular paper complained of was published by the accused, is to prove the statutory declaration made by the accused that he is the printer and publisher of the journal in question.[8] A similar mode of proof is provided in India by Section 7 of the Press and Registration of Books Act.[9] If, however, a person is proved to be the publisher of a certain newspaper, there

1. *Srinivas* v.*Surajanarayan*, AIR 1967 SC 256.
2. *Kandan Soren* v.*Jitan Hembrom*, ILR (1974) 53 Pat 21.
3. *Kirtan Sahu* v.*Thakur Sahu* ; AIR 1972 Orissa 158 at p. 159 : 38 . Cut LT 82 : ILR (1972) Cut 161.
4. *Indian Airlines Corporation* v.*Madhari*, AIR 1965 Cal. 252.
5. *Ramakrishna* v.*Arjuna*, AIR 1963 Orissa 29.
6. *Ram Chandra* v.*E.*, 120 IC 793 : 1930 L 371 : 31 Cr LJ 168 ; *Sarup Singh* v.*E.*, 88 IC 22 : 1925 L 299 : 26 Cr LJ 1078.
7. See *Sarup Singh* v.*E.*, 88 IC 22 : 1925 L 299 : 26 Cr LJ 1078.
8. *Jeremiah* v.*Vas*, 36 M 457 : 12 IC 961 12 Cr LJ 585, per Sundara Aiyar, J.
9. Act XXV of 1867.

is, under this section, a presumption that a document which purports to be a newspaper of that name is that newspaper and was published by him.[1]

Document directed by any law to be kept by any person; register of births and deaths kept under Madras Act III of 1899.—A register of births and deaths kept under Madras Act III of 1899 is a document required by law to be kept. There will, therefore, be a presumption as to its genuineness when it is produced as evidence in Court. Such register is also a public document, a certified copy of which would be admissible in evidence.[2]

82. Presumption as to document admissible in England without proof of seal or signature.—When any document is produced before any Court, purporting to be a document which, by the law in force for the time being in England or Ireland, would be admissible in proof of any particular in any Court of Justice in England or Ireland, without proof of the seal or stamp or signature authenticating it, or of the judicial or official character claimed by the person by whom it purports to be signed, the Court shall presume that such seal, stamp or signature is genuine, and that the person signing it held, at the time when he signed it, the judicial or official character which he claims, and the document shall be admissible for the same purpose for which it would be admissible in England or Ireland.

COMMENTARY

Documents admissible without proof of seal or signature.—This section proves that if by the law of England or Ireland a document would be admissible in those countries in proof of any particular without proof of the seal or stamp or signature authenticating it, or of the official character of the person signing it, the document would be admissible in this country also in proof of that particular without proof of the seal or stamp or signature authenticating it, or of the official character of the person purporting to sign it. The rule enacted by the section is, therefore, partly a rule of admissibility and partly a rule of proof. Prior to the Act, the rule enacted by this section could be deduced from the provisions of Lord Brougham's Act of 1851[3] section 11 of which enacted as follows:—

> "Every document which, by any law now in force or hereafter to be in force, is or shall be admissible in evidence of any particular in any Court of Justice in England or Wales or Ireland without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purpose in any Court of Justice of any of the British

1. *Jeremiah* v. *Vas*, 36 M 457 : 12 IC 961 : 12 Cr LJ 585.
2. See *Krishnamachariar* v. *Krishnamachariar*, 38 M 166 : 13 IC 452. In the report of this ruling the reference to Section 82 which applies to English and Irish documents only seems to be a mistake. Section 81 is more applicable to a document of this kind than Section 82.
3. 14 and 15 Vic c.99.

colonies, or before any person having in any of such colonies, by law or consent of parties, authority to hear, receive and examine evidence, without proof of the seal or stamp, or signature, authenticating the same, or of the judicial or official character of the person appearing to have signed the same."

Section 11 and Section 19 of the aforesaid Act which included India in the definition of "British colonies" have been repealed by the Indian Evidence Act,[1] and instead the present section has been enacted, which substantially reproduces the repealed sections of Lord Brougham's Act. Therefore, the answer to the question whether a document is admissible in India in proof of any particular and whether there is any presumption as to the genuineness of the seal stamp or signature authenticating it, or as to the official character of the person purporting to sign it, depends upon whether the document would be admissible in England or Ireland in proof of that particular without proof of the seal or stamp or signature authenticating it, or of the official character of the person purporting to sign it. In England it is provided by several Statutes that certain certificates, official and public documents, documents and proceedings of corporations and of joint stock and other companies, and certified copies of documents, by-laws, entries in registers and other books, shall be so receivable, in evidence of certain particulars and Courts of Justice, provided they are respectively authenticated in the manner prescribed by such Statues. Whenever, by any Act now or hereafter in force, any such certificate, document, etc., shall be so receivable, it shall be admissible if it purports to be authenticated in the manner prescribed, and no proof need be given of the stamp, seal or signature, or of the official character of the person appearing to have signed the same.[2]

Presumptions as to powers-of-attorney executed and attested abroad.—The provisions of section 85 of the Evidence Act are not exhaustive of the mode of proof of powers-of-attorney;[3] and a power-of-attorney duly attested abroad may under the provisions of section 82, be presumed to have been duly executed. Thus, a declaration as to the execution of a power taken under the Statutory Declaration Act, 1835 or The Probate the Letters of Administration Amendment Act, 1858 at any place to which such Act extends, before a person "lawfully authorized to administer oaths" being admissible in this country under the provisions of section 82 of the Evidence Act.[4] The Chief Magistrate of the City of Glasgow being a person lawfully authorized to administer oaths a declaration as to the execution of a power-of-attorney taken before him and authenticated by his certificate and the common seal of the City of Glasgow and by a notarial certificate is sufficient proof of the execution of the power.[5]

Certificate by the Manchester Chamber of Commerce not within the section.—A certificate granted by the Manchester Chamber of Commerce testifying to the existence of a strike of coal miners which resulted in the shortage of coal supplies and difficulty of manufacture in the mills by which the goods in suit had to be supplied is not a

1. *See* Section 2 of the Evidence Act, and the Schedule to the Act.
2. Phipson Ev., 7th Ed., 531-532; 14 and 15 Vic c.99; 8 and 9 Vic c. 113, Section 1; Taylor § 7: Ros.,m Civ. E., Steprh., Art 79, See Generally as to teh subject. Taylor, §§ 1602-1609, and footnote to Section 1610, 10th Edition.
3. In re Sladen, 21 M 492; see . however, In the goods of Primrose, 16 C 776.
4. In the goods of Henderson 22 C 491.
5. In the goods of Henderson 22 C 491. For other cases where Courts have presumed due execution of a power-of-attorney, see unreported cases cited in Woodroffe, Ev., 9th Ed., 590 ,591.

document contemplated by section 82 of the Evidence Act.[1]

83. Presumption as to maps or plans made by authority of Government.—The Court shall presume that maps or plans purporting to be made by the authority of [2][the Central Government or any State Government] were so made, and are accurate; but maps or plans made for the purposes of any cause must be proved to be accurate.

COMMENTARY

Maps and plans; sections 36 and 83. —Section 36 makes statements in maps or plans made under the authority of Government relevant : the present section provides that plans and maps purporting to be made by the authority of any Government in India must be presumed to be so made and accurate. Thus whereas section 36 makes public maps and plans relevant, section 83 directs them to be presumed to be prepared by the authority by which they purport to be prepared, and creates a presumption of accuracy in respect of their contents.

Maps prepared for a cause.—Maps or plans made for the purpose of any cause must be proved to be accurate. The onus of proving that such a map is accurate lies on the party to produce it.[3] They must be proved by the persons who made them. They are post litem motasa, and lack the necessary trust worthiness. Where maps are made for the purpose of a suit, there is even apart from fraud, which may exit, a tendency to colour, exaggerate and favour which can only be counteracted by swearing the maker to the truth of his plan.[4] Where the maps are prepared by a party himself, it is difficult to attach any importance to the recitals made by the party in it which tends to show something in his favour.[5]

Presumption of accuracy arises in respect of those maps and plans only which are made for a public purpose.—Statement of facts in issue or relevant facts in maps or plans made by authority of Government are made relevant by section 36; the present section creates in favour of maps and plans purporting to be made by the authority of Government a presumption that they were made by the authority of Government and that they are accurate. To be entitled to a presumption under the provisions of this section, the map or plan must not only purport to have been made under the authority of Government but must also have been made for a public purpose. Thus a map prepared by an officer of Government while in charge of a *khas mahal*, Government being at the time in possession of the *mahal* merely as a private proprietor, is not a map purporting to have been made under the authority of Government, the accuracy of which is to be presumed under the provisions of the present section.[6] The maps and plans which are mentioned in the present section are maps and plans made by the Government for

1. *Girdhardas Coorji* v.*Kerawala Karsandas & Co.*, 93 IC 622 : 1926 B 253.
2. The original word "Government" have successively been amended by the A.O. 1937, A.O. 1948, Act 40 of 1949 and the A.O. 1950 to read as above.
3. *Ram Kishore* v *Union of India*, AIR 1965 Cal 282.
4. *Damodaran* v *Karimba Plantation Ltd.*, AIR 1959 Ker 358.
5. *Ram Kishore* v. *Union of India*,AIR 1966 SC 644.
6. *Junmajoy Mullick* v.*Dwarkanath Mytee*, 5 C 287 see also *Dinomoni Chowdhrani* v.*Brojo Mohini Chowdhrani*, 29 C 187 : 29 IA 24 (PC) ; *Upendra Nath Ghosh* v *Chairman of the Calcutta Corporation*, 13 IC 332 : 16 CWN 115 : *Priya Nath Majumadar* v.*Mahendra Kumar Mitra*, 10 IC 376 ; 14 CLJ 578.

public purposes; a map or plan made by the Government for private purposes, or when the Government is acting otherwise than in a public capacity, is not within the meaning of the present section.[1] Section 83 does not deal with the admissibility of private maps at all.[2] *Chittahs* made by Government for its own private use are nothing more than documents prepared for the information of the Collector,[3] no presumption of accuracy would, therefore, attach to such *Chittahs* under section 83. Similarly, a map made by a Deputy Collector for the purpose of the settlement of land forming the silted bed of a river cannot be presumed to be accurate under Section 83, as it is not made for a public purpose but only for a particular purpose which is not a public purpose. The accuracy of such map must, therefore, be proved before it can be relied upon.[4] Notes in a *Thakbast* map in respect of any irrigation rights made by surveyors, who had no authority to record any irrigation rights, carry no presumption.[5]

Extent of the presumption of accuracy.—The map or plan must be presumed to have been correctly drawn and according to the scale according to which it purports to have been prepared.[6] The presumption of accuracy is not affected by the fact that the map has been superseded by a later map under the same authority.[7] There is no presumption of accuracy as to an entry relating to the amount of *debutter* land in a village contained in a map prepared by an *Amin* who had no authority to determine the amount of *debutter* land in that village;[8] nor is there any presumption of the boundaries having been correctly laid down by him according to the rights of the parties.[9] The rights of property as between two parties cannot be affected by a map drawn for a purpose totally different from and totally irrelevant to the subject of the dispute between them.[10] There is a presumption of accuracy of Rennell's map in respect of such matters as to which it is admissible in evidence.[11] Accuracy as to the information is obtained. Where sufficient evidence as to informants who have been questioned is not forthcoming and it is not also clear how far that evidence has been tested by checking the evidence of one of the informants as against that of another, and it is admitted that corrections have been made in the map from time to time, contents of such maps cannot be relied upon as authoritative.[12]

No presumption of accuracy in respect of map or plan made for the purposes of a particular case.—There is, under this section, no presumption of accuracy in respect

1. *Ram Chunder Sao* v.*Bunseedhur Naick*, 9 C 741 , 743 : see also *Nabendra Kishore Roy* v.*Rahima Banu*, 31 IC 695 ; 19 CWN 1015 : *Rahmatullah Khan* v.*Secretary of State*, 63 PR 1931 : 18 IC 799 ; *Tarini Charan Sarkar* v.*Fakarannisa Chowdhurani*, 15 IC 459.
2. *Shib Charan Dey* v.*Nil Kanta Mahato*, 16 IC 747 : 17 CLJ 642.
3. *Upendra Nath Chattopadhya* v.*Radha Govinda Bandopadhya*, 98 IC 85 : 1927 C 189 : *Ram Chunder Sao* v.*Bunseedhur Naick*, 9 C 741.
4. *Rahimuddin Munshi* v.*Bhabagana Debya*, 19 IC 572 ; *Kanto Prasad Hazari* v *Jagat Chandra Dutta*, 23 C 335.
5. *Harihar Prasad Singh* v *Janak Dulari Kuer*, 1941 P 118 : 191 IC 275.
6. *Omrita Lall Chowdhry* v.*Kalee Pershad Shaha*, 25 WR 179.
7. *Jogessur Sing* v.*Bycunt Nath Dutt*, 5 C 822.
8. *Jarao Kumari* v.*Lalonmoni*, 18 C 224 ; 17 IA 145 (PC).
9. *Omrita Lall Chowdhury* v.*Kalee Pershad Shaha*, 25 WR 179.
10. *John Kerr* v.*Nazzur Mahomad*, 2 WR 29 (PC).
11. *Secretary of State* v.*Annada Mohan Roy*, 66 IC 287 : 34 CLJ 205 . As to the evidentiary value of this map, see *Naresh Narayan Roy* v.*Secretary of State*, 50 C 446 : 50 IA 121 : 77 IC 1048 : 1923 PC 1; *Haradas Acharjya Chowdhuri* v.*Secretary of State*, 43 IC 361 : 26 CLJ 590 (PC).
12. *Nama Akpandja* v.*Fiaga Egblomesse*, 1939 PC 143.

of a map or plan which is made for the purposes of a particular cause. A map prepared for the purposes of particular suit must, therefore, be duly proved, and it is not admissible in evidence in the absence of proof its accuracy.[1]

Instances of maps or plans to which a presumption of accuracy attaches under this section.—See notes to section 36, where the various kinds of maps and plans which are relevant under section 36 and to which a presumption of accuracy attaches under this section are fully discussed.

Settlement maps, value of.—The settlement maps, however important they are, and whatever is their evidentiary value, cannot take the place of documents of title.[2]

84. Presumption as to collections of laws and reports of decisions.—The Court shall presume the genuineness of every book purporting to be printed or published under the authority of the Government of any country, and to contain any of the laws of that country.

and of every book purporting to contain reports of decisions of the Courts of such country.

COMMENTARY

Collection of laws and reports of decisions; Sections 38 and 84.—When the Court has to form an opinion as to a law of any country, any statement of such law contained in a book purporting to be printed or published under the authority of the Government of such country and to contain any such law, and any report of a ruling of the Courts of such country contained in a book purporting to be a report of such rulings, is relevant under Section 38 of the Act. The present section merely creates a presumption of genuineness in favour of the books which are made relevant by Section 38.

Law books and reports.—This section lays down a rule of presumption in relation to such books, which is however, rebuttable, and dispenses with proof of the genuineness of the books of any country containing laws and rulings. Section 57 the first two clauses requires Courts to take judicial notice of the existence of all laws and Statutes in India in the U.K.Section 74 declares statutory records to be public documents, and Section 78 enacts a method of proof in the case of Acts and Statutes.

