CHAPTER II

OF THE RELEVANCY OF FACTS

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

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

Illustrations.

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

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

A's beating *B* with the club;

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

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

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

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COMMENTARY

Principle and Scope. [Relevant Facts].—'Relevant facts' have been defined in s 3 and s 5 is a general section declaring that evidence may be given of—(*1*) the existence or non-existence of facts in issue and (*2*) of such other facts hereinafter declared to be relevant and of no *others*. Item (*1*) points to facts which directly tend to prove or disprove any fact in issue and (*2*) refers to collateral facts which are so inseparably connected with the facts in issue that they indirectly and presumptively tend to prove or disprove any fact in issue. These collateral facts are treated in s 6 *et seq.* In drawing up the Act the principle of exclusion has been followed. Facts specifically declared to be relevant in the various sections are admissible and no others. "The great bulk of the law of Evidence consists of negative rules declaring what, as the expression runs, is not evidence. The doctrine that all facts in issue are relevant to the issue, and no others may be proved, is the unexpressed principle which forms the centre of and gives unity to all these express negative rules" (Stephen Dig Introd).

As to 'facts in issue', see s 3. Generally speaking evidence of collateral facts or those facts which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute, are excluded and evidence is to be confined to matters which directly prove or disprove the points in issue. But there are some collateral facts which are so intermixed with the facts in issue as to afford reasonable presumption as to the existence of facts in issue. They lead up to and explain the evidence which bears directly on the points in issue. The section declares such collateral facts also to be relevant. This Chapter sets out the cases in which collateral facts are relevant and the sections in it are illustrations of relevant facts. Where the connexion between the collateral facts and the principal facts are too remote to justify their introduction for the purpose of proving or disproving the facts in issue or the collateral facts come within the test provided in s 6 *et seq* is left to the discretion of the judge to be decided by common sense and enlightened reason. It is by the judicial use of that discretion that a judge has to determine whether the fact offfered in evidence is relevant or not within the sections relating to relevancy of facts (ss 5-55).

The meaning of this section is, that in any suit or proceeding evidence may be given to prove the existence or non-existence of every fact in isssue or of such other facts which are declared to be relevant by some one or other of the remaining sections of this chapter, and of *no other collateral facts*. The facts necessarily involved in the determination of the issue are sometimes called the *res gestae* (see *post*, s 6). The last four words of this section (*'and of no others'*) clearly preclude a litigant from proving any *facts not in issue*, that is, any facts which are not the principal matters in dispute, or which are not declared relevant by any of the remaining sections of this chapter. The last four words therefore exclude evidence of collateral facts which are incapable of affording any reasonable presumption as to the facts in issue. Even if a fact be relevant, it has to be proved in the proper way indicated in the Act in order that it may be admitted. Therefore the rules as to relevant facts in this chapter are controlled by the sections relating to proof of facts in Part II of the Act. Thus, secondary evidence of a document may be relevant, but it is not admissible if the rules as to notice in s 66 have not been complied with. Or, the terms of a contract may be relevant, but if they have been reduced to the form of a document no other evidence is admissible under s 91 except the document itself. The *Explanation* is exemplified by illus. (*b*). A fact may be relevant but its reception in evidence at a particular stage is governed by the procedural law applicable to it.

The force of the section lies in the last four words. Relevancy (determined by the rules in the Act) is the test of admissibility. The judge may, as provided by s 136, ask in what manner a fact which it is proposed to prove would be relevant and he shall admit the evidence only if he thinks that the alleged fact would be relevant. All other rules of evidence that existed before the passing of the Act being repealed, to establish the relevancy of any fact, it must be shown that it is a fact in issue or a fact such as is hereinafter (*i.e.*, in the remaining sections of the chapter) declared to be relevant under some provisions of the Act [*Lekhraj v. Mahpal*, 7 IA 63 : 5 C 744; *Collr. of Gorakhpur v. Palakdhari*, 12 A 1, 43 FB]. The section applies alike to examination-in-chief and to cross-examination, for the cross-examiner may combat his opponent's case by proof of facts which are inconsistent with it or by proving facts which support his own case; but in cross-examination questions are admissible which are not admissible in the examination-in-chief (ss 146, 155). In s 136 a distinction is made betweeen relevancy and admissibility, [Cunn. pp 15-16].

The rule confining evidence to the points in issue, not only precludes the litigant parties from proving any facts not distinctly controverted by the pleadings, but it

limits the *mode* of proving even the issues themselves. Thus it excludes all evidence of *collateral facts*, which are incapable of affording any reasonable presumption as to the principal matters in dispute; and the reason is, that such evidence tends needlessly to consume the public time, to draw away the minds of the jurors from the points in issue, and to excite prejudice and mislead; moreover the adverse party, having had no notice of such evidence, is not prepared to rebut it. The due application of this rule will occasionally tax to the utmost the firmness and discrimination of the judge; so that while he shall reject, as too remote, every fact which merely furnishes a fanciful analogy or conjectual inference, he may admit as relevant the evidence of all those matters, which shed a real though perhaps an indirect and feeble light on the question in issue [Tay, 11th Ed s 316, p 235].

A fact which is not relevant may sometimes be made relevant by the Judge by presumption under s 114. Thus, where the time of death or apparent death was the crucial point in a case and a witness said that while he and others were chatting at 8 pm a man (unidentified and not a witness) made a request for help for cremation saying that *R* was just dead, the statement and the request was a fact within ss 3 and 59 and it was proved by the direct evidence of the witness under s 60; but it was not a relevant fact unless the Judge was entitled to make it a relevant fact by a presumption under s 114—*Held* that the Judge was entitled to hold that it was likely that the request was authorised by the inmates of the house where the death occurred, having regard to the "common course of natural events, human conduct and public and private business". Having made such presumption, the fact of the authorised request became a relevant fact, and the evidence of the witness became admissible [*Bibhabati v. Ramendra*, 51 CWN 98 : A 1947 PC 19 : 73 IA 246].

—Relevancy and Admissibility.—Strictly speaking, '*Relevancy*' and '*Admissibility*' are not the same thing. In general relevancy is determined by logic and human experience. Generally speaking, facts which directly tend to prove or disprove a fact in issue are relevant and also within certain limits, other facts closely connected with the fact in issue which indirectly or inferentially tend to prove or disprove any fact in issue. The limits are described in s 6 and the sections that follow. Originally, Stephen, when comparing scientific and judicial enquiries explained the four methods of induction employed by J S Mill and adopted the theory of causation as a test of relevancy. His view was that reasoning from cause to effect or from effect to cause is the basis of the nature of relevancy in judicial enquiries. This view was afterwards modified and in his 'Digest' Art 1, 'relevant' is defined thus: "Any two facts to which it is applied are so related to each other that, according to the common course of events, one, either taken by itself or in conjunction with other facts, proves or renders probable the past, present, or future existence, or non-existence of the other". By this definition, 'relevant' has been meant to be that which is logically probative.

Admissibility of facts is no doubt mainly determined by their logical relevancy to the matters in issue, or that relation between the two which renders the latter probable from the existence or the non-existence of the former. But everything that is logically probative is not legally admissible in evidence. Admissibility is founded on law and not on logic. Admissibility presupposes relevancy. Thus many facts having no logical bearing on the issue are admissible, *eg*, the proof of some preliminary facts which are necessary for the admissibility of other evidence are also admissible. The admissibility of these facts is mainly based on rules of law. For instance, the admissibility of all circumstances showing that a confession is voluntary, or facts and incidents showing whether they are a part of the *res gestae*. On the other hand, facts which are logically probative, *i.e.*, relevant, may not be admissible as being too remotely connected. Thus, the moral disposition of a person may be of much value in

determining the probability of his doing or not doing a particular act; but, it is generally excluded on account of its tendency to create considerable prejudice against the accused. In proving a case of theft, other instances of theft by the accused may be logically relevant and in some cases of high probative value, but they are not admissible on the ground of policy and fairness, since they would raise a number of collateral issues and create prejudice and surprise with the result that the main fact in issue would be lost sight of. Other logically relevant facts are excluded by positive rules of law, *eg*, the rule in s. 126 prohibiting the disclosure of communication made to legal adviser in confidence or, the rule in s 122 forbidding disclosure of communications between husbands and wives during marriage, or the rules in ss 123 and 124 forbidding disclosure of affairs of State or communications in official confidence. What is *legally* receivable is admissible whether it is logically probative or not. For all practical purposes 'relevant' means what is legally admissible in evidence. Evidence which is legally admissible should be received by the court, unless there is any legal reason for its rejection. Again, if the evidence is admissible on one ground, it will not be rejected because on some other ground it would be inadmissible [*R v. Bond*, 1906 2 KB 389, pp 411, 412, *per* JELF, J]. According to Wigmore the two axioms of admissibility are: (1) None but facts having rational probative value are admissible. (2) All facts having rational probative value are admissible unless some specific rule forbids (Wig ss 9, 10). This point has been thus stated by a Newzealand Court: "The starting point of every inquiry into the admissibility of evidence must be relevancy. In assessing the relevance of contested evidence it is first necessary to identify the fact sought to be established. Credibility aside, that fact will be relevant if its existence will make one of the facts in issue more likely or less likely [*R v. Wilson*, (1991) 2 NZLR 707 High Ct. Auckland].

The distinction between 'proof' and 'relevancy' should here be borne in mind. In a trial the first question that presents itself is—What facts will a party be allowed to lay before the court. This is a matter of relevancy and is determined by the pleadings or the facts in issue. The next question is—How will the court allow the party to prove those admissible facts? This is a matter of proof. Part I of the Act containing ss 6-55 deals with the relevancy of facts and Part II deals with their proof.

Facts which are relevant to an inquiry may principally be: (*1*) facts which are necessary to prove or disprove a fact in issue; (*2*) facts showing identity or connexion of parties (s 9); (*3*) facts showing states of mind or body (s 14); and similar facts (ss 14, 15).

Wigmore says that "admissibility" is a quality standing between Relevancy, or Probative value, on the one hand, and Proof, or Weight of Evidence, on the other hand. Admissibility signifies that the particular fact is relevant and something more,—that it has also satisfied all the auxiliary tests and extrinsic policies. Yet it does not signify that the particular fact has demonstrated or proved the proposition to be proved, but merely that it is received by the tribunal for the purpose of being weighed with other evidence [Wig s 12]. Prof Thayer says: "In stating thus our two fundamental conceptions, we must not fall into the error of supposing that relevancy, logical connection, real or supposed, is the only test of admissibility; for so we should drop out of sight the chief part of the law of evidence. When we have said (*1*) that, without any exception, nothing which is not supposed to be logically relevant is admissible; and (2) that, subject to many exceptions and qualifications, whatever is logically relevant is admissible,—it is obvious that, in reality there are tests of admissibility other than logical relevancy. Some things are rejected as being of too slight a significance, or as having too conjectural and remote a connection; others, as being dangerous and likely to be misused or over-estimated by a jury; others, as

being impolitic, *eg*, unsafe for the State; others; on the bare ground of precedent.... [The law] assuming, as it does, that in general what is evidential is receivable, is occupied in pointing out what part of this mass of matter is excluded. It denies to this excluded part, not the name of evidence, but the name of admissible evidence. Admissibility is determined first, by relevancy—an affair of logic and not of law;—second, but only indirectly, by the Law of Evidence which in strictness, only declares whether matter which is logically probative is excluded..... It is here that Mr Justice Stephen's treatment of the law of evidence is perplexing; indeed, it comes to have the aspect of a 'tour de force' [3 Harvard Law Review 143, quoted in Wig s 12].

Explaining the terms, relevancy, admissibility, probative value and weight etc., QUADRI J of the Supreme Court in *Ram Bihari Yadav v. State of Bihar*, 1998 Cri LJ 2515, 2517 (SC) observed as follows : "The law relating to dying declaration, the relevancy, admissibility and its probative value is fairly settled. More often the expressions 'relevancy and admissibility' are used as synonyms but their legal implications are distinct and different for more often than not facts which are relevant may not be admissible, for example, communication made by spouses during marriage or between an Advocate and his client though relevant are not admissible; so also facts which are admissible may not be relevant, for example, questions permitted to be put in cross-examination to test the veracity or impeach the credit of witnesses, though not relevant are admissible. The probative value of the evidence is the weight to be given to it which has to be judged having regard to the facts and circumstances of each case. In this case, the thrust of the submission relates not to relevancy or admissibility but to the value to be given to the dying declaration. A dying declaration made by a person who is dead as to cause of his death or as to any of the circumstances of the transaction which resulted in his death, in cases in which cause of his death comes in question, is relevant under Section 32 of the Evidence Act and is also admissible in evidence. Though dying declaration is indirect evidence being a specie of hearsay, yet it is an exception to the rule against admissibility of hearsay evidence. Indeed, it is substantive evidence and like any other substantive evidence requires no corroboration for forming basis of conviction of an accused. But then the question as to how much weight can be attached to a dying declaration is a question of fact and has to be determined on the facts of each case." [1998 Cri LJ 2515 at 2517].

[*Ref Tay s 316; Steph Dig Art 1, 2; Steph Intro 12, 13, 68-72; Best ss 251-264; Wigmore, ss 9-21; Phipson, 8th Ed pp 47-50; Whitworth's Theory of Relevancy; Jones, ss 135-39; Hals. 3rd Ed, Vol 15, paras 478-482*].

Precedent as to Admissibility of Evidence.—Criminal cases cannot be put in a straight jacket. Decided cases can be of help if there is a question of law like the admissibility of evidence or about the applicability of some general rule of evidence. This apart, reference to decided cases is hardly apposite when the que the evidence should or should not be accepted [*Charan Singh v. S*, A 1975 SC 246].

"Facts in Issue".—The expression means, the principal matters in dispute. It has been defined in s 3. Under this section the parties are entitled to give evidence of the existence or non-existence of every fact in issue (*ante*, s 3). Although all relevant facts are not necessarily facts in issue, still facts in issue cannot be other than relevant to the determination of the suit and this is clear from the language of s 6 [*per* PHILLIPS, J, in *Raghubhusana v. Vidyavaridhi*, 34 IC 875].

In criminal proceedings the necessity of confining the evidence to the issue is stronger, if possible, than in civil cases. The admission on all occasions of every circumstance on either side having some remote and conjectural probative force, the

precise amount of which might itself be ascertainable only by a long trial and determination of fresh collateral issues, growing up in endless succession as the enquiry proceeded will indefinitely enlarge a court's scope of enquiry [*R v. Prabhudas*, 11 Bom HC 90, 91, 93]. Of no fact can evidence be given, unless the fact be either a fact in issue or a fact which by the Evidence Act is declared to be relevant [*Abinash v. Paresh*, 9 CWN 402, 406].

"Such Other Facts as are Hereinafter Declared to be Relevant".—Facts relevant to the issue are those facts which either directly or inferentially, lead to one of the conclusions necessary to the proof or disproof of a fact in issue or prove directly some relevant fact. The facts which directly lead to such a conclusion are those essential to the issue. The facts which inferentially lead to such a conclusion are those which raise a presumption as to the existence of the facts essential to the issue [Halsbury, 2nd Ed, Vol 13, para 592; 3rd Ed, Vol 15, para 479].

Evidence may be given of facts, which in connection with other facts, make the existence of relevant facts highly improbable. The statement of a witness for the defence, that a witness for the prosecution was at a particular place at a particular time and consequently could not have been at another place, where the latter states he was and saw the accused persons, is properly admissible in evidence, even though the witness for the prosecution may not himself have been cross-examined on the point [ss 5, 11, 153 ill (*c*); *R v. Sakharam*, 11 Bom HC 166, 167]. The accused was charged with having received illegal gratifications from C and Co, on three specific occasions in 1876. In 1876, 1877 and 1878, C and Co. were doing business as a commissariat contractors, and the accused was the manager of the commissariat office—*Held* that the evidence of similar but unconnected instances of receiving illegal gratifications from C and Co, in 1877 and 1878 was not admissible against him under ss 5 to 13 [*R v. Vyapoory*, 6 C 655 : 8 CLR 197]. Where the accused was charged under s 206 I P Code with fraudulently transferring three properties to three different persons on a certain day, in order to prevent their being seized in execution of a decree, and the prosecution tendered evidence of five other fraudulent transfers of property effected by the accused on the same day and apparently with same object, *held* that the evidence was admissible, [*R. v. Vajiram*, 16 B 414]. Report of Court of Enquiry under r 75 of Indian Aircraft Rules cannot be regarded as an entry in a public or official book, register or record within the meaning of s 35. It is a relevant fact under ss 5, 7 and 9 but it must be proved under s 81 (*Indian Airlines Corpn v. Madhuri*, A 1965 C 252). As to when evidence of similar facts are admissible, see *post*, s 14: "*Relaxation of the above rule; Evidence of similar facts when relevant*" and s 15. Exceptions, such as in s 117 (now s 116) Cr P Code, to the general rules of evidence must be applied to the cases to which they are confined by the Legislature [*In re Muthupillay*, 34 M 225 : 8 IC 493].

"And of No Others." [The Rule of English Law as to Admissibility].—The words "*and of no others*" debar a suitor from giving evidence of any other fact which is not declared to be relevant under some of the following sections of the Act. To enable a suitor to give evidence of any particular fact, he must show that the evidence is admissible under some section of this Act (*ante*, s 3: "*Admissibility must be determined with reference to the Act*"). But the principle of English law is that everything is admissible subject to the exceptions:—(*a*) that the best evidence available must be produced; (*b*) that hearsay evidence is inadmissible. Ss 6-11 declare specifically what facts may be proved, whereas the English law declares negatively that certain facts shall not be proved. As to the principle of exclusion resulting from the repeal of all other rules of evidence, see *ante*, s 2: "*Repeal of* s 2".

Unpleaded points.—Where there was neither any plea nor any issue regarding title, the admission of any evidence on that point or additional evidence was held to be not proper. *Pratap Rai N. Kothari v. John Braganza*, AIR 1997 SC 1666 : (1999) 4 SCC 403.

Reception of Documents Without Foundation.—To receive as evidence documents, for whose reception no foundation is laid, would tend to encourage the manufacture of evidence and each relaxation is apt to become a precedent [*Eckowri v. Heera Lal*, 11 WR 2 : 12 MIA 136]. Documents which are neither produced nor proved nor admitted in evidence, should not be considered in judgment though they have been produced in another case between the same parties [*Bibi Putli v. Jwala*, 16 IC 488 : 7 PLR 1912]. The court is not justified in using some letters which were not adduced as evidence through any procedure known to law [*Kalpnath Rai v. State,* 1998 Cri LJ 369, 381 (SC)]. Looking into documents which are not part of the record after conclusion of arguments and relying on them by the appellate court is not permissible. They should be admitted as fresh evidence and parties given opportunity to rebut them [*Chaturbhuj v. Collr*, 1969 SC 255]. Documents filed with pleading which require proof cannot be considered by a court [*R v. Tuti*, A 1946 P 372]. The mere fact that a document was exhibited without proper proof does not make it admissible [*Pratap v. Gyanendra*, A 1951 Or 313]. In a Land Acquisition case mere statement of sale without examining either the vendors or vendees or attestators of sale deeds is not admissible [*Collr v. Harisingh*, A 1979 SC 472]. Even if a document may be admissible or an ancient one, it cannot carry the same weight or probative value as a document which is prepared either under a statute, ordinance or an Act which requires certain conditions to be fulfilled [*State of Bihar v. Sri Radha Krishna Singh*, A 1983 SC 684, 697].

Hearsay Evidence and Duty of Court.—Court must exclude inadmissible evidence even if no objection is taken by any party (*post*, "*Court shall exclude inadmissible evidence..... objection is taken*"). A witness ought not to be allowed to give hearsay evidence as it is impossible to remove its effect from the mind of the jury [*R v. Kally Churan*, 7 WR Cr 2; *Luckeemonee v. Sankuree*, 2 WR 252; *R v. Shk Magan*, 5 WR Cr 28; *R v. Kedar*, 18 WR Cr 16; *R v. Chunder*, 24 WR Cr 77; *Pitumbur v. Rutton*, WR (1864) 213; *R v. Ramgopal*, 10 WR Cr 57]. The moment the witness commences giving hearsay evidence, the court should stop him [*R v. Pitambar*, 7 WR Cr 25]. It is the duty of the court to see that the evidence which is inadmissible should not be allowed to go into the prejudice of accused [*Abbas v. R*, 2 CWN 484]. The evil consequence of admission of hearsay evidence is not merely that it prolongs litigation and increases its cost, but that it may unconsciously be regarded by judicial minds as corroboration of some piece of evidence legally admissible and thereby obtain for the latter quite undue weight and significance [*Atkia Begum v. Md*, A 1916 PC 250 : 21 CWN 345 : 36 IC 20]. Hearsay report of an official to whom a complaint made to an executive officer as such, had sent for report, is no evidence in the case [*Zainulabdin v. Nawabdin*, 377 PLR 1909]. Hearsay evidence which ought to have been rejected does not become admissible as corroborative evidence merely because a party's lawyer erroneously failed to take the objection when the evidence was being given [*Lim Yam v. Lam Choon*, 107 IC 457 : A 1928 PC 127; (**folld in** *Munishwar v. Indrakumari*, A 1963 Pu 449)].

§ As to hearsay evidence, see notes to s 60, *post:* "*Meaning of Hearsay*".

Explanation.—Illus (*b*) clearly expounds the object and meaning of the explanation. As to production of documents and consequence of their non-production, see Or 7, rr 14-18; Or 8, rr 1, 8A; Or 13, rr 1-3 and Or 41, r 27 C P Code 1908. The above rules of the C P Code have been enacted to prevent fraud and not to shut out formal evidence beyond suspicion, such as certified copies of public documents [See *Talewar v. Bhagwan*, 12 CWN 312 : 8 CLJ 147; *Mewalal v. Kumerji*, 13 CWN 797 : 10 CLJ 33 : 22 B 273. The case in 12 CWN 312 was explained in *Taibunnissa v.*

Jagdip, A 1924 P 517 : 78 IC 489]. Under r 10 of Or 13 of the C P Code, the court may send for papers from its own records or from other courts; but nothing contained in that rule shall enable the court to use in evidence any document which under the law of evidence would be inadmissible.

Effect of Admissibility.—Evidence properly admitted for one purpose must be admissible for all purposes in the cause [*Bank of Bombay v. Nandlal*, 40 IA 1 : 37 B 122 : 17 CWN 358].

Admissibility the Rule, Exclusion Exception.—Under the Evidence Act admissibility is the rule and exclusion the exception, and circumstances which under other systems, might operate to exclude are, under the Act, to be taken into consideration only in judging of the value to be allowed to evidence when admitted [*R v. Mona Puna*, 16 B 661, 668].

Duty of Court in Cases of Doubtful Admissibility.—Where a court has doubt as to the admissibility of a document, and its decision is open to appeal, it is better to admit than to exclude in doubtful cases [*Kali Kishore v. Bhusan*, 17 IA 159 : 18 C 201, 203, see also *Collr of Gorakhpur v. Palakdhari*, 12 A 1, 26 FB; *Madhavrao v. Deonak*, 21 B 695, 698; *Mohan Lal v. Tulsan*, 109 IC 774 : A 1928 L 824]. When considering the question of admissibility in evidence, the court should lean always in favour of the accused, and exclude all evidence tendered by the prosecution which is of doubtful or remote relevance [*R v. Benayendra*, A 1936 C 73 : 40 CWN 432; *Laijam v. R*, A 1925 A 405].

Arguments on Admissibility [Proper Time to Object to Evidence].—In criminal trials, as a general rule, arguments on admissibility of evidence should not be heard when case is opened [*R v. Cole*, 165 LT 125; *R v. Hammond*, 1941, 3 All ER 318]. If defence objects to admissibility of certain evidence, prosecution should refrain from referring to it in his opening and the proper time to hear argument is during the trial when the evidence is tendered [*R v. Zielinski*, 34 Cr App R 193 : 1950, 2 All ER 1114].

