CHAPTER IV

OF ORAL EVIDENCE

S. 59. Proof of facts by oral evidence.—All facts, except the *[*contents of documents or electronic records*], may be proved by oral evidence.

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COMMENTARY

Information Technology Act, 2000

Proof of facts by oral evidence [S. 59].—Section 59 provided that all facts except the contents of a document could be proved by oral evidence. The amended provision says that all facts except the contents of documents or electronic records may be proved by oral evidence.

§ For text of the Information Technology Act, 2000, see Stop Press pages in Volume 1 after General Contents.

Principle and Scope.—Under s 3 oral evidence means and includes all statements which the court permits or requires to be made before it by a witness in relation to matters of facts under enquiry. Every fact must be proved in one of the following ways: By oral evidence.—by documentary evidence,—by real evidence *ie* (by production of things). By oral evidence is meant the testimony of living persons examined in the presence of the court or commissioners appointed by the court. Oral evidence does not always mean words falling from the lips of men. It may include signs made by a person who on account of some illness or physical injury [*R v. Abdulla*, 7 A 358 FB *ante*, s 32: "*Written or verbal*"] is unable to speak. If they are of sufficient understanding, deaf and dumb persons may also give evidence by signs or through interpretation or by writing, if they are literate (s 119).

The best available evidence must always be given, and so this section lays down that all facts except the contents of documents may be proved by oral evidence. Documents speak for themselves, and so the contents of documents are to be proved by the production of the documents themselves [or in their absence by secondary evidence under s 65 and by offering proof in the manner laid down in ss 67-73. "S 59 is not very happily worded. Contents of documents may be proved by oral evidence under certain circumstances; that is to say, when such evidence of their contents is admissible as *secondary evidence*. See s 63(5); s 32(8)." Nort p 239]. Facts showing the existence of any state of mind, *eg* intention, knowledge, good faith, negligence, ill-will, &c need not be proved by direct testimony. They may be proved inferentially from conduct, surrounding circumstances, &c [See ss 8 and 14, *ante*].

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* Subs. by the Information Technology Act, 2000.

Contents of Documents Cannot be Proved by Oral Evidence.—It is a cardinal rule of evidence not one of technicality, but of substance that, where written documents exist they shall be produced as being the best evidence of their own contents [*Dinomoyee v. Roy Luchmipat*, 7 IA 8: 6 CLR 101, See s 91, *post*]. As to oral admission of contents of documents, see s 22.

Proof of Facts by Oral Evidence.—In the contradiction of oral testimony which occurs almost in every case, the documentary evidence must be looked to in order to see on which side the truth lies [*Imam v. Hurgobind*, 7 WR 67 PC: 4 MIA 403; *Ekowri v. Heeralal*, 11 WR 2 PC: 2 BLR 4]. Much greater credence is to be given to men's acts than to their alleged words, which are so easily mistaken or misrepresented [*Meer Usdullah v. Imaman*, 5 WR 26, PC: 1 MIA 19, 42, 43]. Oral evidence, if credible is legally sufficient to prove a prescriptive title [*Meherban v. Muhboob*, 7 WR 462] or the fact of possession [*Sheo Sahaye v. Goodur*, 8 WR 328.—CONTRA: *Thakor Din v. Nawab Syed*, 8 WR 341: see s 110]; title [*Ram Sunder v. Akima*, 8 WR 366; *Girdharee v. Modhoo*, 18 WR 323]; boundaries [*Sarat Sundari v. Rajendra*, 9 WR 125—CONTRA: *Goluck v. Nurrendra*, WR 1864, 135]; the existence of an agreement (a farming lease) [*Goluck v. Nund Mohan*, 12 WR 394]; adjustment of accounts [*Purnima v. Nityanunda*, BLR Sup Vol 3 FB; *Kampilikakrivasavappa v. Samasumuddiram*, 1 Mad HC 183]; pedigree [*Mohidin v. Muhammad*, 1 Mad HC 92]; payment of money due upon a mortgage-bond, even though there be a written receipt not produced [*Dalip Singh v. Durga Pd*, 1 A 442]; payment of a bond debt even if there be a clause that all payments are to be entered on the back of the bond [*Narayen v. Motilal*, 1 B 45]; discharge of an obligation created by writing [*Guman v. Sorabji*, 1 Bom HC 11; *Ramanandamisaraiyar v. Rama Bhattar*, 2 Mad HC 412]; to prove without a *patta or kabuliat* the quantity of defendant's land and the amount of its rent [*Dinoo Singh v. Doorga*, 18 WR 348]. There is no presumption of perjury against oral testimony, but it is dangerous to act upon such testimony without testing its credibility both intrinsically and extrinsically [*In re Goomonee*, 17 WR Cr 59].

In Dealing With Oral Evidence, Probabilities, Presumptions, Surrounding Circumstances, etc Are to be Looked into.—The evidence of most witnesses is a mixture of truth and falsehood, or half-truth and if the decision is to be based solely on oral testimony, the task of extracting truth would be most difficult, and sometimes impossible. It is not infrequently seen that persons of the same station in life or standing make contradictory statements in respect of an event to which they were witnesses. Interest or partisanship is a strong element that weans one away uncons-ciously from truth. In weighing evidence considerable aid is obtained if regard be had to the following considerations. The bearing or demeanour of a witness; his intellectual capacity; his station in life and interestedness; his motives: the consis-tency of testimony; the conformity of his testimony with experience; the conformity of the testimony with collateral circumstances; discrepancies in material portions of evidence; the admitted facts; the probabilities of the case, on whom does the burden of proof rest; the necessity of corroboration in certain cases (*eg* accomplice evidence, confession of co-accused, &c); the effect of presumptions; infirmity or speculative expert evidence on certain subjects; statements are evidence for some purposes and not for others, or against some parties and not against others; whether the best evidence the case admits of has been produced, &c. [See *ante* s 5: "*Appreciation or Weight of Evidence*"].

In *Meer Usdoolah v. Imaman*, 1 MIA 19 : 5 WR 26, BARON PARKE, observed: "There is no better criterion of the truth, no safer rule for investigating cases of conflicting evidence, where perjury and fraud must exist on the one side or the other, to consider what facts are beyond dispute, and to examine which of the two cases best accords with these facts, according to the ordinary course of human affairs and the usual habits of life." The probability or improbability of the transaction forms a most important consideration in ascertaining the truth of any transaction relied upon [*Bunwari v. Heinarain*, 7 MIA 148; see *Ramgopal v. Gordon Stuart &Co*, 14 MIA 453; see *Leelanund v. Bassiroonnissa*, 16 WR 102].

The general untrustworthiness of oral evidence in this country has been commented on by the Judicial Committee in several cases. In *Madhoosoodan v. Suroop Ch*, 4 MIA 431: 7 WR 63, it was observed: "It is quite true that such is the lamentable disregard of truth prevailing amongst the inhabitants of Hindusthan that all evidence is necessarily received with great suspicion; but we must be careful not to carry caution to an extreme length nor utterly to discard oral evidence merely because it is oral and unless the impeaching and discrediting circumstances are clearly found to exist." It would, indeed be most dangerous to say that when the probabilities are in favour of the transaction, we should conclude against it solely because of the general fallibility of the evidence of witnesses of a country; such an argument would go to an extent which can never be maintained in this or any other court, for it would tend to establish a rule that all oral evidence must be discarded; and it is most manifest that, however, fallible such evidence may be, however carefully to be watched, justice can never be administered in the most important cases without recourse to it [*Bunwari v. Het Narain*, 7 MIA 148: 4 WR 128; see also *Edun v. Beechun*, 11 WR 345; *R v. Tilak*, 6 Bom LR 330; *Mudhoosoodun v. Suroop*, 4 MIA 431, 441].

In *Ramamani v. Kulanthi*, 14 MIA 346, 354, 355: 17 WR 1, the Privy Council remarked that "the ordinary legal and reasonable presumptions of fact must not be lost sight of in the trial of Indian cases, however untrustworthy much of the evidence submitted to these courts may commonly be; that is, due weight must be given to evidence as elsewhere, and that evidence in a particular case must not be rejected from a general distrust of testimony of persons of a country, nor perjury widely imputed without some grave grounds to support the imputation".

Perjury is rampant in the same degree in Europe and all other countries, and it is the complaint of judges of every country that a good number of witnesses give false testimony willingly. Field says in his book: "It would however be a great mistake to suppose that all inhabitants of India are addicted to these vices in which *some* persons indulge and for which *some* districts are notorious. The upper and more educated classes are as free from them as the same classes in other countries of equal civilization". [Field p 50].[1]

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1. It is very unfortunate the Judicial Committee and other courts have in some cases been led to make strong observations on the general untrustworthiness of Indian evidence [*Mudhoo Soodun v. Suroop*, 4 MIA 431, 441; *Bunwari v. Het Narain*, 7 MIA 148, 167; *Rungama v. Atchama*, 4 MIA 106; *Ramamani v. Kulanthai*, 14 MIA 354; *Mathura v. Ram Ruchia*, 3 BLR, ACJ 112; *Leelanund v. Bassirroonnissa*, 16 WR 102; *Edun v. Bechun*, 11 WR 345; *R v. Elahi Bux*, BLR Sup 482; *Sevaji Vijaya v. Chinna*, 10 MIA 151, 162]. LORD CURZON'S convocation address to the Calcutta University on 11th February, 1905 in which he observed that "the highest ideal of truth is to be a large extent a Western conception.... before it had been similarly honoured in the East, where craftiness and diplomatic vile have always been held in much repute", raised a storm of protest. An observation of this nature by TERRELL CJ, of the Patna High Court in a judgment regarding the general unreliability of the testimony of the people of a province was followed by a widespread agitation culminating in the tabling of a resolution in the Legislative Assembly for his removal and an acrimonious debate was averted by the Viceroy by disallowing the resolution. It is hardly fair to stigamatise a whole nation because some witnesses in some cases have been found to be guilty of perjury. A whole lecture is devoted in MAX MULLERS's "India: *What can it teach us?*" on the "Truthful Character of Hindus", where he has shown by reference to numerous civil servants and authorities who had first-hand knowledge, that of all countries the ideal of truth was the highest in India. Said he: "Such a charge (of untruthfulness), like all charges brought against a whole nation, rests on the most flimsy induction, and that it has done, is doing, and will continue to do more mischief than anything that even the bitterest enemy of English dominion

(Footnote No.1 Contd.)

In *Rajendra v. Sheopersun*, 10 MIA 438, the Judicial Committee observed:—"The consideration of a case upon evidence can seldom be satisfactory unless all the presumptions for and against a claim arising on all the evidence offered, or on proof withheld, in the course of pleading and tardy production of important portions of claim, or defence, be viewed in connection with the oral or documentary proof which *per se* might suffice, to establish it." In *Mathura v. Ram Ruchia*, 3 BLR, ACJ 108, 112: 11 WR 482, MITTER J, said:—

(Footnote No.1 contd.)
in Indian could have invented (p 35). "And because in Calcutta, or Bombay, or Madras Indians who are brought before judges, or who hang about the law courts and the bazars, are not distinguished by an unreasoning and uncompromising love of truth, is it not a very vicious induction, to say, in these days of careful reasoning, that all Hindus are liars?" (p 36). ".....It was love of truth that struck all the people who came in contact with India, as the prominent feature in the national character of its inhabitants. No one ever accused them of falsehood. There must surely be some ground for this, for it is not a remark that is frequently made by travellers in foreign countries, even in our time; that their inhabitants invariably speak the truth. Read the accounts of English travellers in France, and you will find very little said about French honesty and veracity, while French accounts of England are seldom without a fling at *Perfide Albion!*" (pp 57-58 *ibid*).

The truth is that there is no more and no less perjury here than in other countries, however much India may have been stigmatised on account of her dependent position before Independence. The following remarks of JUDGE EDGE, of the County Court as to the prevalence of perjury in England in the *Law Notes* speak for themselves: "The great increase in perjury is beginning to attract judicial notice. Giving his decision in a case which, he said, disclosed a distressing amount of perjury on the defendant's part, JUDGE, EDGE, at the Clerkenwell County Court, last month, said that a few lines inserted in an Act of Parliament would do much to check the glaring perjury that now went on in the courts. Recommendations have been made by the judges, but Parliament—he did not refer to the present one more than to any other—seemed to think it was better to let go perjury unpunished rather than risk the chance of an acquittal by a jury. It was one of the saddest features in English life today that perjury in the law courts was growing more and more common. Witnesses took the oath, knowing at the same time that they were going to make a statement which was altogether the opposite of the truth. They did it knowing that there was little chance of being punished, and they lied with a coolness and deliberation which was enough to stagger one. How long it would be allowed to go on unchecked, he did not know. We have title hesitation in fully endorsing his Honour's remarks" [quoted in 11 CWN 21 notes]. MR JUSTICE MCCARDIE in delivering the eleventh Maudsley Lecture (1933) on "Truth" before the Royal Medico-Psychological Association observed: "In my view, perjury can never have been much more rife than it is now. The oath is rapidly losing its sanctity. Too often it is looked upon as a mere formality. I feel compelled to say that perjury is committed in greater or less degree in the majority of civil or criminal cases that come on trials before the courts... Go, if you will, to any criminal assize court, and you will hear day by day an almost incredible amount of deliberate falsehood committed not only by the man charged, but also, I may add, by wife or child or relative or friend who may be called to support his defence." On this indictment *The Times* remarked: 'In view of the occasional dicta which fall from the mouths of certain judges in this country on the subject of perjury in the courts, as though the people of India had a double dose of original sin in this respect, the recent remarks on the prevalence of perjury in the courts of England, have a special interest.... Those who have daily practical experience of the courts will probably incline to the view that this sensational dictum contains little, if any, exaggeration. In all but an insignificant minority of legal actions, there is conflict of testimony on matters of fact; and, when the most generous allowance has been made for defects of recollection and expression, for *bona fide* confusion and misunderstanding, there is an astonishingly large residue, which can only be accounted for by sheer hard lying." The untruthful and stereotyped evidence by which hundreds of divorces are obtained by collusion in the English courts have more than once elicited strong remarks from judges presiding over divorce courts.

> "Although in dealing with such (oral) evidence we are not to start with any presumption of perjury, we cannot possibly take too much care to guard against undue credulity. There is hardly a case involving a disputed question of fact, in which there is not a conflict of testimony; one set of witnesses swearing point-blank to a particular state of facts, the other swearing with equal distinctness to a state of facts diametrically opposed to it. If therefore we were to form our conclusions upon the bare depositions of witnesses, without reference to the conduct of the parties and the presumptions and probabilities legitimately arising from the record, all hope of success in discovering the truth must be at an end." See the remarks of the same judge at p 110 as to proof of fraud.

Evidence of witnesses though not independent, but not shaken in cross-examination and accepted by the judge who heard and saw their demeanour, should not be rejected on mere suspicion when the story itself as told by them is not improbable [*Maqboolan v. Ahmed*, 31 IA 38: 26 A 108: 8 CWN 241: 6 LR 233].

Case Should Not be Disbelieved Because a Portion of the Evidence is Untrue.— It is not uncommon to find to true case supported by false evidence. So a case is not to be entirely disbelieved because false evidence may have been fabricated to meet a true claim [*Wise v. Sundaloonissa*, 11 MIA 177: 7 WR 13; *Sreeman v. Gopal*, 11 MIA 28], nor must an entire history be thrown aside because the evidence of some of the witnesses is incredible and untrustworthy, [*Ramamani v. Kulanthai*, 14 MIA 364. See also *Hanmantray v. Secy of S*, 25 B 287, 297, where it has been held that the doctrine of "*falsus in uno falsus in omnibus*" in this country affords a test of little or no value, for it is to be feared that there is always a fringe of embroidery to a story however true in the main. See *ante* s 5]. In the case of *Goriboolla v. Gooroodas*, 2 WR (Act 10), 99, the Calcutta High Court made the following observations:—

> "The court will bear in mind that the use of fabricated written evidence by a party, however clearly established, does not relieve the court from the duty of examining the whole of the evidence adduced on both sides, and of deciding according to the truth of the matters in issue..... Forgery or fraud in some material part of the evidence, if it be shown to be the contrivance of the party to the proceedings, may afford a fair presumption against the whole of the evidence adduced by that party, or at least against such portion of that evidence as tends to the same conclusion with the fabricated evidence. It may perhaps also have the further effect of gaining a more ready admission for the evidence of his opponents. But the presumption should not be pressed too far, especially in this country where it happens not uncommonly that falsehood and fabrication are employed to support a just cause".

If a party produces false witness or forged documents in support of his case, but if the other evidence produced by him appears to be genuine, the court will reject the forged documents and take the genuine evidence into its consideration [*Pattabhiramier v. Venkatarow Naiken*, 7 BLR 142; see also *Benga Indigo Co v. Tarini*, 3 WR (Act 10) 149; *Koonjo v. Mothoora*, 1 WR 155; *Kuttoo Md v. Hurdeb*, 19 WR 107; *Nilkrishto v. Bir Ch*, 12 MIA 523: 3 BLR 13: 12 WR 21 PC; *Sevaji v. Chinna*, 10 MIA 151; *Surnamoyee v. Sattees*, 10 MIA 123]. If a part of the evidence of the witness is disbelieved, other evidence coming from the same quarter must be viewed warily, but that does not exonerate the court from weighing whatever evidence has actually been tendered and the mode in which it has been met [*Rameswar v. Bharat*, 4 CWN 18 PC; see also *Casperz v. Kedarnath*, 5 CWN 855]. Discrepancies often trifling in themselves when compared with the great mass of evidence in the case; and small discrepancies quite consistent with the truthfulness of the witnesses who,

it will be remembered were speaking of conversations some 12 or 14 years after they took place, should not be made the ground for disbelief [*Haranand v. Ram Gopal*, 27 IA 1: 27 C 639: 4 CWN 429: 2 Bom LR 562].

Appreciation or Weight of Evidence.—(See *ante* s 5).

Decisions to be Based Upon Legal Evidence and Not Upon Suspicion.—(*ante* s 3).

Probabilities Alone Should Not Exclude Positive Evidence.—If there be found positive testimony unimpeached and credited by a judge competent to judge of the credit due to witnesses, it would seem to be equivalent to total disregard of testimony of the people of a country to say, despite this positive testimony, "We will put all evidence aside, and act alone on the probabilities of the stories and inference from the conduct of the parties" [*Wise v. Sunduloonnissa*, 11 MIA 177, 187-88; *Mudhusoodan v. Suroop*, 4 MIA 431, 441: 7 WR 73 PC; *Nilkristo v. Bir Ch, sup.* See also *ante* s 3].

S. [1]60. Oral evidence must be direct.—Oral evidence must, in all cases whatever, be direct; that is to say—

if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw [2][it];

if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard [2][it];

if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived [2][it] by that sense or in that manner;

if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds:

Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatises if the author is dead or cannot be found, or has become incapable of giving evidence or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable:

Provided also that, if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection.

SYNOPSIS

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1. In Ceylon paras 2, 3, 4, 5 have been numbered (1), (2), (3), (4) respectively.
2. In Ceylon "that fact" substituted.

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COMMENTARY

Principle and Scope.—This section rests on the cardinal rule that the best evidence available must always be given. As LORD ESHER said in *Lucas v. Williams*, 1892, 2 QB 166, 'different kinds of evidence may be used to prove the same fact.' Every relevant fact may be proved by direct or circumstantial evidence, or by both. This section requires that oral evidence must always be *direct* or positive. Evidence is direct when it goes straight to establish the main fact in issue, *eg* when a witness says that he saw *B* inflict a wound on *C* with a knife, or that he saw *B* pay money into *C's* hands, this is direct evidence. Paras 2, 3 and 4 refer to facts and lay down that if the fact to be proved could be *seen, heard, touched, tasted or smelt*, the testimony should be of one who actually saw it, heard it, touched it, tasted it or smelt it. In other words, the testimony must be of the person who perceived the fact through the medium of his own senses. (See Hals 3rd Ed Vol 15 para 486). The fact of deposing is a physical act and might be proved by any one who has seen and heard the witness [*Ganapathi v. Shakharayappa*, A 1929 M 187]. The word 'direct' in this section is used as opposed to mediate or derivative or what is technically called hearsay (*post*).

The effect of all that remains of the best evidence rule, *i.e.*, that if an original document is available to a party that party must produce it and cannot give secondary evidence by producing a copy, is that the party has the original of the document with him in the court or could have it in court without any difficulty, the court will infer the worst if he refuses to produce the original and can give no reasonable explanation.

The knowledge of a person as to crimes of which an accused person is charged is no evidence. What is relevant is not the actual fact of the knowledge but how he had come by that knowledge and since that could have been by a variety of ways other than personally witnessing the event, no inference can be drawn from such a knowledge. [*R v. Blastland*, (1985) 2 All ER 1095 HL].

With regard to the state of mind of another person, *eg* intention, knowledge, good faith, negligence, &c a witness may depose about his conduct and statements which form part of the *res gestae*, (ss 8, 14) but he cannot say what he himself thought about that other man's conduct. Thus, in order to prove the nature of an assembly,

only what a witness actually saw and heard is admissible, but his opinion and impression that the assembly appeared to be unlawful is not admissible [*Jogi v. R*, A 1928 P 98]. Para 5 refers to opinion. If the evidence refers to an opinion or to the grounds thereof, the testimony must be of the person who holds that opinion. The testimony of one who says that he has heard another person express a particular opinion, is not admissible. Opinion of a law committee of a municipality is not admissible when the members of the committee are not examined [*Munpl Board v. Kandhiya*, A 1931 A 499 SB]. Since a body corporate has no sense organs, it cannot give oral evidence. [*Godrej Soap Ltd. v. State*, 1991 Cri LJ 828, 831 (Cal)]. Opinion evidence of experts, &c, is however admissible in the cases provided for in ss 45, 47, 48 and 49, as well as the grounds of the opinion (s 51) and facts which support or are inconsistent with it (s 46).

Oral Evidence Must Be Direct.—Indirect evidence is known in forensic procedure as circumstantial or inferential evidence or presumptive evidence (*ante* s 3). It means proof of other facts from which the existence of the fact in issue may be logically inferred. The division of evidence into direct and indirect or circumstantial, though sanctioned by long use is rather arbitrary and misleading. It is important to remember that circumstantial evidence may also be direct, and this section does not exclude such circumstantial evidence. Thus if a person says that he saw *B* fire a pistol at *C*, this is direct evidence. But if it is proved by the testimony of others that *B* bore a malice towards *C*, that he uttered threats against him, that he purchased the particular pistol from a dealer, that the pistol was found in his box—the evidence of these facts is equally *direct* because it is the evidence of those who saw, heard, &c the facts. They are evidence of collateral facts and not of the *factum probandum* or the subject of inquiry. By direct evidence is therefore meant evidence which goes directly to prove the fact in issue.

In *Nilkanto v. Juggobandhu*, 12 BLR App 18, MARKBY J, observed: "This section provides that where it (the oral evidence) refers to a fact which could be seen, it (oral evidence) must be the evidence of a witness who says he saw it. This last 'it' is somewhat indefinite, but I think that this 'it' has reference to the 'fact' previously spoken of; and I think the fact previously spoken of is the fact deposed to, and therefore, not always the fact which it is ultimately intended to prove. In other words, I do not think it was intended by this section to exclude circumstantial evidence of things which could be seen, heard and felt, though the wording of the section is undoubtedly ambiguous, and at first might appear to have that meaning". This view was relied upon in *Karali v. E I R*, 48 CLJ 32: III IC 792: A 1928 C 498 and so under s 67, direct evidence of handwriting is not necessary. The fact is that the circumstances are proved by direct evidence, and the conclusion as to the principal fact is drawn by inference from the circumstantial evidence. In *R v. Burdett*, 4 B&Ald 95, 161, ABBOTT CJ, said: "If no fact could be thus ascertained by inference in a court of law, very few offenders could be brought to punishment".

The best available evidence should be brought before the court. Secions 60, 64 and 91 are based on this rule. The court is not empowered under the provisions of the CrPC to compel either the prosecution or the defence to examine any particular witness or witnesses on their side. This must be left to the parties but in weighing the evidence, the Court can take note of the fact that the best available witness has not been given, and can draw an adverse inference. [*Pradeep Kumar Agarwal v. State*, 1995 Cri LJ 76, 77 (Ori)]. No material can be relied upon to establish a contested fact which are not spoken to by persons who are competent to speak about them and are subjected to cross-examination by the party against whom they are sought to be used. If a letter or other document is produced to establish some

fact which is relevant to the case, the writer must be produced or his affidavit in respect thereof be filed and opportunity afforded to the opposite party who challenges this fact. [*Ram Jawai v. Shakuntala Devi*, A 1993 Del 330, 338, 339]. Where the witnesses deposed that in their presence the parties had negotiated about an oral agreement for reconveyance and such agreement was made, it will be too hypertechnical to contend that the witnesses should not only state that in their presence negotiation for oral agreement was held but they had heard the talks between the parties. [*Achutananda Baidya v. Praffulya Kumar Gayen*, A 1997 SC 2077, 2080]. Recital in site map prepared by the police would remain purely hearsay and cannot be read as evidence in the case. [*Girish Yadav v. State of M.P.*, A 1996 SC 3098 : 1996 Cri LJ 2159, 2166]. Section 60 days down that oral evidence must in all cases whatever, be direct, that is to say if it refers to a fact which could be seen it must be the evidence of a witness who says he saw it. [*Vijender etc. v. State of Delhi*, 1997(1) Cri 158, 163 SC]. Section 60 of lays down that oral evidence must be direct. If it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it. The evidence before the court can be divided into original and unoriginal. The original is that which a witness reports himself to have seen or heard through the medium of his own senses. Unoriginal, also called derivative, transmitted, second hand or hearsay, is that which a witness is merely reporting not what he himself saw or heard not what has come under the immediate observation of his own bodily senses, but what he had learnt respecting the fact through the medium of a third person. Hearsay, therefore, properly speaking is secondary evidence of any oral statement. [*Balram Prasad Agrawal v. State of Bihar & Ors.*, A 1997 SC 1830 : 1997(1) Cri 10, 19].

—Provisos.—Proviso 1 is an exception to the English rule under which medical and other scientific books are not themselves evidence [*Collier v. Simpson*, 5 C&P 74] whether their authors are alive or dead, although the court may refer to such books for information as to fact which are the subject of judicial notice (s 57). Under this proviso the opinions of experts whether living or dead and the grounds thereof are evidence provided that (*1*) they are expressed in a *treatise commonly offered for sale*; (2) the author is *dead* or if alive, is incapable of giving evidence or cannot be called under the circumstances mentioned in s 32. S 45 refers to living witnesses. Reference cannot be made to any opinion in any unpublished book. Under s 38 statement of foreign law in certain books is admissible and under s 57 the court may resort for its aid to appropriate books on matters of public history, science, literature. Proviso 2 has reference to those cases where on account of inconvenience or impracticability of producing the original thing, secondary evidence is necessarily admitted. It empowers the court to require the *production* of the original if it thinks fit. Under s 165 also, the court may, in order to discover or to obtain proper proof of relevant facts, order the production of any document or thing.

Evidence through live television link.—The Criminal Justice Act 1988, s. 32(1) (UK) provides that a person other than the accused may give evidence through a live television link if the witness is outside the United Kingdom, but evidence may not be so given without the leave of the court. It was held that the trial judge erred in ruling that there is no jurisdiction under the Criminal Justice Act 1988, s. 32(1), to permit a witness to give evidence from abroad through a live television link, when no extradition treaty is in force with the foreign county. Parliament has not limited the places outside the United Kingdom where the procedure is to be available. Accordingly, s. 32(1) may apply, notwithstanding that the witness cannot be extradited if he commits perjury [*R v. Forsyth*, (1997) Times, 8 April (CA)].

Civil Evidence Act, 1995 (English).— The (English) Civil Evidence Act, 1995 has abolished the rule of hearsay is in reference to civil matters [*Bairstow v. Queens Moal House Plc,* (1997) Times, Oct. 23].

Meaning of "Hearsay".—This section aims at the rejection of evidence which is not direct, *ie* what is known as Hearsay evidence. Mention has already been made of Hearsay while speaking of the divisions of Evidence (*ante* s 3). It is a fundamental rule of the English law of Evidence that Hearsay is not admissible. It is one of the rules which is more known than understood, the reason being that the word 'hearsay' is capable of various meanings and is ambiguous in the extreme. Stephen says: "..... the word "hearsay" is used in various senses. Sometimes it means whatever a person is heard to say; sometimes it means whatever a person declares on information given by some one else; sometimes it is treated as nearly synonymous with "irrelevant."' [Steph Intro p 4].

It has been seen that one division of evidence is into *original, ie* when the person who saw or heard a thing reports directly to the court in pursuance of his own knowledge or observation: and *unoriginal, ie* transmitted, secondhand or *hearsay*, (*ante* p 25)—something which a witness before the court says that he heard from a third party who is not called as a witness and the statement of that witness is inadmissible to prove the truth of the fact stated. This is the most common form of hearsay. Hearsay is therefore properly speaking secondary evidence of any oral statement, *eg* when witness *A* says that *B* told him about the happening of event *X* (though *B* is not before the court). *A's* assertion about event *X* being not based on his own observation he is not qualified to speak to it. *B's* assertion made out of court cannot be accepted because it cannot be subject to cross-examination and other tests. But if the object is only to prove *B's* assertion of the event (and not to prove the event), *A* is competent to speak to it and it may be received if it has any relevancy in the case.

There is a distinction between factum and the truth of a statement. In *Subramanium v. Pub Pros*, 1956, 1 WLR 965, 970, the Privy Council observed:

> "In ruling out peremptorily the evidence of conversation between the terrorists and the appellant the trial judge was in error. Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is propossed to establish by the evidence, not the truth of the statement but the fact that it was made. The fact that the statement was made quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other persons in whose presence the statement was made."

LORD PARKER relied on the above statement of law in a case where evidence of statement made to accused by person not called as a witness was held relevant to explain his answers to the police and his conduct when charged [*R v. Willis*, 1960, 1 All FR 331]. Relying on this case a First Information Report mentioning the name of a person present at the occurrence was held admissible, though the informant could not be examined on account of his death [*Umrao v. S*, A 1961 MP 45; see *Sachindra v. Nilima*, A 1970 C 38]. At the trial of two appellants prosecution relied strongly on the fact that each appellant had in his statement sought to set up a joint alibi which the evidence showed to be false—*Held* not only could the statements of each appellant be used against each individually but they could without any breach of the hearsay rule be used not for the purpose of establishing the truth of the assertion

contained therein, but for the purpose of asking the jury to hold the assertions false and to draw inference from their falsity [*Mawaz Khan v. R*, 1967 AC 454 PC: 1967, 1 All ER (*Subramanium v. PP, sup* **applied**)]. "A statement is hearsay if tendered to prove the truth of the facts asserted; it is sometimes called original evidence if its relevance depends on the fact that it was made, and not of the fact that it was true" [Hals, 3rd Ed, Vol 15, para 533; see also the same vol paras 488, 533-35].

Hearsay is not now confined to oral statements. It includes what is done or written, as well as to what is spoken, *ie*, all evidence reported whether *orally or in writing*, *eg*, a letter written by *A* to *B* concerning *C*; or a document purporting to contain statement of or an information derived from a third person not called as witness. Conduct may also be hearsay like statements (see s 50). It is the conduct or outward behaviour which must be proved in the manner laid down in section 60. [*Sitaram Nai v. Puranmal Sonar*, A 1985 Orissa 171, 176 (DB)]. If the defence wanted to rely on the evidence of the person who gave an affidavit stating the accused was not involved in the incident, the proper course is to examine him as a defence witness. [*Munir Ahmad v. State of Rajasthan*, A 1989 SC 705, 710 : 1989 Cri LJ 845].

PHIPSON says:—"The term 'Hearsay' though in its usual and narrow sense confined to unsworn statements used to prove the *truth* of the facts declared, is by some judges and text-writers applied in a wide sense to *all* statements by unexamined persons for whatever purpose tendered—*ie*, as including the various declarations referred to as 'original' evidence. [Phip 8th Ed, p 205]. BEST has said that "it (hearsay) is an expression inaccurate in every way and which has caused the true nature of the rule to be very generally misunderstood".

CROSS says:—"Express or implied assertions of persons other than the witness who is testifying, and assertions in documents produced to the court when no witness is testifying are inadmissible as evidence of that which was asserted" (3rd Ed p 387).

In England, however, four Acts of Parliament, Criminal Evidence Act, 1965; Criminal Justice Act 1967, the Civil Evidence Act 1968, and the Civil Evidence Act, 1972, without doubt mark the beginning of the end of the hearsay rule especially in civil cases. See *ante* 32.

The term 'Hearsay' is rather ambiguous and misleading and it has therefore been purposely excluded from the Evidence Act. The word 'hearsay' is used in various senses, sometimes it means whatever a person is heard to say; sometimes it means whatever a person declares on information given by someone else. When *A* makes a verbal complaint in the presence of 4 persons, the evidence of these 4 persons is not hearsay evidence. [*J D Jain v. Management of State Bank of India*, A 1982 SC 673, 676]. As pointed out above, in its narrow sense, it means statements made out of court which are used to prove the truth of the matters stated. What is commonly known as 'hearsay' is secondary evidence of any oral statement given orally. It may also be in writing *eg*, a document or written statement purporting to contain the statement of a man who is not called as a witness. The statement of a witness of what he says he heard from a third person, being hearsay, is generally excluded. Thus if *A* repeats orally or in writing, a statement alleged to have been made to him or to another person about a certain event by *B* who is not produced before the court, it is hearsay and inadmissible unless the statement is covered by s 32 and *B* is proved to be dead. It is rejected because *A* did not personally observe the event and is not qualified to speak to it. *B* must be called before the court to give his own account of what he saw or did or heard. If *B* is called as a witness, the objection to hearsay disappears, for then it becomes the original evidence of *B* who can be cross-examined about the truth of his statement. If a person testifies directly to his own age

or place of birth, it would be hearsay as it is based not on his own personal knowledge or observation. Broadly speaking, therefore, a witness cannot be called in proof of a fact, to state that he heard some one else state it to another. But there is another aspect of the matter. If *A* says what he heard from *B* not as a proof of the happening of the event, but as what was said by *B* regarding the event in his hearing, there is no objection to the statement. The reasons for the rule excluding the unsworn testimony of third person not called as a witness, is patent. What a man says he heard from another is unreliable for more reasons than one. He may have misunderstood his informant, or he may be attributing statements to him in his absence which he never made, or the third person may have told him falsely.

Thus, a statement made by a person who is not examined as a witness that the accused was not in his house on the night of the offence, is not admissible [*Keramat v. R*, 92 IC 439: A 1926 C 320]. An informant is alleged to have given information to the D.S.P. that the accused will be following the truck which carried the prohibited liquor. When this informant is not examined, the evidence of the D.S.P. about the information received by him is not admissible. [*Bhugdomal Gangaram v. State of Gujarat*, A 1983 SC 906, 910 : 1983 Cri LJ 1276]. The witness heard the names of the accused from other persons seven days after the occurrence and noted down the names in a piece of paper to help his memory. The evidence of that witness giving the names of the accused is not admissible. [*Indra Mohan Brahma v. State of Assam*, 1982 Cri LJ NOC 127 (Gau)]. So also when a child aged 3½ years was raped and she not being competent to depose was not examined, the evidence of her mother and other relations about the statement or conduct of the child was not admitted as hearsay [*Kashi v. R*, 1941, 2 Cal 180: A 1942 C 214 (*R v. Brasier*, 168 ER 202 **folld**)].

Where it is alleged that the boy was adopted on the date of his birth, the oral evidence of the boy in proof of adoption is hearsay [*Debi Pd v. Tribeni*, A 1970 SC 1286]. Statement by *A* that *H* used to conduct himself as her father cannot be rejected as hearsay [*Hazara v Attar*, A 1976 P&H 24]. A statement of a fact contained in a newspaper is merely hearsay [*Harbhajan v. S*, A 1961 Pu 215]. Statement of a witness that the passengers informed him that no tickets were issued to them is hearsay [*Jagroop v. R*, A 1952 A 276]. When in an accident case, the witness had not seen the accused driving the bus and his evidence is only that he was told by others that the accused was driving the bus, that evidence is inadmissible. [*Jaddoo Singh v. Malti Devi*, A 1983 All 87, 89]. When a witness testifies as to the information having been given to him by another and the latter is not examined, the testimony of the witness is not admissible being hearsay. [*State (Collctor Central Excise) v. Papas Kumar Shome*, 1985 Cri LJ 871, 873 : (1984) 2 Crimes 190 (Orissa)]. Statement of a witness that the deceased told him of a rumour that Rs. 5,000 had been offered for his head is hearsay of the very worst type [*Ram Kr v. S*, A 1952 C 231]. Any thing depicted by the investigating officer on the site plan not based on his personal observation but on information from others is hearsay [*Satyabir v. S*, A 1958 A 746; see *Bhagirathi v. R*, 30 CWN 142; *R v. Abinash*, 28 CWN 995; *Ibra Akanda v. R*, 48 CWN 366]. The report or certificate of a medical man regarding the illness of a person or any other matter is hearsay. It must be proved by the testimony of the doctor [*Srish v. Annapurna*, A 1950 C 173; *Govindarajalu v. Lakshmi*, A 1961 M 158; *Palaniappa v. Bombay L A Co*, A 1948 M 296 and cases cited *ante*, s 45: *"Mere Certificate of Medical Man" or Expert*]. Ss 291-293 Cr PC have created exceptions to the rule against hearsay in the case of proceedings under the Code wherein the report is that of certain specified persons, see *Phoolkumar v. Delhi Admn*, A 1975 SC 905.

In trials of *A* and *B* separately, statement of a witness that *B* had told him that *A* had stabbed the deceased is hearsay of a dangerous character [*In re Krishnan*, A 1953 M 400]. Evidence that after the dacoity the police patel went round the village and ascertained whether the accused was in his house is hearsay [*Md Jamsher v. S*, A 1956 B 186]. If witness *A* says that he was told something by *B* who was examined earlier, that statement attributed to *B* cannot be used as admissible evidence unless *B* was asked about it in his examination or he is recalled and given an opportunity to explain it [*Awadh v. S*, A 1956 SC 738: 1956 Cri LJ 1372]. Evidence by a police witness that he received information from a source that accused is going to commit dacoity is hearsay [*Channu v. R*, A 1948 C 125].

The statement of the wife as to what her husband told her would be merely hearsay and would not be admissible as a statement of her husband, but the tape-recorded talk shows that she herself was greatly displeased with the appellant and it was really to emphasise the displeasure of the family and its head that the name of the husband was brought in. In the circumstances the respondents do not derive any advantage from this technical objection to the reception of her husband's statement as second-hand [*Partap v. S*, A 1964 SC 72].

The Criminal Justice Act 1988, (UK) carries this provision that a written statement made by a person who does not give oral evidence before the court may be admitted in evidence if the court is satisfied that the person who made it does not give oral evidence through fear. The victim of a stabbing incident provided the police with a witness statement identifying the appellant as one of the persons who had attacked him. He later made a further witness statement to the effect that he had been told, albeit not by means of a direct threat, that if he continued to support the prosecution he and his family would be in danger. At trial, the victim gave evidence but stated that he was unable to identify his assailants. The prosecution applied for the earlier statement to be admitted on the ground that the victim had not given oral evidence through fear. The judge concluded that the evidence should be admitted. The decision was upheld on appeal [*R v. Waters*, (1997) Times, 10 March (CA)]. The court considered *R v. Ashford Magistrates' Court, ex p Hilden*, (1993) 2 All ER 154, DC.

The cross-examination of a hostile witness brought to light the fact that he had stated before the police that the people of the locality knew that the accused was a hired contract killer. The statement was held to be not a substantive evidence. *Bullu Das v. State of Bihar*, 1998 (7) JT 452 : (1998) 8 SCC 130.

Home office records as hearsay.—The Home office tried to prove the accused as an illegal entrant by producing their records which would have shown his name if he were not an illegal entrant. The officer who compiled the record was not produced. Rejecting the evidence, the court said: The Home Office records relied on by the crown were hearsay evidence and since they are not within a class of documents which are made admissible in criminal proceedings as evidence of the facts contained in them, an officer responsible for their compilation and custody should have been called to give evidence that the method of compilation is such that if *A's* name is not there in the records he must be an illegal entrant. [*R v. Patel*, (1981) 3 All ER 94 CA].

Reason For Rejection of Hearsay.—The reasons advanced for the rejection of hearsay are numerous, among them being the irresponsibility of the original declarant, the depreciation of truth in the process of repetition, the opportunities for fraud which its admission would offer, and the waste of time involved in listening to idle rumour. The two principal objections, however, appear to be the lack of an oath, and the absence of an opportunity to cross-examine him [Hals, 3rd Ed, Vol 15, para 534; Phip 11th Ed p 278]. According to Wigmore, the main reason for rejection of hearsay is that such statements are not subjected to the test of cross-examination; [see Wig s 1362. As to the history of the Hearsay rule, see Wig s 1364; Phip 11th Ed pp

279-81, Tay s 570]. The theory of the hearsay rule is that the many possible deficiencies, suppressions, sources of error and untrustworthiness which lie underneath the bare untested assertion of a witness may be best brought to light and exposed by the test of cross-examniation [*Bruton v. US*, 391 US 123]. Hearsay evidence is therefore not ordinarily admissible. MANSFIELD, CJ, said, "Some inconvenience no doubt arises from the rigour. If material witnesses happen to die before the trial, the person whose cause they would have established may fail in the suit; but although all the bishops on the bench should be ready to swear to what they heard those witnesses declare, and add their own implicit belief of the truth of the declaration, the evidence would not be received" [*The Berkley Peerage*, 4 Camp 414].

There is a distinction between the admissibility of secondary (*ie*, second hand) oral evidence and secondary documentary evidence. The fact that a witness is away or ill or dead, does not of itself admit secondary oral evidence, *ie*, a third person will not be allowed to give his account of the absent witness's statement for the reasons above. The third person may attribute statements to the absent witness which he never made, or he may misreport. But in the case of a document, whenever it is lost, or not found, or is in the possession or power of the adverse party, the other party is entitled to give secondary evidence of its contents, for the reason that a document remains the same and cannot change.

For a recapitulation of the pros and cons of the rule see the view expressed by the Law Lords in *Myers v. DPP*, 1964, 2 All ER 881 HL.

Term "Hearsay" Not Used in the Act.—Generally speaking, all statements or declarations (oral or written) of persons not called as witnesses but repeated by third persons are excluded as hearsay (*ante*, s 3); but there are important exceptions to the rule (see ss 17-39) and the real meaning of hearsay can be best gathered from these exceptions. On account of the ambiguity of the word 'Hearsay' and the loose manner in which the hearsay rule is commonly expressed, the term 'Hearsay' has been purposely omitted from the Act. The Law Commissioners said: "We have however, abstained from making use of the word 'hearsay' from the uncertainty and vagueness of the meaning usually attributed to that word. What a witness says as to what some other person has said or written may be called 'hearsay' in one sense of that word, and that is the widest or popular sense; but the statements by a witness of what he has heard another person say, may be, in fact (as in cases of slander), the very matter is issue; or in other cases may be part of the circumstances which it is essential to ascertain. On the other hand, 'hearsay' may be defined to be that which a witness does not say of his own knowledge, but says that another has said or signified to him. This is probably a more strict and accurate definition of the word 'hearsay' as used in the English law; but it does not include all that is known in that law as hearsay" [Fifth Report].

Although the term 'Hearsay' is excluded from the Act, it is in constant use in the law courts. It has been said earlier that there are important exceptions to the hearsay rule. The correct rule as to hearsay therefore is that statements, oral or written, reported to have been made by persons not called as witnesses are not admissible in evidence subject to certain exceptions. These exceptions are to be found in ss 17-39. Admissions and confessions are exceptions to the hearsay rule (s 17 *et seq.*). So are certain statements made by persons dead or who cannot be called as witnesses, which include dying declarations, statements made in course of business, statements against interest, statements giving opinion as to public right or custom, statements relating to pedigree, &c (s 32); previous depositions of persons who are dead or

cannot be called as witnesses (s 33); entries in books of account kept in the course of business (s 34); entries in public registers or records (s 35) or statements in public documents (s 74) &c, &c. Another exception to the Hearsay rule is the admissibility of statements accompanying acts as *res gestae* or part of the transaction (see notes to s 6 *ante*).

The intention of this section is that derivative or secondhand proofs are not receivable as evidence *in causa*; in other words, its intention is to exclude (hearsay) secondhand or mediate evidence. Speaking of the grounds of the rule for rejection of derivative evidence. BEST says, "The foundation of the rule (excluding derivative or hearsay evidence) lies much deeper than want of opportunity to cross-examine or delivery without sanction of an oath. Instead of stating as a maxim that the law requires all evidence to be given *on oath*, we should say that the law requires all evidence to be given *under personal responsibility, ie,* every witness must give his testimony under such circumstances as expose him to all the penalties, of falsehood which may be inflicted by any of the sanctions of truth. The principle therefore appears to be this—that all secondhand evidence, whether of the contents of a document or of the language of a third person, which is not connected by responsible testimony with the party against whom it is offered, is to be rejected" [Best s 494]. This provision taken in connection with the provisions on relevancy contained in Chap II will, we hope, set the whole doctrine of hearsay in a perfectly plain light, for their joint effect is that:—(*1*) The sayings and doings of third persons are as a rule irrelevant, so that no proof of them can be admitted; (*2*) in some excepted cases they are relevant: (*3*) every act done or word spoken which is relevant on any ground, must (if proved by oral evidence) be proved by some one who saw it with his own eyes or heard it with his own ears. [Rep of Select Com].

[*Ref Tay ss 567-606; Steph Art 14; Best, ss 29-30, 492-5; Ros N P 44-61; Phip 11th Ed pp 275-281; Wigmore, ss 1361-63; Hals, 3rd Ed. Vol 15, paras 486, 533-35*].

Hearsay Evidence When Admissible.—Where the object of the legislature is simply to provide preventive measures, evidence of repute though hearsay, is admissible [*R v. Raoji*, 6 Bom LR 34 (3 M 28 refd to)]. The admissions of a person whose position in relation to the property in dispute is necessary to prove against another, are in the nature of original evidence and not hearsay, and they are legal evidence though he is alive and has not been cited as a witness [*Ali Moidin v. Elaya*, 5 M 238]. Certain communications though hearsay, were held admissible in cross-examination in so far as they relate to the question of the credibility of the witness [*Ganauri v. R*, 16 C 210]. The witness was aroused on hearing the cries of two other prosecution witnesses that the accused had killed the children. His evidence of what he heard is admissible. [*Muni Lal Gupta v. State*, 1988 Cri LJ 627, 630: 1987 2 Crimes 468 (Del)(DB)]. The evidence of a witness that she heard a calling her by name and shouting that her father was assaulting her mother is admissible as direct evidence as to what she actually heard. [*Tulshiram v. State of Maharashtra*, 1984 Cri LJ 209, 211 (Bom) (DB)]. Referring to this Field says, that this case however is no authority for the contention that such evidence is admissible in cross-examination except under the provisions of s 146.

Hearsay evidence is inadmissible to prove a fact which is deposed to on hearsay, but it does not necessarily preclude evidence as to a statement having been made upon which certain action was taken or certain results followed [*Venkataramanuja v. Appalacharayalu*, A 1926 M 1003: 97 IC 785].

While raiding the home of the accused on charges of supplying drugs from home, the police officers noted numerous personal and telephone callers enquiring about

drugs. Police produced no evidence of any would be purchaser but offered evidence of what the callers said and though this was hearsay, it was allowed because it was not offered as an evidence of the truth of the matter but only as to what was actually said. [*R v. Kearley*, 1991 Crim LR 282 CA]. As to hearsay evidence in conspiracy cases, see *ante*, s 10.

Exceptions to the hearsay rule are to be found in admission (s 17 *et seq*), statements falling within s 32 &c, &c (*ante*).

Domestic Tribunal.—A domestic tribunal whose procedure is not regulated by a statute is free to receive evidence from whatever source if it is logically probative. But the extent to which hearsay evidence may be received and used must depend on the facts and circumstances of the case and the principles of natural justice [*S v. Ramchander*, A 1976 P&H 381 FB (*S v. Shivabasappa*, A 1963 SC 375; *K L Shinde v. S*, A 1976 SC 1080 **folld**)].

Hearsay Evidence and Duty of Court.—(See *ante*, p 43). The improper admission of hearsay evidence is to be always deprecated if only from its tendency to provoke appeals [*Mohur v. Ghuriba*, 15 WR 8 PC : 6 BLR 495].

"Perceived by Any Other Sense or in Any Other Manner."—Evidence of persons that they have recognised a person as the particular person who disappeared several years ago is evidence relating to their own perception [*Bibhuti v. Ramendra*, A 1942 C 498 SB; see *ante*, s 9 "*Identity of any thing or person*,"].

Communications Received by Telephone or Dictaphone or Recorded on Tape.— When a witness speaks to a conversation heard by him over the telephone it is admissible, but the identity of the person talking over the telephone must be established by either direct or circumstantial evidence [*Planters' Cotton Oil Co v. Western Tel Co*, 126 Ga 621; *Andrews v. US*, 105 Am LR 322; (refd to in *Rupchand v. Mahabir*, A 1956 Pu 173)]. It is asserted in some cases however that the circumstances tending to establish the identity of the speaker are to be considered in determining the weight of evidence, not its admissibility [*S v. Usher*, 136 Iowa, 606 and cases; Jones, s 211].

In regard to communications by telephone, three situations are to be distinguished: (*a*) It is generally conceded that a person may be recognised and *identified by his voice*, if the hearer is acquainted with the speaker's voice. (*b*) But if there is *no recognition of voice*, what can supply evidence to authenticate the antiphonal speaker? In a given case, no doubt, sundry circumstances (including other admission and the like) may suffice. But apart from special circumstances can any rule be laid down? No one has ever contended that, if the *person first calling up* is the very one to be identified, his mere purporting to be *A* is sufficient, any more than the mere purporting signature of *A* to a letter would be sufficient. The only case practically therefore is that of *B's* calling up *A* and being *answered by a person purporting to be A*. There is much to be said for the circumstantial trustworthiness of mercantile custom, by which, in average experience, the numbers in the telephone directory do correspond to the stated names and addresses, and the operators do call up the correct number, and the person called does in fact answer. These circumstances suffice for some reliance in mercantile affairs; and it would seem safe enough to treat them in law as at least sufficient evidence to go to the jury. (*c*) An additional element enters when the antiphonal speaker does not purport to be *a particular person*, but merely some *member of the office staff authorised* to make a contract or an admission. Here the question is whether there is sufficient evidence that he was really a person acting in the opponent's office and authorised for such transactions, or was a mere intruder,

or unauthorised clerk [Wig s 2155]. A telephone message can be recorded as a first information report [*Shwe Pru v. R*, A 1941 R 209, 211; see however *Chandrama v. S*, 1951, 1 Cal 539].

There may still be a question of the Hearsay rule. If *A*, instead of speaking directly with *B*, converses with a *clerk* or *operator*, and the latter reports *B's* utterance to *A*, then *A* is no longer a witness having personal knowledge. Here three solutions present themselves—(*1*) the *strict rule* of personal knowledge may be applied and *A's* testimony be excluded. (2) or an *exception to that rule* may be recognized on the analogy of the foregoing exceptions and of the exceptions to the Hearsay rule for regular entries in the course of business and of commercial reports; this is the second solution. (*3*) In any case, the doctrine of *admissions* may be invoked, where one of the speakers is a party to the cause, just as it may be for interpreters. If *B* had sent his clerk to *A* to report orally *B's* orders or agreements, the clerk's statements would unquestionably be used as *B's* admissions. In the same way, the clerk's or the operator's report may be used against *B*, on the theory that the latter has made the former his agent for the purpose of communication. Conversely a *bystander*, listening to *A's* conversation with *B* at the telephone, is qualified to report *A's* utterances heard by him, but in strictness is not qualified to report *B's* utterances as repeated or alluded to by *A* during the conversation. Nevertheless, the strict application of the requirement of personal knowledge is here out of place, and leads to unpractical quibbles [Wig s 669].

The dictaphone is merely a form of telephone, and the same questions are presented in testimony based upon its use [Wig s 669]. In England SWIFT J. is reported to have said that he saw no reason why a dictaphone record of an interview which a witness said he had made, should not be admitted in evidence [*Buxton v. Cuming*, 1927, 71 Sol Jo 232].

As to the admissibility of statement recorded on tape-recorder, see *Rupchand v. Mahabir*, A 1956 Pu 173; *Manindra v. Biswanath*, 67 CWN 191; *Partap v. S*, A 1964 SC 72; *Yusufalli v. S*, A 1968 SC 147; *Rama Reddy v. V V Giri*, A 1971 SC 1162; *R M Malkani v. S*, A 1973 SC 157, cited under s 63 and s 155(3) *post*.

Telephonic audition by wire tapping between the sending and receiving instruments, may be equally dependable if the connection is properly made [Wig s 669].

Interception of communication.—The interception of a communication takes place when, and at the place where, the electrical impulse or signal which is passing along the telephone line is intercepted in fact. *Secondly*, if there is an interception of the private system, the communication which is intercepted is not at that time passing through the public system. It is not, in our judgment, in the course of transmission by means of the public telecommunication system. *Thirdly*, the fact that later of earlier signals either have formed part of, or will form part of, the same communication or message does not mean that the interception takes place at some other place or time. Finally, "communication", in our judgment, does not refer to the whole of a transmission or messages; it refers to the telephonic communication which is intercepted in fact, and on the evidence to which I have referred that consists of what has been variously described as the electrical impulse or signal which is affected by the interception that is made. [*R. v. Ahmed* decided on March 29, 1994 cited in *R. v. Effik*, (1994) 3 All ER 458].

Computer Print-out, microfiche of telephone bill.—On a charge of handling stolen goods, microfiche copy of an itemised telephone account relating to the man's

mobile telephone was held to be admissible in evidence. His payment of the bill without querying it was also held to be relevant. The evidence of an employee as to satisfactory working of the computer and that of another employee who controlled the operation of the telephone system were held to be admissible for the limited purposes of proper working of the machines. [*R v. Neville*, 1991 Crim LR 288 CA].

In another case involving use of computer print-out, the prosecution sought to link the accused with an armed robbery by evidence of a computer print-out of telephone calls made on his portable cellphone. The evidence was admitted. The court laid down:

(1) since the machine had observed and recorded the facts the record was not hearsay, but evidence of what the machine had recorded. The information had not been supplied by any person since there had been no human intervention such as the feeding in of an information or a programme;

(2) Section 69 of the [English] Police and Criminal Evidence Act, 1984 applied since the information was in a document produced by a computer. The prosecution had proved to the criminal standard that there was no reasonable ground for believing that the information was inaccurate because of improper use of the computer and that the computer was at all material times operating properly. *R v. Robson*, 1991 Crim LR 362 HH Judge. To the same effect, [*R v. Minors; R v. Harper*, (1989) 1 WLR 441 CA].

Where, however, nobody is produced to vouchsafe the accuracy, such evidence may not be admitted. At *A's* trial for conspiracy to steal, the prosecution relied on a computer print-out showing date, time and length of calls made on *B's* vodaphone to *A's* address. It was held that the print-out could not be put in evidence unless *B* was called. [*R v. Burke*, 1990 Crim LR 401 HH Judge].

Thus the requirement of s 68 of 1984 Act (English) would have to be satisfied, namely, that the person who supplied the information was unable to give oral evidence and that of s. 69 relating to accuracy and functioning of the computer. [*R v. Minors; R v. Harper*, (1989) 2 All ER 208 CA]. Similarly, it was held in [*R v. Bray*, 1988 Crim LR 629 CA], that it was necessary to show that the person who made the print-out was out of the country and that it was not reasonably practicable to call him. No attempt was made to contact him and hence there was no evidence that it was not reasonably practicable to call him.

Computer Printout, Intoximeter.—It is necessary under the Police and Criminal Evidence Act, 1984 [S. 69(1)], (UK) that it must be shown : (a) that there are no reasonable grounds for believing that the statement is inaccurate because of the improper use of the computer, (b) that at all material times the computer was operating properly, or if not, that any respect in which it was not operating properly or was out of operation is not such as to affect the production of the document or the accuracy of its contents. In this case the accused was convicted of driving a motor vehicle with excessive alcohol in her breath. She appealed contending that the clock on the intoximeter in use at the police station was approximately one hour slow. There was no dispute about the time at which the readings had been taken. It was held that the Act, was concerned solely with the proper functioning of a computer, and not with the accuracy of the information supplied to the computer. The difference between a relevant and irrelevant malfunction was that a malfunction was relevant if it affected the way in which the computer processed, stored or retrieved the information used to generate the statement tendered in evidence. Other malfunctions did not matter. Computer clocks, like any others, had to be set to the

correct time. That would not have anything to do with the computer not operating properly. If the error lay in the clock mechanism itself, it was doubtful whether it would constitute a part of 'the computer'. The clock was something which supplied information to the computer rather than being part of the processing mechanism. The model of intoximeter used was of an approved type, and it was impossible to argue that due to the inaccuracy of the clock, the device could no longer be described as an intoximeter [*DPP v. McKeown; DPP v. Jones,* (1997) Times, 21 February (HL)].

Computer printout in extradition proceedings.—It has been held that computer printouts do not amount to hearsay evidence. They constitute a record of the transfers of funds and their evidential status is equivalent to that of a photocopy of a forged cheque. Extradition proceedings are criminal proceedings of a very special kind. The effect of the provision in the Police and Criminal Evidence Act, 1984 (UK) is not to render admissible evidence which would otherwise be inadmissible, but to provide an additional criterion to be satisfied before any document produced by a computer, whether original or hearsay, could be admitted in evidence. The Extradition Act 1989, (UK) s. 9(2), Sch 1, para 6 required extradition proceedings to be conducted 'as nearly as may be' as if they were committal proceedings before magistrates. Such proceedings were criminal proceedings, so the 1984 Act, s. 69(1) and other rules of criminal evidence and procedure would apply to them. Accordingly, the computer printouts were admissible in evidence [*R v. Governor of Brixton Prison, ex p Levin,* (1997) Times, 21 June, Independent, 2 July (HL) **affirming** (1996) 4 All ER 350 (QBD)].

Fifth Clause. [Opinion Evidence].—"The fifth clause of the section affirms in regard to opinion that which is the general rule in regard to other facts, namely, the statements as to the existence of facts made otherwise than by a witness duly called and giving his testimony in court is inadmissible. The result of which is that the person holding the opinion must be called, because no one can know that except the person himself and those whom he had informed it" [Markby, p 53]. Production of a written opinion alleged to have been expressed by some one or the oral testimony of a person to whom an opinion is alleged to have been expressed is not enough. The opinion must be proved by the evidence of the person who gave it, as a witness in the case. The exception is in the case of experts who are dead and whose opinions are expressed in books [see proviso 1].

By this section, if oral evidence refers to an opinion or the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds. But it must be the expression of independent opinion based on hearsay and not repetition of hearsay [*Garuradhwaja v. Saparandhwaja,* 27 IA 238 : 23 A 37 : 5 CWN 33]. The injury report by itself does not prove anything, as it is not a substantive piece of evidence. The evidence of the Doctor alone is substantive evidence. [*Ran Deo Yadav v. State of Bihar,* 1988 Cri LJ 1431, 1433 : (1987) BBCJ (HC) 775 (Pat)].

As to opinion of experts, see ss 45, 46, 47.

Proviso 1: Opinion of Experts Expressed in Books When Dead or Not Available.—This proviso is analogous to the provisions of s 32 and should be read with ss 45 and 46. It alters the English rule. There is no previous section under which the opinion of a dead expert can be given in evidence. According to the English law, medical and other treatises are not evidence, whether the author be dead or alive [*Collier v. Simpson,* 5 C&P 74]. S 45 apparently refers to living witnesses; this novel section, however, makes any book of science published for sale evidence, if the author be dead, or under any of the circumstances specified in s 32, which render his

duction impossible or impracticable (s 46) [Nort p 240]. The treatise, in order to admissible must be commonly offered for sale. The burden of proving that any icular treatise is commonly offered for sale is upon the person who desires to such treatise in evidence (see s 104). Under s 60 the court is entitled to consider act upon the opinion of experts contained in treatises to which it is referred *we v. H*, 38 M 466 : 25 MLJ 594 FB]. Opinion by a living authority in a treatise, o usages and tenets of a body of men or family is not admissible under s 60 *ndan v. Jitan*, A 1973 P 206].

a prosecution for selling adulterated *ghee*, the Corporation analyst applied ain tests and made the deduction that it was adulterated. The defence contended no such deduction could be made according to standard works. The magistrate wed the defence to rely on the books and put exhibit marks on some of them and ted them as evidence—*Held, per* WOODROFFE J, that he was not wrong in ing use of the textbooks but the use of scientific evidence may lead to error if er who use them are themselves not experts or not assisted by experts to whom sages relied upon may be put. *Per* SMITHER J, that the magistrate was right to it the evidence of the text-books under s 60 [*Granade Venkata v. Corpn of Cal*, WN 745 : 46 IC 593]. In a charge of defamation arising out of an imputation of gging a man, the deputy magistrate after considering the prescription in the light assages in medical books, held that the treatment was not for biliary colic and the symptoms were of arsenic-poisoning. The procedure was condemned and it observed that for a mind untrained in medicine, to attempt largely without ied assistance to ascertain why certain medicines were prescribed and what ld be prescribed for biliary colic by a reference to books, is entirely unsound and eless [*R v. Purna*, 28 CWN 579].

lthough under the English law medical and other treatises are not themselves lence, experts may refer to standard text-books or scientific works to refresh their nory or to correct or confirm their opinion. The British Pharmacopoeia, pub-ed by the Medical Council under statute is admissible, though not conclusive. Wharton distinguished between works of exact and those of inductive science, the ier being, he states, admissible in America, the latter not [Phip 6th Ed p 380]. roved works on public history, literature, science or art are admissible in the re of public documents [see s 57 cl (*13*) and *Read v. Lincoln*, 1892 AC 644, 653]. nion as to migration in books of experts on Tribes and Castes is admissible *hadeo v. Vyankammabai*, A 1948 N 287]. Opinion of experts as expressed in ises of persons who are dead can be treated as evidence in proper cases [*Swami bansa v. S*, A 1981 MP 82].

y a '*treatise*' is doubtless meant a work dealing specially with the subject-matter hich the particular question belongs and may be read as included in the term propriate book or documents of reference" used in s 57. Such books as Taylor's lical Jurisprudence may be cited even though no expert witness is called [*Hurry rn v. R*, 10 C 140, 142; *Cunn* p 147]. See also *Hatim v. R*, 12 CLR 86, in which or's Medical Jurisprudence was referred to by the court. As to a list of books rted to by courts, see s 57 (*ante*).

-Other Exceptions. [Price Lists, Market Reports, Business Directory etc].— an exception to the hearsay rule, price lists, market reports in newspapers, essional registers, business directory, shipping list &c, &c are admitted in evi-e. COLLEY J, in *Sisson v. Cleveland &c*, 14 Mich 496 said:

"Evidence of the state of the markets as derived from the market reports in the newspapers should not have been excluded..... As a matter of fact such

reports which are based upon a general survey of the whole market and are constantly received and acted upon by dealers, are far more satisfactory and reliable than individual entries or individual sales or inquiries" (See Wig ss 1704-1708).

Market reports in newspapers are constantly acted upon by dealers and considered more satisfactory than individual sales [*Cliquot's Champagne*, 3 Wall (US) 114 *ante*]. Price list of a firm is good evidence of the price of goods [*Hasanali v. Dara*, A 1949 N 282 cited under s 81 *post*]. Policy matters of company leading to retrenchment can be proved through the manager—resolution of Board of Directors need not be produced [*Parry & Co v. Judge 2nd I T*, A 1970 SC 1334].

Children's welfare.—In England, the children (Admissibility to Hearsay Evidence) Order, 1991 made under the Children Act, 1989 provides that in civil proceedings before the High Court or a county court and in a family proceedings in a magistrate's court the hearsay rule shall not apply to any evidence given in connection with the upbringing, maintenance or welfare of a child.

Computer Print-out of customer's banking account.—Where a bank uses a computer to store information regarding customers' accounts and the crown seeks in criminal proceedings to establish that a sum of money was paid into a customer's account, a computer print-out of the movements on the account may properly be admitted as evidence of the payments stated in the print-out if it is established that the computer operator who fed into the computer information regarding the customer's account cannot reasonably be expected, having regard to the time which has elapsed after he supplied the information to the computer, to have any recollection of dealing with a particular payments into the account. This is so because the operator could give direct evidence and the print-out is a record which amounts to a document prepared and maintained in the ordinary course of business. [*R v. Ewing*, (1983) 2 All ER 645 CA]. Computer print out is admissible if it is proved that the documents were produced by a computer and the computer records were produced in the course of its ordinary use [*Gnanasegaren Pararajasingam v. Public Prosecutor*, (1997) 3 Malayan LJ 1 (CA Kuala Lumpur)].

Proviso 2: Production of Material Thing For Inspection.—The definition of "Evidence" in s 3 does not cover every thing that the court has before it in arriving at a decision. There are other *media of proof, eg* material objects produced, demeanour &c (*ante* s 3). As to why 'material evidence' was excluded from the definition of 'Evidence'. see *ante*, s 3.

Proviso 2 relates to those cases in which secondary evidence of contents of written documents is permitted to be given on account of the great inconvenience or impracticability (legal or physical) of producing the original. Thus, inscriptions on walls, monuments, surveyors' marks on boundary trees, notice boards warning trespassers and the like are proved by copies or oral testimony [*Mortimer v. M'Callan*, 6 M&W 58; see Tay s 438 and *post* s 65(*c*)]. Still cases may arise when the original evidence is producible, though affixed to a building, &c; thus a notice affixed to a tree or house [*Jones v. Tarleton*, 9 M&W 678]. And here it is reasonable that the court, if it think fit, should have the power of calling for the original, instead of allowing it to be proved by the secondary evidence. It would, nevertheless, be highly inconsiderate for a judge to demand the production of the class of "material things" which have been usually proved by secondary evidence, because the very foundation for admitting the secondary evidence is the improbability or all but impossibility, of bringing, the original into court [Nort p 240]. The "best evidence" rule should not be pushed to its extreme limit. Evidence about the nature of chattels can be given by

people who have seen them and speak to their condition, *eg* evidence that a garment infringes certain regulations may be given by persons who have inspected the garment without production of it in court [*Hockin v. Ahlquist Bros*, 1943, 2 All ER 722].

Rule 18 of Or 18 of the C P Code, 1908, empowers the court to inspect any property or thing concerning which any question may arise.

CHAPTER V

OF DOCUMENTARY EVIDENCE

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

COMMENTARY

Principle and Scope. [Primary and Secondary Evidence].—It has been seen that evidence—oral, documentary or real—is either primary or secondary. *Primary evidence* is oral account of the original evidence, *ie* of a person who saw what happened and gives an account of it recorded by the court, or the original document itself, or the original thing when produced in court. *Secondary evidence* is a report or an oral account of the original evidence or a copy of a document or a model of the original thing. Primary evidence has been defined in s 62 as the document produced for the inspection of the court. Ss 67-73 govern cases both of primary and secondary evidence [*Sheikh Karimullah v. Gudar*, A 1925 A 55 : 82 IC 306]. It is therefore necessary that when a document is produced as primary or secondary evidence, it will have to be proved in the manner laid down in ss 67-73. It is a cardinal rule of evidence that where written documents exist, they shall be produced as being the best evidence of their own contents [*Dinomoyee v. Roy Lachmipat*, 7 IA 8 : 6 CLR 101]. Mere marking of a document as an exhibit does not dispense with its proof [*Sait Tarajee v. Yelamarti*, A 1971 SC 1856]. In other words the document upon which reliance is placed by the party must be brought on record legally. There is no provision in the Evidence Act which permits to admit the document if cursorily referred to by the other side while cross-examining the witness or his opponent [*John Mithalal Desai v. Dineshbhai K. Vora*, 1998 AIHC 1894, 1907 (Guj)].

This section says that the contents of a document may be proved either by the production of the original document, which is called primary evidence or in certain cases by copies or oral accounts of its contents. Cases in which secondary evidence is let in are to be found in s 65. By "may" it is not meant that the method of proof of primary or secondary evidence is alternative or optional. This section is descriptive of what is known as primary and secondary evidence. So long as an original document is in existence and is available, its contents must be proved by primary evidence (s 64). Factum of mortgage or passing of considerations is not 'contents of a document' within s 61. Proving of the factum of a mortgage is not the same thing as proving the terms of the mortgage, nor is proving the consideration in a mortgage, the same thing as proving terms of the mortgage [*Panchia v. Harnath*, ILR 8 Raj 459 : 1958 Raj LW 457]. The court may examine all the relevant documents in question in order to determine the admissibility of a particular document [*Boss v. Penang Port Sdn Bhd*, (1996) 5 Malayan LJ 511 (Pulau Pinang HC)].

The statement made by the Investigating Officer in inquest report is a record of what he himself observed and found. Such an evidence is the direct or the primary evidence and is the best evidence [*Rameshwar v. S*, A 1978 SC 1558].

> LORD ESHER in *Lucas v. Williams*, 1892, 2 QB 116: "Primary evidence is evidence which the law requires to be given first; secondary evidence is evidence which may be given in the absence of that better evidence, when a proper explanation of its absence has been given."
>
> JESSEL MR, in *Sugden v. Ld St Leonards*, 1876 PD 154: "The whole theory of secondary evidence depends upon this, that the primary evidence is lost and

that it is against justice that the accident of the loss should deprive a man of the rights to which he would otherwise be entitled."

LORD TENTERDEN in *Vincent v. Cole*, 1828 M&M 258: "I have always acted most strictly on the rule; that what is in writing shall only be proved by the writing itself. My experience has taught me the extreme danger of relying on the recollection of witnesses, however honest, as to the contents of a written instrument; they may be so easily mistaken that I think the purposes of justice require the strict enforcement of the rule."

LORD WYNFORD in *Strother v. Barr*, 5 Bing 151: "I seldom pass a day in Nisi Prius court without wishing that there had been some written instrument evidentiary of the matters in dispute. More actions have arisen, perhaps from want of attention and observation at the time of a transaction, from the imperfection of human memory, and from witness being too ignorant, and too much under the influence of prejudice, to give a true account of it, than from any other cause. There is often a great difficulty in getting at the truth by means of parol testimony. Our ancestors were wise in making it a rule, that in all cases the best evidence that could be had should be produced: and great writers on the law of evidence say, if the best evidence be kept back, it raises a suspicion that, if produced, it would falsify the secondary evidence on which the party has rested his case. The first case these writers refer to as being governed by this rule is, that where there is a contract in writing, no parol testimony can be received of its contents unless the instrument be proved to have been lost."

As to what is a document, see s 3 *ante* and as to what is primary evidence, see further s 62.

Primary Evidence Must be Produced So Long as it is Available.—The rule that in each case best evidence of which the case in its nature is susceptible should always be given naturally leads to the division of evidence into primary and secondary. *Primary evidence* is the best or highest evidence, or, in other words, it is that kind of proof which, in the eye of the law, affords the greatest certainty of the fact in question. Until it is shown that the production of this evidence is out of the party's power, no other proof of the fact is in general admitted. All evidence falling short of this in its degree is termed *secondary*.....It is a distinction of law, and not of fact; referring only to the quality and not to the strength of the proof. Evidence, which carries on its face no indication that better remains behind, is not secondary but primary [Tay s 394]. The cases which most frequently call for the application of the best evidence rule, are those which relate to the *substitution of oral for written evidence; and the general rule of law is that the contents of a written instrument, which is capable of being produced, must be proved by the instrument itself, and not by parol evidence* (*The Queen's* Case, 1820, 2 Brod & B 289).....One of the main reasons for the adoption of this rule is, that the court may require a knowledge of the whole contents of the instrument, which may have a very different effect from the statement of a part [*The Queen's* Case, 2 Brod & B 287—Tay s 396].

The term *second-hand* (*ie hearsay*) evidence is applicable both to oral and written statements; it deals only with their use as evidence of the *truth* of the facts asserted; and it is in general inadmissible, however unanswerably the absence of the original source may be accounted for, *eg* by the death, absence or lunacy of the percepient witness. The term secondary *evidence*, on the other hand, is by common usage confined to documents; it deals only with the means of proving their *contents*; and it is in general admissible whenever the absence of the primary source has been satisfactorily explained [Phip 11th Ed p 10; Hals 3rd Ed Vol 15 para 645].

Consent by a party to exhibit a document does not amount to admission of its contents [*Sanjay Cotton &c v. Omprakash*, A 1973 B 40].

In Each case the Best Attainable Evidence Should be produced.—One of the principles is that the best evidence of which the subject is capable ought to be produced, or its absence reasonably accounted for or explained before secondary or inferior evidence is received. The Privy Council remarked, that in dealing with the documentary evidence, the substantial principles on which the authenticity and value of evidence rest ought to be observed [*Ramalakshmi v. Sivanatha*, 14 MIA 570, 588 : 17 WR 552, see *Ramgopal v. Gordon*, 14 MIA 453]. Person with knowledge must be examined if the documents are to have any probative value [*Madansinhji v. S*, A 1969 G 270]. When oral evidence is unreliable the safest policy is to let the documents speak for themselves. This does not mean that form is to be preferred to substance [*Ramdhandas v. Ramkisandas*, 51 CWN 202 : A 1946 PC 187 : 73 IA 195]. An accused cannot be convicted in a Food Adulteration case on the basis of the certificate issued by the central Food Laboratory. [*The Food Inspector of West Godavari Dist. Hyd. v. Shaik Mohabub Saheb*, 1989 Cri LJ NOC 53 : (1988) 1 APLJ (HC) 460]. To admit documents not strictly evidence at all to prop up oral evidence too weak to be relied upon, is not a course which the Privy Council would approve [*Eckowri v. Heeralal*, 11 WR 2 PC].

A mere production of a certified copy of the judgment of the Criminal Court containing a reference to a spot-map having been prepared by the Magistrate is no evidence by itself unless it is proved as a fact. [*Shabbir Ahmad v. M.P.S.R.T.S. Bhopal*, A 1984 Madh Pra 173, 175 : 1984 ACJ 525]. Copy of deposition of a person recorded in another case cannot be relied on by the court to disbelieve the testimony of an eyewitness [*Pammi v. Govt. of AP*, A 1998 SC 1185, 1187]. Mere proof of the signature cannot prove contents of the letter. However, once the letter is proved by proving signature of the maker thereof there would hardly be any reason to doubt the same regarding veracity of contents therein [*Cynthia Martin v. Prem behari Makhanlal Yadav*, 1998 AIHC 966 (Bom)]. The admissibility of a document must not be confused with its probative value. A document may be admissible but at the same time it may not carry any weight [*Public Prosecutor v. Lai Kon Ching*, (1994) 3 Malayan LJ 621 (Taiping HC)].

Secondary evidence should not be accepted without a sufficient reason being given for non-production of the original [*Syed Abbas v. Yadeen*, 3 MIA 156]. A document should not be considered as proved because its genuineness is not disputed by the opposite party [*Kirteebash v. Ramdhone*, BLR Sup Vol 658]. The documents upon which reliance is sought to be placed must be brought on records of the case legally. Documents do not prove themselves. [*Mostt Rajwati Devi v. The Joint Director, Consolidation, Govt of Bihar, Patna*, A 1989 Pat 66, 67]. Every document should first be started by some proof or other before the person who disputes that document can in any way be considered bound by it [*Reazoonnissa v. Bookoo*, 12 WR 267]. A person can be allowed to depose to the receipt of letters from another or that he took certain action on them, but his evidence is no proof of the contents of the letters [*Firm Chunni v. Firm Sheo*, A 1943 A 370]. A letter filed by a party may be looked into without any further proof at the instance of the opposite party [*Rudnap Export Import v. Eastern Associates Co*, A 1984 Del 20, 29]. Oral admissions as to contents of a written contract are not relevant if the document is inadmissible for want of registration [*Shk Ibrahim v. Parvata*, 8 Bom HCR 163]. Whatever the law may have been before the passing of the Act, the rules contained in this enactment should now be strictly observed. "S 61 lays down that the contents of documents may be proved either by the primary or by secondary evidence" [*Ram Pd v. Raghunandan*, 7 A 738, 743].

A document which owing to non-registration would be inadmissible, may, if its provisions are distinct and separable, and some of those provisions contain a mere personal obligation, be used as evidence of personal obligation, for which registration was unnecessary [*Ulfuttenessa v. Hosain Khan*, 12 CLR 209 FB: 9 C 520; see also *Gour Churn v. Jinut Ali*, 11 CLR 166]. Entries in a ledger were objected to on the ground that they were secondary evidence, being merely a copy of the cash book, but the ledger was admitted [*Megraj v. Sewnarain*, 5 CWN cclxxviii]. Written receipts for payments are important, but by no means necessary as proof nor are they of the nature of primary evidence the loss of which must be shown in order to let in secondary evidence [*Rameshwar v. Bharat*, 4 CWN 18]. Contents of a document can be proved by the document itself. [*Bhagwati v. State of U.P.*, 1983 Cri LJ NOC 216 (All)]. A compromise entered into a criminal case against express provisions of law is *void ab initio* and is not admissible in evidence [*Jagnarain v. Ramdulary*, A 1979 A 71].

A document which is required to be proved as a part of proceeding could only be proved by summoning the record of the case before the court to get the certified copy proved to make it admissible in evidence. [*Shyam Babu v. State*, 1996 Cri LJ 4265, 4271 (All). An exercise book, which contained some entries and slips of papers but there was no page number in it and each and every entry was not proved by any witness, cannot be admitted in evidence without proving the entries made in it. Though this book was exhibited without objection from the defendant, but that would not take away the right of the court to question and/or scrutinize the evidentiary value of the same as section 61 provided the contents of documents may be proved either by primary or by secondary evidence. [*State of Meghalaya v. Jainmanick Nosmel Giri*, A 1995 Gau 23, 31]. Where on the reverse of the pronote the word 'assigned' was specifically written, the intention has to be gathered from the word actually used in the endorsement on the back, which indicated that the party intended only endorse but not to assign the amount covered by the promissory note. [*Mulji Mehta and Sons v. C. Mohan Krishna*, A 1997 AP 153, 155]. *Ex parte* affidavit regarding age without affording opportunity to the other party to test the veracity of the statement made in the affidavit by cross-examining him cannot be held to be sufficient proof of the correct age. [*Kripa Shankar v. Gurudas*, A 1995 SC 2152, 2153].

A deed containing no particulars regarding partition by metes and bounds cannot be considered as a deed of partition but if it evidenced severance of joint status, it would not require any registration and would be admissible in evidence. [*Purnabashi Mishra v. Rajkumari Mishra*, A 1995 Ori 284, 286]. Merely saying that statement is recorded by the police and is signed by the Inspector is not proof of its contents. Unless the officer who recorded the statement is called for and examined, those document cannot be said to be proved, particularly when the person who recorded the statement was very much alive. However, mere production of the documents kept in the police custody willnot be a proof of as a public document. [*Shrawan Nathu Kannuar v. Smt. A.S. Kannuar*, 1997 Cri LJ 491 (492) (Bom)]. Once a document is marked on admission, contents thereof are also treated to be admitted. However, although contents are admitted, its truth is not. Truth or correctness is to be ascertained from the evidence. A party admitting a document has right to explain that though the document contains such a statement, it is not correct. [*L.I.C. of India v. Narmada Agarwalla*, A 1993 Ori 103, 106]. When the PW issued receipt at the relevant time for having weighed the substance (charas) and admitted that he had executed the same, and thus inspite of having opportunity he did not state before the court that certain part of the document was not correct or he had not written the same or written the same at the instance of a particular person and had not written voluntarily, the receipt or certificate of weighing can be read in evidence. [*D.B.*

Thakur v. State of Gujarat, 1995 Cri LJ 3751 (Guj)]. In view of section 51-A of the Land Acquisition Act, 1894 the certified copies of registered sale deeds are admissible in evidence without examining vendors or vendees as witnesses. [*Tata Chemicals Ltd., Bombay v. Sadhu Singh*, A 1994 All 66]. Photo copy of a document is not admissible [*Ramesh Verma v. Lajesh Saxena*, A 1998 MP 46].

Telegram.—A telegram by itself is not an authentic document. It is like an unsigned/anonymous communication. Unless a telegram is confirmed by a subsequent signed application, representation or an affidavit, the contents of the telegrams have no authenticity at all and the same cannot be taken into consideration for assessing the value of the other authentic documents on the record. [*Distt. Magistrate v. G. Jothishankar*, A 1993 SC 2633, 2635 : 1993 Cri LJ 3677].

Judgment.—A prior judgment on a question of title to the land can be used as secondary evidence. A grant of land was made in 1862. The document containing the grant was not there. The Statement the document was gathered from certain observations in *Karumbuira Vanniar v. Govindaswami Vanniar*, (1977) MLW 741. It was an earlier decision about the same land but on a different question and between different parties. The judgment was allowed to be cited as secondary evidence of title. *REMS Abdul Hameed v. Govindaraju*, AIR 1999 SC 1983.

Availability of documentary evidence.—It has been held that in the absence of the documentary evidence which could have been produced, the plaintiff was not allowed to rest his claim on oral evidence particularly when that oral evidence was against the records produced by the defendant. *Banarsi Das v. Brig. Maharaja Sukhjit-Singh*, AIR 1998 SC 179.

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

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

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

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

Illustration

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

COMMENTARY

Primary Evidence.—Primary documentary evidence of a transaction evidenced by writing is the document itself which should be produced in original to prove the terms of the contract (see s 91) if it exists and is obtainable. This is the best attainable evidence. The existence of primary evidence generally excludes secondary evidence. Secondary evidence of contents of written instruments cannot be given unless there is some legal excuse for non-production of the original (see s 65). Except in certain cases where secondary evidence of a particular kind only is admissible [s 65(*e*) and (*f*)], the

law makes no distinction between one kind of secondary evidence and another (*post* p 608; s 65 p 610). In some cases however copies of original document made under public authority rank as primary evidence, *eg* the probate of a will of a testator's personality is primary evidence of the will [*Pinney v. Pinney*, 8 B & C 335; *In re Battie-Wrightson*, 1920, 2 Ch 330; see s 91, Exception 2]. It is more valuable than the will itself as the executors derived their authority from it and it contains the judgment of the court as to its due execution. If a document is required by law to be attested, the primary evidence of execution of the document is the testimony of an attesting witness to the document (s 68). Under the English law primary evidence of a document may also be given against a party by admission of its contents made either orally or in writing or by conduct without notice to produce or explaining the absence of the document [see *Slatterie v. Pooley*, 6 M & W 664 cited under s 22 *ante*]. This rule has not been adopted in the Act [see s 22 *ante*]. As to written admissions see s 65(b) *post*.

A copy served by a party on his opponent is always considered primary evidence of the document as against the former [*Stowe v. Querner*, LR 5 Ex 155, 159; *Boulter v. Peplow*, 9 CB 493; *R v. Hunt*, 3 B & Ald 566—Phip 11th Ed p 744].

A negative becomes admissible in evidence when the person who has taken photograph and had developed into a negative deposes to both the facts [*Laxman v. Anusuyabai*, A 1976 B 204].

It is only when the person who takes the photographs of the scene of accident and develops them into negative himself, comes into the witness-box and deposes both the facts that the negatives become admissible in evidence under section 62. [*Ghewarlal v. Munni Lal Goyal*, 1997 AIHC 3413, 3415 (Raj)]. In *Kathihar Jute Mills Pvt. Ltd. v. Calcutta Match Works (India) Ltd.*, A 1958 Pat 133, Patna HC had observed: "In the case of agreement executed in duplicate, it is only when each of the instruments is duly signed by the party to be bound in it and delivered to the other that the documents are termed, "counterparts", and it is only then that each is evidence against the party who executed it and those in privity with the executing party and each is secondary evidence of the other". [*Shiv Kant Pandey v. Ishwari Singh*, A 1997 Raj 155]. In a case where duplicate partition deed is deposited by one of the executants of the partition deed to whom only a duplicate was given as his title deed and not the original, deposit of original can be insisted as a rule of prudence and caution and not as a legal requirement for the purpose of creating an equitable mortgage. [*State Bank of Travancore v. Velayudhan Pillai Bhaskaran Nair*, A 1996 Ker 32]. Where the genuineness of a document is fundamental question the photostat copies thereof should be accepted after examining the original record. [*Govt. of A.P. v. Karsichinna Venkate Reddy*, A 1994 SC 591, 592]. Where the power of attorney was proved to be duly executed and authenticated by the Public Notary and the original was produced in the court photostat copy of it marked as exhibit is admissible in evidence. [*Northland Traders v. Bank of Baroda*, A 1994 All 381, 382]. Where the original will is not in possession of the petitioner filing of certified copy along with petition for grant of probate is sufficient. [*Rajrani Sehgal v. Parshottam Lal*, A 1992 Del 134, 144].

[*Ref Phip 8th Ed pp 525-29; Tay s 394 et seq; Jones s 199 et seq; Wig ss 1232-41; Hals 3rd Ed Vol 15 para 643-644; Best s 472 et seq*].

Explanation 1: [Document Executed in Counterpart].—The meaning of "counter-part" is "duplicate"; when a deed is prepared in two or more indentical forms, the part signed by the grantor is the original, the other parts are counterparts [Aiyar's Law Lexicon, **quoted** in *Jayarama v. S Ramanatha*, A 1976 M 147]. Where an instrument is executed by all the parties in duplicate or triplicate and each keeps one, each instrument is treated as an original and each is primary evidence of all the others. When each of the instruments is duly signed by the party to be bound by it, and each delivers to the other, the documents are termed *counterparts*, and each is evidence against the party executing it and those in privity with the executing party; and each is

secondary evidence of the other. [Nort pp 241-42]. "Where the writing constituting a bilateral transaction is executed by the parties in duplicate or multiplicate, each of these parts is "the" writing, because by the act of the parties each is as much the legal act as another. It can make no difference that one party has signed only the document taken by the other, except where it is desired to prove specifically the signature. Any one such a duplicate or counterpart, then, may be used *without accounting for the non-production of any other*" [Wig s 1233]. The rule which determines under what head of evidence deeds executed in duplicates are to be classed, appears to be this:—When two or more parts are sealed and delivered by each party, they are denominated as duplicate or triplicate original, and each copy is considered primary evidence [*Colling v. Treweek*, 6 B&C 398; *Brown v. Woodman*, 6 C & P 206]. When however, each part is executed by one party only (as often occurs in the case of leases), the two instruments are called *counterparts*, and each is alternately the best evidence as against the party sealing it, and those in privity with such party, and secondary evidence of the contents of the other part [Tay 1 426]. See also notes to cl (4) s 63 *post*.

It is not always easy, however, to determine what is the original document so as to constitute primary evidence in this sense: and sometimes the same document is primary for one purpose and secondary for another. Where there are *duplicate originals, ie* two documents both fully executed by each party—both are considered primary evidence; in the case of *counterparts—ie* where each document is fully executed by one party only—they are primary evidence against the executing party and his privies, but secondary evidence only against the non-executing party or his privies, except in cases of ancient possession. Two wills in identical language were prepared by the process of typing in which the second copy was obtained by a carbon impression. Both these wills were duly executed by the testator and also attested by the attesting witnesses. Under such circumstance, both of them must be treated as original wills [*Kamala Rajamanikkam v. Sushila Thakur Das*, A 1983 All 90, 93].

Where there are discrepancies between a lease by a deed and its counterpart, the former will in the absence of evidence be presumed to be correct [*Burchell v. Clarke*, 2 CPD 88]; but a patent ambiguity therein may be corrected by the latter [*Mathews v. Smallwood*, 1910, 1 Ch 777]; and where they differ, and are not by deed, a signed draft may be looked at to ascertain the true contract [*Ingleby v. Slack*, 6 TLR 284]. In the case of broker's contracts, the *bought and sold notes are generally* considered primary evidence of the contract. The original of a *telegram* is the one sent, not the one delivered [*Henkel v. Pape*, LR 6 Ex 7; *Goodwin v. Francis*, LR 5 CP 295]. If the copy of a letter be the document sent, this, and not the letter will be the original [*per* JUDGE WOODFALL, Westminister Cy Ct. Times April 27, 1912 p 4—Phip 11th Ed p 743]. Where arbitrators' award was prepared in quadruplicates and each was signed by all of them, each is an original award [*Kruttivasa v. Malati*, A 1959 Or 113].

A common instance of a document in parts is a *pattah* and *muchilka* or *kabuliat* or the two instruments by which a mortgage by conditional sale is often effected. In such cases each of the two parties enters into a contract executes the part which is delivered to the other party. The document so executed is primary evidence against the party who executed it and secondary evidence against the other parties (see s 92, Expl 2). [Cunn p 148]. A *kabuliat* predicates a *pattah*. A *pattah* is a title-deed. The *kabuliat* as its name implies, is a mere acknowledgment, an engagement by the tenant to carry out the terms of the pattah. If a person entered into a *kabuliat*, it may be inferred with certainty that there was also a *pattah* [*Srinath v. Pratap*, 82 IC 879, 882 PC : 28 CWN 145 : A 1923 PC 217]. Since the amendment of s 107 TP Act in 1929 where a lease is executed by a *patta and kabuliat*, each such instrument shall be executed by both the lessor and lessee. Otherwise it would not be a valid lease.

The rule that a counterpart is primary evidence as against the parties executing it and secondary evidence as against the parties who did not execute it, has no application to the case when neither the lease nor the counterpart is complete in

itself, but each supplements the other [*Baidyanath v. Kamini*, 6 CLJ 572]. Where the disputed document, though purported to have been executed by the plaintiff but did not bear his signature, neither the plaintiff is bound by it nor it was delivered to the defendants and as such it cannot be termed as 'counterpart'. [*Shiv Kant Pandey v. Ishwari Singh*, A 1997 Raj 155].

As the law requires that the particulars of the claim should be embodied in the decree (Or 20, r 6), the recitals of the contents of the plaint made in a decree are not secondary evidence of the contents of the plaint but are admissible as primary evidence of the statements of facts made to the judge as the basis of the plaintiff's claim [*Md Ismail v. Bhaggobutti*. Appeal from original decree, Cal HC No 303 of 1897 (25th June 1900)—cited in Wooddroffe, 7th Ed p 486]. But it has been held that recitals in a judgment as to claims are not evidence [*Chhadek v. Sayad*, 85 IC 980 and other cases *ante*, in s 43].

If account books be regarded merely as memoranda and rough books and if the regular accounts be prepared upon examination of the said memoranda they could hardly be regarded as original accounts [*Peary v. Narendra*, 9 CWN 421].

Explanation 2: [Document by Uniform Process].—Where a number of documents are made by a uniform process, *eg*, printing, photography, cyclostyle or lithography, they are not copies in the legal sense of the term. They are all counterpart originals and each is primary evidence of the contents of the rest, but only secondary evidence of the common original [see *Nodin v. Murray*, 3 Camp 228]. "A reproduction by *blotter-press* or letter-press cannot be considered as a duplicate: and policy here supports principle, for such reproduction is by no means uniformly identical or accurate. The case of a *type-machine* (the ordinary printing-press, or its equivalent) is different. Here, the only variances that can occur between different numbers reproduced by printing must arise from a change in the type or from the exhaustion of the ink. But the ordinary printing-press is now self-feeding in respect to ink; and, on the supposition that the type is not intentionally altered, all the reproductions from the same setting of type may be regarded for practical purposes as indentical and equivalent ..... In these days, to be sure, of numerous differing editions of newspapers within a single day, and even of plural editions of periodical magazines and of novels with alternations made since the printing of the first copies, the proof of the above preliminary condition, namely, the *absence of alteration in the type*, becomes a more difficult matter; but this aspect of the subject does not seem yet to have been recognized in judicial rulings". [Wig s 1234].

As the illustration points out "made by one uniform process" means made or printed at one time from one original. A printed paper does not differ from a written one, in respect to both being *copies*; they can alike, therefore, only be received as secondary evidence of the original under such circumstances as render secondary evidence admissible; for instance, if the original is shown to be lost or destroyed, or to be in possession of the opposite party, notice having been given to produce it. There is no more guarantee for printed copy being a true copy than a written one; indeed being a copy at all [*R v. Watson*, 32 How St Tr 82; *Nodin v. Murray*, 3 Camp 288]. But there is a far better guarantee for a number of printed papers struck off from the same machine at the same time being correct facsimiles of each other, than a number of written papers; for here the draftsman may introduce difference impossible with the machine. In this case, each machine-made copy is accepted as primary evidence of all the others, *inter se* (and not of *original* from which they were copied); for instance, if it is desired to prove the publication of a libel in a newspaper, any copy of the issue in which the libel appeared would be primary evidence of the

publication in all the other copies of that issue. But if it were necessary to prove the original libel from which the article was set up, the printed paper would not be primary, but only secondary evidence of the manuscript, and admissible only under the conditions which tender the reception of secondary evidence admissible. [Nort p 242].

Carbon-copies produced by type-writers may for all practical purposes be regarded as equivalent, though the impressions on the lower sheets are likely to be imperfect. They are produced by the same stroke which makes the surface impression. Cash memos prepared in the same process at the same time are primary evidence. [*Gurumurty Patra v. State of Orissa*, 1990 Cri LJ (NOC) 160 (Ori)]. In *Federal U S Co v. Indian*, L&M Co, 176 Ind 328, in the case of a machine carbon-copy in triplicate, each one was held an original. [*Prithi Chand v. State of Him Pra*, 1989 Cri LJ 841 : A 1989 SC 702, 704]. One specimen of a newspaper is not a copy of another specimen of the same newspaper of the same date. They are all counter-part originals, each being primary evidence of the contents of the rest [*Ramchandra v. R*, A 1930 L 371]. It has been held in a case that in order to bring a document within Expln 2, the whole document with the signature must have been made by one uniform process. If after a document is typed the original is signed and sent and the copy is initialled, the copy could not be said to have been made by one uniform process [*Venkataramana v. Narayanarao*, A 1937 M 807]. A carbon copy with certain ink writings on it and which also at a mere glance show not to have been made by one uniform process is not admissible [*Makhan v. S*, A 1958 C 517]. If reliance is placed on the photograph, it would be primary evidence. It is not that only the negative of the photograph would be the primary evidence. [*Parvinkumar Lalchand Shah v. State of Gujarat*, 1982 Cri LJ 763, 777 : 1982 Cri LR (Guj) 14 (Guj)].

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

(1) Certified copies given under the provisions hereinafter contained;

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

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

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

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

Illustrations

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

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

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

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

SYNOPSIS

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COMMENTARY

Principle and Scope.—It has been seen (s 61) that primary evidence is the best evidence obtainable, *ie*, the statement of an eye-witness or an original document. Secondary evidence, as the name implies, assumes the existence of better evidence, *viz*, the original. As a rule, secondary evidence is not admissible until the non-production of primary evidence is satisfactorily accounted for. Secondary documentary evidence is more frequently admitted by courts than secondary oral evidence. A certified or an accurate and compared copy of a document is as good as the original; but the oral account of what a witness has heard from another person, or an oral account of the contents of a document, must naturally be taken with the greatest caution as there is considerable chance of error or inaccuracy. The word 'copy' is not defined in the Act. From the provisions of this section it obviously means a document prepared from the original which is an accurate or true copy of the original [*Hindusthan Construction Co v. Union*, A 1967 SC 526].