A newspaper cannot be regarded as a book purporting to be a report of the ruling of a court. The report of a case in a newspaper is therefore not relevant under Section 38 nor can the presumption under the present section arise, strictly speaking.[3]

85. Presumption as to powers-of-attorney.—The Court shall presume that every document purporting to be a power-of-attorney, and to have been executed before, and authenticated by a Notary Public, or any Court, Judge, Magistrate, [4][Indian] Consul or Vice-Consul, or representative of

1. *Maharaja Sir Kesho Prasad Singh* v. *Bahuria Mst. Bhagiogna Kuer*, 16 P 258 : 1937 PC 69 : 167 IC 329 ; I NLR 121.
2. *Lachmi Narain* v. *Lachmi Narain*, 1948 O 159.
3. *Superintendent and Remembrancer of Legal Affairs* v. *Sardar Bahadur Singh*, (1969) 73 CWN 547 : AIR (1969) Cal 451.
4. Substituted by the Adaptation Order, 1950, for the "British."

Her Majesty,[1]*** of the [2][Central Government], was so executed and authenticated.

[3][**85-A. Presumption as to electronic agreements.**—The Court shall presume that every electronic record purporting to be an agreement containing the digital signatures of the parties was so concluded by affixing the digital signature of the parties.

85-B. Presumptions as to electronic records and digital signatures.—(1) In any proceedings involving a secure electronic record, the Court shall presume unless contrary is proved, that the secure electronic record has not been altered since the specific point of time to which the secure status relates.

(2) In any proceedings, involving secure digital signature, the Court shall presume unless the contrary is proved that—

(a) the secure digital signature is affixed by subscriber with the intention of signing or approving the electronic record;

(b) except in the case of a secure electronic record or a secure digital signature, nothing in this section shall create any presumption relating to authenticity and integrity of the electronic record or any digital signature.

85-C. Presumption as to Digital Signature Certificates.—The Court shall presume, unless contrary is proved, that the information listed in a Digital Signature Certificate is correct, except for information specified as subscriber information which has not been verified, if the certificate was accepted by the subscriber.]

COMMENTARY

Power-of-attorney.—A power-of-attorney purporting to have been executed before, and authenticated by, any of the persons mentioned in this section must be presumed to have been so executed and authenticated. If the document does not purport to have been executed before, and authenticated by, any of the persons mentioned in the section, there would, of course, be no presumption as to its execution and authentication.[4] The execution of a power of attorney may be proved by the production of an affidavit as to its execution made before a person competent to administer an oath.[5] Authentication contemplated by the section does not merely mean attestation. It means that the person authenticating has assured himself of the identity of the person who had signed the instrument as well as the fact of execution.[6] The Court shall take judicial

1. The words "of Her Majesty of" were deleted by the Adaptation Order, 1950.
2. Substituted by the Government of India (Adaptation of India Laws) Order, 1937, for "Government of India".
3. Sections 85-A, 85-B and 85-C inserted by Information Technology Act, 2000 (Act 21 of 2000), S. 92 and Sch. II (w.e.f. 17-10-2000).
4. In the goods of *Primrose*, 16 C 776; *Mst Ram Kailash Kunwari* v. *Lala Ishwari Saran*, 1936 A 475, 163 IC 754.
5. In the goods of Sladen, 21 M 492.
   Wali Mohammad Chaudhary v. *Jamal Uddin Chaudhary*, 1950 A 524; 1950 ALJ 446; 1950 AWR 507.

notice of all seals of notaries public. Where a power of attorney is given under the seal of a notary public, the court must presume its proper execution before, and authentication by the notary public.[1] A registered power of attorney is admissible to prove agency under Section 85 of the Evidence Act.[2]

Power of Attorney neither executed before nor authenticated by Notary Public. Presumption under Section 85 can not be raised.[3]

Due execution and authentication of document power-of-attorney in favour of Yugoslav Company's permanent delegate in Delhi has to be presumed.[4]

Presumption as to a power-of-attorney produced at the time of presenting a document for registration.—Where an endorsement on a registered deed states that the person presenting the document for registration held a special power-of-attorney, it must be presumed that the power-of-attorney was a proper power.[5]

The authentication is not merely attestation, but something more a power-of-attorney bearing the authentication of a Notary Public or an authority mentioned in this section is taken as sufficient evidence of the execution of the instrument by the person who appears to be the executant on the face of it.[6]

Authentication by notary in California.—The section does not prescribed any specific form of attestation. Authentication ordinarily means establish the truth, to establish the authorship or make valid. Subscribed means write one's name at the foot of a document or sign a document. Where a notary public asserts that he had satisfied himself about the identity of the person in question and also about the fact that the executant had signed the document after having admitted its contents to be correct, this means authentication as envisaged in this section. That the executant of the power of attorney has been identified to the satisfaction of the Notary Public flows from the notary public endorsement on the document that it had been subscribed and sworn before him even though the notary does not say so in his endorsement. There is a presumption of regularity of official acts and the Notary Public must have satisfied himself in the discharge of his duties that the person who was executing it was the proper person. The Power of Attorney executed before a Notary Public in California and complying with the laws of that State and authenticated as required by that law. Must be considered duly authenticated in accordance with the laws in India. Such a power of attorney is valid both under Section 85 of the Evidence Act and Section 33 of the Registration Act.[7]

---

1. *Performing Right Society Ltd.* v. *Indian Morning Post Restaurant*, 41 Bom LR 530; 1939 B 347, *Wali Mohammad Chaudhary* v. *Jamal Uddin Chaudhary*; 1950 A 524; 1950 ALJ 466; 1950 AWR 507; *Raj Kumar Gupta* v. *Des Raj*, AIR 1995 HP 107.
2. *Habinunnissa* v. *Musharraf Ali*, 33 IC 651. *See* also *Pratap Bhattadu* v. *Commissioner of Income-tax, Madras*, 84 IC 331 : 1924 M 880.
3. *Electric Construction & Equipment Co. Ltd.* v. *Jagjit Electric Works, Sirsa*, AIR 1984 Delhi 363 DB.
4. *Rudnap Export-Import* v. *Eastern Associates Co.*, AIR 1984 Delhi 20.
5. *Kanhaya Lal* v. *National Bank of India Ltd.*, 4 L 284 : 50 IA 162; 75 IC 7 : 1923 PC 114.
6. *Kulsummunnisa* v. *Ahmadi Begum*, AIR 1972 All 219, 224.
7. *Jugraj Singh* v. *Jaswant Singh*, (1971) 1 SCWR 79 (86).

86. Presumption as to certified copies of foreign judicial records.–The Court may presume that any document purporting to be a certified copy of any judicial record of [1][2*** any country not forming part of India or] of Her Majesty's dominions is genuine and accurate, if the document purports to be certified in any manner which is certified by any representative of [3]*** the [4] [Central Government] [5][in or for] [6][such [7]*** country] to be the manner commonly in use in [8][that [9]*** country] for the certification of copies of judicial records.

[10][An officer who, with respect to [11]*** any territory or place not forming part of [12][India or] Her Majesty's dominions, is a Political Agent therefor, as defined in Section 3, [13][clause (43)], of the General Clauses Act, 1897, (10 of 1897) shall for the purposes of this section, be deemed to be a representative of the [14][Central Government] [15][in and for the country] comprising that territory or place].

COMMENTARY

Certified copies of foreign judicial records.–A record of the proceedigs of a Court of Justice will be presumed to be genuine and accurate, if it is certified in the manner laid down in this section.[16] The presumption is, however, permissive and rebuttable.

This section is an instance of documents to which Section 65 clause (1) refers.[17] The provisions of this section are imperative and must be complied with and in the absence of the certificate refer to the section the statements of witnesses taken in a foreign Court are not admissible in evidence.[18]

It lays down that the Court may presume the genuineness and accuracy of any document purporting to be a certified copy of any judicial record of any foreign country, if such a copy is duly certified in the manner and according to the rules in use in the country for certification of copies of judicial records. To give rise to this presumption, it is not necessary that the judgment of the foreign country should have already been

---

1. Subs. by the A.O. 1950 for "any country not forming part".
2. The words "a Part B State or of" omit by Act 3 of 1951, S. 3 and Sch.
3. The words "Her Majesty or of" were rep. by the A.O. 1950.
4. Subs. by the A.O. 1937 for "G of I".
5. Subs. by the Indian Evidence Act (Amendment) Act, 1891 (3 of 1891), S. 8 for , "resident in".
6. Sub. by the A.O. 1950 for "such country".
7. The words "Part B State or" rep. by Act 3 of 1961.
8. Subs. by the A.O. 1950 "that Country."
9. The words "that State or" rep. by Act 3 of 1951.
10. Subs by the Act 5 of 1899, S. 8.
11. The words 'A Part B State" were ins. by the A.O. 1950, rep of Act 3 of 1951, S. 3 and Sch.
12. Ins. by the A.O. 1950.
13. Subs. by ibid. for "charge (40)".
14. Subs. by the A.O. 1937 for 'G. of I.'.
15. Subs. by Act 3 of 1951 for "in and for that Part B State or Country".
16. *Haramund Chetlangia* v. *Ram Gopal Chetlangia*, 27 C 639 : 27 C 639 : 27 IA 1 (PC).
17. *Huriah* v. *Prosunno*, (1874) 22 WR 303.
18. *State* v. *Abdul Hamid*, AIR 1957 Punj. 86.

admitted in evidence. The presumption may be drawn before the said judgment is admitted.[1]

Copy must be certified in a manner which is certified by an Indian or British representative to the manner commonly in use in that country.—In order to be admissible the copy must be certified, and an Indian or British representative in the foreign country or State must certify that it is certified in the manner commonly in use in that country or State for the certification of copies of judicial records. When a certificate is required by law, it cannot be dispensed with merely because it can be obtained at any time.[2] If there is no Indian or British representative in the country, judicial record of which is sought to be proved by a certified copy, the copy will not be admissible without proof of its being a true copy.[3]

The jurisdiction assumed by the foreign court as well as the grounds on which the relief is granted must be in accordance with the matrimonial law under which the parties are married.[4]

The section is not exhaustive of the modes of proof of foreign judicial records; other modes of proving foreign judicial records.—This section does not exclude other proof of foreign judicial records. If the fact to be proved is that a certain person gave evidence in a foreign Court, it may be proved by the testimony of a person in whose presence that evidence was given. Similarly, uncertified copies of foreign judicial records may be proved by a competent witness deposing to the correctness of the copies.[5] A certified copy of a foreign judicial record may be proved by a witness deposing to the fact that it was sealed and certified by the Registrar of the foreign Court.[6] Photostat copy is prepared by mechanical process which in itself ensures the accuracy of the original. The expression 'certified copy' of a foreign judgement in Section 14 of the Code has to be read consistent with the requirements of Section 86 of the Act. The present photostat copies of the judicial record of the Court of St. Louis (USA) is certified for the Circuit Clerk by the Deputy Clerk who is a public officer having the custody of the document within the meaning of Section 76 of the Act and also in the manner required by the provisions of the said section.[7] Judicial records of a foreign Court, though not authenticated and certified in the manner prescribed by Sections 78 and 86 of the Evidence Act, are admissible if they have been authenticated in the manner prescribed by Sections 14 and 15 of the English Extradition Act.[8]

87. Presumption as to books, maps and charts.—The Court may presume that any book to which it may refer for information on matters of public or general interest, and that any published map or chart, the statements of which are relevant facts and which is produced for its inspection,

---

1. *Badat & Co.* v. *East India Trading Co.*, (1964) 2 SCA 1 : AIR 1964 SC 538.
2. *Murti Das* v. *Achut Das*, 5 L 105 : 92 IC 138 : 1924 L 493.
3. See *Ganee Mahomed Sarkar* v. *Tarini Charan Chuckerbati*, 14 C 546. As to how a copy of the judicial record of such a country may be proved ; *see* 8 Mad Jur 14.
4. *Y. Narasimha Rao* v. *Y.Venkata Lakshmi*, 1991 (3) SCC 451 (para 20).
5. *Haranund Chetlangia* v. *Ram Gopal Chetlangia*, 27 C 639 : 27 IA 1 (PC).
6. 8 Mad Jur 14.
7. *Y. Narasimha Rao* v. *Y.Venkata Lakshmi*, JT (1991) 3 SC 33.
8. In re *Rudolph Stallmann*, 39 C 164 : 12 IC 273 : 13 Cr LJ 505.

was written and published by the person and at the time and place, by whom or at which it purports to have been written or published.

COMMENTARY

Presumption as to books, maps and charts.—Section 57 (3) provides that on all matters of which judicial notice must be taken under the provisions of that section, and on all other matters of public history, literature, science or art, the Court may resort for its aid to appropriate books and documents of reference. Section 36 declares relevant all statements of facts in issue or relevant facts contained in published maps or charts generally offered for public sale. This section provides that if the Court refers to any book for information on matters of public or general interest, or if any published map or plan, statements in which are relevant facts, is produced for its inspection, the Court may presume that the book, map or chart was written and published by the person by whom, and at the time and place at which, it purports to have been written or published. The presumption is limited to the ostensible writer or publisher of the book, map or chart being its actual writer or publisher and to its having been published at the time and place at which it purports to have been published; there is no presumption under this section as to the accuracy of the book, map or chart.

Official reports may be referred to for the purpose of gathering historical facts but only subject to the rule laid down by their Lordships of the Privy Council in *Martand Rao* v. *Malhar Rao*,[1] that opinions expressed in official reports should not be treated as conclusive in respect of matters requiring judicial determination.[2]

88. Presumption as to telegraphic messages.—The Court may presume that a message, forwarded from a telegraph office to the person to whom such message, purports to be addressed, corresponds with a message delivered for transmission at the office from which the message purports to be sent; but the Court shall not make any presumption as to the person by whom such message was delivered for transmission.

[3][**88-A. Presumption as to electronic messages.**—The Court may presume that an electronic message forwarded by the originator through an electronic mail server to the addressee to whom the message purports to be addressed corresponds with the message as fed into his computer for transmission; but the court shall not make any presumption as to the person by whom such message was sent.]

Explanation.—For the purposes of this section, the expression "addressee" and "originator" shall have the same meanings respectively assigned to them in clause (b) and (za) of sub-section (1) of Section 2 of the Information Technology Act, 2000.]

