CHAPTER [VI]

OF THE EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE

[1]**S. 91. Evidence of terms of contracts, grants and other dispositions of property reduced to form of document.**—When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

Exception 1.—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 is appointed need not be proved.

[2]*Exception 2.*—Wills admitted to probate in [3][India] may be proved by the probate.

Explanation 1.—This section applies equally to cases in which the contracts, grants or dispositions of property referred to are contained in one document and to cases in which they are contained in more documents than one.

Explanation 2.—Where there are more originals than one, one original only need be proved.

Explanation 3.—The statement, in any document whatever, of a fact other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact.

Illustrations

(*a*) If a contract be contained in several letters, all the letters in which it is contained must be proved.

(*b*) If a contract is contained in a bill of exchange, the bill of exchange must be proved.

(*c*) If a bill of exchange is drawn in a set of three, one only need be proved.

(*d*) *A* contracts in writing with *B*, for the delivery of [4][indigo] upon certain terms. The contract mentions the fact that *B* had paid *A* the price of other [4][indigo] contracted for verbally on another occasion.

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1. "VII" in the Ceylon Evidence Ordinance. Ch VI contains ss 90A-90F corresponding to the sections in the Bankers' Books Evidence Act (see APP C, *post*) with some modifications.
2. In Burma the following has been substituted:—"*Exception 2.*—Wills may be proved by any probate thereof having effect in the Union of Burma." (AO 1937; AO 1948).
3. Substituted successively by AO 1948; AO 1950 and Part B States (Laws) Act, 1951.
   In PAKISTAN "Pakistan" substituted.
   In CEYLON "the Island" substituted.
4. In Ceylon "plumbago" substituted.

Oral evidence is offered that no payment was made for the other [4][indigo]. The evidence is admissible.

(*e*) *A* gives *B* a receipt for money paid by *B*.

Oral evidence is offered for the payment. The evidence is admissible.

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COMMENTARY

Principle and Scope.—This and the following sections deal with the exclusion of oral by documentary evidence. It has been seen that the contents of all documents must be proved by primary evidence which means the document itself in original, except in those cases in which secondary evidence is admissible (v ss 61-65). S 91 is based on the best evidence rule, *viz* that the best evidence existing and attainable must always be given. The reason for the rule has already been explained (v ss 60, 61 *ante*). When fact is required to be proved by oral evidence, the evidence should be direct (s 60); so when the transaction sought to be proved has been reduced to the form of a document, that document must, if available, be produced. S 91 therefore lays down that when the terms and conditions of a contract, or of a grant, or of any other disposition of property have been set out in writing by agreement of parties and in the case of all documents required by law to be in writing, the document is intended to be a record of the transaction and therefore no other evidence shall be given to prove the transaction except the document itself or secondary evidence thereof (v ss 65, 66) when such evidence is admissible. Oral evidence is excluded equally when a document does exist and when the law requires the matter to be reduced to the form of a document. But where a document in writing is not a fact in issue and is merely used as evidence to prove some fact, oral evidence *aliunde* is admissible (v Expln 3). Thus, payment of money may be proved by oral evidence although a receipt was granted.

S 92 (with some exceptions) deals with the *exclusion* of extrinsic evidence to contradict, vary, add to or subtract from the terms of such a document. The rule on which both the sections are founded is that not only should the document embodying the terms of a contract, or grant &c between the parties be produced in proof of it; but that the terms deliberately entered into and reduced to writing should not be allowed to be varied, contradicted, added to or subtracted from. The exceptions to the latter rule are to be found in the provisos, to s 92. Extrinsic evidence is also admissible for the interpretation of documents, *eg* to explain latent ambiguities, the meaning of illegible characters, &c (ss 96-98).

The rule in s 91 which deals with the *exclusiveness* of documentary evidence and that in s 92 relating to its *conclusiveness*, are often loosely referred to as the "*parol evidence*" rule. In Stephen's Digest they are dealt with under one head (Art 90); in the Evidence Act they are treated as separate rules (ss 91-92), and since neither the excluding principles nor the exceptions to the rules are quite identical, this seems the preferable course (Phīp 8th Ed p 556). The distinctions between s 91 and s 92 have been set out in a tabular form (see *post*).

S 92 applies to two kinds of documents: (*1*) Documents reducing to writing the terms (*a*) of a contract, or (*b*) of a grant, or (*c*) of any other disposition of property, and (2) of all documents required by law to be in writing. (As to whether the section applies to *all* kinds of grants or grants relating to property only, see *post*). As to cases which are required by law to be reduced to writing and registered, no other evidence

of the transaction is admissible. Thus, if a mortgage is not evidenced by a registered instrument, there is no question of secondary or other documentary evidence. It cannot be proved by other forms of evidence such as entries in the revenue register or oral evidence, although the fact of the entries is a relevant fact within s 35 [*Mg Tun v. Mg Khan*, 2 R 441 : A 1925 R 61]. Documents relating exclusively to facts other than those specified above, do not come within the purview of the section, and oral evidence is therefore admissible. In other words, when a document is meant merely as a collateral or informal memorandum of a transaction and not as a document embodying the three kinds of facts [terms (*i*) of a contract, or (*ii*) of a grant, or (*iii*) of any other disposition of property], oral evidence is not excluded. This has been made clear by *Explanation* 3. For instance, payment of money may be proved by oral evidence although receipt was given (*v illus* (*e*). See also *Illustration* (*d*), where the fact of payment is allowed to be proved by oral evidence as it is a fact independent of the contract in writing. S 10A Dekkhan Agricultural Relief Act overrides not only s 92 but s 91 when necessary [*Basappa v. Tayawa*, A 1930 B 79; see however, *Gurunath v. Mallappa*, 52 Bom LR 288].

Oral evidence to prove contents of a licence deed is not admissible in evidence. [*Rubyana v. State of Maharashtra*, 1996 Cri LJ 148, 151 (Bom)]. It is only when the written contract does not contain the whole of the agreement between the parties and there is any ambiguity then oral evidence is permissible to prove the other conditions which also must not be inconsistent with the written contract. [In *Electricity Board v. N. Raju Reediar*, A 1996 SC 2028, 2027]. Settlement contemplated by section 2(p) of the Industrial Disputes Act and Rule 58 of the Industrial Disputes (Central) Rules is a written settlement and not an oral settlement. A written settlement arrived at between the parties cannot be varied or modified except by a written settlement or by a written memorandum duly signed by the parties incorporating the terms of the oral agreement. [*Fabril Gasosa v. Labour Commissioner*, A 1997 SC 954, 957, 958]. The sketch plan of scene of the accident drawn by the IO is not required to be reduced in writing and does not come within the restriction of sections 91 and 92 of the Act [*Chan Sau Chuan v. Choi Kong Chaw*, (1991) 1 CLJ 297 (Kuala Lumpur HC)].

The *first Exception* rests on the old presumption that when a person acts in an official capacity, it is presumed that he was duly appointed (*cf* s 79 last portion). As to the *second Exception*, a probate being the only proof of a will, it is considered as primary evidence. *Explanation 1* points out that a contract, grant &c may be embodied in one document or more, *eg* a contract may be gathered from several letters [*v illus* (*a*)] and all the letters are to be produced in proof of it. *Explanation 2* says that where the originals are more than one [*v illus* (*b*) the case of bills of exchange, of which three are usually executed] one only need be proved. The question whether a contract, or a grant &c has been reduced into writing and what are its terms is one of fact. S 144 points out the manner in which the rule of exclusion in ss 91, 92 may be enforced by the parties.

S 91 deals with contracts, grants, &c as well as unilateral documents, *eg* wills, power-of-attorney, depositions of witnesses &c. It applies to strangers as well as to parties among whom a transaction is made. S 92, however, applies only to "the parties to any instrument". As to the difference between s 91 and s 64, see *ante*, s 64: "*Principle and scope*".

S 91 refers only to the method of proof of the terms of a contract, grant or disposition of property; it does not exclude other proof of the transaction itself [*Makhduman v. Syed Altaf*, 80 IC 187 : A 1922 P 222]. The method or mode of proof is a question of procedure only and may therefore be waived [*Binani Properties (P) Ld v. M*

Gulamali, A 1967 C 390]. The language of s 91 is clear and definite. If the writing is inadmissible for any reason, the promisee must lose his remedy, if independently of the document he has no complete cause of action [*Ramsaran v. Tulsi*, 67 IC 565 : A 1922 L 417].

Exclusion of Oral by Documentary Evidence.—It is a cardinal rule of evidence, not one of technicality, but of substance, which it is dangerous to depart from, that where written documents exist, they shall be produced as being the best evidence of their own contents [*Dinomoyee v. Roy Luchmiput*, 7 IA 8, 15 : 6 CLR 101]. It is likewise a general and most inflexible rule, that whenever written instruments are appointed, either by the requirement of law, or by the contract of the parties, to be the repositories and memorials of truth, any other evidence is excluded from being used, either as a *substitute* for such instrument, or to *contradict or alter them*. This is a matter both of principle and policy; of principle because such instruments are, in their own nature and origin, entitled to a much higher degree of credit than parol evidence; of policy, because it would be attended with great mischief if those instruments, upon which men's rights depended, were liable to be impeached by loose collateral evidence. The same principle applies where private parties have, by mutual compact, constituted a written document, the witness of their admission and intentions. Where the terms of an agreement are reduced to writing, the document itself, being constituted by the parties as the exposition of their intention, is the only instrument of evidence in respect of that agreement, which the law will recognise so long as it exists for the purpose of evidence [*Kashee Nath v. Chandi*, 5 WR 68, 69 FB : BLR Sup Vol 383 (Starkie on Evidence, pp 648, 655 cited in *ibid*); *Subramanian v. Luchman*, 50 IA 77 : A 1923 PC 50 : 50 C 338; *Jivan Das v. Framji*, 7 BHC 45, 78; *Benarasi v. Bhikari*, 3 A 717, 721; *Sumati v. Narendra*, A 1975 Gau 43].

The general rule laid down in s 91 is subject to the important exceptions contained in ss 95 and 97 of the Act. Where land with certain boundaries is sold and is wrongly described as containing a certain area, the area is regarded as a mere misdescription and does not vitiate the deed. The maxim *falsa demonstratio non nocet* applies [*Paruppa v. Periathambi*, 30 M 397 : 2 MLT 336. See *post* s 95].

Best Evidence Rule.—Another rule which governs the production of evidence, requires that *the best evidence, of which the case in its nature is susceptible*, should always be presented. This rule does not demand the greatest amount of evidence which can possibly be given of any fact; but its design is to prevent the introduction of any, which, from the nature of the case, supposes that better evidence is in the possession of the party. It is adopted for the prevention of fraud; for when better evidence is withheld, it is only fair to presume that the party has some sinister motive for not producing it, and that, if offered, his design would be frustrated [*Strother v. Barr*, 5 Bing 151; *Brewster v. Sewell*, 3 B & Ald 302; *Twyman v. Knowles*, 22 LJCP 143; *Clifton v. U C*, 45 US 242]. The rule thus becomes essential to the pure administration of justice ..... Every title by deed must be proved by the production of the deed itself, if it be within the power of the party; for, this is the best evidence of which the case is susceptible; and its non-production raises a presumption that it contains some matter of defeasance [Tay s 391]. The cases which most frequently call for the application of the rule that the best evidence of which the case is susceptible must always be produced, are those which relate to the *substitution of oral for written evidence*; and the general rule of law with respect to this subject is that *the contents of a written instrument, which is capable of being produced, be proved by the instrument itself, and by parol evidence* [*Queen's Case*, 2 B & B 289 (HL); Tay s 396; Hals 3rd Ed Vol 15 para 483].

"The cases under the rule requiring the contents of a document to be proved by the document itself, if its production be possible, may be arranged in three classes; the *first* class relating to those instruments which the law requires to be in writing; the *second*, to those contracts which the parties have put in writing; and the *third* to all other writings, the existence or contents of which are disputed, and which are material to the issue [Tay s 398].

"*First*, oral evidence cannot be substituted for any *instrument which the law requires to be in writing* ..... The law having required that the evidence of the transaction exists, and is in the power of the party [Tay s 399].

"*In the second place*, oral proof cannot be substituted for the *written evidence of any contract which the parties have put in writing*. Here the written instrument may be regarded, in some measure, as the ultimate fact to be proved, especially in the case of negotiable securities; and in all cases of written contracts, the writing is tacitly considered by the parties themselves as the only repository and the appropriate evidence of their agreement. The written contract is not collateral, but is of the very essence of the transaction; and consequently in all proceedings, civil or criminal, in which the issue depends in any degree upon the terms of a contract, the party whose witnesses show that it was reduced to writing must either produce the instrument, or give some good reason for not doing so [Tay s 401].

"In the *third place*, oral evidence cannot be substituted for *any writing, the existence or contents of which are disputed*, and which is *material to the issue* between the parties and is not merely the memorandum of some other fact. Thus, a witness cannot be asked whether certain resolutions were published in the newspapers (*R v. O'Connell*, 1843 Arm & T 163), neither can he be questioned as to the contents of his account-books: but in both these cases the papers and the books, as being the best evidence, must be produced. So, the primary proof of the publication of an opera is the production of the printed music, and the fact of publication was not allowed to be proved in the first instance by a witness who had merely seen the opera in print, and heard parts of it played in society (*Boosey v. Davidson*, 18 LJQB 174. But see *Geralopoulo v. Wieler*, 20 LJCP 105). So, doubts have been entertained as to whether the contents of handbills, written by dictation at a meeting of conspirators could be proved by oral testimony (*R v. Thistlewood*, 33 How St Tr 756-59). So, a plaintiff cannot be asked on cross-examination whether his name is written in a certain book described by the questioner, unless a satisfactory reason be first given for the non-production of the book itself [*Darby v. Ouseley*, 25 LJ Ex 227; Tay s 409].

The third class of cases is dealt with in s 64, which provides that documents must be proved by primary evidence except in the cases mentioned in the sections following it, [see notes there and the observations of LORD TENTERDEN in *Vincent v. Cole*, *ante* p 598].

Writings outside the three classes—are treated as exceptions to the rule and come under *Explanation 3* and do not exclude oral evidence. [See *post* and heading "*Written document collateral to the question in issue need not be produced*"].

[*Ref Tay ss 398-408; Best s 223; Steph Art 90, 92; Roscoe N P 1-4; Ros Cr Ev 2-4; Phip 8th Ed pp 556-63*].

"In Proof of".—The term "in proof of the terms" must carry with it the term "in disproof of it" because if evidence were to be admitted on one side it would have to be admitted on the other [*Rambohor v. Chaturghun*, A 1935 A 58].

S 91 Allows No Exception in Favour of Parol Admissions of Contents of Documents.—In English law an exception is made in favour of parol admissions of a party as to the contents of a document and acts amounting to admissions and they are admissible without production of the document (see Tay s 410). But the exception is not applicable here as under s 22 oral admissions of the contents of documents are not relevant until the party shows that he is entitled to give secondary evidence of the contents of the document [see *ante* s 22; s 65 cl (*b*) and s 144]. The rule in *Slatterie v. Pooley*, 6 M & W 644 on which the exception is based has not been adopted in s 22 (*ante* s 22).

"The Terms of a Contract, or of a Grant, or of Any other Disposition of Property".—If the facts referred to by the above phrase are three distinct things, *viz* (*i*) contract, (*ii*) grant, (*iii*) or any other disposition of property, then the "grant" is not limited to grants of property only but embraces all other grants. If, however 'grant' refers to property, a grant not relating to property does not come within the purview of the section. The language of the section is such that it is possible to argue that 'grant' is not restricted to property only. The question was raised in *Somasundara v. Durasiami*, 27 M 30, where the document was an authority to adopt, but was not decided. That case was followed in *Santhana v. Santhana*, 1913 MWN 199 : 18 IC 1006, where it was held that a document which gives power to a widow to adopt and contains also a provision that in the case of dispute between the widow and the boy, the widow should take a life interest in the property, and that it should go to the adopted son after her death, is not a testamentary disposition but is an authority to adopt which requires registration. S 91 restricts oral evidence in respect of the terms of a Contract. Consideration of a contract cannot be said to be a term of the contract. Even if one kind of consideration is set out in a document another kind of consideration can be proved [*State Bank of India v. Premoo Saw Mill*, A 1984 Guj 93, 96 : 1983 Guj LW 829].

A receipt for payment of money is not a contract, or grant or disposition of property and oral evidence of its contents is admissible [*Sardar v. Iqbal*, 80 IC 57 : A 1925 O 257; see *post*]. The expression "terms" in ss 91 and 92 has no application to a provision in the nature of a condition precedent to the very existence or formation of a contract [*P R Bhatt v. V R Thakkar*, A 1972 B 365]. The word 'terms' is applicable to both classes of documents mentioned in s 91 [*Viraragavalu v. Vellamanda*, 95 IC 584 : A 1926 M 872]. Document must necessarily mean 'any document' relating to the terms of contracts, grants and other depositions of property' as intended by the very title of Section 91. A police report is certainly not 'a document' relating to any terms of contracts, grant or deposition of property [*Tng Tien Chai v. Pendakwa Raya*, Criminal Arrest No 62-51-93 and 62-52-93 dt. 30.1.1995 (Kuala Lumpur HC) **dissenting** from *Ah Mec v. Public Prosecutor*, (1967) 1 Malayan LJ 221]. See also *Apren Joseph v. State of Kerala*, A 1973 SC 1. As to whether the amount of consideration for a contract is one of its terms, see *post* s 92: "*Incorrectness of Recital Amount of Consideration*".

It should be noted that the existence of the fact of a contract or grant is quite distinct from the proof of the terms of the contract or grant and the former may be proved by independent evidence without the document (*post*: "*Existence of contract, grant, fact of partition etc, as distinguished from its terms*"). Further s 91 refers to terms of a contract and oral evidence is not excluded to prove that there was no contract at all (*post*: "*S 91 or S 92 does not exclude extrinsic evidence to show ..... no contract*"). Thus, where the existence of a sale is in question and not its terms, oral evidence is not inadmissible [*Viraragavalu v. Vellamanda*, 95 IC 584 : A 1926 M 872]. A contract for sale is not a matter which is required by law in writing [*Maung*

Myat v. Ma Dun, 2 R 285; *Mg Tun v. Mg Sein*, 7 R 414 : A 1929 R 293]. S 49 Registration Act must be read with s 17 of that Act and s 91 Evidence Act and a fair interpretation does not preclude an unregistered document which is required by law to be registered from being given in evidence as to the terms of the contract for sale. Such a contract itself does not create any interest or charge on the property [*Mg Tun v. Mg Sein, sup*]. A *pyatpaing* which reported an actual sale could not be considered as a document recording the terms of a contract under s 91 [*Mg Kin v. Mg Tun*, 5 R 679 : A 1928 R 53]. An agreement to refer to arbitration is a contract within the meaning of s 91 [*Radha Kishan v. Sapattar*, A 1957 A 406 **dissenting** from *Babu Ram v Lala Ram*, A 1929 A 415]. A Mahomedan divorce is not a disposition of property, nor is it a matter required by law to be in writing. Where a divorce deed is unstamped or its loss is not proved, the divorce can be proved by oral evidence [*Halima v. R*, A 1947 L 306].

As to the meaning of the word "grant" as used in legal transaction in India it has been held that it is not to be used in its technical English meaning of a conveyance at common law of remainders, reversions and incorporeal hereditaments which do not lie in livery or of which livery could not be given [*Sashi Bhusan v. Jyoti Pd*, 44 IA 46 : 21 CWN 377 : 44 C 585 : A 1916 PC 191]. As to grant, see *Harinarayan v. Sriram*, 37 IA 136 : 14 CWN 746 : 37 C 723; *Durga Pd v. Brajanath*, 39 IA 133 : 16 CWN 482 : 39 C 696. As to construction of Crown grants see *Secy of S v. Srinivas*, 40 M 268 FB : 31 MLJ 483; *Rajendra v. Rani Raghubansa*, 45 IA 134 : 40 A 470 : 23 CWN 101 : A 1918 PC 25. As to construction of mineral grants, see *Raghunath v. Durga Pd*, 46 IA 158 : 47 C 95 : A 1919 PC 17 : 23 CWN 914. As to construction of *jagirs*, see *Ram Narayan v. Ram Saran*, 46 IA 88 : 46 C 683 : 23 CWN 866 : A 1918 PC 203. Entries of grant in Inam Register is of great evidentiary value [*Brahmayya v. Rajeswaraswami*, A 1953 M 580].

Even though a contract in writing was signed only by a certain party, oral evidence could be adduced to show that another person was also a party to the arrangement or was bound by it [*Muniswami v. Thandavaraya*, A 1936 M 5; see however *Shankar v. S*, A 1956 B 165 where names of contracting parties were regarded as terms of contract].

Quaere: Whether the words "terms of a contract" include the date of a contract? [*Ma Hla v Mg Shwe*, 9 Bur LT 250]. Dates of instruments are treated as formal parts of documents. Like recitals of consideration they are presumed to be correct until disproved. Parol evidence is admissible to show that there was mistake as to date or that the date is incorrect through collusion or some other reason. Parol evidence has been admitted to prove that recited dates were wrong [see *Hale v. Cazenove*, 4 Fast 477; *Steele v. Mart*, 4 B & C 273: *District of Columbia v. Camden Iron Works*, 15 Pet (US) 21; *Burns v. Moore*, 52 Am Rep 332].

Where a registered document becomes inoperative in law (*eg* when a *kabuliat* is executed by the tenant alone) s 91 precludes proof of its terms; but the terms can be proved by admissions or other evidence not referable to the invalid document [*Indramani v. Snehalata*, 59 CWN 1150; see *Hiralal v. B Colliery Co*, A 1957 P 331].

"Reduced to the Form of a Document". [Sale by Delivery of Possession].—There is always an oral agreement arrived at in the case of every transaction, but the moment an oral contract is reduced to writing, it is not open to any of the parties to seek to prove the terms of the contract referring to the original agreement and s 91 applies not only to cases where the contract is brought about or concluded by the writing, but also where the contract having been originally made by parol is subse-quently reduced to writing.

It is the document which must be produced and proved as evidence of the contract. Plaintiff sued for recovery of possession of a property valued at less than Rs. 100 on the basis of purchase by a registered deed dated 15th June 1922 and defendant claimed a right to it under an unregistered sale deed of 5th June 1917, and pleaded "sale by delivery of property" (s 54 T P Act)—*Held* that the plea was untenable and the sale being by an unregistered document, it was not by mere delivery of property [*Kuppusawami v. Chinnaswami*, A 1928 M 546; see also *Mg Ba v. Mg Kywe*, 6 R 125; *Tribhoban v. Shankar*, 1943 Bom 653 : A 1943 B 431]. A **contrary** view has been taken in other cases, *viz* that when the sale of an immovable property is effected by delivery of possession even though there was an unregistered deed about it. S 91 is no bar to prove the sale by actual delivery of possession. The unregistered document is also admissible for collateral purpose, *ie* the terms of agreement and the nature of possession. Only it cannot be used to prove title to the land [*Keshwar v. Sheonandan*, A 1929 P 620 : 10 PLT 449; *Parikhit v. Nidhi*, A 1954 Or 31; see *Md Gosukani v. Md*, A 1936 M 301, 303; *Dayaram v. Sitaram*, A 1925 A 206].

An unregistered sale deed of property worth less than Rs. 100 may be looked upon as a contract under s 53-A T P Act [*Nanasaheb v. Appa Ganu*, A 1957 B 138]. Oral evidence to prove deed of gift of property under *Mahomedan* law is not hit by s 91 [*Jabeda v. Moksed*, A 1973 Gau 105]. As to the use of unregistered deeds for collateral purposes. The section will apply where the parties intended the document to contain all the terms and conditions of the transaction. Where it is shown that they did not intend to reduce all such terms and conditions into writing, then the section will not come into play and the parties will be entitled to give oral evidence of the terms which they did not intend to reduce into writing [*Lok Nath Petitioner v. Jagbir Suri*, 1982 Cri LJ 1328, 1331 : 1982 Srinagar LJ 80 (J&K)]. See *post*: "*Admissibility for collateral purposes*".

S 91 Applies to Parties to an Instrument as well as Strangers.—S 91 applies to *any* transaction whether it affects the contracting parties or strangers. S 92 however applies only to "*the parties to any such instrument*". Even between strangers, indeed, the *terms* of the transaction can only be shown by the production of the document itself, and not by oral testimony. Thus, in an action by an execution creditor against the sheriff for wrongfully withdrawing an execution, the defence being that a distress was in for rent, the sheriff was not allowed to ask the landlord, whom he called as a witness, the amount of rent due, it appearing that there was a lease which might have been produced [*Augustein v. Challis*, 17 LJ Ex 73 : Phip 11th Ed p 790]. Whereas in s 92 the Legislature has prevented oral evidence for varying the contract as between the parties to the contract, no such limitations are imposed under s 91. Having regard to the juxtaposition of ss 91 and 92 and the deliberate omission from s 91 of such words of limitation, it must be taken that even a third party if he wants to establish a particular contract between certain others, either when such contract has been reduced to a document or where under law such contract has to be in writing can only prove such contract by the production of such writing [*Meenakshisundram v. Mudaliar*, A 1928 M 459 : 109 IC 18]. See further *post*: "*Existence of Contract, Grant, &c as Distinguished From its Terms*".

When Oral Proof of Extrinsic Evidence Cannot be Substituted for the Written Contract etc.—If in an action to recover land against an overholding tenant or in an action for the use and occupation of real estate, it should appear, either on the direct or cross-examination of the plaintiff's witnesses, that a written contract of tenancy has been signed, plaintiff must either produce it or account for its absence [*Brower v. Palmer*, 3 Esp 213 &c]. So, if a landlord were to bring an action against a tenant for rent and non-repair, and it should appear that the parties had agreed by

parol that the tenant should hold the premises on the terms contained in a former lease between the landlord and a stranger, a nonsuit should be directed, unless this lease could be produced [*Turner v. Power*, 7 B & C 625 : Tay s 401]. The same strict rule requiring the production of the written instrument has prevailed, where the question at issue was simply what amount of rent was reserved by the landlord [*R v. Merthyr Tidvil*, 1 B & Ad 29; *Augustein v. Challis*, 17 LJ Ex 73], or who was the actual party to whom a demise had been made [*R v. Rawden*, 8 B & C 708], or under whom the tenant came into possession [*Doe v. Harvey*, 8 Bing 239]; and in an action for the price of labour performed where it appeared that the work was commenced under an agreement in writing, but the plaintiff's claim was for *extra* work, it has several times been held that in the absence of positive proof that the work in question was entirely separate from that included in the agreement, and was in fact done under a distinct order, the plaintiff is bound to produce the original document, since it may furnish evidence, not only that the items sought to be recovered were not included therein, but also of the rate of remuneration upon which the parties have agreed [*Vincent v. Cole*, 3 C & P 481; *Buxton v. Cornish*, 13 LJ Ex 91 and cases; Tay s 402]. The fact that, in cases of this kind, the writing is in the possession of the adverse party, does not change its character; it is still the primary evidence of the contract; and its absence must be accounted for by notice to the opposite party to produce it, or in some other legal mode, before secondary evidence of its contents can be received. In all these cases, however, if the plaintiff can establish a *prima facie* case, without betraying the existence of a written contract relating to the subject-matter of the action, he cannot be precluded from recovering by the defendant subsequently giving evidence that the agreement was reduced into writing; but the defendant, if he means to rely on a written contract, must produce it as part of his evidence [*Magnay v. Knight*, 56 RR 571; *Stephens v. Pinney*, 8 Taunt 327 &c] and in the event of its turning out to be unstamped or insufficiently stamped, he must pay the duty and penalty [Tay s 404]. See also *Yeshwadabai v. Ram Ch*, 18 B 86 [*Fielder v. Ray*, 6 Bing 332 **follD**]. To decide facts of each case and the nature of the documents produced as the evidence and the character of the witnesses who have given evidence in the case before courts specific evidence may be excluded against the documentary evidence. Barring that there is no prohibition imposed on the court to prefer or act upon the oral testimony to the documentary evidence available to it for good and sufficient reasons. [*Javarasetty v. Ningamma*, A 1992 Kant 160, 163].

A vendee of immovable property must prove his title by production of the sale-deed or lay the foundation for admission of secondary evidence. No oral evidence of the sale can be given [*Safar Ali v. Mahesh*, 23 CLJ 122 : 34 IC 956]. Where the term have been reduced to writing, s 91 excludes oral evidence of the agreement as well as of what took place when the agreement was made [*Vyankatesh v. Ganesh*, 61 IC 896 : A 1921 N 166; *Diwan v. Gurbachan*, A 1932 L 276] or what the parties did subsequent to it [*Dinkerrai v. Sukhadayal*, A 1947 B 293; *Belapur Co v. State Farming Corpn*, A 1969 B 231], or prior to it [*Raj Rani v. Hukam*, A 1930 L 675]. For considering what is stipulated in the sale agreement no oral evidence could be led in [*Bibi Anwarunisa v. Baulat Rai*, A 1988 Patna 229, 233 : 1988 BLJ 672]. Where a sale deed is inadmissible for want of registration, other evidence is barred under s 91 [*Parmeshri v. Autar*, 3 LLJ 173 : A 1921 L 113]. When a mortgage deed is executed, secondary evidence is inadmissible for lack of stamping [*Ma Saw v. Maung Ba*, 5 R 650 : A 1928 R 32]. Where after settlement of accounts between principal and agent, a pronote is executed, settled accounts cannot be opened unless there is fraud or undue influence; but the rule does not apply to sureties [*Kalanand v. Gir Pd*, 17 CWN 1060]. Where *A* executed two mortgages in favour of *B* who had arranged to finance him by getting *C* to honour his drafts on the guarantee of *B* and *B*

subsequently transferred the mortgages to *C* with the consent of *A*—*Held* that, *A* could not go behind the recitals in the instrument of transfer and to have an account taken as to what was due on the mortgages [*Lucas v. Bank of Bengal*, 31 CWN 179 : A 1926 PC 129 : 98 IC 925].

When the terms of a written lease are admissible for want of registration, defendants cannot fall back on oral evidence [*Firm of K B v. Taj-ud-din*, 3 LLJ 14 : A 1921 J 24; *Niadar Mal v. Raunak*, 63 IC 90; *Md Din v. Sardara*, A 1934 L 743]. If the written contract is inadmissible in evidence a suit to enforce it must fail [*Aimna v. Lakhmi*, A 1934 L 705]. When an *amalnamah* is inadmissible for want of registration, no evidence is admissible as to the persons for whom the settlement was made or as to the extent of the shares settled [*Hem Ch v. Sashi Bhusan*, 63 IC 863]. Where the deed of surrender is not produced, s 91 unlike as in the case of documents required to be in writing, only bars proof of the terms of the surrender, except by secondary evidence within s 68, but not proof of the matter itself [*Fowler v. Secy of S*, 61 IC 852 : A 1921 M 363].

Where a tenant sets up a permanent tenancy, no evidence other than the settlement and *bandobost* papers are admissible to prove the character and the terms of the lease [*Budhan v. Madan*, 68 IC 653 : A 1923 P 111]. Defendant offered to sell his motor car for a sum and wrote that the "offer only holds good up to Wednesday next"—*Held* that the offer remained open until midnight of Wednesday and oral evidence as to what defendant meant by the words, was inadmissible [*Metropolitan E C v. Debrunner*, 45 C 481 : 22 CWN 416].

Defendants pleaded that the plaintiffs had resold the land to them and referred to a receipt for a consideration said to have been endorsed on the back of the original sale deed—*Held* that the receipt was not admissible and oral evidence could not be allowed to prove re-purchase [*Baggu v. Tara*, 5 PLR 1919].

Contents of Sale Certificate.—Although the court shall grant a sale certificate to the auction-purchaser (Or 21, r 94), he can establish his title independently of the sale certificate, that is, by the production of the order confirming the sale [see *Tantadhari v. Sundar Lal*, 7 CLJ 384; *Khobhari v. Ram Pd*, 7 CLJ 384; *Brojonath v. Jogeswar*, 9 CLJ 346; *Tara Pd v. Nund Kishore*, 9 C 872 : 12 CLJ 448; *Doorga v. Baney Madhab*, 7 C 199, 207; *Jagannath v. Baldeo*, 5 A 305; *Khusal v. Bhimabai*, 12 B 589; *Sada Gopa v. Jamuna*, 5 M 54; *Muzaffar v. Ali Hussain*, 5 A 297; *Naigar Timapa v. Bhaskar*, 10 B 444; *Raj Krishna v. Radha Madhab*, 21 WR 349; *Velan v. Kumarasami*, 11 M 290, 296; *Shivram Narayan v. Ravji*, 7 B 254; *Maleebun v. Raseeda*, 21 WR 401. See however *Lalla Bissessur v. Doolar*, 22 WR 181 and *Pearee v. Gosto Behary*, 26 WR 194]. Construction of sale certificate—Subsequent conduct [see *Secy of S v. Narendra*, 32 CLJ 402; *Kumar Shankar v. Secy of S*, 40 CLJ 322 : 29 CWN 166].

Admissibility of Evidence in Proof of Original Consideration When the Bill or Note is inadmissible for Want or Insufficiency of Stamp.—Every loan contains an implied promise to repay the money [*Pramatha v. Dwaraka*, 23 C 851; *Sri Sri Iswar v. Jahor*, 49 CWN 37; see also *Krishnaji v. Ramal*, 24 B 360] and so when a promissory note is inadmissible for want or insufficiency of stamp, the lender has an independent cause of action on which he may bring a suit [*Mahatabuddin v. Md Najir*, 40 CWN 473; *Indra v. Hiralal*, 40 CWN 596; *Shk Abdul v. Shyam*, 34 CWN 554; *Shk Akbar v. Shk Khan*, 7 C 256; *Lalchand v. Pyare*, A 1971 MP 245; *Punamchand v. Sugavasi*, A 1972 AP 282] and he is not barred from proving the loan independently, by the fact that the cause of action arose out of the same transaction in the course of which the note was executed [*Ram Sarup v. Jasoda*, 34 A 158 :

13 IC 138; *Chedu v. Jagan*, A 1928 A 297; *Baij Nath v. Saligram*, 16 IC 33; *Kashi Pd v. Panna*, 74 IC 359 : A 1923 A 529; *Khitish v. Rajkishore*, A 1980 Or 10. See also *Bachhu v. Kandhai*, 6 OC 16; *Dwarka v. Idu*, 26 OC 361 : A 1924 O 249; *Nankhu v. Girja*, A 1929 O 399; *Lall Bahadur v. Shk Gulam*, A 1933 N 57; *Bhirgu v. Gaya*, 146 IC 751 : A 1934 O 57]—CONTRA: Other cases have held that when money is lent on terms contained in a promissory note the lender suing to recover the money must prove those terms by the note and if for any reason it is not admissible in evidence, the plaintiff is not entitled to set up a case independent of the note [*Parsotam v. Taley*, 25 A 178 (7 C 256 : 8 C 721 **follD**); see also *Sirdai v. Chandrawati*, 4 A 330]. *Ram Sarup v. Jasoda, sup* was **overruled** by *Nazir Khan v. Rammohan*, 53 A 114 : A 1931 A 183 FB *post* following *Parsotam's case. Nazir Khan's case* has however been considered by another Full Bench in *Sheonath v. Sarjoo*, A 1943 A 220, *post.*

An insufficiently stamped pronote is not admissible as an acknowledgment of debt to save limitation [*Jung v. Bansropan*, A 1946 P 118; *Nageshwara v. Narayana*, 1938 Mad 210 : A 1938 M 75; *Jogendra v. Sachindra*, 63 C 813]. An endorsement of payment on a pronote inadmissible for insufficiency of stamp can however be availed of as an acknowledgment of the original debt [*Chokalingam v. Annumalai*, A 1917 M 460; *Vakkalanka v. Kasaneedi*, A 1939 M 34; *Saligram v. Radhey*, A 1931 A 500]. An insufficiently stamped promissory note is admissible to prove the fact of admission made by the debtor of his existing liability and can extend limitation. It can also be admitted as an agreement chargeable with duty under Art 5 (*c*) Sch I, Stamp Act, and is admissible on payment of requisite duty and penalty [*Sudama v. Kisanrao*, A 1938 N 284 : 1938 NLJ 145]. Plaintiff suing on an unstamped pronote may be allowed in a proper case to amend the plaint by falling back on the original cause of action, where a suit to enforce the liability on the same is not barred [*Varadaraja v. Venkatarama*, 99 IC 625 : A 1927 M 378; see *Ranendra v. Keshab*, 38 CWN 488]. In a case where an original cause of action existed, amendment was allowed although on the date of amendment the claim became barred [*East Bengal Com Bank v. Surendra*, 39 CWN 1235].

An unstamped or insufficiently stamped pronote is not admissible in evidence under s 35(*a*) Stamp Act and the proviso as to levy of penalty does not apply to such documents. No suit lies upon such a document [*Pothireddi v. Velayudasivan*, 10 M 94; *Manick v. Jamoona*, 8 C 645; *Shk Akbar v. Shk Khan*, 7 C 256; *Ankur v. Madhub*, 21 WR 1; *Nandan v. Chatterbati*, 21 WR 446; *Prosunno v. Tripoora*, 24 WR 88]. If, however, penalty is levied and the document admitted, its admissibility cannot be questioned in appeal under s 36 Stamp Act [*Devchand v. Hirachand*, 13 B 449 FB; *Panchanand v. Taramoni*, 12 C 64; *Khoob Lall v. Jungle*, 3 C 787; *Nagappa v. V A Firm*, 91 IC 494 : A 1925 M 1215; *Melaram v. Prem*, A 1923 L 143 : 71 IC 42; *Ma Nyun v. Mg San*, A 1929 R 9; *Venkatarama v. Chella*, A 1921 M 413; *Jagdip v. Ferangi*, 6 P 765; *Venkataswara v. Ramanatha*, A 1929 M 622; *Vellayappa v. Somasundaram*, 13 R 322]. There can be no decree on a pronote which is inadmissible for want of cancellation of stamp even though the defendent admitted liability [*Firm Sri Chand v. Lajjia*, A 1939 L 31; *Sohan Lal v. Raghunath*, A 1934 L 606 : 153 IC 1076].

Where a contract reduced into writing is inadmissible in evidence for want of stamp, and the only cause of action arises out of the document, no oral evidence is admissible to prove the terms of the agreement [*Prosunno v. Tripoora*, 24 WR 88; see also *Pothi Reddi v. Velayudasivan*, 10 M 94; *Muthusastrigal v. Viswanath*, 38 M 650 : 26 MLJ 19; *Rali v. Caramali*, 14 B 102; *Damodar v. Atmaram*, 12 B 443; *Ankur Ch v. Madhab Ch*, 21 WR 1; *Sennandan v. Kollakiran*, 2 M 208; *Kopasan v.*

Shamu, 7 M 440; *Rally v. Bhagwan*, 7 Bur LT 95 : 23 IC 975; *Maung Kyi v. Ma Ma*, 12 Bur LT 137 FB : 54 IC 84; *Shk Akbar v. Shk Khan*, 7 C 256 : 57 IC 386]. Where the promissory note itself is the agreement of the loan, it must be proved as is pointed out in *illus* (*b*) and plaintiff cannot sue on original consideration [*Ramsing v. Ramlal*, 9 SLR 150 : 32 IC 582]. When a loan is granted on the security of a negotiable instrument, *eg*, a pronote or a *hundi*, there is no cause of action independent of the instrument and when the note is inadmissible for want of stamp or insufficient stamp, the suit must fail [*Ramjas v. Shahabuddin*, 95 IC 704 : A 1927 L 89; *Bhagbhari v. Gujar*, 63 PR 1917 : 38 IC 623; *Chandra v. Amritsar B Co*, 66 IC 201 : A 1922 L 307; *Gurdas v. Ishar*, 60 IC 107 : 3 LLJ 157; *Ramjas v. Shahabuddin*, 95 IC 704 : A 1927 L 89; *Somaraju v. Venkatasubbarayadu*, 85 IC 389 : A 1925 M 351—CONTRA: *Dhaneswar v. Ramrup*, 7 P 845 : A 1928 P 426; *Gour Ch v. Garib*, A 1957 Or 212; *Abdul Md v. Mahananda*, A 1931 P 293; *Damoo v. Agha*, 12 P 862 holding that when pronote is inadmissible, other evidence of the loan may be given]. But in a case it has been held that though the loan can be proved by other evidence, the rate of interest cannot be proved without the pronote [*Balbadhra v. Bhagwat*, A 1933 P 584; *Ananda v. Pundalik*, A 1936 N 225].

When the bill or note is not itself the original contract, but is executed on account of a pre-existing *independent obligation* complete in itself, an action on the original obligation is maintainable without regard to such bill or note, provided that the creditor has not endorsed or lost or parted with bill or note, so as to render the debtor liable on it to third parties. It will be otherwise if the original cause of action is the bill or note itself [*Yarlagodda v. Gorantala*, 29 M 111 : 15 MLJ 484; *Banarasi v. Fazal Ahmad*, 28 A 298 : 3 ALJ 25; *Shk Akbar v. Shk Khan*, 7 C 256 : 8 CLR 533; see also *Golap Chand v. Mohokoom*, 3 C 314 : 2 CLR 412 note; *Hira Lal v. Datadin*, 4 A 135; *Gobinda v. Ram Ch*, 29 CLJ 508; *Ranendra v. Keshab*, 61 C 433; *Bhusan v. Kanai*, 65 CLJ 151; *Sudhir v. Kamal*, 21 CWN 1043; *Firm Budhu v. Gokal*, 92 IC 1015 : A 1926 L 328]. Where the terms of a loan are recorded in a voucher and a pronote (insufficiently stamped) is also executed at the same time as a collateral security, the creditor can fall back on the original cause of action [*East Bengal Com Bank Ltd v. Surendra*, 39 CWN 1235]. When pronote is inadmissible for material alteration, plaintiff can prove claim by other evidence, where claim is also based on the original cause of action [*Ranchhod v. Ravjibhai*, 95 IC 847 : 28 Bom LR 631 (**affirmed** in *Ravjibhai v. Ranchod*, A 1930 B 66); *Gokuldas v. Parmanand*, 8 IC 281 : 6 NLR 125; *Udaram v. Laxman*, 104 IC 470 : A 1927 N 241].

If a *hundi* embodying the whole contract is not admissible, other evidence to prove the terms cannot be allowed. But where the *hundi* embodies a part of the contract between the parties, s 91 does not exclude other evidence [*Kundan v. Sahu*, A 1929 A 254]. Where *hundis* were renewed from time to time and the last renewal was on insufficiently stamped paper, plaintiff could fall back upon *hundis* given prior to the last renewals, and secondary evidence is admissible to prove them [*Jagan v. Indar*, 36 A 259 : 23 IC 589].

Where a pronote offends against s 25 of the Paper Currency Act, the creditor can fall back on any obligation independently of the execution of the pronote. If there is other evidence of the obligation outside the note, the pronote is admissible in evidence in conjunction with other evidence. Where there is no other evidence, while the pronote is still admissible, there can be no decree on the basis of it alone [*In re s 25 Paper C Act*, A 1928 A 371 SB : 26 ALJ 729].

If a pronote is a forgery, plaintiff is entitled to sue for the original consideration on proof of the loan by independent evidence [*Suraj v. Anant*, 55 IC 556; *Khosal v.*

Amiruddin, 68 IC 33 : A 1922 B 455; *Motlal v. Monmohan*, 5 CWN 56]. So if there is an original consideration apart from the inadmissible pronote, plaintiff may fall back on it [*Abdul v. Shyam*, 34 CWN 554; *In re Assaram*, A 1929 S 164]. It is open to the plaintiff to base his claim on a pronote and alternatively on the original debt [*Sadasuk v. Srikishan*, 46 C 663 : 46 IA 33 : A 1918 PC 146; *Manchershaw v. Govind*, A 1930 B 424] and when a suit is based on a note it is permissible to allow amendment in a proper case [*Vithalrao v. V*, A 1923 B 244 : 72 IC 242; *Kisandas v. Rachappa*, 33 B 644; *Manchershaw v. Govind*, A 1930 B 424].

It is generally agreed that where there is any cause of action or a loan independently of the pronote, the plaintiff may sue on that pre-existing cause of action and give evidence of it if for some reason or other, the pronote is found inadmissible. The question depends on whether there is a separate contract which can be proved apart from the inadmissible bond or pronote and its determination depends on the peculiar facts of each case (see *Duggempudi v. Tirumala*, 59 IC 363 : 12 LW 147; *Ramsarup v. Jasodha*, 34 IC 417; *Shk Akbar v. Shk Khan*, 7 C 256; *Krishnasami v. Rangasami*, 7 M 112; *Krishnaji v. Rajmal*, 24 B 360; *Ramnarain v. Lachmi*, A 1921 P 217 : 2 PLT 323; *Samad v. Brijlal*, 73 PR 1886; *Banarsi v. Fazal*, 28 A 298 : 34 A 158; *Pramatha v. Dwarkanath*, 23 C 851; *Naraindas v. Jassomal*, A 1921 S 80 : 65 IC 37; *Brahmadeo v. Ram Kishun*, A 1921 P 318 : 60 IC 652; *Sadasuk v. Sri Kishan, sup*; *Ghulam v. Fasih-un-nissa*, 1934 ALJ 1185 : A 1935 A 129; *Bhusan v. Kanai*, 65 CLJ 151; *Tarachand v. Protapmal*, 39 CWN 1241). Thus where a pronote is given in payment of goods sold and the note is inadmissible as being insufficiently stamped, the original debt can be availed of. But where the pronote is the consideration of the loan, the debt cannot be proved aliunde [*Ramaswamy v. Murugiah*, 59 M 268 FB].

Opinion, however, is not unanimous as to whether there is any such separate cause of action when there was no loan independently of the pronote and the plaintiff lent money in consideration of the pronote alone, *ie* when the pronote is passed not as a collateral security for a distinct and separate transaction, but the loan and pronote are part and parcel of the same transaction and the entire contract is embodied in the pronote. In such a case the true rule ought to be that s 91 controls it and the document is the only evidence. If it is inadmissible, oral evidence cannot be added to prove the loan [see *Chandra v. Amritsar B Co*, A 1922 L 307 : 2 L 330; *Shk Akbar v. Shk Khan*, 7 C 256; *Varalagadda v. Gorantla*, 29 M 111; *Muthu Sastrigal v. Viswanatha*, 38 M 660; *Parsotam v. Taley*, 26 A 178 : 57 IC 386; *Nazir Khan v. Ram Mohan*, A 1931 A 183 FB : 53 A 114; *Satyanarayana v. Mallaya*, 58 M 735, 742; *Rangaswami v. Doraiswami*, A 1957 M 715; *Ghulam Md v. Habib*, A 1966 J & K 127 (cases discussed)]. When the oral agreement to pay is on the same day and is embodied in a written agreement (*ie* the pronote) the pronote is the only evidence and the contract cannot be proved under s 91 [*Gangaram v. Amirchand*, 66 PR 1906 : 32 IC 582].

In *Muthusastrigal v. Viswanatha*, 38 M 660, 663, SADASIVA IYER J, observed: "To import the doctrines laid down in English cases about vague obligations to repay arising out of equity and not out of contract or about obligations which can be enforced if the plaintiff skilfully draws up his plaint as one on account of money had and received concealing the real contract of loan which had been reduced to the form a document is, it seems to me, merely trying to nullify s 91 Evidence Act." In a Calcutta case where a bond was materially altered (from Rs. 15 to Rs. 25), it was urged that the plaintiff ought to succeed on proof of the actual loan by independent evidence—*Held* that plaintiff cannot recover on the bond at all—not even if he sues upon it in its original state; and that "verbal negotiations leading up to an express agreement in writing cannot be set up as an independent contract and are not even admissible in evidence under s 91. Moreover, where there is an express promise, an

implied promise will not be inferred" [*per* RANKIN J. in *Dula Meah v. Abdul Rahaman*, 28 CWN 70 : 81 IC 641; see also *Shk Diljan v. Makbul*, 107 IC 475 (C); *Prasanna v. Gour*, 33 C 812]. So, where the debt and execution of the pronote are contemporaneous, the debt can be proved only by the note and where it is insufficiently stamped, the suit cannot be converted into one on the original consideration [*Guru v. Krishnamma*, A 1932 M 687; *Chandrasekharam v. Srinivasa*, A 1932 M 1260; *Chokalingam v. Palaniappa*, 67 MLJ 1261—CONTRA: The note is merely a collateral security and the lender can always sue on the original consideration, *Sri Sri Iswar v. Jahor*, 49 CWN 37 : A 1945 C 268].

In a fully discussed Allahabad case it has been held that where money is lent on terms contained in a pronote given at the time of the loan, both the pronote and the lending being concurrent conditions, *ie* part and parcel of the same transaction, the lender must prove those terms on the pronote. If for any reason such as the absence of proper stamp, the pronote is not admissible, the plaintiff is not entitled to set up a case independent of the note in view of the provisions of s 91. He cannot recover the money by proving orally the terms of the contract. It was pointed out that the contrary decisions which are based on the dictum of LORD KENYON in *Farr v. Price*, 1 East 55 do not take sufficient note of s 91 and it is not open to the courts here to ignore the enacted law and follow the English Law, simply because in certain cases the enforcement of the law might appear to create a hard case [*Nazir Khan v. Rammohan*, A 1931 A 183 : 53 A 114 FB (*Ram Sarup v. Jasoda*, 34 A 158 **overruled**: *Parsotam v. Taley*, 26 A 178 **follld**); see *Dhonkal v. Harbans*, A 1933 A 280; *Laduram v. Bansidhar*, A 1937 P 572]. *Nazir Khan's case* was considered by another Full Bench in Allahabad where it was held that in the case of a pronote executed contemporaneously with a loan, the plaintiff on failure of his cause of action on the note may fall back on the independent cause of action in debt, assuming that the circumstances of the case admit of the existence of an independent cause of action on the original debt still surviving. The insufficiently stamped pronote cannot be looked into in order to determine whether it contained all the terms of the contract or not. Where all the terms have not been embodied, other evidence to prove the contract independently of the pronote is admissible [*Sheonath v. Sarjoo*, A 1943 A 220 : 1943 All 610 FB; see also *Mistri v. Binda*, A 1946 A 126 FB; *Lakshmi v. Aparna*, A 1953 A 535; *Gangaram v. Keshava*, A 1960 Raj 10 (cases reviewed)]. But if all the substantial terms are included in the pronote, oral evidence to prove the loan, is not admissible [*Kanhai v. Brijnandan*, A 1952 A 509]. Loan given on receipt and promissory note taken simultaneously—*Held* suit not maintainable without production of the pronote [*Anantharajaih v. Shivaramaiah*, A 1968 Mys 148]. A **contrary** view has been taken in Oudh **dissenting** from *Nazir Khan's case* [*Kunwar v. Suraj*, A 1932 O 235 FB : 139 IC 298].

The observation of RANKIN J, in *Dula Meah's case, sup* was **approved** in the Allahabad Full Bench case. Where money is borrowed on the security of a pronote and later the pronote is renewed by another pronote which is inadmissible for insufficiency of stamp, the plaintiff can fall back on the original pronote provided the terms of contract are to be found in the older promissory note, and subsequent pronote can be used as an acknowledgment. In the case in hand the endorsement on the back of the earlier pronote was held to be an acknowledgment [*Saligram v. Radhay*, A 1931 A 560 : 1931 ALJ 522].

A Full Bench in Rangoon has held that if the whole of the terms of the agreement are embodied in the pronote, it is the only evidence and if the pronote is not admissible, the suit must fall. But if the pronote is given *prima facie* only as conditional payment and the instrument does not contain all the terms of the loan, s 91 does not

apply [*Mg Chit v. Oomer & Co*, 12 R 500 FB]. In *Madras* also it has been held that in all such cases courts must be guided by what appears on the face of the pronote. If it is clear on the face that the pronote was the contract then no further evidence could be given [*Ramaswamy v. Murugiah*, 59 M 268 FB]. A later Full Bench there held that if the promissory note embodies all the terms of the contract and the instrument is improperly stamped, no suit on the debt will lie. S 91 Evidence Act and s 35 Stamp Act bar the way. But if it does not embody all the terms of the contract, the true nature of the transaction may be proved; and where an instrument has been given as collateral security or by way of conditional payment, a suit on the debt will lie. The fact that the execution of the pronote is contemporaneous with the borrowing cannot exclude the possibility of the instrument having been given as collateral security or by way of conditional payment. Whether a suit lies on the debt apart from the instrument therefor depends on the circumstances under which the document was executed [*Perumal v. Kamakshi*, A 1938 M 785 FB : 1938, 2 MLJ 189 (*Gopalaya Padayachi v. Rajagopal*, A 1926 M 1148; *Chinnava v. Shrinivasa*, A 1935 M 206 : 67 MLJ 912 **overruled**); *Lothamasu v. Thadwarthi*, A 1973 AP 342 FB (*Md Jamal v. Munwar*, A 1964 AP 188 **overruled**)].

A material alteration was made in the bond by the plaintiff or some one on his behalf by addition of the name of the second defendant as one of the executant. The consideration for the bond was money due on an earlier bond. The suit was wholly dismissed and it was held that plaintiff was not entitled to rely either on the bond or on the original consideration as the basis of a cause of action, as the original consideration had been merged in and had been satisfied by the later bond [*Gour v. Prasanna*, 33 C 812 (various English and American cases cited)]. In a later case where the plaintiff sold his share of a business to defendant, his co-sharer for Rs. 21,000 and defendant paid Rs. 6,000 in cash and executed a mortgage bond in respect of the balance of Rs. 15,000 a provision as to compound interest was interpolated in the document by the plaintiff before registration. It was held that although the plaintiff could not sue on the altered bond, he could recover on the original consideration as the defendant had admitted in the bond his liability for the sum of Rs. 15,000 and the parties agreed that the bond should be taken *as security* for the pre-existing debt of Rs. 15,000 and not by way of accord and satisfaction of the said debt. *Gour v. Prasanna, sup* was distinguished on the ground that in that case the bond was given in *substitution* for a earlier bond, and that the pre-existing liability had *merged* in the later bond [*Parbati v. Amarendra*, 53 C 418 : 96 IC 97]. The principle may be easy to understand, but it is obvious that in cases like these it is often difficult to draw the line and to decide whether a particular case is on the one side or other, Individual rulings are of little use for they are decided on particular facts and contain citations of cases which merely go to show the general principle—which is not disputed. [As to alteration of document and its effect, see *post* notes to s 106].

A transaction evidenced by a pronote may be of three kinds: (*i*) The contract may be considered as contained wholly in the pronote as in *illus* (*b*) to s 91 in which case the plaintiff cannot sue at all if it is insufficiently stamped; (*ii*) the pronote may be regarded as a conditional payment of the amount of the loan, in which case plaintiff can sue on the loan; (*iii*) the pronote may be passed as security for the loan in which case plaintiff need not sue on the pronote at all and whether it is properly stamped or not he can bring a suit on the loan [*Jacob & Co v. Vicumesey*, A 1927 B 437 : 102 IC 138 : 29 Bom LR 432]. Money is borrowed in the first instance and all the terms of the contract were reduced to writing late in the form of promissory note which is insufficiently stamped. Since it was insufficiently stamped the promissory note is inadmissible, the terms thereof cannot be proved by adducing oral evidence which is

barred under s. 91. [*Bollan Venkataiah v. Vennumuddala Venkata Rama Reddy*, A 1985 Andh Pra 26, 29].

It was held in a case that a suit lies upon an insufficiently stamped document where defendant admits the loan and it was observed that an implied contract to repay money lent arises from the fact that the money is lent even though no express promise, either written or verbal, is made to repay it. Therefore, in a case where the defendant admits the loan and has not repaid it, the plaintiff may maintain an action against him for breach of his promise or contract, entirely independent of any security which may have been given for the advance [*Pramatha v. Dwarka*, 23 C 851; see also *Krishnaji v. Rajmal*, 24 B 360; *Lokumal v. Sind Bank Ltd*, 57 IC 387 (cases discussed)]. Contrarywise it has been held in some cases that in a suit upon an unstamped pronote, no decree can be passed even where the defendant admits liability, because the document is itself inadmissible [*Kodali v. Tangoppala*, 7 IC 320 (M); *Damodar v. Atmaram*, 12 B 443; *Chenbasapa v. Lakshman*, 18 B 369; *Mg Po v. Chettyar Firm*, A 1935 R 282; see also *Thaji v. Tirumaliappa*, 30 M 386]. The decision in 23 C 851 appears to rest on the principle that every loan implies a promise to repay. But as pointed out by RANKIN J, in *Dula Meah v. Abdul Rahman*, 28 CWN 70, *sup* where there is an express promise (embodied in an express contract in writing) an implied promise will not be inferred. So, where a pronote is inadmissible in evidence, no suit can be filed on the basis of a recital acknowledging payment of money because the receipt does not contain any promise to pay [*Chaudhuri v. Lal*, 140 IC 117 : A 1933 A 109; see also *Mirza v. Shipley*, A 1934 A 837].

The many cases cited above show that where a bond or pronote or *hundi* is inadmissible in evidence for want or insufficiency of stamp, or where the document has been materially altered (as to alteration of document see *post*, notes to s 106), judicial opinions are by no means unanimous as to whether the suit should fail or whether the plaintiff may be allowed to plead original consideration or independent contract. In one class of cases the view taken is that when a contract has been reduced to writing the only cause of action arises out of the document and verbal negotiations leading up to the contract in writing cannot be set up as an independent contract and oral evidence is inadmissible under s 91 [see *Prasunno v. Tripoora Soonduree*, 24 WR 88; *Pothi Reddi v. Velayudasivam*, 10 M 94; *Muthu Sustrigal v. Visvanatha*, 38 M 660; *Somasundaram v. Krishnamurthi*, 17 MLJ 126; *Somaraju v. Venkatasubbarayadu*, A 1925 M 351 : 85 IC 389; *Ramjas v. Shahab-ud-din*, A 1927 L 89 : 95 IC 704 : 63 PR 1917; *Chanda v. Amritsar B Co*, A 1922 L 307 : 66 IC 201; *Gurudasmal v. Ishar Das*, A 1921 L 217 : 60 IC 107: 33 C 812; *Gangram v. Amirchand*, 66 PR 1906; 12 B 443; 14 B 102; *Dula Meah v. Abdul Rahman*, 28 CWN 70]. These cases proceed on the principle that the original consideration merges into the written contract and is the only evidence. The opposite view taken in another class of cases is that plaintiff can fall back upon the original consideration and prove his claim by other evidence [*Sudhir v. Gobinda*, 45 C 538; *Iswar Sridhar v. Jaharlal*, 49 CWN 37: 92 IC 1015: 4 L 151: 28 Bom LR 631: 29 M 111: 6 NLR 125; *Udaram v. Laxman*, 104 IC 470].

In another class of cases it has been held that where money is lent in consideration of the pronote alone and the terms are reduced to a document, the note is the only evidence of the transaction [*Nazir Khan v. Rammohan*, 53 A 114 FB and cases cited *ante*; see however the later Full Bench decision in *Sheonath v. Sarjoo*, A 1943 A 220 *ante*]. In a case it has been held that although ss 91 and 92 prohibit secondary evidence of the terms of a written contract, they do not exclude proof of a statement of a fact recited therein. So, the inadmissible pronote may be used as a mere acknowledgment of a statement containing defendant's admission of receipt of money and of

his own liability therefor. The pronote being inadmissible, the creditor can treat the contract as non-existent and ask for refund of consideration on the ground that it failed under s 70 Contract Act [*Udaram v. Laxman*, 104 IC 470 : 10 NLJ 45; *Kundan v. Sahu*, A 1929 A 254].

Documents Compulsorily Registrable.—Under s 49 of the Registration Act no document required by s 17 or by any provision of the T P Act to be registered shall be received as evidence of any transaction affecting an immovable property. The proviso to the section added by Act 21 of 1929 makes an exception in favour of a contract in a suit for specific performance under Ch II Specific Relief Act or part performance of a contract within s 53-A T P Act. The terms of a mortgage can only be proved by the document itself even though there was delivery of possession (consideration Rs. 95) [*Mg Ba v. Mg Tha*, A 1939 R 188 see *Tribhoban v. Shankar*, 1943 Bom 653 : A 1943 B 431]. A receipt by a vendor in favour of the vendee stating that on receipt of certain money he had sold a land to the latter falls within s 17(*1*)(*b*)(*c*) of the Regn Act and is not provable by oral evidence [*Baldeva v. Dipchand*, A 1956 Pu 240]. The combined effect of s 49 Registration Act and s 91 is that if a lease for more than 2 years has not been registered, it cannot be received in evidence, nor can the terms be proved by any other evidence [*Iswar v. Sundar*, A 1960 J&K 63].

Insufficiently stamped promissory note.—In *Bollam Venkataiah v. Venumuddala Venkata Ramana Reddy*, 1985 (1) An WR 284 : A 1985 AP 26 : 1984 (1) ALT 47 (NRC) **followed** in *Kunduru Seethaamma v. Namana Nageswara Rao*, 1997 (6) ALT 9, The Full Bench observed:—

> "A plaintiff can lay an action for recovery of the amount advanced by him basing on the original cause of action where the suit negotiable instrument becomes inadmissible in evidence under Section 35 of the Stamp Act provided there is an allegation in the plaint and proof in evidence about the fact that the promissory note did not incorporate all the terms of the contract of loan and that it was executed as a conditional payment or a collateral security. If the instru-ment embodies all the terms of the contract and the instrument is improperly stamped no suit on the debt will lie. It will be barred by Section 91, Evidence Act and Sec. 35 of the Stamp Act. In such a case where there is an express contract and the document is hit by the provisions of Section 35, Stamp Act and Section 91, Evidence Act, Section 70 of the Contract Act cannot be invoked on the theories of implied promise, money had and received, *quasi* contract and just and reasonable or unjust enrichment or any other equitable doctrine".

The fact that there was a long of time (5½ years) between date of the agreement to sell and the sale deed and also the fact that the agreement was written on a small piece of paper with a revenue stamp affixed and not on a regular non-judicial stamp paper, were held to be factors relevant to considering the genuineness of the agreement. *Taherakhatoon v. Salambin Md.*, AIR 1999 SC 1104.

—Admissibility of Oral evidence in proof of Contents of Written Documents Inadmissible for Want of Registration.—Where a document should have been but was not registered, it itself is inadmissible and further no secondary evidence of its terms can be given [*Offl Ass v. Roopjee*, A 1929 R 604; *Briksh v. Awadh*, A 1961 P 308]. Where a document creates a charge on an immovable property, a later unregistered document releasing it is inadmissible. Secondary evidence of the agreement in the second document would be in violation of s 91 [*Pratap v. Kesharlal*, 62 IA 23 : 39 CWN 440 : A 1935 PC 21 : 59 B 180]. A receipt for sums paid in part liquidation of a bond hypothecating immovable property must be registered to render it admissible in evidence. But under *illus* (*e*) such payments may nevertheless be proved by parol evidence which is not excluded [*Dalip v. Durga*, 1 A 442; *Waman Ram v. Dhondiba*, 4 B 126 FB; *Soorjoo v. Bhugwan*, 24 WR 328; *Venkayyar v. Venkatasubbayyar*, 3 M 53; *Appamma v. Ramanna*, 23 M 92; *Imdad v. Tasadduk*, 6 A 335 : 4 AWN 107; *Jiwan Ali v. Basa Mal*, 9 A 108 FB : 6 AWN 310; *Sharaj v. Jagandar*, 98

PR 1916]. A receipt evidencing payment of consideration for an oral sale of immovable property, is within s 17(*c*) Registration Act and is inadmissible if not registered; but oral evidence can be given to prove the sale and payment of money *aliunde* [*Abdul Rahman v. Kirparam*, 104 IC 585]. A receipt which is inadmissible for want of stamp does not exclude other evidence to prove discharge by payment [*Ram Pd v. Nathuram*, 68 IC 494].

An authority to a widow to adopt and to put the adopted son in possession of all properties is not a document of a testamentary character and its registration being compulsory it is inadmissible for want of registration. *Quaere*—Whether other evidence of such authority can be adduced under s 91 [*Somasundara v. Duraisami*, 27 M 30]. Where a Hindu widow's suit for recovery of her husband's share on partition was dismissed as the partition could not be proved otherwise than by the unregistered deed, secondary evidence of its contents was inadmissible under s 91 [*Kachubabin v. Krishnabai*, 2 B 635; *Maung Po v. Ma E Mai*, 74 IC 47 : A 1923 R 57]. Similarly, where the defendant sought to use an unregistered partition deed not for a collateral purpose but to prove that the property covered thereby had ceased to be joint property [*Upendra v. Umesh*, 15 CWN 375 : 12 CLJ 25]. In such a case oral evidence is wholly inadmissible to prove terms of the deed, but relief may be given on the doctrine of part performance [*Nandalal v. Dhanukdhari*, 76 IC 42 : A 1924 P 244; see now s 53-A T P Act (*post*)].

A valid partition can be effected orally, but where the terms have been reduced to writing and the document is inadmissible for non-registration, oral evidence to prove the terms of the agreement is barred by s 91 [*Subbu v. Varadarajulu*, A 1948 M 26 (**relying** on *Ramayya v. Achamma*, A 1944 M 550 : 1945 Mad 560 FB); see *Jairam v. Rajnarain*, 45 A 21; *Ayitham v. Maddala*, A 1937 M 639; *Bhabi v. Ramalalbyamal*, A 1934 R 303; *Ambai v. Kelan*, A 1937 M 843; *Kandakuri v. K*, A 1948 M 54; *Nainsukhdas v. Gowardhandas*, A 1948 N 110]. It cannot be admitted in evidence even for determining the fact of partition as distinct from its terms [*Ramrattan v. Parmanand*, A 1946 PC 51 : 13 IA 28; *Ramprasad v. Snehalata*, A 1967 C 369; *Ratanlal v. Harishanker*, A 1980 A 180; *Lakshmaiah v. Peddamallaiah*, A 1979 AP 279 (*Rajangam v. Rajangam*, A 1922 PC 266 **rel** on)]; see further *post*: "*Existence of contract, grant, fact of partition, etc as distinguished from its terms*". Unregistered partition deed providing for the execution of another regular partition deed is inadmissible [*Md Ghouse v. Jamila*, A 1950 M 433]. A commission for ascertaining the local features, for proving, in essence, the details of unregistered deed of partition cannot be issued [*Sohanlal v. Shyama*, A 1970 C 192]. As to whether oral evidence is inadmissible to prove fact of partition, see *post*. Unregistered partition deed is not admissible to prove exclusive possession of parties [*Balkrishna v. Saliq*, A 1946 A 476].

Document of dissolution of partnership affecting immovable property of more than Rs. 100 requires registration [*Sriramsubha v. Venkataratnam*, 86 IC 860 : A 1925 M 945] and under s 91 it could alone be looked at for the terms of dissolution [*Samuvier v. Ramasubbier*, 55 M 72 : A 1931 M 580 : 60 MLJ 527]. No evidence is admissible to prove the share of the assignor in certain estates when the deed of assignment is inadmissible for want of registration [*Nemtulla v. Sufiabu*, A 1935 B 208].

Plaintiff alleged that *A* and *B* had sold and conveyed by an unregistered deed, certain land to the person under whom he claimed. The deed being inadmissible for want of registration, oral evidence of *B* to prove the sale is not admissible as secondary evidence of unregistered deed could not be received [*Ram Ch v. Govinda*,

1 CLR 542; see *Gangabisan v. Tukaram*, 5 NLR 70 : 2 IC 744]. Where a plaint alleged that possession of immovable property has been given to defendant as security for loan of Rs. 100 or upwards but without any registered document, oral evidence is not admissible to prove the transaction [*Mg San v. Mg Po*, 4 R 1 FB : A 1925 R 291]. As to the inadmissibility of secondary evidence of a document which is inadmissible for want of registration, see *Kabulan v. Shamshir*, 11 WR 16; *Dina Nath v. Debnath*, 5 BLR Ap 1 : 13 WR 307; *Devithi v. Krishnasami*, 6 M 117; *Sheik Rahamatulla v. Sheik Saritulla*, 1 BLR 58 FB; *Monmohinee v. Bishen Myee*, 7 WR 112; *Shk Ibrahim v. Parvata*, 8 BHC 163; *Crowdie v. Dullar*, 21 WR 307; *Shk Md v. Kallee Pd*, 24 WR 326; *Kochubhai v. Gulab*, 2 B 635.

An unregistered document which comes within s 17 Registration Act, cannot be used in any legal proceeding to bring out indirectly the effect which it would have if registered [*Skinner v. S*, 56 IA 363 : A 1929 PC 269 : 33 CWN 1150 : 51 A 771; see however the proviso to s 49 Regn Act and s 53 A T P Act which were inserted after this decision].

Agreement to sell immovable property is inadmissible if unregistered, only if it creates an interest in the property. Where therefore an agreement to sell does not create any interest in the property, it is admissible in evidence though unregistered [*Jagannadha v. Lakshminarayana*, A 1930 M 683 : 58 MLJ 688]. Though an unregistered *kobala* is invalid as a document of title, it is admissible under s 53A T P Act to prove the requisite contract to transfer on the terms thereof [*Manjural v. Mewajan*, A 1956 C 350 (*Birendra v. Naruzzaman*, 49 CWN 649 **not folld**)].

When a plaintiff claims to have possession of land alleged to have been mortgaged to the defendant and the latter says that the transaction was a sale, an unregistered deed evidencing the transaction is not admissible, but oral evidence other than the unregistered deed is admissible to show the real nature of the transaction [*Mg Po v. Ma Le*, 84 IC 468 : A 1923 R 102]. Where a mortgage-deed is not registered the mortgagor is not debarred from proving his title independently of the document [*Halka v. Nannhon*, A 1932 A 259].

—Unregistered Lease or Compromise Decree Creating Lease.—Unregistered lease or agreement for lease is inadmissible under s 49 Registration Act and s 91 forbids any other evidence of the agreement being given [*Sreeramulu v. Ramaswami*, 33 MLJ 596 (35 M 63 FB **folld**); *Ramjoo v. Haridas*, 91 IC 320: A 1925 C 1087; *Ram Ch v. Tama*, 36 B 500; *Chagan v. Kashi*, 71 IC 33: A 1923 N 76; *Dammulal v. Md Bhai*, A 1955 N 306; *Adit v. Chhaganlal*, A 1969 P 26]. Unregistered lease deed can be looked into for the purpose of proving party's character of possession. [*Kousalia Ammal v. Valliammi Ammal*, A 1998 Mad 287]. It is not admissible for determining fair rent [*Annamalai v. Poosari*, 31 IC 279], or to prove tenancy or its terms [30 MLJ 492: 34 IC 6], or the length of the term [*Niadar v. Rank*, 63 IC 90]. The fact of the execution of an unregistered lease is evidence that before it was executed the parties had agreed that there should be a lease, and of the terms of the previous oral agreement [*Makhumbi v. Anantram*, 84 IC 670: A 1923 N 73]. Where a lease-deed is inadmissible for want of registration, the tenancy can be proved by other evidence as by the doctrine of part performance [*Damodar v. Masoodan*, 105 IC 172: A 1928 P 89; *M Mallikarniunaiah v. Shivanna*, A 1973 My 40]. In the case of agricultural land, a tenancy *sup*, it was observed that such evidence (*eg* possession, acceptance of rent &c) without production of the unregistered lease [*Bishambar v. Ajodhya*, A 1946 P 407; *Shyam v. Ganesh*, A 1930 P 20; *Ramanandan v. Tilakdhari*, A 1936 P 636; *Amir Ali v. Yakub*, 41 347: A 1915 C 39].

Under s 117 T P Act a lease for agriculture purposes is not necessary to be made by a written instrument. It may be effected by oral agreement. But if reduced to writing, then in the case of a lease from year to year registration would be required

[*Ramnath v. Jojan*, A 1964 P 1 FB]. It may be that s 91 is a bar to prove the terms of the agreement, but it is no bar to prove the very existence of the lease itself [*Naban v. Nabakishore*, A 1964 Or 16]. An unregistered *amalnama* which is inadmissible under s 49 Registration Act to prove the lease cannot be used for proving the acceptance by the lessor of the terms of the *kabuliat*. Nor can such acceptance be proved by oral evidence [*Ram Krishna v. Jainandan*, 14 P 672]. A compromise decree in a suit for *khas* possession enhancing the previous rent and creating a lease being compulsorily registrable is inadmissible in evidence. S 91 bars the proof of realisation of enhanced rent by oral evidence and rent receipts [*Atul v. Zahed*, 45 CWN 129: 72 CLJ 132; see *Bogha Mower v. Ram Lakhan*, 27 CLJ 107 *post*]. When a compromise in writing is sought to be enforced as a contract, evidence of any new term is not admissible [*Md Daud v. Abu Md*, A 1961 P 310].

—Admissibility for Collateral Purpose.—Documents which are inadmissible for want of registration may, however, sometimes be admissible for collateral purposes. A collateral purpose is any purpose other than that of creating, declaring, assigning, limiting or extinguishing a right to immovable property [*Bai Gulab v. Shri Datgiri*, 9 Bom LR 393; *Karimulla v. Bhanupratap*, A 1949 N 265]. A collateral purpose means a purpose which excludes all reference to the contract relating to immovable property [*Bahawal v. Amaik*, A 1932 L 655]. It is a purpose foreign and not subordinate to the purpose for which the document was executed [*Brajamohan v. Lachmi*, 1 PLT 719; *Tribhuban v. Ram Ch*, 14 P 233]. As to what is collateral transaction or purpose, see *Ramlaxmi v. Bank of Baroda Ltd*, A 1953 B 50. Consideration is not a collateral fact, *ie* a fact which is independent of or divisible from the purpose to effect which registration is required [*Shukhlal v. Bisweswar*, A 1929 N 115].

A document required by law to be registered, if unregistered is inadmissible as evidence of a transaction affecting immovable property, but it may be admitted for any collateral purpose, *ie*, for any purpose other than that of creating, declaring, assigning, limiting or extinguishing a right to immovable property [*Vidyabhusan v. Ratiram*, 1969, 1 SCWR 341: 1969 SCD 1158]. An unregistered document may be admissible in evidence for a collateral purpose, *eg* to show nature of possession [*Amar v. Surinder*, A 1975 MP 230 FB (*Chelamayya v. Venkatratnam*, A 1972 SC 1121 **applied**); *Abdul Razack v. H K Gopal*, A 1974 My 7; *Ramshanker v. M G H S School*, A 1979 A 184; *Ugni v. Chowa*, A 1968 P 302 FB; *Janki Kuar v. Brij Bhikhan*, 3 P 249: 79 IC 26; *Thakore v. Bamanji*, 27 B 515; *Jhamplu v. Kutramani*, 39 A 696; *Varada v. Jeevarathnammal*, 46 IA 285: 43 M 244: A 1919 PC 44: 24 CWN 346; *Galstaun v. Prafulla*, 36 CWN 583; *Nadepena v. Saripalli*, 47 M 203 FB: A 1924 M 292 *post*; *Narayanaswamy v. Thangavelu*, 82 IC 67: A 1924 M 800; *Qadar Baksh v. Mangha*, 4 L 249; *Ata Md v. Sankar*, 6 L 319; *Ramu v. Panchammal*, 92 IC 1028: A 1926 M 402; *Raje Udaram v. Waller*, 104 IC 253: A 1927 C 884; *Suruchibala v. Suraj*, 46 CWN 419; *Shyam v. Ganesh*, A 1930 P 20; *Girijanandan v. Giridhari*, A 1951 P 277; *Dammulal v. Md Bhai*, A 1955 N 306], provided the transferee is in possession [*Rajani v. Sambhu*, A 1929 C 710], or to explain possession of a donee under an unregistered deed [*Jagannath v. Chandni Bibi*, 26 CWN 65], or the quantum of interest [*Purusottam v. De Souza*, A 1950 Or 213], or to determine who were parties to the transaction [*Lakhan v. Takim*, 80 IC 357: A 1924 C 558], or as evidence of date on which possession was taken [*Abdulah v. Maqbul*, 45 A 464]; or as evidence of payment of money [35 B 438 : 4 B 126 : 2 IC 516; *Shanti v. Lyallpur Bank*, A 1936 L 276], or amount of dower [44 IC 837]; or a debt arising from the court's act [33 B 610]; or to prove an admission [61 IC 328; 57 IC 12; *Rajangam v. R*, 57 IC 18: 39 MLJ 832], or to show the character of possession and evidence can be given of circumstances under which a party obtained possession

[*Mg Sin v. Mg So*, A 1931 R 40: *Rahimansa v. M I Instn*, A 1953 M 366]; for proving that there was a talk of making a gift [*Neelam v. Vinjamoori*, 92 IC 470: A 1926 M 191]; or for proving a transaction by which the rent due to the lessor was transferred to the lessees [*Ganesh v. Sheomangal*, 101 IC 773: A 1927 A 763]; or as evidence or an admission [*Rajani v. Bashiram*, A 1929 C 636: 49 CLJ 532; *Rajangam v. R, sup*]. Document though ineffective to pass interest in land can be used for collateral purposes, *eg* to show the other terms of the partnership [*Arsecularatna v. Perera*, A 1928 PC 273]. Unregistered lease cannot be looked into for finding out whether entry was as permanent tenants [*Karimulla v. Bhanupratap, sup*—CONTRA: *Vishwanath v. Ranganath*, 1942 Bom 595, 602: A 1942 B 268].