This section mentions five kinds of secondary evidence. Cls (*1*), (*2*), (*3*) refer to copies of documents; cl (*4*) refers to counterparts, and cl (*5*) refers to oral accounts of contents of documents. Correctness of certified copies (in cl 1) is presumed under s 79; but that of other copies is to be proved by proper evidence, *eg*, by one who copied from the original or compared with some other person who read out the contents of the original. Some other forms of secondary evidence have already been considered, *eg*, admissions, statements by deceased person &c &c. It has been held in a case that this section is exhaustive of the kinds of secondary evidence admissible under the Act. Where the terms of a document were sought to be proved by a judgment containing a translation thereof in a suit which was not between the same parties or their representatives; neither the translation nor the statement in the judgment was secondary evidence of the contents of the document [*Jagannath v. Secy of S*, A 1922 M 334 : 43 MLJ 37]. S 63 is exhaustive of the meaning of secondary evidence. An abstract translation which is a summary of a document does not come within s 63 [*Hafiz Md v. Hariram*, 21 L 363 : A 1937 L 370]. Draft of award of arbitrators, from which the award was prepared, unless shown to have been compared with the fair award is not secondary evidence [*Girdhar v. Ambika*, A 1969

P 218 (*Hindusthan Construction Co v. Union, sup*; *Public Prosecutor v. Sadagopan*, A 1953 M 785 **dist**: *Jagannath v. Secy of S, sup* **follld**)]. Newspapers are not secondary evidence of the facts mentioned by them [*Bawa Sarup v. R*, A 1925 L 299].

The fact that secondary evidence is receivable is sometimes stated as forming an exception to the rule which provides that the best evidence alone can be given; but it is the logical outcome of it, for, as secondary evidence may only be given when the party tendering it has proved that primary evidence is not obtainable, the secondary evidence becomes the best which the court can procure and consequently satisfies the rule..... There are no degrees of secondary evidence; hence when once it has been proved that a private document exists, but that, for reasons which admit the giving of secondary evidence, it cannot be produced, the contents may be proved by any species of such evidence, *eg*, by the production of a certified copy, any copy which it is possible to prove has been made from the original and is correct, a counterpart, a draft, or by oral evidence given by a person who has seen the document, and is able to swear that he recollects its contents. The statements of deceased persons as to the contents of a lost document, if made under such circumstances as make the state-ments receivable in evidence, can also be given as secondary evidence [Hals, 3rd Ed, Vol 15, paras 484, 485].

In absence of any evidence that the original letters were delivered to the addressee the copy letters carry little evidentiary value. [*J. Patel and Co. v. National Federation of Industrial Co-op Ltd.*, A 1996 Cal 253, 255]. Where name of the correspondent who sent news or information on the basis of which news item was published in the newspaper was not brought on the record no reliance can be placed on such news item suggesting that the murder was committed by some unknown person. [*Manmohan Singh v. State of Punjab*, 1994 Cri LJ 3695, 3701 (P&H)]. True copy of document incorporating facts of amicable partition supplied from the office of the sub-Registrar with the seal and signature is admissible in evidence for the purpose of contents of original. [*Monoranjan Paul v. Narendra Kumar Paul*, A 1994 Gau 64, 66].

Secondary evidence of document can be allowed to be led only when original is proved to have existed but was lost or misplaced [*Filmistan P Ld v. Bombay Munpl Corpn*, A 1973 B 66]. A document which is not a bill of exchange or promissory note, even if insufficiently stamped can be admitted in evidence on payment of penal stamp duty and secondary evidence cannot be refused in respect of such document [*Kundan Mal v. Nand Kishore*, A 1994 Raj 1, 8].

Clause (1): Certified Copies.—The expression "certified copies" is defined in s 76. Public documents may be proved by mere production of certified copies (s 77). A certified copy is sufficient secondary evidence of the existence, condition and contents of a document, but not of its execution [*Sheikh Karimulla v. Gudar*, 82 IC 306: A 1925 A 56]. In the absence of a registered sale deed for any reason, its certified copy may be adduced as secondary evidence, but other evidence is always weak [*Nani Bai v. Gita Bai*, A 1958 SC 706 : 1959 SCR 479; *The Land Acquisition Officer, Vijayawada v. Nulalapati Venkata Rao*, A 1991 Andh Pra 31, 37 (FB)]. As to proof of other official documents, *eg*, Acts, orders, notifications of Government, proceedings of legislatures, &c, see s 78. Under s 79 certified copies are presumed to be genuine and s 86 deals with the presumption as to certified copies of foreign judicial records. Or 11, r 19 of the C P Code empowers the court to order verified copies of entries in any business books to be given to the other side when inspection is asked for. The certified copy of a document in given circumstances may be per se admissible and the applicant may be entitled to lead secondary evidence, while this may not be equally true in the case of a copy of a certified copy of the same document. [*Paramjit Kaur v. Sat Kartar Singh*, 1998 AIHC 3470, 3471 (P&H)]. Certified copy of registered sale-deed of house is not admissible in evidence except after explanation as to the non-availability of the original in an appropriate manner [*Gurmukh Ram Madan v. Bhagwan Das Madan*, (1998) 5 SCALE 4, 6 (SC)].

The translation of the grant contained in a letter from one official to another does not come within s 63 and so cannot be admitted as secondary evidence [*Ambalavana v. Kuppachi*, 26 IC 618; on appeal 35 IC 201]. Orders issued by public officers in the discharge of official duties kept together in a register on the usual course of business, should be presumed to be accurate copies of the originals of public documents and are admissible as secondary evidence under ss 63 and 65 [*Krishna v. Muthnagi*, 28 IC 808 (*In re Ava & Brenhilda*, 5 C 568; *Kalandan v. Kunhunni*, 6 M 80 follld)]. A statement of a witness abstracted in a judgment is not secondary evidence, certified copy of original deposition is necessary [*Saradamba v. Pattabhiramayya*, A 1913 M 207].

Certified copies of documents not falling under either cl (*a*) or cl (*e*) of s 65 is not admissible in evidence [*Biswanath v. Dhapu*, A 1966 C 13].

The certificate issued by the Registrar is to some extent an evidence of the exe-cution of the document (in this case registered will) and the admission of signature before the Registrar by the executant [*Gurbux v. Bishan*, A 1976 P&H 182]. The copy of the will in the office of the Sub-registrar could not be primary evidence. It is only secondary evidence. [*Ramesh Dutt Salwan v. State*, A 1989 NOC 47 (Del) : 1988 Rajdhani LR 387].

CLAUSE (2): Copies By Mechanical Process and Copies Compared with Them.—The first portion refers to all copies made from the *original*, by some mechanical process which ensures their accuracy, *eg* copies by photography, litho-graphy, cyclostyle, carbon &c mentioned in Expln 2 to s 62. *Illus* (*a*) refers to the first portion of cl (*1*). *Illus* (*b*) refers to the second portion of the clause, *viz* copies compared with the copies mentioned in the first portion. These are also admissible. Norton says: The wording of the illustration is somewhat obscure. It means, I take it, that provided that you can show that the original which you wish to prove was really photographed, a photograph will be accepted as *secondary* evidence; under this clause a copy of such copy (compared) would be receivable as secondary evidence of the original, and could not be rejected as a copy of a copy. See *illus* (*b*). [Nort p 243]. An oral account of a photograph or a machine-copy is not secondary evidence of the original [v *illus* (*d*)].

Where the defendant produced xerox copy of the money receipt showing payment of rent and pleaded that he lost the original receipt but no evidence produced to substantiate the plea, xerox copy cannot be accepted in evidence [*Anand Kumar Singhal v. Banarasi Lall*, 1998 AIHC 2287, 2289 (Sikkim)]. At least *prima facie* an applicant must establish the loss of the document before it can seek benefit of leading secondary evidence. The photocopy of the document could be made out only if the certified copy of the document is with the applicant. [*Paramjit Kaur v. Sat Kartar Singh*, 1998 AIHC 3470, 3471 (P&H)].

This clause read with *illus* (*b*) and (*c*) shows that a copy of a copy, *ie* a copy transcribed from and compared with a copy is inadmissible, unless the copy with which it was compared was a copy made by some mechanical process which in itself insures the accuracy of such copy. But copies of copies kept in a registration office, when signed and sealed by the registering officer, are admissible for the purpose of proving the contents of originals [s 57(5) Act 16 of 1908]; see *Hurrish v. Prosunna*, 22 WR 303. The cases of *Unida Bahadur v. Premmasamy*, 7 MIA 128; *Ajudhia v. Amaro*, 6 BLR 502; *Tayabanissa v. Sham Ram*, 7 BLR 627; *Ram Gopal v. Gordon Stuart & Co* 14 MIA 453 : 17 WR 285; *Maqbul Ali v. Masnad Bibi*, 3 BLR 54, are no longer law so far as they relate to copies (Field p 227]. The copy is hand-written copy of the original issued as true copy under the signature of the concerned officer, that copy is not admissible as secondary evidence [*Patel Maganbhai Bapujibhai v. Patel Ishwarbhai Motibhai*, A 1984 Gujarat 69, 74]. In the above mentioned cases, a copy of a copy was admitted in evidence. But in *Neelanunda v. Naseeb*, 6 WR 80, a copy of a copy was rejected even before the passing of this Act. A copy not prepared

in the manner described in cl (2) is only admissible when it has been compared with the original. In the absence therefore of evidence to that effect, a copy made from a copy although the latter has been so compared is not admissible [Cunn p 199].

A carbon copy of a signature is a piece of secondary evidence being a copy made by a mechanical process [*Nityananda v. Rashbehari*, 89 CLJ 204]. Carbon copies of cash book are not secondary evidence. They are admissible as primary evidence [*Public Prosecutor v. Rengsamy*, (1974) 1 Malayan LJ 223 (Ipoh HC)]. But carbon copy of typewritten original is not primary evidence [*Tsia Development Enterprise v. Awang Dewa*, (1984) 1 Malayan LJ 301 (Miri HC)]. An unsigned order which is partly printed and partly typewritten and not authenticated or certified to be a true copy of the order is not a 'copy' [*Lee Weng Kin v. Hal Ehwal Dalam Negeri Malaysia*, (1991) 2 Malayan LJ 472 (Malaysia SC)].

—Photographs.—Photography properly verified on oath by a person able to speak to their accuarcy [see *R v. Tolson*, 1864, 4 F&F 103; *Hindson v. Ashby*, 1896, 2 Ch 1, 21 AC] are generally admissible to prove the identity of persons, or of the configuration of land as it existed at a particular moment [*R v. U K T Telegraph Co*, 3 F&F 73] or the contents of a lost document [*M'Cullough v. Munn*, 1908, 2 IR 194 CA; Hals 3rd Ed Vol 15 para 740]. *In re Stephens*, LR 9 CP 187 photographs of non-removable records were received; but the accuracy of a photographic copy, particularly of external objects, must, like that of a map or plan, be established on oath, to the satisfaction of the judge, either by the photographer or some one who can speak to its correctness [*Hindson v. Ashby*, 1896, 2 Ch 1, 21-22; *U S Shipping Bd v. The St Albans*, 1913 AC 632, 641-2]. Photographs should not be admitted in evidence without examining the person who took the photographs and the negatives of the same being produced on record [*State of Gujarat v. Bharat Alias Bhupendra*, 1991 Cri LJ 978, 980 (Guj); Phip 11th Ed p 748].

In a suit against the Corporation complaining of nuisance created in the user of a refuse depot, photographs of vultures devouring animal matter &c at the site were used [*Basil v. Corpn of Cal.* 45 CWN 1008]. Frequently photographs have been held inadmissible on the ground that they were taken at too remote a time and when conditions had changed. And in some cases where in view of the other evidence they seemed unnecessary or likely to give a wrong impression or to create undue sympathy or prejudice on the part of the jury. [Jones 3rd Ed s 581]. A photograph cannot be relied upon as proof in itself of the dimensions of the depicted object. The necessity for careful delimitation of photographic evidence pointed out [*U S Shipping Board v. The St Albans*, 1931 AC 632: A 1931 PC 189].

Whether a photograph is a correct reproduction of the original depends on many factors, *viz* correctness of lens, state of weather, skill of photographer, accuracy of forming the angle &c. When the original is before the court, the magnified photographic copies can be safely received in evidence as the accuracy can be readily tested by comparison [*Brahma v. Chartered Bank*, A 1956 C 399]. When the Notary certified that the photocopy was true copy of the original, his attestation has to be taken as conclusive evidence and it is not necessary to call the Notary as a witness [*Banari Dass v. Maman Chand*, A 1992 P&H 145, 146]. For proof of identity of persons by photographs, see *ante* s 9.

—Tape Record.—If a statement is relevant, an accurate tape record of it 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 the magnetic tape recording is the ability to erase and reuse the recording medium. Because of this facility the evidence must be received with caution. The

court must be satisfied beyond reasonable doubt that the record has not been tampered with. In this case the conversation between the accused and the complainant was tape recorded. Contemporaneous dialogue between them was held to form part of *res gestae* and was relevant under s 8. Like a photograph of a relevant incident, a contemporaneous tape record of a relevant conversation is admissible under s 7 [*Yusufalli v. S*, A 1968 SC 147; *Pratap Singh v. S*, A 1964 SC 72]. A tape recorded statement is admissible not only to corroborate (s 157) but also for contradiction [s 155(3)] as well as testing the veracity of the witness [s 146(1)] and for impeaching his impartiality (s 153 Excp 2) [*Rama Reddy v. V V Giri*, A 1971 SC 1162]. The tape recorded conversation can only be relied upon as corroborative evidence of conversation deposed by any of the parties [*R.K. Khanna v. State of Bihar*, 1989 Cri LJ NOC 89 (Pat)]. A tape recording may be admissible as corroborative evidence, provided that it recorded the entire conversation and was clearly audible and intelligible [*Ng Yan Pee v. P.P.*, (1959) 3 MC 249 (Kuala Lumpur CA)]. Evidence of tape recorded conversations obtained by a covert electronic listening device, attached by the police to a private house is admissible against the accused in a criminal trial. [*R. v. Khan*, (1994) 4 All ER 426]. Where the very basis as to how the speech was tape recorded and why it was preserved or how the election petitioner came to know about it, has not been explained by the election petitioner, the cassette cannot be relied upon a piece of evidence. [*Quamarul Islam v. S.K. Kanta*, A 1994 SC 1733, 1754].

A tape record of a conversation was admitted though the only witness who overheard it was not conversant with the language and could not make out what was said [*R v. Maqsud Ali*, 1965, 2 All ER 461]. See also *Rupchand v. Mahabir*, A 1956 Pu 173 and *Manindra v. Biswanath*, 67 CWN 191 cited under s 153(3) *post*. Where the voice is denied by the alleged maker thereof, recording of the voice of a witness for comparison with and identification of his earlier recorded voice is neither expressly nor impliedly prohibited under any statute [*Dial Singh v. Rajpal*, A 1969 P&H 350]. A tape-recorded conversation is comparable to a photograph and is admissible provided the identification of the voice and the accuracy of the conversation is proved by eliminating the possibility of erasing the recorded tape [*Smt Joginder Kaur v. Surjit Singh*, A 1985 P&H 128, 131]. Before accepting the evidence of tape record the court must carefully consider the genuineness of the tape and should reject it unless there is further independent and reliable corroboration [*Sumitra v. Calcutta Dyeing &c*, A 1976 C 99 (1972, 2 All ER 699 and 1971, 1 All ER 678 rel on); *Mahabir Prasad Verma v. Dr Surinder Kaur*, A 1982 SC 1043, 1050].

CLAUSE (3): Copies Made From or Compared With Original.—A copy, merely as a piece of paper has no standing as evidence. An ordinary copy (not a certified copy) of a sale deed cannot be considered as secondary evidence [*Kalyan Singh v. Smt Chhoti*, A 1990 SC 396, 404]. In order even to be termed "copy" it must have the support of a witness qualified to say that it represents the contents of the original document. [Wig s 1277]. Under this clause, copies *made* from the original (though not compared with the original) or copies *compared* with the original (though not made from the original), are admissible as secondary evidence. (See *Commr of Wakf v. Khan Jah*, 58 CWN 533; *Krishna v. Dhanapati*, A 1957 C 59). S 63(3) does not require that it must be proved that the copies were made from the original as well as compared with the original [*Harijiwan Sahu v. Jaisam Sahu*, A 1989 Pat 96, 103]. The latter part of this clause shows that a copy of a copy, when compared with the original would be receivable as secondary evidence of the original [v Illus (*c*)]. Thus, we see that copies of copies will not, in general be receivable in

evidence unless compared with the original. In determining what is a copy of a copy, reference should be made to the system of official correspondence prevailing in a particular office [*Sevugan v. Srimathu*, A 1940 M 273].

In the first case here put, the party who *made* the copy can swear to its being a true copy. If he is not produced, then a witness must be produced who can swear to his own comparison; or, as sometimes, two witnesses, one of whom read the original while the other read the copy, or the reverse. But it will save trouble to have comparison made by one and the same person. See *illus* (*c*). [Nort p 243]. Before admission it must be proved that it is a true copy and has been compared with the original by one who can give such evidence. Mere proof of signature does not prove the contents [*Dy. Commr v. Universal &c*, A 1950 A 696; *Mg Po v. Ma Shwe*, 2 R 397: 84 IC 373; see s 67]. Copy of original letter addressed by Govt to Commissioner prepared privately at the time of inspection of relevant file is not secondary evidence [*Nurmahamed v. Abdul Karim*, A 1970 Man 7].

A printed copy of the deposition of a party to the former suit which came up before the Madras High Court is admissible as it is the practice since 1900 after Government took up the printing work, that before the final order for striking off, it would be compared with original [*Ganapathi v. Sakharayappa*, A 1929 M 187]. A later case pointed out that the procedure referred to was followed in the printing of records prior to 1922. Since 1923 the practice is to send to the Government Press typed copies of the record and proofs are corrected in the Press by comparison with the typed copies and not with the original depositions. So the High Court record is not now made from or compared with the original and unless there is some evidence of comparison with the original, the printed record is, in the absence of consent, not good evidence of the original [*Alapati v. Ailoori*, A 1939 M 40: 1939 Mad 333. See also *post "Paper Book"*].

Illus (*c*) lays down that a copy transcribed from a *copy* but afterwards compared with the *original*, is secondary evidence because on account of its comparison with the original it becomes itself an immediate copy; but if it is not compared with the original, it is not secondary evidence although the document from which it was copied was compared with the original. Such a copy of a copy (*ie* 2nd copy not compared with the original) is not evidence because mistakes may have crept in the second transcription; but there is the same possibility in respect of the first copy. Difficulty will arise when the copy of a copy cannot be compared on account of the non-existence of the original. In *Cameron v. Peck*, 37 Conn 763, FOSTER J, said: "The rule that a copy of a copy is not evidence properly applies (*1*) to cases where the original is still in existence and capable of being compared with it, or (2) where it is the copy or a copy of a record, the record being still in existence and being by law as high evidence as the original." (Wig s 1274). A copy of a copy, the original not having been satisfactorily accounted for, is inadmissible [*Mahadeva v. Viravasava*, A 1948 PC 114: 1949 Mad 72: 1948 ALJ 216]. Relying on this case it has been held that a certified copy of the translation of a copy of a will would not be placed on a better footing than a copy of the copy [*Sri Thakur v. Kanhayalal*, A 1961 A 206].

A copy of a certified copy of a document which has not been compared with the original, cannot be admitted, such a copy being neither primary nor secondary evidence of the contents of the original [*Ram Pd v. Raghunandan*, 7 A 738: 5 AWN 160]. A copy of a copy is inadmissible [*Abdul Ghani v. Syed Md*, 54 IC 941: 1 LLT 47]. A copy of the office copy of a sale deed issued by the Official Receiver is inadmissible [*Ramgopal v. Muthukrishna*, A 1957 M 1]. Objection of want of evidence of the formality of comparing the copies with originals cannot be allowed

to be taken in appeal [*Chhatra v. Parbai*, A 1936 P 600]. The proof of a copy being a correct copy is no proof of its execution and genuiness, etc. The proof of the execution of the original must be given in addition to the proof that it is a correct copy [*Amiroonnisa v. Abedoonnissa*, 23 WR 208 PC; *Sookram v. Ramlal*, 9 WR 248; *Appathura v. Gopala*, 25 M 674; *Krishna Kishori v. Kishori Lal*, 14 IA 71: 14 C 486]. A will was submitted for registration but as he had doubts about execution, the sub-registrar referred the matter to the registrar and sent him a copy of the will prepared by him—*Held* it was admissible under cl (*3*) [*Baya v. Bhaurao*, 78 IC 865: A 1924 N 375]. A copy of a copy of mulpatta is not admissible even as secondary evidence of the contents of the original [*Secy of S v. Manjeshwar*, 28 M 257: 15 MLJ 147]. A document used to be produced to settle dispute between villagers does not make it a true copy of *chitta* [*Abdul Bari v. Hrishikesh*, 49 CLJ 546: A 1929 O 459]. Where a witness said: "The paper I now produce is a copy of the original letter and I know it to be a copy," it was admissible as the personal knowledge satisfied the condition in cl (*3*) of s 63. [*Ralli v. Gau Kim Swee*, 9 C 939, 944]. Where the evidence consisted of the copy of a deed filed in another suit, and which was still on the record of the civil court and the copy was endorsed "copy in accordance with the original" and signed by the presiding judge, the copy was duly compared and therefore secondary evidence [*Lachman v. Puna*, 16 C 733: 16 IA 125]. When a copy of the plaint in a previous suit served on the defendant is proved by the said defendant, it is fully proved [*Rohini v. Umesh*, 47 CWN 241].

An examined copy is a copy sworn to be a true copy by a witness who has himself examined it line by line with original [*Reid v. Margison*, 1 Camp 469]. A copy examined merely with a completed draft which latter had not itself been examined with the original, or one which is "practically accurate," or set out only "the material parts" of the original, has been rejected [*Re Halifax Co.*, 1898, 79 LT 183; Phip 11th Ed p 746; Hals 3rd Ed Vol 15 para 654]. A fair copy from a draft of a notice is admissible as secondary evidence [*Smt Lach Cho v. Dwari Mal*, A 1986 All 303, 306]. Where by affidavit of tenant it was proved that photostat copy of the rent note was the copy of the original rent note, though two have not been compared still the said photostat copy of the same can be led as secondary evidence. [*Ratan Sharma v. Ambesedar Dry Cleaners*, A 1997 Raj 75, 77].

Where the original is destroyed, secondary evidence other than a certified copy of a deposition is admissible, but the uncertified copy of the deposition must be proved to be a copy made from or compared with the original as required by s 63(*3*). Where the man who made the copy and the man who compared are dead and their signatures only are proved, s 63(*3*) is not satisfied [*Narendra v. Rajendra*, 45 CWN 654: A 1941 C 506].

CLAUSE (4): Counterparts of Documents.—The common case of counterparts is *pattah* and *kabuliyat*; [see s 62 *Expln 1* and notes, *ante*. Counterparts are primary evidence against the executing parties and their privies, but secondary evidence against non-executing parties. Before copies can be admitted, all counterparts must be accounted for. "If there are two contemporary writings, the counterparts of each other, one of which is delivered to the opposite party, and the other preserved, as they may both be considered as originals, and they have equal claims to authenticity, the one which is preserved may be received in evidence, without notice to produce the one which was delivered" [*per* ELLENBOROUGH LCJ, in *Philipson v. Chase*, 2 *Camp* 110].

All duplicates or counterparts must be accounted for before using copies. For, since all the duplicates or the multiplicates are parts of the writing itself to be proved,

no excuse for non-production of the writing itself can be regarded as established until it appears that *all* of its parts are unavailable (*ie* lost, detained by the opponent or by a third person or the like) [Wig s 1233].

In a suit for recovery of possession by an under-ryot, he produced the *kabuliat* executed by him in favour of his landlord to prove that the lands are part of the leased lands—*Held* that he should have produced his *pattah* or explained its absence and that the *Kabuliat* which was secondary evidence of the *pattah* was inadmissible even though it was produced from the possession of the landlord [*Surjo Narain v. Hurry Narain*, 1 CLR 457]. An over-strict ruling.

CLAUSE (5): Oral Accounts of Contents of a Document By One Who Has Seen, *ie* Read it.—Under this clause it is necessary that the person giving oral accounts of the contents of a document must have himself *seen* the original document and not a copy. 'Seen' means '*read*' [*Ma Mi v. Kallander, infra*] "A person who proposes to testify to the contents of a document, either by copy or otherwise, *must have read it*. He may not describe its contents merely on the credit of what another has told him it contains, even though his informant purports to have read it aloud in his presence. The rule is not always enforced by courts; and no doubt there are cases in which the trial court's discretion may properly allow exceptions. But the general rule is a proper one and is constantly invoked" [Wig s 1278]. The contents of private (but not generally of public or judicial) documents may be proved as secondary evidence by any witness who has in fact read them. A party cannot, however, be compelled by his opponent to admit the contents of documents unproduced in the witness-box, although his admissions out of court afford primary or sometimes secondary evidence of such contents against himself [Phip 11th Ed p 749].

Opinions were divided as to the meaning of "*seen*". Oral account of a document by one who has merely seen with his eyes, but is unable to read was held not to be secondary evidence [*Ghure—v. Chatrapal*, 23 IC 11 : 12 ALJ 239]. So an illiterate attestor is not one who has "seen" execution [*Janki v. Ramkishore*, 66 IC 557—CONTRA: "Seen it" includes reading out or explaining or translating to an illiterate person; *Mehin v. Ramji*, 47 A 13; *Pudai v. Brijmangal*, A 1923 A 612]. The question has been set at rest by the Judicial Committee holding that cl (*5*) "means that the oral evidence of the contents of the document must be given by some person who has seen the contents, that is to say, who has *read* the document. Evidence that the witness saw the document and heard it read out by someone else is only hearsay so far as the contents are concerned, and does not fulfil the requirements of s 60 as to oral evidence generally" [*per* SIR JOHN WALLIS in *Ma Mi v. Kallander*, 54 IA 61: 31 CWN 621: 5 R 18: A 1927 PC 16; *Trimbak v. Yadorao*, A 1940 N 116; *Ramkrishna v. Arjuno*, A 1963 Or 29].

A written statement of the contents of a copy of a document, the original of which the person making the statement has not seen, cannot be accepted as one equivalent of that which this section renders admissible [*Kanyalal v. Pyarabai*, 7 B 139]. Where in prior proceedings between the parties, one of them admitted the existence and contents of a mortgage-deed, it is good secondary evidence within s 63(*5*) [*Bahadur v. Madho*, 36 IC 696]. Contents of original will proved by oral evidence of attesting witnesses [*Deorao v. Raibhan*, A 1954 N 357]. A statement made by a party or his authorised agent in a previous suit in which he refers to a document which is against his interest, is secondary evidence of that document [*Ratipal v. Udai*, 53 IC 667].

Plaints in suit upon bonds were destroyed by fire while under the court's custody and suits were instituted upon duplicate copies of plaints prepared from a register containing particulars of the lost bonds—*Held* that the register though it might not be

secondary evidence of the contents of the lost bonds, was a document that might be used by witness giving accounts of the contents of the bonds, for refreshing his memory under s 159 [*Taraknath v. Jeamat*, 5 C 353]. Where a document has been destroyed by fire, and there is no copy, oral evidence has to be depended on. But oral evidence of the persons who had read the document is not the same as the oral account of persons who were merely present at the transaction. The latter is inadmissible [*Nga Kyin v. Mi Tok*, 14 IC 818]. Statements of witnesses who merely heard judgment pronounced are not admissible. They must have read it [*Mg Chit v. Mg Tha*, A 1923 R 113].

Survey and settlement report based on a *jamabandi* the original of which was not produced and which itself was not exhibited in evidence cannot be treated as secondary evidence of the *jamabandi* under s 63(5) [*Surendra v. Kamakhya*, A 1930 PC 45: 51 CLJ 502: 59 MLJ 731].

Illustrations.—*Illus* (*a*) refers to the first part of cl (2); no comparison with the original is necessary in the case put in *illus* (*a*) if the thing photographed was the original. As shown in this illustration, the negatives and the prints are the secondary evidence of a photographed cheque which is the original and the primary evidence [*Brahma v. Chartered Bank*, A 1956 C 399].

Illus (*b*) refers to the latter part of cl (2) and comparison of the copy with the original is necessary in the case put in *illus* (*b*).

Illus (*c*) refers to cl (*3*).

Illus (*d*) refers to cl (*5*) and shows that an oral account of the contents of the original and not of the copy would be secondary evidence.

Paper Book.—A Paper-book is no evidence at all, primary or secondary. A paper-book containing translation of a party's documents of title is not itself secondary evidence of their contents, but if proper case were made out for reception of such evidence, then in conjunction with the requisite oral evidence, it would prove the said contents [*Ramanuj v. Dakhineswar*, 30 CWN 259]. A paper-book of the High Court is not admissible in evidence in the absence of proof that the papers were the true copies of the original documents [*Santokhi v. Rameshwar*, A 1929 P 41]. See also *ante* "Cl (*3*): *Copies made from or compared with the original*" and *Alapati v. Ailoori*, A 1939 M 140 (*ante*).

As to Admissibilty, Law Recognizes No Degrees in the Various Kinds of Secondary Evidence.—The general rule is that the law recognizes no degrees in the various kinds of secondary evidence; that is, the law makes no distinction between one kind of secondary evidence and another, and that a party is at liberty to adduce any kind of secondary evidence he may choose [*Doe v. Ross*, 10 LJ Ex 201; *Hall v. Ball*, 10 LJCP 285; *Brown v. Woodman*, 6 C&P 206; *Jeans v. Wheedon*, 2 M&Rob 386]. This rule applies whether the original evidence be itself oral or documentary. For instance, if a deed be lost or in the hands of the adversary who after due notice refuses to produce it, secondary evidence of its contents may at once be given by parol testimony, even though the party offering such evidence may be proved to have in his possession a counterpart, a copy, or an abstract of the document [*Sugden v. Ld St Leonards*, LR 1 PD 164; *Brown v. Brown*, 8 E&B 876]; and the former testimony of a deceased witness may be proved by any person who heard him examined, though a clerk or a short-hand writer took down his evidence word for word [*Jeans v. Wheedon*, *sup*; Tay s 550]. At the same time, the rule that there are no degrees of secondary evidence simply applies to the admissibilty of secondary evidence, and not to the degree of weight to which different sorts of secondary evidence are entitled; it

does not mean that the mere memory of a witness, who has read a deed, is entitled to equal weight with an authenticated copy of the same instrument. In many cases a jury would properly disregard evidence with distrust if it appeared that more satisfactory proof was intentionally withheld, and under some circumstances this distrust might even amount to absolute incredulity [Tay s 551].

Cases in which the law has expressly substituted some particular species of secondary evidence, in the place of the primary proof, are, however, excluded from the operation of the rule, that there are no degrees of secondary evidence. For instance, examined copies, and in some cases office or certified copies of public records and documents [see s 65(*e*), (*f*)] are, on the grounds of general convenience, considered admissible and, such copies though in strictness secondary evidence, partake so much of the character of primary proof, that so long it is possible to produce them, other inferior degrees of secondary evidence cannot be received. Parol testimony, therefore, can only be admitted, on proof, (*1*) that the public record or document has itself been lost or destroyed and (*2*) that any such copy which may have been taken is no longer under the control of the party relying upon less satisfactory evidence. Similar rule applies to the deposition of a deceased witness [Tay s 552].

"The American doctrine as deduced from various authorities, seems to be this: that if from the nature of the case itself.....there is no ground for legal presumption that better secondary evidence exists, any proof is received, which is not inadmissible by other rules of law; unless the objecting party can show that better evidence was previously known to the other, and might have been produced; thus subjecting him, by positive proof, to the same imputation of fraud, which the law itself presumes, when primary evidence is withheld" [*Greenleaf* s 84].

The exceptions to the above rule are in the case of : (*1*) *Written admissions*: thus under s 65(*b*) when the existence, condition or the contents of the original have been proved to be admitted in writing, by the person against whom it is proved, the written admission is admissible. (*2*) *Public documents*: thus when the original is a public document within s 74 or when it is a document of which a certified copy is permitted by this Act, the certified copy, but no other kind of secondary evidence is admissible [see s 65 cls (*e*) and (*f*)]. Objection about mode of proof cannot be raised at the appellate stage. [*Moolchand v. Mst. Dhanni*, A 1981 NOC 188: 1981 Raj LW 217].

S. 64. Proof of documents by primary evidence.—Documents must be proved by primary evidence except in the cases hereinafter mentioned.

COMMENTARY

Principle and Scope.—S 61 embodies the general rule that "the contents of documents may be proved either by primary or by secondary evidence." The terms 'primary' and 'secondary' evidence have been explained when dealing with that section. The contents of public documents are generally provable by production of secondary evidence. And the section lays down that private documents must be proved by primary evidence except in the cases hereinafter mentioned. This rule rests on the maxim that the "best evidence" must always be produced. If the original document exists and is available, it must be produced because it is the best evidence [*Sanatan Mohanty v. Baidhar Rout*, A 1986 Ori 66, 68]. Contents of a document can be proved by the document itself [*Bhagwati v. State of U.P.*, 1983 Cri LJ NOC 216 (All)]. The observations of LORD TENTERDEN in *Vincent v. Cole*, 1828 M & M 258

and LORD WYNFORD in *Sirother v. Barr*, 5 Bing 151 [quoted *ante* under "*Principle and scope*" in s 61] show the importance of the strict enforcement of the rule. When the section says that "documents must be proved," it means *contents* of documents must be proved by primary evidence. In a suit for declaration of title over certain land acquired under a settlement, evidence of a certified coy from revenue records was rejected. The document containing the settlement should have been produced, being the primary evidence *Butu Naik v. Saraswati Devi*, A 1998 Ori 119. Ss 61 and 66 both refer to *contents* of documents.

The rule in s 64 applies only to proof of the *contents* of documents and not to cases involving their *existence* or *identity eg* proceedings for conversion, detention, negligent loss or theft, for here there is no distinction between a document and other articles, and the plaintiff is not bound to put it in even though the defendant may be willing to produce it [*Bucher v. Jarratt*, 3 B & P 143; Phip 11th Ed p 740; Tay ss 407, 408].

The difference between this section and s 91 should be noted. This section requires that when the *contents* of a document are to be proved, the document must be produced except in the cases hereinafter mentioned. Like s 91 it does not, for the cases to which it refers, exclude other evidence of the contents of a document. S 91 says that when the terms of a contract or grant have been reduced to the form of a document or when any matter is required by law to be put into writting, no evidence shall be given in proof of the terms of the contract or grant except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible. Here the written contract is of the very essence of the transaction. But where a written instrument is not a fact in issue but only a piece of evidence in proof of some act, other independent evidence is admissible. In a case under s 500 I P Code it was held that where the deposition did not contain a record of the offending words, oral evidence is admissible to prove it [*Sheokaran v. Bandi*, 27 P 778; see *post* s 80, "*Deposition or Memorandum of Evidence*."] The provisions of this section should therefore be distinguished from those of s 91.

Where a writing does not fall within the classes described in s 91, no reason exists why it should exclude oral evidence. For instance, if a written communication be *accompanied* by a verbal one to the same effect, the latter may be received as independent evidence though not to prove the contents of the writing nor as a substitute for it; the payment of money may be proved by oral testimony, though a receipt be taken [*Rambert v. Cohen*, 4 Esp 213; *Jacob v. Lindsay*, 1 East 460; Tay s 415]. The existence of a debt may be proved by oral testimony though an unstamped promissory note to pay was simultaneously given, when the note was not the contract out of which the liability arose [*Balbadhar v. Maharaja of Bettiah*, 9 A 356: 7 AWN 49; see also *Dalip v. Durga*, 1 A 442; *Narayan v. Motilal*, 1 B 45; *Dinoo v. Doorga*, 18 WR 348 and other cases cited *ante* under s 59 under "*Proof of Facts by Oral Evidence*"].

It is not open to a party to object to the admissibility of the documents which are marked as Exhibits without any objection from such party. Once a document is admitted, the contents of that document are also admitted in evidence though those contents may not be conclusive evidence. [*Ashok Dasgupta v. Durjendra Lal Dasgupta*, A 1992 Cal 341, 343; See also *P.C. Purushothama v. S. Perumal*, A 1972 SC 608]. Once the law says that certain evidence is conclusive it shuts out any other evidence which would detract from the conclusiveness of that evidence. Not only that when a certain evidence is made conclusive evidence, it prohibits any other evidence to be led which may detract from the conclusiveness of that evidence, but also the court has no option to hold the existence of the fact otherwise when such

evidence is made conclusive. [*Ramesh Ramrao Hate v. Parvez B. Bhesania*, 1997 AIHC 2521 (2525) (Bom)]. Once a document is properly admitted the contents of the documents would stand admitted in evidence and if no objection has been raised with regard to its mode of proof at the stage of tendering in evidence such a document, no such objection could be allowed to be raised at any later stage of the case or in appeal. We endorse this position of law. [*Amarjit Singh v. State (Delhi Admn)*, 1995 Cri LJ 1623 (Del)]. When neither the sale deeds nor the certified copies thereof were exhibited in court in support of the transactions of sale of lands, the documents were inadmissible though the witnesses had been examined to speak on the transactions. [*Chintaman v. State of Maharashtra*, A 1997 SC 448]. Statement of market value made on the basis of sale-deeds in registration office are not admissible in evidence unless the sale-deeds are produced before the court [*Shyamlal Agarwal v. Government of India*, 1998 AIHC 578 (MP)].

Where the defendant himself admitted the payment under cheque on the relevant date and the evidence is clinching that the amount was paid to the plaintiff on such date absence of the cheque would not mitigate against the filing of the suit on ground that the primary evidence of cheque was missing. [*Sharda Talkies (Firm) v. Madhulata Vyas*, A 1996 MP 68, 74]. In all the pahanis filed by the respondent shows him to be the cultivator of land in dispute. Of course, the latter pahanis filed by the appellant also show the respon-dent's name. Thus the entries of the pahanis would constitute evidence for proof of the factum of possession of the respondent as no contrary evidence has been led to nullify the effect of that evidence. [*Mohd. Kareemuddin Khan v. Syed Azam*, 1997 AIHC 2561 (2565) (AP)(DB)].

Documents.—When a given matter has been expressed in writing, the primary evidence of it is the writing itself and subject to the provision of the next section (s 65), the writing, unless admitted by the other side [*Burjorji v. Muncherji*, 5 B 143; *Satyesh v. Dhunpat*, 24 C 20] must be produced if it is desired to prove the matter expressed in it. When a prosecution is based on an order promulgated by the Govt that order must be filed. Proof of order by newspaper is not sufficient [*In re Kottapalli*, A 1953 M 780 (*Easwaramurthy v. R*, 48 CWN 477: A 1944 PC 54: 71 IA 83 **relied** on)].

A balance sheet does not by itself prove the facts stated therein. It has to be proved like any other fact by affidavit or otherwise [*Petland Turkey &c v. Dyes & Chemical &c*, A 1960 SC 1006: 1960, 2 SCR 906; *Khandesh Spg &c v. Rashtriya Girni*, A 1960 SC 571: 1960, 2 SCR 841].

As to what are 'documents' within the section, see *ante*, s 3. Although a document may be inscribed upon any substance, admissibility under the section sometimes depends on the material used. For instance, inscription on banners, placards, labels on bottles or packages &c are not documents for the purpose of this section and are provable by the oral testimony of persons who saw them [; see *R v. Hunt*, and cases cited *post* section 65: "*When the Original is Not Easily Movable*"]. A cinema film is not a document provable by production of original [*Glyn v. Western & Co*, 1916, 1 Ch 261]. The memorandum made of a conversation is a document. The witness called to depose to the conversation may use the note to refresh his memory under s 159. When an employee who was asked to make good loss of cash in the office, gave a petition to his superior authority, narrating the entire facts, that document is inadmissible in evidence [*State of U.P. v. Pheru Singh*, A 1989 SC 1205, 1213 : 1989 Cri LJ 1135].

[*Ref Tay ss 394 et seq; Phip 11th Ed p 738 et seq; Best ss 472-505; Steph Art 65*].

Proof of Contents of Documents.—A copy of document should not be received in evidence until all the legal means have been exhausted for procuring the original

[*Sookram v. Ram Lal*, 9 WR 248; *Filmistan P Ld v. Bombay Munpl Corpn*, A 1973 B 66]. When the scribe of a compromise deed was not produced, the evidence of a chance witness to the execution cannot be safely relied on [*Bindraban v. Atmaram*, A 1984 NOC Del 305]. Documents properly proved are admissible though not marked as exhibits [*Mahesh v. Nura*, A 1929 L 82: 111 IC 381 (*Imamuddin v. Sri Ram*, 9 L 4 **distd**]. A certified copy of a public document can be admitted as secondary evidence to prove only what the document states. The truth of what the document states must be separately established [*Om Prakash Berbia v. Unit Trust of India*, A 1983 Bom 1, 7]. The evidence of handwriting expert and proof of execution of a document would not be sufficient to prove the truth of the contents of the document [*State v. Pyare Lal Nehru*, 1990 Cri LJ (NOC) 120 (Del)]. Mere marking of document does not dispense with the proof of it [*Sait Tarajee v. Yelamarti*, A 1971 SC 1865; *P G D Ombrain v. Collr*, A 1980 Gau 55]. A party cannot object to the admissibility of documents marked as exhibits without any objection from him [*P C Purushothama v. S Perumal*, A 1972 SC 608; *Kanchanganga Co v. S*, A 1973 C 325]. When a deed of partition was admitted in evidence without objection, the question of admissibility cannot be raised at the stage of arguments [*Goswami Malti Vahaji Maharaj v. Purushottam Lal*, A 1984 Cal 297, 299]. When documents are marked as exhibits without objection, the admissibility cannot be challenged subsequently [*Brahmanandu Misra v. Smt. Sunamoni Padi*, A 1984 NOC 116 (Ori)], but he can impeach that document and the contents thereof in all other possible manner [*Sailendra v. Harekrushna*, A 1978 Or 125].

Where the objection is not that the document is inadmissible but that the mode of proof is irregular or insufficient the objection should be taken at the beginning of trial [*Gopal v. Sri Thakurji*, A 1943 PC 83; *Mira v. Jai*, A 1971 Raj 303; *Subbarao v. Venkata*, A 1964 AP 53]. Objection relating to admissibility of document can be taken even at the appellate stage [*M S Ram Singh v. Bijoy*, A 1972 C 190]. Permitting a document to be marked by consent only means that the party consenting is willing to waive his right to have the document in question proved [*A V S Perumal v. Vadivelu Asari*, A 1986 Mad 341, 346: (1986) 1 MLJ 283 : (1985) 95 Mad LW 297 **overruled**). Once a document is included in an agreed bundle, it is no longer necessary to prove its existence or execution and it is not necessary to produce the original. But the truth of its contents has to be proved [*Red and Yellow Omnibus Co. v. Chuah Lay Boon*, (1993) 2 CLJ 480 (Taiping HC)]. Once a document is properly admitted its contents are also admitted in evidence though they may not be conclusive [*P C Purushothama v. S Perumal*, A 1972 SC 608; *Swarnalata v. Krishna Iron &c*, A 1974 C 393; *Harnath v. Dhanoo*, A 1975 C 98]. Refusal of execution by some of the executants of a document does not imply necessarily that it is not genuine [*S Rangaraju v. Sulochana*, A 1971 M 280].

The admission of a party as to the contents of a document made in a deposition, is only secondary evidence [*Shk Ibrahim v. Parvata*, 8 Bom HCR 163]. Translated entries in a ledger were admitted as secondary evidence [*Megraj v. Sewnarain*, 5 CWN cclxxviii]. The court cannot act on copies of detention orders, still less on uncertified copies. Originals must be produced [*Gokul v. R*, A 1945 N 203; *Kamala Kant v. R*, 23 P 252; *Kali Pd v. R*, 23 P 475]. When the genuineness of a document is in issue, production of either original or at least a photostatic copy is essential [*Sarala v. Dinabandhu*, 71 IA 1: 48 CWN 273: A 1944 PC 11]. An accused cannot be convicted in a food Adulteration case on the basis of the certificate issued by the Central Food Laboratory [*The Food Inspector of West Godavari Dist. Hyd. v. Shaik Mohabub Saheb*, 1989 Cri LJ NOC 53 : (1988) 1 APLJ (HC) 460 (AP)].

When a person denies his alleged signature on a document and opposite party does not prove writing or signature to be his, it is not obligatory on the court to determine genuineness of document by comparing alleged signature with admitted signature [*Charan v. Indrajit*, A 1979 C 256].

[1]**S. 65. Cases in which secondary evidence relating to documents may be given.**—Secondary evidence may be given of the existence, condition or contents of a document in the following cases:—

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

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

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

of any person legally bound to produce it,

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

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

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

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

(*e*) When the original is a public document within the meaning of section 74;

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

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

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

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

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

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

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1. In Ceylon instead of (a), (b), (c) &c, the paras, have been numbered (1), (2), (3), (4), (5), (6), (7) respectively and corresponding numerals have been inserted in the last four paras.
2. Substituted by Part B Sates (Laws) Act, 1951 for "the States" which had been substittued by AO 1950. In Pakistan "Pakistan" substituted: in Burma "the Union of Burma" and in Ceylon "this Island".

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COMMENTARY

Principle and Scope.—It has been seen that the contents of a document must be proved by the production of the original document and secondary evidence of it is not generally admissible (v s 64). There are exceptions to the rule and this section states the various class of cases in which secondary evidence relating to documents may be given. The principle is that so long as the original exists and is available, it

being the best evidence, must be produced. If it cannot be had on account of its loss, destruction, detention by the opponent, or third person who does not produce after notice, physical or legal irremovability, or any other cause, secondary evidence is admissible. PORTER J, in *Thomas v. T*, 1 La 166, 168 (Am):—

> (The rule) "is only another form of expression for the idea that when you lose the higher proof, you may offer the next best in your power.....The rule does not mean that men's rights are to be sacrificed and their property lost because they cannot guard against events beyond their control; it only means that, so long as the higher or superior evidence is within your possession or may be reached by you, you shall give no inferior proof in relation to that".

The section contemplates that the document sought to be used in evidence is in possession of the opposite party or a third person. When it is in possession of the opposite party and secondary evidence of any document referred to in cl (*a*) is desired to be given notice to produce must be served on him or his lawyer as prescribed by Or 11 r 16 except in the cases mentioned in the proviso to s 66. When service is proved and the opposite party fails to produce the document, the party serving notice becomes entitled to give secondary evidence of it. Ss 65 and 66 should be read together : s 65 states the cases in which secondary evidence of a document may be given and s 66 lays down that previous notice to produce must be given except in the cases excepted by the proviso. Both the sections relate to the admission of secondary evidence of a document and its conditions, but the language used is not very clear or consistent. Although the word "party" is not used in s 65 as in the first para of s 66, it is evident that it applies when the document is in possession of a party as well as a stranger. S 66, except in cl (*6*), refers to parties only. Further s 65(*a*) requires notice also in the case of a person out of reach of or not subject to the process of the court; but this is excepted by cl (*6*) of s 66 as useless and unnecessary. The words "any person legally bound to produce it" in s 65(*a*) make any intelligible interpretation difficult; see *post* cl(A)(*iii*).

Secondary evidence cannot of course be given of a document when the original itself is found to be inadmissible (*post*). S 65 admits secondary evidence only of the existence or the contents of a document which is lost or otherwise unavailable, but the execution of the document must be proved by evidence as required by s 67 [*Akshya v. Maheswar*, A 1958 Or 207]. As an accused could not before the insertion of s 342A [now s 315 (*1*)] in the Cr P Code give evidence, it was held that secondary evidence of an identification of a co-accused by him, was clearly inadmissible [*R v. Khetal*, 45 A 300]. Ss 65, 66 must be read together and the adverse party must not be presumed to have knowledge that he would be required to produce an original document so as to dispense with the necessity of a notice to produce, unless the original is shown or appears to be in the possession of the person against whom the presumption is drawn [*per* WALSH J, *Mangra v. Dediram*, 35 IC 328]. S 65 provides an alternative to the bondholder in cases where production of the original is impossible from circumstances beyond control, but if a bond is in existence, production is not dispensed with by that section [*Md Zafar v. Zahur*, 49 A 78: A 1926 A 741; *Hira v. Ram Pd*, A 1949 A 677]. If it can be proved that the original is exactly a true copy of the draft and it has been prepared without any corrections, the draft can be accepted in evidence [*P Kunhammad v. V Moosankurry*, A 1972 K 76].

Once secondary evidence is admitted without any objection and marked as exhibits, no objection regarding admissibility can be raised subsequently [*Collr v. Rajib*, A 1972 Or 200; *Kalayan v. Chhoti*, A 1973 Raj 263] and cannot be ignored by the court without giving any reason [*Collr v. Padma*, A 1972 Or 203]. When a copy of gazette

notification certified to be true by the person concerned is received in evidence without any objection the other party cannot object to it subsequently [*S v. V P Enadeen*, A 1971 K 193 FB]. Party not objecting to reception of uncertified copy of revenue records without examining any officer to prove it, cannot in second appeal question its admissibility [*Harichand v. Bachan*, A 1971 P&H 355 (*Shahzadi v. Secy of S*, 34 IA 194; *Fauja v. Allah Ditta*, A 1931 L 722; *Suraj v. Hafiz*, A 1944 L 1 **folld**)].

When is Secondary Evidence of Documents Admissible.—This section mentions seven cases in which secondary evidence of a document is admissible, *viz.*

(*a*) when the original is in possession or power (*i*) of the opposite party; or (*ii*) of a person who is out of the reach of, or not subject to, the process of the court; or (*iii*) of any person legally bound to produce it and when such person does not produce it after demand, *ie* notice under s 66;

(*b*) when the existence, condition or contents of the original are admitted in *writing* by the person against whom it is proved;

(*c*) when the original is lost or destroyed;

(*d*) when its production is physically impossible or higly inconvenient;

(*e*) when the original is a public document;

(*f*) when the original is one of which a certified copy is permitted by this Act;

(*g*) when the originals consist of numerous accounts or other documents which cannot be conveniently examined in court. If the original document is lost, destroyed, detained by the opponent or third person who does not produce it after notice, or is physically irremovable, secondary evidence is admissible [*Sanatan Mohanty v. Baidhar Rout*, A 1986 Ori 66, 68].

But secondary evidence of an ordinary document is admissible only when the party desirous of admitting it has proved that he has not possession or control of it and further that he has done what can be done to procure the production of it. He has to account for the non-production in one of the ways indicated in this section [*Krishnakishori v. Kishori*, 14 IA 71 : 14 C 486; *Shambati v. Jogo*, 29 C 749; *Bhubaneswari v. Harisaran*, 6 C 720]. When original account books are available copies are not admissible [*Jainarain v. Zubeda*, A 1972 A 494]. Secondary evidence of contents of a document is inadmissible unless the non production of the original document itself has been accounted for [*KPM Khidmat Sdn Bhd v. Tey Kim Suie*, (1994) 2 Malayan LJ 627 (SC Malaysia)]. When documentary evidence is tendered, primary evidence of the said document must be adduced except in cases falling under s. 65 [*KPM Khidmat Sdn Bhd v. Tey Kim Suie*, (1994) 2 Malayan LJ 627 (SC Malaysia)]. Due execution of original must be proved before the secondary evidence can be admitted [*Tsia Development Enterprise v. Awang Dewa*, (1984) 1 Malayan LJ 301 (Miri HC)].

Exceptions (*a*) and (*c*) rest upon the principle that a party tendering a copy has done all that lies in his power to produce the original. The written admission of the existence, condition or contents of the original in exception (*b*) is a sufficient guarantee of truth. Exceptions (*d*), (*e*) and (*f*) are based on considerations of convenience. The object of exception (*g*) is to save public time. The last four paragraphs of the section mention what kind of secondary evidence is to be given in each particular case. Cases provided for in (*b*), (*c*) and (*f*) are exceptions to the general rule that law recognises no degrees in the kinds of secondary evidence; [*ante* s 63 p 608].

The party producing the secondary evidence is not relieved of his obligation to prove the execution just as if the original document had been produced, unless the

case is covered by s 90 [*In re A B Patrika*, 21 CWN 1161, 1211; *Chuha Lal v. Rahim*, 71 IC 568: A 1924 L 303]. When a deed is in possession of the adverse party and is not produced by him, the production of a certified copy is sufficient proof of the deed [*Salimun v. Hakim*, A 1928 A 394], and if the certified copies of registered documents are entered in Book No 1, the contents can be read in evidence by virtue of s 57(5) of Registration Act [*Manilal v. Surat Mun*, A 1978 G 193]. Secondary evidence of a document is evidence of its contents, and oral evidence as to the terms of a mortgage which has been reduced to writing is not evidence of the contents of the document [*Mg Po Din v. Mg Po Nyein*, 66 IC 360].

Where recital in the sale deed that the full amount of consideration was paid before execution of the deed was not conclusive oral evidence can be given to prove non-payment of money. [*Iswar Das v. Muralidhar Rai*, A 1992 Ori 170, 173]. Where the secondary evidence was sought to be produced in respect of certain documents whose production was not granted under Order 11 Rule 4 CPC, there was no material irregularity in rejecting the application for production of secondary evidence. [*Drapodi v. Mahagraha Bhagwat Singh*, A 1995 Raj 138]. In eviction suit on ground of change of user from residential to non-residential purpose, the tenant, in support of its claim that the premises was let out for non-residential premises, not only produced the certificate number but also year of registration under the relevant Act to show that the premises was recorded as non-residential purpose. It was also stated clearly that the original certified copy was lost. Though the witness was summoned has stated that the records are not available, that cannot be a ground to deny the secondary evidence. That part in earlier suit between the parties some evidence was recorded regarding the attested copy. If the record cannot be made available and the attested copy cannot be proved, it will not be in the interest of justice to deny a tenant to lead secondary evidence. More particularly, as the specific allegation is made that since 1958, the tenanted premises was for a non-residential purpose. In fact, this fact can be proved by adducting evidence of the witnesses of the neighbourhood as to whether since 1958 the suit premises were used for residential or non-residential purpose. [*Tulsi Devi v. Som Nath*, 1997 AIHC 253 (HP)].

The present section has nothing to do with the proof of the execution of a lost document. When the document is one requiring attestation, the attesting witness must be called (s 68) just as if the document itself were produced. The reference to the existence or condition of a document appears to be superfluous, for in ss 61 and 66, mention is made of the contents only when the question is whether a certain document is in existence or whether the paper is torn. There is no more need to produce the paper than there would be to produce a horse about the existence or condition of which a question is raised. Persons who have seen the paper or the horse can give direct evidence [Cunn p 154].

The section is applicable to both civil and criminal cases and is a relaxation of the rule of English law, which requires stricter proof in criminal than in civil proceedings, and under which it was decided that, in the former, the original register of births, deaths, marriages, &c must be produced and that copies will not be sufficient [Field p 231; Nort p 245].

[*Ref Tay ss 429, 437 et seq 457-60; 1598; Phip 11th Ed pp 751-58; Best ss 472-91; Step Art 72, 118-19; Ros N P pp 1-15, 157-60; Powell 9th Ed pp 367-77; Wig ss 1185-1231; Greenleaf ss 19-97; Jones (Civil) ss 199-231*].

Last Four Paragraphs. [Kinds of Secondary Evidence Admissible in Particular Cases].—The concluding paragraphs state the kind of secondary evidence admissible in cases (*a*) to (*g*). It has been seen that there are no degrees as to the *admissibility* (*ante* s 63) in the various kinds of secondary evidence (*eg* certified

copy, true copy, examined copy, a counterpart, a memorandum of its purport, or even oral testimony of its contents narrated from memory, &c, &c). All are equally admissible, though it is evident that all kinds of secondary evidence are not entitled to the same degree of weight. The law does not require that the sources of the better kind of secondary evidence should be exhausted before the inferior kind is let in as in the case of *all primary evidence*. The only restriction put is in case (*e*) or (*f*) where the only mode of proof presented is a certified copy. In cases covered by cls (*a*), (*c*) and (*d*) any secondary evidence is admissible irrespective of the provisions of s 63 or s 65(*f*) [*Arunkumar v. Ramanlal*, A 1975 G 73]. In England if the public record or document has been lost or destroyed or if the copy taken is no longer in the control of the party, parol testimony can be admitted (see Tay s 552 quoted *ante* s 63). "Generally, *judicial documents* are provable by office, certified, or examined copies and not by oral evidence [*R v. Bourdon*, 2 C&K 366; *Mash v. Darley*, 1914, 3 KB 1226 CA] and in the case of depositions, parol testimony, or a copy of the deposition, can only be given when the original is lost, destroyed, or in the possession of the opposite party who refuses to produce it after notice [*R v. Whylde*, 6 C& P 380] or inadmissible because not complying with the statute" [*R v. Erdheim*, 1896, 2 QB 260; Phip 11th Ed p 751]. It has also been held here that the rule that certified copy is the only evidence does not apply where the original is lost or destroyed [v *post* "*Clauses* (*e*) and (*f*)"].

In case (*g*) the evidence must be of a person who has examined the documents and who is skilled in such examination [*Krishna v. R*, A 1946 A 227 *post*].

Order of Proof. [Whether Execution or Contents to be Proved First].—When on account of the unavailability of the original, secondary evidence of its contents becomes relevant, a question may arise as to whether the *execution* of the document should be first proved, or its *contents* should first be shown. As a general rule, there must be evidence of execution before evidence of contents is offered. The court has, however, a discretion under s 136 to reverse the order on an assurance that proof of the former will be forthcoming. In *Kimbal v. Morrill*, 4 Greenl 368, 370 it has been observed that a party "should first prove that an instrument was duly executed with the formalities required by law;..... then and not till then, he is permitted to give evidence of its contents" [cited Wig s 1189]. Similarly, loss of a document ought generally to be proved first before giving evidence of existence and execution. But it is somewhat difficult to prove the loss of a document first without some reference to its existence and that it purports to have been executed by a certain person, otherwise it is not possible to describe what is lost. General evidence having been given as to the description of the document, due execution may be proved afterwards. Loss of the document should also be proved first before giving secondary evidence of its contents. Here also it is difficult to prove what is lost without a general reference to the tenor of the document. After this is done, the contents should be proved. In all these cases the court has a discretion under s 136 which will be exercised in proper cases.

Waiver. [Rule Does Not Exclude Evidence Unless There is Objection].—The rule excluding secondary evidence, when that which is primary is attainable, is not so rigid as to the enforced if no objection is made by the party against whom the inferior evidence is offered. It frequently happens that secondary evidence is admitted, and thus becomes primary, when it might have been excluded if proper objection had been taken [Greenleaf s 88; Jones s 202]. When a party has waived proof of circumstances justifying the giving of secondary evidence, he cannot raise the objection in appeal [*Bacharbhai v. Mohanlal*, A 1956 B 196; *Subbarao v. Venkata*, A 1964 AP 53].

Document in Court.—When the third person, being in court with the deed declines to produce it, a copy is admissible [*Doe v. Clifford*, 1847, 2 C & K 448, 451] and a summons is unnecessary [s 66(*4*)]. See Or 16 r 7 C P Code.

Secondary Evidence is Not Admissible Until the Non-production of the Original is Accounted for.—[See *post*, "*Search*"]. Secondary evidence of the contents of a document is inadmissible, until the non-production of the original is first accounted for, so as to bring it within one or other of the cases provided for, in the section [*Krishna Kishori v. Kishori; Bhubaneswari v. Harisaran, ante*]. Before a party is entitled to give other secondary evidence of the contents of the original, the non-production of the original must be satisfactorily accounted for [*Amiroonnissa, v. Abedoonnissa*, 23 WR 208: 2 IA 87; *Md Abdul v. Ibrahim*, 3 Bom HCR 160; see also *Rakhaldas v. Indramani*, 1 CLR 155; *Gourmonee v. Huree Kishore*, 10 WR 338; *Roopmonjari v. Ram Lal*, 1 WR 145; *Ishan Ch v. Bhoyrab Ch*, 5 WR 21; *Ustooran v. Babu Mohan*, 21 WR 333; *Wazeer v. Kalee Kumar*, 11 WR 228; *Shookram v. Ram Lal*, 9 WR 248; *Mafeezoodin v. Maher Ali*, 1 WR 213]. Where the originals were not produced at any time nor was any foundation laid for giving secondary evidence certified copies were not admissible [*Raman Catholic Mission v. S*, A 1966 SC 1457]. Where the evidence adduced affords a good ground for holding that there is a deed capable of being proved by secondary evidence admissible under ss 65 and 66, a case arises for admitting it [*Luchman v. Puna*, 16 IA 125: 16 C 753]. When there is reason to believe that original is not produced by plaintiff because there is an endorsement of payment on it, secondary evidence of the document is not admissible [*Hira v. Ram Pd*, A 1949 A 677].

Objection in Appeal to the Admissibility of Secondary Evidence.—Where copies of documents are admitted in a court of first instance without objection; no objection to their admissibility can afterwards be taken in a court of appeal [see *Mahabir v. Lalla Rai*, 1 WR 12; *Gour Saran v. Kanhya*, 2 WR 237; *Kashinath v. Mohesh Ch*, 25 WR 168; *Jiwan Mal v. Jiwan*, 88 IC 541: A 1925 L 347; *Ma The v. Mg Ni Ta*, 84 IC 486: A 1925 R 113; *Fegredo v. Md*, 10 WR 267; *Fauza v. Alla*, A 1931 L 722; *Badrul v. Ali*, 16 L 782; *Hasmatulla v. Harimohan*, 34 IC 942; *Hardeoram v. Parbati*, 31 IC 600; *Ramlochan v. Harinath*, 1 PLT 397: 67 IC 628; *Suraj v. Hafiz*, A 1944 L 1; *Harichand v. Bachan*, A 1971 P & H 355; *The Oriental Fire and General Insurance Co. Ltd. Chandigarh v. Smt. Chandrawali*, A 1989 P & H 300, 305 (DB) and cases *ante*, s 5: "*Objections to admissibility of documents*"]. A certified copy of a deed of exchange produced from the custody of one of the appellants, and found to be written on paper bearing the same stamp and watermark as other contemporary documents in the record of certain litigation was admitted in evidence [*Shahzadi v. Secy of S*, 34 IA 194: 34 C 1058]. The admission of secondary evidence without proof of loss of original is not worse than an irregularity and an appellate court cannot treat it as a ground for reversing the decree or remanding the case [*Surat v. Rani*, 50 IC 461; *Ramlochan v. Harinath*, A 1922 P 565: 67 IC 628; *Gulal Chand v. Sheokaran*, A 1964 P 45; See *Hanumanthu v. Samacharlu*, A 1917 M 671; *Shahzadi v. Secy of S*, 34 IA 194: 34 C 1059]. When secondary evidence such as a copy of an original instrument not properly stamped has been admitted in evidence, it cannot be questioned subsequently in view of s 36 Stamp Act [*Vishram v. Shankariah*, A 1957 AP 784; *Meera Sahib v. Venkatapathi*, A 1951 M 326; *Ramchand v. Wazir*, A 1962 Pu 293].

As to objections regarding admissibility of document, see *ante*, s 5: "*objections to admissibility of documents*", *et seq.*

Secondary Evidence in Appellate Court.—The appellate court is justified in holding that secondary evidence of a lost deed is admissible when the lower court has rejected it [*Remeswar v. Rajkumar*, 45 IC 888: 5 Pat L W 316].

Time of Objection.—When a party gives in evidence a certified copy without proving the circumstances entitling him to give secondary evidence, objection must be taken at the time of admission and will not be allowed at a later stage [*Uppra Hanumanthu v. Peddapalle*, 33 IC 188; *State v. Jeo Raj*, A 1990 Raj 90, 93; *The Land Acquisition Officer, Vijayawada v. Nutalapati Venkata Rao*, A 1991 AP 31, 37 (FB)], for if the objection had been taken then and there, the party affected could have met it and regularised the proceedings. As to the proper time to object (see *ante*, s 5 *et seq*). Where the certified copy of the will was admitted in evidence and no objection was raised, non-production of the original will at a later stage cannot be urged as a ground to invalidate the will. [*S.A. Quddus v. S. Veerappa*, A 1994 Kant 20, 27].

[3]**S 19 Limitation Act Does Not Exclude Secondary Evidence of an Acknowledgment in a Proper Case.**—In s 19(2) of the Limitation Act it is provided that "Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, oral evidence of its contents shall not be received". In the corresponding section of the Act of 1871, there stood between the words "but" and "oral" the words "where it is alleged to have been destroyed or lost". In view of the omission of these words, it has been held that para 2 of s 19 belongs to that branch of law of evidence which is dealt with in s 91 Evidence Act and ought not to be read as repealing the general rules of secondary evidence in s 65 and that therefore secondary evidence of an acknowledgement is admissible when the loss or destruction of the writing has been proved [*Sambhunath v. Ram Ch*, 12 C 267; see also *Wajibun v. Kadir*, 13 C 292: 20 IC 62: 1877 PR 93]. Agreeing with *Sambhunath's case* it was held that s 19 Limitation Act must be read with ss 65 and 91 Evidence Act and does not exclude secondary evidence in cases where such evidence would be admissible under s 65 [*Chathu v. Virayan*, 15 M 491. A contrary view was taken in *Ziumissa v. Motidev*, 12 B 268 (in which 12 C 267 was not noticed) which does not appear to be good law].

When an acknowledgment bore a date which appeared to have written over an erasure, oral evidence to prove that date was held to be inadmissible under s 19(2) of the Limitation Act [*Syed Golam v. Miyabhai*, 26 B 128: 3 Bom LR 574; see *Nundo Kishore v. Ramsokhe*, 5 C 215 and s 91 *post*]. S 19(2) of the Limitation Act does not apply where the document itself is available for construction. Evidence is always admissible to prove the surrounding circumstances in which the document was executed [*Ramdin v. Ramparichan*, A 1942 P 170]. Statement by mortgagees recorded at settlement in the *mist-i-tanghi-i-huquq mazarian* that a mortgage is still redeemable would, if signed or marked by mortgagees, clearly by acknowledgment. The record of such a statement having been destroyed, and entry in the index that there was a written statement together with the summary of that statement in the settlement superintendent's order is good secondary evidence [*Mohay-ud-din v. Nowroz*, 16 PLR 1915: 5 PWR 1914].

Inadmissibility of Secondary Evidence of a Document Not in Itself Admissible.—The whole of this section presupposed that, but for one or other of the barriers stated therein, the document would have been capable of proving its

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3. See now s. 18 of Act 36 of 1963.

contents, under ss 62 and 64; Under no circumstances can secondary evidence be admitted as a substitute for a compulsorily registrable document, but unregistered [*Gangabisan v. Tukaram*, 5 NLR 70: 2 IC 744; *Jonardan v. J*, A 1927 N 214 (unregistered deed of relinquishment)]. A distinction must be drawn between admissibility of evidence and the manner of proof. Secondary evidence can only be given when the primary evidence or the document itself is admissible, When certain evidence is inadmissible, no secondary evidence is admissible [*Md Din v. Allah Ditta*, 95 IC 444: 27 PLR 268]. Seondary evidence cannot be given of a document when the original is found to be inadmissible [*Kalliani v. Nambiar*, 28 MLJ 266: 28 IC 69; *Nataraja v. Ramabhadra*, 28 IC 883; *Lal Khan v. Allah Ditta*, A 1950 L 154; see *Kallu v. Halki*, 13 A 295].

If a written agreement of sale is written not on a stamped paper, it is not open to the plaintiff to adduce secondary evidence of it even upon payment of penalty [*Hiralal v. Shankar*, 45 B 170: 62 IC 637; see *Sennandan v. Kollakiram*, 2 M 208; *Kopasan v. Shamu*, 7 M 440; *Swaminatha v. Sundara*, (1911) 2 MWN 166; *Md Ayzeb v. Rahim*, 3 L 282; *Ladharam v. Harichand*, A 1938 L 90]. The provisions in the Stamp Act for the case of deeds either unstamped or insufficiently stamped, exclusively refer to *original* documents and have no application when the original deed, which ought to have been stamped or was insufficiently stamped has not been produced. So, a party ought not to be permitted to prove a copy of a deed and to use it as secondary evidence either on due payment of a penalty into court, or upon its endorsement by the Collector [*Raja of Bobbili v. Inuganti*, 26 IA 262: 23 M 49 : 4 CWN 117: 15 TLR 475; see also *Rose v. Clarke*, 1 Y & CCC 534; *Arbon v Fussell*, 3 F & F 152]. No secondary evidence can be given of a letter of assignment of debt which is unstamped [*Doraiswami v. D*, 87 IC 382: 48 MLJ 432: A 1925 M 753]. S 35 of the Stamp Act read with I E Act excludes both the original instrument itself and secondary evidence of its contents. But under s 36 when either the original instrument itself or the secondary evidence of its contents has in fact been admitted, that admission may not be called in question on the ground that the instrument was not duly stamped [*Maung Po v. Ma Gyi*, 4 R 363: 101 IC 198: A 1927 R 109 (*Raja of Bobbili v. Inuganti, sup* **distd** & **expld**); *Satayabati v. Pallaya*, A 1937 M 431: *Skh Meora v. Akkalaneni*, A 1951 M 326]. **Overruling** *Maung Po v. Ma Ma Gyi and Satyavati v. Pallaya, sup.* Supreme Court has held that in view of ss 35 and 36 of Stamp Act secondary evidence by way of a copy of insufficiently stamped document is not admissible even though objection to its admissibility has not been taken [*Jupudi v. Pulavarthi*, A 1971 SC 1070].

Newspapers.—Even if a newspaper is admissible without formal proof, the paper itself is not proof of its contents. It would merely amount to an anonymous statement. S 65 has no reference to a case where mere secondary evidence of the documents has not been tendered, but it is the document itself which is put in as secondary evidence of facts which have to be proved *aliunde*. Hence newspapers are not secondary evidence of facts by them [*Bawa Sarup v. R*, 88 IC 22: A 1925 L 299]. An extract from a newspaper standing by itself is not admissible. If the writer is called as witness, it can be used to corroborate or contradict his statement [*Nisar Ali v. Md Ali Khan*, A 1929 O 494]. From a discussion as to the weight of news items, however, in a recent Supreme Court case it appears, that the court took it for granted that they were admissible. The Court said that without further proof it is at best second hand secondary evidence. A fact has first to be alleged and proved and then newspaper reports can be taken in support of it but not independently [*Samant v. Fernandez*, A 1969 SC 1201].

The report of a speech even though not fully reported appearing in a newspaper can be relied upon especially when the maker of the speech has admitted that the

reporter's version does, more or less, tally with the views expressed by him in the meeting [*Ebrahim v. M C Md*, A 1980 SC 354]. As to presumptions regarding newspapers and what facts they are evidence of, see s 81 *post*; as to refreshing memory by a newspaper report, see notes to s 159 *post*.

CLAUSE (A):—(i)"Original is Shown or Appears to be in Possession or Power" of the Adversary. [What is Possession?—Its Proof].—When the docu-ment is in possession of the adversary, who witholds it at the trial, secondary evidence of its contents will be admitted provided that a notice to produce the original has been duly served, where such notice is requisite [*R v. Watson*, 2 TR 201: *Att Genl v. Le Marchant*, 2 TR 210n; see *Makbul Ali v. Masnad Bibi*, 3 BLR 54; *Greesh v. Ramlal*, 1 WR 145; *Mani v. Annapurna*, A 1943 P 218; *Muthu v. Varadaraja*, A 1971 M 471]. This rule applies equally both in civil and criminal cases; but in either mode of proceeding, in order to render the notice available, it must be first shown that the instrument is in the hands or under the control of the party required to produce it [*Sharpe v. Lamb*, 11 A & E 805]. Of this fact very slight evidence will raise a sufficient presumption [See *Ajoodha v. Esharee*, 10 WR 219]. Where the original manuscript of a leaflet was not shown to be in possession of the successful candidate in an election when the photostat copy was prepared, secondary evidence of photostat copy is not permissible [*Ashok v. Madhavlal*, A 1975 SC 1748].

The first condition of the right to give secondary evidence is the accounting for the non-production of the original [see *Bhubaneswari v. Harisaran*, 6 720: 8 CLR 337 PC]. So, if papers were last seen in the hands of the defendant, it lies upon him to trace them out of his possession [*R v. Thistlewood*, 33 How St Tr 757, 758; *R v. Ings, ibid* 929]. It would seem that where a party has a notice to produce a particular instrument traced to his possession, he cannot object to parol evidence of its contents, on the ground that, previous to the notice, he had ceased to have control over it, unless he has stated this fact to the opposite party and has pointed out to him the person to whom he delivered it [*Sinclair v. Stevenson*, 1 C & P 582]; neither can he escape the effect of the notice by afterwards voluntarily parting with the instrument, which it directs him to produce [*Knight v. Martin*, 1819, Gow 103; Tay s 440]. If the instrument be in the possession of a person in *privity* with the party, such as his banker, agent, servant, deputy or the like, such person need not be served with notice or even called as a witness but a notice given to the party himself will suffice [*Sinclair v. Stevenson, sup*; *Baldney v. Ritchie*, 1 Stark 338; Tay s 441].

The good sense of the rule that though notice be given, it must always be first shown that the original is in the adversary's hand or under his control, is self-evident; for otherwise the party calling for the document might foist upon the court an alleged copy of an original which never had any existence [Nort p 246]. The possession may be proved by showing that the document was last seen in the adversary's hands; or by calling his solicitor, who may be compelled to testify to its possession; or by the admission of his counsel [*Duncombe v. Daniell*, 8 C & P 222]; or presumptively, by showing that it belongs exclusively to him, or would in the ordinary course of business be in his custody [*Henry v. Leigh*, 3 Camp 499, 502; *Robb v. Starkey*, 2 C & K 143]. The adversary may, on the other hand, interpose evidence to disprove the possession; but he cannot escape the effect of the notice by voluntarily parting with the document after the notice, or even perhaps before, unless he discloses the name of the transferee [*Knight v. Martin and Sinclair v. Stevenson, sup*; Phip 11th Ed p 752]. S 65 does not require that in all cases it must be definitely proved that the document is in the possession of the other side, it being sufficient if it is proved that it *appears* to be in his possession [*Zaibunnussa v. Irshad*, 89 IC 284: A 1925 O 504]. To prove possession of a document, it is necessary to establish some element of

knowledge on the part of the person said to be in possession. The element of knowledge can be established from the attendant circumstances [*Bimal Prativa v. R*, A 1942 C 264: 75 CLJ 90].

"This notion of *detention by the opponent* involves three essential elements: (*a*) *possession*, or more broadly, control, by the opponent; (*b*) *demand*, or notice, made to him by the proponent, signifying that the document will be needed; and (*c*) *failure*, or refusal, by the opponent, to *produce* them in court" [Wig s 1199]. "This instrument need not be in actual possession of party; it is enough if it is in his power; which it would be if in the hands of a party in whom it would be wrongful not to give up possession to him" [*per* LITTLEDALE, J, in *Parry v. May*, 1 Moo & Rob 290]. "It is immaterial that the document is *out of the jurisdiction*, if it is held there on behalf of the *opponent* [*Cutter-Tower Co v. Clements*, 1905, 5 Ga App 291]; the only question can be as to the sufficiency of time allowed by the notice to produce. *A past recent possession*, not shown to have ceased, will ordinarily be assumed to continue" [*R v. Hunter*, 1829, 4 C & P 128; Wig s 1200]. (*1*) The opponent's possession *must be somehow shown* by the party offering a copy, and the sufficiency of proof is of course a preliminary question to be determined by the judge. (*2*) It often happens that the only evidence of possession is the *mailing of the document*, under cover duly stamped and addressed to the opponent; this is on general principles to be regarded as sufficient evidence of its receipt by the addressee [Wig s 1201].

In order that secondary evidence of documents mentioned in s 65(*a*) may be given it is essential that the procedure laid down in s. 66 should be strictly complied with [*Smt. Sulochana Devi Bubua v. Gobinda Chandra Nag*, A 1986 Cal 430, 435: (1986) 1 Cal H N 58]. Notice to produce is to be served in the manner laid down in Or 11 r 15 C P Code. When in the ordinary course of things, the opposite party might be expected to be in possession of the document, or when it appears that he had possession of it, the *onus* is on him to show what has become of it.

A court ought not to allow a party to give secondary evidence of the contents of a document, the original of which is in his custody without itself looking at the document [*Hira Lal v. Ganesh*, 9 IA 64: 4 A 406]. If a judge is satisfied of a plaintiff's inability to produce an original *pattah* on which he relies, he ought to allow secondary evidence to be given of its contents, but he should be satisfied on the reasonable ground that the evidence gives a true version of its contents, and he should require sufficient evidence of the *pattah* [*Shookram v. Ramlal*, 9 WR 248]. Secondary evidence in proof of contents of a document which is retained by the adversary after notice to produce it, can only be admitted in the absence of evidence to show that it was unstamped when last seen [*Sennadan v. Kallakiran*, 2 M 208]. Plaintiff sued on a pronote transferred to him under a deed without producing the note on the allegation that the note was with the widow of the executant of the deed and impleaded her as a defendant—*Held*, it could not be said that notice to her would have been ineffectual and secondary evidence was not admissible [*Subbarayulu v. Vengama*, A 1930, M 742].

In the case of a registered mortgage ordinarily the document would be with the mortgagee and it is for him to show that he is not in possession [*Kashibai v. Vianyak*, A 1956 B 65]. Where an original mortgage deed was in the possession of defendant, s 65(*a*), (*f*) read with s 57(*5*) Registration Act makes the certified copy admissible [*Subha v. Oudh Com Bank Ltd*, 36 IC 673]. Oral evidence is also admissible under s 65(*a*) read with proviso (*2*) to s 66 [*Mi Amin Nissa v. Mi Sura Bi*, 32 IC 892: 9 Bur LT 52]. Where a defendant admitted possession of a document in a previous proceeding but in the present proceeding did not file it, denied ever having received it

and gave no account of what had happened to it, but said generally that he had made over all documents to his mortgagee who was another defendant, and the latter did not produce it either, the plaintiff was allowed to put in a certified copy of the document without giving any notice to the first defendant [*Surendra v. Mirza Md*, 63 IA 85: 40 CWN 226]. In a suit for possession of *Chaukidari* lands, defendants pleaded that they held under *patnidar* who had a lease from the superior landlord. They are entitled to prove the lease by secondary evidence when not produced though called for [*Atal v. Lal Mohan*, 49 IC 507].

Where the original rent note was alleged to be in the possession of the defendant and he did not produce it despite several notices and adjournments, it was held that the plaintiff's application for leave for production of secondary evidence should have been allowed. The rejection by the trial court of the plaintiff's prayer on the ground that the copy of the note was of doubtful veracity was not proper. The trial court could not form such opinion without affording the plaintiff an opportunity of adducing secondary evidence. *Nawab Singh v. Inderjit Kaur,* AIR 1999 SC 1668. See also *Ishwar Dass Jain v. Sohan Lal,* (2000) 1 SCC 434 : AIR 2000 SC 426 where a certified copy of the mortgage deed was allowed to be produced because the defendant mortgagee had refused to file the original deed in the court. In *Gurmukh Ram Madan v. Bhagwan Das Madan,* (1998) 7 SCC 367 : AIR 1998 SC 2776, the evidence of certified copy of the registered deed was not allowed where the explanation offered by the plaintiff that the original had been taken away by the defendant from the office of the sub-registrar was not found to be convincing.

—(ii)"When the Original is in the Possession or Power of One Who is Out of the Reach of, or Not Subject to, the Process of the Court".—In the original section (s 36 of Act of 1855) it was the document that must be out of the process of the court: in this section it is the *person* in whose possession it is. In this case, notice to produce is excluded by s 66 (*6*) although it may appear from s 65(*a*) that notice is necessary.

Secondary evidence may also be adduced, when the original is in the possession or power of any person out of the reach of or not subject to the process of the court [*Ralli v. Gau Kim*, 9 C 939, 944; *Mellius v. Vicar Apostolic of Malabar*, 2 M 295; *Gour Monee v. Huree*, 10 WR 338; *Haranand v. Ram Gopal*, 27 IA 1 : 27 C 639: 4 CWN 429]. Secondary evidence of the contents of an income-tax return is not admissible under s 65(*a*). The Income Tax Officer is subject to every process of the court [*Varadarajam v. Kanakayya*, A 1939 M 546. See further *post*, s 74: "*Income-tax Returns*"].

If a document be deposited in a foreign country and the laws or established usages of that country will not permit its removal, secondary evidence of the contents will be admitted [*Burnaby v. Baillie*, 42 Ch D 282: *Alivon v. Furnival*, 3 LJ Ex 241; *Boyle v. Wiseman*, 24 LJ Ex 160; *Quitter v. Jorss*, 14 CBNS 747, see 14 and 15 vic c 99; *Crispen v. Doglioni*, 32 LJP & M 109; Tay s 438]. Where the original mortgage deed was filed in Pakistan court the mortgagee filing a suit on it in India is entitled to produce secondary evidence as the original was in the custody of one beyond the jurisdiction of the court [*Jai Singh v. Harnam*, A 1964 A 381]. Foreign public documents, *eg* registers may be proved by copies (*Burnaby v. Baille, sup*). [See s 86, *post*]. Where, however, a document was in South Africa and the question was merely one of delay, secondary evidence was rejected [*Ward v. Murray*, 1900. Times, Mar 5; Phip 11th Ed p 756].

—(iii)"When the Original is in Possession or Power of any Person Legally Bound to Produce it".—The interpretation of this part of cl (*a*) is not free from difficulty and commentators have speculated upon its true intention, whatever the wording may be, it purports to provide for a case where the original is in possession of "any person *legally bound to produce it*", but there is no reference to a case where it is in possession of a person "*not legally bound to produce*" it. As to the latter, a witness may be, justified in refusing to produce a document where it is, *eg*, one on which he has a lien for money lent, or is a title-deed, or an incriminating document, or one which he holds as a trustee, solicitor or mortgagee for another, and which that other would himself be justified in withholding. (Phip 6th Ed, p 546; see ss 130, 131 and also ss 122-129). In such cases a

witness is not compellable by law to produce the document. If, on the other hand, a document is in the possession of a person (not a party) who has no privilege of the above kind to withhold it and who is therefore "legally bound to produce it", a party would under the plain words of cl (*a*) be entitled to give secondary evidence straightway when the stranger fails to produce the document after notice under s 66 without even having to take out summons or other compulsory processes under Or 16, C P Code. That would be strange, although that is the result if the clause is literally interpreted. Is that the meaning of the clause and does it apply only to such a case?

The English law on which the section is based is otherwise. When the stranger is *compellable by law to produce* (*ie*, legally bound to produce) on *subpoena* an original document in his possession, but fails to do so, secondary evidence of its contents cannot be given, although the witness will be punishable for disobedience [*R v. Llanfaethly*, 2 E & B 940]. When, however, he is *not compellable by law to produce*, (*ie*, not legally bound to produce) on the ground of some kind of privilege stated earlier, and refuses to do so when summoned as a witness, secondary evidence of its contents may be given [*Mills v. Oddy*, 6 C & P 728]. Mere refusal to produce the document will not, therefore, let in secondary evidence thereof; but the witness must also be justified in his refusal, for otherwise the party will have no remedy, except as against him [*R v. Llanfaethly, sup*; Phip 11th Ed, p 755; Tay s 457]. "When the original is in the possession of a person who, by virtue of privilege or otherwise, is not compellable to produce it [*Hibberd v. Knight*, 1848, 2 Exch 11; *Newton v. Chaplin*, 1850, 10 CB 356], secondary evidence is admissible, provided that such person has been served with a notice to produce or *subpoena duces tecum* and expressly claims his privilege" [*Lloyd v. Mostyn*, 1842, 10 M & W 476; Hals, 3rd Ed Vol 15 para 647]. Wigmore says that "if after service of *subpoena* the possessor is recalcitrant and refuses to obey, the proponent should be excused from production" (Wig s 1212) and is of opinion that the ruling in *R v. Llanfaethly* is absurd and would not be followed today [Wig s 1212, p 786, fn 7).

Markby is of opinion that the intention was to reproduce the English rule and what was probably meant was "*not* legally bound to produce it", the word "not" being inadvertently omitted. This would make the meaning quite intelligible (Markby, p 158). Cunningham also says that the language of the section is open to criticism and according to one construction it would follow that any refusal to produce should entail the admission of secondary evidence. According to the other construction in accordance with English law, the word "not" must have been omitted. The section is not clear as to the cases where a witness fails to produce a document without legal justification and where he lawfully refuses to produce on the ground of privilege. He says that the difficulty in construing the section can only be removed by an amendment which shall distinguish between parties and third persons and privileged and unprivileged documents (Cunn 11th Ed, pp 154-55). Field also comments that the wording of cl (*a*) has given rise to considerable doubt and says that when a person is justified in objecting to produce a document on the ground of privilege, the courts will admit secondary evidence on the general principles of English law (Field p 288).

If a document is in possession of a stranger who is not subject to the process of the court, secondary evidence can be given of it without any notice to produce [s 65 (*a*); s 66(*6*)]. But if the person is subject to the process of the court, summons is ordinarily first issued on him for production and on his refusal to obey, he may be penalised under Or 16, rr 10, 12 C P Code or under s 175 I P Code or sued in damages under Recusant Witnesses Act, 19 of 1853. This, however, affords no remedy except as against the stranger who refuses to produce; but at the same time his mere refusal may be no ground for letting in secondary evidence against the adversary who is not responsible for the acts of the stranger. If the words "*legally* bound to produce it" are to be taken literally as they stand, there would be no need to take out even any summons or to exhaust all the processes available in the C P Code to compel production, as secondary evidence becomes admissible immediately after

it is not produced by the witness after notice. This can hardly be the meaning or intention of the clause.

In the case of an unprivileged document, a person is legally bound to produce it when called for, but in the case of a privileged document he is not legally bound to produce it and the difficulty arises because the section does not deal with these cases separately. There is no reason to suppose that any conscious departure from general principles or from the English rule was intended when the section was framed. If, therefore, it is taken that the section does not embrace the case of a person who though subject to the process of the court is *not* legally bound to produce a document (*ie*, on account of some justifiable cause relating to privilege), secondary evidence would no doubt be let in accordance with the English rule stated above; for the non-production is not due to the party's default or neglect who has done all that he could do for the production of the original, but on account of a privilege conferred by law (see *Hibberd v. Knight*, 1848, 2 Ex 12; *Vasanji v. Haribhai*, 2 Bom LR 533]. It would seem that the privileged person need not be summoned to produce. The possibility that he might have waived the privilege, if called, was not sufficient to prevent the offering of secondary evidence [; see *Phelps v. Prew*, 3 E & B 430, 438].

Technically speaking, in one sense every person summoned to produce any document is "*legally* bound to produce it", for under s 162 he must "bring it to court" (physical production) although he may have any privilege entitling him to object to its production or admissibility for purpose of evidence (; see notes to s 162). If the objection is upheld by the court, at that stage he is metamorphosed into a person "not legally bound" to produce the document. This no doubt is a far-fetched construction. Under s 165 also, the Judge cannot compel any witness to "produce any document which he would be entitled to refuse to produce under ss 121-31". As stated earlier, in the case of such or other documents which a person is not legally bound to produce, secondary evidence should be admitted on first principles, as the privilege of non-production being conferred by law, the party offering it has done all that is possible for its production and he is not to be blamed in any way for non-production.

As to document in the hands of a third person and its detention by him, the rules summarised by Wigmore afford a useful guide. He says: "(*1*) if the person within the jurisdiction, possessing the document, is by reason of a *privilege* legally not compellable to produce it, this is clearly an excuse for non-production. (*2*) Where the third person is *hostile and fraudulently* detains the document, this fact of itself suffices to excuse non-production, though such an instance is perhaps often well disposed of by the doctrine of loss [v s 65 cl (*c*)] or of the opponent's possession by the hands of an agent. (*3*) Where neither of the above situations exists, and the case is an *ordinary* one of possession by a *third person*, it is clear that a *request* at least must have been made. The question as to which a difference of opinion exists is whether the *compulsory process of law* should also have been invoked by *subpoena duces tecum*. A number of courts seems to lay down the fixed rule that a *subpoena* is necessary. The truth is that, while for the purposes of a general rule, it is better to require the process of *subpoena*, yet in the discretion of the trial court the failure to use a *subpoena*, provided a request has been made, may not be treated as fatal, if in view of the nature of the document, the residence of the possessor and his relations to the case, the risk of collusion and other circumstances, the service of a *subpoena* would have been an unnecessary effort. If the document is in *court*, a *subpoena* would of course be unnecessary. If after service of *subpoena* the possessor is recalcitrant and *refuses to obey*, the proponent should be excused from production. (*4*) Where the desired witness possessing the document is himself also a *party to the*

cause, on the side of the proponent, his possession is of course no excuse for non-production" [Wig s 1212].

When all necessary steps have been taken but a person in possession of a document does not produce it in collusion with the opposite party, secondary evidence is admissible [*Shiva Shankar v. Beniram*, 22 PLT 200].

Person Notified "Does Not Produce It." [What Constitutes Non-production]. —(*1*) (*a*), If the opponent produces a document which the proponent asserts *not* to be *the one desired*, the latter is not obliged to accept as the one in issue, so as to be precluded from proving otherwise the contents of the desired documents, (*b*) If the opponent refuses to produce because of a *privilege against self-incrimination*,—it is still a refusal, though an allowable one, and is sufficient for the purpose of establishing the proponent's excuse to prove the terms by other evidence. (*2*) It may be asked, "Why should the opponent's mere failure or refusal to produce in a case where he is not protected by a privilege, suffice to establish the proponent's excuse, namely, his inability to obtain the original?" Since such an inability is the root-notion which allows him to prove the document's terms otherwise, how can he claim to be unable since by a *bill of discovery*, or in more modern times in a common law court by a statutory order for production, he could compel the production. It is perfectly settled that this extreme step is not required of him [Wig s 1209]. Where the document relating to a payment by cheque was in the possession of the dependant and he did not produce it saying that it was filed with the Income tax office, the court granted permission for production of secondary evidence [*Gopal Krishan Jiwan Kumar v. Puran Singh,* A 1998 P&H 144]. See notes to s 66 *post*.

CLAUSE (B): Production Excused When the Existence, Condition or Contents Have Been Admitted in Writing.—This clause says that when the existence, condition or contents of the original have been proved to be admitted in *writing* by the person against whom it is proved, secondary evidence of it may be given. It presupposes of course that the original document is not inadmissible in evidence. This clause is to be read with s 22 which declares that *oral* admissions as to contents of documents are not relevant unless and until the party proposing to prove them shows that he is entitled to give secondary evidence under the provisions of s 65. *Oral* admissions may be proved in the cases provided for in s 65 (*a*) (*c*) (*d*). But under the present clause *written* admissions of the contents of documents are always admissible although the original may be in existence. The secondary evidence admissible under cl (*b*) is the written admission (v last para but two of this section) of the person against whom it is sought to be proved, or by his representative in interest [*Hira v. Ram Pd*, A 1949 A 677; *Jaigopal v. Divl Forest Officer*, A 1953 P 310, 312]. Written admissions referred to in this clause should be distinguished from written admissions in s 58 (v *ante*). The latter deals with written admission of parties at the hearing or before the hearing which need not be proved. Ss 65 and 22 deal with evidentiary admissions.

Wigmore says that the rule is in an unhealthy state and should be made more flexible. He proposes that: "Production of the original may be dispensed with, in the trial court's discretion, whenever in the case in hand the opponent does not *bona fide dispute* the contents of the document and no other useful purpose will be served by requiring production" [Wig s 1181]. The case of *Goss v. Quinton*, 2 M & Rob 98 explains the meaning of this clause. Where plaintiffs, who were the assignees of a bankrupt, gave in evidence an examination of the defendant before the commissioners, as proof that he had taken certain property, it was held that they thereby made his cross-examination evidence in the cause; and as, in this cross-examination, the

defendant had stated that he had purchased the property under a written agreement, a copy of which was entered as part of his answer, this statement was considered as some evidence on his behalf of the agreement and its contents, and that, too, though the absence of the document was not accounted for, nor had notice been given to the plaintiffs to produce it [Tay s 728].

When the original is not admissible in evidence, a copy of it filed before the Commr of Wakfs saying that it was a copy of the original *Wasiatnama* is admissible as it is a written admission [*Commr of Wakfs v. Khan Jah*, 58 CWN 533]. When the existence and contents of a document are admitted in a letter, secondary evidence is admissible [*Biswambhar v. S*, A 1954 SC 139: 1954 SCR 842].

Where on account of non-registration, a certain document could not be put in evidence, secondary evidence of the contents of such document cannot be admitted under s 65(*b*) [*Varada v. Krishnasami*, 6 M 117. See also *Samabayya v. Gangayya*, 13 M 308; *Kanduru v. Adam*, 25 IC 661—CONTRA: Oral evidence is admissible to prove rent agreed to be paid by an unregistered *kabuliat* which is inadmissible in evidence; *Amir Ali v. Yakub*, 41 C 347: 19 CLJ 428]. S 65(*b*) is not applicable to an admission of the contents of a document made by the defendant in his written statement, where the original itself is inadmissible for want of stamp [*Damodar v. Atmaram*, 12 B 433; see also *Pramathanath v. Dwarka*, 23 C 851. See however, *Balbhadar v. Maharajah of Betia*, 9 A 351; *Binjaram v. Rajmohun*, 8 C 282; *Krishnasami v. Rangasami*, 7 M 112].

Where the record of the statement of an accused person in the nature of a confession is not admissible in evidence, secondary evidence thereof is not admissible, and s 65(*b*) cannot be invoked because the mark of the accused was affixed to the statement [*R v. Viran*, 9 M 224, 240]. An admission cannot be made use of as secondary evidence of a document inadmissible in evidence for want of stamp or registration [*per* SPENCER J, in *Kalliani v. Nambiar*, 28 IC 69]. An unstamped balance of account may be used for the collateral purpose of showing an acknowledgment for existing liability in respect of goods sold [*Fate Chand v. Kishan*, 18 B 614. But see *Mulji v. Lingu*, 21 B 201]. Plaintiff sued on a copy of a bond alleging loss of original. Defendant pleaded an endorsement of Rs. 200 on the back of the bond and alleged suppression—*Held* that although the bond was not expressly admitted but the plea of payment and endorsement amounted to an admission and execution and plaintiff could maintain a suit on the copy without proving the alleged loss [*Mulla v. Deokaran*, 20 IC 955: 11 ALJ 734]. But it has been held that alternative plea of payment does not amount to an admission of a mortgage sufficient to relieve the plaintiff from proving the loss of original in order to let in secondary evidence [*Sri Ram v. Ram Lal*, 18 IC 878: 11 ALJ 255]. Denial of execution of bond with an alternative plea of payment cannot amount to admission of execution [*Ananta v. Bommadevara*, A 1958 AP 418], see *post* ss 101-104 under *Bond cases*" and notes to s 114 *illus* (*i*)].

Where in a redemption suit, it is proved that in *wazib-ul-arz* the predecessors in title of the defendants admitted in writing the existence and contents of the original, s 65(*b*) applies [*Bhairon v. Abalak*, A 1934 A 529]. In a redemption suit, the deed was not produced, secondary evidence consisted of a document addressed to the mortgagors by the alleged agent of mortgagee mentioning the mortgage. The agency was not proved, nor did it bear the alleged agent's signature but merely a seal purporting to be his. It did not fall under s 65(*b*) [*Gajaraj v. Bakar*, 20 IC 62]. Secondary evidence in the nature of admission by vendor as to sale of immovable property in favour of vendor, cannot in the absence of the conditions mentioned in

s 65(*b*), be admitted [*Safar Ali v. Mohesh*, 23 CLJ 122: 34 IC 956]. Admission of deed in written statement but subsequent denial in defendant's statement before court alters the pleadings and the claim on the copy could not be maintained without proof of loss of original [*Md Altaf v. Hamid-ud-din*, 21 IC 81: 11 ALJ 731]. Debtor's application to the Debt Conciliation Board cannot be regarded as an admission under s 65(*b*) [*Udhao v. Narayan*, A 1941 N 95].