COMMENTARY

Presumption as to telegraphic messages.—If a telegraphic message is proved

1. AIR 1928 PC 10.
2. *Raj Rajendra Malojirao Shitole* v. *State of Madhya Bharat*, AIR 1953 MB 97.
3. **Section 88-A inserted by Information Technology Act, 2000 (Act 21 of 2000), S. 92 and Sch. II (w.e.f. 17-10-2000).**

to have been delivered to the addressee from the office of destination, there is, under the present section, a presumption that it corresponds with the message delivered for transmission at the office of origin. The section allows the Courts to treat telegraphic messages received as if they were the original sent.[1] The presumption is based on the assumption that original acts have been regularly performed and the common course of business followed in particular cases.[2]

Delivery to the addressee from the office of destination must be proved.—Before Section 88 of the Evidence Act can be utilised, there must be legal proof that the message had been delivered from the telegraph office to the person to whom such message had been addressed. In the absence of such evidence the telegram cannot be said to have been proved.[3]

No presumption as to the identity of the sender—No presumption regarding the author of a message sent by post.—It is true that under Section 88 there is a presumption only that the message received by the addressee corresponds with the message delivered for transmission at the office of origin but there is no presumption as to the person who delivered such a message for transmission. Here again proof of authorship of the message need not be direct and may be circumstantial in the case of letters. The contents of the messages received in the context of the chain of correspondence, may well furnish proof of the authorship of the messages at the dispatching end.[4]

Proof of telegraphic message.—No presumption of its being sent by a particular person. Section 88 of the Act enacts that while the court may presume that the message delivered to the addressee corresponds with the message as delivered at the office of transmission, no presumption shall be made as to the person by whom such message was sent. If there is no proof that it was sent by the defendant who denied having sent the same, it should be held that the telegraph was not proved.[5]

A telegraph office makes no inquiries and is in no way responsible for the identity of the sender of a message, much less for the truth of its contents.[6] The section, therefore, expressly forbids the Court to make any presumption as to the person by whom the telegram is sent.[7] Thus, where the sanction of a State Government to prosecute a person was communicated by telegram, it was held that the telegram must be proved to have emanated from the Government.[8] The Bombay High Court, however, has held that, if in reply to a telegram from the sender, there would, under Section 114 of the Evidence Act, be a presumption as to the identity of the sender of the former.[9]

Presumption as to delivery of a telegraphic message to the addressees.—If a letter is properly addressed, posted and not afterwards returned, there is, under Section

---

1. UBR 1897-1901, Vol. II 384.
2. *See* Illustrations (e) and (f) to Section 14.
3. *Thakar Singh* v. *E.*, 4 IC 240 : 10 Cr LJ 520.
4. *Mobarik Ali Ahmed* v. *Bombay*, 1958 SCR 328 : 1957 Cr LJ 1346.
5. *Kishore Chandra Singh Deo* v. *Ganesh Prasad Bhagat*, 1954 SCR 919 : AIR 1954 SC 316.
6. *E.* v. *Abdul Gani Bahadurbhai*, 49 B 878 : 91 IC 690 : 1926 B 71 : 27 Cr LJ 114.
7. *Kishore Chandra Singh Deo* v. *Ganesh Prasad Bhagat*, 1954 SC 316; *Varadarajulu Naidu* v. *E.*, 42 M 885 : 51 IC 343 20 Cr LJ 455; *see* also *Raghunath Pandey* v. *E.*, 142 IC 809 : 1933 P 96 : 34 Cr LJ 421; UBR 1897-1901, Vol. II, 384.
8. *Varadarajulu Naidu* v. *E.*, 42 M 885 : 51 IC 343 : 20 Cr LJ 455.
9. *E.* v. *Abdul Gani Bahadurbhai*, 49 B 878 : 1926 B 71 : 91 IC 690 : 27 Cr LJ 114.

114 of the Evidence Act, a presumption of its having been delivered in due course;[1] and this presumption will be extended to postal telegrams, now that the inland telegraphs form part of the Government postal system".[2] If a message is proved to have been properly addressed and handed over to the office of origin, there may, under Section 114 though not under this section, be a presumption of its having been delivered to the addressee if at the time he is shown to have resided at the place to which the message was addressed.[3]

Presumption as to the date and hour of the message.—In the case of letters the post-marks are evidence of the dates and places mentioned;[4] and the same rule would seem to be applicable to telegraphic messages.[5]

Mode of proof of a telegraphic message.—The original of a telegram is the one sent, not the one delivered;[6] and this must be produced from the post office or else proof of its destruction given, when a copy will be admissible.[7]

The presumption under this section is limited to what is expressly provided in the section. The form handed over to the Post Office by the sender (and not the form delivered by the Post Office) is the original of a telegram, and either this must be produced by an official from the Post Office or proof of its destruction given before a copy can be admitted.[8] Certified copies of telegram produced Presumption arises to the effect that messages contained in certified copies of telegram were delivered to the addresses mentioned therein.[8a]

Where on the date fixed for the production of evidence the Court received a telegram from the plaintiff barely stating that he was ill without mentioning the disease, it was held that such a telegram was no evidence whatsoever, and that the Court was not bound to act upon it.[9]

Radio messages.—The presumption under this section will also apply to radio messages.[10]

89. Presumption as to due execution, etc., of documents not produced.—The Court shall presume that every document, called for and not produced after notice to produce, was attested, stamped and executed in the manner required by law.

COMMENTARY

Applicability.—The wording of Section 89 clearly indicate its operation is restricted to cases where a notice to produce the document has been given to the opposite party.

---

1. *See* Section 114, illustrations (e) and (f) ; *British and American Telegraph Co.* v. *Colson*, LR 6 Ex O per Bramwell, B.
2. Roscoe, NP Ev., 43.
3. *See* Wharton, Ev., Section 76.
4. *R.*v. *Johnson*, 7th East, 65 ; *R.*v. *Plumer*, R & R 264.
5. Halsbury, Vol. 13, paragraph 762.
6. *Henkel* v. *Pape*, LR 6 Ex 7 ; *Godwin* v. *Francis*, LR 5 CP 295 ; Phipson, Ev., 7th Ed., 517.
7. *R.*v. *Regan*, 16 Cox 203 ; Phipson, Ev., 7th Ed., 517.
8. *Punnakotiah* v. *Kolikamba*, AIR 1967 AP 83.
8a. *Manchalal* v. *Shah Manikchand*, AIR 1988 Kant. 221 (DB).
9. *Mohanlal* v. *Indermal*, AIR 1954 Raj 238.
10. *Saila Behari* v. *Orissa*, AIR 1966 Orissa 150.

Where the defendants are not given the notice to produce the document, Section 89 cannot come to plaintiff's aid.[1]

No presumption can be raised where notice to produce has not been given to the party in whose possession the document is.[2]

As against the party refusing or neglecting to produce the document on notice there is a presumption that it has been properly executed.[3]

If a document is not produced after notice to produce it has been given, the Court is bound to presume that the document was properly stamped, attested and executed.[4] The condition precedent for the application of the section is that the original document must have been called for and has not been produced after notice to produce it is given.[5] If, however, the document has been lost or destroyed, this section will not apply; but the Court may, under Section 114 of the Act, raise a similar presumption in regard to it. In either case the presumption is rebuttable, and the party against whom the presumption operates may show that the document was not in fact properly stamped, attested and executed, subject, of course, to the restriction contained in Section 164 of the Act that if the party has refused to produced the document after notice, he cannot use the document to rebut the presumption without the consent of the other party or the order of the Court.[6] The presumption of a document being properly stamped is rebutted, if it is shown that it was unstamped when last seen. Where a document is shown to be at one time unstamped, it will be presumed to have so continued until the contrary is proved.[7] The section is inapplicable where it is not shown that the document is in the possession of the party called to produce it. And no question of presumption arises where the evidence shows that the document was, in fact, not stamped.[8] Secondary evidence of the contents of an unstamped document is not admissible.[9] The party in possession of the document cannot, without producing it, contended that it was not stamped according to law.[10]

No presumption as to the contents of the document.—There is no presumption under this section as to the contents of a document not produced after notice; these must be proved by secondary evidence. There is, however, a general presumption under section 114 that the contents of a document are not favourable to the party who withholds the document.[11]

Doubtful whether the section is applicable when the document is in the possession of a stranger who refuses to produce it.—Subject to the provisions of Section 130 of the Act, a stranger to the suit may be summoned to produce a document.[12] It is

1. *Smt. Mira Bai* v. *Jai Singh*, AIR 1971 Raj 303 at p. 305.
2. *Mira Bai* v. *Jai Singh*, AIR 1971 Raj 303.
3. *Jang Bahadur* v. *Chandraj Singh* AIR 1971, Oudh 406.
4. *Jang Bahadur Singh* v. *Chandraj Singh*, 41 IC 171. As to the presumption that an old document has been properly stamped, see *Ahmad Raza* v. *Abid Husain*, 38 A 494 : 39 IC 11 : 43 IA 264 (PC) ; *Manvaikraman alias Manjeri Karnamuepad* v. *Nilambar Thacharakavil Manavikraman* 31 IC 579.
5. *Kashibai* v. *Vinayak Ganesh*, 1956 B 65.
6. *Ibid.*
7. *Closmadeuc* v. *Carrel*, 18 CB 36 ; Phipson, Ev., 7th Ed., 512.
8. *Ladha Ram* v. *Hari Chand*, 1938 L 90.
9. *See* notes to Section 65 under the heading "secondary evidence cannot be given of the contents of a document which is admissible by reason of its not having been stamped".
10. *Budhe Ram* v. *Hira*, 1953 PP 52.
11. *See* Ill (g) to section 114.
12. O XVI r. 6 CP Code.

doubtful whether the presumption mentioned in this section may be raised when the document is in the possession of a stranger who does not produce it though summoned to do so.[1]

Both sides desired the Court to draw adverse inference against the opposite-party for the non-production of the original sale deed. In the circumstances the Court would refrain from raising any presumption from the non-production of the sale deed.[2]

90. Presumption as to documents thirty years old.—Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

Explanation.—Documents are said to be in proper custody if they are in the place in which and under the care of the person with whom, they would naturally be, but no custody is improper if it is proved to have had a legitimate origin, of if the circumstances of the particular case are such as to render such an original probable.

The explanation applies also to Section 81.

Illustrations

(a) *A* has been in possession of landed property for a long time. He produces from his custody deeds relating to the land, showing his title to it. The custody is proper.

(b) *A* produces deed relating to landed property of which he is the mortgagee. The mortgagor is in possession. The custody is proper.

(c) *A*, a connection of *B*, produces deeds relating to lands in *B's* possession which were deposited with him by B for safe custody. The custody is proper.

LOCAL AMENDMENT

Uttar Pradesh.—The under-mentioned amendments have been made in Section 90. The existing section shall be renumbered as Section 90 (1) and

(a) for words "thirty year" the words "twenty years" shall be substituted, and

(b) the following shall be added thereafter as a new sub-section (2).

"(2) Where any such document as is referred to in sub-section (1) was registered in accordance with the law relating to registration of documents and a duly certified copy thereof is produced, the Court may presume that the signature and every other part of such document which purports to be in the handwriting of any particular person, it is that person's hand-

1. *See* Markby Ev., 67-68.

2. *Rama Shankar Lal and others* v. *The State of U.P.*, 1970 SCD 471.

writing, and in the case of a document executed or attested, that it was duly executed and attested by the person by whom it purports to have been executed or attested".

After Section 90 the following Section 90-A shall be inserted :

"**90-A.** (1) Where any registered document or a duly certified copy thereof or any certified copy of a document which is part of the record of a court of justice, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the original was executed by the person by whom it purports to have been executed.

(2) This presumption shall not be made in respect of any document which is basis of a suit or of a defence or is relied upon in the plait or written statement.

The explanation to sub-section (1) of Section 90 will also apply to this section". (*Vide* Uttar Pradesh Act, XXIV of 1954, Section 2 and Schedule, dated 30th November 1954.

[1][**90-A. Presumption as to electronic records five years old.**—Where any electronic record, purporting or proved to be five years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the digital signature which purports to be the digital signature of any particular person was so affixed by him or any person authorised by him in this behalf.

Explanation.—Electronic records are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they naturally be; but no custody is improper if it is proved to have had a legitimate origin, or the circumstances of the particular case are such as to render such an origin probable.

This *Explanation* applies also to Section 81-A.]

COMMENTARY

As amended in Uttar Pradesh by U.P. Civil Laws Reforms and Amendment Act, 1954.—The presumption which was by virtue of sub-section (1) has been virtue of sub-section (2) extended to certified copies of registered documents. There arises no occasion to raise a presumption under Section 90 till a case for the presumption of secondary evidence has been made out. The only effect of the amendment is that a party is no longer required to lead evidence of execution of a document provided the document is twenty year old.[2] The presumption under Section 90-A (1) applies to registered documents or copies thereof which are not more than twenty years old.[3]

Where a copy of the document less than twenty years old from a court record is not referred to in the pleading but is generally relied upon in support of some factual

---

1. Section 90-A inserted by Information Technology Act, 2000 (Act 21 of 2000), S. 92 and Sch. II (w.e.f. 17-10-2000).
2. *Sardaran* v. *Sunderlal Baldeo*, AIR 1968 All 363, 367
3. *Deo Chand* v. *Dy Director of Consolidation, U.P.*, 1967 ALJ 992, 994

allegation and not as the basis of the suit or defence Section 90-A (2) does not apply and the presumption can be drawn under Section 90-A.[1] The presumption under Section 90-A may be made by only if the original shown on the face of it the name of the person by whom it purports to have been executed. Where a document does not show who prepared and signed it, the mere fact that it is twenty or thirty years old does not make it admissible without proof.[2]

Ancient documents; principle.–Documents thirty years old, produced from proper custody, and otherwise free from suspicion prove themselves and no evidence of the handwriting, signature, sealing or delivery need, in general, be given.[3] The rule, established for the sake of general convenience, is founded on the great difficulty and often impossibility of proving handwriting after a long lapse of time,[4] and on the presumption that the attesting witnesses, if any, are dead-a presumption which is not allowed to be rebutted by proof that such witnesses are alive and actually in Court.[5] Discrepancy between English and Bengali dates though document already acted upon does not invalidate it.[5a]

Construction of ancient documents.–Where an ancient document is ambiguous but it is produced from proper custody. The court may presume under Section 90 that the deed was duly executed. It is to be interpreted and construed according to the plain and the ordinary meanings of the words used therein. If the words are vague and ambiguous extrinsic evidence is admissible under proviso 6 to section 92 for resolving the ambiguity, and for showing that the words used related to some existing state of things.Resort may also be had to any contemporaneous usage.[6]

The scope of Section 90.–The real scope of Section 90 of the Evidence Act seems to be that in the normal circumstances, where it is found that the document in question emanates from an apparently lawful custody and where the document is such that it is likely to have been executed having regard to the common course of conduct, and where there are no circumstances to excite the suspicion of the Court such as unnaturalness and artificially surrounding the transaction or an apparent interlineation or correction or tampering with the document, the Court will draw the presumption. Inasmuch as the presumption dispenses with proof of due execution in cases of testament where the onus of proof is heavy on the propounders of the will, the Court must act with extreme caution and the utmost circumspection.[7]

Documents that are the subject of the presumption.–The rule applies not only to wills and deeds requiring attestation, but to accounts,[8] letters, entries, receipts, settlement certificates,[9] *char sanads*[10] and books of account[11] as well as to all other docu-

1. *Sakloo Ahir* v.*Munshi Ahir*, 1971 AWR (HC) 132; 1971 ALJ 370.
2. *Amrita* v.*Sripad* AIR 1962 A 111.
3. Phipson Ev., 7th Ed., 504 : Stark, Ev., 4th Ed., 521-24, Taylor, §§ 87-88 ; Steph, Art 88.
4. *Wynne* v.*Tyrwhitt*, 4 B and Ald 376 : see also *Rudra Gouda* v.*Basan Gouda*, 40 Bom. LR 202.
5. *Doe* v.*Wolley*, 8 B & C 22; *Doe* v.*Burdett*, 4 A & E 19 : *Marsh* v.*Collnett*, 2 Esp 655 ; Phipson,Ev. 7th Ed 504.

5a. *Prabhat Chandra* v.*Smt. Rani Bala*, AIR 1989 Cal 202.