An agreement which for want of registration is inadmissible to prove a lease may be admissible to prove an agreement which does not affect the land, *eg* an agreement to execute a lease on the fulfilment of certain conditions [*Satyendra v. Anil*, 14 CWN 65; *Harinath v. Parmatha*, 25 CWN 550; *Ardeshir v. Sirdar*, 36 B 610]. Unregistered agreement for sale of earth and sand is admissible to prove the terms of the covenant to level up the land after removing earth and sand [*Kanji v. Shanmugam*, A 1932 M 734]. It can be used to prove the acknowledgment of debt contained therein [*Davindar v. Lachmi*, A 1930 L 985]. It cannot be made the basis of a suit for specific performance [*Diwan v. Gurbachan*, A 1932 L 276]. Inscription on a building showing gift cannot be admitted to prove gift, but may be referred to for ascertaining nature of possession [*Krishnaswami v. Secy of State*, A 1943 M 15]. An unregistered deed cannot be used to prove the quality of possession, *eg* possession as mortgagee [*Narayan v. Jaswani*, 1 NLR 147; *Sukhlal v. Bisheswar*, A 1929 N 115].

A sale of immovable property value at Rs. 99 when made by a document must be registered but having regard to s 91 the unregistered instrument might be used as evidence of the nature and terms of the transaction which was not completed but fell through [*Brajaballav v. Akshoy*, 30 CWN 254: 93 IC 115]. Unregistered sale-deed may be used to prove terms of contract, only it cannot be used to prove title [*Keshwar v. Sheonandan*, A 1929 P 620]. Unregistered sale-deed is admissible to prove the existence of an agreement for sale for applying the doctrine of part performance [*Hemeswar v. Poal*, A 1928 C 755; *Puchha Lal v. Kunj*, 18 CWN 445: 19 CLJ 213]. A compromise filed in suit which relates to immovable property of the value of more than hundred rupees is admissible though unregistered if it has been acted upon by parties [*Dalip v. Dalip*, A 1930 L 446].

Under an unregistered instrument of usufructuary mortgage for over Rs. 100, defendants were in possession for over twelve years. In a suit for redemption—*held* (RAMESAM an VENKATASUBBA JJ,—SPENCER J, **dissenting**) that the unregistered document could be received in evidence for proving the defendnat's possession as mortgagees and that the suit was not liable to be dismissed on account of the non-registration of the document [*Nadepena v. Saripalli*, 47 M 203 FB : 45 MLJ 669 (*Varada Pillai v. Jeevaratnammal*, 46 IA 285: 43 M 244 refd to)]. In a suit for redemption of an usufructuary mortgage for Rs. 200, the unregistered deed was admissible to show the character of defendants' possession; that the defendants could be shown to have acquired only a limited interest as mortgagees by adverse possession; that to prove the extent of the interest acquired by them by adverse possession, the terms of the mortgage asserted by them may be proved, and such proof cannot be regarded as an attempt to prove unregistered mortgage or to adduce secondary evidence of it [*Nadepena v. Saripalli*, 47 M 203 (*Varada v. Jeevarathnammal, sup* **applied**)].

In 44 IC 889 (L) it has been held that an unregistered deed of gift is inadmissible even for collateral purposes, *eg* that donee took possession and began to hold adver-

sely. Secondary evidence of a lost unregistered mortgage is admisssible to prove the document so far as it evidences an oral agreement not affecting the land [*Mapanu v. Ma Shwe*, 44 IC 91]. Where a fresh mortgage is executed in supersession of an earlier mortgage, but the fresh mortgage is unregistered, it is admissible for proving an acknowledgment of the pre-existing debt [*Karam v. Maya*, A 1932 L 592].

A *bona fide* award effecting immovable property is the act of a judge chosen by the parties and is admissible without registration [*Bhagwati v. Bhagwandas*, A 1927 S 206; *Thiru Vengidachariar v. Ranganatha*, 13 MLJ 500; *Krishna v. Aba*, 34 B 139]. When an award affecting a partition of immovable property is signed by the parties in token of consent, it is inadmissible without registration [*Amarsi v. Dayal*, 9 B 50 FB; *Teklal v. Sirpati*, 18 CWN 475]. Where an award is not *bona fide*, but a disguise to give effect to the agreement of the parties before reference to arbitration and intended to evade stamp and registration, it is not admissible [*Bhagwati v. Bhagwandas*, A 1927 S 206].

Admissibility of Oral Evidence When Instrument is Not Legally Attested.—A Mortgage bond below Rs. 100 is not admissible when not legally attested. Oral proof cannot be substituted for written evidence of any contract which the parties have put into writing. Such a bond can be admitted in evidence as a simple bond for payment of money [*Dhana Md v. Nastulla*, 92 IC 948: A 1926 C 637 (*Subramanian v. Lutchman*, 50 IA 77: 28 CWN 1: A 1923 PC 50 **folld**)].

Proper Time to Object When Evidence is Tendered in Contravention of This Section.—The objection to evidence excluded by s 91 should be taken as soon as any question is put to a witness with regard to the terms of any contract. After the plaintiff has succeeded in proving by witnesses a case of implied or oral contract and after he has closed his case, the defendant is not entitled to get rid of it, by suggesting the existence of an unstamped written contract, which he is unable legally to produce, and on the subject of which he might have cross-examined the plaintiff's witnesses [*Yeshwadabai v. Ramchandra*, 18 B 66, 74]. In practice, what usually happens is that, so soon as the plaintiff begins to give parol evidence of an agreement, which the defendant knows to be in writing, objection is taken by the defendant, and the plaintiff is forced by the judge to produce the agreement under penalty of having the parol evidence excluded. But a plaintiff cannot be forced to produce a written agreement merely because one of his witnesses proved, on cross-examination that an agreement, which he only knew *related in some way to the land in question*, and seen in the hand of the plaintiff's solicitor, and was produced at a former trial between the same parties, since, to exclude parol evidence, it should appear that the agreement was between the same parties and binding upon them at the time of the trial, [*Doe v. Morris*, 12 East 237]. Objection cannot be raised at stage of arguments [*Binani Properties (P) Ltd v. M Golamali*, A 1967 C 390]. See s 144 *post*.

"Any Matter is Required by Law to be Reduced to the Form of a Document".—When in regard to any given matter the law requires that the evidence of the transaction should be embodied in a document, the transaction can be established only by proof of the document; no proof can be substituted for that so long as the writing exists and is in the power of the party. The following are some of the documents which are required by law to be reduced to writing:—Judgments and decree of civil courts (Or 20 rr 2 to 19: and Or 41 rr 30 to 32); judgments and orders of criminal courts (see ss 353, 354 and 387 Cr P Code. S 298 of the Cr P Code indicates the proper mode of proving conviction or acquittal; see *Yasin v. R*, 28 C 689: 5 CWN 670); the depositions of witnesses in civil cases (Or 18 rr 5, 14, 16);

depositions of witnesses in criminal trials, confessions and examination of accused persons (see s 164 and the provisions in Ch XXIII Cr P Code as to the mode of recording evidence); acknowledgment of debt and part payment of debt or interest (ss 18 and 19 Limitation Act); agreements made without consideration (s 25 cls 1 & 3 of Contract Act); contracts for reference to arbitration (s 28, exception 2 of the Contract Act); mortgages when principal sum secured is one hundred rupees or upwards (s 59 T P Act); lease of immovable property from year to year or for any term exceeding one year &c (s 107 T P Act); gift of immovable property (s 124 of the T P Act); sales and exchange of tangible immovable property of the value of Rs. 100 and above (ss 54 and 118 T P Act); trusts of movable and immovable property (s 5 Indian Trusts Act); transfer of actionable claims (s 130 of T P Act); wills (ss 63 and 66 of Succession Act, extended to Hindus etc by s 57 of the Act); bequests to religious or charitable use (s 118 of the Succession Act) &c, &c; contracts made by municipal and other such local bodies under special Acts (see *Chairman v. Amulya*, 34 C 1030: 12 CWN 50: 29 M 360: 30 M 200: 27 B 618: 27 A 592); authority to adopt not conferred by a will [see s 17(*3*) of the Registration Act 16 of 1908 and 27 M 30]: "consent in writing" in s 153C(*3*) Companies Act, 1913 (s 399(*3*) of Act 1 of 1956) [*Makhan v. Amrit &c*, A 1953 A 326].

If any ambiguity in decree is not determinable by looking at the judgment and the pleadings, oral evidence may be permitted in order to correct the misleading descriptions in the decree [*Allah Baksh v. Panjab & Sind Bank*, A 1934 L 181].

Family Settlement.—There is no provision of law requiring that partition of family settlements must be reduced to writing and registered, though when reduced to writing the question of registration may arise. Oral evidence of such settlement is therefore admissible [*Ranga v. Lakshman*, A 1930 B 438]. A binding family arrangement dealing with immovable property worth more than Rs. 100 can be made orally and when so made no question of registration arises. If, however, it is reduced to the form of a document with the purpose that the terms should be evidenced by it, it requires registration and is inadmissible without it. While the writing cannot be used as a document of title without registration, it can be used as a piece of evidence, *eg* corroborative of other evidence or as an admission of the transaction or as showing or explaining conduct [*Ramgopal v. Tulshiram*, 51 A 79 FB: A 1928 A 64; *Jiteba v. Parmesra*, A 1950 A 700; *Awadh v. Narain*, A 1962 P 400].

Doctrine of Part Performance and S 53-A T P Act.—Under s 54 T P Act a sale of immovable property of the value of Rs. 100 and above can be made only by a registered instrument. If below Rs. 100, there can be a sale by delivery of possession and without any document. But if a sale deed is at all executed, it must also be registered [*Kuppuswami v. Chinnaswami*, A 1928 M 646; *Mg Ba v. Mg Kywe*, 6 R 125; *Braijaballav v. Akshay*, 30 CWN 254; *Kaliram v. Dulal*, A 1933 C 544]. A document of sale which the law requires to be registered, if not registered is not admissible in evidence (v s 49 Registration Act). A mere contract for sale differs from an actual sale. An agreement to sell, however, is not required by law to be writing. It may be oral or in writing and if in writing, registration is not compulsory [s 17(2)(*v*) Registration Act; see *Harnandan v. Jawad*, 27 C 468; *Sridhar v. Chintamani*, 18 B 396]. Such an agreement, oral or in writing, can be enforced by specific performance under s 10 S R Act. Sometimes a position of difficulty is created when in pursuance of an agreement for sale or lease the intended transferee has taken possession of the property though for some reason or other the required legal documents have not been executed or registered. It was held in several cases that in such cases, under the equitable principle of part performance, the position is the same as if the document has been executed, subject to the proviso that specific per-

formance can be obtained between parties to the agreement in the same court and at the same time as the subsequent legal question falls to be determined [*Gajendra v. Ashraf*, 27 CWN 159: 69 IC 707; *Shamkishore v. Umesh*, 24 CWN 468]. For an exposition of the doctrine of part performance, see *Manchester B Co v. Coombs*, 2 Ch D 608: 70 LT Ch 814; *Maddison v. Alderson*, 1883, 8 AC 473; *Walsh v. Lonsdale*, 52 LT Ch 2.

Thus, although an unregistered sale-deed is inadmissible in evidence, plaintiff who was in possession in pursuance of the agreement was entitled to relief on the doctrine of part performance in a specific performance [*Hiralal v. Shankar*, 45 B 1170]. So, although an unregistered partition-deed is inadmissible in evidence, if there has been division and enjoyment of separate right, the partition would be given effect to under the same doctrine [*Vattam v. Vattini*, A 1929 M 291]. This equitable doctrine of part performance was applied in India in a large number of cases (see *Md Musa v. Aghore*, 42 IA 1: 42 C 801: A 1914 PC 27; *Venkayamma v. Appa Rao*, 39 M 509: A 1916 PC 9: 43 IA 138; *Bapu Apaji v. Kashinath*, 41 B 438 FB; *Puchhalal v. Kunjbehari*, 18 CWN 445; *Meherali v. Arutunnessa*, 25 CWN 905; *Vizagapatam, S D Co v. Muthurama*, 46 M 919 FB; *Ghulam Qadir v. Ghulam Hussain*, A 1973 J&K 11 FB). Even in some cases where the intended transferee was in possession but his right to obtain specific performance of the agreement became barred by lapse of time, the doctrine of part performance afforded a defence in an action for ejectment by the intended transferor [see *Meherali v. Arutunessa, sup*; *Venkatesh v. Malappa*, 46 B 722; *Ramsewak v. Sheonaik*, 45 A 388; *Sandu v. Bihkchand*, 47 B 621; *Salamat-uz-zamani v. Masha*, 40 A 187; *Gandreddi v. Revinipati*, A 1930 M 1021; *Subimal v. Radhanath*, 60 C 1372].

> In 1913 there was a verbal agreement between appellant and respondent for the grant of a permanent lease of a land to the respondent who was let into possession in anticipation of the execution of the lease and shortly thereafter erected certain structures with the knowledge and approval of the appellant. Sometimes in 1914 the parties agreed that the lease should be for five years. No lease was executed and in October 1922 the appellant served upon the respondent a notice to quit asserting that he was a monthly tenant—*held* that the respondent having allowed his right to enforce his contract to become barred can only resist the appellant's claims to possession by seeking to establish a title, the acquisition of which is forbidden by statute, he being a lessee. Therefore the appellant was entitled to succeed, there being neither equitable estoppel nor did the doctrine of part performance apply [*Ariff v. Jadunath*, 58 IA 91: 58 C 1235: 35 CWN 550: A 1931 PC 79; (55 C 1090 **reversed**)]. *Ariff's case* was **applied** in *Subodh v. Bhagwandas*, 50 CWN 851: A 1947 C 353, the facts of which were similar.

The T P Amendment Act (20 of 1929) by introduction of s 53-A gave legislative recognition to the equitable doctrine of part performance in a modified form rendering most of the former decisions obsolete. The doctrine of part performance in s 53-A is subject to certain limitations, one of them being that there must be a writing from which the form of the contract can be ascertained with reasonable certainty. The earlier decisions which allowed the equitable English doctrine of party performance to prevail even in cases where there was no writing are no longer good law [*Aziz Ahmad v. Alauddin*, 144 IC 788: A 1933 P 485; *Suleman v. Patell*, A 1933 B 381; *Ma Mya v. Annamalai*, A 1934 R 127].

As observed by LORD MACMILLAN : "The English doctrine of part performance, as LORD RUSSELL OF KILLOWEN explained in *Ariff's case*, 58 IA 91 (*sup*), is not

available in India by way of defence to an action of ejectment (apart from the subsequent statutory alteration of the law mentioned hereafter)" [*Pir Bux v. Md Taher*, 61 IA 388: 39 CWN 34: A 1934, PC 235]. The English doctrine of part performance is not available by way of defence to a suit for ejectment except under s 53-A T P Act [*Haripada v. Elokeshi*, 44 CWN 357].

S 53-A T P Act which imports in India the equitable doctrine of part performance only partially, does not give the transferee any right on which he can found a suit as plaintiff, but only a right which is available to him as a defence in order to protect his possession [*Dantmara Tea Co, Ltd v. Probodh*, 41 CWN 54 (**affirmed** in 44 CWN 145: A 1940 PC 1: 66 IA 295]; see *Mokyi v. Ma Thon*, 13 R 274 FB; *Kuchwar L&S Co v. Secy of S*, A 1936 P 372]. The defence under s 53-A is available to a person who has an agreement of lease in his favour though no lease has been executed and registered [*Maneklal v. Hormusji*, 1950 SCR 75: A 1950 SC 1]. The section contemplates that the contract itself shall be in writing and not that there is a mere reference to an oral agreement in any writing [*Mg Ohn v. Mg Po*, A 1938 R 356; *Radhabai v. Nayadu*, A 1951 N 285]. If there was a document of the kind envisaged in s 53-A, parol evidence could be given to prove its existence and contents by giving secondary evidence under s 65 [*Bobba Suramma v. Peddireddi*, A 1939 AP 568].

When part of the contract is not valid, s 53-A does not apply [*Abdul v. Ahmed*, 45 CWN 489]. Since s 53-A confers a right which is only available to a defendant to protect his possession, no question of limitation arises thereunder. The right is not accordingly lost if the person claiming it has no present right to enforce the contract [*Nakul v. Kalipada*, 1938, 2 Cal 328: A 1939 C 163]. S 53A does not operate to create a form of transfer of property which is exempt from registration. It creates no real right: it merely creates rights of estoppel between the proposed transferee and the transferor, which have no operation against third person not claiming under those persons [*Banerji v. K L & S Co*, 46 CWN 374: A 1941 PC 128: 21 P 243].

S 53-A does not under any circumstances apply to movable property [*Bhabi v. Ramalabyamal*, A 1934 R 303]. S 53-A does not in terms apply to Punjab [*Firm Kirpa v. Bishan*, A 1944 L 179]; but the principle embodied applies [*Milkha v. Shankari*, A 1947 L 1 FB].

Confession etc of Accused.—The confession of an accused to a magistrate in the course of an investigation has to be recorded in the manner laid down in ss 164 and 364 (now s 281) Cr P Code and it being a matter required by law to be reduced to a document, oral evidence is excluded [*Nazir Ahmed v. R*, A 1936 PC 253 (*ante* s 24)]. But s 91 is no bar to the admission of oral evidence to prove an oral confession to a magistrate which he has not bound to record under ss 164 and 364 (now s 281) Cr P Code [*Rishi v. S*, A 1935 P 425 **relying** on *Nazir Ahmed v. R, Sup*; see also *ante*, notes to s 26: "*Oral confession before magistrate*"]. Where a magistrate is examined to prove what was said by a person and the sub-inspector to the accused and what the accused did in his presence, his statement is admissible [*Jagannath v. R*, A 1950 A 9]. Under s 463 Cr P Code oral evidence is admissible to remedy any defect in recording the confession when it is of form only and not of substance (*ante*, s 24). As to whether an oral confession to a magistrate can be proved by his testimony, see *ante*, s 21: "*Admission in criminal cases or to the police*") and s 26 "*Oral confession before magistrate*".

Oral Statement by Witness to Police Officer.—It is not obligatory upon a police officer to reduce to writing any statement made to him during an investigation under s 161 Cr P Code. It was held that s 91 does not therefore render oral evidence of such statements inadmissible [*R v. Uttam Chand*, 11 BHC 120; *Pitumal v. R*, 88 IC 449: A

1921 S 16; see also *Rustom v. R*, 7 ALJ 468]. But see now amended s 162 Cr P Code which does not make any distinction between the *statement* to a police officer or any *record* thereof, both being inadmissible except for the purpose of the proviso to that section [see *post*, s 157 under "*Whether s 157 is controlled by s 162 Cr P Code*"]. As to statements made to a police officer in the course of an investigation and taken down in writing, see s 35].

Adjustment of Decree.—An agreement not to execute a decree is part of the adjustment of the suit within Or 23, r 3. Where such agreement was not part of the record, *ie*, reduced to the form of a document, no extraneous evidence is admissible under s 91 [*Hukum v. Radha Kishan*, 11 NLR 110: 11 BHC 120 (*Chhoti v. V. Rameshwar*, 6 CWN 796 **folld**)]. S 92 does not exclude oral evidence to prove the adjustment of a decree within Or 21, r 2 C P Code [*Rangal v. Chunnilal*, 16 NLR 204: 60 IC 316; see also *Ratanlal v. Anwar*, 53 IC 527]. See *post*, s 92.

Secondary Evidence to Prove Deposition.—As to whether s 91 is a bar to the proof of deposition by other evidence, where it has not been read out to the witness, see *ante*, s. 80 *et seq*.

Acknowledgment of Debt Required by Law to be in Writing.—Under s 18 Limitation Act an acknowledgment of liability must be made in writing and cl (2) provides that when it is undated oral evidence may be given of the time when it was signed. There is nothing in s 18 (*ibid*) or in the Evidence Act which precludes the letting in of oral evidence to explain to what date an acknowledgment refers. This is also clear from proviso (*6*) to s 92 [*Janardan v. Ganesh*, A 1945 B 200 FB: 47 Bom LR 27]. In an acknowledgment, oral evidence is admissible to prove the exact nature of the right or liability acknowledged [*Ittapan v. Nanu*, 26 M 34; *Nihalu v. Radhu*, A 1934 L 835], or to prove the creditor's name, identity of debt or amount [see *Narayana v. Venkataramana*, 25 M 220 FB; *Upputtaji v. Mammavan*, 16 M 366; *Daia Chand v. Surfaraz*, 1 A 117, 125 FB; *Gopikishen v. Brindaban*, 13 MIA 37: 12 WR 36; *Abdul Ali v. Goldstein*, 43 PR 1910; *Jagan v. Kiwar*, A 1930 A 368; *Munpl Com v. Ralia Ram*, A 1936 L 629: 17 L 737; *Athmaramayya v. Seshappa*, A 1941 M 409: 1941, 1 MLJ 173]. It has however been held that where an acknowledgment is general, the surrounding circumstances may be looked at for ascertaining whether it is in respect of a particular debt. But where there are more debts than one, oral evidence will not be received to identify the debt acknowledged with the debt sued on, for, that would involve a question of *intention* of the debtor as to what debt he meant, and parol evidence of intention cannot be admitted for identifying the debt acknowledged [*Beti Maharani v. Collr*, 22 IA 31: 17 A 198 PC (**affirming** 14 A 162); see also 116 PR 1881]. Relying on this case it has been held that oral evidence of intention is not admissible in construing a written acknowledgment of liability, but the surrounding circumstances can be looked into for such a purpose [*Md Haider v. Brojendra*, 45 CWN 208].

A mere acknowledgment contained in a communication addressed to a third party is not a declaration that creates title and is consequently admissible without registration in evidence of a fresh period of limitation under s 18(*1*) Limitation Act [*Bageshwari v. Jagannath*, 59 IA 130: 36 CWN 250: A 1932 PC 55]. Parol evidence is admissible to prove a debt acknowledged in writing by the debtor, when such acknowledgment being unstamped in inadmissible in evidence [*Tikkan v. Lal and Manka*, A 1923 L 301; *Launjari v. Parsotam*, 103 IC 634: A 1927 A 503]. Parol evidence is admissible to prove the true date of the execution of a written document though it purports to have been executed on some other date (Hals 3rd Ed, Vol 11, para 654].

An instalment bond provided that default in payment of one or more instalments should render the whole debt due forthwith. The suit was within time if the first two

instalments had been paid. Plaintiff could prove payment of earlier instalments by oral evidence [*Nand Lal v. Akki*, 6 L 163]. When payment is endorsed on the back of a bond and defendant denies payment, oral evidence is not admissible to prove payment towards interests [*Zaman v. Ganga*, A 1939 O 142].

As to admission of secondary evidence of acknowledgment, see *ante*, s 65.

Instances of Matters Which are Not Required by Law to be Reduced to Writing. —Resumption of *saranjam* is not required by law to be reduced to writing [*Sayajirao v. Madhav Rao*, A 1929 B 14]. S 91 does not apply when the writing is not evidence of the matter reduced to writing. A house search list is not evidence of the matter stated therein and it does not therefore exclude oral evidence of such matter [*Public Pros v. Sarabu*, 33 M 413]. S 91 does not exclude oral evidence of what took place at the time of search [*Elamathan v. R*, 33 M 416] and other evidence can be given regarding the things seized in the course of the search and regarding the places in which they were respectively found, than the search list. If the narrative of an extrinsic fact has been committed to writing it may be proved by parol evidence even though writing is required by law [*In re Solai and others*, 34 M 349: 21 MLJ 81 FB]. The fact of deposing is a physical act and the fact might be proved by anyone who has seen and heard the witness [*Ganapathi v. Sakharayappa*, A 1929 M 187].

When a dying declaration is recorded by a magistrate, the writing itself is not evidence but the precise statement made by the deceased must be proved by the magistrate, who recorded the statement or some one who heard it. S 91 does not apply to such a document [*Gouridas v. R*, 13 CWN 680: 36 C 659, *ante*, s 32(*1*): "*Recording of dying declaration and mode of proof*"].

Where a Muhammedan executed a deed of gift which is inadmissible, oral evidence is admissible to prove that the gift was in accordance with Mahomedan law [*Ali Baksh v. Ghurai*, 28 IC 180: 18 OC 122].

Exception 1:—The fact that a person has acted *in an official capacity* is also presumptive evidence of his due appointment to the office, because it cannot be supposed that any man would venture to intrude himself into a public situation which he was not authorised to fill. The legislature itself has expressly adopted this presumption in the statutes relating to the excise, customs, &c ..... It extends to all public officers. Moreover, no distinction is recognised though the appointment must necessarily be in writing, or even under seal, or though the action be brought in the name of the officer [*M'Gahey v. Alston*, 2 M&W 206], or though the title be directly put in issue by the pleading, or though the proceedings be criminal, and in the highest degree penal, as for instance, a trial for the murder of a constable in the execution of his duty [*R v. Gordon*, 1789, 1 Lea 515; Tay s 171]. See also notes to s 79, *ante*. "The best practice seems to have excused production [of written appointment to office], and to have done so for the specific reason either of the general inconvenience that such a rule would entail in actions for or against officers, or for the 'collateral' nature of the issue. But the usual sufficient proof in the courts where production is not required, is held to be the facts of acting as officer and of having a reputation as officer, or, in another form of notoriously acting as officer" [Wig s 1228, see also s 2535].

Exception 2 : [Wills Admitted to Probate].—Under this exception the contents of a will of which probate has been granted, may be proved by the probate. The word '*probate*' means the copy of a will certified under the seal of a court of competent jurisdiction with a grant of administration to the estate of the testator [see s 2 (*f*) Succession Act, 39 of 1925]. The probate copy of the will though technically secon-

dary evidence of the contents of the original will, ranks a primary evidence. The executors acquire from the probate their title to administer the estate and it records the act of the courts as to the due execution of the will. It is therefore more valuable than the will itself. It has been held in England that the probate is the proper evidence of a will of personality and the original will cannot be read [*Pinney v. P*, 8 B & C 335]. The production of the probate is the only way in which an executor is allowed to prove his title [*Soona Mavanna v. S N*, 43 IA 113: 85 LJCP 179: 20 CWN 833: A 1916 PC 202].

A probate of a will is evidence of the contents of the will against all the parties interested thereunder [*Brajanath v. Anandamayi*, 8 BLR 219. This decision was contrary to the rule previously followed in *Sharo Bibi v. Baldeo*, 1 BLR OC 24 and in *Jaikakli v. Shib Nath*, 2 BLR OC 1 decided before the passing of the Hindu Wills Act]. By the substitution of the words "*admitted to probate*" in this exception, by s 7 of Act 18 of 1872, the decision in 1 BLR 24 and 2 BLR 1 have been overridden and rendered obsolete.

Letters of administration with a copy of the will annexed may be granted, even though the will has been lost, on satisfactory proof of its contents [*Ishar Chunder v. Dayamoye*, 8 C 864: 11 CLR 135. See the observations of WHITE J, in this case]. Where probate of a will has been granted and an executor appointed, he is bound to prove his title by the production of the probate [*Delaney v. Rahamat Ali*, 32 C 710]. Probate is conclusive evidence of the validity and contents of the will, as well as the validity of the executor's appointment [*Shk Moosa v. Shk Essa*, 8 B 241; *Girish v. Broughton*, 14 C 861, 875; *Lalit v. Radharaman*, 15 CWN 1021; *Hormusji v. Bai Dhanbaiji*, 12 B 164; *Maston v. Swifts*, 8 Beav 368]. The grant is conclusive as to the due execution of the will [*Whicker v. Hume*, 7 HLC 124]. As a matter of fact, "nothing but the probate or letters of administration with the will annexed is legal evidence of the will" in all questions of representation [*Pinney v. P, sup*; see also *Janaki v. Dhanulal*, 14 M 454; *Ameer Chand v. Mohunund*, 6 CLJ 453]. The probate establishes the will from the death of the testator, and renders valid all intermediate acts of the executor as such [s 227 Succession Act].

Wills not admitted to probate in India, but probated in England or Ireland, may be proved by the production of the probate (see s 82 *ante*). As a probate copy of a will records the act of the court in admitting the will to probate after due proof of its execution, a probate is in the nature of a public document. Under s 74, wills of foreign countries may be proved by probate copy. See *ante* s 74 cl (*1*)(*iii*).

—Unprobated Will.—S 218 Succession Act extends to all cases relating to the establishment of the right as executor or legatee. But an unprobated will be looked at for all other collateral purposes [*Sarbamangala v. Mahendra*, 4 C 509; *Basanta v. Gopal*, 18 CWN 1136; *Prayag v. Siva Pd*, 42 CLJ 280, 407; *Sarala v. Hazari*, 42 C 953; *Jogendra v. Makhan*, 1942, 2 Cal 13: A 1942 C 401; see in this connexion *Ranjit v. Subodh*, A 1937 C 252; *Ghansamdas v. Gulab*, 50 M 927 FB]. A person having sufficient interest under an earlier unprobated will has *locus standi* to oppose grant of probate and to apply for revocation of the later will on the ground of non-service of citation [*Draupadi v. Raikumari*, 22 CWN 564]. The plaintiff's claim to certain lands as heir to his father was resisted on the ground that the father had by will, dedicated such lands to the family deity—*Held* that the will not having been probated was not admissible to defeat the plaintiff's claim [*Jogendra v. Makhan, sup*]. See note to s 13, *ante* and s 32(*7*) *ante*, "*will*".

Explanation 1.—It points out that the section applies equally whether a contract, grant, or any other disposition of property is comprised in a single document or in

more documents than one. A contract or a grant may be executed by several documents and the section requires that *all* the documents or letters, should be produced. [See *illus* (*a*)]. Explanation 1 and *illus* (*a*) merely require that all such documents must be proved. But where after the execution of a registered lease, an unregistered agreement between the same parties imposing certain terms was executed on the same day, the agreement being inadmissible did not affect the registered lease [*Janka v. Thakar*, A 1937 O 341]. In cases where secondary evidence is admissible, such evidence must also relate to all documents.

The written evidence need not be comprised in a single document, or be drawn up in any particular form. A draft, if duly signed, will suffice, even where a mere formal document was intended [*Gray v. Smith*, 43 Ch D 298]. It will suffice if the contract can be plainly made out in all its terms from any writings of the party, or even from his correspondence [*Bellamy v. Debenham*, 45 Ch D 481; *Allen v. Bennet*, 3 Taunt, 169; *Jackson v. Lowe*, 1 Bing 9], provided such writings or, correspondence contain internal evidence connecting them together, and an envelope in which a letter has been enclosed is sufficiently connected with the letter to supply the name of one of the parties to the contract [*Pearce v. Gardner*, 1897, 1 QB 688] ..... the entire contract must be collected from the writings [*Chinnock v. Lady Ely*, 146 RR 495]; verbal testimony not being admissible to supply any defect or omissions in the written evidence [*Boydell v. Drummond*, 10 RR 450; Tay s 1026].

Bought and Sold Notes.—A broker when he closes his negotiations as the common agent of both the parties, usually enters them in his business-book and gives to each party a copy of the entry or a note or memorandum of the transaction. The note which he gives to the vendee is called the *bought note*. The notes given to the vendor is the *sold note* (see Benjamin on Sales, s 276 and Story on Agency, s 28). Where conflict between "bought and sold notes" showed minor deviation not violating the genuineness of the 'sold note' the court could not refer to any other evidence, for determination whether arbitrator could be invoked for settlement of the dispute [*Fort Gloster &c v. Sethia Mercantile &c*, A 1971 SC 2289].

As to the position, function and rights of brokers, see *Munpl Corp Bombay v. Cuverji*, 20 B 124, 129-30.

—What is Primary Evidence of the Transaction When the Contract is Made by Means of Bought and Sold Notes Through Broker?—It may occasionally be a question of some nicety to determine what instrument constitutes the primary evidence of a transaction. Thus, where goods have been sold through the medium of a broker, it is not yet distinctly decided how far the *broker's book* is admissible in proof of the contract. On the one hand, it has been powerfully urged by many eminent judges, that this book, if duly signed by the broker, furnishes the best evidence of the agreement [*Sievewright v. Archibald*, 20 LJQB 529 &c]; but on the other hand, it has been ruled, after much consideration, and after consulting merchants, that the *bought and sold notes*, provided they agree, and are signed so as to satisfy the Statute of Frauds, constitute the contract, and, as such, must be produced in the first instance [*Goom v. Aflalo*, 6 B & C 117 &c]. However this particular point may be ultimately determined, it seems to be quite clear that, if notes have been transmitted to the principals, recourse may be had to the signed entry in the book kept by the broker [*Townend v. Drakeford*, 1 Car & K 20 &c]. Where the bought and sold notes are signed by the broker, and these substantially differ from each other, no binding contract is usually effected [*Cowie v. Remfry*, 5 Moo PC 232 &c Tay s 420].

In the case of brokers' contracts, the *bought and sold notes* are generally considered primary evidence of the contract; but if there are none, or if they disagree, the

original signed entry in the *broker's book* may be looked at; while if there be no such entry and the notes disagree, there is no contract, unless the differences can be reconciled, or shown to be only apparent by proof of mercantile usage [*Bold v. Rayner*, 1 M & W 343; *Kempson v. Boyle*, 3 H & C 763; Phip 11th Ed p 742. For a fuller discussion, see Tay ss 421-23].

With respect to notarial instruments, the general rule is that a duplicate made out at any time from the original or protocol in the notarial book, is equivalent to an original drawn up at the time of the entry in the book [*Geralopulo v. Wieler*, 20 LJ, CP 105; Tay s 424].

—Oral Evidence in the Case of Bought and Sold Notes.—Bought and sold notes together may form the contract in accordance with the custom of merchants in Calcutta. So parol evidence was not admissible to vary or add to the terms of the contract which had been thus reduced to writing [*Jadu Rai v. Bhabataran*, 17 C 173. See also *Ralli v. Caramalli*, 14 B 102]. In *Jamna Das v. Srinath*, cited in 17 C 173, note p 176, it has been held that bought and sold notes unobjected to, may be evidence of the contract, but they do not necessarily constitute the whole contract.

In India a contract of sale of goods can be proved by parol evidence. When the bought and sold notes in a contract of sale happen to be falsified by the vendor, the aggrieved purchaser is entitled to disregard them and prove his contract by other antecedent material [*Durga Pd v. Bhajan*, 31 IA 122: 31 C 614: 15 MLJ 106]. Where a contract of sale is effected through a broker, who sent, bought and sold notes to the buyer and seller, the fact they did not agree and were returned by the parties is not positive evidence that the parties did not agree. The contract was made before the notes were sent by the broker to his principals merely by way of information, and the plaintiff was entitled to give parol evidence of the terms of the contract [*Clarton v. Shaw*, 2 CLR 245 refd to in 17 C 173, 177].

Where a broker wrongly entered in sold-note the name of one of the parties to a contract, but the defendant was not misled by the mistake, oral evidence was admissible to show that the contract was really between the plaintiff and defendant, even though the name of a third person had been entered by mistake [*Md Bhay v. Chutterput*, 20 C 854, 857]. If, in the case of an agreement for sale of goods effected by means of bought and sold notes in English, the sold note signed by the vendor and taken with the bought note to the vendee who, before signing, wrote thereon in Chinese (a language unknown to the vendor) "Yellow rice will not be accepted", and the vendor did not assent to the terms thus altered—*Held* that the contract was not concluded until the bought and sold notes had been signed. They were the only evidence of the contract. As both parties were not *ad idem*, that contract failed [*Ah Shain v. Moothia*, 27 IA 30: 27 C 403: 4 CWN 453: 2 Bom LR 556. See also *Cowie v. Remfry*, 3 MIA 448, of which the facts were somewhat similar to the above Privy Council case].

On a contract note the buyer entered the specification of goods in vernacular which was at variance with the specification in English and the note provided that anything except the buyer's signature in vernacular shall be null and void—*held* that the contract in English cannot be modified or altered by reason of the addition of Hindi writing [*Meghraj v. Durga*, 54 C 97].

Telegrams.—The original of a telegram is ordinarily the one sent and not the one delivered to the addressee but there may be circumstances making the communication received the original, *eg* when a person sending an order by a telegram makes the telegraph-company his agent, the message received is deemed the original. The

rule in regard to telegrams is the same as in respect of other writing, *ie* the unavailability of the original must be shown before secondary evidence may be given. Thus when the original is out of the jurisdiction of the court, or when there is a rule of destruction of all messages received for transaction after a certain period, the copy received may be given as secondary evidence. A court may recognise that original telegrams are destroyed after three months and so secondary evidence is admissible [*Bishambar v. R*, 90 IC 706: A 1926 O 161]. In England the message delivered to the company is deemed the original [*R v. Regan*, 1887, 16 Cox C 203]. [As to proof of telegraphic messages and the presumption raised by them, see s 88 *ante*]. The contents of a telegram are not evidence of the facts stated therein [*Judah v. Isolyns*, a 1945 PC 174: 1945 Kar 351].

"Whether, in proving the terms of a *telegram*, the dispatch sent or the dispatch delivered and received is the one to be accounted for depends on the substantive law involved. In an action, for example, by a customer against a broker for falsely reporting his bankruptcy to a third person the dispatch sent would be the one to be proved; but in an action against a telegraph company by an addressee for delayed delivery, the dispatch delivered would be the material one; while in an action by an offeree against an offeror in which the acceptance of the offer is denied, the solution would depend on the rule in force as to the necessity of receipt of acceptance by the offer; and in certain other actions both the sent and the received dispatches would have to be accounted for" [Wig s 1236 and see the cases collected there]. "Although the general rule [that secondary evidence of contents cannot be received until it has been shown that the original cannot be produced] applies to telegram as well as to other writings, there has been some difficulty in determining what are original telegrams within the meaning of the rule that the best evidence must be produced. By the decided weight of authority the question whether the communication sent in or the one received is to be deemed the original depends upon which party is responsible for its transmission, in other words upon the question for whom the telegraph company is agent. If there is but a single communication, the despatch as delivered at the place of destination is the best evidence [*Collins v. W U Tel Co*, 145 Ala 412]. And generally in controversies arising between the sender and the receiver, when the company can be considered the agent of the sender of the message, the message received at the place of destination is to be deemed the original. One who sends an order by telegraph makes the company his agent for the delivery of the same and is bound by the message as delivered. The receiver may put in evidence the message as received [*Collins v. W U Tel Co, ante*; *Anheuser Busch B Assn v. Hutmacher*, 127 Ill 652]. A telegram received in reply to a telegram is admissible in evidence as against an obligation that there is no evidence to prove that it emanated from the alleged sender thereof, according to the weight of authority [*People v. Hammond*, 132 Mich 422]. However, a reply telegram may be excluded on the ground that it is not the best evidence. Thus where there is no evidence that the original telegram given by the sender to the sending operator is lost or destroyed, the telegram given to the sender by the receiving operator is not admissible. The fact that the telegram is a reply telegram does not interfere with the operation of the rule [*Howley v. Whipple*, 48 NH 487; Jones s 210].

Explanation 2:—Illustration (*c*) and Explanations (*1*) and (*2*) to s 62 explain the meaning. A common instance is that of bills of exchange of which three are usually executed, called the 1st, 2nd and 3rd of exchange. Bills of lading are in duplicate or triplicate. Bills of exchange has been defined in s 5 of Negotiable Instruments Act (26 of 1881). With regard to a bill of exchange there is a presumption that a person suing on it gave consideration or is holder in due course.

EXCEPTIONS TO THE RULE IN S 91

Explanation 3: (1) Documents When Collateral or Informal.—Explanation 3 attempts to illustrate, what may be called, exceptions of the embodied in this section. In the opening words of the section, the facts coming within its purview are described *as the terms (i) of a contract, or (ii) of a grant, or (iii)* of any other disposition of property, reduced to the form of a document by agreement of parties or by requirement of law; and if therefore in any document there is a statement of facts *other than the facts referred to above, ie* if any document does not relate to any of three classes of facts mentioned in the section, oral evidence is not excluded by it. With regard to the documents contemplated by this section, the obvious intention of the parties to them it to keep a record or memorial of the terms and conditions agreed upon, so that all controversy relating to them may be determined by inspection of the written document itself. But when anything in a document is not a fact in issue, *ie* when it relates exclusively to something other than any of the facts referred to in the section, or when any document falling within the section contains statement of other independent facts, oral evidence is admissible in proof or disproof of them. *Illustrations* (*d*) and (*e*) are to be read in connection with *Explanation 3*.

Extrinsic evidence is admissible in substitution of any document intended by the parties to operate merely as a collateral or informal memorandum of a transaction, and not as a contract or other binding legal instrument. Thus, payment of debt may be proved orally, though a cheque was given and a receipt taken, the latter of which was produced [*Carmathen Ry v. Manchester Ry*, LR 8 CP 685]. And where possession of goods was taken on a certain understanding, although a receipt and inventory were also signed [*Newlove v. Shrewsbury*, 21 QBD 41; *Charlesworth v. Mills*, 1892 AC 231; *Grigg v. National Co*, 1891, 3 Ch 206], or where a loan was secured collaterally by a promissory note [*Birchall v. Bullough*, 1896, 1 QB 325] oral evidence of the former was admitted [Phip 11th Ed p 791].

Where the writing does not fall within either of the three classes already described (*ante* pp 742-43), no reason exists why it should exclude oral evidence. If, therefore, 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. So, 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]; a verbal demand of goods is admissible in trover, though a demand in writing was made at the same [*Smith v. Young*, 4 Camp 439 (refd to in *Jivandas v. Framji*, 7 BHC 45)]; and the admission of a debt is provable by oral testimony, though a written promise to pay was simultaneously given [*Singleton v. Barrett*, 1 LJ Ex 134; Tay s 415]. Mortgage of 1688—Unregistered deed of the mortgage not proved to be in existence—Oral agreement with possession and recitals in other deeds referring to the property as mortgaged were admissible as the mortgage was not proved to have been in writing and at the time of the mortgage no writing was necessary [*Narsi Kalyandas v. Parshottam*, A 1928 B 484: 30 Bom LR 1277]. Parol or collateral evidence as to a condition precedent to any contract or disposition of property is permissible, but existence of any distinct subsequent agreement to rescind or modify the same in cases in which such terms are incorporated in a document registered in accordance with law is not permissible [*Ganesh Prasad v. Deo Nandan Raut*, A 1985 Pat 94, 96: 1984 Pat LJR 659].

On a somewhat similar ground it has been held that on prosecution for political offences, such as treason, conspiracy, and sedition, the inscriptions on flags and banners, paraded in public, and the contents of resolutions read at a public meeting,

may be proved, as being in the nature of speeches, by oral testimony [*R v. Hunt*, 3 B & Ald 566; *Sheridan's & Kirman's case*, 31 How ST 673; *R v. O'Connell*, 1843 Arm & 8 235-37 Ir; Tay s 417]. A combined reading of section 91 and Explanation 3 thereto makes it clear that if the oral evidence proposed to be adduced does not relate to, (a) terms of a contract, grant or other deposition of property, or (b) matters required by law to be reduced to writing, section 91 is not a bar. Further, if facts other than those mentioned in (a) and (b) above, are reduced to writing, oral evidence in regard to those matters is also not hit by Section 91. So also oral evidence to prove a document can always be allowed and is not prohibited by section 91. [*Y. Ganganaidu v. M. Surkantam*, A 1993 AP 130, 131].

—Written Document Collateral to the Question in Issue etc Need Not be Produced and Oral Evidence is Admissible.—For example, plaintiff can recover without producing the original written agreement, if during an employment under a written contract, a verbal order is given for separate work, if he can show distinctly that the items, for which he seeks remuneration, were not included therein; as, for instance, that whilst certain work was in progress in the inside of a house under a written agreement, a verbal order was given to execute some alterations or improvements on the outside [*Reid v. Batte*, 1829, M & M 414, commented on by PATTESON J, in *Parton v. Cole*, 6 Jur, 370. See *Vincent v. Cole*, M & M 257]. Where a tenant held lands under written rules, but the length of his term has been agreed orally, these rules need not be produced in an action of trespass under a plea denying his possession, because such plea only rendered it necessary to prove the extent of the tenant's term, which, having been agreed to by parol does not depend upon the written rules [*Hey v. Moorhouse*, 6 Bing NC 52, cited in Tay s 405].

Payment of money may be proved by oral testimony by witnesses, although a receipt has been given for the same [*Venkayya v. Venkatasubbaya*, 3 M 53; *Waman Ram v. Dhondiba*, 4 B 126, 137]. Payment of rents by tenants, for which written receipts have been given, may be proved by oral evidence [*Girish v. Sashi Sikhareshur*, 27 IA 110: 27 C 951: 4 CWN 631; see also *Rameswar v. Bharat Pershad*, 4 CWN 18 PC]. Although a receipt for sums paid in liquidation of a mortgage bond is compulsorily registrable, such payments may be proved by parol evidence [*Dalip Singh v. Soorga*, 1 A 442]. See s 92 *post*: "*Oral evidence is extinguishment or release &c*".

If the contents of a *patta* are in any way in question, they must be proved by the production of the document; where this is not the case, oral evidence of the *patta* is admissible [*Kedarnath v. Shurjoonnissa*, 24 WR 425]. So, where a suit for rent is not based exclusively on a *kabuliat*, but also on the collection of rent, s 91 does not apply and plaintiff can give evidence of collection papers without producing the *kabuliat* [*Gouri Shankar v. Minnat Ali*, 2 IC 636]. The terms of a tenancy may be proved by oral evidence although contained in an unregistered document not admissible in evidence [*Yeswadhabhai v. Ramchandra*, 18 B 66. See also *Lala Suraj v. Catherine*, 16 WR 248; *Fazal Sheikh v. Keramuddi*, 6 CWN 916: 33 B 610; *Amir Ali v. Aykap*, 41 C 347: 25 IC 509; *Nago v. Tukaram*, 49 IC 483; *Chavalli v Tullah*, 28 MLJ 361].

Where the document was not a promissory note, a bond or acknowledgment of debt, but was nothing more than a mere memorandum or note drawn up between the parties as to a transaction which has been settled between them, parol evidence was admissible [*Udil Upadhia v. Bhamanidhin*, 1 ALJ 483]. In a suit upon a pronote by a *karta* of a joint Hindu family, plaintiff desiring to have a decree against all members on the original cause of action may give oral evidence [*Harimohan v. Sourendra*, 41 CLJ 535: 88 IC 1025].

On a finding that defendant borrowed but plaintiff suppressed the pronote which is insufficiently stamped on a false plea of loss, the plaintiff is not entitled to succeed. Explanation 3 and illus (*e*) permits oral evidence merely of the fact that payment was made, but production of the document is required to prove the terms on which payment was made. The court cannot allow oral evidence of the fact that there was an unconditional undertaking to repay [*Lila Singh v. Chajju Singh*, A 1952 A 877].

Oral evidence is admissible to prove payments under a bond notwithstanding an agreement in it that all payments must be endorsed on it and that otherwise they are to go for nothing [*Narayan v. Motilal*, 1 B 45, 49; *Sashachillum v. Goundappa*, 5 MHC 451. See also *Kalidas v. Tarachand*, 8 WR 316; *Girdharee v. Laloo Koonwar*, 3 WR Misc 23; *Nagarmal v. Azeemoolah*, 1 NWP 146].

A writing showing an agreement to sell on certain conditions which are not stated must be supplemented by other evidence [*Cutts v. Brown*, 6 C 328: 7 CLR 171]. Where there is a proposal in writing for a contract to be entered into at a later date, it is doubtful if oral evidence of terms not to be found in the written proposal is admissible [*Maung Shwe v. Tew*, 31 IA 188 : 32 C 96: 9 CWN 147].

A decree-holder discharged his judgment-debtor from arrest on the latter's employer executing a pronote for the debt which was inadmissible for want of stamp—*Held* that the note being merely a collateral security and not the contract out of which defendant's liability arose, plaintiff was entitled to give evidence of consideration and to sue apart from the note [*Balbhadar v. Maharaja of Betia*, 9 A 351 FB].

Where legal necessity is pleaded in respect of a sale by a widow, the fact that she had a mortgage debt to pay may be proved by the oral evidence of the mortgagee without production of the mortgage as the terms of the deed are not in issue [*Amjad Ali v. Moniram*, 12 C 52].

Where there is a mere misdescription of a certain area within certain boundaries, the maxim *falso demonstration non nocet* applies [*Karuppa v. Periathamba Goundan*, 30 M 397]. See notes to s 95 *post*.

There is nothing in s 91 or s 92 to preclude proof of existence of agent's authority without producing the power-of-attorney [*Lala Nanak v. Afzal*, 379 PWR 1912].

Quaere.—Where a contract was completed sometimes before the creation of evidence of it in writing which is legally inadmissible in evidence or incapable of creating any rights, whether the contract of prior date cannot be proved as an independent contract and whether such writing cannot be used as evidence of the prior contract though not itself creating rights [*Kotam Reddi v. Vennalakanti*, 31 MLJ 240: 35 IC 18].

Where at the time of letting some premises to the defendant, the plaintiff had read the terms from pencil minutes, and the defendant had acquiesced in these terms, but had not signed the minutes [*Trewhitt v. Lambert*, 10 A & S 470];—and where, upon a like occasion, a memorandum of agreement was drawn up by the landlord's bailiff, the terms of which were read over, and assented to, by the tenant, who agreed to bring a surety and sign the agreement on a future day, but omitted to do so [*Doe v. Cartwright*, 3 B & Ald 326];—and where in order to avoid mistakes, the terms upon which a house was let, were, at the time of letting reduced to writing by the lessor's agent, and signed by the wife of the lessee, in order to bind him, but the lessee himself was not present and did not appear to have constituted the wife as his agent, or to have recognised her act, further than by entering upon any occupying the premises [*R v. St Martin's Leicester*, 2 A & E 210;—in all these instances the court

held that parol evidence was admissible, since the writing only amounted, either to mere unaccepted proposals, or to mere minutes which could not be construed as memoranda, which the parties themselves intended to operate as a record of their agreement [Tay s 406].

On the same principle it has frequently been held that where the action is not directly upon the agreement for non-performance of its terms, but is in tort, for its conversion, or detention, or negligent loss, the plaintiff may give parol evidence, descriptive of its identity, without giving notice to the defendant to produce the document itself [*Scott v. Jones*, 7 Taunt 866; *How v. Hall*, 14 East 274 &c]; and even though the defendant be willing to produce it without notice, the plaintiff is not bound to put it in, but may leave his adversary to do so, if he thinks fit, as part of his case [*Whitehead v. Scott*, 1 M & Rob 2]. It has been observed that, for the purpose of identification, no distinction can be drawn between written instruments and other articles;—between trover for a promissory note, and trover for a waggon and horses [*Jolley v. Taylor*, 1 Camp 143; [Tay s 407].

The same rule prevails in criminal cases; and therefore, if a person be indicted for stealing a bill or other written instrument, its identity may be proved by parol evidence, though no notice to produce it has been served on the prisoner or his agent [*R v. Aickles*, 1 Lea 294, 297, n a 100 n a]. If, however, the indictment be for forgery, and forged instrument be in the hands of the prisoner, the prosecutor must serve him or his solicitor, with a notice to produce it, before he can offer secondary evidence of its contents [*R v. Haworth*, 4 C & P 254; *R v. Fitzsimons*, 1869, Ir R 4 CL 1; Tay s 408].

—S 91 Does Not Preclude Other Proof of the Transaction Itself.—It is well settled that although s 91 bars proof of the terms of a document otherwise than by production of the document, it does not exclude other proof of the transaction itself [*Deopato v. Kamal*, A 1976 P 18; *Makhduman v. Syed Altaf*, A 1922 P 222: 80 IC 187] *eg*, existence of the contract or the relationship of landlord and tenant brought about by possession and payment of rent [*Ugni v. Chowa*, A 1968 P 302 FB]. Where a sale deed for a sum below Rs 100 is not registered and is accompanied by delivery of possession, s 91 does not exclude proof of the fact of delivery of possession [*Shk Juman v. Md Nabinewaz*, 21 CWN 1149; *Sheo Dayal v. Raja*, 20 OC 33: 38 IC 671; *Tribhoban v. Shankar*, 1943 Bom 643: A 1943 B 431; *Girija v. Girdhari*, A 1951 P 277; see *Dawal v. Dharma*, 41 B 550. In *Brajaballav v. Akshoy*, 30 CWN 254, it was held that the unregistered sale deed might be used as evidence of the nature and terms of the transaction]. Similarly, although an unregistered deed of surrender is inadmissible, the fact of surrender may be proved by other evidence [*Venkatesa v. Sengoda*, 2 M 177; *Jagdamba v. Sham*, A 1919 P 13; *Sringeshwar v. Ajab*, A 1941 P 142 (CONTRA: *Sarat v. Nritya*, 13 CLJ 284); see also *Imambandi v. Kamleswari*, 13 IA 160: 14 C 109]. The factum and not the terms of an unregistered mortgage can be proved by independent evidence, *eg*, entry in *jumabundi* [*Nand Singh v. Sewa Singh*, A 1959 Pu 609]. If an award of partition is inadmissible, s 91 does not exclude oral evidence of separation in the joint family [*Kusmi v. Sadasi*, A 1942 P 432]. As to proof of fact of partition when the terms of a partition deed are inadmissible for want of registration. The failure of a party to produce a deed of adoption does not render oral evidence in proof of adoption inadmissible [*Jahuri v. Dwarika*, A 1967 SC 109].

—Mortgage by Deposit of Title Deeds and Oral Evidence.—A loan by simple deposit of title deeds (within the Presidency towns) with the intention of creating a charge, creates and equitable mortgage and it requires no writing at all. If, however,

at the time of the creation of the mortgage by deposit, a memorandum is given merely stating the fact of the deposit, the mortgage may be proved without production of the memorandum. The memorandum being simply the record of a mortgage already completed by deposit of title deeds is also admissible as it did not constitute the bargain. But if the writing accompanying the deposit of title deeds is such that the parties choose to make it the contract for the mortgage, it attracts the operation of s 17 of the Registration Act and no oral evidence is admissible except the writing itself.

"The rule with regard to writings is that oral proof cannot be substituted for the written evidence of any contract which the parties have put into writing. And the reason is that the writing is tacitly considered by the parties themselves as the only repository and the appropriate evidence of their agreement. If the writing was of such nature that it could be treated as the contract for the mortgage, and what the parties considered to be the only repository and appropriate evidence of this agreement, it would be the instrument by which the equitable mortgage was created and would come within s 17 of the Registration Act" [*per* COUCH, CJ, in *Kedar Nath v. Sham Lall*, 11 BLR 405 : 20 WR 150 (**relied** on in *Subramanian v. Lutchman*, 50 IA 77 : 50 C 338: 28 CWN 1: A 1923 PC 50)]. As observed by LORD CAIRNS in the leading case of *Shaw v. Foster*, 1872, 5 HL 321:—

> "Although it is a well-established rule of equity that a deposit of a document of title without more, without writing, or without word of mouth, will create in equity a charge upon the property referred to, I apprehend that general rule will not apply when you have a deposit accompanied by an actual written charge. In that case you must refer to the terms of the written document, and any implication that might be raised, supposing there was no document, is put out of the case and reduced to silence by the documents by which alone you must be governed".

Where defendant obtained a loan and deposited his title-deeds with a memorandum stating the fact, the memorandum was not the contract for the mortgage, nor the agreement to give a mortgage, but was a statement made by the mortgagor that he had deposited his title-deeds as plaintiff had agreed to advance money on the mortgage of the property. The mortgage had already been affected by the deposit and the memorandum which is simply a record of a completed transaction is admissible as also oral evidence of the deposit. No registration is required [*Kshetra v. Harsukhdas*, 31 CWN 703; *Rakhal v. Indubala*, 61 CLJ 473; *Muthia v. Naidu*, 31 MLJ 347; *Rachpal v. Bhagwandas*, 1950 SCR 548: A 1950 SC 272; *Sundarachariar v. Narayana*, 58 IA 68: 54 M 257: A 1931 PC 36; *Punjab & S Bank v. Rustomji*, A 1935 L 821; *Punjab & S Bank v. Jaswant*, A 1937 L 135; *Veeramachineni v. Andhra Bank*, A 1971 SC 1613]. The three requisites for such a mortgage are: (*i*) debt, (*ii*) deposit of title-deeds and (*iii*) an intention that the deeds shall be security for the debt [*Nathan v. Maruthi*, A 1965 SC 430]. The existence of the intention may be established by written documents alone, or coupled with oral evidence, or oral evidence only. The question whether oral evidence is admissible to explain or establish a deposit of title deeds, would depend on, whether the writing itself has constituted the bargain betweeen the parties [*C C Rev Authority v. Pioneer Spinners (P) Ltd.*, A 1968 M 223 FB].

No writing is necessary to create an equitable mortgage. But where titles are handed over accompanied by a written bargain creating a contractual agreement, that bargain which is an integral part of the transaction must alone rule and must be registered [*Pranjeevandas v. Chan Mah*, 43 IA 122: 43 C 895: A 1916 PC 115;

Harishankar v. Kedar, 66 IA 184: 43 CWN 806: A 1939 PC 167; *Subramanian v. Lutchman, sup*; *Punjab & S Bank v. Rustomji, sup*; *Punjab & S Bank v. Jaswant, sup*: *Ram Ch v. Bank of Kolhapur*, 54 Bom LR 245; *Kakaraparthy v. Offl Rec*, A 1971 AP 359]. "The test is, did the document constitute the bargain between the parties or was it merely the record of an already completed transaction" [*per* LORD CAIRNS in *Shaw v. Faster*, 1872, 5 HL 321 *ante*]. It is only in the former case that the document is inadmissible for want of registration [*Velamakany v. Ponnuswami*, 47 M 298]. A mere list of document showing that they had been deposited by way of security or an entry in a voucher though written on the same day when the deposit is made, cannot be considered to embody the terms of the mortgage transaction and hence inadmissible in evidence for want of registration [*Ralli Bros v. Punjab N B*, 11 L 564: 129 IC 21: A 1930 L 920].

Where there is a written memorandum relating to the first advance creating a collateral security for the amount thereof, oral evidence of an agreement whereby the same deposit of title-deeds was to cover further advance is not excluded by s 91 [*Mohini v. Deb Narain*, 40 CWN 1277: 66 CLJ 402]. Where a document relied upon as evidencing a prior mortgage by deposit of title-deeds is held to construe a simple mortgage by itself and being unregistered is inadmissible, other evidence is admissible to prove the terms of the equitable mortgage [*Elumalai v. Balakrishna*, 44 M 965: 41 MLJ 297; see however *Chunilal v. Vithaldas*, 24 Bom LR 502: 68 IC 1005]. Secondary evidence of a mere note that a mortgage had taken place and oral evidence of a mortgage, which was itself oral, is admissible [*Ma Saw v. Mg Ba*, A 1928 R 32 : 5 R 650].

A sub-mortgage by deposit of title-deeds can be made of a mortgage which itself has been by deposit of title-deeds. The agreement of the parties to create a mortgage (and the terms of the mortgage) cannot be proved by parol evidence, while oral evidence would be admissible to prove the circumstances in which the documents of title came to be in the possession of the person who claims to be a mortgagee [*Gurnam v. Bannerjee*, A 1937 R 69].

(2) Public Documents, Registers, etc.—Public documents are, in general, given no exclusive (nor conclusive) authority by law as instruments of evidence. Thus, an entry of marriage [*Evans v. Morgan*, 2 C&J 453; *R v. Wilson*, 3 F&F 119], or of the nationality of a ship [*R v. Seberg*, LR 1 CC 264] in a public register; or the certificate of the registration of a company, even when by statute rendered "conclusive evidence" [*Agri Cattle Co v. Fitzgerald*, 16 QB 432] will not exclude independent proof of those facts [Phip, 11th Ed p 790]. So the fact of birth, baptism, marriage [*Lady Limerick v. Ld Limerick*, 32 LJP & M 22], death or burial, may be proved by parol testimony, though a narrative or memorandum of these events may have been entered in registers, which the law requires to be kept; for the existence or contents of these registers form no part of the fact to be proved, and entry is no more than a collateral or subsequent memorial of that fact, which may furnish a satisfactory and convenient mode of proof, but cannot exclude other evidence, though its non-production may afford grounds for scrutinising such evidence with more than ordinary care [*Evans v. Morgan*, 2 Ca & J 453; *R v. Allison*, 1806 R & R, 109 and other cases, Tay s 416. See also *Jivandas v. Framji*, 7 BHC 45, 63, in which Taylor, ss 415, 416 were referred to on the question how date of birth is to be proved]. A copy of the mutation register would be admissible so far as the factum of sale is concerned, but it would not be admissible to prove the terms and conditions of the sale transaction [*State of Punjab v. Pohu*, A 1986 Punj & Har 143, 148 : 1985 Punj LJ 583 (FB)].

(3) Existence of Contract, Grant, Fact of Partition, etc as Distinguished From its Terms.—The existence of the *fact* of a contract, grant or other transaction is quite distinct from the proof of the *terms* of the contract, grant &c embodied in a document and while the latter can only be proved by production of the document (or secondary evidence in a proper case) the former, *ie*, the fact of the contract &c can be proved by independent evidence of other kind. This may also come under Expln 3. Thus the fact or existence of a partnership may be proved by parol evidence of the acts of parties without production of the deed [*Alderson v. Clay*, 1 Stark R 405]. Fact of sale may be proved by oral evidence though not its terms [*Viraragavalu v. Vellamandu*, 95 IC 584: A 1926 M 812], or the fact of a grant may be proved by the copy of an entry in a public record without production of the sanad [*Parbhu v. Jitendra*, A 1948 O 307; see *Tej v. Daljit*, A 1948 O 9]. Again, when a written instrument or a document is not the fact in issue, but is merely evidence of some fact, independent evidence is admissible to prove that fact. Thus, payment of money may be proved by oral evidence though a receipt was given (*ante* "*Documents when Collateral or Informal*").

Under the English law, in an action or a written contract, oral evidence is admissible to show that the party liable on the contract for himself and as the agent of the partners. Such partners are liable to be used on the contract though no allusion is made to them in it. This is also the law in India, as there is nothing in s 91 to show that the legislature intended to depart from the settled rule of English law [*Venkatasubbiah v. Govindarajulu*, 31 M 45: 3 MLT 259; *Wilson v. Hant*, 817, 7 Taunt 295: 129 ER 118; *Higgings v. Senior*, 58 RR 884 *post*; *Ho Chan & Co v. Chotalal*, A 1939 R 1399; see also *S I Industrial Ltd v. Rama Jogi*, 27 MLJ 501—CONTRA: When a contract was signed by defendant personally, oral evidence is not admissible to show that he contracted as agent and that the name of the principal was disclosed at the time of the contract, *Ebrahimbhoy P M Co v. Hassan*, 23 Bom LR 767: 63 IC 482].

So, also, *the fact* of the existence of a particular relationship may be shown by parol evidence, though the terms which govern such relationship appear to be in writing (see *dictum*, of ALDERSON B, in *Augustien v. Challis*, 17 LJ Ex 73 and cases cited below); if the fact of the occupation of land is alone in issue, without respect to the terms of the tenancy, this fact may be proved by any competent parol evidence, such as payment of rent, or the testimony of a witness, who has seen the tenant occupy, notwithstanding it appears that the occupancy was under an agreement in writing [*R v. Holy Trinity*, 7 B & C 611; *Doe v. Harvey*, 8 Bing 239; *Spiers v. Willison*, 4 Cranch, 398 (Am) and cases; Tay s 405; Phip 11th Ed p 793].

An agreement in writing whereby a partition is arranged between parties being not registered is not admissible as evidence of the transaction [*Peddi Reddi v. Panem*, 33 CWN 233: A 1929 PC 13 : 56 IA 6]. But a memorandum of agreement declaring cesser of jointness and providing for execution of a deed of partition in terms thereof does not require registration and is admissible in proof of separation [*Rajangam v. R*, 50 IA 134: 46 M 373: 27 CWN 561: A 1922 PC 266; *Ramu Chetty v. Panchammal*, 92 IC 1028]. *Hissanama* not amounting to a partition deed but merely a memorandum purporting to acknowledge certain shares and which was only a record of family arrangements is admissible without registration [*Bhudeb v. Asutosh*, A 1928 C 705]. A partition list and subsequent document declaring parties' desire to execute and register a fresh partition deed are admissible though unregistered [*Vattam v. Vattini*, A 1929 M 291]. Evidence of the factum of partition will not be admissible by reason of S 91. Partition lists which are mere records of a previously completed partition between the parties, will be admitted in evidence even though they are unregistered. [*Roshan Singh v. Zile Singh*, A 1988 SC 881, 885]. But reunion of property or reunion of status cannot be proved by an unregistered docu-

ment following a registered partition deed [*Paidimarri v. Choturvedlulu*, A 1928 M 1113].

It was held in several cases that the fact of partition, *viz*, whether joint family property was joint or separate at the date of suit, may be found out by looking into a partition deed which is inadmissible for want of registration, as the object is not to prove the terms of the partition deed [*Chhotalal v. Bai Mahakore*, 41 B 466: 40 IC 83; *Narmadabai v. Rupsing*, 39 Bom LR 1102; *Ram Laxmi v. Bank of Baroda*, A 1953, B 50; *Nilkant v. Hanmant*, 44 B 881; *Jairam v. Raj Narain*, 45 A 21: 70 IC 952; *Maung Tun v. Ko Tu*, 111 IC 472: A 1928 R 196; *Subbarao v. Mahalakshmiamma*, A 1930 M 883]; but it has now been held by the Judicial Committee that the words "for any purpose" in s 35 Stamp Act should be given their natural meaning and therefore an unstamped memorandum or deed of partition cannot be admitted in evidence even for determining the fact of partition as distinct from its term. In this case the Judicial Committee agreed with the High Court that the partition was proved by oral evidence [*Ram Rattan v. Parmanand*, 50 CWN 367: A 1946 PC 51, 53: 73 IA 28]. In a later case, SOMAYYA, J, observed that it not being clear whether oral evidence was accepted in *Ram Rattan's case* only in proof of division in status or to prove the details of the partition, there still remains a doubt as to whether oral evidence is admissible to prove the details of partition and *Ramayya v. Achamma*, A 1944 M 550 FB: 1945 Mad 560 which held that oral evidence of details of partition is inadmissible may require reconsideration in view of the Privy Council decision [*Ittoli v. Imbich*, A 1946 M 534]. This doubt was not shared in a subsequent case which relying on *Ramayya's case* held that oral evidence of details of partition is inadmissible [*Subbu v. Varadarajulu*, A 1948 M 26: 1947, 1 MLJ 90 (**relied** on in *Kandakuri v. K*, A 1948 M 54)]. No document is necessary to effect partition of properties among joint owners. Division may be made orally and a subsequent document may be made recording the fact of partition and independent oral evidence may be given of the actual partition [*Gerua v. Kalyana*, A 1962 Or 107 (*Ram Rattan v. Parmanand, sup* **relied** on)].

A document not a partition deed but which merely states that there was a partition in the past does not require registration and is not affected by s 91 [*Ramjugeshwar v. Gajadhur*, 29 P 980; *Sakharam v. Madan*, 5 B 232; *Kanna Reddi v. Venkata*, A 1965 AP 274 FB]. An unregistered memorandum recording a description of properties partitioned and the *modus operandi* adopted is admissible to prove that partition had already taken place and to explain the position of the parties [*Tarapada v. Shyamapada*, A 1952 C 579, 582. The PC case of *Ramrattan v. Parmanand, sup*, was referred to but not examined in detail]. A recent Bombay case also held that an unregistered memo of partition is admissible as evidence of the collateral transaction of the fact of partition [*Ramalaxmi v. Bank of Baroda*, 54 Bom LR 667. *Ramrattan v. Parmanand, sup*, which appears to have taken a different view was not referred to].

Oral evidence is admissible to prove the fact of the partition although the partition deed is inadmissible for want of registration [*Suleiman v. Cyril*, A 1938 P 603: 177 IC 682; *Narsingh v. Uttam*, A 1923 L 392; *Ramu v. Panchammal*, 92 IC 1028 : A 1926 M 402; *Ma Pwa v. Pan*, A 1927 R 203; *Punjab N Bank v. Mathura*, A 1933 L 194; *Mg Khin v. Mg Ba*, A 1933 R 249; *Manna v. Narayan*, A 1933 N 270]. Partition may be proved *aliunde* by other evidence though not the details of it [*Sukh Dial v. Maniram*, 29 PR 1915: 27 IC 489; *Bisham v. Ram Singh*, 61 IC 399]. The combined operation of s 49 Registration Act and s 91 would be to shut out all evidence to prove the terms of an unregistered partition deed, but separate status and separate possession are provable by other independent evidence [*Jijibai v. Chowdhury*, A 1927 N 113; *Rikhi v. Sada*, A 1977 P&H 94]. Secondary evidence of terms of partition cannot be given. But the court can find whether or not the properties were enjoyed

by one member as separate property [*Ahobilachariar v. Thulasiammal*, 103 IC 281: A 1927 M 830]. An unregistered partition deed is not admissible to prove as to which property fell to the share of a particular person in partition. The unregistered partition deed can be looked into for the collateral purpose but it cannot looked into for the purpose of returning a finding that possession is that of an owner [*Smt Chanderviati v. Lakhmi Chand*, A 1988 Del 13, 19 (DB) : (1987) 5 Reports 507]. Where in partition suit defendant pleads a complete previous partition although the deed is inadmissible for want of registration—*held* that the defendant could rely upon the fact that the partition was acted upon and the doctrine of part performance is applicable [*Nandlal v. Dhanukdhari*, 76 IC 42 : A 1924 P 244 (*Walsh v. Lonsdale*, 21 Ch D 9; *Maddison v. Alderson*, 1883 8 AC 473 **relied** on)]. Fact of existence of a partnership can be proved by oral evidence [*Shiv Singh v. Ramji*, A 1955 HP 54].

Oral evidence may be given to show that a contract, as a matter of fact was reduced to writing, but not the terms [*Ram Bahadur v. Dasuri*, 17 CLJ 399]. Where the deed of surrender is not produced, s 91 only bars proof of the terms of the surrender except by secondary evidence but not proof of the matter itself [*Fowler v. Secy of S*, 61 IC 852: A 1921 M 363]. The fact that a party has agreed to sell goods on commission may be established by parol testimony, though the terms respecting the payment of the commission have been reduced into writing [*Whitefield v. Brand*, 16 LJ Ex 103]. The fact that husband and wife are living apart may be shown by other evidence without producing the separation agreement which is inadmissible for want of stamp [*Fengl v. F*, (1914), p 274].

Telex instructions.—The parol evidence rule applies to formal documents in which the parties have conclusively embodied their intentions. The rule which states that it is not permissible to adduce extrinsic evidence where the intention of the parties has been reduced to writing, does not apply to written payment instructions sent by telex in circumstances where the recipients need formal documentations. [*Guardian Ocean Cargoes v. Banco Do Brasil*, The Times, Feb 27, 1991].

Illustrations.—*Illus* (*a*) relates to Expln 1 *Illus* (*b*) refers to the first part of the section. *Illus* (*c*) relates to Expln 2, *Illus* (*d*) and (*e*) refer to Expln 3. They have been considered above in their proper places.

S. 92. Exclusion of evidence of oral agreement.—When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms.

Proviso (1).—Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party,* [2][want or failure] of consideration, or mistake in fact or law.

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* In Ceylon after "contracting party" the words "the fact that it is wrongly dated" have been added.

2. Substituted for the words "want of failure" by s 8 I E (Am) Act 18 of 1872.

Proviso (2).—The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

Proviso (3).—The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

Proviso (4).—The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

Proviso (5).—Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved:

Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.

Proviso (6).—Any fact may be proved which shows in what manner the language of a document is related to existing facts.

Illustrations

(*a*) A policy of insurance is effected on goods "in ships from [3][Calcutta] to London." The goods are shipped in a particular ship which is lost. The fact that particular ship was orally excepted from the policy cannot be proved.

(*b*) A agrees absolutely in writing to pay B Rs. 1,000 on the first March, [4][1873]. The fact that, at the same time, an oral agreement was made that the money should not be paid till the thity-first March cannot be proved.

(*c*) An estate called "the Rampore [5][tea] estate" is sold by a deed which contains a map of the property sold. The fact that land not included in the map had always been regarded as part of the estate and was meant to pass by the deed cannot be proved.

(*d*) *A* enters into written contract with *B* to work certain mines, the property of *B*, upon certain terms. *A* was induced to do so by a misrepresentation of *B's* as to their value. This fact may be proved.

(*e*) *A* institutes a suit against *B* for the specific performance of a contract, and also prays that the contract may be reformed as to one of its provisions, as that provision was inserted in it by mistake. *A* may prove that such a mistake was made as would by law entitle him to have the contract reformed.

(*f*) *A* orders goods of *B* by a letter in which nothing is said as to the time of payment and accepts the goods on delivery. *B* sues *A* for the price. *A* may show that the goods were supplied in credit for a term still unexpired.

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3. In Pakistan "Chittagong" and in Ceylon "Colombo" substituted.
4. In Ceylon "1896" substituted.
5. In Ceylon word "tea" omitted.

(*g*) *A* sells *B* a horse and verbally warrants him sound. *A* gives *B* a paper in these words: "Bought of *A* a horse for Rs. 500." *B* may prove the verbal warranty.

(*h*) *A* hires lodgings of *B*, and gives *B* a card on which is written—"Rooms, Rs. 200 a month." *A* may prove a verbal agreement that these terms were to include partial board.

A hires lodgings of *B* for a year, and a regularly stamped agreement, drawn up by [6][an attorney], is made between them. It is silent on the subject of board. *A* may not prove that board was included in the term verbally.

(*i*) *A* applies to *B* for a debt due to *A* by sending a receipt for the money. *B* keeps the receipt and does not send the money. In a suit for the amount *A* may prove this.

(*j*) *A* and *B* make a contract in writing to take effect upon the happening of a certain contingency. The writing is left with *B*, who sues *A* upon it. *A* may show the circumstances under which it was delivered.

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6. In Ceylon "a notary" substituted.

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COMMENTARY

Principle and Scope.—It has been seen (*ante*, s 91) that when the terms of any transaction have been reduced to the form of a document, they must be proved by the production of the document itself; the reason being that admission of extrinsic evidence would be equivalent to a permission to substitute another contract by introduction of terms which are ot to be found in the document. The rule embodied in s 92 is a logical sequence of the rule in s 91 and may properly be said to be a part of it. If the intention is that no *substitution* of the terms of a voluntary and deliberate transaction should be allowed, it *follows* that no *variation* of the terms should also be allowed. S 92 therefore enacts that when the terms of all contracts, grants or other disposition of property are reduced into writing, whether or not such contract or grant is compulsorily required to be reduced into writing and registered, *no oral evidence shall be admitted to contradict, vary, add to, or subtract from, its terms* [*Sumati v. Narendra*, A 1975 Gau 43]. All oral evidence of what was spoken to by the parties before, after or contemporaneously with the final transaction will be disallowed, or apart from the unreliability of such oral evidence it would afford an opportunity to the parties to resile from the contract or to set up a new one and furthermore the concluded written contract must be presumed to contain everything that the parties agreed upon after deliberation.

