crees are not conclusive proof of that which they state.

Illustration

A sues B for trespass on his land. *B alleges* the existence of a public right of way over the land, which *A denies*.

The existence of the decree in favour of the defendant, in a suit A against C for a trespass on the same land, in which *C* alleged the existence of the same right of way, is relevant, but it is not conclusive proof that the right of way exists.

COMMENTARY

Principle.—As has been noticed in the notes to the preceding section.[1] the general rule is that a person is not affected by a judgment passed in a litigation to which he was no party. *Res inter alios judicata nullum inter alios prejudicium facit.*[2] To this general rule, judgments in *rem* which are the subject of the preceding section form the first, and judgments relating to matter is a public nature with which the present section deals, the second exception.[3]

This is on the principle that "in matters of public right the new party to the second proceeding, as one of the public, has been virtually a party to the former proceeding and therefore, he is properly excused"[4] Such judgments are sometimes regarded as a species of judgments *in rem*,[5] but are more usually considered as in the nature, of though stronger than, reputation.[6]

Two things must be borne in mind in regard to the provisions of this section. Firstly, the judgment must relate to a matter of a public nature,[7] and secondly the judgment, when admitted in evidence as satisfying the first requirement, is not like judgment admitted under section 40 or section 41, conclusive.[8]

Matters of a public nature.—The expression "matters of a public nature" means subject of public or general nature and thus includes public rights or customs[9] as well as general rights and customs,[10] if there be any distinction, as there is in England, between "public" and "general" rights and customs.[11]

Judgments on question of custom or usage.—The question what is the custom in a particular matter in a locality or a class of people or perhaps a family is a question of public nature and judgments as to the existence or non-existence of the custom would be relevant both under section 13 and this section.[12] Ajudgment by which the existence

1. See notes to section 41 under the heading "jugments in personam and judgments in rem".
2. A matter adjudicated upon between one set of persons does not in any way prejudice another set of persons.
3. *Bai Baiji* v. *Bai Santok*, 20 B 53.
4. *Gujju Lall* v. *Fatteh Lall*, 6 C 171 ; 183 (FB). per Pontifex, J.
5. *Neil* v. *Devonshire*, 8 App. Cas. 147.
6. Stark,., (4th Ed.). 386 ; Phipson Ev., 7th Edf. 413.
7. *Gujju Lall* v. *Fatteh Lall*, 6 C 171 (FB).
8. *Gujju Lall* v. *Fatteh Lall*, 6 C 171 (FB).
9. See section 32 (4).
10. See section 48 ; *Bunyad Ali* v. *Faiz Muhammad* 173 PR 1889.
11. "Public rights " are those common to all members of the State : "general rights " are those affecting any considerable section of the community, Phipson Ev., 7th Ed. 285 ; See notes to section 32 (4) unde the heading "public right of custom or matter of public or general interest".
12. See notes to section 13.

of a custom or usage is recognized is admissible under section 42.[1]

Report is a not a judgment.—The report embodying the findings as to causes of the accident of an aircrash made by an authority designated in Rule 75 of the Aircraft Rules as Court, which is not a judgment or a decree ; such report is not admissible as a judgment under this section, though it is admissible under section 35 of the Act.[2]

Judicial decisions on questions of customs are relevant; compromise judgments admissible.—It has already been noticed that the existence of a public or general custom is a matter of a public nature,. Customs of particular communities also are matter is a public interest[3] and therefore, where a custom alleged to in which such custom has been recognized to exist are good evidence of the existence of that custom.[4] Decision on question of local custom or usage also are relevant.[5] The most cogent evidence of a custom is a final decree based on that custom.[6] It ought to appear clearly from the previous judgment that the question of custom was determined.[7] A judgment becomes relevant under this section by reason of its containing an adjudication on a matter of a public nature and, therefore, the fact that a judgment becomes relevant under this section would not render remarks made in it incidentally about other matters admissible in evidence in a subsequent suit.[8] So far as the question of mere admissibility of a judgment has been suffered by default: or is not supported by any proof of execution; or was pronounced after the commencement of controversy as to that custom, the conditions of *lis mota* not applying to such judgments;[9] or was based on a compromise,[10] or was passed in *exparte* proceedings.[11] But the evidentiary value of a judgment based on a compromise or confession is very much less than that of a judgment in which a custom was held proved or negatived after contest.[12]

Other instances of matters of a public nature, judgments regarding which have been held admissible.—The question what is the caste of a particular family[13] or what is the customary length of a *hath* in a particular *purgunna*,[14] is a question relating to matters of a public nature, and previous judgments on such matters though no *inter*

1. *Raghunath* v. *Rampartab Ramchander*, 1935 S 38 ; *Sher Mohammad Jawahar Khatun*, (1938) 40 PLR 29 ; *Ram Kishore Jaiswal* v. *B. Kavindra Narain*, 1955 A 59 (FB).
2. *Madhuri* v. *I.A. Corporation*, AIR 1962 C 544.
3. *Bai Baiji* v. *Bai Santok*, 20 B 53 ; *Bunyad Ali* v. *Faiz Muhammad*, 173 PR 1889.
4. *Suganchand Bhikamchand* v. *Mangibai Gulabchand*, 1942 B 185 ; *Harnabh Pershad* v. *Mandil Das*, 27 C 379; *Bai Baiji* v. *Bai Santok*, 20 B 53 ; *Shimbu Nath* v. *Gyan Chand*, 16 A 379 : *Bunyad Ali* v. *Faiz Muhammad*, 173 PR 1889.
5. *Easwara Doss* v. *Phungavanchari*, 13 M 361 ; *Gurdayal Mal* v. *Jhandu Mal*, 10 A 585.
6. *Gurdayal Mal* v. *Jhundu Mal*, 10 A 585 ; *Lachman Rai* v. *Akbar Khan*, I A 440 ; *Barkat Ullah* v. *Zulfiqar Ali Shah* , PLD 1949 L 193.
7. See 2 Agra, 120 121 (1867).
8. *Banwari Lal* v. *Sheo Chand*, 85 IC 795 ; 1923 L 384 ; See *Basi Nath Pal* v. *Jagat Kishor Acharjee Chowdhury*, 35 IC 298 ; 23 CLJ 583.
9. See Taylor, § 624.
10. *Lekh Raj* v. *Inder Mal*, 4 L 176 ; 73 IC 658 ; 1924 L 161 ; *Imperial Oil, Soap & General Mills Co. Ltd,. Delhi* v. *Misbahuddin*, 2 L 83 : 61 IC 325 ; 1921 L 69 ; *Abdul Karim* v. *Shiv Narain*, 1952 Punj. 356 : 1952 PLR 255.
11. *Abdul Karim* v. *Shiv Narain*, 1952 Punj. 356 ; 1952 PLR 255.
12. *Lekh Raj* v. *Inder Mal*, 4 L 176 ; 73 IC 658 ; 1924 L 161 ; *Imperial Oil, Soap & General Mills Co. Ltd,. Delhi* v. *Misbahuddin*, 2 L 83 : 61 IC 325 ; 1921 L 69 ; *Mahadeo* v. *Bakshwar Prasad*, 1939 A 626 ; 1939 ALJ 708.
13. *Maharaja of Kothapur* v. *Sundaram Iyer*, 48 M I ; 93 IC 705 ; 1025 M 497.
14. *Jainatullah Sirdar* v. *Romoni Kant Roy*, 15 C 233 ; The previous judgment on this matter was admitted under section 13, but, the judgment was equally admissible under section 42.

partes, are relevant under this section. Where the question is whether the occupancy tenants of certain village are entitled to sell their holding under certain circumstances, judgments, not *inter partes*, recognizing the right of the occupancy tenants of adjoining villages of the same *pugunna* holding similar tenures are admissible.[1] A judgment in a suit under section 92 of the Code of Civil Procedure is not a judgment in *rem*.[2] A pervious judgment not *inter partes*, holding certain property to be trust property dedicated to religious and charitable purposes is relevant in a subsequent suit in proof of the nature of the property.[3] A judgment holding place to be a *takia* is admissible under this section.[4] In a suit brought by the trustees of a temple to recover from the owners of certain lands in certain village money claimed under an alleged right as due to the temple, judgments in other suits against other persons in which claims under the same right had been decreed in favour of the trustees of the temple were held relevant both under section 13 and the present section.[5] A judgment as to what is the custom of adoption in a particular caste or tribe,[6] or as to the status of a class as *ala maliks*[7] is admissible.

Matters not held to be of a public nature.—A trial for murder is not a matter in which the public at large are interested; the morbid interest of a section of the public in the details of a murder trial cannot constitute such trial a matter of public nature. Therefore, the judgment of a Criminal Court convicting the defendant of murder is not admissible against the defendant in a suit for compensation under Act III of 1855 brought against him, by the son of the deceased.[8] Where in a suit for injunction against him, the defendant, in order to show that there was no patent in existence for the watches which bore a certain trade mark gave in evidence a certified copy of the judgment of Swiss Court, given in a litigation to which the plaintiff was no party, the judgment was held inadmissible under this section.[9]

Cornor's Inquistion.—A corner's inquisition is not a judgment and is not relevant under this section.[10]

Only appellate judgment must be produced.—See notes to section 13 under this heading.

43. Judgments, etc., other than those mentioned in Sections 40 to 42 when relevant.—Judgments, orders or decrees, other than those mentioned in Sections 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree, is a fact in issue, or is relevant under some other provision of this Act.

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1. *Dalglish* v. *Guzuffer Hassain*, 23 C 427.
2. *Anjuman Islamia* v. *Latafat Ali*, 1950 A 109 : 1950 ALJ 776 ; but see *Sunni Central Board* v. *Sirajul Haq Khan*, 1954 A 88.
3. *Misbahuddin* v. *Vidya Sagar*, 156 IC 268 ; 1935 L 64 ; 46 PLR 106 ; *Ganesh Dharaindhar Maharajdev* v. *Keshavarav Govind Kulgavkar*, 15 B 625, 635.
4. *Imam Bibi* v. *Abdur Rahman*, 1936 L 929 ; 163 IC 924.
5. *Ramasami* v. *Apparvu*, 12 M 9.
6. *Sundrabai Hanmantrao Kulkarni* v. *Hanman Gurunath Kulkarni* 56 B 298 ; 140 IC 235 ; 1932 B 398.
7. *Sardar Khan* v. *Sadulla Khan*, 140 IC 566 ; 1933 L 57.
8. *Bishen* Das v. *Ram Labhaya*, 106 PR 1915 ; 32 IC 18.
9. *Heinger* v. *Droz*, 25 B 433.
10. *E*, v. *Bhagwandas Tulsidas*, 47 Bom. LR 997 ; 1946 B 184.

Illustrations

(a) *A* and *B* separately sue *C* for a libel which reflects upon each of them. *C* in each case says that the matter alleged to be libellous is true, and the circumstances are such that it is probably true in each case, or in neither.

A obtains a decree against *C for* damages on the ground that C failed to make out his justification. The fact is irrelevant as between B and C.

(b) *A* prosecutes *B* for adultery with *C*, A's wife.

B denies that *C* is A's wife, but the Court convicts B of adultery.

Afterwards, *C is prosecuted* for bigamy in marrying B during A's lifetime. C says that she never was A's wife.

The judgment against *B* is irrelevant as against *C*.

(c) *A* prosecutes *B* for stealing cow from him. *B* is convicted.

A, afterwards, sues *C* for the cow, which *B had* sold to him before his conviction. As between *A* and C, the judgment against *B*, is irrelevant.

(d) *A* has obtained a decree for the possession of land against *B*. *C*. *B's* son. murders *A* in consequence.

The existence of the judgment is relevant as showing motive for a crime.

[1][(e) *A* is charged with theft and with having been previously convicted for theft. The previous conviction is relevant, as a fact in issue.

(f) *A* is tried for the murder of *B*. The fact that *B* prosecuted *A* for libel and that *A* was convicted and sentenced is relevant under Section 8 as showing the motive for the fact-in-issue].

COMMENTARY

Principle.—This section enacts the general rule, to which the two preceding sections are exceptions, that a judgment, not *inter partis*, is not relevant as a judgment, i.e., as proof of the particular point decided by it. "If there is one rule of law", says Chief Justice Garth, "which is better known and approved than another as being founded upon the most manifest justice and good sense it is this : that (except in the case of judgments *in rem* and judgments relating to matters of a public nature, which are governed by a different principle) no man ought to be bound by the decision of a Court

1. *Ins.* by Act (3 of 1891). S. 5.

of Justice, unless he or those under whom he claims were parties to the proceedings in which it was given",[1] The section is based on the maxim *"res inter alios judicata nullum inter alios prejudicium facit"*,[2] which being founded on principles of natural justice has been known to the civil law from the earliest times. A transaction between two parties in judicial proceedings ought to be binding upon a third for it would be unjust to bind any person who could not be admitted to make a defence, or to examine witness, or to appeal from a judgment which he might think erroneous."[3]

Sections 40 to 42 state the circumstances is which previous judgments are relevant in Civil and Criminal cases. Section 43 states that judgments, order or decrees other than those mentioned in sections 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree is a fact in issue, or is relevant under some other provisions of the Act. Sections 44 deals with fraud or collusion in obtaining a judgment or incompetency of a Court which delivered it.[4]

In *State of Bihar* v. *Radha Krishna Singh*[5] the Supreme Court summarised the principles deducible from the authorities referred to in the case, in the following words:-

."(1) A judgment *in rem*, e. g., judgments or orders passed in admiralty probate proceedings etc. (matrimonial and insolvency) would always be admissible irrespective of whether they are *inter partes or not.*

(2) Judgments *in personam*, not *inter partes are* not at all admissible in evidence except for the three purposes—" of proving as to who the parites were and what was the decree passed and the properties which were the subject matter of the suit"—mentioned above.

(3) ..... the recitals in a judgment like findings given in appreciation of evidence made or arguments or genealogies referred to in the judgment would be wholly inadmissible in a case where neither the plaintiff nor the defendant were parites."

A judgment, not inter partes, in conclusive evidence against strangers of its existence, date and legal consequences and distinguished from its truth.—The law attributes unerring verity to the substantive as opposed to the judicial portions of the record. All judgments are conclusive of their existence as distinguished from their truth; so every judgment is conclusive evidence for or against all persons, whether parites, privies or strangers, of its own existence, date and legal effect as distinguished from the accuracy of the decision rendered.[6] If the object is merely to prove the existence of the judgment, its date or legal consequences, the production of the record or a certified copy is conclusive evidence of the facts against the whole world, the reason being that a judgment as a public transaction of a solemn nature must be presumed to be faithfully recorded.[7] A judgment can legitimately be used to explain the history of the case or to

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1. *Gujju Lal* v. *Fatteh Lal*, 6 C 171, 189 (FB).
2. A matter adjudicated upon between one set of persons does not in any way prejudice another set of persons.
3. *Per DeGrey*, CJ., in the *Duchess of Kingston's case*, 20 How St Tr 355.
4. *S.P.E. Madras* v. *K.V. Sundravelu*, 1978 SC 1017 (para 5).
5. 1983 SC 684 (Paras 133, 143).
6. Phipson Ev., 7th Ed., 412 ; *Indra Singh* v. *Commissioner of Income-tax*, 22 P 55 ; 1943 P 169 ; *Trailokyanath Das* v. *E.*, 59 C 136 ; 137 IC 163 ; 1932 C 293 ; 33 Cr LJ 441; *Gopi Sundari Dasi* v. *Kherod Govinda Chowdhury*, 82 IC 99 ; 1925 C 194 ; *Basi Nath Pal* v. *Jagat Kishore Acharjee Chowdhury*, 35 IC 298 ; 23 CLJ 583 ; *Muneswari* v. *Jugal Mohini Dasi*, 1952 C 368.
7. *Abinash Chandra* v. *Paresh Nath Ghose, etc.*, 9 CWN 402, 410 ; Taylor § 1667.

explain or introduce facts is issue.[1] A statement of facts in a pervious judgment cannot be used as evidence in a subsequent case to decide points arising in that case.[2]

A judgment in another suit which is not *inter partes* may be evidence for certain purposes, viz. to prove the fact of the judgment; to show who the parties to the suit were; to show what was the subject matter of the suit; to show what was decided or declared by the judgment; to show what documents had been filed by the parties in the proceeding to establish the transaction referred to in the judgment; as evidence to show the conduct of the parties or particular instances of the exercise of right or ascertain of a title; or to identify property; or to show how property had been previously dealt with; to establish a particular transaction in which a right is asserted and the name of the person, if any, who is declared in the judgment as entitled to possession; but the judgment is not evidence to establish the truth of the matter decided in that judgment. the findings of fact arrived at on the evidence in one case are not evidence of that fact in another case.[3]

Admissibility of judgment not inter partes.—Judgment of conviction by a Magistrate though admissible in civil proceeding to prove the fact of conviction of accused in that case, is not strictly admissible to prove the facts constituting the offence, in another case, in which the party against whom the judgment in the criminal case was sought to be admitted was not a party to the criminal case.[4]

Judgment not inter partes—Redemption suit—Evidentiary value of previous decisions.—Where a suit is brought for possession by way of redemption by plaintiffs as heirs of deceased mortgagor, they in order to establish their right to redeem, are entitled to produce a copy of judgment given in another suit and an order in mutation proceedings whereunder plaintiffs' right to succeed to the estate of the deceased mortgagor is recognised. The order in the mutation proceedings and the judgment are relevant under sections 13 and 43 and their probative value is very high. It is not necessary for the plaintiff to prove that the order and the judgment had been correctly passed. The fact that the order and the judgment have not been challenged or set aside in any proceedings, goes to prove that they were correctly made.[5]

A judgment not inter partes, not being a judgment in rem or relating to matters of a public nature is irrelevant, but the existence of such judgment may become relevant under some other section of the Act.–The language of the present and three proceeding sections must be carefully examined and compared. What is relevant under Section 40 is the existence of a judgment which by law prevents the Court from taking cognizance of a suit or holding a trial. Therefore, a judgment is admitted under Section 40 not as proof of the point decided by it but to support the plea that no inquiry can be made on the point determined by the previous judgment, the existence of the previous judgment barring such enquiry. The point decided by the previous judgment being *res judicata* no question of proving that point arises; hence the relevant fact is not the judgment as such but the existence of the judgment. In Section 41 and 42, however, the relevant fact is not the *existence* of the judgment but the judgment itself, and under

1. *Purnima Debya* v. *Nand Lal Ojha*, 11 P 50 ; 136 IC 577 ; 1932 P 105.
2. *Khub Narain Missir* v. *Ramchandra Narain Dass*, 1951 P 340 ; 28 P 890.
3. *Ramji Batanji* v. *Manohar*, 62 Bom. LR 322.
4. *Caitan D'Souza* v. *Miss Jierbai S. C. Dinshaw*, 73 Bom. LR 418.
5. *Hiralal* v. *Shivlal*, (1969) 71 Punj. LR 735.

these two sections the judgment is admitted in evidence as conclusive,[1] or *prima facie* proof,[2] of the point determined by the judgment. Section 43 contains two rules, one declaring that a judgment which is not relevant under the three preceeding sections is irrelevant, and the other declaring that the existence of a judgment, which is not relevant under the three preceeding section, may become relevant under some other section of the Act. Thus, the fact declared irrelevant by Section 43 is a judgment as a judgment; whereas the fact, the relevancy of which is contemplated as possible under some other section of the Act, is the existence of a judgment. Therefore, when a judgment is introduced in evidence under the latter part of Section 43, it is admitted for the purpose of proving its existence and not for the purpose of proving the point decided by it.[3] In *State of Bihar* v. *Radha Krishna Singh*[4] the Supreme Court observed that "some courts have used section 13 to prove the admissibility of a judgment as coming under the provisions of Section 43", and declared. "We are, however, of the opinion that where there is a specific provision covering the admissibility of a document, it is not open to the court to call into aid other general provisions in order to make a particular document admissible. In other words if a judgment is not admissible as not falling within the ambit of Sections 40 to 42, it must fulfil the conditions of Section 43 otherwise, of the Act' cannot cover Section 13.....The words 'other provisions of the Act' cannot cover Section 13 because this section does not deal with judgments at all." A former judgment not *inter partes*, which is not a judgment *in rem* nor one relating to matters of a public nature, is not admissible in evidence in a subsequent suit, either as *res judicata* or as proof of the particular point which it decides. If a judgment is not admissible under Section 40 or Section 41, 42, it is not admissible at all in its special character of a judgment and, when a judgment is admitted under the latter part of Section 43 read with some other section of the Act, it can only be used to prove the fact that there has been a decision on a particular point and not to prove the particular point on which there has been a decision.[5] As has already been observed, the real question when a judgment is sought to be introduced under the provisions of Section 43 is "Is the existence of the judgment a fact in issue or relevant under some section of the Act"?[6] It is not the correctness of the previous decision but the fact that there has been a decision that is established by the production of the judgment.[7] Section 43 excludes all judgments in a former suit as irrelevant if they are *inter parts*, unless the existence of such judgment is a fact in issue or is relevant under some other provisions of the Act. The existence of judgment may be relevant but the truth of it, by which is understood the

1. Section 41.
2. Section 42.
3. *Hitendra Singh* v. *Rameshwar Singh Bahadur*, 4 P 510 : 88 IC 141 & 87 IC 849 ; 1925 P 625 & 667 ; *Secretary of State* v. *Ahmed Badsha Sahib*, 44 M 778 : 67 IC 971 : 1921 M 248 (FB) ; *Tripurana Seethapati Rao Dora* v. *Rokham Venkanna Dora*, 45 M 332 : 66 IC 280 : 1922 M 71 (FB) ; *Mohammad Amin Valad* v *Hasan Valad*, 31 B 143 ; *Collector of Gorakhpur* v. *Palakdhari Singh*, 12 A. 1 (FB) ; *Gujju Lall* v. *Fatteh Lall*, 6 C 171 (FB).
4. 1983 SC 684 (para 121, 122 & 143).
5. *Gujju Lall* v. *Fatteh Lall*, 6 C 171 (FB).
6. *Babui Shamsunder Kuer* v. *Ramkhelawan Sah*, 8 P 763 : 121 IC 334 : 1929 P 739 ; *Hitender Singh* v. *Rameswar Singh Bahadur*, 4 P 510 : 88 IC 141 & 87 IC 849 : 1925 P 625 & 667 ; *Basi Nath Pal* v. *Jagat Kishore Acharjee Chowdhury*, 35 IC 298 : 23 CLJ 583 ; *Collector of Gorakhpur* v. *Palakdhari Singh*, 12 A 1 (FB) ; see also *Ava Singh* v. *Mansha Ram*, 121 IC 509 : 1930 L 237.
7. *Baidya Nath Dutt* v. *Alef Jan Bibi*, 70 IC 294 : 1923 C 240.

decision of the judge and the opinion expressed by him, is not relevant. It may be relevant to show that a certain circumstances existed at the time when the judgment was delivered, for instance, it may show that the witness in the previous suit made contradictory statements; or it may be relevant to show the nature and the character of the claim in the previous suit.[1] But it cannot be used to prove the conclusion arrived at by the Judge on the particular evidence before him in the previous suit.[2] See notes to Section 13.

Instances of the existence of a judgment becoming a fact in issue or a relevant fact.—It will naturally be asked what are those cases in which the existence of a judgment as distinguished from the correctness of the decision embodied therein become a fact in issue or a relevant fact. "The cases so contemplated by Section 43 are those where a judgment is used not as *res judicata* or as evidence more or less binding upon an opponent by reason of the adjudication which it contains, because judgment of that kind had already been dealt with under one or other of the immediately preceding sections. But the cases referred to in Section 43 are such, I conceive, as the section itself illustrates, viz., when the fact of any particular judgment having been given is a matter to be proved in the case. As, for instance, if A sued B for slander, in saying that he had been convicted of forgery, and B justified upon the ground that the alleged slander was true, the conviction of A for forgery, would be a fact to be proved by B like any other fact in the case, and quite irrespective of whether A had been actually guilty of the forgery or not. This I conceive, would be one of the many cases alluded to in Section 42".[3] If a person is charged with theft and is also liable to enhanced punishment under Section 75, I.P.Code, by reason of having previously been convicted, the judgment of previous conviction would be a fact in issue and thus admissible under Section 43.[4] If A is tried for the murder of B, the fact that B prosecuted A for libel and that A was convicted and sentenced is relevant under Section 8, as showing the motive for the fact in issue.[5] Where the question is whether the plaintiff and his family were on good terms, it is a relevant fact to show by a judgment that the plaintiff was attacked and seriously injured and that he charged his own brother with having taken part in the fight and that the brother was convicted.[6] Where the fact in issue is whether a transaction is *benami*, a judgment which affords motive for the *benami*, though not *inter partes* is relevant.[7] If A has obtained a decree for the possession of land against B, and C, B's son, murders A in consequence, the existence of the judgment is relevant as showing the motive for the crime.[8] In a suit for malicious prosecution the judgment in the criminal proceeding is evidence to establish the fact of acquittal, the fact, namely, that the criminal proceeding terminated in favour of the plaintiff.[9] A reference to a finding in a judgment may explain the character of the party's possession and the nature of the enjoyment had in the property in suit. Similarly, a finding in a judgment may be

1. *Benode Lal Chakravarty* v. *Secretary of State*, 133 IC 573 : 1931 C 239.
2. *Ramparekha Pande* v. *Ramihari Kuer*, 149 IC 1158 : 1933 P 690 : *Benode Lal Chakravarty* v. *Secretary of State*, 133 IC 573 : 1931 C 239.
3. *Gujju Lal* v. *Fateh Lall*, 6 C 171 (FB) per Garth, CJ at P. 192 ; see *Hitendra Singh* v. *Rameswar Singh Bahadur*, 4 P 510 : 88 IC 141 & 87 IC 849 : 1925 P 625 and 667.
4. Ill. (e) to section 43.
5. Ill.(f) to section 43.
6. *Jangi Singh* v. *Ganga Singh*, 77 IC 391 : 1924 O 115.
7. *Babui Shamsunder Kuer* v. *Ramkhelawan Sah*, 8 P 783 : 121 IC 334 : 1929 P 739.
8. *Hitendra Singh* v. *Rameshwar Singh Bahadur*, 87 IC 849 : 1925 P 625 ; Ill. (d) to section 43.
9. *Hitendra Singh* v. *Rameshwar Singh Bahadur*, 87 IC 849 : 1925 P 625 ; *Leggat* v. *Tollervey*, 14 East 302.

referred to in all other cases where the record is matter of inducement or merely introductory to other evidence.[1] A judgment against a master or principal for the negligence of his servant or agent is conclusive evidence against the servant or agent of the fact that the master or principal has been compelled to pay the amount of damages awarded, but it is not evidence of the fact upon which it was founded, namely, the misconduct of the servant or agent.[2] So, a judgment recovered against a surety will be evidence for him to prove the amount which he has been compelled to pay for the principal debtor; but it furnishes no proof whatever of his having been legally liable to pay that amount through the principal's default.[3] A judgment setting aside the transfer of a holding is a fact in issue in pre-emption proceedings instituted by the landlord and therefore, admissible under Section 43.[4] Other instances may be cited where a judgment is admissible in evidence in a subsequent litigation, but in all such cases the existence of the judgment is either fact in issue or relevant under some other section of the Act.[5] A judgment, not *inter partes*, is not admissible as having the effect more or less of *res judicata*. For that purpose a judgment *inter partes* alone is admissible. But a judgment, not *inter partes*, may be used to show the conduct of the parties or how the property was dealt with previously.[6] A judgment may be used to explain or introduce facts in issue or to explain the history of the case.[7] In such case, judgment, not *inter partes*, is not used as evidence or proof of the particular point decided by it but is used as evidence of the *factum* of the decision only. There are, however, cases where a judgment, not *inter partes*, has undoubtedly been used as a sort of proof of the particular point decided by it; but the correctness of these cases would appear to be very doubtful. A judgment, *not inter partes*, is not evidence of the point decided by it; all that it can be used to show is that the right asserted by a party in the litigation which resulted in the judgment was recognised or denied by the Court.[8] The judgment, itself, however, is not proof of the existence or non-existence of that right. Where the right of a party has already been concluded by a previous judgment, the fact can be proved by the production of the judgment since in such circumstances the existence of the judgment itself is a relevant fact.[9] See notes to Section 13 where the matter has been fully discussed.

Mere recitals of relevant or collateral facts in judgments are inadmissible.—A judgment, whether *inter partes* or not, is not evidence of fact which merely come collaterally in question, or are incidentally cognizable, or can only be inferred by argument from the decision;[10] nor is recital of a relevant fact in a judgment, not *inter partes*, admissible in proof of that fact.[11] See notes to Section 13.

Judgment between a party and a stranger.—See notes to Section 13 under this heading.

Judgment inter parties, which are not admissible under Sections 40-42, whether

1. *Hitendra Singh* v. *Rameswar Singh Bahadur*, 4 P 510 : 88 IC 141 & 87 IC 849 : 1925 P 625 & 667.
2. Taylor § 1667.
3. Taylor, § 1667.
4. *Basanta Kumar Churnakar* v. *Durga Nath Pal*, 1939 C 432.
5. *Hitendra Singh* v. *Rameswar Singh Bahadur*, 4 P 510 : 88 IC 141 & 87 IC 849 : 1925 P 625 & 667.
6. *Lakshman Govind* v. *Amrit Gopal*, 24 B 591.
7. *Purnima Debya* v. *Nand Lal Ojha*, 11 P 50 : 136 IC 577 : 1932 P 105.
8. See *M. Misbahuddin* v. *Vidya Sagar*, 1935 L 64 ; *Mutsaddi* v. *Mst. Lachhmi*, 1935 L 179 ; *Sri Krishna Dutt Dube* v. *Ahmadi Bibi*, 153 IC 708 : 1935 A 187.
9. *Maroti Laxman Koshti* v. *Jagannathdas Lachhmandas*, 1939 N 72.
10. Phipson Ev. 7th Ed. 394 : *R* v. *Kingston (Duchess)*, 20 How St. Tr. 355, 538 : *R.* v. *Hutchins* 6 QDB 300 : See *Abinash Chandra* v. *Paresh Nath Ghose, etc.* 9 CWN 402.
11. *Tripurana Seethapati Rao Dora* v. *Rokhom Venkanna Dora*, 45 M 332 : 66 IC 280 : 1932 M 71 (FB) ; *Abdul Latif* v. *Abdul Haq*, 81 IC 667 : 1924 C 523 ; *Satindra Kumar Chaudhury* v. *Krishna Kumari Chaudhurani*,

admissible under Section 43?—The Evidence Act itself does not draw any distinction between a judgment which is not *inter partes*, and a judgment which is *inter partes*, excepts where the judgment is clearly *res judicata*. A judgment, is therefore, admissible as proof of the point decided by it only when it is admissible under Section 41-42 whether it is *inter partes* or not, and it is not admissible when it is given in evidence under some other section of the Act.[1] But where in a suit for possession the defendant pleaded occupancy tenancy and the plaintiff to disprove that plea gave in evidence a previous judgment *inter partes* by which the plaintiff's suit for possession had been dismissed on the ground that it was premature but the Court had found that the defendant was not an occupancy tenant the Privy Council held the judgment to be admissible and observed that it was defendant's paramount duty to displace the finding in the previous suit.[2] Although a finding in a previous suit *inter partes* does not operate as *res judicata* it is the paramount duty of the party against whom it is given to displace the finding.[3] See notes to Section 13 under the heading "whether judgment shift onus".

Previous judgment in criminal case whether admissible in subsequent trial.—A remark in the judgment in a previous criminal case against the accused is inadmissible in a subsequent case against him.[4] A judgment passed in a prosecution convicting a person for encroaching upon land belonging to a Municipality will not operate in favour of the prosecution in a subsequent case for refusing to demolish the encroachment.[5]

The judgment in an earlier criminal case acquitting the accused would be admissible in a subsequent trial of the accused for the similar offence of embezzlement but in respect of different items, "to show what was the issue in question in that case and the decision thereof."[6]

Judgment of a criminal Court is irrelevant in a civil suit as proof of the point decided by the criminal Court.—Where the fact of a person having been acquitted or convicted is relevant, the judgment of the criminal Court acquitting or convicting him may be relevant,[7] otherwise the judgment of a criminal Court is not admissible in a civil Court as proof of the point decided by the criminal Court.[8] Thus, a judgment of acquittal of a criminal charge is irrelevant in a civil suit based on the same cause of action.[9] Similarly, a judgment of conviction cannot, in a subsequent civil suit, be treated as evidence of the facts on which the conviction is based.[10] In a suit for damages for

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36 IC 832 ; *Basi Nath Pal* v. *Jagat Kishore Acharjee Chowdhury*, 35 IC 298 : 23 CLJ 538 ; see also *Chhiddu* v. *Desraj*, 77 IC 753 : 1924 A 294.

1. *Purnima Debya* v. *Nand Lal Ojha*, 11 P 50 : 136 IC 577 : 1932 P 105 ; see also *Ramparekha Pande* v. *Ramjhari Kuer*, 149 IC 1158 : 1933 P 690 ; *Jhingur Raut* v. *E.*, 134 IC 625 : 1931 P 386 : 32 Cr LJ 1224 ; *Hitendra Singh* v. *Rameswar Singh Bahadur*, 4 P 510 : 88 IC 141 & 87 IC 849 : 1925 P 625 & 667 ; *Ajmer Singh* v. *Jangir Singh*, 1952 Pepsu 76.
2. *Midnapur Zamindari Co.* v. *Naresh Narayan Rao*, 48 C 460 : 64 IC 231 ; see also *Prahlad Chandra Singh* v. *Bhim Mahto*, 1940 P 341.
3. *Sombhunath Bhakat* v. *Sree Sridhar Thakur*, 73 CLJ 76 ; see also *Seth Ganga Sagar* v. *Inam Ali*, 48 PLR 195.
4. *Ram Nath Dave* v. *E.*, 1942 O 473.
5. *K Ramchandriah Setty*, In re, 1948 M 502 : 1948, 1 MLJ 403 : 1948 MWN 413 : 61 MLW 435 : 50 Cr LJ 21.
6. *Brijbasi Lal* v. *State of M.P.*, 1979 SC 1080 (Para 10).
7. *See Debnath* v. *Umacharan*, 9 CWN 264 (n) ; *Kashyap* v. *E.*, 1954 L 23 (FB).
8. *Harihar Prasad Singh* v. *Janak Dulari Kuer*, 1941 P 118 ; *Ramadhar Chauahary* v. *Janki Chaudhury*, 1956 P 49.
9. *Doorga Dass* v. *Doorga Charan*, 6 WR Civ Ref 26.
10. *Shamboo Chunder Chowdhry* v. *Modhoo Kyburt*, 10 WR 56 ; *Nittayanund Surmah* v. *Kashenath*, 5 WR 27.

malicious prosecution, the judgment of the criminal Court acquitting the plaintiff is not relevant as proof of the plaintiff having been maliciously or falsely charged,[1] though the judgment may be referred to for the purpose of seeing what the circumstances were which resulted in the acquittal.[2] The finding of a criminal Court cannot be treated as evidence a civil action between different[3] or the same parties; in any case, a civil Court is not bound to adopt the finding of the criminal[4] and must find the facts for itself and independently of what was decided by the criminal Court.[5] A woman who murders her son is not, according to Hindu Law, entitled to succeed to his property by inheritance. The fact of her being acquitted or convicted by a criminal Court for the murder of her son is irrelevant in a civil Court upon the question whether she has murdered her son or not.[6] The judgment of a criminal Court convicting a person of a murder and sentencing him to imprisonment is relevant in a civil Court only to show that there was such a trial resulting in conviction and sentence. It is not evidence of the fact that the convict was the murderer.[7] A judgment in a criminal case in which the plaintiff asserted his possession to the disputed land and possession was held to be with him is inadmissible against a third person who was not a party to the criminal proceedings to prove the plaintiff's possession at the date of the judgment, but is admissible to prove that at the date of the judgment the plaintiff asserted his title to the disputed land.[8] In an action for damages arising out of a collision between two motor cars, the judgment of the criminal Court convicting the defendant's driver of negligent driving is not relevant.[9]

The only sections of the Evidence act under which a judgment can be held relevant are Sections 40 to 43...According to Section 43 a judgment which is not relevant under Section 40 to 42 may become relevant under some other section of the Act. In this case Sections 11 and 155 (a) were considered.[10]

Wallis J.,in *Gopikaraman* v. *Atalsingh*, observed that "The Indian Evidence Act does not make findings of facts arrived at on the evidence before the Court in one case evidence of the fact in another case."[11]

A judgment of a criminal Court can be used only to prove who the parties to the dispute were and what order was passed; but the facts stated therein or statements of the evidence of the witnesses examined in the case, are not admissible, and the Civil Court is bound to find the facts for itself.[12]

The East Pakistan High Court held that a judgment of acquittal in a criminal case,

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1. *Pedda Venkatapathi* v. *Ganagunta Balappa*, 54 M 641 : 141 IC 825 : 1933 M 429 : 9 Bom. LR 1134 ; *Aghorenath Roy* v. *Radhika Pershad Bose*, 14 WR 339 ; *Keromuttollah Chowdhry* v. *Gholam Hossein*, 9 WR 77 ; but see *Rai Jung Bahadur* v. *Rai Gudor Sahay*, 1 CWN 537.
2. *Rai Jung Bahadur* v. *Rai Gudor Sahay*, 1 CWN 537.
3. *Maung Pein* v. *Ma The Ngwe*, 2 R 549 : 84 IC 1009 : 1925 R 143.
4. *Ram Lall* v. *Tularam*, 4 A 97 ; *Nittyanund Surmah*, etc. v. *Kashenath Nyalunker*, 5 WR 26.
5. *Bishen Das* v. *Ram Labhaya*, 106 PR 1915 : 32 IC 18 ; *Keramuttollah Chowdhry* v. *Gholam Hossein*, 9 WR 77.
6. *Vedanayaga Mudaliar* v. *Vedammal*, 14 MLJ 297 : *Anil Behari Ghose* v. *Smt. Laika Bala Dassi*, 1955 SC 566.
7. *Anil Behari Ghose* v. *Smt. Laika Bala Dassi*, 1955 SC 566.
8. *Paran Munda* v. *Santosh Mahto*, 1942 P 372.
9. *Hollington* v. *Hewthorn & Co. Ltd.*, (1943) KB 27.
10. *Muhammad* v. *State*, 1950 PLD Lah 1202.
11. 20 CWN 643.
12. *Ramadhar* v. *Janki*, 1955 BLJR 705.

e.g., under Section 379 I.P.C. only decides that the accused has not been proved guilty and to this extent only and no more is it to be taken as correct and conclusive in a subsequent Civil Suit between the parties (e.g.in a suit for declaration and injunction) the opinion and conclusions expressed in the judgment being otherwise irrelevant and inadmissible in such proceedings.[1]

Any decision of a criminal case cannot be relied on as one binding in a civil action. Equally, the findings a civil proceedings are not binding on a subsequent prosecution founded upon the same or similar allegations.[2]

There is abundant authority for the proposition that a judgment of acquittal in Criminal Court is irrelevant in a civil suit based on the same cause of action, just as a judgment of conviction cannot in a subsequent civil suit, be treated as evidence of fact on which the conviction is based. The Civil Court must independently of the decision of the criminal Court, investigate facts and come to its own findings.[3]

Where the prosecution for an offence of failure to furnish the return due under Rule 11 (1) of the Madras General Sales Tax Rules, punishable under Section 15 (a) of the Act, ended in an acquittal, because the prosecution failed to prove the guilt of the accused beyond reasonable doubt, on subsequent assessment based on the same questions, it was held: (i) that, Sections 40 to 43 of the Act embody primary and fundamental principles governing admissibility of judgments, and unless the assessees are able to bring their case within the permissible ambit of the said provisions they cannot rely on their success in the criminal Court; (ii) that either the Sales Tax Act or the Rules provide for an election between the two courses, a criminal prosecution and the making of an assessment; (iii) that both courses are open concurrently to the department; (iv) that action in respect of one is no bar to proceedings in the other; (v) that the assessees cannot seek shelter under the doctrine of *auterfois acquit* ; that principle can apply only to a second prosecution for the same offence; and (vi) that the principle of *res judicata* embodied in Section 11 C.P.Code ; can have no application as its operation is limited to civil actions; nor can the department be precluded from proceeding with the assessment on the ground of acquiescene in the Magistrate's finding and decision.[4]

Evidentiary value of a Criminal Court.—The judgment of a criminal Court is only relevant about a conviction and acquittal. The findings recorded by the criminal Courts cannot be received as a piece of evidence.[5]

Proceeding for the revocation of the grant of probate: Relevancy of the judgment in a previous criminal case wherein the son was convicted of murder.—In a proceeding for revocation of the grant of probate, the question was whether the testator had been murdered by his adopted son. The judgment in the previous criminal case is relevant only to show that there was such a trial resulting in the conviction and sentence of the son to transaction for life; it is not evidence of the fact that he was the murderer. That question has to be decided on evidence.[6]

Judgment of a civil Court is not admissible in a criminal Court to establish the

1. *S.N. Gupta* v. *Sadananda*, 1960 PLD Dacca 153.
2. See *Krishan Asari* v. *Azzikalam*, (1966) 1 MLJ 348.
3. *Onkarmal* v. *Banwari Lal*, ILR 1962 Raj 202 : 1962 Raj. LW 77.
4. *M/s. Macherlappa & Sons* v. *Government of Andhra*, ILR 1958 AP 421.
5. *Radha Mohan* v. *Bare ul*, 1972 ALJ 15.
6. *Anil Behari Ghose* v. *Smt. Latika Bala Dassi*, (1955) 2 SCR 270 : 1955 SCJ 578.

truth of the facts found by the Civil Court.—In a criminal trial it is for the Court to determine the question of the guilt of the accused and it must do so upon the evidence before it.[1] A judgment of a civil Court is not admissible in a criminal proceeding; to establish the truth of the facts upon which it is rendered.[2] Where there are concurrent proceedings covering the same ground before a criminal Court and a civil Court, the parties being substantially the same, the judgment of the civil Court, if obtained first, will not be admissible in evidence before the criminal Court in proof or disproof of th fact on which the prosecution is based.[3] The findings in a civil proceeding are not binding in a subsequent prosecution founded upon the same or similar allegations. It is the duty of a criminal Court when a prosecution for a crime takes place before it to form its own view and not to reach its conclusion by reference to any previous decision of the civil Court.[4] The judgment of a civil Court, holding a document to be a forgery, is not, in a criminal prosecution, evidence of the document being a forgery.[5] The petitioner charged the respondent with having defamed him and the latter was convicted. Thereupon the petitioner brought a suit for damages for defamation against the respondent, but the civil Court dismissed the suit. The High Court ordered a retrial setting aside the conviction, and the question arose whether a copy of the judgment of the civil Court was admissible in the criminal proceedings. Held, that the matter was governed by Sections 40-43 and the judgment was not admissible under any of these sections as proof of anything material.[6] It has, however, been held by the Bombay High Court that where the civil liability of a person arising out of a certain transaction has been determined by a civil Court, the judgment of the civil Court is a good piece of evidence in the criminal proceedings arising out of the same transaction.[7] Thus where a civil court has held that there was no entrustment of any property, the judgment of that Court is admissible to show that there was no entrustment and, therefore, no criminal breach of trust. This rule, it is submitted, is more a rule of policy than a strictly correct rule of evidence and it was so treated by Heaton, J., in the Bombay case last cited. A criminal Court is not entitled to disregard the decree of a civil Court declaring rights to the identical property in dispute in the criminal case.[8]

Criminal cases should be given precedence.—The Supreme Court has laid down the following in *Sheriff* v. *State of Madras.*

As between the Civil and the criminal proceedings, criminal matters should be given precedence. There is some difference of opinion in the High Courts of India on this point. No hard and fast rule can be laid down but the possibility of conflicting

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1. *Trailokyanath Das* v. *E.*, 59 C 136 : 137 IC 163 : 1932 C 293 : 33 Cr LJ 441 ; *Gogun Chunder Ghose* v. *E.*, 6 C 247.
2. *Raghunath Singh* v. *E.*, 15 P 386 : 1936 P 537 : 165 IC 289 : 37 Cr LJ 1126 ; *Trailokyanath Das* v. *E.*, 59 C 136 : 137 IC 163 : 1932 C 293 ; 33 Cr LJ 441 ; *Raj Kumari Debi* v. *Bama Sundari Debi*, 23 C 610 : *Gogun Chunder Ghose* v. *E.*, 6 C 247 ; distinguished in *Damodar Sahu* v. *State*, 1955 Orissa 156.
3. *Kashyap* v. *E.*, 1945 L 23 : ILR 1944 L 408 : 217 IC 284 : 46 Cr LJ 296 (FB).
4. *E.* v. *Khwaja Nazir Ahmad*, 1945 PC 18 ; *Mansharam Madhavdas* v. *Chetanrame Rupchand*, 1945 S 32.
5. *Trialokyanath Das* v. *E.*, 59 C 136 : 137 IC 163 : 1932 C 293 : 33 Cr LJ 441 ; *Tarapada Biswas* v. *Kalipada Ghose*, 51 C 849 : 88 IC 677 : 1924 C 639 : 26 Cr LJ 117 ; *Gogun Chunder Ghose* v. *E.*, 6 C 247.
6. *Padmanabhini Ramanomma* v. *Golusu Appalanarasayya*, 55 M 346 : 136 IC 348 : 1932 M 254 : 33 Cr LJ 307.
7. In re Markur, 41 B 1 : 33 IC 633 : 17 Cr LJ 153 ; See also In re Velayutham Chetty, 72 IC 172 : 1924 M 516 : 24 Cr LJ 332.
8. *Varadaraja Chettiar* v. *Swami Maistry*, 1948 M 49 : 1947 2 MLJ 179 : 48 Cr LJ 1002 : 60 MLW 499 : 1948 MWN 62 ; but see *Mst. Hosnaki* v. *State*, 1956 A 81.

decisions in the civil and criminal Courts is not a relevant consideration. The law envisages such an eventuality when it expressly refrains from making the decision of one Court binding on the other, or even relevant, expect for certain limited purposes, such as sentence or damages. The only relevant consideration is likelihood of embarrassment. A civil suit often drags on for years and it is undesirable that a criminal prosecution should wait till everybody concerned has forgotten all about the crime. The public interests demand that criminal justice should be swift and sure; that the guilty should be punished while the events are still fresh in the public mind and that the innocent should be absolved as early as is consistent with a fair and impartial trial. Another reason is that it is undesirable to let things slide till memories have grown too dim to trust. This, however, it not a hard and fast rule. Special considerations obtaining in any particular case might make some other course more expedient and just.[1]

Judgment of acquittal in a suit for damages for malicious prosecution—See notes to section 13 under this heading.

