THE INDIAN EVIDENCE ACT, 1872

[ACT No. 1 OF 1872][1]

[Received the assent of the Governor-General on the 15th March, 1872]

Preamble.—Whereas it is expedient to consolidate, define and amend the Law of Evidence; It is hereby enacted as follows:—

COMMENTARY

Preamble.— The title and the preamble undoubtedly throw light on the intents and designs of the Legislature, and indicate the scope or the purpose of the Legislature itself,[2] and might be as aids to the construction of a statute.[3] The preamble of a statute is a good means of finding out its meaning, and a key to the understanding of it; and, as it usually states the general object and intention of the Legislature in passing the enactment, it may legitimately be consulted to solve any ambiguity, or to fix the meaning of words which may have more than one, or to keep the effect of the Act within its real scope, whenever the enacting parts is in any of these respects open to doubt.[4] Where the language and the object and scope of the Act are not open to doubt, the preamble cannot either restrict or extend the enacting part.[5] If the enacting part of a statute is not exactly co-extensive with the preamble, the former, if expressed in clear and unequivocal terms, will override the latter,[6] as, in case of conflict between the preamble and the section, it is the section that governs.[7] But, if the phraseology of the section is ambiguous or doubtful, the preamble may be referred to, to resolve the ambiguity.[8]

The Act is a consolidating, defining and amending Statute.— The preamble shows that the Act was not intended to be a mere fragmentary enactment but a consolidating Statute, repealing all rules of evidence other than those saved by the last part of Section 2 of the Act[9] (now repealed by Act of 1938).

History of the Law of Evidence.— Before the enactment of Evidence Act there was no single exhaustive Code containing the law of evidence of uniform application in the country. The Courts in the three Presidency towns of Calcutta, Madras and Bombay had, since their constitution, followed the English rules of evidence; but this practice

---

1. For Statement of Objects and Reasons, *see Gazette* of India, 1868, p.1574; for the draft or preliminary Report of the Select Committee, dated 31st March, 1871, *see ibid.*, 1871, Pt. V, p.273 and for the second Report of the Select Committee, dated 30th January, 1872, *see ibid*, 1872, Pt. V, p.34; for discussion in Council, *see ibid.*; 1868, Supplement, pp. 1060 and 1209, *ibid.*, 1871, Extra Supplement, p. 42 and Supplement, p. 1641, and *ibid.*, 1872, pp. 136 and 230.
2. *In re The Kerala Education Bill*, ILR 1958 Ker 1167.
3. *Bengal Immunity Co. v. State of Bihar*, (1955) 2 SCR 603.
4. Maxwell's Interpretation of Statutes, 8th Ed., 40; *per* Tindal, C.J., in *Sussex Peerage Case*, (1844) 11 CL and F 85, 143; *Narayana Swami v. E.*, 1939 PC 47: 180 IC 1: 1939 ALJ 298: 41 PLR 272: 69 CLJ 273: 41 Bom LR 428: 1939 MWN 185: 43 CWN 473.
5. Maxwell's Interpretation of Statutes, 8th Ed., 41-42; *Powell v. Kempton Park Race Course Co.*, (1899) AC 143.
6. *Raj Mal v. Harnam Singh*, 104 IC 661: 1928 L 35.
7. *Secretary of State for India v. Maharaja of Bobbili*, 43 M 529: 46 IA 302 (PC); *Mani Lal Singh v. Trustees for the Improvement of Calcutta*, 45 C 343 (FB).
8. *Raj Mal v. Harnam Singh*, 104 IC 661: 1928 L. 35.
9. *Collector of Gorakhpur v. Palakdhari Singh*, 12 A 1, 35 (FB).

was devoid of statutory sanction till 1726 when the first judicial Chapter of that year which remodelled these Courts also formally introduced the English Common and Statute Law of Evidence in the Presidency towns.

Outside the Presidency towns this branch of the law was in a very chaotic condition. The rules of evidence which had statutory force were contained in a number of Regulations and enactments, most important of which was Act II of 1855, which also applied to the Presidency towns. But the scope of these Regulations and enactments was very much limited; in none of them was the subject of the law of evidence treated as a systematic whole; and, for most of the disputed points touching the subject of evidence, the Courts in the Mofussil had to fall back upon the English and Mohammadan Laws of Evidence and on their own notions of what was just and proper under the circumstances. Though a Full Bench of the Calcutta High Court had, as early as 1866, definitely held that the English and Mohammadan rules of evidence had no statutory force in the Mofussil,[1] still by the time the Evidence Act was introduced, a vast body of "customary" rules of evidence, mainly derived from English law, had already come into existence with such limitations and modifications as were suggested by the peculiar circumstances of the country. These "customary" rules had, however, no higher authority than that of use and practice; and, with the passing of the Indian Evidence Act, they have been "consolidated" and, with certain modifications and additions, incorporated into a single enactment which applies to the Presidency towns and the Mofussil alike; and such of these customary rules as have not been so incorporated have ceased to have any force.[2]

The Act repeals all rules of evidence not saved by the Act.— The Act is not exhaustive of the rules of evidence, as it does not contain the whole law of evidence governing this country.[3] The saving clause in the second section of the Act (now repealed by Act I of 1938) left unaffected all Statutes, Acts and Regulations not expressly repealed by the Act.[4] The Evidence Act deals with the subject of the law of evidence in general; but in addition to the general rules contained in the Act, there are other rules of evidence relating to special subjects which are contained in other enactments. Thus the whole law of evidence of this country is contained in the Indian Evidence Act and those Statutes, Acts and Regulations which are not expressly repealed by the Act. Though, therefore the Act is not exhaustive of the rules of evidence, it is, and was intended to be, a complete Code of the law of evidence[5] in the sense that it has repealed all rules of evidence not contained in any Statute, Act or Regulations.[6] Consequently a person tendering evidence of a fact has to show that it is admissible under some provision of the Evidence Act or any other enactment which is not repealed by the Act[7]; and the employment of any kind of evidence not specifically authorised by the Act is prohibited.[8] After the coming into force of the Indian Evidence Act it is

---

1. *Q. v. Khyroolah*, 6 WR Cr 21 (FB).
2. Section 2 (now repealed by Act I of 1938).
3. In the matter of Rudolf Stallman, 39 C 164; *Annavi Muthiriyan* v. *E.*, 39 M 449.
4. *Rahijaddi* v. *E.*, 58 C 1009: 132 IC 159: 1931 C 189.
5. *Q. E.* v. *Kartick Chunder Das*, 14 C 721, 728 (FB).
6. *Lekhraj Kuar* v. *Mahpal Singh*, 5 C 744, 754: 7 IA 63 (PC); *Meer Jangoo* v. *Chote Sahib*, 8 IC 1124.
7. *Lekhraj Kuar* v. *Mahpal Singh*, 5 C 744, 754: 7 IA 63 (PC); *Q E. v. Abdullah*, 7 A 385, 399 (FB).
8. *Chandulal* v. *Bibi Khatemonnessa*, 1943 C 76: 205 IC 344: II.R (1942) 2 C 299: 75 CLJ 301; *Sris Chandra*

not open to the Courts in India to apply in matters of evidence the principles of equity, justice and good conscience,[1] or the rules of Hindu or Mohammadan Law, if they are inconsistent with the Act. The Act repeals the whole of the English Common Law of Evidence so far as it was in force in British India before the passing of the Act. What matters should be given in evidence as essential for the ascertainment of truth, it is the purpose of the law of evidence whether at common law or by statute to define. Once a statute is passed which purports to contain the whole law, it is imperative. It is not open to any judge to exercise a dispensing power, and admit evidence not admissible by the statute because to him it appears that the irregular evidence would throw light upon the issue. the rules of evidence, whether contained in a statute or not, are the result of long experience choosing no doubt to confine evidence to particular forms, and therefore eliminating others which it is conceivable might assist in arriving at truth. But that which has been eliminated has been considered to be of such doubtful value as on the whole to be more likely to disguise truth than discover it. It is, therefore, discarded for all purposes and in all circumstances. To allow a judge to introduce it at his own discretion would be to destroy the whole object of the general rule.[2] The principles of exclusion of evidence laid down in the Act must be strictly applied and cannot be relaxed at the discretion of the Court.[3]

Construction.— In construing Statutes the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the Statute, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further.[4] The only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed the Act. If the words of the Statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do in such case best declare the intention of the law-giver. But if any doubt arises from the terms employed by the Legislature, it has always been held a safe means of collecting the intention, to call in aid the ground and cause of making the Statute, and to have recourse to the preamble.[5] Where the language is doubtful, or ambiguous, the constitutional principles and practice, with surrounding circumstances and the proceedings of the Legislature can be looked into for ascertaining the object or purpose of the Legislature in enacting a particular provision, for the understanding of the circumstances under which the statute in question was passed and

---

Nandy v. *Rakhalananda Thakur*, 1941 PC 16: 68 IA 34: 193 IC 220: *see* also *Kashyap* v. *Emperor*, 1945 L 23 (FB).

1. *Meer Jangoo* v. *Chote Sahib*, 8 IC 1124.
2. *Sris Chandra Nandi* v. *Rakhalananda Thakur*, 1941 PC 16: 68 IA 34: 193 IC 220; *see also Kashyap* v. *Emperor*, 1945 L 23 (FB).
3. *Union of India* v. *T.R. Verma*, (1958) SCJ 142.
4. Lord Wensleydale in *Grey* v. *Pearson*, (1875) 6 HLC 61, 106, followed in *Narayana Swami* v. *E.*, 1939 PC 47: 180 IC 1: 1939 ALJ 298: 41 PLR 272: 69 CLJ 273: 41 Bom LR 428: 1939 MWN 185: 43 CWN 473.
5. Tindal, C.J., in the Sussex Peerage Case, (1844) 11 CL and F 85, 143; Lord Halsbury, L.C., in *Income-tax Commissioner* v. *Pemsel*, (1891) AC 531, 542; *Narayana Swami* v. *E.*, 1939 PC 47.

the reasons which necessitated it.[1] In construing a statute like the Evidence Act which is exhaustive and where any fact intended to be established has to be, in accordance with the scheme of the Act, found to be relevant under a provision contained in the Act before it can be allowed to be proved, any argument based on plausibility can have no effect. The Court must, therefore, ignore any other consideration and confine itself strictly to the provisions of the Act and come to a conclusion as to the relevancy of a fact on the interpretation of the relevant provisions of the fact regardless of the fact whether the conclusion ultimately arrived at is in accordance with a commonsense view of things or not.[2]

In a case in the House of Lords,[3] the rule for constructing a modifying Statute such as the present Act was thus enunciated by Lord Herschell:—"The proper course is, in the first instance, to examine the language of the Statute and to ask what is its natural meaning, uninfluenced by any consideration derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in confirmity with this view. If a Statute, intended to embody in a Code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a Statute surely was that, on any point specifically dealt with by it, the law should be ascertained by interpreting the language used, instead of, as before, by roaming over a vast number of authorities in order to discover what the law was." This principle was adopted by the Privy Council in constructing Section 111 of the Indian Succession Act,[4] and has also been acted upon by the Courts of this country.[5]

Proviso.— A proviso is a part of the section itself. It is attached to the main clause for the purpose of explaining,[6] varying, substracting, or adding to the particular matter referred to therein. It should be read along with the main clause, whose operation it restricts, controls, or modifies, and be interpreted with reference to it.[7] It embraces only the field which is covered by the main clause, and carves out something out of it, but never destroys it as a whole; and it carves out an exception to that main provision only to which it is enacted as a proviso and to no other.[8]

Headings and side-notes.— The headings prefixed to sections or sets of sections in modern Statutes are regarded as preambles to those sections.[9] Headings fulfil the object and serve as a key to construing, in case of logical defects, the meaning, scope and intention of the sections. They cannot control the plain words of the

---

1. *Charanjit Lal* v. *Union of India*, 1950 SCR 869.
2. *Kashyap* v. *E.*, 1945 L 23 (FB).
3. *Bank of England* v. *Vagliano*, (1891) AC 107, 144-145.
4. *Nerendra Nath Sarcar* v. *Kamalbasni Dasi*, 23 C 563: 23 IA 18 (PC).
5. *Suraj Prasod* v. *Golab Chand*, 28 C 517; *Kondayya Chetti* v. *Narasimhulu Chetti*, 20 M 97.
6. *Local Government Board* v. *South Stonehem Union*, 1009 AC 57.
7. *Tahsildar Singh* v. *State of U.P.*, 1959 SCJ 1042.
8. *Ram Narain & Sons Ltd.* v. *Assistant Commissioner*, (1955) 2 SCR 483; *Dattaram Motiram* v. *State of Bombay*, 53 Bom. LR 323, 327.
9. Maxwell's Interpretation of Statutes, 8th Ed., 46. *See* also Eastern Countries, etc., *Ry. Cos.* v. *Francis Marriage*, 1862. 9 HLC 32: 8 WR 743; *Devi Das* v. *Maharaj Rup Chand*, 1927 A 593: 49 A 903.

statutes but may explain ambiguous words. If there is any doubt they help to restore that doubt.[1] The marginal notes to the sections of an Act cannot be referred to for the purpose of construing the Act.[2] Though they form no part of the sections, they are of some assistance, inasmuch as they show the drift of the section.[3] The marginal heading of a section is of no avail in the interpretation of the section if the express provisions of the section point to the contrary, but it may usefully be referred to where it is not in any way repugnant to the provisions of the section.[4] There can be no justification for restriction, or differently interpreting the plain contents of the section by the marginal note, and they are clearly inadmissible for cutting down the plain meaning of a section, though in case of doubt they do furnish some clue as to the meaning and purpose of the section.[5] Marginal notes are not strictly a part of the section. When the language of a section is clear, and unambiguous, they cannot control the meaning of the body.[6]

Illustrations.—Illustrations appended to an Act of the Legislature are a part of the enactment.[7] They can, therefore, be legitimately used, and are of value, in the construction of the section,[8] if the meaning of the section is doubtful,[9] as they indicate the presumable intention of the Legislature.[10] But if the meaning of the section is clear, the illustrations to it cannot be used to control its meaning.[11] Where an illustration is in conflict with the section, it must give way to the section. But it is not to be readily assumed that an illustration is repugnant to the section and should not be rejected.[12]

Reference to English Authorities.— In *State of Punjab* v. *Sodhi Sukhdev Singh*,[13] Subba Rao, J., has observed:

'It has been acknowledged generally with some exceptions that the Indian Evidence Act consolidates the English Law of Evidence. In the case of doubt or ambiguity over the interpretation of any of the sections of the (Indian) Evidence Act the Court can with profit look to the relevant English Common Law for ascertaining the true meaning'. The Act, though not an exact reproduction of the English Law,[14] is mainly

---

1. *Bhinca* v. *Charan Singh*, 1959 ALJ 557.
2. *Thakurain Balraj Kanwar* v. *Rae Jagatpal Singh*, 26 A 303: 31 IA 132 (PC).
3. *Bushell* v. *Hammond*, (1904) 73 LJKB 1005, 1007.
4. *Ram Kirpal* v. *Shri Krishna Deo Pratap Singh*, 1948 A 108: 1948 ALJ 11: 1948 OWN 67: ILR 1947 A 798.
5. *Bengal Immunity Co.* v. *State of Bihar*, (1955) 2 SCR 603.
6. *Western India Theatres Ltd.* v. *Municipal Corporation*, (1959) SCA 145 : 1959 SCJ 390.
7. *Ballamal* v. *Ahmad Shah*, 124 PR 1918 (PC): 48 IC 1: 1918 PC 249; but *See Nanak Ram* v. *Mehin Lal*, I A 487; *Dubey Sahai* v. *Ganeshi*, I A 34 (FB); *Reg* v. *Rahimat*, I B 147, 155 (FB).
8. *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark*, 43 I A 256: 39 IC 401: 1916 PC 242; *Janoo & Co.* v. *Joseph Heap & Sons Ltd.*, 46 IC 497.
9. *Sajidunnissa Bibi* v. *Hidayat Hussain*, 80 IC 896: 1924 A 748;
10. *Satis Chandra Chakrabarti* v. *Ram Dayal De*, 48 C 388: 59 IC 143: *Q.E.* v. *Fakirappa*, 15 B, 491, 496; *Gajjulal* v. *Fattehlal*, 6 C, 171 (FB).
11. *Sajidunnissa Bibi* v. *Hidayat Hussain*, 80 IC 896: 1924 A 748; *Satis Chandra Chakrabarti* v. *Ram Dayal De*, 48 C 388: 59 IC 143: 22 Cr. LJ 31: 24 CWN 982; *Koylash Chunder Ghose* v. *Sonatum Chung Barooie*, 7 C 132.
12. *Jumma Masjid* v. *Kodimaniandra*, (1962) 2 SCA 422: (1962) 2 SCJ 303.
13. 1961 (2) SCJ 691.
14. *Niharendu Dutt* v. *E.*, 1942 FC 22: 200 IC 289: 43 Cr. LJ 504.

based on Taylor's work on Evidence and, in the words of Sir James Fitzjames Stephen who framed it, is an "attempt to reduce the English law of evidence in the form of express propositions arranged in their natural order with some modifications rendered necessary by the peculiar circumstances of India."[1] The Act was intended to, and did in fact, consolidate the English law of evidence.[2] A reference to English authorities is, therefore, not only permissible but useful.[3] It must, however, be noted that as the Act has consolidated, defined and amended the law of evidence, it has to be regarded as a complete Code in itself; and in construing in various provisions we must start from the Act and not deal with it as a mere modification of the law of evidence prevailing in England.[4]

The acceptance of a rule or principle of law, adopted in or derived from English law, is not permissible, if thereby the true and actual meaning of a Colonial Statute under construction be varied in effect.[5] A reference to English authorities is, however, justified where the language used in the Statute is of doubtful import,[6] or where the principle laid down in the English case does not depend upon any peculiarity in the English law,[7] or when a point arises from which there is no positive solution in the Act itself.[8] Acting on this principle, Judges in this country have frequently referred to English authorities on the law of evidence.[9] "Cases frequently occur in India in which considerable assistance is derived from the law of England and other countries. In such case we have to see how far such law was founded on commonsense and on the principles of justice between man and man and may safely afford guidance here."[10] English authorities can, however, be referred to only by way of illustration; they are not in any way binding,[11] and considerable caution is necessary in their application.[12] But, where a Colonial Statute is professedly based on or adopts the terms of an Imperial Statute, and the latter has been authoritatively construed by the English Court of Appeal, the Colonial Courts are, in practice, if not in theory, bound by this construction.[13] On a matter on which the law of evidence in India is the same as in England, the decisions of

---

1. *Smith* v. *Ludha Ghella Domodar*, 17 B, 129, 141.
2. *Gujja Lall* v. *Fatteh Lall*, 6 C, 171, 188 (FB).
3. *Parbhoo* v. *E.*, 1941 A 402: ILR 1941 A, 843 (FB); *E.* v. *Ramanuja Ayyangar*, 58 M 642: 1935 M 528: 158 IC 764; *Annavi Muthiriyan* v. *E.*, 39 M 449 ; *Framji Bhicaji* v. *Mohan Singh Dhan Singh*, 18 B 263, 271; *Collector of Gorakhpur* v. *Palakdhari Singh*, 12 A 1. 11 (FB); *Memon Hajee Haroon Mahomed* v. *Molvi Abdul Karim*, 3 B 91.
4. *E.* v. *Ramanuja Ayyangar*, 58 M 642: 1935 M 528: 158 IC 764; *The King* v. *Nga Mya*, 1938 R 177: 1938 RLR 190 (FB); *Dial Singh* v. *E.*, 16 I 651: 1936 L 337: *E.* v. *Ashootosh Chuckerbutty*, 4 C 483 (FB).
5. *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark*, 43 IA 256 (PC).
6. *Bank of England* v. *Vagliano*, (1891) AC 107, per Lord Herschell quoted in *Kondayya Chetti* v. *Narasimhulu Chetti*, 20 M 97, 103-4; *see* also *Dial Singh* v. *E.*, 16 L 651: 1936 L 337.
7. *Nandi Singh* v. *Sita Ram*, 16 C 677: 16 IA 44 (PC).
8. *E.* v. *Ashootosh Chukerbutty*, 4 C 483, 491 (FB).
9. *Annavi Mutairiyan* v. *E.*, 39 M 449: 28 IC 518; *Framji Bhicaji* v. *Mohan Singh Dhan Singh*, 18 B 263, 271; *Collector of Gorakhpur* v. *Palakdhari Singh*, 12 A 1 (FB); *Memon Hajee Haroon Mahomed* v. *Molvi Abdul Karim*, 3 B 91.
10. *Collector of Gorakhpur* v. *Palakdhari Singh*, 12 A 1, 11-12 (FB).
11. In the matter of the petition of Surat Dhobni, 10 C 302.
12. *Niharendu Dutt* v. *E.*, 1942 FC 22: 200 IC 289: 43 Cr. LJ 504.
13. *Messrs. Lovelock & Lewes* v. *The Malabar Timber & Saw Mills Ltd.*, 18 IC 997; *Ramendra Nath Roy* v. *Brojendra Nath Dass*, 45 C 111: 41 IC 944; *Trimble* v. *Hill*, (1879) 5 AC 342 (PC).

English Courts form a most valuable guide to the Courts in India and a decision of the House of Lords must be considered to be of paramount authority.[1]

Lex fori.— The *'lex fori'* is, in Anglo-American practice, deemed determinative on the general principle that procedure is governed by the rules of the forum, and the Law of Evidence is part of the Law of Procedure. With this result practical convenience also coincides.[2] The law of evidence is a branch of adjective law and, therefore, all questions of evidence must be decided according to the law of the forum in which the action is tried.[3] Even where evidence has been received from abroad, having been taken there on commission or otherwise, its admissibility is determined by the law of the country where the action is being tried.[4] Where the question is one of the proper method of proving an event which occurred in England, the law applicable is the Indian, and not the English law of evidence.[5]

Changes in the law of evidence are retrospective.— As the law of evidence is a law of procedure, changes in this branch of the law are, like changes in other rules of procedure, retrospective.[6]

Objects of the Evidence Act.—The capital object of the Evidence Act is to prevent indiscipline in admission of evidence by enacting a correct and uniform rule of practice. If irrelevant facts are admitted, they are likely to disguise truth than discover it.

The main principles emerging from the Act are:

(i) evidence must be pinned down to matters in issue;
(ii) best evidence must be tendered;
(iii) hearsay evidence must be kept out.

---

1. *E.* v. *Damapala*, ILR (1937) 14 R 666: 1937 R 83 (FB); *Yusuf* v. *State*, 1954 C 258.
2. *Bain* v. *Whitehaven Railway Co.*, 3 HL Cas. 1, 19, per Lord Brougham.
3. In the matter of Rudolf Stallman, 39 C 164, 185; *Bain* v. *Whitehaven Ry. Co.*, 3 HLC 1, 19.
4. Foote's Priv. International Law, 5th Ed., 569.
5. *Niharendu Dutt* v. *E.*, 1942 FC 22: 200 IC 289: 43 Cr. LJ 504.
6. *Paras Ram* v. *Mewa Kunwar*, 125 IC 754: 1930 A 561.

PART I

Relevancy of facts

CHAPTER I

Preliminary

1. Short title, extent and commencement.—This Act may be called the Indian Evidence Act, 1872.

It extends[1] to [2]the whole of India [3][except the State of Jammu and Kashmir] and applies to all judicial proceedings in or before any Court, including Courts-martial, [other than Courts-martial convened under the Army Act (44 & 45 Vict., c.58), [the Naval Discipline Act (29 & 30 Vict., c. 109)] [or * * * the Indian Navy (Discipline) Act, 1934 (XXXIV of 1934) or the Air Force Act (7 Geo 5, c. 51)] but not to affidavits presented to any Court or Officer, nor to proceedings before an arbitrator;

And it shall come into force on the first day of September, 1872.

COMMENTARY

India.— Originally the Act extended to the whole of British India. The anomaly of there being separate rules of evidence for the Presidency towns and for the Mofussil which existed before the passing of the Act was removed by the Act. The expression "the whole of British India" was changed into "all the Provinces of India" by the Adaptation Order, 1948. The expression "whole of India except Part B States" was substituted for "all the Provinces of India" by the Adaptation Order, 1950. The expression "except the State of Jammu and Kashmir" was substituted by Act 3 of 1951. Therefore, now the Act applies to the whole of India. "India" is not defined in the Act. In the absence of any definition of a particular expression in an Act, the definition, if any, in the general Clauses Act, X of 1897, should be referred to. Section 3(28) of the General Clauses Act, X of 1897, as modified by the Adaptation Order, 1950, defines "India" as follows:— "India" shall mean, as respects any period before the establishment of the Dominion of India, British India together with all territories of Indian Rulers then under the suzerainty of His Majesty, all territories under the suzerainty of such an Indian Ruler, and the tribal areas; as respects any period after the establishment of the Dominion of India and before the commencement of the Constitution, all territories for the time being

---

1. The Act now extends to the Union Territories of (a) Dadra and Nagar Haveli (*vide* Ref. 6 of 1963) (b) Goa Daman and Diu (*vide* Ref. 11 of 1963) (c) Pondicherry (*vide* Ref. 7 of 1963) and (d) Lakshadweep (*vide* Ref. 8 of 1965).
2. Subs *by the A.O. 1950, for "all the Provinces of India" which had been* subs. *by the A.O. 1948, for "the whole of British India"*.
3. *Subs.* by Act 3 of 1951, for "except Part B States".

included in that Dominion; and as respects any period after the commencement of the Constitution, all territories for the time being comprised in the territory of India". Article 1 of the Constitution defines "India" as under:— "India, that is Bharat, shall be a Union of States. The States and the territories thereof shall be the States and their territories specified in Parts A, B and C of the First Schedule. The territories of India shall comprise the territories of the States; the territories specified in Part D of the First Schedule; and such other territories as may be acquired."

Pakistan—Omit 'Indian'. For "the whole of India except the State of Jammu and Kashmir" read "all the Provinces and the Capital of the Federation."

Application of the Act to Courts-Martial.—The Act applies to all judicial proceedings in or before any Court. It also applies to proceedings in Indian Courts-Martial,[1] but European Courts-Martial, constituted under the Army Act or the Air Force Act, are not governed by the Indian Evidence Act but by the English law of Evidence.[2] The Act also applies to proceedings before Indian Marine Courts.[3]

Judicial Proceedings.— The term 'judicial proceedings" is not defined by the Evidence Act, but it is defined by the Section 4(m) of the *Criminal Procedure Code as a "proceeding in the course of which evidence is or may be legally taken on oath." An enquiry is judicial, if the object of it is to determine a jural relation between one person and another or group of persons, or between him and the community generally.[4] Proceedings under the Income-tax Act are not judicial proceedings in the sense in which the phrase "judicial proceedings" is ordinarily used.[5] Contempt proceedings, though judicial proceedings, are outside the scope of this section of the Act.[6] As to instances of judicial proceedings, see notes to Section 33 and 80.

Statement by Judge or Presiding Officer.— A statement by the trial judge as to what took place at the trial is conclusive.[7] A statement of the Presiding Officer of a Tribunal is generally taken to be correct.[8]

Courts.— This word includes all persons, except arbitrators, legally authorised to take evidence.[9] A Commissioner appointed under the Civil Procedure Code or Criminal Procedure Code* is entitled to take evidence and, is therefore, a Court.[10]

Affidavits.—An affidavit is a declaration sworn or affirmed before a person competent to administer an oath.[11] It is not evidence within the meaning of Section 3.[12]

---

1. *See* Section 88 of Act VIII of 1911.
2. 44 and 45 Vic., C.58, Section 127.
3. Act XIV of 1887, Section 68.
4. *Q.E.* v. *Tulja*, 12 B.36, p.42.
5. *Anraj Narain Dass* v. *Commr. of Income-tax*, 1952 Punj. 46: 20 ITR 562; *Seth Gurmukh Singh* v. *Commr. of Income-tax*, AIR 1944 Lah. 353(2): 12 ITR 393 (FB).
6. *Sheoraj* v. *A.P. Batra*, 1955 A. 638.
7. *Upendranath*, 19 CWN 653 (FB)
8. *Union of India* v. *T.R. Verma*, 1957 SC 882.
9. See Section 3 post, and notes thereto.
10. See O. 26, r. 16, C.P.C. and Sections 503-505, Cr. P.C.
11. As to persons before whom affidavits can be sworn, *see* Section 539, and 539-A, *Cr. P.C. and Section 139 C.P.C.
12. *Federal India Assurance Co.* v. *Anandrao Pandurangrao Dixit*, 1944 N 161; *Dominion of India* v. *Rupchand Hirachand*, 1953 N 169; but *see* Section 510-A of the *Code of Criminal Procedure, under which evidence of a formal character may be given by affidavit.

* See new Cr. P.C., 1973.

The only basis on which the affidavit of a living person, not called into the witness box, can be acted upon as admissible evidence is that it should be capable of being regarded as a statement in writing, complying with the conditions prescribed in Section 32 of the Act.[1] The Civil Procedure Code provides that a Court may order any fact to be proved by an affidavit;[2] and there are provisions in the Civil and Criminal Procedure Codes* which require certain allegations of fact to be supported by affidavits.[3] It is the practice of Courts in certain other matters to require an affidavit in proof of an assertion.[4] But affidavit evidence is not admissible in order to explain an order passed by a Court.[5] The rules of evidence do not apply to such affidavits; for instance the adverse party is not entitled as of right to cross-examine the deponent, though the Court may, in its discretion, require the production of the deponent for cross-examination by the other party.[6] Again, as a rule, evidence is given before the Court in which the proceedings are pending, but an affidavit may be sworn before another person authorized to attest affidavits. All evidence, under Section 60 of the Evidence Act, must be direct; but in an affidavit the deponent can depose to facts which, under the Act, would be excluded as hearsay, e.g., statements of belief. This however, applies only to affidavits in interlocutory applications.[7] The safeguards for truth in affidavits are the power of the Court to require the deponent to be produced for cross-examination and the fear of prosecution under Section 193, I.P.C., for giving false evidence. If a Magistrate has no power to administer an oath to a person making a declaration in the form of an affidavit, such person, cannot, on the facts stated in such declaration, be prosecuted for committing an offence under Section 193 or Section 199 of the Indian Penal Code.[8] An accused person who makes a false statement in an affidavit in support of an application for transfer of a case can be convinced under Section 193, I.P.C.[9] Since the Evidence Act expressly does not apply to affidavits, proving a fact by an affidavit is not barred. Contempt can be proved by affidavits.[10] Affidavits cannot be used as evidence under any of the provisions of the Indian Evidence Act. Affidavits can, however be used as evidence, only under Order XIX, of the Civil Procedure Code.[11]

Departmental enquiries.— In departmental enquiries the strict laws of evidence according to the Evidence Act are not applicable.[12] Departmental proceed-

---

1. *Marneedi Satyam* v. *Masimukkula Venkataswami*, 1949 M 689: 1949 1 MLJ 434: 62 MLW 256; *Gooru Narayana* v. *Vaikuntam Chinna Lakshmayya*, 1939 M 927: 185 IC 421; *Warner* v. *Moses*, 1881, 16 Ch.D. 100.
2. O. 19, r. 1; *Marneedi Satyam* v. *Masimukkula Venkataswami*, 1949 M 689.
3. *See* Sections 510-A, 526, 539(A), Cr.P.C., O. 11, rr.8-20, O.5, rr.18-19, O.32, r.3, O.38, rr. 1 & 5 and O 39, r. 1, C.P.C.
4. E.g., applications for transfer of civil cases, stay of execution proceedings or for extension of time under Section 5 of the Limitation Act should be supported by affidavit.
5. *Kripashankar Mishra* v. *Anunsingh Bedi*, 1943 N 288: 1953 NLJ 367.
6. O.19, r.2, C.P.C.
7. O.19, r.3, C.P.C.
8. In the matter of the petition of *Iswar Chander Guho*, 14 C 653.
9. *Badri Prasad* v. *Jhamman*, 55 A 114; *Ghulam Mohammad* v. *Crown*, 3 L 46; *Crown* v. *Pir Qadir Baksh Shah*, 6 L 34; *Mst. Allah Wasai* v. *E.*, 1926 L 12.
10. *Sheoraj* v. *A.P. Batra*, 1955 A 638; Section 510-A of Cr. P.C. permits giving of evidence of formal character by an affidavit.
11. *Shamsunder* v. *Bharat Oil Mills*, 65 Bom. LR 584, 587.
12. *Sisir Kumar Das* v. *State*, 1955 C 183: 58 CWN 952.

* See new Cr. P.C., 1973.

ings are not in the same category as criminal prosecutions or even civil proceedings in court. The provisions of this Act are not applicable to these departmental enquiries. But, at the same time, ordinary principles of proof and also rules of natural justice must be applied.

In a departmental enquiry, the delinquent concerned is entitled to an opportunity to deny his guilt and establish his innocence which he can only do if he is told what the charges levelled against him are and the allegations on which such charges are based; an opportunity to defend himself by cross-examining the witnesses produced against him and by examining himself or any other witnesses in support of his defence, and an opportunity to make his representation as to why the proposed punishment should not be inflicted against him, which he can only do, if the competent authority, after the enquiry is over and after applying his mind to the gravity or otherwise of the charges proved against him, tentatively proposes to inflict, and communicates the same to the delinquent.[1] In case these rules of natural justice, are satisfied, the enquiry is not open to attack on the ground that the procedure laid down in this Act for taking evidence was not strictly followed. This was reiterated in *State of M.P.* v. *Chintaman.*[2]

The Act is not applicable to proceedings before an arbitrator.— The Evidence Act in its rigour is not intended to apply to proceedings before an arbitrator.[3] Therefore, an arbitrator is not bound by the strict rules of evidence; and it is not a valid objection to his award that he has departed from some technical rule of the Act.[4] His award can be set aside only when any of the grounds mentioned in Section 30 of the Arbitration Act, 1940, is made out. A departure from the rules of the Act does not *per se* amount to "judicial misconduct", unless the rule of evidence violated is one which is based on natural justice, and an infringement of it is, therefore, repugnant to one's sense of justice and fairness. In such a case, therefore, if the award is set aside, it is not because the arbitrator has not complied with the provisions of the Evidence Act, but because his act or omission amounts to "misconduct" within the meaning of Section 30 of the Arbitration Act, 1940. Thus, if an arbitrator receives the evidence of one party in the absence of the other,[5] or does not give a fair opportunity to a party to prove his case,[6] or disallows a party to cross-examine his opponent's witnesses,[7] or bases his award on the result of a private inquiry,[8] or on his own knowledge and information,[9] his award will be set aside, as the rule of evidence infringed in each of these cases is based on natural justice. An arbitrator may be a most respectable and honest man and yet he may be

1. *Khem Chand* v. *Union of India*, 1958 SCR 1930.
2. 1961 Jab. LJ. 702.
3. *Haji Ebrahim Kassam Cochinwalla* v. *Northern India Oil Industries, Ltd.*, 1951 C 230: 85 CLJ 176.
4. *Suppu* v. *Govindacharyar*, 11 M 85; *Howard* v. *Wilson*, 4 C 231.
5. *Abdul Hamid* v. *Muhammad*, 8 L 329: 101 IC 153; *Bhaiya* v. *Jogeshwar*, 52 A 938: 128 IC 4; *Muhammad Aftal* v. *Abdul Hamid*, 88 IC 161; *Chintalapudi* v. *Chintalapudi*, 73 IC 470; *Delhi Cloth & General Mills Co., Ltd.* v. *Kidari Pershad Chedi Lal*, 64 IC 363: 1921 L 396; *Cursetji Jahangir Khambatta* v. *Crowder*, 18 B 299; *Ganga Sahai* v. *Lekhraj Singh*, 9 A 253; *Sheodutt* v. *Vishnudatta*, 1953 N 116.
6. *Ma Hnine Le* v. *Ma Nyein Bwin*, 1936 R 191: 162 IC 772; *Ganga Sahai* v. *Lekhraj Singh*, 9 A 253, 264; *Deoki Nandan* v. *Rajkumar*, AWN 124.
7. This will be a clear instance of misconduct.
8. *Abdul Hamid* v. *Muhammad*, 8 L 329: 101 IC 153; *Bhaiya* v. *Jageshwar*, 52 A 938: 128 IC 4; *Muhammad Aftal* v. *Abdul Hamid*, 88 IC 161; *Chintalapudi* v. *Chintalapudi*, 73 IC 470; *Ganga Sahai* v. *Baldeo Singh*, 65 IC 779: 1922 A 64.
9. *Lachhmi Narain* v. *Sheo Nath Pandey*, 42 A 185: 54 IC 443.

guilty of legal misconduct vitiating his award, if his conduct cannot be reconciled to general principles.[1]

The Act is not applicable to proceedings under the Income-tax Act.— It is only in respect of certain specified matters that the income-tax authorities are invested with the powers exercisable by a Civil Court and it is only for a limited purpose that proceedings before them are declared to be deemed to be judicial proceedings. Therefore, the Indian Evidence Act does not apply to proceedings under the Income-tax Act.[2]

Administration of Evacuee Property Act— Proceedings held by the Custodian under the Administration of Evacuee Property Act XXXI of 1950 have been held to be of a quasi-judicial nature.[3]

Election Petition.— Under Section 90(3) of the Representation of the People Act, XLIII of 1951, subject only to the provisions of that Act. The provisions of this Act have been made applicable in all respects to the trial of an election petition.

Proceedings before Industrial Tribunal.— Under Section 11 of the Industrial Disputes Act the Industrial Tribunals are vested with some powers as a Civil Court under the Code of Civil Procedure when trying a suit, in respect of certain matters of every inquiry is deemed to be a judicial proceeding within the meaning of Secs. 193 and 228 of the Indian Penal Code. However, the proceedings before an Industrial Tribunal are merely quasi-judicial and hence this section does not make the Evidence Act applicable to such proceedings. An Industrial Tribunal is entitled to proceed on the basis of oral and documentary evidence which may not be strictly admissible under this Act.[4]

2. *[Repeal of enactments.] Rep. by the Repealing Act,* 1938 (1 *of* 1938), *Section 2 and Sch.*

COMMENTARY

Repealed section.— Section 2 which has been repealed by Act 1 of 1938 was as follows:—

"2 On and from that day the following laws shall be repealed:—

(1) all rules of evidence not contained in any Statute, Act or Regulation in force in any part of British India;

(2) all such rules, laws and regulations as have acquired the force of law under the 25th section of the Indian Councils Act, 1861, in so far as they relate to any matter herein provided for; and

(3) the enactments mentioned in the schedule hereto, to the extent specified in the third column of the said schedule.

But nothing herein contained shall be deemed to affect any provision of any Statute, Act or Regulation in force in any part of British India and not hereby expressly repealed."

As the provisions of Section 2 were spent and became unnecessary, that section has been repealed by the Regulating Act (1 of 1938). The repeal was necessitated by the textual modifications effected in the existing Statute law by the Government

---

1. *Payyavula Vengamma* v. *Payyavula Kesanna*, 1953 SC 21: 1952 SCJ 630.
2. *Seth Gurmukh Singh* v. *Commissioner of Income-tax*, 1944 Lah. 353 (23): 12 ITR 393 (FB); *Anraj Narain Das* v. *Commissioner of Income-tax*, 1952 Punj. 46: 20 ITR 562.
3. *Ebrahim Aboobaker* v. *Tek Chand Dolwani*, 1953 SC 298: 1953 SCJ 411.
4. *Harchura Tea Estate* v. *Labour Appellate Tribunal*, (1961) 1 Lab. LJ 174.

of India (Adaptation of Indian Laws) Order, 1937 in pursuance of Section 293 of the Government of India Act, 1935; but it does not have the effect of re-enacting the rules which it had repealed.[1]

The Act is a repealing Statute— The Evidence Act is a repealing and codifying enactment. The first clause of the repealed section repealed all rules of evidence which were not contained in any Statute, Act or Regulation. Hence all rules of evidence which had their origin in the English Common and Statute Law,[2] in Hindu and Mohammadan Laws,[3] or in principles of equity, justice and good conscience[4] and which, with some modifications, were followed by the Courts in India before the present Act came into force, after the passing of the Act ceased to have any force if not incorporated in the Act.

In the Non-Regulation Provinces, Government had issued by Notifications certain rules on the subject of evidence; and the 25th section of the Indian Council Act, 1861,[5] had assigned the force of the law of these rules. The second clause of the repealed section declared that if, on the subject on which these rules had been made, provision was made in the Act, the rules must be taken to have been repealed. If, however, no provision was made in the Act on the subject, then these rules were still to be deemed to be in force.

Almost all previous enactments on the subject of evidence were repealed by the Act. For a list of the repealed enactments, *see* the Schedule which was repealed by the Act 1 of 1938.

Rules of evidence contained in other Statutes, Acts or Regulations are not affected.—The proviso to the repealed section left unaffected all rules of evidence contained in any Statute Act or Regulation which was not expressly repealed by the Act. The English Extradition Act being applicable to British India, records authenticated in accordance with that Act are admissible in evidence in this country.[6]

3. Interpretation clause.—In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:

"Court"—("Court" includes all Judges[7] and Magistrates,[8] and all persons, except arbitrators, legally authorized to take evidence.)

COMMENTARY

Unless a contrary intention appears from the context.— Generally a term or expression which occurs in different places in the same Act has the same meaning, as it

1. *King* v. *King*, 1945 A 190.
2. *Srish Chandra* v. *Rakhat Ananda*, (1937) 65 CLJ 520: 41 CWN 1103; *Lekhraj Kuar* v. *Mahpal Singh*, 5 C744, 754: 7 IA 63 (PC).
3. *Mairaj Fatima* v. *Abdul Waheed*, 43 A 673: 63 IC 286: 1921 A 175: 19 ALJ 713; *Waras Mohamed* v. *Ali Bakhsh*, 70 PR 1891; *Dhondo Bhikaji* v. *Ganesh Bhikaji*, 11 B 433; *Mazhar Ali* v. *Budh Singh*, 7 A 297.
4. *Meer Jangoo* v. *Chote Sahib*, 8 IC 124.
5. 24 and 25 Vic. C67.
6. In the matter of Rudolf Stallman. 39 C 164: 12 IC 273: 12 CrLJ 505.
7. Cf. the Code of Civil Procedure, 1908 (Act 45 of 1908), Section 2, the Indian Penal Code (Act 45 of 1860), Section 19 and for the definition of "District Judge" the General Clauses Act, 1897 (10 of 1897), Section 3(17).
8. Cf. the General Clauses Act, 1897 (10 of 1897), Section 3 (32) and the Code of Criminal Procedure, 1898 (Act 5 of 1898).

would be unreasonable to hold that the Legislature used the same work in different sense in the same Act.[1] Therefore, the terms defined in the interpretation clause have ordinarily the same meaning wherever used in the Act.[2] If, however, the context affords a clear indication that a term is used there in a sense different from the one assigned to it by the interpretation clause; because a definition in the interpretation clause is controlled by subsequent and express provisions on the subject matter of same definition.[3] Therefore, definitions of words and expressions in the interpretation clause are subject to the qualification "unless a contrary intention appears from the context". The definitions given in the Evidence Act are for purposes of the Act alone.[4] But, even if no if no such words are inserted, little weight attaches to the omission, for some such words are to be implied in all statutes where expressions, which are interpreted by a definition clause, are used in a number of sections with meaning sometimes of a wide and sometimes obviously limited character.[5]

Court — A Court is an agency created by the sovereign for the purpose of administering justice.[6] This definition of the word "Court is not exhaustive,[7] and is meant for the purposes of Evidence Act alone.[8] A Commissioner appointed under the Civil Procedure Code or the Criminal Procedure Code is legally authorized to take evidence and is, therefore, a "Court";[9] but an arbitrator, though authorized to take evidence,[10] is expressly excluded from the definition of "Court."[11] A Commissioner appointed under the Public Servants (Inquires) Act is a Court within the meaning of Section 3 of the Contempt of Courts Act.[12] As the word "Court" includes all Magistrates, it is clear that a Committing Magistrate or a Magistrate recording the statement of a witness under Section 166, Criminal Procedure Code, is a "Court". In a trial held by a judge with a jury, the jury is a "Court".[13] A Registrar or a Sub-Registrar is not a Court for the purposes of Section 195,[14] Criminal Procedure Code,[15] but because in proceedings under Sections 73 and 74 of the Registration Act a Registrar has the power to take evidence,[16] he would, when acting under Section 75 of the Registration Act, be a "Court" within the meaning given to this term by the Evidence Act. A Collector or Deputy Collector acting under the Land Acquisition Act has no power to administer an oath and is not, therefore, a "Court".[17] The definition of the word "Court" in the Evidence Act has been framed only for the purpose of that Act which under Section 45,

---

1 *Q.E.* v. *Naglakala*, 22 B 235, 238.
2 *Umachurn Bag* v. *Ajdannissa Bibi*, 12 C 430, 433.
3 *Uda Begam* v. *Imamuddin*, 2A 74, 86.
4 *Q.E.* v. *Ram Lal*, 15 A 141; *E* v. *Tulja*, 12 B 36.
5 *Kinghtbridge Estates Trust Ltd.* v. *Byrne*, 1940 AC 613 at 621: (1940) 2 All. ER 401, per Viscount Maugham.
6 *S.C. Legal Aid Committee etc.* v. *U.O.I.*, (1994) 6 SCC para 14 page 731.
7 *E.* v. *Ashootosh Chuckerbutty*, C 483, 493 (FB).
8 *Q.E.* v. *Tulja*, 12 B 36; see also *Abdul Aziz* v. *Crown*, 34 PR 1916 Cr; *Joyti Narayan* v *Brijnandan Sinha*, 1954 P. 289; *Chaparala Krishna* v. *Guduru Govardhanaiah*, 1954 M 822
9 See O. 26, R. 16, CPC and Section 303-505, Cr.P.C. (see new Cr.P.C. 1973).
10 Section 13, Arbitration Act, 1940.
11 The Act is not applicable to proceedings before an arbitrator, see Section 1.
12 *Joyti Narain* v. *Brijnandan Sinha*, 1954 P. 289; *Kapur Singh* v. *Jaggat Narain*, 1951 Punj.49
13 *E.* v. *Ashootosh Chuckerbutty*, 4 C 483 (FB).
14 See new Cr.P.C. 1973.
15 See Section 195 (2), Cr.P.C. (see new Cr.P.C., 1973).
16 See Section 75, Registration Act (XVI) of 1908.
17 *Durga Das Rukhit* v. *Q.E.*, 27 C 820; see also *Ezra* v. *Secretary of State*, 32 C 605: 32 IA 93 (P.C.); *Ezra* v. *Secretary of State*, 30 C 36.

An Income Tax Officer, though authorized to examine witnesses on oath is not a Court.[1] Affidavit not made evidence under new Cr.P.C. 1973. Order of Sessions Judge for ignoring affidavit upheld.[2] Revenue Officers cannot be said to be court.[3] Rent Controller acting under the A.P. Buildings (Lease, Rent and Eviction) Control Act is a Court as he is authorized to record evidence under Rule (2) of the Rules framed thereunder.[4]

The authority under the Payment of Wages Act is not a Civil Court, but definition of Court under Section 3 of the Evidence Act is an inclusive one and only for the purposes of Act.[5]

The words 'Court' and judge are frequently used interchangeably. They are not *stricto sensce* synonymous. A Court cannot exist without a judge, and the power to create a Court embraces the power to create the office of judge thereof.[6]

Family Court and Evidence Act – Family Court[7] shall be deemed to be a Civil Court so far as proceeding under Chapter IX of Cr.P.C., are concerned, the provisions of the Cr.P.C. have been made applicable. Parties before the Family Court are entitled to be heard in support of their case and are also entitled to adduce evidence in order to prove their claim. They can cross-examine each other and adduce evidence.

Includes, means and includes – When a definition uses the word 'includes' it is enumerative and not exhaustive.[8] When the words used are "means" and "includes", the definition is intended to be exhaustive.[9]

"Fact" – "Fact" means and includes –

(a) anything, state of things, or relations of things capable of being perceived by the senses;

(b) any mental condition of which any person is conscious.

Illustrations

(a) That there are certain objects arranged in a certain place, is a fact.

(b) That a man heard or saw something, is a fact.

(c) That a man said certain words, is a fact.

(d) That a man holds a certain opinion, has a certain intention, acts in goods faith or fraudulently, or uses a particular word in a particular

---

1 *Chaparala Krishna* v. *Guduru Goverdhanaiah*, 1954 M 822.
2 *Rajkishore* v. *State of U.P.*, AIR 1988 Pat NOC 9 (Bihar Tenancy Act 8 of 1885) Section 103.
3 *Depta Tewari* v. *State of Bihar*, AIR 1988 Sum. 14.
4 *G. Bulliswami* v. *C. Annapurnamma*, AIR 1976 AP 270.
5 *Gh. Rasool Wani* v. *Gh. Mohd. Wani*, AIR 1980 NOC 166 (J&K) (FB).
6 *S.C. Legal Aid Committee etc* v. *U.O.I.*, (1994) 6 SCC para 14 page 731.
7 *Munna Lal* v. *State of U.P.*, AIR 1991 All 189 (paras 4, 14).
8 1924 Sind 89.
9 *R.* v. *Ashootosh*, 4C 483 (FB).

sense, or is or was at a specified time conscious of a particular sensation, is a fact.

(e) That a man has a certain reputation, is a fact.

COMMENTARY

Facts.—The Act adopts Bentham's classification of facts into "physical" and psychological" facts. Clause (1) with illustrations (a), (b) and (c) refers to "physical" facts, *i.e.*, external facts which can be perceived by the five best-marked senses of man; clause (2) and illustrations (d) and (e) refer to "psychologial" facts, *i.e.*, internal facts which cannot be so perceived but of which a man is conscious, *e.g.*, intention, knowledge, good or bad faith, feelling or opinion. Physical facts are capable of direct as well as indirect proof, *i.e.*, they can be proved either by the testimony of persons who are favourably situated to perceive them or by proof of other facts which either make their existence probable or are inconsistent with any hypothesis other than that of their existence. Psychological facts, however, generally cannot be proved by direct evidence[1] as the only direct evidence concerning them which is available is the confession of the person who is conscious of them. But, like physical facts, they can be proved by circumstantial evidence. "What passes in the mind of man is not scrutable by any human tribunal; it is to be collected from his acts." If *A* fires at *B*, the act of firing is a 'physical' fact and can be proved by the evidence of a person who saw the occurrence or by circumstantial evidence; but the intention or the object with which B is fired at cannot be proved by any direct evidence other than the statement of the person who fired. It can, however, be proved by circumstantial evidence, *i.e.*, by proof of facts from which a reasonable inference as to that intention or object may be drawn.

The Court takes cognizance only of those facts which appear on the record.[2]

An inference arrived at by a process of ratiocination cannot be regarded as a fact within the meaning of the expression in Section 3 of the Indian Evidence Act, 1872. (1) The state of a man's mind is as much a fact as the state of his digestion. (2) Facts in the act includes[3] Factum Probandum, *i.e.*, the principal fact to be proved, and[4] Factum Probans, *i.e.*, the evidentiary fact from which the former follows immediately or by inference.

"Relevant".— One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts.

"Facts in issue".— The expression "facts in issue" means and includes—any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability, or disability, asserted or denied in any suit or proceeding, necessarily follows.

---

1. The term "direct evidence" is used here in contradistinction to circumstantial evidence and not in the sense in which it is used in Section 60 of the Act.
3. *Karim Bux* v. *Rex*, 1950 A.494: 1950 ALJ 383: 51 Cr.LJ 1323.
4. *Anant Bhaurao* v. *Home Minister*, 68 Bom.LR 187.
5. *Sabhapati* v. *Huntley*, 1938 PC 91.

Explanation.—Whenever, under the provisions of the law for the time being in force relating to Civil Procedure,[1] any Court records an issue of fact, the fact to be asserted or denied in the answer to such issue is a fact in issue.

Illustration

A is accused of the murder of *B*.

At his trial the following facts may be in issue:—

that *A* caused *B*'s death;

that *A* intended to cause *B*'s death;

that *A* had received grave and sudden provocation from *B*;

that *A* at the time of doing the act which caused *B*'s death, was, by reason of unsoundness of mind, incapable of knowing its nature.

COMMENTARY

Facts in issue.—The distinction between facts in issue and relevant facts is of fundamental importance and must be thoroughly comprehended in order to understand and appreciate the scheme of the Act. Sir James Fitzjames Stephen, who framed the Act, in his Introduction to the Act thus defines facts in issue:— "They may by themselves, or in connection with other facts, constitute such a state of things that the existence of the disputed right or liability would be a legal inference from them. From the fact that *A* is the eldest son of *B*, there arises of necessity the inference that *A* is, by the law of England, the heir-at-law of *B*, and that he has such rights as that status involves. From the fact that *A* caused the death of *B* under certain circumstances, and with a certain intention or knowledge there arises of necessity the inference that *A* murdered *B* , and is liable to the punishment provided by law for murder. Facts thus related to a proceeding may be called facts in issue unless their existence is undisputed.[2] The definition of facts in issue in the Act is merely a paraphrase of Stephen's definition in the Introduction. The substantive law of a country defines the rights and liabilities of its citizens in the form of certain abstract propositions or formulae, and the object of every suit or other judicial proceedings is to ascertain whether the right claimed, or the liability sought to be enforced by one person against another, does or does not exist. A party to a litigation seeking to enforce a right or a liability against his opponent, in order to obtain a verdict in his favour by a tribunal, has to establish all such facts as go to constitute that right or liability. These 'necessary constituents" of a right or liability are called "facts in issue" if their existence is asserted by one party and is denied by the other. In other words, every fact which a plaintiff must prove in order to get an adjudication in his favour, or which a defendant may prove in order to defeat the plaintiff's suit, becomes a fact in issue, if the parties are not agreed as to its existence or non-existence. Therefore the answer to the question what are the facts in issue in a

1. See now the Code of Civil Procedure, 1908 (5 of 1908); as to the settlement of issues, see Sch. 1, Order XIV.
2. Steph. Intr., p. 12

particular case depends on the rule of the substantive law which is applicable to the case and on that rule of procedure which deals with the framing of issues of fact.[1] In criminal cases there is no such facts as constitute the offence, their non-existence being presumed. Hence all the 'ingredients' of the offence which is charged against the accused are "facts in issue" in a criminal trial the substantive civil law of India has not yet been completely codified. It is contained partly in some of the legislative enactments, *e.g.*, the Transfer of Property Act and the Indian Contract Act partly in rules of Hindu and Mohammedan Laws, and partly in rules of custom by which the parties are governed; and where there is no express provision on the point in any of these, the Judge has to decide according to the dictates of justice, equity and good conscience. Unlike the substantive civil law, the criminal substantive law of India has been thoroughly codified in the Indian Penal Code and a number of "special" and "local" Penal Statutes.

Facts in issue and issues of fact.—Under Order XIV, rule (1), of the Civil Procedure Code, the Court has to frame issues on all disputed facts which are necessary for the decision of a case. Issues arise when a material proposition of fact is affirmed by one party and denied by the other. "Material propositions of fact are those propositions of fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence."[2] Issues thus recorded are called issue of fact and they are generally recorded in interrogative form. The subject-matter of an issue of fact is always a fact in issue and what, when described in the language of the Evidence Act, is a "fact in issue" becomes, when described in the language of the Civil Procedure Code, an "issue of fact." Order XIV, rule 1 (2) of the Civil Procedure Code is, therefore, merely a paraphrase of the definition of "facts in issue" in Section 3 of the Evidence Act.

"Document"[3].—"Document" means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

Illustrations

A writing[4] is a document;

Words[5] printed, lithographed or photographed are documents;

A map or plan is a document;

An inscription on a metal plate or stone is a document;

A caricature is a document.

COMMENTARY

Document.—One of the essential elements of due execution of a document is that

---

1. *See* Steph., Article 1; Benth. Jud. Ev. 40-44; Gulson, Sections 256-257; Phipson, Ev., 7th Ed., p. 49.
2. Order XIV, rule 1 (2), CPC.
3. Cf. Section 29 of the Indian Penal Code (45 of 1886), and 3 (18) of the General Clauses Act, 1897 (10 of 1897).
4. Cf. definition of "writing" in Section 3 (65) of the General Clauses Act, 1897 (10 of 1897)
5. *Ibid.*

the document should be signed by the party or parties associate with it. The words "intended to be used or which may be used" in the definition necessarily imply that the document has to be used by some party against another. If it is to be so used, then there should be intrinsic evidence in the document itself of some particular party or parties being associated with the same.[1] A document need not necessarily be something which is signed, sealed or executed.[2] It must be proved.[3]

"Evidence".—"Evidence" means and includes—

(a) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called 'oral evidence';

(2) [4][all documents including electronic records produced for the inspection of the Court] : such documents are called 'documentary evidence'.

COMMENTARY

Evidence.—The word "evidence" signifies in its original sense, the state of being evident, *i.e.*, plain, apparent or notorious. But it is applied to that which tends to render evidence or generate proof.....The fact sought to be proved is called the principal fact; the fact which tends to establish it, the evidentiary fact (Best). In English Law, the word "evidence" sometimes means the words uttered and things exhibited by witnesses before a Court of Justice. At other times, it means the facts proved to exist by those words or things and regarded as the groundwork of inference as to other facts not so proved. Again, it is sometimes used as meaning to assert that a particular fact is relevant to the matter under inquiry.[5] In the Act, however, the word has been assigned a more definite meaning and is used only in the first of these senses. As thus used, it signifies only the instrument by means of which relevant facts are brought before the Court (*viz.*, witnesses and documents) and by means of which the Court is convicted of these facts.[6] Therefore matters other than the statements of witnesses and documents produced for the inspection of the Court, *e.g.*, a confession or statement of an accused person in the course of a trial.[7] Statements made by parties when examined otherwise than as witnesses, demeanour of witnesses,[8] the result of local investigation or inspection,[9] and material objects other than documents such as weapons, tools, stolen property, etc., are not "evidence" according to the definition given in the Act. These are, however, *matters* which the Court may legitimately take into consideration. The definition of "evidence" must be read together with the definition of "proved"; and the combined result of these two definitions in that "evidence", as defined by the Act, is not the only medium of proof

---

1. *Mohammed Tahir* v. *Sardar Bano*, 1952 A 782
2. *Emperor* v. *Krishtappa Khandappa*, 1925 B 327 : 87 IC 839.
3. *Suryakant* v. *Subramani*, AIR 1989 NOC 42 (Mad)
4. **Substituted by Information Technology Act, 2000 (Act 21 of 2000), S. 92 and Sch. II (w.e.f. 17-10-2000).**
5. Stephen's Introduction, pp 3, 4
6. Per Macnair, A.J.C., in *Gobarya* v. *E.*, 125 IC 673 : 1930 N 242 : 31 Cr LJ 881 (FB).
7. *Laxman Jairam* v. *E.*, 1937 B 31 : 166 IC 569, 38 Bom LR 1122; *Gobarya* v. *E.*, 125 IC 673 : 1930 N 242 : 31 Cr LJ 881 (FB), *Q E.* v. *Khandia Bin Pandu*, 15 B 65, *E* v. *Tuti Babu*, ILR 25 P 33 (written statement); *see* however, *E* v. *Ashootosh Chakerbutty*, 4 C 483 (EB)
8. *See* O 18, R 12, CPC, Section 636, Cr PC (*See* new Cr PC 1973).
9. *Joy Coomar* v. *Bundhoo Lal*, 9 C 363 : O 26, r 9 and O 18, R 18, CPC, Section 293 and 539 (B), Cr PC (*See* new Cr PC 1973)

and that in addition to it, there are a number of other "matters" which the Court has to take into consideration when forming its conclusions.[1] A statement recorded under Section 164 Cr. P.C.* is not evidence within the meaning of this definition.[2] So also a confession of an accused is not evidence in the ordinary sense of the term.[3] Entire evidence of hostile witness does not get excluded or rendered unworthy of consideration.[4]

In the matter of appreciation of the powers of the appellant court are as wide as that of the trial court. It has full power to review the whole evidence. It is entitled to go into the entire evidence and relevant circumstances to arrive at its own conclusion about the guilt or innocence of the accused."[5]

Evidence is generally divided into three categories (1) oral or personal, (2) documentary, (3) material or real. But the fact only recognizes the first two categories. Real or material evidence is supplied by material objects for inspection of the Court, *e.g.*, weapon of offence or stolen property.

Application of evidence in a murder case.[6]

Types of evidence.

(1) **Primary and Secondary**—It may be oral or documentary.

Primary oral evidence is the evidence of what a witness has personally seen or heard or gathered by his senses. It is called direct evidence as opposed to hearsay (Section 60). As a rule hearsay evidence is not admissible, but there are some exceptional cases of hearsay evidence which are admissible. Such exceptional cases of hearsay evidence are examples of secondary oral evidence or indirect evidence (*e.g.*, Sections 32, 33).

Primary documentary evidence is the evidence of the original documents (Section 62), while secondary documentary evidence is the evidence of copies, etc., of documents which are admissible under certain circumstances. (Sections 63, 65).

(2) The Best Evidence or the original evidence means the primary evidence. The Best Evidence Rule excludes secondary evidence.

(3) Real and personal.

(4) Oral and documentary (see definition of Evidence)

(5) Direct and indirect (hearsay).

The word direct evidence is used in two senses (a) as opposed to hearsay evidence, (b) as opposed to circumstantial evidence. In the first sense direct evidence is the evidence of a fact actually perceived by a witness with his own senses or an opinion held by him, while hearsay evidence is, *e.g.*, what someone else had told the witness to have seen or heard by him. In Section 60 the word 'direct' is used in contradistinction with 'hearsay' evidence.

---

1. *Bhaironprasaad* v. *Laxmi Narayan Das*, 79 IC 609: 1924 N 385.
2. *Bhubioni Sahu* v. *The King*, 1949 PC 257: 1949 ALJ 283: 51 PLR 311: 76 IA 147: *Rambharose* v. *E.*, 1944 N 105: ILR 1944 N 274 (FB). See also *Purshotam Ishwar Amin* v. *E.*, 45 B 834: 60 IC 593; *Brij Bushan Singh* v. *E.*, 1946 PC 38: 223 IC 1: 73 IA 18. But see *E.* v. *Surajbali*, 56 A 750: 1934 A 340; *Parmanand Ganga Parshad* v. *E.*, 1940 N 340: *Sulaiman* v. *E.*, 1941 R 301.
3. *Kashmira Singh* v. *State*, 1952 SC 159.
4. *State of U.P.* v. Chet Ram, AIR 1989 SC 1543.
5. Brathi v. State of Punjab, AIR 1991 SC 318 (para 7).
6. See *Pattad Amarappa* v. *State of Karnataka*, AIR 1989 SC 2004.

* See new Cr. P.C., 1973.

Direct and circumstantial evidence.— English text-writers divide evidence into (a) direct or positive evidence and (b) indirect or circumstantial evidence. Direct evidence is that which goes expressly to the very point in question and which, if believed, proves the point in question without aid from inference or reasoning, *e.g.*, the testimony of an eye-witness to murder.[1] Indirect or circumstantial evidence, on the other hand, does not prove the point in question directly, but establishes it only by inference. Thus, if *A* were tried for the murder of *B*, evidence of the fact *A* had a motive to murder *B* and that, at the time *B* was murdered *A*, with a drawn sword, was seen going towards the place where *B* was murdered and, shortly afterwards, was seen returning from the place with his clothes stained with blood, would be indirect or circumstantial evidence. According to Section 5 of the Act, evidence may be given in a proceeding of the existence or non-existence of facts in issue and of such other facts as are declared to be relevant by the Act. If the evidence relates directly to the existence or non-existence of a fact in issue, the evidence is direct; but if it relates to the existence or non-existence of only a relevant fact, it is indirect or circumstantial. Direct evidence, as thus understood, should not be confused with the sense in which this term is used in Section 60 of the Act. In Section 60 the term "direct evidence" is used as opposed to "hearsay" evidence and not as opposed to "circumstantial" evidence, and therefore, in the sense in which this term is used in that section, circumstantial evidence must always be "direct", *i.e.*, the facts from which the existence of the fact in issue is to be inferred must be proved by "direct" and not by "hearsay" evidence.

Ordinarily, circumstantial evidence cannot be regarded as satisfactory as direct evidence. The circumstances may lead to particular inferences and the relationship to true facts may be more apparent than real. The value of circumstantial evidence has to be assessed on consideration that it must be such as not to admit of more than one solution, and that it must be inconsistent with every proposition or explanation that is not true. If these conditions are fulfilled, circumstantial evidence may approximate to truth and be preferred to direct evidence.[2] For proof by circumstantial evidence four things are essential:—

(i) That the circumstances from which the conclusion is drawn be fully established.
(ii) That all the facts should be consistent with the hypothesis.
(iii) That the circumstances should be of a conclusive nature and tendency.
(iv) That the circumstances, should, to moral certainty actually exclude every hypothesis but the one proposed to be proved.[3]

According to the Supreme Court it is an error to say that "what the Court has to consider is whether the cumulative effect of the circumstances establishes the guilt of the accused beyond a `shadow of doubt'. In the first place, `shadow of doubt', even in

1. *Governor of Bengal in Council* v. *Moti Lal Ghosh*, 41 C 173: 201C 81 14 Cr. LJ 321.
2. *Kenchegowda* v. *P. Chawnaiya*, 1953 Mys. 22.
3. *State* v. *Shankar Prasad*, 1952 A. 776: 1952 CR LJ 1334: *Ratan Lal* v. *Rex*, 1949 A. 222: 50 Cr LJ 333; *Q. E.* v. *Hos Nak*, 1941 ALJ 416; *Hanumant Govind Nargundkar* v. *State of M.P.*, 1952 SCR 1091: 1952 SC 343; *Palvinder Kaur* v. *State of Punjab*, 1953 SCR 94: 1952 SC 354; *Charan Singh* v. *State of U.P.*, 1967 SC 520; *S.P. Bhatnagar* v. *State of Maharashtra*, 1979 SC 826 (paras 21, 22, 23); *State of Maharashtra* v. *Anappa*, 1979 SC 1410 (para 2); *State Delhi Administrator* v. *Gulzarilal Tandon*, 1979 SC 1382 para 1; *Pohabya* v. *State of Maharashtra*, 1979 SC 1949 para 5; *Mahmood* v. *State of U.P.*, 1976 SC 69 (para 9): 1976 Cr. LJ. 10 : *Chandmal* v. *State of Rajasthan*, 1976 SC 917 (para 15) : 1976 Cr.LJ 679; *Tuber Chetia* v. *State of Assam*, 1976 Cr.LJ 1416 (para 7); *Hukam Singh* v. *The State of Rajasthan*, 1977

cases which depend on direct evidence is shadow of 'reasonable' doubt. Secondly, in its practical application, the test which requires the exclusion of other alternative hypothesis is far more rigorous than the test of proof beyond reasonable doubt."[1]

In case where two of the accused persons had intentionally caused death of the deceased, there is no reason to discard evidence of witnesses.[2]

In a prosecution for bribery the fact that money had been recovered from the bushshirt of the appellant, was, by itself held to be not sufficient, for convicting him, when the substantive evidence led to prove the offence was found to be not reliable.[3]

The rule that facts are provable by circumstances as well as by direct testimony, has a considerable effect in preventing guilty or dishonest parties from tampering, or making way with witnesses and other instruments of evidence, which they would be more likely to do, if they knew that the only evidence which the law would receive against them was contained in a few easily-ascertained depositories.[4]

"The sentence of the law to the moral sentiment of the public in relation to any offence is what a seal is to hot wax. It converts into a permanent final judgment[5] what might otherwise be a transient sentiment. The infliction of punishment by law gives definite expression and a solemn ratification and justification to the hatred which is excited by the commission of the offence, and which constitutes the moral or popular as distinguished from the conscientious sanction of that part of morality which is also sanctioned by the criminal law. The criminal law thus proceeds upon the principle that t is morally right to hate criminals, and it confirms and justifies that sentiment by nflicting upon criminals punishments which express it. This close alliance between criminal law and moral sentiment is in all ways healthy and advantageous to the community".....Stephen.

"Proved".—A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

"Disproved".—A fact is said to be disproved when, after considering he matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it loes not exist.

"Not proved".—A fact is said not to be proved when it is neither proved nor disproved.

SC 1063 : 1977 CR LJ 639; *Ram Das* v. *State of Maharashtra*, 1977 SC 1164, *Umedbhai* v *State of Gujarat*, 1978 SC 424 (para 7), *Jaswant Singh* v. *State, Delhi Administrator*, 1979 SC 190 (para 8), *Rama Nand* v. *State of H.P.*, 1981 SC 738 (para 16) : 1981 Cr LJ 298, *Shankar Lal* v. *State of Maharashtra*, 1981 SC 765 ; 1981 Cr LJ (paras 31, 32); *S.S. Kulkarni* v. *State of Maharashtra*, 1981 SC 34 (para 20); *Gambhir* v. *State of Maharashtra*, 1982 SC 1157 (para 9); *Joga Gola* v. *State of Gujarat*, 1982 SC 1227 (para 3), *Prem Thakur* v. *State of Punjab*, 1983 SC 61 (para 11); *Earabhadsappa* v. *State of Karnataka*, 1983 SC 446, *Ashok* v. *State*, AIR 1989 SC 1890.