6. *Union of India* v.*Nand Kishore*,AIR 1966 HP 54.
7. *Dhanpal Chettiar* v.*Govindaraja Chetty*, (1961) 74 LW 261 : AIR 1961 Mad. 262.
8. *Foster* v. *Plumber's Co.*, 44 SJ 211.
9. Stark,Ev.,4th Ed., 521-4 ; Taylor, § 88.
10. *Maharajadhiraj Sir Kameshwar Singh* v.*Hridoy Nath Sahoo*, 1938 C 763 : 67 CLJ 111.
11. *Durga Shankar* v.*Lala Ganga Sahai*, 142 IC 889 : 1932 A 500.

ments, public or private.[1] But it seems doubtful whether it applies to documents sealed by a Court or corporation, since such seals, being of a permanent character, are not rendered more difficult of proof by lapse of time.[2] The section makes no provision for any presumption in regard to seals and a seal cannot be regarded as a signature.[3] Section 90 empowers the Court to presume that a copy purporting or proved to be 30 years old and produced from proper custody is in the handwriting of the person in whose handwriting it purports to be and that the signatures authenticating the copy are genuine.[4] There is, however, no presumption under section 90 with regard to documents which are unsigned and do not purport to be in the handwriting of any particular person.[5] A presumption of genuineness attaches to entries in ancient school registers coming from proper custody.[6] It is not clear from the report of the case just cited whether the entries were signed by or purported to be in the handwriting of any particular person nor does the report mention the provision under which the presumption of genuineness was raised. It is submitted that if the register did not purport to be signed by or to be in the handwriting of any particular person, section 90 was inapplicable to it, though its genuineness could be presumed under Section 114 and the entries did not require any proof by reason of Section 35. In the case of imaginary person like *Imams* there can be no question of signatures and handwritings, and an attempt to apply section 90 to such document is merely futile.[7]

Section 90 is applicable to wills produced in Courts of Probate.—Section 90 is applicable to a will when produced as evidence of a certain fact in the trial of a regular suit.[8] It had, however, been held by the Calcutta High Court that section 90 is not applicable to the proof of a will in a Probate Court.[9] This decision of the Calcutta High Court has been explained in a subsequent decision of the same Court as laying down a rule of expediency rather than a hard and a fast rule of law, and it has been held that a Court may raise the presumption mentioned in section 90 in respect of a document which otherwise is within the terms of the section, whether that document is used as the foundation of a party's right or merely as a piece of evidence.[10] It is submitted that the

1. *Wynne* v.*Tyrwhitt*,4 B & Ald 376.
2. *R* v.*Bathwick* 2 B & Ald p. 648 ; Taylor, § 87 ; Phipson, Ev., 7th Ed 504.
3. *Bhairo Singh* v.*Lal Ambika Baksh Singh*, 1942 O 374 ; *Sri Prasad* v.*Special Manager, Court of Wards*, 12 Luck, 400 : 1937 O 194.
4. *Basant Singh* v.*Brij Raj Saran Singh*, 62 IA 180 : 57 A 494 ; 1935 PC 132 ; *Mst. Mulkh Bano* v.*Mohamad Banaras Khan*, 1936 L 788 ; *Seethayya* v.*Subramanyia Somayajulu*, 52 M 453 : 56 IA 146 : 117 IC 507 : 1929 PC 115 ; *Manavikaraman* v.*Nilambur Thacharakavil Manavikraman*, 31 IC 579.
5. *Special Manager, Court of Wards, Balrampur* v.*Lal Bahadur Singh*, 1937 O 353 : 166 IC 930 ; *Sri Prasad* v.*Special Manager, Court of Wards, Balrampur*, 164 IC 494 : 1936 CWN 768 ; *Hazura Singh* v.*Mohinder Singh*, 1937 L 599 : *Trimkadas* v.*Mathabai*, 124 IC 609 : 1930 N 225 ; *Hota Veerabhadrayya* v.*Kocherla Kota Ramachandra Venkatakrishna Rao*, 73 IC 66 : 1923 M 674 ; but see *Jagdeo* v.*Vithoba*, 105 IC 81 : 1928 N 20.
6. *Parmodh Chand* v.*Narain Singh*, 1936 L 104 : 163 IC 81.
7. *Mansooor Ali* v.*Taiyab Ali Mohammad Ali*, 1935 N 156 : 157 IC 302.
8. *Mahendranath Surul* v.*Netai Charan*, ILR (1943) IC 392 ; *Shankar Das* v.*Dhan Devi*145 IC 241 : 1933 L 53 ; *Swarna Kotayya* v.*Karancheti Vardhamma*, 127 IC 619 : 1930 M 744 ; *Shiam Sundar Singh* v.*Jagannath Singh*, 85 IC 558 : 1925 O 465 : *Mahamnad Hassan* v.*Ali Hyder*, 85 IC 509 : 1925 O 337 ; *Badri Prasad Singh* v.*Anpurna Kuar*, 52 IC 837 see *Shyam Lal Ghosh* v.*Rameswari Basu*, 33 IC 273 : 23 CLJ 82.
9. *Shyam Lal Ghosh* v.*Rameshwari Basu*,33 IC 272 : 23 CLJ 82 : 1916 C 938.
10. *Gobinda Chandra Pal* v.*Pulin Behari Banerjee*, 98 IC 147 ; 1927 C 102 ; *Sarat Chandra Mondal* v.*Panchanan Mondal*, 1953 C 471 *Mahendra Nath Surul* v.*Netai Charan Ghosh*, 47 CWN 359 : ILR 1943, IC 392 : *Munnalal* v.*Kashibai* 1947 PC 15 : 51 CWN 175 ; *Mst. Saran* v.*Abdul Rashid*,PLD 1950 S 131.

view taken in the subsequent Calcutta case is correct. The Evidence Act applies to proceedings in a Court of Probate, and there is nothing in the language of section 90 to limit its operation to cases where a will is produced merely as a piece of evidence in the case.[1] The presumption contained in the section is, however, permissive and has to be applied with a good deal of caution. A Court of Probate may, therefore, refuse to raise the presumption in respect of a suspicious will;[2] but that is a very different thing from saying that Section 90 is not applicable at all to wills produced in a Court of Probate.

The document must purport or be proved, to be thirty years old computation of the period of thirty years.–Mode of reckoning period.–The period of thirty years is to be reckoned, not from the date on which the document is filed in court, but from the date on which, it having been tendered in evidence, its genuineness or otherwise becomes the subject of proof.[3]

The West Pakistan High Court in *Bahadur and other* v. *Sohana and other*,[4] held that the mere fact that the document is old is not enough, but as provided by Section 90 it must be proved that the document is 30 years old and was produced from the custody which the Court considers proper. The said High Court refused to follow the judgment in *Mahavir Prasad* v.*Mst. Nasiban and other*,[5] here Stuart, J.C held that if the document is 30 years old at the time of the argument it enjoys the privileges accorded under Section 90 and Section 107 which raises a presumption of a continuance of human life also assures the 30 years span.

Purporting or proved to be thirty was old. It is not necessary in every case to prove that the document is thirty years old if intrinsically it purports to be that old.[6]

The section applies only to ancient documents, i.e., documents which purport or are proved, to be thirty years old. Where a document neither purports not is proved to be thirty years old, e.g., where the document is undated, there is no presumption of its genuineness under the section.[7] The thirty years date from the execution of the document, and even in the case of wills, not from the death of testator.[8] The presumption of Section 90 is applicable if the document is not 30 years old at the date it is filed, in Court but becomes thirty years old at the date of its genuineness becomes the subject of proof.[9] Thus, where the document is not 30 years old when it is produced in Court, but has become 30 years old when the defendant files his written statement challenging its genuineness,[10] or when arguments in the case are heard,[11] the presumption will be applicable. It has, however, been held in an Allahabad case that where the document is not

1. See *Sarat Chandra Mondal* v.*Panchanan Mondal*, 1953 C 471.
2. In *Channulal* v.*Puna*. 75 IC 660 : 1923 N 169 , and *Shyam Lal Ghosh* v. *Rameswari Basu* 33 IC 273 : 23 CLJ 82, the probate Court refused to raise the Presumption under section 90.
3. *Babu Nandan* v. *Board of Revenue*, AIR 1972 All 406.
4. P.L.D.1961, Lah. 387, 390.
5. 54 IC 368.
6. I.L.R. (1971) Raj 30 : 1969 WLN 288.
7. *Hota Veerabhadrayya* v.*Kocherla Kota Ramchandra Venkatakrishna Rao*, 73 IC 66 : 1923 M 674.
8. *Doe* v.*Woolley*, 8 B & C 22 ; *Man* v.*Ricketts*, 7 Beave, 93 101 ; Phipson, Ev., 7th Ed., 504 ; *Sarat Chandra Mondal* v. *Panchanan Mondal*, 1953 C 471.
9. *Surendra Krishna Roy* v. *Mirza Mohammad Syed Ali*,63 IA 85 : 1936 PC 15 : 160 IC 29 ; *Natha Singh* v.*Dalip Singh*, 169 IC 402 : 39 PLR 340 ; *Gosula Konda Reddi* v. *Pulcherla Pichireddi*,82 IC 487 : 1925 M 184 ; *Ladha Singh* v.*Hukum Devi*, 4 L 233 : 75 IC 57 : 1924 L 145 ; *Hari Ram* v. *Mutsaddi*, 42 IC 80 ; *Minu Sirkar* v.*Rhedoy Nath Roy*, 5 CLR 135 ; *Sarat Chandra Mondal* v.*Panchanan Mondal*, 1953 C 471.
10. *Hari Ram* v.*Mutsaddi*, 42 IC 80.
11. *Mahadeo Prasad* v.*Nasiban*, 54 IC 368 ; *Sarat Chandra Mondal* v.*Panchanan Mondal*, 1953 C 471.

thirty years old when it is produced and the evidence given in proof of it has been disbelieved by the Court, it cannot be presumed to be genuine on the ground that it had become thirty years old at the time when the case was tried and the evidence was recorded.[1]

Proof of proper custody necessary.–Proof of proper custody is a condition precedent to the application of the Section.[2] So that a document may be entitled to the presumption mentioned in this section, it must be produced from custody which the Court, in the particular case, considers proper. Mere production of an ancient document by a party is not enough;[3] the party producing it must given satisfactory proof how he came to possess the document.[4] If the party producing the document is also its proper depository, proof of custody is not necessary,[5] but in other cases proper custody must be proved[6] and there must be sworn testimony as to the custody from which the document has come.[7]

Document of title in the custody of a person out of possession.–The presumption may be raised even if the person claiming title under the document in question is out of possession.[8] See notes to this section under the heading "Evidential value of ancient document; need for corroboration.".

Meaning of "proper custody"; Explanation.–Proper custody is not a matter in respect of which any presumption can be raised, it has to be proved to the satisfaction of the Court.[9] The question whether the custody from which a document is produced is proper or not within the meaning of Section 90 cannot be determined by any general principles, but is one to be determined on the facts of the particular case.[10] Documents are said to be in proper custody if they are in the place in which, and under the case of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.[11] The proper custody of a document means its deposit with a person and in a place where, if authentic, it might naturally and reasonably be expected to be found. Such custody is sufficient, although there might be other custody which would be more strictly and absolutely proper.[12] The document should have been brought from such a place as to offer a reasonable presumption that it was

1. *Chiraunji Lal* v.*Kallo*, 25 IC 412.
2. *Rudragouda* v.*Basangouda*, (1938) 40 Bom. LR 202, per Thakor, J ; *S.K. Ramaswami Goundan* v.*S.N.P. Subbaraya Goundan*, 1948 M 388 : 1948, 1 MLJ 215 : 61 MLW 193 : 1948 MWN 201.
3. *Trimbakdas* v.*Mathabai*, 124 IC 609 : 1930 N 225 ; but see *Dasondhi* v *Milkhi Ram*, 1939 L 152.
4. *Rudra Gouda* v.*Basan Gouda*, 40 Bom. LR 202 ; *Manmatha Nath Mitter* v.*Anath Bandhu Pal*. 50 IC 222 : 23 CWN 201 ; *Trimbakdas* v.*Mithabai*, 124 IC 609 : 1930 N 225.
5. *Doe* v.*Phillips*, 8 QB 158 ; *Doe* v.*Keeling*, 11 QB 884.
6. *Grant* v.*Byjnath Tewaree*, 21 WR 279 ; *Mst. Fureedoonnissa* v.*Ram Onogra Singh*,21 WR 19 ; *Gour* v.*Wooma*, 12 WR 472 ; *Sreekant Bhuttacharjee* v.*Raj Narain Bhuttacharjee*, 10 WR 1; *Gurudas* v.*Sambhu*, 3 Beng. L R 258.
7. *Gobind Chunder Banerjee* v.*Wise*, 12 WR 19 ; *Gooroo Pershad Roy* v.*Bykunta Chunder Roy*, 6 WR 82 ; *Mst. Tarinee* v.*Bamundass Moakhef*, 1 WR 331 ; *Evans* v.*Rees*. 10 Ad. & E 151, 154.
8. *Imam Din* v.*Natha Singh*, 134 IC 296 : 1932 L 43 ; *Swarnamoyi* v.*Sourindra Nath Mitra*, 89 IC 747 : 1925 C 1189 ; but see *Hari Chintaman Dikshit* v.*Moro Lakshman*, 11 B 89.
9. *C.A. Udilakshamma* v.*A. Ramarao*, AIR 1973 AP 149.
10. *Imam Din* v.*Natha Singh*, 134 IC 296 : 1932 L 43 ; *Bhagwati Saran* v.*Ram Sahai*, 126 IC 19 ; *Dinamani Chaudhurani* v.*Jagat Chandra Bhattacharjee*, 23 IC 773.
11. Exp. to Section 90. See *Menth* v.*Winchester*, 3 Bing. NC 183 , on which the Explanation to Section 90 is based.
12. Phipson, Ev., Ed., 505.

honestly and fairly obtained and preserved for use.[1] It is not necessary that it should have been found in the best and the most proper place of deposit. The section insists only on a satisfactory account of the origin of the custody and not on the history of its continuance.[2] It is, therefore, not necessary to go behind the possession of the present owner.[3]

The question whether a document comes from proper custody or not is a question primarily for the trial Court, and the appellate Court is very slow to interfere with its discretion.[4]

Instances of proper custody.—Where a daughter professed to hold under a *pattah* more than thirty years old in favour of her father and was found to have been in possession of the land ever since her father's death, for a period of forty years without interruption on the part of the father's heirs, it was held that the daughter's custody of the *pottah* was natural and proper custody within the meaning of Section 90 of the Evidence Act.[5] A deed relating to the affairs of a family is in proper custody if it is with the mother of the persons interested in the property to which the deed relates.[6] A document relating to the property of an insane person, coming from the possession of a person who was appointed manager of the property of the insane but has since been removed from managership, comes from proper custody.[7] A document found among the papers of a *gamashta* is found in proper custody if the document relates to the affairs of the master of the *gomashta*.[8] Similarly, where an ancient document came from the custody of a party's record keeper who swore to its having been in his custody for the period of his service the Court held it to have come from proper custody.[9] A bond comes from proper custody when it is produced by the person who claim title under its provisions.[10] The proper custody of a deed of lease is that of the lessee who is in possession of the property under it.[11] Expired leases are admissible which come from the custody either of the lessor or his agent or solicitor,[12] or from that of the lessee.[13] The proper custody of family Bibles is with a member of the family.[14] The custody of a person entitled to property alleged to have been conveyed by the document is proper custody.[15] "The illustrations to Section 90 are all cases of deeds relating to land produced by the person in possession, or by one to whom the person in possession has committed the custody of the documents. They do not extend to the documents by which a person out of possession strives to reduce the possession actually enjoyed by another to a temporary or limited interest; and it would be very unsafe to presume that