Malicious Prosecution : Suit for damages.—Malicious prosecution—Suit for damages—'Prosecutor' who is—Determination—First information report for criminal case dogged by first defendant—Other defendants examined therein as prosecution witness. Their evidence however not accepted by criminal Court—Such non-acceptance does not and cannot prove conspiracy between those defendants and the first defendant in initiating the prosecution—Hence those defendants are not presecutors—Suit against them therefore, is not maintainable—First defendant is the prosecutor.[2]

Admissibility of a judgment of the criminal Court in a suit for damages.—The judgment of the criminal Court is admissible in evidence in the civil proceedings but only as a *prima facie* evidence of negligence.[3]

Plea of autrefois acquit.—A plea of *autrefois acquit*, which is statutory recognised under section 403 Cr. P. C. arises when a person is tried again for the same offence or on the same facts for ay other offence for which a different charge from the one made against him might have been made under section 236 or for which he might have been convicted under section 237. Where, however, neither of these provisions is applicable, because the two offence are distinct and spaced slightly by time and place, and require different charges, the Court should order separate trials and the prior acquittal cannot create a bar in reaching a conviction. The earlier judgment is no doubt admissible to show the parties and the decision but it is not admissible for the purpose of relying upon the apparition of evidence. If the bar under section 403 does not operate, the earlier judgment is not relevant for the interpretation of evidence in the subsequent trial.[4]

In a prosecution for perjury, the judgment in the proceeding in which evidence was given is inadmissible.—Where a person is on his trial on a charge of having given false evidence, the judgment in the proceeding in which he is alleged to have given evidence is not admissible in evidence against him.[5]

A judgment may be secondary evidence of the pleadings of the parties thereto, and of any statement, admission or acknowledgment.—A previous judgment is ad-

1. 1954 SCJ 458 ; 1954 SCR 1144.
2. *Jogendra Garabdu* v. *Lingraj*, 35 Cut. LT 835.
3. *Nettleship* v. *Weston*, 1972 ACJ 115.
4. *Kharkan* v. *State of U. P.* ILR (1964) 1 A 519.
5. *Oates* v. *E.*, 76 IC 417 ; 1924 C 104 ; 25 Cr LJ 177.

missible to prove a statement,[1] or an admission,[2] or an acknowledgment[3] made by a party or the predecessor in interest of a party in his pleadings in the previous suit. It is also admissible to prove an arrangement come to between the parties to the first suit.[4] A judgment narrating the substance of the pleadings of the parties to a litigation may furnish evidence of the allegations made by them on that occasion.[5] It should, however, be remembered that when a judgment is used for any for the aforesaid purpose, it is not by itself a relevant fact but merely proof of something relevant contained in the pleadings : the provisions of section 43 are therefore, not in a point when such use is made of a judgment. A judgment is no more than secondary evidence of the pleadings and it is doubtful whether a judgment would at all be admissible for this purpose where original pleadings are available.[6] In any case recitals in a judgment are no evidence whatever to prove the exact admission made by a party or a witness unless the whole of the statement is recited therein.[7] See notes to section 25 and 13.

Finding by a Co-operative Societies' Deputy Registrar.—This section lays down that judgments are irrelevant unless their existence is a fact in issue or relevant. Thus, the finding given by the Deputy Registrar of Co-operative Societies surcharging a Hindu father in respect of an amount misappropriated by him, could not be used in evidence in a suit by his sons to avoid the debt as 'Avyavaharika'. His order would be relevant to prove the existence of the order but not the truth of the facts stated therein.[8]

Contradicting a witness by a judgment whether admissible as proof of the deposition of a witness or the terms of a document referred to in that judgment ?—Where A swore that her son B was born on March 18th, i.e. five days after her marriage, an order of deceased Justices reciting that A swore B was born on March 8th was received to contradict her testimony, though not to prove the bastardy or date of birth.[9] If the object be to discredit a witness by proving that he has given different testimony in a former trial, the judgment in that case, though the litigating parties be strangers, will be admissible for the purpose of introducing the evidence of his former statement.[10] But it has been doubted in India whether a judgment is proof of the statement which is attributed to the witness in the judgment.[11] Extracts from a judgment re-

1. *Krishnasami Ayyangar* v. *Rajagopala Ayyangare*, 18 M 73 ; *S. K. Ramaswami Goundan* v. *S.N.P. Subbaraya Goundanm*, 1948 M 388 ; but see *Nanduri Saradamba* v. *Parakala Pattabhiramayya*, 53 M 952 ; 129 IC 463 ; 1931 M 207 ; *See* also the next note.
2. *Collector of Gorakhpur* v. *Ram Sundar Mal*, 56 A 468 ; 150 IC 545 ; 1934 PC 157 ; *Subbaraya Chettiar* v. *Sellamuthu Asari*, 142 IC 548 ; 1933 M 184 *Rudra Pratap Narain Singh* v. *Nirman Prasad Singh*, 74 IC 225 ; 1923 O 61 ; *Mirza Shamsher Bahadur* v. *Kunj Behari Lall*, 7 CLJ 414 ; 12 CWN 273 ; *Lakshman Govind* v. *Amrit Gopal*, 24 B 591 ; *Parbutty Dassi* v. *Purno Chunder Singh*, 9 C 586 ; *But see Molar* v. *Ram Parshad*, 102 IC 198 ; 1927 L 377 ; *Tripurana Seethaspati Rao Dora* v. *Rokham Venkanna Dora*, 45 M 332 ; 66 IC 280 ; 1922 M 71 (FB).
3. *Obiter in Udamanthala Nalupuratatil Ibraine* v. *Parameswara Bavannavar*, 85 IC 996 ; 1925 M 1019 ; *See Hari Chand* v. *Phiraya Ram*, 11 IC 377 : 180 PLR 1911 ; *But see Jaigopal Misir* v. *Sheo Sagar* Singh, 4 IC 579.
4. *Mohamnad Ahamd Said Khan* v. *Masihullah Khan*, 28 IC 387.
5. *Kailas Chandra Nag* v. *Bijay Chandra Nag*, 72 IC 680 ; 1923 C 18 ; *Kundan Bibi* v. *Magan Lal*, 139 IC 718 : 1932 A 710.
6. *See Medavarapu Narasavya* v. *Medavarupa Veeravya*, 154 IC 753 ; 1935 M 268 ; *Tripurana Seethapati Rao Dora* v. *Rokkam Venkanna Dora*, 45 M 332 ; 66 IC 280 ; 1922 M 71 (FB) ; *Ram Sunder Gope Sikdar* v. *Haribala Dubi*, 37 IC 911.
7. *Indra Singh* v. *Commissoner of Income-tax*, 1943 P 169.
8. *S.M. Jakati* v. *S.M. Brokar*, (1959) 2 MLJ 21 (SC).
9. *Watson* v. *Little*, 5 H & N 472 ; Taylor § 168.
10. Taylor, § 1668.
11. *Nanduir Saradamba* v. *Parakala Pattabhiramayya*, 53 M 952 ; 129 IC 463 ; 1931 M 207 ; *Asa Singh* v. *Mansha Ram*, 121 IC 509 ; 1930 L 237.

producing what a person stated in his evidence on a former occasion are not admissible to discredit the deponent, unless the statement attributed to him is put to him under section 145 of the Act.[1] A judgment is not sufficient proof of the terms of a document which is referred to in the judgment,[2] A Settlement Officer's report on the suvery and settlement of a district is not secondary evidence of the contents of the *jamabandi* statement referred to in the report.[3] In an Allahabad case, however, an order of the Court which set forth the terms in which an application was made, was treated as secondary evidence of the terms of the application under section 63 (3), the original application having been destroyed.[4]

Sections 11, 13 and 43.—Absconding accused separated and tried later—Judgment if admissible as evidence in revision in case of other accused. The provisions of sections 11 and 13 read with section 43 of the Evidence Act do not come in aid of the petitioners to establish their plea that the judgment of the Ist Additional Assistant Sessions Judge, Vijayawada acquitting accused 2 and 7 for offences relating to the same transaction under which the petitioners have been convicted by the 2nd Additional Assistant Sessions Judge, Vijayawada, as accused 2 and 7 were absconding and their case was separated from the other accused, is admissible in evidence.[5]

Motor accidents Tribunal and Criminal Judgment.—The judgment of a criminal Court in a prosecution arising out of a motor accident determining the guilt or innocence of the driver of the motor vehicle concerned, is neither conclusive nor binding on the Motor Accidents Claims Tribunals, dealing with a claim petition under section 110 C of the Motor Vehicles Act, and its findings as to the guilt or otherwise of the driver are wholly irrelevant for the purpose of that trial on merits of the claim petition before the Motor Accidents Claims Tribunal. Such judgment can however be relevant only for the purpose and to the extent specified in section 43.[6]

44. Fraud or collusion in obtaining judgment or incompetency of Court, may be proved.—Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under Sections 40, 41 or 42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion.

COMMENTARY

Avoiding circumstances of a judgment admitted under section 40, 41 or 42.—This section mentions the circumstances which, if proved, would avoid the evidentiary effect of a judgment admitted under section 40, 41, or 42 ; it does not apply to judgment

1. *Nanduir Saradamba* v. *Parakala Pattabhiramayya*, 53 M 952 ; 129 IC 463 ; 1931 M 207.
2. *Jagnatha Naidu* v. *Secretary of State*, 70 IC 107 ; 1922 M 334 ; *Ram Harakh* v. *Jagdmba Debi*, 54 IC 574 ; *See Ambalavana Pandarasannadhi* v. *Kuppachi Janki Ammal*, 35 IC 201 ; *Ambalavana Pandara Sannadhi* v. *Kuppachi Janaki Ammal*, 26 IC 618.
3. *Surendra Nath Karan Deo* v. *Kamakhya Narain Singh*, 123 IC 145 ; 1930 PC 45.
4. *Kundan Bibi* v. *Magan Lal*, 139 IC 718 ; 1932 A 710.
5. *Bojigani Moogadu*, In re, (1971) 1 An WR 316.
6. *Municipal Committee, Jullundur City* v. *Shri Ramesh Saggi*, 72 Pun LR 452 ; 1969 ACJ 135 ; *see APSRT Corpn.* v. *Sravaji*, AIR 1990 AP 162 .

admissible under section 43.[1] The section provides that a party to a suit or other proceeding may show that a judgment, order or decree which is relevant under section 40, that is, which would, as a judgment *inter partes*, operate as *res judicata;* or which is relevant under section 41, that is , which is evidence as a judgment *in rem*; or which is relevant under section 42, that is, which is evidence as a judgment relating to a public matter, —and which is proved by the adverse party, was passed by a Court which had no jurisdiction to pass it or was obtained by fraud or collusion.[2] The section does not apply to transfers of property either as a part of the decree or in carrying out the decree.[3] The section is very wide and lays down not merely a value of law relating to evidence but also a rule of procedure as to how the judgment should be impeached.[4]

In order to render the earlier decree inoperative, it is not necessary that it should be reversed or superseded by proceedings arising out of the same case. On the other had, it may be collaterally superseded and rendered ineffective even by some ulterior and independent proceedings. What is material is, that the parties to the first decree must also be parties to the subsequent proceedings, so that the decision in such subseqent proceedings may be binding on them. The rights and liabilities covered by the decree must also have been considered and adjudicated upon in the subsequent proceedings. When there have been two adjudications binding on the same parties in respect of the same right, the later adjudication has to pevail over the earlier one.[5] The section is not exhaustive of the grounds on which a decree can be set aside. It deals only with cases in which a party to a suit or other proceeding has been properly represented. It does not cover cases of decrees passed against dead persons and against minors and lunatics who are not properly represented or against whom a decree has not been duly obtained. So a decree can be set aside also on one of these grounds.[6] A compromise decree can be set aside on the ground of misrepresentation, undue influence, coercion etc.[7]

The section is applicable both to civil and criminal proceedings. In cognizable cases, the Magistrate no doubt controls the proceedings, but, even in such cases, it is possible for a private complainant to collude with the accused and obtain an acquittal by perpetrating fraud upon the Court. It can, therefore, be shown that the acquittal was brought about by fraud or collusion, and is therefore a nullity.[8]

Avoiding circumstances may be shown in the proceedings in which the decree or order is given in evidence.—When a judgment is given in evidence under section 40, 41 or 42, the party against whom it is given in evidence may, in the proceeding in which it is given in evidence, show that the judgment was given by a Court not competent to give it, or that it was obtained by fraud or collusion, and a separate suit to have the judgment set aside is not necessary. Having regard to the wide terms of

1. *Sankhavram* v. *Rangasubbe Akkappa Rao*, 1941 M 569 ; 53 MLW 352.
2. *Sita Devi* v. *Gopal Narayan Singh*, 111 IC 762 ; 1928 P 375 ; *Prayag Kumari Debi* v. *Siva Prosad Singh*, 93 IC 385 ; 1926 C 1 ; *Biswa Nath Prosad Mahata* v. *Bhagwandin Pandey*, 10 IC 536 ; 14 CLJ 648 ; *Rajib Panda* v. *Lakhan Sendh Mahapatra*, 27 C 11.
3. *Arvi Co-operative Credit Society, Ltd.* v. *Dhondiram Navalchand*, 1940 B 289 ; ILR 1940 B 526 ; 190 IC 606.
4. *Bishunath Tewari* v. *Mst. Mirchi*, 1955 P 66.
5. *Padmanabhan Krishnan* v. *Mathevan Pillai Kesava Pillai*, 1952 TC 294 ; *Shama Purshad* v. *Hurro Purshad*, 10 MIA 203 ; *Naganna* v. *R. Venkatapayya*, 1923 PC 167 ; *Moturi Seshayya* v. *Venkatadri Appa Row*, 1917 M 950 ; 31 MLJ 219 ; *Rukamani Ammal* v. *Narasimna Iyer*, 1921 M 612 ; 1921 MWN 487.
6. *Moti Lal* v. *Murli*, 1951 AWR (HC) 407.
7. *Moti Lal* v. *Murli*, 1951 AWR (HC) 407.
8. *Narmada Prasad Singh* v. *State of Vindhya Pradesh*, 1956 VP 30; *Kamla Shanker Singh* v. *State*, 1988 ALJ 485.

section 44, it cannot be said that it is not open to a Court other than the Court from which a grant of administration has issued, in cases of fraud or collusion, to deal with the matter and decide whether the grant was obtained by fraud or collusion. But in such cases where it is open to the party alleging fraud or collusion, to apply to the Court from which the grant was issued, the better course would be to stay the suit filed on the basis of the letters of administration, to enable an application to be made to the proper Court to revoke the grant.[1] It has, however, been held by a Calcutta Full Bench that it is not open to a Court in proceedings for rateable distribution, and that a decree-holder, is entitled to share in the assets of the judgment-debtor, unless the decree is set aside in appropriate proceedings taken for the purpose.[2]

The plea of *res judicata* presupposes a valid legal decree or judgment. Where the decree is a nullity and non-existent in the eye of law, no plea of *res judicata* can be founded upon it. A party to the suit in which such a decree was obtained just as much as any atranger can show that it is so.[3]

Foreign judgment may be assailed by a stranger on the grounds mentioned in the section—A decree *in rem* passed by a foreign Court can be assailed in India even by persons who were not parties to the suit in which it was pronounced, on the ground that it was not pronounced by a Court of competent jurisdiction or that it was obtained by fraud or collusion.[4]

WANT OF JURISDICTION

Judgment delivered by a Court " not competent" do deliver it is void ; distinction between total want of jurisdiction and erroneous exercise of jurisdiction.—Venkatarama Ayyar, J., in delivering the judgment of the Supreme Court in *Kiran Singh* v. *Chaman Paswan*[5] observed.

"It is a fundamental principle well established that a decree passed by a Court without jurisdiction is a nullity, and that invalidity could be set up whenever and whoever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject matter of the action, strikes at the very authority of the court to pass any decree and such a defect cannot be cured even by consent of parties". The words " not competent" in section 44 refer to a Court acting without jurisdiction.[6] The section refers to the lack of inherent jurisdiction in the Court and not to its territorial jurisdiction.[7] In Article 46 of Sir James Stephen's Digest of the law of evidence, the corresponding rule of English law is stated to be that whenever a judgment is offered as evidence, the party against whom it is so offered may prove that the Court which gave it had no jurisdiction. The "compentency" of a Court and its "jurisdiction" are thus synonymous terms.[8] A judgment or decree passed without jurisdiction is a nullity;[9] and when a decree is void and a nullity; it is the duty not only of

1. *Rakashab Mandal* v. *Tarangini Deyi*, 62 IC 448 ; 1921 C 332.
2. *Biswambar Biswas* v. *Aparna Charan Mohary*, 62 C 715 ; 155 IC 480 ; 1955 C 290 (FB).
3. *Rengal Coal Co. Ltd.* v. *Balmukunda Goenka*, ILR 1951 ; 1 Cal 168.
4. *Sita Devi* v. *Gopal Narayan Singh*, 111 IC 762 ; 1928 P 375.
5. (1955) (1) SCR 117 (SC).
6. *Ketlilamma* v. *Kelappan*, 12 M 228.
7. *Hiralal* v. *Kalinath*, 1955 A 569.
8. *Sardarmal Jagonath* v. *Aranvayal Sabhapathy Moodaliar*, 21 B 205, 212 .
9. *Keshvalal Sakhidas* v. *Amarchand Somchand*, 57 B 456 ; 148 IC 116 ; 1933 B 398 ; *Sita Devi* v. *Gopal*

the Court which passed it to ignore it but of every Court to which it is presented.[1] There must, however, be a manifest lack of jurisdiction in the Court to render its decree or judgment void.[2] Jurisdiction may be defined to be the power of a Court to hear and determine a cause, to adjudicate or exercise any judicial power in relation to it. Such jurisdiction naturally divides itself under three broad heads, namely, with reference to (i) the subject-matter, (ii) the parties, and (iii) the particular question which calls for decision. Question of jurisdiction may consequently arise in one of three ways, that is, either in relation to the subject-matter, or in relation to the parties, or in relation to the question submitted for the decision of the Court.[3] "This classification into territorial jurisdiction, pecuniary jurisdiction and jurisdiction of the subject-matter is obviously of a fundamental character. Given such jurisdiction, we must be careful to distinguish exercise of jurisdiction from existence of jurisdiction, for fundamentally different are the consequences of failure to comply with statutory requirements in the assumption and in the exercise of jurisdiction. The authority to decide a cause at all, and not the decision rendered therein, is what makes up jurisdiction, and when there is jurisdiction of the person and subject-matter, the decision of all other questions arising in the case is but an exercise of that jurisdiction.[4] The distinction between cases where jurisdiction is assumed by a Court where there is absolute want of it and those where the Court in the exercise of its jurisdiction acts wrongly is of fundamental importance.[5] In the former case the decision is void and a nullity;[6] whereas in the latter case it is merely voidable.[7] and has due effect, unless set aside by apropriate proceedings.[8] It cannot be said that wherever a decision is wrong in law or violates a rule of procedure the Court must be held incompetent to deliver it. It has never been and could not be held that a Court which erroneously decree a suit which it should have dismissed as time-barred or as barred by the rule of *res judicata* acts without jurisdiction and is not competent to deliver its decree."[9]

The section has nothing to do with the competency of the former court to try the subsequent suit.[10]

Narayan Singh, 111 IC 762 ; 1928 P 375 ; *Ishan Chandra Banikya* v. *Moomraj Khan*, 97 IC 770 ; 1926 C 1101 ; *Gora Chand Haldar* v. *Profulla Kumar Roy*, 53 C 166 ; 89 IC 685 ; 1925 C 907 (FB) ; *Peary Lal Roy Chaudhuri* v. *Secretary of State*, 83 IC 446 ; 1924 C 913 ; *Haridayanath Roy* v. *Ram Chandra Barua Sarma*, 48 C 138 ; 58 IC 806 ; 1921 C 34 (FB) ; *See Gunnesh Pattro* v. *Ram Nidhee Koodoo*, 22 WR 361 ; *Doorga Das Dutt* v. *Umbika Churn*, 19 WR 284.

1. *Kunja Mohan Chakravarty* v. *Mainndra Chandra Roy Chaudhury*, 77 IC 253 ; 1923 C 619.
2. 3 NLR 185.
3. *Hridayanath Roy* v. *Ram Chandra Barua Sarma*, 48 IC 138 ; 58 IC 805 ; 1921 C 34 (BF) ; Order of Reference of Full Bench in *Sukh Lal* v. *Tara Chand*, 33 C 68 ; 2 Cr LJ 618.
4. *Hridyanath Roy* v. *Ram Chandra Barua Sarma*, 48 C 138 ; 58 IC 806 ; 1921 C 34 (FB) , Per Mookerjee ACJ.
5. *Ishan Chandra Banikya* v. *Moomraj Khan*, 97 IC 770 1926 C 1101 ; *Gora Chand Haldar* v. *Profulla Kumar Roy*, 53 C 166 ; 89 IC 685 ; 1925 C 907 (FB) ; *Pramatha Nath Bose* v. *Bhuban Mohan Bose*, 49 C 45 ; 64 IC 980 ; 1922 C 321 ; *Hridyanath Roy* v. *Ram Chandra Barua Sarma*, 48 C 138 ; 58 IC 806 ; 1921 C 34 (FB) ; *Sardarmal Jagonath* v. *Aranvayal Sabhapathy Moodliar*, 21 B 205, 212.
6. *Ishan Chandra Banikya* v. *Moomraj Khan*, 97 IC 770 ; 1926 C 1101 ; *Peary Lal Roy Chaudhuri* v. *Secretary of State*, 83 IC 446 ; 1924 C 913 ; *Hridyanath Roy* v. *Ram Chandra Barua Sarma*, 48 C 138 ; 58 IC 806 ; 1921 C 34 (FB)
7. *Hridyanath Roy* v. *Ram Chandra Barua Sarma*, 48 C 138 ; 58 IC 806 ; 1921 C 34 (FB)
8. *Ishan Chandra Binkya* v. *Moomraj Khan*, 97 IC 770 : 1926 C 1101, *Nathu Ram* v. *Kolian Das*, 26 A 522.
9. *Ishan Chandra Banikya* v. *Moomraj Khan*, 97 IC 770 ; 1926 C 1101 ; *Nathu Ram* v. *Kolian Das*, 26 A 522 ; *Carston* v. *Carston*, 22 A 270 (FB).
10. *Newton Hickie* v. *Official Trustee of West Bengal*, 1954 C 506.

Separate proceedings to set aside a decree or an order made without jurisdiction are not necessary.—This section clearly provides that when a judgment is offered as evidence, the party against whom it is so offered may prove that the Court which gave it had no jurisdiction.[1] Objection to a judgment, order or decree on the ground of want of jurisdiction may be taken by anybody, whether party or stranger. An order made without jurisdiction being null and void, it is not necessary to take independent proceedings to have it set aside.[2] When any such order is tendered in evidence against a party in a proceeding, he may in that very proceeding show the order to be a nullity, on the ground that it was made by a Court having no jurisdiction to make it.[3] If a judgment is given in evidence under section 40 of the Evidence Act in support of a plea of *res judicita*, the party against whom the judgment is offence in evidence may avoid the judgment by proving that the Court which gave the judgment had no jurisdiction.[4] In proceedings for rateable distribution of assets under section 73. C. P. Code, however, the Court is not entitled to inquire into the validity of a decree. The proper course for the judgment-debtor in such a case is to have the decree set aside in separate proceedings.[5]

The Court executing a decree is entitled to refuse to execute it if it was made by a Court not having jurisdiction.—Though this section is not strictly relevant to the question whether an executing Court can refuse to execute a decree made by a Court not having jurisdiction,[6] it has, on principle, been held that an executing Court can execute only a valid decree and that a void decree ought to be disregarded by the executing Court, can execute only a valid decree and that a void decree ought to be disregarded by the executing Court, even though formal proceedings have not been taken to have it set aside.[7] Where the decree presented for execution was made by a Court which apparently had no jurisdiction, whether pecuniary or territorial or in respect of the judgment-debtor's person to make the decree, the executing Court is entitled to refuse to execute it, on the ground that it was made without jurisdiction.[8] Absolute want of jurisdiction should, however, be distinguished from an erroneous exercise of jurisdiction.[9] The decree in the latter case not being void.

Section is subject to section 11 of the Code of Civil Procedure.—This section is to be read subject to section 11 of the Code of Civil Procedure. Where a question as to jurisdiction of the Court was in issue in the previous suit and a finding given on it, the parties would not be allowed to resort to this section in a subsequent proceeding.[10]

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1. *Sardarmal Jagonath* v. *Aranvayal Sabapathy Moodliar*, 21 B 205 , 212.
2. *Keshavlal Sakhidas* v. *Amirchand Somchand*, 57 B 456 ; 148 IC 116 ; 1933 B 398 ; *Prayag Kumari Debi* v. *Siva Prosad Singh*, 93 IC 385 ; 1926 C 1 ; *Peary Lal Ray Chaudhury* v. *Secretary of State*, 83 IC 446 ; 1924 C 913 ; *Bansi Lal and others* v. *Dhapo*, 24 A 242.
3. *Golub Sao* v. *Chowdhury Madho Lal*, 9 CWN 956 ; *see Gunnesh Pattro* v. *Ram Nidhee Koondoo*, 22 WR 361 ; *see also Padmanabhan Krishnan* v. *Mathevan Pillai Kesava Pillai*, 1952 TC 294.
4. *Abdul Kadir Ibrahim* v. *Dulanbibi*, 37 B 563 ; 20 IC 530.
5. *Biswambar Biswas* v. *Aparna Charan Mohary*, 62 C 715 ; 155 IC 480 ; 1935 C 290 (FB).
6. See *Biswa Nath Prosad Mahata* v. *Bhagwandin Pandey*, 10 IC 536 ; 14 CLJ 648.
7. *Jungli Mal* v. *Ladhu Ram Marwari*, 50 IC 529 (FB) ; *Subramania Aiyar* v. *Vaithinatha Aiyar*, 38 M 682 ; 31 IC 198 ; *Imdad Ali* v. *Jagan Lal*, 17 A 478 ; *Haji Musa Haji Ahmad* v. *Purmand Nursey*, 15 B 216 ; *But see Biswambar Biswas* v. *Aparna Charan Mohary*, 1935 C 290 (FB).
8. *Gora Chand Haldar* v. *Profulla Kumar Roy*, 53 C 166 ; 89 IC 685 ; 1925 C 907 ; (FB), overruling *Kalipada Sirkar* v. *Harimohan Dalal*, 44 C 627 ; 35 IC 856; *Biswa Nath Prosad Mahata* v. *Bhagwan Din Pandey* 10 IC 536 ; 14 CLJ 648.
9. *Gora Chand Haldar* v. *Profulla Kumar Roy*, 53 C 166 ; 89 IC 685 ; 1925 C 907 (FB).
10. *Newton Hickie* v. *Official Trustee of West Bengal*, 1954 C 506.

FRAUD

Fraud as an avoiding circumstance of a judgment, order or decree.—Fraud vitiates the most solemn proceedings of Courts of justice,[1] and reopens and nullifies all judicial acts.[2] The validity of a judgment order or decree may be questioned on the ground that it was pronounced through fraud, contrivance or covering of any description,[3] and it is competent to any Court to vacate any judgment, order or decree, if it be proved that it was obtained by manifest fraud.[4]

Fradulent nature of the judgment order or decree may be proved in the proceeding in which it is tendered in evidence, and a previous separate suit to have it set aside is not necessary.—A judgment, order or decree obtained by fraud upon a Court binds not such court, nor any other, and its nullity upon this ground, though it has not been reversed or set aside, may be alleged in a collateral proceeding,[5] Section 44, lays down not only a rule of evidence but also a rule of procedure. Under this section it is competent for a party against whom a judgment, order or decree has been proved under section, 40, 41 or 42 to show in the very proceeding in which it has been so proved that the judgment, order or decree was obtained by fraud and it is not necessary for him to have it previously set aside by a separate suit.[6] Proof of fraud is sufficient to nullify a decree or order, whether under the Civil Procedure Code or otherwise; e.g. an entry in a Settlement record or Record of Rights,[7] without that order, decree or entry having been formally set aside, and even though a suit to have the decree or order set aside has become time—barred.[8] But a Court cannot refuse rateable distribution or a decree-holder under section 73, C. P. Code, on the ground that his decree was obtained by fraud, unless the decree is set aside by appropriate proceedings taken for the purpose.[9]

No *res judicata* if the previous judgment, order or decree was obtained by fraud or collusion.—The rule as to *res judicata* must be taken to be qualified by the provisions of section 44 of the Evidence Act.[10] If the previous judgment, order or decree was obtained by fraud or collustion, there can be no question of *res judicata*.[11] The rule allowing the vacating of a judgment for fraud is not an exception to the rule of *res*

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1. *Duchess of Kingston's Case*, 20 How, St. Tr. 355.
2. *Narsing* Das. v. *Bibi Rafikan*, 37 C 197 ; 5 IC 198.
3. *Bandon* v. *Behcer*, 3 C & F 510.
4. *Paranjpe* v. *Kanade*, 6 B 148 ; *Philipson* v. *The Earl of Egremont*, 6 A & E 587 , 605 ; *Sarvjit Singh* v. *IIIrd Adl. District Judge* 1988 ALJ 270.
5. *R* v. *Saddlers Co.* (1863) 10 HLC 404 ; 431. per Willes J ; *Hare Krishna Sen* v. *Umesh Chandra Dutt*, 62 IC 962 ; 1921 P 193 (FB).
6. *Bhagwandas Narainda*s v. *Patel & Co.*, 1940 B 131 ; 187 IC 867 ; 41 Cr LJ 526 ; 42 Bom. LR 231 ; *Bhola Nath Bose* v. *Nagendra Bala Chaudhurani*, 110 IC 571 ; 1928 C 810; *Prayag Kumari Debi* v. *Siva Prosad Singh*, 93 IC 385 ; 1926 C 1 ; *Pulin Behari Dey* v. *Satya Charan Dev*, 70 IC 549 ; 1923 C 79 ; *Hare Krishna Sen* v. *Umesh Chandra Dutt*, 62 IC 962 ; 1921 P 193 (FB) ; *Rakshab Mandal* v. *Trangini Devi*, 62 IC 448 ; 1921 C 332 Aswini *Kumar Samaddar* v. *Banamali Chakrabarty*, 40 IC 607 ; 21 CWN 594 ; *Rajib Panda* v. *Lakhan Sendh Mahapatra*, 27 C 11 ; *Bishunath Tewari* v. *Mst. Mirchi*, 1955 P 66 ; *see Nistarini Dassi* v. *Nundo Lal Bose*, 30 C 369 ; *Ahmdbhoy Habibhoy* v. *Vulleebhoy Cassumbhoy*, 6 B 703.
7. *Hare Krishna Sen* v. *Umesh Chandra Dutt*, 62 IC 962 ; 1921 P 193 (FB) ; *Sib Saran Shah* v. *Kameshwar De*, 60 IC 640 ; 1921 P 359 ; *Mir Mozuffar Ali* v. *Kali Prosad Saha*, 22 IC 789 (2).
8. *Bhola Nath Bose* v. *Nagendra Bala Chaudhurani*, 100 IC 571 ; 1928 C 810 ; *Rajib Panda* v. *Lakhan Sendh Mahapantra*, 27 C 11.
9. *Biswambar Biswas* v. *Aparna Charan Mohary*, 62 IC 715 ; 155 IC 480 ; 1935 C 290 (FB).
10. *Radha Kishen* v. *Wajib Ali Khan*, 36 IC 746 ; *Abdul Kadir Ibrahim* v. *Dulanbibi*, 37 B 563 ; 20 IC 530.
11. *Hare Krishen Sen* v. *Umesh Chandra Dutt*, 62 IC 962 ; 1921 P 193 (FB) ; *Radha Mishen* v. *Wajid Ali Khan*, 36 IC 746 ; *Krishnabhupati* v. *Ramamurti*, 16 M 198.

judicata but is independent, and outside the scope, of that principle.[1] But if the decree has been acted upon after the person questioning it became aware of its fraudulent nature, it will be no longer open to him to question it.[2]

What is fraud?—It is impossible to define the grounds on the which fraud can be proved.[3] The Evidence Act does not define fraud, but the Indian Contract Act defines it as follows :—"Fraud' means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto his agent, or to induce him to enter into the contract—

(i) the suggestion, as a fact, of that which is not true by one who does not believe it to be true;
(ii) the active concealment of a fact by one having knowledge or belief of the fact ;
(iii) a promise made without any intention of performing it;
(iv) any other act fitted to deceive ;
(v) any such act or omission as the law specially declares to be fraudulent.

Explanation.—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence in itself is equivalent to speech''.[4]

In the absence of any special definition of it, the word "fraud" should be taken to have been used in section 44 of the Evidence Act in its ordinary sense which has been adopted in section 17 of the Contract Act.

Fraud in section 44 means " actual" and not "constructive" fraud.—Writers on equity distinguish two kinds of fruad, viz., actual or positive fraud and constructive fraud. The former is applied to those cases in which there is an intention to commit a cheat or deceit upon another person to his injury. "By constructive frauds are meant, says Mr. Story, such acts or contracts as, although not originating in any actual evil design or contrivance to perpetrate a positive fruad or injury upon other persons, are yet by their tendency to deceive or mislead other persons, or to violate private or public confidence, or to impair or injure the public interest, deemed equally reprehensible with positive fraud, and therefore, are prohibited by law as within the same reason and mischief as acts and contracts done *malo animo*. it is only in connectiong with the subject of actual or positive fraud that Mr. Story mentions frauds in verdicts, judgments, decrees and other judicial proceedings,[5] and it is in this restricted sense that the word seems to have been used in section 44. In order to get rid of a former judgment, it is not sufficient for a person to prove constructive fraud.[6] He must prove actual positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case and the obtaining of that judgment by that contrivance.[7] A prior judgment cannot be upset on a mere general allegation of fraud or

1. *Logadapatti Chinnayya* v. *Kotla Ramanna*, 38 M 203 ; 19 IC 579.
2. *Pulin Behari Dey* v. *Satya Charan Dey*, 70 IC 548 ; 1923 C 79.
3. *Muktamala Dasi* v. *Ram Chandra De*, 31 CWN 258 ; 1927 C 84 ; 97 IC 879.
4. Section 17, Act IX 1872.
5. Field, Ev., 8th Ed., 376-77.
6. *Bishen Singh* v. *Wasawa Singh*, 92 IC 317 : 1926 L 177 ; *Laxmi Narain Gadodia* v. *Mohd. Shafi Bari*, 1949 EP 141.
7. *Bishen Singh* v. *Wasawa Singh*, 92 IC 317 : 1926 L 177 ; *Janki Kuer* v. *Lachmi Narain*, 37 A 535 : 30 IC 789 ; *Nanda Kumar Howladar* v. *Ram Jiban Howladar*, 41 C 990 : 23 IC 337 ; *Patch* v. *Ward*, 1867, 3 Ch A 203 : 18 LT 134 ; *Mahomed Hashim Ali* v. *Iffat Ara Hamidi Begum*, 1942 C 180 : 200 IC 392 ; *Laxmi Narain Gadodia* v. *Mohd. Shafi Bari*, 1949 EP 141 ; Kerr on Fraud & Mistake, 5th Ed., 344.

collusion, it must be shown how, when, where and in what way the fraud was committed.[1] A party alleging fraud is bound to establish it by cogent evidence and suspicion cannot be accepted as proof.[2] Fraud can be proved by circumstantial evidence, and if the circumstances are such as from which no other inference except that of fraud can be deduced, it would not be right to throw out the plea merely for want of direct proof.[3]

Fraud must be extrinsic or collateral to everything adjudicated upon and not such as has been dealt with by the Court passing the judgment sought to be vacated.—Fraud must be extraneous to the decree;[4] it must be fraud, vitiating the proceedings in which the decree was passed.[5] The decree should have been obtained by fraud practised upon the Court[6] or by preventing a party by tricks and misrepresentations from conducing his case properly.[7] In order that fraud may be a ground for vacating a judgment, it must be a fraud that is extrinsic or collateral to everything that has been adjudicated upon, and not such as has been or must be deemed to have been dealt with by the Court that passed the judgment sought to be vacated.[8]

It may be shown that the Court was misled, but not that the Court was mistaken; decree cannot be attacked on the ground that it was procured by perjured evidence.—With respect to the question, what constitutes fraud for which a decree can be set aside, two propositions appear to be well established. The first is that although it is not permissible to show that the Court in the former suit was mistaken, it may be shown that it was misled: in other words, where the Court has been intentionally misled by the fraud of a party and a fraud has been committed upon the Court with the intention to procure its judgment, it will vitiate its judgment. The second is that a decree cannot be set aside merely on the ground that it has been procured by perjured evidence.[9] There has been considerable difference of opinion in England as to whether an action would lie to set aside the judgment of an English Court on the ground that it had been obtained by perjured evidence.[10] In this country also there has been some dif-

1. *Shidden* v. *Patrick*, 1854, 1 Macq 535 : 149 RR 55 ; *Laxmi Narain Gadodia* v. *Mohd Shafi Bari*, 1949 EP 141.
2. *Hans Raj Gupta* v. *Dehradoon Mussoorie Electric Tramway Co. Ltd.*, 1940 PC 98 ; *A.L.N. Narayana Chettyar* v. *Official Assignee, High Court Rangoon*, 1941 PC 93 ; 196 IC 404 ; ref. in *Laxmi Narain Gadodia* v. *Mohd. Shafi Bari*, 1949 EP 141.
3. *Laxmi Narain Gadodia* v. *Mohd. Shafi Bari*, 1949 EP 141.
4. *Jagarnath Prasad* v. *Bahurani*, 62 IC 594 ; *Manindra Nath Mitra* v. *Hari Mandal*, 54 IC 626 : 24 CWN 133 ; *Kadirvelu Nainar* v. *Kuppuswami Naicker*, 41 M 743 : 45 IC 774 (FB) ; *Nanda Kumar Howladar* v. *Ram Jiban Howladar*, 41 C 990 : 23 IC 337 ; *Logadapatti Chinnayya* v. *Kotla Ramanna*, 38 M 203 : 19 IC 579 ; *Maung Aung Myat* v. *Ma Ywet*, 10 IC 180.
5. *Muktamala Dasi* v. *Ram Chandra De*, 97 IC 879 : 1927 C 84 ; *Punjab Commercial Syndicate* v. *Punjab Co-operative Bank Ltd.*, 6 L 512 : 92 IC 322 : 1926 L 96 ; *Janki Kuer* v. *Mahabir Singh*, 58 IC 317 ; *Ram Narain Lall Shaw* v. *Tooki Sao*, 58 IC 182.
6. *Muktamala Dasi* v. *Ram Chandra, De*, 97 IC 879 : 1927 C 84 ; *Janki Kuer* v. *Mahabir Singh*, 58 IC 317.
7. See *Janki Kuer* v. *Mahabir Singh*, 58 IC 317.
8. *Musthan* v. *Mohendra Nath Singh*, 1 R 560 : 76 IC 794 : 1924 R 119 ; *Logadapatti Chinnoyya* v. *Kotla Ramanna*, 38 M 203 : 19 IC 579.
9. Per Chatterjee J., in *Mahindra Nath Mitra* v. *Hari Mondal*, 54 IC 626 : 24 CWN 133 ; *citing Baker* v. *Wadsworth*, (1898), 67 LJ QB 301 ; *Nanda Kumar Howladar* v. *Ram Jiban Howladar*, 41 C 990 : 23 IC 337 ; *Moruful Huq* v. *Surendra Nath Roy*, 15 IC 893 : 16 CWN 1002 ; *Abdul Haque Chowdhury* v. *Abdul Hafez* 5 C 648 : 11 CLJ 636 : *Mahomed Golab* v. *Mahomed Sulliman*, 21 C 612, 619 ; see also *Logadapatti Chinnoyya* v. *Kotla Ramanna*, 38 M 203 : 19 IC 579, where it has been remarked that the judgment of the Court includes the decision of the question that the testimony of any witness is true or false and whether a document produced in evidence is genuine or not.
10. *Kadirvelu Nainar* v. *Kuppuswami Naicker*, 41 M 743 : 45 IC 774 (FB), per Wallis, CJ ; *Baker* v. *Wadsworth*, (1898) 67 LJ QB 301 ; *Flower* v. *Lloyd*, (1878) 10 Ch D 327 and *Pach* v. *Ward*, (1867) 3 Ch

ference of opinion as to whether a decree can be set aside on the ground that it was obtained by perjured evidence. In *Muhammad Gulab* v. *Muhammad Suliman*,[1] it was held that it could not, and this has been followed, though not uniformly,[2] in other cases in the Calcutta High Court. The Madras High Court in *Venkatappa Naick* v.*Subba Naick*[3] held that deliberate perjury is a ground upon which a decree can be set aside. This decision was, however, overruled by the High Court Full Bench in *Kadirvelu Nainar* v. *Kuppaswami Naickar*.[4] The Allahabad High Court also has held that a judgment cannot be vacated on the ground that it was obtained by perjured evidence.[5] Thus, so far as the Courts of this country are concerned, there is at present title or no difference of opinion on the point that a decree cannot be got rid of merely on the ground that it was procured by false and perjured evidence.[6] It is not sufficient to allege that the judgment or decree was obtained on a false claim,[7] or by false evidence, as the judgment sought to be vacated must be taken as having decided the question whether the testimony of any witness was true or false and whether any document produced in evidence was genuine or not;[8] nor is mere suppression of evidence or production of wrong evidence sufficient to vitiate a previous judgment or decree.[9] But where there has been a wilful suppression of evidence and the evidence with held is of such a character that, if it had been produced, the probabilities are that the Court would have come to a different conclusion, a suit will lie to set aside the decree.[10] If the claim in the previous suit was false and the falsity of the claim was necessarily known to the party putting forward the claim, the decree in that suit is liable to be set aside.[11]

Ex parte decree is invalid if obtained by fraudulent suppression of summonses.–For purposes of section 44 an *exparte* decree stands on the same footing as a decree in a defended suit.[12] An *exparte* decree will be set aside if it is proved to have been obtained

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App 298, favour the view that an action to set aside a decree on the ground of the its having been obtained by perjured evidence does not lie; but *Cole* v. *Longford*, (1898) 2 QB 36, *Vadala* v. *Lawes*, (1890) 25 QBD 310 ; *Priestman* v. *Thomas*, (1884) 9 PD 210 *and Abouloff* v. *Oppenheimer*.(1832) 10 QBD 293 ; seem to support the contrary conclusion.