CLAUSE (C): "When the Original Has Been Destroyed or Lost."—Where the original has been destroyed or lost and a party has made a diligent search for it and exhausted all the sources and means available for its production, secondary evidence is admissible. The *existence and execution* of the document must of course be proved first [*Chuha Mal v. Rahim*, 71 IC 568: A 1924 L 303]. Secondary evidence is not to be admitted mechanically or as a matter of course. Sufficient reason must be shown for not non-production of the original document [*John Mithalal Desai v. Dineshbhai K. Vora*, 1998 AIHC 1894, 1905 (Guj)]. In cases under this clause *any kind* of secondary evidence is admissible (see last but third para of s 65). Such secondary evidence includes copies made from or compared with the original and also oral evidence as to the contents by some one who has seen it [*Pranjivan v. S*, A 1974 C 210]. "A 'destruction' signifies that the thing no longer exists, while a 'loss' signifies merely that it cannot be discovered. The moment the destruction becomes question-able at all (*ie* when not proved by eye-witnesses of a burning or tearing), the inquiry is raised whether the search for it has been sufficient. The case of a loss raises the same inquiry. *There is not and cannot be any universal or fixed rule to test the sufficiency of the search. The inquiry* must depend on the circumstances of each case. The standard of diligence is expressed in this form: the search must appear to have been made with *such diligence as was reasonable upon all the facts of the case in hand*" [Wig s 1194; Hals 3rd Ed Vol 15 para 646]. "The evidence of a document being lost, upon which secondary evidence may be given of its contents, may vary much according to the nature of the paper itself, the custody it is in, and indeed all the surrounding circumstances of the particular matter before the court and jury. A paper of considerable importance, which is not likely to be permitted to perish, may call for a more minute search than that which is considered as wastepaper, which nobody would be likely to take care of" [*per* POLLOCK CB, in *Gathercole v. Miall*, 15 M & W 319, 329]. In order to admit secondary evidence it is important to bear in mind the nature of the document, enquiries made about the original and the evidence about the search and loss [*Rabindra v. Santosh*, A 1975 C 381].

Proof of Loss.—If an instrument be destroyed or lost, the party seeking to give secondary evidence of its contents must, give some evidence that the *original* once existed [*Doe v. Wittcomb*, 6 Ex 601, 605], and must then either prove its destruction positively, or at least presumptively, as by showing that it has been thrown aside as useless [*A v. Johnson*, 7 East 66], or he must establish its loss, by proof that a search has been unsuccessfully made for it, in the place or places where it was most likely to be found and of persons likely to have possession of the same [*Biswanath v. Dhapu*, A 1966 C 13]. What *degree or diligence* is necessary in the *search* for a lost instrument cannot easily be defined, as each case must depend much on its own peculiar circumstances [*Brewster v. Sewell*, 3 B & Ald 296; *Gully v. Bp Exeter*, 4 Bing 298; *Pardoe v. Price*, 14 LJ Ex 212; *R v. Gordon*, 25 LJMC 19]; but the party is generally expected to show, that he has, in good faith, exhausted in a reasonable degree all the sources of information and means of discovery which the nature of the case would naturally suggest, and which are accessible to him [*R v. Saffron Hill*, 22 LJMC 22; *Moriaratt v. Grey*, 12 Ir CLR 129; *Ananta v. Bommadevara*, A 1958 AP 418; *Bobbasuramma v. Peddireddi*, A 1959 AP 568; *Parekh Bros v. Kartick*, A 1968

C 532]. Where the defendant by examining one of the arbitrators proved that the original award was lost and the photocopy not only bore his signature but also the signature of both the parties, in that context, the tendering of the photocopy in evidence cannot be held to be illegal. [*Om Prakash v. Dev Raj*, A 1995 P&H 349, 351]. As the object of the proof is merely to establish a reasonable presumption of the loss of the instrument and this is a preliminary enquiry addressed to the discretion of the judge—the party offering secondary evidence, therefore, need not on ordinary occasions have made a search for the original document, as for stolen goods, nor be in a position to negative every possibility of its having been kept back [*M'Gahey v. Alston*, 6 LJ Ex 29, recognised in *Hart v. H*, 11 LJCh 9: Tay s 429]. "Indeed, it has been held that, in order to show that search has been made for a document so as to let in secondary proof of its contents, hearsay evidence of the answers given by persons who were likely to have it in their custody ought to be received" [*R v. Baintree*, 28 LJMC 1; Tay s 430]. This statement of law was relied on in *Dolgobind v. Makbul*, 62 CLJ 588—CONTRA: *Thelikicherla v. T*, 85 IC 524: A 1925 M 345 *post*.

Certified copy of a document not admissible without proving loss of original [*Mohanlal v. Samal*, A 1961 P 300; *Sardaran v. Sunderlal*, A 1968 A 363]. When there is no evidence about the loss of the original will, the certified copy cannot be admitted in evidence [*Ramesh Dutt v. State*, A 1989 NOC 47 (Del): 1988 Raj LR 387]. Copy cannot be admitted unless loss of original is proved and copy is proved to be a correct copy [*Anand v. Dinshaw & Co*, A 1946 PC 24: 222 IC 195: 1946 Kar 15]. Question of sufficient reason for non-production is a question of fact and depends upon the discretion of the court [*Gaya v. Jaswant*, A 1930 A 550]. "The determination of the sufficiency of the search and in general of the proof of the fact of loss should be left entirely to the *trial court's discretion*" [Wig s 1194 and cases cited]. "They [trial courts] have to determine whether evidence is satisfactory, whether the search has been made '*bona fide*', whether there has been due diligence and so on. It is a mere waste of time on our part to listen to special pleading on the subject. To what employment shall we be devoted, if such questions are to be brought before us as matters of law" [*per* DENMAN LCJ, in *R v. Kenilworth*, 7 QB 642, 649]. The question whether or not sufficient proof of search for, or loss of, an original has been given is one for a court of first instance and its conclusion should not be overruled except in a clear case of miscarriage [*Ma Paik v. Ma Nwal*, 34 IC 153 (*Haripriya v. Rukmini*, 19 C 438: 19 IA 79 refd to); *Mangra v. Dediram*, 35 IC 328].

Where the original document is not found to be lost secondary evidence of its contents is inadmissible [*Atra v. Ramswaroop*, A 1972 P 186]. Where oral evidence of contents of a letter is allowed to be given without any objection and the case of the opposite party was that he had not got the letter, it was a case under s 65(*c*) and not (*a*) [*Prafulla v. R*, 50 CLJ 593: A 1930 C 209].

—Loss of Original.—Where the registered deed of sale being lost oral evidence of the transaction was received, a certified copy was not necessary [*Hurrish v. Prosunno*, 22 WR 303]. When it is admitted by a party that he has not preserved the original, his opponent can give oral evidence of it [*Peary v. Nanak*, A 1948 PC 108: 52 CWN 785]. A mortgage-bond comprising properties in India and executed in England being lost before registration here, secondary evidence of the bond was admissible [*Francis v. Akbar*, 105 IC 502: A 1928 P 134]. Until a party has exhausted all the means prescribed by law for compelling a witness to produce document known to be with him, and so long as the original is procurable, or its loss not satisfactorily accounted for, secondary evidence cannot be admitted [*Roopmoonjori v. Ram Lal*, 1 WR 145; see also *Ishan v. Bhyrub*, 5 WR 21; *Luchman v. Puna*, 16 IA 125: 16 C 753; *Sookram v. Ram Lal*, 9 WR 248; *Mufeezooden v.*

Meher Ali, 1 WR 212]. The court ought to give sufficient time to a party who after diligent efforts finds it difficult to produce the original [*Wazeer Ali v. Kalee*, 11 WR 228]. Where it had been established that an *anumatipatra* was lost, secondary evidence of it is receivable [*Kali Kishore v. Bepin Ch*, 17 IA 159: 18 C 201]. When the original proved in a previous suit was lost, a copy of its transliteration proved by the signatory of the original is admissible [*Munshi v. Baisakhi*, A 1947 L 335]. Where original dying declaration was clearly lost and not available prosecution was entitled to give secondary evidence [*Aherrama v. S*, A 1979 SC 1567]. A plaintiff claiming under a will must satisfy the court about the impossibility of producing the original before he can be allowed to give secondary evidence, specially oral evidence [*Rangappa v. Rangaswami*, A 1925 M 1005: 88 IC 249]. Loss of document like a mortgage or a special power-of-attorney authorising the creation of a mortgage, must be strictly proved [*Jaspat v. Devidayal*, 32 IC 399]. Where there was evidence to show that the original will had been eaten by the rats secondary evidence is admissible [*Chandan v. Longa Bai*, A 1998 MP 1].

In a suit for possession as reversioners, the defence pleaded an adoption under an authority in a will. The will was impugned as a forgery and the defendant put in a registration copy alleging that the original had been burnt. The person with whom the will was deposited though alive and summoned did not appear. Another witness deposed that the abovementioned person told him that the will was burnt.—*Held* that it was hearsay and not admissible to prove loss unless it fulfils the conditions in s 32 [*Appalacharyulu v. Venkataramanuja*, 47 MLJ 906: A 1925 M 345: 47 MLJ 48 *note* (Tay s 430 **refd** to and **not folld**).—CONTRA: *Dologobind v. Makbul*, 62 CLJ 588].

If a witness in whose custody a deed should be, deposes to its loss, unless there is some motive suggested for his being untruthful, his evidence should ordinarily be accepted as sufficient to let in secondary evidence [*Ehitishan v. Jamna*, 48 IA 365: 27 CWN 8: A 1922 PC 56]. Loss can never be proved absolutely. In the case of a document which was not seen for a long period of time, a statement by a person, in whose custody it was alleged to have been, in an application that it was not with him and never was, was accepted as sufficient proof of loss although the person was not examined [*Basant v. Brijraj*, 62 IA 180: 57 A 494: A 1935 PC 132; *Jogu v. Bhiki*, A 1983 HP 13, 16]. If a document alleged to be a copy of a mortgage-bond is produced, it is wrong to hold that on the mere allegation of the loss of original the court may presume that the contract set up is true. The Plaintiff is not relieved from the duty of affirmatively making out the terms of the contract [*Ahmed Haji v. Mayan*, A 1930 M 65]. In the case of a lost mortgage deed, oral evidence of non-attesting witnesses is admissible to prove contents [*Gurdevi v. Mangal*, A 1951 Pu 223]. The statement of plaintiff's pleader that he filed a pronote along with the plaint which afterwards disappeared, was accepted for letting in secondary evidence. As the original was in the custody of the law, the onus of proof did not require plaintiff to show how it was made away with [*Tulsiram v. Ramsaran*, 29 CWN 965: 49 MLJ 132: A 1925 PC 80]. Omission to plead loss in the pleading does not justify the rejection of secondary evidence at the trial [*Kamod v. Khemkaran*, A 1927 N 269: 103 IC 186]. Where the original which was produced in a previous litigation cannot be traced but its custody is satisfactorily proved, secondary evidence of its contents is admissible [*Lakhan v. Takim*, 39 CLJ 90]. When the sanction given was lost, it can be proved by the production of the file in which the original order granting it was recorded [*Pub Pro v. Sadagopan*, A 1953 M 785].

When a party in possession of an unregistered deed of sale of property less than Rs. 100, was unable to give a satisfactory account for its non-production, secondary evidence was inadmissible [*Domai Bara v. Kereo Kolita*, 62 IC 444]. When an

agreement is compulsorily registrable but the doctrine of part performance applies, secondary evidence of the agreement and nature of possession under the unregistered agreement is admissible when it is lost [*Ma Ngwe v. Mg San*, A 1929 R 181]. In a suit on a promissory note secondary evidence cannot be let in when the original itself has been proved to be lost [*Ram Saran v. Tulsi*, 67 IC 565: A 1922 L 417]. Counterfoils of original receipts are admissible in evidence only if proof of the loss of original has been given [*Hafiz Md v. Hariram*, A 1937 L 370]. Where a suit is based on a lost *bahi*, a police sub-inspector's report is not a sufficient proof of loss [*Asaram v. Sukha*, 4 LLJ 416: A 1921 L 336] or the police file of an alleged theft from plaintiff's house and the statement of the *thanadar* made in another case are inadmissible to prove loss of *bahi* [*Baru v. Sukha*, 4 LLJ 418: A 1921 L 332].

—Mutilated Document.—If part of a document is lost or destroyed, the part which is preserved is admissible, on the mutilation being properly accounted for, and secondary evidence may be given of the remainder [*Doe d Godsoe v. Jack*, 1 Allen 476]. Even if the original is worm eaten and in a tattering condition secondary evidence is not admissible [*Amrita v. Sripat*, A 1962 A 111].

—Altered Document.—When a plaintiff who sues upon a document has made alterations or interpolation in it, the identity of document is lost and as he is responsible for it, he cannot be allowed to give secondary evidence of its original contents [*Janardan v. Prandhan*, A 1940 P 245]. See *post* s 106: "*Alteration of Instruments*".

—Lost Record and Its Reconstruction.—Where original documents are lost from the custody of court no formal proof of loss is necessary [*Chatha Kumari v. Mohan*, A 1931 P 114: 121 IC 337; *Harijiwan Sahu v. Jaisam Sahu*, A 1989 Pat 96, 100], and the party must be given another chance of producing a copy or giving secondary evidence [*Ram Singh v. Pat Ram*, A 1933 L 782]. A court has inherent power to reconstruct its records when they have been lost or destroyed [*Rajgir v. Iswardhari*, 11 CLJ 234: 5 IC 660].

When after refusal of registration of an original document by the registering officer, a civil suit is brought for its registration and the original is lost from the custody of the court, the court will admit secondary evidence and after reconstructing it, order registration [*Saraswatibai v. Md Idrakuddin*, A 1963 MP 234]. Where a party obtained a decree, which was appealed against, and the entire record was lost in transit from the lower to the appellate court; the High Court directed the lower appellate court to take secondary evidence of the papers from both the parties or to take additional evidence [*Gooroo Dyal v. Durbaree*, 7 WR 18; see also *Bunwary v. Farlong*, 8 WR 38]. When a court loses its records, *eg* on account of accident, rebellion, &c it has inherent power to reconstruct them. The method of reconstruction being by means of affidavits counter-affidavits, hearing of witnesses, admission of copies, &c [*Marakarutti v. Veeran Kutti*, 46 M 679].

Destruction of Original.—Oral evidence of the contents of a deed destroyed during mutiny is admissible [*Luchmeedhur v. Raghubar*, 24 WR 284; see also *Sheosuran v. Goolbanu*, WR 1864, 264]. Where a decree was destroyed during the mutiny, a suit was held maintainable for the amount of the unsatisfied claim adjusted by the decree [*Ranee Enamun v. Hurdyal*, WR (1864) 301; see also *Nuzur Banoo v. Hossein*, WR (1864) 378; *Bishen v. Khadeema*, Marsh 213: 1 Hay 584 and *Ranjit v. Chuni Lal*, 1 NWP 78]. Record-room being destroyed during the mutiny, the register of *sariskan papers* in the Collectorate is to be treated as the original and certified copy of entry is admissible [*Rajendra v. Bihari*, 11 P 569]. Where a bond is said to have been torn, and the alleged fragments are produced, destruction is not proved in

the absence of evidence that they were really the fragments of the bond in question [*Syed Abbas v. Yadeen Ramy*, 3 MIA 156]. The original plaint having been destroyed an uncertified copy was held admissible [*Kunneth v. Vayoth*, 6 M 80]. In a case falling under s 65(*f*) and also under cl (*a*) or (*c*) of it, any secondary evidence is admissible [*In re Ava & Brenhilda*, 5 C 568: 5 CLR 331; *Bibi Asiha v. Bihar S S M Avaqaf*, A 1969 SC 253]. Where original sale deed was either in the possession of the defendant or was lost and certified copy could not be obtained as record of Registrar's office was destroyed, a copy produced by the plaintiff prepared from a certified copy filed by the defendant in a former suit which was also not available the court record being destroyed, is admissible [*Arunkumar v. Ramanlal*, A 1975 G 73]. When the original telegrams were destroyed by the telegraph office, their copies become evidence [*Manchalal v. Shah Manikchand*, A 1988 Kant 221, 223 (DB): 1 LR 1987 Kant 3568].

Where destruction by fire is alleged, it is improper to admit a copy when the absence of the original is not satisfactorily accounted for [*Md Abdul v. Ibrahim*, 3 Bom HCR 160]. Where the loss or destruction of the original was not satisfactorily proved, secondary evidence of its contents was held inadmissible under cl (*c*) [*Krishna Kishori v. Kishori Lal*, 14 IA 71: 14 C 486]. A plain copy of a *kabuliat* cannot be admitted on the statement of a witness that many years ago, before he attained the years of discretion the original was burnt. Such a statement is not admissible in evidence [*Shk Arjad v. Sarbasona*, 64 CLJ 51]. Where the execution, loss or destruction has been satisfactorily proved, it is not necessary that the witnesses called to prove its contents should be attesting witnesses; those who have seen and know the contents, can prove its contents, provided the court believes them [*Syed Lootfoolah v. Nussebun*, 10 WR 24; *Gurdevi v. Mangal*, A 1951 Pu 223]. It is well known and a court may recognise that original telegrams are destroyed after three months and so secondary evidence is admissible [*Bishambar v. R*, 90 IC 706: 2 OWN 760]. Secondary evidence of an unstamped document which has been lost or destroyed is under no circumstances admissible [*Md Ayub v. Rahim*, A 1922 L 401: 3 L 282; *Ladharam v. Harichand*, A 1938 L 90; *Halima v. R*, A 1947 L 306]. S 65(*c*) is not inapplicable to previous conviction and when records of previous trials have been destroyed, secondary evidence is admissible. But a mere conviction slip is not secondary evidence [*Pokar v. R*, 1941 Kar 308: A 1941 S 173]. Secondary evidence may be given of a probate lost or destroyed or which cannot be produced [*Satya v. Hrishikesh*, A 1959 C 795].

—Destruction or Suppression By Proponent Himself.—When a party in possession of a document himself fraudulently destroyed it [*Shk Abdulla v. Shk Md*, 1 Bom HCR 177] or suppressed it [*Sivasubramania v. Zemindar*, A 1933 M 451: 144 IC 27] he cannot be allowed to give secondary evidence. "Where a writing has been voluntarily destroyed with intent to produce a wrong or injury to the opposite party, or for fraudulent purposes, or to create an excuse for its non-production, in such cases the secondary proof ought not to be received. But in cases where the destruction or loss although voluntary, happens through mistake or accident, the party cannot be charged with default" [*per* TODD J, in *Riggs v. Taylor*, 9 Wheat 483, 487]. "The cause or motive of the destruction is, then, the controlling fact which must determine the admissibility of this evidence in such case" [*per* FIELD J, in *Bagley v. Mc Mickle*, 9 California, 430, 446]. "The view now generally accepted is that (*1*) a destruction in the ordinary course of business, and, of course a destruction by mistake, is sufficient to allow contents to be shown as in other cases of loss, and that (2) a destruction otherwise made will equally suffice, provided the proponent

first removes to the satisfaction of the judge, any reasonable suspicion of fraud" [Wig s 1198].

Proof of Lost, Destroyed or Suppressed Will.—Secondary evidence is admissible in proof of a lost will like any other lost document. On principle there is no possible distinction between the proof of a deed and the proof of a will and therefore parol evidence of a will that is lost or suppressed is admissible. While every attempt should be made to prove that will in its entirety by oral evidence, there is no reason why the will should fall altogether if the witnesses are unable to recollect all the bequests. The evidence in support of the will must of course be trustworthy and although corroboration is desirable in such cases, it is not absolutely necessary [*Sugden v. Ld St Leonards*, 1876, 1 PD 154: 34 LT 372; **relied** on in *Khodromal v. Nicchomal*, A 1939 S 86]. Testatrix destroyed earlier will after execution of later will which was held invalid. Valid earlier will was proved by oral evidence [*Russel v. Delaney*, 1951, 1 All ER 920]. Contents of original will proved by oral evidence of attesting witnesses [*Deorao v. Raibhan*, A 1954 N 357]. The loss of a will does not operate as a revocation and a certified copy of it is admissible [*Babulal v. Baijnath*, A 1946 P 24: 24 P 395]. The certificate of the Registering Officer on the will is sufficient proof of the execution of the will and its contents. Execution of the original will can also be proved by approved circumstantial evidence [*Gurbux v. Bishan*, A 1970 Pu 182—case law discussed].

Non-production "For any Other Reason Not Arising From his Own Default or Neglect".—Plaintiff having purchased in execution the interest of *R* in a bond executed by him in favour of a woman *S*, sued both and sought to use the copy from registry office as secondary evidence. As plaintiff took no steps to get possession of the bond and loss or destruction was not proved, secondary evidence was not admissible. *Woomesh v. Sharma Sundari*, 7 C 98]. Where no reasons are shown for non-production of the original of a mortgage, the suit is bound to fail [*Bhairon v. Hindu*, 67 IC 237: A 1922 N 119].

Where a party can show that the non-production (here a sale-certificate) was not due to his own default or neglect, secondary evidence (a certified copy) would be admissible under cl (*c*) [*Vasanji v. Haribhai*, 2 Bom LR 533]. To adduce secondary evidence it is not enough to show that he cannot produce it because it was not registered; he must show that its non-registration was due to the fraud of the other party [*Kumuzooddin v. Rajjub*, 1 WR 528]. A *latbundi* cannot be accepted as secondary evidence of the certificate of sale, unless the absence of the original certificate is sufficiently accounted for [*Ustoorun v. Mohun*, 21 WR 333]. A party in possession of a document cannot refuse to produce it alleging that it had been in possession of the defendants who might have tampered with it or had tampered with it, and secondary evidence was held inadmissible [*Hiralal v. Ganesh*, 4 A 406, 410: 9 IA 64: 11 CLR 109]. When one of the vendees who is a defendant, was called upon to produce the original, but neither he nor his co-vendees produced it in reasonable time, the trial court allowed secondary evidence of its contents under cl (*e*) [*Chuhamal v. Rahim*, 71 IC 568: A 1924 L 303]. When the original has either been lost or is being deliberately withheld by the person in whose custody it was kept, secondary oral evidence of its contents can be admitted [*Ramchand v. Wazir*, A 1962 Pu 293]. If the sale proclamation is not forthcoming, the sale-certificate may be accepted as secondary evidence [*Midnapore Z Co v. Enatulla*, 62 IC 60].

The mere fact of a document being in another court, is not a good reason for producing secondary evidence [*Gour Monee v. Huree Kishore*, 10 WR 338; and *Rakhal Das v. Indramani*, 1 CLR 155]; but in a case, a certified copy of a document

which was in another court was *admitted under cl (c)* in order to avoid delay [*Jobda v. Shk Monab*, A 1930 C 479]. When the original wakf deed was filed in a court in Calcutta (which is in a different State) it can be assumed that it could not have been produced in the trial court in a reasonable time and so secondary evidence is admissible [*Bihanlal Agarwalla v. Tamizul Haque*, A 1988 Gau 1, 4: (1988) 1 Gau LR 76]. An application for the filing of an award may be made with a copy of the award when the original award is not removable under the rule of a High Court [*Yeshwantrao v. Dattaraya*, A 1948 N 162].

"Produce".—The word 'produce' does not indicate that it was to be produced out of the custody of the party concerned. It only means "procure the production of or give it in evidence" [*Gaya v. Jaswant*, A 1930 A 550].

Sufficiency of Search. [Discretion Exercised By Court Not to be Lightly Interfered With]. The Act has not laid down as to what kind of search would be sufficient, nor is any such rule possible. The sufficiency of the search is a preliminary question for the judge, and it must vary with the circumstances of each case. There must be a *bona fide* search and a party must show that he has exhausted in a reasonable degree all the sources of information and means of discovery which the nature of the case would suggest and which were accessible to him [See *R v. Saffron Hill*, cited *ante* and cases under "*proof of Loss*", *ante*].

There must be sufficient proof of search for the original; and where there was no evidence of a search for the originals, copies were held to be inadmissible [*Meer Usdoolah v. Imaman*, 1 MIA 19: 5 WR 26; see also *Shambati v. Jago Bibi*, 29 IA 127: 29 C 749: 6 CWN 657]. In order to show sufficient reason, the concerned party must lead necessary evidence and testify that he made a diligent search for the original and exhausted all the sources and means available for its production [*John Mithalal Desai v. Dineshbhai K. Vora*, 1998 AIHC 1894, 1905 (Guj)]. The question whether or not sufficient proof of search for, or loss of an original document, to lay a ground for the admission of secondary evidence, has been given, is a point proper to be decided by the judge of first instance and is treated as depending very much on his discretion. His conclusion should not be overruled except in a clear case of miscarriage [*Haripriya v. Rukmini*, 19 IA 79: 19 C 438, 442 (**folld** in *Chuha Mal v. Rahim*, 71 IC 568: A 1924 L 303; *Gaya v. Jaswant*, A 1930 A 550; *Choithram v. Khem Chand*, A 1929 S 7; *Vishvanath v. Rahibai*, A 1931 B 105: 55 B 103; *Md Hasan v. Safdar*, A 1933 A 601; *Mg Ba v. Daw Kha*, A 1935 R 502); see also *Shookram v. Ramlal*, 9 WR 248; *Ningama v. Ramappa*, 5 Bom LR 708]. But when the trial court holds the loss established without consideration of the pre-requisite conditions, the appellate court would certainly interfere [*Ananta v. Bommadevara*, A 1958 AP 418]. Where no explanation is given in evidence by the witness who is said to possess the document or for not taking steps to recover the original or for the omission of the plaintiff not summoning it, it would be clear miscarriage of justice to admit secondary evidence [*Ramanna v. Sambamoorty*, A 1961 AP 361]. If the court of first instance finds loss not proved, it is not refusal to exercise jurisdiction or exercise of jurisdiction with material irregularity [*Pandu v. Bapudas*, A 1929 N 288].

Answers given by persons likely to have had the document are admissible not to prove the facts stated, but to show the reasonableness of the search [*R v. Braintree*, 1 E & E 51; *R v. Kenilworth*, 7 QB 642]. Where inquiry was only made of one out of three persons likely to have the document, this was held insufficient [*Hawker v. King*, 108 IT Jo 540; Phip 11th Ed p 757].

CLAUSE (D): When the Original is Not Easily Movable.—Proviso 2 to s 60 says that if oral evidence refers to the existence of any material thing other than a

document, the court may require its production for inspection. [See s 3 as to definition of document]. The contents of writing may be proved by secondary evidence, when their production is either physically or legally impossible, or highly inconvenient. Thus, inscription on walls and fixed tablets, mural monuments, grave-stones, surveyors' marks on boundary trees, notices warning trespassers affixed on boards, and the like, may be proved by secondary evidence, since they cannot conveniently, if at all, be produced in court. For instance, on one occasion a man was convicted of writing a libel on the wall of the Liverpool gaol on mere proof of his handwriting [*Mortimer v. M'Callan*, 6 M & W 58]. In order, however, to let in secondary evidence of original documents capable of being lawfully removed, it must clearly appear that the document or writing is affixed to the free-hold, and cannot easily be removed; and, therefore, where a notice was merely suspended to the wall of an office by a nail, it was considered necessary to produce it at the trial [*Jones v. Tarleton*, 1842, 9 M & W 675].

Where by law a notice is required to be kept constantly affixed to the wall of a factory, secondary evidence is admissible although it is only suspended from a nail, just as if it were physically affixed [*Owner v. Beehive Spinning Co*, 1914 1 KB 105; Tay s 438; Hals, 3rd Ed, Vol 15, para 647]. Inscriptions on flags and banners have been regarded rather as speeches or acts done as documents, and so provable by oral testimony without reference to the present rule [*R v. Hunt*, 3 B & Ald 556; *R v. I'Connell*, 5 St Tr NS 244-45]; so, with resolutions read at public meetings, and perhaps tablets on parcels of decanters. The rule applies equally where a private document is in the hands of a person resident *abroad* who refuses to produce it [*Boyle v. Wiseman*, 11 Ex 360; *Kilgour v. Owner*, 88 LT 7, 8], or is filed in a foreign court [*Crispin v. Doglioni*, 32 LJP & M 109; Phip 11th Ed p 758]. Cl (*d*) does not contemplate the application of this rule but documents in the possession of persons abroad may come under para 3 of cl (*a*). Any kind of secondary evidence is here admissible.

CLAUSES (E) and (F): "When the Original is a Public Document, etc".—In the cases referred to in these clauses, secondary evidence is admissible even though the original is still in existence and available. The removal of public documents is subject to great inconvenience and risk and secondary evidence is always allowed when the original is a public document within s 74 or a document of which a certified copy is permitted by this Act (see s 78) or by any other Act to be given in evidence, *eg*, Bankers' Books Evidence Act, (28 of 1891), s 4; Banking Companies Act, 1949, s 45; Powers of Attorney Act (7 of 1882), s 4, Cl (*d*) Register of powers of attorney maintained under s 69 Registration Act; Or 45, r 15. Application forms for accounts at a bank completed by a person who was subsequently charged for being knowingly concerned in the importation of heroin were held to be capable of forming part of a record compiled by bank officials. [*R v. Olisa*, (1990) Crim LR 721 CA], **distinguishing** *R v. Tirado (Emilio)*, 1974 CLY 662; *R v. Cunningham*, 1989 CLY 652]. In the cases covered by cls (*e*) and (*f*) a certified copy and no other kind of secondary evidence is admissible. But if without objection raised, other evidence had been admitted, the appellate court will not interfere [*Hasmatullah v. Harimohan*, 34 IC 942]. A notification in the Gazette can be proved only by the Gazette or its certified copy [*Jaigopal v. Forest Officer*, A 1953 P 310].

If the original public document is lost or destroyed and certified copy cannot be obtained, the rule in cls (*e*) and (*f*) does not apply and the general rule in clause (*c*) [v *ante*], becomes applicable and any other secondary evidence becomes admissible [see *Kunneth v. Vayoth*, 6 M 80; *Veerasetty v. Nanjundachari*, A 1955 Mys 139; *In re Ava & Brenhilda*, 5 C 568; *Bibi Aisha v. Bihar S S M Avaqaf*, A 1969 SC 253] including oral evidence [*Hurrish v. Prasunno*, 22 WR 303]. Relying on *Kunneth's* case it

has been held that the rule that in the case of a public document a certified copy is the only original evidence, does not apply where the original has been lost or destroyed. The certified copy of the document and no other kind of secondary evidence is permissible under clauses (*e*) and (*f*) [*Jagdishchandra Chandulal Shar v. State of Gujarat*, 1989 Cri LJ 1724, 1725 : (1989) 1 Guj LH 82]. It was pointed out in this case that *Haranund v. Ramgopal*, 27 IA 1 : 27 C 639, supports this view by implication [*Chandreswar v. Bisheswar*, 5 P 777 : A 1927 P 61 : 101 IC 289].

In *Ananda v. Secy of S*, 43 C 973: 20 CWN 576, 581 also it has been held that when a public document is destroyed or lost, any secondary evidence is admissible. In the Privy Council case above. *B B*, an official in the Sikhar court deposed that there was a litigation between *R B* and *C* in which *C* was examined by the judge and that the decision was passed in his presence. He put in a copy of *C's* deposition which he swore was *C's* deposition in the handwriting of the court *amlas*. The copy bore an endorsement "copy corresponding with the original" by the *sheristadar of the* court. All the Sikhar proceedings were rejected by the High Court as they were not proved under s 86. LORD HOBHOUSE in admitting the document observed: "The assertion of *B B* that *R B* sued *C*, and that she gave evidence before Moonshi *M* in his presence is primary evidence of these matters. His proof of the Sikhar records is secondary evidence; and by ss 65, 66 of the Evidence Act secondary evidence may be given of public documents, which these are under s 74, without notice to the adverse party, when the person in possession is out of the reach of, or not subject to the process of the court, which is the case here" [*Haranund v. Ramgopal, sup*]: It would seem that the document was not admitted in evidence as a certified copy, for in that case it would come under the last but one para of s 65. But the question in controversy was whether it was admissible without *notice* to the opposite party under s 66, and notice applies only to cl (*a*) of s 65 and not to public document in cl (*e*). It may therefore be presumed that the document was admitted as "any secondary evidence of the contents of the document" which was in possession of a person not subject to the process of the court (v last but three paras of s 65). Other secondary evidence has also been admitted under cl (*g*), although the original existed [see *Ram Sundar v. Chandreswar*, 34 C 293 cited *post*]. Profit and loss statements and a statement showing details of net income filed in support of income-tax return are public documents and certified copies are admissible under s 65(*e*), [*Ram Rao v. Venkataramayya*, 1940 Mad 969: A 1940 M 768 FB (*Mythili v. Janaki*, 1940 Mad 329: A 1940 M 161 **overruled**); see further notes under ss 74 & 77 *post*].

If the document is a foreign public document no copy of it could be obtained under s 76, but for the special case of foreign judicial records provision is made in s 86. In the absence of the certificate for which that section provides, the document may under ss 65 and 66 be proved by other secondary evidence; since it is in the possession of a person who is not subject to the process of the court, no notice to produce it is required [*Haranund v. Ramgopal*, 27 C 639, 648: 27 IA 1: 4 CWN 429; Cunn pp 157-58]. The probate of a will granted in Australia is a public document under s 74 which may be proved by secondary evidence under s 65(*e*) [*In re Adija*, 11 IC 261]. An examined copy of quinquennial register was held to be admissible without the production of the original [*Udoymoni v. Bishoo Nath*, 7 WR 14].

Ss 62, 64, 65 define the only evidence permissible in order to prove a warrant of arrest and the stringency of proof demanded cannot be relaxed and no objection as to non-compliance is to be regarded as technical [*Easwaramurthi v. R*, 71 IA 83: 48 CWN 477: A 1944 PC 54]. A type-written order not signed by the District Magistrate, nor having the certificate that it is a certified copy of the order is not admissible in proof of a prosecution based on that order [*Ram Pd v. R*, A 1945 P 210: 24 P 143].

S 57 Registration Act only shows that when secondary evidence has in any way been introduced, a copy certified by the registrar shall be admissible for proving the contents of the original without other proof than the certificate of the contents of the copy. But the copy does not thereby become eligible to be given in evidence without other evidence to introduce it [*Hurrish v. Prosunna*, 22 WR 302 : *Ma Yin v. Ma Box*, A 1927 R 277]. A certified copy of an entry in the Register of Powers of attorney maintained under s 69 Registration Act is admissible under s 65 (*e*) [*Pattu v. Nirmal*, 43 CWN 907]. A registration office copy of a sale-deed is inadmissible in evidence under s 65 (*a*) to prove the contents of the original unless a case for the reception of secondary evidence is made out [*Mannan v. Naiman*, 11 IC 50; *Badhawa v. Akbar*, 103 IC 752: A 1927 L 817]. A certified copy of a registered deed may be admissible under s 65 (*e*) as a secondary evidence, but that does not dispense with the proof of actual execution [*Subudhi v. Raghu*, A 1962 Or 40].

Certified copy of a deed reciting the fact of adoption not compulsorily registrable registered in book 5 instead of proper book 4 is not admissible in evidence as certified copy of document entered in book 5 could not have been given [*Biswanath v. Dhapu*, A 1966 C 13].

Under cl (*f*) secondary evidence is admissible notwithstanding the existence of the original when it is a document of which a certified copy is permitted by this Act [*Krishna Kishori v. Kishori*, 14 IA 71: 14 C 486]. Certified copy of a registered will in the Punjab executed in 1914 is evidence of its execution in view of the fact the original will was being withheld by persons interested to deny it [*Arya P Sabha v. Dev Raj*, A 1963, Pu 208]. Secondary evidence of returns filed with the Registrar of Joint Stock Companies is admissible as such returns constitute the public record of private documents within s 74(*3*) [*In re A B Patrika*, 45 C 169: 21 CWN 1161]. The certified copy of an order of the probate court to the effect that the letters of administration have been granted to the person named, with a copy of the will annexed of the deceased testator is admissible, the latter being a public document within s 74 [*Hariram v. Hemnath*, 19 CWN 1068: 30 IC 609]. The circumstances that a copy of a document has been obtained from the office of the registrar of deeds, does not make that registered document evidence or render it operative against persons who appear to be affected by its terms. It requires to be proved quite as much as if it came out of private custody [*Shk Faiz v. Omedee*, 21 WR 265].

When a certified copy is allowed to be produced, there is no presumption as to the genuineness or the execution of the original and the Court should not merely admit a document merely on the ground that it is a certified copy of the original unless the execution of the original is proved or admitted by the persons against whom the same is to be relied on [*Bhaskar Sabu v. Anama Swara*, A 1987 Ori 138, 141: (1986) 2 Ori LR 410]. Certified copy of a *robokari* is admissible [*Radhanath v. R*, 22 CWN 742: 46 IC 689]. The certified copy of the registered *kabuliat* which is 30 years old, may be received as secondary evidence [*Harihar Paland v. Sudhir Kumar Paland*, A 1988 Cal 68, 72 : (1987) 91 Cal WN 958 (DB)]. Certified copy of entry of the sale deed in the register in the registrar's office can be proved [*Rama Chandra Majhi v. Hambai Majhi*, A 1989 Ori 27, 30]. A carbon copy of *post-mortem* report cannot be admitted especially when the concerned Doctor was not examined [*Bindu Mahto and Hazon v. State of Bihar*, 1989 Cri LJ (NOC) 107 (Pat) (DB)]. Plaintiff relied on a certified copy of partition deed passed between the parties, and the copy produced showed that the original was produced in a previous suit—*held* that the court could rely on the certified copy being a correct copy of the original [*Chudasama v. Takhtasang*, A 1922 B 177]. Entry in settlement record can be proved only by the original or certified copy. Oral

statement of kanungo is not admissible [*Ram v. Ghanasham*, A 1923 L 150]. Copy of assessment diary maintained by spot enquirer but not issued as per requirements of s 330 of U P Municipalities Act, 1916 is not admissible [*Ganesh v. Badri Pd*, A 1980 A 361]. Where an acknowledgment is contained in a plaint, but the plaint is not produced, the same can be proved by a certified copy of the judgment in the suit [*Harichand v. Phiraya*, 11 IC 377: 180 PLR 1911]. As to income tax returns, see *Anwar v. Tafozal*, 84 IC 487: A 1925 R 84 and notes under s 74 & 77 *post*. Copy of list attached to plaint obtained from some record in revenue court is not admissible [*Bhagwati v. Marjael*, A 1931 O 136].

CLAUSE (G): When the Original Consists of Voluminous Documents.— When the original consists of ponderous books or numerous papers and accounts involving great inconvenience of production and loss of public time and when the *general result* is to be proved, secondary evidence of the general result may be given by one who has scrutinised the documents. The last paragraph says that the persons must be skilled in the examination of such documents, and the competence of the witness is a question for the judge. The witness is to go through the books before he comes to the box to state the general result of his scrutiny. He can of course be cross-examined and where practicable, it is desirable that the books should be in court so that the opposite side or the court may inspect them, if need be.

The next relaxation of the rule demanding primary proof to be given of a document before any secondary evidence of it is received, occurs, where evidence is the result of *voluminous* facts, or of the inspection of *many books and papers*, the examination of which could not conveniently take place in court. Thus, if bills of exchange have been drawn between particular parties in one invariable mode, this may be proved by the testimony of a witness conversant with the habits of business, who speaks generally of the fact without producing the bill [*Spencer v. Billing*, 1812, 3 Camp 310]; a witness who has inspected the accounts of the parties, though he may not give evidence of their particular contents will be allowed to speak to the general balance without producing the accounts [*Roberts v. Doxon*, 1791 Peak 83. But see *Johnson v. Kershaw*, 1947 De G and Sm 260, where this course was not allowed]. And where question is as to solvency of a party at a particular time, the general result of an examination of his books and securities may be stated in like manner. This exception, however, will not enable a witness to state the general contents of a number of letters received by him from one of the parties in the cause, though such letters have since been destroyed, if the object of the examination be to elicit from the witness the impression which they produced on his mind with reference to the degree of friendship subsisting between the writer and a third party [Tay s 462].

"In the case of voluminous documents, accounts, record &c it is obvious that it would often be practically out of the question to apply the present principle by requiring the production of the entire mass of documents and entries to be perused by the jury or read aloud to them. The convenience of trials demands that other evidence be allowed to be offered, in the shape of the testimony of a competent witness who has perused the entire mass and will state summarily the net result. Upon the same principle, summaries of official or corporate *records* might be presented; and testimony, by one who has examined records, that *no record* of a specific tenor is there contained is receivable instead of producing the entire mass for perusal in the court-room" [Wig s 1230]. The evidence of a witness who testifies to any fact ascertained by his examination of any books cannot well be cross-examined unless the books themselves are available and therefore they ought to be ready for production [Steph Dig Art 71].

The insistence by the Legislature on the presence in the box of a person who has examined the documents and "who is skilled in the examination of the documents" is intended to afford an opportunity to find out the truth by his cross-examination. Secondary evidence cannot, therefore, be given by a person who has not examined the documents [*Krishna v. R*, A 1946 A 227]. Where in order to ascertain the history of certain properties in suit the judge took the evidence of the record-keeper and clerks in charge of the Collectorate records and registers, as to the general result of their examination of these documents and it did not appear that the document could be conveniently produced in court, *held* that s 65(*e*) does not require that certified copies of the records should be produced in such circumstances, the case falling within the provisions of cl (*g*) of that section, and the judge acted rightly under the latter clause [*Ram Sunder v. Chundreswar*, 34 C 293 : 11 CWN 501]. Where the sale deeds are not numerous, evidence of person who has prepared sales statement is not admissible as secondary evidence [*Collr v. Chaturbhui*, A 1964 MP 196].

Abstract from mutation records prepared by kanungo showing the number of alienations of land is admissible under s 65(*g*) [*Sher v. Dost*, 78 IC 451 : A 1925 L 231]. It is an abuse of their functions to require *kanungos* to give oral evidence of the contents of a document such as records of a *maufi* enquiry, which ought to be examined in original by the court [*Glani v. Hasan*, 2 LLJ 714]. Index of prior sales and the multiple derived on its basis by Land Acq Officer for determination of market value of land would be inadmissible [*P R Modi v. Collr*, A 1975 MP 57]. An extract from the register of applications in respect of minors and lunatics is not admissible as secondary evidence of a statement as to the date of birth made in an application for appointment of guardian [*Gokul v. Baldev*, 5 PLT 403]. It is doubtful if secondary evidence of the *Granth Sahib* or *hukumnamas* is admissible on the ground of their sanctity or immovability [*Arjan v. Harbhanjan*, A 1937 L 280].

§ See also C P Code Or 26 rr 11, 12 (commission to examine accounts). As to production of Bankers' Books and inspection, see ss 5, 6 Bankers' Books Evidence Act, *post* App C.

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

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

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

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

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* S. 65A and S. 65B inserted by the Information Technology Act, 2000.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(5) For the purposes of this section,—

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

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

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

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

Information Technology Act, 2000

Proof of contents of electronic records [Ss. 65A, 65B].—The new section, namely S. 65A, says that the contents of electronic records may be proved in accordance with the provisions of S. 65B. This section is also a new provision. It prescribes the mode for proof of contents of electronic records. The primary purpose is to sanctify proof by secondary evidence. This facility of proof by secondary evidence would apply to any computer output, such output being deemed as a document. A computer output is a deemed document for the purposes of proof. The section says in sub-s. (1) that any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer and to be referred to as computer output, shall also be deemed to be a document. The section lays down certain conditions which have to be satisfied in relation to the information and the computer in question. Where those conditions are satisfied, the electronic record shall become admissible in any proceedings without further proof or production of the original as evidence of any contents of the original or of any fact stated in it.

§ For text of the Information Technology Act, 2000, see Stop Press pages in Volume 1 after General Contents.

Conditions as to relevancy computer output [S. 65B(2)].—The conditions which have to be satisfied so as to make a computer output as primary evidence are stated in sub-s. (2). They are as follows:

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

(b) the information contained in the electronic record is of the kind which was regularly fed into the computer in the ordinary course of its activities;

(c) the computer should have been operating properly during the period of the data feeding, or, if it was not operating properly during that period or was out of operation, that gap was not such as to affect the electronic record or the accuracy of its contents;

(d) the information contained in the electronic record was derived or is reproduced from the information fed into the computer in the ordinary course of its activities.

Where the information was processed or fed into the computer on inter-linked omputers or one computer after the other in succession, all the computers so used shall be treated as one single computer. The references to a computer have to be construed accordingly [S. 65B(3)].

When a statement has to be produced in evidence under this section, it should be accompanied by a certificate which should identify the electronic record containing the statement and describe the manner in which it was produced; give the particulars of the device involved in the production of the electronic record showing that the same was produced by a computer and showing compliance with the conditions of sub-s. (2) of this section. The statement should be signed by a person occupying a responsible official position in relation to the operation or management of the relevant activities. Such statement shall be evidence of the matter stated in the certificate. It should be sufficient for this purpose that the statement is made to the best of knowledge and belief of the person making it [s. 65B(4)].

For the purposes of this section an information shall be taken to be supplied to a computer, if it is done in any appropriate form whether this is done directly with or without human intervention by means of any appropriate equipment, or if the information is supplied by any official in the course of his activities with a view to storing or processing the information even if the computer is being operated outside those activities.

An explanation to the section declares that for the purposes of s. 65-B any reference to information being derived from other information is to be taken to mean derived by calculation, comparison or any other process [s. 65-B (*Explanation*)].

§ For text of the Information Technology Act, 2000, see Stop Press pages in Volume 1 after General Contents.

S. 66. Rules as to notice to produce.—Secondary evidence of the contents of the documents referred to in section 65, [1][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 [2][or to his attorney or pleader,] such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case:

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

(*1*) when the document to be proved is itself a notice:

(2) when, from the nature of the case, the adverse party must know that he will be required to produce it;

(3) when it appears or is proved that the adverse party has obtained possession of the original by fraud or force;

(4) when the adverse party or his agent has the original in Court;

(5) when the adverse party or his agent has admitted the loss of the document;

(6) when the person in possession of the document is out of reach of, or not subject to, the process of the Court.

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1. In Ceylon "Sub-section (1)" substituted.
2. Inserted by s 6 of I E Act (Am.) Act, 18 of 1872.
   In Burma the word "advocate" has been substituted for the word "attorney" (A.O. 1937).
   In Ceylon "proctor" substituted for "attorney or pleader".

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COMMENTARY

Principle and Scope.—Secondary evidence of the contents of a document under s 65 cannot be received unless notice to produce it has first been given. Thus section states the conditions under which notice must be given before secondary evidence can be let in in the cases mentioned in s 65(*a*). The object of the notice has been differently explained: "The reason of giving notice..... was to check a person from giving in evidence what was a false copy" [*per* ELLENBOROUGH LCJ, in *Surtees v. Hubbard*, 1803, 4 Esp 203]. "We see the good sense of the rule which requires previous notice to be given..... that he may not be taken by surprise" [*per* LE BLANC J, in *How v. Hall*, 1811, 14 East 274, 276]. The commonly accepted theory is that the object of notice is to give the adversary an opportunity to produce the document if he pleases, and if he does not, to enable the opposite party to give secondary evidence, so as "merely to exclude the argument that the party has not taken all reasonable means to procure the original; which he must do before he can be permitted to make use of secondary evidence" [*per* PARKE B, in *Dwyer v. Collins*, 7 Ex 639, 647]. The only purpose of a notice is to give the party an opportunity by producing the original to secure, if he pleases, the best evidence of the contents [*per* SIR GEORGE RANKIN, in *Surendra v. Mirza Md*, 63 IA 85 : 40 CWN 226 : A 1936 PC 15].

The provisos state the circumstances in which notice shall not be required in order to render secondary evidence of the contents of documents admissible. When the document in question is already in court, no notice is necessary and a request to produce it, in the presence of the judge, is sufficient [v proviso (*4*)]. Any person present in court, may be required by the court to produce any document then and there in his possession or power (Or 16 r 7 C P Code). The third person being in court with the deed declined to produce it, and a copy was admitted [*Doe v. Clifford*, 2 C & K 448, 451]. Notice is also not necessary when the document tendered is a *duplicate, original* or a *counterpart* executed by the opponent, as the evidence is primary and not secondary [v s 62].

In s 65 the words are "existence, condition or contents of a document", but s 66 only speaks of "contents". It may be asked therefore whether secondary evidence of "existence of condition" can be given without notice under s 66. But the last para of cl (*a*) of s 65 also speaks of "notice mentioned in s 66".

In s 66 the person in possession of the document has been referred to as "party" except in proviso (*6*) which speaks of the "person in possession"; whereas in s 65 the word "party" has not been used though it refers to documents in the possession of parties as well as strangers [; see cl (*a*)]. Obviously both sections refer to parties to suits as well as to strangers. Ordinarily the notice must be to the person in whose possession or power the document is. [As to possession, see notes to cl (*a*) section 65 *ante*].

The requirement of notice does not apply unless the opponent has *possession* of the document. If it is shown that the document has been lost or destroyed [v s 65(*c*)] while in the hands of the opposite party or if its loss is admitted by him [v proviso (*5*)], even out of his possession, no notice is necessary [v s 65]. In the case of parties to the suit notice to produce (Or 11, r 16) is usually given (cases in provisions 2, 3, 4, 5) and in the cases of strangers (case in proviso *6*) a summons (Or 16, r 6) is served. There must be proof of due service of notice and lapse of a reasonable time for production before secondary evidence can be given. The sufficiency of the notice is a question for the judge who must be satisfied that it was such that the recipient might, by using reasonable diligence, have complied with the notice [*Lloyd v. Mostyn*, 10 M & W 478].

A notice should be in as clear terms as possible, so that the person served may not plead that he was unable to ascertain what document was wanted. Inaccuracies, however, will not vitiate a notice unless the recipient has been misled thereby. The notice must be such as is prescribed by law and if no notice is prescribed by law, then such notice as the court considers reasonable under the circumstances.

Under s 163 when a party calls for a document which he has given the other party notice to produce, and such document is produced and inspected by the party calling for its production, he is bound to give it as evidence, if the party producing requires him to do so; and under s 164 when a party refuses to produce after notice, he cannot afterwards use the document as evidence without the consent of the other party or the order of the court. Under s 89 the court shall presume that every document called for but not produced after notice, was attested, stamped and executed in the manner required by law. If a document in possession is not produced after notice, there is the further presumption under s 114 *illus.* (*g*) that the evidence, if produced, would have been unfavourable to the person who withholds it. The *proviso*, mentions the cases in which notice to produce is not necessary.

The rules with regard to the admission of secondary evidence are the same in criminal as in civil trials, and the necessity for notice the same [Nort, p 251]. Ss 91, 94, 230, 233(2), 242(2), 243(2), 254(2) and 349 Cr PC contain the procedure for the production of documents in criminal cases. The following rules and sections of the C P Code lay down the procedure to be followed when applications are made for production, discovery and inspection of documents: Or 5, r 7; s 142 & Or 48, r 2; Or 11, rr 15, 16, 18; Or 16, rr 5, 6, 7, 8, 9, 14, 15, 17, 19, 20, 21. See also ss 162, 163, 164 *post* and s 175 I P Code.

Although the section prohibits the admission of secondary evidence unless the conditions are complied with, it has generally been held that when in the absence of any objections raised by the opposite party, such evidence has been admitted without proof of notice to produce the documents, the court of appeal should not afterwards exclude the evidence as inadmissible, at any rate without giving the party who adduced it, an opportunity to supply the deficiency [*Chimnaji v. Dinkar*, 11 B 320; *Lakshman v. Amrit*, 24 B 591, 596].

[*Ref Tay ss 440-56; Ros N P 3, 7-14; Steph Art 72; Phip 8th Ed pp 535-36 Wig ss 1202-209; Jones, ss 223-25*].

Procedure Regarding Notice. [Tenor, Person, Time].—Before secondary evidence of documents mentioned in cl (*a*) of s 65 may be given it is essential that the procedure in s 66 should be strictmý complied with [*Nityananda v. Rashbehari*, A 1953, C 456]; [*Smt Sulochana Devi Bubua v. Gobinda Chandra Nag*, A 1986 Cal 430, 435 : (1986) 1 Cal H N 58]. A sale deed cannot be proved by production of the Register in which its copy is kept in the registration office. The original must be called and execution proved [*Naresh v. S*, A 1955 C 398].

Before however secondary evidence of the contents of documents becomes admissible, it is necessary that a proper notice to produce should be served upon the party under whose control they are. The notice must not only be in *writing*, but, so far as civil proceedings are concerned, must be in the special form directed by the Rules of Court [Tay s 442]. It may be difficult to lay down any general rule as to *what the notice ought to contain*, since much depends on the particular circumstances of each case; but this much is clear, first, that no mis-statement or inaccuracy in the notice will be deemed material, if it is not really calculated to mislead the opponent [*Justice v. Elstob*, 1 F & F 258; *Graham v. Oldis, ibid*, 262]; and next, that it is not necessary, by condescending minutely to dates, contents, parties &c, to specify precisely the document intended. Indeed, it may be dangerous to do so, since if any material errors were to creep into the particulars, the party sought to be affected by the notice might urge, with possible success, that he had been misled thereby. If enough is stated on the notice to induce the party to believe that a particular instrument will be called for, this will be sufficient [*Rogers v. Custance*, 2 M & Rob 179, 181]. Thus a notice to produce "all letters written by the plaintiff to the defendant, relating to the matters in dispute in the action" [*Jacob v. Lee*, 1837, 2 M & R 33], or "all letters written to or received by the plaintiff between the years 1837 and 1841, both inclusive, by and from the defendants, or either of them, or any person in their behalf; and also all books, papers, etc, relating to the subject matter of this cause" [*Morris v. Hauser*, 2 M & R 392], has been held sufficient to let in parol evidence of a particular letter not otherwise specified. But a notice to produce "all letters, papers, and documents, touching or concerning the bill of exchange mentioned in the declaration, and the debt sought to be recovered" was held too vague to admit secondary proof of a notice of dishonour sent by the plaintiff to the defendant [*France v. Lucy*, 1825, Ry & M 341]. The authority of *France v. Lucy, sup* has been considerably shaken, if not entirely overruled, by *Rogers v. Custance, sup*, where in an action for work and labour, a notice to produce all accounts relating to the matters in question in this cause" was held sufficient (Tay s 443; Hals, 3rd Ed, Vol 15, Para 648].

As to the tenor and form of notice, no general rule is possible and it must depend on the facts of each case. Nor do the rulings help much as they vary in their requirements. The test is that the description of the document should be such as the opponent can easily know what is wanted and is not left in doubt. As DENMAN, LCJ, said in *Rogers v. Custance*, 2 M & R 179, 181 "where enough was stated on the notice to leave no doubt that the party must have been aware the particular instrument would be called for, the notice must be considered sufficient to let in secondary evidence." Where a plaintiff desired to have a letter written nine years ago, a notice to "produce letters and copies of letters, and all books relating to the cause" was held to be uncertain [*Jones v. Edwards*, 1885 M'CI & Y 139]. So also a notice to produce "all letters" [*Gardner v. Wright*, 15 LT 225—*per* BLACKBURN, J]. A *subpoena* to produce "documents relating to the case if he has any is not enforceable as this requires the witness to decide upon their relevancy [*Burchard v. McFarlane*, 1891, 2 QB 241, 247]. Where the plaintiff served notice on the defendant to produce all his title-deeds relating to the property in dispute prior to 1859 and a particular document was not produced, plaintiff is entitled to give secondary evidence [*Narsidas v. Ravishankar*, A 193! B 33 : 32 Bom LR 1435]. Each partner should be served with notice to produce such documents and papers as may be in his custody [*Pulin v. Mahendra*, 34 CLJ 405].

As to the *person*, the notice must be to the opponent, although the actual custody may be with a third person or agent holding for him. Notice to an agent is not sufficient unless there is a duty on him to communicate it to the opponent, "and this will usually not be the case except for one who is an agent for the purpose of the trial, *ie*, an attorney; and to this particular class of agents, it is well settled that notice to the attorney suffices" [Wig s 1208]. As to the *time of notice*, the only consideration should be that the time was reasonable and sufficient for production. It depends largely on the discretion of the court. "All these cases depend on their particular circumstances; and the question in each case is whether the notice was given in reasonable time to enable the plaintiff to be prepared to produce at the time of the trial" [*per* ALDERSON, B, in *Lawrence v. Clark*, 14 M & W 250, 253].

Objection to Notice to Produce When Can be Raised.—Where the objection is not that the document is in itself inadmissible but that the mode of proof is irregular or insufficient the objection should be taken at the trial before the document is marked as an exhibit [*Gopal v. Sri Thakurji*, A 1943 PC 83; *Subbarao v. Venkata*, A 1964 AP 53; *Collr v. Rajib*, A 1972 Or 200].

"Adverse Party".—It is doubtful if a *pro forma* defendant who has no interest in the decision of the case is an adverse party [*Durgawati v. Jagannath*, A 1929, A 680].

Effect of Refusal By Party to Produce After Notice.—If a document is not produced by a party after notice, he cannot afterwards use it as evidence (s 164). Non-production may justify the presumption that the document if produced would be unfavourable to him (Illus (*g*) to s 114 and notes *post*). Under s 89 there is also a presumption of due execution &c. of the document. If the document is produced and inspected by the party calling for it, he is bound to give it as evidence (s 163 and notes *post*).

Necessary Conditions as to Admissibility of Secondary Evidence.—If the document is in the possession or power of a party who desires to use it as evidence, he must produce and he is not relieved, by anything contained in s 66, from the necessity of producing it [*Hira Lal v. Ganesh*, 9 IA 64 : 4 A 406, 410]. Where original unregistered sale deed though not in possession of the plaintiff is yet available with another person secondary evidence cannot be admitted unless notice is given [*Purna v. Kalidas*, A 1973 Or 65]. To entitle a party to put in secondary evidence he must adopt all the means in his power to cause the production of the original; mere perfunctory efforts will not be sufficient [*Shambati v. Jogo Bibee*, 29 IA 127 : 29 C 749 : 6 CWN 682]. Where the plaintiff produced photostat copy of the alleged assessment order but no notice was given to the witness to produce the document in original nor was there any material showing that the photostat copy was made from its original, order permitting the plaintiff to produce said copy is illegal [*Rajasthan Transport Co. v. L Rs of Amritlal*, A 1998 Raj 153].

PROVISOS DISPENSING WITH NOTICE.—Notice to produce shall not be required in the cases mentioned in the provisos:—

Proviso (1): Notice of Notice. ["When the Document to be Proved is itself a Notice"].—Where the document itself is a *notice* to produce served on the opposite party, no notice is necessary. If notice were required in the case of *notices*, notices must go on *ad infinitum* [*per* LORD ELLENBOROUGH in *Phillipson v. Chase*, 2 Camp 111; *R v. Turner*, 1910, 1 KB 346, 359]. Also "on the ground that it is not necessary to give any other notice to the defendant than that which is given by the proceedings, the defendant being sufficiently warned by the issue that the plaintiff means to give secondary evidence of the contents of the notice unless the defendant produces it himself [*per* MAULE, J, in *Robinson v. Brown*, 1846, 3 CB 754, 762]. A facsimile or "counterpart original" or a notice under the Public Health Act, 1875 is admissible as secondary evidence if proper steps have been taken to excuse production of the original [*Andrews v. Wirral*, 1916, 1 KB 816].

This exception originally adopted in regard to notices to produce has subsequently been extended to other notices and now lets in proof by copies of a notice to quit [*Doe v. Somerton*, 14 LJQB 210]; of a notice of dishonour [*Swaint v. Leiws*, 2 CM & R 261], provided the action be brought upon the bill, but not otherwise [*Lanauze v. Palmer*, 31 RR 709]; notices of action, or written demands, which are necessary to entitle the plaintiff to recover [*Jory v. Orchard*, 5 RR 537; Tay s 450; Hals 3rd Ed Vol 15 para 649].

Proviso (1) does not say whether the notice dispensed with is merely a notice of a *notice to produce* or other notices included in some English cases, *ante* (*eg* notice of bill's dishonour, notice to quit, &c), although all the cases on the point are not harmonious. The phrase "is itself a notice" in the section is of wide import and permits a liberal interpretation including notices of other character, though the judge has a discretion what notice may or may not come within it. It was applied in the case of a notice of claim [*In re Sundaresa*, A 1950 M 657]. The proviso applies to a notice of suit under s 80 C P Code [*Haripada v. Prov of E B*, 5 DR 83; *Lokchand v. Union*, A 1959 Raj 231].

In America, "the phrase that 'notice to produce a notice is unnecessary' has often been used in the broad form. Nevertheless, apart from the above single instance (notice to produce a notice), most courts from time to time recognise that the case of a notice—notice to *quit, notice of dishonour*, notice of *suit* and the like—is to be governed merely by the general principle, namely where the pleading by implication give notice to produce the notice, [v prov (2)] no express notice to produce it is necessary; but otherwise it is required. Certain other principles, however, sometimes applicable, have served to confuse the precedents on this point; (*a*) If a notice is made out in duplicate, and one part is served and the other retained, the latter may be used, as a *duplicate original*, without notice to produce the former; some rulings dispose of the matter on

this principle. (*b*) If at the same time an *oral notice* or demand was uttered and a written one also was served, the oral one may be proved without accounting for the written one, because the latter's terms are not involved. (*c*) The fact of the *delivery* of a notice; irrespective of its terms, may for the same reason be proved without accounting for the writing" [Wig s 1206].

Proviso (2): Implied Notice in Pleadings. ["When From the Nature of the Case, the Adverse Party Must Know That he Will be Required to Produce it" or Charged With the Possession of the Document].—The next case in which notice to produce is unnecessary, is when from the form of pleadings, the *defendant must know* that he will be charged with the possession of an instrument and be *called upon to produce* it [*Colling v. Treweek*, 6 B & Co 398]. Thus in an action for trover for converting bond, a bill of exchange or other writing, or in a prosecution for stealing any document, the counsel for the plaintiff or the Crown may at once produce secondary evidence of its contents, even though the defendant should offer to produce the document itself [*Whitehead v. Scott*, 1 M & Rob 2]; and this exception has been recognised in an action on contract against a carrier for the non-delivery of written instruments, as also indictments for conducting a traitorous correspondence. It has, however, been held inapplicable on a charge of forging a deed [*R v. Haworth*, 4 C & P 254]. Similarly it is the necessary (though reverse) consequence of this rule that where by reason of the form of defendant's pleading, plaintiff is absolved from producing the bill of exchange or other instrument sued upon, the defendant will be unable to give secondary evidence of its contents unless he has given notice to plaintiff to produce it [*Goodered v. Armour*, 11 LJQB 56], or unless notice is dispensed with by the instrument being admitted to be in court [*Dwyer v. Collins*, 21 LJ Ex 225; Tay s 452]. "The chief instance of such a notice by necessary implication occurs where by the *pleadings* of the proponent the cause of action makes it clear that he will need to prove, as a material part of his case, the contents of a specific docu-ment in the opponent's possession" [Wig s 1205]. In *How v. Hall*, 1811, 14 East 247, 277, LE BLANC, J, said: "Where the nature of the action gives the defendant notice that the plaintiff means to charge him with the possession of such an instru-ment, there can be no necessity for giving him any other notice."

Notice is not necessary on a charge of theft of the document [*R v. Aickles*, 1 Lea 297 n. 300 *n* **approved** in *R v. Elwarthy*, LR I CC 103—CONTRA: *R v. Farr*, 4 F & F 336, where on a charge of burglary the prosecutor, though allowed to state that there was an inscription on the stolen ring and otherwise identify it, was not allowed to state the contents of the inscription, no notice having been given; *sed qu*]; or as to motor licences, on charge of driving at excessive speed [*Marshall v. Ford*, 72 JP Rep 480; *Martin v. White*, 1910, 1 KB 665; Phip 11th Ed p 754]. In a *criminal prosecution* in which the gist of the charge is an unlawful dealing with a document by the defendant, the charge is a sufficient notice to the defendant to produce the document if in his possession. It seems settled, therefore, that on a charge of larceny, or of forgery, no express notice is necessary, and this principle would also extend to other charges; but the nature of the charge will determine the application of the principle [Wig s 1205].

Notice may be rightly dispensed with when defendant denied that there was or had been a mortgage-deed at all [*Dinanath v. Rama Rai*, 6 P 102 : A 1926 P 512; see also *Indian M Bank v. Anup*, 107 IC 492 : A 1928 L 236] or an unregistered and unstamped agreement appointing them care-takers [*Chandra v. Ahalya*, A 1974 Or 199] or where defendant denied any knowledge of the execution of wakfnama by her deceased husband but told in her evidence that she might be in possession of the document but that she was not quite sure [*Amir Bi v. Nilasandara Mosque*, A 1969 Mys 103]. Where the original is in the possession or control of the party taking the objection and he fails to produce it, no notice is necessary [*Sudhakar v. Nilkantha*, A 1936 P 129; *Gopaldas v. Sri Thakurji*, 47 CWN 607, 615]. So when agreement reduced to writing is possessed by the opposite party and he knowing that he would be required to produce it, withholds it, the contents may be proved by oral evidence [*Br Transport Co v. Suraj*, A 1963 A 313]. In a redemption suit, the original deed being presumably in the possession of the defendants, the plaintiffs were held entitled to give secondary evidence (a certified copy) of the contents without notice to defendants, inasmuch as they must have known that they would be required to produce it in the suit [*Dwarka v. Ramanand*, 41 A 592 : 17 ALJ 711; see also *Bahadur v. Mahadeo*, 36 IC 696; *Baboolal v. Nathmal*, A 1956 Raj 126; *Mira v. Jai*, A 1971 Raj 303]—CONTRA: Proviso (2) does not apply in the case against a mortgagee. Secondary evidence cannot be given unless the mortgagee has been served with a notice to produce the mortgage-deed [*Maung Po v. Ma Shwe*, 84 IC 373 : 2 R 397].

Proviso (3): "When it Appears or is Proved that the Adverse Party has Obtained Possession of the Original by Fraud or Force," ***ie, in odium spolia-toris.***—The third case in which notice to produce is not necessary, is where possession of the paper, the production of which is required, has been obtained by the adverse party fraudulently or forcibly, as where, after action brought, he has received it from a witness in fraud of a *subpoena duces tecum* [*Leeds v. Cook*, 4 Esp 256; *Doe v. Ries*, 7 Bing 724]. In such case "in odium spoliatoris" a notice to produce is not required to be given to him before admitting secondary evidence of the contents of the document of which he has improperly obtained possession [Tay s 453]. *The opponent's fraudulent suppression*, of a document collusively secreted by a third person (who thus virtually acts as the opponent's agent), should exempt from the requirement of notice, because this suppression amounts to a refusal to produce [Wig s 1207].

Proviso (4): "When the Adverse Party or his Agent Has the Original in Court."—The fourth case in which notice to produce is unnecessary, is when it is proved that the adverse party or his solicitor has the original instrument in court; for the object of the notice is not, as was formerly thought, to give the opposite party an opportunity of providing the proper testimony to support or impeach the document, but it is merely to enable him to produce it, if he likes, at the trial and thus to secure the best evidence of its contents [*Dwyer v. Collins*, 21 LJ Ex 225; Tay s 456]. Where the document is at hand in the court-room, in the opponent's possession, an instant demand is sufficient, and no previous notice, *ie*, before the trial is necessary [Wig s 1204].

Proviso (5): "When the Adverse Party or his Pleader has Admitted the Loss of the Original.—notice to produce is dispensed with; for in such a case a notice would be nugatory [*R v. Haworth*, 4 C & P 254; *Foster v. Pointer*, 9 C & P 718], or it seems where the party in possession of the writing might himself give secondary evidence of its contents without producing it, as for instance, if it be an inscription or notice attached to the freehold. Under this exception, however, a party cannot call witnesses to prove the destruction of a document that has been traced into the hands of his opponent, and thus show its contents by secondary proof without serving a notice to produce, because notwithstanding evidence to the contrary the document may still be in existence, and at any rate the opponent may dispute the facts of its destruction [*Doe v. Morris*, 3 A & E 46; Tay s 455].

Proviso (6): "When the Person in Possession is Out of the Reach of, or Not Subject to the Process of the Court."—This proviso expressly declares that no notice is necessary in such a case and qualifies the provisions as to notice in the case of a person not subject to the process of the court to be found in the last para. of s 65(*a*). [As to persons out of the reach of court, see *ante*, s 65(*a*), p 617]. Here the word "person" and not "party" is used, and therefore the clause must include the case where it is impossible to serve the person in possession with notice to produce [Cunn p 160].

Where the original of a letter was in the possession or power of a person outside the jurisdiction of the court a witness was allowed to prove it by production of a copy. No notice to produce the original is necessary, nor is it necessary to prove refusal to produce the original [*Ralli v. Gau Kim*, 9 C 939]. Where defendent who was out of court's jurisdiction failed to comply with the summons to produce a letter, but his pleader appeared at the last moment, secondary evidence of the letter was admitted as defendant was out of jurisdiction and notice upon his pleader would have been nugatory [*Mellus v. Vicar Apostolic*, 2 M 295]. Where the original deed of family settlement was with a third party who was dead, certified copy may be proved without notice being issued [*Abdul Rahman v. Rameshwar*, A 1977 A 470]. The proceedings in a foreign State may be proved by an official of the court speaking to what takes place in his presence and also to an uncertified record thereof. This latter thereby becomes secondary evidence under ss 65 and 66, of the certified record, the record being a public document under s 74, is admissible without notice to the adverse party, when the person in possession of the document is out of the reach of or not subject to the process of the court [*Haranund v. Ramgopal*, 27 IA 1 : 27 C 639 : 4 CWN 429 (cited *ante*, under s 65, cls (E) and (F)].

Court's Discretion to Dispense with Notice. [Notice Also not Required "In Any Other Case in which the Court Thinks Fit to Dispense With it"].—Justice may sometimes be defeated by too rigid an adherence to the strict rules as to notice and so it has been provided that the court may in a fit case dispense with notice, *eg*, when notice is manifestly unnecessary, or when no useful purpose will be served by notice. If a party offers secondary evidence of letters

alleged to have been written and mailed by him and which his opponent denies ever having received, the rule as to notice may well be dispensed with, for no useful purpose would have been served by a previous notice, (*ie*, before trial), as the same assertion of non-receipt would have been made after notice. If the statement of the opponent is taken as false, his denial of receipt is equivalent to a refusal to produce entitling the party to give secondary evidence. Similarly when the opponent denies altogether the execution and existence of a deed, of what use is it to serve notice for production? In a case where it appeared that the original was in the possession of parties interested in opposing the plaintiff's claim, but the latter did not take any steps to call upon them to produce, it was held that there being no question of the genuineness of the document, these steps should have been waived at the discretion of the court and the document admitted under s 66 [*Hariram v. Hemnath*, 19 CWN 1068].

Secondary evidence is admissible when the party offering it cannot for any reason, not arising from his own default or neglect produces the original document in reasonable time, and under s 66 the court's power to dispense with notice when it thinks fit, is absolute [*Surendra v. Mirza Md*, 63 IA 85 : 40 CWN 226 : A 1936 PC 15; *U Po Kin v. U So*, A 1936 R 277]. The tribunal should apply its mind to the question whether the requirement of the issuance of a notice under s 66 on the owner who is supposed to be in possession or power of the original policy of insurance should be dispensed with [*The Oriental Fire and General Insurance Co Ltd, Chandigarh v. Smt Chandrawali*, A 1989 P & H 300, 304 (DB)]. When a document is in undoubted possession of plaintiff, notice is unnecessary as it is a mere formality [*Gopaldas v. Sri Thakurji*, 47 CWN 607, 615: A 1943 PC 83]. When plaintiff's deposition that the originals are in possession of the defendant is not denied by the latter, certified copies are admissible without notice [*Vishwanath v. Genu*, A 1956 B 555].

When original of a letter was not called for and oral evidence was given as to the contents of a letter without any objection and the opposite party denied having recei-ved any letter, the technical defect in its procedure can be condoned [*Prafulla v. R*, 50 CLJ 593 : 57 C 1074]. Similarly notice to addressees served after admission of secondary evidence of letters was condoned as a technical defect [*Jitendra v. R*, A 1937 C 99 SB]. Copies of the letters from the accused to his co-conspirators which were intercepted and reported were admitted in evidence without the formality of making an application to his associates to produce the originals [*Manabendra v. R*, A 1933 A 498].

Where in a redemption suit the plaintiffs alleged that the original deed was in defendant's possession and in the plaint asked the court to summon it, no formal notice is necessary and the court may dispense with it before letting in secondary evidence [*Bahadur v. Mahadeo*, 36 IC 696; see also *Dwarka v. Ramanand*, 41 A 592: 17 OLJ 711 (see *ante*, *proviso*, 2)].

Notice to Produce Essential—Whether Objection as to Want of Notice can be Raised in Appeal.—Oral evidence of the contents of a letter, neither called for nor produced is inadmissible although no objection was raised to it. Notice is essential [*Kameshwar v. Amanatullah*, 26 C 53 : 2 CWN 649; see *Prafulla v. R*, A 1930 C 209 : 50 CLJ 593]. Dissenting from *Kameshwar's* case it has been held that if no objection was taken in trial court, the question of admissibility should not be allowed in appeal [*Kishori v. Rakhal*, 31 C 155; *U Po Kin v. U So*, A 1936 R 277; see *Chimnaji v. Dinkar*, 11 B 320; *Kundanbai v. Venubai*, A 1952 N 47; *Prakasaravanan v. Venkata*, 38 M 160].

No Notice in the Case of Counterparts.—Notice to produce the original is not necessary when the document in possession of the adversary and that tendered in proof, are either *duplicate originals* or are *counterparts* executed by the opponent, or by some person through whom he claims as each such instrument is primary evidence and not secondary (see Expl. 1 to s 62 *ante*, p 600; *Haughton v. Koening*, 18 CB 235; Phip 8th Ed, p 535; Tay s 449A). When a party does not traverse in his written statement the specific allegations concerning a *patta* in his possession, he cannot object to his opponent relying on a counterpart of the document [*Raghunath v. Kishore*, A 1958 Or 260].

Consent—Waiver.—A copy of a copy of an entry in a birth register was admitted by consent—*Held*, it was admissible, as the parties may admit the contents of a document not

produced and may admit that those contents are correctly shown by any paper produced even if what is written on it purports to be fifty times a copy [*Narasayya v. Krishnamurthi*, A 1928 M 1255 [*Yatchayya v. Seetaramayya*, A 1925 M 257 approved]. An express *waiver* of notice, by agreement of counsel 'pro lite' or otherwise, suffices to exempt from notice, and there may be an implied waiver [Wig s 1207].

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

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COMMENTARY

Principle and Scope. [Authentication of Documents].—The mode of proving the contents of documents has been dealt with in ss 61-66. There still remains the most important question, *viz*, the genuineness of the documents produced as evidence, *ie*, Is a document what it purports to be? And this is dealt with in ss 67-73. The production of a document purporting to have been signed or written by a certain person is no evidence of its authorship. Hence the necessity of rules relating to the *authentication* of documents, *ie*, proving their genuineness and execution. Proof, therefore, has to be given of the handwriting, signature and execution of a document. In *Stamper v. Griffin*, 1856, 20 Ga 312, 320 (Am) BENNING, J, said:—

> "No writing can be received in evidence as a genuine writing until it has been proved to be a genuine one, and none as a foregery until it has been proved to be a forgery. A writing, of itself, is not evidence of the one thing or the other. A writing, of itself, is evidence of nothing, and therefore is not, unless accompanied by proof of some sort, admissible as evidence".

This section refers to documents other than documents required by law to be attested. It says that the signature of the person alleged to have signed a document (*ie*, execution) must be proved by evidence that the signature purporting to be that of the executant is in his handwriting (see *Venkatachala v. Thimmajamma*, A 1959 SC 443 *post*) and the other matter in the document (*ie*, its body) must also be proved by proof of the handwriting of the person or persons purporting to have written the document. Execution is proved by the first (*ie*, proof of signature) and the genuineness of the document is proved by the second (*ie*, proof of handwriting), unless they are admitted by the other side. The term "execution" is not defined in any statute. It means completion, *ie*, the last act or acts which complete a document and in English law this is known as "signing, sealing and delivering." The ordinary meaning of executing a document is signing it as a consenting party thereto [*Manmatha v. Purna*, 29 CWN 539, 552 *post*]. Ss 67-73 deal with primary as well as secondary evidence [*Sheikh Karimulla v. Gudar*, A 1925 A 56 : 82 IC 306]. As to the various modes of proving the genuineness of a document, see *ante* s 47.

S 67 does not render it necessary that direct evidence of handwriting of the person who is alleged to have executed the deed must be given by some person who saw the signature affixed. It does not appear that that was the intention of the legislature. The section merely states with reference to the deeds, what is the universal rule in all cases, that the person who makes an allegation must prove it. It lays down no new rule whatever as to the kind of proof that must be given. In that respect the rule is precisely the same as it stood before. It leaves it as before, entirely to the discretion of the presiding judge of fact to determine what satisfies him that the document is a genuine one [*per* MARKBY, J, in *Neelkanto v. Juggabundhoo*, 12 BLR Ap 18; see also *Abdool Ali v. Abdoor Rahaman*, 21 WR 429; *Ponnuswami v. Kalyanasundara*, A 1930 M 770]. Where direct evidence of the handwriting or mark of a person is not available indirect evidence may be given [*Haria v. Manakchand*, 27 IC 866; *Lahini v. Bala*, 77 IC 798 : 18 NLR 85].

S 67 does not prescribe any particular mode of proof. In addition to the usual modes handwriting may also be proved by circumstantial evidence [*Barindra v. R*, 14 CWN 1114, 1209, 1210]. Any recognised mode of proof satisfactory to the judge will do [*Karali v. E I R*, 48 CLJ 32 : A 1928 C 498]. The execution or authorship of a document being a question of fact, it can be proved like any other fact by direct or circumstantial evidence. The internal evidence provided by a document may also be of help [*Krishna v. S*, A 1956 MB 86; *Gobindram v. Abdul Wahab*, A 1963 Raj 234]. In most cases the nature of evidence will depend on the nature of the documents and the circumstances of each case. S 67 does not require any particular mode of proof that any writing or signature is in the hand of a particular person. If it is a letter, it must be proved who was the writer and who signed it. If it is an entry in a diary or note-book, its authorship must be proved, that is, it is the diary or note-book of the person whose statement it is alleged to contain. In a suit for money on account of sale of goods, the ledgers, challans and corresponding bills have to be proved to be in the handwriting of the person who has written them. [*Rukamanand Ajitsaria v. Usha Sales P Ltd*, A 1991 Gau (NOC) 108]. They must be proved by (*1*) direct evidence, *eg* the writer or a person who saw the document written and signed; or (*2*) by circumstantial evidence which may be of various kinds, *viz* (*a*) age, *ie* documents more than 30 years old [v s 90]; (*b*) custody, *ie* when a document purporting to be official comes from official custody; (*c*) official seal and signature, *ie* a document purporting to be official, bearing seal or signature; (*d*) contents of documents [v *post* p 640] or (*3*) by an expert [v s 45]; or (*4*) by the opinion of a non-expert who is acquainted with the handwriting in any of the ways mentioned in the *Explanation* to s 47 or (*5*) by comparison [v s 73 *post*]; or (*6*) by admission 1: see *ante* s 47: "*Mode of Proving Handwriting*"].

The execution of a document cannot be deemed proved merely because it is proved in the sense of the definition of "proved". That definition in s 3 must be read along with s 67 which requires that there must be specified evidence that the signature purporting to be that of the executant is in the handwriting of the executant. Until this is proved the court cannot proceed to consider whether execution is proved. In other words s 67 makes proof of execution of a document something more difficult than proof of matter other than execution of a document [*Salaik v. Tamiz*, 107 IC 564 : A 1928 A 303]. Original of the public document must be proved in the manner required by the provisions of the Act [*C H Shah v. S S Malpathak*, A 1973 B 14]. If a document is marked by consent it does not dispense with either the proof of the contents of the document or the truth or otherwise of the contents [*Karuppanna v. Rajagopala*, A 1975 M 257]. The fact that a document is exhibited only establishes that it has been formally proved. But when the execution of the document is challenged the scribe and the witnesses should be examined. Failure to examine then will result in an adverse inference being drawn [*Bhaiyalal v. Ram Din*, A 1989 All 130, 132]. As to proof of documents required by law to be attested, see ss 68-70.

"Most documents bear a signature, or otherwise purport on their face to be of a certain person's authorship. Hence, a special necessity exists for separating the external evidence of authorship from the mere existence of the purporting document. A horse or a coat contains upon itself no indication of ownership; when it is claimed that Doe wore it or rode it, all can appreciate that this element is missing and must be supplied by evidence. But a document purports in itself to indicate its authorship; and the perception that this element is nevertheless missing and must still be supplied, is likely not to occur. There is a natural tendency to forget it. Thus it has constantly to be emphasized by the judicial requirement of evidence to that effect .....The general principle has been enforced that a writing purporting to be of a certain authorship cannot go to the jury as possibly genuine, merely on the strength of this purport; *there must be some evidence of the genuineness* (or execution) of it" [Wig s 2130].

Proof of Signature and Handwriting. [Execution].—Under s 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting in the manner laid down in ss 45 and 47 [*Venkatachala v. Thimmajamma*, A 1959 SC 443]. The Act does not require any particular mode of proof, *eg* the examination of the writer of a document as a witness, nor does s 67 require the subscribing witness to the document to be produced [*Abdool Ali v. Abdoor Rahaman*, 21 WR 429 *ante*; *Lahini v. Bala*, 77 IC 798 : 18 NLR 85]. The ordinary mode of proving execution is by calling some one who saw the executant write, or who knows his handwriting or by a comparison of his signature with his signature on other documents written by him [*Dhar & Co v. Shib Narayan*, 59 IC 188]. When a signature is merely in a shaky hand but not uncharacteristic of the testator, it is an objection in which there is not much weight [*Sankarareddi v. Mahalakshmamma*, A 1922 PC 315 : 27 CWN 414; *Kameshwara v. Suryaprakasa*, A 1962 AP 178]. The execution of a document cannot be said to be invalid merely because a person who knows to sign his name executes a document by putting his thumb impression. [*Gangadhar Das v. Gadadhar Das*, A 1986 Ori, 173, 181]. A deed purporting to bear the mark of *G* as executant was attested by four witnesses who were all dead. The statement in the deed by the deceased deed-writer that the mark was that of *G* proved by the evidence of one who knew the handwriting of the deceased writer is admissible under s 32(*2*) and is sufficient proof of execution [*Abdulla Paru v. Gannibai*, 11 B 690 (*Whitelocke v. Musgrove*, 1 Cr & M 511 **follld**)]. The mere identification of handwriting of attestor does not prove execution by testator [*Kahan v. Jawandi*, A 1923 L 174]. It is not sufficient reason for admitting a plan in evidence, because a witness says that it was prepared in his presence and bears his signature, unless he deposes that to his knowledge the plan was a correct one. The person who made the measurements and prepared the plan should be called to prove it [*R v. Jora Hasji*, 11 BHCR 242].

A party seeking to prove the execution of a document is not required to prove that the executant knew the contents thereof when the executant denies having signed it and pleads foregery, but if the executant pleads ignorance then in certain circumstances it may be necessary to satisfy the court that the executant had knowledge of the contents [*Dattatraya v. Rangnath*, A 1971 SC 2548]. So where the correctness of the contents of a document is in issue, it should be proved by calling the person who executed the document. It is not sufficient to merely prove through a witness the signature or the handwriting of the person who signed or wrote it [*Madholal v. Asian Ass Co Ltd*, A 1954 B 305; *Md Yusuf v. D*, A 1968 B 112]. The signature of the executant of a sale deed must be proved before it can be admitted in evidence. A sale deed cannot be proved by mere production of the Register in which it is copied out in the registration office. The original should also be called [*Naresh v. S*, A 1955 C 398]. As to the modes of proving handwriting see *ante*, s 47.

Execution or authorship of a document is a question of fact and may be proved like any other fact [*Jhabwala v. R*, A 1933 A 690]. Without some evidence of handwriting, a letter purporting to be written by an accused cannot be held to be in his handwriting upon internal evidence tending to show that it was written by him [*per* HARRINGTON J, in *Barindra v. R, ante*]. If the contents of a complaint are not proved and the maker thereof is not examined, the complaint is clearly inadmissible as the person who hands over the complaint cannot be said to be author of the same [*Ram Singh v. Col Ram Singh*, A 1986 SC 3, 22 : 1985 (Supp) SCC 611]. A court is not bound to treat the registration endorsement as conclusive proof of fact of execution [*Jagannath v. Dhiraja*, 46 IC 279: 5 OLJ 19].

There must be on the record some evidence to show that the execution and gen-uineness of a document were proved. It is not infrequently found that most records or depositions merely contain a simple statement that a document was "proved and marked exhibit"; but the records ought to show the exact nature of the evidence offered in proof. In a suit to recover moneys unaccounted for, where defendants pleaded payments endorsed on two documents purported to have been signed by the plaintiffs, the Judicial Committee observed:—

> "In this country, or in any country where the administration of justice is conducted with any degree of formality and regularity, one would have expected that these documents had been put into the hands of the plaintiffs; and that they had been called upon to admit or deny their alleged signatures, and that the proof of these documents to be given by the defendants would have been far more specific than a mere statement that they were identified and verified, as the judge says, by the witnesses; the witnesses would have been called upon to state whether they saw *BS* sign the first, or *BS* and *J* sign

the second, or, if not, whether they could speak to the handwriting, and generally what took place on the two occasions on which the accounts are vaguely said by one of the witnesses to have been adjusted" [*Gunga Pd. v. Inderjit*, 23 WR 390 PC].

In another case it has been emphasized that the suggestion that the names or signatures were written out by the persons themselves under the date which appears at the heading of the paper is not enough. A paper does not prove itself. Witness must be produced to identify the signature.....The next essential step is to show that the signatures were in fact those of the persons whose names so appeared. This is done in most cases by producing the writer himself or if unavailable by other modes of proof. A document purporting to have been signed by acussed in token of their attendance, must be proved in the manner laid down in s 47 [*Bawa Sarup v. R*, 88 IC 22: A 1925 L 299].

An illiterate person cannot ordinarily prove a writing or signature made by another person. But a person knowing the language in which a document is written can identify it with certainty and when he has seen another person making a writing, he can prove that writing without knowing the language in which it was written [*Bheek-chand v. Parbhuji*, A 1963 Raj 84; *Ram Ch v. Jaithmal*, A 1934 A 490; *Bhanwar v. Ahmed*, A 1977 Gau 27].

The mere fact that an attesting witness does not remember the place or execution or of order of attestation is no reason for disbelieving him [*Bishwanath v. Kayastha T B Co*, 8 P 450]. An attesting person does not fail to prove execution within ss 67 and 68 merely because he is unable to point to the signature or mark of the executant. He may not know the script in which the executant signed or he may have attested on receiving acknowledgement from the execution of his signature or mark [*Raizulnisa v. Puran*, A 1944 O 40].

A certificate from a club-secretary of being in the service of the club on a certain date is inadmissible without production of the writter in court [*Peter v. Md Idoo*, 22 IC 654]. A hospital bed-head ticket is not admissible unless the doctor writing it is examined [*Bechu v. R*, A 1949 C 613]. A certificate by a doctor is hearsay and not admissible unless he is called as a witness (*ante*, s 45: "*Mere certificate of medical man or expert*"). A document does not prove by itself, nor is an unproved signature proof of its having been written by the person whose signature it purports to bear [*Sarojini v. Haridas*, 26 CWN 113]. The existence of a document is distinct from its execution. The mention of a risk-note in a railway receipt does not relieve the Railway from proving the due execution of the risk-note [*Manilal v. Union*, A 1956 P 434].

The method of calling somebody familiar with the handwriting is not available when the executant is a marksman. The signature of the attesting witness will in such a case be evidence of everything on the face of the document and that he saw the executant make his mark [*Ponnuswami v. Kalyansundara*, 57 M 662]. On the question whether the signature on a certain document was genuine, the opinion of the trial court who saw the witnesses should not be lightly disturbed [*Bhagwan v. Ujagar*, 32 CWN 538: A 1928 PC 20]. The signature on the original document cannot be proved by merely producing a certified copy [*Shivlal v. Chetram*, A 1971 SC 2342].

§ As to mode of proving signature and writing, see also ss 45, 47 and 73. As to the presumption in the case of a document more than 30 years old, see s 90.

Meaning and Proof of "Execution".—"Executed means completed. 'Execution' is, when applied to a document, the last act or series of acts, which complete it. It might be defined as formal completion. Thus, execution of deeds is the signing, sealing and delivering of them in the presence of witnesses. Execution of a will includes attestation. In each class of instruments we have to consider when the instrument is formally complete" [*per* FARRAN J, in *Bhawanji v. Devji Panja*, 19 B 635, 638]. Execution consists in signing a document written out and read over and understood and does not consist of merely signing a name upon a blank sheet of paper. To be executed, a document must be in existence; where there is no document in existence, there can be no execution [*Shk Ebadatali v. Md Fareed*, A 1916 P 206; *Sayyaparaju v. Koduri*, A 1950 M 239; see however *Yule v. Ram Khelawan*, 6 CWN 329 which, as pointed out in *Jogesh v. Ram Ch*, A 1950 P 370 is *obiter*]. 'Execution' does not mean merely signing. It should be accompanied by the intention to give effect and operation to the instrument signed

[*Abdul Hasan v. Wajibunnissa*, A 1948 P 186; *Sundar v. Lalji*, A 1933 P 129]. For the purpose of the Stamp Act 'executed' and execution are defined in s 2. Execution there means signed [*In re Chet Po*, 7 LBR 77; *Shams Din v. Collr*, 17 L 223]. All the stamps on which a document is written need not be signed by the executant [*Mathra v. Shamboo*, A 1929 L 203]. In the case of documents required by law to be attested execution includes proper attestation (see s 68 *post*: "*Attestation and Execution*").

"The ordinary meaning of 'executant' is fairly clear.....The ordinary meaning of executing a document is signing a document as a consenting party thereto.....The man whose name has been put to the document as evidencing his assent thereto is the executant for the purposes of the section (s 35 Regn Act)....In the case of *bakalam* signature, such as we have here, a person whose name is put with his authority in evidence of his assent to a document, is "executant" within the meaning of s 35" (*per* RANKIN J, in *Manmatha v. Puran*, 29 CWN 539, 552. **Affirmed** in *Puran v. Man-matha*, 55 IA 81: 55 C 532: A 1928 PC 38 holding that "A document is executed, when those who take benefits and obligations under it have put or caused to be put their names to it. Personal signature is not required"). To say that 'a document was signed by *A'* and that 'a document was executed by *A'*, may mean somewhat different things. The former would convey the meaning that the act of signing was performed personally by the maker while the latter imports that the maker signed it himself or authorised some one to sign for him. Further "person executing" mean something more, *viz*, the person who by a valid execution enters into obligation under the instrument [*Basaruddi v. Khoshali*, A 1944 C 67].

When the executant is illiterate he usually gives his thumb-impression or mark which is described as such by the scribe or the person writing for him. The latter places the name of the executant against or below the mark and authenticates it by his own signature. Sometimes the executant touches the pen of the writer in token of the mark or signature appended thereto being the signature of executant. The insertion of the name, in any part of the writing, in a manner to authenticate the instrument is sufficint. Although the signature be in the beginning or middle of the instrument it is binding as if at the foot of it. [*Smt Har Kaur v. Gura Singh*, A 1988 P&H 41, 42 : ILR (1987) 1 P&H 93].

When a document bearing a thumb mark has to be proved it is not necessary that the person proving the affixation of the mark should be able to identify the thumb mark. It is enough if he can identify the document on which the mark was affixed [*Bheekchand v. Parbhuji*, A 1963 Raj 84].

A document executed by a pardanashin or illeterate woman besides being formally proved must in addition be proved that the contents were read over and explained [*Kali v. Brundaban*, A 1972 Or 132]. Mere proof that the person's signature appears on the document cannot, by itself, amount to execution of the document. If an illiterate person affixes his thumb mark to a document, the onus to prove that the document was properly explained to the person affixing his thumb mark so as to make him understand its true import, is on the person relying on the document. [*Ramjan Khan v. Baba Raghunath Dass*, A 1992 MP 22, 27].

There is a *prima facie* presumption that documents have been executed on the day they bear date [*Anderson v. Weston*, 6 Bing NC 300]. If there is no date, it may be supplied [*Lobb v. Stanley*, 5 OB 574] or if the date is wrong, oral evidence may be given. The English system of executing document at the foot does not usually obtain amongst Indians. Their custom is to execute the document at the top. Ordinarily the signature of the executant appears at the top right hand corner and when he executes the document himself and not by an attorney, he is accustomed to write "by my own pen" [*Sabitri v. Savi*, 19 CWN 1297]. The evidence of the attesting witnesses that the testator signed the Will in their presence and they also attested the same is sufficient proof [*Smt Manorama Srivastava v. Smt Saroj Srivastava*, A 1989 All 17, 29]. This provision applies to proof of Will also. However proof of Will is somewhat different

in as much as the testator will be no more than in the world to depose about his own signature or about what has been depicted or written down in the will. [*Vijayben Vashsam v. State of Gujarat*, A 1989 Guj 75, 79 (DB): (1988) 29 Guj LR 1412]. Execution of a Will has to be proved just like any other document [*N D Samat v. Kumari Jayashree Roy*, A 1989 NOC 189 (Ori) : (1989) 1 Ori LR 345 (DB)].

—Whether Registration is Proof of Execution.—Mere registration of a document is not itself sufficient proof of its execution [*Salimatul v. Kolyashpati*, 17 C 903 (*Kristonath v. Brown*, 14 C 176, 180 **dissented** from); *Munnan v. Najnum*, 11 IC 50; *Naresh v. S*, A 1955 C 398: 59 CWN 757; *Lourembam v. Lalaram*, A 1979 Gau 68; see also *Fazzul Hossein v. Amjud Ali*, 17 WR 423; *Doolee Chand v. Oomda*, 18 WR 238; *Jagannath v. Dhiraja*, 46 IC 279. But see *Nityananda v. Bullub*, 25 WR 267 where it has been held that a mere registration of a document is *prima facie* proof of its execution]. When no other evidence is available, certificate of registration is *prima facie* evidence of execution [*Kangabam v. Gurumayum*, A 1958 Manipur 16; *Irudayam v. Salayath*, A 1973 M 421]. Registration of document is some evidence of its execution by executant [*Hutchegowda v. Chennigegowda*, A 1953 My 49—cases discussed]. When execution is challenged registration is not sufficient proof but proof complying with s 67 is necessary [*Bhutkani v. Kamaleshwari*, A 1972 A&N 15]. Certificate by registering officer under s 60 Registration Act is relevant for proving execution [*Piari v. Fattu*, A 1929 L 711: 116 IC 91; *Shk Moula Buksh v. Dharamchand*, 65 CWN 881]. The decision in *Piari's case*, *ante* is based on *Gangamoyi v. Troilukhya*, 33 IA 60: 33 C 537: 10 CWN 522 where the Privy Council simply stressed on the "solemn act" of registration without anything more; (*see also Ehtisham v. Jamna*, 48 IA 365: 27 CWN 8: A 1922 PC].