1. *Shankar lal* v. *State of Maharashtra*, 1981 SC 765 : 1981 Cr LJ 325 (para 32).
2. *Balbir Singh* v. *State of Punjab*, AIR 1991 SC 2231 (para 7).
3. *Swrajmal* v. *State (Delhi Admn.)*, 1979 SC 1408 (para 2).
4. *Sehoraj* v. *A.P. Batra*, 1955 A 638.
5. *Guvala China Venkatesu* v. *State of A.P.*, AIR 1991 SC 1926.

"India".—[1]["India" means the territory of India excluding the State of Jammu and Kashmir].

[2][The expressions "Certifying Authority", "digital signature", "Digital Signature Certificate", "electronic form", "electronic records", "information", "secure electronic record", "secure digital signature" and "subscriber" shall have the meanings respectively assigned to them in the Information Technology Act, 2000.]

COMMENTARY

What is proof ?—The word 'proof' seems properly to mean anything which serves, immediately or mediately, to convince the mind of the truth or falsehood of a fact or proposition; and the proofs of matters of fact are generally our senses, the testimony of witnesses, documents and the like. (Best, Section 10). Absolute certainty is seldom to be had in human affairs. Mathematical Science alone admits of absolute proof. Hence proof does not mean proof to rigid mathematical demonstration, because that is impossible; it must mean such evidence as would induce a reasonable man to come to a conclusion.[3]

Proof : proved, disproved, not proved[4].—This clause indicates the degree of certainty which is required to treat a fact as proved, and is so worded as to provide for two conditions of mind; first, that in which a man feels absolutely certain of a fact, in other words "believes it to exist," and, second, that in which, though he may not feel absolutely certain of a fact, he thinks it so extremely probable that a prudent man would, under the circumstances, act on the assumption of its existence.[5] The proof of a fact depends not upon the accuracy of statements but upon the probability of its having existed.[6] Absolute certainly in this work-a-day world is seldom to be had in the affairs of life, and we are frequently obliged to act on degrees of probability which fall very short of it.[7] What is required, in a legal trial, is not absolute certainty. All that is required is material whereon the Court can reasonably act upon the supposition that a fact exists.[8] It is useless to speculate on possibilities or probabilities. There are varieties of possibilities and in the absence of reliable evidence it is wrong to take the view that one possibility is more probable than the other.[9] The test of whether a fact is proved is such degree of probability as would satisfy the mind of a reasonable man as to its existence: absolute or conclusive proof is not necessary.[10] The standard of certainty required is that of a prudent man acting in grave and important concerns of his own.[11] Except where artificial probative value is assigned to certain facts by presumptions, the

---

1. *Subs.* by Act 3 of 1951.

2. **Inserted by the Information Technology Act, 2000 (Act 21 of 2000), S. 92 and Sch. II (w.e.f. 17-10-2000).**

3. *Hawkins* v. *Powells*, (1911) 1 KB 988, 995; *Emp.* v. *Shafi Ahmad*, 31 BLR 515.

4. The expression "disproved" occurs only in Section 4, and the expression "not proved" does not occur any where in the Act.

5. *E.* v. *Ram Dat*, 143 IC 129 : 1933 O 340 : 34 Cr LJ 538; *Bhaironprasad* v. *Laxmi Narayan Das*, 79 IC 609, 1924 N 385.

6. *Anam Swain* v. *State*, 1954 Orissa 33.

7. *E.* v. *Ram Dat*, 143 IC 129 : 1933 O 340 : 34 Cr LJ 538; *Prasannamayi Debi* v. *Baikuntha Nath Chatterji*, 49 C 132 : 66 IC 782 : 1922 C 260.

8. *Ahibaran Singh* v. *State*, 1953 A 493 : 1953 Cr LJ 1125 : 1953 ALJ 173.

9. *Kamij Shaikh* v. *E.*, 1948 P 73 : 229 IC 175 : 48 Cr LJ 301.

10. *E.* v. *Ram Dat*, 143 IC 129 : 1933 O 340 : 34 Cr LJ 538; *E.* v. *Shafi Ahmad Nabi Ahmad*, 31 Bom LR 515; *Thakur Das* v. *E.*, 32 PR 1916 (Cr); 38 IC 759 : 18 Cr LJ 375; *Jarat Kumari Dassi* v. *Bissessur Dutt*, 39 C 245 : 13 IC 577.

11. *E.* v. *Ram Dat*, 143 IC 129 : 1933 O 340 : 34 Cr LJ 538; *In re Kallam Narayana*, 56 M 231 : 143 IC 46 : 1933 M 233 : 34 Cr LJ 481; *Ah Lokv* v. *E.*, 4 Cr LJ 382 : Wills' Cir. Ev. 6th Ed., 318-19.

Act affords no guidance on the question whether one fact is or is not sufficient to prove another fact. On this point, the Judge like a prudent man has to use his own judgment and experience and cannot be bound by any rule except his own judicial discretion.[1] No hard and fast rule can be laid down as to what inference can be drawn from a certain circumstance. The cumulative effect of all the circumstances established by evidence and the nature of these circumstances have to be taken into consideration and then it has to be judged whether, having regard to the ordinary course of human conduct, it is safe to presume that the offence was committed by the accused.[2] The definition of the word "disproved" is merely a converse proposition of the definition of the word "proved".[3]

Not proved.— It indicates a State of mind between two states of minds "proved and disproved", when one is unable to decide how the matter precisely stands. It negates both proof and disproof.[4]

A fact may be orally admitted in Court. The admission would not come within the definition of the word 'evidence' as given in this Act, but still it is a matter which the Court before whom the admission was made would have to take into consideration in order to determine whether the particular fact was proved or not.[5]

Evidence and proof: "matters before it."— Though the evidence of a fact and proof of a fact are not synonymous.[6] the term "proof" is often confounded with "evidence," and applied to denote the medium of proof, whereas in strictness it marks merely the effect of evidence.[7] "When the result of evidence is assent to the proposition or event which is the subject-matter of inquiry, such proposition or event is said to be proved."[8] Evidence, therefore, differs from proof as cause from effect. Decree based solely on affidavits cannot be treated as decree based on evidence.[9]

As has been already noticed, proof is not the result of "evidence" alone. "Evidence", is only one of the media of proof and in addition to "evidence," the Court, when forming its conclusions, has to take into consideration a number of other matters which are not evidence" in the sense given to this term by the Act, e.g., admissions of the parties, the result of local inspection, the presumptions arising in the case and facts of which Courts take judicial notice. Court should not attach undue importance to discrepancies, when they do not go to root of the matter and shake the version of the witness.[10]

But the definition of 'proved' does not enable the Court to take into consideration matters, including statements, the use of which is statutorily barred,[11] such as statements made before a Police Officer in the course of investigation, vide-Section 162 Cr. P.C.[12] Motive need not be established, in case of direct evidence.[13]

---

1. *Bhaironprasad* v. *Laxmi Narayan Das*, 79 IC 609: 1924 N 385; *Weston* v. *Peary Mohan Das*, 40 C 898: 23 IC 25.
2. *State* v. *Shankar Prasad* 1952 A 776: 1952 Cr LJ 1334.
3. *E.* v. *Shafi Ahmad Nabi Ahmad*, 31 Bom. LR 515
4. *E.* v. *Shafi Ahmad*, (1929) 31 Bom. LR 515.
5. *Per Mitter, J., Joy* v. *Bundhoolal*, (1882) 9 C 363.
6. *Anam Swain* v. *State*, 1954 Orissa 33.
7. Woodroffe, Ev., 9th Ed., p. 116.
8. Wills' Cir. Ev., 6th Ed., 3; Bhaironprasad v. Laxmi Narayan Das, 79 IC 609; 1924 N 385.
9. *Jagdish* v. *Smt. Premlata Rai*, AIR 1990 Raj 87.
10. *Bhaironprasad* v. *Laxmi Narayan Das*, 79 IC 609; 1924 N 385; see *Aung Hla* v. *E.*, 9 R 404: 135 IC 849: 1931 R 235: 33 Cr LJ 205, and notes on the definition of "Evidence" supra.
11. *Lattan* v. *State* 1989 ALJ 75 (DB)
12. *Hazari Lal* v. *State*, 1980 SC 873.
13. *Gurmeet Singh* v. *State*, 1988 ALJ 1491.

Prima facie case.— A *prima facie* case is not the same thing as "proof" which is nothing but belief according to the conditions laid down in the Act. It is a fallacy to say that because a magistrate has found a *prima facie* case to issue process, therefore, he believes the case to be true in the sense that the case is proved.[1] But depends on the, credibility of witness, and their evidence,[2] cannot be rejected as they are partisan witnesses.[3]

Proof in civil and criminal cases.— The rules of evidence for civil and criminal cases are, in general, the same[4]; but some provisions in the Act are peculiar to criminal cases,[5] and others, peculiar to civil cases.[6] There is, however, a marked difference as to the effect of evidence in civil and criminal cases. Thus, whereas in a civil case a mere preponderence of probability is a sufficient basis of decision, in a criminal case persuasion of guilt must amount to "such a moral certainty as convinces the minds of the tribunal as reasonable men beyond all reasonable doubt."[7] In a criminal case before the Court is called upon to convict a person it has to satisfy itself that possibility of his innocence as ruled out, but in a civil case all that is necessary to insist upon is that the proof adduced in support of a fact is such that should make a prudent man to act upon the supposition that it exists.[8] Where therefore, there is no such moral certainty, and there is reasonable doubt as to the guilt of the accused, the benefit of the doubt is given to the accused.[9] "It is better that ten guilty men should escape than that one innocent man should suffer,[10] and acting on this principle, Courts always insist on a much higher degree of proof in criminal cases than in civil cases. The rule as stated above is nowhere enacted in the Evidence Act, but is a rule of prudence founded on public policy, as the consequences of an erroneous conviction are much more serious both to the accused and society than the consequences of an erroneous acquittal.[11] This maxim means that the greatest possible care should be taken by the Court in convicting an accused.[12] Unlike criminal cases, in a civil case it cannot be said that the benefit of every reasonable doubt must necessarily go to the defendant.[13] As to the degree of certainty required in a criminal case where the burden of proof is on the accused see notes to Sections 105 and 106.

Standard of proof: in civil and criminal cases.— Denning L.J., observed "it is true that by our law here is a high standard of proof in criminal cases, that this is subject to the qualification that there is no absolute standard in either case. In criminal case the charge must be proved beyond reasonable doubt, but there may be degrees of proof

1. *Sher Singh* v. *Jitendranath Sen*, 1931 Cal 607: 33 CrLJ 3.
2. *Balbir Singh* v. *Smt. Salochana Devi*, 1988 ALR 327 (DB).
3. *State of U.P.* v. *Ram Swarup*, 1988 ALJ 555 S.C.
4. *Weston* v. *Peary Mohan Das*, 40 C 898: 23 IC 257
5. E.g. confessions. Sections 24 to 30; character, Sections 53 and 54: incompetency of witnesses, Section 120; character of the prosecutrix in rape cases Section 155.
6. E.g., admissions, Sections 18 to 20; character, Sections 52 and 55; estoppel, Sections 115, 116 and 117.
7. Parke, V., in R. v. Sterne, cited in Best, Section 95; *Bhaironprasad* v. *Laxmi Narayan Das*, 79 IC 609: 1924 N 385: *Ah Lok* v. *E.*, 4 CrLJ 382; *Harprasad Ghashiram Gupta* v. *State*, 1952 B 184: 53 BLR 938.
8. *Pritam Singh* v. *Tilok Singh*, 1954 Pepsu 14.
9. *Lolit Mohan Sarkar* v. *Q.E.*, 22 C 313, 323.
10. Per Holroyd, J., in Sarah Hobson's Case, 1; Lewin's Crown Cases, 261; 2 Hale PC 289; 4 Blackst. Comm. 358; Best, Section 95.
11. 2 Hale PC 290; Best, Section 95.
12. *Pershadi* v. *State*, 1955 A 443.
13. *Edara Venkata Rao* v. *Edara Venkayya*, 1943 M 38(2); 207 IC 163.

beyond that standard .... so also in civil cases .... there may be degree of probability[1] It makes no difference between civil cases wherein charges of a fraudulent nature of criminal character are made and civil cases where such charges are not made. But this is not to say that the Court will not while striking the balance of probability keep in mind the presumption of honesty or innocence or the nature of the crime or fraud charged. It is wrong to insist that such charges must be proved clearly and beyond reasonable doubt, by the party alleging a criminal act against the other party.[2] Evidence of witnesses cannot be rejected as they are partisan witness;[3] interested witness or chance witness.[4]

The basic rule of criminal jurisprudence is that if two views are possible on the evidence adduced in case of circumstantial evidence, one pointing to the guilt of the accused and the other to his innocence, the Court should adopt the latter view favourable to the accused (para 6).[5]

In a case[6] in which the evidence is of a circumstantial nature, the facts and circumstance from which the conclusion of guilt is said to be drawn by the prosecution must be fully established beyond all reasonable doubt and the facts and the circumstances so established should not only be consistent with the suit of the appellant. but also they must entirely be incompatible with the innocence of the accused and must exclude every reasonable hypothesis consistent with the innocence.[7]

But with regard to the proof required in Civil and Criminal Proceedings there is this difference; that in the former a mere preponderance of probability is sufficient.[8] and the benefit of every reasonable doubt need not necessarily go to the defendant,[9] but in the latter the persuasion of guilt must amount to "such a moral certainty as convinces the minds of the tribunal, as reasonable men, beyond all reasonable doubt."[10] In murder trial the eye witnesses found to be truthful, natural and independent having no reason to falsely implicate the accused, reliance could be placed on such witnesses.[11]

The Supreme Court as well as the High Courts have pointed out that in cases arising out of acute factions there is a tendency to implicate persons belonging to the opposite faction falsely. In order to avert the danger of convicting such innocent persons the courts are cautioned to scrutinise the evidence of such interested witnesses with greater care and caution and separate grain form the chaff after subjecting the evidence to a

---

1 *Batar* v. *B*, (1950) 2 All ER 458, 459.
2 *Gulabchand* v. *Kuldiplal*, (1967) 1 SCJ 580.
3 *State of UP* v. *Ram Swaroop*, AIR 1988 SC 1028.
4 *State of UP* v. *Jodha Singh*, AIR 1989 SC 1822.
5 *Harendra Narain Singh* v. *State of Bihar*, AIR 1991 SC 1845.
6 *S.D. Soni* v. *State of Gujarat*, AIR 1991 SC 917 (para 8).
7 See *Gambir* v. *State of Maharashtra*, 1982 (2) SCC 351: AIR 1982 SC 1157; *Rama Nand* v. *Stata of Himachal Pradesh*, 1981 (1) SCC 511: AIR 1981 SC 738: *Prem Thakur* v. *State of Punjab*, 1982 (3) SCC 462; AIR 1983 SC 61; *Earabhadrapa Alias Krishnappa* v. *State of Karnataka*, 1983 (2) SCC 330; AIR 1983 SC 446; *Gian Singh* v. *State of Punjab*, 1986 (Suppl) SCC 676; AIR 1987 SC 1921 and *Balavinder Singh* v. *State of Punjab*, 1987 (1) SCC 1: AIR 1987 SC 350; See also *Lakshmi Naik* v. *State of Orissa*, AIR 1995 SC 1387, relied on *Sharad* v. *State of Maharashtra*, AIR 1984 SC 1622, *Dhanjay Chatterjee* v. *State of West Bengal*, (1994) 1 JT (SC) 33.
8 *Cooper* v. *State*, 6 HL Cas. 746, 772, Per Willes, J.
9 *Edara Venkata Rao* v. *Edara Venkayya*, 1943 M 38 (2): 207 IC 163.
10 Per Parke, B. in *R* v. *Sterne*, Cited in Best, Ev, 76.
11 *Alma* v. *State of M.P.*, AIR 1991 SC 1519.

closer scrutiny and in doing so, the contents of the FIR also will have to be scrutinised carefully. However, unless there are indications of fabrication, the court cannot reject the prosecution version as given in the FIR and later substantiated by the evidence merely on the ground of delay. These are all matters for appreciation and much depends on the facts and circumstances of each case.[1]

Necessary to explain the injuries on the person of the accused.—Injuries on the person of the accused should be explained by the prosecution. Where the prosecution fails to do so, any of the following results may follow:—

(1) That the accused had inflicted the injuries on the members of the complaimants party in exercise of the right of self defence.

(2) That the prosecution case is doubtful and the charge against the accused is not proved beyond reasonable doubt.

(3) That the omission to explain the injuries is innocent or of no effect at all where the injuries sustained are minor and superficial, and the prosecution evidence is so clear and cogent, so independent and disinterested that it far outweighs the omission to explain the injuries[2]

In *Lakshmi Singh's* [3] case the Supreme Court referred to some earlier decisions and ruled that "in a murder case the non-explanation of the injuries sustained by the accused at about the time of occurrence or in the course of the altercation is a very important circumstance from which the Court can draw the following inferences:

'(1) That the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;

(2) That the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable ;

(3) That in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case. "The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one."

As a principle of appreciation of evidence, where serious injuries are found on the person of the accused, the prosecution must explain them so as to satisfy the Court as to the circumstances under which the occurrence originated. But the injuries must be very serious and severe and not merely superficial and must be shown to have been caused at the time of the occurrence in question[4], witness testifying occurence of certain facts. This testimony cannot be rejected merely because of certain aspersions.[5]

Omission to send blood stained earth for chemical examination.—The omission by the prosecution to send the blood stained earth found at the place of occurrence, for chemical examination which could have fixed the sites of the assault, which in almost

1. *Tara Singh* v. *State of Punjab*, AIR 1991 SC 63 (para 4).
2. *Mohar Rai* v. *State of Bihar*, 1968 SC 1281: 1968(3) SCR 525; *State of Gujarat* v. *Beri Fatima*, 1975 SC 1478; *Puran Singh* v. *State of Punjab*, 1975 SC 1674; *Lakshmi Singh* v. *State of Bihar*, 1976 SC 2263 (Para 11): 1976 Cr LJ 1736.
3. *Laxmi Singh* v. *State of Bihar*, 1976 SC 2263 (para 11): 1976 Cr LJ 1736.
4. *Jagdish* v. *State of Rajasthan*, 1979 SC 1010
5. *Smt. Manorama Srivastava* v. *Smt. Saroj Srivastava*, AIR 1989 Alld. 17.

all criminal cases is invariably sent by the prosecution, and the report with the earth produced in Court, may show that the defence case is true. It is sufficient if the defence succeeds in throwing a reasonable doubt on the prosecution case.[1]

Every incidental matter in a criminal trial is not required to be proved beyond a reasonable doubt like the guilt of the accused. Thus on an application for cancellation of bail it is not necessary for the prosecution to prove by a mathematical certainty or even beyond a reasonable doubt that the witnesses have turned hostile because they have been won over by the accused. Proof of facts by preponderance of probabilities as in civil cases is not foreign to criminal jurisprudence, for example, in cases where the statute raised a presumption of guilt as in the Prevention of Corruption Act, the accused is entitled to rebut that presumption by proving his defence by a balance of probabilities. The same standard of proof as in civil cases applies to proof of incidental issues involved in a criminal trial like the cancellation of bail of an accused. Proving by the test of balance of probabilities that the accused has abused his liberty or that there is a reasonable apprehension that he will interfere with the course of justice is all that is necessary for the prosecution to do in order to succeed in an application for cancellation of bail.[2]

Presumption of innocence.— This maxim is often misunderstood. It means nothing more than this that the greatest possible care should be taken by the Court in convicting an accused. The presumption is that he is innocent till the contrary is clearly established. The burden of proof that the accused is guilty is always on the prosecution. If there is an element of reasonable doubt as to the guilt of the accused, the benefit of that doubt must go to him. The maxim merely emphasises those principles in a striking fashion. It does not mean that even an imaginary or unreal and improbable doubt is enough for holding the accused not guilty, if the evidence, on the whole, points to the only conclusion on which a prudent man can act, that the accused is guilty.[3]

Burden on accused—see Sections 105,106. Benefit of Doubt.— This fundamental principle of criminal law is found in the Roman Legal System. The prosecution must prove the *corpus delicti*, that is, the fact that the offence charged has been committed by someone. Then it must prove that the accused has committed the offence. Sometimes the evidence led leaves the mind in a state of doubt as regards accused's guilt. In such cases benefit of doubt must go to the accused. If the impact of evidence is to create doubt then it cannot be said that the prosecution has discharged the burden of proving the guilt of the accused.[4] Where the prosecution claimed that the signatures on certain documents acknowledging due payment of a sum of money by a Bank which was said to have been misappropriated by the appellant, were forged, and produced the person whose signatures they purported to be as a prosecution witness, and also a handwriting expert, and while that witness denied those signatures to be his, the handwriting expert deposed that he could not give a definite opinion on the question whether those signatures were forged or not, the Supreme Court held that the High Court erred in relying on the word of that "witness and thus giving the benefit of doubt to him rather than to the appellant who deserved it, the onus of proof being always on the prosecution

1. *Lakshmi Singh* v. *State of Bihar*, 1976 SC 2263 (Para 13).
2. *The State, Delhi Administration* v. *Sanjay Gandhi* 1978 SC 961 (para 14).
3. *Pershadi* v. *The State*, 1957 Cr. LJ 328.
4. 26 Cr. LJ 782.

to establish beyond reasonable doubt all the ingredients of an offence."[1] However, the doubt must be of a reasonable mind, that is, in the words of Cockburn, C.J., "not the doubt of a vacillating mind that has not the moral courage to decide upon a difficult or complicated question, and, therefore, takes shelter in idle scepticism. (Tichborne Case).[2] No man can be convicted where the theory of his guilt, is no more likely than the theory of his innocence.[3]

Suspicion is not legal evidence.— Suspicion however grave cannot take the place of positive proof.[4] It may be a ground for sifting the evidence minutely but no judicial decision can rest on suspicion or conjecture.[5] There is no ground to discard evidence of interested witness,[5a] but, conviction can be set aside on unreliable[5b] or trustworthy[5c] evidence. Evidence of hostile witness is of no use.[5d]

It is an accepted proposition that in the case[6] of group rivalries and enmities, there is a general tendency to rope in as many persons as possible as having participated in the assault. "The courts have, therefore, to be very careful and if after a close scrutiny of the evidence, the reasonable doubt arises with regard to the participation of any of those who have been roped in, the court would be obliged to give the benefit of doubt to them."

Corpus delicti.— The corpus delicti of a crime is the body or the substance of the crime charged. It involves two elements (i) injury to a specific person, property or right, or a violation of a statute; and (ii) criminal agency of someone in producing that injury or violation.[7]

Circumstantial evidence in criminal cases.— The distinction between direct evidence and circumstantial has already been explained.[8] As to the quantum of circumstantial evidence which can be a sufficient basis for conviction, the rule is that the facts proved must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.[9] Where the circumstances are not inconsistent with the innocence of the accused he cannot be

---

1. *Labhshanker* v. *State of Gujarat*, 1979 SC 1012 (para 5).
2. Kenny p. 397-403 (*R.* v. *Castra*). See also *Sher Mohamad* v. *E.*, 1945 Lahore 27; *E.* v. *Shafi Ahmed*, 31 BLR 515.
3. *Empt.* v. *Shivdas Omkar*, 15 BLR 315.
4. *Ashwani Kumar Roy* v. *E.* CWN 219; *Palvinder Kaul* v. *State*, 1952 SCJ 354; *Ata Mohamad* v. *Crown*, 1950 L 199 (FB).
5. 17 CWN 49.

5a. *Mohan Singh* v. *State*, 1988 ALJ 441 (DB).

5b. *State of U.P.* v. *Dinesh Chandra*, 1988 ALJ 937.

5c. *Lakhan Singh* v. *State*, 1988 ALJ 447 (DB).

5d. *Kathi Odhabhai Bhimabhai* v. *State of Gujarat*, AIR 1993 SC 1193.

6. *Budhwa* v. *State of M.P.*, AIR 1991 SC 4 (para 4).
7. Wharton's Criminal Evidence, 12th Ed., P. 48.
8. See notes to this section under the heading "direct and circumstantial evidence" supra.
9. *Ram Kala* v. *E.*, 1926 A. 191; *Muhammad* v. *E.*, 1945 L 27; *Hasan Din* v. *E.*, 1943 L 56; *Mangal Singh* v. *K.E.*, 1937 PC 179, ILR 1937 L 371; 168 IC 432: 64 IA 134; 39 PLR 426; *Ramun* v. *E.*, 7 L 84: 94 IC 901: 1926 L 88 : 27 Cr, LJ 709; *Majhi* v. *E.*, 86 IC 344: 1925 L 323 : 26 Cr. LJ 760; *Thakar Das* v. *E.*, 32 PR 1916 Cr. : 38 IC 759: 18 Cr. LJ 375; *E.* v. *Kangal Mali*, 41 C 601: 26 IC 161:15 Cr.LJ 713; *E.* v. *Imam Ali Sircar*, 8 CWN 278; *Balmakand Ram* v. *Ghansamram*, 22 C 391; *State* v. *Ganga Sahai*, 1953 A 211: 1953 ALJ 166: 1953 Cr. LJ 571; *Palvinder Kaur* v. *State*, 1952 SC 354: 1952 SCJ 545: ILR 1953 Punj. 107: 1953 SCR 94; *King Emperor* v. *Sheo Shankar Singh*, 1954 P 100: 1954 Cr LJ 171:32 P 243; *Radiana* v. *State*, 1953 Raj. LW 338; *Purnamal* v. *King*, 1949 Assam 84 : 51 Cr. LJ 63; *Ata Muhammad Khan* v. *Crown*, 1950 L 199 (FB) ; *Pershadi* v. *State*, 1955 A 443 ; *Kanbi Babu* v. *State*, 1955 Sau. 93; *Machander* v. *State*, 1955 SC 792; *Deonandan Mishra* v. *State*, 1955 SC 801; *Ram Bharosey* v. *State*, 1954 SC 704;

convicted.[1] No man can be convicted where the theory of his innocence is as likely as that of his guilt and, therefore, if, on the facts proved, any other reasonable theory than that of his guilt can be built, he must be given the benefit of the doubt and acquitted,[2] But the doubt of which benefit is given to the accused must be such as reasonable men may reasonably entertain, and not the doubt of a weak or vacillating mind[3] If, therefore, the facts proved are incapable of explanation on any reasonable hypothesis other than that of the guilt of the accused person, the Court must act on the hypothesis of guilt and cannot refuse to convict merely because certain other hypothesis which are not reasonable hypothesis are possible, and there is an infinitesimal possibility of the Court being wrong in its decision.[4] Suspicion, however grave is an insufficient basis for conviction,[5] and can not take the place of positive proof.[6] Since the failure of one link breaks the chain, every link in the circumstantial chain must be proved,[7] and no person should be required to answer the charge without a clear and unequivocal proof of the *corpus delicti*.[8] There must be clear proof of adultery and it should not rest upon mere suspicion. The Court should, however, bear in mind that direct evidence will not often be possible to prove adultery.[9] Mere speculation is not enough to bring home a charge a fraudulent conspiracy.[10] See notes to Section 105 under the heading "Prima facie proof of an exception is sufficient in criminal cases", and notes to Section 106 under the heading "application of the rule to criminal cases."

In *Hanumant Govind* v. *State of Madhya Pradesh*,[11] it was said "that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established, and all the facts so established should, be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such that as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain so far complete as not to leave any reasonable

---

Mangleshwari Prasad v. *State*, 1954 SC 715; *Kutuhal Yadav* v. *State*, 1954 SC 720.

1. *Jalwanti* v. *State*, 1953 P 246: 32 P 217: 1953 Cr. LJ 1344.
2. *Sher Muhammad* v. *E.*, 1945 L 27; *Hasan Din* v. *E.*, 1943 L 56; In re *Kanakasabai Pillai*, 1940 M 1; *Basangouda Yamanappa* v. *E.*, 1941 B 139: ILR 1941 B 315: 195 IC 208; *Sharif* v. *E.*, 1944 S 113; *Daulat Bai* v. *E.*, 77 IC 600: 1923 L 537: 25 Cr. LJ 424; *E.* v. *Shivdas Omkar Marwade*, 14 Cr. LJ 251: 15 Bom. LR 315: 19 IC 507; Singaram, In re, 1954 M 152: (1953) 2 MLJ 526: 1954 Cr. LJ 115: 1953 MWN 572: 66 MLW 795.
3. *Sher Muhammad* v. *E.*, 1945 L 27; *E.* v. *Shafi Ahmad Nabi Ahmad*, 31 Bom. LR 515; see also *In re Kallam Narayana*, 56 M 231: 143 IC 46: 1933 M 233: 34 Cr. LJ 481.
4. *Sher Mohammad* v. *E.*, 1945 L 27.
5. *Asvini Kumar Roy* v. *E.*, 10 CWN 219; *Gangwar* v. *E.*, 1944 S 155; *Jain Lal* v. *E.*, 1943 P 82; In re *Kuruva Nagamma*, 1941 M 870; *Palvinder Kaur* v. *State*, 1952 SC 354: 1952 SCJ 545: ILR 1953 Punj. 107: 1953 SCR 94; *Ata Muhammad Khan* v. *Crown*, 1950 L 199 (FB); *Padala Veera Reddy* v. *State of AP*, AIR 1990 SC 79.
6. *Pakhar Singh* v. *E.*, 1946 PLR 283.
7. Per Adam. J., in *Niru Bhagat* v. *E.*, I P 630: 71 IC 219: 1922 P 582: 24 Cr. LJ 91; *Seho Narain Singh* v. *E.*, 58 IC 457: 21 Cr. LJ 777.
8. Best, Section 441.
9. *M. Kanniappan* v. *Akilandamnal*, 1953, 1 MLJ 829: 1954 M 427: *Sheigh Issake* v. *Biyamunni Ummah*, 1885, 2 Weir 647; *E.* v. *Nandan*, 1881, 1 AWN 37; *Jodhan Sahu* v. *Kulwanti Kuer*, 1948 P 285; *Earnest John White* v. *Mrs. Katheleen White*, 1954 P 566.
10. *The Bank of India* v. *Jamsetji* A.H. Chinoy, 1950 PC 90.
11. 1953 Cr. LJ 129.

ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

The recent and unexplained possession of stolen property may be presumptive evidence against an accused on a charge of robbery and murder, though it must depend upon the circumstance of his case.[1] Circumstantial evidence in cases of murder by poisoning means a combination of facts creating a network, through which there is no escape for the accused, because the facts, taken as a whole, do not admit of any inference but of his guilt.[2] Where the point for decision is whether the accused had accepted a sum of money from another on the pretext of helping that other in a criminal case, the pendency of the criminal case at the time when the sum of money is said to have been paid is a relevant circumstance. And the association of the accused with that other person is also another relevant circumstance. In order to find a person guilty on circumstantial evidence the circumstance or the circumstances must be such as would irresistibly lead to an inference of the guilt of the accused. If the inference as drawn from the existing circumstances, is not the only irresistible inference then there is an error of law committed which may merit rectification.[3] Penal Code Section 302 and 149 in prosecution of their common object members of unlawful assembly each one shall be guilty under Section 304 Part II read with Section 149 I.P.C.[4]

The mere fact that the dead body is pointed out by the accused or is discovered as a result of a statement made by him cannot necessarily lead to the conclusion of the offence of murder, though the discovery of some property (the deceased's blood stained silver buttons), at the instance of the accused is a circumstance which may raise a presumption of the participation of the accused in the murder.[5]

The completed chain of the several links of circumstantial evidence had to be scrutinised in order to see whether the only conclusion possible is that the accused is guilty or whether there is any reasonable ground for a conclusion consistent with the innocence of the accused.[6] Whether the circumstantial evidence is not of the kind from which the only inference that could reasonably be drawn is that the accused is guilty, it is not possible to convict him.[7] This does not mean that any extravagant hypothesis would be sufficient to sustain the principle, but that the hypothesis suggested must be reasonable.[8] When the prosecution case rests purely on circumstantial evidence, conviction can be justified only when the evidence is of such a character as to be wholly incompatible with the innocence of the accused, and not till then.[9] The circumstantial evidence to prove a fact should be closely scrutinised, and there should be no weak links, every weak link being a ground of reasonable suspicion, always calling for an acquittal. The chain need not be long and complicated and may consist of two or three links only, but the links should fit in and should be strong.[10]

---

1. *Wasin Khan* v. *U.P.*, 1956 SCR 191.
2. *Anant Lagu* v. *Bombay*, 1960 SCJ 778.
3. *Golam Mohiuddin* v. *State of West Bengal*, 68 CWN 215.
4. *Mangal* v. *The State* 1988 ALJ 1503 (DB).
5. *Kanbi Karsan* v. *State of Gujarat*, (1962) Supp. 2 SCR 726.
6. *Devanandan Mishra* v. *Bihar*, 1955 Cr. LJ 1647.
7. *See Prithvisinghji* v. *Bombay*, 1960 Cr. LJ 672.
8. *Govinda Reddy* v. *Mysore*, 1960 Cr. LJ 137.
9. *Palvinder Kaur* v. *Punjab*, 1952 SCJ 545.
10. *Mojiya Ratna* v. *State*, 1960 M.P. LJ 1226.

Explanation of the accused— If the defence put up by the accused is reasonably probable and is consistent with the facts established against him, it must be held that his guilt has not been established beyond reasonable doubt.[1] This does not mean that any extravagant hypothesis would be sufficient to sustain the principle, but that hypothesis suggested must be reasonable.[2] Where circumstances pointed out the accused as the probable assailant, and he offers no explanation which if accepted, though not proved, would afford a reasonable basis for a conclusion on the entire case, consistent with his innocence, such absence of explanation or false explanation would itself be an additional link which complete the chain.[3]

In assessing the evidence imaginary possibilities have no role to play. What is to be considered are ordinary human probabilities. If any of the circumstances proved in a case are consistent with the innocence of the accused or the chain of the continuity of the circumstances is broken, the accused is entitled to the benefit of doubt.[4]

False explanations.— See *case of Devanandan Mishra* v. *Bihar*.[5]

False denials: False denials by an accused constitute an additional link in the chain of circumstances against him. Soon after the deceased was found missing, accused made a statement in anger to witness that he (accused) had a hand in his disappearance by throwing him in a furnace, though actually deceased was found in a well. This statement was held to be an incriminating circumstance against the accused in the chain of circumstantial evidence against him,[6] and on doubtful evidence of eye witness accused entitled to be acquitted.[6-1]

Special rules of proof in criminal trial.— (1) There is presumption of innocence of accused and hence the burden of proving the charge is on the prosecution. Viscount Sankey L.C. in Woolmington Case[7] observed—

> "Throughout the web of the English criminal law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt, subject to matters to defence of insanity and subject also to any statutory exceptions."

(2) The evidence against the accused should be such as to exclude, to a moral certainty, every reasonable doubt of his guilt.

(3) In matters of doubt, it is safer to acquit than to condemn.

(4) There must be clear and unequivocal proof of corpus delicti.

(5) The hypothesis of delinquency must be consistent with all the facts proved.

"Special rules of proof in criminal cases"—Election cases:

> "Election petitions alleging corrupt practices are proceedings of a quasi criminal nature and the onus is on the person who challenges the election to prove the allegations beyond reasonable doubt."[8]

---

1. *Bhagat Ram* v. *Punjab*, 1954 Cr. LJ 1645.
2. *Govinda Reddy* v. *Mysore*, 1960 Cr. LJ 137; *Chappalal* v. *State of Maharashtra*, 1981 SC 1675 (Para 5).
3. *Deonandan Mishra* v. *Bihar*, 1955 Cr. LJ 1647.
4. *Kishore Chand* v. *State of H.P.*, (1991) 1 SCC 286 (para 5).
5. 1955 Cr LJ 1647.
6. *Pershadi* v. *U.P.*, 1957 Cr. LJ 328.

6-1. *Chaman Lal* v. State, 1988 ALJ 1465.

7. 1935 AC 462.
8. *Amolachand* v. *Bhagwandas*, 1977 SC 813 (para 12).

After referring to certain decisions *Daulat Ram Chauhan* v. *Anand Sharma*, (1984) 2 SCC 64 (para 18): 1984 SC 621: *Manmohan Kalia* v. *Sri Yash*, (1984) 3 SCC 499 (para 7) : 1984 SC 1161 : *A Younus Kunju* v. *R.S. Unni*, (1984) 3 SCC 346 : 1984 SC 960; and *Samant N. Balakrishna* v. *George Fernandez*, (1969) 3 SCR 603; 1969 SC 1201. The Supreme Court observed that their sum and substance was that "a charge of corrupt practice has to be proved by convincing evidence and not merely by preponderance of probabilities. As the charge or a corrupt practise is in the nature of a criminal charge, It is for the party who set up the plea of 'undue influence' to prove it to the hilt beyond reasonable doubt and the manner of proof should be the same as for an offence in a criminal case.....a very cautions approach must be made in order before the charge of undue influence levelled by the defeated candidate.....

There is no ritualistic formula nor a cut and dried test to lay down as to how a charge of undue influence can be proved but if all the circumstances taken together lead to the irresistible inference that the voters were pressurised, threatened or assaulted at instance of either the candidate or his supporters or agents with his consent or with his agents' consent that should be sufficient to vitiate the election of the returned candidate.....

While insisting on standard of strict proof, the Court should not extend or stretch this doctrine to such an extreme extent as to make it well-nigh impossible to prove an allegation of corrupt practice. Such an approach would defeat and frustrate the very laudable and sacrosanct object of the Act in maintaining purity of the electrol process.

By and large, the Court in such cases while appreciating or analysing the evidence must be guided by the following considerations;

(1) the nature, character, respectability and credibility of the evidence.
(2) the surrounding circumstances and the improbabilities appearing in the case.
(3) the slowness of the appellate court to disturb a finding of fact arrived at by the trial court who hold the initial advantage of observing the behaviour, character and demeanour of the witnesses appearing before it, and
(4) the totality of the effect of the entire evidence which leaves a lasting impression regarding the corrupt practices alleged.[1]

Time and again the courts have uttered a warning against the acceptance of a non-corroborated oral testimoney in an election matter, courts have, therefore, insisted upon some contemporaneous documentary evidence to corroborate the oral testimony when in particular such evidence could have been maintained.[2]

Legal proof and moral conviction; conjectures and suspicion.—However morally convinced a Judge may feel as to the truth of a particular fact unless there is legal proof of its existence, he cannot take it as proved.[3] Conjectures and suspicion[4] cannot take the place of proof,[5] and the Court's decision must rest not upon suspicion but upon legal grounds established by legal testimony.[6] Once the evidence comes before the

---

1. *Ram Sharan Yadav* v. *Thakur Muneshwar Nath Singh*, 1985 SC 24 (Paras 2 to 9)
2. *M.I. Zakhariasati* v. *T.M. Mohammad* 1990 (3) SCC 396 (Para 70)
3. *Barindra Kumar Ghose* v. *E.* 37 C 467 ; 7 IC 359 :11 Cr LJ 453; *Baboo Aubinash Chander Banerjee* v. *Moonshee Mahomed Yusoof*, 25 WR Cr 43.
4. *Atar Singh* v. *Thakur Singh*, 452 PR 1910 : 35 IA 206 : 6 IC 7821 (PC) ; *Kedar* v. *E.*, 1944 A 94 : 1944 ALJ 87 ; *Lolit Mohan Sarkar* v. *Q E.*, 22 C 313, 323 : *see* also *Barindra Kumar Ghose* v. *E.*, 37 C 467 : 7 IC 359 : 11 Cr. LJ 453 : *State* v. *Shanker Prasad*, 1952 A 776 : 1952 Cr. LJ 1334.
5. *Vinod Samuel* v. *Delhi Administration*, AIR 1992 SC 465
6. *Brij Bhusan Singh* v. *E.*, 1946 PC 38; *Mina Kunari Bibi* v. *Bijoy Singh Dudhuria*, 44 C 662, 672; 44 IA 72; 40 IC 242 1916 PC 238 (PC); *Miran Baksh* v. *E.* 133 IC 446; 1931 L 529; 32 Cr LJ 1032.

court and stands the test of severe legal scrutiny, that evidence constitutes legal proof. Then the dividing line between such proof and moral conviction vanishes. It is, however the duty of the Court in each case to concentrate its attention on the relevant and admissible evidence and then to decide whether or not a particular fact has been proved from the evidence adduced in the case.[1]

There is no rule of prudence, which has crystallized into a rule of law, nor indeed any rule of prudence, requiring that the evidence of police officers who lay a trap, should be treated on the same footing as evidence of accomplices. Thus where such evidence is found to be entirely trustworthy there is no need to seek any corroboration.[2]

Where the circumstances justify it, a Court may refuse to act upon the uncorroborated testimony of a trap witness.[3] On the other hand a court may well be justified in acting upon the uncorroborated testimony of a trap witness if the court is satisfied from the facts and circumstances that the witness is a witness of truth.[4]

Admissibility of suit for partition cannot be held to be not sustainable on ground that sole evidence for partition was unregistered deed which was inadmissible in evidence.[5]

National Security Act, Section 3 (2) and Criminal Procedure Code, Section 156, 172 – Investigation "Log Book" recording message. Practice to keep "Log Book" in the form of loose sheets produced in Court could not be said to be not genuine.[6]

Constitution of India, Article 136 – After meticulously and scrupulously analyzing the evidence, we are left with an impression that the prosecution has not satisfactorily established guilt of these two appellants beyond reasonable doubt.[7]

Wakf, Muslim law

Where a burial ground is mentioned as a public graveyard it is either revenue or historical papers, that would be a conclusive proof to show the public character of the graveyard (para 6).[8]

4. "May presume".

Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it;

"Shall presume" – Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved;

"Conclusive proof" – When one fact is declared by this Act to be conclusive proof of another the court shall, on proof of the one fact,

1 *Kedar* v. *E*, 1944 A 94; 1944 ALJ 87; 212 IC 309; 45 Cr LJ 573.
2 *Hazari Lal* v. *State*, AIR 1980 SC 873; *State of Gujarat* v. *Balubhai Madhabhai Zala*, 1995 Cr LJ 2588, para 6.5.
3 *Ram Prakash Arora* v. *State of Punjab*, AIR 1973 SC 498; *Darshanlal* v. *Delhi Administration*, AIR 1974 SC 218.
4 *Prakash Chand* v. *State*, AIR 1979 SC 400; *State of Bihar* v. *Basawan Singh*, AIR 1958 SC 500; *Bhanu Prasad Hariprasad* v. *State of Gujarat*, AIR 1968 SC 1323.
5 *Smt. Mallamma* v. *Nanjamma*, AIR 1988 Kant 225.
6 *Ayya alias Ayub* v. *State of U.P.*, AIR 1989 SC 364.
7 *Mathura Prasad* v. *State of M.P.*, AIR 1992 SC 49.
8 *Dwarka Dass* v. *Punjab Wakf Board*, AIR 1991 P & H 89.

regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

COMMENTARY

Classification of Presumptions.—In other systems of evidence, the subject of presumptions constitutes a very intricate branch of the law of evidence. The framers of the Indian Evidence Act have, however adopted a simpler and, it is submitted a more logical classification of the subject. The following is a tabular classification of presumptions;—

PRESUMPTIONS

Presumptions of Fact or Natural Presumptions	**Presumptions of Law or Artificial Presumptions**
They are always permissive, rebuttable, and do not constitute a branch of Jurisprudence. They are indicated in the Act by the expression "may presume" (Sections 86 to 88, 90 and 114)	They are always obligatory, may be rebuttable or irrebuttable, and constitute a branch of Jurisprudence.

Rebuttable Presumptions of Law	**Irrebuttable Presumptions of Law**
They are indicated in the Act by the expression "shall presume" (Section 70 to 85, 89 and 105).	They are indicated in the Act by the expression "conclusive proof" (Section 41, 112 and 113).

What is presumption.—Presumption is an inference of fact drawn from other known or proved facts. It means a rule of law that courts shall draw a particular inference from a particular fact or from a particular evidence, unless and until the truth of such inference is disproved. Presumptions help in determining the probative force of evidence by bringing the estimation of probative force under some inflexible rules excluding judicial discretion.

A presumption is a rule which treats an unknown fact as proved on proof or admission of certain other facts. There are two classes of presumptions; (a) presumptions of fact, and (b) presumptions of law.

Presumption of fact or natural presumptions.— These are "inferences which the mind naturally and logically draws from given facts without the help of legal directions."[1] "Such inferences are drawn not by virtue of any rule of law but by the spontaneous operations of the reasoning faculty; all that the law does for them is to recognize the propriety of their being so drawn if the Judge thinks fit."[2] When inferring

1. Phipson, Ev., 7th Ed., 8; *Bommadevara Chayadevamma Bahadur Zamindarini Garu* v. *Sana Venkataswami*, 138 IC 40; 1932 M. 343.
2. *Bommadevara Chayadevamma Bahadur Zamindarini Garu* v. *Sana Venkataswami*, 138 IC 40: 1932 M. 343.

the existence of a fact from another, Courts of Justice do nothing more than apply a process of reasoning which the mind of any intelligent being would, under similar circumstances, apply for itself and the force of which rests altogether on experience and observation of the course of nature, the constitution of the human mind, the springs of human action and the usages and habits of society.[1] These presumptions, therefore, fall more properly within the province of logic and do not constitute a branch of Jurisprudence. They are always permissive, in the sense that the Court has the discretion to draw them.[2] They are also rebuttable as their evidentiary effect may be negatived by contrary proof. They are indicated in the Act by the Expression "may presume" and are mentioned in Sections 86 to 88, 90 and 114.

Presumptions of law or artificial presumptions.— These are "arbitrary inferences which the law expressly directs the Judge to draw from particular facts."[3] These presumptions are nothing but deductions drawn from human experience and observations, and expressed in the form of artificial rules of law. Therefore they constitute a definite branch of Jurisprudence. Unlike presumptions of fact, they are always obligatory; because, a presumption of law being expressed in the form of an imperative rule of law, the Judge is bound to act according to the rule and cannot refuse to draw the presumptions.[4] They may or may not be rebuttable. When rebuttable, they are called "rebuttable presumptions of law" and are indicated in the Act by the expression "shall presume," They occur in Sections 79 to 85, 89 and 105. Under Section 105 of this Act, read with the definition of "shall presume" in this section, the court must regard the absence of such circumstances as proved unless, after considering the matters before it, it believes that the said circumstances existed or that their existence was so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that they did exist.

The evidence so placed may not be sufficient to discharge the burden under Section 105 of the Act, but it raises a reasonable doubt in the mind of the Judge as regards one or other of the necessary ingredients of the offence itself, e.g., whether the accused had the requisite intention laid down in Section 299 of the Penal Code. If the Judge has such reasonable doubt, he has to acquit the accused.[5] When not rebuttable they are called "irrebuttable presumptions of law" or "conclusive proof." Three instances of such presumptions are mentioned in Section 41, 112 and 113. Where one fact is declared by law to be "conclusive" proof of another, the Court cannot allow evidence to be given in rebuttal.[6]

Conclusive proof.— The section lays down that when one fact is declared by this act to be conclusive proof of another, the Court must, on proof of the one fact, (a) regard the other as proved and (b) not allow evidence to be given for the purpose of

---

1. Best. S. 303; *Bammadevara Chayadevamma Bahadur Zamindarini Garu* v. *Sana Venkataswami*, 138 IC 40; 1932 M 343.
2. Best. S. 304; *Bommadevara Chayadevamma Bahadur Zamindarini Garu* v. *Sana Venkataswami*, 138 IC 40; 1932 M 242.
3. *Bommadevara Chayadevamma Bahadur Zamindarini Garu* v. *Sana Venkataswami* 138 IC 40; 1932 M 343
4. Best. S. 304; *Bammadevara Chayadevamma Bahadur Zamindarini Garu* v. *Sana Venkataswami*, 138 IC 40; 1932 M 343.
5. *Dahyabhai* v. *State*, (1964) 1 SCWR 831.
6. *Maharaja of Benares* v. *Jang Bahadur*, 131 IC 555; 1932 A 35; *Collector of Muradabad* v. *Equity Insurance Co. Ltd.* 1948, O 197; 1948 OWN 172.

disproving it. Thus, the statement in an order of the Court has been said to be conclusive of what happened before the Presiding Officer of that court.[1] Between "conclusive evidence" and "conclusive proof" there is no difference as the aim of both is to give finality to the establishment of the existence of a fact from the proof of another.[2]

Suicide by a married woman, presumption of abetment is not mandatory ..... The expression used is 'may presume' and not that 'shall presume'

In view of section 4 of the Evidence Act, the import of expression 'may presume' is that the court may either regard the fact in question as proved, unless and until it is disproved, or may call for proof of it. In section 113-A of the Evidence Act (*commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she committed suicide within a period of seven years from the date of her marriage and that her husband had subjected her to cruelty, the Court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband*). The Parliament in its wisdom did not leave it at that by using the expression 'may presume' alone, but has supplemented the same by using the further expression 'having regard to all the other circumstances of the case', which casts a positive responsibility on the Court to take into consideration all the circumstances of the case also, namely the circumstances mentioned in the Section itself, which are suicide within seven years of marriage and proof of cruelty, in deciding whether the presumption of abatement of suicide should be drawn in a particular case from the proof of cruelty which itself is, separately punishable under section 498-A, Indian Penal Code. (Para 29)[3]

Certificate of incorporation of a company is conclusive evidence of the act that each subscriber of the Memorandum and the articles of Association wrote opposite his name the number of shares he took.[4]

There is no difference between the phrases "conclusive evidence" and "conclusive proof". In both the case evidence cannot be allowed in rebuttal.[5]

This section recognizes three rules of evidence, the rules which prescribe (1) for a presumption which may be drawn, (2) for a presumption which shall be drawn subject to rebuttal, and (3) for a presumption which shall be conclusively drawn. It has been accepted in India that a conclusive presumption is a part of the law of evidence.[6]

---

1 *Catholicos* v. *Athansius*, (1955) I SCR 520.
2 *Smt. Somavanti* v. *Punjab*, (1963) 2 SCJ 35.
3 *Nilakantha Pati* v. *State of Orissa*, 1995 Cr LJ 2472.
4 *Collector of Muradabad* v. *Equity Insurance Co. Ltd*, 1948, O 197; 1948 OWN 172.
5 *Ibid.*
6 *Izhar Ahmad Khan* v. *India*, (1963) 1 SCA 136.

CHAPTER II

Of the Relevancy of facts

COMMENTARY

Relevancy of Facts.— Section 6 to 55 of the Second Chapter of the Act deal with the relevancy of facts. "The word `relevant' means that any two facts to which it is applied are so related to each other that, according to, the common course of events, one, either taken by itself or in connection with other facts, proves or renders probable the past, present or future existence or on existence of the other." (Stephen Dig., Art.I). The definition of "relevant" in Section 3 is an incomplete definition as it merely declares that a fact is said to be relevant to another when it is connected with the other in any of the ways referred to in Section 6 to 55. A fact in issue is a necessary ingredient of a right or liability; because from such fact, either by itself or in connection with other fact, the existence or non-existence of a right or liability necessarily follows. A relevant fact, on the other hand, is not a necessary ingredient of a right or liability; but is one that merely renders probable the existence or non-existence of any ingredient fact of a right or liability. A fact in issue is called the "principal fact" or *factum probandum* and the relevant fact the "evidentiary fact" or factum probans. Where direct evidence concerning a fact in issue is not available, it may be proved by circumstantial evidence; and, in such a case every place of circumstantial evidence would be an instance of a "relevant" fact. In a case of murder, if it be proved against the accused that he had a motive to kill the deceased that he had the opportunity and made preparations to kill, that immediately after the deceased was murdered the accused was seen running away from the place of murder with a sword in hand, that his clothes and the sword were both stained with blood, and that, shortly afterwards, he concealed the blood-stained clothes, and the sword, the fact of his being the murderer is proved as conclusively as by the testimony of persons of unimpeachable credit who might have actually seen him committing the murder. Yet none of these facts is necessary element of the liability to be hanged; as the law does not require, as a condition precedent, proof of any of the facts mentioned above in order to punish a man with death. None of these facts, therefore, is a fact in issue; but all of them are "relevant" since they afford very good material for the inference that the fact in issue did take place, namely, that the accused murdered the deceased.

Logical relevancy and Legal relevancy.— A fact is said to be logically relevant to another when it bears such casual relation with the other as to render probable the existence or non-existence of the latter. All facts logically relevant are not, however, legally relevant. The Act exhaustively enumerates the kinds of casual connection which make a fact legally relevant to another. Hence relevancy under the Act is not a question of pure logic but of law, as no fact, however logically relevant, is receivable in evidence unless it is declared by the Act to be relevant. Except where section 11 is applicable, no presumption of legal relevancy attaches to facts logically relevant and the person tendering evidence of a fact has to show that it is relevant under some section of the Act.[1] Of course every fact legally relevant is not necessarily relevant

1. *E.v. Bhagwandas-Tulsidas*, 47 Bom. LR 997; *Dwijen Chandra Roy* v. *Naresh Chandra Gupta* 49 CWN.

under the Act as common sense or logical relevancy is wider than legal relevancy. A Judge might, in ordinary transactions, take one fact as evidence of another and act upon it himself, when, in Court, he would rule that it was legally irrelevant. And he may exclude facts, although logically relevant, if they appear to him too remote to be really material to the issue.[1] Whatever is legally relevant is logically relevant but not vice versa, *e.g.*, the statement of the accused; "I have kept in the field the knife with which I killed A" is logically relevant to prove the guilt of the accused, but Sec.27 of the Act provides that only so much of the information as relates distinctly to the fact thereby discovered may be proved, *i.e.*, is relevant and hence the latter portion of, the accused's statement, *viz.*, "with which I killed A" though logically relevant is not legally relevant, *i.e*, admissible in evidence.[2]

Legal relevancy and admissibility.—Relevancy and admissibility are not co=extensive or interchangeable terms. A fact may be legally relevant, yet its reception in evidence may be prohibited on grounds of public policy, or on some other ground, as for instance, communications during marriage or between a client and his legal adviser might relate to facts in issue or relevant facts, but they are protected from disclosure.[3] Every relevant fact is not, therefore, necessarily admissible, though where the relevancy of a fact is established, there is presumption of its admissibility, and it is for the person objecting to show that the fact is not admissible.[4] Similarly every admissible fact, if "admissibility" be considered synonymous with receivability in evidence, is not necessarily "relevant" in the sense in which this word is used in the interpretation-clause and the second Chapter of the Act. The tenth Chapter of the Act makes a number of facts receivable in evidence but these facts are not " relevant" under the second Chapter which alone defines relevancy. Thus previous statements which are proved under Section 157 or Section 155 to corroborate or contradict a witness, or facts which are proved to impeach the credit of a witness, are receivable in evidence; but they are; not "relevant" under any section of the Act dealing with "relevancy." "Public Policy" considerations of fairness, the particular necessity for reaching speedy decisions—these and similar reasons cause constantly the necessary rejection of much evidence entirely relevant. All admissible evidence is relevant, but all relevant evidence is not admissible. (Best.....Evidence p. 252). The Court is to decide the question of admissibility of evidence (Section 136). In that section a distinction is made between relevancy and admissibility, while Sec. 298, Cr. P.C. uses both these expressions. Wigmore says admissibility is a quality standing between relevancy or probative value on the one hand and proof or weight of evidence, on the other hand. A fact may be relevant but the proof of it may be such as is not allowed in the case of the hearsay rule.

Relevancy not affected by provisions of Cr. Procedure Code; considerations of public policy not recognised by the Act.—Unless it is so specifically stated in the Code of Criminal Procedure, no rule about the relevancy of evidence in the Evidence

---

791; 1945 C 492; See *Lekhraj Kuar* v. *Mahpal Singh*, 5 C 744-754; 71A 63 (PC); *Q.E.* v. *Abdullah*, 7 A 385, 399 (FB); *Srish Chandra* v. *Rakhal Ananda* 65 CLJ 520; 41 CWN 1103; See also *Chandulal* v. *Khatemonnessa*, 1943 C 76; ILR (1942) 2 C 299; *Sris Chandra Nandi* v. *Rakhalanda Thakur*, 1941 PC 16: *Kashyap* v. *E.*, 1945 L 23 (FB)

1. Cockle's Cases and Statutes on Evidence, 4th Ed., 58.
2. *Pulukuri Kotayya* v. Emp., LR 74 IA 65.
3. Sections 122, 126; Burr Jones, 136 (136)
4. See *Q.E.* v. *Mona Puna*, 16 B 661, 668.

Act is affected by any provision of that Code,[1] and evidence that is relevant cannot be excluded on grounds of public policy not recognised by the Act.[2]

5. Evidence may be given of facts in issue and relevant facts.— Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.

Explanation.—This section shall not enable any person to give evidence of a fact which he is disentitled to prove by any provision of the law for the time being in force relating to Civil Procedure.[3]

Illustrations

(a) *A* is tried for the murder of *B* by beating him with a club with the intention of causing his death.

At *A*'s trial the following facts are in issue:—

A's beating *B* with the club;

A's causing B's death by such beating;

A's intention to cause *B*'s death.

(b) A suitor does not bring with him and have in readiness for production at the first hearing of the case, a bond on which he relies. This section does not enable him to produce the bond or prove its contents at a subsequent stage of the proceedings otherwise than in accordance with the conditions prescribed by the Code of Civil Procedure.[4]

COMMENTARY

Only facts in issue and relevant facts may be given in evidence.—A fact in issue is a necessary ingredient of a right or liability. But a relevant fact is not. It merely renders probable the existence or non-existence of any component fact of a right or liability. Hence a fact in issue is called a "principal fact: while a relevant fact is known as the evidentiary fact." *e.g.* in a murder charge facts in issue to be proved by the prosecution may be that A caused B's death say with a knife and he intended to cause B's death. The evidence of eye-witnesses would be the direct evidence. In addition to it or in its absence murder may be proved by indirect or circumstantial evidence, e.g., it may be proved against A that he had a motive and opportunity to kill B, that he had made preparation by buying a knife, or that after the murder he was seen running with

1. *Ram Naresh* v. *E.*, 1939 A 242; 1939 ALJ 107; 181 IC 646; 40 Cr LJ 559.
2. *Katikineni Venkata Gopala Narasimha Rama Rao* v. *Chitiri Venkataramayya*, 1940 M 786 : ILR 1940 M 969; 52 MLW 159 (FB).
3. See the Code of Civil Procedure, 1908 (5 of 1908).
4. See the Code of Civil Procedure, 1908.

the blood-stained knife in hand, etc. Now this string of collateral facts is declared to be relevant under various provisions of the Act. None of them is a fact in issue but all of them are "relevant" since they afford convincing material for the inference that the fact in issue. *viz.*, A killed B did exist.

"Fact in issue" and "relevant facts" are defined in Section 3, and have been fully explained in the notes to that section and the introductory notes to this Chapter. This section answers the question "Of what facts may evidence be given"? and declares that evidence may be given in a suit or judicial proceeding of facts in issue and of such other facts as are declared by the Act to be relevant. The real object of a judicial proceeding is to ascertain the existence of facts on which the existence of a right or liability is made to depend by the substantive law. These facts which are called "facts in issue" may, therefore, be given in evidence as a matter of course. In addition to these, other facts may also be given in evidence which though not "facts in issue" are, however, connected with them in any of the ways mentioned in Sections 6 to 55. Such facts are called `relevant facts' as they make the existence of "facts in issue" probable or improbable. The section must be read subject to the specific provisions governing admissibility enacted in the last two Parts of the Act. A fact may be relevant under the second Chapter of the Act, yet evidence of it may not be admissible. Thus communications during marriage and professional communications between client and counsel may relate to facts in issue or relevant facts, but they cannot be given in evidence.[1] Similarly the terms of a contract has been reduced into writing.[2] Where the accused is charged with misappropriation and falsification of accounts by making false entries in the account books in his charge showing payments made to other concerns on behalf of the company in which he is serving, the absence of corresponding entries in the account books of the other concerns to whom payments are shown to have been made is not relevant under Section 34, but is relevant under Section 5 and 11.[3]

The credibility of a witness is not affected by the fact that he was not summoned but requested or asked to give evidence by the party which produced him. He cannot be regarded as untruthful for that reason.[4]

Trap witness.— A trap witness cannot be regarded as an accomplice. The evidence of such a witness is that of a partisan who is interested in the prosecution. If the evidence of such a witness is unsatisfactory, independent corroboration is necessary.[5]

But where the evidence of Police Officers who lay the trap is found to be entirely trustworthy, there is no need to seek any corroboration.[6]

Officers functioning in the anti-corruption department must seriously endeavour to secure really independent and respectable witnesses so that evidence in regard to raid inspires confidence and the court is not left in any doubt as to whether any money was paid by way of bribe.[7]

Where the circumstances justify it, a Court may refuse to act upon the uncorroborated testimony of a trap witness. On the other hand it may well be justified in acting

1. Section 122, 126.
2. Section 91.
3. *Andhra Pradesh* v. *Cheemalapati Ganeswara Rao*, 1963 (2) Cr. LJ 671.
4. *Asharfi Devi* v. *Trilok Chand*, 66 PLR 1130.
5. *Ambalal* v. *State*, (1961) 1 Cr LJ 50.
6. *Hazari Lal* v. *State*, 1980 SC 873.
7. *Raghbir Singh* v. *State of Punjab*, 1976 SC 91 (para 8) : 1976 Cr LJ 172.

upon the uncorroborated testimony of a trap witness on being satisfied from the facts and circumstances of the case that the witness is a witness of truth.[1]

Objections to evidence; at what stage may objection to relevancy or to mode of proof be raised.— It is the primary duty of the Court to shut out inadmissible evidence (9Section 136). It is also the duty of the Counsel to object at once to the tendering of the inadmissible evidence. An omission to object to irrelevant evidence cannot make the evidence relevant. Here the distinction between (a) objection to relevancy of evidence and (b) mode of proof must not be overlooked. Objection to relevancy can be taken at any time, but objection to the mode of proof being a matter of procedure will be deemed to be waived if not raised in time. A party will be precluded from raising objection to mode of proof subsequently on principles akin to those of estoppel, *e.g.* when a fact which is *per se* relevant and when the contents of a document have been proved by secondary evidence when such evidence is not legally admissible, the other party cannot subsequently be allowed to object to this mode of proof. Thus in short the question of relevancy is a question of law and may be raised at any time, but the question of mode of proof is one of procedure and can be waived. Objections to evidence should, as a rule, be decided by the Court at once and not reserved for future decision.[2] Apart from any objection that may be raised to the relevancy of a fact by a party, it is the duty of the Court to see that its judgment is based on facts declared by the Act to be relevant,[3] it must, therefore, exclude all irrelevant matter from evidence even if no objection be taken to it by a party;[4] as an omission to object to irrelevant evidence cannot make it relevant or available as a ground of decision.[5] An objection to the relevancy of evidence as distinguished from an objection to the mode of proof of a relevant fact, may be taken at any time.[6] Therefore, an appellate Court is bound to exclude irrelevant evidence, even though no objection was taken to its relevancy in the first Court.[7] The case is, however, different where a fact *per se* relevant has been

---

1. *Prakash Chand* v. *State (Delhi Administration)*, 1979 SC 400 (para 5).
2. *Bindeshwari Singh* v. *Ram Raj Singh*, 1939 A 61; 179 IC 974; 1939 ALJ 128; *Ramajuj Rai, etc.* v. *Dakshineshwar Rai, etc.*, 93 IC 101; 1926 C 752; *Laijam Singh* v. E., 86 IC 817; 1925 A 405; 26 Cr LJ 881; *Kapur Singh* v. *E.* 50 IC 481; 20 Cr. LJ 305; 98 PLR 1918; *Ramjibun Serowgy* v. *Oghore Nath Chatterji*, 25 C 401; *Jadu Ram, etc.* v. *Bhubotaram Nundy, etc.*, 17 C 173; but *see Bal Rajaram Padval* v. Maneklal Mansukhbhal, 56 B 36; 137 IC 717; 1932 B 136; *Parmanand* v. *E.*, 1910 N 340.
3. Section 165.
4. *Dwijen Chandra Roy* v. *Naresh Chandra Gupta*, 49 CWN 791; *Abbas Pedda, etc.* v. *Q.E.* 25 C 736; *Sumitra Kuer* v. *Ram Kair Chowbey*, 57 IC 561; 1921 P 17.
5. *Ayyavar Thevar* v. *Secretary of State*, 1942 M 528 ; *Nanak Chand* v. *Mian Mohammad Shahbaz Khan*, 1936 L 114; *Lim Yam Hong* v. *Lam Choon & Co*, 107 IC 457; 1928 PC 127; *Krishnaswami Pathar, etc.* v. *Ramchandra Ayyar, etc.*, 135 IC 572; 1931 M 601; *Sunder Singh* v. *Sham Singh* 80 IC 235; 1923 L 630; *Jagdish Chandra De, etc.* v. *Harihar De, etc.* 78 IC 219; 1924 C 1042; *Miller* v. *Madho Das*, 19 A 76 (PC); *Kamakshya Narainsingh* v. *Karanpura Development Co. Ltd.* 1950 P 134; 29 P 19.
6. *Padappa Mahalingappa* v. *Shivlingappa*, 47 Bom LR 962; 1946 B 193; *Sri Mahabirji* v. *Ramnath Kesarwani* 1936 P 634; 166 IC 209; *Badrul-Islam Ali Khan* v. *Mst. Ali Begum*, 16 L 782; 1935 L 251; 158 IC 465; *Nanak Chand* v. *Mian Mohammad Shahbaz Khan*, 1936 L 114; *Ghulam Mohammad, etc.* v. *Kalin Ullah*, 109 IC 728; 1928 L 428; *Jhanda Singh, etc.* v. *Harnam Singh, etc.* 94 IC 75; 1926 L 415; *Gonnabathula Thammayya* v. *Gonnabathula Chinnayya*, 92 IC 594; 1926 M 282; *Ambar Ali etc.* v. *Lutfe Ali, etc.*, 45 C 159; 411 C 116
7. *Sri Mahabir ji* v. *Ramnath Kesarwami* 1936 P 634; 166 IC 209; *Lim Yam Hong* v. *Lam Choon & Co.*, 107 IC 457; 1928 PC 127; *Manmatha Nath Kar* v. *Prabodh Chandra Ratari* 94 IC 279 (2); *Damodar Poddar, etc.*, v. *Jadunath Dutt, etc.*, 91 IC 449; *Jagdish Chandra De, etc.* v. *Hariher De, etc.*, 78 IC 219; 1924 C 1042; *Narhari Hari Vaidya* v. *Ambai Balakrishna Sausarikar*, 44 B 192; 55 IC 316; *Sumitra Kuer* v. *Ram Kair Chowbey*, 57 IC 561; 1921 P 61; *Abbas Peada, etc.* v. *Q.E.*, 25 C 736; *Miller* v. *Madho Das*, 19 A 76 (PC); *Marneedi Satyam* v. *Masimukkula Venkataswami*, 1949 M 689; (1949) 1 MLJ 434; 62 MLW 256.

allowed to be proved without objection in manner different from the one prescribed by the Act for its proof as for instance, where the contents of a document have been proved by secondary evidence where such evidence is not legally admissible.[1] The mode of proof, being a question of procedure, may be waived.[2] If an objection to the mode of proof of a fact is taken at the time evidence of it is given, it may be within the power of the party offering its proof to prove it in the regular way.[3] Therefore, if no objection is taken to the mode of proof of relevant fact at the time evidence in proof of it is given, the party neglecting to object or abstaining from objecting to it will not, on principles akin to those of estoppel, be permitted to object to it at a later stage.[4] Thus where secondary evidence of the contents of a document has been given and received by the Court objection, without a foundation for the reception of secondary evidence having been laid,[5] or where secondary evidence of a wrong kind has been given and received without objection[6] the party omitting to object at the time the evidence is given will not be permitted to question it subsequently.[7] In an Allahabad case where an objection to the admissibility of a pedigree was raised in the High Court for the first time on the ground that the pedigree was not shown to represent the statement of a person having special means of knowing the relationship as required by Clause (5) of Section 32, the Court held that the objection ought to have been taken in the first Court but nevertheless referred to the evidence that was on the record and found the statement in the pedigree to have been made by a person having special means of knowledge.[8] Where the Court passed an interlocutory order holding certain evidence to be admissible, it can review the order and rule out the evidence which was wrongly admitted.[9] See notes to Section 63 and to Section 65 under the heading "Secondary evidence

---

1. *Ramachandra* v. *Ranganyaki*, 1941 M 612 ; *Fauja Singh, etc.* v. *Allah Ditta etc.*, 133 IC 874 : 1931 L 722 ; *Ghulam Mohammad* v. *Kalim Ullah*, 109 IC 728 : 1928 L 428 ; *Jhanda Singh, etc.* c. *Harnam Sinch, etc.*, 94 IC 75 : 1926 L 415 ; *Gonnabathula Thammayya* c. *Gonnabathula Chinnayya*, 92 IC 594 : 1926 M 282 ; *Shib Chandra Singh, etc.* v. *Gour Chandra Paul, etc.*, 68 IC 86 : 1922 C 160 ; *Rohilkhand & Kumaon Ry. Co.* v. *Zahirus Syed Alvi*, 78 IC34 : 1924 N 358 ; *Ali Mohammed Khan, etc.* v. *Maharaj Bepari, etc.*, 64 IC 266.
2. *Dogrmal* v. *Suman Ram*, 1944 L 58; *Gonnabathula Thammayya* v. *Gonnabathula Chinnayya*, 92 IC 594 : 1926 M 282; *Bibi Kaniz Zainab* v. *Mobark Hossain*, 72 IC 594; 1926 M 282; *Bibi Kaniz Zainab* v. *Mobarak Hossain*, 72 IC 748: 1924 P 284 : *Zainab Bibi Saheba* v. *Hyderally Saheb*, etc., 43 M 609 : 56 IC 957 (FB).
3. *Ramanuj Rai, etc.* v. *Dakshineshwar Rai, etc.*, 93 IC 101; 1926 C 752.
4. *Gopaldas* v. Sri Thakurji, 1943 PC 83; *Dogarmal* v. *Suman Ram*, 1944 L 58; *Ayyavar Thevar* v. *Secretary of State*, 1942 M 528; *Nand Chand* v. *Mian Mohammad Shahbaz Khan*, 1936 L 114; *Badr-ul-islam Ali Khan* v. *Mst. Ali Begum*, 16 L 782; 1935 L 251; 158 IC 465; *Alfoo* v. *Baburali Mia*, 97 IC 414; *Manmatha Nath Kar* v. *Probdh Chandra Ratari*, 94 IC 279; *Konchand Latchaya Subudhi* v. *Velupla Seetharammayya, etc.* 84 IC 921; 1925 M 257 : *Ambar Ali, etc.* v. *Lutfe Ali, etc.*, 45 C 159; 41 IC 116; *Kishori Lal Goswami* v. *Rakhal Das Banerji*, 31 C 155; *Lakshman Govind, etc.* v. Amrit Gopal, etc., 24 B 591: *Kalijiban Bhattacharjee* v. *E.*, 63 C 1053; 1936 C316; 163 IC 41.
5. *U. Po Kin* v. *U. So. Gole*, 1936 R 277; 163 IC 408 (2) : *Umar-ul-din* v. *Ghulam Mohammed*, 1935 L 628 :160 IC 751; *Kedar Nath* v. *G.R. Pradhan* ILR 1937 N 68 : 1937 N 13 : 167 IC 190; *Fauja Singh* v. *Alla Ditta*, 133 IC 874 : 1931 L 722.
6. *Kedar Nath* v. *G.R. Pradhan*, ILR 1937 N 68 : 1937 N 13 : 167 IC 190.
7. *Chhatra Kumari Devi* v. *Parbati Kuer*, 1936 P 600.
8. *Bindeshwari Singh* v. *Ram Raj Singh*, 1939 R 61; 179 IC 974; 1939 A.L.J 128. It is submitted that the objection in this case was to the relevancy of the pedigree, and if there had been no evidence on the record to show that Baijnath Singh had special means of knowing the relationship, the Court would have been bound to exclude the pedigree as irrelevant;
9. *Chamarette* v. *Chamarette*, 1937 L 176 : 172 IC 619 ; 39 PLR 262.

admitted without objection in the Court of first instance; appellate Court cannot raise or recognise an objection to its admissibility.[1]"

Facts declared to be relevant.—The relevant facts are those which are in the eye of the law so connected with the facts in issue that they render the latter probable or improbable (Sections 6 to 55). This is legal relevancy which must be distinguished from logical relevancy.