1. *Mahomed Golab* v. *Mahomed Sulliman*, 21 C 612.
2. See *Lakshmi Charan Shaha* v. *Nur Ali*, 38 C 936 : 11 IC 626.
3. *Venkatappa Naick* v. *Subha Naick*, 29 M 179.
4. *Kadirvelu Nainar* v. *Kuppaswami Naicker*, 41 M 743 : 45 IC 774 (FB).
5. *Janki Kuar* v. *Lachmi Narain*, 37 A 535 : 30 IC 789.
6. *Muktamala Dasi* v. *Ram Chandra De*, 97 IC 879 : 1927 C 84 ; *Musthan* v. *Mohendra Nath Singh*, 1 R 500 : 76 IC 794 : 1924 R 119 ; *RamNarain Lall Shaw* v. *Tooki Sao*, 58 IC 182 ; *Kripa Sindhu Panigrahi* v. *Nanda Charan Panipatu*, 56 IC 615 ; *Manindra Nath Mitra* v. *Hari Mondal*, 54 IC 626 : 24 CWN 133 ; *Chattu Singh* v. *Radha Kishun*, 50 IC 451 ; *Kasiswar Goswami* v. *Amiruddin*, 47 IC 14 : 23 CWN 133 ; *Kadirvelu Nainar* v. *Kuppaswami Naicker*, 41 M 743 : 45 IC 774 (FB) ; *Janki Kuer* v. *Lachmi Narain*, 37 A 535 : 30 IC 789 ; *Moruful Huq* v. *Surendra Nath Roy*, 15 IC 893 : 16 CWN 1002.
7. *Punjab Commercial Syndicate* v. *Punjab Co-operative Bank*, Ltd 6 L 512 : 92 IC 322 : 1926 L 96.
8. *Logadapatii Chinnayya* v. *Kotla Ramanna*, 38 M 203 : 19 IC 579.
9. *Shriniwas Sarjerao Sholapurkar* v. *Narayanrao Navlojirao Nimbalkar* 76 IC 551 : 1923 B 397.
10. *Bhikaji Mahadev Gund* v. *Balwant Ramchandra Kulkarni*, 105 IC 296 : 1927 B 510 thus interpreting *Birch* v. *Birgh*, (1002) P 130 and *Nanda Kumar Howladar* v.*Ram Jiban Howladar*, 41 C 990 : 23 IC 337.
11. *Rajani Kanta Das* v. *Purna Chandra Kundu*, 63 IC 712 : 1921 C 298 : 48 C 298 ; *Manindra Nath Mitra* v. *Hari Mondal*, 54 IC 626 : 24 CWN 133; see *Kedar Nath Das* v. *Hemanta Kumari Dasi*, 22 IC 709 : 18 CWN 447 ; *Lakshmi Charan Shaha* v. *Nur Ali*, 38 C 936 : 11 IC 626 ; *Vadala* v. *Lawes*, (1890) ; 25 QBD 310 ; *Abouloff* v. *Oppenheimer*, (1882) 10 QBD 295 ; but see *Muktamala Dasi* v. *Ram Chandra De* 97 IC 879 : 1927 C 84 : 31 CWN 258.
12. *Muktamala Dasi* v. *Ram Chandra De*, 97 IC 879 : 1927 C 84 ; see *Moruful Haq* v. *Surendra Nath Roy*, 15 IC 893 : 16 CWN 1002

by fraudulent suppression of summonses.[1] Mere non-service of summonses however, does not constitute fraud.[2] An *exparte* decree obtained by fraud may be set aside on an application being made under O. 9,r, 13,C.P.Code, or in a separate suit, but if the question of fraudulent suppression of summonses has been decided adversely to the judgment debtor in an application under O 9, r, 13 the finding will operate as *res judicata*[3] and a regular suit will not be competent.

Court asked to set aside a decree on the ground of fraud cannot examine the decree on its merits.–A court asked to set aside a decree on the ground of fraud cannot, as if it were, sit in appeal on the judgment; the real issue for its decision is whether the decree was procured by fraud.[4] An unsuccessful party cannot be allowed to get round the rule of *res judicata* and to prove that the judgment was wrong because the Court came to a wrong conclusion on the evidence before it.[5]

Signature on summons forged.–Where the signature on the back of the summons was forged and the fact was within the knowledge of the plaintiff, it could be presumed that it was through his complicity that the return of the summons had been made and that the decree had, in consequence been on that had been fraudulently obtained.[6]

A stranger may plead fraud, as also a party on whom fraud has been practised, but not a party who himself has practised fraud.–In English law, a plea of fraud can, in general, be taken advantage of only by a stranger to the judgment who is in no way privy to the fraud, and not by a party; since, if the latter were innocent, he might have applied to vacate the judgment and if guilty, he cannot escape the consequence of his own wrong.[7] In India, however, it has been settled by a long line of decisions that not only a stranger to a judgment may plead fraud but also a party to the judgment may prove the fraud of his adversary in obtaining the judgment, and this he may do in a collateral proceeding at the time when the judgment is pleaded or proved against him, even though he has not previously taken any step to have the judgment set aside,[8] and a separate suit to have it set aside has become time-barred.[9] But though the language of section 44 is wide enough to allow a party to set up his own fraud,[10] the rule enacted by

1. *Mahadeb Prosad Kanaria* v. *Mahabir Prosad*, 76 IC 767 : 1923 C 569 ; *Pannalal Kothari* v. *Tara Kanta Karmaker*, 63 IC 778 ; *Radha Kishun Rai* v. *Nauratan Lal*, 46 IC 627 ; *Gendu Nasya* v. *Sadi Bania*, 44 IC 983.
2. *Mahadeb Prosad Kanaria* v. *Mahabir Prosad*, 76 IC 767 : 1923 C 569 : *Radha Kishun Rai* v. *Nauratan Lal*, 46 IC 627 ; *Narsing Das* v. *Bibi Rafikan*, 37 C 197 : 5 IC 198.
3. *Musthan* v. *Mohendra Nath Singh*, 1 R 500 : 76 IC 794 : 1924 R 119 ; *Yogamba Bai Ammani* v. *Arumuga Mudaliar*, 36 IC 128 ; *Khirode Chandra Roy* v. *Asthulla Bee*, 35 IC 557 : 20 CWN 845 ; see also *Narsing Das* v. *Bibi Rafikan*, 37 C 197 : 5 IC 198 : *Nadar Mal* v. *Rawnak Hussain*, 29 A 603 . *Nazir Khan* v. *Kallu Khan*, 1987 ALR 100 Sum.
4. *Muktamala Dasi* v. *Ram Chandra De*, 97 IC 879 : 1927 C 84 ; *Nanda Kumar Howladar* v. *Ram Jiban Howladar*, 41 C 990 ; 23 IC 337 ; *Mahomed Gulab* v. *Mahomed Sulliman*, 21 C 612.
5. *Lagadapatti Chinnaya* v. *Kotla Ramanna*, 38 M 203 : 19 IC 579.
6. *Devraj* v. *Hara*,ILR (1959) (9) Raj 167.
7. Phipson, Ev., 7th Ed., 394 ; Taylor 1713 : Steph Dig Art. 46.
8. *Nistarini Dassi* v. *Nundo Lall Bose*, 26 C 891 (where this subject has been exhaustively discussed) ; *Hare Krishna Sen* v. *Umesh Chandra Dutt*, 62 IC 962 : 1921 P 193 (FB) ; *Kuraram Datta* v. *Banomali Patra* 29 IC 838 : *Bansi Lal* v. *Dhapo*, 24 A 242 ; *Srirangammal* v. *Sandammal*, 23 M 216 ; *Rajib Panda* v. *Lakhan Sendh Mahapatra*, 27 C 11 ; *Manchharam* v. *Kalidas*, 19 B 821 ; *Ahmedbhoy Hubiboy* v. *Vulleebhoy Casumbhoy*, 6 B 703 ; see also *Prayag Kumari Debi* v. *Siva Prosad Singh*, 93 IC 385 ; 1926 C I; *Aswini Kumar Samaddur* v. *Banamali Chakrabarty*, 40 IC 607 : 21 CWN 594. On the general question, when may a party plead his own fraud, see *Gudappa* v. *Balaji*, 1941 B 274 (FB).
9. *Rajib Panda* v. *Lakhan Sendh Mahapatra*, 27 C 11.
10. *Ahmedbhoy Hubibhoy* v. *Vulleebhoy Cassumbhoy*, 6 B 703, 716.

the section must be read subject to the general principle of justice that a man cannot take advantage of his own fraud.[1] Therefore, though a party to a judgment, order or decree may show that the judgment, order or decree was obtained by the fraud of his adversary, he will not be permitted to show that it was obtained by his own fraud.[2] Thus, where a person, in order to save his property from the creditors, allows another person to obtain a fraudulent and collusive decree against himself, he will not be permitted to impeach the decree thus obtained by his own fraud, and the Court will not, in such circumstances, give him any relief.[3]

Whether a privy may plead the fraud of his predecessor in interest?—Generally, a person can neither plead his own fraud nor the fraud of his predecessor in interest through whom he claims. Thus, where a person, in order to defeat his creditors, allowed a fraudulent decree to be passed against himself and in satisfaction of the decree conveyed his property to the decree-holder, and subsequently the heirs of the judgment debtor, alleging the fraudulent nature of the decree, sued to recover the property conveyed, it was held that they could not do so, as they claimed through the judgment debtor and could not, therefore, plead the fraud of their predecessor in interest.[4] But the rule that a privy in estate cannot set up fraud as an answer is not of general application.[5] Where the fraud practised is on a provision of the law enacted for the benefit of the privies, the privies are not stopped from pleading the fraud of their predecessors in interest.[6]

COLLUSION

Collusion.—"Collusion" has been defined to be a deceitful agreement or compact between two or more persons to do some act in order to prejudice a third person, or for some improper purpose. Collusion in judicial proceedings is a secret agreement between two persons that the one should institute a suit against the other in order to obtain the decision of a judicial tribunal for some sinister purpose. It may be of two kinds: (i) when the facts put forward as the foundation of the judgment of the Court do not exist, and (ii) when they exist, but have been corruptly preconcerted for the express purpose of obtaining the judgment.'[7] Where litigating parties collude, there can be no real battle but only a sham fight.[8]

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1. *Rajib Panda* v *Lakhan Sendh Mahapatra*, 27 C 11.
2. *Nistarini Dasi* v. *Nundo Lall Bose*, 26 C 891, 907 ; *Kishorbhai Revadas* v. *Ranchhodia Dhulia*, 38 B 427 : 25 IC 37 ; *Rajib Panda* v. *Lakhan Sendh Mahapatra*, 27 C 11 ; *Rangammal* v. *Venkatachari*, 20 M 323 ; *Yaramati Krishnayya* v. *Chundru Papayya*, 20 M 326 ; *Varadarajulu Naidu* v. *Srinivasula Naidu*, 20 M 333 ; *Rangammal* v.*Venkatachri*, 18 M 378 ; *Chenvirappa* v. *Puttappa*, 11 B 708.
3. *Varadarajulu Naidu* v. *Srinivasulu Naidu*, 20 M 333 ; *Yaramati Krishnayya* v. *Chundru Papayya*, 20 M 326 ; *Rangammal* v. *Venkatachari*, 20 M 323 ; *Rangammal* v. *Venkatachari*, 18 M 378 ; *Chenvirappa* v. *Puttappa*, 11 B 708 : for cases of transfer in fraud of creditors where this principle is applicable, see *Chenvirappa* v. *Puttappa*, 11 B 708 : *Honapa* v *Norsapa*, 23 B 406 ; *Banke Behary Das* v. *Raj Kumar Das*, 27 C 231 ; *Kondeti Kama Row* v. *Nukamma*, 31 M 485 ; and for cases of similar transfer where this principle is not applicable by reason of the fraud not having been accomplished, see *Pritha Das* v. *Hira Singh*, 63 PR 1893 : *Govinda Kuar* v. *Kishun Prosad*, 28 C 370 ; *Jadu Nath Poddar* v. *Rup Lal Poddar*, 33 C 967 ; *Muhammad Farough* v. *Gokul Chand*, 3 PR 1906.
4. *Rangammal* v. *Venkatachari*, 18 M 378.
5. *Shripadgouda Venkangouda* v. *Govindgouda Naraingouda*, 1941 B 77 ; see *Bishunath Tewari* v. *Mst. Mirchi*, 1955 P 66.
6. See *Ahmedbhoy Hubibhoy* v. *Vulleebhoy Cassumbhoy*, 6 B 703, 711-12.
7. Warton's Law Lexicon.
8. *Ahmedbhoy Hubibhoy* v. *Vulleebhoy Cassumbhoy*, 6 B 703 : 711-12.

Separate suit to set aside the decree not necessary – It is not necessary that a separate suit should be filed to have a decree set aside on the grounds of its having been procured by collusion: the collusive nature of the decree may be shown by a party in the very proceedings in which it is given in evidence against him.[1] But in proceedings for rateable distribution under section 73, C.P. Code, it is open to a Court to refuse rateable distribution of assets to a decree holder on the ground that his decree was obtained collusively.[2]

A stranger to a previous judgment may plead collusion but not a party to it – As in English law,[3] so under the Act, a stranger to a previous judgment may plead collusion.[4] In case of fraud, one of the parties to a previous judgment may be innocent, but in a case of collusion, both the parties are in *pari delicto*, it is not, therefore, open to either of them to plead collusion.[5] The distinction between fraud and collusion lies in this: that the party alleging fraud in the obtaining of a decree against him is alleging matter which he could not have alleged in answer to the suit in which the decree was passed, whereas a party charging collusion is not alleging new matter. He is endeavouring to set up a defence which might have been used in answer to the suit in which the decree was passed, and that he cannot be allowed to do consistently with the principle of *res judicata*.[6]

NEGLIGENCE

Section, whether exhaustive of the grounds on which a judgment, order or decree may be attacked; negligence – This section is the only provision of law under which a judgment, or an order, or a decree which is sought to be proved with a view to establish the plea of *res judicata* can be avoided.[7] The Section is exhaustive of the grounds on which a judgment, order or decree, when admitted in evidence under any of the three sections mentioned, may be attacked without its having been previously set aside.[8] No decree can be avoided on the ground of negligence, even if negligence be of a very serious character as negligence is not mentioned in the section.[9] It has been held by the Privy Council that this section defines with precision the grounds on which a judgment admitted under section 40-42 of the Act can be avoided and that since negligence is not one of the grounds of avoidance mentioned in the section, a previous judgment obtained against a minor cannot be questioned under this section on the ground of negligence of the guardian unless the negligence amounts to fraud or collusion.[10] But this section not being definitive of the grounds on which a decree may be set

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1 *Rakshab Mandal* v. *Tarangini Devi*, 62 IC 448; 1921 C 332: *Aswini Kumar Samaddar* v. *Banamali Chakrabarty*, 40 IC 607: 21 CWN 594; *Abdul Hakim Gazi* v. *Panchi Dasi*, 32 C 849.

2 *Biswambar Biswas* v. *Aparana Charan Mohary*, 62 C 715: 155 IC 480: 1935 C 290 (FB).

3 See Phipson, Ev., 7th Ed., 394.

4 *Sahib Rai* v. *Bahari Rai*, 101 IC 765: *Varadarajulu Naidu* v. *Srinivasulu Naidu*, 20 M 333.

5 *Shripadgouda Venkangouda* v. *Govindgoud Narayangouda*, 1941 B 77: ILR 1941 B 160: *Sahib Rai* v. *Bahari Rai*, 101 IC 765: 1927 A 494; *Tukaram* v. *Sonaji*, 8 IC 1179; *Varadarajulu Naidu* v. *Srinivasulu Naidu*, 20 M 333, 338: *Yaramati Krishnayya* v. *Chundru Papayya*, 20 M 326; *Rangammal* v. *Venkatachari*, 20 M 323; *Rangammala* v. *Venkatachari*, 18 M 373; *Chenvirappa* v. *Putappa*, 11 B 708; *Venkataramanna* v. *Viramma*, 10 M 17.

6 *Varadarajulu Naidu* v. *Srinivasulu Naidu*, 20 M 333, 338.

7 *Laxmi Narain Gododia* v. *Mohd. Shah Bari*, 1949 EP 141.

8 *Talluri Venkata Seshayya* v. *Thadikonda Kotiswara Rao*, 1937 PC 1: 64 IA 17; followed in *Ashrafi Lal* v. *Koili*, AIR 1995 SC 1440.

9 *Laxmi Narain Gododia* v. *Mohd. Shah Bari*, 1949 EP 141.

10 *Talluri Venkata Seshayya* v. *Thadikonda Kotiswara Rao*, 1936 PC 1: 64 IA 17, over-ruling *Karri Bapanna*.

aside in a separate suit the Privy Council has not decided the question whether a minor can have a decree obtained against him set aside in a separate suit on the ground of the negligence of his guardian. A Full Bench of the Bombay High Court has ruled that a minor cannot have a decree set aside merely on the ground of his guardian's negligence, however gross the negligence may be.[1] But the Calcutta, the Madras and the Lahore High Courts have differed on this point from the Bombay High Court.[2] It has been held by a Full Bench of the High Court of Patna that a minor can avoid, on attaining majority, a decree passed against him during minority on the ground of gross negligence on the part of his guardian-ad-litem or next friend, by bringing a subsequent suit, even if he has not succeeded in proving fraud or collusion on the part of such guardian-ad-litem or next friend.[3] The principle relating to negligent conduct of a former litigation by a guardian in the name of a minor is not applicable to the case of parties litigating on behalf of a public interest. The protection of minors against negligent actions of their guardians is a special one and the principle cannot be extended to cases of gross negligence by parties litigating on behalf of a public interest.[4] This section is, of course, not exhaustive of the grounds on which a decree may be set aside in a regular suit. If a compromise decree has been procured by the exercise of undue influence, it may be set aside in a separate suit brought for this purpose, though undue influence is not mentioned in section 44 as a circumstance vitiating a decree.[5]

Setting aside decrees on ground of mistake.—A decree of a Court cannot be challenged in another action on the ground of mistake in its adjudication. The section allows judgments, orders or decrees, to be challenged in collateral proceedings only on ground of fraud or collusion in obtaining them, or on the ground of incompetency of the Court which delivered them. Mistake as such does not find mention in the section as a ground therefor. One of the maxims in statutory interpretation is *expressio unius est exclusio alterius* (the expression mention of one thing implies the exclusion of another). When incompetency, fraud or collusion have alone been mentioned as grounds for avoidance of decree, the implication is that no other ground is available therefor. Mistake must, therefore, be ruled out as a ground for relief against adjudication in civil judgments, orders and decrees.[6]

Though under this section, a party may show that a compromise decree was obtained by fraud, it is not open to him to plead that the compromise on which the decree was based was vitiated by mutual mistake as to a material fact.[7]

Right under section 44 is independent of any limitation.—The right as given by

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v. *Sunkari Verramma*, 1923 M 718 : 74 IC 218 expressly and *Dhapo* v. *Ramchandra*, 57 A 374 and *Mathura Singh* v. *Ramendra Prashad Sinha* 14 P 824 by implication.

1. *Krishnadas Padmanabhrao Chandavarkar* v. *Vishnu Annappa Shetti*, 1939 B 66 (FB).
2. *Mahesh Chandra* v. *Manindra Nath Das*, 1941 C 401 : ILR (1941) IC 477 : *Lalla Sheo Charan Lal* v. *Ramnandan Dubey*, 22 C 8 ; *Ramalingam* v. *Venkatachalam*, 1945 M 374 ; *Egappa Chettiar* v. *Ramanathan Chettiar*, 1942 M 384 : ILR 1942 M 526 ; *Punnayyah* v. *Viranna*, 45 M 425 ; *Andhra Rao* v. *Appa Rao*, 1925 M 258 : for the Lahore view see *Nawab Iftikhar Husain Khan* v. *Beant Singh* 1946 L 233 (FB) ; *Sayed Makbub Husain Shah* v. *Anjuman Imdad Qarza*, 1942 L 129.
3. *Kamaleshya Narain Singh Bahadur* v. *Balka Sahu*, 1950 P 97 : 27 P 441 (FB).
4. *Talluri Venkata Seshayya* v. *The Collector of Kistna*, 1937 PC 1 : 64 IA 17 ; *Laxmi Narain* v. *Indore Mohd. Shafi Bari*, 1949 P P 141.
5. *Shamnath Choudhry* v. *Ramjas*, 34 A 175 : 13 IC 561 ; see also *Mahesh Chandra* v. *Manindra* ... 1941 C 401 : ILR (1941) IC 477.
6. *Vasudevan* v. *Raman Pillai*, AIR 1963 Ker 217.
7. *Smt. Krishna Subala Bose* v. *Dhananjoy Barua*, 1951 Cal 59.

section 44 has not been fettered by any limitation wheresoever and it is manifest that such a right is quite independent of the right to get a judgment or decree etc. set aside by bringing regular suit for the purpose. A decree or order can be challenged on ground of fraud in a collateral proceedings without any suit for setting aside the decree, irrespective of the time when the judgment was delivered or order or decree was passed.[1]

OPINIONS OF THIRD PERSONS WHEN RELEVANT

45. Opinions of experts.—When the Court has to form an opinion upon a point of foreign law, or of science, or art, or as to identity of hand writing [2][or finger impressions], the opinions upon that point of persons specially skilled in such foreign law, science or art, [3][or in questions] as to identity of handwriting [2][or finger impressions] are relevant facts.

Such persons are called experts.

Illustrations

(a) The question is, whether the death of *A* was caused by poison.
The opinions of experts as to the symptoms produced by the poison by which *A* is supposed to have died, are relevant.

(b) The question is, whether *A*, at the time of doing a certain act, was, by reason of unsoundness of mind, incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law.
The opinions of experts upon the question whether the symptoms exhibited by *A* commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do, or of knowing that what they do is either wrong or contrary to law, are relevant.

(c) The question is, whether a certain document was written by *A*. Another document is produced which is proved or admitted to have been written by *A*.
The opinions of experts on the question whether the two documents were written by the same person or by different persons, are relevant.

COMMENTARY

Opinion evidence in general ; expert testimony.– As a general rule, the opinion of

1. *Triveni Mishra* v. *Ramprajan Mishra*, AIR 1970 Pat. 13.
2. *Ins.* by Act 5 of 1899, S. 3.
3. *Ins.* by Act 18 of 1872, S. 4.

a witness on a question whether of fact or of law, is irrelevant. A witness has to state the facts which he has seen, heard or perceived, and not the conclusions which he has formed on observing or perceiving them. The function of drawing inferences from facts is judicial function and must be performed by the Court. If a witness is permitted to state not only the facts which he has perceived but also the opinion which he has formed on perceiving them, it would amount to delegation of judicial functions to him and investing him with the attributes of a judge.[1]

To this general rule, however, there are some important exceptions, which are enacted in this set of sections.[2] When "the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it", or when "it so far partakes of the character of a science or art as to require a course of previous habit or study", the opinions of persons having special knowledge of the subject-matter of inquiry become relevant; for it is very difficult for the Court to form a correct opinion on a matter of this kind, without the assistance of such persons.[3]

It should be noted that all languages necessarily involves inference of one kind or another, and it is not every inference of a witness which is excluded as "opinion' under the Act. "In all supposed statements of fact, the witness really testifies to the opinion formed by the judgment upon the presentment of the senses".[4] "There have been many cases in which ordinary witnesses have been allowed to give their opinions in evidence and they must frequently be allowed to do so. There are matters on which it is naturally impossible for any witness to give positive evidence of facts which he observed. He must, if he says anything at all, speak as to his opinion or belief, on matters which are essentially matters of opinion or are so complex or indefinite that he can only form a general opinion upon them. Thus, on questions of identity, condition, age, appearance or resemblance of persons or things, on the general character of the weather or the general conduct of a business or of persons during a certain period, or the general character of a meeting alleged to be seditious, clearly only evidence of opinion can be given, and would in most cases be received."[5] Similarly, a witness can testify to the value of a house,[6] or to a person being in possession of certain property;[7] but it is doubtful if the witness will be permitted to say that a person is the "owner" of a property, since "ownership" is a question of legal inference to be drawn from the facts proved in the case.[8] Mere opinion of a witness as to condition of certain goods based on guesswork and not on personal knowledge is not acceptable. Where certain witnesses testified that certain sluice valves lying in rows must have been in good condition though they were lying enclosed in packets, which they did not open, their opinion as to condition of valves was liable to be rejected. Similarly the statement of a Government Auctioneer made 3 years after the auction that the goods sold looked new, which was

1. *Baswantrao Bajirao* v. *E.*, 1949 N 66 : 50 Cr LJ 181 : ILR 1948 N 711 ; *State of Mysore* v. *Sampangiramiah*, 1953 Mys 80 : 1953 Cr LJ 1071.
2. Sections 45-51.
3. Taylor, § 1418.
4. Woodroffe, Ev., 9th Ed., 410.
5. Cockle's cases and Statutes, 4th Ed., 121, 122.
6. Woodroffe, Ev., 9th Ed. 442-443, foot-note, (1), 443 : the evidence of a broker or surveyor can be admitted as expert testimony on a question of market value, *Secretary of State* v. *Sarla Debi Chaudhrani*. 5 L 227 : 79 IC 74 : 1924 L 548 ; *Government of Bombay* v. *Karim Tar Mohomed*, 33 B 325 : 3 IC 273.
7. 4 BLR 97 (FB) ; contra *Ishan Chunder* v. *Ram Lochan*, 9 WR 70.
8. 22 CJ 534.

based on a superficial examination of the goods and not on record, could not be accepted.[1] A witness proving an innuendo in a libel case is merely deposing to the impression caused in his mind by the publication ; such evidence is not "opinion evidence" at all.[2] The opinion or impression of a witness that it appeared to him from the conduct of the mob that they had appeared there for an unlawful purpose is inadmissible to prove the object of the assembly, though statements as to what he actually saw and heard are admissible.[3] Expert evidence is a weak type of evidence.[4] As to evidence of character, see notes to Section 55.

Matters for expert testimony; competency to depose as an expert.—Opinions of experts become relevant only when the Court has to form an opinion upon a point of foreign law, or of science or art, or as to identity of handwriting or finger impressions. This section is, therefore, exhaustive of the matters on which expert testimony can be given,though the expression "science or art" would include almost all branches of human knowledge requiring special study, experience or training. So that a witness may be competent to depose as an expert, he must be shown to have made a special study of the subject or acquired a special experience therein. In such cases, the question is:-"Is he *peritus* ? Is he skilled? Has he adequate knowledge?" [5] An expert is a person who has special knowledge and skill in the particular calling to which the inquiry relates.[6] In law,and as applied to a witness, the term "expert" has a special significance, and no witness is permitted to express his opinion, unless he is an expert within the terms of Section 45.[7] The fact that the evidence of an expert was accepted in one case is no ground for accepting his evidence in every other case.[8]

FOREIGN LAW

Foreign law.—In England, the ordinary mode or proving of point of foreign law is to all a witness specially skilled in that law; but in India it may either be proved under this section by expert testimony, or in the manner laid down in Section 38 of this Act, viz., by the production of official book or reports of the rulings of the Courts of the particular country or by foreign judgments.[9] Foreign law is a question of fact,[10] with which Courts in India are not supposed to be conversant ; opinions of experts in foreign law are, therefore, allowed to be admitted.[11] But where the foreign law is laid down in a particularly elaborate Code which is available, it is unnecessary to call expert evidence on the point of foreign law involved.[12] Hindu Law or Mohammadan Law as admini-

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1. *Sita Ram* v.*Daulati Devi*, 1979 SC 1225 (para 12 and 13).
2. See Woodroffe, Ev., 9th Ed., 442.
3. *Jogi Rayt* v. *E.*, 105 IC 234 : 1928 P 98 : 28 Cr LJ 906.
4. *Melappa* v. *Guramma*, 1956 B 129 ; see *R. Saraswethy* v. *P. Bhavathy Ammal*, AIR 1989 Ker. 228.
5. *United States Shipping Board* v. *The Ship "St. Albans"*, 131 IC 771 : 1931 PC 189.
6. Lawson on Expert Testimony, 2nd Ed., 229.
7. *Ram Das* v. *Secretary of State*, 128 IC 441 : 1930 A 587 ; *Balkrishna Das* v.*Radha Devi*, AIR 1989 All. 133.
8. *Baswantrao Bajirao* v. *E.*, 1949 N 66 : 50 Cr LJ 181 : ILR 1948 N 711.
9. *Suganchand Bhikamchand* v. *Mangibai Gulabchand*, 1942 B 185.
10. *Khoday Gangadara Sah* v. *Swaminanda Mundali*, 92 IC 112 : 1926 M 218 ; *Aziz Bano* v. *Mohammad Ibrahim Hussain*, 47 A 823 : 89 IC 690 : 1925 A 720.
11. *Aziz Bano* v. *Mohammad Ibrahim Husain*, 47 A 823 ; 89 IC 690 ; 1925 A 720.
12. *Palaniappa Chetty* v. *Nagappa Chettiar*, 123 IC 600 ; 1930 M 146 ; but see The Susex Peerage Case, 11 C & F 85 , 114.

stered by the Courts of India, is neither "foreign law" nor "science or art", but is the law of the land; and the opinion of witnesses, however, learned they may be in that law, are irrelevant.[1] But Jewish law is foreign law[2] As to the mode of proof of foreign customs and usages, see Section 48 and 49.

Competency of a foreign law expert.—A person whose knowledge of foreign law is derived solely from study without actual practice, is incompetent.[3] The witness who is called to prove a point of foreign law must be either a practising lawyer or a person *peritus virtute officii, i.e.* the holder of some official position which requires and therefore presumes a knowledge of that law. A foreign Judge, barrister, or solicitor practising in the Courts of his country is competent,[4] but not a mere resident of the foreign country, not specially conversant with the law.[5] It is not enough to show that the witness in fact knows the foreign law : he must be one who, from his position or training, is supposed to know the law.[6]

SCIENCE OF ART

Science or art.—The expression "science or art" should receive a liberal construction and must be taken to include all subjects on which a course of special study or experience is necessary to the formation of an opinion.[7] Thus construed the section would permit a person having special knowledge or experience of a "trade", "handicraft", "provision" or other pursuit to depose to matters concerning his particular vocation ; and thus mechanics, artisans and other workmen would be competent expert witnesses in matters relating to their trades. To determine whether a particular matter is of a scientific nature or not, the test to be applied is whether the subject-matter of inquiry is such that in-experienced persons are unlikely to prove capable of forming a correct judgment upon it without the assistance of experts, and whether it so far partakes of the character of a science or art as to require a course of previous habit or study in order to obtain a competent knowledge of its nature.[8] Thus, the Assistant Mint Master of the Calcutta Mint is a competent expert witness in question relating to coins and instruments of coinage.[9] A surveyor or broker will be allowed to depose as an expert, when the Court has to form and opinion as to the value of a property;[10] though when such expert gives no data in support of his opinion, his evidence will be of no value.[11] An excise officer who is able to distinguish liquours is an expert in his own

1. *Aziz Bano* v. *Mohammad Ibrahim Husain*, 47 A 823 ; 89 IC 690 ; 1925 A 720.*Masjid Shahid Ganj* v. *Shiromani, Gurdwara Prabandhak Committee*, 1940 PC 116 ; 21 L 493 ; 67 IA 251 ; 189 IC 1 ; *Amar Nath* v. *Mrs, Amar Nath*, 1948 L 126 ; *Moula Bux* v. *Charuk*, PLD 1952 *sind 54*.
2. *Ezekil Jacob* v. *Joseph Jacob*, 1946 C 90 ; 48 CWN 513.
3. *Bristow* v. *Sequeville*, (1850) 19 LJ Ex 289 ; but See *Brailey* v. *Rhodesia*, (1910) 2 Ch. 95 ; *Wilson* v. *Wilson*, 1903 P 157.
4. Phipson Ev., 7th Ed., 377.
5. *R.* v. *Naguib*, (1917) 1 KB 359 CCA but see Vander Donckt v. *Thelluson*, 8 C & B 812, where a foreign stockbroker was allowed to depose to a point of foreign law relating to bills of exchange.
6. *Perlak Petroleum* v. *Deen*, 1924 1 KB 111.
7. Steph. Dig., Art.. 49 ; *Sidik* v. *E.*, 1942 S 11.
8. Taylor, § 1418 ; *Mahadeo Dewanna* v. *Vyankamnabai*, 1948 N 287 ; ILR 1947 N 781 ; 1947 NLJ 478.
9. *Gilli* v. *E.*, 88 IC 818 ; 1925 O 616 ; 26 CR LJ 1232.
10. *Secretary of State* v. *Sarla Devi Chaudharani*, 5 L 227 ; 79 IC 74 ; 1924 L 548 ; *Government of Bombay* v. *Karim Tar Mahomed*, 33 B 325 ; 3 IC 273.
11. *Pribhu Diyal* v. *Secretary of State*, 135 IC 183 ; 1931 L 361 ; *Secreatry of State* v. *Sarla Devi Chaudharni*, 5 L 227 ; 79 IC 74 ; 1924 L 548.

department.[1] Evidence of a partner in firm of licensed gold dealers about purity of gold based on touchstone method and of an officer of the Customs Department who was an M.Sc., in Chemistry with 23 years experience in the customs department as an analyst of gold and other articles, was admissible and could be relied upon though the latter did not state the tests which he had applied.[2] "It is well known that .....goldsmiths by profession are able to find out whether a piece of metal is gold or not by the colour of the streak produced by rubbing it on a touchstone used by them even though their assessment of its purity may not be exact. It may not be a scientific way of proving that the metalled bars were gold bars." But the Supreme Court did not rule out the goldsmiths evidence as inadmissible.[3] In cases arising out of the infringement of copyright, the Court, in ordinary circumstance, would get the opinion of experts by appointing them Commissioners to investigate and report on the matters in issue.[4] but it is not permissible in such cases to admit as evidence the opinion of literary gentlemen that the defendant copied from the plaintiff, as it is not a matter for expert testimony at all.[5] If the subject-matter of the inquiry does not require any special study or experience, opinion evidence will be inadmissible.[6] Thus, the opinion of a businessman that goods bearing certain trade marks alleged to be imitations are likely to deceive the purchasers does not amount to expert opinion on any question of science or art,[7] and is therefore inadmissible. A haulage contractor who owns several lorries and has been in business for 116 years, and also fits a large quantity of tyres every month for other companies, is an expert on the quality, wear and usage of tyres,[8] Gambling cannot be considered to be either an art or a science so as to entitle a Police Officer to go into the witness-box and speak as an expert that in his view, based on experience in other cases, certain documents are instruments of gaming. Such opinion may, however, become relevant under section 49.[9] Generally speaking it is not permissible to call a witness to explain to the Court what a document means unless the witness is an expert,[10] or the document contains words or terms used in particular districts or by particular classes of people and the witness has special means of knowledge of them.[11] Telephony is a science or art and the witnesses' knowledge of the telephone and of engineering generally places them in special position and makes them competent to express an opinion upon articles and matters which are largely in use in the department of the telephone and of engineering generally".[12]

Mode of making expert opinion evidence. Under this section, an expert has to state his opinion in Court and must be examined and cross-examined like any other witness.[13] While giving evidence, the expert may refer to any professional treatise or

1. *Ram Karan Singh* v. *E.*, 154 IC 341 ; 1935 N 13 ; 36 Cr LJ 511.
2. *M. G. Venugopalan* v. *E. V. Govindan*, 1976 Cr LJ 165 (para 4).
3. *Asst. Collector* v. *V. P. Sayed Mohamed*, 1983 SC 168 (para 4).
4. *Sita Nath Basak* v. *Mohini Mohan Singh*, 81 IC 754 ; 1924 C 595.
5. *Deeks* v. *Wells*, 142 CI 815 ; 1933 PC 26.
6. 1 Bom HCR 148.
7. *Macdonald & Co.* v. *Holland & Moss*, 41 IC 539.
8. *Globe Automobile Co.* v. *K. A. K. Master*, (1935) 157 IC 12.
9. *E.* v. *Harilal Gordhan*, ILR 1937 B 670 ; 1917 C 385 ; 171 IC 282 ; 38 Cr LJ 1047.
10. *E.* v. *Nathalal Vanmali*, 41 Bom. LR 518.
11. Section 49.
12. *Bacharaj Factories, Ltd.*, v. *Bombay Telephone Co, Ltd.* 1930 S 245.
13. *Balkrishana Das* v. *Radha Devi*, AIR 1989 All 133.

any memorandum which he may have prepared at a time when the facts on which his opinion is based were fresh in his memory,[1] though the memorandum itself is not evidence and no facts can be taken from it.[2] If the expert whose opinion is intended to be proved is dead, or cannot be produced without an unreasonable amount of delay or expense, his opinion may be proved by the production of any treatise commonly offered for sale.[3] The Court itself may, on all matters of science or art, resort for its aid to appropriate books or documents of reference, and well-known scientific works may be read during trial as evidence of experts.[4] An expert may be examined on commission under Chap. XL of the Criminal Procedure Code, or Order XXVI of the Civil Procedure Code; and under O. XXXIX, r. 7 of the latter Code, the Court may authorize an expert to take samples or to make any observation or experiments for the detention, preservation or inspection of any property which is the subject-matter of the suit. The Court may, for its own guidance and information, order independent inquiries and reports to be made, or experiments to be tried by experts of its own selection.[5] The deposition of a medical expert taken and attested by a Magistrate in the presence of the accused or taken on commission, and the report of chemical Examiner may be treated as evidence without calling the medical expert or the Chemical Examiner as a witness.[6] Apart from these special statutory provisions, however, a report, certificate or letter of an expert cannot be considered as evidence, if its author has not been produced in Court to prove it.[7] But if a party has accepted the report of an expert as evidence without the expert being examined in Court, he cannot object to the admissibility of the report in appeal.[8] Where the lower Court has based its decision on the opinion of an expert contained in a report, though he has not given sworn testimony in support of the report, the objection to such evidence will not be permitted to be taken for the first time in revision.[9]

Expert should be examined in the presence of the accused and not on commission.—It is not satisfactory to examine an expert on commission in criminal cases. The evidence of an expert has always to be carefully weighed and much more so when the

1. Section 159.
2. *Roghuni Singh* v. *E.*, 9 C 455.
3. Section 60 ; as to the mode of using a text book, see *Grande Venkata Ratnam* v. *Corporation of Calcutta* 46 IC 593 ; 19 Cr LJ 753.
4. Section 57 ; *Hurry Churn Chukerbutty* v. *E.*, 10 C 140. In the matter of the Steamship "Drachenfels", 27 C 860 the Court referred to the Imperial Gazeteer and a well-known work on Topography, and in *Martand Rao* v. *Malhar Rao*, 55 C 403 ; 55 IA 45 ; 107 IC 7 ; 1928 PC 10 the Privy Council refered to official reports regarding some historical matters.
5. *Marconi* v. *British Co.,Times Dec*, 15, 1910 ; cited in Phipson Ev., 7th Ed., 374 ; see *Sita Nath Basak* v. *Mohini Mohan Singh*, 81 IC 754 ; 1924 C 595 ; where it has been remarked that in infringement of copyright cases experts should be appointed Commissioners.
6. Sections 509 & 510 Cr P Code, but see *Aishan Bibi* v. *E.*, 15 L 310 ; 152 IC 206 ; 1934 L 150 ; 36 Cr LJ 11 ; *Happu* v. *E.*, 146 IC 1089 ; 1933 A 837 ; 35 Cr LJ 280 ; *Tulsiram Kanu* v. *State*, 1954 SC 1 ; 1953 SCJ 612 ; 1954 Cr LJ 225.
7. *Perumal Mudaliar* v. *South Indian Railway Co.*, Ltd, ILR 1937 M 764 ; 1937 M 407 ; 171 IC 259 ; *Bhoore Singh* v. *Karan Singh*, 1935 A 142 ; *Ram Autar Shukul* v. *Baldeo Shukul*, 11 P 782 ; 140 IC 895 ; 1932 P 352 ; *Ahila Manaji* v. *E.*, 47 B 74 ; 84 IC 643 ; 1923 B 183 : 26 Cr LJ 339 ; *Pitain* v. *Baboosingh*, 79 IC 641 ; 1924 N 183 ; *Raghunath Mody* v. *The Kurseong Municipality*, 76 IC 394 : 1923 C 561 ; 25 Cr LJ 170 ; *Peary Lal* v. *E.*, 75 IC 148 ; 1923 A 601 ; 24 CR LJ 900 ; *Rampear Rai* v. *Bhogia*, 8 IC 713 ; *Sris Chandra Nandy* v. *Smt. Annapurna Ray*, 1950 C 171 ; *Coral Indira Gonsalves* v. *Joseph Parbhakar Iswariah*, 1953 M 858 ; 1953 1 MLJ 591.
8. *Dil Muhammad* v. *Sain Das*, 11927 L 396.
9. *Karam Din* v. *Ata Muhammad*, 150 IC 357 ; 1934 L 230 .

expert has been examined on commission and not in the presence of the accused. The value of expert evidence, when given on commission, is considerably reduced.[1]

MEDICAL EXPERTS

Competency of medical expert.—It is only the person who has made medicine as his special study, or who has special experience of it, who can depose as a medical expert. What degree of study or experience would qualify a person to depose as a medical expert is for the Court to decide, but there are recorded cases in which even hospital students, dressers and unqualified practitioners have been allowed to depose as experts.[2]

Where the High court had rejected the evidence of a lady assistant surgeon to the effect that the duration of the respondent's pregnancy in question on the date or examination by her was $2\text{-}^1/_2$ months, on the ground that the witness had not specialised in gynaecology,, the Supreme Court held that :

> "this reason was not sufficient to reject her testimony .....the witness may not have specialised in gyanaecology .....that branch of medical science which treats of the functions and diseases peculiar to women but her knowledge of midwifery as an obstetrician was proved to be of high order in the case itself."[3]

An expert in mental diseases is a competent witness in cases involving a question of insanity.[4] As to the Court itself forming an opinion on a question of medicine by reference to medical works , see *E.* v. *Purna Chandra Ghose*,[5]

Value of medical expert testimony.—In *Lachaman Singh* v. *The State their Lordships of the Supreme Court*[6] held after considering the other evidence in the case that the finding of the doctor did not necessarily affect the prosecution case as to the time of the occurrence and the necessity for full data to reach a proper conclusion based upon the condition of the digestion was emphasised. In *Doddamani* v. *State*[7] the High Court held that the opinion stated by the medical officer was at best an opinion and could not be taken as contradicting the positive evidence of the witnesses as to when the deceased ate his last meal and when he was stabbed. In *Mukanda* v. *State* the Rajasthan High Court held that the medical estimate did not negative the other evidence about the time when the victim was belaboured.[8] Expert evidence should be approached with considerable care and caution.[9] An expert witness is naturally biased in favour of the party who calls him; however impartial he may wish to be, he is likely to be unconsciously prejudiced in favour of the side calling him. Besides, an expert is often called by one side simply and solely because it has been ascertained that he holds views favourable to its interests.[10] "In these Courts instances not infrequently occur in which medical men,

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1. *Nur Din* v. *E.*, 108 IC 369 L 1928 I 533; 29 Cr LJ 377.
2. *Halsbury*, Vol 13, para 661.
3. *Baldev Raj* v. *Urmila Kumari*, 1979 SC 879 (para 4).
4. *Deorao* v. E., 1946 N 321.
5. 83 IC 631 ; 1924 C 611 ; 26 Cr LJ 71.
6. *Lachhman Singh* v. *State*, 1962 Cr LJ 863.
7. *Doddamani* v. *State*, (1961) Cr LJ 120.
8. *Mukanda* v. *State*, 1957 Cr LJ 1187.
9. *Panchu Mondal* v. *E.*, 1 CLJ 385.
10. *Diwan Singh* v. *E.*, 144 IC 331 ; 1933 L 561 ; 34 Cr LJ 735; *Hari Singh* v. *Lachhmi Devi*, 59 IC 220 ; 1921

not of standing or distinction give medical certificate, for instance, for the purpose of obtaining the adjournment of a case on ground which after investigation turn out to be wholly insufficient to justify the exemption of a witness from attendance, thereby forsaking their position as men of science in order to oblige a patient. But complaisance and the pursuit of science go ill together".[1] The evidence of a medical man or other skilled witness, however eminent, as to what he think may or may not have taken place under a particular combination of circumstances, however confidently he may speak, is ordinarily a matter of mere opinion. Human judgment is fallible, human knowledge is limited and imperfect. New and previously unobserved phenomena which, till they have been recorded, are supposed to be impossible are constantly being noticed.[2]

The positive evidence in the case is that of eye witnesses who have seen the occurrence. The evidence of an expert is merely an opinion which may lend corroboration to the direct evidence. But where there is a glaring inconsistence between the direct evidence and medical evidence in respect of the entire prosecution story, that is undoubtedly a manifest defect.[3] Negative evidence of medical board cannot effect positive evidence of doctor.[4] It is well settled that medical evidence is only opinion evidence.[5]

The medical evidence does not itself prove the prosecution case. Its value is only corroborative. It can prove that the injuries could or could not have been caused in the manner alleged and the death could or could not have been caused by the injuries.[6] Where there is a conflict between the medical evidence and the oral testimony of witnesses, the evidence can be assessed only in two ways. The Court can either believe the prosecution witnesses unreservedly and explain away the conflict by holding that witnesses have merely exaggerated the incident, or rely upon the medical evidence and approach the oral testimony with caution testing it with medical evidence. The first method can be applied only in those cases where the oral evidence is above reproach and creates confidence. Where the evidence is not of that character and the medical evidence is not open to any doubt or suspicion, the only safe and judicial method of assessing evidence is the second method.[7] The opinion of an expert witness, not based on any well defined inexorable laws of nature, cannot be taken as decisive, especially where there is direct evidence opposed to it. If the opinions of equally competent expert witnesses conflict on a particular point, the Court ought to accept that opinion which is not in conflict with the direct evidence.[8] A court is not entitled to discard the direct evidence of credible and unimpeachable witnesses deposing to things observed with their own eyes, merely on the opinion of medical witness.[9] Where there is testimony

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L 126; but see *Lila Sinha* v. *Bijoy Pratap Deo Singh*, 87 IC 534; 1925 C 768; where Page J., observes: "There appears no reason why a scientific witness should not be a witness of one or more or all of the parties to a legal proceeding. To a professional man, it matters not which party calls him as a witness, What is of concern to a medical witness is the accuracy of the scientific opinion which he expresses, not the party by which such evidence is tendered.

