STATEMENTS BY PERSONS WHO CANNOT BE CALLED AS WITNESSESS

32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc. is relevant.—Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases:-

(1) **When it relates to cause of death.**—When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

(2) **Or is made in course of business.**—When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty; or of an acknowledgment written or signed by him of the receipt of money, goods, securities of property of any kind; or of a document used in commerce written or signed by him; or of the date of a letter of other documents usually dated, written or signed by him.

(3) **Or against interest of maker.**—When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages.

(4) **Or gives opinion as to a public right or custom, or matters of general interest.**—When the statement gives the opinion of any such person, as to the existence of any public right or custom or

matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware and when such statement was made before any controversy as to such right, custom or matter had arisen.

(5) **Or relates to existence of relationship.**—When the statement relates to the existence of any relationship [1][by blood, marriage or adoption] between persons as to whose relationship [1][by blood, marriage or adoption] the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised.

(6) **Or is made in will or deed relating to family affairs.**—When the statement relates to the existence of any relationship [1][by blood, marriage or adoption] between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised.

(7) **Or in document relating to transaction mentioned in Section 13, clause (a).**—When the statement is contained in any deed, will or other document which relates to any such transaction as is mentioned in Section 13, clause (a).

(8) **Or is made by several persons and expresses feelings relevant to matter in question.**—When the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question.

Illustrations

(a) The question is, whether *A* was murdered by *B;* or

A dies of injuries received in a transaction in the course of which she was ravished. The question is, whether she was ravished by *B;* or

The question is, whether *A* was killed by *B* under such circumstances that a suit would lie against *B* by *A's* widow.

Statements made by *A* as to the cause of his or her death, referring respectively to the murder, the rape and the actionable wrong under consideration are relevant facts.

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1. *Ins. by* Section 2 of the Indian Evidence Act, Amendment Act (18 of 1872).

(b) The question is as to the date of *A*'s birth.
An entry in the diary of a deceased surgeon regularly kept in the course of business, stating that, on a given day, he attended *A's* mother and delivered her of a son, is a relevant fact.

(c) The question is, whether *A* was in Calcutta on a given day.
A statement in the diary of deceased solicitor, regularly kept in the course of business that on a given day the solicitor attended *A* at a place mentioned, in Calcutta, for the purpose of conferring with him upon specified business, is a relevant fact.

(d) The question is whether a ship sailed from Bombay harbour on a given day.
A letter which by a deceased member of a merchant's firm, by which she was chartered to their correspondents in London, to whom the cargo was consigned, stating that the ship sailed on a given day from Bombay harbour, is a relevant fact.

(e) The question is, whether rent was paid to *A* for certain land.
A letter from *A's* deceased agent to *A*, saying that he had received the rent on *A's* account and held it at *A's* orders, is a relevant fact.

(f) The question is, whether *A* and *B* were legally married.
The statement of a deceased clergyman that he married them under such circumstances that the celebration would be a crime, is relevant.

(g) The question is, whether *A*, a person who cannot be found, wrote a letter on a certain day. The fact that a letter written by him is dated on the day, is relevant.

(h) The question is, what was the cause of the wreck of a ship.
A protest made by the Captain, whose attendance cannot be procured, is relevant fact.

(i) The question is, whether a given road is a public way.
A statement by *A*, deceased headman of the village, that the road was public, is a relevant fact.

(j) The question is, what was the price of grain on a certain day in particular market. A statement of the price, made by a deceased

banya in the ordinary course of his business, is a relevant fact.

(k) The question is, whether *A*, who is dead, was the father of *B*.
A statement by *A* that *B* was his own son, is a relevant fact.

(l) The question is, what was the date of the birth of *A*.

A letter from *A*'s deceased father to a friend, announcing the birth of *A* on a given day, is a relevant fact.

(m) The question is, whether and when, *A* and *B* were married.
An entry in a memorandum-book by *C*, the deceased father of *B* of his daughter's marriage with *A* on a given date, is a relevant fact.

(n) *A* sues *B* for a libel expressed in a painted caricature exposed in a shop window. The question is as to the similarity of the caricature and its libellous character. The remarks of a crowd of spectators on these points may be proved.

COMMENTARY

Statements by person who cannot be called as witnesses: ground of admissibility.—The general rule is that all oral evidence must be direct *viz.*, if it refers to a fact which could be seen it must be the evidence of the witness who says he saw it; if it refers to a fact which could be heard, it must be the evidence of the witness who says he heard it; if it refers to a fact which could be perceived by any other sense, it must be the evidence of the witness who says he perceived by that sense; if it refers to an opinion, it must be evidence of the witness who holds that opinion.[1] The eight clauses of this section are exceptions to the general rule against hearsay just stated.[2] When a person deposes to a fact in Court, he speaks under the sanction of oath, he is liable to prosecution for perjury, and his statement can be tested by cross-examination. There is, thus, some sort of guarantee of the truth of his statement. In the case of statements declared relevant by the present section, these safeguards for truth are absent, as the maker of the statement is not examined as a witness at all; but the nature of the statement itself and the circumstances under which it is made make probable the truth of the statement, and thus take the place of oath and cross-examination.[3] The section relates only to the relevancy of evidence and not to the manner of its proof[4] and the burden of proving the circumstances that make the statement relevant under the section is on the party that relies on the statement.[5] Section 32 is not controlled by section 33 of the Act.[6]

Statements made by signs or gestures.—Signs made by a person, who is conscious

1. Section 60.
2. *Mst. Biro* v. *Atma Ram*, 1937 PC 101 : 64 IA 92.
3. *Soney Lall Jha* v. *Darbdeo Narain Singh*, 14 P 461 : 1935 P 167 : 155 IC 470.
4. *Dogar Mal* v. *Suram Ram*, 1944 L 58 ; *Nagaraja Rao* v. *Koothappan*, 1941 M 602 : 53 MLW 634.
5. *Abdul Gani* v. *E.*, 1943 C 465 : ILR (1943) IC 423.
6. *Aboobucker* v. *Sahib Khatoon*, 1949 S 12 ; *Shyamanand Das* v. *Rama Kanta Das*, 32 C 6; *Sulaiman* v. *The King*, 1941 R 301 : 43 Cr LJ 123.

though unable to speak, in answer to questions, amount to verbal statements.[1] Where a woman, with her throat partially cut and unable to speak makes gestures in answer to questions and indicated the person who has wounded her, the gestures are admissible; but the interpretation of the gestures is for the Court alone, and the opinion witnesses as to the meaning of gestures is inadmissible.[2]

Statements of relevant facts; statements of facts in issue — The Bombay High Court has held that where the statement refers to a fact in issue, as distinguished from a relevant fact, the statement is inadmissible under this section,[3] but it is submitted that though the expression "relevant facts" is used in the Act in contradiction to "facts in issue",[4] the different clauses of this section and the illustrations to it seems to show that in this section the expression was intended to include facts in issue.[5]

Joint statements by persons deceased and persons alive — Where a statement is made by several persons, e.g., where a document is executed by several persons, each person must be taken to have made the statement for himself, and if one or more of such persons have died, while the rest are alive, the statement becomes admissible as the statement of a deceased person.[6]

Competency and credibility of the maker of the statement — It does not seem to be necessary that the person whose statement is admitted under this section should be competent to testify.[7] In the case of dying declarations, the English rule is to the contrary,[8] but it is doubtful if the English rule is applicable to India.[9] The credit of the person whose statement is admitted under this section may be impeached or confirmed in the same way as that of a witness actually examined in Court.[10] Thus where a person has made two statements as to the transaction which resulted in his death, one may be used to contradict as well as to corroborate the other.[11]

Statements inadmissible under section 32, whether admissible under section 11, section 114, or any other section — If a statement is inadmissible under section 32 by reason of the fact that its maker is alive and has not been called as a witness,[12] or because the statement does not fall within the terms of any clause of Section 32,[13] it cannot be held relevant under Section 11.[14] But if the statement relates to the mental

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1 *Alexander Perera Chandrasekera* v. *King*, 1937 PC 24: 166 IC 330: 38 Cr LJ 281; *Ranga* v. *E*, 5 L 305: 84 IC 522: 1924 L 581: 26 Cr LJ 328; *E* v. *Sadhu Charan Das*, 49 C 600: 77 IC 993: 1922 C 409: 25 Cr LJ 529; *Q.E.* v. *Abdullah*, 7 A 385 (FB).

2 *Darpan Potdarin* v. *E*, 1938 P 153; *Chandrika Ram Kahar* v. *E*, 71 IC 353: 1922 P 535: 24 Cr LJ 129 relied on by Supreme Court in *Meesala Ramakrishan* v. *State of A.P.*, (1994) 4 SCC 182.

3 *Patel Vandravan Jekisan* v. *Patel Manilal Chunilal*, 15 B 565.

4 See Sections 3 and 5.

5 See the judgement of Abdul Rahim J. in *Raghubhushana Tirthaswami* v. *Vidiavaridhi Tirthaswami*, 34 IC 875, 880 and *Jadavkumar Liladhar Mainthia* v. *Pushpabai Mainthianee*, 1944 B 29: 211 IC 315.

6 *Chandra Nath Roy* v. *Nilmabhab Bhuttacharjee*, 26 C 236.

7 For competency to testify, see section 118.

8 *R.* v. *Pike*, (1829) 3 C & P 598.

9 See Cunningham, 161, 162.

10 Section 158; *Niamat Khan* v. *E*, 127 IC 850: 1930 L 409: 32 Cr LJ 51.

11 *Niamat Khan* v. *E*, 127 IC 850: 1930 L 409: 32 Cr LJ 51; See *Harbans Lal* v. *State of Haryana*, AIR 1993 SC 819.

12 *Munna Lal* v. *Kameshri Dat*, 114 IC 801: 1929 O 113.

13 *Latafat Husain* v. *Onkar Mal*, 152 IC 1042: 1935 O 41; *Naima Khatun* v. *Basant Singh*, 149 IC 781: 1934 A 406 (FB); *Bela Rani* v. *Mahabir Singh*, 34 A 341, 14 IC 116; see *Ramchandra* v. *Rambai*, 123 IC 907: 1930 N 267; *Bhagbhari* v. *Khatun*, 80 IC 118: 1921 S 177; *Luchiram Motilal* v. *Radha Charan Poddar*, 49 C 93: 66 IC 15: 1922 C 267.

14 *Naima Khatun* v. *Basant Singh*, 149 IC 781: 1934 A 406 (FB); *Ambica Charan Khandu* v. *Kumud Mohan*.

state of its maker, it is admissible both under section 11 and section 14 even though section 32 be inapplicable to such a case.[1] There is no legal objection to the admissibility of the statement as to the conduct under section 8, when it is not admissibility under section 32 of the Act.[2] See notes to sections 11, 14 and 21.

Statements admitted under section 32 are substantive evidence.—If the maker of a statement is examined as a witness, ordinarily his previous statement is admissible to corroborate or contradict his testimony in Court, but it is not substantive evidence.[3] If, however, he cannot be called as a witness by reason of any of the circumstances mentioned in this section, his previous statement if it falls within any of the clauses to this section, becomes admissible as substantive evidence.[4]

Condition precedent to the admissibility of statements under section 32.—The provisions of this section are in the nature of exceptions and the onus of establishing circumstances that would bring a statement within any of the exceptions contemplated by the section lies clearly upon the party which wishes to avail itself of the statement.[5] If a statement is sought to be given in evidence under the provisions of this section, the party seeking to tender such statement in evidence has to show that the maker of the statement is dead, or that he cannot be found, or that he has become incapable of giving evidence, or that he cannot be called as a witness without unreasonable delay or expense.[6] Section 110 A of the Dekhan Agriculturists' Relief Act, does not override the provisions of section 32 of the Evidence Act. When a letter written by a person who does not appear in Court, is required to be admitted in evidence, it ought to be shown that it came within any of the clauses of section 32 of the Evidence Act.[7] See notes to section 33.

"Statements made by a person who is dead".—Death must be proved, unless under section 103, it is presumed to have occurred. If it is not proved that the maker of the statement is dead, or if he is alive, the statement is inadmissible, the section not being applicable.[8] In a recent case a Girdawar Qanungo appointed about 70 years ago to hold enquiry as to relationship of parties was presumed to have died.[9] But if the statement is made by several persons, e.g., where a document is executed by several persons one or more of whom have died and the rest are alive, the section is inapplicable and the statement is admissible as that of a deceased person or persons.[10] If, at the time a party closes his case, a person is alive but is not called as a witness, the subsequent death of such person will not entitle the party to tender in evidence any

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Chaudhury, 110 IC 521 : 1928 C 893 ; but see *Lachman Lal Pathak* v. *Kamakshya Narayan Singh*, 131 IC 788 : 1931 P 224.

1. *Leong Hone Waing* v. *Leon Ah Foon*, 7 R 720 : 121 IC 796 : 1930 R 42.
2. *Chennupati Venkatasubramma* v. *Nelluri Narayanaswami*, 1954 M 215.
3. See sections 155 and 157.
4. *Charitter Rai* v. *Kailash Behari*, 44 IC 422 ; see also *Jonab Biswas* v. *Siva Kumari Debi*, 104 IC 733 : 1927 C 855.
5. *Abdul Gani* v. E., 1943 C 465 ; 47 CWN 332 ; 209 IC 105 ; ILR (1943) IC 423.
6. See section 104 ; *Surpati Singh* v. *Gend Jha*, 1936 P 315 ; 1162 IC 999 ; *Karapya Sevai* v. *Mayandi*, 147 IC 414 ; 1933 R 212 ; *Mohan Lal* v. *Tulsan*, 109 IC 774 ; 1928 L 824 ; *Lukhan Chandra Mandal* v. *Takim Dhali*, 80 IC 357 ; 1924 C 558.
7. *Gurunath Madhav* v. *Mallappa Shantappa*, 1950 B 340 ; 52 BLR 288.
8. *Munna Lal* v. *Kameshri Dat*, 114 IC 801 ; 1929 O 113 ; *Mehr Dad* v. *Muhammad Ali Shah*, 84 IC 927 ; 1925 L 63.
9. *Pritam Singh* v. *Tilok Singh*, 1954 Pepsu 14.
10. *Chandra Naty Roy* v. *Nilmadhab Bhuttacharjee*, 26 C o73 236.

previous statement of such person.[1] The embargo placed by section 162 Cr.P.C. on the use of statements made by a Police Officer in the course of an investigation, does not apply to such of them as one relevant under this section.[2] and if a person has actually been called examined and cross-examined as a witness, the death of such person before the termination of the suit will not entitle a party to tender in evidence any previous statement of such person under the provisions of this section.[3] See also notes to Section 33.

Who cannot be found – A person who may be said to have been not found when it is known who he was and if in spite of search he was not found or was found to have been dead. But he may equally be said not to have been found if his identity cannot be traced or found.[4] See notes to Section 33.

Who has become incapable of giving evidence –See notes to Section 33.

Whose attendance cannot be procured without unreasonable delay or expense– 'See notes to Section 33.

CLAUSE (1): DYING DECLARATIONS

Principle and the reason of the rule – This clause makes relevant what in English law, are called "dying declarations" i.e., statements made by a person as to the cause of his death or as to the circumstances of the transaction resulting in his death. The grounds of admission are: firstly, necessity for the victim being generally the only principle eye-witness to the crime, the exclusion of his statement might defeat the ends of justice: and, secondly, the sense of impending death, which creates a sanction equal to the obligation of an oath. "The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so lawful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of justice."[5] The various circumstances attending the case also indicate that the appellant cannot be said to have taken undue advantage or acted in a cruel manner when examined in the light of decision of this Court reported in *Surinder Kumar* v. *U.T. Chandigarh*,[6] It is well settled by a catena of cases that a dying declaration is admissible in evidence on the principle of necessity and can form the basis for conviction if it is found reliable.[7] The deceased must be fully conscious.[8]

What is a dying declaration and its weak points and principle of its admission – The dying declaration is a statement by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death and it becomes relevant under Section 32(1) of the Evidence Act in a case in which the cause.

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1 *Jagatpal Singh* v. *State*, AIR 1980 SC 873.
2 *Hazari Lal* v. *State*, AIR 1980 SC 873.
3 *Sahdeo Narain* v. *Kusum Kumari*, 46 IC 929.
4 *Dogar Mal* v. *Sunam Ram*, 1914 L 58; 121 C 146; 45 PLR 441.
5 Per Eyre,LCB in *R* v. *Woo((1789) Leach 500.*
6 (1989) 2 SCC 217: AIR 1989 SC 1094.*Suraj Mal* v. *State of Punjab*, AIR 1992 SC 559.
7 *Padmaben Shamalbhai Patel* v. *State of Gujarat*, (1991) 1 SCC 744 (para 8). See also *Meesla Ramakrishan* v. *State of A.P.*, (1994) 4 SCC 182.
8 *State of U.P.* v. *Chet Ram*, AIR 1989 SC 1543.

of that person's death comes into question. It is true that a dying declaration is not a deposition in Court and it is neither made on oath nor in the presence of the accused. It is, therefore, not tested by cross-examination by way of an exception to the general rule against the admissibility of hearsay evidence on the principal of necessity. The weak points of a dying declaration just mentioned merely serve to put the Court on its guard while testing its reliability, imposing on it an obligation to closely scrutinise all the relevant attendant circumstances.[1]

Difference between the Indian rule and the English rule; declaration need not have been made under expectation of death.—The Indian law on the subject of dying declarations differs from the English law in two important particulars. Firstly, in English law, a dying declaration is admissible only on a criminal charge of homicide or manslaughter, whereas in India it is admissible in all proceedings, civil or criminal, provided that the cause of the declarant's death comes into question in those proceedings.[2] Secondly, under the English law, the declaration should have been made under the sense of impending death whereas, under the Indian law, it is not necessary for the admissibility of a dying declaration that the deceased at the time of making it should have been under expectation of death.[3]

Competency and credibility of the declarant.—Under the English law, the declarant must have been competent as a witness;[4] thus imbecility or tender age will exclude the declaration.[5] It is, however, doubtful whether this rule is applicable in India, though there can be no doubt that the declaration of a person not competent to testify will carry little weight.[6] The credit of the declarant may be impeached or confirmed in the same way as that of a witness actually examined in Court.[7] Thus, where the deceased has made two statements as to the transaction which resulted in his death, one may be used to contradict as well as to corroborate the other.[8]

Statement of the deceased recorded in the injury report by the medical officer, corroborated by the entries in the bed head ticket was treated as dying declaration and accused was convicted on charge of murder.[9]

Statements made before injuries.—In a case where the deceased had made two statements, one 10 days and the other about 8 or 9 months before her death, the Lahore High Court held, that the clause of Section 32 covers only "dying declarations", that is to say, statements made by a dying person as to the injuries which have brought him to that condition, or as to the circumstances under which those injuries came to be

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1. *Tapinder Singh* v. *State of Punjab*, (1971) (1) SCJ 751.
2. *Lalji Dusadh* v. *E.*, 6 P 747 : 106 IC 698 : 1928 P 162 : 29 Cr LJ 106 ; *State* v. *Kanchan Singh*, 1954 A 153 : 1954 Cr LJ 264 : 153 ALJ 615.
3. *Inayat Khan* v. *F.*, 16 L 589 : 158 IC 336 : 1935 L 94 ; *E.* v. *Akbarali Karimabhai*, 58 B 31 : 146 IC 548 : 1933 B 479 (2) ; 35 Cr LJ 109 ; Rego v. E., 143 IC 17 ; 1933 N 136 ; 34 Cr LJ 505 ; *E.* v. *Parmanand Dutt*, 52 C 987 : 88 IC 1000 : 1925 C 876 ; 26 Cr LJ 1256 ; *State* v. *Kanchan Singh*, 1954 A 153 ; 1954 Cr LJ 264 ; 1953 ALJ 615 ; *Mian Khan* v. *Crown*, PLD 1954 L 646 ; *Sharad* v. *State of Maharashtra*, 1984 SC 1622 (paras 18 and 19) ; *Rajindra Kumar* v. *The State*, 1960 Punj. 310 ; *Tahal Singh* v. *State of Punjab*, 1979 SC 1347 (para 4).
4. For compentency see section 118.
5. *R.* v. *Drummond*, (1784) 1 Leach CC 338.
6. See Cunnigham, 161-162.
7. Section 158 ; *Niamat Khan* v. *E.*, 127 IC 850 ; 1930 L 409 ; 32 Cr LJ 51 ; *Hari Kishan* v. *State*, 1955 Punj. 25.
8. *Nimat Khan* v. *E.*, 127 IC 850 : 1930 L 409 ; 32 Cr LJ 51.
9. *Ashok Kumar* v. *State of Rajasthan*, AIR 1990 SC 2134 : (1991) 1 SCC 166.

inflicted and that it has no application to any statements made by the person some time before he was attacked or injured.[1] In some cases it has been held that this clause seems to apply only to such statements of the deceased as are made subsequent to the injuries sustained by him. In Section 32 (1), the fact of death is the *res gestae*, the main fact, and only those circumstances which constitute or accompany this main fact can be regarded as forming part of the transaction. These incidents, therefore, must be intimately connected with the immediate cause of death, *viz.*, the injury which results in death; and only such facts as are within the knowledge of the injured person as being intimately and immediately connected with the injury are primarily contemplated by the section. The section cannot have the effect of making relevant facts or series of facts which have no direct relation to death. Consequently, statements made by the deceased some days prior to the event which resulted in his death are excluded by Section 32(1). So also statements made by the deceased some days prior to the murder, which prove the motive of, or preparation for, the offence or the agreement to commit the offence are inadmissible, as the "transaction" contemplated by the clause does not commence until the offence is actually attempted.[2] But this view has not found favour with the Bombay High Court, where it has been held that the clause is wide enough to include statements made by a deceased person to another, before receiving the injuries as to the circumstances under which he was accompanying the accused to the place where the murder was committed.[3] A similar view of this matter has been taken in Oudh,[4] and the authority of the Lahore case has been shaken by a subsquent decision of the same Court.[5] The Privy Council has definitely disapproved of the view that this clause only applies to statements made after the injuries. The phrase "circumstances of the transaction" no doubt conveys some limitations. It is not as broad as the analogous use in "circumstantial evidence" which includes evidence of all facts. It is on the other hand narrower than "*res gestae*". Circumstances must have some proximate relation to the actual occurrence: though, as for instance, in a case of prolonged poisoning they may be related to dates as a considerable distance from the date of the actual fatal dose. It is not necessary that there should be a known transaction other than that the death of the declarant has ultimately been caused, for the condition of the admissibiilty of the evidence is "that the cause of (the declarant's) death comes into question". General expressions indicating fear or suspicion. Whether of a particular or individual or otherwise, and not directly related to the occasion of the death will not be admissible. But statements made by the deceased that he was proceeding to the spot where he was in fact killed, or as to his reasons for so proceeding, or that he was going to meet a particular person, or that he had been invited by such person to meet him would each of them be circumstances of the transaction, and would be so whether the person

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1. *Autar Singh* v. 4 L 451 : 81 IC 964 : 1924 L 253 : 25 Cr LJ 1140 ; the view that this cluse of the section applies only to a statement made by a "dying man" has been differed from in a subsequent decision of the Lahore High Court, i.e., *Inayat Khan* v. *E.*, 16 L 589 ; 158 IC 336 ; 1935 L 94.
2. *Rego* v. *E.*, 143 IC 17 : 1933 N 136 : 34 CR LJ 505 ; *E.*, v. *Eddula Venkata Subba Reddi*, 54 M 931 : 134 IC 1143 : 1931 M 689 : 33 Cr LJ 51 ; See also Harendra Kumar Mandal v. E., 66 CLJ 196 : ILR 1938 C 125 ; *Public Prosecutor* v. *Munigan*, 1941 M 359 ; In re *Baggam Appalanarasayya*, 1941 M 101 : 1192 IC 586 : ILR 1941 M 81.
3. *Shivabhai Becharbhai* v. *E.*, 50 B 683 : 97 IC 660 : 1926 B 513 : 27 Cr LJ 1140.
4. *Lekha Singh* v. *E.*, 140 IC 892 : 1933 O 53 : 34 Cr LJ 101.
5. *Inayat Khan* v. *E.*, 16 L 589 : 158 IC 336 : 1935 L 94.

was unknown, or was not the person accused. Such a statement might indeed be exculpatory of the person accused. The statement admissible under this clause may be made before the cause of death has arisen, or before the deceased has reason to anticipate being killed.[1] The expression "any of the circumstances of the transaction which resulted in his death" is wider in scope than the expression "the cause of his death" and the words "resulted in his death" do not mean "caused his death".[2] Where the deceased reported to the police an assault on him by the accused, and next morning, in the course of altercation, the accused stabbed the deceased, it was held that the report made by the deceased was admissible under this clause.[3] Similarly, statements by a person about his own ill-treatment, made before The committed suicide, have been held to be admissible.[4] Letters written by the deceased husband three years before his death referring to certain incidents indicating strained feelings between him and his wife, and the diary of the deceased containing entries relating to the arrival and stay of the paramour of his wife and the incidents which occurred during that period, were held admissible as mentioning circumstances which resulted in the death of the husband.[5] Where the accused are being tried for conspiracy to murder a particular person, who is alleged to have been murdered a petition of complaint made by him to the police, speaking of serious apprehension of danger to his life, is probably admissible under this clause.[6]

Substance of the declaration.—The statement must relate to the clause of the declarant's death, or to any of the circumstances of the transaction which resulted in his death.[7] A statement of the deceased that he was going to the house of the accused to release his cow which the accused had confined, made just before the quarrel over the recovery of the cow is a statement as to a circumstance of the transaction which resulted in the death of the deceased.[8] A statement by a witness that the deceased had told him of a rumour that an amount had been offered by the accused for the deceased's head, is not admissible as a dying declaration. It is not a statement as to the cause of the deceased's death or as to any of the circumstances of the transaction which resulted in his death.[9] A statement made by the widow in her evidence before the Commissioner for workmen's Compensation that she had heard from her husband, who was then dead as a result of injuries received in an accident while going to the factory, that the bicycle on which he met with the accident had been given to him by his employer because otherwise he might be late in attending the factory, is not admissible.[10] Therefore, where the declarant survives the injuries, the declaration is inadmissible under this clause, though it may be proved to corroborate or contradict his testimony if he is examined in Court.[11] Where there is nothing to show that the injury to which the state-

1. *Narayana Swami* v. *E.*, 1939 PC 47 ; *Dr. Jai Nand* v. *Rex.* 1949 A 291 : 1949 ALJ 60 : 50 Cr LJ 498.
2. *State* v. *Ramprasad Singh*, 1953 P 354 : 1953 Cr LJ 1751.
3. *Chunilal* v. *E.*, 88 IC 353 : 1924 N 115 : 26 Cr LJ 1121 ; but see *Rego* v. *E.*, 143 IC 17 : 1933 N 136 : 34 Cr LJ 505.
4. But see *Gokul Chandra Chatyterji* v. *State*, 1950 C 306 ; 51 Cr LJ 1201; *E.* v. *Faiz*, 20 PR 1916 Cr : 35 IC 998 : 17 Cr LJ 438.
5. *Ranjat Singh* v. *State*, 1952 HP 81 ; see also *Findal* v. *State*, 1954 H.P. 11.
6. *Golok Behari Takal* v. *E*,. 42 CWN 129.
7. *Wali Mohammad* v. *E.* 126 IC 511 : 1930 O 249 : 31 Cr LJ 1025 ; *Q. E.*, v. *Surendra Nath Sarkar*, 28 C 397 : 5 CWN 574.
8. *Satish Chandra Saha* v. *State*, 1954 C 379.
9. *Ramkrishna Rov* v. *State*, 1952 C 231 : 1952 Cr LJ 1248.
10. *Messers. T. acco Manufacturers (India) Ltd.* v. *Mrs. Marian Stewart*, 1950 C 164.
E. v. *K ma S tu*, 4 Bom. LR 434.

ment relates was the cause of the injured person's death or that the circumstances under which it was received resulted in his death, the statement will not be admissible.[1] If death is not caused or accelerated by the injuries but is due to an independent supervening cause, e.g., pneumonia, the statement will be rejected.[2] If a woman is raped, and she decides three days later to commit suicide, the rape is not the cause of her death, though it may be the contingent motive. Therefore, a statement alleged to have been made by the woman soon after the occurence cannot be admitted as a dying declaration.[3] If however, the declarant lingers for a few days and ultimately dies of the injuries, the statement will be admissible.[4] The statement of a dying dacoit as to the circumstances of the dacoity which resulted in his death, and giving the names of his associates, is a statement as to the circumstances of the transaction which resulted in his death; but such statement is inadmissible under this clause, for the reason that the cause of his death is not an issue in the trial of his associates for dacoity.[5] A dying declaration is admissible in evidence only where the death of the declarant is the subject-matter of the charge and only where the death of the declarant is the subject-matter of the charge and the circumstances of the death are the subject of the declaration.[6] A declaration may not, however, include hearsay or irrelevant matter; though opinions have been received.[7] Statements by the deceased as to the cause of his death are admissible not only against the person who actualy caused the death of the deponent but also against other persons concerned in the transaction which resulted in the deponent's death.[8] When the deceased has made a statement as to circumstances of the transaction which ended in his death, the fact that he has also referred therein to the enmity caused by his acting as a wizard, as a motive for the attack, does not make the statement anything other than a statement relating to the cause of his death or render the same inadmissible.[9]

Cause of declarant's death must be in issue in case in which the declaration is sought to be given in evidence.—A dying declaration becomes admissible under this clause only when the cause of the declarant's own death comes into question.[10] and not when the subject of the inquiry is the death of another person.[11] or any other different matter.[12] Therefore, the statement of a deceased person, in which he does not charge the accused with having wounded him, but charges him with having wounded another person whose death is the subject-matter of the charge against the accused, is inadmissible.[13] Similarly, where a deceased dacoit who was injured in the course of the

1. *Abdul Gani Bandukchi* v. *E.*, 1943 C 465.
2. *Wali Mohammad* v. *E.*, 126 IC 511 : 1930 O 249 : 31 Cr LJ 1025 ; *Imperatrix* v. *Rudra*, 25 B 45.
3. *Kappinaiah* v. *E.*, 131 IC 456 : 1931 M 233 (2) : 32 Cr LJ 751.
4. *Thakar Singh* v. *E.*, 113 IC 177 : 1929 L 64 : 30 Cr LJ 65.
5. *Dannu Singh* v. *E.*, 85 IC 643 : 1925 AC 227 : 26 Cr LJ 547.
6. *Fakir* v. *E.*, 17 PR 1901 Cr.
7. Phipson, Ev., 4th Ed., 140 ; but see *Lekha Singh* v. *E.*, 140 IC 892 : 1933 O 53 : 34 Cr LJ 101, where it has been observed that the rule admitting dying declarations is subject to the rule against hearsay.
8. *Nga Hla Din* v. *E.*, 1936 R 187 : 162 IC 491 : 37 Cr LJ 621.
9. *E.* v. *Somra Bhuian*, 16 P 593 : 937 PWN 897.
10. *Nobin Krishna Mookerjee* v. *Rossick Lall Laha*, 10 C 1047.
11. *Fakir* v. *E.*, 17 PR 1901 Cr ; *Saudagar Singh* v. *E.*, 1944 L 377 ; *Kanwarpal Singh* v. *E.*, 1948 A 170 ; 1947 ALJ 627 : 49 Cr LJ 140 : ILR 1948 A 122.
12. *Dannu Singh* v. E., 8[illegible] IC 643 : 1925 A 227 ; 26 Cr LJ 547.
13. *Fakir* v. *E.*, 17 PR 1[illegible] Cr. In re *Perla Chelliah Nadar*, 1942 M 450 ; *Kanwarpal Singh* v. *E.*, 1947 A 170.

dacoity made a statement giving the names of his associates, the statement was held inadmissible at the trial of his associates for dacoity, as the question in the trial was not the death of the deceased dacoit, but the participation of his associates in the dacoity.[1] In cross-cases a dying declaration is not admissible against the member of the party of the deceased, but is admissible only so far as it relates to the circumstances of his own death.[2] In a trial for robbery the statement of a deceased victim of the robbery regarding the circumstances of the robbery is relevant even though death was caused remotely by the wounds received at the robbery.[3] The nature of the proceeding in which the cause of the death of the person making the statement comes into question need not necessarily be a charge of murder or homicide. It may be a charge of a different nature or it may be a civil action. The only material point is that the cause of death must come into question irrespective of the nature of the proceeding in which it comes into question. Hence where the cause of the death of the deceased has come into question, the mere fact that the charge of murder failed and was not brought home to the accused would not make the statement inadmissible for the purposes of the other offences which were committed in the course of the same transaction and with which the accused were charged.[4]

In *Ali Jan* v. *The State*, a complaint in writing, made to the police by a person who died some time thereafter, expressing apprehension of death at the hands of a certain person was held admissible under section 32 (1) and section 8 of the Act, when the person whose conduct was the source of the apprehension was charged with the offence of murder of the person making the complaint. His statement was held admissible as relating to the circumstances of transaction which resulted in his death within section 32 (1). The fact that the deceased has made a complaint to the police against the accused charging him with serious offences could also be admitted as showing a motive under section 8.[5]

In *Krishna Ram* v. *State*, the deceased as soon as he was carried to the verandah of his house, on being questioned by his son as to how he sustained the injuries, stated that it was the appellant who had inflicted the injuries on his person. This statement obviously related to the circumstances of the transaction which ultimately resulted in his death. The doctor deposed that the injury was the contributing factor in the death. The statement made by the deceased, very shortly after he sustained the injuries, was held admissible.[6]

Death not as a result of injuries.—When the deceased is not proved to have died as a result of injuries by him in the incident where he is alleged to have been killed, his statement relating to the incident cannot be said to be as to the cause of the circumstances of the transaction which resulted in his death.[7]

Statement not as to the cause of death is not admissible. When dying declaration inadmissible.—Clause (1) of section 32 of the Evidence Act makes a statement of person who had died relevant only when that statement is made by a person as to

1. *Dannu Singh* v. *E.*, 85 IC 643 : 1925 A [illegible] : 26 Cr LJ 547 ; see also *Nga Te* v. *E.*, 20 IC 990.
2. *Saudagar Singh* v. *E.*, 1944 L 377 : 4[illegible] R 135.
3. *Nga Ba Min* v. *E.*, 1935 R 418.
4. *Parmanand* v. *E.*, 1940 N 340 : ILR 194 [illegible] 110 : 42 Cr LJ 17 :
5. *Ali Jan* v. *The State*, 1960 Cr LJ 894 (Bo.)
6. *Krishna Ram* v. *State*, AIR 1964 Assam 53.
7. *Moti Singh* v. *The State of Uttar Pradesh*, 1964 SC 900.

the cause of his death or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. When Gaya Charan is not proved to have died as a result of the injuries received in the incident, his statement cannot be said to be the statement as to the cause of his death or as any of the circumstances of the transaction which resulted in his death.[1]

Circumstances of transaction resulting in his death.—This expression is not as wide in its import as circumstantial evidence and is narrower than *res gestae*. In *Pakala Narayan's case* the Privy Council has set out the limits of the matter that could be brought within the ambit of this expression.

The statement may be made before the cause of death has arisen, or before the deceased has any reason to anticipate being killed. The circumstances must be circumstances of the transaction; general expression indicating fear or suspicion, whether of a particular individual or otherwise will not directly relate to the occasion of the death, will not be admissible. But statements made by the deceased that he was proceeding, or that he was going to meet a particular person, or that he had been invited by such person to meet him, would each of them be circumstances of the transaction, and would be so whether the person unknown was or was not the person accused. Such a statement might indeed be exculpatory of the person accused. "Circumstances of the transaction" is a phrase no doubt that conveys some limitations. It is not as broad as the analogous use in 'circumstantial evidence' which includes evidence of all relevant facts. It is on the other hand narrower than *res gestae*. Circumstances must have some proximate relation to the actual occurrence, though, as for instance, in a case of prolonged poisoning they may be related to dates at a considerable distance from the date of actual fatal dose. It will be observed that 'the circumstances' are of the transaction, which resulted in the death of the declarant. It is not necessary that there should be a known transaction other than that the death of the declarant has ultimately been caused, for the condition of the admissibility of the evidence is that 'the cause of (the defendant's) death comes into question'. In the present case, the cause of the declarant's death comes into question'. The transaction, is one in which the deceased was murdered on one of two successive days next following his statement in question and his body was found in a trunk proved to have been bought on behalf of the accused: the statement made by the deceased that he was setting out to the place where the accused lived and to meet a person, the wife of the accused, who lived in the accused's house appears clearly to be a statement as to some of the circumstances of the transaction which resulted in his death. The statement was rightly admitted".[2]

In *Sharad* v. *State of Maharashtra*,[3] the Supreme Court formulated the following provisions on a review of the cases.[4]

"(1) Section 32 is an exception to the rule of hearsay and makes admissible the statement of a person who dies whether the death is a homicide or a suicide,

1. *Moti Singh* v. *The State of Uttar Pradesh*, (1964) 1 SCR 688 : 1963 Cur. LJ 87 : 1963 (2) SCJ 714.
2. 66 IA 66 ; *Sharad* v. *State of Maharashtra*, 1984 SC 1622 (Paras 12, 13, 14, 15, 16 and 17) ; *Manohar Lal* v. *State of Punjab*, 1981 Cr LJ 1373 ; *Protima Dutta* v. *The State*, 81 CWN 713 : 1977 Cr LJ NOC 96 ; *Onkar* v. *State of Madhya Pradesh*, 1974 Cr LJ 1200 ; *Allijan Munshi* v. *State*, 1960 Com. 290 ; *Chinnavalayan* v. *State of Madras*, (1959) 1 Mad. LJ 246.
3. *Sharad* v. *State of Maharashtra*, 1984 SC 1622 (Para 21).
4. *Sharad* v. *State of Maharashtra*, 1984 SC 1622 (Paras 12, 13, 14, 15, 16 and 17).

provided the statement relates to the cause of death, or exhibits circumstances leading to the death, In this respect .... The Indian Evidence Act ..... Thought it necessary to widen the sphere of Section 32 ....."

"(2) The test of proximity cannot be too literally construed and practically reduced to a cut and dried formula of universal application so as to be confined in a strait jacket, Distance of time would depend or vary with the circumstances of each case. For instance, where death is a logical culmination of a continuous drama long in process and is, as it were, a finale of the story, the statement regarding each step directly connected with the end of the drama would be admissible because the entire statement would have to be read as an organic whole and not from the context. Sometimes statements relevant to or furnishing an immediate motive may also be admissible as being a part of the transaction of death. It is manifest that all these statements come to light only after the death of the deceased who speaks from death. For instance, where the death takes place within a very short time."

Person to whom the declaration should be made; form of the declaration — It is immaterial to whom the declaration is made. The declaration may be made to a Magistrate, to a Police Officer,[1] a public servant or a private person. It may be made before the doctor; indeed, he would, he would be the best person to opine about the fitness of the dying man to make the statement, and to record the statement, where he found that life was fast ebbing out of the dying man and there was no time to call the Police or the Magistrate.In such a situation the Doctor was justified, indeed he was duty bound to record the dying declaration of the dying man.[2] The declaration may be in writing or oral, or made by signs and gestures in answer to question where the declarant is unable to speak;[3] but in the latter case, the interpretation of the signs and gesture is for the Court alone, and the opinion of witnesses as to their meaning is inadmissible.[4] The declaration may take the form of a first information report;[5] or a statement before the police, Section 162 of the Criminal Procedure Code not declaring it inadmissible by reason of its having been made in the course of investigation by the police;[6] or a complaint;[7] or a statement under. Section 164, Criminal Procedure Code,[8] or a deposi-

1 *Rahman* v. *E*, 134 IC 117: 1932 L 14: 32 Cr LJ 1118; *Ramawati Devi* v. *State of Bihar*, AIR 1983 SC 164 (para 7); *Lakhan Lal* v. *State*, 1995 Cr LJ 2699.

2 *A.M.A. Rehman* v. *State of Gujarat*, AIR 1976 SC 1782 (para 11); *Harbans Lal* v. *State of Haryana*, AIR 1993 SC 819.

3 *Alexander Perera Chandarasekera* v. *The King*, 1937 PC 24; 166 IC 330; *E* v. *Motiram Raising*, 1936 B 372: 165 IC 422: 37 Cr LJ 1140; *Q.E.* v. *Abdullah*, 7 A 385 (FB); *E* v. *Sadhhu Charan Das*, 49 C 600: 77 IC 993: 1922 C 409: 25 Cr LJ 529; *Ranga* v. *E*, 5 L 305: 84 IC 552; 1924 L 581: 26 Cr LJ 328; *Sudama Sheoba* v. *K.E.*, 1949 N 405: ILR 1949 N 301: 1949 NLJ 354: 51 Cr LJ 224.

4 *Darpun Potdarin* v. *E*, 1938 P 153; *Chandrika Ram Kahar* v. *E*, 1 P 401: 71 IC 353: 1922 P 535: 24 Cr LJ 129 *Sudama Sheoba* v. *K.E.*, 1949 N 405: ILR 1949 N 301: 1949 NLJ 354: 51 Cr LJ 224.

5 *E* v. *Mohammad Sheik*, 1943 C 74; *Kapur Singh* v. *E*, 123 IC 120: 1930 L 450: 31 Cr LJ 475; *Banta Singh* v. *E*, 122 IC 491: 1930 L 457; *Chunilal* v. *E*, 88 IC 353: 1924 N 115: 26 Cr LJ 1121; *Panchu Das* v. *E*, 34 C 698; See also *Azimaddy* v. *E*, 54 C 237: 99 IC 227: 1927 C 17: 28 Cr LJ 99; *Lalaram Surajmal* v. *State*, 1953 MB 249; 1954 Cr LJ 1764; *Zafar* v. *Crown*, PLD 1951 Dacca 95; *Mannu Raja* v. *State of M.P.*, AIR 1976 SC 2199.

6 *E* v. *Mahadeo Dewoo*, 47 Bom. LR 992.

7 *Gouridas Namasudra* v. *E*, 36 C 659: 2 IC 841: 10 Cr LJ 186.

8 *Rahman* v. *E*, 134 IC 117: 1932 L 14: 32 Cr LJ 1118; *Chandgi* v. *E*, 120 IC 274: 1930 L 60: 31 Cr LJ 79.

tion before the committing Magistrate, in which case it may also become admissible under the next section.[1] Where a statement takes the form of a deposition but is inadmissible as such owing to some irregularity, it may still be relevant as a dying declaration.[2] The declaration may take the form of a simple narrative, or that of questions and answers; in the latter case, it is no objection to its admissiblity that the questions were in the leading form,[3] though it may be an argument against its value. If however, a declaration is made in answer to questions, the record should clearly set out the exact questions put and the answer made to them,[4] so that it may be possible to discover how much was suggested by the interrogator and how much was the production of the person making the statement.[5] Where, however, the recording Magistrate knows nothing of what he does not specially mention, the value of the declaration is not affected as the Magistrate cannot in such a case put any leading questions.[6] The declaration "should be taken down in the exact words which the person who makes it uses, in order that it may be possible from those words to arrive at precisely what the person making the declaration meant. When a statement is not the *ipsissima verba* of the person making it, but is composed of a mixture of questions and answers, there are several objections open to its reception in evidence, which it is desirable should not be open in cases in which the person has no opportunity of cross examination. In the first place, the questions may be leading questions, and, in the condition of a person making a dying declaration, there is always very great danger of leading questions being answered without their force and effect being fully comprehended."[7] It is not necessary that the record of the declaration should be read over to, or signed by, the dying man; though the fact that it was so read over or signed would add to the value of the declaration.[8] A declaration, which is not taken in the deceased's own words but is merely a note of the substance of what she said to the police cannot safely be accepted as a sufficient basis for conviction.[9]

Unreliable dying declaration.—Where the dying declaration of a bride burning victim was recorded in the hospital, but certificate of the doctor about the deceased's fitness to make dying declaration, and the signature or thumb impression of the deceased were not obtained, it was held that the dying declaration could not be relied upon.[9a]

Statements made by deceased to Magistrate and Police Head Constable—Admissibility of.—Where there is no evidence to show that the injuries sustained by the deceased due to theacid burns were in any way connected with his death which oc-

1. *E.* v. *Rochia Mehato*, 7 C 42.
2. *Parmanand Ganga Prasad* v. *E.*, 1940 N 340 ; *Rahman* v. *E.*, 134 IC 117 : 1932 L 14 : 32 Cr LJ 1118 ; *Chandgi* v. *E.*, 120 IC 274 : 1930 L 60 : 31 Cr LJ 79 ; *R.* v. *Woodcock*, (1789) 1 Leach, 500.
3. *R.* v. *Smith*, 10 Cox 82 ; but see *Nga Mya Da* v. *E.*, 1936 R 42 : 160 IC 597 : 37 Cr LJ 299.
4. *Rambira Missir* v. *E.*, 1943 P 397 ; *E.* v. *Premananda Dutt*, 52 C 987 : 88 IC 1000 : 1925 C 876 : 26 Cr LJ 1256 ; *K. E.* v. *Mathura Thakur*, 6 CWN 72.
5. *Rambira Missir* v. *E.*, 1943 P 397 ; *E.* v. *Premnanda Dutt*, 52 C 987 : 88 IC 1000 : 1925 C 876 : 26 Cr LJ 1256.
6. *Ramira Missir* v. *E.*, 1943 P. 397.
7. Per Cave, J., in *R.* v. *Mitchell*, (1892) 17 Cox CC 503 ; *E.* v. *Premananda Dutt*, 52 C 987 : 88 IC 1000 : 1925 C 876 : 26 Cr LJ 1256 ; See also *Nga Mya Da* v. *E.*, 1936 R 42.
8. *Krishnama Naicken* v. *E.*, 54 M 678 : 135 IC 337 : 1931 M 430 : 33 Cr LJ 115 ; See also *Nga Mya Da* v. *E.*, 1936 R 42 ; *Jangir Singh* v. *State*, 1951 Pepsu 111 : 52 Cr LJ 883.
9. *E.* v. *Sikandar*, 125 IC 585 : 1930 A 532 : 31 Cr LJ 862 ; *State of Punjab* v.*Amarjit Singh*, AIR 1988 S. C. 2013.

9a. *Madhu Bala* v. *State*, 1990 Cr. L.J. 790 (Del.)

cured nearly 2 months and 23 days later after the incident the Court is justified in holding the statements made by the deceased, one to the Magistrate and other to the head constable, immediately after the incident, are not admissible in evidence under Section 32 of the Evidence Act.[1]

Declaration recorded by a Magistrate not competent to do so.—A statement under Section 164, Cr. P. Code, can be recorded only by a Magistrate of the first class or by a Magistrate of the second class specially empowered.[2] But where a statement recorded by a Magistrate under Section 164 or otherwise becomes relevant as a dying declaration, the statement is admissible even though the Magistrate who recorded it was not competent to record statements under Section 164, Cr. P. Code.[3] Dying declaration made by deceased in hospital before the judicial magistrate, with doctors certificate to patient remaining conscious during period of recording of statements, held, as there was no infirmity in the recording of the dying declaration, conviction under Section 302/34 of I.P.C. upheld by Supreme Court.[3a] A dying declaration may be recorded by a clerk in the presence and supervision of the Magistrate. It is no doubt highly undesirable that the writing of the dying declaration should be entrusted to a clerk when the Magistrate before whom it is made is not incapable of doing it himself.[4]

Mode of recording a dying declaration.—The recording of a dying declaration is a grave and solemn proceeding. Unauthorized persons should not be permitted to crowd round when the declaration is being made. It is the bounden duty of the Magistrate to take every possible step to ensure that no influence is brought to bear on the declarant and that he is not prompted or aided in any way in making his statement. The proceeding should be so conducted that the declarant is as free from personal influence in emitting his declaration as he would if he were giving evidence in a Court of law.[5]

"When a magistrate records a dying declaration, preferably it should be in question and answer form."[6]

Dying declaration comprising of answers to questions probative value.—A dying declaration cannot be relied upon when it does not record what deceased himself wanted to say, but records what he says on the suggestions of other persons.[7]

A dying declaration is admissible only when it is proved to be genuine and not the result of prompting. Ordinarily, it should be recorded in question and answer form and in the language in which it was spoken. But when it is proved by independent witnesses, its authenticity cannot be questioned merely because it is recorded in the narration form or in the local language.[8]

How should dying declarations be proved ?—A dying declaration may be oral, or it may be reduced to writing by a Magistrate or any other person, but in either case it must be duly proved. The method of proving the record of such a declaration is to

1. *Katasani Rama Lakshmamma* v. *Katasan Jagadeswara Reddi*, (1971) MLJ (Cr.) 392.
2. Section 164, Cr. P. Code.
3. *Sulaiman* v. *E.*, 1941 R 301 ; *Rahman* v. *E.*, 134 IC 117 : 1932 L 14 : 32 Cr. LJ 1118 ; *Chandgi* v. *E.*, 120 IC 274 : 1930 L 60 : 31 Cr. LJ 79 ; Cr. As. 319-321 ; *Nur Mohd. etc.* v. *Crown*, (*Lahore*) decided on 6.6.39 ; *Allah Baksh* v. *Crown*, PLD 1951 FC 111.

3a. *Surinder Kumar* v. *State of Haryana*, JT 1992 (3) SC 64.

4. *Jangir Singh* v. *State*, 1951 Pepsu 111 : 52 Cr. LJ 883.
5. *Nem Singh* v. *E.*, 152 IC 741 : 1934 A 908 : 36 Cr LJ 152.
6. *Rabi Chandra* v. *State of Orissa*, 1980 SC 1738, (para 10).
7. *Keshav Gangaram Navge* v. *State of Maharashtra*, (1971) 1 SCC 513.
8. *Bakhshish Singh* v. *State of Punjab*, 1958 SCR 409 : 1957 Cr LJ 1459.

examine the person who recorded the statement as to what the deceased said or to examine some person or persons who were present at the time and heard the statement being made.[1] When the Magistrate before whom a dying declaration is recorded deposes about its authenticity it should not be rejected merely because the clerk who had recorded it is not produced to prove it.[2] If the statement was written or dictated by the deceased himself, the fact that it was written or dictated by the deceased must be proved.[3] If the statement was written by the deceased person himself it becomes substantive evidence.[4] Where the statement has not been proved in this manner, it will be inadmissible,[5] even though it may have been recorded by a Magistrate,[6] as Section 80 of the Evidence Act does not raise any presumption that the statement was made by a particular person.[7] When the person who recorded the statement is called, he may either repeat what the deceased stated, refreshing his memory, under Section 159, by the record,[8] or he may merely depose that the record correctly represents what the deceased stated.[9] The record must be produced and properly proved.[10] A statement purporting to be a dying declaration should be admitted or rejected as a whole; it is irregular to admit in evidence only portions of the statement. The statement of a witness, made before the committing Magistrate in proof of a dying declaration, may, in appropriate cases, be transferred to the Sessions record under Section 33 of the Evidence Act.[11] If the dying declaration consists of a verbal statement, the person who heard the deceased make it, must be examined as witnesses.[12]

There is authority for the proposition that if the statement of the deceased was taken as a deposition in the presence of the accused by a Magistrate exercising judicial jurisdiction, *e.g.*, by a Magistrate who had taken cognizance of the offence as a committing or inquiring Magistrate, the statement, subject to the provisions of Section 33, is admissible without further proof, *i.e.*, without the recording Magistrate being exam-

1. *Parmanand Ganga Prasad* v. *E.*, 1940 N 340 ; *Nga Mya Da* v. *E.*, 1936 R 42 ; 160 IC 597 ; *E.* v. *Somra Bhuian*, 16 P 593 : 1937 PWN 897 ; *Krishnama Naicken* v. *E.*, 54 M 678 ; 135 IC 337 : 931 M 430 : 33 Cr. LJ 115 ; *Tafiz Pramanik* v. *E.*, 125 IC 743 : 1930 C 228 : 31 Cr. LJ 916 ; *E.* v. *Balram Das*, 49 C 358 : 71 IC 685 : 1922 C 382, (2) : 24 Cr. LJ 221 ; *Kunj Lal* v. *E.*, 67 IC 577 : 1924 L 12 : 23 Cr. LJ 417 ; In re *Karuppan Samban*, 31 IC 359 : 16 Cr LJ 759 ; *Public Prosecutor* v. *Bala Nagi Reddi*, 15 IC 308 : 13 Cr LJ 468 ; *Gouridas Namasudra* v. *E.*, 36 C 659 : 2 IC 841 : 10 Cr LJ 186 ; *K. E.* v. *Mathura Thakur*, 6 CWN 72 ; *K.E.* v. *Daulat Kunjra*, 6 CWN 921 ; E. v. *Samiruddin*, 8 C 211 ; *Nathua Ram* v. *State*, 1951 HP 1 : 52 Cr LJ 50.
2. *Jangir Singh* v. *State*, 1951 Pepsu 111 : 52 Cr. LJ 883.
3. *Nga Mya Da* v. *E.*, 1936 R 42 : 160 IC 597 : 37 Cr. LJ 299.
4. *Ibid.*
5. *K.E.* v. *Daulat Kunjra*, 6 CWN 921.
6. *E.* v. *Samiruddin*, 8 C 211 ; *Reg* v. *Fata Adaji*, 11 Bom. HC 247 : *Panchu Das* v. *E.*, 34 C 698 : *Gouridas Namasudra* v. *E.*, 36 C 659 : 2 IC 841 : 10 Cr LJ 186 : Sarat Chandra Kar v. E., 52 C 446 : 88 IC 860 : 1925 C 821 : 26 Cr LJ 1244, State of *U.P.* v. *Dinesh Chandra*, 1988 ALJ 937.
7. *Sulaiman* v. *E.*, 1941 R 301 see also *Hashim* v. *E.*, 9 PR 1900 Cr.
8. *Nga Mya Da* v. *E.*, 1936 R 42 : 160 IC 597 ; *Kunj Lal* v. *E.*, 67 IC 577 : 1924 L 12 : 23 Cr. LJ 417 ; *K. E.* v. *Mathura Thakur*, 6 CWN 72.
9. *Sulaiman* v. *E.*, 1941 R 301 : *Krishnama Naicken* v.*E.*, 54 M 678 : 135 IC 337 : 1951 M 430 : 33 Cr LJ 115 ; *Kapur Singh* v. *E.*, 123 IC 120 : 1930 L 450 : 31 Cr. LJ 475 ; *Partap Singh* v. *E.*, 7 L 91 : 92 IC 167 : 1926 L 310 : 27 Cr. LJ 215 ; *E.* v. *Balaram Das*, 49 C 358 : 71 IC 685 : 1922 C 382 (2) : 24 Cr LJ 221 ; Section 160 ; but see *Kunj Lal* v. *E.*, 67 IC 577 : 1924 L 12 : 23 Cr. LJ 417 ; *Public Prosecutor* v. *Bala Nagi Reddi*, 15 IC 308 : 18 Cr. LJ 68 ; *K. E.* v. *Mathura Thakur*, 6 CWN 72.
10. *Rahim Gul Hanif Gul* v. *E.*, 1938 Pesh. 33.
11. *Tafiz Pramanik* v. *E.*, 125 IC 743 : 1930 C 228 : 31 Cr. LJ 916.
12. *Nga Mya Da* v. *E.*, 1936 R 42 : 160 IC 597 : 37 Cr. LJ 299.

ined in the Sessions Court;[1] and in some recent decisions it has further been held that a dying declaration properly recorded by a Magistrate under Section 164 Cr. P. Code, is "evidence" within the meaning of Section 3 of the Act and can be admitted in evidence under Section 80 of the Act without further proof.[2] It has, however, been held in one of these cases that proof of the identity of the declarant would in such case be necessary[3] and another that the presumption of Section 80 only applies where the injured man has survived and the record of the statement is used, not as a dying declaration, but merely to corroborate or contradict the evidence given by him.[4] If a certificate appended to a dying declaration recorded as a deposition states that the statement was read over to the deponent, there will be a presumption under Section 80 that the recital as to statement having been read over is correct.[5] Where the declarant has been very badly injured, the medical evidence should be carefully examined to see if he could be in a fit state to make a declaration.[6]

Test of reliable dying declaration.—In the case of *Khushal Rao* v. *Bombay*, the Supreme Court held:

(1) That it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated;

(2) That each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made;

(3) That it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence;

(4) That a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light surrounding circumstances and with reference to the principles governing the weighing of evidence;

(5) That a dying declaration which has been recorded by a competent Magistrate in the proper manner, that is to say, in the form of questions and answers, and as far as practicable, in the words of the maker of the declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character; and

(6) That in order to test the reliability of a dying declaration, the Court has to keep in view, the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated, had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.[7]

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1. *E.* v. *Samiruddin.*, 8 C 211 ; see *Ponchu Das* v. *E.*, 34 C 698 ; *Rev.* v. *Fata Adaji*, 11 Bom. HC 247; contra *Ghazi* v. *E.*, 17 PR 1911 Cr.
2. *E.* v. *Surajbali*, 56 A 750 : 1934 A 340 : 152 IC 249 : 36 Cr LJ 65 ; *Sulaiman* v. *E.*, 1941 R. 301 ; see also *Bishandhari Gope* v. *E.*, 1941 PWN 622 ; contra *Ghazi* v. *E.*, 17 PR 1911 Cr. ; *Hashim* v. *E.*, 9 PR 1900 Cr. ; see also *Purshottam Ishwar Amin* v. *E.*, 45 B 834 : 60 IC 593.
3. *Sulaiman* v. *E.*, 1941 R 301.
4. *Bishandhari Gope* v. *E.*, 1941 PWN 622.
5. In re *Karuppan Samban*, 31 IC 359 : 16 Cr. LJ 759.
6. *Anant Ram Maya Ram* v. *E.*, 1938 L 262 ; *Dharam Singh* v. *E.*, 1938 L 268 ; *Sulaiman* v. *E.*, 1941 R. 301.
7. *Khushal Rao* v. *State of Bombay*, 1958 SCR 552 : 1958 SCJ 198 : 1958 Cr.LJ 106.

Witnesses present at the time of recording of dying declaration not examined.–The statement of the deceased who died after a week, made to the clerk constable cannot be admitted in evidence under Section 32 of the Evidence Act, as the deceased chanced to live for one week as such it ceases to be a dying declaration. Assuming that the statement was a dying declaration admissible under Section 32, it is wholly insufficient for upholding the conviction as it is not recorded in the words of the deceased and the witnesses present when the deceased made the statement were not examined.[1]

Circumstances which lend strength and assurance to a dying declaration –

1. That it was recorded by a competent Magistrate after taking all proper precautions;
2. That it was taken down in the exact words in which it was spoken, and that wherever questions were put, the exact questions and the answers given to them had been carefully recorded.
3. That this was made shortly after the incident of assault when there was no opportunity of its being coloured by impressions received from others.
4. That the deceased had ample opportunity of observation;
5. That the incident happened in broad day light, or if at night time, in a place which was sufficiently lighted;
6. That the deceased had made more than one statement, all of them were consistent as to the circumstances of the occurrence and the identity of the attackers.[2]
7. That the deceased was not under any fear or pressure at the time of making statement.[2a]

Evidential value of dying declarations; need for corroboration.–The human mind is so constituted as to be inclined to attach a very high degree of importance to dying declarations; and it is necessary that the Judge who has to decide should have present to his mind the arguments against their weight as well as in their favour.[3] "The tongues of dying men enforce attention like deep harmony; where words are scarce, they are seldom spent in vain; for they breathe the truth that breathe their words in pain.[4]" But "though declarations, deliberately made under a solemn sense of impending death and concerning circumstances wherein the deceased is not likely to be mistaken, are entitled to great weight, it should always be recollected that the accused has not the power of cross-examination -a power as effectual in eliciting the truth as is the obligation of an oath; and that when a witness has not a deep sense of accountability to his maker, feelings of anger or revenge, or in the case of mutual conflict, the natural desire of screening his own misconduct, may effect the accuracy of his statements, and give a false colouring to the whole transaction. Moreover, the particulars of the violence to which the deceased has spoken are likely to have occurred under circumstances of confusion and surprise, calculated to prevent their being accurately observed, and leading both to mistakes as to the identity of persons, and to the omission of facts essentially important to the completeness and truth of the narrative.[5]" In India, a dying

1. *Jaswant* v. *State*, 1971 AWR 365.
2. *Khushal Rao* v. *State of Bombay*, 1958 SCR 559 : 1958 Cr LJ 106.
2a. *Kishan Lal Sethi* v. *Jagan Nath*, AIR 1990 SC 1357.
3. Nort, 176-177.
4. Anonymous quotation in *In re Arumuga Thevan*, 129 IC 252 : 1931 M 180 : 32 Cr LJ 357 ; *Shah Baz* v. *Crown*, PLD 1953 L 566.
5. Taylor, § 722. But see *State* v. *Kanchan Singh*, 1954 A. 153 : 1954 Cr LJ 264 : 1953 ALJ 615.

declaration assumes a character very widely different from what it has under the English Law, and is relevant whether the person who made it was or was not at the time he made it under expectation of death : the weight to be attached to it depends not upon the expectation of death which is a guarantee of its truth, but upon the circumstances and surroundings under which it was made, and very much also upon the nature of the record that has been made of it. It is almost a question of fact whether it should be relied upon or not, and, therefore, a matter entirely within the province of the jury.[1] In the Punjab, a person mortally wounded frequently makes a statement bringing all his hereditary enemies on to the scene at the time of his receiving the wound, thus using his last opportunity to do them an injury.[2] A dying declaration is not made on oath and is not subject to cross-examination, the maker of it might be mentally and physically in a state of confusion and might well be drawing upon his imagination while he was making the declaration.[3] It is, therefore unsafe to convict on an uncorroborated dying declaration,[4] particularly in the Punjab. A dying declaration is a relevant fact under Section 32 of the Act. This itself means that it can be used for proving the fact in issue.[5] There is no provision in the Evidence Act lending support to the proposition that a conviction cannot be based on an uncorroborated dying declaration. If the dying declaration is not believed, it is a different matter. But once it is believed, it leads to the conclusion of the guilt of the accused.[6] Corroboration of a dying declarant is not necessary as a rule of law, but where a dying declaration is not made in expectation of death and is not made in the presence of the accused prudence requires that it should be corroborated before it is acted upon.[7] A dying declaration is not entitled to any peculiar credit. If a man gasps out his story soon after the transaction which subsequently results in his death, it may be said that there was no time for him to fabricate, or for his friends to suggest falsehood. But if a statement is made several days after the transaction and many days before his death, that statement does not carry much weight and it is incumbent on the Court before it accepts the statement to see how far it is corroborated.[8] Field says that in more than one instance he has known a statement, made by a person who did not expect to live many hours, turn out to be wholly and utterly untrue.[9] Where the deceased, while making a statement, is prompted by a bystander, an inter-

1. *Inayat Khan* v. *E.*, 16 L 589 : 1935 L 94 : 158 IC 336 : 36 Cr LJ 1335 ; *Naimuddin Biswas* v. *E.*, 1936 C 93 : *E.v. Premanand Dutt*, 52 C 987 : 88 IC 1000 : 1925 C 876 : 26 Cr LJ 1256 ; see also *E.*, v. *Akbarali Karimbhai*, 58 B 31 : 146 IC 548 : 1933 B 479 (2) : 35 Cr LJ 109 ; *State* v. *Kanchan Singh*, 1954 A. 153 ; 1954 Cr LJ 264 : 1953 ALJ 615.
2. Stephen's History of the Criminal Law in England, Vol. 1, P. 448 ; *Khursaid Hussain* v. *E.*, 1941 L 368 ; *Ghulam Qadir* v. *Crown*, 1929 PLR 536 ; *Autar Singh* v. *E.*, 4 L 451 : 81 IC 964 : 1924 L 253 : 25 Cr LJ 1140 *but see Mian Khan* v. *Crown*, PLD 1954 L 646.
3. *Ram Nath Madho Prasad* v. *State*, 1953 SC 420 : 1953 Cr LJ 1772.
4. *Ram Nath Madho Prasad* v. *State*, 1953 SC 420 : 1953 Cr LJ 1772 : *Bhikhari* v. *E.*,150 IC 819 : 1934 O 405 : 35 Cr LJ 1113 ; *Bullu Singh* v. *E.*,120 IC 474 : 1929 P 249 : 31 Cr LJ 136.
5. *Bakhshish Singh* v. *E.*, 86 IC 826 : 1925 L 549 : 26 Cr LJ 890 ; but see *Shah Baz* v. *Crown*, PLD 1953 L 566.
6. *State* v. *Kanchan Singh*, 1954 A 153 : 1954 Cr LJ 264 : 1953 ALJ 615 : *Kunwarpal Singh* v. *E.*, 1948 A 170 : 1947 ALJ 627 : 49 Cr LJ 1400 : ILR 1948 A. 122 ; *Sudama Sheobe* v. *K.E.*, 1949 N 405 : ILR 1949 N 301 : 1949 NLJ 354 : 51 Cr LJ 254.
7. *E* v. *Akbarali Karimbhai*, 58 B 31 : 146 IC 548 : 1933 B 479 (2) : 35 Cr LJ 109 ; see also *Mohammad Arif* v. *E.*, 1941 P 409.
8. In re *Arumuga Thevan*, 129 IC 252 : 1931 M 180 : 32 Cr LJ 357.
9. Field, Ev., 8th Ed., 172.

ested party or a Police Officer,[1] or is kept back from hospital to be instructed as to what he has to say,[2] or where a dying declaration is made at a time when the deceased was well aware that the accused was named as the assailant,[3] the declaration should not be assigned much weight. Of course no value can be attached to a dying declaration when the relatives of the declarant arrange with him as to what he has to say.[4] But where a declaration is made by the deceased in full possession of his faculties, and is proved by reliable evidence in the exact words of the deceased, it is a very valuable piece of evidence[5] and is sufficient to support a conviction of murder if it is corroborated by the surrounding circumstances.[6]

According to the Supreme Court "Great weight must naturally and necessarily be attached to the dying declaration recorded so shortly after (within 45 minutes of) the occurrence. Merely because some friends and relatives happened to be with the deceased before his statement was recorded, the statement cannot be thrown out as tutored. In the first place it was indeed natural for the friends and relatives...to be with the deceased at the time. In the second place there is nothing to indicate...in the evidence....that anyone tutored the deceased. It was not suggested to PW 9 the brother of the deceased tutored the deceased to implicate the accused.7"

Where although the deceased had sustained large number of injuries but there was no injury which may have affected the brain or the heart, the serious injuries being on the abdomen, and according to the doctors who examined the deceased did not say that having regard to the injuries the deceased would have become unconscious immediately, the Supreme Court observed, that the short statement made by the deceased was proof of the manner in which he was assaulted and that the shortness of the statement itself appeared to be the guarantee of its truth.[8]

Where, in view of the numerous and very severe injuries received by the deceased on his head, the Court has grave doubts as to his being in a condition to utter even a single word after the injuries had been inflicted on him, the Court should discard the evidence of the dying declaration of the deceased given by the prosecution witnesses.[9]

Where the solitary evidence against the accused was the dying declaration and it was found that it presented 'suspicious features', and the possibility was that the deceased must have become unconscious on account of the nature of injuries a good part of his brain was burnt besides other injuries-the Supreme Court held that the cumulative effect of the circumstances led to the irresistible conclusion that the deceased was unconscious and never made any such dying declaration.[10]

When the maker of a dying declaration is proved to have become unconscious at the spot and died a few minutes after the making of the declaration, it would not be safe to act upon such a dying declaration.[11] Where a dying declaration is supported by the

1. *Dial Singh* v. *E.*, 153 IC 810 : 1934 L 805 : 36 Cr LJ 427 : Bishen Singh v. *E.*, 96 IC 215 : 1926 L 496 : 27 Cr LJ 903.
2. *Pichumma Naidu* v. *E.*, 1980 MWN 1211 : see also *Mohammad Arif* v. *E.*, 1941 P 409.
3. *Muzaffar* v. *E.*,99 IC 322 : 28 Cr LJ 114.
4. *Varand* v. *E.*, 1944 S 137.
5. *Dial Singh* v. *E.*, 153 IC 810 : 1934 L 805 : 36 Cr LJ 427.
6. *Karim Khan* v. *E.*, 1 IC 100: 9 Cr LJ 156.
7. *Habib Usman* v. *State of Maharashtra*, 1979 SC 1181 (para 9).
8. *Surajdeo Oza* v. *State of Bihar*, 1979 SC 1505.
9. *Ratan Lal* v.*E.*, 8 Luck. 570 : 146 IC 381 : 1933 O 333 : 35 Cr LJ 45.
10. *Kake Singh* v. *State of Madhya Pradesh*, 1982 SC 1021.
11. *Gurdial Singh*.v.*Crown* , 1949 EP 228 : 51 PLR 74 : 50 Cr LJ 568.

consistent evidence produced by the prosecution considerable weight should be attached to it.[1] A difference between a dying declaration and the first information report renders it necessary to examine both pieces of evidence with extra care, but such difference alone does not necessarily render a dying declaration wholly unworthy of credence.[2] If a dying declaration contradicts itself in its various parts, its evidentiary value is negligible.[3] For an accused person to be convicted on a dying declaration alone the Court must be quite satisfied that the dying declaration bears all the marks of truth. The statement must be examined with care, remembering that it is an *ex-parte* statement, made as a rule in the absence of the accused without the accused having any change of cross-examining the person who made it. But where the Court is satisfied that the man who made the dying declaration had a good opportunity of recognizing the person who attacked him; that he did recognize him and that he was telling the truth when he made his dying declaration, a conviction can be solely based on such a declaration.[4] There are many cases in which it is quite safe to convict on a dying deposition, but these are cases in which there is absolutely no doubt that the deceased had a good opportunity of knowing who the assailant was and could not have been mistaken and at the same time there is no possible reason why he should be falsely accusing the alleged assailant; but where the recognition, though possible, was difficult under the circumstances, it is not quite safe to convict merely on a dying deposition.[5] A dying declaration which names only one person, and where the killing took place under circumstances where there could be no doubt that the dying man identified his assailant; is the very strongest possible form of evidence. But where a large number of people are implicated it is a very different matter and in the absence of corroboration of the dying declaration, the accused should not be convicted.[6] Where from the dying declaration made by a person who is alleged to have been murdered it appears that there was clearly a conspiracy wrongly to implicate a particular person, the High Court, before it would rely on the evidence of witnesses who have so conspired and who have had such an influence over the deceased making a dying declaration to suit their purpose, must have some other evidence before it which would enable it to distinguish the true from the false.[7]

In order to test the reliability of a dying declaration the Court has to keep in view the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night, whether the capacity of the man to remember the facts stated had not been impaired at the time he was making the statement by circumstances beyond his control; the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.[8]

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1. *Sawan Singh* v. *E.*, 10 LLJ 281.
2. *Mula Singh* v. *E.*, 71 IC 593 : 1924 L 413 : 24 Cr LJ 177.
3. *Inayat Ali* v. *E.*, 118 IC 526: 29 Cr LJ 418.
4. *The King* v. *Maung Po Thi*, 1938 R 282 ; see also In re *Guruswami Tevar*, 1940 M 196 (FB) ; *Mohammad Arif* v. *E.*, 1941 P 409 ; *Ranoo Mir Bhand* v. *E.*, 1942 Kar 587 ; *Gulab Rao Krishnajee* v. *E.*, 1945 N 153 ; *Lumba* v. *State*, 1952 Raj. 155 : 1952 Cr LJ 1248.
5. *Nga Po Si* v. *E.*, 1936 R 324 : 164 IC 139 : 37 Cr LJ 990 ; *Mohammad Arif* v. *E.*, 1941 P 409.
6. *Khurshid Hussain* v. *E.*, 1941 L 368.
7. *Dengo Kandero* v. *E.*, 1938 S 94.
8. *Khushal Rao* v. *State of Bombay*, 1958 SCR 552 ; 1958 SC 22 ; *K. Ramchandra Reddy* v. *Public*

The fact that the declaration was read over to and signed by the dying man adds to the evidentiary value of the declaration.[1]

Unless one is certain about the exact words uttered by the deceased, no reliance should be placed on verbal statements of witnesses and the oral declaration made by a deceased.[2] Oral dying declaration should be consistent, and there should not be a serious discrepancy relating to the evidence.[3]

Need for corroboration to a dying declaration –It is settled law that it is not safe to convict an accused person merely on the evidence furnished by a dying declaration without further corroboration because such a statement is not made on oath and is not subject to cross-examination and because the maker of it maght be mentally and physically in a state of confusion and might well be drawing upon his imagination while he was making the declaration. It is in this light that the different dying declarations made by the deceased and sought to be proved in the case have to be considered, Unless one is certain about the exact words uttered by a deceased, no reliance can be placed on verbal statements of witnesses and on such oral declaration made by the deceased.[4]

But the view that a dying declaration cannot be acted upon unless corroborated by other independent evidence can no longer be regarded to be correct. Indeed the Supreme Court has categorically stated in *State of U.P.* v. *Ram Sagar Yadav*,[5] that "it is well settled that, as a matter of law a dying declaration can be acted upon without corroboration" and that "there is not even a rule of prudence which has hardened into a rule of law that a dying declaration cannot be acted upon unless it is corroborated. The primary effort of the court has to be to find out whether the dying declaration is true. If it is, no question of corroboration arises. It is only if the circumstances surrounding the dying declaration are not clear or convincing that the court may, for its assurance, look for corroboration to the dying declaration."[6]

Infirmity in dying declaration –corroboration required.–The necessity for corroboration arises not from any inherent weakness of dying declaration as a piece of evidence but from the fact that the Court, in a given case, had come to the conclusion, that particular dying declaration was not free from infirmities, or from such other infirmities as may be disclosed in evidence in that case.[7]

Where the deceased has been accompanied from the place of occurrence to the hospital by eye-witnesses to the incident and in the dying declaration, made under solemn sense of impending death, the name of one of the eye-witnesses is not mentioned and two of the accused mentioned therein are acquitted on benefit of doubt and the occurrence had taken place in day light and the eye-witness account strengthens the reliability of that dying declaration, such a declaration is good evidence and is not untrue.[8]

Prosecutor, 1976 SC 1994 (para 6).

1. *Krishnama Naicken* v. *E.*, 54 M 678 : 135 IC 337 ; 1931 M 430 ; 33 Cr LJ 115 ; *Nga Mya Da* v. *E.*, 1936 R 42 : 160 IC 597 : 37 Cr LJ 299.
2. *Ram Nath Madho Prasad*, 1953 SC 420 : 1953 Cr LJ 1772.
3. *Thakur* v. *State*, 1955 A 189.
4. *Ram Nath Madhoprasad* v. *State of Madhya Pradesh*, 1953 Cr LJ 1772.
5. *State of U.P.* v. *Ram Sagar Yadhav*, 1985 SC 416 (para 13)
6. *Khushal Rao* v. *The State*, 1958 SCR 552 ; 1958 SC 22 ; 1958 Cr LJ 106 ; 1958 ALJ 91 ; *Tara Chand Damu Sutar* v. *State of Maharashtra*, (1962) 2 SCR 775 : 1962 SC 130 : 1962 (1)Cr LJ 196 : *Kusa* v. *State of Orissa*, 1980, SC 560 (paras 10 & 11) ; *Gopal Singh* v. *State of M.P.* (1972) 3 SCC 268 : 1972 SC 1557..
7. *Khushal Rao* v. *State of Bombay*, 1958 SCR 522 : 1958 Cr LJ 106 : 1958 SCJ 198.
8. *Meharchand* v. *State of Rajasthan*, 1969 Raj. LW : ILR (1969) 19 Raj. 641.

Absconding as corroboration.—Police alleged that the accused was absconding and this was sufficient corroboration of the dying declaration of the deceased. Really the accused had not left the jurisdiction of the local police. Held that, in these circumstances, absconding was not sufficient corroboration of the dying declaration.[1]

No rule of law or prudence that it requires corroboration.—It is neither a rule of law nor of prudence that a dying declaration requires to be corroborated by other evidence before a conviction can be based thereon. The evidence furnished by the dying declaration must be considered by the Judge just as the evidence of any witness, though undoubtedly some special considerations arise in the assessment of dying declaration which do not arise in the case of assessing the value of a statement made in court by a person claiming to be a witness of the occurrence. In the first place, the Court has to make sure as to what the statement of the dead man actually was. This itself is often a difficult task, specially where the statement had not been put into writing. In the second place, the court has to be certain about the identity of the persons named in the dying declarations a difficulty which does not arise where a person gives his depositions in Court and identifies the person who is present in court as the person whom he has named.[2]

Where the High Court had held in an appeal from acquittal on a charge for murder that the dying declarations of the deceased were essentially true and did not suffer from any infirmity, and had convicted the accused, on the basis of those dying declarations and the statements of two eye-witnesses who had turned hostile, as corroborative evidence, the Supreme Court discarded the evidence of the eye-witness who had turned hostile as unworthy of credit and observed that it could not be used to corroborate the dying declarations, but maintained the conviction on the basis of two out of the three dying declarations alone; observing that; "It is well settled that although a dying declaration must be approached with caution for the reason that the maker of the statement cannot be subjected to cross-examination, there is neither a rule of law nor a rule of prudence which has hardened into a rule of law that a dying declaration cannot be acted upon unless it is corroborated.[3]"

Conviction may be based on uncorroborated dying declaration.—If a dying declaration has been made by a person whose antecedents were doubtful, that may be a ground for looking upon it with suspicion, but generally speaking, the maker of a dying declaration cannot be tarnished with the same brush as the maker of a confession or an approver.[4]

When conviction can be based only on dying declaration —A truthful and reliable dying declaration may form the sole basis of conviction, even though it is not corroborated. But the Court must be satisfied that the declaration is truthful. The reliability of the declaration should be subjected to a close scrutiny, considering that it was made in the absence of the accused who had no opportunity to test its veracity by cross-examination. If the Court finds that the declaration is not wholly reliable and a material and integral portion of the deceased's version of the entire occurrence is untrue, the Court

1. *Khushal Rao* v. *State of Bombay*, 1985 SCR 552 : 1958 Cr LJ 106 : 1958 SCJ 198.
2. *Harbans Singh and another* v. *The State of Punjab*, (1962) (1) Cr LJ 479.
3. *State of U.P.* v. *Ram Sagar Yadav*, 1985 SC 416 (Para 13); *Kusa* v. *State of Orissa*, 1980 SC 560 (Para 12); *Munnu Raja* v. *State of M.P.* 1976 SC 2199 (Paras & 10).
4. *Khushal Rao* v. *State of Bombay*, 1958 SCR 552 : 1958 Cr LJ 106.

may, in all the circumstances of the case, consider it unsafe to convict the accused on the basis of the declaration alone without further corroboration.[1]

Conviction of the offence of murder can be based solely on the dying declarations made by the deceased, when it is proved that they were made without any prompting or influence by any one, and there is no cogent reason given or suggested by the accused for throwing doubt on their truth or correctness.[2]

Dying declaration found reliable, voluntary, and made in a fit mental condition corroboration is not necessary. Conviction can be based for murder solely on dying declaration.[3]

Dying declaration - Evidentiary value of — Court satisfied that dying declaration is truthful version as to circumstances of death and identity of assailants No question of further corroboration arises. The contention was that the High Court was not justified in basing the conviction of the appellant on the dying declaration of the deceased after having rejected the evidence of the four eye witnesses as unreliable. It was said that the dying declaration ought not to have been acted upon unless there was sufficient corroboration thereof. The Supreme Court held that it is not possible to accept this argument as well founded. Once the Court has come to the conclusion that the dying declaration is a truthful version as to the circumstances of the death and the identity of the assailants of the victim, there is no question of further corroboration.[4]

The principle on which dying declarations are admitted in evidence is indicated in legal maxim: "*nemo moriturus prosesumitur mentiri* - a man will not meet his Maker with a lie in the mouth".

Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the Court also insists that the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of deceased was not as a result of either tutoring, prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailants. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. This Court has laid down in several judgements the principles governing dying declaration, which could be summed us as under.

(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (*Munnu Raja* v. *State of M.P.*, (1976) 3 SCC 104: 1076 SCC (Cri) 376: (1976) 2 SCR 764)

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration.(*State of U.P.* v. *Ram Sagar Yadav*, (1985) 1 SCC 552: 1985 SCC (Cri) 127 : AIR 1985 SC 416), *Ramwati*

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1 *Thakuranni Pampiah* v. *State of Mysore*, (1965) (2) SCJ 157: 1965 (2) Cr LJ 31 *Maniram* v. *State of M.P.*, 1994 Supp (2) SCC 539: AIR 1994 SC 840: 1994 Cri LJ 946.

2 *Tarachan Damu Sutar* v. *State of Maharashtra*, 1962 (1) Cr LJ 196.

3 *Nathu Singh* v. *State of U.P.*, 1985 ALJ p. 831 (DB); *Saroj Kumar Gupta* v. *State of U.P.*, 1988 ALJ 569.

Devi v. *State of Bihar*, (1983) 1 SCC 211: 1983 SCC (Cri) 169: AIR 1983 SC 164; see *Jose* v. *State of Kerala*, 1994 Supp (3) SCC 1.

(iii) This Court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration. *K. Ramachandra Reddy* v. *Public Prosecutor*, (1976) 3 SCC 618: 1976 SCC (Cri) 473: AIR 1976 SC 1944.

(iv) Where dying declaration is suspicious it should not be acted upon without corroborative evidence. *Rasheed Beg* v. *State of M.P.*, (1976) 4 SCC 264: 1974 SCC (Cri) 426.

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. *Kake Singh* v. *State of M.P.*, (1981) Supp SCC 25; 1981 SCC (Cri) 645: AIR 1982 SC 1021.

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. *Ram Manorath* v. *State of U.P.*, (1981) 2 SCC 654; 1981 SCC (Cri) 581; *Jagga Singh* v. *State of Punjab*, AIR 1995 SC 135: 1994 Supp (3) SCC 463.

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected (*State of Maharashtra* v. *Krishnamurti Laxmipati Naidu*, (1980) Supp SCC 455: 1981 SCC (Cri) 364: AIR 1981 SC 617.

(viii) Equally, merely because it is a brief statement, it is not be discarded. On the contrary, the shortness of the statement itself guarantee truth. *Surajdeo Oza* v. *State of Bihar*, (1980) Supp SCC 769; 1979 SCC (Cri) 519; AIR 1979 SC 1505.

(ix) Normally the court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye witness has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail. *Nanahau Ram* v. *State of M.P.*, 1988 Sup SCC 152; 1988 SCC (Cri) 342; AIR 1988 SC 912.

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. *State of U.P.* v. *Madan Mohan*, (1989) 3 SCC 390: 1989 SCC (Cri) 585: AIR 1989 SC 1519.

In the light of the above principles, we will consider the three dying declarations in the instant case and we will ascertain the truth with reference to all dying declarations made by the deceased Bai Kanta. This Court in *Mohanlal Gangaram Gehani* v. *State of Maharashtra*, (1982) 1 SCC 700: 1982 SCC (Cri) 334: AIR 1982 SC 839 held: "where there are more than one statement in the nature of dying declaration, one first in point of time must be preferred".

Of course, if the plurality of dying declarations could be held to be trust worthy and reliable, they have to be accepted. *Paniben* v. *State of Gujarat*, 1982 2 SCC 474 (para 17, 18); see *Jose* v. *State of Kerala*, 1994 Supp (3) SCC 1.