Extrinsic parol evidence contradicting, varying, adding to or subtracting from the terms of a solemn written instrument is inadmissible chiefly because the parties having made a complete memorial of their agreement, it must be presumed that they have put into writing all that they consider necessary to give full expression to their meaning and intention; and secondly, because the reception o oral testimony would create mischief and open the door to fraud. The rule in s 92 is an indispensable corollary to the rule in s 91, without which the provisions of the latter section would be useless. S 91 deals with the *exclusive* aspect of the rule and s 92 deals with its *conclusive* aspect. The rule in s 92, known as the *parol evidence rule*, is of considerable antiquity and though the general principle is quite intelligible and well-established, the application of the rule to particular cases is beset with considerable difficulty. There are numerous exceptions and qualifications as will appear from the pages following. The strict application of the rule to writings incomplete or informal (v Proviso 2) may operate harshly; but where the parties after deliberation reduce to

writing what is intended to be a full and complete record of their agreement, the written document must be regarded as the only evidence and the rule must be rigidly adhered to. The admission of oral evidence would defeat the very object of reducing the agreement to a written form.

The application of the rule in this section is restricted to the *parties to the instrument* or to their representatives in interest. So, persons other than parties to the instrument are not precluded from giving oral evidence to contradict, vary, add to or subtract from the terms of the writing. Such persons are at liberty to prove a contemporaneous oral agreement varying the terms of a document (*post* and s 99).

The first general rule respecting the admissibility of extrinsic evidence to affect what is in writing is, that *parol testimony cannot be received to contradict, vary, add to, or subtract from the terms of a valid written instrument* [*Goss v. Ld Nugent*, 1833, 5 B & Ad 64, 65; *In re Huxtable*, 1902, 2 Ch 793]. This rule of the common law, which may be traced back to remote antiquity, is founded on the obvious inconvenience and injustice that would result, if matters in writing, made by advice and on consideration, and intended finally to remedy the entire agreement between the parties, were liable to be controlled by what LORD COKE expressively calls, "the uncertain testimony of slippery memory [*Lady Rutland's case*, 1605 Co 5 Rep 26 a 1st Res; Tay s 1132].

It has been a subject of discussion whether the parol evidence rule, is a rule of law or evidence. Wigmore is of opinion that "*the rule is in no sense a rule of Evidence*, but a rule of Substantive Law. It does not exclude certain data because they are for one or another reason untrustworthy or undesirable means of evidencing some fact to be proved. It does not concern a probative mental process,—the process of believing one fact on the faith of another. What the rule does is to declare that certain kinds of fact are legally ineffective in the substantive law; and this course (like any other ruling of substantive law) results in for bidding the fact to be proved at all. When a thing is not to be proved at all, the rule of prohibition does not become a rule of Evidence merely because it comes into play when the counsel offers to 'prove' or 'give evidence' of it; otherwise, any rule of law whatever might be reduced to a rule of Evidence" [Wig s 2400].

Overall evidence can be taken into consideration to find out the real nature of the transaction. Section 92 is not a bar to the admission of oral evidence to prove that the transaction was intended to be something other than what it purports to be [*Habeeb Khan v. Valasula Devi*, A 1997 AP 53, 60]. The intention of parties has to be gathered from the terms of the document when they are express and clear. Oral evidence may guide the court in unravelling the true intention of the parties and tendering of extrinsic evidence as to acts, conduct and surrounding circumstances is permissible to enable the court to ascertain the real intention of the parties [*Hathika v. Puthiya Purayil Padmanabhan*, A 1994 Ker 141, 146]. Names of adjoining owners given in the sale-deed to identify the property do not form part of the terms of the contract. Therefore adducing of evidence to show that the names of the adjoining owners were wrongly given is not prohibited [*Mohan Rai v. State of Bihar*, A 1994 Pat 42, 44]. When there is doubt as to whether subject-matter of lease is land or land with building oral evidence as to how the parties understood the terms of the lease can be considered. [*Madalsa Devi v. Mridula Chandra*, A 1994 Pat 91, 97]. In case of an agreement entered into between the plaintiff and defendant regarding sale of land by the latter to the former which according to the defendant was in fact an usufructuary mortgage to secure the loan advanced by the former to the latter, the plaintiff, who claimed his right on the basis of the said agreement, himself clearly

stated that the understanding was that he would give up possession if the defendant returned the money. The said statement lends support to the defence case that a mortgage deed was intended to be executed, but another kind of document was prepared to deceive him. Thus the plaintiff's own oral statement was being relied upon not to contradict the contents of the concerned document, but to establish the defence case of invalidity of the document. Such use of oral evidence particularly of the person who claims an the strength of the disputed document is permissible. [*Sitaram Lal v. Jameswar Das*, A 1995 Ori 260, 262].

"Contract, Grant or Other Disposition of Property, or Any Matter..... Document".—It has been said by one writer that the language of this section is not quite free from ambiguity. The words "*no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument, &c,*" correspond with and have clear reference to the words "*contract, grant, or other disposition of property*" in the beginning of the section; but their application to "*any matter required by law to be reduced to the form of a document*" is not so evident. If the matter required by law to be reduced to writing be a deposition, for example, evidence of an oral statement would appear to be admissible for the purpose of contradicting the writing in cases other than those included in the provisos that follow (see the words "*shall presume*" in s 80, with its definition in s 4 and also illustrations (*a*) and (*b*) to s 121). [Field, 6th Ed p 271].

The words "*contract, grant or other disposition of property*" as well as the words "*any matter required by law to be reduced to the form of a document*" in s 92 are also to be found in s 91. The words "contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document" in s 91 refer to transactions recorded in writing by agreement of parties. The words "any matter required by law to be reduced to the form of a document" in s 91 explain themselves. Both phrases apply to unilateral as well as bilateral documents, as s 91 is not restricted to the parties to an instrument. Further, s 91 applies to both dispositive and non-dispositive documents [*v post*].

Taken apart from both the sections and their contexts, the two expressions have the same meaning. But the words "*as between the parties to any such instruments or their representatives in interest*" which appear in s 92 only, indicate that their meaning is not the same in both sections and the documents referred to in both sections are not identical. It should first be noted that the absence of the words "*as between the parties &c,*" in s 91 shows that that section applies to both unilateral documents (*eg*, wills, power of attorney, depositions of witnesses &c) and bilateral documents (*eg*, contracts, grants, &c, between two or more parties). The rule in s 91 therefore applies to strangers, *ie*, persons who are not parties to the document. The words "*as between parties &c,*" and the reference to "*separate oral agreement*" in s 92 seem to point out that the section does not apply to unilateral documents. In an appeal from Palestine, the Judicial Committee held that where a document is signed only by one of the parties, it does not amount to a written agreement and hence oral evidence is admissible to prove that the real intention of the parties was different from that expressed by the terms of the document [*Egged C S Ltd v. Geffen*, A 1947 PC 32].

The words "as between the parties... interest" are to be read along with the words "contract, grant or other disposition of property" and also along with the words "or any other matter ... of a document." The words as "between the parties to any such instrument" further point out that s 92 applies only to dispositive documents, *ie*, documents by which rights are disposed of, *eg*, "contract, grant or other disposition

of property." Those words naturally apply to dispositive documents between contracting parties or parties to whom any property is transferred. This view has been accepted in a case where it has been held that this section refers to only what are known as "dispositive documents" and the words "any other matter required by law to be reduced to the form of a document" must be read in that sense. A decree does not therefore come within the purview of s 92 [*Anandapriya v. Bijoy*, 91 IC 705: A 1926 C 643; see also *Debendra v. Sourendra*, 24 IC 391; *Adapa v. Darbha*, 58 M FB and cases *post*: "*Whether decree comes within s 92*"].

If these important distinctions between the two sections are borne in mind, there does not appear to be any ambiguity. "*Any matter required by law to be reduced to the form of a document*" may be "a contract, or a grant, or any other disposition of property," or an unilateral or non-dispositive document like the deposition of a witness. But as s 92 does not apply to unilateral and non-dispositive documents, a deposition cannot come within its scope. It, therefore, applies to contracts, grants, or other dispositions of property and which are reduced to writing either by requirement of law or by agreement of parties. Thus interpreted, the words "*no evidence of any oral agreement or statement shall be admitted*" in s 92, refer to "contract, grant or other disposition of property" as well as to words "any matter required by law to be reduced to the form of any document." The words "any matter" in the phrase "any matter required by law to be reduced to the form of a document" have therefore reference to such matter as creates dispositive documents, such as "contract, grant or other disposition of property." Taken together, the words therefore mean, any matter required by law to be in writing, *and* which is a "contract, grant, &c, *ie*, the words "any matter required by law ..... document" are *ejusdem generis* with "contract, grant or other disposition of property." Documents other than dispositive documents required by law to be reduced to writing do not come within the section. So, if a deposition is taken as an instance of a matter required by law to be reduced to writing, the words "*no evidence....shall be admitted*" in s 92, are no bar to the reception of oral evidence for the purpose of contracting the writing. A deposition reduced to writing by the court is not an act of the parties and the presumption as to record of evidence in s 80 is rebuttable. (See the definition of "shall presume" in s 4). The rule as to admissibility of extrinsic evidence to contradict depositions, appears to be otherwise in England. There, the same rule of exclusion of extrinsic evidence applies to the statutory deposition of a witness in a civil or criminal proceeding, and the statutory examination of a prisoner, neither of which can be contradicted or varied by extrinsic evidence [Phip 11th Ed, p 788].

S 92 should be read subject to s 115. Thus where in a suit for possession based on a sale-deed, defendant pleaded an oral agreement whereby plaintiff had relinquished his claim to the property—*held* the oral agreement being inadmissible, there can be no question of plaintiff's being estopped from prosecuting his suit by reason of the agreement [*Pichammal v. Ponnambala*, 15 IC 326].

There is nothing in s 92 to exclude oral evidence of an oral agreement which contradicts, varies &c, not the terms of the contract, but some recitals in the contract itself [*Mukhi v. Kishun*, 51 IC 340]. As pointed out by the Judicial Committee the essence of the matter is that the Evidence Act does not say that no statement of facts in a written instrument may be contradicted, but only that the *terms* of the contract may not be varied, added to, subtracted from, or contradicted [*Shah Lal v. Indrajit*, 27 IA 93 : 22 A 370]. Where a lease was taken on behalf of a joint family but only the name of one member appeared in the deed, s 92 is no bar to the other members asserting their rights by showing that the lease was taken on behalf of the joint family [*Raghunath v. Budhoo*, 133 IC 897: A 1932 A 52].

As between parties to an instrument oral evidence of intention is not admissible for the purpose either of construing deeds or of proving the intention of the parties *Balkishen v. Legge*, 27 IA 58: 22 A 149]. But s 92 merely prescribes a rule of evidence; it does not fetter the court's power to arrive at the true meaning and effect of a transaction in the light of all the surrounding circumstances [*Baijnath v. Hajee Valley*, 30 CWN 242: A 1925 PC 75 : 3 R 106 (see *post*, *Proviso* 6 and notes)].

[*Ref Tay ss 1132-67; Steph Art 90; Best, ss 223, 226-28; Roscoe N P. 15-29; Powell 9th Ed, pp 180-95; Phip 8th Ed, pp 564-93; wigmore, ss 2400-53; Jones, ss 434-99*].

Illustration: *Illus* (*a*).—This illustration is based on *Weston v. Emes*, 1808, 1 Taunt 115.[see Tay s 1151].

Illus (*b*).—This illustration explains the proper meaning of proviso (*3*) [see *Ram Jiban v. Oghor Nath*, 25 C 401: 2 CWN 188, *post*].

Illus. (*c*).—This illustration is based on *Barton v. Dawes*, 1850, 19 LJCP 302, where a deed conveyed the messuage and theland called Gotton Farm, consisting of particulars specified in schedule, and delineated in a map drawn thereon, evidence that a close, not included in the map and schedule, had always been occupied and treated as Gotton Farm, was rejected. In *Dhunput v. Shk Jowahir*, 8 WR 152, parol evidence was however admitted (before the passing of this Act) to show that a village, not included in a lease, was intended to be so. This case is therefore distinguishable from *illus* (*c*).

Illus (*d*).—This illustration points to proviso (*1*).

Illus (*e*).—This illustration also refers to proviso (*1*), *eg*, *mistake*.

Illus (*f*).—This illustrates proviso (*2*).

Illus (*g*).—This illustrates the latter part of proviso (*2*).

Illus (*h*).—This also illustrates the latter part of proviso (*2*).

Illus (*i*).—This illustrates proviso (*3*).

Illus (*j*).—This also illustrates proviso (*3*).

Principles on Which Ss 91 and 92 are Based [Points of Similarity and Difference Between Them].—Under s 91, when a transaction has been reduced to the form of a document, either by consent or agreement of the parties or by requirement of law, the written instrument must be regarded as the appropriate and only evidence of the terms of their agreement and no other evidence of the transaction can be substituted for that so long as the writing exists and is within the power of the party. No extrinsic evidence is therefore admissible in *substitution* for the written document. S 91 therefore deals with the *exclusiveness* of documentary evidence, that is, if the transaction has been reduced to writing, the existence of the document excludes all other evidence in proof of its terms.

Under s 92, extrinsic evidence is inadmissible to control or alter the terms of a written instrument, *ie*, to *contradict, vary, add to or subtract from its terms*. It is a branch of the rule in s 91. When the parties have voluntarily and deliberately set down in writing the terms of a transaction, it is conclusively presumed between themselves and their privies, that they intended the document to contain a *full* and *final* statement of their intentions, and the parties or their representatives in interest are thus precluded under s 92 from giving any extrinsic evidence to contradict, vary, add to or subtract from its terms. All the terms and conditions being included in the

written instrument, the matter becomes conclusive. S 92 therefore deals with the *conclusiveness* and necessarily *inclusiveness* of documentary evidence. The object of the rule in s 91 that a transaction reduced to writing must be proved by the document itself would be frustrated if extrinsic evidence is not also excluded to control its *terms*, *ie*, to vary, contradict, &c. Other distinguishing features of the two sections have been already discussed. They are noted below in a tabular form.

Sec 91	Sec 92
(*a*) S 91 is based on the "best evidence" principle.	(*a*) S 92 is also based on the same principle.
(*b*) S 91 deals with "the terms of a contract, or of a grant, or of any other disposition of property" reduced to writing by agreement of parties as also with any matter which "is required by law to be reduced to the form of a document."	(*b*) S 92 refers to similar words, but it appears from the context that their meaning is not exactly the same in both sections [*v. infra*, (*d*) and (*e*)].
(*c*) S 91 is not restricted in its operation to the parties to such instrument or their representatives in interest. The rule in s 91 is of universal application which applies to parties to documents as well as strangers.	(*c*) S 92 applies only to the parties to such instrument or their representatives in interest (*v* "*as between parties, etc, in* para 1). Strangers are outside its scope (*v.* also s 99).
(*d*) S 91 applies to *all* documents whether dispositive, *ie*, by which rights are disposed of, *eg*, contract, grant, etc, or non-dispositive, *eg*, record of evidence, a memorandum, etc. All dispositive and non-dispositive documents reduced to writing either by requirements of law or by agreement of parties come within the section.	(*d*) S 92 deals with dispositive documents only. This is evident from the words "*as between the parties to any such document*" which naturally apply to dispositive documents between contracting parties or parties to whom property is transferred. The words "any matter" in the phrase "any matter required by law" to be reduced to writing in s 92 have therefore reference only to such matter as creates dispositive document, *eg*, "contract, grant or other disposition of property." The words therefore mean, any matter required by law to be in writing and which is a "contract, grant &c." Documents other than dispositive documents required by law to be in writing, (*eg, deposition*), do not come within the section.
(*e*) S 91 deals with both bilateral and unilateral documents. It applies to contracts, grants etc, as well as to unilateral documents like powers of attorney, wills, etc.	(*e*) S 92 deals with bilateral documents only, reduced to writing either by consent of parties or by requirements of law. It does not apply to unilateral documents, such as, powers-of-attorney, wills, etc, (though required by law to be in writing). This is apparent from the words "*as between the parties*" and the reference to "*separate oral agreement*".

(*f*) S 91 deals with the *exclusiveness* of documentary evidence, that is, when the terms of a transaction are reduced to writing either by requirement of law or by agreement of parties, the document excludes other extrinsic evidence of the terms.	(*f*) S 92 deals with the *conclusiveness and inclusiveness* of documentary evidence, that is when the terms of a transaction have been reduced to writing, it is conclusively persumed that a full and final statement of the intention of the parties is included in the document and extrinsic evidence is inadmissible to contradict, vary, add to or subtract from, its terms.
(*g*) S 91 is complementary to s 9	(*g*) S 92 is supplementary to s 91 and is a branch of the rule in the latter section. The rule in s 91 that a written agreement must be proved by production of the writing itself would be frustrated if extrinsic or oral evidence is admitted to vary, contradict, etc, its terms. S 92 comes into operation after the document has been produced to prove its terms under s 91.

Some of the differences between sections 91 and 92 as outlined above have also been stated in *Bai Hira v. Offl Assignee*, A 1958 SC 448: 1958 SCR 1384.

"When the Terms of Any Contract, Grant of Other Disposition of Property ..... to the Form of a Document".—These words are similar to words in s 91, but their meaning as used in s 92 is not exactly similar to the meaning intended in s 91 because it would appear that these words when read with the words "*as between the parties to any such instrument*" and "*separate oral agreement*" which follow them, refer to those instruments only by which rights are disposed of between two or more parties, that is, they refer to *bilateral instruments* only and not to unilateral instruments, such as will and power of attorney [: *ante*, "*Principle and Scope*"]. "This general rule of exclusion has been applied by the courts to assignments, bills of sale, bounds, compromise, contracts, deeds, leases, letters constituting a contract, mortgages, partnership agreements releases, subscriptions for corporate stock, suretyship, &c" [Chamb HB, s 1108].

"Terms of a Contract or Grant etc".—A declaration in a sale-deed that there is no encumbrance on the property or that the vendor has a good title is not one of the terms of the contract and evidence that vendee was aware of the defect in title is admissible [*Gondu Ramasubbu v. Muthiah*, 85 IC 99: A 1925 A 97: *Mukhi v. Kishun*, 51 IC 340]. In a contract for sale a representation that the permission of the authorities to build was shortly expected is not a term of the contract [*Anant v. Nensukh*, A 1956 B 252]. S 92 does not apply to an offer but to contract and so the terms of an offer can be varied at the time the contract is concluded [*Bindeswari v. K K Dutt*, 57 CWN 952]. S 92 does not apply to negotiations [*Sukumar v. Hiralal*, 57 CWN 743]. S. 91 restricts oral evidence in respect of the terms of a contract. Consideration of a contract cannot be said to be a term of the contract. Even if one kind of consideration is set out in a document another kind of consideration can be proved. [*State Bank of India v. Premoo Saw Mill*, A 1984 Guj 93, 96 : 1983 Guj LW 829]. When the executant of a mortgage deed admitted his liability to three persons of specific amounts, oral evidence is not admissible to vary or contradict

the terms of the document. [*Smt. Janki v. Ganesh Ram*, A 1984 All 219, 223 : 1984 All CJ 185]. In terms of S. 92 the vendor is not prevented from adducing evidence to show that recital in the sale deed to the effect that consideration has been paid is incorrect and in fact no consideration was paid. [*Mst Savitri Devi v. State of Bihar*, A 1989 Pat 327, 329]. See *post* : "*Section does not apply..... the Independent collateral facts*".

"Or Any Matter Required by Law to be Reduced to the Form of a Document".—These words also occur in s 91; but when read with the words "any oral agreement or statement shall be admitted, as between the parties to any such instrument" which follow them as also the words "separate oral agreement" (in proviso 2), they would appear to refer to bilateral instruments and dispositive documents only, such as contracts, grants or other disposition of property, which the law requires to be reduced to writing and not to every and all matters which the law requires to be reduced to writing. Thus for instance, the depositions of witnesses, though required by law to be reduced to the form of a document, do not come within this section, inasmuch as, the reduction of depositions of witnesses to the form of a document, is not an act of the parties, but they are reduced to writing by the court as a record of the evidence of witnesses. Therefore, oral evidence is admissible for the purpose of contradicting the depositions of witness (see *ante*).

Oral evidence of subsequent modification of contract required by law to be in writing cannot be allowed [*Eng Bee Properties Pte Ltd v. Lee Foong Fatt*, (1993) 3 Singapore LR 837 (Singapore HC)].

[As to example of documents required by law to be reduced to writing, see notes under s 91, *ante*: "*Any matter is required by law to be reduced to the form of a document*"].

"Have Been Proved According to the Last Section".—S 92 comes into operation when the written instruments referred to in the section, have been proved under s 91, that is, either by the production of the document itself, or by the production of secondary evidence of it, where secondary evidence is admissible under s 65. It is then that this section comes into play.

Whether Decree Comes Within S 92.—The expression "any matter required by law to be reduced to the form of a document, in s 92, if read, as it must be read, along with the expression "as between the parties ..... interest" cannot cover the case of a decree. Therefore, oral evidence may be admissible in proof of an alleged oral agreement between a decree-holder and a judgment-debtor to the effect that although only two years' time for payment was stipulated in a compromise, yet in reality no attempt would be made to execute the decree within twelve years. The effect of the omission of s 257A of the C P Code of 1882 in the Code of 1908, is that court's pemission is not now required to give time to the judgment-debtor for satisfaction of the debt [*Debendra v. Sourindra*, A 1914 C 697: 24 IC 391 (MOOKERJEE & BEACHCROFT, JJ); *Gajanand v. Haribux*, A 1943 C 634: 1943, 1 Cal 195; see also *Anandapriya v. Bijoy*, 91 IC 705: A 1926 C 643 and *Hotchand v. Premchand*, A 1931 S 42]. Dissenting from these cases it was held that s 92 does apply not only to dispositive documents, but also to decrees and Or 21, r 2 also precludes proof of oral agreement modifying a decree [*Rajah Kalahasti v. Venkatadri*, 50 M 897: 105 IC 248; **folld** in *Gopala v. Sankara*, A 1930 M 673; *Lachman v. Ramnath*, 44 A 258 (WALSH, J; see however, *Ramanarsu v. Venkata*, 56 M 198]. This view appears not to be supportable, as under Or 21, r 2 uncertified adjustments cannot be recognized *only* by the court executing the

decree; but it can be recognized by other courts for other purposes. Where a judgment-debtor sues the decree-holder for damages for execution sale of his land in violation of an adjustment after decree, the oral agreement though not certified, is not inadmissible under s 92 [*Ma Shwe v. Sun*, A 1928 R 316: 6 R 573]. *Lachman v. Ramnath, ante*, was dissented from in this case as well as in a later Allahabad case where it has been held that oral evidence to prove a subsequent adjustment of a decree is not inadmissible under s 92 [*Ganga Dihal v. Ram Audh*, A 1929 A 79: 113 IC 760].

A later Full Bench in Madras held that a decree being an act of the court derives its binding force from the authority of the court and not from any agreement between the parties. It therefore does not come within s 92. An oral agreement between a judgment-debtor and the decree-holder subsequent to the filing of the suit and before decree that the decree-holder would not execute any decree that may be passed against him, may be proved in execution proceedings with a view to resist the execution of the decree. An agreement not to execute a decree does not vary its terms [*Adapa v. Darbha*, 58 M 994 FB: A 1935 M 860; see also *Kamakshi v. Thanga-muthu*, A 1935 M 424; *Perumalswami v. Rajammal*, A 1935 M 339]. In Calcutta however it has been held that such a predecree agreement cannot be set up in execution, but a suit lies for restraining the decree-holder from executing the decree [*Panchananda v. Brajendra*, 34 CWN 150; *Harendra v. Gopal*, 39 CWN 512: 62 C 421]. To the same effect are the decisions in *Kalyanji v. Dharmasi*, A 1935 B 303; *Satyabadi v. Mani*, 15 P 390: A 1936 P 619; *Narain v. Basdeo*, A 1950 A 137 and *Behari v. Tulsi*, A 1943 Pesh 29. In Lahore also it has been held that s 92 does not govern decrees and it is no bar to the setting up of an oral contract to operate as an adjustment of a decree [*Udham v. Atma*, 22 L 383 FB: A 1941 L 149; *Nazir Md v. Abdul*, A 1937 L 168; *Allah Baksh v. P & S Bank*, A 1934 L 181].

The observations of the Privy Council in a case where instalments were granted in execution proceedings are pertinent: "The Code contains no general restriction of the parties" liberty of contract with reference to their rights and obligations under the decree and that if they do contract upon terms which have reference to and affect the execution, discharge or satisfaction of the decree, the provisions of s 47 involve that questions relating to such terms may fall to be determined by the executing court ..... They are not prepared to regard a fair and ordinary bargain for time in consideration of a reasonable rate of interest as an attempt to give jurisdiction to a court to amend or vary the decree" [*Oudh Com Bank v. Bindbasini*, 66 IA 84: 14 Luck 192: A 1939 PC 80].

Where a judgment-debtor pleads adjustment of decree by acceptance of a smaller sum than is due, s 92 is no bar to its proof [*Kamakshi v. Thangamuthu*, A 1935 M 424]. A compromise after decree providing for the satisfaction of the decree which differs from the one mentioned in the decree itself (*eg*, by instalments) is not a variation of the decree but merely an adjustment [*Kurani v. Jogemaya*, 66 CLJ 21]. But all adjustment to give effect to the terms of which would be to create a new decree at variance with the decree under execution and which will again have to be executed is not an adjustment [*Azizur v. Ali Raja*, 32 CWN 434; *Palaniappa v. Narayanan*, 69 MLJ 765 FB: A 1936 M 34; *Dinendra v. Pradumnya*, 62 C 28].

Oral evidence cannot however be given to vary or add to the terms of a compromise decree on the plea of silence. See cases noted under the second proviso.

Section Does Not Apply to Documents Operating as an Informal or Collateral Memorandum or to Independent Collateral Facts. [Receipts, Recitals of Formal Matter, Dates etc].—Like s 91 (*see Expl. 3*) the application of the rule is s 92 is confined to the *terms* (*i*) of a contract (*ii*) grant, or (*iii*) other disposition of property. If therefore a document relates to something other than any of the above three classes of facts, as for instance if it be a simple *receipt* for money, or where no part of the case turns upon the terms of the contract or conveyance as such, *eg*, when the document was intended to operate as collateral or informal memorandum of a transaction, extrinsic evidence is admissible to contradict or vary its terms. The bar imposed by S. 92(1) applies only when a party seeks to rely upon the document embodying the terms of the transaction. The sub-section is not attracted when the case of a party is that the transaction recorded in the document was never intended to be acted upon at all between the parties and that the document is a sham, [*Smt Gangabai v. Smt Chhabubai*, A 1982 SC 20, 23: 1982 BBCJ 83 : (1982) 1 SCC 4]. S. 92 does not forbid giving evidence of a separate oral agreement on a distinct collateral matter, which cannot have the effect of contradicting, varying, adding to, or subtracting from any of its terms, even though it may, in a way, have the effect of adding another distinct and independent term to the written agreement between the parties on a collateral matter. [*Lok Nath, Petitioner v. Jagbir Suri*, 1982 Cri LJ 1328, 1332 : 1982 SRINAGAR LJ, 80 (J&K)]. The rule with regard to such documents is the same as in s 91 [see *ante*, notes under s 91, *Explan, 3 and post*: "*S 92 is applicable only when the written instrument contains the whole of the terms*"]. As to extrinsic evidence of independent collateral fact or formal matter, also the *second proviso* of s 92 and notes.

Receipts are in general only *prima facie* evidence of payment and can be contradicted by proof that the money was not in fact paid, that the transaction was fraudulent, that the terms of the receipts do not accurately state the transaction (*Nathan v. Ogdens Ltd.*, 1905 LT 126 CA), that the money was in fact paid by another person, or that the receipt was given "without prejudice". In some cases, however, a receipt may amount to a contract, the terms of which are embodied in it (*Roberts v. E C Rail Co*, 1859, 1 F&F 460; *Rideal v. G W Rail Co*, 1859, 1 F & F 706), and apart from any question of contract, a receipt will be conclusive in cases where it operates as an estoppel [Hals 3rd Ed, Vol 15, Para 735]. Acknowledgment is not a document contemplated in s 92. Where it is alleged that money was advanced on a pronote and liability was acknowledged and suit is based on oral promise at the time of execution of acknowledgment, s 92 does not preclude proof of the oral agreement [*Chhedilal v. Manoharlal*, A 1930 N 298]. Oral evidence to show the purpose of a loan does not vary the terms of a document [*Kistur v. Rajani*, 70 CLJ 201]. Attestation by a reversioner to a sale deed by Hindu widow does not preclude evidence that there was no legal necessity or that there was no consent [*Bishnoodhar v. Bishnoo*, A 1951 N 390].

Though parol evidence is inadmissible to contradict a written agreement, it may be offered to ascertain an independent collateral fact explanatory of the instrument [*R v. Stoke-upon-Trent*, 2 B&Ad 616]. Indeed, it appears that the rule will not be infringed by adducing extrinsic evidence even to contradict a deed or other writing, provided the contradiction be confined to the recitals of formal matter, which may well be presumed not to have been stated with careful precision. For instance, parol evidence has on several occasions been admitted to contradict the recited date of a deed, order or other instrument. In *Reffel v. R*, 35 LJP & M 121, the court of probate admitted parol evidence to prove that a will bearing date the 27th February, 1855, was in fact executed in 1865 and had consequently revoked another will that was made in 1858

[Tay s 1150; Ros N P p 21]. Thus the *date* of execution of a deed may be contradicted [*Exp Slater*, 76 LT 529; *Jayne v. Hughes*, 10 Ex 430] or if omitted, supplied [*Lobb v. Stanley*, 5 QB 574; Phip 11th Ed. p 809]. Dates of documents are therefore regarded as formal parts and it may be shown that dates given are incorrect through mistake or collusion.

S 92 Applies Only to Parties to Instrument and Not to Strangers. [Whether Parties on one Side Only of a Deed are also Within the Rule of Exclusion].—The words "*as between the parties to any such instrument*" are very important, as they and the reference to "*separate oral agreement*" in proviso (2) restrict the application of the rule only to the parties to the document or their privies. It does not apply to strangers who cannot be affected by the terms of a document to which they were not parties and which may contain untrue or collusive statements to serve some fraudulent purpose or things prejudicial to their interests; (*ante*) whereas s 91 applies to both strangers and parties. So, persons other than the parties to the instrument or their representatives in interest, *ie*, *third* parties are not precluded from giving extrinsic evidence to contradict, vary, add to or subtract from the terms of the document (s 99). The rule is not otherwise in England. Where a transaction has been reduced into writing merely by agreement of the parties, extrinsic evidence *to contradict or vary* the writing is excluded only in proceedings between such parties, or their privies and not in those between strangers, or a party and a stranger; since strangers cannot be precluded from proving the truth by the ignorance, carelessness or fraud of the parties (*R v. Cheadle*, 3 B&Ad 833); nor, in proceedings between a party and a stranger, will the former be estopped, since there would be no mutuality (Phip 11th Ed, p 799; Tay s 1149). Although s 92 expressly limits the operation of the rule to parties to instrument or their privies, yet the point has been made more clear by enacting s 99 which says that persons other than parties may give extrinsic evidence to vary a document.

The true position is that when the terms of any document are in dispute between a stranger to it and a party to it or his representative, the restriction in s 92 is inapplicable and both of them are at liberty to lead oral evidence to contradict, vary, add to or subtract from its terms [*Bai Hira v. Off Assignee*, A 1958 SC 448: 1958 SCR 1384].

The words "*as between the parties to any such instrument*" refer to the person who on the one side and the other came together to make the contract, and would not apply to questions raised by the parties on the one side only of a deed, regarding their relations to each other under the contract. Thus, when a sale deed is executed in favour of two persons, one of them is not precluded in a suit by him against the other for ejectment, from proving by oral evidence that defendant was only a nominal party to the deed and the real purchaser of the property was plaintiff [*Mulchand v. Madhoram*, 10 A 421: 8 AWN 127]—CONTRA : Possibly in enacting s 92 it was intended to mean between the parties to the instrument on both sides and not on one side only as between parties themselves; but what the section itself says is not the parties to the *contract*, but parties to the *instrument*, which *prima facie* would seem to include every one concerned [*Pokal v. Ismail*, UBR Civ 1892-96 Vol 1, 354, 357. It is not open to parties on the same side to prove as against each other that a document to which they were parties though purporting to be a sale was in reality a mortgage, *Mg Tun v. Mg Po*, 77 IC 923: 1 Bur LJ 160; see also *Muthu Kumaraswami v. Gobinda*, A 1932 M 218; *Ma Aya v. Daw*, A 1941 R 99; *Nga Sainy v. Nga Lu*, UBR 1906, 13].

The view in *Mulchand v. Madhoram, sup*, that the restriction in s 92 does not apply to parties arrayed on the same side only of a document has been taken in many other cases. In a suit by one of several mortgagors against the other mortgagors for recovery of the mortgage debt which he was compelled to pay, oral evidence is admissible to prove that he joined the mortgage as surety only [*Shamshuljahan v. Ahmed Wali*, 25 A 337: 25 AWN 64 (**reversed** on another ground in 28 A 482: 10 CWN 626: 33 IA 81) *Khudawand v. Narendra*, 58 A 548; see *Lakshmana v. Sinchala*, A 1941 P 211; *Raith Hussain v. Zingrai*, 54 IC 962; *Md Sultan v. Mohideen*, A 1927 M 1102]. In respect of a sale-deed executed by a father in favour of his daughter, the father contended that it was *benami* while the daughter contended that it was really a gift—*Held* that oral evidence in support of the gift is admissible as though both father and daughter claimed through one and the same person, yet so far as the matter was concerned they could not be treated as parties contracting with each other [*Pathammal v. Kalai*, 27 M 329]. Where a document is silent to the insterest of joint transferees, evidence of subsequent conduct to prove this is not barred by s 92 between the transferees *inter se* [*Ramayya v. Mannaru*, A 1930 M 590]. In a suit for declaration that certain properties were joint family properties of the plaintiffs and their deceased father and their father had no right to dispose of the property by will, documents executed by the father reciting that there was in fact no property of joint family were produced. Admissibility of evidence to contract the recial in the document was not precluded by s 92 as the dispute in the suit did not arise between the parties to the documents but between parsons who claimed under the executant of the documents [*Viswanathan v. Abdul Wajid*, A 1963 SC 1].

Same:—Where evidence is tendered as to a transaction with a third party, it is not governed by s 92 and in such a case the ordinary rules of equity and good conscience come into play unhampered by statutory restrictions [*Mg Kin v. Ma Shwe La*, 44 IA 236: 45 C 320: 22 CWN 257: A 1917 PC 207; *Mohesh v. Ananda*, 61 C 344]. Where *A* purported to make a gift of land to his daughter *B*, it is open to *X*, a creditor of the husband of *B*, to prove by oral evidence that the transaction was really a sale to *X* and that the property is liable to be sold in execution of a decree against *X* [*Jagatmohini v. Rakhal*, 2 CLJ 338 (*Rahiman v. Elahi*, 28 C 70 **doubted**); see *Ganu v. Bhau*, 42 B 512; *Megha v. Makhan*, 67 PR 1912; *Sukumari v. Kalipada*, 45 IC 13; *Bishnunath v. Valdeo*, 21 OC 165; *Ram Sundar v. Collr of Gorakhpur*, A 1930 A 797; *Chettyar Firm v. C F*, A 1937 R 220: 1937 Rang 13]. So, any person other than a party, to the transaction is entitled to give oral evidence to show that what purported to be an usufructuary mortgage was really a sale [*Bageshri v. Pancho*, 28 A 473: 3 ALJ 313], or to show that what is ostensibly a sale is really a gift [*Alla Baksh v. Hajin*, 21 IC 60; *Baldeo v. Paltu*, 21 IC 69], or a mortgage [*Hiraji v. Vishnu*, A 1923 B 429] or to show what is ostensibly a lease was really a sale [*Trailakhya v. Jaineshwar*, 38 CWN 1004].

In a proceeding by the Official Assignee for a declaration that a deed of gift executed by an insolvent in favour of his wife and sons was void, it is open to the donees to lead oral evidence to show that the gift was really a transaction for consideration as the Offl Assignee is not a representative of the insolvent. Strangers to the document are outside the scope of s 92 [*Bai Hira v. Offl Assignee*, A 1958 SC 448: 1958 SCR 1384].

The plaintiff after selling some properties to *A*, *B*, two memebers of a joint family, sued the defendants (other members who got the properties under a partition) for a declaration that the sale deeds were mortgages—*Held* that plaintiff is precluded from giving extrinsic evidence as the defendants were parties and at least representatives-

in-interest of *A*, *B* [*Narsingdas v. Radhakishen*, A 1952 B 425 (*Hiraji v. Vishnu, sup* and *Ganu v. Bhau*, 42 B 512 **not folld**)].

The rule does not apply when the question arises between third parties to an agreement in respect of its construction [*Basvant v. Abasalli*, A 1934 B 145]. S 92 would not exclude evidence that a stranger to the contract is entitled to its benefits as an undisclosed principal [*Ladhomal v. Chandumal*, A 1931 S 4].

S 92 does not prevent proof of a fraudulent dealing with a third person's property or proof of notice that property purporting to be absolutely conveyed in fact belonged to a third person who was not a party to the conveyance [*Mg Kyn v. Shwe La*, 38 IA 146: 15 CWN 958: 38 C 892]. Where a person conveys property to another but continues in possession under an oral agreement of repurchase, he can prove against his vendee's purchaser (third party) that the sale was fraudulent [*Malakyi v. Ko Po*, 6 R 741: A 1929 R 86].

In only *some* of the representatives in interest of the parties to a document are parties to the later oral agreement, s 92 does not apply. The mortgagor of a number of properties sold one of them to a stranger, the mortgagee having agreed with the stranger to release that property from security. In a suit by mortgagee to enforce his security against all the properties, oral evidence as to the agreement to release is admissible [*Narrasri v. Koganti*, 87 IC 246: 48 MLJ 280: A 1925 M 775]. Persons who claim to be beneficiaries under a *wakfnama* are parties to it within s 92 [*Ahmad Ali v. Md Aitzad*, A 1936 A 704].

Plaintiff sold his land to *A* and *A* was alleged to have agreed to re-sell it to plaintiff at any time at the same price. Later, *A* sold the land to the defendant who agreed to be bound with the plaintiff by the same terms. In a suit against the defendant for the land, the agreement was admissible [*Maung Than v. Mg Pyu*, A 1928 R 61: 5 R 836].

A person not a party to a sale deed nor the representative in interest of any party thereto, can give oral evidence to show that it was not executed with the knowledge and consent of another as mentioned in the sale deed [*Mg Hyane v. Mg Aung*, A 1935 R 122]. So in a suit for pre-emption where defendants contended that the transaction is not really a sale, it is open to the vendee, as against the plaintiff, to produce evidence to show that the document was not one of sale [*Bhullan v. Khusiram*, 79 IC 320: A 1924 A 229; *Md Ishaq v. Fahimunnessa*, A 1928 O 472]. In a pre-emption suit the vendee can show by evidence that in fact the amount paid as price of land is much more than is stated in sale deed [*Jana Bibi v. Qadir*, A 1960 J&K 28]. The pre-emptor not being a party to the deed can show by oral or other evidence that it was really a sale and not mortgage [*Mari Mal v. Sharifan*, A 1949 C 194; *Shk Usman v. Md Shafi*, A 1927 A 204 : 98 IC 989].

A entered into a contract with *B* as alleged agent of *C*. In a suit by *A* upon the contract against *C*, oral evidence is admissible to show that *B* entered into the contract as agent of *C*, as s 92 has no application to person who are parties to the instruments [*Hoe Chan Co v. Chotalal*, A 1939 R 139: 1939 RIR 622; see *ante* s 91: "*Existence of contract, grant &c*"]. Where a father sells a property as manager of joint family, the other members must be treated as parties to the document and they cannot show that the transaction was of a different kind [*Ram Ch v. Kashinath*, 27 Bom LR 241: 87 IC 804].

This section does not apply to a criminal case, where the Crown is the prosecutor; but where there is a private prosecutor, he is a party for the purpose of this section [8 IC 952: 11 Cri LJ 738].

S 92 is Applicable Only When a Written Instrument Contains the Whole of the Terms. [Incomplete Writings].—The rule in s 92 applies only where upon the face of it, the written instrument appears to contain *the whole of the terms of the contract*. But where it appears that it does not contain the whole agreement between the parties and that there are certain other oral conditions which are not inconsistent with the written instrument and which would make up the whole contract, oral evidence is admissible to prove those other conditions [*Cutts v. Brown*, 6 C 328: 7 CLR 171, see *Coalfields of Burma Ltd v. Jhonson*, 2 R 575: 84 IC 1021; *Co-operative Co Ltd v. Bhagwan*, A 1930 A 615; *Chimanram v. Divan*, 56 B 180. See also *post*. Proviso 2 and case noted there]. "Where a writing embodying an agreement, is manifestly incomplete, and is not intended by the parties to exhibit the whole agreement, but only to define some of its terms, the writing is conclusive so far as it goes. But such parts of the actual contract, as are not embraced within its scope, may be established by parol" [*Sheffield v. Paye*, Fed Cas No 12, 743, 1 Spr 285 and cases cited Jones s 440].

Where the only terms expressed in a document are as to the date of repayment of the money received and as to the rate of interest, oral evidence is admissible to show that it was paid by way of loan, deposit or on account of some joint adventure. Such a document does not purport to record all the terms of the contract [*Md Akbar v. Attar*, 63 IS 279: 17 L 557: 40 CWN 997: A 1936 PC 171]. In a suit on a pronote executed by *K* who was carrying on a business jointly with his brother *L* in partnership, oral evidence was admitted to prove an assurance that the money was being taken for the joint business [*Lalman v. Gopal*, A 1945 A 221: 1945 All 387].

A contract note is not conclusive of the real relation of the parties and evidence is admissible to prove whether a party contracted as agent or in the capacity of seller or buyer [*Sohanlal v. Bilasray*, A 1954 C 179].

Same: [What is Incompleteness?].—What is the criterion for determining whether or not a writing is complete? One view is that the only criterion of the completeness of the writing is the writing itself. Obviously this is an unsatisfactory and unworkable test. The object being to ascertain whether the writing contains all that the parties intended in regard to a certain subject, a great latitude of enquiry embracing that subject and the surrounding circumstances must necessarily be allowed. The degree of formality of the document must also be considered (*v Proviso* 2). Wigmore says (*1*) Whether a particular subject of negotiation is embodied by the writing *depends wholly upon the intent of the parties* thereto. (*2*) This intent must be sought where always intent must be sought, namely, in the *conduct and language* of the parties and the *surrounding circumstances*. The document alone will not suffice. What it was intended to cover cannot be known till we know what there was to cover. The question being whether certain subjects of negotiation were intended to be covered, we must compare the writing and the negotiations before we can determine whether they were in fact covered. (*3*) In deciding upon this intent, the chief and most satisfactory index for the judge is found in the circumstance whether or not the *particular element of the alleged extrinsic, negotiation is dealt with at all* in the writing. If it is mentioned, covered, or dealt with in the writing, then presumably the writing was meant to represent all of the transaction on that element; if it is not, then probably the writing was not intended to embody that element of the negotiation. This test is the one used by the most careful judges [Wig s 2430].

The inference whether the writing was or was not intended to contain the whole agreement may be drawn from the document itself as well as from extrinsic circumstances [*Mercantile Bank of Sydney v. Taylor*, 1893 AC 317, 321]. The burden of

proving want of completeness is on the party alleging [*Tucker v. Benett*, 38 Ch D 1, 9]. The rule is grounded upon this, that the parties to the instrument must be presumed to have committed to writing all which they deemed necessary to give full expression to their meaning; where that appears not to have been their intention, the rule is not applicable [*Beharee v. Kaminee*, 14 WR 319, 329 (*Allen v. Pink*, 4 M & W 140 *post* refd to)].

For the purpose of showing that a document does not, and was not intended to contain the whole of that contract between the parties, oral evidence may be given. When evidence so given conclusively established that the whole contract is contained in the document, no evidence will be admitted to contradict vary, add to or subtract from its terms. That being so, to ascertain the intention of the parties, all that the court has to do, is to construe the written document [*Cohen v. Sutherland*, 17 C 919, 922]. The rule is otherwise when parties agree that a written instrument shall be executed not containing all the terms of the agreement; and when by express arrangement, the written document does not contain all the terms but only a part, parol evidence is admissible to show what was the entire agreement [*Bholanath v. Kaliprosad*, 8 BLR 89, 92]. "Nor does it appear to us, that the writing was intended to contain the whole agreement, and we are, therefore, of opinion that the rule relied upon by the plaintiffs only applies where the parties to an agreement reduce it to writing and agree or intend to agree that writing shall be their agreement" [*per* POLLOCK CB, in *Harris v Rickett*, 4 H & N 1 (**follld** in *Kasheenath v. Chundy*, 5 WR 68, 73 FB; *Guddalur v. Arumuga*, 7 Mad HCR 189]. The facts in *Harris v. Rickett, supra* were—*A* borrowed from *B* and agreed to sign four documents, one of which was to be a bill of sale, as security. He signed three of the documents then, and sometime afterwards executed a bill of sale. In proceedings by *A's* trustee in bankruptcy to impeach the bill of sale, it was held that *B* may prove the oral agreement in pursuance of which it was given. The rule that oral evidence is not admissible to vary or alter the terms of a written contract, is not applicable where the parties did not intend that the writing should contain the whole agreement between them; and this may appear either by direct evidence or by informality in writing.

In an action for breach or warranty, where plaintiff had bought a horse from defendant on a verbal warranty by the latter who shortly after the purchase was completed, gave him a paper as follows:—"Bought of *A*, *B* a horse for £7-2-6—*A*, *B*", the plaintiff was allowed to prove that defendant had verbally warranted the animal quiet in harness, the paper appearing to nave been meant merely as a memorandum of the transaction or an informal receipt for the money not to contain the terms of the contract itself [*Allen v. Pink*, 7 LJ Ex 206]. Where *A* who had hired a horse gave the owner *B*, a paper signed "Six weeks at 2 guineas". *B* was not precluded from proving an additional term that all accidents by the shying of the horse should be at hirer's risk [*Jeffery v. Walton*, 1 Stark. R 267].

A contract of sale of land was entered into by a writing in a book signed by the parties and attested. Evidence by defendant of an 'oral agreement that offer by anybody above the sum agreed, would make the contract null and void is not admissible, even if it be an imperfect agreement of which specific performance cannot be decreed [*Tukaram v. Jagannath*, 76 IC 215: A 1923 B 236]. This section does not exclude verbal evidence, when it is adduced to prove that the written agreement has been totally waived or discharged [*Kashee Nath v. Chundy*, 5 WR 68 FB]. Where the document is merely a written admission and does not contain all the terms, oral evidence of meaning of the words is admissible [*Jumma v. Abu*, 93 IC 193 : A 1926 N 301].

A *pronote* is generally taken as a security for an advance and does not contain all the terms of the advance. It does not exclude oral evidence of the terms and purpose for which the advance was made [*Be Shein v. R*, 13 Bur LT 239: 64 IC 33]. Where a pronote was executed for the loan on a previous barred pronote, oral evidence is admissible for the purpose of connecting the express promise to pay with the previous loan [*Mantajuddin v. Nazar*, 63 C 759]. When cash consideration is mentioned in a pronote, a party is not debarred from praying that in fact the consideration was of a different kind, *viz* the withdrawal of a suit [*Harbans v. Sitaram*, A 1933 A 576; see *post*: "*Incorrectness of Recital*"].

Whether an agreement is a completed bargain or merely a provisional arrangement depends on the intention of the parties as deducible from the language used by the parties on the occasion when the negotiations took a concrete shape [*Harichand v. Govind*, 50 IA 25: 47 B 355: 28 CWN 73: A 1923 PC 47]. Where several transactions are connected together and portion of the contract was not embodied in the sale-deed, oral evidence is admissible to prove the real transaction [*Nathukhan v. Musst Sewak*, 15 CWN 408: 9 IC 161]. When however a document is incomplete, or informal or when it is silent as to any agreement, the existence of a separate oral agreement which is not inconsistent with its terms, may be proved. This is dealt with in *proviso* (2) [see *post*].

S 91 or S 92 Does Not Exclude Extrinsic Evidence to Show That There Was No Agreement or Transaction At All and Therefore No Contract.—Oral evidence to contradict, vary, add to, or substract from the terms of the writing is excluded only when there is an actual contract between the parties. But parol evidence may be admitted to prove that there was no agreement at all [*Ramdhari v. Kewalmani*, 90 IC 929: A 1926 P 156; *Ramlal v. Dhian*, A 1933 L 222; *Dada Hanaji v. Babaji*, 2 BHCR 36]. This does not mean, however, that after entering into a solemn contract, evidence of any kind is admissible in all cases to show that there was no agreement at all and the deed was intended not to have any force or binding effect. If there was any stipulation that the contract would not be enforced or that it was not intended to be acted upon *ab initio*, oral evidence may be given. In *Guddalur v. Arumuga*, 7 MHC 189 (A case decided before the Evidence Act) MORGAN CJ, observed:—"I take the law to be that notwithstanding a paper writing, which purports to be a contract and may be produced, it is still competent to the court to find upon sufficient evidence that this writing is not really the contract. And the risk of a groundless defence does not affect the rule itself, although it suggests caution in acting on it", and cited the following remarks of ERLE J, in *Pym v. Campbell*, 25 LJQB 277: 6 C&B 370:—

> "The point made is, that this a written agreement, absolute on the face of it, and that evidence was admitted to show it was conditional; and if that had been so, it would have been wrong. But I am of opinion that the evidence showed that in fact there was never any agreement at all. The production of a paper purporting to be an agreement by a party, with his signature attached, affords a strong presumption that it is his written agreement; and, if in fact he did sign the paper *animo contrahendi*, in terms contained in it are conclusive and cannot be varied by parol evidence; but in the present case, the defence begins one step earlier; the parties met and expressly stated to each other that though for convenience they would then sign the memorandum of the terms, yet they were not to sign it as an agreement until *A* was consulted. I grant the risk that such a defence may be set up without ground; and I agree that a jury should, always look on such a defence with suspicion; but, if it be proved that in fact the paper was signed with the express intention that it should not be an agreement, the

other party cannot fix it as an agreement upon those so signing. The distinction in point of law is, that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible".

Statutory effect has been given to *Pym v. Campbell, sup* in prov (*3*) to s 92 (*post*). Where a landlord sued to eject tenants under a *kabuliat* executed by them containing a stipulation which the landlords said would not be enforced, SIR RICHARD COUCH, observed: "If there was any stipulation in the *kabuliat* which the plaintiff told the tenants would not be enforced, they cannot be held to have assented to it and the *kabuliat* is not the real agreement between the parties, and the plaintiff cannot sue upon it" [*Pertab v. Mahendra*, 16 IA 233: 17 C 291; see also *Mottayappan v. Palani*, 38 M 226; *Satyendra v. Parmanand*, 39 CWN 888]. **Relying** on *Pertab's case* it has been held that oral evidence to show that the document was never intended to operate as an agreement but was brought into existence solely for the purpose of creating evidence of some other matter (*eg* the undivided status of a family or that there was a stipulation that the contract would not be enforced) is not excluded by s 91 or s 92 [*Tyagaraja v. Vedathanni*, 63 IA 126: 59 M 446: 40 CWN 353: A 1936 PC 70; **folld** in *Sumati v. Narendra*, A 1975 Gau 47; *Yadav v. Laxman*, A 1978 A 123; see also *Bishambhar v. Ram Ch*, A 1938 A 132: 1937 ALJ 1352].

Where a suit for possession was based on a sale deed, oral evidence is admissible to prove that the deed was not to operate as an agreement, but was brought into existence for creating evidence of other matter [*Bhuralal v. Bhiriya*, A 1963 MP 210]. Oral evidence may be adduced to show that it was never intended to act upon certain documents as sale deeds but as exchange deeds [*Ramdip v. Balideo*, A 1977 P 234] or that though the document was executed in the form of an agreement for sale, the real nature of transaction was a loan for which the document was a security [*Sukumar v. Sushil*, A 1972 C 207]. In *Mattayappan v. Palanai* and *Saryendra v. Paramananda, sup*, it was observed that such evidence was admissible under *proviso* (2) to s 92, but in *Tyagaraja's case* SIR JOHN WILLS said that the result would be the same even if there was no *proviso* to ss 91 and 92, because there is nothing in either section to exclude oral evidence that there was no agreement between the parties and therefore no contract. [The discordant note struck in *Lachman v. Ram Pd*, 49 A 680 that evidence in any shape cannot be admitted for showing that there was no agreement at all, or in other words, that a deed was meant to be inoperative was not approved of in *Tyagaraja's case*. See also *Md Sultan v. Serajuddin*, A 1936 L 183 where one of the judges took similar view, but the question must be taken to have been settled by the Privy Council case above]. In this connection it may be observed that a party is not estopped by his deed from avoiding it by proving that it was executed for a fraudulent purpose [see s 115 *post*, "*Fraud—Law Recognises No Estoppel as Between Parties in pari delicto*"].

The bar of s 92 applies only when it is sought to be proved that the terms of the transaction were different and not that the transaction itself was different than what it purported to be [*Jatashanker v. Mavji*, A 1969 G 169; *Srinarayan v. Bhaskar*, A 1964 N 193]. S 92 prohibits only the varying of terms of the documents, not the memoranda or recitals of facts, bereft of dispositive terms, particularly when the correctness of the whole or any part of the recital is in question [*Krishnabai v. Appasaheb*, A 1979 SC 1880].

In a contract the vendor pleaded that a term relating to the statement of an inflated price being not in it, there was no concluded contract—*Held* the plea might fall under prov (*3*) or it might be a plea not covered by s 92 at all, *viz* that there was no

contract at all. In both cases oral evidence is admissible [*Deep Ch v. Md Sajjad*, A 1951 A 93 FB]. S 92 has nothing to do with offers made. Offers can be varied at the time of acceptance [*Bindeswari v. K K Dutt*, A 1954 C 351: 57 CWN 952].

Despite recitals to the contrary in lease deed lessee is not precluded from showing that he was not put in possession and occupation of the land and the lessor is not also precluded from showing that he had not received outstanding part of the nazarana money [*Purna v. Kamala*, A 1065 P 39].

Section Does Not Apply to Fictitious Documents.—Written contracts like all other contracts must be made *animo contrahendi*, and parol evidence is admissible to show that there was no *animus* [*Steph Comm* 19th Ed Vol 3 p 221]. S 92 presupposes the validity of the transaction evidenced by the document. If its validity is impeached, the court is not bound by what has been described as the paper expression of the parties, and is not precluded from entering into the real nature of the transaction between them [*Beni Madhab v. Sadasook*, 32 C 427 FB: 2 CWN 306; see also *Abdul v. Arlin*, 95 IC 512: A 1926 R 94]. S 92 does not preclude a party from showing that the writing was not really the contract between the parties, but was only a fictitious or colourable device which cloaked something else. *Benami transactions* afford a common illustration of the rule [*Asaram v. Ludheshwar*, A 1938 N 334, 342 FB: 174 IC 510]. Oral evidence is admissible to show that an agreement was only a sham or nominal transaction and was not intended to be acted upon [*Tyagaraja v. Vedathanni*, 63 MLJ 707; on appeal 63 IA 126; A 1936 PC 70 *sup*; *Rasool v. Md Moulana*, A 1977 Knt 173], or to show that a written agreement for the conveyance of property was only a fictitious sale to avoid execution proceedings against the property [*Bowes v. Foster*, 157 ER 322] or that a certain receipt is fictitious in the sense that no money was paid [*Hukum v. Shimbhu*, A 1935 A 346].

In *Tyagaraja's case* the Privy Council observed: "S 92 only excludes oral evidence to vary the terms of the written contract and has no reference to the question whether the parties had agreed to contract on the terms set forth in the document". Relying on *Tyagaraja's case* it has been held that there is a material difference between an attempt to show that the terms of a contract were different from those recorded in a deed, and an attempt to show that the contract as mentirned in the deed was not the real contract between the parties but it was something different. It is the former that is hit by s 91 but the latter is not so hit [*Arumoorthi v. S E Committee*, A 1962 M 360]. Where a husband admits that he executed a gift in favour of his wife, but alleges that he had no intention of giving away the property, oral evidence in proof of such defence is admissible [*Md Azim v. Rajah Saiyid*, A 1931 O 177]. See *post*: "*Benami*".

The general rule is that when the words of a written instrument are free from ambiguity and where external circumstances do not create any doubt or difficulty as to the proper application of the words, such instrument is always to be construed according to the strict plain common meaning of the words themselves and evidence *dehors* the instrument for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument is utterly inadmissible. Thus where a deed of assignment was executed by *A* in favour of *X* (his son) and *Y*, and *B* advanced money on the security of *X's* interest in the properties thus conveyed, *A* could not be allowed to give evidence that it was "an elaborate make-believe deed, to mark the properties so that in the case of his death, the properties might be handed over to his son later on. Such evidence of secret intention at variance with the expressed intention in the deed is inadmissible [*Tsang Chuen v. Li Po Kwai*, 1932 AC 715: 139 IC 891: 63 MLJ 418: A 1932 PC 255].

Oral Evidence to Show that Land Was Inserted in Sale or Mortgage Deed Only For Purpose of Registration.—Where a parcel of land in one district which was not intended to form part of the transaction or security was inserted in a mortgage deed along with other lands in another district in order to give jurisdiction to the sub-registrar having jurisdiction over the former district, the registration being a fraud on the law in s 28 Registration Act is invalid [*Collr of Gorakhpur v. Ramsundar*, 61 IA 286: 56 A 468: A 1934 PC 157; *Venkatarama v. Sobhanadari*, 63 IA 169: 59 M 539: A 1936 PC 91; *Jageshwar v. Mulchand*, A 1939 N 57 FB]. The same is the case where the property included for purpose of registration is fictitious or non-existent [*Harendra v. Haridasi*, 41 IA 110 : 41 C 972 : A 1914 PC 67; see also *Bishwanath v. Chandra*, 48 IA 127: 48 C 509: A 1921 PC 8]. In such cases evidence is admissible though it may tend to show that property ostensibly mortgaged was not in fact intended to be mortgaged. It is not evidence which varies the terms of the written instrument. It is evidence which goes to show that the document did not relate to land within the jurisdiction of the sub-registrar who registered it. Further, evidence of this kind which tends to render the document invalid is admissible under *Proviso* 1 [*Ramandan v. Chandradip*, 19 P 578: A 1940 P 504]. When the conveyance was otherwise registrable where it was registered, there is no room for the application of the principle laid down in these cases [*Premsukh v. Mangal*, 41 CWN 854]. The crucial test in order to find out whether the registration law was evaded or defrauded is whether or not the parties intended that the property in question should form part of the transaction [*Chandi v. Hrishikesh*, A 1946 C 465].

"No Evidence of any Oral Agreement or Statement Shall be Admitted". [Forms of Extrinsic or Parol Evidence].—The words "*oral*" in the *proviso* to s 92 is used in the sense of being "not committed to writing" and the words "oral agreement" in this section include all unwritten agreements whether come to by words of mouth, or otherwise. Hence an unwritten agreement though implied from the acts and conduct of the parties is none the less oral [*Mayandi v. Oliver*, 22 M 261: 8 MLJ 196; **folld** in *Radharaman v. Bhabani*, 12 CLJ 439: 6 CWN 60; see also *Lakhatulla v. Bishwambhar*, 12 CLJ 646; *Lakshmi v. Nabadwip*, 56 C 201].

The words "oral evidence" have been defined in s 3. The words "oral" or "*verbal*" are not synonymous with the words "*parol*" which is not unoften used in a different sense. Thus contracts not under seal are said to be parol contracts [*Rann v. Hughes*, (1764) 7 TR 350-1, note]. The words "*parol evidence*" more correctly speaking mean extrinsic evidence [Best s 226]. The words "*parol evidence*" have been used in many decisions of the High Courts; and it is necessary to state here what exactly is meant by the term in English law. *Parol evidence*, a term which, though sometimes applied to written matter as opposed to instruments under seal, and sometimes to oral testimony or statements as opposed to written, is in the present connection used to describe *all* evidence extraneous to the document itself. Such evidence is generally inadmissible whether it consists of (*1*) direct oral testimony by the parties; (2) their admissions, declarations of intent or conversations out of court; (*3*) their statements against interest, &c tendered after death; or (*4*) facts and events not in the nature of declarations, whether happening before, at or after the date of the instrument, *eg* their previous course of dealing tendered to supplement a complete, though aliter an incomplete contract, or to contradict the instrument; (*5*) all documents and correspondence other than those constituting the transaction in issue, or incorporated therewith by reference [Phip 11th Ed pp 795-96].

S 92 was framed in accordance with the current of English decisions upon the question how far parol evidence can be admitted to affect a written contract. In cons-

truing it, care must be taken not to create a precedent that would open the door to indiscriminate parol proof of transactions, where written documents have recorded what has passed between the parties [*per* STRAIGHT J, in *Cohen v. Bank of Bengal*, 8 A 598, 602]. But in *Balkishen v. Legge*, 27 IA 58 : 22 A 149 : 4 CWN 153, and *Mg Kin v. Ma Shwe La*, 44 IA 236 : 45 C 320 : A 1917 PC 207, it has been held that the cases in the English Courts of Chancery have no application to the law of India as laid down in the Acts of the Indian legislature. Similar view was also taken in *Achutaramaraju v. Subbaraju*, 25 M 7 pp 11, 13: 11 MLJ 370 [*per* BHASHYAM AIYANGAR J], and in *Harakchand v. Bishun*, 8 CWN 101.

Two persons made an oral partition of their father's estate extinguishing their rights of survivorship and two lists were drawn up. Oral evidence of the lists is admissible and s 92 does not apply [*Nelakanta v. Ivatuary*, 48 M 933: 49 MLJ 266: 91 IC 401]. Where a verbal agreement to reduce rent is admitted by both plaintiff and defendant, and there is no necessity to prove it, s 92 does not apply [*Satyesh v. Dhunpat*, 24 C 20; see also *Burjorji v. Muncherji*, 5 B 143, 152]. When property is purchased in the name of several persons creating a joint tenancy, parol evidence is admissible to prove that the joint tenants have become tenants in common. Such evidence is tendered not for contradicting or varying the terms of the conveyance but for proving facts from which it may be inferred that the purchasers have subsequently so dealt with their respective interests thereunder that the joint tenancy has become a tenancy in common [*Tan Chey v. Chee Swee*, 56 IA 112: A 1929 PC 72: 116 IC 385: 56 MLJ 643].

Oral evidence is not admissible to prove variation in terms of registered lease deed [*Raval & Co v. K G Ramchandran*, A 1974 SC 818] or that a document which is an out-and-out sale was really meant to be a *donatio mortis causa* [*Benode v. Asutosh*, 16 CWN 666]. Where two deeds on their face appear to be separate transactions, another agreement which was not evidenced by any writing cannot be proved to show that the deeds though apparently two separate transactions were agreed to be treated as one [*Deonandan v. Draupadi*, A 1938 P 242: 15 172 IC 831]. A possessory mortgage and rent note equivalent to the interest on the mortgage were executed contemporaneously. Oral evidence is admissible to ascertain true nature of transaction. Held further there were two different relationships with two different legal consequences and following the rule of harmonious construction, both documents could be given effect to at the same time [*Jatashanker v. Mavji*, A 1969 G 169 (*Balkishen v. Legge*, 27 IA 58; *Hanifunnissa v. Faijunissa*, 38 IA 85; *Radha Sundar v. Md Jahadur*, A 1959 SC 24; *CIT v. Motors &c*, A 1968 SC 200; *Abdulla v. Basarat*, 40 IA 31; *Feroz Shah v. Sohbat*, A 1933 PC 178: 60 IA 273; **reld** on)]. A mortgage was unregistered, but it was admitted as such in a mutation proceeding. The oral contract at mutation was inadmissible [*Gujri v. Samandar*, 276 PLR 1913]. Agreement that a gift should operate as a will could not be proved [*Mottayappan v. Palani*, 38 M 226: 25 MLJ 290]. An order of adjournment noting incidentally the fact of an agreement made out of court as a ground of adjournment, does not exclude additional evidence to add to the terms of the compromise [*Sambhanda v. Chinnaswami*, 29 IC 860].

Where defendant admitted the execution of a pronote jointly with another, but averred that it was verbally agreed that his liability should cease on a certain date, oral evidence is inadmissible [*Motabhoy v. Mulji*, 42 IA 103: A 1915 PC 2: 39 B 399]. Where an oral agreement which was subsequently embodied in written instrument to the effect that the amount of a pronote subsequently executed was not to become payable until the accounts of a certain partnership had been settled—*held* that evidence of the oral agreement which was made sometime before the written

instrument should not be excluded [*Lall Hira v. Bhardwapa*, 88 IC 336: A 1925 R 256]. Where written contract agreed that payment was to be against tender of documents, evidence showing that payment was to be against delivery of goods is not admissible in the absence of any contract oral or written varying the agreement [*Hiralal v. Gobardhan*, 86 IC 399: A 1925 L 74]. Where an endorsement on a promissory note contains no recital of consideration, it cannot amount to a "contract in writing" and oral evidence is admissible to prove what the real consideration was [*Aiyathurai v. Siva Rama*, 32 IC 233].

Loan secured from Bank—Letter, promissory note and deed of hypothecation executed in favour of Bank by three defendants of which *B* was one—*held* all documents formed part of the same transaction and s 92 did not apply as *B* was not attempting to furnish evidence of any oral agreement in derogation of the promissory note but relying on the existence of a collateral agreement in writing [*Chattanatha v. Central Bank of India Ld*, A 1965 SC 1856 (*Venkata v. Karendan*, A 1935 M 643 **dist**)].

Where a *barga kabuliat* stated that defendant was to pay Rs. 25 if he failed to deliver half the crops, oral evidence is not admissible to show that the sum was mentioned for purposes of registration [*Basiruddin v. Afsarunnessa*, 21 CWN 860: 40 IC 833; see *Gurudas v. Gobinda*, 24 CWN 85; After *Morole v. Prasanna*, 15 CWN 249; *Nil Madhub v. Sitanath*, 26 CLJ 94; *Baneswar v. Umes*, 37 C 626; *Ashutosh v. Haran*, 23 CWN 101]. S 92 has no reference to the interpretation of the terms of a contract. Where a contract is capable of different interpretation, the court is justified in finding out the intention with which a particular expression was used [*Juran v. Ram*, 55 C 808: A 1928 C 737].

No evidence should be allowed to vary the recorded voting paper which on the face of it shows an election to be invalid or void [*Nagendra v. Vas*, 32 CLJ 124: 60 IC 547]. Oral evidence cannot be let in that property really meant as security for a mortgage is other than what appears in the deed [*Munshi Kazim v. Haji Mutasaddi*, 90 IC 841 (P)]. Oral evidence to show, what took place on the occasion when an agreement for sale was drawn up is inadmissible under s 92 [*Harichand v. Govind*, 50 IA 25: 47 B 335: 28 CWN 73: A 1923 PC 47]. Where a contract stated that the goods were to arrive by the "SS. Fraunfels", oral evidence that they were to be delivered within a certain number of days is inadmissible [*Firm Jivanji v. Firm M*, 76 IC 286: A 1924 S 127].

Antecedent Documents or Negotiations Preceding the Written Contract.—Where a deed was construed by reference to previous correspondence between the parties, it was held that nothing is better settled than that when parties have agreed into a formal contract, that contract must be construed according to its own terms and not to be explained or interpreted by antecedent communings which led up to it. This is specially true of a conveyance [*Bomanji v. Secy of S*, 56 IA 51, 56: 53 B 230: 33 CWN 293: A 1929 PC 34; *Kaluram v. Gajasa*, A 1928 N 182].

Where the question is as to extent or area of the mehal settled, antecedent documents cannot be admitted for contradicting the terms of the settlement made. And antecedent documents and maps can be used solely for the purpose of identifying the thing demised [*Tilakdhari v. Kesho*, A 1925 PC 122: 41 CLJ 386: 27 Bom LR 819: 48 MLJ 611]. **Distinguishing** *Tilakdhari's case* it has been held that correspondence preceding a final document of compromise must be considered to determine what the compromise is [*U P Govt v. C M T Assen Ltd*, A 1948 O 54]. If the whole contract is found in the formal printed document, evidence of previous correspondence would be inadmissible [*Agra Elec Co v. Bansidhar*, A 1946 A 406: 1946 ALJ 122]. Letters

between the parties written several months before the execution of the mortgage-deed are inadmissible to contradict, vary or add to the terms of the mortgage [*Punjab N Bank v. Arora*, A 1933 L 1024]. Oral evidence is admissible as to negotiations antecedent to execution of mortgage to show what was intended to be offered as security [*Bepin v. Priyabrata*, 26 CWN 30: 34 CLJ 256]. But the true construction of a document could not be varied by the extrinsic evidence of negotiations which led up to the contract [*Durga Pd v. Rajendra*, 40 IA 223 : 41 C 493; *Kaluram v. Gajasa*, A 1928 N 182].

Oral evidence of negotiations preceding a written contract is not admissible without first settling to what extent the contract was so ambiguous as to justify resort to such evidence. In a written contract between *D* and *M* relating to "the excavation of stone and construction thereof by means of machineries," the parties agreed "not to undertake directly or indirectly, the one to the exclusion of the other, works of a similar nature." *D* sued *M* for half-share in the profits of a contract executed with the help of the machinery which was not discussed during the negotiations—*Held* that there was no ambiguity in the words "works of a similar nature" as they clearly referred to "the excavation ..... machineries" and oral evidence of negotiations is not admissible though the contract was executed with machinery (air compressor) not discussed during the negotiations [*Darmanin v. Micallef*, A 1946 PC 50].

Parol evidence to prove an antecedent oral agreement different in terms from the contract put in writing is inadmissible [*Hutton v. Watling*, 1948, 1 All ER 803 CA].

Benami.—In a suit for specific performance of an agreement for purchase made and executed by defendant No. 1 alone, the plaintiffs alleged that the real purchaser was defendant No. 2 and that defendant No. 1 was *benamdar*. Defendant No. 1 raised a similar contention but defendant No. 2 denied it—*held* that although it was doubtful if oral evidence would be admissible in a contest between plaintiffs and defendants, yet it was admissible as between defendants Nos. 1 and 2 to prove the real nature of the agreement between them [*Luxmibai v. Kesab*, 18 Bom LR 134 : 33 IC 396]. Where a party executed an agreement to work land on lease and in a subsequent suit for rent pleaded that the agreement had been executed in pursuance of a *benami* transfer to protect the land from creditors—*held* that oral evidence was admissible to show that there was no grant of disposition at all in law [*Abdul v. Arlin*, 95 IC 512 : A 1926 A 94 (18 Bom LR 134 **not folld**)]. It is not open to a lessee to contend that he is not a real lessee as the same would amount to varying the terms of the contract itself [*Ranvijaya v. Bala*, A 1978 P 91]. In the case of a *benami* transaction, oral evidence is permissible to show who were the actual contracting parties. [*Raj Ballar Das v. Hari Pada Das*, A 1985 Cal 2, 11]. S 92 does not preclude a party from showing that the writing (in respect of a benami transaction) was not really the contract between the parties but was only a fictitious or colourable device which cloaked something else. Quoted from A 1938 Nag 335 (FB); *Ousph Chacko v. Raman Nair Raghavan Nair*, A 1989 Ker 317, 327]. See *ante*: "*Section does not apply to Fictitious Documents*".

Admissibility of Extrinsic Evidence of Acts, Conduct or Intention of Parties for Varying, Contradicting, etc the Terms of a Document.—The decisions on this question are very many and the conflicting views expressed in a large number of them, make the true rule difficult of ascertainment or application. The principle was thus explained in one of the earliest cases [*Kashinath v. Chandi*, 5 WR 68 FB: 1 BLR Sup Vol 383] by PEACOCK, CJ, with whose opinion, the majority of the Full Bench concurred:—

> "I am of opinion that verbal evidence is not admissible to vary or alter the terms of written contract in cases in which there is no fraud or mistake and in

which the parties intend to express in writing that their words import. If a man writes that he sells absolutely, intending the writing which he executes to express and convey the meaning that he intends to sell absolutely, he cannot by mere verbal evidence show that at the time of the agreement, both parties intended that their contract should not be such as their written words express, but that which they expressed by their word to be an absolute sale, should be a mortgage ..... If mere verbal evidence is admissible in this case to contradict a written contract, it would apply to every other case, and a man who writes *one thousand*, intending to write *one thousand* might prove that by an agreement, the words *one thousand* were not intended to mean "*one thousand*" but only "*one hundred*." Nothing could be more dangerous than the admission of such evidence. Further, if it be held that such evidence is admissible, the whole effect of the new Registration Act would be frustrated. If possession did not accompany or follow the absolute bill of sale, it would be a strong fact to show that the transaction was a mortgage and not a sale; and it, therefore, becomes material to try whether the plaintiff was ever in possession, and forcibly dispossessed, as alleged by him and whether having reference to the amount of the alleged purchase money advanced, and to the value of the interest alleged to be sold, *and the acts and conduct of the parties*, they intended to act upon the deed as an absolute sale, or treat the transaction as a mortgage only; for I am of opinion that *parol* evidence is admissible to explain the acts of parties, as for example, to show why the plaintiff did not take possession in pursuance of the bill of sale, if it be found that the defendant retained possession and that the plaintiff had never possession, as alleged by him and was never forcibly dispossessed."

The above case was commented upon by JACKSON, J, in *Madhab v. Gangadhur*, 11 WR 450 : 3 BLR 83, 86 and in several other cases (see *Ram Dulal v. Radha Nath*, 23 WR 167; *Ram Dayal v. Heera*, 3 CLR 386; *Morgan v. Mittu Bibi*, 2 C 58; *Sundar v. Jagjivan*, 1 B 333). In *Daemuddi v. Kaem Faridar*, 5 C 300 : 4 CLR 419, it was held that the Full Bench case of *Kashinath v. Chandi, sup*, was overridden by s 92; but in *Hem Ch v. Kally Churn*, 9 C 528 : 12 CLR 287 it was ruled that s 92 made no alteration in the law as laid down in *Kashi Nath v. Chandi, sup*, but it is in accordance with what was decided in that case and that oral evidence was admissible to prove the conduct of the parties as to whether the transaction had been treated as a sale or mortgage. Similar view was also taken in *Kashi Nath v. Harihar*, 9 C 898 and in *Baksu Lakshman v. Govinda*, 4 B 594 where MELVILL, J, observed:—

"Although parol evidence will not be admitted to prove directly that simultaneously with the execution of a bill of sale, there was an oral agreement by way of defence, yet the court will look to the subsequent conduct of the parties, and if it clearly appear, from such conduct that the apparent vendee treated the transaction as one of mortgage, the court will give effect to it as a mortgage, and nothing more ..... Conduct is, no doubt evidence of the agreement out of which it arose, but it may be very much more. In many cases it may amount to an estoppel ..... In such a case it is clear that evidence of conduct would be strictly admissible under s 115 of the Evidence Act. And, even when conduct falls short of a legal estoppel there is nothing in the Evidence Act which prevents it from being proved, or, when proved from being taken into consideration ..... Court of Chancery will allow a party, (whether he be plaintiff or defendant) to show that an assignment of an estate which is on the face of it, an absolute conveyance was intended to be nothing more than a security for debt. And in order to establish this it will look not only to the

conduct of the parties but will admit mere parol evidence to show or explain the real intention and purpose of the parties at the time. The exercise of this remedial jurisdiction is justified on two grounds, *viz* (*1*) *part performance*, (*2*) *fraud*. The courts in India are not precluded by the Indian Evidence Act from exercising a similar jurisdiction. The courts in India have the same jurisdiction in dealing similarly with the obstacles interposed by the Indian Evidence Act which contains the rule of English law, very slightly modified by equitable considerations. But when subsequently dealing with the equitable jurisdiction of our courts, the legislature has shown the clearest intention to relax the provisions of those sections (91 & 92), section 26 cl (*c*)[7] of the Specific Relief Act would undoubtedly enable a defendant in a suit for specific relief to prove an oral agreement, for re-conveyance, in bar of the plaintiff's conveyance. If our courts are to exercise this equitable jurisdiction in one description of action, it is hardly to be supposed that the legislature does not intend them to exercise it in the other cases merely because the form of an action is different."