And of no others.—This section excludes everything which is not covered by the purview of some other section which follows in the statute.[2] These words impose a duty on the Court to exclude irrelevant evidence. Section 298, Cr. P.C. expressly casts this duty on Court. See O 13 r. 3, C.P.C. The party contending that a fact is admissible must point out the provision in the Act under which it is admissible. Maxim " falsus in uno falsus in omnibus" is only a rule of caution and not of law. The well-known maxim falsus in uno falsus in omnibus has not received general acceptance in different jurisdiction in India; nor has this maxim come to occupy the status of a rule of law. It is merely a rule of caution. All that it amounts to is that in such cases the testimony may be disregarded and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a court may apply in a given set of circumstances,but it is not what may be called " a mandatory rule of evidence."[3]

Question of admissibility to be argued in the absence of the Jury.—The Privy Council has approved of the practice of ordering the jury to retire when a question relating to the admissibility of evidence has to be argued and has held that such question should be argued and decided in their absence.[4]

Criminal cases.—All criminal proceedings must strictly conform to the rules of procedure, and a prisoner cannot give a valid consent to any material irregularity of procedure. He cannot, therefore, be held to have lost his rights by his consent to an illegal procedure or admission of evidence which the law does not authorize.[5]

Explanation.—This section is subject to those rules of Civil Procedure which disentitle a party in certain circumstances, to prove a particular fact whether it be a fact in issue or a relevant fact. Illustration (b) shows what is meant by the explanation.

For the provisions of the law relating to Civil Procedure referred to see O. VII, rr. 14 to 18 O. XIII, rr. 1 to 3 and 10, and O. XLI, r, 27, Civil procedure Code. (Act V of 1908).

6. Relevancy of facts forming part of same transaction.—Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.

Illustrations

(a) *A* is accused of the murder of *B* by beating him. Whatever was said

---

1. *Chamarette* v. *Chamarette*, 1937 L 176 : 172 IC 619 ; 39 PLR 262.
2. *Collector of Gorakhpur* v. *Palakdhari Singh*, (1889) 12 All, 1 (FB).
3. *Nisar Ali* v. *Uttar Pradesh*, 1957 Cr. LJ 556.
4. *Alexander Perera Chandra Sekara* v. *King*, 1937 PC 24; 166 IC 330; 38 Cr. LJ 281 (PC).
5. In *re Kottamal Kolathingal Umar Hajee*, 46 M 117; 69 IC 636 ; 1923 M 32 : 23 Cr. LJ 748; *Allu & others* v. *The Crown*, 4 L 376; 75 IC 980; 1924 L 104: 25 Cr. LJ 68.

or done by *A* or B or the by-standers at the beating, or so shortly before or after it as to form part of the transaction, it is a relevant fact.

(b) *A* is accused of waging war against the [1]Government of India by taking part in an armed insurrection in which property is destroyed, troops are attacked and gaols are broken open. The occurrence of these facts is relevant, as forming part of the general transaction, though *A* may not have been present at all of them.

(c) *A* uses *B* for a libel contained in a letter forming part of a correspondence. Letters between the parties relating to the subject out of which the libel arose, and forming part of the correspondence in which it is contained, are relevant facts, though they do not contain the libel itself.

(d) The question is, whether certain goods ordered from *B* were delivered to *A*. The goods were delivered to several intermediate persons successively. Each delivery is a relevant fact.

COMMENTARY

English Law.—Principal of English Law is that everything is admissible subject to the exceptions that (a) the best evidence available must be produced (b) and hearsay evidence is excluded. In other words English Law declares negatively that certain facts shall not be proved, while Sections 6 to 11 of the Act declare specifically what facts may be proved. Hence Stephen regards especially Sections 6 to 11 as original provisions. Relevant facts are arranged in the Act under Section 6 to 55 thus;

(1) Things connected with the facts in issue as part of the same transaction, occasion, cause, effect, motive, conduct, etc. (Section 6 to 16).
(2) Things said about it, e.g. admission, confessions (Sections 17 to 33).
(3) Statements by persons who cannot be called as witnesses (Sections 32, 33).
(4) Statements under special circumstances (Section 34 to 39).
(5) Things decreed in Court e.g. judgment in other cases (Section 40 to 44).
(6) Opinions about it (Section 45 to 51).
(7) Character and reputation of parties (Section 52 to 55).

Res Gestae: Constituent incidents of a transaction.— This section enacts the rule which in English text books is treated under the head of *Res Gestae*. There are few problems in the law of evidence more unsolved than what things are to be embraced in those occurrence that are designated in the law as the *rea gestae*.[2] The difficulty of formulating a description of the *res gestate* which will serve for all cases seems insurmountable. To make the attempt is something like trying to execute a portrait which shall enable the possessor to recognize every member of a numerous family.[3] *Res*

1. Subs. by the A.O. 1950 for "Queen".
2. Per Beasby, CJ., in *Hunter* v. *State* 10 NLJ 536; Wigmore § 1745.
3. Per Bleckley, C. J., in *Cox* v. *State*, 64 Ga 374, 410; Wigmore § 1745.

Gestae may be broadly defined as matter incidental to the main fact and explanatory of it, including acts and words which are so closely connected therewith as to constitute a part of the transaction, and without a knowledge of which the main fact, are contemporaneous with it and serve to illustrate its character.[1] Taylor defines this expression as including everything that may be fairly considered an incident of the event under consideration.[2] The use of this Latin phrase has led to considerable confusion, and has given rise to at least four conflicting conceptions, i.e., (i) one which applies the term *res gestae* to the main fact in relation to its constituent details; (ii) one which applies it to the details of such fact merely; (iii) one which applies it to the "surrounding circumstances" of some central fact, called, in contradistinction, the "principal fact"; and (iv) one which applies it to the total whole composed of both the principal fact and the surrounding circumstances.[3] It has, therefore, been suggested that this outlandish phrase should be deleted from English legal nomenclature.[4] The framers of the Evidence Act have avoided using this term both in Section 6 and the next two sections which are merely applications of the rule governing the admissibility of *res gestae*.

Sections 6 makes the constituent incidents of a transaction relevant, if a part of the transaction is a fact in issue. These constituent incidents may be acts, declarations or other facts accompanying or explaining the transaction[5] and may vary, according to the nature of the case, from a single occurrence lasting but a few moments, to a variety of acts, declarations and circumstances, occupying a length of time, and occurring on distinct occasions. They may comprise things done, or omitted, either by the principal or his agent, or partly by one and partly by the other, and they may have occurred partly within and partly without the jurisdiction.[6]

Parts of the same transaction.—If the whole of a transaction is a fact in issue, it is obvious that evidence relating to any part of it would be evidence of a fact in issue and, therefore admissible under Section 5. This section however, contemplates a case, where only a part of a transaction is a fact in issue and provides that, in such a case, every other part of the transaction becomes relevant. The question, therefore, that arises under this section is whether the particular fact, which is sought to be given in evidence, does or does not form a part of the transaction another part of which is in issue.

A comprehensive formula of universal application cannot be framed regarding the question whether two or more acts constitute the same transaction.[7] The circumstances which must bear on its determination in each individual case are proximity of time, unity or proximity of place, continuity of action and community of purpose or design.[8] Stephen denies a transaction as a "group of facts so connected together as to be referred to by a single legal name, as a crime, a contract, a wrong or any other subject of enquiry which may be in issue[9] It depends upon the circumstances of each individual

1. 10 RCL 974.
2. Taylor, § 583 ; *Kappinaiah*, etc. v. *E.*, 131 IC 456 : 1931 M 233 (2) ; 32 Cr. LJ 751.
3. Phipson, Ev., 7th Ed., pp. 54 55.
4. Wigmore, § 1767; *Hadu* v. *State*, 1951 Orissa 53.
5. Phipson, Ev., 7th Ed., p. 55; *Jalpa Prasad* v. *E.*, 50 IC 487; 20 Cr. LJ 311.
6. Phipson, Ev., 7th Ed. p.55.
7. *Amritlal Harza* v. *E.*, 42 C 957: 29 PC 513: 16 Cr LJ 497; *see* also *Chain Mahto* v. *E.*, 11 CWN 266; Steph. Dig. Art. 3.
8. *Amritlal Harza* v. *E.* 42 C 957: 29 IC 513: 16 Cr LJ 497; *Hadu* v. *State*, 1951 Orissa 53; *see also Ganesh Prosad* v. *E.*, 130 IC 269: 1931 P 52.
9. Steph. Dig. Art. 3.

case whether a particular fact is or is not a part of the transaction of which another part is a fact in issue. Unity of time and unity of place, though material, are not essential.[1] A transaction may be a continuous one, extending over a long period, and to many places. The expression "parts of the same transaction" must be understood as including both the immediate cause and effect as an act or event, and also its collocation or relevant circumstances, the other necessary antecedents of its occurrence, connected with it, at a reasonable distance of time and space, as cause and effect.[2] Letters which passed in the course of negotiation between the parties for the settlement of the licence, or the extension of the original licence are admissible as *res gestae*.[3] The word "transaction" is used in a limited sense in illustration (a) to Section 6, though it is used in a more general sense in the remaining illustrations of the section.[4]

Several offences may form one transaction.— Where several felonies are connected together and form part of the entire transaction; then one is evidence to show the character of the other.[5] Evidence touching circumstances and transactions which are concerned with the principal subject-matter of the charge as parts of one and the same transaction is admissible.[6] Thus, where robbery and murder form one transaction, possession of stolen property which is presumptive evidence of robbery would be presumptive of murder as well.[7] The facts must relate to, and can only be used to explain, the act they accompany and not independent facts prior or subsequent thereto; evidence as to other offences would be relevant and admissible, if there is a nexus between the offence charged with the other offences of the two acts forming part of the same transaction, so as to fall within this section.[8]

Statement admissible as part of the transaction under inquiry.— Questions of evidence in connection with this section usually arise with regard to statements.[9] A transaction consists both of the physical acts and the words accompanying such physical acts whether spoken by the person doing such acts, the person to whom they were done or any other person present; such words are admissible in evidence if they form part of the transaction.[10] In order for a declaration to be admissible as a part of the *res gestae*, it must be the spontaneous utterance of the mind while under the influence of the transaction, the test being whether the declaration was the facts talking through the party, or the party talking about the facts.[11] What a person states during an occurrence in respect of the occurrence itself is admissible as *res gestae* under Section 6.[12] Where the transaction is a single incident, a statement by a person who was perceiving the incident made simultaneously with occurrence of the incident may be said to be part of the transaction

1. Taylor, § 588.
2. See *Ring, etc.* v. *E.*, 53 B 479: 120 IC 340: 1929 B 296: 31 Cr LJ 65.
3. *Kamakshya Narainsingh* v. *Karanpura Development Co. Ltd.*, 1950 P 134: 29 P 19.
4. *Q. E.* v. *Faqirapa, etc.*, 15 B 491, 496.
5. *R.* v. *Ellis*, 6 B & C 145; *Q. E.* v. *Vajiram*, 16 B 414; *Reg.* v. *Prabhaudas, Ambaram*, 11 Bom. HC 90.
6. *Q. E.* v. *Vajiram, etc.*, 16 B 414, 430.
7. *Q. E.* v. *Sami, etc.*, 13 M 426; see *Lalji Dusadh* v. *E.*, 6 P 747: 106 IC 698 : 1928 P 162 : 29 Cr. LJ 106, where a dying declaration was treated as evidence of murder as well as of robbery.
8. *Wasu Pillai* v. *State*, 1961 Cr LJ 466.
9. Phip., Ev., 7th Ed., p. 56.
10. *Thompson* v. *Trevanion, Skinner, 402; Khijir-ud-din, etc.* v. *E.*, 53 C 372: 92 IC 442: 1926 C 139: 27 Cr LJ 266.
11. 22 CJ 461; See *Kameshwar Prasad Singh* v. *Rex*, 1951 ALJ 149.
12. *Khijir-u-din etc.* v. *E.*, 53 C 372: 92 IC 442: 1926 C 139: 27 Cr LJ 266.

inasmuch as it is the result of a spontaneous psychological reaction through perception.[1] Thus where members of an unlawful assembly uttered words expressing their determination to force their way through a police cordon, the words were held admissible as part of the transaction of unlawful assembly.[2] Similarly statements made by a testator at the time of registration of a will are admissible, under this section, as part of the *res gestae*.[3] A statement in order to be admissible under this section, must be substantially contemporaneous with the fact, *i.e.*, made either during or immediately before or after its occurrence.[4] The statement must be made before its maker has had time to devise or contrive anything for his advantage.[5] If the statement is made after the act is over and its maker has had time for reflection and deliberation, the statement will cease to be part of the *res gestae*, and will not be admissible under this section.[6] The declarations in order that they might be admissible as *res gestae* should be contemporaneous with the transaction in issue, that is, the interval should not be such as to give time or opportunity for fabrication, and they should not amount to a mere narrative of a past occurrence. They are admitted when they appear to have been made under the immediate influence of some principal transaction relevant to the issue and are so connected with it as to characterise or explain it. A bare statement of the complainant made to another after the complaint to police has been made is not admissible.[7] No doubt the Spontaneity of a statement is the guarantee of the truth, the reason for its admissibility under Section 6 is that it is a part of the transaction and not merely because it is spontaneous.[8] Hearsay statements to be admissible as substantive evidence of the truth of the facts stated therein must themselves be "part of the transaction", and not merely uttered in the course of the transaction.[9] What a person states at the time of an occurrence relating to some previous occurrence which took place long ago is no part of the latter and is, therefore, not admissible under Section 6.[10] Evidence of witnesses to whom complaint was made long after a theft is not admissible, as such evidence does not come under *res gestae*.[11] A statement cannot be said to form part of a transaction when it amounts to a mere narrative of past events.[12] Thus where a statement concerning a murder was made by an alleged bystander on the morning following the night on which the murder was committed, the statement was held irrelevant as it was made, not during the transaction, but after it was over.[13] A statement by a bystander was not admitted where it was not known how long after the murder it was made[14] nor where it

1. *Hadu* v. *State*, 1951 Orissa 53.
2. *Maung Tok etc.* v. *E.*, 3 R 352: 90 IC 918: 1925 R 354: 25 Cr LJ 1622.
3. *Muthukrishna Naicken* v. *Ramachandra Naicken*, 47 IC 611.
4. Phip. Ev., 7th Ed., p. 57; *Chain Mahto* v. *E.*, 11 CWN 266; *Jowala Sahai* v. *E.*, 34 PR 1914 Cr; *Mahendrapal* v. *State*, 1955 A 328.
5. *Thompson* v. *Trevanion, Sikinner*, 402.
6. *Raman etc.* v. *E.*, 1921 L 258: 4 LLJ 491; *Jowala Sahai* v. *Crown*, 34 PR 1914 Cr; *Chain Mahto* v. *E*, 11 CWN 266; *Mohammed Afzal* v. *Crown*, PLD 1950 L 189.
7. *Noor Mohammed* v. *Imtiaz Ahmed*, 1942 O 130: 197 IC 839: 43 Cr LJ 280.
8. *Hadu* v. *State*, 1951 Orissa 53.
9. *Ibid.*
10. *Khijir-ud-din, etc.* v. *E*, 53 C 372: 92 IC 442 : 1926 C 139 : 27 Cr. LJ 266.
11. *Brajabala Dhar* v. *Nityamayye Biswas*, 150 IC 209 : 1934 C 17.
12. *R.* v. *Christie*, 1914 AC 545 ; *Kappinaiah, etc.* v. *E*, 131 IC 456 : 1931 M 233 (2) : 32 Cr. LJ 751 ; Taylor, Ss. 589; Phip. Ev., 7th Ed. p. 57.
13. *Jowala Sahai* v. *Crown*, 34 PR 1914 Cr.
14. *Chain Mahto* v. *E*, 11 CWN 266.

was made a little after the murder had been committed.[1] Statements that the witness had learnt that the deceased had been murdered by the accused or that he was told by various witnesses that the accused had murdered the deceased and had run away are in admissible in evidence because they do not form part of the same transaction.[2] Statements made during the investigation of a crime do not spring spontaneously out of the crime under investigation, nor are they simultaneous with it. They are not, therefore, part of the transaction of crime and are inadmissible.[3] Where P handed in a written report to a police officer containing a false allegation of rioting against M and, on the report being read over to him, stated that the report as against M was false and that it had been written by J and, on a prosecution of J by M under Section 211, Indian Penal Code, the statement was sought to be proved against J as part of the conspiracy to bring a false charge, it was held that the statement was inadmissible as there was no conspiracy between P and J to bring a false charge against M; but that, if conspiracy had been proved, the statement would have been admissible as having been made in the course of the transaction of the conspiracy.[4] A statement may follow a physical act and may be the last item of the transaction.[5] Thus where an injured person, after he had been injured, made a statement in the presence of the prisoner, that the prisoner had injured him, the statement was admitted under Section 8 as well as under this Section.[6] Where the accused inflicts injuries on the person of the deceased resulting in fracture of his ribs, and the deceased when questioned, soon after, states that it was the accused, who inflicted the injuries, the statement is admissible under this section, as it was made by the deceased very shortly after he sustained injuries.[7] Statements arising out of accidental facts occurring in the course of a chain of events which constitute the transaction are not part of the transaction.[8]

A first information report may be admissible as a part of the transaction.— The statement of an informant in a first information report is not substantive evidence[9] and is admissible only to corroborate or contradict the testimony of the informant given in Court.[10] A first information report may, however, be admissible as part of the informant's conduct.[11] or as one of *res gestae*..[12] Where a lessee complained to the police of forcible re-entry by the lessor, the report made to the police was held admissible under Section 11 to show that the entry was forcible.[13]

Statements made by a raped woman.—In the cases of sexual offences against women, statements made to third parties are in certain circumstances admissible. But the careful limits placed upon the admissibility of such statements is evidence of the jealousy with which their admission is regarded. There must be complaints, made vol-

1. *Pakhar Singh v. E.*, 91 IC 812: 1925 L 578: 27 Cr. CJ 140
2. *State v. Bihari Lal*, 1953 PLR 221: 1953 Punj 218: 1953 Cr. LJ 1427.
3. *In re Grandhe Venkatasubhiah*, 48 M 640: 86 IC 209: 1925 M 579: 26 Cr. LJ 721.
4. *Jalpa Prasad v. E.*, 50 IC 487: 20 Cr. LJ 311.
5. *R v. Foster*, 6 C & P 325.
6. *In the matter of the petition of Sarat Dhobni*, 10 C 302.
7. *Krishna Rao v. State*, 1964, 1 Cr. LJ 393.
8. *Haldar v. State*, 1951 Orissa 53
9. *Mahadeo v. Ram Kuhar*, 1943 O 451; *Inchan v. E.*, 1943 C 647; *Waris Khan v. E.*, 1940 O 209.
10. See notes to Sections 145, 155 and 157.
11. *Azima Bi, etc. v. E.*, 54 C 237: 99 IC 227, 1927 C 17: 28 LJ 99.
12. *Mahla Singh v. E.*, 130 IC 410: 1931 L 38: 32 Cr. LJ 522.
13. *Habib Ullah v. Bakla Bali Singh*, 30 IC 292.

untarily and at the earliest convenient moment, and even then they are received as evidence or corroboration of the facts complained of, but as evidence of the credibility of the complaint's testimony to the facts alleged, and where consent is a defence to negative consent. They are inadmissible in any other class of cases.[1] A statement made by a raped woman is relevant under Section 6, if the statement is so connected with her rape as to constitute a part of the transaction of rape.[2] But a statement made after the ravishment is no part of the *res gestae* and is not, therefore, admissible under Section 6.[3] A statement made by a raped woman after the rape may, however, be admissible to corroborate or to contradict her testimony in Court,[4] but such statement is not substantive evidence of the truth of the facts mentioned in the statement.[5] A statement made by a raped woman to her neighbours or relatives may be treated as a complaint and held admissible as conduct under Section 8.[6] If the conduct of a woman who has been ravished is such that she lodges a complaint, then that conduct is relevant; and the terms in which the complaint was made are relevant as conduct, but they are not relevant as direct proof of the act. The particulars of the complaint may, so far as they relate to the charge against the prisoner, be given in evidence, not as being evidence of the facts of the complaint, but as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness-box and as negativing consent on her part.[7] Thus the statement of a ravished girl made immediately after the rape to witnesses who saw her crying and asked her reason for her crying was held admissible under Section 8 explanatory of her act of crying.[8] For further notes on this subject, see notes to Section 8 under the heading "evidentiary function of a complaint and its terms."

Spontaneous explanation of the accused.— When the accused gives a spontaneous explanation right at the moment the crime is committed, the explanation becomes *res gestae*.[9]

Statements admitted under Section 6 are original evidence and not hearsay.— The statements which are admissible under this section do not come under the rule against hearsay because, as has been aptly remarked, "in such cases it is the act that creates the hearsay, and not the hearsay the act."[10] It is no objection to their relevancy that they are admissions in favour of their maker, as such statements admissible for or against either party.[11]

The maker of the statement need not be called to prove it.— Since the section makes such statements a "relevant fact," they may be proved by the evidence of any

---

1. *Richard Gillie* v. *Posho Ltd.*, 1939 PC 146.
2. *Kappinaiah, etc.* v. *E.*, 131 IC 456: 1931 M 233: 32 Cr. LJ 751; *Ghulam Hussain* v. *E.*, 127 IC 862: 1930 L 337: 32 Cr LJ 63.
3. *R.* v. *Lillyman*, (1896) 2 QB 167; *Kappinaiah, etc.* v. *E.*, 131 IC 456: 1931 M. 233: 32 Cr. LJ 751; *Muhammad Altaf* v. *Crown*, 1950 L 151.
4. *See* Section 8, III (b); *Soosalal Bania* v. *E.*, 82 IC 142: 1925 N 74: 25 Cr. LJ 1214.
5. *Sreehari Swarnakar* v. *E.*, 124 IC 175: 1930 C 132: 31 Cr.LJ 656; *Nga San Pu* v. *E.*, 43 IC 443; 19 Cr. LJ 155.
6. *Raman etc.* v. *E.*, 1921 L 258: 4 LLJ 491; *E.* v. *Phagunia Bhuian*, 89 IC 1043: 1926 P 58: 26 Cr.LJ 1475.
7. *Kappinaiah, etc.* v. *E.*, 131 IC 456: 131 M 233: 32 Cr. LJ 751; *See* also *Nga San Pu* v. *E.*, 43 IC 443: 19 Cr.LJ 155.
8. *Soosalal Bania* v. *E.*, 82 IC 142: 1925 N 74: 25 Cr.LJ 1214.
9. *Paters* v. *State*, 1959 Cr. LJ 924.
10. *See* Phip. Ev., 7th Ed., 58.
11. Phip. Ev., 7th Ed., 54.

person who hears them, and it is not necessary that their maker should appear in Court to prove them.[1]

Statements which are admissible as part of the transaction are substantive evidence.—In English law, statements which become admissible as part of the transaction are not, in general, evidence of the truth of the matter stated.[2] It is, however, submitted that, under the Act, such statements may be treated as substantive evidence, *i.e.*, as evidence of the truth of the matter stated, inasmuch as the section does not in any way limit their relevancy to any particular purpose.

Statements which are a part of the res gestae may be admissible under Section 157 or Section 155.—A statement which is admissible under Section 6 as a part of the transaction may also be used, under Section 157 or Section 155, to corroborate or to contradict the testimony of its maker in Court.[3] The place where a murder was committed was occupied by a number of persons besides the deceased and the eye-witnesses. The evidence showed that these persons came up immediately after the murder and it was alleged that they were informed by the eye-witnesses as to who the culprits were. It was held, that though those persons did not actually see the culprits, their evidence was material, not with a view to prove the actual fact of murder, which was in 'issue', but to prove the 'relevant fact' that, just after the event, the eye-witnesses disclosed the names of the culprits to those who came there, this relevant fact being so connected with the fact in issue as to have necessitated the giving of evidence on that relevant fact itself.[4]

Where the witnesses stated that they not only saw but also relied on the statements of other persons made immediately after the occurrence that the accused was the assailant, the Supreme Court ruled that even if it were taken that the witnesses relied on the statements of other persons made at the scene immediately after the occurrence, the evidence was admissible as that of a 'relevant fact'.[5]

Statements contained in documents.—It is immaterial whether statements accompanying and explaining the act are oral or written but the principle of Section 6 applies less often to statements explanatory of formal documents, since here the intention must generally be gathered from the instrument itself, and statements cannot, in general, be received to contradict or vary the instrument. Cases are, however, conceivable where the *res gestae* principle may be invoked without infringing this rule and where statements, at or about the time of executing or destroying a deed, may be received to show the intention of the act or the identity of the subject-matter.[6] So where a deed of adoption forms part of the transaction of adoption and a statement was made by the deceased adoptive mother about relationship by adoption, the statement is relevant under this section.[7]

Illustration (a)— "Bystanders.".— The word "bystanders" in illustration (a) means the person who are present at the time of the incident and not the persons who gather on the spot after it.[8]

7. Facts which are the occasion, cause or effect of facts in issue.— Facts which are the occasion, cause or effect, immediate or otherwise, of

---

1. Dysart Peerage, 6 App. Cas. p. 516; *Bateman* v. *Bailey*, 5 TR 512; Phip Ev. 7th Ed., 58.
2. Phip Ev., 7th Ed., 58.
3. *Nga Ba Pu* v. *E.*, 43 IC 443: 19 Cr. LJ 155.
4. *Mahendra Pal* v. *State*, 155 All. 323.
5. *Jethi Ram* v. *State of Rajasthan*, 1979 SC 22 (para 1).
6. Phipson, Ev., 7th Ed., 58.
7. *Pandharao* v. *Sheshrao*, ILR 1960 Bom. 847: 63 Bom. LR 720.
8. *Nasir Din* v. *E.*, 1945 L. 46.

relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence of transaction, are relevant.

Illustrations

(a) The question is, whether *A* robbed *B*.
The fact that shortly before the robbery, *B* went to a fair with money in his possession, and that he showed it, or mentioned the fact that he had it, to third persons, are relevant.

(b) The question is, whether *A* murdered *B*.
Marks on the ground, produced by a struggle at or near the place where the murder was committed, are relevant facts.

(c) The question is, whether *A* poisoned *B*.
The state of *B*'s health before the symptoms ascribed to poison, and habits of *B* known to *A*, which afforded an opportunity for the administration of poison, are relevant facts.

COMMENTARY

Occasion, cause, effect, opportunity, state of things.— Facts which form part of the same transaction are made admissible by the two preceding sections. This section provides that facts, though they are not part of the same transaction, are relevant if they are the occasion, cause or effect of facts in issue or relevant facts, or if they constitute the state of things under which facts in issue or relevant facts occurred, or if they afforded an opportunity for occurrence of facts in issue or relevant facts. These five instances of connection between facts are really different aspects of the law of causation and are, therefore, valuable means for discovering the truth.

Causation.— When an act is done and a particular person is alleged to have done it (not through an agent but personally), it is obvious that his physical presence, within a proper range of time and place forms one step on the way to the belief that he did it. If it be asked, whether the mere possibility involved in opportunity is not too slender and whether something more than mere opportunity, for example, exclusive opportunity, should not first be shown, the answer is, that, by the very showing of an opportunity, countless hypothesis are negatived; and the person charged, who might otherwise have been one of innumerable other persons at the time, is shown to have been of the limited number who were in a position to do this particular act. In short, opportunity alone and not exclusive opportunity, is a sufficient showing for admissibility.[1]

State of things.— The reason for the admission of facts of this nature is that, if you want to decide whether a thing occurred or not, almost the first natural step is to see whether there were facts at hand calculated to produce or afford opportunity for its occurrence, or facts which its occurrence was calculated to produce. In order, moreover, properly to appreciate a fact, it is necessary to know the state of things in which it

1. Wigmore, Ev., Section 131.

occurred.[1]

Opportunity for their occurrence.— No deed can be done without an opportunity. Exclusive opportunity need not be shown. The proof of opportunity negatives a number of hypothesis and reduces the number of persons who might have possibly committed the crime to a limited number. However, mere opportunity is not enough. There can be no crime without the opportunity, but there is a wide gulf to be bridged over by evidence between opportunity and commission. This is illustrated by a famous case found in Best's Evidence.[2]

If an act is attributed to a person, it is obvious that he should have had an opportunity to do it; and if he can show that he had no opportunity to do it, it will be a complete answer to the charge of his being the author of that act.

Illustration (a) is an instance of occasion, (b) of effect, and (c) of opportunity.

The fact in issue is whether the accused had committed the murder of the deceased. The facts that the accused had taken money and ornaments from the deceased and that the deceased had, on the day of his murder, gone to the accused to demand the money and ornaments are relevant facts showing occasion, cause or effect of the fact in issue.[3]

Opportunity.—Once the prosecution establishes that the deceased was last seen alive with the prisoner, it becomes incumbent on the accused to explain that fact either by showing that his being seen together with the deceased had an innocent explanation, or by establishing additional facts to show that just before the murder could have taken place he had left the company of the deceased and was elsewhere than at the scene of crime, or that he was not the person at all seen with the deceased and had been mistakenly identified.[4]

Footprints.—Evidence that there were footprints at or near the scene of an offence or that these footprints came from or led to a particular place is relevant under the section.[5] See notes to Section 45 under the heading "Footprints".

Tape Record.—A contemporaneous tape record of a relevant conversation is a relevant fact and is admissible under Section 7 of the Indian Evidence Act, 1872. If a statement is relevant, an accurate tape record of the statement is also relevant and admissible. The time and place and accuracy of the recording must be proved by a competent witness and the voices must be properly identified. One of the features of magnetic tape recording is the ability to erase and re-use the recording medium. Because of this facility of erasure and re-use, the evidence must be received with caution. The Court must be satisfied beyond reasonable doubt that the record had not been tampered with. The fact that the tape recording was done without the knowledge of the person concerned is not of itself an objection to its admissibility in evidence.[6] The tape recorder was used by the policemen to perform the function which would otherwise have been performed by a pen or pencil in his own hand, and he used the record produced by that piece of mechanism, which he was employing as his tool, to refresh his memory when he was giving evidence. The policeman adopted as accurate the record which that machine had made, and thereupon it became his own record and was

1. Cunningham, Page 201.
2. Russel on Crime, 11th Ed., p. 428.
3. *Dr Jai Nand* v. *Rex*, 1949 A 291: 1949 ALJ 60: 50 Cr.LJ 498.
4. *Hada* v. *The State*, 1952 Cr. LJ 1277.
5. *Sidiks E.*, 1942 S. 11: 198 IC 110: 43 Cr.LJ 308.
6. *Yusufzali Esmail Nagree* v. *Maharashtra*, (1968) 1 SCJ 511: 70 Bom.LR 76.

in all respects and for all relevant purposes the equivalent of a note made by him in his own notebook, sufficiently shortly after the occurrence of the conversations, to which he was entitled to refer when giving evidence.[1]

Similar unconnected facts.— Generally speaking, it is not admissible to prove the fact in issue by showing that facts similar to it, but not part of the same transaction, have occurred on other occasions. Facts which are sought to be made relevant merely from their general similarity to the main fact or transaction, and not from some specific connection therewith, are not admissible to show its existence.[2]

Illustration (c).—Even other letters written by B to third persons are admissible as proof of handwriting and thus of authorship.[3]

8. Motive, preparation and previous or subsequent conduct.— Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

The conduct of any party, or of any agent to any party, to any suit or proceeding, or in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto and the conduct of any person an offence against whom is the subject of any proceeding is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

Explanation 1.—The word "conduct" in this section does not include statements, unless those statements accompany and explain acts other than statements; but this explanation is not to affect the relevancy of statements under any other section of this Act.

Explanation 2.—When the conduct of any person is relevant any statement made to him or in his presence and hearing, which affects such conduct, is relevant.

Illustrations

(a) *A* is tried for the murder of B.
The facts that *A* murdered *C*, that *B* knew that *A* had murdered *C*, *and that B* had tried to extort money from *A* by threatening to make his knowledge public, are relevant.

(b) *A* sues *B* upon a bond for the payment of money. *B* denies the making of the bond.
The fact that, at the time when the bond was alleged to be made, *B* required money for a particular purpose, is relevant.

---

1. *R.* v. *Mills.* (1962) 3 All. ER 298.
2. Stephen, Dig., Art. 10.
3. *Jones* v. *Richard*, 15 QBD 439.

(c) *A* is tried for the murder of *B* by poison.
The fact that, before the death of *B*, *A* procured poison similar to that which was administered to *B*, is relevant.

(d) The question is, whether a certain document is the will of *A*.
The facts that, not long before the date of the alleged will, *A* made inquiry into matters to which the provisions of the alleged will relate, that he consulted Vakils in reference to making the will, and that he caused drafts of other wills to be prepared, of which he did not approve, are relevant.

(e) *A* is accused of a crime.
The facts that, either before, or at the time of, or after the alleged crime, *A* provided evidence which would tend to give to the facts of the case an appearance favourable to himself, or that he destroyed or concealed evidence, or prevented the presence or procured the absence of persons who might have been witnesses, or subjorned persons to give false evidence respecting it, are relevant.

(f) The question is, whether *A* robbed *B*.
The facts that, after *B* was robbed, *C* said in *A*'s presence—"the police are coming to look for the man who robbed *B*", and that immediately afterwards *A* ran away, are relevant.

(g) The question is, whether *A* owes *B* *rupees 10,000*.
The facts that *A* asked *C* to lend him money, and that *D* said to *C* in *A*'s presence and hearing—"I advise you not to trust *A*, for he owes *B* 10,000 rupees", and that *A* went away without making any answer, are relevant facts.

(h) The question is, whether *A* committed a crime.
The fact that *A* absconded after receiving a letter warning him that inquiry was being made for the criminal, and the contents of the letter, are relevant.

(i) *A* is accused of a crime.
The facts that, after the commission of the alleged crime, he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it, are relevant.

(j) The question is, whether *A* was ravished.
The facts that, shortly after the alleged rape, she made a complaint relating to the crime, the circumstances under which, and the terms in which, the complaint was made, are relevant.

The fact that, without making a complaint, she said that she had been ravished is not relevant, as conduct under this section, though it may be relevant as a dying declaration under Section 32, clause (1) , or as corroborative evidence under Section 157.

(k) The question is, whether *A* was robbed.
The fact that, soon after the alleged robbery, he made a complaint relating to the offence, the circumstances under which, and the terms in which, the complaint was made relevant.

The fact that, soon after the alleged robbery, he made a complaint relating to the offence, the circumstances under which, and the terms in which, the complaint was made relevant.

The fact that he said he had been robbed without making any complaint; is not relevant, as conduct under this section, though it may be relevant as a dying declaration under Section 32, clause (1), or as corroborative evidence under Section 157.

COMMENTARY

Motive.— Motive is "that which moves or induces a person to act in a certain way,"[1] it is that which is in his mind and which moves him to act, and whether the belief which produces that state of mind is true or false; the motive remains the same, and the truth or falsity of the belief is not really in question.[2] Motive must be distinguished from intent. Intention is the result of the working of the brain and Salmond has defined it as: Intention is the purpose or design with which an act is done. It is the foreknowledge of the act coupled with the desire of it, such knowledge and desire being the cause of the inasmuch as they fulfil themselves through the operation of the will. An act is intentional if, and in so far as it exists in idea before it exists in fact, the idea realizing itself in the fact because of the desire by which it is accompanied.[3] The word "intent" by its etymology seems to have a metaphorical allusion to archery and implies aim and thus connotes not a casual or a merely possible result forseen perhaps as not improbable incident but not desire—but rather connotes the one object with which the effort is made and thus has a reference to what has been called a dominant motive without

1. Murray's Dictionary; *Gangaram Hari Parit, etc.* v. *E.*, 62 IC 545: 22 Cr LJ 529.
2. *Gangaram Hari Parik, etc.* v. *E.*, 62 IC 545 : 22 Cr LJ 529.
3. Russel on Crimes, 11th Edition, P. 18.

which the action would not have been taken.[1] Thus motive is related to the act as cause to the effect, and an act without a motive would be an effect without a cause. If a person is charged with having committed an offence, the fact that he had no motive to commit it is a circumstance in his favour, as it strengthens the presumption of his innocence. On the other hand, where there is other evidence of the guilt of an accused person, the existence of motive is a circumstance corroborative of the case against him.[2] But motive is a fact which is only within the knowledge of the person doing the act and "which no human being but the partly himself can divine."[3] Therefore, failure to discover the motive for an offence does not signify its non-existence; and failure to produce evidence of motive, though it may constitute a weakness in the whole body of proof, is not fatal as, in law, proof of motive is no more necessary than the proof of any other relevant fact.[4] The prosecution is not bound to prove motive of any offence in a criminal case, inasmuch as motive is known only to the perpetrator of the crime and may not be known to others. If the motive is proved by the prosecution, the Court has to consider it and see whether it is adequate.[5] Where there is clear evidence that a person has committed an offence, it is immaterial that no motive has been proved.[6] On the other hand, mere evidence of motive can never supply the want of reliable evidence, direct or circumstantial, of the commission of the crime with which an accused person is charged;[7] and where the direct evidence as to the commission of an offence breaks down, it is not necessary for the Court to discuss the evidence of motive for the crime.[8] Mere existence of motive is by itself not an incriminating circumstances,[9] and an accused person cannot be convicted because of the motive. It raises a strong suspicion that he committed the crime; but suspicion cannot take the place of positive proof.[10] The existence or absence of motive may explain facts which would otherwise be difficult of explanation.[11] Motive is also relevant and important on the question of intention.[12] Where there is other evidence of insanity, the absence of motive may strengthen the plea of insanity.[13] The want of motive for the commission of a crime, and its being committed in circumstances which render its detection inevitable, are no doubt important points to be taken into consideration, coupled with other evidence on record, on the question of insanity. But the fact that a horrible murder has been committed with no apparent motive does not necessarily lead to the inference that the perpetrator of the deed must have been made at the time.[14] The evidence regarding existence of motive

1. In re *Kuttayanna*, ILR (1959) Mad 654.
2. *Rammun* v. *E.*, 7 L 84: 94 IC 901: 1926 L 88: 27 Cr LJ 709; *Atley* v. *State*, 1955 SC 807.
3. Will's Cri. Ev., 6th Ed., 60: *Hazarat Gul Khan* v. *E.*, 109 IC 482: 1928 C 430: 29 Cr LJ 546.
4. Wigmore ç 118; *Hazarat Gul Khan* v. *E.*, 109 IC 482: 1928 C 430: 29 Cr LJ 540; *Atley* v. *State*, 1955 SC 807.
5. *State of Haryana* v. *Sher Singh*, 1981 SC 1021 (para 6).
6. *Bazlar Rahman* v. *E.*, 115 IC 561: 1929 C 1: 30 Cr LJ 494; *Hazarat Gul Khan* v. *E.*, 109 IC 482: 1928 C 430: 29 Cr LJ 546; *Mohna* v. *The Crown*, 1925 L 328: 26 Cr LJ 774: 86 IC 406; *Manbodh* v. *State*, 1955 N 97.
7. *Rammun* v. *E.*, 7 L 84: 94 IC 901: 1926 L 88: 27 Cr LJ 709.
8. *Ghirrao, etc.* v. *E.*, 145 IC 470; 1933 O 265: 34 Cr LJ 1009.
9. *Hadu* v. *State*, 1951 Orissa 53.
10. *Pokhar Singh* v. *E.*, 46 PLR 283.
11. *Bazlar Rahman* v. *E.*, 115 IC 561: 1929 C 1: 30 Cr LJ 494.
12. *Hazarat Gul Khan* v. *E.*, 109 IC 482: 1928 C 430: 29 Cr LJ 546.
13. *Q.* v. *Sheikh Mustafa*, 1 WR Cr 13.
14. *Bazlar Rahman* v. *E.*, 115 IC 561: 1929 C 1: 30 Cr LJ 494.

which operates in the mind of an assassin is very often than not within the reach of others.[1]

Where a person is charged with obtaining money for forgery, the fact that he was financially embarrassed is relevant as motive.[2] In a trial for the murder of a particular person, it is not open to the prosecution to adduce evidence to show that, on two previous occasions, the accused had committed murders themselves, but, on each occasion, had falsely charged and got convicted some other persons as murderers. Such evidence is irrelevant; because the fact that the previous murders had been committed by the accused does not constitute, under Section 8 of the Evidence Act, the motive or preparation for the subsequent murder.[3] Illustrations (a) and (b) to this section refer to motive. In a case in which a highly placed public servant is charged with a grave offence like forgery, in the absence of any evidence to show that he had received or had been promised any amiable and friendly relations between the two, is not sufficient to establish the move for committing that offence.[4] If the facts proved in any case justify such a course, a conviction for an offence can be based on evidence which does not disclose any motive. But it has to be kept in mind that a person does not disclose any motive. But it has to be kept in mind that a person does not commit a grave illegal act which might expose him to prosecution and possible disgrace unless he is prompted by some strong motive like chance of making illegal money, and if evidence of his having been paid such money as a reward for his illegal act is proved to be utterly false, that fact goes a long way to show that the intention of the accused might not have been dishonest. In such a case, it would ordinarily be unsafe to convict the accused in the absence of any evidence indicating an adequate reason for criminal behaviour on his part.[5] Where there is clear proof of motive for the crime, it lends additional support and assurance to the evidence pointing to the guilt of the accused. But the absence of proof of motive does not necessarily lead to the contrary conclusion. The only effect of the fact that the prosecution has failed to lead any clear evidence as to motive is that the other evidence bearing on the guilt of the accused has to be very closely examined.[6]

Motive is otherwise, dislodged.[7] Where the positive evidence against the accused is clear, cogent and reliable, the question of motive is of no importance. Evidence as to motive is relevant merely for the purpose of lending assurance to the evidence as to the commission of the crime and fortifying it.[8] Evidence as to certain unpleasant things in the past of the accused which is led with a view to establish his motive for the crime cannot be shut out as evidence of bad character of the accused. Such evidence is relevant as falling under Section 8 of the Act, and is admissible even though it may incidentally throw a reflection on the character of the accused.[9] Even if the real cause for the assault may be obscure, that cannot affect the value of the evidence in the case which establishes the commission of the offence by the accused. If the evidence is clear

1. *Subedar Tewari v. State of U.P.* AIR 1989 SC 733.
2. *Joseph v. E.*, 3 R 11: 85 IC 236: 1925 R 122: 26 Cr LJ 529.
3. *Gangaram Hari Parit, etc. v. E.*, 62 IC 545: 22 Cr LJ 492.
4. *Hanumant Govind Nargundkar v. M.P. 1953* SCJ 509.
5. *Shreekantiah Ramayya Munipalli v. State of Bombay*, 1955 SCJ 233.
6. *Atley v. State of U.P.*, 1955 Cr LJ 1653.
7. *Makhan Singh v. State of Punjab*, AIR 1988 SC 1705.
8. *Gurcharan Singh v. State of Punjab*, 1956 Cr LJ 827.
9. *Mangal Singh v. M.B.*, 1956 Cr LJ 325.

that the accused assaulted the deceased, it matters very little if the Court has not before it a clear motive for the assault.[1]

Adequacy of motive.— As to the adequacy of motive, the classical observations of Lord Chief Justice Campbell in his address to the Jury in *Reg.* v. *Palmer* may well be quoted—

"With respect to the alleged motive, it is of great importance to see whether there was a motive for committing such a crime or whether there was not; or whether there is an improbability of its having been committed so strong as not to be overpowered by positive evidence but if there be any motive which can be assigned, I am bound to tell you that the adequacy of motive is of little importance. We know from the experience of Criminal Courts that atrocious crimes of this sort have been committed from very slight motives, not merely from impulse or revenge but to gain a small pecuniary advantage and to drive off for a time pressing difficulties."[2] Where it was found that though some bad blood existed prior to the occurrence between the deceased on the one hand and the accused on the other the Supreme Court observed:

> "The animosity may not have been very bitter but then it is too much to say that it could not possibly form a motive for the occurrence. The variation in human nature being so vast, murders are known to have been actuated by much lesser motives. In any case, it is not a *sine-qua-non* for the success of the prosecution that the motive must be proved. So long as the other evidence remains convincing and is not open to reasonable doubt, a conviction may well be based on it."[3]

Motive assumes importance only when direct and credible evidence is not available and the case rests upon circumstantial evidence.[4] Motive is not an indispensable link in the chain of circumstantial evidence nevertheless it is a strand that runs through all the links and helps to forge a complete chain.[5]

Proof of motive.—The evidence of motive should be of the strictest kind.[6] Under Section 8 of the Evidence Act, a motive is provable as a relevant fact; but it cannot be proved by hearsay evidence.[7]

A statement of the deceased which is inadmissible as a dying declaration cannot be admitted as a motive for the crime.[8]

Preparation.—As a matter of law a preparation for committing an offence is different from attempt to commit it. The preparation consists in devising or arranging the means or measures necessary for the commission of the offence. On the other hand an attempt to commit the offence is a direct movement towards the commission after preparations are made. In order that a person may be convicted of an attempt to commit a crime, he must be shown first to have had an intention to commit the offence, and secondly to have done an act which constitutes the *actas reus* of a criminal attempt.[9]

---

1. *Rabari Ghela Jadav* v. *State of Bombay*, 1960 SCJ 653.
2. *Reg.* v. *Palmer*, quoted in Wills' Cri. Ev., 6th Ed. 63-4.
3. *Krishna Pillai* v. *State of Kerala*, 1981 SC 1237 (para 7).
4. *Bhagoji* v. *Hyderabad Government*, 1954 Hyd 196.
5. *Sivarajan* v. *State*, ILR 1959 Kerala 319.
6. *Q* v. *Zahir etc*., 10 WR Cr 11.
7. *Venkatasubba Reddi* v. *E*., 54 M 931: 134 IC 1143: 1931 M 689: 33 Cr LJ 51.
8. *Nimoo Pal Majumdar* v. *State*, 1955 C 559.
9. *Malkiat Singh* v. *State of Punjab*, 1970 Cr LJ 750.

Premeditated crime must necessarily be preceded by appropriate preparations. Possession of the instruments or means of crime, as of poison, coining instruments, house breaking implements, and other acts of preparation are important factors in the judicial investigation of imputed crime. In many cases, the possession of such instruments and other acts indicative of purpose to commit crime are made by *prima facie* preparations of guilt.[1] Under the head of preparation for the commission of an offence may be ranked the purchasing, collecting or fashioning instruments of mischief; repairing to the spot destined to be the scene of it; acts done with the view of giving birth to productive or facilitating causes, or of removing obstruction to its execution, or averting suspicion from the criminal. Besides preparations of this nature which are immediately pointed to the accomplishment of the principal design, there are others of a secondary nature for preventing discovery or averting suspicion of the former.[2] Previous attempts to commit an offence are closely allied to preparations for the commission of it, and only differ is being carried one step further and nearer to the criminal act, of which, however, like the former, they fall short.[3] Illustrations (c) and (d) to this section refer to preparation.

Preparation and attempt.—Preparation consists in devising or arranging means necessary for the commission of an offence. An attempt is the direct movement towards the commission after preparations are made.[4] The test for determining whether the act of the accused person constituted an attempt or preparation is whether the overt acts already done are such that if the offender changes his mind and does not proceed further in its progress, the acts already done would be completely harmless.[5] Earlier in the Case of *Abhayanand Misra* v. *State of Bihar*, the Supreme Court observed that the question whether a certain act amounts to an attempt to commit a particular offence is a question of fact dependent on the nature of the offence and the steps necessary to take in order to commit, it, and that no exhaustive precise definition of what would amount to an attempt to commit an offence was possible.[6] Sir Lawrence Jenkins in *Queen-Empress* v. *Luxman*, has laid down definition of attempt as follows: An attempt is an intentional preparatory action which fails in object—which so fails through circumstances independent of the person who seeks its accomplishment.[7]

An accused person commits the offence of "attempt" to commit a crime when, with the intention of committing that crime, he does an act or acts which constitute a direct movement towards its commission, but the actual commission of the crime is frustrated by reason of the fact that it is interrupted by circumstances independent of his volition. Such act need not however, be the penultimate act towards the commission of the crime.[8]

Conduct.—Conduct, whether previous or subsequent, must have reference to the suit or the proceeding, or to facts in issue in, or relevant to, the suit or proceeding, and must influence, or be influenced by, facts in issue or relevant facts. The conduct made relevant by Section 8 is conduct which is directly and immediately influenced by a fact

---

1. Wills, Cr. Ev. 6th Ed. 79.
2. Best S. 454.
3. Best S. 455.
4. *Jain Lal* v. *Emperor*, ILR 21 Pat 667.
5. *Malkiat Singh* v. *Punjab* 1970 Cr LJ 750 (SC).
6. AIR 1961 SC 1968.
7. 2 Bom. LR 286.
8. *Yusuf Abdulla Patel* v. *R.N. Shukla*, 72 Bom. LR 575.

in issue or relevant fact, and it does not include actions resulting from some intermediate cause, such as question or suggestions by other persons.[1] Preparations and previous attempts to commit the offence are instances, of previous conduct of the party, influencing the facts in issue or relevant facts. The accused was charged with cheating for importing goods in port Karachi, by deceiving the Customs authorities. Evidence of a previous similar attempt by him at another port was held admissible under this section.[2]

"It is not competent for the prosecution to adduce evidence leading to show that the accused has been guilty of criminal acts other than those covered by the indictment for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible, if it be relevant to an issue before the jury."[3] The question which arose in the case of *Anant Chintaman Lagu* v. *Bombay*, was whether, in a case in which the accused is charged with the offence of murder and the case rests only on circumstantial evidence, (a) the evidence as to the conduct of the accused in respect of the property of the deceased before and after her death was a material link in the chain of evidence which the Court could consider, along with the other evidences in the case, in determining whether murder had in fact been committed, and, if so, whether the accused had committed it, or (b) was the evidence as to the conduct of the accused in respect of the property of the deceased, only such in its character as to provide, at best, only the motive for the murder so that it could not be considered in proof of the murder itself. S.K. Das and Hidayatullah, JJ., were of the former view, while Sarkar, J., was of the latter view.[4]

Persons whose conduct is relevant.—This section makes relevant the conduct to (i) party, (ii) the agent of a party, and (iii) a person an offence against whom is the subject of any proceeding. The plaintiff and the defendant are parties in a civil case; and a private complainant and the accused person are parties in a criminal case. The person aggrieved, *i.e.*, the person against whom an offence is committed, is not a party in a case cognizance of which is taken on a police report; but the conduct of such person is relevant under this section as he is "a person an offence against whom is the subject of any proceeding".[5] Where the deceased had made a complaint to the police shortly before his death, stating that he apprehended danger to his life at the hands of certain persons, the complaint was held admissible as evidence of the conduct of a person an offence against whom was the subject of the trial.[6] A letter written by a relation of the accused, referring to an attempt to raise money to buy off the prosecution, cannot be used as an admission against the accused, unless it is shown that it was written with the knowledge and direct authority of the accused.[7] The section does not apply to the conduct of a witness,[8] but it does not mean that the conduct of a witness cannot be taken into consideration at all. The conduct of a witness has always an

1. *Q.E.* v. *Abdullah*, 7 A 385, per Petheram CJ: see however, Expl 2 to Section 8.
2. *Mohan Lal Bhana Lal* v. *E.*, 172 IC 374: 39 Cr. LJ 123.
3. *Makin* v. *Attorney General of New South Wales*, (1984) AC 57.
4. *Anant Chintaman Lagu* v. *Bombay*, 1960 SCJ 779.
5. *Goloke Behary Takal* v. *E.*, 66 Cr LJ 225; 42 CWN 129; *Q.E.* v. *Abdullah*, 7 A 385 (FB).
6. *Goloke Behary Takal* v. *E.* 66 CLJ 225: 42 CWN 129.
7. *Laijam Singh* v. *E.*, 86 IC 817: 1925 A 406: 26 Cr. LJ 881.
8. See *Khijir-ud-din, etc.* v. *E.*, 53 C 372: 92 IC 442; 1926 C 139: 27 Cr. LJ 266.

important bearing on the question whether he should or should not be believed. Of course, the conduct of a person who is neither a party nor a witness is entirely irrelevant. The conduct of an accused is relevant against him but not against a co-accused.[1]

Instances of relevant conduct.— The following are instances of relevant conduct under this section:—(i) preparation and previous attempts to commit the offence;[2] (ii) providing evidence which would tend to give to the facts of the case an appearance favourable to oneself;[3] (iii) fabricating false evidence, e.g., antedating a document to support a plea of alibi,[4] or attempting to alter a document to fit in with one's defence,[5] (iv) feigning insanity; (v) agitated demeanour;[6] (vi) destroying or concealing evidence;[7] (vii) concealing one's identity or disguising one's person;[8] (viii) attempts to stifle justice by bribing or tampering with officers of justice or by preventing the presence or procuring the absence of witnesses;[9] (ix) possession of fruits of crime;[10] (x) omission to make protestations of innocence when accused of an offence, or when subject to severe treatment;[11] (xi) delay in suing.[12] The mere fact that, on account of sheer timidity, or on account of a desire to avoid running the risk of disgrace of a criminal trial and of dismissal, either the accused or some one on his behalf paid half the amount, said to have been embezzled, when once the prosecution has established the guilt of the accused by the evidence of prosecution witnesses, then, such subsequent conduct may be utilized as furnishing further proof of the correctness of the conclusion as to the guilt of the accused drawn from the evidence of prosecution witnesses.[13] M was charged with cheating, for importing goods in port Karachi by deceiving the Customs authorities. Evidence that before this fraud he had visited another port and tried to come to an arrangement with the Customs authorities there, with a similar object, in which attempt he had failed, was held to be admissible in his prosecution for the offence committed in Karachi under Section 8 or Section 9 of the Evidence Act.[14]

The accused B, P and M were charged with having committed murder by intentionally causing the death of a man D with spears and *lathis*: The first report in the case was made by the brother of the deceased. A short time after the aforesaid report M voluntarily made an exculpatory report explaining the circumstances attending the death of D. The report was held to be admissible under this section.[15]

Evidence of contemporaneous conduct is always admissible as a surrounding circumstance; but evidence as to subsequent conduct of the parties is inadmissible.[16]

---

1. *Des Raj Sharma* v. *State*, 1951 Punj. 14.
2. Ill. (c) and Ill (d).
3. Ill. (e).
4. *Q.E. Sami*, etc., 13 M 426, 432.
5. *Mohamad* v. *E.*, 1934 L 695: 35 PLR 738.
6. In re Semalai Goundon, 86 IC 664: 1925 M 574: 26 Cr.LJ 840.
7. Ill. (e) and Ill. (i).
8. *Q.E.* v. *Sami*, etc., 13 M 426, 432.
9. Ill. (e).
10. Ill. (i): *Q.E.* v. *Sami*, etc., 13 M 426.
11. *Balmakund Ram* v. *Ghansamram*, 22 C 391.
12. *Juggurnath Sahoo, etc.* v. *Syed Shah Mohammad Hossein, etc.*, 14 BLR 386 (PC); *Rajendra Nath Holder* v. *Jogendra Nath Banerjee*, 14 MIA 67 (PC).
13. *Chandika Prasad* v. *E.*, 126 IC 684 : 1930 O 324 : 13 Cr. LJ 1081.
14. *Mohan Lal Bhana Lal* v. *E.*, 172 IC 374 : 39 Cr. LJ 123.
15. *E.* v. *Bhagi*, 1941 O. 359: 194 IC 236 : 42 Cr. LJ 539.
16. *Bhaskar Waman Shrinarayan*, (1960) 2 SCR 117: (1960) 2 SCA 189: 1960 SCJ 327.

Evidence of subsequent conduct of the transferers, as indicative of the character of the transaction as a sale, held not admissible.[1]

Statement of witness recorded by police after detention in police lock-up is not substantive evidence nor can it be reliable evidence of subsequent conduct of the witness under Section 8.[2] In criminal proceedings a man's character is often a matter of importance in explaining his conduct and in judging his innocence or criminality. When the allegation against the appellant was that he was acting in pursuance of the policy of the Ittehad-ul-Muslimeen, that, his state of mind was to exterminate the Hindus he was entitled to lead evidence to show that he did not possess that state of mind; but that, on the other hand, his behaviour towards the Hindus throughout his official career had been very good and he could not possibly think of exterminating them.[3]

Whether in a particular case, the conduct of the accused is a relevant factor, or it is not, depends for decision on the facts and circumstances of each particular case. At the time, when the accused was called upon to produce the money which had been received as bribe from a person, the accused hesitated and he was trembling and perspiring, it was held that the conduct of the accused was a relevant factor which could be taken into consideration.[4]

The conduct of an accused is relevant against him but not against his co-accused. This is on the principle that the evidence of conduct admissible under this section is of the conduct of a person who is a party to the action. It is thus reasonably clear that evidence of acts, statements or writings of a co-conspirator under trial or not on trial but outside the period of conspiracy would not be admissible in proof of the specific issue of the conspiracy.[5] If the prosecution evidence as to the circumstances in which a bribe was accepted is itself unreliable or not free from doubt, the conduct of the accused immediately after his arrest, for example, that he did not indignantly repudiate the charge that he had accepted a bribe or did not give any explanation, can be of no avail to the prosecution. Once the substantive prosecution evidence is rejected as unworthy of credit, the alleged conduct of the accused may be referable to some innocent reason.[6]

Absconding.—The conduct of the accused soon after the incident plays an important part in determining the guilt of the accused, and is a corroborative piece of evidence.[7] The conduct of a person in absconding after the commission of the offence is evidence to show that he was concerned in the offence;[8] but it is usually a very small item in the evidence on which a conviction can be based.[9] Absconding is equally consistent with innocence and guilt. It is a proper matter to be considered along with the other facts of the case, whether they bear upon guilt or upon innocence.[10] It is well

1. *Sita Ram* v. *Bashesher Dayal*, 65 PLR 1064.
2. *State Government of Manipur* v. *Kakchingtabam Gourachandra Sarma*, 1968 Cr.LJ 1390.
3. *Habeed Mohammad* v. *State of Hyderabad*, 1953 SCJ 678.
4. *M.M. Gandhi* v. *Mysore*, 1960 Cr.LJ 934.
5. *Sardul Singh* v. *Bombay*, 1957 SCJ 780.
6. *Zwingalee Ariel* v. *M.P.*, 1954 Cr.LJ 230.
7. *Bhamra* v. *State*, 1953 Bhopal 1: 1953 Cr.LJ 217.
8. Ill (i); *Permeshwar Din* v. *E.*, 1941 O 517; *Crown* v. *Fateh Mohamnad*, 35 PLR 740; *Chandika Prasad* v. *E.*, 126 IC 684: 1930 O 324: 31 Cr.LJ 1081; *Gangaram Hari Parit* v. *E.*, 62 IC 545: 22 Cr.LJ 529; *Q.E.* v. *Sami*, etc., 13 M 426, 432; *Q.E.* v. *Gobardhan*, 9 A 528, 545-6; *Rakhal Nikari* v. *Q.E.*, 2 CWN 81.
9. *Crown* v. *Fateh Mohammad*, 35 PLR 740; *Mahla Singh* v. *E.*, 130 IC 410: 1931 L 38: 32 Cr.LJ 522; *Chandika Prasad* v. *E.*, 126 IC 684: 1930 O 324: 32 Cr.LJ 1081; *Q.* v. *Sorob Roy*, 5 WR Cr. 28.
10. *Khan* v. *State*, 1955 C 146.

known that different persons are differently constituted, and that some accused persons, though innocent, deliberately abscond rather than face the ordeal of a criminal trial.[1] Where it is shown that the accused ran away to avoid the consequence of being charged with an offence different from that for which he was being tried, no importance should be attached to the fact of his running away.[2] 'If, after the commission of a crime, a person whose name is mentioned as a participator in the crime absconds, his conduct shows that he is concerned in the crime. Therefore, anything which tends to explain his conduct and furnishes a motive other than a guilty conscience, will be relevant under Section 9, Evidence Act.[3] If it is established that the accused had absconded immediately after the time when the offence with which he is charged was committed, and that the police could not trace him for several days thereafter in spite of all efforts at his normal place of residence or at any other place where he could normally be expected to be, that is an important circumstance pointing to his culpability, unless he can offer a reasonable explanation of his absence from these places.[4] Subsequent conduct of the accused in that he was absconding for several days after the occurrence of murder has no evidentiary value by way of corroboration to the evidence as to his guilt when it is shown that he kept himself in hiding out of fear of being arrested for the commission of another offence in which he was involved.[5]

In a case where the accused was found hidden in a *Chappar* of the village where he lived, at the time of his arrest, the Supreme Court observed:

> To be an 'absconder' in the eye of law, it is not necessary that a person should have run away from his home, it is sufficient if he hides himself to evade the process of law, even if the hiding place be his own home."[6]

In order to lead to the inference that accused was absconding the investigating police officer must lay before the Court further evidence to show that continuous watch was kept at the house of the accused concerned, and that a watch was also kept by him of the places which the accused frequented, including his place of work but the accused did not turn up at all at any of those places during a certain period of time. In the absence of such evidence no inference can be drawn that the accused was absconding and his subsequent conduct was that of a guilty person.[7]

Pointing out places connected with the offence or where stolen property or articles connected with the offence are concealed production of stolen property or instruments of crime.—This section must be read subject to the provisions of Sections 25, 26 and 27 of the Act.[8] Therefore, evidence of the fact that the accused, while in the custody of the police, pointed out places where he had taken the abducted woman, and other places connected with the offence, being really evidence of confession, is inadmissible under Sections 25 and 26 of the Act,[9] unless the relevant fact is discovered in

---

1. *Chandika Prasad* v. *E.*, 126 IC 684: 1930 O 324: 31 Cr.LJ 1081.
2. *Rakhal Nikari* v. *Q.E.* 2 CWN 81.
3. *Gangaram Hari Parit* v. *E.*, 62 IC 545: 22 Cr. LJ 529.
4. *Pritam Singh* v. *Punjab*, 1956 Cr.LJ 805.
5. *Khushal Rao* v. *Bombay*, 1958 SCJ 198.
6. *Kartarey* v. *State*, 1976 SC 76 (para 42).
7. *Dinkar Bandhu* v. *State*, 72 Bom. LR 405.
8. *Q.E.* v. *Nana*, 14 B, 260 (FB); *Kalijiban Bhattacharjee* v. *E.*, 63 C 1053: 1936 C 316: 37 Cr LJ 775: 163 IC 41.
9. *Turab* v. *E.*, 152 IC 473: 1935 O 1: 36 Cr. LJ 166; *Keramat Mandal, etc.* v. *E.*, 92 IC 439: 1926 C 320 27 Cr. LJ 263; *Hira Gobar* v. *E.*, 52 IC 601: 20 Cr. LJ 681.

consequence thereof. But if the accused leads the police to a place where the weapon with which the murder was committed[1] or the ornaments which the victim was wearing at the time of the murder,[2] or some stolen property,[3] or the body of the murdered man[4] is concealed, the evidence will be admissible under this section, as relating to the conduct of the accused person. If however, two or more persons are alleged to have pointed out a relevant fact, it must be shown who pointed out the fact first; and if that is not done, the evidence of pointing out will not be admissible against any one of the accused.[5] Where no material fact is discovered, and the accused merely points out places where certain incidents took-place, the evidence of pointing out will be admissible.[6] Of course, the fact that the accused produced stolen property or any instrument used in the commission of the offence can always be proved as a relevant fact under, as well as apart from, the present section.[7]

The word "confession", as pointed out by the Privy Council in *Narayana Swami's case*,[8] is used in Sections 25 and 26 of the Evidence Act in the sense of a statement admitting in terms the offence or substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact, is not of itself a confession. Judged by this test, the mere pointing out of places connected with the commission of an offence is not a confession and, even where no discovery is made, is not inadmissible under Sections 25 and 26 of the Evidence Act. But if it be held that such pointing out amounts to a statement made to the police in the course of investigation, it will then be excluded under Section 162 of the Code of Criminal Procedure.* In an Allahabad case where the matter is discussed at some length it has been held that Section 162 of the Code of Criminal Procedure does not apply to the evidence of pointing out of places connected with the commission of an offence and that such evidence is not excluded by Section 25 of the Evidence Act.[9] As will appear from the cases digested in the proceeding paragraph this view is opposed to a long series of decisions in which such evidence, where Section 27 was not applicable by reason of there being no discovery, was held to be inadmissible. See notes to Sections 25 and 27 under the heading "Pointing out places connected with the offence," and notes to Section 21 under the heading "Confessions and admissions in criminal cases."