Once a dying declaration is believed by the Court as truthful, it is sufficient to sustain a conviction.[1] In another case the Supreme Court held that although there was some enmity between the father and the son, yet if the son was not the real assailant it is most unlikely that his father would in his dying moment try to falsely implicate his own

1 *Lallubhai* v. *State of Gujarat*, AIR 1972 SC 1976.

son, and that the circumstance appeared to be a sufficient guarantee of the truth of the dying declaration.[1]

"In a proper case," the Supreme Court held, "it may be permissible to convict a person only on the basis of dying declaration in the light of the facts and circumstances of the case....It is significant that in the course of cross-examination of the witness proving the dying declaration, no questions were put as to the state of health of the deceased and no suggestion was made that the deceased was not in a fit state of health to make such statement. The doctor's evidence also clearly indicates that it was possible for the deceased to make the statement attributed to her in the dying declaration in which her thumb impression had also been fixed...it cannot also be said that there is in corroborative evidence of the statement contained in the dying declaration. The evidence of P.Ws. 1,4,5 and 8 clearly corroborates the statement recorded in the dying declaration."[2]

On an appraisal of the cases cited before it,[3] and after quoting from *Lallubhai Devechand Shah* v. *State of Gujarat*,[4] the Supreme Court observed that "the law is now well settled that there can be conviction on the basis of dying declaration and it is not at all necessary to have corroboration provided the Court is satisfied that the dying declaration is a doubtful dying declaration and not vitiated in any other manner"; but held, that it was not safe to base the conviction of the accused on the dying declaration in the circumstances of the case before it. The dying declaration was made on the date of death 8 days after the occurrence. She did not disclose the allegation to anyone whom she met in the hospital at any earlier point of time, she did not disclose the story to the nurse or the doctor. There was no evidence that she was not conscious during those 8 days. It was only when her uncle met the deceased on the date of her death that she made the oral declaration to him and later to the Magistrate who recorded it, that her husband had sprinkled kerosene oil and set her on fire. The name of her husband given in the dying declaration was not correct. The dying declaration did not bear the thumb marks of the deceased. There was some doubt about the identity of the person who had made statement and the police was shown to have been present nearby when the relevant was recorded by the Magistrate. Further the husband was shown to have covered the burning body of the deceased with a quilt, and then helped in extinguishing the fire, and in doing so he even got burns on his hands.[5]

"The law with regard to dying declarations very clearly is that a dying declaration must be closely scrutinised as to its truthfulness like any other important piece of evidence in the light of the surrounding facts and circumstances of the case, bearing in mind on the one hand, that the statement is by a person who has not been examined in Court on oath (and has not been cross-examined) and on the other hand, that the dying man is normally not likely to implicates innocent persons falsely."[6]

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1. *V.S. More* v. *State of Maharashtra*, 1978 SC 519 (Para 6).
2. *Ramawati Devi* v. *State of Bihar*, 1983 SC 164 (Para 7).
3. *Tarachand Damu Sutar* v. *State of Maharashtra*, (1962) 2 SCR 775 : 1962 SC 130 ; *Maniappan* v. *State of Madras*, (1962) 3 SCR 869 : 1962 SC 1252 ; *Ramnath Madhoprasad* v. *State of Madhya Pradesh*, 1953 SC 420.
4. 1972 SC 1776.
5. *State of Assam* v. *Mafizuddin Ahmad*, 1983 SC 274 (Paras 13, 18 and 19).
6. *Jaswant Singh* v. *State (Delhi Administration)*,1979 SC 190 (Para 8); *Lallubhai* v. *State of Gujarat*,1972 SC 1776 : 1972 Cr LJ 828 ; *Balkari* v. *State of Rajasthan*, 1976 Cr LJ 828 (Para 20). *Ajai Pal Singh* v. *State*, 1988 ALJ 1508 (DB).

The Court must be satisfied that the deceased was in a fit state of mind to make the statement after the deceased has a clear opportunity to observe and identify his assailants and that he was making the statement without any influence or rancour. One of the important tests of reliability of a dying declaration is that the person who recorded it was satisfied that the deceased was in a fit state of mind.[1]

Thus where the dying declaration was recorded by the Sub-Inspector of Police in the presence of the Doctor on duty, who verified its genuineness, and was found to be truthful and convincing, it could not be *bona fide* to set aside dying declaration merely on the ground that it was not recorded by a Magistrate, more so, when it was corroborated by the evidence of the parents and the report of the chemical examiner.[2]

A dying declaration which has been recorded by a competent Magistrate in the proper manner, that is to say, in the form of question and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends on oral testimony which may suffer from all the infirmities of human memory and human character.[3]

A dying declaration recorded by a Police Officer is admissible in evidence, but it is better to leave such a dying declaration out of consideration unless the prosecution satisfies the Court as to why it was not recorded by a Magistrate or by a Doctor. The practice of recording dying declaration by the Investigating Officer himself during the course of investigation ought not to be encouraged. That is not to say that such dying declarations are always untrustworthy, but more reliable methods of recording a dying declaration should be taken recourse to, and a dying declaration recorded by a Police Officer may be relied upon if there was no time or facility available to the prosecution for adopting a better method of recording it.[4] The Supreme Court has held that dying declaration duly recorded by respectable witness cannot be rejected.[4a]

A dying declaration is not to be believed merely because no possible reason can be given for accusing the accused falsely. It can only be believed, if there are no grounds for doubting it at all.[5]

A dying declaration must stand or fall as a whole.—A dying declaration stands upon a widely different footing from the testimony of a witness given in Court. In the case of the latter, it is permissible and at times necessary under certain circumstances to accept a part which is unimpeachable nd reject that which is obviously untrue, though to found a conviction on such appraisement of evidence is very often very unsafe. As regards a dying declaration, to accept a portion and reject the rest is entirely out of the question; there must be absolute guarantee of the accuracy of the record and the truth of the entire statement before it can be acted upon.[6] In a Bombay case, however, it has been observed that the mere fact that a part of dying declaration is shown to be false is not a sufficient reason for disregarding it as a whole.[7] It is the statement actually made

1. *K.Ramchandra Reddy* v. *Public Prosecutor*,. 1976 SC 1994 (Para 6).
2. *Jaswant Singh* v. *State (Delhi Administration)* 1976 SC 190 . (Para 8).
3. *Kushal Rao* v. *State of Bombay*,1958 SCR 552 : 1958 SC 22 ; *K.Ramchandra Reddy* v. *Public Prosecutor*,1976 SC 1994 (Para 6).
4. *Dalip Singh* v. *State of Punjab*,1979 SC 1173 (Paras 9) : 1979 Cr LJ 700 ; *Munnu Raja* v. *State of M.P.*,1976 (2) SCR 76 : 1976 SC 2199 (Para 11).

4a *Ganpat Mahadeo Mane* v. *State of Maharashtra*, AIR 1993 SC 1180.

5. *Tara Chand* v. *The State*, (1962) (2) SCR 775.
6. *E.* v. *Permananda Dutt*,52 C 987 : 88 IC 1000 : 1925 C 876 : 26 Cr LJ 1256.
7. *E.* v. *Akbarali Karimbhai*,58 B 31 : 146 IC 548 : 933 B 479 (2) : 35 Cr LJ 109 ; *Naimuddin Biswas* v. *E.*,1936 C 793 : 40 CWN 1377 : but see *Pichumma Naidu* v. *E.*,1930 MWN 1211.

by the deceased which is relevant and not what he omits to state. No arguments can be built upon what he has not said in his declaration.[1] An omission to mention in the dying declaration a torch which was in the hands of the deceased and with which he caused injury on the body of the accused does not invalidate with dying declaration.[2] A dying declaration mentioned A and B as amongst the assailants. The description of A given in the dying declaration was not sufficient, but description of B was sufficient to identify him. The use of the dying declaration against B was held as not amounting to use of a part of it. It was held to have been accepted wholly.[3] If a part of a dying declaration is proved to be false, the Court will not believe the other parts unless they are corroborated.[4]

Incomplete dying declaration.—An incomplete dying declaration is inadmissible. When the person making the dying declaration dies before the completion of his statement no one can tell what the deceased was about to add. It is serious to admit a dying declaration in part.[5]

But where all the necessary questions had been asked by the doctor and replied to by the deceased, the last question "what more you want to say" was not answered because the became semi-conscious and could not answer any further questions, the dying declaration cannot be regarded to be incomplete.[6]

Dying declaration incomplete.—The deceased could not complete his statement, but the statement in regard to the accused having shot the deceased was complete in itself. Under the circumstances, the dying declaration, though incomplete otherwise, was complete so far as the accused having shot the deceased was concerned and could certainly be relied upon by the prosecution. There was corroboration of the dying declaration in the evidence of other witnesses. Such corroboration invested the dying declaration in the evidence of other witnesses. Such corroboration invested on the dying declaration with a stamp with of truth which went a long way towards inculpating the accused.[7]

Dying declaration complete-thumb impression taken after death-statement admissible in evidence.—Corroboration would not always be necessary if the dying declaration is complete in its accusation and there is nothing to show that the maker of the statement had anything further to add. The fact that on account of sudden death the thumb impression of the person making the statement was taken after his death would not make the declaration inadmissible.[8]

Dying declaration should be free and unaided by outside agency.—The dying declaration should be made by the deceased unaided by the outside agency and without prompting by anybody. The declaration should be free from any outside influence in making his statement.[9]

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1. *Ram Bali* v. *State*, 1952 A 289 : 1952 Cr LJ 600.
2. *State* v. *Govinda Pillai Gopala Pillai*, 1952 TC 449 : 1952 Cr LJ 1558.
3. *State* v. *Kanchan Singh*, 1954 A 153 : 1953 Cr LJ 264 : 1953 ALJ 615.
4. *Naimuddin Biswas* v. *E.*, 1936 C 793 ; *Provincial Govt C.P.* v. *Jagan Bhat*, ILR 1946 N 235 : 1946 N 301 : 47 Cr LJ 625 : *Lalaram Surajmal* v. *State*, 1953 MB 249 : 1954 Cr LJ 1764.
5. *Cyril Waugh* v. *The King*, 1950 AC 203 : 54 CWN 503.
6. *Kusa* v. *State of Orissa*, 1980 SC 559. (Para 8).
7. *Abdul Sattar* v. *The State of Mysore*, 1956 Cr LJ 334.
8. *Muniappan* v. *State of Madras*, 1962 SCR 869, (1962) (2) Cr LJ 404.
9. *Bakshish Singh* v. *The State of Punjab*, 1958 SCR 409 : 1957 Cr LJ 1459.

Limits of dying declaration.–The dying declaration is the statement made by a person to the cause of his death or as to any of the circumstances of the transaction which resulted in his death and such details which fall outside the ambit of this are not strictly within the permissible limits laid down by section 32(1), and unless absolutely necessary to make a statement coherent or complete should not be included in the statement. The authenticity of the dying declaration has to be judged in accordance with the circumstances of each dying declaration has to be judged in accordance with the circumstances of each case depending upon many factors which would vary with each case but those recording such statement would be well advised to keep in view the fact that the object of a dying declaration is to get from the person making the statement the cause of death or the circumstances of the transaction which resulted in death.[1]

Long statement likely to be not genuine.–Long statements which are more in the nature of First Information Reports than recital of the cause of death or circumstances resulting in it are likely to give the impression of their being not genuine or not having been made unaided and without prompting.[2]

But that is not necessarily so a dying declaration containing a wealth of details may not be fabricated one.[3]

But in a case where a Head Constable recorded a dying declaration in his own language-the Supreme Court observed that the fact that the Head Constable had recorded what the deceased had stated in his own way and not in the words of the deceased does not mean that what he accorded was something other than what the deceased had stated, all that it meant was that the language was that of the Head Constable, but the substance was that given out by the deceased and infirmity could be attached to the dying declaration on this account.[4]

Where a dying declaration gave "a very detailed and graphic narration of the entire history of the case, starting from motive, the enmity and minutest features of the assault excluding the individual acts committed by the appellants" the Supreme Court found it to be "wholly unsafe to rely on it on the grounds that there was discrepancy between the dying declaration and the ocular evidence about the weapon of offence; that "it was impossible to believe that the deceased even if conscious would have made such a detailed statement": and that the witness who recorded the statement "did not take the necessary precaution of getting the dying declaration attested by the wife who was stated to be present there or the doctor who was alleged to be present in the hospital.[5]

Dying declaration need not be exhaustive.–Under the law a dying declaration need not be exhaustive, and need not disclose all the surrounding circumstances. It cannot be ruled out because of an omission to refer to a particular circumstances of the transaction, namely motive, nor can any argument be built upon what the declarant has not said in his declaration.[6]

Where the person making the dying declaration was, at that time in severe bodily pain caused by stabbing injuries in his abdomen, and words were scarce, his natural impulse would be to tell the Magistrate, without wasting, his breath on details, as to

1. *Ibid.*
2. *Ibid.*
3. *Tehal Singh* v. *State of Punjab*, 1979 SC 1347 (Para 4).
4. *Ibid.*
5. *Mohar Singh* v. *State of Punjab*, 1981 SC 1578 : 1981 Cr LJ 998 (Para 5).
6. *State* v. *Jawan Singh*, 1971 Cr LJ 1656 (Raj.)

who had stabbed him. The very brevity of his dying declaration was, in the circumstances, not a suspicious circumstances but an index of its being true and from taint of tutoring, more so when the stratum of the dying declaration was fully consistent with the ocular account given by eye-witnesses.[1]

In order that the Court may be in a position to assess the evidentiary value of a dying declaration, what is necessary is that the whole of the statement made by the deceased may be laid before the Court, without tampering with its terms on its tenor, but, the law does not require that the maker of the dying declaration must cover the whole incident or narrate the case history. Indeed, quite often, all that the victim may be able to say is that he was beaten by a certain person or persons. That may either be due to the suddenness of the attack of the conditions of visibility or because the victim is not in a physical condition to recapitulate the entire incident or to narrate it at length. In fact, many a time, dying declaration which are copiously worded or neatly structured excite suspicion for the reason that they bear traces of tutoring.[2]

Dying declaration referring to motive of accused—admissibility.—Where the deceased refers in his dying declaration to threats given by accused to him then that part of the declaration is not admissible under section 32(1) of the Evidence Act which has to be strictly construed. The statement of the deceased containing a reference to the motive of the accused is not admissible, as it is not a statement made by him as to the cause of of his death, or as to any of the circumstances of the transaction which resulted in his death within the ambit and scope of section 32(1) of the Evidence Act. It cannot take in acts which have no direct relation to death.[3]

Dying declaration implicating several persons does not becomes less credible.—The law does not make any distinction between a dying declaration in which one person is named and a dying declaration in which several persons are named as culprits. A dying declaration implicating one person may well be false while dying declaration implicating several persons may be true. It is wrong to think that a dying declaration becomes less credible if a number of persons are named as culprits.[4]

Thereby because some persons other than the accused, are named in the dying declaration and are not challaned, does not of itself prove that the dying declaration is false.[5]

In a case where there were two dying declarations and while the first one omitted the first one of the eight accused and the second one omitted the first and the eighth accused, the Supreme Court observed that the omission of the first accused from the first dying declaration and that of the first and the eighth accused from the subsequent dying declaration, would not detract from the credibility of the dying declaration. The case of *Thurekanni Pompiah* v. *State of Mysore*;[6] was distinguished with the observation that where the deceased in a later dying declaration implicates more persons as the assailants than on the earlier occasion when his memory must be quite fresh, the Court is put to caution that the deceased may have been prompted to implicate some innocent

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1. *Jayaraj* v. *State of Tamil Nadu*, 1976 S.C. 1519.
2. *Munna Raja* v. *State of M.P.*, 1976 SC 2199 (para 7).
3. *Vinayak Datta* v. *State*, AIR 1970 Goa. 96.
4. *Harbans Singh* v. *State of Punjab*, 1962 (1) Cr LJ 479.
5. *Kusa* v. *State of Orissa*, 1980 SC 559 (para 9).
6. *Thukrekanni Pompiah* v. *State of Mysore*, 1965 SC 939 : 1965 2 Cr LJ 31.

persons or is drawing on his imagination or is using the occasion to wreak vengeance or some persons. But where the position is reverse that rule cannot be applied, at any rate observed the Supreme Court, the first and the eighth accused had been acquitted by both the Courts below.[1] The first statement in point of time must be preferred to any subsequent statement.[2]

Value of dying declaration-Eye-witness was disbelieved and according to medical evidence the deceased was not in a position to walk or speak.–The medical evidence showed that the deceased was unable to speak. Ordinarily a dying declaration of this kind which the prosecution had relied upon was by itself insufficient for sustaining a conviction on a charge of murder.[3]

Where the evidence showed that vital organs of the deceased like the peritoneum, stomach and spleen were 'completely smashed', and the 'chances of his remaining conscious after receiving one of the mentioned injuries, 'were remote', the Supreme Court did not rely on his dying declaration observing.

"If the vital organs of S.were 'completely smashed; it is impossible to believe that he was in a fit State of mind and body to make any kind of coherent or credible statement relating to the circumstances which resulted in his death. For, he was quite near his creator...dangerously so indeed, and we may accept that his mind was then free from failings which afflict the generality of human beings, likely involving enemies in false charges. But, S. was too ill to entertain any thoughts, good or bad, and he could not possibly have been in a position to make any kind of intelligible statement. Therefore his dying declaration cannot be relied upon for any purpose and has to be excluded from consideration-when it is said that a conviction can rest on a dying declaration, it is implied that it must inspire confidence so as to make it safe to act upon it"[4]

Dying declaration in Urdu.–A dying declaration recorded in Urdu is not illegal.[5]

Application for police protection.–Deceased widow asking for police protection on account of apprehension of trouble from her brothers-in-law at the time of undertaking sowing operation-two months later deceased found murdered-her application for police protection held admissible under section 32(1).[6]

Section 32 and 33.–A statement made by an eye-witness to a crime to other persons is not a dying declaration, and if that person dies before the case comes up in Court, such a statement is not admissible either under section 32 or 33.

The accused was charged with murder of a girl A at a lonely spot in a jungle where she and her sister B had gone to pick berries. The prosecution see was that when the case the mother of the two girls returned at noon to their hut; she inquired of B where A was, whereupon B made a statement disposing the facts of the murder to the mother, and that sometime later she repeated that statement to others. After some months B died before she could give evidence in Court, and the question was whether evidence could be given by the mother and those witnesses as to what B had told them. The statement made by B was not admissible either under section 32 section 33 of the Evidence Act.

1. *Rabi Chandra* v. *State of Orissa*, 1980 SC 1738 (para 10).
2. *Mohan Lal* v. *State of Maharashtra*, 1982 SC 839 (para 17).
3. *Bhagwan Das* v. *State of Rajasthan*, 1957 Cr LJ 889 ; 1957 SCJ 515 : *Ajay Pal Singh* v. *State*, 1988 ALJ 1508 (DB).
4. *Darshan Singh* v. *State of Punjab*, 1983 SC 554 (para 7).
5. *Bakhshish Singh* v. *State of Punjab*, 1958 SCR 409 : 1957 Cr LJ 1459.
6. *Dinkar Bandhu* v. *State*, 72 Bom. LR 405.

Section 33 could not apply because its scope is limited only to a previous statement made as a witness in a judicial proceeding. Section 32 also could not apply because it was confined to a statement made by a person as to the cause of his own death or as to the circumstances in which the death occurred, and the statement made by B related only to the circumstances in which her sister A's death occurred.[1]

CLAUSE (2): DECLARATIONS IN COURSE OF BUSINESS OR DUTY

Reason of the rule.—The considerations which have induced the Courts to recognize this exception against the hearsay rule are principally these; that in the absence of all suspicion of sinister motives, a fair presumption arises that entries made in the ordinary course of business are correct, since, the process of invention implying trouble, it is easier to enter what is true what is false: that such entries usually form a link in the chain of circumstances which mutually corroborate each other; that false entries would be likely to bring the clerks into disgrace with their employers; that as most entries made in the course of business are subject to the inspection of several persons, an error would be exposed to speedy discovery; and that as the facts to which they relate are generally known but to few persons, a relaxation of the strict rules of evidence in favour of such entries may often prove convenient, if not necessary, for the due investigation of truth.[2] Illustrations (b), (c), (d),(g),(h), and (j) to this section and illustration (b) and (c) to Section 21 refer to this clause and the leading case in English Law on the subject in the case of *Price* v. *Torrington*.[3]

Difference between the English rule and the Indian rule.—The rule, as enacted in this clause, differs from the corresponding rule of the English law according to which (i) the declaration must have been made contemporaneously with the fact recorded *i.e.*, at or near the time the fact recorded occurred,[4] (ii) the declarant must have had personal knowledge of the fact recorded;[5] (iii) the declaration must have been made in the discharge of duty to a third person, a mere personal custom, not involving responsibility, being insufficient[6]; and (iv) the declaration is evidence only of the precise fact that it was the writer's duty to record and not of other matters which, though contained in the same statement, are merely collateral[7] But under the Act, though these considerations may affect the weight of this species of evidence, they do not affect its relevancy, the fact determining its relevancy being that the declaration was made in the ordinary course of business or in the discharge of professional duty.[8]

Condition precedent to the admissibility of the declaration: proof that the declarant cannot be called as a witness necessary.—In order to fund a case for the reception of a statement under this clause, it must be proved that the declarant is dead or that he cannot be called as a witness for any of the reasons mentioned in the section, and the

1. *Ratan Chand* v. *State of Bihar*, 1959 Cr. LJ 108 ; 1959 SCR 1336.
2. Taylor § 697.
3. (1703) 2 Smith LC, 11th Ed., 320.
4. *Doe* v. *Turford*, (1832) 3 B & Ad 890 : The Henry Coxon, (1878) 3 156.
5. *Brain* v. *Preece*, 11 M & W 773.
6. *R.* v. *Worth*, (1843) 4 QB 132.
7. *Chambers* v. *Bernasconi*, (1831) 1 CM & R 374 ; Smith v. *Blakey*, (1867) LR 2 QB 326.
8. *Soney Lal Jha* v. *Darbdeo Narain Singh*, 14 P 461 : 1935 P 167 : 155 IC 470. On the question whether the declarant should have personal knowledge of the fact, see *Reg* v. *Hanmanta*, 1 B 610; *Maroti* v. *Mahadeo*, 226 IC 307, (personal knowledge held essential) ; on the relevancy of collateral matters mentioned in the entries.

burden of proving this is on the person who wishes to give such statement in evidence.[1] Death may, however, in appropriate cases, be presumed, *e.g.*,where the record of the statement is an old one,[2] or where the declarant has not been heard of for 7 years.[3] The fact that the entries were made in the ordinary course of business must also be proved.[4] A statement is not admissible under this clause if it is made, not in the ordinary course of business,[5] but in the ordinary course of gossip.[6]

Carbon copy made by one uniform process of certificate of doctor given in discharge of professional duty is admissible.[7]

If the statement is in writing, it must be proved.—Where the statement is in writing it must be proved to be in the handwriting of the person alleged to have made it. This may be done by adopting any recognized mode of proving handwriting *e.g.*,by calling a witness who saw the deceased write, or who is acquainted with his handwriting[8] or by expert testimony.[9] If the entry is more than 30 years old, the proof of handwriting may, in appropriate cases, be dispensed with.[10] For modes of proving handwriting, see notes to Section 67.

Statement must have been made in the ordinary course of business and not on a special occasion or for a special purpose.—Expressions similar to the expression "in the ordinary course of business" occur in other parts of the Act.[11] In using this expression, the Legislature probably intended to allow to be admitted in evidence statement similar to those admitted in England as coming under that description. The exception to the general rule against hearsay, enacted in this clause, extends only to statements made during the course, not of any particular transaction of an exceptional kind, but of business or professional employment in which the declarant was ordinarily or habitually engaged.[12] Therefore, recitals of boundaries contained in mortgage-deed executed by a deceased agriculturist are inadmissible under this clause, as the mortgage-deed itself is not a statement made in the ordinary course of business, it not being the profession, trade or business of an agriculturist to execute mortgage-deed;[13] and the same will be the result if such recitals are contained in a sale certificate in favour of a purchaser in a

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1. *Tika Ram* v. *Moti Lal*, 52 A 464 ; 126 IC 29 : 1930 A 299 ; *Dukhu Mia* v. *Jagdish Nath Roy Bahadur*, 90 IC 564 : 1926 C 359 ; *Ram Sarup Kamkar* v. *Bhagat Prasad*, 57 IC 194 ; *Umed Ali* v. *Habibulla*, 47 C 266 : 56 IC 38 ; *Sew Prasad* v. *Radha Mohan Sahay*, 37 IC 877.
2. *Jabbar Ali Sardar* v. *Manmohan Pandey*, 55 C 1216 : 114 IC 485 : 1929 C 110 ; *Ambica Charan Kundu* v. *Kumud Mohan Chaudhury*, 110 IC 521 : 1928 Ch 893 ; *Dukhu Mia* v. *Jagdish Nath Roy Bahadur*, 90 IC 564 : 1926 C 359 ; *Dukha Mandal* v. *Grant*, 16 IC 467 ; *Pritam Singh* v. *Tilak Singh*, 1954 Pepsu 14.
3. Sections 107 and 108 : *Hari Chintaman Dikshit* v. *Moro Lakshman*, 11 B 89.
4. *Dukhu Mia* v. *Jagdish Nath Roy Bahadur*, 90 IC 564 : 1926 C 358, *Umed Ali* v. *Habibulla*, 47 C 266 : 56 IC 38 ; but see *Bai Nath Sahay* v. *Nanku Mahton*, 29 IC 219.
5. *Kolangorath Raman Nayar* v. *Kannoth*, 31 IC 184.
6. *Ajodhi* v. *E.*, 56 IC 582 : 21 Cr LJ 486.
7. *Prithi Chand* v. *State of H.P.*, AIR 1989 SC 702.
8. Section 47.
9. Section 45.
10. Section 90 ; *Hari Chintaman Dikshit* v. *Moro Lakshman*, 11 B 89.
11. See Section 16, 34, 47, 114 and the Explanation to Ill. (c) to Section 114.
12. *Girdhardas Coorji* v. *Kerawala Karsandas & Co.*, 93 IC 622 : 1926 B 253 ; *Sheonandan Singh* v. *Jeonandan Dusadh*, 1 IC 376 : 13 CWN 71 ; *Ningawa* v. *Bharmappa*, 23 B 63 ; *Guru Charan Rudra Pal* v. *Mafijuddin Molla*, 65 CLJ 603 ; *Soney Lal Jha* v. *Darbdeo Narain Singh*, 14 P 461 : 1935 P 167 : see also *Ambalavabna Pillai* v. *Gourie Ammal*, 1936 M 871 ; but see *Ramamurthi* v. *Subba Rao*, 1937 M 19 : 167 IC 30.
13. *Abdulla* v. *Kunja Behari Lal*, 12 IC 149 : 14 CLJ 467 ; *Ningawa* v. *Bharmappa*, 23 B 63 ; see *Soney Lal Jah* v. *Darbdeo Narain Singh*, 14 P 461 : 1935 P 167 : 155 IC 470.

Court sale.[1] In a case of the Oudh Chief Court, however, it has been held that recitals, contained in a receipt executed by a deceased persons, as to the ownership of property adjacent to the property in respect of which the receipt is executed, are admissible in evidence under this clause to prove the ownership of the adjoining property, as the receipt is a statement made by a deceased person in the ordinary course of business and consists of an acknowledgement written or signed by him of the receipt of money.[2] A certificate of a Chamber of Commerce, testifying to the existence of a strike of coal miners which resulted in the shortage of coal supplies and difficulty of manufacture in the mills by which the goods in suit had to be supplied, is not a statement made "in the ordinary course of business", but is a statement made for the special purpose of meeting a possible or existent dispute and is, therefore, inadmissible under this clause, which contemplates a statement not specially made in connection with the dispute, but in the routine of business, such as in trade accounts and correspondence.[3] The phrase "in the ordinary course of business" is used to indicate the current routine of the business which was followed by the person whose declaration is sought to be introduced. Where there is not only no evidence that there was any such current routine of business but actually no evidence that the practice had ever been adopted on any other occasion, much less that it was habitually adopted on all occasions, the statement will be inadmissible. Thus, where the statement of a deceased person to his wife that he had lent money to the defendant was sought to be given in evidence to prove the loan, the statement was held irrelevant.[4] The business referred to in this clause may, however, be of a temporary character.[5] The *post mortem* report of a deceased by Civil Surgeon, however, is a document prepared in the ordinary course of business, or in the discharge of his professional duty, and is, therefore: admissible under this clause.[6] Similarly an injury report prepared by the Medical Officer can be proved by his compounder and is admissible if the attendance of the Medical Officer cannot be procured without delay and expense.[7] A deposition made by a *patwari* in an inquiry in the course of a revenue settlement does not fall within this or any other clause of the section,[8] nor can a memo of the amount spent in building a house be said to have been made by the deceased writer of the memo, in the ordinary course of business.[9] A statement made by a midwife to her paramour that she attended a confinement and there witnessed the murder of a new born child is not a statement in the ordinary course of business but in the ordinary course of gossip.[10] A translation of a *parwana* or grant forming an enclosure to the report of a public officer is not admissible under this clause as secondary evidence of the contents of the grant.[11] Where in a criminal case relating to the possession of land the parties appointed a

1. *Ambica Charan Kundu* v. *Kumud Mohan Chaudhury*, 110 IC 521 : 1928 C 893.
2. *Ahmad Shahji* v. *Jamal Ahmad*, 113 IC 414 : 1928 O 248 ; see also *Natwar* v. *Alkhu*, 18 IC 752.
3. *Girdhardas Coorji* v. *Kerawala Karsandas & Co.*, 93 IC 622 : 1926 B 253.
4. *Abdullah* v. *Ma E Kin* 11 IC 854 ; but see *Ramamurthi* v. *Subba Rao*, 1937 M 19 : 167 IC 30.
5. *Sheonandan Singh* v. *Jeonandan Dusadh*, 1 IC 376 : 13 CWN 71.
6. *Mohan Singh* v. *E.*, 85 IC 647 : 1925 A 413 : 26 Cr LJ 551.
7. *State* v. *Rakshpal Singh*, 1955 A 520 ; 1953 ALJ 416 : 1953 Cr LJ 1240.
8. *Deonarayan Singh* v. *Dwarka Prasad Singh*, 109 IC 156 : 1928 P 429.
9. *Narhari Hari Vaidya* v. *Ambai Balkrishna Sansarikar*, 44 B 192 : 56 IC 316.
10. *Ajodhi* v. *E.*, 56 IC 582 : 21 Cr LJ 486.
11. *Ambalavana Pandarasannadhi* v. *Kuppachi Janaki Ammal*, 35 IC 201 ; but see *Seethayya* v. *Subramanya Somayajulu*, 52 M 453 : 56 IA 146 : 117 IC 507 : 1929 PC 115 ; *Subrahmanya Somayajulu* v. *Seethayya*, 46 M 92 : 70 IC 729 : 1923 M 1 (FB).

mukhtear as an arbitrator and agreed to abide by his decision and the *mukhtear* accordingly made a local enquiry and submitted a report, the report was held not to be a statement made in the ordinary course of business.[1] It is not necessary that the entry should be against the interest of the person who makes it.[2] Upon the question, whether a leading *talukdar* was a convert to Islam or was the chief of a Rajput clan, it is permissible and important to prove that the fact of such conversion was unknown to the district and local officers and was not ascertainable from anything to be found in official publication. Such evidence is admissible under Section 32(2) Evidence Act.[3]

Books kept in the ordinary course of business. Entries in books of account kept in the ordinary course of business are statements made by persons who made those entries in the ordinary course of business. That those persons are dead or cannot be found both in the sense as to their identity (*i.e.*,who they were) and in regard to their whereabouts (*i.e.*, where they are) may be safely inferred from the dates of the entries. It is not necessary that the names of the persons who made such entries must be known before the expression 'who cannot be found' can be applied to them.[4] Entry made by father in the usual and ordinary course of business in his account books regarding the birth of a daughter and expenses incurred on the occasion is admissible.[5] For meaning of "books", see notes to Section 34.

Peon's endorsement of refusal on a letter; report of a process-server.—An endorsement on the cover of a registered letter that the cover had been tendered to the addresses on a certain day and had been refused by him is admissible under this clause, if the other requirements of the section are fulfilled.[6] A report of a deceased process peon also is admissible under this clause.[7]

Statements in the diary of a deceased Police Officer.—A Police Officer while making entries in his diary in the course of investigation into an offence does so in the course of his professional duty. Such entries are, therefore, admissible in evidence under this clause, subject, of course, to the provisions of Section 162, Cr. P.Code.[8]

Statements made by deceased deed writers admissible to prove execution of deeds.—Section 67 of the Act enacts that if a document is alleged to have been signed by any person, the signature must be proved to be in that person's handwriting. A signature may, of course, be proved in several ways.[9] A statement in the ordinary course of business, by a deceased person that a certain document was signed by a certain person is admissible proof of the signature. Therefore, a statement in a deed by a professional deceased deed writer that the mark or signature on a document is that of the executant is admissible, and may be sufficient proof, provided the document is proved to have been written by the deed writer in the ordinary course of his business.[10]

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1. *Guru Charan Rudra Pal* v. *Mafijuddin Molla*, 65 CLJ 603.
2. *Ambalavana Pillai* v. *Gourie Ammal*, 1936 M 871.
3. *Keolapati* v. *Raja Amar Krishna Naraina Singh*, 1939 PC 249.
4. *Dogar Mal* v. *Suman Ram*, 1944 L 58.
5. *Mirabai* v. *Kaushalayabai*, 1949 N 235 : ILR 1948 N 794 : 1949 NLJ 154.
6. *Gobinda Chandra Saha* v. *Dwarka Nath Patita*, 26 IC 962 : 20 CLJ 455 : 19 CWN 489.
7. *Lall* v. *Rajkishore Narain Singh*, 13 P 86 : 147 IC 101 : 1933 P 658.
8. *Abdul Aziz* v. *E.*, 140 IC 578 : 1932 A 442 : 34 Cr LJ 109.
9. See to this, notes to Section 67.
10. *Lahini* v. *Bala*, 77 IC 798 : 1922 N 227 ; *Abdulla Paru* v. *Gannibai*, 11 B 690 ; *Muhammad Khan* v. *Ghulam Rasul*, PLD 1952 L 40.

Statements by deceased bhats, family chroniclers and priests as to relationship, births, deaths and marriages.—Bhats are heralds who are interested in keeping *kursinamas* (pedigree tables).[1] Similarly, family chroniclers are professional men who keep such records in the ordinary course of their business.[2] Hence statements as to family pedigree in books kept by a deceased family priest are chronicler are admissible, under this clause,[3] on such family incidents as births, deaths, etc., which would ordinarily be recorded by him in such books. An entry as to the amount of dower of a Muhammadan lady, in a register of marriages kept by a deceased priest, is an entry made in the discharge of professional duty and, therefore, admissible under this clause.[4] *Panjis* maintained by Panjikars who are professional genealogists and systematically maintain pedigree tables, are admissible under this clause.[5]

Entries of death or birth in the diary of deceased chaukidar.—It has been remarked *obiter* in a case,[6] and held directly in another,[7] that entries of birth or death in the diary of a deceased illiterate *chaukidar*, made not by the *chaukidar* himself but by someone else at his instance, are inadmissible under this clause, if it is not shown to be duty of the latter to make such entries in the ordinary course of business.[8]

Correctness of age of accused.—Evidence of relative more valuable—cannot be rejected as being interested.[9]

Entries in hudabandi, chowhaddibandi, jamabandi, jamawasilbaqi, talab-baqi or collection papers and teiskhana registers, etc.—Entries in *hudabandi*,[10] *chowhaddibandi*,[11] *Jamabandi*,[12] *Jamawasilbaqi*,[13] *talabbaqi*, or collection papers,[14] are relevant under this clause, if they were made in the ordinary course of *zamindari* business, and the person who made them cannot be called as a witness for any of the reasons mentioned in the section; and when they become relevant under this clause,

1. *Kartic Chandra Chakravarty* v. *Gossain Protap Chandra*, 66 IC 894 : 1921 C 482 : 25 CWN 908.
2. *Abdul Gafur* v. *Hussain Bibi*, 12 L 336 : 58 IA 188 : 130 IC 612 : 1931 PC 45 : *Hazarilal* v. *Har Govind*, 48 IC 375.
3. *Acharaj Ram* v. *Ganesh Das*, 151 IC 622 : 1934 Pesh 78 ; *Balak Ram High School, Panipat* v. *Nanu Mal*, 11 L 503 : 128 IC 532 : 1930 L 579 ; *Amritsaria* v. *Prabh Dial*, 89 IC 989 : 1925 L 157 : *Bura* v. *Nanak*, 84 IC 912 : 1925 L 281 ; *Anandi* v. *Nand Lal*, 46 A 665 : 83 IC 618 : 1924 A 575 : *Mohansingh Umed Ramol* v. *Dalpatsingh Hanbaji*, 46 B 753 : 67 IC 235 : 1922 B 51 ; *Kartar Singh* v. *Kirpa Singh*, 1921 L 380.
4. *Zakeri Begum* v. *Sakina Begum*, 19 C 689 : 19 IA 157 (PC).
5. *Sitaji* v. *Bijendra Narain*, 1954 SC 601.
6. *Naina Koer* v. *Gobardhan Singh*, 37 IC 424.
7. *Chandrama Koer* v. *Ramgayan*, 67 IC 57 : 1922 P 111.
8. According to these cases, if the deceased chaukidar had been literate and himself made the entry, the entry would have been admissible. Thus the admissibility of the entry depends, according to these cases, on the literacy of the chaukidar. The clause, however, applies to written and verbal statements alike, and it seems doubtful whether the fact that the chaukidar dictates the entry and does not, owing to his being illiterate, make it by his own hand would make all the difference.
9. *Ganga Dhar Iba* v. *State*, 1969 All Cr R 41 : 1969 All WR (HC) 41.
10. *Gopeshwar Sen* v. *Bijoy Chand Mahatab Bahadur*, 55 C 1167 : 108 IC 883 : 1928 C 854 ; see also *Rajnandni Debi* v. *Manmatha Pal*, 1941 C 223.
11. *Gajadhar* v. *Sarat Chandra*, 1941 C 193.
12. *Mon Mohan Pandey* v. *Hari Nath Chaudhury*, 110 IC 338 : 1928 C 408 ; *Dukhu Mia* v. *Jagdish Nath Roy Bahadur*, 90 IC 564 : 1926 C 359 ; *Charitter Rai* v. *Kailash Behari*, 44 IC 422 ; *Dukha Mandal* v. *Grant*, 16 IC 467 ; see also *Durga Priya Choudhury* v. *Hazra Gain*, 62 IC 453 : 1921 C 345.
13. *Jabbar Ali Sardar* v. *Monmohan Pandey*, 55 C 1216 : 114 IC 485 : 1929 C 110 ; *Monmohan Pandey* v. *Hari Nath Chaudhury*, 110 IC 338 : 1928 C 408 ; *Dukhu Mia* v. *Jagdish Nath Roy Bahadur*, 90 IC 564 : 1926 C 359.
14. *Umed Ali* v. *Habibulla*, 47 C 266 : 56 IC 38 ; *Bhaba Sundari Devi* v. *Taira Nasya*, 6 IC 369.

corroboration cases to be a legal necessity.[1] *Teiskhana* registers prepared by a *patwari*, under the rules framed by the Board of Revenue under section 16 of Regulation XII of 1817, are not admissible under section 35 of the Act,[2] but entries in them may become admissible under this clause of the section,[3] if the other conditions prescribed by the section are established. A revenue surveryor's report,[4] entries in the *khatiana* and *chitha* prepared by a deceased *amin*,[5] and entries in the register of *chaukidari chakran* lands[6] are relevant under this clause.

A statement admissible under this clause may amount to an admission in favour of its maker and may be admissible in his lifetime : road-cess returns.—Ordinarily, an admission cannot be proved in favour of the person making it; but when the admission is of such a nature that, if the person making it were dead, it would be relevant as between third person under this section, it may be proved in the life-time and in favour of the person making it.[7] Thus, entries of payments, made by a creditor in the *samnadaskat* book of the debtor, though admissions in the former's favour, are admissible, as they fall within the meaning and language of section 31 (2).[8] In the case of road-cess returns however, the rule making admissions admissible in one's own favour is subject to the special provisions of section 95 of the Road-Cess Act, which makes road-cess returns admissible only against the persons by whom or on whose behalf they are filed, but not in the their favour, notwithstanding the provisions of section 21 and section 32 of the Evidence Act.[9] Thus, a return filed by a landlord is not admissible in his favour,[10] whether it is put in to prove an admission in favour of the landlord, or indirectly for some other purpose.[11] But the rule in section 95 of the Road-Cess Act is not exhaustive, and these returns may be admissible against,[12] as well as in favour of,[13] persons other than those filing them. Section 95 of the Road-Cess Act has no application where the road-cess return is given in evidence by a party who did not file it.[14] Thus road-cess returns filed ba a Hindu widow are admissible in favour of the reversionary heir, as he does not claim through the widow ;[15] and those filed by an inferior landlord are admissible in favour of the superior landlord.[16] Road-cess returns filed by some of the co-

1. *Jabbar Ali Sardar* v. *Monmohan Pandey*, 55 C 1216 : 114 C 485 : 1929 C 110 ; *Monmohan Pandey* v. *Hari Nath Chaudhury*, 110 IC 338 : 1928 C 408 ; *Gopeswar Sen* v. *Bijoy Chand Mahtab Bahadur*, 55 C 1167 : 108 IC 883 : 1928 C 854 ; *Charitter Rai* v. *Kailash Behari*, 44 IC 422 ; *Dukha Mandal* v. *Grant*, 16 IC 467.
2. *Samar Dasadh* v. *Jaggul Kishore Singh*, 23 C 366 ; *Baji Nath Singh* v. *Sukhu Mahton*, 18 C 534 ; *Chalho Singh* v. *Jharo Singh*, 39 C 995 ; 18 IC 61.
3. *Suriatulla Sarkar* v. *Hafizulla Ahmed*, 12 CWN cliv,
4. *Mg. Po Nyein* v. *Maung My*, 297 IC 777.
5. *Gopeswar Sen* v. *Bijoy Chand Mahtab Bahadur*, 55 C 1167 ; 108 IC 883 ; 1928 C 854.
6. *Sheonandan Singh* v. *Jeonandan Dusadh*, 1 IC 376 ; 13 CWN 71.
7. Section 21.
8. *Jethebai* v. *Putlibai*, 17 IC 722 ; 14 Bom LR 1020.
9. *Hem Chandra Chowdhry* v. *Kali Prasanna Bhaduri*, 26 C 832 ; *Swarnamoyi* v *Sopudindra Nath Mitra*, 89 IC 747 ; 1925 C 1189 ; see also *Mahabir Ram Marwari* v. *Bhadai Mandar*, 1937 P 561.
10. *Promode Chandra Roy Choudhry* v. *Binayakdas Acharjya Chaudhury*, 75 IC 201 : 1923 C 611 : 27 CWN 548 ; see *Mohendra Narain Sigh* v. *Ajodhya Prosad Singh*, 39 C 1005 ; 15 IC 284.
11. *Ram Kumar Das* v. *Harnarain Das*, 92 IC 104 ; 1926 C 727.
12. *Chalho Singh* v. *Jharo Singh*, 39 C 995 ; 18 IC 61.
13. *Chandra Mohan Maiti* v. *Kinaram Maiti*, 79 IC 412 ; 1925 C 408 ; *Mohendra Narain Singh* v. *Ajodhya Prosad Singh*, 39 C 1005 : 15 IC 284.
14. *Ram Prosad Roy* v. *Sham Narain*, 6 CLJ 22.
15. *Lachmi Prosad Chowdhury* v. *Jagmohan Lal Chaubey*, 22 IC 594 ; 18 CLJ 633.
16. *Mohendra Narain Singh* v. *Ajodhaya Prosad*, 39 C 1005 ; 15 IC 284.

owners are admissible against the remaining co-owners,[1] and may, for certain purposes, be admissible in their favour.[2] Where a return, jointly field, becomes admissible against one of the persons filling it, it is no objection to its admissibility that by being admissible against him it indirectly becomes admissible in favour of the others.[3] The Privy Council ruling in *Hem Chandra* v. *Kali Prosanna*[4] is clear authority for the admissibility of road-cess returns.[5]

Entires in books of account relevant under section 34 do not require corroboration, if they become relevant under section 32 also.—Accounts, relevant only under section 34, are not alone sufficient to charge a person with liability; corroboration is required. But where accounts are relevant under section 32 (2) also, they do not require corroboration as a matter of law. It is within the discretion of the Court to require, or to dispense with, corroborative evidence.[6] "Fortunately, however, in practice we seldom come across a case is which the entry which comes under Section 32, clause (2), is really sought to be used alone to charge any person with liability."[7] Where the books were kept by a servant since deceased, but the entries showed that certain payments had been made through certain other persons, it was held that, though the books were admissible under this clause, it was necessary to call the persons the books were admissible under this clause, it was necessary to call the persons making the payment, to prove that the payments were, in fact, made.[8] *Zamindari* papers who prepared them are dead or cannot be found, but the weight to be attached to them must depend on the circumstances.[9] But the advance of proof, direct or presumptive, that their writer is dead, books of account, however old are admissible only under section 44, and require the usual corroboration.[10] Books, which are not regular books of account and, therefore, not admissible under section 32.[11] Where the accounts consist of loose sheets which can be substituted and the entires can be interpolated at different places, if one were so minded, it is not possible to say that the entries have been made in the regular course of business and have the necessary probative value.[12]

Evidentiary value of loose sheets of almanac.—As regards the entries in the

1. *Intaz* v. *Dina Nath De Sarker*, 53 C 615 ; 96 IC 72 ; 1926 C 856 ; *Chalho singh* v. *Jharo Singh*, 39 C 995 ; 18 IC 61.
2. *Hem Chandra Chowdhry* v. *Kali Prosanna Bhaduri*, 30 C 1033 ; 30 IA 177 (PC).
3. *Beni Madhab Dandapat* v. *Dina Bundhu Dutt*, 3 CWN 343.
4. *Hem Chandra Chowdhry* v. *Kali Prosanna Bhaduri*, 30 C 1033 ; 30 IA 177 (PC).
5. *Chalho Singh* v. *Jharo Singh*, 39 C 995 ; 18 IC 61.
6. *Abdul Wahab* v. *Nagendra chandra*, 1940 C 524 ; Maroti v. *Mahadeo*, 226 IC 307 ; *Jabbar Ali sardar* v. *Monmohan Pandey*, 55 C 1216 ; 114 IC 485 ; 1929 C 110 ; *Monmohan Pandey* v. *Hari Nath Cahudhury*, 110 IC 338 ; 1928 C 408 ; *Rani* v. *Firm Bahadur Mal Buti Mal*, 63 IC 946 ; 1922 L 119 ; *Chartter Kai* v. *Kailash Behari*, 44 IC 422 ; *ramaswami Naik* v. *ramandhan Chetty* 22 IC 627 ; *Dukha Mandal* v. *Grant*, 16 IC 467 ; *Bhaba Sundari Devi* v. *Taira Nasya*, 6 IC 369 ; *Daji Abaji Khare* v. *Govind Narayan Bapat*, 10 Bom L R 811 ; *Rampyarabai* v. *Balaji Shridhar*, 28 B 294 ; but see the judgment of Mukerji, J. in *Goverswar* Sen v. *Bijoy Chand Mahatab Bhadur*, 55 C 1167 ; 108 ; 108 IC 883 ; 1928 C 954 , where the correctness of this view has been questioned and corroboration has been considered to be necessary both as a matter of law and as matter of practice.
7. Per Mukerji, J., in *Gopeswar Sen* v. *Bijoy Chand Mahatab Bahadur*, 55 C 1167 : 108 IC 883 : 1928 C 854.
8. *Sew Prasad* v. *Radha Mohan Sahay*, 37 IC 877.
9. *Chaturbhuj Singh* v. *Sarada Charan Guha*, 11 P 701 ; 141 IC 157 ;1933 P 6.
10. *Durga Shanker* v. *Ganga Sahai*, 142 IC 889 ; 1932 A 500.
11. *Babhnaji* v. *Ratanlal*, 148 IC 1033 ; 1934 N 106.
12. *Ganesh Prasad Ray* v. *Narendra Nath Sen*, 1953 SC 431.

almanac, it is necessary only to point out that these are loose sheets of papers with blanks left at different palces, if one were so minded. Having regard to these defects, it is not possible to say that the entries have been made in the regular course of business and have the necessary probative value.[1]

Section 32(2) and (6) Panjis (genealogical trees) maintained by Panjikars among Naithal Brahmins.—The Panjis are maintained by Panjikars who are professional genealogists. They systematically maintain pedigree tables in the community of Naithal Brahmins. That they were ancient and had come from proper custody. So they were admissible under section 32 (2) and (6).[2]

Statements is commercial documents.—Statements, made by persons deceased or alive, in certain commercial documents described in the schedule to Act XXX of 1939, are relevant: and such statements shall in the case of documents mentioned in Part 1 of that schedule, and may, in the case of documents mentioned in Part II of that schedule, be presumed to be accurate.[3]

CLAUSE (3) : DECLARATIONS AGAINST INTEREST

Principle and reason of the rule.—Under this section, a statement of a dead person can be admitted in evidence, when it is against the pecuniary or proprietary interest of the person making it.The principle on which such statement is regarded as admissible in evidence is that, in the ordinary course of affairs, a person in not likely to make a statement to his own detriment, unless it is true.[4] "Selt-interst is a sufficient security against wilful mis-statement, mistake of fact, or want of information on the part of the declarant. The place of the test of oath and cross-examination is in some measure supplied by the circumstances of the declarant and the character of his statement".[5] Under this clause, statements by a deceased person are admissible, provided (i) he had personal knowledge of the facts stated, (ii) the facts were to his immediate perjudice, (iii) he knew the facts to be prejudicial and (iv) the interest affected by the statements was pecuniary or proprietary.[6] Illustrations (e) and (f) refer to this clause, and the leading case in English law on the subject is *Higham* v. *Ridgway*.[7]

Condition precedent to the admissibility of statement under this clause ; proof that the declarant cannot be called as a witness is necessary.—See notes to clause (2) under this heading.

If the statement is in writing, it must be duly proved.—See notes to clause under this heading.

Difference between admission and statements admissible under this clause.—An admission, being a statement which suggests any inference as to a fact in issue or a relevant fact,[8] may take the form of a self harming or a self-serving statement. But when admission taken the form of a self-serving statement, Section 21 makes it inad-

1. *Mahasay Ganesh Prasad Ray* v. *Narendra Nath Sen*, 17 Cut LT 73.
2. *Sitaji* v. *Bijendra Narain*, AIR 1954 SC 601.
3. See Appendix D.
4. *Dal Bahadur Singh* v. *Bijai Bhadur Singh*, 52 A 1 ; 57 IA 14 ; 122 IC 8 ; 1930 PC 79 ; *Savitri Devi* v. *Ram Ran Bijoy Prosad Singh*, 1950 PC 1 ; 63 MLW 45 ; 54 CWN 233 ; 76 IA 255 ; 1950 ALJ 134 ; 1950 , 1 MLJ 163.
5. Woodroffe, Ev., 9th Ed., 324.
6. *Ramanathan Chetty* v. *Murugappa Chetty*, 33 IC 969.
7. *Higham* v. *Ridgway*, (1808) 10 East 109.
8. Section 17.

missible in favour of its maker or his representative in interest, unless it is of such nature that, if its maker were dead, it would be relevant as between third persons under Section 32. Therefore, a statement which amounts to a declaration against interest within the meaning of this clause is receivable in favour of as well as against strangers after its maker is dead ; it is also admissible in favour of the maker or his representative in interest during the maker's life-time. Thus, where a land-lord purchased the holding of his tenant in execution of a decree, a statement by the landlord in the sale certificate that the tenant held under him 20 *bighas* was held admissible in the landlord's favour t show the area purchased by him in execution sale, on the ground that the statement admitting that his land was subject to tenancy was in derogation of his proprietary interest.[1] Documents which do not come under any of the clauses to Section 32 are admissible against a person, if they would have been admissible as admissions against persons through whom he claims.[2]

Recitals in a consent decree are not "statements".—Recitals in a consent decree which sets out the terms of the arrangement arrived at between the parties, but does not embody statements of the parties as to their rights in the subject-matter of the litigation, are not "statements" and are, therefore, inadmissible under this clause.[3]

Statement against pecuniary interst.—A statement is against the pecuniary interest of a person when it has the effect of charging him with pecuniary liability to another or discharging some other person upon whom he would otherwise have claim.[4] A statement whereby a man charges himself with the receipt of money is in most cases a statement against his pecuniary interest.[5] A statement by the executant of a sale deed that he was liable for a particular amount is a statement against his pecuniary interest.[6] A petition by a person that a pension allowed to his grandfather be allotted to him and two other brothers of his, whose legitimacy is doubtful, amounts to a statement against interest.[7] A statement by a person that certain monies deposited by him in the name of another person belonged to him is an admission in his own favour and not a statement against his interest ; it is, therefore, inadmissible.[8] Attestation of a deed of adoption by the sons of the adopter is a statement against the pecuniary interest of the sons.[9] An acknowledgment, made by or by the direction of a deceased creditor, of a money received on account of a debt or interest due to him is receivable as declaration against interest, if made before, but not after, the debt has become statute-barred.[10] Whether such acknowledgment is admissible as an entry against interest depends upon the question whether it was made *bona fide* before the claim became barred by limitation, and it ought not to be admitted until it be shown by evidence *dehors* the instrument that it was made at a time when it was against the interest of the creditor to make it.[11] An entry of payment made by the *debtor* is inadmissible whether it is made before or after the claim

1. *Manik Biswas* v. *Jagadindra Nath Roy Bahadur*, 24 IC 283.
2. *Rani Srimati* v. *Khagendra Narayan Singh*, 31 C 871 ; 34 IA 127 (PC).
3. *Jagdish Chandra De* v. *Harihar De*, 78 IC 219 ; 1924 C 1042.
4. *Dev* v. *Robson*, 15 East 32.
5. *Appavu Chettiar* v. *Nanjappa Goundan*, 20 IC 792.
6. *Babhnaji* v. *Ratanlal*, 148 IC 1033 ; 1934 N 106.
7. *Baqar Ali Khan* v. *Anjuman Ara Begum*, 25 A 236 ; 30 IA 94 (PC).
8. *Hirabai Gopaldas* v. *Dhanjibai B. Kavarana* 102 IC 145 ; 1927 B 433 .
9. *Nagammal* v. *Sankarappa Naidu*, 54 M 576 ; 131 IC 9 ; 1931 M 264 ; see also *Gnanmuthu Nadan* v. *Veilukanda Nadathi*, 79 IC 2 ; 1924 M 542.
10. Phipson, Ev., 6th Ed., 279 ; *Briggs* v. *Wilson*, (1853) 5 De. GM & G 12.
11. Taylor, § § 693-696.

became time barred and whether it relates to the payment of interest or part-payment of the principal. An entry made after the period of limitation does not extend time and is not, therefore, against the debtor's iinterest, whears an entry made before the expiry o the period of limitation is only evidence of payment and, therefore, in favour of the debtor.[1]

Road-cess returns.—The Privy Council ruling in *Hem Chandra Chowdhary* v. *Kali Prosonna Bhaduri*.[2] is clear authority for the admissibility of road-cess returns.[3] By Section 95 of the Road-Cess act, road-cess returns are not admissible in favour of the person filing them or the representative in interest of such person notwithstanding the provisions of Section 21 and 32 of the Act ;[4] but Section 95 of the Road-Cess Act not being exhaustive, the returns may be admissible in favour of persons other than those filing them and their representatives in interest,[5] Thus, a road-cess return filed by a Hindu widow is admissible in favour of the reversionary heir, as he does not claim through the widow.[6] Road-Cess returns filed by some of the co-owners are admissible against the remaining co-owners,[7] and those filed by an inferior landlord are admissible in favour of the superior landlord.[8] Statements made in road-cess returns by all the proprietors can be used by one of them against the others.[9] Statements against pecuniary or proprietary interest of person making it or when, if true, would expose him to prosecution—Statement by another person that he had left money to the accused is not relevant under section 32(3).[10]

B. N.'s widow who was a party to the suit had made a statement in a prior proceeding that "Her husband's father went away one month after her husband's death", thereby indicating that B. N. predeceased his father. therefore, it became necessary to consider the admissibility of this statement as well as the value to be attached to it under section 32 (3) of the Evidence Act. It was held that under section 32(3) of the Evidence Act, a statement of a person who is dead is admissible when the statement is against the pecuniary or proprietary interest of the person making it, or when if true, it would expose him or would have exposed him to a criminal prosecution or to suit for damages. In order that the statement may be admissible, the person making the statement must know that it is against his interest and the question whether the statement was made consciously with the knowledge that it was against the person making it would be a question of fact in each case, depending on the circumstances in which the statement was made, except when the statement is categorical in terms. there can hardly be any direct evidence to show that the person making the statement in fact knew that the statement was against his interest and so in most cases knowledge would have to be inferred from the surrounding circumstances.[11]

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1. See Section 20, Limitation Act.
2. 30 C 1033 ; 30 IA 177 (PC).
3. *Chalho Singh* v. *Jharo Singh*, 39 C 995 ; 18 IC 61 ; In *Hem Chandra Chowdhury* v. *Kali Prasunno Bhaduri*, 30 C 1033 ; 30 IA 177 (PC), the Subordinate Judge had admitted the returns under this clause, but the Privy Council did not refer to any section of the Act under which the returns were held admissible.
4. *Hem Chandra Chowdhury* v. *Kali, Prasanno Bhaduri*, 26 C 832 ; *Chandra Mohan Maiti* v. *Kinaram Maiti*, 79 IC 412 ; 1925 C 1189.
5. *Chandra Mohan Maiti* v. *Kinaram Maiti*, 79 IC 412 ; 1925 C 1189.
6. *Lachmi Prasad Chowdhury* v. *Jagmohan Lal Chaubey*, 22 IC 594 ; 18 CLJ 633.
7. *Chalho Singh* v. *Jharo Singh*, 39 C 995 ; 18 IC 61.
8. *Mohendra Narain Singh* v. *Ajodhya Prasad Singh*, 39 C 1005 ; 15 IC 284.
9. *Mahabir Ram Marwari* v. *Bhadai Mander*, 1937 P 561.
10. *Manjunatha George* v. *Government of Manipur*, 1970 Cri LJ 812.
11. *Ramrati Kuer* v. *Dwarika Prasad Singh*, 1967 (2) SCJ 789.

Charging and discharging entries in accounts, discharging entries outbalancing the charging entries : charging entries admissible.—Accounts are admissible, some items of which charge the declarant, though other connected items discharge him or even show a balance in his favour ; for in the former case it is not to be presumed that a man will charge himself falsely for the mere purpose of getting a discharge, and in the latter case the debit items would still be against interest, since they diminish the balance in his favour.[1] It should, however, be noted that this principle applies only when the charging entry is sought to be used. The discharging part of the entry is admissible, unless the discharging part must necessarily be resorted to for the purpose of explaining the charging part.[2]

Statement against proprietary interest : declarations in disparagement of title.—The presumption of law is that a person in possession of property is the absolute owner thereof.[3] Therefore, declarations made by a deceased person tending to cut down, charge, or fetter his presumably absolute interest are admissible as being contrary to his proprietary interest .[4] Declarations in disparagement of title to land are relevant, if they were made whilst the deceased declarant was in actual possession of the property.[5] Such declarations are receivable whether they refer to the tenure or to the extent of the property.[6] A statement by the owner of the land in a deed of conveyance or mortgage-deed that he was extinguishing his interest in the land by an absolute sale or placing restrictions on it by way of mortgage is a statement against the proprietary interest of the owner.[7] A recital in a deed of gift by widow that the gift had been already made by her deceased husband and that she was simply executing a formal document to give effect to that gift in consonance with the oral direction of the deceased is admissible evidence of the gift by the husband.[8] A statement by a person that certain property does not belong to him but belongs to another person is obviously against his interest and, therefore, after his death, admissible in evidence under section 32(3).[9] Similarly a document by which a Hindu widow constitutes a person as her "heir " in her life-time is against her proprietary interest, as by it she divests herself of her widow's estate in the property.[10] But where a Hindu widow, who after a lifelong enjoyment of her husbands property desires at the end to pass it on to her own relations and for this purpose goes through the form of adopting her brother's grandson, makes a statement in mutation proceedings that she has authority from her husband to adopt and that she has adopted a person, the statement would be inadmissible in evidence after her death, as the statement cannot be said to be against her interest.[11] The statement of a judgment-debtor after attachment of his property, that the property had been dedicated by him before the

1. Phipson Ev., 6th Ed., 281 ; Taylor, § 674 ; See Wigmore, § 1464.
2. *Doe* v. *Beviss*, 18 ILR (CP) 1287 ; but see *Taylor* v. *Witham*, (1876) 3 Ch D 605.
3. Section 110.
4. Phipson, Ev., 6th Ed., 279.
5. *Ramdas* v. *Ajudhaidas*, 63 IC 685.
6. Nort., 180.
7. *Abdullah* v. *Kunja Behari Lal*, 12 IC 149 ; 14 CLJ 467.
8. *Appasami Pillai* v. *Ramu Tevar*, 136 IC 340 ; 1932 M 267.
9. *Suraj Narain* v. *Ratan Lal*, 40 A 159 ; 44 IA 201 ; 40 IC 988 ; 1917 PC 12 ; *Venkatasubbiah Chetty* v. *Jumma Mosque*, 1941 M 666.
10. *Hari Chintaman Dixit* v. *Moro Laksman*, 11 B 89.
11. *Dal Bahadur Singh* v. *Bijai Bahadur Singh*, 52 A 1 ; 57 IA 14 ; 122 IC 8 ; 1930 PC 79 . The Principle of this PC decision seems to affect the ruling in *Hari Chitaman Dixit* v. *Moro Lakshman*, 11 B 89.

attachment is hardly against his interest in the circumstances supposed , and perhaps may be a statement in his own interest.[1] Where a mortgage-deed executed by a co-sharer is attested by other co-sharers, the attestation amounts to a statement that they had no right in the property, and is thus a statement against their proprietary interest.[2] A declaration by a person in possession that he has only a life-interest in the property is against his proprietary interest;[3] but where the declarant is not in possession, a statement by him that the land of which the defendant is in possession was mortgaged by him to the defendant would be inadmissible in a suit by the deceased declarant's heir to recover possession of the property alleged to be mortgaged.[4] A statement by a deceased landlord that there was a tenant on the land is a statement in derogation of the landlord's propietary interest, as it amounts to an admission that the landlord had parted with at least some of his proprietary rights in the land, namely, the right to possession .[5] Where the question is whether there was partition between the ancestors of the parties, statements made by the deceased ancestors of the parties that there was partition are admissible, as they are against the proprietary interest of the persons making them.[6] A statement made by a deceased *Sapinda* as to the circumstances under which he received a sum of money in connection with an adoption is a statement against his pecuniary or proprietary interest.[7] A statement by a woman that she was merely a concubine and not the lawful wife of a person is a statement against her proprietary interest,[8] since it would deprive her of the right to succeed to the property of that person. A statement that in the declarant's family a son takes interest by birth is against the declarant's proprietary interest.[9] A statement by the deceased manager of a joint Hindu family that he purchased a certain property out of his earnings in the name of his son-in-law and as a provision for him is against his pecuniary interest and, therefore admissible under this Clause.[10] A statement made by a deceased member of an undivided Hindu family residing in Bengal that he is governed by the Mitakshara law is a statement against his proprietary interest and therefore, admissible under this clause.[11] A statement in a will which is against the interest of the testator is admissible even if the testator subsequently cancelled the will.[12] But a statement made by a deceased Hindu in his will that his son was separate from him is a statement in his own favour and therefore not admissible to prove separation.[13] An assertion in a deed of gift that the subject matter of the gift is the donor's property is not a statement against the proprietary interest of the donor.[14]

1. *Harihar Prasad* v. *Gurugranth Sahib*, 128 IC 791 ; 1930 P 610.
2. *Gnanamuthu Nandan* v. *Veilukanda Nadathi*, 79 IC 2 ; 1924 M 542 ; see also *Nagammal* v. *Shankarappa Naidu*, 54 M 576 ; 131 IC 9 ; 1931 M 264.
3. In re *Adams Benton* v,. *Naga Talok Pyu*, 127 LT 528.
4. *Mi Nge Ma* v. *Nga Talok Pyu*, 29 IC 607.
5. *Manik-Biswas* v. *Jagadindra Nath Roy Bahadur*, 24 IC 283 ; *Mohunt Krishen Dayal Gir* v. *Irshad Ali Khan*, 31 C 965 ; *Golab Sao* v. *Chowdhury Madho*, 2 CLJ 5 (n) ; *Leelanund Singh* v. *Lakhputtee Thakoorain*, 22 WR 231.
6. *Jaitram* v. *Narottam*, 124 IC 689 ; 1929 N 131.
7. *Danakoti Ammal* v. *Balasundara Mudaliar*, 36 M 19 ; 18 IC 989.
8. *Parbati* v.*Maharaj Singh*, 10 IC 188.
9. *Ramnath* v. *Sukalsi*, 78 IC 185 ; 1924 N 330.
10. *Suraj Narain* v. *Ratan Lal*, 40 A 159 ; 44 IA 201 ; 40 IC 988 ; 1917 PC 12.
11. *Sukdeb Charan Jana* v. *Mritunjoy Pal*, 43 CWN 395.
12. *Chouda* v. *Rai*, 1939 N 274.
13. *Manglo Mal Sugno Mal* v. *Mst. Padibai*, 1936 S 217.
14. *Markhu Mahto* v. *Saharai Mahto*, 184 IC 246.

Statement of deceased person regarding separation admissible.—The statements of a particular person that he is separated from a joint family, of which he was a coparcener, and that he has no further interest in the joint property or claim to any assets left by his father would be statements made against the interest of such person and after such person is dead, they would be relevant under section 32 (3), Evidence Act. The assertion that there was separation not only in respect of himself but between all the coparceners would be admissible as a connected matter and an integral part of the same statement.[1]

Recitals of boundaries of property in deeds not inter parties, whether admissible to prove ownership or possession of adjoining property?—Recitals of boundaries of property, contained in deeds not *inter parties*, have been held to be admissible to prove ownership or possession of adjoining property, on the ground that, when the deed is a mortgage-deed, it amounts to a statement against the pecuniary or proprietary interest of the mortgagor, inasmuch as he admits therein that he is indebted in a certain sum of money and that this money is a charge on his property[2] and when the deed is a deed of conveyance on the ground that it amounts to a statement against the vendor's interest, inasmuch as he admits therein that he is extinguishing his interest in the property conveyed.[3] The mortgage-deed or the deed of conveyance having thus been held to be a statement against the pecuniary or proprietary interest of the executant of the deed, on the authority of *Higham* v. *Ridgway*[4] the document is made evidence, not only of the precise fact against interest, but of all the collateral facts mentioned therein, and consequently of the possession or ownership of person who are mentioned in the deed as possessing or owning the land adjoining the property mortgaged or coveyed.[5] Another ground on which recitals of boundaries of the land conveyed is held to be against interest is that a statement by the vendor that his land is limited by certain boundaries is an admission that his proprietary interest does not extend over any land beyond the boundaries mentioned in the deed.[6] On the strength of argument stated above, the recitals of boundaries in deeds not *inter parties* have been held in a series of decisions to be relevant to prove the ownership or possession of persons who are mentioned in the deed as possessing or owning the adjoining land. This view originated with the Bombay High Court,[7] and has been accepted as sound in Allahabad[8] and Nagpur.[9] The Calcutta[10] and Patna[11] High Courts also have generally favoured this

1. *Bhagwai Prasad Sah* v. *Dulhin Rameshwari Kuer*, 1951 SCR 603 ; 1952 SC J 115.
2. *Ningava* v. *Bharmappa*, 23 B 63 ; *Thyagarajan Chetty* v. *Narayana Thevan*, 1940 M 450 ; See *Abdullah* v. *Kunja Bhari Lal*, 12 IC 149 ; 14 CLJ 467 ,where a mortgage deed has been treated as amounting also to an admission of the existence of a restriction of proprietary rights ; the same view can be deduced from *Leelanund Singh* v. *Lakhputee Thakoorain*, 22 WR 231.
3. *Abdullah* v. *Kunja Behari Lal*, 12 IC 149 ; 14 CLJ 467.
4. (1808) 10 East 109.
5. *Ketabuddin* v. *Nafar Chandra Pattok*, 99 IC 907 ; 1927 C 230 ; *Ambar Ali* v. *Lutfe Ali*, 45 C 159 ; 41 IC 116.
6. *Rajaddi Sarkar* v. *Ganga Charan Bhattacharya*, 53 IC 863 ; *Ambar Ali* v. *Lutfe Ali* 45 C 159 ; 41 IC 116 ; *Abdullah* v. *Kunja Behari Lal*, 12 IC 149 ; 14 CLJ 467; See also *Ram Sarup Kamkar* v. *Bhagwat Prosad*, 57 IC 194.
7. *Ningawa* v. *Bharmappa*, 23 B 63 ; *Haji Bibi* v. *The Aga Khan*, 2 IC 874.
8. *Tika Ram* v. *Moti Lal*, 52 A 464 : 126 IC 29 ;1930 A 299 ; *Natwar* v. *Alkhu*, 18 IC 752.
9. *Trimarak* v. *Ganesh*, 68 IC 314 ; 1923 N 22.
10. *Pramatha Nath Roy Chowdhury* v. *Bejoy Singh Dudhuria*, 99 IC 910 ; 1927 C 234 ; *Ketabuddin* v. *Nafar Chanda Pattok*, 99 IC 507 ; 1927 C 230 ; *Abdul Rahim Kazi* v. *Jonabali Sikdar*, 68 IC 329 ; 1928 C 299 ; *Reajaddi Sarkor* v. *Ganga Charan Bhattacharya*, 53 IC 863 ; *Amer Ali* v. *Lutfe Ali*, 45 C 159 ; 41 IC 116 ; *Kangali Molla* v. *Ben Madhab Biswas*, 34 IC 534 ; *Imrit Chamar* v. *Sirdhar Pandey*, 13 IC 120 : 15 CLJ 7 ; *Abdullah* v. *Kunja Behari Lal*, 12 IC 149 ; 14 CLJ 467.
11. *Ramnandan Prasad* v. *Laley Tilkdhari Lal*, 145 IC 944 ; 1933 P 636 ; *Ram Sarup Kamkar* v. *Bhagwat*

view, though the trend of their recent decisions is in the opposite direction.[1] The Madras High Court, on the other hand, holds that it is not the document but the statement that must be against interest,[2] and that the statement in a deed that the executant's property is bounded on the north south east or west by a certain other man's property is not against the executant's interest,[3] except on the assumption that every person must be presumed to own the universe until he makes a statement circumscribing his title. A person is presumed to own nothing until he brings into existence an effective deed with the boundaries stated therein, and this being so, a document of this kind is not against, but in favour of, the proprietary interest of a person.[4] Therefore, the Madras High Court had held that such recitals of boundaries are not admissible under this clause of the section [5] and this view, as already mentioned, is supported by the later decisions of the Calcutta High Court[6] and some recent decisions of the Patna High Court.[7] The Lahore High Court also has held such recitals to be inadmissible.[8]

It is submitted that the view taken of this matter by the Madras High Court is more consonant with the principle on which Section 32 is based. Recitals in a deed are, strictly speaking, evidence only as against the parties to the deed and those claiming through or under them.[9] As against others they are *res inter alios actae* and, as such, inadmissible, unless they come within the terms of any clause of Section 32.[10] It is clear from the words used in the opening part of Section 32, viz., "statements written or verbal of relevant facts " and the words of clause (2), viz., "when the statement is against the pecuniary or proprietary interest" that the statement must not only relate to a relevant fact but must itself be against the pecuniary or proprietary interest of the person making it. The view of the Madras High Court, therefore, that it is the statement sought to be proved, and not the document containing it, which must be against interest[11] is supported by the terms of the section itself. Excepting some cases of the

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Prosad, 57 IC 194 ; *Lalu Singh* v. Sahdeo Singh, 36 IC 610.

1. *Ambica Charan Kundu* v. *Kumud Mohan Chaudhury*, 110 IC 521 ; 1928 C 893 ; *Kumuda Kumar Dasi* v. *Dilsook Roy* 101 IC 542 ; 1927 C 918 ; *Braja Mohun Das Adhikari* v. *Gaya Prosad Karan*, 97 IC 265 ; 1926 C 948 ; *Damodar Poddar* v. *Jadunath Dutt*, 53 C 448 ; 91 IC 449 ; 1926 J 91 (1) ; *Abdul Karim* v. *Chhale Ahmed*, 91 IC 688 ; 1926 C 479 ; *Chooni Lal Khemani* v. *Nil Madhab Barik*, 84 IC 734 ; 1925 C 1034 ; *Pramatha Nath Choudhury* v. *Krishna Chandra Bhattacharjee*, 84 IC 420 ; 1924 C 1067 ; *Hari Ahir* v. *Sir Sangat Chacha*, 152 IC 829 ; 1934 P 617.
2. *Karupanna Konar* v. *Rangaswami Konar*, 107 IC 293 ; 1928 M 105 (2).
3. In re *Daddapaneni Narayanappa*, 8 IC 268.
4. *Karupanna Konar* v. *Rangaswami Konar*, 107 IC 293 ; 1928 M 105 (2).
5. *Aiagiri Navakar* v. *Perumal Nayakar*, 80 LW 422 ; *Karupanna Konar* v. *Rangaswami Konar*, 107 IC 293 ; 1928 M 105 (2); *Saripalli Venkatarayagopala Raju* v. *Fota Narasayya*, 26 IC 747 ; In re *Daddapaneni Narayanappa*, 8 IC 268 ; contra *Thyagarajan Chetty* v. *Naryana Thevan*, 1940 MWN 80 ; 1940 M 450.
6. *Ambica Charan Kundu* v. *Kumud Mohan Chaudhury*, 110 IC 521 ; 1928 C 893 ; *Kumuda Kumari Dasi* v. *Dilsook Roy*, 101 IC 542 ; 1927 C 918 ; *Braja Mohun Das Adhikari* v. *Gaya Prosad Karan*, 97 IC 265 ; 1926 C 948 ; *Abdul Karim* v. *Chhale Ahmad*, 91 IC 688 ; 1926 C 479 ; *Chooni Lal Khemani* v. *Nil Madhab Barik*, 86 IC 734 ; 1925 C 1034 ; *Pramatha Nath Choudhuri* v. *Krishna Chandra Bhattacharjee*, 84 IC 420 ; 1924 C 11067.
7. *Soney Lall Jha* v. *Darbdeo Narain Singh*, 14 P 461 ; 155 IC 470 ; 1935 P 167 (FB) ; *Hari Ahir* v. *Sri Sangat Chacha*, 152 IC 829 ; 1934 P 617.
8. *Nanakchand* v. *Main Muhammad Shahbaz Khan*, 1936 L 114 ; *Daulat, Shah* v. *Bishan Das*, 1934 L 750 ; *Ghulam Mohammad* v. *Kalim Ullah*, 109 IC 728 ; 1928 L 428 ; *Lijpat Rai* v. *Faiz Ahmad*, 8 L 651 ; 103 IC 889 ; 1927 L 448.
9. *Shrinivasdas Bavri* v. *Meherbai*, 41 B 300 ; 44 IA 36 ; 39 IC 627 : 1916 PC 5.
10. *See Rani Srimati* v. *Khagendra Narayan Singh*, 31 C 871 : 31 IA 127 (PC).
11. *Karupanna Konar* v. *Rangaswami Konar*, 107 IC 293 ; 1928 M 105.

Calcutta High Court,[1] there is hardly any authority for the proposition that a mere recital of boundaries of the land transferred is against the transferor's interest. "I fail to see", said Aiyar, J.,[2] "how it is a statement against the interest of a person to say that his property is bounded on the north, south, east or west by a certain other man's property." Again, it is difficult to see how a deed of transfer as such is against the transferor's interest. In fact, the deed is an assertion on the part of the transferor that he has a transferable interest in the property. The inherent character of such a deed is not that of a statement against interest,and if the argument that, since it extinguishes or restricts the rights of the transferor, therefore, it is a statement against the transferors interest, be taken to its logical conclusions, it would make all recitals of relevant facts in deeds of transfer evidence between persons who were no parties to them. The English rule of statements in disparagement of title is not applicable to such cases, as that rule applies to statements made by an occupier of property with reference to the property occupied, and *ex hypothesi* the executant of a deed of a transfer is not in possession of the adjoining property to which the statement relates. Further, it is submitted that such cases are governed more by the rule in *Crease* v. *Barrett*[3] than by the rule in *Higham* v. *Ridgway*.[4] This latter English case forms the foundation of the series of cases which are in favour of the admissibility of such recitals, but, as remarked by Mukerji, J., this case was taken by the Indian Legislature only as illustrative of what is meant by the expression "ordinary course of business" as used in clause (2) of Section 32, and it is extremely doubtful if the Legislature at all intended to incorporate it in its entirety in Section 2 of the Act.[5] Of course, where the executants of the document containing a recital of boundaries are not shown to be dead or unavailable, there is no question of the application of Section 32 and the recital would be entirely inadmissible.[6] See notes to Section 13.

Meaning of a statement being "against interest".—The statement must be to the immediate prejudice of the declarant.[7] It must be *prima facie* against the declarant's interest, that is to say, the natural meaning of the statement standing alone must be against the interest of the person who made it.[8] If *prime facie* against interest, it will not affect its admissibility, though it may its value, to prove by other evidence that it was really in favour of the declarant.[9] Further,the statement must have been against interest at the time it was made; it is not enough that it might possibly turn out to be so

1. *Reajaddi Sarkar* v. *Ganga Charan Bhattachariya*, 53 IC 863 ; *Ambar Ali* v. *Lutfe Ali*, 45 C 159 ; 41 IC 116 ; *Abdullah* v. *Kunja Behari Lal*, 12 IC 149 ; 15 CLJ 7.
2. In re *Daddapaneni Narayanappa*, 8 IC 268 ; see also observations in *Karupanna Konar* v.*Rangaswami Konar*, 107 IC 293 : 1928 M 105.
3. *Crease* v. *Barrett*, 1.C.M.& R. 919. In this case the question being whether a certain spot was within the waste of a manor, a declaration by the deceased lord that "he was entitled to the waste up to a certain point (which did not include the *locus in quo*) but no further was held inadmissible on the ground (i) that the lord was not in possession of the *locus*; and (ii) the statement was not against his proprietary interest, because, though disclaiming as to one part, he affirmed as to the other:" see Phipson, Ev., 6th Ed., 284.
4. *Higham* v. *Ridgway*, (1808) 10 East 109.
5. *Ambica Charan Kundu* v. *Kumud Mohan Chaudhury*, 110 IC 521 : 1928 C 893.
6. *Abdul Rahim Kazi* v. *Jonabali Sikdar*,68 IC 329 : 1923 C 299.
7. *Ramnathan Chetty* v. *Murugappa Chetty*, 33 IC 969.
8. *Taylor* v. *Witham*,(1876) 3 Ch D 605; *Ramnathan Chetty* v.*Murugappa Chetty*, 33 IC 969 ; *Markhu Mahto* v. *Saharai Mahto*, 1940 P 16; where it has been remarked that where the fact that the declaration is against the declarant's interest does not clearly appear from the statement itself, it is permissible to give independent evidence to supply this want".
9. Re *Adams*, (1922) P.240; *Taylor* v.*Witham*,(1876)3 Ch D 605.

afterwards.[1] The extent of the interest affected is immaterial for purposes of admissibility of a statement, though it may be material for determining its value;[2] but the statement must have been to the knowledge of the declarant, contrary to his interest.[3] In determining whether statement is against the interest of the person making it, we must look to the statement itself and not to the nature of the transaction in the course of which the statement was made.[4]

Personal knowledge on the part of the declarant of the fact stated necessary.—Declarations against interest have been admitted, though the declarant had no Personal knowledge of the facts and received them merely on hearsay;[5] but in a comparatively recent English case, in which no reference was made to the earlier case cited in the preceding footnote, Lord Justice Hamilton has held it to be necessary for the reception in evidence of a Statement against interest not only that the statement must have been, to the knowledge of the declarant, contrary to his interest, but also that the declarant must have had personal knowledge of the facts stated,[6] and the same view of this matter seems to have been taken in India.[7]

Collateral and incidental facts mentioned in the statement are admissible.—Where a statement is against the interest of the declarant, it becomes admissible in its entirety[8] and as to every fact contained in it.[9] The statement is evidence not only of the specific fact against interest, but of all collateral or incidental facts contained in the statement, which are not foreign to the part actually against interest.[10] Declarations are evidence not only of the precise fact against interest, but of all connected facts, though not against interest, which are necessary to explain or are expressly referred to by the declarant.[11] The statement of a deceased person, which is against the pecuniary or proprietary interest of that person, or which would expose him to a criminal prosecution or a suit for damages, is admissible not only against that person, but also against other persons mentioned or referred to therein, provided that the reference to such third persons is not foreign to that portion of the statement which is against the interest of the declarant.[12] In the leading English case on the subject, *Higham* v. *Ridgway*[13] an entry

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1. Exparte *Edwards*, (1885) 14 QBD 415 ; *Ramanathan Chetty* v.*Murugappa Chetty*, 33 IC 969 ; *Hollaram* v. *Dwarkadas*, 1939 S 145 ; *Arjun Sukla* v.*Jujesthi Sukla*, 1954 Orissa 52 ; see *Mahmood Khan* v.*E.*, 1942 S 106.
2. Phipson, Ev., 6th Ed., 278 ; see *Shivamanand Das Mohapatra* v. *Rama Kanta Das Mohaptra*, 32 C 6 ; *Hollaram* v. *Dwarkadas*, 1939 S 145.
3. *Lloyd* v. *Powel, etc.*, (1913) 2 KB 130 ; *Ramanathan Chetty* v. *Murugappa Chetty*, 33 IC 969 ; on the question whether the declarant must be conscious that the statement expose him to prosecution, see *Nga Te* v.*E.*, 20 IC 990: 14 Cr LJ 510.
4. *Markhu Mahto* v.*Saharai Mahto*, 184 IC 246 : 1940 P 16.
5. *Percival* v.*Nanson*, (1851) 7 Ex. 1 ; *Crease* v. *Barrett*, 1 CM & R 919 ; Taylor § 669.
6. *Lloyd* v.*Powell, etc, Co.*, (1913) 2 KB 130 (CA).
7. *Ramnathan Chetty* v.*Murugappa Chetty*, 33 IC 969 ; *Savitri Devi* v. *Ram Ran Bijoy Prasad Singh*, 1950 PC 1 : 63 MLW 45 : 54 CWN 233 : 76 IA 255 : 1950 ALJ 134 : 1950, 1 MLJ 163.
8. *Sita Ram Singh* v. *Khub Lal Singh*, 5 P 168 : 94 IC 13 : 1926 P 255 ; see *Leelanund Singh* v. *Lakhputtee Thakoorain*, 22 WR 231.
9. *Ambar Ali* v. *Lutfe Ali*, 45 C 159 : 41 IC 116.
10. *Reg* v. *Overseer of Birmingham*, (1861) 1 B & S 763 ; *Mohamnad* v.*E.*, 89 IC 252 : 1926 L 54 : 26 Cr LJ 1308 ; *Ningawa* v. *Bharmappa*, 23 B 63.
11. Phipson's Manual of Ev., 4th Ed., 121 ; Steph. Dig., Art 28 ; *Sisir Kumar Saha* v.*Jogneswar Shah*, 42 CWN 359.
12. *Mohammad* v. *E.*, 89 IC 252 : 1926 L 54 : 26 Cr LJ 1308.
13. *Higham* v. *Ridgway*, (1808) 10 East 109.

made by a deceased man to a midwife in his own books of the payment of his charges for attending a confinement was treated as evidence of the date of child's birth, a fact which was merely collateral to the actual fact against interest, viz., the admission of the payment of charges. A statement by a deceased person in a mortgage-deed that he is indebted in a certain sum of money which is a charge on his land being a statement against his pecuniary and proprietary interest, a recital in the mortgage-deed that the adjoining land belongs to a particular person is admissible to prove that person's ownership of the adjoining land.[1] The statement of a particular person that he is separated from a joint family, of which he was a co-parcener, and that he has no further interest in the joint property or claim to any assets left by his father, would be statements made against the interest of such persons, and, after such person is dead, they would be relevant. The assertion that there was separation not only in respect of himself but between all the co-parceners would be admissible as a connected matter and an integral part of the same statement. It is not merely the precise fact which is against interest that is admissible but all matters that are involved in it and knit up with the statement.[2]

Statement exposing its author to a prosecution or a suit for damages.—According to English law, the interest involved must be pecuniary or proprietary; no other, even though a penal kind, will suffice.[3] The Act, however, departs from the English rule by making admissible statement which, if true, would expose their author to a criminal prosecution or to a suit for damages, and the Indian rule is more consistent with the principle on which such hearsay is admitted.