The exposition of the law in this case was spoken of in *Hem Ch v. Kally, sup*, as "An excellent judgment of MR. JUSTICE MELVILL, in which he very clearly explains this principle of equity, and the mode and the circumstances under which it may be applied" [*per* GARTH, CJ]. The judgment was similarly eulogised in *Beharee v. Tej Narain*, 10 C 764 in which both 4 B 594 and 9 C 528 were fully approved.

The principle laid down in *Kashinath v. Chandi, sup*, was approved and applied in various other cases [*viz*, in *Pheloomonee v. Greesh Ch*, 8 WR 515; in *Nundo Lal v. Prosunnomoyee*, 19 WR 333; in *Shk Parabdi v. Shk Md*, 1 BLR 87; in *Bholanath v. Kali Pd*, 8 BLR 89; in *Mutty Lall v. Anand Ch*, 5 MIA 72; in *Beharee v. Tejnarain*, 10 C 764; in *Hasha Khand v. Jesha Premji*, 4 B 609; in *Govinda v. Jesha Premji*, 7 B 73; *Venkataratnam v. Reddiah*, 13 M 494; in *Rakken v. Alagappa*, 16 M 80; and in *Kadar Moideen v. Nepean*, 21 IA 96 : 21 C 882]. In all these cases it was held that although parol evidence was not admissible to prove that a deed of sale was intended to operate only as a mortgage; yet such evidence was admissible to show the acts and conduct of the parties.

The question again came up before a Full Bench of the Calcutta High Court in *Preonath v. Madhusudan*, 25 C 603 FB : 2 CWN 562, in which it was held that oral evidence that possession remained with the vendor, notwithstanding the execution of a deed of out-and-out sale, is admissible to prove that the deed was intended to operate only as a mortgage. BANERJI and WILKINS, JJ, in their reference to the Full Bench observed:—

> "..... neither the letter nor the spirit of the section (s 92) excludes oral evidence which seeks to vary a written instrument, not by proving a mere verbal agreement or statement as to which perjury may be easy, but by proving acts and conduct of the parties as to which perjury is not equally easy and which would be inconsistent with the view that the instrument was intended to operate in the form in which it appears."

The Full Bench case was followed in *Shyama Churn v. Hiras Molla*, 26 C 160, in which evidence of conduct, such as, return of the lease, was held admissible to prove that such return was due to an intention to make the lease inoperative. It was also followed in *Md Ali v. Nazarali*, 28 C 189 : 5 CWN 326 (in which oral evidence as to acts and conduct of parties was held admissible for showing that a certain deed

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7. See now s 18 cl (*a*) of Act 47 of 1963.

which purports to be an out-out sale, was in reality a mortgage by conditional sale); in *Khankar v. Ali Hafez*, 28 C 256 : 5 CWN 351; in *Abdul Gafur v. Abdul Kadir*, 72 PR 1901 : 114 PLR 1901; and in *Ramsarup v. Alla Rakha*, 107 PLR 1905. But in the following cases the principle laid down in the above Full Bench case (25 C 603) was not accepted [see *Dattoo v. Ram Ch*, 30 B 119 : 7 Bom LR 669, 670; *Khetsidas v. Shib Narayan*, 9 CWN 178; *Keshavrav v. Ray Pandu*, 8 Bom LR 287; *Abaji Annaji v. Luxman*, 30 B 426 : 8 Bom LR 533; *Gujarmal v. Sitaram Arjun*, 3 NLR 19; *Maung Bin v. Ma Hlaing*, 3 LBR 100, 106; *Achutaramaraju v. Subbaraju*, 25 M 7 : 11 MLJ 370, in which 28 C 256 and 289 were expressly dissented from].

In *Rahiman v. Elahi Baksh*, 28 C 70 it was held that under s 92 no oral evidence is admissible to show that certain deeds of sale are not deeds of sale but of gift; see also *Radharaman v. Bhabani*, 6 CWN 60. [See however *Hanifunnissa v. Faizunnissa*, 38 IA 85 : 15 CWN 521 : 33 A 340 and other later decisions cited *post*]. The description of building in the proposal form of Fire Insurance was vague and not exhaustive. Oral evidence by agent explaining intention of parties neither contradicting, varying, adding to, nor substracting from the terms of the policy is not excluded by s 92 [*General Ass Society v. Md Salim*, A 1965 A 561]. It would thus appear that considerable difference of opinion existed in the several High Courts regarding admissibility of oral evidence to prove acts, conduct and intention of parties. Supreme court has held that extrinsic evidence to determine the effect of an instrument is permissible where there remains a doubt as to its true meaning [*Abdulla Ahmed v. Animendra*, A 1950 SC 15] and evidence of the acts done under it is a guide to the intention of the parties [*Godhra Electricity Co v. S*, A 1975 SC 32 (cases reviewed); see also *Becharbhai v. Khushalbhai*, A 1975 G 98].

Bal Kishen v. Legge, 27 IA 58.—The Privy Council decision of *Balkishen v. Legge*, 1889, 27 IA 58 : 22 A 149 : 4 CWN 153 : 2 Bom LR 523, is the leading case on the point. It has been held there that in deciding the question whether a particular deed is a mortgage by conditional sale or an out-and-out sale, oral evidence of intention is inadmissible under s 92 for the purpose of construing the deed, nor can evidence of oral agreement at variance with the terms of the deed be admitted, but the case must be decided *on a consideration of the contents of the document with such extrinsic evidence of other circumstances as may show in what manner the language of the document is related to existing facts*. When there are two documents, the first document reading like a sale-deed, and the second deed containing the elements of a certain date fixed for the repayment of the money, the addition to the original purchase-money of a sum of money presumably for interest, the consolidation of the debt on a factories account with the principal sum mentioned in the deed, the giving the vendees the securities on the properties comprised in the first document for the debt of the factories, and a provision that the vendor should not be competent to effect a sale until the payment of the estimate money relating to the factories,—it was held that the two deeds construed together amounted to a mortgage by conditional sale and not an out-and-out sale. The following observation in the above case elucidate the principle laid down in it:

> "Their Lordships do not think that oral evidence of intention was admissible for the purpose of construing the deeds or ascertaining the intention of the parties. By s 92 no evidence of any oral agreement or statement can be admitted, as between the parties to any instrument or their representatives-in-interest, for the purpose of contradicting, varying, or adding to, or substracting from its terms, subject to the exceptions contained in the several *provisos*. It was conceded that this case could not be brought within any of them. The cases in the English Court of Chancery, which were referred to by the learned judges in

the High Court have not, in the opinion of their Lordships any application to the law of India, as laid down in the Acts of the Indian legislature. The case must therefore, be decided on a consideration of the contents of the documents themselves, with such extrinsic evidence of surrounding circumstances, as may be required to show in what manner the language of the document is related to existing facts".

The question naturally arises whether the views taken in many of the decision cited earlier have not been weakened or to some extent superseded by *Balkishen v. Legge*. As the case has been differently regarded by different judges when applying the principle enunciated therein to the facts of the case in hand, the matter still remains complicated and to say anything more than this that in determining whether extrinsic evidence of the acts, conduct or intention should be admitted, regard must be had to the peculiar facts and circumstances of each case with particular reference to *proviso* (*6*) which allows such extrinsic evidence as may be necessary to show "in what manner the language of a document is related to existing facts"—words which are very elastic and may therefore have different meanings to different minds in different circumstances.

Some of the conflicting decisions in the several High Courts may now be noted:

Subsequent Decisions. [Evidence of Conduct, Surrounding Circumstances etc to Show the Real Character of a Transaction].—*Bal Kishen v. Legge* was distinguished in a case where after a mortgage-deed, the parties thereto arranged that the mortgagee would be placed in possession for a fixed period and authorised to receive the profits in satisfaction of his dues under the mortgage—*Held* this was not an agreement contradicting, varying, etc the terms of original contract, but merely providing means for the satisfaction of the bond and could be proved by oral agreement and s 92 did not apply [*Kamala v. Babunandan*, 11 CLJ 39 : 2 IC 13; see *Ramavatar v. Tulsi*, 14 CLJ 507 : 16 CWN 137; *Afsar v. Sourava*, 25 CLJ 560; *Behari v. Shib Sahai*, 18 IC 324; *Tarapada v. Hajia*, 60 CWN 903 : A 1956 C 625]. When there is a dispute in regard to the true character of writing, evidence *dehors* the document can be led to show that the writing was not the real nature of the transaction, but was only an illusory, fictitious and colourable device which cloaked something else, and that the apparent state of affairs was not the real state of affairs [*Krishnabai v. Appasaheb*, A 1979 SC 1880].

B executed in favour of *A* an out-and-out sale-deed with a condition of re-purchase, but no date was fixed for the re-purchase. On the same date *B* executed a *kabuliat* in favour of *A* accepting a lease of the house sold. Continuance of possession by vendor, payment of rent at usual rate of interest, considerable excess of the value of the property over the consideration paid, &c are facts which may be legitimately proved and considered in determining whether the transaction was a mortgage without infringing s 92 or dis-regarding anything laid down in *Balkishen v. Legge* [*Shazadi Bibi v. Shk Jamal*, 17 CWN 1053 : 21 IC 90; *Arjun Ali v. Sheikh*, 50 IC 12 (C)]. Evidence of conduct is admissible to show that what was on the face of it a mortgage was in reality a *kobala* [*Ali Sheikh v. Imam Ali*, 35 IC 102 (C)]. The question whether a transaction is a mere mortgage in the form of a sale must depend upon the intention of the parties which may be found in the deed itself or gathered from the circumstances attending the transaction in each case [*Madhab v. Rajani*, 64 IC 583 (C); see *Namdev v. Dhondu*, 22 Bom LR 979 : 58 IC 406]. Oral evidence was held admissible to ascertain whether the real agreement between the parties was embodied in the document or not, *ie* whether it was a nominal sale-deed or a real mortgage [*Ansa Tuka v. Kenchappa*, 8 Bom LR 669]. When a gift is attacked as

fictitious, reliance may be placed on the surrounding circumstances contemporaneous with the gift and the subsequent conduct of the parties [*Miriam v. Ibrahim*, 28 CLJ 306 : 48 IC 561; *Krishnapal v. Sriraj*, A 1927 O 278 : 104 IC 299]. S 92 is not bar to proving a document of sale to be not a sale but a gift or a family arrangement [*Mania v. Dy Director*, A 1971 A 1951].

Where an out-and-out sale deed was followed seven days later by a document agreeing to reconvey if the purchase-money was paid back after nine or ten years—*Held* (distinguishing 22 A 149 PC) that in view of the delay and other circumstances the two deeds were not intended to be parts of one and the same transaction so as together to constitute a mortgage by conditional sale, but must be construed separately [*Jhanda v. Wahid-ud-din*, 33 A 585 FB : 9 IC 1013; **affirmed** in 43 IA 284 : 38 A 570 : A 1916 PC 49; see also *Ghulam Nabi v. Nazunnissa*, 33 A 337]. The mere fact of the conditions on which the mortgage can be redeemed being onerous, would not be sufficient to justify the court in coming to the conclusion that the transaction which purported to be mortgage was a sale. The surrounding circumstances have to be looked to [*Md Quasim v. Sheo Singh*, 32 IC 192(A)].

Oral evidence is not admissible to prove that a deed purporting to be a sale-deed is a mortgage unless the allegation is one of fraud [*Ganu v. Bhau*, 42 B 512 : 20 Bom LR 684]. Where a person desires to set aside a sale-deed by proving that a representation, agreement, or promise was made to him at the time of execution that the deed would not be enforced as a sale-deed, no such evidence can be admitted as the real effect would be not to prove fraud, but to prove a contract different from that which appears on the document itself [*Dagdu Valad v. Nana*, 35 B 93].

In a suit to recover loss on a re-sale of goods agreed to be sold under CIF contract, evidence of previous course of dealings to show that though the contract was on CIF terms, defendants were not entitled either to a bill of lading or to a policy of insurance and that they were bound to pay against the delivery telegram, was held inadmissible under s 92 [*Steel Bros Ltd v. Dayal Khataq & Co*, 47 B 924 : 87 IC 67].

Where parties enter into a sale-deed, it is not competent to them to prove a contemporaneous oral agreement to reconvey the property on payment of the purchase-money, in the absence of fraud, misrepresentation, or failure of consideration, &c rendering the sale invalid [*Sangira v. Ramappa*, 34 B 59 : 11 Bom LR 1130 (**folld** in *Somana v. Gadigeya*, 35 B 231 : 13 Bom LR 113]. Although it may appear to the court that a transaction was intended by the parties to be a mortgage, it is still open to the court not to give effect to it on account of the exclusion of evidence of oral agreement [*Chalia Venkata v. Devabhaktuni*, 1912 MWN 164 : 14 IC 65 (13 CLJ 510 **doubted**)].

Evidence of the acts and the conduct of the parties is inadmissible on the ground that such evidence could be relevant only by reason of the fact that the conduct leads to the inference that there was a contemporaneous oral agreement or statement between the parties that a deed was to operate differently from that stated in the language of the document [*Achutaramaraju v. Subburaju*, 25 M 7; *Lakshmiyya v. Murahari*, A 1930 M 547; see also *Venkatasubba v. Subramania*, 1917 MWN 674; *Venkatachellum v. Mg Tun*, 45 IC 860]. When the instrument is plain and unequivocal, evidence of conduct cannot be received [*Babu v. Gokuldass*, A 1928 M 1064 : 55 MLJ 132; *Babu v. Offl Assignee*, 61 IA 257 : A 1934 PC 138 : 57 M 931; *Gopal v. Ramadhar*, A 1925 P 228]. Evidence of acts and conduct subsequent to the deed is admissible to show that something different from the written contract was intended. The decision in this case was based on the question of estoppel [*Bulaki v. Floyd*, 191 PLR 1911 : 10 IC 1004 : 27 PR 1911; see also *Abdul Gafur v. Abdul Kadir*, 72 PR

1901; and *Beliram v. Devichand*, A 1929 L 785 (*eg* retained possession after execution of a deed) which followed the Calcutta cases in *Preonath v. Madan*, 25 C 603 FB and *Khankar v. Ali Hafez*, 28 C 256. But see *Fitz-Holmes v. Bank of U I Ltd*, 4 L 258]. S 115 overrides ss 91-94 inasmuch as the law of estoppel must prevail against a mere rule of procedure. So that in construing a document evidence of conduct of parties is relevant when such conduct operates as estoppel. But it cannot be proved in order to show that the intention of the parties was something other than that expressed in the document [*Dhanna Ram v. Chabbil*, 71 IC 931]. The intention of the parties as expressed in the deed must be gathered from the terms of the deed itself and the surrounding circumstances and not by oral evidence [*Bishambar v. Ubaidullah*, 45 A 581]. Where the document is unambiguous and on its face an usufructuary mortgage, no parol evidence [*Ram Narain v. Manki*, A 1954 P 562] or evidence of subsequent conduct [*Bhagwat v. Ramasis*, A 1952 P 431] is admissible to show that it was sale.

If the terms of the contract are ambiguous, the rights of the parties may be determined with reference to the conduct of the parties [*Bhupendra v. Harihar*, 24 CWN 374; *Secy of S v. Narendra*, 32 CLJ 402; *Umesh v. Surendra*, 29 CLJ 6]. The rule that the conduct of the parties may be looked to in construing a document, is subject to this reservation that it can be admitted only after every other means to construe it has been exhausted [*Devjee v. Dayamay*, A 1928 P 225]. Evidence of circumstances under which a lease was entered into, cannot alter the plain meaning of the written contract, but may be admissible to explain any latent ambiguity, if any [*Broucke v. Chhatar*, 86 IC 597 : A 1925 P 421]. Where a document of grant contains no latent ambiguity extrinsic evidence of intention is not admissible [*Udai v. Jagat*, A 1928 P 66 : 6 P 638]. Where the terms of an ancient grant is unambiguous, it is not open to the court to say that it means something else merely because the parties have gone on for a long time so understanding it [*Somar v. Shyam*, A 1954 P 586]. Evidence of acts and conduct of parties is not admissible in order to contradict or vary the written terms of an agreement [*Sukhan v. Chakowri*, 56 IC 752]. In a suit upon two bonds, the interest was 9 per cent with a clause for of a contemporaneous oral agreement that 7 per cent was the interest and that further 2 per cent would be charged as penalty upon default, or oral evidence of subsequent conduct in order to prove the contemporaneous agreement, is not admissible [*Fitz-Holmes v. Bank of U I Ltd*, 4 L 258 : 77 IC 523 : A 1923 L 548].

Extrinsic evidence as to acts and conduct of parties to a transaction is admissible to show the real nature of the transaction (*eg* to show that a sale-deed is really a mortgage deed) not by what they intended to do, but by what they did or have been doing [*Abdul Basit v. Khoda Baksh*, 26 IC 171 (*Khonkar v. Ali Hafez*, 28 C 256 : 5 CWN 351; *Md Ali v. Mir Nazar*, 28 C 289 : 5 CWN 326 refd to); see also *Baldeo v. Chet Ram*, 26 IC 706]. When the question is whether a transaction is a sale or a mortgage, s 92 is not a bar to the admission of oral evidence to prove that the transaction was intended to be something other than what it purports to be [*Mahendra Mallik v. Brundaban*, A 1984 Orissa 62, 63]. Other evidence will be admissible to prove the subsequent conduct of the parites as to how they understood a clause in the first agreement. Only oral evidence is prohibited and not documentary evidence. Even the existence of a separate oral agreement constituting a condition precedent to the attaching of any obligation under a contract can be proved by other evidence. [*R B Jodhamal Bishen Lal v. State of Jammu & Kashmir*, A 1984 J&K 10, 23]. Mere registration does not necessarily pass title if the parties intend that no title shall pass till the consideration money has been paid in full. For this purpose court may look to

previous as well as subsequent conduct of the parties [*Ram Singh v. Gangaram*, 3 L 389].

The Privy Council case of *Balkishen v. Legge*, was **followed** in *Achutaramaraju v. Subbaraju*, 25 M 7 : 11 MLJ 70; *Harak Chand v. Bishun Ch*, 8 CWN 101; *Sangira v. Malappa*, 34 B 59; *Mg Bin v. Ma Hlains*, 3 LBR 100; *Dattoo v. Ram Ch*, 30 B 119; *Faizunnissa v. Hanifunnissa*, 27 A 612 (**reversed** in 15 CWN 521 : 38 IA 85 : 33 A 340) : 26 B 252 FB : 3 LR 770; *Venkatasubba v. Subramania*, 1917 MWN 674; *U Thin v. Daw Hmu*, A 1937 R 142; *Kaniyakandiyil v. Pairu*, A 1970 K 16 FB. It was **explained** in *Khonkar v. Ali Hafez, sup* and in *Md Ali v. Mir Nazar, sup*. The acts and conduct of the parties can only be proof either (*1*) of a contemporaneous oral agreement varying the terms of the registered contract, or (2) of the subsequent oral agreement having the same effect. In the former case the evidence is excluded by s 92 and in the latter by *proviso* 4 to s 92. In the case of a possessory mortgage accompanied by a lease back to the mortgagor, the mere absence of a formal handing over the land to the mortgagee and the handing back by him to the mortgagor in the character of lessee is not reason to construe the transaction as a simple mortgage [*Radharaman v. Bhabani*, 12 CLJ 439].

After execution of an out-and-out sale deed reciting the consideration of Rs. 60,000, the plaintiff sued for recovery of the property on the allegation that the deed was fictitious and defendant contended that it was in reality a deed of gift. It was admitted that no consideration money was paid. Oral evidences of witnesses were given by the defendants in the trial court to show that the intention was to make a gift and the High Court held that in view of *Balkishen v. Legge*, the oral evidence was inadmissible (see 27 A 612) to show that a deed of absolute sale was in reality a gift. Reversing the decree the case was remanded for being dealt with on the evidence in question [*Hanifunnissa v. Faizunnissa*, 38 IA 85 : *sup*]. Explaining this case it has been held that in a converse case oral evidence is not admissible to prove that a deed of gift was a deed of sale for consideration [*Bai Hira Devi v. Offl Ass*, A 1955 B 122 (adopted in appeal A 1958 SC 448 but limiting the view to the parties to the deed and indicating that parol evidence by strangers would be admissible, [*Haramoni v. Bauri*, A 1970 Or 203; **folld** in *Kanak v. Ramlakhan*, A 1955 P 458]. Following *Hani-funnissa's case* it has been held that extrinsic evidence is admissible for showing that two documents though purporting to be sale-deeds are in reality part and parcel of the same transaction which was one of exchange [*Kishen v. Ramlal*, A 1927 A 696 : 50 A 59]. The question whether a transaction which evidently purports to be a gift or a sale, is really a *benami* transaction, is purely one of intention; and the evidence and the circumstances showed that it was an absolute gift and not a *benami* transaction [*Ismail Mussajee v. Hafiz Boo*, 33 IA 86 : 33 C 773 : 10 CWN 570].

Under s 92, as between the parties to a document, oral evidence is inadmissible to prove the intention of the parties, and the nature of the transaction must, therefore be decided on a consideration of the contents of the document itself, with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts. The English equity doctrine as expressed in *Lincoln v. Wright*, (4 De G & J 16) is not applicable to India [*Maung Kin v. Ma Shwe La*, 44 IA 236 : 45 C 320 : 22 CWN 257 : A 1917 PC 207].

Where there were conflicting statements of the parties as to the circumstances leading up to the execution of an agreement for sale, and it was difficult to reconcile them—*held*, the court was justified in admitting extrinsic evidence to explain the facts [*Hussonally v. Tribhowan*, 25 CWN 385 : 61 IC 361 : A 1921 PC 40].

To Show that Instruments Apparently Absolute Are Only Securities [Sale or Mortgage?].—[See also cases under the previous heading]. In the case of a dispute as to whether a document is a mortgage by conditional sale, or a sale with a covenant for repurchase, the test is the intention of the parties to be gathered from the language of the documents themselves viewed in the light of the surrounding circumstances [*Jhanda v. Shk Wahiduddin*, 21 CWN 66 : 43 IA 284 : A 1916, PC 49 : 38 A 570 (*Bhagwan v. Bhagwandin*, 17 IA 98 : 21 CWN 66 : 12 A 387 **follld**: *Balkishen v. Legge, sup* dist); see also *Kinwram v. Nitye*, 11 CWN 400; *Ghulam v. Niazunnissa*, 33 A 337; *Bishan v. Banwari*, A 1937 A 724]. Whether a transaction ostensibly of sale may be regarded as a mortgage by incorporation of a condition is one of intention of the parties to be gathered from the language of the deed interpreted in the light of surrounding circumstances. The circumstance that the transaction as phrased in the document is ostensibly a sale with right of repurchase in the vendor, the appearance being laboriously maintained by the words of conveyance or the right of repurchase bearing the appearance of a right in relation to the exercise of which time was of the essence, is not decisive. If there is ambiguity in the language, the intention is to be gathered from the contents of the deed with such extrinsic evidence as is permissible under *proviso* (*6*). Oral evidence of intention is not admissible but evidence to explain or even to contradict the recitals as distinguished from the terms of the document may of course be given. Evidence of contemporaneous conduct is always admissible as a surrounding circumstance; but evidence as to subsequent conduct of the parties is inadmissible [*Bhaskar v. Shrinarayan*, A 1960 SC 301 : 1960, 2 SCR 11 (*Narasingerji v. Panuganti*, 51 IA 305 : A 1924 PC 226 *ante*, refd to); see *Sitaram v. Bashesar*, A 1964 Pu 81].

The intention is to be gathered, in the first place from the document itself. If the words are clear and express clear effect must be given to them and any extraneous enquiry as to what was thought or intended is ruled out. If there is ambiguity in the language employed, then it is permissible to look to the surrounding circumstances to determine what was intended [*Chunchun v. Ebadat*, 1955, SCR 174 : A 1954 SC 345; *Neelagangavva v. Ningana Gowda*, 1996 AIHC 3124 (Kat); see also *Balakrishen Das v. Legge*, (1895) 22 IA 53 (PC)]. Oral evidence is excluded by s 92. Where a deed is attacked after a long period, the burden of proving that it is not what it purports to be lies heavily on the person attacking it [*Bishambhar v. Md Ubaidullah*, 45 A 581 : 77 IC 572; *Maung Shwe v. Mg Toon*, A 1928 R 58 : 5 R 644; *Sisir v. Naran*, 33 CWN 591; *Alderson v. White*, 2 De G&J 106]. In *Jhanda Singh's case sup*, the suit was brought forty-four years after the period of repurchase and in *Sisir's case, post*, a week before the expiry of sixty years.

Where a deed of absolute conveyance was accompanied by another deed whereby the vendee as a matter of grace and kindness stipulated that if the money was paid back within ten years he would "cancel this valid sale," held that the two documents could not be construed as a mortgage so as to entitle the vendor to redeem even after the period of ten years [*Bhagwan v. Bhagwandin*, 17 IA 98 : 12 A 387]. Their Lordships approved the dictum of CRANWORTH, LC, in *Alderson v. White*, 2 De G & J 105 that "The rule of law on this subject is one indicated by common sense; that *prima facie* an absolute conveyance containing nothing to show that the relation of debtor and creditor is to exist between the parties does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that she shall have a right to re-purchase". *Bhagwan v. Bhagwandin, sup*, was **distinguished** in *Balkishen v. Legge*, 22 A 149 PC where the amount made up of the purchase-money and subsequent advance and the fact that the debt was not consolidated indicated that it was not an out-and-out sale (see *Jhanda v. Wahiduddin, sup*)]. Where

simultaneously with an absolute sale there was an agreement by the purchaser that he would "return the deed and take back the document" on payment of the purchase-money by the vendor "at any time"—*Held* that the transaction was not a mortgage [*Sisir v. Naran*, 33 CWN 591].

Notwithstanding the *proviso* to s 58(*c*) T P Act it does not follow that if the condition of repurchase is embodied in the same document, the transaction must necessarily be a mortgage. The other side can show that it was an out and out sale, but oral evidence of intention is not admissible—Tests for determining the intention [*Abdul Hafiz v. Somar Ali*, 4 DR 111]. S 58 (*c*) is not applicable to Punjab—Tests which are usually applied to determine whether a transaction is a sale or mortgage [*Sitaram v. Basheshar*, A 1964 Pu 81].

Where a document executed is a sale-deed, evidence, direct or circumstantial, is not admissible to show that it was intended to operate as a mortgage [*Milkimal v. Totomal*, A 1939 S 200; *Halima v. Sashi*, A 1947 C 463; *Balumal v. Gollapudi*, A 1959 AP 612 (**distd** in *Akoijam v. Gurumayam*, A 1965 Man 31)]. The intention is to be determined from a consideration of the terms of the document itself and the surrounding circumstances. Gross inadequacy of consideration affords an indication that it was not a sale [*Asvath v. Ghimabai*, 91 IC 330 : A 1926 B 107]. What has to be determined is the intention of the parties at the time of the transaction, and although no oral evidence of intention is admissible, regard might be had to the surrounding circumstances. The fact that the deed of sale and agreement to reconvey were executed on the same day, is an important circumstance to be considered in determining whether it was a sale or mortgage [*Mathura v. Jagdeo*, A 1927 A 321 : 49 A 405]. In 1910 plaintiffs executed in favour of defendant No. 1 what purported to be a sale-deed but retained possession of the property. In 1912 defendant No. 1 conveyed the property to defendant No. 2 by a sale-deed with possession and the plaintiffs attested the deed. In a suit by the plaintiffs to redeem on the allegation that both transfers were mortgages—*Held* that evidence of oral agreement that defendant No. 2 had agreed to reconvey the property to the plaintiffs was inadmissible under s 92 [*Talak Chand v. Atmaram*, A 1924 B 58 : 25 Bom LR 818].

When there is no apparent inconsistency between two documents and there is no ambiguity whatever in their terms, there can be no occasion for an enquiry into the real intention of the parties [*Abdullah v. Basharat*, 40 IA 31 : 35 A 48; see also *Abdul Khadir v. Subramanya*, A 1940 M 946]. So, where the surrender deed and lease are perfectly clear and unequivocal, evidence of proposal of sale, &c, is not admissible to show that the real intention of the parties was a sale [*Vinayakrao v. Bhondu*, A 1942 N 103]. Where a deed of possessory mortgage also provides for a lease back to the mortgagor on a monthly rent corresponding to the monthly interest on the mortgage debt and a rent note is executed giving effect to the lease, the two deeds were not inconsistent with each other. On a suit for eviction by the mortgagee based on the rent note, it is not open to the mortgagor to plead he is not a tenant [*Trustees &c v. Ramjatan*, A 1963 MP 265]. Oral evidence is not admissible to show that the parties to a sale-deed intended the transaction to be one of mortgage and not of sale [*Ghaman v. Kanhya*, 121 PLR 1915 : 26 IC 426]; or of *hebabil-ewaz* [*Hafiz v. Sirdar*, 79 IC 81 : A 1924 L 562].

Where a document is on the face of it a mortgage, oral or circumstantial evidence is not permissible to show that the transaction was different [*Milkhi v. Gujar*, A 1933 L 104 : 33 PLR 974] or to show that it was a sale but the deed was in the form of a mortgage in order to circumvent the bar of non-transferability of the land [*Ram Narain v. Manki*, A 1954 P 562; *Chandra Sekhar v. Mural*, A 1957 P 673]; nor is

evidence of subsequent events or conduct admissible to show that it was a sale [*Bhagwat v. Ramasis*, A 1952 P 431; *Rambhujhawan v. Jugal*, A 1957 P 126; *Ramlochan v. Pradip*, A 1959 P 230; *Gurubasappa v. Gurulingappa*, A 1962 Mys 246]. Oral evidence of intention is not admissible for construing a deed or ascertaining the intention of the parties [*Thakar v. Tek Chand*, A 1944 L 175].

In the case of a sale outright, an independent contract to resell, oral or by unregistered deed can be proved, but where the contract is not an independent transaction but forms part and parcel of the original transaction and together constitutes a mortgage, such contract cannot be proved [*Ma Nan v. U Yaing*, A 1927 R 314 : 105 IC 482].

[As to various other cases and the diversity of opinion on the subject in the different High Courts, see the cases noted under the previous heading].

It will appear from the above cited cases that they are not altogether harmonious as to whether oral agreement to reconvey is admissible in the case of a sale outright. In a case a registered sale deed evidenced an outright sale. Prior to the execution of the deed there was an oral agreement that upon the happening of a certain event there was to be a reconveyance of what had been sold. The Privy Council held that the oral agreement did not contradict, vary, substract from or add to the terms of the sale deed [*Veeraswami v. Narayya*, A 1949 PC 32 : 75 IA 252 (*Ma Nan v. U Yaing, sup*; *Harkishandas v. Bai Dhanu*, 50 B 566 **approved**)].

The reason for the rule admitting parole evidence to show that instruments in writing apparently conferring absolute title are in fact only given as security, is thus stated in an American case (*Pengh v. Davies*, 96 US 336) by FIELD, J:

> "It is an established doctrine that a court of equity will treat a deed, absolute in form, as a mortgage, when it is executed as security for loan of money. That court looks beyond the terms of the instrument to the real transaction; and when that is shown to be one of security and not of sale, it will give effect to the actual contract of the parties. As the equity, upon which the court acts in such cases, arises from the real character of the transaction, any evidence, written or oral tending to show this is admissible. The rule which excludes parol testimony to contradict or vary a written instrument has reference to the language used by the parties. That cannot be qualified or varied from its natural import, but must speak for itself. The rule does not forbid an inquiry into the object of the parties in executing and receiving the instrument."

"In replying the exception, the extrinsic evidence will not be received because of any particular form of language which the parties may have adopted. The intention of the parties must govern; and it matters not what peculiar form the transaction may have taken [*Bigler v. Jack*, 114 Jowa, 667 &c]. The inquiry always is, was a security for the loan of money or other property intended? [*Klock v. Walter*, 70 Ill 365]. But where the deed and accompanying papers on their face constitute a mortgage, parol evidence is not competent to show the contrary [*Synder v. Griswold*, 37 Ill 216]. In arriving at the real intent of the parties, their statements and acts at the time of the transaction [*Russell v. Southard*, 12 How (US) 139], the inadequacy of the consideration named in the deed [*Crews v. Threadgill*, 35 Ala 334], the prior existence of a debt [*Ford v. Irwin*, 14 Cal 428] and the recognition of its continuance as by the payment of interest or other acts [*Stollemwerck v. Marks & Gayle*, 188 Ala 587] are all facts to be considered, and are relevant to the issue. But although parol evidence is received in such cases to show the real nature of the transaction, the presumption is that the instrument is what it purports to be; and before a deed

absolute in form can be shown to be a mortgage, the proof should be clear and convincing [*Howland v. Blake*, 97 US 624 and cases; Burr Jones, ss 446, 447].

Same: Result of the Decisions and the Effect of Balkishen v. Legge, ante.— The cases cited above show abundantly that judicial opinion is by no means agreed as to the precise meaning and scope of the Privy Council case of *Balkishen v. Legge*, 27 IA 58 : 4 CWN 153 : 22 A 149.

In Bombay, it has been held that when the terms of a contract are unambiguous, oral evidence of intention or conduct is inadmissible to prove that a document was intended to operate differently from the one which the executant stated in the language of the document, unless there is allegation of fraud, failure of consideration, &c, and the case comes within the first *proviso*. This evidence is excluded on the ground that to admit such evidence would be to allow to prove a contemporaneous oral agreement varying the terms or to afford an opportunity to prove a different contract altogether (see *Dattoo v. Ram Ch*, 30 B 119; *Keshavrao v. Ray Pandu*, 8 Bom LR 287; *Abbaji Anaji v. Luxman*, 30 B 426; *Sangira v. Ramappa*, 34 B 59; *Somana v. Gadigeya*, 35 B 231; *Bai Adhar v. Lalbhai*, 24 Bom LR 239; *Dagdu Valad v. Nana*, 53 B 93 and other cases cited *ante*). Similar view has been taken in Madras and elsewhere (see *Achutaramaraju v. Subbaraju*, 25 M 7; *Lakshmiyya v. Murahari*, A 1930 M 547; *Venkatasubba v. Subramania*, 1917 MWN 674; *Challavenkata v. Devabhaktuni*, 1912 MWN 164 : 5 MLJ s n 9; *Venkatachellum v. Mg Tun*, 45 IC 860; *Mg Bin v. Ma Hlaing*, 3 LBR 100; *Ma Paik v. Ma Nwal*, 9 Bur LT 174; *Mg Shwe v. Mg Toon*, 5 R 644 : A 1928 R 58; *Ghaman v. Kanhya*, 121 PLR 1915 and other cases cited *ante*). The Bombay and Madras High Courts were of opinion that the Calcutta cases [*Preonath v. Madhusudan*, 25 C 603 FB; *Khankar v. Ali Hafez*, 28 C 256 and *Md Ali v. Nazar Ali*, 28 C 289], were impliedly **overruled** by the Privy Council decision in 22 A 149.

The Calcutta High Court has, in many cases, interpreted *Balkishen v. Legge* in a different manner and has taken the view that admission of oral evidence of the acts and conduct of the parties in determining the true nature of a transaction, does not infringe the provisions of s 92 or disregard anything laid down in *Bal Kishen v. Legge* [see *Md Ali v. Mir Nazar*, 28 C 289; *Khonkar v. Ali Hafez*, 28 C 256; *Kamalu v. Babu Nandan*, 11 CLJ 39; *Miriam v. Ibrahim*, 28 CLJ 306; *Ramavatar v. Tulsi*, 16 CWN 137; *Shahzadi Bibi v. Shk Jamal*, 17 CWN 1053; *Ali Sheikh v. Imam Ali*, 1916, 35 IC 102 (28 C 256 **folld**) and other cases cited *ante*]. [The view adopted in Bombay and Madras has however found echo in a few Calcutta cases also, see *Rahiman v. Elahi Baksh*, 28 C 70; *Radharaman v. Bhabani*, 6 CWN 60].

S 92 says that "no evidence of any *oral agreement or statement* shall be admitted," and it does not seem to affect existing or surrounding facts evidencing *conduct* when such conduct is relevant in determining the real nature of the transaction. It is submitted that the observations of the Judicial Committee in *Bal Kishen v. Legge, sup*, were limited only to the oral evidence of *intention* for the purpose of construing deeds; but they do not appear to affect the question of the admissibility of *parol evidence of the acts and the conduct of the parties* to explain ambiguity of words, or to resolve any doubt or difficulty as to the application of the words to external circumstances or existing facts. There is a clear distinction between mere oral evidence of intention and oral evidence of acts and conduct of parties [see *Khonkar v. Ali Hafez*, 28 C 256—BANERJEE & BRETT, JJ, and *Md Ali v. Mir Nazar*, 28 C 289, 291—MACLEAN, CJ].

The distinction above seems to have been also recognised by LORD ROBSON, in *Mg Kyin v. Ma Shwe La*, 38 C 892, 904 when he speaks of "evidence relating to the

acts and conduct of the parties as distinguished from evidence of oral statements and conversations constituting in themselves some agreement between them." Thus interpreted, the view taken in 28 C 256 does not appear to be in conflict with the rule *Balkishen v. Legge*, in which the question of *oral evidence of intention* was expressly dealt with. In that case their Lordships also observed that "the case must be decided on a consideration of the contents of the documents themselves *with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts.*" This passage also seems to support the above view. The words "show in what manner the language of a document is related to existing facts" are exactly the words to be found in the sixth *proviso* under which extrinsic evidence is admissible in appropriate cases (see *post*: "*Proviso 6*").

In a later decision, the court took into consideration how the language of the document (sale deed with a condition of repurchase) was related to the existing facts, as, that the vendor continued in possession, paid rent, &c and further that the value of the property was much more than the consideration—*Held* that these are legitimate materials on which the court is entitled to say that the transaction was a mortgage and in so doing it does not infringe the provisions of s 92 or disregard anything laid down in 22 A 149 PC [*Shahzadi Bibi v. Shk Jamal*, 17 CWN 1053 : 18 CLJ 225 : 21 IC 90]. The soundness of the above view appears to have been further strengthened by a later decision of the Judicial Committee where it has been held that cases in which parol evidence when objected to is, apart from fraud or mistake, receivable to correct written instruments are cases, where, for example, the evidence supplements but does not contradict the terms of the deed, where the provisions of the deed leave the question doubtful whether merely a mortgage and not an out-and-out sale was intended or where the language sought to be explained in evidence is language in an ordinary conveyancing form not exhaustively accurate but without an actual misstatement of fact. Apart from such cases, however, the general rule is that where words of any written instrument are free from ambiguity in themselves and where external circumstances do not create any doubt or difficulty, evidence *dehors* the instrument for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument is utterly inadmissible [*Tsang Chuen v. Li Po Kwai*, 1932 AC 715 : 139 IC 891 : A 1932 PC 255].

It is well settled that no evidence is admissible on the question of construction of a document or grant, which must be based solely on the terms of the document, where there is no dispute as to how the contents of the document are related to existing facts [*Radha Sundar v. Md Jahadur*, A 1959 SC 24 : 1959 SCR 1309]. When the words of a document are clear and unambiguous there is no scope for drawing upon hypothetical considerations or supposed intention of the parties [*Union v. Kishorilal*, A 1959 SC 1362 : 1960, 1 SCR 493]. No presumption can be drawn as to the intention of the parties from previous transaction of a similar nature [*Feroz Shah v. Sobhat*, 60 IA 273 : 37 CWN 993 : 14 L 466 : A 1933 PC 178].

It may also be noted here that the particular evidence which was held inadmissible in *Balkishen's case* consisted only of *oral statements* of one of the parties and a lawyer to the effect that one of the executants before execution said that he would not execute unless it was a mortgage. The later decision of the Judicial Committee in *Hanifunnissa v. Fazunnissa*, 33 A 340 *ante* where it was held that extrinsic evidence is admissible to show that a document purporting to be a sale was in reality a gift, seems to be in agreement with the view in *Preonath v. Madhusudan*, 25 C 603 FB; *Khonkar v. Ali Hafez*, 28 C 256 and *Md Ali v. Mir Nazar*, 28 C 289. In 28 C 289, 293 BANERJEE J, said that he adhered to the view expressed in 28 C 256 that the FB

decision in 25 C 603 has not been in any way **overruled** by the Privy Council in *Balkishen v. Legge*, "A consideration of the contents of the documents themselves with such *extrinsic evidence of surrounding circumstances* as may be required to show in what manner the language of the document is related to existing facts" (as stated in *Balkishen v. Legge, sup*)—must naturally bring in extrinsic evidence of acts and conduct of parties, *eg* if a transaction which purports to be a sale is not followed by possession or if the consideration is wholly inadequate, it would be strong piece of evidence to show that the transaction was really intended as a mortgage. In arriving at the real intent of the parties, the court must look to the surrounding circumstances beyond the terms of the instrument. The principle on which the question of the admissibility of evidence of conduct rests, has been very lucidly explained by MELVILL J, in 4 B 594 (quoted *ante*). Oral evidence of declaration of intention constituting some contemporaneous or separate agreement, is no doubt inadmissible for the purpose of *contradicting, varying, etc* the terms of a document under s 92 unless the case is one of fraud (v *proviso* 1), but it is submitted that for the reason above *oral evidence of the acts and conduct of the parties* is not excluded by *Balkishen v. Legge, ibid*, or s 92 for the purpose of showing the true nature of the transaction.

In a subsequent case before the Judicial Committee, the respondents sued the appellants to recover possession of lands under certain deeds which purported to be absolute conveyances. The Appellants contended that the conveyances were meant to be and always treated as mortgages and they tendered evidence of acts and conduct of the parties to that effect, which was rejected by the court below. The Judicial Committee (without expressing any opinion on the construction or application of s 92) observed that the evidence "no doubt consisted only of evidence relating to the *acts and conduct of the parties as distinguished from evidence of oral statements and conversation* constituting themselves some agreement between them. Its object was to show that whatever the terms of the document may have been, none of the parties had acted on them as effecting an absolute sale" [*per* LORD ROBSON] and that the case for the appellants disclosed a charge of fraud against the respondents and the rejected evidence should be heard subject to any objections the respondents might be advised to make [*Mg Kyin v. Ma Shwe La*, 38 IA 146 : 38 C 892 : 15 CWN 958 : 13 Bom LR 797].

The case again went up before the Privy Council after reception of the rejected evidence and although the actual decision proceeded on the ground that the transaction being with a third party s 92 did not apply at all and secondly that even if it applied the evidence was admissible as proving fraud within the first *proviso*, yet the Judicial Committee while discussing the general question, approved of the cases in 25 M 7; 3 LB Rul 100 and 30 B 119 and expressed the opinion (which, being quite unnecessary for the purpose of the decision in the case, was *obiter*) that the series of cases in 25 C 603 FB: 28 C 256; 28 C 289; 16 B 80 &c definitely ceased to be of any binding authority after the decision in *Balkishen v. Legge*, 22 A 149 PC [*Mg Kyin v. Ma Shwe La*, 45 C 320: A 1917 PC 207: 44 IA 236: 22 CWN 257]. In a latter Calcutta case the dictum expressed in 45 C 320 PC was incorrectly relied upon as a decision in the case [*Kamala v. Ananda Ch*, 71 IC 1030: A 1921 C 457].

The matter, however, can hardly be considered as concluded by the dictum in 45 C 320 PC *sup* as the actual decision in the case rests on different grounds. As pointed out in a case, the *dictum* of the Judicial Committee was only an expression of opinion, but the point was not considered as there was other evidence bearing on the question in issue [*Madhab v. Rajani*, 1919, 68 IC 583 (C)]. It is feared that the

precise effect of the decision in *Balkishen v. Legge, ante* will still be the subject of speculation giving rise to more conflicting decisions.

In another later case in Calcutta, where evidence of subsequent acts and conduct was held admissible to prove that a stipulation in a *kabuliat* was never intended to be acted upon, it was observed: "The question is not free from difficulty, nor settled. But the weight of authority so far as this court is concerned is in favour of the admissibility of evidence of the acts and conduct of parties and as stated above in some cases this court had held upon the subsequent act and conduct of the parties that certain terms of a contract were never intended to be acted upon, *ie* from the very beginning" [*Narendra v. Bholanath*, 27 CWN 336: A 1923 C 417—CONTRA: *Lakshmi v. Nabadwip*, 56 C 201: A 1929 C 437].

It may further be pointed out that the question of admissibility of evidence of conduct has also some bearing on the rule of estoppel in s 115. Thus, if one of the parties to a document has by his conduct caused or permitted the other party to believe that the transaction is different from what it purports to be stated in the document and has caused him to act upon that belief to his detriment, can he plead s 92? It should, however, be remembered that where the words in a deed are clear, the subsequent conduct of parties is an irrelevant consideration [*Barabani Coal Concern Ltd v. Gokulananda*, 61 IA 35: 61 C 313: A 1934 PC 58 (*N E Rly Co v. Hastings*, 1900 AC 260 **folld**)]. Thus, if a document clearly shows a division of right, its legal construction and effect cannot be controlled or altered by the evidence of subsequent conduct of parties [*Venkatapathi v. Venkatanarasimha*, A 1936 PC 264: 63 IA 397: 41 CWN 7]. But where the terms of a deed are ambiguous, evidence of subsequent conduct is admissible for the purpose of interpretation [*Kumar Shankar v. Secy of S*, 29 CWN 166: 40 CLJ 332: 48 IC 478]. Where partnership deed is silent as to liability to pay income tax, the ambiguity could be removed by evidence of subsequent conduct of the parties [*Manilal v. Keshabji*, 6 DLR (P) 140]. Subsequent conduct of parties can be admitted to show alteration of original tenancy [*Lal Ghosh v. Nilkanta*, A 1925 C 340]. The terms of an unregistered partition deed are inadmissible, but s 92 has no application where oral evidence of conduct is let in to prove the fact of partition [*Rama v. Panchammal*, 92 IC 1028 (M)].

Two deeds of the same date were so framed as to be ostensibly a sale of certain villages with an agreement of a re-sale and re-purchase at the same price at a certain date. It appeared however that the price named, which was an amount immediately required to prevent a sale under a decree, had been settled without bargaining and was absolutely low. A clause in one of the deeds indicated that time was not of the essence of the contract for re-purchase and there were other provisions which supported the view that a mortgage was intended—*Held* (with no reference to any oral evidence, other than that of surrounding circumstances such as in LORD DAVEY'S words in *Balkishen v. Legge*, are clearly required to show in what manner the language of the documents was related to existing facts) that the transaction was a mortgage. There has not been introduced into the law in India such a radical change in the laws of evidence as would have the effect of excluding from the class of mortgages by conditional sale many transactions which before Evidence Act would have been held to be within that class [*Narasingerji v. Panuganti*, 51 IA 305: 47 M 729: 29 CWN 246: A 1924 PC 226; see *Mathura v. Jagdeo*, 49 A 405]. Though this section precludes oral evidence of intention for the purpose of construing deeds or proving the intention of the parties, it merely prescribes a rule of evidence, and does not fetter the court's power to arrive at the true meaning of a document in the light of all the circumstances surrounding the transaction [*Baijnath Singh v. Hajee Valley*, 30 CWN 242: 86 IC 332: 3 R 106: A 1925 PC 75].

Where a defendant sets up the plea that a certain instrument exhibits only a nominal transaction and at the same time admits that a definite amount of money was paid under the transaction, the provisions of s 92 and s 81 Trusts Act should be kept in view. Oral evidence of intention is inadmissible, but evidence regarding the attendant circumstances is admissible [*Venkataratnam v. Venkataswami*, A 1929 M 807]. **Following** *Baijnath's case* it has been held that oral evidence is admissible to prove that although a document is executed in favour of two persons one of them is solely entitled to the amount due under the document and is competent to give a valid discharge [*Munna v. Narain*, 107 IC 658: A 1929 N 91]. It has been pointed out in a Calcutta case that in *Baijnath's case* their Lordships did not go back on what they stated in *Balkishen v. Legge*, and evidence so far as it relates to prove how the language of the document is related to the existing facts and surrounding circumstances is only admissible and not the circumstances themselves as elucidating the document, *eg* that in a certain document the sons of the original purchasers described the property as mortgaged [*Sisir v. Naran*, A 1929 C 548: 33 CWN 591].

With regard to the true effect of *Balkishen v. Legge, ante* the **following** observations of MOOKERJI J, in *Kamala v. Babunandan*, 11 CLJ 39 p 42 are instructive:—

> "This decision (*Himmat v. Llewhellen*, 11 C 468) as well as the decision in the case of *Indarjit v. Lal Chand*, 18 A 168 have been repeatedly followed in this Court as good law. It was, however, suggested by the learned vakil for the appellant that the view taken in these cases has been overruled, by implication at any rate, by the decision of their Lordships of the Judicial Committee in the case of *Balkishen Das v. W F Legge*, 22 A 149 in which it was ruled that oral evidence was not admissible in proof of an alleged agreement that the document which purported on the face of it to be a conveyance was intended by the parties to be in reality a mortgage transaction. The case before us is obviously of an entirely different character. The argument set up before their Lordships of the Judicial Committee was one which had undoubtedly the effect of contradicting the terms of the original contract. But even as regards this decision of the Judicial Committee it may be pointed out that there has been divergence of judicial opinion as to its precise effect. It has been ruled by this court in the cases of *Khonkar v. Ali Hafez*, 28 C 256 and *Md Ali v. Mir Nazar*, 28 C 289, that although oral evidence of the agreement might not be admissible, oral evidence of conduct might be admissible. A contrary view was taken by the Madras High Court in the case of *Achutaramaraju v. Subbaraju*, 25 M 7. We are not called upon on the present occasion to consider which of these views is consistent with the decision of the Judicial Committee. It is enough for us to hold that the agreement which was set up in this case can be proved by oral evidence".

In England, a sale absolute on its face, may be proved by extrinsic evidence to be a loan on security [*Mass v. Papper*, 1905 AC 102; *Johnson v. Rees*, 84 LJ KB 1276]; a conveyance, merely a mortgage [*Lincoln v. Wright*, 4 De G&J 16; *Barton v. Bank of N S W*, 15 App Cas 379; *Re Marlborough*, 1894, 2 Ch 133]; an assignment of income, merely an acknowledgment of debt [*Re Sheward*, 1893, 3 Cr 502]; or a mortgage for a specific sum, a security only for a sum to be afterwards ascertained [*Trench v. Doran*, 20 LR Ir 338; Phip 11th Ed p 802]. The intention with which a document was executed will affect its operation, and may generally be shown by parol, *eg* a party who joins it for a specific purpose cannot be treated as joining for a different one [*Re Horsfall*, 1911, 2 Ch 63]; so a deed may be shown to have been signed as a will, or a will not as such, but for some collateral purpose [Phip 11th Ed p 714]. The same appears to be the law in America (*ante*). It has however been obser-

ved by the Judicial Committee in *Balkishen v. Leggee, sup* and *Mg Kyin v. Ma Shew La, sup* that the English equity doctrine is not applicable to India. See also *Harakchand v. Bishun*, cited *ante*.

[See also notes under proviso (*6*) *post*].

Exceptions to the Rule in S 92.—Provisos 1 to 6 enumerate, what may be called exceptions to the rule excluding extrinsic evidence to contradict, vary, add to, or subtract from the terms of a document. It will be seen that some of the matters dealt with in the provisos cannot really be called exceptions as they relate to things outside the scope of this rule, *eg*, existence of separate oral agreement in provisions 3, 4 or usage or custom in proviso 5.

The principles on which exceptions to the rule rejecting extrinsic evidence to control or affect written instruments are founded, are thus stated in Taylor:—The rule does not prevent parties to a written contract from proving that, either contemporaneously or as a preliminary measure, they had entered into a distinct oral agreement on some collateral matter. Still less does the rule exclude evidence of an oral agreement, which constitutes a condition precedent on which the performance of the written agreement is to depend. Again the rule is not infringed by the admission of parol evidence, under proper pleading, showing that the instrument is altogether void, or that it never had any legal existence or binding force either by reason of forgery or fraud, or for the illegality of the subject-matter, or from want of due execution and delivery (Tay s 1135). Parol evidence may also under a proper pleading be offered to show that the contract was made for the furtherance of objects forbidden, either by statute, or by common law; or that the writing was obtained by improper means, such as duress; or that the party was incapable of contracting by reason of some legal impediment, such as infancy, coverture, idiocy, insanity, or intoxication; or that the instrument came to the hands of the plaintiff without any absolute and final delivery by the obligor or party charged [Tay s 1137]. The want or failure of consideration may also be proved by parol evidence, showing that the written agreement is not binding...But if no consideration or a mere nominal consideration, be stated in the deed, the party will be allowed to prove a real substantial consideration by extrinsic evidence, and if the deed is expressed to be made "for divers goods considerations," it may be averred and proved by parol that the bargainee gave for his bargain. The onus, however, of proving the consideration will in such a case, lie on the party claiming under the deed; for the mere statement in the operative part of an instrument that it was made for good and valuable consideration will not suffice to raise a presumption, as against parties disputing the validity of the deed, that any substantial consideration has ever in fact been given [Tay s 1138]. Parol evidence will be admitted in a suit for rescission or rectification to contradict or vary a writing, where, by some *mistake in fact*, it speaks a different language from what the parties intended; and where, consequently, it would be unconscientious or unjust to enforce it against either party according to its expressed terms. In all cases, however, of this kind the party seeking relief undertakes a task of great difficulty, since the court will not interfere, unless it be clearly convinced by the most satisfactory evidence, first, that the mistake complained of really exists, and next that it is such a mistake as ought to be corrected [*M of Townsend v. Strangroom*, 6 Ves 339 and cases; Tay s 1139].

A defendant, also against whom a specific performance of a written agreement is sought, may insist upon the mistake, and may establish its existence by parol evidence, because he may rely on any matter which shows it to be inequitable to enforce the contract (1 Story, Eq Jur s 161]. But here an artificial distinction has been

recognised in British courts: that though parol evidence may be received against a plaintiff seeking a specific performance, it will be inadmissible in his favour; or in other words, the court will not receive parol evidence on the part of a plaintiff to rectify a written agreement, of which he seeks a specific execution [*Davies v. Fitton*, 90 RR 885; *M of Townsend v. Strangroom*, *sup* and other cases]. In America, the doctrine was emphatically challenged by CHANCELLOR KENT [*Keisselbrack v. Livingstone*, 4 John 144 (Am)] and STORY J, (1 Story Eq s 161—Tay s 1140)]. The bar under section 92 is not applicable to an agreement which is partly oral and partly in writing. [*Anjali Das v. Bidyut Sarkar*, A 1992 Cal 47, 52].

In *Cutts v. Brown*, 6 C 328, GARTH CJ, said:—"It will be found that the rule laid down in s 92 is taken almost *verbatim* from Taylor on Evidence (1st Ed) s 813; and the exceptions which follow in the several provisos are discussed in ss 816 to 841 of the same work. That being so, I think it is quite legitimate to refer to those sections, as one means of ascertaining the true meaning of the provisos".

—Dekkhan Agriculturalist's Relief Act etc.—An exception to the rule in s 92 is to be found in s 10-A Dekkhan Agriculturist's Relief Act, 17 of 1879, under which an agriculturist can give extrinsic evidence to vary &c in order to show the real nature of a transaction [see *Swantrava v. Giriappa*, 15 Bom LR 778 FB; *Gopala v. Morar*, 15 Bom LR 555; *Dada v. Bahiru*, 29 Bom LR 1419; *Basappa v. Tayawa*, A 1930 B 79]. In order that section may apply plaintiff claiming redemption must be an agriculturist [*Pandurang v. Malkappa*, 52 Bom LR 146]. Under an agreement of purchase of certain land, defendant agreed to pay the price of Rs. 3,500 by instalments of Rs. 500 p a. In a suit by the plaintiff defendant contended that the real purchase price was Rs. 1,750 in instalments of Rs. 250 p a and claimed to prove it by oral evidence. A transaction of this kind is outside the scope of s 10-A of the Dekkhan Agri Relief Act [*Ratansi v. Balkisen*, 1940 Bom 581: A 1940 B 267; see *Tarachand v. Bala*, 40 Bom LR 974]. S 6 of the Hyderabad Land Alienation Restraint Act also provides an exception to s 92 [*Parasuram v. Pandu*, A 1956 Hyd 177]. S 5 of the Mysore Agriculturists' Relief Act 18 of 1928 is not *void* on the ground of repugnancy to s 92 [*Dasappa v. Joglah*, A 1965 Mys 54 FB]. S. 40 of the Bengal Money Lenders Act (10 of 1940) overrides the operation of S. 92 Evidence Act in a suit under that Act and the borrower may adduce oral evidence of any agreement, statement, contradicting, varying, adding to or subtracting from the terms of any document witnessing a loan. [*Smt Swarnalata Tat v. Chandi Charan Dey*, A 1984 Cal 130, 135 : (1984) 1 Cal LJ 204].

PROVISO (1).—The wording of the Proviso and especially the words "such as" show clearly that the illustrations are not exhaustive [*Pandurang v. Vishwanath*, A 1939 N 20; *Vadia Chand v. Birendra*, 20 CWN 1067; *Benimadhav v. Sadasook*, 32 C 437 FB]. If evidence is intended to be led under any of the provisos, a proper plea must be raised in the pleading [*Shankar v. S*, A 1956 B 165; *Lekhraj v. Sawan*, A 1971 MP 172].

—Facts Invalidating a Document.—The rule in s 92 excluding parol testimony to contradict, vary &c the terms of a written document clearly implies that the documents in which the terms are engrossed, are valid documents. The first part of the proviso therefore, lays down that "*any fact may be proved which would invalidate any document*". From the use of the words "such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law" it is clear that the *proviso* is only *illustrative* and not exhaustive [*Benimadhab v. Sadasook, sup*; *Satyendra v. Paramananda*, 39 CWN 888, 890]. The facts which may be proved must be such as to show either that

the legal requisites for a valid agreement did not exist at all, or that one of the parties did not give his free consent to it or that the document does not express what was really intended to be embodied [*Mottayappan v. Palani*, 38 M 226: 25 MLJ 290]. Parol evidence may be given to show that by a mistake the parties were not *ad idem* and so there was not a valid contract at all [*Raffes v. Vichethands*, 1864, 2 H&C 906: 32 LJ Ex 106; see *post*: "*Mistake in Fact or Law,*"

Proviso (*1*) has no application in a case where the instrument represents what the parties intended to put down in writing, though it might not be in accordance with what they intended to do and with the legal effect that they secretly wanted to bring about, but which, for some reason, they did not want to put in writing [*U Thin v. Daw Hmu*, A 1937 R 142]. It has been held that oral evidence or evidence of conduct that the terms of a written contract were not intended to be acted upon *ab initio, eg* that the rate of rent in a lease was never intended to be acted upon and had not in fact been acted upon, is admissible under this proviso [*Satyendra v. Paramananda, sup*; *Pulin v. Ramakanta*, 1938, 1 Cal 48: A 1938 C 356]. If the validity of a document is not questioned, evidence contrary to the recitals therein cannot be allowed. [*Vonam Venugopal Rao v. Tawala Veerabadra Rao*, A 1989 Noc 178 (Andh Pra) : (1989) 1 Andh LT 91]. See *ante*: "*S 91 or S 92 does not exclude extrinsic evidence to show that there was no agreement or transaction at all &c*"].

Oral evidence is admissible to show that a parcel of land not intended to be con-veyed was inserted in a sale or mortgage deed only for purpose of registration, as it renders the document invalid [*Ramananda v. Chandradip*, 19 P 578: see *ante*: "*Oral evidence to show that land was inserted in sale or mortgage deed only for purpose of registration*".

As to fraud, see the definition in s 17, Contract Act. The definition is incomplete. It is not easy to give a definition of what constitutes *fraud* in the extensive signification of the word. *Fraud* is so various in form and colour, that it is difficult to confine it within the limits of any precise definition. For a definition, see Kerr on *Fraud* and Mistake. As to intimidation or coercion, see s 15 of the Contract Act and s 48 of the Indian Succession Act and its illustrations; as to illegality, see ss 23 and 24 of the Contract Act, s 127 of the Indian Succession Act; and s 43 of the I P Code; as to want or failure of consideration, see s 25 of the Contract Act; as to mistake, see ss 20, 21 and 22 of the Contract Act; as to what agreements are contracts and who are competent to contract, see ss 10, 11 of the Contract Act.

Where a document can be shown to come within proviso 1, evidence of a contemporaneous oral agreement contradicting the document is admissible [*Md v. Abdul Gafur*, 63 IC 368]. An usufructuary mortgagee has a right to show that he has not been put into possession of the mortgaged property [*Kanduri v. Sapani*, A 1971 Or 218].

The incident of unchastity attaches to an annuity granted by a Hindu husband to his wife for her maintenance even in the absence of a *dum casta* clause in the deed of maintenance. This incident is not inconsistent with any provision in the Contract Act and proof of such implied incident is not excluded by s 92 [*Sita Devi v. Gopal Saran*, 111 IC 762: A 1938 P 375].

In a mortgagor's suit for redemption, it was held that oral evidence could be admitted to prove that the document was not intended to be acted upon and that it was a sham document and that it was executed only as a collateral security. Such evidence does not have the effect of varying or contradicting the terms of the document. But on facts there was no evidence to that effect. *Ishwar Dass Jain v. Sohan Lal* (2000) 1 SCC 434 : AIR 2000 SC 426.

—"Or Which would Entitle Any Person to Any Decree or Order Relating Thereto".—These words mean, that in cases in which a party is entitled to a decree or order for rectification of any written instrument, or rescission of contract, he is entitled to adduce oral evidence of those facts which would entitle him to a decree or

order giving the relief. These words will be more clearly understood when read with s 26 of the Specific Relief Act (47 of 1963). As to contracts which cannot be specifically enforced except with variation, see s 18 (*ibid*) As to mistake in law or fact, see *post*.

The distinction between the first part and the second part of the proviso is that the former refers to facts which would wholly invalidate a written document, on the ground of fraud, &c, &c whereas the latter part refers to facts which though they may not wholly invalidate the document, are such that some rectification in the terms of the document is necessary to express the real intention of the parties, as for instance, where through fraud or mutual mistake, the instrument does not truly express the real intention of the parties; in such cases either party may institute a suit to have the instrument rectified and the court may in its discretion pass a decree or order for rectification of the instrument. See s 26 of the Specific Relief Act and *illus* (*e*) to s 92 Evidence Act.

Where plaintiff's name, who was a co-vendee with the defendants, was omitted from the conveyance by fraud, he can recover possession of his share even though the limitation fixed for rectification of the conveyance has expired [*Asatulla v. Sadatulla*, 41 IC 747: 28 CLJ 197]. Plaintiff's case was that plot No 1166 was sold, but through mistake plot No. 1167 was entered in the sale-deed. The plot intended to be sold had passed to the possession of the vendee (plaintiff). Defence was that the proper remedy was a suit for rectification which was time-barred—*Held* that it is always open to the vendee to show that there was a mistake in the instrument and he is entitled to lead oral evidence under proviso 1 [*Kesho v. Roopan*, A 1927 A 355: 100 IC 568]. In this case the doctrine of part performance was also relied on (*v ante* s 91: "*Doctrine of part performance.....*") See also *Saghdeo v. Ramnarain*, A 1930 A 387.

(i) **Fraud.**—Fraud vitiates all contracts however solemn, as well as the solemn proceedings of a court of justice. It has been seen it nullifies judgment (v s 44). Under this proviso a party will be allowed to give evidence of any oral agreement or statement contradicting, varying, adding to, or subtracting from the terms of a written instrument, where such instrument was obtained from him by *fraud* or deception; as fraud vitiates all instruments however solemn and it goes to the root of, and invalidates every transaction. By fraud is meant all surprise, tricks, cunning, dissembling and other unfair way that is used to cheat any one, (1 Domat 510); any cunning, deception or artifice used to circumvent, to cheat or deceive another [Story Eq Jur s 187].

Where one party induces the other to contract on the faith of representations made to him any one of which is untrue, the whole contract is considered as having been obtained fraudulently [*Abaji Annaji v. Luxman Tukaram*, 30 B 426: 8 Bom LR 553]. The parol evidence rule is not enforced where either mistake or fraud is proved [*Kassim v. Noor Bibee*, 1 WR 76. See also *Erskine v. Okhoy Ch*, WR 1864, 58; *Gopinath v. Rupram*, A 1930 A 786].

When a document is executed on the faith of a representation that though, in form, a sale-deed, it will not be enforced against the executant, it cannot be held as a sale-deed [*Navalbhai v. Sivubai*, 8 Bom LR 761]. But where fraud is not alleged in the plaint or in the deposition of the plaintiff, who executed the deed fully knowing that the transaction was a sale and not a mortgage, fraud cannot be set up in appeal to bring the case within the meaning of proviso 1 of s 92 [*Somana v. Gadigeya*, 35 231]. The principle that a fraudulent conveyance is void against creditors is as applicable to Indian as well as to English cases [see *Chidambaram v. Muthuvira*, 7 MHC 85; *Mulla Jaffarji v. Yacali*, 7 MHC 128 and *Shamkissore v. Cowie*, 2 Ind Jur OS 7].

In a suit for rent under a *kabuliat*, the evidence of oral agreement set up by the defendant was admissible for the purpose of proving the fraudulent character of the transaction between the parties [*Kashinath v. Brindaban*, 10 C 649]. So oral evidence is admissible under proviso 1 and 3 to prove the fraudulent nature of a surrender deed [*Ullusmoni v. Sukhomani*, A 1945 P 311: 24 P 230], or that a compromise decree was passed on the representation that all other subsisting civil and criminal cases between the parties would be withdrawn [*Niranjan v. Trilochan*, A 1956 Or 81]. A *kabuliat* contained a stipulation to pay interest at 75 per cent on default of payment of rent. On being found that the landlord assured that the covenant would not be enforced, it was held that the *kabuliat* was not the real agreement as there was fraud [*Nadia Chand v. Birendra*, 20 CWN 1067]. Oral evidence is not admissible to contradict recitals in rent receipts specifying the period for payment, unless there is allegation of fraud [*Behari v. Kalka*, 77 IC 695: 25 OC 282].

A man cannot set up his own fraud as a defence, or a cause of action, against an innocent party [*Montefiore v. Montefiore*, 1 W Bl 364]. See *post*, s 115: "*Estopple in case of fraudulent Transaction*".

Opinion does not appear to be unanimous whether fraud, &c, in this proviso refers to *contemporaneous* or subsequent fraud. It has been suggested that the fraud referred to in this proviso must be contemporaneous and not subsequent fraud; it must be a fraud which prevented the insertion of the alleged agreement in the deed and not fraud which consists in the false denial of the agreement. For, if fraud of the latter description is to be allowed to make oral evidence admissible to contradict a document, it would render the section nugatory, the object of the section evidently being to avoid falsehood and perjury in the great majority of cases, even at the risk of allowing fraud to go undetected in a few instances [Ghose's Mortgage, 4th Ed, pp 195-96]. The above remarks were referred to with approval in the referring judgment in *Preo Nath v. Madhu Sudan*, 25 C 603, 606: 2 CWN 562 FB. In *Cutts v. Brown*, 7 CLR 171: 6 C 328, 338, GARTH, CJ, said: "The *Proviso* seems to me to apply to cases where evidence is admitted to show that a contract is void, or voidable, or subject to reformation, upon the ground of fraud, duress, illegality, &c, *in its inception*; and not to cases where the agreement being in itself perfectly valid and free from any taint of that kind, one of the parties attempts to make a fraudulent use of it against the other." The fraud contemplated is at the very inception a fraud which vitiates the transaction itself and not any subsequent conduct vitiating it. It must be fraud within s 17(3) Contract Act [*Dagdu v. Nana*, 12 Bom LR 972; **relied** on in *Narsinghdas v. Radha Kisan*, A 1952 B 425]. See also *Banappa v. Sunder Das*, 1 B 333; *Keshavrao v. Ray Pandu*, 8 Bom LR 287. But in some cases it has been held that the words of the proviso are very wide and would include subsequent fraudulent conduct disentitling one from obtaining any relief from a court of equity (see *Baksu Lakshman v. Govinda*, 4 B 594; *Rakken v. Alagappudayan*, 16 M 80, and the remarks of PONTIFEX, J, in *Cutts v. Brown, ante*).

The point does not appear to be altogether free from difficulty as it has been seen that in some Bombay and Madras cases where oral evidence of conduct has been held inadmissible under s 92, it has been held that such evidence is admissible to prove a case of fraud under the first proviso [*Dattoo v. Ram Ch*, 30 B 119 and other cases cited *ante*, under "*Result of the decisions and the effect of Balkishen v. Legge*"]. If fraud is held to mean *contemporaneous* fraud only and oral evidence of conduct or acts of parties is also excluded, it may prevent proof of fraudulent character of many transactions which are otherwise perfectly valid. In *Mg Kyin v. Ma Shwe La*, 38 IA 146: 38 C 892: 15 CWN 958 (without expressing any opinion as to whether s 92 excludes oral evidence of conduct or acts of parties) it was held on the facts that the

subject of tendering evidence of acts and conduct was to show that the case disclosed a charge of fraud and that the transactions which purported to be absolute conveyances were always treated as mortgages. See also *Mg Kyin v. Ma Shwe La*, 44 IA 236: 45 C 320: A 1917 PO 207.

A person cannot both approbate and reprobate the same transaction. He cannot be allowed to show the fraudulent nature of the transaction for his own advantage and insist on its apparent character to the prejudice of the opposite party [*Shah Makhan v. Srikrishna*, 2 BLR 44 PC pp 48-49; **refd** to in *Irfan v. Jogendra*, 36 CWN 451: 59 C 1111; **folld** in *Himmat v. Llewhellen*, 11 C 486. This later case has been **followed** in 18 A 168; *Kailash v. Harish*, 5 CWN 158]. The principle laid down in 2 BLR 44 PC has been applied by the Privy Council in *Forbes v. Ameeroonissa*, 10 MIA 356, where it has been held that a man cannot both affirm and disaffirm the same transaction and insist on its apparent character for his own relief and to prejudice his adversary. Strict application of the rule may operate harshly if the exceptions are not allowed their full say because a person unwittingly falling a prey to a fraud, intimidation or similar designs shall not get opportunity to prove the same and the rule shall operate not in the interest of justice but against it. [*Ganesh Prasad v. Deo Nanadan Raut*, A 1985 Pat 94, 96: 1984 Pat LJR 659]. An earlier partition deed cannot be challenged on the ground of fraud, in a later suit for partition, unless a specific pleading of fraud is made in the plaint to prove that the recitals of the said document are not correct. [*Raghunath Tiwary v. Ramakant Tiwary*, A 1991 Pat 145, 151].

(ii) Intimidation.—Coercion and undue influence are defined by ss 15 and 16 of the Indian Contract Act, 9 of 1872. Where consent to an instrument is obtained by illegal duress, that is, by threats, as well as actual violence, actual imprisonment, privation of food or rest, undue influence, torture or the like, such an instrument is avoidable at the option of the party whose consent was so obtained [*Smith v. Montieth*, 13 M&W 13]. Threats may affect loss of life, loss of member, corporal imprisonment. But the duress or threat must be sufficient to overcome a firm and constant man, and not a mere *meticulosus homo*, 14 MIA 250 [Nort p 274].

Coercion corresponds with *duress* of the English law. In order that there may be *duress* there must be some threatening of life, or member or of imprisonment of beating itself. Thus *fear* is the principal element that constitutes *duress or coercion* but it must be such a *fear* as might reasonably affect an ordinarily reasonable man, such as the fear of death or bodily hurt or of imprisonment or of loss of all or most part of one's goods or the like. So *duress* must destroy the free agency of the person subjected to it [*Guthri v. Abdul Mozuffer*, 14 MIA 53: 7 BLR 630]. On the question of coercion see *Tincouri v. Krishna Bhabani*, 20 C 15; *Ranganayakamma v. Alwar*, 13 M 214.

(iii) Illegality.—Since it is open to a party to show that a contract had no legal existence, the proviso says that it may be shown to be tainted with illegality. Parol evidence may be given to show that the contract in writing was really made for objects forbidden either by statute or by common law. The leading case is *Collins v. Blantern*, 1766, 2 Wils 341, 347: 1 Smith, LC 406 (13th Ed) where a person agreed to give another a note for £350 as a consideration for his not appearing to give evidence at the trial; see also *Benyon v. Nettlefold*, 20 LJ Ch 186; *Biggs v. Lawrence*, 3 TR 454; *Waymell v. Reed*, 5 TR 600; *Norman v. Cole*, 3 Esp 253, cited in Tay s 1137. In *Faxton v. Popham*, 1808, 9 East 408, 421: 103 ER 629, LORD ELLENBOROUGH said that, "an obligor is not tied up from pleading any matter which shows

that the bond was given upon an illegal consideration, whether consistent or not with the condition of the bond."

'Illegality' covers instruments or transactions against public policy, such as bonds in restraint of trade [*Mitchell v. Reynolds*, 1 Smith, LC 356]; bonds given for an immoral consideration, *eg*, to induce the obligee to live with the obligor in a state of fornication [*Walker v. Perkins*, 3 Burr 1568]. In *Bamun Das v. Huro Lal*, 10 WR 140, a contract to carry on litigation against a third party out of spite was set aside. Illegality is equally fatal when created by statute [Nort p 274]. Where the *illegality* of a transaction, forbidden by public policy, depends upon the parties' intent (*eg*, a lease of premises for gambling), the actual intent of the parties may always be shown, in spite of the term of the document [Wig s 2439]. It is contrary to public policy to give an undertaking in deed by wife not to take proceedings for child's maintenance [*Bennett v. B*, 1951, 1 All ER 1088].

As to illegality and what considerations are lawful, see ss 23 and 24 of the Contract Act; s 127 of the Succession Act and s 43 of the I P Code. Thus under this proviso, parol evidence may always be adduced to show that a contract is contrary to the provisions of any statute, regulation or common law, or against public policy.

The proviso is only illustrative. Even if it be assumed that the question of the validity of an agreement by way of wager, does not come within the term "illegality", it comes within the proviso [*Benimadhab v. Sadasook*, 32 C 437 FB: 9 CWN 305]. If it be an implied term of an *ekrarnama* that a criminal complaint would not be further proceeded with, then the consideration is unlawful [*Kamini v. Birendra*, 57 IA 117: 57 C 1302: A 1930, PC 100]. In a suit for recovery of unpaid consideration of a sale deed, defendant can show that the consideration was the withdrawal of a pending criminal prosecution against him [*Brahmadeo v. Brajaballabh*, 19 P 424: A 1940 P 573]. In *Eshoor Dass v. Venkata*, 17 M 480, it has been held that oral evidence is admissible to show that an agreement in writing to sell Government paper is really an agreement made by way of wager on its market price; see also *Moti Lal v. Govindram*, 30 B 83: 7 Bom LR 385; 22 B 897; *Dholan v. Ralya*, 85 PR 1898; *Thiruvengada v. Mg Nyo*, UBR (Civil 1897-1901) Vol II, 399. It is open to a Life Insurance Company to prove facts which show that the contract was illegal, *eg*, that the insurance was really effected by the assignee of the policy for his own use and not for the benefit of the assured [*Manishankar v. Allianz Und Stuttgarter*, A 1941 L 33].

—Illegality Not to be Pleaded.—Though facts showing illegality either by statute or by common law, must be pleaded, yet when the illegality appears from the plaintiff's own evidence, it is the duty of the court to take notice of the illegality and to give judgment for the defendant, although the illegality is not raised by the pleadings. The plaintiff sued to recover arrears of monthly allowance based on agreement executed by the defendant, in consideration of past adultery. The court held that in India, unlike in England, adultery is an offence under the original law. If adultery past or future, is the consideration or an indivisible part of the consideration for an agreement, such an agreement is not merely an immoral, but an illegal one and therefore void [*Hill v. Clarke*, 27 A 266]. In *Holman v. Johnson*, 1 Cowper, 341; *Scott v. Brown*, 1892 LR 2 QBD cited in 27 A 266, it has been held that if the evidence adduced on behalf of the plaintiff shows the illegality, the court will not assist him; it matters not whether the defendant has pleaded the illegality or not. A compromise petition in respect of offences non-compoundable being void *ab initio* and inadmissible in evidence High Court in second appeal took notice of this illegality though not pleaded in courts below and held that it did not operate as

estoppel, and it could not be looked into even for collateral purposes [*Jagnarain v. Ramdularay*, A 1979 A 71].

