INTRODUCTION

Function of the law of evidence.—The Law of Evidence may be defined as a system of rules for ascertaining controverted questions of fact in judicial inquiries. It bears the same relation to a judicial investigation as logic to reasoning. The object of every judicial proceeding is the enforcement of some right or liability which invariably depends upon certain facts. The Substantive Law, whether it be Statute Law or Common Law, merely defines what facts go to constitute a right or liability. Before a tribunal can pronounce as to the existence of a right or liability, it must ascertain the facts which, according to the rule of Substantive Law applicable to the case, are the necessary constitutents of that right or liability. This duty of ascertaining the facts which are the essential elements of a right or liability is the primary, and perhaps the most difficult, function of a tribunal. The inquiry into these facts is regulated by a set of rules and principles which go by the name of "Law of Evidence". The first task of a Judge being to ascertain facts, the rules by which the inquiry before him is regulated should not, in their fundamentals, differ from those by which any other seeker after truth regulates his inquiries. The Physicist who ascertains the properties of matter or the Historian who is concerned with finding what happened in the past is as much a seeker after truth as the Judge who is concerned with ascertaining whether a man has encroached on his neighbour's land or stolen another man's watch. Again, in the ordinary affairs of life we are constantly reasoning from the known to the unknown and forming judgment as to facts. Why then, it may be asked, should there be a Code of Evidence for the judicial investigation of truth differing in detail or principle from the rules which a scientific inquirer employs in his investigations or a man employs in the ordinary affairs of life? In other words, why should there be any legal rules of evidence as distinguished from the ordinary rules of reasoning? The question is a fundamental one and confronts the legislator at the very outset of his task. This was the argument of the gentleman who said to the framer of the Indian Evidence Act—"My Evidence Bill would be a very short one. It would consist of one rule to this effect: 'All rules of evidence are hereby abolished'. The absence of what we call a "Law of Evidence" in the judicature of all non-English-speaking countries, whether ancient or modern, is referable to this reason. What, then, is the explanation for the evolution of that elaborate and difficult doctrine which is known by the name of "Law of Evidence" and which is a peculiarity of the legal system of the English-speaking countries. The answer is not far to seek. It is furnished partly by the history of the judicial organization of these countries and partly by the differences that underlie judicial inquiries and scientific investigations, notwithstanding apparent resemblance between the two.

Historically the Law of Evidence may be described as the child of the jury system. It was born, and has developed, with this ancient Anglo-Saxon institution and remains to-day as characteristic a feature of the legal system of English-speaking countries as, until quite recently, the jury system of their judicial organization. It is not proposed here to trace the history of the rules of evidence and to show how the system of trial by jury brought these rules into being or helped to developed them. It is sufficient to notice here that most of the rules relating to admissibility to presumptions, and to impeachment and confirmation of the credit of witnesses have been influenced in their history

by, if not have had their origin in, the system of associating with the Judge "twelve men" in the administration of justice. The real origin of rules of evidence, however, lies in the circumstances that distinguish scientific investigation from judicial inquiries. "In dealing with litigation," says **Professor Thayer,** "Courts are not engaged in an academic exercise. With them the search for truth is not the main matter; their desire to know this, and their ability to use it are limited by the requirements of their main business, namely, that of awarding justice, i.e., awarding it so far as they may under the rules of law, and according to established usages and forms". The process of reasoning is primarily an affair of logic, but, in law, there are various important qualifications restraining the freedom of operation of this process. These qualifications have their origin in the circumstance that time for judicial inquiries being very much limited, some decision must be arrived at within this limited time even at the risk of error. This accounts for the exclusion of much data which, though perfectly relevant to the issue in the popular sense, affords only a slender basis for inference, owing to the remoteness of its connection with the issue. Again, the principal instrument for the discovery of truth in a judicial inquiry being testimony, much relevant data is excluded on grounds of public policy, expediency or convenience. Thus, whereas, on the one hand, it is an error to suppose that legal reasoning, as compared with reasoning in general, calls into play any different faculties or involves any different method or principle, it would be wrong to say that the Judge, in ascertaining facts in a judicial inquiry, is not fettered by certain artificial rules which are not rules of pure argumentation. These limitations on the free process of reasoning constitute the Law of Evidence, and if they can be reduced to certain principles, it is possible to classify and arrange them into a system. What is or what should be the general scheme of such a system is the next question and we can best deal with that question by examining the arrangement of this subject as given in the Indian Evidence Act.

It may be remarked at the very outset that the Indian Evidence Act, which was drafted by Sir **James Fitzjames Stephen,** the distinguished jurist and legislator, is a unique piece of legislation the like of which is not to be found anywhere else in the world. In the symmetry of its structure, in the clearness and fullness of its outline, in the terseness of its expressions, and in the compactness of its subject-matter, the work stands out unrivalled and unparalleled. An idea of the conciseness and comprehensiveness of the work may be formed by the fact that in the 167 mostly singly-sentenced sections of the Act, the framer has compressed a subject-matter which covers some 6,000 closely printed pages of the work of an American writer, and yet, during more than hundred years that the Act has been in force, no important amendment of principle or detail has been deemed necessary, and hardly a question of evidence has ever arisen for which a solution in these 167 sections has not been found.

Scheme of the Evidence Act.—The plan of the Act is perfectly simple. The Act is divided into three main parts : (1) Relevancy of Facts, (2) Proof and (3) Production and Effect of Evidence.

PART I

Facts in issue and Relevant Facts

The first duty of a Judge being to ascertain facts about which the parties are at issue, Part I of the Act is concerned with defining what facts may be given in evidence in order to prove the fact in issue. This is the subject-matter of Chapter II of the Act consisting of 50 sections—sections 6 to 55. The fifth section, which may be described as the corner-stone of the structure of Part I, specifies the fact that may be given in evidence. For this purpose, facts are divided into (1) Facts in issue and (2) Relevant Facts, both of these classes of facts having been previously defined in Section 3. The distinction between facts in issue and relevant facts is a fundamental one and must be thoroughly comprehended to understand and appreciate the whole structure of the Act. It has already been remarked that every right or liability which becomes the subject of litigation, always depends upon certain facts. A person who moves the machinery of the Law by coming to Court as a plaintiff has, in order to get the relief claimed, to establish certain facts. If he fails to prove any one of the facts which constitute the right or liability which he seeks to enforce against the defendant, or if the defendant disproves any one of these facts, the plaintiff must be non suited. If he succeeds in proving all such facts, the Court must award to him the relief that he claims. These facts, which are constituents of the litigated right or liability, are called "facts in issue". (S. 3). What are or may be facts in issue in a particular litigation is entirely a question of substantive law and those rules of procedure which deal with the striking of issues. (see O. XIV, R. 1, C.P. Code). The Act, unlike other systems of evidence, is not concerned with this question beyond stating the properties of such facts, Since facts in issue are the necessary ingredients of the litigated right or, liability, they may be given in evidence as a matter of course. (S. 5). If often happens, however that direct evidence concerning these facts in issue is not available. In such a case, it does not mean that these facts cease to be capable of proof. Their existence may be established as satisfactorily by circumstantial evidence as by direct evidence. Many a murder has come to light and been proved to the satisfaction of the Judge and the jury by circumstantial evidence, though there was not a single eye-witness to the occurrence. Every fact in this world is preceded and followed by a train of other facts which are connected in one manner or another with he fact in question. It is this sequence or co-existence of facts according to some law of nature governing men and things that makes it possible for us to reason to the unknown from the known. "A detective policemen", says **Huxley**, "discovers a burglary from the marks made by his shoe, by a mental process identical with that by which Cuvier restored the extinct animals of Montmarte from fragments of their bones, nor does that process of induction and deduction by which a lady finding a stain of a particular kind upon her dress, concludes that somebody has upset the ink-stand thereon., differ in any way from that by which Adams and Leverrier discovered a new planet". (Lay Sermons, p. 78 quoted by Sir J. F. Stephen in his introduction to the Evidence Act, pp. 17-18.]