An objection should be taken when the evidence is tendered and not before [*R v. Hammond, sup*; *R v. Patel*, 1951, 2 All ER 29]. The proper time to object to the admissibility of evidence is when the evidence is tendered [*Kissen Kamini v. Ram Ch.*, 12 WR 13; *Sheetul Pd v. Junmejoy*, 12 WR 244]. So also in the case of an objection as to the method of proving a particular document [*Madhabi v. Gaganendra*, 9 CWN 111; *Abdul Samad v. Gunendra*, 82 IC 974 : A 1925 C 452; *Kalijeeban v. R*, 63 C 1053; *Dwijen v. Naresh*, 49 CWN 791; *Dula Dai v. Jadi*, A 1965 Or 113]. Where the objection to be taken is not that the document is in iteself inadmissible, but that the mode of proof put forward is irregular or insufficient, it is essential that the objection should be taken at the trial before it is marked as an exhibit and admitted. A party cannot lie by until the case comes in appeal. A strictly formal proof might or might not have been forthcoming had it been insisted on at the trial [*Gopal v. Sri Thakurji*, 47 CWN 607 : A 1943 PC 83; *Bhagwan v. Khemchand*, A 1973 P & H 477]. When objection is taken at the proper time the party affected may take steps to make the evidence admissible [*Jahangir v. Sheoraj*, 37 A 60; *Bindeshwari v. Bamraj*, A 1939 A 61]. Thus if secondary evidence is sought to be put in instead of the original, the objection must be taken at the earliest point of time and not at the time of argument or the appellate stage [*Dolgobind v. Maqbul*, 61 CLJ 588 : A 1938 C 164]. Where admissibility rests upon facts which need to be proved, the proper place is objection in the trial court [*Jabbar v. Monmohan*, 55 C 1216]. Omission to object becomes fatal only in cases where if the objection is taken in time, any defect in its admissibility can be cured and the document made admissible [*Chooni Lal v. Nilmadhab*, A 1925 C 1034 : 41 CLJ 374 : 86 IC 734]. When once a

document is rejected by the court, it has no jurisdiction to admit it when it is put in again unless some explanation is given for offering it for the second time [*Ramkishan v. Ramsohag*, A 1939 P 530].

A document which is *per se* inadmissible may be objected to at any time even if it has been duly proved. But an objection as to the mode of proof should be made at the time the document is attempted to be put in [*Dolgobinda v. Maqbul*, A 1936 C 164; *Madhabi v. Gaganendra*, 9 CWN 111; *Kalijeeban v. R*, 63 C 1053]. The appellate court cannot raise any such objection suo motu [*Ziauddin v. Fatima*, 14 IC 539 : 216 PWR 912]. A document can be objected to as irrelevant at any time though a document can be objected to as inadmissible as opposed to relevant at the first hearing only [*Ghulam v. Karimullah*, 109 IC 728 : A 1928 L 428]. Questions of relevancy of a document is a question of law and can be raised at any stage; but the question of proof of a document is a question of procedure and can be waived [*Kalikanand v. Shivanand*, 63 IC 625 : A 1922 P 122].

Questions of Admissibility to be Decided Then and There.—The time for determining questions as to the admissibility of evidence is ordinarily the time when they arise, *ie*, when the evidence is offered, instead of admitting the evidence in the first instance and reserving the question of law as to its admissibility until the end of the trial [*Jadu Rai v. Bhabataran*, 16 IA 148 : 17 C 173, 186; **folld in** *Ramjiban v. Oghore*, 2 CWN 188 : 25 C 401; see also *Basir v. Girijanath*, 13 CLJ 18; *Abdul Samad v. Gunendra*, 82 IC 974 : A 1925 C 452; *Parmanand v. R*, A 1940 N 340; *Devasikhamani v. Andamuthu*, 1955, 1 MLJ 457; *Srirama v. Lokshmidevamma*, A 1957 AP 60]. So also in the case of a criminal trial [*Kapur v. R*, 50 IC 481 : 98 PLR 1918], or in a trial by jury. The jury ought not to be left to decide on the admissibility of evidence [*Lokhono v. R*, 21 P 965]. A ruling as to admissibility must be very brief and there should be no interruption of trial once the ruling is given. If need be, fuller reasons may be given in the judgment [*Ponnamal v. M Stores*, A 1950 M 62].

All objections to admissibility should be dealt with at the time of reception of a document or at any rate at the earliest possible opportunity. The reason is that if the court allows the objection, the party tendering the evidence may take steps to get the lacuna remedied. The expression 'subject to objection' means that the objection remains undecided. In some cases evidence has to be received subject to objection in anticipation of other evidence which if produced will remove the objection. In such cases a final decision on the objection must be recorded before the court proceeds to judgment [*Ramanuj v. Dakhineswar*, 30 CWN 259, 262; see s 136 *post*]. Matters tendered in evidence must be dealt with summarily and instantly when they are tendered. When the judge is unable to make up his mind about admissibility the proper course for him is, either to direct the prosecution to keep back the documents until he has an opportunity of looking into the law, or to reject them altogether. No judge in a doubtful case of admissibility ought to allow the evidence first to be given, and then in his judgment give a decision about their admissibility. Doubtful or inadmissible evidence ought not to be admitted in criminal trials [*Laijam v. R*, 86 IC 817 : A 1925 A 405]. Whether a document is admissible or inadmissible must always be ruled upon at the time the document is being proved or put in or the question is asked of the witness. In many cases a thing may be good evidence at one stage of the case and inadmissible at another [*Padam v. R*, A 1929 C 617, 620]. When no objection is taken to the admissibility of a document at the trial, it is not necessary to consider whether the document was admissible under the law [*Bhagat v. Khetu*, A 1929 PC 110 : 116 IC 394; **folld in** *P C Purushothama v. S Perumal*, A 1972 SC 608].

Objections to Admissibility of Document.—No objection can be taken to the admissibility of documents marked as exhibit without any objection [*P C Purushothama v. S Perumal*, A 1972 SC 608]. The reception of papers and documents by the lower appellate court, unless objected to at the time, cannot be made a ground of special appeal [*Rashbeharee v. Nabai*, 3 BLR 99 : 11 WR 465. See also *Jagannath v. Hanuman*, 36 IA 221 : 36 C 833; see however, *R v. Amrita Govinda*, 10 Bom HC 497, where it has been held that it is the duty of the appellate court to see that the lower court exercised judicial discretion in proper manner]. A question of law relating to the admissibility of a document by reason of non-registration cannot for the first time be allowed to be raised before the Privy Council when the plea cannot be disposed of without deciding nice questions of fact on which the evidence is not clear and the parties are at variance [*Offl Liquidator v. Burjorjee*, 59 IA 161 : 36 CWN 677 : A 1932 PC 118]. Where a document consists of two separate parts, one admissible and the other inadmissible, the document cannot be rejected as a whole [*Fazal Din v. Karam*, A 1936 L 81].

There is a clear distinction between waiving the necessity of formal proof of a document and objecting to the admission of evidence which is *per se* inadmissible. In the latter case acquiescence is no bar to objecting in appeal [*Sri Mahabirji v. Ramnath*, A 1936 P 634; *Dolgobind v. Maqbul*, A 1936 C 164 : 61 CLJ 588; *M S Ram Singh v. Bijoy*, A 1972 C 190]. Mere consent of counsel to documents being marked as exhibits for cross-examination is neither an admission as to documents nor can be treated as an admission of contents thereof [*Sanjay Cotton Co. v. Omprakash*, A 1973 B 40]. Where a piece of evidence not proved in the proper manner, has been admitted without objection in direct contravention of an imperative provision of law, it is open to the opposite party to challenge it at any later stage [*Shib Ch v. Gour*, A 1922 C 160 : 27 CWN 134]. But an objection that a document, which *per se* is not admissible, has been improperly admitted cannot be entertained in appeal when, if the objection had been taken in the trial court, it might have been met and the proceedings regularised [*Sayeruddin v. Samiruddin*, 72 IC 985 : A 1923 C 378].

No objection should be allowed to be taken in the appellate court as to the admissibility of a copy of a document, which was admitted in evidence in the court below without any objection [*Akbar Ali v. Bhyea Lal*, 6 C 666, 670; *Prasanna v. Mahananda*, 40 IC 553; *Kishori Lal v. Rakhal Das*, 31 C 155, 158 (*Kameshwar v. Amanatulla*, 26 C 53 **dissented from**); *Hridoy Kishna v. Prasanna*, 28 C 142; *Shahazadi v. Secy of S*, 34 IA 194: 34 C 1059; *Padam v. Hanwanta*, 19 CWN 929: A 1915 PC 111; *Lachman v. Kamakshya*, A 1931 P 224; *Mirza Md v. Sawdar*, 14 L 473; *Kedar v. Pradhan*, A 1937 N 13; *Ram Pd v. Lala Sham*, 6 CLJ 22; *Girindra Ch v. Rajendra*, 1 CWN 530; *Miller v. Madho*, 23 IA 106: 19 A 76 : 23 C 335, 338; *Chimanji v. Dinkar*, 11 B 320; *Ningawa v. Bharmappa*, 23 B 63; *Lakshman v. Amrit*, 24 B 591, 596; *Seth Behari v. Amin*, 79 IC 1029: A 1924 A 918; *Konchada v. Valupula*, 48 IC 921: A 1925 M 257; *Alfoo v. Babur Ali*, 97 IC 414: A 1926 J 158; *Manmatha v. Probodh*, 43 CLJ 274; *Arjuna v. Dayanidhi*, 98 IC 301: A 1927 M 60 : *Bindeshwari v. Ramraj*, A 1939 A 61; *Yagganna v. Kutagulla*, A 1945 N 361; *Kanchanganga Co v. S*, A 1973 C 325]. Where no objection was taken to the admissibility of a document before the arbitrator or the High Court, it cannot be raised in the Supreme Court [*Haji Md v. S*, A 1959 SC 488 : 1959 Sup 1 SCR 922]. Once secondary evidence of a document has been admitted in trial court without any objection, its admissibility cannot be challenged in appeal [*Rama Ch v. Ranganayaki*, A 1941 M 612].

It must be generally understood that questions of admissibility of evidence will not as a general rule be entertained in second appeal [*Satnarain v. Ramautar*, 22 ALJ

153: 78 IC 221: **relied on** in *Radha Kishan v. Kedar*, 80 IC 874 : 46 A 815 : A 1924 A 845]. Mere absence of formal proof of a document not objected to will not be entertained in appeal [*Ali v. Niamatullah*, 134 IC 770 : A 1931 L 274]. So also an objection that a document has been allowed to be proved in a manner different from that which is prescribed by law [*Fauza v. Allah*, A 1931 L 722]. Unproved documents cannot be regarded as proved and considered by an appellate court merely because they were wrongly admitted by the lower court [*Feroj Din v. Nawab*, 9 L 224 : A 1928 L 432]. Document mechanically exhibited without reason can be objected to in appeal [*Krishna v. Waryaman*, A 1927 L 45 : 99 IC 920].

A suitor filing a document cannot object to its admissibility [*Ramani v. Secy of S*, 24 M 427 : 11 MLJ 315]. It would save trouble, if courts were to ask the opposite party, on the tender in evidence of a document, requiring proof, whether he would admit it without formal proof [*Manson v. Golam*, 15 WR 490].

The question whether a document is admissible or not for want of registration or irrelevant can be raised in appeal [*Sabdi v. Budhai*, 82 IC 940 : A 1925 C 370; *Chavakula v. C*, A 1947 M 168]. An appellate court will not for the first time entertain an objection that a document which *per se* is not inadmissible has been improperly admitted in evidence [*Ambar Ali v. Lutf Ali*, 21 CWN 996 : 45 C 159]. Although objection as to admissibility was not taken in first court, yet if it is urged and the appellate court gives effect to the objection, and no application was made to such court to take fresh evidence as to the admissibility of such document, the High Court will not in second appeal interfere [*Puruma v. Rama*, 28 MLJ 115]. Where no objection is taken in the first court to the admission of documents not inter partes, objection cannot be taken in second appeal [*Reajaddi v. Ganga Charan*, 53 IC 863]. A question as to the inadmissibility of oral evidence not raised in either of the courts below was allowed to be taken in second appeal [*Harak v. Bishnu*, 8 CWN 101; see *Kanta v. Jagat*, 23 C 335]. A lady who filed a suit for partition, contended that her thumb impression was obtained fraudulently by her brother-in-law in the earlier partition deed for the illeged purpose of changing *Karta*. But in her evidence, she admitted that the panchayatdars at the partition fraudulently took the thumb impression. Such evidence which is contrary to the pleadings cannot be looked into [*Smt. Mallamma v. Smt. Nanjamma*, A 1988 Kant 225, 227 (DB): (1988) 22 Reports 8]. Some documents (rent receipts) having been admitted in evidence without objection in the primary court, no objection could be taken in the appellate court that they were not properly proved [*Rajeswari v. Pulin*, 25 CWN 881 : 62 IC 647; **follld in** *Abdul Samad v. Gunendra*, 82 IC 974: A 1925 C 452]. Plaintiff having joined several actions in ejectment against several defendants in disregard of C P Code is not entitled to object to the use of evidence relating to one holding in dealing with the others and to which he apparently took no exception when rendered at the trial [*Seturatnam v. Venkatachala*, 47 IA 76 : A 1920 PC 67 : 25 CWN 485]. Where in a criminal trial an accused omits to object to a document which is not *per se* inadmissible, he cannot afterwards impeach the verdict of the jury on the ground that the document was admitted without formal proof [*Ram Bhagwan v. R*, 47 IC 82]. When documents are shown to a witness in cross-examination it is not open to the cross-examining party to complain of lack of proof [*Ram Janki v. Juggilal*, A 1971 SC 2551].

Court Shall Exclude Inadmissible Evidence Even Though No Objection is Taken.—[1]S 298 Cr P Code expressly lays down that it is the duty of a judge to

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1. Omitted in Act 2 of 1974.

exclude inadmissible evidence "whether it is or is not objected to by the parties". The duty of a judge in civil cases has not been expressed in similar language but there is no manner of doubt that it is exactly the same. The combined effect of s 5 (which says that evidence may be given of relevant facts *and of no others*), s 60, s 64 and Proviso 1 to s. 165 is that an omission to object to evidence not admissible under the Act does not make it admissible and that it is the duty of the judge in all cases to exclude inadmissible evidence whether or not objected to by a party (see also *post* notes to s 165). The duty of a judge is to disallow inadmissible evidence even when no objection is taken. He should stop such questions himself without waiting for an objection to be taken to the admissibility [*Stirland v. D P P*, 1944, 2 All ER 13 HL]. In *R v. Pitambar*, 7 WR Cr 25, MARKBY, J. said: "The moment a witness commences giving evidence which is inadmissible he should be stopped by the court".

An erroneous omission to object to evidence not admissible or relevant under the Act does not make it admissible. It is the duty of the court to exclude all irrelevant or inadmissible evidence even if no objection is taken to its admissibility by the parties [*Sumitra v. Ram*, 5 PLJ 410 : 57 IC 561; *Ambar v. Lutfe*, 21 CWN 996 : 41 IC 116; *Narhari v. Ambabai*, 44 B 192 : 55 IC 316; *Miller v. Madho Das*, 23 IA 106 : 19 A 76; *Jagadis v. Harihar*, 40 CLJ 39; *Luchiram v. Radha Charan*, 34 CLJ 107; *Chooni v. Nil Madhav*, 41 CLJ 374 : A 1924 C 1042; *Damodar v. Jadunath*, 91 IC 449; *Manmatha v. Probodh*, 43 CLJ 274; *Nanak v. Mian Md*, A 1936 L 114; *Lachhu v. Mela*, A 1929 L 583; *Dwijen v. Naresh*, 49 CWN 791 : A 1945 C 492, see *Inayat v. R*, A 1936 PC 199 : 17 L 488 : 40 CWN 1101].

Evidence Illegally Obtained is Admissible.—It has long been held that the admissibility of evidence is not affected by the illegality of the means by which the evidence has been obtained, though a person taking recourse to illegality may be accountable under the law [see *Legatt v. Tollervey*, 1811, 14 East 202; *R v. Granatelli*, 1849, 7 St Tr, NS 979, 987; *Elias v. Pasmore*, 1934, 2 KB 164; see Wig s 2183]. If evidence is relevant the court is not concerned by the method by which it was obtained or with the question whether that method was tortious but excusable [*Kuruma v. R*, 1955, 1 All ER 326 PC; *King v. R*, 1968, 2 All ER 610 PC]. The fact that a document was procured by improper or even illegal means will not be a bar to its admissibility if it is relevant and its genuineness proved [*Magraj v. R K Birla*, A 1971 SC 1295]. But the court will take care to find out that it is genuine and free from tampering or mutilation. It may also secure scrupulous conduct and behaviour of the police [*R M Malkani v. S*, A 1973 SC 157]. There is no difference in principle for this purpose between a criminal case and a civil case. No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused, *eg*, a document obtained from a defendant by a trick [*Kuruma v. R*, 1955, 1 All ER 236 : 1955 AC 197, 203; see also *Selvey v. DPP*, 1968, 2 All ER 497 HL]. Similarly things seized under an illegal search may nevertheless be used as evidence [*R v. Allahabad*, 35 A 358; *R v. Abbasbhai*, 27 Cri LJ 503; *Legal R v. Mumtazuddin*, 1947, 1 Cal 329; *Indu v. S*, A 1955 C 129; *Ramrao v. R*, A 1951 N 237]. The rule that evidence obtained by improper means or unfair means was admissible in criminal trial, applies to evidence obtained by the use of surveillance devices which invaded a person's privacy [*R. v. Khan*, (1996) All ER 289 (HL)]. A Judge has no discretion to exclude otherwise admissible evidence on ground that it had been obtained improperly or unfairly. If, however, he considers that in all the circumstances the obtaining of the evidence in that way would have the adverse effect, then he will exclude it. [*R. v. Smurthwaite*, (1994) 1 All ER 898. See also *R. v. Governor*, (1992) 1 All ER 317]. Use of evidence obtained as a result of an illegal search is not prohibited by art 19 of Constitution

[*Balwant v. Director of Inspection*, A 1969 D 91]. Tape-recorded conversation without the knowledge of the accused is admissible and does not violate art. 20(*3*) or 21 of Constn [*R M Malkani v. S*, A 1973 SC 157]. Once the whole backdrop of the investigation on the basis of which the accused had been prosecuted was found to be unfair and against the basic tenets of criminal jurisprudence, the conviction and sentence based on such a highly infirm investigation and cannot be sustained in the eye of law [*Gyan Chand v. State of Rajasthan*, 1993 Cri LJ 3716, 3718 (Raj)]. In case of defective investigation, it would not be proper to acquit the accused if the case is otherwise established [*Krishna Pal v. State of U.P.*, A 1996 SC 733 : 1996 Cri LJ 1134, 1137; *Karnail Singh v. State of M.P.*, 1995 A SCW 3644]. For lapses of investigation the intrinsic weight of ocular account cannot be discarded [*Janardhan Ragho Mahatre v. State of Maharashtra*, 1996 Cri LJ 4180, 4185 (Bom)].

In the United States, however, the law is quite different and evidence obtained by virtue of an illegal search or seizure violates the citizen's constitutional rights and is not admissible [see *Davis v. Mississippi*, 394 US 712; *Desist v. US*, 394 US 244; *Alderman v. US*, 394 US 165]. It is not alone deterrence against future illegal action by the police that warrants exclusion of evidence illegally obtained. It is the imperative of judicial integrity [*Terry v. Ohio*, 392 US 1; *Harrison v. US*, 392 US 219].

Evidence obtained unlawfully or improperly (in this case evidence obtained unlawfully by French undercover agents) is admissible before an English Court. *R v. Sang*, 1979 CLY 1425. Section 79 of the Extradiction Act, 1984 does apply to extradiction proceedings. *Nazir Chinoy Re*, 1991 COD 105 DC.

Where the business partner of the accused disappeared and the police questioned the appeal informally without any caution on a number of occassion about the disappearance. It was subsequently discovered that he told lies about his movement on the day in question. He appealed against the use of such informal interviews as evidence. The Court rejected his contention and held that the evidence was not capable of causing prejudice to a fair trial and therefore it was rightly admitted [*R v. James,* (1996) Crim LJ 650 (CA)].

Tapping Telephone.—Evidence obtained by tapping overseas telephone has been held to be admissible [*R v. Anjila,* (1997) Times, 24 November (CA)].

Test-purchase made by police officer in plain clothes.—Test-purchases of liquor made by police officers in plain clothes so as to detect and create evidence of the unlicenced items sold by the licenced dealer was held to be wrongly excluded by the magistrates since it had not been shown that the evidence would have an adverse effect on the fairness of the proceedings [*DPP v. Marshall*, (1988) 3 All ER 683 QBD].

Breath-specimen obtained at police station.—The breath-specimen of a driver taken at a police station after arresting him was held to be admissible in evidence because it is not a prequisite for this purpose that the arrest should be lawful [*Fox v. Chief Constable of Gwent*, (1985) 3 All ER 392 HL].

The public interest in ascertaining the truth in litigation permits the admission of evidence obtained by illegal methods. In a case of this kind, a protected document was stolen from the files of the plaintiff's solicitors which he had brought into the court. The matter arose out of a copyright action. The defendants refused to return the document and tried to make use of its copies. The plaintiff sought to restrain them from doing so. The court said: The public interest in the ascertainment of truth in litigation, which is the reason for the rule allowing secondary evidence of privileged

documents to be adduced though improperly obtained, is outweighed by the public interest in the proper administration of justice in regard to a litigant being able to bring his documents into court without fear that his opponent would fetch them by stealth or a trick. Furthermore, for a party to litigation by stealth or a trick to take possession of documents in court belonging to the other side is probably a contempt of court which the court should not countenance by admitting the document in evidence in the litigation. *ITC Film Distributors v. Video Exchange Ltd.*, (1982) 2 All ER 241 Ch D.

Confidentiality and disclosure of criminal evidence to civil parties.—In the course of a criminal investigation the police may seize and detain documents which are necessary for their inquiry. The courts have to consider whether the police may disclose such documents to parties involved in civil proceedings arising from the events which led to the police investigation. This kind of problem was before the court in *Marcel v. Commissioner of Police of the Metropolis*, (1991) 1 All ER 845. It was a claim for breach of contract. The defendant alleged fraud on the part of the plaintiff company's representatives. In the course of a criminal investigations police seized documents from the representatives. The defendant obtained orders from the court directed to the police in respect of the documents. Accordingly, the police allowed the defendant to see some of the documents. As a result, some of the documents were read in the open court while others were left in the custody of the court. The persons from the documents had been seized brought proceedings to restrain the police from dealing with the documents save for the purpose of the criminal investigation. They also sought an injunction against the defendant to restrain him for using the documents or any information derived from them. It was held that a public body, which obtains information under a statutory power, is under a duty of confidence towards the persons from whom the information has been obtained. Such a person is then entitled to enforce his right of confidence by restraining the public body from using the information for any purpose outside the context in connection to which it was obtained. The court granted the injunction sought and set aside the order to the police. But this was reversed on appeal. [*Marcel v. Commissioner of Police of the Metropolis*, (1992) 1 All ER 72]. It was held that while it is true that the police are not free to use documents seized in a criminal investigation for any other purpose outside the criminal process, a subpoena may be issued against the police to compel production in court of relevant documents. Police are, for example, free to disclose to interested parties statements of witnesses concerning road accidents. Similarly, they may supply information to the social services in connection with child abuse, and may provide information to the Criminal Injuries Information Board.

Out of court statements, *e.g.*, statements to the liquidator of a company, may be used for purposes other than the truth of the facts they state. [*Barlow Clowers Gilt Managers Ltd. Re*, (1991) 4 All ER 385]. There is, however, some authority to the effect that documents which are required only for cross-examination may not be obtained for compulsory process. [*R. v. Chettenham Justices*, (1977) 1 All ER 460].

It is well settled that where a well founded claim for immunity has been made, disclosure would be ordered only if the party claiming disclosure can persuade the court that the document in question would substantially aid his case. *Air Canada v. Secy of State for Trade (No 2)*, (1983) 1 All ER 983, noted All ER Review 1983, pp 205-210.