(iv) Want of Due Execution.—Parol evidence may be given to prove that a document was not duly executed according to the rules laid down in any Act. As for instance s 63 of the Indian Succession Act, extended to Hindus by the Hindu Wills Act, 1872, (now s 57 Succession Act) lays down certain rules for execution, attestation, &c, of unprivileged wills, and it may be shown by parol evidence that those rules have not been followed. So, ss 3, 59 and 123 of the Transfer of Property Act, 4 of 1882, lay down certain rules for execution and attestation of mortgages, etc, and it may be shown that those rules have not been allowed. As to what is execution see *ante*, s 67: "*Meaning and proof of execution*" and as to attestation see s 68. *ante*. As to want of execution, see Tay s 1135.

(v) Want of Capacity.—Parol evidence is admissible to show that the party was incapable of contracting or making valid disposition of his property by reason of some legal impediment, such as, infancy, coverture, insanily, idiocy, intoxication, unsoundness of mind, severe illness, extreme old age, etc, etc. As to want of capacity and incompetency to make a valid contract see ss 10, 11 and 12 of the Contract Act, 9 of 1872. As to want of capacity, see Tay s 1137.

(vi) Want or Failure of Consideration.—The words "*want or failure*" were substituted for "want of failure" by s 8 of Act 18 of 1872. Under s 25 Contract Act, an agreement without consideration is void, unless it is made on account of natural love and affection in writing and registered, or is a promise to compensate for something done or is a promise to pay a barred debt. S 92 says that the *terms* of an agreement cannot be varied, &c, by oral evidence, but the statement of a fact, *eg*, "for value received" may be contradicted. *Illus* (i) refers to the practice of applying for payment of a debt by sending a receipt in advance [*Sripat v. Naresh*, A 1932 P 332].

In the following cases it has been held that recital in a document as to the payment of consideration is not in itself conclusive evidence of such payment and parol evidence is admissible to rebut such payment [*Shk Wallee v. Shk Kuwar*, 7 WR 428; *Dookha v. Ram Lall*, 7 WR 408; *Chowdry Deby v. Chowdry Dawlat*, 3 MIA 347: 6 WR 55; *Hukum Chand v. Hira Lal*, 3 B 159; *Vasudeva v. Narasamma*, 5 M 6; *Kumara v. Srinivasa*, 11 M 213; *Himmat Llewhellen*, 11 C 486; *Pogose v. Bank of Bengal*, 3 C 174; *Kailash v. Harish*, 5 CWN 158; *Faizunnissa v. Hanifunnissa*, 27 A 612 (on App 33 A 340 PC); *Keshabdeo v. Ray Pandu*, 8 Bom LR 287; *Puthi v. Nandkishore*, 25 IC 27; *Ramaswami v. Lodd Govindoss*, 49 MLJ 414: A 1926 M 35; *Munna v. Narain*, A 1929 N 91; *Irfan v. Jogendra*, 36 CWN 451: 59 C 1111; *Ram Jash v. Markanda*, A 1934 A 1068; *Ganga Dwar v. Tilakdhari*, A 1934 A 496; *Nabin v. Sonamala*, 35 CWN 280; *Sandhura v. Kehr*, A 1936 L 1010; *Murtaza v. Abdul Rahaman*, 27 P 122: A 1949 P 364; *Baldeo v. Dwarika*, A 1978 P 97]. In all these cases it has been held that under the proviso, it is open to a party to show want or failure of consideration, that no consideration passed, that the actual consideration was different from that stated in the deed, that the payment of consideration was postponed and what was the mode agreed upon as to the payment of it, notwithstanding the recital in the document as to the payment of consideration [*Ram Deye v. Shib Dayal*, 7 WR 334; *Ram Deye v. Bishen Dayal*, 8 WR 339 have been superseded]. The statement *M Nabin v. Sonamala*, 35 CWN 279, that the consideration specifically mentioned in a document is a mere recital of fact and not one of the terms of a transaction evidenced by a document was not approved in *Nagendra v. Bholanath*, 41 CWN 734. A recital of receipt in deed does not operate as an estoppel under s 115 [*Baz Bahadur v. Rughubir*, A 1927, A 385]. In a case it was held that

"want or failure of consideration" is a complete want or failure of consideration since no consequence invalidating the document could otherwise follow [*Kesavrao v. Rao Pandu*, 8 Bom LR 287].

It is settled law that notwithstanding an admission of receipt of consideration in the recital of a sale-deed, it is open to the vendor to give evidence that no money has actually been received. Where the deed stated that Rs. 30,000 was received, it was competent for the vendor to prove a collateral agreement that the consideration should remain in the hands of the purchaser for the purpose and subject to the conditions alleged by him [*Shah Lal v. Indrajit*, 27 IA 93: 22 A 370: 4 CWN 485. This case, it should be noted, does not touch on the *amount* of consideration but only whether the consideration stated had or had not been paid]. In a suit on a bond, the defence of an agreement by promise to lease out a land when money would be paid by executant as *nazarana*, could be proved as it was want of consideration. Such a plea could not be taken by the representatives of the executant [*Baldeo v. Ram Autar*, 82 IC 347: 47 A 7]. Inasmuch as it is open to the plaintiff to prove that the whole of the consideration money was not paid, it is equally competent to the defendant to give evidence to prove that the consideration was different from that stated in the contract [*Himmat v. Llewhellen*, 11 C 486].

Where one party to a document alleges that the consideration stated therein to have passed did not really pass and the other party sets up an agreement that consideration was not to be paid until the happening of a particular contingency, evidence of the agreement is receivable under proviso (*1*). Such an agreement does not come under proviso (*3*) [*Irfan v. Jogendra*, 36 CWN 451 : 59 C 1111]. Where the plaintiff claimed the consideration money stated in a *kobala* and the defendant pleaded that the real consideration was the service rendered to the plaintiff in inducing a third person to sell a certain property to the plaintiff, oral evidence to show the real nature of the transaction is rightly admissible [*Nathu Khan v. Shewak*, 15 CWN 408]. But where the terms of the bond are clear, the defendants are not entitled to go behind it, and to allege and prove that the consideration for it was in substance an assigned rent [*Hridoy v. Joyram*, 4 CLJ 402].

Sections 91 and 92 is a complete bar for any party to set up a case that the consideration for a sale is more than what is mentioned in the conveyance or in the contract. [*Keelamma Ambika Kumari v. Narayanan Ramakrishnan*, A 1992 Ker 115, 119].

Pronote for losses in gambling is want or failure of consideration, and oral evidence may be given to prove the fact [*Balgobind v. Bhaggu*, 35 A 558]. Pronote in consideration of giving evidence is no consideration and also opposed to public policy [*Adiraja v. Vittil*, 23 IC 540: 1914 MWN 322].

—Incorrectness of Recital. [Amount of Consideration].—S 92 does not debar a party from giving evidence for contradicting the recitals of facts mentioned in the document [*Mahalakshmi v. Krishna*, A 1938 M 320]. Though a document says there was consideration and states exactly what it was, a party may contradict and show that there was none at all or that it has failed or that it was different [*Pandurang v. Vishwanath*, A 1939 N 20; *Gopal v. Laloo*, 10 CLJ 27: 2 IC 953]. If on the face it appears that the consideration is no more than nominal, evidence to show the true circumstance and the true consideration is admissible [*Turner v. Forwood*, (1951), 1 All ER 746].

Where the consideration was stated as Rs. 100 in ready cash, but the evidence disclosed that it was made up of an old bond for Rs. 63-12 plus Rs. 36-4 in cash—

Held there was no real variance between the statement in the deed and evidence. Whether a bond is given wholly or partly in consideration of an existing debt, it is customary in India to describe it as "ready money received" [*Hukum Chand v. Hiralal*, 3 B 179; see also *Vasudeva v. Narasumma*, 5 M 6; *Kumara, v. Srinivasa*, 11 M 213; *Himmat v. Llewhellen*, 11 C 486; *Indrajit v. Lalchand*, 18 A 168 (**affirmed** in 22 A 370 PC *ante*); *Md Yusuf v. Md Musa*, 4 ALJ 441; *Nara Deddiar v. Doraiswami*, 31 MLJ 96: 35 IC 301; *Hajee Lin Lin v. Mg Ba*, A 1928 R 79: 5 R 822]. A party is not debarred from giving evidence as to the real character of the consideration. Where the rent in a lease was 670 baskets of paddy, plaintiff may show that a part of the consideration, *viz* 420 baskets was in respect of a previous debt [*Abdulla Kin v. Mg Ne Dun*, 7 R 192: A 1929 R 240; see also *Lal Md v. Kallanus*, 11 C 519; *Ganapathy v. Muniswami*, 33 M 159]. Where a deed contained statement of receipt of certain consideration and the plaintiff denied having got any, it was open to the defendant to show that there was some consideration though not the same as recited in the document [*Kailash v. Harish*, 5 CWN 158; *Munna v. Narain*, A 1929 N 91]. In the case of a renewed pronote in consideration of a debt due under a prior note, the defendant may prove that he paid some amount towards the prior note and to that extent his liability under the new note should be proportionately reduced [*Balasubramania v. Venkatarama*, 67 MLJ 650].

Where one party tenders oral evidence to prove that the amount acknowledged in the deed or any part of it was not received, this does not give the other party a right to produce evidence of any oral agreement or statement that the *amount* of sale consideration was less than what is entered in the document [*Md Taqi v. Jang*, A 1935 A 529: 58 A 1 FB **overruling** *Chunni v. Basanta*, 36 A 537]. Evidence cannot be admitted to vary the provisions of the sale and as to the *amount* fixed as consideration, *eg.*, where the price as fixed in the deed is Rs. 35,000 evidence of an oral contract that the amount was really Rs. 36,000 cannot be given [*Adityan v. Ram Krishna*, 38 M 514: A 1915 M 868; *Narasimhachari v. Indo Comm Bank*, A 1965 M 147; **folld** in *Lala Singh v. Basdeo*, 71 IC 768: A 1923 A 429]. Though want of consideration or failure of consideration or difference in the kind of consideration may be proved, evidence to vary the *amount* of consideration in a registered sale-deed is inadmissible [*Annada v. Hargobinda*, 27 CWN 495: 75 IC 557: 37 CLJ 552; *Kallu v. Partab*, 92 IC 787: A 1926 O 301; *Motilal v. Fulia*, A 1958 P 61]. In *Ramaswami v. Lodd Govindass*, A 1926 M 35: 91 IC 612, KRISHNAN J, doubted whether *Adityan's case, sup* can be supported in view of *Hanifun-nissa v. Faiaz-un-nissa*, 38 IA 85: 33 A 340: 15 CWN 621. In *Hunif-un-nissa's case*, it was held that it is open to a party to what was a sale-deed for consideration to show by extrinsic evidence that no consideration did pass, and that what was a nominal sale was a real gift. The question was again discussed in another case and it was held (**following** *Adityan v. Ram Krishna and Annada v. Hargobinda, ante*), that it is not open to a party to prove a variation in the *amount* of consideration, since it is clearly a term of the contract. As to evidence being admissible to show a difference in kind of consideration, the difference in kind must be absolute, that is, the consideration mentioned must be wholly false; a mere omission to mention some portion of the consieration will not come within the proviso, since such omission is clearly a variation in the terms of the contract. It was observed in this case that *Adityan's case* was not affected by *Hanif-un-nissa's case* [*Mothey v. Md Galeb*, A 1930 M 659: 58 MLJ 240; see also *Md Taqi v. Jang*, 58 A 1 FB *infra*].

Explaining *Hanif-un-nissa's case* it has been held that where there is a deed of gift it is not open to a party to prove that in spite of the tenor of the document the term was different and there was consideration [*Bai Hiradevi v. Offi Ass*, A 1955 B 122],

adopted in appeal A 1958 SC 448 but limiting the view to the parties to the deed and indicating that parol evidence by strangers would be admissible [*Haramoni v. Bauri*, A 1970 Or 203]. Where the consideration stated in a deed (10s) is trifling, parol evidence to prove a larger consideration [£ 1,215) does not contradict the deed and is admissible [*Turner v. Forwood*, 1951, 1 All ER 746 CCA]. Where there is a nominal consideration, evidence is always admissible that the true consideration was something more than the consideration stated in the written agreement [*Clifford v. Turrel*, 1845, 14 LLC Ch 390, 397]. Relying on these two cases it has been held that when there is one consideration stated in the document, a higher consideration to that instalment is admissible as it is not inconsistent with the consideration stated in the deed. In this case there was a sale deed dated 15th Feb., 1952 and another document dated 16th Feb., 1952 in which it was stated that the consideration in the former deed was a trifling sum for reasons stated therein [*Kasturi Bai v. Ramlal*, 66 CWN 8].

If one party can show that he did not receive the consideration specified, the other party is entitled to show that the consideration was paid in full, not in cash but in kind by proving contemporaneous oral agreement to that effect. A contemporaneous oral agreement to be paid in kind may not be enforceable for that would be varying the written contract, but once the consideration is *actually paid* and accepted in kind it can be proved as it is a discharge of the obligation. The test is whether the consideration is executed or still executory [*Pandurang v. Vishwanath*, A 1939 N 20; see *post*: "*Oral evidence in extinguishment or release of rights under a written contract.*" Where in a deed of assignment of a mortgage decree the consideration is stated to be Rs. 2,89,000, oral evidence is inadmissible to prove that the price was less than the amount stated in the recital [*Lood Govindoss v. Muthiah*, 48 MLJ 721: A 1925 M 660]. The same view has been taken by a Full Bench at Allahabad holding that the *amount* of consideration is a term of a deed of sale and no evidence is admissible for varying or contradicting it. But the acknowledgment of receipt of the whole or part of the consideration stated is not a term of the deed of sale but a mere statement of fact [*Md Taqi v. Jang*, 58 A 1 FB : A 1935 A 529]. Consideration for enhanced rent does not constitute a term of the contract within s 29 B T Act [*Probol v. Cherag Ali*, 11 CWN 62: 33 C 607]. Where in a document no consideration was recited, it was held that so long as passing of consideration is not a term of the contract, oral evidence of consideration is not within the prohibition in s 92. It was further held that such evidence is admissible under prov (*3*), the document being silent on the subject of consideration [*Somepalli v. Chittineni*, A 1946 M 452: 1946, 1 MLJ 346].

The true rule appears to be that where 'consideration' means the actual amount or thing received, it can be disputed like any other admission for admissions are not conclusive (v s 31); but where 'consideration' signifies a term of the contract, the writing is the only evidence and must firmly control the contract.

(vii) Mistake in Fact or Law.—Under this proviso oral evidence can be given to show that due to mistake in fact or law the written document does not correctly express the agreement which the parties had really entered into. Here again, says Norton, the Indian court sits as a court of equity, and will reform a document on the principles which prevail in Equity; see *illus* (*e*). In equity, parol evidence is often admitted to vary or even contradict a writing where by some mistake, surprise or the like it does not represent the party's true intention; but it requires a very clear case to induce the court to interfere. The mistake must be satisfactorily made out, and the error be shown to be one which ought to be corrected. If this be done by the plaintiff, the court will reform the instrument, so as to make it in conformity with the true intent. A defendant against whom specific performance is sought, may insist on the

mistake in defence, and establish it by parol evidence [Nort p 275]. Under s 20 Contract Act, an agreement is void when both parties are under mistake as to matter of fact. S 21 *ibid*, says that a contract is not voidable because it was caused by any mistake as to law in force in India, but a mistake as to a law not in force in India has the same effect as a mistake of fact, S 22 *ibid*, enacts that a contract is not voidable merely because it was caused by mistake of one party as to a matter of fact. As to mistake "which would entitle any person to any decree or order relating thereto," *eg*, rescission, see ss 26, 28, 31-34 S R Act[8] . Before rectification under s 31 S R Act[8] he court is to find clearly proved that there has been mutual mistake in framing the instrument and it must ascertain the real intention of the parties in executing the instrument [*Siddique & Co v. Utoomal Co*, A 1946 42: 1946, 1 MLJ 74: 1946 Kar 52].

As to correction of clerical or arithmetical mistakes in judgments, decrees, &c see s 152 C P Code.

"*(1) Individual, mistake, not known to or induced by the second party.*—Where a jural act is executed by *signing* a specific and *complete* document, the second party has a right to treat the signed contents as representing the terms of the act. The principle of reasonable consequences plainly requires this result. That the signer did not intend to execute such terms is immaterial, and whether the lack of intent was due to a *failure to read it over*, or to some other cause, is immaterial. In other words, his individual innocent mistake or deliberate secret dissent cannot be shown. Such may be taken to be the general rule. As exceptions to the rule, there may be two classes of cases: (*i*) Where a document was drafted and *prepared by the second party*, and contains also parts which physically constitute virtually a *separate document* and are not included in the scope of the first party's signature, it may be proper, in order to protect against imposition, to exonerate him if he misunderstood the extent of the terms to which his signature applied. In particular, this may be the case for an *insurance application*. (*ii*) Where a person is *illiterate*, or *blind*, or *ignorant of the alien language* of the document, his case again is to be tested by the reasonable consequences as applied to the circumstances. In other words, he is of course not bound as against the second party if that party himself misrepresented the contents" [Wig s 2415].

"*(2) Individual mistake known to or induced by the second party.*—Where the party's error as to the contents of the signed document is *known to the second party*, the first party may, of course, by the general principle insist upon the terms as supposed by him, because these are identical with those which he appeared to the second party to be intending to utter. (*i*) The ordinary instance is that of *fraudulent misrepresentations of the document's terms* by the second party; and, in particular, a false reading to a person *illiterate, blind*, or *alien*. (*ii*) Where the first party's error is merely *known* to the second party, *without fraudulent means* by the latter, the result is still the same, for the latter cannot claim that the first party's expressed words were reasonably so accepted by him; the only difference ought to be that in this case the first party should be satisfied with having the document reformed, while in the case of fraud, he ought to be entitled to repudiate the entire transaction by way of penalty upon the trickster. (*iii*) Where the first party's error was *not known* to the second party, but was *induced by the latter's own conduct*, here also the first party, may not be bound; for in such case it may well be that the terms actually expressed did not come to be expressed as the natural consequence of the first party's volition, but were due rather to the second party's own conduct" [Wig s 2416].

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8. See now ss 18 and 26 of the Act 47 of 1963.

"(3) Mutual mistake. (i) Concerning mutual mistake and its effect on the terms of the jural act, it is necessary at the outset to exclude two questions which do not involve the present principle. In the first place, the question what sort of mistake—including individual mistake—will suffice *to bar a bill for specific performance*, is a distinct one; it involves merely the choice of remedies, not the terms of the valid act. In the next place, the question whether an act may be avoided for a *mistaken assumption of fact external to the contract*, is a distinct one, belonging to the principle of avoidability [see ss 20, 21, 22 Contract Act]. *(ii)* The kind of mutual mistake involved in the present principle is purely a mistake as to the *actual words intended to form part of the act*, just as in the cases of individual mistake already consiered. This sort of mutual mistake can rarely occur in oral acts, but it is common enough in written acts. The case is the simple one of an oral agreement which, when reduced to writting for signature, contains terms, varying from the actual undertaning of the parties, but is nevertheless signed by them both in ignorance of the variance. No one appears ever to have doubted that in such cases the instrument should be judicially amended to represent the actual agreement" [Wig s 2417].

Mutual mistake as affecting bona fide holders of value.—"The theory of reformation is to make the instrument state, objectively and in appearance to others what it did subjectively state to the parties themselves. The one party is not bound to the other by the purporting tenor of the act, because the other party shared the error. But as against third persons, who are not sharers of the same supposition, and who are authorized by the substantive law to rely upon the instrument as defining the rights acquired by it, the tenor of the instrument controls, as a necessary result of the general principle that the actor is responsible for the reasonable consequences of his act. In other words, an instrument may be reformable as against one person, but not as against another" [Wig s 2418].

Unilateral mistakes (not amounting to fraud, legal or equitable) is not a ground for rectification and does not therefore, if proved, entitle the party alleging it to a decree or order rectifying or cancelling the document [*United State v. Motor Trucks Ltd*, 1924 AC 196, 200; *May v. Platt*, 1900, 1 Ch 616, 623 **refd** to]. If one is dealing with a case of unilateral mistake, it is by no means every mistake of such a nature which would give rise to a claim to relief and serve as defence under prov (*1*). But when the mistake is one common to all parties, evidence would be admissible under prov (*1*) to found a claim for rectification of the document [*Janardan v. Venkatesh*, 1939 Bom 149: A 1939 B 151; *Shiddappa v. Rudrappa*, A 1945 B 463]. Mutual mistake is an equitable remedy and is available to a plaintiff. If remedy sought is equitable, it is open to equitable defence. S 92 (prov 1) only applies if there is such mistake and would enable the party alleging the mistake to a decree or order rectifying or cancelling the document. Where a mortgage bond provided for interest at the rate of Rs. 2 per month, oral evidence is not admissible to show that the words "per cent" were left out by oversight [*Sayamma v. Venkata*, A 1931 M 785: 61 MLJ 437—CONTRA: *Kamala Pd v. Hasan*, 1939 All 329: A 1939 A 309]. As to mutual mistakes, see *Cowen v. Truefitt*, 1899, 2 Ch 309 CA; *Craddock v. Hunt*, 1923, 2 Ch 136; *Banks v. Ripley*, 1940 Ch 719: 1940 3 All ER 49. It is enough if the parties prove beyond reasonable doubt the concurrent intention of the parties at the moment of executing the instrument and that the instrument fails to give effect to that concurrent intention. The court may act upon intrinsic evidence upon the face of the deed itself that there was a mutual mistake [*Noorudin v. Md Umar*, 1940 Bom 605: A 1940 B 321 (*Shipley U D C v. Bradford Corpn*, 1936, 1 Ch 375; *Fitzgerald v. F*, 1 IR 477 **follD**)].

Same.—With regard to mistake as to description or as to identity of person, see the *sixth proviso*. As to mis-description, see further ss 95, 97. Mistake in expression may be either common or unilateral. The court permits mistake to be proved when it is common; that is, where the expression of the contract is contrary to the concurrent intention of all the parties. If such mistake be established, then the court can give the relief of rectification, but what is rectified is not the agreement, but the mistaken expression of it. The general rule is that the intention of the contracting parties is to be gathered from the words they have used. Where the mistake is unilateral, it does not ordinarily affect the rights which are the legitimate consequences of the words, though it may affect the remedy, that will be awarded against the party in error. But the mistake known at the time to the other party may be proved, and performance in accordance with the terms of the error, will not be compelled. A mistake, even not known, has legal consequences, provided there can be restoration of all parties concerned to their original position. Where a contradicting party, who cannot read has a written contract falsely read over to him and the contract written differs from that pretended to be read, the signature on the document is of no force because he never intended to sign and therefore in contemplation of law did not sign the document on which the signature is. If a person executes a document knowing its contents but mis-appreciates the legal effect, he cannot deny its execution [*Dagdu v. Bhana*, 28 B 420]. The proviso is not limited in its application to suits for rectification of instruments [*Mahendra v. Jogendra*, 2 CWN 260, 262; *Rajaram v. Manik*, A 1952 N 90].

Where either mistake or fraud is proved, parol evidence as a general rule, will be received to vary or control written contract [*Kassim v. Noor Bibee*, 1 WR 76]. Where a note of contract ran: "Sold silver bars sixty to *D* deliverable in May 30," oral evidence that the silver was of a certain quality and that the purchase price was to include customs duty is admissible [*Chimanram v. Divan*, 56 B 180]. Parol evidence was admitted to prove that a village not included in a putni lease was intended by the parties to be included in it [*Dhunput v. Sheikh Jawahir*, 8 WR 152]. The mistakes contemplated in the section are genuine and accidental mistakes, just as the misdescription of property [*Haji Khan v. Chothu*, A 1939 Pesh 41; *Rikhiram v. Ghasiram*, A 1978 MP 189]. Oral evidence was allowed to be put in to prove the mutual mistake regarding some land conveyed to the plaintiff by the defendant, and the question was whether or not certain land was covered by the conveyance, [*Mahendra v. Jogendra*, 2 CWN 260; see *Arya v. Daundi*, A 1940 L 236]. *Mahendra's case* has been followed in *Narayansamy v. Rodriguez*, 3 LBR 227, where evidence was admitted to prove mutual mistake in an agreement and the real intention of the parties, and such evidence as to the alleged mistake may be given not only in a suit for rectification under the S R Act, but also in a suit brought upon the agreement itself. In *Durga Pd v. Bhajan*, 31 C 626, 627 the plaintiff was allowed to fall back on the original contract, where certain contracts evidenced by bought and sold notes were falsifed by fraud and mistake. In an engineering contract oral evidence was admitted for correcting typing mistake of 'sock' for 'rock' [*Gujarat E Bd v. S A Jais*, A 1972 G 192].

Court is competent to correct mistake in a negotiable instrument or pronote if the term does not represent the true bargain between the parties [*Druiff v. Parker*, 1868 LR 5 Eq 131]. Where in the bond, the rate of interest mentioned was "*one rupee a month*" oral evidence was admitted to show that the word "*per cent*" *had* been omitted by mistake.[*Bissessar v. Bhagaban*, 5 AWN 41]. In an *ex parte* case, plaintiff was allowed to give evidence that "one per cent per annum" were inadvertently put in a pronote for "one per cent per month". It was held on the one-sided evidence that

what was expressed on the face of the document did not represent the real bargain between the parties. But COSTELLO J, observed that he was not at all sure that the plaintiff ought not to have brought proceeding under s 31[9] S R Act to have the document rectified [*Ladha v. Munshiram*, 31 CWN 747: 104 IC 559]. Where a blank was left in a document as to the amount of consideration for a conveyance, oral evidence was admitted to fill the blank [*Maung Po Gyi v. Hakim*, 80 IC 759: A 1924 R 235]. As to blanks, see notes under ss 93 and 96 *post*.

Where a certain word was introduced in a will by blunder, and the clauses in which it appeared had never been brought to the notice of the testator, parol evidence was allowed to be admitted to expose the blunder and the court directed that the obnoxious expression should be struck out of the instrument wherever it occurred [*Guard House v. Blackburn*, 1866 LR 1 P&D 109]. Where a plaint alleges a mutual mistake of fact, extrinsic evidence of such mistake is admissible although no rectification thereof is prayed for [*Mahadeva v. Gopala*, 34 M 51]. If there is a mutual mistake as to the description of a piece of land in a registered mortgage-deed, oral evidence is admissible [*Kota China v. Kannekanti*, 31 IC 671]. Where on a renewal of mortgage an item of property was misdescribed, reference to the former is permissible to establish the identity of the disputed item [*Abdul Hakim v. Ram Gopal*, 44 A 246: 64 IC 961]. The wording of a surety bond did not support the contention that the surety was liable only for appearance and not the decretal amount. Evidence was admissible that the bond was executed under a mistake [*Po Waw v. Mg Ba Chit*, A 1929 R 262].

—Mistake of Fact and S 26 S R Act. [Mistake May be Pleaded in Defence]. There is nothing in the prov (1) to suggest that the facts which may be proved under it can only be proved in support of a claim to which those facts give rise; such facts may be pleaded also by way of defence [*Janardan v. Venkatesh*, 1939 Bom 149: A 1939 B 151; *Shiddappa v. Rudrappa*, A 1954 B 463; *Dogdu v. Bhana*, 28 B 420]. The combined effect of s 92 prov 1 and s 31[10] S R Act is to entitle either party to prove a mistake without prior rectification of an instrument under the latter section. S 31[10] is only an enabling section. So, defendant can resist a suit on the ground that what was sold to him was different from what the document described [*Rangaswami v. Sowri*, 39 M 792: 29 MLJ 229; *Dagdu v. Bhana, sup*; *Minalal v. Kharsetji*, 30 B 395; *Binns v. W&T Avery*, 61 C 548, 553; *Soorama v. Venkayya*, A 1938 M 589 M 589; *Rajaram v. Manik*, A 1952 N 90; *Balaprasad v. Asambi*, A 1954 N 328; *Mahendra v. Jogendra*, 2 CWN 260; *Santi Ranjan v. Dasuram*, A 1957 As 49]. So also a mistake relating to a survey number in a sale-deed [*Sabaji v. Nawal*, A 1928 N 4; *Palami v. Nachappa*, 53 IC 379 (M); see also *Bepin v. Jogeshwar*, 34 CLJ 256; *Kurpal v. Shamrao*, 47 B 589; *Nandalal v. Jogendra*, 36 CLJ 421; *Abdul Hakim v. Ramgopal*, 44 A 246; *Asitulla v. Sadatullah*, 28 CLJ 197; *Mahadeva v. Gopala*, 34 M 51; *Chinna v. Veeriah*, 31 IC 671; *Balusami v. Lakshmana*, A 1921 M 172: 44 M 605 FB].

Where a certain property sold is not mentioned in the sale-deed through fraud or mutual mistake and the sale is acted upon by delivery of possession, the omission will not defeat the title of the vendee. The omission to have the deed rectified within three years cannot extinguish the title and the vendee is entitled to lead oral evidence to show the mistake [*Keshoo v. Roopam*, 100 IC 368: A 1927 A 355]. This rests on the equitable doctrine of part performance [*v ante* s 91: "*Doctrine of part perfor-*

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9. See now s 26 of Act 43 of 1963.
10. See now s 26 of Act 43 of 1963.

mance and s 53A T P Act"]. So, in a suit for recovery of possession based on a document in which the property was left out through mistake, the plaintiff is entitled to succeed and prove mistake under s 92 although a suit for rectification may be barred [*Sukhdeo v. Ram Narain*, A 1930 A 387]. The contrary view in *Anarullah v. Koylash*, 8 C 118 that such a plea is not available without prior rectification is not good law. It has been held in Madras that the proviso does not empower a plaintiff suing on an unreformed, registered and unambiguous deed to lead evidence to show that by a mistake a term has been omitted from the deed, unless the mistake is such a one as would found a claim for rectification or cancellation [*Sayamma v. Venkata*, A 1931 M 785].

The onus of proof is on the person asking for rectification. He must clearly show what the real intention was [*Fredensen v. Rothschild*, (1941), 1 All ER 403].

PROVISO (2): Separate Oral Agreement as to Matter Silent and Not Inconsistent with the Terms of the Document. [Collateral Agreement and warranties].—Law is well settled that when a document in writing does not contain the entire agreement but embodies only some of the conditions oral evidence to prove some other terms agreed upon and not inconsistent with the written instrument is clearly admissible [*Balaram v. Ramesh*, A 1973 Or 13 (cases referred)]. "Seperate oral agreement" evidently refers to contemporaneous or prior oral agreement, as subsequent oral agreement is dealt with in prov (*4*). When there is a contemporaneous or prior separate oral agreement as to a matter on which a document is silent, proof of it may be given only when such agreement is not inconsistent with or does not contradict the terms of the document [*Lakshmiayya v. Murahari*, A 1930 M 547]. The proviso requires that (*i*) the separate agreement should relate to any matter on which the document is *silent* and (*ii*) that it is not *inconsistent* with its terms. The principal rule in s 92 is intended to apply to contracts, &c which have been formally and carefully drawn up and which may therefore be presumed to contain all that the parties intended to be their terms. The proviso does not apply to such documents. The presumption is weakened in the case of less formal documents. The separate agreement should be on a *distinct collateral matter*, although it may form part of the same transaction; the test being that it should not vary or contradict the terms of the written contract. *Illus* (*f*), (*g*) & (*h*) are in point. The word '*May*' shows that the court has a discretion in the matter.

The rule does not prevent parties to a written contract from proving that, either contemporaneously or as a preliminary measure, they entered into a distinct oral agreement on some collateral matter [*Lindley v. Lacey*, 34 LJCP 7 (**folld** in *Nagendra v. Bholanath*, 41 C 734; *Kunja Behari v. Raman*, 41 CWN 1953); *Morgan v. Griffith*, LR 6 Ex 71]. The rule excluding parol evidence to vary or contradict a written document, is not infringed by proof of any collateral parol agreement, which does not interfere with the terms of the written contract, though it may relate to the same subject-matter. For instance, the fact that a written demise of an unfinished house has been duly signed will not preclude the tenant from proving that at the time of the demise, the landlord verbally agreed with him to put the premises into a habitable state [*Mann v. Nunn*, 43 LJCP 241]. Letters which are passed during negotiations which have terminated in a written agreement, are admissible to support a collateral verbal agreement set up by one of the parties [*Pearson v. Pearson*, 54 LJ Ch 37; Tay s 1147 s 1135. See *Kasinath v. Chundi*, 5 WR 68 FB where Tay s 1147 has been referred to], but not to contradict, vary or add to the terms [*Punjab N Bank v. Arora*, A 1933 L 1024]. Where the alleged collateral agreement is a material term of the contract, it is inadmissible [*Bailey v. Woodstone*, 1907, 42 LJ 457 CA].

Plaintiff being unable to pay off a mortgage sold his rice mill to the defendent for Rs. 26,000. Subsequently the defendant executed a pronote for Rs. 5,000 and an agreement saying that he agreed to pay Rs. 5,000 over and above the mortgage dues—*Held* that the plaintiff was entitled to prove the separate oral agreement on which the sale-deed was silent [*Nagendra v. Bholanath*, 41 C 734]. So, oral agreement subsequent to a mortgage that the mortgagee agreed to take the mortgaged lands in full satisfaction of his dues is admissible where there was nothing in the mortgage-deed as to mode of payment [*Kunja Behari v. Raman*, 41 CWN 1053; see *Lakshminarasimha v. Raghavamma*, A 1936 M 380]. The vendor can prove a separate oral agreement that the vendee would give up certain money-debt not specified in the deed of conveyance [*Ranbahadur v. Awadh*, 18 P 318: A 1939 P 411]. Where the consideration in a deed was Rs. 2,000 payable in cash to the plaintiff, a separate oral agreement that defendant was to retain Rs. 1,000 which plaintiff's relation owed him (defendant) can be proved [*Himmat v. Llewhellen*, 11 C 486].

Unwritten terms of contract can be proved by oral evidence [*Coal Fields of Burma v. Johnson*, 84 IC 1021: A 1925 R 128]. When on the face of it the document contains a complete agreement, evidence of an agreement to supplement the terms expressed in it may still be admitted, subject to the conditions expressed in the proviso. There may be two agreements with regard to the same matter, one being written and the other oral. But the supposition that the parties have in their written contract left out some of the terms is not readily to be entertained except when the writing is of an informal character. The more formal the document, the greater will be the reluctance to admit oral evidence of supplementary terms. The two case put in *illus* (*h*) illustrate the point [see also *Moran v. Mittu*, 2 C 68; *Mayen v. Alston*, 16 M 238; *Umesh Ch v. Mohini*, 9 CLR 301; *Nachiappa v. Chokalingam*, 4 LBR 240; 14 Bur LR 231]. Where the written contract is silent about any sample being exhibited, oral evidence is not admissible to show that the sale was by sample [*Meyer v. Everth*, 171 ER 8; *Gardiner v. Gray*, 171 ER 46; *Mahadev v. Gouri*, A 1950 Or 42]. Where a document is not silent as to consideration, oral evidence to prove additional consideration not recited in the document is not admissible [*Narasimhachari v. Indo Comm Bank*, A 1965 M 147].

In considering whether or not prov (2) applies, the court shall have regard to the degree of formality of the document. If the document is a mere contract, it cannot be considered as a particularly formal document at all [*Kesla Mal v. Cooper Allen & Co*, A 1936 A 717 : *Mayen v. Alston*, 16 M 238: *Jodhraj v. Byran*, 7 NLJ 25: *Asad Ali v. Answar Ali*, A 1959 Tri 40]. In the case of formal documents, it is not always easy to determine what matters are *collateral*. In *Helibut v. Buckleton*, 1913 AC 30 LORD MOULTON said:—

> "It was clear there might be a contract the consideration of which would be the making of some other contract. The effect was to increase the consideration of the main contract, and the natural and usual way would be to modify the terms of the latter and not to execute a concurrent collateral contract, which is viewed with suspicion because its sole effect is to vary or add to the main contract. Both the terms of the collateral agreement and *animus contrahendi* of the parties thereto must, therefore, be strictly proved".

A tenant may prove the existence of a warranty by the landlord as to drains collateral to the lease [*De Lassalee v. Guildford*, (1901) 2 KB 215]. Where the writing contains *all the terms*, oral agreement to vary, add, etc is inadmissible although the document may be in imperfect agreement of which specific performance cannot be decreed [*Tukaram v. Jagannath*, 76 IC 215. See *ante* p 779]. When a loan is evidence by a pronote, oral evidence to show the purpose of the loan, *eg* it was

incurred on behalf of the family, when the document is silent on the point, does not vary the terms of the document [*Kistur v. Rajani*, 70 CLJ 201]. Evidence to prove place of payment is admissible where pronote is silent [*Sahni v. S*, A 1954 MB 184]. Where a member of a Hindu joint family executed an agreement to sell joint property, oral evidence is admissible to prove the character of the execution, *ie*, the member executed the document as *karta* and where there was no stipulation that the signatory to the agreement would get the sale deed signed by his brothers also, oral evidence to add his fact is clearly barred [*Hari v. Umrao*, A 1979 A 65].

—Document Incomplete or Informal. [Silence as to Interest].—Oral evidence is admissible to prove some items of an agreement entered into between the parties, when some others have been reduced into writing in letters exchanged between the parties. There is no Statute of Frauds in India and there is nothing in s 92 to exclude such evidence. Where there is no agreement as to the date of commencement of the lease, there was no concluded agreement [*Ambika v. Galstaun*, 13 CWN 326]. In a document of little formality plaintiff agreed to pay rent for a land at Rs. 100 p.m. In a suit by the plaintiff for specific performance he was allowed to prove that there was a separate oral agreement by defendant to grant a 51 years' lease. It is a case of a document containing only some of the terms of a tenancy [*Champaran v. Sripati*, A 1938 C 430: 177 IC 355 (*Cutts v. Brown*, 6 C 328; *Ambika v. Galstaun*, 13 CWN 326 **relied** on)]. The balance struck in the creditor's books is not such a formal document in which an agreement to pay interest independently cannot be proved [*Khairathi v. Diwan*, A 1932 L 652]. Oral evidence to prove payment of interest in respect of a debt entered in a *bahi* was allowed [*Bhan v. Gokul*, A 1919 L 42]. *Nahan* transactions in *bahi* in Kashmir are not, however, informal agreements and oral agreement to pay interest is inadmissible [*Hindu &c v. Hemraj*, A 1962 J&K, 41]. Where a memorandum was executed in the form of a letter and a formal document was contemplated embodying all the terms of the lease, it did not attract the operation of s 92 Evidence Act or s 49 Registration Act [*Sundar v. Ramsaran*, 33 PLR 323].

Where a mortgage decree was sold free from incumbrance and a portion of the purchase-money was left with the purchaser who gave a receipt embodying the real contract between the parties with regard to the deposit,—*held* that evidence is not admissible to prove a separate agreement empowering the purchaser to pay off an attaching creditor of the decree. But evidence might be let in to prove the object for which the deposit was made or to explain the meaning of a sentence in the receipt [*Khetsidas v. Shib Narain*, 9 CWN 178]. Where the *pattah* under which the land was let out, contained no boundaries of the land, oral evidence was admitted to show the boundaries [*Mohun v. Annapurna*, 9 WR 567].

Where the document is a mere acknowledgment of debt oral evidence as to terms and condutions of loan and rate of interest should be allowed [*Brij Krishore v. Lakhan*, A 1978 A 314]. Where a promissory note was silent as to interest, a *subsequent* verbal agreement to pay interest was allowed to be proved [*Saudamini v. Spalding*, 12 CLR 163]. But where no interest was mentioned in a promissory note, evidence of a *contemporaneous* oral agreement to pay interest at a certain rate is not admissible [*Lachmi v. Hemendra*, 18 CWN 1260; *Banwari v. Jogannath*, 1 Pat LJ 71: 35 IC 431; *Mati v. Haripada*, 26 CWN 171n; 79 IC 790; *Pentaya v. Kesorao*, 16 NLR 68: 56 IC 249; *Fatema v. Hanumantha*, 17 MLJ 296; *Kishore v. Gurditta*, 52 PR 1911; *Gopal v. Achut*, A 1941 N 271].

Where no interest is mentioned in a pronote, all that can be awarded is interest at 5 per cent under s 80 of the N I Act [*Yada v. Behari*, 53 IC 242 (17 MLJ 296: 26 IC 935; 18 CWN 1260; 35 IC 431; 1 PLJ 71 **follo**): *Bishan v. Audh Behari*, 2 PLJ 451].

In a suit after demand on a pronote payable on demand, but not at any specified place and which is silent as to interest, interest can be awarded under s 80 N I Act at 6% from date of the note [*Ganpat v. Sopana*, 52 B 58 (*Framroz v. Md Essa*, 50 B 266; *Bishun v. Audh*, 2 PLJ 451 **folld**)—CONTRA: *Best v. Haji Md Sait*, 23 M 18, interest runs from the date of demand]. Following the Madras case it has been held in Calcutta that interest at 6% is payable from date of demand and if there is no demand previous to the suit, interest is payable from the date of service of summons [*Prem Lall v. Radha Ballav*, 34 CWN 779]. S 80 of the N I Act, 1881 does not exclude evidence of an oral agreement to pay interest at a higher rate [*Goswami Sri v. Ram Narayan*, 34 IA 6: 29 A 33: 11 CWN 105; *Rangappa v. Bismilla*, 32 IC 238]. Where a *hundi* is silent as to interest but there is a prevailing custom to pay interest, interest is payable [*Maung Po v. Vekayappa*, 62 IC 315].

Where the rate of interest was put down as 'one rupee a month', oral evidence was admitted to show that "per cent" had been omitted by mistake [*Bissessar v. Bhagaban*, 5 AWN 41; see however *Sarju v. Sukhi*, 4 PLT 577]. Where on a loan of Rs. 300, defendant agreed to pay interest at "10 *kalams* of paddy per annum", oral evidence is admissible whether 10 kalams were the interest on Rs. 100 or all the Rs. 300 [*Muthersami v. Varda*, 56 IC 476: 1920 MWN 239. For other cases see s 93 *post*]. In the case of a pronote (*hundi*) an oral agreement for interest made "at the time of the agreement" is not only highly suspicious but *prima facie* inadmissible. If admissible, it is so entirely by virtue of its separateness and because it is not a part of the bargain or promise expressed in the note; otherwise it adds to its terms [*Kader v. Serajuddin*, 70 IC 130: A 1922 C 513].

—Hath-chita.—The principle applies only to formally complete contracts; for, in such documents it is reasonable to suppose that the parties have set down all that they intended, and omitted nothing. This presumption becomes weaker and weaker, as the document is found to be less and less formal [*Beharee Lal v. Kamini*, 14 WR 319]. In a suit upon a *Hath-chita*, having regard to the informal nature of the document oral evidence was allowed of a contemporaneous verbal agreement to pay interest [*Umesh Ch v. Mohini*, 9 CLR 301; *Nabin v. Debendra*, A 1917 C 210]. The correctness of these decisions is open to doubt if it is meant that in the case of every *hath-chita* (hand-note) oral evidence of a contemporaneous agreement as to interest may be given. If the *hath-chita* or writing be not the transaction itself, but a mere note, memorandum, acknowledgment or the like, of a pre-existing debt or a separate obligation, it may be taken as an informal document. But if in pursuance of a contract to lend money at a certain interest, as is very often the case, a *hath-chita* is executed it loses its character of informality, and it should be presumed that all the terms of the loan are reduced to writing. There can be a loan with or without interest, and when interest is agreed upon it being an important element in the contract of loan should appear in the document, as the money is lent for the interest. A *hath-chita* executed on account of such a loan is a hand-note and is in substance a pronote. The law cannot be evaded by merely giving it the garb of a *hath chita*. In such a case, it is naturally to be expected that it contains all the terms of the bargain and oral evidence of a contemporaneous agreement to pay interest ought not to be admitted. When the terms of such a contract are reduced into writing it becomes the only evidence and no part of the contract has any separate existence. Relaxation of the rule will open the door to fraud which it is the very object of the rule in s 92 to guard against.

"Matter On Which a Document is Silent and Which is Not Inconsistent With its Terms [Contemporaneous or Collateral Oral Agreement].—If a document actually states or sets out the consideration for the contract or transaction, it is not permissible by oral evidence to contradict, vary, add to, or subtract from the same. It is of course

permissible to prove under proviso 1 either that no consideration had been received or that a portion had been received or that consideration had been satisfied in an otherwise manner [*S Rajamma v. S M Dhondusa*, A 1970 My 271 (*Hira v. Offi Assignee*, **rel** on and cases discussed)]. The oral evidence contemplated by this proviso will not be admitted, if it is inconsistent with the terms of the written instrument [*Ebrahim v. Coursetji*, 11 B 644; *Cowasji v. Burjorji*, 12 B 335; *Cutts v. Brown*, 6 C 328]. Where a *kabuliat* provided that a tenant would hold two *hals* of land, at a certain rate, contemporaneous separate oral agreement that one *hal* would be held rent free is not admissible [*Pulin v. Ramakanta*, 1938, 1 Cal 48: A 1938 C 356]. An alleged contemporaneous oral agreement to add to the terms of the partition deed was held inadmissible, where a partition deed, in which special provisions were made for giving means of access to various portions of the partitioned property, was silent as to the means of access over a particular share [*Krishnamaraju v. Marraju*, 28 M 495: 15 MLJ 255; *Sabapathy v. Kuppusamy*, 15 MLJ 225]. Contemporaneous oral agreement inconsistent with or contradicting the terms of the document is not admissible, *eg* that an absolute sale-deed was a transaction of another nature [*Lakshmiayya v. Murahari*, A 1930 M 547]. When there is a mortgage by conditional sale, a separate oral agreement to sell is inadmissible under prov (2). Prov (*3*) does not also apply [*Halima v. Sashi*, A 1947 C 423; see *ante*: "*To show that instruments apparently absolute are only securities*"].

Where a document was in the form of a receipt for money received payable after two years with certain rate of interest, oral evidence of a contemporaneous agreement that if not paid in two years the money was to remain payable on demand is inadmissible as inconsistent with the express terms of the document. But as the document did not contain all the terms of the contract, oral evidence is admissible to show that the money was paid by way of loan, deposit, or on account of some joint adventure. Oral evidence is also admissible to prove that on the expiry of the two years there was an agreement that the money and the interest were to remain on deposit with the defendants payable on demand [*Mohammad Akbar v. Attar*, 63 IA 279: 17 L 557: A 1936 PC 171: 40 CWN 997].

Where an agreement is silent as to consideration, oral evidence is admissible [*Rameshwardas v. N J B Sugar Co*, 94 IC 371: A 1926 S 202; *Somepalli v. Chittanani, ante*; *Kanak v. Ramlakshman*, A 1955 P 458]. But when consideration is a *term* of the contract, the writing is the only admissible evidence (see *ante* p 803). An agreement of reference to arbitration in a partition suit related to matter in dispute in the suit, *viz* whether the family was joint and whether movables held by defendant were liable to be partitioned. Oral evidence of a separate agreement as to the mode of division by certain person is not admissible [*Tulsiram v. Basdeo*, 96 IC 531: A 1926 A 567]. A lessee under a registered lease can prove a collateral oral agreement regarding his preferential right to purchase the leased property if it was brought for sale [*Jahangir v. Savarkar*, A 1932 PC 231: 63 MLJ 408: 138 IC 774]. But an oral agreement prior to a sale deed that the purchaser would pay certain *taccavi* loan of vendor in case it was recovered from him is not admissible [*Nokhelal v. Seth Kisan*, A 1950 N 44; see *Krishnayya v. Md Galeb*, A 1930 M 659].

When bond is silent about interest, oral evidence of a separate agreement to pay interest is admissible. But evidence must be strong [*Rozario v. Hariballabh*, A 1927 N 195: 100 IC 794]. Evidence of independent agreement that interest was to be compound is admissible [*Sital v. Kurhan*, A 1952 N 25]. Oral evidence is inadmissible to prove agreement for a rate of interest different from that provided in the pronote [*Muthu Erulappa v. Vunuka*, 36 IC 957].

Oral evidence is not admissible to prove that a document which in terms is an out-and-out gift was really meant to be a *donatio mortis causa* [*Benode v. Ashutosh*, 16 CWN 665]. Where an appeal was compromised by reciting that "*all matters in dispute*" were adjusted, oral evidence of a separte agreement on the ground of silence is not admissible [*Rajaram v. Tuljram*, 17 IC 43]. So when a compromise is reduced to writing and a decree is drawn up, oral evidence of an agreement to receive some money is not admissible [*Abdul Hamid v. Abdul Majid*, 21 IC 305: 11 ALJ 770]. Oral evidence is not admissible in the case of a consent decree to explain ambiguity [*Ganapathy v. Subramania*, A 1933 M 516]. Only in the case of latent ambiguity can evidence be given to assist the court in construing the terms of a consent decree [*Jahuri v. Kandhai*, A 1935, P 123]. Where a case was withdrawn by plaintiff in consideration of an agreement passed by defendant and there is a suit on the agreement, oral evidence is not admissible to add a new term to the agreement [*Jagjivan v. Nathji*, 18 Bom LR 90: 32 IC 938]. Where a sale-deed was executed for Rs. 35,000, but in fact settled by oral contract to be Rs. 35,000 and the discharge of a mortgage for Rs. 1,000, the oral contract is inadmissible [*Ramakrishna v. Adityam*, 21 IC 463: 1913, MWN 850].

Where it appeared that it was agreed that the advance to the defendant on the pronote was upon the arrival of the specified date to be held as an advance by plaintiff to *H* of a sum of money which the plaintiff had separetely contracted to advance to *H* on that date, and that the joint note was to be replaced by a single acknowledgment on the part of *H*, evidence of the agreement was admissible [*Motabhoy v. Mulji*, 42 IA 103; 19 CWN 713: 39 B 399 : A 1915, PC 2]. When a partition deed was silent as to certain paddy belonging to the family which was sought to be divided, oral evidence was admissible to show that the paddy was not divided by the partition deed. It is settled law that notwithstanding the apparent tenor of a partition deed, it is open to parties to prove that partition was incomplete or that certain properties were left out [*Duraiswami v. Rajagopala*, 34 IC 712: 4 LW 239]. Where a bond provides for labour by executant in lieu of interest and the document is silent as to payment of wages and there is no negative covenant, s 92 does not bar evidence as to wages paid for work done [*Karuppana v. Pambayan*, A 1927 M 531: 101 IC 39].

A subsequent oral agreement that each mortgagor was to be liable only for his proportionate share of the money is one materially varying the terms and is inadmissible. The variation can be effected only by another written and registered instrument [*Krishna v. Sanat*, 34 IC 609: 44 C 162]. A mortgage-deed carried no interest and simultaneously with its execution, the mortgagor executed a lease in favour of the mortgagee for six years (the term of the mortgage)—*held* that evidence of an agreement intending to give an usufructuary mortgage was inadmissible [*Md Husain v. Md Ashgar*, 19 OC 328]. Where a father purchased property in the name of his two minor sons, and the question arose as to the share of each of the vendees, oral evidence as to the intention of the father is not admissible as the sale-deed was silent regarding the share of each vendee [*Md Sultan v. Mohideen*, 52 MLJ 557: A 1927 M 1102; *Ramayya v. Mannaru*, A 1930 M 590].

In a suit a promissory note, it appeared that it was customary for the bank to fix a period for payment and that on the defendant's application for loan were added the words (for six months *thavanai*) on which there was an endorsement by the bank—*Held* that the form and endorsement were admissible for fixing the date of payment [*Ponnuswami v. Vellore Com Bank*, 38 MLJ 70: 56 IC 384]. A pronote by a bank simply bore interest at 11 per cent—*Held*, that it is the usual practice of banks to make out accounts at regular intervals of six months or a year to add unpaid interest to principal [*Bharat N Bank v. Banarasi*, 5 L 129: 83 IC 190].

On the same day of execution of a pronote there was a collateral agreement giving ten months' time for payment—*Held* under ss 62, 63 of the Contract Act an agreement to give time is operative in India and English decisions to the contrary are inapplicable [*Annamalai v. Valayudu*, 39 M 129: 32 IC 869 FB].

A contract for purchase of goods was cancelled by an unconditional promise by vendee in writing to pay a sum as liquidated damages. Contemporaneous oral agreement to be excused from payment on a certain contigency, is not admissible [*Subbayyar v. Kuppaswamy*, 41 MLJ 541]. An oral agreement that the consignment should be sent when plaintiff ordered and that defendant was not bound to send consignments without definite orders would not be inconsistent with the terms of the written agreement [*Seth Laxmichand v. Shk Sahabuddin*, 70 IC 844: A 1923 N 46]. Where a vendee executed a *Varthamanan* expressing only the varying terms, *eg.*, number of bags, amount of money, time of delivery, &c, oral evidence of an agreement by which defendant was to supply goods only after the whole price was paid, is admissible [*Vairavan v. Kannapa*, 86 IC 436: A 1925 M 1029]. Under Or 34, r 4 read with r 2, a mortgagee has a statutory right to interest at the contract rate up to the due date of payment and any other arrangement could not be proved, under s 92 [*Sayaret v. Sadar*, 61 IC 241]. Where a person relinquished a portion of his leasehold land by a registered document and there was a contemporaneous oral agreement that the landlord should pay him Rs. 200—*Held* that the agreement was admissible as constituting the consideration for the relinquishment or as constituting a condition precedent under prov 3 [*Badairam v. Jhulai*, 19 ALJ 816: 63 IC 861]. Evidence of an oral agreement substituting a new executory contract in lieu of a decree is admissible [*Lachmi v. Babakali*, 44 A 258: 64 IC 990]. The interlineated words and figures in an *ekrarnama* were written after defendant had signed it. Plaintiff alleged an oral agreement before execution justifying the additions which were explanatory—*Held*, oral evidence of the agreement is admissible [*Ganga v. Motiram*, 68 IC 268: A 1922 N 191]. Where a lease is silent as to the place of payment of rent, evidence is admissible to prove subsequent agreement as to the place [*Onkar v. Badri*, 89 IC 273: A 1925 N 281]. Oral evidence of an express collateral warranty, *eg*, that a car is in perfect order is admissible [*Amies v. Birji*, 77 IC 150 : A 1924, B 41]. Despite a written contract oral representation as to the quality of goods to be supplied, *eg*, that the pens would work satisfactorily for three years, is admissible [*Indian Textiles v. Kanhaiya*, A 1959 P 378].

Implied Contract or Warranty.—The appellants used to overdraw their account with the bank. The fact that the bank charged compound interest with monthly rests appeared on the face of their pass-books. The appellants merely gave a letter in a printed form in which they merely agreed to pay interest on the daily balance—*Held* that s 92 did not prevent from proving an agreement to pay compound interest and it could be implied from the appellants' long acquiescence in such a method of calculations [*Haridas v. Mercantile Bank*, 47 IA 17: 44 B 474: A 1920 PC 61; see *Bharat N Bank v. Banarasi*, 5 L 129, *sup*]. An implied warranty as to the correctness of the extent of the property sold cannot be proved dehors the instrument [*Delhi v. Ramchandram*, A 1953 M 769].

Independent Collateral Facts Explanatory of the Instrument.—It appears that the rule will not be infringed by adducing extrinsic evidence even to contradict a deed or other writing, provided the contradiction be confined to the recitals of formal matter, which may well be presumed not to have been stated with careful precision. For instance, parol evidence has on several occasions been admitted, to contradict the recited date of a deed, order, or other instrument [*Hall v. Cazenove*, 7 RR 611; *Steele v. Mart*, 28 RR 256; *Cooper v. Robinson*, 62 RR 726; Tay s 1150].

In *Higgins v. Senior*, 11 LJ Ex 199, 201, PARKE, B said: "There is no doubt that when such an agreement (*ie*, an agreement for sale of goods) is made, it is competent to show that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contracts, so as to give the benefits of the contract on the one hand (*Garrett v. Handley*, 4 B&C 644; *Batemen v. Phillips*, 15 East 272), and charge with liability (*Patterson v. Gandasequi*, 15 East 62), on the other, the unnamed principals;.....and this evidence in no way contradicts the written agreement". [See *Ladhomal v. Chandumal*, A 1931 S 4 and *Hoe Chan Co v. Chotalal*, A 1939 R 139 *ante*]. "The true rule is that parol evidence is admissible for the purpose of introducing a new party, but never for discharging an apparent party to the contract" [Smith, LC, Vol II, 1929, p 376, notes to *Thompson v Davenport*, 9 B & C 78]. A person who describes himself in a written contract as an agent of an unnamed principal, may be shown by the party with whom he contracted to be the real principal [*Carr v. Jackson*, 21 LJ Ex 317]. Where the question is whether *A* signed a contract as *B's* agent merely, or as to render himself jointly liable with *B*, statements by *A* at the time are admissible to show intention [*Young v. Schuler*, 11 QBD 651 CA]. Parol evidence is admissible to prove whether one of the contracting parties was acting for himself or on behalf of a principal [*S I Industrials Ltd v. Rama Jogi*, 27 MLJ 501]; see however *Ebrahimbhoy P M Co v. Hassan*, A 1921 B 81: 45 B 1242: 63 IC 482]. Where a lease is in favour of one person, the fact that another person is co-sharer with him is not a matter which varies the terms of the lease [*Butto v. Gobind*, A 1939 P 540].

L K was a partner in the firm of *R L*. As such partner he was entitled to his proportion of certain shares of the Hongkong Mill and of the commission earned by his firm as agents of such mills. On his retirement from the firm in 1900 entries were made in the firm's books from which it appeared that 35 of such shares were appropriated to the said *L K* and that he from date of the entries ceased to have any interest in the firm of *R L—Held* that under provisos (*2*) and (*4*) evidence was admissible to show that in fact the arrangement was that *L K* should continue to be entitled to his share in the commission [*Narrondas v. Narrondas*, 31 B 418].

PROVISO (3): "Separate Oral Agreement Constituting a Condition Precedent to the Attaching of Any Obligation". [Conditional Documents].—This proviso means that where there is a *separate oral agreement* (either contemporaneous or as a preliminary measure) that the terms of the written contract will not take effect or will be of no force until a condition precedent has been fulfilled or a certain event has happened, oral evidence is admissible to show that the conditions not having been performed the contract did not mature so there was no written agreement at all. *Illus* (*b*) and (*j*) explain the priviso. [See *Ramjiban v. Oghore*, 25 C 401; *Jagtanand v Nerghan*, 6 C 433 and cases *post*]. But an oral contemporaneous agreement that a promise to pay on demand in a pronote which is absolute in its terms and in which the obligation attached immediately was not to be enforceable by suit until the happening of a particular event (*eg.*, until defendant's share of money awarded in a case is received by him), or in other wrods, that the legal obligation to perform the promise was to be postponed, is not such an agreement as falls within the proviso [*Ramjiban v. Oghore, Sup*; *Jaimal v. Nand*, A 1932 L 549]. But a plea of an oral agreement that a *pronote* was to come into effect only on the happening of a certain contingency is distinct from a postponement of money due under a pronote and such an oral agreement can be proved, *eg* that the real consideration was the construction by the plaintiff of a sluice, which not having been constructed defendant is not liable. [*Satyanarayana v. Anjaneyulu*, A 1935 M 310]. With the execution of a promissory note there was a collateral written agreement that no demand was to be made until certain specified

condition was fulfilled—*Held* that the accompanying or collateral agreement being a written agreement was outside s 92. But even if the collateral agreement was an oral agreement so as to come within s 92 it would fall within proviso 3 which states the Indian law in terms which are in accordance with English law [*Ady v. Admnr Genl*, 1938 Rang LR 417 : A 1938 PC 198; follo on *Narandas v. Papammal*, A 1967 SC 333; *Balaram v. Ramesh*, A 1973 Or 13]. The proviso permits the proof of a separate oral agreement as a condition precedent to the attaching of any obligation to it, but an attempt to show that the written agreement is not what it purported to be but something different is opposed to prov (*3*) [*Tatia v. Sawania*, 71 IC 477 : A 1923 N 135]. Proof of the delivery and payment of a cheque by itself is not sufficient evidence of a debt [*Aubert v. Walsh*, (1812) 4 Taunt 293 cited with approval in *Goh Kim Huang v. Koh Tech Yeow*, Suit No 2219 of 1993 dt. 20.8.1996 (Singapore HC)].

A collateral or contemporaneous agreement in defeasance of the contract must be distinguished from an agreement suspending the coming into force of the contract until some condition is fulfilled. An agreement of the latter description, *eg.*, not to make demand on a pronote until certain specified condition is fulfilled is within proviso (*3*) [*Ady v. Admnr Genl, sup*; *Narandas v. Papammal, sup*], but an agreement that one of the executants was not to be made liable on a pronote [*Tyabji T Co v. Ghulamali*, 1939 Kar 523 : A 1939 S 299], or an agreement to renew a bill payable on maturity at three months' date [*N L Credit Syn Ltd v. Neale*, 1898, 2 QB 487], or a contemporaneous oral agreement that amount of pronote would only be payable out of the profits of a firm after settlement of its accounts [*Dungarmull v. Sambhu*, A 1951 C 55], or an oral agreement that the note to be enforced unless an encumbrance on property was discharged [*Vishuram v. Ganesh*, 45 B 1155] is not within prov (*3*), as it would alter the legal effect of the instrument. Prov (*3*) clearly presupposes that the contract, grant or disposition itself remains in fact, but that the condition precedent pleaded must in its very nature be extraneous to the contract &c., and as agreed must come into existence before the obligation arises thereunder. But, if the condition pleaded nullifies entirely the effect of the instrument, the proviso cannot apply. So an oral agreement that a pronote was not to be enforced but that its amount was to be adjusted in the making up of partnership account cannot be proved as it nullifies entirely the pronote [*Chhaganlal v. Jagjivan*, A 1940 B 54]; so a contemporaneous oral agreement that the sum in the pronote is payable only after account is taken and the sum found due, is not also admissible [*Dowlatram v. Vasdeo*, A 1943 S 67].

The true construction of s 92(*3*), is that it is inapplicable in a case in which any obligation under the written contract has attached and if the effect of the alleged contemporaneous agreement is merely to suspend the performance of the obligations contained in the written contract, evidence of it cannot be granted. On the other hand it is permissible to adduce evidence of a contemporaneous agreement under which the parties agreed that until the happening of a certain event, no obligation whatever under the written contract should attach [*Mitchell v. Tennent*, 52 C 677 : A 1925 C 1007; **relied** on in *Shama Rao v. Patel*, A 1962 Mys 203; *Narandas v. Papammal*, A 1967 SC 333].

So, where a pronote is payable on demand, an oral agreement providing for a different mode of satisfaction [*Bharat N B Ltd v. Mohanlal*, 63 IC 748 : A 1921 L 74]; or a subsequent agreement varying its terms as regards its exigibility on demand [*Shk Jamu v. Md Ibrahim*, 90 IC 378 : A 1926 N 194] is inadmissible; or an agreement not to demand until settlement of accounts [*Sriram v. Sobha Ram*, 44 A 521 : 67 IC 513; *Ghansiram v. Mithan*, A 1930 A 529 : 124 IC 763—CONTRA: *Sheo Pd v. Gobind*, 49 A 464 and *Bhogi v. Kishore*, A 1928 A 289 where it has been held that an oral agreement that no obligation under a pronote should arise till there was a final

balance of account on certain transactions is admissible]; or oral agreement that the amount was to be set off against the amount due to executant on some other account [*Ram Singh v. Ebrahim*, 78 IC 418 : A 1925 S 136] is inadmissible. See further *post*: "*Rule as to Negotiable Instruments*".

> GARTH CJ, in *Jagtanand v. Nerghan*, 6 C 433, 435: "The proviso is intended to introduce into the law of evidence of this country the rule which is well established and understood in England and treated of in s 1038 (11th Ed s 1135) of Mr Taylor's book on Evidence. That rule is that, when, at the time of a written contract, being entered into, it is orally agreed between the parties that the written agreement shall not be of any force or validity until some condition precedent has been performed, parol evidence of such oral agreement is admissible to show that the condition has not been performed and consequently that the written contract has not become binding. Until the condition is performed, there is, in fact, no written agreement at all. .....But this rule can never apply to a case where the written agreement had not only become binding, but had actually been performed as to a large portion of its obligations".

Where the defence is that a pronote was executed by the defendant only as a receipt for the earnest money paid to him by the plaintiff under an agreement to purchase certain properties of the defendant and that the note was not to be acted upon on failure of the transaction, oral evidence is admissible in support of such plea [*Umrao v. Raunak*, A 1939 P 495]. In a suit on a pronote defendant's plea is that there was a collateral agreement that repayment would not be demanded but the sum would be liquidated out of the usufruct of certain land and that plaintiff had given possession of it, oral evidence is admissible to prove the discharge [*Ramjatan v. Chandrabati*, A 1960 A 746].

In a suit on pronote of Rs. 25,000 the defence was that (*1*) there was no consideration and (*2*) defendant was not liable by reason of a contemporaneous written agreement of the same date in a letter from the plaintiff. Defendant was director of a company which had since been in liquidation and it was pleaded that the note was by way of only a moral obligation and not as a legal obligation and that the letter was to the effect that the note would be effective if no other claim was made on the defendant in the liquidation of the company and when he would be in a position to pay—*Held* that the letter was admissible to control the operation of the pronote [BUCKLAND J, *Seth Kesrichand v. A E Stille*, '*Statesman*', July 29, 1927].

"The act is not an act until the final moment appointed, and that moment may by the parties be made to depend upon some future event, which thus becomes a condition precedent to the jural existence of the act" [Wig s 2410]. The rule does not exclude evidence of an oral agreement, which amounts to a condition, subject to which the written agreement has been entered into and subject to which the performance of the written agreement is to depend [*Lindley v. Lacey*, 34 LJCP 79]. See *post*, "*Any obligation*".

The leading case is that of *Pym v. Campbell, ante* to which statutory effect has been given in proviso (*3*). See *Tyagaraja v. Vedathanni*, 63 IA 126: 59 M 446, 459 *ante*]. It was held in *Pym's case* that in a suit by *B* against *A* on an agreement in writing to purchase *B's* interest in a patent *A* may prove an oral agreement at the time that his purchase was conditional on *A's* engineer approving the patent and that it was not approved [see the observation of KERLE J, in *Pym's case* quoted *ante* p 781]. Where *A* orally agreed to lease a house from *B* on condition that certain repairs were made and a lease was executed and *A* took possession, the date of lease being left blank for being filled up only after repairs; oral evidence of the facts were admissible

in a suit for legal distress against *B* [*Davis v. Jones*, 17 CB 625]. *A*, the holder of a bill made a blank endorsement and made it over to banker *B* on condition that *B* should return other bills therewith which was not done by the latter. This is admissible in support of a traverse on the endorsement by *A* [*Bell v. Ingestre*, 12 QB 317].

The condition precedent to which this proviso refers is a condition the subject of which is *dehors* the contents of the instrument, and if effect be given to the condition it cannot affect the terms of the doucment itself. Where there was a written agreement in a mortgage bond to take over some unsatisfied bonds and to pay a certain sum to the plaintiff, it is not open to the defendant to prove an oral arrangement that defendant should pay plaintiff as and when the money on bonds was collected [*Papi Reddy v. Narayana*, A 1936 M 841 : 165 IC 669]. In a written contract of sale of property subject to mortgage, a separate oral agreement that ascertainment of mortgage-due as condition precedent to the execution of sale deed, can be proved [*Parshottam v. Taimur*, A 1945 A 39 : 1944 ALJ 454].

In a suit for specific performance on a receipt acknowledging earnest money, defendant may prove an oral agreement that plaintiff would execute a deed of reconveyance as condition precedent [*Sahdeo v. Namdeo*, A 1949 N 15].

A condition precedent within s 92 is a condition without the fulfilment of which there is in effect no written agreement at all and no contractual obligation of any kind arises. Thus, in a suit by a Hindu widow for arrears of maintenance under a contract of annuity which was acted on for some years, contemporaneous oral agreement that the widow was not to receive maintenance if she did not behave well is inadmisisble [*Shivlal v. Bai Sankil*, A 1931 B 297 : 33 Bom LR 490]. Plaintiff who purchased certain properties in auction sale subject to a mortgage in defendant's favour agreed with third parties to sell some of them with the knowledge and consent of the defendant who agreed in writing to accept piece-meal payments from plaintiff and to release the lands which the plaintiff agreed to sell to third parties. In a suit by plaintiff for specific performance of the agreement, defendant cannot be allowed to give oral evidence of a condition that the release deed was only to be given when the entire mortgage debts had been discharged [*Rami Reddi v. Pattavirami*, 71 MLJ 599 : A 1937 M 124].

A deed with a blank may be prepared with a condition that a specified person is to fill it up. It then takes effect from the time when the blank is filled [see *Hudson v. Revett*, 1829, 5 Bing 368]. As to blank in deed, see *post*, notes to ss 93, 96.

In a sale deed, when the property is to pass is a strictly contractual part and is to be determined solely from the words of the writing, no oral evidence being admissible under s 92. If the terms as to when the property is to pass are ambiguous, recourse may be had to external evidence with a view to determining the intention of the parties [*Radhamohan v. Bepin*, 17 P 418 : A 1938 P 505].

"Any Obligation". [Contemporaneous Oral Agreement etc].—The expression means "a condition precedent to any obligation contained in the contract being of force or validity," *eg*, a proviso that instalments should not be paid till a certain debt has been paid. Till the condition was performed, there was, in fact, no contract at all, but where the contract had in fact, become binding and had in part been performed, it was not permissible to show that some particular provision in the written contract was subject to an oral condition precedent. The true meaning of the words "*any obligation*" in this proviso is any obligation whatever under the contract, and not some particular obligation which the

contract may contain [*Jagatanund v. Nerghan*, 6 C 433 : 7 CLR 437 *ante*; *Irfan v. Jogendra*, 36 CWN 451 : 59 C 1111; *Radha Kishen v. Durga*, 59 C 106]. 6 C 433 *ante*, was **followed** in *Ramjiban v. Oghore*, 25 C 401 *ante*, where it has been held that having regard to *illus.* (*b*) and (*j*), the proper meaning of that proviso is that a contemporaneous oral agreement to the effect that a written contract was to be of no force or effect at all, and that it was to impose no obligation at all until the happening of a certain event, may be proved. See also *Tiruvengada v. Rangasami*, 7 M 19 and p 813 *ante*. The admissibility of a contemporaneous oral agreement constituting an undertaking on the part of the plaintiff not to enforce some notes executed by the defendant until the happening of a certain event, will depend to some extent on the way in which defendant's case is presented at the *trial—per* SANDERSON, CJ. In this case RANKIN, J, expressed the opinion that it may well be that such oral agreement is within prov. (*3*) [*Tennent v. Mitchell*, 29 CWN 670 : 88 IC 435].

When a party executes sale-deed, it is not open to him to prove a contemporaneous oral agreement either by oral, or documentary evidence that title to one item of property would not pass to the vendee and that it was entered in the deed for purpose of registration only [*Kunewar Ram v. Anand*, A 1929, A 578].

A Contemporaneous oral agreement may be proved to show that an instrument was not meant to operate until the happening of a given condition; but it cannot be shown by parol evidence that the agreement is to be defeated on the happening of a given event [*Ali Jawad v. Kulanjan*, 44 A 421 : IC 131]. A contemporaneous oral agreement that a party to it is not bound according to the tenor of the pronote is not admissible [*Sornalinga v. Pachi*, 38 M 680]. In the case of a bond stipulating repayment of money with interest, a simultaneous oral agreement that no interest was to be paid but the creditor was to be in possession of a certain piece of land and to take usufruct *in lieu* of interest, is inadmissible [*Kali Deen v. Jagat*, A 1930, A 404 : 122 IC 894. As to subsequent oral agreement of a similar nature see notes to proviso (*4*)].

If the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of a further contract is a condition of the bargain or whether it is a mere expression of the desire of parties to the matter in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored [*Seth Hukum v. Ran Bahadur*, 4 PLJ 580 : 53 IC 833].

Where a property was sold to the plaintiff for Rs 480 and there was a separate agreement for payment of a certain sum to defendant as a condition precedent to the sale taking effect, it can be proved [*Mg Mon v. Ma Kin*, 5 R 636].

Defendant mortgaged his property to plaintiffs. Three days later, he passed in plaintiff's favour a pronote which stated that the amount was borrowed in cash. In a suit upon the note, defendant contended that he did not receive any consideration but that the note was passed by way of indemnity against any claim that might be made by his prior mortgagees, and the note was to be returned to the defendant duly cancelled after such re-conveyance—*held* that oral evidence is admissible under s 92(*3*). The note was to have no legal effect until the eventuality arose [*Ahmed Saheb v. Ubhanja*, 25 Bom LR 867 : A 1924, B 44 : 87 IC 37].

A executed a mortgage bond for Rs 130 bearing interest at 60 per cent in favour of *M*. Defendants, who were purchasers of the property from *A* went to *M* before their purchase for ascertaining the amount to be paid on the mortgage and it was agreed that it would be discharged on payment of principal and interest at 14 as. per cent per mensem. In a suit on the bond, such an agreement can be proved as it amounted to a contract contingent on the would-be purchaser's equity of redemption [*Sailesh v. Bechai*, 40 CLJ 67 : 84 IC 124 : A 1925, C 94].

Where a conveyance recited that property is transferred by judgment-debtor for certain consideration in satisfaction of a mortgage decree, a separate oral agreement to the effect that the vendee would proceed no further in prosecution of his claim for certain money debts can be proved [*Ranbahadur v. Awadh*, A 1939 P 411].

A condition that a lessor should not be required to execute a promised lease until he had paid off a debt, attached a condition precedent, the obligation to execute the lease, which condition must be fulfilled before he could be compelled to do so [*Giribala v. Kalidas*, 25 CWN 320 : A 1921 PC 71 : 39 MLJ 329 : 57 IC 626]. A condition precedent if not complied with vitiates a sale but a condition subsequent does not [*Dyam Khan v. Sarat*, Ch 26 CWN 218].

In a suit on a pronote, defendant pleaded that it was executed as a security to cover the advance to be made by the payee to a third party and that defendant was liable only for such sum as may be found due upon a taking of accounts between the payee and the third party—*Held* that oral evidence was admissible [*Sundram Chetty v. Damodaram*, 84 IC 146 : A 1924 M 850; *Maneckjee v. Maung Po*, 84 IC 1042].

—**Escrow.**—An *escrow* is a document deposited with a third person to be delivered to the person purporting to be benefitted by it, upon the performance of some condition, the fulfilment of which only is to bring the contract into existence. Oral evidence is admissible under this *proviso* to show that a deed was executed or delivered conditionally as an *escrow* [see *Pym v. Campbell, ante*]. The restrictive delivery may be conditional though the document is kept with the grantor [*Xenos v. Wickham*, LR 2 HL 296], or it may also be made over to the grantee [*Bell v. Ingestre, ante*]. Oral evidence is admissible under this proviso to prove such condition precedent, its effect being not to vary the written agreement, but to show that until the performance of the condition, there is no agreement at all [*Ramjiban v. Oghore*, 2 CWN 188 : 25 C 401, *ante*; see also 27 C 7. See however *Shah Mosum v. Balasoo*, 1863, Hay 576 where the document was delivered to the *party* and not to a third person]. *B* signed an agreement to take a lease of *A's* house. *A* afterwards signed the agreement but deposited it with his solicitor with instruction not to part with it until *B* obtained a reasonable person to join her in the lease. In a suit by *B* against *A*, *B* may be allowed to prove these facts to show that there was no concluded contract [*Pattle v. Hornibrook*, 1897, 1 Ch 25].