It is this necessary interconnection of facts with each other which underlies the whole theory of circumstantial evidence. If, therefore, the existence or non-existence of a fact may be inferred from the existence or non-existence of certain other facts, it follows that the existence or non-existence of the latter is a legitimate data for the purpose of proving the existence or non-existence of the latter is a legitimate data for the purpose of proving the existence or non-existence of the former. Consequently the Evidence Act provides that in order to prove the existence or non-existence of facts in issue, certain other facts may be given in evidence. The name "Relevant Facts" is given by the Act to such facts (S. 5). It takes one full chapter of fifty sections for the Act to define relevant facts (Ss. 6-55). This part of the Act is its distinctive characteristic, distinguishing it from all other systems in the world. In other systems, the law tacitly refers to logic and general experience for relevancy assuming that the principles of reasoning are known to its judges, every fact which is logically probative is relevant though, as we will just have occasion to see, not necessarily admissible. The Act, however, markes relevancy of a particular fact is irrelevant, unless the argument be founded on any such inconsistency probability or improbability as is referred to in Section 11. In the English and American systems of evidence every fact which is logically relevant is legally relevant and admissible, unless excluded by some express rule. In those systems, therefore, admissibility in the sense of a fact being receivable in evidence, expressed in a mathematical form, is equal to logical relevancy minus fact logically relevant but expressed in a mathematical form, is equal to logical relevancy minus fact logically relevant but expressly declared inadmissible for one reason or another. Under the Indian Evidence Act admissibility is equal to facts declared relevant by Ss. 6 to 55 minus facts expressly declared inadmissible though relevant under Ss. 6 to 55.

Relevancy and admissibility are neither synonymous nor co-existence. Nor is one included in the other. Every fact declared to be relevant by the Act is not admissible in evidence. A statement made by a client to his legal adviser or by a husband to his wife may come under half a dozen sections of relevancy, but the statement is not admissible, being excluded by an express rule on the point. Similarly, there are several facts which are receivable in evidence and therefore admissible, thought it is impossible to call them "relevant" in the sense in which the word is used in the Act. Thus facts which may be given in evidence to confirm or impeach the credit of a witness are admissible, though they are not relevant under the second Chapter of the Act which exhaustively defines relevancy.

The distinction between relevancy and admissibility having been pointed out, let us turn to the classification of relevant facts. The Act specified five instance of connection which may exist between the evidential fact and the fact to be proved, in order to make the former relevant. This lands to the following classification of relevant facts:—

(a) Facts connected with the fact to be proved—Ss. 6—16.
(b) Statements about the fact to be proved—Ss. 17—39.
(c) Decisions about the fact to be proved—Ss. 40—44.
(d) Opinions about the fact to be proved—Ss. 45—51.
(e) Character of the persons who are concerned with the fact to be proved Ss 52—55.

The fact to be proved may be a fact in issue or another relevant fact.

In making these sub-divisions of relevant facts, it is not meant that everything that is connected with, said, decided or thought, etc. about the fact to be proved is relevant. The sub-divisions merely indicate the view-point from which relevancy is looked at. The general rules governing these sub-divisions may perhaps be more accurately expressed in negative forms. Thus, the correct rule relating to these sub-divisions may be expressed in this form : nothing connected with the fact to be proved is relevant unless it is connected with the latter in any of the ways mentioned in Sections 6 to 16 : nothing said about the fact to be proved is relevant unless the statement falls within the terms of any or more of the Sections from 17 to 39 ; nothing decided about the fact to be proved is relevant unless the decision is of the kind mentioned in Sections 40 to 44, no opinion about the fact to be proved is relevant unless the opinion is of a person and about the matter mentioned in Sections 45 to 51 ; character is relevant except in the cases mentioned in Sections 52 to 55 : Thus, the facts which are declared relevant by the Act constitute exceptions to the general rule that no fact is relevant to another.

(a) Facts connected with the fact to be proved.

Relevant facts falling within this category are dealt with in Sections 6 to 16. These facts are—

(1) facts connected with a fact in issue so as to form part of the same transaction : (S. 6)

(2) facts constituting the occasion, cause or effect of, or opportunity or state of things for the occurrence of, the fact sought to be proved whether it be a fact in issue or another relevant fact; (S. 7)

(3) facts evidencing motive preparation or conduct; (S. 8)

(4) explanatory or introductory facts; facts supporting rebutting an inference suggested by a fact in issue or another relevant fact; facts showing identity or fixing time or place of a fact in issue or relevant fact; and facts showing the relation of parties : (S. 9).

(5) acts and statements of conspirators in reference to their common intention; (S. 10)

(6) facts inconsistent with, or making highly probable or improbable the existence of, a fact in issue or relevant fact; (S. 11)

(7) facts affecting the amount of damages; (S. 12)

(8) facts showing a transaction by which, or an instance in which, a right or custom was asserted, recognised etc; (S. 13)

(9) facts showing state of mind or body when such state is in issue or relevant; (Ss. 14 and 15)

(10) facts showing the existence of any course of business according to which the act in question would have been done. (S. 16).

(b) Statements about the fact to be proved.

The general rule which governs the relevancy of statement which is known by the "hearsay" rule is that what is stated about the fact in questions is irrelevant. To this general rule there are three exceptions. These are (1) admissions, (2) statements as to certain matters, and under certain circumstances, by persons who cannot be called as

witnesses, and (3) statements made under special circumstances.

Admissions.—Sections 17 to 31 enact the rules relating to what are known as "self-regarding" statements. A self regarding statement may take a "self-serving" form or a "self-harming" form. A statement is in the self-serving form when it is against the interest of such person. In other systems of evidence, the rule of relevancy regarding such statements is expressed by declaring that a statement in "self-harming" form is admissible but a statement in a "self-serving" form when it is against the interest of such person. In other systems of evidence, the rule of relevancy regarding such statement is expressed by declaring that a statement in "self-harming" form is admissible but a statement in a "self-serving" form is not generally admissible. The reason for this rule is obvious. There can be no guarantee of the truth of a statement when it is made with a view to serve one's own interest. The truth of a self harming statement is, however guaranteed by that human instinct which makes a man reluctant to make any statement against his own interest. The Evidence Act reproduce this rule by declaring that an admission may be proved as against the person who makes it, or his representative in interest but not by, or on behalf of the person who makes it or by, or on behalf of, his representative in interest, unless (i) the admission is such that, if the person making it were dead, it would be relevant as between third persons under S. 32 ; or

(ii) the admission relates to a relevant state of mind or body, if made at or about the time when the state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable ; or

(iii) the admission is relevant under some other rule of relevancy ; (S. 21).

Before enacting this substantive rule as to the relevancy of admissions, the Act defines the term "admission" (S. 17) and the person by whom it may be made. An admission may be made by a party, by the Agent or predecessor in interest of a party, by a person having joint propriety or pecuniary interest in the subject-matter (S. 18) or by a referee. (S. 20). In regard to the persons whose statements may amount to admissions, the Act notices the instance of statements by a person whose position or liability it is necessary to prove as against any party to the suit. (S. 19). The rule is expressed in a highly involved language and can be comprehended only by reference to the illustration that is appended to it. It has very seldom been applied in practice.

As regards the evidential value of admissions, the Act declares that they are merely relevant and not conclusive unless the party to whom they were made has acted upon them and thus altered his position to his detriment, so as to be able to put forward a case of estoppel.

Confessions.—Sections 24 to 30 deal with confessions. The act does not define a "confession", but includes it in admissions of which it is a species. A confession is relevant as an admission (S. 21) unless it is made (i) to a person in authority in consequence of some inducement, threat or promise held out by him in reference to the charge against the accused; (S. 24)

(ii) to a Police Officer ; (S. 25) or

(iii) to any one at a time when the accused is in the custody of a Police Officer and no Magistrate is present. (S. 26)

A confession made in the circumstances mentioned in (i), (ii) and (iii) above be-

comes admissible if it leads to the discovery of a relevant fact, but in such a case only that part of the confession becomes provable which distinctly relates to the fact discovered. (S. 27.) A confession is evidence only against its maker; but if the maker, besides implicating himself, involves another person who is being jointly tried with him for an offence, the confession may also be taken into consideration against the latter. (S. 30).

Statements by persons who cannot be called as witnesses.— The second exception to the rule against hearsay makes relevant certain statements made by persons who are dead, or cannot be found or produced without unreasonable delay or expense. The conditions determining the relevancy of statements under this rule are—

(1) that the statement must relate to a fact in issue or relevant fact, and

(2) that the statement must fall under any one of the following classes:—

(i) A statement as to any of the circumstances of the transaction which resulted in the death of the maker;

(ii) A statement made in the ordinary course of business;

(iii) A statement which is against the pecuniary of proprietary interest of the maker, or which exposes him to a criminal prosecution or a suit for damages;

(iv) A statement giving the opinion of the person before the commencement of the controversy, as to the existence of any public right or custom or matter or public or general interest, of the existence of which, if it existed, he would have been likely to be aware;

(v) A statement, made before the commencement of the controversy, as to the relationship of persons, alive or dead, if the maker of the statement has special means of knowledge of the subject ;

(vi) A statement, made before the commencement of the controversy as to the relationship of persons deceased, made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or on any tombstone, family portrait, etc.;

(vii) A statement in any will, deed or other document relating to any transaction by which a right or custom was created, claimed, modified, recognized, asserted or denied, or which was inconsistent with its existence;

(viii) A statement made by a number of persons and expressing their feelings, or impressions; (Section 32)

(ix) Evidence given in a judicial proceeding or before a person authorized by law to take it, provided that.