Waiver of Objections, or Consent.—A document can be treated as duly admitted where its admission without being proved is not objected to by the party affected

[*Shrinivas v. Balwant*, 37 B 518; *Konchada v. Velupula*, 84 IC 921 : A 1925 M 257]. But consent of parties cannot make a piece of evidence relevant and admissible which is not so under the law. Mode of proof being a question of procedure may be waived and if this is done there can be no subsequent objection [*Gonnabathula v. G*, 92 IC 594 : A 1926 M 282; *Jainab v. Hyderally*, 43 M 609 FB; *Bibi Kaniz v. Mobarak*, 72 IC 748 : A 1924 P 284; *Dogar v. Suman*, A 1924 L 58] By consent although the contents are proved, the truth thereof cannot be said to have been proved or admitted if the truth of the facts stated in the document is in issue [*John Mithalal Desai v. Dineshbhai K. Vora*, 1998 AIHC 1894, 1907 (Guj); see also *Ayyavar v. Secy of S*, A 1942 M 528 where the matter has been discussed]. Statements not admissible in evidence cannot be rendered admissible by consent [*Ponnusami v. Singarama*, 41 M 731; *Sundar v. Sham*, A 1923 L 630]. Admissibility of documents can be challenged though admitted without objection when the question is not a mere question of mode of proof [*Sashimukhi v. Sarat*, 45 CLJ 537 : A 1927 C 327 : 31 CWN 310]. Objection as to relevancy may be raised in appeal even though evidence was admitted in trial court without demur [*Marneedi v. Masimukkula*, A 1949 M 689]. Omission of a party to prevent irrelevant evidence from being admitted will not in the absence of a deliberate consent to waive objection, cure the defect [*Chinna Meena v. Kumara*, 36 IC 906 (*Offl Assignee v. Madho*, 23 IA 106 : 19 A 76 **folld**)]. In a question of title where neither party made any objection to oral evidence, the objection could not be taken in second appeal [*Vaddaboyina v. Vaddaboying*, A 1969 AP 300]. See notes to s. 33 *post*.

In civil case consent of parties can validate mode of recording evidence even though it be irregular. The party consenting cannot afterwards object [*Yusaf v. Md Din*, 99 IC 861: A 1927 L 132; *Labh v. Ram*, 5 L 282. See however, *Lahore Bank v. Lakhi*, 105 PR 1913]. Where during examination by commission certain documents are admitted in evidence without being proved according to law and without objection by the opposite party, the court has no power to reject them inasmuch as proof of documents should be deemed to have been waived [*Kalikanand v. Shivanandan*, 63 IC 625 : A 1922 P 122]. The appellate court has no jurisdiction to reject a copy of a document exhibited in the lower court with the consent of both parties, at any rate, without giving an opportunity of producing the original [*Kamalammal v. Athikari*, 48 IC 615 : 35 MLJ 11]. Technical rules of evidence can be dispensed with by consent [*Baerlin v. Chartered M Bank*, 1895, 2 Ch 488].

Where a common question arises in two suits in which the plaintiff is same but defendants are different, if the suits are tried together by consent and evidence taken in one suit is treated as evidence in the other also, the procedure is not irregular [*Varadarajalu v. Velayudu*, 90 IC 743 : A 1925 M 1160]. Though recitals in a judgment as to the contents of a document are not admissible in evidence, the parties can agree to their reception without further proof and cannot afterwards object to their admissibility [*Gopu Nataraja v. Rajammal*, A 1922 M 394 : 43 MLJ 448 : 69 IC 15].

Waiver : [Rule of Waiver is Not Applicable in Criminal Cases].—Except where the law expressly permits waiver, the rights of an accused should not be held to be lost by his consent to a procedure or to admission of evidence which the law does not authorise. The prisoner on his trial can consent to nothing. It is the duty of the magistrate and all criminal courts to follow the procedure prescribed by law, and the consent of the accused cannot be invoked against irregularity in procedure [*Dy Legal Rem v. Upendra*, 12 CWN 140, **folld in** *Kottam v. Umar*, 46 M 117]. Wide difference exists between a civil suit and a criminal prosecution. Criminal proceedings are bad unless they are conducted in the manner prescribed by law and if they

are substantially bad, the defect will not be cured by any waiver or consent of the prisoner [*R v. Bholanath*, 2 C 23, 30]. A prisoner on his trial cannot waive his ordinary right, nor can he consent to anything [*Att. Genl v. Bertrand*, 36 LJPC 51, 57. See also *R v. Bishonath*, 12 WR Cr 3]. See *post*, s. 58, "*Admissions in Criminal Cases*".

When evidence in one connected case is admitted as evidence in another case at the wish of the accused, the procedure is illegal, as evidence was not recorded in the presence of the accused as required by s 353 (now s 273) Cr PC [*Thakkar v. R*, 104 IC 99 : A 1927 L 781; *Allu v. R*, 4 L 376].

Appreciation or Weight of Evidence.—The Act does not purport to lay down any rule as to the weight to be attached to the evidence when admitted, nor is any such rule possible for proper appreciation of evidence is a matter of experience, common sense and knowledge of human affairs. "For weighing evidence and drawing inferences from it, there can be no canon. Each case presents its own peculiarities, and common sense and shrewdness must be brought to bear upon the facts elicited in every case which a judge of facts in this country discharging the functions of a jury in England, has to weigh and decide" [*per* BIRCH, J, in *R v. Madhub*, 21 WR Cr 13, 19; *Mahendrapal v. S*, A 1955 A 238; *Cf Lord Advocate v. Lord Bluntyre*, 4 App Cases 770, *per* LORD BLACKBURN]. The onus of proof may be a determining factor when the evidence is so evenly balanced that it can come to no sure conclusion; but it is immaterial when the tribunal after hearing and weighing the evidence has come to a final conclusion on a question of fact [*per* VISCOUNT DUNEDIN in *Robins v. National Trust Co Ltd*, 1927 AC 515, 520; *Huyton & U D C v. Hunter*, 1955, 2 All ER 398, 401].

Neither the Evidence Act nor any other Act lays down any law governing the question which statement of a witness should be believed or should not be believed. The question depends upon so many circumstances that it is impossible to lay down hard and fast rules. The law has left it to the court to decide whether the evidence should be believed or not and, if believed, what weight should be attached to it or what effect should be given to it. These matters have been left at the sound discretion of the court. When the Legislature itself has left them at the discretion of the court, it is not open to the highest court to fetter the discretion by laying down hard and fast rules, because it would be tantamount to legislating [*Jwala v. S*, A 1963 A 161 FB].

Although efforts have been made by mathematical writers to formulate rules for determining moral certainty it is obvious that no satisfactory system can be devised for weighing evidence and drawing conclusions. The effect of evidence must necessarily be left to the discretion of each judge. "It may be objected," writes Mr Wills, "that the minds of men are so differently constituted, and so much influenced by differences of experience and culture, that the same evidence may produce in different individuals very different degrees of belief; that one man may unhesitatingly believe an alleged fact, upon evidence which will not in any degree sway the mind of another. It must be admitted that moral certainty is not the same fixed and unvarying standard, alike in every individual; that scepticism and credulity are modifications of the same principle, and that to a certain extent this objection is grounded in fact; but, nevertheless, the psychological considerations which it involves have but little alliance with the present subject; the argument, if pushed to its extreme, would go to introduce universal doubt and distrust, and to destroy all confidence in human judgment founded upon moral evidence. It is as impossible to reduce men's minds to the same standard, as it is to bring their bodies to the same dimensions; but in the one case, as well as in the other, there is a general agreement

and similarity, any wide departure from which is instantly perceived to be eccentric and extravagant. The question is, not what may be the *possible* effect of evidence upon minds *peculiarly* constructed, but what ought to be its fair result with men, such as the generality of civilised men are" [Nort pp 29, 30].

In *Townshend v. Strangroom*, 6 Ves 328, 333, LORD ELDON said: "This inconvenience belongs to the administration of justice, that the minds of different men will differ upon the result of the evidence, which may lead to different decisions on the same cause." With regard to the numerical strength, the general rule is that no particular number of witnesses shall in any case be required for the proof of any act [v s 134, *post*]: Evidence is to be weighed and not counted. What is required in the judge is judicial training and experience and a wide knowledge of men and things. The direct evidence of one witness if believed by the court is sufficient for the proof of a fact. According to Wigmore, the common law, in repudiating the numerical system lays down four general principles.

(*1*) *Credibility, does not depend on numbers* of witness. Therefore:

(2) In general, the testimony of a single witness, no matter what the issue or who the person, *may legally suffice as evidence upon which the jury may find a verdict.*

(3) Conversely, the *mere assertion of any witness* does not of itself need to be believed, *even though he is unimpeached* in any manner, because to require such belief would be to give a quantitative and impersonal measure to testimony.

[*In Bourda v. Jones*, 110 Wis 52, 85 NW 671 (Am) MARSHALL, J, said: "It is not infrequently supposed that a sworn statement is necessarily proof, and that, if uncontradicted, it establishes the fact involved. Such is by no means the law. Testimony, regardless of the amount of it, which is contrary to all reasonable probabilities or conceded facts—testimony which no sensible man can believe—goes for nothing; while the evidence of a single witness to a fact, there being nothing to throw discredit thereon, cannot be disregarded"].

(*4*) As a corollary of the first proposition, *all rules requiring two witnesses*, or a corroboration of one witness, are exceptions to the general principle [Wig s 2034]. As to the exception, see notes to s 134 *post*. As to corroboration of accomplice evidence, see s 133, *post*.

In determining on the credit due to the witness, the judge should have regard to the following considerations:—(*1*) Their integrity; (*2*) Their ability; (*3*) Their number and consistency with each other; (*4*) The conformity of their testimony with experience; (*5*) The conformity of their testimony with collateral circumstances [Nort p 33]. In determining questions regarding the weight of evidence, however, valuable aid is provided by the judge's directions on the following points:—who has the burden of proof; what presumptions apply; when corroboration is required; that statements are evidence for some purposes and not for others, or against some parties and not against others; that documents are sometimes conclusive and sometimes merely *prima facie* evidence of the facts recorded; that oral evidence is more reliable than that given by affidavit; and that direct and positive testimony is preferable to the speculative opinion of experts [Phip 8th Ed, p 661]. As to value of expert evidence, see s 45, *post*.

STEPHEN says in his Introduction to the Evidence Act.—"In judicial inquiries the facts which form the materials for the decision of the court are the facts that certain persons assert certain things under certain circumstances. These facts the judge hears with his own ears. He also sees with his own eyes documents and other

things respecting which he hears certain assertions. His task is to infer—(*1*) from what he himself hears and sees, the existence of the facts asserted to exist; (*2*) from the facts which on the strength of such assertions he believes to exist, other facts which are not so asserted to exist. Each of these inferences is an inference from the effect to the cause, and each ought to conform to the Method of Difference; that is to say the circumstances in each case should be such that the effect is inconsistent (subject to the limitations contained in the following paragraphs) with the existence of any other cause for it than the cause of which the existence is proposed to be proved.

The highest result of judicial investigation must generally be, for the reasons already given, to show that certain conclusions are more or less probable.

The questions what degree of probability is it necessary to show, in order to warrant a judicial decision in a given case—is a question not of logic, but of prudence, and is identical with the question, what risk of error is it wise to run, regard being had to the consequences of error in either direction.

This degree of probability varies in different cases to an extent which cannot be strictly defined, but wherever it exists it may be called moral certainty."

[*Ref Tay ss 50-69; Best, ss 440-51; Phip 8th Ed pp 380, 661; Wig ss 26, 1008, 2034; Jones, ss 898-903; Nort, pp 29-81; Ram on Facts, Chs VIII, X, XI; Moore on Facts*].

—General.—Below will be found observations in some judicial decisions bearing on the appreciation or weight of evidence. (See also notes to s 59, *post*).

In appreciating the evidence against the accused the prime duty of a court is firstly to ensure that the evidence is legally admissible, that the witnesses are credible and have no interest in implicating him or have ulterior motive [*H P Admn. v. Om Prakash*, A 1972 SC 975]. Where the court has to depend upon probabilities based on certain points the rule laid down in *Smith Ld v. G W Rly Co*, 1921 KB 237 may profitably be followed. There BANKERS, LJ said: "Although the judge is undoubtedly entitled to draw inferences from the facts proved before him, the inferences must be such as could legitimately be drawn from the facts. If the facts are such that no reasonable man could draw a particular inference from them, or if the particular inference is such as to be equally consistent with non-liability and with liability, then the party who relies on the inference to discharge the onus of proof of establishing liability fails" [**Approved** in *B N Ry v. Mooji Sicka*, A 1930 C 815].

"In order to judge the credibility of witnesses the court is not confined only to the way in which the witnesses have deposed or to the demeanour of witnesses but it is open to it to look into the surrounding circumstances as well as the probabilities" [*Ramchandra v. Champabai*, A 1965 SC 354; *Govinda v. Chimabai*, A 1968 My 309]. Where neither prosecution nor defence comes out with the whole unvarnished truth court can only try to guess or conjecture to decipher the truth if possible [*Jamuna v. S*, A 1974 SC 1822]. Test as to determination of credibility of witness [*K Jawala v. Narayana*, A 1979 NOC 41 (AP)].

Criticism that certain evidence appears to be got by rote or learnt by heart though not without weight, is by no means conclusive. Evidence substantially true, not infrequently assumes too perfect a form and witnesses such as children not infrequently get a story by heart which is none the less a true story. The real tests are how consistent the story is with itself, how it stands the test of cross-examination and how far it fits in with the rest of the evidence and the circumstances of the case [*Bhojraj v.*

Sitaram, 40 CWN 257 : A 1936 PC 60]. Cross-examination is not the only method of discrediting a witness. Courts are not bound to accept testimony which on the face of it is unacceptable merely because there was no cross-examination [*Juwarsingh v. S*, A 1981 SC 373 : 1980 Cri LJ 1418]. The veracity of a witness is judged not solely from his individual statements but from his testimony taken in conjunction with all other facts brought out in the course of the testimony. So far as the appreciation of oral testimony by the appellate court is concerned there are two conflicting view-points, *viz* on the one hand the undoubted duty of the court of appeal to review the recorded evidence and to draw its own inference and conclusions, and on the other hand, the unquestionable weight which must be attached to the opinion of the judge of the primary court who had the advantage of seeing the witnesses and noticing their look and manner [*Surendra v. Ranee*, 47 C 1043 : 24 CWN 860 : A 1921 C 677]. "Credibility in the witness-box is more valuable in assessing evidential values than kinship or standing"—*per* LORD RUSSELL in *Radhakishen v. Sri Kishen*, A 1945 PC 79, 80 : 1945 Kar, 191]. Merely because witness was a mere labour boy it could not be said that he had no sense of time [*Ganesh v. S*, A 1979 SC 135]. Presence of police at the installation ceremony of mohunt far from advancing the case of coercion advances the case of non-coercion [*Amarprakash v. Parkasha*, A 1979 SC 845]. In a murder trial solitary eye witness did not disclose assailant's name immediately after occurrence—*held* conviction was not proper [*Panda v. S*, A 1979 SC 697].

Generally, oral testimony can be classified into three categories, *viz*. (*1*) wholly reliable; (2) wholly unreliable; (*3*) neither wholly reliable nor wholly unreliable [*Vadivelu v. S*, A 1967 SC 614 : 1957 CrLJ 1000 : 1957 SCJ 527]. Where the evidence of witnesses is backed by medical evidence, conjectural alternatives cannot be substituted in place of accepted evidence of those who actually saw the incident [*Ram Sagar v. State*, 1994 Cri LJ 589, 594 (All)]. Court should not discard an otherwise reliable piece of evidence on mere surmise and conjecture [*Satbir v. Surat Singh*, A 1997 SC 1160]. Defence witnesses are entitled to equal treatment with those of the prosecution. Courts ought to overcome their traditional, instinctive disbelief in defence witnesses. Quite often, they tell lies but so do the prosecution witnesses [*Dudh Nath Pandey v. State of U.P.*, A 1981 SC 911, 916 : 1981 Cri LJ 618]. The evidence of the eyewitness, if accepted, is sufficient to warrant conviction, though in appropriate cases, the court may seek some confirming circumstances from other sources as a measure of caution [*State v. Selvaraj*, 1994 Cri LJ 705, 715]. Where in a case of committing murder by pouring petrol in the room of the deceased and setting that on fire, the rickshaw driver after reading in the newspaper about the incident gave evidence that his rickshaw was hired by the accused for carrying tins to the petrol pump and bringing back those tins filled with petrol and going to a particular place, his evidence cannot be discarded simply on the ground that he had come forward for giving statement ofter seven days [*Amir Jamal Khan v. State of Maharashtra*, 1995 Cri LJ 1956, 1961 (Bom)].

Mere rejection of evidence is not by itself affirmation or confirmatory proof of the truth of other evidence to the contrary [*R v. Chapman*, 1973, 2 All ER 624; *Mrs. Abba Astavans v. Suresh Astavans*, A 1984 NOC 131 (Delhi)]. The evidence of a prosecution witness, if found otherwise unreliable and untrustworthy, cannot be accepted merely because the defence has not been able to say as to how and why a case had been instituted against the accused and some witnesses had deposed against him [*V. Prabhakarrao v. State of Orissa*, 1982 Cri LJ NOC 152 : (1982) 53 Cut LT 368 (Orissa); *Rameshwar v. State of U.P.*, 1984 Cri LJ NOC 203 (All)].

—Other cases.—It is a sound rule of appreciation of evidence that if the testimony of such a witness is to be used as the sole basis of conviction it should be of such a calibre as to be regarded as wholly reliable. The blemish attached to a witness as a partisan witness stands in the way of his evidence becoming wholly reliable and hence without adequate reassurance from other circumstances or materials it may not be safe to make the uncorroborated evidence of such a witness the sole basis for reversing the order of acquittal [*Harpal Singh v. Devinder Singh*, A 1997 SC 2914, 2917 : 1997 Cri LJ 3561]. Intention is locked up in the heart of the assailant and the inference is to be drawn from acts and attending circumstances [*State v. Kala*, A 1996 SC 2962 : 1996 Cri LJ 1872, 1873]. Where the medical evidence indicated that there were three incised wounds of different dimensions at three places on the body of the deceased but the prosecution case was that the accused had inflicted injury only once, conviction cannot be sustained [*State of M.P. v. Surbhan*, A 1996 SC 3345 : 1996 Cri LJ 3199, 3200]. It cannot be said that the bodyguard of the victim had exhibited unnatural conduct in not trying to save the victim from onslaught of bullet shots when they were unarmed and had hardly any time to retaliate [*Ram Sanjiwan Singh v. State*, A 1996 SC 3265 : 1996 Cri LJ 2528, 2534]. The totality of the evidence of a witness has to be taken into consideration for fixing the probative value. One or two sentences from the deposition of a witness will not an issue completely [*Sooraj v. State*, 1994 Cri LJ 1155, 1160 (Ker)]. It is possible that a mother of the accused would pardon her son who has committed patricide. But absence of her evidence in support of the prosecution would not affect the truth of the prosecution case if it could be establish from other evidence [*Bellana Kannan Naidu v. State of A.P.*, 1994 Cri LJ 1146, 1147 (AP)]. Prompt interrogation of the witness by the police leuds assurance to the credibility of the witness [*Janardhan Ragho Mhatre v. State of Maharashtra*, 1996 Cri LJ 4180, 4184 (Bom)].

Evidence may be accepted partially or in the whole are where there are certain infirmities the evidence would be of restrictive use [*Turner Morrison and Co., Bombay v. K.N. Taparia*, 1993 Cri LJ 3384, 3405 (Bom)]. Where the eye-witness did not give name of two accused in their initial statements given to the police and the doctor though all the accused were known to them and they failed to explain eight injuries found on the deceased and they also made some improvements conviction could not be based on their evidence [*Pandit Ram Prakash Sharma v. Kharaiti Lal*, 1998 Cri LJ 1410 (SC)]. Evidence of an eye-witness cannot be rejected on sole ground of non-mention of his name in the FIR [*Babu Singh v. State*, A 1996 SC 3250 : 1996 Cri LJ 2503, 2505]. Non mention of the name of the accused in the station diary entries cannot be a ground to disbelieve the otherwise credible prosecution evidence [*Malik Ram Bhoi v. State of Orissa*, 1993 Cri LJ 984, 988 (Ori)]. When the eyewitnesses clearly deposed that it was the accused who first came forward and attacked the deceased, merely because it was 7 p.m., and the medical evidence to that extent corroborated the evidence of the eyewitnesses, it cannot be said that they could not have been able to identify the accused when the occurrence took place [*Pularu v. State of M.P.*, A 1993 SC 1487, 1488]. Disbelieving the prosecution story on a fragile reason is not justified. [*Teja Singh v. State of Punjab*, A 1997 SC 921 : 1997 Cri LJ 1175]. Where the deceased sustained two missive injuries—one on his chest and the other on his thigh, but the eyewitness was absolutely silent about the thigh injury and the prosecution failed to explain that injury, absence of such explanation falsifies his presence at the place of the incident [*Ganpat Kisan v. State of Maharashtra*, 1995 Cri LJ 792, 794 (Bom)]. In a murder case there can be no reason to explain why witnesses are telling lie against an accused person. The circumstances brought out by the evidence may show that in fact their evidence cannot be safely relied upon [*Thyagarajan v. State*, 1993 Cri LJ 1933, 1942 (Mad)].

Where the eyewitness did not disclose about the incident to anyone for 5 days and disclosed it to the police on the fifth day when on the next day of the incident the police had come to the village his testimony was rightly rejected by trial court [*State of Maharashtra v. Bhanudas Sommanna Sangolkar*, 1997 Cri LJ 3205, 3207 (Bom)]. When the trial court and High Court gave cogent and convincing reasons for accepting the evidence of the eyewitnesses who were most natural witnesses and the evidence adduced in defence was not at all material, acquittal of one of the accused by trial court by giving him benefit of doubt would not affect the evidence of the eyewitnesses [*Krishna Ram v. State of Rajasthan*, A 1993 SC 1386, 1388 : 1993 Cri LJ 1056].

The fact that the brother of the witness had figured as a panch witness or the brother and some relations were accused in some earlier cases, cannot be a valid ground to doubt his veracity [*Paresh Kolyandas Bhavsar v. Sadiq Yakubbhai*, A 1993 SC 1723 : 1993 Cri LJ 1857, 1862]. Testimony of a witness cannot be discarded on the ground that he has named some other persons also as co-accused who were acquitted by giving them the benefit of doubt [*Balbir Singh v. State of Haryana*, 1996 Cri LJ 2663, 2667 (P&H)]. Law does not require multiplicity of evidence but quality of evidence is needed for arriving at a finding [*Parsu Ram v. State*, 1996 Cri LJ 2316, 2319 (All)]. The evidence of an eye-witness naming an accused in the dacoity or robbery cannot be brushed aside solely on the ground that the accused was previously known or resident of the same locality and the accused committed offence without taking precaution to conceal his identity. Sometime the evidence of a witness naming an accused in a dacoity has also to be accepted on taking into account the entire and total circumstances of the case [*Parsu Ram v. State*, 1996 Cri LJ 2316, 2318 (All)]. One cannot expect mathematical accuracy in the evidence of different witnesses who witnessed the incident from different places and different angles [*Sanjay Ramchandra Tarare v. State of Maharashtra*, 1996 Cri LJ 713, 719 (Bom)]. Insurance frauds are perpetrated and it is difficult to book the guilty ones. These are facts of life and cannot be disputed. The court has to be careful in assessing a charge of fraud [*Harsud Co-op. Mktg. Society Ltd. v. United India F.&G. Ins. Co. Ltd.*, A 1992 Bom 341, 347].

The fact that the dead body was found lying on the cot corroborates the prosecution version that the death was due to strangulation and not by hanging [*Shri Kishan v. State of Haryana*, A 1994 SC 1597, 1598 : 1994 Cri LJ 2190]. Where all the relevant evidence has been considered by the court in detail each one of the items of evidence need not be considered again in review petition [*A.S. Joshi v. State of Maharashtra*, A 1994 SC 2582, 2583]. Where a witness of will commits mistakes on certain irrelevant points his evidence cannot be completely rejected [*P. Subramaniam v. Ramachandran*, A 1996 Ker 64]. It is not safe to act upon the evidence of a witness whose testimony is clouded with grave suspicion and serious doubts [*Jagdish Prasad v. State of M.P.*, A 1994 SC 1251 : 1994 Cri LJ 1106]. Where the person at whose house the dacoity was committed first went to the tubewell of a person who had a licensed gun and then to the police station it cannot be said that his conduct was unnatural [*State of U.P. v. Bhoora,* 1998 Cri LJ 478 (SC)]. The court cannot reject the testimony of a witness merely on the ground that whereas he stated that he saw the accused assaulting the victim, the other witness stated that by the time he came the accused were leaving the place of the incident. [*State of Maharashtra v. Datta Maruti Salagar*, 1998 Cri LJ 3756, 3758 (Bom)].