—**Wills.**—*A* a testator having left *B* a legacy by his will, executed a codicil revoking it. Declaration by *A* to his solicitor that it was not to revoke the legacy but only to be used by the solicitor to induce *B* to give up a certain house was held admissible to negative the *animus testandi* [*Lister v. Smith*, 3 S&T 282]. Whether in the case of a conditional will, the condition must appear on the face of the document or may be proved by the oral declarations of the testator, appears doubtful [*Newton v. N*, 12 Ir Ch R 118; *O'Leary v. Douglas*, 3 Ir LR 323]; but where the words used in the will are ambiguous, evidence both of surrounding circumstances and declarations by the testator may be given [*Vines v. V*, 1910 P 147—see Phip 11th Ed pp 444-45]. Two wills were executed on two dates. The later will raise ambiguity on the face of it

as to whether it was in substitution for or in addition to earlier will. External evidence can be admitted to ascertain testator's intentions [*Rajalu v. Kothandarama*, A 1965 K 122; (*Jenner v. Ffinch*, 1879, 5 PD 106 : 49 LJP 25 **reld** on)].

Rule as to Negotiable Instruments. [Unconditional Undertaking, Pronote, etc].—Oral evidence of a condition postponing the enforcement of a pronote is not admissible [*Subramania v. Narayanaswami*, 90 IC 1020 : A 1925 M 140; *Ramjiban v. Oghore*, 25 C 401 (see *ante*, "*Proviso (3)*")]. With regard to bill or note, PARKE, B, said in *Foster v. Jolly*, 1835, I C M&R 703 : "The general rule is that the maker is at liberty to contradict the value as between himself and the party to whom he gave the note; but he is not at liberty to contradict the express contract to pay at a specified time." Though s 120 N I Act precludes the maker from denying the validity of a pronote, where money has been advanced after the note had been executed and on certain conditions previously agreed upon, the promisor is entitled to prove circumstances in repudiation of his liability [*Bachan v. Dharam*, A 1933, L 456].

Under s 128 Contract Act, the liability of a surety is co-extensive with that of the principal debtor unless it is otherwise provided in the contract (see *Hodges v. Delhi & London Bank Ld*, 23 A 137 : 27 LA 168 : 5 CWN 1). Oral evidence is inadmissible to show that one of the executants of a note of hand signed it only as a surety for a certain period [*Harak Chand v. Bishan*, 8 CWN 101; *Mg Ko v. U Kyaw*, 5 R 168 : 103 IC 79; *Radhakishen v. Durga*, 59 C 106; *Abdul Hamid v. Punjab N Bank*, A 1933 L 965; *Khumaji & Co v. Damaji*, A 1934 B 39; *Venkata v. Karnedan*, A 1935 M 643—CONTRA: *Md Husain v. Hanuman*, A 1942 O 273; *Mulchand v. Madho*, 10 A 421 *obiter*]. The same is the case with bonds [*Nandlal v. Surajmal*, A 1932 N 62]. No equitable exception to s 92 can be allowed in India. Where two persons signed a pronote containing unconditional undertaking to pay, evidence is inadmisible to show that one person's liability was conditional on the other's failure to pay [*Narasimma v. Ramasami*, 24 MLJ 91 : 18 IC 696; see *Mg Kya v. Peria Kurpan*, 70 IC 872 : 1 Bur LJ 157; see however *Moolji v. Pinto*, A 1926 S 156 *post*; *Md Hussain v. Hanuman*, A 1942 O 273]. In a suit on a pronote the question whether defendant executed it by way of security for others cannot be tried except so far as it affects the question of consideration [*Durga Charan v. Lakhi*, 47 IC 917]. In the case of a pronote by *A* and *B*, *A* can give oral evidence that he joined as surety for *B*, but oral evidence cannot be given of a contemporaneous oral agreement whereby plaintiff agreed to recover the amount in the first instance from *B* [*Central Bank of India v. Nadir*, A 1924 S 13]. It has however been held that where a person executed a joint and several pronote, with others and the promises himself knows that he signed as a surety, proviso (*1*) of s 92 will let in evidence of the fact [*Mg Sein v. Ma Saw*, 82 IC 816 : A 1924 R 360].

In an action on bill of exchange or pronote against a person whose name properly appears as a party to it, it is not open by way of claim or defence to show that the signatory was in reality acting for an undisclosed principal [*Sitaram v. Chiman Das*, 52 B 640].

Where a pronote is endorsed by a person who is neither the maker nor the holder, oral evidence is admissible to prove a contract of guarantee [*Thakursey v. Kishendas*, 76 IC 282 : A 1925 S 9]. The contract by an endorser of a bill or note stands on a different footing from the maker. When the endorsement is silent, there is a presumption that every prior endorser must indemnify a subsequent one. But it is only a presumption and not the term of a contract and therefore the rules as to exclusion of oral evidence in s 92 does not apply. It is open to an endorser of a

pronote to prove that the endorsee orally agreed to recover the amount from the estate of the drawer only [*Sunderji v. Abigail*, A 1928 S 50 : 105 IC 747 (*Macdonald v. Whitfield*, 1883 AC 733 **relied** on)].

The reception of parol evidence in regard to negotiable instruments is subject to the same rules as govern written contracts generally. Therefore, oral evidence is admissible to show that a pronote executed by an individual was executed on behalf of a firm [*Muthar v. Kadir*, 28 M 544 : 15 MLJ 384; *Banerji v. Ahmed*, A 1935, R 327]. Oral evidence is admissible to show that defendant's liability on a pronote does not arise until another person to whom defendant stood surety has failed to pay [*Maneckjee v. Mg Po*, 84 IC 1012 : 2 R 482 : A 1925 R 83].

Where in a suit on a pronote, the defendant set up an oral contemporaneous agreement reduced to writing by him but not signed by plaintiff,—*held* that the agreement was inadmissible [*Hiralal v. Benarsi*, 6 L 411 : 90 IC 982 : A 1925 L 576]. In a suit upon a pronote, oral evidence to show that it was not really executed in plaintiff's favour or evidence that it has been discharged by payment to person really interested is not admissible [*Madan v. Lalchand*, A 1927 A 463 : 25 ALJ 402 : 100 IC 103; *Subbanarayana v. Ramswami*, 30 M 88 FB]. Execution of pronote being admitted, oral evidence that the money was advanced to defendant for purchase of paddy in pursuance of a partnership agreement is not admissible [*Mg Kyam v. Arunchalam*, A 1927 R 327 : 5 R 520; *Vallamkondu v. Malupeddi*, 31 M 373]. Where two persons jointly execute a bill or pronote, there is nothing to prevent one of them from proving by parol evidence that he is the surety, provided that he does not thereby intend to affect the right of the creditor to demand immediate payment from either or both [*Moolji v. Pinto*, 92 IC 667 : A 1926 S 156]. In a suit on a pronote, one of the defendants who had put the word 'witness' before his signature pleaded that he attested the document—*Held* that oral evidence to prove that defendant had borrowed and was one of the executants, is admissible [*Md v. Jai Chand*, A 1930 A 709]. Where there is a contract with the partnership and a pronote is signed by a partner in his own name, all the partners will be liable. The principle that only the maker of the pronote can be held liable, is not applicable in a case where an independent contract is alleged, and therefore, the promisee can be allowed to adduce evidence as to the independent contract [*Pynda v. P*, A 1930 M 168 (*Karamali v. Karinji*, 42 IA 48 : 39 B 261 : A 1914 PC 132; *Shanmuganatha v. Srinibasa*, 40 M 727 **relied** on)].

Same: The rules against "varying the terms" of a document as applied to negotiable instruments have been thus stated by Wigmore:—

(*1*) An extrinsic agreement as to the *mode of payment*, or the *amount* of payment, must be ineffective, since the parties have expressly dealt with those matters in the instrument and though an agreement to concede a *credit or counter claim*, as offsetting the obligation of the instrument, would be a separate transaction and therefore valid, yet the distinction between the two may sometimes be hard to draw. [Agreement to credit on a note a sum to be found due to the maker excluded (*Phelps v. Abbott*, 14 Mich 88). Agreement that any deposit made in the payee bank by the maker should be credited against the note, held admissible (*Roe v. Bank*, 167 Mo 406)].

(*2*) An extrinsic agreement as to the *time of payment* is for the same reason ineffectual, although an agreement of *renewal*, which may practically be equivalent, is in theory an agreement for an independent transaction and should be recognised. An agreement subjecting the obligation of the instrument to any *condition* or *contingency*, whether in time or otherwise, is ineffective, because the terms of a negotiable

instrument are expressly unconditional. [Agreement between maker and payee that a note payable on demand should not be payable till the death of the maker, excluded (*Woodbridge v. Spooner*, 3 B&Ald 233). Note payable on demand; stipulation that the note should not be payable till the payee delivered possession of premises and rendered account, excluded (*Moselay v. Hanford*, 10 M&C 729)].

(*3*) An agreement not *to enforce or sue upon the instrument at all* must be equally ineffective.

(*4*) An agreement between one *co-maker* and the *payee*, to hold *former* as surety only, seems at first sight to be a mere condition qualifying the face of the instrument, and therefore ineffective; but as in the case of accommodation paper, it may be that the negotiation of the instrument requires several parties having primary liability, hence the surety would have to appear as co-maker and not as a drawer, and the suretyship agreement would have to be extrinsic. Such an agreement is generally given effect to.

(*5*) The question whether one who signs as "*agent*" or "*president*" or "*guardian*" is personally liable seems to be mainly a question of interpretation: for if no such word had been inserted, the agreement would be ineffectual, as totally destroying the validity of the instrument; while if the signature had been of the principal, ward, or company, "by" the representative, the representative would not have been liable; the question thus becomes one of the construction of the document [Wig s 2444].

S 46 Negotiable Instruments Act.—Evidence to show that an instrument like a pronote the title to which generally passes by delivery, was delivered conditionally or for a special purpose only and not for transferring absolutely the property therein is admissible. There is no difference in substance but only in illustration and application between s 46 N I Act and proviso (*3*) to s 98 Evidence Act [*Sheo Pd v. Govind*, 49 A 464 : A 1927 A 292 (*Sriram v. Sobharam*, 44 A 221 **dissented** from; *New London C S v. Neale*, 1898, 2 QB 487 **follld**); *Punjab N Bank v. Cotton Factory*, A 1924 L 640; *Umrao v. Raunak*, A 1939 P 495]. Where the endorsement contained no explicit words limiting the rights of the endorsee or is a blank endorsement, it is open to the endorser to lead evidence to show that it was really a conditional endorsement for a specific purpose only, namely that of collection [*Fazil Hussain v. Taj Md*, A 1936 Pesh 181].

Other Cases.—Where a plaintiff attempted to enforce, as a contract of loan binding upon the defendant immediately upon its execution, an instrument which he verbally agreed at the time, should not so operate, and for which the defendant received no consideration, the latter may give evidence of the verbal agreement [*Annagurubala v. Krishnaswamy*, 1 MHC 457]. Where a defendant executed a pronote and pleaded that he was led to believe that plaintiff would perform *puja* which would have the effect of saving the lives of his children and they would survive the age of one year, oral evidence is admissible on the point [*Lallumal v. Reoti*, 45 A 679 : 74 IC 353]. Where in a money suit in respect of transaction of pronote and passing of title of a motor truck the defendant pleaded separate oral agreement constituting a condition precedent to the attaching of the obligations arising out of such contract, that the name of defendant No. 2 should be mutated in place of plaintiff No: 2 in the Financier's records and the Motor Vehicles Registration Office with respect to the truck in question after compliance of the required formalities, it comes within purview of prov (*3*) to s 92 [*Rati v. Ram Pd*, A 1971 P 156]. Where there is a proposal in writing for a contract to be entered into in future, oral evidence of terms not to be found in the written proposal is admissible [*Mg Shwe v. Mg Tun*, 31 IA 188 : 32 C 96 : 9 CWN 147].

A mortgage executed by a minor's guardian in favour of *T* recited that it was made to secure the payment of a certain sum which *T* had undertaken to expend in liquidating certain debts due by the minor's estate including a debt to *K*. *T* having failed to pay, *K* obtained a decree and was paid by the minor's guardian. In a suit brought on behalf of the minor against *T*, to recover the amount paid in satisfaction of *K's* decree, an oral agreement at the time of the mortgage that *T* was to obtain an indemnity either from *K* or from the minor's guardian before payment, in case the minor repudiated the debt on coming of age was admissible [*Tiruvengada v. Rangasami*, 7 M 19]. Oral evidence is admissible, where by way of defence, the object is to get rid of a contract of a sale of land, by showing that it was not the contract really entered into between the parties [*Dada Honaji v. Babaji Jagushet*, 2 BHCR 36 (*Wallis v. Littel*, 31 LJPC 100 : 11 CBNS 369 **folld**)]. See however *Cohen v. Bank of Bengal*, 2 A 598, where evidence of such oral agreement was held inadmissible—*per* STRAIGHT, J, (SPANKIE, J, **dissenting.**)].

Where an agreement for the sale of property contains the conditions that the bargain paper in respect of the sale shall be made through a *vakil*, it does not mean that it is a condition to which the bargain is subject but that it is only one of the terms of the contract [*Harichand v. Govind*, 50 IA 25 : 47 B 335 : 28 CWN 73 : A 1923, PC 47]. Where a sale is to take only if defendants succeeded in getting possession of a property in suit, oral evidence is admissible [*Mahalinga v. Hyder*, 11 IC 384 : 9 MLT 450]. Where a mortgage provided that no obligation attached till the fulfilment of certain conditions; upon fulfilment, the obligation attaches from the date of the execution, and not from the date on which the condition was fulfilled [*Jadunandan v. Koerkalyan*, 16 CWN 612 : 15 CLJ 61]. After an agreement in writing to refer certain disputes to arbitrators there was an award only by a majority—*Held* that separate oral agreement that decision of majority would be binding was inadmissible [*Baksh v. Chulia*, 5 OLJ 471 : 47 IC 960]. An *ijara patta* may be attached with the condition precedent that the lease was to operate only in the event of the lessees being able to obtain possession [*Kafiluddin v. Sabdar*, 29 CLJ 478 : 50 IC 918]. Rent is the consideration for a lease and '*avakasam*' a kind of *premium* or renewal fee paid to landlord is clearly in the nature of a condition precedent as to which evidence may be given [*Damodaran v. Achuthan*, A 1935 M 190].

PROVISO (4): "Distinct Subsequent Oral Agreement to Rescind or Modify any such Contract, Grant etc."—This proviso deals with three situations, *viz*:—

(*1*) Where a transaction has been reduced into writing not because the law requires it to be so done, but *by agreement* for the convenience of the parties, parol evidence of any distinct subsequent oral agreement modifying or rescinding it altogether is admissible. The reason is obvious. After having entered into a contract, (which the law allows to be made orally or in writing) the parties are free to make a new contract waiving, annulling, modifying or altering it. Such distinct and subsequent agreement creates a separate transaction. It is a sort of novation. Thus, parol evidence is admissible to show that the prior written contract has been waived or replaced by a new parol agreement, or the time and place of performance has been changed. For instance, a CIF contract is not required by law to be in writing and if it is not registered (see *post*, cl 3) it can be varied by oral agreement. The parol agreement must be *subsequent* in time. Agreements or negotiations prior to or contemporaneous with the written instrument, are excluded.

(2) But where a matter has been reduced into writing because the *law requires it to be in writing* for its validity, no parol evidence can be given of any subsequent agreement rescinding or modifying it. It can only be waived, rescinded, modified or

altered by another written instrument of equally solemn character. The criterion is not whether the subsequent agreement is required by law to be in writing, but whether the original contract the terms of which the subsequent oral agreement is to rescind or modify is by law required to be writing. Thus a pronote being by law required to be in writing, any subsequent agreement rescinding or modifying such contract must be in writing [see *Muthuraman v. Sellupona*, A 1937 R 521; *Ma On v. Chettyar Firm*, A 1935 R 188 *post*].

(*3*) The rule applies to all registered instruments, whether or not registration is compulsory under the law. Expression "or has been registered" refers to the *fact of registration* and not to the requirement of law. So, when a writing embodying a contract, grant, &c has been *registered* (although registration is not compulsory), parol evidence of any subsequent agreement modifying or rescinding the registered instrument is not admissible. It must be modified, altered or waived by another registered instrument.

[The word "or" in this proviso is not to be read as "*and*". So, the contention that oral evidence is admissible when the document though registered as a matter of fact is not required by law to be registered was negatived (*Nokoor v. Asutosh*, 9 CWN 214n). (Quoted in *Idris v. Abdul Samad*, A 1973 Gau 132; see also *Kadavannoor v. Kallu*, A 1971 K 333; *Madanmohan v. Srinath*, A 1973 Or 22). Apart from this section, want of registration of compulsorily registrable documents makes them inadmissible in evidence for certain purposes].

The rule laid down in this proviso is based upon the case of *Goss v. Nugent*, 2 B&Ad 58, where LORD DENMAN said:

> "By the general rules of the common law, if there be a contract which has been reduced into writing verbal evidence is not allowed to be given of what passed between the parties either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to or substract from, or in any manner to vary or qualify the written contract; but after the agreement has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreements, or in any manner to add to, or substract from, or vary or qualify the terms of it, and thus to make a new contract; which is to be proved, partly by the written agreement, and partly by the subsequent verbal terms, engrafted upon what will be thus left of the written agreement".

Wigmore says that "the application of this principle varies in practice according to the nature of the particular legal right and the actual separatsion of the transactions in time" [Wig s 2441]. "The application of the rule, resting as it does upon the parties' intent, can be properly made only after a comparison of the kind of transaction, the terms of the document, and the circumstances of the parties. Such is the complexity of circumstances and the variety of documentary phraseology, and so minute the *indicia* of intent, that one ruling can seldom be of controlling authority or even of utility for a subsequent one. The opinion of judges are cumbered with citations of cases which serve no purpose there except to prove what is not disputed,—the general principle. The application of the rule should be in almost all instances be left to the trial judge's determination" [Wig s 2442].

Oral evidence is admissible to show that the terms of a *patta* of 1830 were varied by a subsequent agreement as a contract of the kind was not required by law to be in writing, and in any event the Registration Act was not then in force [*Amarnath v. Trilochan*, A 1943 C 565 : 76 CLJ 251].

A promissory note being by law required to be in writing, any distinct subsequent agreement rescinding or modifying such contract must be in writing. Thus oral evidence to prove that the promisee agreed to discharge or did discharge one of the joint executants [*Muthuraman v. Sellupona*, A 1937 R 521], or that he agreed to take less than what is due under the pronote [*Ma On v. Chettyar Firm*, A 1935 R 188] is admissible.

If in a suit on a pronote, defendant's plea is that the amount was agreed as an advance towards his pay and bonus and that as they had fallen due before date of suit, it was discharged; oral evidence is not excluded. But if the plea is that the pronote was not payable on demand, *ie* was not enforceable until it was discharged, s 92 would exclude oral evidence [*Satheppa v. Muthuswami*, 92 IC 393 : A 1926 M 537]. An oral agreement by the executant of a pronote that payment should be made in the form of transfer of land is not in itself satisfaction but an agreement modifying the terms of the original contract and s 92(*4*) excludes such evidence [*Nachiappa v. Theivanai*, A 1934 R 228; see A 1920 B 115; A 1919 M 833].

Contemporaneous oral agreement varying the rate of interest is also admissible [*Gopal v. Achut*, A 1941 N 271]. Under s 63 Contract Act the promisee can discharge the promisor from his obligation to form the contract without any consideration or fresh agreement. Where there was not merely an agreement to remit but there was actual remission or dispensation in respect of obligation of the debtor to pay interest upon the money advanced by pronote, it was an one-sided act on the part of the promisee and s 92(*4*) cannot be invoked [*Jitendra v. Banerjee*, 47 CWN 213 : 76 CLJ 115]. As to the effect of additions upon a promissory note by way of memorandum of record of the terms of and oral agreement or by way of fresh agreement varying the terms of the pronote, see *Joharmal v. C Firm*, 14 R 29.

A receipt which says: "I release you from the liability to pay compound interest as written in the said mortgage bond" is admissible though the receipt is not registered and it operates as a full acquittance for the money already paid [*Kailash v. Sheikh*, 42 C 546]. When an instalment bond executed after the mortgage-deed merely recited that a certain amount was payable on a certain date and the mode in which that instalment was to be paid and it appeared that there was no term in the mortgage-deed directing payment in a particular way, the bond was held admissible [*Sasi Bhusan v. Ram Ch*, 35 CWN 861]. Subsequent oral agreement by which the joint and several liability of the executant under a pronote is split up with the consent of all parties into a several liability is not obnoxious [*Rangasami v. Somasundaram*, A 1928 M 173]. When parties who have bound themselves under a written agreement depart from the terms and adopt some other line of conduct, it is incumbent on the party endeavouring to enforce a substituted agreement to show, not merely what he understood to be the new terms, but also that the other party had the same understanding [*Dinanath v. Metharam N & Co*, 33 CLJ 577]. Evidence not of oral agreement varying terms of written contract but of different contract is admissible [*Shailesh v. Bechai*, 40 CLJ 67].

One of the mortgagors can enter into an oral agreement with the mortgagee for the redemption of his share only of the mortgage and proof of such agreement by which money is paid is not precluded by s 92 prov (*4*) [*Kandaswamy v. Pakkiriswamy*, A 1928 M 1050]. At the time of presentation for registration of a sale-deed the executant denied and stated that he had executed a mortgage and the parties agreed that it should be treated as a mortgage. Proviso (*4*) did not prevent the successor in interest of the executant from proving that the transaction was really a *mortgage* and not a sale [*Ganga v. Phoga*, A 1933 L 318].

altered by another written instrument of equally solemn character. The criterion is not whether the subsequent agreement is required by law to be in writing, but whether the original contract the terms of which the subsequent oral agreement is to rescind or modify is by law required to be writing. Thus a pronote being by law required to be in writing, any subsequent agreement rescinding or modifying such contract must be in writing [see *Muthuraman v. Sellupona*, A 1937 R 521; *Ma On v. Chettyar Firm*, A 1935 R 188 *post*].

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not evidencing an equitable mortgage or its terms, s 92 would be no bar to the reception of independent oral evidence to establish an equitable mortgage [*Muthiah Chetty v. Naidu*, 31 MLJ 347 : 35 IC 804; see *ante* s 91: "*Mortgage by deposit of Title Deeds and Oral Evidence*".

A CIF contract is not required by law to be in writing. If it is not registered it can be legally varied by an oral agreement modifying its terms [*Durga Datt v. Wood & Co*, A 1933 L 453].

Oral evidence is not admissible to show that a deed of gift was revocable by donor if future services were not rendered by the donee [*Ranga Rao v. Kithari*, 1917 MWN 634].

In an execution case the parties compromised and certified to the court adjustment of the decree. The fact that the liabilities under the decree form the consideration of the compromise, did not prevent that compromise from being a new and independent contract which might form the basis of a suit which might be proved by oral evidence and such evidence would not amount to contradicting, carrying, etc the terms of the decree [*Ratanlal v. Anwarkhan*, 53 IC 527; see also *Rangal v. Chunnilal*, 60 IC 204 : 16 NLR 204].

An under-*raiyati* interest of the value of less than Rs. 100 created by a registered instrument, does not preclude evidence of an unregistered instrument to show that the interest has been relinquished [*Sarman v. Molla*, 57 IC 949].

Subsequent Rescission.—A contract *required by law to be in writing* may, whether before or after breach, be *wholly rescinded* by an oral agreement, even though the latter be not itself enforceable [*Morris v. Baron*, 1918 AC 1 (**disapproving** *Williams v. Moss's Empires*, (1915) 3 KB 242); *Br & Benningtons v. N W Cachar Tea Co*, 1923 AC 48]; or by abandonment [*Pearl Mill v. Ivory Tannery*, (1919) 1 KB 78; *Fisher v. Eastwoods*, (1936) 1 All ER 421]; but it cannot be *partially abandoned or varied* thereby [*Stead v. Dawber*, 10 A&E 57; *Vezey v. Rashleigh*, (1904) 1 Ch 634—Phip 11th Ed p 813].

Modification or Variation of Written Contract by Equitable Principle.—If parties who have entered into definite and distinct terms involving certain legal results—certain penalties or legal forfeiture—afterwards by their own act or with their own consent lead one of the parties to suppose that the strict rights arising under the contract will not be enforced, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between parties [*per* LORD CAIRNS in *Hughes v. Metropolitan Rly*, (1877) 2 AC 439, 448; see also *Combe v. C*, (1951) 1 All ER 767]. Applying the above principle it has been held that written contract may not be modified by oral agreement, but a party may by conduct or oral assurances induce the other party into believing that the contract need not be performed in accordance with its written terms. The principle of equity known as "*quasi* estoppel" should apply in such a case [*Dominion v. Ram Rakha*, A 1957 Pu 141]. The rule of estoppel must prevail against a pure rule of procedure contained in s 92 [*State Bank v. Jasroop*, A 1974 MP 193].

Oral or Unregistered Agreement to Modify or Rescind Registered Contract, etc.—Parties may substitute another contract in the place of the original contract but if the law requires that it shall be made with certain formalities such as writing and registration, than unless it is so made, the old contract subsists. Thus, a subsequent oral agreement suppressing a forfeiture clause in a mortgage-deed is not admissible [*U Kyo v. Mg Pan*, 47 IC 154]. Proviso (*4*) precludes evidence of oral agreement to

Where a partner of a firm executed a rent note in his name and after his retirement from the partnership, the shop continued to be in possession of the partners of the reconstituted firm, oral evidence is admissible to show that there was apart from the rent note, a distinct subsequent oral agreement modifying the terms of the original contract or grant and that the partners of the firm, both before and after its re-composition, were the real tenants [*Niranjan v. Dhyan*, A 1976 SC 2400].

A will is neither a contract nor a grant nor a disposition of property until the death of the testator makes it operative. Hence a registered will can be revoked by an unregistered document and s 92(*4*) is no bar [*Md Yunus v. Abdur Sattar*, A 1938 M 616 : 1938 1 MLJ 444].

Substituted Mode of Performance or Voluntary Postponement.—The mere acceptance of a substituted mode of performance [*Leather Co v. Hieronimus*, LR 10 QB 140] or a voluntary postponement of performance at the request of the other party [*Ogle v. Yane*, LR 3 QB 272; *Besseler v. S D Coal Co*, 1938, 1 KB 408], will not amount to a new contract rescinding the old [Phip 11th Ed p 813; *Cf Ram Ch v. Kailash*, 58 C 532 *post*; *Sashi Bhusan v. Ram Ch*, 35 CWN 861, *sup*].

Oral Agreement to Lease.—Where there is an oral agreement to grant a lease, s 92 does not preclude proof of an agreement by implication or inference as to the time of commencement of lease [*Kailash Chandra v. Bijoykanta*, 23 CWN 190].

Admissibility of Oral Evidence to Rescind or Modify a Contract, etc Reduced into writing.—As to the meaning of the word "oral" in this proviso, see *ante*: "*No Evidence of any Oral Agreement or statement &c*". As to admissibility of oral evidence of conduct or intention to contradict, vary &c a document, see *ante*.

Under s 92(*4*) oral evidence is admissible to prove subsequent modifications made in a written agreement to refer matters in dispute to arbitration [*Pyarelal v. Chanaram*, 83 IC 22 : A 1925 N 203]. An agreement to convey though reduced to writing, is not required by law to be reduced to writing and it can therefore be modified by an oral agreement entered into by the parties [*Hutchi v. Bheema*, A 1960 M 33]. A lessor can recover enhanced rent from lessee on the basis of an agreement subsequent to an instrument which is neither required by law to be in writing nor to be registered [*Abdul Kadir v. Noor Md*, A 1959 K 400]. By a will in 1892 a testator gave all his properties to *P* and appointed him his sole executor. After the testator's death a letter signed by him was discovered addressed to *P* dated 28th April 1895, in which he requested him to sell some of his properties and to give the sale proceeds to his brother, *R*. In a suit for administration of the testator's estate on the strength of that letter—*Held* that extrinsic evidence to show a specific trust created by the letter, was inadmissible [*Taylor v. Raja of Parlakimedi*, 32 M 443, 454].

Where the *muchlika* by the tenant fixes the rent, he cannot let in oral evidence to prove variation of the contract, and any length of payment of lesser rent will not help the tenant—Effect of a letter written by the *zemindar* that the reduction hitherto granted will be withdrawn [*Maharaja of Bobbili v. Appala*, 32 IC 703 : 1916 MWN 149; see also *Manindra v. Durgasundari*, 20 CWN 680]. The rent note is executed evidencing certain terms of lease agreed upon between the landlord and the tenant and it certainly would be a contract or at least a disposition of property. So no oral evidence to vary the terms of such a contract or disposition of property is admissible. [*Roshanlal v. Munshi Ram*, A 1981 Punj 73, 74]. Along with deposit of title-deeds, a letter was given, giving a personal remedy if the property did not cover the debt. The letter was a simple mortgage and is inadmissible for want of registration. The letter

An oral agreement to forego interest on a mortgage bond in consideration of payment of principal in a lump within a certain date is inadmissible [*Mg Shwe v. C Firm*, 41 IC 913]. A subsequent agreement to take less than what is due under a mortgage is inadmissible as it modifies the written contract [*Malappa v. Matum Nagu*, 42 M 41 FB : 48 IC 158; *Yegnarayana v. Suppan*, 100 IC 54 : A 1927 M 111; *Jagannath v. Shankar*, 44 B 55 : 54 IC 689; *Ghanaya v. Rallia*, A 1928 L 893 : 9 L 597; *Mg Ba v Nanigram*, A 1934 R 316]. An oral agreement to accept a conveyance of six shops valued at Rs. 95,000 and Rs. 7,000 in full satisfaction of a mortgage debt of Rs. 1,12,000, is not admissible [*Md Niaz v. Nanhi*, A 1929 A 615]. So, an agreement whereby a lesser amount was agreed to be taken in full discharge of a mortgage or a different period was fixed, would be a variation [*Namagiri v. Srinivasa*, 27 IC 269—CONTRA: *Mahim v. Ramdayal*, 30 CWN 371; *Ramjan v. Jayanti*, 30 CWN 710; *Bhabasundari v. Ramkamal*, 44 CLJ 269]. It has however been held that where in a suit by mortgagee for sale, the mortgagor pleaded that there was an oral agreement between him and the mortgagee that the mortgage amount should be settled at a certain amount and certain property should be sold to the mortgagee in full discharge of the mortgage debt, evidence to prove such oral agreement is admissible [*Krishnasami v. Srinivasa*, A 1937 M 261. See *post*, "*Oral Evidence in extinguishment or Release of Rights Under a Written Contract*," p 826]. It has also been held that subsequent oral agreement showing a different mode of payment or discharge or providing means for the satisfaction of the bond, *eg.*, mortgagee would be placed in possession of a portion of the mortgaged property and receive the profits in satisfaction of his dues, is admissible [see *Ramavatar v. Tulsi*, 16 CWN 137; *Kamala v. Babunandan*, 11 CLJ 39 (cited *ante* p 796); *Tarapada v. Hajia*, A 1956 C 625; *Balam v. Sadireddi*, 53 MLJ 863 : A 1928 M 233 : 107 IC 417; *Baidram v. Tikuram*, 39 A 300; *Madari v. Baldeo*, 27 A 351 FB; *Lakshmi Narasimha v. Raghavamma*, A 1936 M 380; *Narain v. Mahanth*, A 1952 P 421. *Cf Ariyaputhira v. Muthukumarasami*, 37 M 423; *Ram Baksh v. Durjan*, 9 A 392 which was accepted as good law in *Indrajit v. Lalchand*, 16 A 168 (**affirmed** in 27 IA 93 : 22 A 370)].

In Rangoon it has been held that a verbal agreement extending the time of repayment of a mortgage debt and altering the mode of repayment is excluded [*Mg Ba v. Nanigram*, A 1934 R 316]. Where the mortgagor intends to sell the mortgaged property to the mortgagee, evidence of settlement as to the money due under the mortgage is not excluded [*Harikishen v. Nazir*, A 1934 O 115]. An oral agreement by lessor and lessee that lessor should give credit for a certain sum for having cut trees is admissible, as the transaction is a mode of payment of rent or a discharge or waiver of a portion of rent [*Jhabba v. Chhajoo*, 94 IC 169 : A 1926 A 445]. So also, evidence of an oral agreement that mortgagee had agreed to allow credit for certain items and that a particular sum had been paid in a particular manner is admissible [*Sukhlal v. Murari*, 95 IC 1019 : A 1926 O 273].

Where a bond stipulated payment of interest, a simultaneous oral agreement that creditor was to be in possession of a certain land *in lieu* of interest is not admissible [*Kali Deen v. Jagdat*, A 1930 A 440 : 122 IC 894]. Evidence of a contemporaneous oral agreement that compound interest should be mentioned in the mortgage-deed, but that simple interest only would be realised, is not admissible. Nor would the fact that simple interest was a matter of fact realised, entitle the mortgagor to a variation of the written contract [*Abdul Aziz v. Amanmal*, A 1925 C 276 : 78 IC 742; *Manikka v. Doraiswami*, 102 IC 141 : A 1927 M 1158]. Oral agreement to relinquish mortgagee's right to interest on the mortgage money [*Jwala v. Mohan*, 48 A 705 : 97 IC 162 : 24 ALJ 839; *Radhaswami v. Hanskumar*, A 1959 MP 172]; or to accept interest at a lower rate is inadmissible [*Sukhlal v. Murari*, 95 IC 1019 : A 1926 O 273]. Oral

rescind a registered contract [*Namagiri v. Srinivasa*, 27 IC 269]; or of conduct [*Srinivasaswami v. Athemaram*, 32 M 281]. Defendant's plea that the consideration of a registered deed of sale was not Rs. 300 as stated therein, but the marriage of her daughter to the plaintiff, can be proved by oral evidence, as the matter related to disproof of recital [*Vasudeva v. Narasamma*, 5 M 6]. Where the written contract itself provided that the parties would be at liberty to reduce the rate of commission by mutual consent and the rate was reduced by oral agreement, it was not a distinct subsequent oral agreement and could be proved [*Mirza v. K F & Co*, A 1946 A 489].

Where the defendant claimed certain property as a preferential heir and also set up an alternative defence of an alleged oral agreement cancelling a registered deed of sale, the defence was held admissible, as the object of oral agreement was not to rescind the original transaction but to transfer any rights, acquired by the plaintiff to the defendant and was an entirely new transaction [*Rakhmabai v. Tukaram*, 11 B 47]. Where the plaintiff sought to attach a certain *hak* as belonging to his judgment-debtor *K*, the defendant who was the original grantor of the *hak* to *K*, pleaded a re-grant of it to him by *K*, and produced the original *sanad* bearing an endorsement by *K*—*Held* that the defendant was at liberty to prove the alleged re-grant, as it was a transaction entirely distinct from the original grant, and therefore not one falling under this proviso [*Herambadev v. Kashinath*, 14 B 472; **folld** in *Chowdhri Bhagwan v. Chandri*, 129 PWR 1908].

The exception at the end of proviso (*4*) applies to any agreement whether executed or executory. The proviso only applies where the original contract is rescinded or modified, and does not apply where subsequent contract is made, independent of the original contract that one party shall be discharged from it, so far as that can be done as between the parties to the subsequent contract. Such a subsequent contract can be proved even though only oral [*Goseti Subba v. Varigondo*, 27 M 268 : 14 MLJ 218, see *Emam v. Baijnath*, 3 CLJ 576. See *post*: "*Oral evidence in extinguishment or release of rights under a written contract.*" In a suit upon a *hundi*, defendant pleaded payment of four annas in cash and an oral agreement to accept *hundis* payable in future for twelve annas—*Held* s 92 did not apply [*Kalumal v. Kessumal*, A 1929 S 153 (*Smith v. Trowsdale*, 23 LJQB 107 **folld**)].

It was agreed in a sale-deed that as long as a certain latrine existed, the vendor would have a right of easement in respect of it. The latrine was afterwards removed by agreement of the parties and oral evidence of the subsequent agreement is admissible [*Suraj v. Maheswari*, 96 IC 276 (A) J 122].

No oral agreement which purports to modify the terms of a registered mortgage by reducing the amount recoverable, by taking away the right of sale, and by providing for the payment of the reduced debt by a sale of other property can be proved [*Maharaj Singh v. Balwant*, 28 A 508]. The plaintiff mortgaged certain property to the first defendant, who sold it by auction under power of sale in the mortgage deed, and the defendant purchased it. In a suit by the plaintiff to set aside the sale and redeem evidence of an alleged oral agreement that first defendant had promised to postpone the sale for four days and that the second defendant had notice of it was admissible as it was merely an agreement to forbear, for four days, from the exercise of the power of sale given by the mortgage [*Trimbak v. Bhagwandas*, 23 B 348]. Subsequent oral agreement that mortgagee promised to allow redemption at any time is not admissible [*U Kyo v. Mg Pan*, A 1923 R 102 : 74 IC 154]. As to admissibility of evidence to prove an oral agreement whereby property other than what was comprised in the mortgage-deed was placed in mortgagee's possession, see *Baid Ram v. Tikaram*, 39 A 300.

is inferred from conduct [*Manindra v. Durgasundari*, 20 CWN 680; *Lakhatulla v. Bisambhar*, 12 CLJ 646]. When the agreement to reduce rent fixed by a registered lease is admitted by the lessor, the lessees can rely on it; and s 92 does not affect the case [*Satyesh v. Dhunput*, 24 C 24. Explained in *Radha Raman v. Bhabani*, 12 CLJ 439 : 6 CWN 60, where it has been held that a contemporaneous oral agreement cannot be proved to show that the rent is less than what is stated in a registered *kabuliat* and that acts and conduct of the parties can only be proof either (1) of a contemporaneous oral agreement varying the terms of a registered contract or (2) of a subsequent oral agreement having the same effect. In the former case the evidence is excluded by s 92, and in the latter case by proviso (*4*) to s 92. See *Rajkumar v. Rajani*, 13 IC 449]. Where there is a registered lease, oral evidence is not admissible under s 92 to prove surrender and abatement of rent [*Sarat v. Nitya*, 13 CLJ 284; *Narbadji v. Gopal*, 87 IC 29 : A 1925 N 459], or to modify any of its terms [*Jadunandan v. Maho*, A 1939 P 429]. In a suit for rent under a registered lease, oral evidence that defendant had not taken possession and that there was rescission of the lease is not admissible [*Mangladha v. Abdul*, A 1933 L 278]. A raiyat can orally surrender a holding under s 86 B T Act[11] if the lease is not for a fixed period, and possession is given up although he holds under a registered lease and s 92(*4*) does not apply [*Poran v. Indra*, 47 C 129].

Where tenancy was created by a lease which provided that the rent was payable partly in paddy and partly in cash, and if the rent in kind is not duly delivered, the tenant would be liable for a specified fixed sum, as its price—*held* that evidence to show that money value was put in only for the purpose of registration and that real intention of the parties was to realize the current price of the paddy is not admissible [*Afar Moral v. Surjo*, 12 CLJ 649 : 15 CWN 249].

A document (in the case of a *solenama* in a suit) which embodies a contract for variation of the rent payable in respect of a lease is in essence a lease, and if it is not registered, it is not only not admissible in evidence, but it does not even constitute a valid and operative contract between the parties [*Bogha Mower v. Ram Lakhan*, 27 CLJ 107 : 41 IC 804; *Attar v. Chandu*, A 1929 L 291 : 10 L 685; *Kailash v. Madan*, 41 CWN 107; *Atul v. Zahed*, 45 CWN 129 *ante*; *Kamini v. Haripada*, A 1939 C 416 : 69 CLJ 163]. A compromise in a mutation proceeding varying the terms of a registered mortgage deed is not admissible without registration [*Sadaruddin v. Ahmad*, 5 ALJ 717].

Oral evidence is not admissible for contradicting a statement in a registered *kabuliat* as to the amount of rent, but evidence is admissible to show that the *kabuliat* was never intended to be acted upon or enforced or that there was a waiver of some of the terms. The evidence that since the execution of the *kabuliat* the tenant paid rent at a lower rate than that stated in the *kabuliat*, is admissible to show that the intention of the parties was that the *kabuliat* from the very first was not intended to be acted upon or that there had been a waiver by the parties [*Beni Madhab v. Lal Moti*, 6 CWN 242 (**folld** in *Manindra v. Durgasundari*, 20 CWN 680); *Hadu v. Ramdulal*, A 1944 P 35]. The last proposition that evidence may be given of waiver is not supported by later authorities [see *Lalit v. Gopalichuk Coal Co*, 39 C 284 FB; *Lakhatulla v. Bishwambhar*, 12 CLJ 646; *Kailash v. Darbaria*, 20 CWN 347; *Manindra v. Durgasundari*, 20 CWN 680]. But when the plea is that an agreement the terms of which had been embodied in a written contract was not intended to be

11. B.T. Act has been repealed.

evidence that although 24 per cent was mentioned in the bond, the creditor was in the habit of taking 15 per cent at the time of repayment is inadmissible [*Ramalingam v. Chettiar*, A 1927 M 620 : 52 MLJ 612]. Where interest in the bond was 2 per cent, a subsequent oral agreement to receive at 1½ per cent cannot be proved even though some interest was paid at 1½ per cent and mortgagee made entries in his account at that rate [*Narayan v. Keshosa*, A 1930 N 235]. Subsequent oral agreement not to charge compound interest is inadmissible [*Jogendra v. Khoda Buksh*, A 1924 C 380 : 72 IC 554]. Subsequent agreement that the holder of registered bond would take the rents of certain tenants in satisfaction of interest is admissible [*Autu v. Ajudhia*, 9 A 249].

An unregistered agreement purporting to set out the manner in which rents and profits of the mortgaged property were to be dealt with, at variance with the stipulation in the registered mortgage, is inadmissible [*Saiyid Abdulla v. Saiyid Basharat*, 40 IA 31 : 17 CWN 233 : 35 A 48]. Terms of a registered family arrangement cannot be modified by subsequent unregistered document [*Kamalmukhi v. Siya*, A 1962 P 215]. Subsequent oral agreement that the mortgagor (and not the usufructuary mortgagee as provided in the bond) should pay rent is inadmissible [*Shk Budhu v. Sital*, A 1939 P 142]. Oral evidence is not admissible to prove a contract splitting up the contract in the mortgage bond [*Krishna v. Sanat*, 44 C 162 : 21 CWN 740].

A conveyance, *eg.*, a sale having been registered, evidence to prove an oral agreement to rescind it was not allowed [*Umedmal v. Daveebin*, 2 B 547; *Bijjukallu v. Veddula*, 15 IC 282; *Pichammal v. Ponnambala*, 15 IC 326]. S 92(*4*) excluded oral evidence of an agreement to sell following a registered mortgage [*Maung Myat v. Maung Law*, 3 R 243 : 89 IC 875]. An oral agreement that a registered sale-deed shall be null and void until vendee executes an agreement of re-purchase cannot be proved [*Veerappa v. Ko Ba*, A 1933 R 310]. An oral agreement by which the vendee was to retain portion of the consideration till he got possession of the entire property, is inconsistent with the terms of the registered sale-deed and is inadmissible [*Muthusami v. Dharmaraja*, 94 IC 302 : A 1926 M 495].

Where a *kabuliat*, which was not compulsorily registrable, was registered, the defandants were not allowed to prove the subsequent oral agreement to vary the terms of the lease; the word "or" in this proviso is not to be read as "and" [*Nakoor v. Ashutosh*, 9 CWN ccxiv]. As to subsequent oral agreement to rescind or vary the term of a registered lease, see also *Dwarkanath v. Bhogoban*, 7 CLR 577 and *Banku Behari v. Shama Churn*, 2 CWN cclxv. Non-realisation of rent at the rate stipulated in a registered *kabuliat* and realisation at reduced rate implying waiver, cannot be pleaded. Such a variation or reduction could only be made by another registered instrument [*Lakshmi v. Nabadwip*, 56 C 201 : A 1929 C 437; *Shiva Pd v. Lalit*, A 1943 P 151]. But where the question is whether a particular sum due under a registered lease has in fact been remitted, oral evidence is admissible to prove it as it is not a question of alteration of rate of rent *Ramkumar v. Ramnath*, A 1942 P 315; see *post*: "*Oral evidence in extinguishment or release of rights under a written contract*"]. Where an annual rent was reserved in a lease, a subsequent unregistered agreement whereby the landlord agreed to take a reduced rent for a year only, is inadmissible [*Durga Pd v. Rajendra*, 40 IA 223 : 18 CWN 66 : 41 C 493]. Any variation of rent reserved by a registered instrument or of a term as to payment of rent must be made by a registered instrument and oral evidence is inadmissible to prove such variation and agreement is none the less oral because it

Oral Evidence in Extinguishment or Release of Rights Under a Written Contract [Release of Mortgage].—Where there is a stipulation in a bond that the only evidence of payment should be payment endorsed on the bond itself, it does not preclude the parties from adducing other evidence of discharge [*Ramkripal v. Baleswar*, A 1941 P 246; *Sago v. Ramjee*, A 1942 P 105]. Generally speaking evidence in proof of payment or other satisfaction of a claim does not come within the section or the proviso. Thus, oral evidence is admissible to prove the discharge and satisfaction of a mortgage bond. Proviso (*4*) does not exclude such evidence [*Ram Lall v. Govinda*, 4 CWN 404; *Krishnaji v. Kashirao*, 90 IC 450 : A 1926 N 220]. A release of a debt may also be effected by parol, but if it is in writing it should be registered if it falls within s 17, Registration Act. There is nothing in law to exclude oral evidence of the discharge or release of a mortgage debt when the plea is that it was made partly by payment of money and partly by release of the debt [*Mahim v. Ramdayal*, 30 CWN 371 : 42 CLJ 582—(*Jagannath v. Shankar*, 44 B 55 **disstd** from); see also *Emam v. Baijnath*, 3 CLJ 575; *Gosetti v. Varigonda*, 27 M 368]. In *Debendra v. Mirza Abdul*, 10 CLJ 150, 173 it has been observed that there is a divergence of judicial opinion as to whether a release of an interest in immovable property may be effected by parol or only by registered instrument and that in 27 M 368 and 3 CLJ 576 (*ante*) the matter was not presented before the court from the point of view of ss 54 and 58 T. P. Act. 27 M 368 was **followed** in *Chowdhri v. Chandri*, 129 PWR 1908 (*per* JOHNSON, J) and *Narra Sri v. Koganti*, 48 MLJ 280 : 87 IC 246 and *Mahim v. Ramdayal, sup* were relied on a *Ramranjan v. Jayanti*, 30 CWN 710 : 96 IC 111. In another case it has been held that it is open to a mortgagor to prove that the mortgage has been satisfied not merely by part payment in full of the amount due, but by part payment and remission of the balance [*Bhabasundari v. Ramkamal*, 44 CLJ 269 : A 1927 C 27; *Jagannath v. Shankar*, 44 B 55 **disstd** from)]. It has also been held that a *solenama* for the discharge or satisfaction of a registered mortgage bond is a contract for satisfaction of the mortgage in a particular way. It is not a document with a contract for varying the terms of mortgage and is admissible in evidence without registration [*Ram Ch v. Kailash*, 58 C 53 : A 1931 C 667 (*Mahim v. Ramdayal*, **folld**)].

A distinction appears to have been drawn in some cases between acceptance in *fact* of a lesser amount in whole or part discharge of the debt and the subsequent oral *agreement* to do so, making the former admissible and the latter inadmissible; [*see* judgment of SADASIVA AYYAR, J, in *Malappa v. Matum*, 42 M 41, 45 FB; JACKSON, J in *Balasundara v. Ranganatha*, 53 M 127; *Ariyaputhira v. Muthukumaraswamy*, 37 M 423; *Bapanamma v. Kristnamma*, 30 M 231; *Karampalli v. Thekka*, 26 M 195; *Shanmugasundra v. Sivalinga*, A 1952 M 675]. So in a suit for redemption of a registered *Zarpeshgi* oral evidence to prove the oral settlement in discharge of the *Zarpeshgi* is admissible because it is a case of total extinguishment of the *Zarpeshgi* and not a case of varying the agreement by setting up a subsequent transaction [*Punit v. Mahabir*, A 1959 P 531].

In Bombay a view **contrary** to that in Calcutta was taken and MACLEOD, CJ, observed that a plea of discharge by acceptance of a lesser amount than is due under the mortgage is none the less an agreement which modified the original agreement of mortgage and oral evidence is inadmissible and pointed out the danger of allowing such a plea [*Jagannath v. Shankar*, 44 B 55; see also *Malappa v. Matum*, 42 M 41 *ante*]. The view in Bombay appears to be more in consonance with the letter and spirit of s 92. A relaxation of the rule would also give rise to a plea that there was a subsequent oral agreement to forego interest or to take interest at a lower rate, which in substance implies a plea of discharge by acceptance of a lesser amount. But it has

been held in many cases (*ante*) that an oral agreement modifying the rate of interest is inadmissible. In any case it would seem that when payment or discharge has not in fact been made, an oral agreement or promise to accept less would be inadmissible. A later case has held that an oral agreement to receive a lesser amount than was due on a registered mortgage cannot be proved and in such a case the actual discharge cannot also be proved [*Yegnarayana v. Suppan*, 100 IC 54: A 1927 M 1111]. The alleged discharge in *Yegnarayana's case* was said to have been in pursuance of an undertaking underlying the mortgage contract which was that the rate of interest should be Rs. 1-4 and not Rs. 3-2 as stated in the contract. (See *Vaidyanathan v. Kandappa*, A 1931 M 636, 638 *post*). An oral agreement that on defendant's paying Rs. 15,000 more, the entire claim for interest up to certain period would be discharged and balance of interest would be remitted, and a plea of payment of the amount in discharge is inadmissible [*Sukhlal v. Jetha*, A 1928 B 522 : 20 Bom LR 1455]. Where in a mortgage deed there is an express term that payment should be made in a certain way, the mortgagor cannot be allowed to prove discharge in another way by a subsequent oral agreement [*Khublal v. Bechan*, A 1940 P 49].

Where in a mortgage claim defendant pleaded satisfaction on the strength of an unregistered agreement which *inter alia* provided for acceptance of a lower rate of interest, it was inadmissible. There is a difference between a receipt and a remission or a release. It is the payment of the money which extinguishes the mortgage or limits the liability and the receipt does no more than evidence the fact. Not so a release. The extinguishment or diminution of liability is in that event effected by the agreement itself. If the agreement is oral, it is hit by proviso (*4*), for it "rescinds" or "modifies" the contract. If it is in writing, it is hit by s 17(*1*)(*b*) Regn Act [*Kashinath v. Bhaskar*, A 1952 SC 153 : 1952 SCR 491].

Same.—A mortgage bore interest at 7½% p a, but on default of payment of principal or interest it was to become 9%. The mortgagors pleaded an agreement to waive the claim of higher interest under the default clause and also that the mortgagee had actually accepted interest at the lower rate—*Held*, that so far as the alleged agreement is advanced as imposing any legal obligation to accept interest at the lower rate always, it is a variation of the contract and therefore inadmissible; but in so far as it is put forward merely as a promise of grace imposing no legal obligation, s 92 is no bar. The only value of the evidence of the agreement would be to support other evidence that such less amount was actually accepted, not on account or in part payment, but in satisfaction of a large amount due. To state the proposition in another way, if the evidence of such acceptance cannot be understood or will not prove the acceptance without evidence that the mortgagee was under a legal obligation so to accept, the evidence is inadmissible; but if it can be understood and proved without proof that the mortgagee was under such legal obligation, there is nothing in s 92 to prevent the admission of such evidence. S 63 Contract Act is clearly in point and illustration (*e*) to it may be cited by way of example [*Vaidyanatha v. Kandappa*, A 1931 M 636: 132 IC 292]. S 63 Contract Act permits not an agreement but an actual remission. From this point of view, s 92(*4*) does not touch any act of a creditor which extinguishes a debt by taking a smaller sum. If the writing itself does not purport to extinguish the mortgage bond, it would be admissible in evidence, and a plea of discharge based on the fact that the sum shown in the endorsement was taken in full discharge and the discharge was given to the obligor orally would stand on a different footing from the admission of a writing evidencing the payment. When a creditor not only promises previous to the payment, to take it in complete discharge, but at the time of payment gives a discharge, it is not affected by s 92(*4*) [*Balasundara v. Ranganatha*, 53 M 127: A 1929 M 794; *Mahim v. Ramdayal*, 30 CWN 381 **approved**].

The discharge by payment and receipt of smaller sum can be proved as a *fact* if it is separable from an agreement to vary the terms of the contract [*Suppan v. Yegnarayana*, A 1932 M 141 : 136 IC 317. See also *Krishnaswami v. Srinivasa*, 71 MLJ 850 and *Parattakath v. Mammad*, A 1949, M 852 where it has been held that an actual discharge of a mortgage under an oral agreement to accept less than the amount due under the terms of the mortgage can be proved].

Where mortgagor puts the mortgagee in possession under an oral agreement that the latter was to enjoy the profits in lieu of interest, it is admissible as it merely provides for satisfaction of one of the conditions of the deed [*Jagatpal v. Harnam*, 34 IC 745: 19 OC 466; *Sahibdin v. Sri Dhansukh*, A 1948 O 129; *Afsar v. Sanaga*, 25 CLJ 560; *Kamala v. Babunandan*, 11 CLJ 39; *Tarapada v. Hajia*, A 1956 C 625]. So an oral agreement subsequent to a registered mortgage by which the property was to be put in possession of the mortgagee for five years and the mortgage debt was deemed to be discharged is admissible as the contract operated as a discharge of the mortgage debt and not alter the terms of the bond [*Lakshminarasimha v. Raghavamma*, A 1936 M 380 : 162 IC 53]. In a similar case it was held that evidence of oral agreement to take the lands in full satisfaction of the mortgage is admissible under proviso (2) of s 92 [*Kunja Behari v. Raman*, 1937, 2 Cal 753 : 41 CWN 1053 : A 1937 C 619]. The matter was the subject of a Full Bench in Allahabad where it was held that an oral agreement that the plaintiffs were to receive in full satisfaction less money than was due under a mortgage is inadmissible. S 63 Contract Act has nothing to do with the interpretation of s 92. But a plea in satisfaction of debt by payment of debt in full or in part is not a plea contradicting or varying the terms of a document. So oral evidence may be adduced to prove satisfaction of a debt by payment of a part of it and the remission of the balance [*Collr of Etah v. Kishori*, A 1930 A 721 FB: 1930 ALJ 1193]. The applicability of s 92 to cases falling within ss 62 and 63 Contract Act was also considered in Patna, and *Collr of Etah v. Kishori, ante* and *Balasundara v. Ranganatha, ante* were **followed** [*Sago v. Ramjee*, A 1942 P 105]. It may be that under s 92(*4*) the release of a mortgage should be in writing and then it should also be registered. But where the oral contract to release is not between a mortgagor and mortgagee but between a mortgagee and a stranger, evidence of such release may be given [*Munnuswami v. Govindaraja*, 58 M 371].

When a receipt is given by the mortgagee to the mortgagor for sums paid on account of the mortgage, and is not intended to be a release of the mortgage claim, but purports to be a mere settlement of account, it is clear that no agreement to modify or rescind the original mortgage contract is involved and this proviso has no application [*Lakshman v. Damodar*, 24 B 609]. But an unregistered receipt reciting that the mortgagee accepted a smaller sum in full satisfaction of the debt and he would return the bond, duly endorsed as to such payment, is not admissible in proof of such satisfaction: nor in proof of the payment which under the terms of the receipt, would extinguish the mortgage; nor in proof of the mortgagee's admission to return the bond [*Asamuddin v. Asmatulla*, 36 CWN 738]. So an unregistered receipt showing payment of money in extinction of a mortgage debt is inadmissible [*Haranath v. Baishnab*, 64 CLJ 10 : A 1937 C 178]. S 92 does not preclude oral evidence of payment in extinguishment of rights under a registered mortgage. But oral evidence is not admissible for proving an invalid oral conveyance of the equity of redemption by virtue of such payment [*Ariyaputhira v. Muthukmaraswami*, 23 MLJ 339: 37 M 423. See also *Kattika v. K*, 30 M 231]. A receipt releasing from liability to pay compound interest in terms of a mortgage bond need not be registered and is admissible in evidence [*Kailash v. Shk Chenna*, 42 C 546 (9 A 108 **folld**)]. Receipt evidencing part payment of mortgage debt is not compulsorily registrable

[*Jogendra v. Sufiuddin*, 72 IC 554: A 1924 C 379]; but a receipt purporting to extinguish the mortgage requires registration [*Asamuddin v. Asmatulla*, 36 CWN 738]. So also an endorsement on the deed unless registered is inadmissible to prove extinguishment of the mortgage though it may be admitted in proof of the payment of the money. Evidence either oral or in the nature of unregistered receipts are admissible to prove actual payment [*Ramkumar v. Ramnath*, A 1942 P 315: 199 IC 30]. It has been held in Lahore that endorsement on a mortgage deed acknowledging payment of the whole or part of the mortgage money is exempt from registration even if it purports to extinguish the mortgage. It is only an independent receipt for the money that requires registration when it purports to extinguish the mortgage [*Naman v. Hari*, 1952 Lah 324: A 1941 L 246]. An extinguishment of a mortgage by the mortgagee's rights being merged in those of an owner involves an alteration of the relationship of mortgagor and mortgagee into one of seller and purchaser. The law does not permit the substitution of one for the other to be effected in a less formal manner, *eg*, an oral sale [*Thotakora v. Pepakyalul*, 31 IC 678 (16 CWN 137; 30 M 231 **folld**]. Oral agreement by which the mortgagee agreed to release a co-mortgagor on payment of her share inadmissible [*Ma Tin v. Alagappa*, A 1935 R 197].

There is a clear distinction between a discharge of a debt and the extinguishment of mortgage interest though one may be the result of the other. Where a document in terms only discharges the debt it cannot be brought under s 17(*b*) Regn Act [*Neelamani v. Sukadev*, 43 M 803: 60 IC 255; *Ramanathan v. Sethuram*, A 1928 M 382; *U Tha v. Ma Cho*, 8 R 257: A 1930 R 277]. A release need not be in writing, but if it is, it must be registered and s 91 shuts out all oral evidence of its terms [*Totaram v. Haris*, A 1937 R 402]. Where an oral agreement is made which modifies or rescinds the manner of payment under a written and registered contract and any payment is made in complete or partial satisfaction of the contract, s 92 does not exclude oral evidence of the payment or the agreement explaining it. It does exclude evidence of the agreement in respect of future payments not in accordance with the terms of the contract [*Sambhoo v. Tukaram*, 59 IC 840].

Oral evidence to prove satisfaction of a pronote is admissible, but an agreement to accept a lesser amount and payment by instalments is a mere *nudum pactum* without consideration, if no instalment has been paid [*Maung Pu v. Mg Po*, A 1928 R 144].

Although endorsement on a mortgage bond in extinguishment of the mortgage, if unregistered is inadmissible, oral evidence is admissible in proof of the payment [*Labhu v. Sazawar*, A 1927 L 237: 100 IC 129]. On the same day as a lease and a mortgage of a property by *A* in favour of *B*, *B* executed an unregistered agreement (*Varthamanam*), agreeing to pay a certain sum out of rents for charity and to credit the balance for the mortgage debt. In a suit by *A* that the mortgage bond had been fully discharged, *held* that the varthamanam was admissible as it provided for another method of discharge [*Ramanathan v. Sethurama*, A 1928 M 382].

Unregistered Letters etc.—An unregistered letter is inadmissible in evidence to show that a mortgage-deed and a sale-deed executed previously were not to be acted upon and no money was due under the former and no property passed under the latter [*Rattiram v. Nanalal*, A 1927 L 625: 103 IC 421 (*Venkatachalapathi v. V*, 26 MLJ 151: 23 IC 409 FB **folld**. The contrary view in *Nomula v. Appaya*, 91 IC 452: A 1926 M 362 not accepted)].

Contemporaneous Oral or Written Agreement.—Contemporaneous oral agreement varying the terms of the original contract is inadmissible [*Firm Chunni v. Firm Sheo*, A 1943 A 370]. As between the parties to an outright conveyance, a contemporaneous oral agreement to purchase cannot be proved [*Ma Mi v. Mg Aung*, A 1928

R 244: 6 R 376]. In a suit on a pronote, the defendant pleaded a contemporaneous written agreement allowing repayment by instalment. Evidence is admissible [*Nagardas v. Moses*, 12 IC 896]. Oral agreement to recovery the property is not admissible to show that the sale-deed was to be treated as a mortgage [*Bai Adhar v. Lalbhai*, 24 Bom LR 239: 66 IC 865]. A contemporaneous oral agreement with the execution of a pronote that no interest would in fact be charged, is inadmissible [*Shanmugasundara v. Sivalinga*, A 1952 M 675].

A letter written contemporaneously with a sale-deed is not admissible to prove that the sale-deed was not intended to be given effect to [*Mutha Venkata v. Pyanda*, 23 MLJ 652: 27 M 348 (ABDUR RAHIM, J, **dissenting**)]. Where the contemporaneous agreement though in writing is not registered, it is not open to show that what is apparently a sale was a mortgage [*Meenakshisundram v. Mudaliar*, A 1928 M 459]. Where along with a sale-deed there was an unregistered agreement by the purchaser to reconvey the lands at the end of five years, the transaction was a sale and not mortgage [*Namdey v. Dhondu*, 22 Bom LR 979: 58 IC 406]. When along with a registered sale-deed an unregistered document is taken from the purchaser with an agreement to reconvey, it is inadmissible if the property affected is not less than Rs. 100 in value [*Bala Khandapa v. Sadashiv*, 23 Bom LR 1066 (38 B 703 **refd** to)]. Plaintiff executed a registered sale-deed to the defendant who on the same date executed an unregistered agreement to recovery the properties to the plaintiff. In a suit by the plaintiff for specific performance of the agreement it was held that no objection could be taken under s 92(*4*) [*Chinnakkal v. Chinnathambi*, A 1934 M 703]. On the date of sale of land, an unregistered contemporaneous agreement was executed by the purchaser that he would not dissipate or alienate the land, and in case of violation of this agreement the vendor would be entitled to purchase back the property. The vendor is not entitled to revoke the sale-deed on the basis of this unregistered agreement under S. 92 [*Brahama Nand v. Smt Roshani Devi*, A 1989 HP 11, 12, 14].

See also *ante*: "*To show that Instruments Apparently Absolute are Only Securities*".

PROVISO (5): Usage or Custom to Annex Incidents to Contract.—Oral evidence is admissible to explain or supply terms in commercial transaction, *eg.*, contracts, bills of exchange, insurance policies, &c on the presumption that the parties did not intend to put into writing the whole agreement, but tacitly agreed that their contract was to be interpreted or regulated by established usages and customs, provided they are not inconsistent, with the terms of the contract (*Cf* second proviso and see also s 98). Such evidence is admitted to *annex incidents* to written instruments. The rule is not confined to mercantile transactions only but applies to other transactions in which established usages prevail [*Hutton v. Warren*, 1 M and W 466, 475; *Gibson v. Small*, 4 HLC 397]. In *Hutton v. Warren, sup*, PARKE B, said:—

> "It has long been settled that in commercial transactions extrinsic evidence of custom and usage is admissible to annex incidents to written contracts in matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions of life, in which known usages have been established and prevailed, and this has been done upon the principle of presumption that in such transactions the parties do not mean to express in writing the whole of the contract by which they intended to be bound but to contract with reference to known usages".

Thus, with regard to a lease of right of fishery, evidence was held admissible to show that the word '*san*' did not signify the Bengali year from Baisakh but from

Ashar from which month *jalkar* tenancies begin [*Jote Coomar v. Jadunath*, 26 CWN 1022]. The law was thus explained by COLERIDGE, J, in *Brown v. Byrne*, 3 S and B 703:—

> "Mercantile contracts are very frequently framed in a language peculiar to merchants; the intention of the parties though perfectly well-known to themselves, would often be defeated if the language were strictly construed according to its ordinary import in the world at large. Evidence, therefore, of mercantile custom and usage is admitted in order to expound it, and arrive at its true meaning. Again, in all contracts, as to the subject-matter of which a known usage prevails, parties are found to proceed with the tacit assumption of that usage; they commonly reduce into writing, the special particulars of their agreement, but omit to specify those known usages which are included however, as of course, by mutual understanding; evidence, therefore, of such incidents is receivable. The contract in truth is partly express and in writing, partly implied or understood and unwritten .....What words are more plain than 'a thousand', 'a week', 'a day'? Yet the cases are familiar in which 'a thousand' has been held to mean twelve hundred, 'a week' only a week during the theatrical season; 'a day' a working day. In such cases the evidence neither adds to nor qualifies, nor contradicts, the written contract—it only ascertains it by expounding the language".

The proviso merely reproduces the English law on the subject [*per* BAYLEY CJ, in *Smith v. Ludha Ghella*, 17 B 129 (judgment of PARKE B, in *Hutton v. Warren, sup* **refd** to)].

Parol evidence of usage or custom is not confined to cases where the written instrument is expressed in ambiguous technical language; for it is certainly sometimes admissible "to annex incidents", as it is termed—that is, to show what things are customarily treated as incidental and accessorial to the principal things, which is the subject of the contract, or to which the instrument relates. For instance, when a bill of exchange or promissory note payable either at a fixed time or on demand (not being one payable in England upon demand) is silent as to any days of grace, in England, three days, called "days of grace", are (subject to provisions as to holidays) added to the time of payment as fixed by the bill, and where a bill is payable elsewhere than in England parol evidence of the known and established usage of the country of place is admissible to show on what day the grace expired. So, it may be proved by parol that it is the custom in particular trades, under general contracts of hiring and service, for the contracts to be defeasible on giving a month's notice on either side [*Parker v. Ibbetson*, 27 LJCP 236]. So, lessee by deed may show, that by the custom of the country, he is entitled to an away-going crop, though no such right be reserved in the deed [*Wigglesworth v. Dallison*, 1878, 1 Doug 201; Tay s 1168].

Parol evidence is also admissible to show that by usages of particular trades all sales of tobacco are by sample, although this term be not expressed in the bought and sold notes [*Syers v. Jonas*, 1848, 2 Ex 111; Tay 1169]. But here it must be borne in mind, that "incidents" are frequently "annexed" to contracts, and conditions implied, not only by the usage or custom or trade, which is always a matter of evidence, but by the law-merchant, which is judicially noticed without proof, and by the common law, and also occasionally by statute [Tay s 1170]. "That *usage* or *custom of a trade or locality*, which would otherwise by implication form a part of the transaction, will equally form a part when the transaction has been embodied in a document, provided the document was not intended to cover the topic affected by the custom. The test is on principle the same as for express extrinsic agreements, except that in the case of

the custom the ordinary presumption is in favour of its implication, because the topics covered by the writing will usually be those which do not concern some known and usual term but vary in each particular transaction. The application of the rule in a given instance depends entirely on the nature of the transaction and the terms of the particular document, and precedents are of little service" [Wig s 2440].

"Provided That the Annexing of Such Incidents Would Not be Inconsistent, etc".—In *The Schooner Reeside*, 2 Sumn 567, STORY, J, said: "The true and appropriate office of a usage or custom is, to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising, not from express stipulations, but from mere implications and presumptions, and acts of a doubtful or equivocal character. It may also be admitted to ascertain the true meaning of a particular word, or of particular words, in a given instrument, when the word or words have various senses, some common, some qualified, and some technical according to the subject-matter to which they are applied. But I apprehend that it can never be proper to resort to any usage or custom to control or vary positive stipulations in a written contract, and '*a fortiori*", not in order to contradict them. An express contract of the parties is always admissible to supersede or vary or control a usage or custom; for the latter may always be waived at the will of the parties. But a written and express contract cannot be controlled, or varied, or contradicted by a usage or custom; for that would not only be to admit parol evidence to control, vary or contradict written contracts, but it would be to allow mere presumptions and implications, properly arising in the absence of any positive expressions of intention to control, vary, or contradict, the most formal and deliberate declarations of the parties". See also *Indar Ch v. Lackmi Bibi*, 7 BLR 682: 15 WR 501, where evidence of custom as to *hundi* was excluded by express terms of writing.

Neither collateral evidence, nor the evidence of usage of a trade is receivable to prove anything which contradicts the tenor of a written contract; but subject to this condition both may be received for certain purposes. Evidence of usage has been admitted as to contracts relating to transactions of commerce and trade, framing or other business for the purpose of defining what would otherwise be indefinite, or to interpret a peculiar term, or to explain what was obscure, or to ascertain what was equivocal, or to annex particular incidents, which although not mentioned in the contracts, were connected with them or with relations growing out of them; and the evidence in such cases is admitted with the view of giving effect, as far as can be done, to the present intentions of the parties (quoting from Phillips Ev) *per* LORD CAMPBELL in *Humfrey v. Dale*, 7 E&B 266, where the English law on the subject has been fully explained.

In a *dowl kabuliat* where there was an express statement that the tenant had no right of sale, gift or transfer, no evidence of custom is admissible on the question of heritability and transferability [*Md Ayejuddin v. Prodyot*, 48 C 359 : 25 CWN 13]. Oral evidence of extension of due date in a contract is not inadmissible if not repugnant to the expressed terms of the contract. The evidence must in order to affect the meaning of the date be very clear and consistent [*Goverdhan v. Rowji*, 76 IC 62: A 1921, S 22 (*Bowes v. Shand*, 46 LJQB 561 **relied** on)]. Though evidence of usage augmenting the responsibility of a broker is admissible as consistent with the contract, evidence of a usage inconsistent with the terms of the contract is not admissible. There is no custom in the stock market in Calcutta that a broker should be treated as principal by both buyer and seller [*Nandalal v. Gurupada*, 51 C 588].

Proof of Usage.—As to business usage which may be proved as adding an incident to a written contract, there need not be either the antiquity, the uniformity, or

the notoriety of *custom* which in respect of all these becomes local law. The usage may be still in the course of growth; it may require evidence for its support in each case; but in the result it is enough if it appears to be so well known and acquiesced in that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into the contract [*Juggomohan v. Manick*, 7 MIA 263: 4 WR 8 PC; *Devonald v. Rosser*, 1906, 2 KB 728; *Maitland v. Chartered Merc. Bank*, (1865) 28 LJ Ch 363]. But though evidence of known mercantile usage is receivable to supplement the written agreement on the hypothesis that some of its terms were implied or understood or unwritten, such evidence cannot be admitted to contradict the positive stipulations in the written agreement [*The Reeside*, (1877, 2 Sumn 567; *Brown v. Byrne*, 23 LJQB 313 (**Referred** to in *Chundunmall v. National Bank of India*, 76 IC 757: 51 C 43)]. As to proof of usage by opinions of persons, see s 49 *ante*.

An agricultural usage need not have existed from time immemorial, though it may be for a reasonable length of time [*Tucker v. Linger*, 8 App Cas 508; *Dashwood v. Magniac*, 1891, 3 Ch 306 CA. See other cases cited in Phip 11th Ed pp 135-140]. Recent customs will be judicially noticed in the High Court if shown (*eg*, by reported decisions, *Exp Powell, Re Mathews*, 1 Ch D 501) to have been determined therein at all events more than once (*Exp Turquand, Re Parker*, 14 QBD 636), though such customs may of course be displaced by proof of later ones [*Moult v. Halliday*, (1898) 1 QB 125; Phip 11th Ed p 26]. As to admissibility of judicial decisions in support of customs, see *ante* s 13 p 133.

Mercantile and Other Customs and Usages.—Evidence of a custom or usage of trade is not admissible to explain or vary the natural and ordinary meaning of the words in the contract. Such evidence is only receivable when the incident which it is sought to import into the contract is consistent with the terms of the written instrument. If inconsistent, the evidence is not receivable, and the inconsistency may be evidenced (*a*) by the express terms of the written contract, (*b*) by implication therefrom [*Smith v. Ludha Ghella*, 17 B 129 (judgment of PARKE, B, in *Hutton v. Warren, ante* **referred** to). See also *Morris v. Panchananda*, 5 MHC 135, where it has been held that evidence of custom cannot be admitted to prove something excluded by the express terms of the written instrument.

When ambiguous terms or phrases are found in a mercantile contract, evidence of usage is admissible to explain the meaning of the expression in the particular trade or locality; and where a contract is silent in respect of some incidental term or condition which according to the course of business established in a particular trade, it is customary to find included in such a contract, evidence of the usage is admissible to prove that such term or condition formed part of the contract; unless the incorporation of the term or condition will have the effect "of introducing something repugnant to or inconsistent with the tenor of the written agreement" [*per* LORD CAMPBELL, CJ, in *Humphrey v. Dale*, 1857, 7 E&B 266]. But where the terms of a contract are capable of a reasonable interpretation according to the natural meaning of the words used, a trade usage altering fundamentally the nature and character of the written contract can neither determine nor affect the rights and obligations of the parties and as it is inconsistent with the written agreement the usage is inadmissible. It does not become admissible merely because the parties are aware of the usage [*Holmes Wilson & Co v. Batakristo*, 54 C 549: 104 IC 268 (*Mollet v. Robinson*, 1870 LR 5 CP 646 **refd** to)]. Neither by the English law nor the Hindu law, unless there be mercantile usage, can interest be imported into a contract which contains no stipulation to that effect [*Jago Mohan v. Kaisri Chand*, 9 MIA 260. As to interest on incidental charges of an invoice, see *Haji Mahomed v. Spinner*, 24 B 519]. A custom

cannot be at variance with the express terms of a written contract [*Macfarlane v. Carr*, 8 BLR 459. As to local custom at Dacca regarding *hundi*, see *Hari Mohan v. Krishna*, 9 BLR App 1].

Evidence of usage of trade which the parties making the contract know, or may be reasonably presumed to have known is admissible for importing terms into the contract respecting which the instrument is silent, *eg*, that there was a custom in the market of gunny, hessian and manufactured jute trade that the brokers are held liable upon contracts relating to them [*Joy Lall & Co v. Manmatha*, 20 CWN 365: 35 IC 31 (*Patiram v. Kankinarra Co.*, 19 CWN 623 **dist**; LR 7 QB 126 **follld**)]. In "F O R", "ready delivery" contract for sale of liquid molasses, evidence is admissible to prove usage as to who was responsible for procuring tank wagons at the siding for being pumped [*Bejoy v. NW Sugar &c*, 1945 2 Cal 173: A 1949 C 490]. In order that the practice on a particular estate may be imported as a term of the contract, into a contract respecting land in that estate, it must be shown that the practice was known to the person, sought to be bound by it and that he assented to its being a term of the contract; and where the person sought to be bound is an assignee of rights under the contract, it must also be shown that he and all prior assignees (if any) for value, knew that the practice was a term of the original contract [*Manna Vikaram v. Pattar*, 2 M 275]. According to the usage prevalent among piece-goods merchants in Godown Street Madras, sales with stipulation to charge interest as 3/4 per cent per month after sixty days "*thavanni*" are sales on credit for the period stipulated and not cash sales [*K M P R N M Firm v. Somasundaram*, 48 M 275: 85 IC 299].

Negotiable Instruments.—Negotiable instruments have special characteristics of their own which are impliedly annexed to them by law, *eg*, transferability, person, amount, time, acceptance and dishonour obligations by endorsement &c. So, there can be no agreement affecting the implied terms of the instruments, *eg*, agreement not to transfer, &c. While in some cases the parties may make agreements modifying or discarding the implied incidents as *between themselves*, they cannot affect others as it would destroy their negotiable qualities [See *ante*: "*Rules as to Negotiable instrument*"].

PROVISO (6): Extrinsic Evidence of Surrounding Circumstances.—This is the last of the proviso to this section and is expressed in very general terms. This is really a rule regarding the interpretation or construction of documents, and it embodies one of its principal canons. Wherever a court has to deal with a document which has been proved, its object is to endeavour to ascertain its real meaning, and for this purpose extrinsic evidence is sometimes necessary. So the proviso says that "any fact may be proved which shows in what manner the language of a document is related to existing facts". The object of the admissibility of the evidence of surrounding circumstances is to ascertain the real intentions of the parties, but those intentions must be gathered from the language of the document as explained by the extrinsic evidence. No evidence of any intention inconsistent with the plain meaning of the words used will be admitted, for the object is not to vary the language used, but merely to explain the sense in which the words are used by the parties. This rule of interpretation is not so easy as it may appear, and it is not possible to define its precise limits in view of the ever changing facts involved in every case. Generally speaking, in case of ambiguity or doubt as to its meaning extrinsic evidence of intimately connected existing facts or surrounding circumstances may be given in order to find out the real nature of the transaction in the document. In the words of MACLEOD CJ, it is one of the provisos which is the despair of judges and the joy of lawyers [*Ganpathrao v. Bapu Tukaram*, 44 B 710: A 1920 B 143].