(a) the proceeding was between the same parties or their representatives in interest.

(b) the adverse party in the first proceeding had the right and opportunity to cross-examine, and

(c) the questions in issue were substantially the same in the first proceeding as in the proceeding in which the deposition in sought to be given in evidence. (Section 33).

Statements made under special circumstances.— Statements becoming relevant on account of their having been made under special circumstances, fall under the following categories:—

(i) Entries made in books of account regularly kept in the course of business. Such entries, though relevant, cannot, alone, be used to charge a person with liability ; (Section 34)

(ii) Entries made in public or official records made by a public servant in the discharge of his official duties, or by a person in performance of a duty specially enjoined by law; (Section 35)

(iii) Entries made in published maps or charts generally offered for public sale, or in maps and plans made under the authority of Government; (Section 36)

(iv) Statement as to facts of a public nature contained in a recital in any enactment or notification; (Section 37)

(v) Statements as to foreign law books purporting to be printed or published by the Government of the foreign country, or in reports of decisions of that country. (Section 38)

In order to be relevant under this class, the statement must relate to a fact in issue or a relevant fact. When a statement becomes relevant and forms part of a longer statement, only so much of the statement can be given in evidence as is necessary to the full understanding of the nature and effect of the statement which becomes relevant. (Section 39).

(c) Decisions about the fact to be proved judgments, orders or decrees of Courts of Justice are irrelevant, unless ;

(i) the existence of the judgment, decree or order is fact in issue or relevant under some other rule of relevancy ; (Section 43)

(ii) the judgment, decree or order bars a trial or inquiry ; (Section 40)

(iii) the judgment order or decree was made by a Court in the exercise of its probate, matrimonial, admiralty or insolvency jurisdiction ; (Section 41), or

(iv) the judgment, order or decree relates to a matter of a public nature relevant to the inquiry. (Section 42).

The Act follows the English rule in regard to the relevancy of judgments without adopting its terminology. In that system of evidence, a judgment is not relevant as proof of the point decided by it, unless

(a) it is a judgment in rem, as distinguished from a judgment in personam ; or

(b) it is a judgment relating to a public or general right.

A judgment in rem has been defined English law as "an adjudication upon the status of some particular subject-matter by a tribunal having competent authority for that purpose"; (2 Smith, L. C. 666, 13th E.) but the definition is open to several objections. The Act, therefore, avoids this difficulty by omitting to use this expression and attempts to reproduce the English law on the subject by enumerating the classes of tribunals whose judgments are conclusive, and the matters on which they are conclusive. If a

judgment is passed by a Court in the exercise of its probate, matrimonial, admiralty, or insolvency jurisdiction and the judgment confers upon, or takes away from, any person any legal character, or declares any person to be entitled to any such character, it is conclusive proof of the conferment, declaration or taking away of that legal character. If any such judgment declares any person to be entitled to any specific thing, not as against any specified person but absolutely, the judgment is conclusive proof of the fact that the thing was the property of the person at the time from which the judgment declares that it had been or should be his property. (Section 41). When a judgment is given in evidence against a party, he may show that the judgment was passed by a Court not competent to pass it, or that it was obtained by fraud or collusion. (Section 44).

(d) Opinions about the fact to be proved.

The general rule is that opinion, whether on a matter of fact or law, is irrelevant. There are, however, many a matter which become relevant in judicial inquiries, and on which opinion can be formed by a person only by undergoing a course of training in the subject. Obviously, therefore, on matters requiring special skill and knowledge, the Court should not be denied the assistance of experts in coming to a right conclusion. Consequently the Act makes the opinion of "experts" relevant on questions of foreign law, or of science or art, or of identity of handwriting or finger impressions. (Section 40).

Facts which support, or are inconsistent with, the opinions of experts are also made relevant. (Section 46).

In addition to the opinion of experts, opinion is relevant in the following cases:—

(i) Opinion as to the handwriting of a person, if the person giving the opinion is acquainted with the handwriting of the person in question; (Section 47).

(ii) Opinion as to the existence of any general right or custom, if the person giving the opinion is likely to be aware of the existence of such right or custom; (Section 48).

(iii) Opinion as to usages, tenants, etc., and as to words and terms used in particular districts, if the person giving the opinion has special means of knowledge on the subject ; (Section 49).

(iv) Opinion expressed by conduct, as to the existence of any relationship, by a person having special means of knowing the relationship; (Section 50).

When opinion is relevant, the grounds on which such opinion is held are also relevant. (Section 51).

(e) Character,

Character is relevant in the following cases:—

(i) Good character of the accused; (Section 53).

(ii) Bad character of the accused, only in reply to evidence of good character, or where his bad character becomes a fact in issue; (Section 54).

(iii) Character of the plaintiff, good or bad, where according to substantive law, it affects the amount of damages to be awarded to him, (Section 55).

A previous conviction is relevant as evidence of bad character, if bad character

becomes relevant. (Section 54). Where evidence of character is given under the above rules, the evidence must relate only to general reputation or general disposition, and not to particular acts showing reputation or disposition. (Section 55).

PART II

Mode of Proof

The range of facts which may be given in evidence having been defined in Part I, the Act proceeds in Part II to deal with the manner in which facts receivable in evidence under Part I may be given in evidence. It is a fundamental rule that unless there is some presumption as to the existence of a fact, a subject which will be dealt with a little later, its existence must be proved to the satisfaction of the Court. Therefore, the party who wishes the Court to believe in the existence of a fact, must prove it. To this rule, there are, however, two exceptions.

These are:–

(1) a fact which is admitted by the other party need not be proved; (Section 58).

(2) facts of which the court shall take "judicial notice" need not be proved. (Section 56).

Judicial notice.–The Act gives a long list of facts of which Courts shall take judicial notice; (Section 57) but it has been held that the list is not exhaustive and that there are several other facts of which the Courts may take judicial notice. These facts posses one common characteristic– namely, they are of such public notoriety that their formal proof is unnecessary. Included in the list of such facts are laws. Articles of War, the rule of the road, the course of proceedings of the legislatures; seals of certain functionaries ; names, titles, functions and signatures of Gazetted Officers; names of the members and officers of the Court including legal practitioners; the divisions of time; the geographical divisions of the world; public festivals and holidays; the territories under the dominion of the British Crown, the flags of foreign States, and the commencement and termination of hostilities between the British Crown and any other State. (Section 57).

Facts which are neither admitted nor are subject of judicial notice must be proved. The Act divides the subject of proof into (1) proof of facts other than contents of documents, and (2) proof of documents including (i) proof of execution of documents, and (ii) proof of existence, condition and contents of documents.

Oral evidence.–All facts, except contents of documents, may be proved by oral evidence, (Section 59) which must in all cases be "direct". (Section 60). The term "direct evidence" is used in the Act not in the sense in which it is used in English law, i.e., meaning evidence of facts in issue as distinguished from circumstantial evidence or evidence of relevant facts, but is used in contradiction to "hearsay evidence." According to the Act, "direct evidence" means the evidence of the person who perceived the fact to which he deposes. Thus, if the fact to be proved is one that could be seen, the person who saw the fact must appear in Court to depose to it; if the fact to be proved is one that could be heard, the person who heard it must appear in Court to depose to it, and if the fact to be proved is opinion, the person who is that of an expert expressed in a treatise commonly offered for sale, in which case the opinion may be proved by the production of the treatise if the expert is dead or cannot be called without unreasonable

delay or expense. (Section 60). In defining "direct evidence" in the manner stated above, the Act impliedly enacts what is called "the rule against hearsay"; since evidence as to a fact which could be seen, by a person who did not see it, is not "direct" but hearsay and so is the evidence as to a statement, by a person who did not hear it. This rule against hearsay is a deduction from what in English Law is known the "best evidence rule." The maxim that "the best evidence must be given of which the nature of the case permits", expresses the great fundamental principle upon which the law of evidence depends, and if the more important rules of evidence were analysed, they would be found to be merely corollaries of this fundamental proposition. The rule is founded on the consideration that evidence which *ex natura rei* supposes a better evidence behind in the party's own possession or power carries little or no value. Originally the rule related merely to the weight of the substituted evidence tendered, but has now been converted into one of admissibility, and is so stated in the Act.