—Falsus in uno, Falsus in omnibus.—[*False in one thing, false in everything*]. It is now well settled that principle of *falsus in uno falsus in omnibus* does not apply to criminal trials and it is the duty of the court to disengage the truth from falsehood, to sift the grain from the chaff instead of taking an easy course of rejecting the evidence in its entirety merely on the basis of few infirmities [*Keshoram v. S*, A 1978 SC 1096; *Laxman v. S*, A 1974 SC 308; *Bava v. S*, A 1974 SC 902; *Jagdip v. S*, A 1974 SC 1978; *Deepchand v. S*, 1969, 3 SCC 890; *Ranbir v. S*, A 1973 SC 1409; *S v. Hari*

Singh, A 1974 SC 1168; *Abdul Gani v. S*, A 1954 SC 31; *New India Assurance Co. Ltd. v. Smt Shakuntalabai*, A 1987 Madh Pra 244, 251 : 1987 Jab LJ 462]. This maxim is not a sound rule to apply in the conditions of our country and therefore, it is the duty of the court, in cases where a witness has been found to have given unreliable evidence in regard to certain particulars, to scrutinise the rest of his evidence with care and caution. If the remaining of the evidence is trustworthy and the substratum of the prosecution case remains intact then the court should uphold the prosecution case to the extent it is considered safe and trustworthy. The mere fact that the evidence of the prosecution witnesses was not firm and safe enough to be relied upon with regard to the part assigned to the acquitted accused in the occurrence was no ground to reject it mechanically against the accused-appellant [*Ram Narain v. State of Haryana*, 1993 Cri LJ 1343, 1350 (P&H)]. The approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view of the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief [*State of U.P. v. M K Anthony*, A 1985 SC 48, 54 : 1985 Cri LJ 493]. It is not a sound rule for the reason that hardly one comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishments [*Ugar Ahir v. S*, A 1965 SC 277; *Sohrab v. S*, A 1972 SC 2020]. The court must disengage the truth from falsehood and to sift the grain from the chaff instead of taking an easy course of rejecting the prosecution case in its entirety merely on the basis of a few infirmities [*State v. Selvaraj*, 1994 Cri LJ 705, 715 (Mad)]. Discrepancies are bound to occur in the testimony of witnesses particularly when they are called upon to depose in Court a long time after the occurrence [*Suresh Samal v. State of Orissa*, 1981 Cri LJ 1575, 1578 : (1981) 52 Cut LT 333 (Orissa); *State of Orissa v. Kirtan Bhuyan*, 1981 Cri LJ NOC 177 : (1981) 52 Cut LT 155 (Orissa); *Alok Kumar IACH v. Asoke Kumar AICH*, A 1982 Cal 599, 602]. There are bound to be minor contradictions, omissions and discrepancies in the evidence when several witnesses try to describe the same incident [*Adhir Banerji v. State*, 1984 Cri LJ NOC 187 (Cal) (DB)]. Where one part of a witness's evidence is disbelieved, judges of fact have the right to act on the rest of his testimony [*Sukha & Ors v. S*, A 1956 SC 513 : 1956 SCR 288; *Gallu v. S*, A 1958 SC 813 : 1959 SCR 861; *Dalini v. Nandarani*, A 1970 C 292; *Razic v. J S Chouhan*, A 1975 SC 667; *Soma v. S*, A 1975 SC 1453; *S v. Lalla*, A 1978 SC 368]. Merely because in one respect the court considers it unsafe to rely on the testimony of a witness it does not necessarily follow as a matter of law that it must be discarded in all other respects as well [*Rai Singh v. S*, A 1971 SC 2505]. The evidence of eye-witnesses could not be rejected merely on the ground that they did not intervene to save the deceased [*Angad v. State of Maharashtra*, A 1981 SC 1227, 1230 : 1981 Cri LJ 733; *Dhanaful Meherani v. Baru Mehar*, 1984 Cri LJ NOC 65 : (1984) 57 Cut LT 168 (Orissa); *Mulia Kirsani v. The State*, 1984 Cri LJ 123 : (1983) 56 Cut LT 349 (Orissa) (DB); *Prithvi Nath Pandey v. State of U.P.*, 1994 Cri LJ 3623 (All)].

Consistent evidence of eyewitnesses cannot be rejected merely on ground that their evidence has not been accepted with regard to some other accused [*Arjun v. State of Rajasthan*, A 1994 SC 2507, 2512; *Bolineedi Venkataramaiah v. State of A.P.*, A 1994 SC 76 : 1994 Cri LJ 61]. The court is not justified in holding a witness to be a truthful witness with regard to fatal injury when he was disbelieved with regard to the other part of the prosecution case [*Ramesh Maruti Patil v. State of Maharashtra*, 1994 Cri LJ 9, 10 (Bom)]. When a part of the statement of one

witness is disbelieved, the evidence of that witness should be scrutinised with care and caution to find out whether remaining portion his evidence can be treated as credible [*Prem v. State of U.P.*, 1995 Cri LJ 3888, 3889 (All)]. Where the witness was found to be truthful by the High Court with regard to the fatal injury but disbelieved with regard to other part of the prosecution case, it was held by the Supreme Court that the evidence was unreliable [*Ramesh Maruti Patil v. State of Maharashtra*, A 1994 SC 28, 29]. Where evidence regarding involvement of some of the accused was rejected by the court while acquitting them, the case of the co-accused on that very evidence could not be discriminated from that of the acquitted accused [*Hari Singh v. State of Punjab*, 1994 Cri LJ 2072, 2076 (P&H)]. The evidence of a witness cannot be rejected merely because a part of his testimony may not inspire confidence [*Poolin Haldar v. State*, 1996 Cri LJ 513, 519 (Cal)]. In *Janardhan Ragho Mhatre v. State of Maharashtra*, 1996 Cri LJ 4180, 4185 (Bom), it was held that it is perfectly permissible to believe the evidence of eye-witnesses *vis-a-vis* the accused persons in spite of the fact that the co-accused were acquitted. In this case truth and falsehood was capable of being separated. The doctrine *falsus in uno, falsus in omnibus* is not applicable in India. In such a case the only requirement of law will be that the testimony of these witnesses in regard to the remaining version or the case against the other accused must be considered with more care and caution. [*Naurangi v. State*, 1996 Cri LJ 81, 88 (All)]. In a criminal trial especially in a case of eye-witnesses the maxim *falsus in uno, falsus in omnibus* cannot apply and the court has to make efforts to sift the grain from the chaff. When a witness is said to have exaggerated in his evidence and has tried to involve many more accused and if that part is not found acceptable the remaining part of evidence has to be scrutinised with care [*Hari Chand v. State*, A 1996 SC 1477 : 1996 Cri LJ 1701, 1709]. It is true that the principle *Falsus uno falsus omnibus* is not a rule applicable to our country and the court should make every endeavour to separate the grain from the chaff. However this exercise is only resorted to by courts where truth and falsehood are capable of being separated and are not inextricably mixed. If in a purely mechanical manner witness could falsely depose about the assault launched on her brother by the acquitted accused, there can be no guarantee that there was truth in her claim that she saw the convicted accused assaulting the deceased [*S.P. Tigare v. State of Maharashtra*, 1997 Cri LJ 157, 160 (Bom)(DB), this view was fortified in the decision of the Apex Court in *Balaka Singh v. State of Punjab*, A 1975 SC 1962 : 1975 Cri LJ 1734]. This maxim cannot be mechanically applied and the mere fact that evidence of some of the prosecution witnesses was found unsafe for convicting the co-accused, is by itself no ground for rejecting the whole body of their testimony. It only puts the court on its guard to carefully scrutinise their evidence.' [*Nadodi Jayaraman v. State of T.N.*, A 1993 SC 777, 784 : 1993 Cri LJ 426]. When the evidence is interminably interwined; where a part of the statement cannot be separated from the rest, the entire testimony has to be rejected [*Jyotilal Chakraborty v. Dipak Dutta*, 1995 Cri LJ 930, 933 (Cal)]. Maxim *falsus in uno, falsus in omnibus*, that is to say false in one thing, false in everything is neither a sound rule of law nor a rule of practice. In such a circumstance the Court has to analyse the prosecution evidence carefully and on such analysis if the evidence is found to be consistent and reliable, the Court can accept the same with regard to the other accused persons and hold them guilty, even though the court is unable to rely fully on the prosecution evidence with regard to some of the accused persons [*Arjun v. State of Rajasthan*, A 1995 SC 2507 : 1995 Cri LJ 410, 415]. The maxim *falsus in uno, falsus in omnibus* does not apply to criminal cases. But, if the falsehood is so inextricably mixed with the truth that it is not possible to disassociate the two from

each other, only then the entire statement needs to be rejected. In case, however, it is possible to disengage the grains of real from the chaff of deception and lies, then the court must undertake that exercise for doing justice [*Gulshan Kumar v. State*, 1993 Cri LJ 1525, 1529 (Del)]. The principle *falsus in uno, falsus in omnibus* does not come to the rescue of a witness if the major part of his testimony is found to be false and only a small part may be true. It may come to his rescue in the converse situation [*State of Maharashtra v. Bhanudas Sommanna Sangolkar*, 1997 Cri LJ 3205, 3209 (Bom)]. Where all the accused have been acquitted by accepting the evidence in part conviction of remaining one accused on the same set of evidence is not permissible [*Chinnaswamy v. State*, 1994 Cri LJ 882, 887 (Mad)]. When the witness protested against the assault of the deceased, the accused threatened to kill him. So the fact that the witness did not make hue and cry does not mean that his evidence cannot be acted upon [*Allad Naik v. The State*, 1983 Cri LJ 1032, 1035 (Orissa) (DB) : (1983) 55 Cut LT 254]. A person whose evidence is false or evasive in part, of the case, may be perfectly reliable in another part of the case [*Kishan v. S*, A 1973 SC 2751]. If a witness is reliable on other points, his evidence is to be accepted in proof of those points and disregarded with respect to the point on which he has deposed falsely [*Sohonlal v. State of M.P.*, 1982 Cri LJ 654, 662 (Madh Pra); *Hazarilal v. State of M.P.*, 1981 Cri LJ NOC 111 (Madh Pra)]. If a witness is reliable on other points, his evidence is to be accepted in proof of those points and disregarded with respect to the point on which he has deposed falsely [*Sohanlal v. State of M.P.*, 1982 Cri LJ 654, 662 (Madh Pra)]. If after scrutinising the evidence, a part of the evidence is found to be true, there is no bar to the acceptance of the remaining part [*Hazarilal v. State of M.P.*, 1981 Cri LJ NOC 111 (Madh Pra)].

In a murder trial on meticulous examination of the evidence of all the witnesses it being found that the assault was pre-planned and there was motive for the assault minor variances in the evidence cannot be given undue weight to doubt the commission of crime [*Sheo Darshan v. S*, A 1971 SC 1794]. Where witnesses claimed that they snatched weapons and held the accused, their evidence could not be rejected because of absence of bloodstains on their clothing or on their hands although deceased was profusely bleeding and the weapons were blood-stained [*Somappa v. S*, A 1979 SC 1831]. A witness in her evidence stated that the accused was pushing a sword at the head of the deceased. In her statement she had only stated that the accused was holding the sword. This omission would not be a material omission amounting to a contradiction [*Nimal Samal v. State of Orissa*, 1989 Cri LJ 420, 423 : (1988) 2 Crimes 344 (Orissa)]. When large number of accused persons are involved, the witness who is also injured in the incident, may get confused and some discrepancies may not affect the truth of his testimony [*Har Pd v. S*, A 1971 SC 1450]. In a melee where several people are giving blows at one and the same time it will be impossible to particularize, the blows. If any witness attempts to do it, his veracity is doubtful [*Budhwa alias Ramcharan v. State of Madhya Pradesh*, 1990 Cri LJ 2597, 2599 (SC)]. Unless the exaggeration and falsehood in the prosecution evidence are on points destructive of the substance of the prosecution story, court's duty is to separate truth from falsehood and come to its own conclusion about the guilt or innocence of the accused [*Dharamdas v. S*, A 1973 SC 2195]. The maxim, says Wigmore, is unsound as a rule of law. (*1*) It is untrue to hum nature. It is not correct that a person who tells a single lie is therefore necessarily lying throughout his testimony, nor that there is any strong probability that he is so lying. The probability is to the contrary. (2) The jury are the part of the tribunal harged with forming a conclusion as to truth of the testimony offered. They are absolutely free to believe or not to believe a given witness [Wig, s. 1010].

In *Parsons v. Huff*, 41 Me 411 (Am), APPLETON, J said: "The truth or falsehood of testimony depends upon the motives, or the balance of motives, acting upon the witness at the time of its utterance. The motives which influence the human mind are as various as the feelings and desires of man..... There is no motive the action of which upon testimony is uniform. The same motive may lead to truth or to falsehood..... The witness may be exposed to the action of a different class of motives as to the several facts to which his testimony may relate. It is obvious therefore that, of the testimony of the same witness, part may be true and reliable and part false and mendacious. A rule of law which requires a jury to infer from one false assertion that all facts uttered by the witness are false statements, is manifestly erroneous."

It is not safe to assume that a case must be false if some of the evidence in support of it appears to be doubtful or is clearly untrue. There is on some occasions a tendency amongst litigants to back up a good case by false or exaggerated evidence [*Bankim v. Matangini*, 24 CWN 626, 628 PC; *In re Addanki*, A 1939 M 266]. When some of a witness's evidence is found to be untrue, it only means that a statement made by him cannot be relied on unless supported by independent evidence [*Bhowanipur Bank Corpn v. Durgesh*, 68 IA 144 : A 1941 PC 95]. Evidence of eye-witness could not be rejected on the sole ground of discrepancy in the timings regarding receipt of message in police station and admission of the deceased in the hospital [*Somappa v. S*, A 1979 SC 1831]. Where improvements in an earlier version are made at the trial the court should sift the evidence with extraordinary caution and accept those portions which appear fully trustworthy either intrinsically or by corroboration from other trustworthy evidence [*Bhimrao v. S*, A 1980 SC 1322]. Where the witness is found to be untruthful on material facts that is an end of the matter. Where the witness is found to be partly truthful or to spring from tainted sources, the court may take the precaution of seeking some corroboration, adequate and reasonable to meet the demands of the situation [*State of Gujarat v. Raghunath Vamanrao Baxi*, A 1985 SC 1092, 1094 : 1985 Cri LJ 1357]. The widow of the deceased admitted that her husband was holding a lathi. It appears that she had suppressed a part of the story, so the court cannot act on her evidence alone to find that the deceased was an innocent person and he was not the aggressor [*Jade Behera v. State*, 1990 Cri LJ 817, 820 (Orissa)]. Rules for appreciation of evidence when the prosecution story is accepted by the court in essential particulars, but there are embellishments of the actual occurrence by false embroideries [*Chhotan v. S*, A 1959 P 362].

Acquittal of some of the accused is not sufficient for rejection of entire prosecution case. The court should make every effort to disengage the truth from falsehood and to sift the grain from the chaff rather than taking the easy course of rejecting the entire prosecution case [*Molu v. S*, A 1976 SC 2499; *Bhagwan v. S*, A 1974 SC 21; *Ahmed Suleman v. S*, A 1971 SC 991]. But where the grain cannot be separated from the chaff because they are so inextricably mixed up that in the process of separation the court will have to reconstruct an absolutely new case for the prosecution entire case must be discarded [*Balak v. S*, A 1975 SC 1962; *Bhagwan v. S*, A 1974 SC 21; *Kanbi v. S*, A 1970 SC 219]. Similarly where the evidence has no grain in it and is nothing but wholly a chaff there is no question of separating grain from chaff. In this case certain persons were prosecuted of communal riots. The Supreme Court observed that it appeared that police picked up any two persons for prosecuting them [*Mohd. Iqbal M. Shaikh v. State of Maharashtra*, 1998 Cri LJ 2537 at 2551 (SC)]. When it appears that the involvement of two out of three accused is false and purposeful, the testimony of the witnesses as a whole gets tainted and

blemished [*Rewaram v. State of Maharashtra*, 1983 Cri LJ 1845, 1851 (Bom) (DB)]. If acquittal of some co-accused casts a cloud of doubt over the entire prosecution case, the whole case may be rejected [*Sadha Singh v. State of Police*, A 1985 SC 1130, 1132 : 1985 Cri LJ 1361].

It does not necessarily follow that because two of the accused have been acquitted, the other two who have been convicted on the same evidence should be similarly acquitted [*Gurucharan v. S*, A 1956 SC 460 : 1956 Cri LJ 827]. Merely because one of the accused is given benefit of doubt and acquitted there is no reason to acquit the others [*Dalbir v. S*, A 1977 SC 472 (*Md Moinuddin v. S*, 1971, 3 SCC 338; *Satkumar v. S*, A 1974 SC 294 **rel on**); *Jai Prakash v. State*, 1981 Cri LJ 1340, 1343 : (1981) 19 DLT 437 (Del); *M Apparao v. State of Orissa*, 1983 Cri LJ 953, 955 (Orissa) (DB) : (1983) 2 Crimes 378; *Sahab Singh v. State of Madhya Pradesh*, (1986) Cri LJ 128, 130 (MP)(DB) : 1985 Cur Cri J (MP) 122; *Ambaram v. State of M.P.*, 1989 Cri LJ 199, 200 (MP)]. Merely because some of the accused were acquitted does not mean that the other accused should also be acquitted, when the evidence of the witnesses does not suffer from any serious infirmity [*Balbir Singh v. State of Punjab*, A 1991 SC 2231, 2233]. When the evidence of the eye-witnesses is supported by medical evidence, the acquittal of one accused does not mean that the other accused also should be acquitted [*Mewa Ram v. State of U.P.*, 1989 Cri LJ (NOC) 78 (DB) (All)]. Clear evidence against two of the accused cannot be discarded merely because the third accused was acquitted [*Balbir Singh v. State of Punjab*, 1991 Cri LJ 3286, 3288 (SC)].

—Discrepancies.—Discrepancies do not necessarily demolish testimony [*Narotam v. S*, A 1978 SC 1542]. Discrepancies in the testimony of various witnesses on material or broad points have to be carefully weighed in arriving at the truth. But trifling discrepancies should be ignored, as they are often a test of truth. Several persons giving their versions of a transaction witnessed by them are naturally liable to disagree on immaterial points. Their powers of observation, expression or memory are not the same and honest differences are easily possible. It must be remembered that there are discrepancies of truth as well as falsehood. It is the broad facts of a case and not the little details that are to be considered in weighing evidence. PALEY said: "I know not, a more rash or unphilosophical conduct of the understanding than to reject the substance of a story by reason of some diversity in the circumstances with which it is related. The usual character of human testimony is substantial truth under circumstantial variety. This is what the daily experience of courts of justice teaches. When accounts of transaction come from the mouths of different witnesses, it is seldom that it is not possible to pick out apparent or real inconsistencies between them. These inconsistencies are studiously displayed by an adverse pleader, but often times with little impression upon the minds of the judges. On the contrary a close and minute agreement induces the suspicion of confederacy and fraud."

It is well settled that an innocuous omission is inconsequential. Omissions amounting to contradictions that militate against the meat or core of the prosecution case are alone material [*State of Maharashtra v. Harishchandra Tukaram Awatade*, 1997 Cri LJ 612 (615) (Bom—DB)]. A witness who in his earlier statement has not stated that he witnessed the occurrence and did not see the accused running and if he tries to make improvement and tries to become an eye-witness of the occurrence then the testimony of such a person cannot be believed and he cannot be said to be an eye-witness to the occurrence. [*Tej Singh v. State of Rajasthan*, 1995 Cri LJ 1944 (Raj)]. Minor discrepancy is immaterial [*Haricharan v. State of Rajasthan*, 1998 Cri LJ 398 (SC)]. Even if the statements of eye-witnesses are not strictly in conformity with the medical evidence as regards the injuries found on the bodies of the deceased, when

there is no great variance between the two, the testimony of the witnesses, otherwise reliable, cannot be discarded merely on ground of such minor discrepancies. [*State of Rajasthan v. Ganesh Das*, 1995 Cri LJ 25, 47 (Raj)]. Improvements and inconsistencies in the evidence of eye-witnesses regarding the part played by each of the accused would not be a ground to disbelieve the witnesses when having regard to number of injuries on them it would have been impossible to give a detailed account of the incident [*Navganbhai Sanabhai v. State of Gujarat*, A 1994 SC 1187, 1189 : 1994 Cri LJ 1103]. Discrepancies do occur even in the statements of perfectly honest witnesses which are really due to difference in individual faculties with regard to observations, recollection and recital of details and unless there is any good ground to indicate that they are due to deliberate attempt to suppress or depart from the truth, it is unfair to discard the direct testimony of witnesses merely on account of such discrepancies, when there is general agreement as to material circumstances, Photographic picturisation is not possible [*State of Rajasthan v. Ganesh Das*, 1995 Cri LJ 25; see also *Shivaji Sahebrao Bobade v. State of Maharashtra*, A 1973 SC 2622, 2634 : 1973 Cri LJ 1783, 1794, 1795 para 18]. Ladies, generally make exaggerations. Witness is not like a tape-recorder [see, *Kishan Narain v. State of Maharashtra*, A 1973 SC 2751 : 1973 Cri LJ 1839]. There is difference between rural and urban witnesses. Rural witnesses generally make exaggerations. In *Shivaji Sahebrao Bobade v. State of Maharashtra*, 1973 Cri LJ 1783 1789, para 8 : A 1973 SC 2622, 2628 the Supreme Court observed: "When scanning the evidence of the various witnesses we have to inform ourselves that variance on the fringes, discrepancies in details, contradictions in narrations and embellishments in unessential parts cannot militate against the veracity of the care of the testimony provided there is the impress of truth and conformity to probability in the substantial fabric of testimony delivered." Minor omissions and contradictions with regard to details of assault should be ignored. [*Arjun v. State of Rajasthan*, A 1994 SC 2507, 2510].

Discrepancy as regards how many days (15 or 7-8 days) before the incident of murder had the deceased complained to the PWS about the evil designs of the accused is not enough to discard the otherwise consistent evidence [*State of M.P. v. Dhirendra Kumar*, A 1997 SC 318]. "Every person who witnesses a murder reacts in his own way. Some are stunned, become speechless and stand roated to the spot. Some become hysteric and start wailing. Some start shouting for help. Others run away to keep themselves as far removed from the spot as possible. Yet others rush to the rescue of the victim, even going to the extent of counter attacking the assailants. There is no set rule of natural reaction. To discard the evidence of witnesses on the ground that he did not react in any particular manner is to appreciate evidence in a wholly unrealistic and unimaginative way." [*Rana Pratap v. State of Haryana*, A 1983 SC 680, 682 : 1983 Cri LJ 1272, 1274]. Evidence of the witnesses who have stood the test of cross-examination and are trustworthy cannot be discarded on ground that another witness has given inconsistent version with it [*State of Rajasthan v. Chathu Ram*, 1998 Cri LJ 1528 (Raj)]. There is tendency amongst witnesses in our country to back up a good case by false or exaggerated version. The witnesses also add embroidery to prosecution version, perhaps for the fear of being disbelieved. But that is no ground to throw the case overboard, if true in the main. If there is a ring of truth, the case should not be rejected. [*Markanda Naik v. State*, 1993 Cri LJ 3328 (Ori); See also *Bankim Chander v. Matagini*, A 1919 PC 157; *Ashok Kumar Barik v. State of Orissa*, 1992 Cri LJ 1849]. Contradictions, embellishments and inconsistencies are natural and bound to creep in with the passage of time. If the witnesses are not tutored they would come out with a natural and spontaneous version on their own. [*Zameer Ahmad v. State*, 1996 Cri LJ 2354, 2357 (Del)]. Where the eye-witness made a statement that he saw the accused giving dao blow on the neck of the

deceased but he did not make this statement before the police it was laid down that such omission amounted to contradiction. [*Dulal Sonowal v. State of Assam*, 1996 Cri LJ 4086, 4088 (Gau)].