Whole statement admissible.—The principle that the whole of the statement against interest, including parts which are not against interest is admissible, is applicable to a statement which is admitted on the ground that it would expose its author to a criminal prosecution or to a suit for damages.[4]

If a person has witnessed a murder, it is his duty under section 44. Cr.P.Code, to give information of such murder, forthwith to the nearest Magistrate or Police Officer and the omission to give such information is punishable under section 202 of the Indian Penal Code. Therefore, the statement of a deceased person, who witnessed a murder but did not inform the authorities of it, that he witnessed the accused committing the murder is admissible under this clause.[5] A statement made by the mate of a vessel admitting responsibility for a collision is admissible under this clause.[6] A statement made by a person to a village headman that he set fire to a heap in the village exposes him to a criminal prosecution that is, therefore, admissible if the person who made it has disappeared.[7] In a divorce suit filed in India by the husband on the ground of adultery, a letter written to him by the co-respondent who lives in England admitting adultery with the respondent is admissible in evidence under section 32 (3) Evidence Act, as the admission of adultery would expose him to a criminal prosecution.[8]

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1. *Ningawa* v.*Bharmappa*,23 B 63. This view has not been accepted as correct in some cases. See notes to this clause under the heading "recitals of boundaries in deeds, etc."
2. *Bhagwati Prasad Sah* v.*Dulhin Rameshwari Kuer*,1952 SC 72 : 1952 SCJ 115.
3. Phipson, Ev., 6th Ed., 278 ; Sussex Peerage Case, 11 C & F 103.
4. *Mohammad* v.*E.*,89 IC 252 : 1926 L 54 : 26 Cr LJ 1308.
5. *Ajodhi* v.*E.*,56 IC 582 : 21 Cr LJ 486.
6. *Asiatic Steam Navigation Co.*v.*Bengal Coal Co.*, 35 C 751.
7. *S. Paul De Silva* v.*The Korossa (Ceylon) Rubber Co., Ltd.*, 1919 PC 231.
8. *Cockman* v.*Cockman*,56 A 570 : 150 IC 445 : 1934 A 618.

Statement by accomplices.—The statement of a deceased accomplice to the police detailing the incident of the crime and incriminating him self and the accused is admissible against the latter, provided the reference to the accused is not foreign to that part of the statement, which is against the interest of the deceased declarant.[1] Similarly, the confession of an accused person who is dead, implicating him self and an accomplice in a crime, is admissible notwithstanding the provisions of Section 30, illustration (b).[2] The statement of a deceased convict incriminating himself but exonerating the accused from guilt, is admissible in favour of the accused.[3]

Admissibility of confessional statements made to the police by a deceased accomplice doubtful: Sections 32 (3), 25, 26 and 30, Evidence Act, and Section 162, Cr.P.Code. It will be noticed that a statement made by a deceased accomplice in the course of police investigation, incriminating himself and others, has been held admissible in some cases.[4] If the maker of the statement had been alive, there is no doubt that such statement would have been in-admissible, under Section 25 and 26 of the Act, against its author, and it is difficult to see on what principle an incriminating statement, which would have been inadmissible even against its maker if he had been alive, can be held admissible against others.[5] Further, a statement of this kind is inadmissible under Section 30, as, *ex hypothesi;* its maker is not being jointly tried with those against whom the statement is sought to be proved, and Section 30 being the only exception recognized to the general rule that a confession is evidence against its maker and not against others, it is doubtful whether the special rule enacted in Section 30 can be read subject to the general provisions of Section 32 (3).[6] Lastly, Section 162 of the Criminal Procedure Code, as amended in 1923, makes statements made in the course of police investigation inadmissible; and the admission of such statements clearly contravenes this provision of the Code.[7] The admission, under this clause, of statements, made by an accomplice to the police after the police have started investigating the case against him also contravenes the rule laid down by the Bombay High Court[8] that this clause does not apply to statements which are made after prosecution has been actually started.

Relief that the statement would expose its maker to prosecution is necessary.—Where the declarant was a police spy who had joined the dacoits to assist the police but was mortally wounded, and who made a statement before his death implicating himself and others, the statement was held inadmissible on the ground that, at the time he made the statement, he could not have the slightest idea that he would be prosecuted.[9]

Statement made after prosecution has commenced or after the risk of prosecution has passed away are inadmissible.—The principle underlying Section 32(3) is that when a person makes a statement rendering him liable to criminal prosecution, the

1. *Mohammad* v.*E.*,89 IC 252 : 1926 L. 54 : 26 Cr LJ 1308.
2. *Nag Poyin* v. *E.*,5 Cr LJ 300 ; see also Cr. A 450 of 1937. *Sardha Ram* v.*Crown* (*Lahore*), and Cr. A 659 of 1939. *Labhu Ram* v.*Crown* (*Lahore*) decided by Ram Lal and Din Mohammad, JJ., on Oct. 3 1939.
3. *Sheikh Shafi* v.*E.*,124 IC 459 : 1930 N 259.
4. *Mohammad* v.*E.*,89 IC 252 : 1926 L. 54 : 26 Cr. LJ 1308 : *Ajodhi* v.*E.*,56 IC 582 : 21 Cr. LJ 486.
5. See *Keratali* v.*E.*,61 C 967 : 150 IC 980 : 1934 C. 616 : 34 Cr. LJ 1178.
6. See *Keratali* v.*E.*,61 C 967 : 150 IC 980 : 1934 C 616 : 35 Cr LJ 1178 ; *Dengo Kandero* v.*E.*,1938 S 94 held contra *Nga Poyin* v.*E.*,5 Cr LJ 300.
7. See *Narayana Swami* v.*E.*,1939 PC 47.
8. *E.*v.*Keshav Narayan Manolkar*,25 Bom. LR 248, followed in *Janu* v.*E.*,ILR 1946 Kar. 79.
9. *Nag Te* v.*E.*,20 IC 990 : 14 Cr. LJ 510 ; as to whether the statement should, to its maker's knowledge, be against interest, see *Ramanathan Chetty* v.*Murugappa Chetty*,33 IC 969.

statement is likely to be a true statement. Therefore a statement made by a person against whom there is already in existence evidence which would lead to his prosecution and conviction, is inadmissible under this section.[1] This clause of Section 32 does not apply to a statement made by an accused person after the charge has been preferred against him. Therefore, where one of the accused persons made a statement before the committing Magistrate implicating himself and the other accused persons and then died, the statement was held inadmissibile against the latter, as it was made after the former had incurred the liability for prosecution.[2] A confession made by a deceased accomplice or conspirator after he had rendered himself liable to criminal prosecution is not admissible under Section 23(3)[3] The words 'would have exposed him' require some observation. They will no doubt be construed to mean 'would have exposed him at the time that the statement was made.' It could never have been intended that a statement after the risk had passed away, as after the expiry of the two years within which prosecution for offences under the Indian Christian Marriages Act must be instituted,[4] should be admitted merely because, if made some months or weeks earlier, it would have exposed its maker to a criminal prosecution or to a suit for damages. This view has since been supported by the Calcutta High Court,[5] and is generally adopted by modern authorities."[6]

Statement falling within Section 32(3) are admissible under Section 21 in the declarant's lifetime.—A statement which amounts to an admission and falls within the purview of Section 32 (3) is admissible even during the declarant's lifetime under Section 21(1). Thus, where a landlord purchased his tenant's holding in execution of a decree against him, and the landlord stated that the area held by the tenant was 20 *bighas*,it was held that the statement was against the proprietary interest of the landlord and was, therefore, admissible in favour of the landlord under Section 32(3) and Section 21.[7]

CLAUSE (4): DECLARATIONS AS TO PUBLIC AND GENERAL RIGHTS

Principle and reason of the rule.—In proof of public or general rights and customs or matters of public or general interest statements made by deceased persons of competent knowledge as to the existence of such rights. etc., and as to the general reputation thereof in the neighbourhood, if made *ante litem motam*, are admissible. Such statements are known as declarations as to public and general rights.[8] Such declarations are admissible, even if they be no more than evidence of reputation or hearsay.[9] The

1. *Achhailal* v.*E.*,ILR 25 P 347 : 1947 P 90.
2. *E.*v.*Keshav Narayan Manolkar*,25 Bom. LR 248 ; but see *Sheikh Shafi* v.*E.*,124 IC 459 : 1930 N 259, where a statement made after trial and conviction and just before execution of death sentence was, with some degree of doubt, held admissible; *Mohammad* v.*E.*,89 IC 252 : 1926 L 54 : 26 Cr. LJ 1308, where statement made by the deceased after he had been charged by the police was admitted.
3. *Janu* v.*E.*,ILR 1946 Kar. 79 ; *Kunja Lal Ghose* v. *E.*, 38 CWN 1015.
4. See Section 76, Act XV of 1872.
5. See *Nichols* v.*Asphar*,24 C 216.
6. Field, Ev.,8th Ed., 184.
7. *Manik Biswas* v.*Jagdindra Nath Roy Bahadur*,24 IC 283.
8. *Weeks* v.*Sparke*,(1813) 1 M & S 679 : Cockle's Cases and Statues, 4th Ed., 221, 222 ; *Ram Parshad* v.*Gurdwara Prabandhak Committee*, 12 L 497 : 135 IC 657 : 1931 L 161, *State of Bihar* v.*Radha Krishna Singh*,1983 SC 684 (Paragraphs, 134 & 135).
9. *Busiod* v.*Newaz Ahmed Khan*,119 IC 116 : 1929 C 533.

grounds on which this species of evidence is received are thus stated by Taylor: "The origin of the rights claimed is usually so ancient and the right themselves are of so undefined and general a character, that direct proof of their existence and nature can seldom be obtained and ought not to be required; that in matters in which the community are interested, all persons must be deemed conversant; that as common rights are naturally talked of in public and as the nature of such rights much lessens the probability, if it does not exclude the possibility, of individual bias, what is dropped in conversation respecting them may be presumed be to true; that the general interest which belongs to the subject would lead to immediate contradiction from others, if the statement advanced were false; that reputations can hardly exist without the concurrence of many parties unconnected with each other, who are all more or less interested in investigating the subject ; that such concurrence furnishes strong presumptive evidence of truth; and it is this prevailing current of assertion which is resorted to as evidence, for to this every member of the community is supposed to be privy, and to contribute his share."[1] The reason of this execution, in favour of hearsay evidence is partly necessity, since without such evidence ancient rights could rarely be established : and partly that the public nature of the right minimizes the risk of mis-statement.[2] This sub-section allows evidence of opinion in respect of any matter of public or general interest, the test being whether the deceased person expressing the opinion was likely to have knowledge of the fact stated.[3]

Condition of admissibility.—The conditions of admissibility of a statement under this clause are : (i) the statement must be in the form of an expression of opinion of a person who cannot be called as a witness for any of the reasons mentioned in the section,(ii) the opinion must relate to the existence or non-existence of a public right or custom, or a matter of public or general interest, (iii) the opinion must be of a persons who would have been likely to be aware of the existence of the right, custom or matter to which the opinion relates, and (iv) the opinion must have been expressed before any controversy as to the existence of that right, custom or matter arose.

Statement must relate to the existence of the right or custom and not to particular facts evidencing the existence of that right or custom.—What this clause makes relevant is a statement giving the opinion of a person, as to the existence of a public right or custom, or a matter of public or general interest. Therefore, the statement must relate directly to the existence of the right itself and not to particular facts which may support or negative it, as the latter, not being equally notorious, are liable to be misrepresented and misunderstood,[4] and may have been connected with other facts by which, if known, their effect might be limited or explained.[5] Thus, where the question was whether a road was public or private, a statement made by a deceased resident that he had planted a tree to mark the boundary of the road was held inadmissible, on the ground that the statement did not describe the road as public or private but related to a particular fact.[6] Although hearsay evidence is good evidence of reputation in matters of

1. Taylor, § 608.
2. *Busoid* v.*Newaz Ahmed Khan*,119 IC 116 : 1929 C 533.
3. *Ram Parshad* v.*Gurdwara Parbandhak Committee*, 12 L 497 : 135 IC 657 : 1931 L 161.
4. *R.v.Bliss*,(1837) 45 R R 757 ; Cockle's Cases and Statutes, 4th Ed 227 ; *Phipson,Ev.*, 6th Ed 296 ; Taylor, § 617 ; *Ram Parshad* v.*Gurdwara Parbandhak Committee*,12 L 497 : 135 IC 657 : 1931 L 161.
5. Taylor, § 617.
6. *R.v. Bliss*, (1837) 45 R R 757.

public interest, it is not good evidence of particular facts.[1] A statement of a deceased person that in his family or caste such and such a custom obtain is admissible under this clause, but a statement by such persons that the custom was followed on a particular occasion is inadmissible.[2]

Public rights versus private right; statement asserting the existence of a private right admissible to prove the non-existence of a public right.—Declarations are receivable, which not only directly negative a general right, but which indirectly do so, e.g., by setting up an inconsistent private claim,[3] or by omitting all mention of it where mention might reasonably be expected.[4] No distinction can be drawn between the evidence of reputation to establish, and that to disparage, a public right. Thus, where the question was whether certain forest tracts were State property or whether they were included within the limits of the private property of the plaintiff *Zamindar*, documents which furnished proof of inclusion of the said tracts within the limits of the *Zamindari* were held admissible.[5] But in a Bombay case[6] it has been remarked that this clause is inapplicable to a document which purports to deal with the rights of a private individual as against the public, and in which the interest of the individual forms the subject-matter of the statement.

Statement must give the declarant's opinion and must not be a mere repetition of hearsay sections 32(4). 48 and 49.—In a case[7] decided under the provisions of section 49, Privy Council has held that a mere repetition of hearsay, as distinguished from an independent opinion based on hearsay, is inadmissible. Though section 32(4) only applies to opinions of deceased persons, the principle of this Privy Council decision should be equally applicable to statements admitted under this clause of the section inasmuch as section 49 and section 32(4) both deal with the relevancy of opinion the former with the relevancy of the opinion of living persons, the latter with the relevancy of the opinion of deceased persons, and should, therefore, be governed by the same principle. A statement that is given in evidence under this clause must give the independent opinion of the deceased declarant as to the existence of the right or custom in question, though the opinion may be based on nothing but reputation, which is another name for hearsay. But if the statement is merely a reproduction of hearsay, and not an independent opinion based on hearsay the statement will be inadmissible.[8] The grounds of the opinion of a deceased person as to the existence of a custom even if stated to a witness, cannot, as such, be proved under this clause of the section.[9]

Public right or custom, or matter or public or general interest.—"Public rights" are those that are common to all members of the State,e.g. rights of highway and ferry, or of fishery in tidal rivers. "General rights" are those affecting any considerable

1. *R.v.Berger*,(1894) 1 QB 823.
2. *Mst. Parbati v.Rani Chandrepal*, 8 OC 94.
3. *Drinkwater v.Porter*,7 C & P 181.
4. *Edgar v.Fisheries Comms*, 23 LT NS 723 : Taylor, 620 ; Phipson Ev. 6th Ed 296.
5. *Shivasubarmanya v.Secretary of State*, 9 M 285.
6. *Heiniger v.Droz.*, 25 B 433.
7. *Garudhwaja Prasad v.Superundhwaja Prasad*, 23 A 37 : 27 IA 238 (PC), followed in *Partap Chandra Deo Dhabal Deb v Jagdish Chandra Deo Dhabal Deb*,82 IC 886 : 1925 C 116, referred to in *Mst. Parbati v. Rani Chandrepal*, 8 OC 94 ; *Prabhu Narain Singh v Jitendra Mohan Singh*,1948 O 307 : 22 Luck 522.
8. See *Mst. Amina Khatun v.Kalilurrahman Khan*,8 Luck 445 : 1933 O 246 : *Pratap Chandra Deo Dhabal Deb v Jagdish Chandra Dhabal Deb*,82 IC 886 : 1925 C 116.
9. *Mst. Parbati v.Rani Chandrepal*, 8 OC 94.

section of the community, e.g.,question as to the boundaries of a parish or manor.[1] The Act does not anywhere define the expression "public right,"but the expression "general right" has been defined as including rights common to any considerable class of persons.[2] This clause of the section does not expressly refer to general rights, but they seem to have been included in "matters of public or general interest." The terms "public" and general are sometimes used as synonyms, meaning merely what concerns a multitude of persons.[3] The term "interest" in the expression "matters of public or general interest" does not mean that which is interesting from gratifying curiosity, or a love of information or amusement, but that in which a class of the community have a pecuniary interest, or some interest by which their legal rights or liabilities are affected.[4] Where the statement does not relate to a public right of custom, or a matter of public or general interest, it is inadmissible.[5] The clause does not justify the admission of a statement, where the question is whether a person was, at the time of his death, joint with, or separate from, others; or whether he survived another.[6] But a statement in a deed that a certain place is a *masjid* is a statement on a matter of general interest and, therefore, admissible under this clause.[7] The question of the limits of a particular revenue *mahal* is not a matter of public right or public or general interest.[8] Recitals as to boundaries of plots in any document do not constitute the opinion of the executent of the deed on any matter. Therefore such recitals are not admissible.[9]

Statement is admissible whether the right or custom be a fact in issue or merely relevant.—Where the question was whether a widow could adopt without the express authority of her husband a statement to the effect that she could do so was held inadmissible, on the ground that the alleged custom was a fact in issue in the case and not merely relevant, and that this section only applies to statements of relevant facts and not to statements of facts in issue.[10] This Bombay decision has, however, been disapproved in a later case, where it has been remarked that facts in issue are included in relevant facts, and that this section is applicable whether the statement relates to a fact in issue or to a relevant fact.[11] It is submitted that the language of different clauses of the section and the illustrations appended to the section clearly indicate that statements relating to facts in issue are within the section; though, at the same time, it must be observed that the whole scheme of the Act shows that the expression "facts in issue" is used in contradiction to the expression "relevant facts".[12]

Declaration as to private rights are inadmissible.—Declaration by deceased persons as to private rights are inadmissible, since these are not likely to be so commonly or correctly known, and are more likely to be misrepresented.[13] This clause is inappli-

1. Phipson, Ev., 6th Ed., 294.
2. Section 48.
3. Taylor, § 609.
4. *R.* v.*Bedfordshire*,(1855) 4 E & B 535.
5. *Motilal* v.*Baba Baldeo Dass*, 1952 VP 36.
6. *Mst. Parbati* v.*Rani Chandrepal*, 8 OC 94.
7. *Busoid* v. *Newaz Ahmed Khan*, 119 IC 116 ; 1929 C 533.
8. *Maharaja Sir Kesho Prasad Singh* v. *Bahuria Mst. Bhagjogna Kuer*, 16 P 258 : 1937 PC 69 : 167 IC 329.
9. *Ram Saran* v. *Narayan Chandra*, 1954 C 125
10. *Patel Vandravan Jekisan* v. *Patel Manilal Chunilal*, 15 B 565
11. *Raghubhushana Tirthaswami* v. *Vidiavaridhi Tirtl. iswami*, 34 IC 875, per Abdul Rahim, J.
12. See the definition of these two expressions in section 3 and the Chapter on Relevancy
13. *Dunraven* v. *Llewellyn*, 15 QB 791 ; Phipson, Ev., 6th Ed., 294.

cable to a document which purports to deal with the rights of a private individual as against the public and in which the interest of the individual forms the subject-matter of the statement.[1] But in a Madras case[2] a statement asserting the right of an individual as against the State was held admissible, on the ground that no distinction can be drawn between the evidence of reputation to establish, and that to disparage, a public right, and this Madras case is in accordance with the English rule.[3] The public or general right, or matter of public or general interest, which is sought to be established by reputation, or by declarations of deceased persons, must be one that is common to all the persons interested, e.g., a right common to all the inhabitants of a particular manor. A right is not within the rule simply because it is enjoyed by many persons in their own individual capacities, such as a right of common enjoyed by several persons in the same manor in their individual capacities, or an aggregate of private rights.[4]

Statement must be by a person likely to be aware of the existence of the right, custom or matter in question ; competency of the declarant; entries in wajibulariz.—The distinction between a public right and a general right has already been noticed.[5] In English law, the distinction between "public rights" and "general rights" is material; in as much as whereas, in the case of "public rights," all being concerned may generally be presumed competent, so that the absence of peculiar means of knowledge goes, strictly speaking, to weight and not admissibility, in the case of "general rights." the competency of the declarant has to be proved.[6] The distinction between "public rights" and "general rights" is not however, of much importance under the Act as, whether the right be "public" or "general", the "competency" of the declarent has to be established. A declarant is considered competent" when, by residence, duty or other connection, he was so situated as to the place in question that it may be concluded he had both the means and the motive for giving a true account of the matter.[7] Where a custom was sought to be established by the entries in certain *wajibularaiz* which were certified by a person belonging to the family affected by the custom, and which appeared by internal evidence to have been prepared on the information furnished by the Zamindars of the village, the entries were held relevant, under this clause, to prove the existence of the custom.[8] On a question of custom, a witness having special means of knowledge may state his own opinion, or he may state what he heard from deceased person having special means of knowledge as to the existence of that custom.[9]

Statement must have been made before the commencement of the controversy; lis mota; Section 32(4) and Section 49.—The statement must, in order to prevent bias, have been made *ante litem motam*, i.e., before the commencement of any controversy, and not merely before the commencement of any suit involving the same subject-matter. Statements made after the commencement of the situation from which the controversy springs are admissible, if made before any dispute has in fact arisen; whilst

1. *Heiniger* v. *Droz*, 25 B 433.
2. *Sivasubramanya* v. *Secretary of State*, 9 M 285.
3. See *Drinkwater* v. *Porter*,7 C & P 181.
4. *Dunraven* v. *Llewellyn*, 15 QB 791 ; Cockle's Cases and Statues, 4th Ed., 224, 225.
5. See notes under the heading "public right or custom, or matter of public or general interest".
6. Phipson, Ev., 6th Ed., 295.
7. *Newcastle* v. *Broxtowe*, (1832) 4 B & Ad 273 ; Cockle's Cases and Statues, 4th Ed., 228.
8. *Baji Nath Singh* v. *Bahadur Singh*, 91 IC 583 : 1926 O 101 : 12 CLJ 571.
9. *Ikbal Narain* v. *Rajendra Narain*, 48 IC 767.

those made after a dispute has arisen are inadmissible, although the dispute was unknown to the declarant, or was fraudulently commenced with a view of excluding the statements, or involved different parties or related to different property or claims.[1] Statements relating to a custom are inadmissible, if they were made after a controversy as to that custom had arisen.[2] A statement that the testator had no power to make the will contained in an objection petition filed in a probate case, is not admissible in another proceeding, to show that one of the members of the family had admitted the existence of prohibition on testamentary disposition in the family as the controversy about the right of making a will is to be considered as having commenced before the objection petition was filed.[3] Section 32 is a special section providing in what cases statements of deceased persons would be admissible. Such statements have not the sanction of oath and the person making them cannot be subject to cross-examination. It is necessary, therefore, that the statements should not be made under bias, i.e.after a controversy has arisen. Clause 4 of this section accordingly provides that statements of deceased persons are admissible only if they were made before the controversy had arisen. Therefore, it would not be reasonable to hold that those very statements, though made after the controversy had arisen and consequently inadmissible under Section 32 (4), may become admissible under Section 49, as the latter section, taken with Section 60, is applicable only to the opinion of a living witness actually examined in Court.[4]

CLAUSES (5) AND (6): DECLARATIONS AS TO PEDIGREE

Principle and reason.–The two clauses reproduce with some modifications the English law on the subject of the admissibility of declaration as to pedigree. The grounds of reception of such declarations are; (i) death; (ii) necessity, such inquiries generally involving remote facts of family history known to but few, and incapable of direct proof; and (iii) the peculiar means of knowledge and absence of interest to misrepresent of the declarants -members of the family having the greatest interest in seeking the best opportunities of obtaining, and the least motive for falsifying, information on such subjects.[5]

In cases where a claim is based on a certain genealogy and the success of the claim depends in a large measure on proof of it, there is tendency, on the part of interested parties, observed the Supreme Court in *State of Bihar* v. *Radha Krishna Singh*,[6] "to concoct, fabricate or procure false genealogy to suit their ends", and the courts "must guard themselves against falling into the trap laid by a series of documents or a labyrinth of seemingly old genealogies to support their claims". The principle governing the reception and appraisal of evidence relating to genealogies were enunciated by the Supreme Court thus:

"(1) Genealogies admitted or proved to be old and relied on in previous cases are doubtless relevant and in some cases may even be conclusive of the facts proved but there are several considerations which must be kept in mind by the courts before accepting or relying on the genealogies:

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1. Phipson, Ev., 6th Ed., 295.
2. *Ekradeshwar Singh* v. *Javeshwari Bahuasin*, 42 C 582 : 41 IA 275 : 25 IC 417 : 1914 PC 76 ; *Mst. Amina Khatun* v *Khalilurrahman Khan*, 8 Luck, 445 : 1933 O 246.
3. *Pratap Chandra Dev Dhabal Deb* v. *Jagdish Chandra Dev Dhabal Deb*, 82 IC 886 : 1925 C 116.
4. *Pratap Chandra Dev Dhabal Deb* v. *Jagdish Chandra Dev Dhabal Dev*, 82 IC 886 : 1925 C 116.
5. Phipson, Ev., 6th Ed., 307 ; Taylor, 635.
6. *State of Bihar* v. *Radha Krishna Singh*, 1983 SC 684 (paras 18, 19 & 136).

(a) Source of the genealogy and its dependability.
(b) Admissibility of the genealogy under the Evidence Act.
(c) A proper use of the said genealogies in decisions or judgments on which reliance is placed.
(d) Age of genealogies.
(e) Litigations where such genealogies have been accepted or rejected:

"(2) On the question of admissibility the following tests must be adopted:
(a) The genealogies of the families concerned must fall within the four corners of Section 32(5) or Section 13 of the Evidence Act.
(b) They must not be hit by the doctrine of post *litem motam*.[1]
(c) The genealogies on the claims cannot be proved by recitals, depositions or facts narrated in the judgment which have been held by a long course of decisions to be inadmissible.
(d) Where genealogy is proved by oral evidence, the said evidence must clearly show special means of knowledge disclosing the exact source, time and the circumstances under which the knowledge is acquired, and this must be clearly and conclusively proved.[2]

Scope of Section 32 (5).—The Supreme Court of India has laid down the four essential conditions for the application of Section 32(5) as follows: in the case of *Dolgovinda Paricha* v.*Nimai*[3] that (1) the statements verbal or written, of relevant facts must have been made by person who is dead etc. (2)They must relate to the existence of any relation by blood, marriage or adoption. (3) The person making the statement must have special means of knowledge as to the relationship in question, and (4) the statement must have been made before the question in dispute was raised. The declarations may take the form of oral statement, family correspondence, the recitals in deeds, wills, pleadings, depositions, schools registers, etc. It is not necessary that the statement should be relevant to the matter in issue in respect of which it was made and it is immaterial whether it was made in a judicial proceeding or otherwise. Statement by several persons some of whom are dead and some alive are admissible as a statement of the deceased person under Section 32(5). In Paricha's case the pedigree was held admissible though one of the person was dead and two were alive.

Points of distinction between clauses (5) and clause (6).—The following are the points of distinction between the two clauses:—

(i) The declaration under clause (5) may relate to the existence of relationship between persons alive or deceased, whereas clause (6) applies to declarations of relationship between deceased persons only,[4] (ii) Clause (5) requires the declaration to proceed from a person having special means of knowledge, but clause (6) does not expressly impose this restriction, presumably because no stranger

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1. *Kalka Prasad* v. *Mathura Prasad*, (1908) ILR 30 All. 510 : (1908) 35 IA 166 (PC) ; *Hari Baksh* v. *Babulal*, 1924 PC 126 ; *Dolgobinda Parichna* v. *Nimai Charan Misra*, 1959 Supp. (2) SCR 814 : 1959 SC 914 ; *Kalidindi Venkata Subbaraju* v. *Chintalalpati, Subbaraju*, (1968) 2 SCR 292 : 1968 SC 947.
2. *State of Bihar* v. *Radha Krishna Singh*, 1983 SC 684 (Paras 18,19).
3. AIR 1959 SC 914.
4. *Ramnarain Kallia* v. *Monee Bibee*, 9 C 613.

can be a party to the preparation of documents of the kind mentioned in the clause. In the case of documents made relevant by the sixth clause, there is an implied assumption that the statements contained in them were made by persons having special means of knowledge. (iii) Under clause (5), the declaration may be written or verbal, and may have been made on any occasion, *ante litem motam*, and in any manner, but clause (6) requires not only that the statement should be a written one, but also that it should be contained in some document of the kind mentioned therein.

Both clauses, however, require that the statement should have been made before any controversy as to the relationship sought to be proved by the statement arose.

Scope of Section 32(5) and (6).—Both sub-sections (5) and (6) of Section 32 of the Indian Evidence Act declare that in order to be admissible the statement relied on must be made *ante litem motam* by persons who are dead, i.e., before the commencement of any controversy actual or legal, upon the same point. The words 'before the question in issue was raised, do not necessarily mean before it was raised in the particular litigation in which such a statement is sought to be adduced in evidence.[1]

Form of the declaration.—The following are the forms which hearsay upon matters of pedigree usually takes :—Oral statements; family correspondence; recitals or descriptions in deeds; settlements and wills; plaints; petitions; pedigree tables; horoscopes ; depositions; affidavits; and school registers. It is not necessary that the statement should be relevant to the matter in issue in respect of which it was made, and it is immaterial whether it was made in a judicial proceeding or otherwise.[2] As has been noticed already, clause (6), unlike clause (5) requires the statement to be made only in documents of the kind mentioned therein, i.e., wills, deeds, family pedigrees, tombstones, family portraits or other things on which such statements are usually made.

Invalidity of a documents does not ordinarily affect the admissibility of the statement.—A statement in a written agreement is admissible as evidence of pedigree, even though the agreement has been set aside as against a party.[3] Section 17 (b) of the Registration Act does not render a passage in a will inadmissible in evidence, if its words do not purport or operate to extinguish an interest but state only past facts. Such a statement, if proved, may also be admissible as evidence of pedigree under Section 32, clause (6).[4] It is no objection to the relevancy of a statement of relationship contained in a will that the will is an unprobated will.[5]

Declaration must be shown to have been made by a person who is dead or who cannot be produced as a witness.—The party tendering in evidence a declaration under this section has to show that the person who made the declaration is dead, or has become incapable of giving evidence, or cannot be called as a witness. If, therefore, the declarant is alive,[6] or has not been proved to be dead or incapable of giving evidence,[7]

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1. *Kalidindi Venkata Subbaraju* v. *Chintalapati Subbaraju*, (1968) (2) SCJ 513 : 1968 SC 947.
2. *Biro* v. *Atma Ram*, 64 IA 92 : 1937 PC 101 : 167 IC 346.
3. *Timma* v. *Daramma*, 10 M 362.
4. *Chamanbu Javje Mahomedali Boshori* v. *Multanchand Shivram*, 20 B 562.
5. *Hitnarain Singh* v. *Rambarai Rai*, 7 P 733 : 1928 P 459 : but see *Maheshwar Panda* v. *Sunder Narain Pattanaik*, 33 IC 342 : 22 CLJ 551.
6. *Munna Lal* v. *Kameshri Dat*, 114 IC 801 : 1929 O 113 ; *Hara Kumar Dey* v. *Jogendra Krishna Roy*, 71 IC 336 : 1924 C 526 : *Sumitra Kuer* v. *Ram Kair Chowbey*, 57 IC 561 : 1921 P 61 ; *Paevathi* v. *Thirumalai*, 10 M 334.
7. *Surjan Singh* v. *Sardar Singh*,23 A 72 : 27 IA 183 (PC) ; *Mehr Dad* v. *Muhammad Ali Shah*, 84 IC 927 :

the declaration will be inadmissible. A report as to relationship of parties made about 70 years ago was held admissible on the presumption that the maker of the report must have died.[1]

Statement by several persons some of whom are dead.—Where a statement is made by several persons, each person must be taken to have made the statement for himself; and, if one or more of such persons be dead, while the rest are alive, the statement will still be admissible as the statement of deceased persons''.[2]

To be admissible under clause, 5 the declaration must be of a person having special means of knowledge.—Under the English law, declarations are receivable only from persons connected by blood with the person or family whose pedigree is in question, or from the husbands or wives of persons so connected; and must not proceed from mere relatives of such husbands or wives; nor from friends, servants, or neighbours of the family, nor from the family solicitor.[3] Unlike the English rule, the Act makes relevant declarations from all persons having special means of knowing the relationship. Thus declarations from family members, e.g., the father,[4] adoptive grandfather[5] adoptive mother[6] adoptive parent's sister[7] servants,[8] family priest[9], family bards,[10] *bhats*,[11] *pandas*,[12] and *mirasis*,[13] have been received. The declaration may come from a member,[14] relative, servant of dependent[15] of the family. Special knowledge required by Section 32 (5) should be presumed in the case of members of the family.[16] Therefore, in the case of a statement as to relationship of certain persons with the family by an old member of the family it is not necessary for the member to depose to any particular source of knowledge. His special knowledge may be presumed.[17] A *qanungo* of a *taluqdar* is presumed to have special means of knowing the relationship between

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1925 L 63 ; *Ramnarain Kallia* v. *Monee Bibee*,9 C 613 : See *Mohan Lal* v. *Tulsan*, 109 IC 774 : 1928 L 824.

1. *Pritam Singh* v. *Tilok Singh*, 1954 Pepsu 14.
2. *Bindeshwari Singh* v. *Ram Raj Singh*, 1939 A 61 ; *Chandra Nath Roy* v. *Nilmadhab Bhuttacharjee*, 26 C 236.
3. Phipson, Ev., 6th Ed. 298.
4. *Latafat Hussain* v. *Onkar Mal*, 1935 O 41.
5. *Chendikamba* v. *Vishwanathamayya*, (1939) 1 MLJ 227 : 1939 M 466.
6. *Naima Khatun* v. *Basant Singh*. 149 IC 781 : 1934 A 406 (FB).
7. *Ma Nyun Vin* v. *Ma Kyin*, 1941 R 276.
8. *Mohima Chunder Chund* v. *Mothoora Nath Ghose* 9 WR 151.
9. *Acharaj Ram* v. *Ganesh Das*. 151 IC 622 : 1934 Pesh. 78 ; *Balak Ram High School, Panipat* v. *Nanu Mal*, 11 L 503 : 128 IC 532 : 1930 L 579 : *Shamlal Singh* v. *Radha Bibee*, 4 CLR 173.
10. *Anandi* v. *Nand Lal*, 46 A 665 : 83 IC 618 : 1924 A 575 ; *Mohansing Umed Ramol* v. *Dalpatsing Hanbaji*, 46 B 753 : 67 IC 235 : 1922 B 51 ; *Lahanu* v. *Motiram*, 63 IC 968 : 1921 N 49 ; but see *Ghulam Mohammad* v. *Miraj Din*, 40 PLR 162.
11. *Kartic Chandra Chakravarty* v. *Gossain Protap Chandra Gir*, 66 IC 894 : 1921 C 482 ; *Hazarilal* v. *Har Govind*, 48 IC 375.
12. *Amritsaria* v. *Prabh Dial*, 89 IC 989 : 1926 L 157 ; *Bura* v. *Nanak*, 84 IC 912 : 1925 L 281 ; *Collector of Farrukhabad* v. *Gajraj Singh*, 15 IC 625.
13. *Abdul Ghafur* v. *Hussain Bibi*, 12 L 336 ; 58 IA 188 : 130 IC 612 : 1931 PC 45 ; *Ratni* v. *Harwant Singh*, 1949 EP 158 : 50 PLR 249.
14. *Khadam Hussain* v. *Mohammad Hussain* 1941 L 73 ; *Abdul Ghafur* v. *Hussain Bibi*, 12 L 336 : 58 IA 188 : 130 IC 612 : 1931 PC 45 ; *Mohammad Azim Khan* v. *Raja Saiyid Mohammad Saadat Ali Khan*, 1931 O 177.
15. *Garuradhwaja Prasad* v. *Superundhwaja Prasad*, 23 A 37 : 27 IA 238 (PC) ; *Ramakrishna Pillai* v. *Tirunarayana Pillai* 55 M 40 : 139 IC 684 : 1932 M 198 ; *Balbhaddar Singh* v. *Sripal Singh*,48 IC 308.
16. *Prabhakar Vithoba Gourkhede* v. *Sarubai*, 1943 N 253 : ILR 1943 N 779 : 208 IC 211.
17. *Mohammad Asad Ali Khan* v. *Sadiq Ali Khan*, 1943 O 91 : 18 Luck. 346 : 205 IC 433.

the different branches of the *taluqdar's* family;[1] and a *mazumdar* has special means of knowing the relationshp among the members of the, *zamindar's* family.[2] But where a declaration proceeded from a *mukhtar* employed by certain members of a family but not otherwise connected with the family, and the declaration was based on information derived from his being instructed as a mukhtar, the Privy Council held, to be inadmissible.[3] The fact that a man is the general agent of another does not by itself justify the conclusion that he has special means of knowledge with regard to the members of his employer's family. But where there is evidence to show that his father who had also similarly acted as himself had been on terms of friendship with the family for a long period and the agent's family was living close to the master's house, it can be said that he has special means of knowledge of the relationship between different members of the family.[4] The burden of proving that the declarant had special means of knowledge is on the party who wishes to give the declaration in evidence,[5] but the question whether the declarant had such means is for the Court to determine.[6] A declaration by a deceased person as to his own parentage,[7] or date of birth, [8] or his own relationship with another person,[9] or as to his having been adopted by another when four years of age,[10] or as to the names of his relatives,[11] is admissible. But Section 32 is inapplicable to a statement by an adopted son that he was told by his natural father that his adoption was without the consent of the husband of the adoptive mother.[12] A statement made by a deceased person that there was a marriage between him and a certain woman is admissible in evidence to prove the legitimacy of his children. The doctrines of Mohamedan law cannot be held to exclude such evidence and the Evidence Act applies to the case.[13] Where the declaration is not shown to have had special means of knowing the relationship, the declaration will be inadmissible. To render a family pedigree admissible, it is necessary to show that the person filing it had special means of knowledge of the relationship mentioned in the pedigree.[14] But where a pedigree represents a joint statement by several persons, it is sufficient that one or more of them had special means of knowledge.[15] An *inam* statement is inadmissible in evidence for proving relationship, where the person making the statement was in no way related to the family concerned and had no special means of knowledge on the subject.[16] A report by a *Girdawar Qanungo* appointed to enquire into the relationship of the parties is admissible because the enquiry held by him afforded him special means of knowledge on the question of relationship.[17]

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1. *Lal Harihar Partap Bakhsh Singh* v. *Bisheshwar Bakhsh Singh*, 3 Luck 326 : 109 IC 422 : 1928 O 307.
2. *Navaneetha Krishna Thevar* v *Ramasami Pandia Thalwar*, 40 M 871 : 39 IC 263.
3. *Sangram Singh* v. *Rajan Bahi*, 12 C 219 : 12 IA 183 (PC).
4. *Pratap Kumar* v. *Raj Bahadur Singh*, 1943 O 316 : 209 IC 310.
5. Section 104 ; see also *Subbiah Mudaliar* v *Gopala Mudaliar*, 1936 M 808.
6. *Ramkrishna Aiyar* v. *Chinna Vengammal*, 26 IC 110.
7. *Santu* v. *Tara*, 85 IC 407 : 1925 O 537.
8. *Ramanathan Chetty* v. *Murugappa Chetty*, 33 IC 969.
9. *Mullangi Venkatarangam Chetty* v. *Venkatasubbammah*, 19 IC 740.
10. *Gulab Thakur* v. *Fadali*, 68 IC 566 : 1921 N 153.
11. *Wahid Bux Bhutto* v. *E.*, 120 IC 81 : 1929 Section 250 : 30 Cr LJ 1121.
12. *Prem Jagat Kuer* v. *Harihar Baksh Singh*, 1946 O 163.
13. *Zamin Ali* v. *Azizunnisa*, 55 A 139 : 144 IC 433 : 1933 A 329.
14. *Bhmima Singh* v. *Sunder*, 69 IC 421 : 1922 O 218.
15. *Lahanu* v. *Motiram*, 63 IC 968 : 1921 N 49.
16. *Kandalam Krishnamacharulu* v. *Sathulari Vijayasarathi* , 88 IC 646 : 1925 M 823.
17. *Pritam Singh* v. *Tilok Singh*, 1954 Pepsu 14.

If a pedigree has been admitted in evidence in the trial Court without objection, its admissibility cannot be called in question in appeal on the ground that the person who prepared the pedigree is not proved to have had special means of knowledge.[1]

Statement in a register of baptism, school register, pocket book, or petition for guardianship, whether admissible? –An entry as to the age of a person, contained in a register of baptism, is inadmissible, if there is nothing to show by whom the statement entered therein was made and whether the person, making the statement had special means of knowleldge.[2] But an entry in a school register as to the age of a scholar, which is made on information supplied by the deceased father of the boy, is admissible in evidence under clause (5) of Section 32.[3] There is a presumption that when a boy is admitted into a school, he was accompanied by some close relative of his who must have been aware of his age.[4] A statement as to the date of birth of a person in a guardianship petition is admissible under this section if the person making the statement is dead and had special means of knowledge.[5] but not if the person making the application for guardianship is alive and has not been examined as a witness.[6] An entry by the father in his pocket book regarding the birth of his various sons is relevant under Section 32(5) after the death of the father and it can be proved by persons acquainted with his handwriting.[7]

Relationship by blood, marriage or adoption.–Relationship by fosterage is not relationship by blood, marriage or adoption[8] The word "marriage" includes a marriage by *muta* in the Shia law[9] The relation between *a mahant* and a *chela* is a relation by adoption.[10] The declaration may relate to the declarant's own relationship with another person,[11] or to his own age.[12] Recitals in sale deeds and mortgage deeds by an adopted son, or in a will in which he described himself as an adopted son, are admissible under Section 32, clauses (5) and (6)[13]. A statement in a will that a beneficiary under it was the adopted son of the testator is admissible, provided the statement was not made by the testator in his own interest, or in view of contemplated litigation.[14]

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1. *Bindeshwari Singh* v. *Ram Raj Singh*, 1939 A 61. It is submitted that if there is no evidence to show that the person who prepared the pedigree had special means of knowledge, the pedigree must be rejected as the objection in such a case is to the relevancy of the statement.
2. 2 NLR 34.
3. *Latafat Husain* v. *Onkar Mal*, 1935 O 41 ; *Indian Cotton Co. Ltd.* v. *Raghunath Hari Deshpande*, 130 IC 598 : 1931 B 178 : *Munna Lal* v. *Kameshir Dat*, 114 IC 801 : 1929 O 113.
4. *Kala Ram S. Bhag Singh* v *Fazal Bari Khan*, 1941 Pesh 38 : 194 IC 824.
5. *Mukti Pada Dawn* v. *Aklema Khatun*, 1950 IC 533 ; *Prohlad Chandra Chwdhury* v. *Ramsaran Chowdhury*, 81 IC 630 : 1924 C 420; *Hara Kumar De* v. *Jogendra Krishna Ray*, 71 IC 336 : 1924 C 526 ; see also *Abdul Ghafur* v. *Hussian Bibi*, 12 L 336 : 58 IA 188 : 130 IC 612 : 1931.PC 45.
6. *Kishorilal* v. *Adhar Chandra*, 1942 C 438 : *Hara Kumar* v. *Jogendra Krishna Ray*, 71 IC 336 : 1924 C 526 : *Sarat Chandra Maiti* v. *Bibhati Debi*, 66 IC 433 : 1921 C 584 ; as to recital of date of birth in a guardianship certificate, see *Mohindra Mohan Roy Mukhopadhya*, v. *Ram Krishna Sadhukhan*, 28 IC 595 : 21 CLJ 621.
7. *Kala Ram S. Bhag Singh* v. *Fazal Bari Khan*, 1941 Pesh 38 : 194 IC 824.
8. *Suraiya Qadr* v. *Qudsia Begam*, 24 IC 643. *Sudershan Kaur* v. *The State*, AIR 1988 Del. 368.
9. 2 OC 115 ; see also *Baqar Ali Khan* v. *Anjuman Ara Begam*, 25 A 236 : 30 IA 94 (PC).
10. *Achyutananda Das* v. *Jagannath Das*, 27 IC 739 : 21 CLJ 96 ; see also *Ram Prashad* v. *Gurdwara Prabhandhok Committee*, 12 L 497 : 135 IC 657 : 1931 L 161.
11. *Mullangi Venkatarangam Chetty* v. *Venkatasubbamnah*, 19 IC 740 ; *Pannalal* v. *Chaman Prakash*, 225 IC 8.
12. *Oriental Government Security Life Assurance Co. Ltd.* v. *Narasinha Chari*, 25 M 183.
13. *Mullangi Venkatarangam Chetty* v. *Venkatasubbammah*, 19 IC 740.
14. *Chandreshwar Prosad Narain Singh* v. *Bisheshwar Pratap Narain Singh*, 5 P 777 : 101 IC 289 ; 1927 P 61.

The statement made by testator in his will about relationship by adoption is certainly admissible evidence but there is no rule of law or prudence laying down the principle that such a statement must be regarded as conclusive.[1]

A statement by a *sapinda* as to the circumstances in which he was adopted is a statement as to the existence of his relationship by adoption, and is, therefore, admissible under clause (5).[2] A statement in a panchait's report mentioning a person as having been adopted by another person is admissible on the question of adoption.[3] Statements of deceased person relating to incidents bearing more or less directly on the fact or otherwise of an adoption and its validity are admissible.[4] In a case in which the question was whether the plaintiff was the adopted son of a dismissed Sirdar, documents coming from official sources recording statements as to adoption made before any dispute had arisen to the officials in the locality not merely by the plaintiff himself in the presence of others but also by other members and by the dismissed Sirdar himself were treated by the Privy Council as carrying the greatest possible weight though it is not stated under what section these statements were admissible.[5] A statement written and signed by the officiating priest at a marriage that the essential ceremonies of the marriage were duly performed is not a statement as to relationshp and cannot, therefore, be tendered in evidence in proof of the marriage.[6]

Where the question at issue is whether a person died issueless or left a son, the statement that he died issueless amounts to a statement relating to the existence of a relationship by blood, because the question whether he left a son involves the question whether there is any blood relationship between him and the person who claims to be his son. "The existence of any relationship," includes the non-existence of that relationship. If a statement relating to the existence of such relationship between two persons should also be admissible.[7] The number of heirs who are entitled to succeed to the property of a deceased Hindu is very large. Hence statements made by a deceased Hindu in his lifetime that in his family there was no person alive, whether near or remote, cannot be construed as meaning that the deceased left no heir to his property.[8]

A statement in a deed of adoption by a deceased widow is admissible under section 32(5).[9]

Declaration admissible on such matters as age, seniority, minority, date of birth legitimacy, and names of relations; but not on questions which are not strictly questions of relationship.—The rule of English law is particularly strict in the matter of evidence regarding a pedigree, and the admission of hearsay evidence in pedigree cases is confined to the proof of pedigree and does not apply to proof of the facts which constitute a pedigree, such as death, birth and marriage, when they have to be proved for other purposes. But in India, the rule enacted by section 32, clauses (5) and (6), is not so strict, and declarations of deceased competent declarants have been admitted on

1. *Banwari Lal* v. *Trilok Chand*, 1980 SC 419 (para 5).
2. *Danakoti Ammal* v. *Balasundra Mudaliar*, 36 M. 19 : 18 IC 989.
3. *Ajab Singh* v. *Nanabhau*, 25 B 1 : 28 IA 48(PC).
4. *Haridas Chatterjee* v. *Manmatha Nath*, 1936 C 1 : 160 IC 332.
5. *Arjuno Naiko* v. *Modonomohono Naiko*, 1940 PC 153.
6. *Jadavkumar Liladhar* v. *Pushpaba Mainthianee*, 1944 B 29 : 211 IC 315.
7. *Suba Raut* v. *Dindeyal Choudhary*, 1941 P 205.
8. *Secretary of State* v. *Kanhaiya Lal*, 1941 O 337 : 16 Luck 551 : 192 IC 131.
9. *Punjab Rao* v. *Shesh Rao*, 62 Bom LR 726.

questions of age, birth, death, marriage, etc.[1] A statement relating to the existence of any relationship is admissible to prove the facts mentioned in the statement.[2] Since a question as to the existence of any relationship also includes the question as to the commencement of that relationship,[3] declarations of deceased competent declarants have been held to be admissible to prove a persons date of birth,[4] and, consequently his age,[5] minority or majority,[6] or the orders in which the members of the family were born.[7] Such declarations have also been admitted to prove legitimacy or illegitimacy,[8] parentage,[9] names of relations,[10] or the date of death of a member of the family, as death implies the termination of a relationship just as birth implies its commencement.[11] A statement where an ancestor of the person making the statement was related to him as an elder uncle or a younger uncle, or an elder brother or a younger brother or an elder son or a younger son of a certain person is a statement as to relationship. Since the dates of birth of the ancestors could be admissible on the ground that they indicated commencement of the relationship with the person making the statement, the statement as to relative seniority is also equally admissible on the same ground showing as it does that the relationship with one commenced earlier than relationship with the other. The question of seniority thus falls within the ambit of the word relationship and evidence relating to it is admissible under Section 32(5).[12] But, where the question is one which is entirely unconnected with the question of relationship, e.g., mode of succession in a family,[13] or the status of an accused person as a European British subject,[14] the declaration is not admissible. A declaration is inadmissible on the question whether a person

1. *Naima Khatun* v. *Basant Singh*, 149 IC 781 : 1934 A 406 (FB) ; *Mahadeo Prasad* v. *Ghulam Mohammad*, 1947 A 161 : 1946 ALJ 411 : ILR 1946 A 649.
2. *Dhanmu* v. *Ram Chunder Ghose*, 24 C 265.
3. *Amardayal Singh* v. *Har Pershad Sahu*, 58 IC 72 : *Annamalai Chetti* v. *Annamalai Chetti*, 52 IC 456 : *Mohindra Mohan Roy Mukhopadhya* v. *Ram Krishna Sadhukhan*, 28 IC 595 : 21 CLJ 621 : 2 OC 758 ; *Sheo Lal Singh* v. *Goor Narain*, 7 IC 218 ; *Oriental Government Security Life Assurance Co. Ltd.* v. *Narasima Chari*, 25 M 183 ; *Ram Chandra Dutt* v. *Jogeswar Narain Deo*, 20 C 758 ; but see *Satis Chandra Mukhopadhya* v. *Mohendro Lal Pathuk*, 17 C-849 ; *Bipin Behary Daw* v. *Sreedam Chunder Dey*, 13 C 42 ; and observations in *Amardayal Singh* v. *Har Pershad Sahu*, 58 IC 72.
4. *Abdul Subhan Khan* v. *Nusrat Ali Khan*, 12 Luck 606 : 1937 O 170 : 165 IC 523 : *Naima Khatun* v. *Basant Singh*, 449 IC 781 : 1934 A 406 (FB) ; *Munna Lal* v. *Kameshri Dat*, 114 IC 801 : 1929 O 113 ; *Prohlad Chandra Chowdhury* v. *Ramsaran Chowdhury*, 81 IC 680 : 1924 C 420 ; *Hara Kumar Dey* v. *Jogendra Krishna Ray*, 71 IC 336 : 1924 C 526 ; *Ramnathan Chetty* v. *Murugappa Chetty*, 33 IC 969 ; *Monindra Mohan Roy Mukhopadhya* v. *Ram Krishna Sadhukhan*, 28 IC 595 : 21 CLJ 621 ; *Achyutananda Das* v. *Jagannath Das*, 27 IC 739 : 21 CLJ 96 ; *Bappu Raju* v. *Kondu Raja*, 9 IC 324 ; 2 OC 758.
5. *Ch. Jadunath Singh* v. *Th. Bisheshar Singh*, 1939 O 17 ; *Naima Khatun* v. *Basant Singh*, 149 IC 781 : 1934 A 406 (FB) ; *Kuram Krishnama Chariar* v. *Veervali Krishnama Chariar*, 38 M 166 : 19 IC 452 ; *Oriental Government Security Life Assurance Co. Ltd.* v. *Narasimha Chari*, 25 M 183.
6. *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gurk*, 43 IA 256 : 39 IC 401 : 1916 PC 242 ; *Chuah Hooi Gnoh Neoh* v. *Khaw Sim Bee*, 31 IC 637 : 19 CWN 787 : 1915 PC 45.
7. *Dhanmuli* v. *Ram Chunder Ghosh*, 24 C 265 ; see *Krishnapal Singh* v. *Raj Kuar*, 104 IC 299 : 1927 O 278.
8. *Parbati* v. *Maharaj Singh*, 10 IC 188 ; *Gopalasami Chetti* v. *Arunachelam Chetti*, 27 M 32 : *Baqar Ali Khan* v. *Anjuman Ara Begam*, 25 A 236 : 30 IA 94 (PC).
9. *Santu* v. *Tara*, 85 IC 407 : 1925 O 537.
10. *Wahid Bux Butto* v. *E.*, 120 IC 81 : 1929 S 250 ; 30 Cr LJ 1121.
11. *Sheo Lal Singh* v. *Goor Narain*, 7 IC 218 ; see *Sayeruddin* v. *Akond* 72 IC 985 ; 1923 C 378 ; *Lachman Lal Pathak* v. *Kamakshya Narain Singh*, 131 IC 788 : 1931 P 224 ; *Naima Khatun* v. *Basant Singh*, 149 IC 781 : 1934 A 406 (FB).
12. *Kanhaiya Bux Singh* v. *Mst. Ram Dei Kuer*, 1944 O 162.
13. *Patinharkuru Vallaban Chattan Rajah Avergal* v. *Raman Varma*, 24 IC 519.
14. *Thomas* v. *E.*, 53 C 746 : 98 IC 248 : 1926 C 1203 : 27 Cr LJ 1304.

was living, earning, and holding property separately,[1] or where he survived another person, or whether he was joint or separate at the time of his death.[2] The relationship between a *mahant* and a *chela* is a relationship by adoption within the meaning of this clause.[3]

Construction of Section 32 (5)—Statement as regards age—admissible—A statement as regards age is tentamount to a statement as to the existence of relationship. Therefore, the statement made by a person in his will that he was 119 years of age at the time of its execution is admissible and can be relied upon as establishing that the person concerned was a major and was competent to make the said will.[4]

Horoscopes or birthday-books—The Privy Council decision in *Chuah Hooi* v., *Khaw Sim Bee*,[5] is an authority in favour of the admissibility of a horoscope or birthday-book.[6] The circumstances under which and the purposes for which a horoscope may become admissible in evidence are as follows:—

(i) If the horoscope represents the statement of a person who is alive at the time it is given in evidence, it is not relevant either under clause (5) or clause (6) of section 32; but it may be used, under section 159 or section 160 of the Act, by the person whose statement it represents to refresh his memory if he examined as a witness in the case and if he had himself written it or read it soon after it had been written;[7] or it may be used to corroborate or to contradict the testimony of such person, under section 157 or section 155.[8]

(ii) If the person whose statement it embodies is dead or cannot be called as a witness for any of the reasons mentioned in section 32, the horoscope may be admissible under clause (6) of this section, if it is given in evidence to prove any relationship or the commencement of any relationship between persons deceased.[9] If, however, it is tendered in evidence to prove the relationship of persons who are alive or to prove the relationship of a deceased person with a

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1. *Gokaldas Jethanand* v. *Chandibai*, 10 IC 967.
2. *Parbati* v. *Rani Chandrepal*, 8 OC 94.
3. *Achyutananda Das* v. *Jagannath Das*, 27 IC 739 : 21 CLJ 96 ; see also *Ram Parshad* v. *Gurdwara Prabandhak Committee*, 12 L 497 : 135 IC 657 ; 1931 L 161.
4. *Kalidindi Venkata Subharaju and others* v. *Chintalapti Subharaju and others*, 1968 (2) SCJ 513.
5. *Ghuah Hooi Gnoh Neoh* v. *Khaw Sim Bee*, 31 IC 637 : 19 CWN 787 : 1915 PC 45.
6. *Ramanathan Chetty* v. *Murugappa Chetty*, 33 IC 969.
7. *Las Baba* v. *Government of Mysore*, 12 Mys LJ 133 ; *Ambika Prasad* v. *Lal Bahadur*, 83 IC 840 : 1924 O 353 : *Shankergir Guru Motigir* v. *Chunnuji*, 71 IC 140 : 1923 N 164 ; *Banwari Lal* v. *Mahesh*, 41 A 63 : 45 IA 284 : 49 IC 504 ; 1918 PC 118 : *Har Bahadur Lal* v. *Chand Raj Bahadur*, 48 IC 400.
8. *Har Bahadur Lal* v. *Chand Raj Bahadur*, 48 IC 400.
9. *In Ramnarain Kallia* v. *Monee Bibee*, 9 C 613, the horoscope was held inadmissible under clause (6) on the ground that it was given in evidence to prove relationship between a living person and a deceased person, and because it had not been shown that its writer was dead or could not be found or had become incapable of giving evidence. If, therefore, the horoscope had been given in evidence to prove any relationship or commencement of any relationship between persons deceased and its writer had been shown to be dead, the horoscope would have been admissible under clause (6). In *Satis Chunder Mukhupadhya* v. *Muhendro Lal Pathuk*, 17 C 849, the ground of inadmissibility of the horoscope under clause (6) was that the person who made it was not shown to have had any special means of knowledge, and because the question to be decided in the case, viz., the date of birth of a person, was not a question of a relationship by blood, marriage or adoption. Both these grounds of decision in 17 C 849 are open to objection : because, firstly, clause (6), unlike clause (5), does not require that the person making the statement must have had special means of knowledge, see *Lahanu* v. *Motiram*, 63 IC 968 ; and, secondly, the question as to a person's date of birth is a question as to the commencement of his relationship with other persons and, as such, is within clause (5) as well as within clause (6), see *Ram Chandra Dutt* v. *Jogeswar Narain Deo*, 20

living person, it will be admissible under clause (6).[1]

(iii) A horoscope is always admissible under clause (5) to prove relationship between persons deceased or alive, provided the person whose statement it embodies is shown to be dead and to have possessed special means of knowing the relationship; and since it has been held that the question of the existence of a relationship covers also the question of the commencement of relationship,[2] horoscopes prepared by deceased persons, or representing the statements of deceased persons, who had special means of knowing the relationship, have been admitted under clause (5), not only to prove the existence of relationship, but also such matters as age, minority, date of birth, etc.[3]

(iv) A horoscope may be admissible as an admission under section 17 and 18 of the Act, or as a "public record" under section 35 if it has been on the record of a revenue office from a period *ante litem motam*.[4]

A horoscope which is produced by a stranger, and when the person who made it has not been called as a witness, is inadmissible in evidence.[5] In the matter of proof of minority a horoscope is not of very great evidentiary value but the birth register is.[6]

Admissibility of pedigrees under clause (6)—Pedigrees are written statements of relationship and, as such, relevant, under clause (5) and clause (6) of the section, on proof of the fact that they represent statements made *ante litem motam* by persons who are dead or who cannot be called as witnesses for any of the reasons mentioned in the section. It should, however, be noted that clause (6), unlike clause (5), does not expressly require that the statement must have been made by a person who had special means of knowing the relationship. Therefore, if a document is held to be a "family pedigree" within the meaning of clause (6), and it represents the statement of a deceased person, it is necessary to show that the person whose statement is embodied in the "family pedigree" had special means of knowing the relationship.[7] In *Kalka Prasad* v. *Mathura Prasad*,[8] where certain documents purporting to be pedigrees prepared on a previous occasion were put in evidence but neither party relied on clause (6) for their

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C 758 ; *Dhanmull* v. *Ram Chunder Ghose*, 24 C 265 ; *Oriental Government Security Life Insurance Co. Ltd.* v. *Narasimha Chari*, 25 M 183 ; *Monindra Mohan Roy Mukhopadhhya* v. *Ram Krishna Sadhukhan*, 28 IC 595 ; *Annamalai Chetti* v. *Annamalai Chetti*, 52 IC 456. In *Ramanathan Chetty* v. *Murugappa Chetty*, 33 IC 969, clause (6) was held inapplicable to a horoscope because it was given in evidence to prove the date of birth of a living person and clause (6) is obviously inapplicable where the relationship to be proved is between a living person and a deceased person.

1. *Ramnarain Kallia* v. *Monee Bibi*, 9 C 613.
2. *Las Baba* v. *Govt. of Mysore*, 12 Mys. LJ 133 ; *Annamalai Chetti* v. *Annamalai Chetti*, 52 IC 456 ; *Monindra Mohan Roy Mukhopadhya* v. *Ram Krishna Sadhukhan*, 28 IC 695 ; *Oriental Government Security Life Assurance Co. Ltd.* v. *Narasimha Chari*, 25 M 183 ; *Dhanumull* v. *Ram Chunder Ghose*, 24 C 265 : *Ram Chandra Dutt* v. *Jogeswar Narain Deo*, 20 C 758.
3. *Noni Gopal Ganguly* v. *Calcutta Improvement Trust*, 1938 C 43 ; *Nirmalanalini Devi* v. *Kamalabala Dassi*, 142 IC 36 : 1933 C 51 ; *Ganganand Singh* v. *Rameshwar Singh Bahadur*, 6 P 388 : 102 IC 449 : 1927 P 271 ; *Amardayal Singh* v. *Har Pershad Sahu*, 58 IC 72 ; *Annamalai Chetti* v. *Annamalai Chetti*, 52 IC 456 ; *Ramanathan Chetty* v. *Murugappa Chetty*, 33 IC 969 ; *Bidyadhari Dassee* v. *Pran Gopal Kissen Mookerji*, 5 CWN cxlviii.
4. *Raja Goundan* v. *Raja Goundan*, 17 M 134.
5. *Kuram Krishnama Chariar* v. *Veeravelli Krishnama Chariar*, 38 M 166 : 19 IC 452.
6. *Bharat Basi* v. *Gopi Nath*, 1941 A 385 : 197 IC 866 : 1941 ALJ 560.
7. *Lahanu* v. *Motiram*, 63 IC 968 : 1921 N 49 ; see notes under the heading "points of distinction between clause (5) and clause (6)".
8. *Kalka Prasad* v. *Mathura Prasad*, 30 A 510 : 35 IA 166 (PC).

admissibility, the Privy Council observed as follows:

"They are not ancient family records handed down from generation to generation and added to as a member of the family dies or is born, but documents drawn up on a particular occasion for a specific purpose by members of the family, and must accordingly be treated as mere declarations made by the persons who respectively drew them up or adopted them." These remarks of the Privy Council have been understood in a case[1] as laying down the distinction between a "family pedigree" of clause (6) and a mere declaration of relationship admissible under clause (5) : but in more recent cases these remarks of the Privy Council have been interpreted as merely indicating the highest and best type of a "family pedigree" and not as laying down an exhaustive definition of it.[2] In a later case the Privy Council itself has recognized the difficulty of preparing pedigrees in a country like India.[3] Consequently, the term "family pedigree" has been interpreted to mean a "pedigree of the family,"[4] kept by a member of the family or by another person on its behalf, e.g., a family bard or a family chroniclers,[5] and clause (6) of the section has been applied to a pedigree prepared by a deceased member of the family[6] about 32 years before the suit,[7] to one written by a living *gomashta* of a deceased family bard at the latter's instance,[8] to one kept in the family of a family chroniclers for three generations,[9] to one received by a member of the family from his father,[10] or grandfather,[11] and to one written by the deceased *mukhtar* of a member of the family and produced in Court by the widow of that member of the family.[12] The words "family pedigree" should not be understood according to the standard adopted by courts of law in England in regard to English pedigrees. The people of India and the people of England differ considerably in their habits of thought. The form and appearance of a family pedigree in England, itself contains the marks of its authenticity . In India unless the pedigree in a document is shown to be a statement of some member of the family or maintained in the family as a family pedigree, it cannot be said to be admissible in evidence.[13]

Admissibility of pedigrees under clause (5)—A pedigree which is not strictly a "family pedigree" within the meaning of clause (6) is admissible also under clause (5) on proof of the facts, that it represents the statement of a person who is dead or who cannot be called as a witness for any of the reasons mentioned in the section, that the

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1. *Mathura Prasad Singh* v. *Bhulan Singh*, 14 IC 339.
2. *Jang Bahadur Singh* v. Arjun Singh, 3 Luck 256 : 110 IC 466 : 1928 O 125 ; *Namdeo* v. *Ganoba*, 86 IC 847 : 1925 N 271.
3. *Doddawa Kom Bennepgowda* v. *Bennapagowda Bin Tenkangowada*, 1925 PC 199 ; 86 IC 326 ; see also *Kanhiaya Bux Singh* v. *Mst. Ram Dei Kuer*, 1944 O 162.
4. *Jang Bahadur Singh* v. *Arjun Singh*, 3 Luck 256 ; 110 IC 466 ; 1928 O 125.
5. *Anandi* v. *Nand Lal*, 46 A 665 ; 83 IC 618 ; 1924 A 575 ; *Mohansingh Umed Ramol* v. *Dalpatsingh Hanbaji*, 46 B 753 ; 67 IC 235 ; 1922 B 51 ; *Lahanu* v. *Motiram*, 63 IC 968 ; 1921 N 49 ; *See also Balak Ram High School, Panipat* v. *Nanu Mal*, 11 L 503 ; 128 IC 532 ; 1930 L 579.
6. *Abdul Ghafur* v. *Hussain Bibi*, 12 L 336 ; 58 IA 188 ; 1130 IC 612 ; 1931 PC 45 ; *Mohammad Azim Khan* v. *Saadat Ali Khan*, 1931 O 177.
7. *Jagdeo* v. *Viyhoba*, 105 IC 81 : 1928 N 20.
8. *Anandi* v. *Nand Lal*, 46 A 665 ; 83 IC 618 ; 1924 A 575.
9. *Mohansingh Umed Ramol* v. *Dalpat Singh Hanbaji*, 46 B 753 ; 67 IC 235 ; 11922 B 51.
10. *Namdeo* v. *Gonaba*, 86 IC 847 : 1925 N 271.
11. *Jahangir* v. *Sheoraj Singh*, 37 A 600 : 36 IC 505 (2) : 1915 A 334.
12. *Jang Bahadur Singh* v. *Arjun Singh*, 3 Luck 256 ; 110 IC 466 ; 1928 O 125.
13. *Kanhaiya Bux Singh* v. *Ram Dei Kuer*, 1944 O 162.

person whose statement it represents had special means of knowing the relationship mentioned in the pedigree, and that the statement was made before the relationship sought to be proved by it came into controversy.[1]

Pedigrees filed in settlement proceedings are admissible under section 32 (5) and section 35: presumption of genuineness as under section 90 in respect of 30 years old pedigrees.—if a settlement pedigree is one that is signed by- the members of the family, it will be admissible under section 32, clause (5), as the statement of a deceased person who had special means of knowing the relationship. It must, however, be proved that the statement in the pedigree was made at a time when there was no dispute as to the pedigree set up.[2] Even if a pedigree was not signed by the deceased members of the family, but its contents were adopted by them, and the entries in the *khewat* were recorded on its basis, it would be admissible under section 32, clause (5).[3] But where a pedigree is neither signed nor shown to have been filed by a deceased member of the family or a person who had special means of knowing the relationship, the pedigree will not be admissible under clause (5).[4] In the absence of evidence that he had special means of knowing the relationship, a pedigree filed by a distant member of the family in some previous proceedings does not make the pedigree admissible under section 32 (5).[5] If the pedigree is prepared by the settlement officer himself after proper inquiry, and bears his signature, it can be admitted under section 35 of the Act as an entry in a public record stating a fact in issue and made by a public servant in the discharge of his official duties.[6] Section 35 is applicable to a pedigree prepared for the purposes of a settlement and which is the basis of the entries in the *khewat*.[7] In order to be relevant under section 35, it is not necessary that the settlement pedigree should have been signed by members of the family.[8] When a pedigree becomes relevant under section 35, a certified copy of it is admissible in evidence;[9] and if it is more than 30 years old, there is, under section 90, a presumption of genuineness[10] in favour of the pedigree.[11] provided it purports to be in the handwriting of, or signed by, a particular person.[12] A pedigree filed for the purposes of preparation of *khewat* more than 30 years

1. *Abdul Ghafur* v. *Hussain Bibi*, 12 L 336 ; 58 IA 188 ; 130 IC 612 ; 1931 PC 45 ; *Sarfaraz Khan* v. *Rajana*, 4 Luck 39 ; 112 IC 834 ; 1929 O 129 ; *Namdeo* v. *Ganoba*, 86 IC 847 ; 1925 N. 271 ; *Bhimma Singh* v *Sunder*, 69 IC 421 ; 1922 O 218 ; *Suraj Bali* v. *Tilok Chand*, 36 IC 66 ; *Bhabuti Singh* v. *Khetal Singh*, 21 IC 274 ; *Mathura Prasad Singh* v. *Bhulan Singh*, 14 IC 339 ; *Kashi Singh* v. *Balraj Singh*, 10 IC 199 ; *Mohammad Azim Khan* v. *Brijraj Singh*, 8 IC 728 ; *Kalka Prasad* v. *Mathura Prashad*, 30 A 510 ; 35 IA 166 ; 1 IC 175 (PC).
2. *Sarfaraz Khan* v. *Rajana*, 4 Luck 39 ; 112 IC 834 ; 1929 O 129 ; *Suraj Bali* v. *Tilok Chand*, 36 IC 66 , *Bhabuti Singh* v. *Khetal Singh*, 21 IC 274.
3. *Ram Din* v. *Kayesth Pathshala*, Allahabad, 25 IC 823.
4. *Bhimma Singh* v. *Sunder*, 69 IC 421 ; 1922 O 218 ; *Mohammad Azim Khan* v. *Brijraj Singh*, 8 IC 728 ; *See also Kashi Singh* v. *Balraj Singh*, 10 IC 199 ; where even a signed pedigre was held inadmissible.
5. *Bhimma Singh* v. *Sunder*, 69 IC 421 ; 1922 O 218.
6. *Sarfaraz Khan* v. *Rajana*, 4 Luck 39 ; 112 IC 834 ; 1929 O 129 ; *Sarju Dei* v. *Ram Harakh*, 18 IC 250 ; *See also Sardar Ali* v. *Ali Mohammad*, 110 IC 710.
7. *Baji Nath Singh* v. *Rajju Singh*, 91 IC 583 ; 1926 O 101.
8. *Sarfarz Khan* v. *Rajana*, 4 Luck, 39 ; 112 IC 834 ; 1929 O 129 ; *Baji Nath Singh* v. *Rajju Singh*, 91 IC 583 ; 1926 O 101.
9. *Sarju Dei* v. *Ram Hara'h*, 18 IC 250.
10. *Bhabuti Singh* v. *Khetal Singh*, 21 IC 274 ; *Sarju Dei* v. *Ram Harakh*, 18 IC 250.
11. Presumption of genuineness does not apply to copies, see notes to section 90.
12. Section 90 ; *Mathura Prashad Singh* v. *Bhulan Singh*, 14 IC 339 ; In *Jagdeo* v. *Vithoba*, 105 IC 81 ; 1928 N 20 , presumption under section 90 was raised in respect of a pedigree which did not purport to be in the handwriting of any particular person but which was proved aliunde to have been written by a particular

previously, when there was no controversy in respect of it, is admissible under section 32(5) if the signatories to it are dead.[1] A reference to the relationship of the donee with the husband of the donor contained in the final order of the Revenue Officer sanctioning mutuation of the gift is admissible under section 32(5) of the Act.[2]

Pedigree must be shown to represent the statement of a competent declarant who is dead or who cannot be called as a witness—In the case of old pedigrees it is generally impossible to give evidence as to who was the author of the statement contained in the pedigree,[3] and the Allahabad High Court has held that it is not necessary to show who had made the statement mentioned in the pedigree.[4] It is submitted, however, that though it is not necessary to show which particular person made the statement embodied in the pedigree, it is necessary to show that the pedigree represents the statement of a person who is dead or who cannot be called as a witness for any of the reasons mentioned in the section.[5] Section 32, which makes the statements in the pedigree relevant, applies only when the statement was made by a person who is dead, or cannot be found, or has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which the Court considers unreasonable. Therefore, where there is nothing to show that the person whose statement is contained in the pedigree is dead or cannot be examined as a witness for any of the reasons mentioned in the section, the pedigree will not be admissible.[6] Thus, where a pedigree was prepared in the family 113 years before the suit and the bards wee called to dictate it, and it was prepared from the history given by them, but the person assembling the bards and the bards themselves were not called as witness and no proof was given that these persons were dead or could not be produced as witnesses, the Privy Council held the pedigree to be inadmissible.[7] This ruling of the Privy Council is an authority for the proposition that the party tendering in evidence a pedigree is under a clear obligation to show that the pedigree represents the statement of a dead person or of a person who cannot be called as a witness. In a case the Lahore High Court held entries in the books of some *pandas* of Hardwar inadmissible where the person producing them could not say by whom they had been written.[8] Where a pedigree was copied from an old genealogical table, and it was not shown who was responsible for the old genealogical table, the pedigree was held inadmissible on the ground that it was not shown that the statement in the genealogical table was that of a deceased person who had special means of knowledge.[9] Similarly, in another Lahore case where a witness had prepared the pedigree on the information of some other persons, the pedigree was

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person ; as to the inapplicability of section 90 to such pedigrees, see *Mathura Prashad Singh* v. *Bhulan Singh*, 14 IC 339.

1. *Mahadeo Singh* v. *Suraj Bali Singh*, 148 IC 1041 : 1934 O 210.
2. *Fazal Haq* v. *Said Nur*, 1948 L 113.
3. *Jahangir* v. *Sheoraj Singh*, 37 A 600 ; 30 IC 505 ; *Sitaji* v. *Bijendra Narain Choudhary*, 1951 Pat. 356 ; 28 Pat 447.
4. *Anandi* v. *Nand Lal*, 46 A 665 ; 83 IC 6118 ; 1924 A 575 ; *Jahangir* v. *Sheoraj Singh*, 37 A 600 ; 30 IC 505.
5. *Mehr Dad* v. *Muhammad Ali Shah*, 84 IC 927 ; 1925 L 63.
6. *See Chunna Kanwar* v. *Mukat Behari Lal*, 151 IC 338 ; 1934 A 117. where this aspect of the rule is clearly brought out.
7. *Surjan Singh* v. *Sardar Singh*, 23 A 72 : 27 IA 183 (PC).
8. *Harnam Singh* v. *Mst. Bhagi*, 16 L 1007 : 1936 L 261 : 161 IC 916 ; *See also Hazura Singh Mohindar Singh*, 1937 L 599 ; *Mst. Nanhi* v. *Badhi*, 1940 L 245 ; *Kundan Lal* v. *Hukam Singh*, 1952 Punj 115.
9. *Jhobali Rai* v. *Sakhi Rai*, 79 IC 335 : 1923 P 585.

held inadmissible for the reason that there was nothing to show that the person giving the information were dead or otherwise incapable of giving evidence.[1] In the two Allahabad cases cited in the beginning of this paragraph,[2] though it could not be said who had written the pedigrees or who had given the information contained in them, it had, in fact, been shown that the pedigrees had been in the possession of a deceased members of the family, and therefore the statements made in them could rightly be taken as having been adopted by the deceased persons in whose possession they had been. A person who is in possession of a document is presumed to adopt its contents, and a pedigree which has been shown to have been in the possession of a deceased member of the family may rightly be treated as the statement of a deceased person within the meaning of Section 32. There must, however, be proof, direct or presumptive, of the statement in the pedigree having been adopted by a deceased member of the family.[3] Statements of deceased members of the family may be proved not only by showing that they actually made the statements, but by showing that they acted upon them or assented to them, or did anything that amounted to showing that they recognized them.[4] The mere production of an ancient document from the family archives will not dispense with proof that it was made or recognized by some members of the family.[5] Where a pedigree is said to have been prepared by a deceased member of the family, it must be shown either that he prepared it himself or that he had personal knowledge and belief as to its accuracy.[6] Where some *bahis* containing statements as to pedigree were produced by a servant of the priest to whom the books belonged and he was unable to say when those entries were written and by whom, and he could not even swear to their being written by a priest of the family, it was held that the conditions precedent for applying clauses (5) and (6) of Section 32 were not fulfilled.[7]

Pedigrees more than 30 years old may be presumed to be genuine under Section 90—In the case of pedigrees which are more than 30 years old and which purport to be in the handwriting of, or signed by, a particular person, a presumption of genuinness may be raised under Section 90 of the Act.[8] But Section 90 is obviously of no avail where a pedigree, even though more than 30 years old, does not purport to be in the handwriting of, or signed by, a particular person,[9] or which is signed by the *patwari* or by some person on behalf of others;[10] and the admissibility of such pedigrees would

1. *Mehr Dad* v. *Muhammad Ali Shah*, 84 IC 927 ; 1925 L 63 ; *See also Hazura Singh* v. *Mohindar Singh*, 1937 L 599.
2. *Anandi* v. *Nand Lal*, 46 A 665 ; 83 IC 618 ; 1924 A 575 ; *Jahangir* v. *Shoraj Singh*, 37 A 600 ; 30 IC 505.
3. *See Abdul Ghafur* v. *Hassain Babi*, 12 L 336 ; 58 IA 188 ; 130 IC 612 ; 1931 PC 45 ; *Khadam Hussain* v. *Mohammad Hussain*, 1941 L 73.; *Shiv Lal* v. *Jootha*, 1952 Raj. 167.
4. *Abdul Ghafur* v. *Hassain Bibi*, 12 L 336 ; 58 IA 188 ; 130 IC 612 ; 1931 PC 45 ; *Khadam Hussain* v. *Mohammad Husasin*, 1941 L 73.
5. Phipson, Ev., 6th Ed., 311.
6. *Mohammad Azim Khan* v. *Mohammad Saadat Ali Khan*, 136 IC 642 ; 1931 O 177 ; *See also Kashi Singh* v. *Ram Narain*, 37 IC 138.
7. *Hazura Singh* v. *Mohindar Singh*, 1937 L 599 ; *Kundan Lal* v. *Hukam Singh*, 1952 Punj 115.
8. *Jagdeo* v. *Vithoba*, 105 IC 81 ; 1928 N 20 ; *Bhabuti Singh* v. *Khetal Singh*, 21 IC 274 ; *Sarju Dei* v. *Ram Harakh*, 18 IC 250 ; *See Kashi Singh* v. *Ram Narain*, 37 IC 138 ; *Prtiam Singh* v. *Tilok Singh*, 1954 Pepsu 14 ; *Gurdial Singh* v. *Crown*, 1949 EP 228 ; 51 PLR 74.
9. *Mathura Prasad Singh* v. *Bhulan Singh*, 14 IC 339 ; *In Jagdeo* v. *Vithoba*, 105 IC 81 ; 1928 N 20, however, section 90 was applied to a pedigree which did not purport to be in the handwriting of any particular person, but which had been proved aliunde to be in the handwriting of a particular person.
10. *Kashi Singh* v. *Ram Narain*, 37 IC 138.

depend on proof of their having been made, or their contents having been adopted, by some deceased members of the family, as mere production of an ancient document from the family archives cannot dispense with the proof that is necessary in such cases that the document was made or recognized by some deceased member of the family.[1] Some papers were filed at the time of the settlement of a village. The first of them was a genealogical table. At the end of the papers were the names of some of the persons whose names appeared in the said table. None of them affixed their signatures. It was stated that the village *patwari* signed on behalf of the majority and that certain other persons signed on behalf of the rest. The settlement officer affixed at the end a statement that the owners of the village had verified the correctness of the statements. This verification took place after the *khewat* of the village had been prepared, so that the entries in the genealogical table could not be deemed to have been utilized in any way for the preparation of the *khewat*. It was not clear whether the attached names were placed at the end of the papers to record acceptance of the correctness of all or of only the last of the papers. Nor was the fact made clear by the settlement officer's order recording the verification. Held, that the genealogical table could not, in these circumstances, be held to be admissible in evidence.[2]

Evidence of relationship derived from a pedigree inadmissible if pedigree not produced.—A statement by a person that he derived his information about the relationship existing between certain persons from a pedigree prepared by his father is inadmissible in evidence, without the pedigree being produced or a foundation being laid for admitting secondary evidence of the contents of the pedigree.[3] Where a *bhat* witness admitted that the pedigree produced by him in Court was largely a copy made by his father from an older book which was then in existence, and it was not alleged that the old book was in such a condition that it could not be produced, or that the entries made therein were undecipherable owing to age or owing to some other cause, it was held, having regard to Sections 64 and 65 of the Act, that the pedigree produced in Court could not be looked upon as independent or original, and that secondary evidence could not be admitted as the original pedigree had not been produced.[4]

Objection to the admissibility of a pedigree table must be taken in the trial Court.—Where *a kursinama* (pedigree table) purporting to have been made by an ancestor "by the pen of *gomashta*" was received without objection at the trial, the Privy Council did not allow an objection to its admissibility to be raised before it.[5]

Statement in Wills.—The statement of a relationship may be contained in an unprobated will.[6] A statement in a will by a deceased Hindu widow that a certain person is her daughter's son or related to her on her husband's side is admissible,[7] but a statement that the testator and his brothers were living, earning, and holding property,

1. Phipson Ev., 6th Ed., 311.
2. *Kashi Singh* v. *Ram Narain*, 37 IC 138.
3. *Seshamnal* v. *Kupanaiyyangar*, 91 IC 462 ; 1926 M 475.
4. *Hazarilal* v. *Har Govind*, 48 IC 375 ; *see Bejai Bahadur Singh* v. *Bhupindar Bahadur Singh*, 17 A 456 ; 22 IA 139 (PC), where the admissibility of evidence based on a pedigree not produced was held by the Privy Council to be doubtful and its value practically nil ; *see also Balmakund* v. *Bishwa Nath Singh*, 52 IC 851.
5. *Shahzadi Begam* v. *Secretary of State for India*, 34 C 1059 : 34 IA 194 (PC) ; *Bindeshawari Singh* v. *Ram Raj Singh*. 1939 A 61.
6. *Hitnarain Singh* v. *Rambarai Rai*, 7 P 733 : 1928 P 459 ; but *see Moheswar Panda* v. *Sundar Narain Pattanaik*, 33 IC 342.
7. *Kidar Nath* v. *Mathumal*, 40 C 555 : 18 IC 946 (PC).

separately is inadmissible, as it does not fall within the scope of Section 32.[1] Statements contained in a will to the effect that a beneficiary thereunder was the adopted son of the testator can be used as evidence of adoption if the statements were not made in the testator's own interest or in view of contemplated litigation.[2] A statement in a will as to status is inadmissible under this clause.[3]

Personal knowledge; evidence by a living witness on matters of pedigree inadmissible if based on hearsay of incompetent declarants, but admissible if based on hearsay of competent declarants.—On questions of relationship, the Act does not make the opinion of a witness relevant except when such opinion is expressed by conduct.[4] Nor is there any express provision in the Act making evidence of general reputation admissible as proof of relationship.[5] Therefore, where a witness gives evidence as to relationship and bases his evidence on information derived from others, the evidence will be rejected as mere "hearsay" unless it be shown that the information came from persons deceased who had special means of knowing the relationship. Thus, where, on a question of relationship, the statements of witnesses, who spoke from the information which they had derived from others but did not state the persons from whom they had derived this information, were rejected by the High Court as "hearsay", the Privy Council held the High Court justified in the manner in which the provisions of this section were applied.[6] Witnesses should not be permitted by the Court to give their testimony as to matters which could not be within their own knowledge without first stating the source of their information. They should be required to prove the statements relied upon with proper particularity and with due attention to the requirement that the person making the statement had special means of knowledge. It cannot rightly be left to time or chance or cross examination to disclose whether a statement has any basis which could give it admissibility under clause (5) of Section 32.[7] In a case of this kind, where a witness has no personal knowledge of relationship but merely speaks from information and is unable to disclose the source of his information, it cannot be held that the information was given by a deceased person having special means of knowing the relationship, and unless this fact is established, the section is inapplicable and the general rule against hearsay excludes the information. But where a living witness gives evidence of relationship, which is based on information received from deceased ancestors, the evidence is admissible.[8] Where a witness gives evidence as to the relationship of persons whom he could not possibly have seen, it cannot be presumed that the witness derived his information from his deceased ancestors; and, in the absence of evidence to show that the witness is basing his evidence on information received from competent deceased person, his evidence would be inadmissible.[9] Evidence of witness that they

1. *Gokaldas Jethanand* v. *Chandibai*, 10 IC 967.
2. *Chandreswar Prasad Narain Singh* v. *Bisheswar Pratap Narain Singh*, 5 P 777 ; 101 IC 289 ; 1927 P 61.
3. *Hollaram* v. *Dwarkadas*, 1939 S. 145.
4. Section 50 ; *Chunna Kunwar* v. *Mukat Behari Lal*, 151 IC 338 ; 1934 A 117.
5. *Lakshmi Reddi* v. *Venkata Reddi*, 1937 PC 201 ; *Shiv Lal* v. Jootha, 1952 Raj. 167 ; *Chandulal* v. *Bibi Khatemonnessa*, 1943 C 76 ; ILR (1942) 2 C 299 ; See also notes to S. 50.
6. *Shafiq-un-Nissa* v. *Shaban Ali Khan*, 26 A 581 ; 30 IA 217 (PC) ; *Mohan Lal* v. *Tulsan*, 109 IC 774 ; 1928 L 824.
7. *Lakshmi Reddi* v. *Venkata Reddi*, 1937 PC 201 : 168 IC 881.
8. *Abdul Ghafur* v. *Hussain Bibi*, 12 L 336 : 58 IA 188 : 130 IC 612 : 1931 PC 45 ; *Bahadur Singh* v. *Mohar Singh*, 24 A 94 : 29 IA 1 (PC).
9. *Chunna Kunwar* v. *Mukat Behari Lal*, 151 IC 358 ; 1934 A 117.

heard the names of the ancestors recited by members of the family on ceremonial and other occasions is admissible in proof of pedigree.[1]

Personal knowledge; declaration inadmissible if based on hearsay of person not having special means of knowledge, but admissible if based on hearsay of persons having special means of knowledge.—According to English law, though the declaration as to relationship must come from a deceased relative only, it is not necessary that the declarant should have had personal knowledge of the fact stated; it is sufficient if his information purported to have been derived from other relations, or from general family repute or even simply from "what he has heard", provided such "hearsay upon hearsay" does not directly appear to have been derived from strangers.[2] The Act, however markes relevant declarations not only of deceased relatives but of other persons as well, if such person had special means of knowing the relationship; and it appears to be settled that the declarant's knowledge need not be personal but may be derived from hearsay.[3] But if the statement of a deceased person having of another person, alive or deceased, who had no special means of knowledge, it seems that the statement will be inadmissible, on the analogy of the English rule which, as stated in the beginning of this paragraph, excludes declarations of relatives where they directly appear to be based on information derived from strangers.