1 *Lila Sinha* v. *Bijoy Pratap Deo Singh*, 87 IC 534; 1925 C 678; per Page J.

2 *Gupta* v. *E*, 1 R 290; 76 IC 425; 1924 R 17; 25 Cr LJ 185; *Hari Singh* v. *Lachhmi Devi*, 59 IC 220; 1921 L 126; *Q.* v. *Ahmad Ali*, 11 WR Cr 25.

3 *Piara Singh* v. *State of Punjab*, AIR 1977 SC 2274 (para 5).

4 *Munir Ahmad* v. *State of Rajasthan*, AIR 1989 SC 705.

5 *Ram Dev* v. *State of U.P.*, 1995 Supp (1) SCC 547.

6 *Sunil Chandra Roy* v. *State*, 1954 C 305; *Chimanbhai Ukabhai* v. *State of Gujarat*, 1983 SC 484.

7 *Thakur* v. *State*, 1955 A 189.

8 *Pelydell* v. *E*, 96 IC 641; 1926 L 313; 27 Cr LJ 977. *Piara Singh* v. *State of Punjab*, AIR 1977 SC 2274.

9 *Siddubai Rauragauda Desai* v. *Nilapagauda Bharmagauda*, 83 IC 616; 1924 B 457; *Q.E.* v. *Wazir Ali*, 9 AWN 74; *Ghulam* v. *Crown*, PLD 1950 L 90. *Munga* v. *State of Haryana*, AIR 1979 SC 1194.

of a considerable body or trustworthy and respectable witnesses who were able to observe fact and draw inferences for themselves, the opinion of medical men as to what should have been the probable state of the testator should not outweigh and prevail over such testimony.[1] Where there is strong direct evidence of murder having been committed at a certain place, but no blood is detected by the chemical examination of the earth, leaves and grass sent to him for examination, is not sufficient to rebut the strong evidence as to the place of occurrence.[2] If the general condition and state of health of a person is in issue and it is sought to prove that he was unable to write on account of a disease, isolated extracts from medical works ought not to be preferred to the evidence of a medical man examined with reference to the symptoms deposed to by the witnesses.[3] Text books are admissible but their use without the assistance of expert might lead to error, hence, if they are used to contradict an expert, the passages relied on in them should be put to him.[4] The opinion of the medical man who did not observe the fact himself but based his opinion of the facts deposed to by other witnesses is not of much weight when compared with the evidence of the doctors who personally attended the patient.[5] The expert should put before the Court all the materials which induced him to come to his conclusion, so that the Court may form its own judgment on those materials.[6] The opinion of a Court, itself untrained in medicine, and without expert assistance, on questions of medicine is valueless.[7] The opinion of a doctor is entitled to great weight but it may be discarded if there are good grounds for doing so.[8] The opinion of a medical witness, however, eminent he may be, must not be invited in exceptional circumstance where there is no dispute as to facts or their Interpretation, but it must be considered by the Court as nothing more than relevant.[9] See notes to this section under the heading "value of expert testimony in general."

Use of the evidence of medical Expert.—Per. S. K. Das and Sarkar JJ.—when a medical man is called as an expert, he is not a witness of fact, and his evidence is not direct evidence of how an injury in question was caused. He only gives his opinion as to how that injury in all probability was caused. The value of such evidence lies only in the extent to which it supports and lends weight to the direct evidence of eye-witness, or contradicts that evidence and removes the possibility that the injury in question could take place in the manner alleged by those witnesses. If the evidence of an eye-witnesses as to how an injury was caused is disbelieved by the Court, the question of corroboration to that evidence does not remain, and in such a case the evidence of a medical expert as to how that injury could be caused ceases to have any significance. *Per Hidayatulla, J :* A medical witness who performs a *post-mortem* examination is witness

1. *Saradindu Nath Rai Chaudhuri* v. *Sudhir Chandra Das*, 50 C 100 ; 69 IC 48 ; 1923 C 116.
2. *Haseenulla Sheikh* v. *E.*, 83 IC 485 ; 1924 C 625 ; 26 Cr. LJ 5.
3. *Rawat* Sheo Bahadur *Singh* v. *Beni Bahadur Singh*, 51 IC 419.
4. *Grande Venkata Ratnam* v. *Corporation of Calcutta*, 46 IC 593 ; 19 Cr LJ 753 : opinion formed by reference to medical books and without trained assistance is valueless. *E.* v. *Purna Chandra Ghose*, 83 IC 631 ; 1924 C 611 ; 26 Cr LJ 71.
5. *Hari Singh* v. *Lachhmi Devi*, 59 IC 220 ; 1921 L 126 ; *In* the goods of Gopessuar Dutt, 39 C 245 ; 13 IC 577 ; *Baswantrao Bajirao* v. *E.*, 1949 N 66.
6. *Titli* v. *Jones*, 56 A 428 ; 153 IC 733 ; 1934 A 273 ; *See also Baswantrao Bajirao* v. *E.*, 1949 N 66; 50 Cr LJ 181 ; ILR 1948 N 711.
7. *E.* v. *Purna Chandra Ghosh*, 83 IC 631 ; 1924 C 611 ; 26 Cr LJ 71.
8. *Abu Pramnaik* v. *E.*, 1942 C 239 ; 199 IC 610 ; 43 Cr LJ 565 ; 74 CLJ 423 ; *See* also *Nilabati Behera* v. *State of Orissa*, (1993) 2 SCC 746.
9. *Baswantrao Bajirao* v. *E.*, 1949 N 66.

of fact, though he also gives opinion on certain aspects of the case. The value of his evidence does not lie in merely serving as a check upon the testimony of eye witnesses. It is also independent testimony, because it may establish certain facts, quite apart from the other oral evidence. Quite often, it is direct evidence of the fact found upon the person of the victim and it is wrong to say that it is only opinion evidence. For example, from the marks of tattooing found on the body the expert can say about the range from which a shot was fired, and from the depth and size of a wound he can speak about the nature of the weapon used and the force which was employed.[1]

It is the duty of the prosecution, and no less of the court, to see that the alleged weapon of the offence, if available is shown to the medical witness and his opinion invited as to whether all or any of the injuries on the victim could be caused with that weapon. failure to do so may sometimes, cause aberration in the course of justice.[2]

Medical opinion — Injury — A medical witness should merely describe the nature of injury; it is not his province to say whether the injury is grievous or not.[3]

Medical evidence — If the evidence of the prosecution witnesses is totally inconsistent with the medical evidence this is a most fundamental defect in the prosecution case and unless this inconsistency is reasonably explained it is sufficient not only to discredit the evidence but the entire case.[4]

Medical opinion as to age — Medical evidence as to the age of a person merely renders probable or improbable the other evidence in the case as to that person's age.[5] Although such evidence is valuable yet it is not by itself sufficient to fix the exact age.[6] Where a doctor forms his opinion as to the age of a person; "judging by his appearance, his voice and his teeth", no weight can be attached to such evidence.[7] However, it has been held that the ossification test is no doubt a surer test for determining age. But the opinion of a doctor as to age based on other factors should not be brushed aside merely because he did not conduct the ossification test.[8] It cannot possibly be said that a doctor's opinion as to a person's age is not entitled to any greater weight than that of any other person. Even if the indications from which age can be inferred are known to a layman, a layman is not in a position as medical man is, to examine a person with a view to discovering the presence or absence of those indications.[9] Medical evidence as to age cannot stand against the evidence of municipal register of births.[10]

Proof of age of girl — Kidnapping or abducting a female–age of girl, proof–Entry in school certificate not reliable with implicit faith as against medical evidence. Test of epiphyses on the basis of fusion being scientific test would be acceptable. If

1 *Nagindra Bala Mitra* v. *Sunil Chandra Roy*, 1960 Cr LJ 1020.
2 *Ishwar Singh* v. *State of U.P.*, 1976 Cr LJ 1883: AIR 1976 SC 2423 (para 8); *Kartare* v. *State*, 1976 Cr LJ 13: AIR 1976 SC 76 (para 25).
3 1885 AWN 296. The practice is against this view.
4 *Mani Ram* v. *State of U.P.*, 1994 (2) SCC 289 at page 292: 1994 Cri LJ 3848.
5 *Sripal Singh* v. *Jagdish Narain*, 56 IC 313.
6 *Bishnath Prasad* v. *E*, 1948 O 1; 48 Cr LJ 542; 230 IC 144.
7 *Mahomed Syedol Arifin* v. *Yeoh Ooi Grak*, 43 IA 256; 39 IC 401; 1916 PC 242; See also *E* v. *Qudrat*, ILR 1939 A 871; 185 IC 271; distinguished in *Abdulah* v. *Mst Zulekha*, PLD 1950 Peshawar 19
8 *Anam Swain* v. *State*, 1954 Orissa 33; 1954 Cr LJ 132.
9 *Nasrullah* v. *E*, 147 IC 759(2); 1934 O 32; 35 Cr LJ 498; but see *E* v. *Qudrat*, ILR 1939 A 871; 185 IC 271.
10 *Mt Zaitoon* v. *E*, 1946 S 132.

there be conflicting evidence as to age, benefit of uncertainty as to age of the girl should be given to accused.[1]

When the age of person in respect of whom an offence has been committed is in question the only sure proof of that person's age is the birth certificate. However a birth certificate is often not available in this country, and for the purpose of arriving at its conclusion as to the age of a person, the Court had to rely mainly upon the opinion of the medical expert, together with such other evidence as may be available, such as, the testimony of the near relatives and of persons who were present at the birth. If the opinion of a doctor as to the age of person is based upon careful physical examination of the person, and the recognised pointers and indices for determining age, such as, the stage of ossification, and that evidence is supported by the evidence of relatives and in the cross-examination of the prosecution witnesses nothing has come out which throws a doubt on their testimony, the Court would be justified in relying upon such evidence for the purpose of determining the age of a person.[2]

It has been pointed out in *Chathu* v. *Govindan Kutty*, that on the question as to the age of a girl alleged to be taken from the custody of the father, the Magistrate was not right in performing the opinion of the radiologist to the positive evidence furnished by the municipal birth register, the school admission register and the evidence of the girl's father, particularly when medico-legal opinion is that owing to variations in climatic, dietics hereditary and other factors affecting the people of different States of India, it cannot be reasonably expected to formulate a uniform standard for the determination of the age by the extent of ossification and the union of epiphyses in bones.[3]

According to the Supreme Court,"it is notorious and one can take judical notice that the margin of error in age ascertained by radiological examination is two years on either side."[4]

Opinion of experts—post-mortem report —Evidentiary value as to age of injuries.—Doctor's evidence regarding the age of injuries cannot be of much reliance if he has failed to mention the age in the report. Besides it is difficult for a doctor to give the exact age of injuries. Hence Court cannot fix the time of occurrence on the basis of opinion of the doctor.[5]

Medical report or certificate.—Medical certificates are inadmissible being the worst form of hearsay evidence.[6] So that a medical report or certificate may be evidence of its contents, it must be proved by calling and examining its writer.[7] As to the practise of giving false certificates to litigants for the purpose of obtaining adjournments, see the reports of Page J., in *Lila Sinha* v. *Bijay Pratap Deo Singh*.[8]

Doctor's endorsement regarding soundness of mind.—Evidence of medical experts.—endorsement of Registrar under section 35, Registration Act as to soundness of

1. *Raunki* v. *State*, 1969 Cut LJ 666; 72 Punj LR 332.
2. *Sidheswar Ganguly* v. *West Bengal*, 1958 Cr LJ 273.
3. *Chathu* v. *Govindan Kutty*, 1959 Cr LJ 637.
4. *Jaya Mala* v. *Home Secretary Govt of J & K* ., AIR 1982 SC 1297.
5. *Basudeo Mahto* v. *State*, 1970 Pat LJR 376.
6. *Sirs Chandra Nandy* v. *Sm. Annapurna Ray*, 1950 C 173.
7. *Ahila Manaji* v. *E*., 47 B 74 ; 84 IC 643 ; 1923 B 183 ; 26 Cr LJ 339 ; *Rampear Rai* v. *Bhogia*, 8 IC 713 ; *Sris Chandra Nandy* v. *Sm Annapurna Ray*, 1950 C 173 ; CJ *Balaram* v. *Rukmannamma*, 1953 Hyd 209 ; *Jeevandas Ibji* v. *Jadeja Karubha Dujajee*, 1953 Kutch 7 : *Coral Indira Gonsalves* v. *Joseph Prabhakar Iswariah*, 1953 M 858 ; 1953 1 MLJ 591 ; see *Keema* v. *Ramoo*, 49 PR 1866 Cr., *Q*. v. *Kaminee Dossee*, 12 WR Cr 25 ; *Chintamonee Nye*, 11 WR Cr 2 ; *Ali Akbar* v. *Java Bengal Line*, 1937 C 697. 87 IC 534 ; 1925 C 768.

mind of executant of deed of adoption including opinion of medical expert. Failure to give direct or a evidence under section 60 though medical expert was alive. Opinion of medical expert cannot be considered.[1]

Scope.—Expert evidence as to mental condition of a person.—Where the medical officer of the mental Hospital, who is called to give evidence as to the unsoundness of mind of the accused, admits that he is not in a position to state as to what was the mental condition of the accused on the date of the occurrence (offence) nor as to whether the accused was suffering from any such disease prior to that date and his opinion is only a conjecture or presumption based on the facts heard by him, no weight can be attached to it as it cannot be held to be the opinion of an expert.[2]

Workmen's Compensation Act.—Medical evidence is opinion evidence and it is only with regard to the physical aspect of the injuries that the opinion of medical witness is relevant and admissible as the opinion of an expert. But in cases dealt with under the Workmen's Compensation Act, medical opinion is valueless to adjudge the loss of earning capacity, which alone would be the crucial issue in the case. The utmost that a medical witness can give is to give the percentage of the loss of the normal physical capacity or power ; but it has no relation to the loss of physical capacity. It is therefore wrong to treat his evidence not only as relevant but as decisive on the question of the loss of earning capacity.[3]

Accident.—Loss of expectation of Life—Proof—Medical Evidence.—Admissibility.—Loss of expectation of life is an item of damage only when injuries sustained are such which lead to the curtailment of the normal expection of life of the injured person. Where the injured person himself such as plaintiff, some evidence possibly of medical must be led if he claims damages for loss of expectation of life to show that the injury has shortened his normal expectation of life. Medical evidence in such cases will be speculative and like other sworn testimony may turn to be incorrect, and, therefore, some caution may be necessary before accepting their evidence.[4]

Chemical Examiner's report.—In an Allahabad case it has been ruled, perhaps, too broadly that the Chemical Examiner's report is not evidence of any fact whatsoever, as the Chemical Examiner is not examined on oath and is not subjected to cross-examination.[5] This broad proposition has not been subscribed to by the Lahore High Court.[6] In view of the clear provisions of section 510, Cr. P. Code, which makes such report admissible, it has been held by the Supreme Court that in ordinary circumstances there would be nothing wrong in taking reports of the Chemical Examiner and the Imperial Serologist on record without examining these persons as witnesses, as permitted by the Criminal Procedure Code. When, however, there is difference of opinion mere production of reports is not sufficient.[7] The Chemical Examiner must state in his report the grounds of his opinion, so that the report may take the place of his *viva voce* testimony in Court.[8] Chemical analyst is not expected to know the difference in legal

1. *Smt. Gopi* v. *Madanlal*, AIR 1970 Raj 190.
2. *State* v. *Jose Gaspar Noroutha*, 1971 Cr LJ 36.
3. *Kalidas* v. *Mondal*, AIR 1957 Cal 660 , 662.
4. *Vinod Kumar* v. *Ved Mitra* 1970 MPLJ 306 ; 1970 Jab LJ 504.
5. *Happu* v. *E.*, 146 IC 1089 ; 1933 A 837 ; 35 Cr LJ 280.
6. *Aishan Bibi* v. *E.*, 151. 310 : 152 IC 206 ; 1934 L 150 ; 36 Cr LJ 11.
7. *Tulsi Ram Kanu* v. *State*, 1954 SC 1 ; 1953 SCJ 612 ; 1954 Cr LJ 225.
8. *Gajrani* v. *E.*, 144 IC 357 ; 1933 A 394 ; 34 Cr LJ 754 ; *Ramsingh* v. *State*, 1952 RLW 269 ; ILR 1952 , 2 Raj, 93.

parlance.[1]

Differing reports from Chemical Examiner and Imperial Serologist.—Duty of Prosecution.—When there is a difference of opinion in the reports of the Chemical examiner and the Imperial Serologist, the duty to explain the difference is on the prosecution and the mere production of the report does not, under the circumstances, prove anything which can weigh against the appellant. The effect of the first document, which itself shows two different results is practically nullified by the second document. In this unsatisfactory state of the evidence, the Sessions Judge was right in holding that both in the matter of the production of the axe and on the question of blood being found on the axe, the evidence is unreliable and cannot be considered as evidence to prove the guilt of the appellant.[2]

Hypothetical questions.—A witness deposes as a pure expert when he offers his opinion on a pure question of science or art. But the opinion of an expert is always based on facts which either the expert noticed himself or which are stated by the witnesses at the trial. When, therefore, a person states his opinion as well as the facts which he noticed and on which his opinion is based, his opinion is pure expert testimony; his statement concerning the facts on which that opinion is founded is not the statement of an expert but that of an ordinary witness. If, however, the expert did not himself notice the facts on which opinion has to be formed, they have to be proved by other evidence, and the expert can be asked to state his opinion only on the assumption that the Court considers those facts as having been proved in the case.[3] In such cases, therefore, the question must always have a hypothetical form, and the expert should not be asked to give his opinion as to the existence, or otherwise of the facts stated by the other witnesses, since it is for the Court to decide whether or not those facts have been established. A medical man who has seen, and made a *post mortem* examination on, a corpse can state the number, the position and extent of the injuries which he has noticed and can also offer his opinion as to the manner in which those injuries must have been caused as to the cause of death.[4] In describing the number, position and extent of the injuries, he is not deposing as an expert; but the opinion which he has formed as to the weapon by which those injuries must have been caused and as to the cause of death is pure expert testimony. If, therefore, the medical man has not himself examined the corpse and noticed the injuries, the condition of the corpse and the nature of the injuries have to be proved by other evidence; and the medical man could be asked his opinion as to the cause of death and as to the manner in which the injuries must have been received, on the assumption that the condition of the corpse and the nature of the injuries are correctly described by the other witnesses.[5] An expert should not be asked questions which involve determination of the truth or otherwise of the facts stated by the other witnesses. Thus, the question "you have heard the evidence in the case,

1. *Durand Didier* v. *Chief Secretary U.T.* Goa, AIR 1989 SC 1966.
2. *Tulsi Ram Kanu* v. *The State*, 1953 SCJ 612 ; 1954 Cr LJ 225.
3. *United States Shipping Board* v. *The Ship "St. Albans"*, 131 IC 771 : 1931 PC 189 ; *Rawat Sheo Bahadur Singh* v. *Beni Bahadur Singh*, 51 IC 419 ; see also *Secretary of State* v. *Sarla Davi Chaudhrani*, 5 L 227 : 79 IC 74 : 1924 L 548 ; but see In the goods of Gopessuar Dutt, 39 C 245 : 13 IC 577.
4. *Raghuni Singh* v. *E.*, 9 C 455.
5. *Raghuni Singh* v. *E.*, 9 C 455 ; *Q.E.* v. *Mehar Ali Mullick*, 15 C 589 ; see *Mehr Illahi* v. *E.*, 12 IC 93 : 12 Cr LJ 485, where two surgeons gave their opinion as to the cause of death on post mortem symptoms described by a third surgeon ; *Monosseh Jacob Monosseh* v. *Shapurji Hormusji Harver*, 10 Bom LR 1004, where it is remarked that the Court should first find the facts and then apply to such facts the various expert opinions.

state your opinion as to the cause of the death of the deceased" is an improper question, since the answer to it involves a determination of the question whether the facts, e.g., the position, the number and the extent of the injuries and the general condition of the corpse, described by the other witnesses are true or not. Similarly, the question "you have heard the evidence for the prosecution and the defence; state whether in your opinion the prisoner, at the time he committed the act, was of an unsound mind", is an improper question.[1] But a medical man who has been present in Court had heard the evidence may be asked whether the facts, assuming them to be true, show a sane or insane mind.[2] The opinion and conclusion of a skilled person on proved facts are receivable in evidence, provided the witness has made a special study of the subject or acquired a special experience therein. The question in such cases is whether the witness is skilled, whether he has adequate knowledge.[3]

Hypothetical questions to an expert.—An expert is entitled to answer all hypothetical questions put to him. The only safeguard which the Court must apply is that the hypothesis is correctly put to the expert.[4]

Chances of a man falling out of a window.—The question can only be put as a matter of convenience and not of right, the correct course being to put the facts to the witness hypothetically, asking him to assume one or more of them to be true and to state his opinion upon them. In a case a medical witness was asked in his evidence-in-chief the following question: "Supposing an individual 5 fit. 3-$^1/_2$ inches tall was standing near a window the height of the sill whereof was 3 ft. 4-$^1/_2$ inches from the floor level and there was a parapet and the combined width of the sill and the parapet was one foot ten inches, what are the chances of the man falling out of the window. The question was disallowed because it was not for an expert to tell the Court what would be the chances of a man falling out of the window from which the assured was said to have fallen out.[5]

HANDWRITING EXPERTS

Handwriting experts.—Handwriting is a useful test of identity. Experiments and observation have disclosed the fact that there are certain general principles which may be relied upon in questions pertaining to the genuineness of handwriting. For instance, it is asserted that in every person's manner of writing there is a certain distinct prevailing character which can be discovered by observation, and being once known, can be afterwards applied as a standard to try other specimens of writing, the genuineness of which is disputed. Handwriting, notwithstanding it may be artificial, is always, in some degree, the reflex of the nervous organization of the writer. Hence, there is in each person's handwriting some distinctive characteristic which, as being the reflex of his nervous organisation, is necessarily independent of his own will, and unconsciously forces the writer to stamp the writing as his own."[6] By nature and habit individuals

1. See In the goods of Gopessurar Dutt, 39 C 245 : 13 IC 577 : where it is remarked that it is better that the expert should hear the evidence as to which he is asked his opinion than that he should give his opinion on a copy of the deposition.
2. In re *Sankoppa Shetry*, 1941 M 326 : 194 IC 332 : 42 Cr LJ 558.
3. *United States Shipping Board* v. *The Ship "St. Albans"*, 131 IC 771 " 1031 PC 189.
4. *Bai Diva* v. *S.C. Mills*, 1956 Bom. 424.
5. *Ranjanibai Jamundas Champsey* v. *New India Assurance Co. Ltd.*, 1956 Bom. 633, 636.
6. Rogers on Expert Testimony, 290. 292.

contract a system of forming letters which gives a character to their writing as distinct as that of the human facts."[1] "Manifold as are the points of difference in the infinite variety of nature in which one man differs from another, there is nothing in which men differ more than in handwriting."[2]

Competency of handwriting experts.—Under this section it is only the opinion of a person specially skilled in questions relating to the identity of handwriting, which is relevant. It is, therefore, for the party, who produces a person as an expert witness, to show that the witness possesses the requisite skill.[3] An expert is no more than a person possessing peculiar skill and knowledge upon the subject-matter that he is required to give an opinion upon.[4] What degree of study, training or experience amounts to peculiar skill is very difficult to define and no hard and fast rule can be laid down. Any person who, from his circumstances and employment, possess special means of knowledge, has given the subject attention and is more than ordinarily conversant with its details will be considered specially skilled for the purposes of this section. "Writing engravers, lithographers, tellers, cashiers and other officers of banks, post office officials, book-keepers and cashiers of commercial houses[5] have been permitted to testify as experts". In an English case, a solicitor "who had for some years given considerable attention to the subject and had several times compared handwriting for purposes of evidence, though never testified as an expert"[6] was held competent ; and, in a Bombay case, a solicitor himself studied a disputed will for 128 hours and satisfied the Court that will was a forgery.[7] It should be noted, however, that the higher or lower qualifications of an expert merely affect the weight and not the strict relevancy of his opinion.

Mode of proving a writing genuine or forged.Sections 45, 47 and 73, Modes of proving handwriting.—Handwriting may be proved on admission of the writer, by the evidence of some witness in whose presence he wrote. This is direct evidence and if it is available the evidence of any other kind is rendered unnecessary. The Evidence Act also makes relevant the opinion of a handwriting expert (Section 45) or of one who is familiar with the writing of a person who is said to have written a particular writing. Thus besides direct evidence which is of course the best method of proof, the law makes relevant two other modes. A writing may be proved to be in the handwriting of a particular individual by the evidence of a person familiar with the handwriting of that individual or by the testimony of an expert competent to make the comparison of handwritings on a scientific basis. A third method (Section 7) is comparison by the Court with a writing made in the presence of the Court or admitted or proved to be the writing of the person.[8]

"Both under Ss. 45 and 47 the evidence is an opinion, in the former by a scientific comparison and in the latter on the basis of familiarity resulting from frequent observa-

1. Lawson, Expert and Opinion Evidence, 2nd Ed. 327-28.
2. Cockburn, CJ, in his address to the jury in the Trichborne Trial.
3. *Chet Ram* v. *Jogi Ram*, 127 IC 368 : 1930 L 386 : *Hari Chintawan Dikhhit*,v. *Moro Lakshman*, 11 B 89, 101 ; see however, *Shankarrao Gangadhar* v. *Ramji Harjivan*, 28 B 58, a case under section 47; see also *Batachu Jha* v.*Parmeshwar Raj*, 64 IC 234.
4. Lawson, Expert and Opinion Evidence, 2nd Ed, 453.
5. Woodroffe, Ev, 9th Ed., 450.
6. *R.* v. *Silverlock*, (1894) 2 QB 766.
7. *Dahibai* v.*Soonderi Damji*, 31 B 430.
8. *Fakhruddin* v. *State of Madhya Pradesh*, 1967 MPLJ 473 : 1967 Mah LJ 571 ; *State (Delhi Admn.)* v. *Pali Ram*, AIR 1979 SC 14 (para 23Z).

tions and experience. In either case, the Court must satisfy itself by such means as are open that the opinion may be acted upon. One such means open to the Court is to apply its own observations to the admitted or proved writings and to compare them with the disputed one, not to become a handwriting expert but to verify the premises of the expert in one case and to appraise the value of the opinion in the other case.. where an expert's opinion is given, the Court must see for itself and with the assistance of the expert come to its own conclusion whether it can safely be held that the two writings are by the same person.[1] This is not to say that the Court must play the role of an expert but to say that the Court may accept the fact proved only when it has satisfied itself on its own observation that it is safe to accept the opinion, whether of the expert or other witness."[2]

The proof of the genuineness of a document is proof of the authorship of the document, and is proof of a fact like that of any other fact. The evidence relating thereto may be direct or circumstantial. It may consist of the direct evidence of a person who saw the document being written or the signature being affixed. It may be proof of the handwriting of the contents, or of the signature by one of the modes provided in Sections 45 and 47. It may also be proved by the internal evidence afforded by the contents of the document. This last mode may be of value, where the disputed document forms part of a link in the chain of correspondence, some links of which have already been proved. In such a situation, the person, who is recipient of the document is in a position to speak to its authorship.[3] The writing with which the disputed writing is to be compared must, if not admitted, be proved to be genuine *i.e., to* be in the handwriting of the person whose writing is in dispute, and the comparison must be made in open Court.[4] In addition to the mode of proving by expert testimony, a writing to be forged or genuine there are other modes by which the genuineness or otherwise of a writing may be established. A document may be proved genuine or otherwise by the evidence of persons proved to be acquainted with the handwriting of the alleged writer,[5] or by comparing in Court the disputed writing with some other writing admitted or proved to be genuine,[6] but this latter mode has been disapproved by experienced Judges,[7] as a hazardous and inconclusive mode of proof,[8] and the practice of the Court itself

1. *Smt. M. Srivastava* v. *Smt. S. Srivastava*, 1988 ALR, 818.
2. *Fakhruddin* v. *State of Madhya Pradesh*, 1967 SC 1326 ; *State (Delhi Admn.)* v. *Pali Ram*, 1976 SC 14 (para 31).
3. *Mobarik Ali Ahmed* v. *State of Bombay*, 1957 Cr LJ 1346.
4. *Khirjiruddin* v. *E.*, 53 C 372 ; 92 IC 442 : 1926 C 139 : 27 Cr LJ 266 ; *Suresh Chandra Sanyal* v. *E.*, 39 C 606 : 14 IC 753 : 13 Cr LJ 239 ; In re *Basrur Venkata Roy*, 36 M 159 : 14 IC 418 : 13 Cr LJ 226 ; *Barindra Kumar Ghose* v. *E.*, 37 C 467 : 7 IC 359 : 11 Cr LJ 453 ; but see In re *Sithava Naik*, 30 IC 751 : 16 Cr LJ 703, where it was held that it is not necessary that the comparison should be made in Court and that it is sufficient if the documents are shown to the expert in court.
5. Section 47, *Ganpatrao Khanderao Vijaykar* v. *Vasantrao Gangpatrao Vijaykar*, 141 IC 747 : 1932 B 588 ; *Khijiruddin* v. *E.*, 53 C 372 : 92 IC 442 : 1926 C 139 : 27 Cr LJ 266 ; *Jasoda Kuer* v. *Janak Missir*, 4 P 394 : 92 IC 1034 : 1925 P 787 ; In the matter of Chanda Singh, 18 PR 1915 Cr : 28 IC 722 : 16 Cr LJ 338 ; *Shankarrao Gangadhar* v. *Ramji Harjivan*, 28 B 58. The witness must show his acquaintance with the handwriting of the writer to make his evidence relevant, *Jalaluddin* v. *E.*, 15 IC 979 : 13 Cr LJ 563 ; In re *Basrur Venkata Row*, 36 M 159 : 14 IC 418 : 13 Cr LJ 226.
6. Section 73 ; *Ganpatrao Khanderao Vijaykar* v. *Vasantrao Ganpatrao Vijaykar*, 141 IC 747 : 1932 B 558 ; *Khijiruddin* v. *E.*, 53 C 372 : 92 IC 442 : 1926 C 139 : 27 Cr LJ 266 ; *Barindra Kumar Ghose v.E.*, 37 C 467 : 7 IC 359 : 11 Cr LJ 453 ; *Vembu Amal* v. *Esakkia Pillai*, 1949 M 419 : 1949, 1 MLJ 71 : 1949 MWN 47 ; See *Balak Ram* v. *Muhammad Said*, 77 IC 872 : 1923 L 695.
7. *Gulstaun* v. *Sonatan Pal*, 78 IC 668 : 1925 C 485 ; *Batahu Jha* v. *Parmeshwar Rai*, 64 IC 234 ; *Suresh Chandra Sanyal* v. *E.*, 39 C 606 : 14 IC 753 : 13 Cr LJ 289.
8. *Rudragonda Venkangonda* v. *Basangonda Danappagonda*, 1939 B 257 ; *Major Stanley Hugh Barker* v.

acting as a expert and pronouncing a document to be a forgery has been deprecated,[1] particularly when there is no evidence or allegation of forgery.[2] Evidence relating to the dissimilarity of signatures, when the dissimilarity is not that of a general character but merely of particular letters, is peculiarly fallacious,[3] and the Court is not a competent judge of this matter. On the other hand, if two signatures, when one is superimposed on the other, *perfectly* coincide, it is almost a certain indication of the fact that one is forgery traced from the other.[4] 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. Where the character of the signature is such that the Court is satisfied that the signature is not that of the alleged testator, there is nothing to prevent the Court from acting upon its conviction and pronouncing against the document as a valid testamentary disposition ; though, where witnesses have positively affirmed that the testator did, in fact, execute 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 independently and from a consideration of the nature of the signature by which the testator is alleged to have executed the will.[5] See notes to Section 67, where different modes of proving handwriting are fully discussed.

Report of a handwriting expert.—The mere report of an expert who has not been examined in Court, which is not supported even by an affidavit, is no evidence and is entirely inadmissible.[6] But where a party has himself called for the report of an expert, the report will be admissible against him, even if he has not examined the expert as a witness in proof of the report.[7]

Examination of handwriting expert in a sine qua non.—A Court is competent to compare the disputed writing of a person with others which are admitted or proved to be his writings. It may not be safe for a Court to record a finding about a person's writing in a certain document merely on the basis of comparison but a Court can itself compare the writing in order to appreciate properly the other evidence produced before it in that regard. The opinion of a handwriting expert is also relevant in view of Section 45 of the Evidence Act, but that too is not conclusive. It has also been held that the sole evidence of a handwriting expert is not normally sufficient for recording a definite finding about the writing being of a certain person or not. It follows that it is not

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Mrs. Patricia May Barker, 1955 MB 103 (FB); *Latafat Husain* v. *Onkar Mal*, 152 IC 1042 : 1935 O 41 ; *Ambika Charan Barua* v. *Nareswari Dasi*, 85 IC 525 : 1925 C 145 ; *Balak Ram* v. *Muhammad Said*, 77 IC 872 : 1923 L 695 ; *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.

1. *Bibi Kaniz Zainab* v. *Mobarak Hossain*, 72 IC 748 : 1924 P 284 ; *Barindra Kumar Ghose* v. *E.*, 37 C 467 : 7 IC 359 : 11 Cr LJ 453.
2. *Galstaun* v. *Sonatan Pal*, 78 IC 668 : 1925 C 485.
3. *Galstaun* v. *Sonatan Pal*, 78 IC 668 : 1925 C 485 ; but see *Sarojini Dasi* v. *Haridas Ghose*, 49 C 235 : 66 IC 774 : 1922 C 12.
4. Rogers, Expert Testimony, 290, 292 ; Hagan, Disputed Handwriting, 91,92.
5. *Lila Sinha* v. *Bijoy Pratap Deo Singh*, 87 IC 534 : 1925 C 768 ; See *Sarojini Dasi* v. *Haridas Ghose*, 49 C 235 : 66 IC 774 : 1922 C 12.
6. *Tasaduq Hussain* v. *Basawan Rai*, 141 IC 767 : 1933 P 159 ; *Ram Autar Shukul* v. *Baldeo Shukul*, 11 P 782 : 140 IC 895 : 1932 P 352 ; *Pitain* v. *Baboo Singh*, 79 IC 641 : 1924 N 183 ; *Raghunath Mody* v. *The Kurseong Municipality*, 76 IC 394 :1923 C 561 : 25 Cr LJ 170 ; *Peary Lal* v. *E.*, 75 IC 148 : 1923 A 601 : 24 Cr LJ 900 ; *Padma Priya Debya* v. *Dharma Das Deb Sharma*, 10 IC 965 : 15 CWN 728 : See *Kazim Husain* v. *Shambhoo Nath*, 132 IC 259 : 1931 O 298.
7. *Dil Mohammad* v. *Sain Das*, 100 IC 922 : 1927 L 396.

essential that the handwriting expert must be examined in a case to prove or disprove disputed writing.[1]

"It is not the province of the expert to act as Judge or Jury. As rightly pointed out in *Titli* v. *Jones*,[2] the real function of the expert is to put before the Court all the materials together with reasons which induce him to come to the conclusion, so that the Court, although not an expert, may form its own judgment by its own observation of those materials, Ordinarily, it is not proper for the Court to ask the expert to give his finding upon any of the issues, whether of law or fact, because strictly speaking, such issues are for the Court to determine. The handwriting expert's function is to opine after a scientific comparison of the disputed writing with the proved or admitted writing with regard to the points of similarity and dissimilarity in the two sets of writings. The Court should then compare the handwriting with its own eyes for a proper assessment of the value of the total evidence."[3]

Value of expert testimony on questions of handwriting — It may be that normally it is not safe to treat expert's evidence as to handwriting as sufficient basis for conviction.[4] It may be relied upon in conjunction with other internal and external evidence relating to the document in dispute.[5] Expert opinion must always be received with great caution,[6] especially the opinion of handwriting experts.