1. *Vital* v. *Mahummad*, 6 Bom.HCR 90.
2. *Sharfudin Valad Tajudin* v.*Govind Bhikaraji Bade*, 27 B 452.
3. *Chunder Kant Mistree* v.*Brojonath Bysack*, 13 WR 109.
4. *Dinamani Chaudhurani* v.*Jagat Chandra Bhattarcharjee*, 23 IC 773.
5. *Trailokia Nath Nundi* v.*Shurno Chungoni*, 11 C 539.
6. *Darshan Singh* v.*Parbhu Singh*, 1946 A 67.
7. *Shama Charan Nandi* v.*Abhiram Goswami*, 33 C 511.
8. *Hari Chintaman Dikshit* v.*Moro Lakshman*, 11 B 89.
9. *Ekcowree Singh Roy* v.*Kylash Chunder Mookerjee*, 21 WR 45.
10. *Devaji* v.*Godabhai*, 11 WR 35 : 2 BLR 85 (PC).
11. *Ram Lal* v.*Satya Niranjan Chakerverty*, 57 IC 786 : 1921 P 379.
12. *Plaxton* v.*Dare*,10 B & C 17 ; *Doe* v.*Phillips*, 8 QB 158 ; *Doe* v.*Keeling*, 11 QB 884.
13. *Hall* v.*Ball*, 3 M & Gr. 242.
14. *Hubbard* v.*Lees*,LR 1 Ex. 255.
15. *Mahomod* v.*Shaffi*,8 BLR 26, 29.

the counterpart of a mortgage with possession by A to B for thirty-one years after its ostensible date by A's son for the purpose of depriving B's son of the property of which he was in possession, and should, therefore, be presumed to be the owner according to Section 110 of the Indian Evidence Act. Such a document would be admissible as coming from proper custody, and such cases as *Doe Dem Neale* v.*Samples*,[1] sanction a liberal construction of what may be deemed proper custody ; but a document thus adduced, without possession to support it, and without proof of any act done in connection with it, would generally have almost no weight in this country as a ground of inference."[2]

Document produced from the records of a Court, whether produced from proper custody?—Custody of Court.—A compromise petition thirty years old kept in Record Room as part of a decree can be presumed to be genuine under this section as the custody of court would be proper in such a case.[3] No legal presumption can arise as to the genuineness of a document more than thirty years old merely upon proof that it was produced from the records of a Court in which it had been filed at some time previous. It must be shown that the document had been so filed in order to the adjudication of some question of which that Court had cognizance, and which had come under the cognizance of the Court.[4] The mere fact of a certain document having been produced from Court where it had been filed does not necessarily bring that document within the requirements of section 90 of the Evidence Act. The application of this proposition, however, depends upon the circumstances of each particular case.[5] The Collectorate is not normally the proper custodian of a *chittah* relating to a private partition among certain persons of certain property. Where, therefore, such a *chittah* was produced in Court by an officer of the Collectorate who stated that the document had been handed over to him by the record keeper to be produced in Court, it was held that the genuineness of the document could not be presumed, inasmuch as (i) there was nothing to show that the document was actually in the custody of the Collectorate before it was produced in Court, and (ii) there was nothing to show that the custody of the Collectorate was proper custody within the meaning of section 90.[6] Mere production of a certified copy of document on the record of a case not entitle the original document to a presumption of genuinenesses in the absence of evidence to show why the original is not produced.[7]

The presumption is discretionary and not imperative.—Discretion of Court though it is not obligatory on the Court to raise the presumption, it is a matter of judicial discretion whether the Court will make the presumption or call upon the party to offer other proof.[8] The presumption under this section is rebuttable.[9] Presumption would be justified in respect of thirty years old registered document coming from property custody.[10]

1. *Doe De. Neale* v.*Samples*, 8 A & E 151.
2. *Timangavda* v.*Rangangavda*, 11 B 94-N, 98-99 per West J.
3. *Savitri Devi* v.*Bhaskar*, AIR 1972 Orissa 148.
4. *Sri Prasad* v.*Special Manager, Court of Wards, Balrampur*, 1937 O 194 : 164 IC 494 ; *Gudadhur Paul Chowdhry* v.*Bhyrub Chunder Bhuttacharji*, 5 C 918.
5. *Rajendra Prasad Bose* v. *Gopal Prasad Bose*, 4 P 67 : 94 IC 814 : 1925 P 442.
6. *Purna Chandra Singha* v.*Radhika Mohan Dey*, 90 IC 722 : 1926 C 370.
7. *Nathuram* v.*Jagannath* 55 IC 426.
8. *Ram Milan* v.*Sher Bahadur*, AIR 1976 All 251.
9. ILR (1971) 21 Raj. 30.
10. *Tej Singh* v.*Hastimal*,AIR (1972) Raj 191.

The presumption as to the genuineness of a document is a matter for judicial discretion and where the trial court has exercised a proper discretion in raising the presumption of the genuineness of a document ordinarily it is not proper for the Appellate Court to overrule the discretion of the trial court where the appellate Court is constrained to overrule the discretion exercised by the trial Court, the party producing the documents should be given an opportunity of supporting the presumption as to the genuineness of the document.[1] Where it is shown that the exercise of the discretion was made arbitrarily and not on judicial grounds it may be challenged even in second appeal.[2]

Where the party express his desire to rely on the presumption and the presumption may be justifiably drawn, the fact that he was witness who could formally prove the execution of the document will not by itself be a reason to refuse to draw the presumption.[3] Section 90 of the Indian Evidence Act is worded in general terms as it was designed to meet situations varying in character, where passage of time might have obliterated the proof of the genuineness of any disputed document. Under this section wide powers are conferred on the Court. A wrong exercise of the discretion under this provision is likely to strengthen the hands of the forger. It is not difficult to incorporate recitals in a document to show that it is over thirty years old. Hence before raising any presumption under this section, great deal of circumspection is necessary, lest the balance should be tilted in favour of an undeserving cause. The Courts ought to be careful to see that provision is not made the forger's paradise. The section states that the Court may draw a presumption and not that it must draw a presumption.[4] Section 90 makes it clear that the presumption which is to be raised relates only to the signature, execution or attestation of a document and does not involve a presumption that the contents of the documents are true.[5] A document purporting to have been executed by the executant by the pen of the scribe attracts the presumption under the section for included in that presumption is the one that the scribe was duly authorised to sign for the executant.[6]

Age, proper custody and innocent appearance of the document are the features upon which the presumption under this section is based. But the Court would be well advised not to raise the presumption where the document is apparently suspicious and is betrayed, for example, by writing on folds, ink being new or such other tell tale circumstance.[7]

The presumption mentioned in this section is permissive and not imperative.6Even if a document is thirty years old and is produced from proper custody, the Court is not bound to presume its genuineness. The section says that the Court "may presume," and not that it "shall presume" a document thirty years old and produced from proper custody to be genuine.[8] It is, therefore, discretionary with the Court to raise or to refuse

---

1. *Ranga Vithoba* v.*Rambha Dina*,AIR 1967 Bom 382, (387).
2. *Imam Din* v.*Natha Singh*, ILR (1971) 21 Raj 30.
3. *Tej Singh* v.*Hastimal*, AIR 1972 Raj 191.
4. *Ravjappa* v.*Nilakanta Rai*, AIR 1962 Mys 53.
5. *Amulya Charan Maity* v.*Sateyswar Maity*, ILR (1966) 1 Cal 395.
6. *Gulzarilal* v.*Bhagwath Prasad*, ILR (1968) 18 Raj 481.
7. *Kapur Chand* v.*Lal Chand* AIR 1975 Raj 178.
8. *Gomti* v.*Megraj Singh*, 145 IC 147 : 1933 A 443 ; *Ram Naresh Singh* v.*Chirkut*, 8 Luck, 18 : 138 IC 513 : 1932 O 227 ; *Husaini* v.*Basit Ali*, 110 IC 415 ; *Surendra Nath Rath* v.*Sambhu Nath Dobey* 55 C 210 : 104 IC 219 : 1927 C 870 ; *Imrit Chamar* v.*Sridhar Panday*, 13 IC 120 : 15 CLJ 7 : 17 CWN 108 ; *Shafiqun-*

to raise the presumption.[1] This discretion should, however, be judicially exercised.[2] The discretion is not to be exercised arbitrarily or capriciously, but must be governed by principles which are consonant with law and justice. While, on the one hand, great care is requisite in applying the presumption, on the other hand, it is clear that very great injustice may be perpetrated if an ancient document coming from proper custody is refuted by a Court capriciously and for inadequate reasons.[3] The presumption permitted by this section is rebuttable.[4]

Presumption must be applied with care and caution.–Even in England where forgery and fraud are of comparatively rare occurrence, the presumption mentioned in this section is applied with considerable care; therefore in this country where forgery and fraud have been the subject of frequent judicial comment, the presumption must be applied with much more care and caution.[5] "Our experience in this country"observed Prinsep. J., "tells us that forgery and fraud are not of such rare occurrence in India as they are in England, and therefore, it behoves us to scrutinize this kind of evidence with more care in this country...Then further, the possibility of discovering fabrication by an anachronism or other inconsistency is much less in this country than in England. In the first place, written instruments are not too common and the materials for comparison are, therefore, fewer. Then the care with which a case is prepared for trial, and the industry with which evidence is sought out and brought forward, are much less, regard being had to the average skill and experience of *Mofussil* practitioners and those agents who have the management of the greater portion of the litigation in the *mofussil*."[6] Since these observations were made, the necessity of exercising great care and caution in raising the presumption of genuineness in respect of ancient document has been emphasized in good many decisions.[7] The Court must first satisfy itself that the elements necessary to bring the document within the rule, exist and then exercises its discretion as to whether, in the circumstances, the presumption of genuineness should be applied.[8] The Court must consider the evidence, external and internal of the document in order to enable it to decide whether in any particular case it should or should not presume proper

---

nissa v.*Shaban Ali Khan*, 26 A 581 : 30 IA 217 (PC) ; *Timangavda* v.*Rangangavda*,11 B 94-N, 98 ; *Uggragant Chowdhry* v.*Hurr Chunder Shickdar*, 6 C 209 ; *S.K.Ramaswami Goundau* v.*S.N.P.Subbaraya Goundan*, 1948 M 388 : 1948, 1 MLJ 215 : 61 MLW 193 : 1948 MWN 201.

1. *Mahendranath* v.*Netai Charan*, 1944 C 241 ; *Bhairo Singh* v.*Lal Ambika Baksh Singh*, 1942 O 374 ; *Shafiqunnissa* v.*Shaban Ali Khan*, 26 A 581 : 30 IA 217 (PC) ; *Rudragouda* v.*Basangouda*, 40 Bom LR 202 : *Gir Har Saroop* v.*Bhagwan Din*,1935 O 96 ; *Husaini* v.*Basit Ali*, 110 IC 415 ; *Imrit Chamar* v.*Sridhar Panday*, 13 IC 120 : 15 CLJ 7 : 17 CWN 108 ; *Srinath* v.*Kuloda*, 2 CLJ 592 ; *Kotiswar Mukherjee* v.*Paresh Nath Mukherjee*, 1956 C 205.
2. *Special Manager, Court of Wards, Balrampur* v.*Tirbeni Prasad*,1935 O 289 : 154 IC 965 ; *Gomti* v.*Meghraj Singh*, 145 IC 147 : 1933 A 443 ; *Imrit Chamar* v.*Sridhar Panday*, 13 IC 120 : 15 CLJ 7 : 17 CWN 108 ; *Srinath* v.*Kuloda*, 2 CLJ 592.
3. *Govinda Hazra* v *Protap Narain Mukhopadhya*, 29 C 740.
4. *Rudra Gouda* v.*Basan Gouda*, 40 Bom LR 202.
5. *Vaidyanathaswamy Iyer* v.*Natesa Matavarayan*, 69 IC 289 : 1921 M 452 ; *Shripuja* v.*Kanhaya Lal*, 53 IC 947 : *Timangavda* v.*Rangangavda*, 11 B 94-N, 98 ; *Boikunt* v.*Lukhun*, 9 CLR 425 .
6. *Boikunt* v.*Sukhun*. 9 CLR 425.
7. *Mansoor Ali* v.*Taiyab Ali*, 1935 N 159 : 157 IC 302 ; *Trialokia Nath Nundi* v.*Shurno Chungoni*, 11 C 539 ; *Shaik Husain* v.*Govaradhandas Parmanandas*, 20 B 1, 5 ; *Gauhar Bibi* v.*Ghalam Mahammad* 4 IC 923 : 82 PLR 1909 ; *Imrit Chamar* v.*Sridhar Panday*, 13 IC 120 : 15 CLJ 7 ; *Ghulam Nabi* v *Allah Din*, 19 IC 964 : *Jesa Lal* v.*Ganga Devi*, 81 PR 1913 : 20 IC 868 ; *Vaidyanathaswamy Iyer* v *Natesa Malavarayan*, 69 IC 289 : 1921 M 452 ; *Govinda Chandra Pal* v.*Pulin Behari Banerjee*, 98 IC 147 : 1926 C 102.
8. *Imrit Chamar* v.*Sridhar Panday*, 13 IC 120 : 15 CLJ 7 : 17 CWN 108.

signature and execution.[1] The Courts should be very careful about raising any presumption under section 90 in favour of old deeds of *shankalap* which are produced practically for the first time during the trial of suits in which under-proprietary rights are set up on the basis of those deeds.[2]

Proper cases for the application of the presumption.—Where the scribe and the attesting witnesses of a deed are dead and the document is a registered one, it is very strong case for the application of the presumption.[3] The presumption of due execution and attestation may readily be raised in respect of ancient registered documents.[4] Where an old will comes from proper custody and all the attesting witnesses are dead, the will may be presumed to be genuine.[5] Where a document purporting to be fifty five years old and to have been written by a licensed stamp-vendor and comes from proper custody, it can claim the benefit of section 90, Evidence Act,[6] In order to decide the genuineness of old documents the important consideration should be whether they were acted upon or not or whether they were supported by possession or not, and too much importance cannot be attached to resemblance of signature or to the opinion of experts about them.[7] Where a document more than thirty years old was produced from proper custody and was proved to have been acted upon in three previous litigations, executants and attesting witnesses were dead and the scribe was not available in spite of best efforts, the document was presumed to be genuine and properly proved.[8]

Cases where the Court may refuse to apply to presumption.—The Court may refuse to apply the presumption where evidence in proof of the document is available,[9] or where evidence in proof of the document has been produced but disbelieved.[10] It may also refuse to raise the presumption where it has reasons to believe the document to be a fabrication.[11] or where grave suspicion attaches to it.[12] e.g., where a document is suspicious on the face of it on account of erasures and rewriting.[13] The effect of the presumption may be weakened by circumstances which tend to raise doubts as to the authentic-