The witness stated that while returning to his village, he took rest near the place of occurrence in a cow-shed. But no such statement was made to the police. He also did not speak about the appellant assaulting the injured. It was held that his version that on his return from the village he was resting near the place of occurrence in a cow-shed cannot be accepted [*Melika Nidi v. State of Ori*, 1996 Cri LJ 3304 (Ori)]. A witness who can change his statement as and when it suits him, cannot at all be said to be a reliable witness and such statement has to be discarded outright [*Maharaj Deen v. State*, 1996 Cri LJ 506, 510 (All)]. Where in the FIR and in the statement under section 161 Cr PC the eye-witnesses mentioned that the accused were armed with lathis but in the court they deposed that the lathis had small kanta attached it was held that the prosecution witnesses were tutored to make improved statements so as to bring it in conformity with the post-mortem report. [*Harban Sahai v. State of U.P.*, 1994 Cri LJ 23, 25 (All)]. An omission would not discredit the evidence of a witness [*Ved Prakash v. State of Haryana*, A 1996 SC 2795 : 1996 Cri LJ 4156, 4157]. Embellishment, exaggeration, contradictions and inconsistencies are bound to creep in with the passage of time. If the witnesses are not tutored they would come out with a natural and spontaneous version on their own. Two persons would not be able to reproduce a particular incident in like manner. Each one of them will narrate the same in his own words [*Zamir Ahmad v. State*, 1996 Cri LJ 2354, 2357 (Del)]. There is bound to occur contradiction and inconsistency in the statement of witnesses with the passage of time or for any other reasonable cause, but on account of this, by itself, benefit of doubt cannot be extended to the accused [*Kanwar Singh v. State of Rajasthan*, 1996 Cri LJ 4054, 4056 (Raj)].

The evidence of a witness will have to be assessed by its intrinsic worth. If there are contradictions in the evidence and if by such contradictions the veracity of the evidence is affected, it can be a ground for the court to reject the evidence of such witness. But, merely because the previous complaint of the witness against some other person has been dismissed it cannot be a ground for the court to disbelieve the witness in the subsequent case. Law permits a court to believe a witness even if he has spoken both falsehood and truth in a particular case and if the truth can be separated from falsehood, law permits the court to act on that part of the evidence which is truthful and separable from the falsehood spoken by the witness. [*Vishnu Narayan v. State of Karnataka*, 1996 Cri LJ 1121, 23 (Kar)]. Minor discrepancies are immaterial. They only show that the witnesses are not tutored. [*Chhuttan v. State of U.P.*, 1996 Cri LJ 649, 651 (All)]. Minor inconsistencies as to the time of occurrence in the evidence of village witness is of no consequence [*Balbir Singh v. State of Punjab*, A 1994 SC 969, 971 : 1994 Cri LJ 1206]. Evidence of an eye-witness cannot be discarded on ground of some minor discrepancies [*Nonappa Poojari v. State of Karnataka*, A 1994 SC 1581, 1582 : 1994 Cri LJ 2185]. Where the witnesses have clearly stated that the accused had fired a shot from the pistol from a close range, such deposition gets corroboration from the medical evidence as to the nature of the injuries suffered by the deceased and also from the dying declaration given by the deceased, it was held that their testimony could not be discarded merely because of some contradictions in their depositions [*Bhagirath v. State of Haryana*, A 1997 SC 234 : 1997 Cri LJ 81 (90)].

In weighing evidence, it must be remembered that there are discrepancies of truth as well as discrepancies of falsehood, and that a too minute attention to immaterial discrepancies may lead to serious failure of justice [*R v. Harnama*, 11 Cri LJ 66 : 10

PR (Cr) 1909; see *Anam v. S*, A 1954, Or 33; *Sampat v. S*, A 1974 SC 791]. Slight discrepancies are not uncommon in the testimony of most truthful wintnesses. They are indications of truth rather than falsehood. [*Ram Sagar v. State*, 1994 Cri LJ 589, 594]. Unless there is any good ground to think that the discrepancies are due to a deliberate attempt to depart from truth, it is unfair to discard their entire evidence [*Sikhar Behera v. The State*, 1982 Cri LJ 1167, 1172 (Orissa)]. The evidence of injured eye-witnesses cannot be discarded merely on account of slight discrepancies. [*Jagat Singh v. The State*, 1984 Cri LJ 1551, 1556 (Delhi) (DB)]. Some differences and discrepancies in detail are generally found in the case of honest witnesses and unless they are material they need not necessarily be disbelieved [*Ramvilas v. State of M.P.*, 1985 Cri LJ 1773, 1780 : (1984) MPLJ 492 (MP) (DB)].

Minor discrepancies are possible even in the version of truthful witnesses and such minor discrepancies only add to the truthfulness of their evidence [*Sidhan v. State of Kerala*, (1986) Cri LJ 470, 473 (Ker)]. But discrepancies in the statements of wit-nesses on material points should not be lightly passed over, as they seriously affect the value of their testimony [*Brij Lal v. Kunwar*, 36 A 187 : 18 CWN 649 : A 1914 PC 38]. The main thing to be seen is whether the inconsistencies go to the root of the matter or pertain to insignificant aspects thereof. In the former case, the defence may be justified in seeking advantage of the incongruities obtaining in the evidence. In the latter, however no such benefit may be available to it [*Krishna Pillai Sree Kumar v. State of Kerala*, A 1981 SC 1237, 1239 : 1981 Cri LJ 734]. Discrepencies which do not go to the root of the matter and shake the basic version of the witnesses, cannot be annexed with undue importance. More so, when all the important 'probabilities-factor' echoes in favour of the version narrated by the witnesses [*Bharwada Bhoginbhai Hiribhai v. State of Gujarat*, A 1983 SC 753, 756 : 1983 Cri LJ 1096 ; *Lallan v. State of U.P.*, 1990 Cri LJ 463, 469 : 1989 All LJ 45 (All); *Ibrahimkutty v. State of Kerala*, 1984 Cri LJ 221, 223 : 1983 Ker LJ 655 (Kerala) (DB); *State of Orissa v. Dullip Kumar Chand*, 1987 Cri LJ 1242, 1252 : (1987) 1 Orissa LR 555; *Kondagiri Laitara v. State*, 1985 Cri LJ 1611, 1612 : (1985) 1 Crimes 538 (Orissa) (DB)]. An approver was deposing about events which took place over a period of three years. Some inconsistencies in her version were found to be of minor nature. She gave better details before the sessions court and improved her testimony. Her trustworthiness could not be questioned for that reason alone. *Ranadhir Basu v. State of WB*, AIR 2000 SC 908.

The murder took place in broad day light. The eye-witnesses were subjected to gruelling cross-examination and the defence has not been able to spin out any infirmity or discrepancy which may render him unworthy of reliance. His version has to be accepted [*State v. Akhtar Khan*, 1991 Cri LJ 1779, 1781 (All)]. Regard is to be had to the deposition on material facts. Minor discrepancies are bound to occur in human testimony and mathematical precision cannot be expected [*Mohanlal v. Ram*, A 1979 NOC 48(D) : ILR 2 D 48]. The contradictions in the evidence of the wit-nesses which are of minor nature which generally appear in the statements of witnesses have to be ignored [*Bharat v. State of Rajasthan*, 1981 Cri LJ 1474, 1475 : (1980) Raj LW 112 (Raj); *Hanif Banomiya Shkalkar v. State of Maharashtra*, 1981 Cri LJ 1622, 1636 : 1981 Cri LT (Mah) 73 (Bom); *Kumar Majhi v. State*, 1981 Cri LJ 1787, 1789: 1981 Cut LT 546 (Orissa); *Naban Epo v. State of Arunachal Pradesh*, 1981 Cri LJ NOC 199 (Gujarat); *Podiyami Badodi v. State of M.P.*, 1985 Cri LJ NOC 26 : (1984) 1 Crimes 363 (MP) (DB); *Yog Raj v. State*, 1990 Cri LJ (NOC) 80 (Delhi); *Babrati Ahmedati Sayad v. State of Gujarat*, 1991 Cri LJ 1269, 1274 (Guj); *Bijoy Kumar Mohapatra v. The State*, 1982 Cri LJ 2162, 2172 (Orissa)]. Witnesses making small omission while making statements under s 162 Cr PC cannot be regarded as self-contained liars [*Matadin v. S*, A 1979 SC 1234].

The court while appreciating the evidence must not attach undue importance to minor discrepancies. The discrepancies which do not shake the basic version of the

prosecution case may be discarded. The discrepancies which are due to normal errors of perception or observation should not be given importance. The errors due to lapse of memory may be given due allowance [*Appabhai v. State of Gujarat*, A 1988 SC 696, 700 : 1988 Cri LJ 848]. Every witness on the scene of occurrence cannot give an identical account of what happened and variations are found to exist after lapse of long period [*Ramu Santa v. The State*, 1982 Cri LJ 1160, 1162 : (1982) 53 Cut LT 470; *Baikunthanath Mohantey v. State of Orissa*, 1985 Cri LJ 563, 566 : (1985) 2 Crimes 6 (Orissa); *Rangilal v. State of U.P.*, 1991 Cri LJ 916, 920 (All)]. Minor discrepancies in the evidence of eye-witnesses can be ignored when the credibility of their version is not shaken [*Rajesh v. State*, 1984 Cri LJ NOC 38 : (1984) 1 Crimes 247 (Delhi) (DB)]. When there is no serious discrepancy between the evidence of witnesses and F.I.R. regarding the time, place and manner of occurrence and name of the assailant, it can be accepted though there may be discrepancies in respect of minor details [*Rajesh Thakur v. State*, 1988 Cri LJ 1477, 1481 (Cal)(DB); *State of M.P. v. Sunderlal*, 1985 Cri LJ NOC 4 : (1984) 1 Crimes 910 (MP) (DB)]. The two doctors who examined the injured gave evidence which contained minor discrepancy in the description of injuries. Their evidence cannot be rejected on that account [*Kanak Sarma v. State of Assam*, 1981 Cri LJ (NOC) 5 (Gau)]. There is no inconsistency in the evidence of the three eye-witnesses so as to create doubt or infirmity in their testimony. When such evidence is corroborated by the medical evidence also, it can be accepted [*Chandra Pal Singh v. State*, 1990 Cri LJ 826, 829 : 1989 All LJ 376 (All)]. The statement of a prosecutrix of a tender age would be dubbed as parrot-like in the absence of minor discrepancies which are bound to occur in a genuine, straight forward and truthful accounts of an incident. [*Jito v. State of Himachal Pradesh*, 1990 Cri LJ 1434, 1438 (Him Pra)]. If the Sessions Judge had attached undue importance to minor discrepancies and had made a suspicious approach to the evidence of the witnesses by resorting to conjectures, the High Court will be justified in characterising such assessment of the evidence as unreasonable and in appreciating the evidence on its own [*Aher Pitha Vajshi v. State of Gujarat*, A 1983 SC 599, 602 : 1983 Cri LJ 1049]. It would not be right to reject the testimony of illiterate and ignorant witnesses merely on the ground of minor contradictions [*Boya v. S*, A 1976 SC 1541]. Minor discrepancies in the evidence of rural witnesses not affecting the truth of the prosecution case is not fatal [*Mokbul Ali v. The State of Assam*, 1984 Cri LJ NOC 45 (Gauhati)]. Minor contradictions in the evidence of a lady and a girl from a village will not be material [*Suresh Chaudhary v. State of Bihar*, 1988 Cri LJ NOC 10 : 1988 BLJ 49 : (1988) 1 Crimes 756 (Pat)].

Evidence of an illiterate witness cannot be scrutinised on mathematical calculation, although the entire evidence has to be considered to find whether reliable, satisfactory and trustworthy [*Ram Sakhi v. Daroga*, A 1981 P 204]. Where the evidence is conflicting and it is impossible to reconcile the conflicting statements on any theory of defective memory or failing power of observation of the several witnesses who contradict each other, the only safe guide to follow is that afforded by the action and conduct of the principal parties concerned and the contents of the documents produced [*Kishori v. Chuni*, 36 IA 9 : 31 A 116 : 13 CWN 370]. "Where there has been a conflict of evidence the court of appeal will have special regard to the fact that the judge saw the witnesses" per VISCOUNT SANKEY in *Powell and wife v. S M Nursing House*, 1935 AC 243; **folld in** *Chinnaya v. U Kha*, 14 R 111. The evidence which does not inspire confidence cannot be accepted; [*Jana Munda v. State*, 1981 Cri LJ 1763, 1765 : 52 Cut LT 507 (Orissa)]. The eye-witness who has given two different versions cannot be believed especially when he is not corroborated by the other eye-witness [*Dhaneswar Phukan v. State of Assam*, 1984 Cri LJ NOC 161 (Gauh) (DB)]. When the two eye-witnesses give different versions regarding the sequence of events, a doubt arises regarding their evidence [*Maneswar*

Mallik v. State of Orissa, 1989 Cri LJ NOC 101 (Orissa) (DB)]. Discrepancy regarding the time of occurrence is material [*Ramaswamy v. State of Tamil Nadu*, 1983 Cri LJ NOC 45 (Mad)(DB) : 1982 Mad LW (Cri) 63]. The mere fact that the eye-witness escaped unhurt or that there are discrepancies in the evidence of the witnesses regarding the fact whether they had accompanied the deceased on the day of occurrence or a day earlier is not a ground to disbelieve their evidence [*State of Punjab v. Wassan Singh*, A 1981 SC 697, 702 : 1981 Cri LJ 410]. There is overwhelming evidence against the 1st accused. But there are some variations in the narration of sequences of events in the testimony of two witnesses. Since these variations mainly relate to the direction in which the assailants were moving at different stages, it will affect the core of the prosecution case [*Martin v. State*, 1991 Cri LJ 2391, 2394 (Ker)]. The mere fact that the witnesses did not admit or had expressed ignorance about certain collateral facts is hardly a ground to reject their ocular account when there was general agreement among them with regard to the substratum of the prosecution case [*State of U.P. v. Shanker*, A 1981 SC 897, 905 : 1981 Cri LJ 23].

The contradictions and omissions shake the trust-worthiness of the witnesses. The weapon of the offence was not shown to the doctor who conducted the post-mortem and his opinion whether the injuries could have been caused by this weapon was not obtained [*State v. Babir Chand*, 1991 Cri LJ 881, 886 (Delhi)].

—Demeanour.—The demeanour and bearing of a witness should be very closely observed. Unless the witness is a skilled actor, his demeanour frequently furnishes a clue to the weight of his testimony. It is because the trial judge had the advantage of seeing the witnesses that it has been repeatedly held that his decision on a question of fact shoud not be lightly disturbed. "The most careful note must often fail to convey the evidence fully, in some of its most important elements; to those for which the open oral examination of the witness in presence of prisoner, judge and jury, is so justly prized. It cannot give the look or manner of the witness; his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration; it cannot give the manner of the prisoner, when that has been important, upon the statement of anything of particular moment. It is, in short, or it may be, the dead body of the evidence, without its spirit, which is supplied when given openly and orally, by the ear and eye of those who receive it" [*per* SIR JOHN COLERIDGE in *R. v. Bertrand*, (1867) LR 1 PC 520, 533].

When the questions of credibility depends on the demeanour in the box, the manner in which the witness answers and by how he seems to be affected by the question put and so on, the trial judge has an advantage. But when the views upon credibility are founded upon argumentative inferences from facts not disputed, the court of appeal is really in as good a situation as the trial judge [*Palchar v. P*, 27 CWN 414 : A 1922 PC 315]. The absence of a separate note regarding demeanour of a witness is immaterial, specially when judgment is written before the recollection of the judge has become dim [See remarks of LORD ATKINS during argument in *Sitalakshmi v. Venkata*, 34 CWN 593 : A 1930 PC 170]. When judges arrive at a conclusion after seeing demeanour it will be difficult to reject their appreciation, except upon grounds which prove that their view was wrong [*Nana v. Gopal*, A 1940 PC 93 : 72 CLJ 263 : 1940 Kar 235]. An impression as to the demeanour of a witness ought not to be adopted by a trial judge without testing it against the whole of his evidence and it is open to the appellate court to find that the view of the trial judge as to demeanour was ill-founded [*Yuill v. Yuill*, 1945, 1 All ER 183 CA].

—Civil Appeal.—In appeals the burden of showing that the judgment appealed from is wrong, lies upon the appellant. If all he can show is nicely balanced calculations which lead to the equal possibility of the judgment on the one side or the other being right, he has not succeeded [*per* LORD BUCKMASTER, in *Nabakishore v. Upendra*, 35 CLJ 116, 120 : 26 CWN 322 : A 1922 PC 39; *Fakrunissa v. Izarus*, 25 CWN 866, 875 : A 1921 PC 55; *Chandra Kishore v. Sissendi Estate*, A 1949 PC 207, 225 : 76 IA 17; see observations of VISCOUNT SANKEY, LC in *Powell and wife v. S M Nursing Home*, 1935 AC 243 and of VISCOUNT SIMON in *Watt v. Thomas*, 1947 AC 484, 486 quoted in *Sara Veeraswami v. Talluri*, 75 IA 252: A 1949 PC 32: 1948 ALJ 479]. In an appeal on questions of fact, it is not sufficient to show that a different conclusion might have been drawn from the document [*Midnapur Z Co v. Umacharan*, A 1923 PC 187: 29 CWN 131]. Where there is a conflict of testimony, the appellate court should in order to reverse decision not merely entertain doubts whether it is right but be convinced that it is wrong [*Ress v. Young*, 66 IC 745: A 1921 C 543: 25 CWN 519].

There are cases in which in face of the irrefragable testimony of contemporary written communications or of a course of business, an appellate tribunal may bring its knowledge of life and business to bear and say confidently and rightly that evidence given about them at the trial cannot be true, be the trial judge's impression of the witness what it may [*Br South Africa Co v. Lennon*, 34 IC 273: A 1915 PC 50].

—Criminal Appeal.—The sound rule to apply in criminal appeal is to consider whether the conviction is right and in this respect it differs from a civil appeal. In the latter case the court must be convinced before reversing a finding of fact that the finding is wrong [*Pratap Ch v. R*, 11 CLR 25]. The duty of the court is not similar to that in a civil appeal. The standpoint is not whether the decision is wrong, but whether the conviction is right. In the case of any doubt the order should be set aside [*Milan v. Sagai*, 23 C 347; *Kanchan v. R*, 18 CWN 1215: 42 C 374; *Md Husain v. R*, 1945 Nag 441: A 1945 N 116; see *R v. Madhub*, 21 WR Cr 13, 19; *Ibrahim v. R*, 47 CWN 332; *Nga Kyaw v. R*, 39 Cri LJ 248].

—Medical evidence *vis-a-vis* eye-witness.—If the evidence of the witnesses for the prosecution is totally inconsistent with the medical evidence or the evidence of the ballistic expert, unless reasonably explained, it is sufficient to discard the entire case [*Ramnarain v. S*, A 1975 SC 1727 (*Mohinder v. S*, A 1953 SC 415 **folld**)]. While both of the eye-witnesses categorically stated that the accused assaulted the deceased with spades, the doctor who held the autopsy stated that the injuries could be caused only by a kassi—a pickaxe. In view of this glaring inconsistency between the ocular and medical evidence, it will be extremely unsafe and hazardous to convict the accused [*Mohar Singh v. State of Punjab*, A 1981 SC 1578, 1579 : 1981 Cri LJ 998 (SC)]. The eye-witnesses stated that the deceased was attacked with daggers, the medical evidence and report of the Forensic Science Laboratory were conflicting. So the accused is entitled to benefit of doubt [*Man Singh v. State*, 1984 Cri LJ NOC 39,: (1983) 23 Delhi LT 478 (Delhi) (DB)]. The mere fact that in a murder case the evidence of eye-witnesses is inconsistent with the medical evidence will not by itself render the former unreliable [*Bajwa v. S*, A 1973 SC 1204; *Punjab Singh v. State of Haryana and Karnail Singh v. State of Haryana*, A 1984 SC 1233, 1234 : 1984 Cri LJ 921; *State of Maharashtra v. Withal Pandurang Bhagat*, 1985 Cri LJ 664, 671 (Bom)(DB); *Ummen Chacko v. State of Kerala*, 1989 Cri LJ NOC 76 (DB)(Ker); *Dharamvir v. State*, 1990 Cri LJ 839, 845 : 1989 All LJ 454 (All); *Kulamani Sandha v. State*, 1991 Cri LJ 599, 600 (Ker); *Nandakishore Rath v. Nanda alias Ananta Cheran Sahera*, 1991 Cri LJ 835, 839 (Orissa)]. When there is overwhelming

evidence of eye-witnesses, the medical evidence which is contrary to that of eye-witnesses, can be discarded [*Naran Pradhan v. State of Orissa*, 1983 Cri LJ NOC 31 (Orissa)(DB) : (1982) 54 Cut LT 527; *Chamara Pradhani v. State*, 1983 Cri LJ 1706, 1710 (Orissa) (DB); *Amar Singh v. State of Punjab*, A 1987 SC 826, 829 : 1987 Cri LJ 706; *Ramjee Pandey v. State of Bihar*, 1989 Cri LJ NOC 186 (Pat)(DB); *Ved Parkash v. State*, 1990 Cri LJ (NOC) 148 (Delhi); *Ramesh Kumar v. The State*, 1990 Cri LJ 255, 262 (Delhi); *Suresh Chandra v. State of U.P.*, 1990 Cri LJ 2479, 2482 (All); *Ram Raj Singh v. State of U.P.*, 1991 Cri LJ 2462, 2464 (All)]. The evidence of a single eye-witness can be accepted when there is corroboration from the medical evidence and the evidence of another witness who arrived at the spot immediately after the occurrence [*Thangavel v. State*, 1981 Cri LJ NOC 210 (Mad)]. When the medical evidence corroborates the ocular evidence it can be accepted. [*Gurnam Singh v. State of Haryana*, 1981 Cri LJ (NOC) 83 (P&H) : 1981 Chand Cri C 143]. When the accused, his deceased wife and children alone were in the house and there was no outside intervention, and the medical evidence showed that the wife died of throttling, the husband can be guilt for the murder of his wife [*State of Kerala v. Perappurah Keezhuveettil Avaran*, 1983 Cri LJ NOC 176 (Ker)(DB) : 1983 Ker LT 571]. When the evidence of an eye-witness is corroborated by medical evidence, the witness should not be disbelieved or his evidence be looked with the suspicion only because he happens to be related to the deceased [*Chanel Mia v. State of Assam*, 1990 Cri LJ 2387, 2389 (Gauhati)].

When there is a conflict between the evidence of the eye-witnesses and the medical evidence it is necessary to call some more expert evidence to clarify it [*Soundarapande v. State*, 1982 Mad LW (Cri) 92 : 1983 Cri LJ 1199 : 1208 (Mad) (DB)]. In his report the doctor has used the word 'accident'. It appeared that the doctor wrote the word 'accident' as synonymous for mishap *i.e.*, the unfortunate happening [*Mangal Singh v. State of Rajasthan*, 1985 Cri LJ 602, 612 : 1984 Rajasthan LR 953 (Raj) (DB)]. Even where a doctor has deposed in Court, his evidence has got to be appreciated like the evidence of any other witness [*Mayur Panashai Shah v. State of Gujarat*, A 1983 SC 66, 67 : 1982 Cri LJ 1972]. The mere fact that the Doctor who conducted the autopsy did not note or find any imprints of a rope on the wrists of the dead body, is hardly a ground for rejecting the evidence of the brother of the deceased that the hands of the deceased had been tied at his back when he was forcibly taken by the accused into a field and shot dead since the deceased being a rustic, hardskinned villagers, the rope was not likely to leave any distinct imprints on the wrists [*Maharaj Singh v. State of Rajasthan*, A 1981 SC 936, 938 : 1981 Cri LJ 477]. Unless the medical evidence goes so far that it completely rules out all possibilities whatsover of injuries taking place in the manner alleged by the eye-witnesses, the testimony of eye-witnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence [*Solanki Chimanbhai Ukabhai v. State of Gujarat*, A 1983 SC 484, 487 : 1983 Cri LJ 822].