Declaration contained in a document filed by the deceased or by the counsel or agent of the deceased.—Where a genealogical table which had been filed by a deceased member of the family in a previous suit was given in evidence in a subsequent suit as a declaration of the deceased member of the family, the Privy Council held it to be inadmissible, on the ground that the document not having been brought home to the deceased, except as being an exhibit binding on him for the purpose of the previous suit, his relation to the document in question was something entirely different from the personal knowledge and belief which must be found or presumed in any statement of a deceased person which is admissible in evidence.[4] A pedigree which cannot be shown to have been filed by a competent declarant or his agent is not, therefore, an admissible declaration of relationship.[5] If the declaration is contained in a document filed by the agent of a party in some previous proceedings,[6] or in a suit or petition filed by the *vakil* of a party,[7] the presumption is that the document or petition was filed under the instruction of the party and it will be treated as the party's own declaration.

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1. *Debi Pershad Chowdhry* v. *Radha Chowdhrain*, 32 C 84 ; 31 IA 160 (PC) referred to in *Bhojraj* v. *Sita Ram*, 1936 PC 60 : 160 IC 45 ; *Madan Singh* v. *State*, 1954 Raj. 38 : 1954 Cr LJ 258.
2. Phipson. Ev., 6th Ed., 310.
3. *Ramanathan Chetty*, v. *Murugappa Chetty*, 1917 M 930 ; 33 IC 969. In *Bahadur Singh* v. *Mohar Singh*, 24 A 94 : 29 IA 1 (PC), The Privy Council held evidence of a witness based on information received from ancestors admissible. In *Debi Persad Chowdhry* v. *Radha Chowdhrain*, 32 C 84 : 31 IA 160 (PC), evidence of witnesses that they had heard the names of the ancestors recited by members of the family on ceremonial and other occasions was held admissible in proof of the pedigree.
4. *Jagatpal Singh* v. *Jageshar Bakhsh Singh*, 25 A 143 : 30 IA 27 (PC); see also *Thakur Ganesh Bakhsh Singh* v. *Thakur Ajudhia Bakhsh Singh*, 1937 PC 310.
5. *See Mohammed Azim Khan* v. *Mohammad Saadat Ali Khan*, 136 IC 642 : 1931 O 177.
6. *Balbahaddar Singh* v. *Sripal Singh*, 48 IC 308.
7. *Ramakrishna Pillai* v. *Tirunarayana Pillai* 55 M 40 : 139 IC 684 : 1932 M 198 ; *Chandreswar Prosad Narain Singh* v. *Bisheswar Pratap Narain Singh*, 5 P 777 ; 101 IC 289 : 1927 P 61 : *Kanhaiya Bux Singh* v. *Ram Dei Kuer*, 1944 O 162.

The declaration is admissible in declarant's favour even in his lifetime; section 32 and section 21; statements in the affidavit or deposition of a living person.—A statement in an affidavit or deposition by a person as to his date of birth would be admissible between third persons after his death. Such statement is, therefore, admissible, under Section 32 clause (5) read with Section 21, in the declarant's own favour even in his lifetime.[1] Similarly, a statement of the deceased as to his own age is admissible under Section 32 (5) and Section 21, even though it may be an admission in his own favour.[2] A statement made by a party as to the relationship of certain persons whose relationship he had special means of knowing is admissible in the declarant's favour under Section 32 (5) read with Section 21 (1), if the statement was made before any controversy.[3] A statement as to relationship contained in the pleadings is admissible in evidence as having been made before the question was raised by person who had special means of knowing the relationship to which the statement relates.[4]

Lis mota the declaration must have been made before the commencement of any controversy.—The declaration to be admissible must have been made *ante litem motum*, i.e., before the commencement of any controversy, actual or legal upon the same point.[5] The words "before the question in issue was raised" do not necessarily mean "before it was raised in the particular litigation in which such statement is sought to be adduced in evidence." A statement which was made after the question had been raised in the previous litigation is inadmissible in a subsequent suit even though it was made before the question was raised in the later suit.[6] The condition that the statement of the deceased person must be *ante litem motam* involves the idea that the dispute on the former occasion must not be the same in substance as the dispute in the later suit. In other words, the statement now sought to be used will not be concluded if it merely related to some matter, foreign or collateral to the matter in controversy on the former occasion.[7] Where the question of a person's legitimacy was in issue in mutation proceedings statements made by witnesses since deceased, in the course of such proceedings, would be inadmissible in a subsequent civil suit in which the question of his legitimacy arises.[8] Statements with regard to relationship made in settlement proceedings, at a time when the title to a portion of a *taluka* was under enquiry are not admissible in evidence in a subsequent litigation not *inter partes* in which the same questions are matters of controversy, as the dispute had arisen at the time when the statements were made.[9] Clause (5) does not apply to statements made by interested parties in

1. *Ramanathan Chetty* v. *Murugappa Chetty*, 33 IC 969.
2. *Oriental Government Security Life Assurance Co., Ltd.* v. *Narasimha Chari*, 25 M 183, 207.
3. *Jadu Nath Sarkar* v. *Mahendra Nath Rai*, 12 CWN 266.
4. *Jan Mohammad* v. *R.B. Karam Chand*, 1947 PC 99 : 1947 ALJ 395 : 60 MLW 448 : 49 BLR 577 : 51 CWN 777 : ILR 1947 L 399.
5. Phipson, Ev., 6th Ed., 310 ; *Chendikamba* v. *Viswanathamayya*, (1939) 1 MLJ 227 : *Biro* v. *Atma Ram*, 64 IA 92 : 1937 PC 101 : 167 IC 346 ; *Subbiah Mudaliar* v. *Gopala Mudaliar*, 1936 M 808 : *Mata Bakhsh Singh* v. *Ajodhia Bakhsh Singh*, 1936 O 340 : 163 IC 770 ; *Bayava Shiddappa Desai* v. *Parvateva Basavaneppa Bellad*, 144 IC 442 : 1933 B 126 ; *Mohammad Azim Khan* v. *Mohammad Saadat Ali Khan*, 136 IC 642 : 1931 O 177 ; *Rup Kishore* v. *Patrani*, 50 A 152 : 107 IC 45 : 1927 A 818.
6. *Brijmohan* v. *Kishun Lal*, 1938 A 443 : 176 IC 441 ; *Rup Kishore* v. *Patrani*, 50 A 152 : 107 IC 45 : 1927 A 818.
7. *Bindeshwari Singh* v. *Ram Raj Singh*, 1939 A 61 ; *Natabar Parichha* v. *Nimai Charan Misra*, 1952 Orissa 75 ; see also *Subbiah Mudaliar* v. *Gopala Mudaliar*, 1936 M 808.
8. *Mumtaz-un-Nisa Begam* v. *Wazi Ali*, 65 IC 308 : 1921 O 242.
9. *Mata Bakhsh Singh* v. *Ajodhia Bakhsh Singh*, 1936 C 340 : 163 IC 770.

denial, in the course of litigation, of pedigrees set up by the opposite parties.[1] In order that a declaration may be excluded on the ground of *lis mota*, it must be shown that the subject-matter of the declaration had come into controversy when the declaration was made. If it is not shown that the relationship had come into controversy at the time the statement was made, it will be admissible.[2] A statement made in proceedings in which the heirship of the claimant in those proceedings was not in dispute is not inadmissible on the ground of *lis mota*.[3] A statement by a deceased plaintiff describing his relationship with certain person, contained in a plaint filed before the existence of any dispute concerning that relationship, is admissible in a subsequent suit in which the relationship is in dispute.[4] Comparing the English common law rule with that enacted in section 32 (5) the Patna High Court has held that a statement is admissible even though it was made in a case in which the issue was the same as in the case in which it is sought to be proved.[5] The Madras High Court has however, ruled that statements regarding the fact of an adoption, made in a previous suit in which the question of adoption was directly in issue, are not admissible in a subsequent suit, as they must be considered as having been made after the question in dispute was raised.[6]

Value of evidence as to pedigree.—The evidence afforded by ancient pedigrees is at best evidence of tradition and in so far as the statements are interested, or contradictory, or disputed, they rapidly lose value. The fact that a pedigree is given in the course of the account of the history of a village does not (necessarily at least) transmute it into something higher than tradition. Where the tradition has been ascertained with reasonable certainty, a proper value must be given to it on questions of pedigree, and it may be sufficient of itself; but that a case is difficult of proof does not dispense with proper proof, and in many cases there is good reason to regard tradition as poor and treacherous material.[7] The value of the evidence as to matters of pedigree depends on the character of the witnesses who depose to what they heard from deceased person, and also on the character of the deceased person and whether they were expressing their own opinion or merely repeating hearsay.[8] It must always be a matter of great difficulty to prepare pedigrees in a country like India, where, there is no official register of births and deaths, where records of a family may be few, and where it is essential to depend for information upon the uncertain testimony of family traditions. Men's lives are

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1. *Naraini Kuar* v. *Chandi Din*, 9 A 467 ; See also *Jagatpal Singh* v. *Jageshar Bakhsh Singh*, 25 A 143 : 30 IA 27 (PC) For a statement made in view of contemplated litigation, see *Chandreswar Prasad Narain Singh* v. *Bisheshwar Pratap Narain Singh*, 5 P 777 : 101 IC 289 : 1927 P 61.
2. *Kalka Parshad* v. *Mathura Parshad*, 30 A 510 : 35 IA 166 : 1 IC 175 (PC) ; *Jainath Kuar* v. *Danpal Singh*, 1947 O 164 : 231 IC 203 : 22 Luck 249 ; *Jadunath Kuar* v. *Bisheshar Baksh Singh*, 1932 PC 142 : 59 IA 173 : 136 IC 747 (PC) ; *Sukhdarshan Singh* v. *Chanan Singh*, 1951 Pepsu 81,
3. *Bahadur Singh* v. *Mohar Singh*, 24 A 94 : 29 IA 1 (PC) ; *Jai Nath Kuar* v *Danpal Singh*, 1947 O 164 : 231 IC 203 : 22 Luck 249.
4. *Mauladad Khan* v. *Abdul Sattar*, 39 A 426 : 39 IC 666. For the admissibility of a statement of relationship in a written statement see *Sarvabhotla Thotapalle Chendikamba* v. *Kanala Indrakanti Viswanathamayya*, 1939 M 446.
5. *Gokhul Pande* v. *Baldeo Sukul*, 7 P 90 : 105 IC 26 : 1928 P 113. This case, it is submitted, is not free from doubt and draws a wrong analogy from the decision of Petheram, CJ., in *Dhanmull* v. *Ram Chunder Ghose*, 24 C 265.
6. *Ramakrishna Pillai* v. *Tirunarayana Pillai*, 55 M 40 : 139 IC 684 : 1932 M 198.
7. *Ganesh Baksh Singh* v. *Ajudhia Bakhsh Singh*, 1937 PC 310 : 170 IC 335, per Sir George Rankin.
8. *Mulchand Bassarmal* v. *Devigir Motigir*, 1933 S 213.

swiftly forgotten and the memories of survivors often fail. It is, therefore, not a matter of surprise to find that pedigrees prepared in India and which may be accepted as honestly prepared are, nonetheless, not in actual agreement in every detail. A pedigree which has been subjected to investigation many years prior to the institution of the litigation in which it is questioned and which has previously been relied upon by competent authorities and is supported by verbal evidence may safely be accepted as correct.[1] Where the question of relationship arises between people among whom accessible records of births and deaths are not maintained nor are such events preserved in written family memorials, the question must depend for its decision on oral tradition, and though this requires close scrutiny, the tradition ought not to be regarded as weak and unsatisfactory merely because it may in one or two respects fail to satisfy the strict conditions that would be necessary for proving a pedigree where records and documents could be used.[2] Where a pedigree brings one down from the remotest ancestor to the generations living contemporaneously with a person in whose time it is prepared, the document is a record of family traditions as to pedigree and of the existence of persons contemporaneously alive. The authenticity of that part of the record which embraces the names of persons who existed before the living members rests on the absence of anything showing, directly or inferentially, that the pedigree was prepared with any motive other than the natural motive for preparing and preserving a record of family traditions relating to the family pedigree.[3] Where the relationship in a pedigree table is corroborated in material parts by the oral evidence, and the table *prima facie* satisfies all the conditions prescribed by section 32 (6) and section 90 of Evidence Act, a presumption should be made in favour of its genuineness.[4] A statement in the will of a deceased Hindu widow that a certain person was her daughter's son was held by the Privy Council to be conclusive evidence of this relationship, when corroborated by other relatives and not contradicted by other reliable evidence.[5] Entries of relationship in *pandas'* books[6] or in the books of the priests of Hardwar, Mathura and Thaneswar, though admissible have to be taken with great caution if they appear in leaflets or stitched books containing blank pages or spaces which admit of interpolations.[7] A passage in a District Gazetteer cannot take the place of a pedigree.[8]

CLAUSE (7) : DECLARATIONS RELATING TO A TRANSACTION BY WHICH A RIGHT IS CREATED, ASSERTED, ETC.

Scope and application of clause (7).—The following conditions are necessary for admissibility of a statement under this clause, namely, (1) the statement should be contained in a document, (2) it should have been made by a person who is dead, and (3)

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1. *Doddawa Kom Bennepgowda* v. *Bennapagowda Bin Yenkangowda*, 1925 PC 199 ; *Mohammad Aziz Khan* v. *Mohammad Saadat Ali Khan*, 136 IC 642 : 1931 O 177.
2. *Sabz Ali Khan* v. *Khair Mohammad Khan*, 3 L 48 : 49 IA 74 : 67 IC 264 : 1922 PC 139 ; see also *Mewa Singh* v. *Basant Singh*, 48 IC 540 : 1918 PC 49.
3. *Jang Bahadur Singh* v. *Arjun Singh*, 3 Luck 256 : 110 IC 446 : 1928 O 125.
4. *Jagdeo* v. *Vithoba*, 105 IC 81 : 1928 N 20.
5. *Kidar Nath* v. *Mathumal*, 40 C 555 : 18 IC 946 : 77 PR 1913 (PC).
6. *Collector of Farrukhabad* v. *Gajraj Singh*, 15 IC 625.
7. *Achzaj Ram* v. *Ganesh Das*, 151 IC 622 : 1934 Pesh 78 ; *Balak Ram High School, Panipat* v. *Nanu Mal*, 11 L 503 : 128 IC 532 : 1930 L 579 ; *Collector of Farrukhabad* v. *Gajraj Singh*, 15 IC 625.
8. *Balmekund* v. *Bishwa Nath Singh*, 52 IC 851.

the document should relate to what can be called a transaction within the meaning of Section 13 (a) of the Act.[1] The object of the clause is that the statement must have been made in relation to a transaction where it was necessary to make the statement. The section aims at keeping out gratuitous statements which were either not necessary to be made at the time and on the occasion when they were made or which it was not the duty of the party who made them to make.[2]

The clause does make relevant statements made in deeds, wills and such other documents which relate to transactions by which a right or custom in question was created, claimed, modified, recognised, asserted or denied. It does nto allow introduction of oral evidence, but such oral evidence may be relevant under clause (5) of this section, which however, requires that such a statement should have been made before the question in dispute was raised.[3]

Statements contained in a document relating to any such transaction as is mentioned in Section 13 (a).—The clause, read with section 13 (a), makes statements by deceased persons in respect of relevant facts themselves relevant, if those statements are contained in a document which relates to a transaction by which an assertion is made of a right or title which is a relevant question in the suit.[4] Since section 13 is applicable to both public and private rights and customs,[5] this clause also must be taken to apply to public as well as private rights and customs. A deed executed by the plaintiff and some deceased person, to which the defendant is not a party and which contains a recital as to the existence of a private customs, *e.g.*, a family custom, is admissible in proof of that custom, without the plaintiff being examained as a witness.[6] A statement of a deceased person, contained in a deed of family settlement, to the effect that after the death of his father, a partition was effected amongst the brothers, is not admissible under the clause.[7]

Section 32 (7) and 32 (3).—In Bhagwati Prasad Sah's case the Supréme Court of India held that the assertion in a mortgage bond by the deceased that other co-parceners were also separate is admissible as connected matter and integral part of the statement, *viz.*, that he was separated from the joint family, under section 32 (3) and not under section 32 (7).[8]

Transaction must be one by which, and not in which, the right or custom was created, asserted, etc.—To disprove a right or a custom, it is not enough to adduce evidence of a transaction in *which or in the course of which* the right or custom was asserted or denied. The transaction is relevant under section 13 (a) only if it be one by *which* and not one *in which* the right or custom was asserted or denied.[9] Thus, where the question was whether a tenant held land under the *nakdi* or a different system of

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1. *Khudiram Ojha* v. *Amodebala Debi*, 1948 P 426.
2. *Ibid.*
3. *Dwarka Nath* v. *Lalchand*, (1965) 1 SCWR 947.
4. *Nallasiva Mudaliar* v. *Ravan Bibi*, 70 IC 389 : 1921 M 383.
5. See notes to Section 13.
6. 1 BLR 263.
7. *Raj Narain* v. *Maharaj Narain*, 1937 O 133 : 165 IC 785.
8. 1952 SCJ 115.
9. *Subbarayalu Naidu* v. *Vengama Naidu*, 123 IC 197 : 1930 M 742 ; *Brojendra Kishore Roy Chaudhuri* v. *Mohim Chandra Bhattacharji*, 99 IC 189 : 1927 C 1 ; *Saripalli Venkatagopala Raju* v. *Fota Narasayya*, 26 IC 747 ; *Bansi Singh* v. *Mir Amir Ali*, 11 CWN 703.

rent and the Court based its decision on a statement contained in a deed of gift executed by a deceased ancestor of the defendant that the land was held under the *nakdi* system of rent, it was held that the decision was based on an inadmissible statement, as the deed of gift was not a transaction *by which the nakdi* nature of the holding was asserted but was only a transaction *in which the nakdi* nature of the holding was asserted.[1] Statements of fact contained in a will executed by a Hindu coparcener to the effect that the properties dealt with in the will are his self-acquired properties are admissible to prove the character of the properties.[2]

Statements in the will of a deceased person.— Where, in a suit for possession of lands as their *nishkar brahmottar*, the plaintiffs relied upon a recital of *brahmottar* title in the will of their deceased father, the recital in the will was held not to be admissible under this clause.[3] A non-probated will is not admissible in evidence under seciton 32 (7) and 13 (a), except on proof by an attesting witness that it had been executed in accordance with section 50 of the Indian Succession Act.[4] A statement taken by Sub-Registrar in the house of the testator before registering the will is admissible under this clause.[5]

Assertion of title in a mortgage-deed by a deceased mortgagor is admissible in proof of ownership.—An assertion of title as owner, found in a document and implied by the transaction itself, is admissible under section 13 as evidence of ownership, and a statement which forms the recital in the document as to how the title was acquired is also admissible under section 32 (7), if the person making recital is dead.[6] A deed of mortgage, executed by a mortgagor since deceased, and containing an assertain of title, is admissible, under the this clause, on the question of ownership,[7] and may be sufficient proof of ownership if corroborated by other evidence.[8]

Other instances of assertion.— A statement contained in a deed of adoption that the sons of the adopter was suffering from a virulent and incurable form of leprosy at the time of the adoption, is a relevant fact for deciding whether adoption during the lifetime of those sons was valid or not, and is admissible under section 32 (7).[9] A statement by a deceased person, who filed in some previous proceeding a copy of an original grant, that the copy was a true copy of the grant, is admissible evidence under section 32 (7) and section 13.[10] Where in a criminal case relating to the possession of land, the parties appointed a *mukhtear* as an arbitrator and agreed to abide by his decision, and *mukhtear* accordingly made a local inquiry and submitted a report, of the deceased *mukhtear* is admissible under this clause.[11]

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1. *Bansi Singh* v. *Mir Amir Ali*, 11 CWN 703.
2. *Venkataramayya* v. *Seshamma*, ILR 1937 M 1012 : 1937 M 538 : 170 IC 107.
3. *Satindra Kumar Chaudhury* v. *Krishna Kumari Chaudhurani*, 36 IC 882.
4. *Moheswar Panda* v. *Sunder Narain Pattanaik*, 33 IC 342 : 22 Cr LJ 551 ; see, however, *Hitnarain Singh* v. *Rambarai Rai*, 7 P 733 : 1928 P 459.
5. *Muthukrishna Naicken* v. *Ramachandra Naicken*, 47 IC 611.
6. *Nallasiva Mudaliar* v. *Ravan Bibi*, 70 IC 389 : 1921 M 383.
7. *Nallasiva Mudaliar* v. *Ravan Bibi*, 70 IC 389 : 1921 M 383 ; *Visalakshi Ammal* v. *Dorasinga Pillai* 29 IC 974.
8. *Visalakshi Ammal* v. *Dorasinga Pillai* , 29 IC 974.
9. *Nagammal* v. *Sankarappa Naidu*, 54 M 576 : 1931 M 264.
10. *Subrahmanya Somayajulu* v. *Seethavya*, 46 M 92 : 70 IC 729 : 1923 M 1 (FB), confirmed by the Privy Council in *Seethavya* v. *Subrahmanya Somayajulu*, 52 M 453 : 56 IA 146 : 117 IC 507 : 1929 PC 115 ; but *see Ambalavana Pandarasannadhi* v. *Kuppachi Janaki Ammal*, 35 IC 201.
11. *Guru Charan Rudra Pal* v. *Mufijul din Molla*, 65 CLJ 603.

CLAUSE (8) : STATEMENTS MADE BY A NUMBER OF PERSONS EXPRESSING THEIR FEELINGS OR IMPRESSIONS

Principle.—This clause means that when a number of persons assemble together to give vent to one common statement which expresses the feelings or impressions, produced in their mind at the time of making it, that statement may be given in evidence,[1] if the persons or some of the persons who made that statement are dead or cannot be examined as witnesses for any of reasons mentioned in section 32. "This clause relates to statements expressing feelings or impressions, not of an individual but an aggregate of individuals, as the exclamations of a crowd; and the evidence is receivable on account of the difficulty or impossibility of procuring the attendance of all the individuals who composed such crowd or aggregate of persons. Illustration (n) to this section which exemplifies this clause is taken from the well-know English case of *Du Bost* v. *Beresford*[2] where, in an action for damages for destroying a picture, the defendant, in support of his plea that he was justified to destroy the picture as it was a libel calculated to bring two of his relations into public ridicule, was allowed to give in evidence exclamations of recognitiion of the picture by the spectators.

33. Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated.—Evidence given by a witness in a judicial proceedings, or before any person authorized by law to take it, is relevant for the purpose or providing, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case the Court considers unreasonable:

Provided—

that the proceeding was between the same parties or their representatives in interest;

that the adverse party in the first proceeding had the right and opportunity to cross-examine;

that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation.—A Criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.

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1. *The Queen* v. *Ram Dutt Chowdhury*, 23 WR 25. Cr.
2. *Du Bost* v. *Beresford*, 2 Camp. 512.

COMMENTARY

Principle and reason.—The general rule is that all evidence must be direct.[1] *i.e.*, the witness must himself appear in Court to give *viva voca* evidence of the facts which he claims to have perceived. This section enacts the second exception to this general rule. Where a witness is not available, but it so happens that he had previously given evidence in proceedings between the same parties involving the same issue or issues, and the parties had the right and opportunity to cross-examine him, this section, on grounds of necessity and convenience, permits the previous deposition of such witness to be given in evidence in subsequent proceedings between the same parties.

Proof of unavailability of the witness is a necessary prerequisite for the admission of former deposition.—This section makes a previous deposition admissible only when the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an unreasonable amount of delay or expense.[2] Therefore, where the witness is alive and available[3] and none of the conditions mentioned in the section is fulfilled[4] there is no occasion for the application of the section. Section 33 is inapplicable where the witness produced at trial but is shy and speechless, in such circumstances the statement of the witness before the committing Magistrate cannot be transferred to the Sessions record under this section.[5] It is for the party wishing to give in evidence a former deposition to make out a case for its reception under the provisions of this section.[6]

Section 33 does not, however, restrict or override the provisions relating to 'admissions' under the Act. see comments under Section 17.[7]

Provisions of the section should be applied sparingly and with caution; evidence of and reasons for, application of the section should be formally recorded.—The provisions of the section must be strictly applied and the circumstances mentioned therein must be strictly proved before a deposition can be accepted as evidence.[8] But it is difficult to lay down a hard and inflexible rule which should govern all cases of the application of the section. It is primarily for the Court to statisfy itself that there are good and lawful grounds for admitting evidence for witnesses under this section.[9] Where it is desired to have recourse to this section on the ground that a witness is

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1. *See* Section 60.
2. *Bai Gangadhar Tilak* v. *Shri Shriniwas Pandit*, 39 B 441 : 42 IA 135 : 29 IC 639 : 1915 PC 7 ; See *Supdt. & Remembrance of Legal affairs, Bengal* v. *Forhad*, 153 IC 493 : 1934 C 766 : 36 Cr LJ 364.
3. *Supdt. & Rememberance of Legal Affaris, Bengal* v. *Forhad*, 153 IC 493 : 1934 C 766 : 36 Cr LJ 364 ; *Ram Prakash Das* v. *Anand Das*, 43 C 707 : 43 IA 73 : 33 IC 583 (PC) ; *E.* v. *Mulu*, 2 A 646 ; *Bhoobun Moyee Dossee* v. *Umbica Churn Sett*, 23 WR 343 ; the same was the ground of rejection of a former deposition in *Mohamnad Khan* v. *Mst. Fattan*, 12 PLR 1919.
4. *Supdt. & Remembrancer of Legal Affairs, Bengal* v. *Forhard*, 153 IC 493 : 1934 C 766 : 36 Cr LJ 364 ; *Ghulam Haidar* v. *E.*, 10 L 837 : 116 IC 329 : 1929 L 542 : 30 Cr LJ 623 ; *Brajaballav Ghose* v. *Akhoy Bagdi*, 93 IC 115 : 1926 C 705 ; *Dwarka Singh* v. *E.*, 74 IC 860 : 1922 O 254 : 24 Cr LJ 828 : see also *Bela Rani* v. *Mahabir Singh*, 34 A 341 : 14 IC 116 : *S C. Mitter* v. *State*, 1950 C 435 : 86 CLJ 21 ; *Behara Tanti* v. *State*, 1950 Orissa 202 : 51 Cr L 1493 ; *G.Bulliswamy* v. *Annapuranamma*, 1976 AP 270.
5. *Moti Ram* v. *E.*, 75 IC 152 : 24 Cr LJ 904 .
6. Section 104 : *S.C. Mitter* v. *State*, 1950 C 435 : 86 CLJ 21 distingished in *State* v. *Gajaraj*, 1953 Raj. 66 : 1952 Cr LJ 577.
7. *Union of India* v. *Moksh Builders & Financiers*, 1977 SC 409 (para 23).
8. *Behera Tanti* v. *State*, 1950 Orissa 202 : 51 Cr LJ 1493.
9. *Gaya Prasad* v. *State*, 1954 A 59 : 1954 Cr LJ 68.

incapable of giving evidence, that fact must be proved, and proved strictly. It is an elementary right of an accused person or a litigant in a civil suit that a witness who is to testify against him should give his evidence before the court trying the case which then has the opportunity of seeing the witness and observing his demeanour and can thus form a far better opinion as to his reliability than is possible from reading a statement or deposition. It is necessary that provision should be made for exceptional cases where it is impossible for the witness to be before the court, and it is only by a statutory provision that this can be achieved. But the Court must be careful to see that the conditions on which the statute permits previous evidence given by the witness to be read or strictly proved.[1] The application for this section is essentially a matter of discretion.[2] The powers given by the section should be exercised only sparingly,[3] and with great caution.[4] The courts should be loath to admit evidence under this section by observing only formalities of law and the importance of examining witness before the Court should, under no circumstances, be underrated.[5] In criminal cases the application fo the section must be confined with the narrowest limits,[6] and where a man is being tried for his life and the evidence sought to be put in is of signal importance, the Court must insist on strict proof before holding that the conditions requisite for admitting a former deposition have been satisfied.[7] Where a former deposition is admitted under the provisions of the section, the grounds for its admission should, before such deposition is admitted in evidence, be fully and clearly stated, preferably in a separate order,[8] to enable the appellate Court to judge of their adequacy.[9] But an omission to record at the proper statge the reasons for admitting such evidence is a mere irregularity curable under section 537, Cr. P. Code.[10] The circumstances which justify the reception in evidence of a former deposition should be proved like any other fact in the case,[11] evidence as to the existence of such circumstances should be formally recorded,[12] and the matter determined judicially.[13] A mere statement by the Public Prosecutor that the witness cannot be found is insufficient.[14] There must be independent evidence before a

1. *Chainchal Singh* v. *K.E.*, 1946 PC 1.
2. *Jati Mali* v. *E.*, 1929 C 765.
3. *E.* v. *Mulu*, 2 A 646.
4. *Nga Nyo* v. *E.*, 1 R 512 : 76 IC 817 : 1924 R 209 : 25 Cr LJ 257 ; In re *Pyari Lall*, 4 CLJ 504 : *Q.* v. *Nawjan alias Nane Khan*, 20 WR 69 Cr.
5. *Gaya Prasad* v. *State*, 1954 A 59 : 1954 Cr LJ 68.
6. *Lakshman Totaram* v. *E.*, 31 IC 354 : 16 Cr LJ 754 : 17 Bom. LR 590.
7. *Nag Nyo* v. *E.*, 1 R 512 : 76 IC 817 : 1924 R 209 : 25 Cr LJ 257 : *Kala* v. *E.*, 1914 L 206 ; *Saudagar Singh* v. *E.*, 1944 L 377 ; *Kanhaiyalal Sewaram* v. *State*, 1953 MB 262 : 1954 Cr LJ 6 ; *Isher Das* v. *State*, 1954 J & K 19.
8. *Nga Nyo* v. *E.*, 1 R 512 : 76 IC 817 : 1924 R 209 : 25 Cr LJ 257 ; *Savlimiya Miyabhai* v. *E.*, 1944 B 338 ; *E.* v. *Gajendra Mohan Kar*, 1943 C 222 : ILR (1943) IC 405.
9. *Mokshed Sheikh* v. *E.*, 129 IC 105 : 1930 C 756 : 32 Cr LJ 233 ; *Nga Nyo* v. *E.*, 1 R 512 : 76 IC 817 : 1924 R 209 : 25 Cr LJ 257 : *Annavi Muthiriyan* v. *E.*, 39 M 449 : 28 IC 518 : 16 Cr LJ 294 : *E.* v. *Fateh Ali*, 1881 AWN 51 ; *Q.* v. *Nawjan alias Nane Khan*, 20 WR 69 Cr.
10. *Nga Ba On* v. *E.*, 104 IC 637 : 1927 R 248 : 28 Cr LJ 861.
11. *Sajjan Singh* v. *E.*, 6 L 437 : 90 IC 145 : 1925 L 418 : 26 Cr LJ 1489 ; *Khem Singh* v. *E.*, 88 IC 30 : 1925 L 319 : 26 Cr LJ 1086 : LBR (1872-92) 134.
12. *Satish Chandra Seal* v. *E.*, 145 C 197 ; *Indar* v. *E.*, 129 IC 195 : 1930 L 1041 : 32 Cr LJ 256 ; *Khem Singh* v. *E.*, 88 IC 30 : 1925 L 319 : 26 Cr LJ 1086 ; *E.* v. *Mulu*, 2 A 646 ; *Q.E* v. *Ram Sarup*, 1898 AWN 22.
13. *Satish Chandra Seal* v. *E.*, 1945 C 197 ; *Indar* v. *E.*, 129 IC 195 : 1930 L 1041 : 32 Cr LJ 256 ; *Mokshed Sheikh* v. *E.*, 129 IC 105 : 1930 C 756 : 32 Cr LJ 233 ; *Ghulam Haidar* v. *E.*, 10 L 837 : 116 IC 329 : 1929 L 542 : 30 Cr LJ 623.
14. *Indar* v. *E.*, 129 IC 195 : 1930 L 1041 : 32 Cr LJ 256 ; *Mokshed Sheikh* v. *E.*, 129 IC 105 : 1930 C 756 : 32 Cr LJ 233.

Court before it can exercise the powers given to it by section 33 of the Evidence Act. The appelete Court may not be prepared to act upon representations which have satisfied the trial Court and, therefore, it is incumbent on the lower Court to have on record some legal evidence on which it intends to act.[1] Where, however, a witness is stated by other witnesses to be ill, it is not absolutely necessary, to examine a qualified medical practitioner.[2] In a recent case where the fact of illness of a witness and his inability to attend was sought to be proved by the evidence of the Police Officer who served the summons, the Privy Council excluded the evidence, Lord Goddard who delivered the judgment observing. "In the present case the only evidence was that of the Police Officer already mentioned and his visit was thirteen days before the trial. The officer was not a proper person to prove from what disease the witness was suffering ; he could only say what someone told him. If such evidence as he gave were sufficient it would mean that any reluctant witness could take to his bed when he found there was a likehood of being served with a witness summons and get excused from attendance by telling the server that he was suffering from some serious complaint. Their Lordships do not mean to lay down that in every case there must be evidence of a medical man, where excuse is sought on the ground of physical incapacity. That is not the law in England (see *R.*v. *Noakes* [1917] 1 K.B. 581), and there is no reason for a different rule to apply in India. There may be many cases in which the facts are such, that the incapacity can be proved by a lay witness. Here there was no evidence at all except that the policeman found the witness was ill thirteen days before the trial and as he was not competent to speak to the illness their Lordships are of opinion that there was no evidence before the Court that he was incapable of giving evidence on 19th January. The learned Additional Judge was no doubt largely influenced by counsel for the accused consenting to the evidence being read, but in their Loardships opinion that does not do away with the necessity of the Court being satisfied by proof. Nehther counsel nor his client could have had any personal knowledge on the subject, unless indeed counsel had recently seen the witness, in which case he could have so informed the Court and not merely given a consent. It may be that there are some matters as to which it would be possible for a prisoner to consent to be taken as proved though no strict evidence was given; if there are, as to which their Lordship express no opinion, they could only be such as might reasonably be supposed to be particularly, within the knowledge of the accused. Their Lordships accordingly consider that this previous statement was wrongly admitted. Their Lordships would also observe that though in this case the accused was represented before the committing Magistrate and the witness was therefore cross-examined, in very many of these cases the accused is not represented at this stage, so while he has the opportunity to cross-examine it is not often that this would be effectively done. This is another reason for exercising great care before admitting a statement".[3]

The Court can hold evidence, given in a prior judicial proceeding, or before any person authorised by law to take it, relevant only, if it is satisfied that the requisite conditions mentioned in this section are fulfilled. It is, no doubt, open to the parties to admit that the requisite conditions are fulfilled. But if the parties do not admit this fact, evidence given in a former judicial proceeding, or before any person authorised by law

1. *Nga Chit Tin* v. *The King*, 1939 R 225 ; *Annavi Muthiriyan* v. *E.*, 39 M 449 : 28 IC 518 : 16 Cr LJ 294.
2. *Alijan* v. *E.*, 103 IC 846 : 1927 C 679 : 28 Cr LJ 766.
3. *Chainchal Singh* v. *K.E.*.1946 PC 1 : *Kesar Singh* v. *State*. 1954 Puni 286.

to take it, cannot become relevant under the provisions of this section, if the conditions stated in this section are not fulfilled.[1]

Effect of consent to the admission of inadmissible evidence in civil and criminal cases.—A civil suit is a proceeding *inter partes;* and as parties can by consent settle its final result by having a consent decree passed, there is no reason why they should not be permited to consent to treat something as evidence of a relevant fact, which otherwise may not be evidence of that fact. In a civil case, where no question of public policy is involved, a party may waive the benefit of the provisions of section 33, which are merely intended for his benefit; and where a party has done so and the trial judge has admitted and acted upon a former deposition which was in fact not admissible under section 33, the consenting party will not be allowed to object to its admissibility in appeal.[2] But in criminal cases a prisoner can consent to nothing ; and an omission to object,[3] or consent to the admission of evidence which is inadmissible under section 33 cannot make the evidence admissible.[4]

When the witness is dead.—The death of the witness must be proved,[5] like any other fact, by the evidence of witnesses and a mere report that the witness is dead is not sufficient.[6] Under Section 107, 108 and 114, however, death may, in appropriate cases, be presumed to have occurred.

Where witness died before the sessions trial began it was held that his evidence in Committing Court was admissible under Section 33.[7]

Person making the statement died before her statement could be recorded before the Magistrate—Statement inadmissible under this section.— Mst. Jatri had two daughters, Baishakhi and Aghani. The mother had gone out to pluck wild berries leaving the daughters in the house. When she returned in the noon she found only Aghani. She enquired where Baishakhi was and Aghani made certain statement to her mother and also to others but before her statement was recorded before the magistrate she died. Baishakhi did not return in the evening. On search, her headless body was found lying near the village. The statements of Aghani who died within a few months of the occurrence before her statements could be recorded in a judicial proceeding, were not admissible in evidence either under Section 32 or Section 33 of the Evidence Act. Section 33 was clearly out of the way because Aghani made no statements in a judicial proceeding or before any person authorised by law to take her evidence.[8]

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1. *Nathubhai* v. *Chhotubhai*, 1962 Guj LR 418.
2. *Chainchal Singh* v. *K.E.*, 1946 PC 1 ; *Ayyavar Theva* v. *Secretary of State*, 1942 M 528 ; *Jainab Bibi Saheba* v. *Hyderally Saheb*, 43 M 609 ; 56 IC 957 (FB) over ruling *Ponnusami Pillai* v. *Singaram Pillai*, 41 M 731 : 46 IC 849 ; *Lakshmidevamma* v. *Pobhisetti Krishtiah*, 104 IC 518 : 1927 M 1107 ; *Varadarajulu Chetti* v . *Velayudha Udayan*, 90 IC 743 : 1925 M 1160 ; *Radha Kishan* v. *Kedar Nath*, 46 A 815 : 80 IC 874 : 1924 A 845 ; *Bobba Bhavamma* v. *Bobba Ramamma*, 78 IC 176 : 1924 M 537 ; *Lakshman Gobind* v. *Amrit Gopal*, 24 B 591 ; but see *Luchiram Motilal* v. *Radha Charan Poddar*, 49 C 93 : 66 IC 15 : 1922 C 267 ; *Ratna Munda* v. *State*, 52 Cr LJ 685 ; *Nitya Nanda Mandhata Patnaik* v. *Binayak Sahu*, 1955 Orissa 129 ; see also *Rangasami Naidu* v. *Sundarajulu Naidu*, 35 IC 52.
3. *E.* v. *Fateh Ali*, (1881) AWN 51 ; *S.C.Mitter* v. *State*, 1950 C 435 : 86 CLJ 21.
4. *Chainchal Singh* v. *K.E.*, 1946 PC 1 ; *Savlimiya Miyabhai* v. *E.*, 1944 B 338 ; *Mokshed Sheikh* v. *E.*, 129 IC 105 : 1930 C 756 : 32 Cr LJ 233 ; *Abdul Gaffoor* v. *Govind Prasad* 117 IC 241 : 1923 R 284 : 30 Cr LJ 623 ; In re *Kottammal Kolathingal Umar Hajee*, 46 M 117 : 69 IC 636 : 1923 M 23 : 32 Cr LJ 748 ; *Annavi Muthiriyan* v. *E.*, 39 M 449 : 28 IC 518 : 16 Cr LJ 294 ; *Ratna Munda* v. *State*, 52 Cr LJ 685 : *Kesar Singh* v. *State*, 1954 Punj. 286.
5. *Sajjan Singh* v. *E.*, 6 L 437 : 90 IC 145 : 1925 L 418 : 26 Cr LJ 1489.
6. LBR (1872-92) 134.
7. *State* v. *Dhusa Kandy*, 1970 Cr LJ 1332 (Orissa).
8. *Ratan Gond* v. *The State of Bihar*, 1959 SCR 1336 : 1959 Cr LJ 180 : 1959 SCJ 222.

When the witness cannot be found.— Where a witness is untraceable,[1] or has disappeared, so that it is impossible to serve him,[2] his former deposition may be properly admitted under this section. In other cases it must be shown that the witness cannot be found by ordinary care and the use of ordinary means,[3] and that reasonable exertion has been made to find him.[4] Where a constable who goes to serve the summons on the witness does not find him at his house, he having gone to his other residence,[5] or the witness fails to attend on the date fixed, it cannot be said that the witness cannot be found,[6] and if there is nothing of a special kind to stand in the way, the case should be adjourned to some other day,[7] and warrant issued,[8] and further attempt made to enforce his attendance.[9] A mere statement by the Public Prosecutor that the witness cannot be found is insufficient.[10] Where the Sessions trial commenced before the return of the *subpoena* of a witness and the Sessions Judge admitted in evidence the deposition of the witness before the committing Magistrate without waiting for the return of the *subpoena*, or without taking any other step to secure the presence of the witness, the High Court held the admission of the deposition not justified under the provisions of Section 33.[11] This section is inappliable to a case where the only evidence in support of the assertion that a witness cannot be found is the statement of a Police Officer that search was made for the witness but he could not be found and that a warrant was also issued, but the warrant is not produced that there is no evidence of any attempt to serve it.[12] The Statement of a Head Constable that he went thrice to the house of the witness and was unable to find him in the village is not sufficient to establish that the attendance of the witness cannot be procured.[13] But where the Police Officer in charge of the case stated on good authority before the Sessions Judge that inquiries were made about the whereabouts of the witness but he could not be traced and no attempt was made by the defence to challenge the statement of the Police Officer, the requirements of the section were held to have been complied with.[14] If a witness has left his residence, an effort should be shown to have been made to find him,[15] and if the residence of the witness was temporary, the authority serving the summons should look for him at his original place of residence.[16] When the failure of the witness to appear is due to the failure of the prosecuting agency to take out a summons for the witness in good time, the use of Section 33 is improper.[17]

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1. *Ajodhi* v. *E.*, 56 IC 582 : 21 Cr LJ 486.
2. *E.* v. *Rocin Mohato*, 7 C 42.
3. *Q.* v. *Nawjan* alias *Nanhe Khan*, 20 WR 69 Cr.
4. *Q.* v. *Luckhy Narain Nagory*, 24 WR 18 Cr. : *Murli Singh* v. *Rex*, 1951 ALJ 677.
5. *Hari Prasad* v. *State*, 1953 Cr LJ 1496 : 1953 ALJ 318 ;
6. *E.* v. *Nanhe Khan*, 2 Cr LJ 518.
7. *Q.* v. *Lukhun Santhal*, 21 WR 56 Cr.
8. *E.* v. *Nanhe Khan*, 2 Cr LJ 518.
9. *Dwarka Singh* v. *E.*, 74 IC 860 : 1922 O 254 : 24 Cr LJ 828.
10. *Annavi Muthiriyan* v. *E.*, 39 M 449 : 28 IC 518 : 16 Cr LJ 294.
11. *Ghulam Haidar* v. *E.*, 10 L 837 : 116 IC 329 : 1929 L 542 : 30 Cr LJ 623.
12. *E.* v. *Kangal Mali*, 41 C 601 : 26 IC 161 : 15 Cr LJ 713.
13. *Dwarka Singh* v. *E.*, 74 IC 860 : 1922 O 254 : 24 Cr LJ 828.
14. *Jati Mali* v. *E.*, 57 C 248 : 125 IC 599 : 1929 C 765 : 31 Cr LJ 857.
15. *Abdul Gaffoor* v. *Govind Prasad*, 117 IC 241 : 1928 R 284 : 30 Cr LJ 736.
16. *Q.* v. *Luckhy Narain Nagory*, 24 WR 18 Cr. ; *Hari Prasad* v. *State*, 1953 A 660 : 1953 Cr LJ 1496 : 1953 ALJ 318.
17. *Nasib Singh* v. *E.*, 1943 L 89 : 207 IC 32 : 44 Cr LJ 552 ; *Lal* v. *E.*, 1943 L 118 : 207 IC 243 : 44 Cr LJ 627 ; See also notes to Section 32 under the heading "who cannot be found".

A statement of a witness recorded before the Committing Magistrate can be taken on record under Section 33 at the Sessions trial only if his present whereabouts are not known and cannot be discovered. In the present case evidence before the Committing Magistrate a doctor at an hospital in whose presence a dying declaration was recorded, was brought on record at the Sessions trial under Section 33. It was established that the summons could not be served on the doctor because at the time of the Sessions trial he had left his employment at the hospital and inquiries failed to disclose his "present whereabouts". The Sessions Judge took the previous statement on record on the ground that there was no likelihood of the witness being available without unreasonable delay and expense and no objection was taken thereto by the defence. It was held that there was no infirmity in the order and the previous statement so taken on record was, admissible in evidence.[1]

Incapable of giving evidence; illness.—The expression "incapable of giving evidence" contemplates such case as where the witness has become insane or , owing to illness or some other infirmity, is unable to attend the Court. Whether, owing to the illness of the witness, his evidence should be taken on commission, or the trial postponed till such time as the witness is likely to recover, or his former deposition should be admitted under the provisions of this section, is a question for the determination of the trial Judge, and the answer to this question would depend on the individual circumstances of each case.

The illness of the witness must be proved and its nature indicated,[2] though it is not absolutely necessary to call a doctor to prove.[3] Incapacity due to a temporary cause, such as illness, is not the kind of incapacity contemplated by the section,[4] and in such cases of temporary illness the Court can admit a previous deposition under the section only if the attendance of the deponent cannot be secured without an unreasonable amount of delay or expense.[5]

Where a witness appears before the Session's Court and is examined but is not cross-examined due to illness, his statement made in the committing court cannot be taken into consideration under the section.[6]

When the witness is kept out of the way by the adverse party.—The proposition that if a witness be kept out of the way by the adverse party his former statement will be admissible, rests chiefly on the broad principle of justice, which will not permit a party to take advantage of his own wrong.[7] The mere fact that the witness was examined by the first party on the previous occasion and cited by him on the subsequent occassion, though not actually examined, and that when cited by the second party the witness did not appear, does not, in the absence of evidence that he is being kept out of the way by the first party entitle the second party to let in his previous deposition under the provisions of Section 33.[8] If the witness is kept out of the way by one prisoner, the

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1. *Bakhshish Singh* v. *State of Punjab*, 1958 SCR 409 : 1957 Cr LJ 1459 : 1958 SCJ 106.
2. *Abdul Gaffoor* v. *Govind Prasad*, 117 IC 241 : 1928 R 284 : 30 Cr LJ 736 ; *E.* v. *Asgur Hussein*, 6 C 774.
3. *Alijan* v. *E.*, 103 IC 846 : 1927 C 679 : 28 Cr LJ 766.
4. *Hari Prasad* v. *State*, 1953 All 660 : 1953 Cr LJ 1496 : 1953 ALJ 318 : In re *Pyari Lall*, 4 CLR 504 ; but see *Asgur Hossein*, 6 C 774.
5. In re *Pyari Lall*, 4 CLR 504 ; *E.* v. *Gajendra Mohan Kar*, 1943 C 222 : 47 CWN 271.
6. *Kanteswar Chowdhury* v. *Province of Assam*, 1950 Assam,77.
7. Taylor, § 478.
8. *Brajaballav Ghose* v. *Akhoy Bagdi*, 93 IC 115 : 1926 C 705.

previous deposition of the witness will be admissible only against the particular prisoner who has kept the witness out of the way, and not against the other prisoner.[1] Where a relation of the accused was examined by the prosecution before the committig Magistrate and personal recognizance was taken from him to appear before the Sessions Judge, and, when the case was tried by the Sessions Judge, the witness did not turn up and could not be found, it was held that his deposition before the committing magistrate could be admitted at the trial under Section 33, either because he could not be found, or because he was kept out of the way by the accused.[2] The expression "the adverse party" is used in the section to distinguish that party from the party who calls the witness, and the distinction has nothing whatever to do with the nature of the evidence given by the witness. A party calling a witness does not become "the adverse party" because the witness gives evidence which favours the opposite party or is hostile to the party calling the witness.[3]

Unreasonable delay and expense.—The question of the reasonableness of the amount of delay or expense should be considered with reference to the circumstances of each case. It is impossible to lay down any hard and fast rule for the application of Section 33 of the Evidence Act, Each case must depend upon its own facts, and the matter is essentially one for the exercise of discretion on the part of the trial Judge.[4] The Judge has, however, to satisfy himself that the presence of the witness cannot be obtained without an unreasonable amount of delay or expense.[5] It would be unreasonable to incur much delay or expense when the deposition sought to be admitted is of a formal nature or relates to facts as to which there is little or no dispute. On the other hand, it might be very reasonable to submit to much delay and considerable expense when the evidence of the dependent is vital to the success of the prosecution or has a very important bearing upon the guilt of the accused.[6] When a witness is material, justice requires that he should, if possible, be examined at the trial in the presence of the accused. Where the evidence of the witness is not material, there is no need to introduce it under the provisions of Section 33.[7] In criminal cases in which the evidence of the witness is material.[8] and of signal importance,[9] the provisions of this section should be resorted to only in extreme cases of delay and expense.[10] In a murder case the principal witness had joined the army and was at Muttra. It was held that any delay or expense which might be involved was insignificant as compared with the public interests involved in examining, in the box and in the presence of the Judge and the assessors, the principal witness upon so serious a charge.[11] Where a person is accused of an offence under Section 411, I.P. Code, the evidence of the alleged owner of the stolen property is of the utmost moment. In such a case, the presence of the alleged owner cannot be dispensed with on

1. See *R.* v. *Scaife*, 5 Cox 243.
2. *Abbas Mandal* v. *E.*, 131 IC 855 : 1931 C 473 : 32 Cr LJ 810.
3. *Makhan Khan* v. *E.*, 1948 S 122 : PLD 1949 S 27.
4. *Jati Mali* v. *E.*, 57 C 248 : 125 IC 509 : 1929 C 765 : 31 Cr LJ 857.
5. *Annavi Muthiriyan* v. *E.*, 39 M 449 : 28 IC 518: 16 Cr LJ 291.
6. In re *Pyari Lall*, 4 CLR 504.
7. *Lakshman Totaram* v. *E.*, 31 IC 354 : 16 Cr LJ 754 : 17 Bom. LR 590.
8. *Lakshman Totaram* v. *E.*, 31 IC 354 : 16 Cr LJ 754 : 17 Bom. LR 590 ; In re *Pyari Lall*, 4 CLR 504.
9. *Nga Nyo* v. *E.*, 1 R 512 : 76 IC 817 : 1924 R 209 : 25 Cr LJ 257.
10. *Lakshman Totaram* v. *E.*, 31 IC 354 : 16 Cr LJ 754 : 17 Bom. LR 590 ; *E.* v. *Mulu*, 2 A 646.
11. In re *S. Siluvai Antony Nadar*, 1944 M 319 : ILR 1944 M 687 : 215 IC 242 : 46 Cr LJ 85.

the ground that it would mean an expense of Rs. 500. to bring him to Court and inconvencience to the witness is not at all a ground for the admission of a former deposition under Section 33.[1] If a case turns on a conversation between the prosecutor and the accused, it is of the highest importance that the evidence of the prosecutor should be heard by the jury.[2] Where the charge against the prisoner is a serious one, the delay of an adjournment to the next Session is not in itself unreasonable and, unless there is anything of a special nature to stand in the way, the case should be adjourned to be duly tried on *viva voce* testimony,[3] and warrant issued.[4] and further attempt made to enforce the attendance of the witness.[5] If the witness has left his temporary residence, the authority serving the summons should look for him at his original place of residence.[6] Where there is nothing to show either that the witness could not be found if reasonable exertion had been made to find him[7] or that the presence of the witness could not have been obtained without an unreasonable amount of delay or expense,[8] the former deposition would not be admissible. A previous deposition cannot be admitted under this section if the delay or expense is not very great,[9] or is trifling.[10] A fortnight's delay is not unreasonable,[11] The evidence of a witness in the committing Magistrate's Court cannot be transferred to the Sessions Court merely on the ground that it would be expensive to retain the assessors until he is served.[12] The fact that the witness has gone to a place not far away for purposes of training for a few days (a week) is not a sufficient ground to admit his deposition under this section[13] But if the witness has left the country, it will be proper ground for admitting his deposition in evidence.[14] When a witness migrates from one country to another and cannot be brought before the Court within week is not a sufficient ground to admit his deposition under this section.[15] The mere fact that the witness has to come from Rangoon to Madras is not a sufficient reason for admitting his statement in evidence without examining him.[16] The expense contemplated by this section is the expense in obtaining the attendance of the particular witness[17] and the expense of adjoining the trial.[18]

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1. *Q.E.* v. *Burke*, 6 A 224.
2. *Q.E.* v. *Jacob*, 19 C 113.
3. *Q* v. *Lukhan Santhal*, 21 WR 56 Cr.
4. *E.* v. *Nanhe Khan*, 2 Cr LJ 518.
5. *Dwarka Singh* v. *E.*, 74 IC 860 : 1922 O 254 : 24 Cr LJ 828 ; *E.* v. *Nanhe Khan*, 2 Cr LJ 518 ; See *Ghulam Haidar* v. *E.*, 10 L 837 : 116 IC 329 : 1929 L 542 : 30 Cr LJ 623.
6. *Q* v. *Luckhy Narain Nagori*, 24 WR 18 Cr. ; *Hari Prasad* v. *State*, 1953 A 660 : 1953 Cr LJ 1496 : 1953 ALJ 318.
7. *Q.* v. *Luckhy Narain Nagori*, 24 WR 18 Cr.
8. *Noshai Mistri* v. *E.*, 5 C 958.
9. *Lakshman Totaram* v. *E.*, 31 IC 354 : 16 Cr LJ 754 : 17 Bom. LR 590.
10. *E.* v. *Fateh Ali*, (1881) AWN 51 : *Lal* v. *E.*, 1943 L 118 : 207 IC 243.
11. In re *Pyari Lall*, 4 CLR 504 See also *Savlimiya Miyabhai* v. *E.*, 1944 B 338 ; *E.* v. *Gajendra Mohan Kar*, 1943 C 222 : ILR (1943) IC 405.
12. *Lal* v. *E*,. 1943 L 118 ; 207 IC 243.
13. *Savlimiya Miyabhai* v. *E.*, 1944 B 338.
14. *Nga Ba On* v. *E.*, 104 IC 637 ; 1927 R 248 ; 28 Cr LJ 861 ; *Asiatic Steam Navigation Co.* v. *Bengal Coal Co.*, 35 C 751.
15. *Khadim Hussain* v. *Crown*, 1950 L 34 ; *Gurdial Singh* v. *Crown*, 1949 EP 228 ; 51 PLR 74 ; 50 Cr LJ 568.
16. *Kadappa Chetti* v. *Tirupathi Chetti*, 86 IC 576 ; 1925 M 444 ; but see *J. G. G. Fernandes* v. *E.*, 1935 R 484.
17. *Reghbushana Tirthaswami* v. *Vidiavaridhi Tirthaswami*, 34 IC 875 ; *See* In re *Pyrai Lall*, 4 CLR 504.
18. *See In re Pyari Lall*, 4 CLR 504 ; *Q.* v. *Lukhun Santhal*, 21 WR 56 Cr.

Depositions in foreign country under the Fugitive Offenders Act.—Evidence recorded in a foreign country under the Fugitive Offences Act may be admitted under this section at the trial of the fugitive in India.[1]

The evidence must have been given in judicial proceedings or before a person authorized by law to take it.—Evidence sought to be admitted under the provisions of this section must have been given in judical proceedings or before the person authorized by law to take it. "Judicial proceedings " include any proceeding in the course of which evidence is or may be legally taken on oath.[2] A proceeding before a Judge or a Magistrate who has no jurisdiction is not a judicial proceeding within the meaning of Section 33 and, therefore, the evidence of a witness given in such proceeding is not admissible under the said section in a subsequent trial by a competent Court.[3] Where a Munsif, after the examination of a witness, returns the plaint on the ground that the value of the subject matter is above his pecuniary jurisdiction, the evidence of the witness so examined will not be admissible in the subsequent trial before the Sub-Judge, even though the witness has died in the interval and so cannot be examined afresh[4] Evidence recorded in the investigation of claims and objections under O. 21 r. 58, C. P. Code, is admissible in a suit under O 21 r. 63, C. P. Code, to establish the right to the attached property, if the other requirements of this section have been complied with.[5] Revenue proceedings to ascertain who are the heirs of a deceased proprietor are not judicial proceedings,[6] nor Proceedings before a Settlement Deputy Collector in a dispute in respect of the boundary between two villages for fiscal purposes.[7] Proceedings before a tribunal having no jurisdiction are not judicial proceedings within the purview of this section.[8]

Persons authorized by law to take evidence. If the evidence was given before a person authorized by law to take it, it is not necessary that the proceeding before him in which it was given should have been judicial.[9] The British Consul at Zanzibar is a person authorized to take evidence;[10] So is a Commissioner appointed under the C.P. Code,[11] or the Cr. P. Code.[12] A deposition taken on commission issued and executed under Section 503-505. Criminal Procedure Code, is admissible in evidence at any subsequent stage of the same case before another Court;[13] it is a different case if the

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1. *Wheeler* v. *E.*, 112 IC 673 ; 1928 S 161 ; 29 Cr LJ 1089 ; as to the admissibility of evidence of the fugitive's own deposition during the extradition proceedings, *See E.*, v. *Wheeler*, 112 IC 50 ; 1929 S 15 ; 29 Cr LJ 962.
2. Section 4 (m) Cr. P. Code.
3. *State* v. *Sudhindra Nath Dutta*, 56 CWN 835 ; *Abdul Mannan* v. *Crown*, PLD 1954 Dacca 129 ; *Sankappa Rai* v. *Keraga Pujary*, 54 M 561 ; 132 IC 122 ; 1931 M 575 ; *Buta Singh* v. *E.*, 7 L 396 ; 97 IC 752 ; 1926 L 582 ; 27 Cr LJ 1168 ; *Rama Reddi and Seshu Reddi*, 3 M 48.
4. *Sankappa Rai* v. *Keraga Pujary*, 54 M 561 ; 132 IC 122 ; 1931 M 575.
5. *Nga Seik* v. *Nga Pu*, 22 IC 676.
6. *Bayava Shiddappa Desai* v. *Parvateva Basavaneppa Bellad*, 144 IC 442 ; 1933 B 126.
7. *Sri Krishna Dutta Dube* v. *Mst. Ahmadi Bibi*, 153 IC 708 ; 1935 A 187.
8. *E.* v. *Ajit Kumar*, 1945 C 159 ; 220 IC 237 ; 46 Cr LJ 692.
9. *Lanka Lakshmanna* v. *Lanka Vardhanamma*, 42 M 103 ; 49 IC 638.
10. *E.* v. *Dassaji Ghulam Husein*, 3 B 334.
11. O. 26, r. 16.
12. Sections 503-505.
13. *Q. E.*, v. *Ramchandra Govind Harshe*, 19 B 749 ; See also clause (2) of Section 507, Cr. P. C., which was enacted to remove the difficulty created by the decision in *Q.E.* v. *Jacob*, 19 C 113, to the effect that evidence taken on commission issued by a committing Magistrate was not admissible in the trial before the High Court.

other conditions of Section 33 are satisfied. A Registrar making an inquiry under Section 74 of the Registration Act as to the execution of a document,[1] or a District Registrar dealing with an appeal under Section 72 of that Act[2] or a Sub-Registrar holding an inquiry under Section 41(2) of the same Act.[3] on the presentation of a will, is a person legally authorized to take evidence; and, therefore, a deposition made in the course of such proceedings will be admissible in subsequent proceedings between the same parties, provided the other conditions of Section 33 are satisfied. Under Act IV of 1871 and Act V of 1989, a Coroner has authority to take evidence. A Magistrate holding an inquest also has authority to take evidence.[4]

Reasons to be stated for transfer or statement.—If a witness is not likely to be available without undue delay and expense, his statement might be transferred under Section 33 by the Court. He might have been well advised to give fuller reasons for making the order transferring the statement. It appears that the learned Judge transferred it on the ground of unreasonable delay and expense and there is no infirmity in this order of transfer.[5]

Evidence must have been given before a competent authority and taken in accordance with law.—Evidence given before a Judge or a Magistrate having no jurisdiction is not admissible under the provisions of this section in subsequent proceedings before a competent Court.[6] Though this section does not, like Section 80, expressly so State, it seems to be implied that a previous deposition, in order to be admissible in subsequent proceedings, must have been taken and recorded in accordance with law; and, therefore, a deposition not so taken or recorded would be inadmissible.[7]

PROVISO (1) : IDENTITY OF PARTIES

Former proceedings in which evidence was given must have been between the parties to the subseaquent proceeding or between the representatives in interest of such parties.—The scope and object and the language of this proviso have been authoritatively explained by the Privy Council in a judgment delivered by Lord Russel of Killowen. The Privy Council has differed from the interpretation that was put upon the terms of this proviso in some earlier decisions in India and by five Judges of the Madras High Court, who in its various stages dealt with the case which went in appeal to the Privy Council.[8] Proviso 1 to Section 33 means "provided that the first proceeding was between the parties to the second proceeding or between representatives in interest of the parties to the second proceeding". The proviso exactly inverts the requirements of the English law which requires that the parties to the second proceeding should legally represent the parties to the first proceeding or be their privies in estate. The person who is called by the proviso a "representative in interest" of another is a person

1. *Jekali Sheik* v. *Taibannessa Bai*, 20 IC 661 ; 18 CWN 605.
2. *Muthu Goundan* v. *Pachaymmal*, 1943 M 749.
3. *Lanka Lakshmanna* v. *Lanka Vardhanamma*, 42 M 103 ; 49 IC 838.
4. Section 176, Cr. P. Code.
5. *Bakhshish Singh* v. *The State of Punjab*, 1958 SCR 409 ; 1957 Cr. LJ 1459 : 1958 SCJ 106.
6. *Buta Singh* v. *E.*, 7 L 396 ; 97 IC 752 ; 1926 L 582 ; 27 Cr LJ 1168 ; *Rami Reddi and Seshu Reddi*, 3 M 48 ; *E.*, v. *Ajit Kumar*, 1945 C 159 (Magistrate's own appointment) *ultra vires*.
7. *See E.* v. *Phagunia Bhuian*, 89 IC 1043 ; 1926 P 58 ; 26 Cr LJ 1475. As to the mode of recording evidence in criminal cases, see Chapt. XXV and Sections 503, 509, 512, 263 and 264, Cr. PC; as to the mode of recording evidence in civil cases, see O. 18, rr 4—17 C.P. Code.
8. *Krishnayya Rao* v. *Raja of Pittapur*, 57 M 1 ; 60 IA 336 ; 146 IC 216 ; 1933 PC 202.

who was a party to the first proceeding. The proviso requires that the party to the first proceeding should have represented in interest the party to the second proceeding in relation to the questions in issue in the first proceeding to which "the fact which the evidence states " were relevant. It covers not only cases of privity in estate and succession of title, but also cases where both the following conditions exist, viz (i) the interest of the relevant party to the second proceeding in the subject-matter of the first proceeding is consistent with and not antagonistic to the interest therein of the relevant party to the first proceeding, and (ii) the interest of both in the answer to be given to the particular question in issue in the first proceeding is indentical. What Section 33 intends is to allow the admission of evidence given in a former proceeding, which it is, for the specified reasons, impossible to give in a later proceeding, subject to the protection which the proviso afford to the party to the later proceeding against whom the evidence is tendered. What the first proviso aims at securing is that the evidence shall not be admitted unless the person who tested, or had the opportunity of testing, the evidence by cross-examination, either is himself, or represented the interests of, the party to the later proceeding against whom the evidence is tendered, i.e., that he was in the later case, in effect, fighting that person's battle as well as his own.[1] According to this Privy Council decision, the first proviso is applicable not only to cases where the party to the first proceeding is the predecessor in interest of the party to the second proceeding in respect of the litigated right or question, but also to cases where the former represented the latter's interest, immediate or contingent. Thus, the proviso has been given a much wider scope, and, in view of this exposition of the proviso, several earlier cases in which the term "representative in interest" was held to mean only a "predecessor in interest" must be taken to have been wrongly decided. The test to determine whether a prior deposition is admissible in favour of a party is to see whether it would be admissible against him.[2] The fact that a party to the subsequent proceeding has been wrongly made a party in the former proceeding in which the evidence was given does not affect the application of the section, provided he was in fact a party and had the right and opportunity of cross-examining the deceased witness.[3] "It makes no difference that the parties are differently marshalled in the two proceedings, the plaintiffs in the first proceeding being defendants in the second, or *vice versa*; nor if there have been plurality of parties in the one case and not in the other.[4] As thus stated, the rule comes to this, that if the party against whom a former deposition is sought to be given in evidence under this section was himself a party, or is, in the subsequent proceeding, the representative in interest of a party to the former proceeding, evidence given by a witness in the former proceeding will be inadmissible against him; and the fact that some more persons have been impleaded in the subsequent proceeding or some persons who were parties to the former proceeding are not parties to the subsequent proceeding will be immaterial.[5] It is also immaterial that in the subsequent proceeding the party is the plaintiff or prosecutor, whereas in the former proceeding he was the defendant or

1. *Krishnayya Rao* v. *Raja of Pittapur*, 57 M 1 ; 60 IA 336 ; 145 IC 216 ; 1933 PC 202., reversing *Krishnayya Rao* v. *Raja of Pittapur*, 511 M 893 ; 116 IC 673 ; 1928 M 994 (FB) *and Krishna Surya Rao* v. *Raja of Chittapur*, 102 IC 713 ; 1927 M 733 ; *Ganpatrao* v. *Nagorao*, 1940 N 382.
2. *Krishnayya Rao* v. *Raja of Pittapur*, 57 M 1 ; 60 IA 336 ; 145 IC 216 ; 1933 PC 202.
3. *Gangaram* v. *E.*, 82 IC 715 ; 1925 N 172 ; 25 Cr LJ 1355.
4. *Wright* v. *Doe D, Tatham*, IA & E 3, but see *Hari Kishen* v. *Raghubar Dayal*, 1 Luck. 489 ; 97 IC 853 ; 1926 O 578.
5. *Hari Kishen* v. *Raghubar Dayal*, 1 Luck, 489 ; 97 IC 853 , 1926 O 578.

accused, and *vice versa*. But if a party to the subsequent proceeding was neither a party to the former proceeding nor is, in the subsequent proceeding, the representative in interest of a party to the former proceeding, this section will have no application and the evidence given by a witness in the former proceeding will be inadmissible.[1] Where a murder was committed by six accused persons, but only five of them were tried and, at the trial, evidence was not expressly recorded under Section 512, Cr. P. Code, against the sixth accused who was absconding at the time of the trial, the depositions of the witnesses in the former trial were held inadmissible in the subsequent trial of the sixth accused as he was not a party to the former trial and had no opportunity to cross-examine the witnesses.[2] A deposition in a former proceeding is inadmissible against an accused person if he was not a party to the former proceeding[3] but had appeared merely as a witness therein.[4] Statements of deceased witness as to the legitimacy of a claimant to certain property, made before Revenue Officer in a mutation case, are not admissible in a subsequent civil suit for that property by a person who was no party to the mutation case, but they will be admissible if the suit be by a person who was a party to the mutation case.[5] But where two civil suits, one by a person who was no party and the other by a person who was party to the mutation case, are tried together, it would be more consonant with justice not to take into consideration in either suit the statements of witness recorded in the mutation proceedings.[6] A party subsequently, impleaded may adopt the evidence which was led before he was made a party,[7] and where that is the case, depositions taken in his absence might become admissible against him in subsequent proceedings if the other conditions of the section are satisfied.

A purchaser of the equity of redemption is a representative in interest of the mortgagor within the meaning of this section.[8] To decide whether the subsequent litigant is or is not the representative in interest of the former litigant, the interest involved in each case must be considered and shown to be the same or similar, Without having regard to the nature of action, it is impossible, to say whether a certain person is another's representative in interest," for that very expression connotes and implies that the representation must be with reference to a particular title. The term "representative in interest" is a well known legal term and one cannot conceive of a representative in interest in the abstract.[9] Where the former suit was brought by R, a Hindu, against M for possession of some property, on the ground that M was not a genuine son of R's father but suppositious child fraudulently put forward, evidence recorded in the suit was held admissible in a subsequent suit brought by M against R's natural son who had been

1. *Ayyavar Thevar* v. *Secretary of State*, 1942 M 528 ; *Rup Kishor* v. *Patrani*, 1927 A 818 ;
2. *Q. E.* v. *Ishri Singh*, 8 A 672.
3. *Abdul Ghaffoor* v. *Govind Prasad*, 117 IC 241 ; 1928 R 284 ; 30 Cr LJ 736.
4. *Kadhe Mal* v. *E.*, 42 A 24 ; 52 IC 394 ; 20 Cr LJ 634 ; *Rami Reddi & Seshu Reddi*, 3 M 48.
5. *Mumtaz-un-Nisa Begam* v. *Wazir Ali*, 65 IC 308 ; 1921 O 242 ; *See also Bayava Shiddappa Desai* v. *Parvateva Basavanepa Bellad*, 144 IC 442 ; 1933 B 126.
6. *Mumtaz-un-Nisa Begam* v. *Wazir Ali*, 65 IC 308 ; 1921 O 242 As to the admissiblity of the statements in mutation proceedings, see the Privy Council decision in *Dal Bahadur Singh* v. *Bijai Bahadur Singh*, 52 A 1 ; 57 IA 14 ; 122 IC 8 ; 1930 PC 79.
7. *Rangasami Naidu* v. *Sundarajulu, Naidu*, 35 IC 52.
8. *Ma Shwe La* v. *Mg Kyin*, 26 IC 111.
9. *Krishna Surya Rao* v. *Raja of Pittapur*, 102 IC 713 ; 1927 M 733. This decision was reversed by the Privy Council in *Krishnayya Rao* v. *Raja of Pittapur*, 57 M 1 ; 60 IA 336 ; 145 IC 216 ; 1933 PC 202. *but the* Privy Council decision does not affect this part of the Madras Judgment.

adopted by M's uncle's widow, on the ground that in the former suit R was the representative in interest of his son who would, in a joint Hindu family, take by birth.[1] Where a statement made by an insolvent under Section 27 (1) of the Presidency Town Insolvency Act was given in evidence in a subsequent suit against the insolvent by the creditors, it was held that the statement was inadmissible under this section.[2]

To determine whether a person is the representative in interest of another regard must be had to the state of affairs at the time the evidence was given in the first suit; adopted son whether representative of his natural father?—In determining whether a person is or is not the representative in interest of another, regard must be had to the state of affairs at the time when the evidence was given in the former proceedings.[3] The question whether regard should be had also to the state of affairs existing at the time the deposition is tendered in evidence in the subsequent case is, in the existing state of authorities, not free from difficulty. The Madras High Court held that such state of affairs is an important, perhaps the determining, consideration;[4] but this Madras decision has been reversed by the Privy Council,[5] and there are indications in this Privy Council decision that subsequent events would not cause the party in the first suit to cease to be a representative of the party to the second suit, if in the first suit the former did represent the later's interest. Thus, if a Hindu coparcener was a party to the first suit, he will be taken to have represented his sons, born and unborn, and if any such son ceases to be a member of the comparcenary by his being adopted by someone after the first suit, the father will still be treated as his representative in interest for purposes of Section 33 in a subsequent suit to which the adopted son as such is a party.[6] If a party to the subsequent suit has purchased his interest from a person who, not being interested in the property, was merely an ostensible and not a real party to the former suit, but, having acquired interest in the property after the decisions of the former suit, transferred it to the purchaser, evidence given in the former suit will be inadmissible against the purchaser, as, at the time the evidence was given, the ostensible party to the former suit was not the representative in interest of the purchaser.[7]

In some cases the question whether a person is or is not the representative in interest of another has been discussed with reference to the rule of *res judicata* enacted in section 11, C. P. Code,[8] but the Privy Concil has observed that much assistance cannot be derived in considering this question from that point of view.[9]

Former depositions admissible against and in favour of persons suing or being sued as partners, joint contractors, coparceners, legatees, or tenants-in- common representative suits.—The vague expression "representative in interest " has not been defined in the Act, but whatever scope may be given to those words, they must at least

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1. *Krishnayya Rao* v. *Raja of Pittapur*, 57 M 1 ; 60 IA 336 ; 145 IC 216 ; 1933 PC 202.
2. *Luchiram Motilal* v. *Rada Charan* Poddar, 49 C 93 ; 66 IC 15 ; 1922 C 267.
3. *See Sitanath Dass* v. *Mohesh Chunder*, 12 C 627 ; See also *Krishnayya Rao* v. *Raja of Pittapur*, 57 M 1 ; 60 IA 336 ; 145 IC 216 ; 1933 PC 202.
4. *Krishnayya Rao* v. *Raja of Pittapur*, 57 M 893 ; 116 IC 673 ; 1928 M 994 (FB).
5. *Krishnayya Rao* v. *Raja of Pittapur*, 57 M 1 ; 60 IA 336 ; 145 IC 216 ; 1933 PC 202.
6. *Krishnayya Rao* v. *Raja of Pittapur*, 57 M 1 ; 60 IA 336 ; 145 IC 216 ; 1933 PC 202.
7. *Sitanath Dass* v. *Mohesh Chunder*, 12 C 627 .
8. *Bayava Shiddappa Desai* v. *Parvateva Basavaneppa Bellad*, 144 IC 442 ; 1933 B 126 ; *Ramakrishna Pillai* v. *Tirunarayana Pillai*, 55 M 40 ; 139 IC 684 ; 1932 M 798.
9. *Krishnayya Rao* v. *Raja of Pittapur*, 57 M 1 ; 60 IA 336 ; 145 IC 216 ; 1933 PC 202.

include privies in estate. Partners and joint contractors are the agents of each other for the purpose of making admission against each other in relation to partnership transactions or joint contracts and must be regarded as privies in estate.[1] The rule that evidence given as to a fact is admissible to prove the same fact in a later action between the same parties or their privies has been extended to cases where the interest of the parties to the second action were represented in the earlier one to which they were not parties, as, for instance, where a co-legatee or a tenant-in-common[2] or a coparcener[3] represented the interest of the other co-legatee tenants-in-common or coparceners. If the object of the former litigation was to advance a common claim,[4] or the litigation was a representative suit to which the sixth explanation to section 11, C. P. Code is applicable,[5] evidence given in it can be received under section 33 in a subsequent proceeding even against persons who were no parties to it. The principle, of the English rule according to which, when there are several remainders limited by one deed, a judgment for or against one of them becomes evidence for or against the next in succession, may justify the use, under Section 33 of the Evidence Act, of a former deposition in a suit brought against a Hindu widow, in a subsequent litigation against the reversioners.[6] In a joint Hindu family, in a coparcener acquires rights on and by birth. Therefore, the head of such family will, for purposes of section 33, be treated as the representative in interest of his sons, born and to be born ; and subject to the other conditions of the section, a deposition in a suit to which the head was a party will be admissible in a subsequent suit to which a son born or not born at the time of the first suit is a party.[7] An impartible *Raj*, though not subject to all the incidents of a Joint Hindu family property, retains to some extent its character of joint family property, inasmuch as senior members of the family take such *Raj*, by survivorship, Therefore, the incumbent of the *Raj* would be a representative in interest of his descendants who have a contingent right to succeed to the *Raj* by survivorship.[8]

Explanation ; depositions in criminal cases admissible in civil cases and vice versa.--"The explanation to the section is inserted for the purpose of excluding the objection which may arise, when the depositions are taken in criminal cases, that they cannot be used in a subsequent proceedings for want of mutuality, because the King is the prosecutor in all criminal proceedings." The explanation declares that in a criminal case the parties to the proceeding are the prosecutor and the accused person, and that, therefore, a deposition given in a former criminal case between the prosecutor and the accused person is admissible in a subsequent civil proceeding between them. Similarly, evidence given in a civil proceeding, where the prosecutor and the accused of the subsequent criminal proceeding were arrayed as plaintiff and defendant, will be admissible as between them, if the other requirements of the section are satisfied. If the of-

1. *Chandreswar Prasad Narain Singh* v. *Biseshwar Protap Narain Singh*, 5 P 777 ; 101 IC 289 ; 11927 P 61.
2. *Krishna Surya Rao* v. *Raja of Pittpur*, 102 IC 713 ; 1927 M 733 ; see the judgment of Kay. Lj. in Printing Telegraph & Construction Co. of the Agence Hevas v. *Drucker*, (1894) 2 BQ 801.
3. *Krishnayya Rao* v. *Raja of Pittapur*, 57 M 1 ; 60 IA 336 ; 146 IC 216 ; 1933 PC 202.
4. *Patinharkuru Vallaban Chattan Rajah Avergal* v. *Raman Varma*, 24 IC 519 ; see *Llanover* v. *Hemfrey*, (1882) 19 Ch. D 224.
5. *Krishna Surya Rao* v. *Raja of Pittapur*, 102 IC 713 ; 1927 M 733.
6. *Raj Kumari Devi* v. *Nritya Kali Devi*, 7 IC 892 ; 12 CLJ 434; but see *Lachmi Prosad Chowdhury* v. *Jagmohan Lal Chaubey*, 22 IC 594 ; 18 CLJ 633.
7. *Krishnayya Rao* v. *Raja of Pittapur*, 57 M 1 ; 60 IA 336 ; 145 IC 216 ; 1933 PC 202.
8. *Krishnayya Rao* v. *Raja of Pittapur*, 57 M 1 ; 60 IA 336 ; 145 IC 216 ; 1933 PC 202.

fence was taken cognizance of on the complaint of the person against whom the offence was committed would be the prosecutor within the meaning of the explanation, and thus a party to the proceedings within the meaning of the section, and the same would be the result if the complaint was made by another person at the instance of or on behalf of the person against whom the offence was committed.[1] Thus, where a complaint in respect of an offence of criminal trespass in the house of F was made by S against N, at the instance and on behalf of F, wherein S gave evidence, the deposition of S was admitted under section 33 in a subsequent suit by F against N under section 9 of the Specific Relief Act for possession of the house. F having been held to be the real prosecutor and, therefore, a party to the former criminal proceedings.[2] When an offence is taken cognizance of on police report and not on complaint,[3] the answer to the question who is the prosecutor must depend upon all the circumstances of the case. The mere setting of the law in motion by making a report to the police is not the only criterion : the conduct of the complainant before and after making the charge must also be taken into consideration. Nor is it enough to say that the prosecution was instituted and conducted by the police, as theoretically all prosecutions are conducted in the name and on behalf of the Crown, though in practice this is left in the hands of the person immediately aggrieved by the offence who, *pro hac* vice represents the Crown.[4] Wherein the prosecution of an accused person by a Court official for having forged a will, the deposition of a deceased witness in a former civil miscellaneous petition was given in evidence, it was held that neither the Crown nor the Court official prosecuting the accused having been a party to the former civil miscellaneous petition, the deposition of the deceased the depositions of witness of the deceased witness could not be admitted in evidence.[5] In a suit for compensation under Act III of 1855 by the sons of the deceased against the alleged murderers of the deceased the depositions of witness taken in the criminal trial which resulted in the conviction of the defendants are inadmissible, as the criminal proceedings cannot be said to have been between the plaintiffs and the defendants.[6] But where the defendant of a former civil suit, and deposition of the deceased plaintiff in the civil suit was given in evidence against him at his trial, it was held that the deposition was admissible under the explanation to this section.[7] It is illegal to bodily import in a civil case a deposition from a criminal case, unless the dependent is dead or otherwise incapable of giving evidence.[8]

Depositions before the Coroner.—In proceedings before the Coroner, the accused may or may not be a party according to whether he is or is not suspected; but the Crown is not a party. Therefore, depositions taken by the Coroner are not admissible at the subsequent trial of the accused, even if the deponents have died or are not available to be examined.[9]

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1. See Section 190 (1) (a), Cr. P. Code.
2. *Foolkissory Dassee* v. *Nabin Chunder Bhunjo*, 23 C 441.
3. See section 190 (1) (b), Cr. P.Code.
4. *Gaya Prasad* v. *Bhagat Singh*, 30 A 525 ; 35 IA 189 (PC) following in *Radhu Naik* v. *Dhadi Sahu*, 1953 Orissa 56.
5. *E.* v. *Waman Shivram Damla*. 27 B 626.
6. *Bishen Das* v. *Ram Labhaya*, 106 PR 1915 ; 32 IC 18.
7. *Debi Singh* v. *E.*, 52 IC 385 ; 20 Cr LJ 625.
8. *Bal Gangadhar Tilak* v. *Shriniwas Pandit*, 39 B 441 : 42 IA 135 : 29 IC 639 : 1915 PC 7.
9. *E.*, v. *Mohamed Yusuf*, 146 IC 544 : 1933 B 479 : 35 Cr LJ 106.