Documentary evidence.—The contents of a document must be proved by "primary evidence", (Section 64) which means the production of the document itself for the inspection of the Court. (Section 62). This rule also is a deduction from the "best evidence rule" already explained. "Secondary evidence" is generally in the form of compared copies, certified copies of copies made by such mechanical processes as in themselves insure accuracy.

Secondary evidence.—Oral accounts of the contents of a document by a person who has himself seen it are also good secondary evidence. (Section 63). Counterparts of documents are primary evidence as against the parties executing them. (Section 62) but only secondary evidence as against the parties who did not execute them. (Section 63). As already stated, documents must, generally, be proved by primary evidence; but in certain cases, e.g., where the document is lost or destroyed, or is not easily producible or movable, or consists of numerous documents, or is a public document or provable under some law by a certified copy, the existence, condition or contents of the document may be proved by secondary evidence. A written admission as to existence, condition or contents of a document may be given in evidence as secondary evidence. Secondary evidence is also admissible when the document is in the possession of the other party or someone else, and is not produced after notice. (S. 65). In the last mentioned case, the giving of notice to produce is a condition precedent to the admissibility of secondary evidence; but in certain cases, e.g., where the document to be proved is itself a notice, or is in the possession of a person not subject to the process of the Court, or where the adverse party has obtained the original by force or fraud, or has it in Court or was expected to know that he would be required to produce it, or where he has admitted its loss, the notice to produce need not be given. (S. 66).

Proof of execution.—The Act draws a distinction between proof of the contents of a document and proof of its execution or authorship. The rules mentioned above relate to the mode of proof of the contents of documents. For the purposes of proof of the execution of a document. The Act divides the documents into two classes, viz, documents not required by law to be attested and those required by law to be attested.

If a document is alleged to be signed or written by a particular person, the signature or writing must be proved to be in the alleged person's hand-writing. (S. 67). This rule does not prescribe any particular mode of proof of handwriting, and the provisions as to

the manner in which a signature or writing may be proved occur in scattered places in the Act. Any mode of proof which does not offend against the "best evidence rule", may be adopted to prove the signature or writing. If the document is one that is required by law to be attested, at least one attesting witness must be called to prove its execution. (S. 68). This rule may, however, be relaxed where (1) the document purports to have been executed in the United Kingdom, (S. 69), (2) none of the attesting witness is available (Ss. 68 and (69) or (3) the document, not being a will has been registered, and its execution is not specifically denied by the person by whom it purports to have been executed. (S. 68). in cases (1) and (2), however, it must be proved that the attestation of one attesting witness at least is in his handwriting and that the signature of the executant is in his handwriting.(S. 69).

The fate of a document is not, however, entirely at the mercy of the attesting witnesses; since if the witness who is called to prove a document turns hostile to the calling party or states that he does not recollect execution, its execution may be proved by other evidence. (S. 71). If a party to an attested document has admitted execution, the admission is sufficient proof of its execution by him and the document need not be proved at all. (S. 70). While considering whether a document is written or signed by, or bears the finger impression of, a person the Court may compare the disputed signature, writing or finger impression with an admitted or proved signature, writing or finger impression, and for this purpose may order him to give a specimen of his signature, handwriting or finger impression. (S. 73).

The contents of public documents may be proved by certified copies. (S. 77). Documents forming the acts or records of the acts of sovereign authority, of official bodies and tribunals, and public officers of British India or of foreign countries, and public records kept in British India of private documents, are public documents. (S. 74). All other document is bound to give to any person who is entitled to inspect that document, a certified copy of it on payment of the legal fees therefor and such certified copy may be given in evidence in proof of the contents of the documents. (S. 77). A special mode of proof is provided for certain public documents, e.g., Acts, orders and notifications of the Executive Government of British India or of foreign countries, the proceedings of the legislatures of British India or of foreign countries, the proceedings of a municipal body in British India, and foreign public documents of any other class, (S. 78). Some other documents are proved merely by the presumption of genuineness which the Act attaches to them. This presumption of genuineness attaches to the following documents :—

(1) Certificates, and certified copies and other documents which are declared by law to be admissible as evidence of any particular fact, provided such documents are properly certified, are substantially in the form prescribed, and purport to be executed in the manner directed by law in that behalf ; (S. 79).

(2) A record of evidence or confession taken in accordance with law and signed by the recording Judge or Magistrate ; (S. 80).

(3) Government Gazettes, newspapers or journals, and private Acts of Parliament ; (S. 81).

(4) Documents admissible in England or Ireland without proof of seal or signature ; (S. 82).

(5) Maps and plans made by authority of Government ; (S. 83).

(6) Books printed or published under the authority of the Government of any country and containing any of the laws of that country ; (S. 84).

(7) Reports of decisions ; (S. 84).

(8) A power-of-Attorney executed before, and authenticated by Notary Public, British Consul, or Judge or Magistrate, etc. ; (S. 85).

(9) Documents called for and not produced after notice to produce ; (S. 89).

The presumption of genuineness that attaches to the documents mentioned above is an obligatory presumption and must be raised by the Court. There are certain other documents in regard to which the Court may, if it so likes, raise a presumption, though the Court is not bound to do so, the presumption being permissive and not obligatory. Thus the Court may presume—

(1) that a properly certified copy of any judicial record of any foreign country is genuine and accurate ; (S. 86).

(2) that a book on a matter of public or general interest, or a published map or chart, 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 ; (S. 87).

(3) 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, though the Court cannot make any presumption as to the person by whom such message was delivered for transmission; (S. 88).

(4) that a thirty years' old document coming from proper custody was duly executed and by the person by whom it purports to be executed and attested ; (S. 90).

Exclusion of oral by documentary evidence.— It goes without saying that documentary evidence is superior to oral evidence. That being so, the "best evidence rule" generally excludes oral evidence where documentary evidence existed. One instance of the application of the principle has already been noticed in the rule which requires the contents of a document to be proved by primary evidence. But the most important application of this principle is to be found in sections 91 and 92 of the Act, which make documentary evidence exclusive evidence of certain matters and conclusive evidence of others. These two sections excluding oral evidence in certain circumstances, though based on a common principle, are really two different rules, and the exact distinction between them must be fully comprehended, Whereas section 91 excludes evidence in proof of certain matters, section 92 excludes evidence in disproof of matters mentioned in a document. Section 91 excludes oral evidence of certain matters which are required by law to be reduced to the form of a document and of the terms of all contracts, grants and dispositions of property where such terms have been reduced to writing. The mere circumstance that a fact is mentioned in a document does not exclude evidence in proof or disproof of the fact, unless the fact is a term of the contract, grant or disposition

which is the subject-matter of the document. It will thus be noticed that oral evidence of a matter required by law to be reduced to the form of a document is excluded irrespective of whether the matter has or has not been reduced to writing ; whereas oral evidence of the terms of a contract, grant or disposition of property is excluded only when the terms of that contract, grant or disposition have actually been reduced to writing. A contract, grant or disposition may itself be a matter required by law to be reduced to writing. Where that is the case, oral evidence of the matter will be excluded whether the terms of that contract, grant or disposition have or have not been reduced to writing. Thus, in the Provinces in which the Transfer of Property Act is in force, sales, mortgages, gifts, etc., are required by law to be reduced to writing. Therefore such transactions cannot be effected orally, and, where, so effected, cannot be proved by oral evidence. Section 92 makes oral evidence inadmissible to contradict, vary, add to, or subtract from, the terms of a contract, grant or disposition of property, is such terms, having been reduced to writing, have been proved by primary or by secondary evidence. This rule excludes oral evidence in contradiction, variation, etc., of a document only between the parties to the document or their representatives in interest. This rule excludes oral evidence in contradiction, variation, etc., of a document only between the parties to the document or their representatives in interest. The rule does not therefore apply to documents to which there are no parties, i.e., non-dispositive documents. Thus, if there is a matter required by law to be reduced to writing, and it has actually been reduced to writing and proved by the production of the secondary evidence, oral evidence in contradiction, variation, etc. of the document will be excluded only if there are parties to the document ; since, if there are no parties to the document, the exclusionary rule enacted in section 92 does not apply. There are six Provisos appended to section 92, some of which are exceptions to, and other explanation of, the rule excluding oral evidence in contradiction, variation, etc. of a document.