The use which the defence can make of the medical evidence is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eye-witnesses. Unless the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries having taken place in the manner alleged by the eye-witnesses the testimony of the eye-witnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence [*State v. Aru Pradhan*, 1985 Cri LJ 161, 166 : (1984) 2 Crimes 198]. The manner in which the medical evidence and the ballistic expert evidence fit in with the earliest version given by the eye-witness in the First Information Report justify placing implicit reliance on the evidence of the eye-witness [*Gurnam Kaur v.*

Bakshish Singh, A 1981 SC 631, 635 : 1981 Cri LJ 34]. The exculpatory part of the confessional statement that the deceased caught hold of his neck and throat on account of which he had stabbed her, which is against the evidence of the eye-witnesses and the medical evidence has got to be rejected. [*State of Orissa v. Bhuben Chirgun*, 1981 Cri LJ 1461, 1466 : (1981) 52 Cut LT 276 (Orissa)]. When it is stated that the accused produced the weapon of offence, it is the duty of the prosecution to get it chemically examined to establish that there was trace of 'human blood' [*Ram Lal Lohar v. State of Assam*, 1981 Cri LJ 1734, 1736 (Gauhati)]. The statement of the injured to the Doctor who first examined him being the first statement in point of time must be preferred to any subsequent statement made to another [*Mohanlal Gangaram Gehori v. State of Maharashtra*, A 1982 SC 839, 842 : 1982 Cri LJ 630(2)]. The panchanama and the evidence of witnesses mention about the smell of kerosene in the floor and hut where the incident of burning took place. So negative report of the chemical analyser will not affect the above evidence [*State of Maharashtra v. Gopichand Uttamchand Keswani*, 1985 Cri LJ 784, 791: 1985 Cri LR (Mah) 79 (Bom) (DB)]. The evidence of the Doctor and his certificate regarding the blood group of the accused which is contrary to that shown in the case paper cannot be relied on [*Kanu Mohan Marathe v. State of Gujarat*, 1985 Cri LJ NOC 23: 1985 Guj LH 69 (Guj) (DB)]. The out patient register would be the best piece of evidence in support of the fact that the defendant was being treated at the Primary Health Centre for his illness [*Nityananda Majhi v. Sipra Das*, A 1986 Orissa 102, 103 :(1985) 2 Orissa LR 272]. When the dead body had decomposed, the bones had fallen out and were separate, it was incumbent upon the doctor to have referred the matter to anatomy expert [*Bhanwar Singh v. State*, 1988 Cri LJ 1054, 1056: (1987) 2 Raj LR 233 (Raj) (DB)].

When the Doctor who treated the victim stated that the victim was in a serious condition and had told him that her mother-in-law burnt her, there is no question of finding out from the Doctor whether the victim was in a position to give her statement or not especially when it is not suggested to him that he was enimically disposed towards the accused [*Smt. Lichhamadevi v. State of Rajasthan*, A 1988 SC 1785, 1787 : 1988 Cri LJ 1812]. When the injured improves his statement regarding the seat of injuries to make his version consistent with medical opinion, it is not safe to rely on his testimony [*Mahendra Singh v. State of Rajasthan*, A 1989 SC 982, 985 : 1989 Cri LJ 886 (1977 WLN (VC) 392 (Raj) **Reversed**)]. The doctor did not find any smell of kerosene on the person of the deceased. There were burn injuries only at the neck. So the evidence that the Kerosene was poured on the deceased 'from head to toe' cannot be accepted [*Smt. Madhu Bala v. State (Delhi Admn.)*, 1990 Cri LJ 790, 795 (Delhi)]. The medical officer stated that if shorts are fired from a distance of over 4 feet, the two injuries could have been caused, they did not say if two injuries could be caused by a single shot. The ballistic expert vacillated and stated that the possibility of the 2 injuries being caused by two shots is not ruled out. So where the expert evidence is obscure and oscillating, it is not proper to discredit the direct testimony of the eye-witnesses [*Anvaruddin v. Shakour*, 1990 Cri LJ 1259, 1273 (SC)].

The opinion of the Doctor about the age of the kidnapped person based on superficial examination and observation and not on any scientific data cannot take the place of the legal proof [*Nirmal Mangal v. State of Orissa*, 1990 Cri LJ NOC 110 (Orissa)]. When the witnesses also sustained gun-shot injuries in the course of the very same transaction at the very time and place of occurrence, their presence at the scene of occurrence is beyond question [*Gurnek Singh v. State of Punjab*, A 1988 SC 2249, 2251: 1989 Cri LJ 299]. In a case where hemp plants were detected in 17 cases

in the same village on the same day, discrepancy in the evidence about the time and non-examination of villagers will not affect the prosecution case [*State v. Palka Majhi*, 1990 Cri LJ (NOC) 89 (Orissa)]. When there is discrepancy regarding the nature of weapon or injuries between ocular witnesses and medical evidence it can be stated that the ocular witnesses could be said to have mistaken to notice whether the assault was by the sharp side or blunt side [*Motilal v. State of Madhya Pradesh*, 1990 Cri LJ NOC 125 (MP)].

It would be erroneous to accord undue primacy to hypothetical answers of medical witnesses to excluds the eye-witnesses account, which has to be tested independently and not treated as 'variable' keeping medical evidence as 'constant'. Where eye-witnesses account is found credible and trustworthy medical opinion pointing to alternative possibilities is not accepted as conclusive. Witnesses are the eyes and ears of justice. Eye-witnesses account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence including medical evidence as the sole touchstone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the version presented consistency with the account of other witnesses held to be creditworthy; consistency with the undisputed facts, the 'eredit' of the witnesses; their performance in the witness-box; their power of observation and many such factors. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation, conclusion of learned trial judge that medical evidence scores over 'eye-witnesses' account is not legally sound. [*Sankar Rana v. Lohor Rana*, 1995 Cri LJ 3570 (Ori)].

—Opinion of Trial Court.—In a matter of appreciation of evidence and the credibility of witnesses, the opinion of the trial judge should not be lightly disturbed in appeal [*Bombay Cotton Mfg Co. v. Motilal*, 42 IA 110: 39 B 386: 19 CWN 617; *Bhagwan v. Ujagar*, 47 CLJ 189; see also *Ram Parkash v. Anand*, A 1916 PC 256: 43 IA 73, 79: 43 C 707; *Atychides v. Secy of S*, 27 CWN 557: 46 B 857: A 1922 PC 371; *Banubai v. Manilal*, A 1923 PC 62: 45 MLJ 242: 84 IC 696; *Wijetilaka v. Ranasinghe*, A 1931 PC 265; *Jnanendra v. Birendra*, A 1939 C 595; *Marikar v. Arulappa*, 182 IC 416 PC; *Apcar v. Standard Coal Co.*, A 1943 PC 159: 48 CWN 1; see observations of VISCOUNT SANKEY, LC in *Powell and wife v. S M Nursing Home*, 1935 AC 243 and *Watt v. Thomas*, 1947, 1 All ER 582]. It requires circumstances of exceptional character to justify a reversal [*Ma Than v. Ma Pwa*, 29 CWN 610: A 1923 PC 156: 1 R 451]. In *Sitalakshi v. Venkata*, 34 CWN 593, 597 the Judicial Committee again drew the attention of the appellate courts to the principle laid down in *Khoo Sit v. Lim Thean*, 1912 AC 323, 325 that a trial judge sees, hears and questions witnesses and a finding of fact arrived at by him on oral testimony should not be disturbed except in rare cases where some error susceptible of being dealt with wholly by argument is disclosed, such as omission to take account of circumstances or probabilities material to an estimate of the evidence or giving credence to testimony which turns out on more careful analysis to be substantially inconsistent with itself or with indisputable fact. See also *Sarju v. Jwaleshwari*, A 1951 SC 120: 1950 SCR 781; *Radha Prasad v. Gajadhar*, A 1960 SC 115: 1960, 1 SCR 663; *Narbada v. Chhaganlal*, A 1969 SC 395. As to the exceptions to the rules, see *Robin v. National Trust Ld*, 101 IC 903: A 1927 PC 66. The gist of the many decisions has been summarised by VISCOUNT SIMON in a case where he said: "..... This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration" [*Watt v. Thomas*, 1947 AC 484, 486; **folld** in *Sara Veeraswami v. Talluri*, A 1949 PC 32: 1949 Mad 487: 75 IA 252].

An appellate court should not differ lightly from the finding of the trial judge on a question of fact, but a distinction in this respect must be drawn between the perception of facts and the evaluation of facts. Where there is no question of credibility of witnesses, but the sole question is the proper inference to be drawn from specific facts, an appellate court is in as good a position to evaluate the evidence as the trial judge, and should form its own independent opinion, though it will give weight to the opinion of the trial judge [*Benmax v. Austin Motor Co Ltd*, 1955, 1 All ER 326, HL; see *Radha Prasad v. Gajadhar, sup*; *Narbala v. Chhaganlal, sup*].

"When a judge hears and sees witnesses and makes a conclusion or inferences with regard to what is the weight on balance of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the judge makes any observation with regard to credibility or not" [*per* LORD SHAW, in *Clarke v. Edinburgh Tramways Co*, 1916 SC (HL) 35, 36; quoted with approval by VISCOUNT SANKEY, LC, in *Powell and wife v. S M Nursing Home*, 1935 AC 243]. Where the trial court makes no comment on the demeanour of the witness or on his truthfulness apart from comments on probabilities, the appellate court is in as good a position to judge of the matter as the trial court [*Govind v. Bala Kunwar*, A 1934 PC 12: 59 CLJ 93: 147 IC 326]. Where a trial judge had not omitted anything in coming to a conclusion, it does not detract from the advantage it had over the appellate court in seeing the witness, because he had not expressed his reliance on the demeanour of the witness [*Netherlandsche H M v. Chettiar Firm*, A 1929 PC 202: 118 IC 257].

In a case where the Judicial Committee preferred view of the Subordinate Judge to that of the High Court in the matter of the credibility of witnesses, it was observed that it is open to an appellate court to differ from the court which heard the evidence where it is manifest that the evidence accepted by such court of first instance is contradictory or is so improbable as to be unbelievable or is for other sufficient reasons unworthy of acceptance. But such grounds must exist, if a conclusion as to credibility, opposed to that of the judge who had the great advantage of seeing and hearing the witnesses, is to be justified [*Bodhraj v. Sitaram*, 40 CWN 257: 160 IC 45: A 1936 PC 60]. Where the trial judge has approached the evidence from a wrong standpoint and has applied wrong standards of probability, it is not merely a question of credibility of witnesses and the appeal court is not obliged to accept the estimate of the trial judge [*Hem Ch v. Krishna*, 47 C 1079: 25 CWN 803].

When the findings as regards facts have been drawn from "argumentative inferences" from the testimony oral or documentary produced by a witness, and depend upon "the weight of evidence" and "the inherent improbability of the story" and not on the credibility induced by his "whole demeanour in the witness-box", or "the manner in which he answers questions"—the trial court is in no better position than the court of appeal in discovering the truth [*Virappa v. Periakaruppan*, 49 CWN 211: A 1945 PC 35]. When evidence is taken on commission, the first appellate court is in at least as good a position to appreciate its credibility as the trial judge and the Privy Council would naturally attach greater weight to the former's estimate [*Md Sadiq v. Fakr Jahan*, 59 IA 1 : 36 CWN 137 : A 1932 PC 13].

—Failure to explain injuries on accused.—Non-explanation of injuries suffered by the defence side probabilises the defence version that the prosecution side attacked first [*Chandoo v. State of U.P.*, 1996 Cri LJ 2496, 2502 (All)]. The fact that the explanation given by the accused about his injuries are not satisfactory and the statements of the prosecution witnesses fully explain the injuries of the accused proves that the accused had committed the crimes for which he was charged [*Gorey*

Lal v. State of U.P., 1994 Cri LJ 1337, 1342 (All)]. Where injuries were sustained by both sides, and the accused had not only explained the injuries sustained on the side of the prosecution but the injuries sustained on their own side also, both the prosecution and the defence were suppressing their own aggression in the incident on were only coming out with the partial truth. In such a situation, the gainer is not the prosecution, for prosecution has to swim on its own strength and not on frailities of the defence [*Sarjerao Saradeo Gaikwad v. State of Maharashtra*, 1997 Cri LJ 3839 (Bom); See also *Jamuna Choudhary v. State of Bihar*, A 1974 SC 1822 : 1974 Cri LJ 890]. In the absence of evidence to show that the accused suffered injuries in the same transaction, the prosecution is not bound to explain injuries sustained by the accused [*V. Viswambharan v. State of Kerala*, 1994 Cri LJ 1522, 1526 (Ker); See also *Ram Sunder Yadav v. State of Bihar*, (1998) 4 SCALE 641 (SC)]. Non-explanation of serious head injury sustained by the accused assumes great importance in certain cases. In each and every case where prosecution fails to explain injury found on some of the accused, prosecution case does not get automatically rejected without any further probe. Failure of prosecution to offer any explanation in that regard shows that evidence of prosecution witnesses relating to incident is not or at any rate not wholly true. Some times injuries probabilise plea taken by accused person [*Sankar Rana v. Lohor Rana*, 1995 Cri LJ 3570, 3572 (Ori)]. In *Machindra Babu Salve v. State of Maharashtra*, 1997 Cri LJ 486, 490 (Bom), where the defence version of the incident is also reinforced by the fact that the number of injuries sustained on the side of the defence is substantially larger than those on the side of the prosecution, a Division Bench of the Bombay High Court observed as follows:

"It is true that there is no inflexible rule of law that the party which sustained smaller number of injuries is the aggressor and that which suffers a larger number of injuries is the victim of aggression. However, more than often, it is found, and the present case is one of those cases, that the number of injuries is a very significant circumstances for determining as to who is the aggressor. The rationale on which this principle is founded is that a party which goes to launch the assault would go well prepared and well armed in defence and, therefore naturally would inflict more injuries than which it receives from the other side in its self defence. In the instant case we are implicitly satisfied that the circumstance that on the side of defence a larger number of injuries have been sustained as compared to the prosecution side shows that it was the prosecution side which was the aggressor."

Where the eye-witness stated that when his brother was being attacked he went inside the house and brought a sua and inflicted the injury on the accussed the explanation was held sufficient [*Shangara v. State of Punjab*, 1994 Cri LJ 1098, 1099 (SC)]. Where the prosecution fails to explain injuries on the accused, two results follow (*i*) the evidence of the prosecution witness is untrue, and (*ii*) the injuries probabilise the plea taken by the accused. But where the evidence is clear, cogent and creditworthy and where the court can distinguish the truth from falsehood the mere fact that the injuries are not explained by the prosecution cannot by itself a sole basis to reject such evidence, and consequently the whole case [*Nirakar Behera v. State*, 1996 Cri LJ 3913, 3914 (Ori)]. Simply because prosecution did not explain injuries on the person of accused court could not disregard the entire prosecution evidence [*Bankeylal v. S*, A 1971 SC 2233 (*Mohar v. S*, A 1968 SC 1281; *Ugar v. S*, A 1965 SC 277 **dist**); *Bhagwan v. S*, A 1974 SC 21]. The obligation to prove injuries on an accused can be placed on the prosecution when they were serious and severe and must have been caused at the time of the occurrence [*Jagdish v. S*, A 1979 SC 1010; *Chudamani Barik v. State*, 1981 Cri LJ NOC 117 : (1881) Cut LT 186; *Abdul Hye v. State of Assam*, 1983 Cri LJ NOC 93 (Gauhati); *Deo Narayan Rai v. State of Bihar*, 1988 Cri LJ NOC 9 : 1988 BBCJ (HC) 86 (Pat); *Chintamani Singh v. State of Orissa*,

1989 Cri LJ NOC 47 (Ori) (DB). The prosecution need not explain the injuries on the accused if they were not caused during the occurrence; *State v. Bipra Samul*, 1982 Cri LJ NOC 214 : (1982) 54 Cut LT 321 (Ori)]. If there is a riot, assault and counter, assault and the injuries on the accused are quite preceptible and might not go unnoticed, a duty is cast on the prosecution to, explain the same [*Sargug Pd. Singh v. State of Bihar*, 1984 Cri LJ 1086, 1088 : 1984 BLJ 147 (Pat)]. When there was mutual assault between the prosecution witnesses and the accused, both received injuries. This fact was not disclosed by the prosecution. So the prosecution case cannot be accepted [*State of Orissa v. Sarat Chandra Puri*, 1990 Cri LJ 814, 816 (Ori)].

If the prosecution witnessess shy away from the reality and do not explain the injuries caused to the accused in the course of the same incident it casts a doubt on the genesis of the prosecution case [*State of Rajasthan v. Madho*, A 1991 SC 1065, 1067]. The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance when the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution [*State of Assam v. Sofiuddinsheikh*, 1981 Cri LJ (NOC) 4 (Gau)]. Non-explanation of injuries on the accused can be regarded as voluntary suppressing of facts [*The State of Assam v. Felanu Malokar*, 1982 Cri LJ 551, 554 (Gau)]. Failure to explain the injuries on the accused makes the prosecution version doubtful [*Dambarudhar Mahanta v. State*, 1984 Cri LJ NOC 67 : 1983 Cur LR (Cri) 321 (Ori)]. By suppression of the injuries on the accused an impression is given that the true story has not been unfolded and a concocted story has been substituted by the prosecution [*Balgopal Panda v. State*, 1990 Cri LJ 1848, 1856 (Ori)]. In the absence of any proof that when the accused were apprehended and reached the police station, they had injuries which could corroborate their alleged apprehension by the prosecution witnesses, the prosecution case that these accused were chased and apprehended immediately after the occurrence after chasing them for a mile appears highly doubtful [*Man Raj v. State of U.P.*, 1990 Cri LJ 782, 787 (All)].

—Concurrent Findings of Fact of Two Courts.—Where courts concurrently come to a conclusion with a mind fully open to the suspicious circumstance, the Judicial Committee find nothing to bring it within the rare class of exceptional cases [*Bal Monghibai v. Pragji*, 30 CWN 462: A 1925 PC 198: see also *Ganesh v. Manik*, 30 CWN 464; *Bhujendra v. Sukdeb*, 31 CWN 152 PC: 99 IC 427: A 1926 J 194; *Thakur v. Allahabad Bank Ld*, 31 CWN 154; *Fatma Binti v. Admn Genl.*, A 1949 PC 254: 1949, 2 MLJ 484]. The power of the Supreme Court under art 134 are wide but in criminal appeals the court does not interfere with the concurrent findings of fact save in exceptional circumstances [*Balak Ram v. S*, A 1974 SC 2165; *Janak v. S*, A 1972 SC 1853; *Charan Singh v. S*, A 1967 SC 520]. Where the prosecution story is fiction-like and inherently impossible of belief the Supreme Court will set aside the conviction [*Kaur v. S*, A 1974 SC 329]. To constitute concurrent findings, it is sufficient that the majority of the court of appeal should concur in the view of the facts taken by the original court [*Sayed Habibur v. Syed Altaf*, 48 IA 114: A 1922 PC 159: 26 CWN 81]. The rule as to concurrent findings is nonetheless applicable when the decision of a court is not unanimous [*Robin v. National Trust Ld, infra*; *Bibhabati v. Ramendra, infra*; *Yachuk v. Oliver B Co*, A 1949 PC 250: 54 CWN 469].

Concurrent findings of fact will not be disturbed unless it is shown that there has been a miscarriage of justice or the violation of some procedure or principle [*Satgur v. Harnarain*, 59 IA 147: 36 CWN 461: A 1932 PC 89; *Jehangir v. Savarkar*, 63 MLJ 408: 138 IC 774 : A 1932 PC 231; *Rochiram v. Faizulla*, 37 CWN 580: A 1933

PC 120; *Nathu v. Collr of Budaon*, A 1938 PC 183: 174 IC 867; *Satish v. Dharanidhar*, 67 IA 32: 44 CWN 177: A 1940 PC 24; see also *Allen v. Q Ware House Co*, 1887, 12 AC 101, 104; *Umrao v. Irshad*, 21 IA 163, 166: 21 C 997; *Rani Srimati v. Khagendra*, 31 IA 127, 131: 31 C 871], or that they have been arrived at by reason of any error or method or mistake or through neglect of any aspect of the evidence [*Biradhmal v. Prabhabati*, A 1939 PC 152: 1939 Kar 258: 43 CWN 842], or important aspects of the case escaped notice or failed to receive due emphasis [*Darshanlal v. Delhi Admn*, A 1974 SC 218], or that the forms of legal process were disregarded or principles of natural justice were violated or substantial and grave injustice resulted [*Balakram v. S*, A 1974 SC 2165], or that it cannot be supported by the evidence or it is perverse [*Nankhu v. S*, A 1973 SC 491], or that the rule of prudence that the evidence of an unreliable witness should not be accepted without corroboration has been departed from [*Hanumant v. S*, A 1952 SC 343: 1952 SCR 1091]. As to what is meant by "miscarriage of justice", see judgment of LORD DUNEDIN in *Robins v. National Trust Co*, 1927 AC 515, 517. They will not be disturbed on the ground that inadmissible evidence was received, when the findings cannot on any reasonable view be regarded as based or dependent upon such evidence [*Keolapati v. Amar*, A 1939 PC 249: 44 CWN 66].

The rule as to concurrent findings of fact is not so rigid that it might not be departed from if such a state of things existed as facts appearing from some undisputed document which are completely destructive of the findings of fact by the courts below [*Peiris v. Pillai*, A 1941 PC 55: 195 IC 658]. In *Datar v. S*, the Supreme Court set aside concurrent finding of fact in view of the unreliability of the two eye-witnesses. As to the nature of the special circumstances which will justify a departure from the practice of not interfering with the concurrent findings of two courts, see *Bibhabati v. Ramendra*, 51 CWN 98: A 1947 PC 19 where LORD THANKERTON has laid down eight propositions. Concurrent findings of judges intimately acquainted with Hindu mode of life are preferable to expert medical opinion [*Rajkumar v. Ramsundar*, A 1932 PC 69: 55 CLJ 120: 136 IC 102]. Federal Court deciding appeal under enlarged jurisdiction would adhere to the Privy Council practice as to concurrent findings of fact [*Gangadara v. Subramania*, A 1949 FC 88: 1949, 1 MLJ 568].

Concurrent findings of fact cannot be interfered with however much incidentally there might have been questions of law involved [*Jagadishwar v. Gouri Shankar*, 63 CLJ 410 PC].

—Probabilities.—The probabilities of a case are a material test in judging of the credibility of a witness [*Bunwari v. Hetnarain*, 4 WR 128 PC: see *Musadi Md v. Meerza Ally*, 6 MIA 27 and *post*, s 59. As to probability, see *ante* s 3: "*Probability*"]. By what we have done ourselves, or have seen or known others do, we may judge of the probability of the same or the like deed being accomplished by some other person [RAM on Facts p 128]. Where some of the oral evidence was untrustworthy whilst the documents record a state of affairs which was often hard to reconcile with probabilities—*held* that unless the facts evidenced by documentary and oral testimony were so much at variance with known conditions as to be incapable of reasonable explanation, it was to those facts and those facts alone that the court must trust to reach a safe conclusion upon the matter in controversy [*Irshed Ali v. Kariman*, 22 CWN 530: A 1917 PC 169: 46 IC 217]. It has to be tested by the yardstick of probability along with the other materials in record [*Nemai v. S*, A 1965 C 89]. Presumption against misconduct is among the probabilities to be taken into account in estimating the value of evidence and where the character and position of the person is above reproach, this probability becomes stronger. The mere fact that

this or that thing in a complete transaction is improbable, does not count for much as against clear and distinct evidence of reliable witness [*Gopeswar v. Bissessur*, 39 C 245: 16 CWN 265]. In order to prevail against positive evidence (adduced in support of a will), the improbability must be clear and cogent and must approach very nearly to, if it did not altogether constitute an impossibility [*Sarojini v. Haridas*, 26 CWN 113: *Surendra v. Ranee*, 24 CWN 860]. The accused were known dacoits. It is not possible to believe that some of the accused who were armed, after firing two shots from their arms they would submit while the other accused who were not armed could have escaped [*Jagdish Raj v. State*, 1988 Cri LJ 785, 787 (Delhi)]. Merely because for some reason, the accused was seen running or walking briskly, it does it follow that he was the culprit although a strong suspicion may arise against him. [*Vindo Samuel v. Delhi Administration*, 1991 Cri LJ 3359, 3360 (SC)].

The court cannot decide a case on a small admission here and there when evidence is given after a lapse of over 8 years. Some allowance must be made to forgetfulness and lapse of memory and the case must be judged on broad probabilities [*Md Yusuf v. D*, A 1968 B 112].