1. *Mansukh Panachand Shah* v.*Trikambhai Ichhabai Patal*, 123 IC 492 : 1930 B 39 ; see also *Shafiqunnissa* v. *Shaban Ali Khan*, 26 A 581 : 30 IA 217 (PC) ; *Brij Raj Saran Singh* v.*Basant Singh*, 118 IC 154 : 1929 A 561 ; *Rudra Gouda* v. *Basan Gunda* 40 Bom LR 202.
2. *Special Manager, Court of Wards, Balrampur* v. *Lal Bahadur Singh*, 1937 O 353 : 166 IC 930 ; *Sri Prasad* v. *Special Manager, Court of Wards, Balrampur*, 1937 O 194 : 164 IC 494 ; *Ram Naresh Singh* v.*Chirkut*, 8 Luck 18 : 38 IC 513 : 1932 O 227 ; *Har Prasad Upadhiya* v.*Bikramajit Singh*, 61 IC 959.
3. *Lal Bahadur Singh* v.*Rameshwar Prasad*, 105 IC 581 : 1927 O 510.
4. *Vaidyanathaswamy Iyer* v.*Natesa Malavarayan*, 69 IC 289 : 1921 M 452 see also *Lal Bahadur Singh* v.*Rameshwar Prasad*, 105 IC 581 : 1927 O 510 ; *Ramachri* v.*Sadho Saran Tewari*, 79 IC 405 : 1924 A 869 ; *Goya Singh* v.*Surajbali Singh*, 75 IC 931 ; 1924 A 832 ; *Narain Singh* v.*Deputy Commissioner of Partapgarh*, 55 IC 501.
5. *Shiam Sundar Singh* v.*Jagannath Singh*, 85 IC 558 : 1925 O 465 ; *Mohamad Hasan* v.*Ali Hyder*, 85 IC 509 : 1925 O 337.
6. *Kartar Singh* v.*Mehr Nishan*, 16 L 313 : 155 IC 1064 : 1934 L 885.
7. *Ram Baran* v.*Bahadur Khan*, 1942 A 425 : 1942 ALJ 449.
8. *Ram Lal* v.*Khushi Ram*, 1949 EP 233.
9. *Mahendra Nath* v.*Netai Charan*, 1944 C 241 : ILR (1943) IC 392 ; 215 IC 124 ; *Raghubar Singh* v.*Sanwal Singh* 61 IC 125 : 1921 O 55.
10. *Surendra Nath Rath* v.*Sambhu Nath Dobey*, 55 C 210 : 104 IC 219 ; 1927 C 870 ; *Chiranji Lal* v.*Kallo*, etc., 12 ALJ 507 ; contra, *Dwarka* v.*Makka*, 49 IC 419 ; see *Ramachari* v.*Sadho Saran Singh*, 79 IC 405 : 1924 A 869.
11. *Shafiqunnissa* v.*Shaban Ali Khan*. 26 A 581 : 30 IA 271 : 6 Bom LR 750 (PC) ; *Gooroo Pershad Roy* v.*Bykunto Chunder Roy*, 6 WR 82 ; *Munshi Ram* v.*Thakar Das* , 1951 Pepsu 87.
12. *Gujar Singh* v.*Mehr Singh*, 34 IC 168.
13. *Baldeo Misir* v.*Bharos Kunbi*, 95 IC 261 : 1926 A 537.

ity of a document.[1] Where a will was produced for probate long after it was executed and there was no satisfactory explanation of the delay, the Court refused to raise the presumption under this section.[2]

Procedure in, and consequent on making the presumption.—The presumption mentioned in this section is rebuttable,[3] and the party against whom genuineness of a document has been presumed is entitled to give evidence in rebuttal of the presumption.[4] It is for the Court to determine whether it will raise the presumption or not. If it raises the presumption, it must give the other side opportunity to rebut it.[5] If it declines to raise the presumption, it must state its reasons,[6] and call upon the party to produce evidence of the execution of the document.[7] The Madras practice is that the document is marked as an exhibit if *prima facie* evidence of the age of the document and of its proper custody is produced, and the other side if given an opportunity of producing evidence in rebuttal of the presumption.[8] But the mere fact that the trial Court has made an endorsement on an ancient document that it was proved by a particular witness does not necessarily imply that the trial Court was willing to raise the presumption under Section 90 of the Evidence Act.[9] If the trial Court recorded and communicated to the parties a finding, before the opportunity for receiving evidence had passed, that it was prepared to raise the presumption under this section, but the appellate Court, not agreeing with the trial Court,finds that the presumption was not justified, it must give the party concerned opportunity to adduce fresh evidence in proof of the document. If, however, the trial Court did not record and communicate any such finding before the parties had closed their case, the appellate Court can, without giving opportunity to adduce fresh evidence, reject as unproved a document which was admitted by the trial Court under the presumption of this section.[10] If the appellate Court decides that the presumption under Section 90 was wrongly made by the trial Court, it should remand the case to enable the party adversely affected by the decision to discharge the *onus* that has thus been placed upon him.[11]

Interference by the appellate Court with the discretion of the trial Court in the matter of raising the presumption.—The question whether a presumption under Section 90 should or should not be raised is primarily a question for the trial Court.[12] The appellate Court is slow to interfere with the discretion exercised by the first Court in raising or declining to raise the presumption under this section;[13] and it will not inter-

1. *Madanmohan Gossain* v *Kumar Rameshwarmalia*,7 CLJ 615.
2. *Chanulal* v *Puna*,75 IC 660 : 1923 N 169.
3. *Narain Singh* v *Deputy Commissioner of Pratapgarh*, 55 IC 896 ; *Narain Singh* v *Deputy Commissioner of Pratapgarh*, 55 IC 501.
4. *Narain Singh* v *Deputy Commissioner of Pratapgarh*, 55 IC 869.
5. See *Srinath* v *Kuloda*, 2 CLJ 592.
6. *Srinath* v *Kuloda*, 2 CLJ 592.
7. *Imrit Chamar* v *Sridhar Panday*, 13 IC 120 : 15 CLJ 7 : 17 CWN 108.
8. *Ramien* v *Veerappudian*, 37 M 455 : 14 IC 394 ; *S.K. Ramaswami Goundan* v *S.N.P. Subbaraya Goundan*, 1948 M 388 : 1948 1 MLJ 215 : 61 MLW 193 : 1948 MWN 201.
9. *Muthiyan Chetti* v *Vayyadayan*, 108 IC 412.
10. *Muthiyan Chetty* v *Vayyadayan*, 108 IC 412 ; see also *Radhe Kishen Basdeo Lal*, 1935 O 482 : 156 IC 983.
11. *Gomti* v *Meghraj Singh* 145 IC 147 : 1933 A 443 ; see *Rajendra Prasad Bose* v *Gopal Prasad Sen*, 7 P 245 : 108 IC 545 : 1929 P 51.
12. *Har Prasad Upadhiya* v *Bikramjit Singh*, 61 IC 959.
13. *Raghubir Singh* v. *Thakurain Sukhraj Kuar*, 1939 O 96 ; *Radhe Kishen* v. *Basdeo Lal*, 1935 O 482 : 156 IC 983 ; *Gir Har Saroop* v. *Bhagwan Din*, 1935 O 96 ; *Khazan Singh* v. *Lachhmi*, 142 IC 13 : 1933 L 347 ; *Ram Naresh Singh* v. *Chirkut*, 8 Luck. 18 : 138 IC 513 : 1932 O 227 ; *Afsar Begum* v. *Muhummad*

fere unless the discretion has been exercised arbitrarily, capriciously or perversely,[1] or without due consideration of all the relevant facts and circumstances of the case,[2] or unless the reasons are *prima facie* unsound,[3] or the first Court has raised the presumption in favour of the document apparently without carefully examining it.[4] Where the presumption has been drawn neither arbitrarily nor as a matter of course but after considering the various circumstances, there is no justification for interference in second appeal.[5] When the first Court has exercised the discretion with due care and has made the presumption, the appellate Court will not interfere.[6] The presumption permitted by this section is a presumption of fact and, therefore, not a good ground for a second appeal,[7] unless the lower Court, in making or declining to make the presumption, has acted arbitrarily and not on judicial grounds,[8] or the lower appellate Court has not adequately considered the reasons given by the first Court for refusing to raise the presumption.[9] Where the trial Court exercise its discretion and admits a document and the first appellate the Court finds no reason to interfere with it, the High Court should not overrule the discretion and reject the document.[10] Ancient documents which are unsupported by any evidence that might free them from the suspicion of being fabricated, should not be acted upon. Where the Courts below have acted upon this principle, it is not open to the High Court in second appeal to interfere lightly with the exercise of this discretion.[11] Where the lower appellate Court in arriving at a finding fails to attach the presumption of genuineness attaching to an ancient document and does not properly consider the documentary evidence on record, it is the duty of the High Court to come to its own opinion on the matter.[12]

Extent of the presumption; no presumption as to the correctness of the contents of the document.–**Extent of presumption.**–The section empowers the Court to presume the signature and every other part of a document thirty years old which purports to be in the handwriting of any particular person as in that person's handwriting, and in the case of a document executed or attested that it was duly executed and attested by the persons by whom it purports to be executed and attested. A thirty years old document can be read in evidence without having been formally proved. (In U.P. 20 years).[13]

Presumption of due execution.–The presumption is one of due execution and

---

Yusuf, 6 Luck 526 : 130 IC 861 : 1931 O 103 ; *Rajendra Prasad Bose* v. *Gopal Prasad Sen*, 7 P 245 : 108 IC 545 : 1929 P 51 ; *Muhammad Usman* v. *Rahim Bakhsh*, 44 IC 559 ; *Manavkraman* v. *Nilambur Thacharakail Manavikraman*, 31 IC 579 ; *Dinamani Chaudhurani* v. *Jagat Chandra Bhattacharjee*, 23 IC 773 ; *Safiqunnissa* v. *Shaban Ali Khan*, 26 A 581 : 30 IA 217 : 6 Bom LR 750 (PC).

1. *Special Manager, Court of Wards, Balrampur* v. *Tribeni Prasod*, 154 IC 965 : 1935 O 289 ; *Khazan Singh* v. *Lachmi*, 142 IC 13 : 1933 L 347 ; *Jas Karan Singh* v. *Ram Tahal*, 114 IC 307.
2. *Special Manager, Court of Wards, Balrampur* v. *Tribeni Prasad*, 154 IC 965 : 1935 O 289.
3. *Raghubir Singh* v. *Thakurain Sukhraj Kuar*, 1939 O 96 ; *Vridyanathanswamy Iyer* v. *Natesa Malavarayan*, 69 IC 289 : 1921 M 452.
4. *Baldeo Misir* v. *Bharos Kunbi*, 95 IC 261 : 1926 A 537.
5. *Imam Din* v. *Natha Singh*, 134 IC 296 : 1932 L 93.
6. *Muhammad Usman* v. *Rahim Bakhsh*, 44 IC 559.
7. *Parakusa Zatindra Mahadesikaswami* v. *Subramania Pillai*, 26 IC 117, per Sankaran Nair J., contra, Tyabji J ; see *Pandappa* v. *Shivalingappa*, 1946 B 193.
8. *Mahadin Singh* v. *Bikrama Singh*, 93 IC 13 : 1926 O 362.
9. *Lachman Das* v. *Ganga Sahai*, 60 IC 96.
10. *Nathu Lal* v. *Gomti Kuar*, 1940 PC 160 : ILR 1940 A 625 : 67 IA 318 : 190 IC 135.
11. *Sardara* v. *Akbar*, 38 PLR 322.
12. *Maharajadiraj Sir Kameshwar Singha* v. *Hridoy Nath Sahoo*, 1938 C 763.
13. *Lila Dhar* v. *Sitaram*, AIR 1976 All 213.

attestation,[1] of, old documents does not extend to truth of contents of the document.[1a]

When a document purporting, or proved to be, thirty years old is produced from proper custody, three presumptions arise in respect of it: (i) that the signature and every other part of the document which purports to be in the handwriting of any particular person is in that person's handwriting, (ii) that the document was executed by the person by whom it purports to have been executed, and (iii) that the document was attested by the person by whom it purports to have been attested.[2] There is also a presumption that the document was prepared at the time it purports to have been prepared; but there is no presumption as to the correctness of the contents of the document,[3] and the section cannot be so used as to dispense with formal proof of the contents of the document.[4] The party producing the document, if the other conditions of Section 90 are satisfied is relieved of the duty of proving the execution of the document; but that is not the same thing as saying that the Court shall presume the correctness or genuineness of every statement appearing in the document.[5] If a Court is prepared to presume the genuineness of a document under Section 90 of the Evidence Act, the question whether the endorsement on it by the stamp-vendor sets out the true facts as to the name of the purchaser of the stamp and the object of the purchase of the stamp paper, is not a question so much governed by Section 90 as by Section 114, illustration (e) which provides that the regularity of official acts may be presumed.[6] When a party produces a forty years old receipt of the delivery of possession, the Court may properly presume that possession was in fact delivered at the time the receipt was passed.[7] It is also open to a Court to hold that a document, the genuineness of which is presumed by it under Section 90, was not acted upon.[8] The passing consideration for a document, which is over thirty years old and which was never questioned before the time of the suit, should be taken as proved, even if the direct evidence is not as strong as might be expected in respect of recent transactions.[9] Where a document, found in a settlement file, purports to be an order of a Raja to his servants prohibiting them from taking forced labour from the blacksmiths and carpenters of a certain village, the Court cannot assume that the impression of the seal on this document is the impression of genuine seal of the Raja.[10]

Inspite of the strict provisions of this section, there may be circumstances under which a copy produced would be available not only to prove the existence of the

1. *Nammalwar* v. *Appavu*, ILR 1960 Mad 35.
1a. *Ajit Kumar* v. *Mukanda Lal*, AIR 1988, Cal. 196.
2. See *Chandi* v. *Kali Charan*, 1949 A 733 ; *Kotiswar Mukherjee* v. *Paresh Nath Mukherjee*, 1956 C 205.
3. *Chandulal Ashram* v. *Bai Kashi*, 1939 B 59 ; *Abdul Ghani* v. *Faqir Muhammad*, 111 IC 361 : 1929 L 78 ; *Priya Nath Majumdar* v. *Mahendra Kumar Mitra*, 10 IC 376 : 14 CLJ 578 : 16 CWN 317 : *Kotiswar Mukherjee* v. *Paresh Nath Mukherjee*, 1956 C 205.
4. See *Abdul Ghani* v. *Faqir Muhammad*, 111 IC 361 : 1929 L 78. What this decision perhaps means is that the recitals in a document the genuineness of which is presumed under this section are neither conclusive nor even presumptive evidence of the facts recited.
5. *Keshetra Mohan Das* v. *Bhairab Das*, 98 IC 1021 : 1927 C 229 ; *Abdul Ghani* v. *Faqir Muhammad*, 111 IC 361 ; 1929 L 78 ; see also *Banamali Behera* v. *Padmalabha Misra*, 1951 Orissa, 262.
6. *Vaidyanathaswamy Iyer* v. *Natesa Malavarayan*, 69 IC 289 ; 1921 M 452.
7. *Pandurang Wasudeo Chate* v. *Basappa* ; 77 IC 479 : 1923 B 364.
8. *Mahadeo Ramchandra Patkar* v. *Raghoji Jiyaji Raje Surke*, 77 IC 472 ; 1923 B 293.
9. *Jagna Sanyasiah* v. *Mycherla Peda Atchanna Naidu*, 70 IC 759.
10. *Sri Prasad* v. *Special Manager, Court of Wards*, 1937 O 194 : 164 IC 494 : 1938 OWN 768.

original document but of the terms thereof as well. The circumstances therefore, have to be considered, where on the facts in a particular case, if a copy of a document is found to be admissible as secondary evidence under Section 65, whether the terms thereof can be taken to have been proved although they do not under section itself prove themselves on a presumption raised under it.[1]

Presumption of a second disposing mind and due attestation in the case of an ancient will.—In the case of an ancient will, there is a presumption, under Section 90 of the Evidence Act, not only that it is genuine but that it was duly executed, that is, executed by a person who was in a sound deposing state of mind at the time of execution.[2] Where presumption of due execution of a will is drawn, it necessarily amounts to a finding that the attesting witnesses signed in the presence of the testator.[3]