See also *Bahadul* v. *State of Orissa*,[10] Where the High Court had relied on the fact of production of an axe from underneath his cot by the accused as admissible under

1. *Pahalal* v. *E.*, 1946 N 120: In re Semalal Goundan, 86 IC 664: 1925 M 574: 26 Cr. LJ 840.
2. *E.* v. *Mi. ri*, 31 A 592 (FB); *Mst. Jununia Partap Lohar* v. *E.*, 1936 N 200: ILR 1936 N 78; *Sadashiva Dadaji* v. *State*, 1950 MB 104.
3. *E.* v. *Na. i Mung Ba*, 35 IC 962: 17 Cr. LJ 402.
4. *In re* Syama Maha Patro, etc., 55 M 903: 137 IC 9: 1932 M 391: 33 Cr.LJ 418 (FB).
5. *Faqira etc.* v. *E.*, 116 IC 619: 1929 L 665: 30 Cr.LJ 639; *Rafiqueuddin Ahmad* v. *E.*, 1935 C 184: 155 IC 687: 36 Cr LJ 808 (FB).
6. *Ramai Mohan De* v. *E.*, 143 IC 797: 1933 C 146: 34 Cr.LJ 638; *Beghel Singh, etc.* v. *E.*, 121 IC 497: 1929 L 794: 31 Cr LJ 269; *Keramat Mandal* v. *E.*, 92 IC 439: 1926 C 320: 27 Cr. LJ 263; *Hira Gobar* v. *E.*, 52 IC 691: 20 Cr LJ 681.
7. *Bas[illegible]* 1946 N 120; *E.* v. *Nasea*, ILR 1941 A 280: 1941 A 145: 193 IC 873; *Ganu Chandra Kashid* v. *E.*, 26 B 172: 137 IC 174: 1932 B 286: 33 Cr.LJ 396; *In re* Syama Maha Patro, etc. 55 M 903: 137 IC 9: 1932 M 391: 33 Cr.LJ 418 (FB); *Q. E.* v. *Kamalia, etc.*, 10 B 595.
8. 1939 FC 47.
9. *E.* v. *Nasea*, 1941 A 145
10. *Bahadul* v. *State of Orissa*, 1979 SC 1262 (para 4).

* See now Cr.P.C., 1973.

Section 8, but the Supreme Court did not regard that fact merely to be sufficient to convict the accused, observing that there was nothing to show that the accused had concealed it at a place which was known to him alone and no one other than the accused had knowledge of it; and since the accused did not make any statement relating to the recovery of the axe from beneath his cot the mere factum of recovery was not admissible under Section 27 also.

Statements preceding or accompanying production or pointing out of stolen property or instruments of crime.— See notes to Section 27 under the headings: "In consequence of information: accused himself producing, or leading the police to the material object; statements proceeding discovery" and "Statements accompanying pro duction of a thing."

Conduct is admissible to explain, but not to control, the terms of a document.— See notes to Section 92 under the headings: "Evidence conduct is admissible when the document is ambiguous or obscurely framed" and "*Contemporanea erpositio*; acts of the parties admissible to explain, but not to contradict, documents".

Explanation 1: Statements explaining or accompanying relevant conduct.— The first explanation declares that statements are not relevant as conduct, unless they explain or accompany any conduct which is itself relevant. If, therefore a statement does not explain or accompany any relevant conduct, or explains or accompanies conduct which is not itself relevant, the statement will not be relevant.[1] There is a clear distinction between the conduct of an accused, which is admissible under Section 8, if such conduct is influenced by any fact in issue or relevant fact and the statement made to a Police Officer in the course of investigation. What is excluded by Section 162 of the Code of Criminal Procedure is the statement made to a Police Officer in the course of investigation and not the evidence relating to conduct of an accused (not amounting to a statement).[2]

The evidence of the fact that the accused led a Police Officer and pointed out the place where stolen articles or weapons used in the commission of the offence, were found hidden, would be admissible as conduct under Section 8 irrespective of whether any statement made by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27.[3] The evidence showing that the accused started trembling and showed signs of fright on being questioned by the Police is also admissible.[4] Similarly evidence of the conduct of the accused on being confronted to the Police Officer with the allegation of his having taken a bribe, would also be admissible.[5]

On the other hand, if the statement explains or accompanies some conduct which is itself relevant, then the statement will also become relevant.[6] Statements accompanying facts are, in fact, part of the *res gestae* just as are the acts themselves. They are

---

1. *E. v. Eddula Venkata Subba Reddi*, 52 M 931: 134 IC 1143: 1931 M 689: 33 Cr.LJ 51; *Narasamma Hegadth v. Billa Vasu Pujari*, 31 IC 543.
2. *Prakash Chand v. State (Delhi Admn.)*, 1979 SC 400 (paras 8 and 9).
3. *Himachal Pradesh v. Om Prakash*, 1972 SC 975.
4. *Zwinglee Ariel v. State of M.P.*, 1954 SC 15.
5. *Rao Shiv Bahadur Singh v. State of Vindhya Pradesh*, 1954 SC 322; *State of Madras v. A. Vaidyanath Iyer*, 1958 SC 61.
6. *Tukaram v Arjuna*, 45 IC 904; *Neharu Mangatu Satnami v. E.*, ILR 1937 N 268: 1937 N 220: 168 IC 962: 38 Cr. LJ 642.

often absolutely necessary to show the *animus* of the actor. They have been styled verbal acts.[1] It is on such statements that the significance of the acts which they accompany wholly depends.[2] *Explanation* (1) to Section 8 points to a case in which a person whose conduct is in dispute mixes up together actions and statements; and in such case those actions and statements may be proved as a whole. For instance, a person is seen running down a street in a wounded condition, and calling out the name of his assailant; and the circumstances under which the injuries were inflicted. Here what the person says and what he does may be taken together and proved as a whole.[3] Where statements made by an accused person at the time of pointing out places connected with the commission of an offence were sought to be proved by the prosecution as part of the *res gestae*, it was remarked by the Court that the section makes "those statements admissible and those only which are the essential complements to acts done or refused to be done, so that the act itself, or the omission to act acquires a special significance as a ground for inference with respect to the issues in the case under trial."[4] What is relevant in such cases is the particular act upon the statement, and the statement and the act must be, so blended together as to form part of a thing observed by the witnesses.[5] If a person wishes to prove that he has retired from a firm, he is entitled to show that, immediately after the date of retirement, he wrote to the Bank and informed them that he had severed his connection with the firm and could not guarantee its account. If he does that, then, a statement made by him at the time as the reason for his refusing to continue to guarantee will be admissible to explain his conduct.[6] In a case of rape on a girl of four years of age there was no direct evidence but the following statement was made by the mother of the girl in her evidence: "I saw her answering call of nature outside in the open and on seeing me she began crying and on questioning she told me that accused had placed her on his lap and blood came out". It was held that the latter part of the statement which was by way of explanation of her crying was admissible under Explanation 1 to Section 8.[7]

In a bribery case based on the evidence of a raid it was observed by the Supreme Court that "the conduct of the accused could be relevant under Section 8 of the Evidence Act if his immediate reactions to the illegal overture of the complainant or his action in inserting unwanted something in his pocket were revealed in the form of acts accompanied then and there or immediately thereafter by words or gestures reliably established."[8]

Signs and gesticulations in reply to questions not admissible as conduct.— Signs made by a person, unable to speak, in reply to questions asked are mere statements and, therefore, not relevant as conduct under Section 8 unless they explain or accompany some other relevant conduct.[9] Similarly, gesticulations of a deaf mute are not admissible as conduct under this section.[10]

---

1. Norton Ev., 106.
2. *Reg. v. Prabhudas Ambaram, etc.*, 11 Bom. HC 242.
3. *Q. E. v. Abdullah*, 7 A 385 (FB).
4. *E. v. Rama Birapa*, 3 B 12, 17; see *Rego v. E.*, 143 IC 17: 1933 N 136: 34 Cr. LJ 505.
5. *Rego v. E.*, 143 IC 17: 1933 N 136: 34 Cr. LJ 505.
6. *Pranjivha Chandrakar, etc. v. Bhagwandas-Madanlal*, 59 C 40: 136 IC 529: 1932 C 226.
7. *Maharashtra v. Hiraman Punjab Vadhata*, 1967 Bom. LR 14.
8. *Madhu Singh v. State (Delhi Admn.)* 1976 SC 449 (para 39): 1976 Cr. LJ 346.
9. *Q. E. v. Abdulah*, 7 A 385 (FB); *E. v. Motiram Raising*, 1936 B 372.
10. 5 QC 225.

Relevancy of a complaint; distinction between a complaint and statement.— According to Section 8, the relevant fact is conduct; and a statement is relevant in so far as it explains or accompanies conduct which itself is relevant. If a person against whom an offence has been committed, shortly after the occurrence makes a complaint, the relevant conduct is the act of making the complaint; and the terms of the complaint; become relevant, because they accompany and explain the act of making the complaint. If, therefore, the aggrieved person does not make a complaint;, but makes only a statement, the statement is not relevant under Section 8, as it does not explain or accompany any conduct.[1] The distinction between a complaint and a mere statement is therefore, of fundamental importance from the point of view of Section 8. The distinction between a complaint and a mere statement is that the former is expressive of feeling, the latter, of knowledge; the former evidences conduct, but the latter has no such tendency. A complaint, unlike a bare statement, is made with a view to redress or punishment, and is made to some one in authority, the police, for instance, or a parent, or some other person to whom the complainant is justly entitled to look for assistance and protection.[2] It is not necessary that a complaint should be made to a public officer.[3] Thus, if a girl on whom rape has been committed goes to her relatives straight after the occurrence and complaints on her own initiative her statement will be a complaint for purposes of Section 8.[4] If a girl immediately after the rape, is seen by the witnesses crying and, on being asked by them, says that she has been ravished the statement will be admissible under this section as explaining her act of crying.[5] Where a person who had been robbed and injured made a statement to a *chaukidar* and a *panch* president immediately after the robbery and assault, the statement was admitted under this section as part of the *res gestae*.[6] The complaint, in order to be relevant, should have been made shortly after the occurrence. A complaint, made three weeks after the occurrence has been rejected.[7] But a complaint made eight days after the act, has been admitted, though there was earlier opportunity to make it.[8] The complaint must be voluntary and spontaneous, and not elicited by leading, inducing or intimidating questions.[9] If a ravished girl merely answers questions put, to her, the answers do not constitute a complaint.[10] If the circumstances indicate that but for the questioning there probably would have been no voluntary complaint, the answers are inadmissible; but if the questions merely anticipated a statement, which the complainant was about to make, the fact that the questions spoke first is immaterial,[11] and the statement in reply to the questions will be a "complaint" for purposes of Section 8.[12] A complaint by the deceased

1. Ill. (j) and Ill. (k); *Naga Aye Maung* v. *E.*,. 1938 R 127: 175 IC 222: 39 Cr. LJ 531.
2. Woodroffe Ev., 9th Ed., 154.
3. *R.* v. *Lee*, 7 Cr. App. R 31.
4. *E.* v. *Phagunia Bhuian*, 89 IC 1043: 1926 P. 58: 26 Cr. LJ 1475: *Raman* v. *E.* 1921 L 258: 4 LLJ 491; *Nga Aye Maung* v. *E.*, 1938 R 127.
5. *Soosalal Bania* v. *E.*, 82 IC 142: 1925 N 74: 25 Cr. LJ 1214: *see also Raman* v. *E.*, 1921 L 258: 4 LLJ 491.
6. *Lalji Dusadh* v. *E.*, 6 P, 747: 106 IC 698: 1928 P. 162: 29 Cr. LJ 106.
7. *R.* v. *Pataney*, 71 JP 101.
8. *R.* v. *Hedges*, 3 Cr. App R 262.
9. Phipson Ev., 7th Ed, 111.
10. *E.* v. *Phagunia Bhuian*, 89 IC 1043: 1926 P. 58: 26 Cr.LJ 1475; *E.* v. *Soopi*, 120 IC 539: 1930 L 84: 31 Cr. LJ 141; see *Kashi Noth Pandey* v. *E.*, 1942 C 214.
11. Phipson Ev., 7th Ed., 111; *Raman* v. *E.*, 1921 L 528: 4 LLJ 491.
12. *Raman* v. *E.*, 1921 L 528: 4 LLJ 491.

that he was apprehending danger from the accused is admissible under this section.[1]

Where the accused is on her trial for making a false charge of rape, the fact that she made certain allegations, which she related in the course of an inquiry which she sought and demanded is relevant.[2] When 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 conduct and may be proved, whether the person whose conduct is sought to be proved is alive or dead.[3] Where F, who had been accused by C of having torn out and destroyed certain leaves from the latter's *bahi*, one day subsequently to a police report by C regarding the alleged destruction, himself reported to the police that C was falsely charging him with having torn out the leaves in question, it was held, that the fact that F did make a report and the general nature of his allegations were admissible as showing his conduct in relation to the alleged offence.[4]

The raped girl, aged four years, cried and disclosed the name of the accused. Her private parts were swollen and did show that she had been raped, and, further, the stains of blood and semen on the clothing of the accused strongly suggested that he could be the offender. It was held, that all the circumstances put together necessarily led to the only conclusion that it was the accused who committed the crime, and that the girl and her mother's conduct was relevant under this Section.[5] The previous statement of the complainant at about the time of occurrence is admissible and relevant as evidence of conduct under this Section. It is also admissible as corroboration of the evidence of the complainant in Court under Section 157. What weight is to be attached to such statement is a different matter.[6] The evidence of the Prosecutrix does not require corroboration in all case.[7]

Evidentiary function of a complaint and its terms.—In English law a complaint is admissible only in cases of rape and kindred offences,[8] but illustration (k) to Section 8 clearly shows that in India the rule is not limited to sexual and kindred offences. According to English law, a complaint and its particulars are admissible not to prove the truth of the matters stated but only to confirm the testimony of the prosecutrix or the prosecutor and to negative consent.[9] Following this English rule, it has been held here that when a complaint and its terms become relevant under Section 8 of the Evidence Act, they cannot be treated as evidence of the fact stated, and are merely evidence of non-consent, and of the consistency of the conduct of the complainant with the story told in the witness-box.[10] Illustration (j) and (k) do not expressly limit the relevancy of the complaint and its terms to any particular purpose, and it may perhaps be argued that there being nothing in the illustrations to qualify the relevancy of this species of

1. *Goloke Behari Takal* v. *E.*, 42 CWN 129: 66 CLJ 225.
2. 17 NLJ 189.
3. *Goloke Behari Takal* v. *E.*, (1938) 42 CWN 129: 66 CLJ 225.
4. *Fazal Ahmad* v. *Crown*, 1937 Pesh 72: 161 IC 885: 37 Cr. LJ 603.
5. *State* v. *Hiraman*, 67 Bom. LR 16.
6. *Orissa* v. *Parvatisam*, 29 Cut. LT 546.
7. *Rameshwar* v. *State*, 1952 SCJ 46.
8. *R.* v. *Osborne*, (1905) 1 KB 551, 558-91; *Beatty* v. *Cullingworth*, 60 JP 740; *Jones* v. *S.E.Ry.Co.*, 87 LJKB 775, CA.
9. *R.* v. *Osborne*, (1905) 1 KB 551; *R.* v. *Lillyman*, (1896) 2 QB 167.
10. *Kappinaiah etc.* v. *E.*, 131 IC 456: 1931 M 233: 32 Cr. LJ 751; *Soosalal Bania* v. *E.*, 82 IC 142: 1925 N 74: 25 Cr.LJ 1214; *Nga San Pu* v. *E.*, 43 IC 443: 19 Cr. LJ 155.

was rolled back. The Supreme Court observed that it did not think that such a slipshod observation regarding such a vitally important identification mark can be taken as a seriously observed feature particularly when the senior doctor did not observe any such thing. Similarly the age estimated by this novice medical practitioner without conducting any medical tests in that regard is hardly sufficient to conclude that the dead body was that of a person aged 40. Even otherwise the approximation of age made by looking at the dead body is not enough to offset the age spoken by the kith and kin of the deceased. The Supreme Court held that plea that the identity of the *corpus delicti* was not established cannot be allowed.

State of West Bengal v. *Mir Mohammad Omar,* AIR 2000 SC 2988 : (2000) 8 SCC 382 : 2000 SCC (Cri) 1516.

Section 45—Determination of time of death.

The evidence of two doctors indicated that the occurrence took place at night and not in the morning between 6 to 7 a.m. P.W. 2 who conducted the autopsy on the dead body in examination chief deposed that the death was possible on 6.9.1977 at 7 and 7½ a.m. But in his cross-examination he deposed that it may be possible that death occurred in the mid night of 5/6-7. 1977. Similarly P.W. 4 another doctor deposed in examina-tion chief that the injuries could be caused on 6.9.1977 between 6-7 a.m. but in cross-examination deposed that injuries could have been caused at any time after 10 a.m. The Supreme Court observed that by no stress of imagination it can be held that the occurrence did not take place between 6-7 a.m. on 6.7.1977. The Supreme Court agreed with the High Court that it is well known that doctor can never be absolutely certain on the point of time so far as duration of injuries are concerned.

Ram Swaroop v. *State of U.P.,* AIR 2000 SC 715 : 2000 Cri LJ 808 : 2000 All LJ 391 : (2000) 2 SCC 461.

Section 45—Opinion of the handwriting expert.

The Supreme Court observed that it is important to note that when the Investigating Officer made a search in the house of 4-A he found a slip of paper containing a few names of herbal articles. The slip was forwarded to the handwriting expert along with specimen handwritings collected from A-3 for comparison. The handwriting expert gave an opinion holding that the scribe who wrote the slip and the specimen manuscripts was the same. The Supreme Court added that from that description alone it cannot be gathered whether the office of the Assistant State Examiner of Documents would fall within the purview of Section 293 of the Criminal Procedure Code. The Supreme Court held that without examining the expert as a witness no reliance can be placed on his opinion.

State of Maharashtra v. *Damu,* AIR 2000 SC 1691 : (2000) 6 SCC 269 : 2000 Cri LJ 2301 : 2000 SCC (Cri) 1088.

Section 45—Typewriting identification.

The opinion of the typewriter expert is admissible under Section 45 of the Act and the contrary view taken by the trial court and the High Court in the present case is erroneous.

State (through C.B.I., New Delhi) v. *S.J. Chaudhery,* (1996) 2 SCC 428 : AIR 1996 SC 1491 : 1996 Cri LJ 1713.

Section 45—Finger prints.

The trial court disbelieved important evidence about finger prints on the ground that the earlier photographs of these finger prints were not clear enough to enable the expert to come to any definite conclusion and, therefore, it was doubtful whether the subsequent photographs were of the original finger prints. The Supreme Court observed that the High Court was right in severely criticising the trial court for their view. It was not even suggested by the defence that the co-accused finger prints were again taken by the Investigation Officer on those glasses. The finding of the trial court was speculative in nature. In the absence of any effective cross examination of the photographer his evidence that he was able to take better photographs on the second occasion could not have been disbelieved by the trial court.

Ammini v. *State of Kerala,* (1998) 2 SCC 301.

Section 45—Opinion of the post-mortem examiner.

The Supreme Court observed that all the circumstances have been considered in detail by both the courts and it has been found, that there is no substance in the contentions put forward by the defence. The opinion of the post-mortem examiner that the death was homicidal and not suicidal has been accepted by both the courts. The court did not find any justification to take a different view.

Najjam Faraqhi alias *Nijjam Faruqui* v. *State of West Bengal,* (1998) 2 SCC 45 : AIR 1998 SC 682.

Section 45—Ocular evidence and medical evidence.

Discussing the conflict between the ocular evidence and medical evidence the Supreme Court observed that the eye-witness had stated that the deceased sustained gunshot injury in the back whereas the medical evidence showed injuries in the chest. The witness and the deceased were travelling in the same rickshaw. The High Court has rightly pointed out that the witness having seen the exit wound on the back of the deceased bleeding thought that he had been hit in the back. The court rejected the contention about conflict in evidence on this score.

Surendra Narain alias *Munna Pandey* v. *State of U.P.,* (1998) 1 SCC 76.

after the murder, she had stated to the brothers of the deceased, when questioned by them, that she did not know the whereabouts of her husband. In the committal Court, she stated that on the night in question she was sleeping with her husband and upon the other accused knocking at the door she opened it and they murdered her husband. It was held that her statement to the brothers of the husband was not admissible in evidence as it did not accompany and explain an act other than the statement.[1]

Silence admissible as conduct.—In illustration (f) the relevant conduct is the act of running away, and in illustration (h), that of absconding; whereas in illustration (g) there is no positive act but mere silence. Silence may in certain circumstances amount to conduct.[2] Silence does not amount to admission, unless the occasion is such that a contradiction or explanation may reasonably be expected.[3] Thus, the injured person named the prisoner as his assailant to a third person in the presence of the prisoner, and the prisoner did not deny that he had done the act complained of, the statement was held admissible under this section.[4] But where the charge is not shown to have been made in the presence of the prisoner, Section 8 will have no application.[5] The degree of weight to be attached to the silence of an accused person depends upon the nature of the case. Many factors must be taken into account in assessing it; and no hard and fast rule can be laid down. Care must be taken in all cases not to put too high a value on the absence of an immediate denial unless the surrounding facts point unequivocally to the conclusion that any accused person, whether educated or ignorant, cautious or impulsive, voluble or taciturn, would have felt bound to make a rejoinder in view of the particular charge against him and in the particular circumstances prevailing when he was made aware of it.[6] The fact of silence of the accused may, with all the other circumstances of the case, be taken into account in a proper case. But it is to be borne in mind that an accused person always has a right to remain silent if he wishes. The silence of the accused must have never been allowed to any degree to become a substitute for proof by the prosecution of its case. No presumption against the accused arises *ipso facto* from the silence of the accused person.[7] "There is in general no duty cast upon the recipient of a letter to answer it, and his omission to do so does not amount to any admission of the truth of the statement contained in it. It may, however, be otherwise where the relation between the parties is such that a reply might properly be expected, as where a man of business states in a letter to another that the latter has agreed to do certain things, the person who receives the letter must answer it if he means to dispute the fact that he did so agree; or where merchants are in dispute, one with the other, in the course of carrying on some business negotiations and one writes to the other, 'but you promised me that you would do this or that', if the other does not answer the letter, but proceeds with the negotiations, he must be taken to admit the truth of the statement."[8]

---

1. (1961) 2 Guj LR 582.
2. *Hadu* v. *State*, 1951 Orissa 53.
3. *Wiedenmann* v. *Walpole*, (1891) 2 QB 534; *E.* v. *Bal Gangadhar Tilak*, 28 B 479.
4. *E.* v. *Damapala*, 14 R 666: 1937 R 83 (FB); In re *Surat Dhobni*, 10 C 302; *see* also *Ah Sein* v. *E.*, 38 C 446: 12 IC 87: 12 Cr LJ 479.
5. *Nga Aye Maung* v. *The King*, 1938 R 127: 175 IC 222: 39 Cr LJ 531.
6. *E.* v. *Damapala*, 14 R 666: 1937 R 83 (FB).
7. *Ghura* v. *E.*, 1942 A 47: ILR 1941 A 912: 198 IC 452.
8. Taylor, § 811.

A party's silence will render statements, made in his presence, evidence against him of their truth.[1] Statements made in a party's presence during a trial are not generally receivable against him merely on the ground that he did not deny them, for the regularity of judicial proceedings prevents the free interposition allowed in ordinary conversation.[2]

When a Judge, at a trial, made a proposal as to the course of proceedings in the presence of counsel who raised no objection, it was held not open to counsel subsequently to question the propriety of the course to which he had impliedly given his assent.[3] "If a client be present in Court and stand by and see his solicitor enter into terms of an agreement he is not at liberty afterwards to repudiate it.[4]

A man is not bound to answer every officious letter written to him. Though unanswered, a letter may be evidence of a demand.[5] But it is otherwise, if the writer is entitled to an answer: so, in the case of a letter written by A to B to which the position of the parties justified A in expecting an answer, as when the subject of it is a contract or negotiation pending between them, the silence of B may be important evidence against him.[6]

Admissions by possession of, or access to, documents.— "An admission by conduct may, too, be made by being found in possession of letters and other papers, as it is a *prima facie*, inference that the person in whose possession they are found knows their contents and has acted upon them. Such evidence is occasionally available in a civil suit. It is frequently received in criminal prosecutions, especially those for conspiracy and treason, though its weight, as evidence against the prisoner, will in a great measure depend on the fact, whether answers to the letters or papers can be traced, or whether anything can be shown to have been done upon them. The mere opportunity of constant access to documents may, indeed, sometimes by raising a presumption that their contents are known, afford ground for affecting parties with an implied admission of the truth or correctness of such contents. Thus, the rules of a club, or a record of the proceedings of a society, contained in a book kept by the proper officer and accessible to the members—charges against a club, entered by the servants of the house in a book kept for that purpose open in club-room, and the like,—are admissible against the members; their knowledge of the contents of the books, and their acquiescence therein, being presumable under the circumstances. On similar grounds, books of account which have been kept between master and servant, tradesman and shopman, banker and customer, or copartners, will occasionally be admitted as evidence even in favour of the party by whom they have been written, provided that the opposite party has had ample opportunities from time to time for testing the accuracy of the entries.'[7] It is not necessary that the document should have been written by the person against whom it is sought to be used; it is sufficient, if it be proved, that it has been in his possession and that his conduct in reference to it has been such as to create an inference that he was aware of its contents and admitted their accuracy.[8] What sort of conduct will give rise

1. *Neile* v. *Jakle*, 2 C & K 709.
2. *Melen* v. *Andrews*, 1 M & M 337.
3. *Morrish* v. *Murrey*, 13 M & W 52.
4. *Swinfen* v. *Swinfen*, 24 Beav 549, 559.
5. Norton Ev., 113.
6. *Lucy* v. *Mouft*, 5 H & N 229.
7. Taylor, §812.
8. *Barindra Kumar Ghose, etc.* v. *E.*, 37 C 467: 7 IC 359: 11 Cr LJ 453; *Bimal Protiva Debi* v. *E.*, 1942 C 464.

to such inference will depend upon the circumstances of each case.[1] It is, however, necessary to show that the party, who is sought to be bound by the contents of documents found in his possession, has in some way identified himself, or in other words, has by any act, speech, or writing manifested an acquaintance with, and knowledge of, the contents of all or any of them. The rule would apply more strongly where some of the papers and letters were received, and others written, by the party against whom they are sought to be used.[2] A document becomes evidence when it is written by, or is in the possession of, the person against whom it is sought to be proved; or when it becomes admissible under Section 10 as the act or writing of a co-conspirator.[3] When a document is given in evidence under Section 8, the relevant fact is the fact of possession of that document. In such case, the document is original and not secondary evidence, so far as it is relied on as a piece of evidence found in the accused's possession.[4] For further notes on this subject, see notes to Section 10 under the heading "Documents found in the Possession of a conspirator, when admissible against the other conspirator, when admissible against the other conspirators."

Illustrations

(a) See also *R.* v. *Buckley*.[5]

(c). See *R.* v. *Palmer*.[6]

(e) "A party who gives or Produces false evidence may by so doing give rise to a general presumption against the truth of his case.[7]

(f) See *R.* v. *Abdullah*.[8]

(k) The absence of the accused at the time when a complaint is made against him, in cases coming within this illustration, does not affect the relevancy of such complaint and therefore does not exclude.[9]

9. Facts necessary to explain or introduce relevant facts.—Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of any thing or person whose indentity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose.

---

1. *Jitendranath* v. *E.*, 1937 C 99: 169 IC 977: 38 Cr LJ 818 (SB).
2. *Lalit Chandra* v. *E.*, 39 C 119: 15 IC 65: 13 Cr LJ 433.
3. *Pulin Behari Das, etc.* v. *E.*, 16 IC 257: 13 Cr LJ 609; see also *Jitendranath* v. *E.*, 1937 C 99: 169 IC 977: 38 Cr LJ 818 (SB).
4. See *E.* v. *Phillip Spratt*, 108 IC 32: 1928 B 77: 29 Cr LJ 322.
5. 13 Cox 293.
6. Steph. Intro. 107, 158.
7. *Girish* v. *Iswar*, (1869) 3 BLR ACJ 341.
8. (1885) 7 All. 600.
9. *R.* v. *Macdonald*, (1872) 10 BLR App. 2.

Illustrations

(a) The question is, whether a given document is the will of *A*.

The state of *A*'s propery and of his family at the date of the alleged will may be relevant facts.

(b) *A* sues *B* for libel imputing disgraceful conduct of *A*. *B* affirms that the matter alleged to be libellous is true.

The position and relations of the parties at the time when the libel was published may be relevant facts an introductory to the facts in issue.

The particulars of a dispute between *A* and *B* about a matter unconnected with the alleged libel are irrelevant, though the fact that there was a dispute may be relevant if it affected the relations between *A* and *B*.

(c) *A* is accused of a crime.

The fact that, soon after the commission of the crime, *A* absconded from his house, is relevant under Section 8, as conduct subsequent to and affected by facts in issue.

The fact that, at the time when he left home, he had sudden and urgent business at the place to which he went, is relevant, as tending to explain the fact that he left home suddenly.

The details of the business on which he left are not relevant, except in so far as they are necessary to show that the business was sudden and urgent.

(d) *A* sues *B* *for inducing C* to break a contract of service made by him with *A*, *C*, on leaving *A*'s service, says to *A*—"I am leaving you because *B* has made me better offer". This statement is a relevant fact as explanatory of *C*'s conduct, which is relevant as a fact in issue.

(e) *A* accused of theft, is seen to give the stolen property to *B*, who is seen to give it to *A's* wife. *B* *says as he delivers it*— "*A* says you are to hide this". *B*'s statement is relevant as explanatory of a fact

which is part of the transaction.

(f) *A* is tried for a riot and is proved to have marched at the head of a mob. The cries of the mob are relevant as explanatory of the nature of the transaction.

COMMENTARY

Scope.— This section makes relevant, facts—

(i) which are necessary to explain or introduce a fact in issue or relevant fact, or
(ii) which support or rebut an inference suggested by a fact in issue or relevant fact, or
(iii) which establish the identity of a person or thing whose identity is relevant, or
(iv) which fix the time or place at which any fact in issue or relevant fact happened, or
(v) which show the relations of parties by whom any fact in issue or relevant fact was transacted.

in so far as they are necessary for that purpose.

Introductory or explanatory facts.— These facts are explained by illustrations (a), (b), (d), (e) and (f) to Section 9, and also by ill. (c) to Section 6, and ill. (d) to Section 8.

Illustrations (d), (e) and (f) to Section 9 are important as they show that the statements made by a person who is not the agent of a person against whom they are to be used and behind his back, may be used against him. The facts introductory to, or explanatory of, facts in issue or relevant facts are themselves relevant in so far as they are necessary for that purpose. Before questioning a witness as to the main fact, it is generally desirable and sometimes necessary, to question him about some preliminary facts. These preliminary facts may have no bearing on the facts in issue; but since they lead to the main fact, they are made admissible by the present section to make the main fact more easily comprehensible. Similarly, facts which are explanatory of the main fact, whether the main fact be a fact in issue or a relevant fact, are rendered admissible; because it is only in the light of such facts that the true significance of the main fact can be understood.

Under this section, even statements provided they are introductory to, or explanatory of, facts in issue or relevant facts, become admissible. Thus in illustration (d) the fact that, when leaving A's service, C stated that he had left him since B had made him a better offer, and in illustration (e) the fact that B, when delivering the stolen property to A's wife, stated that A desired her to hide it, become admissible, as the former is explanatory of C's conduct which is a fact in issue, and the latter, of the delivery of stolen property to A's wife which is relevant under Section 6 as part of the transaction. In both these illustrations, 'the statement is made in the absence of the person who is affected by it and , therefore, the rule declaring such statements relevant is a departure from the general rule against hearsay.[1] It is, however, submitted that the statements in these illustrations are not intended to be used as evidence of the truth of the matter

1. See Norton Ev., 118, 119.

mentioned in the statement, but merely as explanatory of some other fact. Thus in illustration (d) the statement by C that he was leaving A's service because B had made him a better offer is no evidence of the fact that B, in fact, made a better offer to C; and in illustration (e) B's statement to A's wife that a had handed over the stolen property to him and had requested him to ask A's wife to hide it is no evidence of the fact that the property was given by A to B, and that A had requested B to ask A's wife to hide it. Illustration (a) also is an illustration of the admissibility of explanatory or introductory fact.[1]

Illustration (f) is founded on the well known case of *R* v. *Lord George Gorden*,[2] and illustrates the principle that in cases of riot, conspiracy, etc., the declarations of all concerned in the common object, although not defendants, are admissible as explanatory of the common object. Criminal conspiracy, in order to find out as to when exactly the conspiracy was hatched, it will be necessary and also relevant to look into the background in which such a conspiracy took its root and this aspect of evidence becomes relevant under section 9 of the Act.[3]

A *chittah* which describes the various plots is admissible under this section as explanatory of partition papers which, without it, would be difficult to understand.[4] A telegram received by a person even though not proved to have been sent by a particular person, may be admissible under this section to explain the conduct of the person who received it.[5] Where an alleged conspirator tore up a stolen draft on hearing of the arrest of another conspirator, evidence of this fact was held admissible under this section.[6] The accused was charged with cheating for importing goods in port Karachi by deceiving the Customs authorities. Evidence of a previous similar attempt by him at another port was held to be admissible under this section.[7]

Facts which support or rebut an inference suggested by a fact in issue or relevant fact – Fact which support or rebut an inference suggested by a fact in issue or relevant facts are themselves relevant. This part of the section is merely a paraphrase of Section 11 which says that fact which make the existence of a fact in issue or relevant fact highly probable or improbable are relevant, and is founded on the same principle as that section. Statements made by an accused person on previous occasions, which have a bearing upon the question of his guilt, i.e., which support or rebut the theory of his guilt, have been held to be admissible under this section[8] provided they do not come within the prohibition of Sections 25 and 26, and are not self serving. If a person accused of an offence absconds, his conduct shows that he is concerned in the offence. Therefore, anything which tends to rebut the inference suggested by this flight become relevant under this section.[9] The existence of an entry in a book of account is relevant under Section 34; the absence of any entry in an account book as to a transaction is evidence of the non-existence of that transaction and, therefore, relevant under

---

1 See *Nur Muhammad* v. *E.*, 1944 S 38.
2 21 1 low St. Tr. 535.
3 See *State of T.N.* v. *T. Thulasingham*, 1994 Supp (2) SCC 405 at p. 421.
4 *Sheikh Jaki Mohamood* v. *Dino Bandhu Bhattacharjee*, 2 IC 367.
5 *Raghunath Pande etc.* v. *E.*, 142 IC 809: 1933 P. 96: 34 Cr LJ 421.
6 *E.* v. *Abdul Ghani Bahadurbhai*, 49 B 878.
7 *Mohan Lal Bhana Lal* v. *E.*, 1937 S. 293: 172 IC 374: 39 Cr LJ 123.
8 *Madan Guru etc.* v. *E.*, 73 IC 963.

the present section.[1] Where the accused were charged with committing or conspiring to commit a particular dacoity, and the prosecution sought to prove that some of the accused were intimately associated with the approver, the evidence was held admissible under this section to support the approver's statement that a conspiracy in fact, existed.[2] In a trial for sedition the prosecution sought to adduce in evidence a copy of a letter sent by the accused to the editor of a newspaper which was found in the accused's possession. On an objection to the relevancy of this letter being taken, it was held that the letter was relevant to prove the intention of the accused, and that, since it was found in his possession, it was original and not secondary evidence.[3] Court should disengage truth from falsehood.[4] A return or accepted assessment of the neighbouring premises is relevant to determine the letting value of building.[5] Market rate and rental value of the neighbouring land are admissible to determine the value of land that is being acquired.[6]

Identity.—Questions relating to identity may arise in two ways; either a person's identity with an ascertained person may come in issue, or his identity as the doer of a particular act may come in question.

Section applies to the identity of properties as well as to the identity of persons.[7]

Identity of things.—The identity of articles of property like that of human person, is capable of being established not only by direct evidence but by means of numberless circumstances which it is not possible to enumerate, though the identification of property stands on a different footing from the identification of person.[8]

Where the articles are of ordinary kind found with anybody in a village and the witnesses do not point out any special features or marks of identification on them, no value can be attached to their testimony.[9]

Women can indentify their own necklaces, even without marks of identification.[10]

It is a matter of common knowledge that ladies have an uncanny sense of identifying their own belongings, particularly articles of personal use in the family.[11]

At any rate, articles need not be put up for identification under this section which is applicable both to person and property; for identification in court assumes more importance.[12]

There is no legal requirement that property must be put up for test identification before the testimony of witnesses as to their identity in Court could be relied upon.[13]

Where, however, the property is not sealed at the time of recovery, little value would be attached to the test identification parade.[14]

Where a gun is recovered under the Arms Act and the recovered article is not

---

1. *Ganga Ram Agarwalla, etc.* v. *Lachi Ram Kishan Dayal*, 28 IC 705.
2. *Wahiuddin Hamiduddin* v. *E.*, 54 B. 524; 127 IC 189: 1930 B 157: 31 Cr. LJ 1168.
3. *E.* v. *Phillips Spratt*, 108 IC 32: 1928 B. 77: 29 Cr. LJ 322
4. *Matura Ram* v. *State*, 1988 ALJ 1207 (DB).
5. *Corp. of Calcutta* v. *Province of Bengal*, 1940 C 47.
6. *Lal Chand* v. *Corporation of Calcutta*, 1953 C 428: 57 CWN 259.
7. *Ramkishan* v. *S.V.S.*, 1955 (1) SCR 903.
8. *State* v. *Ram Bilas*, 1961 ALJ 402.
9. *State* v. *Wahid Bux*, 1953 All. 314: 1953 Cr LJ 705.
10. *Sadasiv* v. *State*, 1958 Cr LJ 534.
11. *Earabharappa* v. *State of Karnataka*, 1983 SC 446 (para 7).
12. *Gundala Narayan Chinna* v. *State*, 1951 Cr LJ 947.
13. *Earabharappa* v. *State of Karnataka*, 1983 SC 446 (para 7).
14. ILR (1960) 10 Raj. 921.

sealed, and there is no link evidence to identify the gun recovered, evidence of recovery can be accepted, even though the gun had not been sealed soon after the recovery, provided that Court is satisfied, on consideration of the material on record and the circumstances of the case, that the gun produced before the Court is the same which has been recovered from the possession of the accused.[1]

Identity of skeleton.—The question at issue in the instant case is the identity of the skeleton. That identity could be established by its physical or visual examination with reference to any peculiar features in it which would mark it out as belonging to the person whose bones or skeleton it is stated to be. Similarly the size of the bones, their angularity on curvature, the prominances or the recessions would be features, which on examination and comparison might serve to establish the "identity of anything" within the meaning of Section 9.[2]

Evidence of Expert Trackers.—The evidence of an expert tracker as to the identity of the foot-prints of the accused with those of the offender found at the scene of offence are relevant and admissable and could be considered along with the other evidence regarding the identity of the accused..... If during his examination in court the accused is asked by the court to wear the shoes which have been proved to be his for the purpose of deciding whether they fit him and the accused does show without objecting, the court is entitled to rely on the observation made in court. Such occular demonstration and its result are relevant and admissible.[3]

Facts establishing the identity of a person with an ascertained person.— When a party's identity with an ascertained person is in issue, it may be proved or disproved not only by direct testimony, or by opinion evidence, but presumptively, by similarity or dissimilarity of personal characteristics (*e.g.*, age height, hair, complexion, voice, bearing, manner, address, distinctive marks, faculties), as well as of resident, occupation, family relation, education travel, religion, knowledge of particular places and facts, and other details of personal history. The identity of mental qualities, habits and disposition may also become relevant in this connection.[4]

Similarity of physical characteristics in cases involving questions of paternity.— Evidence of family likeness has often been admitted as a reason for inferring parentage and identity.[5] In cases of bastardy, inheritance and seduction, evidence of similarity of the features of the child with those of the alleged father is relevant.[6] The relevancy of such evidence is based on the supposed physiological fact that bodily traits may be transmitted by procreation.[7] Where, in a paternity case, reliance is placed by the trial judge merely on similarity of features, his decision cannot be received or acted on by a Court of appeal.[8]

Question of paternity.— Hill J. "In my view any conclusion drawn from a likeness or unlikeness of the child to the petitioner, whether in general or in the shape of the ears

---

1. *State of U.P.* v. *Dhanwan*, 1964 ALJ 621.
2. *Ram Lochan Ahir* v. *State of West Bengal*, 1964 SCJ 82.
3. *Pritam Singh* v. *State of Punjab*, 1956 Cr. LJ 805 (SC).
4. Phipson, Ev., 7th Ed., 132; *Bibhati Devi* v. *Ramendra Narayan Roy*, 1942 C 498.
5. Wills' Cir. Ev., 6th Ed., 188.
6. Wigmore, S. 1154; *Russell* v. *Russell*, 1924 P 1; *Bagot* v. *Bagot*, 1 LR Ir. 303; *Burnaby* v. *Ballie*, 42 Ch D 282, 290; Phipson, Ev., 7th Ed., 114.
7. Wigmore, S. 166.
8. *Anand Behari Singh* v. *Dy. Commr.*, Bara Banki, 143 IC 568; 1933 O 242.

produced in court, unless it takes steps to summon the document from such authority.

Subhra Mukerjee v. *Bharat Coking Coal Ltd.*, (2000) 3 SCC 312 : AIR 2000 SC 1203.

Section 65—Secondary evidence—Production of photostat copy.

The Rajasthan High Court observed that to allow a party to lead secondary evidence under Section 65, Evidence Act, firstly the court is required to determine the entitlement of the party to lead such secondary evidence. Section 65, Evidence Act enumerates such cases and it clearly lays down that secondary evidence may be given of the existence, condition or contents of a document, when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved. In the instant case since the document in question must have been in possession of the witness, because it related to him and, therefore, the plaintiff was entitled to produce the secondary evidence. However, under Section 66 of the Evidence Act, it is obligatory that secondary evidence of the contents of the document referred to in Section 65, clause (a) shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is such notice to produce it. The court held that the lower court has committed an illegality or material irregularity in exercise of its jurisdiction in according permission for production of photostat copy of assessment order of the year 1980-81.

Rajasthan Golden Transport Company v. *L.R's of Amritlal,* AIR 1998 Rajasthan 153.

Section 65—Production of secondary evidence.

Discussing the production of secondary evidence and its permissibility the Punjab and Haryana High Court observed that the parameters of Section 65 of the Evidence Act can come to the rescue of party who has served notice on the other side to produce the document, the original of which is in possession of parties to whom notice is served. Consequently the secondary evidence can be permitted to be led when the original is shown or appears to be in possession and power of the person against whom such a document is sought to be proved. The fact which emerged from the record is that such a document was executed by the respondent the original of which was in possession of the petitioners which either continues to be in her possession or/and they have refused to produce it or the document is in possession of the plaintiffs to lead evidence based on this document and prove the same in accordance with law cannot be taken away.

Gopal Krishan Jiwan Kumar v. *Puran Singh,* AIR 1998 P & H 144.

cannot be said that the identification by the witness from hearing his voice and by observing his gait was unreliable.[1]

Utterances: identification by.— It often happens that a place or a time is marked significantly by an utterance, there and then occurring, so that the identification of it may alone be made, or not be made, by permitting the various witnesses to mention the utterance as an identifying mark. This utterance, not being used as an assertion to prove any fact asserted therein, is not obnoxious to the hearsay rule and may, therefore, be proved like any other identifying mark. The utterance cannot, however, be used as having any assertive value.[2]

The identity of machine.—The identity of machine on which two letters have been typewritten would not by itself show that the writer of the two is one and the same person.[3]

Identity of a person as the doer of a particular act.—The identity of a person as the doer of a particular act frequently comes in question in civil as well as in criminal cases. In such cases the range of facts which may be given in evidence is much wider and perhaps co-extensive with the whole field of relevancy, inasmuch as every fact which shows that the person in question is the author of a particular act is admissible under one section of the Act or another, unless evidence of any such fact is expressly made inadmissible by some section in Part III of the Act. Where the identity of a person as the doer of a particular act which is the subject-matter of investigation is in question, direct evidence of the fact that the person in question did the act is admissible under Section 5; and other circumstances which go to show this fact may be given in evidence under the provisions of the Act which deal with the relevancy of facts. In civil cases, the identity of a person may come in question as executant or attesting witness of a document, or as a deceased declarant, or as having taken prior legal proceedings, or as having in a particular legal capacity.[4] Previous and subsequent conduct, previous attempts-threats or enmity, finger prints, foot marks, possession of incriminating articles or documents may also become relevant to establish the identity of a person as the doer of a particular act, whether the question of the identity of the doer of that act arises in a civil or in a criminal case.[5]

But in view of the admission of the witness that she did not have a clear vision and she could not see things at night as clearly as during the day and her further statement that on account of the dark night she could not see what the accused was holding in his hand, it is indeed difficult to hold that she unmistakably recognized the accused as the person inflicting the fatal blow.[6]

Similar transactions whether admissible to establish the identity of an offender.—Similar transactions in which an accused person was concerned, unless admitted under Section 14 or Section 15 or under Section 16 as part of the transaction, cannot be given in evidence to establish the identity of the accused as the doer of the act charged. Thus where, at the trial of two accused persons for robbing and murdering a prostitute the prosecution tendered evidence of the fact that both the accused, on several

---

1. *Kirpal Singh* v. *State of U.P.* 1964(1) SCJ 411.
2. Wigmore, Ev. Section 416.
3. *S.H. Jzabhwala* v. *Emperor*, 1933 All 690.
4. Phipson, Ev., 7th Ed., 132.
5. See Phipson, Ev. 7th Ed., 132-134.
6. *Bramananda Nanda* v. *State*, 1971: 1 CWR 351.

previous occasions, committed thefts in the houses of other prostitutes under similar circumstances by going about under different names, it was held that the evidence was inadmissible, Section 9 being not applicable to the case.[1] For further notes on this subject, see the commentary to Sections 14 and 15.

Identity of tenure.—Where the plaintiffs sued to recover arrears of rent of their share of certain tenures, a decree obtained against the same defendants by another co-sharer for his share of rent was held admissible under this section to prove the identity of the tenure.[2]

Value of premises similarly situated.— The rateable value of similar premises in the same union is admissible in valuation matters, but the value of such evidence would depend upon the circumstances and degree of closeness with which the two sets of premises resemble each other.[3] Substantive evidence of the price paid can be given by the person who have actual personal knowledge of the matter. Usually the buyer or the seller and the recitals in a document can be evidence only if they are relevant as admission or under Section.[4]

Identification tests or parades.—Identification parades are held by the police for the purpose of enabling witnesses to identify the properties which are the subject-matter of offence or to identify the persons concerned in the offence. The identifying witnesses are explained, the purpose of holding the parades.[5] Identification parade belongs to investigation stage. Whether a witness has or has not identified the accused during investigation is not of itself relevant at the trial. The actual evidence regarding the identification is that given by the witness in the Court. There is no provision in the Cr. P.C. entitling the accused to demand that an identification parade should be held at or before the inquiry of the trial.[6] Evidence of identification must satisfy the tests provided in the definition of proved in the Section 3.[7]

Identification parade—when necessary.—It is not necessary for State to hold identification parade when accused were arrested at the spot of the crime. If the accused felt that witness would not be able to identify them they should have requested for an identification parade.[8]

The holding of a test identification parade is as much in the interest of the investigating agency or the prosecution as in the interest of the suspect or the accused in cases where the eye-witnesses do not mention the accused by name but claim that they could identify him by his features. It enables the investigating officer to ascertain the correctness or otherwise of such a claim by a witness. On the other hand it saves the accused from the risk of being suddenly identified while in the dock by such a witness during the trial. Where two of the witnesses emphatically claimed that they had seen the culprit and could identify him, the holding of a test identification parade is absolutely necessary. The fact that the parade was held within two days of the arrest of the

1. *E.* v. *Panchu Das, etc.*, 47 C 671: 58 IC 929: 21 Cr. LJ 849 (FB). See also *Gangaram Hari Parit, etc.* v. *E.* 62 IC 545: 22 Cr. LJ 529; but See *Q. E.* v. *Nur Muhamed*, 8 B 223, See also notes to Section 15.
2. *Surendra Nath Pal Chowdhary, etc.* v. *Brojo Nath Pal Chowdhary, etc.* 13 C 352 (FB).
3. *Pointer* v. *Norwich*, AC 1922; LR 2 KB 741.
4. *S. V. Mariammu, A* 1969 K 265.
5. *Ramkishan* v. *S.V.S.*, 1955 (1) SCR 903.
6. In re, Sanghia, 1947 (2) MLJ 252.
7. *Anwar* v. *S.A.* 1961 All. 50.
8. *The State of U.P.* v. *Rajju*, 1971 Cr. LJ 642.

accused, after taking all the necessary precautions by a Judicial Magistrate, made the evidence of the test identification considerably important. In the absence of effective cross examination or evidence in rebuttal from the side of the accused, the evidence was found acceptable by the Supreme Court although the prosecution did not lead evidence to prove that the appellant was kept *ba parda*.[1]

Late identification parade – A test identification which is not a substantive piece of evidence but can be used only as corroborative evidence is not of much evidentiary value. There is no question of the accused being prejudiced by a late parade, especially when it is not relied on.[2]

But for rejecting the evidence of test identification in *Autar Singh* v. *State of M.P.*,[3] the Supreme Court set forth as the very first ground the fact that the test identification of the accused was held in that case about 12 months after the occurrence. Benefit of unexplained delay of 4 months, ensues to accused.[4]

Effect of failure to hold identification parade – The absence of test identification in all cases is not fatal and if the accused person is well known by sight it would be waste of time to put him for identification. of course, if the prosecution fails to hold an identification on the plea that the witness already knew the accused well and it transpires in the course of the trial that the witness did not know the accused previously, the prosecution would run the risk of losing its case. If there is any doubt in the matter the prosecution should hold an identification parade especially if an accused says that the alleged eye witnesses did not know him previously.[5] Failure to hold an identification parade does not make inadmissible the evidence of identification in court.[6] Primary and substantive evidence as to identify is only oral testimony in court but identification test was not necessary and superfluous.[7]

But the evidence of identification of a person by a witness for the first time in Court without being tested by a prior identification is valueless.[8]

Apart from the non-mention of the names of the accused in the First Information Report, the total absence therein of any description of the accused, which would have provided a yard stick to evaluate their identification at a later date would render the later identification weak. Even so no identification parade was held and the identification of the accused by the witness in his statement before the Court some four months later could "hardly furnish any evidence" against the accused.[9]

The evidence of a witness who identifies the accused who is not known to him for the first time in Court, without a test identification parade being held in the course of investigation, is absolutely valueless,[10] and so is interested witnesses credibility.[11]

---

1 *Ramnathan* v. *State of Tamil Nadu*, AIR 1978 SC 1204; *State of Rajasthan* v. *Ranjita*, AIR 1962 Raj. 78 (FB).

2 *Raj Kishore Singh* v. *State of Bihar*, 1971 SCD 62.

3 *Autar Singh* v. *State of M.P.*, AIR 1979 SC 1188 (paras 9 & 10).

4 *Hari Nath* v. *State of U.P.*, AIR 1988 SC 345.

5 *Jadunath Singh* v. *State of U.P.*, AIR 1971 SC 363.

6 *Kanta Prasad* v. *Delhi Adm*, 1958 SCR 1218.

7 *Hari Nath* v. *State of U.P.*, AIR 1988 SC 345.

8 *Mohan Lal* v. *State of Maharashtra*, AIR 1982 SC 839 (para 20, 25); *State (Delhi Administration)* v. *V.C. Shukla*, AIR 1980 SC 1382 (para 23).

9 *Mohd Abdul Hafeez* v. *State of A.P.*, AIR 1983 SC 367 (para 4).

10 *Kanan* v. *State of Kerala*, (1979) 3 SCC 319: AIR 1979 SC 1127 (para 1) distinguished in *Suresh Chandra Bahari* v. *State of Bihar*, (1995) Supp (1) SCC 80 para. 78: AIR 1994 SC 2420.

11 *Mathura Ram* v. *State (DB)*, 1988 ALJ 1207.

Evidentiary function of identification tests.— Identification parades are held not for the purpose of giving defence advocates material to work on, but in order to satisfy investigating officers of the bona fides of the prosecution witnesses.[1] Identification proceedings amount simply to this that certain persons are brought to the jail or some other place and make statements, either express or implied, that certain individuals, whom they point out, are persons whom they recognize as having been concerned in a crime. These statements are not made on oath, and are made in the course of extra-judicial proceedings. The law does not allow statements of this kind to be made available as evidence at the trial unless and until the persons who made those statements are called as witnesses. When those persons are called as witnesses, then, those previous statements become admissible, not as substantive evidence, but as evidence to corroborate or contradict the statements made by those witnesses in Court.[2] An identification parade has, by itself, no independent value. It is a corroboration of the evidence given by the witness in Court.[3] The evidence given in Court is substantive evidence,[4] while that of the identification made by the witness at the identification parade is confirmatory or corroborative. The fact that while picking out the accused at the identification parade the identifying witnesses did not say anything with regard to the specific part played by the accused in the commission of the crime, does not render inadmissible their evidence of identification.[5] When a witness is called in Court and states that he cannot identify anyone, there is obviously nothing to corroborate and, therefore, evidence of the previous statement, express or implied, made by him in the course of the identification proceedings is not admissible.[6] There is no section in the Evidence Act which makes identification proceedings, held otherwise than in the course of a trial, substantive evidence in the case.[7] For a Magistrate or other officer to come into Court and depose that a certain witness in his presence identified one of the accused as having taken part in the crime is no more than to give hearsay evidence. The Magistrate's evidence amounts in substance to this: "The witness said in my presence that the particular accused whom he pointed out took part in the crime." The statement of the witness is not made on oath and it is not made in the Court; such statement can only be proved either under Section 157 of the Evidence Act to corroborate, or, under Section 155, to contradict the evidence which he afterwards gives in Court.[8] If the witness is unable to recognize the accused at the trial, there are two ways in which his previous statement can be rendered admissible. The statement made by the witness before the Committing

---

1. *State* v. *Ghulam Mohiuddin*, 1951 A. 475.
2. *Mohammed Husain* v. *E.*, 1936 Pesh. 166: 164 IC 578: *Nagina, etc.* v. *E.*, 95 IC 477: 27 Cr. LJ 813; *bindeshri* v. *E.*, 98 IC 478: 1927 A 163; 27 Cr. LJ 1358; *Lal Singh, etc.* v. *E.*, 5 L 396: 91 IC 954: 1925 L 19: 27 Cr. LJ 170; *Sarju Singh* v. *E.*, 88 IC 852; 1925 O 726; 26 Cr. LJ 1236; *Satya Narain* v. *State*, 1953 A 385: 1953 Cr. LJ 848; *Hebat Singh* v. *State*, 1953 Raj. LW 228; *Rama Gope* v. *State*, 1950 P 514.
3. *Satya Narain* v. *State*, 1953 A 385: 1953 Cr. LJ 848; In re *Sanghiah* 1948 M 113; *Kanhaiya Lal* v. *State*, 1950 C 413; *Rex* v. *Christie*, 1914 AC 545.
4. *Bollavaram P.N. Reddy* v. *State of A.P.* (1991) 3 SCC 434 (Para 8).
5. *State of AP.* v. *K.V. Reddy*, 1976 SC 2207. (para 40).
6. *Nagina, etc.* v. *E.*, 95 IC 477: 27 Cr. L 813; see *Pesh Muhammad* v. *E.*, 1942 P 319; *Mohammad Ishaq* v. *E.*, 1943, L 59; *Rama Gope* v. *State*, 1950 P 514.
7. *Bindeshri* v. *E.*, 98 IC 478.
8. *Nagina, etc.* v. *E.*, 95 IC 477: 27 Cr. LJ 813; *Lal Singh etc.* v. *E.* 5 L 396: 91 IC 954: 1925 L 19: 27 Cr. LJ 170; *Chutkan, etc.* v. *E.*, 90 IC 444; 1926 O 36: 26 Cr. LJ 1564: *Kanai Lal* v. *State*, 85 CLJ 196: 51 Cr. LJ 1507; *Provash Kumar Bose* v. *King*, 1951 C 475; 52 Cr. LJ 819.

Magistrate may be brought on the record under Section 288, Criminal Procedure Code. This course is available only where the witness was able to pick out the accused before the Committing Magistrate, though he could not do so before the Sessions Judge.[1] The other method is to elicit at the trial a statement from the witness that he identied certain persons at the jail and that the persons whom he there identified were persons whom he had seen taking part in the crime. If the witness is prepared to swear to this, then, it is open to the Court, under Section 9 of the Evidence Act, to establish by other evidence the identity of the accused whom the witness identified at the jail. For this purpose the best evidence will be that of the officer who conducted the identification; and his evidence will be strictly relevant under the provisons of Section 9 of the Indian Evidence Act.[2] It has been held in an Oudh case[3] which has been followed by the Lahore High Court,[4] that, if a witness to a dacoity states at an identification parade that he identifies a certain person as having taken part in the dacoity, it is permissible to produce evidence at the trial that the witness identified that person even if he failed to identify him in Court. This Oudh case apparently seems to lay down that to make the evidence of identification at the jail admissible it is not necessary, as ruled in some case,[5] that the witness should, in the course of his deposition in Court, say that the person whom he had seen committing the crime was correctly identied by him in jail at the identification parade. The Lahore High Court has gone a step further and ruled that, even if the identifying witness says in Court that he does not see in the dock the person who was seen by him committing the crime, it is permissible under Section 9 to produce evidence that the witness did identify the accused at the identification parade as the person whom he had seen committing the offence.[6]

In a case from Goa, the Supreme Court observed that the evidence of one Vengurlekar the Mamlatdar who had held the test identification parade, "has no meaning, since Xavier (the witness who identified) in his evidence did not depose that he had identified the appellants at the test identification parade. Ordinarily, the person who is supposed to have identified the assailants at the test identification parade must himself give evidence in regard to the identification. If he does not himself give such evidence and leaves it to the officer holding the identification parade to do so, the defence would be deprived of an opportunity of cross-examination for the purpose of showing that the witness had an opportunity of seeing the accused before they were brought for identification. In any event the evidence in regard to identification at the test identification parade is at the highest corroborative piece of evidence and if the evidence of Xavier suffers from serious infirmities and cannot be accepted, the evidence in regard to identication by him at the test identification parade cannot improve the situation.[7]

Identification proceedings are facts which establish the identity of the accused

---

1. *Abdul Wahab* v. *E.*, 47 A 39 : 95 IC 756 : 1925 A 223 : 27 Cr. LJ 836 ; *Nagina,. etc.* v. *E.*, 95 IC 477 : 27 Cr. 813.
2. *Abdul Wahab* v. *E.*, 47 A 39 : 95 IC 756 : 1925 A 223 : 27 Cr. LJ 836 ; *Chutkan, etc.* v. *E.*, 90 IC 444 : 1926 O 36 : 26 Cr. LJ 1564.
3. *Ram Prasad, etc.* v. *E.*, 2 Luck. 631 : 106 IC 721 : 1972 O 369 : 29 Cr. LJ 129 : see also *Bachcu* v. *E.*, 128 IC 739 : 1930 O 455 : 32 Cr. LLJ 162.
4. *Natha, etc.* v. *E.*, 108 IC 265 : 1928 L 546 : 29 Cr. LLJ 366.
5. *Abdul Wahab* v. *E.*, 47 A 39 : 95 IC 756 : 1925 A 233 : 27 Cr. LJ 836 : *Chutkan, etc.* v. *E.*, 90 IC 444 : 1926 O 36 : 26 Cr. LJ 1564.
6. *Natha, etc* v. *E.*, 108 IC 265 : 1928 L 546 : 29 Cr. LJ 366; *see* also *Nur Muhammad* v. *E.*, 1944 S 38.
7. *C.P. Fernandes* v. *Union of Territory of Goa*, 1977 SC 138 (Para 8).

persons and are themselves relevant. The evidence of the eye witnesses if rejected would apply to the case of appellant also. The evidence is common to all the accused.[1] Evidence of identification is relevant under Section 9 and it can be proved by any of the mode of proof given in Part II, Chapter IV of the Act.[2]

Precautions to be taken in conducting test parade.— As a general rule the substantive evidence of a witness is a statement made in court. The evidence of mere identification of the accused at the trial for the first time is from its very nature inherently of a weak character.....The purpose of a prior test identification seems to be to test and strengthen the trustworthiness of that evidence. It is essentially a safe rule of prudence to generally look for a corroboration of the sworn testimony of a witness in Court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. There may, however, be exceptions to this general rule.....The Magistrates holding identification parade are expected to take all possible precautions to eliminate any suspicion of unfairness. They must take intelligent interest in the proceedings bearing in mind two considerations. One, that the life and liberty of an accused may depend on their vigilance and caution (2) That justice should be done in the identification. The Magistrate must make a note of every objection raised by the accused... The persons required to identify should have no opportunity of seeing the accused after the commission of the crime and before identification. The identification to be of value should be held without much delay. The number of persons mixed up with the accused should be reasonably large and their bearing and general appearance not glaringly dissimilar. The evidence as to the identification deserves to be subjected to a close and careful scrutiny by the court.[3]

Evidentiary value of identification tests.— Identification proceedings should not be held at the police station.[4] The Magistrate who is conducting an identification parade should take an intelligent interest in the proceedings, bearing in mind that the life and liberty of the accused person may depend on his vigilance and caution, and at the same time, bearing in mind that justice should be done in the identification proceedings.[5] It is the duty of the Magistrate who conducts identification proceedings to make a note of every objection which is made by an accused at the time of identification evidence may take into consideration the objections and in the light of those objections may appreciate the evidence of identification.[6] No mark or stamp should be put on the suspected persons at the time of identification.[7] Where the articles recovered from the possession of the accused had chits attached to them while the other articles mixed with them had no chits, the identification would be of no value at all.[8] Where the accused has a beard, it is advisable that the Magistrate should hold two identification parades; one, by mixing the bearded accused with others of similar appearance, and the other, by asking all the persons taking part in the identification parade to cover up their beards.[9] As

1. *Hardial Singh* v. *State of Punjab*, AIR 1992 SC 1871, 1872.
2. *Kashmira Singh* v. *Crown*, 1949 EP 361; 51 PLR 215: 51 Cr. LJ 177.
3. *Budhsen* v. *The State of U.P.*, 1971 SCJ 223.
4. *Nari Santa* v. *E.*, 1945 P. 161.
5. *Prabhu* v. *E.*, 146 IC 364: 1933 L. 946: 35 Cr LJ 79.
6. *E.* v. *Debi Charan*, 1942 A 339: 202 IC 586: 43 Cr LJ 867.
7. *Pesh Mohammad* v. *E.*, 1942 P 319: 201 IC 486: 43 Cr LJ 742.
8. *State* v. *Wahid Bux*, 1953 A 314: 1953 Cr LJ 705: 1952 ALJ 568.
9. *Laijam Singh* v. *E.*, 86 IC 817: 1925 A 405: 26 Cr LJ 881.

regards the value of identification by witnesses each case has to be judged on its own particular facts. If the identification of the accused were not satisfactory identification, his conviction is erroneous.[1] No hard and fast rule can be laid down with regard to the period of time which may elapse between the commission of a crime and the identification of culprits.[2] However, identification proceedings should be held as early as possible.[3] An ideal identification proceeding is that which is held in the same conditions and circumstances in which the offenders were seen by the witnesses. There is no justification for providing, better facilities to a witness for identifying the accused than he had of seeing his features.[4] Identification at night during a dacoity, when the people are terrorised, is generally of very little value.[5] Chances of error in identification become greatly increased when the identification is based upon a momentary glimpse in the confusion and excitement of the moment at night, though it was a moonlight night. Even where there is no doubt as to the honesty of a witnesses who gives evidence of identification, the testimony of the senses cannot be implicitly relied upon.[6]

Rebuffing the argument that the light shed by a lantern hanging in the courtyard where the victims of a murder were sleeping on cot was not sufficient to have enabled the eye witnesses to identify the accused, the Supreme Court observed that people living in places where electricity has not reached yet are accustomed to seeing things in the light of a lantern. Their eyesight gets conditioned and becomes accustomed to the situation. Their powers of seeing are not diminished by the circumstances that the incident was seen in the light shed by a lantern and not an electric bulb. Moreover, identification does not pose any serious problem where the accused are already known to the witnesses, it was not difficult to identify them from their facial features, built and gait etc., and under the circumstances the light shed by the lantern was held to be sufficient to have enabled the witnesses to identify the accused.[7]

The value of identification depends on two most important facts, namely, that the persons who identify an accused have had an opportunity of seeing him after the commission of the crime, and secondly, that no mistakes have been made by these witnesses or the mistakes made by them are negligible. A test identification, when witnesses have already seen an accused person, is worth nothing at all.[8] The weight to be attached to the identification of a suspect by a witness should ordinarily not depend upon his failure to identify other suspects or mistake in picking out innocent men.[9] It is not necessary to take into consideration the mistakes committed by the identifying witnesses at previous identification parades, unless any of them had made a palpably large number of mistakes of all other identification parades.[10] The possibility of a witness identifying the accused by chance should be reduced as much as possible.[11] As

1. *Santasingh Musafarsingh* v. *Crown*, 1950 N 49: 51 Cr LJ 474: ILR 1949 N 925.
2. *Dhaja Rai* v. *E.*, 1948 A 241: 1947 ALJ 687: 49 Cr LJ 287.
3. *E.* v. *Debi Charan*, 1942 A 339.
4. *Satya Narain* v. *State*, 1953 A 385: 1953 Cr LJ 848.
5. *Charan Singh* v. *E.*, 1933 L. 299: *Irian etc.* v. *E*, 104 IC 714: 1927 C 820: 28 Cr LJ 874: *Mangal Singh etc.* v. *E.*, 93 IC 892: 27 Cr LJ 492; but *see Sucha Singh etc.* v. *E.*, 142 IC 699 : 1932 L 488 : 34 Cr LJ 379.
6. *Gajadhar etc.* v. *E.*, 137 IC 79: 1932 O 99: 33 Cr LJ 381.
7. *Machhi Singh* v. *State of Punjab*, 1983 SC 957.
8. *Kanai Lal* v. *State*, 1950 C 413: 85 CLJ 196: 51 Cr LJ 1507.
9. *Satya Narain* v. *State*, 1953 A 385: 1953 Cr LJ 848.
10. *Chandra Pal* v. *State*, 1954 A 684.
11. *E.* v. *Chaddani Lal*, 1936 A 375: 162 IC 948: *Satya Narain* v. *State*, 1953 A 385: 1953 Cr LJ 848.

many undertrial persons as possible should be mixed with the suspect who is put up for identification.[1] There is no hard and fast rule laid down by the courts prescribing a particular ratio between the suspected persons and the innocent persons.[2] Too large a number of persons should not be mixed.[3] A proportion of five to one is quite insufficient to eliminate the element of chance.[4] Each suspect should be put up separately for identification mixed with as large a number of innocent men as possible, in any case not less than nine or ten.[5] When several suspects are put up for identification in connection with the same offence, care must be taken to see that the same innocent men are not mixed with each of them, otherwise the benefit of holding separate identification proceedings would go away.[6]

The following points help in determining what weight should be given to an identification test:—

(i) the number of "wrong persons" picked out by the identifying witnesses, by "wrong person" being meant persons other than suspected persons;
(ii) consistency of the identifications made at different times, i.e., did the various witnesses pick out the same man alike in the jail identification proceedings, before the Committing Magistrate, and in the Sessions Court?
(iii) was a sufficiently large number of men paraded along with the suspects? and
(iv) did any witness pick out a large number of men so as to create a suspicion that he was picking out men at random ?[7]

Where an analysis of the identification proceedings shows that the identifying witnesses identified only three suspects as against four "wrong men," the identification test should not carry much value.[8] It would be fatuous to discredit an identification on the ground that reasons are not being formulated by the witness.[9] The power to identify varies according to the power of observation, and observation might be based upon small minutiae which a witness cannot himself describe or explain. It is obviously impossible to lay down any broad principle as to the exact amount of observation which is required in any particular case.[10] The power of observation and memory of different persons vary, and the mere fact that some witnesses have failed to identify a culprit does not necessarily render the identification by other witnesses valueless."[11] The evi-