Prosecution under special laws (TADA).—The Supreme Court observed as to this aspect of appreciation of evidence in *Mohd. Iqbal M. Shaikh v. State of Maharashtra,* 1998 Cri LJ 2537 at 2551 (SC) as follows :

> "Law does not make any distinction in the matter of appreciation of evidence in a case under TADA or under normal criminal law. This question has been answered by this Court in a case in somewhat similar circumstances in *Dilawar Hussain v. State of Gujarat*, (1990) 4 JT (SC) 282 : (A 1991 SC 56), wherein it has been observed (Para 4) : "Misgiving, also, prevailed about appreciation of evidence. Without adverting to submissions suffice it to mention that credibility of witnesses has to be measured with same yardstick, whether, it is an ordinary crime or a crime emanating due to communal frenzy. Law does not make any distinction either in leading of evidence or in its assessment. Rule is one and only one, namely, if depositions are honest and true. Whether the witnesses, who claim to have seen the incident in this case, withstand this test is the issue."

—Relationship.—The mere fact that some of the witnesses for the defence are fellow-castemen of the accused [*Rameshwar v. R*, 53 IC 156] or have respect or loyalty to some religious institution [*Dinkar v. S*, A 1970 B 438] is no ground for discrediting their evidence. The mere fact that witnesses are relatives or employees and interested in the suit is not ground to disbelieve them if the point can only be established by their testimony [*Ghanashyam v. Hardei*, 2 OLJ 562: 32 IC 380; *People's C Bank v. Shyam*, A 1940 P 629: *Har Sahai v. R*, A 1949 A 582: *Gulichand v. S*, A 1974 SC 276; *S v. Hari*, A 1974 SC 1108, *Sarwan v. S*, A 1976 SC 2304; *Molu v. S*, A 1976 SC 2499; *S v. Ramji*, A 1977 SC 1085; *Natthu v. S*, A 1977 SC 2096; *Vishvas v. S*, A 1978 SC 414; *Ramadhar v. S*, A 1979 SC 702; *Panchan Yadav v. State*, 1994 Cri LJ 848, 851; *Ram Sagar v. State*, 1994 Cri LJ 589, 594 (All)] unless a motive is proved to spare the real assailant and falsely involve another person [*S v. Samman*, A 1972 SC 677]. Unless there is something inherently defective that is to say to the contrary to the prosecution, it cannot be said that the alleged eye-witness was not present and simply on the score that the deceased was related to the eye-witness the testimony does not deserve to be discarded because the testimony of the said eye-witness was convincing and of sterling worth [*Aidan v. State of Rajasthan,* 1993 Cri LJ 2413 (Raj)]. The mere circumstances that the relations between the accused and his superior were

strained is not sufficient to establish that he is falsely implicated [*Gangaram v. S*, A 1973 SC 852]. It only puts the court on guard to scrutinise their evidence with more than ordinary care. The word 'related' is not equivalent to interested. A witness can be called interested only when he or she derives some benefit from the litigation, in the decree in a civil case or in seeing the accused punished. [*Govind v. State of M.P.*, 1996 Cri LJ 305, 307 (MP)]. Rejection of evidence of an eye-witness only on ground that he was related to the accused is improper [*Talluri Venkaiah Naidu v. Public Prosecutor, H.C.*, A 1997 SC 353 : 1996 Cri LJ 4432, 4434; *Ramesh v. State*, 1996 Cri LJ 2185, 2187 (Bom); *State of U.P. v. Vinod Kumar (Dead) and Udai Bhan Sing*, 1992 (1) Crimes 1198 (Del); *Muniappan v. State*, 1994 Cri LJ 1309 (Mad)]. In a murder case, it is an error to reject the evidence of witnesses on the ground that they are related to the deceased. Close relatives of the deceased would normally be themselves reluctant to spare the real assailant and falsely mention the name of other persons. The fact that the two eye-witnesses were close relatives of the deceased is all the more no ground for believing their statements. [*Lal Diwan v. State of U.P.*, 1995 Cri LJ 3899, 3903 (All)], [*Ravulappali v. S*, A 1975 SC 216; *Ramabhupala v. S*, A 1971 SC 460]. Ordinarily a close relative would be the last person to screen the real culprit and falsely implicate an innocent person. However, each case must be judged on its own facts [*Dalip v. S*, A 1953 SC 364: 1954 SCR 145; *Barati v. S*, A 1974 SC 839; *S v. Bhola*, A 1969 Raj 219; *Gopal v. S*, A 1979 SC 1722]. Witness's relationship with the deceased as brother would add to value of his evidence because he would be interested in getting the real culprit, rather than innocent persons, punished [*Angnoo v. S*, A 1971 SC 296]. The fact that the witnesses are close relatives of the deceased is not sufficient to discard their evidence straightway unless it is proved that it suffers from serious infirmities. [*Dharampal Singh v. State of Rajasthan*, 1998 Cri LJ 3372, 3388 (Raj)]. The evidence of the promissory relatives of the deceased were accepted by courts. Wife [*State of U.P. v. Suresh alias Chhavan*, A 1982 SC 1076, 1079 : 1982 Cri LJ 850; *State of Orissa v. Abdul Wahid*, 1990 Cri LJ (NOC) 136 (Orissa); (Son) *Kishore Naik v. State*, 1983 Cri LJ NOC 239 (Orissa); *Lodai v. State*, 1991 Cri LJ 1878, 1881 (All); (Daughter) *State of Kerala v. Padmanabhan Nair*, 1990 Cri LJ (NOC) 33 (Ker); husband, son and daughter *Birsa Kumar v. State of Bihar*, 1989 Cri LJ NOC 171 (Pat) (DB); brother and brother's wife *Sheappa v. State*, A 1991 Cri LJ 2215, 2219 (Kant); (Cousin) *Smt Lajwanti v. Haryana State*, A 1985 P & H 71, 72; uncle and aunt *Sheo Prasad v. State of U.P.*, 1985 Cri LJ NOC 17 : (1984) 2 Crimes 594 (All) (DB); maternal uncle *Nara Raghava Rao v. Nadiabasi Biswas*, A 1986 Orissa 255, 259]. While such witnesses never fail to denounce the real culprit, when some of them are inimically disposed towards the accused, they cannot be absolutely immune from the tendency of roping in some innocent persons along with the guilty [*Ravulappalli v. S*, A 1975 SC 216].

When a witness holds a position of relationship favouring the party producing him or of possible prejudice against the contesting party, it is incumbent on the court to exercise appropriate caution when appraising his evidence and to examine its probative value with reference to the entire mosaic of facts appearing from the record. It is not open to the court to reject the evidence without anything more on the mere ground of relationship or favour or possible prejudice [*Madhusudan Das v. Narayani Bai*, A 1983 SC 114, 119]. Even where there is only a sole eye-witness of a crime, a conviction may be recorded against the accused provided the Court which hears such witness regards him as honest and truthful. But prudence requires that some corroboration should be sought from the prosecution evidence in support of the testimony of a solitary witness particularly where such witness also happens to be closely related to the deceased and the accused are those against whom some motive or ill-mind is suggested [*Ramji Surjya v. State of Maharashtra*, A 1983 SC 810, 815: 1983 Cri LJ 1105].

More often than not it has been observed that offences are committed in the presence of the persons who are close relations of a victim. Had there been any such rule that the testimony of such witness should be flung to the winds simply because he or she is related to the victim and thus an interested witness, in that eventuality it will become a hard nut to crack to convict an accused person. Thus the worth of testimony of a witness is to be weighed and assessed like the evidence of any other witness with the difference that Courts while assessing the value of the statement of such a witness would be on their tiptoe and guard and would examine and scrutinise his statement more carefully. However, if the Court comes to the conclusion that the statement of the witness is natural, spontaneous and credit worthy, in that eventuality, there is no obstruction and hurdle in the way of the Court to base the conviction thereon [*Jaipal Singh v. State*, 1996 Cri LJ 4097, 4101 (Del)]. In this connection reference may be made to the observations of the Supreme Court in *Kartik Malhar v. State of Bihar*, (1995) 8 JT (SC) 425 : 1995 A SCW 4540: "We may also observe that the ground that the witness being a close relative and consequently, being a partisan witness, should not be relied upon, has no substance. This theory was repelled by this Court as early as in *Dalip Singh's case,* 1953 Cri LJ 1465 : A 1953 SC 364 in which this Court expressed its surprise over the impression which prevailed in the minds of the members of the bar that relatives were not independent witnesses. Speaking through VIVIAN BOSE, J., the Court observed (Para 25 of A 1953 SC):

"We are unable to agree with the learned Judges of the High Court that the testimony of the two eye-witnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rules. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in *Ramashwar v. State of Rajasthan*, (1952) SCR 377 : A 1952 SC 54 : (1952 Cri LJ 547). We find however, that it unfortunately still persists, if not in the judgment of the Courts, at any rate in the arguments of counsel."

A related witness would not shield the real culprit because of his affinity with the deceased and therefore, evidence of a related witness is much more reliable than the evidence of an interested witness or inimical witness. It may be that these witnesses do not narrate the incident in the same language or manner which in the opinion of this Court, is natural and do not affect the credibility of the witness. Indeed, such variations are natural and do not cast any doubt about the correctness of their version. Indeed, absence of these variations would lead this Court that they are tutored witnesses. A parrot like reproduction is not expected from an independent witness [*Rokad Singh v. State of M.P.*, 1994 Cri LJ 494, 499 (MP)].

Quite a good number of crimes are committed at the residence of victims and at odd hours when none but the relations can be expected to be present. Thus if their statements are to be discarded it would be impossible to prove guilt of the accused [*Mahinder Kumar v. State*, 1996 Cri LJ 2945, 2948 (Del)]. Evidence of related witnesses should not be thrown away only on that account. They are as much reliable witnesses as other can be, but their evidence is to be scrutinised with care and caution. Where these witnesses were subjected to lengthy cross-examination but nothing had come out to discredit the same and they were corroborative on each and every material point, there was no reason to disbelieve them only because they were related to each other [*Jai Narain v. State of U.P.*, 1995 Cri LJ 2333 (All)]. The law, only requires that in case the eye-witnesses are relations, the court should scrutinise, their evidence with more care and caution [*Bapu Lal v. State*, 1995 Cri LJ 3772, 3778

(Del)]. In case there is hostility between the families of the deceased and the accused the evidence of the son of the deceased cannot be accepted on its face value [*Gurdial Singh v. State of Punjab*, A 1994 SC 1072, 1074 : 1994 Cri LJ 1231]. Every related witness necessarily cannot be an interested witness [*Ramlal v. State*, 1994 Cri LJ 736, 741 (J&K)]. Evidence of relative eye-witnesses cannot be discarded if it passes the acid test of truthfulness of their depositions [*Pancham Yadav v. State of U.P.*, 1994 Cri LJ 848, 851 (All)]. Where a person is murdered in his own house in the night his wife would be most natural witness. Her testimony cannot be discarded simply because she happens to be the wife of the deceased. Her evidence has only to be scrutinised with greater care [*Anil Kumar v. State*, 1996 Cri LJ 2491 at p. 2493 (Del)].

The fact that the witnesses were known to the younger brother of the deceased would not be a ground to discard their evidence [*Girish Yadav v. State of M.P.*, A 1996 SC 3098 : 1996 Cri LJ 2159, 2167]. It is not the Law of this country that the evidence of a person, who is related to deceased, should be rejected [*Malla Govindarajulu v. State of A.P.*, 1995 Cri LJ 3255, 3258 (AP)]. The evidence of the witness who are close relatives of the victim has to be carefully scrutinised before the same can be acted upon. While considering the evidence of both these witnesses, it has to be seen whether they were actually present of the scene of the occurrence when the incident took place or they are merely the chance witnesses and are diposing against the accused [*Ram Narain Singh v. State of Rajasthan*, 1995 Cri LJ 2847, 2850 (Raj)]. The mere fact that the PWs were related to the deceased and they were employed in the shop of the deceased is not sufficient to reject their evidence as their presence at the scene place is most natural and probable and they are competent witnesses to speak about the occurrence [*Basheer v. State*, 1993 Cri LJ 2173, 2178 (Mad)]. When the eye-witnesses gave consistent version which found place in the earliest report given within a very short time, and there was indication whatsoever about false implication by the eye-witnesses who were close relatives of the deceased conviction could be based on the evidence of the eye-witnesses [*Kathi Ramku Aligbhai v. State of Gujarat*, A 1993 SC 2472, 2474]. When the PWs had stated about the incident in graphic details and in spite of elaborate cross-examination, no noticeable infirmity, therein was noticed, merely because they were related to the deceased, that cannot be a ground for disbelieving their statement. Relation or a friend normally would not false implicate a person thereby shielding the actual culprit [*Narasingh Challan v. State*, 1997 Cri LJ 2204, 2205 (Ori)]. Otherwise reliable evidence of the deceased's brother cannot be rejected merely because he had lodged the FIR on the next morning of the incident of murder when the incident had occurred near a bus stand and it was quite unlikely that the widow and the brother of the deceased would have come to know of the incident only next morning [*Saheb Singh v. State of Rajasthan*, A 1997 SC 945, 946 : 1997 Cri LJ 1188]. Where the witness who was daughter of the deceased, was initially not daring to make any statement about the murder during investigation as she was living with her licentious mother and accused, but when she was cited as a witness, she wanted to make clean breast of the relevant facts and stated truth and her evidence got corroborated from the depositions of other witnesses and also from extra-judicial confession, there was no reason to discard her evidence [*Pathan Fatima v. State of M.P.*, A 1995 SC 1958, 1959 : 1995 Cri LJ 3613].

Merely because the eye-witnesses are related and interested witnesses, their evidence cannot be thrown away or discarded. Court has to scrutinize their evidence scrupulously before accepting the same [*Jeet Singh v. State of Delhi*, 1995 Cri LJ 1537, 1540 (Del)]. If due to fear the deceased's wife did not try to save her husband

whom the accused persons were beating, it cannot be said that she was not present at the scene place. While examining the truthfulness of such witness, court should not be influenced by the fact that the wife had not expressed any emotion even though her husband was killed in her presence. Such an approach would not be plausible for the reason that every person has his own way of expressing emotions and no universal practice can be adopted while examining the worth of the witness [*Aidon v. State of Rajasthan*, 1993 Cri LJ 2413, 2418 (Raj)]. Mere fact of relationship far from being foundation for falsehood is often a sure guarantee of truth. Each case must be judged on its own merits. The close relatives of a victim are likely to be most reluctant to spare the real assailant and falsely involve another person in place of the assailant. Relationship is not sufficient to suspect credibility, specially when presence on the spot is corroborated by other witnesses. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted like any other evidence, a relative's evidence is to be tested in the crucible of credibility and cogency. Desirability of the testimony being subjected to close and severe scrutiny arises when it is shown that there was likelihood of an attempt to falsely implicate an accused [*Bibhisan Barik v. State*, 1995 Cri LJ 390 (Ori)].

Mere relationship with the deceased is no ground to discard his testimony, if it is otherwise found to be reliable and trustworthy. In the normal course of events, a close relation would be the last person to spare the real assailant of his uncle and implicate a false person. However, the possibility that he may also implicate some innocent person alongwith the real assailant cannot be ruled out and therefor, as a matter of pruduce. Court looks for some independent corroboration of his testimony, to decide about the involvement of the appellant in the crime [*Anil Phukan v. State of Assam*, A 1993 SC 1462 : 1993 Cri LJ 1796]. The evidence of a PW who is related to the victim cannot be brushed aside merely on the ground of relationship in absence of any material showing that he had any enmity with the accused as generally relation of the victim is always interested in bringing to book the real culprit [*Kailash v. State of U.P.*, A 1997 SC 2835, 2838 : 1997 Cri LJ 3511]. The members of the family of the deceased, if present at the time of the occurrence, are most natural witnesses. There is not reason to doubt their testimony only on the ground that they were closely related to the deceased [*Jarnail Singh v. State of Haryana*, 1993 Cri LJ 1656, 1659 (SC)]. Where the statement of the deceased's son shows that it was a statement given by a truthful witness in a straightforward manner and despite lengthy cross-examination, nothing had been brought out which may in any way cast a doubt about his reliability and his evidence received ample corroboration from recovery of the deed body on the disclosure statement of the accused and from the statements of other witnesses, his evidence cannot be discarded [*Sewa Kaur v. State of Punjab*, A 1997 SC 1843 : 1997 Cri LJ 1833, 1834, 1835]. Testimony of the wife of the deceased cannot be discarded on ground of her relationship with the deceased. Close relative who is a natural witness cannot be regarded as an interested witness [*Kartik Malhar v. State of Bihar*, 1996 Cri LJ 889, 893 (SC)]. Evidence of related witness should be scrutinised with great care and caution [*Joginder Singh v. State of Punjab*, 1996 Cri LJ 2737, 2740 (P&H)].

Evidence of related witnesses cannot be rejected on ground of their relationship with the deceased. As a matter of fact the brother of the deceased would he the last person to implicate somebody falsely [*Sher Singh v. State of Haryana*, A 1994 SCC (Cr) 783 : 1994 Cri LJ 1980, 1981]. Evidence of real brother of the deceased has to be assessed with caution [*D.D. Suvarna v. State of Maharashtra*, 1994 Cri LJ 3602, 3612 (Bom)]. In faction ridden villages only partisan evidence is available and the mechanical rejection of such evidence would result in failure of justice. The court accepted the evidence of three eye-witnesses who were sister-in-law, wife and

daughter of the deceased. The witnesses though interested were natural witnesses and their testimony could not be discarded *Janardhan Ragho Mhatre v. State of Maharashtra*, 1996 Cri LJ 4180 at p. 4184 (Bom)]. The wife of the deceased will not falsely implicate a third person to let off the real offenders [*Rayipalli Paramesu v. State of A.P.*, 1994 Cri LJ 931, 936 (AP)].

Relationship of prosecution witnesses to the murdered man is no ground for rejecting their evidence [*S v. Hari*, A 1974 SC 1108; *Balakram v. S*, A 1974 SC 2165; *Madhuban Bharai v. State*, 1983 Cri LJ 1711, 1714 (Orissa): (1983) 56 Cut LT 185; *Chalku v. State*, 1983 Cri LJ 1717, 1719 (Orissa) : (1983) 56 Cut LT 205; *Balvantappa v. State of Karnataka*, 1983 Cri LJ NOC 29 (Kant) (DB); *Kothi Subbaramaiah v. State of A.P.*, 1984 Cri LJ NOC 186: 1984 APLJ (HC) 343 (AP) (DB); *Shiv Kumar v. State*, 1985 Cri LJ NOC 76: (1984) 2 Crimes 960 (All) (DB); *Sudhir Mahanta v. State of Orissa*, 1988 Cri LJ 1918, 1920: (1988) 2 Crimes 342 (Orissa); *Babu v. State of Kerala*, 1988 Cri LJ NOC 56 (Ker); *Ashok Kanaujiua v. State*, 1989 Cri LJ (NOC) 79 (DB) (All); *Brathi alias Sukhdev Singh v. State of Punjab*, 1991 Cri LJ 402, 405 (SC)]. If the testimony is otherwise reliable in the sense that they could be expected to be near about the place of occurrence and could have seen what happened [*Gurcharan v. S*, A 1956 SC 460: 1956 Cri LJ 827; *Bhupendra v. S*, A 1968 SC 1438; *S v. Bhola sup*; *Omprakash v. S*, A 1974 SC 1983; *S v. Hakim*, A 1980 SC 184; *Dular v. State*, 1981 Cri LJ (NOC) 88 : 1981 All Cri R 317; *State of U.P. v. Ramdas*, 1991 Cri LJ 1179, 1181 (All)].

The evidence of an eye-witness who is related to the deceased cannot be rejected when his presence at the scene of occurrence is admitted by other eye-witnesses [*Bishambher Singh v. The State*, 1984 Cri LJ NOC 96 (All) (DB)]. The occurrence took place at 9 p.m. in a deserted place. The presence of a close relative at that spot is only natural and we cannot expect any corroboration for his evidence [*Umakanta Mahanta v. State*, 1991 Cri LJ 2024, 2028 (Orissa)]. Related and interested witnesses would be the last persons to screen the real culprits and falsely substitute innocent ones in their places [*Girija Prasad v. State of M.P.*, 1992 Cri LJ 754, 758 (MP)]. Straightforward and trustworthy evidence of relations of the deceased needs no corroboration for substaining conviction. Such evidence cannot be discarded on the sole ground of interestedness in the prosecution case [*Sahadwan Rajan v. State of Kerala*, 1992 Cri LJ 2049, 2051 (Ker)]. Out of 5 eye-witnesses of a murder committed at midnight there being sufficient light from lantern 3 were close relatives of the deceased. Remaining two resiled as to the identity of assailant. Evidence of 3 close relatives held acceptable [*Narayan v. S*, A 1971 SC 1656]. Merely because the prosecution has failed to prove any independent witness to the murder or incident which took place in the bazar which normally would be thickly populated area would be no ground to throw out or doubt the version of injured witnesses or the evidence of relatives of the deceased who on the evidence as it stands were accompanying the deceased and whose presence cannot be doubted for any other reason [*State of Gujarat v. Bharwad Jakshibhai Nagribhai*, 1990 Cri LJ 2531, 2539]. The *corroboration* necessary in the case of evidence by a relation is not the same as that of accomplices but only such as would be sufficient to satisfy the court that the particular persons were concerned in the offence [*Lachhman v. S*, A 1952 SC 167; *Karanail v. S*, A 1954 SC 264]. Where there is no previous enmity between the deceased or his relatives and the accused the evidence of the relatives needs no corroboration [*Varghese v. S*, A 1977 SC 701].

When a man is *prima facie* respectable and reliable, his testimony should not be rejected merely because he is relation to a party [*Tan San v. U Kya*, A 1933 R 162]. Unless the evidence is shaken in cross-examination or the demeanour of the

witnesses is such as to lead to the inevitable conclusion that they have perjured themselves, no court is entitled to discard evidence on speculative grounds, *e.g.* that witnesses are tenants of a party to the suit [*Beas v. Khedu*, A 1930 P 58].

—Faction Cases.—In cases arising out of acute factions, persons unconnected with either faction do not care or dare to come forward as witnesses for fear of increasing the wrath of the other party. Court should guard against the danger of convicting innocent persons on perjured testimony [*In re Poreddi*, A 1961 AP 23]. Where because of two factions bitterly opposed to each other in a village only partisan witnesses would be natural and probable, their evidence has to be examined with utmost care and caution [*Muthu v. S*, A 1978 SC 1647; *Kaveeri Venkateswarlu v. State of A.P.*, 1991 Cri LJ NOC 133 (Andh Pra); *State of U.P. v. Ballabh Das*, A 1985 SC 1384, 1385]; and assessed on its own merits instead of rejecting them [*Badri v. S*, A 1975 SC 1985 (*Raghubir v. S*, A 1971 SC 2156 **rel on**); *Bhagirathi v. Damodar*, 1987 Cri LJ 631, 634: (1986) 61 Cut LT 307 (Orissa); *State of U.P. v. Ram Swarup*, A 1988 SC 1028, 1030; *Ratikanta Rout v. State*, 1990 Cri LJ 291, 294 (Orissa); *Mahendra Mandal v. State of Bihar*, 1991 Cri LJ 1030, 1037 (Pat)]. In cases of group rivalries and enmities there is general tendency to rope in as many persons as possible and hence the court should scrutinise evidence carefully and where doubt arises benefit should be given to accused [*Baldeo v. S*, A 1972 SC 464]. Where some persons are injured in a commotion involving large number of persons and the evidence is of a partisan character, it is often safer to be guided by the compass of probabilities along the rock-ribbed contours of the case converging on the heart of the matter [*Bava v. S*, A 1974 SC 902].

—Party as Witness.—There is no inflexible rule that if a party, plaintiff or defendant, gives his testimony, he must be disbelieved, because he is a party to the suit. When a plaintiff has deposed in support of his case, his testimony must be scrutinised in the same manner as that of any other witness [*Jogendra v. Kurpal*, 35 CLJ 176]. It is wrong to assume that defence witnesses always lie and that prosecution witnesses are always trustworthy [*Kaur v. S*, A 1974 SC 329].