PROVISO (2) : THE RIGHT AND OPPORTUNITY TO CROSS EXAMINE

Both the right and the opportunity to cross-examine must have co-existed.—Cross examination is one of the most efficacious tests for the discovery of truth.[1] What Section 33 intends is to allow the admission of evidence given in a former proceeding, which it is, for the specified reasons, impossible to give in a later proceeding, subject to the protection which the second proviso affords to the party to the later proceeding against whom the evidence is tendered. What the second proviso aims at securing is that the evidence shall not be admitted unless it was tested by cross-examination by the party or by his representative in interest.[2] In Section 33 of the Evidence Act, which requires that the adverse party in the first proceeding had the right and the opportunity to cross examine, the word "and" cannot be read as "or". The true meaning of the section is that the adverse party had both the right and the opportunity of cross examination.[3] Therefore, where the adverse party had the opportunity but not the right, or had neither the opportunity nor the right, to cross-examine the witness in the first proceeding, the deposition of the witness in the first proceeding will not be admissible in the subsequent proceeding.[4] But if the right to cross-examine existed and opportunity for cross-examination was offered but the party did not avail himself of this right and opportunity, the deposition would be clearly admissible.[5] The question whether the accused had the opportunity to cross-examine is a question of fact. The mere fact that the accused was present in police custody when a witness was examined without any previous notice does not mean that the accused was given reasonable opportunity to cross-examine.[6] What is contemplated by the section is an opportunity to cross-examine the witness and not an effective exercise of that right. It cannot be postulated that in every case where the accused is not represented by counsel and cannot submit the witness to a searching cross-examination, he had no opportunity to cross-examine the witness.[7]

No right to cross-examine: statement made in an inquiry under Section 476, Cr.P. Code ; deposition taken before the framing of the charge in warrant cases, whether admissible if the witness not available for further cross-examination?—A person against whom proceedings have been instituted under Section 476, Cr. P. Code. does not have the right to cross-examine the witness in the inquiry under that section. Therefore, statements of deceased witnesses recorded in the inquiry under Section 476, Cr. P. Code, are inadmissible at the trial of a person which takes place as a result of the inquiry under Section 476, Cr. P. Code.[8] In some cases[9] evidence recorded in a trial of a warrant case before the framing of the charge has been held to be admissible under this

1. See notes to Section 137.
2. *Krishnayya Rao* v.*Raja of Pittapur*, 92 IC 167 : 1926 L 310 : 1933 PC 202.
3. *Dal Bahadur Singh* v.*Bijai Bahadur Singh*, 52 A 1 : 57 IA 14 : 122 IC 8: 130 PC 79.
4. *Sundara Rasjali* v.*Gopala Thevan*, 150 IC 132: 1934 M 100 ; *Bayava Shiddappa Desai* v.*Parvateva Basaveneppa Bellad*, 144 IC 442 : 1933 B 126.
5. *Tahawar Ali Khan* v.*E.*, 1946 O 26; *Gauri Dutt Marwari* v.*Dowring*, 13 P 735 : 151 IC 683: 1934 P 413.
6. *Abdul Rahman* v.*E.*, 1946 L 275.
7. *Bora Narasimhulu*, In re, 1951, 1 MLJ 478.
8. *Bakir Saheb Amir Saheb* v.*E.*, 34 IC 969 : 17 Cr LJ 249.
9. *Mangal Sen* v. *E.*,118 IC 647 : 192 L 840 : 30 Cr LJ 951; *Nga Ba On* v.*E.*, 104 IC 637 : 1927 R 248 : 28 Cr LJ 861 : *Lockely* v.*E.*, 43 M 411; 55 IC 345 : 21 Cr LJ 297 ; see also In re *Muthiah Chetty*, 81 IC 44: 1924 M 735 : 25 Cr LJ 556.

section if the witness is unavailable for cross-examination after the charge is framed, but in one case[1] the Calcutta High Court has distinctly ruled that in a warrant case the accused has no right to cross-examine the prosecution witnesses until after the charge is framed, though the Magistrate in his discretion may allow him to do so, and that, therefore, the evidence of a prosecution witness examined in a case, tried as a warrant case, before the charge is framed, is not admissible in evidence against the accused under Section 33 of the Evidence Act, when the case is subsequently tried by the Sessions Court. The Madras High Court has, however, differed from this view.[2] and so have the Nagpur[3] and the Allahabad High Court.[4]

Witness dying before conclusion of cross-examination; admissibility of the deposition doubtful.—Where a witness dies or leaves the country after he has been examined-in-chief but before his cross-examination has been concluded, the deposition is admissible under this section, though its evidentiary value is little,[5] but the Allahabad High Court on a consideration of the terms of Section 33 and guided by an earlier ruling of the Calcutta High Court,[6] entirely excludes from evidence such deposition, on the ground that in such cases it is open to a party to argue that a subsequent cross-examination of the witness might have destroyed to a great extent the effect of his evidence-in-chief.[7] The Calcutta High Court has recently held that the opportunity to cross-examine required by the proviso is a full opportunity and not a partial one.[8]

Right and opportunity to cross-examine not utilised before the committing Magistrate: deposition admissible.—In an inquiry before the committing Magistrate, the accused has the right under section 208(2), Cr. P. Code, to cross-examine the prosecution witnesses and, on the maxim "*omnia praesumuntur rite esse acta*", the opportunity to cross-examine will be presumed to have been offered to him.[9] If the record of the inquiry shows that the witness was not cross-examined but does not show that the opportunity to cross-examine was denied, the presumption will be that the accused was given the opportunity to cross-examine and that he declined to avail himself of it.[10] It is the duty of the Court to bring to the notice of the defence that it is their duty to cross-examine the witness after he has been examined.[11] If the opportunity to cross-examine was offered the deposition will not be rendered inadmissible because the accused did not avail himself of it.[12]

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1. *E.* v. *Mathew*, 125 IC 281 : 1929 C 822 : 31 Cr LJ 809; *see* also *S.C. Mitter* v. *State*, 1950 C 435 : 80 CLJ 21 : *Brahmachari Ajitananda* v. *Anath Bandhu Dutt*, 1954 C 395.
2. *Muthiah Pillai* v. *E.*, 139 IC 203 1932 M 559 : 33 Cr LJ 738.
3. *Gurudin* v. *E.*, 154 IC 369 ; 1935 N 8 : 36 Cr LJ 578.
4. *Rex* v. *Daya Shankar Jaitly*, 1950 A 167 : 51 Cr LJ 571 : 1950 ALJ 155 ; see also *State* v. *Gajraj*, 1953 Raj. 66 : 1953 Cr LJ 577.
5. *Diwan Singh* v. *E.*, 144 IC 331 : 1933 L 561 : 34 Cr LJ 735 ; *Maharaja of Kolhapur* v. *Sundarani Iyer*, 48 M 1: 93 IC 705 : 1925 M 497; *Rosi* v. *Yadala Pillamma*, 5 IC 512: 11 Cr LJ 145 ; *Mangal Sen* v. *E.*, 1929 L 840 (2) : 118 IC 647 ; see also *Ahmad Ali* v. *Joti Prashad*, 1944 A 188 : ILR 1944 A 241; *Mst Horil Kuer* v. *Rajab Ali*, 1936 P 34 : 160 IC 445.
6. *Boisagonoff* v. *Nahapiet Jute Co. Ltd.*, 5 CWN 230 (n) : *S.C. Mitter* v. *State*, 1950 C 435 : 86 CLJ 21.
7. *Narsingh Das* v. *Gokul Prasad*, 50 A 113:107 IC 243 : 1928 A 140.
8. *S.C Mitter* v. *State*, 1950 C 435 : 86 CLJ 21.
9. *Tafiz Pramanik* v. *E.*, 125 IC 743 : 1930 C 228 : 31 Cr LJ 916: *R.* v. *Peacock*, 12 Cox CC 21 ; but see *Q.* v. *Nawjan alias Nane Khan*, 20 WR 69 Cr. where it has been remarked that the record of the proceeding must show that an opportunity was presented to the prisoner of cross-examining the witness; for observation to the same effect, see *Ibrahim* v. *E.*, 18 IC 406 : 14 Cr LJ 70.
10. *Tafiz Pramanik* v. *E.*, 125 IC 743: 1930 C 228 : 31 Cr LJ 916; but see *State* v. *Ramani Mohan Chanda*, 1953 Assam 176: 1953 Cr LJ 1593.
11. *Ibrahim* v. *E.*, 18 IC 406 : 14 Cr LJ 70.
12. *Tafiz Pramanik* v. *E.*, 125 IC 743 : 1930 C 228 : 31 Cr LJ 916 ; *Azimuddy* v. *E.*, 101 IC 661 : 1927 C 398 :

One of the requirements for application of section 33 is that the adverse party in a proceeding should have the right and opportunity to cross-examine. It does not say that the opportunity should have been availed of or the right should have been exercised. If opportunity for cross-examination was offered, but the party did not avail himself of the right and opportunity, the deposition would be clearly admissible. Once the evidence is admissible what weight should be attached to that evidence is a different matter and must necessarily depend upon other facts and circumstances of the case. To say that the evidence of such a witness, who was not cross-examined in spite of the right and opportunity being there, should not be accepted without due corroboration, is to import into section 33 a limitation which is not there.[1]

Cross-examination reserved, witness dying before cross-examination; deposition whether admissible?—Witnesses have to be first examined and then (if the adverse party so desires) cross-examined.[2] The proper time for the cross-examination of a witness is immediately after he has been examined-in-chief, and the practice of deferring the cross-examination of the prosecution witnesses until they have been all examined-in-chief is a procedure not contemplated by Criminal Procedure Code[3] The phrase "cross-examination reserved" is quite familiar to the practitioners in criminal Courts though there is no provision in the Criminal Procedure Code for reserving cross-examination to a later stage. Where, however, the Court has expressly allowed the cross-examination of a witness to be reserved, it seems that the evidence of the witness will not be considered to have been concluded and it is doubtful whether such incomplete deposition would be admissible under this section if the witness died before being actually cross-examined.[4] The Calcutta High Court has remarked that, having regard to the practice of not cross-examining the prosecution witnesses during the committing Magistrate is of doubtful admissibility and of little evidentiary value, particularly where the record does not show that the accused was asked to cross-examine the witness.[5]

Right and opportunity to cross-examine witnesses implied in proceedings before an officer authorized to take evidence.—Where the law authorizes an officer to take evidence, e.g., in an inquiry under section 41(2) of the Registration Act, and provides that the parties may appear by counsel but does not expressly provide for the examination and cross-examination will be implied and the depositions of witnesses in any proceeding before such officer will be admissible in subsequent proceedings between the parties as to the same matter, if the witnesses are dead or not available for examination in the subsequent proceedings.[6] The fact that a witness was cross-examined by the Registrar in an inquiry under section 74 of the Registration Act is sufficient to make the evidence admissible under this section.[7]

Depositions taken on commission admissible.—In civil as well as in criminal cases, evidence may be taken on commission.[8] The proviso does not require proof of the

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28 Cr LJ 485 ; *Q.E.*v. *Basvanta*,25 B 168 ; *Gauri Dutt Marwari* v.*Dowring*, 13 P 735 : 151 IC 683.

1. *Chintamani Das* v.*State*, AIR 1970 Orissa 100.
2. Section 138.
3. *Tombi* v.*E.*,44 IC 343 : 19 Cr LJ 327.
4. *E.*v.*Mahrab*, 120 IC 524: 1930 S 54 : 31 Cr LJ 121.
5. *Ibrahim* v.*E.*, 18 IC 406: 14 Cr LJ 70 ; but see *Tafiz Pramanik* v.*E.*,125 IC 743: 1930 C 228 : 31 Cr LJ 916 ; *Azimuddy* v.*E.*, 101 IC 661: 1927 C 398 : 28 Cr LJ 485 : *Q.E* v.*Basvanta*, 25 B 168.
6. *Lanka Lakshmana* v.*Lanka Verdhanamma*, 42 M 103: 49 IC 638 : as to the power of a Revenue Officer to take evidence in mutation proceedings, see *Mumtaz-un Nisa Begum* v.*Wazir Ali*, 65 IC 308 : 1921 O 242.
7. *Jekali Sheikh* v.*Taibannessa Bibi*, 20 IC 661: 18 CWN 605.
8. O. 26 r. 16 C.P. Code; sections 503-505 Cr. P. Code.

presence of the cross-examining party or his agent before the Commissioner and in such case the "opportunity to cross-examine should be deemed to include the opportunity to cross-examine the witness by cross-interrogatories.[1] If, however a commission be executed without any notice, or without sufficient notice, to the opposite party to enable him, if he pleases, to put cross-interrogatories, the deposition will be rejected. Where a commission is not issued in the form of interrogatories in writing and the witness is examined by the party, who applied for his examination by commission, in person, the admissibility of the deposition will depend on whether or not the adverse party had notice and the means to arrange for the cross-examination of the witness. There may be circumstances where, although a prisoner has the right, he has not the opportunity, to cross-examine, e.g., where the witness is at a great distance and the prisoner cannot go to the place or is too poor to employ a pleader or too unfamiliar with the ways of the place to get legal help there.[2] Thus, where a witness was examined in the preliminary inquiry on commission and the position of the accused did not permit him to arrange for the cross-examination of the witness, the statement of the witness, on this ground and others, was held inadmissible under this section.[3]

Evidence recorded in Lunacy proceedings.—The evidence of an expert recorded in proceedings under the Lunacy Act, to which, the parties to the subsequent suit were parties and had examined and cross-examined the expert on the question of the lunacy of a person, are admissible under section 33 in the subsequent suit in which an issue as to that person's lunacy is raised[4] if the expert is not available as a witness.

Evidence given in ex parte proceedings or in the absence of a party.—Evidence given in *ex parte* proceedings against a person who was not served with process prior to the granting of the *ex parte* decree is inadmissible under this section.[5] Similarly, evidence recorded in the absence of the accused, where no express order under section 512, Cr. P.C. was made, is inadmissible at the subsequent trial of the accused.[6] But where proceedings are taken under section 512 of the Code of Criminal Procedure evidence recorded in a previous trial would be treated as evidence against the absconding accused, notwithstanding the fact that he had no opportunity to cross-examine the witnesses at the time the evidence was recorded.[7] The evidence of witnesses on the record of another judicial proceeding to which the accused was not a party cannot be brought on the record under this section.[8] Section 33 is inapplicable to evidence recorded before a person is added as a defendant, but the objection to the inadmissibility of such evidence will not be allowed to be raised for the first time in second appeal.[9] Though the case last cited says that section 33 is inapplicable to evidence recorded before a person is impleaded as a party, it is submitted that a subsequently added party has the right and opportunity of recalling the witnesses examined in his absence and of

1. See *Q.E.*v. *Ramchandra Govind Harshe*, 19 B 749 : *Narayana Bharatigal* v.*Ittull Amma* ,39 IC 893.
2. See *Q.E.*v.*Ramachandra Govind Harshe*, 19 B 749.
3. *Q.E.*v.*Burke*, 6 A 224.
4. *Mahant Rai* v.*Lachhmina Kunwar*, 101 IC 363 : 1927 PC 123.
5. *Rajmangal Misir* v.*Mathura Dubain*, 38 A 1: 30 IC 576.
6. *Q.E.*v.*Ishri Singh*, 6 A 672.
7. *State* v.*Bhimaraya*, 1953 Hyd. 63.
8. *Abdul Gaffoor* v.*Govind Prasad*, 117 IC 241 : 1928 R 284 : 30 Cr LJ 736.
9. *Rangasami Naidu* v.*Sundarayajulu Naidu*, 35 IC 52.

cross-examining them, and therefore, the proviso will be deemed to have been satisfied where the subsequently added Party does not recall the witnesses examined before he was made a party, and the evidence will be admissible against him in a subsequent proceeding if the witnesses are not available.

A former deposition is inadmissible if it was not read over to the witness.—Section 33 does not apply to a statement made before an inquiring Magistrate if it was not read over the deponent in the manner required by section 360, Cr. P. Code, inasmuch as , unless evidence is recorded in the manner prescribed in Ch. XXV, Cr. P. Code, and the statement properly verified under Section 360 of that Code, the defence cannot be considered to have had an opportunity of cross-examination.[1]

In a de novo trial depositions of dead witnesses may be admitted under section 33.—The general provisions of section 33 are in no way affected by section 350 Cr P Code. Under section 350, Cr. P. Code, on the transfer of a case, the duty of the Court to resummon the witnesses for a trial *de novo* at the request of the accused extends only to resummoning the witnesses that are available. Therefore, where, on a trial *de novo* in consequence of a transfer, the Court, finding that a witness is dead, gets his evidence in the first judicial proceeding proved under section 33 and resummons the other witnesses, the procedure adopted is strictly in accordance with law.[2]

Right and opportunity of cross-examination in mutation proceedings.—In an Oudh case, decided under the Land Revenue Act of that province, it has been held that a Revenue Officer is authorized to take evidence on oath.[3] If this view is correct, then in a proceeding before a Revenue Officer the parties have the right, and may be presumed to have the opportunity, to cross-examine the witnesses examined in those proceedings.[4] But the issues in a mutation proceeding are not necessarily the same as in a subsequent civil suit on the same cause of action and, therefore, both the right and the opportunity to cross-examine are much more limited in the former than in the latter. Thus, where in a mutation case cross-examination on irrelevant matters has "filtered through" the objection taken to its relevancy, the statement made by a witness in the mutation proceedings will not be admissible under this section in a subsequent civil suit as to the same matter.[5] The Bombay High Court has held that in revenue proceedings to ascertain the heir to a deceased proprietor there is no such right to cross-examine as would make the present section applicable.[6]

Existence of an opportunity to cross-examine, if not admitted, must be proved.—The fact that the accused had full opportunity to cross-examine, if admitted, must be proved.[7] If the deposition was taken in the presence of the prisoner, there is, in England, a presumption that he had full opportunity to cross-examine,[8] but this presumption may

1. *E.*v.*Phagunia Bhuian*, 89 IC 1043 : 1926 P 58 : 26 Cr LJ 1475 ; see, however, as to this irregularity, the Privy Council decision in *Abdul Rahman* v.*E.*,5 R 53: 54 IA 96 : 100 IC 227 : 1927 PC 44.
2. *Lekhal* v.*E.*, 8 L 570; 101 IC 483 : 1927 L 332 : 28 Cr LJ 451 ; *Muthiah Pillai* v.*E.*,139 IC 203 ; 1932 M 559 : 33 Cr LJ 738.
3. *Mumtaz-un-Nisa Begam* v.*Wazir Ali*, 65 IC 308 : 1921 O. 242.
4. See *Lanka Lakshmanna* v.*Lanka Vardhanamma*, 42 M 103 : 40 IC 638.
5. See on this point the Privy Council decision in *Dal Bahadur Singh* v.*Bejai Bahadur Singh*, 52 A 1; 57 IA 14: 122 IC 8 : 1930 PC 79 : cited under the heading "questions in mutation proceedings whether the same as in a subsequent civil suit" in the notes to proviso (3) ; see also *Mumtaz-un-Nisa Begam* v.*Wazir Ali*, 65 IC 306 : 1921 O 242.
6. *Bayava Shiddappa Desai* v *Parvateva Basavaneppa Bellad*, 144 IC 442: 1933 B 126.
7. *Q.E.*,v. *Ramchandra Govind Harshe*, 19 B 749 ; *Q.* v. *Nawjan alias Nane Khan*, 20 WR 69 Cr.
8. *R.*v.*Peacock*, 12 Cox 21 ; see also *Bora Narasimhulu*, in re, 1951, 1 MLJ 478.

be rebutted by proof of the prisoner's insanity, or by proof of the dependent's illness rendering him unfit for cross-examination, or by proof that the notice to cross-examine was so short that the prisoner had no time to instruct a solicitor.[1]

Statement in affidavits are inadmissible.—This section does not apply to the statement of a dead man contained in an affidavit, as the adverse party has ordinarily neither the right nor the opportunity to cross-examine the person making the affidavit.[2] Defect in verification is only an irregularity and is no ground of rejecting the affidavit.[3]

Evidence produced by a defendant in the first proceeding is inadmissible against his co-defendant.—One defendant has, *ordinarily*, no right, or opportunity to cross-examine the witnesses produced by another defendant and, therefore, depositions of the deceased witnesses of one defendant are not admissible in subsequent proceedings against the other defendants. Similarly, a party has no right or opportunity to cross-examine his own witnesses,[4] and it seems that the evidence given in a former proceeding by the witnesses of a party will, in a subsequent proceeding, be inadmissible against the party on whose behalf the witnesses appeared in the first proceeding. Thus, where in proceedings under Section 145, Cr. P. Code, U appeared as a witness for the first party, his deposition was, in a subsequent proceeding in which the first party was a defendant, held inadmissible against the first party.[5]

PROVISO (3) : IDENTITY OF ISSUES

Principle.—Although the Act, in using the word, "questions" in the plural seems to imply that to render the former deposition admissible, it is essential that all the questions must be the same in both the proceedings, that is not the intention of the law. The principle involved in requiring identity of the matter in issue is to secure that in the former proceeding the parties were not without the opportunity of examining and cross-examining to the very point upon which their evidence is adduced in the subsequent proceeding. And though separate proceedings may involve issues, of which some only are common to both, the evidence to those common issues given in the former proceeding may, on the conditions mentioned in Section 33 arising, be given in the subsequent proceedings.[6] Thus, if in a dispute respecting lands, any fact comes directly in issue, the testimony given to that fact is admissible to prove the same point in another action between the same parties or their privies, though the last suit relates to other lands.[7] Where R charged A with breach of trust, but A being acquitted R was tried for making a false charge, it was held that the depositions given by witnesses in the first case could be used under this section against R in the second case, as at least one question, namely, whether there had been breach of trust, was common to both the cases, and the fact that in the second case there was an additional issue made no difference.[8] What the proviso requires is that the questions in issue in the first proceeding should have been substan-

1. Phipson, Ev., 7th., 488,
2. *Daraiswami Ayyar* v.*Balasundaram Iyer*, 102 IC 243 : 1927 M 507
3. *Mehar Singh* v.*Mahendra Singh*, AIR 1987 Del. 308 (DB).
4. Section 154.
5. *Brajaballav Ghose* v.*Akhoy Bagdi*, 93 IC 115 : 1926 C 705.
6. *Rami Reddi & Seshu Reddi*, 3 M 48 : *Krishnayya Rao* v.*Raja of Pittapur*, 51 M 1 : 60 IA 336 : 145 IC 216 : 1953 PC 202.
7. Taylor, §436 ; *Rami Reddi & Seshu Reddi*, 3 M 48.
8. *Rami Reddi* v. *Seshu Reddi*, 3 M 48.

tially the same as in the subsequent proceeding, though it is not necessary that a specific issue should have been raised regarding any particular matter in issue between the parties.[1] A good test of the applicability of the proviso is whether the same evidence is applicable to both the proceedings, although different consequences may follow from the same act.[2] In the proceedings before a Magistrate on a charge of causing grievous hurt to a person, some witnesses, one of whom was the person assaulted, were examined on behalf of the prosecution. The prisoners were committed for trial. Subsequently, the person assaulted died in consequences of the injuries inflicted on him. At the trial before the Sessions Judge, charge of murder and of culpable homicide not amounting to murder were added to the charge of grievous hurt. the deposition of the deceased witness was put in and read at the Sessions trial. It was held that the evidence was admissible both under Section 32 (1) and Section 33 of the Evidence Act, notwithstanding the additional charges before the Sessions Court, as the evidence to prove the act with which the accused was charged remained precisely the same, though the gravity of the offence became presumtively increased.[3] The questions involved in a prosecution for criminal trespass and a suit under Section 9 of the Specific Relief Act against the trespasser for recovery of possession of the property trespassed upon are substantially the same, and the evidence given in the former is admissible in the latter if the other conditions of Section 33 are satisfied.[4] Statements of deceased witness, made in a prosecution of the accused for dacoity are not admissible in his prosecution for an offence under the Arms Act[5] committed on a different date.

Questions in mutation proceedings are not necessarily the same as in a subsequent civil suit.—Mutation disputes are to be decided on the basis of possession, and if the mutation officer is unable to satisfy himself on this point, he has to ascertain by a summary inquiry as to which of the parties is best entitled to the property.[6] Where a Hindu widow adopted a son, professing to do so in exercise of a power given to her by her deceased husband, and in the mutation proceedings consequent upon such adoption made a statement that she had adopted a person and that her husband had given her power to adopt, but the opposing reversioners were not allowed to fully cross-examine the widow with regard to the creating of the power to adopt, the Privy Council, in a suit by the reversioners to avoid the adoption for want of authority to adopt, held the statement of the widow to be inadmissible under this section, on the ground that the question as to the power to adopt was not in issue in the mutation proceedings and that the reversioners did not have full opportunity to cross-examine the widow on that point.[7]

Evidence recorded in a suit to contest a notice of ejectment, whether admissible in subsequent civil suit?—Evidence recorded in a suit in a revenue Court to challenge a notice of ejectment is not admissible in a subsequent civil suit between the tenant and

1. *Chandikamba* v. *Viswanathamayya*, (1939) 1 MLJ 227.
2. *E.*v. *Rochia Mohato*, 7 C 42.
3. *E.* v. *Rochia Mohato*, 7 C 42.
4. *Foolkissary Dassee* v. *Nobin Chunder Bhunjo*, 23 C 441.
5. *Nga Tha Ku* v. *E.*, 36 IC 480 : 17 Cr. LJ 512.
6. *Dal Bahadur Singh* v. *Bijai Bahadur Singh*, 52 A 1 : 57 IA 14 : 122 IC 8 : 1930 PC 79.
7. *Dal Bahadur Singh* v. *Bijai Bahadur Singh*, 52 A 1 : 57 IA 14 : 122 IC 8 : 1930 PC 79 ; the question whether the issue in mutation proceedings was the same as in a subsequent civil suit was not decided in *Mumtaz-un-Nisa Begum* v. *Wazir Ali*, 65 IC 308 : 1921 O 242.

the landlord for recovery of possession of occupancy tenancy.[1]

Deposition made before a Sub-Registrar in an inquiry under Section 41 (2) of the Registration Act is admissible in a Subsequent civil suit relating to the genuineness of the will.—The issue before a sub-Registrar making an inquiry under Section 41(2) of the Registration Act on the presentation of a will is the same as in a subsequent civil suit in which the genuineness of the will is called in question, and, therefore, depositions made before the Sub-Registrar are admissible in the civil suit, provided the witnesses are dead and the other party had an opportunity of cross-examining them in the inquiry.[2]

A deposition admitted under Section 33 constitutes substantive evidence; admissibility of a previous deposition under some other provisions of the law.—When a previous deposition is admitted under Section 33, it becomes substantive evidence in the case, inasmuch as the section declares it to be relevant for the purpose of proving the truth of the facts which it states. A previous deposition may also be used, as an admission, against the dependent in his lifetime, and even without his being examined in the case to which he is a party[3] as well as against his successor in interest; or as a dying declaration under Section 32 (1) ; or as a declaration as to a public right or custom under Section 32(4) or under Sec. 288 Cr. P. Code, if the dependent has been examined at the Sessions trial.[4] In each of the aforesaid cases, the deposition, when duly proved, constitutes substantive evidence, i.e., evidence of the truth of the matters which it states. A previous deposition is a previous statement and may, therefore, be legitimately used for purposes for which previous statements are generally used. For instance, if the dependent is examined as a witness in a subsequent proceeding, his previous deposition may be used under Section 157 to corroborate his testimony, or under Sections 155 and 145 to impeach his credit,[5] or under Section 159 to refresh his memory; but used as such , a previous deposition does not become substantive evidence, i.e., it cannot be used as evidence of the fact which it states, and is admissible only for the limited purpose specified by the section which authorizes its admission.[6] A deposition may, however,becomes substantive evidence when it is used to refresh a witness's memory in the manner contemplated by Section 160 of the Act.[7]

Mode of proof of a deposition.—Where evidence is required by law to be reduced to writing,[8] the writing itself or a certified copy of it[9] must be produced, as oral

1. *Saru Khan* v. *Jan Muhammad*, 106 IC 313 : 1928 L 43 . It does not appear from the report of the case be inadmissible on the ground of absence of identity of issues or on the ground that there was nothing to show that the witnesses were dead or not available. Contra *Special Manager, Court of Wards, Balrampur* v.*Tribeni Prasad*, 1935 O 289 : 154 IC 965.
2. *Lanka Laksmanna* v. *Lanka Vardhanamma*, 42 M 103 : 49 IC 638.
3. *Brajaballav Ghose* v. *Adhoy Bagdi*, 93 IC 115 : 1926 C 705 ; *Ali Mohammad Khan* v.*Maharaj Bepari*, 64 IC 266 : 36 CLJ 185 ; *Soojan Bibee* v.*Achmut Ali*, 21 WR 414 ; in *Mohammad Khan* v.*Mst. Fattan*, 12 PLR 1919, the dependent was a party to the subsequent suit, but the admission of her previous deposition would have amounted to admitting in evidence an admission in her own favour ; see Section 21, ante.
4. *See* In re *Kottammal Kolathingal Ummar Hajee*, 46 M 117 : 69 IC M 32 : 1923 Cr. LJ 748.
5. In re *Kottammal Kolathingal Ummar Hajee*, 46 M 117 : 69 IC 636; 1923 M 32 : 23 Cr LJ 748 ; *Hussaina* v. *Sahib Nur*, 7 IC 505.
6. As to whether a previous statement constitutes substantive evidence see *Niamat Khan* v.*E.*, 127 IC 850 : 1930 L 409 : 32 Cr LJ 51 ; *Bishen Datt* v.*E.*, 105 IC 677 : 1927 A 705 : 28 Cr LJ 965 ;*E.v. Cherath Choyi Kutti*, 26 M 191.
7. See *Pratap* Singh v E., 7 L 91 : 92 IC 167 : 1926 L 310 : 27 Cr LJ 215 ; *Kapur Singh* v.*E.*, 123 IC 120 : 1930 L 450 : 31 Cr LJ 75.
8. *See* O. 16 r. 21 and O 18, r. 5, CPC and Sections 256, 360, 362, 364 and 503, Cr. P Code.
9. Section 77; *Chandreswar Prasad* v.*Bisheshwar Pratap* ,5 P 777: 101 IC 289 : 1927 P 61.

evidence in such a case is excluded by Section 91 of the Act. "But where the law either does not require the statements of witnesses to be reduced to writing[1] or merely requires the substance of the evidence of witnesses,[2] or of witnesses and parties called as witnesses to be recorded, in the first of these cases certainly, and it would seem also in the second,[3] oral evidence of such statements as had not been recorded would be admissible under this section.[4] Where oral evidence as to a deposition becomes admissible, the deposition may, like any other statement, be proved by examining as a witness a person to or before whom it was made, or any other person who heard it, and in such a case notes taken at the time it was made would also be admissible, under Sections 159 and 160 of the Act, to refresh the witness's memory. The Privy Council has held that the heading of a deposition in which the name, age, residence, etc., of the witness are stated is only descriptive of the witness and does not from part of the evidence given by him on solemn affirmation;[5] and the Calcutta High Court has held in a case that a certified copy of the deposition of a witness would not come in by itself and that it is necessary to adduce evidence proving the identity of the person who made the deposition.[6] It is, however, submitted that in law there being a presumption against fraud and impersonation, the identity of the dependent may be presumed under Section 114 and Section 80 of the Act.[7] Extracts from the previous deposition, contained in the judgment, in the proceeding in which the deposition was made, are not the right kind of proof of the deposition.[8] *See* Notes to Section 80 under the heading "Is there any presumption under Section 80 as to the identity of the dependent or the confessor ?"

Use of incomplete evidence.—In a suit on the original side of the Calcutta High Court where trial remained incomplete due to the death of the Judge, on both parties inviting his successor to use evidence already recorded it was held that such evidence is admissible.[9]

Credit of a deceased dependent may be confirmed or impeached like that of an ordinary witness.—When a previous deposition is used as evidence under Section 33, any other statements made by the deponent may be used, by virtue of Section 158 of the Evidence Act, for the purpose of contradicting the deponent, as if the deponent had appeared in Court, was cross-examined on the statement, and had denied the facts

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1. Section 263, Cr P Code.
2. Section 264 and 355, Cr P Code.
3. Woodroffe, Ev., 9th Ed., 366.
4. Woodroffe, Ev., 9th Ed., 366.
5. *Maqboolan* v. *Ahmad Husain*, 26 A 108 : 31 IA 38 (PC), followed in *Lukhan Chandra Mandal* v. *Takim Dhali*, 80 IC 357 : 1924 C 558; *see* also *Ma Tin* v. *M.E. Nyun*, 1938 R 81. It seems that if the witness is sworn or affirmed, as it is sometimes done, before the witness is asked his name, age, residence, etc., the "descriptive part" of the deposition might form part of the evidence given by the witness on oath or solemn affirmation, *see Jadunath Singh* v. *Bisheshar Singh*, 1939 O 17.
6. *Brajballav Ghose* v. *Akhoy Bagdi*, 93 IC 115 : 1926 C 705. A similar view was also taken in *Bhagwat Prasad* v. *Sher Khan*, 94 IC 985 : 1926 O 489 and *Q.E.* v. *Durga Sonar*, 11 C 580.
7. For cases on an analogous point, *see Gopaldas* v. *Sri Thakrji*, 1934 PC 83, *E.* v. *Surajbali*, 56 A 750 : 1934 A 340, *E.* v. *Samiruddin*, 8 C 211, *Reg* v. *Fata Adaji*, 11 Bom HC 247, *Panchu Das*, 34 C 698, notes to Section 32 (1) under the heading "how dying declarations should be proved," and notes to Section 80 under the heading "Is there any presumption under Section 80 as to the identity of the dependent of the confessor."
8. *Nanduri Saradamba* v. *Parkala Pattabhiramayya*, 53 M 952 : 129 IC 463 : 1931 M 207; *Medavarapu Narasayya* v. *Medavarapu Veerayya*, 151 IC 753 : 1935 M 268.
9. *Dalun Kumar* v. *Nandorani*, 73 CWN 877.

mentioned in the same.[1] Similarly, any previous statement made by such person may be used for the purpose of corroborating his previous depositions.[2]

Section 33 of the Evidence Act and Section 288 of the Criminal Procedure Code.—The conditions of Section 33 of the Evidence Act must be completely satisfied before the Sessions Court can take on record the committal Court deposition of a witness who is not produced before it. Section 288 Cr. P.C. has no application to such a case. When a witness examined on behalf of the prosecution in the Court of the Committing Magistrate is not produced in the Sessions Court and the prosecution seeks to bring his deposition in the committal court on the record of the case, it is the duty of the Sessions Court to *see* whether the conditions of Section 33 of the Evidence Act are duly satisfied. For that purpose, the Court is bound to inquire to the prosecution the reason for which it finds itself unable to produce that person as a witness, and it can take such deposition on record only when, as a result of such inquiry, it is satisfied that the efforts had in fact been made to trace the witness and yet he could not be found. Section 288 Cr. P.C. has no application whatever to such a case, because that section comes into operation only when a witness is produced and examined in the Sessions Court and the question of bringing on record his deposition in the lower Court arises for the purpose of contradicting his evidence in the Sessions Court. If, in any case, the High Court finds that a Sessions Judge has taken the deposition of an important witness in the committal Court on the record of the Sessions trial, in violation of the provisions of Section 33 and purporting to act in the exercise of his powers under Section 288 of the Code, the High Court would be quite justified if it sends the case back to the Sessions Court for a retrial after recording the evidence of such witness or after recording the reasons why he could not be examined as a witness.[3]

STATEMENTS MADE UNDER SPECIAL CIRCUMSTANCES

34. [4][5][**Entries in the books of account, including those maintained in an electronic form**] **when relevant.**—[5][Entries in the books of account, including those maintained in an electronic form] regularly kept in the course of business, are relevant whenever they refer to a matter into which the Court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability.

Illustration

A sues *B* for Rs. 1,000 and shows entries in his account books showing *B* to be indebted to him to this amount. The entries are relevant, but are not sufficient, without other evidence to prove the debt.

COMMENTARY

Principle.—If an entry is against the interest of the person in whose books it occurs, it is relevant as an admission under Section 21, even if the book is not regularly kept in

1. *Niamat Khan* v. *E.*, 127 IC 850 : 1930 L 409 : 32 LJ 51.
2. *See* Section 158.
3. *Bihari Singh Madho Singh* v. *State of Bihar*, 1954 Cr LJ 1742
4. Cf Section 240 of the Indian Companies Act, 1913 (7 of 1913), and Sch I, Order VII, rule 17 of the Code.
5. **Substituted by Information Technology Act, 2000 (Act 21 of 2000), S. 92 and Sch. II (w.e.f 17-10-2000).**

the ordinary course of business; but if the entry is in favour of such person, then, according to the general rule which excludes admissions in one's own favour, it is admissible,[1] unless it is given in evidence after his death, in which case it will become admissible under Section 32(2). As the present section makes entries in regularly kept books of account admissible in favour of a person even in his lifetime, it must be treated as an exception to the general rule enacted in Section 21 that a man cannot make evidence for himself.[2] The section seeks to avoid the dangerous consequences of admitting this self-serving kind of evidence by declaring that the entries cannot be used against other persons as sufficient evidence of liability.

What is a book of account?—So that an entry may be relevant under this section, it must be shown that (i) the entry is in a book, (ii) the book is a book of account, and (iii) the book of account is regularly kept in the course of business. In Section 34, the word "book" signifies a collection of sheets of paper bound together with the intention that such binding shall be permanent and the papers used collectively in one volume. Unbound sheets of paper in whatever quantity, though filled up with one continuous account, are not a "book of account." Loose sheets of paper containing accounts have no probative force of a book of account regularly kept.[3] To account is to reckon, and it is not possible to conceive any accounting which does not involve either addition or subtraction or both of these operations of arithmetic. A book which contains successive entries of item may be a good memorandum book, but until those entries are totalled or balanced or both, as the case may be, there is no reckoning and consequently no accounting. The Legisl ture did not intend to include in the category of "books of accounting" any record in which there is no process of reckoning. Therefore a book which merely contains entries of items of which no account is made at any time is not a "book of account" for the purposes of Section 34.[4]

"Regularly kept in the course of business"; the system according to which accounts are kept affects their value and not their admissibility, contemperaneous, personal knowledge of the entrant.—The expression "regularly kept" does not mean "correctly kept";[5] it means that the accounts in the books are kept according to a set of rules or system.[6] If books are kept in pursuance of some continuous and uniform practice in the current routine of the business of the particular person to whom they belong, they are "books of account regularly kept in the course of business".[7] The system, however, need not necessary be an elaborate or a reliable one. Even the roughest memoranda of accounts, kept generally according to the most elementary system, are admissible.[8] From the point of view of admissibility alone, Section 34 marks no difference between the cash books and ledgers of a large bank and the day-book of a

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of Civil Procedure, 1908 (Act 5 of 1908). As to admissibility in evidence of certified copies of entries in Bankers' books, see Section 4 of the Bankers' Books Evidence Act, 1891 (18 or 1891).

1. Section 21.
2. *Uttam Chand Ishar Das* v. *Mohammad Sharif*, 137 IC 44 : 1932 L 417.
3. *Ganesh Prasad Roy* v.*Narendra Nath Sen*, 1953 SC 431 : 17 Cut LT 73.
4. *Mukundram* v. *Dayaram*, 23 IC 893 ; see also *Ambalavana Pillai* v.*Gouri Ammal*, 1936 M 871.
5. *Gulab Halwai* v. *Bhagwan Dass*, 138 IC 716 : 1932 O 225 ; *Kesheo Rao* v. *Ganesh*, 95 IC 128 : 1926 N 407.
6. *Gulab Halwai* v. *Bhagwan Dass*, 138 IC 716 : 1932 O 225 ; *Kesheo Rao* v. *Ganesh*, 95 IC 128 : 1926 N 407 ; *Chandi Ram Deka* v. *Jamini Kanta Deka*, 1952 Assam 92.
7. *Ramchand Pitambhardas* v.*E.*, 19 IC 534 : 14 Cr LJ 262 ; *Pannalal* v.*Labhchand*, 1955 MB 49.
8. *Kesheo Rao* v.*Ganesh*, 95 IC 128 : 1926 N 407.

house-keeper.[1] But the evidentiary value of the books would largely depend upon their formality and the checks against fraud secured by the method of keeping them.[2] The degree of excellence of the system of keeping accounts and the closeness with which that system has been followed would affect the weight of the evidence of an entry, not its admissibility.[3] Merely because *bahis* are not so regularly kept as one would expect from people who carry on very large business is no ground for rejecting them.[4] It is not necessary that the entries in the books should have been made from day to day or from hour to hour as transaction took place. The time of making the entries may affect the value of them but should not, if they have been made afterwards regularly in the course of business, make them irrelevant.[5] Accounts prepared from rough books or memoranda should be treated as original accounts,[6] and cannot be rejected on the ground that they were not entered regularly from day to day.[7] It is not necessary that the accounts be totalled every day.[8] But a book in which calculations are made in a haphazard way for varying periods of time is not a book regularly kept in this course of business.[9] A day-book, which has been entered after four months from the happening of an event and the rough notes of which are not available, is not a document which can be held to have been kept in the regular course of business. These remarks apply a *fortiori* to the ledger which is prepared from such a day-book.[10] Accounts written up casually once a week or a fortnight, though admissible, do not possess the same claim to confidence that attaches to books entered from day to day or from hour to hour as transactions take place.[11] Accounts prepared from memory or inadequate materials posses little evidentiary value.[12] It is not necessary to show that the person making or dictating the entries had personal knowledge of the fact stated, provided the entry was made in a book of account regularly kept in the course of business. The question whether the person making or dictating the entry had personal knowledge of the fact stated affects the value, and not the admissibility, of the entry.[13] Books which are not regularly kept are not admissible under this section.[14] If a book of account is not admissible under Section 34 by reason of its not having been regularly kept, it may be admissible as an

1. *Mukundram* v. *Dayaram*, 23 IC 893.
2. *Mukundram* v. *Dayaram*, 23 IC 893 ; *Ramchand Pitambhardas* v. *E.*, 19 IC 534 : 14 Cr LJ 262.
3. *Kesheo Rao* v. *Ganesh*, 95 IC 128 : 1926 N 407.
4. *Khushi Ram* v. *Mehr Chand* 1950 Punj. 272.
5. *Deputy Commissioner of Bara Banki* v. *Ram Parshad*, 27 C 118 : 26 IA 254 (PC) ; *Kesheo Rao* v. *Ganesh*, 95 IC 128 : 1926 N 407 ; *Chandreswar Prasad* v. *Bisheshwa Pratap*, 5 P 777 : 101 IC 289 : 1927 P 61 ; *Nanilal Das* v. *Nutbehari Das*, 38 CWN 861 ; *Ramkumar Janarayan* v. *Pyarchand Meerchand*, 1952 MB 55.
6. *Peary Mohan Mukerjee* v. *Narendra Nath Mukerjee*, 32 C 582 : 9 CWN 421 ; See also *Kesheo Rao* v. *Ganesh*, 95 IC 128 : 1926 N 407 ; *Maung Sit Kon* v. *Ma Sa Ya*, 42 IC 117.
7. *Mandal Prasad* v. *Mandir Das*, 11 IC 95.
8. *Narayan* v. *Waman*, 59 IC 121 : 1931 N 133.
9. *Jamnabai* v. *Dharamdas Thawerdas*, 142 IC 271 : 1932 S 186.
10. *Arjan Singh Bhajan Singh* v. *Surjan Singh Acharaj Singh*, 155 IC 1006 : 1935 Pesh. 44.
11. *Bankey Behari Lal* v. *Brij Behari Lal*, 51 A 519 : 116 IC 285 : 1929 A 170 ; *Kesheo Rao* v. *Ganesh*, 95 IC 128 : 1926 N 407 ; *Hingu Miya* v. *Heramba Chandra Chakravarti*, 8 IC 81 : 13 CLJ 139 ; See *Munchershaw Bezonji* v. *New Dhurumsey Spinning & Weaving Co.*, 4 B 576, where such accounts held entirely inadmissible. This ruling was, however, disapproved by the Privy Council in *Deputy Commissioner of Bara Banki* v. *Ram Prashad*, 27 C 118 : 26 IA 254 (PC).
12. *Rajagopala Naidu* v. *Subhamma*, 51 M 291 : 109 IC 153 : 1928 M 180.
13. *Reg.* v. *Hanmanta*, 1 B 610.
14. *Vithoo Punjabi* v. *Thakurdas Kunjilal*, 1949 N 414 : ILR 1949 N 307 : 1949 NLJ 398.

entry or memorandum under Section 32 (2), if the writer of the book is dead.[1] Books and papers of a limited company kept in the usual course of business are best evidence.[2]

In applying the general principle of Regularity of Entry different circumstances may come into question.—The kind of occupation, the kind of book, the kind of item.[3]

Incorrect entries in the books.—The fact that there are incorrect entries and mistakes in an account book, provided it is kept in the ordinary course of business, does not make it irrelevant, though this fact will affect its evidentiary value.[4] But the books are sufficiently discredited, if they are shown to contain bogus entries,[5] or unexplained blanks.[6] Merely because ledger contained blank pages cannot lead to conclusion that entries made therein are wrong.[6a]

Formal proof of the fact that the books have been regularly kept in the course of business, whether necessary?—An entry in an account book is an admission by the maker thereof in his own favor, and it is accepted as evidence only if it strictly complies with the requirement of being kept regularly and in the ordinary course of business.[7] It is essential in every case, where reliance is placed upon books of account, to establish that they have been regularly kept in the ordinary course of business.[8] If the fact of regular maintenance and general accuracy of the books is not admitted, it must be formally proved.[9] Where the writer of a book of account is alive but is not examined as a witness the book cannot be said to have been duly proved, and is inadmissible.[10] The proper procedure to follow is to call the the clerk who has kept the accounts, or some person competent to speak to their genuineness, to prove that the books have been regularly kept and that they are generally accurate.[11] In a case, however, the Allahabad High Court has held that formal proof of the fact that the books have been regularly kept in the course of business is not necessary and that it is a matter of intrinsic evidence whether the books are books of account and regularly kept in the course of business.[12] S.34 of the Evidence Act although dispenses with the formal proof that the accounts were kept in the regular course of business, it is a matter of intrinsic evidence as to whether the books in question were books of account and regularly kept in the course of business.[12a] If the accounts are in the form of a memorandum not regularly kept in the course of business, they are not evidence by themselves but can be used to corroborate the testimony of the person who kept them or to refresh the memory of such

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1. *Babhnaji* v. *Ratanlal*, 148 IC 1033 : 1934 N 106.
2. *Lodna Colliery Co.* v.*Bholanath Rai*, 1954 C 233.
3. Wigmore, Vol. 2 S 1546, P 1905 ; *Ramaji* v. *Manohar*, 62 Bom LR 322.
4. *Gulab Halwai* v. *Bhagwan Dass*, 138 IC 716 : 1932 O 225 ; See *Kesheo Rao* v. *Ganesh*, 95 IC 128 : 1926 N 407.
5. *Maganmal* v. *Darbarilal*, 107 IC 113 : 1928 PC 39.
6. *Charan Das* v. *Lal Chand*, 41 PLR 295.

6a. *Jain Plastic Industry* v. *Gopi Chand*, AIR 1990 Del. 51.

7. *Uttam Chand Ishar Das* v.*Mohammad Sharif*, 137 IC 44 : 1932 L 417 ; *Bankey Behari Lal* v. *Brij Behari Lal*, 51 A 519 : 116 IC 285 : 1929 A 170 ; *Hingu Miya* v. *Heramba Chandra Chakravarti*, 8 IC 81 : 13 CLJ 139.
8. *Abdul Haq* v. *Shivaji Ram Khem Chand*, 71 IC 259 : 1922 L 338 ; *Imambandi* v. *Matasuddi*, 13 IC 678 : 15 CLJ 621.
9. *Mukundram* v. *Dayaram*, 23 IC 893.
10. *Gajendra Shah* v.*Shankar Baksh Singh*, 152 IC 468 : 1935 O 16 ; *Lachmi Narain* v . *Musaddi Lal*, 1942 O 155.
11. *Dwarka Doss* v.*Jankee Doss*, 6 M IA 88 (PC) ; *Hingu Miya* v.*Heramba Chandra Chakravarti*; 8 IC 81.
12. *E.v. Narbada Prasad*, 51 A 864 : 121 IC 819 : 1930 A 38 : 31 Cr LJ 36.

12a. *Pit Ram Singh* v. *Vimla Devi*, AIR 1992 Raj. 149 (p. 152).

person when examined as a witness.[1] If the account book was written by a person who is dead, any objection to its admissibility on the ground that it was not regularly kept must be taken in the trial Court.[2]

Evidentiary function of the entries; entries relevant but not sufficient to charge a person with liability.—Under the Old Act, entries in books proved to have been kept in the course of business were admissible only as "corroborative" and not as "independent" proof of the facts therein stated.[3] If, therefore, there was no other evidence of the fact stated in the entries, the entries were inadmissible, there being nothing to corroborate. The language of the present Act, however, is materially different from the language of the old Act and implies a substantial alteration in the law.[4] The present Act does not say that an entry is merely corroborative evidence; the entry is substantive evidence, though, by itself, it is not sufficient to charge; a person with liability.[5] Expressions such as 'corroborative evidence", "independent evidence", and "substantive evidence" which occur in some of the reported decisions bearing upon Section 34 of the present Act[6] are a survival of the phraseology of the old Act and are misnomers. Under the present Acts, the entries are admissible whether they are corroborated or not or whether they are given in evidence to charge a person with liability or to prove any other relevant fact. It is not correct to say that the entries not admissible unless corroborated. The only limitation imposed by the section on the evidentiary function of the entries is that, when they are sought to be used for a particular purpose, namely, to charge any person with liability, they shall not alone be sufficient. This limitation on their evidentiary function does not, however, affect their general admissibility.[7] Suppose, for instance a question whether a person was on a particular date in Calcutta. Evidence is adduced to show that in a book of account regularly kept in the course of business there is an entry that he received a sum of money from X in Calcutta on that date. That entry would be admissible under the first part of Section 34, and apparently no corroboration would be needed as no liability is sought to be imposed upon him by virtue of that entry.[8] Similarly, where an entry in a book of account is given is evidence not to charge a person with liability but to prove any other relevant fact in the case, *e.g.*, to prove the rate of rent paid by a tenant with a view to rebut the presumption under Section 50 of the Bengal Tenancy Act, the uncorroborated entry will be admissible.[9] When an entry is used to show variation in the rent, it is not used to charge a person

1. *Keyarsosp* v. *Garbad*, 120 IC 224 : 1930 N 24.
2. In re *Madu Chinnagi Reddi*, 32 IC 665 : 17 Cr LJ 73 ; See also *Chakravarthi Nainar* v. *Pushpavathi Ammal*, 95 IC 1005 : 1926 M 985.
3. See Section 43 of Act 11 of 1855.
4. *Gopswar Sen* v. *Bijoy Chand Mahatab Bahadur*, 55 C 1167 : 108 IC 883 : 1928 C 854, per Mukerji, J. ; *E.* v. *Narbada Prasad*, 51 A 864 : 121 IC 819 : 1930 A 38 : 31 Cr LJ 36 ; *Belget Khan* v. *Rash Beharee Mookerjee*, 22 WR 549.
5. *Yesuvadiyan* v. *Subha Naicker*, 52 IC 704.
6. See *Deonarayan Singh* v. *Dwarka Prasad Singh*, 109 IC 136 : 1928 P 429 ; *Jonab Biswas* v. *Siva Kumari Debi*, 104 IC 733 : 1927 C 855 ; *Faijaddin* v. *Agni Kumar Sharma*, 71 IC 300 : 1924 C 370.
7. *Gopeswar Sen* v. *Bijoy Chand Mahatab Bahadur*, 55 C 1167 : 106 IC 883 : 1928 C 854 ; See also *Yesuvadiyan* v. *Subba Naicker*, 52 IC 704.
8. *Aktowli* v. *Tarak Nath Ghose*, 17 IC 266 : 16 CLJ 328.
9. *Gopeswar Sen* v. *Bijoy Chand Mahatab Bahadur*, 55 C 1167 : 108 IC 883 : 1928 C 854 ; *Nirod Krishna Ghose* v. *Produt Kumar Tagore*, 32 IC 794 ; *Dukha Mandal* v. *Grant*, 16 IC 467 : 16 CLJ 24 ; *Belaet Khan* v. *Rash Beharee Mookerjee*, 22 WR 549 ; but see *Aktowli* v. *Tarak Nath Ghose*, 17 IC 266 : 16 CLJ 328 ; *Surnomoyi* v. *Johur Mahomed Nasyo*, 10 CLR 545.

with liability,[1] there is, therefore, nothing to prevent a Court, if it so likes, to treat the entry was sufficient proof of the fact mentioned in the entry, namely, the rate of rent paid by the tenant,[2] where corroboration seems to have been required as a matter of law. Even if the ultimate result of the proof of the variation in the rent may be to impose on the tenant the liability of paying enhanced rent. An entry in a book of account is relevant to prove the rate at which the defendant had been paying for water used.[3] An entry in a book of account may also be used to corroborate the testimony of other witness deposing to the fact mentioned in it.[4]

Entries in bank books of account proved by corroborative evidence. High Court not right in dismissing suit, bank entitled to decree.[5]

In this regard, following paragraph from the *Halsbury's Laws of England* Fourth Ed. at page 57 is relevant:-

"The power so to order is complementary to the jurisdiction to stay or strike out any action under the inherent jurisdiction of the court. Although no evidence is admissible on an application invoking the rule, if the summons additionally invokes the court's inherent jurisdiction evidence may be filed, and all the relevant facts considered. The practice is not to consider this evidence until the question whether or not on the fact of the pleading some reasonable cause of action or defence, as the case may be, is disclosed has been determined.

If the court concludes that the pleading or any part of it should be struck out, the court will consider whether there is sufficient justiciable issue remaining; if there is not the court will direct the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.[6] No presumption of correctness attaches to the entries in the *bahis*.[7]

Account books, as such, do not create any right, and any entry in the account books cannot be basis of charging a person with the liability of what is noted against him.[8] Entries in the account books can be merely evidence of certain alleged facts and, as such, are relevant evidence. Certain entries which might be signed by a constituent may form the basis of a charge against him in view of his acknowledging his liability and the correctness of the contents noted in that entry, defendants liable to pay balance amount.[9]

The rule contained in the section applies only to entries in books of original entry, e.g., as in cash books or *Rokar Bahis*. But not to a ledger or *Khata Bahi*, which though a book of accounts and kept in the regular course of business, is not a book of original entry. No reliance should be placed on the entries in the *Khata Bahi*, which are not supported by corresponding entries in the *Rokar Bahi* or *Naqai Bahi*.[10]

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1 *Gopeswar Sen* v. *Bijoy Chand Mahatab Bhahdur*, 55 C 1167: 108 IC 883: 1928 C 854: *Nirod Krishna Ghose* v. *Produt Kumar Tagore*, 32 IC 794; *Dukha Mandal* v. *Grant*, 16 IC 467; 16 CLJ 24; *Belaet Khan* v. *Rash Beharee Mookerjee*, 22 WR 549; but see *Aktowli* v. *Tarak Nath Ghose*, 17 IC 266; 16 CLJ 328; *Sumomoyi* v. *Johur Mahomed Nasyo*, 10 CLJ 545.

2 See however, *Deonarayan Singh* v. *Dwarka Prasad Singh*, 109 IC 136: 1928 P 429: *Jonab Biswas* v. *Siva Kumari Devi*, 104 IC 733: 1927 C 855; *Faijaddin* v. *Agni Kumar Sarma*, 71 IC 300; 1924 C 370.

3 *Prabhu Diyal* v. *Ram Chunder*, 1923 L 595.

4 *Lal Mohan Sahu* v. *Tazimaddin*, 49 IC 756.

5 *S.B.I.* v. *Gouramani Singh*, (SC) Comp. Cases, 79, 1994 at page 389.

6 *Pit Ram singh* v. *Vimla Devi*, AIR 1992 Raj 149 p. 152.

7 *Ahmad Din Allah Ditta* v. *Pratap Singh*, 41 PLR 373: 1939 L 433.

8 *Hari Prasad* v. *State*, 1953 A 660: 1953 Cr LJ 1496: 1953 ALJ 318.

9 *Sachindra Prasad* v. *Ahamd Ali*, AIR 1988 Gau. 33.

10 *Sohanlal* v. *Gulab Chand*, ILR 1965 Raj. 1035.

But this section is not the only provision to be considered. There is Section 11, which provides that facts not otherwise relevant are relevant, if they are inconsistent with any fact in issue or relevant fact. So, where a fact in issue in a case is whether a certain sum of money was paid, that fact is a relevant fact. Absence of entries in the account books would be inconsistent with the receipt of the amount and would thus be a relevant fact which can be proved under Section 11.[1]

Corroboration.—When an entry is used to charge a person with liability, corroboration is necessary.[2] The law does not require any particular form of corroborative evidence, and it is impossible to lay down any hard and fast rule as to the kind of corroborative evidence which should be produced.[3] What the section requires is that the entry should not stand alone; there must be some other evidence to support it.[4]

Account books regularly kept in course of business may be proved but should be corroborated.—Entries of account books are not by themselves sufficient to charge any person with liability. Therefore, when A sues B for a sum of money, it is open to him to put his account books in evidence, provided they are regularly kept in the course of business and show by reference to them that the account claimed by him is debited against B. The entry though made by A in his own account books, and though it is in his own favour is a piece of evidence which the court may take into consideration for the purposes of determining whether the amount referred to therein was in fact paid by A to B. The entry by itself is of no help to A in his claim against B but it can be considered by the Court alongwith the evidence of A for drawing the conclusion that the amounts was paid by A to B.[5]

Rent Control—Landlord and Tenant.—Entries sought to be proved are merely in the form of receipts of the amount of rent. Even if these receipts were not signed, on the basis of these entries in view of Section 34 of the Evidence Act, it could not be held that payments were received by the landlord. (para 5).[5a]

Each item in the books must be proved.—There is no presumption of correctness attaching to the entries in a book of account.[6] A mere account book, without entries, does not prove anything. Mere proof of the existence of certain entries in books of account kept in the ordinary course of business is not sufficient to charge a person with liability;[7] nor is a mere assertion that particular pages of certain volumes were written by this or that writer sufficient compliance with the provision of the law. The books must be proved item by item for the purpose of charging the opposite party. The law requires proof not only of account books generally but of each item that is in the

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1. *State of Andhara Pradesh* v. *Ganaswara*, AIR 1963 SC 1950.
2. *Narain Das* v.*Ghazi Ram Gojar Mal*, 1938 ALJ 449 : 1938 AWR (HC) 294 ; *Khuda Baksh Nur Ilahi* v. *Yasin*, 1937 Pesh, 103 ; *Khunni Mal Narain Das* v. *Dwarka Das Baij Nath*, 128 IC 767 : 1930 A 710 ; *Beni* v. *Bisan Dayal*, 89 IC 371 : 1925 N 445 ; *Jodha Mal Budha Mal* v. *Ditta*, 84 IC 909 : 1925 L 242 ; *Rani* v. *Bahadur Mal Buti Mal*, 63 IC 946 : 1922 L 119 ; *Abdul Ali* v. *Puran Mal*, 82 PR 1914 : 25 IC 560.
3. *Yesuvadiyan* v. *Subba Naicker*, 52 IC 704.
4. *Faiz Mohammad Pir Baksh* v. *Muhammad Zaman Khan*, 157 IC 52 ; *E.v.Narbada Prasad*, 51 A 864 : 121 IC 819 : 1930 A 38 : 31 Cr LJ 36 ; *State* v.*Kishan Dayal*, 1952 HP 46 : 1952 Cr LJ 1128.
5. *State of Andhara Pradesh* v. *Ganeswara Rao*, (1963) 2 Cr LJ 671 : (1964) 2 SCA 38.

5a. *Suresh Kumar* v. *Mewa Ram*, AIR 1991 P & H 254.

6. *Ahmad Din Allah Ditta* v. *Partap Singh*,51 PLR 373 : 1939 L 438.
7. *T.N.S. Firm* v. *P.S. Muhammad Hussain*, 146 IC 608 : 1933 M 756 ; *Mathila Sice* v. *Gaebele*, 96 IC 429 : 1926 M 955 ; *Yesuvadiyan* v. *Subba Naicker*, 52 IC 704 ; *State* v. *Kishan Dayal*, 1952 HP 46 : 1952 Cr LJ 1128 ; *Duni Chand* v. *Munshi Amar Nath*, 1953 HP 68.

interest of the person producing the books.[1] In order to obtain a decree on the basis of entries in books of account, it is not sufficient merely to prove that the books are correct and have been regularly kept in the course of the business; the entries must also be proved.[2] A general statement by the plaintiff that there were dealings between him and the defendant is not sufficient evidence of any particular item charged against the defendant.[3] But it has been remarked in *Hawanta* v.*Akbar Khan*,[4] that where there is the plaintiff's statement on oath that the account is correct, disputed items interspersed in an otherwise true account should not be disallowed simply because no specific evidence is adduced in regard to them.

Writer must be examined.—Where the writer of the account books is alive and has not been examined, the account books may be said not to be duly proved.[5]

The nature of corroborative evidence.—Section 34 of the Evidence Act does not in any way limit the nature of the material upon which the Court may rely to support the entries in a book of account. Such material may be in the shape of temporary vouchers, receipts or other documentary evidence. It may take the shape of sworn oral testimony. The circumstances surrounding the existence of the book and the circumstances surrounding the transaction which is recorded in the book may constitute sufficient corroborative material.[6] Any relevant fact which is evidence within the meaning of the Evidence Act may be treated as sufficient corroboration.[7] If, in addition to the production by the plaintiff of account books regularly kept in the course of business, there is evidence of witnesses who prove a number of items claimed by the plaintiff, the requirements of Section 34 are fulfilled and there is sufficient evidence to charge the defendant with liability.[8]

What would amount to independent evidence sufficient to corroborate the entries in the account books depends upon the facts of each case and particularly on the issues between the parties. What is necessary to be seen in each case is whether besides the entries in the account books, there is any evidence to prove that the transactions referred to in those entries actually took place. Where the transactions sued upon are numerous and extend over some length of time, it is hardly reasonable to expect independent evidence to be given to prove each and every particular transaction. In such cases the genuineness of the account books, if they are regularly kept in the course of business, will be the determining factor. But mere proof of the correctness of the entries in the account books is not enough. There must be some evidence to corroborate those entries. Such corroboration is best afforded by the evidence of the person who wrote the account books and in whose presence the transactions took place. He need not

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1. *Banwari Lal* v.*Mst. Hussaini*, 1939 L 455 ; *Mathila Sice* v. *Gaebele*, 96 IC 429 : 1926 M 955 ; *Ganeshi Lal* v. *Mangat Ram Atma Ram*, 76 IC 157 : 1924 L 540 ; *Abdul Haq* v. *Shivji Ram-Khem Chand*, 71 IC 259 : 1922 L 338 ; *Ganga Ram* v. *Kaka Ram*, 22 IC 403 ; *Imambandi* v. *Mutasuddi*, 13 IC 678 : 15 CLJ 621.
2. *Bahadur Singh* v.*Padam Chand Asa Ram*, 141 IC 655 : 1933 L 384.
3. *Buta* v.*Tirlok Chand*, 100 IC 862 : 1927 L 903.
4. *Hanwanta* v. *Akbar Khan*, 80 PR 1910 : 7 IC 1011 ; see also *Ramgobind Prasad* v. *Gulabchand Sahu*, 1941 P 430 : 20 P 273.
5. *Kaka Ram* v.*Thakar Das*, AIR 1962 Punj 27.
6. *Kalu Mal Dhakhan Lal* v. *Bhawani Dass-Rakhab Das*, 88 IC 383 : 1925 A 742.
7. *Narain Das* v. *Ghazi Ram Gojar Mal*, 1938 ALJ 449 : 1938 AWR (HC) 294 ; *Yesuvadiyan* v. *Subha Naicker*, 52 IC 704. The word "evidence" in this ruling seems to have been used in a wider sense than in Section 3.
8. *Nanak Chand* v.*Parmeshri Das*, 35 PLR 539.

prove each and every particular transaction. If he proves the entries written by him and states that the transactions referred to in those entries actually took place in his presence or to his knowledge, the effect will substantially be the same. But in case of dispute in respect of particular items, specific evidence should be insisted upon to prove those particular transactions.[1]

Plaintiff's own statement, whether sufficient corroboration?—A general statement by the plaintiff that the books speak for themselves[2] is insufficient as the plaintiff's statement in such a case is not independent of the entries in the books, and the law requires evidence independent of the entries to corroborate them.[3] It is, however, equally clear that if the plaintiff deposes from his personal knowledge and does not merely state the inference which he has drawn from the books, the requirement of the law is complied with and his statement, if believed would be sufficient corroboration.[4] Where the examination-in-chief of the plaintiff does not make it clear whether he is speaking from his personal knowledge or merely from the state of affairs disclosed by the books, and no question is put to him in cross-examination to show that he is not speaking from his personal knowledge the statement of the plaintiff should be interpreted in the manner most favourable to him, and he should he held to have spoken from personal knowledge.[5] If, however, a party has the means of producing better evidence, it is clearly his duty to produce it,[6] and in such a case a general statement by the party that the books speak for themselves,[7] or that the items in the books are correct, [8] or that there were dealings between him and the other party,[9] is not sufficient. The statement of a book-keeper who makes daily balances each day is insufficient if the actual items were not paid in his presence.[10] Where accounts are prepared by a book-keeper from memoranda supplied by the plaintiff, the statement of the book-keeper is not sufficient, and the plaintiff must himself go into the witness-box to support the accounts.[11] A book-keeper may testify to facts recorded by him in books regularly kept in the course of business if he knows that the books were correctly kept, although he has forgotten the particular transactions entered.[12] But such evidence can hardly be considered as sufficient independent corroboration of the entries.

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1. *Ramgobind Prasad* v. *Gulabchand Sahu*, 1941 P. 430 : 196 IC 57 : 20 P 273.
2. *Ganga Ram* v. *Kaka Ram*, 22 IC 403 ; see also *Ganga Prasad* v.*Inderjit Singh*, 23 WR 390 (PC).
3. *Q.* v. *Hurdeep Sahay*, 23 WR 27 Cr.
4. *Jodha Mal Budha Mal* v. *Ditta*, 84 IC 900 : 1925 L 242 ; *Yesuvadiyan* v.*Subba Naicker*, 52 IC 704 ; *Hanwanta* v. *Akbar Khan* 80 PR 1910: 7 IC 1011 ;*Sarat Husain* v.*Ram Kishen Das*, 68 PR 1899 : 5 PLR 1900 : see *Suraj Prasad* v.*Mt. Makhna Devi* , 1946 A 127 ; *Khuda Baksh Nur Ilahi* v. *Yasin*, 1937 Pesh 103 : *Dwarka Das* v.*Sant Baksh*, 18 A 92; *Gopasundar Sabatho* v.*Chunilal*, 1955 Orissa 6.
5. *Mukhi Ram* v.*Firm Kamla Prasad Balamdas*, 161 IC 164 : 1937 P 222 ; *Dwarka Das* v.*Sant Baksh*, 18 A 92 ; *Har Dei* v.*Sri Kishun*, 133 IC 900 ; 1932 A 60 ; *Jagat Singh Kawatra & Sons* 145 IC 157 : 1933 L 212 ; *Yesuvadiyan* v.*Subba Naicker*, 52 IC 704.
6. *Ganga Persad* v.*Inderjit Singh*, 23 WR 390 (PC); *Hira Bhagat* v.*Govind Ram*.63 PR 1897 ; *Ganga Ram* v. *Kakla Ram*, 22 IC 403 ; see also *Buta* v.*Tirlok Chand*, 100 IC 862 : 1927 L 903.
7. *Ganga Ram* v.*Kaka Ram* , 22 IC 403; see also *Abdul Ali* v.*Puran Mal*, 32 PR 1914 : 25 IC 460.
8. *Ganga Prasad* v.*Indrajit Singh*, 23 WR 390 (PC)
9. *Buta* v.*Tirlok Chand* ,100 IC 862 : 1927 L 903 ; *Ganeshi Lal* v.*Mangat Ram Atma Ram*, 76 IC 157 : 1924 510.
10. *Gokal Mal Ram Chand* v.*Nath Mal Gulzari Mal*, 75 IC 812 : 1923 L 431, followed in *Buta* v. *Tirlok Chand*, 100 IC 862 : 1927 L 903: for a still stronger case on the necessity of corroboration, see *Ganeshi Lal*. v.*Mangat Ram Atma Ram*, 76 IC 157 : 1924 L 510.
11. *Hira Bhagat* v.*Gobind Ram*, 63 PR 1897.
12. Illustration to Section 160.

Absence of entry of a fact which, in the usual course, should have been recorded in the books, is relevant to prove the non-existence of that fact.—Absence of entries in the account books would be inconsistent with the receipt of the amounts and would thus be a relevant fact which can be proved under Section 11.[1] In some earlier cases of the Calcutta High Court,[2] it was held that though under Section 34 of the Evidence Act the actual entries in a book of account, regularly kept in the course of business, are relevant the mere absence of an entry in such books as to a transaction, is not relevant to prove the non-existence of that transaction. In an another case, use of a negative character was, sought to be made of the case in the same Court, however, a different view of this matter was taken and the absence of an entry was held relevant, not under Section 34, but under Section 9 and Section 11 of the Evidence Act.[3] In a subsequent case in the same Court, however, a different view of this absence of entry of a fact in books of account in the following circumstances. The question was whether Z was the wife of the deceased. the books of account of the deceased contained entries of payments made to two admitted wives of the deceased, but there was no entry of any payment made to two admitted wives of the deceased, but there was no entry of any payment having ever made to Z. The books were given in evidence to show that, as there was no entry of any payment having been made to Z,Z was not the wife of the deceased. The High Court,[4] not approving the view taken in the earlier cases,[5] was inclined to treat the absence of entry of any payment to Z relevant, in accordance with the decision last cited.[6] When the case went up to the Privy Council, this negative use of the absence of any such entry was not questioned, and this fact was treated as a relevant circumstance to show that Z was not the wife of the deceased.[7] The decision of the Privy Council has been taken in India as an authority for the admissibility of absence of entries in books of account[8] and as having overruled the earlier Calcutta cases to the contrary.[9] This also fits in with the opinion expressed by Turner, L.J., in *Wise* v. *Bhodun Moyee Debia Chowdranie*.[10] If a transaction, in the ordinary course, should have been entered in a book, the fact that it was not recorded there, is presumtive proof of its non-existence. Such evidence is admissible both under Section 9 and Section 11 of the Evidence Act.[11] Thus, where, when any partner of a certain firm made a journey on the firm's business, it was usual to enter in the books of the firm the expenses of the journey, and the question was whether M, a partner of the firm, visited

1. *State of Andhra Pradesh* v. *Ganeswara Rao*, 1963 (2) Cr LJ 671: (1964) (2) SCA 38.
2. *Q.E.v.Gress Chunder Banerjee*, 10 C 1024 ; In the matter of *Juggun Lal*, 7 CLR 356; see also the observations of Lord Devey and Lord Robertson in *Ram Pershad Singh* v.*Lakhpati Koer*, 30C 231, 247: 30 IA 1 (PC).
3. *Sagur Mal* v.*Manraj*, 4 CWN ccvii.
4. *Imambandi* v.*Matasuddi*, 13 IC 678 : 15 CLJ 621.
5. *Q.E.v.Greeschunder Banerjee*, 10 C 1024; In the matter of *Juggun Lal*, 7 CLR 356.
6. *Sagur Mal* v.*Manraj*, 4 CWN ccvii.
7. *Imambandi* v.*Matasuddi*, 45 C 876 : 45 IA 73 : 47 IC 513 : 1918 PC 11.
8. *Tara Kumar Ghose* v.*Kumar Arun Chandra Singh*, 74 IC 383 : 1923 C 261 ; *Debendra Nath Basu* v.*Arun Chandra Sinha*, 1925 C 64.
9. *Q.E.v.Grees Chunder Banerjee*,10 C 1024 ; In the matter of *Juggan Lal*. 7 CLR 356.
10. 10 MIA 165 ; *Tara Kumar Ghose* v.*Kumar Arun Chandra Singh*, 74 IC 383 : 1923 C 261.
11. *Ganga Ram Agarwalla* v. *Lachi Ram Kishen Dayal*, 28 IC 705: 19 CWN 611 ; *Imrit Chamar* v.*Sridhar Pandey*, 13 IC 120: 15 CLJ 7; *Sagur Mall* v.*Munraj*, 4 CWN ccvii; see also *Tara Kumar Ghose* v. *Kumar Arun Chandra Singh*, 74 IC383 : 1923 C 261; *Kasam* v.*Firm of Haji Jamal*, 76IC 327 : 1924 N 22, where absence of entry was held relevant under Section 7, Section 8 Section 11.

Calcutta on a certain date, the absence of any entry relating to the expense of the alleged journey by M to Calcutta was held admissible both under Section 9 and Section 11.[1] The fact that no entry of an alleged payment is to be found in the regularly kept account books of the payer is relevant[2] to show that no payment was made. The absence of recitals in a document may be used in evidence as against a person who is not a party to that document under Section 9 and 11 of the Evidence Act. Therefore, the absence of the name of a party from the category of tenants mentioned in a road-cess return is evidence against him.[3] The absence of an entry in a document is evidence, though its effect is to be determined in the light of general evidence in the case.[4] The fact that a certain rivulet is not shown in Rennell's survey map is not sufficient proof of the non-existence of the rivulet in the *parganna, kanungo* and *mauzawari* registers and the *thak* map of 1852 is not sufficient to show that the land was the *mal* land of the *zamindar* and thus not liable to assessment to rent.[5]

Account relevant under Section 34 and other sections of the Act, e.g., Sections 32(2), 21, 157, 159 and 160; corroboration, whether necessary?—Accounts relevant only under Section 34 are not alone sufficient to charge a person with liability; corroboration is required. But where accounts are relevant under Section 32(2) also, they do not require corroboration as a matter of law. It is within the discretion of the Court to require or to dispense with corroborative evidence.[6] "Fortunately, however, in practice we seldom come across a case in which the entry which comes under Section 32, clause (2), is really sought to be used alone to charge any person with liability.[7] An entry in a book of account may become relevant also under Section 21, if it is against the interest of the person in whose books it appears, and, when used as an admission against a party's interest, the entry does not require corroboration.[8] Even if the entry was not made by the party but by the party's agent, it will be admissible against the party[9] as an admission.[10] Besides, an entry may be used to contradict[11] to corroborate[12]

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1. *Sagar Mull* v.*Manraj*, 4 CWN ccvii.
2. *Kasam* v.*Firm of Haji Jamal*, 76 IC 327: 1924 N 22; *Ganga Ram Agarwalla* v.*Lachi Ram Kishen Dayal*, 28 IC 705 ; 19 CWN 611.
3. *Imrit Chamar* v.*Sridhar Pandey*, 13 IC 120: 15 CLJ 7.
4. *Debendra Nath Basu* v.*Arun Chandra Sinha*, 1925 C 64 ; *Tara Kumar Ghose* v.*Kumar Arun Chandra Singh*, 74 IC 383 : 1923 C 261 ; *Imambandi* v.*Mutsaddi*, 45 C 878 : 45 IA 73 : 47 IC 513 : 1918 PC 11; *Ganga Ram Agarwalla* v.*Lachi Ram Kishen Dayal*, 28 IC 705: 19 CWN 611; as to the absence of entry in wajibularz as to the existence of custom of pre-emption see *Ali Nazir Khan* v.*Manik Chand*, 25 A 90; *Sadhu Sahu* v.*Raja Ram*, 16 A 40 (FB).
5. *Benode Lal Chakravarty* v.*Secretary of State*, 133 IC 573 : 1931 C 239.
6. *Bipradas Pal Choudhury* v *Monorama Debi*, 45 C 574 : 47 IC 49.
7. *Abdul Wahad* v.*Nagendra Chandra*, 1940 C 524 :*Jabbar Ali Sardar* v.*Manmohan Pandey*, 55 C 1216 : 114 IC 485 : 1929 C 110 ; *Mon Moman Pandey* v.*Hari Nath Choudhury*, 110 IC 338: 1928 C 408 ; *Gopeswar Sen* v.*Bijoy Chand Mahatab Bahadur*, 55 IC 1167: 108 IC 883: 1928 C 854: *Rani* v.*Bahadur Mal Buti Mal*, 63 IC 946 : 1922 L 119: *Chaitter Rai* v.*Kailash Behari*, 44 IC 422; *Ramaswami Naik* v.*Ramanadhan Chetty*, 22 IC 627 ; *Bhaba Sundari Devi* v.*Taira Nasya*, 6 IC 369 : *Daji Abaji Khare* v. *Gobind Narayan Bapar*, 10 Bom. LR 811; *Ramapyarabai* v.*Balaji Shridhar*, 28 B 294 ; but see the judgment of *Mukerji*, J, in *Gopeswar Sen* v.*Bijoy Chand Mahatab Bahadur*, 55 C 1167: 108 IC 883: 1928 C 854, where the correctness of this view has been questioned and corroboration has been considered necessary both as a matter of prudence and as a matter of law.
8. Per Mukerji, J., In *Gopeswar Sen* v. *Bijoy Chand Mahatab Bahadur*, 55 C 1167: 108 IC 883 : 1928 C 854.
9. *Mohomed Baksh* v.*Rawalpindi Club Ltd.*, 1935 L 222; *Mathila Sice* v.*Gaebele*, 96 IC 429 : 1926 M 955 ; *Nanilal Das* v.*Nutbehari Das*, 38 CWN 861.
10. *Nanilal Das* v.*Nuthbehari Das*, 38 CWN 861.
11. Section 145; *Mukundram* v.*Dayasram*, 23 IC 893.
12. Section 157; *Keyarsosp* v.*Garbad*, 130 IC 224 : 1930 N 24 ; *Mukundram* v.*Dayaram*, 23 IC 893.

the testimony, or refresh the memory,[1] of the person who made the entry, if such person is examined as a witness. A book-keeper may testify to facts recorded by him in books regularly kept in the course of business, if he knows that the books were correctly kept, although he has forgotten the particular transactions entered.[2] But evidence given in this manner can hardly amount to independent corroboration of the entries. As to the applicability of Sections 159 and 160 to evidence given by a witness by referring to books of account, see *Yesuvadiyan* v.*Subba Naicker*,[3] and *Mukundram* v.*Dayarami*.[4]

Suspicious entry.—If the entry is made in a suspicious way, the circumstances detracts from the value of the entry.[5]

An entry made in 1971 is not relevant on the question whether a person had taken a loan in 1916.[6]

Sections 34 and 90 Evidentiary value of loose sheets of account.—They have not the probative force of a book of account regularly kept. Being old documents, naturally the writer was not called and barring the fact that they were produced from the Receiver's possession there was nothing to show their genuineness.[7]

Rent collection papers, Jamawasilbaqi, Jambandhi, talib baqi papers etc.—Jamawasilbaqi papers are yearly accounts showing the total rent demandable from each *raiyat* for the current year, the balance of the previous year, the amounts collected during the year, and the balance due. The *Jamabandi* papers, on the other hand, show the quantity of land held by each cultivator, its different qualities, the rate of rent for each kind the total rent for all the lands of every kind held by him. These two classes of papers are not identical in their nature; but, from the point of view of Section 34, there is no difference between them.[8] They are books of account kept in the course of *zamindari* business,[9] and, if proved to have been regularly kept, are relevant under section 34 and admissible in evidence even if not corroborated.[10] Under the old Act,[11] such papers were only admissible as "corroborative" evidence, and therefore, if there was no other evidence in the case, they were altogether inadmissible.[12] The language of the old Act, and such papers are admissible even if not corroborated.[13] In some cases decided under the present Act, the language of the old Act has been used, and such

1. Sections 159, 160: Keyarsosp v.*Garbad*, 130 IC 224 : 1930 N 24 ;*Ramprasad* v.*Nathuram*, 68 IC 494 : 1923 N 32 : *Yesuvadiyan* v.*Suba Naicker*, 52 IC 704 ; *Mukundram* v.*Dayaram*, 23 IC 893.
2. Illustration to Section 160.
3. 52 IC 704.
4. 21 IC 893.
5. *Venkata Mallayya* v.*Ramaswami & Co.*,AIR 1964 SC 818.
6. *Ramji* v. *Banerji* 62 Bom. LR 322.
7. *Mahasay Ganesh Prasad Ray* v.*Narendra Nath Sen* , 17 Cut LT 73 : 1951 Ker. LT (SC) 28.
8. *Aktowli* v.*Tarak Nath Ghose*, 17 IC 266 : 16 CLJ 328.
9. *Brajnath Bhakat*.v.*Bimalendu Roy*, 1947 C 21;*Deonarayana Singh* v. *Dwarka Prasad Singh*, 109 IC 136 : 1928 P 429 ; *Gajjo Koer* v.*Syed Ally Ahmed*, 14 WR 474 : 6 BLR App.62.
10. *Gopeswar Sen* v.*Bijoy Chand Mahatab Bahadur*, 55 C 1167 ; 108 IC 883: 1928 C 854.
11. Section 43 of Act 11 of 1855.
12. As to jamawasilbaqi papers, see *Janab Biswas* v.*Siva Kumari Debi*, 104 IC 733 : 1927 C 855 ; *Beejoy Gobind Burral* v.*Bheekoo Roy*, 10 WR 291 ; *Sheo Suhaye* v. *Goodur Roy*, 8 WR 328 ; *Ram Lall Chuckerbutty* v. *Tara Sundari*, 8 WR 280 ; *Kheeronanee Dassee* v. *Beejoy Gobind Bural*, 7 WR 533 : *Gopal Mundul* v.*Nobo Kishen*, 5 WR Act X Rulings, 33; as to jamabandi papers. see *Kishore Doss* v. *Pursun Mahtoon*. 20 WR 171 ;*Dhanookdharee* v.*Toomey*, 20 WR 142 ; *Gajjo Koer* v.*Syed Aly Ahmed*, 14 WR 474 ; *Chamarnee Bibbe* v.*Ayenoollah Sirdar*. 9 WR 451.
13. *Gopeswar Sen* v.*Bijoy Chand Mahatab Bahadur*, 55 C 1167 ; 108 IC 883 : 1928 C 854 ; *Belaet Khan* v.*Rash Beharee Mookerjee*, 22 WR 549 ; see also *E.v.Narbada Prasad*, 51 A 864 : 121 IC 819 : 1930 A 38 : 31 Cr LJ 356 ; *Yesuvadiyan* v.*Subba Naicker*, 52 IC 704.

papers have been held to be inadmissible as "independent" or "substantive" evidence in the absence of other evidence,[1] but, as has been mentioned before,[2] this is not a correct view of the present section. When used under section 34, these papers are, of course, not sufficient to charge a person with liability. It has, however, been held in several cases that when such papers are given in evidence to show variation in the rent paid by a tenant and thus to rebut the presumption under Section 50 of the Bengal Tenancy Act, it cannot be said that they are used to charge a person with liability,[3] and, therefore, corroboration is not necessary as a matter of law[4] If the person who prepared the papers is dead, they become admissible under section 32(2) as well,[5] and then corroboration ceases to be a legal necessity.[6] It should, however, be remembered that such papers, whether admitted under section 34 or under section 32(2), are open to great suspicion; for having been prepared by the landlord's agents and in the absence of the tenants, they belong to the self-serving type of evidence.[7] It is, therefore, usual to require corroboration, even when corroboration may not be necessary as a matter of law.[8] The evidentiary value of such papers, when they are sought to be used against the tenant, has got to be carefully appraised; the entries themselves have to be scrutinized with care and the circumstances under which they were made carefully considered. The occasions on which they have, without corroboration, been implicitly relied on against the tenants are few and far between. The reason why they find this disfavour is that they are made behind the back of the tenants and they put the tenants entirely at the mercy of the *zamindar* or his agents. When, however, there is nothing to suggest that they were made with a motive, and all the circumstances point to their having been made in the ordinary course of business, the chances of their accuracy and of the transactions to which they relate being true are considerably enhanced. It depends, therefore, on all the circumstances of any particular case whether they would require corroboration or not for their acceptance

1. See *Janab Biswas* v.*Siva Kumari Debi*, 104 IC 733 : 1927 C 855 ; *Deonaryan Singh* v.*Dwarka Prasad Singh*, 109 IC 136 : 1928 P 429 ; *Faijaddin* v.*Agni Kumar Sarma*, 71 IC 300 : 1924 C 370.
2. See notes to this section under the heading "evidentiary function of the entries; entries relevant but not sufficient to charge a person with liability.
3. *Abdul Wahad* v.*Nagendra Chandra*, 1940 C 524 ;*Gopeswar Sen* v.*Bijoy Chand Mahatab Bahadur*, 55 C 1167; 108 IC 883 : 1928 C 854 ; *Nirod Krishna Ghose* v.*Produt Tagore*, 32 IC 794 ; *Dukha Mandal* v.*Grant*, 16 IC 467 : 16 CLJ 24 ; *Belaet Khan* v. *Rash Beharee Mookerjee*, 22 WR 549 ; contra *Aktowli* v. *Tarak Nath Ghose*, 17 C 266 : 16 CLJ 328 ; *Surnomoyi* v. *Johur Mahomed Nashyo*, 10 CLR 545.
4. This follows from the decisions cited in the preceding note, but is contrary to the view taken in *Deonarayan Singh* v.*Dwarka Prasad, Singh*, 109 IC 136 : 1928 P 429 : *Jonab Biswas* v.*Siva Kumari Debi ;* 104 IC 733 : 1927 C 855 : *Faijaddin* v. *Agni Kumar Sarma*, 71 IC 300 : 1924 C 370 ; *Aktowli* v. *Tarak Nath Ghose*, 17 IC 266 : 16 CLJ 328 ; *Surnomoyi* v. *Johur Mohomed Nashyo*, 10 CLR 545, where corroboration seems to have been considered necessary as matter of law.
5. For jamawasilbaqi papers, see *Jabbar Ali Sardar* v.*Monmohan Pandey* 55 C 1216 : 114 IC 485 : 1929 C 110 ; *Man Mohan Pandey* v.*Hari Nath Choudhury*, 110 IC 338 ; 1928 C 408 ; *Dukho Mia* v. *Jagdish Nath Bahadur*, 90 IC 564 ; 1926 C 359 ; *Charitter Rai* v. *Kailash Behari*, 44 IC 422 ; *Dukha Mandal* v. *Grant*, 16 IC 467 : 16 CLJ 24 ; see also *Durga Priya Chowahury* v. *Hazra Gain*, 62 IC 453 : 1921 C 345.
6. For jamawasilbaqi papers, see *Abdul Wahad* v. *Nagendra Chandra*, 1940 C 524; *Jabbar Ali Sardar* v. *Manmohan Pandey*, 55 C 1216 : 114 IC 485 : 1929 C 110 ; *Mon Mohan Pandey* v. *Hari Nath Chaudhury*, 110 IC 338 : 1928 C 408 ; for jamabandi papers, see *Mon Mohan Pandey* v. *Hari Nath Chaudhury*, 110 IC 338 : 1928 C 408 ; *Charitter Rai* v. *Kailash Behari*, 44 IC 422 ; *Dukha Mandal* v.*Grant* 18 IC 467 : 16 CLJ 24.
7. For jamawasilbaqi papers, see *Sheo Suhaye* v. *Goodur Roy*, 8 WR 328 ; *Allyat Chinaman* v. *Juggut Chunder Roy*, 5 WR 242 ; for jamabandi papers, see *Gajjo Koer* v. *Syed Ally Ahmed*, 14 WR 474.
8. See *Faijaddin* v.*Agni Kumar Sarma*, 71 IC 300 : 1924 C 370 ; *Jonab Biswas* v.*Siva Kumari Debi*,104 IC 733 : 1927 C 855 ; *Deonarayan Singh* v.*Dwarka Prasad Singh*, 109 IC 136 : 1928 P 429 , where corroboration seems to have been considered necessary as a matter of law.

when given in evidence to show variation in the rent paid by the tenant.[1] They cannot, however, be entirely ignored on the ground that they were prepared in the landlord's office in the absence of the tenants,[2] they are entitled to credit on the same principle as other contemporary records made and kept by the party producing them in the ordinary course of his business.[3] When the papers are signed by the tenant, they would amount to an admission and the tenant would be bound by them.[4] In the absence of the *patwari* who collected the rent, they are not of much value,[5] but coupled with his evidence, they might constitute sufficient evidence of the rate of rent mentioned therein.[6] If the person who prepared the papers is examined as a witness, they may be used to refresh the witness's memory.[7]

Corroboration necessary for entries in account books.—Plaintiff is entitled to a decree on the basis of the entries in regularly kept account books provided they are corroborated.[8] The provisions of Section 34 of the Evidence Act are clear enough and they have been constantly interpreted as laying down a rule of evidence that the entries in the books of accounts would not be sufficient for the purposes of fixing the liability against a person.[9] There should be additional evidence independent of those entries. The entries from books of accounts are corroborative piece of evidence and they would not by themselves be sufficient evidence for fixing liability.[10]

35. Relevancy of entry in public record, made in performance of duty.—An entry in any public or other official book, register or [11][record or an electronic record] stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or [11][record or an electronic record] is kept, is itself a relevant fact.