1. *Manohar* v. *E.*, 1944 OWN 383: *State* v. *Wahid Bux*, 1953 A 314: 1953 Cr LJ 705: 1952 ALJ 568; *Dal Chand* v. *State*, 1953 A 123: 1953 ALJ 94: 1953 Cr LJ 356.
2. *State* v. *Wahid Bux*, 1953 A 314 : 1952 ALJ 568: *Dal Chand* v. *State*, 1953 A 123; *Satya Narain* v. *State*, 1953 A 385.
3. *Dal Chand* v. *State*, 1953 A 123; 1953 ALJ 94: 1953 Cr LJ 356.
4. *E.* v. *Chaddami Lal*, 1936 A 373: 162 IC 948; *Naubat Singh* v. *E.*, 1935 A 653: 157 IC 354; *Ram Singh* v. *E.*, 1943 O 269; see also *Manohar* v. *E.*, 1944 AWR (CC) 257: *State* v. *Wahid Bux*, 1953 A 314: 1953 Cr LJ 705; 1952 ALJ 568; *Lal Chand* v. *State*, 1953 A 123: 1953 ALJ 94: 1953 Cr LJ 356; *Aliya* v. *State*, 1953 MB 87: 1953 Cr LJ 610, where ratio of one to three was held sufficient.
5. *Satya Narain* v. *State*, 1953 A 385: 1953 Cr LJ 848.
6. Ibid.
7. *Sheo Sahai etc.* v. *E.*, 141 IC 511: 1932 O 287: 34 Cr LJ 197; *Hari Narain* v. *State*, 1953 Bhopal 18: 1953 Cr LJ 692.
8. *Tula etc.* v. *E.*, 142 IC 821: 1933 O 49: 34 Cr LJ 392; *Satya Narain* v. *State*, 1953 A 385: 1953 Cr LJ 848; *Abdul Jalil Khan* v. *E.*, 1938 A 786.
9. *Public Prosecutor* v. *India Chem Lingiah*, 1953 MWN 918: 1954 M 433.
10. *Buchhu* v. *E.*, 128 IC 759: 1930 O 455: 32 Cr LJ 162; see also *Sher Jang* v. *E.*, 131 IC 277: 1931 L 178: 32 Cr LJ 684.
11. *Sher Jang*, v. *E.*, 131 IC 277: 1931 L. 178: 32 Cr LJ 684; *Satya Narain* v. *State*, 1953 A 385: 1953 Cr LJ 848.

dence as to identification ought, in each case, to be subjected to a close and careful scrutiny. It is an important fact whether all the persons identified were previously known to the witnesses, or were perfect strangers to them; the time of the occurrence, the state of light, the opportunities which the witnesses had of identifying and the state of mind of the witness are material circumstances to be deposed to in each and every case.[1] It cannot be laid down as a proposition of law that where witnesses come forward to identify persons whom they could not possibly have seen for many years, their evidence of identification cannot be accepted.[2] Identification parades held by the police require the most careful scrutiny, for if a witness, has before the parade, seen the person that he is going to identify, it does not matter in what order that person is placed, the witness is sure to identify him.[3]

Where the manner in which the identification parades were held throws a lot of suspicion on the conduct of the police, the evidence of the identification of the accused persons by the witnesses is not entitled to any weight.[4] If the identification appears to have been induced by any suggestion or other means, the court should not base the conviction of that identification alone.[5] Witnesses should be kept out of sight of the persons whom they have been called to identify and should not be allowed to communicate with each other.[6]

Where the conviction of the appellants was based upon evidence of identification, the Supreme Court held it to be unsustainable inasmuch as, all the witnesses, except PW 2, had seen the accused from behind while they were running away and so far as PW 2 was concerned, he knew one of the appellants since before and the other appellants were also resident of the same village as his near the residence of the witness and therefore, the possibility of his knowing them since before could not be ruled out.[7]

"The basic difficulty", according to the Supreme Court, "in accepting the evidence" of witnesses on the question of identification of the accused was that as many as 14 or 15 persons had taken part in the four murders at dead of night, when every one was soundly asleep and apart from the inherent difficulty in identifying a large group of persons at dead of night in the light of a tiny kerosene lantern, it was highly unlikely that the accused would continue to remain at the scene of offence after committing the crime so as to have enabled the witnesses to see them on their arrival on the scene.[8]

Whenever an accused person disputes the ability of the prosecution witnesses to identify him, the Court should direct an identification parade to be held save in the most exceptional circumstances. From the mere fact that the accused and such witnesses live in near villages the Court should not prejudice that the accused has suborned these witnesses and reject the prayer for identification. For it is impossible to assume this until those witnesses have not only failed to identify the accused but have also been

---

1. *Man Singh etc.* v. *E.*, 121 IC 103: 1929 A 928: 31 Cr LJ 206; *Hari Narain* v. *State*, 1953 *Bhopal 8: Nobi Dusadh* v. *State*, 1956 P 38.
2. *Khilawan etc.* v. *E.*, 112 IC 337: 1928 O 430: 29 Cr LJ 1009; but see *Chunnoo* v. *State*, 1954 A 795.
3. *Basangi Kui* v. *E.*, 1942 P 342: In *re Nanni Kudumban etc.*, 76 IC 289: 1924 M 232: 25 Cr LJ 145: *Din Dayal* v. *E.*, 81 IC 949: 1924 O 295: 25 Cr LJ 1125.
4. *Bahadari* v. *E.*, 1940 L 281: 189 IC 672: 42 PLR 229.
5. *Satya Narain* v. *State*, 1953 A 385: 1953 Cr LJ 848; *R.* v. *Dickman*, 1910 26 TLR 640.
6. In *re Kshatri Ram*, 1941 M. 675.
7. *Bali Ahir* v. *State of Bihar*, 1983 SC 289 (paras 7 and 8).
8. *State of U.P.* v. *Jageshwar*, 1983 SC 349 (paras 4 & 5).

examined in Court with regard to the matter whether their failure to do so is in collusion with the accused or not.[1] The above decision and the decision in *Sajjan Singh* v. *Emperor*,[2] was not followed by the Madras High Court, and it was held that there was no provision in the Code of Criminal Procedure entitling an accused to demand that an identification parade should be held at or before the enquiry at the trial.[3] The accused persons may or may not have a legal right to claim for a test identification, and the holding of a test identification may or may not be a rule of law, but it is a rule of prudence that a test identification parade should be held when the accused persons definitely assert that they were unknown to the prosecution witnesses either by name or by face, and they requested the authorities concerned to have the test identification held. Non-holding of a test identification parade though not a ground to vitiate the trial, is a very important feature in considering the credibility of the witnesses on the point of identification.[4] In the absence of identification proceedings the entire sworn testimony of the witnesses cannot be discarded. But in practice, it is not safe to accept the statement of a witness about the complicity of an accused in the crime if he did not describe him by name or other particulars during the investigation and still was not made to identify him out of a group.[5] However, the statement of a witness does not become inadmissible if he has not identified the accused during the investigation.[6]

Where the evidence against an accused person is evidence of identification alone, the Magistrate must hold the identification parade of the accused before releasing him on bail.[7]

The whole object behind an identification proceeding is to find out whether the suspect is the real offender or not.[8] Failure to identify accused by eye witnesses creates doubt about the presence of the accused at the place of occurrence.[9] Identification tests of accused persons cannot, as a rule, form a sufficient basis for conviction, though they may perhaps add some weight to the other evidence against the accused.[10] Where the only evidence against an accused person is that of identification by one witness, as a rule of prudence it should not be considered enough to justify the conviction.[11] It would not be safe to convict the appellant on the basis of the identification evidence.[12] A witness's evidence given in Court should be accepted only if he identifies the same person whom he had previously picked out in the identification parade in jail.[13] As a

---

1. *Amar Singh* v. *E.*, 1943 L 303.
2. 1945 L 48: ILR 1944 L 236: 219 IC 259: 46 Cr LJ 550.
3. In *re Sangiah*, 1948 M 113: 1947 2 MLJ 252: 60 MLW 571: 1947 MWN 594: 49 CrLJ 89: ILR 1948 M 667.
4. *Awadh Singh* v. *State*, 1954 P 483, wherein *Provash Kumar Bose* v. *King* 1951 C 475 ref; *Lajja Ram* v. *State*, 1955 A 671; *Shakoor* v. *State*, 1955 AWR (HC) 55.
5. *Satya Narain* v. *State*, 1953 A 385: 1953 Cr LJ 848: *Rex* v. *Christie* 1914 AC 545: Phipson. Law of Evidence Ed, 8 p. 392; Davis v. King, 57 CLR 170; *Craig* v. *King*, 49 CLR 429.
6. *Satya Narain* v. *State*, 1953 A 385: 1953 Cr LJ 848 *Dhaja Rai* v. *E.*, 1948 A 241.
7. *Ganga Singh* v. *State*, 1956 A 122.
8. *Satya Narain* v. *State*, 1953 A 385; 1953 Cr. LJ 848.
9. *Sheo Shankar* v. *State*, 1953 A 652; 1953 Cr. LJ 1400: 1953 A LJ 720.
10. *Ramzan etc.* v. *E.*, 115 IC 328: 1929 S 149: 30 Cr. LJ 456; *Din Dayal* v. *E.*, 81 IC 949: 1924 O 295: 25 Cr. LJ 1125; *Sudhindra Nath Dutt* v. *The King*, 1952 C 422; *Provash Kumar Bose* v. *The King*, 1951 C 475, but *see E.* v. *Jai Ram*, 1943 O 16.
11. *Saghir Ahmad* v. *State*, 1950 A 723; but *see Nobi Dusadh* v. *State*, 1956 P 39; *Wakil Singh* v. *State of Bihar*, 1981 SC 1392 (para 2).
12. *Chaman* v. *State of U.P.*, AIR 1992 SC 601.
13. *Manni, etc.* v. *E*, 82 IC 280 : 1925 L 137: 25 Cr. LJ 1272.

general rule, the failure of a witness to identify the accused in Court, whom he had identified at a previous identification parade, perceptibly weakens his evidence in Court.[1] An identification parade of a particular accused held long before or after another identification proceeding of other accused persons, should not be taken into consideration in judging the value of the particular identification.[2] The identification of articles is not defective merely because the person identifying them was present at the time of the search at which those articles were recovered.[3]

Evidence given by the witnesses before the court is a substantive evidence. —In a case where the witness is a stranger to the accused and he identifies the accused person before the court for the first time, the court will not ordinarily accept that identification as conclusive.[4]

Identity of an accused must be established before he is punished.— Mere mentioning of an accused in a dying declaration as a 'person residing in a particular police station' is not enough to connect him with the crime[5] but, conviction on basis of injured eye witnesses held legal.[6]

Mistake in identification is a question of fact.— It is not unusual for witnesses to make mistakes of identity, when a large number of persons are concerned in committing the crime, in any event it is a question of fact to be decided in each case and is not a question of law.[7]

Identification parade and Art. 20(3) Constitution.— Ordering accused to appear in test identification parade does not contravene Art. 20(3) of the Constitution.[8] Ordering to expose parts of the body for purpose of identification does not offend against Art. 20(3) Constitution.[9]

Section 9 and Section 164 Cr. P.C.— Section 9 of the Evidence Act provides that facts which support or rebut an inference suggested by a relevant fact or which establish the identity of any person or thing whose identity is relevant, are themselves relevant in so far as they are necessary for that purpose. The Section 164 Cr. P.C. prescribes the procedure which must be observed by a Magistrate when he records any statement of a witness in the course of investigation or at any time afterwards before the commencement of the inquiry or trial. If it were held that the statement of a witness recorded under Section 164 Cr. P.C. can go in as evidence under Section 9, the object of Section 164 will be defeated. Therefore, it is necessary to resort to the rule of harmonious construction so as to give full effect to both the provisions. If a Magistrate speaks to facts which establish the identity of any person or thing, such facts will be relevant under Section 9, but if the Magistrate seeks to prove the statement which is not recorded according to Section 164 Cr. P.C., such part of the evidence must be excluded even though it may be relevant under Section 9. By such a construction the provisions

1. *Bachchu* v. *E*, 128 IC 739: 1930 O 455: 32 Cr. LJ 162; *Parbhu* v. *E*, 104 IC 626: 28 Cr. LJ 850; *Ramprasad, etc.* v. *E.*, 2 Luck 631: 106 IC 721: 1927 O 369: 29 Cr. LJ 129; *Natha, etc.* v. *E*, 108 IC 265: 1928 L 546: 29 Cr. LJ 366.
2. *State* v. *Wahid Bux*, 1953 A 314: 1953 Cr. LJ 705: 1962 ALJ 568.
3. *Mohd. Ilyas* v. *State*, 1950 A 615.
4. *Pollavaram P.N. Reddy* v. *State of A.P.*, (191) 3 SCC 434 (para 80.
5. *State* v. *Kanchan Singh*, 1954 A 153: 1954 Cr. LJ 264: 1953 ALL 615.
6. *Gurnek Singh* v. *State of Punjab*, AIR 1988 S.C. 2249.
7. *Bharwad Mepa Dana* v. *State of Bombay*, 1960(2) SCR 172.
8. *Pearelal* v. AIR 1961 Cal 531.
9. *S.* v. *Kathikalu*, 1962 (3) SCR 10.

of both the sections can be reconciled. There is nothing in Section 164, Cr. P.C. which prohibits a Magistrate from deposing to relevant facts which have come to his knowledge about the identity of the person or thing. It is open to a Magistrate to take verification proceedings with a view to test the truth of the statement made before him. The evidence given by a Magistrate on the basis of the verification proceedings conducted by him is relevant evidence, though he could not speak to the statement made to him by a witness, if it is not recorded by him in a manner laid down in Section 164 Cr. PC.[1]

Admissibility of identification proceedings held by the police but not supervised by a Magistrate.—A question as to the admissibility of identification proceedings might arise, where such proceedings are held by the police but not supervised by a Magistrate. It has been noticed already that in some cases identification proceedings have been held to amount to statements which, like other previous statements by witnesses, are admissible merely to corroborate or to contradict the evidence given by them at the trial.[2] It has, however, been ruled by almost all the High Courts in India that statements by witnesses made to the police in the course of investigation are not admissible to corroborate the evidence given by such witnesses at the trial.[3] It follows, therefore, that where identification proceedings held by the police are not supervised by a Magistrate, the proceedings will, under Section 162, Criminal Procedure Code, be inadmissible to corroborate, under Section 157 of the Evidence Act, the evidence given by the identifying witnesses in Court.[4] Since statements made by witnesses in the course of police investigation are admissible under Section 162, Criminal Procedure Code, to contradict the evidence given by them at the trial, identification proceedings held by the police whether supervised by a Magistrate or not, will also be admissible to contradict the evidence given by them at the trial. The Supreme Court has approved of the view taken by the Allahabad and Calcutta High Courts and has held that the evidence in regard to the test identification parades held at the instance of the police and under their active supervision was hit by Section 162 of the Criminal Procedure Code.[5]

Oral evidence of identification before the police is admissible and the panchnama may be used by the witness to refresh his memory under Section 159 of the Act.[6]

Who can hold identification parade.— *In Ramkishan Mithanlal* v. *State of Bombay*[7] it is held "It is clear that the process of identification by the identifying witnesses involves the statement by the identifying witnesses that the p;articular properties identified were the subject-matter of the offence or the persons identified were concerned in the offence. This statement may be express or implied. The indentifier may point out by

---

1. *Deepchand* v. *State of Rajasthan*, 1962 (2) SCJ 658.
2. *Nagina, etc.* v. *E.*, 95 IC 477: 27 Cr. LJ 813; *Chutkan, etc.* v. *E.*, 90 IC 444: 1926 O 36: 26 Cr. LJ 1564; *Lal Singh* v. *E.*, 5 L 396: 91 IC 954: 1925 L 19: 27 Cr. LJ 170.
3. See *Rakha* v. *E*, 6 L 171: 93 IC 230: 1925 L 399: 27 Cr. LJ 438; *Jagwa Dhanuk, etc.* v. *E.*, 5 P 63: 93 IC 884: 1926 P 232: 27 Cr. LJ 484 and notes to Section 157, post.
4. *Khabiruddin* v. *E.*, 1943 C 644; *Krishna Chandra Dhenki* v. *E.*, 1953 C 311: 158 IC 813: 62 C 918; *Krishna Kahar* v. *E.*, 43 CWN 1117: 1940 C 182; *Bhola Nath* v. *E.*, 43 CWN 1180; *Contra Lela Lalung* v. *E.*, 42 CWN 620: 68 CLJ 103; *Ramadhin Ibrahim* v. *E.*, 112 IC 51: 1929 N 36: 29 Cr LJ 963; In *re Kshatri Ram Singh*, 1941 M 675; *Mor Mohammad* v. *E.*, 1949 S 168; See also *Chatru* v. *State*, 1953 Bilaspur 3: 1953 Cr. LJ 708.
5. *Ramkishan Mithanlal Sharma* v. *State*, 1955 SC 104.
6. *E.* v. *Mahadevo Dewoo*, 47 Bom. LR 992.
7. 1955 (1) SCR 903.

his finger or touch the property or the person identified may either nod his head or give his assent in answer to a question addressed to him in that behalf or may make signs or gestures which are tantamount to saying that particular property identified as the subject-matter of the offence or the person identified was concerned in the offence. All these statements express or implied, including the signs or gestures, would amount to a communication of the fact of identification by the identifier to another person".....'The communication thereof by the identifier to the person holding the proceedings is tantamount to a statement made by the identifier to that person. The note or memo of the proceedings prepared by the person in question is, therefore, a record of the statement of the identifying witnesses. But since there is no legal bar to any person recording the statement of another (provided the statement has been voluntarily made) any person can conduct a test identification.

Identification parade and Section 162 Cr. P.C.— Other conditions being satisfied, identification proceedings may be conducted by panch-witnesses— witnesses who are all ordinary citizens. If after arranging the parade, the police leave the field, and allow identification to be made under the exclusive direction and supervision of panch witnesses Section 162 is not attracted.... It is essential that the process of identification be carried out under the exclusive direction and supervision of the citizens themselves, and the police should completely obliterate themselves from the parade before the statements made by the identifiers could fall outside the purview of Section 162. Cr. P.C.[1]

Facts fixing the time or place at which any fact in issue or relevant fact happened.— Such facts are obviously admissible as introductory, or explanatory, or on the res gestae principles.

Facts showing the relation of parties by whom any fact in issue or relevant fact was transacted.— Such facts are admissible as explanatory of, or as occasioning or causing, a fact in issue or relevant fact. For the sort of facts made admissible by this rule, see illustration (b).

Memorandum of identification parade.— Absence of memorandum of identification parade does not show that the accused were not identified at the time of the commission of the offence.[2]

Legal status of Identification Memo.—In the case of an Identification Memo prepared by a Magistrate it is a record of a statement taken under the provisions of Section 164 Cr. P.C. It is, therefore, evidence given before any officer authorised by law to take evidence. In consequence, Section 80 of this Act applies, whereunder the Court must presume the genuineness of the memo. And not only this, under the same section there is also a legal presumption as to the circumstances under which the memo was prepared, so that it becomes evidence not only of the fact that the witness identified the suspect but also of the various steps or precaution taken by the Magistrate to ensure a fair and just identification proceeding. Thus where the test identification is held by Magistrate it is not necessary to call him in evidence, his memo under the terms of Section 80, is evidence of everything that it contains. He should be called only, if it is desired to obtain clarification of doubtful matters in the memo or matters omitted therefrom. Even if a question is raised as to the identity of the witness who appears at

1. *Ramkishan Mithanlal* v. *State of Bombay*, 1955 SC 104.
2. *Guddar Singh* v. State, 1954 Punj 37.

the identification, it is unnecessary to call the Magistrate: the doubt can be resolved by summoning the police or jail official who produced him.[1] Thus identification memo is a record of the statement which the identifier expressly or impliedly made before them. The statement is a former statement of the identifier and in Court is usable not only for contradicting him under Section 145 or Section 155 of the Evidence Act but also for corroborating him under Section 157, except when it was made before the police, in which case it is hit by Section 162, Cr.P.C. and is, therefore, not admissible for purposes of corroboration. If a private person holds the parade then he may be called in evidence to prove the memo. Where Section 164, Cr.P.C. operates the proceedings are independent even of the territorial jurisdiction of the Magistrate concerned.

Evidence of identification—Value of.— The Supreme Court will not reassess evidence unless exceptional ground is established.[2]

10. Things said or done by conspirator in reference to common design.— Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy, as for the purpose of showing that any such person was a party to it.

Illustrations

Reasonable ground exists for believing that *A* has joined in a conspiracy to wage war against the Government of India.

The fact that *B* procured arms in Europe for the purpose of the conspiracy, *C* collected money in Calcutta for a like object, *D* persuaded persons to join the conspiracy in Bombay, *E* published writings advocating the object in view at Agra, and *F* transmitted from Delhi to *G* at Kabul the money which *C* had Collected at Calcutta, and the contents of a letter written by *H* giving an account of the conspiracy, are each relevant, both to prove the existence of the conspiracy, and to prove *A*'s complicity in it, although he may have been ignorant of all of them, and although the persons by whom they were done were strangers to him, and although they may have taken place before he joined the conspiracy or after he left it.

COMMENTARY

Principle: Theory of agency.— It is recognized on well-established authority that

1. *Sadulla* v. *Emperor*, 39 Cr. LJ 864: 117 IC 32.
2. *Ramdeo Rai* v. *State of Bihar*, AIR 1990 SC 1180.

the principle underlying the reception of evidence under Section 10 of the Evidence Act of the statements, acts and writings of one co-conspirator as against the other is on the theory of agency. The admission of such evidence, in proof of conspiracy or of the fact that he was a co-conspirator, is, in its essence, admission not as against himself but as against the others who are on trial. To the extent that such an issue, *i.e.*, of those being a conspiracy and of his being a co-conspirator is relevant at the trial, it must be proved only by evidence under Section 10, Evidence Act, which is an exceptional section limited in its application to conspiracies to commit an offence or to commit an actionable wrong.[1] A conspirator is an agent of his associates in carrying out the object of the conspiracy. His acts and declarations are therefore admissible against the other conspirators on the same principle as the acts and declarations of an agent are receivable against his principal.[2] The rule of law is that where several persons are proved to have combined together for the same illegal purpose, any act done by one of the parties in pursuance of the original concerted plan with reference to the common object is, in contemplation of the law, an act of the whole. Each party is an agent of the others in the objects of the conspiracy and doing anything in furtherance of the common design.[3] The principle contained in Section 10 is that "once a conspiracy to commit an illegal act is proved, act of one conspirator becomes the act of the other."[4] Section 10 not only lays down the rule applicable in India, so far as leading evidence in cases of conspiracy is concerned, but has to be treated as a part of the statute law in the matter of proof of the existence of a conspiracy and of the furtherance of its objects.[5]

Applicability and scope of—Analysis of the section.— (1) There shall be a *prima facie* evidence affording a reasonable ground for a Court to believe that two or more persons are members of a conspiracy; (2) if the said condition is fulfilled, anything said, done or written by any one of them in reference to their common intention will be evidence against the other; (3) anything said, done or written by him should have been said, done or written by him after the intention was formed by any one of them; (4) it would also be relevant for the said purpose against another who entered the conspiracy whether it was said, done or written before he entered the conspiracy or after he left it; and (5) it can only be used against a co-conspirator and not in his favour.[6]

Before Section 10 of the Indian Evidence Act, 1872, can be invoked, as a general rule, some *prima facie* evidence should be placed before the Court to enable it to form an opinion that there is reasonable ground to believe that two or more persons have conspired together; and if that condition is fulfilled the acts and declarations of a conspirator against his fellow conspirators may be admitted as evidence.[7]

The acts, statements or writings of a conspirator are admissible against himself, independently of Section 10.— This section makes the acts, statements or writings of a

1. *Sardul Singh* v. *Bombay*, 1957 Cr LJ 1325.
2. *Vishindas Lachhmandas* v. E., ILR 1943 Kar. 449: 1944 S 1; *E.* v. *Vaishampayan*, 55 B 839: 134 IC 1238: 1932 B 56: 33 Cr LJ 76; *Indra Chandra Narang* v. *E.*, 116 IC 756: 1929 P 145: 30 Cr LJ 646 (FB); *E.* v. *Shafi Ahmad Nabi Ahmad*, 31 Bom LR 515; Best, § 508.
3. *Q.* v. *Ameer Khan etc.*, 17 WR Cr 15; per Couch, C.J.
4. *Shivnarayan* v. *State of Maharashtra*, 1980 SC 439 (para 19).
5. *Jitendra Nath* v. *E.*, 1937 C 99: 169 C 977: 38 Cr LJ 818 (SB).
6. *Bhagwan Swarup* v. *Maharashtra*, (1964) 2 SCR 378: (1964) 2 SCJ 771; *Sardul Singh* v. *State of Bombay*, 1957 Cr LJ 1325.
7. *Natwarlal Sakarlal Mody* v. *The State of Bombay*, 65 Bom LR 666.

conspirator admissible against other conspirators. The section is, therefore, an exception to the general rule that the acts, statements or writings of a person are admissible only against himself and not against others. The rule that a statement is always admissible against a person as an admission is not, however, in any way affected by the present section.

Difference between English and Indian law on the object.— This section is wider than the corresponding rule in English law[1]; the difference being, firstly, that whereas in English law the act must have been done or declaration made in *execution or furtherance of the common object*, under the Indian Evidence Act, to establish the admissibility of the act or declaration, it is sufficient to show that it had *reference to the common intention*,[2] and, secondly, that whereas in English law the act of a conspirator must have been done, or declaration made, *before* the person against whom it is sought to be given in evidence ceased to be a member of the conspiracy,[3] in Indian law the act or declaration would be admissible, even though it was done or made after the person, against whom it is sought to be given in evidence, terminated his connection with the conspiracy.[4]

Common intention: English Law.— The expression "in reference to their common intention" is very comprehensive and appears to give it a wider scope than the words "in furtherance of" in the English law with the result that anything said, done or written by a co-conspirator, after the conspiracy was formed, will be evidence against the others before they entered the field of conspiracy or after they left it.[5]

Construction of things done, spoken or written regarding conspiracy.— Section 10 must be construed, in accordance with the principle that the thing done, written or spoken, was something done in carrying out the conspiracy and was receivable as a step in the proof of the conspiracy. The evidence receivable under Section 10 of the Evidence Act "anything said, done, or written, by any one of such persons" (*i.e.*, conspirators) must be "in reference to their common intention."[6]

Prima facie proof of conspiracy and of the accused's connection with it must be given before giving in evidence the act, declaration or writing of a conspirator.— So that the acts, statements or writings of a conspirator may be given in evidence against the prisoner, it is necessary to show that there are reasonable grounds to believe that the prisoner and the persons whose acts, statements or writings are intended to be given in evidence were members of a conspiracy.[7] Strict proof of conspiracy is not necessary; what is required by the section is that there should be reasonable grounds to believe that the prisoner and the person whose acts, statements or writings are sought to

---

1. *Bhola Nath* v. *E.*, 1939 A 567: 1939 AWR (HC) 464; *Ram Prasad, etc.* v. *E.*, 2 Luck 631 : 106 IC 721: 1927 O 369: 29 Cr LJ 129; *E. v. Abani Bhusan Chakrabuty*, 38 C 169: 8 IC 770: 11 Cr LJ 710; *Balmokand* v. *E.*, 17 PR 1915 Cr: 28 IC 738: 16 Cr LJ 354.
2. *Balmokand* v. *E.*, 17 PR 1915 Cr: 28 IC 738: 16 Cr LJ 354.
3. *R.* v. *Hardy*, 24 How. St. Trials, 718, 731; Phipson, Ev., 7th Ed., 89; Taylor, §§ 594—5.
4. See the illustration to Section 10.
5. *Samunder Singh* v. *State*, AIR 1965 SC 598.
6. *Sardul Singh* v. *State of Bombay*, 1957 Cr LJ 1325.
7. *Jhabwala, etc.* v. *E.*, 145 IC 481: 1933 A 690: 34 Cr LJ 967; *Abdul Aziz* v. *E.*, 137 IC 317: 1932 C 557: 33 Cr LJ 456; *Mukundlal Sircar* v. *E.*, 1930 MWN 1264; *E* v. *Shafi Ahmad Nabi Ahmad*, 31 Bom LR 515; *Indra Chandra Narang, etc.* v. *E.*, 116 IC 756 : 1929 P 145 : 30 Cr. LJ 646 (FB) : *Balmokand* v. *E.*, 17 PR 1915 Cr: 28 IC 738: 16 Cr LJ 354; *Kadambini Dassi Kumudini Dassi* v. *E.*, 30 C 983; *Kusir Bap, etc.*, v. *E.*, 21 IC 378: 14 Cr LJ 586: 18 CLJ 590.

be given in evidence have conspired to commit an offence.[1] If *prima facie* evidence of the existence of a conspiracy is given and accepted, the evidence of the statement made by one of the conspirators in reference to the common object becomes admissible against all.[2] The object of the rule is to ensure that one person shall not be made responsible for the acts or deeds of another, until some bond in the nature of an agency has been established between them.[3] In England, for the sake of convenience, the acts or declarations may be admitted in evidence before proof of conspiracy has been given, if the prosecutor undertakes to furnish such proof in the subsequent stage of a cause; but this mode of proceeding rests in the discretion of the Judge, and in seldom permitted, except in particular and urgent circumstances.[4] The same course may, in appropriate cases, be adopted in this country.[5] The person whose acts, statements and writings are sought to be given in evidence and the person against whom they are sought to be so given must both be shown to have been connected with the conspiracy;[6] but it is not necessary that the conspirator whose acts, statements or writings are sought to be given in evidence should be an accused.[7] "It is necessary to prove the existence of a conspiracy, and to connect the prisoner with it in the instance, where you seek to give in evidence against him the declarations of a co-conspirator; and having done so, you are then at liberty to give in evidence against the prisoner acts done by any of the parties whom you have connected with the conspiracy.[8] The application of the section follows and does not precede the finding that there are reasons to believe that there was a conspiracy and that the accused persons were members of it.[9] Thus, if a letter is given in evidence, the writer of the letter must be proved to be a member of the conspiracy.[10] Mere association of a person with a conspirator is not sufficient to show that the former was in conspiracy with the latter,[11]

Meaning and proof of conspiracy.— The essence of conspiracy, is therefore, that there should be an agreement between persons to do one or the other of the acts described in the section. The said agreement may be proved by direct evidence or may be inferred from acts and conduct of the parties. There is no difference between the mode of proof of the offence of conspiracy and that of any other offence: it can be established by direct evidence or by circumstantial evidence. But Section 10 of the Evidence Act introduces the doctrine of agency and if the conditions laid down therein are satisfied, the act done by one admissible against the co-conspirators. This Section 10, as the opening words indicate, will come into play only when the Court is satisfied that there is reasonable ground to believe that two or more persons have conspired

---

1. *Balmokand* v. *E.*, 17 P R 1915 Cr: 28 IC 738: 16 Cr LJ 354; *Jitendranath* v. *E.*, 1937 C 99: 169 IC 977: 38 Cr LJ 818 (SB); *Mohammad Ismail* v. *E.*, 1936 N 97: ILR 1936 N 152: 165 IC 913: 38 Cr LJ 106.
2. *In re Lilaram Ganganmull*, 81 IC 817: 1924 M 805: 25 Cr LJ 1041; *Balmokand* v. *E.*, 17 PR 1915 Cr; *Ngangam Mahendra Singh* v. *Manipur State*, 1952 Manipur 4.
3. *Indra Chandra Narang, etc.* v. *E.*, 116 IC 756: 1929 P 145: 30 Cr LJ 646 (FB).
4. Taylor. § 591.
5. Section 136, Evidence Act.
6. E. v. Shafi Ahmad Nabi Ahmad, 31 Bom LR 515; Mohammad Ismail v. E., ILR 1936 N 152: 1936 N 97: 165 IC 913: 38 Cr LJ 106.
7. *Balmokand* v. *E.*, 17 PR 1915 Cr; *E.* v. *Dugold*, 94 LT 889.
8. Pennefather, C.J., in *R.* v. *Mc. Kenna*, Ir. Cir. Rep. 461, quoted in Taylor, § 596.
9. *Chandrattan Moondra* v. *Crown*, ILR 1940 Kar 129: 1945 S 158.
10. *E.* v. *Keshav Narayan Manolkar*, 25 Bom LR 248.
11. *Kali Das Basu, etc.* v. *E.*, 83 IC 513: 26 Cr LJ 33.

together to commit an offence or an actionable wrong, that is to say, there should be a *prima facie* evidence that a person was a party to the conspiracy before his acts can be used against his co-conspirators. Once such a reasonable ground exists, anything said, done or written by one of the conspirators in reference to the common intention after the said intention was entertained, is relevant against the others, not only for the purpose of proving the existence of the conspiracy but also for proving that the other person was a party to it.[1] Conspiracy consists in a combination and agreement by two or more persons to do some illegal act, or to effect a legal purpose by illegal means; the conspiracy is complete as soon as two or more than two persons agree to do any unlawful or illegal act that amounts to an offence.[2] Generally, the law does not take notice of mere intention to commit an offence, unless some overt act is done to give expression to that intention: but the offence of conspiracy is, in a sense, an exception to this general rule, where mere agreement to commit an offence becomes indictable. It is, however, more correct to say that, in a prosecution for conspiracy to commit an offence, the overt act is the agreement itself.[3] An agreement implies the concert of at least two persons, so that *ex* v. *termini* there cannot be a conspiracy of one.[4] Where, therefore, the prisoner is charged with having conspired with other specified persons, and the latter are acquitted, the prisoner must also be acquitted.[5] But where the charge is that the prisoner entered into a conspiracy with certain unknown persons, the prisoner may be convicted alone.[6] Mere agreement to do a civil wrong is not actionable, unless there has been some overt act causing damages;[7] but when such overt act has been done, then, in a suit founded on such cause of action, the acts, statements and writings of the persons who have conspired to cause a civil injury will, under this section, be admissible against each other.

It is not necessary that it should be established by direct evidence that the accused and the person whose acts, statements or writings are sought to be given in evidence against the prisoner, entered into a formal consultation or agreement to commit an offence,[8] as in cases of conspiracy direct evidence is seldom available.[9] A conspiracy may be proved by the surrounding circumstances, or by the antecedent or subsequent conduct of the accused.[10] A conspiracy need not be established by proof which actually brings the parties together, but may be shown, like any other fact, by circumstantial evidence. Detached acts of the different persons accused, including their written corre-

---

1. *Bhagwan Swarup* v. *State of Maharashtra*, (1964) 2 SCR 378: (1964) 2 SCJ 771.
2. Section 120 (A), IPC; *Nirmal Chandra De* v. *E.*, 100 IC 113: 1927 C 265: 28 Cr LJ 241; *Barindra Kumar Ghose, etc.* v. *E.*, 37 C 467: 7 IC 359: 11 Cr LJ 453; *Kalil Munda, etc.* v. *E.*, 28 C 797.
3. *Jhabwala, etc.* v. *E.*, 145 IC 481: 1933 A 690: 34 Cr LJ 967; *Nirmal Chandra De* v. *E.*, 100 IC 113: 1927 B 265: 28 Cr LJ 241; *Amritlal Hazra etc.* v. *E.*, 42 C 957: 29 IC 513: 16 Cr LJ 497.
4. *Jhabwala, etc.* v. *E.*, 145 IC 481; *Barindra Kumar Ghose, etc.* v. *E.*, 37 C 467: 7 IC 359; 11 Cr LJ 453.
5. *Kasem Ali* v. *E.*, 101 IC 481: 28 Cr LJ 449; *Prafulla Kumar Roy Chowdhury, etc.* v. *E.*, 91 IC 883: 1926 C 345 : 27 Cr LJ 147.
6. *Manindra Chandra Ghose* v. *E.*, 41 C 754: 23 IC 1002; 15 Cr LJ 402.
7. *Templeton* v. *Laurie, etc.*, 25 B 230.
8. *Barindra Kumar Ghose, etc.* v. *E.*, 37 C 467: 7 IC 359: 11 Cr LJ 453; *Balmokand* v. *E.*, 17 PR 1915 Cr.: 28 IC 738: 16 Cr LJ 354; *Pulin Behary Das, etc.* v. *E.*, 16 IC 257: 13 Cr LJ 609: 15 CLJ 517 (FB); *E.* v. *Annappa Bharamganda*, 9 Bom. LR 347: 5 Cr LJ 323.
9. *Bhola Nath* v. *E.*, 1939 A 567: 1939 AWR (HC) 464; *Jitendranath* v. *E.*, 1937 C 99: 169 IC 977: 38 Cr LJ 818 (SB): *Gour Chandra Das, etc.* v. *E.*, 115 IC 359: 1929 C 14: 30 Cr LJ 475.
10. *Kishanchand* v. *E.*, 92 IC 419: 1926 S 171: 27 Cr LJ 243; *Bhola Nath* v. *E.*, 1939 A 567; *E.* v. *Annappa Bharamganda*, 5 Cr LJ 323: 9 Bom. LR 347; see also *Pritam Hariomal* v. *E.*, 1939 S 185: ILR 1939 K 449.

spondence, entries made by them, and other documents in their possession relative to the main design, will sometimes from necessity be admitted, as steps to establish the conspiracy itself. On this subject it is difficult by its own peculiar circumstances.[1] A conspiracy can be proved by conduct of the accused and other circumstances. A conspiracy can also be inferred from beliefs, associations, activities of the accused and even from statements made in Court.[2]

Conspiracy is the root and specific instances are fruits.— If a specific instance of the particular offence was proved against any accused, that would furnish the best corroboration of the offence of conspiracy, because conspiracy was the root and the specific instances were the fruits.[3]

Evidence which is admissible on a charge of conspiracy.— In regard to the period, within which limits such evidence can be adduced, it may be taken that anything said, done or written of any one of such persons must be after the time when such intention was first entertained by any one of them and before the common intention ceased to exist.[4]

When in a case under Section 120-B of the Penal Code, the prosecution seeks to lead evidence as to the activities of a conspirator, the first question to decide is whether such evidence falls under Section 10 of the Act. If such activity relates to period when the conspiracy was on foot, the evidence falls under Section 10, and in that case it can be used in proof of the conspiracy and also in proof of the participation therein of each conspirator. But that is not the end of the matter, and even when the Court is satisfied that such evidence relates to a period after the conspiracy has ended, the further question that remains is whether such evidence falls under any of the other sections of the Act relating to relevancy of facts. If it does, the evidence is clearly admissible even though it does not fall under Section 10. But in that case what happens is that such evidence applies only to the person against whom it is relevant, and has to be excluded from consideration in proof of the conspiracy itself as well as in proof of the participation therein of the other conspirators. Thus the conduct of each individual conspirator, as evidenced by his acts, words and statements, is evidence against himself, under Section 8 of the Act, irrespective of the time to which it relates. Evidence of such conduct is also relevant under Section 14 for the purpose of showing his criminal intention. It would also be relevant for the purpose of rebutting the defence suggestion that such participation, though proved, was only an innocent participation. Such evidence would be relevant under Sections 8 and 14 of the Act against the individual conspirator whose intention is established, though it would not be usable against the fellow-conspirators if it does not relate to a period covered by Section 10.[5]

In criminal trials on a charge of a conspiracy evidence not admissible under Section 10 of the Evidence Act as proof of the two issues to which it relates viz., of the existence of conspiracy and of the fact that a particular person being a party to that conspiracy is not admissible at all. But it is necessary to appreciate clearly that what is sought to be admitted in such a case is something said or done or written by any one of the conspirators behind the back of others, as being in law attributable to the others and

1. Ibid, p. 1.
2. *Khurai Singh Maharaja Singh v. State*, 1952 Manipur 4.
3. *Sardar Hussain* 1957, SCJ 510.
4. *Sardar Singh v. State of Bombay*, 1957 Cr. LJ 1325.
5. *Sardar Singh v. State of Bombay*, 1957 Cr. LJ 1325.

what is sought to be proved by such evidence taken by itself is existence of the conspiracy as between the alleged conspirators and that a particular person was a party to the conspiracy. It is such evidence that is inadmissible otherwise than under section 10. In normal cases such evidence is admissible against himself and not against others, except where there is relationship of agency or representative character or joint interest.[1]

The existence of the fact of conspiracy must be proved. For that there should be at least two persons. One person alone cannot conspire. There should be *prima facie* evidence of the existence of the conspiracy.[2]

Evidence admissible beyond period of conspiracy: Conspiracy to Commit Criminal Breach of Trust.— In a case of conspiracy to commit criminal breach of trust where the charge specified the period of conspiracy, evidence of acts of co-conspirators outside the period is not receivable in evidence. But in such a conspiracy all evidence which would go to show that certain transactions are bogus and not genuine is certainly admissible under other sections of the Act notwithstanding that such evidence may refer to and narrate the acts of the conspirators beyond the period of conspiracy but within reasonable limits.[3]

Past transactions.— Past transactions unconnected with conspiracy are not admissible in evidence, even if true.[4]

Applicability of the section at the appellate stage.— Just as a trial Judge may admit evidence under Section 10 when he has such a reasonable ground of belief as is postulated, yet he must reject it if at a later stage of the trial that reasonable ground of belief is displaced by further evidence. So the appellate Court, which has from the outset refused that belief, must refuse also to admit evidence which was admissible only upon the footing of the belief being entertained It is not the correct view that in a conspiracy charge evidence once admitted remains admissible evidence whatever new aspect the case may bear, whether in the original or the appellate Court.[5]

Confession of a co-accused or statement of an approver whether admissible under Section 10 as the communication of a conspirator?— Conspiracy means something more than the joint action of two or more persons to commit an offence; if it were otherwise, Section 10 would be applicable to any offence committed by two or more persons jointly, and with deliberation, and would thus import into a trial a mass of hearsay evidence which the accused person would find it impossible to meet.[6] The section is intended to admit evidence of communications between different conspirators while the conspiracy was going on, with reference to the carrying out of the conspiracy, but it is not intended by this section to admit in evidence the confession of a co-accused, and put it on the same footing as a communication passing between conspirators, or between a conspirator and other persons, with reference to the conspiracy.[7]

---

1. *Sardul Singh* v. *State of Bombay*, 1957 Cr. LJ 1325.
2. *Topandas* v. *State of Bombay*. AIR 1956 SC 33.
3. *Sardul Singh* v. *State of Bombay*, 1957 Cr. LJ 1325.
4. *Rameshwar* v. *S.A.*, 1965 Cal. 38.
5. *H.H.B. Gill* v. *The King*, 1948 PC 128: 52 CWN 567: 49 Cr LJ 593: 75 IA 41: 1948 ALJ 256: 50 BLR 487.
6. *Nogendrabala Debee* v. *E.*, 4 CWN 528.
7. *E.* v. *Abani Bhusan Chakrabutty*, 38 C 169: 8 IC 770: 11 Cr LJ 710; *Kusir Bap, etc.* v. *E.*, 21 IC 378: 14 Cr. LJ 586: 18 CLJ 590; *see* also *Pritam Hariomal* v. *E.*, 1939 S 165: ILR 1939 Kar. 449; but *see Baliram Singh* v. *E.*, 1939 N 295: ILR 1941 N 506.

Where, however, a conspiracy is proved, the confession of one conspiring accused will, apart from Section 30 of the Evidence Act, be admissible against the other conspiring co-accused.[1] Section 10 does not cease to apply to "anything said, done or written" by a conspirator simply because to apply to "anything said, done or written" by a conspirator simply because that conspirator gives evidence as an approver.[2]

Confession of a deceased conspirator.— A confessional statement made by a deceased conspirator, after he had rendered himself liable to criminal prosecution, is admissible in evidence against a co-conspirator, when general evidence of the existence of a conspiracy has already been given.[3]

In reference to their common intention.— This expression is very comprehensive and it appears to have been designedly used to give it a wider scope than the words "in furtherance of" in the English Law; with the result, anything, said, done or written by a co-conspirator, after the conspiracy was formed will be evidence against the other before he entered the field of conspiracy or after he left it. Another important limitation implicit in the language is indicated by the expressed scope of its relevancy. Anything so said, done or written is a relevant fact only "as against each of the persons believed to be so conspiring as well as for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it." It can only be used for the purpose of proving the existence of conspiracy or that the other person was a party to it. It cannot be used in favour of the other party or for the purpose of showing that such a person was not a party to the conspiracy.[4]

The statement, act or writing of conspirator must, in order to be admissible against others, have reference to common intention. Statements made or acts done by others after the arrest of the accused whether admissible against the accused?—

The effect of Section 10, Evidence Act, is that once the prosecution has established that two or more persons had conspired together to commit an offence by entertaining a common intention to commit that offence, anything said or done by any one of them on or after that date until the object of the conspiracy had been accomplished, is evidence not only against himself but also against each of the other conspirators, not only for the purpose of proving the existence of the conspiracy but also for the purpose of showing that they were parties to such conspiracy. The ordinary rule of criminal law is that one man cannot be made responsible for the acts and statements of another. Section 10, Evidence Act, is an exception to this rule, and says that when there is, evidence of concerted action in furtherance of a common intention to commit a crime, everyone concerned in the conspiracy must be held to be acting as the agent of the rest of them so as to make them commonly responsible for his actions. In other words, as soon as the Court has reasonable grounds to believe that there is identity of interest and community of purpose between a number of persons, anything said or done by any one of the conspirators must be held to be the word or act of the others if it has a relation to the object of the conspiracy.[5] The fact made admissible by Section 10 is anything said, done or

---

1. *Ram Prasad, etc.* v. *E.*, 2 Luck 631: 106 IC 721: 1927 O 369: 29 Cr LJ 129; *Satdeo* v. *E.*, 1936 O 164: 150 IC 919: 37 Cr LJ 182; *Kunjalal Ghose* v. *E.*, 1935 C 26: 155 IC 261: 36 Cr.LJ 678: 38 CWN 1015; but *see Dengo Kandero* v. *E.*, 1938 S 94: 175 IC 99: 39 Cr.LJ 545.
2. *Vishindas Lachmandas* v. *E.*, 1944 S 1: ILR 1943 Kar. 449: 212 IC 56 (FB).
3. *Kunjalal Ghose* v. *E.*, 1935 C 26.
4. *Bhagwan Swarup* v. *Maharashtra*, (1964) 2 SCR 378: (1964) 2 SCJ 771.
5. *Badri Rai* v. *State of Bihar*, 1958 Cr.LJ 1434: 1959 SCJ 117.

written by a conspirator. "Any thing said" would include the statements made speeches delivered, or declarations made; "anything done" must be some act done and not merely the intention or knowledge of the person; "anything written" would include manuscript, whether signed or unsigned, written by a person, and matter transcribed by him on a typewriter.[1] Section 10 of the Evidence Act applies only to things said or done after the time when the common intention was first entertained by any one of the conspirators.[2] In English law, statements of a conspirator which are not in furtherance of the common purpose, *e.g.*, where they are mere narratives, descriptions or admissions of past events, are not admissible against others.[3] Though the rule in Section 10 of the Evidence Act is expressed in terms slightly different from those in which the corresponding rule of the English law is expressed.[4] It has been held that narrative coming from conspirators as their past acts cannot be said to have reference to their common intention, as the word "intention" implies that the act intended is in the future, and that the section makes relevant only such statements as are made by a conspirator with reference to the future.[5] Therefore, where in a charge of conspiracy the prosecution sought to prove an alleged statement of an absconding accused to the approver that they had shot a police officer, and that a pamphlet should be written and distributed to start a propaganda in furtherance of the objects of the conspiracy, it was held that the narrative as to the shooting incident was not admissible, but that it was permissible to prove what the conspirators intended to do in future by publishing the pamphlet, and what the version of the incident was if the pamphlet was to contain an account of the incident.[6] The words of Section 10 are not capable of being widely construed so as to include a statement made by one conspirator in the absence of the other with reference to past acts done in the actual course of carrying out the conspiracy after it has been completed. The words "common intention" signify a common intention existing at the time when the thing was said, done or written by one of them. Things said, done or written while the conspiracy was on foot are relevant as evidence of the common intention, once reasonable ground has been shown to believe in its existence. But it would be a very different matter to hold that any narrative or statement or confession made to a third party after the common intention or conspiracy was no longer operating and had ceased to exist is admissible against the other party. There is then no common intention of the conspirators to which the statement can have reference.[7] A statement made by any of the conspirators after the common intention of the conspirators had been achieved, would not be admissible under Section 10 of the Act.[7] A agreed to supply B with only one packet of explosive, enough for the purpose of blowing up a railway bridge. B along with C utilized the explosive for the purpose of blowing up the aforesaid bridge. But the attempt proved unsuccessful. On the next day B sent a letter to A describing the

---

1. *Jhabwala, etc.* v. *E.*, 145 IC 481: 1933 A 690: 34 Cr.LJ 957.
2. *Htin Gyaw, etc.* v. *E*, 6 R 6: 109 IC 491: 1928 R 118: 29 Cr.LJ 555.
3. Phipson, Ev, 7th Ed. 89; Taylor, § 594. For the American rule which follows the English rule See 22 CJ 399.
4. *See* notes to this section under the heading "Difference between English and Indian Law."
5. *Pritam Hariomal* v. *E*, 1939 S 185: ILR 1939 Kar. 449; *E.* v. *Vaishampayan*, 55 B 839: 1932 B 56: 134 IC 1238: *Dengo Kandero* v. *E.*, 1938 S 94: 175 IC 99: 39 Cr.LJ 545.
6. *E.* v. *Vaishampayan*, 55 B 839: 134 IC 1238: 1932 B 56: 38 Cr.LJ 76.
7. *Mirza Akbar* v. *E*, 1940 PC 176: 190 IC 233: 67 IA 336; *Balabhadra Misra* v. *Nirmala Sundari Devi*, 1954 Orissa 23; *See* also *Achhailal* v. *E*, ILR 25 P 347.

unsuccessful attempt to damage the bridge and asked A to say if he could supply some further explosive substances. It was held, that the letter was not admissible against A as the common intention had ceased to exist after the attempt to blow up the bridge had failed and the letter was written at the time when the conspiracy had come to an end.[1] As on the arrest of a conspirator the conspiracy *qua* him comes to an end, the statements by other conspirators after his arrest are not admissible against him.[2] Similarly where the acts of a conspirator, subsequent to the arrest of the accused, were sought to be given in evidence, it was remarked that when persons have been taken into custody, and are in a condition which makes it impossible for them to act in aid or furtherance of the conspiracy, that is, when so far as they are concerned, the conspiracy has come to an end, the acts of persons who were members of the conspiracy and are still free to act in pursuance thereof, are not admissible as against them, since these acts can no longer be deemed to be the acts of co-conspirators.[3] Section 10 of the Evidence Act refers to things said or done by a conspirator in reference to the common intention. Statements made by an accused person during a trial can hardly be regarded as statements by him as a conspirator in reference to the common intention of the persons who were members of the conspiracy; they are, therefore, not admissible under this section.[4] A statement made by a conspirator after his arrest is not admissible against others under Section 10 though it may be admissible under Section 30 as the confession of a co-accused.[5] If the conspirator who writes a letter to another conspirator is under arrest at the time he writes the letter, the letter will not be admissible against the other conspirators, if the letter is in the nature of a mere confession; but if the letter refers to some present or future scheme relating to the conspiracy, the letter will be admissible against the other conspirators under Section 10.[6] A statement made to the police by an accused conspirator is inadmissible under Section 25, Evidence Act, as well as under Section 162, Criminal Procedure Code.[7] A letter written by conspirator, though not written in support or furtherance of the conspiracy, would be admissible if it was written in reference to the conspiracy.[8]

Statements made or acts done by others before the accused joined the conspiracy.— So far as their strict relevancy is concerned, it is immaterial whether the acts were done and the declarations made in the absence of the prisoner and without his knowledge, or before he joined, or after he left, the conspiracy.[9] It is not necessary that the accused should have joined the conspiracy from its inception.[10] It makes no difference at what time the party accused is proved to have entered into a conspiracy or combination; because every one who agrees with others to effect a common illegal purpose, is generally considered in law as party to every act which either had before been done, or may afterwards be done, by the confederates, in furtherance of the common design. One or two individuals may have concocted the scheme, but all who afterwards join in

---

1. In *re. N. Ramaratnam*, 1944 M 302: 57 MLW 100: 1944 MWN 57.
2. *Sital Singh, etc. v. E*, 46 C 760: 54 IC 53: 21 Cr.LJ 5; *Achhaila l v. E*, ILR 25 P 347.
3. *Pulin Behary Das, etc. v. E*, 16 IC 257: 13 Cr.LJ 609: 15 CLJ 517 (FB).
4. *Kunwar Sen, etc. v. E*, 141 IC 192: 1933 O 86: 34 Cr.LJ 124.
5. *Baliram Singh v. E*, 1939 N 295.
6. *Abdul Aziz v. E*, 137 IC 317: 1932 C 557: 33 Cr.LJ 456; *See also Kunjalal Ghose v. E*, 38 CWN 1015.
7. *Fritam Harnomal v. E*, 1939 S 185: ILR 1939 Kar. 449.
8. *Bholanath v. E*, 1939 A 567.
9. *See* the illustration to Section 10.
10. *Barindra Kumar Ghose v. E*, 37 C 467: 7 IC 359: 11 Cr.LJ 453; *E v. Abani Bhusan Chakrabutty*, 38 C [illegible]

carrying it out are equally guilty with the originators. Neither does it matter whether the acts were done, or the declarations made, in the presence or in the absence of the accused, but everything said or done by any one of the conspirators or accomplices in furtherance of the common object is evidence against each and all of the parties concerned, whether they are present or absent, and whether or not they were individually aware of what was taking place.[1] Facts which show how the conspirators were first thrown together and formed the conspiracy are admissible to show how the conspiracy came into existence.[2]

Statement by a conspirator that another conspirator mentioned the accused as a co-conspirator.—A document written by a deceased female conspirator in which she described her conversations with another conspirator in which she said that he told her that among his revolutionary friends was the accused, to whom he was accustomed for guidance, is admissible, as the statement, if proved, is itself a relevant fact by virtue of Section 10. The statement by the writer is a relevant fact and, being admissible under Section 10, is evidence against all the conspirators, including the accused, to the effect that the third person made his statement concerning the accused.[3] Any statement made by one conspirator to another indicating in any way the complicity of a third conspirator is a relevant fact and such statement may be admitted. Whether it should be believed or not is another question.[4]

Can one person be convicted of conspiracy.— Where more than two persons charged in conspiracy, it does not follow, that all of them must be convicted, or all must be acquitted. But, if all are tried jointly, one cannot be convicted if the other or all the others are acquitted. In *Bimadhar Pradhan* v. *State of Bombay*,[5] one person was convicted of conspiracy, while the other enjoyed immunity on his turning approver.

It is not necessary that all conspirators must be convicted or acquitted.

Where more than two persons are charged with a conspiracy, it does not follow that either all the conspirators must be convicted or they must all be acquitted.[6] If a defendant is tried alone for conspiracy, he may be convicted although his co-conspirators do not appear, provided it is established that the latter were also guilty,[7] but if all are tried jointly, one defendant cannot be convicted if the other, or all of the others, are acquitted.[8]

Illustration.—The illustration shows how a number of apparently independent acts by different persons at different times and places may be joined together for the purpose of establishing the existence of a common design as also for proving that the several persons were parties to the conspiracy.

The way that the words 'and to prove A's complicity in it' come into the illustration is not quite in accordance with commonsense or with the section as I read it. I am unable to see how what B did in Europe and C in Calcutta and so forth can *per se* possibly touch the question of A's complicity which can only be shown by acts, or, A, being otherwise shown to be a member of the conspiracy by acts of B,C and so forth implicating him. Other acts of B, C, and rest seem to me capable as regards A only of adding proof of the existence and

1. Taylor, § 592.
2. *Sital Singh, etc.* v. *E*, 46 C 700: 54 IC 53: 21 Cr.LJ 5.
3. *E* v. *Surjya Kumar Sen*, 147 IC 32: 1934 C 221: 35 Cr.LJ 334 (FB).
4. *Shyam Kumar Singh* v. *E.*, 1941 O 130 : 191 IC 466 : 42 Cr. LJ 165.
5. *Bimadhar Pradhan* v. *State of Bomay*, AIR 1956 SC 469.
6. *Barindra* v. *R*, 14 CWN 1114: 37 C 467.
7. *Beechey* v. *R.*, 85 LJPC 32.
8. *R* v. *Plumner*, 1902, 2 KB 339: *R* v. *Manning*, 12 QBD 214.

nature of the conspiracy. Of course, in framing a law the Legislature can lay it down that any given thing is 'relevant' for the purpose of proving such and such; but I think I am justified in rejecting the idea that the Legislature intended by a provision of the law of evidence, to create a barren, useless and merely nominal relevancy. Anyhow one sees, after an analysis of this kind, that the question is not very important, it seems not to matter much whether a thing is technically relevant against A or not, if, as a matter of fact, from the nature of things, it cannot of its own force help towards the conviction of A". Johnston, J. in *Balmokand* v. *Emperor*.[1]

The illustration shows how a number of apparently independent acts done by different persons may be pieced together for the purpose of proving the existence of a common design as also for the purpose of implicating the several persons engaged in it. The evidence of any such act may when given, affect only one of such persons charged; it cannot be used against other persons unless and until the fact that they were acting in reference to an object common to all of them is established.[2]

Participation in conspiracy: expert testimony as to hand writing based on photographs: Sections 10, 47, 120-B I.P.C.— It is not possible to accept the contention that expert testimony as to handwriting can only be based upon the examination of the originals and not photographs. It is not correct to say that there is nothing in the Evidence Act which makes a photograph of a disputed writing the basis of conviction or that expert testimony cannot be invited about it..... Detection and proof of crime will be rendered not only not easy but sometimes impossible if conspirators begin to correspond through photographs of letters instead of originals. Many conspirators will then remain unproved because one of the usual methods is to intercept a letter, take its photograph and then to send it on and wait for the reply. But evidence of photographs to prove writing or handwriting can only be received if the original cannot be obtained and the photographic reproduction is faithful and not faked or false. In the present case no such suggestion exists and the originals having been suppressed by the accused, were not available. The evidence of photographs as to the contents and as to handwriting was receivable.[3]

Conspiracy to hush up case of corruption.— A and B approached a police inspector to hush up a case against them and A offered him Rs. 500 saying that B had sent him with the money as formerly proposed. The statement by A is admissible also against B to prove that B had constituted A his agent, as also to prove the existence of the conspiracy.[4]

Charge of cheating.—No charge of conspiracy was made against the fourth accused and his action as a mere clerk is capable of a different interpretation unless the court can attribute to him an intention to cheat the firm as did the other accused. On this part there is no evidence whatever. The only evidence is that being a clerk he wrote some of the invoices and took them to the firm... If a charge of conspiracy had been made, this evidence might have been relevant under Section 10 of the Evidence Act but as no charge of conspiracy was made the charge of cheating by the fourth accused had to be made out on good and proper evidence.[5]

Charge under Section 120-B I.P.C. not necessary.—It is no answer in law to say that unless the charge under Section 120-B had been framed, the act or statement of one

1. *Balmokand* v. *E.*, per Johnston J. 1915 Lah 16, 28 IC 738.
2. Cunningham pages 29-30.
3. *Laxmipat Choraria and others* v. *Maharashtra*, (1968) 2 SCJ 589.
4. *Badri* v. *S.A.*, 1958 SC 953: 1959 SCR 1141.
5. *Madan Lal Ramchandra Daga* v. *Maharashtra*, AIR 1968 SC 1267.

could not be admissible against the other Section 10 of the Evidence Act has been deliberately enacted in order to make such acts and statements of a co-conspirator admissible against the whole body of conspirators, because of the nature of the crime.[1]

Documents in the possession of a conspirator when admissible against co-conspirators.—If, after the arrest of a conspirator, papers are found on the person or at the lodgings of a co-conspirator, they will be admissible against the former if there is evidence that they existed previously to the arrest of the former. If there happens to be no such evidence, they will be rejected, as a prisoner cannot be responsible for acts or writings which possibly may not have existed until after the common enterprise was, so far as he was concerned, at an end. But if their previous existence be established, either by direct proof or by strong presumptive evidence, no objection to their admissibility can prevail.[2] The existence of a secret cypher code in the possession of a person charged with conspiracy, which sets forth the names and addresses of other persons charged with such conspiracy, and contains words and names having a revolutionary significance, is in itself good evidence for supposing that the persons named therein have conspired to commit an offence. Such cypher code is not an act done or a thing written by one person, which is to be attributed vicariously, and by provisions of Section 10 of the Evidence Act, to a person charged so that he may be held responsible for it, but is substantive evidence of conspiracy.[3] It has, however, been held in some cases that a document, of which the writer is not known, found in the possession of a conspirator is not by itself admissible for the purpose of proving the truth of its contents as against the other accused. The fact of possession is merely evidence to show that the conspirator, in whose possession it was found, had received and preserved it.[4] The fact of possession of seditious literature written before the formation of the conspiracy is admissible, apart from Section 10, to ascertain the object of the conspiracy.[5] Entries in note-books and *jama kharch* entries in books of account made by a conspirator are admissible against his co-conspirators to show their participation in the conspiracy,[6] but memoranda of payments made by one conspirator to another after the object of the conspiracy had been achieved are not admissible.[7]

Copies of intercepted letters.—Copies made from the letters which were sent by the accused to his co-conspirators but were intercepted and re-posted are admissible in evidence.[8]

Evidentiary value of acts, statements or writings admitted under this section.—The acts, statements or writings of a conspirator may be given in evidence for the purpose of proving the existence of the conspiracy, as well as for showing that the accused was a party to it.[9] The evidentiary function of facts which are admitted in evidence under this

---

1. *Badri Raj* v. *State of Bihar*, 1958 Cr.LJ 1434: 1959 SCJ 117.
2. Taylor, § 595.
3. *Jitendranath* v. *E.*, 1939 C 99: 169 IC 977: 38 Cr.LJ 818 (SB); *Indra Chandra Narang, etc.* v. *E.*, 116 IC 756: 1929 P. 145: 30 Cr.LJ 646 (FB).
4. *Jhabwala, etc.* v. *E.*, 145 IC 481: 1933 A 690: 34 Cr.LJ 967; *see* also *Jitendranath* v. *E.*, 1937 C 99: 169 IC 977: 48 Cr.LJ 818 (SB).
5. *Monindra Mohan Sanyal, etc.* v. *E.*, 46 C 215: 46 IC 152: 19 Cr.LJ 696.
6. *Supdt. and Remembrancer of Legal Affairs, Bengal* v. *Mon Mohan Roy, etc.*, 35 IC 999: 17 Cr.LJ 439; *see* also Taylor, § 594.
7. Taylor, § 594.
8. *Manabendra Nath Roy* v. *E.*, 1933 A 498; *see* also *Jitendranath* v. *E.*, 1937 C 99: 169 IC 977: 38 Cr.LJ 818 (SB).
9. *Indra Chandra Narang, etc.* v. *E.*, 116 IC 756: 1929 P. 145: 30 Cr.LJ 646 (FB); *Kalil Munda* v. *E.*, 28 C

section is well illustrated by the illustration to this section; but it has been remarked about this illustration that it is inconsistent with the terms of the section, and that the words "and to prove his complicity in it" which occur in the illustration are not quite in accordance with common sense, or with the section.[1] Where an agreement exists between two parties in pursuance of which speeches are made, such speeches are admissible to prove the object of the conspiracy.[2] The fact of possession of seditius literature, written before the formation of the conspiracy, is admissible apart from Section 10, to ascertain the object of the conspiracy.[3] Entries in books of account by one conspirator are admissible against other conspirators to show their participation in the conspiracy.[4] The weight which is to be attached to evidence admitted under this section would depend upon the nature of the evidence and the circumstances of each case. The section cannot be applied so as to convict a person by admission of what has been said, or done, or written by others.[5] The mere circumstance that a book of an objectionable character is present in the library of an individual or association does not necessarily justify the inference that the teachings of the book are adopted by persons having access to it.[6]

Statements and acts of persons conspiring to commit an actionable wrong whether admissible against each other in civil cases?—Although in criminal cases it is the agreement which is the essential element, and in civil cases the resultant damage,[7] yet the acts and declarations of co-trespassers in civil actions, and indeed of all persons combined for a common object, whether civil or criminal,[8] are governed by the same rules. The acts and declarations of joint tort-feasors are not, however, reciprocally admissible, unless combination for a common purpose be proved.[9]

11. When facts not otherwise relevant become relevant.—Facts not otherwise relevant are relevant—

(1) if they are inconsistent with any fact in issue or relevant fact;

(2) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

Illustrations

(a) The question is whether *A* committed a crime at Calcutta on a certain day.

797; *Kudambini Dassi* v. *Kumudini Dasi*, 30 C 983; *Lilaram Ganganmull*, 1924 M 805 : 81 IC 817: 25 Cr.LJ 1041; *Balmokand* v. *E.*, 17 PR 1915 Cr.: 28 IC 738: 16 Cr.LJ 354.

1. *Balmokand* v. *E.*, 17 PL 1915 Cr.: 28 IC 738: 16 Cr.LJ 354.
2. *Chidambaram Pillai* v. *E.*, 32 M 3.
3. *Monindra Mohan Sanyal, etc.* v. *E.*, 46 C 215: 46 IC 152: 19 Cr.LJ 696.
4. *Supdt. and Remembrancer of Legal Affairs, Bengal* v. *Mon Mohan Roy, etc.*, 35 IC 999: 17 Cr.LJ 439.
5. *Nogendrabala Debee* v. *E.*, 4 CWN 528; *Jagdish Das* v. *E.*, 1938 P. 497: 1938 PWN 403: 178 IC 324: 40 Cr.LJ 27.
6. *Pulin Behary Das, etc.* v. *E.*, 16 IC 257: 3 Cr. LJ 609 : 15 CLJ 517 (FB).
7. *Quinn* v. *Leathem*, (1901) AC 495; *Templeton* v. *Laurie, etc.*, 25 B 230.
8. *Pilot* v. *Graze*, 52 JP 311.
9. *Daniels* v. *Potter*, M & M 501. Phipson, Ev., 7th Ed., 90-91.

The fact that, on that day, *A* was at Lahore is relevant.

The fact that, near the time when the crime was committed, *A* was at a distance from the place where it was committed, which would render it highly improbable, though not impossible, that he committed it, is relevant.

(b) the question is, whether *A* committed a crime.

The circumstances are such that the crime must have been committed, either by *A,B,C, or D*. Every fact which shows that the crime could have been committed by no one else, and that it was not committed by either *B,C, or D*, is relevant.

COMMENTARY

Principle.—Section 11 declares the relevancy of a class of facts which in themselves are not relevant, but which acquire relevancy by reason of their connection with some relevant fact on which the prosecution relies for the purpose of proving its case against the accused. This class of facts is highly valuable to the accused in support of his defence, because they tend, together with the explanation offered by the accused of the circumstances appearing in the evidence against him, to expose the infirmity of the prosecution case and to demolish the inferential structure on which that case rests. The accused can bring such a fact on record either by suggesting the existence to the prosecution witnesses in their cross-examination, or by proving it through his own witnesses. Whenever any such fact is sought to be produced by the accused the first question is whether it is relevant. The test for that is the one laid down in Sections 9 and 11 of the Act, namely, whether that fact is such as to rebut or to be inconsistent with the prosecution case, or such as to render the existence of that case improbable or its non-existence probable. If the fact so sought to be produced passed this test, it is relevant, if not, it is not relevant.