Where the document (the will) emanates from an apparently lawful custody and where the document is such that it is likely to have been executed, having regard to the common course of human conduct, and there are no circumstances exciting suspicion, or evidence of artificiality and unanturalness, or interlineation or correction or tampering with the document, the presumption in favour of the due execution of the will may be drawn. The degree of proof sufficient to establish a will is not what is required to satisfy the mind of every sceptic, but what would appease the conscience of the Court.[4]

No presumption that the document was executed by a pardanashin lady intelligently and without undue influence.—The word "duly executed and attested" merely mean execution and attestation according to the formalities prescribed by law. The question whether the document has been explained to the executant and whether she has fully understood the import and effect of it is hardly a question of execution, It is, therefore, not open to the Court in the case on an ancient document executed by a *pardanashin* lady, to make a presumption that the document was executed by the lady intelligently, i.e., with full knowledge and comprehension. The fact whether the transaction was free from all attempt at undue influence is also not one on which evidence can be dispensed with and in respect of which any presumption can be made under Section 90 of the Evidence Act.[5]

No presumption as to the agent's authority when the document is executed by an agent.—Where an ancient document purport to be signed by an agent on behalf of the principal, the only presumption that arises under Section 90 of the Evidence Act is that the document was signed by the person alleging himself to be the agent of the latter; but the fact that the agent had authority to execute the document on behalf of the principal cannot be presumed under this section and must be proved otherwise.[6]

---

1. *Kotiswar* v. *Paresh*, 60 CWN 822, AIR 1956 Cal 205 ; *Ramji* v. *Manohar*, AIR 1961 Bom 169.
2. *Munnalal* v. *Mst. Kashibai*, 1947 PC 15 ; *Swarna Kottayya* v. *Karancheti Vardhamma*, 127 IC 619 : 1930 M 744 ; *Badri Prasad Singh* v. *Anupurna Kuar*, 52 IC 837 ; *Sarat Chandra Mondal* v. *Panchanan Mondal*, 1953 C 471 ; *Saran Bai* v. *Abdul Rashid*, 1948 S 127 ; but see *Shankar Das* v. *Dhan Devi*, 145 IC 241 : 1933 L 53.
3. *Rajeshwar Misser* v. *Sukhdeo Misser*, 1947 P 449.
4. *Dhanpal* v. *Govindaraja*, AIR 1961 Mad 262.
5. *Rajeshwar Bali* v. *Har Kishen Bali*, 8 Luck 538 : 150 IC 346 : 1933 O 170 (2) ; *Afsar Begam* v. *Muhammad Yusuf*, 5 Luck 526 : 130 IC 861 : 1931 O 103.
6. *Harihar Prasad Singh* v. *Deonarain Prasad*, 1956 SC 305 ; *Ramani Kanta Ray* v. *Bhimnandan Singh*, 50 C 526 : 85 IC 224 : 1924 C 82 ; *Uggrakant Chowdhry* v. *Hurr Chunder Shickdar*, 6 C 209 ; *Ubilack Rai* v. *Dallia Rai*, 3 C 557 ; *Oomrao Begum* v. *The Nawab Nazim of Bengal*, 24 WR 28 ; see also *Moharam Sheikh Chaprasi* v. *Telamuddin Khan*, 13 IC 606 : 15 CLJ 220 : 16 CWN 567 ; *Mohammad Azim* v. *Special Manager, Court of Wards, Balrampur*, 1936 O 170.

Presumption of authority to execute document.—The presumption raised by the section are confined to handwriting execution and attestation, so where a document more than thirty years old purports to be signed by an agent on behalf of a principal no presumption arises to the agent's authority, which must be proved.[1]

No presumption as to the authority of the executant of a deed of grant.—The application of Section 90 of the Evidence Act does not justify the inference that a deed of grant which is presumed to be genuine was in fact executed by a person possessed of the requisite authority,[2] though such inference may be drawn from all the surrounding circumstances of the case.[3]

Document executed by an illiterate person; document marked by an illiterate executant or signed on his behalf by the scribe.—In the case of an illiterate person, "signed" includes "marked".[4] Therefore, the presumption created by Section 90 is applicable where an illiterate executant has made some work or symbolic writing on the document.[5] Similarly, the presumption permitted by the section in the case of a document purporting to be 30 years old that it was duly executed by the party by whom it purports to be executed includes the presumption that, when the signature of the executant purports to have been made by the pen of the scribe or any other person, the latter was duly authorized to sign for him.[6] The cases where a document is signed for the real party by the pen of another stand on a different footing from those cases where a person, holding himself out as the agent of a party, himself signs the document as an executant.[7] In the case of the former there is, according to the Allahabad Full Bench decision in *Haji Sheikh Bodha* v. *Sukhram Singh*,[8] a presumption that the person who signed the name of the party had authority to sign the party's name; but there is nothing in the Full Bench ruling to lend colour to the view that Section 90 authorizes also the presumption that a person, himself purporting to execute a document for another as his agent had authority to do so. In a subsequent Allahabad case,[9] which purports to follow the Full Bench ruling in *Haji Sheikh Bodha* v. *Sukhram Singh*,[10] the facts are not clearly

1. *Harihar Prasad* v. *Deonarain Prasad*, AIR 1956 SC 305, 310.
2. *Tarakeswar Pal Chowdhury* v. *Srish Chandra Mondal* v. *Panchnan Mondal*, 1933 C 236 ; *Basi Nath Pal* v. *Jagat Kishore Acharjee Chowdhury*, 35 IC 298 : 23 CLJ 583 ; *Special Manager, Court of Wards, Balrampur* v. *Lal Bahadur Singh*, 1937 O 353 ; 166 IC 930.
3. *Tarakeswar Pal Chowdhury* v. *Srish Chandra Ghose Mandal*, 80 IC 628 ; 1924 C 236.
4. Section 3 (52), General Clauses Act (Act X of 1897) ; *Special Manager, Court of Wards, Balrampur* v. *Tribeni Prasad*, 154 IC 965 ; 1935 O 289 ; *Ram Naresh Singh* v. *Chirkut*, 8 Luck 18 : 138 IC 513 : 1932 O 227 ; *Shailendranath Mitra* v. *Girijabhushan Mukherji*, 58 C 686 ; 1931 C 596.
5. *Shailendranath Mitra* v. *Girijabhushan Mukherji*, 58 C 686 : 133 IC 606 : 1931 C 596 ; *Imam Din* v. *Natha Singh*, 134 IC 296 : 1932 L 43.
6. *Bhairon Prasad* v. *Abalak Singh*, 148 IC 1172 : 1934 A 529 ; *Muhammad Rafi* v. *Kirpa Ramji*, 142 IC 784 : 1933 A 99 ; *Ganga Ram* v. *Chunni Lal*, 99 IC 759 : 1927 A 765 ; *Balkaran Singh* v. *Dulari Bai*, 49 A 55 : 97 IC 292 ; 1927 A 231 ; *Bodha* v. *Sukhram Singh*, 47 A 31 : 83 IC 5 : 1925 A 1 (FB); *Bhim Shankar Datt* v. *Mani Ram* 80 IC 457 : 1924 O 265 ; *Ramachari* v. *Sadho Saran Tewari*, 79 IC 405 : 1924 A 869 ; *Raghubar Singh* v. *Sanwal Singh*, 61 IC 125 ; *Shed Ahmad* v. *Ibrahim*, 52 IC 314. In view of the Allahabad Ful Bench decision in *Bodha* v. *Sukhram Singh*, 47 A 31 : 83 IC 5 : 1925 A 1 the earlier Allahabad rulings in which a contrary view of this matter was taken must be taken to have been overruled. *See* for such cases, *Bodha* v. *Sukhram Singh*, 73 IC 989 : 1923 A 420 ; *Lokman Das* v. *Ganga Sahai*, 60 IC 96 ; *Gokul Singh* v. *Sahib Singh*, 38 IC 162 ; *Sheo Nandan Ahir* v. *Ram Lagan Singh*, 30 IC 908 ; see also *Raghubir Singh* v. *Sanwal Singh*, 61 IC 125 : 1921 O 55.
7. For the latter class of cases, *see* the two previous paragraphs.
8. *Bodha* v. *Sukhram Singh*, 47 A 31 : 83 IC 5 : 1925 A 1 (FB).
9. *Balkaram Singh* v. *Dulari Bai*, 49 A 55 : 97 IC 292 : 1927 A 231.
10. *Bodha* v. *Sukhram Singh*, 47 A 31 : 33 IC 5 : 1928 A 1 (FB).

stated, inasmuch as it does not appear whether the signatory Bikram Singh had merely signed the names of Hardayal Singh and Musammat Khatua with his own pen, or had himself executed the document on their behalf as their agent. If the latter was the case and the presumption of valid execution was applied to the document thus executed, it is submitted that the decision goes beyond the Full Bench ruling. The Oudh Court has held that where there is nothing to show that the alleged executant was illiterate but the document purports to be signed on the executant's behalf by another, there can be no presumption that the document was signed under the authority of the executant.[1] Where a *wajibularz* which is more than thirty years old purports to have been signed for the mortgage by some other person, and the existence of the mortgage is admitted therein, the presumption under Section 90 applies and the person who has signed must be presumed to have had authority to do so and the mortgage must be deemed to be proved on the production of the original *wajibularz*.[2]

The section makes no provisions for any presumption in regard to sales, nor can a seal be regarded as a "signature" as defined in the General Clauses Act.[3]

Presumption of due attestation includes cases of attestation by agent.—The presumption of due attestation includes a presumption as to the authority of the person who purports to have attested the document as agent for a person who purports to be the real attesting witness.[4]

Attestation by a Registrar.—Section 90 of the Evidence Act merely says that the Court may presume in the case of document executed or attested that it was duly executed or attested by the persons by whom it purports to be executed or attested. But when a Registrar makes his endorsement on the back of a document, he is simply carrying out his statutory duties under the Registration Act and makes the signature *alio intuito* and is not purporting to attest the document. And though the endorsement shows that the Registrar received from the executant a personal acknowledgement of his signature, in the absence of evidence that the Registrar signed in the presence of the executant, no presumption can possibly be made under Section 90 of the Evidence Act that the signature of Registrar was affixed in the presence of the executant or that the document was duly attested, even if the document is thirty years old.[5]

Section 90 is inapplicable to documents not purporting to be signed by, or to be in the handwriting, of, any particular person; unsigned accounts.—The Section was intended to apply to documents which were signed. A common instance of such documents is a deed. All the three instances appended to this section refer to deeds only. In order, therefore, to attract the provisions of Section 90, the document must have been signed.[6] Where a document does not purport to be signed by,[7] or to be in the handwrit-

1. *Mohamned Azim* v. *Special Manager, Court of Wards, Balrampur*, 1936 O 170 : 161 IC 269.
2. *Bhairon Prasad* v. *Abalak Singh*, 148 IC 1172 : 1934 A 529.
3. *Bhairon Singh* v. *Lal Ambika Bakhsh Singh*, 1942 O 374 ; *Sri Prasad* v. *Special Manager, Court of Wards, Balrampur*, 1937 O 194 : 164 IC 494 ; *Special Manager, Court of Wards, Balrampur* v. *Tribeni Prasad*, 154 IC 965 : 1935 O 289.
4. *Bodha* v. *Sukhram Singh*, 47 A 31 : 83 IC 5 : 1925 A I (FB).
5. *Neelima Basu* v. *Jaharlal Sarkar*, 61 C 525 : 151 IC 1063 : 1934 C 772.
6. *Dogar Mal* v. *Sunam Ram*, 1944 L 58 : 212 IC 416 : 45 PLR 441.
7. *Chiranji Lal* v. *Ramji Lal*, 1939 L 285 ; *Sri Prasad* v. *Special Manager, Court of Wards, Balrampur*, 1937 O 194 : 154 IC 494 ; *Ram Naresh Singh* v. *Chirkut*, 8 Luck 18 : 138 IC 513 : 1932 O 227 ; *Bhagirathmal* v. *Jamini Ghose*, 1942 C 309.

ing of, any particular person, no presumption under Section 90 can arise in respect of it.[1] Thus, Section 90 does not enable the Court to presume that unsigned accounts which do not purport to be in the handwriting of any particular person were written by persons having authority in that behalf.[2] Presumption as to genuineness of a document does not arise where evidence of the witnesses in support of the handwriting is untrustworthy and suspicious.[3]

The section does not apply where the signature of a particular person is not in question or is not sought to be established.[4]

Unsigned documents.—The presumption refered to in this section is as stated above, of a limited character and applied only to signature or handwriting. So where, there are no names of the executant, scribe or writnesses, the section cannot avail to prove the documents, merely because it happens to be more than thirty years old, or is produced from custody which the Court may consider proper.[5]

No presumption can be made in respect of a document which is neither signed nor attested and which does not give the name of the scribe either.[6]

No presumption of due execution in favour of the original where the contents of the original are proved by a copy.—Presumption under Section 90 arises in respect of original document. Section 90 of the Indian Evidence Act cannot be relied upon to draw the presumption that the will being more than 30 years old it was duly executed and attested by person by whom it purported to have been executed and attested. Such a presumption under that section arises in respect of an original document. In view of the words "where any document purporting or proved to be 30 years old' in Section 90, the production of which entitles the court should draw the presumption as to execution and attestation is of the original and not the copy.[7]

Presumption under Section 90-Scope and applicability.—The presumption enacted in Section 90 of the Evidence Act can be applied only with regard to the original documents and not copies thereof.[8] It is not controlled by Sec. 68.[8a]

It is now settled law that the production which entitles the Court to draw the presumption under this section as to the execution and attestation of a document is of the original and not the copy.[9]

---

1. *Nagaraja Rao* v.*Koothappan*, 1941 M 602 ; *Trimbakdas* v. *Mothabai*, 124 IC 609 : 1930 N 225 ; *Charitter Rai* v. *Kailash Behari*, 44 IC 422 ; *Janendra Mohun Choudhury* v. *Gopal Chandra Har*, 40 IC 450 ; *Bhagirathmal* v. *Jamini Ghose*, 1942 C 309 ; See *Chandukutty Nambiar* v. *Rama Varma Raja*, 1939 M 926 ; *Kanhiya Lal* v. *Jamna Lal*, 1950 Raj 47 ; *Hota Veerabhadrayya* v. *Kocherla Kota Ramchandra Venkatakrishna Rao*, 73 IC 66 : 1923 M 674 ; but see *Jagdeo* v. *Vithoba*, 105 IC 81 : 1928 N 20, where a presumption was raised in respect of a pedigree not in the handwriting of an ascertained person.
2. *Dogar Mal* v. *Sunam Ram*, 1944 L 58 ; *Trimbakdas* v. *Mathabai*, 124 IC 609 : 1930 N 225 : *Naina Pillai Marakayar* v. *Ramanathan Chettiar*, 41 IC 788 : 1918 M 932.
3. *Deputy Commissioner, Lucknow* v. *Chandra Kishore Tiwari*, 1947 O 180 : 21 Luck 362 (FB), reversed in *Chandra Kishore Tiwari* v. *Deputy Commissioner, Lucknow*, 1949 PC 207 : 76 IA 17 : ILR 1949 A 531.
4. *Ganesh Prasad Ray* v. *Narendra Nath Sen*, 1953 SC 431.
5. *Hiralal* v. *Parsottam Das*, AIR 1974 Guj. 74.
6. *Ibid.*
7. *Kalidindi Venkata Subbaraju and others* v. *Chintalapati Subbaraju and others*, (1968) 2 SCJ 513.
8. *Tilak Chand Kureel* v. *Bhim Raj*, (1969) 1 SCWR 1066.
8a. *Prabhat Chandra* v. *Smt. Rani Bala*, AIR 1989 Cal 202.
9. *K.Venkatesubbaraju* v. *C Subbaraju*, (1968) 2 SCR 292.