The rule of construction embodied in proviso 6 is applicable when the words of document taken by themselves are not clear in their meanings. [*S.T. Industries, Surat v. Chief Controlling Revenue Authority*, A 1994 Guj 153, 154]. Proviso (*6*) is of an exceptional nature, in so far as it is not an exception to the rule laid down in the main part of the section. It is a substantive provision itself laying down the law relating to the admissibilty of extrinsic evidence as an aid to the construction of a document in cases in which it is necessary to find out how the document is related to existing facts [*Belapur Co v. State Farming Corpn*, A 1969 B 231]. An extrinsic evidence is admissible for the purpose of showing the circumstances in which the document came to be executed with a view to arrive at the true effect of the transaction to which the document relates [*P R Bhatt v. V R Thakkar*, A 1972 B 365].

Its application will appear from the provisions of ss 93-98. When the language is on the face ambiguous or defective, extrinsic evidence is not admissible (s 93), for admission of such evidence would not be interpreting a contract, but making a new one. Such a course would be upholding a document which is void for uncertainty. When the language is plain in itself or unambiguous and when it applies accurately to existing facts, extrinsic evidence is also inadmissible (s 94). To do so would be to allow the parties to show that they meant something different from what they have plainly expressed, and to alter the document. Parol evidence is in no case admissible to alter or vary the terms of a written instrument. The extrinsic evidence admissible under this proviso is to be confined to surrounding facts so intimately connected with the instrument that they afford reliable material for ascertaining the *identity* of the parties or the *nature and extent* of the subject-matter referred to in the document. The scope and limitation of the rule embodied in this proviso will be found in the following sections (93-98). They should be read together. It is with regard to will cases that the rule is mostly applied as the surrounding circumstances there, are varied and many, but the rule is applicable in other cases also. In *Doe v. Hiscocks*, 5 M&W 363, it has been held that "the object in all cases is to discover the intention of the testator. The first and obvious mode of doing this is to read his will as he has written it, and collect his intention from his words. But as his words refer to facts and circumstances respecting his property and his family, and others whom he names or describes in the will, it is evident that the meaning and application of his words cannot be ascertained without evidence of all those facts and circumstances".

Prov (*6*) comes into play when there is latent ambiguity in a document, *ie.*, when its language is not *prima facie* consistent with the existing facts, or in other words, when there is a conflict between the plain meaning of the language used and the facts existing or when put together they lead to an ambiguity [*Ram Narain v. Manki*, A 1954 P 562; *Chandra Sekhar v. Mural*, A 1957 P 673; *Basant v. Offl Rec*, A 1936 L 508]. If the language employed is ambiguous and admits of a variety of meaning, the 6th proviso can be invoked. The object of admissibility of such evidence is to assist the Court to get the real intention of the parties and thereby overcome the difficulty caused by the ambiguity. In such a case the subsequent conduct of the parties furnishes evidence to clear the blurred area and to ascertain the true intention of the author of the document [*Raj Kumar v. State of H P*, A 1990 SC 1833, 1845]. Where there is no dispute as to how the contents of the document are related to existing facts, it is well settled that no evidence is admissible on a question of construction of a contract or a grant which must be based solely on the terms of a document [*Radha Sundar v. Md Jahadur*, A 1959 SC 24 (*Balkishen v. Legge*, 27 IA 58, 65 and *Mg Kyin v. Ma Shwe La*, 44 IA 236, 243 **relied** on)].

The terms of an unambiguous document cannot be controlled by the conduct of the parties [*Kiransashi v. Ananda*, 32 CLJ 15]. But if the terms of the contract are

ambiguous, the rights of parties may be determined by reference to the subsequent interpreting statement or conduct of the parties [*Abdulla Ahmed v. Animendra*, 1950 SCR 30: A 1950 SC 15; *Godhra Electricity Co v. S*, A 1975 SC 32; *Bhupendra v. Harihar*, 24 CWN 874: 58 IC 867; *Secy of S v. Narendra*, 32 CLJ 402; *Midnapur Z Co v. Jogendra*, 62 IC 491: A 1921 C 756; *Pramathanath v. Dinamani*, 34 CLJ 129; *Bhupendra v. Midnapur Z Co*, 68 IC 937 : A 1922 C 300; *Abinash v. Majub Ali*, 36 CLJ 196; *Hemanta Kumari v. Midnapur Z Co*, 35 CLJ 493]. When the language of an instrument is clear and the intention of the parties has been reduced to writing, no extrinsic evidence is admissible. If the construction is doubtful and the doubt cannot be removed in any other way, it is permissible to refer to a preliminary agreement or to acts done in pursuance of the instrument, though not to mere subsequent declarations [*Punjab N Bank v. Chaudhuri*, A 1941 O 893]. See *ante*: "*Antecedent Documents or Negotiations preceding the Written Contract*".

It may be laid down as a broad and distinct rule of law extrinsic evidence of every material fact, which will enable the court to ascertain the nature and qualities of the subject-matter of the instrument, or, in other words to identify the persons and things to which the instrument refers, must of necessity be received [*Charrington v. Wooder*, 1914 AC 71; *Bank of New Zealand v. Simpson*, 1900 AC 182, 188; *Janson v. Poole*, 1915, 84 LJ (KB) 1543; *Grahame v. Grahame*, 19 LR Lr 249]. Whatever be the nature of the document under review, the object is to discover the intention of the writer as evidenced by the words he has used, and in order to do this, the judge must put himself in the writer's place, and then see how the terms of the instrument affect the property and the subject-matter [*Shore v. Wilson*, 9 Cl&F 556]. With this view, extrinsic evidence must be admissible of all the circumstance surrounding the author of the instrument [*Sweet v. Lee*, 1841, 3 Man&G 452, 460]. In the simplest case that can be put, namely, that of an instrument appearing on its face to be perfectly intelligible, inquiry must be made for a subject-matter to satisfy the description. If an estate be conveyed by the designation of Blackacre, parol evidence must be admitted to show what property is known by that name [*Ricketts v. Turquand*, 1848, 1 HLC 472]; and if a testator devised a house purchased of *A*, or a farm in the occupation of *B*, it must be shown by extrinsic evidence what house was purchased of *A*, or what farm was in *B's* occupation, before it can be shown what is devised [Tay s 1194]. Court has to take into consideration surrounding circumstances in deciding whether parties intended that title would pass independently of question of payment of consideration [*Ram Ch v. Mathura*, A 1964 Or 239]. "It may frequently be necessary, in order to construe written instruments, to receive evidence of other accompanying facts than those which serve to apply the instrument to the subject-matter or the persons intended. There is a class of cases which have carried the rule somewhat further. These cases hold that under certain circumstances, not only the situation and relation of the parties, but their acts, negotiations and statements may be proved as part of the surrounding facts which throw light on the transaction. It would be impossible to prescribe by general rule the precise limits within which, under the ever varying facts, such testimony may be admitted" [Jones s 453].

Application of the Rule to Instruments Generally.—Extrinsic oral evidence of surrounding circumstnaces showing in what manner the language of a document is related to the existing facts is admissible under s 92 but oral evidence of intention is not admissible [*Balkishen v. Legge*, 22 A 149 (*ante*); see also *Hussonally v. Tribhowandas*, 15 CWN 385: A 1921 PC 40; *Sabaji v. Nawal*, 104 IC 736: A 1928 N 4]. Evidence so far as it relates to how the language of the document is related to existing facts and surrounding circumstances is only admissible, not any surrounding facts and circumstances themselves as throwing light on the meaning of the document [*Sisir v. Naran*,

33 CWN 591]. The rule as to "surrounding circumstances" cannot be extended to enable a party to prove that when he wrote one thing he meant something totally different [*Afsar v. Dharamsey*, A 1947 B 98]. Where the words of a written statement are free from ambiguity in themselves and where external circumstances do not create any doubt or difficulty as to the proper application of the words, such instrument is always to be construed according to the strict plain common meaning of the words themselves and evidence *dehors* the instrument for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument is utterly inadmissible [*Tsang Chuen v. Li Po Kwai*, 1932 AC 715: 139 IC 891].

Ss 94 and 95, read with the main rule in s 92 clearly suggest that proviso (6) comes into play only when there is a latent ambiguity in a document and not when the language is plain in reference to existing facts [*Ramnarain v. Manki*, A 1954 P 562; *Darshan v. Ganga*, A 1962 P 53; *Sait Bolumal v. Gollapudi*, A 1959 AP 612].

Though oral evidence of intention is excluded, s 92 merely prescribes a rule of evidence and does not fetter the court's power to arrive at the true meaning of a document in the light of all the circumstances surrounding the transaction [*Baijnath v. Hajee Valley*, 30 CWN 242: A 1925 PC 75]. Proof of any oral agreement to show the nature of the document is excluded. All that the court has to do is that if the document is of doubtful tenor, the surrounding circumstances must be looked into for its construction [*Lakshmiayya v. Murahari*, A 1930 M 547]. Proviso 6 to s 92 does not cover facts which are intended to show that the language of the document meant the exact opposite of what it purports to mean. There is no necessity for the explanation of the language used in relation to existings facts. The only object or use of such evidence, if admitted, would be to show that the language was intended to mean something which is utterly incapable of being expressed by that language [*Kesavrao v. Ray Pandu*, 8 Bom L R 287]. The language of the proviso is rather vague. It is true that evidence of surrounding circumstances is admissible, but it is only for the purpose of throwing light on its meaning. When a document is on the face of it a mortgage, evidence of surrounding circumstances is not admissible to prove that it was intended to operate as a sale-deed [*Martand v. Amritrao*, 49 B 662: A 1925 B 501 (**dissented** from in *Balumal v. Venkata*, A 1955 M 78); *Kaluram v. Gajasa*, 107 IC 201: A 1928 N 182; *Akoijam v. Gurumayam*, A 1965 Man 31].

In determining whether a sale-deed and an agreement to reconvey make together a mortgage by conditional sale, strictly speaking, the actual contents of the documents should be looked to. But there may be such extrinsic evidence and circumstances showing the relation of the written language to existing facts that it would be possible to hold it as a mortgage [*Namdev v. Dhondu*, 22 Bom LR 979: 58 IC 406]. In the case of a dispute as to whether a document is a mortgage by conditional sale, or a sale with a covenant for repurchase, the test is the intention of the parties to be gathered from the language of the document themselves, viewed in the light of the surrounding circumstances. An absolute conveance does not become a mortgage merely because the vendor stipulates that he shall have a right to repurchase [*Jhanda v. Shk Wahibuddin*, 21 CWN 66: 39 A 570: A 1916 PC 49: 43 IA 294].

Parol evidence is admissible to explain a deed *eg.*, to prove that a village not included in a *putni* lease, was intended by the parties to be included in it [*Dhunput v. Shk Jawahir*, 8 WR 152 (decided before the Evidence Act)]. As to admissibility of extrinsic evidence in such transaction see *ante* under "*Admissibility of extrinsic evidence of the acts, conduct or intention of parties for varying &c*".

When by a written agreement, persons engage to refer unspecified questions in dispute to arbitration, evidence must be admitted to show what the questions are

the subsequent declatations, instead of relating to what the declarant had done, or had intended to do, by the instrument written by him, were simply to refer to what he intended to do, or wished to be done, at the time of speaking [*Whitaker v. Tatham*, 7 Bing, 628; Tay s 1209].

Persons, things, subject-matter, &c, In *Doe v. Hiscocks*, 5 M&W 363, LORD ABINGER said: "The object, in all cases, is to discover the intention of the testator. The first and most obvious mode of doing this, is to read the will as he has written it and collect his intention from his words. But as his words refer to facts and circumstances, respecting his property and his family, and others whom he names or describes in his will, it is evidence that the meaning and application of his words cannot be ascertained with evidence of all those facts and circumstnaces..... All the facts and circumstances, therefore, respecting persons or property to which the will relates, are undoubtedly legitimate and often necessary, to enable us to understand the meaning and application of his words".

Though declarations of intention are inadmissible for the purpose of explaining a latent ambiguity in the instruments, this rule will not preclude mere collateral statement made by the author of the instrument respecting the persons or things mentioned therein. For instance, "the testator may have habitually called certain persons or things by *peculiar names*, by which they were not commonly known. If these names should occur in his will, they could only be explained and construed by the aid of evidence to show the sense in which he used them, in like manner as if his will were written in cipher, or in a foreign language. The habits of the testator in these particulars must be receivable as evidence to explain the meaning of his will" [*per* LORD ABINGER in *Doe v. Hiscock, ante*; Tay s 1210]. It may appear from the rest of the will that the testator had, so to speak a language of his own, *eg*, that he used the word "niece" to include a great-niece or his wife's niece [*Stringer v. Gardiner*, 27 Beav 35; *In re Corsellis*, 1906, 2 Ch 316; Powell, 9th Ed, p 562]. In a bequest to his "children", the fact that the testator only had and could only have illegitmiate children already born was proved to show that such issue was meant [*Re Wohlgemuth*, 1949, Ch 12].

If on reading a will there is any doubt as to the meaning of the testator's language, evidence is always admissible of the circumstances surrounding the testator at the time of making his will [*Rayner v. Rayner*, 7 Ch 176; *In re Gent*, (1905) 1 Ch 386], so as to put the court "in the shoes of the testator". Thus the court should be informed as to what property the testator owned at his death, its tenure or other nature, and where material, the date at which the testator acquired it [*In re Gibbs*, (1907) 1 Ch 465; Powell, 9th Ed, p 564]. See the **following** cases *Stringer v. Gardiner*, 27 Beav 36; *In re Ojner*, 1909, 1 Ch 60, *Charter v. Charter*, LR 7 HL 364.

Wigram in his treatise on Wills has laid down seven propositions for interpretation of Wills. Three of them are given below:—

> "**V.** For the purpose of determining the object of testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a Court may inquire into every material fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator and of his family and affairs; for the purpose of enabling the court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will. The same, it is conceived, is true of every other disputed point, respecting which it can be shown that a knowledge of extrinsic facts can, in any way, be made ancillary to the right interpretation of a testator's words.

As to variation of the original contract by a subsequent verbal agreement and the construction of the agreement in the light of surrounding circumstances, see *Rustomji v. Dhairyawan*, 34 CWN 681: A 1930, PC 165: 32 Bom LR 789: 59 MLJ 43.

Extraneous evidence is admissible to determine whether a particular trade practice set out in an agreement has or may have effect of preventing, distorting or restricting competitions so as to constitute 'a restrictive trade practice' under Monopolies and Restrictive Trade Practices Act, 1969 [*Mahindra & Mahindra v. Union*, A 1979 SC 798 (Observations of BEG, CJ in *Hindustan Lever v. MRTP*, A 1977 SC 1285 **held** not good law)].

—Decree.—It is doubtful whether evidence is admissible in the case of a consent decree to explain the ambiguity [*Ganapathy v. Subramania*, A 1933, M 516].

Extrinsic Evidence in Will Cases.—The rule as to the admissibility of extrinsic evidence in the cases of will is the same as in the cases of other deeds. When the meaning is clear and language unambiguous, extrinsic evidence is not admissible to find out what the testator may have intended. The intention has to be gathered primarily from the language of the will. In *In re Glassington*, 1909, 2 Ch 314, JOYCE J, said: "Parol evidence is not to be resorted to except for the purpose of proving a fact which will make intelligible something in the will that, without the aid of the extrinsic evidence, would not be intelligible". "In the case of wills, the ambit of surrounding circumstances is necessarily wider than in that of contracts, for in the former the testator is dealing not with a single transaction, but with the whole of his affairs, and the state of facts at various periods and with regard to different persons may, therefore, become material; on the other hand the rule excluding direct declarations of intention is perhaps more strictly enforced here than in the case of contract" [Phip 11th Ed p 845].

Declarations of intention.—In regard to wills, declarations of intention are generally excluded. Such declarations become admissible in the case of latent ambiguity [see ss 95, 96, 97]. Collateral statements respecting persons or things are not considered declarations of intention, when it it necessary to determine to which of two or more persons or things, the description applied. LORD ABINGER said: "But there is another mode of obtaining the intention of the testator, which is by evidence of his declarations, or the instructions given for his will, and other circumstnaces of the like nature, which are not adduced for explaining the words or meaning of the will, but either to supply some deficiency, or remove some obscurity, or to give effect to some expressions that are unmeaning or ambiguous. Now, there is but one case, in which it appears to us that this sort of evidence of intention can properly be admitted, and that is, where the meaning of the testator's words is neither ambiguous nor obscure, but where the devise is on the face of it perfect and intelligible, but, from some of the circumstances admitted in proof, an ambiguity arise (as to which of the two or more person each answering the words in the will), the testator intended to express..... It appears to us that, in all other cases, parol evidence of what was the testator's intention ought to be excluded, upon the plain ground, that his will ought to be made in writing; and if his intention cannot be made to appear by the writing, explained by circumstances, there is no will" [*Doe v. Hiscocks*, 5 M&W 363].

Where declarations of intention are receivable in evidence, the rule most consistent with modern authorities seems to be, that their admissibility does not depend upon the *time* when they were made. Contemporaneous declarations will certainly be entitled, *caeteris paribus*, to greater weight than those made before or after the execution; but in point of law no distinction can be made between them [*Doe v. Allen*, 12 A&E 451; *Doe v. Hiscocks, sup*—CONTRA: *Thomas v. T*, 6 TR 671]; unless

Shamsool v. Sewkram, 11 BLR 226 PC : 22 WR 409; *Radha v. Ranee Mani*, 35 IA 118: 35 C 896: 12 CWN 729; 18 MLJ 287; *Sher Bahadur v. Ganga Baksh*, 41 IA 1 : 18 CWN 401: 36 A 101; *Chunilal v. Bai Samarath*, 18 CWN 844: 38 B 399: A 1914 PC 60; *Phanindra v. Hemangini*, 36 C 1; *Beti Maharani v. Collr of Etawah*, 7 A 198; *Sakharam v. Kalidas*, 18 B 631; *Dinbai v. Musserwanji*, 27 CWN 199]. A knowledge of the law is valuable in construing a will, because as observed by the Judicial Committee in *Md Shamsool v. Sewkram, ante*, "in construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of a Hindu with respect to the devolution of property". But too much stress should not be laid on the law as such in finding out the intention of the testator. As cautioned by the Judicial Committee in another case: "The point is not what is the strict rule of the Hindu religion, or the strict rule of Chhattri caste, (and if I may with respect add, the strict rule of the Hindu law either) but this, namely, what were the wishes and intentions of the testator as revealed by the language of that instrument viewed through the light of surrounding circumstances" [*Sher Bahadur v. Ganga Baksh, ante*].

Where a will directed "I direct that all my debts be paid out of my estate in the first instance including the charities and subscriptions promised", the latter part of the clause is void for uncertainty. Parol evidence could not be admitted for the purpose of ascertaining by enquiry the persons to whom and the charities to which the testator had promised subscriptions [*Dinanath v. Hansraj*, 62 C 190]. Where a testator, in one part of his will, has recited that he had given a legacy to a certain person, but it does not appear that any such legacy has been given, the court would take the recital as conclusive evidence of an intention to give by the will and would give to the erroneous recital the effect of an actual gift. But where the recital amounts only to a declaration that he supposes that a party has an interest independent of the will, such recital is no evidence of an intention to give by the will and cannot be treated as a gift by implication [*Satis v. Niladhri*, 39 CWN 237].

Circumstances taking place long after execution of a will and death of testator can afford no assistance in interpretation of a will [*Shera Khatun v. Md Ali*, 77 IC 538: A 1923 L 559]. Evidence of statements made at the time of making a will is not admissible for varying its terms [*Govind v. Chintaman*, A 1928, N 55]. In the absence of any thing to the contrary, the words of a will are to be taken as having their ordinary meaning [*Sudhamani v. Surat*, 28 CWN 541]. Calling a document a will does not make it so [*Tirugnanapal v. Ponambal*, 58 IC 228: 25 CWN 511: A 1921 PC 89].

A testator by his will gave his widow a life estate in his immovable properties and a share equal to a son's share in his business—*Held* that though the words in the will were not admissible as a statement, the fact that the testator treated a particular house specifically as being his to dispose of by will, was admissible as conduct on his part in regard to the ownership of the property [*Indubala v. Manmatha*, 41 CLJ 258]. The circumstances of the testator referred to in the will and surrounding at its date, are not irrelevant upon the question of construction as to daughter's claim to an absolute interest [*Joydurga v. Saroj*, A 1929 PC 214: 33 CWN 1117]. Where a testator after making several legacies in respect of his share of immovable and movable properties disposes of the "residue" in favour of *R*, there is no ambiguity and extrinsic evidence is not admissible, as "residue" undoubtedly includes immovable property [*Rajagopala v. Venkataraman*, A 1947 PC 122: 51 CWN 829].

—General Rules as to Construction of Wills.—There are two cardinal principles: (*1*) Clear and unambiguous dispositive words are not to be controlled or

VI. When the words of a will, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, no evidence will be admissible to prove what the testator intended, and the will (except in special cases—see proposition VII) will be void for uncertainty.

VII. Notwithstanding the rule of law, which makes a will void for uncertainty, where the words, aided by evidence of the material facts of the case, are sufficient to determine the testator's meaning—courts of law, in certain special cases, admit extrinsic evidence of intention, to make certain the person or thing intended, where the description in the will is sufficient for the purpose. These cases may be thus defined: Where the object of a testator's bounty. or the subject of disposition (*ie*, person or thing intended) is described in terms, which are applicable indifferently to more than one person or thing, evidence is admissible to prove which of the persons or things so described was intended by the testator".

BLACKBURN J, in *Allgood v. Blake*, LR 8 Ex 160 said: "The general rule is that in construing a will the Court is entitled to put itself in the position of the testator, and to consider all material facts and circumstances known to the testator with reference to which he is to be taken to have used the words in the will and then to declare what is the intention evidenced by the words used, with reference to these facts and circumstances which were (or ought to have been) in the mind of the testator when he used those words. As said in Wigram on Extrinsic Evidence, "The question in expounding a will, is not what the testator meant—as distinguished from what his words express—but simply, what is the meaning of his words. But we think that the meaning of words varies according to the circumstances of and concerning which they were used".

The decisions relating to the admissibility of extrinsic evidence in the interpretation of wills are very many and not harmonious. Ss 94-98 contain some of the rules and they apply equally to wills and other instruments. For fuller information the reader is referred to Jarman on Wills; Theobald on Will; Wigram; Tay ss 119-223; Phip 8th Ed p 601 *et seq*; Steph Art 91; Bailey on Wills. As to the rules relating to construction of Wills, see ss 74-111 Succession Act 39 of 1925.

Same:—The rule as to extrinsic evidence in the construction of will has been applied to many cases in India. In *Soorjeemony v. Dinabandhu*, 6 MIA 526: 4 WR 114, TURNER, LJ, said: "The Hindu law, no less than the English law points to the intention as the element by which we are to be guided in determining the effect of a testamentary disposition; nor, so far as we are aware, is there any difference between the one law and the other, as to the materials from which the intention is to be collected. Primarily, the words of the will are to be considered. They convey the expression of the testator's wishes; but *the meaning to be attached to them may be affected by surrounding circumstances*, and where this is the case, those circumstances, no doubt, must be regarded. Among the circumstances thus to be regarded, is the law of the country under which the will is made, and its dispositions are to be carried out. If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that the testator, in the dispositions which he has made, had regard to that meaning or to the effect, unless the language of the will or the surrounding circumstances displace that assumption" [**Relied** on in *Nathuram v. Gangabai*, 42 CWN 1082; A 1938, PC 228; see also the observation of LORD MOULTON in *Meka Venkata v. Sri Raja*, 41 IA 51: 17 CWN 1221: 25 MLJ 386; *Mathuradas v. Bhikhan*, 19 A 19; *Bhagbutty v. Choudhury*, 1 C 104: 2 IA 256: 24 WR 168; *Md*

The first principle is to ascertain and give effect to the real intention of the testator as expressed in the will. Rules of construction are only intended to aid when there is ambiguity [*Adams v. Gray*, 90 IC 5: A 1925 M 599]. The intention should be gathered from the language used in the will and not by anything extraneous to it. The whole will should be looked into for the meaning of a particular word. It would not be right to take a single word out of its context and give it its etymological meaning [*Piramu v. Serunatha*, 86 IC 737: A 1925 M 1175]. The intention is to be gathered from the language used by the testator. The meaning to be attached to the words may however be affected by surrounding circumstances and, when this is the case, those circumstances should be taken into consideration. The meaning of any clause in a will is to be collected from the entire instrument; and all the parts of a will are to be construed with reference to each other and so as, if possible, to reconcile all the parts. Where it is not possible to reconcile all the parts the latter must prevail (reference was to codicil for determining intention) [*Ramesh v. Balraj*, 40 CWN 8: A 1935 PC 187; see *Venkata v. Parthasarathy*, 37 M 192: 41 IA 51, 70]. The court may ascertain the dominant intention of the testator; for that purpose it is legitimate to look to other provisions of the settlement, in order to see what is the vocabulary of the testator and how he expresses himself with regard to other matters [*Kamakhya v. Kushal*, 61 IA 145: 38 CWN 477: A 1934 PC 72]. The intention would determine the sense in which particular words are to be read and if it be impossible to reconcile any words with the intention, the Court will reject them and if any particular word is wanting to express the intention, the court will supply it [*Manekji v. Nanabhai*, 53 B 724].

When there is a reference in a codicil to a prior testamentary instrument by such terms as to make it capable of identification, it is necessarily a subject for parol evidence and when the parol evidence sufficiently proves that in the existing circumstances there is no doubt as to the instrument, it is no objection to it that by possibility, circumstances might have existed in which the instrument referred to could not have been identified. But the reference must be to an existing document and evidence is not admissible if the reference may be to a future document [*In re White*; *Knight v. Briggs*, 1925 Ch 179]. To construe one will by reference to expressions of more or less doubtful import to be found in other wills, is unsatisfactory [*Nisar v. Md Ali*, A 1929 O 494]. In matters of construction of wills, decisions in other cases cannot and do not afford sufficient guidance [*Pravabati v. Sarojini*, 36 CWN 1015; see *Gnanambal v. Raju*, 1950 SCR 949: A 1951 SC 103: 1951, 1 MLJ 333; *Ramautar v. Ramsundari*, A 1959 P 585].

S. 93. Exclusion of evidence to explain or amend ambiguous document.—When the language used in a document is, on its face, ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects.

Illustrations.

(*a*) *A* agrees, in writing, to sell a horse to *B* for "Rs. 1,000 or Rs. 1,500".

Evidence cannot be given to show which price was to be given.

(*b*) A deed contains blanks. Evidence cannot be given of facts which would show how they were meant to be filled.

qualified by any general expression of intention; (2) Technical words must have their legal effect even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical words in their proper sense [*Lalit v. Chukkun*, 24 IA 76: 23 C 834: 1 CWN 387]. The duty of the court is to ascertain the intention from the words used in the document. The court is entitled and bound to bear in mind surrounding circumstances, but the court does that only to ascertain the real intention of the executant from the words used by him. The surroundings of an Indian, his manners, his outlook, &c, are often different from those of an Englishman. Ordinarily documents executed by an Indian in his own language and without any professional aid are often expressed in loose and inaccurate language. The court in such cases should put itself into the testator's armchair and give effect to his intentions [*Rajendra v. Gopal*, 57 IA 296: A 1930 PC 242: 34 CWN 1161: 59 MLJ 615. "It is a matter of difficulty to determine from translations the true effect of testamentary instruments framed in the vernacular by persons with customs and habits of mind different widely from the customs and habits of mind of testators in England, and it would be unwise to adhere too rigidly to rules of construction formulated for the interpretation of instruments created in a different environment" [*per* LORD TOMLIN in *Nisar v. Mahomed Ali*, 59 IA 268: 36 CWN 937, 944 : A 1932 PC 172, see also the observations of LORD MACHNAGHTEN in *Narendra v. Kamalbasini*, 23 IA 18: 23 C 563]. Wills of people speaking a different tongue, trained in different habits of thought, and brought up under different conditions of life, though executed in the English language, must not be interpreted by the application to them of a too rigid construction of the English language [*Indira v. Akhay*, 59 IA 419: A 1932 PC 269: 37 CWN 153]. The general rule is that a will should not be so construed, unless the plain wording makes it necessary to do so, as to lead to an intestacy with regard to some part of the testator's property [*Rathnammal v. Pillai*, A 1946 M 12: 1945, 2 MLJ 190].

The plain and the natural meaning of the language should not be departed from to give effect to a supposed intention of the testator on the assumption that he used it in a particular sense and not in a sense consonant with the personal law [*Natwar v. Musst Loi*, A 1930 A 652; *Manindra v. Durga*, 21 CWN 707: (A 1917, PC 23 **relied** on)]. In construing a will the Court is not bound by transaction officially made at the time of grant of probate. It can look at the original will itself for the purpose [*Purna v. Sudhangshu*, 49 CWN 524: A 1946 C 55]. In construing a Hindu will, it is no doubt proper to take into consideration what are known to be ordinary motives and wishes of a Hindu with respect to the devolution of his property and that a Hindu, except in rare cases, would not deprive his sons or grandsons of their right of inheritance or even curtail the same for the benefit of his widow. But the primary duty of a court of construction is to give the words of the will their plain and natural meaning [*Rolo v. Koklan*, 57 IA 325: 34 CWN 1169: 11 L 657: A 1930 PC 270]. The extraordinary character of the contents of the will ought not to over-balance the direct or positive evidence as regards execution of the will [*Jatindra v. Rajlakshmi*, 57 CLJ 8; *Gayeshwar v. Bhagwati*, A 1933 p 612]. Although the intention of the testator is a very important element, where the language is clear and unambiguous the question of finding out the intention of the testator does not arise and the will has to be construed according to its plain language [*Jio v. Rukuran*, 8 L 219: 100 IC 54: A 1927 L 126]. Clear and unambiguous dispositive words are not to be controlled or modified by any general expression to rely upon artificial rules of construction to find out the intention of the testator [*Manikam v. Venkatesa*, 99 IC 705: A 1927 M 494].

sentence. Ordinary words are used in their ordinary meaning. Evidence of intention of parties is inadmissible in the matter of construing deed. In construing the terms of a deed the question is not what the parties may have intended, but what is the meaning of the words which they used [*Manindra v. Durga*, 21 CWN 707: A 1917 PC 23: 32 MLJ 559]. As LORD ATKIN observed: "But in truth when the meaning of words is plain it is not the duty of the courts to busy themselves with supposed intention" [*Narayanaswamy v. R*, A 1939 PC 47: 66 IA 66].

"The expression 'construction' as applied to a document, at all events as used by English lawyers includes two things: first, the meaning of the words, and secondly their legal effect or the effect which is to be given to them. The meaning of the words, I take to be a question of fact in all cases, whether we are dealing with a poem or a legal document. The effect of the words is a question of law" [*per* LINDLEY LJ, in *Chatenay v. Brazilian S T Co*, (1891) 1 QB 79, 85: 63 LT 739. **Relied** on in *Badri v. Rajkumar*, 75 IC 686: A 1923 A 337].

The interpretation of a document is the duty of the court and it is not permissible to call a witness to explain it unless he is an expert under the Evidence Act [*R v. Nathalal*, 1939 Bom 434: A 1939 B 339]. Any ruling as to interpretation of a document can only be applied in its entirety to a document absolutely identical in language, and in a case the general circumstances of which are substantially the same [*Alkhu v. Lachman*, 80 IC 550: A 1924 A 324 FB]. It is not proper to construe one document in the view taken with regard to another document which is differently worded [*Harmohan v. Hen Ch*, 42 CLJ 172: 87 IC 758]. As to the use of decisions in the interpretation of contracts and documents generally, see the observations of LORD WRIGHT in *Luxor v. Cooper*, 1941 AC 108 where attempts to enunciate decisions on the construction of agreements as if they embodied rules of law have been deprecated. The remarks of LORD WRIGHT were relied on in *Angurbala v. Debabrata*, 53 CWN 348. "It is the duty of a judge to ascertain the construction of a document before him and not to the construction put by another judge upon an instrument perhaps similar but not the same. The only result of referring to authorities for that purpose is confusion and error" [*per* JESSEL MR, in *Aspden v. Seddon*, (1875) 10 Ch A 394, 397].

When the question is entirely one of construction on a particular agreement, it can only be properly answered after a consideration of all the surrounding circumstances, the position of the parties to the agreement, its subject-matter, and the apparent purpose and object thereof, and, in particular of the provisions to be construed [*Laffer v. Gillen*, 47 CLJ 327: 107 IC 347: A 1927 PC 275]. Antecedent communings which led up to a contract cannot be referred to in construing a conveyance [*Bomanji v. Secy of S*, 56 IA 51: 33 CWN 293: A 1929 PC 34 (*ante*: "*Antecedent documents or negotiations preceding the written contract*").

Rules Regarding Construction of Documents.—When any document has been put in evidence and proved, the function of the court is to interpret it, so as to find out the true meaning of the words used and to give effect to the true intention of the maker. There are certain well-recognised rules as to construction of documents:—

(*1*) Documents which are plain and unambiguous must be interpreted according to their plain and unambiguous language without extraneous help. The presumption is that ordinary words in a language are used to convey their ordinary meaning and that parties must have meant what they have written. A witness cannot be asked the meaning of plain and ordinary words. Every document should be construed as a whole without divorcing isolated words or passages from their context. An attempt should be made to reconcile apparent inconsistencies and to avoid a construction

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COMMENTARY

Construction of Documents [General Principles].—This and the following sections (ss 94-98) deal with the rules as to interpretation or as is also called, construction of documents with the aid of extrinsic evidence. If the language employed in the document is ambiguous, the question of the admissibility or otherwise of extraneous evidence would be regulated by the provisions of ss 93 to 98 [*Belapur Co v. State Farming Corpn*, A 1969 B 231]. Interpretation means ascertaining the meaning of the language of a document or the manner in which it is related to existing facts. The primitive rule is to be found in the words of LORD ELDON that "generally speaking you must construct instruments by what is found within their four corners" [*Smith v. Doe*, (1821) 2 B&B 473, 602]. The rule underwent relaxation and it is now recognised that subject to certain exceptions, extrinsic evidence is admissible to explain the sense of words when they are not sufficiently expressive. THURLOW LC, in *Shelburne v. Inchquin*, 1 Bro CC 338, 341 said: "If you go to parol evidence to raise the ambiguity, you cannot well refuse it to explain such ambiguity." Thayer says: "It had become possible for Wigram to lay it solidly down, over seventy years ago, that with the exception of direct statements of intention, no extrinsic fact, relevant to any legitimate question arising in the interpretation of writings and admissible under the general rule of evidence, could be shut out" (Pr Treatise on Ev 445). "Once freed from the primitive formalism which views the document as a self-contained and self-operative formula, we can fully appreciate the modern principle that the words of a document are never anything but indices to extrinsic things, and that therefore *all the circumstances must be considered which go to make clear the sense of the words*,— That is, their association with things" (Wig s 2470).

There is a controversy among writers as well as judges as to whether the object of interpretation is to find out the *meaning of the words or the meaning of the writer, ie* intention. LORD BLACKBURN expressed himself thus: "In all cases, the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what the intention is, without enquiring further, and seeing what the circumstances were with reference to which the words were used, and what was the object appearing from these circumstances which the person using them had in view, for the meaning of the words varies according to the circumstances with respect to which they were used" [*River Weir Commrs v. Adamson*, 2 App Cas 743, 763 (**relied** on in *Royal Bank of Canada v. Salvatori*, 107 IC 346: A 1927 PC 271)]. To put the matter in another way, whether it be the intention of the writer or the meaning of the words, the aim no doubt is to ascertain the true nature of the transaction. Neither 'intention', nor meaning of 'words' can be the sole object. For instance, when the language is quite clear and plain words are used and there is no ambiguity, extrinsic evidence is inadmissible for finding out the intention of the writer, because a witness cannot be asked what he means by a plain word or a plain

sentence. Ordinary words are used in their ordinary meaning. Evidence of intention of parties is inadmissible in the matter of construing deed. In construing the terms of a deed the question is not what the parties may have intended, but what is the meaning of the words which they used [*Manindra v. Durga*, 21 CWN 707: A 1917 PC 23: 32 MLJ 559]. As LORD ATKIN observed: "But in truth when the meaning of words is plain it is not the duty of the courts to busy themselves with supposed intention" [*Narayanaswamy v. R*, A 1939 PC 47: 66 IA 66].

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which will make any part of the document meaningless. *Prima facie*, the same meaning must be given to the same word throughout a document, unless there is special reason justifying the attribution of different meanings. The established rule of construction is to read the words in their ordinary and grammatical sense, and to give them effect unless such a construction would lead to some absurdity or inconvenience, or would be plainly repugnant to the intention of the parties to be collected from other parts of the deed [*Secy of S v. Sassoon*, 1 B 513; *Ram Pd v. Basanta*, 86 IC 1009: A 1925 P 729; *Khan Gul v. Lakha*, A 1928 L 609 FB: 9 L 701]. "The general rule is to give the words their natural meaning unless, when applied to the subject matter.....they produce.....an absurdity" or inconvenience so great as to convince the court that the words could not have been used in their proper signification' [*per* BLACKBURN J, in *Allgood v. Blake*, LR 8 Ex 160, 163]. The literal meanings of the words may be disregarded and another meaning given, if the words are sufficiently flexible to bear that interpretation [*N W Ry v. Hastings*, 1900 AC 260].

(2) The primary object is to determine what is the intention conveyed by the deed and the primary source of determining such intention is the language used in the deed. Oral evidence of intention is not admissible [*Balkishen v. Legge*, 27 IA 158: 22 A 149 PC]. The intention must be gathered, in the first place, from the document itself. If the words are express and clear, effect must be given to them and any extraneous enquiry into what was thought or intended is ruled out [*Chunchun v. Ebadat*, A 1954 SC 345: 1955 SCR 174]. For the purpose of gathering the intention, the language of the entire deed should be taken into consideration. The interpretation to be adopted should be one which gives effect, if possible, to all the parts and does not reject any of them [*Purananthachi v. Gopalaswami*, 63 IA 436: 41 CWN 14: A 1936 PC 281]. Too much stress should not be laid on a word here or a word there, but the intention is to be gathered from the document as a whole [*Allah Rakha v. Ali Md*, A 1929 L 45; *Abdul v. Advte General*, A 1937 B 37; *Farok v. Lalit*, A 1939 C 582] and so far as the intention is in accordance with law [*Kandarpa v. Akshaya*, 60 C 706]. Where the words are not sufficiently clear to fix the intention, the circumstances that surrounded the transaction may and ought to be resorted to [*Maharaja of Venkatagiri v. Rajeswara*, 1939 Mad 622: A 1939 M 614]. But where the language is clear and unambiguous, the question of finding out the intention does not arise [*Jio v. Rukuran*, 8 L 219: 100 IC 54] and evidence of surrounding circumstances as to intention of the executant becomes inadmissible [*Udai Pratap v. Jagat Mohan*, 6 P 638]. Evidence of intention is inadmissible when it is clearly expressed in the deed [*Bimala v. Abdul*, A 1928 C 825]. The Court has not to speculate as to the supposed intention but has to gather it from the plain words used [*Gangaram v. Birjo*, A 1929 L 143: 111 IC 893]. In construing the terms of a deed the question is not what the parties may have intended, but what is the meaning of the words which they used [*Manindra v. Durga*, 21 CWN 707: A 1917, PC 23]. Clear and unambiguous dispositive words are not to be controlled or qualified by any general expression of intention [*Lalit v. Chukkun*, 24 IA 76: 23 C 834].

Where the words of a deed are clear, all evidence of what occurred or what was said when the parties were in a state of negotiation is inadmissible [*Chapsey v. Jethabai*, 9 Bom LR 514], or the subsequent conduct of parties is an irrelevant consideration [*Barabani Coal Con Ltd v. Gokulananda*, 61 IA 35: 61 C 313: A 1934 PC 58; *N E Ry Co v. Hastings*, 1900 AC 260; *Suresh v. Mahendra*, A 1939 C 459]. But where the meaning of the words is not clear, it is open to see what preceded the execution of the document [*Secy of S v. Abdul Rahim*, A 1928 M 1246; *Gulabdas v. Collr of Surat*, 3 B 186: 6 IA 54]. The words must be construed according to their

natural meaning and no amount of acting by the parties can alter or qualify words which are plain and unambiguous [*Rahim v. Shajad*, 19 CWN 1311; *Midnapore Z Co v. Jogendra*, 33 CLJ 186]. Where the point in dispute is as to the meaning of a particular word in a document, evidence may be admitted to show in what peculiar sense that particular word was used, and extrinsic evidence including the evidence of subsequent conduct of the parties is admissible to determine the effect of the instrument as well as the intention of the parties [*S v. Bundi Electric Supply Co*, A 1970 Raj 36]. Where the question is purely one of construction of a particular agreement, the subsequent conduct of the parties is irrelevant [*Rustomji v. Dhariyawan*, 34 CWN 681: A 1930 PC 165: 59 MLJ 43].

It follows that when the language is perfectly plain and intelligible and there is no doubt as to the proper application of the words to existing facts, parol evidence is not admissible to show that the parties intended to mean other than what they have said (s 94).

(*3*) Parol evidence is admissible to show the meaning of commonly unintelligible characters, foreign-words, technical words, local and provincial expressions, words used in a peculiar sense (s 98). Technical legal expressions should be given their technical legal meaning [*Leach v. Jay*, 9 Ch D 42].

(*4*) If there are two clauses or parts of deed repugnant to each other, the first will be received and the latter rejected, unless there is some special reason to the contrary; but this is an expedient to which the court very reluctantly has recourse, and never until it has reconciled apparent inconsistencies, and the rule is subordinate to the general principle that the intention must be ascertained from the entire contents of the deed; for effect ought to be given to that part which is calculated to carry into effect the real intention and that part which would defeat it should be rejected [*Midnapore Z Co v. Jogendra*, 33 CLJ 186: 62 IC 491: A 1921 C 750]. The rule that of two clauses or parts of a deed repugnant to each other, the first will be received and the latter rejected unless there be some special reason to the contrary, is subject to the general rule that every document must be construed as a whole [*Sheo Darshan v. Sheo Bhajan*, 14 OC 189: 11 IC 685]. A deed must be read as a whole in order to ascertain the true meaning of several clauses, and the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the deed, if that interpretation does no violence to the meaning of which they are naturally susceptible [*Yusuf v. Seth Alibhoy*, A 1929 L 53]. All the terms of a deed must be taken into consideration when construing the deed [*Weerasekera v. Peiris*, 143 IC 170: A 1933 PC 49]. Intention of parties should be looked to in construing repugnant words [*Rama Rao v. Chellayya*, 97 IC 580 : A 1926 M 1208]. If a particular construction of a document makes a contract inoperative, and another construction makes it operative and is reconcilable with other parts of the document, the second should supersede the first [*Mahtab Chand v. Hurdeo*, 16 WR 119]. The rule is different in the case of wills. If there are two inconsistent clauses in a will which cannot be reconciled, the latter clause is to prevail.

(*5*) It would be wrong to give different meanings to the same expression in different parts of the same document unless it is evident from the context that a different meaning should be put upon it [*Maharaja of Venkatagiri v. Rajeswara*, 1939 Mad 622: A 1939 M 614].

(*6*) A court is not entitled to read words which are not in a document if it can be given a rational meaning. But a court is entitled to read words into a document, if it is necessary in order to reconcile conflicting clauses or otherwise to give effect to what

it considers to have been the real intention of the parties [*Wellington Cinema v. Performing R S Ltd*, 1937 Bom 724: A 1937 B 472].

(*7*) Deeds and contracts of the people of India ought to be liberally construed. The form of expression, literal sense, is not to be so much recorded as the real meaning of the parties which the transaction discloses (*Hanooman v. Babooe Munraj*, 6 MIA 393, 411; *Thakur v. Mt Chandra*, 19 CWN 873: A 1915 PC 18: 37 A 369: 29 MLJ 130; *Upendra v. Bindeshri*, 20 CWN 210; *Kusum v. Dasarathi*, 34 CLJ 323]. In construing a document it is not the description at the head of the document or its form but the substance that has to be looked into [*Bhupati v. Basanta*, 40 CWN 1320: *Ariyaputra v. Nachimuthu*, A 1936 M 918]. In construing documents in the vernacular it is not safe to rely on English precedents [*Pancham v. Pramatha*, A 1936 P 450; *Murugesam v. Minakshisundara*, 41 CWN 22: A 1936 PC 309: 63 IA 429].

(*8*) Where the language used is on its face ambiguous or defective so as to render the meaning unintelligible [*v. Illus* (*b*) to s 93] or where the language though intelligible creates an obvious uncertainty of meaning [*v. illus* (*a*) to s 93], extrinsic evidence is wholly inadmissible to explain the meaning. This is known as patent ambiguity.

(*9*) Where the words are quite plain and intelligible, but some difficulty arises in applying them to existing facts, *eg.*, when a description is partly correct and partly incorrect [*v. s 95 and illus*], parol evidence is admissible to indetify the subject-matter or where the words used are such that part of a description applies to one subject-matter and part to another, but the whole does not apply correctly to either [*v.* s 97 and *illus*], parol evidence is admissible to show to which of the two they were meant to apply. These are both cases of latent ambiguity.

(*10*) Where the language though clear and intelligible applies equally to two or more persons, or two or more things and it is necessary to ascertain to which person or thing the words were intended to apply [*v.* s 96 and *illus*], parol evidence is admissible for the purpose. This is also a case of latent ambiguity and is known as *equivocation*.

(*11*) For the construction of ambiguities in ancient documents resort may be had to contemporaneous usage to ascertain the meaning of the deed [*Souresh v. Saroj*, 38 CWN 707].

The sections in this chapter of the Act do not affect any of the provisions of the Succession Act 39 of 1925 as to construction of Wills. As to construction of Wills, see ss 74-111 of the Succession Act.

Principle and Scope. [Extrinsic Evidence Not Admissible to Explain Patent Ambiguity].—S 93 deals with *patent ambiguities* as distinguished from *latent ambiguities* (ss 95-97). BACON classified ambiguities into two "the one is '*ambiguitas patens*' (patent ambiguity), and the other is '*ambiguitas latens*' (latent ambiguity). '*Patens*' is that which appears to be ambiguous upon the deed or instrument; '*latens*' is that which seemeth certain and without ambiguity, for anything that appeareth upon the deed or instrument, but there is some collateral matter out of the deed that breedeth the ambiguity '*Ambiguitas patens*' is never holpen by averment, and the reason is, because the law will not couple and mingle matter of speciality, which is of the higher account, with matter of averment which is of interior account in law; for that were to make all deeds hollow and subject to averments, and so, in effect, that to pass without deed, which the law appointeth shall not pass by deed." [Bacon's Law Tracts, Maxims Rule XXV]. When the language used is plain in itself and perfectly

clear, but is unmeaning with reference to existing facts or may apply to two or more persons or things, the ambiguity is *latent* (ss 95, 96, 97). Extrinsic evidence is admissible in such case. Where the document is on the face of it unintelligible, the ambiguity is *patent, eg.*, a gift is made but no amount is mentioned; or though the amount is stated, a blank is left in the place of the name of the donee. Here extrinsic evidence is inadmissible.

This section has reference to documents the language of which is so vague or defective on their face as to convey no meaning [*v. illus* (*b*)] or so inherently ambiguous as to render the meaning uncertain [*v. illus* (*a*)]. On account of the inherent ambiguity or imperfection in the language or the deficiency or inconsistency of the words used, the intention of the maker of the document becomes a matter of pure speculation and the document fails. When the persons or the subjects named in the document cannot be ascertained from the language used and it is on its face unintelligible, extrinsic evidence of intention cannot be given. The court is to interpret documents, but it cannot supply the intention of the writer or import words into documents which are incapable of meaning for want of adequate expression. These are cases of *patent ambiguity*. "The diffficulty arises in determining whether the ambiguity is patent within the meaning of the rule. It is very clear that all extrinsic evidence is not to be rejected, merely because the instrument is of such doubtful meaning on its face as to admit of more than one interpretation. A great number of cases show that words or phrases having an equivocal meaning may be thus explained. But if the instrument is unintelligible on its face or inconsistent with itself, and remain so after all the extrinsic evidence as to the situation of parties and the surrounding circumstances have been received, then a patent ambiguity exists" [Elphinstone, Deeds, 105; 4 Phill Ex 524; Jones s 473]. Markby observes: This section can only apply where a writing is required by law. If no writing is required by law, and if the writing is so incomplete that its meaning cannot be ascertained (which is, I suppose, the case contemplated), it may be disregarded or used as an admission, and oral evidence given [Markby, p 74].

Blank.—The general rule is that extrinsic evidence is not admissible to explain patent ambiguities, for the business of the court is not to make instruments but to interpret them. The rule, however, does not appear to be true in its entirety [*Watchman v. Att Genl*, 1919 AC 533; *Re Atlay*, 56 Sol Jol 444]. Thus it has been held that where the christian name is given but a blank is left in the place of the surname, *eg* "Percival—of Brighton, Esq the father", evidence that the testator knew two persons called Percival Boxall, father and son, both living at Brighton was admitted [*In re De Rosaz*, 2 PD 66]. Where the name of the legatee is left wholly blank, [*Baylis v. A G*, Atk 239], extrinsic evidence is inadmissible; where the blank is partial [*In re Hubback*, 1905 P 129] such evidence is admissible. Though extrinsic evidence is not admissible to fill in blanks, s 93 does not affect the court's power to fill in blanks or omissions by the ordinary rules of construction [*U P Govt v. Nanhoo Mal*, A 1960 A 420]. No oral admission can be allowed for filling up the blank space in the remuneration clause of the contract. [*Food Corporation of India v. Birendra Nath Dhar*, A 1989 Noc 119 (Cal) (DB)]. [As to when a blank is an equivocation, see *post* s 96]. So, patent ambiguities in order to shut out extrinsic evidence must be such, that they are inherent in the language and are, in the nature of things incapable of explanation [*Colpoys v. C, Jacob*, 45], 463-64; *G W Ry v. British Corpn*, 87 LJ Ch HL 414, 429]. As Stephen puts it: "If the words of a document are so *defective or ambiguous, as to be unmeaning*, no evidence can be given to show what the author of the document intended to say" [Steph Dig Art 91]. As an instance of a document being "defective", Norton cites *Benode Lall v. Dallo*, Marsh 620 where the court

admitted parol evidence to supply parts of an old document lost in consequence of having been eaten away by white ants [Nort p 278]. But it is really a case of secondary evidence of a document destroyed or lost in part [s 65(*c*)] and not parol evidence to explain its meaning. There are comparatively few cases in which a bare inspection of the instrument will show that no proper extrinsic evidence will afford any light on the construction of the writing. Hence the court cannot generally determine whether there is a patent ambiguity until extrinsic evidence of the surrounding circumstances has been received [Jones s 474 based on Wigram on Wills 260]. As to blanks in documents, see also s 96 *post*.

So far as patent ambiguities are concerned BACON expounds the law with sufficient precision; for no doubt that when the ambiguity is *patent*, all declarations of writer's intention will be uniformly excluded. If, therefore, a testator, after leaving specific legacies to his several children, were to bequeath the residue to his child, not specifying which, the will would, so far as regards the residuary bequest, be inoperative and void. On the same principle, where a testator purported to leave his property to persons designed by letters of the alphabet, his will stating at its end that the key to the initials was in his writing desk on a card, it was held that (no card of as old a date as the will being found) a card which would have furnished a key, but dated many years after the execution of the will, could only be regarded as a declaration of the testator and that the case being one of the patent ambiguity, the species of evidence could not be legally admitted [*Clayton v. Ld Nugent*, 13 M&W 205; Tay s 1213]. The execution of a rectification deed to correct certain mistakes in the original sale deed cannot be considered to be extraneous evidence and s 93 is not applicable to such a case [*Brij Lal v. Kartar Kaur*, A 1988 P&H 88, 90L: (1987) 91 Pun LR 610].

Patent and Latent Ambiguity.—Starkie writes: "By *patent* ambiguity must be understood an ambiguity *inherent in the words and incapable of being dispelled*, either by any legal rules of construction applied to the instrument itself, or by evidence showing that terms, in themselves unmeaning or unintelligible, are capable of receiving a known conventional meaning. The great principle on which the rule is founded is that the intention of parties should be construed, not by vague evidence of their *intention, independently of the expressions* which they have though fit to use, but by the *expressions themselves*. How, those expressions which are incapable of any legal construction and interpretation by the rules of art, are either so because they are in *themselves unintelligible*, or because *being intelligible they exhibit a plain and obvious uncertainty*. In the first instance, the case admits of two varieties: *the terms though at first sight unintelligible, may yet be capable of having a meaning annexed to them by extrinsic evidence*, just as if they were written in a foreign language, as when mercantile terms are used, which amongst mercantile men have a distinct and definite meaning, although others do not comprehend them: the *term used may, on the other hand, be capable of no distinct and definite interpretation*. Now, it is evident that to give effect to an instrument, the terms of which though *apparently* ambiguous, are *capable of having a distinct and definite meaning annexed to them*, is no violation of the general principle, for in such a case effect is given, not to any loose conjecture as to the intent and meaning of the party, but to the expressed meaning and that, on the other hand where either the terms used are *incapable of any certain and definite meaning*, or, being in themselves intelligible, exhibit *a plain and obvious uncertainty* and are equally capable of *different applications*, to give an effect to them by extrinsic evidence as to the *intention* of the party, would be to make the supposed intention operate independently of the definite expression of such intention. By *patent ambiguity*, therefore, must be understood *an inherent ambiguity*,

which cannot be removed either by the ordinary rules of legal construction, or by the application of extrinsic and explanatory evidence, showing that expressions *prima facie* unintelligible, are yet capable of conveying a certain and definite meaning." (Quoted in Norton, pp 279-80).

Wigram writes in his book on Extrinsic Evidence: "A written instrument is not ambiguous because an ignorant and uninformed person is unable to interpret it. It is ambiguous only if found to be of uncertain meaning when persons of competent skill and information are unable to do so. Words cannot be ambiguous because they are unintelligible to a man who cannot read, nor can they be ambiguous merely because the court which is called upon to explain them may be ignorant of a particular fact, art or science, which was familiar to the person who used the words, and a knowledge of which is therefore necessary to a right understanding of the words he has used. If this be not a just conclusion, it must follow that the question, whether a will is ambiguous, might be dependent, not upon the propriety of the language, the *testator* has used, but upon the degree of knowledge, general or even local, which a particular judge might happen to possess; nay, the technical precision and accuracy of a scientific man might occasion his intestacy—a proposition too absurd for an argument".

As to *inaccuracy* of expression and *ambiguity*, Wigram says: "Again, a distinction must be taken between inaccuracy and ambiguity of language. Language may be inaccurate without being ambiguous and it may be ambiguous although perfectly accurate. If for instance, a testator, having one lease-hold house in a given place, and another house, were to devise his freehold house there to *A B*, the description, though inaccurate would occasion no ambiguity. If however, a testator were to devise an estate to *John Baker*, of Dale, the son of Thomas, and there were two persons to whom the entire description accurately applied, this description, though accurate, would be ambiguous. It is obvious, therefore, that the whole of that class of cases in which an inaccurate description is found to be sufficient, merely by the rejection of words of surplusage are cases in which no ambiguity really exists. The meaning is certain, notwithstanding the inaccuracy of the testator's language" [Wigram, Extrinsic Ev 2nd Ed, p 130].

[*Ref Tay ss 1212-14; Phip 8th Ed, XLVI, pp 594-649; Steph Art 91; Ros N.P.p 32; Powel, 9th Ed, p 542 et seq; Wegram's Extrinsic Evidence*].

This section is to be read with s 98. No section in this chapter shall affect the provisions of the Succession Act as to construction of Wills (see s 100 *post*). See s 77 of the Succession Act 39 of 1925, which provides for supplying by the context any material word in a will, which has been omitted. S 81 of the Succession Act 39 of 1925 says: "Where there is an ambiguity or deficiency on the face of a will, no extrinsic evidence as to the intentions of the testator shall be admitted." See the illustrations attached. Agreements, the meaning of which is not certain or capable of being made certain, are void under s 29 of the Contract Act (9 of 1872). Solemn contracts entered into between parties are not to be readily declared invalid for uncertainty or vagueness. If the court is satisfied that there was ascertainable and determinative intention it must give effect to that intention. Mere difficulty in interpretation is not synonymous with vagueness [*Kandanath Cine Enterprises (Pvt Ltd.) v. John Pilipose*, A 1990 Ker 198, 202].

Cases Where Extrinsic Evidence is Inadmissible.—A patent ambiguity cannot be explained under s 93 by oral evidence, but a latent ambiguity can be under s 96 [*Maharastraya v. Bijjulal*, 71 IC 436]. If, on a fair construction, the condition mentioned in the document is held to be vague or uncertain, no evidence can be admitted to remove the said vagueness or ambiguity [*Keshavlal v. Lalbhai*, A 1958

SC 512: 1958 SCJ 866]. Govt issued a notification appointing a certain person as a member of the Notified Area Committee, but there were three persons of the same name in the locality, A latent ambiguity might be removed by extrinsic evidence, but a letter from the Dy Secy to Govt cannot be admitted as extrinsic evidence [*Ramchandra v. Chairman*, A 1965 P 174]. Extrinsic evidence is not admissible to show what property was hypothecated in a bond when the language used in it expresses no definite meaning [*Deojit v. Pittamber*, 1 A 275; see also *Collr of Etawah v. Beti Maharani*, 14 A 162. But see 12 A 175 and 5 A 11 *post*]. The mere fact that there is ambiguity or difficulty not being a latent ambiguity, will not entitle the judge to consider questions of fact to assist him in construing a deed. But if there is no expression the document itself, which properly construed will entitle the court to come to any conclusion with regard to the matter, then the questions of the fact are certainly open to him to consider in coming to a conclusion with regard to the matter [*Darbar Saheb v. Barelal*, 162 IC 797: A 1936 P 275: 17 PLT 488].

Oral evidence may be admitted to explain a document, but not to vary the terms thereof when such terms are themselves clear and undoubted [*Rambuddun v. Sree Koonwar*, WR (1864) (Act X Rulings) 22]. A condition in a partnership contract gave one party the right to specify the share of profits to be assigned to the other but did not afford the slightest indication as to the proportion of losses which one party was to bear. Oral evidence is inadmissible as the contract is void for uncertainty [*Barkatram v. Anantram*, 31 IC 632].

Where a deed is ungrammatical and cannot be read literally so as to give any clear meaning without adding to or removing some words, there is patent ambiguity and oral evidence is not admissible to supply the defect [*Ramganesh v. Rupnarain*, 80 IC 944 : A 1925 A 34]. The words 'sir lands' are not at all ambiguous and evidence is not admissible to show that what was meant was not *sir* lands but *sir* rights [*Dhanpat v. Badri*, A 1935 A 729].

Cases Where Extrinsic Evidence is Admissible.—An instrument charging a certain annual allowance on the mortgagor's "granted villages" (where certain villages were granted) by Government was not void for uncertainty, and though the villages were not named in it, there was no doubt as to the particular villages which had been granted [*Kanhya Lal v. Md Hussain*, 5 A 11]. A simple mortgage-deed which described the property mortgaged as "our *zemindary* property" and gave no further specification or description was held not void for uncertainty, the words used being sufficiently certain [*Shade Lal v. Thakurdas*, 12 A 175: 10 AWN 60]. S 93 does not prevent evidence being given that the municipal number given in a rent receipt which is different from the present number of the holding was in fact the old number of the same holding [*Galstaun v. Prafulla*, 36 CWN 583]. Where there is a dispute as regards the identity and extent of the land leased, correspondence preceding the lease can be looked at [*Sital v. Badri*, 20 ALJ 907]. When the terms are ambiguous, evidence of subsequent conduct is admissible [*Kumar Sankar v. Secy of S*, 40 CLJ 322: 29 CWN 166]. Where a lease is ambiguous, evidence of user under it may be given in order to show the intention of the parties *(obiter)* [*Guru Prasanna v. Madhusudan*, 26 CWN 901: 35 CLJ 87 (1919 AC 533, 537 refd to)]. See under "*Contemporanea Expositio*" s 98 *post* p 1432.

In the construction of written or printed documents, it is legitimate in order to ascertain their true meaning, if that be doubtful, to have regard to the circumstances surrounding their creation and the subject-matter to which it was designed and intended they should apply [*Venkatasubhadrayyamma v. Poosapati*, 29 CWN 57, 73]. Although extrinsic evidence is not admissible to explain a patent ambiguity, nevertheless it is open to the court to study the document as a whole, and to ascertain

from the context, if possible what was the word which the writer omitted. Thus, in *Mourmand v. Le Clair*, (1903) 2 KB 216, the action was brought on a bill of sale to secure a loan of £70 and interest at is in the pound per month, which stipulated that the principal and interest should be repaid by monthly instalments of "seven" on a certain date in each month. It was held, that as having regard to the amount of the monthly interest, the bill of sale could only be paid off if the repayments were at the rate of £7 per month, the bill of sale was not rendered invalid by the omission of any unit of monetary denomination after the word "seven". [Powell 9th Ed p 555].

A handnote contained a stipulation to pay interest at 2½% without anything more and evidence was admissible to show that the words meant that interest should be calculated monthly [*Manmatha v. Nabin*, 14 CWN 110: 14 CLJ 97 (*Md Samsooddeen v. Abdul Huq*, 1864 WR Gap No 379 **folld**); *Md Masor v. Zafur*, 62 IC 702]. Such evidence is admissible under s 95 or s 98 [*Teja v. Sant*, A 1930 L 144]. In a bond the rate given was '*I Re a month*' and oral evidence was admitted to show that "per cent" had been omitted by mistake [*Bissessar v. Bhagban*, 5 AWN 41; *Ram Bharosay v. Janki*; A 1930 O 95; *Kamala v. Hasan*, A 1939 A 308; see *Indrodal v. Azizur*, 16 CWN 957]. In the Punjab, where the document is silent as to whether interest is payable monthly or annually, it is understood that it is payable monthly [*Teja v. Sant, sup*]—CONTRA: Not agreeing with *Manmatha v. Nabin, sup* it has been held that where a *kabuliat* recited that the interest would be paid at "*one anna per rupee*", oral evidence was not admissible under ss 92 and 93 to show whether it was payable monthly or annually. MOOKERJI, J, said: "The intention must be gathered from the language used by them in the instrument. The case of *Manmatha v. Nabin* is really of no assistance. The learned judges who decided that case did not specify the evidence which could be admissible to interpret the instrument; they relied merely on the decision in *Md Samsoodden v. Abdul Huq*, (*supra*) which was decided before the Indian Evidence Act was placed on the Statute book....In our opinion evidence of this description is clearly not admissible under the provisions of the I E Act. This view is fortified by *illus* (*b*) to s 93" [*Pratap v. Md Ali*, 19 CLJ 66: 41 C 342; see also *Sarju v. Sukhi*, 4 PLT 577; *Ramganesh v. Rupnarain*, A 1925 A 34: 80 IC 944]. See *ante* notes to s 92 prov (*2*).

Illus (*b*) to s 93 shuts out evidence to fill blanks in a deed. But oral evidence is admissible if the case comes within proviso (*1*) to s 92 [*Mg Po Gyi v. Hakim*, 80 IC 759: A 1924 R 235].

S. 94. Exclusion of evidence against application of document to existing facts.—When language used in a document is plain in itself, and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts.

Illustration

A sells to *B*, by deed, "my estate at [1][Rampur] containing 100 [2][bighas]". A has an estate at [1][Rampur] containing 100 [2][bighas]. Evidence may not be given of the fact that that estate meant [3][to be sold] was one situated at a different place and of a different size.

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1. In Pakistan "Rangpur" and in Ceylon "Negombo" substituted.
2. In Ceylon "acres" substituted.
3. Omitted in Ceylon.

SYNOPSIS

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COMMENTARY

Principle and Scope.—This section does not refer to any ambiguity, patent or latent or otherwise. The rule embodied in it is based on plain common sense. It means that when the language is crystal clear and it applies correctly or definitely to existing facts, no evidence can be allowed to show that the parties intended to mean something else, even though they have acted long in a different way without understanding the true effect of the plain words in a document.

When any document comes before a court for interpretation, it will first try to ascertain its meaning by looking into the language itself. When the words used in it are plain in themselves, *ie.*, perfectly clear and free from ambiguity, and there is no doubt or difficulty as to the proper application of the words to existing facts, parol evidence is not admissible to show that the parties intended to mean other than what they have said. "The question....is not what was the intention of the parties, but what is the meaning of the words they have used" [*per* DENMAN LCJ, in *Rickman v. Carstairs*, 5 B&Ad 663]. When the words of an instrument are plain and ambiguous, they should not be explained away by extrinsic evidence [*Alagiya v. Saminada*, 1 Mad HC 264]. It is presumed that ordinary words were used to convey their ordinary meaning and that the parties must have meant what they have written. A witness cannot be asked what he understands by a plain sentence in English [*Dowling v. Pontypool &c Co.*, LR 18 Eq 714]. So, in a libel case plaintiff's witnesses cannot be asked what meaning they attached to the words complained of because that is the question the jury or the court has to decide, though they can depose that they understood the words to refer to the plaintiff [*The Advocate Co Ltd v. Abraham*, A 1946 PC 13: 1946, 1 MLJ 152: 223 IC 103]. Section 94 would apply only when the execution of the document is admitted and there is no vitiating circumstance against it [*General Court Martial v. Aniltej Singh Dhaliwal*, A 1998 SC 983 : 1998 Cri LJ 1402].

> LORD HALSBURY in *North E Ry Co v. Hastings*, 1900 AC 260, 263: "The words of a written instrument must be construed according to their natural meaning, and it appears to me that no amount of acting by the parties can alter or qualify words which are plain and unambiguous. So far as I am aware, no principle has ever been more universally as rigorously insisted upon than that written instruments, if they are plain and unambiguous, must be construed according to the plain and unambiguous language of the instrument itself".
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> EYRE C B, in *Gibson v. Minet*, 1, H B1 615: "All latitude of construction must submit to this restriction that the words may bear the sense which by construction is put upon them. If we step beyond this line, we no longer construe men's deeds, but make deeds for them".
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> TINDAL CJ, in *Att-Gen v. Shore*, 11 Sim 592, 615: "The general rule I take it to be, that where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the

instrument, or the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves; and that, in such case, evidence *dehors* the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible".

LORD BRAMPTON in *North E Ry Co v. Hastings* (*supra* at p 270): "It seems to me to be clear and free from ambiguity, and incapable of any other cons-truction than that assigned to it by the respondent. Certainly there is nothing to be found in the rest of the agreement to suggest any other interpretation. But it is said that it must have been differently understood by the parties themselves and that the omission by the plaintiff and his predecessors for upwards of forty years to claim the rents now sought to be recovered is cogent evidence that such was the case. I grant that if the clauses were capable of two constructions, one of which would support, the other of which would defeat the claim, the omis-sion would afford irresistible proof that the latter was the interpretation intended by the parties. No such ambiguity, however, exists, and it seems therefore to me that, in the absence of any proof to the contrary, it must be assumed that the parties knew and understood the language they were using, and that in executing the agreement containing that clause they were truly expressing their intentions, and are bound by the writing they have signed. Why the agreement was so framed—what were the considerations which induced it and why the claim was so long allowed to sleep, are mere matters of speculation, but one has no right to act upon speculation to set aside a deed or agreement which is on the face of it clear and definite".

[The facts of the case are that *A* by a deed in 1854 granted leave to *B* (a railway company) to make a railway through his land, *B* agreeing to pay a certain rent on all coal carried over "any part of the railways comprehended in their Act and shipped at *C*."—In an action by *A* for such rent, it was held that the words being unambiguous, evidence that for forty years *B* had paid and *A* accepted rent only on such coal as passed over *A's* land and was shipped at *C*, was not admissible to disentitle *A* to rent on all coal passing over parts of *B's* railways, and shipped at *C*, but not passing over *A's* land.]

The rule that plain meaning of words cannot be disturbed, though well settled has to be applied liberally. Common or plain words are often used by merchants, traders and others in a sense differing from their ordinary meaning. When words are used in a peculiar sense by persons according to usage, provincialism, &c evidence is admissible to prove the peculiar sense in which the parties understood them [see s 98].

Section 94 comes into play when there is a document and its language has to be considered with reference to a particular factual situation. The section applies when the execution of the document has been admitted, and its validity is not vitiated by any circumstances put forth against it. The document in question was a record of the proceedings of a board. The signatories verified that they had checked the materials and serviceability. The verification amounted to an admission on the part of the signatories. They wanted to place their comments on it. The argument against them was that they were not entitled to give oral evidence. The court relied upon the well-settled rule that an admission can be explained by its maker. It is not conclusive of the truth of the matter stated in it. It is only a piece of evidence. Its weight depends upon facts and circumstances. Therefore, oral evidence is allowable explaining its import in the context of the facts and circumstances in which it was made. *General Court Martial v. Aniltej Singh Dhaliwal,* AIR 1998 SC 983: 1998 Cri LJ 1402.

Natural Meaning to be Given to Plain and Clear Words.—Where the words of a document are unambiguous or the difficulty is merely grammatical, extrinsic evidence is not admissible [*Higgins v. Dawson*, 1902 AC 1; *Great W Ry v. Bristol Corp*, 87 LJ Ch (HL) 414, 418-20; *Clyde Navgn v. Laird*, 8 AC 658; *North E Ry v.*

Hastings, ante]. Parties are bound by the words they have used, however clear their intention may be [*Venkata v. Subba Naidu*, 1915 MWN 822]. The words must be construed according to their natural meaning and no amount of acting by the parties can alter or qualify words which are plain and unambiguous [*Rahim Baksh v. Shajad*, 19 CWN 1311: 26 IC 466; *Midnapore Z Co v. Jogendra*, 33 CLJ 186]. In interpreting a surety bond the language of which is plain and unambiguous or without any inconsistency, it is not permissible to rely on the surrounding circumstances under which the bond came to be executed. The duty of the court is not to delve deep to ascertain one's undisclosed intention, but only to take the ordinary meaning of the words used. It is well-settled that a surety bond has to be strictly construed [*Kamala Devi v. Takhatmal*, A 1964 SC 859]. The mere fact that the parties have acted on an erroneous construction is no reason why courts should not follow the general rule that an instrument should be construed according to its meaning in the light of the circumstances in which it was executed [*Bhupendra v. Midnapur Z Co*, 86 IC 937].

The expression "husband and wife" conveys the meaning that the woman is the man's wedded wife [*Mi Me v. Mi Shwe Ma*, 39 IA 57: 3 9C 492]. *Prima facie* the words "child or children" mean only legitimate children and no other meaning can be given unless there is clear evidence in the will itself of an intention to establish another application of the words. The *prima facie* meaning can be departed from in two classes of cases, *ie* first, where it is impossible from the circumstances of the parties that any legitimate children could take under the bequest; and secondly, where on a just and proper construction, there is a clear intention to include illegitimate children also [*In re Taylor*: *Hockley v. O'Neal*, 1925 Ch 739]. A testator first made a settlement in which after giving himself a life-estate in his reality, he disposed of his property after his death among his sons and their descendants. *X* was a grandson of the testator, but his father was considered to be an illegitimate son and was not mentioned in the settlements. Some months later, the testator made a will disposing of his personality and herein he referred to the father of *X* as a legitimate son and made a bequest in his favour. The question was whether for the purposes of the settlement also *X's* father could be treated as one of the sons of the testator—*Held* there being no ambiguity in the deed of settlement, the subsequent will could not be used as a "dictionary" for construing it. Where there is a gift to a class, such as 'sons', there is *prima facie* interpretation of words denoting descent or relationship which holds the field till it is displaced. Children as such means legitimate children and any evidence *dehors* the instrument itself showing that the settlor must have meant to use ordinary words otherwise than in their usual meaning cannot be admitted [*Khoo Hool Leong v. Khoo Hean Quee*, 96 LJPC 94].

Although evidence of all the circumstances which surrounded the author of a written instrument will be received for the purpose of ascertaining his intentions, yet those intentions must ultimately be determined by the language of the instrument, as explained by the extrinsic evidence; and no proof, however conclusive in its nature, can be admitted, with the view of setting up an intention inconsistent with the plain meaning of the writing itself [*Newenham v. Smith*, (1859) 10 Ir CLR 245: *Higgins v. Dawson*, 1902 AC 1]. For the duty of the court in all these cases is to ascertain, not what the parties may have really intended, as contradistinguished from what their words express; but simply, what is the meaning of the words, they have used [*Doe v. Gwillim*, 2 LJKB 194]. It is merely a duty of interpretation and construction; that is, to *find out the true sense of the written words, as the parties used them*; and, when the true sense is ascertained to subject the instrument to the established rules of law [Tay s 1201]. In no case therefore,—except, where the description in the document would equally apply to any one of two or more subjects, (v s 96), or where the object is to rebut an equity—is it permitted to explain the language of a written instrument by evidence of the private views, the secret intentions, the known principles, or even the express parol declarations of the writer; but, in all cases alike, the court must expound the instrument in strict accordance with the language employed; and if the primary meaning of this language

be unambiguous, both with reference to the context and to the circumstances in which the parties to the instrument were placed at the time of making it, such primary meaning must be taken conclusively to be that in which the parties used the language, and no extrinsic evidence can be received to show that in fact they used it in any other sense, or had any other intention [*Shore v. Wilson*, 9 CI & Fin 355, 525; Tay s 1202].

S 94 can have no application in cases of misdescription [*Sabaji v. Nawal*, A 1928 N 5]. Where the dispute is not as to existing facts, but is as to what is intended by the parties to be done by them in future, s 94 does not apply and mutual mistake of fact can be proved, *eg.*, mistake in field number in a compromise petition [*Dalip v. Dalip*, A 1930 L 446].

[*Ref Phip 8th Ed p 594 et seq; Tay ss 1201-31; Steph Art 91; Wigmore, ss 2461-63*].

Admissibility of Extrinsic Evidence to Explain Supposed Intention When the Language is plain.—Extrinsic evidence is not admissible to alter a written contract or to show that its meaning is different from what its words import; where there is latent ambiguity in the wording, parol evidence is admissible to explain it [*Ram Lochan v. Unnopoorna*, 7 WR 144. See also *Rambuddun v. Sree Koonwar*, WR (1864) Act X rulings, 22 noted under s 93]. Contemporaneous circumstan- ces and subsequent conduct of the parties are not admissible when there is no ambiguity in the deed and legal construction can be put on it [*Bisheshwar v. Achhaibar*, A 1941 O 507]. Extrinsic evidence is not admissible when the terms of a bond are clear. An agreement to pay "interest on interest" does not mean compound interest [*Bhadu v. Ganpati*, A 1931 N 25]. Where a bequest was for *dharmarth*, evidence is not admissible to show what the testator meant by the simple word. It was void for uncertainty [*Gurdit v. Sher Singh*, 78 PR 1912 (3 B 725 PC **folld**)]. The intention of the parties to a document whose language is plain and unambiguous, should be gathered from the language of the document itself, without resorting to surrounding circumstances for aid [*Babu v. Sitaram*, 3 Bom LR 768; *President, Taluk v. Chilakaman*, (1911) 2 MWN 238; *Velappa v. Palani*, 1915 MWN 325].

Where a mortgage deed specified the mortgaged property as 5 pies share in a *mehal*, s 94 shuts out oral evidence to prove that the mortgagor intended to mortgage his entire zemindary [*Uma Shankar v. Ram*, A 1939 A 231]. Where the terms of a mortgage deed are clear and unambiguous and apply to properties specified in the deed, the parties are debarred by ss 92 and 94 from showing that there had been an inadvertent misdescription and their intention was to mortgage properties different from what appears in the deed unless the circumstances are compelling as to lead inevitably to such conclusion [*Gobind v. Shujjat*, A 1938 A 364: 1938 All 494]. Parol evidence is not admissible to alter or vary a written document, even if the inadequacy of the consideration and the conduct of the parties show that the transaction was different from what appears in the instrument or writing [*Madhab v. Gangadhar*, 11 WR 450. See however, 12 WR 532].