Scope.—While the seventh section defines the meaning of the term 'relevancy' in quasi-scientific language, the present section contains a statement in popular language of what in the former section is attempted to be stated in scientific language. The practical effect of those two sections is to make every relevant fact admissible as evidence.[1] This section attempts to state in popular language the general theory of relevancy and may, therefore, be described as the residuary section dealing with the relevancy of facts.[2]

The construction of Section 11 must be inferred from the words of the section. The section requires that the irrelevant fact to be introduced in evidence in order to be relevant must be inconsistent with the fact in issue or relevant fact or makes the existence or non-existence of such fact highly probable which means very high degree of probability is required. Facts which are of merely probative force cannot be offered in evidence under the section.[3]

Facts which make the existence of a fact in issue or a relevant fact highly probable

1. Markby Ev. 17. 18.
2. *Rangayyan* v. *Innasimuthu*, 1956 Mad. 226, 230: (1955) 2 MLJ 687.
3. *State* v. *Lakshmandas Chaganlal Bhatia*, 69 Bom. LR 808.

or improbable are themselves relevant.—According to this section, a fact is relevant when by itself, or in connection with other facts, it makes the existence or non-existence of a fact in issue or a relevant fact highly probable or improbable. The section attempts to state in popular language the general theory of relevancy and may, therefore, be described as the residuary section dealing with the relevancy of facts. "The words of Section 11 are very wide, and it may be safely laid down that all evidence which would be held to be admissible by English law would be properly admitted under this section of the Act.[1] Collateral facts which, by way of contradiction, are inconsistent with a fact in issue or another relevant fact, i.e., which make the existence of a fact in issue or a relevant fact impossible or highly improbable, or which, by way of corroboration, are consistent with the existence of a fact in issue or a relevant fact, i.e., tend to render the existence of a fact in issue or a relevant fact highly probable, are themselves made relevant by the present section.[2] The section has been expressed in a very wide language, and if construed widely, the question of valuation, non-passing of consideration, absence of necessity for sale and matters of such nature will be relevant. But it does not admit of collateral facts which have practically no connection with the main fact.[3]

Highly probable.—The sort of facts, the section is intended to include, are those which either exclude or imply more or less distinctly the existence of facts sought to be proved. As already stated, there is a distinction between the existence of a fact and a statement as to its existence. It is the former only that is relevant under this section. The words "highly probable" in this section point out that the connection between the fact in issue and the collateral fact sought to be proved must be so immediate as to render the co-existence of the two highly probable. The admissibility of a particular piece of evidence offered must be so closely connected with and in fact must depend on the weight to be attached to that piece of evidence, if it is taken into consideration.[4] The mere physical presence of the accused in close proximity to the object cannot be an incriminating circumstance. Possession of a hidden firearm alone without knowledge will not impute an offence under the Arms Act.[5] In a case of conspiracy close association of the accused with the approver was held to be relevant, under this section as making the existence of the conspiracy highly probable.[6]

Degree of probability between the fact to be proved and the fact sought to be given in evidence.—"Section 11 of the Evidence Act is no doubt expressed in terms so extensive that any fact which can, by a chain of ratiocination, be brought into connection with another, so as to have a bearing upon a point in issue, may possibly be held to be relevant within its meaning. But the connections of human affairs are so infinitely various and so far-reaching, that thus to take the section in its widest admissible sense would be to complicate every trial with a mass of collateral inquiries limited only by the patience and means of the parties. One of the objects of a law of evidence is to restrict the investigations made by Courts within the bounds prescribed by general convenience, and this object would be completely, frustrated by the admission, on all occasions, of every circumstance on either side having some remote and conjectural probative force, the precise amount of

1. *Q.E.* v. *Vajiram*, 16 B 414 430, per Telang, J.
2. *Khaver Sultan* v. *Rukha Sultan, etc.*, 6 Bom. LR 983.
3. *Rajendra Singh* v. *Ramganit Singh*, 1954 P 556.
4. *Special Land Acquisition Officer* v. *Lakhamsi*, 61 Bom LR 1032.
5. In re *K. Thimma Reddi*, 1957 Cr.LJ 1091.
6. *Emperor* v. *Wahiduddin*, 1930 Bom. 157: ILR 54 Bom. 524: 127 IC 189.

which might itself be ascertainable only by a long trial and a determination of fresh collateral issues, growing up in endless succession as the inquiry proceeded. That such an extensive meaning was not in the mind of the Legislature seems to be shown by several indications in the Act itself. The illustrations to Section 11 do not go beyond familiar cases in the English law of evidence,"[1] So that a collateral fact may be admissible under this section it must itself be established by reasonably conclusive evidence, and it must, when established, afford a reasonable presumption as to the matter in dispute.[2] The words "highly probable" indicate that the connection between the fact to be proved and the fact sought to be given in evidence under section 11 to prove it must be so immediate as to render the co-existence of the two highly probable.[3] The section makes admissible only those facts which are of great weight in bringing the Court to a conclusion, one way or the other, as regards the existence or non-existence of the fact in question.[4] The admissibility under this section must, in each case, depend on how near is the connection of the facts sought to be proved with facts in issue and to what degree do they render facts in issue probable or improbable when taken with the other facts in the case.[5] The facts which the section was intended to include are facts which either exclude or imply, more or less distinctly, the existence of the facts sought to be proved.[6]

Court's discretion in admitting evidence under this section.—Some degree or latitude has been designedly left in the working of the section on account of the variety of matters to which it might apply.[7] When a fact is sought to be given in evidence under this section on the ground that it makes the existence or non-existence of a fact in issue or relevant fact highly probable or improbable, the Court has a discretion in admitting or rejecting the evidence; and the Appellate Court will not interfere with any reasonable use of this discretion.[8] While admitting or rejecting such evidence, the Court will bear in mind the closeness of the connection of the degree of probability or improbability that exists between the fact to be proved and the fact sought to be given in evidence to prove it. The answer to the question, to what extent is the admission of the evidence inconsistent with principles enunciated elsewhere in the Act, is another factor which will affect the Court's discretion in the matter.[9] Of course, no Court will reject evidence of a fact which is sought to be given in evidence on the ground that it is inconsistent with the existence of another fact in issue or relevant fact.

Is the section controlled by the more specific provisions of the Act?—It has been held in some cases that the general provisions of Section 11 are controlled by, and are subject to, the more specific provisions on the subject if enacted elsewhere in the Act.[10]

---

1. *R.* v. *Parbhudas Ambaram etc.*, 11 Bom. HCR 90, 91, per West, J.; see also *E.* v. *Panchu Das*, 47 C 671: 58 IC 929; 21 Cr.LJ 849; 31 CLJ 402 (FB); *Ambica Charan Kundu, etc.* v. *Kumud Mohan Chaudhury, etc.*, 110 IC 521: 1928 C 893.
2. *Khaver Sultan* v. *Rukha Sultan, etc.*, 6 Bom. LR 983.
3. *E.* v. *Vyapoory Moodeliar*, 6 C 655, 662; *Jhabwala, etc.* v. *E.*, 145 IC 481; 1933 A 690: 34 Cr.LJ 967; *E.* v. *Panchu Das*, 47 C 671: 58 IC 929; 21 Cr.LJ 849; 31 CLJ 402 (FB).
4. *Lovelock & Lewes* v. *Malabar Timber & Saw Mills Ltd.*, 18 IC 997.
5. *Htin Gyaw, etc.* v. *E.*, 6 R 6: 109 IC 491: 1928 R 118: 29 Cr.LJ 555.
6. Steph. Intr. 160.
7. Steph. Intr. 160-161.
8. See R. v. Parbhudas Ambaram etc., 11 Bom. HCR 90, 94.
9. *Htin Gyaw, etc.* v. *E.*, 6 R 6: 109 IC 491: 1928 R 118: 29 Cr.LJ 555.
10. *Ambica Charan Kundu, etc.* v. *Kumud Mohan Chaudhury, etc.*, 110 IC 521: 1928 C 893; *Mst. Bela Rani, etc.* v. *Mahabir Singh, etc.*, 34 A 341: 14 IC 116; *see* also *Htin Gyaw, etc.* v. *E.*, 6 R 6.

But it is submitted that the proposition cannot be stated quite so broadly, inasmuch as this interpretation of the section will render the section practically unnecessary. The words "facts not otherwise relevant are relevant" which occur in the section clearly show that a fact may become relevant under Section 11, even if it be irrelevant according to the rule which deals specifically with the relevancy of that class of facts to which the fact in question belongs. Thus, as will be seen later,[1] though statements of persons not called as witnesses are only relevant under Sections 17-39, and are inadmissible as hearsay when they do not fall within the provisions of any one or more of those sections, there are cases where such hearsay has been held to be admissible under the present section. Similarly, though the general rule is specifically stated in this Act that an admission cannot be proved in one's own favour, admissions in one's own favour, though not falling without any of the exceptions recognized by Section 21, have been admitted under this Section.[2]

Statements, oral or documentary, of persons not called as witnesses, whether admissible under Section 11? Rule against hearsay how far affected by the section?— The intention of the framer of the Act was that statements of persons not called as witness should be admissible only under that set of sections which specifically deals with the relevancy of such statements, and that a statement which is not admissible under Sections 17 to 39 should not be made admissible under Section 11 merely on the ground that it makes the existence or non-existence of the fact to which it relates highly probable or improbable,[3] and in several decisions the section has been interpreted in that manner. Thus it has been held that a statement of a dead person, or of a person who cannot be called as a witness, cannot be admitted under this section, if it does not fall within any of the various clauses to Section 32.[4] In a case in which there is no reference to this section and in which the High Court had admitted evidence of a tradition in a family on the ground that it was essential for the ascertainment of truth, it was held by the Privy Council that the evidence was hearsay and that since it could not lay any claim in admissibility under Section 32, it was inadmissible.[5] If a statement does not fall within Section 32 it cannot be admissible under Section 11. There is a difference between the existence of a fact and a statement as to its existence. Section 11 makes the existence of a fact and a statement as to its existence. Section 11 makes the existence of facts admissible, and not statements as to such existence, unless, of course, the fact of making that statement is itself a matter in issue.[6] A statement made by a person since dead in a petition for guardianship that a certain person was born on a certain date does not fall within any of the clauses of Section 32, and cannot be admitted under Section 11.[7] A statement of a dead person, though not admissible under Section 32, may, however, become admissible under Section 11 where the material fact is the fact of that person having made the statement and not the truth or falsity of that statement.[8]

---

1. *See* the next paragraph.
2. *See* notes under the heading "admissions in one's own favour may become admissible under Section 11" *infra*.
3. *See* Steph. Intr. 159-163
4. *Sevugan Chettiar* v. *Zumindar Sivaganga*, 1940 M 273: 1939 MWN 841; *Latafat Hussain* v. *Onkar Mal*, 152 IC 1042: 1935 O 41, *Ambica Charan Kundu, etc.* v. *Kumud Mohan Chaudhury. etc.*, 110 IC 521: 1928 C 893; *Mst. Bela Rani, etc.* v. *Mahabir Singh, etc.*, 34 A 341: 14 IC 116; *Q.E.* v. *Surendra Nath Sarkar*, 5 CWN 574, 583.
5. *Sris Chandra Nandi* v. *Rakhalananda Thakur*, 1941 PC 16: 68 IA 34: 193 IC 220.
6. *Mst. Naima Khatun* v. *Basant Singh*, 149 IC 781: 1934 A 406 (FB).
7. *Ram Krishna Sadhukhan* v. *Monindra Mohan Ray*, 27 IC 30.
8. *Ambica Charan Kundu, etc.* v. *Kumud Mohan Chaudhury. etc.*, 110 IC 521: 1928 C 893; *Sethna* v. *Mirza*

It is submitted that the rule that the statement of a dead person, if the statement does not fall within any of the clauses to Section 32, cannot be admitted under Section 11, is not absolute, and its infringement is clearly discernible in some cases. Thus a statement in a will made by a person since deceased that he is the follower of a particular religion has been held to be admissible in evidence, though the statement does not fall within any of the clauses of Section 32.[1] A statement in a petition for grant of probate as to the date of the death of the deceased, made shortly after the death, by a person in a position to know the fact, is admissible under this section, even if it is not covered by Section 32.[2] Similarly, in the case cited[3] it has been held that statements made by deceased persons in old documents as to who constructed a certain house are admissible under Section 11. A statement made by the deceased executant of a document that he intended to take steps to cancel the document has also been held to be admissible under the provisions of the present sections.[4] Statements made by a donor and the widow of the donee that the gift in favour of the latter's husband was fictitious are admissible.[5]

A statement made out of Court by a person who is alive but has not been called as a witness is mere hearsay and cannot, therefore, be admitted as evidence under this section.[6] A statement as to the kind or rate of rent made in an order for the delivery of possession of property is not evidence of the kind or rate of rent,[7] unless the person who made the statement deposes in Court as to the rate or kind of rent.

A previous statement by a witness is not ordinarily substantive evidence, and can be used only to corroborate or contradict his testimony in Court. It is contrary to principle therefore, to admit such statement as evidence in a case under the general provisions of this section. Thus, where a woman mortally wounded and believed to be at the point of death, in her statement to a Magistrate, named a particular person as her assailant, but on being examined in Court as a witness, stated that she could not recognize her assailant, it was held that her previous statement to the Magistrate could not be admitted in evidence under this section against the person whom she had named before the Magistrate.[8]

Recitals of boundaries in ancient deeds.—Recitals in a document are not facts within the meaning of this section and are, therefore, not admissible under it.[9] See notes to Section 32(3) and Section 13.

Bad character inadmissible.—Evidence of bad character of the accused is made irrelevant by Section 54; such evidence cannot, therefore, be admitted under this section on the ground that his bad character makes it highly probable that he committed the offence in question. It is illegal to admit against a person evidence of crime A in order to prove the cognate but unconnected crime B.[10]

Mahomed Shirazi, 9 Bom LR 1047.

1. *Leong Hone Waing* v. *Leon Ah Foon*, 7 R 720: 121 IC 796: 1930 R 42; the statement in this case would also be admissible under Section 14 as bearing on the belief of the deceased.
2. *Lachuman Lal Pathak, etc.* v. *Kamakshya Naryana Singh*, 131 IC 788: 1931 P 224.
3. *Raghunath* v. *Bindeshwari Nandan, etc.*, 82 IC 582: 1924 A 526.
4. *Mir Syed Hasan, etc.* v. *Mst. Taiyaba Begam, etc.*, 26 IC 547.
5. *Ram Bharose* v. *Diwan Rameshwar Prasad*, 171 IC 481.
6. *Munna Lal, etc.* v. *Kameshri Dat*, 114 IC 801: 1929 O 113; *Nehar Bawa, etc.* v. *Kador Bakas Mohammad*, 68 IC 282: 1923 C 290.
7. *Chandra Mohan Talukdar* v. *Sheikh Elim*, 87 IC 512: 1926 C 415.
8. *E.* v. *Abdul Sheikh*, 54 IC 887.
9. *Kallappa* v. *Bhima*, AIR 1961 Mys 160.
10. *R.* v. *Parbhudas Ambaram*, 11 Bom HCR 90; *see* also *E.* v. *Vyapoory Moodeliar*, 6 C 655, 662.

Opinion evidence.—The general rule is that opinion evidence is inadmissible. To this general rule there are some exceptions which are recognized by Sections 45 to 55. Therefore, opinion which is not admissible under those sections which deal specifically with the relevancy of opinion cannot be made admissible under Section 11 on the ground that it makes the existence or non-existence of a fact in issue or relevant fact highly probable or improbable.[1] Judgments, of whatever authority, are after all nothing but opinions as to the existence or non-existence of certain facts. These opinions cannot be regarded to be such facts as would fall within the meaning of Section 11 of the Act unless existence of these opinions is a fact in issue or a relevant fact.[2]

Admissions in one's own favour may become admissible under Section 11.—Admissions may be proved as against the person who makes them, but not by or on behalf of the person who makes them except in three cases mentioned in Section 21.[3] In several cases, however, admissions have been held admissible under Section 11 in favour of their makers also. Thus, where the plaintiff's case was that a certain person had died before a certain date, he was, under this section, allowed to prove a statement made by himself in a mortgage deed that the person in question was dead before the date in question.[4] Similarly, where the question was whether an employee had purchased certain property in his own right, or as *benamidar* for his employer, statements, made by the employee, that he had purchased the property for himself were admitted under this section.[5] Where the question between the parties who were co-owners was a partition between them and whether, under that partition, the defendants came to be in possession of a specific property in lieu of their shares in the other properties, and a petition and a written statement, filed by the defendants in certain previous suits alleging the partition and exclusive acquisition of certain properties, were put in and were objected to as being inadmissible in evidence, it was held that the documents were admissible under Section 11.[6] A recital in a *zarpeshgi* deed describing the land as *zirati* may be admissible under Section 11.[7] A map filed with the plaint in a previous suit was held to be admissible under Section 11, even if it amounted to an admission, because it made the existence of the *chabutra* the subject matter of the suit, as improbable.[8]

Similar unconnected transactions.—Transactions similar to, but unconnected with the fact in issue are in general inadmissible,[9] but where a previous felony is connected with the one under inquiry,[10] or throws light on a relevant state of mind, e.g., intention, knowledge, etc., [11] it becomes admissible. There are also cases where previous or simultaneous similar transactions have been admitted in evidence under Section 11, on the ground that they made the transaction in dispute highly probable.[12]

---

1. *See* Steph. Intr. 160-163.
2. *Kashyap* v. *E.*, 1945 L 23.
3. Section 21.
4. *Sayeruddin Akond, etc.* v. *Samiruddin Akond, etc.*, 72 IC 985: 1923 C 378.
5. *Hariher Prasad Singh etc.* v. *Kesho Prasad Singh Bahadur*, 93 IC 454: 1925 P 68.
6. *Gyanessa, etc.* v. *Moharakhanessa, etc.*, 25 C 210.
7. *Tikdar Kurmi* v. *Lalji Missir, etc.*, 150 IC 884: 1934 P 81.
8. *Gokal Prasad* v. *Mohant Hari Saran Das*, 1947 Oudh 96: 1947 OWN 30: 229 IC 112: 22 Luck 270.
9. Steph. Int. 160-163.
10. Section 6; *R.* v. *Ellis*, 6 Barn. and Cress. 145; *Q. E.* v. *Vajuram*, 16 B 414; *see* also *Q. E.* v. *Noor Mohamed*, 8 B 223.
11. Sections 14 and 75; *E.* v. *Allomaya Hasan*, 28 B 129, *Kalu Mirza* v. *E.*, 37 C 91.
12. *See* notes to Sections 14 and 15.

Similar unconnected previous incidents Sections 11 and 54.—Section 54 cannot be given overriding effect so as to be directly contradictory to the other sections of the Act. The use of evidence of prior transactions which is given by the prosecution must however be confined within its proper and legitimate limits only. The Court cannot merely because there was evidence of similar actions on the accused some previous time, infer that the offence under inquiry must also necessarily have been committed by the accused and to that extent one may with advantage restrict the operation of Section 11 of the Act. If that were not done, under the provisions of the widely worded Section 11, the Court would be invited to hold the accused guilty not by direct evidence regarding the crime charged, but by means of evidence in respect of previous incident.[1]

Sections 11, 13 and 43.—The provisions of Sections 11 and 13 read with Section 43 of the Evidence Act do not come in aid of the petitioners to establish their plea that the judgment of the 1st Additional Assistant Sessions Judge, Vijayawada acquitting accused 2 and 7 for offences relating to the same transaction under which the petitioners have been convicted by the 2nd Additional Assistant Sections Judge, Vijaywada, as accused 2 and 7 were absconding and their case was separated from the other accused, is admissible in evidence.[2]

Instances of probability: inference of the probability of a transaction from the similarity or simultaneousness of another.—It has been mentioned above that similar transactions not connected with the one under inquiry cannot, in general, be given in evidence to prove the latter.[3] A similar transaction may, however, become admissible when it is a part of the transaction under inquiry,[4] or where it raises an inference as to the existence of a relevant state of mind, e.g., intention, knowledge, etc., in which case it becomes admissible for that purpose under the provisions of Sections 14 and 15.[5] An inference as to the existence of one transaction from the similarity of simultaneousness of another has, in many cases, been drawn under the provisions of Section 11. Thus, where the accused were charged with having obtained money from the complainant by falsely representing that they were servants of one Akbari Begum, a wealthy lady of Rampur who was anxious to lend money on easy terms, it was held that, the evidence [illegible], at or about the same time when the accused were alleged to have made such representation to the complainant, they had been making precisely the same representation to a third person, was admissible under Section 11 to corroborate the story of the prosecution and to prove the intention of the accused.[6] Where the question is whether a person is a habitual cheat, the fact that he belongs to an organisation formed for the purpose of habitually cheating in concert, is relevant under Section 11, and it is competent to the prosecution to prove against each person that the members of the gang do cheat.[7] In a prosecution for having conspired to bring false evidence against a person, the fact that the accused had previously instituted an unfounded prosecution against the same person is admissible under Section 11 of the Evidence Act.[8] In proceedings under Section 107, Criminal Procedure

1. *State* v. *Lakshmandas Chaganlal Bhatia*, 69 Bom LR 808.
2. *Bojjagani Moogadu* In re, (1971) 1 ANWR 316.
3. See also *E.* v. *Panchu Das*, 47 C 671: 58 IC 929: 21 Cr. LJ 849 (FB); *R.* v. *Parbhudas Ambaram*, 11 Bom. HCR 90; *E.* v. *Vyapoory Moodeliar*, 6 C 655; but see *Q. E.* v. *Noor Mohomed*, 8 B 223.
4. *R.* v. *Ellis*, 6 Barn. and Cress. 145; *Q. E.* v. *Vajiram*, 16 B 414, 436.
5. See *E.* v. *Ailoomiya Husan*, 28 B 128.
6. *E.* v. *Yakub Ali, etc.*, 39 A 273: 39 IC 673: 18 Cr. LJ 529.
7. *Kalu Mirza, etc.* v. *E.*, 37 C 91: 51 IC 29: 11 Cr. LJ 23.
8. *Htin Gyaw, etc.* v. *E.*, 6 R 6: 109 IC 491: 1928 R 118: 29 Cr. LJ 455.

Code, against a person, incidents in connection with processions which he had led previously are admissible under this section to show the particular line of action which he would probably take in regard to similar processions on subsequent occasions.[1] Where the accused was charged with taking part in a communal riot and dacoity, and evidence was tendered by the prosecution that, on the day after the occurrence the accused attempted to forcibly convert a member of the opposite community and threatened to beat him if he did not agree, it was held that the evidence was admissible as it had no bearing on the charges framed against the accused.[2] Where the question was whether a certain lease was intended to be perpetual, the fact that a number of other leases granted at about the same time and under similar circumstances were intended to be perpetual was held admissible under this section to show that the lease in dispute also was perpetual.[3] On the question whether immovable property was given to the donee by the donor to complete the gift as required by Mohammadan Law, evidence of the fact that possession of movable property covered by the same deed of gift had been given to the donee was held admissible under this section to show that possession of immovable property also had been given to the donee[4] "Where, too, the question is whether a strip of waste land lying between the highway and the enclosed land of the plaintiff belongs to him or to the lord of the manor, the lord may give evidence of acts of ownership on other parts of the waste land between the same road and the enclosures of other persons, although at a distance of two miles from the spot in dispute, and although the continuity of the waste be interrupted."[5] Where the plaintiff sued the defendants to prevent an encroachment by them on the land which the plaintiff stated to be common, statements made by some of the defendants that part of the land between their houses and that of the plaintiff was common were held to be relevant to show that the whole land was common.[6] The ownership of a particular site does not, however, necessarily prove a general proprietary interest in the whole area.[7] Where the history and status of a particular family, which is one of a group, is in question, evidence might be adduced to elucidate the history and status of connected families in the same group, and such evidence is admissible under Section 11 of the Evidence Act.[8] Where the question in issue is whether certain property was dedicated to religious endowments, the circumstances under which gift of one item of property was made are admissible under Section 11 on the question of the dedication of the whole property, provided that such circumstances throw light on the question of dedication.[9] See notes to Sections 14 and 15.

Facts or circumstances which weaken the prosecution case: Effect of all prosecution witnesses being only chance witnesses—If the prosecution case is that a murder occurred in broad daylight in a crowded locality, and the prosecution does not cite or examine a single witness from that locality, but relies only on the evidence of alleged eye-

1. *Satindra Nath Sen Gupta* v. *E.*, 111 IC 396: 1928 C 433: 29 Cr. LJ 844.
2. *Dargahi etc.* v. *E.*, 52 C 499, 507: 88 IC 733: 1925 C 831: 26 Cr. LJ 1213.
3. *Narsing Dyal Sahu* v. *Ram Narain Singh*, 30 C 883: but see *Kamaleshwari Prashad Singh* v. *Kanai Singh, etc.*, 20 IC 171: 17 CWN 1159.
4. *Khaver Sultan* v. *Rukha Sultan, etc.*, 6 Bom LR 983.
5. Taylor, § 323.
6. *Naro Vinayak Patvardhan* v. *Nathari Bin Raghunath, etc.*, 16 B 125.
7. *Ali Khan, etc.* v. *Malik Maidan, etc.*, 78 IC 552.
8. *Sarada Prasanna Roy* v. *Uma Kanta Hazari, etc.*, 50 C 370: 77 IC 450: 1923 C 485.
9. *Bhagwat Prasad, etc.* v. *Bindeshwari Das, etc.*, 1930 ALJ 964.

witnesses who are all chance witnesses who are said to have come on the scene by accident, that is a circumstance which must weigh heavily in favour of the accused.[1]

In a prosecution for robbery, the prosecution case was that the accused appellant was arrested on 29th September, 1973, but his co-accused, had on 27th September, 1973, made an application before the Magistrate that the accused appellant had already been arrested and that he the applicant was also apprehending his arrest. On this the Supreme Court held that the evidence of recovery produced by the prosecution became extremely suspect, although the application does not have much evidentiary value, yet it was relevant under Section 11(2), and in conjunction with other circumstances of the case it threw considerable doubt on the prosecution case of recovery.[2]

Effect of identification made at the parade held after two months.—If a witness has seen an assailant only for a brief space of time, it would be a remarkable feat of memory to be able to identify him after a long space of time such as two months, and suspicion must arise that the suspect must have been pointed out to the witness before the parade. The suspicion becomes all the stronger when as many as three witnesses depose to such identification, and in such a case the value of the identification at the parade gets altogether destroyed.[3]

Effect of a material discrepancy between deposition and Police statement.—If a material witness gives a version in his evidence which is materially at variance with what he had previously stated in his statement to police, the Court would be in error in brushing aside the discrepancy is unimportant. A material discrepancy merits careful consideration in determining whether the witness is truthful and reliance could be placed on his evidence. It is entirely a wrong approach to sweep aside such discrepancies as unimportant.[4]

Effect of inconsistency with medical evidence, improbability, omission in Report and factional rivalry.—When the accused and the deceased admittedly belong to two rival factions such rivalry is as much a ground for giving and fabricating false evidence as it may be a ground of motive, and in such cases Courts should be on their guard against accepting oral evidence as its face value in the absence of corroborative circumstances. Inconsistency of medical evidence with the manner of causing death described by witness is an important circumstance in favour of the accused. Sheer improbability of unnatural character of an incident is a circumstance for consideration when judging the guilt of the accused, when the prosecution evidence consists of eye-witnesses who belong to a faction hostile to the accused. Omission to state the names of the assailants in a telegram sent by an alleged eye-witness immediately after the incident is a matter which must receive its due weight in favour of the accused. Applying these principles to the present case, it was held that the High Court was wrong in interfering with an order of acquittal when the evidence consisted of alleged eye-witnesses whose story was that the accused who were armed with guns and spears felled the deceased from his house by giving spear blows and then gave more blows after he fell on the ground, and yet the medical evidence was that the deceased had no incised wounds but only superficial scratches. The Supreme Court further considered it improbable that armed and desperate men would allow four eye-

1. *Mohinder Singh* v. *State*, 1952 Cr.LJ 1761 : 1950 SCR 821.
2. *Satbir* v. *State of Haryana*, 1981 SC 2074 (para 2).
3. *Muthuswami* v. *Madras*, 1954 Cr.LJ 236 (SC) : 1953 SCJ 69.
4. *Madan Mohan Singh* v. *U.P.*, 1954 Cr.LJ 1656 SC

witnesses to remain on the spot only a few feet away so as to allow them a full view of the whole incident, and not chase them away.[1]

Relevancy of judgments not inter partes.—See notes to Section 13.

Instances of probability; entry or absence of entry.—An entry in a hospital register is, under this section, evidence of the fact that the person mentioned in the entry was in the hospital on the date mentioned in the entry.[2] On the other hand, absence of any entry as to a transaction in a book of account is admissible evidence of the non-existence of the transaction,[3] though the effect to be given to the fact of absence of entry would depend on the general evidence in the case.[4]

Batwara papers.—Batwara papers are admissible against strangers, if at all, only under Section 11.[5]

Other instances of probability.—Where the accused are charged under Arms Act for possession of arms and for conspiracy to commit a dacoity, the fact that one of the accused was seen showing a revolver to another, with whom he was alleged to be conspiring to commit a dacoity, is relevant under Section 11, as being evidence of preparation.[6] A report to the police by a tenant complaining of forcible re-entry by the landlord is relevant to prove that the re-entry was forcible.[7] A letter addressed to the accused and referring to a telegram sent from his office address, though signed in a different name is *prima facie* evidence of the accused having sent the telegram.[8] Copies of printed newspapers containing an account of some proceedings, found in the possession of an accused, are evidence of the fact of the publication of such account in that paper, but are not by themselves evidence of the truth of the facts stated therein, unless in connection with other facts they make the existence or non-existence of the facts mentioned highly probable or improbable.[9] A statement by a person that certain parties are governed by a particular school of Hindu law is admissible under this section if he is a member of a connected family.[10] When an oral tenancy is denied and the sale-deed executed by the alleged tenant in favour of the person suing as landlord is alleged to be bogus, the evidence about the nature of the sale-deed becomes relevant on question of the existence or non-existence of the oral lease.[11]

Resemblance of features in cases involving question of paternity.—See notes to Section 9.

Factors which render the prosecution case improbable: Case of bribery.—The fact that accused has not only rendered no service to the complainant and shown him no favour, but that he has actually done to the complainant a disservice in his official capacity, to the complainant's own knowledge, will render the complainant's story about the offer of a bribe highly improbable. The fact that an alleged eye-witness to the incident

---

1. *Wilayat Khan* v. *State of Uttar Pradesh*, 1953 Cr. LJ 662 SC.
2. *Amolak Ram* v. *E.*, 43 IC 429: 19 Cr. LJ 141.
3. *Kasam* v. *Firm of Haji Jamal*, 76 IC 327: 1924 N 22; *Tara Kumar Ghose, etc.* v. *Kumar Arun Chandra Singh*, 74 IC 383: 1923 C 261; *Imambandi, etc.* v. *Mutsaddi, etc.*, 45 C 878: 47 IC 513: 45 IA 73 (PC); for absence of recital in a document, *see Imrit Chamar* v. *Sidbahi Pandey, etc.*, 17 CWN 108.
4. *Imambandi, etc.* v. *Mutsaddi, etc.*, 45 C 878: 47 IC 513: 45 IA 73 (PC).
5. *Rahim-ud-din Sarkar, etc.* v. *Umesh Chandra Khaswabish*, 87 IC 694: 1926 C 115.
6. *Saroj Kumar Chakravarty, etc.* v. *E.*, 59 C 1361: 1391873: 1932 C 474: 33 Cr. LJ 854.
7. *Habib Ullah Shah* v. *Bakht Bali Singh*, 30 IC 292.
8. *Booth* v. *E.*, 41 C 545: 22 IC 179: 15 Cr. LJ 35.
9. *Pathwala* v. *E.*, 145 IC 481: 1933 A 690: 44 Cr. LJ 967.
10. *Sukdev Charan Java* v. *Mrityunjoy Pal*, 43 CWN 395.
11. *Rashid* v. *Hussain Bakash*, 1943 N 265: ILR 1943 N 340.

of acceptance of bribe is a superior officer who is well known to the accused and that the accused knew about his presence on the spot, is a circumstance which renders the prosecution story improbable.[1]

Effect of improbability.—In a case where the accused was charged with murdering a hefty young man by strangulation during day time in a room in which both were living together, the following facts were held to weigh heavily and in favour of the defence: that there were no visual signs of any struggle inside the room; that the body of the deceased was discovered a mile away from the village, that no immediate hue and cry had been raised either by a witness residing in an adjoining house who said that he had heard the sounds of a struggle, or by the wife of the accused who said she ran up to that witness and told him about the struggle going on inside her house.[2]

Instances of improbability or inconsistency.—A fact is relevant under the first clause of Section 11 if it is inconsistent with a fact in issue or a relevant fact. It is under this clause that the evidence as to *alibi* is admitted. If the charge against a person is that he committed a crime at Calcutta on a certain date, he is entitled to show, to negative the charge against him, that on the day in question he was at Lahore.[3] A statement by a witness for the defence that a witness for the prosecution was at a particular place at a particular time and consequently could not then have been at another place where the latter states he was and saw the accused person, is properly admissible in evidence under Section 11, even though the witness for the prosecution himself may not have been cross-examined on the point.[4] In a trial for rape, the accused may defend himself by showing that he had, for many years, been afflicted with a rupture so great as to render sexual intercourse impossible.[5] Dissimilarity of thumb impressions is relevant to disprove identity.[6] Where the question is whether A lent money to B, the fact that A was in so straitened circumstances that he could not have lent the amount relevant.[7] Where the question is whether a holding is transferable, the fact that during a period of is more than 60 years there had been frequent transfers of the holdings and no change in the terms of the holdings, being inconsistent with the fact that the interest is terminable at will, is admissible under Section 11.[8]

Instances of improbability.—The accused was a Sub-Inspector of Police who was charged under Section 161, I.P.C., for accepting bribe. The circumstances which weighed with the Supreme Court were: 1. That the accused had already recommended the discharge of the complainant from the case under investigation, and this was known to the complainant, 2. That there were material contradictions and discrepancies in the evidence of the prosecution witnesses, 3. That the three officials who were immediately behind the complainant were all known to the accused, and he must surely have recognised them when he turned round and the complainant gave him the money, 4. That in their zeal, the officials had drawn upon their imagination and had touched up their story in an attempt to make it fool-proof.[9]

---

1. *Madan Mohan Singh* v. *U.P.*, 1954 Cr. LJ 1656 SC.
2. *Bihari Singh Madho Singh* v. *Bihar*, 1954 Cr. LJ 1742 SC.
3. Illustration (a) to Section 11.
4. *R.* v. *Sakharam Mukandji, etc.*, 11 Bom. HCR 166; Illustration (c) to Section 153.
5. Best, S. 450.
6. *Q. E.* v. *Faqir Mahomed Sheikh, etc.*, 1 CWN 33.
7. *Dowling* v. *Dowling*, (1860) 10 Ir. CLR 236.
8. *Nidhikrishna Bose* v. *Nistarini Dasi*, 13 BLR 416.
9. *Ramjanam Singh* v. *State of Bihar*, 1956 Cr. LJ 1254 SC.

Effect of an omnibus statement involving all present in an offence.—When a number of accused are charged with the offence of rioting and a witness makes an omnibus statement involving all of them in a particular incriminating act, by using some such words "the accused raised their sticks and threatened me", it is unsafe to rely on such a statement. Therefore such expressions that "accused", "they all", "the attackers", etc., should normally not be taken literally or at their face value in the absence of further particulars showing the actual part played by each of the accused covered by such wide-sweeping statements.[1]

Effect of omission to give the name of the accused in the F.I.R.—The fact that a First Information Report does not contain the names of the accused or of the eye-witnesses is normally a circumstance of importance in favour of the accused. But in the present case it was held that such omission lost much of its significance because the F.I.R. was filled in on receipt of a written report sent by a local Police-patil who lived in a different village from that where the offence occurred, and the Patil himself had received information of the offence from another person who ran up to him, and that person himself was not an eye-witness.[2]

Effect of circumstances raising grave suspicion.—The three eye-witnesses deposed that the accused shot at the deceased from a distance of about 25 feet when he was attempting to run away. Three features of grave suspicion in this case were: 1. The circular wound of entry at the back of the deceased had burnt inverted margins, and the medical evidence was that such a wound with burnt edges could only be caused from a short distance of less than a yard or so. 2. There was inordinate delay of nearly a fortnight before the recovered gun and the empty cartridge case were sent to the ballistic expert, giving rise to the suspicion that the empty cartridge case so sent was from a cartridge which was fired at the police station, and was not the one recovered at the spot. 3. The fact that the accused was not interrogated by the investigating officer till more than a week after his arrest. In the face of these circumstances of grave suspicion, it was considered unsafe to hold that the prosecution had established the guilt of the accused beyond doubt, and he was acquitted.[3]

Effect of a false statement by a witness that another alleged eye-witness was present.—When the prosecution relies upon two alleged eye-witnesses A and B in support of a charge of murder, if the evidence of A is clearly proved to be false on the ground that he was not at all present at the scene of occurrence, and if witness B deposes falsely that A was present and that he saw him there, the Court should not lightly brush aside this fact on the assumption that B was forced to say that A was present because the prosecution had produced and examined A as an eye-witness. Such a false statement would normally detract so materially from his reliability that it would be dangerous to accept his testimony as being of any value.[4]

If A, an important eye-witness, says that B also was present and saw what happened, and B denies that he was present, that fact would normally detract from the weight to be given to A's evidence, if the Court is satisfied that B is speaking the truth. If, however, the Court finds B to be unreliable, B's testimony loses all value for the purpose of throwing

---

1. *Peddurang Tukia v. Hyderabad*, 1955 Cr.LJ 572 SC.
2. *Ibid*
3. *Santa Singh v. Punjab*, 1952 Cr.LJ 930 SC.
4. *Bhagwan Das v. Rajasthan*, 1957 Cr.LJ 859 SC: 1957 SCJ 515.

doubt on the evidence of A.[1]

Effect of omission to hold an identification Parade.—If a witness did not know a person concerned in a crime, it is prudent to hold an identification parade at which witness gets the earliest opportunity to identify that person. Failure to hold such a parade does not make the identification in Court inadmissible, yet the omission considerably affects the weight to be attached to such identification. If, however, the accused is known to the witness before the date of the occurrence, an identification parade is not necessary, in such a case the ommission to hold an identification parade cannot be of any avail to the accused in assailing the identification made by a witness in the Court.[2]

Instances of facts and circumstances which were held not to vitiate the value of the prosecution evidence. Absence of name of accused in FIR—When the informant is not an eye-witness.—The omission of the name of the accused in the first information report would not be material if the man who lodged the first information with the police was not an eye-witness of the occurrence.[3]

Absence of any injury on person of accused—When he is only a leader who did not take direct part in a fracas.—Absence of any injury on the person of the accused who is charged with the offence under Section 302/149 Penal Code, may indicate, at best, that he did not take a direct part in the attack. The fact cannot in any way militate against the evidence that the accused was present at the place of the incident and was directing the operations, as deposed to by the eye-witness.[3]

Absence of blood-marks on clothes of a near relative.—The fact that an eye-witness to the incident of murder by incised wounds in a room, is the wife of the deceased or his son, and that there were no blood-stains on the clothes of the witness cannot lead to any inference against the credibility of the witness. It may well happen in such a case that out of fright or under threats from the assailants, the witness might keep at a little distance and not attempt to intervene, and thus may not come into physical contact with the deceased who had got blood drenched as a result of his injuries.[4]

Slight errors in description particularly when the witness is illiterate.—Exactness and accuracy of description cannot be expected of illiterate witnesses. The fact that an eye-witness describes the fatal blow as having been struck on the chest, when as a matter of fact it was on the abdomen, cannot be considered a discrepancy which throws doubt on her testimony, when the blow is on the upper part of the abdomen. A layman is not capable of the same degree of accuracy which is found in the medical report.[4]

Relationship of a witness with the deceased is no ground in itself for rejecting his evidence.—In the absence of any evidence as to hostility towards the accused, the mere fact that a prosecution witness is closely related to the deceased, is no ground for rejecting his testimony, if it is otherwise found to be reliable.

If a witness to a crime is not a chance witness, that is, one who could well be expected to be at the scene of occurrence, and his evidence does not suffer from an infirmity which could cast a doubt on his credibility and bears the stamp of truth, there is no reason in law why his evidence should be looked upon with suspicion merely because he happens to be relative of the deceased.[5]

---

1. *Vadivelu Thevar* v. *Madras*, 1957 Cr. L.J 1000 SC; 1957 SCJ 527.
2. *Kanta Prasad* v. *Delhi Administration*, 1958 SCJ 668; 1958 Cr. L.J 698 SC.
3. *Thakur Prasad* v. *State of Madhya Pradesh*, 1954 Cr. L.J 261 SC.
4. *Abdul Gani* v. *State of Madhya Pradesh*, 1954 Cr. L.J 323 SC.
5. *Gurcharan Singh* v. *State of Punjab*, 1956 Cr. L.J 827 SC.

Unregistered documents whether admissible under section 11 for collateral purposes.—A document, which requires registration but has not been registered, cannot be used for any purpose affecting immovable property; but it can be admitted under Section 11 of the Evidence Act to disprove the genuineness of a *chittah* which is inconsistent with it.[1]

Evidence of a witness may be accepted even though some portion of the testimony is discarded.—There is no rule of law that when any one part of a witness's evidence is disbelieved, the whole testimony of that witness has to be forthwith rejected.

It is settled law that corroboration is not a rule of law, but one of caution as an assurance. The conviction could be made on the basis of the testimony of a solitary witness. It is not the quantum of evidence but its quality and credibility of the witness which lends assurance to the court for acceptance.[2-a]

Guilt to be proved.—The guilt of the appellant has to be proved beyond reasonable doubt on the basis of the evidence produced by the prosecution. (Para 7).[2-b]

The question as to whether the whole evidence should or should not be discarded depends on the fact and circumstances of each case and the nature and gravity of that portion of the evidence which has not been accepted. A court has the right to accept and act upon a portion of a witness's testimony if Court finds him to be truthful and reliable, even though some portion of his evidence has not been accepted.[3]

Evidence of Alibi.—*Alibi* is a Latin word meaning elsewhere. The defence of *alibi* is a legitimate defence, and, in fact, is often the only evidence of an innocent man.

The theory of an *alibi* is that the fact of presence elsewhere is essentially inconsistent with the presence at the place and time alleged, and therefore personal participation is the fact.[4] The credibility of an *alibi* is greatly strengthened, if it be set up at the moment when the accusation is first made, and be consistently maintained throughout the subsequent proceedings. On the other hand, it is a material circumstance to lessen the weight of this defence, if it be not resorted to until some time after the charge has been made.[5] An *alibi*, not set up at the very earliest stage, is, in most cases, unconvincing, but that is no reason why the courts should fail to give due weight to public documents filed before them, and afford reasonable facilities for the accused to call his evidence. Usually, a request to call an *alibi* witness at the very end is vexatious and dilatory unless the *alibi* has been indicated at the earlier stages.[6] Where the accused sets up a plea of *alibi* that he was on duty at other town on the date of occurrence, the burden of proof lies on him under Section 103 to establish the plea. It is not for the prosecution to prove the fact.[7]

The plea of *alibi* postulates the physical impossibility of the presence of the accused at the scene of offence by reason of his presence at another place. The plea can therefore, succeed only if it is shown that the accused was so far away at the relevant time that he could not be present at the place where the crime was committed.[8]

---

1. *Sheo Bandhan Singh etc.* v. *Sheo Prasad Singh*, 122 IC 895: 1930 A 130.
2-a. *Malkiat Singh* v. *State of Punjab*, (1991) 4 SCC 341.
2-b. *Sakharam* v. *State of M.P.*, AIR 1992 SC 758.
3. *Sukha* v. *State of Rajasthan*, 1956 Cr. LJ 923: 1956 SCJ 503.
4. Wigmore Section 136.
5. Wills' Circumstantial Evidence, P 281.
6. *Sahdeo* v. *State of Vindhya Pradesh*, 1954 VP 6.
7. *Satya Vir* v. *State*, 1958 Cr. LJ 1260.
8. *Dudh Nath Pandey* v. *State of U.P.*, 1981 SC 911 (Para 19).

Alibi.—It should be pleaded at the earliest opportunity.[1] *Alibi* should cover the time of the alleged offence. In proving his *alibi*, the accused should not be required to prove the exact time or every moment of time involved in order to sustain his defence. On the other hand, it is sufficient for him to raise a reasonable doubt of his presence at the scene of the crime at the time that it was committed. But, it must cover the time, when the offence is shown to have been committed, so as to preclude the possibility of the prisoner's presence at the place of the crime at the relevant time. For, if it be possible that he could have been at both places, the proof of the *alibi* is absolutely valueless. The failure to establish a plea of *alibi* does not give rise to a presumption as to his complicity in the crime. But, when all is said against an adverse inference, Judges and Juries being after all human, it is difficult to ignore the subtle effect of a plea of *alibi* which has utterly broken down and deliberate fabrication of evidence which is always a circumstance pointing, though never conclusively, to the guilt of the accused.[2]

According to the Supreme Court the prosecution cannot be said to have proved its case merely because the evidence in support of the plea of *alibi* taken by the accused is found to be untrustworthy.[3]

Previous judgments.—As a judgment is a mere opinion and not a fact it is relevant under Section 11.[4]

Illustration.—Illustration (a) is an example of a fact rendering the hypothetical fact on the other side not positively impossible, but highly improbable, as often happens when the question it, whether there was time for the accused to have gone from the place where he says he was to the scene of the crime and returned again. The second example here is of a fact rendering the hypothetical fact on the other side not possitively impossible but highly improbable, as often happens when the question is whether there was time for accused to have gone from the place where he says he was, to the scene and returned again. Illustration (b); This a disjunctive hypothetical syllogism. X is either A or B or C. But it is not B or C. Therefore it is A (Nort p. 124). Illustration (b) gives another case which may be thus stated in a concrete from; A warder who has been locked up in a jail with four prisoners A, B, C and D, is found murdered and it is proved that no other person could have entered the jail, whence it appears that the murder must have been committed by one of the four. Evidence is rendered to show that B and C were chained up in Cells and that D was paralysed. This evidence is admissible since it makes it highly probable that A committed the murder''. (Cunningham Page 31).

12. In suits for damages, facts tending to enable Court to determine amount are relevant.—In suits in which damages are claimed, any fact which will enable the Court to determine the amount of damages which ought to be awarded, is relevant.

COMMENTARY

In a suit for damages the amount of damages is a fact in issue and, therefore, evidence of facts which determine the amount of damages to be awarded is evidence of

1. Cr.LJ 785; *Thiagraja* v. *Emp.*
2. *Sarat Chandra* v. *Emperor* 35 Cr.LJ 1335.
3. *State of Haryana* v. *Prabhu*, 1979 SC 1019 (Para 7).
4. *Special L.A. Officer* v. *Lakhamsi*, A 1960 Bom. 78.

facts in issue and consequently admissible under Section 5. This section is, therefore superfluous.

"The question as to when damages may be recovered, and the amount of damages recoverable in particular suits, as well as defences pleadable in such suits, is a portion of the particular branch of the substantive law under the provisions of which these suits are brought."[1] It is beyond the scope of the law of evidence to define–and the Evidence Act does not profess to do so–the facts which affect the amount of damages awardable in particular cases; all that this Section of the Act says is that if a fact will; according to the rule of the substantive law applicable to the case, affect the amount of damages to be awarded, that fact may be given in evidence. Where a defamatory statement complained of is an imputation of bad conduct towards a woman, and truth is pleaded in defence of the action, the evidence that the female herself made statements to that effect to a considerable number of persons is relevant under Section 12 in order to assist the Court in assessing the damages to be awarded.[2] As to when any evidence of character be given in aggravation or mitigation of damages, see Section 55 notes thereto.

The leading case on the subject of damages in the case of breach of contract–*Hadley* v. *Baxendale* is the foundation of the rule contained in Section 73 of the Indian Contract Act; according to which rule, the damages which the plaintiff ought to receive should be such as naturally arose in the usual course of things from the breach, or such as the parties I, knew, when they made the contract, to be likely to result from the breach of it.[3]

13. Facts relevant when right or custom is in question.–Where the question is as to the existence of any right or custom, the following facts are relevant:–

(a) any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted or denied, or which was inconsistent with its existence;

(b) particular instances in which the right or custom was claimed, recognized or exercised, or in which its exercise was disputed, asserted or departed from.

Illustration

The question is whether A has a right to a fishery. A deed conferring the fishery on A's ancestors, a mortgage of the fishery by A's father, a subsequent grant of the fishery by A's father, irreconcilable with the mortgage, particular instance in which A's father exercised the right, or in which the exercise of the right was stopped by A's neighbours, are relevant facts.

---

1. Woodroffe, Ev., 9th Ed., 170.
2. *Ma Sein Tin* v. *U Kyaw Maung*, 1935 R 332, 164 IC 385.
3. 23 LJ Ex. 179, 182; 9 Ex. 341.

COMMENTARY

Principle.–The Section merely says as to which facts are relevant. It does not say how these relevant facts are to be proved. For that one has to look to other provisions of the Act.[1] Where the existence of a right or custom is in question, it is permissible for the party relying on its existence to prove any transaction by which it was created, modified, claimed, asserted or recognised; and particular instances in which it was claimed, exercised, recognised or asserted. On the other hand, the party denying its existence may give evidence of any transaction by which it was denied, or which was inconsistent with its existence; and particular instance in which its existence was disputed or departed from. In the absence of direct title deeds, acts of ownership are the best proofs of title. Title to property may be inferred from acts of ownership. It is not easy to define precisely what acts will be deemed acts of ownership. Where a person is proved to have been in possession, he is deemed to be the owner; and, therefore, all acts which show that the person who did them was in possession of the land on his own behalf are acts of ownership. They include a conveyance of the freehold, or a lease of the land, or of the mines and minerals under the land, enclosing the land or putting up boundary stones, depasturing cattle or sheep, planting or cutting trees or hedges, mending banks or repairing fences, building a jetty on a foreshore, and the like.[2]

Possession, receipts of rents and profits, or the discharge of the burdens, and repairs of the property are also indications of ownership. Similarly, user of an easement is evidence of title thereto.[3] The grounds on which such act are admissible is not acquiescence of any party; they are admissible of themselves, *proprio vigore*, for they tend to prove that he who does them is the owner of the soil; though, if they are done in the absence of all persons interested to dispute them, they are of less weight.[4]

By which.–On account of the governing qualification "by which" in regard to any transaction, if it is a case which is sought to be made admissible on the ground of the right being created, claimed, modified, asserted or denied, then it must be shown to be not apart from the transaction by which it was created, claimed, etc. An instance of creation or modification of a right would be inconceivable apart from the transaction "by which" it was created or modified.[5]

The section applies to all kinds of rights and custom.–This Section applies to all kinds of rights, whether rights of full ownership, or falling short or ownership, e.g. rights of easement, etc.[6] and to all kinds of customs, whether public, general or private. A right may be public[7] or general[8] or private.[9] Similarly, a custom may be public,[10] or general[11] or private.[12] Further, a right may be incorporeal, e.g. a right of way; or

---

1. *U.P.Govt. v. Church Missionary Trust Association*, 1948 O 54 : 22 Luck 93 : 229 IC 421.
2. Powell, Ev., 119–120.
3. Phipson, Ev. 7th Ed., 107.
4. *Per* Parke, B in *Jones* v. *Willams*, 2 M and W 326 ; *Brojendra Kishore Roy Chaudhary* v. *Mohun Chandra Bhattacharji, etc.* 99 IC 189 : 1927 C 1.
5. *Rangayyan* v. *Innasimuthu*, 1956 Mad, 226 : (1955) 2 MLJ 687
6. *Rangayyan* v. *Innasimuthu*, 1956 Mad. 226 : (1955) 2 MLJ 687
7. Section 32 (4)
8. Section 48.
9. Illustration to Section 13.
10. Section 32 (4).
11. Section 48.
12. E.g. family custom.

corporeal e.g., right of ownership. The Section is not limited in its application only to corporeal rights, but applies to all kinds of rights known to the law.[1] On general principles of construction, therefore, the section must be taken to apply to all kinds of customs as well.[2] The word "custom" as used in the Section, includes all customs, ancient or otherwise, and all usages.[3] Custom must be ancient, but usage may be of a comparatively recent origin.[4]

Where the question to be determined is the alleged relationship of persons as father and son, neither a question of any right nor of custom is involved.[5]

Right claimed by custom.—Where a right is claimed by virtue of a custom, all the essential characteristics of a custom, bearing on it, have to be established. It has to be seen whether it has been proved that the right was certain and invariable, and that its enjoyment was not bad by leave or permission. Then, it has to be seen whether the custom could be said to be reasonable and whether it had been in existence for a fairly long period of time.[6]

Admissibility of statements made in prior proceedings.—The assertion of a right, whether in a pleading or other statement, is relevant under this clause and is, therefore, legally admissible in evidence.[7] Statements constituting evidence of the assertion of a right are relevant under this Section. Such documents, even if not *inter partes* and not relating to the property in dispute are relevant under this Section, though they are not binding on the opposite party who is not a party to the same. Where a landlord is described as adopted son of a particular person in the descriptive portion of a document, the description of landlord, as adopted son, is not a superfluous recital but is made in assertion of a right, and is admissible under this Section.[8]

"Transaction by which" and "instances in which"; mere recitals, statements and admissions in one's own favour are not admissible.—A transaction is a business or dealing which is carried on or transacted between two or more persons,[9] it is something which has been concluded between persons by a cross or reciprocal[10] and, in its largest sense, it means that which is done.[11] A written statement, filed in a suit is not a transaction.[12] An instance is that which offers itself or is offered as an illustrative case; something cited in proof or exemplification; a case occurring; an example.[13] A mere statement made by a person in a suit is not such an instance as is contemplated by Section 13 (b).[14]

---

1. *Raghupat Tiwari* v. *Narbadeshwar Prasad Tewari*, 166 IC 664 ; *Tepu Khan, etc.* v. *Rajani Mohun Dass. etc.*, 25 C 522 ; *Collector of Gorakhpur, etc.* v. *Palakdhari Singh*, 12 A 1 (FB) ; *Mohammad Amin, etc.* v. *Hasan, etc.*, 31 B 143 ; *Ranchhordas Krishnadas* v. *Bapu Narhar*, 10 Bom. 439 contra ; *Gujju Lal* v. *Fateh Lal*, 6 C 171 (FB) *per* Garth, C.J., *Ram Kishun* v. *Narijan Pande*, 12 P 285 ; 145 IC 223 ; 1933 P 285.
2. See *Collector of Gorakhpur, etc.* v. *Palakdhari Singh* 12 A 1, 16 (FB).
3. *Dalglish etc.* v. *Guzuffer Hassain, etc.* 23 C 427.
4. *Dalglish, etc.* v. *Guzuffer Hassain, etc.*, 23 C 427.
5. *Ajmer Singh* v. *Jangir Singh* 1952 Pepsu 76.
6. *Ramchandra* v. *Pratap Singh*, 1965 Raj. L W 242.
7. *Satya Deo Prasad* v. *Chanerjoti*, 1965 BLJR 800
8. *Harihar* v. *Nabakishore*, ILR 1962 Cut 422.
9. *Gujja Lall* v. *Fateh Lall*, C 171, 186 (FB) *per* Garth. CJ
10. *Gujja Lall* v. *Fateh Lall*, C 171, 186 (FB) *per* Jackson, J
11. *Gujja Lall* v. *Fateh Lall*, C 171, 186 (FB) *per* Mitter, J.,
12. *Saripalli Venkatarayagopala Raju* v. *Fota Narasayya*, 26 IC 747 ; but see *Mst. Amina Khatun* v. *Khalil-ul-Rahman Khan*, 8 Luck 445 ; 1933 O 246.
13. Webster's Dictionary.
14. *Protap Chandra Deo Dhabal Deb* v. *Jagdish Chandra Deo Dhabal Deb*, 82 IC 886, 907 : 1925 C 116.

If a transaction is sought to be given in evidence, it must be shown that the transaction is one *by which* the right or custom, intended to be proved, was created, claimed modified, recognised, asserted or denied, or which was inconsistent with the existence of that right or custom. If it is an instance which is sought to be made admissible, it must be shown that the instance is one in which the right or custom in question was claimed, recognised or exercised, or in which its exercise was disputed, asserted or departed from. The words "created" and "modified" occur in clause (a) only; and the word "exercised" in clause (b) only. This is for the reason that an instance of the creation or modification of a right or custom would be inconceivable apart from the transaction by which it was created or modified. Therefore, the words "created" and "modified" are omitted in clause (b). But there may be a transaction by which there has been the recognition of a right or custom; there may also be particular instances of its recognition, and so the word "recognised" appears in both the clauses. In clauses (b), instead of the words by which the right or custom is asserted or denied or which was inconsistent with its existence' of clause (a), we have the words "in which the right or custom was exercised, or in which its exercise was disputed, asserted or departed from." It is, therefore, clear that in clause (b) instances of the assertion or denial of a right or custom do not come in but only instances of its exercise, or instances where its exercise was disputed, asserted or departed from. It follows from this that a transaction *in which* there is mere assertion or denial of a right or custom, as distinguished from a transaction *by which* the right or custom is asserted or denied, is not within the meaning of clause (a) to Section 13. Neither a transaction nor an instance in which there is mere assertion or denial of a right or custom comes within Section 13, and only those transactions are admissible by which the right or custom was asserted or denied.[1] The distinction between the expression *"transaction by which"* and the expression *"transaction in which"* has been emphasized in several decisions.[2] Therefore, a recital in a sale deed that the vendor possesses certain rights in the property sold is not admissible in evidence in a suit between the vendor or his successor in interest and third persons, in which a dispute arises as to whether the vendor had or had not such rights in the property. A recital in a deed is not a transaction *by which* a right is asserted, but is a mere instance of the assertion or denial of the existence of the right. It comes neither under clause (a), nor under clause (b). It is a mere statement which, unless it is relevant under some other provision of the law, e.g. as an admission, or as a statement of a deceased person, etc., is not admissible in evidence.[3] Similarly, a recital in a deed that certain property is situated in a particular village is not admissible under Section 13.[4] Recitals in documents are admissible only to a limited extent.[5] What Section 13 makes

---

1. *Brojendra Kishore Roy Chaudhary* v. *Mohim Chandra Bhattacharji, etc.*, 99 IC 189 : 1927 C1 ; *Asaddar Ali Khan* v. *Province of Assam*, 1944 C 57, 211 IC 460 ; ILR 1944 C 203. But see *Maharajdhiraj Sir Kameshwar Singh* v. *Hridoy Nath Sahoo*, 1938 C 763 ; See also *Subbarayallu Naidu, etc.* v. *Vengama Naidu*, 123 IC 197 ; 1930 M 742 ; *Saripalli Venkatarayagopala Raju* v. *Fota Narasayya*, 26 IC 747 ; *Motilal* v. *Baba Baldeo Dass*, 1952 VP 36.
2. *Asaddar Ali Khan* v. *Province of Assam*, 1944 C 57 ; *Brojendra Kishore Roy Chaudhuri* v. *Mohim Chandra Bhattacharji, etc.*, 99 IC 189 ; 1927 C 1 : *Saripalli Venkatarayagopala Raju* v. *Fota Narasayya*, 26 IC 747 ; *Bansi Singh, etc.* v. *Mir Amir Ali*, etc., 11 CWN 703 ; See also *Subbrayalu Naidu, etc.* v. *Vengama Naidu*, 123 IC 197 ; 1930 M 742 ; but see *Maharajdhiraj Sir Kameshwar Singh* v. *Hridoy Nath Sahoo*, 1938 C 763.
3. *Brojendra Kishore Roy Chaudhari* v. *Mohim Chandra Bhattacharji*, 99 IC 189 ; *Abdul Rahim Khan* v. *Faqir Mohammad Shah*, ILR 1946 N 518 ; but see *Maharajdhiraj Sir Kameshwar Singh* v. *Hridoy Nath Sahoo*, 1938 C 763.
4. *Sevugan Chettiar* v. *Zamindar of Sivaganga*, 1939 MWN 841 ; 1940 M 273.
5. *U.P. Govt.* v. *Church Missionary Trust Association*, 1948 O 54 ; 22 Luck 93 ; 229 IC 421 ; see also *Govind Narayan Singh* v. *Sham Lal Singh* 1931 PC 89 ; 58 IA 125 ; 58 C 1187 ; 131 IC 753 ; *Dinomoni* v. *Broja*

relevant is the transaction *by which* a right is asserted or denied, and not such a transaction as furnishes only an indirect or remote occasion for the assertion or denial of that right. In other words, a transaction becomes relevant when the assertion or denial of a right is necessarily involved in it, or when it was the cause of, or the necessary occasion for, the assertion or denial of the right. The transaction may be an act, or a statement; and if the latter, it is no objection to it that it is self-serving, or that it was made in the absence of the party against whom it is sought to be proved. The ground on which such acts are admissible is not the acquiescene of any party. They are admissible of themselves, *proprio vigore*, for they tend to prove that he who does them is the owner of the soil; though if they are done in the absence of all persons interested to dispute them, they are of less weight.[1] The fact that the disputed land was claimed as part of a particular estate in the course of partition proceedings under the Bengal Estates Partition Act, is admissible under this section.[2]

The word "claimed" denotes a demand or assertion in relation to a thing or attribute, as against or from some person, showing the existence of a right to it in the claimant. A bare statement may or may not be a claim according to the attending circumstances in which it is made; it may amount to a claim or be a mere statement of a claim. There is a distinction between the statement of a claim and a claim, though in some circumstances a statement may amount to a claim; the latter is made with reference to a right in a thing which was at that time being dealt with or directly in contemplation, the former may be casual or made with reference to some other right or thing.[3] "Claim" must mean that the right is asserted to the knowledge, and in the presence, of the person whose right will be derogated by the establishment of the claim. The mere assertion of the right in a document to which the person against whom the right is asserted is not a party, and of which he knows nothing, is not to "claim" the right.[4] The above view has been dissented from by a Division Bench of the Patna High Court and it has been held that the "claim" need not be made in the presence and to the knowledge of the person to be affected thereby. A "claim" can very well be made in the absence and without the knowledge of the person to be affected.[5]

The word "claim' in Section 13 should not be given a wider meaning so as to neutralize the effect of Section 21, and thus make an admission admissible in favour of the person who makes it."I make a note in my note-book that I have lent Rs. 1,000 to A. Thereafter, I bring a suit against A and put in my note-book to prove the entry I have made therein. If this evidence is admissible in my favour (under Section 13 as evidence of a transaction by which a right is claimed). I do not know what statements Section 21 seeks to exclude."[6] Therefore, a mere recital of a right, which is no more than an admission in favour of the person who makes that recital is not admissible under clause (b) to Section 13.

Mohini, 29 IA 24 ; 29 C 187.

1. *Brojendra Kishore Roy Chaudhuri* v. *Mohim Chandra Bhattacharji*, 99 IC 189.
2. *Chaterjee Estates, Ltd.* v. *Dhirendra Nath Roy*, 40 CWN 821.
3. *Radha Kishen Marwari* v. *Sarbeshwar Nag* 86 IC 674 ; 1925 C 684.
4. *Maharaja Srish Chandra Nandi* v. *Kala Chand Roy*, 1942 C 445 : 75 CLJ 20 ; *Jyoti Prasad Singh* v. *Bharat Shah Babu*, 1936 P 543 ; 15 P 260 ; 165 IC 589 ; *Brojendra Kishore Roy Chaudhuri* v. *Mohim Chandra Bhattacharji*, 99 IC 189 ; 1927 Cl.
5. *Ashfaque Ali Khan* v. *Asharfi Mahaseth*, 1951 P 641.
6. *Per* Suhrawardy, J., in *Radha Kishen Marwari* v. *Sarbeshwar Nag*, 86 IC 674 ; 1925 C 684 ; *Kheman* v. *Chhotu*, 1938 L 635 ; 179 IC 68 ; 40 PLR 968.