There is profusion of authority which has ruled that it is unsafe to base a conviction solely on expert opinion without substantial corroboration. This rule has been universally acted upon and it has almost become a rule of law, although it is unsafe to treat expert opining on handwriting as a sufficient basis for conviction, yet it may be relied upon when it is supported by other items of internal and external evidence.[7] Expert evidence can, never be conclusive because it is after all, opinion evidence.[8] Being opinion evidence it can rarely if ever take the place of substantive evidence, and before acting of such evidence it would be desirable to consider whether it is corroborated either by clear direct evidence or by circumstantial evidence.[9] It would be risky to find a conviction solely on the evidence of a handwriting expert and before acting upon such evidence the Court must always try to see whether it is corroborated by other evidence direct or circumstantial.[10] There can be no doubt that expert evidence of handwriting, being opinion evidence, is by its very nature, weak and infirm and cannot, of itself form the basis for a conviction.[11]

Commenting on the said observation in *Magan Beharilal's* case.[12] and the cases cited therein a Bench of the Supreme Court observed in *Murari Lal* v. *State of U.P.*,[13] "We do not think that the observations were meant to be observations of general appli-

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1 *The State of Gujarat* v. *Vinaya Chandra Chhota Lal*, 1967 SCJ (1) 821.
2 ILR 56 All 428; 1934 All 273.
3 *State (Delhi Adm)* v. *Pali Ram*, AIR 1979 SC 14 (Para 30).
4 See *Jagmal Singh Yadav* v. *Aiamiddim Ahmed Khan*, 1994 Supp (2) SCC 309, para 17.
5 *Ram Chandra* v. *State of U.P.*, 1957 Cr LJ 559.
6 *Kazim Husain* v. *Shambhoo Nath*, 132 IC 259; 1931 O 298; *Deputy Commissioner, Lucknow* v. *Chandra Kishore Tewari*, 1947 O 180 (FB) See also *Manorama* v. *Saroj*, AIR 1989 All 17.
7 *Ram Chandra* v. *State of U.P.*, AIR 1957 SC 381.
8 *Ishwari Prasad* v. *Mohd Isa*, AIR 1963 SC 1728.
9 *Shashi Kumar* v. *Subhdh Kumar*, AIR 1964 SC 529.
10 *Fakruddin* v. *State of M.P.*, AIR 1967 SC 1326.
11 *Magan Behari Lal* v. *State of Punjab*, AIR 1977 SC 1091: 1977 Cr LJ 711 (para 7).
12 *Murari Lal* v. *State of U.P.*, AIR 1980 SC 531 (para 10).
13 AIR 1980 SC 531 (para 10).

cation or as laying down any legal principle. It was plainly intended to be a rule of caution "and not a rule of law as is clear from the statement 'it has *almost* become a rule of law'. 'Almost', we presume means 'not quite'. it was said by the Court there was a 'profusion of precedential authority' which insisted upon corroboration and reference was made to. *Ram Chandra* v.*State of U.P.; Ishwari Prosad* v. *Mohd Isa*; *Shashi Kumar* v. *Subodh Kumar* and *Fakhruddin* v. *State of M.P.*[1] We have already discussed these cases and observed that none of them supports the proposition that corroboration must invariably be sought before opinion evidence can be accepted. There appears to be some mistake in the last sentence of the above extracted passage because we are unable to find in *Fakhruddin* v. *State of M.P.*[2] any statement such as the one attributed. In fact, in that case, the learned Judges acted upon the sole testimony of the expert after satisfying themselves about the correctness of the opinion by comparing the writings themselves. We do not think that the observations in *Magan Behari Lal* v. *State of Punjab*,[3] must be understood as referring to the facts of the particular case. We are firmly of the opinion that there is no rule of law, nor any rule of prudence which has crystalised into a rule of law, that opinion evidence of a handwriting expert must never be acted upon, unless substantially corroborated. But having due regard to the imperfect nature of the science of identification of handwriting, the approach, as we indicated earlier, should be one of caution. Reasons for the opinion must be clearly probed and examined. All other relevant evidence must be considered. In appropriate cases, corroboration may be sought. In cases where the reasons for the opinion are convincing and there is no reliable evidence throwing a doubt, the uncorroborated testimony of a handwriting expert may be accepted. There cannot be any inflexible rule of a matter which, in the ultimate analysis is no more than a question of testimonial weight."[4]

In order to rely on the evidence of an expert the Court must be fully satisfied that the witness is truthful and reliable and is fully adept in the art of identification of handwriting. In a case where certain signatures were in the opinion of the expert forged, but the persons whose signatures they purported to be appeared as witnesses and stated on oath that they were their signatures, the expert could not be believed at all.[5]

According to the Supreme Court in *Murari Lal* v. *State of Madhya Pradesh*[6] "the argument" that "the opinion evidence of a handwriting expert should not be acted upon without substantial corroboration", "cannot be justified on principle or precedent....the expert is no accomplice". There is no justification for condemning his opinion-evidence to the same class of evidence as that of an accomplice and insist upon corroboration. True, it has occasionally been said on very high authority that it would be hazardous to base a conviction solely on the opinion of a handwriting expert. But, the hazard in accepting the opinion of any expert, handwriting expert or any other kind of expert, is not because experts, in general, are unreliable witnesses-the quality of a credibility or incredibility being one which an expert shares with all other witnesses,-but because all human judgment is fallible and an expert may go wrong because of some defect of

1. *Ram Chandra* v. *State of U.P.*, 1957 SC 381 : 1963 SC 1728 : 1964 SC 529 : 1967 SC 1327.
2. *Fakhruddin* v. *State of M.P.*, 1967 SC 1326.
3. *Magan Behari Lal* v. *State of Punjab*, 1977 SC 1091 : 1977 Cr LJ 711 (para 7).
4. *Kanchan Singh* v.*State of Gujarat*, 1979 SC 1011 (para 1).
5. 1980 SC 531 (para 10).
6. *Kanch Singh* v. *State of Gujarat*, 1979 SC 1011 (para 1).

observation, some error of premises or honest mistake of conclusion. The more developed and the more perfect a science, the less the chance of an incorrect opinion and the converse if the science is less developed and imperfect. The science of indentification of finger prints has attained near perfection and the risk of an incorrect opinion is practically non-existent. On the other hand, the "science of identification of handwriting is not nearly so perfect and the risk is, therefore, higher. But that is a far cry from doubting the opinion of a handwriting expert as an invariable rule and insisting upon substantial corroboration in every case, however the opinion may be backed by the soundest of reasons. It is hardly fair to a expert to view his opinion with an initial suspicion and to treat him as an inferior sort of witness. His opinion has to be tested by the acceptability of the reasons given by him. An expert deposes and not decides. His duty is to furnish the judge with the necessary scientific criteria for testing the accuracy of his conclusion, so as to enable the judge to form his independent judgment by the application of these criteria to the facts proved in evidence.....Expert testimony is made relevant by Section 45....and where the Court has to form an opinion upon a point as to identity of handwriting, the opinion of a person 'specially skilled' 'in questions as to identity of handwriting ' is expressly made a relevant fact. There is nothing in the Evidence Act, as for example like illustration (b) to Section 114 which entitles the Court to presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars, which justifies the Court in assuming that a handwriting expert's opinion is unworthy of credit unless corroborated. The Evidence Act itself (Section 3) tells us that 'a fact is said to be proved when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists'. It is necessary to occasionally remind ourselves of this interpretation clause in the Evidence Act lest we act on artificial standard of proof not warranted by the provisions of the Act. Further, under Section 114..... the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to facts, not otherwise relevant, relevant if they support it or are inconsistent with the opinion of experts, when such opinions are relevant. So, corroboration may not invariably be insisted upon before acting on the opinion of an handwriting expert and there need be no initial suspicion. But, on the facts of a particular case, a Court may require corroboration of a varying degree. There can be no hard and fast rule, but nothing will justify the rejection of the opinion of an expert supported by unchallenged reasons on the sole ground that it is not corroborated. The approach of a Court while dealing with the opinion of a handwriting expert should be to proceed cautiously, probe the reasons for the opinion, consider all other relevant evidence and decide finally to accept or reject it."[1]

An expert witness, however impartial he may wish to be, is likely to be unconsciously prejudiced in favour of the side which calls him. The mere fact of opposition on the part of the other side is apt to create a spirit of partisanship and rivalry, so that an expert witness is unconsciously impelled to support the view taken by his own side. Besides it must be remembered that an expert is often called by one side simply and

1. *Murari Lal* v. *State of M.P.*, 1980 SC 531. (paras 4 and 6).

solely because it has been ascertained that he holds views favourable to its interests.[1] Of all kinds of evidence admitted in a Court, this is the most unsatisfactory. It is so weak and decrepit as scarcely to deserve a place in our system of jurisprudence.[2] In view of this infirmity of expert testimony, it is the settled practice of Courts not to base a finding merely on expert opinion.[3] Conclusions based on mere comparison of handwriting must, at best, be indecisive, and yield to the positive evidence in the case.[4] The opinion of an expert cannot be more reliable than the statement of a witness of fact such as a petition-writer who had seen the party signing the document.[5] In the fact of the overwhelming documentary evidence proving execution of a document, the opinion of a handwriting expert to the contrary is of no value.[6] Experts, like lawyers, differ in their opinion, and it is in the highest degree unsafe to rely on expert evidence when the admitted facts lead to a contrary conclusion.[7] It is extremely unsafe to base a conviction upon the opinion of handwriting experts without substantial corroboration.[8] A comparison of handwriting is something hazardous and inconclusive, and should be made with care and caution in the light of assistance that may be available in the shape of expert evidence or arguments on behalf of the parties concerned or other ways ensuring a right decision. No hard and fast rule can possibly be laid down as to the best method of arriving at a proper conclusion of the question of similarity of handwriting. But the most important things to examine are the general characteristics, formation of letters, fixed pen habits and mannerisms. The identity or resemblance in handwriting has to be found out on the value of the effect of various considerations arising from individual characteristics and idiosyncrasies which have been embodied in the technical language of experts.[9] Mere resemblance between two writings is not sufficient to create the conviction that they were written by one and the same person;[10] since it is not difficult to forge the handwriting of a person in such a manner as to make it impossible for even the most acute and experienced Judge to discriminate between the false and the true.[11] There may, however, be cases where the handwriting is of such a peculiar character that the conclusion as to the identity of the writer is almost irresistible.[12] On the other hand, a clear dissimilarity of habit between two writings is evidence to show that the

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1. *Sadiqua Begum* v. *Ata Ullah*, 144 IC 497 : 1933 L 885 ; *Diwan Singh* v. *E.*, 144 IC 331 : 1933 L 561 : 34 Cr LJ 735 ; *Hari Singh* v. *Lachmani Devi*, 59 IC 220 : 1921 L 126.
2. *Indar Datt* v. *E.*, 132 IC 185 : 1931 L 408 : 32 Cr LJ 818 ; Lawson, Expert and Opinion Evidence, 3rd Ed., 327 ; See *Batahu Jha* v. *Parmeshwar Rai*, 64 IC 234.
3. *Saqlain Ahmad* v. *E.*,1936 A 165 : 160 IC 264 : 37 Cr LJ 263 ; In re *Basrur Venkata Row*, 36 M 159 : 14 IC 418 : 13 Cr LJ 226 : *Punjab National Bank, Ltd.*,v. *Mercantile Bank of India, Ltd.*, 8 IC 98 ; *Lalta Prasad* v.*E.*, 5 IC 355 : 11 Cr Lj 114 ; *Kali Charan Mukerji* v.*E.*, 2 IC 154 : 9 Cr LJ 498 : 2 ALJ 444 ; *Deputy Commissioner, Lucknow* v.*Chandra Kishore Tewari*, 1947 O 180 (FB).
4. *Kishore Chandra Singh Deo* v.*Ganesh Prasad Bhagat*, 1954 SC 316.
5. *Lal Singh Didar Singh* v. *Guru Granth Sahib*, 1951 Pepsu 101 ; See also *Govardhan Das* v. *Ahmadi Begum*, 1953 Hyd 181.
6. *Banbasi Store* v. *President of the Union of India*, 1953 A 318.
7. See *Sheotahal Singh* v *Arjun Das*, 56 IC 879.
8. *Sudhindra Nath Dutt* v. *The King*, 1952 C 422.
9. *Jitendra Nath Gupta* v.*E.*, 1937 C 99 : 169 IC 977 : 38 Cr LJ 818 (SB) ; See also *Shriniwas Pannalal Chockhani* v.*The Crown*, 1951 N 226 : ILR 1951 N 104.
10. *Sarojini Dasi* v.*Haridas Ghose*, 49 C 235 : 66 IC 774 : 1922 C 12 ; *Batahu Jha* v.*Parmeswar Rai*, 64 IC 234 ; *Lalta Prasad* v *E.*, 5 IC 355 : 11 Cr LJ 114 ; *Ambal Bagyam* v.*Ramayya Padayachi*, 1955 M 88.
11. *Sarojini Dasi* v.*Haridas Ghosh*, 49 C 235 : 66 IC 774 : 1922 C 12.
12. In re *Basrur Venkata Row*, 36 M 159 : 14 IC 418 : 13 Cr LJ 226 ; *Kali Charan Mukerji* v.*E.*, 2 IC 154 : 9 Cr LJ 498 ; See also *Lalta Prasad* v.*E.*, 5 IC 355 : 11 Cr LJ 114.

documents are not in the handwriting of the same person.[1] The evidence of a handwriting expert need not definitely point out that anybody wrote a particular thing. The expert is only to point out the similarities to the Court, which has to determine whether a particular writing is to be assigned to a particular person.[2] A court should not surrender its own opinion to that of experts who are called before it, but with such help as the experts can afford the Court must form its own opinion on the subject in hand.[3] Where the trial is by jury the question of the reliability of the evidence of an expert in handwriting is clearly one for the jury to decide.[4] The evidence of an expert in handwriting is of little value when it is contradicted by that of another.[5] Where the signature examined by an expert is in a language which he cannot read or write, his opinion is not of much value, and can be used merely as corroborative of other evidence.[6] Experts can also give their opinion as to whether a writing is in a feigned or natural hand,[7] as to the probable age of a document, and as to whether interlineations were written on temporaneously with the rest of a document.[8] Whatever the value of expert testimony in general may be, if a party wishes to produce an expert in evidence the Court is bound to call him.[9] On the other hand, since the evidence of a handwriting expert is not of much value, no inference adverse to a party should be drawn from the mere fact that the party did not call an expert to prove the genuineness of a signature.[10] There is nothing in the Evidence Act to require the evidence given by an expert in any particular case to be corroborated before it could be acted upon as sufficient proof of what the expert states. Of course the question as to how much reliance a Court would be entitled to place on the statement of any particular witness in any particular case must necessarily depend on the facts and circumstances of that particular case.[11] To prove or disprove a writing, it is not essential to examine the Handwriting Expert, The court also can do the comparison for the disputed signatures and arrive at a decision in that regard. But the Court could allow a party to establish his case by having the disputed handwriting examined by a Handwriting Expert.[12]

Evidence of one of the experts may not be discarded if the Court after examining the disputed signature with the genuine signature also comes to the same conclusion. Thus the opinion of the expert can be accepted with re-inforced reasoning. In such a case the Court will not be acting as an expert. Three modes of proof of document were suggested

1. *Lila Sinha* v.*Bijoy Pratap Deo Singh*, 87 IC 534 : 1925 C 768 : In re *Basrur Venkata Row*, 36 M 159 : 14 IC 418 : 13 Cr LJ 226 ; *Sarojini Dasi* v *Haridas Ghosh*, 48 C 235 : 66 IC 774 : 1922 C 12.
2. *Wakeford* v. *Lincoln Bishop*, 1921 PC 168.
3. In the matter of U.P. an advocate, 13 R 518 : 1935 R 178 : 156 IC 582 : 36 Cr LJ 961 (SB); *Moosa Ghulam Ariff* v. *Khoo Soo See*, 157 IC 82 ; *Jitendra Nath Gupta* v.*E.*, 1937 C 99 : 169 IC 977 : 38 Cr LJ 818 ; *Prasad Mahto* v. *Mst. Josada Kuer*, 18 PLT 491 ; 4 R 628 ; *Durga Prasad* v. *State*, 1952 *Mst Josada Kuer*, 18 PLT 491 : 4 BR 628 ; *Durga Prasad* v.*State*, 1952 N 289 : 1952 Cr LJ 1225.
4. *Kishori Kishore Mishra* v.*E.*, 1935 C 208 : 156 IC 396 : 36 Cr LJ 921.
5. *Mohammad Ziaulla Khan* v.*Rafiq Mohammad Khan*, 1939 O 213 ; *Sadiqa Begum* v.*Ata Ullah*, 144 IC 497 :1933 L 885.
6. *Ram Sewak Sahu* v.*E.*, 1933 P 559 : See also *Saqlain Ahmad* v.*E.*, 1936 A 165 : 160 IC 264 : 37 Cr LJ 263.
7. 6 Cox 163.
8. *Re Hindmarch*, LR 1 P & D 307.
9. *Ram Narain Sharma* v.*E.*, 139 IC 508 : 1932 L 481 : 33 Cr LJ 761 ; See however, *Sheotahal Singh* v.*Arjun Das*,56 IC 879.
10. *Gobindjee Madhuvjee & Co., Ltd.* v.*Smith*, 143 IC 698 : 1928 P 563.
11. *Ladharam Narshingdas* v. *E.*, 1945 S. 4.
12. *Venkatalakshmiah* v. *Venkatappa*, AIR 1991 Mad 399 (para 3).

by the Supreme Court in *Fakhruddin* v. *State of Madhya Pradesh*, (*AIR 1967 SC 1326* : *1967 Cri LJ 1197*). Firstly by direct evidence, secondly by Expert's evidence and thirdly by the Court coming to the conclusion by comparison.[1] The opinion of a handwriting expert should not be rejected because it is based solely on the photograph.[2]

Opinion as to typewritten matters.—Value of expert opinion as to typing. The expert opinion was that the letter was not typed on the typewriter then in use. It was typed on another typewriter. Such evidence is inadmissible, not being covered by Section 45 of the Act.[3] A proven specimen of typewriting may be admitted in evidence for the purpose of comparison with a disputed specimen on the principle that where an impression is made on paper, wood, leather, or any other plastic material by an instrument or mechanical contrivance having or possessing a defect or peculiarity, the identity of the instrument may be established by proving the identity of the defects or peculiarities which it impresses on different papers.[4] The opinion of a witness that one document has been typewritten on the same machine as another document is not admissible under Section 45. The Court may ask the witness to explain points in favour of the view whether the two documents have or have not been typewritten on the same machine, but the Court cannot treat the witness's opinion as expert testimony.[5]

Opinion as to printed matters.—Where the question was whether a lottery ticket was forged, the Supreme Court examined and discussed the opinion evidence of two 'experts' in the art of printing; and while with regard to one it observed that he undoubtedly had the qualifications of an expert, his evidence did not clinch the issue as to whether the ticket in question was a forged one, with regard to the other witness it observed that "*Assuming arguendo*" he "had the necessary skill, scientific knowledge and experience of an 'expert' and his opinion was admissible under S. 45, then also it would be highly unsafe to condemn" the lottery ticket in question "on his opinion alone, as a forged document. The dissimilarities.....on the basis of which he has characterised the number.....as a forged number, may be natural variations. His opinion does not inderbitably exclude the possibility of the number in question....having been printed in the ordinary course.....In cross-examination he did not rule out this possibility. His opinion that the questioned number...had not been printed with the same ink with which the numbers on....and the other Lottery Tickets were printed in their Press cannot pass muster....The only reason...given by him, is that the ink used in printing the questioned number....is less dense or lighter in shade....This variation in density of ink may be due to an innocuous cause. The witness never examined the ink chemically. This circumstance pointed out by the witness was too precarious to be a safe basis for a finding of forgery."[6]

Finger Impression Experts

Thumb-impression experts.— The knowledge of finger prints is a science and the evidence of persons conversant with this science is admitted on principles similar to

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1. *Suresh Kumar* v. *Mewa Ram*, AIR 1991 P & H 254 (para 6).
2. *Shriniwas Pannalal Chockhani* v. *The Crown*, 1951 N 226 : ILR 1951 N 104.
3. *Hanumant Govind Nargundkar* v. *State of Madhya Pradesh*, 1952 SCR 1091 : 1953 Cr LJ 129.
4. 10 RCL 999.
5. *Bachcha Babu* v. *E.*, 155 IC 369 : 1935 A 162 : 36 Cr LJ 684 ; *Jhabwala* v. *E.*, 145 IC 481 : 1933 A 690 : 34 Cr LJ 967 ; see also *Manabendra Nath Roy* v. *E.*, 148 IC 833 : 193 A 498 : 35 Cr LJ 768.
6. *Chatt Ram* v. *State of Haryana*, 1979 SC 1890 (paras 22 and 24).

those governing the admissibility of this section by Act V of 1899, evidence of person skilled in questions relating to the identity of thumb-impressions was not admitted under this section; but the similarity or dissimilarity of thumb-impression could be considered as evidence of indentity or otherwise under Section 9 and 11 of the Act, provided the comparison was made, and opinion on this comparison formed, by the Court itself and not by an expert.[1] The study of finger prints is now generally admitted to constitute a science,[2] since it has been ascertained "that between birth and death there is absolutely no change say, in 699 out of the 700 numerous characteristics of the marking of the fingers of the same person",[3] and the similarity of finger prints is looked upon as a very reliable test for identity. By those who have made a study of the subject, there has never yet been found any case in which the pattern made by one finger exactly resembled the pattern made by any other finger of the same or any other hand.[4] The term "finger impression" does not include palm impressions, but there can be no doubt that the opinion of an expert on the identity of a palm impression is admissible,[5] as the comparison of palm impression also constitutes a science.

Competency of finger print experts.—No precise rule can be laid down as to the qualifications which a person must possess to be able to depose as an expert in the examination of finger prints. There must be profession of some special qualification by study or experience on the part of a person who lays claim to the position or character of an expert. A person who has studied finger-impressions for five months in a training school and thirteen months in the office of the Inspector-General of Police and who examined two or three lacs of impressions and himself taken thousands of impressions is a competent expert witness.[6]

Value of finger print experts testimony.— The evidence of an expert should be approached with considerable care and caution, and the attention of the jury must be drawn to the infirmity of such evidence.[7] The argument in finger print cases rests on a simple deduction from a number of observations of the similarities and differences between the finger prints in question, and there is no reason why it should not be a sure foundation for a conclusion, and it may be a better one than any based on direct evidence.[8] The comparison of thumb-impressions has become an exact science and the evidence of an expert on this subject is entitled to considerable weight.[9]

Indeed in *Jaspal Singh v. State of Punjab*.[10] "the Supreme Court observed that the science of identifying thumb impression is an exact science and does not admit of any mistake doubt."

The evidentiary value of identity afforded by the prints of two or three fingers which contain even a few points of resemblance in the minutiae and no points of

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1. *Q.E.* v. *Faqir Mahomed Sheikh,etc.*, 1 CWN 33.
2. *Diledad* v. *E.*, 113 IC 68 : 1929 L 210 : 30 Cr LJ 52 ; *E.* v. *Abdul Hamid*, 32 C 759.
3. Henry, Finger Prints, 4th Ed., 16-19.
4. *Ganga Sahai -Bhagmal* v. *Molar*, 155 IC 799 : 1935 L 147 ; *Q.E.* v. *Faqir Mahomed Sheikh, etc.*, 1 CWN 33.
5. *E.* v. *Babulal Behari*, 52 B 223 : 108 IC 508 : 1928 B 158 : 29 Cr LJ 410.
6. *E.* v. *Abdul Hamid*, 32 C 759.
7. *Panchu Mondal* v. *E.*, 1 CLJ 385.
8. *Public Prosecutor* v. *Virammal*, 46 M 715 : 69 IC 374 : 1923 M 178 : 23 Cr LJ 694.
9. *Diledad* v. *E.*, 113 IC 68 : 1929 L 210 : 30 Cr LJ 52.
10. *Jaspal Singh* v. *State of Punjab*, 1979 SC 1708 (para 8).

disagreement is so great as to render it superfluous to seek confirmation from other sources.[1] Expert opinion as to the similarity of finger-impressions stands on an entirely different footing from expert opinion as to the similarity for handwriting. No two human beings have the same thumb marking; and if no difference whatever can be found between one mark and another, the conclusion is irresistible that the same thumb made both.[2] Therefore, a conviction based on a comparison of the thumb-impression of the accused person with the thumb-impression on the document in question is not open to any legal objection,[3] though Courts regard it unsafe to act on such evidence in the absence of other corroborative circumstances.[4] Courts should exercise great caution in arriving at a conclusion by a comparison for thumb-impressions. The positive evidence of witnesses who were undoubtedly present and eye-witnesses to the transaction should not be lightly brushed aside.[5] The Court should be very chary in accepting the opinion of a finger print expert as to the age of a thumb-mark as fixing the date of a document when such date is markedly opposed to the date which appears upon the document itself, so long as no serious extraneous testimony controverts the date which appears on the document.[6] Section 73 of the Act authorizes a Court to obtain from any person present in Court a specimen of his thumb-impression for the purpose of causing it to be compared by an expert,[7] or for the purpose of its being compared by the Court with the disputed impression,[8] There is nothing in the so-called science of finger prints, or the qualification of an expert in it, which need deter a Court from applying its own magnifying glass or its own eyes and its own mind to the evidence and verifying the results submitted to it by the witnesses.[9] It would, however, be risky for the Court to form an opinion without the assistance of a finger print expert.[10] Neither a Court nor a jury is bound to accept of a opinion of an expert in thumb-impressions without the corroboration of its own intelligence as to the reasons which guided him in his conclusions.[11] It cannot be said that it is unsafe to base a conviction on the uncorroborated testimony of a finger print expert. But the Court cannot delegate its authority to the expert and has to satisfy itself as to the value of the evidence for the expert in the same way as it must satisfy itself as to the value of any other evidence.[12] The question of the identity of

1. *E.v. Sahadeo*, 3 NLR 1.
2. *Ganga Sahai-Bhagmal* v. *Molar*, 155 IC 799 : 1935 L 147 ; *Diledad* v. *E.*, 113 IC 68 : 1929 L 210 : 30 Cr LJ 52 ; *Ahmada* v. *E.*, 9 PR 1914 Cr : 27 IC 203 : 16 Cr LJ 139.
3. *Fakir Mohammad* v. *E.*, 60 B 187 : 1936 B 151 : 37 Cr LJ 539 ; *Harendra Nath Sen* v. *E.*, 133 IC 111 : 32 Cr LJ 1001 ; *Basgit Singh* v. *E.*, 6 P 305 : 104 IC 626 : 1928 P 129 : 28 Cr LJ 850 ; *Public Prosecutor* v. *Kandasmi Thevan*, 50 M 462 : 98 IC 99 : 1927 M 696 : 27 Cr LJ 1251.
4. *Harendra Nath Sen* v. *E.*, 133 IC 111 : 1931 C 441 : 32 Cr LJ 1001 : *Basgit Singh* v. *E.*, 6 P 305 : 104 IC 626 : 1928 P 129 : 28 Cr LJ 850 ; *Jassu Ram* v. *E.*, 4 L 246 : 77 IC 423 : 1923 L 622 : 25 Cr LJ 375 ; *Bazari Hajam* v. *E.*, 1 P 242 : 63 IC 958 : 1922 P 73 : 23 Cr LJ 638 : *E.* v. *Abdul Hamid*, 32 C 759 ; *State* v. *Karu Gope*, 1954 P 131 : 1954 Cr LJ 201.
5. *Baidya Nath Dutt* v. *Alef Jan Bibi*, 70 IC 194 : 1923 C 240.
6. *Ramlakhan Panda* v. *Dharmdeo Misir*, 97 IC 335 : 1926 P 575.
7. *Public Prosecutor* v. *Kandasami Thevan*, 50 M 462 : 98 IC 99 : 1927 M 696 : 27 Cr LJ 1251 ; *Supt & Remembrancer of Legal Affairs* v. *Kiran Bala Dasi*, 93 IC 73 : 1926 C 531 : 27 Cr LJ 409. But the practice of taking finger prints of an accused was strongly condemned in *Bazari Hajam* v. *E.*, 1 P 242 : 68 IC 958 : 1922 P 73 : 23 Cr LJ 638.
8. *Public Prosecutor* v. *Kandasami Thevan*, 50 M 462 : 98 IC 99 : 1927 M 696 : 27 Cr LJ 1251.
9. *Public Prosecutor* v. *Viramma*l, 46 M 715 ; 69 IC 374 : 1923 M 178 : 23 Cr LJ 694.
10. *Bibi Zainab* v. *Anwar Khan*, 1946 P 104.
11. *Basgit Singh* v. *E.*, 6 P 305 : 104 IC 626 : 1928 P 129 : 28 Cr LJ 850 ; *E.* v. *Abdul Hamid*, 32 C 759 ; *Crown Prosecutor* v. *Gopal*, 1941 M 551.
12. *Golam Rahman* v. *The King*, 1950 C 66 : 83 CLJ 387.

thumb-marks is a question of fact to be decided by evidence as any other question of fact,[1] and, therefore, in trials by jury, eminently a matter for the jury and not for the Judge.[2] In dealing with the evidence of a finger-print expert the Court must be careful not to delegate its authority to a third party. The Court must satisfy itself that the accused is guilty and cannot hold him guilty because the expert comes forward and says that in his opinion the accused must be guilty. The Court must satisfy itself as to the value of the evidence of the expert in the same way as it must satisfy itself for the value of other evidence. The Court has to rely on the expert upon two distinct points. First of all on the question of similarity between the marks, which is a question of fact on which the Court can, and should, with the assistance of the expert satisfy itself, and secondly on point which is one for expert opinion, whether it is possible to find the finger-prints or thumb-impressions of two individuals corresponding in as many points of resemblance as are shown to exist between the impressions found in the case before the Court and those of the accused. When the expert tells the Court that it is impossible to find so many characteristics indentical in the finger prints of two persons and when that statement agrees entirely with that one has read on the subject in scientific books, the Court need not hesitate in accepting the opinion.[3] The impression with which the admitted thumb-impression is to be compared must be shown to be that of the person whose identity is sought to be established by this means.[4] Where the thumb impressions are not clear but blurred, the expert evidence cannot be treated as reliable and conclusive.[5]

"There is no gain saying the fact that a majority of finger-prints found at crime scenes or crime articles are partially smudged and it is for the experienced and skilled finger-print expert to say whether a mark is usable as finger-print evidence. Similarly it is for a competent technician to examine and give his opinion whether the identity can be established, and if so whether that can be done on eight or even less identical characteristics in an appropriate case." The clear and categorical opinion of the Director of Finger Print Bureau, only supported by adequate reasons was accepted by the Supreme Court in that case of course, after scrutinizing the same in some detail.[6]

The opinion of an expert, which is admissible against an accused, is the opinion given by him at the trial. The opinion formed by him before the trial in another case is not substantive evidence. It is doubtful if such opinion, recorded for the purposes of the previous suit, is at all admissible.[7] The experts should be required to explain to the Court the reasons for his opinion.[8]

Where the expert gave no reasons in support of his opinion and it was not shown that he had acquired special skill, knowledge and experience in the science of identification of finger-prints, it was held that it would be highly unsafe to convict one on a capital charge without any independent corroboration, solely on the bald and dogmatic opinion of such an expert even if such opinion is assumed to be admissible under section 45.[9]

1. *Public Prosecutor* v. *Kandasami Thevan*, 50 M 462 : 98 IC 99 : 1927 M 696 : 27 Cr LJ 1251.
2. *Panchu Mondal* v. *E.*, 1 CLJ 385.
3. *E.v. Faqir Mohammad Ramzan*, 60 B 187 ; 1936 B 151 : 162 IC 231 ; 37 Cr LJ 539.
4. *Hulosi* v. *E.*, 7 Cr LJ 406 ; *E.v. Sahadeo*, 3 NLR 1.
5. See *E,v. Abdul Hamid*, 32 C 759.
6. *Mohan Lal* v. *Ajit Singh*, 1978 SC 1183 (para 44-46).
7. *Ganda Mal* v. *E.*, 110 IC 810 : 1928 L 921 : 29 Cr LJ 778.
8. *Crown Prosecutor* v. *Gopal*, 1941 M 551 : 195 IC 183 : 42 Cr LJ 596.
9. *Mahmood* v. *State of U.P.*, 1976 SC 69 (para 19) : 1976 Cr LJ 10.

The report of a finger print expert.—In re-Govinda Reddy[1] it was pointed out that the science of comparison of finger-prints has developed to a stage of exactitude, and it is quite possible for the Court to compare the impressions taken from finger-prints of individuals with disputed impressions, provided they are sufficiently clear and enlarged photographs are available. The identification of finger impressions with the aid of a magnifying glass is not difficult, particularly when the photographs of the latent and patent impressions are pasted side by side. But Courts of Law, must not play the role of finger-print expert when the point in issue is not the patent differences in pattern visible to the naked eye and which will rule out that two impressions for comparison are by the same digit, but when by reason of detailed counting of similarities the identity or the non-identity of the two impressions for comparison have got to be established. In such cases the Court must insist upon clear evidence being led including that of an expert.[2] The Court must apply its own mind and find out with the explanatory help of the expert and the counsel appearing on both sides whether the identity or the non-identity spoken to by the expert is based upon sound reasons.[3] The report of a finger print expert is inadmissible, unless the expert is called as a witness and is examined.[4] But if a party invites the opinion of a finger print expert and the expert submits a report which is placed on the record, but the expert is not examined as a witness, the party inviting the opinion of the expert will be deemed to have accepted the expert's report as evidence and will not be permitted to object its admissibility in appeal.[5]

Section 45 and 5-Evidence of thumb impression expert-Importance of Duty of Court.—Evidence of a thumb impression expert has an important bearing and is bound to be of great value in determining the issue regarding the validity of a document which purports to the bear thumb impression of an executant, when those thumb impressions are denied. It is a matter of common knowledge that science of finger print is more exact than that relating to handwriting. In cases of comparison of finger prints, the points of similarity and difference are easily discernable and the Courts must apply their mind properly to the evidence of experts in such cases. The Judge commits a gross error of law in not even considering the evidence of such expert.[6]

Opinion of Expert Trackers.—Opinion of expert trackers as to the identity of the shoe-prints of the accused with the prints found at the scene of offence, is relevant and admissible, though it may not amount to much by itself. The science of identifications of foot-prints is a rudimentary science, and much reliance cannot be placed upon the evidence of trackers as to the identity of foot-prints or shoe prints. The evidence was admissible and could be considered, along with other evidence as to the identity of the accused as the person who had committed the crime.[7]

Evidence of foot print expert.—Evidentiary value-It is unsafe to convict accused solely on the opinion of foot-print expert-Science of identification of foot-print impression is not an exact science.[8]

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1. *In re, Govinda Reddy,* 1958 Cr LJ 1489.
2. *Amar Singh* v. *Ganga,* AIR 1956 Bhopal 6.
3. *In re, Godavarthi,* 1960 Cr LJ 315.
4. *Bhurey Singh* v. *Karan Singh,* 1935 A 142 ; *Wadahawa* v. *Jai Kishen Das,* 106 IC 493 : 1928 L 427 ; *Pitam* v. *Baboo Singh,* 79 IC 641 : 1924 N 183 ; *Chajju* v. *Ayub Ahmad,* 28 IC 132 : 38 B 703 ; *Padma Priya Debya* v. *Dharma Das Deb Sarma,* 10 IC 965.
5. *Dil Muhammad* v. *Sain Das,* 100 IC 922 : 1927 L 396.
6. *Hukum Singh* v. *Smt. Udham Kaur,* (1969) 71 Pun. LR 908.
7. *Pritam Singh* v. *Punjab,* 1956 Cr. LJ 805 (SC).
8. *Bhulakiram Koiri* v. *State,* 73 Cal. WN 947, 1970 Cr. LJ 403 (Cal).

Opinion of expert on type script.—The matter for admissibility is referred by larger bench of the Supreme Court.[1]

Footprints.—The section does not include footprints within its ambit as it does the finger impressions. Notwithstanding, this evidence of a footprint expert is admissible in evidence.[2] In a criminal prosecution a witness may testify as to human tracks found upon the ground at the place of the crime, and to what point they had led and the size thereof as they appeared to him, and he may also testify as to the size, shape or any peculiarity of any track or tracks that he may have seen the accused make after the commission of the crime.[3] The science of footprints is not exact.[4] The science, if it could be so called, of footprints has not yet progressed very far. But there is no doubt whatever that evidence of similarities of the impressions of the foot, of shod or unshod, given by a footprint expert, is admitted by the Courts. Such evidence comes under the head of circumstantial evidence. It is not the opinion of the expert that is of any importance, but the facts that the expert has noticed. A person who has made a study of the prints made by the human foot is better qualified to notice points of similarity or dissimilarity, than one who has made no such study. He is also to lay these points before the Court, and from his evidence the Court draws its own conclusion.[5] The Court is entitled to take into consideration the evidence of a person who has seen a footprint and taken the footprints of the accused and found that they are very similar. Such evidence is not, however, sufficient to bring home the offence to the accused in the absence of further knowledge regarding the differences between one foot and another.[6] The mere fact that foot marks are found which tally with those of accused's shoes is not sufficient. There may be a large number of shoes of the size of the accused's shoes. The evidence must go further and show that the marks had some peculiarity which was found in the shoes of the accused, and would not be found in most other shoes.[7] Evidence that there were footprints at or near a scene of offence or that these footprints came from a particular place or led to a particular place is relevant evidence under section 7, and statements as to these facts made by persons skilled in identifying footprints is admissible under section 45, Evidence Act. Whether a particular tracker called upon to assist is or is not an expert in this art or science, is a matter to be decided by the Court before reliance can be placed upon his evidence. But if it is established to the satisfaction of the Court that the tracker is a person capable of distinguishing and identifying footprints, his evidence should be given such consideration as it may deserve.[8] Before relying on the opinion of the expert in footprints as conclusive evidence against the accused, the Judge should form his own opinion with regard to the identity of the footprints of the accused.[9] Evidence that a tracker identified certain footsteps is admissible, notwithstanding the provisions of section 162, Cr. P.Code.[10]

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1 *State* v. *S. J. Chowdhary*, AIR 1990 SC 1050.
2. *Ganesh Gogoi* v. *State*, 1955 Assam 51.
3. 10 RCL 993.
4. *Chandrama Prasad Chamar* v. *State*, ILR 1951 IC 539.
5. *Mylaswami Goundan* v. *E.*, 1937 M 951.
6. In re Oomayan, 1942 M 452 (2).
7. *Bhikha Gober* v. *E.*, 1943 B 458 : 210IC 362.
8. *Sadik* v. *E.*, 1942 S 11 : 198 IC 110 : 43 Cr LJ 308.
9. In re *Balija Pullaya*, 1941 M 88 : 192 IC 704 : 42 Cr. LJ 316 ; *Fakirchand* v. *State*, 1955 MB 119 (FB).
10. *Mor Mahomud* v. *E.*, 1940 C 168 : 190 IC 499 : 41 Cr LJ 924.

Identification of Hair — The science of identification of hair has not attained the certainty of a scientific study.[1]

Dog tracking evidence — Admissibility — The tracker dog's evidence cannot be linked to the type of evidence accepted from scientific experts describing chemical reactions, blood tests and the actions of bacilli, because the behaviour of chemicals, blood corpuscles and bacilli contains no elements of conscious volition or deliberated choice. Dogs are intelligent animals with many thought processes similar to the thought processes of human beings and wherever there are thought process there is always the risk of error, deception and even self deception. In the present state of scientific knowledge evidence of dog tracking even if admissible is not ordinarily of much weight. Am. Juris 2nd Edn., Vol 29,p. 429, para 378 and 1866 N.I. 1960 Red. to.[2]

Fire arms experts — Opinion of a ballistic expert can conclusively prove that a particular cartridge has been fired by a particular pistol.[3] Where a fire arms expert categorically states that he has compared the land and groove markings on the bullets under a comparison microscope, his evidence could not be rejected simply because he did not think it necessary to take photograph of the same for the perusal of the Court.[4]

The opinion of the ballistic expert is of considerable importance. Failure to produce the expert opinion before the trial court effects the credit-worthiness of the prosecution case to a great extent.[5]

Where the ballistic expert stated that the recovered cartridges could not have been fired through any other firearms except those of the accused because every firing pin, firing pin scrape and breach face mark has its own individuality. The evidence was found to corroborate the eye witnesses and good for upholding the conviction of the accused for murder and maintaining the death sentences in the absence of any mitigating circumstances,[6] so the evidence of eye witness cannot be discredited on basis of expert evidence which is oscillating.[7]

It may be indicated that as a rule of prudence, corroboration preferably by a reliable witness is desirable.[8]

Scope of murder caused by use of firearm prosecution, if bound to call ballistic expert in addition to direct evidence — It is settled law that it is not necessary in every case where an accused person is charged with murder caused by a lethal weapon that the prosecution case can succeed only if an expert is called and examined. It cannot be laid down as an invariable proposition of law that in every case where a firearm is alleged to have been used by an accused person, the prosecution must in addition to the direct evidence lead the evidence of a ballistic expert.[9]

Value of the opinion of natural assessors — The decision of the case, however, rests entirely with the Court and even impurely nautical matters and Court is not bound to follow the advice of assessors, but on questions of nautical science and skill, great

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1 *Ganesh* v. *State of M.P.*, 1959 MLPJ 23.
2 *Abdul Razak Murtaza* v. *State of Maharashtra*, (1969) 2 SCC 234: (1969) 2 SCJ 870: 1970 Cr LJ 373.
3 *Kalua* v. *State of U.P.*, 1958 Cr LJ 30 (SC).
4 *Ramnathan* v. *State of Tamil Nadu*, AIR 1978 SC 1204 (para 26) 43.
5 *Sukhwant Singh* v. *State of Punjab*, AIR 1995 SC 1 1601.
6 *Kartar Singh* v. *State of Punjab*, AIR 1977 SC 349 (para 13).
7 *Anvaruddin* v. *Shakoor*, AIR 1990 SC 1242.
8 *Sukhpal* v. *State of Haryana*, (1995) 1 SCC 10; applied *Sanjay Dutt (II)* v. *State through CBI Bombay*, (1994) 5 SCC 410, see also *Sanjay Dutt* v. *State*, 1995 Cri LJ 477.
9 *State* v. *Jawan Singh*, 1971 Cr LJ 1656 (Raj); *Chatar Singh* v. *State of Haryana*, AIR 1976 SC 2474.

attention must obviously be paid to the opinion of the assessors since they are the only source of information on these points and some reasons should be given for disregarding them. The assessors in an appeal court are not submitted for those previously consulted; they are additional to them; and if one advisor or two advisors are to be preferred, it is because in the judgment of the court the advice given is such as, in itself, is the more acceptable. There can be no question of any appeal from one set of assessors to another.[1]

Expert opinion of nautical advisers on nautical science and skill must be accepted, and if it is to be rejected, reasons will have to be given. The decision of the case, however, rests entirely with the Court; and even in purely nautical matters, the Court is not bound to accept their advice.[2]

Public Analyst's certificate.–Though the certificate of a person who is declared to be a public analyst can alone be held admissible, there is nothing in the Act to prevent a qualified person from examining the sample and being actually examined in the case and speak to the contents of a certificate issued by him and which can be treated as a contemporaneous document for the purpose of refreshing memory, etc.[3] That the weight as a piece of evidence to be attached to the written report of a public analyst will depend upon the date of the quantitative analysis furnished by the public analyst in his report, and that the mere *lapse dixit* of the public analyst which cannot be adequately tested must be rejected has been laid down in *Dindayal* v. *The State*.[4] This was followed in *State* v. *Shantiram*,[5] wherein it was held that the certificate of the public analyst should contain the factual data which the analysis should reveal, and not merely the opinion of the public analyst as to what the date indicates about the nature of the article of food. Otherwise, if the certificate merely gives the final opinion of the public analyst and if such an opinion be held to be conclusive evidence about the nature of the article of food, the merit of the case against the accused will be really decided by the public analyst and not by the Court.[6] The Punjab High Court has condemned the practice of the analyst, in cases where food is analysed, of merely stating that it is highly adulterated with extraneous vegetable matter. On the other hand, the analyst should indicate what is the extent of the impurity and what the impurity is.[7] The procedure prescribed by the relevant Acts should be strictly adhered to.[8]

Section 45 Scope-Opinion of Architects-Regarding cost of construction-Value of.–The Architects may be experts for the purpose of designing and building houses, but they are not experts for the purpose of giving an opinion as to what would be the cost of construction in a particular year without any data about the price of materials and wages prevalent in that particular year.[9]

Opinion of Registrar of Trade Mark as an Expert.–Registration of trade Mark-Similarity with the existing trade mark-Registrar's opinion that there was no deceptive

1. *Asiatic Steam Navigation Co., Ltd.* v. *Sub. Lt. Arabinda Chakrawarti*, 1959 SCA 581 : 1959 SCJ 815.
2. *Asiatic Steam Navigation Co. Ltd.* v. *Arabinda Chakravarthi*, AIR 1959 SC 597.
3. *State* v. *Karson Zaveri*, 1960 Cr. LJ 1582.
4. 1956 Cr. LJ 1031.
5. 1958 Cr. LJ 8.
6. *Municipal Council, Kanpur* v. *Badloo*, 1960 Cr. LJ 1056.
7. *State* v. *Shanti Prakash*, 1957 Cr.LJ 390.
8. *P.P.* v. *Kuppam*, 1960 Cr. LJ 46.
9. *Diwanchand* v. *Tirath Ram*, AIR 1972 Delhi 41.

similarity between two marks. Having an expert knowledge in the matter his opinion should not be lightly disturbed. Where however, there is concurrent finding of two Courts below that there was deceptive similarity, the finding is binding in appeal under Art. 136 of the Constitution.[1]

Section 45 — Copyright — In case of infringements of copyright, the Court should be reluctant to sit as experts and to decide without the aid of expert evidence.[2]

Statement contained in Gazette of Bombay Presidency, Vol III (1879) can be treated as evidence under Section 45.[3]

EXPERT TESTIMONY IN GENERAL

Failure to examine Excise Inspector — The report of an excise inspector as to the strength of illicit liquor, unless admissible under Section 32 or some other section of the Act, cannot take the place of the sworn statement of the maker thereof. The excise inspector should be examined and cross examined in Court. Then and then alone his evidence can have any weight.[4]

Examination of a handwriting expert if a sine qua non — A Court is competent to compare the disputed writing of a person with others which are admitted or proved to be his writings. It may not be safe for a Court to record a finding about a person's writing in a certain document merely on the basis of comparison but a Court can itself compare the writings in order to appreciate properly the other evidence produced before it in that regard. The opinion of a handwriting expert is also relevant in view of Section 45 of the Evidence Act, It has also been held that the sole evidence of a handwriting expert is not normally sufficient for recording a definite finding about the writing being of a certain person or not. It follows that it is not essential that the handwriting expert must be examined in a case to prove or disprove dispute writing.[5]