COMMENTARY

Principle.—Statements in public documents are receivable to prove the facts stated, on the general ground that they were made by the authorized agents of the public in the course of official duty and respecting facts which were of public interest or required to be recorded for the benefit of the community. In many cases, indeed in nearly all cases, after a lapse of years it would be impossible to give evidence that the statements contained in such documents were in fact true, and it is for this reason that this exception is made to the rule against hearsay[12] and the statements declared relevant. The section is based upon the circumstances that, in the case of official documents, entries are made in the discharge of public duty by an officer who is the authorized and

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1. *Gopeswar Sen* v. *Bijoy Chand Mahatab Bahadur*, 55 C 1167 : 108 IC 883 : 1928 C 854, per *Mukerji, J.*
2. *Mon Mohan Pandey* v. *Hari Nath Chaudhury*, 110 IC 338 : 1928 C 408.
3. *Kheeronee Dassee* v. *Beejoy Gobind*, 7 WR 533.
4. *Watson & Co.* v. *Mohendra Nath Paul*, 29 WR 436.
5. *Bhugwan Dutt Jha* v. *Sheo Mangal Singh*, 22 WR 256; *See Faijaddin* v. *Agni Kumar Sarma*, 71 IC 300 : 1924 C 370.
6. *Dhanookdharee* v. *Toomey*, 9 WR 142; *Bhugwan Duttt Jha* v. *Sheo Mangal Singh*, 22 WR 256.
7. *See* Sections 159 and 160; *Kheeronee Dassee* v. *Beejoy Gobind*, 7 WR 533.
8. *Ganpati Ram* v. *Narsingh Charan Sahu*, (1972) 38 CLT 309.
9. *See Manish Dixit* v. *State of Rajasthan*, (2001) 1 SCC 596.
10. *Shub Karan* v. *Durga Prasad (P) Ltd.*, (1972) 13 GLR 179.
11. **Substituted by Information Technology Act, 2000 (Act 21 of 2000), S. 92 and Sch. II (w.e.f. 17-10-2000).**
12. *Ghulam Rasul Khan* v. *Secretary of State for India*, 6 L 269 : 52 IA 201 : 86 IC 654 : 1925 PC 170 : Taylor § 1591.

accredited agent appointed for the purpose. The law reposes such confidence in public officers that it presumes they will discharge their several trusts with accuracy and fidelity.[1] Statement as to age of witness at the hearing of deposition can be treated as evidence.[2]

Section 35 requires the following conditions to be fulfilled before a document can be admissible thereunder;

(1) The document must be in the nature of an entry in any public or other official book, register or record.

(2) It must state a fact in issue or a relevant fact.

(3) The entry must be made by a public servant in the discharge of his official duties or (by any other person) in performance of his duties especially enjoined by the law of the country in which the relevant entry is kept."[3]

Scope—Hath Chitha.—The reason why an entry made by a public servant in a public or other official book, register, or record stating a fact in issue or a relevant fact has been made relevant is that when a public servant makes it himself in discharge of his official duty, the probability of its being truly and correctly recorded is high. No proof has been led in this case as to who made the entry and whether the entry was made in the discharge of any official duty. As the High Court rightly pointed out, the Additional Sessions Judge should have dealt with the question of the admissibility of the document. Therefore the document was inadmissible in evidence.[4]

The statement must be in a public or other official book, register or record as distinguished from a merely, private register or record. This requirement of the section being complied with, the statement may have been made either by a public servant in the discharge of his official duty or by any person other than a public servant; but, in the latter case, the statement must be shown to have been made in performance of a duty specially enjoined by the law.[5]

Thus a death certificate given by a certain respectable person of the place where the family of the deceased once resided does not satisfy the requirements of Section 35, as no statutory duty was cast upon the person issuing the certificate to keep a record of births and deaths, and the certificate had no evidentiary value.[6]

In order that a document may be admissible under Section 35, it is not necessary that the public servant preparing it should be compellable by legislative enactment to discharge the duty of preparing or keeping it.[7] The wording of the section conveys the idea of duty imposed upon the maker of the entry by law or his official position to record the information he possesses or has gathered in an official document. It further imports that the entry will be of a permanent nature and thus excludes all such writing as are merely of an ephemeral character, and, in so far as they do not incorporate the result of personal inquiries, are not intended to be used for reference in future. Another idea that runs underneath this section is that the person making the the entry should be such as is

1. *Tarak Chandra Chakraburty* v. *Prosanna Kumar Saha*, 78 IC 719 : 1924 C 654, per Mukerji, J.
2. *Mono Ranjan* v. *Suchitra Ganguly*, AIR 1989 Cal 14.
3. *State of Bihar* v. *Radha Krishna Singh*, 1983 SC 684 (para 35).
4. *Ram Prasad Sharma* v. *State of Bihar*, 1971 SCJ (1), 184.
5. *See Samar Dasadh* v. *Juggul Kishore Singh*, 23 C 366; *Devarapalli Ramalinga Reddi* v. *Srigiriraju Kotayya*, 41 M 26 : 41 IC 286.
6. *Rajrani* v. *Chief Settlement Commr., Delhi*, 1984 SC 1234 (Para 15).
7. *Phakkar* v. *Pragi*, 154 IC 570 : 1935 O 268.

invested with authority to record a decision which, so far as the matter before him is concerned, will be final. It thus excludes all views expressed before the final stage is reached and makes only those decisions which constitute the final word in the matter relevant.[1]

The reason why an entry made by a public servant in a public or other official book, register or record stating a fact in issue or a relevant fact has been made relevant is that when a public servant makes it himself in the discharge of his official duty, the probability of its being truly and correctly recorded is high. That probability is reduced to a minimum when the public servant himself is illiterate and has to depend on somebody else to make the entry. Accordingly an entry made in an official record of births maintained by an illiterate chowkidar or by somebody else at his request does not come within Section 35 of the Evidence Act.[2]

Public or other official register, book or record; public servant.—The terms "public", "official" and "public servant" are not defined by the Act; but, for purposes of interpretation, reference may be made to Section 74 which defines "public documents", to Section 78 which refers to other "official" document,[3] and to Section 21 of the Indian Penal Code, where the term "public servant" is defined. The term "public servant" includes the public servant of a foreign country.[4] Orders of detention passed under Rule 26(1) (b) of the Defence of Indian Rules are not public records.[5]

Section 35 is applicable to an entry in a public or other official record of a foreign country.—The words "specially enjoined by the law of the country in which such book, register or record is kept" which are used in the section clearly show that entries in the public records of foreign countries are relevant under the section. The reference to the law of the country in which such book, register or record is kept would be quite unnecessary, if it was intended to cover only cases of entries in a public or official book, register or record kept in India.[6]

Contemporaneousness ; personal knowledge.—It is not necessary that the entry should have been made contemporaneously with the fact recorded or that the entrant should have had personal knowledge of the fact of which entry is made. "The principle upon which entries in a register are received depends on the public duty of the person who keeps the book, register or record to make such entries after satisfying himself of their truth. It is not that the writer makes them contemporaneously, or of his own knowledge, for no person in a private capacity can make such entries"[7] A register is evidence of the particular transaction which it was the officer's duty to record, even though he had no personal knowledge of its occurrence.[8] An entry in a public register

1. *Ghulam Mohammad Khan* v. *Samundar Khan*, 1936 L 37 : 165 IC 626 ; *Sant Ram* v. *Sital Das*, 1952 Punj 301 : 1952 PLR 226.
2. *Brij Mohan Singh* v. *Narain Sinha*, 1964 SCJ (2) 644.
3. See the marginal note to Section 78, post.
4. *Maharaj Bhanudas Narayanboa Gosavi* v. *Krishnabai Chintaman Deshpande*, 50 B 716 : 99 IC 307 : 1927 B 11.
5. *Harkishan Das* v. *E.*, 1944 L 33 : ILR 1944 L 245 : 212 IC 312 (FB).
6. *Maharaj Bhanudas Narayanboa Gosavi* v. *Krishnabai Chintaman Deshpande*, 50 B 716 : 99 IC 307 : 1927 B 11 ; see also *Ponnammal* v. *Sundaram Pillai and others*, 23 M 499, 503.
7. Phipson, Ev., 7th Ed., 328 ; *Graham* v. *Phanindra Nath Mitter*, 31 IC 41 : 19 CWN 1000 ; *Shoshi Bhooshun Bose* v. *Girish Chunder Mitter*, 20 C 940 ; *Lekhraj Kuar* v. *Mahpal Singh*, 5 C 744 : 7 IA 63 (PC); see, however, *Ambalavana Pandarasannadhi Avergal* v. *Sree Minakshy Devastanam*, 26 IC 841 ; *Saraswati Dasi* v. *Dhanpat Singh*, 9 C 431.
8. *Doe* v. *Andrews*, 15 QB 756 ; Phipson, Ev., 7th Ed. 330.

kept for the public benefit under the sanction of official duty is relevant under Section 35,even though the person who made the entry had no personal knowledge of the fact entered or the register was copied from a previous register which had become untidy.[1]

Entry in an official record made in excess of official duty, whether admissible?—An entry shown to have been made in excess of the official duty of the entrant is not admissible.[2] Entries of matters which it is not the duty of the public servant to record,[3] or which he is neither expected nor permitted to record,[4] are not admissible. Statements of collateral facts which it was no part of the public servant's duty to inquire into are similarly inadmissible.[5] Thus, a statement as to the legitimacy of a child recorded in a *wajibullarz* is inadmissible, being in excess of the function of the recording officer.[6] An entry about a civil suit and its dismissal is not one of the particulars required to be entered in the revenue records. The entry being an unauthorised entry does not carry with it any statutory presumption of accuracy.[7] An entry as to the status of a person being the adopted son of his father has no presumption of correctness.[8] But if incidental particulars concerning the main transaction are required by law to be included in the entry, they are admissible.[9] The mere fact that a public servant has acted under a misconception about his official duty is not sufficient to take an entry made by the such official act, out of the class referred to in section 35.[10] It is enough, if it is prescribed by rules made under authority of an enactment.[11]

Entry, if not made by the proper official, whether admissible?.—The entries must be made by, or under the direction of, the person whose duty it is to make them at the time. Thus, where entries in the books of a public office had been made, not by some specific person in the discharge of his official duty, but indiscriminately by any of the clerks in the office, they were rejected.[12] In some cases, entries in registers of birth and deaths have been held to be in admissible, on the ground that they were not made by the public servant keeping the registers but by others.[13]

Absence of entry in a public or official book, register or record, whether relevant?.—It was formerly held that the absence of entry of a relevant fact in an official book, register or record was not by itself relevant;[14] but this view must now be taken to have been overruled by the Privy Council decision in *Imambandi* v. *Mutsaddi*[15]

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1. *Graham* v.*Phanindra Nath Mitter*, 31 IC 41 : 19 CWN 1038.
2. This follows from the observations of the Privy Council in *Raj Kishore Deo* v, *Bani Mahto*, 47 IC 1: 1917 PC 197; *State* v.*Kamruddin Imamoddin*, 1956 N 74.
3. *Lyell* v *Kennedy*, 14 AC 437 ; *Prabhu Narain Singh* v *Jitendra Mohan Singh*, 1948 O 307 : 22 Luck. 522; see also *Namdeo Shankar Patil* v. *Ramrao Marvti Patil*, 146 IC 152 : 1933 N 310 ; *Tara Kumar Ghose* v *Kumar Arun Chandra Singh*, 1923 C 261 : 74 IC 383 ; but see *Suresh Ch. Rai* v.*Sitaram Singh*, 57 IC 126.
4. *Ali Nasir Khan* v.*Manik Chand*, 25 A 90, 104.
5. *Madhavrao Appaji Sathe* v.*Deonak*, 21 B 695; *Sukhdev Singh* v.*Mathra Singh*, 142 IC 606 : 1933 L 412.
6. *Sukhdeo Singh* v.*Mathra Singh*, 142 IC 606 : 1933 L 412.
7. *Mohan Jha* v.*Shivadayal Prasad*, 1950 P 293.
8. *Hariharsingh Sukhiram Channahu* v. *Deonarayan Bodhram Channahu*, 1954 N 319.
9. *Re Stollery*, (1926) 1 Ch, 284 : Phipson Ev., 7th Ed., 330, 331.
10. *Prem Jagat Kuer* v. *Harihar Baksh Singh*, 1946 OWN 26.
11. *Bishnath Prasad* v. *E.*, 1948 O 1 ; 48 Cr LJ 542 ; 230 IC 144.
12. Phipson, Ev., 7th, Ed., 329.
13. *Sheo Balak* v. *Gaya Prasad*, 77 IC 52 ; 1922 A 510 ; *Mohammad Jafar* v. *E.*, 54 IC 166 ; 21 Cr LJ 22 ; *Jiwan Baksh* v. *Khan Bahadur Khan*, 19 IC 528 ; *Sampt* v. *Gauri Shankar*, 10 IC 713 ; but see *Madho Saran* Singh v. *Manna Lal*, 1933 P 473.
14. In the matter of Juggun Lal, 7 CLR 356 ; see *Bipardas Pal Choudury* v. *Monorama Debi*, 45 C 574 ; 47 IC 49.
15. *Imambandi* v. *Matsuddi*, 45 C 878 ; 45 IA 73 ; 47 IC 513 ; 1918 PC 11.

in which the absence of entry of a relevant fact of a document was itself treated by the Board as a relevant fact. See note to section 34 under the heading "absence of any entry.....of that fact".

Admissibility of registers of births, baptism, marriages or deaths.--In England, registers of births and deaths (or certified copies thereof) are, on their mere production, statutory proof both of the fact and date of birth or death. The register is also evidence of the place of birth or death, where this fact has been added under the direction of the Registrar General[1] But a register of deaths is not evidence of the cause of death.[2] Registers of baptisms are evidence of the date and place is baptism, but not of the date of birth.[3] Registers of marriages are evidence of the fact and date of marriage.[4] A register of burials kept under the Registration of Burials Act, 1864, is evidence of the burials recorded therein, but not of the date of death, nor of the age of the deceased, though stated therein.[5] An entry of a Christian marriage made in a marriage register is, under section 80 of the Christian Marriages Act, admissible in proof of marriage.[6]

The Hindu Marriage Register and certified extracts therefrom as maintained under section 8 (4) of the Hindu Marriage Act, 1955 is admissible.

Though the entry regarding the birth in a birth register is receivable in evidence under this section, it is wrong to assume that mere filing of a copy of an entry in the birth register process *ipso facto* that the entry relates to or proves the birth of the person concerned. Evidence has to be introduced to connect that entry with the person whose date of birth has to be established. Connection of the identity of the person under the entry must be estabalished by other evidence.[7]

Even if the information, regarding birth or death of a particular person, is not given within the prescribed time, yet, on that account, it cannot be held that the entries regarding birth or death are not admissible, inasmuch as these entries can safely come within the purviews of this section. The birth or death register is maintained by a public servant in the discharge of his official duty and it cannot be ignored.[8]

Where there is a dispute as to the date of birth or death of a person, an extract from the register of births or deaths is bound to be accepted as conclusive of the matter, if there is no controversy that the extract does not relate to the person the date of whose birth or death is in question. A birth or death register is covered by the language of this section.[9]

Entries in the register of births and deaths are *prima facie* evidence of what is stated in them.[10] In *Ratcliffe* v. *Ratcliffe and Anderson,*[11] it was pointed out that a register of

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1. Births and Deaths Registration Act, 1837, Births, Marriages and Deaths Registration Act, 1836, ; Births and Deaths Registration Act, 1874 ; Registration (Births, Still-Births, Deaths and Marriages) Regulations, 1927 and 1929 ; Phipson, Ev., 7th Ed., 311, 665,. 666, Re *Goodrich, Payne* v. *Bennett,* 1940 P 138.
2. *Bird* v. *Keep,* (1918) 2 KB 692 AC.
3. Phipson, Ev., 7th Ed., 331.
4. *Doe* v. *Barnes,* 1 M & Rob. 386 ; Phipson, Ev., 7th Ed., 311, 332.
5. Phipson, Ev,., 7th Ed., 332.
6. *W. D.* v. *E. D.* 141 IC 284 ; 1933 S 27.
7. *Paryanai Bai* v. *Bajirao,* ILR 1961 B 963 ; 64 Bom, LR 86.
8. *Manickchand* v, *Bhagwan Das,* 1964 BLJ 283.
9. *Bagiamnal* v. *Kamalamnal,* 77 LW 679.
10. *Allianz Und Stuttgarter Life Insurance Bank Ltd.* v. *Hemanta Kumar Das,* 1938 C 641 ; 178 IC 554 ; 42 CWN 855 ; *Bharat Basi* v. *Gopi Nath* 1941 A 395 ; *Manicka Mudaliar* v. *Ammakannu,* 1942 M 129.
11. (1959) 1 Swabey & Tristram, 467.

births and deaths kept under the orders of the East India Company was a public document of the description mentioned in section 35. The Madras High Court also has held that, apart from any special enactment, registers which are being kept under the direction of the Board of Revenue since the year 1865 are relevant under section 35.[1] It has never been questioned that a register of births and deaths, kept by a *Chaukidar*,[2] a *muqaddam*,[3] a *Topadar*[4] or a village *Munsiff*,[5] or in a police station,[6] is an official register, and that an entry of birth or death made therein would be relevant under section 35, if proved or properly presumed to have been made either by a pubic servant in the discharge of his official duty or by any other person in performance of a duty specially enjoined by the law.[7] The Calcutta High Court holds that in such cases there is a presumption under section 114 that the entry was properly made. i.e., that the entry was made by a public servant in the discharge of his official duty, and that formal proof of the fact that a particular officer made the entry is not necessary.[8] The Allahabad High Court also dispenses with such proof if the register is one directed to be kept by any enactment or the rules made thereunder e.g., a register of deaths kept in the police station under Chap. XXIV para, 274, sub-para, (4) of the police Regulations;[9] though in some earlier cases, this Court, agreeing with the view taken of this matter by the Oudh Court,[10] had rejected entries of births and deaths in municipal[11] or *chaukidars'*[12] registers of births and deaths where it was not proved who had made the particular entry in the register.[13] In Oudh it has been held that neither section 81 nor illustration (e) to section 114 is applicable to such cases, and that it is not enough to prove that the register relied on was made either by a public servant in the discharge of his official duty or by some other person in performance of a duty specially enjoined by the law of the country. It is not sufficient to show that the Inspector General of Police had power to require a *Chaukidar* to carry about the register and to require the police writer at every *thana* to make entries in it. There must be either a "specific enactment" directing the keeping of the register in a particular form[14], or proof that the particular entry in the register was made by a public servant in the discharge of his official duty.[14] Therefore, where the entry does not purport to have been made by a public officer and there is no

1. *Devarppali Ramalinga Reddi* v. *Srigiriaju Kotayya*, 41 M 26 ; 41 IC 286.
2. *Madho Saran Singh* v. *Manna Lal*, 1933 P 473 ; *Mohammad Jafar* v. *E.*, 54 IC 166 ; 21 Cr LJ 22 ; *Zaibunnissa* v. *Hasratunnissa*, 52 IC 162 ; *See also Baldei* v. *Abhey Ram*, 24 IC 540.
3. *Shri Kisen Bhikam Chand* v. *Jagoba Mahipat*, ILR 1937 N 382 ; 1937 N 264.
4. *Gehimal Dyalmal*, v. *Karmoomal Sirromal*, 35 IC 551.
5. *Chakravarthi Nainar* v. *Puspawathi Ammal*, 95 IC 1005 ; 1026 M 985 ; *Rangappa Nayakan* v. *Rangaswami Nayakan*, 88 IC 249 ; 1925 M 1005.
6. *Shib Deo Misra* v. *Ram Prasad*, 46 A 637 ; 87 IC 933 ; 1925 A 79 ; *Zaibuinnissa* v. *Hasratunnissa*, 52 IC 162 ; *Tamiz-ud-Din Sarkar* v. *Taju*, 46 C 152 ; 46 IC 237 ; *Dasi Ram* v. *E.*, 1947 A 429 ; 1947 ALJ 76 ; 48 Cr LJ 449 ; *Manikrao Jairamji* v. *Deorao Baliram*, 1955 N 290.
7. *See Mohammad Jafar* v. *E.*, 54 IC 166 ; 21 Cr LJ 22.
8. *Tamiz-ud-Din Sarkar* v. *Taju*, 46 C 152 ; 46 IC 237.
9. *Shiv Deo Misra* v. *Ram Prasad*, 46 A 637 ; 87 IC 938 ; 1925 A 79 ; *Dasi Ram* v. *E.*, 1947 A 429 ; 1947 ALJ 76 ; 48 Cr LJ 449.
10. For Oudh cases see *Mohammad Jafar* v. *E.*, 54 IC 166 ; 21 Cr LJ 22.; *Bisheshar Dayal* v. *Hira Lal*, 36 IC 941 ; *Habibullah* v. *E.*, 18 IC 653 ; 14 Cr LJ 93 ; *Sampat* v. *Gauri Shankar*, 10 IC 713 ; but see *Zaibunnissa* v. *Hasratunnisa*, 52 IC 162.
11. *Jiwan Bakhsh* v. *Khan Bahadur Khan*, 19 IC 528.
12. *Sheo Balak* v. *Gaya Prasad*, 77 IC 52 ; 1922 A 510.
13. But see *Baldei* v. *Abhey Ram*, 24 IC 540, where the Oudh view was doubted.
14. *Mohammad Jafar* v. *E.*, 54 IC 166 ; 21 Cr LJ 22.

evidence who made the entry in the *Chaukidar's* register the entry would be, according to this view, inadmissible,[1] and the same would be the result if the entry in the register was not made by a public servant in the discharge of his duty, but by a private person. The Allahabad High Court draws a distinction between a *chaukidar's* register and a register kept at the *thana;* but it is submitted that the distinction is not real, as both these classes of registers are maintained in pursuance of the rules framed under the same enactment.[2] Section 81 of the Evidence Act, therefore, is either applicable or not applicable to both classes of registers. The Oudh Court holds that the presumption of section 81 is not applicable, as the register is not required to be kept in a particular form by a "specific enactment" and that, therefore proof of the particular entry having been made by a public servant is necessary. This reasoning being equally applicable to the *thana* register, the entries therein also would, according to this view, require similar proof. On the other hand, the Allahabad High Court applies section 81 to the *thana* registers as they are kept in pursuance of the rules framed under section 12 of the Police Act, Act V of 1861,[3] but since a *chaukidar's* register also is required to be kept by the rules framed under the same enactment, the presumption of section 81 would be equally applicable to the entires made in it,. For Madras there is a specific enactment, Act III of 1899, which makes provisions for the registration of births and deaths in rural tracts, and Section 81 would clearly be applicable to the registers kept under that enactment.[4] But even if the register be one which is not kept under Act III of 1899 but is kept under the direction of the Board of Revenue, according to the Madras case last cited,[5] the entry would still be relevant; and in another case the Madras High Court has held that an entry of birth in a village *munsiff's* register is receivable in evidence.[6] The Madras case cited above[7] has, however, been understood in Oudh as laying down the contract law only on the assumption that the entry to be given in evidence is one which purports or is proved to have been made by public servant. Where the entry does not purport to have been made by a public servant, it must, according to the Oudh view, be proved to have been made by a public servant, unless it occurs in a register required specially to be kept by a "specific enactment".[8] In a case the Patna High Court has held that an entry as to the date of birth of person made in the *hathchita* of a *chaukidar* is admissible, even if the entry was not made by the *chaukidar* himself but at his instance by the *dafadar*, provided the *dafadar* has been called to prove the entry.[9] but in another case where there was no evidence to show who entered the fact of a death in the *hathchita* of a *chaukidar*, the entry was rejected.[10] A birth register is relevant under

1. *Mohammad Jafar* v. *E.*, 54 IC 166 ; 21 Cr LJ 22.*Bisheshar Dayal Sampat* v. *Gauri Shankar*, 10 C 713 ; but see *Zaibunnissa* v. *Hasratunnissa*, 52 IC 162.
2. *Mohammad Jafar* v. *E.*, 54 IC 166 ; 21 Cr LJ 22.but see *Zaibunnissa* v. *Hasratunnissa*, 52 IC 162.
3. Section 12 of the Act V of 1861 (The Police Act).
4. *Shib Deo Misra* v. *Ram Prasad*, 46 A 637 ; 87 IC 938 ; 1925 A 79 ; *Dasi Ram* v. *E.*, 1947 A 429 ; 1947 ALJ 76 ; 48 Cr LJ 449.
5. *See Devarpalli Ramalingn Reddi* v. *Srigiruraju Kotayya*, 41 M 26 ; 41 IC 286.
6. *Devarpalli Ramalingn Reddi* v. *Srigiruraju Kotayya*, 41 M 26 ; 41 IC 286.
7. *Chakravarthi Nainar* v. *Puspawati Ammal* 95 IC 1005 ; 1926 M 985. *See also Rangappa Nayakan* v. *Rangawami Nayakam*, 88 IC 249 ; 1925 M 1005.
8. *Devarpalli Ramalingn Reddi* v. *Srigiruraju Kotayya*, 41 M 26 ; 41 IC 286.
7. *Mohammad Jafar* v. *E.*, 54 IC 166 ; 21 Cr LJ 22.but see *Zaibunnissa* v. *Hasratunnissa*, 52 IC 162.
9. *Madho Saran Singh* v. *Manna Lal*, 1933 P 473 ; for similar Nagpur case, see *Shri Kisen Bhikam Chand* v. *Jagoba Mahipat*, ILR 1937 N 382 ; 1937 N. 264.
10. *Sanatan Senapati* v. *E.*, 1945 P 489.

section 35.[1] An entry in a Municipal register of births and deaths is admissible.[2]

Chowkidar Hathchita entries-Book not produced but a leaf of the book.--Still admissible if requirements of Section 35 are satisfied.[3]

Entries made in an official record maintained for an illiterate *chowkidar*, by someone else at his request does not come within section 35 of the Evidence Act, and are not admissible in evidence for any purpose.[4]

Entries in Hatchita Book about child birth-Admissibility to prove paternity-Non-mention of name of child-If ground for not relying on it.--It is the normal practice obtaining in these parts of the country (Orissa) that at least until the 21st day, a name is not given to a son and for a month from the date of birth ordinarily a daughter is not named and the refusal to attach importance to these entires mainly on account of the fact that the names were not given is not a proper reason for refusing to attach importance to the entires.[5]

Certified copies of registers of births and deaths admissible.--When a birth or death entry becomes relevant under the provisions of this section, a certificated copy thereof becomes admissible.[6] But such a certificate does not prove itself and is no proof of age of person unless the person making the entry or giving information comes forward and connects the entry with the individual concerned.[7] But the Supreme Court has ruled that the entry having been made by the concerned official in the discharge of his official duties, it is clearly admissible under section 35, it is not necessary to examine its author.[8] Where the birth register is not produced by the party bound to produce it, and a copy of it is filed by the opposite side without objection, it would not be necessary to the make out that the conditions mentioned in section 35 or section 32 of the Evidence Act existed. Objection to the admissibility of such copy cannot be taken for the first time in second appeal.[9]

Evidentiary value of registers of births and deaths.--A death register which is as public document would, in ordinary circumstance, be accepted as almost conclusive.[10] Where a village watchman or *kotwal* makes a report every week of the births and deaths in the village, it may be inferred that the person whose death is reported on a particular date died in the week preceding that date.[11] An entry in a death register is, as a rule, reliable to within a few days, and even where the date is not absolutely exact, the entry

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1. *Nanhak Lal* v. *Baijnath, Agarwala*, 1935 P 474.
2. *Jai Bhagwan* v. *Gutta*, 148 IC 418 ; 1934 O 167 ; *Anis-ul-Rahman Khan* v. *Beni* Ram, 59 PR 1901 ; *Ram Dular Teli* v. *Raj Bahadur Singh*,. 1939 AWR (BR) 4 ; *Mrs, Anwari Jan* v. *Baldua*, 159 IC 190 ; *Maniklal Shah* v. *Hira Lal Shaw*, 1950 C 377 ; 54 CWN 225.
3. *Dasaratha Naik* v. *Gura Bewa*, (1971) 1 CWR 339.
4. *State* v. *Jawan Singh*, 1971 Cr LJ 1656 (Raj).
5. *Jadhar Samal* v. *Malati Dei*, AIR 1971 Orissa 230.
6. *Tamiz-ud-Din Sarkar* v. *Taju*, 46 C 152 ; 46 IC 237 ; *See also Chakrawarthi Nainar* v. *Pushpawati Ammal*, 95 IC 1005 ; 1926 M 985 ; *Shib Deo Misra* v. *Ram Prasad*, 46 A 637 ; 87 IC 938 ; 1925 A 79 ; *Gota* v. Kanti Prasad 1940 RD 6 for certified copies of Municipal registers of births and deaths, *see Jai Bhagwan* v. *Guttoo*, 148 IC 418 ; 1934 O 167 ; *Anis-ul-Rahman Khan* v. *Beni Ram*, 59 PR 1901 ; *Maniklal Shah* v. *Hiralal Shaw*, 1950 C 377 ; 54 CWN 226 ; *Mainikrao Jairamji* v. *Deorao Baliram*, 1955 N 290.
7. *Biseswar Misra* v. *The King*, 1949 Orissa 22.
8. *Harpal Singh* v. *State of Himachal Pradesh*, 1981 SC 361.
9. *Chakrvarti Naina* v. *Pushpawati Ammal*, 95 IC 1005 ; 1926 M 985 : *See also In re Madu Chinnagi Reddi*, 32 IC 665 ; 17 Cr LJ 73.
10. *Rangappa Nayakan* v. *Rangaswami Nayakan*, 88 IC 249 ; 1925 M 1005.
11. *Bani* v. *Zamaji*, 103 IC 883 : 1927 N 326.

is often most valuable evidence where the question is as to the relative order in which certain deaths took place.[1] But a Court is not bound to accept an entry made in a death register as true and may reject the same if it is not reliable.[2] An entry in a birth register that a daughter was born to a certain person residing in a certain mohalla is not of much value, where there are other persons of the same name residing in the *mohalla*.[3] A death register is admissible to prove the date of death of the deceased but cannot be used as evidence to prove his age[4] or the cause of his death.[5] But in a Sindh case such entry has been assumed to be good evidence of age, though not conclusive.[6] An entry in a births register is good evidence of minority.[7] Entries in a death register are at best reliable only with regard to the date of death and the fact of death. It is not safe to rely on them for the purpose of proving the religion of the deceased in a case in which the evidence as to his religion is conflicting.[8] A statement by a father in a birth register that a child was born to him is evidence of the legitimacy of the child.[9] But it is doubtful whether the mere fact of a child being described in the birth register as the son of his mother would be any evidence of his illegitimacy.[10] Entries of the names of persons in a register of births or deaths or marriages cannot be positive evidence of the birth, death or marriage of such persons, unless their identity is fully proved.[11] The birth certificate does not prove itself and is no proof of age of a particular person, unless the person connected with that entry, either by making it or giving information, comes forward and speaks of the entry and connects the entry with the individual concerned.[12]

The Bombay High Court has held that entries of names of persons in a register of births or deaths or marriage cannot be evidence by itself that the entries relate to or prove the births etc., of person concerned. Evidence must be produced to connect the entires with a person concerned whose birth etc., have to be established.[13]

Applicability.--Entry of birth date in non-Government School's General Register under Statutory Rules is admissible under section 35. However, its evidentiary value depends on other factors. In a kidnapping case parents of girl not examined as to her age—entry could not be held to have proved the age.[14]

Official record of custom admissibility and evidentiary value of entries in the wajibularz.–The *wajibularz*, or the village administration paper, is a record of existing customs regarding rights and liabilities in the estate; it is not to be used for the creation of new rights or liabilities. The entries in a wajib-ul-arz can be said to express the

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1. *Zaibunnissa* v. *Hasrathunnissa*, 52 IC 162.
2. *Kalipada Das Karmarkar* v. *Shashi Bhusan Majhi*, 128 IC 804 ; 1930 C 636 ; 32 Cr LJ 184.
3. *Saidunnissa* v. *Ruqya*, 53 A 428 ; 130 IC 201 ; 1931 A 307.
4. *Tanneru Venkayamma* v. *Tanneru Gangayya*, 149 IC 335 ; 1934 M 116 ; *Maniklal Shah* v. *Hiralal Shaw*, 1950 C 377.
5. *Maniklal Shah* v. *Hiralal Shaw*, 1950 C 377; 54 CWN 225.
6. *Mst. Shamul* v. *Dost Mohammad*, 1933 S 317.
7. *Bharat Basi Naik* v. *Gopi Nath*, 1941 A 385 ; 197 IC 866.
8. *Gurusami Nadar* v. *Irulappa Konar*, 1934 M 630.
9. *Muhammad Ebrahim* v. *Safia Bai*, 1937 MWN 1282.
10. *Manicka Mudaliar* v. *Ammakanu*, 1942 M 129.
11. *Hemanta Kumar Das*. v. *Allianz Und Stuttgarter Life Insurance Co. Ltd.* 1938 C 120 ; 177 IC 517 ; *State* v. *Kamruddin Imamoddin*, 1956 N 74.
12. *Biseswar Misra* v. *The King*, 1949 Orissa 22 : 50 Cr LJ 650 : ILR 1949 1 Cut 194.
13. *Parwatibai* v. *Bajirao*, 64 Bom, LR 86.
14. *Gandhi Vora* v. *State of Gujarat*, AIR 1970 Guj 178.

views of certain authorities as to the rights of the parties or the intention of Government, but the view of the revenue authorities as to the effect or construction of a grant or the intention of Government in respect of a grant do not conclude the matter or bind the Civil Courts.[1] However, in *Avadh Kishore* v. *Ram Gopal*,[2] the Supreme Court laid it down "*Wajibularz is* village administration paper prepared with due care and after due enquiry by a public servant in the discharge of his official duties. It is a part of the settlement record and a statutory prosecution of correctness attaches to it." An entry with regard to a custom prevailing in a particular locality, contained in a book compiled by an officer under the order of the Government is admissible under this section and is *prima facie* evidence of the existence of the custom recorded therein.[3] The *wajibularz* is a village administration paper prepared by a village official in which are recorded the statements of persons possessing interest in the village, relative to existing rights and customs.[4] It is intended to be an official record of the local customs of the district,[5] and as such, is admissible in evidence[6] under this section.[7] The *wajibularz is* a part of the record-of-right. It is unnecessary to produce any witness to prove the *wazibularz*. It is a public document and is admissible in evidence without any formal proof.[8] Even if the officer compiling the *wajibularz* does not expressly record his opinion as to the existence of a certain custom, but merely records the statements of the *zamindars* and attests them by his signature and places them in the Government record he should be presumed to have been satisfied as to the existence of the alleged custom,[9] and the *wajibularz* would be admissible under this section as an official record of the custom,[10] as well as under section 48, as the record or opinions of persons acquainted with the custom.[11] A *wajibularz* prepared and attested according to law is a document of a public character[12] and is very valuable evidence in support of the custom recorded.[13] It is good *prima facie* evidence of the custom mentioned in it;[14] and shifts the onus of

1. *Rajinder Chand* v. *Mst. Sukhi*, 1957 SCJ 119 ; 1956 SCR 889.
2. 1979 SC 8611 (Para 20).
3. *Tula Ram Sah Jagati* v. *Shyam Lal Sah Thulgharia*, 49 A 848 ; 86 IC 729 ; 1925 A 648.
4. *Murtaza Husain Khan* v. *Mohammad Yasin Ali Khan*, 38 A 552 ; 43 IA 269 ; 36 IC 299 ; 1916 PC 89 ; *Lali* v. *Murlidhar*, 28 A 488 ; 33 IA 97 (PC) ; *See also Madari Singh* v. *Nazim Ali*, 105 IC 24 ; 1927 O 540.
5. *Uman Parshad* v. *Gandharp Singh* , 15 C 20 ; 14 IA 127 (PC).
6. *Parbati Kunwar* v. *Chandrapal Kunwar*, 31 A 457 ; 36 IA 125 ; 4 IC 25 (PC).
7. *Mst., Prem Jagat Kuer* v. *Harihar Baksh Singh*, 1946 O 163 ; *Mehdi Hasan Subedar* v. *Abdul Wahid*, 101 IC 820 ; 1927 O 608 ; *Baji Nath Singh* v. *Bahdaur Singh*, 91 IC 583 ; 1926 O 101 ; *Lali* v. *Murlidhar*, 28 A 488 ; 33 IA 97 (PC) ; *Muhammad Imam Ali Khan* v. *Husain Khan*, 26 C 81 ; 25 IA 161 (PC) ; *Lekhraj Kuer* v. *Mahaipal Singh* 5 C 744 ; 7 IA 63 (PC) ; *Parbhu Narain Singh* v. *Jitendras Mohan Singh*, 1948 O 307 ; 22 Luck 522.
8. *Fajju* v. *Sirya*, 170 IC 392 ; 38 Cr LJ 881 ; 39 PLR 491.
9. *Lekhraj Kaur* v. *Mahipal Singh*, 5 C 744 ; 7 IA 63 (PC).
10. *Ibid.*
11. *Mst. Prem Jagat Kuer* v. *Harihar Baksh Singh*, 1946 O 163 ; *Lekhraj Kuar* v. *Mahipal Singh*, 5 C 744 : 7 IA 63 (PC) ; *Lali* v. *Murlidhar*, 28 A 488 ; 33 IA 97 (PC)
12. *Ali Nasir Khan* v. *Manik Chand*, 25 A 90 ; *Mst. Amina Khatun* v. *Khalilur-rahman Khan*, 8 Luck, 445 ; 1933 O 246.
13. *Murtaza Hussain Khan* v. *Mohammad Ysin Ali Khan* 38 A 552 ; 43 IA 269 ; 36 IC 299 ; 1916 PC 89 ; *Balgobind* v. *Badri Prasad*, 45 A 413 ; 50 IA 196 ; 74 IC 449 ; 1923 PC 70 ; *Sher Muhammad Khan* v. *Dost Muhammad Khan*, 78 IC 451 ; 1925 L 231.
14. *Tula Ram Sah Jagati* v. *Shyam Lal Sah Thulgharia*, 49 A 848 ; 86 IC 729 ; 1925 A 648 ; *Lal chand* v. *Ram Chand*, 46 A 674 ; 82 IC 526 ; 1924 A 753 ; *Sher Muhammad Khan* v. *Probhu Lal*, 46 A 47 ; 79 IC 41 ; 1924 A 274 ; *Gayan Singh* v. *Babu Lal*, 79 IC 438 : 1924 A 86 ; *Ali Nasir Khan* v. *Manik Chand*, 25 A 90.

proving to the contrary to the other side.[1] It is not necessary to corroborate the entry in the *wajibularz* by proof of instances[2] and, if there is no evidence to the contrary, the entry in the *wajibularz* may be accepted as sufficient proof of the custom.[3] But the *wajibularz* only creates a presumption in favour of the existence of the custom recorded in it, and this presumption may be rebutted by intrinsic or extrinsic. evidence to the contrary.[4] Where there is evidence which satisfies the Court that, in fact the *wahjibularz* cannot reasonably be treated as the record of a custom, the presumption in favour of the custom recorded in it is rebutted ; such evidence may be found in the language of the *wajibularz* itself or there may be external evidence.[5] Where a *wajibularz* contains matters which cannot properly or possibly be the subject of a custom, then the ordinary presumption that it is a *prima facie* record of a custom is over turned by the internal evidence afforded by the other terms embodied therein though they may be separable from the rest.[6] A Settlement Officer should not receive for entry in the *wajibularz* of a village, a mere expression of the views of the proprietor, or enter it upon the records relating to the village.[7] A *jamabandi* is not a proper document to record custom. Such entries should be made in the *dastur dehi* or the *wajibularz*.[8] The district of Banaras is a permanently settled district, but in 1883 there was a revision of settlement in that district in the course of which, a document called *halat-i-dehi* was prepared in place of a regular *wajibularz*. An entry in this document as to an existing custom is, therefore, relevant under section 35.[9] An entry in a *wajibularz* is not inadmissible merely because under a Settlement Circular it was not necessary for the Settlement Officer to record the entry.[10]

Official record of custom ; admissibility and evidentiary value of entries in the riwaj-i-am.—No statutory presumption to the contents of a *Riwaj-i-am* or similar compilation.[11] The *riwaj-i-am* is a record of custom prepared by a public officer in the discharge of his duties and is therefore, admissible in evidence under this section in proof of the custom recorded therein.[12] The principle upon which an entry in a *riwaj -i-am* is admitted as a piece of evidence is that it is an official record kept by a person upon whom there is a pubic duty to make entries, and accordingly the document itself is

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1. *Sher Muhammad Khan* v. *Dost Muhammad Khan*, 78 IC 451 ; 1925 L 231 ; *Ali Nasir Khan* v. *Manik Chand*, 25 A 90.
2. *Sher Muhammad Khan* v. *Frabhu Lal*, 46 A 47 ; 79 IC 41 ; 1924 A 274.
3. *Fazal Hussain* v. *Muhammad Sharif*, 36 A 471 ; 24 IC 464.
4. *Lalchand* v. *Ram Chand*, 46 A 674 ; 82 IC 526 ; 1924 A 753.
5. *Sher Muhammad Khan* v. *Prabhu Lal*, 46 A 47 ; 79 IC 41 : 1924 A 274 ; *Guyan Singh* v. *Babu Lal*, 79 IC 438 ; 1924 A 36.
6. *Lalchand* v. *Ram Chand*, 46 A 674 ; 82 IC 526 ; 1924 A 753 *Randhir Singh* v. *Rajpal Singh* 46 A 478 ; 81 IC 25 ; 1924 A 321 (FB) ; *Balwant Singh* v. *Mare Singh*, 74 IC 322 ; 1924 A 52.
7. *Uman Prashad* v. *Gandharp Singh*, 15 C 20 ; 14 IA 127 (PC).
8. *Mohammad Asghar Ali Khan* v. *Rammon*, 71 IC 432 ; 1923 A 378.
9. *Sri Lal Goika* v. *Kesho Das*, 87 IC 368 ; 1926 A 83.
10. *Prem Jagat Kuer* v. *Harihar Baksh Singh*, 1946 O 163 : 1946 OWN 26.
11. *Gokal Chand* v. *Parvin Kumari*, 1952 SC 231 ; *Narain Singh* v. *Kapur Singh*, 1953 Punj. 196 ; 55 PLR 25.
12. *Subhani* v. *Nawab*, 1941 PC 21 ; 1 LR 1941 L 154 ; *Basan Singh* v. *Brij Rai Saran Singh*, 1935 PC 1132 ; 156 IC 864 ; *Labh Singh* v. *Mango.*, 8 L 281 ; 100 IC 924 ; 1927 L 241 ; *Naraini* v. *Jowahir* Singh, 89 IC 724 ; 1926 L 142 ; *Beg* v. *Allah Ditta*, 45 PR 1917 ; 44 C 749 ; 44 IA 89 ; 38 IA 354 ; 1916 PC 129 ; *Narain Singh* v. *Kapur Singh*, 1953 Punj 196 ; 55 PLR 25 ; *Gokal Chand* v. *Parvin Kumari* 1952 SC 231.

evidence of the truth of its contents.[1] The Privy Council has held that statement contained in the *riwaj*-i-am and in the Manuals of Customary Law issued by authority form a strong piece of evidence in support of the custom, even if unsupported by instances.[2] But the evidence afforded by the *riaj-i-am* or the Manuals of the Customary Law is not conclusive and it is always open to the other side to rebut it.[3] An entry in a *riwaj-i-am* recording a special custom as opposed to a general custom is *prima facie* proof of that custom, even if it be unsupported by concrete instances, and the onus is on the other side to show that the custom is not as recorded in the *riwaj-i-am*.[4] Though the entries in the *riwaj-i-am* are entitled to an initial presumption in favour of their correctness, irrespective of the question whether or not the custom as recorded is in accord with the general custom, the quantum of evidence necessary to rebut this presumption would, however, vary with the facts and circumstances of each case. Where, for instance, the *riwaj-i-am*, lays down a custom in consonance with the general agricultural custom of the province, very strong proof would be required to displace this presumption. But, where, on the other hand, this is not the case and the custom as recorded in a *riwaj-i-am* is opposed to the rules generally prevalent, the presumption would be considerably weakened. Likwise, where the *riwaj-i-am* affects adversely the rights of females who had no opportunity whatever of appearing before the revenue authorities, the presumption would be weaker still, and only a few instances would suffice to rebut it.[5]

Entries in *Riwaj-i-am* in conflict with general custom recorded in *Rattigan's Digest*-The former should prevail.—There is an initial presumption of correctness as regards the entries in *Riwaj-i-am* and when the custom as recorded in the *Riwa-i-am* is in conflict with the general custom as recorded in Rattigan's Digest or ascertained otherwise, the entries in the *Riwaj-i-am* should ordinarily prevail except that as was pointed out by the Judicial Committee of the Privy Council in a recent decision in *Mst. Subhani* v. *Nawab*, AIR 1951 PC 21, that where the *Riwaj-i-am* affects adversely the rights of female who had no opportunity whatever of appearing before the revenue authorities, the presumption would be weak, and only few instances would suffice to rebut it.[6]

Other official records of custom.—Reference may legitimately be made to the work of Mr. Crookes on Castes and Tribes of the North-Western Provinces and Oudh, prepared at the instance and published by the authority of the Government of that province.[7] Mr. Panna Lal's Book on Local Kumaon Custom is relevant and valuable

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1. *Subhani* v. *Nawab*, 1941 PC 21 ; ILR 1941 L 154 ; *Aisha Bibi* v. *Begun Bibi*, ILR 1939 Kar 475 ; 1939 S 263 ; *Basant Singh* v. *Brij Rai Saran Singh*, 1935 PC 132 ; 156 IC 864 ; *Labh Singh* v. *Mango*, 8 L 281 ; 100 IC 924 ; 1927 L 241.
2. *Vaishno Ditti* v. *Rameshri*, 10 L 86 ; 55 IA 407 ; 113 IC 1 ; 1928 PC 294 ; *See Harnam singh* v. *Mst. Bhagi*, 16 L 1007 ; 1936 L 261 ; 161 IC 916 ; *Beg* v. *Allah Ditta*, 45 PR 1917 ; 44 IA 89 ; 38 IC 354 ; 1916 PC 129 ; 44 C 749.
3. *Jawala Singh Sant Singh* v. *The Province of Punjab*, 1948 EP 59 ; 50 PLR 113.
4. *Saligram* v. *Maya Devi*, 1955 SC 266 ; *Khan Beg* v. *Fateh Khatun*, 13 L 276 ; 135 IC 769 ; 1932 L 157 ; *Sardar Shah* v. *Sardar Begum*, 113 IC 44 ; 1928 L 893 ; *Labh Singh* v. *Mango*, 8 L 281 ; 100 IC 924 ; 1927 L 241 ; dissenting from *Gurdit Singh* v. *Malan*, 5 L 364 ; 84 IC 171 ; 1925 L 35 ; *Budha* v. *Fatima Bibi*, 4 L 99 ; 76 IC 921 ; 1923 L 401 ; *Manohar* v. *Nanhi*, 2 L 366 ; 66 IC 399 ; 1922 L 320 ; and *Khuda Bakhsh* v. *Fatteh Khatun*, 13 PR 1919 ; 46 IC 679.
5. *Saligarm* v. *Maya Devi*, 1955 SC 266 ; *Subhani* v. *Nawab*, 1941 PC (1960) 2 Punj 615 (SC),.
6. *Jai Kaur* v. *Sher Singh*, ILR (1960) 2 Punj.,615 (SC).
7. *Mariam Bibee* v. *Muhammad Ibrahim*, 48 IC 561 ; 28 CLJ 306.

evidence of the customs it recites.[1]

Records of Rights, settlement survey and other revenue records.—A Record of Rights is a public record prepared by public officers appointed under the statutory authority of the Local Government and is, therefore, admissible under section 35,[2] and presumptive evidence of its contents.[3] it is, however, not conclusive evidence of title.[4] An entry in a Record of Rights, of a matter not required to be recorded therein, e.g., an entry as to the existence of a local custom is admissible.[5] In other cases, however, unauthorised entries have been held to be inadmissible.[6] An entry in a Record of Rights and that the tenant claimed to hold adversely to the landlord of an assertion of adverse title.[7] A draft Record of Rights is admissible to rebut the presumption of the correctness of Record of Rights,[8] though itself it carries no presumption of correctness and can be used merely to show the nature of the entry before the final publication.[9] Settlement records,[10] e.g., settlement pedigrees,[11] settlement *khewats*,[12] settlement khataunis,[13] and village notes prepared by Settlement Officers,[14] are relevant under this section so are *jamabandis*,[15] boundary papers,[16] *fards bachh*,[17] *fards riwaj bhaoli*,[18] and other revenue

1. *Behari Lal* v. *Har Lal Shah*, 153 IC 556 ; 1934 A 984 ; *Tula Ram Sah Jagati* v. *Shyam Lal Sah Thulgharai*, 49 A 848 ; 86 IC 729 ; 1925 A 648.
2. *Gangabai Kom Baswantrao Desai* v. *Fakirgowda Somappagowda Desai*, 54 B 336 ; 57 IA 61 ; 123 IC 166 ; 1930 PC 93 ; *Fazlar Rahman Biswas* v. *Golam Kader Mea*, 96 IC 959 ; 1929 C 862 ; *Babi Wakilan* v. *Deonandan Prosad*, 59 IC 298 ; 1921 P 268 ; *See Akubali* v. *Najamali*, 50 CWN 382 ; *Abdul Rasheed* v. *Jogesh Chandra Roy*, 11 CWN 153.
3. *Ghasi Sahu* v. *Shib Sahu*, 1942 P 140 ; *Fazlar Rahman Biswas* v. *Golam Kader Mea*, 96 IC 959 : 1926 C 862 : *Indian iron & Steel Co.* v. *Bara Gopal Thakur*, 1935 C 641 ; *Harihar Sahu* v. *Tikait Sheo Prasad Singh Deo*, 1954 P 173.
4. *Rakhialkhan Khan Muhammad* v. *Chothiram Kaliandas*, 1944 S 176 ; ILR 1944 Kar. 14 : *Vassandmal Dawaldas* v. *Hiromol Mohanmal*, 1947 S 94. ; *Sakharam Shriniwas* v. *Sushilabai Namdeo*, 1953 N 339 ; *Brij Bhukhan Kalwar* v. *SDO Siwan*, 1955 P 1 ; *Amnar Ahmad Khan* v. *Union of India*, 1955 Punj 37.
5. *Suresh Ch. Rai* v. *Sitaram Singh*, 57 IC 126.
6. See notes to this section under the heading "entry in an official register or record made in excess of official duty, whether admissible.?"
7. *Sohawa Singh* v. *Kesar Singh*, 13 L 432 : 140 IC 474 : 1932 L 586, per Bhide, J.
8. *Chand Ray* v. *Bhagawati Charan Goswami*, 2 P 314 : 81 IC 326 : 1924 P 248 ; *Ranranbijaya Prasad* v. *Naubat Rai*, 1942 P 346 ; but see *Saroop Rai* v. *Srinkant Prasad*, 55 IC 922 ; see also *Ambar Ali* v. *Lutfe Ali*, 45 C 159 : 41 IC 116 ; *Gulab Kuer* v. *Ram Ratan Pandey*, 27 IC 229 : 18 CWN 896.
9. *Hardeo Narayan Singh* v. *Kapil Singh*, 108 IC 417 : 1928 P 353.
10. *Raja Brajasunder Deb* v. *Raja Rajindranarain*, 1941 P 260 (such record carries a presumption of correctness) ; *Ghulam Rasul Khan* v. *Secretary of State*, 6 L 268 ; 52 IA 201 : 86 IC 654 ; 1925 PC 170 : *Raghunandan Ramanuja Das* v. *Bibhuti Bhushan Mukherji*; 39 C 304 : 12 IC 147.
11. *Sarfaraz Khan* v. *Rajano*, 4 Luck 39 : 112 IC 834 : 1929 O 129 ; *Baji Nath Singh* v. *Rajju Singh*, 91 IC 583 : 1926 O 101 ; *Sarju Dei* v. *Ram Harakh*, 18 IC 250.
12. *Pratap Chandra Deo Dhabal Deb* v. *Jagdish Charan Deo Dhabal Deb*, 82 IC 886 : 1925 C 116 ; *Skinner* v. *Chandan Singh*, 31 A 247 : 2 IC 215 ; see also *Kumar Kamakhya Narain Singh* v. *Abhiman Singh*, 13 P 589 : 150 IC 807 : 1934 PC 182.
13. *Skinner* v. *Chandan Singh*, 31 A 247 : 2 IC 215.
14. *Ghasi Sahu* v. *Shib Sahu*, 1942 P 140 ; *Ganjhu Upendra Singh* v. *Surjan Singh*, 8 P 266 : 120 IC 756 : 1929 P 328 ; *Sheo Bahadur Singh* v. *Bishwanath Saran Singh*, 2 Luck 4 : 99 IC 876 : 1927 O 74 ; *Bhagwan Singh* v. *Lachuman Prasad Sahu*, 90 IC 579 : 1925 P 754 ; *Sri Lal Goika* v. , *Kesho Das*, 87 IC 368 : 1926 A 83 ; but see *Kedar Nath Goenka* v. *Amrit Mandal*, 88 IC 676 : 1925 P 568.
15. *Taru Patu* v. *Abinash Chunder Dutt*, 4 C 79 ; *Sri Lal Goika* v. *Kesho Das*, 87 IC 368 : 1926 A 83 ; *Yadgar Husain* v. *Mohammad Ibrahim Raza*, 1936 N 71 : 163 IC 179.
16. *Haradas Acharjya Chowdhury* v. *Secretary of State*, 43 IC 361 : 1917 PC 86 : 26 CLJ 590.
17. *Malik Mahmud* v. *Khushi Ram*, 131 IC 638 : 1931 L 605.
18. *Sheo Prasad Singh* v. *Lal Babu*, 39 IC 505 ; *Tulsi Mahton* v. *Jhandoo Pandey*, 38 IC 176.

records.[1] A survey record is properly admissible in evidence and an entry in it carries a presumption of correctness which may, however, be rebutted by contrary proof.[2] An *abadi Khasra* prepared by the *Amin* which the Sub-Divisional Officer ordered as survey of the cultivated area of the village at the instance of the Nazul Officer is admissible under section 35.[3] Sifton's Settlement Report containing the statement that "*dwamin thicas*", being in their origin cultivating tenancies, are by custom, non-transferable, is admissible in evidence to prove the custom of the non-transferability of "*dwamin thicas*."[4] The decision of a Khanapuri Office recorded in settlement proceedings in admissible to prove an admission embodied in the decision.[5]

Record of rights – Order under Record of Rights Act directing name of respondent to be entered in the record. Once is by no means conclusive. It is always open to petitioner to institute a suit to establish his title. In that suit such order can have no effect since title will be decided therein on evidence provided by parties.[6] Entries in the Record of Rights regarding the factum of partition is a relevant piece of documentary evidence in support of oral evidence to prove the factum of partition[7]

A *jamabandi* prepared by the landlord is admissible to show that since the creation of the tenancy, rent has been assessed and such assessment was on the basis of a certain areas.[8] But an entry as the existence of a custom should not find place in a *jamabandi*.[9] A register of *minhaidhari* villages is an official document and is admissible in evidence, unless any portion of it is shown to be prepared in excess of official duty.[10] A record of the rates of rent in the *rubkars* prepared by a revenue authority on an inquiry under the Bengal Land Revenue Settlement Regulation, VII of 1822, is made by the officer in the performance of a duty imposed upon him by the Regulation and is, therefore, admissible in evidence.[11] Entries in *mahalwar* register kept under section 4 of Act VII of 1876,[12] paper prepared by the *patwari* showing how much land has been cultivated and how much is lying fallow,[13] and an estimate of the income of a crop made by a Revenue Officer,[14] are relevant under this section. The index to a lost survey register is admissible under this section,[15] so is an entry in a *mauzawari* register,[16] or a

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1 *Ghulam Rasul Khan* v. *Secretary of State*, 6 L 269: 52 AI 201: 86 IC 1925 PC 170; *Maung Po Lun* v. *Ma E. Mai*, 74 IC 47: 1923 R 57.
2 *Kumar Kamakhya Narain Singh* v. *Abhiman Singh*, 150 IC 807: 1934 PC 182; See also notes to section 36.
3 *Phakkar* v. *Pragi*, 154 IC 570: 1935 O 268.
4 *Somar Ram* v. *Budhur Ram* 1937 P 463: 171 IC 115.
5 *Khedu Matho* v. *Khonka Mahto* 1939 P 591.
6 *Payappa Nemanna* v. *Chamu Appoyya* (1969) 2 Mys LJ 198.
7 *Digambar Adhar Patil* v. *Devram Girdhar Patil*, AIR 1995 SC 1728.
8 *Shib Sahai Lal* v. *Bijai Chand Mahatab*, 5 P 151: 90 IC 82: 1926 P 197.
9 *Mohammed Asghar Ali Khan* v. *Rammon*, 71 IC 432: 1923 A 78.
10 *Raj Kishore Deo* v. *Bani Mahto*, 47 IC 1: 1917 PC 197.
11 *Deonarayan Singh* v. *Dwarka Prasad Singh*, 109 IC 136: 1928 P 429.
12 *Mutsaddi Main* v. *Mahomed Idris*, 34 IC 283: 1915 PC 177.
13 *Sitaram* v. *Himatrao*, 90 IC 38: 1926 N 161.
14 *Ganpati* v. *Hanuman Singh*, 54 A 125: 137 IC 255: 1932 A 196.
15 *Hiralal Ranchhoddas* v. *Secretary of State*, 134 IC 721: 1931 B 436: *Sarat Chand Dass* v. *Smt. Sarojini Rudraja*, 1924 C 135: 79 IC 527: *Secretary of State* v. *Chinamalal*, 1942 B 161: ILR 1942 B 357 (Printed copy of Index-register).
16 *Secretary, Cantonment Committee, Barrackpore* v. *Satish Chandra Sen*, 58 C 858: 57 IA 339: 130 IC 616: 1931 PC 1.

register of *pargana watandars.*[1] *Khasra girdawaris* are public documents and can properly be proved by the production of certified copies. They are also admissible under section 35.[2] Entries made in village papers by a *patwari* are admissible under this section.[3] Where the *patwari* instead of making the entry with respect of *nazrana* in the remarks column of the *jamabandi* has made the entry in the *fahrist tabdilat* which he submits to the same authority at the same time, it is a mere irregularity in making the entry in one place rather than another and does not invalidate the entry. The *fahrist* is admissible even if the *patwari* has not been called.[4] In order to prove a mutation, it is not necessary to call the Revenue Officer who sanction it.[5] *Khasra paimaish* prepared under the orders of Governments is relevant under this section.[6] Entries in the record of right prepared for *deara* purposes are a valuable piece of evidence.[7]

Evidentiary value of settlement records.–Patta of property in settlement records by itself cannot confer title to property. It is of consequence in adjudicating the proprietary right in respect of property in a suit for possession.[8]

Where entries are made in the Khasra Register, which is a public and official register and made by a public servant in the discharge of his official duties, and maintained under a certain law, and the columns provided in such registers are to be filled up in the discharge of official duties of the public servant concerned, till they are proved to be false, they have to be taken as good evidence of what is stated therein.[9]

The Supreme Court observed in *State of Bihar* v. *Radha Krishna Singh.*[10] Even if a document may be admissible or an ancient one, it cannot carry the same weight or probative value as a document which is prepared either under Statute, ordinance or an Act which requires certain conditions to be fulfilled. This was the case in both *Ghulam Rasul Khan's and Shyam Pratap Singh's cases.*[11] The case of *Meer Usdooilah* v. *Mussumat Beeby Inamam,*[12] appears...to be a clear illustration of a document which while being an entry in a public record is of great probative value and carries the utmost weight. In this case, the Registers concerned were probably under Bengal Regulations and the act of registration in the Registers was made after a proclamation amounting to a public, open and notorious assertion of title.

Evidentiary value of revenue records.–Revenue records are not evidence of title, for they are kept for fiscal purposes; but when the facts recorded are facts which it is the duty of the Revenue Officer to record, then his record is evidence of those facts.[13] On questions of title, the evidentiary value of revenue records varies with the circum-

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1. *Malappa* v. *Tukko,* ILR 1937 B 464 : 1937 B 307 : 170 IC 801.
2. *Mohammad Din* v. *Fateh Din,* 51 IC 786 : 1934 L 698 ; *Abdul Baqi* v. *Fakhr-ul-Islam,* 1937 P 333 : 170 IC 187 ; *Jagan Koeri* v. *Chairman Gaya Municipality,* 1937 P 567.
3. *Shyam Lal* v. *Ishwari Dayal,* 1939 BD 325.
4. *Devisingh Umraosingh* v. *Dharma Bhura Nayak,* 1944 N 314.
5. *Mst. Atri* v. *Rodhal,* 1936 L 864.
6. *Pratap Singh* v. *Ganesh Das,* 40 PLR 298.
7. *Akubali Hooladar* v. *Najemali Howladar,* 1946 C 326.
8. *Mammed Kunhi* v. *Lakshmana Pai,* 1969 Ker LR 894.
9. *Sheojee* v. *Pramkuer,* 1964 BLJR 152.
10. *State of Bihar* v. *Radha Krishna Singh,* AIR 1983 SC 864, (para 47-48).
11. *Ghulam Rasul Khan* v. *Secretary of State,* (1925) 52 IA 201 : 1925 PC 170 ; *Shyam Pratap Singh* v. *Collector of Etawah,* 1946 PC 103.
12. (1836-37) 1 Moo Ind App. 19.
13. *Bibi Sahibzadi* v. *Mir Mohamad,* 32 IC 548 ; *Salabat Mahatab* v. *Malati Mahatani,* 1954 P 481.

stances; where entries in them are made after a most careful public inquiry, they are cogent evidence of the facts recorded though not conclusive.[1] Where, from an entry in a revenue register, the foundation source of the right can be traced, it is not safe to rely upon the entry itself, but resource must be had to the origin of the entry.[2] The presumption of correctness which attaches to the finally published Record of Rights relates only to possession at the time when the Record was prepared.[3] An entry in the record of rights is not a foundation of title, but is a mere piece of evidence.[4] Entries made in such Government records as the Record of Rights are evidence of title mainly because they are good evidence of possession, but if contrary to the facts as to possession at the time when they were made, they carry little, if any, weight. This would be specially applicable to entries made by the Tahsildar as of routine and without notice to any parties interested to oppose their being made.[5]

An entry in a Record of Rights operates in the same way between landlord and tenant as between landlords of the same or of neighbouring estates, or between tenant and tenant. The entry must be presumed to be correct until it is shown by evidence to be incorrect.[6] Revenue records prepared under the Land Revenue Acts, are presumed to be correct unless shown by evidence to be otherwise.[7] "The entries in the revenue records ought, generally, to be accepted at their face value and courts should not embark upon an appellate enquiry into their correctness. But the presumption of correctness can apply only to genuine, not forged or fraudulent entries. The distinction may be fine but it is real...One cannot challenge the correctness of what the entry....states but entry is open to the attack that it was made fraudulently or surreptitiously. Fraud and forgery rob a document of all is legal effect...The normal presumption of correctness attaching to entries in the revenue record which by law constitute evidence of legal title (as in the case of Section 20 of the U.P. Zamindari Abolition and Land Reforms Act, 1950) is displaced by proof of fraud".[8] An entry in the *khewat* is *prima facie* evidence of title.[9] It is not any part of the law of India that settlement records are by themselves conclusive evidence of the facts which they purport to record. They have merely to be considered with other evidence in the case.[10] Where the question is as to the tribe to which a party belongs, the fact that he is mentioned as belonging to that tribe in the earliest revenue records is good evidence of his belonging to that tribe. In a pedigree case, statements contained in public documents are receivable to prove the facts stated, on the general ground that they were made by the authorized agents of the public in the course of

1. *Gangabai Kom Baswantrao Desai* v. *Fakirgowda Samappagowda Desai*, 54 B 336 : 57 IA 61 : 123 IC 166 : 1930 PC 93.
2. *Pirtha Singh* v. *Mohammad Ali Mohammad Khan Bahadur*, 94 IC 188 : 1926 O 427.
3. *Nayan Mandal* v. *E*., 115 IC 746 : 1930 C 134 : 31 Cr LJ 918.
4. *Sakharam Shriniwas* v. *Shushilabai*, 1953 N 339 ; *Wali Mohammed* v. *Mohamvnad Baksh*, 1930 PC 91.
5. *Maharaja Sir Kesho Prasad Singh* v. *Bahuria Mst. Bhagjogna Kuer*, 1937 PC 69 : 16 P 258 : 167 IC 329.
6. *Nitai Lal Dutta* v. *Govinda Bhushan Sen*, 1936 P 142 ; *Mazharul Ekbal* v. *Gopal Lal Ray Bahadur*, 84 IC 488 : 1924 P 719.
7. *Durga* v. *Ram Padarath*, 65 IC 749.
8. *Vishwa Vijaya* v. *Fakharul Hasan*, 1976 SC 1485 (Paras 14 & 15).
9. *Ghulam Muhammad* v. *Sabit Ali*, 69 IC 821 : 1922 O 140 ; *Nageshar Bakhsh Singh* v. *Ganesha*, 42 A 368 : 47 IA 57 : 56 IC 306 : 1920 PC 46 ; See also *Muhammad Habibuddin* v. *Mohd. Wazeul Haq*, 1933 P 555 (2).
10. *Nageshar Bakhsh Singh* v. *Ganesha*, 42 A 368 : 47 IA 57 : 56 IC 306 : 1920 PC 46 ; as to the evidentiary value of Settlement Registers of 1876; See *Srinivasa Chariar* v. *Evalappa Mudaliar*, 45 M 565 : 49 IA 237 : 68 IC 1 : 1922 PC 325.

official duty and respecting facts which were of public interest or required to be recorded for the benefit of the community. In most cases, after a lapse of years, it would be impossible to give evidence that the statements contained in such documents were in fact true, and it is for this reason that this exception is made to the rule of hearsay evidence.[1] Where an entry in a particular settlement is opposed to entries in the two previous settlements, it must be considered to be unauthorized, where there is nothing on the record to show why the entry of the two previous settlement was submitted by that in the third.[2] An entry in a Government register showing payment of revenue by a person does not necessarily imply his title to the property.[3] A definition of shares in revenue and village papers affords by itself but a very slight indication of an actual separation.[4] Entries in revenue records showing certain land to be a thoroughfare, are relevant for the purpose of showing that the land in dispute was used as a thoroughfare when the entries were made.[5] Entries made in a *khasra*, being entries made in an official record, by public officers in the discharge of their duties, are themselves relevant facts and may be considered by the courts as evidence of possession, from which the courts may, if they think fit, draw an inference as to title.[6] *Hudabandi* papers are to be accepted as *prima facie* accurate between Government and the zamindars; and the boundaries given therein ought to be regarded as the boundaries of the grant.[7] The orders of Settlement Courts and *Rubkars akhir*, containing a summary of all the proceedings, prepared and kept on the settlement files, are admissible to show that a sanad was granted to the persons named therein.[8]

In case of discrepancy in *jamabandi* and *Wazibularz* entries in the letter must prevail.[9]

Where the entry in the record-of-rights show that the suit lands stood in the name of the plaintiff, the onus rests on the defendant to prove that the said entry is in favour of the plaintiff is not correct.[10]

It is the entry in the Record of rights and not the entry in the Tenancy Register that has a presumptive value.[11]

Revenue register.—It affords no evidence on question of title.[12]

More than one record of rights.—In case of conflict between an earlier entry in the Cadastral Survey Record of Rights and a subsequent entry in the Revisional Survey

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1. *Ghulam Rasul Khan* v. *Secretary of State*, 6 L 269 : 52 IA 201 : 86 IC 654 : 1925 PC 170; but see *Sarabjit Singh* v. *Court of Wards, Rampur Mathura Estate*, 37 IC 27 ; *Ghulam Rasul's* case was explained and distinguished by the Supreme Court in *State of Bihar* v. *Radha Krishna Singh*, 1983 SC 684, (paras 43 to 47).
2. *Budha Khan* v. *Mohammad*, 31 IC 287 : 133 PWR 1915.
3. IPLT 602.
4. *Nageshar Bakhsh Singh* v. *Ganesha*, 42 A 368 : 47 IA 57 : 56 IC 306 : 1920 PC 46 ; *Kartar Singh* v. *Lona*, 113 IC 773 : 1929 L 74 ; *Durga Prasad* v. *Ghanshiam Das*, 1948 PC 210 : 1948 ALJ 279 : 61 MLW 517 : 1948, 2 MLJ 226 : 50 BLJ 669 : 53 CWN 118 ; *Brajraj Singh* v. *Yogendrapal*, 1952 MB 146.
5. *Megh Raj* v. *Municipal Committee, Abohar*, 1936 L 921.
6. *Jagan Koeri* v. *Chairman, Gaya Municipal*, 1937 P 567 : 171 IC 732.
7. *Rajnandini Debi* v. *Manmatha Pal*, 1941 C 223 : ILR 1940 2 C 393 : 197 C 147.
8. *Parbhu Narain Singh* v. *Jitendra Mohan Singh*, 1948 O 307 : 22 Luck 522.
9. *Manturabai* v. *Ithal Chiman*, 1954 N 103.
10. *Ramkrishna* v. *Arjuno*, AIR 1963 Orissa 29.
11. *State* v. *Bharat Singh*, 1961 (1) Cr LJ 649.
12. *Shahin* v. *Ganesh*, 1961 MPLJ 105.

Record of Rights, the latter entry must prevail.[1]

Recital of alienation or partition in a revenue record, whether evidence of alienation or partition?—Entries in revenue records reciting the fact of an alienation[2] or partition[3] having taken place are relevant, though they may not be sufficient to prove the alienation. Where the question in disputes is whether an alienation took place or not, an entry in a revenue register, relating to the alienation is a relevant fact under Section 35 of the Evidence Act. Where an entry in a revenue register shows that the parties made a report of an alienation having taken place, the entry does not prove the alienation or the ownership of the alienator at the time the report was made, but it creates a presumption that a report of the alienation, in the terms recorded, was made by the parties.[4]

Inam Registers.—The Inam Register is a great act of State and is entitled to very great weight.[5] Entries in Inam registers are not conclusive, but are strong piece of evidence not to be lightly disregarded excepting for solid and substantial reasons or on account of other rebutting or contrary evidence.[6] The Register embodies the conclusions of the Inam Commissioner on such inquiry as he chooses to make upon the statements filed before him. The presumption is that the Register embodies the findings of the Inam Commissioner after such investigation. There is no rule prescribing the extent of the investigation to be made by him.[7]

In the absence of the original grant, the Inam Register has great evidentiary value, yet the entry or entries in any particular column or columns in the register should not be accepted at their face value, without giving due consideration to other matters recorded in the entry itself. And the entries in the Inam Register cannot displace actual or authentic evidence in individual cases.[8]

Value of entries in Inam Register.—The fact that in the absence of the original grant, the Inam Register is of great evidentiary value, does not mean that the entry or entries in any particular column or columns be accepted at their face value without giving due consideration to other matters recorded in the entry itself.[9]

Quinquennial Registers.—The Quinquennial Register is a register kept by the Collector under Regulation XLVIII of 1973. Such register is admissible under section 35 of the Evidence Act.[10] The mere fact that a *taluq* is not entered in the Quinquennial Register is not sufficient to rebut the presumption arising under section 50 of the Bengal Tenancy Act.[11]

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1. *Durga Singh* v. *Thakur*, 1963 (2) SCJ 206 : 1963 (2) SCR 693.
2. *K. Po Maung* v. *Ma Mein Gale*, 1 R 562 : 77 IC 380 : 1924 R 135.
3. *Maung Po Lun* v. *Ma E Mat*, 74 IC 47 : 1923 R 57.
4. *Maung Hlaing* v. *Maung Chit Su*, I R 135 : 76 IC 449 : 1923 R 196.
5. *Arnachellam Chetty* v. *Venkatachalapathi Guru Swamigal*, 46 M 253 : 46 IA 204 : 53 IC 288 : 1919 PC 62 ; *Kandalam Krishnamacharylu* v. *Sathulari Vijaysarathi*, 88 IC 646 : 1925 M 823 ; *Kondaviti Brahmayya* v. *Rajeswaraswami Temple*, 1953 M 580 ; 1953 MWN 45 : 1953, I MLJ 164 ; *Jammi Raja Rao* v. *Sri Ahjaneyoswami Temple Volu Ji*, 1992 (2) SCC 470 : AIR 1992 SC 110.
6. *Harihar Mahapatra* v. *Hari Otha*, 1950 Orissa 257.
7. *Kundalam Krishnamcharylu* v. *Sathulari Vijayasarathi*, 88 IC 646 : 1925 M 823.
8. *Sadavarthy* v. *Commissioner, Hindu, RC Endowments*, (1962) Supp. (2) SCR 276.
9. *Poohari Fakir Sadawarthy* v. *Commissioner of Hindu Religious and Charitable Endowments*, 1962 (Sup.) (2) SCR 276 : 1962 SCD 648.
10. *Hem Chandra Ray Choudhury* v. *Benayakdas Acharji Choudhury*, 86 IC 538 : 1925 C 1037 ; *Ramnandan Sahay* v. *Jaogovind Pandey*, 2 P 839 : 75 IC 955 : 1924 P 213 ; *Secretary of State* v. *Wazed Ali Khan Pani*, 65 IC 866 : 1921 C 687.
11. *Hem Chandra Ray Choudhury* v. *Benayakdas Acharji Choudhury*, 86 IC 538 : 1925 C 1037.