It has been held in Bombay that certificate of registration is not by itself sufficient to prove due execution as required under s 67. The effect of registration is only to prove an admission to the registration [*Ramkrishan v. Md Kasam*, A 1973 B 242; *Maruti v. Dattu*, A 1923 B 253; *Bulaki v. Chotu*, A 1942 N 84: 1942 NLJ 214; dissented from in *Putti Lakshmayya v. Garlapati*, A 1958 AP 720]. Value of Registrar's certificate that testator admitted execution [*Kameshwar v. Suryaprakasa*, A 1962 AP 178]. More than a mere admission of signature is needed to amount to admission of execution of a document within s 35 Registration Act [*Sayyaparaju v. Koduri*, A 1950 M 239]. Mere proof of admission of execution before Registrar does not prove execution [*Lourembam v. Lalaram*, A 1979 Gau 68]. In a case (**relying** on the observation in *Gopal v. Sri Thakurji*, A 1943 PC 83, 87: 47 CWN 607) it has been held that in regard to document not required to be attested, registration is some evidence of execution against party making admission of execution [*Kalu v. Bapurao*, A 1950 N 6]. The presumption of execution under s 60(2) Registration Act is raised when it is not possible to prove execution in the way laid down in s 67 owing to the death of the marginal witnesses or other reason, but not otherwise [*Indernath v. Nandram*, A 1957 Raj 231].

Proof of Execution or Attestation by Mark.—(See *post* s 68: "*Whether there can be Attestation by Mark*" and "*Signed.....Execution by Signature and Mark*").

—Proof of Documents by Reference to Contents. [Illiterate's Letter, Unsigned Letter, Typewritten Letter, etc].—It has been seen that the usual mode of proving a document is by calling the writer or by the testimony of persons who are acquainted with the handwriting in question. But this method of proof is not always available, *eg* when a letter purporting to be from *A* is received and it is not known who wrote it, or when an unsigned or an anonymous letter is received, or when an illiterate person gets his letter written by another person. In special cases like these when it is not

possible to get handwriting testimony, a document is sometimes regarded as evidenced by its contents. The internal evidence afforded by the contents is accepted as authentication, *eg* when it states facts and circumstances which are found to be accurate and which could have been known only to the person to whom the authorship is attributed. This is known as Authentication by Contents and the rule is thus explained by Wigmore:

> "If Doe is the sole person who knows the circumstances of an interview, and if a letter arrives purporting to be from Doe and stating those circumstances, and the statement appears by subsequent developments to be accurate, it would be a simple matter, for the law as for common sense, to deem that sufficient evidence of Doe's authorship had been furnished" [Wig s 2148]. But as more than one person may have knowledge of the facts narrated in the letter and other circumstances, and as such other persons who may be hostilely disposed have a motive for fabrication, the rule has to be applied with caution. It is therefore "generally conceded that the mere *contents of a written communication*, purporting to be a particular person's, are of themselves not sufficient evidence of genuineness. Only in special circumstances, where the contents reveal a *knowledge* or other trait peculiarly referable to a single person, could the contents alone suffice" [Wig s 2148].

A publisher in *M.* received an anonymous letter notifying him that the writer would send to him a paper of a certain description; subsequently such papers in the same hand, came to him by mail, and were published; the question being whether this publication in *M.* was authorised by the defendant, the correspondence of the papers with the description, and the defendant's handwritings similarity to that of the libels and the similarity of the handwriting of the libels and the original letter, were held sufficient [1805, *R v. Johnson*, 7 East 65].

An *illiterate's letter* is an instance of the impossibility of obtaining handwriting testimony. In *Singleton v. Bremer*, Harp 201, 209 (Am), NOTT, J, said: "But that (handwriting testimony) could not be expected in this case, as the party cannot write. Even if her name had been subscribed to the letters, the difficulty would not have been lessened. Some other method must therefore be resorted to, and why may not the letters be looked into? If they furnish internal evidence of the source from whence they were derived, I can see no reason why we may not avail ourselves of that evidence. Thus, for instance, if they relate to facts which cannot be known to any other person, it will be presumed that they were written by her authority. If they embrace a number of facts which relate to her and her situation, and which cannot apply to any other person, each of those facts constitutes a link in the chain of circumstances which go to strengthen the presumption." If an illiterate person affixes his thumb mark to a document, the onus to prove that the document was properly explained to the person affixing his thumb mark is on the person relying on the document. [*Ramjan Khan v. Baba Raghunath Dass*, A 1992 MP 22, 27].

Proof by internal evidence afforded by the contents of a document may be of considerable value when the disputed document purports to be a link in a chain of correspondence, some links in which are proved to the satisfaction of the court [*Mobarik v. S*, A 1957 SC 857: 1958 SCR 328; reld on in *Snow White &c v. Sohanlal*, A 1964 C 209]. An unsigned letter by a daughter to her father whose contents indicated unmistakably that it was from her, was admitted in evidence [*Sofia Begum v. Syed Saheer*, A 1947 A 16, 17].

"The case of an amanuensis using a *typewriter-machine*, presents a similar impossibility, whenever the signature (as sometimes happens) is also typewritten or stamped; and it would seem that a similar necessity justifies a resort to evidence from

contents. In *S v. Fresh-water*, 1906, 30 Utah 422, typewritten letters were sufficiently evidenced by contents, &c, and in *Maynard v. Bailey*, 1920, 102 S.E. 480, a typewritten letter proposing a bribe, was admitted as by the plaintiff, on evidence of its contents, &c." [Wig s 2149]. The discretion in all such cases no doubt rests with the trial court as to whether the internal evidence as to the contents bears sufficient and reliable indication of authenticity. It is said that no two typewriters produce impressions which are exactly alike and authorship may also be traced if the services of experts in the line may be secured (see *ante*, s 45, "*—Typewriting specimen*").

"Duly Proved" in S 162 Cr P Code.—S 67 applies to statements that are required to be "duly proved" in s 162 Cr P Code [*R v. Vithu Balu*, 28 Bom, LR 965]. See further *post*, s 145: "*Duly proved*".

Proof of Rent Receipts.—Where genuineness of rent receipt was sworn to by the tenant who paid the rent, it was legally sufficient to prove it notwithstanding that the person whose signature it bore had not been examined [*Abdul Samad v. Gunendra*, 82 IC 974: A 1925 C 452; *Surya v. Baneshwar*, 24 C 251]. Rent receipts not properly proved are admissible to corroborate the statement of a person that they were brought home to her by her husband, who said that they were rent receipts [*Ambika v. S*, A 1961 A 38; Pronote and receipt executed by the defendant were stamped and were written in Hindi. He signed these documents at several places. The execution of these documents was proved when witnesses testified that this document was signed in their presence after receipt of loan in cash. [*Babban v. Shiv Nath*, A 1986 All 185, 187 : 1986 All CJ 130] also see *ante* s 32(2): "*Dakhilas or rent-receipts*"].

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

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

[1][*Provided* that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the [2][Indian Registration Act, 1908], unless its execution by the person by whom it purports to have been executed is specifically denied].

SYNOPSIS

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* **S. 67A inserted by the Information Technology Act, 2000.**

1. Proviso added by s. 2, I E (Am) Act, 31 of 1926.
   In Ceylon the proviso has not been inserted.
2. In Pakistan "Indian" omitted. In Burma "Indian" and "1908" omitted.

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COMMENTARY

Principle and Scope. [Reason of the Rule].—This section and ss 69 to 71 deal with the proof of documents required by law to be attested. Unattested documents or documents which though attested are not required by law to be attested, may be proved in one of the various modes referred to before (s 67). The latter class of documents may be proved as if they were unattested (s 67). But the law is very strict in regard to documents required by law to be attested. "The general notion of preference which insists that a particular witness shall be called before another can be called rests on the supposed excellent position of that particular witness to obtain knowledge of the matter more accurately than any other person. His *opportunities of knowledge*, it must be supposed, have been not only better than those of others, but so much better that it would be a palpable risking of injustice to proceed in the trial without endeavouring to obtain him" (Wig s 1286. As to the history of the rule requiring the calling of attesting witness, see Wig ss 1287, 1288).

The section lays down that documents required by law to be attested shall not be used as evidence unless at least one attesting witness is called to prove its execution, if he is alive and subject to the process of the court. This is not the same thing as saying that a

document required to be attested by more than one witness shall be proved by the evidence of only one witness. S 68 only lays down the mode of proof and not the quantum of evidence required. More than one attesting witness may be necessary to prove a document according to the circumstances of a case (*post*: "*Until One Attesting Witness At Least has been Called*").

The reason for calling an attesting witness is not, as is sometimes supposed, that proof by the attesting witness is the *best evidence*, but that he is the witness appointed or agreed upon by the parties to speak to the circumstances of its execution, an agreement which may be *waived* for the purpose of dispensing with proof at the trial, but cannot be *broken* [*Whyman v. Garth*, 8 Ex 803; Phip 11th Ed p 718]. "It is not on the ground that his is the best evidence;.....but because he is the witness agreed upon between the parties" [CRESWELL J, in *Geralopoulo v. Weiler*, 10 CB 690, 696]. Wigmore criticises the reason on the ground that "no such agreement can be implied, particularly when attestation is required by law. Moreover, were such the reason, the rule would not apply between others than the parties to the document,—which is not the law" [Wig s 1288]. Another reason suggested is that the opponent is entitled to the *benefit of cross-examining* the attesting witness as to the circumstances of execution, *ie* fraud, duress, or other matters of defence [ASHHURST J, in *Abbot v. Plumbe*, 1 Doug 216; LE BLANC J, in *Call v. Dunning*, 4 East 54]. This reason is also criticised by Wigmore on the ground that "the rule applies even where fraud, duress, and time are not in issue, and even where the maker himself is competent as a witness. Again, the attestor is in practice, not usually a person who knows anything about the circumstances preceding the document's execution, or knows more than any other person who by being present would be a qualified witness" [Wig s 1288].

Precaution against forgery, non-existence of special hardship in obtaining the attesting witness, the attestor's testimony being the most desirable and trustworthy evidence as to the fact of execution of documents by illiterate persons who are dead and the fairness of placing the burden of producing the attesting witness upon the party of whose case it is a part to prove the due execution and attestation—are the reasons attributed by Wigmore [Wig s 1288]. The object of requiring an attesting witness is that when the factum of the document comes into question, it may be years afterwards, the document shall be proved by the evidence of witnesses who have this to vouch for truth of their evidence—the consideration that not only do they now say that at the time when they were present they saw and witnessed the execution, but they are able to go on to say: "I put my signature on the instrument at that time by way of saying then what I am saying now, namely, that it was executed and that I saw it 'executed'" [*Abinash v. Dasarath*, 48 CLJ 281: A 1929 C 123]. S 68 deals only with the mode of proof. It has nothing to do with the question about the legality or validity of the instrument itself as an effective document of title, if there has been no proper attestation as required by law [*Bahadur v. Lakshmi*, A 1930 A 669].

Under the Proviso (added in 1926) the rigour of the rule has been relaxed to some extent, and it is not necessary to call an attesting witness (except in the case of a registered Will), unless the execution of the document is "specifically denied." When all the attesting witnesses are dead or incapable of being called for giving evidence, or when the document purports to have been executed in the United Kingdom, secondary evidence of attestation, *ie* by proof of handwriting of signature of any one of them (under s 47 or s 73) may be given (s 69). This section should be read with s 70 which is in the nature of a proviso. When an attesting witness denies or does not recollect execution, s 71 comes into play and other evidence (as laid down in s 67) is admissible. Under s 68 it is not necessary that an attesting witness should *prove* execution; it requires that an attesting witness must be *called* to prove execution, but if he forgets or pretends to forget or denies execution or proves hostile, it may be proved by other evidence under s 71 [see *Bashiran v. Md Husain*, 16 Luck 615: A 1941 O 284; *Sarjoo v. Jagatpal*, 1941 OWN 1298: A 1942 O 201].

[The English law on the subject has been thus stated by Taylor:—The general rule which requires the production of an attesting witness, when the validity of an instrument depends upon its formal attestation, is so inexorable that it applies even to cancelled or burnt deed; and also to one, the execution of which is admitted by a party to it; and that too, though such admission be deliberately made, either in open court or in a subsequent agreement or even in a sworn answer to interrogatories delivered to a party in the cause....So also, the attesting witness must be called, though subsequently to the execution of the deed he has become blind; and the court will not dispense with his presence on account of illness, however, severe. If the indisposition of the witness be of long standing, the party requiring his evidence should have applied for power to examine him before a commissioner or examiner, and if he be taken suddenly ill, a motion must be made to postpone the trial [Tay s 1843].

—Change of Law in England.—The law in England as to the strict proof of an attested document by calling one or more of the attesting witnesses has been considerably altered by the Evidence Act, 1938 (1 & 2 Geo 6 c 28), s 3 proviso. Under this law, except wills and other testamentary documents, instruments which are required by law to be attested, instead of being proved by an attesting witness, may be proved as if no attesting witness were alive; that is by proof of an attestator's handwriting. The introduction of such law is overdue in India, and the continuation of the former English law leads to avoidable perjury in many cases.

—Exceptions to the Rule Requiring Production of Attesting Witness.—The rule embodied in s 68 that a document required by law to be attested must be proved by calling one of the attesting witnesses is, however, subject to certain exceptions:—

(*1*) When a party to an attested document has *admitted* its execution *for the purpose of the trial* [v s 70].

(*2*) When the opponent by his prior conduct is *estopped* from denying execution. The adverse party may be estopped from disputing the document by recital in a deed to which he is a party and under which he has acquired some benefit on the faith of the document recited being valid [*Bringloe v Goodson*, 5 Bing NG 738; Tay s 1849, Phip 11th Ed p 722] or by a failure to plead in denial of execution.

(*3*) When the document is proved to be in the *possession of the adverse party, who refuses to produce it after notice* [v *ss* 65, 89; *Cooke v. Tanswell*, 1818, 8 Taunt, 450; *Poole v. Warren*, 1838, 8 A & E 588]. On refusal to produce, the party may give secondary evidence without calling the attesting witness. In such a case execution and attestation are presumed by the court [s 89] unless and until it is disproved. The person refusing to produce the document, cannot be allowed to rebut the presumption by subsequent production without the consent of the other party or the order of the court [s 164].

(*4*) When although producing it, the *opponent claims and interest under the same instrument in the cause*, because his claim of interest predicates an admission of its validity or genuineness [*Rearden v. Minter*, 5 M & G 204; *Doe v. Cleveland*, 9 B & C 864, 869: see Tay s 1848 and Wig s 1297]. The interest must be still subsisting at the time of the trial [*Fuller v. Pattrick*, 18 LJQB 236].

(*5*) When the document is *thirty years old* [s 90]. Here also the court may presume attestation and dispense with proof.

(*6*) When the document is tendered against a public officer, who is bound by law to have it executed and who has dealt with it as a document duly executed [*Plumer v. Briscoe*, 11 QB 46; *Bailey v. Bidwell*, 1844, 13 M & W 73; Tay s 1850].

(*7*) When the attesting witness has signed the instrument merely in pursuance of a rule in some court and such court has subsequently recognised the validity of the instrument by acting upon it [Tay s 1846].

(*8*) When no *attesting witness is available* on account of physical or legal obstacle. The cause of unavailability may be death, imprisonment, insanity, dangerous illness or infirmity, blindness, absence from jurisdiction, &c [s 69 *post*], failure to find after honest and deligent search [*Cunliff v. Sefton*, 1802 East 183; *Crosley v. Percy*, 1 Taunt 364]; absence from trial by collusion with the opposite party [*Egan v. Larkin*, 1942 Arm M & R 403; *Spooner v. Payne*, 4 CB 328. "I will watch very narrowly your proof of search.....if the attesting witness knows too much of the transaction, and his examination would hazard the validity of the deed, he may be sent out of the way, and we may be amused at the trial with an account of his being absconded"—*per* ELLENBOROUGH LCJ, in *Wardell v. Fermour*, 2 Camp 283].

(*9*) When the attesting witness *does not recollect* or *denies* the execution (v s 71 *post*).

(*10*) When the attesting witness *refuses to testify*. "(*a*) Where the attestator is *Privileged* not to testify, and is thus not compellable, the proponent should be excused from production [*Cf* similar case of privileged documents, ss 130, 131]. (*b*) Where the attestor, though *not privileged*, nevertheless refuses to testify, the proponent should be excused, provided it is made to appear that there is no collusion" [Wig s 1317].

(*11*) Under the proviso to the section it is not necessary to call an attesting witness in proof of any document not being a registered will, *unless its execution is specifically denied*. A probate granted by a competent court, is sufficient evidence of the validity and contents of the will and attestation need not be proved [s 91 Excep 2].

(*12*) Under the Merchant Shipping Act, 1894, 57 & 58 Vic c 60 s 694 documents requiring attestation, may be proved without calling attesting witnesses.

(*13*) It is unsettled whether the attesting witness can be dispensed with in the case of deeds *executed by corporations* before 1926 or *enrolled under statute* and tendered against persons other than those on whose acknowledgment they have been enrolled [see Tay ss 1852-53; Phip 11th Ed pp 722-23].

(14) A document, execution of which is admitted by the plaintiff, can be allowed on the general law of evidence although its attestator is not called to prove its execution [*Boonsom Boonyanit v. Adorna Properties Sdn Bhd*, (1995) 2 Malayan LJ 863 (Penang HC)].

—Loss or Destruction or Original.—This section is not clear whether the attesting witness, when producible, must be called, if the original document itself is not forthcoming by reason of loss or the like, and is therefore not itself "used as evidence" but secondary evidence is offered of its contents under s 65 [Field, 6th Ed p 237]. In England, however, the rule requiring the production of attesting witnesses, provided their names are known, holds although the document is lost or destroyed [*Keeling v. Ball*, 1796, Peak Add Cas 88: *Giles v. Smither*, 2 Stark R 528]: or cancelled [*Breton v. Cope*, 1791, 1 Peak 43, 44]. The law does not appear to be otherwise in India. The loss or destruction of a document may necessitate the giving of secondary evidence to prove its contents, but if it is a document required by law to be attested, so long as an attesting witness is available, he must be called [see *Sheikh Karimullah v. Gudar*, 82 IC 306: A 1925 A 56; *Jadunath v. Isar*, A 1939 P 47: 178 IC 198]. Where both the document is lost and the attesting witnesses are dead, s 69 will govern the situation [see *R v. St Giles*, 1 E & B 642].

—S 68 is Imperative.—The rule is s 68 is mandatory and cannot be relaxed except under circumstances provided for in the Act itself [*Jaikaran v. Pratap*, 43 CWN 1084: A 1040 C 169; *Vedachala v. Ameena*, A 1944 M 131]. S 68 is imperative. Merely taking out summons and warrant against the attesting witness is not exhausting all the processes of the court as contemplated by Or 16, r 10 [*Piari Sundari v. Radha Krishna*, 27 CWN 60n]. In order that a case may attract the operation of s 69, the processes of the court in Or 16 r 10 have all got to be exhausted. S 68 is mandatory and is not controlled by s 90 [*Gobinda v. Pulin*, 31 CWN 215: A 1927 C 102; *Amal v. Dacca C H S Ltd*, 49 CWN 377 : A 1945 C 350; *Shahzadi v. Syed Md*, 7 P 312: A 1928 P 356; see also *Sudhanaya v. Gour*, 27 CWN 134: 35 CLJ 473]. So long as there is a witness alive and subject to the process of the court, no document shall be used as evidence until one such witness is called. The fact that, when called, he will prove hostile does not excuse the plaintiff of his duty [*Tula Singh v. Gopal*, 1 PLJ 369; *Gobinda v. Pulin*, 31 CWN 215; *Peda v. Vantabattina*, 34 LW 663; *Kalicharan v. Surajbali*, A 1941 O 89, *Ramratan v. Bittan*, A 1980 A 395]. Even if the only living attesting witness is a defendant, plaintiff is bound to sommon him [*Dhira v. Moti*, 63 IC 266: 2 PLT 614]. Evidence of attestors to mortgage-deed is indispensable unless it is impossible to produce them. S 68 must be observed even when secondary evidence is given [*Sheikh Karimullah v. Gudar*, A 1925 A 56]. S 68 is complied with when one attesting witness is produced and from mere failure to produce both attesting witnesses it cannot be inferred that the other is being intentionally held back [*Lachmi v. Zahirul*, 76 IC 772: A 1923 N 322]. The right of the court to presume under s. 90 is not controlled or curtailed by s. 68 when the ancient document has been acted upon by the particles [*Probhat Chandra v. Sm Rani Bala*, A 1989 Cal 202, 205 (DB)].

Attestation and Execution.—It was held in a case that the intention of ss 68, 69 was that if their provisions as to proof were complied with, the document must be considered proved, and that it was not required that it must be proved further that the document was in fact signed in the presence of at least two attesting witnesses [*Ram Dei v. Munna Lal*, 39 A 109: 14 ALJ 104; *Dhiren v. Bhutuki*, A 1972 Gau 44; see also *Shib Dayal v. Sheo Ghulam*, 39 A 241, where the attesting witness did not say that any other attesting witness was present at the time of the execution]. But in some cases it was ruled that proof by attesting witnesses of not merely the execution but also the attestation by two witnesses is necessary under the section [*Venkata Reddi v. Muthu Pambulu*, 39 MLJ 463: 58 IC 101; *Tulsi v. Chethree*, 18 CLJ 48; *Thanneru v. Bommadevera*, (1912) MWN 747—*per* WALLIS, CJ; *Lachman v. Surendra*, 54 A 1051 FB *post*; *Karri v. Putra*, A 1974 AP 13]. This view is undoubtedly the correct one. The section no doubt speaks of "proving its execution"; but under s 59 of the T P Act, the actual execution must be seen and attested by at least two witnesses [*Shamu Pattar v. Abdul Kadir*, 35 M 607: 39 IA 218—a decision before the insertion of the definition of 'attested' in s 3 T P Act and which has been superseded to this extent only that attestation on acknowledgment has now also been made valid].

'Attestation' and 'Execution' are different acts one following the other [*Dhiren v. Bhutuki*, A 1972 Gay 44]. In the case of documents whose attestation is not compulsory, proof of execution under s 67 is enough (*ante*); but in the case of documents required by law to be attested, *eg*, will mortgage, gift, &c. 'execution' must include both execution and attestation as without proof of the latter such documents are not legally valid. In these cases there can be no valid execution without due attestation and if due attestation is not also proved, the fact of execution is of no avail. It has, therefore, been held in numerous cases that in the case of documents which are compulsorily attestable, execution means something more than

mere signing. It includes delivery and signing in the presence of witnesses, or on personal acknowledgment of execution by executant. It includes the whole series of acts or formalities which are necessary to give the document validity [*Arjun v. Kailasa*, 27 CWN 263: 36 CLJ 373; *Harinath v. Nepal*, 1937, 1 Cal 507, 512: 41 CWN 306; *Ebrahim v. Akshay*, 40 CWN 151; *Hare Krishna v. Jagneswar*, 43 CWN 1025: A 1939 C 688; *Kalicharan v. Surajbali*, A 1941 O 89; *Jhama v. Deobux*, 2 NLR 10; *Baliram v. Kamalja*, 78 IC 330: A 1924 N 367; *Sams Din v. Collr*, 17 L 223]. Where a mortgagor denies his signature it is not sufficient to prove the handwritting. It must also be proved that he affixed his signature in the presence of two witnesses [*Arjun v. Kailash, sup*; see also *Ganga Pd v. Ishri Pd*, 45 IA 94: 45 C 748: A 1918 PC 3, the principle of which is that there should be not only proof of execution but also of valid attestation].

Attesting witness deposing that the defendant executed the bond and that he and other witnesses witnessed the execution is sufficient to satisfy the requirement of valid attestation [*Kishore v. Ganesh*, 1954 SCR 919: A 1954 SC 316: 33 P 313]. It cannot be laid down that because the witnesses did not state in examination-in-chief that they signed the will in the presence of the attestor there was no due attestation. Whether they signed in the presence of the executant is a question of fact depending on the circumstances of each case [*Naresh v. Paresh*, A 1955 SC 363: 1955 SCR 1035]. Where the witnesses said that the will was executed in their presence and they signed as attesting witnesses, it did not matter if they omitted to say that the testator signed in their presence [*Gori v. Munshi Ram*, A 1956 Pu 145].

[*Ref Tay ss 1843-57; Wig ss 1278-321; Phip 11th Ed, pp 720-23, Halls, 3rd Ed, Vol 15, paras 814-16; Jones, ss 527-36*].

"Required by law to be Attested".—This section applies only to cases where a document is required to be attested in the manner provided by law [*Mathura v. Chhedi Lal*, 13 ALJ 553: 29 IC 363], *eg* mortgages, wills, gifts, &c. If an instrument which, though attested, does not depend upon attestation for its validity, it is unnecessary to prove it by calling an attesting witness. Sale-deeds, bonds, &c do not come within the rule and they may be proved by the evidence of any other witness who saw execution though he is not an attesting witness. A money bond [*Ramdat v. Lalta*, A 1948 O 258] as a surety bond creating a mere money or personal liability does not require to be attested [*Sanatan v. Dinanath*, 26 C 222]. If a document which is not required by law to be attested is attested, it may be proved as if it was unattested by the evidence of any person who saw execution, *eg*, bond, sale-deed &c [s 72, *post*]. The words "required by law to be attested" in s 68 means required by law of the country where the property is situate [*Toomey v. Bhupendra*, 7 P 520: A 1927 P 304].

Following are some instances of documents required by law to be attested:—(*1*) Wills made by persons other than Hindus, Mahomedans, or Buddhists after 1st January, 1866. See ss 58 and 63 of Act 39 of 1925 (Indian Succession Act); (*2*) Wills made by Hindus, Jains, Sikhs and Buddhists after 1st September, 1870 (s 57, Act 39 of 1925); (*3*) A mortgage, the principal money secured by which is Rs. 100 or upwards (see s 59 of the Transfer of Property Act, Act 4 of 1882); (*4*) A gift of immovable property (see s 123 of Act 4 of 1882). S 123 T P Act is similar to s 59 T P Act. The section is mandatory and its requirements must be strictly fulfilled, although a plea may not be definitely taken under the section [*Balbhadar v. Lakshmi*, A 1930 A 666]. The T P Act is not in force in the Punjab and therefore deeds there need not be executed or attested according to the formalities in the T P Act [*Kanwar v. Ghugi*, A 1928 L 148; *Teja v. Kalyan*, A 1925 L 575; *Dula v. Behla*, A 1925 L 92].

S 68 has no application in the NWF Provinces where a conveyance of property does not require to be attested [*Agha v. Mahbub*, A 1942 Pesh 83]. A bond is not required by law to be attested [*Ram Ch v. Jhibal*, A 1940 N 240, *Khurajiam Ongli Thoibisana Devi*, AIR 1982 Gau 100, 107]. Partnership deeds and the application for registration of firm under the Income-tax Act do not fall into the category of those documents which by law are required to be attested and so for proof of those documents sec. 68 would not apply. Sec. 67 alone would apply. [*Smt. Rani Bai v. Life Insurance Corporation of India*, A 1981 MP 69, 72: 1981 M P L J 192].

Waiver.—Formal proof of a document even when required to be proved in a particular way may be waived by any of the parties whose interest it may affect, and this is in accordance with s 68. But although proof may be thus waived, it does not affect the legal character of the document or its validity as a gift. Attestation on acknowledgment was held insufficient in the case of gifts [*Baijnath v. Biraj Kumar*, 2 P 52: A 1922 P 514 (*Sudhanya v. Gour*, 35 CLJ 475 discussed); but see the present definition of 'attested' in s 3 T P Act].

Identity of Party, Document, and Witness.—The attesting witness must prove the identity of the party of the instrument with that of the party in dispute [Tay s 1857; see *Doe v. Paul*, 3 C & P 162]. Proof of the identity of the document is also necessary where the document produced after notice is denied to be the document referred to [*Froude v. Hobbs*, 1 F & F 612]. As to identity of a deceased attesting witness, see *R v. St Giles*, 1 E & B 642.

"Shall Not Be Used As Evidence". [Documents Incidentally or Collaterally in Issue].—The section says that documents whose attestation is compulsory "shall not be used as *evidence*" until one attesting witness has been called. It would appear therefore that under the clear words of the section, it cannot be used as evidence for any purpose whatsoever (Collaterally or incidentally) unless it is proved in the particular manner. It has also been held in a case that the imperative and stringent wording of s 68 does not permit the use of the instrument as evidence for *any purpose whatsoever*—whether the document is used on or tendered for collateral purpose—unless and until it is proved in strict accordance with this section [*Shib Ch v. Gour Ch*, 27 CWN 134: 68 IC 86 (*Manners v. Postan*, 1803, 3 Esp 239 **approved**)]. In this case it was rightly pointed out that the fact that improperly attested mortgage bonds are used as evidence and proved in the ordinary way to enforce a personal covenant to pay (see next heading) forms no exception to the rule, because in such cases the bonds are not treated as mortgage bonds but given effect to as simple money bonds. They then become simple money bonds not requiring attestation and are therefore admissible under s 72; see also *Awadh v. Mahabub*, 79 IC 175: A 1924 O 255]. The strict rule was applied to a deed cancelled and offered only as containing an admission [*Breton v. Cope*, 1791 Peake 30]. In several jurisdictions in America the rule is relaxed when the document whose execution is to be proved is not a document necessarily involved in the pleading but comes collaterally or incidentally in issue [see Wig. s 129].

In Allahabad it has been held that the words "shall not be used as evidence" merely apply to a suit for enforcement of the document, leaving the ordinary provisions of law in s 67 to apply when the document is to be used for any other purpose. Thus an admission in a mortgage bond of a prior mortgage may be relied upon for purpose of acknowledgment without proof of attestation [*Shyam Lal v. Lakshmi*, 1939 All 366: A 1939 A 269] or it may be used to prove the handwriting of the scribe [*Motichand v. Lalta*, 40 A 266: 44 IC 596; see also *Mathura v. Chhedi*, A 1915 A 254; *Mahadeb v. Ghulam*, A 1947 A 161].

"Called".—Is not the same as summoned. It means tendered for giving evidence [*Motichand v. Lalta*, 40 A 256; *Ruprao v. Ramrao*, A 1952 N 88].

Whether Unregistered or Improperly Attested Mortgage Bonds Create Personal Liability to Pay or Charge.—A full Bench held (overruling *Madras D Society v. Ponnamali*, 18 M 29) that a document purporting to be a mortgage but which is not one for non-attestation, is not a document which requires attestation, within s 68, and whether registered or unregistered, it is admissible as evidence of personal covenant to pay, since such covenant does not require attestation in law [*Puluka Veetil v. Thiruthipalli*, (1908) 32 M 416 FB (*Sadakavour v. Tadepully*, 3 M 284, 288 **folld**); see *Venkata Jagannadha v. Venkata Kumara*, 54 M 163]. In an earlier (1898) Calcutta case it was also held that a personal decree can be passed on an unattested or unregistered mortgage-deed inasmuch as it is evidence of a money debt [*Sonatun v. Dinonath*, 26 C 222: 3 CWN 228; see also *Dullim Sundari v. Behari*, 1919 Pat HCC 279: 51 IC 328; *Rakhal v. Sidhinath*, 1919 Pat HCC 390: 53 IC 922; *Quah Cheng v. Mg Po*, 66 IC 589; *Kerr v. Clara B Ruxton*, 4 CLJ 510; *Kondi Sama v. Firam of M*, 43 MLJ 475; *Ram Autar v. Ram Asre*, 66 IC 680: A 1921 O 203; *Mathura v. Chedi*, 13 ALJ 553: 29 IC 363; *Tafaladdi v. Mahar*, 26 C 78; *Dhana v. Nastulla*, 92 IC 948: A 1926 C 637]. It has however been held that if an attesting witness is available, he must be called to prove the execution of the bond, even if the object is only to enfore personal covenant [*Veerappa v. Ramasami*, 30 M 250: 17 MLJ 213].

A document not operating as a mortgage for want of pro[illegible] treated as creating a charge within s 100 T P Act [*Rani Kuma[illegible]* 81; *Collr of Mirzapur v. Bhagwan*, 35 A 164 FB: 11 ALJ 141; *Shamu Pattar v. Abdul Kadir*, 31 M 215 (**Affirmed** by the PC in 35 M 607); *Royzuddi v. Kalinath*, 33 C 985: 4 CLJ 219; *Debendra v. Beharilal*, 16 CWN 1075: 15 IC 666; *Narayan v. Lakshmandas*, 7 Bom LR 934; *Arjun v. Kailash*, 27 CWN 263, 264; *Anantaram v. Yussufji*, 31 MLJ 133: 36 IC 903 (*Samoo Patter v. Abdul Sammad*, 31 M 337 follds: *Neelakantam v. Madasami*, 17 MLJ 39 **distd**); *Pribhdas v. Sahibkhan*, 93 IC 660: A 1926, S 88—CONTRA: *Gobinda v. Dwarka*, 35 C 837: 12 CWN 849: *Tafaladdi Mahar*, 26 C 78]. On the construction of a document purporting to be an usufructuary mortgage but not enforceable on account of want of proper attestation, it was held that the mortgagor did not intend to make him [illegible]ally liable, and that the document did not create a charge [*Ram Narayan v.* [illegible] 20 CWN 989: 34 IC 900: A 1916 PC 169].

—Subsequent Mortgage Invalid.—Where an earlier mortgage is substituted by a subsequent mortgage which is not legally attested the mortgagee can fall back on the earlier mortgage, if not otherwise barred [*Venkatrao v. Ganpat*, A 1927 N 83 : IC 695].

"[illegible] One [illegible]lesting Wit[illegible]s[illegible]t Least Has Be[illegible]alled". [illegible]hen Does More Than One W[illegible]ss Become Necessa[illegible]. S 68 deals with the proof of execution of attested [illegible]ts and provides that such a docu[illegible] shall not be used as [illegible]idence unles[illegible]ne attesting witness at least has been called to [illegible]ve executio[illegible] [*Venkatachala v. Thi[illegible]majamma*, A 1959 SC 4[illegible]]. The object of requiring attes[illegible]n by more than one witness is to guard against the difficulties arising out of death, unavailability, absence from jurisdiction, etc. It is necessary to call only one of them. If two witnesses are alive both need not be called. If one is ca[illegible] and he speaks to attestation, the document is *prima facie* proved. But it is open to the other side to rebut the proof by evidence that the apparent attestors were not attestors in the legal sense [*Venkata Reddi v. Mathu*, 39 MLJ 463: 58 IC 801; see also *Tulsi v. Chethree*, 18 CLJ 43: 16 IC

379]. Where only one of the attesting witnesses is called and his evidence is not believed, it cannot be said that the provisions of s 68 has been complied with [*Surendra v. Behari*, 43 CWN 669: A 1939 PC 117: 1939 Kar 222; *Kalicharan v. Suraj*, A 1941 O 89]. It is not proper if an attesting witness alive is not called on the ground that he is a leper. He could be examined on commission [*Ramkrishna v. Arjuna*, A 1963 Or 29].

S 68 no doubt says that it is not necessary to call more than one attesting witnesses, but this is not tantamount to saying that an attested document shall be proved by the evidence of one only of two or more attesting witnesses. For instance, if the one attesting witness examined only proved that the executant signed before him or personally acknowledged his signature to him, it will still be necessary to prove that the executant had signed before the other attesting witness or acknowledged his signature to him. All that the section appears to mean is that if both the attesting witnesses signed or received the executant's acknowledgement and also attested in each other's presence, the execution may be proved by the evidence of one attesting witness, and it is not necessary to call both. 'Execution' in the case of documents required by law to be attested means also valid attestation by two or more witnesses (*ante*: "*Attestation and Execution*") and so valid attestation must be proved. Whether it can be done by one witness or it becomes necessary to call more than one for the purpose. If, therefore, the validity of a document is challenged on the ground that it was not properly attested, it must be proved by both the attesting witnesses who attested on different occasions, unless the attestations were made by the witnesses at one and the same time, in which case one witness need be called. The section lays down only the mode of proof (*Balbhadar v. Lakshmi*, A 1930, A 669; *Roda v. Kanta, infra*) and not the quantum of evidence that may be necessary to prove proper attestation.

As pointed out in a case the words "at least" presuppose that more evidence may be required and it can only be by reference to the circumstances of each case that the quantum of evidence necessary to discharge the onus of proof can be measured. Where a document was attested by two different witnesses at different times, the evidence of one of the witnesses is not sufficient to prove execution [*Roda v. Kanta*, A 1946 B 12: 47 Bom LR 709]. So if one attesting witness merely states that the executant signed in his presence, but does not speak of attestation by the other attesting witnesses it is necessary to prove that the deed was properly attested by the other attesting witnesses [*Mirza Md v. Jambulingam*, A 1941 R 122: 195 IC 221: *Zaharul v. Mahadeo*, A 1949 N 149; *Vishnu v. Nathu*, A 1949 B 266; *N Ramaswamy v. C Ramaswamy*, A 1975 M 88].

Evidence of Attesting Witness Not Conclusive—Rebutting Evidence.—Although great stress is laid on proper attestation and proof by attesting witnesses, their evidence is not necessarily conclusive and other evidence may be given in rebuttal. Where the attesting witnesses said that they signed before the testatrix had appended her signature, other evidence may be called to show that they were in error [*Vere-wardale v. Johnson*, 1949, 2 All FR 250: 1949 P 395]. Where the evidences of the attesting witnesses is found to be cogent and acceptable and there is nothing to doubt that they were lying minor discrepancies in their depositions are immaterial [*K.R. Rajalakshmi Devi v. K.R. Chandrasekhar*, 1998 AIHC 1397, 1411 (Kant)].

Attestation. [Former law].—The Evidence Act or the TP Act did not contain any definition of the word "attestation" when used with reference to documents required by law to be attested and its precise meaning was speculated upon in various decisions. After many decisions both ways, it was held by the Judicial Committee

that attestation to be valid must be made by the witness after seeing the actual execution and that the attesting witness must sign as such. Attestation on acknowledgement of execution was held insufficient [*Shamu Pattar v. Abdul Kadir*, 39 IA 218: 35 M 607]. The present definition of "attested" in s 3 T P Act (as amended by Act 27 of 1926) does not require that the attesting witness must see the executant sign in all cases and attestation after obtaining a personal acknowledgment of previous execution from the executant is now sufficient *Shamu Pattar's case, ante*, has therefore been superseded to that extent only, but the other requirement of the decision that the attesting witness must sign in his capacity of an attesting witness still holds good. The earlier decisions are noted below and they will be found helpful in understanding the course of the law and its development. These decisions should be considered in the light of the present meaning given to the word "attested" (next heading).

[In *Burdett v. Spilshury*, 10 Cl & F 340, p 417, LORD CAMPBELL said: "What is the meaning of the attesting witness to the deed? Why, it is a witness who has seen the deed executed, and who signs it *as a witness*". Following the case it was held that this is the meaning of the term "attesting witness" in s 68. [*Ranu v. Laxmanrao*, 33 B 44; *Dalichand v. Lotu*, 44 B 405; *Badri Pd v. Abdul Karim*, 35 A 256; *Shamu Pattar v. Abdul Kadir*, 39 IA 218: 16 CWN 1009: 35 M 607]. In *Shamu Pattar's* case, the judicial committee adopted the words of DR LUSHINGTON in *Bryant v. White*, 1850, 2 Rob (Ecc) 315-17 that: "Attest means the presons shall be present and see what passes and shall, when required, bear witness to the facts"; see also *Hira Bibi v. Ramhari*, 30 CWN 364: A 1925, PC 203: 52 IA 362. *Shamu Pattar's* case is the leading case on the subject. The word "attest" means to bear witness, to affirm the truth or genuineness of. Attestation of a deed required by law to be attested, *eg*, a mortgage-deed, must be made by the witnesses signing their names after seeing the actual execution of the deed. Mere acknowledgment of his signature by the executant is not sufficient (*Shamu Pattar v. Abdul Kadir, sup*). An attesting witness is a person in whose presence the instrument is executed. It may generally be stated as the result of the decisions, that presence involves two ideas, namely mental cognition of the act, and physical contiguity, in other words, the person in whose presence that act is done must be able mentally to know what is being done, and what is done in the presence of a person, must take place in physical proximity to him, though it is impossible to lay down any inflexible rule as to what degree of proximity is essential (*per* MOOKERJEE, J, in *Sarurjigar v. Barada*, 37 C 526: 11 CLJ 563; see also *Deonarain v. Kukur Bind*, 24 A 319 FB; *Pran Krishna v. Jadu Nath*, 2 CWN 603; *Girindra v. Bejoy Gopal*, 26 C 246: 3 CWN 84; *Dina Moyee v. Bonbehary*, 7 CWN 160). Where *purdanashin* ladies are unable to appear before male witnesses, a document which by independent testimony is conclusively proved to have been executed by *Purdanashin* lady, may reasonably be deemed to have been attested by witnesses who were present outside the *purdah*; and who before attestation satisfied themselves that there was no fraud and that the document had been actually executed by the lady screened off from their gaze (*Sarurjigar v. Barada, sup*)].

Present law [Who is an Attesting Witness?].—The word "Attested" has now been defined in s 3 of the TP Act (as amended by Act 27 of 1926 and Act 10 of 1927, v *post*: "*Attestation as affected by s 2 of Act 27 of 1926 and Acts 10 and 12 of 1927*" and the meaning given to the word in *Shamu Pattar v. Abdul Kadir, sup* has been superseded in so far as it held that attestation on acknowledgment of signature was invalid. Attestation on personal acknowledgment of signature but without seeing

the executant sign is now sufficient. The definition of "attested", if it may be so called, is unsatisfactory as in defining the word "attested" the same word "attested" has been used in the body of the defintion. So it may be that the question will still have to be considered in some cases what is meant by saying that a document has been "attested". The defintion in s 3 TP Act runs thus:—

> "'Attested' in relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgement of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant: but it shall not be necessary that more than one of such witnesses shall have been present at the same time and no particular form of attestation shall be necessary".

According to this definition an attesting witness is a person who in the presence of the executant of a document puts his signature or mark on it after he has seen the executant or some one by his (executant's) direction sign or affix his mark to it, or after he has received from the executant a personal acknowledgment of his signature or mark or of his signature or mark of such other person: but it is not necessary that more than one of such attesting witnesses shall have been present at the same time. For the validity of an instrument, attestation by two or more witnesses is necessary. The subscription of the witness's name on the document, *ie*, attestation involves a statement, implied or express that the document was known by him to have been executed by the person purporting to execute it. *Cf* s 63(*c*) Succession Act, 1925, the provisions of which regarding attestation of a will are in identical terms.

Requirements of Attestation.—(*1*) The person attesting must have "*seen the executant sign*" (either by the executant's own hand or by some other person by his direction), or obtained a *personal acknowledgment* of execution from him (executant) and *thereupon* signed in the *presence* of the executant. So, a person who though seeing an executant put his signature or mark does not sign *then* as a witness, but signs *afterwards* in the absence of the executant and without request, cannot be regarded an attesting witness. The same is the case if after obtaining a personal acknowledgment of the executant's signature, he does not sign then and there in the presence of the executant, but does so afterwards in the absence of the executant. In any case, the attesting witness's signature must be made in the *presence* of the executant.

Under the new definition in s 3 TP Act, it is not necessary that an attestor should have actually seen the party sign, or have been present at the very moment of signing; for if the party acknowledges his signature to the witness and requests him to attest, it is deemed sufficient attestation. It supersedes *Shamu Pattar v. Abdul Kadir*, 35 M 607: 39 IA 218 in so far as it decided otherwise.

"*See the executant sign*": The true test should be whether the relative position of the parties was such that the attesting witness might have seen, not whether he did see in fact (See *In re Trimnell*, 1865, 11 Jur NS 248, refd to in *Brahmadat v. Chaudan*, 20 CWN 192: 34 IC 686 *post*; and *Kundan v. Mushrafi Begum*, 63 IA 326: A 1936 PC 207: 40 CWN 1093 *post*). Where one of the witnesses is blind, a will has not been signed in his presence and he is incapable of attesting it (*In re Charles Gilson*, 1949 P 434).

"*Personal acknowledgement*" is not the equivalent of "express acknowledgment" and an acknowledgment can be inferred from gestures or conduct. It

is not necessary that acknowledgment should be express and should have been made verbally. The law is not different from that in England although the word "personal" does not appear in s 9 of the English Wills Act, 1837, 1 Vic c 26 (*Amir Husain v. Abdul Samad*, 1937 All 723: A 1937 A 646; see *Ghanshyamdas v. Gulab*, 50 M 927 FB: A 1927 M 1054; *Umrao v. Bakshi*, A 1957 Raj 180). There can be no sufficient acknowledgement of executant's signature unless the witnesses either saw it or might have seen the signature, *ie*, were able to see if they were so minded. So if a person with a document in his hand says: "My signature is inside the paper, it is no acknowledgment (*Hudson v. Parker*, 1844, 1 Rob Ecc 14; *In re Charles Gilson*, 1949, p 434).

An attesting witness if he was present at the execution of the document must put his signature in the presence of the executant; or if he is the person to whom the acknowledgment of the signature is made, he must put his signature also in the presence of the executant (*Atul Ch v. Krishna*, 67 CLJ 31).

"*Signed in the presence*" does not necessarily mean that the executant should actually see the attesting witnesses sign. It is enough if their signature is made under circumstances that the executant, if he was minded to see the witnesses sign could have done so (*Kundan v. Mushrafi Begam*, A 1936 PC 207 *post*; *Brahmadat v. Chaudan, sup*). The expression "in the presence" was held to mean actual visual presence while interpreting the same expression in the analogous provision of s 9 Wills Act, 1837, 1 Vic c 26 (*Brown v. Skirrow*, 1902, 71 LJP 19).

(2) A person, who, though he is present and sees the execution, does not sign in the capacity of an attesting witness, is not an attesting witness, although his name is on the document. The witness is to see the execution (or obtain a personal acknowledgment of execution) and also to *attest the fact of execution*. *Shamu Pattar v. Abdul Kadir*, 35 M 607 PC is still good law on this point. The act of attestation must be done *animo attestandi*, *ie*, with the intention to attest. The fact that his name is on the document does not make him an attesting witness, irrespective of the purpose for which it is there [*Abdul Jabbar v. Venkata Sastri*, A 1959 SC 1147; *Abinash v. Dasarath*, 32 CWN 1228: 48 CLJ 281 *post*. See "*Can Scribe or any one who does not sign &c*", *post*. "It is not the mere presence of a person at the time of the execution of an instrument that makes him an attesting witness; for if five hundred person were, if they do not sign as attesting witnesses, you are not bound to call one of them" [*per* ABINGER, LCB, in *Cussons v. Skinner*, 11 M & W 161, 168].

(3) It is generally agreed that signature of registering officer on admission of execution by the maker, makes him an attesting witness; but the officer must have affixed his signature in the presence of the executant [*v post*, "*Can the Registering Officer be regarded an attesting Witness?*", *post*].

(4) An illiterate person may be an attesting witness by affixing his mark or finger-impression [see *post*: "*Attestation by Mark*"]. It is however difficult to prove a mark (*ante* s 47: "*Whether handwriting includes marks*").

(5) It is not necessary that all the attesting witnesses should be present together [*Dalichand v. Lotu Sakharam*, 44B 405 which held otherwise is no longer good law] and no particular form of attestation is required [*v* last portion of definition in s 3 TP Act].

(6) If a deed is attested by one who is at the time *incompetent* to attest, the rule is not satisfied by calling him, *eg*, a party to a deed is not competent to attest it [v. *post*, p 661]. The attestation is a nullity.

Proof of Execution.—[See *Ante*, s 67: "*Meaning and proof of execution*"].

Attestation of Mortgage Bond.—Many of the following cases have become obsolete (on account of the new definition of "attested") in so far as it was held that attestation on acknowledgment was not sufficient and that the attesting witness must see the executant sign in his presence. In these cases amongst other [*Shamu Pattar v. Abdul Kadir*, 39 IA 218: 35 M 607 PC : 16 CWN 1009; *Quah Cheng v. Mg Po*, A 1921 LB 39: 66 IC 589; *Godawari v. Sampat*, 68 IC 198: A 1923 N 45; *Amrappa v. Rachaya*, 44 B 231; *Subedha v. Raja Ram*, 11 ALJ 757; *In re Valavapatti*, 8 IC 887; *Periannan v. Bd Thaw*, 43 IC 916; *Radha Shiam v. Chunni*, 14 ALJ 361: 35 IC 192; *Chidambaram v. Subbaraghava*, 16 IC 207] it was held that attestation on acknowledgment of execution was not attestation within s 59. In a few cases decided before the insertion of the definition of "attested", it was held that attestation included attestation on acknowledgment [see *Ganga Dei v. Shiam Sundar*, 26 A 69; *Ramji v. Bai Parvati*, 27 B 91]. Attestation by personal acknowledgment from the executant of a signature or mark is now valid attestation under the added defintion [*Ramcharan v. Bhairon*, 53 A 1].

A mortgage bond not attested by two witnesses as required by s 59 TP Act is inadmissible in evidence [*Rani Kumari v. Srinath*, 1 CWN 81; see also *Girindra v. Bijoy*, 26 C 246: 3 CWN 84; *Sonatan v. Dinanath*, 26 CWN 222: 3 CWN 228; *Abdul Karim v. Saliman*, 27 C 190; and *Ranu v. Laxman Rao*, 33 B 44: 10 Bom LR 943].

When a deed contains at the foot, the names of 3 or 4 persons as witnesses all of whom are illiterate, and do not say that their marks were attached to the document at their desire, the deed is not validly attested [*Taki Nashya v. Puru*, 2 CLJ 70n (27 C 190 **distd**)]. It is not required that the signatures of attesting witnesses must appear at any particular place. Attesting witnesses signing against receipt clause signed by mortgagor is valid attestation [*Kederbhai v. Fatmabai*, A 1944 B 25]. The placing of signatures of witnesses in a document purporting on the face of it to be attested by witnesses, may warrant a presumption that they signed it after it was executed in their presence [*Bank of Bengal v. Lucas*, 41 CLJ 1]. An attesting witness stated, that the mortgagor made his mark in his presence and the document was not shown to him. This was enough [*Chiranji v. Poorna*, 12 ALJ 1114]. A mortgage of movable property does not require to be attested and registered [*Mir Ansar v. Guru Churn*, 12 CLJ 419]. An usufructuary mortgage bond creating an interest in a turn of worship in a temple does not require attestation under s 59 [*Jatikar v. Mukeda*, 14 CLJ 369]. A document not executed in the manner prescribed by s 59, *eg*, the marginal witnesses not having seen the mortgagor, did not operate as a mortgage, notwithstanding that the mortgagor did not deny execution [*Radha Shiam v. Chunni*, 14 ALJ 361]. A mortgage-deed bore the signature of one attesting witness; and the name of another person was written in the margin by the scribe but there was no signature or mark by that person. The man was dead and there was nothing to show that he had authorised the scribe to sign for him—*Held* that the deed was not attested by two witnesses [*Parmhans v. Ramdhin*, 38 A 461: 14 ALJ 673].

An agreement qualifying a previous mortgage-deed by which mortgagee was to accept half of the money in full satisfaction of the mortgage debt need not be attested [*Bisheshar v. Ram Bharose*, 20 IC 544]. A mortgage consisted of three sheets of paper. The mortgagor signed the second sheet in the presence of the two attesting witnesses who also signed at the foot. A third sheet was then added including other properties in the mortgage, and it was signed by the mortgagor in the presence of the two same witnesses who did not again sign there—*Held* the document was properly attested [*Janakinath v. Aswini*, 60 IC 736]. In the case of a will, the operative

signature was held to be the one on the first page [*Sabitri v. Savi*, 19 CWN 1297]. Where there are two executants, attestation may be according to law in respect of one of them but not in respect of the other [*Dhana v. Sambhu*, 47 IC 9].

Under s 2 of the T P Validating Act (26 of 1915) where a deed of mortgage or gift purports to have been executed prior to the 1st January, 1915, it is sufficient if the witness before signing his name received from the executant a personal acknowledgment of his signature to the same.

Attestation as Affected by S 2 of Act 27 of 1926 and Acts 10 and 12 of 1927.—After attestation was defined by s 2 of Act 27 of 1926 (see *ante*) the question arose whether it was retrospective. It was held in Madras that Act 27 of 1926 was retrospective in its operation and also applied to pending actions [*Balaji v. Chakka*, 99 IC 143: A 1927 M 85]. The same view was taken in Allahabad in *Mohammadi v. Kashi*, 96 IC 775: A 1926 A 725, but in a later FB case of the same court it was ruled that the new Act was not retrospective [*Girijanandan v. Hanuman*, 99 IC 161: 49 A 25 FB: A 1927 A 1]. The same view was taken in a Calcutta case [*Nepra v. Soyer*, 53 C 67: 31 CWN 128n: A 1927 C 763]. The matter was intended to be set at rest by another amendment (Act 10 of 1927) by which the words "*and shall be deemed always to have meant*" were added after the word "means". It was therefore held that the meaning of "attested" was given retrospective effect [see *Radhamohan v. Nripendra*, 31 CWN 160n : 105 IC 422: A 1928 C 159; *Probhakar v. Indra*, 34 CWN 20n; *Budhai v. Rahimtulla*, 107 IC 216: A 1928 S 93; *S M R L Firm v. R M M A Firm*, 5 R 772: A 1928 R 101; *Thyammal v. Muthukumaraswami*, A 1929 M 881; *Prabhakar v. Indra*, 53 CLJ 326]. But s 4 of Act 10 of 1927 which is a saving clause declaring that the Act shall not affect the validity, invalidity, effect, or consequences of anything already done or suffered, &c, &c applied to all the Acts amended by Act 10 of 1927. Act 12 of 1927 which was passed five months later, repealed ss 3, 4 of Act, 10 of 1927, but the saving clause in Act 12 of 1927 is identical with the saving clause in Act 10 of 1927 and it was held in a case that the result has been to leave matters exactly where they were and the definition of 'attested' has not got retrospective effect and does not apply to deeds executed prior to Act 27 of 1926 [see *Palaniappa v. Rajagopala*, A 1928 M 773: 111 IC 407]. A latter FB in Madras held that 'attested' has been given retrospective effect by Act 27 of 1926, 10 of 1927 and 12 of 1927, but although one of the points referred to was whether *Palaniappa v. Rajagopala, ante*, was rightly decided, no opinion was expressed on the ground that the decision had not then been reported [*Veerappa v. Subramanya*, 52 M 123: 116 IC 367: A 1926 M 1 FB; see also *Ram Charan v. Bhairon*, A 1931 A 101]. The phraseology of ss 59 and 123 T P Act is almost identical and it has been held in Allahabad that the amending Act 27 of 1926 cannot operate retrospectively on a deed of gift executed before that Act came into force. So when an executant signed in the presence of one witness, it is no attestation [*Balbhadar v. Lakshmi*, A 1930 A 669: 125 IC 507].

Proviso—"Specifically Denied" [Where Attesting Witness Need Not Be Called].—Under the added proviso, the necessity of calling an attesting witness is done away with in the case of a document (not being a will registered) unless its execution by the person by whom it purports to have been executed is "*specifically denied*". There does not appear to be agreement about the exact meaning of the words.

'Specifically' means expressly, distinctly or definitely and not an ambiguous or vague statement. The same meaning as given to the words "specifically" in Or 8, r 3 CPC should be attached to the word in Proviso to s 68 [*Dhiren v. Bhutuki*, A 1972 Gau 44]. The proviso is retrospective in its operation [*Somasundaram v. Muthiru-*

lappa, A 1933, M 432]. Specific denial means something over and above a general denial [*Dasrath v. Lallo*, A 1951 N 343]. The proviso is merely an exception to the special rule in s 68. It is not intended to override the general provisions of the law as to proof of documents relied upon by the parties [*Kartar v. Didar*, A 1934 L 382]. In *Cooke v. Tanswell,* 1818, 8 Taunt 450, GIBBS, CJ, said: "In cases where '*non est factum*' is not pleaded..... I have never heard it contended that it was necessary to call the subscribing witness". When there is no specific denial there is a presumption of proof of attestation [: see *post* "*Presumption of Attestation*"].

"Specifically denied" by whom? The words evidently mean specifically denied by the party against whom the document is sought to be used and not only by the executant. A mortgage bond executed by a third party may be sought to be used as evidence against a party to a suit on a particular issue although the executant may not be a party to the suit and it seems that the calling of an attesting witness cannot be dispensed with unless its execution is admitted by the party affected. The person executing the document not being a party to the suit there is no opportunity to him either to deny or admit execution. The denial therefore, is to come from the party who is entitled to dispute or is interested in disputing its execution. This view has since found favour in an Oudh case where it has been held that a third party (*ie*, a party to the suit but not to the deed) can deny execution and required proof of attestation when the executant of the document admits execution [*Chandra Kali v. Bhabhuti*, A 1943 O 416 and also in *Zaharul v. Mahadeo*, A 1949 N 149; *Kumbara v. Lakkanna*, A 1959 Mys 148]. The rigour of the section cannot by watered down to a case where a Will which is required by law to be attested can be used in evidence for collateral purposes without strictly complying with the section. The mandate of S 68 has to be complied with even where the opposite party does not specifically deny execution of the Will in the written statement, [*Paramu Radhakrishnan v. Bharathan*, A 1990 Ker 146, 148, 149].

When the execution of duly registered gift deed is not denied, and the executant was examined, there is no need to examine the attestors. [*Bai Dabi v. Hiralal Chalabhai Lakdawala*, A 1983 (NOC) 54 Guj]. Even the persons who are not parties to a document can deny the execution by the person by whom it is purported to have been executed 1984 Ker LT 855 **followed**. [*Krishnan Assari v. Parameswaran Pillai*, A 1989 Ker 163]. But another case that the proviso relates only to the person who has actually executed or purported to have executed the document, that is to say, the person who is in a position to admit or deny execution, and it is manifestly implicit that such person must be party to the suit [*Hava v. Lakumal*, A 1944 S 61]. The plea that the plaintiffs were not aware of the execution of the documents would not amount to specific denial of execution. [*Kadiya Umma v. Mayankutty*, A 1992 Ker 261, 264].

Yet another case held that "specifically denied" means that the denial in question should relate to the specific document which is sought to be denied. It does not mean that the denial should be contained in the written or oral pleadings. A mere denial noted on the back of the document or on the list of documents on the date of issue is enough [*Gurcharan v. Ram*, A 1943 O 218]. Following this case it has been held that the denial should relate to the specific document sought to be denied and should be unqualified. It is not necessary that 'specific' denial must be a denial of attestation [*Lachmi v. Pirthipal*, A 1944 O 99].

It was held by BUCKLAND, J, that under the proviso if execution is not denied, the evidence of an attesting witness is dispensed with and a decree may follow on the pleading of the plaintiff [*Chatoo Lal Dey v. Tyed Haji Ismail*, Statesman, Dec. 4,

1926]. In a later undefended suit where execution was not similarly denied, PEARSON, J disagreed with this view and held that the amending Act simply dispensed with the necessity of calling of an attesting witness, but evidence must still be adduced to prove execution of the deed [*Ruplal Nandy v. Monmohan Nundy*, Statesman, Jan. 26, 1927]. This undoubtedly is the correct view. If execution is not specifically denied, it is not necessary to call an attesting witness for proving the bond, but evidence must of course be adduced for proving it by any other witness. The proviso cannot dispense altogether with proof of the document and claim. If a document is taken to be executed and proved simply because the dafendant does not appear and deny it, it may also follow that every suit may be decreed against the defendant when he does not appear and deny the claim. But a decree cannot be granted without taking evidence simply on defendant's non-appearance and upon verification in the plaint [see *Ross v. Scriven*, 43 C 1001]. In a later case it has been held that the proviso, only removes the necessity of calling an attesting witness to prove due execution and does not purport to relieve the party of the necessity of proving a mortgage by adducing other evidence in that behalf [*Chettiar Firm v. U Hlaw*, 11 R 26: A 1933 R 6; *Balappa v. Asangappa*, A 1960 Mys 234].

Attesting witnesses of a sale deed, which never required any attestation, need not be examined. Proviso to section 68 cannot be invoked to find out whether the execution of such a document was specially denied by the adverse party or not. [*Hans Rajiv Yosodanand*, A 1996 SC 761, 763]. Where execution of a registered gift deed is not denied by the executor proviso to section 68 is attracted and, therefore, it does not require formal proof. [*Shayama Devi v. Premvati*, A 1996 All 57, 62]. At least one of the attestators of the will, if alive, must be examined. [*Asia Bi v. S.A. Abdul Gaffar*, 1996 AIHC 1332 (Mad)].

If execution is not specifically denied, marginal witnesses need not be produced [*Jhillar v. Rajnarain*, A 1935 A 781], but if any of the defendant specifically denies that any of the alleged executants executed the deed the plaintiff must produce the marginal witnesses [*Radhaballav v. Deoki*, A 1932 A 320].

The effect of the proviso is that when execution of a document of the kind referred to is neither admitted nor its execution specifically denied, the law requires the proof of the document in a less formal manner, *ie*, by the evidence of one who is not necessarily an attesting witness, "Execution" in the proviso means not merely signing but also attestation of signature (*ante*: "*Attestation and Execution*"). In a Full Bench at Allahabad a distinction was drawn between the case (*1*) "where the execution and attestation of the deed *are not admitted*" and (2) "when the validity of the mortgage is *specifically denied*". It was held that in the former case the mortgagee need prove only this much that the mortgagor signed the document in the presence of an attesting witness and one man attested the document; provided the document on the face of it bears the attestation of more than one man. In the latter case it must be proved by the mortgagee that mortgage-deed was attested by at least two witnesses [*Lachman v. Surendra*, 54 A 1051, 1058 FB: A 1932 A 527; *Amir Husain v. Abdul Samad*, 1937 All 723: A 1937 A 646]. In this connexion see s 70 *post* which dispenses with proof of execution on admission. If the execution of a document itself is admitted by a party, the question of further proving the execution of the document by an attesting witness will not arise. [*Durgapada Jana v. Nemani Charan*, A 1986 Cal 23, 26: (1986) 90 Cal WN 95]. If signing or execution is admitted but attestation is denied, attestation must be proved [*Kundan v. Mushraffi*, 63 IA 326: 40 CWN 1093: A 1936 PC 207; *Bindeshari v. Pancheyati*, A 1936 A 169] or, if attestation is specifically denied but signing is not so denied, it is necessary to call an attesting witness to prove execution under s 70 [*Ebrahim v. Akshoy*, 40 CWN

151]. Where the contesting defendant pleaded in the written statement that he did not admit execution, nor is receipt of consideration admitted, and the trial court further recorded that execution and attestation were "hotly contested"—the contention that there was no specific denial cannot be accepted [*Surendra v. Behari*, 43 CWN 669: A 1939 PC 117; *Gansilal v. Bhuriduri*, A 1964 Raj 39]. The execution of a mortgage deed was not denied but it was alleged that such deed was the outcome of coercion and undue influence and there is no allegation that the entire sum was not advanced. Under such circumstances, examination of the attesting witnesses for the purposes of proof of the execution of the document was not necessary. [*Engineers (Overseas) Corporation Pvt Ltd v. West Bengal Corporation*, A 1986 Cal 132, 141: (1985) 89 Cal WN 700].

The specific denial of execution must be in the suit itself [*Amal v. Dacca CHS Ltd.*, 49 CWN 377]. If execution or attestation is specifically denied in the written statement, the plaintiff is bound to produce an attesting witness [*Ebrahim v. Akhoy*, 40 CWN 151]. But if execution of mortgage bond is not denied in the pleadings, it is not necessary to call an attesting witness under the proviso [*Lakho v. Lalit*, 104 IC 622: A 1927 P 403; *Ram Charan v. Bhairon*, A 1931 A 101]. Attacking a deed as a sham and nominal transaction is not a specific denial of execution [*Vedachala v. Ameena*, A 1944 M 121]. Denial of execution and also statement in the written statement that the bond is not genuine is specific denial [*Kalicharan v. Surajbali*, A 1941 O 89]. Statement that defendant had no knowledge of the mortgage bond and that if genuine it was without consideration, is not a specific denial [*Yakub v. Gulraj*, 52 B 219; *Gobinda v. Chanan*, A 1933 L 378]. So also a statement that defendant is not aware of the mortgage bond and therefore execution, consideration and attestation are denied [*Bhima v. Fakir*, A 1948 N 155].

Mere fact that defendant pleaded that he did not admit the genuineness of the bond does not put the plaintiff to proof [*Bishwanath v. Kayestha T B Co*, A 1929 P 422: 8 P 450]. Denial on the ground of attestation must be specific [*Aziznnissa v. Siraj*, A 1934 A 507]. Apart from denial in pleading when an attesting witness is not cross-examined as to the details of attestation, a simple statement that it was attested by the other witnesses and himself is sufficient [*Kuwar Lal v. Rakhlal*, A 1950 N 83]. It is not necessary to call an attesting witness unless it is expressly contended that the attesting witnesses had not witnessed the execution *Kamal v. Krishnabai*, A 1946 B 304]. If the validity of the mortgage is specifically denied in the sense that the document did effect a mortgage in law, then it must be proved that the deed was attested by at least two witnesses [*Lachman v. Surendra, sup*]. Where on production of a certified copy of a deed of gift it is not specifically denied that is the copy of the deed, attesting witness is not essential [*Nandlal v. Lakhmi*, A 1939 L 414].

It will appear from the cases above that the requirement that execution must be "specifically denied" has been variously interpreted. In any case the denial must be express, distinct or definite and not in any way ambiguous. If execution is admitted but not valid attestation, the fact must be clearly stated. The second rule to apply would be that whether, in the pleadings or in any other document or at any other stage of the trial, the specific denial should be in sufficient time before the actual hearing to enable the opposite party to prove execution by production of attesting witnesses. To lie by until the actual hearing and to raise the objection then, cannot be allowed [*Sarat v. Chandramani*, A 1972 Or 222].

Where the defendant in his additional pleas admitted that the mortgage deed was executed but that its purpose was to circumvent the new rent control legislation, it was held that the execution of the deed was not specifically denied and, therefore, it was not necessary to call any attesting witnesses. *Ishwar Dass Jain v. Sohan Lal*, (2000) 1 SCC 434.

—Application of Proviso to Cases Decided Prior to the Act.—It is not correct to apply an Act (the proviso which was passed by Act 31 of 1926) which is passed subsequent to the trial of the case. The Act adding the proviso did not come into force until the 18th September, 1926 and the present case was disposed of on 10th February, 1926. *Held*, the proviso did not apply [*Banwari v. Gopi Nath*, A 1931 A 441 : 13 IC 557].

"Indian Registration Act, 1908".—These words apply equally to documents registered under any previous Registration Act [*Jadunath v. Isar*, A 1939 P 47: 178 IC 198].

Execution by Pardanashin Woman and Attestation of Such Deeds.—It is not necessary that the witnesses should be actually inside the *purdah*. Where one witness was inside the *purdah* where the women affixed their signatures and the other witnesses were on the other side and the deed was read out and explained, it was properly attested [*Syed Zakir v. Madhusudan*, 45 IC 691 : 4 Pat LW 417]. Defendants 2, 3 were the wives of defendant No. 1, and all were executants. The women signed behind the *purdah* and admitted that they were the wives of defendant No. 1 who was the identifier. The witnesses did not see the women making their signatures, *held* that, the deed was properly attested [*Kasidanbi v. Gangulal*, 16 NLR 196: 56 IC 247]. Where the witnesses did not see the woman but saw her signing and impressing with her seal through a *purdah* hanging between them and one of the witnesses knew her by her voice, it was proper attestation [*Rai Radha v. Jag Sahu*, 60 IC 173]. Where the ladies were sitting behind a *chick* not lined with cloth and the attesting witnesses who were well acquainted with their voices recognised their voices and through the *chick* saw each lady execute the deed, though they were unable to see their faces,—*Held* that it was duly attested [*Padarnath v. Ram Narain*, 42 IA 163: 19 CWN 991: 37 A 474; see *Sarurjigar v. Barada*, 37 C 526 and *Barkatunnisa v. Debi*, 31 CWN 693: A 1927 PC 84: 101 IC 29]. Where the attesting witnesses were on one side of a *purdah* and the woman on the other, but her son took the deed behind the *purdah*, returned with it bearing a signature purporting to be hers and said that it had been signed by her and the witnesses thereupon attested—*Held* that the mortgage was void and not properly attested [*Ganga Pd v. Ishri Pd*, 45 IA 94: 45 C 748: 22 CWN 697: A 1918 PC 3; see *Hira Bibi v. Ramhari*, 52 IA 362: 5 P 58: 30 CWN 364: A 1925 PC 203] All the above cases were decided under the old law. The difficulty felt in regard to execution and attestation of deeds by *Pardanashin* woman has been mitigated to some extent by the new defintion of "attested, in s 3 T P Act. It would seem that the mortgage-deed in *Ganga Pd v. Ishri Pd, sup* would still be invalid as there was no personal acknowledgment from the executant and the attesting witnesses did not sign in her presence (assuming that the *purdah* was not thin enough for seeing through it).

If the attestors to a deed executed by a lady did not see her sign it, the lady did not acknowledge her signature to it and the attestors did not themselves sign the instrument in the presence of the lady, the instrument is not properly attested [*Venkata Jagannadha v. Venkata Kumara*, 54 M 163]. The law requires that the attesting witnesses must have signed "*in the presence* of the executant". Therefore persons accepting deeds from *Pardanashin* women which require attestation for their validity must take care that the condition is as far as possible literally fulfilled, lest there be any trouble in future. The expression "in the presence" in s 3 T P Act means actual visual presence. It was so held in *Brown v. Skirrow*, 1902, 71 LJP 19 (*ante*) while interpreting the same expression in the analogous provisions of s 9 Wills Act 1837, 1 Vic s 26 [*Chandrani v. Sheo Nath*, A 1931 O 146].

It is not necessary, however, that a *pardanashin* woman should see the witnesses sign, but they must sign in her *presence, ie* nothing should obstruct her view so that she may see the attesting witnesses sign if she chooses to do so. In a case where a

document executed by a *pardanashin* woman was attested by the witnesses while she was sitting behind a thin curtain and it was clear enough that if she had minded to see the witnesses sign, she could have done so; even if she did not actually see them through the curtain, it was held to amount to sufficient attestation with s 3 T P Act. Whether an attesting witness signs his name in the presence of the executant is in each case a question requiring full consideration of the whole circumstances [*Kundan v. Mushraffi*, 63 IA 326: A 1936 PC 207: 163 IC 156 (**reversing** A 1933 O 365); *Cf Brahmadat v. Chaudan*, 20 CWN 192]. It must be remembered that in the case of *pardanashin* women, even if the formalities are observed what must be established is the conscious execution of the document and not merely the mechanical execution (see s 111 *post*).

Presumption of Attestation.—When a will has been proved to have been duly executed in the presence of witnesses, the presumption is that the requirements of attestation were satisfied [*Nitai v. Nagani*, 10 CLJ 499; *Wright v. Sanderson*, 1884, 9 PD 149, 163; *Brahmadat v. Chaudan, sup*: *Md Ziaullah v. Rafiq*, A 1939 O 213; see also *Shibo Sundari v. Hemangini*, 4 CWN 204], although there was no attestation clause [*In re Amulya*, 42 CWN 649]. When attestation is not specifically denied, there is a presumption of attestation when execution is proved or admitted [*Seth Mulchand v. Janki*, 2 NLR 65], or when a witness who speaks of attestation [*Kuarlal v. Rekhlal*, A 1950 N 83], or execution [*Dasrath v. Lallo*, A 1951 N 343] is not cross-examined on the point. The same presumption applies when to the signatures of attesting witnesses there are clause saying that executant signed in the presence of witnesses [*Narainrao v. Hanmantrao*, A 1930 N 273]. Though the witness may not categorically state that he and the other witnesses signed in the presence of the executant after seeing her sign, the fact of due attestation may be proved from the circumstances disclosed in the evidence [*Mahalakshmi Bank Ltd v. Goenka*, A 1958 As 56]. When it is impossible to call any attesting witnesses and where all that can be proved is their handwriting, it will be presumed that the persons who purported to have signed were attesting witnesses [*Mirza Md v. Jambulingam*, A 1941 R 122]. A court cannot make a presumption that the witnesses were in the visual presence of the testator when a will was attested [*Mary Mirza v. Sangster*, A 1928 O 258: 112 IC 12].

Objection to Attestation in the Appellate Court.—Where execution was admitted but it was never suggested at the trial court that attesting witnesses had not signed in the presence of the executant, such a contention cannot be reasonably raised before the appellate court [*Kundan v. Mushrafi*, 63 IA 326: A 1936 PC 207]. Objection as to mode of proof must be taken at trial before it is marked as an exhibit and not in appeal [*Bhagwan v. Khemchand*, A 1973 P & H 477; (*Gopal v. Sri Thakurji*, A 1943 PC 83 **rel** on)].

"Signed"—Whether it Includes Mark? [Execution By Signature or Mark].—The question may be asked whether a mark or symbol affixed by the executant or attestor is sufficient. "Signed" has not been defined in the T P Act or the Evidence Act. The word does not bear the same meaning for the purpose of all Acts. The general policy of the law is that a "signature" includes a "mark" [*Pran Kr v. Jadunath*, 2 CWN 603, 605; *Ponnuswami v. Kalyan*, A 1930 M 770]. Under the General Cl Act, 10 of 1897, "sign" with reference to a person who is unable to write his name includes "mark". See Stroud's Judicial Dictionary, Vol 3 P 1879. A thumb-mark by a person who is able to write his name is not a 'signature' within s 3(*56*) *ibid* [*Sachananda v. R*, 32 C 550]. The definition of 'signed' in s 2(20) C P Code is wider and includes stamped. There may be signature by stamping even in the case of a person not illiterate [*Maharaja v. Devi*, 3 A 575] and stamping by some other person

by the direction of executant is valid execution. Similarly, to constitute a signature it is not necessary that a person should write his name himself; his mark is sufficient, though he was able to write [*Baker v. Dening*, 8 Ad & E 94].

The use of a pen and ink is not necessary for signing [*Nirmal v. Saratmani*, 2 CWN 642 (*Jenkyns v. Gainsford*, 3 SW & Tr 93 refd to)]. Therefore, any recognised form in which a person affixes or impresses his name or mark either by himself or by another person with the intention that it shall be treated as his signature is sufficient in law. As to whether 'handwriting' includes 'mark', (see *ante*, s 47: "*Whether handwriting includes marks*") and as to difference between 'signing' and 'mark', see *Nirmal v. Saratmani*, 25 C 911]. "Signed" does not mean "personally autographed". A mortgage signed for the executant by another person under his direction and in the presence is sufficient even if no mark or any symbol of executant is put in [*Deo Narain v. Kukur Bind*, 24 A 319 FB; *Sashi Bhusan v. Chandra*, 33 C 861: 4 CLJ 41; *Dahu v. Jamadar*, A 1951 P 368]. Thumb-marks are not exempt from the provisions of s 67 [*Ramanemma v. Basavayya*, A 1934 M 558: see however *Shahzadi v. Beni*, A 1934 A 390].

Initials operate as signatures and a will is not invalid if intitials are properly attested *Nawab Sher v. D C of Bahraich*, 58 IC 134; *Re Blewitt*, 5 PD 116; *Re Savory*, 15 Jur 1042]. An illiterate person passed a mortgage-deed by putting a mark described by the scribe thus: "The mark of a dagger (representing the signature) *G* (made by him) with his own hands. The handwriting of *K* (the scribe)." The document was attested by two witnesses. The execution was testified by attesting witnesses and the scribe—*Held* that the deed was duly proved. In the case of an illiterate executant, his mark is his signature, and is independent of any writing by which the mark may be explained [*Govind v. Bhau*, 41 B 384; *Dasa v. Venkatasubbammal*, 57 M 979]. Signature includes a mark, a mark being a short symbolic writing. "*Sree Sahi*" is a signature [*Shailendra v. Girijabhusan*, 58 C 686: A 1931 C 596]. If a testator in making his mark is assisted by some other person who guides his hand and he acquiesces in and adopts it, it is just the same as if he had made it without any assistance [*Muktanath v. Jitendra*, 19 CWN 1295; *In re Amulya*, 42 CWN 649; *Wilson v. Beddard*, 1841, 12 Simon's Report 28]. Whether it be signature or mark or finger impression, it must be affixed with the intention of executing the document after a full comprehension of its contents. Where the document was read so hurriedly that the executor would not grasp its meaning it is no execution [*Annada v. Bhuban*, 28 IA 71: 28 C 546: 5 CWN 489].

As a general rule, even where signature is required by statute and for solemn documents, a manual signing is not essential, any form in which a man affixes his name, with intent that it shall be treated as his signature, being sufficient. Thus, a will may be signed by another guiding the testator's hand [*Wilson v. Beddard, sup*]; or by a stamp [*Jankyns v. Gainsford*, 11 WR 854]; mark, whether the testator can write or not, for no such inquiry will be allowed [*Baker v. Dening*, 8 A & E 94]; initials [*Re Blewit*, 5 PD 116]; or initialled seal [*Re Emerson*, 9 LR Ir 443]; but not by a plain seal nor by passing a dry pen over a previous signature [*Casement v. Fulton*, 5 Moo PC 130; Phip 11th Ed p 713].

Attestation of Deed of Gift.—The conditions regarding attestations of deeds of gift under s 123 T P Act are the same as in the case of a mortgage under s 59 of that Act. In view of the present definition of "attested" in s 3 of the Act, the earlier cases [*eg Amrappa v. Raghav*, 44 B 231: 55 IC 355; *Sabedha v. Rajaram*, 11 ALJ 757: 21 IC 83; *In re Velvalapatti*, 9 MLT 57: 8 IC 887; *Baijnath v. Biraj Kuar*, 2 P 52] which

held that attestation on acknowledgment of execution was not sufficient, are no longer good law.

Attestation of Wills. [Attestation by Mark].—In the case of a will, s 63 Succession Act requires that the testator "shall sign or shall affix his mark", and in the case of a mortgage or gift it is stated that the deed shall be "signed" by the mortgagor or donor (ss 59 and 123 T P Act). But in the definition of "attested" in s 3 T P Act, the words "sign or affix his mark" have been used while speaking of the action of the executant, whereas in both s 3 T P Act and in s 63 Succession Act the word "sign" only has been used while speaking of the witnesses. It has been seen that signature includes a mark or a signature by the hand of another person and it appears to be clear that the omission of the word "mark" in any statute or the use of the word "signed" only makes no difference unless the intention is clearly expressed by the introduction of words like personally" or "with his own hand". The reasonable conclusion therefore is that execution or attestation may be made either by signature or by mark. S 9 of English Wills Act (1 Vic c 26) uses the word "signed", but execution by mark has been held sufficient in spite of the statutory requirement of manual signing [see *Margary v. Robinson,* LR 12 PD 8; In Estate Davies, 1951, 1 All ER 920 (will signed by putting mark; it was declared invalid only for improper attestation) and cases cited before].

Before attestation was [illegible] in s 3 T P Act it was held that attestation of mortgage bond could also be made by marksman [*[illegible] Jadu[illegible]* N 603, 605]. It has also been so held afterwards [*Nagamma v. Venkataramayya*, 58 [illegible] 20; *Chiranji v. Poorna*, 12 ALJ 1114]. It is not necessary that somebody else should attest the mark of the attesting witness [*Firm v. Md E*, A 1937 A 293]. As with signature, in the case of attestation also one attesting witness can sign for another attesting witness at his instance without any mark being put [illegible] *v. Jamadar*, A 1951 P 368]. The present definition of "attested" brings [illegible] in line with the a will in s 63 (*c*) Succession Act.

As to attestation of wills, as s 63 of Succession Act says that the testator "shall sign or affix his mark", but in speaking of witnesses simply says "shall [illegible]", it was held in a case that distinction was clearly intended and there could be no attestation of a will by mark [*Nityegopal v. Nagendra*, 11 C 429 following *Fernandez v. Alves*, 3 B 382]; but a contrary view has been taken in other cases [illegible] *Goods of Wynne*, 13 BLR 392; *Maikoo v. Santoo*, A 1936 A 576 FB; *Nagamma v. Venkataramayya, ante* (mortgage). Although [illegible] was not decided, 11 C 429 and 3 B 382 were not agreed to in *Ammayee v. Yalumalai*, 15 M 261], and the latter view appears to be correct. It is also sufficient if attesting witnesses affix their initials [*Ammayee v. Yalumalai, sup*; *Harendra v. Chundra*, 16 C 19]. Where the document is a will which does not require registration, the sub-registrar and the identifying witnesses may be attesting witnesses [*Ammu v. Krishnan*, A 1965 K 32]. If it is proved that they signed the will in the presence of the testator after receiving from him an acknowledgement of his signature on the Will. [*Jarnail Singh v. Narain Singh*, A 1984 Punj & Har 181, 182 : 1984 Rev LR 131]. The proof contemplated in s. 68 can be furnished by the scribe of the document-a will-who could speak to the execution of it and it is not essential that it should be proved only by at least one of the attesting witnesses. [*Ujagar Singh v. Chanan Singh*, A 1986 P&H 230, 231].

The principles which govern the proving of a will are well-settled. The mode of proving a will does not ordinarily differ from that of any other document except as to the special requirement of attestation prescribed in s 63 Succession Act. In regard to proof of a Will, the expression "and that the signature of the person executing the

document is in the handwriting of that person" is not available in view of S. 63(a) of the Succession Act which says that it is not necessary that the will for its validity, shall contain the signature of the testator. [*R Saraswathy v. P Bhavathy Ammal*, A 1989 Ker 228, 230]. The onus of proving the will is on the propounder and in the absence of suspicious circumstances, proof of testamentary capacity and the signature of the testator is sufficient to discharge the onus. Where there are suspicious circumstances, the propounder has to explain them. Where the caveator alleges undue influence, fraud and coercion; the onus is on him to prove the same [*Sashi Kumar v. Subodh Kumar*, A 1964 SC 529; *Venkatachala v. Thimmajamma*, A 1959 SC 443: 1959 Supp 1 SCR 426; *Purnima v. Khagendra*, 1962, 3 Cr 195: A 1962 SC 567; *Gorantla v. Thotakura*, A 1968 SC 1332; *Susama v. Anath*, A 1976 C 377]. If the standard of proof as envisaged by S. 68 falls short of the legal requirement, a 'Will' which is neither registered nor proved to have been attested and executed in accordance with law cannot be taken into consideration for the purpose of establishing the claim of the legatee. [*Mst Gullan Devi v. Mst Puran Alias Devi*, A 1989 J&K 51, 53 (DB)].

The conflicting versions of the scribe and the attestor will lead to a suspicion especially when the testatrix was not in a sound disposing state of mind due to cerebral stroke. [*D.S Sreeramaiah Shetty v. Smt. Dontu Kanthamma*, A 1984 NOC 193 (Kant)]. Registration cannot do away with the requirement of proof of attestation of the will [*Karri v. Putra*, A 1974 AP 13; *Jagdish v. Rajendra*, A 1975 A 395; *N D Samant v. Kumari Jayashree Roy*, A 1989 NOC 189 (Ori) : (1989) 1 Ori LR 345 (DB); *Thayullathil Kunhikannan v. Thayullathil Kalyani*, A 1990 Ker 226, 233]. Mere registration of a Will will not by itself be sufficient to dispel all suspicion regarding execution and attestation without submitting the registration to a close examination. It is of no use if the registration was just perfunctory [*Dinesh Chandra v. Bindubashini*, A 1969 As 118; *Ajit Kumar Maulik v. Mukunda Lal Maulik*, A 1988 Cal 196, 200 (DB)]. The registering officer must have signed the document authenticating the signature of the executant and not merely for the purpose of registering the document. [*Ramesh Dutt Salwan v. State*, A 1989 NOC 47 (Del) : 1988 Rajdhani LR 337].

Where the plaintiff himself accepts the execution of the Will, but chooses to contest only on legal aspects touching upon the validity of the bequeathment of certain properties. Section 68 of Indian Evidence Act does not come into play and is totally inapplicable. [*Valluri Jaganmohini v. Kopparthi Ramchandra Rao*, (1994) 3 CCC 1]. A will is not invalid merely because the attesting witnesses have signed at different time. [*K.M. Varghese v. K.M. Oommen*, A 1994 Ker 85, 101]. Where after the deceased had put the signature and executed the will in presence of the witnesses, the other two witnesses had put their signatures as attesting witnesses in presence of the deceased and the advocate, who had drafted the will, had put his signature after seeing that the executant and other two witnesses had put their signatures on the will in the presence of each other, the document was not only properly executed and attested by the executant and witnesses, but in fact it was really executed and attested. [*Jamuna Bai v. Surendra Kumar*, A 1995 MP 274].

By attestation is meant the signing of document to signify that the attestor is a witness to the execution of the document [*Benichaund v. Kamla*, A 1977 SC 63]. For attestation of wills see s 63(c) Succession Act. S 50 (now s.63) of the Succession Act differing from s 9 of the English Wills Act, 1837, I Vic c 26, expressly provides that it is not necessary for both attesting witnesses to be present at the same time [*Sabitri v. Savi*, 19 CWN 1297: 29 IC 743; *Muktonath v. Jitendra*, 19 CWN 1295: 22 CLJ 262]. In cases where two attesting witnesses had signed in the presence of each other,

it is not necessary to examine both to prove that they had received the acknowledgment from the attestor but if the attestations are not made at the same time, it is necessary to prove that the attestors had signed so on the acknowledgment of the testator. [*M.S Thanigachala Pillai v. Rukmani Ammal*, A 1989 Mad 99, 101 : (1988) 101 MLW 425]. The attesting witness must sign the will in the presence of the testator [*In re Hemlata Debee*, 9 C 226: 11 CLR 359; see also *Bisshonath v. Dayaram*, 5 C 738: 5 CLR 565; *Hurro Sundari v. Chunderkant*, 6 C 17: 6 CLR 303; *Amarendra v. Kashinath*, 27 C 169]. If one attesting witness proves execution of the will and its attestation by him it is admissible to prove what it contains unless the very validity of the transaction is questioned [*Bala Pd v. Bholanath*, A 1981 NOC 29 (A)]. "Signed by the testatrix in our presence and attested by us in the presence of her and of each other"—was held sufficient [*Re Sulby-Bigge*, 1950, 1 All ER 1009]. Where the evidence of the attesting witness is vague, doubtful or even conflicting, the court is of course competent to disregard their testimony and pronounce in favour of the will upon other reliable evidence and the *surrounding circumstances* [*Brahmadat v. Chaudan*, 30 CWN 192; *Kedar v. Rajkumar*, A 1939 C 675: 69 CLJ 294]. As to effect of repudiation of signature by an attesting witness, see *Nobokishore v. Joy Doorga*, 22 WR 189.

Attestation in the presence of the testator on acknowledgment of signature is sufficient attestation [*Ameer Chand v. Mohanund*, 6 CLJ 453; *Sabitri v. Savi, sup*: *Muktonath v. Jitendra, sup*]. It is not necessary that affirmative evidence should be forthcoming that the testator did as a matter of fact see the attesting witnesses put their signature or that the attesting witnesses did actually see the testator sign. It is enough if the circumstances show that they might have seen the execution and the attestation respectively [*Brahmadat v. Chaudan, sup*]. The attesting witness in respect of a Will should speak not only about the testator's signature or affixing his mark to the Will but also that each of the witnesses has signed the Will in the presence of the testator. [*Illyas v. Balshae Alias Kamala*, A 1990 Madh Pra 334, 337]. Where there is no proof of execution of a will, the identification of the handwriting of the attestors does not prove execution by testator [*Kahan v. Jawandi*, A 1923 L 174]. There is no legislative enactment requiring a Mohomedan to be attested [7 Bom LR 558; see also *Sakina Bibi v. Md Ishak*, 37 839].

In order to prove proper execution of Will it must be proved that two or more witnesses attested it [*T Venkat v. T Kamakshiamma*, A 1978 Or 145]. The attestation of a Will by as many as six witnesses must be held to be sufficiently outstanding to establish the genuineness of the Will so as to overshadow the other factors alleged to be suspicious circumstances surrounding Will. [*Talak Raj Kakkar v. Shambhu Nath Kakkar*, A 1987 Del 360, 362]. Where one of two attesting witnesses has proved due attestation by himself as well as by the other one execution is duly proved [*Naraini v. Pyare*, A 1972 Raj 25; *Hari Shankar v. Chimman Lal*, A 1983 (NOC) All 170]. When the second attesting witness for a Will is alive, he should also be examined unless some explanation is given why the witness though available was not produced. [*Dinesh Kumar v. Kharan Singh*, A 1988 Del 273, 275 = (1987) 31 DLT 388].

It was held in a case that a will can be proved by one of the attesting witnesses [*Rammol v. Hakol*, 22 CWN 315]. Possibly it was a case of attestation by the two witnesses at the same time in each other's presence. But if attestation to the testator's signature are not made at the same time but at different times by two witnesses not in each other's presence, the evidence of one of the attesting witnesses is not sufficient to prove the will [*Roda v. Kanta*, A 1946 B 12; *N Ramaswamy v. C Ramaswamy*, A 1975 M 88; Where title was solely based on will one of the attesting witness alive summoned by lower appellate court failed to prove the will, decree in suit based on

such will was set aside [*Eamwshwari v. Shyamkal*, A 1980 A 292], see *ante*: "*Until one attesting witness at least &c*]. In spite of s 281 Succession Act, in a probate petition one of the attesting witnesses must affirm an affidavit to prove the signature and execution of the will [*In re Carlton*, 56 CWN 650]. Where all the surviving attestors have been examined, the non-examination of the scribe is of very little consequence [*Kristogopal v. Baidyanath*, A 1939 C 87; *Kameshwar v. Suryaprakasa*, A 1962 AP 178; *Smt Manorama Srivastava v. Smt Saroj Srivastava*, A 1989 All 17, 29]. Where all the attesting witnesses are dead, a Will can be proved in the manner prescribed for proof of a document. [*Balwant v. Mainabai*, A 1991 Madh Pra 11, 13]. Where an attesting witness of a will had died after giving evidence in previous proceedings and in subsequent proceedings between the same parties or their representatives, his evidence was brought on record surviving attesting witness need not be summoned [*Mohinder v. Piara*, A 1981 P&H 130 FB]. As to burden of proving will, see notes to ss 101-4 *post*: "*Wills*".

In the Punjab the formalities as to attestation in s 63 Succession Act are not applicable to wills made before the 1st January 1927 [*Mehtab v. Amrik*, A 1957 Pu 146]. Where the witness stated that certain person made publication in his newspaper and through that publication he cancelled the Will held, neither the publication nor the statement is sufficient proof of the document *i.e.* the Will in question [*Chandan v. Longa Bai*, A 1998 MP 1].

Can the Registering Officer be regarded an Attesting Witness?—With regard to wills, it was formerly held that signature of sub-registrar on admission of execution is sufficient attestation [*Hurro Sundari v. Chunder*, 6 C 17; *Marendra v. Kashinath*, 27 C 169; *Tofaladdi v. Mahar*, 26 C 78; *Sarada v. Triguna*, 1 P 300: 70 IC 402; *Theresa v. Francis*, 45 B 989; *Mir Syed Hasan v. Taiyaba*, 26 IC 547]. As the meaning of "attested" in the T P Act is now the same as in the case of wills, sub-registrar's endorsement after receiving acknowledgment of execution was held sufficient attestation [*Radhamohan v. Nripendra*, 47 CLJ 118: A 1928 C 154; see also *Saroda v. Triguna*, 1 P 300: A 1922 P 402; *Kanchedi v. Zabbarshah*, A 1936 N 171; *Ganpatrao v. Nagorao*, A 1940 N 382 (**dissented** from in *Sakharam v. Sushilabai*, A 1953 N 339)]. A Full Bench in Madras has also held that signatures of registering officer and of the identifying witnesses affixed under ss 58 & 59 Registration Act amount to sufficient attestation if it is proved that the sub-registrar or the identifying witness signed in the presence of the executant after receiving a personal acknowledgment of the executant's signature [*Veerappa v. Subramanya*, 52 M 123 FB: A 1929 M 1; see also *Venkataramayya v. Nagamma*, 1931 MWN 1242: A 1932 M 272; *Ramanathan v. Delhi Batcha*, A 1931 M 335; *Chunnibai v. Girdhari*, A 1934 N 1; *Chhaju v. Surinder*, A 1951 Pu 305]; but a contrary view has been taken by a Full Bench at Allahabad [*Lachman v. Surendra*, 54 A 1051 FB: A 1932 A 527; see also *Ma Thein v. Ma Ngwe*, A 1939 R 211.

In *Lachman's case* it was observed that if it were held that registration and what might happen at the time might take the place of execution and attestation, which according to the language of the Act must precede registration, the entire spirit of the enactment would be broken]. There is much to be said in favour of this view as the condition relating to attestation is not satisfied if a name is put *alio intuitu* (*ie* under a different aspect). The act of attestation should be done with *animo attestandi* (*ie* with the intention to attest; *ante*). It may also be pointed out that s 60(2) of the Registration Act provides that the certificate of the registering officer shall be signed, sealed and dated by him and shall be admissible for the purpose of proving registration. But the particulars which are to be endorsed on documents under s 58 do

not include a statement that the registering officer or the identifying witnesses signed in the presence of the executant.

Radhamohan's case, *ante* was not followed in *S M &c Firm v. R M &c Firm*, 5 R 772: A 1928 R 101 and it was commented in *Abinash v. Dasarath*, 48 CLJ 281 that it was overlooked that it is necessary within the definition of 'attested' that attesting witnesses should have signed in the presence of the executant. It was also not followed in another case holding that it must be definitely and affirmatively proved that the sub-registrar had affixed his signature in the presence of executant [*Haripada v. Annada*, A 1930 C 750; see *Atul Ch v. Krishna*, 67 CLJ 31]. The registering officer may therefore be treated as an attesting witness if it is proved that he signed in the presence of the executant [*Nilima v. Joharlal*, 38 CWN 753: 61 C 525; see also *Hem Ch v. Guiram*, A 1934 C 201; *Seth Gordhandas v. Rijhibai*, A 1937 S 47; *Ruprao v. Ramrao*, A 1952 N 88; *Sakhkaram v. Sushilabai*, A 1953 N 339]. The scribe and the sub-registrar can duly prove the execution and attestation of a Will. [*Ajmer Singh v. Tirath Singh*, A 1984 (NOC) 101 (Punj & Har)]; but the mere endorsement by the sub-registrar of an admission of execution and the signature of the witnesses present at the time are not sufficient for valid attestation, where there is no separate evidence that the signature of the witnesses were affixed in the presence of the admitting executants or of any endorsement to that effort [*Dhanapala v. Gover Chand*, A 1938 M 959: 1938 MWN 938; *Ramanathan v. Delhi Batcha*, A 1931 M 335: 60 MLJ 302; *Umrao v. Bakshki*, A 1957 Raj 180].

The Judicial Committee without expressing any opinion on the conflict of decisions observed that assuming that it would be legitimate to look at the proceedings relating to registration, the fact that the registrar signed the endorsement in the presence of the executant or that the identifying witnesses heard the executant admit the execution must be proved by other evidence [*Surendra v. Behari*, 43 CWN 669: A 1939 PC 117: 1939 Kar 222; **relied** on in *Sakharam v. Sushilabai, sup*].

In Bombay it has been held that the signature of the Sub-Registrar or the identifying witnesses cannot be regarded as signatures of attesting witnesses [*Timmavva v. Channava*, A 1948 B 322]. No presumption of attestation can be made from the registration endorsement [*Md Ziaullah v. Rafiq*, A 1939 O 213].

Supreme Court has held that it is essential that the witness should have put his signature *animo attestandi*, *ie*, for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgment of his signature. If a person puts his signature for some other purpose, *eg*, to certify that he is a scribe or an identifier or a registering officer, he is not an attesting witness [*Abdul Jabbar v. Venkata Sastri*, A 1969 SC 1147: follld in *Gurnam, v. Ass*, A 1977 P&H 103].