Opinion of expert not called as a witness — The report of an expert is not admissible unless he had been examined as a witness and the party affected by it has had an opportunity of cross examining him.[6] In *State* v. *Bhausa Hanmantsa*, it was said that, normally in order that a certificate could be received in evidence, the person, who has issued the certificate, must be called and examined as a witness before the Court. For a certificate is nothing more than a mere opinion of the person purporting to issue the certificate, and opinion is not evidence, until the person is brought before the Court and is subjected to the test of cross-examination. Therefore, the certificate of a medical man, without more, nor being evidence, cannot be relied upon and form the basis of a finding.[7]

Failure to cross examine an expert — Mere failure to cross examine an expert would not detract from the weight of his evidence by applying to it considerations to which his attention was not directed.[8]

Court acting as an expert—The opinion of the Court, itself untrained in medicine

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1 *K.R. Chinna Krishna Chettiar* v. *Sri Ambal and Co.*, (1970) 1 SCJ 23.
2 *Sitanath* v. *Mohini*, 81 IC 754.
3 *Bala Shankar Maha Shankar* v. *Charity Commissioner*, 1995 Supp (1) SCC 485, para 22: AIR 1995 SC 167.
4 *Raja Ram* v. *State*, 1954 A 214.
5 *State of Gujarat* v. *Vinaya Chandra Chhota*, 1967 SCJ 821.
6 *Parwat Vedu Patil* v. *Sukdeo Shivram Patil*, 1956 Bom 617.
7 ILR 1962 Bom 472 ; 64 Bom. LR 303.
8 *Sarwar Khan* v. *E*, 55 IC 273: 21 Cr LJ 257.

and without trained assistance, on questions of medicine is valueless.[1] On questions of handwriting also, the practice of the Court itself acting as an expert has been disapproved.[2] But there is nothing in the so-called science of finger prints which need deter a Court from applying its own magnifying glass or its own eyes and mind to the evidence and verifying the results submitted to it by the witnesses.[3] In trial with the aid of jury, a question of handwriting or thumb-impression is entirely a matter for the jury.[4]

Value of expert testimony in general.—Perhaps the testimony which least deserves credit is that of skilled witnesses. These gentlemen are usually required to speak not to facts but to opinions, and, when this is the case, it is quite often surprising to see with what facility and to what an extent their views can be made to correspond with the wishes and interests of the parties who call them. They do not indeed willfully misrepresent what they think, but their judgment becomes so warped by regarding the subject from only one point of view that, even when conscientiously disposed, they are incapable of expressing a candid opinion. To adopt the language of Lord Campbell, "they come with such a bias on their minds to support the cause in which they re embarked that hardly any weight should be given to their evidence".[5] In considering the value of the evidence of an expert it must be borne in mind that an expert witness, however, impartial he may wish to be, is likely to be unconsciously prejudiced in favour of the side which calls him. It must also be remembered that an expert is often called by one side simply and solely because it has been ascertained that he holds views favourable to its interests.[6] Experts evidence has little value when one expert is contradicted by another[7] or when the admitted facts of the case are against such evidence.[8] The opinion of an expert by itself may be relevant but would carry little weight with a Court unless it is supported by a clear statement of what he noticed and on what he based his opinion. The expert should, if he expects his opinion to be accepted, put before the Court all the materials which induced him to come to his conclusion so that the Court, although not expert, may form its own judgment on those materials, The mere mention that certain kinds of tests were applied and certain results obtained, might be relevant as a piece of evidence, but would not be conclusive.[9] At the same time, if a person with

1. *E.v. Purna Chandra Ghose*, 83 IC 631 : 1924 C 611 : 29 Cr LJ 71.
2. *Asmat Ullah Khan* v. *M. Shiam Lal*, 1947 A 411 : 1947 ALJ 110 ; *Darshan Singh* v. *Prabhu Singh*, 1946 A 67 ; *Ambika Charan Barua* v. *Nareswari Dasi*, 85 IC 525 : 1925 C 145 ; *Gulstaun* v. *Sonatan Pal*, 78 IC 668 : 1926 C 485 : *Bibi Kaniz Zainab* v. *Mobarak Hossain*, 72 IC 748 : 1924 P 284 ; *Sarojini Dasi* v. *Haridas Ghose*, 49 C 235 : 66 IC 774 : 1922 C 12; but see *Lila Sinha* v. *Bijoy Protap Deo Singh*, 87 IC 534 : 1925 C 768 ; *Makhan Lal Sircar* v. *Gokul Chandra Chakravarti*, 62 IC 832; *Kali Charan Mukerji* v. *E.*, 2 IC 154 : 9 Cr. LJ 498.
3. *Public Prosecutor* v. *Viramnal*, 46 M 715 : 69 IC 374 : 1923 M 178 : 23 Cr. LJ 694 ; *E.v. Abdul Hamid*, 32 C 769 : see also *Public Prosecutor* v. *Kandasami Thevan*, 50 M 462 : 98 IC 99 : 1927 M 696 : 27 Cr. LJ 1251 ; *Panchu Mondal* v. *E.*, 1 CLJ 385 ; *Crown Prosecutor* v. *Gopal*, 1941 M 551 : 195 IC 183 : 42 Cr. LJ 696.
4. *Panchu Mondal* v. *E.*,1 CLJ 385.
5. Taylor, § 58; *Tracy Peerage Case*, (1843) 59 RR 59 ; see *Hari Singh* v. *Lachhmi Devi*, 59 IC 220 : 1921 L 126.
6. *Diwan Singh* v. *E.*, 144 IC 331 : 1933 L 561 : 34 Cr. LJ 735 ; *Hari Singh* v. *Lachhmi Devi*, 59 IC 220 : 1921 L 126.
7. *Sadiqa Begum* v. *Ata Ullah*, 144 IC 497 : 1933 L 885.
8. *See Sheotahal Singh* v. *Arjun Das*, 56 IC 879.
9. *Ram Karan Singh* v. *E.*, 154 IC 341 : 1935 N 13 : 36 Cr. LJ 511 ; *Titli* v. *Jones*, 56 A 428 : 153 IC 733 ; 1934 A 273 ; *Crown Prosecutor* v. *Gopal*, 1941 M 551 : 195 IC 183 : 42 Cr. LJ 606.

special professional qualifications, such as a doctor or an engineer, is called in to make professional examination of a person or a building, and is then asked to give the result of his examination as evidence in Court, it is hardly fair to treat him as being on the same footing as those necessary to suppose that he must necessarily be suffering from undue bias merely because he has professional qualifications.[1] But there cannot be any more unsatisfactory evidence than that of an interested party called as an expert.[2]

It is not the duty or even the function of a Magistrate to decide beforehand whether the evidence of an expert, if produced, would influence his opinion one way or the other. That is a matter which should be settled only after the evidence has been recorded and read in the case.[3]

Section 45-opinion of handwriting expert-Evidentiary value.—It is well-settled that though the opinion of a handwriting expert is relevant on the question of handwriting of a person, it is not conclusive unless corroborated by clear and direct or circumstantial evidence.[4]

Evidence of a handwriting expert-Evidentiary value and binding nature.—It is well-settled law that the evidence of handwriting experts under section 45 of the Evidence Act is not conclusive and cannot be used as substantive evidence. The Court must always look for corroboration from the other evidence adduced in the case. The Court will have to take into account the various factors that surround the transaction which is in dispute and should judge the case on the basis of both external and internal evidence available in the case; the evidence of the expert *per se* is not binding on Court.[5]

Value of expert evidence.—The evidence of expert is nearly always a weak type of evidence.[6]

Experts are not expected to be decisive in their opinion.[7] Their evidence can never be conclusive, as it is opinion evidence.[8] Where a person claims to be an expert but there is no evidence about the nature of training received by him and his qualifications, and there is no data from which he arrived at his conclusion,the evidence given by him is neither legal nor sufficient.[9]

The expert's opinion does not take away the common man's judgment. They have the right to think and judge things from day-to-day experience.[10] Expert evidence is nearly always a weak type of evidence, especially in the case of one who has not sufficient knowledge on the subject.[11]

Expert's evidence not supported by reasons valueless.—A court may refuse to rely on the evidence of an expert if it is not supported by any reasons.[12]

It is not necessary for an expert to give reasons at great length. It is sufficient if he gives them briefly.[13] But the Court may not place any reliance on an expert, who is un-

1. *Elizabeth Mand Baines* v. *Ram Sahai*, 1940 L 505 : 42 PLR 616.
2. *Judah* v. *Isolyne Shrojbashini Bose*, 1945 PC 174.
3. *Ram Narain Sharma* v. *E.*, 139 IC 508 : 1932 L 431 : 33 Cr. LJ 761.
4. *Sridhar Jena* v. *The State*, (1970) 36 Cut LT 1251.
5. *Shardabai* v. *Sayed Abdul Hai*, (1972) 2 Mys. LJ 407.
6. *Melappa* v. *Guramma*, AIR 1956 Bom 129.
7. *Ishwari Prasad* v. *Mohammad Isa*, (1963) 3 SCR 722.
8. See *Ayub* v. *State*, AIR 1967 Goa 17.
9. *State* v. *Madhukar Gopinath*, 1965 B 257 : 67 Bom LR 226.
10. *Bir Bahadur* v. *State*, AIR 1956 Assam 15, 16.
11. *Nellappa* v. *Guramma*, AIR 1956 Bom 129.
12. *Haji Mohammed Ekramul Haq* v. *State of West Bengal*, 1959 SCJ 443 : 1959 SCA 477.
13. *Prem Shanker* v. *State*, 1957 Cr LJ 108 (All).

supported by reasons.[1]

Finding based on expert testimony may be challenged in second appeal.—It has been ruled in some decisions that where a finding is based on the opinion of experts, it is not necessarily a finding on facts proved or directly demonstrated and may, therefore, be interfered with in second appeal.[2] It is, however submitted that where an expert gives his opinion as to the existence or non existence of a "fact" as defined by section 3, the opinion is admissible evidence of the existence or non-existence of that fact and it is no more open to a Court of second appeal to go behind a finding based on such evidence than to go behind a finding based on the evidence of an ordinary witness.

Evidentiary value of photographs.—The uses for which, upon mere production of them, photographs can be accepted as means of proof of matters of fact require careful delimitation. A photographic picture cannot be relied upon as proof in itself of the dimensions of the depicted object or objects, and cannot be made properly available to establish the relative proportions of such objects except by evidence of personal knowledge or scientific experience to demonstrate accurately the facts sought to be established. The extent to which and the processes by which an accurate topographic plan can be produced from a pictorial delineation of a scene are not matters of common knowledge but are matters for experts. Two perquisites for the conversion of a photographed picture of a land-scape into a map or plan-after ascertainment of the viewpoint of the photographer—are said to be proof that the lens used had been accurately corrected to yield what is known as flat field and knowledge of the angle to the horizontal plane at which the camera was held.[3]

Whether expert testimony of handwriting can be based on photographs— Admissibility of photographs.—Even if the original photographs be not forthcoming, opinions as to handwriting can be formed from the photographs. It is common knowledge that experts themselves base their opinion on enlarged photographs. The photos were facsimiles of the writings and could be compared with the enlargements of the admitted comparative material. If the Court is satisfied that there is no trick photography and the photograph is above suspicion, the photograph can be received in evidence. It is, of course, always admissible to prove the contents of the document, but subject to the safeguards indicated, to prove the authorship.[4]

Mode of impeaching the credit of an expert.—The credit of an expert may be impeached like that of any other witness under sections 146, 153 and 155. He may be asked if he had given a contrary opinion on the same matter at some other time and whether his evidence has been disbelieved on a former occasion;[5] but technical works cannot be used to refute his opinion, unless his attention has been drawn in cross-examination to passages intended to be relied on.[6] The weight of the evidence of an expert cannot be diminished by applying to it considerations to which his attention was never directed.[7] "The Act makes no provision allowing evidence of the opinion of one

1. *Haji Mohammad Ekramul Haq* v. *State of West Bengal*, 1959 SCJ 443.
2. *Tilok Chand Charan Das* v. *Mahandu*, 144 IC 741 : 1938 L 458 : *Mohd. Ibrahim* v. *Altafan*, 47 A 243 : 83 IC 27 : 1925 A 24 ; *Altafan* v. *Ibrahim*, 75 IC 502 : 1924 A 116.
3. *United States Shipping Board* v. *The Ship "St. Albans"* 131 IC 771 ; 1931 PC 189.
4. *Laxmipat* v. *State of Maharashtra*, 1968 SCJ 589.
5. Sections 155 and 146 (1).
6. *Grande Venkata Ratnam* v. *Corporation of Calcutta*, 46 IC 593 ; *See Rawat Sheo Bahadur Singh* v. *Beni Bahadur Singh*, 51 IC 419.
7. *Sarwar Khan* v. *E.* 55 IC 273 ; 2311 CR LJ 257.

expert upon the qualifications of another", though such evidence can be given in other system of evidence.[1]

Cross-examination of an expert by another expert.—In specific cases an expert can be allowed under a special power of attorney to cross-examine an expert in the same line of business coming as a witness for the other side.[2]

46. Facts bearing upon opinions of experts.—Facts, not otherwise relevant if they support or are inconsistent with the opinion of experts, when such opinions are relevant.

Illustrations

(a) The question is, whether A was poisoned by a certain poison.

The fact that other persons, who were poisoned by that poison, exhibited certain symptoms which experts affirm or deny to be symptoms of that poison, is relevant.

(b) The question is, whether an obstruction to a harbour is caused by a certain sea wall.

The fact that other harbours similarly situated in other respects, but where there were no such sea walls, began to be obstructed at about the same time, is relevant.

COMMENTARY

Facts consistent or inconsistent with the opinions of experts.—Facts which are inconsistent with the opinions of experts, or which make the truth of their opinion probable, are declared relevant by this section which is based on the same principle as Section 11. The section adopts a "roundabout way of stating that the opinion of an expert is open to corroboration or rebuttal". Collateral facts which are generally inadmissible in evidence become receivable when the question is a matter of science, and the facts tend to illustrate or contradict the opinions of scientific witnesses. Illustration (b) is based on the well-known English case of *Folks* v. *Chadd*,[3] in which the point in dispute being whether a sea-well had caused the choking up of a particular harbour, engineers were called to give their opinions as to the effect of the wall : and evidence of the fact that other harbour in question was not, as stated by the engineers, due to the making of the sea-wall. "If the point in dispute be whether a defendant was or was not in his right mind on a certain occasion, it is clear that, proof by a medical man that madness is often of an hereditary character, evidence tending to show that none of the defendant's ancestors or near relations had been insane would be admissible in support of the negative proposition and, on a question of disputed paternity, once proved as a matter of science that children are apt to inherit the features or general appearance of their parents, and then, as a matter of course, evidence will be received of personal resemblance between the party in question and his alleged father."[4]

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1. Lawson, Expert Testimony, 2nd Ed., 275.
2. *Thummudeo* v. *Baldeo*, 1944 NLJ 449.
3. 1782, 3 Doug, 157.
4. Taylor, § 335.

Expert Evidence.—Where the expert evidence is obscure and oscillating, it is improper to discredit the direct testimony of the eye-witnesses on such uncertain evidence, unless the evidence of the eye-witnesses is shaken by some glaring infirmities, it would not be proper to doubt the correctness of their statements.[1]

Admissibility positive assertion by one expert. Another expert casting certain doubts. Opinion of first expert accepted.[2]

Value of Passage from books.—The Learned Judges of the High Court disposed of this matter by saying that the doctor was comparatively young and that his statement was not in accord with the opinion expressed in books on 'Medical Jurisprudence' by authors like Modi and Lyon. But it cannot be said that the opinions of these authors were given in regard to circumstances exactly similar to those which arose in the case before the Supreme Court nor is this a satisfactory way of disposing of the evidence of an expert unless the passage which are sought to discredit his opinion are put to the expert.[3]

47. Opinion as to handwriting when relevant.—When the Court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is relevant fact.

Examination.—A person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.

Illustrations

The question is, whether a given letter is in the handwriting of *A*, merchant in London.

B is a merchant in Calcutta, who has written letter addressed to *A* and received letters purporting to be written by him. *C* is *B's* clerk, whose duty it what to examine and file *B's* correspondence. *D* is *B's* broker, to whom *B* habitually submitted the letters purporting to be written by *A* for the purpose of advising with him therein.

The opinions of *B*, *C* and *D* on the question whether the letter is in the handwriting of *A* are relevant, though neither *B*, *C* or *D* ever saw *A* write.

[4][**47-A. Opinion as to digital signature when relevant.**—When the Court has to form an opinion as to the digital signature of any person, the opinion of the Certifying Authority which has issued the Digital Signature Certificate is a relevant fact.]

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1. *Anvaruddin* v. *Shakoor*, AIR 1990 SC 1242 (page 1247).
2. *Smt. Manorama Srivastava* v. *Smt. Saroj Srivastava*, AIR 1989 Alld. 17.
3. *Bhagwan Das* v. *The State of Rajasthan*, 1957 Cr LJ 889; 1957 SC 515.
4. **Inserted by Information Technology Act, 2000 (Act 21 of 2000), S. 92 and Sch. II (w.e.f. 17-10-2000).**

COMMENTARY

Mode of proving Handwriting.—The ordinary methods of proving handwriting are:—

(1) By calling as a witness a person who wrote the document or,
(2) Saw it written, or signed, or,
(3) Who is qualified to express an opinion as to the handwriting by virtue of section 47 ;
(4) By a comparison of the handwriting as provided by section 73 :
(5) By admission of the person against whom the document is tendered.[1]
(6) By expert evidence under section 45 (expert opinion is only relevant, but it is for Court to determine whether a writing is genuine or not);
(7) By internal evidence afforded by the contents of the document.[2]
(8) If signature of handwriting is to be proved by circumstantial evidence, the Court should be satisfied that circumstantial evidence irresistibly leads to the inference that the inference that the person in question must have signed or written it.[3]
(9) These modes of providing handwriting should be considered in the light of the recent Supreme Court decision that testimony as to handwriting can be based not only upon the examination of the originals but also on that of photographs which can now be received in evidence to prove authorship besides the contents of the documents provided that there is no trick photography and the photograph is above suspicion and the original cannot be obtained.[4]

Besides the three modes of proof of authorship of a document other modes are, by examining the writer himself, or under section 73 by comparison of disputed writing with the writing of the alleged writer, or by the Court comparing the impugned writing with the admitted proved writing, the Court may also direct any person present in the Court to write words or figures for enabling the Court to compare them with those alleged to have been written by such a person. Article 20 (3) of the Constitution of India forbidding testimonial complusion is no bar against such procedure.[5]

Modes of proving handwriting.—A writing may be proved in any of the following ways :—

(i) by calling and examining the writer himself ;
(ii) by the evidence of a person who saw the document being written ;
(iii) under this section, by the evidence of a person acquainted with the handwriting of the writer :
(iv) under section 45, by expert evidence.[6] See notes to section 45 under the heading "mode of proving a writing genuine or forged ", see also notes to section 67, where different ways of proving handwriting are fully discussed.

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1. *Barindra* v. *R.* 14 CWN 1114, 1138.
2. *Mobarik* v. *SA*, 1958 SC 857 ; 1958 SCR 328.
3. *Baru Ram* v. *Prasanna A*, 1969 SC 93 ; 1959 SCR 1403.
4. *Laxmipat* v. *SA*. 1968 SC 938.
5. *Kathi Kalu* v. *State of Bombay*, 1963 (1) SCJ 195.
6. *Ganpatrao Khanderao Vijekar* v. *Vasantrao Ganpatrao Vijaykar*, 141 IC 747 ; 1932 B 588 ; *Khijruddin* v. *E.*, 53 C 372 ; 92 IL 442 ; 1926 C 139 ; 27 Cr LJ 268 ; *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 ; *Brindra Kumar Ghose* v. *E.*, 37 C 467 ; 7 IC 359 ; 11 Cr . LJ 453.

Proof of the genuineness of a document.—The proof of the genuineness of a document is proof of the authorship of the document and is proof of a fact like that of any other fact. The evidence relating thereto may be direct or circumstantial. It may consist of direct evidence of a person who saw the document being written or the signature being affixed. It may be proof of the handwriting of the contents, or of the signature by one of the modes provided in section 45 and 47 of the Indian Evidence Act. It may also be proved by internal evidence afforded by the contents of the document. This last mode of proof by the contents may be of considerable value where the disputed document purports to be a link in a chain of correspondence, some links in which are proved to the satisfaction of the Court. In such a situation the person who is the recipient of the document, be it either a letter or a telegram would be in a reasonably good position both with reference to his prior knowledge of the writing or the signature of the alleged sender, limited though it may be, as also his knowledge of the subject matter of the claim of correspondence, to speak to its authorship.[1]

Considering the manner in which section 77 is framed, it has been held by the Courts generally that it is enough for a witness to say in examination-in-chief that he is acquainted with the handwriting, and that if it is desired to challenge that statement of his he to be cross-examined on that statement to show that he could not be acquainted with the handwriting in the circumstances of any particular case. The witnesses need not state in the first instance how he knows the handwriting, since it is the duty of the opposite party to explore on cross-examination the sources of his knowledge, if he is dissatisfied with the testimony as it stands. The Indian Law of Evidence is based on the English Law, and there is nothing in section 47 which goes against this principle which has been accepted by the English Courts. Following this principle, the Indian High Courts have also taken the same view.[2]

In examining a disputed document the true test is not the extent of the similarities observed when compared with genuine documents, as forged documents usually are good limitations of genuine documents, but the nature and extent of the dissimilarities noticed. It is the differences which expose a true character of the document in question.[3]

Handwriting proof of.—Handwriting may be proved by the evidence of a person familiar with such writings (section 47) or by the testimony of an expert competent to make the comparison on a scientific basis (section 45) or by the Court by comparison with a writing made in its presence or admitted or proved to be the writing of the person.[4]

Expert evidence would be of great use, since a comparison of the signatures without the help of an expert may not afford a convulsive test in the case of expert forgers; and this would be more so when the disputed signatures appear to belong to a class different from the group of *admitted signatures*.[5]

The value of the opinion of an expert engaged by a party suffers from the defect that it is given by a remunerated witness, who knows beforehand why he has been called and what the party calling him wishes him to prove. It is not improbable that he

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1. *Mobarik Ali Ahmed* v. *The State of Bombay*, 1958 SCR 328 ; 1957 Cr LJ 1346 ; 1958 SCJ 111.
2. *Pusaram* v. *Manmal*, 1955 Raj 86.
3. *Raviappa* v. *Nilakanta Rao*, AIR 1962 Mys. 53.
4. *Fakhruddin* v. *SA*. 1967 SC 1326.
5. *Venkataswami* v. *Lakshminarayan*, ILR 1957 Andh Pra. 399.

has an unconscious bias in favour of the party. This detracts from the weight to be attached to such witness's opinion.[1]

There may be cases in which the peculiarities in the handwriting of a person are so numerous, pronounced and striking that the Court may well reach a safe conclusion on its own comparison of the disputed writing and the standard writing.[2]

Examination of handwriting expert is not necessary in every case of disputed writing—No adverse inference can be drawn against the prosecution for not obtaining expert's opinion . It is not necessary to examine a handwriting expert in every case of disputed writing. No adverse inference can be drawn against a party from the fact that the opinion of the handwriting expert had not been obtained.[3]

Anthracene powder and ultra-violet lamp.—In the presence of panchyatdars the market currency notes are treated with anthracene powder. Then the trap witness pays them into the hands of their briber direct. Then by means of prearranged signal the investigating officer rushes to the trapped person and examines his hands using an ultra-violet lamp. Now anthracene powder is one of many fluorescent substances which emit a light of a particular hue excited by the ultra-violet light. The ultra-violet light is the exciting agent. In other words, the true tests required to be satisfied by the prosecution to prove the presence of anthracene powder are[4] that no powder was detected on the hand, etc.. of the trapped person with the naked eye, and[5] that when ultra-violet light was focused there was an emission of light blue fluorescent light. If evidence proved positive results of both these tests, then it would be right to infer that the anthracene powder was present.

Competency : Witness must be acquainted with the handwriting.—This section makes relevant the opinion of a person who is acquainted with the handwriting of the person by whom the disputed document is alleged to have been written or signed,[6] even though he is not an expert.[7] It is, therefore, the duty of the party calling the witness to show that the witness is acquainted with the handwriting of the alleged writer.[8] But if, in examination-in-chief, the witness states that he is acquainted with the handwriting, his evidence will be admissible though he has not been questioned as to the means of his knowledge, unless the opposite party can show by cross-examining the witness that he is really incompetent to testify under the section.[9]

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1. *Abbayanand* v. *State of Bihar*, 1959 Cr LJ 893.
2. *Bisseswar Poddar* v. *Nabadwip*, 64 CWN 1067.
3. *Srichand* K. *Khetwani* v. *State of Maharashtra*, (1967) 1 SCJ 178.
4. *Ramsingh* v. *State*, 1960 Cr. LJ 1207.
5. *Ambalal* v. *State*,. 19611 (1) Cr. LJ 59.
6. *Khijiruddin* v. *E.*, 52 C 372 ; 92 IC 442 ; 1926 C 139 ; 27 CR LJ 266 ; *Jasoda Kuer* v. *Janak Missir*, 4 P 394 ; 92 IC 1034 ; 1925 P 787 ; In the matter of Chanda Singh, 18 PR 1915 Cr : 28 IC 722 ; 18 Cr LJ 388 ; *Jalaluddin* v. *E.*, 15 IC 979 ; 13 Cr LJ 563 ; *Shankarao Gangadhar* v. *Ramji Harjivan*, 28 B 58 ; *Lolit Mohan Sarkar* v. *Q.E.*, 22 C 313.
7. *Jagan Nath* v,. *E.*, 101 IC 493 ; 1927 L 724 ; 98 Cr LJ 461 ; In the matter of *Chanda Singh*, 18 PR 1915 Cr ; 28 IC 722 ; 15 Cr LJ 338.
8. *Hemraj Lodhi* v. *Ram Charan Lodhi*, 1934 N 204 ; *Jasoda Kuer* v. *Janak Missir*, 4 P 394 ; 92 IC 1034 ; 1925 P 787 ; *Jalauddin* v. *E.*, 15 IC 979 ; 13 Cr LJ 563 ; In re *Basrur Venkata Row*, 36 M 159 ; 14 IC 418 ; 13 Cr LJ 226. But see *Jagdish Das* v. *E.*, 1938 PWN 403 ; It is not clear from the report in *Balak Ram* v. *Muhammad Said*, 77 IC 872 ; 1923 L 695, whether the identifying witnesses were acquainted with the handwriting of the writer, but evidently the opinion as to the similarity of the signature could not be admitted under Section 45, the witnesses not being "experts" as defined by section 45. There is no reference to Section 73 in the report.
9. *Shankarao Gangadhar* v. *Ramji Harijan*, 28 B 58 ; *Shyam Pratap* v. *Ben Nath*, 1942 P 349 ; *Pasaram*

A person is said to be acquainted with a person's handwriting when he has seen that person write at any time. The frequency and recentness of the occasions and the attention paid to the matter by the witness will affect the value, and not the admissibility, of the evidence.[1] Thus, in England such evidence has been admitted, though the witness had not seen the party write for twenty years, or had seen him write but once, and then only his surname.[2] Where a witness deposes that a certain document is in the handwriting of the accused, the degree of his acquaintance with that handwriting will affect the value, and not the admissibility of his evidence.[3] It is not impossible for a person, unable to read and write certain characters, to know and to recognize and prove the handwriting of another in those particular characters, if he had the occasion to see the latter write.[4]

In the *Explanation* to this section, the term "habitually" means "usually", "generally" or according to custom". It does not refer to the frequency of the occasions but to the invisibility of the practice. Thus, the opinion of a recordkeeper who, in the course of his official duty, has to examine and file papers sent to him is relevant to prove the handwriting of the person whose papers are so filed, though the number of such papers may not be great.[5]

Whilst evidence of opinion or belief is admissible for the purpose of proving handwriting where direct evidence of one who was present when the document was written is not available, an opinion based on mere inference is insufficient.[6]

Whether handwriting includes signature and mark?—The word "handwriting" in the sentence "any person acquainted with the handwriting, etc." presumably includes both handwriting in general and signature. Therefore, a person who is acquainted with the general style of person's writing or signature is competent under this section to identify that person's general writing as well as his signature. It is true that very often the signature of person possesses a great peculiarity and is very much different from his general style of writing, but this fact would affect the value of the witnesse's testimony and not his competency. But section 2 of the Civil Procedure Code and section 3 of the Registration Act, "signature" is made to include the affixing of a mark, but there being no such extension of the meaning of "signature" in the present Act, the terms "sign" and "signature" should be confined to their ordinary sense. If this view be correct, *opinion* evidence of a person who claims acquaintance with the mark of another person would be inadmissible under his section,[7] but, if the mark of was affixed in his presence, there would be no objection to his deposing that it was so affixed. A seal always has, and a mark may have a distinguishing feature; and if section 9 be interpreted liberally, the opinion of a person, who recognizes the seal or the mark by any distinguishing feature, may become admissible under that section as evidence of indentity.[8]

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v. *Manmal*, 1952 Raj. 102 ; *Pasaram* v. *Manmal*, 1955 Raj. 186.

1. *Kala Ram* v. *Fazal Bari Khan*, 1941 Pesh 38.
2. Taylor, § 1863 ; *Kala Ram* v. *Fazal Bari Khan*, 1941 Pesh 38.
3. *Saqlain Ahmad* v. *E.*, 1936 A 165 ; 160 IC 264 ; 37 Cr LJ 263 ; *KalaRam* v. *Fazal Bari Khan*, 1941 Pesh 38.
4. *Ram Chandra* v. *Jaithmal*, 1934 A 990.
5. *E.* v. *Ponde*, 89 IC 1042 ; 1925 B 429 ; 26 Cr LJ 1474.
6. *Deputy Commissioner, Lucknow* v. *Chandra Kishore Tewari*, 1947 O 180 (FB).
7. *See Ponnuswami Goundan* v. *Kalyanasundra Ayyar*, 57 M 662 ; 149 IC 571 ; 1934 M 365 ; *Shahzadi* v. *Beni Prasad*, 157 IC 405 ; 1934 A 390.
8. *See Teshwadabai* v. *Ramchandra Tukaram*, 18 B 66, 74.

See notes to Section 67.

Evidence of handwriting expert should be corroborated.—It is necessary to observe that a expert's evidence as to handwriting is opinion evidence and it can rarely, if ever, take the place of substantive evidence. Before acting on such evidence, it is usual to see if it is corroborated either by clear direct evidence or by circumstantial evidence.[1]

The Supreme Court in *Ramchandra* v. *State of U.P.* laid down that normally it is not safe to treat expert evidence as to handwriting as sufficient basis for a conviction. But it may, however, be relied upon along with other pieces of external and internal evidence relating to the document in question. Sections 45 to 47 lay down the method by which the signature in dispute could be proved. But even assuming that the signature of the person could legally be held to be proved, the principle which governs the appreciation of such circumstantial evidence in cases of this kind, cannot be ignored. It is only if the Court is satisfied that the circumstantial evidence would irresistibly lead to the inference that the person must have signed the document in question that the Court could legitimately reach a conclusion.[2]

It is settled view that it will not be safe to base a conviction on the uncorroborated testimony of a handwriting expert.[3]

In *Kishore Chand* v. *Ganesh Prasad*, the Supreme Court held that conclusions based upon mere comparison of handwriting must at best be indecisive and yield to the positive evidence in the case.[4] *Onnamalai Ammal* v. *Sithapathi Reddiar* lays done that in evaluating the evidence of a handwriting expert on the question of the genuineness of the signature alleged to be that of the testator, the Court must keep in view the fact: (i) very few people sign in the same manner on all occasions, (ii) the opinion of an expert as to the genuineness of a signature should be received with great caution especially in a case where there is a positive evidence of person who saw the testator sign the will, (iii) all the tests evolved by the experts, in the matter of compensation of handwriting and signature are merely tentative in character, and lastly, (iv) opinion evidence is weak evidence.[5]

Explanation to section 47.—Even the opinion evidence of non-expert, becomes good evidence to go by, if the acquaintance of such witness with the signature of the executor is well proved within the meaning of section 47, Explanation.[6]

One of the ways in which the knowledge of a person's handwriting may be acquired is by the witness having seen, in the ordinary course of business, documents which on evidence, direct or circumstantial, are proved to have been written by such person.[7] The technical requirements of proof of handwriting are satisfied if a person alleged that he had seen another writing and that, in his opinion, the writing to be proved is of that other person. This section deals only with the admissibility of a variety of opinion evidence and not with its value. In a case covered by this section, the value of the opinion, unlike that of the expert, depends upon the familiarity which a witness has acquired with the writing of the person about which the opinion is expressed and not

1. *Shashi Kumar Banerjee* v. *Subodh Kumar Banrjee*, AIR 1964 SC 229.
2. *Ram Chandra* v. *State of U.P.*, 1957 SC 381 : 1957 Cr. LJ 559.
3. *Kameshwar* v. *State*, 1957 Cr LJ 276.
4. *Kishore Chand* v. *Ganesh Prasad*, AIR 1954 SC 316.
5. *Onniamalai Ammal* v. *Sithapathi Reddiar* (1961) 1 MLJ 33.
6. *Dalim Kumar* v. *Smt. Nandarni Dassi*, 73 Cal. WN 877.
7. *Bhupen Narain* v. *Ek Narain Lal*, AIR 1965 Pat. 332.

upon the reasons which he can advance in support of the opinion. The evidence given by a witness, who have insufficient familiarly with the handwriting of the person about which he states should be discarded.[1]

The evidence of person acquainted with the handwriting of the executant of a document is relevant and admissible. But his opinion which is based on himself comparing the handwriting would not be admissible, since it would be more or less trenching upon the sphere of the expert.[2]

Sections 45 and 47—Expert evidence about genuineness of the handwriting.—Before accepting the evidence of an expert or that of a person familiar with the handwriting and signature of a person as comtemplated under section 45 and section 47, respectively of the Evidence Act, the Court is to apply its own observation to the admitted or proved, writings and to compare them with the disputed ones. The Court is not to become a handwriting expert but has to verify the premises of the expert in one case and to appreciate the value of the opinion in other.[3] In a criminal case it is quite unsafe to record conviction of an accused merely on the basis of a handwriting expert. In civil cases also it is not safe for the court to rest its finding merely on the opinion of a handwriting expert, the court should seek corroboration from other sources.[4]

Sections 45 and 47—Opinion of handwriting expert.—Evidentiary value of — When Court to accept opinion.—Both under section 45 and section 47 the evidence in an opinion, in the former by a scientific comparison and in the latter on the basis of familiarity resulting from frequent observations and experience. In either case the Court must satisfy itself by such means as are open that the opinion may be acted upon. One such means open to the Court is to apply its own observation to the admitted or proved writing and to compare them with the disputed one, not to become a handwriting expert but to verify the premises of the expert in the one case and to appraise the value of the opinion in the other case. This comparison depends on an analysis of the characteristics in the admitted or proved wirings and the finding of the same characteristics in large measure in the disputed writing, In this way the opinion of the deponent whether expert or otherwise subjected to security and although relevant to start with becomes probative. Where an expert's opinion is given, the Court must see for itself and with the assistance of the expert come to its own conclusion whether it can safely be held that the two writings are by the same person. This is not to say that the Court must play the role of an expert but to say that the Court may accept the fact proved only when it has satisfied itself on its own observation that it is safe to accept the opinion whether of the expert or other witness.[5]

Sections 67, 45 & 47.—A document before being exhibited must be proved in accordance with S. 67. To get benefit of S. 34 it must be proved that the books of accounts were kept in the regular course of business and the books of accounts have to be proved properly.[6]

Sections 47 and 67.—Idetification of signature on document on basis of acquaintance with handwriting of signatory. Signatory not deposing to truthfulness of contents

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1. *Devi Prasad* v. *State*, AIR 1967 All. 64.
2. *Rajmal* v. *Islam Mahomed*, 1958 Raj. LW 89.
3. *T. P. Singh* v. *J. K. Roy*, 1971 A & N 168.
4. *Joseph* v. *Aleyamma*, AIR 1991 NOC 28 (Ker.).
5. *Fakhruddin* v. *State*, 1967 MPLJ 473 : 1967 Mah. LJ 571.
6. *Rukmanand Ajitsaria* v. *Usha Sales Pvt. Ltd.*,. AIR 1991 NOC 47.

of document. Whether proof of signature amounts to proof of contents of documents. One D identified the signature amounts to proof of contents of documents. One D identified the signature of *A* to a typewritten document on the basis of his acquaintance with *A's* handwriting. It was sought to be urged by *D* that he had proved not only *A's* signature of the document but also its contents.*A* had not deposed to the truthfulness of the contents of the document:— Held, that what was formally proved was the signature of *A* and not the writing of the body of the document, and that even if the entire document was held formally proved, that did not amount to a proof of the truth of the contents of the document.[1]

Section 47 describes the various methods of proving the handwriting of a person. Section 67 says that if a document is alleged to be singed by a person, the signature of that person must be proved : it does not say that the signature must be proved by a person who actually saw that person affixing his signature. If sections 47 and 67 be read together, the reasonable inference is that the signature of the executant may be proved either by examining the person in whose presence the signature was affixed, or else by examining another person who is acquainted with the handwriting of the executant and is able to prove his signature by his opinion.[2]

Sections 45, 47 and 73.—Evidence of the indentity of handwriting can be adduced in one of three ways. Proof of a writing by the admission of the writer or by the evidence of someone in whose presence he wrote is called direct evidence and is the best method of proof and if such evidence is available evidence of any other kind becomes unnecessary. But the law makes relevant two other modes. A writing may be proved to be in the handwriting of a particular individual by the evidence of persons familiar with the handwriting of that individual (Section 73) is comparison by the Court with a writing made in the presence of the Court or admitted or proved to be the writing of the person. Both under sections 45 and 47 of the Evidence Act the evidence is an opinion, in the one case by scientific comparison and in the other by familiarity resulting from frequent observation and experience. In either case the Court must satisfy itself by such means as are open that the opinion may be acted upon. One such means open to the Court is to apply its own observation to the admitted or proved writing and to compare them with the disputed ones in order to satisfy itself on its own observation whether it is safe to accept the opinion of the expert or other witnesses. Thus in such cases the Court is not itself playing the role of an excpert but is only coming to its conclusion, with the assistance of the expert, whether it can safely be held that the two writings are by the same person.[3]

48. Opinion as to existence of right or custom, when relevant.— When the Court has to form an opinion as to existence of any general custom or right, the opinion as to the existence of such custom or right, of persons who would be likely to know of its existence if it existed, are relevant.

Explanation.—The expression "general custom or right" includes customs or rights common to any considerable class of persons.

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1. In the matter of *Mr. D. and Mr. S. Advocates*, 68 Bom. LR 228.
2. *Akshya Narayan* v. *Maheshwar*, AIR 1958 Orissa 207, 212.
3. *Fakhruddin* v. *State of M P.*, 1967 (2) SCJ 885.

Illustration

The right of the villagers of a particular village to use the water of a particular well is a general right within the meaning of this section.

COMMENTARY

Opinion as to the existence of a right or custom; section 13 compared with section 48.—(i) Section 48 is limited in its application to general rights and customs;[1] but section 13 includes all kinds of rights and customs-public, general and private.[2] (ii) Section 48 refers to the opinion of a person as to the existence of a general right or custom, but section 13 refers to particular facts which are relied on in support of the existence of a right or custom.

Section 32(4) compared with section 48.—(i) Section 32 (4) refers to the opinion of a person who cannot, for any of the reasons stated in that section, be called as a witness; but section 48 refers to the opinion of a living person who must himself appear in Court to testify.[3] (ii) Under section 32 (4), the opinion must have been expressed before the commencement of the controversy; but section 48 imposes no such limitation, and, on the contrary, contemplates a case where the witness states his opinion after the commencement of the litigation.[4] (iii) Section 32 (4) refers to a public custom or right, but the distinction between these two kinds of customs and rights is not of much consequence in view of the definition of "general custom and right" given in this section which would include all "public" customs and rights as they are understood in English law.

General custom or right.—"The opinions of persons likely to know about village-rights to pasturage, to use of paths, water course, or ferries, to collect fuel, to use tanks and bathing *ghats* mercantile usage and local customs, would be relevant under this section".[5] The section has no application to private rights.[6]

Whether custom includes usage?—In *Dalglish* v. *Guzuffer Hussain*,[7] the Calcutta High Court defined the word "usage in section 178 and 183 of the Bengal Tenancy Act[8] as meaning "what the people are now or recently in the habit of doing in a particular place". "It may be", the Court remarked, "that this particular habit is only of a very recent origin or it may be one which has existed for a long time. If it be one regularly and ordinarily practised within the inhabitants of the place where the tenure exists, there would be usage within the meaning of the section". The Court remanded the case to the sub-Judge who had rejected the evidence on the ground that it did not refer to a "custom", and directed him to consider the evidence in the light of the provisions of the section 48 of the Evidence Act. The rejected evidence not being before it, the High

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1. *Sankaracharya Swamigal* v. *Manali Saravana Mudaliar*, 51 IC 876.
2. *Gujju Lall* v. *Fatteh Lall*, 6 C 171 (FB); *Samuel Cochrane* v. *Maharanee Brojo Soonduree Debia*, 23 WR 311.
3. Section 60; Norton 227; *Probhu Narain Singh* v. *Jitendra Mohan Singh*, 1948 O 307 : 22 Luck 522; but see *Lali* v. *Murlidhar*, 28 A 488 : 33 IA 97 (PC); *Lekraj Kuar* v. *Mahpal Singh*, 5 C 744 : 7 IA 63 (PC).
4. See section 60.
5. Cunningham, Ev., 130.
6. *Sankaracharya Swamigal* v. *Manali Saravana Mudaliar*, 51 IC 876.
7. *Dalglish* v. *Guzuffer Hassain*, 23 C 427.
8. Act VII of 1835.

Court did not decide the question of its admissibility under section 48. In a subsequent case,[1] the case of *Dalglish* v. *Guzuffer Hussain* was taken to mean as laying down the proposition that opinion evidence on matters of "usage" is admissible under the present section. But it is submitted that the earlier case did not go to that extent, since the question of the applicability of section 48 to opinion evidence on a matter of "usage", as distinguished from opinion on a matter of "custom", was not decided by the High Court. The usage set up by the defendant in that case being the right to transfer an occupancy holding, opinion evidence in the case would have been admissible under the present section as evidence of a "general right", if not as evidence of a "general custom". If there is really a distinction between a "custom" and a "usage",[2] opinion on a question of "usage which does not amount to a "custom" does not seem to be within the terms of the section, unless the usage raises any question as to some "general right". Such evidence may, however, be relevant under the provisions of the next section.