Register of sarsikan papers.—A register of *sarsikan* papers maintained in a Collectorate is a public document and, therefore, entries therein are relevant under section 35 of the Act and provable by certified copies.[1] A **sarsikan** paper prior to the permanent settlement of 1790 and short before it is evidence of the fact that rent had varied; if alone, it is of little value as such, but its value is enhanced in combination with quinquennial *fahrist*.[2]

Presumption of public temple in Madras State and near abouts.—In the greater part of the former Madras Presidency, where private temples were practically unknown, the presumption is that temples and their endowments form public charitable trusts. The presumption is certainly rebuttable.[3]

Diglott Register.—Diglott Register entries are relevant evidence, but not on title. Though the entries in the Diglott register may be evidence, they are, by themselves, not conclusive evidence of the facts which they purport to record. It may turn out that they are in accord with the general bulk of the evidence in the case and they may supply gaps in it. When viewed in the light of other compelling circumstances from which inference contrary to such entries can be drawn, they may become unimportant and their value insignificant.[4]

Value of recitals in an ancient document.—The recital of the Ekrarnama and its terms in an ancient public document like the Rubakari whose authenticity has not been, nor indeed could be, doubted furnishes strong evidence of the existence and genuineness of the settlement arrived at by the parties.[5]

Chittahs.—A *chittah* prepared by a *zamindar*,recording the suit land as being in the possession of tenants, is not admissible under sections 35 and 36, as it was not prepared by a public servant.[6]

Partition or batwara papers.—There has been a good deal of conflict of judicial opinion as to the admissibility of what are commonly known as "partition papers". In some cases they have been held to be admissible,[7] while in others the verdict has been against their admissibility.[8] The admissibility of these papers depends upon several considerations, viz., the nature of the document, the circumstances in which and the person by whom it was prepared, the persons in whose presence it was prepared, and the use to which it is sought to be put.[9] A *batwara barawada* prepared by a Deputy Collector under Chapter VII of Act VIII of 1879 (Bengal Estates Partition Act) is a document prepared by a public servant in the discharge of his official duty and is therefore, admissible under this section;[10] but a *batwara khasra* is not so admissible,[11]

1. *Rajendra Narayana Singh Deo* v. *Bihari Lal Chakravarthy*, 11 P 569 : 138 IC 419 : 1932 P 157.
2. *Dinanath Mahatha* v. *Jyoti Prasad Singh & Co.*, 1936 P 400 : 163 IC 971.
3. *Poohari Fakir Sadavarty* v. *Commissioner of Hindu Religious and Charitable Endowments*, 1962 (Sup.) 2 SCR 276, 1962 SCD 648.
4. *Ramanna* v. *Sambamoorthy*, AIR 1961 Andhra Pradesh, 361.
5. *Bishwambhar Singh* v. *State of Orissa*, 1954 SCR 842 : 1954 SCJ 219.
6. *Abdul Khaleque* v. *Sushil Chandra Chaudhuri*, (1935) 39 CWN 330.
7. *See Anund Chunder Roy* v. *Haronath Roy*, 4 WR 26 ; *Taru Patur* v. *Abinash Chunder Dutt*, 4 C 79 ; *Saraswati Dasi* v. *Dhanpat Singh*, 9 C 431 : per Field. J; *Shoshi Bhooshaun Bose* v. *Girish Chunder Mitter*, 20 C 940 ; *Khetra Nath Mandal* v. *Mahomed Alla Rakha*, 45 IC 921 : 23 CWN 48 ; *Secretary of State* v. *Wazed Ali Khan Pani*, 65 IC 866 : 1921 C 687 ; *Kali Singh* v. *Matru Singh*, 15 P 584.
8. *See Saraswati Dasi* v. *Dhanpat Singh*, 9 C 431, per Garth, CJ; *Ram Chunder Sao* v. *Bunseedhur Naick*, 9 C 741 ; *Akshaya Kumar Dutt* v. *Shama Charan Patitanda*, 16 C 586.
9. *Tara Kumar Ghose* v. *Kumar Arun Chandra Singh*, 74 IC 383 : 1923 C 261.
10. *Ramsarup Raut* v. *Ramnarain Tewary*, 7 P 85 : 114 IC 479 : 1929 P 32.
11. *Ramsarup Raut* v. *Ramnarain Tewary*, 7 P 85 : 114 IC 479 ; 1929 P 32 ; *Sadhu Saran* v. *Ambika Lal*, 68

nor a *batwara chittah*.[1] *Batwara* papers are very valuable evidence if they contain any admission by the persons concerned in the *batwara* proceedings.[2] They may be admitted in evidence also against the parties to the *batwara* proceedings to rebut the presumption raised by the Record of Rights;[3] but they are no evidence against strangers.[4] Thus, in a suit for enhancement of rent the *batwara* papers are no evidence against the tenants.[5] The *batwara* record is evidence under section 35, being an official record but it is very weak evidence when it conflicts with the Record of Rights.[6] A record of existing rents and other cases of an estate published under section 48 of the Bengal Estates Partition Act is relevant under this section.[7]

Maps, surveys and parcha slips.—Maps and surveys in India for revenue purposes are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible as valuable evidence of the state of things at the time they were made.[8] Boundaries shown in cadastral surveys are presumed to be cor-stronger in the case of culturable land than in the case of land which is rect and are evidence of title, as title follows possession.[9] A survey entry is presumptive evidence of possession, but this presumption of possession is stronger in the case of culturable land than in the case of land which is unfit for cultivation.[10] A cadastral survey map is admissible and presumptive evidence even as against the landlord of the neighbouring estate.[11] If there is any discrepancy between the Gangetic survey map and a later cadastral survey map, the latter must be given preference.[12] A *parcha* slip granted in the course of survey proceedings is not a public document and, not being in any way recognized by law, is admissible to prove title or possession. In a criminal trial, however, the Judge is competent to draw the attention of the jury to the fact that the *parcha slip* was granted to a particular person, as a fact relevant to the question of possession.[13]

Survey *khasra* maps which are not finally published have no evidentiary value. Survey officers, under the Calcutta Survey Act, have no power to prepare a record-of-

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IC 676 : 1923 P 163 ; *Nanda Lal Pathak* v. *Chanurpat Das*, 18 IC 143 : 17 CLJ 462 ; *Bhola Roy* v. *Jung Bahadoor*, 8 IC 890 ; but see *Trilok Prasad Singh* v. *Umanand Lal*, 72 IC 634 : 1922 P 447 ; *Kali Singh* v. *Matru Singh*, 5 P 584.

1. But see *Khetra Nath Mandal* v. *Mahomed Alla Rakha*, 45 IC 921 ; 23 CWN 48.
2. *Chattra Nath Chowdhury* v. *Babar Ali*, 86 IC 835 : 1925 C 635 : *Dinanath Chanda* v. *Nawab Ali*, 49 IC 984.
3. *Sri Ans Das* v. *Jugat Pat Lall*, 38 IC 205.
4. *Rudra Narain Singh* v. *Rameshwar Singh*, 37 IC 829.
5. *Sajiwan Mahto* v.*Gulab Chand Lal*, 35 IC 678 ; See also *Banamali Paul* v. *Satish Chandra Datta*, 56 IC 138.
6. *Benoda Charan Chakravarty* v.*Ramani Kishore Chakravarty*, 60 C 302 ; 151 IC 749 . 1934 C 488, relied on in *Srijukta Maharaja Sir Bir Bikram Kishore Manikya Bahadur* v. *Girish Chandra Deb*, PLD 1952 Dacca 214.
7. *Chatterjee Estates, Ltd.* v. *Dhirendranath Roy*, (1934) 40 CWN 821.
8. *Radha Kishun* v. *Shyam Das*, 13 P 51 : 149 IC 1095 : 1933 P 671 ; *Bibi Wakilan* v. *Deo Nandan Prosad*, 59 IC 298 : 1921 P 268 ; See also *Ko Maung* v. *Maung Ba Htwe*, 98 IC 166 : 1926 R 204 ; *Kalayi Narayana Jogithaya* v. *Secretary of State*, 29 IC 154.
9. *Radha Kishun* v. *Shyam Das*, 13 P 51 : 149 IC 1095 : 1933 P 671.
10. *Radha Kishun* v. *Shyam Das*, 13 P 51 : 149 IC 1095 : 1933 P 671. For the presumption where there are two inconsistent survey entries, See *Paran Munda* v. *Santosh Mahto*, 1942 P 372 : 199 IC 144.
11. *Radha Kishun* v. *Shyam Das*,13 P 51 : 149 IC 1095 : 1933 P 671.
12. *Ibid.*
13. *Ram Bhagwan* v. *E.*, 47 IC 82 ; 19 Cr LJ 886.

rights, and as such, any note made in a *khasra* is of no use.[1]

Reports made by public servants.—Every isolated document is not a book register or record, but in certain cases a single document, e.g., a report by a public servant made within the discharge of his duty, may be considered an official book, register or record.[2] Where there is a statutory duty laid upon public officers to investigate and report facts, a report of the facts elicited by their investigation is an official record within the meaning of this section[3] and entitled to great weight.[4] Thus a report made by a *Tehsildar* in land acquisition proceedings,[5] a crop cutting report drawn up by a Deputy Collector under Section 40 of the Bengal Tenancy Act,[6] a report by a *kanungo* under section 202, Cr. P. Code,[7] a report by a *kotwal* to the Political Agent,[8] a report by the Collector under the Court of Wards Act,[9] and a peon's return in execution proceedings,[10] have been admitted under the provisions of this section. The report of a process-server is not admissible in evidence, unless the process-server has been examined as a witness.[11] The report of a Revenue Officer who has conducted a sale is not evidence unless the Revenue Officer who has been examined as a witness.[12] A report of the administration of a Court of Wards is admissible in proof of the age of a ward of Court[13] But the report of a confidential inquiry[14] or a report by a public servant to his superior regarding a particular fact is not admissible.[15] A tahsildar's report to the sub-divisional officer, stating that the dependent was holding her cattle fair over the land in dispute, was held to be, "an expression of his impression granted by him at the spot", and "evidence only of the fact that he had been deputed to make an enquiry and that came to the conclusion mentioned by him in his report and shown in the map"; but not admissible in evidence under section 35 though it "might have become admissible under some other provision of the Evidence Act," if the tehsildar had been examined as a witness.[16] Settlement Reports, selections from the records of the Board of Revenue, and District Gazetters, whether admissible under section 35 or not, may be read for what they may be worth.[17] A document purporting to be the translation of a grant, which is appended as an enclosure to a report by a public servant, is not the right kind of secondary evidence of the terms of the grant.[18] In a dispute as to whether a certain institution is a Sikh Gurdwara or not, reports of Tehsildars and Extra Assistant Commissioners, prepared in

1. *Murli Prasad Gupta* v. *Sheo Kishore Narain*, 1950 P 432 : 29 P 448.
2. *Mallikarajuna Dugget* v. *Secretary of State*, 35 M 21 : 14 IC 401.
3. *Ramkrishna Pillai* v. *Jirunarayana Pillai*, 55 M 40 : 139 IC 684 : 1932 M 198.
4. *Marhewson* v. *Secretary of State*, 3 P 673 : 84 IC 405 : 1924 P 616.
5. *Rathanamassari* v. *Secretary of State*, 72 IC 214 : 1923 M 382.
6. *Hargobind Singh* v. *Kishendeyal Gope*, 95 IC 966 : 1926 P 436.
7. *Jagdat* v. *Sheopal*, 104 IC 287 : 1927 O 233.
8. *Baldeo Das* v. *Gobind Das*, 36 A 161 : 23 IC 18.
9. *Ramakrishna Pillai* v. *Tirunarayana Pillai*, 55 M 49 ; 139 IC 684 : 1932 M 198.
10. *Rewti* v. *Mohan Lal*, 1940 L 312 ; *Heramba Nath Bandopadhya* v. *Surendra Nath Mittra*, 63 IC 20 ; but see *Fateh Muhammad* v. *Hakim Khan*, 8 L 52 : 96 IC 825 : 1926 L 629.
11. *Fateh Muhammad* v. *Hakim Khan*, 8 L 52 : 96 IC 825 : 1926 L 629.
12. *Dataram* v. *The Punjab National Bank, Ltd.*, 1936 PLR 515.
13. *Ari Chettiar* v. *Rama Reddiar*, 9 IC 567.
14. *Baldeo Singh* v. *Sheoraj Kueri*, 56 IC 807.
15. *Nizam Din* v. *Mohammad Iqbal*, 108 IC 619 : 1928 L 643 ; *Mallikarjuna Dugget* v. *Secretary of State*, 35 M 21 : 14 IC 401 ; *See* also *Keolapati* v. *Raja Amar Krishna Narain Singh*, 1939 PC 249.
16. *State of U.P.* v. *Ram Sri*, 1976 A 121 (para 28).
17. *Jogesh Chandra Roy* v. *Makbul Ali*, 47 C 979 : 60 IC 964 : 1921 C 474.
18. *Ambalavana Pandarasannadhi* v. *Kuppachi Janaki Ammal*, 35 IC 201.

muafi inquiry at a time when there was no such dispute, are relevant and entitled to considerable weight.[1]

Evidentiary value of Official reports.–Opinions expressed in official reports though in many cases valuable and the best evidence of the facts stated therein, should not be treated as conclusive in respect of matters requiring judicial determination.[2] Reports made by public officers within their province and within their line of duty are not of judicial force or authority; but, being made in the course of duty and under statutable authority, are entitled to much consideration.[3] The reports of Government officers and official documents containing opinions on the private rights of parties are not be regarded as having judicial authority. But being reports to public officers made in the course of the duties, they are entitled to great consideration, so far as they supply information of official proceedings and historical facts, and also in so far as they are relevant to explain the conduct and acts of the parties in relation to them and the proceedings of the Government founded on them.[4] But where a report is based on hearsay evidence or the public servant (Village Chowkidar) on whose information the entry is made by some one else is himself illiterate, it cannot be admissible under section 35.[5] On the other hand,"where a report is given by a responsible officer, which is based on evidence of witnesses and documents and has a statutory flavour in that it is given not merely by an administrative officer but under the authority of a statute, its probative value would indeed be very high so as to be entitled to great weight."[6]

Reports under Section 202, Cr.P.Code, or under O. 26, C.P.Code.–The words "an entry" in section 35 are not intended to apply to the opinions of public officers contained in reports under section 202, Cr.P.Code, or under O. 26, Civil Procedure Code.[7] But Order XXVI, Rule 10 (2), C.P.C. provides that the report of the Commissioner and the evidence taken by him shall be evidence in the suit (in which the commission is issued). It is, therefore, not necessary to examine the Commissioner as a witness to prove the report, though it is open to the parties to examine the Commissioner as a witness in respect of the matters referred to him or stated in his report.[8]

Endorsement of a public document by a public servant: statement made by a public servant in a public document.–An endorsement on an official record signed by a public servant in the performance of his duties should, in the absence of any evidence to throw doubt on it, be presumed to be correct.[9] A recital in a public record as to a statement made by a public servant with reference to a particular grant by the Government may be admitted under section 35 of the Evidence Act, as proving that the public servant made the statement that he is stated to have made, if the fact that he made such

1. *Ram Kishan* v. *Bur Singh*, 15 L 270 : 151 IC 738 : 1934 L 39.
2. *Martand Rao* v. *Malhar Rao*, 55 C 403 : 55 IA 45 : 107 IC 7 : 1928 PC 10 ; *Rai Rajendra Malojirao Shitole* v. *The State of Madhya Bharat*, 1953 MB 97.
3. *Rajah Muttu Ramalinga Setupati* v. *Perianayagum Pillai*, 1 IA 209 ; *Chandu Lal* v. *Pushkar Raj*, 1952 N 271 : 1952 NLJ 213 : ILR 1952 N 318.
4. *Muktakeshi Patrani* v. *Midnapur Zamindary Co., Ltd.*, 13 P 517 : 156 IC 136 : 1935 P 33.
5. *Brij Mohan Singh* v. *Priyabrat Narain Singh*, (1965) 3 SCR 861 : 1965 SC 282 ; *State of Bihar* v. *Bihar* v. *Radha Krishna Singh*, 1983 SC 684 (para 53); See *State of Bihar* v. *Radha Krishan Singh*, 1983 SC 684 (para 52).
6. *State of Bihar* v.*Radha Krishna Singh*, 1983 SC 684 (para 52).
7. *Ghanaya* v. *Mehtab*, 16 L 377 : 155 IC 1040 : 1934 L 890.
8. *State of U.P.* v. *Ram Sri*, 1976 A 121 (para 35).
9. *Kesri Kumar* v. *Ram Rani*, 53 IC 725.

a statement is a relevant fact. But such recital would not be admissible, under section 48, in a case where a specific right claimed by a particular individual, and not a general right, is being dealt with.[1] A transaction of a grant forming an enclosure to the report of a public officer is not the right kind of secondary evidence of the grant.[2] A statement of the *patwari*, a report of the Tehsildar an order of the Sub-Divisional Officer that the person named in the *khewat* was unheard of, are admissible being acts prescribed by the rules as part of the official duties of the officer concerned.[3]

Recitals of relevant facts in judgment inter partes or not inter partes.—Recitals of relevant facts in judgments, not *inter partes*, are not admissible under this section,[4] but recital in judgments, *inter partes*, admissible.[5] A recital in a judgment that a party made a certain admission,[6] or filed a pedigree-table in Court is relevant,[7] and, where the judgment is *inter partes*, it is conclusive against the party and cannot be questioned in appeal.[8] In a Madras case it has been remarked that judgement, though *interpartes*, which reproduces an admission made by a party is merely secondary evidence of the admission and is not, therefore, proper proof of the admission, unless a foundation is laid for the reception of secondary evidence.[9] An entry in an order sheet that notice has been served on a party is admissible and presumptive, though not conclusive, evidence of the *factum* of service.[10] As to applicability of section 35 to judgments, see notes to section 13 under the headings "sections 35 and 11, whether applicable to judgments" and "recitals of age, date of birth or..section 35."

Entry of date of birth in a guardianship certificate or in a register of application for guardianship, whether relevant?—An entry of the age or date of birth of a minor, in a certificate of guardianship granted under the provisions of the Guardians and Wards Act, is not admissible under this section;[11] but in some Oudh cases such entries have been held to be admissible.[12] An entry as to the date of birth of a minor, in

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1. *Sankaracharya Swamigal* v. *Manali Saravana Mudaliar*, 51 IC 876.
2. *Ambalavana Pandarasannadhi* v. *Kuppachi Janaki Ammal*, 35 IC 201.
3. *Ram Pheran* v.*Shri Ram*, 1947 O 174.
4. *Bhupa* v. *Jai Chand*, 135 IC 202: 1932 L 50 ; *Asa Singh* v.*Mansha Ram*, 121 IC 509 : 1930 L 237 ; *Tripurana Seethapathi Rao Dora* v. *Rokham Venkanna Dora*, 45 M 332 : 66 IC 280 : 1922 M 71 (FB) ; *See* also *Doraisami Naidu* v. *Kanniappa Chetty*, 131 IC 654 : 1931 M 487 : 32 Cr LJ 767.
5. *Gopal Rao* v. *Sitaram*, 97 IC 694: 1927 N 19 ; *Chandu Lal* v. *Pushkar Raj* 1952 N 271 : 1952 NLJ 213 : ILR 1952 N 318.
6. *Khedu Mahto* v. *Khonka Mahto*, 1939 P 591 ; *Collector of Gorakhpur* v. *Ram Sunder Mal*, 56 A 468 : 150 IC 545 : 1934 PC 157 ; *Subbaraya Chettiar* v. *Sellamuthu Asari*, 142 IC 548 : 1933 M 184 ; *Rurdra Pratap Narain Singh* v. *Nirman Prasad Singh*, 74 IC 225 : 1923 O 61 ; *Lakshman Govind* v. *Amrit Gopal*, 24 B 591 ; *Parbutty Dassi* v. *Purno Chunder Singh*, 9 C 586 ; but see *Medavarapu Narasayya* v. *Medavarapu Veerayya*, 154 IC 753 : 1935 M 268 ; *Tripurana Seethapati Rao Dora* v.*Rokham Venkanna Dora*, 45 M 332 : 66 IC 280 : 1922 M 71 (FB).
7. *Collector of Gorakhpur* v. *Ram Sunder Mal*, 56 A 468 : 1934 PC 157.
8. *Mirza Shamsher Bahadur* v. *Munshi Kunj Behari*, 12 CWN 273.
9. *Medavarapu Narasayya* v. *Medavarapu Veerayya*, 154 IC 753 : 1935 M 268.
10. *Lall* v. *Rajkishore Narain Singh*, 13 P 86 : 147 IC 101 : 1933 P 658.
11. *Muktipada Dawn* v. *Aklema Khatun*, 1950 C 533 ; *Kishori Lal* v. *Adhar Chandra*, 1942 C 438 ; *Naima Khatun* v. *Basant Singh*, 149 IC 781 : 1934 A 406 (FB) ; *Chandrabhan* v. *Rajkumar*,54 A 1019 : 142 IC 794 : 1933 A 100 ; *Saidunnisa* v. *Rugya*, 53 A 428 : 130 IC 201 : 1931 A 307 ; *Hara Kumar De* v. *Jogendra Krishna Ray*, 71 IC 336 : 1924 C 526 ; *Harihar Prasad Singh* v. *Edul Singh*, 57 IC 333 : 1921 P 69 ; *Gunjra Kuar* v. *Ablakh Pande*, 18 A 478 ; *Satish Chandra Mukhopadhya* v. *Mohendro Lal Pathuk*, 17 C 849 ; *Hem Chandra Chowdhury* v. *Bhobo Prosad Khan Chowdhury*, 2 CLJ 69 (n).
12. *Mehdi Ali* v. *Walayat Hussain Khan*, 5 Luck 658 : 121 IC 277 : 1930 O 97 ; *Amir Hussain* v.*Mohammad Aiyaz Husain*, 117 IC 456 : 1929 O 134 ; *Mohan Lal* v. *Mohammad Adil*, 89 IC 69 : 1926 O 88 ; *See* also

a register of applications for guardianship, is inadmissible.[1] Recital of the date of birth in the application for appointment of a guardian is not by itself admissible in evidence upon mere production of the document, but may be rendered admissible under certain circumstances. If, however, the conditions recited in section 32(5) Evidence Act, are satisfied, that is a person who had made the statement had special means of knowledge of the relationship and is now dead or cannot be found, such a statement will be admissible. The statement made in the application may be used to corroborate a witness or to impeach his credit.[2] A certified copy of an order passed under Guardianship Act cannot be admissible to prove the age of the minor.[3] If it can be shown that the entry as to the date of birth of a minor was made in some document relating to the guardianship proceedings, on the information supplied by a deceased relative of the minor, the entry will be admissible under Section 32, as a statement as to pedigree.

Hospital registers and certificates.–Entries in the prescription register of a Government dispensary, made by a compounder, are relevant and admissible under this section though the compounder is not called.[4] An entry of the parentage of an illegitimate infant made three years after the birth in a vaccination register is admissible under section 35.[5] A certificate as to the age of a private patient does not fall within the terms of section 35.[6] A carbon copy of *post mortem* notes may be admissible under section 35.[7] An entry as to the age of a person in an inoculation or vaccination register is relevant under section 35.[8]

School registers, records and certificates.–School certificates duly prepared according to authority are relevant.[9] A transfer certificate granted by the Head Master of a State school in a native State is a public document,and as such admissible under this section in proof of the age of a scholar.[10] An entry as to the age of a scholar in a Government or Municipal school register is an entry in a public register made by a public servant in the discharge of his duty;[11] but in the absence of evidence to show on what materials the entry was made it has not much evidentiary value.[12] Entries in registers of schools other than Government or State schools are, however, not admissible as employees of such schools are not "public servants."[13] In *Abdul Majeed* v.

Mohindra Mohan Roy Mukhopadhya v. *Ram Krishna Sadhukhan*, 28 IC 595 : 31 CLJ 621.

1. *Kishori Lal* v. *Adhar Chandra*, 1942 C 438 ; *Gokhulanand* v. *Baldev Narain Singh*, 86 IC 681 : 1924 P 796.
2. *Mukti Pada Dawn* v. *Aklema Khatun*, 1950 C 533. *Mano Ranjan Das Gupta* v. *Suchitra Ganguly*, AIR 1989 Cal. 14
3. *Ibid.*
4. *D'Cruz* v. *D'Cruz*, 103 IC 512 : 1927 O 310.
5. *Kanniappan* v.*Kullammal*, 126 IC 613 : 1930 M 194 : 31 Cr LJ 1089.
6. *Venkata Rangappa Naicken* v. *Subbarayya Goundan*, 33 IC 142.
7. *Mohan Singh* v. *E.*, 85 IC 647 : 1925 A 413 : 26 Cr LJ 551.
8. *Supdt. & Remembrancer of Legal Affairs, Bengal* v. *Forhad*, 153 IC 493 : 1934 C 766 : 36 Cr LJ 364.
9. *Liladhar Bania* v. *Mabibi*, 149 IC 660 : 1934 N 44.
10. *Maharaj Bhanudas Narayanboa Gosavi* v.*Krishnabai Chintaman Deshpande*, 50 B 716 : 99 IC 307 : 1927 B11.
11. *Kalaram* v. *Fazal Bari Khan*, 1941 Pesh 38 ; *Aga Jan Khan* v. *Kesheo Rao* 1940 NLJ 150 ; *Latafat Husain* v. *Onkar Mal*, 52 IC 1042 : 1935 O 41 ; *Supdt. & Remembrancer of Legal Affairs, Bengal* v. *Forhad*, 153 IC 493 : 1934 C 766 : 36 Cr LJ 364 ; *Las Baba* v. *Government of Mysore*, 12 Mys LJ 133 ; *Manikchand* v. *Krishna*, 140 IC 66 : 1932 N 117 ; *Indian Cotton Co., Ltd.* v. *Raghunath Hari Deshpande*, 130 IC 598 : 1931 B 178 ; *Munna Lal* v. *Kameshri Dat*, 114 IC 801 : 1929 O 113 ; *Ambika Prasad* v. *Lal Bahadur*, 83 IC 840 : 1924 O 353 : *Mahmood Faitma* v. *Mahmood Khan*, PLD 1954 L 325.
12. *Janki Nath Roy* v *Jyotish Chandra*, 1941 C 41 : ILR (1941) IC 234 : 193 IC 419.
13. *Hook Saing* v. *Ma Ehta*, 1940 R 191 : 191 IC 21.

Bhargaan, it was said that the admission registers of Government schools, being admissible under this section, could not be discarded on the ground that the appellant failed to examine the parents or guardians in support of the schools records; and that it could not be laid down that under no circumstances entries as to the date of birth in school registers have any value.[1]

In *Umesh Chandra* v. *State of Rajasthan*,[2] the Supreme Court observed: "A perusal of the provisions of Sec. 35 would clearly reveal that there is no legal requirement that the public or other official book should be kept only by a public officer but all that is required is that it should be regularly kept in discharge of official duty. This fact has been clearly proved by two independent witnesses. Reference was then made to certain observations of Hidayatullah, J. in *Mohd Ikram Husain* v. *State of U.P*,[3] and thereafter to the Kerala decision in *Abdul Majeed* v. *Bhargavan*.[4] While the evidence of entries in the records of two Convent Schools with regard to the date of birth of the appellant was believed the subsequent entry relating to his date of birth in the records of a third school was discarded, by the Supreme Court, in view of the explanation given by the appellant's father that a lower age was specified by him in order to enable the appellant to appear at the High Secondary Examination for which the minimum age of 15 years was fixed."

School admission register of a Municipal High School is prepared by a Clerk, who under Section 358 of the Dt. Municipalities Act is a public servant. The entry is admissible under this section, which embodies an exception to the rule of hearsay. The clerk need not therefore be examined but his non examination may be material, if through negligence or other bad motive, the necessary entries had not been made.[5]

In *Subbaro* v. *Venkata Ramarao*, it was said that extracts from the register of admissions and withdrawals of municipal school are extracts from official register maintained by public servants in the discharge of official duties enjoined by law, and are public document which can be proved by secondary evidence. They fall within the ambit of this section and cannot be rejected on the ground that the originals were not called.[6] An unproved entry in a school register is not sufficient evidence of *alibi*[7] Entries in a conduct book maintained by primary school authorities, entries in application forms for admission to a High School, and monthly progress reports maintained under the rules of the Education Department are relevant as evidence of the conduct of the parties proving or disproving the fact of adoption.[8]

Matriculation certificate — Matriculation certificate is held admissible as proof of the age of the candidate.[9] But the Calcutta University's copy of the duplicate Admit Card which purported to date of birth could not have been relied upon.[10]

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1 ILR (1962) (2) Ker. 65.
2 *Umesh Chandra* v. *State of Rajasthan*, AIR 1982 SC 1057.
3 *Mohd Ikram Husain* v. *State of U.P*, (1964) 5 SCR 86 at page 100: 1964 SC 1625 at page 1631.
4 *Abdul Majeed* v. *Bhargavan*, 1963 Ker 18.
5 Siram Reddi, In re (1959) 2 Andh WR 241: 1959 MLJ Cr 651.
6 1963 (2) Andh WR 307.
7 *Chando* v. *Siri Ram*, 80 IC 177; 1923 L 607.
8 *Chunnibai Modhoram* v. *Gidhari Lal Chunnilal*, 150 IC 1007: 1934 N 1.
9 *Hrishikesh* v. *Sushil*, 60 CWN 1053;.
10 *Burn Standard Co.Ltd* v. *Dinabandhu Majumdar*, AIR 1995 SC 1499; (1981) 1 Servs LR 570 (Cal) overruled.

In *Anadi Mohan* v. *Rabindra Nath*, the appellate Court, in arriving at its finding on fact on the question of age, relied upon the statement as to age contained in the matriculation certificate issued by the Calcutta University. It was contended that the certificate was not admissible in evidence. But the contention was rejected on the ground that the certificate was admissible under this section.[1]

Evidentiary value of school registers.[2] –The registers not presumed to have been kept in the performance of duty.[3]

In *Shiv Ram* v.*Shiv Charan Singh*, it was held, that an entry in a birth and/or death-registers as to age is excellent evidence, and may have to be preferred to entries in the records of educational institutions. But the same rule cannot apply in cases where the evidence furnished by the birth registers is not available. It cannot be laid down that entries of age, in school registers, have little or no evidentiary value. Each case must depend upon its own facts and circumstances and must be decided on the net balance or the various counts of proof therein.[4]

Where there are two documents one, an entry in the school admission register, and the other an entry in the staff card, and both of them have been found to be genuine, the entry in the school admission register cannot be taken to prove birth on the particular date mentioned in the school admission register. It is difficult to say that the entry about the date of birth in one document is correct whereas the entry in the other is not correct.[5]

False entry in School Register can be explained.–However much one may condemn an act of making a false statement of age, in a School Admission Register, with a view to secure an advantage in getting public service, a judge of facts cannot ignore the position that in actual life this happens not infrequently. The explanation that such statement of age was made with a view to secure advantage in public service for which a minimum age for eligibility is often prescribed, may very well be true and it will not be proper for the Court to base any conclusion about the age of a candidate for election on the entries in the School Admission Register; Matriculation Certificate or application for a Government post.[6]

Municipal registers and records.–Since a Municipality is a public body and its functionaries are public officials, a book or a register maintained by that body is a public book or register within the meanings of section 35.[7] A record plan, filed on behalf of a Municipal Committee, in which a site is shown as a public street is not relevant under section 35.[8] An entry in a municipal register that a well is public is no evidence against a party laying claim to the well.[9] A municipal assessment list, however, is admissible in evidence.[10] Entries in municipal registers of births and deaths are

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1. 65 CWN 1165.
2. *Parmodh Chand* v. *Narain Singh*, 1936 L 104 : 163 IC 81 ; *Asa Nand* v. *Gian Chand*, 1936 L 598 : 164 IC 751.
3. *Gopalan* v. *Kannan*, ILR 1958 Ker 916.
4. ILR 1964 Raj 26.
5. *Tata Iron and Steel Co. Ltd.* v. *Abdul Wahab*, AIR 1966 Pat 458.
6. *Brij Mohan Singh* v. *Narain Sinha*, 1964 SCJ (2) 644.
7. *Municipal Board, Aligarh* v. *Mumtaz Khan*, 1948 A 309 : ILR 1948 A 215.
8. *Gauri Shankar* v. *E.*, 124 IC 547 : 1930 A 26 : 31 Cr. LJ 133.
9. *Nur Ahmad Khan* v. *Municipal Committee, Amritsar*, 75 IC 896 : 1924 L 511.
10. *Bhagalpur Municipality* v. *Maulavi Fanik*, 126 IC 908 : 1930 P 370.

relevant and provable by certified copies.[1] But where there was nothing to show who wrote the register and on whose information, and who was responsible for keeping it, an entry in a register of births and deaths was held by the Allahabad High Court to be inadmissible.[2] Entries in the municipal *shajra* and *khasra* are relevant under this section.[3] The *khasra paimaish* of a Municipality is not a record of title but a mere record of survey and though admissible, carries with it no presumption of correctness so far as the question of ownership is concerned. A Municipality is generally interested more in the assessment of tax than in the determination of ownership of documents like *khasra paimaish* a Municipality is concerned more with the measurement of the building with a view to safeguard its own interests against any encroachment on the public streets than in the ascertainment of the title of the person owning such buildings.[4] Extracts from municipal register of *tharas* and of *khannshumari* cannot be relied upon and are inadmissible for the purpose of proving the ownership of a well when there is no statutory obligation on the officials who had prepared these registers to make inquiries as to the ownership of well.[5] Entries in a *shajra* prepared by a Municipal Committee are admissible under the present section.[6]

Municipal records.—Presumption of correctness.—Presumption relates only to the period when entries were made.[7]

Jail registers.—The jail registers are official records kept by public servants in the discharge of their official duties and when there is no suggestion that the entries are not genuine or that they have been tampered with, or that the officials who made them did not make them on the dates noted therein, they are admissible as a whole.[8]

Forest marking book.—The entries in the marking book made by the forest guard and checked and initialed by the officer responsible for the correctness of the marking are entries in an official record which are admissible in evidence.[9]

First information reports and statements recorded by the police.—A statement recorded by the police under section 161, Cr. P. Code, in the course of investigation of an offence is, under section 162 of the Code, inadmissible in evidence. Section 35, has, however, been applied to a first information report recorded under section 154, Cr. P. Code, by an office in charge of a police station.[10] But though a first information report may attract the operation of the provisions of section 35 it cannot be treated as substan-

1. *Mst. Anwari Jan* v. *Baldua*, 1936 A 218 : 159 IC 190 ; *Jai Bhagwan* v. *Ghuttoo*, 148 IC 418 : 1934 O 167 ; *Anis-ul-Rahman Khan* v. *Beni Ram*, 59 PR 1901 ; *Maniklal Sha* v. *Hiralal Shaw*, 1950 C 377 : 54 CWN 225.
2. *Jiwan Bakhsh* v. *Khan Bahadur Khan*, 19 IC 528 : see as to this subject notes to this section under the heading "entries in birth and death registers."
3. *Jassa Ram* v. *Puran Bhagat*, 1938 L 440 : 40 PLR 693 ; *Jagan Koeri* v. *Chairman of the Gaya Municipality*, 1937 P 567 : 171 IC 732 ; *Municipal Board, Aligarh* v. *Mumtaz Khan*, 1948 A 309 : ILR 1948 L 215.
4. *Kartar Singh* v. *Mehr Nishan*, 16 L 313 : 155 IC 1064 : 1934 L 885 ; *Jassa Ram* v. *Puran Bhagat*, 1938 L 440 : 40 PLR 693.
5. *Magan Nath* v. *Harbans Singh*, 1936 L 965 : 163 IC 817.
6. *Jassa Ram* v. *Puran Bhagat*, 1938 L 440 : 40 PLR 693.
7. *Syed Rahiqur* v. *Commissioner of Wealth-Tax, Patna*, 1970 Pat. LJR 614.
8. *Ram Rao* v. *E.*, 1943 O 1.
9. *Barikrao Bhaddoo Kunbi* v. *E.*, 1943 N 139.
10. *Babu* v. *Government of Mysore*, 11 Mys. LJ 475 ; *Muhammad Salim* v. *Ramkumar Singh*, 110 IC 657 : 1928 A 710 ; *Chittar Singh* v. *E.*, 47 A 280 : 81 IC 650 : 1925 A 303 : 26 Cr. LJ 554 ; *Mohan Singh* v. *E.*, 85 IC 647 : 1925 A 413 : 26 Cr LJ 551 ; *Gansa Oragon* v. *E.*, 2 P 517 : 73 IC 561 : 1923 P 550 : 24 Cr. LJ 641, per Mullick J.

tive evidence, i.e., as evidence of the facts mentioned therein.[1] By itself the report would only prove that a certain person made the statement contained in it.[2] The Oudh Court has held a first information report to be admissible in evidence under section 3, even if the informant be alive and not called as a witness.[3] This view obviously runs counter to the generally accepted view that a first information report is admissible only for the purpose of corroborating or contradicting the testimony of the informant. See notes to sections 145 and 157.

Relevancy of Police Report of election meeting.—The first part of section 35, says that an entry in an public record stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty is relevant evidence. Quite clearly the report of a Police Officer deputed to cover election meetings is made by a public servant in the discharge of his official duties. Hence when the issue before the Court hearing an election petition under the Representation of the People Act is whether the returned candidate had arranged certain election meetings on certain dates for the purpose of finding out whether he had incurred expenditure more than the prescribed limit, the police reports regarding the meetings are extremely relevant. They come within the ambit of the first part of section 35.[4]

Proof of Electoral Roll.—The electoral roll prepared under the Representation of the People Act is admissible in evidence without the author thereof and the person supplying the information being examined in the case. When the electoral roll is produced before the Court by virtue of section 81 read with section 4 of the Evidence Act, the Court shall regard the fact entered in the electoral roll as proved unless and until it is disproved.[5]

Evidentiary value of voter's list.—There is no evidence to show that at whose instance the father's name of the voter was mentioned. The person preparing the voters' list is not examined. Hence no reliance can be placed on the voters list affecting the proof of relationship claimed in the voters list.[6]

Entries in Crime Note Book.—Where there is an official duty cast upon any officer to make an entry in his register, such entries are admissible under section 35. The village Crime Note Book is one of the registers which are prescribed for a station house under the Police Manual. Therefore, entries in it are admissible to prove that certain crimes were reported and registered, but of course they are no proof against persons named as suspects in them.[7]

Entries in the book prescribed under section 154 Cr.P.C. may be relevant under this section. But a report made to a Magistrate, as provided under section 157 Cr.P.C. is not relevant under this section, being a report, though it may be a public document.[8]

War Diaries.—Under section 35 of the Act, the documents admissible are not only public documents, but also records of official acts. The War Diaries were records of

1. *Babu* v. *Government of Mysore*, 11 Mys. LJ 475 ; *Chittar Singh* v. *E.*, 47 A 280 : 81 IC 650 : 1925 A 303 : 26 Cr. LJ 554 ; *Ganga Oragon* v. *E.*, 2 P 517 : 73 IC 561 : 1923 P 550 : 24 Cr. LJ 641.
2. *Mohan Singh* v. *E.*, 85 IC 647 : 1925 A 413 : 26 Cr. LJ 551.
3. *Abheraj Singh* v.*Gaya Singh*, 135 IC 387 : 1932 O 137.
4. *J.C. Purushothama Reddiar* v. *S.Perumal*, (1972) 1 SCJ 469 : (1972) 2 SCR 646 : Followed in *State of Bihar* v. *Radha Krishna Singh*, 1983 SC 684, (Paras 38 and 39).
5. *Kirtan Sahu* v. *Thakur Sahu*, 1972 (1) CWR 57 : 38 Cut LT 82.
6. *Paramananda Sahu* v. *Babu Sahu*, (1970) 36 CLT 1211.
7. *Amdumiyan Gulzar* v. *E.*, ILR 1937 N 315 : 1937 N 17 : 166 IC 582 & 587 : 38 Cr LJ 237 & 251.
8. *Hasan Abdulla* v. *State of Gujarat*, 1962 Guj LR 107.

official acts and in fact, there was specific evidence of witnesses that these were required to be maintained under the rules applicable to the units of the army which maintained these diaries. The diaries were further proved by the evidence of the persons who wrote them and of the persons who dictated the entries recorded in them. There was, therefore, no error in admitting these diaries in evidence.[1]

Recovery list — A recovery list prepared by the police under Section 103, Cr.P. Code, is an official document properly admissible under Section 35 of the Evidence Act. But if it contains any inadmissible confession, the part containing such inadmissible matter must be excluded.[2]

Public record of a relevant statement is admissible — The statement of a Court that a person admitted the claim of another person in a case pending before it is relevant, inasmuch as the statement forms part of the record.[3] A recital in a public record as to a statement made by a public servant with reference to a particular grant by the Government may be admitted, under Section 35 of the Evidence Act, as proving that the public servant made the statement that he is stated to have made, if the fact he made such a statement is a relevant fact.[4] When original notification or order issued by the Government is not traceable and has been lost the statement in the Order and Rules published under the authority of the Government, being a record made by a public servant in the discharge of his official duty, can be admitted in evidence and relied upon.[5]

District Gazetteers — A District Gazetteer, even in not admissible under section 35 may be read for what it is worth;[6] but is not substitute for a family pedigree.[7]

Gazette of Bombay Presidency, Vol. III. (1879) admissible in evidence, read with section 81.[8]

Meteorological records — Records kept by the weather bureau or signal service or by public officers who are required to keep such records as part of their official duty, are admissible in evidence as to the condition of the weather at a certain time and place, as they come within the rule which admits in evidence officers registers or records kept by persons in public offices, in which they are required, either by statue or the nature of their office, to write down particular transactions occurring in the course of their public duties or under their personal supervision.[9]

Correspondence and copies of correspondence—Copies of actual letters made in registers of official correspondence kept for reference and record and admissible in evidence under Section 35 and are entitled to great consideration.[10] The section is,

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1 *Bakshish Singh* v. *State of Punjab*, 1967 All Cr R 79.
2 *Baloch Pirwali* v. *E*, 144 IC 772; 1933 S 220: 34 Cr LJ 848; *Mahfuz Ali* v. *State*, 1953 A 110; 1953 Cr LJ 340; 1953 ALJ 193.
3 *Subbarya Chettiar* v. *Sellamuthu Asari*, 142 IC 548: 1933 M 184; *Rudra Pratap Narain Singh* v. *Nirman Prasad Singh*, 74 IC 225: 1923 O 61; but see *Tripurana Seethapati Rao Dora* v. *Rokhman Venkanna Dora*, 45 M 332; 66 IC 280: 1922 M 71 (FB).
4 *Sankaracharya Swamigal* v. *Mangal Saravana Mudaliar*, 51 IC 876.
5 *Amir Khan* v. *State*, 1950 A 423: 51 Cr LJ 1144: 1950 ALJ 407.
6 *Jogesh Chandra Roy* v. *Makbul Ali*, 47 C 979; 60 IC 984; 1921 C 474; *Kali Prasanna* v. *Nagendra Nath*, 44 CWN 873.
7 *Balmukund* v. *Biswas Nath Singh*, 52 IC 851.
8 *Bala Shankar Maha Shanker* v. *Charity Commissioner*, 1995 Supp (1) SCC 485, para 22: AIR 1995 SC 167.
9 10 RCL 1129.
10 *Navneetha Krishna Thevar* v. *Ramasami Pundia Thalavar*, 40 M 871: 39 IC 263; see also *Sevugan Chettiar* v. *Zamindar of Sivganga*, 1939 MWN 841: 1940 M 273; *Public Prosecutor* v. *Sadagopan*.

however, not applicable to ordinary correspondence conducted by officials, as the entry must be in something which is a book, register or record.[1] A letter of the Government of India, in which anaesthesine is included in the list of recognised preparations of cocaine, is not admissible in evidence.[2] Documents consisting of mere opinions expressed in secretariat correspondence which passed between various officers of the Government who had held no personal inquiries in the matter are inadmissible in evidence.[3]

Instances of other entries held admissible under the section.—An entry made by a Muhammedan Registrar of Marriage, under Act I of 1876, that the wife might under certain circumstances divorce here husband is admissible.[4] An entry in a register of previous convictions is admissible evidence of a previous conviction.[5] An entry in a register of civil suits that a suit was disposed of in a particular manner is admissible.[6] An entry made in a certified copy as to the date on which the copy was applied for and the date on which it was completed is relevant, but not a departmental report by the copyist to his superior.[7] Copies of letters made in registers of official correspondence kept for the purpose are admissible.[8] *Katardhar* papers drawn up under the Punjab Land Preservation Act are public documents, certified copies of which are admissible.[9] Entries in a register made, under Bengal Act VII of 1875, by the Collector, are entries made in an official register kept by a public servant under the provisions of a statute, and certified copies of such entries are admissible in evidence for what they are worth.[10] A statement of a *kanungo* recorded by a Settlement Officer in the discharge of his official duty is admissible in evidence under section 35 of the Evidence Act.[11] Entries in village Crime Note Book are admissible under this section though they are no proof against persons named as suspects in them.[12] An entry in the register of powers-of-attorney maintained by the Registering Officer under the Registration Act is relevant under section 35 to prove the contents of the power-of-attorney and may be presumed to be correct in accordance with the usual presumption that official acts have been regularly performed.[13] An endorsement by the Sub-Register showing that the executant presented the document for registration and acknowledged its execution is relevant under this section.[14] Entries in public records consequent upon a decree are relevant

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1953 M 785 : 1953 Cr LJ 1429 : 1953, 1 MLJ 636 : 1953 MWN 291, but see *Biswabhuson Naik* v. *State*, 1952 Orissa 289 : 1952 Cr LJ 1533.

1. *Matusri Jijoyamba Bal* v. *Vengalakshmi Amnal*, 5 IC 827 : 5 PR 1910 Cr. : *Ghulam Mohammad Khan* v. *Samundar Khan*, 1936 L 37 : 165 IC 625 ; *Keolapati* v. *Raja Amar Krishna Narain Singh*, 1939 PC 249.
2. *Bishan Dass* v. *E.*, 42 IC 16 : 18 Cr LJ 964.
3. *Ghulam Mohammad Khan* v. *Samundar Khan*, 1936 L 37 : 165 IC 625.
4. *Khadem Ali* v. *Tajimunnissa*, 10 C 607.
5. *Maung Tha Zan* v. *E.*, 52 IC 923 : 19 Cr LJ 11.
6. So assumed in *Sarat Chandra Das* v. *Sarajini Rudraja*, 79 IC 257 : 1924 C 135 : See also *Basanta Kumari Dasi* v. *Janamendra Nath Ghose*, 1940 C 589 ; *Gokulanand* v. *Baldev Narain Singh*, 86 IC 681 : 1924 P 769 ; *Hiralal Ranchhoddas* v. *Secretary of State*, 134 IC 721 : 1931 B 436.
7. *Nizam Din* v. *Mahammad Iqbal*, 108 IC 619 : 1928 L 64
8. *Navaneetha Krishna Thevar* v. *Ramasami Pandia Thalavar*, 40 M 871 : 39 IC 263 ; *Public Prosecutor* v. *G. Sadagopan*, 1953 M 785 : 1953 1 MLJ 636.
9. *Shamasuddin* v. *Ganesh Gir*, 117 IC 80 : 1929 L 328.
10. *Shashi Bhooshun Bose* v. *Girish Chunder Mitter*, 20 C 940 ; *Shyama Sundari Dasya* v. *Mahomed Zarip*, 3 IC 693 : 9 CLJ 91 ; but see *Saraswati Dasi* v. *Dhanpat Singh*, 9 C 431.
11. *Lal Harihar Pratap Bakhsh Singh* v. *Bisheshwar Bakhsh Singh*, 3 Luck. 326 : 109 IC 422 : 1928 O 307.
12. *Amdumiyan Guijar Patel* v. *Opposite Party*, 1937 N 17.
13. *Pattu Kumari* v. *Nirmal Kumar*, 43 CWN 907 : 1939 C 569 : 185 IC 691.
14. *Ganpatrao* v. *Nagorao*, 1910 N 382 : 193 IC 41 ; *Fateh Mohammad* v. *Ghosia Bibi*, 1953 Ajmer, 19.

under this section.[1] An entry in an order sheet as to the service of a notice is admissible.[2] The irrigation map and the *khasras* prepared by the canal department are admissible in proof of possession.[3] A pedigree contained in an estate note-book prepared under the Court of Wards Manual is an official document prepared by public authority in pursuance of statutory authority and is evidence of fact stated therein even if it does not show the source, on which its compiler based his findings.[4] Entries of vaccination in the Vaccination Report are relevant and their certified copies are admissible.[5]

Mutation entries.—There is no presumption of correctness attached to a mutation as to the date of the death of the last holder.[6]

Evidentiary value of mutation order based on untrue evidence.—The decision of the Naib Tahsildar in a mutation proceeding even as a piece of evidence has little evidentiary value when it is founded on a material piece of evidence which is untrue. The decision in appeal of the Deputy Commissioner suffers from the infirmity.[7]

Report of Court of Enquiry on accident to aircraft.—The report of a Court of Enquiry on accident to aircraft by crash while navigating, is an official report of a formal investigation by a Court under Rule 75 of the Aircraft Rules. The investigation is to be conducted by an authority who is designated in the statute and/or rule as a Court. Though designated as a Court, the Court of Enquiry is not a Civil Court which can deliver judgments and pass a decree. Such a report is not admissible as a judgment under sections 40, 41 and 42 of the Act, but is admissible under this section. The report is, however, entitled to adequate weight and its findings, as to matters of fact, cannot be rejected or set aside unless sufficient acceptable evidence is tendered before the Court hearing the suit to indicate the contrary findings.[8]

The report of the Court of Enquiry cannot be regarded as an entry in a public or official book, register or record within the meaning of this section. Yet this enquiry is a formal and statutory enquiry under section 7 of the Aircraft Act, 1934, read with the rule 75 of the Aircraft Rules. It is not a private enquiry. The report is a relevant fact under section 5 of the Act, because it bears on the question of the existence or non-existence of every fact in issue and of such other facts which are regarded as relevant under this Act. This report is also a fact which speaks of the occasion, cause or effect or facts in issue under section 7 of the Act. The report is also admissible as a fact under section 9 of the Act, because it is a fact necessary to explain or introduce a fact in issue or relevant fact, or which supports or rebuts an inference suggested by a fact in issue or relevant fact, or fixes the time and place at which any fact in issue or relevant fact happened. For these reasons the report of the Court of Enquiry on the accident is a relevant fact and as such is admissible. The report is a printed report and published by the Government under Rules 75 of the Indian Aircraft Rules. The report bears all the authentic marks of the official recognition. Therefore, under section 81 of the Act the

1. *Kesho Prasad Singh* v. *Bahuria*, 16 P 258 : 1937 PC 69 : 167 IC 329.
2. *Gaibandha Loan Office, Ltd.* v. *Saiyadunnessa Khatun*, 1943 C 114 : ILR (1943) IC 22 : 76 CLJ 17 ; *Aswini Kumar Das Gupta* v. *Karamat Ali Khan*, 1948 C 165 : 82 CLJ 278.
3. *Raja Mohan Bikram Shah* v. *Deonarain Mahto*, 1945 P 458.
4. *Kuar Shah Pratap Singh* v. *Collector of Etawah*, 1946 PC 103.
5. *Manikra Jairamji* v. *Deorao Baliram*, 1955 N 290.
6. *Dalpat Singh* v. *Rajwant Singh*, 1954 Punj. 33.
7. *Dayaram* v. *Dawalatshah*, 1971 SCJ (2) 431.
8. *Madhuri* v. *I.A. Corporation*, AIR 1962 C 544.

Court is bound to presume the genuineness of this report. Therefore, the report is both relevant and admissible, but the evidence tendered before the Court of Enquiry is not necessarily evidence.[1]

Entries held inadmissible under the section.—Entries in *teiskhana* registers are not relevant under this section, as the *patwari* who makes them is not a public servant.[2] Neither a register of *chaukidari chakran* lands,[3] nor a return filed by a *zamindar* in the Collector's office under section 48 of Bengal Regulation VIII of 1793 and section 15(8) of Bengal Regulation VII of 1793,[4] is admissible under this section. *Rasabandi* or *chaukidara* papers are not prepared by a public servant in the discharge of his official duty and are, therefore, inadmissible under section 35.[5] A *hissawari* prepared in consequence of a demand made by the Collector under section 30 of the Bengal Land Regulation Act is not a public or other official book, register or record, and is inadmissible under section 35. It is merely the record of information supplied by some of the sharers in an estate and can only be admitted in evidence if it is proved to have been made by the person or persons by whom it is signed.[6] Absence of entry of a tenure in a writ of attachment prepared by the Collector who had no duty cast upon him to prepare a record of all the tenures in existence is not relevant.[7] Certified copies of *fard hissa kashi baghat* of the first regular settlement are admissible.[8] Section 35 is inapplicable to depositions made by witnesses in an inquiry by a Revenue Officer to ascertain the heirs of a deceased proprietor.[9] In the absence of all evidence to show how and by whom a register of houses was prepared, it cannot be treated as a public document, even though it is maintained in the record room of the Collector of the district.[10] A certificate by the Manchester Chamber of Commerce certifying the existence of a coal strike,[11] or a certificate by a doctor as to the age of a private patient,[12] does not fall within the terms of this section. Secretariat notes do not come within the scope of section 35 of the Act. A note recorded on a file that sanction for prosecution has been accorded is not admissible.[13]

The entry in the *roznama* cannot be said to be a judicial order, as the *roznama* merely records as to what happened on the day on which the suit was fixed for hearing.[14]

Municipal Act.—Under Section 136 of the Calcutta Municipal Act the authority is limited to inspection, survey and measurement and does not authorise the making of any entry. If the making of such an entry is neither authorised nor required by statute, it

1. *Indian Airlines Corporation* v. *Madhuri*, AIR 1965 C 252.
2. *Samar Dusadh* v. *Juggul Kishore Singh*, 23 C 366 ; *Baij Nath Singh* v. *Sukhu Mahton*, 18 C 534.
3. *Sheonandan Singh* v. *Jeonandan Dusadh*, 1 IC 376 : 13 CWN 71.
4. *Tarak Chandra Chakravarty* v. *Prosanna Kumar Saha*, 78 IC 719 : 1924 C 654.
5. *Thakar Singh* v. *Ghanaya Singh*, 94 IC 125 : 1926 L 452.
6. *Thana Singh* v. *Bandhu Singh*, 59 IC 8.
7. *Tara Kumar Ghose* v. *Kumar Arun Chandra Singh*, 74 IC 383 : 1923 C 261.
8. *Lachhman* v. *Satrohan Singh*, 38 IC 67.
9. *Bayava Siddappa Desai* v. *Parvaleva Basavaneppa Bellad*, 144 IC 442 : 1933 B 126.
10. *Mahtab Din* v. *Kasar Singh*, 107 IC 618 : 1928 L 640.
11. *Girdhardas Coorji* v. *Kerawala Karsandas & Co.*, 93 IC 622 : 1926 B 258.
12. *Venkata Rangappa Naicken* v. *Subbaraya Goundan*, 33 IC 142.
13. *Biswabhusan Naik* v. *State*, 152 Orissa 289 : 1952 Cr LJ 1533 ; but see *Public Prosecutor* v. *G. Sadagopan*, 1953 N 785 : 1953 Cr LJ 1429.
14. *Krishnaji Ramchandra* v. *Raghunath Shankar*, 1954 B 125.

cannot be said that the officer made the entries in discharge of his official duty.[1]

Recitals of boundaries of land in a sale certificate.–Recitals of boundaries in a sale certificate relating to adjoining lands cannot be admitted in evidence to prove the facts recited therein as to the lands lying on the boundaries, as a sale certificate is not a public or other official book, register or record.[2] See also notes to section 32 (3) and 13.

Sections 35 and 77.–A certified copy of an extract from the register of births maintained by the Municipal Committee under by-laws framed under section 188(c) of the Punjab Municipal Act must be regarded as the record of official acts performed by public servants in the discharge of their official duties and is admissible under section 35 of the Evidence Act without proof under section 77 of the Evidence Act.[3]

Facts contained in Judgment not Inter partes are not admissible under Sections 40 to 43.–The Act does not make a finding on fact arrived at on the evidence before the Court in one case evidence of that fact in another case. A judgment not *inter partes*, which is not admissible under sections 40 to 43 of the Act, does not become relevant, merely because it contains a statement as to a fact which is in issue or relevant in the suit and to such a judgment this section has no application. Where a judgment is neither in rem, nor relates to matters of a public nature, nor is one between the parties to a subsequent suit, the fact that the Court by that judgment decides a point in a particular way is not relevant for the purpose of the decision of the same point in the subsequent suit. Therefore, the statement of a relevant fact in a previous judgment, not *inter partes*, is not admissible under section 35.[4]

Commissioner's Report.–Report of a Commissioner dying after filing his report is admissible in evidence under the provision of section 35.[5]

36. Relevancy of statements in maps, charts and plans.–Statements of facts in issue or relevant facts, made in published maps or charts generally offered for public sale, or in maps or plans made under the authority of [6][the Central Government or any [7](State) Government] as to matters usually represented or stated in such maps, charts or plans, are themselves relevant facts.

COMMENTARY

Maps, charts and plans.–Section 35 deals with pubic records, and section 36 with classes of public documents namely, maps, charts and plans.[8]

Published maps or charts generally offered for public sale.–This section deals

1. *Jitendra Nath* v. *Makhan*, (1957) 61 CWN 175.
2. *Ambika Charan Kundu* v. *Kumud Mohan Choudhury*, 110 IC 521 : 1928 C 893.
3. *Sham Lal* v.*Muni Lal*, (1972) 74 PLR 67.
4. *Khedia* v.*Turia*, 1962 BLJR 323 .
5. *Luxmi Narayan* v. *State Bank of India*, AIR, 1969 Pat 385.
6. The word "Government" originally used in the section was substituted by the words "any Government in British India" by the Government of India (Adaptation of Indian Laws) Order, 1937. These words were substituted by the words "the Central Government of any Provincial Government", by the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948. The word "State" was substituted for the word "Provincial" by the Adaptation of Laws Order. 1950.
7. *Subs.* by the A.O. 1950 for "Provincial."
8. *Tarini Charan Sarkar* v. *Fakarannissa Chaudhurani*, 15 IC 459.

with two kinds of maps, (i) or charts generally offered for public sale, and (ii) maps or plans made under authority of Government. The admissibility of the first kind depends on grounds similar to those on which a Judge may refer to a dictionary for the meaning of a word or to a historical work for information on matters of public history.[1] The publication being accessible to the whole community and open to the criticism of all, the probabilities are in favour of any inaccuracy being challenged and exposed.[2] Where the sale of copies of maps printed by Government is stopped and a copy is sold to a party by a mistake, the copy is admissible in evidence.[3] Published maps generally offered for public sale are admissible to show the relative position of towns, countries and other matters of geographical notoriety. In *R* v. *Orton*,[4] maps of Australia were received to show the situation of various places at which the defendant was alleged to have lived; in *R.* v. *Jameson*[5] standard maps of Rhodesia and the Transvasal were admitted to show the general position of the places referred to; in *Edmondson* v. *Amery*,[6] War Office maps were admitted to show the position of various places in South Africa;[7] and in *Prahlad Sen* v.*Rajendra Kishore Singh*,[8] the Privy Council referred to "good general map of India."

Maps and plans made under the authority of Government must have been made for a public purpose.—Maps and plans made under the authority of Government are relevant and are, under section 83, presumed to be correct,[9] provided they were made for a public[10] and not for a private purpose.[11] A map made by Government for a particular purpose which is not a public purpose, e.g., for the settlement of the silted bed of a river, is not admissible under this section; nor is there may presumption or to the accuracy of such a map under section 83 of the Act.[12]

Map not an official map-Admissible only on proof that it was generally offered for public sale.—The question about the admissibility of the map has to be considered in the light of section 36. The map in question is not one made under the authority of the Central Government or any State Government; and so, before it is treated as relevant; it must be shown that it was generally offered for public sale. Without proof of the fact that the maps of the kind were generally offered for public sale, the map in question would be irrelevant.[13]

Superimposed maps.—Superimposed maps and plans may be relied on if they are brought to the same scale.[14]

Plan made by a Commissioner.—A plan prepared by a Commissioner in a suit,

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1. *See* Section 57.
2. Field, Ev., 8th Ed., 240.
3. *Gadadhar* v. *Sarat Chandra*, 1941 C 193 : 195 IC 412 : 44 CWN 935 ; 72 CLJ 320.
4. *See* Steph, Dig, Art. 35.
5. Trial at Bar, 1896 QB July 21 ; Official Rep. 91-5.
6. Times, Jan. 28, 31, 1911.
7. Phipson, Ev., 7th Ed., 367.
8. 2 BLR 111 (PC).
9. *Ram Chandar* v. *Ali Muhammad*, 35 A 197 : 18 IC 797.
10. *Tarini Charan Sarkar* v. *Fakarannissa Chowdhurani*, 15 IC 459 : *Kanto Prasad Hazari* v. *Jagat Chandra Dutta*, 23 C 335.
11. *Rahmatulla Khan* v. *Secretary of State*, 63 PR 1918 : 18 IC 792 ; 113 PLR 1918.
12. *Kanto Prasad Hazari* v. *Jagat Chandra Dutt*, 23 C 335.
13. *Ram Kishore Sen* v. *Union of India*, AIR 1966 SC 644.
14. *State of Andhra Pradesh* v. *P.V.Raju*, 1959 Andhra LT 305.

even if not an integral part of the trial and appellate judgments is nevertheless admissible to render those judgments intelligible.[1]

Proof of maps and plans.—The Court shall presume that maps or plans purporting to be made by the authority of Government were so made and are accurate; but maps or plans made for the purpose of any cause must be proved to be accurate.[2]

Survey maps.—Maps and surveys in India for revenue purposes are official documents prepared by competent persons and with such publicity and notice to persons concerned as to be admissible in evidence and to be valuable evidence of the state of things at the time they were made.[3]The survey officer is required to seek the co-operation of the parties inserted in the measurement and, therefore, it is reasonable to presume that the parties were present at, and had notice of, the survey proceeding,[4] and if there is an entry in the map that it was prepared in the presence of the parties or their representatives, the entry as admissible[5] and evidence of the fact that it was so prepared. A cadastral survey map is properly judicially receivable in evidence[6] and is presumed to be correct unless shown to the contrary.[7] There is no provision of law which makes a survey map inadmissible in evidence without the field-book. The failure to produce the field-book affects the weight to be attached to the map and not its admissibility.[8] A map prepared by a Municipality under the Calcutta Survey Act is prepared under the authority of Government and a presumption of correctness attaches to it under Section 83.[9]

Survey maps are good but not conclusive evidence of possession; presumption as to their accuracy.—Primarily a survey map is evidence of possession[10] at the time at which the survey was made.[11] The map is not, however, conclusive and may be shown to be wrong, but in the absence of evidence to the contrary, it may be properly and judicially received in evidence as correct.[12] There is a *prima facie* presumption in

1. *Joseph* v. *Makkaru*,ILR 1960 Ker 7.
2. Section 83 ; *Kesho Prasad Singh* v. *Bahuria*, 16 P 258 : 1937 PC 69 : 167 IC 329.
3. *Sitanath Saha* v. *Manoranjan Roy*, 1939 C 148 ; *Debendra Nath Bagchi* v. *Surendra Nath Sur*, 102 IC 370 : 1927 C 345 ; *Mazharul Ekbal* v. *Gopal Lal Ray Bahadur*,'84 IC 488 : 1924 P 719 : *Kali Prosanna Bhaduri* v. *Rani Hemanta Kumari Debi*, 79 IC 1038 : 1924 C 977 ; *Bibi Wakilan* v. *Deo Nandan Prosad*, 59 IC 298 : 1921 P 268 ; *Secretary of State* v. *Radha Kishore Manikiay Bahadur*, 44 C 328 : 43 IA 303 ; 38 IC 379 : 1916 PC 141 ; *Vadakhiniyedath Kirnagat Sankaran Nambudripad* v. *Nilombur Thacharakanil Manavikraman*, 10 IC 653 ; *Jagandra Nath Roy* v. *Secretary of State for India*, 30 C 291 : 30 IA 44 (PC).
4. *Nuzirul Haq* v. *Abdul Wahab Khan*, 1 P 65 : 1922 P 58 ; see also *Ramunandan Sahay* v. *Jaogovind Pandey*, 2 P 839 : 75 IC 955 : 1924 P 213 ; *Nobo Commar Dass* v. *Gobind Chunder Roy*, 9 CLR 305.
5. *Bidhumukhi Dasi* v. *Jitendra Nath Roy*, 1 C 442 : 10 CLR 527.
6. *Mazharul Ekbal* v. *Gopal Lal Rai Bahadur*, 84 IC 488 : 1924 P 719 : *Muhammad Guran Choukidar* v. *Basarat Ali*, 55 IC 645.
7. *Mohammad Guran Chaukidar* v. *Basarat Ali*, 55 IC 645 ; see also *Brindaban Prasad* v. *Gopal Saran Narain Singh*, 104 IC 514 : 1928 P 36.
8. *Shashi Bhusan Banerji* v. *Ramjas Agarwala*, 3 P 85 : 1 C 205 : 1924 P 402.
9. *Jagan Koeri* v.*Chairman of the Gaya Municipality*, 1937 P 567 : 171 IC 732.
10. *Debendra Nath Bagchi* v. *Surendra Nath Sur*, 102 IC 370 : 1927 C 345 ; *Ramanandan Sahay* v. *Jaogovind Pandey*, 2 P 839 : 75 IC 955 : 1924 P 213 : *Nazirul Haq* v. *Abdul Wahab Khan*, 1 P 65 : 64 IC 326 : 1922 P 58 ; *Syam Lal Sahu* v. *Luchmah Chowdhury*, 15 C 353 ; *Joytara Dassee* v. *Mahomed Mobaruck*, 8 C 975 ; *Mohesh Chander Sen* v. *Juggut Chunder Sen*, 5 C 212.
11. *Bibi Wakilan* v. *Deo Nandan Prosad*, 59 IC 298 : 1921 P 268 ; *Syam Lal Sahu* v. *Lachman Chowdhury*, 15 C 353.
12. *Kali Prosanna Bhaduri* v.*Rani Hemanta Kumari Debi*, 79 IC 1038 : 1924 C 977 ; *Ramanandan Sahay* v. *Jaogovind Pandey*, 2 P 839 ; 75 IC 955 : 1924 P 213 ; *Taramoni Chaudhrani* v. *Gopal Das Chaudhury*, 65 IC 182 ; *Bibi Wakilan* v. *Deo Nandan Prosad*, 59 IC 298 : 1921 P 268 ; *Maung Thin* v. *Ma Zi Zan*, 44 IC 247 ; *Secretary of State* v. *Radha Kishore Manikya Bahadur*, 44 C 328 : 43 IA 303 : 38 IC 379 : 1916

favour of the accuracy of survey maps and it is for the party who impugns their accuracy to prove his case.[1] The map may be shown to be incorrect by the admissions of the parties, of adjudication by a Court, or by evidence, intrinsic or extrinsic to the map in question.[2] The fact of a later survey map having been prepared does not affect the presumption of accuracy of an earlier superseded map.[3] But unless it can be proved that the person against whom a survey map is attempted to be used expressly consented to the delineation or admitted the correctness of the map, he is not bound by it.[4] If, however, the parties consent to be bound to regard the boundary lines as laid by the survey authorities as conclusive, they cannot afterwards question the correctness of the same.[5]

Factors governing the evidentiary value of survey maps.—The weight to be attached to survey maps is in direct ratio to the opportunities which existed of objecting to the demarcation made by the survey officer. If objections were made and disallowed the map would be the best evidence in cases of boundary disputes. If objection was made to one part of a boundary line and not to another, acquiescence in the later must be presumed, and it would also afford cogent evidence of an admission of the correctness of the boundary or of the statement as to that part.[6]

Survey maps, whether evidence of title?—A survey map is not direct evidence of title in the same way as a decree in a disputed cause is evidence of title,[7] for the survey officers have no jurisdiction to inquire into or decide questions of title.[8] A survey map merely demarcates the boundaries of the various estates and ascertains the areas comprised therein.[9] and even if it shows a person to be the proprietor of an estate, it exceeds its scope and is not thereby rendered direct evidence of title.[10] but a survey map is undoubtedly good evidence of possession, and evidence of possession is evidence of title.[11] A survey map is cogent evidence and may alone be the foundation of a decree declaring title, if the evidence afforded by it is not rebutted.[12] In each case it must be

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PC 141 ; *Mirza Shamsher Bahadur* v. *Munshi Kunj Behari*, 12 CWN 273 ; *Jagadindra Nath Roy* v. *Secretary of State for India*, 30 C 291 : 30 IA 44 (PC); see also *Mazharul Ekbal* v. *Gopal Lal Ray Bahadur*, 84 IC 488 : 1924 P 719 ; *Kumar Kamakhya Narain Singh* v. *Abhiman Singh*, 13 P 589 : 150 IC 807 : 1934 PC 182.

1. See *Tarakdas Acharjee Choudhury* v. *Secretary of State*, 1935 PC 125 : 156 IC 548 ; *Muhammad Habibuddin* v. *Muhammad Waezul Haq*, 1933 P 555 (2) ; *Baijnath Jugalkishore* v. *Manindra Chandra Nandi*, 133 IC 453 : 1931 P 436.
2. *Taramoni Chaudhurani* v. *Gopal Das Chaudhury*, 65 IC 182.
3. *Joggessur Singh* v. *Bycunt Nath Dutt*, 5 C 822.
4. *Krishto Moni Gupta* v. *The Secretary of State for India*, 3 CWN 99.
5. *Raghunath Prasad Singh* v. *Rameshwar Singh*, 1922 P 87.
6. *Dunne* v. *Dharani Kanta Lahiri*, 35 C 621.
7. *Debendra Nath Bagchi* v. *Surendra Nath Sur*, 102 IC 370 ; 1927 C 345 ; *Nobo Coomar Dass* v. *Gobind Chunder Roy*, 9 CLR 305 ; *See also Anug Hla* v. *Ton Gyi*, 35 IC 432.
8. *Nazirul Haq* v. *Abdul Wahab Khan*,. 1 P 65 ; 64 IC 326 ; 1922 P 58 ; *Nobo Coomar Dass* v. *Gobind Chunder Roy*, 9 CLR 305.
9. *Ramanandan Shay* v. *Jaogovind Pandey*, 2 P 839 ; 75 IC 955 ; 1924 P 213. *See* also *Nazirul Haq* v. *Abdul Wahab Khan*, 1 P 65 ; 64 IC 326 ; 1922 P 58.
10. *Ramanandan Shay* v. *Jaogovind Pandey*, 2 P 839 ; 75 IC 955 ; 1924 P 213.
11. *Radha Kishun* v. *Shyam Das*, 13 P 51 ; 149 IC 1095 ; 1933 P 671 L ; *Brindraban Prasad* v. *Gopal Saran narayan Singh*, 104 IC 514 ; 1928 P 36 ; *Debendra Nath Bagchi* v. *Surendra Nath Sur*, 102 IC 370 ; 1927 C 345 ; *Nazirul Haq* v. *Abdul Wahab Khan*, 1 P 65 ; 64 IC 326 ; 1922 P 58 ; *Satcowri Ghosh Mondal* v. *Secretary of State*, 22 C 252 ; *Syam Lal Sahu* v. *Lachman Chowdhury*, 15 C 353 ; *see also Syama Sunderi Dassya* v. *Jogubundhu Sootar*, 16 C 1186.
12. *Dunne* v. *Dharani Kanta Lahiri*, 35 C 621.

decided upon the circumstances whether the map raises a reasonable presumption of title.[1] In general, where the question is simply one of title, and the available evidence is proof of possession at a particular period, a survey map ought to be and is most cogent evidence.[2] The presumption of possession raised by a survey map is stronger in the case of culturable land than in the case of land which is unfit for cultivation.[3] A cadastral survey map is admissible and presumptive evidence even as against the landlord of the neighbouring estate.[4]

Revenue maps.—Revenue maps are relevant, but entries therein are not sufficient to establish title to the land.[5]

Chittahs and field-books.—*Chittahs* are admissible in evidence although their value is a matter to be determined by the Court in the particular circumstance of each case.[6] A *Chittah* of the revenue survey is a public record, viz . the record of public work carried out by a public servant,[7] and may therefore be admissible under section 35.[8] *Chittahs* and field-books of the survey department are the primary records out of which a survey map is made and are originally component parts of the map[9] and, on this view of the nature of *chittahs*, they would be admissible under the present section.[10] If *Chittahs* are relied upon without any account given or verification made of them, they cannot be treated as evidence of title in boundary disputes;[11] but where an account is given of the *chittahs* and they are properly introduced and verified, they become admissible.[12] But a *chittah* made by Government for their *khas mahal* is not a public document;[13] such a *chittah* is made by Government for its own private purposes and is nothing more than a document prepared for the information of the Collector and is not therefore, *per se* evidence against private persons for the purpose of proving that the lands described therein are or are not of a particular character or tenure. Neither section 83 nor section 13 is applicable to such *chittahs*.[14] *Chittahs* are not public documents if they are prepared with the object of ascertaining the lands belonging to the Government without prejudice to the rights of the owners of *bahali* shares, even if they are availed of by the Government for assessment of land revenue; but they become public documents if they are prepared for a public purpose, such as the distribution of revenue on the shares, or assessment and settlement of revenue on the share belonging to the Government.[15]

1. *Debendra Nath Bagchi* v. *Surendra Nath Sur*, 102 IC 370; 1927 C 345 ; *Ramanandan Shay* v. *Jaogovind Pandey*, 2 P 839 ; 75 IC 955 ; 1924 P 213 ; *Dunne* v. *Dharani Kanta Lahiri*, 35 C 621 ; *Syam Lal Sahu* v. *Luchman Chowdhury*, 15 C 353 ; *Nobo Coomar Dass* v. *Gobind Chunder Roy*, 9 CLR 305
2. *Mohesh Chunder Sen* v. *Juggat Chunder Sen*, 5 C 212.
3. *Radha Kishun* v. *Shyam Das*, 13 P 51 ; 149 IC 1095 ; 1933 P 671.
4. *Ibid.*
5. *Aung Hla* v. *Ton Gyi*, 35 IC 432.
6. *Surat Chandra Rakhit* v. *Sarala Bala Ghosh*, 105 IC 61 ; 1928 C 63.
7. *Mohinee Mohun Roy* v. *Mohesh Chunder Chowdhry*, 24 WR 192 ; but *see Ram Chaunder Sao* v. *Bunseedhur Naick*, 9 C 741.
8. *Ganguli* v. *Rajendra Nath Chatterjee*, 1 CWN 530.
9. *Gopeenath Singh* v. *Anundmoyee Debia*, 8 WR 167.
10. Woodroffe, Ev. 9th Ed., 400.
11. *Eckowrie Singh* v. *Heerala*, 2 BLR 4 (PC).
12. *Sudukhina* v. *Raj Mohan*, 3 BLR 381 ; 12 MIA 136 (PC) ; *See Dinomoni Chowdhrani* v. *Brojo Mohini*, 29 C 187 ; 29 IA 24 (PC) ; *Matiwor Rasuk Alikar Rasul* v. *Dhanu Molla*, 59 IC 963.
13. *Ram Chunder Sao* v. *Bunseedhur Naick*, 9 C 741 ; *See Sarat Chandra Rakhit* v. *Sarala Bala Ghosh*, 105 IC 61 ; 1928 C 63 , where the ruling in *Ram Chunder* v. *Banseedhur*, 9 C 741 , has been explained.
14. *Upendra Nath Chattopadhya* v. *Radha Govinda Bandopadhyay*, 98 IC 85 : 1927 C 199.
15. *Narendra Kishore Roy* v. *Rahima Banu*, 31 IC 695 ; 19 CWN 1015.

There is no provision of law which makes a survey map inadmissible in evidence without the field-book. The failure to produce the field-book affects the weight to be attached to the map and not its admissibility.[1] A *chittah* prepared by a *zamindar* recording the suit land as being in the possession of tenants is not admissible.[2] As to survey maps becoming admissible under Section 13 or section 21, see *Collector of Rajshahye* v. *Doorga Soonduree Debia;*[3] for the various kinds of *chittahs and* their weight and admissibility.

Topographical survey maps.—Topographical survey maps are prepaed by the survey officers acting under the authority of Government and are admissible under section 36. Section 36 does not lay down that the authority under which the maps are prepared must be authority given by statute. These maps are official documents prepared by competent person and with such publicity and notice to persons interested as to be admissible and valuable evidence of the state of things at the time they were made. They are not conclusive and may be shown to be wrong but, in the absence of anything to the contrary they may be properly judicially received in evidence as correct when made. They are good evidence of possession in cases of boundary disputes.[4]

Thakbast maps and thak khasra.—A regular survey of a district is preceded by a preliminary measurement by a *amin* who lays down on a rough map the locality, without any guarantee of scientific accuracy, and enters in a register particulars regarding the plots gathered from the people. The map is called *thakbast* map, and the register the *thak khasra*..[5] The word *'thak'* literally means a small boundary demarcation mark.[6] The *thak* survey is conducted by the Settlement Officer before the scientific work of the revenue surveyor is commenced. The Settlement Officer's duty is first to settle all boundary disputes on the spot and then demarcate on the ground the actual boundaries of villages and estates. This is done by placing *thak* marks or *dhuis* (generally large mud pillars about five feet high, although they might assume other forms) at the principal bends in the village and at all trijunction points. These marks are shown on a map which is called the *thak* map. The *thak* map is, therefore a rough sketch or, at most, an unscientifically prepared plan showing the number and approximate position of the *thak* mark or *dhuis* for the guidance of the revenue surveyor who follows after and who, after picking up and verifying the *thak* marks in the *thak* maps, prepares the revenue map by accurate observation with scientific instruments.[7] There are three kinds of *thak* maps: (i) eye sketches in which no actual measurements are made: (ii) maps in which rough magnetic bearing are used, and rough linear measurements made, and (iii) maps made from careful magnetic bearing and careful linear measurements.[8] The first two kinds of maps are not intended to be more than a rough guide to the revenue surveyor, The third class of maps is more accurate and more reliable.[9]

Presumption of accuracy of thak maps.—There is no presumption that the *thak*

1. *Shasi Bhusan Banerji* v. *Ramjas Agarwala*, 3 P 85 ; 83 IC 205 ; 1924 P 402.
2. *Abdul Khalique* v. *Sushil Chandra Chaudhri*, 39 CWN 330.
3. 2 WR 210.
4. *Gajhoo Dasar Singh* v. *Jagat Pal Singh*, 2 IC 648 ; 9 CLJ 415.
5. *Jagdeo Narain Singh* v. *Baldeo Singh*, 2 P 38 ; 49 IA 399 ; 71 IC 984 ; 1922 PC 272.
6. *Shasi Bhusan Banerji* v. *Ramjas Agarwala*, 3 P 85 ; 83 IC 205 ; 1924 P 402.
7. *Keshabji Pitamber* v. *Shashi Bhusan Banerji*, 96 IC 1027 ; 1926 P 385.
8. *Keshabji Pitamber* v. *Shashi Bhusan Banerji*, 96 IC 1027 ; 1926 P 38 ; *Shashi Bhusan Banerji* v. *Ramjas Agarwala*, 3 P 85 ; 83 IC 205 ; 1924 P 402.
9. *Keshabji Pitamber* v. *Shashi Bhusan Banerji*, 96 IC 1027 ; 1926 P 385.

maps are incorrect;[1] on the contrary, there is a *prima facie* presumption of their being correct.[2] Of course, they are not conclusive[3] and may be shown to be incorrect by the admissions of Parties of adjudication by a Court or by evidence, intrinsic or extrinsic to the map;[4] but, in the absence of any such rebutting evidence, they may be properly judicially received in evidence as correct when made.[5] Of course, *thak* maps cannot be expected to give mathematical acuracy, but only substantial accuracy.[6]

Evidentiary value of thak maps.--The value of *thak* maps depends on their accuracy.[7] It varies enormously. In the case of a *thak* map containing definite landmark and undisputed boundaries signed by the parties or their accredited agents, and representing land which has been brought under cultivation and is in the possession of the *raiyats* whose names are known or can be ascertained from the zamindari papers, a *thak* map, is very valuable evidence of possession. But the value of such a map is greatly diminished when we find that there are no natural landmarks delineated thereupon: that the land was jungle when measured, that the boundaries are not discoverable from a mere inspection of the map, and that neither the *zamindars* nor their agents have by their signatures admitted the correctness of the *thak*.[8] If a *thak* map is signed by the parties, or their agents, or if it was prepared in the presence of the parties, the map may fairly be taken to be an admission by the parties of the boundary lines between adjoining villages.[9] An entry in a *thakbast khasra* has no evidentiary value unless it is proved that the persons adversely affected thereby had notice of it and opportunity to controvert it, but knowingly acquiesced in the entry by the *amin* who prepared the *khasra* in connection with the measurement preliminary to the survey of the village.[10] The weight to be attached to such documents is in direct ratio to the opportunities which existed of objecting to the demarcation made by the officers.[11] If there is an entry in a *thak* map that it was prepared in the presence of the parties or their representatives, the entry is admissible,[12] as evidence of an admission of the correctness of the map. A *thak* map and the boundary shown in it can be relied on in preference to the Revenue survey map and the boundary ascertained by the pleader commissioner on the basis of it.[13] Notes in a *thakbast* map in respect of an irrigation right made by surveyors who had no authority to record any irrigation rights carry no presumption of correctness.[14]

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1. *Krishna Kalyani Dasi* v. *Braunfield*, 36 IC 184 ; 20 CWN 1028.
2. *Taramoni Chaudhurani* v. *Gopal Das Chaudhury*, 65 IC 182.
3. *Gokul Chanda Das, etc.* v. *Hara Sundari Dasi*, etc., 9 CWN 383 ; ;*See also Sateowri Ghosh Mandal* v. *Secretary of State*, 22 C 252.
4. *Taramoni Chaudhurani* v. *Gopal Das Chaudhury*, 65 IC 182.
5. See notes to this section under the heading "survey maps are good but not conclusive evidence of possession ; presumption as to their accuracy ".
6. *Krishna Kalyani Dasi* v. *Braunfield*, 36 IC 184 ; 20 CWN 1028.
7. *Krishna Kalyani Dasi* v. *Braunfield*, 36 IC 184 ; 20 CWN 1028.
8. *Joytara Dassee* v. *Mahomed Mobarack*, 8 C 975.
9. *Maharaja of Cooch Behar* v. *Mohendra Rajan Rai Choudhuri*, 66 IC 923 ; 1921 C 277 ; *Dunne* v. *Dharani Kanta Lahiri*, 35 C 621 ; *Kumar Raj Krishna Prasad Lal Singh Deo.* v. *Baraboni Coal Concern, Ltd.* 62 C 346 ; 1935 C 368 ; 159 IC 98.
10. *Jagdeo Narian Singh* v. *Baldeo Singh*, 2 P 38 ; 49 IA 399 ; 71 IC 984 ; 1922 PC 273 ; but see *Krishna Promada Devi* v. *Dhirendra Nath Ghosh*, 56 IA 74 ; 56 C 813 ; 1929 PC 50 ; 113 IC 465.
11. *See Dunne* v. *Dharani Kanta Lahiri*, 35 C 621.
12. *Bidhumukhi* Dasi v. *Jitendra Nath Roy*, 4 IC 442 ; 10 CLJ 527.
13. *Mantajaddin* v. *Alqm* 73 CLJ 477.
14. *Harihar Prasad Singh* v. *Janak Dular Kuer*, 1941 P 118.

Thakbast maps, whether evidence of possession and title?--*Thakbast* maps are good evidence of possession at the time the survey was made;[1] they are also some evidence of title, though not conclusive.[2] But they are not evidence of title acquired by prescription or adverse possession,[3] nor of the land being *debutter*,[4] as the officers conducting the *thakbast* operations are not required to record such matters. The *thak* map, however, affords good substantial evidence of the linear distances between the successive marking points of the boundary lines.[5]

Survey maps and thak maps, whether sufficient evidence of the fact that the land was included in the Permanent Settlement?--The onus of proving that any particular land was included in the Permanent Settlement of 1793 is on the person who affirms that such was the case.[6] and the burden of proof is not necessarily shifted by the production of the *thak* and survey maps showing that specific lands are included in a particular estate. The *thak* and survey maps are valuable evidence of the state of things at the time they were made, but it does not follow that they show conclusively what was the state of things at the time of the Permanent Settlement. it cannot be presumed as a matter of law that the state of things described in the *thak* and survey maps existed at the time of the Permanent Settlement.[7] The mere circumstance that the owner of a *taluq* had possession of a certain property at some time is not conclusive or nearly conclusive evidence of the fact that the property formed part of the *taluq* at the time of the Permanent Settlement.[8] What lands were included in the Permanent Settlement is a question of fact and not of law and it may or may not be satisfactorily proved by subsequent survey maps.[9] An entry in a *thak* map is insufficient to show that the land was in the same state at the time of the Permanent Settlement.[10] A *thak* map is evidence of the boundaries of a property at the time of the *thakbast* survey[11] and it may also be good evidence of what its boundaries were at the time of the Permanent Settlement.[12]

1. *Chattrapat Pratap Bahadur Sahi* v. *Lees*, 72 IC 648 ; 1923 P 558 ; *Satcowri Ghosh Mondal* v. *Secretary of State*, 22 C 252 ; *Jautara Dassee* v. *Mahomed Mobaruck*, 8 C 975 ; *but see Debendra Lal Khan* v. *Secretary of State*, 103 IC 13 ; 1927 C 403
2. *Satcowri Ghosh Mondal* v. *Secretary of State*, 22 C 252 ; *but see Debendra Lal Khan* v. *Secretary of State*, 103 IC 13 ; 1927 C 403 ; *Ramanandan Shay* v. *Jaogovind Pandey*, 2 P 839 ; 75 IC 955 ; 1924 P 213 ; *Barada Prasad* v. *Girindra Kumar Das*, PLD 1951 Dacca 174.
3. *Chattrapat Pratap Bahadur Sahi* v. *Lees*, 72 IC 648 ; 1923 P 558
4. *Jarao Kumar* v. *Lalomoni*, 18 C 224 ; 17 IA 145 (PC).
5. *See James Burn* v. *Achumbit Roy*, 20 WR 14.
6. *Kumar Raj Krishna Prasad Lal Singh* Deo v. *Barabani Coal Concern*, Ltd., 62 C 346 ; 1935 C 368 ; 159 IC 98 ; *Secretary of State* v. *Wazed Ali Khan Pani*, 65 IC 866 ; 1921 C 687 ; *Prafulla Nath Tagore* v. *Secretary of State*, 57 IC 29 ; 31 CLJ 320 see also *Ramanandan Shay* v. *Jaogovind Pandey*, 2 P 839 ; 75 IC 955 ; 1924 P 213.
7. *Secretary of State* v. *Upendra Narain* Roy, 71 IC 849 ; 1923 C 247 ; *Secretary of State*, v. *Wazed Ali Khan* Pani, 65 IC 866 : 1921 C 687 ; *Prafulla Nath Tagore* v. *Secretary of State*, 57 IC 29 : 31 CLJ 320 ; *Jagadindra Nath Roy* v. *Secretary of State for India*, 30 C 291 ; 30 IA 44 (PC) ; *Ananda Hari Basak* v,. *Secretary of State for India in Council*, 3 CLJ 316. For a case where such presumption was raised, see *Kumar Raj Krishna Prasad Lal Singh Deo* v. *Barabani Coal Concern, Ltd.*, 62 C 346 ; 1935 C 368 ; 159 IC 98.
8. *Mohesh Chunder Sen* v. *Juggut Chunder Sen*, 5 C 212.
9. *Sitanath Saha* v. *Monoranjan Roy*, 1939 C 148 ; *Secretary of State* v. *Wazed Ali Khan Pani*, 65 IC 866 ; 1921 C 687 ; *Ananda Hari Basak* v. *Secretary of State for India in Council*, 3 CLJ 316 ; *See Prafulla Nath Tagore* v. *Secretary of State*, 57 IC 29 ; 31 CLJ 320.
10. *Ramanandan Shay* v. *Jaogovind Pandey*, 2 P 839 ; 75 IC 955 ; 1924 P 213.
11. *Syama Sunderi Dassya* v. *Jogobundhu Sootar*, 16 C 186.
12. *Ramanandan Shay* v,. *Jaogovind Pandey*, 2 P 839 ; 75 IC 955 ; 1924 P 213.