(1) There are certain facts which affect the validity of a contract or transfer, rendering it void or voidable, e.g., fraud, undue influence, want of capacity or consideration, etc. Such facts may be proved by oral evidence since, if proved, their effect is not to contradict, vary, add to, or subtract from, the terms of the contract, but to show that there was no valid contract. The principle of the rule forbidding the admission of oral evidence in contradiction,. variation, etc., of the terms of a contract is not therefore affected by this proviso.

(2) If a document is silent on a matter, a separate oral agreement as to that matter may be proved, provided the oral agreement is not inconsistent with the document. The degree of formality of the document is a matter which must be taken into consideration in applying the proviso.

(3) A separate oral evidence constituting a condition precedent to the attaching of any obligation under a written contract, grant or disposition may be proved.

(4) A distinct subsequent oral agreement to rescind or modify a contract, grant or disposition may be proved, unless:—

(i) the contract, grant or disposition is a matter required by law to be reduced to writing, or

(ii) the contract, grant or disposition has actually been registered whether it is required by law to be registered or not.

(5) Any usage or custom by which incidents not expressly mentioned in a written contract are annexed to that contract may be proved, unless the annexing of such incident is expressly excluded by the document.

(6) Facts showing in what manner the language of a document is related to existing facts may be proved.

Ambiguities in documents.— Ambiguities in documents are of two kinds: (1) patents and (2) latent. If the document is ambiguous on the face of it, i.e., unintelligible or uncertain, the ambiguity is "patent". If the document is not uncertain or unintelligible on the face of it, but is ambiguous when read in the light of external circumstances the ambiguity is "latent". A patent ambiguity is subjective, inasmuch as it is due either to the writer's having no definite conception of the subject or to his failure to express himself by appropriate language. A latent ambiguity is objective, as it is an ambiguity in the description of the thing to which the document relates. The general rule governing the admission of oral evidence to remove ambiguities in a document is that such evidence is not admissible if the ambiguity is a patent ambiguity, but it is admissible if the ambiguity is a latent ambiguity. From this general rule the following deductions may be drawn—

(1) When the language of the document is, on its face, ambiguous or defective, evidence is inadmissible to show its meaning or to supply its defects, (Section 39) as the ambiguity is a patent ambiguity.

(2) When the language of a document is plain and applies to existing facts, evidence is admissible to show that it was not meant to apply to such facts, (Section 94) as there is no ambiguity at all in the document.

(3) When the language of a document, though plain in itself, is unmeaning in reference to existing facts, evidence in admissible to show that the language was used in a peculiar sense, as the ambiguity is a latent ambiguity. (Section 95).

(4) When the document was meant to apply only to one out of several persons or things, evidence is admissible to show to which of these persons or things it was intended to apply. (Section 96).

(5) When the language of a document applies partly to one set of facts and partly to another, but the whole of it applies to neither, evidence may be given to show to which of the two it was meant to apply (Section 97).

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

PART III

Having defined in Part I the facts which may be given in evidence, and in Part II the mode or manner in which they must be given in evidence, the Act proceeds to consider in Part III the subject of "Production of Evidence". The heading of Part III does not sufficiently indicate the scope and function of the various rules which are lumped together in the Part. The general questions considered in this Part may be stated as follows :—

(1) Whose duty is it to prove a particular fact ? (Burden of proof).

(2) What inference does the proof of a particular fact raise as to the existence of another fact ? (Presumptions).

(3) When may a party be precluded from proving a particular fact? (Estoppel).

(4) What are the rules relating to the examination of witness ? — a subject which may be further sub-divided into the following question :—

(i) Who a competent to testify ? (Competency).

(ii) What matters may not be testified to at all ? (Privilege).

(iii) How are witnesses to be examined?

(iv) How may the credit of witnesses be impeached or confirmed?

(v) What is the effect of improper admission or rejection of evidence ?

Burden of Proof.— The first question, when a fact has to be given in evidence, that arises is "whose duty is it to prove that fact ?" This question is the subject-matter of rules which are known by the name of rules relating to Burden of Proof. The Act first formulates certain general rules on this subject and then considers the question of burden of proof in particular cases. The general rules relating to burden of proof are:—

(1) Whoever desires the Court to give judgment as to any right or liability dependent on the existence of facts which he asserts, must prove that fact. (Section 101).

(2) The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence. (Section 103).

(3) The burden of proof lies on that person who would fail if no evidence at all were given on either side. (Section 102.)

(4) The burden of proof of any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence. (Section 104).

(5) The burden of proving facts which bring the case of an accused person within an exception or a proviso is on the accused. (Section 105).

(6) When any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. (Section 106).

These rules overlap each other. Therefore more than one of these rules may be applicable to the circumstances of a particular case, and the same result may be arrived

at by applying one rather than another of these rules. The specific cases of burden of proof dealt with by the Act are the following :—

(1) If a man is shown to be alive within 30 years, the burden of proving that he is dead is on the person who asserts it ; (Section 107); but if it is shown that the person in question has not been heard of for seven years by those who could have naturally heard of him, the burden of proving that he still alive is on the person who affirms it. (Section 108).

(2) Where any persons are shown to have been acting as partners, landlord and tenant or principal and agent, the burden of proving that they discontinued that relationship is on the person who asserts this facts. (Section 109).

(3) Where a person is shown to be in possession, the burden of proving that he is not the owner is on the person alleging this fact. (Section 110).

(4) Where one of the parties to a transaction stands to the other in a position of active confidence the burden of proving the good faith of the transaction is on the party standing to the other in that position. (Section 111).

Presumptions.— After dealing with Burden of Proof, the Act notices some rules as to and instances of, Presumptions. The subject of Presumptions is closely allied to the subject of Burden of Proof. All rules relating to Burden of Proof may be stated in terms of presumptions, and all presumptions may be stated in terms of rules of burden of proof. When the burden of proof of a fact is on a party, it may be said that there is a presumption as to the non-existence of that fact and where there is a presumption as to the existence of a fact, the burden of proving the non-existence of that fact is on the party who asserts its non-existence. When a presumption operates in favour of a party, the burden of proof is on the opponent, and when the burden of proof is on a party, there is a presumption operating in favour of the opponent. In other systems of evidence, several rules which occur in the Act of rules of burden of proof are stated in the form of presumptions, whereas several other rules which are stated in the Act in the form of presumptions occur in other systems as rules of burden of proof.

The Act does not deal with the subject of Presumptions in one place. Thus, the three well-known kinds of presumptions are stated in Section 4, where the terms "conclusive proof," "shall presume", and "may presume" are defined. Presumptions as to documents are stated in Sections 79 to 90, some of which are obligatory while others are discretionary. One instance of a conclusive presumption is noticed in Section 41, while two others occur in Sections 112 and 113. Then there is Section 114 which may be described as the residuary section dealing with this subject and to which several instance of presumption are appended as illustrations.

The Madras Government had strongly criticised the treatment of Presumptions in the Evidence Bill, remarking that the treatment of the subject was incomplete. This remark was obviously based on a comparison of the treatment of this object in the Bill with the treatment of this subject in other systems of evidence. Where a long list of presumptions and their classes is given. The Act deals with Presumptions in a similar manner. In order to understand and appreciate the manner in which Presumptions have been dealt with in the Act, a brief account of their classes and of their function in the

English system is necessary.