The word "assertion" indicates some act or deed which may or may not follow a statement.[1] It also includes a verbal statement not amounting to, and not accompanied by, any act if the statement amounts to a claim.[2] The language of Section 13 is very wide and covers the assertion of a right in a previous suit in which that right was in dispute. It is not necessary that the right should have been asserted successfully; mere assertion of the right is sufficient to make it relevant.[3] Repeated assertions of title in ancient documents, being mere recitals, are no evidence of what is there recited; though actual possession in conformity therewith would constitute a prima facie title.[4] In effectual opposition to the exercise of what is claimed to be a right is evidence rather in support of the right than of its non-existence.[5] The fact that a right has not been exercised for a long time does not necessarily lead to an inference of its abandonment.[6] In considering evidence of inalienability it should be seen that if there was any occasion, when having regard to human nature there was likehood of alienation, and alienation was not affected, it would be evidence of inalienability.[7] Where the question is whether a property is or is not alienable, the fact that it was not alienated when, in the circumstances existing, it would have been alienated, is evidence of its not being alienable.[8]

Deed of sale, mortgage, etc., whether admissible as a transaction by which a right is claimed or asserted.—There is a fundamental distinction between a mere recital and an assertion. A right is not asserted simply because it is recited in a certain document. It is asserted only when the transaction concerned is itself entered into in exercise of the right.[9] An act of transfer of interest in property necessarily involves the assertion that the transferor owns the interest transferred; it is, therefore, a transaction by which a right is claimed or asserted.[10] A mortgage involves an assertion of title by the mortgagor; hence, it is admissible in proof of the mortgagor's title.[11] But where the mortgagors are entitled to grant of the lands, whether they hold them under a revenue-free title or not, the mere fact in the document of mortgage a revenue-free title is recited, will not constitute an assertion of such title.[12] An assertion in a deed of transfer executed by the tenant that his interest in the land is permanent is admissible against the landlord in a suit for ejectment against the tenant's transferee.[13] Recital as to character of land made in a mortgage deed is admissible under this section.[14] Similarly,

1. *Radha Kishen Marwari* v. *Sarbeshwar Nag*, 86 IC 674 ; 1925 C 684.
2. *Ramakrishna Rangarao Bahadur* v. *Venkatasuryanarayana*, 1939 M 432 ; 1939 MWN 325 ; 49 MLW 409 ; (1939) I MLJ 602.
3. *Ram Kumar Dass* v. *Harnarian Das*, 32 IC 104 ; 1926 C 727.
4. *Nanda Lal Roy, etc.* v. *Pramatha Nath Roy*, etc., 143 IC 179 ; 1933 C 222.
5. *Pakala Venkanna, etc.* v. *Rao Swetachalapati Ramakrishna Ranga Rao Bahadur Garu*, 54 M 427 ; 131 IC 312 ; 1931 PC 128 (PC).
6. *Sundaram Iyer* v. *Theetharapp Mudaliar, etc.*, 40 IC 159 ; but see *Har Prasad etc.*, v. *Hori Lal, etc.*, 116 IC 799.
7. *Protap Chandra Deo Dhabal Deb* v. *Jagdish Chandra Deo Dhabal Deb*, 82 IC 886 ; 1925 C 116
8. *Protap Chandra Deo Dhabal Deb* v. *Jagdish Chandra Deo Dhabal Deb*, 82 IC 886.
9. *Kumud Kanta Pahari* v. *Province of Bengal*, 1947 C 209 : 81 CLJ 274.
10. See *Shankarrao Dagadujirao* v. *Shambhunath*, 1940 PC 192 ; *Maharaj Bahadur Singh* v. *Barkatulla*, 1946 C 450 ; *Rasik Lal Mukhuti* v. *Prasanna Kumar Saha*, 1935 C 367 : 60 CLJ 569.
11. *Shankarrao Dagadujirao* v. *Shambhunath*, 1940 PC 192 ; *Lachhmi Narain* v. *Manak Chand*, 1938 L 846; *Nallasiva Mudaliar, etc.* v. *Ravan Bibi, etc.*, 70 IC 389 ; *Ronald Duncan Cromatic, etc.* v. *Iswar Radha Damodar*, 62 CLJ 10 ; *Ihsan Ali* v. *Ata Ullah*, 1937 L 688.
12. *Kumud Kanta Pahari* v. *Province of Bengal*, 1947 C 209 : 81 CLJ 274.
13. *Jnanendra Nath Dutt* v. *Nerada De*, 83 IC 948 : 1924 C 991.
14. *Kanhaiya Singh* v. *Bhagwat Singh*, 1954 P 326.

previous deeds in which the predecessors of the plaintiff claimed the land as *lakhiraj* are admissible to show that the land is *lakhiraj*.[1] A recital in a *zarpeshgi* lease describing the land as *zirati* is admissible under this section.[2] In a suit for assessment of rent by the plaintiff *zamindar* against defendants who claim to hold rent-free, a deed of sale by which the land was sold as rent-free is admissible as evidence of a transaction by which the rent-free nature of the land was asserted,[3] but a mere recital in a deed that the executant or predecessor in interest of the executant of the deed held the land as *nishkar brahmottar* is not admissible.[4] Documents evidencing transactions of transfer of a tenancy are admissible for purposes of establishing the permanent character of the tenancy,[5] as the assertion of a right to transfer necessarily implies the existence of a permanent lease.[6] In a case not governed by Section 18A, Bengal Tenancy Act, *kabuliyats* evidencing sub-leases granted by the lessee and describing the interest of the lessee as that of a *mukarrari* tenant are evidence of the assertion of *mukarrari* title on the part of the lessee and as such they are good evidence under this section against the landlord even though he was not a party to the same.[7] But where the case is governed by Section 18A of the Bengal Tenancy Act and the question is whether the land for which rent is claimed is *niskar*, neither a mortgage decree in which the land was described as *lakhiraj* but to which the landlord was not a party, nor a mortgage deed or *kobala* wherein the defendant tenant described his interest as *niskar* and to which the plaintiff landlord was not a party, is admissible under this section.[8] Mere statement in a *patta* executed by a stranger in favour of a party that the land is *lakhiraj debutter* is not admissible.[9] The defendant effected in favour of the plaintiff a mortgage of rent-land, and the mortgage deed recited that the rent payable to the superior landlord in respect of that holding was Rs. 18. Subsequently the debt was paid off and the plaintiff purchased the superior interest and claimed Rs. 24 as rent. It was held that the question as to what the amount of rental was, was one of the essential terms of the mortgage and the document was admissible in evidence as it was a transaction by which the right of the defendant to the land was asserted.[10] Rent receipts, showing that the land had been assessed at a full rent which was being realized, and describing the persons paying the rent as tenants, are relevant and admissible when the question at issue is the status of the persons paying the rent.[11] An ancient deed in which a house is claimed to have been built by a certain

1. *Keshava Prasad Singh* v. *Brahmdev Rai*, 13 P. 45 : 1933 P. 656 ; but *see Jyoti Prasad Singh* v. *Bharat Shah Babu*, 1936 P. 543 : 15 P. 260 : 165 IC 589.
2. *Thakar Kurmi* v. *Lalji Misser, etc.*, 150 IC 884 : 1934 P. 81.
3. *Jnanendra Nath Dutt* v. *Nesea De*, : 1924 C 991 ; *Kiran Chandra Roy Bahadur* v. *Srinath Chakravarti etc.*, 100 IC 453 : 1927 C 210 ; *see also Roy Monmatha Nath Mitra* v. *Rajeswar Rai Chowdhuri*, 55 C 355 : 107 IC 81 : 1928 C 315 ; *Kameshwar Singh* v. *Ramji Misser*, 1933 P. 685.
4. *Jagatdwipendranarayan Bhup* v. *Bilash Ray Aggarwala*, 59 C 454 : 137 IC 860 : 1932 C 427 ; *Brojenra Kishore Roy Chaudhuri* v. *Mohim Chandra Bhattacharji*, 99 IC 189 : 1927 C 1 ; *Jyoti Prasad Singh* v. *Bharat Shah Babu*, 1936 P. 543 ; *Kanta Mohan Malik* v. *Basudeb Ghora*, 39 CWN 311 ; but *see Maharajdhiraj Sir Kameshwar Singh* v. *Hridoy Nath Sahoo*, 1938 C 763 ; for the admissibility of a judgment not inter partes that the land is Nishkar Brahmottar, *see Satindra Kumar Chaudhuri, etc.*, v. *Krishna Kumari Chaudhurani*, 36 IC 882.
5. *Jogendra Krishna* v. *Suhasini Dassi*, 1941 C 541 : 74 CLJ 145 : 197 IC 376 : ILR 1941-42 C 44.
6. *Sukumar Chandra* v. *Nagendrabala Dasi*, 1940 C 393 : 71 CLJ 209.
7. *Dwarkadas Marwari* v. *Parbati Dassi*, 1942 C 486.
8. *Sris Chandra Nandi* v. *Kala Chand Roy*, 1942 C 445.
9. *Jyoti Prasad Singh* v. *Bharat Shah Babu*, 15 P. 260 : 1936 P. 543 : 165 IC 589.
10. *Abdul Munser Munshi, etc.* v. *Yakub Talukdar*, 117 IC 599 : 1928 C 703.
11. *Duryodhan Kar* v. *Brajasundar Deb*, 1949 O 31.

person,[1] or in which it is claimed as one's dwelling house,[2] is admissible as evidence of the claim asserted in the deed. A deed of settlement asserting that the settlor is the creditor of a person under a promissory note, if the promissory note is lost.[3] For the purpose of proving a custom entitling the *ryots* to transfer their houses, certified copies of sale deeds are admissible to prove instances of transfer.[4]

Other documents containing assertion of right: maps, chittahs, khas mahal papers, jamabandis, road cess papers, partition deeds, batwara papers, etc.—If a document records, a transaction by which a right is asserted, it is admissible under Section 13, even though it is not *inter partes*[5] Documents containing assertion of title to, and possession of, the property in dispute by the predecessor-in-interest of a party are admissible under this section on the question of title and possession.[6] Where the question is whether a plot is *mal* or *jote*, an *ekrarnama* by a third person in favour of the plaintiff's ancestor describing the land as *mal* is relevant.[7] In a suit for possession against defendants who claim a permanent right and plead that the plaintiff is only entitled to the *malvaram*, documents executed by the other tenants showing the tenture on which the village is held are admissible.[8] Partition deeds, not *inter partes*, are admissible under Section 13 on the question of possession.[9] A deed of partition is admissible in order to establish the right to effect a partition; because by that deed the right to partition the property is asserted. But a deed of partition between the descendants of a tenant containing a recital that the lands are held by them in *mukarrari kayami* interest, is not admissible for the purpose of establishing a *mukarrari* right in the tenancy.[10] If the preparation of a map[11] a *chittah*[12] or *khas mahal* papers[13] by Government involves an assertion of its right as proprietor and landlord, the assertion in the document becomes admissible in evidence as a transaction by which a right is asserted. A *thak* map with its explanatory field book is admissible under this section, since it could not have been compiled, unless the persons, who are shown therein as holding plots, had asserted their possession.[14] *Chittahs* are admissible in evidence, but their value is to be determined in the particular circumstances of each case.[15] But *chittahs* and *jamabandis* made by Government for its own private purpose are nothing more than documents prepared for the information of the Collector, and are not, *per se*, evidence

---

1. *Raghunath* v. *Bindeshwari Nandan, etc.*, 81 IC 582 : 1924 B 526.
2. *Roy Monmatha Nath Mitra* v. *Rajeswar Rai Choudhuri*, 55 C 355 : 107 IC 81 : 1928 C 315.
3. *Subbarayalu Naidu, etc.* v. *Vengama Naidu*, 123 IC 197 : 1930 M 742.
4. *Narain Singh* v. *Net Ram*, 1940 A 535.
5. *Roy Monmatha Nath Mitra* v. *Rajeswar Rai Choudhuri*, 55 C 355 ; *Ghoghar Raut* v. *Jagarnath Prasad Singh*, 1947 P. 475.
6. *Nitya Kali Dutt* v. *Sarat Chandra Bose, etc.*, 51 IC 366.
7. *Sabran Sheikh* v. *Odoy Mahto*, 1 P. 375 : 70 IC 18 : 1922 P. 488.
8. *Vythilinga, etc.* v. *Venkatachala, etc.*, 16 M 194.
9. *Parbati Majhi, etc*, v. *Digpati Majhi, etc.*, 64 IC 465.
10. *Narendra Nath Mandal* v. *Sannyasi Charan Das, etc.*, 137 IC 658 : 1932 C 398.
11. *Junmajoy Mullick* v. *Dwarkanath Mytee*, 5 C 287 ; *Upendra Nath Ghosh, etc.* v. *Chairman of Calcutta Corporation*, 13 IC 332 : 16 CWN 116 ; but *see Kesho Prasad* v. *Mst. Bhagjogna Kaer*, 1937 PC 69 : 167 IC 329 : 16 P. 258 (PC).
12. *Nobendra Kishore Roy, etc.* v. *Lutful Huq*, 2 IC 513.
13. *Sutu Howldar, etc.* v. *Alep, etc.*, 101 IC 792 : 1927 C 576.
14. *Dowlat Rai* v. *Khub Lal Singh*, 22 IC 645.
15. *Sarat Chandra Rakhit* v. *Sarala Bala Ghosh*, 105 IC 61 : 1928 C 63 ; *Aptabuddi, etc.* v. *Alla Hafij, etc.*, 88 IC 548 : 1925 C 1104 ; *Abdul Khaleque* v. *Susil Chandra Chaudhri*, 39 CWN 330.

against private persons for the purpose of proving that the lands described therein are not of a particular character of tenure. They are therefore, not admissible under Section 13.[1] Private *chittahs*, however old, are, not admissible under Section 13.[2] *Chittahs* prepared by Government for resumption proceedings are not admissible as evidence of the assertion of a right,[3] though they may be admissible as explanatory of resumption proceedings.[4] A map prepared by a party for purposes of a particular suit, not being a transaction by which a right is asserted, is inadmissible.[5] But a map and a *chittah* of the disputed lands prepared under the orders of the defendant and collection papers showing collection of rent by the defendant on the basis of the map and the *chittah* may evidence an assertion of right by the defendant and thus be admissible under this section.[6] A map prepared in a previous suit is not relevant under this section in a subsequent suit, when the land in dispute in the two suits is different.[7] Road cess papers and returns are also admissible under this section.[8] A partition paper prepared under Section 57 of the Estates Partition Act is record of a transaction by which the right to certain plots is recognized and is, therefore, admissible under section 13.[9] *Batwara* papers are admissible in proof of title, as against the parties to the *batwara* proceedings, to rebut the presumption raised by the Record of Rights.[10] A *batwara khasra*[11] and a *batwara khasra* map[12] may be admissible under Section 13. Printed copies of the index register are admissible under this section.[13] Maps and registers in which a party is asserted to be in possession of the land in dispute are admissible.[14] A letter in which a right is admitted may constitute an instance of the recognition of that right.[15]

Entries in sale-certificates, writs of attachment, robkaries or orders for delivery of possession, etc.—A sale-certificate is admissible in evidence as a transaction by which the right to possession of a certain plot of land as constituting the tenancy lands was recognized.[16] An entry in a sale certificate that the holding is *mukarrari* is admissible under Section 13 against the advertising co-sharer as well as the other co-sharers.[17] An entry in a writ of attachment as to an under-tenure in the land is relevant under this

---

1. *Uppendra Nath Chattopadhya, etc.* v. *Radha Govinda Bandopadhya*, 98 IC 85 : 1927 C 189.
2. *Nafar Jordar* v. *Pratima Sundari Dassya*, 41 IC 726.
3. *Uppendra Nath Chattopadhya etc.* v. *Radha Govinda Bandopadhyay*, 98 IC 85.
4. *William Graham* v. *Phamindra Nath Mitter*, 31 IC 41 : 19 CWN 1038.
5. *Shashi Bhusan Dhur, etc.* v. *Nawab of Murshidabad*, 49 IC 951.
6. *Dwijen Chandra Roy* v. *Naresh Chandra Gupta*, 49 CWN 791 : 1945 C 492.
7. *Mohd. Suleman* v. *Badruddin*, 1940 L 309 : 42 PLR 247.
8. *Dattari Mohanti* v. *Jugo Bundhoo Mohanti*, 23 WR 293 ; *Manmohini Dassi* v. *Adwaita Maiti, etc.*, 19 IC 548 ; *Imrit Chamar* v. *Sudhari Pandey*, 17 CWN 103 ; *Mahabir Ram Marwari* v. *Bhadai Mander*, 1937 P. 561 : 172 IC 129.
9. *Sheikh Jaki Mamood* v. *Dino Bandhu Bhattacharjee*, 2 IC 367 ; *Ghoghar Raut* v. *Jagarnath Prasad Singh*, 1947 P 475.
10. *Sri Ans Das* v. *Jugat Pat Lall, etc.*, 38 IC 205.
11. *Ramtarup Raut, etc.* v. *Ramnarain Tewary*, 7 P. 85 : 114 IC 479 : 1929 P. 32 ; *Sadhu Saran* v. *Ambika Lal, etc.*, 68 IC 676 ; *Ghoghar Raut* v. *Jagarnath Prasad Singh*, 1947 P. 475.
12. *Ajodhya Prasad Singh Kunar, etc* v. *Kamal Narain Singh, etc.*, 38 IC 491.
13. *Secretary of State* v. *Chimanlal Jamnadas*, 1942 B 161 : 201 IC 420 : ILR 1942 B 357.
14. *Rajendra Narayan Singh Deo* v. *Lal Mohan Tribeni*, 1936 P. 462 : 164 IC 277 ; *see* also *Mallappa* v. *Tukko*, ILR 1937 B 464 : 1937 B 307 : 170 IC 801.
15. *Secretary of State* v. *District Board, Rangpur*, 1939 C 758.
16. *Basanta Kumari Dasi* v. *Jnanedra Nath Ghosh*, 1940 C 539 : 191 IC 577.
17. *Khirode Chandra Ghosh* v. *Janki Das Janup, etc.*, 20 IC 753 : 17 CWN ccxliviii.

section;[1] so is a *robkari* mentioning *mukarrari* rights in a *jagir*.[2] But a statement contained in an order for the delivery of possession of land as to the rent payable in respect of the land is not admissible in evidence in a suit between the landlord and the tenant in which the rent payable is in dispute.[3]

Assertion or denial of a right or custom in pleadings, applications, reports, etc.–The assertion or denial of a right or custom may be contained in a plaint or a written statement,[4] an application[5] or a report.[6] Thus, an assertion as to the legitimacy of a person contained in an application is admissible in proceedings in which the question of that person's legitimacy arises.[7] Where the right of a person as a *mahant* is in question, a report containing the signatures of Revenue Officers and residents of the village that he is the *mahant* are admissible.[8] That a certain piece of land was claimed as a part of a particular estate in proceedings under the Estates Partition Act is a transaction within the meaning of Section 13, and, therefore, relevant.[9]

Recitals in a Will.–A statement made in a Will executed by a tenant as to the nature of the tenancy which is bequeathed by him to a legatee under the Will is admissible in evidence to prove the nature of the tenancy.[10] So also a recital in a will that the property dealt with thereunder is the property of the testator, is relevant evidence.[11] In the absence of a proof by the attesting witnesses, a Will not admitted to probate is inadmissible.[12] A recital of *brahmottar* title in a Will is not admissible under Section 32(7) read with Section 13(a).[13]

Recitals of boundaries in documents.–Cases falling under this head may be divided into three classes:–

(i) When the recital is in a document *inter partes*. In such a case the recital is a joint statement made by the parties to the document and, therefore, relevant against all of them as an admission.

(ii) When the recital is in a document between a party and a stranger. In such a case the recital is relevant against the party as an admission but is not admissible in his favour,[14] unless the fact recited is deposed to in Court by the executant of the document, in which case the recital will become admissible under Section 157

---

1. *Jogesh Chandra Patitunda, etc.* v. *Rohini Kumar Roy Chowdhry*, 34 IC 215.
2. *Luchmeedhur Pattuck* v. *Rughoobar Singh*, 24 WR 284.
3. *Chandra Mohan Talukdar* v. *Sheikh Elim*, 87 IC 512 : 1926 C 415.
4. *Mst Amina Khatun* v. *Khalil-ur-Rahman Khan*, 8 Luc. 445 : 1933 O 246 ; *Rangaswami Pillai, etc.* v. *Vaidylinga Mudaliar etc.*, 33 IC 446 ; but *see Saripalli V enkatarayagopala Raju* v. *Fota Narasayya*, 26 IC 747.
5. *Galstaun* v. *Abid Husain*, 73 IC 428 : 1924 O 19.
6. *Bhagwat Prasad, etc.* v. *Bindeshwari Das, etc.*, 1930 ALJ 964.
7. *Galstaun* v. *Abid Husain*, 73 IC 428 : 1924 O 19.
8. *Bhagwat Prasad etc.* v. *Bindeshwari Das, etc.*, 1930 ALJ 964.
9. *The Chatterjee Estates, Ltd* v. *Dhirendra Nath Roy*, 40 CWN 821.
10. *Pramatha Nath Das Baira;i* v. *Champa Dasi*, 56 C 275 : 118 IC 353 : 1929 C 473.
11. *Periasami Kachirayar* v. *Vuradappa Kachirayar*, 1950 M 486 : (1950) 1 MLJ 325 : 63 MLW 310 : 1950 MWN 242 ; *Kotikelapudi 'enkatramayya* v. *Digavalli Seshamma*, 1937 M 538 : ILR 1937 M 1012 ; *Mudanna Virayya* v. *Mudanna Adenna*, 1930 PC 18 : 51 CLJ 136 : 58 MLJ 245 : 51 MLW 176 : 1930 MWN 60 : 121 IC 205 : 32 BLR 499.
12. *Moheshwar Panda, etc.* v. *Sunder Narain Pattanaik, etc.*, 33 IC 342 : 22 CLJ 551.
13. *Satindra Kumar Chaudhuri, etc.*, v. *Krishna Kumari Chaudhurani, etc.*, 36 IC 882 : 1917 C 805.
14. *Radha Kishen Marwari* v. *Sarbeswar Nag, etc.*, 86 IC 674 : 1925 C 684 ; *Daulat Shah* v. *Bishan Dass*, 1934 L 750.

to corroborate the evidence of the executant[1] or under Section 155 to contradict such evidence.

(iii) When the recital is in a document between strangers. In such a case, the recital is neither a particular instance in which a right is *exercised*, nor a transaction *by which* a right is claimed or asserted.[2] Therefore, the recital is inadmissible, unless as in case (ii), the executant appears as a witness and deposes to the fact recited, in which case the recital will become admissible under Section 157 to corroborate the testimony of the executant,[3] or under Section 155 to contradict such testimony.[4] A mere statement of boundary cannot be classed with any of the verbs in Section 13, Clause (a), "created, claimed, modified, recognized, asserted or denied."[5] There was, at one time a conflict of opinion as to the admissibility of documents between strangers where one of the parties, to the suit was mentioned as owner of the boundary land, but recent decisions have finally settled the point. In some cases it was sought to make such documents admissible in evidence under Section 11, Clause (2) of the Indian Evidence Act. In some cases, the admissibility of such documents was made to rest on Section 13, and in some other cases, on Section 32, Clause (3) of the Evidence Act. It may now be taken as settled law that such recitals are neither admissible under Section 11, nor under Section 13.[6] In some cases, where the executant could not be produced as a witness, the recitals were admitted under Section 32, Clause (3),[7] but the tendency of recent decisions is to hold that even Section 32, Clause (3),

---

1. *Ketabuddin, etc.* v. *Nafar Chandra Pattok, etc.*, 99 IC 907 : 1927 C 230 ; but see *Ambica Charan Kundu* v. *Kumud Mohan Chaudury, etc.*, 110 IC 521 : 1928 C 893.
2. *See Das Mal* v. *Sunder Singh*, 1937 L 480 ; *Kunda Singh* v. *Rangi Ram*, 1950 Pepsu 7.
3. *Thyagarajan Chitty* v. *Narayana Thevan*, 1940 M 450 ; *Rakhal Chandra Ghose, etc.* v. *Mohendra Narain Sen etc.*, 51 IC 797 ; but see *Khemon* v. *Chhotu*, 1938 L 635 : 179 IC 68 : 40 PLR 968.
4. *Das Mal* v. *Sunder Singh*, 1937 L 480.
5. *Karupana Konar, etc.* v. *Rangaswami Konar, etc.*, 107 IC 293 : 1928 M 105(2).
6. *Kheman* v. *Chhotu*, 1938 L 635 ; *Bhagwan Das* v. *Parabhu Dial*, 1936 L 1005 ; *Nanak Chand* v. *Mian Muhammad Shahbaz Khan*, 1936 L 114 ; *Daulat Shah* v. *Bishan Das and others*, 1934 L 750 ; *Ambica Charan Kundu, etc.* v. *Kumud Mohan Chahudury, etc.*, 110 IC 521 : 1928 C 893 ; *Lajpat Rai* v. *Faiz Ahmad*, 8 L 651 : 103 IC 889 : 1927 L 448 ; *Kumud Kumari Dasi* v. *Dilsook Roy*, 101 IC 542 : 1927 C 918 ; *Braja Mohun Das Adhikari* v. *Gaya Prasad Karan*, 97 IC 265 : 1926 C 948 ; *Abdul Karim* v. *Chale Ahmed*, 91 IC 688 : 1926 C 479 ; *Damodar Poddar* v. *Jadunath Dutt*, 91 IC 684 ; *Pramatha Nath* v. *Krishna Chandra Barik*, 1925 C 1034 : 86 IC 734 ; *Radha Kishan Marwari* v. *Sarbeswar Nag, etc.*, 86 IC 674 : 1925 C 681 ; *Pramatha Nath* v. *Krishna Chandra*, 84 IC 420 : 1924 C 1067 ; *Abdul Rahim Kazi* v. *Jonabali Sikdar*, 68 IC 329 : 1923 C 299 ; *Saraj Kumar Acharji* v. *Umed Ali*, 63 IC 954 : 1922 C 251 ; *Saripalli Venkatarayagopala Raju* v. *Fota Narasaya*, 26 IC 747 ; *Mahiditta Mal* v. *Mrs. Nicholson, etc.*, 19 IC 770 ; *Abdul Ali* v. *Rejan Ali*, 21 IC 618 : 19 CWN 468 ; *Abdullah* v. *Kunja Behari Lal*, 12 IC 149 : 15 CLJ 467 ; *see* also *Brojendra Kishore Roy Chaudhuri* v. *Mohim Chandra Bhattacharjee*, 99 IC 189 : 1927 C 1 ; contra *Tika Ram* v. *Moti Lal*, 52 A 464 : 126 IC 29 : 1930 A 299 ; *Farzand Ali* v. *Zafar Ali*, 46 IC 119 : 132 PWR 1918 ; *Dwarka Nath Bakshi* v. *Mukundu Lal Chowdhury*, 5 CLJ 55 ; *Natwar* v. *Alkhu*, 18 IC 752 : 14 ALJ 139 ; *Imrit Chamar* v. *Sridhar Panday*, 13 IC 120 : 15 CLJ 7.
7. *Thyagarajan Chetty* v. *Narayana Thevan*, 1940 M 450 ; *Tika Ram* v. *Moti Lal*, 52 A 464 : 126 IC 29 : 1930 A 299 ; *Ahmad Shahji* v. *Jamal Ahmad*, 113 IC 414 : 1928 O 248 ; *Sarat Chandra Rakhit* v. *Sarala Bala Ghosh*, 105 IC 61 : 1928 C 63 ; *Ketabuddin* v. *Nafar Chandra Pattak*, 99 IC 907 : 1927 C 230 ; *Pramatha Nath Roy Chowdhury* v. *Rejoy Singh Dudhuria*, 99 IC 910 : 1927 C 234 ; *Abdul Rahim Kazi* v. *Jonabali Sikdar*, 68 IC 329 : 1923 C 299 ; *Ambar Ali* v. *Lutfe Ali*, 45 C 159 : 41 IC 116 ; *Natwar* v. *Alkhu*, 181 ALJ 139 ; *Imrit Chamar* v. *Sridhar Panday*, 13 IC 120 : 15 CLJ 7 ; *Abdullah* v. *Kunja Behari Lal*, 12 IC 149 : 14 CLJ 467 ; *Haji Bibi* v. *The Agha Khan*, 2 IC 874 : 11 Bom LR 409 ; *Ningawa* v. *Bharmappa*, 23 B 63 ; *Trimbak* v. *Ganesh, etc.*, 68 IC 314 : 1923 N 22.

is inapplicable to such recitals.[1] As was remarked by Jackson, J., it cannot be said that a statement of boundaries is against the proprietary interest of the person making it, except on the assumption that every person must be presumed to own the universe until he makes a statement circumscribing his title.[2] The inadmissibility of such documents depends on the general principle that if a party is not bound by the recital in an instrument to which he was no party, the document will not be allowed to affect his right in any way.[3] See also notes to Section 32(2) and (3).

Statements in third party documents.—*Pottahs* executed in favour of the landlord by his co-sharers after the creation of the tenancy are like third party documents, and recitals therein are not admissible in evidence as against the tenant who has already acquired his interest from the landlord prior to the execution of those *pottas*.[4]

Essentials of a valid custom.—A custom should be continuous and uniform, it must not be immoral or opposed to public policy, and must have the qualities of antiquity and certainty. But it is not necessary that a custom should be deducible from any accepted principle of law.[5] Custom, as used in the sense of a rule which, in a particular district, class, or family, has, from long usage, obtained the force of law, must be ancient, continued, unaltered, uninterrupted, uniform, constant, peaceable and acquiesced in, reasonable, certain and definite, compulsory and not optional to every person to follow or not. The acts required for the establishment of customary law must have been performed with the consciousness that they spring from a legal necessity, and it must not be immoral. It must not be opposed to morality or public policy immoral and it must not be expressly forbidden by the Legislature. The Calcutta High Court has held that a custom must be proved to be immemorial, reasonable, uninterrupted and also certain as regards its nature in the locality, and persons affected by it. In this case it was said that a custom is void at law if there is proof that it originated within the time of memory but proof of its existence for a longer period will put the onus on those who assail it.[6]

Custom Overrides the General Law.—It has been declared that "clear proof of usage will outweigh the written text of law.[7] Where a custom is proved to exist, it supersedes the general law which however regulates all beyond the custom.[8]

---

1. *Hari Ahir* v. *Sanghat Chacha*, 152 IC 529 : 1934 P 617 ; *Abdul Ghani* v. *Fakir Mohammad*, 111 IC 361 : 1929 L 78 ; *Ambica Charan Kundu* v. *Mohan Chauduri* 110 IC 521 : 1928 C 893 ; *Ghulam Muhammad* v. *Kalim Ullah*, 109 IC 728 : 1928 L 428 ; *Hakim Ali* v. *Amrik Singh*, 108 IC 264 ; *Karupanna Konar* v. *Rangaswami Konar*, 107 IC 293 : 1928 M 105 ; *Lajpat Rai* v. *Faiz Ahmad*, 8 L 651 : 103 IC 889 : 1927 L 448 ; *Kumud Kumari Dasi* v. *Dilsook Roy*, 101 IC 542 : 1927 C 918 ; *Braja Mohun Das Adhikari* v. *Gaya Prasad Karan*, 97 IC 265 : 1926 C 948 ; *Radha Kishen Marwari* v. *Sarbeswar Nag* 86 IC 674 : 1925 C 684 ; *Pramatha Nath Chaudhuri* v. *Krishan Chandra Bhattacharjee*, 84 IC 420: 1924 C 1067 ; but see *Rajendra Narayan Singh Deo* v. *Lalmohan Tribeni*, 1936 P 462: 164 IC 277.
2. *Karupanna Konar* v. *Rangaswami Konar*, 107 IC 293: 1928 M 105.
3. *Per* Mitter, J., in *Kumuda Kumari Dasi* v. *Dilsook Roy*, 101 IC 542: 1927 C 918 ; see *Braja Mohan Das Adhikari* v. *Gaya Prasad Karan*, 97 IC 265: 1926 C 948 ; *Nanak Chand* v. *Mian Mohammad Shahbaz Khan*, 1936 L 114.
4. *Ali Hossain Shaikh* v. *Jonab Ali Mondal*, 1936 C 770.
5. *Chelladovia* v. *Chinnathambiar*, ILR 1960 Mad 880.
6. *Mahamaya* v. *Haridas*, 1915 Cal 161(2): ILR 42 C 455.
7. *Collector of Madura* v. *Muthu Ramalinga*, 12 MIA 397, 436: 1 BLR 12.
8. *Neel Kristo* v. *Beer Ch.*, 12 MIA 542.

A general custom may be varied by a special local custom.[1]

Proof of Customs.—The law in regard to the proof of customs is in doubt.[2]

To prove a custom the evidence should be such as to prove the uniformity and continuity of the usage and the conviction of those following it that they were acting in accordance with law, and this conviction must be inferred from the evidence. Oral evidence or witnesses who depose to having heard of the custom from their deceased ancestors is admissible.[3] Evidence of acts of the kind, acquiescence in these acts, their publicity, decisions of Courts, or even of Panchayats upholding such acts, the statements of experienced and competant persons of their belief that that such acts were legal and valid will all be admissible but it is obvious that although admissible, evidence of this latter kind will be of little weight if unsupported by actual examples of the usage asserted.[4]

Modes of proving custom.—A general custom may be proved by the opinion of living persons who would be likely to know of its existence if it existed,[5] and public custom, by the opinion of such persons,[6] or by the opinion of person who cannot be produced as witnesses, if such opinion is contained in a statement made before any controversy as to such custom arose.[7] Custom, whether public, general or private, may also be proved or disproved, as the case may be, by statements of deceased persons contained in any deed, will or other document which relates to a transaction by which that custom was claimed, modified, recognized, asserted or denied,[8] as well as by proof of such transaction itself.[9] Particular instances in which a custom was claimed, recognized or exercised, or in which its exercise was disputed, asserted, or departed from,[10] as well as judgments relating to customs of a public nature are admissible.[11] Entries as to custom in a *riwaj-i-am* or *wajib-ul-arz* are relevant under Section 35.

Oral evidence as to instances which can be proved by documentary evidence cannot safely be relied upon to establish custom, when no satisfactory explanation for withholding the best kind of evidence is given.[12]

The most cogent evidence of custom is not that which is afforded by the expression of opinion as to its existence, but by the examination of instances in which the alleged custom has been acted upon, and by the proof afforded by judicial decisions, revenue records, private records or receipts that the custom has been enforced.[13] The kind of evidence that ought to be required to prove a custom is the evidence showing that the claim was more or less contested and the contest abandoned by some one who, if the custom had not existed, would have been entitled to it; or showing that generally in the district the custom was followed to the exclusion of persons who, if it had not been for the custom, would presumably have enforced their right under the general law.[14] Un-

1. *Salig Ram* v. *Mst. Maya Devi*, 1955 SC 266: 1955 FCJ 248 (SC).
2. *Pushpavathi Vijayaram* v. *Visweswar*, (1964) 3 SCR 403.
3. *Shri Krishna* v. *Ahmad*, 57 All 588.
4. *Ci palaiyan* v. *Raghupatiyyam*, (1873) 7 MHC 250, 254.
5. Section 48.
6. Section 48.
7. Section 32(4).
8. Section 32(7).
9. Section 13(a).
10. Section 13(b).
11. Section 42.
12. *T. Saraswathi Ammal* v. *Jagadambal*, 1953 SC 201: 1953 SCR 939: 1953 SCJ 287.
13. *Lachman Rai* v. *Akbar Khan*, I A 440; *Mst. Zunkari* v. *Budhmal, etc.*, 57 IC 252 (2).
14. *Rama Nand* v. *Surgiani*, 16 A 221.

contested cases are very good proof of any alleged custom, for the greater the strength of the custom the less probability is there of any attempt to controvert it.[1] Evidence of acts, acquiescence in those acts, their publicity, decisions of Courts or even of *panchayats* upholding such acts, the statements of experienced and competent persons of their belief that such acts were legal and valid, will be admissible; but although admissible, evidence of this latter kind will be of little weight, if unsupported by actual examples of the usage asserted.[2] It is open to Court to infer from long enjoyment, not exercised by permission, stealth or force, the existence of a custom.[3] A custom may be very satisfactorily proved by evidence of particular instances so numerous as to justify the Court in finding in favour of the custom; one solitary instance or even four modern instances are not sufficient to prove a custom.[4] A custom cannot be established by a few instances or by instances of a recent date.[5] Judicial decisions are admissible as instances in which a custom is recognized,[6] and furnish the most satisfactory evidence of existence of the custom.[7] But the instances must be prior to the suit in question and *post litem* instances are not admissible.[8] Judicial decisions recognizing the existence of a disputed custom among the community of one place are relevant as evidence of the same custom among the community of one place are relevant as evidence of the same custom among the same community of another place.[9] In order to prove the existence or non-existence of a particular custom it is only the judgment that can be produced as an instance. If a judgment which is produced as an instance contains reference to another judgment which is not produced, the latter cannot be relief upon as proof of another instance.[10] A compromise decree or a decree passed in *ex parte* proceedings is admissible to prove or negative a custom.[11]

When a custom has been repeatedly brought to the notice of the Courts and is judicially recognised, it becomes a part of law of the locality where it prevails, and it is not necessary to prove its attributes in each individual case.[12]

Where the question is whether daughters are excluded from inheritance in a family, plaints and written statements in other suits in the family asserting or denying, or omitting to assert or deny, the right of the daughters are relevant.[13] Custom must be alleged in precise terms and must by evidence be established.[14] The fact that a custom was not

1. *Maryam Sultan* v. *Karam Ilahi*, 1947 Pesh. 39.
2. *Gopalayyam* v. *Raghupatyayan*, 7 MH 250.
3. *Shadi Lal* v. *Muhammed Ishaq Khan*, 33 A 257: 9 IC 198.
4. *Durga, Charan Mahto* v. *Raghunath Mahto*, 20 IC 810: 18 CWN 55; *Suba Dusadh* v. *Shiva Prasad*, 1950 P. 302.
5. *Kakorla Abbayya* v. *Venkata Papayya Rao*, 29 M 24.
6. *Mst. Jatan* v. *Jiwan Singh*, 14 L 630: 144 IC 454: 1933 L 553; *Sher Mohammad* v. *Jawahar Khatun*, 40 PLR 29.
7. *Mahadeo* v. *Baleshwar*, 1939 A 626; *Gurdayal Mal* v. *Jhandu Mal*, 10 A 585; *Shimbu Nath* v. *Gayan Chand*, 10 A 379; *Niamat* v. *Abdul Rahman*, 126 IC 748: 1930 S 193; but see *Dewan Singh* v. *Mst. Shanti*, 17 L 809: 1937 L. 223: 167 IC 39.
8. *Shankar Lal* v. *Kailash*, 41 PLR 21: 1939 L 105.
9. *Bobbaladi Gateppa* v. *Babbaladi Enamma*, 50 M 228: 99 IC 503: 1927 M 228; *Mst. Sano* v. *Puran Singh*, 78 IC 461: 1925 N 174.
10. *Dasondhi* v. *Milkhi Ram*, 1939 L 152: 181 IC 703.
11. *Abdul Karim* v. *Shiv Narain*, 1952 Punj. 356: 1952 PLR 255.
12. *Jugal Kishore Birla* v. *Bishnu Hari Jana*, 1955 C 419.
13. *Mst. Amina Khatun* v. *Khalil-ur-Rahman Khan*, 8 Luck. 445: 1933 O 246.
14. *Lal Singh Sukha Singh* v. *Roor Singh Bela Singh*, 1953 Punj. 202: 1953 PLR 168; *T. Saraswathi Ammal Jagadambal*, 1953 SC 201: 1953 SCR 939: 1953 SCJ 287.

pleaded in a litigation between members of a community, where it would have been pleaded if it existed, is relevant.[1] A statement made by a deceased person on a previous occasion that he was adopted when he was an orphan is admissible in evidence, under Section 13(b), in a subsequent suit in which the existence of a custom recognizing the validity of adoption of orphans is in question.[2] For the purpose of proving a custom entitling the ryots to transfer their houses, certified copies of sale-deeds evidencing particular instances of transfers by ryots are admissible.[3] Evidence of existence of custom of pre-emption in neighbouring sub-divisions is relevant to prove a similar custom.[4]

Admissibility of Judicial Decisions in Support of Custom and their Value.—The evidence afforded by decision of the courts in the enforcement of a custom is the most satisfactory.[5]

Value of oral evidence of custom when documentary evidence is withheld—Custom cannot be inferred by analogy.—Oral evidence as to instances which can be proved by documentary evidence cannot safely be relied upon to establish custom, when no satisfactory explanation for withholding the best kind of evidence is given. It is incumbent on a party setting up a custom to allege and prove the custom on which he relies and it is not any theory of custom or deductions from other customs which can be made a rule of decision but only any custom applicable to the parties concerned that can be the rule of decision in a particular case. It is well settled that custom cannot be extended by analogy. It must be established by inductively, not deductively and it can not be established by priori methods.[6]

Hearsay Evidence to Establish custom.—After the existence of the custom for some years has been proved by direct evidence, it can only as a general rule, be shown to be immemorial by hearsay evidence, and it is for this reason that such evidence is allowable as an exception to the general rule.[7]

Family custom.—The consensus of opinion amongst the members of the family, the traditional belief entertained by them and acted upon by them their statements, and their conduct would all be relevant, and it is only where the relevant evidence of such a character would appear to the Court to be sufficient that a specific family custom pleaded in a particular case would be held to be proved.[8]

Sections 13 and 101 to 103.—Proof of family custom.—The burden of proving a family custom in derogation of the general law being heavily on the party who sets it up, it was incumbent on that party to prove by clear and cogent evidence that there was such a custom as was pleaded by them.[9]

Caste Custom.—An alleged custom among the Reddiars of South India, according to which a man can marry his own daughter's daughter, cannot be recognized by a Court of law. The chief attributes of a custom, namely, that the same should not be opposed to public policy, abhorrent to decency and morality or inconsistent with the practices of good men are not present. The civilised and cultured society in which we

1. *Per* Mookerjee, J., in *Mariam Bibee* v. *Muhammad Ibrahim*, 48 IC 561 : 28 CLJ 306.
2. *Birj Raj Saran Singh* v. *Basant Singh*, 118 IC 154 : 1929 A 561.
3. *Narain Singh* v. *Net Ram*, 1940 A 535 : ILR 1940 A 726.
4. *Mariyam Sultan* v. *Karam Ilahi*, 1947 Pesh. 39.
5. *Kehar Singh* v. *Dewan*, A 1966 SC 1555.
6. *T. Saraswathi Ammal* v. *Jagadambal*, 1953 SCR 939 : 1953 SCJ 287.
7. *Rajendra* v. *Gangananda*, 52 IA 279.
8. *Abdul Hussain* v. *Sona*, LR 45 IA 10 cited with approval in *Pushpavathi* v. *Visweswar*, (1964) 2 SCR 403.
9. *Mohammad Baqar* v. *Naimunissa Bibi* AIR 1956 SC 548.

live and the progressive country in which we are, should not approve of an incest which would not find favour even under primitive or tribal societies.[1]

Prohibitory custom.—Where the custom alleged is a prohibitory custom that is to say, a prohibition from doing an act, which involves sacrilege to the temple itself, one cannot get innumerable instances in which such an attempt was made and was frustrated. The general rule that where a customary right is alleged several instances of the assertion of the right and its due recognition should be proved will not therefore apply.[2]

Relevancy of judgments not inter partes.—This controversial question is a subject of many conflicting decisions. The following types of Judgments both *inter-partes* and *non-inter-partes* are made admissible under the provisions of the Act, thus:

(1) Judgment in support of a plea of *res-judicata* in a civil case. (Section 40 read with Section 11 C.P.C.).
(2) Judgment of *autre fois acquit* in a criminal case (Section 40 read with Section 403 Cr. P.C.).
(3) Judgment *in rem* (Section 41).
(4) Judgment relating to a matter of public nature (Section 42).

Thus judgments *inter-partes* are always admissible both in Civil and Criminal cases. However, the question whether a judgment which does not fall within any of the above categories, and which is not *inter-partes* is admissible had given rise to much controversy.

Relevancy of judgments not inter-partes.—A judgment is admissible in support of a plea of *res judicata* in a civil case,[3] or that of *autre fois acquit* in a criminal case,[4] or when it is a judgment *in rem*, [5] or when it relates to a matter of a public nature.[6] On the question whether a judgment, which neither operates *res judicata*, nor is a judgment *in rem*, nor relates to a matter of a public nature, is admissible under Section 13 or any other section of the Act *as proof of the particular point decided by it*, there has been a considerable divergence of judicial opinion; though, in view of some recent decisions of the Privy Council to which reference will presently be made, this conflict should now be taken to have been practically concluded.

Calcutta decisions.—The matter came up early before a Full Bench of the Calcutta High Court in *Gujju Lal* v. *Fatteh Lal*,[7] which was a suit for possession of property in which the success of the plaintiff depended on proof of the fact that A survived B. In a previous case between the defendent and a third person, it had been found that A survived B. The plaintiff put in evidence this judgment in proof of the fact that A survived B, and the question referred to the Full Bench was whether this judgment, not being *inter partes*, was admissible in evidence under Section 13 or any other section of the Act. Four out of the five judges (Mitter, J., dissenting) held, (i) that the judgment was not a "fact" within the meaning of Section 11; (ii) that the judgment was not a "transaction," in any case, not such a transaction as is mentioned in Section 13; and (iii) that, the judgment was not admissible as proof of the fact that A survived B. The Full

1. *Balusami* v. *Balakrishna*, ILR (1957) Mad. 164.
2. *Ramakrishna* v. *Gangadhar*, AIR 1958 Orissa 26.
3. Section 11, C.P.C. (*See* S. 372 new Code) : Section 40, Evidence Act.
4. Section 403, Cr. P.C. ; Section 40, Evidence Act.
5. Section 41, Evidence Act.
6. Section 42, Evidence Act.
7. *Gujju Lal* v. *Fatteh Lal*, 6 C 171 (FB).

Bench further held that a previous judgment, which is not a judgment *in rem*, nor one relating to a matter of a public nature, is not admissible in a subsequent suit either as *res judicata or as proof of the particular point which it decides unless between the same parties or those claiming under them.*[1] Subsequently to this ruling, however, the same Court, in a case in which the question was whether the land in dispute was *lakhiraj* or rent-paying, admitted in evidence previous judgments not *inter partes* by which claims for rent for this land had been decreed, as evidence to show that the land was rent-paying;[2] and in another case, which was a suit for possession and in which the defendant relied for his possession on a sanad, previsue judgments not inter partes in suits in which he had set up the same *sanad* were admitted in evidence to show the *character of his possession and the nature of enjoyment had in the land.*[3] The two decisions just mentioned and the decision of the Privy Council in *Run Bahadur Singh* v. *Lucho Koer*[4] having been supposed to have affected the ruling in *Gujju Lal* v. *Fatteh Lal*,[5] the matter was again referred to a Full Bench in *Surendra Nath, Chawdhury* v. *Brojo Nath Chowdhury*,[6] took the matter to be concluded by the earlier Full Bench decision in *Gujju Lal* v. *Fatteh Lall*, and declined to reopen the question.[7] After this, in a case where the question was whether in calculating the amount of rent a *hath* should be taken as one of 18" as alleged by the plaintiff *zamindar* or as one of 21 5/8" as alleged by the defendant tenant, decrees obtained by the plaintiff against other tenants in which 18" had been taken as the customary measurement of a *hath* in the *purgana* were held admissible as particular instances in which a custom was claimed.[8] In a subsequent case, which was a suit for recovery of *mesne profits*, a decree obtained by the plaintiff in an *inter partes* suit under Section 9 of the Specific Relief Act was admitted in evidence to show dispossession of the plaintiff by the defendant; and the two earlier Full Bench decisions[9] were distinguished on the ground that the judgments sought to be put in evidence there were not *inter partes*.[10] But in a later Full Bench ruling. *Tepu Khan* v. *Rajani Mohan Das*,[11] the Privy Council decisions in *Ram Ranian Chakerbati* v. *Ram Narain Singh*,[12] and *Betto Kunwar* v. *Kesho Prasad Misra*[13] were held to have materially qualified the rule in *Gujju Lal* v. *Fatteh Lall*[14] and *Surendra Nath Chowdhry* v. *Brojo Nath Chowdhry*[15] and it was held that, under certain circumstances and in certain cases, the judgment in a previous case to which one of the parties to the subsequent suit was not a party might be admissible in evidence for certain purposes and with certain objects in the subsequent suit. In a still later case,[16] however, where the question was whether A

1. *Ibid.*
2. *Hira Lal Pal* v. *Hills*, 11 CLR 528.
3. *Peari Mohun Mukerji* v. *Dorobomoyi Dabia*, 11 C 745.
4. 11 C 301 (PC).
5. 6 C 171 (FB).
6. 13 C 352 (FB).
7. *Surendra Nath Pal Chowdhary* v. *Brojo Nath Pal Chowdhary*, 13 C 352 (FB).
8. *Jianutullah Sirdar* v. *Romoni Kant Roy*, 15 C 233.
9. *Gujju Lall* v. *Fateh Lall*, 6 C 171 (FB) and *Surendra Nath Pal Chowdhry* v. *Brojo Nath Pal Chowdhry*, 13 C 352 (FB).
10. *Jianutullah Sheikh* v. *Inu Khan*, 23 C 693.
11. 25 C 522.
12. 22 C 533 (PC).
13. 19 A 277 (PC).
14. 6 C 171 (FB).
15. 13 C 352 (FB).
16. *Abinash Chandra* v. *Paresh Nath*, 9 CWN 402.

and G were partners, an award *inter partes* made by an arbitrator was held inadmissible by Geidt. J., to prove the alleged partnership; and the expression of opinion in *Tepu Khan* v. *Rajani Mohan Das*,[1] that the decision in the two earlier Full Bench rulings was materially qualified by the two aforesaid Privy Council decisions was not accepted. But since the decision of the Privy Council in *Dinomoni* v. *Brojo Mohini*,[2] in which section 13 has been expressly held to justify the reception of previous proceedings *not inter partes* in evidence, the tendency of the Calcutta High Court has been to take the rule in *Gujju Lal* v. *Fatteh Lall*[3] as materially qualified,[4] and to admit previous judgments, orders and decrees not *inter partes*, as evidence of the "transaction" of litigation or of "particular instances" of the recognition of a right or custom,[5] and as *proof*, weak or strong according to circumstances, of the matters dealt with by the previous judgment, order or decree.[6] In another case, however, this Court has remarked that where a previous judgment becomes admissible under Section 13, the findings contained therein cannot be treated as part of the evidence in the subsequent case. It is not the correctness of the previous decision, but the fact that there has been a decision, that is established by the production of the judgment.[7] And, in some other cases, it has ruled that findings in a judgment cannot be used as evidence against a person who was no party to it.[8] If this view be considered to be the representative view of the Calcutta High Court, it is practically a re-affirmation of the principle laid down by the Full Bench in *Gujju Lall* v. *Fatteh Lal*;[9] since the real point which that Full Bench decided was that a previous judgment, not *inter partes*, is no proof of the particular point decided by it; and this is another way of saying that the finding in the previous case is no evidence in the subsequent case. But, as will appear from several decided cases, this Court has in practice, been treating previous judgments, not *inter partes*, as evidence of the facts found therein. Thus, where in a suit brought by a third person against the plaintiff and the defendants of the subsequent suit it was found that certain land appertained to a particular *mudafat*, the decree in that suit was treated in the subsequent suit as evidence of the fact that the land did appertain to that *mudafat*.[10] An *ex parte* rent decree

1. 25 C 522 (FB).
2. 29 C 187 (PC).
3. 6 C 171 (FB).
4. *Anukul Chandra Dhar* v. *Kamala Kanta Roy*, 67 IC 787 : 1923 C 270 ; *Ram Kumar Das* v. *Harnarain Das*, 92 IC 104 : 1926 C 727 ; *Kanta Mohan Mullick* v. *Gopi Nath Santra*, 112 IC 785 ; 1928 C 355.
5. *Hem Chandra Bhaduri* v. *Purna Chandra Sarkar*, 153 IC 134 : 1934 C 788 : 59 CLJ 320 ; *Ram Kumar Das* v. *Harnarain Das*, 92 IC 104 : 1926 C 727 ; *Gopi Sundari Dasi* v. *Kherod Gobinda Chowdhury*, 82 IC 99 : 1925 C 194 ; *Hasim Ali* v. *Abjal Ali*, 82 IC 392 : 1924 C 1046 ; *Baidya Nath Dutt* v. *Alef Jan Bibi*, 70 IC 194 : 1923 C 240 ; *Mohar Ali Sarkar* v. *Mafizuddin Sarkar*, 65 IC 699 ; *Parbati Mahji* v. *Digpati Mahji*, 64 IC 465 ; *Bansi Nath Pal* v. *Jagat Kishore Acharjee Chowdhary*, 35 IC 298 : 20 CWN 643 ; *Madhab Chandra Bara* v. *Sarat Kumari Debi* 6 IC 26 : 15 CWN 126 ; *Ranjit Sinha Bahadur* v. *Basanta Kumar Ghosh*, 4 IC 81 : 9 CLJ 597 : 12 CWN 739 ; *Baleshwar Bagarti* v. *Bhagirathi Das*, 35 C 701 : 7 CLJ 563 ; *Bhaya Dirguj Deo* v. *Pande Fateh Bahadur Ram*, 3 CLJ 521.
6. *Hem Chandra Bhaduri* v. *Purna Chandra Sarkar*, 153 IC 134 ; *Kiran Chandra Roy* v. *Jagannath Banik*, 114 IC 670 : 1928 C 472 ; *Gopi Sundari Dasi* v. *Kherod Gobinda Chowdhury*, 88 IC 99 : 1925 C 194 ; *Hasim Ali* v. *Abial Ali*, 82 IC 392 : 1924 C 1046 ; *Anukul Chandra Dhar* v. *Kamala Kanta Roy*, 67 IC 787 : 1923 C 270 ; *Parbati Mahji* v. *Digpati Mahji*, 64 IC 465 ; *Syed Mohammad Khan* v. *Maharaja Nam Narain Singh Bahadur*, 7 CLJ 90.
7. *Baidya Nath Dutt* v. *Alef Jan Bibi*, 70 IC 194 : 1923 C 240.
8. *Satish Chandra Mukherjee* v. *Joy Ram Roy*, 65 IC 525 ; see also *Benode Lal Chakravarty* v. *Secretary of State*, 133 IC 573 : 1931 C 239 : 34 CWN 1113.
9. 6 C 171 (FB).
10. *Kiran Chandra Roy* v. *Jagannath Banik*, 114 IC 670 : 1928 C 472.

obtained by a landlord against the heirs of a tenant, which is satisfied by payment of the decretal amount, is sufficient evidence to show that, at the date of the decree, the heirs were paying rent and occupying the position of tenants.[1] The recitals and findings in judgments passed in suits for additional rent on the ground that land in the holding had increased by accretion, are not evidence against persons who are not parties to those suits. But the fact that such decrees were passed by which additional rent was imposed is evidence as regards the time from which such reformed land became fit for possession.[2] On the question as to who is entitled to recover rent from the defendants a judgment in a previous case between the plaintiff and the defendants' landlord, decreeing the plaintiff's claim for possession against the defendants landlord, is a strong piece of evidence.[3] In a suit for recovery of possession of land, a judgment in a previous suit for ejectment from the same land, brought by the plaintiff against a third person in which the defendant's title was set up, is admissible in evidence for the purpose of showing that that was a suit in which the title of the defendant was set up by a third person, and that the suit was decreed.[4] A judgment *inter partes* or not, holding that the defendant held a holding in an estate on a certain rent is admissible to show that the defendant did hold that holding on that rent.[5] A revenue decision that certain lands are rent-free owing to their having been dedicated as public *debutter* is admissible in a suit for declaration of title, in which the *debutter* character of the land is challenged, to show that the *sebait* on a previous occasion put forward the claim that the land was *debutter*, and that this claim was *admitted by the revenue* authorities.[6] Where a grant was sought to be resumed by the grantor, previous judgments were admitted in evidence to show that similar grants were resumed by him on the death of the grantees.[7] Where a holding sold in execution of a rent decree obtained by a landlord is described in the sale-certificate as *muharrari*, the entry in the sale certificate is strong evidence against other landlords, of the holding being *mukarrari*.[8] Where the question is whether a family has or has not adopted the *Dayabhaga* law, a previous judgment deciding that the *Dayabhaga* law had been adopted by the family is a relevant circumstance of great weight.[9] Following the Privy Council decision in *Gobinda Narain Singh* v. *Sham Lal Singh*,[10] this Court has held judgments, not between the same parties, to be admissible under Section 13 as evidence of the assertion and recognition or denial of a right.[11] Thus, where in a suit by a person against the Government it was asserted by him that he along with another person purchased a *zamindari* at a revenue sale, and the Court, accepting this assertion, gave him a decree against the Government, it was held that this decision was admissible even against a stranger to the purchase at the revenue sale, as evidence of a transaction within the meaning of Section 13.[12] In a suit where the question is whether the tenancy is permanent or not, the judgment in a previous title

1. *Anukal Chandra Dhar* v. *Kamala Kanta Roy*, 67 IC 787 : 1923 C 270.
2. *Abdul Latif* v. *Nawab Khaieb Habibulla*, 1939 C 354 : 69 CLJ 28.
3. *Purna Chandra Thakur* v. *Ramesh Chandra Achariya Chowdhury*, 87 IC 753 : 1925 C 1218.
4. *Mohar Ali* v. *Mufizuddin Sarkar*, 65 IC 699.
5. *Bymkesh Chakrabarty* v. *Jagadiswar Roy*, 40 IC 442 : 22 CWN 304.
6. *Madhah Chandra Bara* v. *Sarat Kumari Debi*, 6 IC 26 : 15 CWN 126.
7. *Syed Mohammad Khan* v. *Maharaja Nam Narain Singh Bahadur* 7 CLJ 90.
8. *Khirode Chandra Ghosh* v. *Janki Das Janun*, 20 IC 753.
9. *Sarada Prasanna Roy* v. *Uma Kanta Hazari*, 50 C 370 : 77 IC 450 : 1923 C 485.
10. 58 C 1187.
11. *Radhu Roy* v. *Jyoti Prasad Singh Deo*, 140 IC 385 : 1933 C 21.
12. *Nanda Lal Roy* v. *Pramatha Nath Roy*, 143 IC 179 : 1933 C 222.

suit, in which permanent tenancy rights were claimed, though the plaintiff in the subsequent suit was not a party to it, is admissible as evidence of a transaction in which permanent tenancy rights in the land were previously claimed.[1] Though recitals and findings in a judgment not *inter partes* are not admissible such a judgment and decree are admissible to prove the fact that a decree was made in a suit between certain parties and for finding out for what lands the suit was decreed.[2] A judgment not *inter partes* may be admissible as evidencing a particular transaction by which or an instance in which the relevant right was asserted, recognized, etc.; it is also admissible to prove that there was a litigation and that as a result of that litigation a party recovered possession of certain land; but findings of fact in or reasons for the judgment are irrelevant and not admissible.[3] Where a party relies on a finding in a previous Privy Council decision not *inter partes* for showing that a village is a fixed place, the finding is not evidence in the case.[4] A map incorporated in a decree in a suit not *inter partes* is not admissible as evidence of the facts stated therein.[5]

Allahabad decisions.—In the Allahabad Full Bench case, *Collector of Gorakhpur* v. *Palakh Dhari Singh*,[6] P brought a suit against K a Hindu widow to establish his right of inheritance, as her husband's reversioner, in certain villages which had belonged to K's husband, and to have it declared that the husband died childless and that the child put forward by K as her husband's son was a supposititious child of unknown parentage. K was the only defendant to the suit, who maintained that the child in question was her son by her deceased husband. The suit was dismissed on the merits. After K's death, P brought a suit against D whom the Collector, as Manager of the Court of Wards, had accepted as the minor son of K, and against the Collector, as such Manager, for possession of the same villages upon the same grounds as those put forward in the former suit. The defendants put in evidence the judgment in the previous suit to prove that D was the son of K's husband. On objection being taken to the relevancy of the judgment, it was held, (i) that the existence of the previous judgment being neither a fact in issue nor relevant; Section 43 was inapplicable; (ii) that the judgment in the previous suit was not a "transaction" within the meaning of section 13, but that the suit was resulted in that judgment was a "transaction" by which the right of D was asserted and recognized; (iii) that the previous suit, but not the judgment, was a "particular instance" in which a right was claimed for D and recognized; and (iv) that the previous judgment was the best evidence of this transaction and instance. There is a subtle but real difference between the view taken of the relevancy of judgments not *inter partes* in the leading Calcutta Full Bench case,[7] and this Allahabad Full Bench case.[8] According to the former, a previous judgment not *inter partes* is no proof of the particular point decided by it, but according to the latter, such a judgment becomes evidence of an instance in which a right is *recognized* by the tribunal. This is merely another way of saying that the fact of

1. *Kamud Behari Basu* v. *Himansuh Kumar*, 1937 C 373 : 65 CLJ 333.
2. *Gadadhar* v. *Sarat Chandra*, 1941 C 193 : 195 IC 212.
3. *Asaddar Ali Khan* v. *Province of Assam*, 1944 C 57 : 211 IC 460 : ILR (1944) IC 203 ; *Kirtanand Singh* v. *S.S*, 1940 C 506.
4. *Midnapore Zamindary Co.* v. *Raja Bijoy Singh Dudhuria*, 1941 C 1.
5. *Dwijen Chandra Roy* v. *Naresh Chandra Gupta*, 49 CWN 791.
6. 12 A 1 (FB).
7. *Gujju Lall* v. *Fatteh Lall*, 6 C 171 (FB).
8. *Collector of Gorakhpur* v. *Palakh Dhari Singh*, 12 A 1 (FB).

a previous adjudication having been made in favour of the existence or non-existence of a right is evidence, in a subsequent suit, of its existence or non-existence; and, therefore, according to this view, a previous judgment does, in a sense, become evidence of the particular point decided by it. The Full Bench ruling in *Collector of Gorakhpur* v. *Palakh Dhari Singh*[1] has since been followed in several other decisions.[2] A judgment of another Court interpreting a similar decree relating to a third person, although not *inter partes*, has been held to be admissible.[3] In more recent cases of this Court, however, it has been held that a finding of fact or a statement of fact in a judgment delivered in one case is not admissible as proof of that fact in another case when the parties are not the same.[4] In a single Judge decision of this Court, a judgment has been held to be admissible under Section 11, as proof of the point decided by it;[5] but, as will be pointed out later, it is wrong to found any argument on the provisions of section 11 to establish the relevancy of a judgment not *inter partes* as evidence of the point decided by it.

Oudh decisions.—In a case, in which the question was whether certain property was public or private property, the Lucknow Court, on the question of relevancy of a previous judgment in which the property had been held to be public, expressed itself in these terms:—"It is clear that in the previous suit brought by BP one of the main points for the consideration of the Courts was whether the property in suit was private property or public property. All the Courts concurred in holding that the property was public property and that B P had no right to bring the suit in connection thereof. This was clearly both a transaction as well as an instance in which the right that the property was public property was clearly asserted and recognized by the Court."[6] In another case in which objection was taken to the relevancy of a previous judgment, the same Court observed as follows:—"I am of the opinion that this is a far belated contention. There can be no doubt whatsoever that, in spite of the fact that the present plaintiffs were no party to that litigation, the judgment which ended that litigation is admissible under the provisions of Section 13 of the Indian Evidence Act. There is no doubt that at a certain remote period in the past this was treated as a moot question, but there have been at least three decisions of the Privy Council besides the decisions of the several High Courts in India which place the matter beyond any doubt."[7] Where a gift in favour of A was in question, a judgment in a previous case between A and a third person in which the gift was held valid was admitted under this section, as evidence of an "instance in which A's right under the gift was asserted and enforced."[8] A judgment of a Civil Court in which a person's right to a trade mark is negatived is admissible in a prosecution started by him against another person for counterfeiting the trade mark. Such judgment evidences an instance where a right was claimed and was disputed.[9] A previous judg-

1. 12 A 1 (FB).
2. *Gobind Krishna Narain* v. *Abdul Qayyum*, 25 A 546 ; *Sri Krishna Dutt Dube* v. *Mst. Ahmadi Bibi* 153 IC 708 : 1935 A 187.
3. *Bisheswar Dayal* v. *Zamin Ali*, 1949 A 269.
4. *Muhammad Abdul Karim Khan* v. *Bishan Sahai*, 121 IC 387 : 1930 A 9 ; *Mst. Phulwanti Kunwar* v. *Janeshwar Das*, 83 IC 782 : 1924 A 625 : 46 A 575 ; *Chhiddu* v. *Desraj*, 77 IC 753 : 1924 A 294 ; *Ram Kishan* v. *Karam Singh*, 1949 A 673.
5. *Kali Charan Sharma* v. *E.*, 104 IC 225 : 1927 A 654 : 28 Cr. LJ 785.
6. *Hari Kishen* v. *Raghubar Dayal*, 1 Luck 489 : 97 IC 853 : 1926 O 578.
7. Per Wazir Hasan, AJC *in Ghulam Sarwar Khan* v. *Wazir Khan*, 65 IC 398 : 1922 O 98.
8. *Mst. Anjuman-un-Nisa* v. *Ashiq Ali*, 66 IC 222 : 1922 O 78.
9. *Palli Ram* v. *E.*, 134 IC 477 : 1931 O 277 : 32 Cr. LJ 1177.

ment is evidence of the fact that a claim was asserted and rejected.[1] A previous judgment in which a person has been held to be legitimate or illegitimate is admissible in a subsequent suit in which the question of his legitimacy arises.[2] When a judgment has determined the right to any property between two parties, it is not open to a third person to set up the right of the defeated party as against that of the successful party. Such cases form an exception to the rule of *res inter alias acta*.[3] Where a party sets up a particular right, judgments not *inter partes* in previous cases in which a similar right was asserted and admissible under Section 13.[4] A judgment not *inter partes* may be used under Section 13 as an instance when the possession of a party was challenged and found to be proved, but the Indian Evidence Act does not make a finding of fact arrived at on the evidence before the Court in one case evidence of that fact in another case, where the parties are not the same.[5] In a suit between two parties a prior judgment, recognizing the right of one of them to the property which is the subject-matter of the suit, may not have a binding effect against the other who was not a party to the judgment, but it is undoubtedly of great evidentiary value under Section 13 of the Evidence Act.[6]

Patna decisions.—A judgment not *inter partes* can be admissible under Section 13 only for certain purposes and with certain objects.[7] A judgment, not being a judgment *in rem*, is not admissible in evidence against those who are neither parties to it nor derive their title through the parties, as proof of the facts determined therein,[8] at the most it is admissible as evidence of an assertion of the right claimed in the suit.[9] A judgment not *inter partes* is admissible as evidence of the assertion of a right and of its recognition or denial by the Court.[10] A judgment can be used as evidence of the point decided by it only when it is properly given in evidence under Sections 40-42; but when a judgment is not admissible under these sections and is tendered in evidence under Section 43 or Section 13, it cannot be treated as evidence of the point decided by it.[11] A rent decree passed against a person is to some extent evidence of the possession of that person.[12] In a suit for produce of rent, a decision in a case regarding land of similar quality may be admissible under Section 13.[13] A judgment may be used to explain or introduce facts in issue or to explain the history of the case.[14] Where what the plaintiff in a suit seeks to

1. *Muhammad Ali Khan* v. *Ghazanfar Ali Khan*, 60 IC 147 (Oudh).
2. *Raj Fateh Singh* v. *Baldeo Singh*, 3 Luck 416 ; 109 IC 310 : 1928 O 233 : *J. C. Galstaun* v. *Abid Husain*, 73 IC 428 : 1924 O 19.
3. *Ajodhia Prasad* v. *Sanjhari Kaur*, 6 Luck 710 : 139 IC 631 : 1932 O 342.
4. *Kalu Misir* v. *Bhagwati Singh*, 60 IC 142 (U.P. Revenue Board).
5. *Sher Bahadur Singh* v. *Sri Madho Prasad Singh*, 1935 OWN 674.
6. *Gulai* v. *Sripal*, 162 IC 334.
7. *Shamsunder Kuer* v. *Ramkhelawan Sah*, 8 P 783 : 121 IC 334 : 1929 P 739 ; See also *Janki Kuer* v. *Saudagar Ram*, 56 IC 417 : 1920 P 177.
8. *Kesho Prasad Singh* v. *Kirtarath*, 97 IC 282 : 1926 P 577.
9. *Ibid.*
10. *Purnima Debya* v. *Nand Lal Ojha*, 11 P 50 : 136 IC 577 : 1932 P 105 ; *Ram Lakhan Upadhya* v. *Jai Upadhya*, 123 IC 387 : 1929 P 749 ; *Shamsunder Kuer* v. *Ramkhelawan Sah*, 8 P 783 : 121 IC 334 : 1929 P 739 ; *Muhammad Ehia* v. *Ganga Dayal Ojha*, 40 IC 838 ; *Ramdhan* v. *Purshottam*, 88 IC 699 : 1926 N 109.
11. *Ramparekha Pande* v. *Ramjhari Kuer*, 1933 P 690 ; *Purnima Debya* v. *Nand Lal*, 11 P 50 : 136 IC 577 : 1932 P 105 ; *Jhingur Raut* v. *E*, 134 IC 625 : 1931 P 386 : 32 Cr. LJ 1224 ; *Hitendra Singh* v. *Rameshwar Singh Bahadur*, 4 P 510 : 87 IC 849 : 1925 P 625.
12. *Nandkishore Sao* v. *Bikan Singh*, 65 IC 856 : 1922 P 557 : 23 Cr. LJ 200.
13. *Shibo Singh* v. *Janki Prasad Singh*, 125 IC 115 : 1930 P 231.
14. *Purnima Debya* v. *Nand Lal*, 11 P 50 : 136 IC 577 : 1932 P 105.

establish by a judgment is not a right or custom but a fact proved in a previous action to which the defendant in the suit was not a party, the judgment is not admissible in evidence.[1] A judgment in land registration proceedings is no evidence of the facts mentioned therein, more particularly when the proceedings were not between parties to the subsequent suit in which the judgment is sought to be admitted in evidence.[2] In a previous suit the plaintiff's father claimed that his family was governed by the Benares and not the Mithila School. This was denied by the defendants to that suit who alleged that the family was governed by the Mithila School. The Court found in favour of the plaintiff. In a subsequent suit, not *inter parties*, filed by the plaintiff, the plaintiff claimed that his family was governed by the Benares School.[3] A judgment in a criminal case in which the plaintiff asserted his possession to the disputed land and possession was held to be with him is inadmissible against a third person who was not a party to the criminal proceedings to prove the plaintiff's possession at the date of the judgment; but it is admissible under Section 13 to prove that at the date of the judgment the plaintiff asserted his title to the disputed land.[4] As regards the truth of the matter decided a judgment is not admissible evidence against a stranger to the suit.[5]

Nagpur decisions.—Judgments *inter partes* which do not operate as *res judicata* are relevant in so far as they explain the nature of the possession, or throw light on the motives or conduct of the parties, or reproduce admissions made by the parties or their ancestors, and also embody an authoritative statement of the facts which the investigation then held before the Court brought to light. Such judgments have a very high evidential value and may even shift the burden of proof.[6] Where the question in issue is the status of one of the parties to the suit, judgments and orders in previous suits and proceedings between the parties, in which the question of status was in issue, are admissible in evidence to prove the fact, nature and result of the previous litigation, and may raise a presumption in favour of one of the parties so as to shift the burden of proof.[7] A judgment not *inter partes* in a previous suit in which an adoption was upheld is a relevant piece of evidence under Section 13, and will enhance the burden of proof needed for establishing the contrary of the fact held proved by it.[8] A judgment may be admissible as evidence of title, or under Section 13.[9] In a Full Bench case, however this Court has held that if a point is decided in a particular way by a judgment, which is not a judgment *in rem*, nor relating to matters of a public nature, nor between the parties to subsequent suit,. it is not relevant for the decision of the same point in the subsequent suit.[10] A judgment is not admissible to prove the truth of the fact which it states, much less is any fact, stated as part of the reasoning in arriving at the fact in issue, evidence

---

1. *Raghupat Tewari* v. *Narbadeshwar Prasad Tewari*, 166 IC 664.
2. *Krishna Kumar Chatterjee* v. *Mst. Jaypat Kuer*, 16 P 84 ; 1937 P 73 ; 167 IC 152.
3. *Sri Chandra Choor Deo* v. *Bibhuti Bhushan Deva*, 1945 P 211.
4. *Paran Munda* v. *Santosh Mahto*, 1942 P 372.
5. *Sri Thakurji Ramji Lachhmanji* v. *Mathura Prasad Missir*, 1941 P 354.
6. *Gopal Rao* v. *Sitaram*. 97 IC 594 : 1927 N 19 ; *Chandu Lal* v. *Pushkar Raj*, 1952 N 271 ; 1952 NLJ 213 ; ILR 1952 N 318.
7. *Junilal* v. *Mst. Halki*, 78 IC 981; 1924 N 387.
8. *Yamunabai* v. *Dhaunalal*, 114 IC 616 ; See also *Yeshwant* v. *Daulat*, 89 IC 663 ; 1926 N 129; *Ramdhan* v. *Purshottam* 88 IC 699; 1926 N 109.
9. *Abdul Majid Khan* v. *Tukaram*, 101 IC 774 ; 1927 N 359 ; *Yeshwant* v. *Daulat* 89 IC 663; 1926 N 129.
10. *Shankar Ganesh* v. *Kesho*, 121 IC 644 ; 1930 N 1 (FB)

of the truth of that fact. Where, however, the right of a party has already been concluded by a previous judgment, the fact can be proved by production of the judgment, since in such circumstances the existence of the judgment itself is a relevant fact.[1] The decision of an income-tax officer holding that the assessee was separate from his joint family and had separate grain business, is a mere opinion of that officer and is irrelevant in a civil suit involving a dispute as to whether a particular item of property in his separate property or joint family property.[2]

Bombay decisions.—In an early Bombay case, a previous judgment not *inter partes* was held admissible "for the purpose of showing that the right had not only been asserted but recognized by the tribunals of the country."[3] But in a subsequent case in which the *bona fides* of some entries in a firm's books were questioned, the Court concurred in the view taken of this matter in *Gujju Lal* v. *Fatteh Lall*[4] and held a previous judgment, in which the entries were held to have been made *bona fide*, inadmissible in evidence,[5] In a still later case, however, where the fraudulent and colourable nature of a release was in question, a previous judgment not *inter partes*, in which the release had been found to be fraudulent and colourable, was admitted in evidence on the strength of the Privy Council decision in *Bitto Kunwar* v. *Kesho Prasad Misr*.[6] Ranade , J. made the following general observations in regard to the relevancy of previous judgments;

—"Apparently, the cases, which decide that judgments, not *inter partes*, are not admissible, proceed chiefly on the ground that those judgments are sought to be used as having the effect, more or less, of *res judicata*. For that purpose, a judgment *inter partes* alone can be admitted in evidence; but for other purposes where judgments are sought to be used to show the conduct; of the parties or show particular instances of the exercise of a right, or admissions made by ancestors, or how the property was dealt with previously they may be used under Section 11 or Section 13 as exceptions recognized under Section 43, as relevant evidence. In the present case, though the decision in the former suit will not stop the defendant from contesting the claim as being *res judicata*, still the record and judgment in that case showing the conduct of the parties and their admissions would be admissible under Section 13."[7] In so far as judgments explain the nature of possession, or throw light on the motives or conduct of parties, or identify the property, they are admissible.[8] A judgment, not *inter partes* but in a suit brought by other creditors against the same defendant, in which the existence of the partnership denied in the subsequent suit was asserted and with success, is not conclusive but is admissible and relevant.[9] A judgment not *inter partes* may not be proof of facts therein stated, but it is admissible for the purpose of explaining the character in which possession of an estate has been enjoyed and matters of that class.[10] The matter was thoroughly discussed in *Mohamad Amin v. Hasan*,[11] in which the plaintiff sued his