An entry in a *thak* map that certain lands formed part of certain estate is relevant under this section and it is open to a court to hold that the same state of things existed at that time of the Permanent Settlement[1] and that the land was included in that settlement.[2] If the boundary lines of the various estates were admitted by the parties at the time of the *thakbast* survey, the map is strongest evidence that they were so at the time of the Permanent Settlement if there is nothing to show that there has been any change in the physical features of the place.[3] But *ex parte* statements in survey maps should be treated on the same footing as books of account and regarded not a primary proof, but merely as corroborative of other evidence. Where such documents relate to distant times, and direct evidence of the matter mentioned therein is no longer available, their value assumes greater proportions, and if they indicate a state of affairs which may be presumed as not unlikely to have happened they may be taken into account and acted upon with more certainty.[4]

Survey map disagree with the thakbast map.—There is no general or definite rule making it incumbent upon the Courts to follow either the survey map in preference to the *thak* map or the *thak* map in preference to the survey map.[5] As a general rule, the *thak* and the survey maps should agree. Where however, they differ, the one that more clearly agrees with the local conditions is the one which should be followed.[6] The revenue map must be accepted as showing the result for the thak survey even more accurately than the *thakbast* map.[7] and, therefore, the revenue survey map should ordinarily prevail over the *thakbast* map.[8] The rule is not, however, absolute.[9] The signature of the revenue surveyor on a *thak* map means merely that he has satisfied himself that the boundary had been correctly picked up on the ground and correctly surveyed on the revenue survey map.[10] If the revenue survey map, which was carefully and accurately prepared by the competent officers, and the *thakbast* map do not agree, it is quite impossible to rely on the *thakbast* map unless indeed the demarcation pillars put down on the ground by the *thakbast* authorities are still in existence and correspond with the boundary pillars as shown in the map or the field-book, and the materials collected by the *thakbast* authorise furnish sufficient data.[11] Where there is no satisfactory direct evidence of acts of possession on the part of either of the parties, the evidence of possession of the cadastral survey entries must prevail until it is rebutted.[12] If there is any discrepancy between the Gangetic map and later cadastral survey map, the latter must be given preference.[13]

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1. *Abdul Hamid Khan* v. *Kiran Chandra* Roy, 7 CWN 849.
2. *Fazlar Rahim* v. *Nabendra Kishore Roy*, 15 IC 341 ; 17 CWN 151 ; *See also Moizuddi Biswas* v. *Ishan Chandra Das Sarkar*, 7 IC 849 ; 13 CLJ 293.
3. *Syama Sunderi Dassya* v. *Jogobundhu Sootar*, 16 C 186.
4. *Kumar Kamakhya Narayan Singh* v. *Surendra Kaeran Deo*, 113 IC 703 ; 1928 P 284.
5. *Maharaja of Cooch Behar* v. *Mohendra Rajan Rai Chaudhuri*, 66 IC 923 ; 1921 C 277 ; *Abid Hossein Mandul* v. *Dowcurry Pal*, etc. 6 CWN 629.
6. *Maharaja of Cooch Behar* v. *Mohendra Rajan Rai Chaudhuri*, 66 IC 923 ; 1921 C 277 .
7. *Keshabji Pitamber* v. *Shashi Bhusan Banerji*, 96 IC 1027 ; 1926 P 385.
8. *Shashi Bhusan Banerji* v. *Ramjas Agarwala*, 3 P 85 ; 83 IC 205 ; 1924 P 402.
9. *Kali Prosanna Bahaduri* v. *Rani Hementa Kumari Debi*, 79 IC 1038 1924 C 977 ; *Maharaja of Cooch Behar* v. *Mohendra Rajan Rai Choudhuri*, 66 IC 923 ; 1921 C 277 ; *Mantajaddin* v. *Alam*, 73 CLJ 47.
10. *Keshabji Pitamber* v. *Shashi Bhusan Banerji*, 96 IC 1027 ; 1926 P 385 ; *Shashi Bhusan Banerji* v. *Ramjas Agarwala*, 3 P 85 ; 83 IC 205 ; 1924 P 402.
11. *Shashi Bhusan Banerji* v. *Ramjas Agarwala*, 3 P 85 ; 83 IC 205 ; 1924 P 402.
12. *Brindraban Prasad* v. *Gopal Saran Narayan Singh*, 104 IC 514 ; 1928 P 36.
13. *Radha Kishun* v. *Shyam Das*, 13 P 51 ; 1949 IC 1095 ; 1933 P 671.

Absence of entry in a survey map or thak map.—The fact that a certain rivulet is not shown in Rennel's map is no proof of the non-existence of that rivulet in Rennell's time.[1] The fact that certain land was not shown as *lakhiraj in the tak map* of 1852 is not sufficient to show that the land was the *mal land* of the *zamindar* and, therefore, liable to assessment to rent.[2]

Diara map.—The correctness or otherwise of the *diara map* can, under no circumstances, depend upon the correct location of a particular trijunction, where there is nothing to show that the *diara map* was prepared with reference to it. The presumption of correctness of the *diara map* will, in no sense, be rebutted by the mere fact that this particular trijunction has not been located.[3]

Rennell's map.—One of the purposes of the preparation of Rennell's map was the delineation of roads and waterways.[4] The map, therefore, correctly, shows the course of rivers;[5] but it does not show all the rivulets that existed at the time it was prepared.[6] The map has been used as a valuable piece of evidence in several cases.[7] and, when it is referred to as evidence, there is a presumption of its accuracy under section 83 of the Evidence Act in respect of such matters as to which it is admissible in evidence.[8]

Other maps and plans.—A *mahalwari* map is relevant under this section;[9] so is a map made for purposes of a partition which affects the public revenue.[10] A *khasra or shajra* prepared by a *patwari* who is a public servant is also admissible.[11] A *kistwari map* is admissible, and a presumption of the accuracy of physical features represented therein, or of statements as to possession contained therein, may be made.[12] Plans made under the Calcutta Survey Act are admissible as evidence of possession, and, therefore, they are of great value on questions of title.[13] A site plan prepared by an officer of a Municipal Board for the purposes of particular case amounts to an admission in favour of the Board and is no therefore relevant,[14] but printed maps prepared by Government showing different wards of a city are admissible.[15] A map made by a Deputy Collector for the purpose of the settlement of land forming the sited bed of a river is not one which is admissible in evidence under section 36; but it is a map made for a particular purpose, the accuracy of which must be proved before it can be admitted in evidence.[16] The Settlement map in respect of the area of a field is the original record of which the entry in the *khasra* is a copy in a different notation, and, in case of conflict between

1. *Benode Lal Chakravarty* v. *Secretary of State*, 133 IC 573 ; 1931 C 239.
2. *Bipradas Pal Choudhury* v. *Monorama Debi*, 45 C 574 ; 47 IC 49.
3. *Sri Gobinda Chaudhury* v. *Secretary of State*. 176 IC 341.
4. *Secretary of State* v. *Ananda Mohan Roy*, 66 IC 287 ; 34 CLJ 205.
5. *Nand Lal Roy* v. *Pramatha Nath Roy*, 143 IC 179 ; 1933 C 222 ; *Secretary of State* v. *Ananda Mohan Roy*, 66 IC 287 ; 34 CLJ 205 ; *Secretary of State* v. *Midnapore Zimindari Co.* 1941 C 520.
6. *Benode Lal Chakravarty* v. *Secretary of State*, 133 IC 573 ; 1931 C 239.
7. *See Naresh Narayan Roy* v. *Secretary* of State, 50 C 446 ; 50 IA 121 ; 77 IC 1048 ; 1923 PC 1 ; *Haradas Achariya Chowdhuri* v. *The Secretary of State*, 43 IC 361 (PC).
8. *Secretary of State* v. *Ananda Mohan Roy*, 66 IC 287 ; 34 CLJ 205.
9. *Madhabi Sundari Dassya*, etc. v. *Ganganendra Nath Tagore*, etc,, 9 CWN 111.
10. *Abdul Hamid Choudhuri* v. *Brojendra Kumar Roy Choudhury*, 90 IC 643 ; 1926 C 290.
11. *Rahmatulla Khan* v. *Secretary of State*, 63 PR 1913 ; 18 IC 799 ; 113 PLR 1913.
12. *Nazirul Haq* v. *Abdul Wahab Khan*, 1 P 65 ; 64 IC 326 ; 1922 P 58 .
13. *Debendra Nath Bagchi* v. *Surendra Nath Sur*. 102 IC 370 ; 1927 C 345.
14. *Gauri Shankar* v. *E.*, 120 IC 547 ; 1930 A 26 ; 31 Cr LJ 133.
15. *Secretary of State* v. *Chimanlal*, 1942 B 161 ; ILR 1942 B 357.
16. *Kanto Prashad Hazari* v. *Jagat Chandra Dutta*, 23 C 335.

these two as regards area, the map is more reliable than the *khasra*.[1] Where the *diara* operations extends over a very wide area and the *diara* map is not prepared with reference to any particular survey trijunction of certain *mouzahs* named the presumption of correctness of the *diara* map is in no sense rebutted by the mere fact that the particular trijunction has not been located.[2]

Section 36 and 83.–Section 36 mentions two kinds of maps, namely :—

(1) Published maps or charts generally offered for public sale, and

(2) Maps or plans made under the authority of Government.

The first kind is considered relevant, because, the publication, being accessible to the whole community and open to criticism of all, the probabilities are in favour of any inaccuracy being challenged and exposed. But the statements made in such maps or charts are merely relevent. There is no presumption as to their accuracy. On the other hand, section 83 lays down that the Court shall presume that maps or plans purporting to be made by the authority of the Central Government or any State Government were so made and are accurate, but maps or plans made for the purposes of any cause must be proved to be accurate.[3]

37. Relevancy of statement as to fact of public nature, contained in certain Acts or notifications.–When the Court has to form an opinion as to the existence of any fact of a public nature, any statement of it, made in a recital contained in any Act of Parliament [4][of the United Kingdom] or in any [5][Central Act, Provincial Act or [6][a State Act] or in a Government notification or notification by the Crown Representative appearing in the official *Gazette* or in any printed paper puporting to be the London *Gazette or the* Government *Gazette* of any Dominion, colony or possession of His Majesty is a relevant fact].

[7]X X X

COMMENTARY

Principle.–This section makes the recital of a fact of a public nature relevant, if the recital is contained either in any enactment or in a any notification appearing in any Indian Gazette, the London Gazette, or any Colonial Gazette. "These documents are admissible on grounds similar to those on which entries in public records are received. They are documents of a public character made by the authorized agents of the public

1. *Laharam* v. *Gurmukhrao*, 99 IC 628 ; 1927 N 204.
2. *Sri Gobinda Chaudhuri* v. *Secretary of State*, 1937 C 574.
3. *Ramkrishore* v. *Union of India*, AIR 1965 Cal. 282.
4. *Ins.* by the Adaptation of Laws Order, 1950.
5. The original words were "Act of the Governor General of India in Council or of the Governors in council of Madras or Bombay, or of the Lieutenent-Governor in Council of Bengal or in a notification of the Govt. appearing in the *Gazette of India*, or in the *Gazette* of any L. G or in any printed paper purporting to be the London *Gazette* or the Govt. *Gazette* of any colony or possession of the Queen is a relevant fact" This was amended first by the Repealing and Amending Act, 1914 (10 of 1914) and then by the A. O. 1937, the A.O. 1948 and the A. O. 1950 to read as above.
6. *Subs, by* Act 3 of 1951 for "an Act of the Legislature of a Part A State or a Part C State".
7. The last paragraph was rep. by Act 10 of 1914.

of the State, and the facts recorded therein are of public interest and notoriety. Moreover, as the facts stated in them are of a public nature, it would often be difficult to prove them by means of sworn witness".

Fact of a public nature.—The fact as to the existence of which opinion has to be formed must be a fact of a public interest and not one of a mere private interest. Thus, where public statutes recited that great outrages had been committed in a particular part of the country, and a public proclamation was issued, with similar recitals, and offering a reward for the discovery and conviction of the perpetrators, these recitals were held admissible and sufficient evidence of the existence of those outrages, to support the averments to that effect in an information for a libel on the Government in relation thereto. So, a recital of a state of war in the preamble of a public statute, is good evidence of its existence, and the war will be taken notice of without proof, whether this country be or be not a party to it.[1] In the case of *Queen* v. *Amir-ud-Din*,[2] the Gazette of India and the Calcutta Gazette containing official letters on the subject of hostilities between the British Government and certain Muhammadan fanatics on the Frontier, were held to have been rightly admitted in evidence under section 8 of the Repealed Act,[3] which generally corresponds to section 37 of the present Act, to prove the commencement, continuation and determination of hostilities, In the subsequent trial of the *wahabi* consecrations at Patna the Gazette was used in evidence for a similar purpose.[4] A statement made in the Gazette notification that an Act has been assented to by the President is proof of that fact.[5]

Recital of a fact of a public nature in a private Act.—In English law, a Private Act of Parliament is no evidence against strangers on the facts recited,[6] but the present section draws no distinction in this respect between private and public Acts of Parliament and makes the recital admissible whether it is contained in a private Act or in a public Act, provided the fact recited is one of a public nature.

38. Relevancy of statements as to any law contained in law books.—When the Court has to form an opinion as to a law of any country, any statement of such law contained in a book purporting to be printed or published under the authority of the Government of such country and to contain any such law, and any report of a ruling of the Courts of such country contained in a book purporting to be a report of such rulings, is relevant.

COMMENTARY

Proof of foreign law.—The law of British India requires no proof as the Courts are bound to take judicial notice of it.[7] This section, therefore, applies only when the Court

1. Taylor, § 1660.
2. 7 BLR 63.
3. Act II of 1855.
4. Field Ev., 8th Ed., 250.
5. *K. C. Gajapati Narayana Deo* v. *The State of Orissa*, 1953 Orissa, 185.
6. Taylor, § 1660.
7. Section 57.

has to form an opinion as to the law of any foreign country, which must be proved like any other disputed question of fact.

Statement of foreign law in authorized books and authorized or unauthorized reports is admissible.—If the statement of the law is contained in a book which is not a report of the rulings of a country, it must purport to be printed or published under the authority of the Government of that country and to contain the law of such country. Thus, in *Christien* v. *Delanney,*[1] a statement contained in a translation of the *Code Napoleon* as to what the French law was on a particular matter was held irrelevant, as the book had not been printed or published under the authority of the French Government. If, however, the statement is contained in a book which purports to be a report of the rulings of a country, the statement is admissible even if the book does not purport to be, and in fact is not, printed or published under the authority of the Government of such country.

The Court may take judicial notice of a publication containing a foreign law, if it is issued under the authority of the foreign Government concerned, and may accept the law as set out in such publication as a law in force in the particular foreign country at the relevant time. But such a publication cannot be evidence, that what is contained in it, is the whole law.[2]

Proof of foreign law by expert testimony.—Foreign law may be proved in India by expert testimony also.[3] In England, likewise, foreign law may be proved by expert testimony, but it cannot be proved in the manner permitted by this section, *viz.*, by the mere production of the books in which it is contained.[4]

Foreign law is provable by foreign judgment.[5]

Commercial documents.—Notwithstanding anything contained in the Indian Evidence Act, 1872, statements of facts in issue or of relevant facts made in any document included in the Schedule to Act XXX of 1939 (Commercial Documents Evidence Act) as to matters usually stated in such document shall be themselves relevant facts within the meaning of the Evidence Act.[6]

HOW MUCH OF A STATEMENT IS TO BE PROVED

[7][**39. What evidence to be given when statement forms part of a conversation, document, electronic record, book or series of letters or papers.**—When any statement of which evidence is given forms part of a longer statement, or of a conversation or part of an isolated document, or is contained in a document which forms part of a book, or is contained in part of electronic record or of a connected series of letters or papers, evidence shall be given of so much and no more of the statement, conversation, document, electronic record, book or series of letters or papers as the Court considers necessary in

1. *Christien* v. *Delanney,* 26 C 931.
2. *Kumar Jagdish Chandra Sinha* v. *Commissioner of Income-tax,* 1956 C 48.
3. Section 45.
4. *Sussex Peerage* case, 11 C & F 114-117.
5. *Suganchand Bhikam Chand* v. *Mangibai Gulabchand,* 1942 B 185; 201 IC 759 : ILR 1942 B 467.
6. For the list of such document, *see* Appendix D.
7. **Substituted by Information Technology Act, 2000 (Act 21 of 2000), S. 92 and Sch. II (w.e.f. 17-10-2000).**

that particular case to the full understanding of the nature and effect of the statement, and of the circumstances under which it was made.]

COMMENTARY

Independent parts of a statement not admissible.—If the fact given in evidence is a statement which forms part of a longer statement, or was made in the course of some conversation, or occurs either in a single document or in a document which forms part of a book, correspondence or other papers, the whole statement, conversation, document, book or correspondence is not thereby rendered admissible, and only so much of the statement, conversation, document book or correspondence can be given in evidence as is necessary for a correct understanding of the nature and effect of the statement and of the circumstances under which it was made. The section is based on the principle that part of a statement, which are foreign to the admissible part and do not in any way explain or qualify it, are not made admissible merely by reason of their being parts of the statement of which a portion is admissible. Thus, if a police diary is used by a Police Officer to refresh his memory or by the Court to contradict such Police Officer to refresh his memory or by the Court to contradict such Police officer, the accused is entitled to *see* only the particular entry used by the Court, may be necessary to the full understanding of the particular entry.[1] What Section 39 makes admissible is what the Court considers necessary in order that a statement may be intelligible.[2] Because a document has been proved and admitted in evidence, it does not follow that all the recitals, statements and references therein can be used as proof of the facts to which they relate.[3] Where a document consists of two separate parts, one of which is admissible and the other inadmissible, the document cannot be rejected as a whole.[4] Although a Court has inherent power to refuse disclosure of matters which in the public interest should be kept secret, it has no power to allow a witness to put in a portion of a letter and to say which portions of it are to go in and which are to be concealed from his opponent. Nor is the Court empowered to hand back a letter, which has once been made an exhibit in the case.[5]

Explanatory or qualifying parts of a statements are admissible.—A sentence or part of statement detached from its context might lend itself to an entirely different meaning and, therefore, the section makes admissible only such parts of the statement as are necessary to the full understanding of the nature and effect of the statement. Those parts of a statement which qualify or explain the part which is sought to be given in evidence must be admitted to enable the Court to understand the true effect and import of the latter. In the case of a statement in a civil or a criminal proceeding by way of admission or confession, the whole of it must be taken and read together, since thus alone can the whole of that which the person making the statement intended to convey be arrived at with certainty, that it is obviously unfair to take only that which is against the interest of the declarant, as the very next sentence might contain a material qualification.

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1. *Q.E.* v. *Mannu*, 19 A 390 (FB).
2. *Karam Din* v. *E.*, 115 IC 1; 1929 L 338 : 30 Cr LJ 385.
3. *Tika Ram* v. *Moti Lal*, 52 A 464 : 1939 A 299.
4. *Mistri Fuzal Din* v. *Main Karam Husain*, 1936 L 81 : 162 IC 404.
5. *E.A. Morlev* v. *E.*, 1936 R 299 : 164 IC 369.

Parts of a confession, not admissible under Section 27, do not become admissible under Section 39.–Section 39 is not drafted for the purpose of Section 27 alone, but is a general section and the words "nature and effect" of the statement are meant in that section to apply both to the inherent character of the statement and the meaning of the statement or the effect produced by the statement, if the word "effect" has a wider meaning. It is possible that in a particular case the prosecution may wish to prove the exact words used by the accused and in that case Section 39 would apply. But so far as the admissibility of the words deposed to is concerned, it is still governed by the provisions of Section 27.[1] This section cannot be invoked for the purpose of letting in a concession in respect of which the bar created by Section 24, 25 and 26 has not been removed by Section 27. It was never intended that a matter which has been expressly ruled out should be allowed to come in, in the garb of an explanatory statement.[2]

JUDGMENTS OF COURTS OF JUSTICE, WHEN RELEVANT

40. Previous judgments relevant to bar a second suit or trial.–The existence of any judgment, order to decree which by law prevents any Court from taking cognizance of a suit or holding a trial, is a relevant fact when the question is whether such court ought to take cognizance of such suit or to hold such trial.

COMMENTARY

Previous judgments admissible in support of a plea of res judicata or of autrefois acquit or autrefois convict –A previous judgment, order or decree is relevant when it is tendered in evidence in support of a plea of *res judicata* in civil cases,[3] or of *autrefois acquit or autrefois convict* in criminal cases.[4] "The plea of *res judicata* as a bar to an action belongs to the province of adjective law, *ad litis ordination*, but difference of opinion prevails among jurists as to whether the rule of the law of evidence as furnishing a ground of estoppel. In England and I may say also in America, the rule is usually dealt with as belonging to the law of evidence, for there judgments in *personam*, which operate as *res judicata* are as often treated as falling under the category of estoppels by record. Sir Fitzjames Stephen, the distinguished jurist who formed our Indian Evidence Act, 1 of 1872, and whose views have been accepted by our Indian Legislature in framing Section 40 of that, Act, adopted what seems to me the only logical and juristic classification by treating the rule of *res judicata* as falling beyond the proper region of the law of evidence, and as appertaining to procedure properly so called.[5] This section declares that if there is a previous judgment, order or decree which, according to the law of procedure, has the effect of preventing a Court from taking cognizance of a suit or from holding any trial, and in a subsequent litigation it is pleaded by a party that the Court cannot by reason of the previous judgment, order or decree, take cognizance of the suit or hold the trial, the previous judgment, order or decree is relevant in support of such plea. The question as to what previous judgments,

1. *Karam Din* v. *E.*, 115 IC 1 : 1929 L. 338 : 30 Cr LJ 385.
2. *Sukhan* v. *E.*, 10 L 283 : 115 IC 6 : 1929 L 344 : 30 LJ 414 (FB).
3. See Section 11, CP Code ; *Bhola Nath* v. *Manmoth Nath*, 45 CWN 420.
4. See Section 403, Cr P Code.
5. *Sita Ram* v. *Amir Begum*, 8 A 324, per Mahmood, J.

orders or decrees have the effect of preventing a Court from taking cognizance of a suit or holding a trial is purely a question of procedure, and must be decided with reference to the relevant provisions of the Civil Procedure Code in civil cases and of the Criminal Procedure Code in criminal cases, the Evidence Act, as mentioned above, having nothing to do with this matter. This section merely renders possible proof of the circumstances which, according to the law of procedure, preclude a Court from typing any particular matter. It applies to a case in which the Court has jurisdiction to decide a matter, and one party says that it should not do so because that matter has been decided before.[1]

A Court may be prevented from proceeding with the trial of a suit, because a previously instituted suit involving the same matter is pending between the same parties,[2] or because there has been a previous decision on the same matter between the same parties by an Indian[3] or a foreign[4] Court or because the relief sought in the subsequent suit is one which could have been claimed by the plaintiff in the previously decided case,[5] or because the previous suit was dismissed for default.[6] In criminal cases, a Court cannot try an accused person for an offence if he has been previously tried by a competent Court for the same offence, nor can a person be tried for any other offence, for which he could have been tried and convicted in a previous trial.[7]

The provisions of Sections 40 to 43 only exclude judgments as pieces of conclusive evidence. They do not bar the admission of judgments as proof of the fact of litigation, or its results and effects upon the parties, which make a certain course of conduct probable or improbable on the part of one of the parties. Thus, in view of the previous litigation and its result that one of the parties was actually in possession, that fact can be used to corroborate the evidence given in the subsequent proceeding.[8]

"Holding a trial" includes trial of an issue.—Under Section 11, C.P.Code, an issue in the suit, as distinguished from the whole suit, may be *res judicata*. What it is pleaded that an issue in the subsequent suit is *res judicata*, the previous judgment is relevant, the words "holding a trial" being wide enough to cover such a case. The section was intended to include all judgments which by law operate to prevent a Court, whether civil or criminal, from taking cognizance of a suit or trying any particular issue. "The words 'holding a trial' are amply large enough to admit of this construction, and it is not because in some other Act the words 'holding trial' may have been construed to refer to criminal trials only, that we ought to confine their meaning in the same way in Section 40 of the Evidence Act".[9]

Only appellate judgment must be produced.—When a judgment becomes admissible under Section 40, the judgment that can be given in evidence is the judgment of the appellate court, as the judgment of the first Court gets merged in the judgments of the appellate Court, See notes to Section 13 under this heading.

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1. *Lakshan Chandra Naskar* v. *Ramdas Mandal*, 118 IC 857 : 1929 C 374 (FB).
2. Section 10, C.P. Code.
3. Section 11, C.P. Code.
4. Section 13, C.P. Code.
5. O.2, r. 2, C.P. Code.
6. O.9,r. 8, C.P.Code.
7. Section 403, Cr. P. Code, See Section 26 of the General Clauses Act and Article 20 Clause (2) of the Constitution,
8. *Shiv Charan* v. *State*, AIR 1965 A 511.
9. Per Garth, CJ., In *Gajju Lal* v. *Fateh LaL*, 6 C 171 (FB).

Judgment given in evidence under Section 40 may be attacked on any such ground as is mentioned in Section 44.—See notes to Section 44.

41. Relevancy of certain judgments in probate, etc., jurisdiction.—A final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any legal character, or the title of any such person to any such thing, is relevant.

Such judgment, order or decree is conclusive proof—

that any legal character which it confers accrued at the time when such judgment, order or decree came into operation;

that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment,[2] [order or decree] declares it to have accrued to that person;

that any legal character which it takes away from any such person ceased at the time from which such judgment, [1][order to decree] declared that it had ceased or should cease;

and that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, [1][order or decree] declares that it had been or should be his property.

COMMENTARY

Judgments in personam and judgments in rem.—The general rule is that a person is not bound by a transaction to which he was not a party. *Res inter alias acta alteri nocere non debet.*[2] This rule equally applies where the transaction is a litigation, between strangers. *Res inter alias judicata nullum inter alias prejudicium facit.*[3] If there is one rule of law which is better known and approved than another, as being founded upon the most manifest justice and good sense, it is that no man ought to be bound by the decision of a Court of Justice unless he or those under whom he claims were parties to the proceedings in which it was given.[4] This is on the principle that it would be unjust to bind any person by the result of litigation in which he could not be unjust to bind any person by the result of litigation in which he could not be admitted to make a defence or to examine or cross-examine witnesses or to appeal from a judgment which he might think erroneous.[5] To this general rule, however, there are certain exceptions,

1. Inserted by Section 3 of the Indian Evidence Amendment Act (18 of 1872).
2. A matter transacted between one set of persons ought not to injure or affect another person.
3. A matter adjudicated upon between one set of parties in nowise prejudices another set of parties.
4. Per Garth, C.J. in *Gajju Lal* v. *Fateh Lal*, 6 C 171 (FB).
5. *See* the remarks of De Grey, C.J., in *Duchess of Kingston's case*, 20 How St. Tr. 355, 544.

of which the one enacted by the present section is perhaps the most important. Section 41 makes certain judgments not only relevant against strangers but makes them conclusive of certain matters. Though the section does not use the term judgment in *rem*, it incorporates the law of the subject of judgments *in rem* as explained by Sir Barnes Peacock in *Kanhay Lal* v. *Radha Churn*.[1]

As applied to judgments, the terms "*in rem*" and "*in personam*", which are adopted from, though not belonging to the Roman Law, have never been clearly defined in reference to our own or any other system,[2] and great misunderstanding and error have resulted from the use of the term "*judgment n rem*" in some of the English text books without any precise definition and indeed, in some cases, without accurate conception of its meaning.[3] It is, therefore, interesting to notice briefly how the term came to be used in the text books.

The term "*in rem*" was used in Roman Law in connection with *actio* but not in connection with *jus*. An *actio in rem* went upon the right to over the thing whereas an *actio in personam* went upon the right against to over the individual only. An *actio in rem* created what was in act a right good against all mankind. The effect of an *actio in rem* was to conclude the whole community but the effect of an *actio in personam* was to conclude the individual only. This effect was an accident arising from the peculiar system of Roman procedure. After Roman forms of procedure had passed away, the term "*in rem*" survived to express the effect of an *action in rem* and gradually it came to import "generally". When civilians of the 12th and the 13th centuries made their division of rights which avail against the world and rights which avail against individuals only, they employed the phrase "*jus in rem*" to signify the former and the phrase "*jus in personam*" to signify the latter kind of right. Later lawyers compounded the terms "*in rem*" and "*in personam*" with judgments and coined the expressions "judgments "*in rem*" and "*judgment in personam*", the former to signify judgments which are good against all mankind and the latter to signify judgments which are good only against the individuals who are parties to them and their privies.[4] "The only definition of a judgment *in rem* which can properly be given is that it is a judgment which binds all men, and not only the parties to the suit in which it was passed and their privies; and that it belongs to positive law to say what judgments are to be judgments *in rem*, whether for reasons of international comity or of domestic expediency." The point adjudicated upon in a judgment *in rem* is always as to the status of the *res* and is conclusive against the world as to that status, whereas in a judgment *in personam* the point whatever it may be, which is adjudicated upon, it not being as to the status of the *res*, is conclusive only between parties or privies.[5] A decision *in rem* not merely declares the status of the person or thing, but *ipso facto* renders, it such as it is declared; thus, a decree of divorce not only annuls the marriage, but renders the wife *feme sole*, adjudication in bankruptcy not only declares, but constitutes the debtor a bankrupt; a

1. 7 WR 338 (FB). *See* the report of the Select Committee ; Firm of *Radhakishan* v. *Gangabai*, 110 LC 730 : 1928 S 121.
2. Phipson, Ev., 7th Ed., 395 ; Steph Dig., Note XXIII.
3. *Kanhya Lal* v. *Radha Churn*, 7 WR 338 (FB), per Peacock, C.J. ; *See* remarks of Holloway, J.,in *Yarkalamma* v. *Anakala Naramma*, 2 MHR 276.
4. See on this subject, the judgment of Sir Barness Peacock, C.J.,in *Kanhaya Lal* v. *Radha Churn*, 7 WR 338 (FB), and the judgment of Holloway, J. in *Yarkalamma* v. *Anakala Naramma*, 2 MHCR 276.
5. Firm of *Radhakishen* v. *Gangabai*, 110 IC 730 : 1928 S 121 ; *Ballantyne* v. *Mackinnon*, (1896) 2 QB 455.

sentence in a prize Court not merely declares the vessels prize, but vests it in the captor.

Final judgment, order or decree.—The word "final" is used in this section as distinguished from "interlocutory" and does not mean not subject to appeal.[2]

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

Judgment in rem conclusive of matters actually decided; foreign judgments in rem.—Subject to impeachment on the grounds mentioned in Section 44,[3] a domestic judgment *in rem* is in civil proceedings conclusive evidence for or against all persons, whether parties, privies or strangers, of the matters actually decided.[4] It is also, as between parties and privies, conclusive of the grounds of the decision where these have been put in issue and actually decided by the Court; but as between strangers or a party and a stranger, it is no evidence of the truth of such grounds, except upon questions of prize where it is conclusive if the ground of condemnation is plainly stated.[5] Where in an order of adjudication a transfer has been found to be fraudulent and therefore an act of insolvency, the finding, under Section 116 of the Presidency Towns Insolvency Act, is conclusive against the transfer even though it was passed in his absence and without notice to him.[6] In England, a foreign judgment *in rem* is generally conclusive against strangers only upon questions of prize, where the ground of condemnation is plainly stated; or of marriage and divorce, where the marriage was solemnised and the parties domiciled in the foreign country,[7] or of bankruptcy, as to contracts made in such country; or of probate, administration, and guardianship to a limited extent.[8] In India, there is no legislative provision recognizing the conclusive operation of foreign judgments *in rem* against strangers, as Section 13 of the Civil Procedure Code limits the conclusiveness of foreign judgments between the parties thereto and their privies. It seems, however, that on the analogy of the practice of the English Court, foreign judgments *in rem* will receive in India the same recognition as is accorded to them in England.[9]

Reasons of the conclusiveness of judgments in rem.—The principle of the conclusiveness of judgments *in rem* as regards persons is, that public policy for the peace of society requires that matters of social status should not be left in continual doubt; and as regards things that, generallyspeaking, everyone who can be affected by the decision may protect his interest by becoming a party to the proceedings.[10]

Judgment in rem, whether conclusive in criminal proceedings?—In English law, a judgment *in rem* is not conclusive in criminal proceedings.[11] In India, however, it

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1. Phipson, Ev.,7th Ed., 397.
2. *Huntly* v. *Gaskell*, (1905) 2 Ch. 656 C.A. ; Phipson, Ev.,7th Ed., 393.
3. *Sita Devi* v. *Gopal Saran Narayan Singh*, 111 IC 762 : 1928 P 375.
4. Phipson, Ev., 7th Ed., 395 ; Taylor, § 1673.
5. Phipson, Ev., 7th Ed., 395 ; Taylor, §§ 1733-34 ; See *Kanhya Lal* v. *Radha Churn*, 7 WR 338 (FB) ; Firm of *Radhakishen* v. *Gangabai*, 110 IC 730 : 1928 S 121.
6. *Mohammad Siddique Yousuf* v. *Official Assignee of Calcutta*, 1943 PC 130 : 70 IA 93.
7. *Bater* v. *B.*, (1906) P 209.
8. Phipson Ev., 7th Ed., 395 ; Taylor , §§ 1732-1738 ; Pigott on Foreign Judgments, 244 ; Foote on International Law, 5th Ed., 622 ; 628 2 Smith L.C., 13th Ed., 722-754.
9. *Sita Devi* v. *Gopal Saran Narayan Singh*, 111 IC 762 : 1928 P 375.
10. Phipson, Ev., 7th Ed., 397 ; Taylor, § 1676.
11. *R.* v. *Buttery*, Rus & Ry., 342 ; Phipson, Ev., 7th Ed., 419 : Taylor, §§ 1680-81 ; See the case of the Duchess

seems that a judgment of the kind mentioned in Section 41 will be conclusive in civil as well as criminal proceedings.[1] See also notes under the heading "order granting probate, whether conclusive answer to a criminal prosecution?"

Construction and Interpretation of the section.—Section 41 of the Indian Evidence Act consists of two parts. The first makes certain judgments relevant. The second part makes the judgments conclusive evidence of certain matters. The conditions necessary for making a judgment relevant may be considered under two heads; those having reference to the contents of the judgment, and those to the nature of the proceedings in which the judgment is sought to be relied upon. Firstly, with reference to the judgment alleged to fall under Section 41, it must be : (i) of a competent Court in the exercise of probate, matrimonial admiralty or insolvency jurisdiction; (ii) it must (a) confer upon or take away from any person any legal character or (b) declare any person to be entitled to any such character or (c) to be entitled to any specific thing, not as against any specified person, but absolutely. Secondly with regard to the proceedings in which the said judgment is sought to be relied upon as a piece of evidence, the existence of any such legal character or the title of any such person to any such thing must be relevant.[2] Section 41 of the Evidence Act makes no distinction between a positive or a negative judgment or between the point adjudicated upon and the grounds on which the decision is based, but it arrives at the same result in a more simplified manner. It declares the purpose for which the judgments of a competent Court operates as conclusive against the world and, so far as such purposes relate to the status or what is referred to as "the legal character" of a person, it specifies three purposes only: it provides that the judgment is conclusive proof only for showing (a) that the judgment has conferred a legal character on a person ; or (b) that it has declared that a person had such legal character; (c) that it has declared that any legal character of a person which subsisted had ceased to exist.[3] The expression "legal character" must be narrowly construed. "Legal character" means something equivalent to status. The legal character assigned to a person announces to all the world what the legal status of the person in question is.[4] In order that declaration of title to a specific thing should have a conclusive character as against the whole world, it is not enough to show that under the judgment of the Court one has become entitled to a specific thing, but his title to such a thing must have been declared not as against any specified person but absolutely. A right to recover a debt or a chose-in-action cannot be deemed to be a specific thing.[5]

What is a matter of status.—The status of a person means his "personal legal condition", that is, a man's legal condition only so far as his personal rights and burdens are concerned, to the exclusion of his "proprietary relation". An adjudication on adoption in law amounts to a declaration of status. But the claim to succession is not a matter of status in this sense, and relates to the proprietary relation of the claimant with reference to the deceased estate holder.[6]

Judgments of probate Courts.—The law connected with the grant of probates and

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of Kingston, 20 How. St. Tr. 355.

1. *Manianah Debi etc.* v. *E.*, 4 CWN clxxvi ; *Mansharam* v. *Chetauram*, 1945 S. 32.
2. *Firm of Radhakishen* v. *Gangabai*, 110 IC 730 : 1928 S 121.
3. *Ibid.*
4. In the matter of Venkataramanayya Pantulu, 54 M 601 : 131 IC 817 : 1931 M 441.
5. In the matter of Venkataramanayya Pantulu, 54 M 601 : 131 IC 817 : 1931 M 441.
6. *Duggamma* v. *Ganeshayya*, 1965 Mys. 97, at 101.

letters of administration has been consolidated into a single enactment.[1] Under Section 264 and 300 of the Indian Succession Act,[2] the District Judge and the High Court have concurrent jurisdiction to grant and revoke probates and letters of administration. Probate can be granted only to the executor appointed by the will,[3] but if no executor has been appointed by the will, or if the executor appointed by the will renounces or fails to accepts the executorship, or if the deceased died intestate, then only letters of administration to the estate of deceased can be granted.[4] Thus, an "executor" is a person to whom the execution of the last will of a deceased person is by the testator's appointment, confided, whereas an "administrator" is a person appointed by competent authority to administrate the estate of a deceased person when there is no executor.[5] The expression "legal character", when it has reference to a judgment of Court of probate, means the status of an executor or administrator only.[6] The legal character of an executor is declared, not conferred, while that of an administrator is conferred, not declared, by the judgment of a probate Court granting probate to an executor and letters of administration to an administrator.[7] Section 41 is applicable to probates granted to Hindus before the passing of the Hindu Wills Act[8] as well as to probates granted after that enactment.[9]

An order for grant of probate operates as judgment in rem.[10]

A judgment of Court, granting probate in the exercise of Probate jurisdiction, is the 'Probate' defined in section 2(f) of the Indian Succession Act, for it is the grant which declares or confers the legal character on the propounder or the applicant.[11]

Judgment in rem –Presumption regarding probate judgment. The judgment of the Probate Court must be presumed to have been obtained in accordance with the procedure prescribed by law and it is a judgment *in rem.* The objection that the respondents were not parties to it, is unsustainable because of the nature of the judgment itself.[12]

Order granting probate conclusive against parties, privies and strangers, of the appointment of the executor or the administrator, and of due execution, validity and contents of the will.–The words "final judgment, order or decree" in reference to the probate Court mean the judgment, order or decree of the Court by which the grant is actually issued, for it is only the grant which declares or confers the legal character on the propounder. Therefore an order merely granting letters of administration to the applicant with a copy of the will annexed on condition that executes the usual bond is not a final judgment, order or decree.[13] A judgment *in rem* is conclusive evidence for or against all persons, whether parties, privies, or strangers of the matters actually

1. Act XXXIX of 1925, Indian Succession Act.
2. Act XXXIX of 1925.
3. Section 222, Act XXXIX of 1925.
4. *See* Sections 232, 231, 218 & 219 of Act XXXIX of 1925.
5. Section 2(c),(a), Act XXXIX of 1925.
6. *Mi Ngwe Zan* v. *Mi Shwe Taik,* 10 IC 987.
7. *Girish Chander Roy* v. *Broughton,* 14 C 861.
8. XXI of 1870.
9. *Girish Chunder Roy* v. *Broughton,* 14 C 861.
10. *Malati* v. *Dhanapati,* 66 CWN 879.
11. *Satyacharan* v. *Hrishkesh,* 63 CWN 615.
12. *Surinder Kumar* v. *Gian Chund,* 1958 SCR 584 : 1957 SCJ 159 : 1958 SCA 412.
13. *Hari Lal Chatterjee* v. *Sarat Chandra Chatterjee,* 43 CWN 824.

decided.[1] All that is essential to the decision that the executor is entitled to the probate must be taken to have been conclusively determined by the probate Court,[2] but a finding not essential to the judgment in a probate action cannot operate as a finding *in rem*.[3] A grant of probate or of administration is conclusive of the appointment of the executor or the administrator.[4] It actually invests the executor or administrator with the character which it declares to belong to him, and is conclusive against all the world. A judgment of a Court of probate is conclusive proof of the fact that the person to whom probate or letters of administration have been granted has been clothed with the power and the responsibilities of the deceased;[5] It is conclusive proof of the representative title of the granted against the debtors of the deceased and all persons holding property which belonged to the deceased.[6] A final order of a competent probate Court granting probate is conclusive proof of the due execution and validity of the will[7] as well as its contents.[8] So long as a grant issued by a probate Court is in force, it is not open to a party to question it in a civil Court[9] except any such ground as is mentioned in section 44.

Other matters of which the probate is conclusive evidence.—When a grant of probate is produced in evidence, it may be shown that the grant was revoked or that it was forged or that it was made by a Court having no jurisdiction; but it cannot be shown that the testator was insane, or that the will or any part of it was procured by fraud[10] or that words were inserted by mistake and without and knowledge of the testator;[11] or that the will was forged, for these facts could have been alleged in the Court granting the probate in opposition to such grant.

Order of a probate Court cannot be questioned by any other civil Court.—The order of a probate Court granting probate is the decree of a Court which no other Court can set aside, except for fraud or want of jurisdiction.[12] The judgment of a probate

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1. Phipson, Ev., 7th Ed., 395.
2. *Chandreswar Prosad Narain Singh* v. *Bisheshwar Pratap Narain Singh*, 5 P 777 : 101 IC 289 : 1927 P 61.
3. *Ibid.*
4. *Allen* v. *Dundas*, (1780) 3 TR 125 : Phipson Ev., 7th Ed., 418 : *Hari Lal Chatterjee* v. *Sarat Chandra Chatterjee*, 43 CWN 824 ; *Daropati* v. *Santi*, 116 IC 452 : 1929 L 483 : *Chandreshwar Prosad Narain Singh* v. *Bisheshwar Pratap Narain Singh*, 5 P 777 ; 101 IC 289 : 1927 P 61 : *Sheoparsan Singh* v. *Ramanandan Prasad Narayan Singh*, 43 C 694 : 43 IA 91 : 33 IC 914 : 1916 PC 78 ; *Chintaman Vyankatrao Ghadge* v. *Ramchandra Viyankatrao Ghadge*, 34 B 589 : IC 944 ; *Hormusji Navroji* v. *Bai Dhanbaji*, 12 B 164.
5. *Mi Ngwe Zan* v. *Mi Shew Taik*, 10 IC 987.
6. *Jagannath Prasad Gupta* v. *Ranjit Singh*, 25 C 354, 369.
7. *Thakurain Raj Rani* v. *Dwarkanath Singh*, 223 IC 206 ; *Hari Lal Chatterjee* v. *Sarat Chandra Chatterjee*, 43 CWN 824 ; *Sheoparsan Singh* v. *Ramanandan Prashad Narayan Singh*, 43 C 694 : 43 IA 91 : 33 IC 914 : 1916 PC 78 ; *Phekni* v. *Manki*, 9 P 698 : 128 IC 128 : 1930 P 618 ; *Daropti* v. *Santi*, 116 IC 452 : 1929 L 433 ; *Chandreshwar Prosad Narain Singh* v. *Bisheshwar Pratap Narain Singh*, 5 P 777 : 101 IC 289 : 1927 P 61 : *Chintaman Vyankatrao Ghadge* v. *Ramchandra*, 34 B 589 : 7 IC 944 ; *Sarada Kanta Das* v. *Gobinda Mohan Das*, 12 CLJ 91 : 6 IC 912 ; *Hormusji Navroji* v. *Bai Dhanboji*, 12 B 164.
8. *Chintaman Vyankatrao Ghadge* v. *Ramchandra Vyankatrao Ghadge*, 34 B 589 : 7 IC 944 ; *Hormusji Navroji* v. *Bai Dhanbaji*, 42 B 164 : *Pinney* v. *P.*, 8 B & C 335 : Phipson, Ev., 7th Ed., 418.
9. *Sheoparsan Singh* v. *Ramanandan Prashad Narayan Singh*, 43 C 694 : 43 IA 91 : 33 IC 914 : 1916 PC 78.
10. *Meluish* v. *Milton*, 3 Ch. D. 27.
11. Phipson, Ev. 7th Ed., 418.
12. *Sheoparsan Singh* v. *Ramanandan Narayan Singh*, 43 C 694 : 43 IA 91 : 33 IC 914 : 1916 PC 78 ; *Annoda Charan Mondal* v. *Atul Chandra Malik*, 54 IC 197 ; 34 CLJ 3 ; *Brendon* v. *Shrimant Sunderbai*, 38 B 272 : 23 IC 221 : *Komollochun Dutt* v. *Nilruttun Mundle*, 4 C 300.

Court, while it remains in force, is not subject to any collateral attack and conclusive not only against the parties to the proceedings but against all persons and all Courts.[1] If probate or letters of administration have been wrongly granted, the proper course is to apply to the probate Court itself for revocation of the probate or letters of administration.[2]

Order granting probate, whether conclusive answer to a criminal prosecution?—In England, on a charge of forging the will, the order of grant of probate is not conclusive of the genuineness of the will.[3] In India, however, it seems that a Criminal Court is bound by the decision of the probate Court,[4] particularly if the Court found in favour of the genuineness of the will, on a distinct issue raised in the proceeding. If a probate Court has found a will to be genuine, it is not open to a criminal Court to find to the contrary, or to convict a person of having forged the will.[5] If a probate will is subsequently found to be forged, the proper course is not a criminal prosecution of the alleged forger but an application to the probate Court for revocation of the probate.[6] But the grant of letters of administration, though it operates as a judgment *in rem* and presupposes the non-existence of a will is no bar to the prosecution of a person under section 477, I.P.Code, for having fraudulently concealed a will of the deceased.[7] Where a person is on his trial on a charge of having given false evidence in a probate case, the judgment in the proceedings in which he is alleged to have given false evidence is not admissible in evidence against him.[8]

Probate judgment is conclusive of the grounds of the decision against parties and privies on principles of res judicata.—As between parties and privies, not strangers, a probate judgment is also conclusive of the grounds of the decision where these have been put in issue and actually decided.[9] This is not by reason of section 41 of the Evidence Act, but on the principle of *res judicata* enacted by section 11 of the C.P.Code. Thus, where, in opposition to an application for grant of probate by the executor named in the will, the widow of the testator pleaded that the will had been revoked by the testator shortly before his death and that he had given her authority to adopt, but the allegation not having been proved, probate was granted to the executor, the finding of the probate Court that the testator had not revoked the will and given no authority to the widow to adopt was held conclusive in a subsequent civil suit between the same parties.[10] Similarly, a finding of the probate Court, in rejecting an application for probate, that the testator was not of sound disposing mind at the time of making the will operates as *res judicata* between the same parties in a subsequent litigation.[11] If matters in issue in a probate proceeding were the same as those in a subsequent suit, and if the

1. *Hemanaini Debi* v. *Sarat Sunderi Debya*, 66 IC 882 : 1921 C 292 : *Raj Kishore Prasad* v. *Promoda Behari Singh*, 1944 P 182 : 22 P 756.
2. *Daropti* v. *Santi*, 116 IC 452 : 1929 L 483 : *Annoda Charan Mondal* v. *Atul Chandra Malik*, 54 IC 197 : 34 CLJ 3 : *Komollochun Dutt* v. *Nilruttun Mundle*, 4 C 300.
3. *R.* v. *Buttery Rus. & Ry.* 342 ; Phipson, Ev., 7th Ed., 419 ; see Taylor , §§ 1680-81.
4. *Manjanali Debi, etc.* v. *E.*, 4 CWN clxxvi.
5. *Manjanali Debi, etc.* v. *E.*, 4 CWN clxxvi.
6. See section 263, ill (iii), Act XXXIX of 1925 ; see also *Daropti* v. *Santi*, 116 IC 452 ; 1929 L 483.
7. *Mali Muthu Servay* v. *E.*, 4 R 251 : 97 IC 1054 : 1926 R 202 : 27 Cr. LJ 1230.
8. *Oates* v: *E.*, 76 IC 417 : 1924 C 104 : 25 Cr. LJ 177.
9. Phipson, Ev., 7th Ed., 395 ; Taylor § 1673 : see *Spencer* v. *Williams*, 40 LJP 45.
10. *Brendon* v. *Shrimant Sunderbai*, 38 B 272 : 23 IC 221.
11. *Kalyanchand Lalchand* v. *Sitabai Dhanasa*, 38 B 309 : 23 IC 325 (FB).

points were formulated and a decree was passed in the probate case, the parties are bound to that extent and cannot reopen the same questions in the subsequent suit. A judgment of a probate court deciding that the plaintiffs are not the next reversioners to the estate of a person is *res judicata* in a subsequent suit for declaration that the plaintiff are the next reversioners to the estate.[1]

Probate judgment no evidence, in any case, not conclusive evidence either under section 41.Evidence Act, or section 11, C.P.Code, of matters only incidentally decided.—Though it be necessary, as a step to making a declaration which will operate *in rem*, to find a fact, that finding will not bind third parties in subsequent proceedings.[2] No Judgment is evidence of the truth of any matter which is not directly decided or which is not a necessary ground of the decision; thus it is never evidence of facts which merely came collaterally in question, or were incidentally cognizance, or can only be inferred by argument from the decision.[3] A finding not essential to the judgment in a probate action neither operates as a finding *in rem*,[4] nor is *res judicata* between the parties. Thus, a Civil Court, in a suit for the construction of a will is competent to put upon it a construction different from the one incidentally put upon it by a probate Court in determining the question of the representative title of the applicant for letters of administration.[5] It is not the province of a probate Court to determine any question of title with reference to the property covered by the will,[6] or to inquire what disposing power the testator had over such property:[7] a probate is not, therefore, conclusive evidence of the fact that any given property is assets of the testator.[8] A judgment of a probate Court cannot conclude a person as to his title in the estate.[9] Where letters of administration have been granted to the defendant in preference to the plaintiff, the order granting the letters of administration is not a bar to the plaintiff bringing a suit for the purpose of determining any question of inheritance, or of the right to be appointed as *shebait*, the decree in which will supersede the grant.[10] A probate of the will is not primary evidence of any declaration as to pedigree contained in the will,[11] nor are letters of administration any evidence of the intestate's marriage.[12] A decision of a probate Court on a question of relationship does not operates as *res judicata* in a subsequent civil suit between the same parties.[13] Similarly, a decision of a probate Court on a question of status, e.g., that a woman is or is not the widow of the testator is not conclusive and can be reopened in a regular suit.[14] Probate and letters of administra-

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1. *Ramanandan Prosad* v. *Sheo Parson Singh*,6 IC 301 : 11 CLJ 623.
2. In the matter of Venkataramanayya Pantulu, 54 M 601 : 131 IC 817 : 1931 M 441, (FB), per Stone, J.
3. Phipson. Ev., 7th Ed., 394.
4. *Chandreswar Prasad Narain Singh* v. *Bisheshwar Pratap Narain Singh*, 5 P 777 : 101 IC 289 : 1927 P 61.
5. *Arunmoyi Dasi* v. *Mohendra Nath Wadadar*, 20 C 888 : *Thakurain Raj Rani* v. *Dwarkanath Singh*, 223 IC 206.
6. In the matter of the goods of Saraswati Bala Devi, 23 IC 296 : 17 CWN 613 ; *Chintaman Vyankatrao Ghadge* v. *Ramchandra Vyankatrao Ghadge*, 34 B 589 : 7 IC 944 ; *Brij Nath De* v. *Chundar Mohan Banerji*, 19 A 458 ; *Arunmoyi Dasi* v. *Mohendra Nath Wadadar*, 20 C 888.
7. *Brij Nath De* v. *Chander Mohan Banerji*, 19 A 458.
8. Re M'Kenna, 42 Ir. LTR 50 ; Phipson, Ev., 7th Ed., 419.
9. *Arunmoyi Dasi* v. *Mohendra Nath Wadadar*, 20 C 888.
10. *Jagannath Prasad Gupta* v. *Ranjit Singh*, 25 C 354.
11. Phipson, Ev., 7th Ed., 419.
12. *Ibid.*
13. *Lalit Mohan Das* v. *Radha Raman Saha*, 10 IC 434 : 13 CLJ 547 : 15 CWN 1021.
14. *Mi Ngwe Zan* v. *Mi Shwe Taik*, 10 IC 987.

tion are not conclusive, though they may perhaps be *prima facie* evidence of the death of the testator or intestate, or of his domicile.[1]

Order refusing probate, whether conclusive?—It is doubtful whether an order refusing probate of a will is a judgment *in rem* ; in some cases the order may operate as a judgment *in rem*, while in others it may clearly not be a conclusive adjudication *in rem*.[2] If the probate Court holds that the will is a forgery, or that it has not been duly executed by the testator with a sound disposing mind, or that it has not been duly attested, the judgment of the probate Court takes away from the executor named in the will the legal character and this result is final as against all persons interested under the will.[3] But every refusal to grant probate does not conclusively show that the will propounded is not the genuine will of the testator. The decision may be based upon entirely different grounds which do not touch the question of the genuineness of the will. Such a judgment cannot operate conclusively unless it embodied a final decision against the genuineness of the will.[4] A decision that, on the evidence produced in the case, the due execution of a will has not been proved cannot be treated as a final decision upon the genuineness or otherwise of the will and does not preclude a fresh application on the part of executors when they are in a position to support it with better proof.[5] If an application for probate by the executor has been dismissed for default, that fact itself cannot debar an application by any other person claiming an interest under the will or by the executor himself.[6] The refusal to grant probate does not conclusively show that the will is not the genuine will of the testator and does not prevent the adjudication of the question in a subsequent proceeding; in other words, the judgment of a Court by which probate is refused does not necessarily operate as a judgment *in rem* in the same way as a judgment by which probate is granted.[7] A finding of a probate Court that an attempted proof of a will has failed is not equivalent to a finding *in rem* and does not prevent the unsuccessful executor from setting up the unprobated will in answer to a claim made by an heir in a regular civil suit.[8] Such a finding is not conclusive within the meaning of Section 41. The only kind of negative judgment which is contemplated by section 41 is that which expressly takes away from a person a legal character which has, up to that time, subsisted,[9] and a judgment refusing grant of

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1. Phipson, Ev., 7th Ed., 419.
2. See *Rama Naidu* v. *Rangayya Naidu*, 56 M 346 : 141 IC 227 : 1933 M 114.
3. *Phekni* v. *Manki*, 9 P 698 : 128 IC 128 : 1930 P 618 ; *Rallabandy Venkataratnam* v. *Yanamandra Satyavati*, 79 IC 44 : 1924 M 578 ; order of reference to FB by Beaman, J., in *Kalyanchand Lalchand* v. *Sitabai Dhanasa*, 38 B 309 : 23 IC 325 ; *Sarada Kanta Das* v. *Gobind Mohan Das*, 6 IC 912 : 12 CLJ 91 ; contra FB decision in *Kalyanchand Lalchand* v. *Sitabai Dhanasa*, 38 B 309 : 23 IC 325. See also *Ramani Debi* v. *Kumud Bandhu Mukherjee*, 7 IC 126 : 12 CLJ 185 ; *Chinasami* v. *Hariharabadra*, 16 M 380.
4. *Ramani Debi* v. *Kumud Bandhu Mukherjee*, 7 IC 126 : 12 CLJ 185.
5. *Ganesh Jagannath Dev* v. *Ramchandra Ganesh Dev*, 21 B 563 ; but see *Phekni* v. *Manki*, 9 P 698 : 128 IC 128 : 1930 P 618 ; *Schultz* v. *Schultz*, (1853) 10 Gattan 358 ; cited in *Ramani Debi* v. *Kumud Bandhu Mukherjee*, 14 CWN 924, where it was held that no fresh application for probate will lie if a previous application has been fairly rejected on the merits.
6. *Ramani Debi* v. *Kumud Bandhu Mukherjee*, 7 IC 126 : 12 CLJ 185.
7. *Ramand Debi* v. *Kumud Bandhu Mukherjee*, 7 IC 126 : 12 CLJ 185 ; 14 CWN 924 ; *Ganesh Jagannath Dev* v. *Ramchandra Ganesh Dev*, 21 B 563 : 2 NLR 123 ; contra *Phekni* v. *Manki*, 9 P 698 : 128 IC 128 : 1930 P 618 ; *Chinnasami* v. *Hariharbadra*, 16 M 380.
8. *Kalyanchand Lalchand* v. *Sitabai Dhanasa*, 38 B 309 : 23 IC 325 (FB).
9. *Firm of Radhakishen* v. *Gangabai*, 110 IC 730 : 1928 S 121 ; *Kalyanchand Lalchand* v. *Sitabai Dhanasa*, 38 B 309 : 23 IC 325 (FB).

probate is not a judgment which expressly takes away any subsisting legal character from the executor named in the will but is a judgment which merely refuses to recognize the legal character claimed by him. But though section 41 is not applicable to a judgment refusing probate, a finding by the probate Court that the testator was not of sound disposing mind when the alleged will was made would operate *res judicata* between the parties in subsequent proceedings.[1] A finding as to the genuineness or otherwise of a will, arrived at in the course of guardianship proceedings cannot be pleaded as *res judicata* in the probate Court when an application for grant of probate is made.[2]

Probate judgment of foreign Court.—A judgment of a foreign Court granting probate of a will is conclusive evidence that the instrument proved was testamentary according to the law of that foreign country. It proves nothing else. The subsequent revocation of that probate by that Court proves no more than that the instrumental before it was not testamentary according to the law of that place. Such a judgment cannot be treated as a judgment *in rem* so as to make it incumbent on a Court in India to hold that the deceased left no will or died intestate. A Court in India can still hold that the will left by the deceased is true, valid and binding in respect of the properties left by him in India, the devolution of which is governed by the law of India, and not by the law of the place where the owner of the properties resided and died.[3]

Matrimonial jurisdiction.—Courts in India are invested with matrimonial jurisdiction under various special enactments.[4] In addition to the jurisdiction under these special Acts, an ordinary Civil Court has, under the general law, jurisdiction to decide question of matrimonial, status between Hindus and Mohammedans according to their respective personal laws, but such adjudications are not judgment *in rem*. Thus, Where A, a non-Christian, gets an *ex parte* decree for restitution of conjugal rights against B, the decree will be binding between A and B, but a third person will not be bound by the decision, nor will such judgment be conclusive of marriage in proceedings between B and a third person.[5] A decree granted by a Court under section 42 of the Specific Relief Act that the plaintiff in that suit was no longer the wife of the defendant is not a judgment passed in the exercise of the matrimonial jurisdiction and is not, therefore, admissible as a judgment *in rem* under section 41 of the Evidence Act.[6]

Judgment of a Court of matrimonial jurisdiction conclusive against strangers on questions of status but not on grounds for the dissolution of marriage, etc.—The expression "legal character" when it has reference to a judgment of a Court of matrimonial jurisdiction means the status of widowhood or wifehood.[7] Section 41 enacts that a final decree of a competent Court, in the exercise of matrimonial jurisdiction, which

1. *Kalyanchand Lalcand* v. *Sitabai Dhanasa*, 38 B 309 : 23 IC 325 (FB).
2. *Chinasami* v. *Hariharbadra*, 16 M 380; *Jerbanoo Rustomji Garda* v. *Pootlamai Manecksha Mehta*, 1955 B 447.
3. *Fatima Kanni Ammal* v. *Sheikh Dawood*, 1936 M 197 : 160 IC 733.
4. Act IV of 1869, (Indian Divorce Act); Act XV of 1872, (Indian Christian Marriages Act); Act XV of 1865 and Act XXXVII of the 1920 (Parsi Marriage and Divorce Act); Act XXI of 1886, (Native Converts Marriage Dissolution Act); Act III of 1872 (Civil Marriage Act).
5. *Ma Po Khin* v. *Ma Shin*, 11 R 198 : 148 IC 67 : 1933 R 250; but see *Kanhya Lal* v. *Radha Churn*, 7 WR 338 (FB).
6. *Muncherji Curesetji Khambata* v. *Jessie Grant Khambata*, 59 B 278 : 154 IC 1075 : 1935 B 5 : 36 Bom. LR 1021; Cr R 1506 of 1934 (Lahore) decided on 22-2-1935.
7. *Mi Ngwe Zan* v. *Mi Shwe Taik*, 10 IC 987.

confers upon or takes away from any person any legal character not as against any specified person but absolutely, is relevant when the existence of any such legal character is relevant, and is conclusive proof that any legal character, which it takes away from any such person, ceased at the time from which such decree declares that it had ceased or should cease.[1] Decrees by Courts of competent jurisdiction for the absolute dissolution of marriages are no doubt binding upon third parties. If a Court of competent jurisdiction decrees a divorce or sets aside a marriage between Mohammadans or Hindus, it puts an end to the relationship of husband and wife, and is binding upon all persons that, from the date of the decree the parties ceased to be husband and wife. This is not upon the principle that every one is presumed to have had notice of the suit, for, if they had notice, they could not intervene or interfere in the suit, but upon the principle that when a marriage is set aside by a Court of competent jurisdiction, it ceases to exist, not only so far as the parties are concerned, but as to all persons; a valid marriage causes the relationship of husband and wife, not only as between the parties to it, but also as respects all the world; a valid dissolution of a marriage, whether it be the act of the husband, as in the case of repudiation by a Mohammadan, or by the act of a Court competent to dissolve it, causes that relationship to cease as regards all the world.[2] A judgment of a competent Court dissolving or annulling a marriage is conclusive proof of the fact that the relationship of husband and a wife ceased from the date of the decree of dissolution,[3] and, in the case of a decree of nullity, that the marriage was null and void.[4] The judgment is conclusive that the parties are no longer husband and wife, but it is not conclusive, nor even *prima facie* evidence, against strangers that the cause for which the decree was pronounced existed.[5] For instance, if a decree between A and B were granted upon the ground of the adultery of B with C, it would be conclusive as to the divorce, but it would not be even *prima facie* evidence against C that he was guilty of adultery with B, unless he were a party to the suit. So if a marriage between Mohammadans were set aside upon the ground of consanguinity or affinity, as for instance in the case of a Mohammadan, that the marriage was with the sister of another wife then living, the decree would be conclusive that the marriage had been set aside and that the relationship of husband and wife had ceased, if it ever existed; but it would be no evidence as against third parties, for example, in a question of inheritance, that the two ladies were sisters.[6]

Judgment under the Hindu Marriage Act is a judgment in rem.—A judgment by a District Judge in the exercise of the jurisdiction conferred upon him by the Hindu Marriage Act, 1955, falls within the purview of the section 41 of the Indian Evidence Act, 1972, and the decision given in the exercise of such jurisdiction is conclusive not only against the parties to the proceeding but against the whole world i.e.,such a judgment would operate as a judgment *in rem*.[7]

A judgment in a maintenance suit cannot be impleaded as a bar to a petition under

1. *Sita Devi* v. *Gopal Saran Narayan Singh*, 111 IC 762 : 1928 P 375.
2. *Kanhya Lal* v. *Radha Churn*, 7 WR 338 (FB), per Peacock, CJ.
3. *Kanhya Lal* v. *Radha Churn*, 7 WR 338 (FB).
4. *Caston* v. *Caston*, 22 A 270 (FB).
5. *Kanhya Lal* v. *Radha Churn*, 7 WR 338 (FB).
6. *Kanhya Lal* v. *Radha Churn*, 7 WR 338 (FB), per Peacock, CJ, *Firm of Radhakishen* v. *Gangabai*, 110 IC 730 : 1928 S 121.
7. *Sukas Manohar* v. *Mahohar Shamrao*, 74 Bom. LR 414.

section 10 of the Hindu Marriage Act. But a judgment by a Judge in exercise of the jurisdiction conferred upon him by the Hindu Marriage Act falls within the purview of this section. Any decision given in the exercise of matrimonial jurisdiction is conclusive, not only against the parties to the proceeding but against the whole world. In other words, such judgments operate as judgment *in rem*.[1] And a valid dissolution of marriage causes the relationship between the husband and wife to cease to exist as against the whole world. Such a result cannot be achieved by a decision rendered by a Civil Court in a suit for maintenance. Application under Order 9 Rule 13, CPC is maintainable even if husband dies.[1a]

Judgments of a foreign matrimonial Courts.—The English Courts to not recognize a foreign judgment of divorce as conclusive if the parties are English subjects and the marriage was solemnised in England;[2] but if the parties were domiciled in the foreign country, the judgment will be recognized.[3] A similar rule has been assumed to prevail in India.[4] Of course, in England, as in this country, a foreign judgment is liable to impeachment on the ground of fraud, collusion or want of jurisdiction.[5]

Judgment of a matrimonial Court annulling marriage, whether conclusive on a charge of bigamy?—In England, a judgment of a matrimonial Court annulling marriage is not conclusive in a prosecution for bigamy,[6] but this rule does not seem to be applicable in India.[7]

Admiralty jurisdiction.—Admiralty jurisdiction is conferred on the High Courts in India by their respective Letters Patent, and on Civil Courts of unlimited jurisdiction in the *mofussil* by the Colonial Courts of Admiralty Act, 1890.[8] It is with reference to vessels condemned as *prizes* more especially that questions concerned with admiralty jurisdiction arise.[9] Adjudication as to *prize* in the Admiralty Court,[10] or for the enforcement of maritime lien,[11] are judgments *in rem*,[12] and, therefore conclusive against the whole world. The decision of an Admiralty Court restoring the certificate of an officer of a ship which had been suspended is a judgment *in rem* so far as the status and certificate of that officer is concerned; but the decision is not binding on a person who was not a party to that suit.[13]

Scope of Section 41, Insolvency judgments.—A Judgment is conclusive proof, as against persons and privies, of facts directly in issue in the case, actually decided by Court,and appearing from the judgment itself to be the ground on which it was based. But there are certain exceptions to this general rule and the provisions contained in section 41 are by way of exceptions. This section consists of two parts. The first one

1. *Siddaiah* v. *Penchalamma*, (1962) 2 Andhra WR 259.
1a. *Iravva* v. *Shivappa*, AIR 1987 Kant. 241.
2. *Briggs* v. *Briggs*, (1880) 5 PLD 163.
3. Phipson, Ev., 7th Ed., 395 ; *Bater* v. *B.*, (1906) P 209 ; *Harvey* v. *Farnie*, (1880) 5 P 153.
4. See *Sita Devi* v. *Gopal Saran Narayan Singh*, 111 IC 762 : 1928 P 375.
5. See Section 44 ; Section 13, C.P.C. ; *Sita Devi* v. *Gopal Saran Narayan Singh*, 111 IC 762 : 1928 P 375 ; The Conflict of Laws by Dicey & Keith, 3rd Ed., 436.
6. *R.* v. *Duchess of Kingston*, 20 How. St. Tr. 355.
7. *Manjanali Debi, etc.*, v. *E.*, 4 CWN cixxvi.
8. 53 & 54 Vict., c. 27 ; In re "Falls of Ettrick", 22 C 511.
9. For an Admiralty case in India, see, In re "Falls of Ettrick", 22 C 511.
10. *Le Caux* v. *Eden*, 2 Doug 612.
11. The City of Mecca, 5 PD 28.
12. Phipson, Ev., 7th Ed., 396.
13. *Yoosaf Sagar Abdulla* v. *S.S. Ellora*, 1939 SD 349.

makes certain judgments, orders or decrees relevant, and the second one makes those judgments conclusive evidence in certain matters. In order that a judgment should come within the purview of Section 41, it must be (1) of a competent Court in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction and (2) it must (a) confer upon or take away from any person any legal character, or (b) declare any person to be entitled to any such character, or (c) to be entitled to any specific thing, not as against any specified person but absolutely. Under Section (4) of the Provincial Insolvency Act a decision of an Insolvency Court is final between a debtor and the debtor's estate on the hand and all claimants against him or it and all persons claiming through or under them or any of them on the other hand. Thus a decision is not binding on the plaintiffs who were not debtors or claimants as against the debtors inasmuch as they were not parties to the insolvency case or the appeal arising therefrom, Section 4(2) of the Act is not at all attracted to the case.[1]

Insolvency jurisdiction; order of adjudication as insolvent, etc.—Insolvency jurisdiction is exercised by the Indian High Courts under their respective Letters Patent as well as under the Presidence Towns Insolvency Act,[2] and by the *mofussil* Courts under the Provincial Insolvency Act.[3] A judgment of an insolvency Court, subject to any objection under Section 44 of the Evidence Act has both under Section 41 of the Evidence Act and Section 4(2) of the Provincial Insolvency Act conclusive operation. An order adjudicating a person insolvent and vesting his property[4] in the Official Receiver operates as a judgment *in rem*[5] and is conclusive against the whole world. But the finding on which it is based is not binding on third parties in subsequent proceedings.[6] If a creditor opposes his debtor's application to be declared an insolvent, on the ground that the debror has made a fraudulent transfer of his property, but the insolvency Court, after hearing the creditor, declares the debtor insolvent, the insolvency Court will have held that there was no fraudulent transfer and the creditor will not be permitted to raise in a subsequent suit the plea that the transfer was fraudulent.[7] In such a case, the estoppel against the creditor is not limited to the provisions of section 41 of the Evidence Act, as the judgment of the insolvency Court being a *judgment inter partes is* conclusive against the creditor on principles of *res judicata* even if it be not a judgment *in rem* of the kind mentioned in section 41 of the Evidence Act.[8] And the same will be the result if the creditor has sought for an order of adjudication against the debtor on the ground that he has made a fraudulent transfer of property but the insolvency Court has refused to make the order on the ground that no fraudulent transfer has been proved.[9] Where in an order of adjudication a transfer has been found to be fraudulent and therefore an act, of insolvency, the finding under section 116 of Presidency Town Insolvency Act, is conclusive against the transferee even though it was passed in his absence and without notice to him.[10] The rule is, however, otherwise in the case of

1. *Ripumadhusudan Prasad* v. *Rama Shankar*, 1969 BLJR 544 : 1969 Pat LJR 343.
2. Act III of 1909.
3. Act V of 1920.
4. *Ibid.*
5. *Firm of Radhakishen* v. *Gangabai*, 110 IC 730 : 1928 S 121.
6. *D.G.Sahasrabudhe.* v. *Kilachand Devchand and Co.*, 1947 N 161 : 230 IC 195 : ILR 1947 N 85 (FB).
7. *Narayan* v. *Harditarai*, 57 IC 612 ; *Ram Narain* v. *Durga Dat*, 55 PR 1912 ; 13 IC 968.
8. *Ibid.*
9. *Narayan* v. *Harditarai*, 57 IC 612.
10. *Mahomed Siddique Yousuf* v. *Official Assignee of Calcutta*, 1943 PC 130 ; 70 IA 93.

adjudication under Provincial Insolvency Act.[1] The judgment of an insolvency Court declaring a person creditor of the insolvent does not confer any "legal character" on him within the meaning of section 41; hence, the declaration that a judgment debt is a provable debt does not declare that an alleged debt which merged in that judgment debt is proved.[2] If the insolvency Court refuses to set aside an execution sale on the application of receiver, the order is conclusive and no similar application by the insolvent is competent.[3]

Adjudication by insolvency Court as to a person's title to property seized by the Court is conclusive.—If a person lays claim to the property seized by the insolvency Court, the decision is conclusive against the claimant who is thereby precluded from bringing a civil suit.[4] In such circumstances, the decision of the insolvency Court amounts to conclusive proof as to title in respect of the specific property claimed by the applicant, not merely as against him but absolutely within the meaning of section 41.[5]

Order refusing to declare a person insolvent is not a judgment in rem ; decision of insolvency Court that a person is or is not member of a firm not conclusive inter omnes.—The only kind of negative judgment which is contemplated by the section 41 is that which expressly takes away from a person a legal character which has up to that time subsisted;[6] an order refusing to declare a person insolvent is not a negative judgment of this kind, inasmuch as it does not purport to take away from the debtor a legal character which up to that time subsisted.[7] The expression "legal character" must be narrowly construed. "Legal character" means something equivalent to status. The legal character assigned to person announces to all the world what the legal status of the person in question is.[8] Being member of a firm is not a legal character at all of the kind mentioned in section 41, and any adjudication by the insolvency Court on the question whether a person is or is not member of an insolvent firm is neither relevant nor conclusive against strangers,[9] though it may be conclusive *inter partes on the principle of res judicata.* Further, as has been noticed before,[10] as between strangers or a party and stranger, a judgment *in rem is* no evidence of the truth of the grounds of the decision;[11] and, therefore, if an insolvency Court declines to declare a person insolvent on the ground that he is not a member of the firm adjudicated insolvent, the judgment of the insolvency Court is no evidence of the truth of this ground.[12]

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1. *Official Receiver* v. *Narra Gopalakrishniah,* 1945 M 66 ; 218 IC 240 ; ILR M 541 (FB).
2. In the matter of *Venkataramanayya Pantulu,* 54 M 601 ; 131 IC 817 ; 1931 M 441.
3. *Bansi Ram* v. *Anandi Ram Mohan,* 1935 P 273 ; 155 IC 734.
4. *Bhairo Prasad* v. *Dass,* 51 IC 113 ; *Irshad Husain* v. *Gopi Nath,* 41 A 378 ; 49 IC 590; *Pitaram* v. *Jhujhar Singh,* 33 IC 798.
5. *Pitaram* v. *Jhujhar Singh* 33 IC 798.; this observation which is obiter, it is submitted, is incorrect, as in the circumstances mentioned the estoppel arises by re judicata and not by reason of section 41, Evidence Act, and therefore, though parties and privies are within the estoppel, strangers are not. *See Ram Narain* v. *Durga Dat,* 55 PR 1912 ; 13 IC 568.
6. *Firm of Radhakishen* v. *Gangabai,* 110 IC 730 ; 1928 S 121 ; *Kalyanchand Lalchand* v. *Sitabai Dhanasa,* 38 B 309 : 23 IC 325 (FB).
7. *Firm of Radhakishen* v. *Gangabai,* 110 IC 730 ; 1928 S 121 .
8. In the matter of *Venkataramanayya Pantulu,* 54 M 601 ; 131 IC 817 ; 1931 M 441.
9. *Official* Assignee of *Madras* v. *Official Assignee of Rangoon,* 83 IC 174 ; 1924 M 662 ; *Firm of Radhakishen* v. *Gangabai,* 110 IC 730 ; 1928 S 121 *Punjab National Bank* v. *Balik Ram,* 1940 C 225.
10. See notes under the heading "judgment in rem conclusive of matters actually decided", supra.
11. Phipson Ev., 7th Ed., 395 ; Taylor, § 1733-34.
12. *Firm of Radhakishen* v. *Gangabai,* 110 IC 730 ; 1928 S 121

Questions of title decided by an Insolvency Court act *as re judicata* in subsequent suits.[1]

Decision that a creditor has or has not proved his right to present the petition.—The question whether a petitioning creditor had proved his right to present the petition or not, which, *inter alia*, includes, the question whether the debtor had committed an act of insolvency or not, is a question between the petitioning creditor and the alleged debtor. An order of the Court rejecting a petition on the ground that the petitioning creditor had not proved his right to present the petition would not operate as *res judicata* against the other creditor.[2]

Findings in an insolvency judgment, whether conclusive?—Though is may be necessary as a step to making a declaration which will operate *in rem*, to find a fact, that finding will not bind third parties in subsequent proceedings.[3] See also notes under the heading "judgment *in rem* conclusive of matter actually decided".

So far as the effect of an order of adjudication is concerned, in view of the provisions of this section no one can challenge it except by way of an appeal under the Insolvency law. Once an order of adjudication has come to stay beyond challenge, it is not open to any person, in a subsequent proceeding in the insolvency, or otherwise, to challenge it. The mere fact that, the status is determined, as result of an application by a petitioning creditor, cannot give to anyone any right at a subsequent stage in the insolvency proceeding , to challenge the adjudication order. Such a challenge is prohibited by virtue of this section. Nobody, at subsequent stages of the proceeding can challenge the very order of adjudication of the debtor as an insolvent in the guise of throwing a challenge to the genuineness of the debt of the petitioning creditor.[4]

Legal character.—The adjudication of a person as an insolvent has the effect of taking away from that persons his legal character of being not insolvent, An order by which such adjudication is made is covered by this section.[5]

The section is exhaustive of judgments in rem : judgment on questions of adoption, legitimacy, etc., are not judgment in rem.—This section is exhaustive of the classes of judgments which have a conclusive operation. No judgment, except that passed by a Court in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, can have the effect of a judgment *in rem.*[6] Therefore, a judgment deciding a question of adoption,[7] or declaring a person as a partner,[8] is not a judgment *in rem* binding on strangers. But it has been held that a foreign judgment declaring that a person is the adopted son of a Hindu widow, though not a judgment *in rem*, is binding on the Courts in India in a suit relating to immovable property in India belonging to that widow.[9] A decision by a competent Court that a Hindu family was joint and undivided,

1. 1962 Pak LJ Lah 106.
2. *Firm of Radhakishen* v. *Gangabai*, 110 IC 730 ; 1928 S 121
3. In the matter of *Venkataramanayya Pantulu*, 54 M 601 ; 131 IC 817 ; 1931 M 441.
4. *Bajrao* v. *Bansilal*, ILR 1963 B 173 ; 65 Bom. LR 39.
5. Amar *Kaur* v. *Shiv Karan*, ILR (1965) 1 Punj. 160.
6. *Arjun* v. *Mathura Nath*, 116 IC 83 ; 1928 A 395 ; *Guru Mahadeo Asram Prashad Sahi Bahadur* v. *Jagatraj Kuer*, 71 IC 929 ; 1924 P 298 ; *Rahmat Ali Khan* v. *Bubu Zuhra*, 14 PR 1912 ; 14 IC 486.
7. *Appa Trimbak Deshpande* v. *Waman Govind Deshpande*, 1941 PC 85 ; *Arjun* v. *Mathura Nath*, 116 IC 83 ; 1928 A 395 ; *Guru Mahadeo Asram Prashad Sahi Bahadur* v. *Jagatraj Kuer*, 71 IC 929 1924 P 298 ; *Kanhya Lal* v. *Radha Churn*, 7 WR 338 (FB); *Yarakalamma* v. *Anakala Naramma*, 2 MHCR 276.
8. *Firm of Radhakishen* v. *Gangabai*, 110 IC 730 : 1928 S 121 : *Abdurahiman Koyakutty Hajee* v. *Agastheenju Joseph*, 1952 TC 176.
9. *Natraja Pillai* v. *Subaraya Chetiar*, 1939 MWN 180 ; 1939 M 693.

or upon a question of legitimacy, partibility of property, rule of descent in a particular family, or upon any other question of the same nature in *suit inter partes in* not a judgment *in rem*, or binding upon strange, i.e., persons neither parties to the suit nor privies.[1] The decision of a Court acting under the Guardians and Wards Act as to the age of a minor is not a judgment *in rem* and, therefore, not conclusive, though it may be relevant to prove that the person was ward at the time.[2] Orders passed in the guardianship proceedings cannot be treated as a judgment *in rem*. They are admissible only to prove that such an order had in fact been made, but not to prove their contents. Certified copies of such orders are not, therefore, available even as being judgments to prove the age of the minor.[3] Where the father was not made a party to the guardianship proceedings for the custody of his child, the order passed in those proceedings are inadmissible under this section in a subsequent suit involving the issue of the parentage of the child.[4] But an order may be conclusive otherwise then under the provisions of this section. Thus by reason of section 68 of the Guardians and Wards Act an order appointing a guardian cannot be called in question except by appeal or revision.[5] An order upon a contributory under the Companies Act is conclusive evidence that the moneys ordered to be paid are due, and all other pertinent matters stated in such order are to be taken to be truly stated as against all persons and in all proceedings whatsoever.[6] An award made under the Bombay Agricultural Debtors Relief Act is an award between the debtor and all his creditors and is therefore binding upon all the creditors. It is not a judgment *in rem*.[7]

Foreign judgments declaring status.—Judgments of foreign Courts which declare the status of persons domiciled within their territory are by the comity of nations treated in India as analogous to judgments *in rem*.[8]

Foreign Judgments.—Conclusiveness from the point of view of the Law of Evidence can attach to a judgment, order or decree, only if it falls within the category mentioned in this section. In considering the question, whether a judgment of a foreign Court is conclusive the Court will not enquire whether conclusions recorded thereby are supported by the evidence, or are otherwise correct because the binding character of the judgment can be displaced only by establishing that the case falls within one or more of the six Clauses of section 13 C.P.C., and not otherwise.[9]

Orders in lunacy proceedings.—See notes to section 13 under this heading.

42. Relevancy and effect of judgments, orders or decrees, other than those mentioned in section 41.—Judgments, orders or decrees other than those mentioned in section 41, are relevant if they relate to mattes of a public nature relevant to the enquiry; but such judgments, orders or de-

1. *Yarakalamma* v. *Anokala Naramma*, 2 MHCR 276 ; *Abdurahiman Koyakutty Hajee* v. *Agastheenju Joesph*, 1952 TC 176.
2. *Husaina* v. *Sahib Nur*, 7 IC 505 ; *see also Manicka Mudaliar* v. *Ammakannu*, 1942 M 129 ; 2011 IC 39.
3. *Muktipada Dawn* v. *Aklema Khatun*, 1950 C 533.
4. *Manicka Mudaliar* v. *Ammakannu*, 1942 M 129 ; 201 IC 39.
5. *Sankhavaram Naligindla Venkata Rangacharyulu* v. *Rangasubbe Akappa Rao*, 1941 M. 569.
6. *See*, Section 198 ; Act VII of 1913.
7. *Keshav Ganashyam* v. *Waman Rangaji*, 1953 B. 340.
8. *Nataraj Pillai* v. *Subbaraya Chettiar*, 1939 MWN 180 ; 1939 M 693.
9. *Viswanatham* v. *Abdul Wajid*, (1983) 3 SCR 22.