Wigmore says: 'An officer, whose signature is required by law or by rule of court to give validity to a document or to enable it to be filed for a specific purpose, is an attesting witness, though he signs for a different purpose; and for the same reason an officer authorised to take an acknowledgment and to give a certificate thereof admissible as evidence under the Hearsay exception, would be an attesting witness [Wig s 1292].

Can Scribe or any One Who Does Not Sign in the Capacity of an Attesting Witness be Regarded an Attesting Witness?—Judicial opinions do not appear to be unanimous on this point. It was held in *Raj Narain v. Abdur Rahim*, 5 CWN 454 (**approving** *Radha v. Fateh*, 20 A 522) that a person whose name appears on the document as the scribe is competent to prove the execution of the deed if he was in fact present and witnessed the execution. *Raj Narain's case* was **followed** in

Dinamoyee v. Ban Behari, 7 CWN 160. *Radha v. Fateh* was not **approved** in *Badri Pd v. Abdul Karim*, 35 A 256 and other subsequent cases and the report of the case being meagre, full facts do not appear from it. *Badri Pd v. Abdul Karim, sup* held that the scribe of a mortgage-deed cannot be counted as an attesting witness merely because he has signed the deed, even though the deed may in fact have been executed in his presence; see also *Ram Sahu v. Gouri Shankar*, 39 IC 153. In *Ranu v. Luxmanrai*, 33 B 44 and *Dalchand v. Lotu*, 44 B 409 it has also been held that a scribe could not be treated as "attesting witness" within s 68 unless he actually signed as *attesting* witness and these cases were relied on in *Timmavva v. Channava*, A 1948 B 322; see also *Amardas v. Harmanbhai*, A 1942 B 291. The decision in *Govinda v. Bhau*, 41 B 384: 39 IC 61 is not opposed to the above view as the signature below the mark of the executant was held to have been made not as a scribe but as an attesting witness. These decisions are based on the meaning of the word "attestation" in *Burdett v. Spilsbury* (*ante*, "*under Attestation* [*former Law*]", which was also quoted with approval in the Privy Council case of *Shamu Pattar v. Abdul Kadir*, 16 CWN 1009: 35 M 607: 39 IA 218. In Burma also it has been held following *Shamu Pattar's case* that a writer signing as scribe does not become an attesting witness [*Mg So v. Ramaswamy*, 24 IC 375; *Chetty v. Po Mya*, 12 Bur LT 261: 56 IC 945; *Maung Po v. Muthia*, 65 IC 64], but he may be so, provided he signs as an attestor [*Aung Rhi v. Ma Aung*, 77 IC 362: 1 R 557]. The same view has also been taken in Patna in *Ran Bahadur v. Ajodhya*, 20 CWN 699: 34 IC 370, where CHAMIER CJ, said: "To be an attesting witness within s 59 T P Act, the witness must not only have seen the execution of the document, but should have also subscribed as a witness" [see also the judgment of MILLER CJ, and MULLICK J, in L P App No 13 of 1917 (Pat)]. *Ran Bahadur v. Ajodhya*, was followed in *Nageshwar v. Bachu*, 53 IC 79: 4 PLJ 511 where it was held that a scribe who deliberately elects to affix the word "scribe" to his name in preference to the word "witness", places upon himself an almost insupportable burden of proof that he signed as an attesting witness and not as a scribe. The same view has been taken in Oudh **following** 20 CWN 699 [*Ram Samuih v. Maninath*, 91 IC 176: A 1925 O 737].

Where the scribe of the Will stated that the Will was scribed by him at the instance of the testator who was in fit state of health and mind and that the Will was signed by the testator after it was read over to him by the scribe whereafter the marginal witnesses and he himself also signed, beside being the scribe, the statement of such marginal witness can be taken to be statement of attesting witness [*Dhyan Chand v. Savitri Devi*, A 1998 HP 37]. The scribe of an endorsement on pronote need not be examined as it is not one of the documents required by law to be attested or scribed [*Musunuri Anjaneyulu v. Koona Lakshmi*, A 1998 AP 214].

A contrary view has been taken in a few cases in Madras and also in Calcutta that the fact a person calls himself a scribe in a certain document does not debar himself from being an attesting witness, if he in fact witnessed the execution, on the ground that the essence of attestation of a document is that the person attesting must have seen the document executed by the executant [*Paramasiva v. Krishna*, 41 M 535: A 1918 M 491; *Venkatasubbiah v. Subbamma*, A 1956 AP 195; *Jagannath v. Bajrang*, 48 C 61: 62 IC 97 (**following** *Rajnarain v. Abdur Rahim, sup*)]. But while subscribing to this view it has been pointed out that the fact that the scribe signed in the capacity of an attesting witness must be duly proved [*Murugesa v. Gopala*, 1950, 2 MLJ 262].

It is submitted that this view does not appear to be in agreement with the law laid down by the Privy Council in *Shamu Pattar v. Abdul Kadir*, 39 IA 218: 35 M 607. In that case *Burdett v. Spilsbury*, (v. *ante*), was cited and the statement of the Lord

Chancellor that "the party who sees the will executed is in fact a witness to it; *if he subscribes as a witness, he is then an attesting witness*" was quoted with approval, holding that the word "attested" in s 68 and s 59 T P Act has been used in the sense in which it has been uniformly construed in English decisions. Their Lordships observed:—

> "Sec 59 of the T P Act in requiring that in a certain class of cases a mortgage 'can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses' could only mean that the witnesses were to *attest the fact of execution*. Any other construction in their Lordships' opinion would remove the safeguards which the law clearly intended to impose against the perpetration of frauds."

A man may be considered to have attested the fact of execution, not only when he saw the execution, but also when he signed as an attesting witness. The sole question for determination in that case was the meaning of the word "attested", and the decision is therefore a clear authority for the proposition that the witness is to *attest the fact of execution, ie*, he must see the execution (or get an acknowledgment of it from the executant) and "*sign it as a witness*" as defined by LORD CAMPBELL in *Burdett v. Spilsbury*. If this test is applied in the case of documents required by law to be attested, the conclusion follows that an attesting witness must sign *as such, ie*, he must in fact see the execution and also sign in the capacity of an attesting witness and it is not enough that his name is on the document though in any other capacity or for any other purpose. Attestation has since been defined in s 3 T P Act, but the definition adopted does not appear to disturb the position as to who can be regarded as an attesting witness [See *ante*: "*Requirement of attestation*"].

The authorities were not examined at length in *Jagannath v. Bajrang*, 48 O 61 and it is difficult to consider *Rajnarain v. Abdur Rahim*, 5 CWN 454 on which it is based, as good law after the decision in *Shamu Puttar v. Abdul Kadir*, 39 IA 218. In *Abinash v. Dasarath*, 56 C 598: 114 IC 84, *Rajnarain's case* and *Jagannath's case* were commented on and RANKIN, CJ, said that the exposition of law in *Rajnarain's case* was somewhat too wide. *Jagannath v. Bajrang*, 48 C 61 was **distinguished** in *Ram Samujh v. Mainath*, A 1925 O 737 where it is observed that the scribe signed in two places and the learned judges possibly took the view that when he signed the second time he signed in attestation on the deed. In the case of *Benoy v. Dhirendra*, 74 IC 178 : 38 CLJ 114, the decisions in 39 IA 218 and *Ganga Pd v. Ishri Pd*, 45 C 748: 45 IA 94: A 1918 PC 3 have been relied on as authorities for the proposition that a mortgage bond is not duly executed and cannot operate as a mortgage unless it is in fact signed by the mortgagor in the presence of at least two witnesses *who sign the document as attesting witnesses*, *Shamu Pattar's case* is still good law on this point. The Judicial Committee in *Sarkar Barnard & Co v. Alakmanjari*, A 1925 PC 89 apparently approved a similar view of the Patna High Court.

In later Calcutta cases it has also been pointed out that merely because a person's name appears on the document it does not make him an attesting witness irrespective of the purpose for which it is put there. The fact that a person is the scribe or that he puts the word 'scribe' after his name will not, in itself, show that he has not put his signature on the document by way of saying that he had seen the instrument executed. But where under the separate heading 'scribe' a man has put his name, it is erroneous to hold as a matter of law that even although on the construction of document, the name is put *alio intuitu* (under a different aspect), the fact that the name is on the document at all makes the man an attesting witness. It is wrong to say that because the man's signature is on the document at all—disregarding the purpose

for which it is on the document and disregarding altogether what his signature is put to authenticate, the man in question in an attesting witness [*Abinash v. Dasarath*, 56 C 598: 32 CWN 1228: A 1928 C 123 (**relied** on in *Gokul v. Jamna*, A 1946 C 168: 1944, 2 Cal 388); *Chandrani v. Sheonath*, A 1931 O 146]. The same view has been taken in *Jnanada v. Birendra*, A 1939 C 595: 69 CLJ 347; *Nirode v. Charu*, A 1950 C 401. The position therefore is that there is no bar to a scribe becoming an attesting witness provided that he also—(1) sees execution and (2) signs as an attesting witness *ie*, in the capacity of an attesting witness by describing himself as such. Many documents are faircopied and signed by the writer as a scribe long before the executants put their signature in the presence of attesting witnesses.

The determination of the question whether the signature put by a person on an instrument is to be regarded as an attestation or not, must depend on the character and circumstances in which the signature is made [see *Sham Sundar v. Jagannath*, 32 CWN 305: A 1927 PC 248: 106 IC 534; *Sarkar Barnard & Co v. Alakmanjari*, 83 IC 170: 26 Bom LR 737: A 1925 PC 89; *Paramasiva v. Krishna*, 41 M 535, 537] and assuming that a person signing as scribe can be regarded as an attesting witness, the fact that the scribe did sign as an attesting witness must be duly proved [*Murugesa v. Gopala*, 1950, 2 MLJ 262]. It cannot be presumed from the mere signature of two persons appearing at the foot of the endorsement of registration of a will that they had appended their signatures to the document as attesting witnesses. They must be called under s 68 before they might be treated as attesting witnesses [*Girja v. Gangotri*, A 1955 SC 346; *Karri v. Putra*, A 1974 AP 13: *Gurnam v. Ass*, A 1977 P&H 103].

In this connexion the reason for the rule in s 68 should also be kept in mind. Attestation is required by law as a special precaution against forgery or fraud. Moreover, a person who sees the execution or gets an acknowledgment of execution from the executant for the purpose of attesting it and authenticates the fact by subscribing as an attesting witness, is the most competent and trustworthy person to speak to the fact; and his knowledge of the circumstances relating to the execution is of much help when fraud or undue influence is alleged. If every scribe signing as such, is allowed to speak to the execution, on the plea that he was in fact present at the execution, it will do away with the safeguard imposed by law and it will afford an encouragement to litigants to make the scribe speak to the execution in almost all cases and in fact lead the parties to a document to believe that one instead of two witnesses is necessary, provided the scribe could be made to say about the execution. It is well known that many documents are engrossed days before execution and the scribes put down their names when they finish copying. In *Dalichand v. Lotu*, 44 B 405 MACLEOD, CJ, expressed himself thus:—

> "I should myself be very disinclined to hold that in any case, a scribe wherever he wrote his name could be considered to sign the document as an attesting witness. There is very great difference between an attesting witness and a scribe, and it would seem to me that it would lead to attempts to evade the plain words of s 59 and would also lead to constant difficulties thereafter, if the law was not strictly observed, since the parties might think that they were executing a valid mortgage if only one outside person was brought in to witness the document".

A mortgage bond written by *H* was signed "Mark by the hand of *M* by the hand of "*H*". It was attested by *B*, *R* and *S*. *B* said that *M* was not present when he attested it. *R* had attested before the sub-registrar the mark of *M* made below her acknowledgment as executant. *R* and *S* were dead. *R* was an attesting witness be-

cause he had before the sub-registrar received from the executant an acknowledgment of her mark within Act 27 of 1926 and had signed the instrument in her presence; and that the signature of *H* under the description of the mark of the executant was made as an attesting witness and not as a scribe and therefore the deed was validly attested [*Yakub Khan v. Gulraj*, 52 B 219: A 1928 B 267: 111 IC 287]. Where a scribe deposed that the executant signed the deed first, then he signed it and then the other witnesses signed, the scribe was also functioning as an attesting witness [*Haripada v. Annada*, A 1930 C 750].

The Supreme Court has settled the conflict by declaring that a scribe or an identifier or a registering officer cannot be an attesting witness unless he puts his signature *animo attestandi*, [*Abdul Jabbar v. Venkata Sastri*, A 1969 SC 1147 **folld** in *Rajammal v. Chinnathal*, A 1976 M 4: *Gurnam v. Ass*, A 1977 P&H 103].

A Party to a Deed is Not a Competent Witness to Attest it. [Scribe Signing for Executant].—LORD SELBORNE held that a person who is a party to the deed cannot be regarded as an attesting witness on the ground that if the person for whose benefit the instrument is executed is allowed to be an attesting witness, the very object of attestation, namely, the prevention of fraudulent malpractice, may be completely defeated [*Seal v. Claridge*, 1881, 7 QBD 516]. To permit a grantee to attest as a witness the execution of an instrument made to himself or take its acknowledgment as an officer, where its attestation and acknowledgment are necessary to give it validity, would be against public policy, and practically defeat the real purpose of the law [*Amick v. Woodworth*, 58 Ohio 86 (Am)]. Co-executants cannot be regarded as attesting witnesses because, they do not sign the deed for the purpose of attesting the execution, but with the object of conveying the interest they have in the property to transfer [*Wickham v. Marquis of Bath*, LR 1 Eq 17, 24]. It was also held here that party to deed cannot be regarded as an attesting witness and the above cases were referred to by MOOKERJEE, J, who observed that this line of reasoning appears to be based on good sense, and is consistent with the principles of justice, equity and good conscience, according to which Indian courts are bound to decide [*Sarurjigar Begum v. Baroda Kant*, 14 CWN 974: 37 C 526]. "Where the attestor has become, since the Act of attestation, disqualified to give testimony, it would be useless to produce him, and production is therefore excused" [Wig s 1316]. It should be remembered that when the attesting witnesses deny or do not recollect execution, other evidence to prove execution is admissible under s 71 and the grantee or executant then becomes a competent witness to prove execution provided of course the execution took place in his presence [*Jaikaran v. Protap*, 1939, 2 Cal 479: 43 CWN 1084: A 1940 C 189].

A proxy though not a party to, or beneficially interested in the instrument cannot attest his own appointment [*Re Parroti*, Exp Cullen, 1891, 2 QB 151]. The signature of the directors and secretary of a company witnessing the affixing of the common seal form part of the execution, and such persons are not considered as attesting witnesses [*Doe v. Chambers*, 4 A & E 410; *Deffel v. While*, LR 2 CP 144—Phip 8th Ed p 511].

The evidence of one of the executants, even if he was present at and witnessed the execution of a mortgage bond by others cannot be accepted as that of an attesting witness in regard to such executions [*Peary v. Sreenath*, 14 CWN 1046; *Debendra v. Behari*, 16 CWN 1075: 15 IC 666; see also *Sarurjigar Begum v. Barodakant, sup*]. A person cannot attest his own signature. Thus, where there is no mark, seal, or thumb-impression of the illiterate executant, the scribe or the person who executes for and on behalf of the mortgagor cannot be an attesting witness [*Rajani v. Panchananda*, 23 CWN 20; **folld** in *Paban v. Badal*, 34 CLJ 498: *Sristidhar v. Rakshakali*, 26 CWN

264: 63 IC 507; *Upendra v. Hukum*, 46 C 522; *Rajaram v. Jagannath*, 91 IC 507: A 1926 O 209; *Venkataramayya v. Nagamma*, 1931 MWN 1242: A 1932 M 272]. A power-of-attorney agent executing a deed for another cannot attest it [*Gomathi v. Krishna*, A 1954 M 126]. If the executant puts his mark, or finger impression, the person signing his name can attest. A person interested in the money under a mortgage-deed but who is not himself a party to the deed can validly attest [*Balu v. Gopal*, 13 Bom LR 944].

S. 69. Proof where no attesting witness found.—If no such attesting witness can be found, or if the document purports to have been executed in the [1][United Kingdom], it must be proved that the attestation of one attesting witnss at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.

SYNOPSIS

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COMMENTARY

Principle and Scope.—If no attesting witness can be found, *ie*, if he is dead, insane, blind, too ill to attend, suffering imprisonment, out of the jurisdiction of the court, kept out of the way by the adverse party or cannot be traced after diligent search; or if the document purports to have been executed in the United Kingdom of Great Britain and Northern Ireland, two things must be proved—(*1*) the signature of one attesting witness, and (*2*) the signature of the executant. They may be proved in the manner indicated in s 67 (*ante*, p 636) by the evidence of persons who are able to prove the hand-writing of the attestor and of the executant. Such proof of hand-writing and signature is considered *prima facie* sufficient to charge the other party. This is founded on the rule that on proof of the hand-writing of the attesting witness, it must be presumed that everything was rightly done.

The section relaxes strict proof of execution and attestation as required in s 68. The words used in the section is 'signature" and not "execution" and so when some kind of proof is given of executant's signature and the handwriting of one attesting witness, due execution is presumed. There should also be some evidence as to the identity of the executant. It has been held that in an action upon an instrument the subscribing witness to which is dead or resides abroad, it is necessary besides proving the handwriting of the subscribing witness to give some evidence of the identity of the party who appears to have executed the instrument [*Whitelock v. Musgrove*, 2 Cr & M 511].

The section speaks of 'signature' and 'handwriting' and it seems to contemplate that the attesting witnesses and the executant have signed their names. But in this country a large number of both executants and attestors being illiterate are either

1. In Ceylon "United Kingdom of Britain and Northern Ireland" substituted.

marksmen or their names are written by other persons for and on their behalf, 'Signature' includes mark (v *ante*, s 68). Proof of mark is no doubt more difficult than proof of signature, as it is not possible to recognise or identify with any degree of certainty a person's mark (unless there is something very peculiar about it) in the same manner as handwriting (*ante* s 47: "*whether handwriting includes marks*"). Such proof becomes more difficult where the witness was not present at the time when the mark was put. The degree of diligence required in searching attesting witness, must be the same as in case of a lost document [v *ante*, s 65(c)].

This section applies only when no attesting witness can be found if an attesting witness denies or does not recollect execution, s 71 comes into operation. The amendment to s 68 (by Act 31 of 1926) covers s 69 also which has to be read as a corollary to it [*Parumal v. Abdul*, A 1929 S 235].

Absence Of All Attestors Must be Accounted For.—"The force of the rule is not spent until it appears that no attestor can be had; in other words, if there is more than one attestor, *all must be shown unavailable* before resort can be had to other testimony. This is the ancient and settled doctrine" [Wig s 1309]. Evidence cannot be admitted to prove the signature of the attesting witnesses until the absence of all of them have been duly accounted for. A statement by a pleader that their whereabouts could not be ascertained is not enough [*Swamidin v. Kaniz*, 11 IC 225]. Death of attesting witness must be proved by proper legal evidence and not hearsay [*Asoomeah v. Chetti*, 61 IC 637]. In order that s 69 may be applied, mere issue of summons and warrants against the attesting witness and his failure to appear thereafter is not sufficient. All the processes of court in Or 16, r 10 must be exhausted (see: "*S 68 is Imperative*"). When the court refuses the process asked for, s 69 can be invoked [*Amal v. Dacca C H S Ltd*, 49 CWN 377: A 1945 C 350].

Where "No Attesting Witness Can be Found".—S 69 comes into play when no attesting witness can be found [*Doraiswami v. Rathnammal*, A 1978 M 78]. S. 69 is attracted when a witness cannot be found not merely when he has not been found. When summons to a witness was taken more than once and the summons were returned with endorsement saying that he was not available, it is to be held that the witness could not be found. [*Khuraijam Ongli Thoibisana Devi v. Akoijam Amnbi Singh*, A 1982 Gau 100, 107]. In the case of a Will, if the attesting witness cannot be found, the execution can be proved by examining a witness who can identify the signature of the attestor. In other words, there is no need to establish that the signature of the person executing the Will (that is the testator) is in his handwriting as in the case of other documents since S. 63(a) of the Succession Act says that it is not necessary that the Will for its validity, shall contain the signature of the testator. [*R Saraswathy v. P Bhavathy Ammal*, A 1989 Ker 228, 230]. This section is applicable only if the person says that the attesting witness cannot be found and so he is unable to examine him. [*Paramu Radhakrishnan v. Bharathan*, A 1990 Ker 146, 148]. The words "can be found" include not only cases where the witness cannot be traced, but also incapacity to depose on account of physical or mental disability or other sufficient cause [*Bam v. Sadhu*, A 1946 A 178]. When the production of any attesting witness is legally or physically impossible, thus if all the witnesses be proved to be dead, or insane [*Adam v. Kerr*, 1 Bos & P 360: *Currie v. Child*, 3 Camp 283; *Bennett v. Taylor*, 9 Ves 381]; or out of the jurisdiction of the court [*Barness v. Trompawsky*, 7 TR 265]; or if he cannot be found after diligent enquiry, or if he has absented himself from the trial by collusion with the opposite party [*Egan v. Larkin*, 1 Arm M & O 403], it will be sufficient, but perhaps not necessary in all cases, to prove his handwriting. If the instrument be lost, and the name of the subscribing witness be

unknown [*Keeling v. Ball*, 1796, Peake Add Cas 88] the execution must be proved by other evidence (Tay s 1851).

If proof is given of the signature of the attestor as well as of the person executing the document, it is no doubt most satisfactory. But the question may not unoften arise whether proof of the signature of the obligor is absolutely necessary, *eg* when the obligor denies execution and no witness is available to prove his signature. The section no doubt says that such proof should also be given, but it seems that as s 67 does not prescribe any particular mode of proof (*ante* s 67), such proof need not necessarily be that of a person who can speak to the obligor's signature; it may be given by presumptive, circumstantial or other available evidence. When proof of the signatures of the attestors is given, there is a presumption that they attested the deed after it was executed by the obligor. Thayer in his Evidence says (2nd ed p 764); "We perceive no reason, assuming that a proper case for any secondary evidence was shown, why the proof of the handwriting of one witness to the deed was not quite sufficient to authorise reading the deed to the jury." The proposition that the obligor's signature must also be otherwise proved has strong grounds behind it. Wigmore says: "It has often been contended that the signature of the maker also, as well as that of the attestor, must be proved. This contention means in effect that another attesting witness to the maker's signature must be called; for the attestation is the attestor's testimony to the facts of execution, *ie* the placing of the signature by the purporting maker. If, then, it is necessary to call a second witness to the maker's signature, this must be on the supposition that testimony of the attestation, taken alone, does not go far enough in its implied or expressed statements. This is indeed the ground upon which in part the above contention has been rested. It argues, first that the attestation, while asserting execution by a person of a certain name, does not sufficiently identify that person with the party in the case. It argues, furthermore, from the point of view of policy, that a person might be bribed to make a false attestation to a forged maker's signature and then to abscond, leaving it feasible to prove the document against a deceased person by establishing the attestor's genuine signature [Wig s 1513]. Thus "a paper false in itself might be established by proving nothing but the truth in a court of justice" [PORTER J, in *Dismukes v. Musgrove*, 7 Mart NS 58, 63]. The question has been discussed from both points of view in Wigmore, ss 1320 and 1513 by reference to numerous authorities and the learned author concludes thus: "The preferable rule is to allow the attestor's signature to suffice, in the absence of special circumstances which might justify the trial court, in its discretion, in exacting something more. At the same time, where the alleged maker is deceased (as in the case of wills) and therefore the counter-proof may likely be less available, it would be proper enough to insist on the present requirement" [Wig s 1513].

Nature Of Proof Where No Attesting Witness Found.—The English rule also required that in case of unavailability of proof of handwriting, any other kind of evidence can be let in. If a witness is not available, secondary evidence of execution must be given by proof of the *handwriting* of the witness; or if this is not obtainable by presumptive or other available evidence [*Clarke v. C*, 5 LRI 47; *Baxendale v. De Valmer*, 57 LT 566—Phip 11th Ed p 720. By s 3 of the Documentary Evidence Act, 1938, the former law has been altered and now a document requiring attestation may be proved as if no attesting witnesses were alive (*ante* s 68)]. The matter was considered at length in a case and it was held that the Indian law is not different from the English law; so that where the executant of a document who is illiterate denies execution and having put his mark to it, and all the attesting witnesses are either dead or have turned hostile or are not available, there is no rule of law which prevents a court from holding the execution

proved when the signatures of the attesting witnesses are proved to its satisfaction having regard to all circumstances of the case [*Ponnuswami v. Kolyansundara*, A 1930 M 770: 125 IC 231 **disapproving** the contrary view in *Gobardhan v. Harilal*, 35 A 364: 19 IC 121 and observing that court's attention was not drawn to *Abdulla v. Paru*, 11 B 690]. Following *Abdulla's* case, when all but executant were dead, relatives of the attesting witnesses were allowed to prove their signatures [*Nooruddin v. Md Oomer*, A 1956 B 641].

S 67 does not prescribe any particular kind of proof (*ante*) and under the Act handwriting may, in addition to the usual modes, be also proved by circumstantial evidence [*Barindra v. R*, 14 CWN 1209, 1210], or by the presumptive evidence. Thus, where the mortgagor and all witnesses were dead, proof that his signature and the signatures of two of the witnesses were in their handwriting raise a presumption of due execution and was sufficient unless rebutted [*Uttam v. Hukam*, 39 A 112; *Bairon v. Ganga*, A 1935 A 527; *Vekataramayya v. Kamisetti*, A 1927 M 662]. When all the attesting witnesses are dead, the court may rely on the presumption under s 114 that they signed before the mortgagor and the finding that they are attesting witnesses practically involved the finding that they signed after the mortgagor [*Radhanath v. Nagendra*, 53 CLJ 586: A 1931 C 806]. It will be presumed that the maker of an instrument executed it before the witness signed [*Hughes v. Debham*, 35 NC 127] and that a document purporting to be witnessed was witnessed at the time of its execution [*Pringle v. Dunn*, 19 Am Rep 772: Jones s 50]. Identification of signature is not necessary to prove a document, as required under section 69 of the Act. Identification of signature is necessary only if document is not signed in presence of the witness. In a case, where document has been executed in presence of a witness, it is not necessary for him to say that he identifies the signature. It is sufficient for the witness, if he says that the document in question produced in Court, to which his attention was drawn, was executed and attested in his presence. [*Haradhan Mahatha v. Dukhu Mahatha*, A 1993 Pat 129, 134].

When the handwriting of dead attesting witness has been proved, there is a presumption in the absence of rebutting evidence, that they witnessed execution [*Venkataramayya v. Gamisetti*, 101 IC 489: A 1927 M 662]. The requirements of s 69 are sufficiently complied with by proof of the handwriting of the scribe and by the fact that some of the attesting witnesses signed by the pen of the scribe [*Krishna v. Bishwanath*, 34 A 615: 10 ALJ 217]. When the executant, writer and attesting witnesses are all dead, it is sufficient to satisfy the court that the execution which was not specifically denied was so probable that a prudent man ought to act upon the supposition that it was executed [*Perumal v. Abdul*, A 1929 S 235]. If all the attesting witnesses are dead, the requirements of the law would be satisfied by any evidence showing that the document was executed in the presence of two attesting witnesses [*Namperumal v. Raghava*, 14 LW 563].

Where the only living attesting witness was got at by the opposite party and in cross-examination denied the clear evidence he gave in examination-in-chief about execution and attestation, the evidence in examination-in-chief was acted upon [*Thannera v. Bommadevara*, 1812 MWN 747]. The signature of the executant may be proved under s 69 indirectly by a contemporaneous admission of execution, *eg* admission of execution endorsed by the sub-registrar on the document [*Ajudhia v. Jagannath*, 20 OC 18: 38 IC 605 (*Harilal v. Thakur*, 34 IC 281: 19 OC 23 **doubted**)]. Where a court finds that a document has been "legally proved" within s 69, it should not be interfered with in appeal, especially when no objection was taken below to its admissibility [*Manchkonda v. Atchi*, 32 IC 760].

Document Executed in England.—A document executed in England and requiring to be attested under the English law but not under the Indian law, relating to property in India may be proved only by proving the signature of the executant [*Toomey v. Bhupendra*, A 1928 P 304].

Witness's Name Unknown Through Loss or Illegibility.—It is clear that where the very name of the attestor cannot be ascertained, the attestor is unavailable for the purpose of furnishing his testimony. This situation occurs where the document is *lost*; here the proponent is exempt from producing the attestor: unless of course the name has otherwise before trial become known to the proponent; for in that case his testimony though not of great value without the document before him, might at least help to establish the fact that such a document did or did not once exist. Where the name of the attestor is *illegible*, the same reason for exemption from production exists [Wig s 13, 14].

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

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COMMENTARY

Principle and Scope.—According to the English rule the attesting witness must be called, although the execution of the deed is admitted by the party to it. The general rule which requires the production of an attesting witness, is so inexorable, that it applies also to one, the execution of which is admitted by the party to it [*Abbot v. Plumbe*, 1779, 1 Doug 216]; and that too though such admission be deliberately made, either in open court [*Johnson v. Mason*, 1764, 1 Esp 89], or in a subsequent agreement [*Doe v. Penfold*, 8 C & P 536. But see *Bringloe v. Goodson*, 1839, 8 LJ CP 364], or even in a sworn answer to interrogatories delivered to the party in the cause [*Call v. Dunning*, 1803, 4 East 53. But see *Bowler v. Langworthy*, 1793, 5 TR 366; Tay s 1843]. A witness whether a party or not, cannot be asked, nor compelled on cross-examination, to admit the execution of document required by law to be attested [*Whyman v. Garth*, 8 Ex 803]. The strict rule has however been relaxed in some cases when execution has been *admitted for purposes of the trial* [*Whyman v. Garth, ante*; Tay s 1849: Phip 11th Ed p 722. A further relaxation has been made by the Documentary Evidence Act, 1938, 1 & 2 Geo 6 C 28]. S. 70 is inapplicable to a Will because the executant of a Will, which will become effective only on the death of the executant, will not be available to admit the execution at the relevant time [*R Saraswathy v. P Bhavathy Ammal*, A 1989 Ker 228, 230].

This section is a sort of proviso to s 68 and is a relaxation of the former English rule above. It says that an attesting witness is not necessary when a party executing a document admits the fact of its execution. The 'admission' referred to in this section is an admission *in the course of the suit in reference to the cause* by a party to the document, *eg* in his pleadings in the suit or during the examination at the trial (see *Raj Mangal v. Mathura*, 37 A I and other cases *post*). An admission not made in the course of the suit or proceeding, but made, without reference to it, may be used under s 69 as secondary evidence of signature of the document. It should be noted that there is no conflict, between this section and s 22 (v *ante*), which refers to oral admissions as to contents of document or s 65(*b*) which refers to admissions as to *existence, condition or contents of a document.*

Next, this section refers only to admissions as to the execution of a document. An admission to be effectual under this section must be *unqualified.* Thus if a person admits his signature in a mortgage bond but denies that the attesting witnesses were present at that time, the bond must be proved under s 68 by calling attesting witnesses. In other words, the admission must amount to an acknowledgment of the formal validity of the instrument [*Arjun v. Kailas*, 36 CLJ 373: 70 IC 532: *Benoy v. Dhirendra*, 38 CLJ 114: 74 IC 178: *Komalsing v. Krishnabai*, A 1946 B 304]. There is no reason for holding that where a party admits execution within s 70 he must necessarily be taken to admit that the document has been attested as required by s 59 T P Act [*per* CRUMP J, *Jagannath v. Ravji*, 24 Bom LR 129: 47 B 137]. The admission in s 70 refers to an *attested document* and so in order that the admission of execution may be effective it must first be shown that the document was attested in accordance with law. The words in s 70 apply only to a document *duly attested.* So where a person admits signature in a mortgage bond, it is not binding against him if it is not found to be legally attested [*Hira Bibi v. Ramhari*, 52 IA 362: 30 CWN 364: A 1925 PC 203; *Mg Po v. Mg Min*, 5 R 56]. Admission in s 70 therefore refers not only to execution but also the attestation of the signature [see *Harinath v. Nepal*, 1937, 1 Cal 507: 41 CWN 306].

In s 70 the expression "execution by himself" is evidently distinguished from the execution by witnesses which is known as attestation. S 70 lays down no rule as to the burden of proof, but in a particular class of cases, makes proof of partial execution adequate as proof of complete execution. Where there is evidence on both sides as to the *factum* of attestation, the maxim "*omnia rite esse acta*" can only be resorted to, (if at all); when the evidence on both sides is evenly balanced [*Jhama v. Deobux*, NLR 18].

[*Ref Tay ss 1843, 1849: Phip 11th Ed p 722: Wig ss 1294-98*].

Admission by Rule of Pleading.—The section does not say that the admission should be express. So if any of pleading requires that the execution alleged by the opponent must be specifically denied, failure to plead denial must be construed as equivalent to an admission of execution by the doctrine of admission by nontraverse. Without the denial the execution is not put in issue. Under the improved and strict rules of pleading in the C P Code of 1908, there is no reason why failure to plead should not amount to an admission [: see Or 8 r 5 C P Code].

Execution Cannot Be Put in Issue Where it is Indisputable.—"(*1*) *Estoppel.* Where the opponent by his prior conduct is estopped from denying execution, the execution cannot be put in issue by him, and the party offering the document need not in any manner evidence its execution. (2) *Rule of Pleadings.* So far as any rule of pleading requires that the execution of any document named in the declaration must be expressly traversed, the failure to plead in denial, must under such a rule, be

equivalent to a confession of the allegation of execution in the declaration, and thus execution is not in issue on trial; (*3*) *Judicial Admission*. For the purposes of proof, a judicial admission of the opponent, *ie* an express agreement for purpose of the trial has the same effect as a failure to plead in denial; it is a waiver of proof on the subject. (*4*) *Opponent's Claim under the Same Instrument*. Where the opponent's claim, as expressly set forth in the pleading or as developed in the course of proof predicates the genuineness of the very document which the proponent now desires to prove, it is clear that the former is in precisely the same situation as if he had by pleading or by judicial admission conceded the document's execution" [Wig ss 1294-97].

What is Admission of Execution?—Admission of "execution" in this section means not only admission of signature but also the valid attestation of the signature by two witnesses as required by law [*Arjun v. Kalidas*; *Hira Bibi v. Ramhari*; *Harinath v. Nepal ante*; *Vadia Nagia v. Divakara*, 41 IC 585 : 1917 MWN 583; *Narain v. D C Pratapgarh*, 55 IC 501]. Where attestation is specifically denied, but the signing of the document is not so denied, it is necessary to call an attesting witness to prove execution under s 70 [*Ebrahim v. Akshay*, 40 CWN 151]. Where defendant disputes the claim generally but does not dispute the execution or attestation, it dispenses with proof of the document [*Jagannath v. Ravji*, 47 B 137 : 76 IC 73]. The borrower admitted the execution of the receipt for the payment of money. But he contended that certain words were interpolated. When the execution of the receipt is admitted the interpolation of the words will not make it inadmissible. [*Kuri Lal Rungla v. Smt Banarsi Devi*, AIR 1986 All 94, 106 (DB)].

In a suit on a mortgage bond not validly attested, the mortgagors did not plead invalidity of mortgage but pleaded payment and at the trial admitted due execution and attestation. If the plaintiff had relied solely upon the admission as to the due execution and attestation, it might well be that he would have been entitled to succeed. But he did not do so and adduced evidence from which it appeared that the document was not a valid mortgage in law—*Held* that the suit must be dismissed. S 70 cannot and does not render valid a document which is invalid in law. The mortgagors were not estopped from alleging that the document was not duly executed, attested or registered [*Skh Kachu v. Md Ali*, 45 CLJ 577 : 105 IC 28]. Where there was a clear admission of execution in the written statement but the attesting witness stated that the executor did not sign in his presence, the document was taken to be proved [*Ramlal v. Mt Septi*, 94 IC 558 : A 1926 P 295].

Certificate of admission of execution endorsed by the registering officer cannot be used as an admission within s 70. Such endorsement amounts to some *prima facie* evidence at least under s 71 [*Sarja v. Murlidhar*, 13 NLR 197 : 42 IC 715: *Deorao v. Dhondirao*, 109 IC 576 : A 1928 N 244. See *Pribhdas v. Sahib*, 93 IC 660 : A 1926 S 88; *Raj Mangal v. Mathura*, 37 A 1]. Where the attesting witnesses were dead or could not be found, the admission of execution before registering officer is not sufficient and the bond is to be proved in accordance with s 69 [*Deorao v. Dhondirao, sup*].

Admission of Execution Only Does Not Dispense With Proof of Attestation.—There was a controversy as to the exact scope of s 70 and the question was raised in several cases as to when does admission of execution dispense with proof of attestation. In *Jogendra v. Nitai*, 7 CWN 384 (BANERJI and GEIDT JJ), it was held that the only effect of s 70 is to make the admission sufficient proof of execution and that it is not sufficient to dispense with the necessity of proof of attestation by two witnesses to make a mortgage bond valid. This decision was strongly criticised by

Woodroffe as erroneous contending that if admission of execution did not dispense with proof of attestation there was no need for s 70 (Woodroffe's Ev 8th ed p 536). In a later case WOODROFFE & CHATTERJI JJ, (NEWBOULD J, **dissenting**) declining to follow *Jogendra v. Nitai, sup* held that the effect of s 70 is that proof by calling attesting witnesses is dispensed with as against the party admitting execution [*Satish v. Jogendra*, 44 C 325 : 20 CWN 1044]. To the same effect are the decisions in *Nibaran v. Ram*, 22 CWN 444 : 44 IC 984; *Gobardhan v. Harilal*, 35 A 364 : 19 IC 121; *Arjun v. Kelai*, 2 P 317 : 74 IC 150; *Boonsom Boonyanit v. Adorna Properties Sdn Bhd*, (1995) 2 Malayan LJ 863 (Penang HC); *Aung Rhi v. Ma Aung*, 1 R 557; *Boonsom Boonyanit v. Adorna Properties Sdn Bhd*, (1995) 2 Malayan LJ 863 (Penang HC); *Ashrafi v. Nanhi*, A 1922 A 153(1) : 44 A 127. In *Ashrafi's case* there was an admission of execution in the pleading but although it was found that the attesting witnesses did not see the executant sign, the deed was considered proved].

In a case, a distinction has been made between cases where it is apparent on the facts of the document that the attestation is insufficient, or improper and cases where on the face of it the attestation is proper and no issue about it is raised in the pleadings. In the former case, admission of execution does not dispense with proof. In the latter it may [*Jagannath v. Ravji*, 47 B 137; see also *Dalichand v. Lotu*, 44 B 405]. A later Calcutta case held that unless the admission of execution is *unqualified*, *ie* an admission "plain and simple, capable of being construed as an admission of due execution in the presence of the attesting witnesses," the party relying on the admission may have to prove attestation. Stress is laid between the difference between 'execution' and 'signature'. The word used in s 70 is "execution" and not "signature" which is used in s 69 [*Arjun v. Kailash*, A 1923 C 149(2) : 27 CWN 263, 266]. Where execution is admitted but it is specifically denied that the bond had been attested as required by law, it must be strictly proved [*Benoy v. Dhirendra*, 38 CLJ 114 : 74 IC 178; see also the remarks of CRUMP J, in *Jagannath v. Raoji*, 47 B 137 *ante*].

The controversy has now been set at rest by the Judicial Committee by holding that before the admission of execution under s 70 can be relied upon, it must be proved to be a document *duly attested*. In this case the signature of a mortgage-bond was admitted by an executant, but it has found on evidence that the attesting witnesses were not *present* when she signed it. LORD DARLING said:

> "*Those words* (of s 70) *apply only to a document duly attested*. The mortgage-deed here in question was not, in a legal sense attested; for it was merely signed by persons who professed to be witnesses to its execution, although in truth and in fact they were not so" [*Hira Bibi v. Ram Hari*, 52 IA 362 : 5 P 58 : 39 CWN 364 : A 1925 PC 203].

So, the authority of *Jogendra v. Nitai*, 7 CWN 384, *ante*, has been re-established and the contrary rulings have been superseded by *Hira Bibi v. Ram Hari, sup*. See also *Harinath v. Nepal*, 1937, 1 Cal 507 : 41 CWN 306 and *Davood v. Ramanathan*, 1938 Mad 523 : A 1938 M 43, where it has been emphasised that 'execution' in s 70 is not a mere signing of the document but due execution, *ie* execution in accordance with law which requires due attestation. Following *Hira Bibi v. Ram Hari, sup* it has been held that s 70 cannot and does not by admission of execution render valid a document which is invalid in law [*Shk Kachu v. Md Ali*, A 1927 C 926 *sup*]. So mere admission of execution does not dispense with proof of attestation [*Rajani v. Bonbehari*, A 1952 C 7] and where the execution of a mortgage bond is admitted but it is not duly attested, it is invalid [*Mg Po v. Mg Min*, A 1927 R 233 : 104 IC 386]. Where a mortgagor admits execution of a mortgage bond it means that he admits

valid execution including therein valid attestation. It is unnecessary for the mortgagee to prove attestation. But if he proceeds to prove attestation and the evidence adduced falls short of proof of due attestation then also the mortgagee is entitled to succeed. But if the evidence shows positively that the document has not been attested in accordance with law, then despite admission of execution by the mortgagor the mortgagee would fail [*Ram Nahak v. Sita*, A 1970 Or 82 (case law discussed)]. Admission contemplated in s 70 relates only to the person who has actually executed or purported to have executed the document and it is manifest that such person must be a party to the suit [*Hava v. Lokumal*, A 1944 S 61]. Where a defendant admitted execution before the sub-registrar but averred that he understood the document to be a power of attorney it was not an admission under s 70 [*per* JACK J.—CONTRA: MITTER J, *Ayenati v. Ismail*, 49 CLJ 347 : A 1929 C 441].

—Effect of Admission on Successor-in-interest.—Admission of execution does not bind his successors-in-interest for the purpose of s 70 in all cases. The admission is however binding on the executant's successor-in-interest when the latter founds his title of the property in suit upon a document which contains such admission [*Chandra Kali v. Bhabhuti*, A 1943 O 416].

"Admission of Execution" Must Be in the Course of the Suit Itself.—The 'admission' in this section, is an admission *in the course of the suit* or proceeding itself in which the document is produced and intended to be proved (*eg* in the pleadings or by a party in his examination. The certificate endorsed by a registering officer upon a registered document is no evidence of an admission made by an executant [*Rai Mangal v. Mathura*, 37 A 1 : 13 ALJ 881; *Sarja v. Murlidhar*, 13 NLR 197 : 42 IC 715; *Banwari v. Bigni*, A 1927 P 131; *Bhikari v. Sudhir*, 42 CWN 1055; *Deorao v. Dhondi Rao*, 109 IC 576 : A 1928 N 244; *Thimmavva v. Channava*, A 1948 B 322; see also *Budha v. Sarwan*, 7 NLR 85; *Harilal v. Thakur*, 34 IC 281 : 19 OC 23]. Accepting this view it has been held that an admission of execution of a bond in the power of attorney executed for the purpose of registration of the bond is not an admission within s 70 [*Davood v. Ramanathan, sup*]. S 70 does not relate to the attestation of a document by the admission of the party executing it. In other words, it has no relation to any admission of execution made before an attesting witness without reference to any suit or proceeding [*Abdul Karim v. Saliman*, 27 C 190]. Where execution was denied in the written statement, but the bond was allowed to go in at the trial without objection, it cannot take the place of execution and attestation and in the absence of proof of attestation the suit must fail [*Bonwari v. Bigni*, A 1927 P 131 : 101 IC 277; *Bhikari v. Sudhir*, 42 CWN 1055]. Under the English law also, proof of a document required by law to be attested is dispensed with against a party who has admitted its execution in the *course of proceedings for the purposes of the trial* [*Whyman v. Garth*, 1853, 8 Exch 803, 807 : Hals 3rd Ed Vol 15 para 816; Phip 11th Ed p 722; Tay s 1849].

CONTRA: It has been held in some cases that admission of execution in s 70 need not be in the course of trial, *eg* admissions made antecedent to the institution of legal proceedings [*Nageshwar v. Bachu*, 4 PLJ 511 : 53 IC 79; *Aung Rhi v. Ma Aung*, 1 R 575 : 77 IC 362; see also *Gobardhan v. Hari*, 35 A 364 and remark (*obiter*) of WALSH and WALLACH JJ, in *Ashrafi v. Nanhi*, 44 A 129], or admission of execution in the receipts in subsequent mortgage or deed of further charge [*Priyanath v. Bissessur*, 1 CWN 222n: *Gurcharan v. Ram*, A 1943 O 218]. But is such admission of any use without further proof that the document in question was duly attested, as the admission in s 70 applies only to a document duly attested [; see *Hira Bibi v. Ram Hari*, A 1925 PC 203, *ante*].

Effect of Admission of Execution by One of the Executants.—Admission of execution of mortgage by adult members of a joint family, does not bind the minor, execution as against whom must be proved by attesting witness [*Nageshwar v. Bachu*, 4 PLJ 511 : 53 IC 79]. Admission of execution by one executant does not bind the minor sons of another deceased executant [*Brahmananda v. Kanduri*, A 1959 Or 126]. Admission of execution under s 70 is sufficient proof as against the executant himself but not against the transferees from him [*Arjun v. Kelai*, 2 P 347 : 74 IC 150]. Admission of execution by representative of a party cannot be treated as an admission by the party within s 70. Where an attesting witness says that he affixed his signature but had no recollection whether he actually saw execution, and there is other evidence, it may be inferred that the requirements of law have been fulfilled [*Benoy v. Dhirendra*, 74 IC 178 : 38 CLJ 144].

Quaere.—Whether admission of execution by a party is not receivable in proof of such documents by himself [*Peary Mohun v. Sreenath*, 14 CWN 1046].

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

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COMMENTARY

Principle and Scope.—S 71 is one of the exceptions to the stringent rule of proof of an attested document in s 68. The fate of an attested document is not necessarily at the mercy of attesting witnesses [*Maharaj Lal v. Anjuman*, 48 IC 538 : 5 OLJ 667]. In the event of an attesting witness being declared hostile, the propounder of the will can cross-examine him and also rely upon other evidence to provide proper execution [*Bandaru v. Chirravuri*, A 1976 AP 370]. The provision that execution can be proved by other evidence does not mean that the other attesting witnesses also should be called to give evidence [*Brundaban Nayak v. Gohardhan Biswal*, A 1990 Orissa 232, 234]. When all the attesting witnesses turn hostile, other evidence may be given to prove execution at the mercy of attesting witnesses [*Maharaj Lal v. Anjuman*, 48 IC 538 : 5 OLJ 667]. When all the attesting witnesses turn hostile, other evidence may be given to prove execution and attestation [*Jaikaran v. Protap*, 43 CWN 1084]. The force of the rule is spent when the attesting witness is called. It is not necessary that he should speak favourably. If he positively denies execution, or his memory fails or he pretends not to recollect, it entitles the party to give other evidence of execution. This section lays down the mode of proof when attesting witness denies execution. Where attesting witness denies execution, forgets, refuses to prove or is hostile, other evidence is admissible to prove the document. It may be proved in the manner of documents not required by law to be attested (v s 67). It must however be remembered that s 71 comes into play only when *all* the attesting witnesses alive have been called or every attempt made to enforce their attendance and they deny or do not recollect execution. When only one attesting witness is called and he is not believed, it cannot be said that the provisions of s 68 have been complied with and no further

evidence of execution and attestation is necessary. It is doubtful whether non-acceptance of evidence as reliable comes within the description "denies or does not recollect" [*Surendra v. Behari*, 43 CWN 669 : A 1939 PC 117]. When one attesting witness categorically gave evidence about the execution of the will and the attestation by him and another, that evidence was accepted though that other witness denied his attestation in the presence of the testator [*Mathew v. Devass Kutty*, A 1988 Kerala 315, 318 DB : (1988) 1 Ker LT 184].

Where an attesting witness denies all knowledge of the matter or does not recollect having seen the execution of the documents, it becomes necessary to give further evidence on the matter, *eg* by calling some one acquainted with the handwriting of the person executing it, or who was present at the time of execution, or by the admission of the party [*Talbot v. Hodson*, 7 Taunt 251; *Fitzgerald v. Elsee*, 2 Camp 635]. If the attesting witnesses turned hostile, the execution can be proved by a person like the writer who was present at the time of execution [*Chaitan Charan Parida v. Maheswar Parida*, A 1991 Ori 125, 129].

This section applies to all attesting witnesses, whether to documents requiring attestation or not. Sometimes an attesting witness turns round upon the party who calls him, and denies his signature. This ordinarily happens where he has been bribed by the other side. Here, it would defeat justice if the party so injured were not allowed this licence. The same observation applies to the case of a witness not being able to recollect his attestation [*Lowe v. Jolifee*, 1 W Bl 365; *Bowman v. Hodgson*, LR 1 P & D 362; Nort p 254]. In proving the execution of a deed, the attesting witness frequently states that he does not recollect the fact of the deed being executed in his presence, but that seeing his own signature to it, he has no doubt that he saw it executed; this has always been received as sufficient proof of the execution [*per* BAILEY J, in *Maugham v. Hubbard*, 8 B & C 16; *per* TAUNTON J, in *R v. St Martin's Leicester*, 2 Ad & E 213; Ros N P 18th Ed P 135; see also *Benoy v. Dhirendra*, 38 CLJ 114].

If one of two or more attesting witnesses is called and he denies or does not recollect execution, is it permissible to give other evidence without calling the other attesting witnesses if available? The question was in some cases answered in the affirmative [*Hasan Ali v. Gurudas*, 33 CWN 248 : A 1929 C 188; *Manki v. Hansraj*, A 1938 P 301; *Ayenati v. Md Ismail*, A 1929 C 441 : 49 CLJ 347 (CONTRA: MITTER J)]. This view does not appear to be correct. It seems that there was no intention on the part of the legislature to depart from the rule of English law that other evidence should not be allowed unless *all* the attesting witnesses alive and subject to the process of the court are called or their absence has been satisfactorily explained. This view has now obtained recognition of the Judicial Committee [*Surendra v. Behari, sup*; see also *Hare Krishna v. Jagneswar*, 43 CWN 1025 : A 1939 C 688; *Vishnu v. Nathu*, A 1949 B 266]. In *Pilkington v. Gray*, 1899 AC 401 : 68 LJPC 63, one of two attesting witnesses to a will gave adverse evidence and said that the signatures were forged and it was held that other evidence could not be let in unless the absence of the second attesting witness was satisfactorily explained. See also *Coles v. C*, 13 LT 608 : LR 1 P 70 where it has been held that the other attesting witness must be called although the party may know him to be adverse. See *Bowman v. Hodgson*, 1867, I P & D 362; *Dayman v. D*, 71 LT 699. S 68 is imperative (*ante*) and it lays down that an attesting witness must be called so long as he is alive and subject to the process of the court and no document shall be used as evidence until one such witness is called. So, it has been held that the fact, when called he will prove hostile, does not excuse the plaintiff of his duty [*Tula v. Gopal*, 1 PLJ 369; *Gobind v. Pulin*, 31

CWN 215 *ante*]. If attestors are dead or prove hostile, s 71 requires evidence to prove execution. It is not necessary to prove execution in the presence of attesting witnesses [*Paleshwari v. Shankar*, 74 IC 669 (A); *Lalta v. Darshan*, 74 IC 839 : A 1924 A 149].

[*Ref Tay s 1844; Wig s 1302; Phip 8th Ed p 521*].

"Execution".—has the same meaning as in s 68 (*ante*), *ie*, not merely the signing by the executant but also attestation as required by law [*Jaikaran v. Protap*, 43 CWN 1084 : 1939, 2 Cal 479 : A 1940 C 189 and cases cited *ante*, under ss 67, 68]. In the case of *pardanashin* women it is the conscious execution and not merely the mechanical execution of a document that must be established [*Nathusa v. Md Siddique*, A 1939 N 159; see *post* s 111].

"Other Evidence".—may be any evidence other than that of the attesting witnesses, *eg*, of the grantee or executant of the document who gives evidence not as an attesting witness but as a witness proving attestation by others [*Jaikaran v. Protap, sup*].

Denial of Execution by Attesting Witnesses.—Where an attesting witness denies the execution, other evidence thereof is admissible, and the document may be upheld in spite of such denial [*Coles v. C*, LR 1 P 70; *Pilkington v. Gray*, 1899 AC 41], though where the denial is distinct and positive and there is nothing to throw doubt upon it, the attestation will be rejected [*Wyatt v. Berry*, 1893 P 5]. A party, however, is not bound to call a hostile attesting witness, if there be another available [*Belbin v. Skeats*, 1 Sw & Tr 148; Phip 11th Ed, p 722]. Where the attesting witnesses deny the execution of the Will the scribe of the Will can testify the attestation by the witnesses. His statement comes under s. 71 [*Chandan v. Longa Bai*, A 1998 MP 1].

B, one of three persons whose signature appeared as attesting witnesses denied that the executant had put her thumb-impression in his presence and the plaintiff who said that the executant put her thumb-impression in the presence of the attesting witnesses did not state that these attesting witnesses made their signature in the presence of the executant (as required by s 3 T P Act)—*Held* that *B* was not really an attesting witness and as no attesting witness was exami-ned, s 71 did not apply [*Banwari v. Gopinath*, A 1931 A 411 : 131 IC 557]. Other oral evidence is admissible to show that the attestor did as a matter of fact see the execution, if he denies it [*Sashimukhi v. Mon Mohini*, 67 IC 87; *Lakskhman v. Gokul*, 1 P 154; *Basdeo v. Rasbehari*, 104 IC 344: A 1927 C 535]. In order to rebut the evidence of the only attesting witness, plaintiff may call the writer to prove execution by the mortgagor and attestation by two witnesses. It is not necessary in such a case that the writer should also be an attesting witness [*Lakhshman v. Krishnaji*, 105 IC 769 : A 1927 B 655]. A statement of the attesting witnesses that they signed the blank paper, was sufficient to attract the operation of s 71 and entitled the tender of other evidence [*Dinabandhu v. Sanatan*, 48 IC 624; *Ajmer Singh v. Tirath Singh*, A 1984 NOC 101 (Punj & Har)]. Where the only living attesting witness was illiterate and denied execution, other evidence could be given [*Badri v. Gambhir*, 26 IC 500]. No doubt s 71 does permit the evidence of the executant of the deed in certain circumstances, but it does not however have the effect of rendering his evidence or that of other witnesses inadmissible in different circumstances [*Murari v. Md Samiruddin*, A 1937 A 273; **disapproved** in *Vishnu v. Nathu*, A 1949 B 266]. As to whether a recital in a mortgage-deed of the receipt of consideration is binding on auction purchaser of equity of redemption, see *Naraindas v. Dilwar*, 41 A 250.

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

COMMENTARY

This is s 7 of Act 2 of 1855. For a long time the rule was that when a document though not required by law to be attested, was in fact attested, one at least of the attesting witnesses must be produced. This hardship was done away by the Common Law Procedure Act, 1854 (Vic, c 125, s 26) which was also adopted here by s 7 of Act 2 of 1855. See also Cr Procedure Act, 1865 (28 & 29 Vic c 18, ss 1, 7). Now, an attested document which is not required by law to be attested may be proved by any of the modes indicated before (v s 67) without examining attesting witness [*Karuppian v. Muthukaruppan*, A 1975 M 221]. This rule has been held to apply only where all the parties are before the court; in proceedings *ex parte*, the attesting witness must still be called [*Re Reay*, 3 WR 312; *Re Rice*, 32 Ch D 35; *Worthington v. Moore*, 64 LT 338; Phip 11th Ed p 723].

Testimony of attesting witness is not the only evidence by which a sale deed can be established, it may be done by any other evidence [*Daitari v. Juggobandhu*, 23 WR 293]. S 72 applies to bond [*Ram Ch v. Jhibal*, A 1940 N 240] and sale deed [*Karuppiah v. Muthukaruppan, sup*] and not s 68. Where a mortgage-deed is unenforceable as a mortgage on account of want of proper attestation or registration it is admissible under s 72 as evidence of a personal covenant to pay [see *ante*, notes to s 68: "*Whether unregistered or improperly attested mortgage bonds create personal liability to pay or charge*"].

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

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

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

SYNOPSIS

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1. In Ceylon the three paras have been numbered sub-sections (1), (2), (3) respectively and in sub-section (3) the words, "palm impressions or foot impressions", have been added at the end.
2. This paragraph was added by the I E Act, 5 of 1899, s 3.

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Mere Direction by the Court under S 73 to Accused to Give Writing or Finger Impression Does Not Offend Art 20(3) of Constitution [Compulsion to Give Finger Print &c, or to Expose Parts of the Body Also Does Not Infringe the Article as it Is Not Included in the Expression "to be a Witness"] ...	1171
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COMMENTARY

Principle and Scope.—The section corresponds with s 48 of the repealed Act 2 of 1855 with some modifications and follows the English law now in force. The English law until the year 1854, did not allow the witness, or even the jury, except under special circumstances (comparison was always permitted in the ecclesiastical courts), actually to compare two writings with each other, in order to ascertain whether both were written by the same person. The technical rule of the common law was abrogated in the year 1854 so far as it related to civil proceedings. In 1865, the provision was made applicable alike to civil and criminal cases and it was enacted (by 28 & 29 Vic. cl 18, s 8) that a "comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute." *Vide* Taylor on Evidence, paras 1870 and 1871 quoted in *S v. Paliram*, A 1979 SC 141. Under this Act it seems clear first, that any writings, the genuineness of which is proved to the satisfaction, not of the jury, but of the judge [*Egan v. Cowan*, 30 LT 223], may be used for the purposes of comparison, although they may not be admissible in evidence for any other purpose in the cause [*Birch v. Ridgway*, 1858, 1 F & F 270]; and next, that the comparison may be made by witnesses acquainted with the handwriting, or by witnesses skilled in deciphering handwriting, or by the jury themselves [*Cobbett v. Kilminister*, 1865, 4 F & F 490, *per* MARTIN, B], or by the court. The comparison amounts to bringing in new evidence and cannot be done in revision [*Hardevi v. S*, A 1969 A 423]. The genuineness of ancient documents may be established by producing from the proper custody other documents admitted to be genuine, or proved to have been respected, treated, and acted upon as such by the parties interested in them, and by then permitting witnesses, whether experts or others and the court and the jury, to compare such documents directly with the paper in dispute [*Davies v. Lowndes*, 1843, 12 LJ 506; *Doe v. Tarver*, 1824, Ry & M 141; Tay ss 1869-70; 1874]. The English statute as to comparison has been adopted in many jurisdictions in America though not in all. (Jones, s 522).

S 73 consists of two parts:—

(1) The first part of the section provides for comparison of signature, writing, finger impression &c, purporting to have been written or made by a person with others admitted or proved to the satisfaction of the court to have been written or made by the same person. But it does not specifically say by whom such comparison may be made. Construed in the light of the English Law on the subject, which is the legislative source of this provision, it is clear that such comparison may be made by a handwriting expert (s 45) or by one familiar with the handwriting of the person concerned (s 47) or by the court [*S v. Paliram*, A 1979 SC 14]. The Court observed as under:—

> "The matter can be viewed from another angle also. Although there is no legal bar to the Judge using his own eyes to compare the disputed writing with the admitted writing, even without the aid of the evidence of any handwriting expert, the Judge should, as a matter of prudence and eaution, hesitate to base his finding with regard to the identity of a handwriting which forms the sheet anchor of the prosecution case against a person accused of an offence, solely on comparison made by himself. It is therefore, not advisable that a Judge should take upon himself the task of comparing the admitted writing with the disputed one to find out whether the two agree with each other, and the prudent course is to obtain the opinion and assistance of an expert".

The necessity for adhering to the said sound advise and guidance is all the more necessary in a case where hundreds of signatures are disputed and the striking dissimilarities noticed by the Court at the time of trial of the Election Petition. [*O. Bhaiathan v. K. Sudhakaran*, A 1996 SC 1140, 1145]. It is imperative that the court be first satisfied that the signature on a document is genuine before it can be used as a basis for the comparison of disputed signatures [*Ngan Teng Hook v. Lee Ban Sing*, Civil Suit No. 22-140-90 dt. 28.7.1995 (Seremban HC)].

In addition to the modes of proving handwriting as provided by ss 45 and 47 (*ante*,) this section provides another mode by direct comparison of the disputed signature or writing or finger impression, with one which is admittedly genuine or proved to be so. As stated above, the comparison may be made by experts (s 45) or persons acquainted with the handwriting (s 41), or by the jury [*Cobbett v. Kilminister, sup*), or by the court [*Sarojini v. Haridas*, 26 CWN 113 : 49, C 235 : A 1922 C 12; *Ramaswami v. Ramanathan*, 1914 MWN 240 : 22 IC 627]. When the accused asks the court to compare a letter alleged to have been written by the prosecutor with the latter's admitted handwriting, the judge must place the document before the jury and ask them to compare and decide [*Khijiruddin v. R*, 53 C 372 : 92 IC 442]. The court should be slow to make comparison of signature itself. It should take the aid of any handwriting expert [*Taraknath Sha v. Bhutoria Brothers Ltd.*, A 1998 Cal 31].

Referring to the methods of proving handwriting given by JENKINS, CJ, (in *Barindra v. R*, 14 CWN 1114, 1138 : 37 C 467), MOOKERJEE, J, observed that the ordinary methods of proving handwriting are *(1)* by calling as a witness a person who wrote the document or saw it written or who is qualified to express an opinion as to handwriting by virtue of s 47; *(2)* by a comparison of handwriting as provided in s 73; and *(3)* by the admission of the person against whom the document is tendered. A document does not prove itself, nor is an unproved signature proof of its having been written by the person whose signature it purports to bear. S 73 does not sanction the comparison of any two documents, but requires that the writing with which the comparison is to be made, or the standard writing as it may be called, shall

be admitted or proved to have been written by the person to whom it is attributed and next the writing to be compared with the standard, or, in other words, the disputed writing, must purport to have been written by the same person, that is to say, the writing itself must state or indicate that it was written by that person [*Sarojini v. Haridas, sup*].

It will be noticed that in the first portion of the section, comparison of the purported signature or finger impression is to be made with any "admitted or proved" writing or finger impression, whereas in the second portion of the section the word used is "alleged" to have been written or made by such person. It does not appear, however, that the use of different expressions indicate any difference in idea. It will be remembered that under the second portion the writing or the finger impression which a person may willingly give is taken in the presence of the court and so it is in every sense a document admitted by him. It is that writing which has to be compared with the disputed writing. As to meaning of the words "purports to have been written", see *post*.

(*ii*) The second para of s 73 empowers the court to direct any person present in court (including a party or an accused) to give his specimen writing or finger impression "*for the purpose of enabling the court to compare*" it with others alleged to have been written or made by him. The occasion for such direction will arise only when the court feels that it is necessary in the interests of justice to make such a comparison for the purpose of coming to a conclusion of fact along with the other evidence in the case about the identity of its disputed authorship of handwriting. S 73 is an enabling provision under which the court "may direct" any person present in court to give specimen handwriting or finger impression. It confers no power on the court to compel the person to give it if he refuses to comply with the order. The court can only make such presumption under s 114 from the refusal as is permissible under the circumstances. A sample writing taken by the court under the second para is in substance and reality the same thing as admitted writing within the purview of first para also. The two paras are not mutually exclusive. They are complementary to each other. S 73 is therefore to be read as a whole, in the light of s 45, and so it is clear that a court can direct an accused appearing before it, to give his sample writing to be compared by a handwriting expert chosen or approved by the court, irrespective of whether his name was suggested by the prosecution or the defence to enable the court to reach its own conclusion with the assistance of the expert [*S v. Paliram*, A 1979 SC 14]. A prosecution witness cannot be called upon to get his voice tape recorded for comparison [*Vinod Kumar v. The State*, 1981 Cri LJ 927 : (1981) 19 DLT 390 (Del)]. See *post*: "*For the purpose of enabling the court etc, etc*").

Comparison of Handwriting.—In *R v. Harvey*, 11 Cox 576, BLACKBURN, J, refused to permit a comparison by the jury without the help of experts. To leave a question of handwriting to be decided by a jury unaided by expert evidence was a dangerous course that should not be followed [*R v. Tillay*, 1961, 3 All ER 406; *R v. Rickard*, 1918, 13 Cr A Rep 142, 143; *R v. Day*, 1940, 1 All ER 402, 403]. In *Hennessy v. Keating*, 1908, 1 IR 43 CA : 42 Ir TLR 169 HL, (an infringement case) LORD ASHBOURNE said: "I go on the evidence of my own eyes. Looking at the bottles and looking at the labels, I am unable to see my colourable imitation". It is not always necessary that the expert should be invariably examined and his opinion alone must be taken into account, for comparing the disputed signature. The court can compare the signature in a disputed document with the signature in the admitted documents [*Venkatesa Naidu v. Perumal*, 1998 AIHC 2171, 2172 (Mad)].

"In all cases of comparison of handwriting, the witness, the jury and the court may respectively exercise their judgment on the resemblance or difference of the writings

produced with respect to the general character of the writing,—the forms of the letters and relative number of diversified forms of each letter,—the use of capitals, abbreviations, stops and paragraphs, the mode of effecting erasures, or of inserting interlineation or corrections, the adoption of peculiar expressions,—the orthography of the words,—the grammatical construction of the sentences,—and the style of composition,—and also on the fact of one or more of the documents being written in a feigned hand" (Tay s 187). See also *post*, "*Comparison of Handwriting by the Court*".

"It has been doubted whether *fictitious specimens* may, on cross-examination, be submitted to a witness in order to impeach his testimony; but Mr Taylor's opinion sanctions this course (8th Ed s 1873), and it has been frequently employed in practice" (Phip 6th Ed, pp 108-109). Mr Hawkins (afterwards LORD BRAMPTON while cross-examining a handwriting expert gave him six slips of paper, each written in a different kind of handwriting and asked if they were written by one hand at about the same time. The expert examined carefully and said that they were written by different persons. Mr Hawkins then said "I wrote them myself this morning at this desk." (Reminiscences of Sir Henry Hawkins, Vol II, pp 16-17). The comparison question would not assume any significance when there is no other clear evidence on record to prove the execution of pronotes [*Mangubhai Mansukhram Pandya v. Pranjivan Tribhovandas*, A 1992 Guj 1, 4].

It is true that the court cannot be an expert and base its conclusions merely on comparison of signatures by itself. But it can definitely compare the signatures in light of other admitted evidence on record. [*Satish Jayantilal Shah v. Pankaj Mashruwala*, 1997(2) Crimes 203, 209 (Guj)]. The court cannot base its conclusion merely on comparison of signatures by itself. But it can definitely compare the signatures in the light of other admitted evidence on record. [*Satish Jayantial Shah v. Pankaj Mashruwala*, 1996 Cri LJ 3099, 3102 (Guj)]. Under section 73 of the Evidence Act, a Court is competent to compare the disputed writings of a person with other writings which are admitted or proved to be his writings. Such comparison by the Court is with a view to appreciate properly the other evidence available on record on the question of writings. It would, however, be too hazardous for a court to use his own eyes and merely on the basis of personal comparison decide a very vital issue between the parties entering ground the handwriting or signature of a person. [*Laxmi Bai v. A. Chandravati*, A 1995 Ori 131, 134]. In a case of enforcement of bank guarantee when the respondent denied to have signed the document as guarantor, in absence of an expert opinion, it was just and proper on the part of the lower court to compare the signatures with the admitted signature. When the court was satisfied that there were admitted signatures of the respondent available in court, there was no necessity to get another signature of the respondent in open court. [*New Bank of India, Trivandrum v. Sajitha Textiles*, A 1997 Ker 201, 202, 203]. The court cannot act as an expert while appreciating the evidence. [*Hamida v. Humer*, A 1992 All 346].

[*Ref Tay ss 1869-79; Phip 8th Ed pp 106-7; Hals 3rd Ed Vol 15 para 595; Best ss 238-48; Steph Art 52; Ros N P 241-43; Jones, ss 551-55; Rogers Expert Testimony, 2nd Ed 1861, p 309 et seq*].

"Purports To Have Been Written."—The writing to be compared with the standard, *ie*, admitted or proved writing, must purport to have been written by the same person, that is to say, the writing itself must state or indicate that it was written by that person [*Barindra v. R*, 14 CWN 1114 : 37 C 467; see also *Sarojini v. Haridas*, A 1922 C 12 : 26 CWN 113 *ante*. See the remarks of COUCH, CJ, in *Abdul Ali v.*

Abdoor Rahaman, 21 WR 429 and of FARRAN, J, in *Abdulla v. Ganni Bai*, 11 C 690]. But in a Madras case it has been held that the word "purports" does not limit the scope to such documents only as are signed or contain some intrinsic statements of the identity of the writer. Any document alleged by a party to be in the handwriting of a particular person may for purposes of proof be compared with other writing or signature admitted or proved [*Veeraraghava v. Souri Aiyangar*, 35 MLJ 608 : 48 IC 68 (37 C 467 **dissented** from: *R v. Ganpat Balkrishna*, 14 Bom LR 310 **apprd**)]. The latter view appears to be the sounder one. A writing does not always contain a statement disclosing or indicating the identity of the writer. All that the section requires is that any writing admitted or proved to the satisfaction of the judge to be genuine, may be compared with the disputed handwriting.

To prove that a certain letter was in the handwriting of *A*, it is admissible to compare therewith cheques purporting to be signed by *A* and produced by the manager of a bank, although he had never seen *A* write, had no signature book, and the course of business was merely for *A's* wife to pay in money to *A's* account against which the manager wrote out cheques which he sent back to *A* for signature, such cheques being afterwards honoured and preserved by the bank as being signed by *A* [*R v. Tranter, Times*, Jan 23, 7893 CCR cited in Phip 11th Ed p 143)]. To prove that the letters were written by *G* the court was entitled to compare the signatures on the letters with the signatures on the postal acknowledgment cards which was regarded by the court to be signatures of [*G Kamlesh v. Balbir*, A 1973 P&H 152]. To prove the handwriting of *A* (deceased) to a letter;—a comparison cannot be made between the letter and a deed fifty years old purporting, but not proved to be signed by *A* [*Miller v. Wheatley*, 28 LR Ir 144, 160]. O'BRIEN, J, remarked that "proof to the satisfaction of the judge" implied a personal judgment by him, and not the mere presumption of genuineness arising from the age of the deed [cited in Phip 11th Ed p 143].

"Admitted or Proved to Have Been Written etc."—The genuineness of the document with which comparison is to be made must be satisfactorily established. It must have been "admitted or proved to the satisfaction of the court to have been written or made by that person," which is also the requirement of the English statute. The handwriting used as a standard must be established by clear and undoubted evidence. Strict proof of its genuineness is required in order that no reasonable doubt shall remain. Nothing short of the evidence of the person who saw the person write the paper or his admission of genuineness ought to suffice [*Richardson v. Newcombe*, 21 Pick 317]. Where writings otherwise irrelevant, are allowed for the purpose of comparison, such writings should clearly be proved to be the genuine handwriting of the party sought to be charged. Any other rule would lead to many collateral issues [*US v. Oritz*, 176 US 422 and other cases cited Jones, 3rd Ed, s 555]. A document may be proved to be in the handwriting of an accused person by comparison with an admitted or proved specimen of his handwriting, in the light of the testimony of expert witnesses as explained in *Barindra v. R*, 37 C 467, 504 [*Pullin v. R*, 16 CWN 1105, 1143]. The admission must be by the accused himself or the signature must be proved to be his [*Tarubala v. S*, A 1953 C 307]. Before invoking s 73 there must be evidence that a thumb impression is that of a party in the litigation [*Krushna v. Commr &c*, A 1976 Or 52].

Both the disputed and the genuine writings must be produced in court. *A* sued *B* for libel contained in a lost letter and put in a photographed copy alleged to have been taken before loss—*Held*, that though the letter is admissible as secondary evidence of the contents of the letter, it could not be used for comparison with proved handwritings [*McCullough v. Munn*, 2 IR 194 CA]. Under the wording of the section

also the comparison is to be made with the genuine writing itself, but in the case of expert, comparison solely on photograph of handwriting has been held admissible [*Shrinivas v. R*, A 1951 N 226]. Copies made on carbon paper cannot generally be relied upon for purpose of comparison [*Nityanand v. Rashbehari*, A 1953 C 456]. *A sued B* on a lost contract which was denied by the latter. A comparison from memory of the signature of *B* in the contract with the admitted signature of *B* in a letter was not allowed [*Arbon v. Fussel*, 3 F & F 152]. The genuineness of the writing with which the comparison is made must first be shown. Comparison of the signature to a bond with a document not before the court or with one whose authenticity is disputed is illegal [*Gurumurthi v. Pappa Nayudu*, 1 Mad HC 164].

A court could not properly make comparison of signature, taking for a standard a signature on a deed, sought to be set aside as spurious [*Puran Ch v. Girish Ch*, 9 WR 450]. When the Handwriting Expert has not given any worthwhile opinion about the handwriting in the incriminating letters, the court cannot campare the handwriting and form an opinion and convict the accused on the basis of such opinion [*R.R. Nair v. State of Karnataka*, 1981 Cri LJ (NOC) 39 (Kant)]. When the handwriting experts differ, ultimately the court has to form its own opinion on the basis of the entire evidence brought on record. The court also would be competent to compare the signatures and the writings [*Mrs. Maria Piedade D'Souza v. M. Narayanaswamy*, A 1984 NOC 139 : (1983) 2 Kant LJ 135]. Where certain *raiyats* swore that they got their *pattas* from the hand of the person who professed to sign them, this was held, under s 73 to be sufficient proof that the signatures were those of the lessor [*Tara Pd v. Lukhee Narain*, 21 WR 6].

"Court".—Even in regard to s 13 the word 'Court' must be equated with the court of the magistrate in a case triable by him or before it is committed to sessions in a case triable by the sessions court [*Gulzar v. S*, A 1962 P 255 FB]. The conclusion arrived at by the trial court on the truth of a document on a consideration of the entire evidence, circumstances and improbabilities cannot be reversed by the appellate court merely on a comparison of the handwriting [*Jagannath Parida v. Anath Bandhu Das*, A 1984 NOC 97 (Orissa)]. Court of the magistrate cannot exercise the powers at the pre-cognizance stage [*T Subbiah v. Ramaswamy*, A 1970 M 85; see below]. The court must be connected with the trial or the proceeding. Where signature was taken at the direction of a sub-divisional magistrate who was neither conducting the enquiry nor was the trial fixed before him, it was held that such specimen could not be used for the purposes of S. 73 because it did not seem to have been meant for that purpose. *Amarjit Singh v. State of U.P.*, (1998) 8 SCC 613.

The Court May Direct Any Person Present in Court to Write any Words or Figures etc.—A party may under para 2 be made to write for the express purpose of comparison in the judge's presence [*Doe d Devine v. Wilson*, 1855, 10 Moo PCC 502, 530]. The person asked to write must be present in court. The power cannot be delegated to a magistrate not sitting as a court [*Kishore v. R*, 39 CWN 986; *Patitapaban Panda v. State*, 1983 Cri LJ NOC 124 (Ori)]. The court which can direct a person to give his specimen writing can either be a court holding the enquiry or the court trying the accused. [*Sukhvinder Singh & Ors. v. State of Punjab*, 1994(2) Crimes 904, 913 SC]. Under s 73 the magistrate has no power at the investigation stage by the police to issue a direction to the accused to appear in court for the purpose of giving specimen handwriting and signature at the request of the police [*Aloysious v. S*, 1966 MLJ Cr 298(K)]. S 73 does not permit a court to give a direction to the accused to give specimen writing for comparison at the stage of investigations [*S v. Ram Babu*, A 1980 SC 791 (*Farid v. S*, A 1960 € 32; *Priti v. S*, 77 CWN 865; *T Subbiah v. Ramaswamy*, A 1970 M 85; *Dharamvir v. S*, 1975 Cri LJ 884 (P&H); *Brijbhusan v. S*, A 1957 MP 106; *Srikant v. S*, 2 Cut WR 1332 **approved** and *Gulzar v. S*, A 1962 P 255 FB; *B Rami Reddy v. S*, 1971 Cri LJ (AP) **overruled**)]. But once such specimen signature handwriting etc., were taken and they were sent to the expert, and the expert also has given evidence, it will not vitiate the trial before the special Judge [*Hurekrishna Patnaik v. State of Orissa*, 1991 Cri LJ 462, 466 (Ori)].

The direction given under this section is to enable the court to compare the writings and not to enable the investigating agency or any other agency to compare such writings. [*Shiv Kumar v. Badri Prasad*, 1981 Cri LJ (NOC) 1 : 1980 All Cri R 216 (All)]. Agreeing with the same it has been held in *T Subbiah v. Ramaswamy*, A 1970 M 85 that to direct a person to write words or figures for the purpose of comparison, there must be (*i*) a cause before the court, (*ii*) the person so directed must be a party or witness to the cause, (*iii*) he should be present in court in respect of the said cause and (*iv*) such comparison must be necessary to determine the issue raised in the said cause. By reason of the provisions of ss 73 and 45 and Or 3, r 1 CPC, the court can direct a party to be present in court to give signature, handwriting or thumb impression for the purpose of comparison either by itself or for purpose of obtaining the opinion of an expert [*M Narayanaswami v. V Yangatanna*, A 1975 AP 88]. But the party cannot be compelled to give their signatures or writings [*Sashi Bhusan Pati v. State Bank*, A 1986 Ori 218, 220: (1985) 60 Cut LT 591]. This request could not be declined merely on the ground that it has been made by a party to the litigation and could be used as evidence by such party [*Sheo Narain v. Rawat*, A 1986 Punj & Har 174, 175 : 1984 Har Rent R 540]. The court does not exceed its powers under sec. 73, if in the interests of justice, it directs any person present in court to give his sample writing enabling the same to be compared by an expert [*Kumaran Nair v. Bhargavi*, 1988 Cri LJ 1000, 1003 : (1987) 2 Ker LT 644].

The words "any person" are wide enough to include the accused [*S v. Paliram*, A 1979 SC 14; *R v. Nga Hlaing Tung*, A 1924 R 115 FB; *R v. Ramrao*, 56 B 304; *Golam Rahman v. R*, A 1950 C 66; *S v. Parameshwaran*, A 1952 TC 482 FB]. Accused is not bound to furnish specimen writings and signatures. His refusal can be taken into consideration to arrive at a proper decision [*J.D. Aggarwal v. State*, 1983 Cri LJ NOC 155 (Del) : (1983) 1 Crimes 1083]. A stranger to the suit present in court must come within the sweep of the expression "any person" [*Dinanath v. Sukhdeo*, A 1980 P 253].

Mere Direction by the Court Under S 73 to Accused to Give Writing or Finger Impression Does Not Offend Art 20(3) of Constitution..... [Compulsion to Give Finger Print etc or to Expose Parts of the Body Also Does Not Infringe the Article as it is Not Included in the Expression "to be a Witness"].—It has been well settled beyond controversy by the Supreme Court in *S v. Kathi Kalu*, 1962, 3 SCR 10 : A 1961 SC 1808 that S 73 does not offend art 20(*3*) of Constn by giving a direction to an accused to give his specimen handwriting [*S v. Paliram*, A 1979 SC 14]. An account of judicial decision leading to the decision of *S v. Kathi Kalu, sup*, being of much interest and value is given herein. In a case of 1922 it was held that s 73 did not empower the court to direct the finger impression of the accused to be taken to implicate himself in the crime with which he is charged. BUCKNILL J, strongly condemned the practice and said: "When he (the accused) is on trial, such an idea is highly repugnant to all thoughts of the proper administration of justice in this or in any other British country". He had probably in mind the common law rule in England giving immunity to the accused against self-incrimination [*Bazari v. R*, 1 P 242 : A 1922 P 73; **relied** on in *Jassuram v. R*, 77 IC 423 : A 1923 L 622]. *Bazari's* case was dissented from by the same court in *Basgit v. R*, 6 P 305 and *Zahuri v. R*, 6 P 623. It was also dissented from by SIR WALTER S CHWABE, CJ, and WALLER, J, holding that it was not illegal or improper to take finger impression of accused in the course of a criminal trial [*Pub Pro v. Kandasami*, 50 M 462 : A 1927 M 696]. Similar view was taken in other cases on the ground that the words "any person" in s 73 included the accused and that further s 5 of the Identification of Prisoners Act, 33 of 1920, authorised a magistrate to direct finger impression,

photograph &c to be taken for the purpose of any investigation under the Cr P Code [*R v. Ramrao*, 56 B 304; *per* JACK, J, in *Kishori v. R*, 39 CWN 986 : A 1935 C 368 (CONTRA: *per* LORD-WILLIAMS, J, in *ibid*); *Golam v. R*, A 1950 C 66; *R v. Nga Tun*, A 1924 R 115 : 1 R 756 FB; *Supd & Rem v. Kiranbala*, 30 CWN 373 : 43 CLJ 79]. It applies also to investigation under the Bengal Excise Act [*Gubbay v. R*, 40 CWN 415]. Adverse impression may be drawn if accused refuses to give finger impression for comparison [*Zahuri v. R*, 6 P 623].

Since the Constitution in 1950 the question has cropped up again on many occasions in view of art 20(*3*) which confers immunity on the accused against self incrimination. There is nothing in s 73 to confine it to civil cases, nor is there anything in the expression "any person present in court" in para 2 to exclude the accused [see also *R v. Nga Hlaing Tung*, A 1924 R 115 FB; *R v. Ramarao*, 56 B 304; *Golam Rahman v. R*, A 1950 C 66 : *S v. Parameshwaran*, A 1952 TC 482 FB].

The question that presents itself for consideration is—What does the court's direction to the person to write words or give finger impressions imply? The words used are "may direct" and not "compel" (which has been used in ss 125, 129, 130, 131, 132) and so the idea of using compulsion to enforce obedience to the court's order does not arise. A mere direction to write words or give finger impressions does not imply any obligation to comply. That being so, the accused has the right to protest or to refuse to comply and s 73 does not arm the court with any compulsive power to enforce obedience to its direction. "The direction contemplated in s 73 is not compulsion; s 73 is only an enabling provision which confers power upon the court to give certain direction and does not impose any obligation upon the person to comply with it and there is no other provision obliging a person to write any words at the dictation of the court" [*per* DESAI, CJ, in *Ranjit Ram v. S*, A 1961 A 456, 458; see also *S v. Parameshwaran*, A 1952 TC 482 FB]. When therefore an accused complies with the court's direction without raising any objection, he shall be deemed to have done so voluntarily and not under any compulsion.

In this connexion it may be observed that although it is possible to take the finger print of a person against his will by compulsion, as the giver of the impression remains passive without exercising any volition and it is the person taking the impression who does an act, a direction to give specimen writing is to ask him to do a "positive volitional evidentiary act" and unless the accused co-operates and agrees to write, no specimen writing can be had from him. There is a distinction between taking finger impression of a person and making him write as has been pointed out in some cases (see *Badri Lal v. S*, A 1960 Raj 184; *Ranjit Ram v. S*, A 1961 A 456, 460).

An accused who is directed to give specimen writing or finger impression is free to decide whether he would or would not comply with it and s 73 does not permit the use of compulsion [see *S v. Parameshwaran*, A 1952 T-C 482 FB; *Ram Swarup v. S*, A 1958 A 119, 123; *Ranjit Ram v. S*, A 1961 A 456; *Badri Lal v. S*, A 1960 Raj 184]. And on the accused's declining to comply with the order, the court will be at liberty to draw adverse presumption under s 114 as is appropriate in the circumstances [*S v. Paliram*, A 1979 SC 14; *Ram Swarup v. S; Ranjit Ram v. S, sup*]. The presumption to be drawn is not guilt, but in corroboration of other evidence [*Balraj v. Ramesh*, A 1960 A 157]. If however, the accused complies with the order and voluntarily gives specimen writing or finger print without raising any objection that would be no violation of art 20(*3*) as there has been no compulsion [*Ranjit Ram v. S; Balraj v. Ramesh, sup*; *Bhaluka v. S*, A 1957 Or 172; *Pakhar v. S*, A 1958 Pu 294, 296; *Badri Lal v. S, sup*]. It has been held in England that specimen of handwriting voluntarily written by the accused before trial when detained by the police for enquiries although

not cautioned is admissible [*R v. Voisin*, 1918, 1 KB 531 : 13 Cr App Rep 89]. If the accused objects, no action will be taken by the court to compel him to furnish it [*Balraj v. Ramesh, sup*; *Bhaluka v. R, sup*]. It may be pointed out that the privilege under art 20(*3*) may also be waived by an accused either by failing to claim it or by voluntarily giving specimen writing or finger impression [see *Subedar v. S*, A 1957 A 396; *Ram Swarup v. S, sup*; *Pakhar v. S, sup*; *S v. Sankaran Nair*, A 1960 K 392; *Subbaya Goundan v. Bhoopala*, A 1959 M 396].

Relying on *Sharma v. Satish*, 1954 SCR 1077 : A 1954 SC 300 (the first Supreme Court decision on the meaning of the words "to be a witness against himself"), it was held in a series of cases that a direction on the accused to give specimen writing or finger impression, or the issue of any compulsory process for the production of any document which is reasonably likely to support the prosecution case infringed art 20(*3*) [see *Swarnalingam v. Asst Lab Insper*, A 1955 M 716; *Swarnalingam v. Asst Lab Inspr*, A 1956 M 165; *Rajamuthukoil v. Periaswami*, A 1956 M 632; *Collr of Customs v. Cal M Cycle Co*, A 1958 C 682; *Gupta v. S*, A 1959 A 219; *S v. Nagpur E I & P Co.*, A 1961 B 242; *Ranchordas v. Jahangir*, A 1961 G 137; *Bhaluka v. S*, A 1957 Or 172; *Gulam Nabi v. S*, A 1957 J&K 44; *Krishnan v. S*, A 1957 K 78; *S v. Ram Kumar*, A 1957 MP 73; *Brijbhusan v. S*, A 1957 MP 106; *Tarini v. S*, A 1960 C 318; *Farid v. S*, A 1960 C 32; *S v. Sankaram Nair*, A 1960 K 392].

In another group of cases it was held that a mere direction by the court to give specimen writing or finger impression does not violate art 20(*3*) [*S v. Gopala Rao*, A 1954 Mys 117; *Sailendra v. S*, A 1955 C 247; *Pakhar v. S*, A 1958 Pu 294; *In re Palani Goudan*, A 1957 M 546; *Ram Swarup v. S*, A 1958 A 119; *Ranjit Ram v. S*, A 1961 A 456 FB; *Nazir Singh v. S*, A 1959 MP 411; *Mahalchand v. S*, A 1961 C 123]. The mere absence of warning that he has free to refuse to comply with the court's direction will not bring about compulsion [*Ranjit Ram v. S, sup*].

It was also held in some cases that thumb impression of the accused taken by the police in the course of investigation does not offend art 20(*3*) [*In re Shk Md Hussain*, A 1957 M 47]. If an accused complies with the request of the police officer to give his specimen handwriting without raising any objection it does not violate art 20(*3*). The article does not prohibit an accused from furnishing evidence which may be used against him; it only affords a protection against compulsion in furnishing evidence [*S v. Abu Ismail*, A 1959 B 408; see *Badrilal v. S*, A 1960 Raj 184; *Sekender v. S*, A 1962 C 36].

In another group of cases it was held that the words "to be a witness against himself" should be given a liberal interpretation and that under a search warrant or any other kindred process of law, documents or articles or any other incriminating evidence can be seized from the custody of the person of the accused by force against his will, such as stolen articles, blood-stained clothes &c, &c but he cannot be compelled to produce them himself. For the same reason, an accused person can be taken to a doctor for the examination of injuries on his body so as to ascertain whether he could not have participated in an occurrence. He can also be taken to an identification parade to enable the prosecution witnesses to observe his physical features with a view to identify him. The taking of thumb impression or signature of the accused does not stand on a different footing from the seizure of documents or articles or other facts of evidence from the person of the accused. Though he cannot be compelled to produce such evidence, it can be taken or seized from him [*In re Palani Goundan*, A 1957 M 546; see also *Subbaya Goundan v. Bhoopala*, A 1959 M 396].

In the same way, it has been held that taking the finger impression of the accused under the magistrate's order under the Identification of Prisoners Act (33 of 1920) is

not violation of Art 20(*3*). The principle of such decisions is that the constitutional inhibition prohibits compulsion or force in obtaining oral or written testimony. But truth is not endangered where compulsion is used for the exhibition of the body or of any identifying marks on it, for purposes of comparison with evidence produced at the trial. Similarly the finger prints, foot-prints, palm-prints, photographs of the accused, for purpose of comparison with those found at the scene of the crime do not lose their probative character whether they have been obtained voluntarily or involuntarily. In principle resort to compulsion requiring the accused to exhibit his body for purpose of establishing the identity is not objectionable, because by doing so he is not being bound to give false testimony. In fact he does not testify at all and the physical facts which are notice speak for themselves [*Phakar v. S*, A 1958 Pu 294]. The permissibility of identification by finger, palm and foot-prints and the taking of accused's pictures after arrest, blood and urine test, use of emetic stomach pump or similar device for extracting ornaments swallowed &c, requiring suspect or accused to wear or trying on particular apparel or requiring defendant in a criminal case to exhibit himself or perform physical acts during trial and in the presence of the jury are not hit by the immunity conferred by art 20(*3*) [*Subbaya Goundan v. Bhoopala*, A 1959 M 396]. Even if it is assumed that the accused's thumb impression was taken by the police for comparison by compulsion or use of force, it is not hit by art 20(*3*) [*Gobinda Reddy v. S*, A 1958 Mys 150 (**affirmed** in A 1960 SC 29 : 1960 Cri LJ 137); *Sekender v. S*, A 1962 C 36].

It will appear from the cases cited above that in many instances it was only on the authority of *Sharma v. Satish*, 1954 SCR 1077 : A 1954 SC 300 that some of the High Courts held that a mere direction on the accused to give finger print or specimen writing infringes art 20(*3*). The observation in *Sharma's case* that "it would extend to any compulsory process for production of evidentiary documents which are reasonably likely to support a prosecution against them" and similar other remarks though *obiter* were taken as actual decision in the case and were loosely interpreted by some High Courts to mean that such a direction brought it within the mischief of art 20(*3*). These observations in *Sharma's case* were declared in a later case as *obiter* as the actual decision in *Sharma's* case was that the seizure of documents on search warrant was not unconstitutional. The Supreme Court observed that the accused was no doubt asked by the police officer to produce the incriminating articles (currency notes), but it was within his power to refuse to comply with the request, but as he produced the notes voluntarily there was no compulsion and therefore no violation of art 20(*3*) [*Md Dastagir v. S*, A 1960 SC 756 : 1960, 3 SCR 116]. It was also reiterated in *S v. Kathi Kalu*, A 1961 SC 1808 : 1962, 3 SCR 10 that the observations in *Sharma's* case were *obiter* as the question which arose directly for decision in that case was whether a search and seizure came within the prohibition of art 20(*3*). Accordingly, the cases (see *ante* p 676) which held on the authority of *Sharma v. Satish, sup* that the mere issue of compulsory process or a direction on the accused to give finger impression or specimen writing or to produce the incriminating articles or documents offended art 20(*3*) are on longer good law. The accused has the right to refuse their production.

It was thought that the exhaustive judgment in *Sharma's* case as to the meaning of the words "to be a witness against himself" will settle the law as to the limits of the protection under art 20(*3*) but that hope was soon dispelled as on the question whether a direction on the accused to give his finger impression or specimen writing, or to compel him to give such impression or writing, infringed art 20(*3*), the different High Courts interpreted *Sharma's* case in different ways, and in a few cases two Benches of the same High Court came to different conclusion. There was therefore a

confusion of law as to what the expression "to be a witness against himself" meant or what constituted violation of art 20(*3*).

In this state of things, three cases were taken up to the Supreme Court, one from Bombay, another from Punjab and the third from Calcutta and a larger Bench was constituted in order to re-examine some of the propositions laid down in *Sharma v. Satish*, 1954 SCR 1077. In the case from Bombay, the respondent was charged with another under s 302 PC read with s 34 PC. He was sentenced to life imprisonment by the trial court. The prosecution adduced in evidence a chit alleged to be in the accused's handwriting and said to have been given by him. The police had obtained from him during investigation three specimen handwritings of his on three sheets of paper and the handwriting expert's opinion was that all the writings were by the same person. Both the trial judge and the High Court excluded the three specimen writings as the element of compulsion was implicit in his being at the time in police custody. There being an acquittal by the High Court, the State of Bombay obtained special leave. In the case from Punjab [*Pakhar v. S*, A 1958 Pu 294], a shop was burgled and some guns and rifles were stolen. In consequence of the information given by the accused, the buried arms were recovered. During the investigation the police had taken possession of some glass panes and phials which bore some palm and finger impressions. The investigating police officer got the impressions of the palms and fingers of the accused taken in the presence of the magistrate. These were found to be identical with those on the glass panes and phials. The accused were convicted and their appeals were dismissed. They obtained the necessary certificate under art 134(*1*)(*c*). In the case from Calcutta [*Farid v. S*, A 1960 C 32] a first class magistrate directed the respondent to give his specimen writing and signature under s 73 as there were reasonable grounds to believe that the endorsement on the back of certain railway receipts for consignment of goods seized at Howrah was in the handwriting of the respondent and it was therefore necessary for purpose of comparison. The respondent declined to give his specimen handwriting. The High Court held that the prohibition in art 20(*3*) applied and the State of West Bengal got special leave to appeal.

The Supreme Court by a majority held that:—

(*1*) An accused cannot be said to have been compelled to be a witness against himself simply because he made a statement while in police custody without any thing more. The fact of police custody in conjunction with other circumstances, would be a relevant fact in an enquiry whether or not he had been compelled to make the statement.

(2) The mere questioning of an accused by a police officer, resulting in a voluntary statement, which may ultimately turn out to be incriminatory, is not 'compulsion'.

(*3*) Giving thumb impressions or impressions of foot or palm or fingers or specimen writings or showing parts of body by way of identification are not included in the expression 'to be a witness' in art 20(*3*). It must be assumed that the Constitution makers were aware of s 73 Evidence Act or ss 5 and 6 of the Identification of Prisoners Act, 33 of 1920.

(*4*) 'To be a witness' in its ordinary grammatical sense means giving oral testimony in court. Case-law has gone beyond this strict literal interpretation of the expression which may now bear a wider meaning, namely, bearing testimony in court or out of court by a person accused of an offence orally or in writing. 'To be a witness' in this sense may be equivalent to 'furnishing evidence' (as held in *Sharma's* case), but not in the larger sense of the expression so as to include giving of finger impressions &c or exposing a part of the body.

(*5*) The majority of eight judges further held that 'to be a witness' means imparting knowledge in respect of relevant facts, by means of oral statements or statements in writing by a person who has personal knowledge of the facts to be communicated to a court or to a person holding an enquiry or investigation. But mere production of some material evidence whether documentary or otherwise which is not his statement conveying his personal knowledge relating to the charge against him does not come within the expression 'to be a witness' [*S v. Kathi Kalu*, A 1961 SC 1808 : 1962, 3 SCR 10 (**reversing** *Farid v. S*, A 1960 C 321; *S v. Sankaran Nair*, A 1960 K 392)].

> [So far as the majority view limits the meaning of the expression 'to be a witness' to a statement oral or in writing imparting personal knowledge of relevant facts, this "unduly narrow interpretation" was not assented to by the minority of three judges who cited the example of an accused being in possession of a letter written to him by an alleged co-conspirator in reference to their common intention in connexion with the conspiracy to commit an offence which is a relevant fact under s 10, Evidence Act, although by producing the letter the accused will not be imparting any personal knowledge of facts. They also cite the instance of the possession by an accused of the plan of a house which has been burgled and which would be a relevant fact under 58 as preparation for committing theft].