Persons having special means of knowledge.—Opinions of persons who are in a position to know of the existence of a custom or usage in their locality are relevant under this section.[3] Opinion of the bar or its individual members is not admissible under section 48, on the question whether a sect of Mohammadans had adopted special customs of the Hindu Law.[4]

Opinion is admissible, though based on hearsay.—It is competent for a witness to give his opinion on the existence of a custom and to state, as the ground of that opinion, information derived from deceased persons. But it must be the expression of independent opinion based on hearsay, and not mere repetition of hearsay.[5] Where the evidence given by some of the plaintiffs supported a family tradition from generation to generation and which evidence was founded upon information derived from deceased persons and such traditions was also supported by documentary evidence, held that no part of the evidence in support of the plaintiff's case could be held to be inadmissible.[6]

Value of opinion evidence.—A tribal or family custom excluding a daughter or sister from inheritance may be proved by general evidence as to its existence by members of the tribe or family who would naturally be cognizant of its existence. No specific instances need be proved.[7] The opinion of persons, "whose position and profession are a guarantee of their acquaintance with custom and usage are of undoubted importance. Such persons are, so to speak, the depositaries of customary law, just as the text books are the depositaries of the general law".[8] But see *Bai Baji* v. *Bai Santok*,[9] and *Lachman Rai* v. *Akbar Khan*,[10] where it has been remarked that mere opinion evidence

1. *Sariatullah Sarkar* v. *Pran Nath Nandi*, 26 C 184.
2. See section 92. Prov (5).
3. *Sariatullah Sarkar* v. *Pran Nath Nandi*, 26 C 184 ; *Dalglish* v. *Guzuffer Hassain*, 13 C 427.
4. *Advocate General* v. *Jimbabai*, 41 B 181 : 31 IC 106.
5. *Garurdhwaja Prasad* v. *Superundhwaja Prasad*, 23 A 37 : 27 IA 238 (PC) ; *Amina Khatun* v. *Khalil-ur-Rahman Khan*, 8 Luck 455 : 150 IC 282 : 1933 O 246 ; *Pratap Chandra Deo Dhabal Deb* v. *Jagdish Chandra Deo Dhabal Deb*, 82 IC 886 : 1925 C 116.
6. *Srish Chandra* v. *Rakhal Ananda*, (1937) 65 CLJ 5290.
7. *Ahmad Khan* v. *Channi Bibi*, 6 L 522 : 52 IA 379 : 91 IC 455 : 1925 PC 267 ; *Pannalal* v. *Chaman Parkash* 225 IC 8 ; *Thunthi* v. *Dhani Ram*, 1953 HP 66 ; *Hubraji* v. *Chandrabali Upadhya*, 6 Luck 519 : 130 IC 849 : 1931 O 89 (2). "Custom is not a matter to be submitted to the senses, "Norton § 227.
8. *Jugmohandas Mangaldas* v. *Mangaldas Nathubhoy*, 10 B 528, 543.
9. 20 B 53.
10. 1 A 440.

is not entitled to much weight and that the custom must be proved by specific instances.

Entries as to custom in a wajibularz or rewaj-i-am.–Under section 60, the person whose opinion is relevant must himself appear in Court to testify, and his opinion cannot be proved by derivative evidence.[1] But in the case cited,[2] entries in a *wajibularz* as to the existence of a custom were admitted by the Privy Council under this section, though the persons whose opinion were recorded in the *wajibularz* were not called as witnesses.[3] Where the interpretation of a clause of a *wajibularz* is accepted by certain members of a family, the fact is admissible in evidence in a subsequent suit between the members of the family, to show how a custom applying to the family was interpreted by the members of that family.[4] Entries in the *riwaj-i-am* of a district in the Punjab are admissible being the opinion, as to the existence of a general custom or right, of persons who would be likely to know of its existence if it existed.[5]

Rattigan's Digest.–Rattigan's Digest of Customary Law has been accepted as a book of unquestioned authority in the Punjab.[6]

49. Opinion as to usage, tenets, etc., when relevant.–When the Court has to form an opinion as to —

the usages and tenets of any body of men or family,

the constitution and government of any religious or charitable foundation, or

the meaning of words of terms used in particular districts or by particular classes of people,

the opinions of persons having special means of knowledge thereon, are relevant facts.

COMMENTARY

Opinions as to usages, tenets, etc..–Under this section, the opinions of witnesses having special means of knowledge are relevant when the Court has to form an opinion as to : (i) the usages[7] of any body of men, e.g., usages of trade or agriculture, mercantile usages, or any other usages common to a body of men; (ii) usages of a family, e.g., the custom of primogeniture in the family of ancient *zamindars ;* (iii) tenets of family ; (v) the constitution and governments of any religious or charitable foundation; and (vi) the meaning of words or terms used in particular districts or by particular classes.[8]

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1. The present section refers to the evidence of a living witness produced before the Court, sworn and subject to cross-examination, Norton, § 227.
2. *Lali* v. *Murlidhar*, 28 A 488 : 33 IA 97 (PC).
3. See also *Sharfuddin* v. *Niamat Ali*, 87 IC 8 : 1925 O 688 ; *Lekraj Kuar* v. *Mahpal Singh*, 5 C 744 : 7 IA 63 (PC). In *Lali* v. *Murlidhar*, 28 A 488 : 33 IA 97 (PC), the Privy Council did not refer to an earlier ruling *Garurdhwaja Prasad* v. *Superdhwaja Prasad*, 23 A 37 : 27 IA 238 (PC), in which section 60 was mentioned and the opinion admitted was a "living person".
4. *Sharfuddin* v. *Niamat Ali*, 87 IC 8 : 1925 O 688.
5. *Subhani* v. *Nawab*, 1941 PC 21 : 193 IC 436 : ILR 1941 L 154.
6. *Salig Ram* v. *Mst. Maya Devi*, 1955 SC 266 : (1955) 1 SCR 1911.
7. For the meaning of "usage", see *Dalglish* v. *Guzuffer Hussain*, 23 C 427 ; *Sariatuallah* v. *Pran Nath Nandi*, 26 C 184 and notes to the preceding section.
8. Norton, § 228 ; see *Tulasiram Das* v. *Ramprasanna Das*, 1956 Orissa 41.

Under Section 93, evidence may be given to show the meaning of foreign, technical, local or provincial expression, and of words used in a peculiar sense; the present section makes the opinion of persons having special knowledge of such expressions and words admissible. The section "is particularly valuable in a country like India, in which there are so many different languages and in which justice is largely administered by Englishmen in languages other than English". The Court can also resort for its aid to appropriate books of documents of reference on all matters of literature,[1] and to a dictionary for the meaning of words and expressions.[2]

Usages of a family.—In order to prove a custom of this kind, the evidence must be cogent, above board and unimpeachable. It should further be established that the custom was an ancient one. It is true that about things which happened a long time ago, it is difficult to expect direct testimony of persons who were living then and are dead. In such cases, a party has to remain content by examining witness who may otherwise be competent to speak either about the inheritance or the custom governing succession of the property belonging to any family. However, the question remains whether the witness who comes to depose about the custom heard of it from his ancestors and whether there was any occasion for his having any conversation with his ancestors about that custom.[3]

Opinions of persons having special means of knowledge.—It is not the opinion of every person, that is made relevant by the section. The persons whose opinion is relevant under this section are those who have means of special knowledge of the matters stated in the section. Thus, the opinion of the members of a family as to the usages of that family is relevant as the opinion of persons having special means of knowledge.[3] The opinion may be based on knowledge or information derived from statements of deceased persons.[4] "It is admissible for a living witness to state his opinion as to the existence of a family custom and to state, as the ground of that opinion,[5] information derived from deceased persons; and the weight of the evidence would depend on the position and character of the witness of the persons on whose statements he formed his opinion.[6] But it may be the expression of independent opinion based on hearsay and not mere repetition of hearsay",[7] If the opinion of the witness is based on statements made by deceased persons, it seems that the opinion would be admissible, irrespective of the fact the statements were made by the deceased persons after the controversy had arisen;[8] but if the witness merely repeats these statements without stating his independent opinion, it is apprehended that the statements would be admissible if they were made by the deceased after the controversy had arisen, since the admission of such statements would offend against the special provision of the fourth

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1. Section 57.
2. *Kameshwar Prasad* v.*Mithilesh Kishori*, AIR 1964 Pat. 150.
3. *Shyamanand Das Mohapatra* v. *Rama Kanta Das Mohapatra*, 32 C 6.
4. *Garurdhwaja Prasad* v. *Superundhwaja Prasad*, 23 A 37 : 27 IA 238 (PC) ; *Sarabjit Partap Bahadur Sahi* v. *Indarjit Partap Bahadur Sahi*, 27 A 203.
5. See Section 51.
6. See Section 158.
7. *Garurdhwaja Prasad* v. *Superundhwaja Prasad*, 23 A 37 : 27 IA 238 (PC).
8. *Garurdhwaja Prasad* v. *Superundhwaja Prasad*, 23 A 37 : 27 IA 238 (PC).It is not clear from the report whether the statements were made after the controversy had arisen, but the observations made by the Privy Council supports the view stated above.

clause to Section 32.[1]

Gambling slips.—Under Section 49 a police officer may give evidence that he has had a long experience amongst people who indulged in *satta* gambling in a particular district, and from that experience, supported by instances which he should be prepared to give so as to establish his means of knowledge, he is satisfied that a system or code prevails among such persons, and he may then express an opinion which be relevant under Section 49 that certain slips were prepared in accordance with that system or code and had a certain meaning.[2]

In order to prove that the articles seized are instruments of gaming, it is not essential to examine an expert in every case. The fact may be proved by proper evidence.[3]

Meaning of betting terms.—The witness must claim to be an expert having special means of knowledge of the meaning of the words used in recording betting transactions. Otherwise his evidence is not admissible under this section.[4]

Entries as to custom in a wajibularz.—See notes to the preceding section.

50. Opinion on relationship, when relevant.—When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact:

Provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act (IV of 1869), or in prosecutions under Sections 494, 495, 497 or 498 of the Indian Penal Code (XLV of 1860).

Illustrations

(a) The question is, whether *A* and *B* were married.
The fact that they were usually received and treated by their friends as husband and wife, is relevant.

(b) The question is, whether *A* was the legitimate son of *B*. The fact that *A* was always treated as such by members of the family, is relevant.

COMMENTARY

Family conduct; principle.—This section provides for the admission of a class of circumstantial evidence, when the Court has to form an opinion as to the relationship of one person to another. It is a reproduction of the English rule of "family conduct", which makes evidence of the conduct of members of the family admissible on question

1. *Protap Chandra Deo Dhabal Deo* v. *Jagdish Candra Deo Dhabal Deb*, 82 IC 886 : 1925 C 116. The observations of the Privy Council in *Fanindra Deb Raikat* v. *Rajeshwar Das*, 11 C 463, 481 : 12 IA 72 (PC) seem to be opposed to this proposition.
2. *Harilal Gordhan* v. *E.*, ILR 1937 B 670 : 1937 B 385 : 171 IC 282 : 38 Cr LJ 1047.
3. *State of Gujarat* v. *Jaganbhai*, AIR 1960 SC 1633.
4. *Harakchand Radhakishan* v. *State*, 55 Cr LJ 1347.

of relationship. When the question is whether *B* is the wife and *C* the son of *A*, the fact that *B* was treated by the members and friends of the family as *A's* wife and *C* as his son, is relevant. When a Court has to form an opinion as to the relationship of one person with another, it is permitted to take into consideration the "belief" on "judgment" of a person having special means of knowledge. The opinion that the section makes relevant is opinion expressed by conduct as to the existence of such relationship and not merely as to that relationship. In order to enable the Court to infer the opinion the conduct must be of a tenor which cannot well be supposed to have been willed without the inner existence of the opinion. It is for the Court to weigh such evidence and to come to its own opinion as to the relationship in question.[1]

Essential requirements.—The essential requirements of the section are: (1) there must be a case where the court has to form an opinion as to the relationship of one person to another; (2) in such a case, the opinion expressed by conduct as to existence of such relationship is a relevant fact; (3) but the person whose opinion expressed by conduct is relevant must be a person who as a member of the family or otherwise has special means of knowledge on the particular subject or relationship; in other words, the person must fulfil the condition laid down in the latter part of the section. If the person fulfils that condition, then what is relevant is his opinion expressed by conduct. Opinion means something more than mere relating of gossip or of hearsay; it means judgment or belief, that is, a belief or a conviction resulting from what one thinks on a particular question. Now, the 'belief' or conviction may manifest itself in conduct or behaviour which indicates the existence of the belief or opinion. What the section says is that such conduct or outward behaviour as evidence of the opinion held is relevant and may, therefore, be proved.[2]

Section 50-Scope-Relationship of one person to another-Proof of conduct of witness having special means of knowledge-If can be proved by another-A witness appearing in Court can make a statement to prove the conduct of another about the disputed relationship no matter such conduct may by a logical reasoning be said to be expressive of the opinion of that person about such relationship but such evidence will not be admitted as opinion evidence under Section 50 of the Act.[3]

Section 32(5) and Section 50 compared.—This section should be distinguished from the connected rule enacted in the fifth clause to Section 32. The points of difference between the two are:-(1) what is admissible under Section 32(5) is the statement of a deceased person, whereas, under the present section, the relevant fact is the *opinion* of persons, alive or deceased, expressed by conduct, the qualification of special means of knowledge being common to both provisions; (ii) under Section 32(5), the statement must have been made before the question in dispute was raised, but, under the present section, so far as its strict relevancy is concerned, it is immaterial whether the opinion was expressed before or after the controversy arose.

The statement of a witness on a question of relationship can be admissible either under Section 32 (5) or Section 50. If any particular statement does not fall within the purview of either of these provisions, it should be ruled out as inadmissible. Where the

1. *Chandulal* v. *Bibi Khatemonessa*, ILR (1942) 2 C 299 : 1943 C 76 : 205 IC 344 ; *Ramadhar Chaudhary* v. *Janki Chaudhary*, 1956 P 49.
2. *Dolgobinda Paricha* v. *Nimai Charan Misra*, 1959 (Sup.) 2 SCR 814 : (1960) 1 SCA 39.
3. *Amar Singh* v. *Chhaju Singh*, (1972) 74 PLR 625.

statement relates to the existence of relationship between two persons, one or both of whom could not have been seen by the witness, it cannot be presumed that he heard of the relationship from his own deceased ancestor. Where therefore, the statement of the witness giving the pedigree is found to be inadmissible under section 32(5), but he deposes to facts which establish such treatment as is contemplated by section 50, it should be admitted to that extent.[1]

Sections 50 and 32(5).—Question whether M was adopted son of B-Document executed by W widow of B, stating that B had taken M in adoption during his life time is admissible under section 50. Further as W was dead and statement was made before any dispute regarding M's adoption was raised, it was also admissible under section 32(5).[2]

Mode of proving opinion.—The opinion made relevant by this section is "direct" evidence within the meaning of section 60, and it is immaterial whether it is proved by the person, whose opinion is sought to be proved, himself appearing in Court to state it, or by other evidence.[3]

Special means of knowledge.—Such evidence is admissible only, if the persons giving their opinion have special means of knowledge regarding the usages or tenets of any body of men or their family. The weight of such evidence would upon the position and character of the witnesses, and his evidence must be the expression of an independent opinion formed on what he has known or heard. Repetition of hearsay is still evidence.[4]

Oral evidence of witnesses who have no special means of knowledge and whose evidence can be said to be mere hearsay, is not admissible under this section, because that is not the opinion expressed by conduct as to the existence of relationship.[5]

Special means of knowledge about the relation is essential. A statement about the relationship between two persons by another persons who is not shown to have any special means of knowledge, cannot be relevant.[6]

Persons having special means of knowledge.—The persons whose opinion is made evidence by the section must be shown to have "special" means of knowledge on the subject[7] whether they are members of the family or are strangers.[8] Members and friends of the family will be presumed to have special knowledge of the relationship; and their conduct will not only be relevant under this section but Courts should attach considerable importance to it in determining the question of relationship.[9] Relationship between T and D was in dispute. Nephew of D deposed that T addressed D as "phupnar" and that D himself told him that T's father was his (D's) wife's brother. Opinion of nephew supported by T's conduct was held relevant.[10]

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1. *Chunna Kunwar* v. *Mukat Behari Lal*, 151 IC 338 : 1934 A 117.
2. *Namraj* v. *Kameshwar*, 1969 Raj LW 507.
3. In *Q.E* v. *Subbarayan*, 3 M 9 Hutchins, J., seems to have held that the person whose opinion is relevant cannot himself be called to state his opinion, his opinion can be proved by other evidence only when such person is dead or cannot be called.
4. *Tulasiram* v. *Ramprasanna*, ILR 1955 Cut. 653.
5. *Dukh Haran* v. *Bilasa Kuer*, AIR 1963 Pat. 390.
6. *Bujhawan Singh* v. *Shyama Devi*, AIR 1964 Pat 301.
7. *Chandulal* v. *Bibi Khatemonessa*, 1943 C 76 : ILR (1942) 2 C 299 : 205 IC 344.
8. *Ramadhar Chaudhary* v. *Janki Chaudhary*, 1956 P 49.
9. See *Muttuswamy* v. *Jugavera Yettappa Naicker* v. *Venkataswara Yettaya*, 12 M IA 203 ; *Khojah Hidayut Oollah* v. *Rai Jan Khanum*, 3 MIA 295 ; *Fazilatunnessa* v. *Mst. Bibee Kamarunnessa*, etc. 9 CWN 352.
10. *Ajmer Singh* v *Jangir Singh*, 1952 Pepsu 76 ; *Parvin Kumari* v. *Gokal Chand Bala Ram*, 1949 EP 35.

Value of the evidence relevant under this section.–When the legitimacy of a person is questioned after very considerable time, the defendant, in order to defend his status, should be allowed to invoke against the claimant every presumption which reasonably arises from the long recognition of his legitimacy by members of the family or other persons. These remarks would apply also when the adoption of a person is called in question.[1] Where there is *prima facie* evidence of cohabitation as man and wife and a long course of treatment of the lady as wife and the children as legitimate, the presumption of marriage can be repelled only by evidence of the clearest character. Much weight must be attached to reputation among the relation on both sides, among all the friends and among all the acquaintances in the locality where the parties resided.[2]

Value of evidence relevant under Section 50.–The section allows the leading of presumptive proof as regards marriage, legitimacy, adoption, etc. In *Thakur Gokal Chand* v. *Parvin Kumari*,[3] it was held that the presumption of lawful marriage from continuous cohabitation is rebuttable, if there are other circumstances which weaken or destroy it.

Instances of conduct held relevant.–Distribution and devolution of family property is very valuable evidence of "family conduct".[4] Where the fact to be proved was an adoption alleged to have taken place about 40 years before the suit, evidence of enjoyment of the properties of the adoptive father by the alleged adopted son and evidence of acquiescence of such enjoyment by persons who, but for the adoption, would have been entitled to possession of such properties was held admissible under this section.[5] But no presumption as to adoption arises where there is no clear and unambiguous evidence regarding acquiescence.[6] Where the Court has to decide whether one person is related to another, the fact that, according to the religious usage of the parties, the names of particular persons are usually recited or omitted during the performance of ceremonies, and the observance of pollution are instances of conduct relevant under the present section.[7] If the legitimacy of a certain type of marriage contracted by the members of a certain family is questioned, much may be gathered from the treatment accorded to the wives and from the way in which they described themselves in official documents and petitions and legal proceedings to which they were parties. Evidence of this kind is admissible as conduct under section 50 of the Evidence Act,[8] as it shows the repute in which such marriage was held in the family.[9] On the same principle, opinion expressed

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1. *Rajendra Nath Holdar* v. *Jogendra Nath Banerjee*, 14 MIA 67 ; *Mullangi Venkatarangam Chetty* v. *Vankatasubbammah*, 19 IC 740. Conduct of all parties is strong evidence of marriage. *Monji Lal* v. *Chandrabati Kumari*, 38 C 700 : 33 IA 122 : 11 IC 502 (PC) ; "If the father is proved to have brought up the party as his legitimate son, this amounts to a daily assertion that the son is legitimate" per Sir James Mansfield in *Berkeley Peerage* case, (1811) 4 Camp, 401, 416.
2. *Imambandi* v. *Matasuddi*, 13 IC 678 : 15 CLJ 611.
3. 1952 SCJ 331.
4. *Seshammal* v. *Kuppaenalyangar*, 91 IC 462 : 1926 M 475.
5. *Mullangi Venkatarangam Chetty* v. *Venkatasubbammah*, 19 IC 740.
6. *Girdhari Biswal* v. *Golak Biswal*, 1949 Orissa 27 ; but see *S.Ramakrishna Pillai* v. *Tirunarayana Pilai*, 1932 M 198 : 55 M 440 and Sri *Kanchumarthi Venkata Seetharama Chandra Row* v. *Kanchumarthi Raju*, 1925 PC 201 : 89 IC 817.
7. *Ramakrishna Aiyar* v. *Chinna Vengammal*, 26 IC 110.
8. Illustration (b).
9. *Maharaja of Kolhapur* v. *Sundaram Iyer*, 48 M 1 : 93 IC 705 : 1925 M 47.

by conduct is relevant on a question of illegitimacy.[1]

General reputation as proof of relationship not admissible.—Section 50 does not make evidence of mere general (without conduct) admissible as proof of relationship.[2]

Opinion on relationship.—When a woman lives for a number of years in close association with a man bears children, who are acknowledged by the man as born to him, relations and persons of the village treat them as such; there is a presumption of legitimacy, as vice and immorality are not usually attributed to such associations between a man and a woman. Where, therefore, the, question was whether the defendant was the legitimate son of the one M, evidence that the plaintiff, wife of M, herself, M and his brother acknowledged and recognized the defendant as the legitimate son, and his mother as the legitimate wife of M, was admissible under this section.[3] The section can be passed into service to decide the question of membership of a joint family which is a peculiar incident of Hindu Law and which is relevant to prove the relationship between persons. The opinion of persons expressed by conduct is also relevant.[4] Where, however, proof of marriage is an essential ingredient, there must be strict proof of marriage.[5]

Opinion expressed by conduct.—Where witness testify to the conduct of a particular person living and being in joint possession of property with her daughter since the life time of the mother's husband and witnesses testify that the husband died leaving behind the widow and her daughter, that his properties devolved jointly on the widow and the daughter, and that, after the widow's death, the daughter alone remained in possession, the evidence given satisfied the requirements of this section as such is admissible to prove the parentage of the daughter. The devolution of family property is often valuable evidence of conduct within the meaning of this section.[6]

Presumption from conduct.—In respect of an ancient adoption the actual evidence of giving and taking may not be available, and if there is sufficient evidence to show that for a long time the boy was treated as the adopted son at a time when there was no controversy, the burden will shift on the other side to show that the adoption did not take place.[7] In *Mutyala* v. *Subbalakshimi*,[8] it was held that the proviso makes the opinion as to the relationship insufficient to prove marriage in proceedings under the Divorce Act or in prosecutions under Sections 494, 495, 497 or 498 of the Penal Code. This means that the proof of act of marriage is not to depend on opinion or conduct evidence.

Member of family deposing about fact heard from ancestors.—Admissibility.—A member of the family can speak in the witness-box of what he has been told and what he learned about his own independent opinion (even though it is based on hearsay derived from deceased, not living persons) and is not merely repetition of the hearsay opinion of information and the time at which he acquired the knowledge (for example, whether the dispute or not) would affect its weight but not its admissibility.[9]

1. *Gopalasami Chetti* v. *Arunachelam Chetti*, 27 M 32.
2. *Dolgobinda Paricha* v. *Nirmal Charan Misra*, 1959 (Sup) 2 SCR 814 : (1960) 1 SCA 39.
3. *Sivalingiah* v. *Chowdamma*, 1956 Mys 17, 18 ; *Khageswar Naik* v. *Domini Bewa*, AIR 1989 Ori. 10.
4. *Shriram Sardarmal* v. *Gouri Shankar*, 62 Bom. LR 336.
5. *Phankari* v. *State*, AIR 1965 J & K 105.
6. *Bhogal* v. *Nabihan*, AIR 1963 Pat 450.
7. *Harihar* v. *Nabakishore*, ILR 1962 Cut. 422.
8. *Mutyala* v. *Subbalakshmi*, (1962) 1 Andh. WR 91.
9. *Sitaji* v. *Bijendra Narain Choldhar*, 1954 601.

Personal knowledge not necessary.—Such persons may be members of the family or outsiders, but they must have had special means of knowledge on the subject of relationship. A member of the family can speak in the witness-box vide what he says is an expression of his own independent opinion (even though it is based on hearsay, derived from deceased, not living persons) and is not merely repetition of the hearsay opinion of others, and provided the opinion is expressed by conduct. His sources of information and the time at which he acquired the knowledge of (for example, whether before the dispute or not) would affect its weight, but not its admissibility. Personal knowledge is not necessary.[1]

Opinion based on hearsay not admissible.—Where the opinion of relationship is expressed by conduct, the belief or conviction must manifest itself in conduct or outward behaviour which indicates existence of belief or opinion. Where the opinion is based on hearsay and not on any belief or conviction, it is not admissible.[2]

Evidence of general repute.—In some cases,[3] evidence of general repute on a question of relationship has been held admissible; but, except in the Madras case, it is not stated in these cases whether the evidence was admitted under this section or under the fifth or sixth clause to section 32. The present section deals with opinion expressed by conduct, and the evidence of general reputes, as distinguished from evidence of conduct, does not seem to be within its purview, nor is there any other section in the Act, which would make such evidence admissible.[4] Section 32 provided for the admission of statements by deceased personal, and is obviously inapplicable to evidence of general reputation. Since reputation is simply a culmination of ordinary "perception testimonies" heard and gathered and reduced to a single implied assertion which is reported to the tribunal by the witness who perceived the cumulative assertions and since the special weakness of reputation is the anonymity of the original assertors, all the considerations for hearsay testimony apply and hence such evidence is not admissible.[5] Mere rumour or gossip that A and B are married unaccompanied by conduct on their part or on the part of their friends and relations is mere hearsay and therefore inadmissible.[6]

Marriage; acknowledgment; adoption.—Where a man and a woman have cohabited continuously for a number of years, the law presumes in favour of marriage;[7] but not where marriage between the parties is not legally possible.[8] Where a man and a woman are treated as husband and wife by friends and relatives or other person having

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1. *Ibid.*
2. *Paras Ram* v. *Dayal Das*, AIR 1965 SC 32.
3. *Mi Me* . v. *Mi Shive Ma*, 39 C 492 ; 39 IA 57 : 114 IC 475 (PC) ; *Maharaja of Kolhahpur* v. *Sundaram Iyer*, 48 M I ; 93 IC 705 ; 1925 M 497 ; *Ma Hmun* v. *Ma Nagwe Thin*, 1 R 34 ; 74 IC 104 ; 1923 R 171 ; *Sadik Husain Khan* v. *Hashim Ali Khan*, 38 A 627 ; 43 IA 212 ; 36 IC 101. 1916 PC 27 ; *Imambandi* v. *Mutosuddi*, 13 IC 678 ; 15 CLJ 621.
4. *Lakshmi Raddi* v. *Venkata Reddi*, 1937 PC 201 ; 168 IC 881 ; *Natabar Parichha* v. *Namai Charan Misra*, 1952 Orissa 75 ; *Kunji Lal* v. *Suba Lal*, 1952 MB 12 ; *Ramadhar Choudhary* v. *Janki Chaudhary*, 1956 P 49 ; *Chandulal* v. *Bibi Khatemonnessa*, ILR (1942) 2 C 299 ; *Seshamnal* v *Kuppanaiyyangar*, 91 IC 462 ; 1926 M 475 ; *See Mohan Lal* v. *Tulsan*, 109 IC 774 ; 1928 L 824.
5. *Chandulal* v. *Bibi Khatamonnessa*, ILR (1942) 2 C 299 ; 1943 C 76 ; 205 IC 344.
6. *Manug Maung* v. *Ka Sein Kyi*, 1940 R 181.
7. *Harnam Singh* v. *Mst. Bhagi*, 16 L 1007 ; 1936 L 261 ; 161 IC 916 ; *Durg Bux Singh* v. *Suresh Bux Singh*, 1937 OWN 1221 ; *Mohabhat Ali Khan* v. *Muhammad Ibrahim Khan*, 10 L 725 ; 56 IA 201 ; 117 IC 17 ; 1929 PC 135 ; *Kyan Hoe Tsee* v. *Kyan Won Si*, 96 C 762 : 1926 R 90 ; *Maharaja of Kolhapur* v. *Sundaram Iyer*, 48 M I ; 93 IC 705 ; 1925 M 497.
8. *Keolopati* v. *Harnam Singh*, 1936 O 298 ; 162 IC 527.

special means of knowing their relationship the evidence of the treatment is admissible under this section.[1] But where the evidence merely stated that A and B were regarded by the members of the brotherhood as husband and wife, the evidence was not held admissible as evidence of family conduct.[2] Mere statements that a person is or is not married are not admissible under section 50. What the Court wants under section 50 is the opinion expressed by the conduct of any person who as a member of the family or otherwise, had special means of knowledge of the relationship.[3] Where the question is whether a man and a woman have been married or divorced, the opinion, as expressed by the conduct of the parties or by the conduct of members of the family or caste, is relevant under section 50.[4] Mere rumour or gossip that two persons are married is inadmissible but the fact that they were usually received and treated by their friends as husband and wife is admissible. Phrases such as "I learnt that they were living together as man and wife" or "I learnt that they were man and wife" are not receivable in evidence. The witness must prove conduct on the part of the man and woman, or on the part of their friends and neighbours from which the Court may draw the conclusion about their relationship.[5] Under the Mohammedan Law, in all cases in which marriage may be presumed from cohabitation combined with other circumstances for the purpose of conferring upon the woman the status of wife, it may also be presumed for the purpose of establishing paternity.[6] The rule just stated is not, however, a rule of evidence, but is a rule of Mohammedan family law.[7] Since this section is concerned with the conduct of persons other than those whose relationship is sought to be established, where acknowledgment is relied on to establish legitimacy, evidence of the conduct of the father and his treatment of the son and his mother cannot be received under this section, but his treatment of the son and his mother cannot be received under this section, but it can be received as evidence of facts in issue.[8] The evidence of the conduct of relations, friends, and neighbours will, of course, be relevant under the present section. Similarly, where the question is whether a *taluqdar* not having male issue has treated his daughter's son in all respects as his own within the meaning of section 22 (4) of Act 1 of 1869, evidence of the *taluqdar*'s treatment of the daughter's son will be received as evidence of facts in issue.[9] Section 8 makes relevant the conduct of a party to the suit, and section 21 does not deal with admissions by conduct of a party to the suit, and Section 21 does not deal with admission by conduct at all;[10] hence,

1. *See Maharaja of Kolhapur* v. *Sundaram Iyer*, 48 M 1 ; 93 IC 705 ; 1925 M 497 ; *see Khageswar Naik* v. *Domuni Bewa*, AIR 1989 Ori, 10.
2. *Lakshmi Chand* v. *Auandi*, 143 IC 815 ; 1933 A 130 ; *but see Maharaja of Kolhapur* v. *Sundaram Iyer*, 48 M 1;93 IC 705 ; 1925 M 497 ; *Parvin Kumari* v. *Gokal Chand Bala Ram*, 1949 EP 35 ; 50 PLR 151 ; *Gokal Chand* v. *Parvin Kumari*, 1952 SC 231 ; 1952 SCR 825 ; 1952 SCJ 331.
3. *Secretary of State* v. *Mst. Mariam*, 1937 S 126 ; 169 IC 685 ; 31 SLR 71 ; *Parvin Kumari* v. *Gokul Chand Ram*, 1949 EP 35 ; *Gokal Chand* v. *Parvin Kumari* 1952 SC 231 : 1952 SCR 825 ; 1952 SCJ 331.
4. *Janglia* v. *Jhingrya*, 63 IC 594 ; 1921 N 71.
5. *Maung Maung* v. *Ma Sein Kyi*, 1940 R 181.
6. *Mohabbat Ali Khan* v. *Muhammad Ibrahim Khan*, 10 L 725 ; 56 IA 201 ; 117 IC 17 ; 1929 PC 135 ; *Wilson's Anglo-Mohammadan Law*, section 84.
7. *Fazilatunnessa* v. *Mst. Bibee Kamarunnessa. etc.*, 9 CWN 352.
8. *See Abdul Razak* v. *Aga Mahomed Jaffer Mahomed Jaffer Bijdanim*, 21 C 666 ; 21 IA 56 (PC) ; *Fazilatunnessa* v. *Mst. Bibee Kamarunnessa*, 9 CWN 352. ; *Khajah Hidayut Oolah* v. *Rai Jan Khanum*, 3 MIA 295 ; *See also Imambandi* v. *Mustasuddi* 13 IC 678 ; 15 CLJ 621.
9. *Pertab Narain Singh* v. *Subhao Kooer*, 3 C 626 ; 4 IA 228 (PC) ; *Umrao Begum* v. *Irshad Husain*, 21 C 997 : 21 IA 163 (PC).
10. See notes to section 17 under the heading "an admission is a statement, oral or documentary".

evidence of the conduct of an adoptive father, who is not a party to the suit, is not relevant under section 8 or section 21, nor is it relevant under the present section which is concerned only with the conduct of persons other than those whose relationship is in question. Such conduct may, however, be received under section 11, as rendering probable the *factum* of adoption, and possibly under section 114.[1] Where the fact of adoption has been acquiesced in by the members of the adopting family for a long period there is a very strong presumption in favour of the validity of the adoption.[2] Where a person has nearly for half a century enjoyed the status of an adopted son and has been treated as such all his life, and, at the time the question arises, it is not possible to get witnesses who were actually present at the time and could depose to the performance of the ceremony, it must be presumed, that all the necessary ceremonies were duly and regularly performed at the time of his adoption.[3]

Where the plaintiff's case is that his ancestor was the son of a particular testator, the fact that the testator mentioned all the members of the family in the will but took no notice of the plaintiff's ancestor is evidence to show that either the plaintiff's ancestor was not the son of the testator or that he had predeceased the testator.[4] Evidence of notoriety of an adoption must be the evidence of a number of people who owing to their circumstances are in a position to say what was the attitude of the alleged adoptive Parents towards the claimant. A mere statement that an opinion was held by the witnesses or other persons does not come within the scope of this section which is the only provision of the Evidence Act under which evidence of repute is admissible.[5]

Law presumes marriage.—Law presumes in favour of marriage and against concubinage, and long cohabitation raises a rebuttable presumption of wedlock. Where the descendants of a common ancestor do not challenge the legitimacy of a person, that is an important circumstance in favour of legitimacy. Acknowledgment and repudiation of legitimacy, both being conduct, are admissible in evidence under this section. So, where in a suit instituted by a father and his son, the father makes a statement in the plaint describing the son without mentioning whether he is a an illegitimate son amounts to an acknowledgement that the son is legitimate. The fact that the defendants of a common ancestor who are defendants in the suit do not challenge the legitimacy in the suit is an important circumstance in favour of the legitimacy of the son.[6] Every presumption ought to be made in favour of marriage when there has been a lengthened cohabitation, specially in cases where the alleged marriage took place so long ago that it must be difficult if not impossible to obtain a trustworthy account of what really occurred,. Such presumption would be almost irresistible if the conduct of the parties is compatible with the existence of the relation of husband and wife.[7] It is well-settled that continuous cohabitation for a number of years may raise the presumption of marriage.[8]

1. *See Cunningham*, Ev., 132 ; See however, *Mullangi Venkatarangam Chetty* v. *Venkatasubbammah*. 19 IC 740.
2. *Girdhari Biswal* v. *Golak Biswal*, 1949 Oriss 27 ; *S. Ramakrishna Pillai* v. *Tirunarayana Pillai*, 1932 M 198 ; 55 M 40 ; *Sri Kanchumarthi Venkata Seetharama Chandra Row* v. *Kanchumarthi Raju*, 1925 PC 201 ; 89 IC 817.
3. *Roshan Lal* v. *Samar Nath*, 1937 L 626 ; *Lal Achal Ram* v. *Raja Kazim Husain Khan*, 27 A 271 ; 32 IA 113.
4. *Tracy Peerage case*, 10 Cl. & Fin, 191. Such evidence is admissible under section 11.
5. *Maung Mya Maung* v. *Ma Mya Sein*, 1936 R 518.
6. *Shoedhar Prasad* v. *Jagdhar Prasad*, AIR 1964 Pat 316.
7. *Rewa* v. *Galharsingh*, 1960 MPLJ 1389.
8. *Gokul Chand* v. *Pravin Kumari*, 1952 SC 231 ; 1952 SCJ 331.

Proviso.—Sections 494, 495, 497 and 498 of the Indian Penal Code define and punish some of the offences against marriage. The proviso to the present section enacts that in prosecution for offences punishable under these sections of the Code, the opinion expressed by conduct is not sufficient proof of marriage. The proviso does not direct the Court to exclude such evidence of opinion, though the Court is directed not to base, on such evidence alone, a finding that the marriage took place,[1] where, therefore, a finding as to marriage is based on opinion evidence alone, the conviction would be illegal.[2] The framers of the Evidence Act have endeavoured, in dealing with this subject, exactly to follow the English law. And in England, there has never been any doubt that, in an indictment for *bigamy*, the first marriage, and in proceedings founded upon adultery, the marriage, must be proved with the same strictness as any other material fact.[3] In all criminal cases, strict proof of the commission of the offence is required;[4] hence, where marriage is an ingredient of the offence charged against the accused, a clear proof of the marriage is necessary,[5] the statements of the alleged husband and of the alleged wife together being insufficient.[6] In a prosecution under section 497 or section 498, I. P Code, it is not permissible to find the marriage proved merely on the presumption of marriage arising from cohabitation for a number of years.[7] Section 488 of the Criminal Procedure Code is not included in the Proviso to the section. Hence for proof of marriage in a proceeding under section 488 Cr. P.C., the standard of proof need not be so high as required in proceedings under section specified in the Proviso.[8]

Effect of the proviso to Section 50.—The Proviso to section 50 of the Evidence Act enacts only this much that the opinion evidence of the nature mentioned, which is otherwise made relevant by the main body of section 50 of the Act for the purpose of proving existence of relationship, shall not be sufficient to prove a marriage in a prosecution under section 494, I. P. Code. The proviso does not make the opinion evidence relating to the marriage either irrelevant or inadmissible. Therefore, the only effect of the proviso is that on the basis of the opinion evidence alone, the Court cannot hold in a prosecution under section 494 I. P. Code that the factum of the marriage has been proved. Hence the contention that the opinion of the persons who testify to the marriage, the factum of which is in issue cannot be taken into consideration at all has to be ejected. Such testimony being relevant can be availed of along with other evidence to reach the conclusion that the factum of marriage had been proved.[9]

Proviso to section 50 not applicable to contempt proceedings.—Injunction against husband restraining him from entering into second marriage—Disobedience of order—Contempt proceedings—Principle that strict proof is required in all criminal cases not to be extended to such a case—Proviso to section 50, Evidence Act is not applicable—Nor is contemner a person accused of any offence.[10]

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1. *Raghupat Singh* v. *E.*, 100 IC 535 ; 1927 O 140 ; 28 Cr LJ 311.
2. *Syed Munir* v. *E.*, 42 IC 760 ; 18 Cr LJ 1016.
3. *E.* v. *Pitamber Singh*, 5 C 566 (FB).
4. *E.* v. *Kallu*, 5 A 233 .
5. *Ganga Patra* v. *E.*, 112 IC 469 ; 1928 P 481 ; 29 Cr LJ 1045 ; *Gopal* v. *E.*, 94 IC 603 ; 1925 R 328 ; 27 Cr LJ 651 ; *Bhagu Dhondi* v. *E.*, 27 IC 837 ; 16 Cr LJ 213 ; *E.* v. *Isap Mohomed*, 31 B 213 ; *Q. E.* v. *Santok Singh*, 18 BWN 186 ; *Q.E.* v. *Dal Singh*, 20 A 166 ; *R.* v. *Arshed*, 13 CLR 125. For proof of a Mohammedan marriage, see *Badal Awat* v. *Q. E.* 19 C 79.
6. *E.* v. *Pitamber Singh*, 5 C 566 (FB) ; *E.* v. *Kallu*, 5 A 233 ; *but See Ganga Patra* v. *E.*, 112 IC 469 ; 1928 P 481 ; 29 Cr LJ 1045 ; *Syed Munir* v. *E.*, 42 IC 760 ; 18 Cr LJ 1016 ; *Q. E.* v. *Subbarayan*, 9 M 9.
7. *Gul Mahomed* v. E., 148 IC 753 ; 1934 S 10 ; 35 Cr LJ 816 .
8. *K. J. B. David* v. *Nilamoni Devi*, 1953 Orissa 10.
9. *Rabindra Kumar* v. *Smt Prativa*, AIR 1970 Tripura 30.
10. *Bhonrilal* v. *Mst. Kaushaliya*, 1969 Raj LW 427.

Sections 50 and 60.—Applicability and scope—opinion evidence as to relationship—Mode of proof.—Section 50, however, does not state as to how the conduct or external behaviour which expresses the opinion of a person coming within the meaning of section 50 has to be proved. For this purpose, one is to turn to section 50. If the conduct relates to something which can be seen, it must be proved by the person who saw it, if it is something which can be heard then it must be proved by the person who heard it. If it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says that he perceived it by that sense or in that manner, and if it refers to an opinion to the grounds on which that opinion is held, it must be the evidence of such person who holds such opinion on those grounds. The portion of section 60 which provides that the person who holds an opinion must be called to prove his opinion does not necessarily mean that it must be proved only by the person whose conduct expressed the opinion. It can be proved either by the testimony of the person himself whose opinion is evidence under section 50 or by some other person acquainted with the facts which express such opinion.[1]

Sections 50 and 60—Inter-Relationship between these Sections.—It we remember that the offered item of evidence under section 50 is conduct then there is no difficulty in holding that such conduct or outward behaviour must be proved, in the manner laid down in section 60; if the conduct relates to something which can be seen, it must be proved by the person who saw it; if it is something which can be heard, then it must be proved by the person who heard it; and so on. The conduct must be of the person who fulfils the essential conditions of section 50 and it must be proved in the manner laid down in the provisions in relation to proof. It appears to us that portion of section 60 which provides that the person who holds an opinion must be called to prove his opinion does not necessarily delimit the scope of section 50 in the sense that opinion expressed by conduct must be proved only by the person whose conduct expresses the opinion. Conduct, as an external perceptible fact, may be proved either by the testimony of the person acquainted with the facts which express such opinion, and as the testimony must relate external facts which constitute conduct and is given by person personally acquainted with such fact, the testimony is in each case direct within the meaning of section 60. This is the true inter-relation between section 50 and section 60 of the Evidence Act.[2]

Section 50 and 60—Proof of Marriage.—The proof required for marriage or relationship of husband and wife stands on a different footing from the ordinary standard of proof in respect of other facts. In fact, the rule of exclusion of hearsay evidence has been in a way relaxed in case where marriage or relationship of one person to another has to be proved. It is not essential that the factum of marriage must be established by eye-witnesses or proof of the performance of ceremonies. Section 50 makes relevant the opinion expressed by conduct i.e, external facts. It may be proved by the evidence of the person holding the opinion or by other persons acquainted with such facts evidencing conduct. Evidence as to the conduct of other members of the family made admissible under the section may be given either by the person whose conduct is in question or by a stranger who has special means of knowledge. In either case, the witness is to state facts observed by him and the opinion he has formed

1. *Balaram Das* v. *Jayakrishna Das*, (1972) 38 CLT 44.
2. *Dolgobinda Paricha* v. *Nimai Charan Misra*, 2 SCR 814 ; (1960) SCA 39.

therein. The opinion may be of a member of the family or an outsider; it is enough if he has special means of knowledge on the subject.[1]

Evidence of devolution of property.—Sections 50 and 60.—Opinion on relationship expressed by conduct of person whose opinion is relevant must be a person who has special means of knowledge of relationship. Section 50 does not make evidence of mere general reputation (without conduct) admissible as proof of relationship. Devolution of family property is often very valuable evidence of conduct within meaning of section 50.[2]

51. Grounds of opinion, when relevant.—Whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant.

Illustration

An expert may give an account of experiments performed by him for the purpose of forming his opinion.