The subject of presumptions constitutes in English law and other systems of the law of evidence a very important and highly technical branch of the law of evidence. A "presumption" is a rule of law that courts of juries shall or may draw a particular inference from a particular fact or from particular evidence, unless and until the truth of such inference is disproved. There are three classes of presumption, viz (i) presumptions of law (ii) presumptions of fact, and (iii) mixed presumptions. A presumption of law is a rule of law that a particular inference shall be drawn by a court or jury from a particular circumstance. The grounds on which presumption of law is a rule of law that a particular inference shall be drawn by a court of jury from a particular circumstance. The grounds on which presumptions of law rest are various. Some of these presumptions are natural presumptions which the law simply recognizes and enforces. But in most of these presumptions the inference is only partially approved by reason;—the law, from motives of policy, attaching to the facts which give rise to it an artificial effect beyond their natural tendency to produce belief. Some of the presumptions belonging to this class are absolute and conclusive, commonly called irrebuttable presumptions of law, while others are conditional, inconclusive or rebuttable. Irrebuttable presumptions of law are inferences which the law makes so peremptorily that it will not allow them to be over turned by any contrary proof however strong. "Fictions of law" or closely allied to irrebuttable presumptions of law. A fiction of law arises where the law, for the advancement of justice, assumes as fact and will not allow to be disproved, something which is false, but is not impossible. The difference between fictions of law and irrebuttable presumption of law consists in this : that the latter are arbitrary inferences which may not be true ; while, in the case of fictions, the falsehood of the fact assumed is understood and avowed. The other kind of presumptions of law are commonly called rebuttable presumptions of law. These presumptions, like irrebuttable presumptions of law, are intendments made by law; but unlike them they only hold good until disproved. The second class of presumptions consists of those which are connonly known as presumptions of fact. A presumption of fact is rule of law that a fact otherwise doubtful may be inferred from a fact which if proved. The term "presumptions of fact". A presumptions of fact is rule of law that a fact otherwise doubtful may be inferred from a fact which is proved. The term "presumption of fact" is used to designate an inference, affirmative or disaffirmative of the existence of some fact, drawn by a judicial tribunal, by a process of probable reasoning from some matter of fact, either judicially noticed, or admitted, or established by legal evidence to the satisfaction of the tribunal. When inferring the existence of a fact from others, Courts of Justice do nothing more than apply, under the section of law, process of reasoning which the mind of any intelligent being would under similar circumstances, have applied for itself ; and the force of which rests altogether on experience and observation of the course of nature, the constitution of the human mind, the springs of human action, and the ugages and habits of society. The sources of presumptions of fact are (i) the common course of natural events, (ii) the common course of human conduct and (iii) the common course of public and private business.

"The grounds of sources of presumptions of fact are obviously innumerable, they are co-extensive with the facts, both physical and psychological, which may under any

circumstances whatever become evidentiary in Courts of Justice ; but, in a general view, such presumptions may be said to relate to things persons, and the acts and thoughts and intelligent agents. With respect to the first of these it is an established principle that conformity with the ordinary course of nature ought always to be presumed. Thus, the order and changes of the seasons, the rising, setting and course of the heavenly bodies, and the known properties of matter, give rise to very important presumptions relative to physical facts or things. The same rule extends to persons. Thus, the absence of those natural qualities, power and faculties which are incident to the human race in general will never be presumed in any individual; such as the impossibility of living long without food, the power of procreation within the usual ages, the possession of the reasoning faculties, the common and ordinary understanding of man etc. To this head are reducible the presumptions which juries are sometimes called on to make, relative to the duration of human life, the time of gestation, etc. Under the third class— namely, the acts and thought of intelligent agents—come among others, all psychological facts ; and are most important inference are drawn from the ordinary conduct of mankind, and the natural feelings or impulses of human nature. Thus, no man will ever be presumed to throw away his property, as for instance, by paying money not due : and so it is a maxim that every one must be taken to love his own offspring more than that of another person. Many presumptions of this kind are founded on the customs and habits of society ; as for instance, that a man to whom several sums of money are owing by another will first call in the debt of longest standing". The principal points of distinction between presumptions of law and presumptions of fact are : First, that whereas in the case of a presumption of fact a discretion, more or less extensive, as to drawing the inference is vested in the tribunal ; in the case of presumptions of law the law peremptorily requires a certain inference to be made whenever the facts appear which it assumes as the basis of that inference. Secondly, as presumptions of law are, in reality rules of law, and part of the law itself, the Court may draw the inference whenever the requisite facts are before it : while presumptions of fact, however obvious, being inference of fact, could not, at common law, be made without the intervention of a jury, "Presumptions of mixed law and fact" hold an intermediate place between presumptions of law and presumptions of fact. They consist chiefly of certain inferences which, from their strength, importance, or frequent occurrence, attract, as it were, the observation of the law, and from being constantly recommended by Judges and acted on by juries, become in time as familiar to the Courts as presumptions of law, and occupy nearly as important a place in the administration of justice.

The terms "presumption of law" and "presumptions of fact" are nowhere mentioned or defined by the Indian Evidence Act : but that this classification of presumptions has been substantially recognized by the Act is apparent from Section 4 where the terms "conclusive proof", "shall presume" and "may presume" have been define. The term "conclusive proof" designates those presumptions which in English law are called irrebuttable presumptions of law; the term "shall presume" indicates presumptions of law, and the term "may presume" indicates presumptions of fact. The act mentions only there instances of irrebuttable presumptions of law in Sections 41, 112 and 113. Rebuttable presumptions of law are enumerated in Sections 79 to 85, 89 and 105, and in the form of several rules of burden of proof in Chapter VII. Most of the rules of burden of

proof are treated in English law and other systems of evidence as rules of rebuttable presumptions of law; and rightly so, since a rule of burden of proof is nothing but a rule of presumption. When a presumption operates in favour of a party, the burden of proof, as already pointed out, is on the opponent; and conversely, when the burden of proof is on a party, there is some presumption operating in favour of the opponent. The treatment of this subject in the Evidence Act is not therefore logical, inasmuch as rules of burden of proof and rebuttable presumptions of law are not treated together in the Act but in two separate sets of sections. Again, Sec. 114, which deals with presumptions of fact, occurs in Chapter VII which deals with rules of burden of proof, and as pointed out above, the rules of burden of proof are statements of the subject of presumptions of fact is concerned, the Act adopts and more logical mode of dealing with them. Other systems of evidence divide presumption of fact into "strong" and "slight" presumptions, and attempt an artificial enumeration of such presumptions, ignoring the fundamental fact that the vast field over which presumptive reasoning extends must render ineffectual any attempt to reduce into definite classes the presumptions to which it gives rise. Section 114 of the Evidence Act attempts no such impossible task, but merely recognizes the general power of the court to raise inferences as to the existence or non-existence of unknown facts on proof or admission of other facts. As pointed out above, the source of such presumptions is the common course of natural events, human conduct and public or private business, and the section proceeds on the assumption that just as in Nature there prevails a fixed order of things, so the volitional acts of men placed in similar circumstances exhibits, on the whole, a distinct uniformity which is traceable to the impulses of human nature, and customs and habits of society. The section merely states the principle, and the several illustrations appended to it which are taken from some of the well known classes of presumptions in other systems, merely illustrate what is ment by the section. The illustrations are by no means exhaustive ; nor are the presumptions illustrated therein obligatory in the sense that the court must raise them or conclusive in the sense that no evidence in rebuttal is admissible.

The presumptions which have been specially recognized by the Act may now be noticed. The Act creates three instances of conclusive or irrebuttable presumptions of law. These are as follows :—

(1) A judgment of a court of probate, insolvency, matrimonial or admiralty jurisdiction is conclusive proof of the legal status, character or right adjudged by it (Section 41).

(2) A notification in the Gazette of India is conclusive proof of cession of territory of a Native Prince. (Section 113).

(3) Birth during continuance of lawful marriage or within 280 days of its dissolution, the woman remaining unmarried, is conclusive proof of legitimacy, unless nonaccess between the spouses is proved at the probable time of conception. (Section 112).

Rebuttable presumptions of law, as pointed out, are indicated in the Act in several places by the expression "shall presume". Most of these presumptions relate to documents which have already been noticed in connection with documents. Rules relating to burden of proof also are, in a sense, statements of rebuttable presumptions of law.

Presumptions of fact are indicated in the Act by the expression, "may presume".

These presumption, as pointed out above, are all discretionary and rebuttable. Those which relate to documents have already been noticed in connection with documents. Other presumptions of this class are raised under Section 114. It is impossible to enumerate presumptions of fact, as they are co-extensive with the whole field of natural reasoning. Some of the important presumptions of this class have been appended as illustrations to Section 114. These are:—

(a) That a man who is in possession of stolen goods soon after the theft is either the thief or the receiver of the stolen property knowing it to be stolen, unless he can account for his possession.

(b) That an accomplice is unworthy of credit unless corroborated in material particulars.

(c) That a bill of exchange was accepted or endorsed for good consideration.

(d) That a thing or state of things once shown to be in existence is still in existence.

(e) That judicial and official acts have been regularly performed.

(f) That the common course of business has been followed in particular cases.

(g) That evidence which could be and is not produced would if produced, be unfavourable to the person withholding it.

(h) That if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him.

(i) That when a document creating an obligation is in the hands of the obligor, the obligation has been discharged.