If an undescribed dispute is referred to arbitration and the language of the submission paper is not so plain in itself, evidence is admissible to show what the actual dispute was at the time of submission [*Ghelabhai v. Nandubai*, 21 B 335, 344]. Of two kinds of description, preference should be given to the more definite [*Velappa v. Palani*, 29 IC 201].

A testator devised "all his real estates in the country of Limerick and city of Limerick" to *A*. He had no real estates in the country of Limerick, but had some in the country of Clare and city of Limerick of which the will did not dispose—*held* that evidence is inadmissible to show that the words "of Clare" had by mistake been erased from the draft and so omitted from the will [*Miller v. Travers*, 8 Bing 224].

Evidence to prove adoption is not inadmissible under s 94 on the ground that the language of a document on which plaintiff has partly relied but to which he was no party, is plain and unambiguous [*Gopi Kishen v. Gopi Kishen*, 57 PLR 1915].

Where the true effect of the language in a lease is perfectly clear, no reference is permissible to the conduct of the parties. It cannot be said that it means something else merely because the parties have gone on so long without understanding it [*Rahim Baksh v. Shajad*, 19 CWN 1311]. Outside evidence is not admissible to show the intention of the writer, which is not disclosed by the authorised channel, *viz.*, the words which he himself selected [*Manmatha v. Probodh*, 37 CLJ 52]. Where the lease agreement did not stipulate mode of payment of interest on arrears of rent the collector is not prevented from deciding the same. [*Tata Iron and Steel Co. Ltd. v. State of Bihar*, A 1996 Pat 37, 39].

Summary of the Rules in Ss 94-97.—[See *post*, s 97].

S. 95. Evidence as to document unmeaning in reference to existing facts.—When language used in a document is plain in itself, but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a [1][peculiar] sense.

Illustration.

A sells to *B*, by deed, "my house in [2][Calcutta]".

A had no house in [2][Calcutta], but it appears that he had a house at [3][Howrah], of which *B* had been in possession since the execution of the deed.

These facts may be proved to show that the deed related to the house at [3][Howrah].

SYNOPSIS

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COMMENTARY

Principle and Scope.—Latent ambiguity has been explained while dealing with patent ambiguity (*ante* s 93). Ss 95, 96 and 97 deal with ambiguities. S 95 refers to documents plain in themselves but are unmeaning in reference to existing facts. Thus, when the language of a document applies in *part correctly* and in *part incorrectly to an existing fact*, extrinsic evidence is admissible to show whether it was intended to apply to it. The single *illustration* exemplifies the rule. S 97 is a part of the rule in this section. That section refers to documents, the words of which apply *partly to one* set of existing facts and *partly to another*, but correctly to neither and

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1. In Ceylon "particular" substituted.
2. In Pakistan "Karachi" and in Ceylon "Colombo" substituted.
3. In Pakistan "Keumari" and in Ceylon "Kottee" substituted.

there also extrinsic evidence is admissible to show which of the two was intended. The illustration to s 97 exemplifies the rule. Ss 95 and 97 are best understood if read together. They apply to *incorrect description* or misdescription of *person and property*. The rule embodied in ss 95 and 97 is the same that prevails in England and all kinds of extrinsic evidence is admissible in the cases covered by the sections, except that in England direct declarations of intention of the maker of the instrument cannot be given (Phip 11th Ed p 875; Tay ss 1202, 1206, 1218). No such restriction appears to exist in the Evidence Act and declaration of intention are equally admissible under ss 95, 97 along with other kinds of extrinsic evidence [*post* s 97]. S 96 applies to what is known as *equivocation, ie* when the words of a document though intended to apply to one person or thing, apply equally to two or more. See *illustrations* to s 96.

In a will case the Supreme Court of the United States thus classified latent ambiguities: "Latent ambiguities are of two kinds; first, where the description of the devisee or the property devised is clear upon the face of the will, but it turns out that there is more than one estate or person to which the description applies; and second where the devisee or property devised is imperfectly, or in some respects, erroneously described, so as to leave it doubtful what person or property is meant" [*Patch v. White*, 117 US 210]. No ambiguity is apparent in such cases to the person construing the written instrument, until from the evidence of relevant surrounding circumstances, it is found that there is more than one person or thing answering the description given. In other words the ambiguity does not appear on the face of the instrument, but lies hidden in the person or subject whereof it speaks [*Hand v. Hoffman*, 8 NLJ 78]. It is an old familiar rule that, when the ambiguity is thus raised by extrinsic evidence, it may be removed by the same means [*Patch v. White, sup*; Jones s 472].

Language Plain and Intelligible But Uncertain as to Persons or Things Referred to.—The principle on which ss 95 and 97 are based has been thus explained by Taylor: The law as to latent ambiguities is not so easily intelligible. It is especially necessary to guard against the supposition, that, because no ambiguity arises on the face of the instrument, any doubt, which is occasioned by the introduction of extrinsic evidence may be cleared up by having recourse to the declarations of the writer's intention. This is not the law; and many instances of strictly latent ambiguities might be given, where evidence of declarations of intention would be inadmissible. For, in the first place, a will, apparently plain and intelligible, may, when an inquiry is instituted respecting the persons or things to which it relates, turn out to be uncertain; that is, the persons or things may prove *not* to have been described with *legal certainty*. Suppose a bequest be made to the *four children of A*, and it appears that *A* had *six* children, two by a first marriage, and the remainder by a second. Here, though evidence of the circumstances of the family, and of the respective ages of the children, would no doubt be admissible, with the view of identifying the particular legatees alluded to the will, it seems that proof of the testator's declarations of intention could not be received [*Doe v. Hiscocks*, 1839 9 LJ Ex 27; questioning *Hampshire v. Peiree*, 2 Ves Sen 216; Tay s 1214]. Secondly a legatee may be so described in a will that *while part of the description answers to one claimant, the remainder may apply to another*. Here the law used to attach somewhat greater weight to the name than to the *description* of the legatee; and therefore, if there were nothing in the rest of the will, or in the evidence received, to show who has meant, the person rightly named was allowed to take in preference to him who was only rightly described [*Ld Camoys v. Blundell*, 1 HLC 786]. The doctrine seems to have been first promulgated by LORD BACON .....The doctrine has, however, been very

roughly handled by LORD CHANCELLOR CAMPBELL in the House of Lords [*Drake v. D*, 8 HLC 172, 179]; and if, on the one hand it cannot at present be safely regarded as exploded [*In re Plunkett's Estate*, 11 Ir Ch R 361, &c], still less on the other hand, can it be recognised as an inflexible rule [*Ld Camays v. Blundell, sup*; *Thomson v. Hempenstall*, 1849, 1 Roberts 783]. The court, in all such cases, will look narrowly at the context and the surrounding facts and place itself, as nearly as may be, in the situation of the testator at the time of executing the instrument; and if it can then clearly ascertain from the language of the will thus illustrated [*Re Brake*, 6 PD 217], which of the two claimants are intended by the testator, it will award the legacy to the one so meant to be benefited [*Garland v. Beverley*, 9 Ch D 213], though the supposed maxim may in such case chance to be contravened [*Doe v. Huthwaite*, 3 B&Ald 632 and other cases; Tay s 1215].

The principle of the rules in ss 96, 97 is embodied in the maxims: *veritas nominis tollit errorem demonstrationem: nihil facit error nominis cum de corpore constat; falsa demonstratio non nocet cum de corpore constat.* A false description does not vitiate a document. In the *illustration* to s 95, the word "in Calcutta" in the phrase "my house in Calcutta" have no application and make the document unmeaning, as *A* had no house in Calcutta; but the words "*my house*" have application to existing facts because *A* had a house in Howrah. The ambiguity arises from the evidence that *A* had a house at Howrah and not in Calcutta, and extrinsic evidence is here admissible to clear the ambiguity. In *Miller v. Travers*, 8 Bing 244 TINDAL CJ, said:

> "In all cases in which a difficulty arises in applying words of a will to a thing which is the subject-matter of the devise, or to a person of the devisee, the difficulty or ambiguity which is introduced by the admission of extrinsic evidence may be rebutted and removed by the production of further extrinsic evidence upon the same subject, calculated to explain what was the estate or subject-matter really intended to be devised".

Where a single subject-matter is involved, the inquiry, in case of incorrect description, will often be confined to the mere sufficiency of the expression. Thus, when the name of a legatee is correct, but the description incorrect and there is no one answering the description, the person answering the name will take, and *vice versa* [Theobald, Wills, 7th Ed 268]. So, a devise of "freeholds" will carry leaseholds, if that is all the testator had [*Day v. Trig*, I P Wms 286]; or a bequest of "shares" in a company, debenture stock therein, provided he held no shares [*Re Weeding*, (1896) 2 Ch 364; *Re Bodman*, (1891) 3 Ch 135]; or of monies on "current account" those on deposit, if that was the only account open [*Re Vear*, 62 Sol Jol 159—Phipson. 11th Ed p 875].

Where second hand note recites being executed for cash but it is found to be executed not for fresh cash consideration but in lieu of previous dues of the hand note in suit, for construction of the hand note oral evidence and circumstances will have to be taken into consideration [*Baleshwar v. Lalbahadur*, A 1972 P 87].

In declaring the legal result of one or more documents, two considerations have to be borne in mind: (*1*) What is reasonably to be taken to have been the intention of the parties when they made the contract in question, assuming them to be ordinary reasonable business people? (2) Does the language used by the parties themselves fairly represent to carry out that intention? [*Mahabir v. Jag Mohan*, 57 IC 569].

When a description is partly correct and partly incorrect and the former part is sufficient to identify the subject-matter intended, while the latter does not apply to

any subject, the erroneous part will be rejected [*Naraindas v. Tekchand*, A 1923, S 42: 84 IC 137. See s 97 *post*].

[*Ref Tay ss 1218-23; Phip 8th Ed pp 628-38; Steph Art 91 (7); Wig s 2476*].

Admissibility of Extrinsic Evidence Where Description is Partly Correct and Partly Incorrect.—The general rule laid down in s 91 is subject to certain important exceptions contained in ss 95 and 97. So, where a reference to survey numbers in a sale-deed is a misdescription of the land, but the other particulars given in regard to it describe it correctly, so that there is no doubt as to its identity, the misdescription in the document may be disregarded and does not render it useless as a document of title. In this case the illustration attached to the section has been clearly explained [*Karuppa v. Periathambi*, 30 M 397: 2 MLT 336; *Basavapunnareddy v. Krishnayya*, A 1966 AP 261 (misdescription of area in sale certificate); see *Basudev v. Somenath*, A 1964 Or 63]. So a misdescription in a sale certificate was held not to prejudice the purchaser's title, *eg*, a *shikmi* taluk described as *jotedari* interest [*Kalimuddin v. Ashraf Ali*, 19 WR 276; see also *Tara Nath v. Jay Sundari*, 21 WR 93; *Ram Gopal v. Shib Pd*, 12 WR 483; *Maleeban v. Raseda*, 25 WR 401]. This section has no application in the matter of construing an order of court, appointing receiver to bring a suit upon an agreement of one date, when it was found afterwards, that the agreement intended to be sued upon was one of another date [*Benode v. Raj Narain*, 30 C 699: 7 CWN 651].

When there is a written agreement to deliver a quantity of grain at a particular time, evidence may be given to show what kind of grain the contracting parties had in their contemplation at the time the contract was made [*Valla Bin v. Sidaji Bin*, 5 BHC 87]. Where in the list of properties mortgaged Hala Nagla was entered instead of Paniyala, oral evidence was admissible to prove the misdescription [*Mahabir v. Md Masiyatullah*, 38 A 103]. A testator devised to *A* "all my farm called Trogues-farm now in the occupation of *C*" and to *B* the residue of his lands, *B* claimed two closes which were not in occupation of *C* but *M*—*Held* that evidence that shortly before the will the testator served notice to quit on *M* in which he described the two closes as "my lands belonging to and called Trogues-farm" was admissible and that the two closes passed to *A* [*Goodtitle v. Southern*, 1 M&S 299 (**refd** to in *Umesh v. Eliza Sageman*, 5 BLR 633]. Where a *jalkar* 'situate in *mauza* Nariar' was leased, oral evidence is admissible to show that the disputed *jalkar* was situate in village Morsandi though through a misapprehension due to its vicinity to Nariar it was known as situate in Nariar [*Ramalakhan v. Digbijoy*, A 1948, P 274: 26 P 278].

By a deed "all the properties appertaining to the entire *bhag*" *were* mortgaged. The *bhag* comprised (*inter alia*) four *gabhans* or building sites. But the clause containing particulars of the mortgaged property mentioned only two *gabhans*, one only of which belonged to the *bhag* and the other did not. The deed then proceeded: "According to these particulars, lands, houses and *gabhans*, barnyard, &c, all the properties appertaining to the whole *bhag* have been mortgaged and delivered to your possession.....There is no other property appertaining to the said *bhag* of which mention is not made here"—*Held* that the particulars were "the leading description" and the supplementary description of them as constituting the entire bhag should be regarded as '*falsa demonstratio*' [*Tribhovandas v. Krishnaram*, 18 B 283]. *A devised* 'all that part of Rigby's estate devised to me by my father's will consisting of *L* meadow, *K* pasture, *F* meadow, and *M* meadow"—*held*, that by the father's will two other closes were devised to *A* and that the whole six passed [*Travers v. Blundell*, 6 Ch D 436 (**folld** in 18 B 283 *ibid*). A devised all his cash in Bank, consols and shares to *B*. *A* had no consols, but had some Bank of England annuities. A letter to *B* soon

after the will in which he had described the annuities as consols was held admissible and the annuities passed [*Re Windsor*, (1918) 47 Ir LTR 344].

Parol evidence is admissible to show that in an acknowledgment, the name of the creditor was through mistake put down as *K* instead of *R* [*Aijaz v. Ramsarup*, A 1931, O 54]. Where a person made a bequest to "*A my aurasha son*" knowing that he was not his *aurasha son—Held* that the misdescription was immaterial [*Court of Wards v. Venkata*, 22 M 383]. Where it was alleged that the numbers of plots entered in the mortgage-deed were incorrect, oral evidence was admissible under ss 95 and 96 to prove how the language was related to existing facts [*Radhi v. Angne*, 16 OC 213]. Where a sale-deed purported to convey an upstair house standing on a certain site which was also described and conveyed, and the vendor had no upstair house on that site but had one on the opposite side of the same street and no other elsewhere—*Held*, parol evidence was admissible to show that the house intended was the latter house [*Annathuri v. Ramanuja*, 22 MLJ 411: 15 IC 223]. Where a deed of release is silent as to the claim released, evidence *aliunde* is admissible under s 95 to show what claim was intended to be released [*Abraham v. Lodge Good Will*, 34 M 156]. Where property is transferred and the deed gives a wrong number of description of property, the transferee is entitled to treat his title to the property that was really intended to be conveyed as complete and can invoke the aid of ss 95 to 97 [*Palani v. Nachappa*, 53 IC 379].

Where mortgagee transferred mortgaged property and there was no mention that only mortgage rights were intended to be sold, the inference is that the whole property is sold. If the absence of assertion of absolute ownership in the deed makes it possible to hold that only mortgagee's rights were sold, there is latent ambiguity and evidence can be given [*Daulat v. Baliram*, A 1929 N 267]. Where there is any doubt as to the construction of a security bond, reference may be made to antecedent circumstances, *eg*, the order directing the security to be given [*Mahendra v. Satish*, 61 C 890: A 1934 C 569; *Jiban v. N B Coal Co*, A 1965 C 242; *Raghunandan v. Kirtyanand*, A 1932 PC 1].

Where the language in a sale-deed is plain and the area sold is correctly stated the fact that the boundaries do not correctly describe the plots will not make extrinsic evidence admissible [*Ram Rakhi v. Gauri*, 36 PLR 61]. Where the relevant recital in the deed, where it dealt with the name of the transferor, was unmeaning in reference to existing facts when judged in the context of the earlier recitals and the undisputed case of the parties about them, it is permissible for the court to look to oral evidence to find out whether the transfer was made to two different persons or one person having two names [*Hiralal v. Ram Dularey Sorabiya*, A 1982 All (NOC) 228].

For other cases of misdescription, see s 97 *post*.

Falsa demonstratio non nocet cum de corpore constat.—A false description does not vitiate. [*Greenleaf*, s 301; Broom Max 629 *et seq*]. According to the old maxim, an instrument does not necessarily fail or become inoperative because it contains an inaccurate or false description. If after rejection of the inaccurate description, there is sufficient evidence to identify the person or the property, effect will be given to it. "Here, though parol evidence of the author's declarations cannot be received, the instrument will not in consequence of the inaccuracy be regarded as inoperative; but if, after rejecting so much of the description as is false, the remainder will enable the court to ascertain with legal certainty the subject-matter to which the instrument really applies, it will be allowed to take effect [see *Ford v. Batley*, 23 LJ Ch 225]. The rule in such cases is—"*falsa demonstratio non nocet*' [Tay s 1218]. If the descriptive words contain a sufficiently certain definition of what is conveyed,

inaccuracy of dimension or of plans as delineated will not vitiate or affect that which is sufficiently described [*Cowen v. Truefitt Ltd.*, (1898) 2 Ch 551; *Cowen v. Truefitt Ltd*, (1899) 2 Ch 309; *Mellor v. Walmesley*, (1905) 2 Ch 164]. In a deed of rooms on second floor of Nos 13 and 14, Old Bond Street, with free ingress "through the staircase and passage of No 13", there was a staircase in No 14 but none in No 13. It was held that the words "of No 13" might be rejected as *falsa demonstratio* and the deed made effectual by the only staircase [*Cowen v. Truefitt*, (1898) 2 Ch 551]. Where *N* by his will bequeathed his properties "to my wife *P* absolutely," the identity of the legatee *P* being clearly established, the possible misdescription as wife (assuming the marriage was not valid) did not vitiate the bequest [*Boisogomoff v. Manmatha*, 43 CWN 1164 (*Fanindra v. Rajeswar*, 12 IA 72, 89: 11 C 463 **folld**)]. It is immaterial in what part of the description in the document the false demonstration appears. It is not necessary that it should follow the true part, and qualify what has gone before, in *Cowen v. Truefitt, sup*, LINDLEY, MR, said:

> "I must protest against the way in which the doctrine was stated by the applicant's counsel, that the maxim *falsa demonstratio non nocet* only applies where there is some correct description at the end of the sentence. That is whittling away the doctrine and making it ridiculous; it is a misapprehension."

"When the present rule is to be applied, a part of the description being found erroneous but non-essential, three situations may be distinguished. *First*, only one object may be eligible to answer the description; this is the common case, about which no difficulty can arise. *Secondly*, two or more objects may be eligible, the description being in one part imperfect for one, in another part for the other; this is a frequent case and the rule is equally well settled. *Thirdly*, two or more objects may be eligible one of which perfectly answers the description, the others imperfectly in some respects. Now in this situation the rule against disturbing a plain meaning (if such a rule be recognized) [see s 94] will of course oblige us to apply the description to the first object, even though it could be made to appear that a part of the description was non-essential and that the essential terms of it were actually used to designate one of the other objects. So far, then, as such a rule is recognized, it prevents the due operation of the present principle" [Wig s 2476].

A testator left "£20 for mourning and his premises called Rose Cottage" to his "niece Elizabeth Stringer." He had had a niece Elizabeth Stringer, who died before the date of his will and whose funeral he attended; and it was proved that at the date of his will the only person living was a great-grand niece Elizabeth Jane Stringer, a child five years old—*Held*, that the latter took as sufficiently answering the description; but evidence that the will was a copy of an earlier one made in Elizabeth Stringer's lifetime, and that the legacy to her by inadvertence of the solicitor who did not know of her death, been recopied into the new will without the testator's attention being directed thereto, was inadmissible [*Stringer v. Gardiner*, 4 De G&J 468: 28 LJ Ch 758]. This decision, remarks Stephen, "the result of which was to give a legacy to a person whom the testator had no wish to benefit and who was not neither named or described in his will, appears to me to be a practical refutation of the principle or rule on which it is based" [Steph Dig Note XXXIII].

Where one description, and that an incomplete one, has been added to an already sufficient description, the added description may be disregarded under the maxim *falsa demonstratio* [*Jalpaiguri B&T Co Ltd v. Samaresh*, 60 C 701]. Where description of property by share is sufficient to render what is intended, the subsequent addition of area should be discarded [*Balbhadra v. Kameshwar*, A 1952 P 146]. Where there is no mistake or misapprehension in the minds of either party as

to the identity of the property itself, but the description of it in documents is somewhat unmeaning in reference to existing facts, held even without rectification evidence is admissible to show to which of these properties it was meant to apply [*Abhoy v. Gopinath*, 76 CLJ 183]. If the property described is existing and identifiable, misdescription in some respects would be a mere irregularity [*Sheodhyan v. Sanichara*, A 1956 P 349]. Where boundaries are given with precision it will prevail even if there is some discrepancy about actual extent of land [*Chitturi v. Yedanpudi*, A 1971 AP 74]. In conflict between the area and the boundary, the description of the boundary will prevail [*Roy & Co v. Nanibala*, A 1979 C 50 (*Palestine Kupat &c v. Govt.*, A 1948 PC 207: *Bholanath v. Mritunjay*, A 1934 C 851: **rel** on)].

Summary of the Rules in Ss 94-97. [See *post*, s 97].

S. 96. Evidence as to application of language which can apply to one only of several persons.—When the facts are such that the language used might have been meant to apply to any one, and could not have been meant to apply to more than one of several persons or things, evidence may be given of facts which show which of those persons or things it was intended to apply to.

Illustrations.

(*a*) *A* agrees to sell to *B*, for Rs, 1,000, "my white horse". *A* has two white horses. Evidence may be given of facts which show which of them was meant.

(*b*) *A* agrees to accompany *B* to [1][Haidarabad]. Evidence may be given of facts showing whether [2][Haidarabad in the Dekkhan or Haidarabad in Sind] was meant.

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COMMENTARY

Principle and Scope.—This section also deals with latent ambiguities. It has been seen that s 94 lays down the rule that extrinsic evidence is inadmissible when the language of a document is perfectly clear and correctly applies to some subject-matter (person or thing). But though the language may be perfectly clear and intelligible, yet when intended to apply to one person or thing, it may apply, equally well to two or more persons or things. It is then a case of latent ambiguity known as *equivocation* and extrinsic evidence (including declarations of intention of the author of the document) is admissible to show to which person or thing the words were intended to apply [see *Chairman Sarajganj Muny v. Chittagong Co. Ltd*, 36 CLJ 242: 72 IC 696]. "Declarations of intention though ordinarily excluded from consideration are receivable to assist in *interpreting an equivocation*,—that is, a term which, upon application to external objects, is found to fit two or more of them equally. In the

1. In Ceylon "Halifax" substituted.
2. In Ceylon "Halifax in Yorkshire or Halifax in Nova Scotia" substituted.

case of an equivocation, this risk [of *allowing* declaration of intention] does not exist. Since the term of the document describes equally two objects, and since it was aimed to designate one only, there can be no competition with the words of the document by declarations which merely expand and make more specific those words" [Wig s 2472]. Under the English law, declarations of intention are not admissible except where the description would apply equally to any one of two or more subjects [Tay ss 1202, 1206, 1210], *ie*, the case contemplated by this section; but ss 95, 96, 97 do not appear to make any distinction in this respect and such declarations are admissible in all cases covered by them (v *post* s 97).

S 96 is a modification of the rule in s 94. In both cases the language is certain and intelligible, but in the document contemplated in s 96 the ambiguity is introduced on account of the words being applicable to two or more persons or things, while it was intended to apply to one. Illus (*a*) and (*b*) exemplify its meaning. Oral evidence is admissible in cases of equivocation, because it is meant to explain the document and not to contradict or vary it. As PARKE, B, said in *Goldshede v. Swan*, 1 Ex 158:—

> "You cannot vary the terms of a written instrument by parol evidence; that is a regular rule, but if you can construe an instrument by parol evidence, when that instrument is ambiguous, in such a manner as not to contradict, you are at liberty to do so".

The following exposition of the section and illustration is to be found in Stephen's Digest, Art 91: "Proof may be given of every fact which identifies any person or thing mentioned in a document in which the relation of the words to facts has to be ascertained. If the language of the document, though plain in itself, applies equally well to more objects than one, evidence may be given, both of the circumstances of the case and of the statements made by any party to the document, and as to his intentions in reference to the matter to which the document relates." The case given by him in illustration is *Doe v. Needs*, 2 M&W 129. The facts are that a testator devised one house to "George Gord, the son of George Gord," another to "George Gord, the son of George Gord," and a third to "George Gord, *the son of Gord*"—*Held* that evidence of the circumstances and declaration by the testator was admissible to show that by the third devise he meant the first of the two Georges. In this case PARKE, B, observed (p 140 *ibid*):—

> "The characteristics of all these cases are that the words of the will do describe the object or subject intended; and the evidence of the declarations of the testator has not the effect of varying the instrument in any way whatever; it only enables the court to reject one of the subjects or objects to which the description in the will applies, and to determine which of the two the devisor understood to be signified by the description he used in the will."

The rule was clearly explained by LORD ABINGER, CB, in *Doe v. Hiscocks*, 5 M&W 363 thus:—

> ".....Now, there is but one case in which it appears to us that this sort of evidence of intention can properly be admitted, and that is, where the meaning of the testator's words is neither ambiguous nor obscure, and where the devise is on the face of it perfect and intelligible, but from some of the circumstances admitted in proof an ambiguity arises, as to which of the two or more things or persons (each answering the words of the will), the testator intended to express. Thus, if a testator devises his manor of *S* to *A B*, and has two manors of North *S* and South *S*, it being clear he means to devise one only, whereas both are equally denoted by the words he has

used; in that case there is what LORD BACON calls "*an equivocation*," that is, the words equally apply to either manor, and evidence of previous intention may be received to solve this latent ambiguity; for the intention shows what he meant to do; and when you know that, you immediately perceive that he has done it by the general words he has used, which in their ordinary sense, may properly bear that construction. It appears to us, that, in all other cases, parol evidence of what was the testator's intention ought to be excluded, upon the plain ground, that his will ought to be made in writing; and if his intention cannot be made to appear by the writing explained by circumstances, there is no will".

Phipson states the rule thus: "When the language of a document, though intended to apply to one person or thing only, is equally applicable in all its parts to two or more, and it is impossible to gather from the context which was intended, an *equivocation* arises, and in addition to the evidence admissible under former rules, [v Proviso 6 to s 92, ss 95, 97] direct declarations of the writer's intention may be given to solve the ambiguity" [Phip 11th Ed p 885].

[*Ref Tay ss 1206-14; Phipson, 8th Ed pp 638-44; Steph Art 91(8); Powell, 9th Ed pp 543, 555; Wig s 2472*].

S 80 of the Succession Act 39 of 1925, has laid down a rule similar to this section, See *illus* (*i*) and (*ii*) to that section.

Admissibility of Extrinisic Evidence in Case of Equivocation.—Parol evidence is admissible, in a case where two debts are mentioned, to identify the particular debt referred to in an acknowledgment in writing [*Umesh v. Sageman*, 12 WROJ 2: 5 BLR 633]. Where a pronote, bore both English and Malayalam dates, the correct date is to be decided by evidence and probabilities according to s 96 [*Achuttan v. A*, 1941 M 587]. Admissibility of parol evidence of acknowledgment of debt required by law to be in writing (see s 91: *ante* "*Acknowledgment of debt ..... in writing*").

In executing an award it is only when the words are ambiguous or capable of more than one interpretation that oral evidence can be given [*Keshoram v. Thakur*, 78 IC 80]. In construing a deed of sale where the terms are ambiguous, the conduct of the parties immediately after and acting upon the deed is very important [*Cheetun v. Chutterdharee*, 19 WR 432]. In the case of ambiguity in the terms of a document there is no safe guide than to see how the parties have acted under that document [*Ali Abbas v. Kunwar*, 75 IC 267]. The real intention of the parties to an instrument is to be collected chiefly, no doubt from its terms, but to a certain extent also from the circumstances existing at the time of the execution, and further by the conduct of the parties since its execution [*Watson v. Mohesh*, 24 WR 176 P 177].

A testator devised property to "my grandson Robert William Henderson." He had two grandsons, one Robert William Henderson and the other William Robert Henderson. Declarations of intention are admissible to show which person was meant [*Henderson v. Henderson*, 1905, 1 IR 353]. A person who had accounts with several banks, bequeathed the balance "at the said bank" to *B*. It was *held* that a clause which gave the name of the bank, but had been erased could be looked at to supply the name [*Re Battie-Wrightson*, 1920 Ch 330]. A testatrix left property "between my brother *B*, his wife and their *daughter*." *B* had 5 daughters. Evidence was admitted to show that the testatrix was very intimate with *C*, one of the daughters with whom she corresponded affectionately and constantly, while she took no notice of the others, that she desired *C* to live with her and that in a former will she had left property to

"*B* and his daughter *C*" [*Re Jeffrey*, (1914) 1 Ch 275; see *Phelan v. Slattery*, 19 LRI 177].

A left a legacy to the "National Society for the prevention of consumption." There was no society exactly of that description but there was one in London of that name but with the additional words "and other forms of tuberculosis" and also a *local branch* thereof near *A's* house—*held* there was no equivocation as there was only one institution and not two and that declarations by *A* showing which he referred to were inadmissible [*Re Raven*, 1915, 1 Ch 673]. *A* left a legacy to his "niece Laura, second daughter of my brother J H Webber;" another to his "niece Laura"; and the residue to "Laura Webber". He had another niece called Laura F T Webber and extrinsic evidence in favour of the latter was rejected on the ground that the intention being clear from the will itself, there was no equivocation [*Webber v. Corbett*, LR 16 Eq 515]. Where an usufructuary mortgage-deed provides for payment of revenue by mortgagee, but fails to indicate whether the parties meant the revenue as assessed at the date of the deed or as it might be assessed from time to time, evidence is admissible under s 96 to show what was meant [*Farzand v. Kariz*, 22 OC 270 : 54 IC 364]. As to *Contemporanea Expositio*, see s 98 *post*].

Where by a will the testatrix bequeathed "my five row diamond bracelet" to a beneficiary and by a subsequent bequest she bequeathed my diamond chain bracelet" to another beneficiary and it was found that she possessed only one diamond bracelet with eight rows of diamonds—*Held* that it was a latent ambiguity so that extrinsic evidence was admissible and the article being divisible each beneficiary was entitled to a moiety [*Re Alexander's Will Trust*, (1948) 2 All ER 111].

Is a Blank Space an Equivocation?—"It certainly fits two or more objects equally; and where it represents merely an insufficient term in an attempted description it may be treated as an equivocation; because the writer has fixed upon an object, but his words do not carry the description far enough. On the other hand, where blank space represents a failure to make final expression of will, the act is incomplete; to supply declarations of intention would be to set up a rival will; there can be no interpretation, for there is nothing to interpret. It therefore depends on the particular document whether a blank space is an equivocation" [Wig s 2473]. Such evidence was admitted in *Re De Rosaz* and in *Re Iubback* [*ante* s 93: "*Same* [*Blank*]". In a bequest to—Price son of—Price, where the description applied equally well to the father of the claimant; parol evidence of the declarations of the testator that he had made or would make provisions by will for the claimant was received; "this is only that the testator did not know the christian name" [*Price v. Page*, 4 Ves Jr 679, 680]. In *Baylis v. Att Genl, ante*, evidence was excluded. In *Hunt v. Hort*, 3 Prec Ch 311—"my other pictures to become the property of Lady—," parol evidence not admitted to supply the blank. [As to blank resulting in a patent ambiguity, see *ante* s 93].

—Blanks in Documents.—A writing signed and delivered, but left with a *blank part*, may or may not be final, according to circumstances; and that whether the filling up of the blank by a third person completes the instrument and makes it effective depends upon whether this circumstance was agreed upon beforehand as the decisive one [Wig s 2410]. A deed may be prepared leaving a blank, and prescribing this be filled up by a specified person, and will then have effect from the time when the blank is filled in [*Hudson v. Revett*, 5 Bing 368 cited Wig s 2410]. With regard to deeds the rule is that matters not essential to their operation (*eg* the mere insertion of a christian name) may be filled in after execution, by or with the consent of the grantor, and if his intention is thereby carried out [*Eagleton v. Gutteridge*, 11 M&W

465; Tay s 1835]; but that with respect to essential matters (*eg* the name of a transferee of shares or the number of the shares) the deed must, after the blanks have been filled in, be redelivered either by the party himself, or by his agent authorized thereto by deed, otherwise it is void [*Hudson v. Revett*, 5 Bing 368; *West v. Steward*, 14 M&W 47; *Societe Generate v. Walker*, 11 App Cas 20: *Powell v. London & Prov Bank*, (1893) 2 Ch 555 CA; Tay ss 1836-37; Phip 11th Ed p 734].

Summary of the Rules in Ss 94-97. [See *post* s 97].

S. 97. Evidence as to application of language to one of two sets of facts, to neither of which the whole correctly applies.—When the language used applies partly to one set of existing facts, and partly to another set of existing facts, but the whole of it does not apply correctly to either, evidence may be given to show to which of the two it was meant to apply.

Illustration

A agrees to sell *B* "my land at *X* in the occupation of *Y*." *A* has land at *X*, but not in the occupation of *Y*, and he has land in the occupation of *Y*, but it is not at *X*. Evidence may be given of facts showing which he meant to sell.

SYNOPSIS

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COMMENTARY

Principle and Scope.—S 97 also deals with latent ambiguity. Where the description in the document applies partly to one set of facts (person or thing) and partly to another but the whole applies correctly to neither, extrinsic evidence including declarations of intention is admissible to show which of the two was intended. S 97 also refers to misdescription of persons or things. As to the difference between s 95 and this section, see s 95 (*ante*). See *illustration* to s 97. S 97 is an extension and an application of the rule in s 95. This section presupposes an inaccuracy such as there is in the case for which s 95 provides, but there is the further difficulty that the language is partially applicable to two sets of facts and therefore it has to be decided which was meant.

By way of illustration reference may be made to *Doe v. Hiscocks*, 5 M&W 363 where the gift was to John Hiscocks, eldest son of John Hiscocks, and there were two sons of John Hiscocks, one called Simon and a younger son by a second wife called John. Evidence of the circumstances of the family, not evidence of declarations made by the testator, was admitted to show which son was intended. According to the Act, evidence of both kinds would be admissible. Under the English law declarations of intention are admissible only where the description would equally apply to any one of two or more subjects (s 96) and in no other case (*ante* s 96). But the Act does not appear to make any distinction in this respect between cases covered by s 96 and those covered by ss 95, 97 and such declarations are equally admissible in all cases.

S 96 says that "evidence may be given of facts which show"; while ss 95, 97 say that "evidence may be given to show" and this difference, in language does not appear to make any difference in meaning. Stephen criticised the distinction made in English law and observed: "The strictly logical course, I think, would be either to admit declarations of intention both in cases falling under Art 91 para (7) [corresponding with ss 95, 97] and in cases falling under Art 91 para 8 [corresponding with s 96], or to exclude such evidence in both class of cases, and to hold void for uncertainty every bequest or devise shown to be uncertain in its application of fact" [Step Dig p 186, 170-74]. Woodroffe, Cunningham and Field are also of opinion that no distinction between declaration of intention and other extrinsic evidence is observed by this Act in respect of admissibility under any of the ss 95, 96, 97 [Woodroffe, 8th Ed p 663; Field 6th Ed p 284; Cunn pp 275-77].

As to the reason for admission of declarations of intention in the case covered by s 97, Wigmore says: "The description applies in part only to each object, and yet one of the two (or more) is obviously signed; there is no danger in receiving declarations of intention, because the precise words of the document cannot be literally applied in any event and there is thus no competition between the words and the extrinsic utterance; it is simply a question which words shall be ignored as the un-essential part of the description [Wig s 2474]. The devise was to "my well-beloved nephews John and William Willard"; the testator had two grand-nephews so named and also two grandsons so named, the latter being his intimates and the former being personally unknown to him; evidence of his repeated declarations that he had bought this land for them and that he had instructed the scrivener in their favour was admitted. In this American case the principle was thus explained by BRACE PJ:— "The description of the persons is partly correct and partly incorrect, leaving something equivocal. The description does not apply precisely to either of these two sets of brothers, but is morally and legally certain that it intended to apply to one or the other, thus bringing the case within the second class of cases, in which direct or extrinsic parol evidence, including expressions of intention, is admissible. Such evidence was therefore admissible in this case, in order to solve a latent ambiguity produced by extrinsic evidence in the application of the terms of the will to the objects of the testator's bounty, to prevent the fourth clause of the will from perishing, and obviate a partial intestacy of the testator. Its effect is not to establish an intention different in essence from that expressed in the will, but to let in light by which that intention rendered obscure by outside circumstances, may be more clearly discerned, and the will of the testator, in its entire scope, effectuated according to his true intent and meaning" [*Willard v. Darrah*, (1902) 168 Mo 660 cited in Wig s 2474].

When the words of description apply correctly to one subject and do not so apply to another, the case cannot be brought under this section or under s 96. Evidence to show that it was not meant to apply to the former subject is not admissible, see s 94 [Cunn pp 210-11]. "If all the terms of description fit some particular property, you cannot enlarge them by extrinsic evidence. But if they do not fit with accuracy, the whole thing must be looked at fairly to see what are the leading words of description, and what is the subordinate matter, and for this purpose extrinsic evidence is admissible". [*per* LORD SELBORNE, in *Hardwick v. H*, 16 Eq 168 p 175].

[*Ref Tay ss 1218-23; Phip 8th Ed pp 628-38; Steph Art 91(7)*].

Admissibility of Extrinsic Evidence in Cases of Latent Ambiguity Covered by the Section.—Where lands are described as lying within certain boundaries, and there is a mis-statement as to the area within such boundaries, the boundaries

must prevail and the error in the quantity should be considered as a mere false description [*Pahalwan v. Maheswar*, 16 WR 5 PC : 9 BLR 150; *Zeenat Ali v. Ram Dayal*, 18 WR 25; *Eshan Ch v. Pratap*, 20 WR 224; *Shib Ch v. Brojonath*, 14 WR 301; *Abdul Mannath v. Baroda*, 15 WR 394; *Mohiuddin v. Sandes*, 12 WR 439; *Virjivandas v. Md Ali*, 5 B 208, see also *Tribhoban v. Krishnaram*, 18 B 283; *Karuppa v. Periathambi*, 30 M 397 : 2 MLT 336; *Harimohan v. Rameshwar*, 64 IC 737; *Shk Bara v. Rajendra*, 64 IC 751; *Nga Cho v Mi Se*, 10 Bur LT 245; *Johri v. Jowahra*, 58 IC 67; *Ritlal v. Spilingford*, 57 IC 2; *Narain v. Jawahir*, 50 PLR 1922; *Bholanath v. Mrityunjoy*, 59 CLJ 532, and other cases as to false description noted under s 95]. Where there is seeming inconsistency as between boundaries and the area stated in an instrument, it is permissible to have recourse to extrinsic evidence and evidence of user by acts of parties for the purpose of gathering the real intention [*Sattendra v. Girijabhusan*, 58 C 686 : A 1931 C 596; *Basavapunnareddi v. Krishnayya*, A 1966 AP 260].

Where the operative part of a lease gives the boundaries only although in the schedule the area is mentioned by guess, there is only one description of the land demised and that is the description by boundaries—[*Linton & Co Ld v. Jagannath*, 77 IC 403]. Where land is described in document by boundaries and also area, the area is considered to be false description if there is error in quantity [*Baker Ali v. Amir Ali*, A 1939 R 396; see *ante* s 95: "*Falsa demonstratio non nocet*"].

Where a sale-deed so far as boundaries are concerned, indicates that the whole of a grove is sold, but another part of it referred to survey number and area indcates that only part of it is sold, evidence is clearly admissible to show whether the whole or part was meant to be conveyed [*Banaphal v. Noor Md*, A 1935 A 662]. When a land is sold with definite boundaries unless it is very clear from the surrounding evidence that smaller area was intended to be sold, the boundaries must prevail [*Subbappa v. Maniram*, 78 IC 414]. Where the area of demised land, which was described in the lease as lying within certain specified boundaries, stated as 400 bighas, extrinsic evidence as to negotiations which led up the contract was inadmissible to show that there was not the stated area within the specified boundaries [*Durga Pd v. Rajendra*, 40 IA 223 : 18 CWN 66 : 41 C 493]. The description by fixed boundaries prevails over description by area and the principle applies equally to (gnment grant [*Palestine K B &c Ld v. Govt of Palestine*, 52 CWN 719 : A 1948 PC 207; *Roy & Co v. Nanibala*, A 1979 C 50].

In the case of an ambiguity in the description of land in a mortgage-deed, it is open to a party to show by other evidence what land was actually covered by the deed [*Ram Charan v. Arsad*, 43 IC 721]. Where the boundaries are vague and indefinite the area shall prevail [*Bholanath v. Mrityunjoy*, A 1934 C 851]. The entirety which has been expressly and definitely mortgaged cannot be prejudiced by an imperfect and inaccurate enumeration of the particulars of the mortgage [*Kalikanand v. Shivananda*, 63 IC 625]. Where a mortgage-deed by mistake described the property as *tauzi* No 6607, but mortgagor owned *tauzi* No 9907, *held* that mortgagee could give evidence to prove property actually mortgaged [*Wajibunnessa v. Valmiki*, 71 IC 389 (P)]. Where in a sale certificate there are two descriptions of the property which cannot be reconciled, it is for the court to look at the decree [*Mukhtar v. Kabir*, A 1924 A 856].

Where in an agreement for the sale of land, it was impossible to reconcile the statement in the body of the agreement with the recital in the schedule as to the context of the land to be conveyed, extrinsic parol evidence is admissible to explain the facts that led to the execution of the agreement in order to reconcile the

different statements regarding the property sold [*Hussonally v. Mangaldas*, A 1921 PC 40 : 1920 MWN 726]. Where a map exhibits the boundaries of the demised land, the map is decisive on the question of boundaries unless it contradicts the unambiguous description of boundaries in the lease [*Londa Coll Co v. Bipin*, 1 PLT 84 : 55 IC 113].

By a will in 1873, A left a legacy to "each of the three children of Mrs W, widow of *Wm W*." The latter, half-brother of *A*, had died in 1857 leaving a widow and 3 children, one of whom died in 1870, the other two surviving. In 1858 Mrs *W*, had married again, and at the date of the will had six children by the second husband. On evidence that *A* knew of the existence of the first three children, but not of the death of the one, and knew of the death of *Wm W*, and the widow's remarriage, but not of the number of children by such remarriage—*Held* that the two children alone took [*Newman v. Piercy*, 4 Ch D 4].

An error in name or description, or both, will not invalidate the instrument, and extrinsic evidence, other than direct declarations of intent, is admissible to identify and ascertain the persons intended [*Simmons v. Woodward*, 1892 AC 100, 105-6; *Wray v. W*, 1905, 2 Ch 349; *Maughan v. Sharpe*, 17 CB (NS) 443; Phip 11th Ed p 875].

Where a vendor agrees to sell land to several named persons and in the agreement only one name is given with the word "others", evidence is admissible to prove the identity of vendees [*Vedamurthi v. Jawalapuram*, 42 MLJ 475 : 65 IC 973]. If a contract in writing is executed by some only of the several persons who purport to join it and were intended to be parties to it, the document constitutes only a proposed agreement not perfected and it cannot bind even those who did not execute it [*Ram Ch v. Ruprao*, 64 IC 726 (25 M 359 **refd**)]. Where some of the executants of a document sign it, the question arises whether the party not having signed it regularly at the foot yet meant to be bound by it as it stood or whether he refused to complete the document. But when it is ascertained that he meant to be bound by it, the signature is for the purpose of execution effective [*Ezekiel v. Annada*, 36 CLJ 109].

Falsa demonstratio non nocet.—This section also applies to the cases covered by the above maxim (v *ante* s 95).

Summary of the Rules in Ss 94-97.—Taylor thus summarises in s 1226 the law which is embraced in ss 94, 95, 96, 97:—

"*Firstly*, where in a written instrument, the description of the person or thing intended is *applicable with legal certainty to each of several subjects*, extrinsic evidence, including proof of declarations of intention, is admissible to establish which of such subjects was intended by the author (Wigr Wills 160)." This rule corresponds with s 96.

"*Secondly*, if the description of the person or thing be *partly applicable and partly inapplicable to each of several subjects*, though extrinsic evidence of the surrounding circumstances may be received for the purpose of ascertaining to which of such subjects the language applies, yet evidence of the author's declarations of intention will be inadmissible [*Doe v. Hiscocks*, 9 LJ Ex 27]." This rule corresponds with s 97 but declarations of intention are admissible under the Act (*ante*, s 97).

"*Thirdly*, if the description be partly correct and partly incorrect, and the correct part be sufficient of itself to enable the court to identify the subject intended, while the incorrect part is *inapplicable to any subject*, parol evidence will be admissible to

the same extent as in the last case, and the instrument will be rendered operative by rejecting the erroneous statement (Wigr Wills, 67-70)." This rule corresponds with s 95 and declarations of intention are admissible under the Act (*ante*, s 97).

"*Fourthly*, if the description be *wholly inapplicable* to the subject intended or said to be intended by it, evidence cannot be received to prove whom or what the author really intended to describe (Wigr Wills 133)." This rule corresponds with s 94.

"*Fifthly*, if the language of a written instrument, when interpreted according to its primary meaning, be insensible with reference to extrinsic circumstances, collateral facts may be resorted to, in order to show that in some secondary sense of the words, and in one in which the author meant to use them, the instrument may have a full effect [*Doe v. Hiscocks, supra*; Wigr Wills, 11]." This rule corresponds with s 95.

Similar rules are also to be found in ss 76-81 of the Indian Succession Act 39 of 1925, which are also made applicable to Hindus, by s 2 of the Hindu Wills Act 21 of 1870 (now s 57 of Succession Act 39 of 1925).

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

Illustrations

A, a sculptor, agrees to sell to *B*, "all my mods." *A* has both models and modelling tools. Evidence may be given to show which he meant to sell.

SYNOPSIS

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COMMENTARY

Principle and Scope.—A document may be couched in language which is not intelligible to ordinary people on account of the use of illegible or not commonly intelligible characters, *eg* when the writing is such that it is not possible to decipher it without the help of experts or a person who is specially familiar with the writing; or when it is written in shorthand or in cipher or symbols. A document may also be unintelligible on account of legal terms, technical words, trade terms established by usage, foreign, local and provincial expressions and abbreviations, &c the meaning of which is known only to persons of competent skill or information. Such documents cannot be rejected as ambiguous only because the court has not the particular knowledge or skill which is necessary to ascertain their true meaning. Experts or persons possessing the requisite knowledge may be called to explain the meaning of such terms (v s 45 *ante*; see also s 49). Extrinsic evidence is therefore admissible in order to help the court come to a right understanding as to the meaning of such words. But the general principles must not be violated when extrinsic evidence is admitted for the purpose. Thus, ordinary or common words of a language

having plain and fixed meaning, should always be given that meaning and a witness cannot be asked what is meant by a plain sentence in English composed of ordinary words, *eg* on a question what lands were "*delineated*" upon statutory plans, the opinions of engineers cannot be received, the word being intelligible to ordinary readers [*Dowling v. Pontypool &c Rly Co*, LR 18 Eq 714]. Words having a common or popular meaning may also have a limited meaning as used in some locality or branch of business, or they may appear from the context to have been used in a peculiar sense. In such cases parol evidence is admissible to explain the writing.

"The real difficulty arises in determining in each case whether the language of the instrument is ambiguous as shown, either by the context or by the circumstances attending the making of the same. If no such ambiguity exists, no extrinsic evidence can be received to show the secret intention of the parties or that any other than the natural and primary meaning of the language was intended" [Jones s 456]. in *Gill's case*, where it is called "ordinary popular meaning", LORD BLACKBURN observed that when one is enquiring after the popular meaning of a term, the court is as good a judge of that meaning as any learned authority [*Gill v. Manchester, S & L Ry Co*, (1873) 28 LT 587]. Agreeing with this view RANKIN CJ, observed in *Ojamshee & Co v. Abdul Rahim & Co*, A 1929 C 705 : 126 IC 133:—

> "I am far from saying that the court is not put in a better position for judging by a consideration of the definitions which are to be got from dictionaries. But it is essential in this case to remember that the duty of the court is to take a particular case and decide whether or not that case comes within the term that is in question, and that it is not any necessary part of the duties of the court to affirm a definition as one which can safely be relied upon to govern all other cases".

The question whether a specification of a prior invention describes the invention claimed by the subsequent inventor, is a question of construction and parol evidence is only admissible for the purpose of explaining words or symbols of art and other such like technical matters, and of informing the court of relevant surrounding circumstances [*Canadian G E Co v. Fada Radio Ltd*, A 1930 PC 1: 124 IC 569].

The court takes judicial notice of the meaning of words and idioms in the vernacular of the language [Greenleaf s 5]. Extrinsic evidence is not admissible to explain the meaning of ordinary words used in modern statutes, of which the court aided where necessary by dictionaries and other literary authorities, will take judicial notice [*Camden v. Inland Rev Commrs*, (1914) 1 KB 641 CA; see s 57(*13*); s 60 prov 1]. The rule is that extrinsic evidence of the secondary meaning of a word is not admissible unless the court is satisfied from anything in the context of the instrument itself or surrounding circumstances indicating that the word ought to be construed not in its ordinary and primary signification, but according to its secondary or peculiar sense [*Holt & Co. v. Collyer*, 16 Ch D 718: 50 LJ Ch 311, *vide* judgment of FRY J]. Extrinsic evidence is admissible to explain but not to vary or contradict a document or when it is inconsistent with the terms. Extrinsic evidence is not also admissible to vary the statutory meaning of words *eg* the meaning of "nominal rent" in a statute [*Camden v. Inland Rev Commrs, sup*].

"Where foreign words have been so far anglicised by common use as to have become substantially a part of our language, it is within the province of the court to define them to the jury. Instances of such words are '*habeas corpus*,' '*bona fide*,' '*prima facie*,' '*a fortiori*.' *flagrante delicto*'. The general rule undoubtedly is that the meaning of an English word, not a technical term, cannot be made known to the jury by an examination of witnesses. If has, therefore, been held an error in an action for

libel to allow a physician to testify as to the meaning of the word 'malpractice' [*Rodgers v. Kline*, 56 Miss 818]. But this rule does not apply when a known English word or phrase has acquired a local meaning different from its ordinary acceptation, nor where it has acquired a peculiar meaning in a particular science, art or trade, or among a particular sect, and where it seems to have been used in such a local or peculiar sense [*Rodgers v. Kline, sup*]. Hence, it may be laid down that when a new or unusual word is used in a contract, or when a word is used in a technical or peculiar sense, as applicable to any trade or business, or to any particular class of people, it is proper to receive the testimony of witnesses having special knowledge of such words as to the meaning attached to them" [*Eaton v. Smith*, 20 Pick (Mass) 156 and other cases in Roger's Expert Test, 1891, s 118]. The principle is thus stated in *Shore v. Wilson*, 9 Cl&F 555.

> "There is no doubt that not only when the language of the instrument is such as the court does not understand, it is competent to receive evidence of the proper meaning of that language, as when it is written in a foreign tongue; but it is also competent, where technical words or peculiar terms are used, or indeed, any expressions which at the time when the instrument was written had acquired an appropriate meaning, either generally or by local usage, or amongst particular classes.....This description of evidence is admissible in order to enable the courts to understand the meaning of the words contained in the instrument itself, by themselves, and without reference to the extrinsic facts on which the instrument is intended to operate" [*Per* PARKE B].
>
> And in the same case, TINDAL CJ, observed: "Where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence *de hors* the instrument itself; for reason and commonsenses agree, that by no other means can the language of the instrument be made to speak the real mind of the party. Such investigation does of necessity take place in the interpretation of instruments written in a foreign language; in the case of ancient instrument, where, by the lapse of time and change of manners, the words have acquired in the present age a different meaning from that which they bore when originally employed; in cases where terms of art or science occur; in mercantile contracts which, in many instances use a peculiar language, employed by those only who are conversant in trade or commerce; and in other instances in which the words, besides their general common meaning, have acquired by custom or otherwise, a well-known peculiar idiomatic meaning in the particular country in which the party using them was dwelling, or in the particular society of which he formed a member, and in which he passed his life. In all these cases evidence is admitted to expound the real meaning of the language used in the instrument in order to enable the court or judge to construe the instrument and to carry such real meaning into effect".

Extrinsic evidence is also admissible on a question of usage in a particular trade or business. Oral evidence of usage is admissible to supply terms or explain ambiguous phrases in mercantile transactions, provided the annexing of incidents by usage would not be inconsistent with the terms of the contract [v. *ante*, s 92 *proviso* (*5*)].

Same.—It is also a principle that, parol evidence may in all cases of doubt be adduced, to explain the written instrument; or, in other words, to enable the court to discover the meaning of the terms employed and to apply them to the facts [*Shore v. Wilson*, 9 Cl&F 555]. Now, the "doubt" here adverted to may arise from one or both

of the two following cases; either the language of the instrument may be unintelligible to the court, or at least, be susceptible of two or more meanings; or the persons or things mentioned may require to be identified [*Shore v. Wilson, sup per* PARKE B]. The rule, therefore, embraces two descriptions of the evidence: *First*, if the characters, in which the instrument is written, are in shorthand [*Kell v. Charmer*, 23 Beav 195], or are otherwise difficult to be deciphered—or if the language, whether as being foreign, obsolete, technical, local or provincial, is either not understood by the court, or is capable of bearing two or more interpretations,—the testimony of persons skilled in deciphering writings, or who understand the language in which the instrument is written, or the ancient, technical, local, or provincial meaning of the terms employed, is admissible, to interpret the characters, or to translate the instrument, or to testify to the proper meaning of particular expression [*Shore v. Wilson, supra*]. The first branch of this rule has been acted upon in several cases, where wills written in a scarcely legible hand, have been interpreted by Courts of Equity, with the assistance of persons, skilled in writing [*Goblet v. Beechey*, (1829) 3 Sim 24 &c].

The practice of proving translations of foreign documents is so notorious as to require no authority to support it, while the remainder of the rule is established beyond dispute by an absolute cloud of decisions. In cases of this nature, the testimony resorted to consists for the most part of evidence of usage, that is, witnesses conversant with the business, trade, or locality to which the document relates, are called to testify that, according to the recognized practice and usage of such business, trade or locality, certain expressions contained in the writing have in similar documents a particular conventional meaning. The jury are then asked to presume that the parties, who employed these expressions, intended to use them, and did use them, in the conventional sense as explained by the witnesses (Tay ss 1158-60). Thus, where the founder of a charity in the early part of the eighteenth century had, in the deed of grant described the object of her munificence as "Godly preachers of Christ's Holy Gospel" and it became necessary to determine what persons were entitled to the charity—extrinsic evidence was admitted to show that at that period of history a religious sect existed, who applied his particular phraseology, capable though it seemed at first sight of a far wider interpretation, to Protestant Trinitarian Dissenters, and that the founder was herself a memeber of such sect [*Shore v. Wilson, sup*; Tay s 1161].

"There is no reason, in the nature of things, why the individual parties to a transaction may not employ words in a particular sense, irrespective of the ordinary or popular sense; because what we are seeking, in interpretation, is their actual standard, and the popular standard is merely taken provisionally, as presumably theirs. It can thus be, in theory, only a question of fact in each case whether the parties *were* using a special mutual sense.....There is no transaction whatever in which, for some idea or other, the parties do not use words in a sense of their own. Having themselves locked up the idea in the words, themselves must furnish the key to unlock it" [Wig s 2465].

[*Ref Tay ss 1158-62, 1165; Phip 8th Ed p 618 et seq; Steph Art 91(2); Rogers Expert Test 2nd Ed ss 118-20; Powell 9th Ed pp 543, 548-54; Jones ss 455-56; Wig ss 2460-64*].

Contemporanea Exposito.—Under this head is usually placed the rule that in order to explain, but not to contradict, ancient documents whose meaning is doubtful, the *acts of the parties* even *before* the execution of instrument (though not their declarations), or the *mode in which property has since been held or enjoyed* thereunder, as well as constant modern user may be given in evidence [*A G v. Vandeleur*,

1907 AC 369]. Such evidence, however, seems now admissible not only in the case of ancient but of modern documents, and whether the ambiguity be latent or patent [*Van Dieman's Land Co v. Table Cape Board*, 1906 AC 99—Phip 11th Ed p 892; see *Ch Serajganj Muny v. Chittagong Co Ltd, infra*]. *Van Dieman's Land Co's* case was approved in 40 M 1016. *Contemporanea expositio* as to guide to the interpretation of documents is often accompanied with danger and great care must be taken in its application [*Shrimant Raje v. Shrimant Raje*, 34 IA 202 : 16 CWN 1058].

The doctrine that "contemporaneous usage is a strong ground for the interpretation of doubtful words or expressions" in a document, has no application where the document is neither ancient nor ambiguous [*Rahim Baksh v. Shajad*, 19 CWN 113]; see the observation of CRANWORTH LC, in *Sadle v. Briggs*, 4 HLC 435, 458 and of COZENS-HARDY LJ, in *Assheton-Smith v. Owen*, 75 LJ Ch 181, 200]. But in another case it has been held that the principle that when an instrument contains an ambiguity, evidence, or user under it may be given in order to show the sense in which the parties employed the language used, applies to a modern as well as an ancient instrument [*Ch Serajganj Muny v. Chittagong Co Ltd*, 36 CLJ 242: 72 IC 676 (1919 AC 533; 1906 AC 92: 7 HLC 650 refd to)]. The doctrine of *contemporanea expositio* should be limited in its application to the acts and conduct of the grantor, beginning contemporaneously with the grant and continued for a long course of years and not extended to declarations of the grantee's successor made 40 years afterwards behind the back of the grantor [*Swaminath v. Saravana*, 33 MLJ 370]. The maxim *contemporanea expositio* is applied in construing ancient statutes but not in interpreting acts which are comparatively modern [*Raja Ram v. S*, A 1964 SC 828].

Legal Words.—Technical legal words should be given their technical legal meaning [*Leach v. Jay*, 9 Ch D 42].

Illegible or Not Commonly Intelligible Characters, Foreign, Technical, Local Expressions, Abbreviations, etc.—Where a written agreement is expressed in short and incomplete terms, or contains words of indeterminate signification, witnesses, present at the time of making the agreement, may be called to explain that which is *per se* unintelligible; such explanation not being inconsistent with the written terms [*Sweet v. Lee*, 3 M&Gr 452, 460], as, for instance, to show what are meant by "S and others" in an agreement [*Herring v. Boston Iron Co*, 1854, 1 Gray (Mass) 134 (Am)]. On one or two occasions, even conversations between the parties when the contract was being made, have been received, in proof of the sense which they attached to the ambiguous expressions [*Birch v. Depeyster*, 1861, 1 Stark, 210; *Gray v. Harper*, 1841, 7 Story, 574 (Am); *Selden v. Williams*, 1839, 9 Watts, 9 (Am); Tay s 1193]. Where there is a controversy as to the meaning of vernacular words (*eg, Hukmi, Malguzari, Jama, etc*), it is desirable that the word used in the vernacular should be inserted in brackets after the English rendering so as to assist the court in determining which meaning is applicable in the particular case [*Charu Ch v. Kamakhya*, A 1931 PC 5: 58 IA 17: 35 CWN 201].

Evidence given to show the meaning of words used in a peculiar sense only explains the meaning in which the mercantile terms are used. It cannot properly be said to vary the contract [*Smith v. Ludha*, 17 B 144].

In mercantile transactions, evidence of usage is admissible to construe particular or peculiar terms: *eg*, 'Months' in a charter party means calendar and not lunar months [*Jolly v. Young*, 1 Esp 186]. In the absence of any usage 'month' in ordinary legal documents primarily means lunar months [*Simpson v. Margitson*, 11 QB 23]. See *Helsham v. Hennen*, 87 LJ Ch 569 where it has been held that in every contract, save mercantile ones in the City of London, 'month' *prima facie* means lunar month,

unless the context or surrounding circumstances show otherwise—*per* EVE, J. 'Month' in judgment means calendar month [*Sashi v. Hill*, 54 CWN 926]. Evidence is admissible to show that 'year' in a theatrical contract means parts of the year during which the theatre was open [*Grant v. Maddox*, 15 M&W 737]; 'days' in a bill of exchange means working days [*Cochran v. Retberg*, 3 Esp 121]; "Expected to arrive about November" in a bought note is a mere description and is not a contract as to time [*Bold v. Raynor*, 5 LJ Ex 172]; "Thousand" in a lease of a rabbit warren in a particular locality as meaning "twelve hundred' [*Smith v. Wilson*, 3 B&Ad 729]; Ten packets of Kent hops at £5 as meaning the hop trade at five pounds per cwt. [*Spicer v. Cooper*, 1 QB 424]; Usage of the district to show what trees are included in the terms "timber" [*Dashwood v. Magniac*, (1891) 3 Ch 306 CA]; Local meaning of "good or fine" barely [*Hutchinson v. Bowker*, 5 M&W 353]; "October" in a certain contract of Marine Insurance as meaning from 25th to 31st of October [*Chaurand v. Angerstein*, Peake R 43]: 'Close' by local usage as meaning 'farm' [*Richardson v. Watson*, 4 B & Ald 799]; "N M" as meaning New Zealand Mutton [*Cameson v. Wiggins*, (1901), 1 KB 1]; "Duly honoured" as applied to a bill of exchange [*Lucas v. Groning*, 7 Taunt, 164]. Opinion of iron merchants has been received as to what was meant by "No 1 Sport's Scotch pig iron" [*Pope v. Filley*, 9 Fed Rep 65, 69] and experts may be called to decipher abbreviated and elliptical entries in the book of a deceased notary [*Sheldon v. Benham*, 4 Hil 129; Rogers, 2nd Ed, p 276]. As to construction of "letter of credit" or "letter of advice of credit", see *Chandan mull v. National Bank of India*, 51 C 43. Meaning of the letters "OK" in contract [*Dawson Bank Ltd v. Nippon M K Kaisha*, 62 IA 100: 39 CWN 657]. To find out intended meaning of the word 'forfeit' and 'forfeiture' in resolution of company as well as declaration by Directors in relation to some transaction extrinsic evidence becomes permisible [*Unity Co v. Diamond Sugar Mills*, A 1971 C 18].

In the case of a document in foreign language the court requires a translation by a competent translator, and if there are any technical expressions expert evidence will also be admitted to explain their proper meaning [*Chatenay v. Brazilian Tel Co.*,1891 1 QB 79; *Di Sora v. Phillips*, 10 HLC 624; see also *Copin v. Adamson*, 31 LJ 242, 258; *R v. Tilak*,22 B 143]. For a case where translation was not proved, see *Fakisandhla v. Nkambule*, 1940 AC 760. It is the duty of courts to act upon the official translation of documents unless there is expert evidence justifying its rejection [*Satanan v. Shibnarain*, 49 IA 25: A 1922 PC 63; *Rajendra v. Gopal*, 57 IA 296: A 1930 PC 242; *Sellamani v. Thikai*, 73 IA 264: A 1946 PC 185]. It may be that the judge is better qualified to translate, but the trouble is that he is not a witness and the parties cannot test the translation [*Harendra v. Hemchandra*, A 1949 PC 179: 53 CWN 803]. The accuracy of court translator may be questioned; [see *R v. Tilak, ibid*; *Harris v. Brown*, 28 C 621, 634 and in *R v. Kali Prasanna*, 1 CWN 465, the court interpreter was cross-examined by the accused]. In *Mahatalal v. Haleemoozooman*, 10 CLR 293, the court interpreter and outside expert witness were examined as to the correct translation of the Persian words "*mukadarat mahalum.*" As to the opinion of experts regarding certain defamatory words in a poem, see *R v. Kali Prasanna*, 1 CWN 465.

'Week' when used in reference to computation of time from which it is to be reckoned, excludes the day of the date. The expression may be inclusive or exclusive according to the context [*Gopal v. Bahorani*, 15 CLJ 120].

In a suit for possession of immovable property, under a grant from the Rajah of *Pachete*, it became necessary to construe the meaning of the words "in the year 16."—*Held* that the meaning of the words "in the year 16" might be shown by reference to another grant signed by the same officer, from which it appeared that the

"year 37" meant the 37th year of the Rajah of Pachete and that it corresponded with 1186 BS. [*Eq Coal Co v. Ganesh*, 9 CLR 276]. Sepcial meaning of the word "*goods*" rejected [*Jadu Rai v. Bhabataran*, 17 C 173, 193-94]. As to the meaning of the expression "within soundings," see *Aga Syud v. Hajee Jackeriah*, 2 Ind Jur NS 308, 311; and 9 CWN 710, 713. As to the meaning of "FOB", "Free Bombay Harbour" see *Hajee Md v. Spinner*, 24 B 510, 519.

'Early January' meant at or near the beginning of a period [*Findlay v. Nursee*, 9 IC 460]. 'On demand' means 'when you require' [*Karunakaran v. Krishna*, 10 MLT 258]. As to meaning of "adhi proja," see *Biroj v. Mahabut*, 11 IC 32; "*Shishya Shishyanukrame*" [*Gopal v. Radharaman*, 16 CWN 108]; 'Dharmakarta' [*Parivraja-kachariya v. Prayaga*, 21 MLJ 730]; 'kaimi' or 'sthayee' [*Meher Ali v. Kali Khalasi*, 19 CWN 1129]; "dwelling house" [*Radhagobinda v. K Municipality*, 19 CWN 1027]; "Astabhogam" and "Sarvamaniam" [*Parankusa v. Subramania*, 26 IC 117]; "Putra poutradi kramay" [*Kartic v. Bamacharan*, 29 IC 502; *Brojokishore v. Jagat Mohan*, (1919) Pat HCC 209; *Ramsaran v. Ram Narain*, 42 C 305 (reversed by the PC in A 1918 PC 203: 46 IA 88: 46 C 683: 23 CWN 866]; Generation to generation [*Giribala v. Kedar*, 56 C 180]; "Malik, Nirbuyadha Malik" [*Sures v. Lalit*, 22 CLJ 316]; "Malik" [*Syed Ahmed v. Ibrahim*, 52 IC 314; *Ashurfi v. Biseswar*, 65 IC 977]; "Saranjam" [*Bhabani v. Purna*, 25 CWN 308]; "Malik" in a will indicates absolute interest [*Sudhamani v. Sarat*, 28 CWN 541; *Surjamoni v. Rabi*, 30 A 84 PC: 12 CWN 231]; "From" preceding a date may have one of two meanings; *viz*, on and after, *ie*, including the named date; or merely after *ie*, excluding the named date [*In re Court Fees*, 76 IC 721: 46 M 685]; "Pucca" [*Dinanath v. Gopal*, 67 IC 90]; "Kar" [*Annada v. Habibulla*, 65 IC 598]; "Up to" and "until" [*Metropolitan E Co v. Debrunner*, 22 CWN 416]. "Company's sicca rupee", [*Maharaj Bahadur v. Jadab*, 47 IC 109]; "Bakri" and "Farokht" [*Rameshwar v. Rajkumar*, 45 IO 885]; "Months" in vernacular contract means calendar months even lunar months are mentioned [*Harbhagat v. Narayan Rao*, 78 IC 338 (N)]. "Sadharaner" means which is common as a common property, possession in common and does not mean public or anything approximating to it [*Jatindra v. Corporation of Calcutta*, 35 CWN 397]. 'Year' though usually means 12 months, the context of a document may show that a particular year ending in a specified month or season was intended [*Prag v. Mohanlal*, 47 IC 161]. There is no special significance on the word "*paricharak*" [*Gobinda v. Mohunt*, 62 CD 153]. "Building materials and furniture" include electric fittings [*Munna v. Munpl Board*, 57 A 655]. All moneys in a will have been held to be sufficient to pass the net personality of the estate including dividends, interest received or accrued due, cash, rents and substantial investments [*Perin & Others v. Morgan & Others*, (1943) 1 All ER 187 HL].

In a mercantile contract, "part of the crop" did not mean parcels which might be sold over grocer's counter, but parcels such as where in fact sold in the present case [*Wester v. Bosanquet*, 16 CWN 697 PC: 16 IC 147 : 23 MLJ 177]. An assistant of a firm is not a 'merchant' in a contract for arbitration [*Ojamshee & Co v. Abdul Rahim*, A 1929 C 706].

'Without prejudice' when used in private documents, have not the well-known meaning (*ante*, p 215) which they have when used in connection with actual or impending litigation [*Venkata v. Subba Naidu*, 1915 MWN 822].

Illustration.—The *illustration* is the case of *Goblet v. Beechey*, 3 Sim 24. The distinguished sculptor Nollekens bequeathed to Goblet "all the marble in the yard, the tools in the shop, bankers, *mod tools for carving*," etc. Statuaries were examined

to prove that there were no such tools known as modelling tools for carving and that 'mod' would be understood by a sculptor as 'models'.

S. 99. Who may give evidence of agreement varying terms of document.—Persons who are not parties to a document, or their representatives in interest, may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document.

Illustrations.

A and *B* make a contract in writing that *B* shall sell *A* certain cotton, to be paid for on delivery. At the same time they make an oral agreement that three months' credit shall be given to *A*. This could not be shown as between *A* and *B*, but it might be shown by *C*, if it affected his interests.

COMMENTARY

Principle and Scope.—It has been seen that the words "*as between the parties to any such instrument*" in s 92 restrict the operation of that section to the parties or their privies, and it does not apply to strangers (*ante*: "*S 92 applies only to parties to instruments and not to strangers*"). S 92 therefore does not debar persons other than parties, from giving extrinsic evidence to vary a document. S 99 therefore merely emphasises or repeats this aspect of s 92 by making it the subject-matter of a separate section, although it seems that was not strictly necessary. The section however speaks only of "*varying*" the terms of a document by a contemporaneous oral agreement and the other words "contradicting, adding to, or subtracting from" have been omitted. The omission does not appear to be material as varying no doubt includes supersession or substitution in any form, *eg*, *contradicting*, adding to, &c. If a stranger may give extrinsic evidence under s 92, as he undoubtedly can, he can tender evidence to vary, contradict, &c, a document; [see also *Pathammal v. Kalai*, 27 M 329]. This view has been endorsed by the Supreme Court in *Bai Hira v. Offl Ass*, A 1958 SC 448: 1958 SCJ 766. S 90 is an enabling section and s 92 is a disqualifying section. In a later case it has been held that the word "varying" in s 99 covers the same ground as the words "contradicting, varying &c" in s 92. It is competent for persons who are not parties to a document to adduce oral evidence to show that the rights of parties to it are at variance with the rights ostensibly created and declared by the instrument [*Krishnaswami v. Mangalathmmal*, 53 IC 243].

S 99 refers only to a contemporaneous agreement, but as s 92 is restricted in its operation only to the parties to a document or their representatives, strangers who are not affected by any terms of the document are not precluded from relying on any agreement or from giving any extrinsic evidence to contradict or vary the terms of the document.

The rule has been thus stated by Greenleaf:—"The rule under consideration is applied only (in suit) between the parties to the instrument, as they alone are to blame if the writing contains what was not intended or omits that which it should have contained. It cannot affect third persons who, if it were otherwise, might be prejudiced by things recited in the writing contrary to the truth through the ignorance, carelessness or fraud of the parties; and who, therefore, ought not to be precluded from proving the truth, however, contradictory to the written statement or others" [Greenleaf, s 249]. "It is to be observed, however, that the right of a stranger to vary a written contract by parol is limited to rights which are independent of the instrument" [*Schultz v. Plankinton Bank*, 141 Ill 116]. "Even in respect of strangers

the writing itself is the best evidence of its contents, and must, if possible, be produced" [*Clow v. Brown*, 134 Ind 287; Jones s 449]. "The theory, of the rule is that the parties have determined that a particular document shall be made the sole embodiment of their legal act for certain legal purposes. Hence, so far as that effect and those purposes are concerned, they must be bound in that writing and nowhere else, no matter who may deisre to avail himself of it. But so far as other effects and purposes are concerned, the writing has not superseded their other conduct, nor other persons' conduct, and it may still be resorted to for any other purpose for which it is material, either by other persons or by themselves. For example, where the issue is as to title by adverse possession of right of way, and the deed has reserved such a right, a conversation between grantor and grantee, the former conceding the way would be available as affecting the permissory nature of the grantee's possession [*Asheley v. A*, 4 Gray 197]; because the deed embodied only the title as constituted by grant, and did not cover the act of permissory user. So, too, a creditor, attacking a mortgage-deed as fraudulent may establish the debtor's fraudulent extrinsic agreement with the mortgagee [*Jewett v. Sandback*, 58 NW 20]; because the agreement is here invoked not as affecting transfer but as constituting fraud; for a creditor claiming under the deed could not avail himself of the agreement to enlarge the terms of the transfer.... The truth seems to be, then, that the rule will still apply to exclude extrinsic utterances, even as against other parties, provided it is sought to use those utterances for the very purpose for which the writing has superseded them as the legat act" [Wig s 2446].

[*Ref Greenleaf, s 249; Tay s 1149; Jones s 449; Wig s 2446*].

Persons Not Parties to a Document May Give Evidence Varying its Terms.—In a mortgage suit the mortgagors and their representatives will be estopped from disputing that they have not got the interest which was said they had, but third parties can question the mortgagor's title [*Rukmani v. Ankama*, A 1926 M 74]. A person who does not claim through the settlor is entitled to challenge the validity of a *waqf* on the ground that it was merely an illusory transaction never intended to be acted upon [*Minnat v. Nabendra*, A 1928 C 253]. A party to what is on the face of it a sale-deed cannot in a suit with a person who is no party to the deed produce evidence to show that the deed was really a deed of gift [*Ashfaq v. Syed Nazir*, 22 OC 222: 53 IC 961].

Contemporaneous oral agreement to repurchase can be proved by persons not actual parties to the conveyance [*Ma Mi v. Maung Aung*, 6 R 376: A 1928 R 244].

The subject-matter of this section has been treated under s 92. See heading "S 92 *applies only to parties to instrument and not to strangers*" (*ante*) and *Maung Kin v. Ma Shwe*, A 1917 PC 207: 44 IA 236: 22 CWN 257 *ante* and other cases cited there.

S. [1]100. Saving of provisions of Indian Succession Act relating to wills.—Nothing in this Chapter contained shall be taken to affect any of

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1. In CEYLON s 100 is in a separate Chapter which runs thus:—

CHAPTER VIII
ENGLISH LAW OF EVIDENCE WHEN IN FORCE

S. 100. Whenever in a judicial proceeding a question of evidence arises not provided for by this Ordinance or by any other law in force in this Island, such question shall be determined in accordance with the English Law of Evidence for the time being".

the provisions of the [1][Indian Succession Act [2](X of 1865)] as to the construction of wills.

COMMENTARY

This is a saving section declaring that the sections in this Chapter do not affect the provisions of the Succession Act as to the construction of wills. Part VI of this Succession Act has been made applicable by s 2 of the Hindu Wills Act 21 of 1870 (now s 57 of Succession Act 39 of 1925) to all wills and codicils made by any Hindu, Buddhist, Sikh or Jaina, on or after the first day of September 1870 within the territories which at the said date were subject to the Lieutenant-Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts at Madras and Bombay. Ss 74-111 *ibid* relate to construction of will and ss 112-18 to void bequests. This chapter of the Evidence Act which does not affect the provisions of the Succession Act as to the construction of wills, therefore, applies only to wills that"do not come under that Act and to all instruments other than wills. As s 100 speaks of *construction*, the provisions in the sections of this chapter not referring to matters of construction apply equally to all wills and other instruments.

For the word 'affect', see *Adm Genl v. Prem Lal*, 21 C 732 (reversed in 22 C 788: 22 IA 107). As to construction of Khoja Wills, see *Hassonally v. Popatlal*, 37 B 211.

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1. In PAKISTAN "Indian" omitted (AO 1949).
   In BURMA "Burma Succession Act" substituted (AO 1937).
2. Now Act 39 of 1925.