In this connexion it is interesting to find that although there was no Constitution in so far back as 1924, a Full Bench of the Rangoon High Court took the view that compelling an accused to give his finger impression did not infringe the immunity against self-incrimination. In repelling the contention that by directing the accused to make his finger impression, the court is, in effect, compelling him to provide evidence against himself, MAY OUNG J, observed:—

> "Such a contention is, however, in my view inadmissible, since what really constitutes the evidence, *viz*, the ridges on his thumb are not provided by him any more than the features of his countenance are provided by him. All that he is asked to do is to display those ridges; for better scrutiny the ridges are inked over and an impression is made on a piece of paper" [*R v. Nga Tun Hlaing*, A 1924 R 115, 119 FB].

The principle of the decisions in *In re Palani Goundan*, A 1957 M 546 and *Phakar v. S*, A 1958 Pu 284 *ante* are based on the above decision which was cited with approval.

From the many authorities cited before, it is clear that under s 73 the court may direct any person present (including the accused) to give specimen writing or finger impression for purpose of comparison. If he voluntarily complies with the court's direction without raising any objection there is no compulsion [see *S v. Parameshwaran*, A 1952 T-C 482 FB; *Ranjit Ram v. S*, A 1961 A 456, 458; *Badrilal v. S*, A 1960 Raj 184; *Md Dastagir v. S*, A 1960 SC 758]. But if he declines to give his finger impression or writing, s 73 does not authorise the court to secure compliance by compulsion.

Under the Supreme Court decision, however [*S v. Kathi Kalu*, A 1961 SC 1808] giving thumb impressions or impressions of foot or palm or specimen writings or showing parts of the body by way of identification are not included in the expression 'to be a witness' in art 20(*3*). In other words, when an accused who is asked to give his finger impression &c does not voluntarily obey the order he may be compelled to do so and it would not be an infringement of art 20(*3*). Further, ss 5 and 6 of the Identification of Prisoners Act (33 of 1920) authorises a magistrate to allow

measurements (which include finger impressions &c) or photographs to be taken if he is satisfied that it is expedient for the purpose of any investigation or proceeding under the Cr P Code to do so. The principle of the Supreme Court decision appears to be that finger or palm impressions &c or any mark or scar on the body is a fact of evidence which the accused carries on his body and to force him to display such evidence for purpose of identification is not included in the expression "to be a witness" and does not therefore infringe art 20(*3*). As observed by the Supreme Court: "When an accused person is called upon by the court or any other authority holding an investigation to give his finger impression or signature or a specimen of his handwriting, he is not giving any testimony of the nature of a 'personal testimony'. The giving of a 'personal testimony' must depend upon his volition. He can make any statement or refuse to make any statement, but his finger impression or handwriting, in spite of efforts at concealing the true nature of it by dissimulation cannot change their intrinsic character" [*S v. Kathi Kalu*, A 1961 SC 1808, 1815].

As already observed, para 2 of s 73 unquestionably authorises the court to direct the accused to give specimen writing or finger impression but it appears that directing an accused to give his finger impression under s 73 has been equated by the Supreme Court in *S v. Kathi Kalu, sup* with calling up on him to give specimen writing. There is however a clear distinction between the two [see *Badrilal v. S*, A 1960 Raj 184; *Ranjit Ram v. S*, A 1961 A 486 FB *ante*]. If a direction to give finger impression is met with refusal, it is permissible under the law to compel the accused to give it. In this operation the accused remains passive and it is the person taking the impression who does an act. But when the accused refuses to give specimen writing, it is not possible to get it from him as to write is to do "a positive volitional evidentiary act" and unless he is willing to co-operate, he can never be made to write. It has been observed in *S v. Kathi Kalu, sup* that "the giving of a personal testimony must depend upon his volition". In the same way the operation of writing is a purely volitional act. When a person is asked to write something on paper, he is required to exercise a volition. If the accused refuses to write, the only thing that the court can do is to draw such presumption as is permissible under s 114 (*ante*).

—English and American Law.—It would be profitable to enquire about the English and American Law on the subject. The English Common Law rule that an accused shall not be compelled to be a witness against himself has been adopted in the Fifth Amendment of the American Constitution. In *Ullman v. US*, (1956) 350 US 422, 427 the Supreme Court held that the privilege against self-incimination which serve as a protection to the innocent as well as to the guilty should be given a liberal application.

The following observations of that most eminent American Judge MR JUSTICE HOLMES (in *Holt v. US*, 1910, 218 US 245 p 252 : 54 Law Ed 1021 p 1030) are pertinent and shed much light:—

> "Another objection is based upon an extravagant extension of the 5th amendment of the American Constitution [analogous to art 20(*3*) of the Indian Constitution]. A question arose as to whether the blouse belonged to the prisoner. A witness testified that the prisoner put it on and it fitted him. It is objected that he did this under the same duress that made his statement inadmissible and that it should be excluded for the same reasons.
>
> "But the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communication from him, not an exclusion of his body as evidence when it may be material. The objecting in principle would forbid a jury to look at a

> prisoner and compare his features with a photograph in proof. Moreover, we need not consider how far a court would go in compelling a man in exhibiting himself. For when he is exhibited whether voluntarily or by order, and even if the order goes too far, the evidence, if material, is competent".

In several other American cases it has been held that the prohibition against compelling an accused person to be witness against himself is a prohibition of the use of coercion or physical or moral compulsion to extort oral or written communications and not of exposure of his body or the taking of finger impression or photograph &c. for purpose of identification.

Wigmore says: "..... for, if the privilege extended beyond these limits and protected an accused otherwise than in his strictly testimonial status,—if, in other words it created inviolability not only for his physical control of his own vocal utterances but also for his physical control in whatever form exercised, then it would be possible for a guilty person to shut himself up in his house, with all the tools and indicia of his crime, and defy the authority of the law to employ in evidence anything that might be obtained by forcibly overthrowing his possession and compelling the surrender of the evidential articles,—a clear '*reductio ad absurdum*'" (Wig Vol 8 s 2263).

As to whether the taking of finger prints is a violation of the privilege against self-incrimination, H E WILLS in his treatise on the Constitutional Law of the United States (1936 Ed p 522) says:

> "Is the taking of prints a violation of the privilege against self-incrimination? This question seems to have been answered in the negative. The accused does not exercise a volition or give oral testimony. He is passive. He is not giving testimony about his body but is giving his body. If there is any question involved, it is a question of the right of privacy".

WILLOUGHBY in his Constitutional Law of the United States (2nd Ed p 1172 para 719) is of the same opinion. He says:—

> "Though there has been no direct cases in the United States Supreme Court upon the point, there are State decisions which support the doctrine that the accused's right to immunity from self-incrimination is not violated when he is compelled to exhibit himself or a part of his body to the jury or to allow a record of his finger prints to be taken".

In this connexion reference may be made to the English Prison Act, 1952 (15 & 16 Geo 6 and 1 Eliz 2 c 53), sec 16, which empowers the Secretary of State to make regulations as to the measuring and photographing of prisoners. Any prisoner who refuses to obey such regulations is guilty of an offence against prison discipline [Prevention of Crimes Act, 1871 (34 & 35 Vic c 112) s 6(10)]. In addition to the measurements of various parts of the body and the description of every scar and distinctive marks, the finger prints are to be taken. (Regulations dated 20th June 1896 S R & O 1896 No 762 regs 1-3; Hals 3rd Ed Vol 30 para 1131). If a person refuses to allow his photograph and finger prints to be taken, a reasonable degree of force may be used. (See Halsbury, 2nd Ed Vol 25 p 175).

Standard of proof.—Section 8 of the [English] Criminal Procedure Act, 1865 which provides that 'any writing proved to the satisfaction of the judge to be genuine may be compared with a disputed writing, merely directs that it is the judge and not the jury who has to decide whether writing is genuine and can be admitted in evidence for comparison with a disputed writing, and does not deal with the standard

of proof required to satisfy the judge that writing sought to be admitted in evidence for comparison is genuine. Accordingly, the standard of proof is governed by the common law and therefore when s 8 is being applied in a criminal trial it must be shown beyond all reasonable doubt that the writing sought to be adduced for comparison is genuine writing of the accused before it may be admitted in evidence. [*R v. Ewing*, (1983) 2 All ER 645 CA]. applying [*Blyth v. Blyth*, (1966) 1 All ER 524 and **disapproving** [*R v. Angeli*, (1978) 3 All ER 950], citing 17 Halsbury's Laws (4th edn) para 91].

Compulsion in Art 20(3).—The guarantee in art 20(*3*) is against testimonial compulsion. In *Sharma v. Satish*, A 1954 SC 300 : 1954 SCR 1077 the Supreme Court observed: "Indeed every positive volitional act which furnishes evidence is testimony, and testimonial compulsion connotes coercion which procures the positive volitional evidentiary acts of the person as opposed to the negative attitude of silence or submission on his part". Compulsion must mean what in law is called 'duress' [*S v. Kathi Kalu*, A 1961 SC 1808 quoting the definition of 'duress' in Earl Jowitt's Dictionary of English Law]. Compulsion is when third degree method is employed in extorting oral or written statement by bullying or torture. If an act does not involve coercion, violence or brutality to the person, it is no compulsion [*Irvine v. California*, 1954, 347 US 128, 133]. The Magistrate has no jurisdiction to issue direction to the accused to give his specimen handwriting. [*State v. Jagbir Singh*, 1996 Cri LJ 2545, 2554 P&H].

Authoritative decisions abundantly show that compulsion in art 20(*3*) means coercion or duress or constraint and does not include a mere asking by the police to do a certain act or to give finger impression or to write something on paper. Nor is there any compulsion when the court merely directs an accused to give his finger impression or specimen writing.

Even if force has to be used in taking the finger impression of an unwilling accused, it is no complusion under the constitutional protection, because it is a fact of evidence which he carries on his body, only for better scrutiny he is required to have his finger inked over and pressed it on paper. So it has been held that giving finger print or showing parts of body for purpose of identification are not included in the expression 'to be a witness' in art 20(*3*) [*S v. Kathi Kalu*, A 1961 SC 1808]. A detective constable said to *G*, when he was in custody, "I want to take your finger prints. All right?" *G* replied "Yes", and gave his finger prints without objection. He was not cautioned before his finger prints were taken that he need not give them—*Held*: the evidence was not a confession, the Judges' rules (as to this, see *ante* pages 270 and 286) had not application and there was no necessity for a previous caution [*Callis v. Gunn*, 1963, 3 All ER 677].

When an Accused Complies with the Direction of the Court and Gives His Writing or Finger Impression Is It Evidence?—In a case it has been held that it is not 'evidence' as defined in s 3 [*Ram Swarup v. S*, A 1958 A 119]; but this dictum was declared to be *obiter* in another case [*Balraj v. Ramesh*, A 1960 A 157]. In *Ranjit Ram v. S*, A 1961 A 456, MATHUR J, appears to be of the opinion that it is evidence within s 3. It is doubtful whether it can strictly be regarded as 'evidence' as defined in s 3 unless the word 'inspection' in the definition of 'documentary evidence' includes a comparison by the court for coming to a conclusion of fact. When the object of such comparison is to consider whether a fact is said to be proved or not, inspection may embrace comparison. In any case, the writing or finger impression taken in the presence of the court is compared by it, not because it is evidence within s 3 but because it is one of "the matters before it" in the definition of the word

'proved' in the Evidence Act. The expression "matters before it" includes many matters which do not fall within the definition of 'evidence' in s 3. Therefore in determining what is 'evidence' within the meaning of the Act, the definition of 'evidence' must be read with that of 'proved'.

Again under s 5 of the Act, "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 the others". The specimen writing or finger impression given by a person in the presence of the court for the purpose of comparison provided in s 73 being also a relevant fact, evidence of it ought to be admissible under s 5.

"For the Purpose of Enabling the Court to Compare" the Writing or the Finger Print with Others Alleged to Have Been Made by such Person. [Can it be Made Over to the Prosecution For Being Used Against the Accused?].—There was divergence of judicial opinion on this point. In *Hiralal v. S*, A 1958 C 123 it was held that s 73 does not entitle the court to assist a party to the proceedings. It is not open to the magistrate to send the specimen writing obtained from the accused for examination to an expert who is a prosecution witness. It is however open to the court to call its own expert as a court witness for enabling it to come to a proper conclusion. Following *Hiralal v. S, sup*, it was held in *S v. Poonamchand*, A 1958 B 207 that the power does not permit one or the other party to take such writing for the purpose of its evidence on its own use. In *T Subbiah v. Ramaswamy*, A 1970 M 85 it was held that S 73 gives no power to a magistrate at the pre-cognizance stage or in the course of police investigation, to direct an accused to give his specimen writing. Patna High Court in *Gulzar v. S*, A 1962 P 255 FB held that a magistrate has the power under s 73 to direct, even before cognizance of an offence has been taken, an accused to give signatures, specimen writings, finger-prints or foot-prints which the police may require in the course of investigation; folld in *B Rami Reddi v. S*, 1971 Cri LJ 1591].

The Supreme Court, on review of the cases cited above, without definitely pronouncing whether under s 73 a magistrate in the course of police investigation or in a pre-cognizance stage has power to aid the police in investigation in the above way, has however definitely held that where a court is seized of a case it can direct the accused present in court to write down a sample writing and for the purpose of enabling the court to, compare with the disputed writing and arrive at a proper conclusion may in the interest of justice obtain expert assistance of handwriting expert cited by any of the parties or calling an expert on his own motion [*S v. Paliram*, A 1979 SC 14].

Comparison of Handwritings by the Court: [Its Meaning, Value and Use].—It will be useful to remember that the s 73 permits comparison of signatures, writings, &c of a person with others admitted or proved to have been written by that person. This comparison can be made by an expert (s 45) or a person acquainted with the handwriting (s 47) or by the jury or by the court. In this comparison of handwritings, the court may have the advantage of expert evidence, if any has been examined; but even if no expert has been examined the court is competent to compare the admitted or proved writings with the disputed writing: (see *ante "For the purpose of enabling the Court to compare &c &c"*).

By comparison of handwriting is meant the examining of writing brought at the time into juxtaposition (Lawson p 323). Under s 47 a witness who is acquainted with the handwriting of a person may have formed in his mind an exemplar of his handwriting and he compares a disputed signature or handwriting with the exemplar

in his mind. Under s 73 a person who has no personal knowledge of another's handwriting compares a disputed handwriting by placing it in juxtaposition with other writings admitted or proved to be genuine so as to give an opinion whether the writings were made by the same person. Comparison by an expert is also of the latter kind but the comparison is made by a person who is specially skilled.

As to comparison of signature or writing by the court, it has been held that although there is no legal bar to the Judge using his own eyes to compare the disputed writing with the admitted writing, he should, as a matter of prudence and caution, hesitate to base his finding solely on comparison made by himself. The prudent course is to obtain the opinion and assistance of an expert [*S v. Paliram*, A 1979 SC 14]. Where a person denied his alleged signature and the opposite party did not prove the signature to be his it is not obligatory on the court to determine genuineness of the document by comparing alleged signature with admitted signature [*Charan v. Indrajit*, A 1979 C 256 (*Fakhruddin v. S*, A 1967 SC 1326 **dist**)]. By comparing the signatures, the court does not become a handwriting expert. The opinion of the Court is also not conclusive. The court as a matter of prudence and caution should hesitate or be slow to base its findings solely on the comparison made by himself. However, if there is an opinion whether of the expert or any witness, the Court may apply its own observation by comparing the signatures or handwriting for giving a decisive weight or influence. [*Ala Uddin v. Sishir Kumar Dutta*, A 1989 Gau 42, 43]. Prudence demands that the court should be extremely slow in venturing an opinion on the basis of mere comparison [*State of Maharashtra v. Sukhdeo Singh*, 1992 Cri LJ 3454, 3471 (SC)].

"A comparison of handwriting is at all times a mode of proof hazardous and inconclusive, and especially when it is made by one not conversant with the subject and without such guidance as might be derived from the arguments of counsel and the evidence of experts. In *Phoodee Bibi v. Govind*, (1874) 22 WR 272 it was said by the court that 'a comparison of signature is a mode of ascertaining the truth which ought to be used with very great care and caution'" [*Barindra v. R*, 37 C 467, 503 : 14 CWN 1114; see also identical remarks of MOOKERJEE, J, in *Sarojini v. Haridas*, A 1922 C 12 : 26 CWN 113], has been repeated in various other cases decided earlier and later (see *Kuralee v. Anantoram*, 8 BLR 490, 502 : 16 WR 16 PC: remarks of COUCH, CJ, in *Abdool Ali v. Abdoor Rahaman*, 21 WR 429; *Phoodee Bibi v. Gobind, sup*; *Nobin v. Rasik*, 10 C 1051; *Pasupuleti v. Venkamma*, 14 IC 741 : 11 MLT 424; *Balakram v. Md Said*, A 1923 L 695; *Ambika v. Nareswari*, 29 CWN 75; *Jitendra v. R*, A 1937 C 99; *R v. Ramrao*, 56 B 304; *Latafat v. Onkar*, A 1935 O 41; *Ram Sobhag v. R*, A 1937 P 146; *Rudragouda v. Basangouda*, A 1938 B 257; *Nagappa v. Nannibu*, A 1960 Mys 220; *Surendra v. Saroj*, A 1961 C 461; *Galstaun v. Sonatun*, A 1925 C 485; *Darshan v. Parbhu*, A 1946 A 67; *Azmat v. Shiam*, A 1947 A 411; *Bhagwan v. Gouri*, A 1957 A 119; *Annapurnama v. Sankara Rao*, A 1960 AP 359; *Tilakdhari v. Jagat*, A 1961 P 76; *Bhagwandin v. Gouri Sankar*, A 1957 A 119; *Ramakrishan v. Md Kasam*, A 1973 B 242]. In the absence of the testimony of any handwriting expert on this matter it would be rather too much for the Judge to use his own eyes for the purpose of deciding very vital claims of the parties. [*Smt Shanta Trivedi v. Life Insurance Corporation of India*, A 1988 Delhi 39, 44 : (1988) 94 Pun LR 1].

In *Kessarbai v. Jethabhai*, A 1928 PC 277, 281, LORD ATKIN observed: "But their Lordships are unable to come to the same conclusion as the members of the Appellate Court. They would have thought it unsatisfactory and dangerous in any event to stake a decision in such a case as this on the correct determination of the genuineness of the signature by mere comparison with admitted signatures, espe-

cially without the aid of evidence of microscopic enlargement or any expert advice". The Supreme Court observed: "The High Court, however, was of the opinion that there was no such dissimilarity. As the signatures are not before us, we are unable to say that the finding of either court is more acceptable than that of the other. But conclusions based on mere comparison of handwriting must, at best, be indecisive and yield to the positive evidence in the case [*Kishore v. Ganesh*, 1954 SCR 919 : A 1954 SC 316].

As to the dissimilarity of signatures SIR JOHN NICHOL observed in *Robson v. Rocke*, 1824, 2 Add 63, 79 : 162 ER 215:—

> "But such evidence is peculiarly fallacious, where the dissimilarity relied upon is not that of a general character, but merely particular letters; for the slightest peculiarities of circumstances or position, as for instance the writer sitting up or reclining or the paper being placed upon a harder or softer substance, or on a more or less inclined—nay, the materials as pen, ink etc, being different at different times are amply sufficient to account for the letters being made variously at the different times by the same individual. Independently, however, of anything of the sort, few individuals, it is apprehended, write so uniformly that dissimilar formations of particular letters are grounds for concluding them not to have been made by the same person" (**Quoted with approval** in *Galstaun v. Sonatun, sup*).

PHEAR, J, in *Lallah Jha v. Tullebmatool*, 21 WR 436, observed:—

> "It may be generally said that no two real signatures of any person accustomed to write freely ever correspond exactly; there is always some degree of diversity between them. And in making the comparison between two real signatures, the opinion of people would differ as to the amount of apparent diversity. The judgment may well enough be led astray as to erroneous opinion that the diversity which is apparent, is inconsistent with the identity of the two signatures."

The caution administered by JENKINS, CJ, in *Barindra v. R*, 37 C 467: by MOOKERJI, J, in *Sarojini v. Haridas*, A 1922 C 12, by LORD ATKIN in *Kessarbai v. Jethabhai*, A 1928 PC 277 (quoted above) and the deprecatory observations in the other cases referred to before that it is hazardous to prove the identity of disputed authorship of handwriting by the method of comparison have been used by some judges to support the view that the court should not use its own eyes to compare handwritings without the aid of microscopic enlargement or expert evidence. At the same time superior courts have in many instance observed that expert opinion on handwriting must always be received with great caution and that it would be unsafe to rely upon it without substantial corroboration from evidence internal and external. They are a type of remunerated witnesses who are available on hire to pledge their oath in favour of the party who has paid them [see *per* JESSEL, MR, in *Lord Abinger v. Ashton*, 1873, 17 Eq 358, 373-74]. These handwriting experts talk in terms of a jargon commonly unintelligible to the courts and by tendentious argument pretend to elevate the scrutiny of handwritings to the level of a science. S 45 only makes evidence of a hand-writing expert a relevant fact, but it is for the court to determine whether a particular writing is to be assigned to a particular person [*Wakeford v. Bishop of Lincoln*, 1921, 90 LJPC 174]. The evidence of handwriting experts is not entitled as a rule to any great weight [see remarks of ABBOTT, CJ, in *Gurney v. Langlands, ante*, cited under s 45]. There is no obligation on the court to rely on such evidence, especially when there is other positive evidence [see *Kishore v. Ganesh*, A 1954 SC 316 : 1954 SCR 919; *Annapurnamma v. Sankararao*, A 1960 AP 359; *S v. Kailash*, A 1961 P 451; *Tilakdhari v. Jagat*, A 1961 P 76]. An

expert's opinion is opinion evidence and it can rarely, if ever, take the place of substantive evidence. Before acting on such evidence courts should see if it is corroborated either by clear direct evidence or by circumstantial evidence [*Sashi Kumar v. Subodh Kumar;* A 1964 SC 529].

So uncertain and inexact is the study of the science of calligraphy that it has been for some years past the tendency to regard evidence even of experts as of somewhat inconclusive character. The mere fact that there is a resemblance between the signature alleged to be false and a signature admitted to be genuine does not carry great weight [*Batahu Jha v. Parmeshwar*, 64 IC 260; see also *Sarojini v. Haridas*, 26 CWN 133 and *ante*, s 45, "*Handwriting expert*"].

Faced with these two extreme views, the judge naturally hesitates to exercise the power conferred by s 73 to compare handwritings by using his own eyes when the other evidence is scanty or unreliable or there is no evidence of handwriting expert. "A judge should not appear to act as a handwriting expert and compare examples of the accused's signature. [*R v. Simbodyal*, The Times, Oct 10, 1991 CA].

The disparaging observations in the cases referred to above about comparison of handwritings by the judge taken at their best mean no more than this that ordinarily unaided by expert evidence it is risk and indecisive and that as observed in *Phoodee Bibi v. Gobind* the method of comparison of writings "ought to be used with very great caution". The observations of the Spreme Court (in *Kishore v. Ganesh*) are to the same effect. On questions as to identity of handwriting, comparison by the court is however not only sanctioned by law, but specially provided in s 73 and a judge is well within his rights if oppressed by the paucity or unsatisfactory nature of the evidence tendered, he feels the necessity of applying the test of comparison with his own eyes to settle a question of disputed authorship of handwriting. As observed in a case, where other evidence is not available and the handwriting has not been proved by independent evidence to be the handwriting of a particular person, it is necessary to have recourse to the provisions of s 73 to see whether by comparison it can be determined whether the document was written by that person or not [*Khijiruddin v. R*, A 1926 C 139 : 53 C 372].

It is a matter of common knowledge that handwriting experts are seldom, if ever examined in cases before district courts and in the mofussil they are almost unknown. Even in big cities handwriting experts are examined in a small proportion of cases. In *Bisseswar v. Nabadwip*, A 1961 C 300, a case tried on the original side of the Calcutta High Court, no handwriting expert was examined and the judges had to decide it solely on a comparison of handwritings. The wisdom of the provision in s 73 authorising comparison of handwritings by the court will be apparent when it is considered that where the other evidence is meagre or untrustworthy, the court has of necessity to compare handwritings by using its own eyes.

Notwithstanding all that has been observed in reported cases, s 73 gives an express authority to the court to compare handwritings [see *Sarojini v. Haridas*, A 1922 C 12, 17 : 26 CWN 113, 119; *Manindra v. Mahaluxmi Bank—Ld*, 49 CWN 481, 483 : A 1945 PC 105; *Gondu v. Tulsiram*, A 1930 N 27; *Udhab v. R*, 65 IC 426; *Bisseswar v. Nabadwip*, A 1961 C 300, 306: *Dalim v. Nandarani*, A 1970 C 242; *Ishwar v. Ramnik*, A 1978 Or 156]. Where a case depends upon a comparison of handwritings, the court is competent to use its own eyes for deciding the question. In such a matter, the court cannot accept the expert's evidence like an automation [*Parsad v. Jasoda*, A 1937 P 328; relied on in *Abhayanand v. S*, A 1959 P 328]. When the evidence to prove the handwriting of the accused is weak, the court should not venture to compare the disputed signatures with the signature in the vakalat. [*Vishwanath*

Mahadev Karkhan's v. State of Maharashtra, 1991 Cri LJ 3146, 3151 (Bom)]. The rejection even in *toto* of an expert's opinion would not exonerate the court from the duty of coming to an independent finding on the authorship of handwriting [*Jitendra v. R*, A 1937 C 99 SB]. S 73 expressly enables the court to compare disputed writings with admitted or proved writings to ascertain whether a writing is that of the person by whom it purports to have been written. Where there are expert opinions, they will aid the court. Where there is none, the court will have to seek guidance from other sources, and its own experience and knowledge [*Murarilal v. S*, A 1980 SC 531]. There is nothing in principle or authority which bars the judge of facts from using his own eyes and looking at the admitted signature along with the disputed signature deciding whether the evidence given as regards the genuineness of the document should be believed or not [*Fazaladdin v. Panchanan*, A 1957 C 92; *Narasimha v. Someshwar*, A 1957 M 210; *Kameshwar v. Suryaprakasha*, A 1962 AP 178; *Bhupendra v. Eknarain*, A 1965 P 332]. The question has been dealt with fully in a case where the correct law appears to have been laid down, holding that there is no legal bar to the judge using his own eyes to compare disputed signatures with admitted signatures even without the aid of experts [*Bisseswar v. Nabadwip*, A 1961 C 300 : 64 CWN 1067, 1067 : P B MUKHARJI, J, observed:—

> "As I read the case-law and the sections I am unable to subscribe to the view of judicial blindness that a court is prevented by law to use its own eyes either in addition to handwriting expert's evidence on the point or even in the absence of such expert evidence on the point.....
>
> These observations again (in *Barindra v. R*, 37 C 467; *Kesserbai v. Jethabhai*, A 1928 PC 277, 281 &c, &c), I do not find, impose blindness on the judge. They do not support the view that the judge cannot use his own eyes without the aid of the handwriting expert. What is said here is that it is a 'hazardous and inconclusive' course and that it should be used only with 'very great care and caution'. What was intended to be a rule of salutary caution is now attempted to be converted into a rule of law. It is against this conversion, I protest".

It happens not infrequently that in spite of all evidence tendered including that of experts there arises a situation when courts cannot help comparing handwritings or signatures with their own eyes for a proper assessment of the value of the total evidence. The observations of LORD ATKIN (in *Kesserbai v. Jethabhai, ante*) and in the other cases cited earlier are usually used in support of the view that courts ought not to undertake the task of comparing handwritings. But the following passage a few lines down in the same judgment, shows that their Lordships of the Privy Council themselves felt the necessity of comparing the signatures for coming to their decision:

> "But their Lordships have also themselves carefully compared the endorsements with the admitted signatures, and they, are unable to feel the certainty which was expressed by the Chief Justice. The signatures appears to be written with different ink and possibly at different times and though the purported signature of the firm bears a close resemblance to some of the genuine examples produced, notably to a signature in a letter of authority addressed to Jethabhai himself, the purported signature of Kesserbai is by on means convincing."

In another case the Privy Council compared the disputed signature with admittedly genuine signature and was "strongly impressed" by such comparison [*Manindra v. Mahaluxmi Bank Ld*, 49 CWN 481, 483 : A 1945 PC 105, 107]. In another case the Privy Council made such comparison and observed: "After carefully examining the

various signatures, their Lordships are not satisfied that the disputed signature does not look like the accepted signature of the deceased" [*Madhavayya v. Achamma*, A 1949 PC 325, 329 : 1949, 2 MLJ 716). In *Kishore v. Ganesh* (*ante*, p 683) the Supreme Court observed that it was unable to compare the signatures as they were not on the record. In a case relating to the genuineness of a will, the Supreme Court compared the various signatures and writings of the testator at different times, and held that the will was genuine [*Sashi Kumar v. Subodh Kumar*, A 1964 SC 529]. If on the face of it the court is able to come to a conclusion that a document contains alterations or interpolations, it is not bound to seek the assistance of handwriting experts [*Bhaggu v. Manni*, A 1965 A 202].

The Privy Council preferred the decision of an Indian Judge on a question of Indian handwriting to that of the English Judges of the High Court [*Rajendra v. Jogendra*, 7 BLR 216 PC]. Where the court's finding is not based only on a comparison of handwritings but also on other evidence and positive evidence of handwriting of accused, it is entitled to weight [*S v. Kailash*, A 1961 P 451].

Under s 48 of the repealed Act 2 of 1855, it was held the test of comparison of Indian seals was, at least, but a fallible one, and must always be received with great caution [*R v. Amanoolah*, 6 WR Cr 5. See also *R v. Bakhoree*, 5 WR Cr 98 and *R v. Kartick Ch*, 5 RC & C, Cr Rul 58].

In the matter of comparison of handwritings, COLERIDGE, J, in *Doe d Mudd v. Suckermore*, 1837, 5 A & EI, 703 observed: "The test of genuineness ought to be the resemblance not to the formation of letters in some other specimen or specimens, but to the general character of the writing which is impressed on it as the involuntary and unconscious result of constitution, habit or other permanent cause and is therefore itself permanent". See also the observations of SUNDARA AYYIAR J, in *Re Venkata Row*, 36 M 159, 165 (*ante* s 45), in *Jitendra v. R*, A 1937 C 99 *ante* s 45 which was relied on in *Bisseswer v. Nabadwip*, A 1961 C 300 and *Bhupendra v. Eknarain*, A 1965 P 332. The presence of personal characteristics, mannerisms, peculiarities in spelling, the formation of a loop in some letters, fixed pen habits, embellishments &c and other characteristics which enter into the handwriting as personality and leave their unconscious impress on a person's handwriting are considered a telling test. (As to comparison of handwriting, see *ante* s 45: "*Handwriting expert*".)

It is true that a clever forger will try to give forged signatures as much resemblance as possible to a genuine signature. But the personal characteristics of the writings or signatures of a particular individual are often an unfailing guide in determining the question of genuineness of the writing and it is often a difficult work for a stranger or a forger to reproduce faithfullly all such characteristics in the writings forged by him [*Bisseswar v. Nabadwip*, A 1961 C 300, 304].

Appellate courts are quite as competent to apply the test of comparison of writing as courts of first instance [*R v. Amanoollah*, 6 WR Cr 5, 6; see *Phoodee Bibi v. Gobind*, 22 WR 272].

Where the defendant denied signature on the exhibited documents and also on Vakalatnama and written statement, the Supreme Court pointed out that the trial court could have exercised its powers under S. 73. K.S. Satayanarayana v. V.R Narayana Rao, AIR 1999 SC 2544.

Specimen For Comparison.—"It is the general rule that a signature, made for the occasion *post litem motam*, and merely for use at the trial, ought not to be taken as a standard. It is only when the paper is written not by design, but unconstrainedly and in the natural manner, so as to bear the impress of the general character of the party's writing, as the involuntary and unconscious result of constitution, habit or other permanent cause, and therefore of itself permanent, that it furnishes, if otherwise admissible, any satisfactory test of genuineness" [*Hickory v. U S*, 151 US 303 and other cases in Jones, s 553]. A signature made in the witness box for the purpose of

comparison will be less satisfactory as a person may feign or alter ordinary character of his handwriting with the object of defeating a comparison [*Cobbett v. Kilminster*, 1865, 4 F & F 490; see the observations of the Judicial Committee in *Jaswant v. Sheo Narain*, 21 IA 5, 8: 16 A 157, 161]. A signature written out while a party was in the witness box cannot be regarded as a reliable standard for comparison as it is likely to be simulated [*Bisseswar v. Nabadwip, sup*]. When a party or an accused is asked to write in the presence of the court, he will naturally try his best to simulate to alter its character and therefore such a specimen is unsatisfactory for comparison, but it may be compared with the genuine writing for all that it is worth.

It is not fair to compare the free hand writing spread over a folio page of a will with plenty of space, and a post card in which a writer has to condense all he wishes to say in a small space. The writing must necessarily be far more cramped and naturally various letters in the post card writing would differ from the writing which is not cramped [*Irabasappa v. Bhadrawa*, A 1922 B 296]. It is not of much use to compare a signature said to have been made in 1950 with that made six years earlier in 1944 as there is likely to be some change in the signature [*Annapurnamma v. Sankararao*, A 1960 AP 359]. Supreme Court itself on comparison of writings sustained conviction [*Ram Pyarelal v. S*, A 1980 SC 1523].

In obtaining specimen handwriting, the same kind of paper, the same colour of ink and the same kind of medium used in the disputed handwriting should be used as far as possible [*Abdul Gani v. Devi Lal*, A 1960 Raj 77].

Proof of Handwriting.—[See *ante* s 47: "*Mode of proving handwriting*". As to the value of handwriting evidence, see *ante* s 45: "*Value of expert opinion on hand-writing*".]

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

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

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

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

Information Technology Act, 2000

Proof of digital signature [S. 73A].—For the purpose of ascertaining whether a digital signature is that of the person by whom it purports to have been affixed, the court may direct that person or the controller or the certifying authority have to produce the digital signature certificate. The court may also direct any other person to apply the public key listed in the digital signature certificate and verify the digital signature purported to have been affixed by that person. For this purpose the "controller" means the controller appointed under s. 17(1) of the Information Technology Act, 2000.

§ For text of the Information Technology Act, 2000, see Stop Press pages in Volume 1 after General Contents.

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* S. 73A inserted by the Information Technology Act, 2000.

PUBLIC DOCUMENTS

[1]**S. 74. Public documents.**—The following documents are public docu-ments:—

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

(*i*) of the sovereign authority,

(*ii*) of official bodies and tribunals, and

(*iii*) of public officers, legislative, judicial and executive [2][of any part of India or of the Commonwealth], or of a foreign country;

(2) public records kept in [3][any State] of private documents.

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1. In PAKISTAN Cl (1) (*iii*) reads : "(*iii*) of public officers, legislative, judicial and executive of any part of Pakistan or of the Commonwealth, or of a foreign country". In Cl (2), for "any State", substitute "Pakistan".

   In BURMA Cl. (1) (*iii*) reads: (*iii*) of public officers, legislative judicial and executive whether of the Union of Burma, or of a foreign country". In cl (2) for "any State" substitute "the union of Burma". (AO 1937; AO 1948).

   In CEYLON Cls. (1), (2) have been designated (*a*) (*b*) respectively, Cl (*a*) (*iii*) reads: "of public officers, legislative, judicial and executive, whether of the Island or of any other part of His Majesty's dominions, or of a foreign country".

   In cl. (*b*) for "in and State" substitute "in the Island".

   Cl (*c*) has been added *viz*, "(*c*) plans, surveys, or maps purporting to be signed by the Surveyor-General or officer acting on his behalf".
2. Substituted successively by AO 1948 and AO 1950.
3. Substituted by AO 1950.

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COMMENTARY

Principle and Scope.—This section defines what are known as *public documents*. Documents other than those which come under the definition are called private documents (s 75). Public documents form an exception to the Hearsay rule and their admissibility rests on the ground that the facts contained therein are of public interest and the statements are made by authorised and competent agents of the public in the course of their official duty (*ante* s 35). Certified copies of public documents becomes admissible as proof of the original under s 65(*e*). The Evidence Act lays down the manner in which contents of document are to be proved before the court of law. It also defines the documents which are admissible in evidence. No document can be looked into by a court of law unless the same has been proved according to the provision of Evidence Act. A document has to be proved either by the executant or the executee. An exception has been carved out from this general principal by incorporating section 74 of the Evidence Act with regard to the public document. A joint reading of sections 74 and 75 will go to show that section 74 is only an exception of the provisions of requiring proof under the Evidence Act. It illustrates certain selected documents to be called as public documents which require no formal proof as laid down by the other provisions of the Evidence Act. S. 75 says that all documents other than those stated in section 74 are private documents, is not a public document and therefore it cannot be said that the modes of proof required under law can be dispensed within respect of the said declaration. Section 74 only provides for the categorizing of a public document and nothing more than that. Section 78 is only for the purpose of certification of a public document [*Dato Yap Peng v. Public Prosecutor*, (1993) 1 Malayan LJ 387 (Kuala Lumpur HC)]. Merely because a declaration of an individual bearing a seal of a public authority will not make the said declaration/ document as a public document. *Manual Bawets Xavier v. Naryan Biku Naik*, 1997 AIHC 959, 961.

In *Sturia v. Freccia*, 5 App Cas 643, 644, LORD BLACKBURN defined a public document as "a document that is made for the purpose of the public making use of it, and being able to refer it. It is meant to be where there is judicial or *quasi*-judicial duty to inquire". In *Mercer v. Denne*, 1905, 2 Ch 538, 541, 544, FARWELL J, said: "The test of publicity as put by LORD BLACKBURN (In *ibid*) is that the public are interested in it and entitled to see it, so that if there is anything wrong in it they would be entitled to protest. In that sense, it becomes a statement that would be open to the public challenge or dispute, and therefore it has a certain amount of authority". Again at p 544: "The whole gist of the rule as to public documents is that the publicity must be contemporaneous, and publicity means such publicity as would afford the opportunity of correcting anything that was wrong". To be admissible as a public document it should not only be available for public inspection, but should also have been brought into existence for that purpose [*Thrasyvoulous v. Papa Christoforos*, 1952, 1 All ER 179]. If a document be prepared by a Government official for a temporary purpose only, it is not a public document [*Mercer v. Denne, sup*]. Documents indicating salary and allowances of a Government servant issued by the concerned department do not require any evidence to prove them. [*Subhadra Kumari v. Lallu Ram*, A 1996 Del 64].

Public documents consist of "the acts of public functionaries, in the Executive, Legislative and Judicial Departments of Government, including under the general head the transaction which official persons are required to enter in books or registers in the course of their public duties (see *ante* s 35) and which occur within the circle of their own personal knowledge and observation. To the same head may be referred the consideration of documentary evidence of the acts of State, the laws and judgment of courts of foreign Governments" (Greenleaf, s 470). The term public document as defined in s 74 includes (*1*) documents forming the acts or records of the acts—(*i*) of the sovereign authority; (*ii*) of official bodies and tribunals; (*iii*) of public officers, legislative, judicial and executive whether of India or of a foreign country and (*2*) public records kept of private documents. Under the English law the following are the principle documents which come within the category of public documents: (*1*) Public statutes, Parliamentary journals and Government Gazettes. (*2*) Public registers. (*3*) Public surveys, assessments and reports (*4*) Official certificates. (*5*) Books of Corporations, (*6*) Histories, Scientific works, and works of reference [Hals 3rd Ed Vol 15 para 571; Phip 8th Ed 328].

Writings are divisible into two classes, *public* and *private*. Public writings consist of acts of public functionaries, in the Executive, Legislative, and Judicial departments of Government; including under this general head, the transactions which official persons are required to enter in books or registers, in the course of their public duties, and which occur within the circle of their own personal knowledge and observation. Foreign acts of State, and the judgments of foreign courts also belong to the same class. (Tay s 1479).

The mere fact that a document is kept in a public office does not make it a public document. It must be shown that it was prepared by a public servant in the discharge of his official duty [*Mahtabdin v. Kasar*, 107 IC 618: A 1928 L 640; *Nityanund v. Abdul Reheem*, 7 C 76].

[*Ref Tay ss 1591-95; Best s 219; Phip 8th Ed p. 328 et seq; Steph Art 34; Wigmore s 1639-58*].

Right of Inspection and Copy.—In England, the *Public Record Office Act* (1 and 2 Vic c 94) was passed in 1838, by which most of these invaluable documents were placed under the charge and superintendence of the Master of the Rolls and it empowers the Master of Rolls to make rules for the admission of such persons as ought to be admitted to the use of such records, and to fix the amount of fees, if any, to be paid for such use and authorize the Master of the Rolls or the Deputy Keeper of the Records, to allow copies to be made of any of the documents, at the request and cost of any person desirous of procuring the same. The provisions of the Public Record Office Act, 1838, have been fully considered in Taylor, Chapter IV, ss 1480-522.

In India there is no separate enactment, except the provisions of s 76 with regard to the means of obtaining an inspection or copy of public documents. S 76 provides for the granting of certified copies of public documents which a person has the right to inspect. But it has nowhere been laid down, how the right of inspection of public documents is to be regulated. In *Mutter v. The E M Rly Co*, 1888 LR 38 Ch D 92, 106 LINDLEY LJ, said,—

> "When the right to inspect and to take a copy is not expressly conferred, the extent of such right depends on the interest which the applicant has in what he wants to copy, and on what is reasonably necessary for the protection of such interest. The common law right to inspect and take copies of public documents is limited by this principle and is shown by the judgment in *Rex v. Justices of Staffordshire*" [6 Ad & E 84, 99, 101].

This common law right of inspection of public document by a person interested in the document so far as may be necessary for protection of such interest has been recognised in several cases here. A person wishing to avail of the right has to show *prima facie* the interest which needs protection. Persons in custody of public documents are a sort of trustees for such persons. "A right to inspect public documents is however, assumed in s 76. I think it might be inferred that the legislature intended to recognise the right generally (*ie* the right to inspect) for all persons who can show that they have an interest for the protection of which it is necessary that liberty to inspect such document should be given" [*per* SHEPHERD J, in *R v. Arumugam*, 20 M 189 FB. HENDERSON J, agreed with this in *Chandi Charan v. Baistab*, 8 CWN 125, 132: 31 C 284; see also *Parasuram v. Cocke*, A 1942 B 26:

1942 Bom 71]. Right to obtain copies depends upon applicant's right to inspect such documents [*V J Thomas v. S*, A 1970 K 273].

In *R v. Arumugam, sup* the right of an accused to apply for copies of public documents if they fall under s 74 and concern the offence with which he is charged was recognised [*S v. Krishnan*, A 1961 M 92, 96]. Under Art 227 of the Constitution the High Court may make rules for the inspection of records. This presupposes that subject to such rules the public have a right to inspect the records of subordinate courts and the only valid reason for refusing inspection would be that the inspection of the particular record was against public interest [*Ladli v. R*, 53 A 724: A 1931 A 364]. Subject to rules that may be made by the High Court, a judge or a magistrate has a discretion to allow inspection of record, but the discretion is to be exercised judicially. The right to a certified copy presupposes a right of inspection. It is altogether unreasonable to insist that a party must take certified copies of all documents on the record in order to determine of which documents he really requires copies. Therefore *prima facie*, under s 548 [now s 363 (*5*)] Cr P Code a party would have an implied right to ask the court to allow inspection of the record [*Parasuram v. Coke, sup*].

S 76 gives the right to obtain a certified copy of a public document which any person has a right to inspect on payment of legal fees. The right to obtain a certified copy therefore presupposes the right to inspect. But a right of inspection does not necessarily carry with it a right to take copies. It was held that statute which gives a person a right of inspection gives him no right to take copies himself, because the statute gives him a right to have copies on payment, and there was no ground for implying any other right [*In re Balaghat G M Co*, 1901, 2 KB 657; *Ormerod Grierson & Co v. St George's I W Ltd*, 1905, 1 Ch 506, 512]. Following these cases it has been held that in the case of a statutory right of inspection, the court will not imply a right to take copies, unless the right would otherwise be of no avail or practically useless [*Rameswar v. Calcutta W & S Assn*, 42 CWN 161].

S 76 allows the issue of certified copies only to a person who has a right to inspect document and s 77 does not make admissible copies which have been unlawfully issued [*Anwar v. Fazal*, 84 IC 487: 2 R 391: A 1925 R 84]. An income-tax assessment order is a public document, but as the Income-Tax Act does not give the assessee a right to inspect the records of the income-tax department, he has no right to demand a certified copy of the assessment order [*Pramatha v. Nirode*, 43 CWN 1169; *Devidatt v. Shriram*, 56 B 324; see s 54[4] I T Act—CONTRA : *Venkataramana v. Varahalu*, A 1940 M 308; see also *Ram Rao v. Venkataramayya*, 1940 Mad 768: A 1940 M 768 FB *post*]. In Allahabad it has been held that a very narrow interpretation has been placed on the words "right to inspect" in s 76. It does not necessarily mean that the person should have a right to inspect the original record. It only means that he has a right to look at the order. An income-tax assessment order is a public document and a certified copy would be admissible under s 65 [*Suraj v. Jhabbu*, A 1944 A 114 : A 1944 ALJ 118; see also *R v. Osman*, A 1942 B 289: 1942 Bom 767 *post*]. In Nagpur it has been held that statements recorded or orders passed by I T Officers are public documents under s 76. It is not necessary that the public must have a right to inspect. It is sufficient if there is a single person who has a right to inspect. An assessee has a right to inspect statements recorded or orders passed by the I T Officers and consequent certified copies of them are admissible under s 65 [*Bunchibai v. Nagpur Univ*, A 1946 N 377]. An assessee has the right to inspect the order passed on appeal by the App Asst Commr [*Rasipuram &c v. Commr I T*, A 1957 M 151].

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4. See now s. 137 of Act 41 of 1963.

A copy of the general power-of-attorney cannot be obtained by any person who is not a party to the deed [*Bishen v. Abdul Samad*, A 1931 A 649]. The accused had no right to inspect the records in the custody of the court in which he is being tried. He could look into documents filed by the prosecution only as and when they were tendered to the court by the prosecution at the trial [*In re Swaminathan*, A 1944 M 419]. Statements recorded under s 164 Cr P Code are public documents [*Bashiruddin v. R*, A 1932 A 327: 139 IC 330]. As observed in a case, s 76 is only an enabling section. It cannot be read as an exhaustive provision, much less as a provision declaring the grant of copies illegal in any particular case [*Venkataramana v. Varahalu*, A 1940 M 308].

Special Enactment Conferring Right of Inspection.—There are various statutes which specifically confer the right of inspection of documents, *eg* Books in the Administrator General's office relating to the accounts of an estate, reports &c (s 49 Act 3 of 1913): Books and Indexes (s 57 Registration Act, 16 of 1908) &c.

Even in the statutes which specially confer the right of inspection of public documents, no remedy has been provided to which resort may be made, when inspection or copy is refused. A person aggrieved may however in a proper case get a writ of *mandamus* from the High Court under s 45[5] of the Specific Relief Act (see now Art 226 of Constitution) requiring any specific act to be done or forborne by a public servant. S 45 is wide enought to include an application for copies of deposition and orders recorded by the Presidency Magistrate. All prosecution whose charges are dismissed, being affected by the order of dicharge, are entitled to copies of such documents [*Bank of Bengal v. Dinanath*, 8 C 166]. See also *R v. Sailendra*, 15 CWN 770 where the High Court ordered the records of the case to be brought up and kept with the Registrar and allowed liberty to the party to take copies.

Inspection of or Copy From Share Registers of Banks and Companies.—The position of a shareholder of a corporation who has no statutory or contractual right to inspect any book was considered by the Privy Council and it was held that where the shareholder of a Bank had no such right to inspect the register of shareholders, the only right that he can have in reference to such matters, is that which at common law belongs to every member of a corporation. Their lordships quoted with approval para. 1495 of Taylor's Ev (10th Ed) where it is said that "the privilege of inspection is now confined to cases where the member of the corporation has in view some definite right or object of its own, and to those documents which would tend to illustrate such right or object" [*Bank of Bombay v. Suleman*, 35 IA 130: 12 CWN 825: 32 B 466; see *R v. Merchant Taylor Co*, 1832, 2 B & Ad 115]. As to inspection and copy of registers of members of companies by debenture holders, shareholders and others, see now s 163 Indian Companies Act, 1956. As to right to inspect copies of instruments creating charges, Company's Register of Charges, Trust Deeds &c, &c see ss 144 and 118 *ibid.*

The right to inspect the records of the proceedings of a company given by article of association is not conterminous with the right to take copies. A contractrual right of inspection does not of itself imply a right to take copies any more than a statutory right would do. In the case of a statutory right of inspection, the court will not imply a right to take copies unless the statutory right would otherwise be of no avail, or practically useless [*Rameswar v. Calcutta W&S Assn*, 42 CWN 161].

Mode of Proof.—The mode of proving public documents is dealt with in ss 76 to 78 *post*. As to the presumption with regard to documents taken in the course of

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5. In view art 226 of Constn s 45 has been omitted in Act 47 of 1963.

judicial Proceedings. Gazettes, newspapers, and other documents of a public nature see *post* ss 80-87. Owing to the great inconvenience of removal of public documents, they are provable by secondary Evidence, *ie*, certified copies [see *ante* s 65(*e*), (*f*)].

Admissibility and Effect of Public Documents.—The admissibility and effect of public documents (non-judicial) have been dealt with in ss 35 to 38 and (judicial) ss 40 to 44, see *Ante*. The question whether a document is admissible in evidence as a public document is distinct from the question whether the contents are binding on persons not parties to it [*Tara Kumar v. Arun*, 74 IC 383: A 1923 C 161]. Documents forming records of the acts of public officers are public documents, but they do not furnish proof of all facts to which they refer. In this case the court refused to base decision on the opinion of Governmnet servants expressed in correspondence [*Rupa v. Bhairan*, 105 IC 353: A 1928 N 93].

"Documents of a public nature, and of public authority are generally admissible in evidence.....This must not be understood to mean that the contents of public writings are admissible in evidence for every purpose: each public document is only receivable in proof of those matters the remembrance of which it was called into existence to perpetuate. Some public writings are like records,—conclusive on all the world; but this is not their general character, as, most usually, they only hold good until disproved" [Best s 219]. See also *ante* s 35: *"Foundation for reception of entries in public records"*.

CLAUSE (1): "Acts or Records of the acts".—In construing s 74 it may fairly be supposed that the word "acts" in the phrase, "documents forming the acts or records of acts" is used in one and the same sense. The act of which the record made is a public document must be similar in kind to the act which takes shape in a public document. The kind of acts which this section has in view is indicated by s 78. The acts there mentioned, are all final completed acts as distinguished from acts of a preparatory or tentative character. The enquiries which a public officer may make whether under the Cr P Code or otherwise, may not result in action. There may not be publicity about them. There is a substantial difference between such measures and the specific act in which they result. It is the latter only that this section was intended to apply. Unless the above distinction is drawn, we cannot see where the right of discovery is to stop [*per* SHEPHARD J, in *R v. Arumugam*, 20 M 189, 196; **follld** in *Chandi Charn v. Baistab*, 31 C 284: 8 CWN 125]. A memo sent to a magistrate by a Civil Surgeon in compliance with the former's request to report the age of an accused, is not the act or a record of his act as a public officer and it merely embodies the civil surgeon's opinion as an expert [*Abdul Halim v. Saadat Ali*, A 1928 O 155]. It would be an unwarranted restriction on the words "documents forming the acts or the records of the acts", to say that they should be confined to those parts of an income-tax record which the Income Tax Officer has himself prepared and to exclude documents which he has himself called for (*eg* return, profit and loss statement &c) or which have been admitted to the record for the purpose of the assessment [*Ramarao v. Venkataramayya*, A 1940 M 768 FB].

Documents Forming the acts or Records of the acts of the Sovereign Authority.—Under this head comes Acts of Parliament, judgments and acts of courts, both of voluntary and contentious jurisdiction, proclamations, public books and the like. They are divided into "judicial" and "not judicial", and also "writings of record" and "writing not of record". Records are the memorials of the legislature, and of the King's Courts of Justice, and are authentic beyond all manner of contradiction [Best 11th Ed s 218]. State Bank of Dholpur Act, 1915 is a public document [*Murli v. State Bank*, A 1971 Raj 6].

Documents Forming the acts or Records of the acts of Official Bodies and Tribunals.—The words "record" (in the English Public Records Act) is to be taken to mean all rolls, records, writs, books, proceedings, decrees, bills, warrants, accounts, papers and documents whatsoever of public nature, belonging to His Majesty, or on the 14th of August 1838, deposited in any of the offices or places of custody in the Act (see ss 20 and 1 and 2 of the Public Record Office Act, 1838). [Tay s 1485]. The records of courts of justice and other judicial writings constitute public documents. Amongst these are the records of the Supreme Courts, and of the old superior courts of law and equity and the *quasi records* of those courts [Tay s 1534; see Best s 218].

Documents Forming the acts or Records of the acts of Public Officers, Legislative, Judicial and Executive etc etc.—Under cl (*1*), (*iii*) documents forming the acts or records of the acts of public officers, legislative, judicial and executive not only of this country, but also of any other parts of the Commonwealth or of foreign countries, are public documents and are provable by certified copies. The records of the acts in Sec. 74 mean something different from the public or other statutory book, public register which is required to be kept by law, postulated by Sec. 35. [*Ram Jethmalani v. Director, CBI, CIA-I New Delhi*, 1987 Cri LJ 570 578 (Del)]. A copy of the probate of a will and of the endorsement granted in Australia is admissible in evidence. It is a public document under this section [*In re Adija*, 11 IC 261].

For the definition of public officer, see s 2(*17*) C P Code 1908. Cf the definition of public servant in I P Code s 21. The following are public officers, *viz*: The Official Trustee [*Shahebzada v. Ferguson*, 7 C 499; *Abdul Latif v. Dourtee*, 12 M 250]. The Official Assignee [*Joora Haji v. Kemp*, 26 B 809]; Administrator General [*Bhalaram v. Adm General*, 8 CWN 913]; A Policeman [*R v. Arumugam*, 20 M 189]; Secretary of a Municipal Board [19 A 293]; The *gorait* of a village [*R v. Saddu*, 1 ALJ 243]; Collector when acting as agent of the Court of Wards [*Collr of Bijnor v Munwar*, 3 A 20; *Narsingrao v. Luxmanrao*, 1 B 318; but see *Anantharaman v. Ramasami*, 11 M 317; *Bhau Balapa v. Nana*, 13 B 343; *Sardar v. Ganpat*, 14 B 395]; A Surveyor employed by the Collector in the Khas Mehal department [*Bajoo Singh v. R*, 26 C 158]; A cantonment committee constituted under the Indian Cantonment Act (13 of 1889) [*Gray v. Cant Com of Poona*, 34 B 583]; Peon acting under delegation by *nazir* to execute a warrant of arrest [*Sheo Pragash v. Bhoop Narain*, 22 C 759]. Teachers employed by Government in a school for education come within "executive officers" [*Maharaj v. Krishnabai*, 50 B 716: 99 IC 307].

Judgment.—A judgment of a court is a public document within s 74 and the general public has a right to inspect and have copies of judgment [*Ladli v. R*, A 1931 A 364]. See Or 20 r 20 C P Code. The records of the act of Labour Tribunals are public documents entitling the parties to inspection and copy [*Mahaboob Mills Co Ld v. Vittal*, A 1959 Mys 180].

DOCUMENTS HELD TO BE PUBLIC:—The following are some instances of documents held provable by certified copies:—

—Birth and Death Registers. see notes to s 35 *Ante*.

—Charge Sheet etc.—are public documents which the accused has the right to inspect under s 76 [*R v. Arumugam*, 20 M 189—SHEPHARD & SUBRAMANIA AYYAR JJ]. So also a statement or confession recorded under s 164 Cr P Code, but the accused's right to get copy before the filing of charge sheet has been impliedly taken away by s 173(4) [now s 173(5)] Cr P Code [*S v. Krishnan*, A 1961 M 92]. Acts or records of the acts of police and Magistrates exercising powers under Cr P C are

public documents and persons having to inspect them can have right to obtain copies under s 76 [*V J Thomas v. S*, A 1970 K 273 (case discussed)].

—Chittas, Accounts, etc.—*Chittas* prepared for the purpose of distributing the public revenue on a partition of an estate is a public document and is evidence of the state of affairs then existing [*Nabendra v. Durga*, 15 CWN 515; see *Nabendra v. Rahima*, 10 CWN 1015. As to proof of *chittas*, see *Hari Narain v. Khetra*, 8 IC 715 (C)]. Certified copies of chittas and maps relating to partition under Reg 19 of 1814 are admissible apart from anything in s 35 [*Khettar v. Md Alla Rakha*, 23 CWN 48]. A *jammabundi* prepared by a deputy-collector engaged in the settlement of land under Regln 7 of 1822 is a public document [*Tara Patur v. Abinash*, 4 C 79; **doubted** in *Ram Ch v. Banseedhur*, 9 C 741 and in *Akshoy v. Shama*, 16 C 586]. *Ayakut* accounts prepared for revenue purpose to show the sources of revenue in each village, are to some extent public documents, and they are not altogether to be disregarded [*Siva Subramanya v. Secy of S*, 9 M 284, 294]. Accounts prepared in the ordinary course by a revenue officer showing the area under cultivation are in the nature of official records [*Narayanaswami v. Chintalapati*, 22 MLJ 393: 14 IC 1007]. Crop cutting report by Collector under s 40 B T Act is public document [*Kishun v. Ishwarnath*, A 1927 P 167: 102 IC 391; *Hargobind v. Kishandayal*, 95 IC 956: A 1976 P 436]. Statement before Settlement Officer being a *quasi* judicial body can be proved by a certified copy [*Kopparam v. Udaysankar*, A 1981 AP 34]. As to Government *Chittas*, see s 36.

—Compromise Petitions.—A compromise petition, the court's order confirming it and power of attorney are all entered upon the record and they become as much a part of the record as if the case had been tried in the ordinary way. The record of suit together with the petition is a public document provable by certified copies [*Bhagain v. Gooroo Pd*, 25 WR 68 (**follld** in *Lalita v. Surnomoyee*, 5 CWN 353]; see also *Mangal Sen v Hira Singh*, 1 ALJ 369].

—Confessions.—Certified copy of confession of accused is admissible [*Md Ali v. R*, 1933 ALJ 1551 FB: A 1934 A 81: 56 A 302]. The record of a confession made before and attested by a judicial officer in an Indian State is probably a public document [*R v. Sundar Singh*, 12 A 595].

—Depositions.—The deposition of a witness taken by an officer of the court is part of the record of the acts of an official tribunal and a statement made in it can be proved by a certified copy [*Chandreshwar v. Bisheshwar*, 5 P 777: 101 IC 289; *Sakhina v. Laddon*, 2 CLJ 218. See also *Haranand v. Ram*, 27 IA 1: 27 C 639: 4 CWN 429, where it has been held that the depositions of witnesses taken by a foreign judicial tribunal are public documents]. For a deposition to be proved it is not enough to file a certified copy. Evidence must be adduced to prove identity [*Brajaballav v. Akshoy*, 30 CWN 254: 93 IC 115]. Since a copy of the FIR is forwarded to the court, it becomes a public document. [*Jayanthibhai Lalubhai Patel v. State of Gujarat*, 1992 Cri LJ 2377, 2380 (Guj)].

—Hindu Marriage Register.—Hindu marriage register is a public document [*Manjula v. Mani*, 1998 Cri LJ 1476 (Mad)].

—Income-tax Returns or Assessment Orders.—Certified copies of income-tax returns were held by the lower court to be inadmissible under s 76 and although there was a reference to them in the judgement of the Judicial Committee there was no clear pronouncement one way or the other on the question of their admissibility [*Ali Khan v. Indar Pd*, 23 IA 92: 23 C 950]. Income tax assessment order, though a

confidential document under s 54[6] I T Act, would be admissible in evidence if produced by an assessee or his representative-in-interest [*Tulsiram v. Annibai*, A 1971 SC 571 (*R v. Osman*, A 1942 B 289: *Suraj v. Jhabbu*, A 1944 A 114; *Buchibai v. Nagpur University*, A 1946 N 377 **apprd**)]. S 54[6] of the I T Act does not make the issue of a cer tified copy of the return to an assessee unlawful. Although it is a confidential document there is no objection to the maker of the return having a copy for his own purpose. There is nothing, in s 54[6] which prohibits the putting in evidence of a certified copy of an income tax return if it is a public document [*Rama Rao v, Venkataramayya*, A 1940 M 768 FB: 1940, 2 MLJ 257 (*Mythili v. Janaki*, 1940 Mad 329: A 1940 M 161 **overruled; relied** on in *Narbadashankar v. Jamnabai*, A 1961 MP 21)]. An income-tax return as well as a statement filed in support of it being a public document, certified copy of it is admissible. It is unnecessary to prove the signatures of partners in the original statement [*Somanna v. Subba Rao*, A 1958 AP 200 (*Rama Rao v. Venkataramayya*, A 1940 M 768 FB **folld**)]. In Nagpur also it has been held to be a public document. The direction that such document shall be treated as confidential is a direction to the officials in the I T Department and it is open to an assessee to waive the right [*Buchibai v. Nagpur Univ*, A 1946 N 377 *ante*]: so also in Patna [*Hiralal v. Ramanand*, A 1959 P 515] and Kerala [*Kaderkutty v. I T Officer*, A 1961 K 32].

In Calcutta, however, it has been held that though an assessment order is a public document within s 74, it cannot be inferred that because a document is a public document it is one to which the public have a right or access. The I T Act does not give an assessee the right to inspect the records of the income-tax department. In a suit by certain partners of a firm against another for account, the defendant sought to prove the extent of his share by putting of in certified copies of assessment—*Held* that they were inadmissible [*Pramatha v. Nirode*, 1939, 2 Cal 394: A 1940 C 187 : 43 CWN 1169; see also *Banarsi v. Janki*, A 1959 P 172]. This Calcutta view has been dissented from in Allahabad [*Suraj v. Jhabbu*, A 1944 A 114 *ante*]. In Bombay also it has been held that there is nothing in s 54[6] of the Income Tax Act to justify the extreme view that all the documents referred to in it are made inadmissible in evidence. If a document can be given in evidence without requiring a public servant to produce it, there is nothing in the section to preclude that from being done [*R v. Osman*, A 1942 B 289 : 1942 Bom 767]. Where an assessee dies one of his legal representatives is not entitled to obtain certified copies of the statement made by the deceased to the I T authorities where all the legal representatives do not apply [*Muniayammal v. I T Officer*, A 1960 M 366].

S 54[6] (*1*) and (2) of I T Act seems to impose a restraint on him from making disclosures of the contents of the file. The privilege being that of the assessee, it can be waived by him [*Kaderkutty v. I T Officer*, A 1961 K 32: *Tulsiram v. Annibai*, A 1963 Or 111]. Certified copy of Income-tax return of defendant showing payment of interest to plaintiff can be admitted in proof of plaintiff's claim [*Venkataramana v. Varahalu*, A 1940 M 308; *Naim v. Tikam*, A 1955 A 388; *Kakaram v. Thakar*, A 1962 Pu 27].

Profit and loss account filed in the Income-tax office is a public document [*Santiranjan v. Dasuram*, A 1957 As 49].

—Maps.—Whether a map is a public document within s 74 is *prima facie* a question of fact, and the mere circumstance that a map was treated as a public document in some earlier litigation to which the plaintiff was not a party, does not

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6. See now s 137 of Act 41 of 1963.

bind him [*Preonath v. Durgatarini*, 16 CWN 317: 14 CLJ 578]. As to maps made by Government, see *post* s 83 and as to value of survey and *thak* maps. Map prepared by Collector is not a public document [*Preonath v. Durgatarini, sup*].

Medical report.—Medical officers are public officers and reports of their medical examination are public documents [*Toh Kong Joo v. Penguasa Perubatan Hospital Sultanah Aminah*, (1990) 2 Malayan LJ 235 (Johore Bahru HC)].

Medico Legal Case.—Medico Legal Case prepared by a doctor, in due course of discharge of his duties as a public servant, is a public document. [*Dalip Kumar v. State*, 1995 Cri LJ 1742, 1746 (Del)].

—Order.—Order of competent authority fixing price of commodities under R 81 D I. Rules is public document [*Ganesh v. R*, A 1946 P 123: *Easwarmurthi v. R*, 48 CWN 477: A 1944 PC 54: 71 IA 83: *Ram Pd v. R*, 24 P 143]. An order issuing a search-warrant is a public document and the person affected is entitled to a copy [*Kalinga Tubes v. Suri*, A 1953 Or 49]. Order to make a complaint under s 153-A PC signed by Dy Secy is a public document [*S v. Ghulam*, A 1965 P 393].

—Order-sheet.—An order-sheet in a case is a public document [*Nand Kumar v. R*, A 1937 P 534].

—Pahanies and faisal patties.—Records maintained by revenue officers relating to land revenue, survey and settlement, etc., are public documents. Phanies and faisal patties are public documents. [*K. Pedda Jangaiah v. Mandal Revenue Officer*, 1996 AIHC 1006 (AP)].

—Plaints and Written Statements.—A certified copy of the plaint and written statments being tendered, the plaint was admitted on the ground that it was a public document, as it formed a part of the record; but the written statement was rejected [*Md Shahabuddin v. Wedgeberry*, 10 BLR App 31]. Field and Woodroffe have questioned the correctness of this decision. Taylor says: "The expression *quasi records* will embrace deposition, affidavits, *bills*, answers, orders, and decrees, filed in the old Court of Chancery, rules of court and certain other documents, which although not strictly records partake so much of their nature, that they can be proved by means of copies to the same extent as records, and are subject generally to the same rules of evidence. As to bills and answers, see *Emer v. Ambrose*, 1825, 4 B & C 24" [Tay s 1534]. Again:—The mode of proving certain documents, which though not emanating from courts of justice, are not strictly records, or such proceedings, as for the most part, are capable of being primarily proved by means of copies, must now be noticed. First, writs of execution and warrants of commitment, untill they are returned, must be proved by actual production, though, after their return, they become matters of record and are consequently provable by copies.....The *pleadings* in an action may be proved either by producing the originals, or by means of the copies filed with the officer of the court, under Or 41, r 1 [*R v. Scott*, 1877, 2 QBD 415-Tay s 1586; Ros N P 111].

In *R v. Scott, sup* on a charge of perjury, the production of the filed copies of the writ and pleadings with the order made thereon was held sufficient proof of a former civil action. Best also mentions "writs, pleadings, etc" among public documents of judicial nature [see Best, 11th Ed, s 218, *ante*]. When a plaint is presented, and the court makes an order admitting or registering it, the plaint as well as the order are entered upon record and they form a part of the record. If not strictly a public document within the meaning of this section, it may at least come under *quasi records* as indicated above. The rule permitting the contents of public documents to be proved by certified copies has its foundation in the great inconvenience, hardship

and risk attending the removal of public documents up and down, and when the accuracy of the certified copy of a plaint or written statement is endorsed by the public officer having custody of it, in the same way as any other public document, there exists no valid reason why there should be any necessity for calling the original. It would abviate considerable hardship and expense, if it is treated as a sort of public document. In view of the case in 25 WR 68 *sup*, and the general principles of English law referred to above, there is hardly any reason to suppose that the decision of PONTILEX, J, in 10 BLR App 31 *ante*, is altogether erroneous. It is of course difficult to make any distinction in the case of a written statement, which stands on the same footing as a plaint. It may be pointed out that under Or 37, r 4, of the Rules of the Supreme Court "office copies of all writs, records, pleadings and documents filed in the High Court of Justice shall be admissible in evidence in all causes and matters and between all persons or parties, to the same extent as the original would be admissible". Office copies are copies in an office of the High Court, and authenticated by an officer who has the custody of the original document, and is empowered to furnish copies either by law or by a rule of court: and they are admitted upon the credit of such officer, without proof of examination with original [Phip 8th Ed, P 530]. A certified copy under s 76 is also signed, sealed and certified as true in the same manner by the officer having custody of a public document. Sometimes the object is merely to prove the existence of a former suit or proceeding or the fact that a defence was put in, irrespective of the contents or the matters decided and there is no reason why this at least should not be allowed to be done by production of certified copy of plaint or written statement.

It has however been held in several cases that neither plaint nor written statement is public document and certified copy is not admissible [*Tarakeshwar v. Devendra*, 92 IC 184: A 1926 P 180; *Gulab Chand v. Sheokaran*, A 1964 P 45; *Akshay v. Sukumar*, A 1951 C 320; *Manbodh v. Hirasat*, A 1926 N 339: 93 IC 650; *Ahmed v Hurmuzi*, 8 OLJ 27; *Usaf v. Raunaq* A 1943 O 54; *Mata Pd v. Brij*, A 1942 O 303]. But see a sale deed and a plaint are public documents and the certified copies of these documents are admissible to prove the contents of the original. Whenever the question of execution of the sale deed or about the signature in the plaint arises, they have to be proved according to law. [*Jagdish Chandra Chandulal Shah v. State of Gujarat*, 1989 Cri LJ 1724, 1726: (1989) 1 Guj LH 82]. If a certified copy of a written statement is admitted without objection, it is not open to object to it in appeal [*Durga Dat v. Ram Pratap*, 79 IC 221: A 1923 L 138]. There is a distinction between admissibility of a plaint as evidence of a transaction and the admissiblity of a document in proof of a statement contained therein [*Lakhan v. Takim*, 39 CLJ 90].

—Process-server's Return of Service.—Peon's return in execution proceedings being an official record made by a public servant in the discharge of official duty is admissible [*Heramba v. Surendra*, 53 IC 20: A 1919 P 465; *Lall v. Rajkishore*, A 1936 P 658; see also *Abdul v. Ajiyar*, 35 M 670: 12 IC 679, where SUNDARA AYYAR, J, observed: "In my opinion the returns are admissible under s 35 of the Evidence Act as evidence of the facts reported by process-servers"]. *Dakhalanama* or report by a process-server of delivery of possession, is a public document, and copy is admissible without proof [*Md Nazir v. Ramkaran*, 25 IC 529 (A); *Satnarain v. Narain*, 30 IC 830: 13 ALJ 935; *Sitaram v. R*, A 1927 A 52; *Balku v. R*, 81 IC 533: A 1925 O 183]: so also the report of the officer of the court entrusted with the execution of a decree [*Balku v. R, sup*]. But it has been held in Lahore that process-server's report is not admissible unless he is examined [*Fateh v. Hakim*, 96 IC 825: A 1926 L 629—CONTRA : *Kanhaya v. Kishore*, 38 PLR 279: 164 IC 790; *Rewti v. Mohan*, A 1940 L 312]. Under added r 19A of Or 5 C P Code (Calcutta) "a

declaration made and subscribed by a serving officer shall be received as evidence of the facts as to service or attempted service". See *post*: *"Sheriff's Return"*.

Writs and warrants before they are returned must be proved by actual production; after return they become matters of record, and may be proved either by production or, by office copy [*R v. Scott*, 2 QBD 415—Phip 11th Ed, p 779]. A warrant is a public document and can be proved only by production of certified copy [*Kantilal v. S*, A 1968 G 100].

Registers.—The following have held to be public documents: The loan register of the public debt officer in the Bank of Bengal [*Chandi Churn v. Boistab*, 31 C 284: 8 CWN 125]: Quinquennial register [*Udovmoni v. Bisshonath*, 7 WR 14]: Quinquennial register under Reg 48 of 1793 [*Ramanandan v. Joygovind*, 75 IC 955: 2 P 839]; Register of Chakran lands at the time of decennial settlement [*Collr of E Burdwan v. Shk Imdad*, WR (1864) 358]: Register of tenures prepared by a Special Commissioner appointed under Act 2 of 1869 BC (Chotanagpur Tenures Act) and confirmed by the Commissioner [*Pertap Udai v. Masi Das*, 22 C 112]; Register of information regarding pargana watandars [BROOMFIELD, J, in *Malappa v. Tukko*, A 1937 B 307—CONTRA : TYABJI J, in *ibid*]; Entries in Collector's registers made under Act 7 of 1870 BC are admissible in evidence for what they are worth [*Sashi v. Girish Ch* 20 C 940 (*Saraswati v. Dhanpat*, 9 C 431 **disstd** from)]; Book or a file of papers usually kept in office containing copies of letters &c sent to subordinate or other officers [*Sevugan v. Srimathu*, A 1940 M 273; *Navaneetha v. Ramaswami*, 40 M 871; *Pub Pros v. Sadagopam*, A 1953 M 785]; Registers giving details as to areas of villages and the Government revenue chargeable thereon at the time of the Settlement from the Collectorate are public documents [*Lalmohan v. Nandalal*, 15 CLJ 191]. Certified copy of entry in death register [*Tamijuddin v. Tazu*, 46 C 152 (*Ramalinga v. Kotayya*, 41 M 26 refd to); see s 35, p 433]; Entry in the register of power of attorney kept in the registration office under s 69 Registration Act [*Pattu v. Nirmal*, 43 CWN 907 : A 1939 C 569]; Printed copies of index register of lands in a city [*secy of S v. Chimanlal*, 1942 Bom 357: A 1942 B 161].

As to entries in public or official book register of record, see *ante*, s 35, *et seq.*

—Registration.—A certified copy of the entry of registration of a deed at a registry office is admissible under ss 74 and 77 as proof of the entry, but not of the contents of the deed [*Hemanta v. Alliantz U S L Ins Co Ld*, A 1938 C 120]. Public records of a Wakf deed which is a private document kept in the office of the Sub-Registrar is a public document and certified copy thereof is admissible in evidence. [*Fazal Sheikh v. Abdur Rahman Mea*, A 1991 Gau 17,20].

—Report.—A survey and settlement report prepared by Assistant Survey Superintendent is public document [*Brajasundar v. Rajendra*, a 1941 P 260: 195 IC 313; *Manu v. S*, A 1965 Or 49]. A confidential report by the Addl District Panchayet Officer on the method adopted by the Election Officer in counting votes is a public document [*Rajagopala v. Election Commr*, A 1957 AP 339].

—Sales-tax.—An assessment order by a Sales-tax Officer is a public document as also the return of sales-tax filed by an assessee [*Alla Bux v. Ratan*, a 1958 A 829].

—Sanction.—Sanction to prosecute is a public document provable by certified copy [*Sagarmal v. S*, A 1951 A 816; *S v. Sagarmal*, A 1951 A 515; *S v. Gurdas*, A 1956 Pepsu 11; *Quasim Ali v. R*, 1950 ALJ 660; *Gayadin v. S*, A 1958 A 39; see *Dhanpat v. S*, A 1960 A 40—CONTRA: *Legal Remem v. Moazzim*, A 1947 C 318: 48 Cri LJ 815].

—Sheriff's Return.—(*a*) It is clear enough, and well accepted that the *sheriff's office* authorises him by implication to *make a return* of his doings under the customary authority of his office, and this return is admissible, without calling the sheriff, as an official statement. ELLENBOROUGH, LCJ, in *Gyfford v. Woodgate*, 1809, 11 East 297, "was of opinion that this (return) was *prima facie* evidence of the facts stated in the return upon the ground that faith was to be given to the official act of a public officer like the sheriff, even where third parties were concerned", (*b*) The sheriff's return is, however, also a part of the record of proceedings leading up to a judgment in litigation [Wig s 1664].

—Other Cases.—The following have been held to be public documents:—Authorised copies of the record of proceedings of a municipal body in India [*Reference under s 45 of Act 1 of 1879* (Stamp Act), 19 A 293 FB: 17 AWN 61; see s 78 (*5*) *post*]: Certified copies of assessment registeres of Municipality and tax receipts are relevant. [*Dukhiram Dey v. Mrityunjoy Prosad*, A 1982 Cal 294, 299]. Documents furnished by the Indian Newspaper Society and other newspaper's management to the Press Council of India are public documents. [*Indian Federation of S&M Newspapers v. Press Council of India*, A 1996 Del 90, 91]. Letters between district authorities forming a record of the acts of public authorities [*Pirthee v. Court of Wards*, 23 WR 272]; History of a district attached to a settlement record [*Md Khan v. Sultan*, A 1924 L 639: 75 IC 1040]; Pedigree containing recitals of ownership of land, if such recitals are required by law to be entered in revenue records [*Gurdit v. Kartar*, A 1928 L 214: 103 IC 182]: Canal *Jamabandi* under s 43 of Act 8 of 1873 as also *purchas* distributed to cultivators [*Umrao v. Ram*, 4 UPLR (BR) 96]; Certified copy of an order of the probate court that letters of administration be granted [*Habiram v. Hemnath*, 19 CWN 1068]; A notice under s 107 Cr P Code—but it cannot come in without proof that the parties mentioned in it are the parties concerned [*Shk Amjad v. Lachmi*, 18 CWN 644]; Record of information under s 154 Cr P Code [7 Bur LR 166]: Letters from the Controller of Military Accounts acknowledging attachment [*Edu v. Hiralal*, A 1928 O 488]; Pedigree contained in estate note-book prepared under s 332 U P Court of Wards Manual [*Shyam v. Collr*, A 1946 PC 103: 50 CWN 729]; Permit under the Motor Vehicles Act [In *re Sabir Ahmad*, A 1960 MP 318]: Certified copy of a transfer certificate granted by a school in an Indian State comes within s 74 (*1*) (*iii*) [*Maharaj v. Krishnabai*, 50 B 716: 28 Bom LR 1225]; There are two documents of two different schools showing the age of the accused as 22-6-57 and both these documents are signed by his father and were in existence *ante litem motam*. Hence there could be no ground to doubt the genuineness of these documents. [*Umesh Chandra v. State of Rajasthan*, 1982 Cri LJ 994: A 1982 SC 1057, 1061]. Maintenance application filed before Salar Jung Estates Committee [*Chand Sultana v. Khurshid*, A 1963 AP 365]; Visa entries on a passport and residential permits in favour of a foreigner [*S v. Abdul Sattar*, A 1963 G 226]. Out door tickets and discharge certificates of public hospitals [*Ramanibala v. Kanai*, A 1965 Tri 17]. Check Memo maintained by officer in charge of votes counting table of an election [*Banamali v. Rajendra*, A 1975 SC 1863]; Electoral roll is a public document and does not require any formal proof. [*Naladhar Mahapatra v. Seva Dibya*, A 1991 Ori 166, 172]. Certified copies from electoral roll and family register are public documents [*Aina v. Bachan*, A 1980 A 174]. Pariwarik register prepared under Bihar Panchayat Rule, 1959 [*Toral v. Chandeshwar*, A 1972 P 13]. Money lenders' register maintained in Sub-Registrar's office [*Dwarka v. Lalchand*, A 1974 P 103]. When a document appears to have been issued by the Rehabilitation Department but it does not make it clear as to who has prepared the original of this document, it is not a copy of the revenue record which could be considered as a public document and could be taken in evidence without any mode of proof. [*Chander Bhan v. Sh Pehlad*, 1987, 33 DLT 363: A 1988 Del 177, 179]. There was an agreement between the Maharaja of a State which got merged with the Union of India and the Central Government regarding the administration

of a Gurdwara. This was entered into as an off-shoot of the merger agreement. It is a public document. [*Kabul Singh v. Ram Singh*, A 1986 All 75, 81]. Injury reports prepared by Medical Officers on requisitions sent by the Investigating Officer, are public documents. [*Balagopal Panda v. State*, 1990 Cri LJ 1848, 1855 (Ori)].

DOCUMENTS HELD NOT TO BE PUBLIC.—Certificates.— A certificate of the Board of Trade is not a public document *In re Ava & Brenhilda*, 5 C 568 : 5 CLR 331]. A certificate of sale granted under C P Code (Act 8 of 1859) and before Act 12 of 1879 was enacted is a document of title, but is not a public document [*Bhasanji v. Haribhai*, 2 Bom LR 533; see also *Ambika v. Kumud*, A 1928 C 893: 110 IC 521; *Abanibala v. Lalita*, 7 Dom LR (C) 80].

—Award.—An award annexed to a petition is not a public document [*East India T Co v. Badat & Co*, A 1959 B 414]. A Book named "The Naga Tribes of Manipur by T.C. Hodson" is not an official compilation of the custom or the customary laws if the Tribe concerned prepared by the public officer in the discharge of his duties under the Government Rules and so it is not a public document. [*Pujiba Tang Khul v. Ganwirung Kubuini*, A 1992 Gauhati 66, 71].

—Chittas.—Copies of Government measurement *chittas* produced from the Collectorate, but in which there was nothing to show that they were the records of measurements made by any Government Officer were held not to be public documents [*Nityanund v. Abdur Raheem*, 7 C 76]. The measurement papers, prepared by a *Batwara Ameen* deputed by the Collector to make a partition, are not public documents [*Mohi Chowdhury v. Dhiro*, 6 CLR 139]. *Chittahs* made by Government for its own private use are nothing more than documents prepared for the information of the Collector and not evidence against private persons [*Ram Ch v. Banshidhur*, 9 C 74] (*Taru Patur v. Abinash* 4 C 79 **Doubted**). See also *Akshaya v. Shama Churn*, 16 C 586]. As to Chittas, see *ante* s 35.

—Petition.—A petition is not a public document [*East India T Co v. Badat & Co.* A 1959 B 414].

—Post-mortem report.—Under section 74 of the Evidence Act certain documents are stated to be public documents and neither the post-mortem report nor any certificate issued by any doctor about the date of death can be said to be a public document. [*State v. Bhola Pal*, 1995 Cri LJ 3717, 3719 (Cal)].

—Registers etc.—*Teishkhana* register prepared by a *patwari* under the rule framed by the Board of Revenue under s 16 of Regulation 12 of 1817 is not a public document [*Baijnath v. Sukhu Mahton*, 18 C 534; see also *Samar Dusadh v. Juggul*, 23 C 366. But see 12 CWN cliv, where it has been held that although *teishkhana* papers may not be public documents they may be some evidence under s 32(2)]. An abstract statement by a *patwari* even though based on papers in his possession and filed in a suit is a private document [*Sheo Das v. Sheo Dayal*, A 1930 A 712]. The census registeres are not public documents [*R v. Bhavanrao*, 6 Bom LR 535].

—Sale-deed.—A deed of sale is not a public document [*Hureehur v. Churn Manjhi*, 22 WR 335; *Hurrish v. Prosumno*, 22 WR 303].

—Will etc.—A document purporting to be certified copy of will taken from the protocol or record in Ceylon was filed but no evidence was tendered before the court (in India), that the copy had been made from the compared with the original—*held*, that it was inadmissible and that it was not a public document within s 74 [*Pannammal v. Sundaram*, 23 M 499]. A registered copy of a will is not a public document [see *Padam v. Hanwanta*, 19 CWN 929: A 1915 PC 111; *Parsa v. Parkash*, A 1976 P &H 245]. A translation of a will kept in the office

of the Court of Wards for its use though it is not its duty to retain the translation, is not a public document [*Sri Thakur v. Kanhayalal*, A 1916 A 206]. An *anumatipatra* or instrument giving permission to adopt is not a public document within the meaning of this section [*Krishna Kishori v. Kishori Lal*, 14 C 486: 14 IA 71].

—Warrants.—A warrant issued under s 46 of the Calcutta Police Act stating that the issuing officer has "cause to suspect" a certain thing, is not a public record and its contents must be proved in the regular way [*Watvekar v. R*, 30 CWN 713: 53 C 718].

—Other Cases.—Documents kept by post office showing the times of the receipt and delivery of telegrams are not admissible as public records [*Heyne v. Fischell*, 30 TR 190]. Statements recorded by a magistrate in his executive capacity in a departments enquiry are not public documents [*Govt of Bengal v. Santiram*, A 1930 C 370]. Reports to police officers that a certain person was married to another is not a public document [*Nawab Bibi v. Sher Zaman*, A 1930 L 1067]. *Roznamcha* of police stations are not public documents [*Ajodhya v. Tarabai*, 18 NLJ 333]. Letter to the Collector by the president of a public meeting forwarding proceedings of the meeting is not a public document [*Collector v. Sarat*, 55 CLJ 558]. A record copy of a lease for the use of Government officers which it is not the duty of Government to maintain is not a public documents [*Secy of S v. Chimanlal*, 1942 Bom 357: A 1942 B 161]. Copies of an execution petition or a counter affidavit are not public documents [*Venkatalingama v. Panaganti*, A 1942 M 558]. Regimental Records are not public documents [*Petti v. Lilley*, 1946, 1 All ER 593].

Inspection Book of lands and Buildings maintained by the Calcutta Corporation is not a public document [*Jitendra v. Makhan*, 61 CWN 175]. Papers containing communications between Reserve Bank of India and Controller of Capital Issues are admissible but the evidence being very weak can be treated as corroborative only [*Octavious Steel Co v. Endotram Tea Co*, A 1980 C 83 (*In the Matter of Tarit Kanti*, A 1918 C 988 SB; *Supted & LR v. Moazem*, A 1947 C 318; *C H Shah v. S S Malpathak*, A 1973 B 14 **impliedly overruled** by *Kanwarilal v. Amarnath*, A 1975 SC 308)]. Letter written by Manager Dist Co-Operative Bank to customer is not a public document [*Keshavrao v. Chandrabhan*, A 1980 B 380]. The post mortem report and inquest report are not public documents, [*State v. Gian Singh*, 1981 Cri LJ 538 (Del) : (1981) 19 DLT 104]. The document produced in court is not a copy of any Shajora Sakni prepared by any revenue official so that any presumption of truth could be attached to it under sec. 44 of the Punjab Revenue Act. The document appears to have been issued by the Rehabilitation Department but it does not make it clear as to who has prepared the original of his documents. So it cannot be admitted in evidence. [*Chander Bhan v. Sh Pehlad*, A 1988 Del 177: (1987) 33 DLT 363].

Reports By Police Officers or Statement Recorded by Them.—Reports made by a police officer in compliance with ss 157, 158 Cr P Code are not public documents and consequently accused is not entitled before trial to have copies of them (SUBRAMANIA AYYAR J, dissentient). The same rule applies to charge-sheets under s 173 Cr P Code—*per* COLLINS CJ, and BENSON J, (CONTRA: SHEPHERD and SUBBRAMANIA AYYAR JJ) [*R v. Arumugam*, 20 M 189 FB]. Statement of a witness to a police officer during investigation, though reduced to writing is not a public official document [*Isab Mandal v. R*, 28 C 348: 5 CWN 65; *Natabar v. S*, 59 CWN 729; *Sunil v. S*, A 1963 C 431; see *ante* s 35]. Accused under remand is not, before the commencement of preliminary inquiry, entitled to copies of statement under ss 162 and 164 Cr P Code [*R v. Muthiaswamiyar*, 30 M 466]. In a later case of the same court disagreeing with the view it has been held that statement under s 164 Cr P

Code is a public document, but the right of the accused to get copy before the filing of the charge sheet has been impliedly taken away by s 173(*4*) Cr P Code; see now s 207 Cr P Code, 1973 [*S v. Krishnan*, A 1961 M 92]. S§ 207 and 208 Cr P C, 1973 have cast duty on the magistrate to supply the accused before the commencement of enquiry or trial free copies of police report, FIR, statements recorded under s 161(*3*), or s 200 or s 202, confessions and statements recorded under s 164 and documents etc. It may be noted that no provision has been made for supplying copies of charge-sheets.

CLAUSE (2): Public Records Kept of Private Documents.—This clause refers to such records as are kept under the Registration Act (16 of 1908); see s 51&57 of the Act &c. The fact that a document is registered does not make it a public document, *eg* sale-deed, nor is mere registration proof of its execution [*Salimatul v. Koylashpati*, 17 C 903: *Naresh v. S*, 59 CWN 757: A 1955 C 398: see *ante* s 67: "*Whether registration is proof of execution*"]. Private registered trust deed is a private document of which public record is not required to be kept and certified copy is not admissible under s 76 [*Rabindra v. Santosh*, A 1975 C 381 (*Gopal v. Sri Thakurji*, A 1943 PC 83; *Krishna v. Kishori*, 41 IA 71 **rel** on)]. In the case of such documents secondary evidence in the shape of certified copies are admissible in case falling within s 65 (*a*), (*b*) and (*c*), but execution and contents have still to be proved in the ordinary way (See *Subudhi v. Raghu*, A 1962 Or 40). Public record of sale deed which is a private document being kept in the office of the Sub-Registrar it falls within the category of public document, and hence certified copy is admissible [*Md Saimuddin v. Abejuddin*, A 1979 Gau 14, *Rama Chandra Majhi v. Hambai Majhi*, A 1989 Ori 27, 30]. Certified copies of will admitted to probate may be proved by the probate [see s 91 Exception 2 *post*].

Return in the custody of the Registrar of Joint Stock Companies constituted public records of private documents within s 74(*2*) and secondary evidence thereof is admissible under s 65(*e*) [*In re A B Patrika*, 45 C 169: 21 CWN 1161: 26 CLJ 459]. Memorandum of Association kept in the custody of Registrar of Joint Stock Companies does form public record of private documents under s 74(*2*) [*Binani Properties (P) Ltd v. M Gulamali*, A 1967 C 390]. Sale deeds copied out and recorded in the Register kept in Registration office are not public documents. A kobala cannot be proved by producing that Register. It must be proved under s 67 [*Naresh v. S, sup*]. An original receipt for money which is registered is not public record of a private document within s 74(2). The receipt has to be returned to the party [*Gopal v. Sri Thakurji*, 47 CWN 607: A 1943 PC 83].

S 74(*2*) cannot apply to a document executed and authenticated before the sub-registrar under s 33(*1*)(*a*) Registration Act but not registered, and when the original is not forthcoming it may be proved by a private copy in the way allowed by law [*Bishen v. Abdul Samad*, A 1931 A 649].

[See *ante* notes to s 35].

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

All other documents besides those mentioned in s 74, are private documents, Private writings may be of various kinds, *eg* contract—unilateral or bilateral, memorandum, power, letter, any deed, &c. Documents which are registered are also private documents. As to the mode of proving private documents, see Ch V, ss 61 to 73. Private documents must be proved by production of original primary evidence except in cases mentioned in s 65 *ante*.

As to documents which have been held not to be public, see ss 35 and 74.

S. 76. Certified copies of public documents.—Every [1]public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal; and such copies so certified shall be called certified copies.

Explanation.—Any officer who, by the ordinary course of official duty, is authorized to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section.

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COMMENTARY

Principle and Scope.—The documents referred to in this section form a limited class of documents. The section says that the custodian of a public document which a person has a right to inspect, shall give on demand a copy of the document with a certificate that it is a true copy. A certified copy is therefore a copy certified as true and signed by an officer who has the custody of the original. This section applies to that class of documents, which any person *has a right to inspect.* As to "right to inspect" see *ante*, s 74. The words "has a right to inspect" protect privileged communications or documents, the disclosure of which may be refused by the Government for reasons of state or on account of injury to public interests (s 123). If the disclosure of the contents of any of the general records of the realm and of any other documents of a public nature, would, in the opinion of the court, or of the head of the department under whose control they may be kept, be injurious to the public interests, an inspection would not be granted [Tay s 1483]. A registration copy [s 57(5) Registration Act] is a certified copy of a public document under s 76 [*Karuppanna v. Kolandaswami*, A 1954 M 486]. Unless it is proved that the officer having custody of a public document is proved to have been authorised to make use of a seal, the absence of seal on a certified copy does not make it uncertified when the other necessary formalities have been duly carried out [*Sriram v. Md Abdul*, A 1938 O 69]. Court fees on certifed copies of judgments are payable at the stage of applying for copies [*Prasanna v. S*, A 1971 ALN 55]. No particular form as such is prescribed in S. 76 and hence if the copy produced contains the necessary particulars by which its authenticity can be inferred, the same can be treated as a certified copy. [*Thatha v. Paru*, A 1986 Ker 196, 198 : 1985 Ker LT 1069]. Right to seek certified copies of a public document is not absolute but dependent upon right to inspect that

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1. A village-officer in the Punjab is a public officer having the custody of a public document for the purposes of this Act, *vide* The Punjab Land Revenue Act 17 of 1887, s. 151(2).

document. [*K. Pedda Jangaiah v. Mandal Revenue Officer*, 1996 AIHC 1006, 1007 (AP)].

As to presumption with regard to certified copies of foreign judicial records. see s 86.

Civil Court Records.—Under the provisions of the C P Code, 1908, certified copies of the judgment and decrees shall be furnished to the parties on their application and at their expense (see Or 20 r 20). In matters before the Calcutta Small Causes Court the word proceedings is to be read for judgment (Notn by the Calcutta High Court dated 18th February 1889). Under Or 11 r 15 every party to a suit shall be entitled to insepct documents referred to in the pleadings or affidavits and to take copies. Certified copies of the judgment and decree in appeal shall be furnished to the parties on their application to the Appellate Court and at their expense (see Or 41 r 36). As to certified copies of Privy Council decrees, see Or 45 r 15.

As to the rules made by the Calcutta High Court for obtaining copies, see Civil Rules and Orders. Vol 1 Ch 4, Although under rule 603 of the rules a stranger to a suit is not entitled to copies of private documents, without the consent of the party producing them, yet under s 57 of the Registration Act 1908, he can take a certified copy of any registered document and there is no scuh restriction in the Registration Act with regard to strangers.

Criminal Court Records.—Under art 227 of Constitution the High Court may make rules for the inspection of records of subordinate courts and *prima facie* under s 548 [now s 363(5)] of Cr P Code a party has an implied right of inspection [see *Parasuram v. Cocke*, A 1942 B 26 *ante*]. Sub-ss (1) and (2) of S 363 *ibid*, provide for supplying to accused copy of judgment which will be given free of cost when accused is sentenced to imprisonment or the judgment is appealable, Under s 363(5) Cr PC "any person affected by judgment or order passed by a criminal court shall, on an application made in this behalf and on payment of the prescribed charges, be given a copy of such judgment or order or of any deposition or other part of the record: Provided that the court may, if it thinks fit for some special reasons, give to him free of cost". The words "affected by a judgment or order" should not be construed narrowly. They do not refer to a person who is a party to the judgment or order, for the rights of the accused to the copy of the judgment are dealt with elsewhere in the Code. The public as a whole cannot fail to be affected by every judgment of a criminal court [*Ladli v. R*, 53 A 724: A 1931 A 364 **approved** in *Madhavan v. S*, A 1957 TC 31; *S v. Veerana*, A 1959 Mys 52—CONTRA: *In re Pandu rao*, A 1932 B 636]. Sub-s (6) of s 363 Cr P C, 1973 has provided that High Court may, by rules provide for the grant of copies of any judgment or order to any person who is not affected by a judgment or order. See further Sarkar's Cr P Code, 4th Ed notes under s 363.

In *R v. Subbaya*, 1 Mad HC 138, the High Court refused to direct a sessions judge to furnish the prisoner with copies of the notes for the evidence and proceedings in the case. But *In the matter of Shib Pd*, 6 BLR App 59, the Calcutta High Court held that a magistrate wrongly refused to furnish prisoner under trial before him with copies of certain papers required for his defence.

"Custody".—Several records of cases, registers, &c, relied on by the police and sent to the Joint Magistrate's court were forwarded to the court of special Magistrate for being let in evidence in the preliminary enquiry. As the records were of the Joint Magistrate's Court, it was that court which had custody of them, and the accused should apply for copies to that court and not the Special Magistrate's Court [*In re Swaminathan*, A 1944 M 419].

Right to Inspect Public Documents. (See *ante*, s 74).

Certificate.—The particular form of certificate prescribed by s 76 is not necessary in every case. All that s 65 requires is that it must be a true copy. In different offices different set of rules are provided for that purpose [*Suraj v. Jhabbu*, A 1944 A 114]. A copy of a public document without the requisite certificate is inadmissible [*Khadim v. Jaganath*, A 1941 O 77].