Estoppel.— Having done with presumptions the Act proceeds to enact the rule of estoppel. Estoppel by deed does not exist in this country; estoppel by judgment or the rule of *res-judicata* is not a rule of evidence all but a rule of pure procedure, and is not therefore noticed in the Act, expect with reference to the relevancy of judgments. Estoppel by representation or by matters in pais is the only form of estoppel dealt with by the Act. The general rule of estoppel is enacted in these terms. "When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that things." (Section 115). Having thus stated the rule of estoppel by representation, the Act notices certain cases of estoppel by contract or agreement, which is merely a species of estoppel by representation. Thus, it is enacted that no tenant or licensee of immovable property shall be permitted to deny the title of his landlord or licensor ; (Section 116) no acceptor of a bill of exchange shall be permitted to deny that the drawer and authority to draw bill or to endorse it; (Section 117) and that no bailee or licensee shall be permitted to deny that his bailor or licensor had, at the time when the bailment or license commenced, authority to make such bailment or grant such license. (Section 117).

Witnesses

Competency.— Having dealt with the subject of Burden of Proof, Presumptions and Estoppel, the Act proceeds to state the rules as to the examination of witness. The

first topic that the Act touches in this connection is that of competency to testify. Every person who can understand the questions put to him and give rational answers to them is competent to testify. Tender years, extreme old age, disease of mind or body, make a person incompetent to testify if their effect is to render him incapable of understanding the questions and answering them rationally. A lunatic in his lucid intervals is competent, unless he is prevented by his disease from understanding the questions put to him and giving rational answers to them. (Section 118). The parties to a civil proceeding are competent. The husband or wife of a party to a civil proceeding or of an accused person is also competent. (Section 119) though, as will be presently pointed out, communications between the spouses during marriage are protected from disclosure. (Sections 122). An accomplice is competent and a conviction based on his evidence not illegal, though as a rule of practice and prudence, corroboration of his evidence is required. (Sections 114 (b) and 133.) A person who is dumb may give evidence in writing or by signs or in any other manner in which he can make it intelligible ; but the writing must be written and the signs made in open court. (Section 119).

Privilege.— Certain matters, on grounds of public policy, are protected from disclosure and Witnesses cannot be compelled or permitted to answer questions relating to such matters.

(1) No Judge or Magistrate can be compelled to answer any question as to his own conduct in court as such Judge or Magistrate or as to anything which came to his knowledge in court as such Judge or Magistrate, though he may be examined as to other matters which occurred in his presence whilst he was so acting. (Section 121).

(2) No person can be compelled to disclose any communication made to him or her during marriage by his wife or her husband. Even if such person does not claim any privilege and offers to give evidence, he or she, as the case may be, cannot be permitted to depose to the communication without the consent of the other party to marriage or the representative in interest of such party. Such consent is, however, not necessary if the suit be between the parties to the marriage themselves or in cases in which one married person is prosecuted for any crime committed against the other. (Section 122). It will be noticed that this rule relating to the privilege of married persons is divided into two distinct parts, one relating to the privilege of the person examined, and the other relating to the privilege of the husband or wife of the person examined. The rule relating to the person examined is absolute—the person examined cannot be compelled to disclose the communications if he or she does not wish to disclose it and the consent of the other party to the marriage is absolutely immaterial. The question of consent of the other party to the marriage can arise only where the person examined does not claim any privilege and is willing to disclose the communication. In such a case, the person examined may disclose the communication if the other party to the marriage or the representative in interest of such party gives consent to the disclosure, or if the suit is one in which one party to the marriage themselves or if the proceeding is one in which one party to the marriage is prosecuted for an offence

committed against the other party.

(3) No one can be permitted to give any evidence derived from unpublished official records relating to any affairs of State, without the permission of the head of the department concerned. (Section 123).

(4) No public officer can be compelled to disclose any communication made to him in official confidence if he considers that the public interests would suffer by the disclosure. (Section 124).

(5) No Magistrate or police officer can be compelled to disclose how he got any information as to the commission of any offence; nor can any Revenue Officer be compelled to say whence he got any information as to the commission of any offence against the public revenue. (Section 125).

(6) No legal practitioner can be permitted without his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment. (Section 126). The rule also applies to interpreters, clerks and servants of legal practitioners; (Section 127) but it does not protect from disclosure:—

(i) any communication made in furtherance of any illegal purpose, and

(ii) any fact observed, showing that a crime or fraud has been committed since the commencement of the employment. (S. 126).

The mere fact that the client gives evidence in the case does not amount to such consent as is mentioned in this rule; and if the client calls the legal practitioner as a witness, he will be deemed to have consented to such disclosure only if he questions the legal practitioner on a matter which, but for such questions, he would not be at liberty to disclose. (Section 128). The client cannot be compelled to disclose any confidential communication between himself and his professional legal adviser, unless he offers himself as a witness, in which case he may be compelled to disclose any such communication as may be necessary to explain any evidence which he has given. (Section 129.)

(7) No one, who is not a party to the suit, can be compelled to produce his title-deeds to any property, or any document in virtue of which he holds any property as mortgagee or pledgee or any document the production of which might tend to criminate him, unless he has agreed in writing to produce them with the person seeking their production or some person though whom he claims. (S. 130.) And no one can be compelled to produce documents in his possession, which another person would be entitled to refuse to produce if they were in his possession, unless such last mentioned person agrees to their production. (S. 131).

(8) The mere fact that the answer to a question will tend to criminate the witness, or to expose him to a criminal prosecution or a penalty or forfeiture, is no reason for his refusing to answer the question if it relates to a relevant fact. But the witness, in such a case, may ask the Court to excuse

him from answering such question, and if the Court then compels him to answer, the answer will not subject him to any arrest or prosecution or be proved against him in any criminal prosecution except perjury. (S. 132).

Unlike many ancient, and even some modern, systems, the Act does not lay down any artificial rule as to the number of witnesses necessary to prove a particular fact, but provides that no particular number of witnesses is necessary to prove a particular fact. (S. 134).

Examination of witnesses.— The order in which witnesses should be produced is regulated by the rules of Civil and Criminal Procedure Codes, and, in the absence of such rules, is in the discretion of the Court. (S. 135). The Court may ask a party how the fact of which he proposes to give evidence will, if proved, be relevant. If the relevancy or admissibility of some evidence depends upon proof of another fact, the latter fact must ordinarily be proved first. In appropriate cases, however, the party may give undertaking that the fact on which the relevancy or admissibility of the proposed evidence depends will be proved later. (S. 136). A witness is first examined by the party calling such witness, then by the opponent, and then again by the party calling him. The first examination of a witness by the party calling him is called "examination-in-chief" ; examination by the opponent is called "cross-examination", and the second examination of the witness by the party calling him is called "re-examination". The "examination-in-chief and cross-examination" must both relate to relevant facts, though the later need not be confined to matters elicited in the former. Re-examination must be confined to the examination of matters referred to in cross-examination, though, with the permission of the court, it may extend to new matters, in which case the other party has the right of cross-examination in regard to such new matters. (Ss. 137 and 138). Every witness is liable to be cross-examined, but, there is no right of cross-examination if a person is not sworn and is merely asked to produce a document. (S. 139.) A party may, with the permission of the Court, put such questions to witness of his own as may be put in cross-examination. (S. 154). Leading questions, i.e., question which suggest the answer, (S. 141), though permissible in cross examination (S. 143), cannot be asked in examination-in-chief or re-examination if the party objects. The court may, however, permit such questions, and shall permit them if they relate to introductory matters or to matters which are undisputed or sufficiently proved. (S. 142). A witness may be questioned in cross-examination as to previous statements abouts relevant facts (Ss. 145 and 153) and if the statement is in writing, the writing need not be shown to him or proved before questioning him; but if it is intended to contradict him, his intention must be drawn to the writing by which it is intended to contradict him. (S. 145).

A witness may also be asked, in cross-examination, questions which tend :—

(i) to test his veracity ;

(ii) to discover who he is and what is his position in life ; or

(iii) to shake his credit by injuring his character. (S. 146).