The certified copy of statement said to have been made in a mutation proceedings, the original of which had been lost, cannot prove the signature on the original. Nor can the courts raise any presumption under this section.[1]

It had been held by almost all the High Courts in India that where a document, thirty years old and last found in proper custody, became provable by means of a certified copy under the rules relating to the admission of secondary evidence, as for instance, when the original was lost, destroyed or could not, for any other valid reason, be produced, the same presumption arose in regard to it under this section as would have arisen if it had been produced in Court.[2] But in *Basant Singh* v. *Brij Raj Saran Singh*,[3] the Privy Council has held this view to be erroneous and has ruled that the section requires the production in Court of the particular document in regard to which the Court is invited to make the statutory presumption and that, therefore, the production of the copy is not sufficient to justify the presumption of due execution of the original. This Privy Council decision has been followed in several Indian cases and it may now be taken to be settled law that Section 90 can be of no help if the original deed is not forthcoming and only a certified copy has been produced.[4] The presumption of due execution and attestation cannot be raised in the case of a certified copy because the presumption can be raised only in respect of original documents.[5] The execution of a document need not, however, be proved by direct evidence; it may be proved by circumstantial evidence. In the case of an ancient document, the original of which has been lost, it would be impossible to adduce any direct evidence of execution, and, therefore, for considerations of justice, equity and good conscience, it is necessary to invoke every legitimate presumption which can be reasonably raised upon the facts and

---

1. *Shio Lal* v. *Chetram*, (1971) 2 SCJ 8.
2. *Gir Har Saroop* v. *Bhagwan Din*, 1935 O 96 ; *Gopinath Maharaj Sansthan* v. *Moti*, 148 IC 561 : 1934 N 67 ; overruling *Shripuja* v. *Kanhaya Lal*, 53 IC 947 ; *Brij Kishore* v. *Beni Pershad*, 5 Luck, 424 : 121 IC 273 : 1929 O 483 ; *Brij Ram Saran Singh* v. *Basant Singh*, 118 IC 154 : 1929 A 561 ; *Chudasama Kholuba Sartansang* v. *Chudasama Takhatsand Narsingji*, 46 B 32 : 76 IC 155 : 1922 E 177 ; *Jakkamreddi Seshadu Reddi* v. *Jakhamreddi Pichi Reddi*, 74 IC 35 : 1923 M 163 ; *Subrahmanya Samayajulu* v. *Seethayya*, 46 M 92 : 70 IC 729 : 1923 M 1 (FB) ; *Khageswar Sarma Bhattacharya* v. *Someswar Bhattacharya*, 63 IC 518 : 33 CLJ 382 ; *Dwarka Singh* v. *Rama Nand Upadhya*, 41 A 592 : 51 IC 275 ; *Ram Sunder Raj* v. *Mst. Kali Kuer*, 1922 A 321 (1) : 44 A 683 : 80 IC 1006 ; *Raj Bahadur Lal* v. *Bindeshri*, 46 IC 344 ; *Nanu Nair* v. *Kantan Ashta Moorthi Nambudripad*, 29 IC 386 ; *Sarju Dei* v. *Ram Harakh*, 18 IC 250 ; *Ponnambalath Parapravan Bavotti* v. *Karoth Sanskaran Nair*, 12 IC 453 : 21 MLJ 981 ; *Sawan Singh* v. *Karim Bakhsh*, 93 PR 1910 : 8 IC 353 ; *Ishri Prasad Singh* v. *Lalli Jas Kunwar*, 22 A 294 ; *Khetter Chunder Mookherjee* v. *Khetter Paul Sreeterunto*, 5 C 886 : but see *Nathuram* v. *Jagannath*, 55 IC 426.
3. 62 IA 180 : 57 A 494 : 1935 PC 132 : 156 IC 864 (PC) ; *Asafuddaula Beg* v. *Ram Rattan*, 1940 A 74.
4. *Pandappa Mahalingappa* v. *Shivlingappa*, 47 Bom LR 962 ; *Vithoba Savlaram* v. *Shrihari Narayan*, 1945 B 319 ; *Amjad Husain* v. *Raisunnisa*, 1941 O 433 ; *Keolapati* v. *Harnam Singh*, 1936 O 298 : 162 IC 527 ; *Gopal Das* v. *Sri Thakurji*, 1936 A 422 ; *Mahadeo Ganorkar* v. *Secretary of State*, 20 Nag. LJ 209 ; *Hans Raj* v. *Banarsi Lal*, 1937 L 920 ; *Mumtaz Husain* v. *Brahamanand*, 1936 A 298 : 162 IC 56 ; *Kahna* v. *Government of Punjab*, 4 PLR 376 : 1939 L 458 ; *Ramu* v. *Kanshi*, 1944 A 5 ; *Jewan* v. *Kesho Das*, 41 PLR 377 ; *Harnam Singh* v. *District Official Receiver*, 1941 L 400 ; *Kalu Nimbaji Singne* v. *Bapurao Chinkaji Shingne*, 1950 N 6 : 1949 NLJ 226 : ILR 1949 N 521 ; *Gadey Venkata Ratnam* v. *Gadey Sitaramayya*, 1950 M 634 : 1950 MWN 368 : 1950, 1 MLJ 720 : 63 MLW 588 ; *Sital Das* v. *Sant Ram*, 1954 SC 606 ; *Motishan* v. *Abdul Gaffar Khan*, 1956 N 38.
5. *Harihar Prasad Singh* v. *Deonarain Prasad*, 1956 SC 305 ; *Mohamad Saheb Nabi Saheb Ismail Magdul* v. *Kamal*, 1953 B 338 : 55 BLR 291 : ILR 1953 B 734 ; *Karuppana Gounder* v. *Kalandasami Gounder*, 1953 2 MLJ 717 ; *Kashibai* v. *Vinayak Ganesh*, 1956 B 65 ; but see *Pandappa Mahalingappa* v. *Shivalingappa Murteppa*, 1946 B 193.

circumstances of the particular case in favour of the execution of the original. Though no presumption can be made under Section 90 as regards the genuineness of a document, the original of which has not been produced in Court, yet the Court can presume its genuineness from other circumstances. Thus, where a copy of a will, executed more than forty years ago, is tendered in evidence, every allowance that can fairly be made for the loss of evidence during the long period which has elapsed from the date of the making of the will and that can account for any imperfection in the evidence, ought to be made and great weight should be attached to all those inferences and presumption which arise from the conduct of the family with respect to the will and to the acts done by them under it.[1] A copy considered with the other evidence may give rise to a presumption as to the genuineness of the original.[2] It has been held by the Madras High Court that a copy purporting to be more than 30 years old and produced from proper custody might be presumed to be a copy satisfying the requirements of the Evidence Act as to secondary evidence, and would be admissible in evidence when that very copy contains a statement that it is a true copy and contains the signature of the person who signed the original.[3] A certified copy of a rent-deed cannot be admitted as proof of the due execution of the original, but where another copy of the original, in the handwriting of the executant himself, which he had prepared for his own use, has been duly proved and the loss of the original has been established, such copy can be admitted in evidence.[4] But the mere fact that the original document the contents of which are proved by a certified copy was a registered document does not dispense with the proof of its execution.[5]

A copy purporting to be 30 years old and produced from proper custody may be presumed to have been written or signed by the person by whom it purports to have been written or signed.[6] –But where a copy is neither signed by, nor is in the handwriting of, a particular person, nor does it purport to be thirty years old, there can be no presumption in respect of it under this section, and it will not be admissible as secondary evidence.[7] If a copy more than thirty years old is produced from proper custody, the signatures authenticating the copy may be presumed to be genuine; but the production of the copy is not in itself sufficient to justify any presumption of due execution of the original.[8] In case of copies of registered document Section 90 of the

1. *Mst. Shamsnnnisa Bibi* v. *Sh. Ali Asghar*, 1936 O 87 : 159 IC 780.
2. *Hans Raj* v. *Banarsi Lal*, 1937 L 920.
3. *Sevugan Chettias* v. *Zamindar of Sivaganga*, 1939 MWN 841 : 1940 M 273.
4. *Mahadeo Ganorkar* v. *Secretary of State*, (1937) 20 Nag. LJ 209.
5. *Gopal Das* v. *Sri Thakurji*, 1936 A 422 ; contra, *Pandappa Mahalingappa* v. *Shivlingappa*, 47 Bom LR 962 : 1946 B 193 ; *Sri Ram* v. *Muhammad Abdul Rahim Khan*, 1938 O 6 : 172 IC 882 ; See also *Tribhawan Bahadur Singh* v. *Ram Rattan*, 1937 RD 133. *See* notes to Section 67 under the heading "proof of a registered document".
6. *Basant Singh* v. *Brij Raj Saran Singh*, 62 IA 180 : 57 A 494 (PC) ; *Harnam Singh* v. *District Official Receiver*, 1941 L 400 ; *Ganpatrao* v. *Nagarao*, 1940 N 382 ; *Gurdit Singh* v. *Sri Ram*, 1941 Pesh 89 ; *Sevugan* v. *Zamindar of Sivaganga*, 1939 MWN 841 : 1940 M 273 ; *Seethayya* v. *Subramanya Somayajulu*, 52 M 453 : 56 IA 146 : 117 IC 507 : 1929 PC 115 ; *Mst. Mulkh Bano* v. *Mohammad Banaras Khan*, 1936 L 788 : 166 IC 647 ; *Banwarilal Singh* v. *Dwarkanath Missir*, 52 IC 825 : 29 CLJ 577 ; *Manavikraman* v. *Nilombur Thackarakavil Manavikraman*, 31 IC 579.
7. *Hota Veerabhadrayya* v. *Kocherla Kota Ramchandra Venkatakrishna Rao*, 73 IC 66 : 1923 M 674 ; *Mst. Mulkh Bano* v. *Mohamad Banaras Khan*, 1936 L 788 : 166 IC 647.
8. *Sangam Lal* v. *Gangadin*, 1946 A 389 ; *Harnam Singh* v. *District Official Receiver*, 1941 L 400 ; *Amjad Husan* v. *Mst. Raisunnissa*, 1941 O 433 ; but see *Gurdit Singh* v. *Sri Ram*, 1941 Pesh. 89 and

Evidence Act does not apply but Section 57 of the Registration Act applies.[1]

Certified copies of document.—There is no presumption of genuineness under Section 90. There is no presumption of genuineness in favour of certified copies of documents under Section 90 of the Evidence Act. The High Court was wrong in treating the certified copy of the petition in question as genuine on the ground that it was more than 30 years old document.[2]

Evidentiary value of ancient documents; need for corroboration.—The presumption under Section 90 of the Evidence Act can only dispense with the necessity of proving a document and not touch the question of the evidentiary value of the document.[3] The mere production of an ancient document, unless supported by some corroborative evidence of acting under it or of modern possession, is entitled to little, if any, weight.[4] Ancient documents are admissible in evidence upon proof that they have been produced from proper custody; but their value as evidence, when admitted, must depend in each case upon the corroboration derivable from external circumstances. In order to form an estimate of the evidentiary value of ancient documents, the following considerations have been usually regarded as important-(i) have they been produced on those previous occasions on which they would have been naturally produced, if in existence at the time; (ii) have any acts been done under them; and (iii) has there been ancient or modern corresponding enjoyment?[5] The degree of credit to be given to an ancient document depends chiefly on the proof of transactions or state of affairs necessarily or at least properly or naturally referable to it.[6] An ancient deed must be corroborated by evidence of ancient or modern corresponding enjoyment, or by other equivalent or explanatory proof; it is then presumed to have constituted part of the actual transfer of the property mentioned. Though absence of proof of possession under an ancient document does not effect the admissibility of the document, it undoubtedly affects the weight to be attached to it.[7] A document without possession to support it and without proof of any act done in connection with it, would generally have almost no weight in this country as a ground of inference, The illustration to Section 90 are all cases of deeds relating to land, produced, by the person in possession, or by one to whom the person in possession has committed their custody. They do not extend to documents by which a person out of possession strives to reduce the possession actually enjoyed by another to a temporary or limited interest.[8]

Where the Court is dealing with a document more than thirty years old, the mere fact that proof of consideration is not satisfactory is, by itself, a slender ground for

---

Ganpat Rao v. *Nagarao*, 1940 N 382.

1. *Karuppana Gounder* v. *Kalandasami Gounder*, 1953 2 MLJ 717 ; 1954 M 486 ; *Kashibai* v. *Vinayak Ganesh*, 1956 B 65.
2. *Lallan Singh and others* v. *State of Bihar*, (1969) 1 SCWR 1076.
3. *Baldeo Missir* v. *Bharos Kunbi*, 95 IC 261 : 1926 A 537.
4. Phillips, Ev., Section 599 ; *Swarnamoyi* v. *Sourindra Nath Mitra*, 89 IC 747 : 1925 C 1189 ; *Mst. Phool Bibee* v. *Goor Surun Doss*, 18 WR 485 ; See also *Ram Baran* v. *Bahadur Khan*, 1942 A 425.
5. *Baikunt* v. *Lukhun*, 9 CLR 425, following *Allucka* v. *Kashee Chunder Dutt*, 1 WR Civ. Rul 131 ; *Bishespur Bhuttacharjee* v. *George Henry Lamb*, 21 WR 22 ; *Anund Chunder Pooshalee* v. *Mookta Keshee Dabia* 21 WR 130 and *Grant* v. *Byjnath Tewaree*, 21 WR 279.
6. *Hari Chintaman Dikshit* v. *Moro Lakshman*, 11 B 89.
7. *Swarnamoyi* v. *Sourindra Nath Mitra*, 89 IC 747 : 1925 C 1189 ; *Special Manager Court of Wards, Balrampur* v. *Lal Bahadur Singh*, 1937 O 353 : 166 IC 930.
8. *Timangavda* v. *Rangangavda*, 11 B 94—N. 98-99.

holding that a document known to have come into existence was entirely unreal.[1]

Service books and other documents.—Entries in Service Books and related letters etc., if ancient, can be admissible under this section.[2]

Sections 90 and 65—Copy of document admitted as secondary evidence.—Presumption of due execution of original document not warranted. If the document produced is a copy admitted under Section 65 as secondary evidence and it is produced from proper custody and is over 30 years only the signatures authenticating the copy can be presumed to be genuine. The production of a copy therefore does not warrant the presumption of due execution of the original document. The presumption available under this section cannot be extended to a Will even if it is a registered Will.[3] Where a copy of will has been admitted, the court is not entitled to presume the genuineness of the will.[4]

Commercial Documents.—The Court :

(a) shall presume in relation to documents included in Part I of the Schedule to Act XXX of 1939 (Commercial Documents Act), and

(b) may presume in relation to documents included in Part II of that Schedule,

that any document purporting to be a document included in the Schedule and to have been duly made by or under the appropriate authority was so made and that the statements contained therein are accurate.[5]

---

1. *Sailaja Nath Roy Chaudhary v. Raja Rashee Case Law*, 81 IC 493 ; 1924 C 693 ; 51 C 135.
2. *Hargat Rai v. State of Himachal Pradesh*, 1974 SLWR 515 HP.
3. *Kempanna v. Kalamma*, AIR 1992 Kant 282.
4. *Kalidindi Venkata Subbaraju and Others v. Chintalapati Seshayya and Others*, (1968) 2 SCJ 513.
5. *See Appendix D*