Explanation.—The explanation attached to this section declares who is a legal custodian. A village-officer in the Punjab has been declared for the purposes of this Act to be a public officer having the custody of a public document [see the Punjab Land-revenue Act 17 of 1887, s 151 (2)]. As to *patwaris* in the Central Provinces, see s 146 of the Central Provinces Land-revenue Act, 18 of 1881.

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

COMMENTARY

Principle and Scope.—S 76 enacts that the custodian of a public document which any person has a right to inspect, shall give a certified copy on demand. S 77 says that such certified copies may be produced in a proof of the contents of the public documents or their parts. The certified copies are by statutes deemed to be originals [*Collr of Gorakhpur v. Ramsundar*, 61 IA 286: 38 CWN 1101, 1114: A 1934 PC 157]. The use of the word 'may' has led Norton to hold the view that production of certified copies is only one mode of proof. If then, a certified copy, should from want of some formality fail as a *certified* copy, it might still be used in evidence as an examined or sworn copy if it has been examined with the original by any one who can swear to the comparison with the original and to the accuracy of the copy; *Reid v. Margison*, 1808 1 Camp 469; (Norton, p 258). It appears that this interpretation would be not in consonance with the provisions of s 65(*e*). A public document may be proved by the production of the original like any other document and it is on the ground of convenience that a public document is allowed to be proved by a certified copy. By the word 'may' an option has been given to a party of proving the contents of public documents by certified copies, or by production of the original. It is a particular application of the general rule laid down in s 65, and does not include examined or sworn copies. So where the copy which was produced from the record in a previous proceedings which purported to be an authenticated copy, but not a certified copy as required by s 76, the document was held inadmissible [*Krishna Kishori v. Kishori Lal*, 14 IA 71: 14 C 486].

The document in question being the certified copy of a public document need not have been proved by calling a witness, Besides no objection was raised about the mode of proof in the trial courts [*Ramappa v. Bojjappa*, A 1963 SC 1633]. The standing order of the President, Manipur State Darbar and the order passed by the President, Manipur State Darbar as recorded in the Register of Miscellaneous matters are public documents and the certified copies of these documents can be marked without calling for proof. [*Thatithoi Chiru v. Ningampao Kabui (Deceased by Lrs)*, A 1990 Gauhati 7, 10]. The certified copy of an electoral roll, which is a public document, is admissible in evidence, [*Naladhar Mahapatra v. Seva Dibya*, A 1991 Orissa 166, 172]. Certified copies of the post mortem report, inquest report

and Panchnama are admissible in evidence in a Motor accident claim case without calling the Doctor or other connected witnesses to prove these documents. [*Rajasthan State Road Transport Corporation v. Devilal*, A 1991 Raj 29, 32]. A sale deed and a plaint are public documents and the certified copies of the documents are admissible to prove the contents of the original. Whenever the question of execution of the sale deed or about the signature in the plaint arises, they have to be proved according to law. [*Jagdish Chandra Chandulal Shah v. State of Gujarat*, 1989 Cri LJ 1724, 1726 : (1989)1 Guj LH 82].

This section and the preceding one refer to public documents, and are not applicable to *kobalas, &c.*, filed in a suit for the purpose of evidence [*Harihar v. Charan*, 22 WR 355]. As to whether ss 76-79 apply to copies given before the passing of the Evidence Act, see *Jakeer Ali v. Raj Ch*, 10 CLR 469, 476. As to public documents or registers provable under this section, see *ante*, s 35: *"Entries in Public books, records, registers that come under this section"*. Unless, otherwise provided by statute, a certified extract from a document or a certificate of its *result* or effect is not admissible [*Finlay v. F*, 31 LJ Mat 149]. A certified copy of the entry of registration of a deed is admissible under ss 74 and 77 as proof of the entry, but not of the contents of a deed [*Hemanta v. Alliantz U S L Ins Co Ltd*, A 1938, C 120].

[*Ref Phip 8th Ed p 356; Tay ss 1610-59, 1784-84A*].

Norton's opinion above as to examined copies seems to be based on the English Practice. It has long been a rule of the Common Law that whenever a document is of a *public*, which here includes *judicial*, nature, and would be evidence if produced, an *examined copy*, thereof is also evidence, without production of the original, or accounting for its absence; but where the document is of a *private* nature, the original must be produced unless lost or destroyed, when copies will be admitted. This rule has since been confirmed as to examined, and extended to *certified*, copies by statute, 14 & 15 Vic c 99, S 14 [Phip 8th Ed pp 543-44; Hals, 3rd Ed Vol 15 para 654; Powell, 9th Ed p 250]. Copies certified by a bank are admissible under s 4 of the Bankers' Books Evidence Act.

Statement of a *kanungo* is not relevant evidence of what is contained in the settlement record. It can be proved only by the production of the original or a certified copy of the settlement record [*Ramlal v. Ghanishram*, 71 IC 825: A 1923 L 150].

An income-tax assessment order is a public document within s 74. But as an assessee has no right to inspect the original order and to demand a certified copy, copies of the assessment order though certified by the income-tax department are not under s 77 certified copies which may be produced in proof of the contents of a public document [*Pramatha v. Nirode*, 1939, 2 Cal 394: 43 CWN 1169: A 1940 C 187; *Banarsi v. Janki*, A 1939 O 172—CONTRA: *Venkataramana v. Varahalu*, A 1940 M 308: *Suraj v. Jhabhu*, A 1944 A 114; see also *Rama Rao v. Venkataramayya*, A 1940 M 768 FB *ante*].

S 298 Cr P Code makes special provision for proof of a previous conviction or acquittal. As to proof of previous conviction, see *ante*, 54.

Under s 82 a foreign judgment may be proved by an authenticated copy. As to presumption with regard to certified copy of a foreign judgment, see s 14 C P Code of 1908.

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

(*1*) Acts, orders or notifications of [1][The Central Government] in any of its departments, [2][Or of the Crown Representative] or of any [3][State Government] or any department of any [State Government],—

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

or by any document purporting to be printed by order of any such Government, [2][or, as the case may be, of the Crown Representative];

(*2*) The proceedings of the Legislatures,—

by the journals of those bodies respectively, or by published Acts or abstracts, or by copies purporting to be printed [1][by order of the Government concerned];

(*3*) Proclamations, orders or regulations issued by Her Majesty or by the Privy Council, or by any department of Her Majesty's Government,—

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

(*4*) The Acts of the Executive or the proceedings of the Legislature of a foreign Country,—

by journals published by their authority, or commonly received in that country as such, or by a copy certified under the seal of the country or sovereign, or by a recognition thereof in some [4][Central Act];

(*5*) The proceedings of a municipal body in [5][a State],—

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

(*6*) Public documents of any other class in a foreign country,—

by the original, or by a copy certified by the legal keeper thereof. with a certificate under the seal of a notary public, or of [6][an Indian Consul] or diplomatic agent, that the copy is duly certified by the officer having the legal custody of the original, and upon proof of the character of the document according to the law of the foreign country.

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* Modifications in Pakistan, Burma and Ceylon have been given below the section.

1. Substituted by AO 1937.
2. Inserted by AO 1937.
3. Substituted successively by AO 1937 and AO 1950.
4. Subs. by AO 1937.
5. Subs. successively by AO 1948 and AO 1950.
6. Subs. by AO 1950.

WEST BENGAL AMENDMENT.—After s 78 the following new section has been inserted by West Bengal Act 20 of 1960 (w.e.f. 5-1-1961).

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

MODIFICATIONS IN PAKISTAN, BURMA AND CEYLON

PAKISTAN.—Cl (1):—For the words "State Government" substitute "Provincial Government".

Cl (5):—For "a State" substitute "Pakistan".

Cl (6):—For "an Indian Consul" read "a Pakistan Consul".

BURMA.—Cl (1) reads: "(1) Acts, orders or notification of the Government,—by the records of the departments, certified by the heads of those departments respectively, or by any document purporting to be printed by order of the President of the Union:" (AO 1937 and AO 1948).

Cl (3):—For "Her Majesty" or "Her Majesty's substitute "Her Britannic Majesty" or "Her Britannic Majesty's" and for "King's Printer" substitute "Official Printer". (AO 1948).

Cl (4):—For "some Central Act" substitute "some enactment in force in the Union of Burma". (AO 1937 and AO 1948).

Cl (5):—For "in a State" substitute "in the Union of Burma". (AO 1948).

Cl (6):—For "an Indian Counsel or diplomatic agent" substitute "a British Consul or diplomatic agent or the diplomatic agent for the Union". (AO 1948).

CEYLON.—Cls (1) and (2) read: "(1) acts, orders or notifications of the Government of the Island or any its departments—

(*i*) by the records of the departments certified by the head of those departments respectively, or by the Permanent Secretary, or a Deputy or an Assistant Permanent Secretary;

(*ii*) by any document purporting to be printed by order of the Government".

"(2) the proceedings of the Legislature—(*i*) by the minutes of that body, or (*ii*) by published Ordinances or abstracts, or (*iii*) by copies purporting to be printed by order of Government."

Cl (3):—For the words "or purporting to be printed by the Queen's Printer" substitute "or in the Government Gazette of the Island, or purporting to be printed by the King's Printer".

Cl (4):—For "in some Central Act" substitute "in some public Ordinance of the Island".

Cl (5):—For "in a State" substitute "in the Island".

Cl (6):—For "an Indian Consul" substitute "a British Consul".

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COMMENTARY

Principle and Scope.—This section prescribes special modes of proving the contents of various kinds of official documents Public Acts Proceedings of the Legislatures, &c mentioned in cls (*1*), (*2*) are also judicially noticed (v *ante* s 57). As the contents of all such documents cannot be remembered, reference to printed copies is necessary. They may be proved by production of copies purporting to be printed by the official printer or by order of the Government. 'Proceedings' means record of proceedings.

Clause (3) is analogous to the provisions of the Documentary Evidence Act 1868 (31 & 32 Vic c 37) which as amended by 45 & 46 Vic c 9, is in force in India and every other British colony or possession subject to any law that may from time to time be made by the legislature of such country. *Clauses* (*4*) & (*6*) refer to the Acts of the Executive or proceedings of the Legislature and other public documents of foreign countries. As to the presumption with regard to certified copies of foreign judicial records, see s 86. For the presumption as to documents admissible in England without proof of seal or signature, see s 82. As to the presumption with regard to a certified copy of a foreign judgment see s 14 C P Code, 1908. As to foreign law, see ss 38, 45, 84. As to the conclusiveness of a foreign judgment, see s 12 C P Code and as to the effect of foreign judgment, see s 13 C P Code, *Clause* (*5*) refers to the proceedings of the Municipal body. The documents specified in this section *may* be proved in the manner indicated. The section is therefore permissive and does not shut out other modes of proof.

For proving the public documents under section 78, it would be necessary that the copies of the Acts, Rules, Regulations and other statutory instruments being made available. [*Sanjeev M. Gonwadkar v. State of Maharashtra*, A 1997 Bom 303]. The court cannot act on a report based on the subjective an personal opinion of the author and not on any impartial enquiry, investigation and collection of relevant materials. [*J. Gopalan v. Municipal Corp. of Hyderabad*, A 1996 AP 371, 385].

CLAUSE (1): Acts, Orders, Notifications etc of the Government.—A comparison of ss 57 and 78 show that Acts, Orders or Notifications of the Central or any State Govt. require proof in the manner prescribed by s 78, unless they amount to law into force and judicial notice can be taken under s 57 [*S v. Ramcharan*, A 1977 MP 68 FB]. As to public and private Acts, see *ante* s 57. Proof of statutory rules may be given by production of the annual volume of Statutory Rules and Orders published by authority, containing them or by a copy issued by the King's printer [Arch Cr Pleadings 24th Ed p 411]. Statements and recitals of public matters contained in public statutes; Royal proclamations; Speeches from the Throne; Addresses to the Crown from either House of Parliament; State Papers (including, perhaps diplomatic

correspondence); or Parliamentary Journals as to all matters properly before either House, whether legislative, ministerial, or, in the House of Lords, judicial, are in general *prima facie*, but not conclusive evidence of the facts recited [Phip 8th Ed p 328; Hals 3rd Ed Vol 15 paras 657-662].

Orders and other instruments made and executed in the name of the President shall be authenticated in such manner as may be specified in rules to be made by the President and the validity of an order or instrument so authenticated shall not be called in question. (See Art 77 Constn). The corresponding Article in respect of order &c by a Governor is 166. A printed copy of order signed by the President of the Indian Union and not headed "Gazette of India" or not purporting to be published by order of Government is no proof of the order [*Brahmeshwar v. S*, A 1950 P 265]. There is a difference between Acts and Orders. Acts of Parliament are publicly enacted. Proclamations and Orders must be promulgated and reasonably published [*Harla v. S*, A 1951 SC 467: 1952 SCR 110].

An order passed by Government is to be proved by the order itself and no secondary evidence is permissible without the conditions of s 65 being complied with [*Raghaviah v. S*, 1951, 2 MLJ 52]. A mere cyclostyled covering letter accompanied by a similar copy of the Rules by itself is not enough and it is necessary that these Rules and the letter should be certified as laid down in S. 78. [*Union of India v. Nirmal Singh*, A 1987 All 83, 86 : 1986 All WC 692].

An original order of the local Government under s 25 Bengal Suppression of Terrorist Outrages Act with the seal of the Government and over the signature of the Under-Secretary is a document within s 49 of the Govt of India Act, 1919 (now Art 166 of Constitution) and cannot be called in question. S 78 has no application to such a document—*per* CUNLIFFE J. There is nothing in s 49 (Govt of India Act) to suggest that proof of the existence of the order is dispensed with. It is open to the prosecution to adopt any legal modes of proof they please. Although s 78 provides a convenient mode, it is not exhaustive—*per* HENDERSON J, [*Kalijeeban v. R*, 63 C 1053: A 1936 C 316]. A sanction under s 196 Cr P Code has to be proved under s 78(1) and such an order signed by the Deputy-Secretary on behalf of the Cheif-Secretary to the Government was insufficient [*Md Ozizullah v. Beni Madhav*, 26 CWN 878; see *ante* s 74: *"Sanction"*].

Judicial notice cannot be taken of a Govt notification as it is not "law". It must be proved by the production of the Gazette [*Collr Cawnpore v. Jugal*, A 1928 A 355; *Mathuradas v. S*, A 1954 N 296; *Ramji Raja v. Puncham*, A 1959 MP 269] or a copy certified by the head of the department which issued the notification [*Janukhan v. S*, A 1960 P 213].

S 78(*1*) applies only to proof of documents, that is, it is only a provision for the notification being proved by the Gazette and cannot prove that the authority promulgating a notification was the Governor with the Ministers when the notification does not purport to say so [*Naicker v. Madras Corp*, 99 IC 18: A 1927 M 22]. Notification in the Gazette fixing date of the municipal election is proof of the order of Government fixing the election [*Venkata v. Padmanabha*, A 1927 M 980: 53 MLJ 603 FB]. When a notification is not published in Government Gazette such notification is not one that has been 'made' and it cannot be proved under s 78(1) by producing revenue records of the province [*R v. Fazal*, A 1937 Pesh 52; *Kashmiri Lal v. State of Punjab*, A 1984 Punj & Har 87, 89 : (1983) 85 Pun LR 741]. Police Gazette is a public document and courts can take judicial notice of it [*Maqbul v. Govt of U P*, A 1947 O 210]. Lyall's Report of the Cess-Revaluation operations comes within "any document purporting to be printed by order of Government" [*Sahdon v.*

Balam, A 1937 P 334]. An extract from a newspaper about a Government notification is inadmissible. A newspaper is not one of the documents referred in S. 78(2) by which an allegation of fact can be proved. [*Laxmi Raj Shetty v. State of Tamil Nadu*, A 1988 SC 1274, 1290 : 1988 Cri LJ 1783]. Under s 78 a copy of the Gazette is to be produced. Statement of a telephone conversation with the Chief Secretary as to the extension of an Act is inadmissible [*Moti Lal v. R*, A 1931 A 12 : 129 IC 443].

—Executive Proclamations.—Executive proclamations are difficult to classify; they are precisely neither Registers nor Returns nor Certificates. So far as recitals of facts therein are germane to the doing of the executive act itself, they are on principle admissible. The Executive cannot be supposed to need express authority, because he has no superior. And, in general, the office of the Executive should suffice to make admissible any recital of fact announced or recorded by him in the line of duty [Wig s 1663].

CLAUSE (2): Proceedings of Legislatures, Parliament etc.—Proceedings of the Parliament or of the Legislative Assemblies or Councils in the various States or Provinces are published in book form under authority. The test roll of the House of Commons and the official copy of the division lists are admissible in evidence [*Forbes v. Samuel*, 1913, 3 KB 706; Hals 3rd Ed Vol 15 para 658]. The court shall take judicial notice of the course of proceedings in Parliament and of the Legislature [see s 57 *ante*]. Proceedings of Legislatures are not ordinarily admissible as aid to the construction of statutes. A statute expresses the collective intention of the Legislature and any statement by an individual, albeit a Minister, of the intention and object of the Act cannot cut down the generality of the words used in the statute [*S v. Union*, A 1963 SC 1241, 1247].

Under s 78(2) the authorised text of an Act of the Legislature is the one that is published in the official Gazette. In this case there was a difference in the text of the Limitation Act (Art 177)[1] as printed in the Gazette and in the Act published by the Government in book form [*Bhagat v. Rup Kishore*, 77 IC 409: 4 L 367; see *Brindaban v. Mahabir*, A 1927 P 142: 97 IC 31; *Subramania v. Shanmugan*, 49 MLJ 363: A 1926 M 65]. It has however been held in Calcutta that the mode of proof in respect of published documents in s 78 is permissive and the court is at liberty to have recourse to other available source. It was decided that the version of Art 177[1] Limitation Act (90 days) contained in the published Act and not that contained in the Gazette, is the right one [*Sheodayal v. Joharmull*, 50 C 549, 561: A 1924 C 74]. The matter has since been put right by an amending Act.

The proceedings of Parliament may be proved, under s 78(2), by the journals of the House of Commons or by copies purporting to be printed by order of the Government. But they cannot be proved by the production of the volume of Hansard's Reports of Parliamentary Debates containing a report of the speech it is desired to prove. *Hansard's* Reports are not admissible for the purpose of proving what was said in the House of Commons, without the evidence of the person who made the report, or of any person who was present when the speech was made—*per* HARRINGTON J,—CONTRA: WOODROFFE, J, *The Englishman v. Lajpat Rai*, 37 C 760; 14 CWN 713; v *ante* s 57]. The Federal Court has held that the proceedings of Parliament fall either under s 78(2) or s 78(4). The "Legislatures" to which the second category refers are intended to include all the Legislatures which have the power to make laws for India or any part thereof [*Niharendu v. R*, A 1942 FC 22: 1942 FCR 38: 46 CWN 9 FR]. Reports of proceedings of State Legislatures are

1. See now Art 120 of Act 36 of 1963.

admissible under s 78(2). In proper cases speeches of Ministers piloting a bill have some value [*Narayan v. S*, A 1953 Or 185]. The official report of the proceedings of the House of Lords is proof that the proclamation of emergency by the G-G in Council under s 102(1), G I Act was approved by the House [*Bimal Prativa v. R*, A 1942 C 464: 75 CLJ 90]. The journals of Houses of Parliament are admissible as evidence of the facts relating to parliamentary procedure [*Att Genl v. Bradlaugh*, 1885, 14 QBD 667 CA: 52 LT 589].

—**"Journals"**—s 78 is plainly to be given a broad and general meaning, since it is not confined to Journals of the Houses of Parliament but includes journals of other Legislatures also. There is no reason why in application to Parliament, it should necessarily be confined to the official journals published by each House. It includes the Official Parliamentary Debates authorised by Parliament and these records are therefore printed "by order of Government" [*Niharendu v. R, sup*].

Parliamentary Journals signed by the Speaker, are provable either at Common Law by production of the original or examined copies, or under Statute by copies purporting to be printed by the printers to the Crown or, by the printers to either House of Parliament (Ev Act 1945, 8 & 9 Vic c 113 s 3); or perhaps by authority of H M Stationery Office (Doc Ev Act 1882, 45 & 46 Vic c 9 s 2) [Phip 8th Ed p 542]. As to procedure for production of journals or certified copies of required entries, see May's Parliamentary Practice, 11th Ed p 202. Neither *Hansard's Debates*, nor the *Authorised Parliamentary Debates* printed by the Government printer, are, however, admissible to prove the questions, answers, and speeches of members, these publications not having the authority of Parliamentary Journals [*McCarthy v. Kenneddy*, Times, Mar 4, 1905, *per* DARLING, J,—Phip 11th Ed p 454].

CLAUSE (3): Proclamations and Orders in Council.—It does not appear that courts are bound to take judicial notice of Royal Proclamations [*Van Omeron v. Dowick*, *ante*, s 57]. Royal Proclamations, and orders and regulations issued by the Government, may be proved, like other public documents, by the production of the originals or by examined copies thereof; or, in the case of proclamations, by copies purporting to be printed by the Crown printers or by printers to either House of Parliament (Ev Act, 1845, s 3) or as further enacted by the Documentary Evidence Act, 1868, s. 2 by production of the *Gazette* which includes "the London Gazette, the Edinburgh Gazette, and the Dublin Gazette, or any of such Gazettes" [see Phipson 8th Ed, 540; Archbold Cr P Ed p 414]. The courts will not act on such proclamations, orders or regulations unless they are proved by a copy of the Gazette or in one of the ways set out above [*Duffin v. Markham*, 1918, 88 LJ KB 581; *Tyrrel v. Cole*, 1918, 120 LT 156; Hals 3rd Ed Vol 15 para 659].

'Privy Council' shall include His Majesty in Council and the Lords and others of His Majesty's Privy Council, or any of them, and any committee of the Privy Council that is not specially named in the schedule hereto; [s 5 Documentary Ev Act].

'Government Printers' shall mean and include the printer to His Majesty and any printer purporting to be the printer authorised to print the Statutes, Ordinances, Acts of State, or other public Acts of the legislature of any British colony or possession, or otherwise to be the Government printer of such colony or possession; [s 5 Documentary Ev Act].

CLAUSE (4): Foreign Judicial Records.—As to proof of foreign judicial records, see *Haranand v. Ram Gopal*, 27 IA 1: 27 C 639, 648: 4 CWN 427, cited *ante* and under s 86, *post*. Records of a foreign court though not authenticated and

certified under s 78 and s 86 may be admissible [see *In re Rudolph Stallman*, 15 CWN 1053 cited under s 86]. When it is impossible to obtain from the proper source exemined copies or the form of proof required by the Evidence Act, 1851 (14&15 vic c 99) ss 3, 7, in respect of acts of Foreign State, the best secondary evidence of the original orders of the State may be given [*Finska Angfartuqs v. Baring Bros*, 1937, 54 TLR 147: 157 LT 585].

As to "Journals" see *sup*.

CLAUSE (5): Proceedings of Municipal Body.—Minutes and proceedings of London Country Council or of Municipal Corporation may be proved by printed copies under London County Council Act (44&45 Vic c 48, s 33) or under Municipal Corporations Act (45 & 46 Vic c, 50, s 22).

The records of proceedings of a Municipal body is a public document and the officer who is authorised to give copies is a public officer [*Ref under s 46 of Act 1 of 1879* (Stamp Act), 19 A 293 FB]. A copy of the proceedings of the meeting of the municipal commissioners certified by the keeper thereof, is admissible under s 78(5) [*Akshay v. Commrs of Bogra Mun*, 37 CLJ 589]. Departmental records should not be sent for wholesale. A party relying on a Municipal register should tender a certified copy of same [*Shadi Ram v. Mt Atri*, A 1936 L 933].

CLAUSE (6): Public Documents of Any Other Class in a Foreign Country.—As to the proof of documents in cl (6), see the opinion of SUBBA RAO J, in *Badat & Co v. E I T Co*, A 1964 SC 538 (the majority expressing no opinion on the point). The words 'diplomatic agent' are very wide and include the Resident of Hyderabad [*Maharaj v. Krishnabai*, 50 B 716: A 1927 B 11: 99 IC 307]. Copies of attendance and leave registers kept in the State of Hyderabad are not admissible in evidence having regard to s 78(6) [*Shamsher v. Md Sah*, A 1926 O 29: 90 IC 329]. Copy of a birth entry in the record of a town in Pakistan is not admissible unless attested by the High Commissioner of India in Pakistan [*Union v. Amrik*, A 1963 Pu 104].

PRESUMPTIONS AS TO DOCUMENTS

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

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1. PAKISTAN—In para 1 omit "to be genuine" and for the words "of the Central Government..... Central Government" substitute "of the Central Government or a Provincial Government, or by any officer in an Acceding State or non-Acceding State who is duly authorised thereto by the Central Government, to be genuine:" (AO 1949).

   BURMA—In para 1 omit "to be genuine" and for the words "of the Central Government..... Central Government" substitute" in the Union of Burma, or by any officer in any other part of Burma who is duly authorised thereto, to be genuine:" (AO 1937 and AO 1948).

   CEYLON—In para 1 [which has been numbered sub-sec (1)] omit "to be genuine" and for the words "of the Central Government..... Central Government" substitute "in the Island, to be genuine:" Para 3 has been numbered sub-sec (2).
2. Inserted by AO 1950.
3. Substituted successively by AO 1937, AO 1948, AO 1950 and Part B States (Laws) Act 1951.

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

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

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COMMENTARY

Principle and Scope.—As to the meaning of the term presumption and its various divisions, see *ante*, s 4, and s 114 *post*. This and the following sections down to s 90 deal with presumption as to documents. Ss 79-85, 89 refer to certain facts about documents which the court *shall presume*. In these cases the court is bound to take the facts as proved until evidence is given to disprove it. Ss 86-88, 90 deal with cases in which the court *may presume* certain things about documents. Here the court *may* consider the facts as proved until the contrary is shown. The presumptions as to documents provided for in these sections are not of course exhaustive, and in appropriate cases other presumptions may be raised under the general provisions of s 114 [see *illus* (*i*)], the terms of which are permissive. There are some presumptions as to documents in English law for which there is no express provision in this Act and which can therefore be raised only under the general provisions contained in s 114, *eg*, there is a general *prima facie* presumption that all documents were executed on the day they bear date. [As to other presumptions relating to documents in English law, see Taylor, ss 160-165].

This section applies only to certificates, certified copies or other documents certified by proper officers or by officers duly authorised. S 79 does not apply to original documents [*Bishnath v. R*, A 1948 O 1]. The genuineness of certificate of registration must be presumed [*Govindram v. Abdul Wahab*, A 1963 Raj 234]. Apart from being thus certified, the documents must be such as are by law (under this Act or other special Act) declared to be admissible as evidence of particular facts. S 82 provides for similar presumption with regard to documents admissible in England without proof of seal or signature. The presumption that the document itself is genuine, of course includes the presumption that the signature and the seal (where seal is used: s 76) are genuine. The last clause of s 79 provides for presumption as to official character [Field, p 248]. It is another *prima facie* presumption of law that a person has been duly appointed to it, if he has in fact acted in an official capacity, because it cannot be supposed that any man would venture to intrude himself into a public situation which he was authorised to fill [Taylor, s 171]. See also Exception 1 to s 91 which provides that when a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he was appointed need not be proved. A rebuttable presumption of genuineness under 79 is permissible only if a certified copy was executed substantially in the form and manner provided by law [*Bhinka v. Charan*, A 1959 SC 960: 1959 Supp 2 SCR 796].

A letter authorising a prosecution under s 196 Cr P Code purporting to be issued by the Chief Secretary but signed by a Deputy-Secretary for the Chief-Secretary to

the Government raises no presumption under s 79. It would have arisen if it had been signed by the Chief-Secretary [*Ozizulla v. Beni Madhab*, 50 C 135: A 1923 C 298; see *Legal Rem v. Moazzim*, A 1947 C 318; see however CONTRA: *Sagarmal v. S*, A 1951 A 816; *S v. Gurdeo*, A 1956 Pepsu 11; *Quasim Ali v. R*, 1950 ALJ 660; *Gayadin v. S*, A 1958 A 39]. Letters written by the plaintiff to the Nazul Department, Nagar Mahapalika, Allahabad become public documents once they are filed in the Nazul Department. [*Smt Manorama Srivastava v. Smt Saroj Srivastava*, A 1989 All 17, 21]. The police official who recorded the F.I.R. had done so in a regular manner in due performance of his duty. So a presumption as to the genuineness of the certified copy of the F.I.R. can be raised. [*Smt. Krishna Rani v. Chunilal Gulati*, A 1981 Puj 119, 124]. There should be evidence that the entry in the khasra was made by the Patwari and the copy was signed by him in his official capacity and was issued in the manner prescribed in the form provided by law. Then only, under section 79 the inference could be drawn that the document was genuine and not spurious. [*Sitaram v. Ram Charan*, A 1995 MP 134, 137].

As to whether this section is applicable to copies given before the passing of the Act, see *Jakeer Ali v. Raj Ch*, 10 CLR 419, 476.

Presumptions as to Genuineness of Certified Copies.—These definitions of the words '*shall presume*' and "*may presume*" are to be found in s 4 (*ante*). The expression 'shall presume' occurs in ss 79-85 and the expression 'may presume' occurs in ss 86-90. This section proceeds upon the maxim *omnia rite esse acta*. The presumption drawn in favour of official certificate &c is *prima facie* and not conclusive. They may be shown to be incorrect. When the relevant dates are shown both in words and figures the possibility of interpolation in dates is almost eliminated. [*U.P. State Road Transport Corporation v. Kedar Singh*, A 1991 All 317, 319].

Certificate—*eg*, certificate under s 60 of the Registration Act: see also ss 298, 331, 337 Cr P Code and s 90 of the Christian Marriage Act (15 of 1872). The registering officer's evidence is not necessary to prove certificate of registration, the genuineness of which is to be presumed under this section [*Md Hasan v. Sohara*, 71 IC 805: A 1924 L 389]. Certificate of the visitors of a lunatic asylum made receivable by s 337 Cr P Code and signed by the superintendent of the asylum is a public document the genuineness of which is to be presumed under this section [*Kalidas v. R*, 63 C 425]. There is some importance to the proviso to the section which says that it is enough that such document "is substantially in the form and purports to be executed in the manner directed by law in that behalf" when the law requires only substantial compliance and not strict compliance a carbon copy can be treated as a certified copy. [*Thatha v. Paru*, A 1986 Ker 196, 198 : 1985 Kr LT 1069].

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

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

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COMMENTARY

Principle and Scope.—This section deals with the presumptions attached to one important class of judicial documents *viz*, depositions of witnesses in a judicial proceeding or before any office authorised by law to take such evidence, or statements or confessions by any accused person taken in accordance with law. Evidence recorded in open court or confession recorded by a magistrate is an act performed by observance of certain prescribed rules and formalities and accordingly afford sufficient guarantee for the presumption that it was correctly done. The presumptions under this section are wider than those in s 79. They comprise not only the genuineness of the document but that it was duly taken under the circumstances stated in it.

The section has nothing to do with admissibility of any particular kind of evidence (which question has to be decided by reference to other sections of the Act), but only dispenses with necessity for formal proof in the case of certain documents taken in accordance with law. S 80 does not operate to make admissible; it merely gives legal sanction to the maxim *omnia praesumuntur rite esse acta* and raises a presumption in the case of documents taken in the course of a judicial proceeding [*R v. Viran*, 9 M 224: 2 Weir 125].

In order that presumptions mentioned in the second para may be raised, it must be a record of evidence given in a *judicial proceeding* or before any officer authorised by law to take it; and the statement or confession must also be duly taken in the manner laid down by law by a competent official. *Cf* s 33 (*ante*) which also requires that the evidence must be "given by a witness in a judicial proceeding or before any person authorised by law to take it." That section deals with the *relevancy* or admissibility of certain evidence for proving in subsequent proceeding the truth of the facts therein stated; but this section is concerned only with the *proof* of certain documents taken in accordance with law. It does not deal with the question of their *admissibility*, but simply dispenses with the necessity of their formal proof by raising the presumption that everything in connection with them was legally and correctly done, *ie*, (*i*) that the documents purporting to be record of evidence or statements or confession are genuine; (*ii*) that the statements as to the circumstances under which they were

taken, made by the officer who affixed his signature are true; and (*iii*) that the evidence, statement or confession was duly taken [see *Padam v. R*, 33 CWN 1121 SB: A 1929 C 617]. These presumptions however are not conclusive: they may be rebutted by contrary evidence: See the definition of "shall presume" in s 4 (*ante*) and further *post: "Statement or Confession must have been taken in accordance with law"*.

Evidence in a Judicial Proceeding or Before One Authorized by Law to take it.—The word 'evidence' has been defined in s 3. The mode of recording evidence in civil cases is to be found in Or 18, rules 5-13 C P Code, 1908; and in criminal cases in Ch xxiii, ss 272-283, Cr P Code, 1973. The presumptions prescribed by this section are only to be made with reference to depositions and confessions or statements taken under the provisions of the Civil and Criminal Procedure Codes; but the presumptions are not to be made as to any statement not recorded under the provisions of the Codes above referred to.

Under s 161 Cr P code a police officer making an investigation under Ch xii may examine witnesses and take down their statements. But such statements to police are not to be signed by persons making them, nor shall such writing be used as evidence [*Raghuni v. R*, 9 C 455: 32 B 111] for any purpose except the contradiction of prosecution witnesses as prescribed in s 162 Cr P Code, though they may in certain cases be used to refresh the memory of the police officer (*post* ss 159, 160). S 80 therefore does not apply to statements taken down by police officers during investigation. Statements of witnesses recorded under ss 164 and 299 Cr P Code, are not inadmissible merely because the magistrates recording them are not examined. There is a presumption of genuineness under this section [*R v. Lalji*, 16 PLT 730: A 1936 P 11; *Bishundhari v. R*, 1941 PWN 622]. A statement recorded by a magistrate in the course of a police investigation under s 164 is not evidence within s 193, Expln 2 I P Code [*R v. Purshottam*, 45 B 835 FB]. The description of a witness in the heading of the deposition is not part of the evidence given by the witness on solemn affirmation [*Maqbulan v. Ahmad*, 31 IA 38: 26 A 108: 8 CWN 241; *Lakshman v. Takim*, 39 CLJ 90; *Ramgahan v. Ramdasi*, A 1933 P 627—CONTRA: *Chotan v. R*, 7 P 361: A 1928 P 420 (*ante* s 33) *"Description on top of deposition"*].

When a tribunal is held to be incompetent to try a case the presumption under s 80 does not apply to the depositions of witnesses recorded by it. That however does not mean that there is no other mode of proving the statements [*Anwar Ali v. S*, A 1955 C 535].

Deposition Before Committing Magistrate.—[S 288[1] Cr P Code]. S 287 Cr P Code says that "the examination of the accused duly recorded by or before the committing magistrate shall be tendered by the prosecutor and read as evidence." One use to which the deposition before the committing magistrate may be put is in s 288 *ibid* under which the evidence duly recorded may, if the witness is examined before the judge, be treated by him as evidence for all purposes, *eg*, contradiction or impeaching credit (see ss 145, 155 *post*) or corroboration (see s 157 *post*) or even as substantive evidence, as the basis of finding a verdict [*Abdul Gani v. R*, 53 C 181; *Fakira v. R*, 41 CWN 741: A 1937 PC 119: 64 IA 148; see *post* notes under ss 145, 155 and 157 and Sarkar's Cr P Code 3rd Ed P 465].

"In a Judicial Proceedings."—'Judicial proceeding' (*ante*, s 1). The presumption is raised only in the case of documents taken in the course of a judicial proceeding.

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1. Committal proceeding being abolished in 1973 Code s 288 has been omitted.

Therefore, statements recorded by a magistrate in his capacity as an executive officer does not come under s 80 [*R v. Viran*, 9 M 224].

Memo of Identification Test.—An identification memo is not record of evidence of a witness in a judicial proceeding and no presumption attaches under s 80 [*Ram Sanchi v. S*, A 1963 A 308; **approved** in *Sheoraj v. S*, A 1964 A 290 FB; *Pritam v. S*, A 1971 Raj 184]. The memorandum of identification proceeding held by a Magistrate is not admissible without proof. [*Kanai Shet v. The State*, 1984 Cri LJ 527, 528 (Cal) (DB)]. When the test identification chart is not proved by the Magistrate who recorded it, it is not admissible. [*Ramadhar Chamar v. State of Bihar*, (1986) Cri LJ 684, 687 (Pat) : 1986 B.L.J.R. 335 : 1985 B.B. CJ (HC) 749].

"Statement or Confession".—The words "statement or confession" in juxtaposition to a prisoner or accused point that it was intended that a statement as well as a confession was to be presumed as genuine statement does not refer to the statement of a witness [*Ram Sanchi v. S, sup*]. Statements made soon after the incident are far more trustworthy than later denials or embelishments. [*Ramchit Rajbhar v. State of W.B.*, 1992 Cri LJ 372, 378 (Cal)].

Statement or Confession Must have Been "Taken in Accordance With Law." [Extent of Presumption].—The presumptions can be raised only when the evidence of confession has been taken in accordance with law, *ie*, by observance of all the formalities prescribed by law. When a confession duly taken is tendered in the sessions court, it proves itself under s 80 without calling the magistrate who recorded it. Sec 80 makes the examination of the Magistrate who recorded the confession unnecessary. It authorises the Court to presume that the document is genuine, that any statements as to the circumstances under which it was taken are true and that such confession was truly taken in accordance with law. [*Madi Ganga v. State of Orissa*, A 1981 SC 1165, 1157 : 1981 Cri LJ 628; *State of Karnataka v. R. Varadaraju*, 1994(1) Crimes 736 (Kar)]. The court presumes that the document is genuine and that the signature appended is that of the magistrate by whom it purports to be signed. It is genuine in that sense; but it may be that in recording it all the provisions of law were not complied with or meticulously observed, *eg*, the magistrate may not have given the necessary warning or satisfied himself about the voluntary nature of the confession by questioning the accused properly, or he may not have appended the memorandum and the certificate required by ss 164, 281 Cr P Code (*ante*, s 24) &c. Such a confession cannot be said to have been in accordance with law, and no presumption can be raised under s 80. The document must purport to show that all the acts required by law to be done were done. It can then only be presumed to be "duly taken." But where there is no obligation under the law to record the circumstances under which a statement was recorded, the evidence or statement might still have been "duly taken" (see *R v. Pohp Singh*, 10 A 174, 178; *Md Ali v. R*, 147 IC 390 FB: A 1934 A 81). The presumption arises when a confession is recorded strictly in accordance with law [*Mg Tha v. R*, A 1935 R 431]. There is no inconsistency between s 80 and s 24 (*ante* s 24).

Having regard to s 24 and the presumption under s 80, a confession duly recorded by a magistrate with proper certificate will be admitted in evidence subject to the restrictions in s 24 that under the latter section a well-founded conjecture of inducement, threat or promise reasonably based upon circumstances disclosed in the evidence is sufficient to exclude the confession [*R v. Panchkari*, 52 C 67 : 29 CWN 300: *Nayeb v. R*, 38 CWN 659; *ante* s 24]. S 80 says nothing about there being any presumption regarding the voluntariness of the confession [*R v. Thakurdas*, A 1943 C 625 see *ante*, s 24]. Mode of recording confessions (*ante*, s 24); curing of irregu-

larities under s 463 Cr P Code (*ante* s 24). Where there is substantial compliance with the requirements of s 164 Cr P C, reliance can be placed on ss 29 and 80 and any non-compliance with the provisions of s 164 Cr P C may be regularised by application of s 533 (now s 463) Cr P C (In this case essential principles indicated) [*Shanti v. S*, A 1978 Or 19 FB].

As a necessary basis for the presumption, the document must purport to show all the facts required to satisfy that it was taken in accordance with law, *viz*, (*1*) that the confession was accurately taken down or repeated; (*2*) that the confession was taken in the immediate presence of a magistrate; (*3*) that no inducement had been held out to the accused. If the memorandum and the certificate in the terms required by ss 164 and 364 Cr P Code be not attached to the confession or is defective, no presumption will be raised and it will not be admissible [*R v. Shivya*, 1 B 219, 222] unless the defect can be cured under s 533 (now s 463), Cr P Code [*Partap v. R*, 6 L 415: A 1925 L 605; *Kheman v. R*, 6 L 58: see *ante*, s 24]. A confession not bearing the magistrate's certificate stating his belief that it was freely and voluntarily made could not be admitted under this section without proof of its having been made [*R v. Radha Halwai*, 7 CWN 220]. Confession recorded by a second class magistrate not specially empowered in that behalf not being taken in accordance with law is inadmissible in evidence [*Nikaram v. S*, A 1972 SC 2077 (*S v. Singhara*, A 1964 SC 358; *Nazir Ahmed v. R*, A 1936 PC 253 **rel** on)].

Before the deposition of a medical witness taken by a committing magistrate can, under s 291 Cr P Code, be given in evidence before the court of sessions, it must either appear from the magistrate's record, or be proved by the evidence of witnesses, to have been taken and attested by the magistrate in the presence of the accused. The court is neither bound to presume under s 80 nor ought it to presume either under s 80 or under s 114 *illus* (*e*) that the deposition was so taken and attested [*Kachali Hari v. R*, 18 C 129]. It is not obligatory on a magistrate to attest depositions in the accused's presence and so s 80 does not apply [*R v. Phop Singh*, 10 A 174; see also *R v. Riding*, 9 A 720].

Where the confession was recorded by the magistrate of an Indian State, in accordance with law, it was held admissible under s 80 and probably under s 74, when the accused was on his trial in a court in India [*R v. Sunder*, 12 A 595]. The confession of a witness in the shape of a former deposition can be used as evidence against the prisoner only on the condition prescribed by s 249 Cr P Code, 1872; that is, it must have been taken by the committing officer in the presence of the person against whom it is to be used. The certificate of the magistrate ought to give the facts necessary to render the deposition admissible [*R v. Nussurddin*, 21 WR Cr 5].

Dying Declaration.—A dying declaration made before a magistrate who records it is 'evidence' and can be admitted with proof under s 80 [*Suraibali v. R*, 56 A 750: A 1934 A 340; see *ante* s 32: *"Whether dying declaration is evidence"*]. The presumption under s 80 does not arise when a dying declaration is recorded by a magistrate not authorised to record it and it has to be proved [*Sulaiman v. R*, A 1941 R 301; see *ante* s 32].

"Signed".—Absence of signature of presiding judge to a copy of deposition does not preclude the presumption [*Sarabjit v. Matadin*, 7 OLJ 542: 60 IC 437].

Deposition of Memorandum of Evidence.—The mode of recording depositions in civil and criminal cases are to be found in Or 18, rr 5, 6, C P Code and ss 275-279, Cr P Code. The provisions in both the Codes are almost similar. It is laid down that the deposition shall be read over or interpreted when the witness does not understand the

language in which it is taken down. The question arises whether the presumption of genuineness under s 80 may be raised if all the directions in the two Codes are not strictly carried out. An earlier case held that the deposition in a civil suit taken down in a language other than that in which the evidence was given is not admissible in a prosecution against him for perjury unless the provisions of ss 182, 183 C P Code 1882 (now Or 18, rr 5, 6) have been complied with [*R v. Mayadeb*, 6 C 762: 8 CLR 292; **follld** in *R v. Jogendra*, 42 C 240: 18 CWN 1242; *Kamatchinathan v. R*, 28 M 308; see also *Jyotish v. R*, 36 C 955]. The only way depositions can be proved is under s 80 and this is only when they are taken in accordance with law [*Yusuf v. R*, A 1933 C 190].

Where the deposition of a witness is not read over to him in the presence of the accused or his pleader in accordance with s 360 (now s 278) Cr P C Code, it is not admissible and no other evidence is admissible in proof of the statements made therein [*Mohendra v. R*, 12 CWN 845: 8 Cri LJ 116; *Kadir v. R*, 42 IC 326; *R v. Mungul*, 23 WR 28; *Kamatchinathan v. R*, 28 M 308; *Nallurj v. R*, 42 M 561; see however *In re Muthukumara*, 9 MLT 325]. In a case of perjury the English record was held to be not legal evidence of what the prisoner said before the magistrate as it was not interpreted to the accused nor was it read over to him [*R v. Mungul*, 23 WR 28, see also *Haricharan v. R*, 4 CWN 249]. But deposition given in *Hindustani* but taken in English by the magistrate, with a memorandum that it was read to the witness, though held not to be quite satisfactory was however, admitted as affording some evidence of the facts stated in it [*R v. Ganouri*, 22 WR Cr 2].

It is dangerous and against public policy to convict a man of perjury on the strength of his deposition in a court when it has not been interpreted and read over as required by Or 18, rr 5 and 6 [*Nalluri v. R*, 42 M 561: 50 IC 987; *Taj v. R*, 15 L 407]. In a prosecution for perjury the statements on which the charge was founded was not read over to the witness—*held* that secondary evidence cannot be admitted at the trial to prove the making of the statement in the Munsif's court [*Imam Din v. Niamatullah*, 1 L 361: 58 IC 830]. The view taken in the above cases has not been accepted in some later decisions. "I can see no reason why even in a prosecution for perjury, failure to comply with the provisions of rr 5 and 6 Or 18 should render a deposition entirely inadmissible in evidence, or why if s 80 cannot be called in aid, the deposition should not be proved, for instance by the judge who took it down, or by the admission of the deponent. If it can be proved in some such way, s 91 will have no application." [*Per* RICHARDSON, J, in *Elahi Baksh v. R*, 45 C 825: 22 CWN 646: 46 IC 285. In this case BEACHCROFT, J, **doubted** the correctness of the decision in *R v. Mayadeb*, 6 C 781 which was **followed** in most of the cases cited above]. The same view was taken in *Mirabux v. R*, 68 IC 36: A 1923 N 39; *Feroz v. Mirza Amir*, A 1923 O 119: 74 IC 445; *Tun Ya v. R*, 12 Bur LT 167: 51 IC 666; *Sheo Shankar v. R*, A 1940 N 410; *Md Farroq v. R*, A 1950 A 501; see also *R v. Jagatram*, 28 PR (Cr) 1918: 47 IC 872.

The case in *Elahi Baksh v. R, ante*, was **dissented** from in a case holding that if a deposition is not read over in accordance with Or 18, r 5 it is admissible in evidence in a subsequent trial for perjury and s 91 excluded oral evidence of its contents [*R v. Nawab Ali*, 51 C 236: A 1924 C 705; see also *Ramdhari v. R*, 45 IC 585: 4 PLW 44]. As to *R v. Nawab Ali, sup*, it may be pointed out that the deposition held inadmissible was recorded in a rent suit in which under s 148 (*f*) B T Act a memorandum of the substance of evidence is to be recorded as laid down in Or 18, r 13. The mandatory provision as to "reading over" in Or 18, r 5 was not therefore applicable to the suit and court's attention does not appear to have been drawn to this aspect.

It is submitted that the view taken in *Elahi Baksh v. R, sup* is the correct one. S 91 is no bar to the admission of such a document, although it says that when a matter is

required by law to be reduced to writing no evidence shall be given except the document itself or secondary evidence of its contents when such evidence is admissible. That section is founded on the principle that the best evidence of the contents of a document is the document itself, and proof of the contents of a deposition is the deposition itself. The object of Or 18, rr 5, 6 and s 278 Cr P Code requiring a deposition to be read over or interpreted is to ensure accuracy, so that mistakes, if any, may be corrected then and there. If this is not done, the deposition may not prove itself under s 80, and an argument may also be raised against its correctness; but it is difficult to understand why it should affect the admissibility of the document itself *quantum valebat*, or why it could not be proved by other evidence.

In a case under s 500 I P Code where the deposition did not contain a record of the offending words said, it was held that the prosecution is not debarred from proving it by oral evidence. But where there is a record, it is the only evidence admissible [*Sheo Karan v. Bandi*, 21 P 779: A 1943 P 117]. If a deposition irregularly taken has been admitted by the witness to be correct and signed by him, it may be used against him, though he will not be estopped from proving that the record was in fact, incorrect [*Bogra v. R*, 34 M 141]. Serious irregularities in recording the depositions do not render inadmissible to prove the statements recorded and only go in mitigation of the weight to be attached to the record as accurate [*Meango v. Baviah*, 45 IC 507].

Omission to read over deposition in accordance with s 360 (now s 278) Cr P Code is an illegality vitiating the trial. Compliance is imperative [*Hiralal v. R*, 28 CWN 968: 52 C 159; *Haronath v. Sonal*, 28 CWN 119]. The reading over in the presence of the accused of the deposition of a witness, during the examination of another witness is not a compliance with s 360 (now s 278). [*Dargahi v. R*, 52 C 499; *Manick v. R*, 41 CLJ 393]. Deposition should be read over then and there and not at the close of the day [*Kuppu v. R*, 49 M 71; *Deo Rao v. R*, A 1946 N 321. As to the object of reading deposition and procedure, see *Abdul Rahaman v. R*, 5 R 53: 31 CWN 271: A 1927 PC 44: 54 IA 96]. The evidence of each witness should be read over before that of another witness commences [*Abdul Bari v. R*, 30 CWN 644: 92 IC 887: A 1926 C 157]. Reading over of deposition, to accused's pleader is not a sufficient compliance [*Kasim v. Sarada*, 30 CWN 336: A 1926 C 528]. If a witness who understands the language in which his deposition is taken down reads and admits it to be correct, instead of being read over to him. It is a sufficient compliance and the deposition proves itself under s 80 [*Rames v. R*, 23 CWN 661: 29 CLJ 513—CONTRA: It is not in compliance with s 360 (now s 278) as it cannot convey to the accused what has been recorded, *Md Yasin v. R*, 52 C 431: A 1925 C 782]. If the deposition is read by the witness himself and it is explained by the judge to the accused but not in the presence of the witness, it is not sufficient compliance [*Jessarat v. R*, 39 CWN 526: A 1935 C 298].

The absence of a certificate does not itself prove that the provision of s 278 were not complied with. The practice of appending a memorandum is a salutary one, but the Code does not require that it should be subjoined [*Bhagwat v. R*, 4 P 231; *Arjun v. R*, A 1927 P 100: 99 IC 109]. The court is bound to accept as correct until it is proved to be untrue the certificate of the court that the deposition was read out to the witness [*Bhagwan v. S*, A 1952 SC 214: 1952 SCR 812].

The provisions of ss 360, 361 (now ss 278, 279) Cr P Code and the effect of non-compliance were fully considered by the Judicial Committee in a later case and the procedure to be followed was pointed out and the reasoning in *Hira Lal v.*

R, 52 C 159 and *Dargahi v. R*, 52 C 499 were **not approved**. It was held that bare fact of an omission or irregularity as occurred in the appeal unaccompanied by any probable suggestion of any failure of justice having been thereby occasioned is not enough to warrant the quashing of a conviction [*Abdul Rahman v. R*, 54 IA 96: 31 CWN 271; see also *Subramania v. R*, 28 IA 257: 5 CWN 866; *Nayeb v. R*, 38 CWN 659].

In a summary trial the magistrate is not required by law to record the evidence, and when no obligation is laid upon the judge or the presiding officer to reduce the depositions or statements to writing, they may be proved by persons who heard them made, in order to establish the fact that they were made [*Hamard v. Rustomji Databhai*, Ratanlal's Unreported Cr Cas 334].

Identity of the Person Making Statement.—A deposition given by a person is not admissible against him in a subsequent proceeding without its being first proved that *he* was the person who was examined. The identity must be established [*R v. Durga Sonar*, 11 C 550; see *ante* s 33: "*Identity*"]. Where a witness denied before the sessions court that the deposition alleged to have been given by him before the magistrate, was the deposition made by him, the presumption allowed by s 80 could not be made [*R v. Nusseruddin*, 21 WR Cr 5—CONTRA: Though there is no oral evidence to identify the deponent of a deposition made more than 60 years ago, it does not render the provisions of s 80 inapplicable [*Sarabjit v. Matadin*, 7 OLJ 542: 60 IC 437]. In the case of a very old document one can turn to the deposition to find out inherent evidence of identity [*Bhagwat v. Sherkhan*, 94 IC 985: A 1926 O 489].

Other Cases.—A report submitted by a Commission empowered to examine witnesses comes under s 80 [*Mohan v. Sundar*, A 1949 Pu 295]. When a magistrate holds a test identification parade s 164 Cr P Code applies and his identification memo is admissible under s 80 [*Ashrafi v. S*, A 1961 A 153—CONTRA: *Ram Sanchi v. S*, A 1963 A 308]. A revenue officer who was convicted of an attempt to receive a bribe, subsequently charged the raiyats who deposed against him with having conspired to bribe him: *held* that the depositions of the raiyats given in the bribery case came under s 80 [*R v. Samiappa*, 15 M 63: 2 Weir 794]. The failure of a civil court in a case of perjury to make memorandum of evidence of the accused when examined before it does not vitiate the depositions, if the evidence itself was duly recorded in the language in which it was given [*R v. Behari*, 9 WR Cr 69]. In a suit for recovery of lands, the lower appellate court refused to recognise a statement made before a Collector in a mutation case—*Held* that it is a document entitled to be received as evidence under s 80 in a subsequent suit [*Budree v. Bhoosee*, 25 WR 134]. Notwithstanding the provisions of the Evidence Act, a statement made by the accused person and not recorded according to the provisions of the Cr P Code, may be admitted, if the error has not injured the accused on the merits and the fact of the statement having been made is proved [*R v. Anunt*, 5 C 954 FB: 6 CLR 297; see also 5 A 253: 2 AWN 25 and *R v. Munshi Shk*, 8 C 616]. The deposition of witnesses in a case of rioting may be used as evidence against them in their trial on a counter charge of rioting [*Moher Sheikh v. R*, 21 C 392]. The knowledge of the sessions judge, of the handwriting of the judicial officer, before whom the statement was made, is no evidence of the statement having been made before that officer [*R v. Fatik*, 1 BLR (AP) 13: 10 WR (Cr) 37]. Declaration under Goa, Daman and Diu (Citizenship) Order, 1962, Cl 2 proviso is not covered by s 80 *G Y Bhandare v. Erasmo*, A 1972 Goa 25].

[1]**S. 81. Presumption as to Gazettes, newspapers, private Acts of Parliament and other documents.**—The Court shall presume the genuineness of every document purporting to be the London Gazette or [2][any Official Gazette, or the Government Gazette] of any colony, dependency or possession of the British Crown, or to be a newspaper or journal, or to be a copy of a private Act of Parliament [3][of the United Kingdom] printed by the Queen's Printer, and of every document purporting to be a document directed by any law to be kept by any person, if such document is kept substantially in the form required by law and is produced from proper custody.

SYNOPSIS

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COMMENTARY

Principle and Scope.—This section declares Government Gazettes, or newspapers or journals, or copies of private Acts of Parliament printed by the King's Printer to be *prima facie* proof of their genuineness. The presumption is rebuttable. See "shall presume" in s 4 (*ante*). A Government order published in the Gazette was rebutted by production of another Government order from proper custody [*Trimbak v. S*, A 1950 N 203]. As to the relevancy of statements as to facts of public nature in Gazettes and their value, see s 37 (*ante*). Genuineness of the Gazette must be presumed even if it is not formally tendered. It is enough if the court has the Gazette before it [*Bawa Sarup v. R*, 88 IC 22: A 1925 L 299]. As to judicial notice of notifications of appointment of public offcers appearing in Gazettes, see s 57 cl (7) (*ante*). The official Gazettes of London, Edinburgh and Dublin are noticed on their mere production (31 & 32 Vic c 37 ss 2, 5). The entire Gazette must be produced and not a mere cutting [*R v. Lowe.*, 15 Cox 286]. Court can presume genuineness of a Gazette notification although produced for the first time without production in the lower court [*Nanakchand v. R*, A 1931 L 273]. As to proof of proclamations, orders in council, &c by production of Gazette see s 78 (*ante*). The documents referred to in the last part of this section are mostly documents referred to in s 95 *ante* and which are declared to be public documents under s 94 *ante*. The issuance of a notification is in the eye of law either notice or imputed knowledge of its contents to the citizens in general. It is only the factum of proclamation or publication in the Gazette or other prescribed modes of publicity which alone would give such an order or decision, the indicia or the necessary stamping of a notification. Till then it would remain merely

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1. BURMA.—For the words "any Official Gazettee, or the Government Gazette" substitute the Gazette of Burma or the Government Gazette"; after "United Kingdom" insert "of Great Britain and Ireland" and for "Queen's Printer" substitute "Official Printer". (AO 1937 and AO 1948).

   CEYLON.—For "any Official Gazette, or the Government Gazette" substitude "the Government Gazette of the Island, or"; after "colony" insert "dominion", after "British Crown" insert "or to be the Gazette issued by the Local Government of any part of such colony, dominion, dependency or possession"; omit "of the United Kingdom" after "Parliament".
2. Substituted by AO 1937.
3. Inserted in India by AO 1950 and in Pakistan by Ord 1 of 1961.

an order or decision and it may not travel beyond the knowledge of its author and might well remain completely cloistered [*Kashmiri Lal v. State Of Punjab*, A 1984 P&H 87, 89 : (1983) 85 Pun LR 741]. The Gazette of the Bombay Presidency, Vol. III published in 1879 is admissible under section 35 read with 81. [*Bala Shankar Maha Shankar Bhattjee v. Charity Commr*, A 1995 SC 167, 175].

By virtue of s 81 read with s 4 the court shall regard the fact entered in electoral roll as proved unless and until it is disproved [*Kirtan v. Thakur*, A 1972 Or 158 FB]. Report of Court of Enquiry under R 75 of the Aircraft Rules, 1937 must be held properly and duly proved under s 81. But although the report was admissible, yet the evidence tendered before the court of Enquiry was not necessarily evidence in the suit unless the questions and answers put to the witnesses, were put to those witnesses who deposed at the trial and only those portions of that evidence before the Court of Enquiry which was tendered before the witnesses concerned would be evidence in the suit and not otherwise [*Indian Airlines v. Madhuri*, A 1965 C 252].

As to "proper custody." see *Explanation* to s 90 *post* which applies also to s 81. See also *Explanation* to s 76 *ante* as to custody of public documents.

As to Queen's printer or Government printer, see s 78 *ante*. As to Government Gazettes, see Tay ss 1527, 1662-66; Phip 11th Ed p 456.

Newspapers.—In this case it was contended that s 81 applied to public documents and not newspapers: "but it is very doubtful whether the language of the section supports it". If punctuation may be taken to throw any light on the question, the existence of a comma after the word 'journal' is against the appellant's contention. Even otherwise, the natural import of the words of the section do not appear to favour the view that the phrase "printed by the Queen's Printer" not only qualifies the expression "private Act of Parliament," but also "newspaper or journal" [*per* SUNDARA AYYAR J, at p 463]. There must be an assumption that whatever is published in the Government owned paper correctly represents the actual state of affairs relating to Government business until the same is successfully challenged and the real state of affairs is shown to be different from what is stated in the Government publication [*R S. Nayak v. A R Antulay*, A 1986 SC 2045, 2078: 1986 Cri LJ 1922]. If a person is proved to be the publisher of a newspaper, then under s 81 there is a presumption that what purports to be a newspaper of a particular name is that paper, and that every copy of it was issued by the publisher of that paper. The presumption under s 81 does not include a presumption that it was printed and published by the person by whom it purports to be [*Jeremiah v. Vas*, 36 M 457: 12 IC 961: 2 MWN 576]. The presumption is of the genuineness of the specimen of newspaper actually produced [*Ram Ch v. R*, A 1930 L 371]. Even if newspapers are admissible in evidence without formal proof, the paper itself is not proof of its contents. It would merely amount to an anonymous statement [*Bawa Sarup v. R*, A 1925 L 299] and cannot be treated as proof of the facts stated in the newspaper [*Harbhajan v. S*, A 1961 Pu 215].

The presumption of genuineness attached under S. 81 to a newspaper report cannot be treated as proof of the facts reported therein [*Laxmi Raj Shetty v. State of Tamil Nadu*, A 1988 SC 1274, 1290 : 1988 Cri LJ 1783; *S. Bangarappa v. G.N. Hegade*, 1992 Cri LJ 3788, 3811 (Kar)]. A speech reported in a newspaper is not admissible to prove it. The person making the speech or the persons who were then present or the reporter who heard it and reported must be produced [*Khilumal v. Arjundas*, A 1959 Raj 280]. The statement of a fact in a newspaper is merely hearsay and is inadmissible in the absence of the maker of the statement deposing to have perceived the fact reported [*Harbhajan v. S, sup*; *Sangappa v. Shivamurthiswami*, A 1961 My 106; *Narayan v. Radhagobinda*, A 1971 C 53; see *Nageshwarrao v. S*, A

1959 SC 1376]. An extract from a newspaper about a Government notification is inadmissible [*Motilal v. R*, A 1931 A 12; *In re Kottapalli*, A 1953 M 780]. The translated copy of news item cannot be considered by the court as a document in the absence of the newspaper. [*Binod Kumar Jain v. Gauhati Municipal Corporation*, A 1994 Gau 96, 99]. For refreshing memory by a newspaper report, see notes to s 159 *post*.

Under s 1 of the Press and Registration of Books Act (25 of 1867) "'Newspaper' means any printed periodical work containing public news or comments on public news." Under this Act any publication produced by typewriting, duplicating, cyclostyling or such method is not a 'newspaper' [*Rameshwar v. R*, A 1931 N 177: 134 IC 854. See however *Rameshwar v. R*, 10 P 492: A 1931 P 351].

"Printed matter in general bears upon itself no mark of authorship other than contents. But there is ordinarily no necessity for resting upon such evidence, since the responsibility for printed matter, under the substantive law, usually arises from the act of causing publication, not merely of writing, and hence there is usually available as much evidence of the act of printing or of handing to a printer as there would be of any other act, such as chopping a tree or building a fence. There is however no judicial sanction for considering the contents alone as sufficient evidence. For *newspapers* and the like, special questions arise. Suppose, for example, that the publication of a libel is to be proved, and that the libel is alleged to have been communicated to *J S*. It is simple enough to prove that *J S*, read a copy of the paper containing the libel; but how shall the defendant's publication of that copy be proved? Here the process would be to bring home to him the issuance on that day of a certain copy (either by the testimony of one who bought at an office proved to be the defendant's or by some statutory method); then the identity between that copy and the one read by *J S* will suffice as evidence that the two issued from the same press, *ie* the defendant's. ALDERSON B, in *Gathercole v. Miall*, 1846, 15 M&W 319, 336 said: 'The question is whether there is reasonable evidence that this is a copy of the individual paper which has been produced and which has been shown to have been published by the defendant.....We must use our common sense, and remember that, with respect to newspapers, not one, but a great variety of copies, are published for general circulation among the public at large. If you compare an instrument in one or two parts, and find the one is an exact copy of the other, you would have no difficulty in saying that it was printed from the same materials and from the same type.....So I say here with respect to a newspaper. If you find it in general corresponds, it is evidence from which the jury may infer that the paper is printed from the same type as the paper which is produced, and if so, it is printed by the defendant.' This is but one of the various questions that arise; their solution depends chiefly on the application of ordinary principles of Evidence to the varying substantive law" [Wig s 2150].

Under s 7 of the Press & Registration of Books Act (25 of 1867) the production of an authenticated copy of a declaration made under that Act is admissible to prove that the person mentioned in the declaration is the publisher of the journal to which the declaration relates. Under the Press Laws every printed matter should bear the name of the printer and publisher. With regard to newspapers, the law is that the name of the editor should also appear [s 5 *ibid*].

—Admissibilty of Newspapers, Advertisements, Catalogues etc.—Newspapers are as a general rule inadmissible in proof of its contents [*Bawa Sarup v. R*, *ante*, s 65: "*Newspapers*"]. News item on Doordarshan and newspapers are merely hearsay and cannot be relied on. [*Nachhattar Singh v. State of Punjab*, 1985 Cri LJ NOC 115 : (1985) 87 Pun LR (P&H) (FB)]. But when it is shown that a person is the author of,

or otherwise responsible for statement or advertisements, they may, of course be used against him [*Berry v. Mathews*, 7 Ga 457]. Such advertisements have been received to establish the public character of a hotel at a given time [*Stringer v. Davis*, 35 California 25], the advertised time for the arrival of trains or coaches [*Com v. Robinson*, 1 Gray 555] and the dissolution of a partnership [*Roberts v. Spencer*, 123 Mass 397]. The courts have in various cases received those market reports in newspapers on which the commercial world rely as evidence of the state of the market. 'As a matter of fact, such reports, which are based upon a general survey of the whole market are constantly received and acted upon by dealers, are far more satisfactory and reliable than individual sales or inquiries" [*Cliquot's Champagne*, 3 Wall (US) 114; *Virgina v. West Virginia*, 218 US 202 and cases cited Jones s 582]. In *Cliquot's Champagne*, *ante* it was said that "it (printed price list of a firm) is as liable to that objection [of hearsay] as the entries in the books of the dealer." Relying on this case it has been held that catalogue of a firm is good evidence of the price, etc of goods and not hearsay [*Hasanali v. Dara*, A 1949 N 282: 1948 Nag 922]. Catalogues, price-lists, market reports &c are received as exceptions to the Hearsay rule (see *ante* notes to s 60).

The presumption of genuineness created under the section about newspaper reports is not to be treated as proof of facts stated in them. Such statements are merely hearsay. *Ravinder Kumar Sharma v. State of Assam*, 1999 (6) JT 565 : (1999) 7 SCC 435.

"Proper Custody."—The explanation to s 90 also applies to this section (See s 90 and notes thereto).

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

Information Technology Act, 2000

Presumption as to Gazettes in electronic form [S. 81A].—The court has to presume the genuineness of any electronic record purporting to be the Official Gazette or purporting to be the electronic record directed by law to be kept by a person. It is necessary that the electronic record is substantially kept in accordance with the form required by the law and is produced from proper custody.

§ For text of the Information Technology Act, 2000, see Stop Press pages in Volume 1 after General Contents.

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

and the document shall be admissible for the same purpose for which it would be admissible in England or Ireland.

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* **S. 81A iserted by the Information Technology Act, 2000.**

1. In Ceylon for "England and Ireland" substitute "England or Northern Ireland" and for "England or Ireland" substitute "England or Northern Ireland".

COMMENTARY

Principle and Scope.—The object of this section is to make applicable in India the same presumptions which are recognised in England with regard to certain docu-ments. They are declared to be admissible here in the same manner as in England, *ie* without proof of seal or signature. This section is founded on Evidence Act, 1851, 14&15 Vic c 99 (Lord Brougham's Act). Under the common law a document of a public nature, was for a long time provable by production of an examined copy coupled with the deposition of the person who swore that he had examined it with the original. To put an end to this unsatisfactory and inconvenient state of things, it was enacted by Lord Brougham's Act 1851 (14&14 Vic c 88 s 14) that "Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, and copy thereof or extract therefrom shall be admissible..... provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy of extract by the officer to whose custody the original is entrusted....." Where the copy is certified and signed as the section provides, it is admissible on its mere production in court [*R v. Weaver*, 1873 LR 2 CC 85]; where it is informally certified and therefore inadmissible, it may yet be proved to be an examined copy, the provisions of the section being cumulative [*R v. Manwaring*, 26 LJMC 10, 14; Ros N P p 101; Phip 11th Ed p 767; Hals 3rd Ed Vol 15 para 365].

This section follows ss 9 and 10 of Lord Brougham's Act. S 9 of that statute runs thus:—

> "Every document which by any law now in force or hereafter to be in force is or shall be admissible in evidence of any particular in any court of justice in England or Wales without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purpose in any court of justice in Ireland.....without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same".
>
> S 10 is exactly in the same terms as s 9 except that the word "Ireland" appears for "England and Wales" and *vice versa*. See also provisions of the Documentary Evidence Act (8&9 Vic c 113) s 1.

The effect of the adoption of ss 9&10 of 14 and 15 Vic c 9 in the Evidence Act is that documents which are presumed to be genuine without proof of the seal or stamp or signature of the person authenticating the same and are admissible in England or Ireland are also admissible in India. The court shall presume—(*i*) that the seal or stamp or signature is genuine; (*ii*) that the person signing it held at that time the judicial or official character which he claims. And lastly (*iii*) the document shall be admissible here for the same purpose for which it would be admissible in England or Ireland. The question would therefore naturally arise whether the document is or is not which is admissible in England in proof of the fact in question without proof of the seal &c authenticating it. This question is to be determined by reference to the English statute governing the matter and to s 14 (14&15 Vic c 99). As to list of statutes containing provisions for making certified copies evidence, see Ros N P 18th Ed pp 98, 99; Tay s 1601 fn; Phip 11th Ed pp 762-64. The mode of proof prescribed by s 82 is not the only mode. In particular cases, other modes are provided in s 78.

Besides official books and registers there are certain other documents of a somewhat similar nature which, the legislature has provided, may under certain circumstances be admitted in evidence on mere production; the provision above referred to as to copies does not, however, apply to those documents [Tay s 1596. For instances of some of the principle of such documents, see Tay s 1596 fn 11th ed p 1085]. As to the public books and documents, the contents of which, in the absence of the originals, are now provable under Lord Brougham's Evidence Act, 1851 (14 and 15 Vic c 99), either by examined or certified copies, see a long list in Tay ss 1600-09. See also Roscoe's N P Ev Vol I, 18th Ed p 98 *et seq.*

[*Ref Tay ss 1147-58; Phip 8th Ed pp 543-44; Roscoe N P p 100 et seq; 8&9 Vic c 113. s 1; 14&15 Vic c 99 ss 9-11, 14; Step Art 79, 80*].

Documents Admissible without Proof.—A declaration regarding the execution of a power-of-attorney, taken before the chief magistrate of Glasgow and authen-ticated not only by the certificate of the said magistrate under the common seal

of the City of Glasgow, but also by a certificate of a notary public, was accepted as sufficient proof of the power [*In the goods of Henderson*, 22 C 491]. Affidavit sworn before Notary Public in USA is admissible in evidence [*In re, K K Ray (P) Ltd.*, A 1967 C 636]. The following seven unreported cases have been cited in Woodroffe's Evidence, 7th Ed pp 549-50, in which similar evidence regarding execution of powers was held admissible:—(1) *In the goods of John Eliot,* deceased (Dec 15th, 1886), *per* TREVELYAN J; (2) *In the goods of William Abbot,* deceased (November 19th, 1887), *per* TREVELYAN J; (3) *In the goods of Henry Packer,* deceased (June 20th, 1892), *per* HILL, J; (4) *In the goods of H W Agar,* deceased (August, 31st; 1892), *per* HILL, J; (5) *In the goods of William Cornell,* deceased (Sept 16th, 1892), *per* PIGOT, J; (6) *In the goods of Henry Francis,* deceased (2nd May, 1893), *per* Sale, J; (7) *In the goods of Anna Hinde*, deceased (11th January, 1895) *per* AMEER ALI, J.

An application for letters of administration made by a person under a power-of-attorney executed in Scotland by a person appointed executor, *dative qua* father was refused as the power was not executed and authenticated in the manner provided by s 85 of the Evidence Act [*In the goods of Primrose*, 16 C 776]. This case has been commented on by SHEPHARD, J, who held that the provisions in s 85 are not exhaustive and there may be other modes of proving the execution of a power-of-attorney, *viz*, by an affidavit [*In re Sladen*, 21 M 492, 494].

A register of births and deaths kept under Madras Act 3 of 1899, is a public document and a certified copy thereof is admissible under ss 35 and 82 [*Krishnama Chariar v. K*, 38 M 166; see *ante* s 35: "*Registers of births and deaths*"]. A certificate of Manchester Chamber of Commerce testifying to the existence of strike of coal mines is not a document within s 82 [*Girdhardas v. Kerawala*, 93 IC 622: A 1926 B 253]. Certified copy of probate granted in England is admissible [*Blackwood & Sons Ltd v. Parasuraman*, A 1957 M 410].

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

SYNOPSIS

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1. In PAKISTAN for "the Central Government or any State Government" substitute "the Central Government or the Provincial Government".

   In BURMA for the words "the Central Government or any State Government" the original word "Government" stands.

   In CEYLON the section reads: "The court shall presume that maps, plans, or surveys purporting to be signed by the Surveyor-General or officer acting on his behalf, were duly made by his authority and are accurate; but maps, plans or surveys not so signed must be proved to be accurate".
2. Subs. successively by AO 1948; Repealing and Amending Act, 40 of 1949; and AO 1950.

COMMENTARY

Principle and Scope.—This section is to be read with s 36 by which statements made in maps or plans made under the authority of Government have been declared relevant. Their contents are provable under ss 77 and 79 by the production of certified copies. The section dispenses with proof of the execution and accuracy of the original maps, inasmuch as the courts shall under the provisions of this section, presume that maps, or plans purporting to be made by the authority of Government are accurate. The general ground for the presumption is that they contain the results of enquiries made by competent officers with publicity concerning matters in which the public are interested.

The presumption is in respect of the accuracy of the maps but it does not extend to the statement of other facts made in or on the maps. The word "accurate" means accuracy as to drawing and correctness of the measurements, *ie*, accuracy with regard to the drawing of the map. The accuracy certainly does not refer to the laying down of boundaries between estates according to the rights of parties, names of proprietors &c. These depend on the correctness of information which the *amin*, or draftsman obtained from other persons [*Amrita Lal v. Kali Pd*, 25 WR 179]. Thus where the question was as to the quantity of debutter land in a village, a *thakbust* map made at a revenue survey by an *amin* who had no authority to determine what land was debutter, but only to lay down and to map boundaries could not be treated as raising a presumption of correctness within s 83 [*Jorao Kumari v. Lalonmani*, 17 IA 145 : 18 C 224 (**expd** and **distd** in *Rajkumar v. Basanta*, 7 CWN 612]. In a dispute relating to ownership of lands in the forest at the foot of the Western Ghats, an entry in a Government survey plan relating to the lands in dispute was held admissible under s 83 though no doubt the weight to be attached to the entries depends largely on the circumstances under which it was prepared [*Vadakkinydath v. Nilambar*, 10 IC 653 : 9 MLT 415]. The presumption regarding accuracy, is in no way affected by the fact that such map has been superseded by a later survey map made under the same authority, and under an order of the Board of Revenue [*Jogessur v. Bvcunt*, 5 C 822 : 6 CLR 519]. As to maps under authority of Government, see *ante* s 36.

Under the concluding words of this section no presumption will arise regarding maps or plans made for the sole purpose of a suit between litigants. Such maps are not prepared for public purposes, and their accuracy cannot be presumed under this section, but must be proved like any other fact.

Presumption of Accuracy of Government Maps.—An accuracy of thakbust map must be presumed under this section [*Niamutullah v. Himmut Ali*, 22 WR 519; see also *Protab Ch v. Rani Surnomoyee*, 19 WR 361, 364]. Maps and surveys for revenue purposes, are official documents prepared by competent persons, and with such publicity and notice to persons interested, as to be admissible and contain valuable evidence of the state of things at the time they are made. They are not conclusive and may be shown to be wrong but in the absence of evidence to the contrary, they may be judicially received in evidence as correct when made [*Jagadindra v. Secy of S*, 30 IA 44 : 30 C 291 : 7 CWN 193; refd to in *Abdul Hamid v. Kiran Ch*, 7 CWN 849, 851; **folld** in *Nobendra v. Kazi Lutful*, 2 IC 513; *Maizuddin v. Ishan*, 13 CLJ 293 : 15 CWN 706; *Maung Thin v. Ma Z: Zan*, 44 IC 247 : see *Tarakdas v. Secy of S*, 39 CWN 994 : 156 IC 548 : A 1935 PC 125]. Entries in survey map and *khewat* carry a presumption of correctness [*Md Habibuddin v. Md Waezul*, A 1933 P 555]. Entry in a cadastral survey map has presumptive value against landlord of a neighbouring estate [*Radha Kishen v. Shyam*, A 1933 P 671]. Recitals

in private documents contrary to location of village in maps prepared under authority of Government cannot be given any importance [*Ramkishore v. Union*, A 1966 SC 644]. Maps prepared under Calcutta Survey Act are prepared under authority of Government [*Jagan v. Gaya Mun*, A 1937 P 567]. Settlement maps however important cannot take the place of document of title [*Lachmi Narayan v. Lachmi*, A 1948 O 139]. Development plan prepared in accordance with relevant statutory provisions is presumed to be correct and that presumption was not rebutted in this case. [*Marvi Municipality v. Arunodaya Mills Ltd.*, A 1995 Guj 109].

Relative Value of Thak and Survey Maps.—There is no inflexible rule that a survey map must have preference of a *thak map*. There is no general or definite rule making it incumbent upon the courts to follow either the one or the other; the court may, if it considers that the *thak* map is more reliable, follow that in preference to the survey map [*Maharaja of Cooch-Behar v. Mahendra*, 34 CLJ 465 : A 1921 C 277]. It has been repeatedly laid down that the *thak* and survey maps afford important evidence of possession at the time they were made, and, as evidence of possession is evidence of title, they also afford valuable evidence of title. As to the relative superiority of the *thak* and survey maps when they disagree, it may be conceded that the survey officers had, at their disposal, means of more accurate measurement than the *thak* officers had; but no hard and fast rule can be laid down that a survey map is more reliable than a *thak* map; the one that more clearly agrees with the local landmark, is the one which should be followed [*Nawab Bahadur v. Gopinath*, 13 CLJ 625; see the observations of MOOKERJEE, J, at pp 631-32 and *Mantazaddi v. Alam*, 73 CLJ 47].

Certain plots of land were entered in the *thakbust* maps as belonging to certain *pergunnah* in which the plaintiffs claimed them to be, and the title to those lands were with them—*Held* that having regard to the nature of the land which was jungle, possession must be presumed to have been with the plaintiffs. *Ex parte* entry in *thakbust* made without enquiry which was immediately contradicted cannot be relied on [*Jagadindra v. Hemantakumari*, 15 CWN 887 PC : 14 CLJ 319 : 13 Bom LR 806]. Where *diara* operations extend over a wide area and the *diara* map is not prepared with reference to any particular survey tri-junction point, the presumption of correctness of the map is in no sense rebutted by the mere fact that the tri-junction point has not been located [*Srigobinda v. Secy of S*, A 1937 C 574]. As to the accuracy and evidentiary value of *thak* and survey maps. The evidentiary value of a *thak* map may be affected by the condition of the land at the time of the survey; but it cannot be ignored upon a general allegation that the land at that time was *jungle* [*Preonath v. Durgatarani*, 14 CLJ 578 : 16 CWN 317]. See also (*ante* s 36: *"Survey maps—Evidenciary value of"*).

Renell's Map.—There is presumption of accuracy of Renell's map in respect of such matters as to which it is admissible [*Secy of S v. Annoda*, 34 CLJ 205 : A 1921 C 661]. Renell's map though correct with reference to the course of the rivers, cannot be preferred in a matter regarding the direction of villages to the investigations of a Commissioner appointed for the purpose [*Nanilal v. Prahlad*, 56 CLJ 369 : A 1933 C 222]. So far as road surveys and river surveys are concerned, Renell's maps (1769-71) are scientific and accurate, only the village sites shown in his map are approximate [*Secy of S v. Midnapore Z Co Ltd*, A 1941 C 520]. As to the value of Renell's map, see *Secy of S v. Kalika*, 15 CLJ 281; *Haradas v. Secy of S*, 26 CLJ 590 : A 1917 PC 86 : 43 IC 361; *Naresh v. Secy of S*, 50 IA 121 : 28 CWN 453 : 50 C 446 : 77 IC 1048 : A 1923 PC 1]. Renell's map published before 1917 was withdrawn by Government from circulation and it is therefore inadmissible [*Gadadhar v. Sarat*, 44 CWN 935 : A 1941 C 193].

Maps, Chittas etc Made For Any Cause.—A map prepared at the instance of the Collector, in his capacity as the holder of a trust estate, is a private document and s 83 has no application to it [*Preonath v. Durgatarini*, 14 CLJ 578]. Billon's map prepared in 1872 under the direction of Government, acting not in its sovereign capacity but as the landlord of that and neighbouring holding (*Khasmahal*) is admissible if not under s 83 but under s 13 [*Upendra v. Cal Corpn*, 16 CWN 116 (**not folld** in *Upendra v. Radha Gobinda*, A 1927 C 189)]. A map prepared by an officer in charge of Government *Khasmahal* does not come within this section. It cannot be presumed to be accurate, but is admissible under s 13 as evidence of possession or assertion of right [*Janmejoy v. Dwaraka*, 5 C 287 : 4 CLR 574; **folld** in *Kanto Pd v. Jaggut*, 23 C 335; but see *Taruck v. Mohendra*, 13 WR 56, 57].

A map of the silted bed of a river, being on the fact of it neither a *thak* nor a survey map, such as is made by, or under the authority of Government for public purposes was held not to be of the description given in ss 36 and 83 of this Act [*Kanto Pd v. Jaggut, sup*]. A map prepared by private arrangement by a deputy collector for settlement of the silted bed of a river does not come within s 83 [*Rahimuddin v. Bhabangana*, 19 IC 572]. The rights of property as between two parties cannot be affected by a map drawn for a totally different purpose and a purpose totally irrelevant to the subject of the dispute between them [*Kerr v. Nuzzur Md*, 2 WR 29 PC].

Chittas made by Government for its own private use are nothing more than documents prepared for the information of the Collector, and are not evidence against private persons for the purpose of proving that the lands described therein are of a particular description or tenure [*Ram Ch v. Bunshidar*, 9 C 741; **folld** in *Dwarka v. Taritamoyi*, 14 C 120 and in *Girindra v. Rajendra*, 1 CWN 530; see also *Nobendra v. Kazi Latful*, 2 IC 513]. Chittas made by Government for private use for presumption proceedings are not admissible under s 83 or s 13 [*Upendra v. Radhagobinda*, A 1927 C 189]. A map prepared by an *amin* employed by Government is not one made for public purpose and therefore no presumption can be made with regard to it. But it may be admissible under s 13 and their accuracy must be proved [*Dinamoni v. Brojomohini*, 29 IA 24 : 29 C 187, 191 : 6 CWN 386]. As to maps etc made by Government for a particular purpose, see *ante*, s 36.

S 83 does not deal with the admissibility of private maps. A private map may be admissible as against the party by whom it was prepared or his predecessor as an admission; or it may be used as evidence possibly even against a stranger on questions of public or general interest, if made by a deceased person of competent knowledge [*Shib Charan v. Nilkantha*, 17 CLJ 642 : 16 IC 747]. Maps or plans made for any cause must be proved to be accurate by the person who made them [*Damodaran v. Karimba*, A 1959 K 358; *Ramkishore v. Union*, A 1965 C 282].

Map Which is the Basis of a Decree.—A map made by a Commissioner in a previous suit which was the basis of a decree is a map not within s 83 [*Kesho Pd v. Bahuria*, 16 P 258 : 41 CWN 577, 585 : A 1937 PC 69].

Map in Criminal Cases.—Persons making a map in a criminal case ought not to put upon it anything more than what he saw himself. Particulars derived from witnesses examined on the spot should not be noted in the body of the map but on a separate sheet of paper annexed to the map as an index thereto, the spots being marked as *A, B, C, D,* etc. [*R v. Abinash*, 28 CWN 995 : 52 C 172; *R v. Mofizel*, 29

CWN 842]. Map prepared by police officers during investigation should not on the face of it contain statements made to them by some other person [*Kalia & Ors v. R*, 85 IC 723 : A 1925 C 989]. Statements in maps alleged to have been made by other persons, are inadmissible under s 162 Cr P Code as well as under the general law as to hearsay [*Bhagirath v. R*, 30 CWN 142]. Sketch map by a trained surveyor showing the whole disputed land and blocks can be taken in evidence for identifying the blocks. Sketch prepared by sub-inspector of police in a proceeding under s 144 Cr P Code cannot be used to prove the fact evidenced thereby of the sub-inspector having seen the parties in possession of the blocks [*Sashimukhi v. Sarat*, 45 CLJ 537 : 31 CWN 310].

Waiver or Consent.—No presumption of accuracy can be made with regard to maps not falling within the section: but the mode of dealing with the case and the absence of objection may suggest the inference that any objection to the want of proof of its accuracy has been waived [*Madhabi v. Gaganendra*, 9 CWN 111, 113]. When a plan is relied upon by both parties without raising any objection, it need not be proved in order to make it admissible [*Md Sulaiman v. Badruddin*, A 1940 L 309]. A Collectorate map put in by the plaintiffs and not objected to by the defendants, who recognised the boundary indicated as that whereon the enquiry was to be made must be taken as recognised by the parties to be correct and trustworthy [*Ganga v. Radha*, 21 WR 115].

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

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

COMMENTARY

This section is to be read with s 38 which makes relevant the statement of the laws and rulings contained in officially printed books of any country. It applies to both statutes and judicial decisions. The words 'any country' also appear in s 38 and they include India as well foreign countries, though s 57 authorises the courts to take judicial notice of the existence of all laws and statutes in India and in the United Kingdom. S 74 recognises statutory records to be public records and s 78 lays down the method of proving the statutes passed by the Legislature. This section dispenses with the proof of the genuineness of the officially printed books of any country (including foreign countries) containing laws and reports of decisions of courts. Their accuracy is to be presumed. As regards the books containing authorised reports of decisions of the courts in India, see the Indian Law Reports Act 18 of 1875. As to the relevancy of decisions published in authorised Law Reports and in non-official Law Reports, see *ante* s 38.

"The intolerable inconvenience of having to prove the genuineness of printed matter purporting to be published by the Government has led to general concession, by judicial decisions or by statute, that such purporting publications, at least when in the form of standard official documents constantly issued and referred to are assumed to be genuine" [Wig s 2151].

[1]**S. 85. Presumption as to powers-of-attorney.**—The Court shall presume that every document purporting to be a power-of-attorney, and to have been executed before, and authenticated by, a notary public, or any Court, Judge, Magistrate, [2][Indian] Consul or Vice-Consul, or representative[3] * * * of the [4][Central Government], was so executed and authenticated.

SYNOPSIS

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COMMENTARY

Principle and Scope.—This section declares that the court shall presume the due *execution* and *authentication* of a power-of-attorney, when executed before and authenticated by a Notary Public, or any Court, Judge, Magistrate, Consul or Vice-Consul, or representative of the Central Government. The provision of s 85 is mandatory [*Performing R S Ltd v. I P M Restaurant*, 1939 Bom 295 : A 1939 B 347]. Under s 57(*6*), the court shall take judicial notice of all seals of the functionaries mentioned therein including the seal of the Notary Public. Ss 138 and 139 of the Negotiable Instruments Act, 1881, which empowered the appointment of a Notary Public for the purpose of performing the functions under that Act were omitted by the Notaries Act, 53 of 1952, under which Notaries Public may be appointed by the Central Government or the State Government for all recognised notarial purposes. S 85 applies to Notaries Public of foreign countries also [*N & G Bank v. World Science News*, A 1976 D 263; *Abdul Jabbar v. 2nd Addl Dist Judge*, A 1980 A 369 (*In Re, K K Ray (P) Ld*, A 1967 C 636; *Jugraj v. Jaswant*, A 1971 SC 761 rel on)]. The objection to production and proof of special power of attorney on ground that it was neither executed nor authenticated in accordance with section 85 cannot be accepted when the endorsement in the form of certificate had been appended to the document which shows that it was presented by the executent before the Notary Public and when the contents of the document were read over and explained to the executant which he admitted to be correct and thereafter, it had been attested by the Notary Public. The mere fact that the document had not been drafted or typed out by the executant before the Notary Public and typed matter duly signed by the executant was presented before the Notary Public would not in any way, militate the presumption as to the execution and administration of the power of attorney. [*Raj*

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1. In PAKISTAN for the words "Indian Consul.....Central Government" substitute "Pakistan Consul or Vice-Consul, or representative of the Central Government".
   In BURMA for the words "Indian Consul.....Central Government" substitute British Consul or Vice-Consul or representative of His Britannic Majesty or the Union of Burma".
   In CEYLON after "notary public", insert "a person duly authorised by law in that behalf" and for the words "Indian Consul.....Central Government" substitute "British Consul or Vice-Consul, or representative of His Majesty, or of the Governor-General of the Island, or of the Government of India".
2. Substituted by AO 1950 for "British".
3. The words "of Her Majesty, or" deleted by AO 1950.
4. Subs. by AO 1937.

Kumar Gupta v. Des Raj, A 1995 HP 107, 111, 112]. The court is bound to presume that a power of attorney which was duly authenticated by a Public Notary was duly authenticated and executed. However, this presumption is rebuttable. [*Northland Traders v. Bank of Baroda*, A 1994 All 381, 385].

Notary Public is also mentioned in the last para of s 78 of the Evidence Act and in s 33 of the Registration Act, 1908. A register of power-of-attorney is maintained under rules made under s 69 Registration Act and under s 74(*1*)(*iii*) of the Evidence Act every entry in such register is a "public document" [*Pattu v. Nirmal*, 43 CWN 907 : A 1939 C 569].

The powers-of-attorney recognizable for purposes of presentation and registration of documents are mentioned in s 32 of the Registration Act 16 of 1908. In Act 7 of 1882 (powers of attorney), provision is also made for these instruments and it is enacted in s 4 that where an instrument creating a power-of-attorney has been duly deposited in a High Court or in the Court of the Recorder at Rangoon, a certified copy of such instruments shall without further proof, be sufficient evidence of the contents of the instrument and of the deposit thereof. There are different modes of executing a power-of-attorney. This section is not exhaustive and it does not exclude other modes of proving the execution of a power-of-attorney, *eg* by an affidavit [*In re Sladen*, 21 M 494 *ante*], or under the seal of a notary public, s 57(6) [*Performing R S Ltd v. I P M Restaurant, sup*]. It may be that there is not the presumption under s 85 in favour of a particular power-of-attorney, but it does not follow that there is an opposite presumption that it has not been duly executed [*Ram Kailash v. Iswari*, A 1936 A 475 : 163 IC 754].

Under the Commissioners for Oaths Act, 1889, 52&53 Vic c 10 ss 3, 6 and 1891, 54&55 Vic c 50 s 2, judicial notice is required to be taken of the seals and signatures to affidavits &c required for the purpose of any court or matter in England, or for the registration of any instrument in the United Kingdom, of all persons authorised (*otherwise than by the law of any foreign country*) to administer oaths &c in any place out of England. Such persons are, in any part of the Commonwealth outside England and Wales—any Judge, court, notary-public, or, other person lawfully authorised (Or 41 r 12) and in foreign countries—the various diplomatic and consular agents [Phip 11th Ed p 31].

In order to authorise an agent to execute a deed for his principal, the authority must be given by an instrument under seal; and as such an instrument or power-of-attorney, transfers no interest, the agent or attorney being merely put thereby in the place of the principal, it follows that the deed must be executed by the agent in the name and as the act of him who gave the power [Tay s 985]. The term power-of-attorney has not been defined in this Act. The power-of-attorney is a document executed by a person in favour of another empowering the latter to do any lawful act or acts for and on behalf of the donor: It may be either *special*, that is to do any particular act for him, *eg* the registration of a document; or *general*, to do all acts for the principal in his stead, *eg* to collect rents, execute all deeds, sign all contracts, defend or prosecute suits, make appearance &c in courts &c, &c. Under the Stamp Act s 2(21) "power-of-attorney includes any instrument (not chargeable with a fee under the law relating to court-fees for the time being in force) empowering a specified person to act for and in the name of the person executing it." According to the Indian Contract Act, "an *agent* is a person employed to do any act for another, or to represent another in dealings with third persons" (See s 182 Contract Act 9 of 1872). The term '*recognised agent*' has been defined in Or 3 r 2 C P Code, 1908

Authentication must mean more than attestation. What is required is an assurance by the person authenticating of the identity of the person who has signed the instrument as well as the fact of execution. There must therefore be an affidavit or declaration taken from a person who can speak to the identity of the executant. A power-of-attorney authenticated in the manner required by the Registration Act may be admitted without further proof. The presumption under the section is no doubt rebuttable [See *Haggitt v. Ineff, post*; *Wali Md v. Jamaluddin*, A 1950 A 524; *Kulumunnisa v. Ahmadi*, A 1972 A 219].

A witness does not need a power of attorney or any authority in writing from a party calling him as its witness to depose about certain facts before a court which are within his special knowledge [*Chander Kanta Singhal v. Kapadia Exports*, 1998 AIHC 153, 167 (Delhi)].

Powers-of-attorney etc.—Where an application is made for letters of administration with a copy of the will annexed under a document purporting to be a power-of-attorney and to have been executed before, and authenticated by, a notary-public, an affidavit of identification as to the person, purporting to make the power-of-attorney, being the person named therein, is unnecessary [*In re Mylne*, 33 C 625 : 9 CWN 986]. A registrar or sub-registrar has no jurisdiction to register a document unless he is moved to do so by a person who has executed or claims under it, or by the representative or assign of such person or by an agent for such person, representative or assign duly authorised by a power-of-attorney executed and authenticated in manner prescribed in s 33 of the Regn Act [*Jambu v. Aftab*, 42 IA 22 : 37 A 49 : 19 CWN 282]. Where the endorsement of the registering officer bears that the person presenting had a special power-of-attorney it must be presumed that the power-of-attorney was a proper power. S 34 of Registration Act imposes upon the registering officer the duty of enquiring as to the due execution of the document and by s 35 he registers the document on being satisfied as to various particulars mentioned [*Kanhaya v. National Bank Ltd*, 50 IA 162 : 4 L 284 : 28 CWN 689 : A 1923 PC 114; see *Baijnath v. Jamal Bros*, 51 C 354: 2 R 99: 28 CWN 1029: A 1924 PC 48; *Chhotey v. Collector*, 49 IA 375 : 44 A 514 : 27 CWN 437 : A 1922 PC 279; *Jambu Pd v. Aftab, sup*].

Authentication is more than mere execution before one of the persons designated in s 85. For the purpose of presumption of power-of-attorney to be operative the authentication must be clear, specific and decisive. Where a magistrate uses rubber stamp to authenticate a thumb impression and puts his signature on the basis of identification made by an advocate, the presumption under s 85 should not be drawn [*Mohanshet v. Jayashri*, A 1979 B 202]. A certificate by a notary-public is sufficient evidence of the execution of the instrument to which it refers [*Cooks v. Wilby*, LR 25 Ch D 769]. Endorsement by a Notary Public in a power of attorney that it had been subscribed and sworn before him raises a presumption that he must have satisfied himself in discharge of his official duties that the person executing it was the proper person—Fact that he does not say so is not material [*Jugraj v. Jaswant*, A 1971 SC 761; *Bank of India v. Ajaib*, A 1979 (NOC) 199 (D)]. The fact that the power-of-attorney was executed by a Director of the Bank duly authorised by a resolution of the Board of Directors to execute the same and its attestation by a Notary Public was also done on the date of execution itself clearly indicates that the power-of-attorney was executed before the Notary Public [*Punjab National Bank v. Parmesh Knitting*, A 1986 Punj & Har 214, 216 : (1985) 87 Punj LR 708]. In respect of a power-of-attorney executed by two officers of a Bank, a presumption would arise that the two officers who executed the power-of-attorney on behalf of the Bank were competent to do so [*Citibank N. A. v. Juggilal Kanlapat Jute Mills Co. Ltd.*, A 1982 Del 487, 495].

An affidavit sworn in the United States in the presence of the notary-public and attested by him, with a certificate of the British Consul at New York was admitted in evidence

[*Haggit v. Ineff*, 24 LJ Ch 120]. Power-of-attorney endorsed by the Notary Public of USA are admissible in evidence. [*Rajesh Wadhwa v. Dr (Mrs) Sushma Govil*, A 1989 Del 144, 155]. A power-of-attorney, executed in British Honduras before a notary-public was held to be provable in a court of Equity by the production of certificate of the notary-public under his hand and official seal [*Armstrong v. Stockham*, 24 LJCh 176; see also *Hayward v. Stephens*, 36 LJCh 135; Tay ss 1567-68 *fn*]. A power-of-attorney executed in Yugoslavia authenticated by a Judge of that country has to be presumed to have been duly executed and duly authenticated. [*Rudnap Export-Import v. Eastern Associates Co*, A 1984 Del 20, 24].