COMMENTARY

Principle.—Opinion is merely an inference which a person draws from certain facts; and the correctness of this inference depends upon an accurate observation of the facts and deducing correct conclusions from them. if, therefore, opinion is offered by a witness on a particular matter, the grounds on which that opinion is held by him must be examined in order to test the accuracy of the opinion. The opinions of the witnesses are entitled to little or no regard, unless they are supported by good reasons founded on facts which warrant them in the opinion of the jury. If the reason are frivolous or inconclusive, the opinions of the witnesses are nothing.[3] The opinion of an expert carries little weight, unless it is supported by a clear statement of what he noticed and on what he based his opinion. The expert should put before the Court all the materials which induced him to come to his conclusion, so that the Court may form its own judgment, on those materials.[4] This section, though not a complete paraphrase of section 46, is based on a principle similar to the one enacted in that section. It "deals with the subjective grounds upon which the opinion is held, which can only generally be proved by the testimony of the person whose opinion is offered, whereas section 46 deals with objective external facts provable either by that person or others, which support or rebut the opinion of an expert".[4]

Grounds of opinion.—An Excise Inspector is an expert on the question whether a certain liquid is illicit liquor or not. But before he is in a position to give such an opinion as an expert, he has to examine it and has also to furnish the data on which his opinion is based. His bald statement without examining the liquid that the content was illicit liquor is not sufficient to prove that fact.[5]

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1. *Bomray* v. *Gaya*, 1969 All WR (HC) 579.
2. *Mt. Ayub Khan* v. *Abdus Samad Khan*, 1969 BLJR 932.
3. Wigmore § 1917, quoting Washington, J., in *Harrison* v. *Rowan*, 3 Wash CC 587.
4. *Rainkaran Singh* v. *E.*, 1935 N 13 : 154 IC 341 ; *Tilli* v. *Alfred Robert Jones*, 1934 A 273 ; 56 A 428 ; 1953 IC 733.
5. *Gobardhan* v. *The State*, 1959 Cr LJ 13.

CHARACTER, WHEN RELEVANT

Introductory.—This set of sections, comprising sections 52 to 55 deals with the relevancy of the evidence of the character of parties. Rules governing the admissibility of the evidence of the character of witnesses are enacted in a subsequent part of the Act.[1] As a general rule, if the character of a party is in issue in a civil or criminal case, evidence of character, good or bad, will be admitted as evidence of a fact in issue, but when the character of a party is not in issue, the evidence will be rejected as inadmissible. There are, however, two exceptions to the latter part of this general rule : (i) evidence of good character may be given by an accused person,[2] and (ii) if the character of a person is such as affects the amount of damages which he ought to receive, evidence of such character will be received.[3]

52. In civil cases character to prove conduct imputed, irrelevant.—In civil cases the fact that the character of any person concerned is such as to render probable or improbable any conduct imputed to him is irrelevant, except in so far as such character appears from facts otherwise relevant.

COMMENTARY

Scope of Sections 52, 53, 54 and 55.—The provisions of sections 52, 53, 54 and 55 make it clear that the evidence of general reputation and general disposition is relevant in a criminal proceeding. Under this Act, unlike in England, evidence can be given both of general character and general disposition. But the character evidence is very weak evidence. It may be useful in doubtful cases, to tilt the balance in favour of the accused, or it may also afford a background for appreciating his reactions in a given situation. It must give place to acceptable positive evidence.[4]

Evidence of character is admissible where character is a fact in issue.—The rule of exclusion of evidence of character does not apply when, according to the rule of substantive law applicable to the case, the character of party is a fact in issue. Under the general law of defamation the truth or otherwise of an imputation of bad character is a fact in issue; and evidence on this point will therefore be received.[5] Thus, in an action for a libel, where the language, complained of stated that the defendant parted with the plaintiff "on account of her incompetency, and her not being lady like or good tempered; and where, in a similar action, the words charged the plaintiff "on account of her incompetency, and her not being lady like or good tempered," general evidence of her competency, good temper and manners was received: and where, in a similar action, the words charged the plaintiff generally with dishonesty and misconduct while in service, a witness, with whom she had previously lived, was allowed to testify to her antecedent general conduct.[6] Under the Punjab custom, the unchastity of a widow in-

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1. See sections 145, 146, 148, 153 and 155.
2. Section 53.
3. Section 55.
4. *Bhagwan Swarup* v. *State of Maharashtra*, (1964) 2 SCR 378 ; (1964) 2 SCR 771.
5. Cockle's Cases & Statutes, 4th Ed., 111.
6. Taylor § 355.

volves a forfeiture of her life interest in her husband's property;[1] and, under Hindu, law a forfeiture of her right to maintenance.[2] Therefore, where the question is whether a widow governed by the Punjab custom has forfeited her life interest, or a Hindu widow her right to maintenance, by reason of her unchastity, evidence of bad character will be admitted without question. Similarly, a Mohammedan woman, otherwise entitled to the custody of boy or girl, is disqualified by gross and open immorality;[3] and where her right to the custody of a minor is attacked on this ground, evidence of her immoral character will be admitted as a matter of course.

Evidence of character inadmissible when character not in issue.—When the character of a party is not in issue but the evidence of character is tendered for the purpose of rendering probable or improbable any conduct imputed to him, it will be rejected as inadmissible. If A sues B on a promissory note the execution of which is denied by B, evidence of the fact that A is a habitual forgerer of promissory notes will be inadmissible.[4] In a divorce case, the husband cannot, in disproof of a particular act of cruelty, tender evidence of his general character for humanity. As to the meaning of "character ", see section 55, Explanation.

Unchastity of allegation of woman made against second wife in written statement of husband in maintenance suit filed by former question not considered and suit dismissed as not maintainable—Title suit filed by daughter—Question whether second wife was unchaste—Allegations in written statement in maintenance suit held not admissible in evidence in the title suit.[5]

Sections 52 and 155.—Section 155 lays down a different method of discrediting a witnesses by allowing independent evidence to be adduced. Section 155 is not an exception to this section. Though independent evidence of the character of a plaintiff is not admissible under this section, if he offers as a witness, he may be discredited by answers elicited in his cross-examination.[6]

53. In criminal cases, previous good character relevant.—In criminal proceedings, the fact that the person accused is of a good character, is relevant.

COMMENTARY

Previous good character.—Section 53 accords with the English rule : viz. "Though general evidence of bad character is not admitted against the prisoner, general evidence of good character is always admitted in his favour." This would, no doubt, be an inconsistency justifiable, or at least intelligible, on the ground of the humanity of English law, if such evidence were not often of great importance as tending to explain conduct. In criminal proceedings a man's character is often a matter of importance in explaining his conduct and in judging his innocence or criminality. Many acts of an accused person would be suspicious or free from all suspicion when we come to know

1. *Gurdit Singh* v. *Khewan Singh*, 57 PWR 1913 ; 19 IC 253.
2. *Mulla*, Hindu Law, Section 561.
3. *Wilson's* Anglo-Mohammadan Law, Section 108.
4. Section 11 is inapplicable to evidence of this kind.
5. *Lakshmamma* v. *Chinnappayya*, (1970) 2 Andh.WR 94.
6. *Guntaka Hssenai* v. *Busetti Yerrajah*, (1954) Andhra 39 ; (1954) 2 MLJ Andh. 39.

the character of the person by whom they are done.[1]

Under Section 53 of the Evidence Act evidence as to the good character of the accused is always relevant in a criminal case, for the purpose of showing the state of his mind. In criminal proceedings a mans character is often matter of importance in explaining his conduct and in judging his innocence or criminality. Many acts of an accused person which look suspicious become free from all suspicion when we come to know the character of the person who had done them. Not only that, but even on the question of punishment, an accused must be allowed to prove his general good character. Therefore, when a judge thinks that the evidence of character will not materially affect the result of a case, he should not ordinarily shut out the evidence of defence witnesses whom the accused desires to examine for the purpose of establishing his good character.[2]

Where character not in issue.—In a case, where it was alleged that certain document had been obtained from a person while he was under the influence of drink, and the allegation stood disproved, it was held that evidence could not be let to prove his general bad character, with a view to establish want of consideration for the transaction.[3]

Value of the evidence of good character.—In criminal cases good character of the accused is always treated as a relevant fact. If the case is clearly established against the accused, evidence of good character will not carry any weight,[4] but in doubtful cases such evidence is of great importance,[5] since it straightens the presumption of innocence[6] and can explain acts and conduct,[7] which are otherwise suspicious and even *prima facie* criminal. If vicious intention is an ingredient of the offence charged against the accused, evidence of good character is useful in showing the improbability of the existence of that intention.[8] A man's character is often a matter of importance in explaining his conduct and in judging his innocence or criminality.[9] In all cases, when, evidence is admitted touching the general character of the party, it ought manifestly to bear reference to the nature of the charge against him; as for instance if he be accused of theft, that he has been reputed an honest man; if of treason, a man of loyalty. It should also relate to the same period as the supposed offence; for, as Lord Holt once remarked, "a man is not born a knave; there must be time to make him so; nor is he presently discovered after he becomes one".[10]

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1. *Habeeb Mohammad* v. *State of Hyderabad*, 1953 SCJ 678 ; 35 Cr LJ 338.
2. *Hebeeb Mohammad* v. *State of Hyderabad*, 1954 Cr LJ 338.
3. *Abdul Shakur* v. *Kotwaleswar*, AIR 1958 All 54.
4. *R.* v. *Nur*, 8 B 223, 227 ; *R* . v. *Turner*, (1964) 6 How St. Tr. 565 , 613 ; *The Governor of Bengal* v. *Umeshchunder Mitter*, 16 C 310.
5. *R.* v. *Turner*, (1964) 6 How St Tr 565 ," A murder is committed under such circumstaces that one of the two persons must be the murderer ; one of them is a habitual offender of notorious evil life, of ferocious deposition, of lawless habits ; the other is a person of refinement, delicacy and saintliness.. Who can doubt that, in such a case, the character of the person concerned is a main element in the consideration of innocence or guilty?" *Cunningham*, 135.
6. *R* v. *Rowton*, 10 Cox CC 25 , 38 ; Taylor § 352.
7. *Cunningham*, 135.
8. A man is found in possession of stolen goods. He says he found them and took charge of them to give them to the owner. If he is a man of very high character, this may be believed".
9. *Habeeb Mohammad* v. *State of Hyderabad*, 1954 SC 51.
10. Taylor § 351

In proceedings under section 110, Criminal Procedure Code, the character of the person proceeded against is directly in issue and therefore evidence of good character is material.[1] In prosecutions for political offences the evidence of good character, education, etc., does not strengthen the presumption of innocence.[2] The mere fact that a person has enjoyed the confidence of his superiors, or that he will not succumb to temptation at the close of his career but before a man of this type and such antecedents is adjudged guilty, the evidence against him must be of an unimpeachable character.[3] Good character in this section presumably includes good reputation which a man may bear in his own circle as well as his real disposition as distinct from what his friends and neighbours my think of him.[4]

Sections 53 and 55, Explanation.—Difference between character and disposition.—Evidence of good character—value of.—Under the Indian Evidence Act, evidence can be given both of general character and general distinction. Disposition means the inherent qualities of person; reputation means the general credit of the person amongst the public. There is a real disposition between reputation and disposition. A man may be reputed to be a good man, but in reality he may have a bad disposition. The value of evidence as regards disposition of a person depends not only upon the witnesses' perspicacity but also on their opportunities to observe a person as well as the person's cleverness to hide his real traits. But a disposition of a man may be made up of many traits, some good and some bad, and only evidence in regard to a particular trait with which the witness is familiar would be of some use. But, in any case, the character evidence is a very weak evidence ; it cannot out-weigh the positive evidence in regard to the guilt of person. It may be useful in doubtful cases to tilt the balance in favour of the accused or it may also afford a background for appreciating his reactions in a given situation. It must give place to acceptable positive evidence.[5]

[6][**54. Previous bad character not relevant, except in reply.**—In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant.

Explanation 1.—This section does not apply to cases in which the bad character of any person is itself a fact in issue.

Explanation 2.—A previous conviction is relevant as evidence of bad character.

COMMENTARY

Evidence of bad character.—This section enacts that the bad character of an accused person is irrelevant, and that a evidence of this fact cannot be given, unless his

1. *Sham Lal* v. *E.*, 2 IC 225 ; 9 Cr LJ 528.
2. *In re Loganath Iyer*, 4 IC 700 ; 11 Cr LJ 730.
3. *Mangat Rai* v. *E.*, 10 LLJ 262 ; 110 IC 676 ; 1926 L 647 ; dissented from in *E.* v. *Khurshid Hussain*, 1947 L 410 ; 48 Cr LJ 882.
4. *See Stirland* v. *Director of Public Prosecutions*, 60 TLR 461.
5. *Bhagwan Swarup Lal Bishan Lal* v. *The State of Maharashtra*, (1965) 1 Cr LJ 608 ; (1964) 2 SCR 178 (1964) 2 SCJ 771.
6. Substituted by the Indian Evidence Act (1872) Amendment Act, 1891 (3 of 1891), Section 6 for the original section.

bad character is a fact in issue, or unless evidence of good character has been given by him under the preceding section. The rule is founded on the reason that such evidence tends to prejudice the tribunal against the accused.[1] and interferes with the formation of a calm and dispassionate judgment on the case.[2] Section 310 of the Criminal Procedure Code, whereby all knowledge of previous conviction is withheld from jurors and assessors during the trial of the accused, is based on the same principle.[3] Since "a man's bad character is a weak reason for believing that he was concerned in any particular criminal transaction"[4] an accused person cannot be convicted of the offence charged against him simply because he has been guilty of another offence, and proof of the commission of an independent offence cannot be offered to show that, by reason of the commission of such independent offence, the accused is more likely to have committed the offence for which he is on trial. Evidence of the commission of such independent offence is therefore, inadmissible as substantive evidence of the offence charged.[5] The guilty of a person should be established by proof of the facts alleged and not by proof of his bad character.[6] Evidence of general dishonesty of character is irrelevant for the purpose of raising a presumption of dishonesty in the particular case under trial.[7] Similarly, the statement that the accused was reputed to be a thief cannot be legally admitted in evidence even if the statement be made by a witness in his cross-examination by the defence.[8] Where, in a case of perjury, a document made by the accused was given in evidence for the purpose of showing the unthoughtful character of the accused, the document was rejected.[9] Evidence of the fact that the accused is under police surveillance is evidence of bad character and therefore, inadmissible.[10] It should, however, be remembered that evidence which is otherwise relevant cannot become irrelevant merely because, besides being relevant on the point on which it is tendered, it incidentally shows the accused to be of a bad character.[11] If the evidence of motive incidentally discloses the bad character of the accused, the evidence does not, for that reason, become irrelevant.[12] Where the accused, charged with sedition, pleads loyalty, evidence of previous seditious speeches becomes admissible.[13] At the trial of an offence under Section 4 of the Bombay Prevention of Gambling Act (IV of 1887), evidence was tendered by the prosecution that the accused was previously convicted of a similar

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1. *Gaya Lal* v. *E.*, 1946 O 233 ; *Maung E. Gyi* v. *E.*, 1 R 520 ; 81 IC 106 ; 1924 R 91 ; 25 Cr LJ 618 ; *Amritlal Hazra* v. *E.*, 42 C 957 ; 29 IC 513 ; 16 Cr LJ 497 ; for cases before the Act see *Q.* v. *Kulum Sheikh*, 10 WR Cr 39 ; *Q.* v. *Bykunt Nath Banerjee*, 10 WR Cr 17 ; *Q.* v. *Phoolchand* 8 WR Cr 11 ; *Q.* v. *Beharee Dosadh*, 7 WR CR 7 ; *Q.* v. *Runjeet Singh*, 6 WR Cr 72.
2. *Q. E.* v. *Ram Saran*, 8 A 306, 314,
3. *Maung E. Gyi* v. *E.*, 1 R 520 ; 81 IC 106 ; 1924 R 91 ; 25 Cr LJ 618 ; *Teka Ahir* v. *E.*, 60 IC 331 ; 22 Cr LJ 219.
4. Stephen's General view of the Criminal Law of England, 309 ; 310.
5. *Maung E. Gyi* v. *E.*, 1 R 520 ; 81 IC 106 ; 1924 R 91 ; 25 Cr LJ 618 ; *Gungaram Hari Parit*, v. *E.*, 62 IC 545 ; 22 Cr LJ 529 ; *Baharuddin Mandal* v. *E.*, 22 IC 187 ; 36 M 471 ; 15 Cr LJ 43 ; *Girdhari Lalv. E*,. 12 PR 1913 Cr : 6 IC 964 ; 11 Cr LJ 428 ; *Reg* v. *Parbhudas Ambaram*, 11 Bom HC 90.
6. *Amritlal Hazra* v. *E.*, 42 C 957 ; 29 IC 513 ; 16 Cr LJ 497 ; *Q.* v. *Bykunt Nath Banerjee*, 10 WR Cr 17.
7. UBR 1908 , 2nd Quar. Ev., 1.
8. *Mi Myin* v. *E.*, 2 IC 349 ; 9 CR LJ 576.
9. *E.* v. *Barkatram Lachiram*, 28 B 533 ; 6 Bom LR 379.
10. *Phekan Singh* v. *E.*, 133 IC 449 : 1931 P 345 : 32 Cr LJ 1025.
11. *Saroj Kumar Chakravarty* v. *E.*, 59 C 1351 : 139 IC 873 : 1932 C 474 : 33 Cr LJ 854.
12. *Jagwa Dhanuk* v. *E.*, 5 P 63 : 93 IC 884 : 1926 P 232 : 27 Cr LJ 484.
13. *E.* v. *Govindanand*, 84 IC 448 : 1921 S. 199 : 26 Cr LJ 304.

offence. Jacob, J., excluded the evidence as irrelevant under this section; but, on the case being referred under Section 429 of the Criminal Procedure Code, Aston, J., held the evidence admissible, not under the present section but under Sections 5, 11 and 14.[1] In a prosecution for an offence of rioting, the statement by a witness that he brought a case under Section 107, Cr.P. Code, against the accused who was bound down is admissible, not for the purpose of proving the bad character of the accused but as part of the *res gestae*.[2] Where the gambling habits and the previous bad conduct of the accused were given in evidence not for the purpose of showing that he was a bad character and therefore likely to commit offence of the kind of which he was convicted, but for the purpose of showing that he was in straitened circumstances and needed money for his gambling transactions, the evidence was held admissible.[3] Evidence that the accused persons ran cocaine and gambling dens is admissible if the case against them be that they were thrown together into a conspiracy by frequenting or running such dens.[4] Evidence of the fact that the accused is a member of a criminal tribe is evidence of bad character and should not be tendered before the jury until after the verdict.[5] The conduct of a Magistrate in looking into the confidential police record of the accused maintained in the police station and allowing his judgment to be influenced thereby is a violation of the fundamental principles of criminal jurisdiction.[6]

When the bad character of the accused is not in issue, he cannot be referred to as a *goonda* in the charge to the jury.[7]

Evidence of bad character, when admissible; Explanation I.—A fact otherwise relevant under any section as to relevancy of facts cannot be shut out merely because it might incidentally cast a reflection on the good character of the accused.[8] When the character of the accused person is a fact in issue.[9] e.g., in security proceedings under Chapter VIII (Sections 100-119) of the Criminal Procedure Code, evidence of bad character becomes admissible.[10] Similarly, where, by reason of a previous conviction, the accused is liable to enhanced punishment under section 75. Indian Penal Code, the previous conviction is provable as a fact in issue.[11] A previous conviction may, after the accused is found guilty, be given in evidence to determine the amount of punishment to be awarded. Such conviction is relevant to the question whether the provisions of section 562, Criminal Procedure Code, should be applied to the case and is also relevant on the general question of punishment.[12] When evidence of a previous conviction is given to ask for an enhanced sentence, the evidence has no bearing on the question

1. *E.* v. *Alloomiya Husan* 28 B 129.
2. *Samaruddin* v. *E.*, 40 C 367 : 17 IC 565 : 13 Cr LJ 821.
3. *Daulat* v. *R.*, 2 LLJ 653.
4. *Sital Singh* v. *E.*, 46 C 700 : 54 IC 53 : 21 Cr LJ 5.
5. *Mosahb Dome* v. *E.*, 143 IC 660.
6. *Gaya Lal* v. *E.*, 1946 O 233.
7. *Nimoo Pal Majumdar* v. *State*, 1955 C 559.
8. *Mangal Singh* v. *State of Madhya Bharat*, 1957 Cr LJ 325.
9. *Beni Madho* v. *E.*, 146 IC 1064 : 1933 O 335 : 35 Cr LJ 273.
10. See section 117 (3), Cr.P.Code (See new Cr. P.C); *Ajay Kumar Singh* v. *E.*, 146 IC 1070 : 1933 A 674 (2) : 35 Cr LJ 284 ; *E.* v. *Kumera*, 51 A 275 : 125 IC 19 : 1929 A 650 : 31 Cr LJ 755.
11. *Dehri Sugar* v. *E.*, 50 C 367 : 77 IC 991 : 1923 C 707 : 25 Cr LJ 527 : see *Bhura Singh* v. *E.*, 1935 S 115 : 158 IC 282 ; *Rahim Baksh* v. *E.*, 109 IC 349 : 1928 O 215 : 29 Cr LJ 525 ; LBR (1872 : 1892) 449.
12. In re *Suban Sahib*, 52 M 358 : 115 IC 483 : 1929 M 306 : 30 Cr LJ 471 ; *E.* v. *Nga Ba Shein*, 6 R 391 : 111 IC 453 : 1928 R 200 : 29 Cr LJ 869 ; *Rahim Bakhsh* v. *E.*, 109 IC 349 : 1928 O 215 : 29 Cr LJ 525 ; *Ismail Alibhai* v. *E.*, 30 B 326 : 26 IC 995 : 16 Cr LJ 83 ; but see *E.* v. *Alloomiya Husan*, 28 B 129.

whether the accused has or has not committed the offence, this question must be decided independently of the evidence of conviction.[1]

The prosecution cannot give evidence of bad character in the first instance and as part of their case, but when the accused gives evidence of his good character under the preceding section, the prosecution may rebut it by evidence of bad character[2] since, by adopting this course, the accused invites and challenges inquiry on the subject. Under the proceedings section the prisoner has the option to give or withhold evidence of good character. If he elects to give such evidence of his bad character in rebuttal; if he elects to withhold it, the prosecution's option does not come into play, for there is nothing to rebut, and evidence of bad character is consequently excluded. This is not quite adequately expressed by saying that "evidence of the prisoner's character, good or bad, is always admissible at the prisoner's option".[3] An accused who puts his character in issue must be regarded as putting the whole of his past record in issue. He cannot assert his good conduct in certain respect without exposing himself to inquiry as to the rest of his record so far as this tends to disprove a claim for good character. But it is no disproof of good character that a man has been suspected, or accused of a previous crime. Such questions as "Were you suspected?" or "Were you accused?" are inadmissible because they are relevant to the issue of character.[4] Where evidence of bad character e.g., of orders under the preventive sections of the Cr. P. Code, has been wrongly introduced by the prosecution, the evidence will become admissible if the accused decided to lead evidence of good character in defence.[5] The answer to a question concerning the character of an accused person is not inadmissible under section 54 when the question is asked, not with the object of showing what sort of character the prisoner has, but with a collateral object.[6]

Evidence of bad character may become relevant under sections 14 and 15.—Cases are conceivable where evidence of bad character may become relevant under the provisions of sections 14 and 15.[7] Generally, evidence adduced to prove that an accused person has committed acts which are not the subject of charges in a trial is irrelevant must be excluded unless it is otherwise relevant, and greatest care ought to be taken to reject such evidence unless it is plainly necessary to prove something which is real in issue. Evidence of declarations both prior or subsequent to those for which an accused is being tried, whether such defalcations formed the basis of another charge on which an accused may have been acquitted or not, are admissible in evidence to prove guilty intent as also to anticipate the defence of the non-existence of such intent.[8] In cases of crime where it is though desirable by the prosecution to bring evidence of previous conduct of similar character to the suggested crime before the jury, the intention of section 54 is not infringed and evidence pointing to directly similar conduct is admis-

1. *In re Suban Sahib*, 52 M 358 : 115 IC 483 : 1929 M 306 : 30 Cr LJ 471 ; *Rahim Bakhsh* v. *E.*, 109 IC 349 :1928 O 215 : 29 Cr LJ 525.
2. Cockle's Cases and Statutes, 4th Ed. 114 ; *Bhura Singh* v.*E.*, 1935 S 115 : 158 IC 282 ; *Abdul Jalil Khan* v. *E.*, 128 IC 593 : 1930 A 746 : 32 Cr LJ 152 ; *Khilawan* v. *E.*, 112 IC 337 : 1928 O 430 : 28 Cr LJ 1009 ; *Teka Ahir* v. *E.*, 60 IC 331 : 22 Cr LJ 219.
3. Cockle's Cases and Statutes, 4th Ed. 117.
4. See *Stirladd* v. *Director of Public Prosecutions*, 60 TLR 461.
5. *Khilawan* v. *E.*, 112 IC 337 : 1928 O 430 : 29 Cr LJ 1009.
6. *Nital Koley* v. *E.*, ILR (1939) IC 337.
7. See notes to Sections 14 & 15.
8. *E.* v. *Stewart*, 97 IC 1041 : 1927 S 28 : 27 Cr LJ 1217.

sible.[1] See notes to section 14 and 15.

Previous conviction; Explanation II.—Before the amendment of this section by Act III of 1891, a previous conviction was always relevant against the accused person, but general evidence of bad character was admitted only if the accused gave evidence of good character.[2] Under the section in its present form, a previous conviction becomes relevant as evidence of bad character when the accused gives evidence of good character, or when the bad character of the accused is a fact in issue, e.g., in security proceedings under Chapter VII of the Criminal Procedure Code. This section does not affect the relevancy of previous conviction under some other section of the Act, as the section does not say that a previous conviction is never relevant unless bad character is relevant or is in issue;[3] and previous convictions have been received in evidence under the other provisions of the Act. Thus, where the accused is liable to enhance punishment by reason of the provisions of section 75 of the Indian Penal Code, a previous conviction may be proved as a fact in issue under section 5. When the previous commission by the accused of an offence is relevant within the meaning of section 14, the previous conviction of the accused also becomes a relevant fact.[4] In *E.* v. *Alloomiya Husan*,[3] Aston, J. admitted evidence of a previous conviction under section11, but in an earlier case,[5] it was remarked that section 11 is limited in its effect by the present section. A previous conviction may also become relevant under section 8 as showing motive.[6]

Explanation II.—If a habitual thief is found in the company of a gang of dacoits, and it is established that he knew that the said gang was habitually committing dacoity, it may be reasonably inferred that his association with them was not casual but that he joined the gang for the purpose of habitually committing dacoity, unless there are other circumstances connected with his association with the gang which supported a contrary view. Apart from the evidence of habit and character, previous conviction may also be admissible for the purpose of proving association of group of individual.[7] This view, however, is too broadly stated. The fact in issue, in a charge under Section 401, I.P.C., is a particular trait of bad character namely association for the purpose of habitually committing robbery and theft. Evidence can be given of only that particular trait of bad character but not of general bad character, e.g., that the accused is a murderer or a cheat.[8] It is an elementary principle of criminal law that a prisoner on his trial ought not to be prejudiced by statement of a previous conviction suffered by him. Previous convictions are no doubt made admissible by Explanation II, but they cannot be admitted to prejudice the trial. It is an elementary principle of criminal jurisprudence that the previous convictions of the accused are not relevant and cannot be proved, unless his good character is relevant under this section or unless an enhancement of sentence is

1. *Raikhon Boro* v. *E.*, 1936 C 469 : 166 IC 364.
2. *Q.E.* v. *Kartick Chunder Das*, 14 C 721 (FB), dissenting from Roshun Doosadh, 5 C 768, where it had been held that, except in exceptional circumstances, the proper use of a previous conviction was to determine the amount of punishment.
3. *E.* v. *Aloomiya Husan*, 28 B 129 , per Aston, J,
4. Expl. 2 to section 14. See as to this, notes to Expl. 2 to section 14.
5. *Reg.* v. *Prabhudas Ambaram*, 11 Bom. HC 90.
6. *Jagwa Dhanik* v. *E.*, 5 P 63 : 93 IC 884 : 1926 P 232 : 27 Cr LJ 484 ; *Samaruddin* v. *E.*, 40 C 367 : 17 IC 565 : 13 Cr LJ 821 ; *E.* v . *Naba Kumar Patnaik*, 1 CWN 146.
7. *Bhimashaw* v. *State*, 1956 Orissa 177.
8. *Baichaturi* v. *State*, AIR 1960 Guj. 5.

sought for under Section 75, Indian Penal Code.[1]

Previous convictions for specific offences, whether admissible in trials of gang cases under Section 400 or Section 401 I.P.Code?—Where the charge against the accused persons is that of belonging to a gang of persons associated for the purpose of habitually committing dacoity,[2] evidence of previous convictions of the specific offence of dacoity is relevant.[3] under Section 114 of the Evidence Act. Evidence of previous convictions of specific offences of theft and of being bound over under Section 110, C.P.Code, is also, according to the general trend of authorities, relevant to show habit and association.[4] Such evidence is not strictly speaking, evidence of bad character only but is evidence of a fact in issue, i.e., association, and Section 54 does not prevent evidence of a fact in issue or a relevant fact being given even if the evidence incidentally shows that bad character of the accused.[5] One of the chief points to establish in a case of gang dacoity is association in crime; and if it can be proved that certain persons have joined together to commit burglaries as well as dacoities, the former fact is strong evidence of criminal association and is, therefore, relevant to show that they are members of the gang; and if that gang can also be shown to have been associated for the habitual commission of dacoities, evidence as to these burglaries may very well be relevant against the accused.[6] If the charge against the accused is that of belonging to a gang of persons associated for the purpose of habitually committed thefts,[7] previous convictions of theft and orders under Section 110, Cr. P.Code, are undoubtedly relevant;[8] and a *fortiori*, convictions of dacoity also would be relevant.[9] Evidence showing the actual participation by an accused in any given theft or robbery is evidence both of his association with the gang and of his object in such association. Evidence which has not been believed for the purpose of a conviction under Section 379 or Section 392, I.P.Code, may yet be relied upon for the purpose of conviction under Section 401, I.P.Code.[10] But where the charge is neither under Section 400 nor under Section 401,I.P.Code but is one of committing or conspiring to commit a particular dacoity, and the prosecution seek to prove that the object of the conspiracy was the commission of thefts and other discreditable acts, the evidence is not relevant either under Section 54 or under Section 14, though it is admissible for the limited purpose of corroborating the state-

1. *Kamya* In re, A 1960 Cr LJ 1302.
2. Section 400, I.P. Code.
3. *Amduniyan Patel* v.,*E.*, 1927 N 17 ; *Bachchu* v. *E.*, 128 IC 739 : 1930 O 455 : 32 Cr LJ 162 ; *Nidhi* v. *E.*, 83 IC 683 : 1925 O 144 : 26 Cr LJ 123 ; *E.* v. *Sher Mahomed*, 46 B 958 : 75 IC 67 : 1923 B 71 : 24 Cr LJ 867 ; *E.* v. *Naba Kumar Patnaik*, 1 CWN 146.
4. *Amduniyan Patel* v. *E.*, 1927 N 17 ; *Beni Madho* v. *E.*, 146 IC 1064 : 1933 O 355 : 35 Cr LJ 273 ; *Khilawan* v. *E.*, 112 IC 337 : 1928 O 430 : 29 Cr LJ 1009 ; *Ledu Molla* v. *E.*, 52 C 595 : 87 IC 925 : 1925 C 872 : 26 Cr LJ 1037 ; *Nidhi* v. *E.*, 83 IC 683 : 1925 O 144 : 26 Cr LJ 123 ; *Kader Sundar* v. *E.*, 13 IC 279 : 13 Cr LJ 39 ; *Bonai* v. *E.*, 38 C 408 : 9 IC 555 : 12 Cr LJ 97 ; See also *Bhurasing* v. *E.*, 1935 S 115 : 158 IC 282 ; *Lale* v. *E.*, 118 IC 423 : 1929 O 321 : 30 Cr LJ 922 ; contra., *E.* v. *Sher Mahomed*, 46 B 958 : 75 IC 67 : 1923 B 71 : 24 Cr LJ 867 ; *Public Prosecutor* v. *Bonigri Pottigadu*, 32 M 179 : 2 IC 307: 9 Cr LJ 567.
5. *Saroj Kumar Chakravarty* v. *E.*, 59 C 1361 : 139 IC 873 : 1932 C 474 : 33 Cr LJ 854 ; See also *Lale* v. *E.*, 118 IC 423 : 1929 O 321 : 30 Cr LJ 922 ; *Khilawan* v. *E.*, 112 IC 337 : 1928 O 430 : 29 Cr LJ 1009.
6. *Nidhi* v. *E.*, 83 IC 683 : 1925 O 144 : 26 Cr LJ 123.
7. Section 401, I.P.Code.
8. *Baksho* v. *E.*, 127 IC 468 : 1930 S 211 : 31 Cr LJ 1046 ; *Lale* v. *E.*, 118 IC 423 : 1929 O 321 : 30 Cr LJ 922 ; *E.* v. *Sher Mahomed*, 46 B 958 : 75 IC 67 : 1923 B 71 : 24 Cr LJ 867 ; *E.* v. *Tukaram Malhai*, 15 IC 811 : 13 Cr LJ 539 ; *Bonai* v. *E.*, 38 C 408 : 9 IC 555 : 12 Cr LJ 97 ; contra *Mankura Pasi* v. *Q.E.*, 27 C 139.
9. *Moti Ram Hari* v. *E.*, 89 IC 527 : 1925 B 195 : 26 Cr LJ 1391.
10. *Bachchu* v. *E.*, 129 IC 739 : 1930 O 455 : 32 Cr LJ 162 ; *Lale* v. *E.*, 118 IC 423 : 1928 O 321 : 30 Cr LJ

ment of the approver that a conspiracy in fact existed.[1] Where a man is charged with committing a specific dacoity, evidence of previous acts of sabotage is not relevant.[2] The position is, however, otherwise where the charge against the accused is that of making preparations to commit a dacoity. In such a case the fact that any one of the accused persons had been previously concerned in a similar transaction would be relevant.[3] Evidence of offences committed after those charged is not admissible, whether the prosecution be under Section 400 or under Section 401, Indian Penal Code.[4]

Proof of Previous conviction under Section 75, I.P.Code.—Since the evidence of previous conviction tends to prejudice the jury or the assessors against the accused.[5] Section 310, Criminal Procedure Code, provides that where the accused is charged with an offence and further charged that he is, by reason of a previous conviction, liable to enhanced punishment, such further charge shall not be referred to by the prosecution, nor any evidence adduced thereon, until the accused has been convicted, or the jury or the assessors have given their opinion. It is illegal during the course of the trial of an accused person to record evidence of a previous conviction. Such evidence amounts to evidence of bad character and is expressly forbidden by Section 54 of the Evidence Act, unless and until the accused offers evidence of good character.[6] When a previous conviction is charged against an accused person under Section 310, Criminal Procedure Code, it cannot be treated as substantive evidence of the principal offence, and the Magistrate should not allow himself to be guided in his decision by the fact that the accused has one or more previous convictions against him.[7] When a previous conviction is sought to be given in evidence against the accused it must be strictly proved.[8]

Character of the prosecutor.—The prosecutor stands on the same footing as any ordinary witness in a criminal case; his credit may, therefore, be impeached in the same manner as the credit of any other witness, e.g., by proof of his general untrustworthiness. In a prosecution for rape, the Act specifically makes the general immoral character of the prosecutrix relevant.[9] Under Section 55 of the Act the character of the plaintiff has been specifically made a fact in issue for the purpose of ascertainment of damages, but no such provision has been made in regard to the character of the prosecutor or complainant in a criminal case. Reputation of the complainant is not a necessary fact to be proved in charge under Section 499 of the Indian Penal Code and hence it does not become a fact in issue.[10] It has been held in *Munnalal* v. *D.P.Singh*,[11] that in a criminal prosecution for defamation, the accused is entitled to rebut the complainant's case that the alleged imputation was likely to harm his reputation. He can do that by showing that the complainant's reputation was already at a law ebb.

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922 ; but see *Khilawan* v. *E.*, 112 IC 337 : 1928 O 430 : 29 Cr LJ 1000.

1. *Wahiduddin Hamiduddin* v. *E.*, 54 B 524 : 127 IC 189 : 1920 B 157 : 31 Cr LJ 1168.
2. *Goma Ram* v. *E.*, 1945 B 152.
3. *Khwaja Hassan* v. *E.*, 71 IC 360 : 24 Cr LJ 136. This case is open to doubt.
4. See *E.* v. *Naba Kumar Patnaik*, 1 CWN 146.
5. *Maung E Gyi* v. *E.*, 1 R 520 : 81 IC 106 : 1924 R 91 : 25 Cr LJ 618.
6. *Teka Ahir* v. *E.*, 60 IC 331 : 22 Cr LJ 219.
7. *Maung E Gyi* v. *E.*, 1 R 520 : 81 IC 106 : 1924 R 91 : 25 Cr LJ 618 ; See also *Jagwa Dhanuk* v. *E.*, 5 P 63 : 93 IC 884 : 1926 P 232 : 27 Cr LJ 484 ; *Baharuddin Mandal* v. *E.*, 22 IC 187 : 15 Cr LJ 43.
8. *E.* v. *Sheikh Abdul*, 43 C 1128 : 33 IC 825 : 17 Cr LJ 185.
9. See Section 155 (1).
10. *Devbrata Shastri* v. *Krishna Ballabh*, 1954 P 84 ; wherein *Laidman* v. *Hearsey*, 7 A 906 ; *Devi Dial* v. *King Emperor*, 1923 L 225 ; *Munnalal* v. *D.P.Singh*, 1950 A 455 not followed.
11. 1950 A 455 : 51 Cr LJ 964.

55. Character as affecting damages.—In civil cases, the fact that the character of any person is such as to affect the amount of damages which he ought to receive, is relevant.

Explanation.—In Sections 52, 53, 54 and 55, the word "character" includes both reputation and disposition; but [1][except as provided in Section 54], evidence may be given only of general reputation and general disposition, and not of particular acts by which reputation or disposition were shown.

COMMENTARY

Character evidence in suits for damages.—This section is superfluous, in as much as the rule enacted by it can also be deduced from the wider provisions of Section 12. In a case where damages are claimed the amount of damages is always a fact in issue; hence, any fact which enables the Court to determine this amount becomes relevant under Section 12. It is not in every case of tort that character becomes material for the assessment of damages; for example, the amount of damages claimed for being bitten by a dog or for an injury caused by a railway accident does not in any way depend on the character of the plaintiff, and therefore character evidence in cases of this kind would not be relevant. The section does not say that in every suit for damages the character of the plaintiff becomes relevant, but contemplates only such cases where, by the substantive law applicable to the case, the character of the plaintiff would influence the Court's opinion as to the amount of damages that he should receive. In suits for damages for adultery or seduction, evidence concerning the character of the wife or the seduced person is not relevant under the present section, which limited in its application to the evidence of the character of the plaintiff. Such evidence is, however, relevant under Section 12.

Cases where bad character of the plaintiff affects the amount of damages.—The bad character of the plaintiff affects the amount of damages in the following three cases:-(1) in suits for damages for defamation, and in prosecutions for defamation, evidence of the bad character of the plaintiff or the prosecutor is admissible in mitigation of damages and fine;[2] but evidence or rumours and suspicious of bad character cannot be received;[3] (2) in actions for breach of promise to marry, the defendant is entitled to prove that the plaintiff is a person either of bad character or of course and brutal manners;[4] (3) in a claim for damages against an alleged adulterer, may prove that the plaintiff has been guilty of notorious infidelity or has otherwise been guilty of dissolute conduct.[5]

Plaintiff's good character, whether relevant.—In England the plaintiff in a suit for damages, cannot give evidence of his good character in aggravation of damages; but if the defendant has given evidence of his bad character, the plaintiff may give evidence of good character to rebut the evidence of bad character.[6] Under the present section it

1. *Ins.* by S. 7, for the original section.
2. *Samrathmal* v. *E.*, 141 IC 438 : 1932 N 158 : 34 Cr LJ 154 ; *Devi Dial* v. *E.*, 4 L 55 : 73 IC 805 : 1923 L 225 : 24 Cr LJ 693 ; *The Englishman, Ltd.* v. *Lajpat Rai*, 37 C 760 : 6 IC 81 : Taylor § 359.
3. *The Englishman, Ltd.* v. *Lajpat Rai*, 37 C 760 : 6 IC 81.
4. Taylor § 358.
5. Taylor § 358.
6. Taylor § 362.

would appear that evidence of good character of the plaintiff would be relevant as affecting the amount of damages.

A bad general reputation can be proved but not rumours or suspicions. It is not open to give evidence of particular facts showing bad character or disposition. The section allows admissible the evidence of general reputation and general disposition, but not of particular facts or of traits.[1]

Explanation : general reputation and general disposition.—According to the English rule as authoritatively laid down in *R.* v. *Rowton*,[2] evidence of character must be evidence of general reputation and not of disposition[3] but the present section departs from the English, law in this respect, in as much as it makes evidence of disposition equally admissible.

"Reputation" means what is thought of a person by others, and is constituted by public opinion; it is the general credit which a man has obtained in that opinion.[4] "Disposition", on the other hand, means the witness's individual opinion of a person's character.[5] Under this section, evidence can be given of general reputation and general disposition only, and not of particular facts,.[7] since isolated incident afford no presumption of a man's general character and even "the most consummate villain may be able to prove that on some occasions he has acted with humanity, fairness or honour".[6] Reputation must be distinguished from rumour. Evidence of rumour is mere hearsay evidence of a particular fact; evidence of repute is a different thing. A man's general reputation is the reputation which he bears in the place in which he lives amongst all the townsmen, and if it is proved that a man who lives in a particular place is looked upon by his fellow townsmen, whether they happen to a know him or not, as a man of good repute, that is strong evidence that he is a man of good character. On the other hand, if the state of things is that the body of his fellow townsmen who know him look upon him as a dangerous man and a man of bad habits, that is strong evidence that he is a man of bad character.[7] "It is possible for a man to have a fair reputation who has not in reality a good character although man of really good character are not likely to have a bad reputation."[8] Evidence of general repute does not offend against the rule against hearsay but is direct evidence of a man's character.[9]

Relationship of the witness of the deceased is no ground for acting upon that testimony if it is otherwise reliable in the sense that the witnesses was a competent witness who could be expected to be near about the place of occurrence and could have seen what happened that afternoon.[10]

Both dying declarations and testimony of eye witnesses found reliable conviction and sentence imposed upheld.[11]

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1. *Harbhajan Singh* v. *State of Punjab*, 63 PLR.
2. *R.* v. *Rowton*, 34 LJMC 57.
3. Cockle's Cases and Statutes, 4th Ed 114.
4. Taylor § 350.
5. *Samrathmal* v. *E.*, 141 IC 438 : 1932 N 158 : 34 Cr LJ 154 ; *Christensen* v. *Castor*, 41 IC 696.
6. Taylor § 351.
7. *Rai Isri Prasad* v. *Q.E.*, 23 C 621.
8. Crabb's Synonhe cited in Field, Ev., 8th Ed., 398, footnote (3).
9. *Raghubar Dayal* v. *E.*, 152 IC 120 : 1934 A 735 : 36 Cr LJ 33.
10. *Gurcharan Singh* v. *State of Punjab*, 1956 Cr LJ 827.
11. *Ishwar Chandra* v. *State of U.P.*, 1988 ALR,60, (DB) SOC.