If any such question relates to a relevant matter, the witness is bound to answer it, though, as already pointed out, the witness may ask to be excused to answer if the answer would tend to criminate him or to expose him to a penalty or forfeiture, in which case the answer, if compelled, would not subject the witness to any arrest or

prosecution, or be proved against him in any criminal prosecution, except that for perjury. (Ss. 132 and 147). But if the question does not relate to a relevant fact, and is asked merely to shake the credit of the witness by injuring his character, the court will exercise its discretion in allowing or disallowing the question. The court will exercise its discretion in favour of the question, if the truth of the imputation conveyed by it would seriously effect the opinion of the Court as to credibility of the witness; and against the question, if the truth of the imputation, would not affect, or would affect only in a slight degree, the opinion of the court as to the credibility of the witness or if there is great disproportion between the importance of the imputation and the importance of the witness's evidence. (S. 148). Counsel should not ask questions tending to impeach the character of a witness, unless he has reasonable grounds to believe that the imputation is well-founded ; (S. 149) if he disregards the rule, he is guilty of misconduct and his case may be reported to the High Court for disciplinary action. (S. 150).

Indecent or scandalous inquiries are forbidden, unless they relate to facts in issue or to matters necessary to be known in order to determine whether or not the facts in issue existed ; (S. 151) and so are questions intended to insult to annoy, or needlessly offensive in form. (S. 152).

If a question is asked merely to shake the credit of the witness by injuring his character, the answer to it is conclusive, in the sense that no evidence to contradict it can be given. There are, however, two exceptions to this rule :—

(i) If the witness denies a previous conviction, he may be contradicted by proving the conviction.

(ii) If the question is asked to impeach the impartiality of the witness, and he denies the facts suggested, his answers may be contradicted.

Of course, a witness giving false answers to questions asked with a view to shake his credit by injuring his character, may be prosecuted for perjury. (S. 153).

Impeachment and corroboration.— The credit of a witness may be impeached in the following manner :—

(i) By the testiomony of persons who swear that they know the witness to be unworthy. A person dealing a witness to be unworthy of Credit may not give reasons in his examination-in-chief, but he may be questioned as to such reasons in cross-examination and the answers thus given are not liable to be contradicted, though, if false, they may form a proper foundation for his prosecution for perjury.

(ii) By proof of bribery, or offer of bribery or other corrupt inducement.

(iii) By proof of former statements inconsistent with that part of his evidence which is liable to be contradicted.

(iv) In a case of rape, by proof of general immoral character of the prosecutrix. (Section 155).

A witness may be corroborated by :—

(i) questioning him as to any other fact which he observed at or near the time or place at which the relevant fact to which he has testified, occurred ;

(ii) proof of any previous statement relating to the fact made by him at or

about the time when the fact took place, or before any authority legally competent to investigate the facts. (Section 157).

The credit of a person whose statement is admitted under Section 32 or Section 33, may be impeached or confirmed in the same manner as the credit of a witness actually examined. (Section 158).

Refreshing memory.— A witness may refresh his memory by referring to any document made or read by him at the time of the transaction, or so soon afterwards that the transaction was at that time fresh in his memory. (Section 159). If the witness is sure that the facts were correctly recorded in any such document as has just been mentioned, he may testify to those facts from the document though he has no specific recollection of the facts. (Section 160). When a witness may refer to a document for refreshing his memory, he may, if there is sufficient reason for the non-production of the original, refer to a copy of it with the permission of the Court. An expert may refresh memory by reference to professional treatise (Section 159). The document by which a witness refreshes his memory must be produced and shown to the adverse party, who may cross-examine the witness with reference to it. (Section 161).

A witness who is summoned to produce a document, must bring the document to court. The Court has the power to inspect such document, unless it be a document referring to affairs of State, and to take evidence to determine any objection to its production or admissibility. (Section 162).

If a party gives notice to the other party to produce a document, and the document is produced, and inspected by the party calling for its production, he is bound to give it in evidence if the party producing so likes. (Section 163). On the other hand, if a party does not produce a document which he is required by the other side to produce, he shall not be permitted subsequently to give the document in evidence. (Section 164). The Judge, the jury or the assessors may ask of any witness any questions, relevant or irrelevant, and the Court may order the production of any document. The parties are not entitled to object to any such question or order, nor to cross-examine the witness upon any answer made to any such questions. But neither the answers to such questions nor such documents can be made the basis of decision unless they are relevant. Further, the judge cannot compel a witness to answer any question or to produce any document, which the witness would be entitled to refuse to answer or produce if the question were asked, or the document called for, by the adverse party. The Judge is also not entitled to ask any question which it would be improper, for any other person to ask, nor to dispense with primary evidence where it cannot, under the provisions of the Act, be dispensed with. (Section 165).

Effect of improper admission or rejection of evidence.— The improper admission or rejection of evidence is not a ground for reversal of the decision, unless the remaining evidence, after excluding the improperly admitted evidence is insufficient to sustain the decision, or the improperly rejected evidence, if admitted, would have varied the decision. (Section 167).

Conclusion.— In the preceding pages an attempt has been made to explain the scheme and arrangement of the Act, and to give a bird's eye view of its main provisions. The Act which is one of the most skilfully drafted enactments of the Indian Legislature, is a unique experiment in codification, and, since Sir James Fitzjames

Stephen's time, there is hardly any writer of note on Evidence who has not referred to it in his work or to its counterpart. "A Digest of the Law of Evidence." The manner in which the subject has been presented is original, and the chief merit of the work is due to the fact that the rules of pure procedure and of substantive law, which in other systems are mixed up by textbook writers with rules of evidence, have been completely separated from the latter. The Act has worked unexpectedly well, though owing to the difficulty and abstruseness of the doctrine propounded, Courts are less eager to entertain, and lawyers are diffident to urge, questions of the law of evidence which depend for their solution on a closer and more critical study of the provisions of the Act.

As has been already remarked, the object of a system of evidence is to provide rules for regulating the injury into disputed questions of fact. The importance of these rules can hardly be over estimated. Many a litigant has lost a just and well-founded cause owing to his disregarding a rule of evidence. Besides the questions what facts may be given in evidence and how, there is in almost every trial the question whether evidence as to a fact should be believed or not, and if believed what is its effect on the main question. Does this elaborately framed Code of the Law of Evidence give any assistance to the Judge on this question ? The answer, of course, must be in the negative. First, however carefully and with whatever detail the rules of relevancy may be framed, no rule of evidence can guide the Judge on the fundamental question whether evidence as to a relevant fact should be believed or not. Secondly, assuming that the Judge believes the evidence as to a fact, no Code of Evidence, however exhaustive, can except in a very few cases, guide him on the question what inference he should draw from it as to the main fact. "No rule of evidence that was framed", says the framer of the Act, "will assist a Judge in the very smallest degree in determining the master question of the whole subject—whether and how far he ought to believe what the witnesses say ? Again, rules of evidence are not, and do not profess to be, rules of logic. They throw no light at all on a further question of equal importance to the one first stated. What inference ought the Judge to draw from the facts in which, after considering the statements made to him, he believes. In every judicial proceeding whatever these two questions—Is this rule, and, if it is true what then ?— ought to be constantly present to the mind of the Judge, and it must be admitted, both that the rules of evidence do not throw the smallest portion of light upon them and that persons who are absolutely ignorant of those rules may give a much better answer to each of these questions than men to whom every rule of evidence is perfectly familiar. The best shoes in the world will not make a man walk, nor will the best glasses make him see; and in just the same way, the best rules of evidence will not supply the place of natural sagacity or of a taste for and training in logic."

The first of these questions, viz., whether a witness should or should not be believed is one peculiar difficulty owing to the perjury that pervades the atmosphere of law Courts in this country. What is the Judge to do where, as it came to the experience of the writer, in answer to a true charge of murder the accused is able to support a plea of alibi by proof of an actual conviction of an offence of cattle-lifting alleged to have been committed by him at the time of murder at a place not connected by rail, fifty miles away from the place of murder, and witnesses are prepared to swear to the arrest of the accused and his detention in custody at and since the alleged time of the murder ? In

another case of murder, the writer again speaks from experience, a conviction of an offence under the Motor Vehicles Act said to have been committed at a place some 200 miles away from the place of murder, where it was physically impossible for the accused to be after committing the murder, was given in evidence, and though the murder resulted in conviction, the difficulty of the Court in coming to a decision to convict can well be judged. Questions of this nature can never be solved by any artificial rules of evidence, and the best guide of the Judge on such questions is his own common sense and experience of human nature. Again, though the law may declare that a certain fact may be given in evidence to prove another fact, it is impossible for the law to say. except in very rare cases, that the Judge should consider the latter fact to be proved on proof of the former fact. No rules of law can impart to the Judge a knowledge of the ordinary rules of ratiocination, and here again the accuracy of his decision will depend upon his general education, on the development of his intellectual faculties, and his experience of men and the world.