A registered power-of-attorney is admissible to prove agency under s 85 and unless its genuineness is suspected, in which case proof of execution can be called for, the agent should be allowed to appear and act within Or 3 r 2 [*Habib-un-nissa v. Musharaff*, 18 OC 372 : 33 IC 661]. But recital in the document itself that the executant holds a power-of-attorney to execute it, or the sub-registrar's endorsement that a special power-of-attorney to present had been produced, is not sufficient to raise the presumption that the executant had the authority he claimed [*Bhagwat v. Jafar*, 91 IC 209 : A 1926 O 241]. There is no presumption in respect of a power-of-attorney executed in Pakistan if it is not authenticated [*Sardar v. Pissumal*, A 1958 AP 107; *Nar Bahadur v. Anil*, A 1970 Man 57]. Statements in power-of-attorney have to be proved like any other statements [*Nar Bahadur v. Anil, sup* (*Siva Pratap v. CIT*, A 1924 M 880; *Salimatul v. Kovleshpati*, 17 C 903 **reld** on)].

An application for letters of administration made by one *K* under a power-of-attorney granted by *P* who had been appointed executor *dative qua father* was refused as the power was not executed and authenticated as provided in s 85 [*In re Primrose*, 16 C 776; see however In re Sladen, 21 M 492 *ante*]. A sale deed was executed and presented for registration under a power-of-attorney not duly authenticated. Second power-of-attorney duly authenticated and noticing first being defective and same being ratified validates transaction and registration even though both being earlier to the second power [*Jugraj v. Jaswant*, A 1971 SC 761 (*Keighley v. Durant*, 1901 AC 241; *Wilson v. Tumman*, 12 LJCP 306 **follD**: *Dottie v. Lachmi*, A 1931 PC 52 **dist**)].

Construction.—When an act purporting to be done under a power-of-attorney is challenged, it is necessary to show that on a fair construction of the whole document, the authority in question is to be found within the four corners of the instrument either in express terms or by necessary implication [*Bank of Bengal v. Ramanathan*, 43 IA 48 : 43 C 527 : A 1915 PC 121].

Registration is not Proof of Execution.—Mere registration of a power-of-attorney is not sufficient without further proof of its execution [*Salimatul Fatima v. Koylashpati*, 17 C 953 (*Kristonath v. Brown*, 14 C 176 **dissented** from); see also *Thama v. Govind*, 9 Bom LR 401]. See *ante* s 67: *"Whether registration is proof of execution"*.

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

Information Technology Act, 2000

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

§ For text of the Information Technology Act, 2000, see Stop Press pages in Volume 1 after General Contents.

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* **S. 85A inserted by the Information Technology Act, 2000.**

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

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

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

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

Information Technology Act, 2000

Presumption as to electronic records and digital signatures [S. 85B].—In any proceeding involving a secure electronic record, the court has to presume, unless the contrary is shown, that such record has not been altered since the specific point of time to which the secure status relates.

Sub-s. (2) provides that in any proceeding involving secure digital signature, the court has to presume unless the contrary is shown, that the secure digital signature was affixed by the subscriber with the intention of signing or approving the electronic record. This presumption is to be confined only to secure electronic record or to secure electronic signature. Sub-section (2) says that except for these two presumptions, nothing in the section shall create any presumption relating to the authenticity and integrity of the electronic record or any digital signature. Secure system is defined in S. 2(*ze*) of the I.T. Act as follows:

(*ze*) "secure system" means computer hardware, software, and procedure that—

(*a*) are reasonably secure from unauthorised access and misuse;

(*b*) provide a reasonable level of reliability and correct operation;

(*c*) are reasonably suited to performing the intended functions; and

(*d*) adhere to generally accepted security procedures;

§ For text of the Information Technology Act, 2000, see Stop Press pages in Volume 1 after General Contents.

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

Information Technology Act, 2000

Presumption as to digital signature certificates [S. 85C].—Unless the contrary is shown, the court has to presume that the information listed in a digital signature certificate is correct. The presumption does not apply to the information specified as subscriber information which has not been verified if the certificate was accepted by the subscriber.

§ For text of the Information Technology Act, 2000, see Stop Press pages in Volume 1 after General Contents.

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* S. 85B inserted by the Information Technology Act, 2000.

* S. 85C inserted by the Information Technology Act, 2000.

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

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

COMMENTARY

Principle and Scope.—This section lays down that the court may presume the genuineness and accuracy of any document purporting to be certified copy of any judicial record of any foreign country, if such copy is duly certified in the manner and according to the rules in use in the country for the certification of the copies of judicial records. There must be an additional certificate by a representative of His Majesty or of the Government of India in or for the country or State, to the effect that the copy has been certified in conformity with the rules in force in that country or State. When a certified copy of a foreign judicial record thus certified by a represen-tative of His Majesty is produced, the court may call for other proof. See definition of 'may presume' in s 4. In s 79 the words are "shall presume". It has been held in *Haranand v. Ram Gopal*, 27 IA 1 : 27 C 639 (v *infra*) that this section does not exclude other modes of proof. S 86 is imperative. In the absence of the certificate referred to, the statements of witnesses taken in a court in Jeypur State are not admissible in evidence even though they were forwarded by the Resident [*Murli v. Achut*, 5 L 105; *S v. Abdul Hamid*, A 1957 Pu 86]. 'Political Agent' includes an Assistant Political Agent [*Hadibandhu v. R*, A 1946 P 196 : 24 P 699]. See *Badat & Co v. E I T Co*, A 1964 SC 538. Fax copy of the order passed by the American Court duly attested by the Indian Consulate is admissible as secondary evidence. [*Aleyamma Kuruvilla v. Pennamma Thomas & Anrs.*, 1994(1) Crimes 670, 673 Ker].

This section should be read with s 14 C P Code (Act 5 of 1908) which runs thus: "The court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment that such judgment was pronounced by a court of competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction".

The words, *"in or for"* in the first clause were substituted for the words *"resident in"* by s 8 of the Act 3 of 1891, in consequence of the decision in *Ganee Md v. Tarini Churn*,

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1. PAKISTAN.—In both the paras for "India or of Her Majesty's dominions" read "Pakistan".

BURMA.—For the words "of India or of Her Majesty's dominions" in para 1 substitute "of Her Britannic Majesty's dominions". For "of the Central Government" substitute "of Her Britannic Majesty or the Union of Burma". (AO 1937 and AO 1948). Omit para 2 (AO 1937).

CEYLON.—Omit the words "of India or" in para 1 and for the words "of the Central Government" substitute "of His Majesty or of the Governor-General of the Island, or of the Government of India". Omit para 2.

Substituted successively by AO 1950 and Part B States (Laws) Act, 1951.

'ords "Her Majesty or of" omitted by AO 1950.

'ituted by AO 1937.

'ed by I E Act (Am) Act 3 of 1891 s 8 for "resident in".

Act, 5 of 1899, s. 4 and amended successively by AO 1937 AO 1950 and Part B 'ct, 1951.

14 C 546, in which it was held that there is no representative of Her Majesty or of the Government of India residing in the State of Cooch Behar, and that consequently certified copies of judicial records of that State could not be received in evidence in the courts of India under provisions of this section as then framed. The second para was added by s 4 of Act 5 of 1899.

The Section Does Not Exclude Other Modes of Proof.—Proceedings of a Court of justice, when certified under s 86, are presumed to be genuine and accurate. S 86, which says that, if a copy of a foreign judicial record purports to be certified in a given way, the court may presume it to be genuine and accurate, does not exclude other modes of proof. A deposition taken in the court of an Indian State with reference to which there was no such certificate as is required by this section, may be proved by the evidence of an official, deposing to what took place in his presence and also to an uncertified record therof. Such proof is secondary evidence, under ss 65 and 66, of the certified record, the record being a public document under s 74, admissible without notice to the adverse party, where the person in possession of the document is out of the reach of or not subject to the process of the court [*Haranand v. Ram Gopal*, 27 IA 1 : 27 C 639: 4 CWN 429]. Copy of deposition given in a court in Cutch not certified in a manner which fully satisfied the requirements of ss 76 and 86 is not inadmissible, as s 86 does not exclude other proof. Under s 114 there is a presumption that the copy is a correct copy of the record of the deposition [*Vallabhdas v. Pranshankar*, A 1929 B 24].

A copy of the court of a French colony where His Majesty's Government had no representative was admitted on the testimony of a witness who swore that he was acquainted with the handwriting of the Registrar of that court and that Registrar was the keeper of the records of the court and had duly signed and sealed the document [*Monomohiney v. Greesh*, 8 Mad Jur 14]. In an execution proceeding it was held that the records of the Berlin Court though not authenticated and certified under ss 78 and 86, but authenticated in the manner prescribed by ss 14&15 of English Extradition Act (33&34 Vic s 52) which are applicable to this country are admissible [*In re Stallmann*, 15 CWN 1053 : 39 C 185 : 14 CLJ 375]. "But I do not wish it to be understood that the accused can in no case insist upon the production of the original" [*per* MOOKERJEE J, in *ibid*].

Other Cases.—This section contains an instance of documents to which s 65(*b*) seems to refer [*Hurrish v. Prosunno*, 22 WR 303]. As to the powers and position of Political Agent, see *Damodar v. Deoram*, 1 B 443—the argument of Sir William Harcourt.

S 14 of the C P Code 1908, (Explanation VI of s 13 of the C P Code, 1882) lays down that where a foreign judgment is relied on, the production of the judgment duly authenticated is presumptive evidence that the court which made it had competent jurisdiction, unless the contrary appear on the record, but such presumption may be removed by proving want of jurisdiction [*Kassim v. Isaf Md*, 29 C 509 : 6 CWN 829; see also *Sita Devi v. Gopal*, A 1928 P 375 : 111 IC 762; *Ishri Pd v. Sri Ram*, A 1927 A 510 : 105 IC 186]. In a suit upon a foreign judgment in India, the defendant, if he disputes the jurisdiction of the foreign court, must prove that fact. S 14 C P Code 1908 has thrown the onus upon the defendant, but that was not the case under the old section [see *Udhe Singh v. Puran*, 41 PLR 1910].

S. 87. Presumption as to books, maps and charts.—The Court may presume that any book to which it may refer for information on matters of public or general interest, and that any published map or chart, the statements of which are relevant facts and which is produced for its inspection, was written and published by the person and at the time and place, by whom or at which it purports to have been written or published.

COMMENTARY

S 57(*13*) lays down that in all the cases referred to therein and also on all matters of public history, literature, science or art, the court may resort for its aid to appropriate books

or documents of reference. S 36 declares the relevance or statements of fact in issue or relevant facts in published maps or charts generally offered for public sale. Under this section the court may presume that such books, document, map or chart was written or published by the person and at the time and place, by whom or at which it purports to have been written or published. The presumption is with regard to publication, authorship &c and not accuracy. S 83 declares that the court shall presume the accuracy of maps and plans made by authority of Government; but maps or plans made for the purpose of any case must be proved to be accurate. A map or plan is a document (v *illustration* to s 3). With regard to the presumption as to maps thirty years old, see s 90 *post*.

Reference may be legitimately made to Crokes on Castes and Tribes of NWP and Oudh as an authoritative statement of customs among the Eraki sect of *Mahomedans* [*Mariam Bibee v. Sheikh Md*, 28 CLJ 306 : 48 IC 561]. Pamphlet on Schizophrenia published by charitable society in England of which authorship was not established cannot be treated as authoritative [*Narayan v. Sucheta*, A 1970 B 312].

§ See notes to ss 46, 57, 83 *ante* and s 90 *post*.

S. 88. Presumption as to telegraphic messages.—The Court may pre-sume that a message, forwarded from a telegraph office to the person to whom such message purports to be addressed, corresponds with a message delivered for transmission at the office from which the message purports to be sent; but the Court shall not make any presumption as to the person by whom such message was delivered for transmission.

COMMENTARY

Principle and Scope.—The presumption under this section is another presumption in favour of the regularity of acts (*Omnia praesumuntur &c*). A fact may be presumed from the regular course of business in public office (*ante* s 16). If a letter correctly addressed is proved to have been put into a letter box or delivered to a postal clerk, it is presumed to have reached its destination at the proper time and to have been delivered to the addressee in due course. So where the law requires a public servant to make an entry in any public or official book or to do any act, it is presumed that all acts in connection therewith have been rightly and regularly done [see ss 35, 114 *illus* (*e*)].

The presumption under this section is only with regard to the message transmitted, *viz* that a message forwarded to the addressee from the telegraph office by the officers through the wire, corresponds exactly with the message made over to them for transmission. But, as the latter portion of the section expressly says, the court shall not make any presumption as to the person by whom such message was delivered for transmission. Thus in the case of a sanction of Government for prosecution under S 124-A I P Code communicated by telegram, the telegram must be proved to have emanated from Government [*Varadarajulu v. R*, 42 M 885 : 51 IC 343]. S 88 is a bar to the making any presumption as to the person by whom the message was handed in for transmission or sent, when the original has not been proved to be in the handwriting of the alleged sender [*Raghunath v. R*, A 1933 P 96; *Kishore v. Ganesh*, A 1954 SC 316 : 1954 SCR 919 : 33 P 313] and in the absence of any evidence that it was sent by him his denial stands [*Kishore v. Ganesh, sup*]. Though there is no presumption under s 88 as to the person who delivered the message for transmission, such proof of authorship may be given by circumstantial evidence, *eg*, by the internal evidence afforded by the contents of the message in the context of the chain of other correspondence [*Mobarik v. S*, A 1957 SC 857 : 1958 SCR 328: see *ante*, notes to s 67: *"Proof of documents by reference to contents"*].

Although under the section there is no presumption of delivery or receipt of the message or as to the date and hour of sending it, such presumptions may be raised as in the case of letters, as pointed out above, under ss 16 and 114 (*e*). The burden of proving that there was variance is on the person alleging it. Now that wireless apparatus is being extensively used by the Government of all countries, it is conceived

that the presumption under this section will also apply to radio messages. "The true effect of s 88 is to enable the court to accept this hearsay statement as evidence of the identity of the message delivered with that handed in" [Markby, p 67].

Presumption as to Telegraphic Messages.—The form handed into the post office by the sender (and not the form delivered by the post office) is the original of a telegram [*Henkel v. Pape*, LR 6 Ex 7; *R v. Regan*, 16 Cox CC 203] and either this must be produced by an official from the post office, or proof of its destruction given a copy can be admitted [*R v. Regan, sup*]. Presumptions as to date and hour of sending a telegram are, it seems, the same as in the case of letters [Hals, 3rd Ed, Vol 15, para 730]. A telegram will constitute primary evidence of the fact that the same was delivered to the addressee on the date indicated therein. Proof of authorship can be established by circumstantial evidence [*Mrs. Abba Astavans v. Suresh Astavans*, A 1984 NOC 131 (Del)]. Where a telegram is sent by means of code, the *onus* is upon the sender, if he relies on the telegram having one of two possible meanings, to prove that it could not possibly be misunderstood [*Falck v. Williams*, 1900 AC 176]. Notice to quit conveyed through phonogram by Advocate of landlord not valid [*Shyam Raghunath*, A 1977 P 155]. In the case of the post office, there is a presumption that a letter properly directed and posted will be delivered in due course [see *Br & American Tel Co v. Colson*, LR 6 Ex 122, *per* BRAMWELL, B; and *Stocken v. Collin*, 7 M&W 515; *In re London and Northern Bank, ex parte Jones*, 1900, 1 Ch 200; *R v. Johnson*, 7 East 65; *R v. Plumer*, 1814 R & R 264; *Gobinda v. Dwarka*, 20 CLJ 455] and the presumption applies to post-marks on telegrams. The presumption under this section could be rebutted by producing the messages actually received by the person who wants to rebut the presumption. [*Manchalal v. Shah Manikchand*, A 1988 Kant 221, 224 (DB) : 1 LR 1987 Kant 3568]. As to use of post-mark as evidence see *ante*, s. 16: *"Post-mark"*.

§ As to telegram, see further s 91 *post*: *"Telegrams"*, and as to copies, see s 62, Expln 2 and s 63(2).

Telegrams sent from South Africa to the Commissioner of Police Bombay were held admissible and under the particular circumstances of the case a presumption was also raised under s 114 that the telegrams emanated from the police in South Africa [*R v. Abdul Gani*, 91 IC 690 : 49 B 878 : A 1926 B 71].

**[S. 88A. Presumption as to electronic messages.—The Court may presume that an electronic message forwarded by the orginator through an electronic mail server to the addressee to whom the message purports to be addressed corresponds with the message as fed into his computer for transmission; but the Court shall not make any presumption as to the person by whom such message was sent.*

Explanation.—For the purposes of this section, the expressions "addressee" and "originator" shall have the same meanings respectively assigned to them in clauses (b) and (za) of sub-section (1) of section 2 of the Information Technology Act, 2000.]

Information Technology Act, 2000

Presumption as to electronic messages [S. 88A].—The section provides that the court may presume that an electronic message forwarded by the originator through an electronic mail server to the addressee corresponds with the message as fed into his computer for transmission. The court is not authorised to make any presumption as to the person by whom such matter was sent.

The explanation to the section explains the meaning of the terms "addressee" and "originator". It says that these terms will have the same meaning as is assigned to them in clauses (*b*) and (*za*) of S. 2(1) of the Information Technology Act, 2000. Section 2(1)(b) says that an addressee means a person who is intended by the originator to

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* S. 88A inserted by the Information Technology Act, 2000.

receive the electronic record but does not include any intermediary. Section 2(1)(za) says that an originator means a person who sends, generates, stores or transmits any electronic message or causes any electronic message to be sent, generated, stored or transmitted to any other person, but does not include an intermediary.

§ For text of the Information Technology Act, 2000, see Stop Press pages in Volume 1 after General Contents.

S. 89. Presumption as to due execution etc of documents not pro-duced.—The Court shall presume that every document, called for and not produced after notice to produce, was attested, stamped and executed in the manner required by law.

COMMENTARY

Principle and Scope.—This section is founded on the maxim "*omnia praesu-muntur contra spoliatorem*" It declares that when a document is called for from any person and he does not produce it after proper notice to produce (ss 65, 66), the court shall presume that it was duly attested, stamped and executed. The presumption is rebuttable by evidence. If the non-production is due to loss or destruction, the same presumption arises in England [*Pooley v. Goodwin*, 4 A&E 94] as also here (s 114 *post*), as it is unavailable to the party serving notice. The presumption is as to attestation, stamp and execution, and does not extend to contents of the document which would require proof by secondary evidence, where evidence is admissible (s 65). But there is a general presumption under s 114(*g*) that when a party does not produce a document in his possession, it would, if produced, be unfavourable to him (see notes s 114, *post*).

The presumption under s 89 is based on the principle that no one shall be allowed to take advantage of his own wrong. When the contents of a document called for and not produced after notice is proved by secondary evidence under s 65, the court shall presume under this section that the original was duly attested, stamped and executed, unless some evidence to the contrary, as for example, that it was unstamped when last seen can be given [*Hart v. H*, 1842, 1 Hare 1; Tay s 148; *Dilipsingh v. Dhaniram*, A 1976 B 38]. This power to give evidence to the contrary is controlled by s 164 which says that when a party refuses to produce a document after proper notice, he cannot afterwards use it as evidence without the consent of the other party or the order of the court (see *illus* to s 164). In order that the presumption under this section may be drawn, there must be evidence that the opponent was in possession or power of the document called for.

The mere non-production of deed or papers, upon notice, has no other *legal* effect in general than to admit the other party to prove their contents by parol, and as against the party refusing to produce them, to raise a *prima facie* presumption that they have been properly stamped [*Crisp v. Anderson*, 1 Stark 36; Tay ss 117, 148]. Where a document requiring a stamp is lost, or not produced upon notice, it will, in the absence of evidence to the contrary, be presumed to have been duly stamped; but where it is shown to have been unstamped, it will be presumed to have so continued until the contrary is proved [*Closmadeuc v. Carrel*, 18 CB 36; *Marine Investment Co v. Haviside*, LR 5 HL 624]; and where shown to have been unstamped, no secondary evidence will be admissible [*Rose v. Clarke*, 1 Y & CCC 534; *Arbon v. Fussell*, 3 F & F 152], even though the penalty be tendered [Phip 11th Ed, p 736; Hals, 3rd Ed, Vol 15, para 745]. See *Raia of Bobbili v. Inuganti*, 26 IA 262 : 15 TLR 475 : 23 M 49 cited *ante* under s 65.

[*Ref Roscoe N P 223-24; Phip 11th Ed, p 736; Steph Art 86; Tay ss 1171, 1847*].

Presumption as to Documents Not Produced After Notice.—According to Markby this section "is restricted to cases where a notice to produce is delivered to adverse party, and that it does not extend to cases where a summons to produce is delivered to a stranger to the suit" (Markby pp 67-68). The word "party" has not been used in the section and further a notice to produce a document may be served

by means of a summons. The language of the section being too general, it is difficult to say, that the section does not apply to the case of strangers. It would seem that notice to produce, as the term is used in ss 65 and 66, includes notices served under Or 16, r 6 of the C P Code 1908. In that case the section would apply to the case of strangers as well. The language of rule 6 is also general, it runs thus:—"Any person may be summoned to produce a document, without being summoned to give evidence, &c, &c." The words 'any person' would certainly include a party to the proceeding as well as strangers.

In a suit for redemption, plaintiff sought to establish the mortgage by placing reliance on a certified copy of a petition of compromise bearing a one-rupee stamp filed in 1857 which contained a recital relating to the mortgage. The record of the proceedings was destroyed in the Mutiny. The defendants objected that the contract was not enforceable, inasmuch as the document was not properly stamped—*held* that the officer before whom it was presented satisfied himself that it was properly stamped [*Ahmad Raza v. Saiyid Abid*, 43 IA 264 : 38 A 494 : 21 CWN 265 : A 1916 PC 41].

In an unreported case of the Calcutta High Court, *Shk Lal Md Saodagar v. Girish Ch Guha & Ors* (Sp Appeal No. 948 of 1905 against the decision of the Subordinate Judge of Manbhoom decided on 2nd May 1906—MACLEAN, CJ, and BRETT, J), the presumption arising from this section was applied with regard to an usufructuary mortgage deed. Where an unstamped copy of a document is produced by way of secondary evidence, the court may presume that the original was stamped [*Rokia v. Abdul*, 1932 MWN 432]. Where the attesting witnesses were dead and it was proved that the mortgagor had executed the deed and that it had been returned to him at the time of the sale of the mortgaged property to the mortgagee and where the mortgagor had failed to produce the deed though called upon to do so, *held* that the execution of the mortgage deed was established under s 89 [*Jang Bahadur v. Chandrej*, 41 IC 171]. Where an entry regarding a mortgage was made in ordinary bahi and not on stamped paper, there can be no presumption on failure to produce it though called [*Ladharam v. Harichand*, A 1938 L 90]. Once the plaintiff excuses himself from the production on the plea that documents are not traceable or are lost, the question of giving notice for production does not arise [*Manilal v. Surat Mun*, A 1978 G 193].

[1][**S. 90. Presumption as to documents thirty years old.**—Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such docu-ment, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the person by whom it purports to be executed and attested.

Explanation.—Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.

This explanation applies also to section 81.

Illustrations

(a) *A* has been in possession of landed property for a long time. He produces from his custody deeds relating to the land, showing his titles to it. The custody is proper.

(b) *A* produces deeds relating to landed property of which is the mortgagee. The mortgagor is in possession. The custody is proper.

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1. In Ceylon Ch VI headed "BANKER'S BOOKS" has been inserted after s 90. It contains ss 90-A to 90-F corresponding to ss 1 to 7 of the Banker's Books Evidence Act 18 of 1891 (see App C at the end of the book) with some modification.

(c) *A*, a connection of *B*, produces deeds relating to lands in *B's* possession which were deposited with him by *B* for safe custody. The custody is proper.

STATE AMENDMENT.—S 90 has been amended thus in ALLAHABAD by the U P Civil Laws (Reforms and Amendment) Act 34 of 1954 [Nov 22, 1954]:—

1. The existing section shall be re-numbered as section 90(1), and

(*a*) For the words "thirty years" the words "twenty years" shall be substituted, and

(*b*) The following shall be inserted thereafter as a new sub-section (2):

"(2)Where any such document as is referred to in sub-section (1) was registered in accordance with the law relating to registration of documents and a duly certified copy thereof is produced, the Court may presume that the signature and every other part of such document which purports to be in the handwriting of any particular person, is in that person's handwriting, and in the case of a document executed or attested, that it was duly executed and attested by the person by whom it purports to have been executed or attested".

2. After section 90, add the following as a new section 90A:

"90A (1). Where any registered document or a duly certified copy thereof or any certified copy of any document which is part of the record of a court of justice, is produced from any custody which the court in the particular case considers proper, the court may presume that the original was executed by the person by whom it purports to have been executed.

(2) This presumption shall not be made in respect of any document which is the basis of a suit or of a defence or is relied upon in the plaint or written statement.

The explanation to sub-section (1) of section 90 will also apply to this section."

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COMMENTARY

Principle and Scope.—This section does away with the strict rules of proof which are enforced in the case of private documents, by giving rise to a presumption of genuineness,

with regard to documents reaching a certain age. If private documents not less than *thirty years old* are produced from *proper custody*, and are on their face free from suspicion, the court may presume that they have been signed or written by the person whose signatures they bear or in whose handwriting they purport to be, and that they have been duly attested and executed, if they purport so to be. In other words documents thirty years old prove themselves. The age of the document, its unsuspicious appearance, the production from proper custody and other circumstances are the foundation for the presumption. It is immaterial that a witness to the document is alive or is present in court. The period of 30 years is fixed as in s 107. In England originally the period was 40 years [Gilbert Ev 1st Ed p 102], and the first case of application of 30 years was *R v. Farrington*, 1788, 2 TR 466. By the Documentary Evidence Act, 1938, s 4, the period has now been reduced to 20 years. In view of the great difficulty of producing witnesses to such ancient docu-ments, the reduction of the period of 30 years to 20 years in India is long overdue.

Section 90 of the Act is in the Chapter of presumptions as to documents and sections as to documents and sections 79 to 90 fall within that Chapter. Under sections 79 to 85 and 89, a court is obliged to presume a particular state of affairs, if the conditions enumerated thereunder are satisfied, as the expression used in these sections is that the court "shall presume"; where as under sections 86 to 88 and 90, there is no such obligation upon the Court to presume even if the conditions enumerated thereunder exist, but it is discretionary matter of the Court to raise or not to raise a presumption as the expression used in the sections is that the Court "may presume". The expressions "shall presume" and may presume have been defined in section 4 of the Act. According to section 4 of the Act, whenever it is provided by this Act that the Court may presume a fact, it may either regard such a fact as proved, unless and untill it is disproved, or may for proof of it. It further provides that whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and untill it is disproved. In my view, according to section 4, wherever the expression "may presume" has been used in the Act, a discretion has been given to the Court to presume a fact of refuse to raise such a presumption. If the Court finds that it is a fit case for raising presumption, in that event, such fact stands proved unless and until it is disproved by other side. According to this section, in cases where a discretion lies with the Court and it refuses to exercise discretion, then it may call upon the parties to prove the fact by leading evidence. In those sections where the expression has been used that the Court 'shall presume' in that event no discretion has been left with the Court and there is a legislative command to it to raise a presumption and regard such fact as proved unless and until it is disproved. In such an eventuality, the question of calling upon the parties to formally prove a document does not arise.

According to section 90 of the Act, where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested. For application of section 90 of the Act, there are two pre-requisites, firstly, that the document is thirty years old and, secondly, that the same is produced from proper custody. If these two conditions are fulfilled, then the Court is required to consider whether it is a fit case or not for raising presumption of due execution and attestation of a document. If the Court finds that it is a fit case for exercising judicial discretion and raises a presumption, in that event only, a presumption of due execution and attestation can be raised and thereafter necessity of formal proof of the document is waived. If the Court feels that it is not a fit case for exercising discretion and raising presumption, in that event, as stated above, it will call upon the parties to formally prove the document, even though the two conditions enumerated in section 90 are in existence.

The principle underlying section 90 is that if a document, thirty years old or more, is produced from proper custody and is, on its face, free from suspicion, the Court may presume that it has been duly executed and attested. The reason for incorporating section 90 is founded on necessity and convenience. It is extremely difficult and sometimes

impossible to prove handwriting, signature and execution and attestation of ancient documents after lapse of many years. Further reason for incorporating this provision is that if the two conditions enumerated in section 90 are fulfilled, then in relation to documents the execution and attestation of which are not denied, the necessity of formal proof is waived and thereby Court's time is saved.

The question arises in which case the Court should exercise discretion of raising presumption and in which one the discretion should be refused. In my view, there cannot be any straight-jacket for exercising discretion by the Court under section 90 of the Act. If the two conditions laid down in Section 90 are fulfilled in relation to a particular document and its genuineness is not disputed, then the Court should exercise its discretion under section 90 of the Act, even if the executant or attesting witnesses are alive and available, and admit the document into evidence thereby waiving its formal proof. Otherwise unnecessarily Court's time will be wasted in formally proving the document by examining witnesses and the same will frustrate the very purpose of incorporating section 90 in the Act. It has been noted by LORD HAILSHAM in Halsbury's Laws of England, 4th Edition, Volume 17 in para 129 that such documents *prove themselves* notwithstanding the fact that one of the subscribing witnesses is alive.

If the executant or attesting witnesses are not alive or available in relation to a document, the genuineness of which is disputed and mode of proof as required under section 69 of the Act is also not possible, the Court should raise a presumption under section 90 of the Act in relation to due execution and attestation of document, if it comes to the conclusion that the document is such that it is likely to have been executed, having regard to the common course of human conduct and there are no circumstances exciting suspicion of the Court such as artificiality and unnaturalness or correction or tampering with document. In the case of *Shafiq-un-Nissa v. Shaban Ali Khan*, ILR XXVI Allahabad 581, the Privy Council was considering the effect of section 90 of the Act. Both the conditions were in existence, but genuineness of the document was disputed and the Courts in India refused to mark the document as an exhibit under section 90 of the Act and called the party for formally proving the document as in their opinion there was evidence in the case which raised great suspicions as to the document itself. When the matter was taken to the judicial Committee the decision of the Indian Courts was upheld and it was observed thus:

"Under the circumstances, their Lordships are not surprised that the Judges, both in the Civil Court and in the Court of the Judicial Commissioner, exercised the discretion which is vested in them by Section 90 by not admitting the document to evidence without formal proof, although it is more than thirty years old, and purports to come from the proper custody. It should be added that the Court considered that there was evidence in the case which it is not necessary to go into, and to which in fact, their Lordships' attention has not been pointedly drawn—which raised great suspicions as to the document itself.

In cases where genuineness of a document is disputed and the executant or attesting witnesses are alive and available, or if they are dead or not available, but evidence is available for proving the document in accordance with the mode pres-cribed under section 69 of the Act, then the Court should not raise presumption under section 90 of the Act and admit the document into evidence, but direct the parties to prove the document by leading evidence. [*Haradhan Mahatha v. Dukhu Mahatha*, A 1993 Pat 129]

The rule is founded on Necessity and Convenience. It is extremely difficult and sometimes impossible to prove the handwriting or signature or execution of ancient documents after the lapse of many years [*Wynne v. Tywhitt*, 4 B Ald 377]. It is therefore presumed that all persons acquainted with execution &c of the documents, if any, are dead, and proof of those facts are dispensed with. The presumption relates to the execution of the document, *ie* signature, attestation &c in other words, its genuineness, but not to the truth of its contents [see *post : Extent of Presumption*].

A presumption of genuineness may be raised provided they are produced from *proper custody*. Proper custody is a sort of guarantee of the genuineness of the documents. 'Proper custody' has been defined in the *Explanation* which appears to be based on the

wider interpretation put upon the term by TINDAL, CJ, in *Bishop of Meath v. Marquis of Winchester* (1936), 3 Bing (NC) HL 183, p 200 [v *post: "Proper Custody"*]. As COLERIDGE, J, said in *Doe v. Phillips*, 8 QB 158, the custody should be one which affords reasonable assurance of the authenticity of the documents. Another requirement found in American rulings is that the appearance should not be suspicious. "On inspection it must exhibit an honest face; otherwise it is not such an ancient document that its countenance will pass muster. Age will not sanctify ear-marks of fraud" [*per* JACKSON, J, in *Hill v. Nisbet*, 58 Ga 586, 589]. The law cannot be otherwise here, for document with a suspicious appearance, ancient or modern, cannot inspire confidence The presumption is in all cases discretionary, the words used being "May" (see *post*). So where a document is suspicious on the face of it, *eg* erasure or rewriting on the very place of importance, there is no presumption under this section [*Baldeo v. Bnaros*, 95 IC 261 : A 1926 A 537]. It is necessary to consider the evidence external and internal [*Mansukh v. Trikambhai*, A 1930 B 39 : 123 IC 492; see also *Shafiqunnissa v. Shaban*, 31 IA 217 : 26 A 58]. In some earlier English rulings it was held that in the case of deeds and wills of land, besides age and proper custody, the party claiming under the instrument should have in possession the land since the time of the execution [*Forbes v. Wall*, 1 Esp 278], but in time it obtained relaxation. In America it has been held in most jurisdictions that possession is not necessary as an absolute requirement see [; Wig s 2141].

This section deals with the admissibility of ancient documents without proof in the usual manner, but it has nothing to do with the question of their relevancy which must be determined in accordance with the rules regarding relevancy. Though documents are declared admissible without proof, if produced from proper custody, the credit to be given to them depends on the discretion of the court, and the particular circumstances of each case (*post*).

The presumption is permissive and according to the circumstances of each case the court may or may not raise it. It is a matter of judicial discretion whether the court will make the presumption or call upon the party to offer other proof (*post: "May Presume"* and *"Corroboration of Ancient Documents"*). The discretion of the trial court to raise or not to raise the presumption cannot be overruled by the appellate court without sending the case back for retrial [*Rajendra v. Gopal*, 7 P 245 : A 1929 P 51]. The presumption is one of fact and stands on the same footing as any other piece of evidence and the High Court will not interfere in second appeal with a finding given on it [*per* SANKARAN NAIR, J—CONTRA: The presumption is one of law—*per* TYABJI, J, in *Parankusa v. Subramania*, 26 IC 117]. If a document purpor-ting to be thirty years old is not duly tendered, proved or exhibited, s 90 cannot cure the defect. Or 13, r 10 merely authorises the court to send for their records of another case for inspection. It does not make that whole record 'evidence' [*Abdul Ghani v. Faqir*, A 1929 L 78].

When a document purporting to be 30 years old is admitted in evidence without any objection, it follows that proper custody is not challenged, but it does not preclude a party from urging that there are special circumstances under which the presumption may not be drawn [*Ramkrishna v. Gangadhar*, A 1958 Or 26].

The provisions of s 90 can have no effect on ss 61, 62, 63 and 65 [*Sardaran v. Sundarlal*, A 1968 A 363].

Presumption as to 30 Years Old Documents.—The presumption in favour of ancient documents, is not confined to deeds and wills; but extends equally to letters, entries, receipts, settlement certificates, and indeed to all other written documents and in such cases the signatures and the writings need not be proved [Tay s 88; Phip 11th Ed p 724: Wig s 2145]. It applies to accounts [*Foster v. Plumbers' Co*, 44 Sol Jo 211], maps, plans, &c [see illus to definition of 'document' in s 3] and all classes of documents. In *R v. Daye*, 1908, 2 KB 333, document has been defined as "any writing or printing or capable of being made evidence, no matter on what material it may be inscribed." Under s 90 the map may show the time of its preparation; but the section does not establish the accuracy of the map [*Preonath v. Durgatarini*, 16 CWN 317]. When the paper of horoscope produced in support of claim as to date of birth has not been shown to have been made

more than 30 years ago, the presump-tion under section 90 cannot be made applicable and as such the burden was on the plaintiff to prove the horoscope as well as the fact that its having been made or prepared at the time of the birth or in near proximity of time after the date of birth. [*State of Karnataka v. Veeranagouda Mallikarjunagouda*, A 1995 Kant 361, 365]. Entries in revenue records made more than 30 years ago are presumed to be authentic. [*Kartar Singh v. Collector, Patioala*, 1996 AIHC 1538 P&H].

Another exception to the rejecting hearsay evidence is allowed in favour of *ancient documents*, when tendered in support of *ancient possession*; and as these often furnish the only attainable evidence of ancient possession, the law, on the principle of necessity, allows them to be read in courts of justice on behalf of persons claiming under them and against persons in no way privy to them, provided that they are not mere narratives of past events, but that they purport to have formed a part of the act of ownership, exercise of right, or other transaction to which they relate (see *Malcomson v. O'Dea*, 10 HLC 593; *Blandy Jenkins v. Dunraven*, 1899, 2 Ch 121). No doubt this species of proof deserves to be scrutinised with care: for, first, its effect is to benefit those who are connected in interest with the original parties to the documents, and from whose custody they have been produced: and next, the documents are not proved, but are only presumed to have constituted part of the *res gestae*. Still, as forgery and fraud are, comparatively speaking of rare occurrence, and a fabricated deed will, generally, from some anachronism or other inconsistency, afford internal evidence of its real character, the danger of admitting these documents is less than might be supposed; and at any rate, it is deemed more expedient to run some risk of occasional deception, than to permit injustice to be done by strict exclusion of what, in many cases, would run out to be highly material evidence. On a balance, therefore, of evils, this kind of proof has for many years past been admitted subject to certain qualifications (Tay s 658). And first, care is especially taken to ascertain the genuineness of the ancient documents produced; and this may in general be shown, *prima facie*, by proof that they come from the *proper custody*. (Tay s 653). See *post: "Proper Custody"*.

This presumption—so far as the present rule of evidence is concerned—is not affected by proof that the witnesses are living [*Ooe v. Burdett*, 4 A&E 19], and it seems, even actually in court [*Marsh v. Collnett*, 2 Esp 666]; nor, in the case of wills, by showing that the testator died within the 30 years [*Doe v. Wolley*, 8 B&C 22]. But it must appear that the instrument comes from such custody, as, though not strictly proper in point of law, is sufficient to afford a reasonable presumption in favour of its genuineness [*Doe v. Samples*, 8 A&F 151]: and that it is otherwise free from just ground of suspicion [*Roe v. Rawlings*, 8 RR 632: Tay s 87].

Whether the statements in a document would be relevant under s 32(5) will depend on the fulfilment of all the conditions of that section [*Sheojee v. Prema*, A 1964 P 187].

Gist of the Law in S 90.—(1) The presumption applies to documents proved to be 30 years old or more. (In the State of Allahabad the period has been reduced to 20 years by U P Act No 24 of 1954 *ante*).

(2) The document must come from "proper custody".

(3) The presumption is discretionary and so where a document is suspicious on the face of it or mutilated, the court may refuse to make it. It may call upon the party to offer other proof.

(4) The presumption applies only to documents which bear the signature of the writer or of witnesses, and not to unsigned or anonymous papers.

(5) The presumption relates only to the signature, execution or attestation of a document, *ie* to its genuineness. It does not involve any presumption that its contents are true or that they have been acted upon. The presumption does not also apply to the authority of a person to execute a document on behalf of another.

(6) The presumption applies to execution and attestation of wills including that of sound disposing mind of testator.

(7) 30 years is to be counted from the date the document purports to bear. Although a document may not be 30 years old when it is filed, it is sufficient if it is so when the case is tried.

(8) The presumption applies to the original document and not to any copy, certified or otherwise. (In Allahabad it has been made applicable to the certified copy, of an ancient document).

[*Ref Tay 87, 88, 658-59; Phipson 11th Ed pp 724-26; Best s 499 p 252; Powell 9th Ed pp 282-88; Wig s 2137-146; Jones ss 531-32; Ros N P 102-103; Stephen Art 88: Halsbury 3rd Ed Vol 15 paras 636-642*].

"Purporting".—By 'purporting' is meant '*stating itself to be*', but this statement being hearsay would be excluded were it not for this section, which contains an excellent provision if it is not misunderstood. (Markby p 68). "The period of thirty years signifies of course, the period in which, the specific document has been in existence. The purporting date is of itself not determinative: for anybody may have forged the written date but yesterday. Accordingly this existence of the document thirty years ago must be somewhat shown" (Wig s 2138). If a document dates thirty years back, that itself is not conclusive for the purpose of drawing the presumption. In spite of the date appearing on it, it is necessary that its existence for 30 years should be proved. In *Forbes v. Wale*, 1764, 1 W BI 532, a bond bearing the date 1872 was objected to on the ground that "if the length of the date was alone sufficient to establish it, a knave has nothing to do but to forge a bond with a very ancient date"; whereupon MANSFIELD LCJ, "directed the bond to be proved" cited Wig s 2138]. The word "purporting" and "proved" must be read in a sequence. A *prima facie* case must be made out to show that the document is 30 years old [*Lakshmaiah v. Venkateswarlu*, A 1977 AP 301].

Mode of Reckoning 30 years.—30 years is to be computed from the date the document purports to bear. The outer limit of time is to be reckoned not from the date on which the document is filed in court, but the material date is the date on which, it having been tendered in evidence, its genuineness or otherwise becomes the subject of proof [*Minu Sarkar v. Rhedoy*, 5 CLR 135; *Ladha v. Hukum*, 4 L 233: 75 IC 57; *Harriram v. Matasuddi*, 42 IC 80; *Kondo Reddi v. Pichireddi*, A 1925 M 184: 82 IC 487]. *Minu Sarkar's* case *ante* was **approved** in *Surendra v. Mirza Md*, 63 IA 85: 40 CWN 226: A 1936 PC 15. The presumption is applicable to document which was not 30 years old either on the date of suit or on the date of production, but was so on the date when arguments were heard [*Mahadeo v. Nasiban*, 54 IC 368—CONTRA: *Chiraunji v. Kallo*, 12 ALJ 507, or when it was sought to be proved [*Sarat v. Panchanan*, 58 CWN 271: A 1953 C 471].

The period is to be reckoned backwards from the *time of offering* the deed, not from the time the suit began or any earlier period; and forwards, from the time of existence or purporting *execution* of the document and not from the time of its taking effect in law (as, in a will, from the death of the testator) [Wig s 2138]. The period dates from the execution of the document, and, even in the case of wills, not from the death of the testator, [*Deo v. Wolley*, 8 B&C 22; *Man v. Ricketts*, 7 Beav 93, 101; *Sarat v. Panchanan, sup*; Phip 11th Ed p 724].

Unsigned Papers or Anonymous Documents.—When there are no names of executant, scribe or witness on a document [*Prov of Bengal v. Ramlal*, A 1942 C 308], or where a document does not purport to show who prepared or signed it, the mere fact that it is 30 years old does not make it admissible without proof [*Charittar v. Kailash*, A 1918 P 537: 3 PLJ 306; *Hazura v. Mahinder*, A 1937 L 599; *Special*

Manager v. Lal Bahadur, A 1937 O 353; *Sumarthan v. Chirakkal*, A 1939 M 926; *Chiranji v. Ramji*, A 1939 L 285; *Nagaraja v. Koothappan*, A 1941 M 602; *Bhairo v. Ambika*, A 1942 O 374]. There is no presumption under s 90 with regard to unsigned accounts not purporting to be in the handwriting of any particular person, nor does s 114 help the matter [*Naina Pillai v. Ramanathan*, 33 MLJ 84: 41 IC 788; *Dobar v. Sunam*, A 1944 L 58; *Chandukutty v. Rama*, A 1939 M 926; *Nagaraja v. Koothappan, sup*; *Trimbakdas v. Mathabai*, A 1930 N 225; *Sri Prasad v. Special Manager*, 164 IC 494: A 1937 O 194; *Ram Naresh v. Chirkut*, A 1932 O 227; *Chiranji v. Ramji, sup*; *Bhagirathmal v. Bibhuti*, 46 CWN 309; *Kotiswar v. Paresh*, A 1956 C 205: 60 CWN 821; *Amrita v. Sripat*, A 1962 A 111]. A person failing to prove the handwriting in an anonymous document cannot invoke the presumption under s 90 [*Venkatarao v. Venkateswararao*, A 1956 AP 1].

"May Presume".—The courts may exercise the discretion vested by not admitting a document without formal proof, although it is more than 30 years old, and purports to come from proper custody. What is meant by 'may presume' is shown by s 4 [*Shafiqunnissa v. Shaban*, 31 IA 217: 26 A 581: 9 CWN 105; *Kunhamina v. Spl Tahsildar*, A 1977 K 41]. The judicial discretion under section 90 should not be exercised arbitrarily. [*Lakhi Barua v. Padma Kanta Kalita*, A 1996 SC 1253, 1256]. The presumption may be made when the elements in the section are present and the document is on the face of it free from suspicion [*Kotiswar v. Paresh, sup*]. The court could even reject an ancient document if it thought it to be a fabrication [*Gooroo Pd v. Bykunto*, 6 WR 82; *Tara Debia v. Nittyanund*, 12 WR 90]. It is not obligatory on a court to raise the presumption, the language being 'may'. Notwithstanding that the elements mentioned in the section are satisfied, it will always be in the discretion of the court, to make the presumption, or if it sees any sufficient reason, to have the document proved in the ordinary manner; [see *Surendra v. Sambhu*, A 1927 C 870: 104 IC 219; *Imrit v. Sirdhari*, 17 CWN 108: 15 CLJ 7; *Ram Naresh v. Chirkut*, A 1932 O 227; *Har Pd v. Bikramji*, A 1921 O 36; *Bhairo v. Ambika, sup*, *Mahendra v. Nitai*, 1943, 1 Cal 392: A 1944 C 241; *Kotiswar v. Paresh, sup*; *N Ramaswamy v. C Ramaswamy*, A 1975 M 88; *D. Ramanatha Gupta v. S. Razaack*, A 1982 Kant 314, 317] stating its reason in the latter event, and in the former whether the presumption has been rebutted or not [*Srinath v. Kuloda*, 2 CLJ 592]. The court will not arbitrarily say that it will not draw the presumption merely because the matter is for the exercise of its discretion [*Dhanapal v. Govindraja*, A 1961 M 262].

S 90 only lays down that the court *may presume* that documents purporting to be 30 years old are genuine, not that it *must* presume them to be so, and experience teaches that *'may presume'* in such cases ought generally to be construed in the more rigorous of the senses allowed by s 4 [*Timangavda v. Rangangavada*, 11 B 94, 98]. The presumption is discretionary, but where the court chooses to make the presumption, no further proof is necessary under s 69 [*Mahendra v. Nitai, sup*]. In using this discretion the court should be very particular as very great injustice may result from its arbitrary use. The discretion should be in consonance with law and justice and great caution should be exercised in its application (*post*). It must be exercised judicially and not arbitrarily [*Govinda v. Pratap*, 29 C 740: *Imrit v. Sirdhari, ante*: *Abdul Ghani v. Fakir*, A 1929 L 78: 111 IC 361].

When the document bearing the signature was 30 years old, it was produced from proper custody, the cross-examination was not directed to show that the witness was unacquainted with the handwriting of the person concerned and there is a note by the court, *viz*, "signature proved". Suggesting that there was no objection at the time, the presumption can properly be made [*Surendra v. Mirza Md*, 63 IA 85: 40 CWN 226:

A 1936 PC 15]. The presumption of genuineness can only dispense with necessity of proof, but the question of sufficiency of evidence is not affected thereby [*Baldeo v. Bharos*, 95 IC 261 : A 1926 A 537]. 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 [*Nanilal v. Prahlad*, 56 CLJ 369].

In the case of *bahis* of priests, the presumption will be permissible only if evidence is led to prove the identity, signature and handwriting of the writer [*Hazura v. Mohindar*, A 1937 L 599; *Nanhi v. Badlu*, A 1940 L 245]. The court may presume its due execution but it is open to it to hold that it was not acted upon [*Mahadeo v. Raghoji*, 77 IC 472: A 1923 B 293]. Genuineness of *jama-wasil-baki* papers 70 years old was presumed [*Nirod v. Pradyot*, 45 CLJ 129]. A deed executed before the T P Act was presumed to be genuine although not signed by the executant but by a scribe [*Goya v. Surajbali*, A 1924 A 832]. Presumption of genuineness attaches to *char sanads* executed in 1251 and 1269 BS [*Kameshwar v. Hriday*, A 1938 C 763: 67 CLJ 111]. Where evidence of execution is available under s 68, the court is justified in refusing to draw the presumption [*Reghubar v. Sanwal*, 9 1921 O 55: 61 IC 125]. Where the executants, scribes, attesting witnesses are all dead, it is a strong case for applying the presumption [*Lal Bahadur v. Rameshwar*, A 1927 O 510: 105 IC 581; *Md Hasan v. Ali Haider*, 85 IC 509: A 1925 O 337]. In the case of a document required by law to be attested a presumption under s 90 does not exclude the right to rebut it by showing that it was not properly attested [*Narain Singh v. D C*, 55 IC 501].

The appellate court will always be slow to interfere with the discretion of the trial court as to the raising of or refusing to draw presumption [*Nathu v. Gomti*, 45 CWN 29 PC: 67 IA 318: A 1949 PC 160: 1940 All 625; *Vaidyanathaswami v. Natesa*, 69 IC 289: A 1921 M 452; *Md Usman v. Rahim*, 57 PWR 1918; *Gomti v. Meghraj*, A 1933 A 443; *Khazan v. Lachmi*, A 1933 L 347; *Girttar v. Bhagwan*, A 1935 O 96; *Radhe v. Basdeo*, A 1935 O 482; *Sardar v. Akbar*, 38 PLR 322; *Raghubir v. Sukhraj*, A 1930 O 96; *Ravjappa v. Nilakanta*, A 1962 Mys 53; *Rangu v. Rambha*, A 1967 B 382]. It will interfere only when the trial court has exercised its discretion arbitrarily without due consideration of all relevant facts [*Special Manager v. Tirbeni*, A 1935 O 289].

"Duly Executed And Attested".—These words merely mean execution and attestation according to the formalities prescribed by the law. The presumption does not apply to the fact that a document was sufficiently explained to and understood by the executant a *pardanashin lady*. It must be established by positive evidence [*Afsar Begam v. Md Yusuf*, A 1931 O 103; *Rajeshar v. Harkishen*, A 1933 O 170]. Where an ancient deed of gift was attested by only one person there is no presumption under s 90 that the registering officer signed in the presence of the executant so as to make him an attesting witness [*Nilima v. Jaharlal*, 61 C 525].

Extent of Presumption.—S 90 only provides that documents 30 years old coming from proper custody prove themselves, *ie* no evidence of the handwriting, execution, attestation &c need in general be given. The presumption permissible relates to the signature, execution or attestation of a document, *ie* to its genuineness. But it does not involve any presumption of correctness of every statement in it which may contain narratives of past events, or that the contents of the document are true, or that it has been acted upon. That must be proved like any other fact [see *Kshetra v. Bhairab*, A 1927 C 229: 98 IC 1021; *Chandulal v. Bai Kashi*, 1939 Bom 97: A 1939 B 59; *Mahadeo v. Raghoji*, 77 IC 472: A 1923 B 293; *Prov of Bengal v. Ramlal*, A

1942 C 308; *Kotiswar v. Paresh*, A 1956 C 205; *Ramkrushna v. Gangadhar*, A 1958 Or 26; *Subudhi v. Raghu*, A 1962 Or 40; *Md Ahmed v. Nirmal*, A 1979 C 312; *Ghurahu v. Sheoratan*, A 1981 A 3]. The presumption could only be about the genuineness of the endorsement that the document was certified by an officer [*Kalyan v. Chhotsi*, A 1973 Raj 263], see *post* "*Corroboration of Ancient Documents*". Presumption of due execution necessarily amounts to a finding of proper attestation [*Rajeshwar v. Sukhdeo*, A 1947 P 449], *ie* the execution and attestation were in accordance with law [*Chandi v. Kali*, A 1949 A 733]. If a plaintiff in a suit for possession does nothing more than produce a certified copy of the original sale deed more than 30 years old, he would not succeed in establishing his title. There should be sufficient other evidence including that of one of the identifying witnesses of the executants [*Asafuddaula v. Ram Narain*, 1939 ALJ 1023: A 1940 A 70].

In connexion with the presumption in respect of ancient documents it should be remembered that the endeavour of the court is always to uphold titles after a long lapse of time and to presume a legal origin when it is not reasonable to expect evidence of it [*Magniram v. Kasturbhai*, 48 B 481: A 1922 PC 163: 49 IA 54]. As to the legal effect of suing after a long lapse of time when all persons who could give evidence are dead, see *Venkata Reddi v. Rani Saheba*, 43 M 541: A 1920 PC 64: 47 IA 6; *Babulal v. Maniklal*, A 1941 N 79]. There is no presumption that the document has the legal effect it purports to have. The circumstances justifying an alienation by a Hindu widow such as, legal necessity are matters extraneous to the execution of the document. However, a presumption can be drawn in certain circumstances in the case of ancient alienations by Hindu widows. It rests mainly on the fact of disappearance of all evidence [*Ramaji v. Manohar*, A 1961 B 169].

Marks.—Presumption of execution extends to this also that a mark put on the document, indicated, that it was signed by the executant by a sort of symbolic writing, which is taken to be the signature in the absence of proof to the contrary [*Sailendra v. Girijabhusan*, 58 C 686]. When a document is signed by *H* for *D*, the presumption will only be in respect of signature of *H* and not in respect of execution of document by *D* [*Kalika v. Jhenjho*, A 1964 Or 241]. As to Marks and Signature, see *ante*, s 68: "*signed—whether it includes mark?*"

Seals.—Presumption does not apply to genuineness of seals, nor is a seal a signature within s 3(*52*) General Clauses Act [*Special Manager v. Tribeni*, A 1935 O 289; *Sri Prasad v. Special Manager*, A 1937 O 194; *Bhairo v. Ambika*, A 1942 O 374; *Maheshwar v. Sailendra*, A 1951 As 327].

Stamps.—S 90 does not refer to stamps, but if a court draws a presumption as to stamping, a court of appeal ought not lightly to interfere with the discretion [*Manavikraman v. Nilambur*, 31 IC 579]. See s 89.

Whether S 90 Applies to Wills.—Formerly the presumption was held inapplicable to proof of a will in the Probate Court [*Shamlal v. Rameshwari*, 23 CLJ 82: 33 IC 273; see *Channulal v. Msst Puna*, 75 IC 660: A 1923 N 169]; but in later cases it was held that the court may in a proper case rely upon s 90 [*Gobinda v. Pulin*, 31 CWN 215: A 1927 C 102; *Mahendra v. Nitai*, 47 CWN 359: A 1944 C 241; see *Basant v. Brijraj*, 62 IA 180: 57 A 494: A 1935 PC 132, in which a copy of a will was produced but its genuineness was established by other satisfactory evidence]. The presumption was extended to disposing power of the testator [*Kotayya v. Vardhamma*, A 1930 M 744] and the Judicial Committee have now held that the execution and attestation of a will more than 30 years old and produced from proper custody as also that the testator was of sound disposing mind can be presumed under

s 90. The presumption is fortified by s 114 [*Munnalal v. Kashibai*, A 1947 PC 15: 73 IA 223: 51 CWN 175; *Saran v. Abdul Rashid*, A 1948 S 127; *Sarat v. Panchanan*, A 1953 C 471; *Dhanapal v. Govindraja*, A 1961 M 262; *Rameshwar v. Krishna*, A 1969 MP 4; *Venkata Ramarao v. Bhaskarao*, A 1962 AP 28; *Motilal v. Sardar*, A 1976 Raj 40]. Production of certified copy of will purporting to be 30 years old does not warrant execution and attestation. Presumption arises only in respect of original document [*Kalidindi v. Chintalapati*, A 1968 SC 947 (*Munnalal v. Kashibai, sup*; *Basant v. Brijraj, sup*; *Harihar v. Deonarain, sup* **folld**)]. In the case of a copy, if the execution of the will is proved by other evidence, it can prove the contents [*Venkata Ratnam v. Sitaramayya*, A 1950 M 634].

It appears that in English law the presumption also applies to wills and is not affected by proof that the testator died within the thirty years [*Deo v. Wolley*, 1828, 8 B & C 22; *M'Kenire v. Fraser*, 1803, 9 Ves Jr 5 (SIR W GRANT VC, said: "I do not see how a will can be distinguished from a deed"); *Doe v. Deakin*, 3 C & P 402; *Doe v. Passingham*, 2 C & P 440; *Radcliffe v. Parkyns*, 6 Dow 149, 202. See also Tay s 87]. In America also, it has been held that the rule applies to all sorts of documents including wills [see Wig s 2145]. In *Jackson v. Blanshan*, 3 Johns. N Y 292, 295 (Am), it was held that the thirty years are to be computed from the time of the testator's death.

Where a will was more than 30 years old and the only surviving attesting witness spoke against due attestation, genuineness was presumed [*Shiam Sundar v. Jagannath*, A 1925 O 465: 85 IC 558]. If claim is made on the basis of a Will after a long time, the propounder should aver that the will was acted upon, that the executant was in a sound and disposing state of mind, that it was duly attested and that it was the last Will and testament of the testator. [*Kemparmura v. Kalamma*, A 1992 Kant 282, 286].

—Presumption as to Disposing Mind.—The presumption under s 90 applies even to the fact that the testator was in a sound disposing state of mind, for the phrase "duly executed," if effect is to be given to the word "duly", means execution by a person legally competent to execute the document [*Kotayya v. Karancheti*, A 1930 M 744: 59 MLJ 461; *Nidhkaur v. Gian*, A 1938 L 55; see also *Badri v. Anupurna*, 52 IC 837: 6 OLJ 311—CONTRA: *Shankar v. Dhan Devi*, A 1933 L 53]. The Judicial Committee have also held that sound disposing mind can be presumed under s 90 [*Munnalal v. Kashibai, sup*; *Venkatarama v. Bhaskarao*, A 1962 AP 29]. But it does not involve any presumption of correctness of every statement in it which may contain narrative of past events or that the contents of the documents are true, or it has been acted upon [*Gouri Shankar Kour v. State of Orissa*, A 1984 Ori 88, 90: (1984) 57 Cut LT 249; *Ajit Kumar Maulik v. Mukunda Lal Maulik*, A 1988 Cal 196, 199 (DB)].

Presumption as to Ancient Documents. [Great Caution to be Exercised in the Application of the Rule].—[See also *ante*: "*May Presume*"]. There is very considerable danger in accepting documents without due care and caution simply because they purport to be 30 years old [*Ghulam v. Allahdin*, 241 PLR 1913: 19 IC 964: *Jesu Lal v. Ganga Devi*, 81 PR 1913: 20 IC 868]. The rule in s 90 ought to be applied with special care and great caution because nothing can be more easy than, for an unscrupulous person, who is wrongfully in possession and wants to make out a title to it to forge a deed in his own favour more than thirty years old and produce it as the proper custodian, relieving himself of the necessity of proving its execution [*Trailokya v. Shurno*, 11 C 539; *Uggrakant v. Hurro Ch*, 6 C 209, 221; *Gobinda v. Pulin*, 31 CWN 215; *Vaidyanathaswami v. Natesa*, 41 MLJ 310: A 1921 M 452;

Gauhar Bibi v. Ghulam Md, 82 PLR 1909; *Ravjappa v. Nilkanta*, A 1962 Mys 53]; and so when a document is suspicious on the face of it, *eg* on account of erasure and rewriting [*Baldeo v. Bharose*, 95 IC 261: A 1926 A 537], or when the evidence as to handwriting is untrustworthy [*Dy Commr v. Chandra*, A 1947 O 180 FB] there is no presumption. "We are fully aware of the danger of treating old documents as established, merely because they are 30 years old and come from the proper custody" [*per* FARRAN CJ, in *Shk Husain v. Goverdhandas*, 21 B 1, 5].

Ancient documents which are unsupported by any evidence that might free them from the suspicion of being fabricated should not be acted upon [*Sardara v. Akbar*, A 1937 L 17 (a will)]. While on the one hand great care is requisite in applying the presumption, on the other hand it is clear that very great injustice may be perpetrated if an ancient document coming from proper custody is refused by a court capriciously and for inadequate reasons. When the genuineness of a document purporting to be an ancient document is put in issue, the presumption merely takes the place of evidence which would, when a modern document is concerned, be necessary for the purpose of proving due execution, and it must be met and rebutted in the same way as direct evidence of execution, in the case of modern document [*Govinda v. Pratap*, 29 C 740]. It is necessary to consider the evidence external and internal of the document to enable the court to decide whether the presumption should or should not be drawn [*Mansukh v. Trikambhai*, A 1930 B 39; *Kapoorchand v. Lalchand*, A 1975 Raj 178]. The courts should be very careful about raising the presumption in favour of old deeds of *shankalp* which never saw the light of day until produced during the trial of suits in which under-proprietary rights are set up on the basis of those deeds [*Sri Pd v. Special Manager*, 164 IC 494: A 1937 O 194; see *Special Manager v. Lal Bahadur*, A 1937 O 353]. *Imams* are imaginary persons and it is futile to attempt to apply the presumption to *imami* letters [*Mansoor v. Taiyab*, A 1935 N 156].

Where a document is found on independent evidence to have been in existence long prior to the institution of the suit, and also to be genuine, it is not necessary to insist on the testimony of the subscribing witness [*Md Fedye v. Ozeeooddin*, 10 WR 350; see also *Mohesh v. Boodhun*, 18 WR 315]. A *pattah* must not be presumed to be genuine merely from its being ancient. Some evidence may be required to be given of the early existence and publicity of the document [*Allucka v. Kashee Ch*, 1 WR 131]. A statement made before a Collector in a mutation proceeding is a document entitled to be received as evidence if it had been made 30 years ago [*Budree v. Bhoosee*, 25 WR 134].

The court may presume genuineness, but the effect of the presumption may be weakened by circumstances which tend to raise doubts as to its authenticity [*Madan v. Rameswar*, 7 CLJ 615]. When an ancient document was acted upon by the parties, the evidence that the signatures in that ancient document are not that of the executant cannot overthrow the presumption under S. 90 [*Prabhat Chandra Kanrar v. Smt. Rani Bala Kanrar*, A 1989 Cal 202, 204 (DB)]. In practice a court does not generally decide whether it will make the presumption or not untill all the evidence in the case is before it [*Ibrahim v. Ramnarain*, 10 ALJ 87]. The practice in Madras is that when *prima facie* evidence of custody and of date of a document is given, the court generally marks it on the footing that there is sufficient evidence to satisfy its being marked as an exhibit at the stage. It is only subsequently that opponent exercises his right of adducing evidence to show that the presumption under s 90 should not be drawn and the court generally arrives at its conclusion after the evidence on both sides has been given [*Ramien v. Veerappudiayan*, 37 M 455: 22 MLJ 217]. Although there is a presumption under s 90 in respect of a pedigree filed at the time of

settlement proceedings, yet before it can be admitted in evidence it must be shown that it is admissible under cl 5 or cl 6 of s 32 [*Mathura v. Bhulan*, 14 IC 339]. In a case where there were circumstances giving rise to grave suspicions as to the genuineness of a will, the presumption was not drawn [*Gujar v. Mehar*, 34 IC 168: 97 PWR 1916]. The presumption applies to deed executed by an illiterate person whose signature has been made by some other person on his behalf [*Sher Ahmed v. Ibrahim*, 52 IC 314]. Presumption arising from statement of legal necessity in a document 39 years old takes the place of evidence [*Wawan v. Janabai*, A 1951 N 357]. Entries in marriage register maintained in church with respect to payments of *streedhanam* to sisters of deceased in the absence of evidence to rebut presumption about genuineness and motive for making false or imaginary entries were presumed to be genuine [*Acharu v. Rappai*, A 1979 K 34 FB].

Corroboration of Ancient Documents.—Although ancient documents are admissible on proof of production from proper custody, their value as evidence must depend on each case upon the corroboration derived from external circumstances, *eg* from the documents having been produced on previous occasions upon which they would have been naturally produced if in existence at the time or from acts having been done under them [*Boykanta v. Lakhan*, 9 CLR 425. See the observations of FIELD J]. The mere production of an ancient document, unless supported by some corroborative evidence of acting under it, or of modern possession, would be entitled to little, if any, weight. "We feel obliged to say that this reason has not the same weight in this country as it is supposed to have in England, and here less credit should be given to ancient documents, which are unsupported by any evidence that might free them from the suspicion of being fabricated. Even in England this evidence unsupported is of very little weight" [*per* COUCH CJ, in *Luteefoonissa v. Goor Surun*, 18 WR 485]. Where a document is not proved because it is more than 30 years old and there are no witnesses to prove it; it is therefore necessary in order to establish its authenticity to show that it was accompanied by possession [*Bisheswar v. Lamb*, 21 WR 22 PC; see also *Timangavda v. Rangangavda*, 11 B 94 pp 98-99 *ante*]. Where a *kobala* more than 30 years old produced from proper custody was rejected by the lower courts as not genuine because evidence had not been given that it had remained in the custody of the parties after the death of their father and because it had not been filed in any public office—*Held* that it was erroneous to require such proof and to overlook the evidence of possession under the kobala [*Anand Ch v. Muktakeshi*, 21 WR 130].

Ancient document must be corroborated by some evidence. Mere production without some evidence of acting under it, is not entitled to any weight. If it is corroborated by evidence, ancient or modern, it is then presumed to have constituted part of the actual transfer of property mentioned [*Swarnamoyi v. Sourendra*, 42 CLJ 14: A 1925 C 1189; *Special Manager v. Lal Bahadur*, A 1937 O 353]. In America it has been held that there must be some corroborating evidence beyond the mere production from the proper custody [*Smythe v. Inhabitants of New Providence*, 263 Fed 481 and cases cited in Jones s 531].

"Proper Custody".—[Proof and Effect of].—Proper custody has been explained thus by TINDAL CJ, in *Bishop of Meath v. Marquis of Winchester*, 3 Bing NC 198 p 200:—

> "Documents found in a place in which, and under the care of persons with whom such paper might *naturally and reasonably be expected to be found*, are precisely the custody which gives authenticity to documents found within it; for *it is not necessary that they should be found in the best and most proper place of*

deposit. If documents continued in such custody, there never would be any question as to their authenticity; but it is when documents are found in other than the proper place of deposit, that the investigation commences, whether it was reasonable and natural under the circumstances in the particular case, to expect that they should have been in the place where they are actually found; for it is obvious, that, while there can be only one place, of deposit strictly and absolutely proper, there may be various and many that are reasonable and probable, though differing in degree; some being more so, some less; and in those cases the proposition to be determined is, whether the actual custody is so reasonably and properly to be accounted for, that it impresses the mind with the conviction that the instrument found in such custody must be genuine. That such is the character and description of the custody, which is held sufficiently genuine, to render a document admissible appears from all the cases."

'It is not necessary to show the strictest legal custody" [*per* DENMAN CJ, in *Doe v. Phillips*, 8 QB 158, 160]. "It is enough if the persons be so connected with the deed that he may reasonably be supposed to be in possession of it without fraud, no such fraud being proved" [*per* PATTESON J, in *Doe v. Samples*, 8 Ad and E 151 p 154]. "Most of the reported cases are decisions in favour of receiving documents on the ground that they come from proper custody, and the courts ought, I think, to be liberal in this respect" [*per* DENMAN CJ, in *Doe v. Keeling*, 11 QB 884, 889]. "It is not necessary that the custody from which an ancient document comes should be strictly according to legal right; it is enough if it be brought from a place of deposit where in the ordinary course of things such a document, if genuine, might reasonably be expected to be found" [*per* COLERIDGE J, in *Doe v. Peace*, 2 M & R 240].

It would appear from the above and other cases that the custody contemplated is not necessarily that which is strictly proper or legal and that there is *no one custody* which is considered necessary. The document must come from custody which is natural and reasonable under the circumstances. As PARKE, B, said: "It is not necessary to show that it has come from the *most* proper custody; it is sufficient if it comes from a place where it might reasonably be expected to be found" [*Croughton v. Blake*, 12 M & W 205. 208]. S 90 read with the Explanation insist on a satisfactory account of the origin of the possession being given by the party relying upon the document. The custody might not be strictly legal, but the origin must be explained. The court must examine the surrounding circumstances and for that purpose contemporary events assume importance [*Rudragouda v. Basangouda*, A 1938 B 257 : 175 IC 361]. The question of proper custody should be determined by the trial court on the consideration of the particular case and the appellate court would be slow to interfere with the discretion of the trial court in refusing or admitting the document [*Dinamani v. Jagat*, 23 IC 773; *Rajendra v. Gopal*, 7 P 245; *Imam v. Natha*, 134 IC 296: A 1932 L 43; see also *Vidyanathaswami v. Natesa*, 69 IC 289: A 1921 M 452; *Md Usman v. Rahim*, 57 PWR 1918].

Mere production of the document in court is not enough; the custody must be proved by evidence. In *Evans v. Rees*, 10 Ad & E 151, p 154, COLERIDGE, J, said: "If it be necessary to prove the custody of ancient documents, some one must be sworn for that purpose. The person producing them may have had them from a grocer's shop." But in *Doe v. Phillips*, 8 QB 158; *Doe v. Keeling*, 11 QB 884, it has been held that where the party producing the document is also the proper depository, proof of custody is not necessary.

Same:—Proper custody is custody proved to have had a legitimate origin or an origin the legitimacy of which the circumstances of the case render probable. It is not

necessary that the document shall be found in the best and most proper place of deposit. The section insists only on a satisfactory account of the origin of the custody and on the history of its continuance [*Sharfuddin v. Govind*, 27 B 452: 5 Bom LR 144]. If the custody is such that judging, from the document itself and the other circumstances it would naturally be expected to reside, then it ought to be treated as authentic. To establish the authenticity of an ancient document it is not necessary to go behind the possession of the present owner [*C Ghundra v. Brojonath*, 13 WR 109]. The general rule is, that the documents should be brought from such a place as to offer a reasonable presumption, that they were honestly and fairly obtained and preserved for use and are free from suspicion of dishonesty [*Vital Mahadev v. Md Hussain*, 6 BHCR 90].

A document 30 years old does not prove itself in the absence of evidence, that it has come from proper custody in which it would naturally be expected to reside were it a real authentic document [*Gurudas v. Sambhunath*, 3 BLR 258; *Thakoor Pd v. Banamali*, 24 WR 428; *Gour Paroy v. Wooma Soondari*, 12 WR 472; *Furridoonissa v. Ramanoogra*, 21 WR 19; *Grant v. Byjnath*, 21 WR 279; *Sreekant v. Rajnarain*, 10 WR 1; *Md Aizaddi v. Shaffi Mulla*, 8 BLR 26, 29; *Trimbakdas v. Mathabai*, A 1930 N 225; *Ravjappa v. Nilakanta*, A 1962 Mys 53]. It has however been held in a case that where 30 years old documents are produced only as instances of a particular custom and not as foundation of title, they may be admitted even if proper custody is not proved [*Dasondhi v. Milkhi*, A 1930 L 152. The exception is not understood].

An *anumatipatra* deposited with the Collector a few days after the death of the executant and produced from his office 54 years afterwards was held to come from proper custody [*Rajendra v. Gopal*, 4 P 67: A 1925 P 442]. Custody of a document with the manager of the property of an insane person, after he is removed from his office by the court, does not become improper [*Shyama Charan v. Abhiram*, 33 C 511 : 3 CLJ 306 (on appeal 36 IA 148 : 14 CWN 1 : 36 C 1003]. No legal presumption as to its genuineness arises merely upon proof that a document was produced from the records of a court in which it had been filed at some time previous. It must be shown that it had been so filed for the adjudication of some questions which had come under the cognizance of such court [*Gadadhar v. Bhyrub*, 5 C 918; *Sri Pd v. Special Manager*, 164 IC 494 : A 1937 O 194; see also *Rajendra v. Gopal, sup*]. Where a will alleged to have been made in 1899 was first produced in the probate proceeding by a person named in the will, but there was nothing to show that it was produced in that proceeding from proper custody, the presumption under s 90 cannot arise when it is subsequently produced in a proceeding in 1930 [*Ram Piari v. Sardar*, A 1937 L 786].

A private partition *chitta* more than 30 years old was produced by a collectorate officer who deposed that the record-keeper directed him to produce it—*Held* that there was no presumption as there was no proof that it was in the collectorate before production nor did the proof establish that the collectorate custody was the proper custody [*Purna v. Radhika*, 90 IC 722: A 1926 C 370]. Thirty years old compromise petition produced from record room where it has been kept as a part of a decree raises presumption under s 90 [*Sava v. Bhaskar*, A 1972 Or 148]. The possession of the *gomosta* being legally the possession of his master, a deed produced from the possession of the *gomosta* was held to be proper custody [*Hari Chitaman v. Moro*, 11 B 80]: so also the custody of plaintiff's record-keeper [*Ekkwori v. Koylash*, 21 WR 45]. A daughter professed to hold under a *pattah*, more than 30 years old in favour of her father, and was in possession of the land for 40 years eversince her father's death—*Held* that the custody of the *pattah* was natural and proper custody [*Trailokya v. Shurno*, 11 C 359; **follld** in *Lakhan v. Takim*, 39 CLJ 90: 80 IC 357]. Where a bond

was produced in the usual manner by the persons, who claim title under its provisions, and who therefore, were entitled to its possession, it was proper custody [*Devaji v. Godabhai*, 11 WR 35: 2 BLR 85 PC]. *A's* custody of order of Rent Controller fixing fair rent 30 years old sent to *A's* father is proper and presumption under s 90 can be raised [*M N Soi v. New Delhi Mun*, A 1975 D 236 FB].

The proper custody of family Bibles is with a member of the family [*Hubbard v. Lees*, LR 1 Ex 255]; of expired lease is with lessor or his agent or solicitor [*Plaxton v. Dare*, 10 B & C 17; *Ress v. Walters*, 3 M & W 527; *Doe v. Philips*, 8 QB 158] or lessee [*Hall v. Ball*, 3 M & G 242, p 253]. The presumption attaches to a school register produced from proper custody even if the persons responsible for the entries could not be produced [*Parmodh v. Narain*, A 1936 L 104]. Custody of lessees who are in possession of the *mouza* under the documents in question, is proper [*Ramlal v. Satyaniranjan*, 5 PLJ 563: 57 IC 768]. A mother is a proper custodian [*Darshan v. Prabhu*, A 1946 A 67]. Although a *kabja* receipt evidencing delivery of possession passed in execution proceedings to an auction purchaser may not indicate delivery of actual possession, yet when such a receipt is produced after 40 years, the court should in the absence of contrary evidence presume delivery of possession [*Pandurang v. Basappa*, 17 IC 479 (B)]. The dispute is regarding the admissibility of the certified copy of the special vakalat filed in a proceeding and it is 30 years old. The District Court in whose custody the original vakalat was, sent a reply to the requisition, stating that the original vakalat had been destroyed as per rules. A presumption can be drawn in respect of the special vakalat. [*Satyapramoda Thirthaswamulavaru v. Mulla Gunnayya*, A 1982 AP 24, 32].

Explanation: ["Had a Legitimate Origin, or etc, etc."].—This is to provide for those cases in which the custody is not, perhaps, that which it might most reasonably be expected, but yet sufficiently reasonable to constitute such custody *not improper*. Thus in *illustrations* (*a*) and (*b*), the documents are produced from their *natural* place of custody; in (*c*) the documents ordinarily would be with the owner *B*, but under the circumstances *A's* custody was *proper* [Nort p 267]. If the party entitled to the custody of a document be dead, inquiries should generally be made of his personal representatives, and if the document relate to real estate, of the heir-at-law or devisee also; but these steps will not be necessary, should it appear that another party is in possession of the papers of the deceased [Tay s 434]. The section read with the Explanation seems to insist only on a satisfactory account of the origin of the custody and not of the history of its continuance [see *Sharfuddin v. Govind*, 27 B 452: 5 Bom LR 144 *ante*]. The question whether the origin of a document is legitimate or not must depend largely on whether the custody is proper and other surrounding circumstances [see *ante*: "*Proper Custody*" and cases there].

Illustrations.—The illustrations to this section are all cases of deed relating to land, produced by the person in possession or by one to whom the person in possession has committed the custody of the documents. They do not extend to the documents by which a person out of possession strives to reduce the possession actually enjoyed by another to a temporary or limited interest; and it would be very unsafe to presume that the counterpart of a mortgage with possession by *A* to *B*, for 31 years had really been executed by *A* and *B* when brought forward 31 years after its ostensible date, by *A's* son for the purpose of driving *B's* son out of the property of which he was in possession, and should therefore be presumed to be the owner according to s 110. Such a document would be admissible as coming from proper custody [*Doe de Neale v. Samples*, 8 A & E 151]. But a document thus adduced without possession to support and without proof of any act done in connection with

it, would generally have almost no weight in this country as a ground of inference [*Timangavda v. Rangangavda*, 11 B 94, pp 98-99].

Whether Presumption Extends to the Authority to Execute.—The presumption under s 90 is in respect of the genuineness of the document, *ie*, execution, but there is no presumption as to the authority of a person to execute. So when as ancient document purports to be signed by a person on behalf of others, there is no presumption as to the authority of the executant to sign it on behalf of others so as to bind them or those claiming under them; the authority must be proved [*Abilak Rai v. Dallal Rai*, 3 C 557; *Airey v. Stapleton*, 1897, 1 Ch 164; *Kashi v. Ram Narain*, 19 OC 321: 37 IC 138; *Sheo Narain v. Ramlagan*, A 1915 A 393: 13 ALJ 921; *Md Azim v. Special Manager*, A 1936 O 170; *Ram Naresh v. Chirkut*, A 1932 O 227; *Special Manager v. Lal Bahadur*, A 1937 O 353; *Maharam v. Telamuddin*, 16 CWN 567 : 15 CLJ 220; *Tarakeswar v. Srish*, 27 CWN 964]. Thus, where a *kabuliat* more than 30 years old purported to have been executed by two ladies *ba-kalam mmukhtear*,—*Held* that there should be presumption that it was executed on behalf of the ladies [*Ramanikanta v. Bhimnandan*, 50 C 526: A 1924 C 82: *Tarakawshwar v. Srish*, 27 CWN 964]. The Supreme Court has also held that when a document has been signed by a person as an agent there can be presumption of the existence of such authority unless it is proved that he was an agent [*Harihar v. Deo Narain*, A 1956 SC 305, 310: 1956 SCR 1: 35 P 221]. Where in a document there was a line alleged to be the mark of the executant, though it was not described as such, it could not be presumed that the scribe had authority to sign his name and the deed was inadmissible [*Lakman v. Ganga*, 60 IC 96].

Where a document purports to have been executed under a power of attorney, while the actual execution is presumed to have been regular, it must be shown that the attorney was duly authorised [*Airey v. Stapleton*, 1897, 1 Ch D 164] unless perhaps execution was a merely ministerial act [*Airey v. Stapleton, sup* at p 170, *per* KEKEWICH, J; Hals, 3rd Ed, Vol 15, para 641].

S 90 presumes the genuineness of the document but it does not prove the attorney of the person who has made the grant [*Kashinath v. Jagat Kishore*, 20 CWN 643: 23 CLJ 583; *Uggrakanta v. Hurro Ch*, 6 C 209]. The rule was somewhat relaxed in a case when it was held that it does not follow however that it is necessary for the grantee or his successor in interest to establish the authority by direct evidence which may be impossible in the case of an ancient grant. It is open to the court to draw such an inference from surrounding circumstances [*Tarakeswar v. Srish*, 80 IC 628: 27 CWN 964: A 1924 C 236].

In Allahabad, however, a distinction has been drawn between executing a document on the basis of an authority by another document in the nature of a power-of-attorney and the physical act of execution carried out under the express authority and supervision of the executant. In the latter cases where the signature of the executant purports to have been made by a scribe, the authority of the latter is presumed. WALSH, CJ, said: "In our view the expression 'duly executed' must include all the facts, which would be necessary in order to establish due execution before a court by positive evidence, if the obligation of producing positive evidence were not dispensed with by the presumption" [*Skh Bodha v. Sukhram*, A 1925 A 1 FB : 47 A 31 (*Sheonandan v. Ram Lagan*, A 1915 A 393; *Gokul v. Saheb*, 15 ALJ 121 superseded); see *Gangaram v. Chunni*, 99 IC 759: A 1927 R 765; *Balkaran v. Mt Dulai*, 49 A 55: 97 IC 292 : A 1927 A 237; *Haji Shk v. Sukhram*, 73 IC 989: A 1923 A 420; *Bhairon v. Abalak*, A 1934 A 529; see also *Bhim v. Mani*, 80 IC 457: A 1924 O 265; *Sher Ahmed v. Ibrahim*, 52 IC 314]. Where there exist signatures of all

executants though under the pens of others and at behest of each one of the executants and there is also attestation by witnesses though at the behest of the executants presumption of genuineness arises [*Gulzarilal v. Bhagwati*, A 1969 Raj 11 **following** *Shk Bodha v. Sukhram, sup*]. The distinction drawn in *Shk Bodho v. Sukhram, sup*, appears to be reasonable as all documents by illiterate persons are signed for them in their presence by the scribe at their request and the purpose of s 90 will be defeated if presumption is excluded in such cases.

In the cases in which it has been held that the presumption does not apply to the authority to execute, the rule of thumb in s 90 appears to have been applied with unnecessary strictness. Such a construction would strike at the usefulness of the rule and ignore the object for which it has been introduced; for, the same lapse of time which has resulted in the unavailability of evidence of the witnesses to the execution, will have removed the evidence of authority to execute. If, however, evidence of authority to execute is available, it should be produced and the case for presumption would disappear. In America the general consensus is that a mere authority as agent or attorney will be assumed to have existed. Existence of a power-of-attorney presumed [*Reuter v. Stuckart*, 181 Ill 529; *Doe v. Phelps*, 9 John N Y 169, 171]. The rule covers "in most cases" the authentication of a power under which it purports to be made [*Watrous v. McGrew*, 16 Tex 506, 513, cited in Wig s 2144].

Whether Presumption Applies to Copies.—The earliest case is of 1880 where a will more than 30 years old being lost, a copy was admitted without proof of the execution of the original will [*Khetter Ch v. Khetter Paul*, 5 C 886]. Since then it was held in many cases that the presumption might be applied to copies [See *Ishri Pd v. Lalli Jas*, 22 A 294; *Sawan v. Karim*, 93 PR 1910; *Ponnambalath v. Karoth*, 21 MLJ 981; *Nanu Nair v. Kantan*, 29 MLJ 772; *Gopinath v. Moti*, 30 NLR 155; *Jakkam Reddi v. Subramania*, 16 LW 839; *Subramanya v. Seethaya*, 46 M 92 FB; *Dwarka v. Ramanand*, 41 A 592; *Raj Bahadur v. Bindeshri*, 5 OLJ 219; *Manavikraman v. Nilambar*, 31 IC 579; *Sarju v. Ram Harakh*, 18 IC 250; *Banwari v. Dwarkanath*, 29 CLJ 577; *Chudasama v. C*, 46 B 32; *Brij v. Basant*, A 1929 A 561; *Gaya v. Jaswant*, A 1930 A 550; *Khageswar v. Someswar*, 33 CLJ 382]. In the case of a private copy, proof was necessary that it was compared with the original [*Hota Veera v. Venkata*, 73 IC 66: A 1923 M 674]. The view in the decisions above that presumption of execution applies also to copies of ancient documents under s 65 (c) and s 90, appears to have found some support from the cases in *Luchman v. Puna*, 16 IA 125: 15 C 753 and *Shahzadi Begam v. Secy of S*, 34 IA 194: 34 C 1059.

The decision in *Khetter Ch v. Khetter Paul*, 5 C 886, *ante*, was **disapproved** in *Shripuja v. Kanhayalal*, 15 NLR 192 : 53 IC 947; *Nathuram v. Jagannath*, 16 NLR 106: 55 IC 426; see also *Appathura v. Gopala*, 25 M 674. The Judicial Committee upon a review of the authorities did not accept *Khetter Ch v. Khetter Paul, sup* and other decisions in which the presumption was held applicable to copies, as sound. It was held that in view of the clear language of s 90 (*viz* "*document is produced*"), it requires the production of the *particular* document to which the court may make the statutory presumption. If the document produced is a copy, admitted under s 65 as secondary evidence, and it is produced from proper custody and is over 30 years old, then the signature authenticating the copy may be presumed to be genuine (as was done in *Seethayya v. Subramanya*, 56 IA 146 : 33 CWN 578: A 1929 PC 115). But production of a copy is not sufficient to justify the presumption of the due execution of the original under s 90 [*Basant v. Brijraj*, A 1935 PC 132: 62 IA 180: 57 A 494: 39 CWN 1057]. The presumption regarding old documents is not available, where a certified copy of an old document is produced [*Shiolalsing Gannusing Rajput v. Shankar Motisam Nale*, A 1984 Bom 19, 21]. It is not possible to bring necessary

evidence in respect of a document which is 80 years and 73 years old. The raising of presumption in regard to the due execution and proof of document is discretionary [*Ali Hasan v. Matin Ilah*, A 1988 All 57, 63 : (1988) All VYR 174]. The Supreme Court has affirmed this view [*Sital v. Santram*, A 1954 SC 606; *Harihar v. Deonarin*, A 1956 SC 305: 1956 SCR 1: *Tilak v. Bhim*, 1969, 3 SCC 367; *Shivlal v. Chetram*, A 1971 SC 2342].

The Privy Council decision has changed the current authorities and since then it has consequently been held that the production of a copy or certified copy does not raise the presumption under s 90 [see *Mumtaz v. Brahmanand*, A 1936 A 298; *Gopal v. Sri Thakurji*, A 1936 A 422; *Keolapati v. Harnam*, A 1938 O 398; *Kahna v. Govt*, A 1939 L 458; *Jiwan v. Kesho*, A 1939 L 273; *Asafuddaula v. Ram*, A 1940 A 74; *Harnam v. Offl Receiver*, A 1941 L 400; *Amjad v. Raisunnissa*, A 1941 O 433: *Ramu v. Kashi*, A 1944 A 5; *Vithoba v. Shrihari*, A 1945 B 319; *Subodhi v. Raghu*, A 1962 Or 40; *Manilal v. Surat Mun*, A 1978 G 193].

The position since the Privy Council decision is that the presumption under s 90 does not apply to a copy (certified or private) though 30 years old, but if a foundation is laid for the admission of secondary evidence under s 65 by proof of loss or destruction of the original and a copy which is 30 years old is produced from proper custody, then only the signatures authenticating the copy may under s 90 be presumed to be genuine. But the production of the ancient copy does not raise the presumption of the due execution of the original under s 90. The execution of the original has still to be proved by circumstantial or presumptive evidence or by some other circumstances [see *Lakhi Barua v. Padma Kanta Kalita*, A 1996 SC 1253, 1256, 1257; *Venkataratnam v. Sitaramayya*, A 1950 M 634; *Kotiswar v. Paresh*, 60 CWN 821 *post*; *Ramanna v. Sambamoorthy*, A 1961 AP 361; *Dhirendra Singh v. Dhanai*, A 1983 All 213, 220; *Harihar Paland v. Sudhir Kumar Paland*, A 1988 Cal 68, 72 : (1987) 91 Cal WN 958 (DB)]. In the case of certified copies resort may sometimes be made in appropriate cases to s 57 (5) Registration Act [*Karuppänna v. Kolandaswami*, A 1954 M 486 *post*] or to s 60(2) of Registration Act as to admission of execution before the registrar [*Kashibai v. Vinayak*, A 1956 B 65 *post*; *Putti Lakshmayya v. Garlapati*, A 1958 AP 720]. As to how far registration is proof of execution, see *ante* s 67: "*Whether registration is proof of execution*".

The position therefore is that when a thirty years old document is lost and a certified copy or other copy is produced, it can prove the contents but not execution [*Kalu v. Bapurao*, 1949 Nag 521: A 1950 N 6; *Motishah v. Abdul Gaffer*, A 1956 N 38; *Harnam v. Offl Rec*, A 1941 L 400], and execution of the original must be proved in the ordinary way, at least by circumstantial evidence [*Venkataratnam v. Sitaramayya*, A 1950 M 634: 1950, 1 MLJ 720; *Putti Lakshmayya v. Garlapati*, A 1958 AP 720 (these are cases of certified copies of a will)]. In a later case it has been observed that *Venkataratnam's* case did not consider the effect of s 57(5) Registration Act and where a case for admission of secondary evidence is made out, a registration certified copy of a particular deed is admisible without any further proof. In the case of registration copies what is applicable : not s 90 but s 57(5) Registration Act [*Karuppanna v. Kolandaswami*, A 1954 M 495; see *Kashibai v. Vinayak, post*].

Reviewing many earlier authorities it has been observed that the legal position created by *Basant v. Brijraj, ante* is by no means clear, but seems that the effect is that the execution and contents of a lost document cannot be proved merely by the production of a copy, which itself is over 30 years old; but the copy considered with the other evidence, may give rise to a presumption as to the genuineness of

the original [*Hansraj v. Banarsi Lal*, A 1937 L 920; see also *Shamsunnissa v. Ali Ashgar*, A 1936 O 87; *Raghubir v. Sukhraj*, A 1939 O 96]. In Bombay it has been held that though production of a certified copy does not raise any presumption of execution under s 90, yet when the document is registered such proof of execution is to be found in the certified copy itself, *viz* the endorsement of the sub-registrar. The Privy Council case in *Basanta v. Brijraj, sup* was distinguished on the ground that the document dealt with was unregistered [*Pandappa v. Shivalingappa*, A 1946 B 193 : 47 Bom LR 962]. In another case the distinction between s 90 and s 60 Registration Act has been pointed out. In the case of a certified copy of a registered document (whether ancient or not) it would be competent to the court to hold under s 60(2) Registration Act that the execution of the document had been admitted and the other things were in order. But in the case of a certified copy of a mortgage deed (which is 80 years old) this presumption under s 60 would not be of material assistance as valid execution in such a case also requires proof of attestation. In the instant case, however, plaintiff was allowed to avail of the presumption under s 89 for non-production of the mortgage bond by the defendant [*Kashibai v. Vinayak*, A 1956 B 65].

The presumption was however applied to a copy of an ancient document on the ground that it contained a statement that it was a true copy and bore the signature of the person who signed the original. The Privy Council case *ante* was distinguished [*Sevugan v. Srimathu*, A 1940 M 273 : 1939 MWN 841]. The presumption of correctness was applied to a copy admissible under s 65 [*Gurdit v. Siri*, A 1941 Pesh 89]. In spite of the strict provisions of s 90 there may be circumstances under which a copy produced would be available not only to prove the existence of the original document but of the terms thereof as well [*Kotiswar v. Paresh*, A 1956 C 205 : 60 CWN 821].

In a Nagpur case it has been observed that the presumption cannot apply to a copy that is not itself 30 years old [*Ganpatrao v. Nagorao*, A 1940 N 382]. A certified copy of an ancient document cannot be admitted under s 90 without the requisite proof. But where a copy of a document is duly proved, and the original is proved to be lost, the copy can be admitted in evidence [*Mahadeo v. Secy of S*, 20 NLJ 209].

English Law.—The decision of the Judicial Committee in *Basant v. Brijraj*, *ante* is based on the wording of s 90 and it cannot be helped. But if the presumption is not applied to old copies of lost documents under any circumstances, the Necessity principle on which the presumption relating to ancient document rests is given away to a certain extent and in many cases it will be hard or impossible to give the usual proof of execution. In England copies of ancient document are sometimes taken as evidence along with other circumstances. CHLEF BARON GILBERT says: "Where the possession has gone along with any deed for many years, there a very old copy of the deed may be given in evidence, with proof also that the original is lost; and that is according to the rule of the civil law, '*si vetustate temporis et judiciaria cognitione sint roboratae*'; for possession could not be supposed to go along in the same manner unless there had been originally such a deed and so executed as the copy mentions" [Gilbert Ev 97]. Wigmore says: "Where the alleged ancient *original is lost*, and an *ancient purporting copy* is offered, made by a private hand, and the purporting maker being unknown or deceased, it seems to have been long accepted that this suffices, and that the copy may be received under the ancient document rule [Wig Ev s 2143]. When the alleged ancient *original* is *lost* (or otherwise unavailable) and a purporting *official record* is offered, made more than thirty years before, and certifying the deed's contents and execution, the case is stronger than the preceding one [See Wig Ev s 2143].

Oral Evidence of Lost Ancient Documents.—Where the alleged ancient *original* is *lost*, and proof of its contents (including the purporting signatures) is offered to be made by one who having seen it before its loss, *recollects its contents or took a copy*, the difficulty in assuming genuineness is that the element of unsuspicious appear-ance, can never be furnished, since the original is lacking; perhaps also the other element of natural custody, will usually also be lacking. It may be said to be doubtful therefore, whether a court would consider the rule satisfied [Wig Ev s 2143].

Consideration.—Passing of consideration of a 30 years old document should be taken as proved if the direct evidence is not as strong as might be expected in case of recent transaction [*Jagna Sanyasiah v. Mycherla*, 70 IC 738]. When dealing with document 35 years old, the mere fact that proof of consideration is not satisfactory, is by itself a slender ground for holding that it was unreal [*Sailaja v. Risheecase*, 51 C 135 : 39 CLJ 380 : A 1924 C 693].

U.P. Amendment.—There is no other effect of the amendment of s 90 except that the presumption is to be made in respect of 20 years' old document and the same can also be extended to certified copies [*Sardaran v. Sunderlal*, A 1968 A 363; *Babu Nandan v. Bd of Rev*, A 1972 A 406]. Presumption under s 90A applies only if the original shows on the face of it the name of the person by whom it purports to have been executed. The presumption under s 90-A is with regard to the execution only and so it is narrower than s 90 under which a presumption may be made as to the handwriting of a person by whom it purports to have been written [*Amrita v. Sripat*, A 1962 A 111]. Presumption (of genuine execution of 20 years old registered document) cannot arise on production of certified copy when it forms basis of suit or defence [*Omprakash v. Bhagwan*, A 1974 A 389; *Babu Nandan v. Bd of Rev, sup*; *Ram Jos v. Surendra*, A 1980 A 385 FB (*Omprakas Bhagwan*, A 1974 A 389 **overruled**); *Smt Vidya Devi v. Nandkumar*, A 1981 All 274, 278; *Bhaggal v. Rangi Lal*, A 1986 All 163, 165].

*[*S. 90A. **Presumption as to electronic records five years old.**—Where any electronic record, purporting or proved to be five years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the digital signature which purports to be the digital signature of any particular person was so affixed by him or any person authorised by him in this behalf.*

Explanation.—Electronic records are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they naturally be; but no custody is improper if it is proved to have had a legitimate origin, or the circumstances of the particular case are such as to render such an origin probable.

This *Explanation* applies also to section 81A.]

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Presumption as to electronic record five years old [S. 90A].—Where an electronic record purports to be or is proved to be five years old and is produced from any custody which the court considers proper in the particular case, the court may presume that the digital signature which purports to be the digital signature of any person was so affixed by him or by any person authorised by him in that behalf.

Defining the expression "proper custody" the explanation to the section says that electronic records are said to be in proper custody if they are in the place in which and under the care of the person with whom they would naturally be; but that no custody is improper if it is proved to have had a legitimate origin or the circumstances of the particular case are such as to render such an origin probable. This explanation also applies to the presumption under S. 81A as to Gazettes in electronic forms.

§ For text of the Information Technology Act, 2000, see Stop Press pages in Volume 1 after General Contents.

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* S. 90A subs. by the Information Technology Act, 2000.