1. *Maroti Laxman Koshti*, v. *Jagannathdas Lachhmandas*, 1939 N 72 ; 180 IC 118; 1938 NLJ 466.
2. *Nand Kumar* v. *Kaluram*, 19 MLJ 287.
3. *Naranji Bhikhabhai* v. *Dipa Umed*, 3 B 3.
4. 6 C 171 (FB).
5. *Ranchhoddos Krishnadas* v. *Bapu Narhar*, 10 B 439.
6. 19 A 277 (PC).
7. *Lakshman Govind* v. *Amrit Gopal* 24 B 591.
8. *Ibid.*
9. *Govindji Jhaver* v. *Chhotalal Velsi*, 2 Bom. LR 651, followed in *Devidatta Ramniranjandas* v. *Shriram Narayandas*, 1932 B 291; 137 IC 381; 56 B 324 ; 34 Bom LR 236.
10. *Sri Ganesh Dharnidhar Dev* v. *Shri Dhundiraj Ganesh Dev*, 5 Bom LR 230.
11. 31 B 143.

brother, brother's wife and the widow of a deceased brother to recover possession of a house on the strength of a sale deed passed to the plaintiff by his deceased father. Some time after the sale to the plaintiff, certain mortgagees of the father brought a suit on the mortgage against the plaintiff, his father and mother. In the said suit, the sale to the plaintiff was held to have been a sham transaction and the plaintiff had to pay off the mortgage. In the suit brought by the plaintiff for the recovery of the house on the strength of the sale deed, the defendants relied on the judgment in the suit on the mortgage to show that the sale was a colourable transaction. Russell, A.C.J., held, that the judgment in the previous case was neither a "transaction" nor a "particular instance;" but that the proceedings which terminated in that judgment were a "particular instance" in which a right was claimed and the judgment was admissible as evidence of that "particular instance". Beaman, J., was of the opinion that the judgment was admissible only to prove that the genuineness of the plaintiffs sale deed was questioned, but that it could not be used for any ulterior purpose. In another case, a judgment declaring the exclusive right of fishing of a party at particular seasons of the year was held relevant under Sections 13 and 42, though not conclusive, in proceedings in which the right was subsequently denied by a third party.[1] In a suit between a *jagirdar* and a tenant, judgments pronounced in cases decided between the jagirdar and other tenants are not admissible to prove the relation of the *jagirdar* to his tenants and the rights under which the *jagir* is held.[2] A judgment not *inter partes* is admissible evidence of the decision arrived at, but the reasons upon which the judgment is founded and the other findings of fact there come to are irrelevant.[3] A foreign judgment is an admissible proof of foreign law.[4]

Lahore decisions.—The Lahore High Court has applied Section 13 to judgments not *inter partes* and concurred with judgment of Beaman, J., in *Mohamad Amin* v. *Hasan*[5] as to the evidentiary scope of such judgments.[6] Where the question is whether a certain property is *wakf* and attached to a *gaddi* and, therefore, not alienable by the *granthi*, a finding in a previous judgment in which the property was held to be *wakf*, attached to the *gaddi* and inalienable is not relevant to show that the property is *wakf*, attached to the *gaddi* and inalienable; and the judgment is admissible only for the purpose of showing that, at that time, the right of the then *granthi* to alienate the property was called in question.[7] Similarly, a finding in a previous judgment that certain property is ancestral is not relevant to show the ancestral character of the property and is admissible only to show that the right of the alienor to alienate was called in question on the ground that the property was ancestral.[8] A finding in a previous judgment, not *inter partes*, that a woman's husband and his brother were living in a village at a certain time is not relevant and evidence of that fact.[9] A finding of fact arrived at on the

---

1. In re *Anya Shidya Patil*, 102 IC 546; 1927 B 654; 28 Cr. LJ 578.
2. *Pandu Mahipat* v. *Shivshankardas Shivlaldas*, 118 IC 702.
3. *Sanvurangonda* v. *Basangonda*, 41 Bom. LR 561; 1939 B 313.
4. *Suganchand Bhikamchand* v. *Mangibai Gulabchand*, 1942 B 185.
5. 31 B 143.
6. *Jatan* v. *Jiwan Singh*, 14 L 630; 144 IC 454; 1933 L 553; *Sardar Khan* v. *Sadulla Khan*, 140 IC 566; 1933 L 57; *Indar Singh* v. *Fateh Singh*, 1 L 540; 59 IC 734.
7. *Indar Singh* v. *Fateh Singh*, 1 L 540.
8. *Partab Singh* v. *Mathu*, 96 IC 998; 8 LLJ 492.
9. *Har Nath* v. *Mohan Lal*, 115 IC 422; 1929 L 123.

evidence before the Court in one case is not evidence of the fact in another case when the parties are not the same.[1] Findings as to the *factum* or validity of an adoption, contained in a judgment, not *inter partes*, are inadmissible.[2] A decision in a custom case is not a judgment *in rem*; it is relevant only under Section 13 as a judicial instance of the custom having been recognized.[3] A judgment in a previous suit declared a certain property to be *wakf* and consequently exempt from attachment. The judgment also contained the previous history of the property by reference to which certain words in a relevant document could be properly explained. *Held*; (i) the matter of *wakf* was a matter of a public nature within the meaning of section 42 and the judgment was admissible in evidence for that reason; (ii) the judgment was admissible under section 9 as a fact which explained the words in the document, which was a fact in issue; and (iii) the judgment could be admitted under Section 13 as a particular instance in which the right that the property should be treated as wakf was claimed, recognized or exercised.[4] Possessory orders under Section 145, Cr.P. Code, are admissible as evidence of forcible possession having been alleged and possession having been claimed.[5] A judgment, not *inter partes*, mentioning that certain rights in respect of property have been claimed by a party and recognized by the authorities concerned is admissible in a subsequent suit.[6] A judgment decreeing a suit for possession, whether *inter partes* or otherwise, which does not operate as *res judicata*, is relevant only for the purpose of proving that at that time there was a successful assertion of title on the plaintiffs' part. The finding on which the judgment was based or the reasons given by the Court in support of that finding are not relevant.[7] A suit instituted by the plaintiff's ancestors against some persons who had taken away a part of the land which had been granted to them by the *farman-i-shahi*, was decreed on the ground that the land in dispute formed part of the royal grant. In a subsequent suit against different persons for possession of different land plaintiffs sought to rely on the previous judgment. It was held that the judgment in the previous suit was relevant to show only that the land which formed the subject matter of prior litigation was the property of the plaintiffs, but it was not relevant to show that the land in the subsequent suit formed part of a bigger piece of land which was given by means of a royal grant to the plaintiffs' ancestors. Findings of fact in a judgment, not *inter partes*, and the reasons upon which the judgment is founded are not relevant.[8]

Madras decisions.—The Madras High Court[9] has concurred in the leading Calcutta Full Bench decision in *Gujju Lal* v. *Fatteh Lal*.[10] But in a subsequent case where the

---

1. *Anayat Ullah Khan* v. *Kanshi Ram*, 1937 L 437; *Asa Singh* v. *Mansha Ram*, 121 IC 509 ; 1930 L 237 ; *Sankar Shaw* v. *Anil Chandra Majumdar*, 1953 C 671.
2. *Arjan Singh* v. *Darbara Singh*, 32 IC 312 : 193 PLR 1915.
3. *Mst Janat Bibi* v. *Ghulam Hussain*, 1934 L 861 ; 36 PLR. 256.
4. *M. Misbahuddin and another* v. *Vidya Sagar and another*, 1935 L 64 : 156 IC 268 ; 36 PLR 106 ; see also *Mst. Imam Bibi* v. *Abdul Rahman*, 1936 L 929 ; *Ram Lal* v. *Khushi Ram*, 1949 EP 233 ; *Govinda Narayan Singh* v. *Sham Lal Singh*, 1931 PC 89 ; 58 C 1187 ; 58 IA 125 ; 131 IC 753 ; *Inayat Ullah Khan* v. *Kanshi Ram*, 1937 L 437 ; 174 IC 722.
5. *Debi Singh* v. *Sisram*, 1939 L 188 ; 41 PLR 120.
6. *Mutasaddi* v. *Mst. Lachhmi* 1935 L 179.
7. *Kuldip Raj* v. *District Board*, Gurdaspur, 1948 L 109.
8. *Mahomed Seleman* v. *Badruddin*, 1940 L 309 ; 190 IC 689 : 42 PLR 247.
9. *Subramanyan* v. *Paramaswaran*, 11 M 116.
10. 6 C 171 (FB).

trustees of a temple had sued to recover from the owners of certain lands in certain villages money claimed under an alleged right as due to the temple, judgments in other suits against other persons in which claims under the same right had been decreed in favour of the trustees of the temple were held relevant under Section 13, as being evidence of instances in which the right claimed had been asserted, as well as under Section 42 as relating to matters of a public nature; and the ruling in *Gujju Lall* v. *Fateh Lal*, though approved, was distinguished.[1] A previous judgment in which the plaintiff's father was held to be the owner of the property in dispute is admissible in a subsequent suit to show that the plaintiff's ancestors had dealt with the property as their own for a long term of year.[2] In a subsequent case, a previous judgment was admitted in evidence, not for the purpose of proving an adjudication, but to show that in a particular instance the plaintiff's ancestor had acted in the capacity of a *karnavan* wholly irrespective of the decision arrived at in that suit,[3] and in another case, a judgment was used to prove a statement made by a predecessor in interest of a party.[4] In both the cases last cited, as well as in *Thana* v. *Kondan*[5], the judgments was, however, considered by a Full Bench of this Court in a subsequent case in which, in order to prove the date of the death of a person, a party put in evidence as to the date of the death of that person; and it was held that Section 35 is inapplicable to judgments.[6] Kumaraswami, J., who delivered the judgment of the Full Bench remarked that it would be straining the language of Section 35 to hold that a Judge, when he writes a judgment, is making entries in a public or official book, register or record, and that every statement made in a judgment is an entry in such book, register or record. He further held that Sections 40 to 44 of the Evidence Act codify the law as to the admissibility of judgments in evidence. The recital of the death in the judgment was, therefore, held irrelevant. A judgment holding a person to be a minor does not determine any right pertaining to an individual and is, therefore, admissible in evidence.[7] In a case, where the question was whether a person was or was not the heir of another person, the Court observed:—"The fact that V's father failed in a contested suit to prove the relationship of his line with the deceased 50 years ago when such an issue was much more susceptible of proof than it is now is, in my opinion, evidence against the existence of a right of that line to claim as heirs of the deceased within the meaning of Section 13."[8] In a Full Bench decision of Madras, the relevancy of judgments, not *inter partes*, has been assumed,[9] whereas in another case it has been held that a judgment is admissible as an instance where a right was claimed or denied or recognized.[10] Observations in a judgment relating to a different matter, though connected, cannot bind a third party and the judgment itself cannot be evidence against him.[11] In a suit in

1. *Ramasami* v. *Appavu*, 12 M 9.
2. *Venkatasami* v. *Venkatareddi*, 15 M 12.
3. *Byathamma* v. *Avulla*, 15 M 19.
4. *Krishnasami Ayyangar* v. *Rangasami Ayyangar*, 18 M 73; 4 MLJ 212.
5. 15 M 378.
6. *Tripurana Seethapati Roa Dora* v. *Rokkam Venkanna Dora*, 45 M 332 : 66 IC 280 : 1922 M 71 (FB).
7. *Venkata Rangappa Naicken* v. *Subbaraya Goundaw*, 33 IC 142.
8. *Secretary of State for India* v. *Subraya Karantha*, 31 IC 590 : 1915 MWN 962.
9. *Secretary of State for India* v. *Ahmad Badsha Sahib Bahadur*, 44 M 778; 67 IC 971 : 1921 M 248 (FB).
10. *Sundaram Iyer* v. *Theetharappa Mudaliar*, 40 IC 159.
11. *Narasimha Sastri* v. *Official Assignee*, Madras, 129 IC 650; 1930 M 751.

ejectment, where the defendant relies on the title of a third person, a judgment negativing the title of that person as against the plaintiff is admissible. Whatever would estop or bar the person whose title is set up must also bar the person pleading *just ertii*.[1] A reversioner of a deceased holder of an office of *karnam* claimed certain properties from alienees and the defence was that the properties were enfranchised *mirasi* service *inam* lands and the alienations were valid as the holder was entitled to deal with them as absolute owner as they had been enfranchised in favour of the holder of the office of the *karnam*. One of the defendants, an alienee, was in possession of certain documents, relating to some prior litigation between the alienor and another (who claimed to be entitled to the *mirasi inam* lands and the office jointly with the alienor) in which it had been decided that the alienor was absolutely entitled to the lands. It was held that the previous proceedings on the question of the existence of the right to the office and property were very relevant as being transactions by which the right was recognised.[2]

Rangoon decisions.—The Rangoon High Court has also applied Sections 11 and 13 to judgments and decrees, not *inter partes*, and admitted them as evidence to show that a right was asserted and recognized or negatived in the course of the litigation which resulted in the particular judgment or decree.[3]

Sindh decisions.—A judgment is admissible as evidence of the transaction of litigation but its admissibility is subject to the overriding principle that the Evidence Act does not make a finding of fact arrived at on the evidence before one Court in one case evidence of that fact in another case. The judgment is, however, admissible for the purpose of ascertaining the parties to the dispute and the contentions of the parties, the subject of the dispute and the final decision of the Court.[4]

Privy Council decisions.—Criminal proceedings, not *inter partes*, are admissible in evidence for the purpose of showing the nature of enjoyment of the water in dispute.[5] Where the plaintiff sued his brother's widow for possession of certain properties by right of survivorship and the widow pleaded that the plaintiff and her husband were not joint as alleged by the plaintiff but separate, the Privy Council treated previous judgments in suits for recovery of rent as evidence showing that the brothers were separate.[6] In a suit by a *zamindar* against the defendants, the question was whether the defendants were *mukarraridars* and, therefore, not liable to ejectment. The Privy Council admitted in evidence previous judgments, not *inter partes*, in which the defendants had been found to be *mukarraridars*, for the purpose of ascertaining the rent paid for the possession at and prior to the date of the judgments, and for inferring therefrom whether the tenure was or was not of a permanent character.[7] A claim for a share of property by inheritance from a deceased relation who had been in joint possession with the defendant was met by the defence that the estate had been jointly held for religious and charitable purposes under a Will, the deceased having had no heritable or beneficial

1. *Krishnan Nair* v. *Kambi*, 1937 M 544.
2. *Sithanna* v. *Lakshminara Simhulu*, 1940 M 540 : 51 MLW 339.
3. *Vednath Singh* v. *Mohomed*, 7 R 264 : 154 IC 123 : 1934 R 212.
4. *Shamdas* v. *Gurmukh Singh*, 1945 S. 57; *Tahilram Tackchand* v. *Mst. Miral*, 1938 S. 132: 176 IC 549.
5. *Ramessur Persad Narain Singh* v. *Koonj Behary Pattuk*, 4 C 633, 640: 6 IA 33 (PC).
6. *Run Bahadur Singh* v. *Lucho Koer*, 11 C 301: 12 IA 23 (PC). The judgment in this case was *inter partes* since the plaintiff had intervened in the suits which were originally instituted against the tenants by the lady.
7. *Ram Ranjan Chakerbati* v. *Ram Narain Singh*, 22 C 533: 22 IA 60 (PC).

interest. The defendant alleged that the original owner of the property had bequeathed the property in trust for these purposes. The claimant alleged a revocation of the Will and denied that there was such a trust. The Privy Council held that a previous judgment in a suit brought by others interested in the trust which found the Will to have been revoked, was admissible, though not conclusive, against the defendant.[1] In none of the cases cited above was reference made to Section 13 or any other section of the Evidence Act; but in a case in which the plaintiff had sued the defendant for possession and in which the plaintiff, in proof of her title by previous possession, had produced in evidence some orders made under Section 145, Criminal Procedure Code, by which she was declared entitled to retain possession, the Privy Council observed as follows:— "These police orders are, in their Lordships' opinion, admissible in evidence on general principles as well as under the thirteenth section of the Indian Evidence Act to show the fact that such order were made. This necessarily makes them evidence of the following facts all of which appear from the orders themselves viz., who the parties to the dispute were; what the land in dispute was, and who was declared entilled to retain possession. For this purpose and to this extent, such orders are admissible in evidence for and against every one when the fact of possession at the date of the order has to be ascertained."[2] In another case the Privy Council has held that the Indian Evidence Act does not make a finding of fact arrived at on the evidence before the Court in one case evidence of that fact in another case, not *inter partes*.[3] And in a later case where the question was whether the plaintiff's *zamindari* to which, originally, some villages (known as Achra villages) held by the defendant at the time of the suit belonged, was partible or not, and where, in order to show that the *zamindari* was partible, the defendant gave in evidence a judgment in a previous case between the plaintiff's ancestor and a third person wherein it had been held that the *zamindari* was partible and that the Achra villages held by the defendant had also come to him on an earlier partition, it was held by the Privy Council that the judgment was not admissible for the purpose for which it was given in evidence. Sir George Lowndes, who delivered the judgment of the Board, observed: "Their Lordships are unable to accept this contention. They think that the judgment in question is only admissible under the provisions of Sections 13 and 43 of the Evidence Act as establishing a particular transaction in which the partibility of the Pandara Estate was asserted and recognized, viz., the partition resulting from the 1793 suit. The reason upon which the judgment is founded are not part of the transaction and cannot be regarded, nor can any finding of fact there come to, other than the transaction itself, be relevant in the present case. The judgment, therefore, is no evidence that Thakar Sib Singh got the Achra village by partition; it is at most evidence that he might have done so, and this is plainly not sufficient.[4] In a subsequent case[5] where the plaintiff in proof of his title to the suit land tendered in evidence a judgment to which the defendant was not a party, Sir George Rankin delivering the judgment of the Board observed: "The admissibility of the decree of 1916 is the next question. Whether based upon sound general principle or merely supported by reasons of convenience, the rule that so

1. *Bitto Kunwar* v. *Kesho Prasad Misr*, 19A 277: 24 IA 10 (PC)
2. *Dinomoni* v. *Brojo Mohini*, 29 C 187: 29 IA 24 (PC), approved in *Collector of Gorakhpur* v. *Ram Sunder Mal*, 56 A 468: 150 IC 545: 1934 PC 157 (PC).
3. *Kumar Gopika Raman Roy* v. *Atal Singh*, 56 C 1003: 56 IA 119:114 IC 561: 1929 PC 99.
4. *Gobinda Narain Singh* v. *Sham Lal Singh*, 58 C 1187: 58 IA 125: 131 IC 753: 1931 PC 89 (PC).
5. *Kesho Prasad Singh* v. *Mst. Bhagjogna Kuer*, 1937 PC 69: 167 IC 329: 16 P 258.

far as regards the truth of the matter decided a judgment is not admissible evidence against one who is a stranger to the suit has long been accepted as a general rule in English Law. Exceptions there are, but the general rule is not in doubt. That the same rule applies in India, though it is not expressly formulated in these terms, may be seen from a reference to Section 43, Evidence Act, 1872, and the illustrations given thereunder. On the other hand, apart from all discussion whether a judgment is or is not a transaction within the meaning of Section 13, Evidence Act, the judgment of 1916, together with the plaint which preceded it and the steps in execution which followed, are evidence of an assertion by the Raj (plaintiff) of the right which it claims to have acquired in 1903 and are thus admissible evidence of the right. There are undoubtedly cases in which a judgment in evidence of weight even against third parties. But the fact that a person, not in possession of the land now in suit, claimed in 1911 to have been entitled to it since 1903 is not by itself serious evidence of his right. There is and was no lack of assertion on the other side. It adds little or nothing that having got decree he took symbolical possession or even that he set up boundary pillars well to the north of the land now in suit. The respondents could not prevent his doing these things and their rights are not in any way affected by them. Of course if it could be said that had the respondents the right they claim, they would have at once challenged these acts by bringing a suit for a declaration of their title—some weight might be attached to the fact that they did not. But in the present case such an argument would be quite hollow. It is difficult to think that any Court would grant relief upon the sole basis of the plaintiff's assertion made against other parties and because the parties now impleaded waited to be sued. That on this basis alone possession should be disturbed would be indefensible, especially in *Ram Sarup's* cases, seeing that he was recovering decrees for rent in 1919 and 1920. Their Lordships find themselves in agreement with the observations of Ross, J.:

> "The judgment is not *inter partes*, nor is it a judgment *in rem*, nor does it relate to a matter of a public nature. The existence of the judgment is not a fact in issue; and if the existence of the judgment is relevant under some of the provisions of the Evidence Act, it is difficult to see what inference can be drawn from its use under these sections."

In another case evidence of decrees was held by the Board to be admissible evidence of merely recognition of a right[1]; and in a more recent Canadian case Lord Russell of Killowen has reiterated the view expressed in several previous cases that the Court is not entitled to refer to or rely upon a judgment, not *inter partes*, as proving the facts stated therein.[2]

Conclusion.—The Supreme Court has held that in a dispute as to the succession to the office of a mohunt, a previous judgment in a suit by the former mohunt is admissible as a transaction in which a person from whom one of the parties purported to derive his title, asserted his right as a spiritual collateral of the former mohunt and on that footing got a decree.[3] Judgments which support a plea of *res judicata* under Section 11, Civil Procedure Code, or that of *autrefois acquit* under Section 403, Criminal Procedure Code, judgments *in rem*, and judgments which refer to a matter of a public nature, are expressly made relevant by the Act.[4] But other judgments are irrelevant, unless their

1. *Shankarrao Dagadujirao* v. *Shambhu Nath*, 1940 PC 192.
2. *Coca-Cola Company* v. *Pepsi-Cola Company*, 1942 PC 40.
3. *Sital Das* v. *Sant Ram*, AIR 1954 SC 606; See also *Shrinivas* v. *Narayan*, 1955 SCR 1.
4. Sections 40, 41 and 42.

existence is either a fact in issue or relevant under some other section of the Act.[1] That there are cases where the existence of a judgment might become a fact in issue or a relevant fact under some other section of the Act, is perfectly clear from the illustrations to Section 43. It should, however, be remembered that when a judgment becomes admissible under the provisions of Section 43, the judgment can only be used to show that there has been a decision and cannot be used as evidence of the facts found by that judgment to exist. In other words, what a judgment, admitted under Section 43, proves is the *factum* of the decision and not its accuracy. The judgment cannot, therefore, under that section, be used as evidence of the particular point decided by it.[2] But ordinarily what a party has in mind, when producing in evidence a previous judgment not admissible under Sections 40, 41 or 42, is that the Court trying his action should find on a particular point as another Court found on it in a previous case not *inter partes*, and it is when a judgment is sought to be used for this purpose that the real difficulty arises. The language of Section 43 does not authorise such use of a judgment and, in consequence, support is sought for this result in the provisions of Sections 35, 11 and 13.

A judgment in a previous suit for maintenance, in which the quantum of maintenance awarded was to depend on the extent of joint family property and was to be a charge on that property, is admissible in a subsequent suit for partition of the joint family property to prove the extent of such property.[3]

Sections 35 and 11, whether applicable to judgments?—The fate of Section 35, in so far as its provisions were sought to justify the reception in evidence of recitals of relevant facts in judgments not *inter partes*, has been sealed by a Full Bench of the Madras High Court.[4] But in a case where a decree contained a recital that the parties had filed a pedigree table, the Privy Council used the recital under Section 35 as evidence of the parties having filed that pedigree.[5] The recital held admissible by the Privy Council was of a fact which took place in the presence of the Court, and the recital of such a fact clearly stands on a different footing from a finding or decision on a point in issue; and, therefore, this Privy Council decision cannot be taken as authorizing the reception in evidence of everything mentioned or recited in a decree.

In the earlier cases, with the exception of the dissentient judgment of Mitter, J., in *Gujju Lal* v. *Fateh Lall*,[6] which was adopted by Mahmud, J., in *Collector of Gorakhpur* v. *Palakh Dhari Singh*,[7] and the decision by Ranade, J., in *Lahshman Govind* v. *Amrit Gopal*,[8] there is hardly any authority in favour of the applicability of Section 11 to judgments, though there are several later decisions in which Section 11 has been applied.[9] It is however, submitted that this view of Section 11 is erroneous and leads to

1. Section 43.
2. *Benode Lal Chakravarty* v. *Secretary of State for India*, 133 IC 573: 1931 C 239: see notes to Section 43.
3. *Srinivas Krishnarao Kango* v. *Narayan Devji Kango*, 1954 SC 379.
4. *Tripurana Seethapati Rao Dora* v. *Rokkam Venkanna Dora*, 45 M 332: 66 IC 280: 1922 M 71 (FB). See also *Hara Kumar Dev* v. *Jogendra Krishna Ray*, 38 CLJ 186.
5. *Collector of Gorakhpur* v. *Ram Sunder Mal*, 56 A 468: 150 IC 545: 1934 PC 157 (PC).
6. 6 C 171 (FB).
7. 12 A 1 (FB).
8. 24 B 591.
9. *M. Misbahuddin and others* v. *Vidya Sagar and another*, 1935 L 64: 156 IC 268: 36 PLR 106; *Vednath Singh* v. *Mahomed*, 7 R 264: 154 IC 123: 1934 R 212; *Hem Chandra Bhaduri* v. *Purna Chandra Sarkar*, 153 IC 134: 1934 C 788: 59 CLJ 320; *Kali Charan Sharma* v. *E.*, 104 IC 225: 1927 A 654(2): 28 Cr.LJ 785; *Gopal Rao* v. *Sitaram*, 97 IC 694: 1927 N 19.

curious results. Section 11 makes a fact relevant only when it is inconsistent with a fact in issue or a relevant fact, or when it makes the existence of a fact in issue or a relevant fact highly probable or improbable. The application of the section to judgments, therefore, depends on the assumption that the decision contained in the judgment as to the existence or non-existence of a right is correct. But if the accuracy of the decision is assumed to make the judgment relevant, a judgment not *inter partes* would have, in practice, the effect, more or less of *res judicata*: since its accuracy having been assumed to establish its relevancy, a person who was no party to it would be bound by the judgment, unless he could show that the assumption of its accuracy which was employed to establish its relevancy was not well founded. Thus, a judgment not *inter partes* would have the effect of shifting *onus*—a result which would be inconsistent with the rule against *res inter alios actae*. This interpretation of the section, as pointed out by Garth, C.J., in *Gujju Lal* v. *Fatteh Lall*[1] would make all judgments and decisions of Courts of Justice, whatever may be their nature and whoever may be the parties to them, admissible in evidence so long as they contained an adjudication which is adverse to the claim of one party or consistent with the claim of the other.

Section 13, whether applicable to judgments?—The Privy Council decisions in *Dinomoni* v. *Brojo Mohini*[2] and *Govinda Narain Singh* v. *Sham Lal Singh*,[3] are direct authorities for the applicability of Section 13 to judgments not *inter partes*; and therefore, it becomes unnecessary to discuss whether the "transaction" or "instance" of Section 13 is the judgment itself or the litigation which terminated in that judgment—a point which was once the subject-matter of much discussion. The Full Bench ruling in *Gujju Lal Fatteh Lall*[1] must, therefore, to this extent, be taken to have been overruled. But another, and by far the most important, point which this Calcutta Full Bench ruling decided was that a judgment which is not admissible under Sections 40, 41 and 42 is not relevant under Section 13 to prove the particular point decided by it. If the matter were *res integra*, it is difficult to see how, on this particular point, any other view of Section 13 could be taken than that taken by Beaman, J., in *Mohamad* v. *Hasan*[4] that is, the relevant fact under Section 13 being the assertion or denial of a rights, the transaction of litigation by which these assertions and denials of rights are made becomes relevant; but since proof cannot be taken beyond the things to be proved, a judgment, being a convenient proof of the transaction of litigation, can be given in evidence only for the purpose of proving the assertion or denial of a right and cannot be used for any ulterior purpose. This result is not in any way inconsistent with what was laid down by the Full Bench in *Gujju Lal* v. *Fatteh Lall*[1] and is, in a sense, a reaffirmation of the same principle. It would seem, therefore that whether a judgment be admitted to prove its existence under Section 43, or as evidence of the fact that in a certain litigation a certain right was asserted or denied, it is not treated as proof of the particular point decided by it; and used in this manner, it is stripped of its special attributes of a judgment. The Privy Council has in several cases admitted in evidence judgments not *inter partes*; and, on analysing these cases, it becomes apparent that at least in two of these cases judgments were used as evidence of the facts determined by them. Thus in

1. 6 C. 171 (FB).
2. 29 C. 187 (PC).
3. 58 C. 1187 (PC).
4. 31 B. 143.

Ram Ranjan Chakerbati v. *Ram Narain Singh*[1] which was a suit for possession by the plaintiff *zamindar* against the defendants tenants who claimed a permanent tenure in the land on fixed rent, the defendants, in order to lay a foundation for the inference that the tenure was of a permanent nature, produced in evidence an ancient rent decree in a suit between their ancestors and a third person by which rent on the same rate as was paid by them at the time of the suit was made payable; and the Privy Council used the decree as evidence of the rate of rent at which the land had been held by the defendant's ancestors before the decree was made. The Privy Council observed: "Although predecessor of the Raja was no party to that litigation, it was competent to use the judgment as evidence showing the rent paid for the possession, *at and prior* to that date, now nearly 80 years ago". Similarly, in *Dinomoni* v. *Brojo Mohini*,[2] in which the plaintiff had sued the defendant for possession and in which the plaintiff, in proof of her title by previous possession, had produced in evidence some orders made under Section 145, Criminal Procedure Code, by which she was declared entitled to retain possession of the land in dispute, the Privy Council held the orders admissible to prove the plaintiff's possession *at the date of order*. In proceedings under Section 145 of the Criminal Procedure Code, the Magistrate has to decide which of the parties is in possession of the land in dispute: and if he decides that one of the disputants is in possession, he has to make an order declaring such party to be entitled to retain possession. This being so, if the order becomes evidence of that fact that a certain person was declared entitled to retain possession, it necessarily becomes evidence of the successful disputant's possession *prior to the date of the order*, and thus the order becomes proof of the particular point decided by it.

In the two decisions mentioned above,[3] the Privy Council has not anywhere expressly ruled that a judgment not *inter partes* is admissible as proof of the particular point decided by it: though, as submitted above, it seems possible to argue that the judgments in these cases were in fact treated as evidence of the facts found by them.[4] In some subsequent decisions, however, the Board has expressly ruled that a finding of fact arrived at in a judgment is not relevant as proof of that fact in subsequent proceedings not *inter partes*.[5] All that a judgment, not *inter partes*, can be used to show is that there was a transaction, *i.e.*, litigation, between the parties to the suit in which a right was asserted or denied, and that the right was recognized or denied by the tribunal. The reasons given by the tribunal for the recognition or denial of the right are irrelevant and cannot merely by reason of their being the bases of the finding in the previous case, be taken into consideration.[6] In a case where the matter is fully discussed the board has emphatically reiterated the general rule that as regards the truth of the matter decided a judgment is not admissible evidence against one who is a stranger to the suit. The

1. 22 C. 531 (PC).
2. 29 C. 187 (PC).
3. *Ram Ranjan Chakerbati* v. *Ram Narain Singh* 22 C 533: 22 IA 60 (PC) and *Dinomoni* v. *Brojo Mohini*, 29 C 187: 29 IA 24 (PC).
4. See *Maharaja Sir Kesho Prasad Singh Bahadur* v. *Bahuria Mt. Bhagjogna Kuer*, 16 P. 258: 1937 PC 69 (PC), where the effect of these two judgments has been stated.
5. *Coca-Cola Company* v. *Pepsi-Cola Company*, 1942 PC 40; *Gobinda Narain Singh* v. *Sham Lal Singh*, 58 C 1187: 58 IA 125: 131 IC 753: 1931 PC 89; *Kumar Gopika Raman Roy* v. *Atal Singh*, 56 C 1003: 56 IA 119: 114 IC 561: 1929 PC 99.
6. See *Gobinda Narain Singh* v. *Sham Lal Singh*, 58 C 1187: 58 IA 125: 131 IC 753: 1931 PC 89: see also *Shankarrao Dagadujirao* v. *Shambhu Nath*, 1940 PC 192.

Board has, however, pointed out that a judgment in a suit not *inter partes*, together with the pleadings in that suit and the steps in execution, may constitute good evidence of the assertion of a right by a party and as such may be evidence of weight even against strangers.[1] This pronouncement of the Privy Council, while affirming the general principle that a judgment is not evidence against a stranger of the facts found by the tribunal delivering the judgment, is authority for the proposition that in certain circumstances the judgment may, even against strangers, be "admissible evidence of the right" asserted by a party to the litigation in which the judgment was delivered. Therefore, the very numerous cases in which the judgments not *inter partes* were directly or indirectly treated by the Courts in India as substantial proof of the point decided by such judgments must be taken to have gone too far. The decisions, which relate to the relevancy of such judgments and have been digested in the commentary to this section, must be read subject to these observations.

In *State of Bihar* v. *Radha Krishna Singh*,[2] the Supreme Court observed that:

> "Some Courts have used Section 13 to prove the admissibility of a judgment as coming under the provisions of Section 43", and declared:
>
> "We are, however, of the opinion that where there is a specific provision covering the admissibility of a document, it is not open to the court to call into aid other general provisions in order to make a particular document admissible. In other words if a judgment is not admissible as not falling within the ambit of Sections 40 to 42, it must fulfil the conditions of Section 43 otherwise it cannot be relevant under Section 13.....The words 'other provisions of the Act' cannot cover Section 13 because this section does not deal with judgments at all."

Judgments inter partes but not operating as res judicata.—The Evidence Act itself does not draw any distinction between a judgment which is not *inter partes* and a judgment which is *inter partes*, except where the judgment is clearly *res judicata*. A judgment is admissible as proof of the point decided by it only when it is given in evidence under Sections 41-42; and it is not so inadmissible when it is admitted in evidence under some other section of the Act. From this point of view, therefore, the distinction between a judgment *inter partes* and a judgment not *inter partes* is not of any importance, except when the judgment is given in evidence to support a plea of *res judicata* under Section 40.[3] Where an issue is found against a party, but the suit is decided in his favour, the finding does not operate as *res judicata* in a subsequent suit between the parties, but the judgment in the former suit is admissible in evidence in the subsequent suit under Section 13 of the Evidence Act and the burden of proving that the finding is incorrect lies on the party against whom the finding is given.[4] The probative value of a finding in a previous suit between the parties depends upon the nature of the finding and of the issues involved in that suit and in the subsequent suit.[5] Where rights

---

1. *Maharaja Sir Kesho Prasad Singh Bahadur* v. *Bahuria Mt. Bhagjogna Kuer*, 16 P. 258: 1937 PC 69; see also *Coca-Cola Company* v. *Pepsi-Cola Company*, 1942 PC 40.
2. *State of Bihar* v. *Radha Krishna Singh*, 1983 SC 684 (Para 121).
3. See *Purbina Debya* v. *Nand Lal Ojha*, 11 P 50: 136 IC 577: 1932 P 105; *Ramparokha Pande* v. *Mst. Ramjhari Kuer*, 1933 P 590; see also Hitendra Singh v. Rameshwar Singh Bahadur, 4 P 510: 87 IC 849: 1925 P 625; but see *Maiber Singh* v. *Rai Krishna Bahadur*, 1937 P 86: 168 IC 109.
4. *Azizan* v. *Ibrahim Beg*, 1935 OWN 894; see notes to this section under the heading "whether judgment may shift onus" and notes to Section 43 under the heading "judgments *inter partes* which are not admissible under Ss. 40—42, whether admissible under S. 43?"
5. *Prahlad Chandra Singh* v. *Bhim Mahto*, 185 IC 685

of a party in a subsequent suit were not in issue in a previous suit, the judgment in the previous suit is not admissible in the subsequent suit.[1] *See* notes to this section under the heading "whether judgments may shift *onus*" and notes to Section 43 under the heading "judgments *inter partes* which are.....admissible under Section 43."

Extent of admissibility of judgments not inter partes.—The judgment in a previous suit, though not *inter partes*, is admissible under this section in proof of a transaction or particular instance, in which the right in question was asserted and recognised or denied.[2] A judgment in another suit, which is not *inter partes*, is not evidence to establish the truth of the matter decided in that judgment, and the findings of fact arrived at on the evidence in one case are not evidence of that fact in another case.[3] But a judgment in another suit, which is not *inter partes*, may be evidence under this section for certain purposes, e.g., to prove the fact of the judgment: to show who the parties to suit were, to show what was the subject-matter of the suit; to show what was decided or declared by the judgment; to show what documents had been filed by the parties in the proceedings, to establish the transaction referred to in the judgment; to show the conduct of the parties, or particular instances of the other side of a right or assertion of title.[4] A judgment in another suit not *inter partes* is not evidence to establish the truth of the matters decided in the judgment. The findings of fact arrived at on the evidence in one case could not be the evidence of that fact in another case.[5] The existence of a judgment may be of some probative value as for instance, in determining the question of possession. And it may create a paramount duty in appropriate cases to displace the finding.[6] Judgments may be admitted 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.[7]

In *Special Land Acquisition Officer* v. *Lakhamasi Ghelabhai*[8] the Bombay High Court had held that judgments not *inter partes*, relating to compensation to be awarded on the basis of market value of land in acquisition cases decided by the Courts were not admissible merely because the land dealt with was situated near that of which the value had to be determined in the case in hand, that such judgments did not fall either under Section 11 or 13; that they embody findings or opinions or facts investigated in a different case; and that even slight differences in situation could sometimes cause considerable difference in value. The Supreme Court did not however, agree with the said view and observed:

> "We do not think it necessary to take so restrictive a view of the provisions of Section 11 and 13 of the Evidence Act, as to exclude such judgments altogether from evidence even when good grounds are made out for their admission." And referred to its own decision in *Khaja Fizuddin* v. *State of Andhra Pradesh*, CA No. 176 of 1962, decided on 10/4/1963, wherein it was ruled that such judgments are relevant if they relate to similarly situated properties and

1. *Ganpatrao* v. *Nagorao*, 1940 N 382.
2. *Srinivas* v. *Narayan*, (1955) 1 SCR 1.
3. *Harihar Prasad* v. *Deo Narain*, 1956 SCR 1.
4. *Ibid.*
5. *Ramji* v. *Manohar*, 62 Bom LR 322.
6. *Midanpur Zamindari Co. Ltd.* v. *Naresh*, LR 48 IA 49.
7. *Shivcharan* v. *State*, AIR 1965 All 511.
8. AIR 1960 Bom 78.

contain determinations of value on dates fairly proximate to the relevant date in the case."[1]

Relevancy of judgment inter partes.—The Evidence Act does not make a distinction between judgments *inter partes* and judgments not *inter partes*. It only says as to when judgments are relevant whether they are *inter partes* or not *inter partes*. Section 43 of the Act says that judgments other than those mentioned in Sections 40, 41 and 42 are irrelevant unless the existence of those judgments is a fact in issue or they are relevant under some other provisions of the Act. Sections 40 to 42 of the Act deal with judgments which operate as *res judicata*, judgments *in rem* and judgments which relate to matters of a public nature. Of course judgments may be admissible under Section 13 of the Act to show that a right was asserted or denied by a party or to introduce a fact in issue or to explain the history of a case. But that is different from admitting the judgments for the purpose of acting on the correctness of the findings entered therein. By the production of the previous judgment under Section 13 it is not the correctness of the previous decision but only the fact that there has been a prior decision that is established. There is no presumption that a prior judgment is a correct adjudication. The law only says that you cannot go behind it in certain cases. That is only on the ground of public policy. Such judgments or judgments which operate as *res judicata* and judgments *in rem*. Judgments qua judgments and an expression of the opinion of the Court which pronounces them are relevant only under Sections 40 to 42. Judgments not coming under Sections 40 to 42 are not relevant at all in respect of opinions expressed therein. They can amount only to opinion evidence and opinion evidence is generally inadmissible. Such opinion evidence is however admitted under Section 45 of the Act when the Court has to form an opinion upon a point of foreign law, or of science or art or as to identity of handwriting but in such cases it is the duty of the Court to scrutinise the soundness or validity of the opinion evidence exercising its own independent judgment. In the case of a previous judgment such scrutiny is impossible because the Court trying the subsequent case cannot reopen the case and hear it on the merits as if the Court is hearing an appeal or is retrying the previous case on fresh evidence. The Court in the subsequent case has to decide it on the materials before it exercising its own independent judgment. Therefore judgments qua judgments and as expression of opinion of the Courts which pronounced them are not relevant at all except under Sections 40 to 42 of the Act.[2]

Judgment between a party and a stranger.—A judgment against a party cannot be used against him in a subsequent suit by another person as proof of the point decided by it.[3]

Only appellate judgment must be produced.—When a judgment becomes admissible either under Section 13 or under Sections 40—43, the judgment that can be given in evidence is the judgment of the appellate Court and not of the trial Court. When an appeal is taken against a decree, the decree of the lower Court gets merged in the

---

1. *Land Acquisition Officer* v. *H.Narayanaiah* 1976 SC 2403 (Para 27).
2. *Gopalakrishna Gupta* v *Ammalu Ammal*, 1971 KLT 578.
3. *Benode Lal Chakravarty* v. *Secy. of State for India*, 133 IC 573 : 1931 C 239 ; *Ma Po Khin and others*. v. *Ma Shin and others*, 11 R 198 : 1933 R 250 ; *Secy. of State for India* v. *Ahmed Badsha Sahib Bahadur*, 44 M 778 : 67 IC 971 : 1921 M 248 (FB) ; *Pratab Singh* v. *Mothu* 96 IC 998 : 27 PLR 544 ; see also *Harihar Prasad Singh* v. *Kesho Prasad Singh Bahadur*, 93 IC 454 : 1925 P 68.

decree of the appellate Court and so the judgment of the trial Court is not the final adjudication on the point in issue between the parties to the suit and is not, therefore, admissible in evidence.[1]

Judgment of the Appellate Court.—Even the findings of the highest Court of Appeal in the litigation are not admissible against that party. The question in dispute between the parties has, therefore, to be decided upon independent evidence.[2]

Findings of fact, statements or recitals of facts, and observations contained in judgments not inter partes, whether relevant?—The Privy Council has ruled that findings of fact arrived at on the evidence before the Court in one case are not evidence of that fact in another case not *inter partes*,[3] and there are cases both before and after this Privy Council decision to the same effect.[4] A statement of a fact,[5] or a recital of a fact[6] in a judgment not *inter partes* is not relevant as proof of the existence of that fact.[7] Thus, a recital in a judgment not *inter partes* that a certain person has *brahmottar* title in the land is not admissible to prove that title.[8] Observations in a judgment relating to a different matter cannot bind a third party and the judgment itself cannot be evidence against him.[9] A judgment not *inter partes* may, however, be used to explain or introduce facts in issue or to explain the history of the case.[10] *See* notes to Section 43.

Admission of judgment in a previous case.—The judgment can be received in evidence under Section 13 of the Evidence Act as a transaction in which Kishore Dass asserted his right as a spiritual collateral of Mangal Das and on that footing got a decree. The judgment could be received in evidence and although it is not by any means conclusive and has got to be weighed and apprised for what it is worth, it can be used in support of the oral evidence adduced in the case.[11]

A judgment may be secondary evidence of the pleadings of the parties thereto, and of any statement, admission or acknowledgement.—*See* notes to Section 43 under this heading.

Contradicting a witness by a judgment; judgment whether admissible as proof

---

1. *Benode Lal Chakravarty* v. *Secretary of State for India*, 133 IC 573 : 1931 C 239.
2. *Onkarmal* v. *Bareswar* 61 CWN 970.
3. *Kumar Gopika Raman Roy* v. *Atal Singh*, 56 C 1003 : 56 IA 119 : 114 IC 561 : 1929 PC 99 ; see also *Gobinda Narain Singh* v. *Sham Lal Singh*, 58 C 1187 ; *Maharaja Sir Kesho Prasad Singh Bahadur* v. *Mst. Bhagjogna Kuer*, 16 P 258 (PC).
4. *Asaddar Ali Khan* v. *Assam Province*, 1944 C 57 ; *Kritanand Singh* v. *S.S.*, 1940 C 506 ; *Mahomed Soleman* v. *Badruddin*, 1940 L 309 ; *Tahilram Takchand* v. *Mst. Miral*, 1938 S. 132 ; *Inayatullah Khan* v. *Kanshi Ram* 1937 L 437 ; *Sher Bahadur Singh* v. *Sri Madho Prasad Singh*, 1935 OWN 674 ; *Benode Lal Chakravarty* v. *Secy of State for India*, 133 IC 573 : 1931 C 239 ; *Muhammad Abdul Karim Khan* v. *Bishan Sahai*, 121 IC 387 : 1930 A 9 ; *Satish Chandra Mukherjee* v. *Joy Ram Roy*, 65 IC 525.
5. *Muhammed Abdul Karim Khan* v. *Bishan Sahai*, 121 IC 387 : 1930 A 9.
6. *Doraisama Naidu* v. *Kaunipa Chetty*, 181 IC 654 : 1931 M 487 ; *Asa Singh* v. *Mansha Ram*, 121 IC 509 : 1930 L 237 ; *Har Nath* v. *Mohan Lal* 115 IC 422 : 1929 L 123 : *Abdul Latif* v. *Abdul Huq*. 81 IC 667 : 1924 C 523 ; *Bansi Nath Pal* v. *Jagat Kishore Acharjee Chowdhury*, 35 IC 298 : 23 CLJ 583.
7. As to the relevancy of a recital of fact in a document not inter partes. see *Narendra Nath Mandal* v. *Sannyasi Charan Das*, 137 IC 658 : 1932 C 398 : *Nehar Bawa* v. *Kador Bakas Mohammad*, 68 IC 282 : 1923 C 290 : *Gouri Shankar Show* v. *Anil Chandra Majumdar*, 1953 C 671 ; *Ram Kishan* v. *Karam Singh*, 1949 A 673.
8. *Satindra Kumar Chaudhary* v. *Krishna Kumari Chaudharani*, 36 IC 882.
9. *Narasimha Sastri* v. *Official Assignee Madras*, 129 IC 650 : 1930 M 751 ; see also *Banwari Lal* v. *Sheo Chand*, 85 IC 795 : 1923 L 384.
10. *Purnima Debya* v. *Nand Lal Ojha*, 11 P 50 : 136 IC 577 : 1932 P 105.
11. *Sital Das* v. *Sant Ram*, AIR 1954 SC 606.

of the deposition of a witness or the terms of a document referred to in the judgment?—See notes to Section 43 under this heading.

A previous judgment holding a person to be a minor is not evidence of minority.—Where the defendant produced two judgments in evidence to prove his minority and the cases in which those judgments were passed were not in which any right asserted by the defendant was recognised or exercised, or its existence disputed, asserted or departed from, but the question in these cases was that of the competency of the defendant to execute the documents which were the foundations of those suits, it was held that the judgments were admissible only to prove the fact of the defendant's denial and of the Court's decision but not to prove, as against the plaintiff, the minority of the defendant.[1]

Admission of mortgagor in a mortgage-deed relevant and admissible in evidence.—The mortgagees described the mortgaged land in the mortgage-deeds as their "sir and khas possession." Such admissions cannot be regarded as admissions by the mortgagees as the deeds were executed by the mortgagors; but they are certainly admissible under Section 13, Evidence Act, as assertions of title, and as it is under these documents that the mortgagees claim that their probative value as against them and as against the lessees who claim under them is high.[2]

Adopted son.—Where the right of an adopted son is disputed and he brings a suit against trespassers who dispute his right and the factum of adoption, an order passed in an earlier revenue case, directing the impleading of plaintiff as the adopted son of one of the defendants in the case, is admissible to show that right as an adopted son was claimed and recognised, even though the order was not *inter partes*.[3] So, where the issue in the suit was whether a particular person was an adopted son and it was found to be so the judgment in that suit is admissible for the purpose of showing that there was an assertion and denial with regard to the adoption and that it was ultimately found that he was the adopted son.[4] Where, however, the question of adoption is agitated in a previous litigation and it is held that the person in question is not the adopted son, and the same finding is given in another suit, then although these decisions do not operate as *res judicata*, yet they have evidentiary value under this section.[5]

Recitals of age, date of birth, date of death, etc., in judgments, whether admissible under Section 13 or Section 35?—It is well settled that, although a judgment not *inter partes* may be evidence in certain circumstances as a fact in issue or a relevant fact or possibly as a transaction under Section 13, the recitals in the judgment cannot be used as evidence in a litigation between the parties.[6] Thus, where a party relied upon facts in the history of the title to the suit property stated in a previous judgment of the Judicial Committee,[7] or, to prove the date of birth of a minor, relied on a recital in the

---

1. *Gaya Din* v. *Mst. Dulari*, 2 IC 839 : 6 ALJ 693 ; See also *Venkata Rangappa Naicken* v. *Subbaraya Goundan*, 33 IC 142.
2. *Harihar Prasad Singh* v. *Deo Narain Prasad*, 1956 SCJ 279 : 1956 SCR 1.
3. *Subbarao* v. *Venkata Rama Rao*, (1963) 2 Andh. WR 307.
4. *Venkataratnam* v. *Venkatanarasayamma*, (1963) 2 Andh. WR 169.
5. *Maheshwar* v. *Maiana*, AIR 1964 Orissa 174.
6. *Bansi Nath Pal* v. *Jagat Kishore Acharjee Chowdhury*, 35 IC 298 : 23 CLJ 583 ; *Abdul Latif* v. *Abdul Haq*, 81 IC 667 : 1924 C 523 ; *Satindra Kumar Chaudhury* v. *Krishna Kumari Chaudhurani*, 36 IC 882 ; *Hara Kumar Dey* v. *Jogendra Krishna Ray*, 71 IC 336 : 1924 C 526.
7. *Bansi Nath Pal* v. *Jagat Kishore Acharjee Chowdhury*, 35 IC 298 : 23 CLJ 583.

order of appointment and discharge of the minor's guardian,[1] it was held that these recitals were inadmissible. Statement of the plaintiff's age in a decree to which the defendant was no party is neither conclusive nor binding.[2] A recital in a judgment not *inter partes* that a certain person died on a certain date is not relevant as proof of that person's death on the date mentioned.[3] Recitals of the claims of parties contained in possessory orders under Section 145, Cr. P. Code, are inadmissible under Section 13 to prove title and are not the right kind of secondary evidence of the original pleadings of the parties.[4] The recitals in a judgment are no evidence whatsoever to prove the exact admission made by a party or a witness unless the whole of the statement is recited therein. The rule is based on good principle because it may be that the Court has taken an incorrect view or has misunderstood the admission made.[5] Like the earlier Madras decisions, an argument for the relevancy of judgments and the recitals of relevant facts contained therein was founded on the provisions of Section 35 in the Calcutta High Court as well;[6] but, in view of the Full Bench ruling of the Madras High Court,[7] the earlier Madras cases should be taken as obsolete and the Calcutta decisions doubtful. See notes to Section 35.

Previous decisions in favour of or against other co-sharers.—A decree obtained by a co-sharer landlord is admissible in evidence as to the rate of rent in a subsequent suit for rent brought by another co-sharer.[8] In a similar case, however, Mitter, J., held to the contrary on the ground that it does not follow that, because one co-sharer was suing for a particular amount as representing his share of the rent, the other co-sharers would necessarily be getting the same amount if the shares were identical or a proportional amount, unless there was one contract by which the tenancy was created.[9] A judgment in a previous suit between a co-sharer and the defendant, in which the defendant had been found to be in possession, is inadmissible in a subsequent suit by another co-sharer for recovery of his share of the rent, to prove the defendant's possession.[10] A decree obtained by a co-sharer as to his share of a plot of land as against a third party is not admissible as evidence of title in a subsequent suit by another co-sharer; but it becomes admissible where a partition of the plot of land has been made by the co-sharers in consequence of that decree.[11]

Possessory orders under the Criminal Procedure Code and the Specific Relief Act: orders under Section 107, Criminal Procedure Code.*—Proceedings under Section 145, Cr. P. Code are relevant *inter partes* in a subsequent suit for possession,

---

1. *Hara Kumar Dey* v. *Jogendra Krishna Ray*, 71 IC 336 : 1924 C 526.
2. *Nilratan Mitra* v. *Abdul Gafur Gazi*, 59 IC 3 : 32 CLJ 75.
3. *Tripurana Seethapati Rao Dora* v. *Rokam Venkanna Dora*, 45 M 332 : 66 IC 280 ; 1922 M 71 (FB).
4. *Ram Sunder Gope Sikdar* v. *Haribala Dhubi*, 37 IC 911.
5. *Indra Singh* v. *Income-tax Commissioner*, 1943 P 169.
6. *Bhaya Dirguj Deo* v. *Pande Fateh Bahadur Ram*, 3 CLJ 521 ; *Parbutty Dassi* v. *Purno Chunder Singh*, 9 C 586.
7. *Tripurana Seethapati Rao Dora* v. *Rokam Venkanna Dora*, 45 M 332 : 66 IC 280 : 1922 M 71 (FB) ; See also *Hara Kumar Dey* v. *Jogendra Krishna Ray*, 71 IC 336 : 1924 C 526.
8. *Kanta Mohan Mullick* v. *Gopi Nath Santra*, 112 IC 785 : 1928 C 355 ; *Bymkesh Chakrabarty* v. *Jagdiswar Roy*, 40 IC 442 : 22 CWN 304.
9. *Kanto Mohan Mullick* v. *Jarab Chandra Khara*, 112 IC 787 : 1928 C 353 ; See also *Abdul Ali* v. *Raj Chandra Das*, 10 CWN 1084 ; *Tepu Khan* v. *Rajani Mohan Das*, 25 C 522 (FB).
10. *Surender Nath Pal Chowdhury* v. *Brojo Nath Pal Chowdhury*, 13 C 353 (FB).
11. *Naresh Narayan Roy* v. *Secy. of State for India*, 50 C 446 : 50 IA 121 : 77 IC 1048 : 1923 PC 1.

* See new Cr.P.C. 1973.

though the reasons of the order are not relevant.[1] Criminal proceedings not *inter partes* are admissible in evidence for the purpose of showing the nature of enjoyment of the water in dispute.[2] Orders under Section 145 Cr. P. Code, are admissible in evidence on general principle as well as under the thirteenth section of the Evidence Act to show the fact that such orders were made. This necessarily makes them evidence of the following facts, all of which appear from the orders themselves, viz., who the parties to the dispute were: what the land in dispute was: and who was declared entitled to retain possession. For this purpose and to this extent, such orders are admissible in evidence for and against every one when the fact of possession at the date of the order has to be ascertained.[3] In a suit for possession, the fact that there was a proceeding under Section 145, Cr. P. Code, that there was an inquiry into the matter and that there was a decision adverse to the allegations of the plaintiff, is a relevant fact and admissible on general principles as well as under Section 13.[4] But neither recitals of the claims of the parties contained in possessory orders under Section 145, Cr. Procedure Code, whether *inter partes* or not, nor findings contained therein,[5] nor reasons for the findings[6] are admissible in evidence either on general principles, or under Section 13, or under Section 35.[7] An order under Section 107, Cr. P. Code, is, like an order under Section 145 of that Code, admissible in proceedings for recovery of land to show what order had been made, who the parties to the dispute were, what the land in dispute was and who was declared entitled to possession.[8] But an order under Section 144, Cr. P. Code, prohibiting a party from entering a piece of land is not necessarily evidence of possession of the opposite party;[9] nor is the report of a Magistrate holding local inquiry in proceedings under that section admissible.[10] A decree in an *inter partes suit* under Section 9 of the Specific Relief Act is admissible in a suit for recovery of *mesne* profits, as evidence of dispossession.[11] A judgment in a case under Section 9 of the Specific Relief Act does not come under Section 41 or Section 42 of the Evidence Act; it is relevant only under Section 13, 40 and 43 of the Act as evidence of a transaction or instance where the right to possession was claimed or disputed and also as evidence to show that there was such a judgment or decree, or in order either to found a further claim, or to determine whether cognizance should or should not be taken of a suit, or whether a trial should or should not be held. The decree can be put in the subsequent suit only to show that a right to possession was asserted by one party and denied by the other and a suit was instituted and was either decreed or dismissed. The Legislature did not intend to give the proceedings under Section 9 the character of finality which is essential to invest the

1. *Broda Prosad Roy Chowdhury* v. *Manmath Nath Mitra*, 41 IC 456.
2. *Ramessur Persad Narain Singh* v. *Pattuk, etc.*, 4 C 633, 640 : 6 IA 33 (PC).
3. *Dinomoni* v. *Brojomohini*, 29 C 187 : 29 IA 24 (PC) ; *Collector of Gorakhpur* v. *Ram Sunder Mal*, 56 A 468 : 150 IC 545 : 1934 PC 157 ; *Krishen Doyal Gir* v. *Irshad Ali Khan*, 31 IC 965 : 23 CLJ 525 ; *Ghulam Sarwar Khan* v. *Mohammad Ali Khan*, 65 IC 398 : 1922 O. 98.
4. *Hasim Ali* v. *Abjal Khan*, 82 IC 392 : 1924 C 1046 ; *Broda Prasad Roy Chowdhury* v. *Manmath Nath Mitra*, 41 IC 456 ; See also *Debi Singh* v. *Sisram*, 1939 L 188 : 41 PLR 120.
5. *Krishen Doyal Gir* v. *Irshad Ali Khan*, 31 IC 965 : 23 CLJ 525.
6. *Broda Prosad Ray Chowdhury* v. *Manmath Nath Mitra*, 41 IC 456.
7. *Ram Sunder Gope Sikdar* v. *Haribala Dhubi*, 37 IC 911.
8. *Krishna Nath Chakravarti* v. *Muhammad Wafiz*, 31 IC 789 : 23 CLJ 563.
9. *Sheopujan Rai* v. *Kesho Prasad Singh*, 2 P 919 : 76 IC 347 : 1924 P 310 ; *Raja Mohan Bikram Shah* v. *Deonarain Mahto*, 1945 P. 453.
10. *Raja Mohan Bikram Shah* v. *Deonarain Mahto*, 1945 P. 453.
11. *Jiaullah Sheikh* v. *Inu Khan*, 23 C 693.

decision with a character which will make it operative as *res judicata*.[1]

Foreign judgments.—A foreign judgment is an admissible proof of foreign law.[2] A judgment by a French Court, though not binding on Indian Courts, is admissible in evidence under Section 13, even if it is not between the parties. A weight to be given to it depends on all the circumstances.[3]

Decisions in land acquisition cases.—Previous decisions in land acquisition cases are relevant in a subsequent case where the market value of lands in the same neighbourhood is in issue.[4]

Land Acquisition case.—A judgment not *inter partes* in a land acquisition reference, relating to the lands situate near land involved in a subsequent reference, is not admissible for determining the value of the land in question.[5]

Maharashtra Regional and Town Planning Act.—Section 127, 126,—Reservation of land in development plan. Failure by Authority to take steps for acquisition of land within six months, held that a reservation of land in development plan lapsed.[5-1]

Judgment as evidence of a compromise.—A judgment reciting the terms of a compromise is admissible as the record of a transaction by which the rights of the parties were recognised.[6] The Privy Council in *Ramessur Persad Narain Singh* v. *Pattuk, etc.*,[7] admitted in evidence criminal proceedings and a compromise not *inter partes* to explain the character of the enjoyment of the property.

Compromise.—A judgment based upon a compromise or confession, although of some probative force, cannot be placed on the same footing as one in which after contest a custom was held to be proved or negatived.[8]

Razinama in Criminal Proceedings.—Criminal proceedings not *inter partes* and agreements entered into between parties not before the court, were held to be admissible in evidence, the Privy Council observing, that the *razinama* in the criminal proceedings, though apparently made between tenants, seems to have been subsequently acted upon, and may be properly used to explain the character of the enjoyment of the property.[9]

Police reports and orders under Section 145, Cr. P. Code.*—Police reports and orders for possession by magistrates under Section 145, Cr. P. Code are admissible in evidence under Section 13, being a "transaction" in which the right or custom was claimed, modified recognised, asserted or denied.[10]

Plaint and Written Statement.—Plaint and written statement in a previous suit not *inter partes* are relevant evidence in a subsequent suit as assertion of a right.[11]

Illustration.—The illustration of Section 13 shows that an instance claiming a right

---

1. *Chhadek Karikar* v. *Sayad Ali Kaviraj*, 85 IC 979 : 1925 C 1046.
2. *Suganchand Bhikamchand* v. *Mangibai Gulabchand*, 1942 B 185.
3. *C.S. Nataraja Pillai* v. *C.S. Subbaraya Chettiar*, 1950 PC 34 : 54 CWN 200 : 1950 ALJ 105 : 1950, 1 MLJ 172 : 63 MLW 91 : 52 BLR 474 : 77 IA 33.
4. *Madan Mohan Burman* v. *Secy. of State for India*, 78 IC 557 : 1925 C 481.
5. *Special Land Acquisition Officer* v. *Lakhansi*, 61 Bom. LR 1033.
5-1. *Greater Bombay Municipal Corporation* v. *Dr. Hakim Wadi Tenants Association*, AIR 1988 SC 233.
6. *Roop Chand Bhukut* v. *Har Kishen Doss*, 23 WR 162.
7. 4 C 633 : 6 IA 33 (PC)
8. *Imperial Oil Mills Co. Ltd* v. *Misbahuddin*, 21. 83 : A 1921, L 69.
9. *Rameshur* v. *Kunj Behari*, 6 IA 33 ; 4 C 633.
10. *Dinomoni* v. *Brojomohini*, 29 IA 24 : 29 C 187 : 6 CWN 386.
11. *Chandrachoor* v. *Bibhuti*, A 1945 P 211.

* See now Cr.P.C.

means something more than a mere statement of boundaries in a deed or in a plan. A distinction has been drawn between a claim and statement of claim. A plan filed in a previous suit not *inter partes* in which certain property was not then in dispute describing the property as of the plaintiff's predecessors is not an instance in which the right in dispute was claimed and hence is not admissible in evidence.[1] The deed, the mortgage, the grant, all come under cl. (a): the first is a transaction creating the right and the rest are transactions asserting the right. Particular instances came under cl. (b). The reason for the admissibility of such instances is thus stated by Parke B; in *Jones* v. *Williams*.[2] "The ground on which such acts are admissible is not the acquiescence of any party. They are admissible of themselves proprio vigore, for they tend to prove that he who does them is the owner of the soil: though if they are done in the absence of all persons interested to dispute them, they are of less weight."

Judgment of acquittal in a suit for damages for malicious prosecution.—In a suit for damages for malicious prosecution the fact of acquittal is a fact in issue, and, therefore, the judgment of acquittal is admissible not only to show the fact that the plaintiff was acquitted but the circumstances which resulted in acquittal,[3] but the grounds on which the acquittal was based are not relevant and the civil Court should make an independent inquiry on the question whether the plaintiff was or was not guilty of the offence with the commission of which he was charged by the defendant,[4] and whether as a matter of fact there was reasonable and probable cause or the complaint.[5]

Judgment in a civil suit, whether admissible in subsequent criminal proceedings ?--See notes to section 43 under the headings "Judgment of a civil Court not admissible in a criminal Court to establish the truth of the facts found by the civil Court" and "in a prosecution for perjury, the judgment in the proceeding in which evidence was given is inadmissible".

Judgment in a criminal case whether admissible in a subsequent civil case?—See notes to Section 43.

Orders in lunacy proceedings—Lunacy proceedings are relevant to show that the defendant was a lunatic at the time the proceedings were taken.[6] An order in lunacy proceedings is not conclusive, but it is relevant and binding upon the parties thereto and those who claim under them just like any other judgment of a civil Court. When a person has been found lunatic by inquisition, so long as the inquisition has not been superseded but continues in force, he cannot, even during a lucid interval, execute a valid deed dealing with or disposing of his property. The Court will not recognise such a deed even by directing proceedings to be taken to try the question of its validity, or to perpetuate testimony as to the state of the lunatic's mind at the time it was executed, but will treat the deed as entirely null and void.[7]

Subsequent judgment.—Section 13, Evidence Act, does not make judgments subsequent to the matter under investigation relevant in another case.[8] Judgments subse-

1. *Kheman* v. *Chottu*, A 1939 L 635.
2. 1837, 2 M and W 326.
3. *Jung Bahadur* v. *Gudor Sahoy*, 1 CWN 537 ; *Hitendra Singh* v. *Rameshwar Singh Bahadur* 4 P 510 : 87 IC 849 : 1925 P 625 ; *Gulabchand Gopaldas* v. *Chunilal Jagjivandas*, 9 Bom LR 1134.
4. *Pedda Venkatapathi* v. *Ganagunta, Balappa*, 56 M 641 ; 143 IC 825 : 1933 M 429.
5. *Govinda Setty* v. *Nanjundappa*, 41 Mys. HCR 283.
6. *Padmabut Dassi* v. *Bonomali Seal*, 56 IC 566 ; 24 CWN 378.
7. *Subha Naiker* v. *Solaippa Naicher*, 56 M 904: 147 IC 479: 1933 M 624.
8. *Jhingur Rani* v. *E.*, 134 IC 625: 1931 P 386: 32 Cr.LJ 1224: but see *Kishen Singh* v. *Fakir*, 112 IC 447:

quent to the suit in which they are relied on as evidencing the particular transaction or instances in dispute are not admissible.[1]

Whether judgments may shift onus?—There are several decisions, chiefly of the Nagpur High Court, where it has been held that judgments not *inter partes* may shift the *onus* of proving the contrary of what has been decided by the judgment.[2] But it submitted that this view as the evidentiary value of judgments not *inter partes* is not sound, as it gives to such judgments the force of qualified *res judicata* and, therefore, offends against the rule against *res inter alios actae*. The Privy Council has observed that a judgment, not *inter partes*, cannot alter the burden of proof between rival claimants.[3] A judgment *inter partes*, may, however, cast on a party the *onus* of proving the contrary of what was decided by it, even if the judgment does not operate as *res judicata*.[4]

14. Facts showing existence of state of mind, or of body, or bodily feeling.—Facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, rashness, ill-will or good will towards any particular person, or showing the existence of any state of body or bodily feeling, are relevant, when the existence of any such state of mind or body or bodily feeling is in issue are relevant.

[5][*Explanation* 1.—A fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists, not generally, but in reference to the particular matter in question.

Explanation 2.—But where, upon the trial of a person accused of an offence, the previous commission by the accused of an offence is relevant within the meaning of this section, the previous conviction of such person shall also be a relevant fact.[6]

Illustrations

(a) *A* is accused of receiving stolen goods knowing them to be stolen. It is proved that he was in possession of a particular stolen article. The fact that, at the same time, he was in possession of many other

---

1929 L 966.

1. *Dasondhi* v. *Mikhi Ram*, 1939 L 152: 181 IC 703.
2. *Yamunabai* v. *Dhannalal*, 114 IC 616; *Gopal Rao* v. *Sitaram*, 97 IC 694 : 1927 N 19; *Yeshwant* v. *Daulat*, 89 IC 663: 1926 N 129; *Jumilal* v. *Mst. Halki*, 78 IC 981: 1924 N 387: See also *Lakshman Govind* v. *Amrit Gopal*, 24 B 591; *Tularam* v. *Sunrati*, 79 IC 621: 1924 N 422; *Baldeo Das Birla* v. *Lal Nilmani Nath Sahi Deo*, 8 P 122: 113 IC 681: 1928 P 615.
3. *Kesho Prasad Singh* v. *Bahuria*, 1937 PC 69: 167 IC 329.
4. *Midnapur Zamindari Co.* v. *Naresh Narayan Rao*, 48 C 460: 64 IC 231; *Prahlad Chandra Singh* v. *Bhim Mahto*, 1940 P 341; *Kameshwar Singh* v. *Hridoy Nath Sahoo*, 67 CLJ 111: 1938 C 763; *Aziman* v. *Ibrahim Beg*, 1935 OWN 894; *Sambhunath Bhakat* v. *Sree Sree Sridhar Thakur*, 73 CLJ 76: see also *Baldeo Das Birla* v. *Lal Nilmani Nath Sahi Deo*, 8 P 122: 113 IC 681: 1928 P 615, per Fazl Ali, J.; *Tularam* v. *Sunrati*, 79 IC 621: 1924 N 422. See notes to S 43 under the heading, "Judgments inter partes which are not admissible under Sections 40-42, whether admissible under S. 43."
5. Substituted by Section 1(1) of the Indian Evidence Act, (1872) Amendment Act 1891 (3 of 1891) for the original Explanation.
6. See Code of Criminal Procedure, (1898), (V of 1898) Section 311. (Now see new Code 1972).