—Independent witness.—Acquaintance with the police by itself would not destroy a man's independent outlook. In a society where police involvement is a regular phenomenon many people would get acquainted with the police. But as long as they are not dependent on the police for their living or liberty or for any other matter, it cannot be said that those are not independent persons. If the police in order to carry out official duties, have sought the help of any other person he would not forfeit his independent character by giving help to police action. Every citizen must be presumed to be an independent person until it is proved that he was a dependent of police or other officials for any purpose whatsoever [*Hazari Lal v. State*, (1980) 2 SCR 1053 **followed** in *State of U.P. v. Zakaullah*, Cr Appeal No. 724 of 1994 decided on 19-12-1997 (SC)]. Acquaintance with the police by itself would not destroy a man's independent outlook [*State of U.P. v. Zakaullah*, A 1998 SC 1474, 1476]. Strong grounds must exist to disbelieve the testimony of an independent witness [*Abdul Razak v. Nanhey*, A 1984 SC 452 : 1984 Cri LJ 185; *State of U.P. v. Hari Ram*, A 1983 SC 1081; *Prahlad v. State*, A 1981 SC 1241]. It cannot be said that evidence of an independent witness should automatically be believed. The evidence of an independent witness has also to pass test of being trustworthy and in consonance with attending circumstances [*Chunni v. State*, 1996 Cri LJ 489 at p. 493 (All)]. A witness is normally to be considered independent unless he springs from sources which are likely to be tainted and that usually means, unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would not do so, thereby sparing the real offender free. Thus relationship is a sure guarantee of truth [*Mahabir v. State*, 1996 Cri LJ 158, 159

(Ori)]. Non-examination of independent witnesses, though their statements were recorded by the police, would not detract veracity of eye-witnesses whose presence on the spot was natural and probable [*Ram Sanjiwan Singh v. State*, A 1996 SC 3265 : 1996 Cri LJ 2528, 2534]. Acquaintance of the independent witness with the police would not by itself discredit his evidence [*State of U.P. v. Zakaullah*, 1998 Cri LJ 863 (SC)]. Conduct of the eye-witnesses in not intervening in the occurrence due to fear cannot be said to be unnatural [*Purkha Ram v. State of Rajasthan*, 1998 Cri LJ 918 (Raj)].

—**Interested Party as Witness.**—Interested witnesses are not necessarily false witnesses though the fact that those witnesses have personal interest or stake in the matter must put the court on its guard, the evidence of such witnesses must be subjected to close scrutiny and the court must assess the testimony of each important witness and indicate the reasons for accepting or rejecting it and no evidence should be at once disregarded simply because it came from interested parties [*Chandra Mohan Tiwari v. State of M.P.*, A 1992 SC 891, 901]. There is no legal presumption that interested witness should not be believed [*Balasingham v. P.P.*, 1959 Malayan LJ 193 (Kuala Lumpur HC)]. The proposition that when eye-witnesses to the occurrence were interested persons, there should be corroboration to their evidence by independent evidence cannot be of universal application. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. There can be no sweeping generalisation and foundation must be laid for such an innocent person is being unnecessarily dragged to face trial [*Kedar Behara v. State*, 1993 Cri LJ 378, 381 (Ori)]. A close relative who is a very natural witness cannot be regarded as an interested witness. The term "interested" postulates that the witness must have some direct interest in having the accused somehow or other convicted for some animus or some other reason [*Dalbir v. S*, A 1977 SC 472 (*Dalip v. S*, A 1953 SC 364: 1954 SCR 145; *Masalti v. S*, A 1965 SC 202; *Gulichand v. S*, A 1974 SC 276; *S. v. Jagir*, A 1973 SC 2407 **rel** on)]. Evidence of interested witness must be subjected to greater scrutiny [*Bolineedi Venkatramaiah v. State of A.P.*, A 1994 SC 76 : 1994 Cri LJ 61; *Ram Lakhan v. State of U.P.*, A 1996 SC 3429 : 1996 Cri LJ 3496; *Jayalal Sahu v. State of Orissa*, 1994 Cri LJ 2254 (Ori)]. Merely because of interestedness their evidence cannot be rejected outrightly [*Brijpal Singh v. State of U.P.*, A 1994 SC 1624 : 1994 Cri LJ 2082]. A witness is normally considered to be an independent witness unless he springs from the sources which are likely to be tainted such as enmity and relationship and which make him inclined to implicate the accused falsely [*Rajaram v. State of M.P.*, A 1994 SC 846, 847]. Whether evidence of interested witness is worthy of credence is to be judged in the special facts of the case [*State of W.B. v. Orilal Jaiswal*, A 1994 SC 1418, 1429 : 1994 Cri LJ 2104]. A witness may be called 'interested' only when he or she derives some benefit from the result of a litigation; in the decree in a civil case, or in seeing an accused person punished. A witness who is a natural one and is the only possible eye-witness in the circumstances of a case cannot be said to be 'interested' [*State of Rajasthan v. Smt. Kalki*, A 1981 SC 1390, 1391 : 1981 Cri LJ 1012; *Om Prakash v. State*, 1990 Cri LJ 2372, 2376 (Delhi); *Sarbeswar Malik v. State*, 1986 Cri LJ 1721, 1724 (Orissa) (DB)]. Interested witnesses are not necessarily false witnesses though the fact that the witness has a personal interest or stake in the matter must put the court on its guard [*Moti Gouduni v. State*, 1982 Cri LJ 2342, 2345 (Orissa); *Madkami Baja v. State*, (1986) Cri LJ 433, 435 (DB) (Orissa): (1985) 1 Orissa LR 421: (1985) 1 Crimes 1063]. A witness who is not shown to be interested in the prosecution or inimical to the accused must be held to be disinterested witness [*Kasam Abdulla Hafiz v. State of Maharashtra*, 1998

Cri LJ 1422 (SC)]. The evidence of such witnesses must be subjected to a closer scrutiny and the court must assess the testimony of each important witness and indicate its reasons for accepting or rejecting it [*Birbal v. Kedar*, A 1977 SC 1; *Babu v. S*, A 1980 SC 443]. Where the entire evidence is of a partisan character impartial investigation can lend assurance to the court to enable it to accept such partisan evidence. But where the investigation itself is found to be tainted the task of the court to sift the evidence becomes very difficult [*Sevi v. State of Tamil Nadu*, A 1981 SC 1230, 1232: 1981 Cri LJ 736; *Anam Pradhan v. The State*, 1982 Cri LJ 1585, 1595 (Orissa); *State of Kerala v. Cleetus Thomas*, 1983 Cri LJ 1939, 1942 (Ker) (DB); *Jamu Majhi v. State*, 1989 Cri LJ 753, 754 (Orissa)].

When the witnesses are partisan and when there is no other witnesses available the court has to come to its conclusion upon a consideration of the evidence as it is, although it may be necessary to examine the evidence with greater care and contain than usual [*Md. Akram v. The State*, 1984 Cri LJ 520, 525 (Calcutta) (DB)]. No evidence should be at once discarded simply because it came from interested parties [*Maidhandas v. Sricharan*, A 1956 As 170; *Bindeshri v. Rajaram*, A 1961 A 198; *Bishwanath v. Sachhinananda*, A 1971 SC 1949; *Balwant v. S*, A 1972 SC 860; *Ghurpekhan v. S*, A 1972 SC 1172; *S. v. Iftikhar*, A 1973 SC 863; *Samson v. S*, A 1974 SC 1153; *S. v. Hari Singh*, A 1974 SC 1168; *Harihar v. S*, A 1975 SC 1501; *Piara v. S*, A 1977 SC 2274; *S v. Babboo*, A 1978 SC 1084; *Hazara v. S*, A 1981 SC 451: 1980 Cri LJ 1501; *Sashi Behera v. State of Orissa*, 1986 Cri LJ 1145, 1147 (Orissa); *Raghavan Pillai v. State of Kerala*, 1989 Cri LJ NOC 188 (Ker) (DB); *State of U.P. v. Smt. Chhedana*, 1990 Cri LJ 1535, 1540 (All); *Ram Sagar v. State*, 1994 Cri LJ 589, 595 (All)], even if inimical to the accused unless it is found to be untruthful by reason of other infirmities [*S v. Sughar*, A 1978 SC 191; *Sadhu v. S*, A 1978 SC 1506; *Dargahi v. S*, A 1973 SC 269]. The mere fact that the witnesses are interested is no ground for throwing out their evidence abroad. All that is necessary is that in such cases, the evidence of the witnesses should be examined with caution and having done that if the court feels that the evidence does not suffer from any other legal or factural infirmity, there is no reason to distrust the evidence of such a witness [*State of U.P. v. Hari Ram*, A 1983 SC 1081, 1085: 1983 Cri LJ 1638]. Merely because witnesses were inimical to the accused by itself was not a sufficient ground for rejecting their testimony [*Raman v. S*, A 1979 SC 1261]. It should be scrutinised with great caution and accepted only when it finds corroboration [*Champa v. Madho*, A 1981 P 103]. If inimical witnesses are examined and indepen-dent witnesses are kept away the evidence of inimical witnesses has to be scrutinized very closely [*State of Madhya Pradesh v. Ramcharan*, (1986) Cri LJ 424, 426: (1985) Cur Cri J MP 64 (DB)]. The injured who is an interested witness made two inconsistent statements with regard a material fact and circumstances. When the incident was witnessed by 10 or 15 persons and no independent witness was examined, it is difficult to place reliance upon the interested and inimical witnesses [*Ram Swarup v. The State of U.P.*, 1990 Cri LJ 511, 517 : 1989 All LJ 1 (All)]. But the courts require as a rule of prudence, not as a rule of law, that the evidence of such witnesses should be scrutinised with a little care [*Sarwan v. S*, A 1976 SC 2304; *Nankhu v. S*, A 1973 SC 491]. Interested evidence is not necessarily unreliable evidence. Even partisanship by itself is not a valid ground for discrediting or rejec-ting sworn testimony. Nor is it an invariable rule that interested evidence can never form the basis of conviction unless corroborated to a material extent in material parti-culars by independent evidence. If the evidence of interested witnesses on scrutiny is found to be intrinsically reliable or inherently probable, it may, by itself, be sufficient to base a conviction thereon. Broad guidelines for assessing interested

testimony pointed [*Hari Obula v. S*, A 1981 SC 82: 1980 Cri LJ 1330; *State of U.P. v. Manoharlal*, A 1981 SC 2073: 1981 Cri LJ 1701; *State of Bihar v. Ram Bachan Singh*, 1981 Cri LJ (NOC) 56 (Pat): 1981 BLJR 212; *Dhani Ram v. State*, 1983 Cri LJ NOC 157 (All) (DB) : 1983 All Cri R 86; *State of Orissa v. Bata alias Khandi Sethi*, 1990 Cri LJ 1087, 1091 (Orissa); *Ram Sagar v. State*, 1994 Cri LJ 589 (All); *Narain v. State of U.P.*, 1990 Cri LJ NOC 98 (All)]. Where the witnesses are interested, the court should approach their evidence with care and caution in order to exclude the possibility of false implication. The evidence of interested witnesses is not like that of an approver which is presumed to be tainted and requires corroboration but the said evidence is as good as any other evidence. In a faction ridden village, it will really be impossible to find independent persons to come forward and give evidence and in a large number of such cases only partisan witnesses would be natural and probable witnesses [*State of U.P. v. Ballabh Das*, A 1985 SC 1384, 1385]. In cases of admitted enmity and injuries on both sides court should look to the facts proved rather than accept testimony of witnesses at their face value [*Ghunnu v. S*, A 1980 SC 864].

In *Sarwan Singh v. State of Punjab*, 1976 Cri LJ 1757 it was posited that the evidence of interested witness does not suffer from any infirmity as such, but the courts require as a rule of prudence, not as a rule of law, that the evidence of such witnesses should be scrutinised with a little case. In *State of Punjab v. Wasan Singh*, 1981 Cri LJ 410, it was observed that mere interestedness was not a valid ground to reject the testimony of a witness. Mere relationship with the deceased was not a good ground for discarding their testimony when their presence at the scence of accurrence was probable. In *Appa v. State of Gujarat*, A 1988 SC 696 the Supreme Court laid down that the Court instead of doubting the prosecution case for want of independent witness must consider the broad spectrum of the prosecution version and then search for the nugget of truth with due regard to probability, if any, suggested by the accused. The above decisions were noticed by a Division Bench of the Allahabad High Court in *Dalsigar v. State of U.P.*, Cri Appeal No. 2579 of 1979 decided on 19-1-1995 and the legal position was summarised as under:

> "Thus the correct legal position is that the testimony of related winesses or the witnesses who are otherwise interested cannot be equated with the testimony of a tainted witness. All that is required, by way of prudence and not by way of law, is that the testimony of such witness must be examined with little more care and caution. If on such scrutiny, it is found that there is nugget of truth in their statements there will be no illegality in accepting their testimony. So far as relative witnesses are concerned, unless there are strong grounds to disbelieve their testimony, they are normally more natural and reliable witnesses as they would not like to spare the real assailants and involve need be drawn merely because of the failure of the prosecution to examine independent witness. If on scrutiny of the statements of interested witnesses, with care and caution, they are found to be truthful, failure to examine independent witness will not be material at all."

The above view taken in *Dalasigar's* case was reiterated by the same judges in another case and held that the testimony of an interested witness cannot be equated to the testimony of a tainted witness. It cannot be discarded merely on that ground. The only requirement is that the testimony of such a witness must be examined with more care and caution [*Naurangilal v. State*, 1996 Cri LJ 81, 84, 85 (All)].

Just because the witnesses are interested their evidence cannot be rejected [*Suraj Pal v. State of U.P.*, A 1994 SC 748, 751 : 1994 Cri LJ 928]. Hostility or

interested-ness does not require outright rejection of the evidence. What is required is a deeper scrutiny of the evidence [*Kulamani Sahu v. State of Orissa*, 1994 Cri LJ 2245, 2247 (Ori)]. Evidence of eye-witnesses cannot be rejected merely on ground that the accused and the deceased belonged to two factions [*Gurdev Singh v. State of Punjab*, A 1992 SC 1924 : 1992 Cri LJ 3447, 3449]. where all the prosecution witnesses are independent witnesses and they are not on terms of animosity with accused persons, there is no reason to put a question mark on their evidence [*Mirza v. State of U.P.*, 1996 Cri LJ 472, 479 (All)]. The son of the deceased cannot be called as an interested witness as he has no reasons to save the real culprit of his father and brother [*S.G. Gundegowda v. State*, 1996 Cri LJ 852, 859 (Kant)]. Evidence of interested witnesses cannot be rejected if their presence is natural and their testimony is corroborated by other witnesses and medical evidence [*Arjun Ram v. State of Rajasthan*, 1996 Cri LJ 577, 579 (Raj)]. No reliance can be placed on the testimony of an interested witness who is inimically disposed towards the accused since long and whose name does not find place in the FIR [*Pravat Kumar v. State of Orissa*, 1996 Cri LJ 4357, 4359 (Ori)]. If after assessing the evidence cautiously and carefully, the court finds that the evidence of the interested witness is acceptable, the court will be justified in accepting the same [*Harabailu Kariappa v. State of Karnataka*, 1996 Cri LJ 321, 324]. Evidence of interested witness is to be scrutinised with care [*Shaukat v. State of U.P.*, 1996 AIHC 634 (All)].

The evidence of the interested witnesses has to be scrutinised with great care and caution and should be examined in the light of the earliest report, the medical evidence and other surrounding circumstances [*Ladha Shamji Dhanani v. State of Gujarat*, A 1992 SC 956, 958]. It is true that where the witnesses are interested witnesses, the omission on the part of the prosecution to explain the injuries on the person of the accused-appellants assumes greater importance. But where the injuries sustained by the accused are minor or superficial and the evidence produced by the prosecution is clear, cogent and credit-worthy then the prosecution case cannot be thrown away on this count [*Pyara v. State of Rajasthan*, 1997 Cri LJ 1065 (Raj—DB)]. Where a large number of persons armed with deadly weapons participated in the occurrence during which four persons were killed and many of the witnesses who were present were also injured it may be that the witnesses were interested, but on that ground alone their evidence cannot be rejected. Their can be subjected to close scrutiny [*Nallamsetty Yanadaiah v. State of A.P.*, A 1993 SC 1175, 1177 : 1993 Cri LJ 408]. Where nobody other than interested witnesses, had seen the occurrence, non-production of independent witnesses would not affect the prosecution case [*Pyara v. State of Rajasthan*, 1997 Cri LJ, 1065 (Raj—DB)]. Merely because the occurrence had taken place at the shop of the witness, it is not enough to dub him as an interested and partisan witness. When he had no motive to falsely implicate the accused and he was not shown to have any ill will against the accused not any affinity or relationship with the deceased, he was an independent witness [*Kunwar v. State of U.P.*, 1993 Cri LJ 3421, 3438 (All)]. Mere interestedness is not a ground to reject the evidence of the eye-witnesses particularly those who were injured. The injured witnesses would be the last persons to leave out the real culprits and implicate others falsely. However, it becomes necessary to scrutinise their evidence with great care and caution. Normally evidence of such witnesses is scrutinised in the light of the medical evidence, their precious statements, the earliest version put forward and other circumstances like the investigation being defective and also the effect of omission or discrepancies, if any [*Paresh Kalyandas Bhavsar v. Sadiq Yakubbhai*, A 1993 SC 1544].

If the testimony of a rival group is to be used as a whole basis of conviction, it should be of such a calibre as to be regarded as wholly reliable. The blemish attached to a witness as a partisan witness stands in the way of his evidence becoming wholly reliable and hence without adequate reassurance from other circumstances or materials it may not be safe to make the incorroborated evidence of such a witness the sole basis for reversing the order of acquittal. [*Harpal Singh v,. Devinder Singh*, A 1997 SC 2914 : 1997 Cri LJ 3561]. Mere interestedness is not a ground to reject the evidence of the eye-witnesses particularly those who were injured. Firstly their presence during the occurrence cannot be doubted. Secondly the injured witness would be the last person to leave out the real. However, it becomes necessary to scrutinise their evidence with great care and caution normaly in a case of this nature the evidence of such witnesses is scrutinised in the light of the medical evidence, their previous statements, the earliest version put forward and other circumstances like the investigation being defective and also the effect of omissions or discrepancies, if any [*Paresh Kalyandas Bhavsar v. Sadiq Yakubbhai*, A 1993 SC 1544 : 1993 Cri LJ 1857]. The level of interested witness is frequently used to throw cloud on the evidence. The probation that when eye-witnesses to the occurrence were interested persons, there should be corroboration to their evidence by independent evidence cannot be of universal application. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him, falsely. There can be no sweeping generalisation and foundation must be laid for such a criticism that an innocent person is being unnecessarily dragged to face trial [*Kedar Behera v. State*, 1993 Cri LJ 378, 381 (Ori)]. When the *bona fides* of the investigation had been successfully assailed, it would not be safe to rely upon the testimony of the interested witnesses in absence of strong corroborative evidence of a clinching nature [*State of A.P. v. Punati Ramulu*, A 1993 SC 2644, 2645 : 1993 Cri LJ 3684]. Where a large number of persons armed with deadly weapons participated in the occurrence during which four persons were killed and many of the eye-witnesses were also injured, even if these eye-witnesses were interested witnesses, on that ground alone their evidence cannot be rejected [*Nallamsetty v. State of A.P.*, A 1993 SC 1175 : 1993 Cri LJ 408, 410].

The evidence of interested or related witnesses should be subjected to a very careful scrutiny with extreme care and caution and if on such scrutiny the testimony is found to be intrinsically reliable then that evidence may be relied upon in the circumstance of the particular case [*State of U.P. v. Vinod Kumar*, A 1992 SC 1011, 1016]. The evidence of the interested witnesses has to be scrutinised with great care and caution and should be examined in the light of the earliest report, medical evidence and other surrounding circumstances [*Ladha Shamji Dhanani v. State of Gujarat*, 1992 Cri LJ 1286, 1288 (SC)].

Evidence should first be scrutinised on its merits before investigating whether the witness is an interested witness [*Satyanarayana v. Sri Ramudu*, A 1961 AP 461: *Nanigopal v. Abdul Hamid*, A 1959 As 200: *Surajmal v. S*, 1959 Raj LW 381]. The proposition that when the eye-witnesses to the occurrence were interested persons there should be corroboration of their evidence cannot be of universal application [*Mangal v. S*, A 1957 SC 199; *S v. Bhola sup*; *Tameshwar v. S*, A 1976 SC 59]. In the absence of corroboration to a material extent in all material particulars, it is extremely hazardous to convict the accused on the basis of the testimony of highly interested, inimical and partisan witnesses, particularly when it bristles with improbable versions and material infirmities [*Ram Ashrit v. State of Bihar*, A 1981 SC 942, 945 : 1981 Cri LJ 484; *Ram Bali v. State of Bihar*, 1988 Cri LJ 764, 769

(Pat) (DB)]. The two eye-witnesses are very natural witnesses whose presence on the scene of occurrence was extremely probable. Even assuming that they are interested witnesses, applying the rule of caution, their evidence is found to be creditworthy. Shorn of a few discrepancies or contradictions which are not a vital nature their evidence is by and large consistent and congruent straightforward and poignant. Such witnesses are reliable and truthful [*State of U.P. v. Sahai*, A 1981 SC 1442, 1449: 1981 Cri LJ 1034].

The evidence of a witness who has sustained injuries in the incident and whose name finds a place in the F.I.R. cannot be brushed aside on the ground that he is a interested witness or chance witness [*State of U.P. v. Jodha Singh*, A 1989 SC 1822, 1826: 1989 Cri LJ 2113]. Although their omission to come forward to tell the investigating officer may condemn their testimony as afterthought [*Ravulappalli v. S*, A 1975 SC 716]. In election disputes petitioner's party's evidence should not be rejected merely because they are interested witnesses [*Punjabrao v. Meshram*, A 1965 SC 1179]. In an election case, the polling agent or a candidate is the most interested witness. His evidence carries no weight unless corroborated by some unimpeachable documentary evidence [*Ram Singh v. Col Ram Singh*, A 1986 SC 3, 22: 1985 (Supp) SCC 611]. Evidence of a not totally independent and disinterested Returning Officer will also not be rejected in toto but will have to be scrutinised carefully and must be accepted at least to the extent to which it may be supported by circumstantial evidence [*Hussain Khan v. Nijalingappa*, A 1969 SC 1034]. The evidence of Sarpanch of village cannot be rejected on the ground that he and the accused are co-villagers [*Keal Singh v. State of Punjab*, 1984 Cri LJ NOC 128: (1984) 11 Cri LT 97 (P&H)].

The evidence of partisan witnesses cannot be accepted when their evidence is not corroborated by medical evidence [*Satya Narain v. State*, 1985 Cri LJ 966: 1985 All Cri R 178 (All) (DB)]. The witnesses were in the car driven by the victim when the assault took place, merely because one of them is a servant under the victim and the others are his co-villagers does not mean that their evidence has to be discarded. [*Tunu v. State of Orissa*, 1988 Cri LJ 524, 526: (1987) 1 Crimes 695 (Ori)]. A witness cannot be branded as partisan witness simply because he deposed against the accused on a previous occasion [*Hari Patbandha v. The State*, 1988 Cri LJ 1614, 1618 (Cal)]. If the Court feels that before acceptance of the evidence of an interested witness there should be corroboration from independent sources, it should not hesitate to insist upon the same [*Hemaraj Sharma v. Banwarilal Bathwal*, 1988 Cri LJ 1887, 1889: (1988) 1 Crimes 516]. The partisan witnesses go to the extent of implicating one accused falsely. Their version cannot be relied on [*B.N. Singh v. State of Gujarat*, 1990 Cri LJ 1601, 1605 (SC)].

Merely because the eye-witnesses were close friends of the victims and were residing at far off places in different localities, it cannot be urged that it would be unsafe to convict the accused on the basis of evidence of such eye-witnesses [*Asha v. State of Rajasthan*, A 1997 SC 2828, 2830 : 1997 Cri LJ 3508]. Where there was enmity between the accused and the deceased as well as the PW, evidence of PW had to be scrutinised with great care and caution. When the version of the PW attributing overt acts to each of the accused does not inspire confidence and many improbabilities appears in the said version, the same cannot be relied upon [*Dharam Singh v. State of Punjab*, A 1993 SC 319 : 1993 (1) Cri LJ 150, 156]. Where though the eye-witnesses had occasions to be partisan witnesses for being inimical against the accused and there were some contradictions in their deposition, but the contradictions being not very material for which their deposition was to be discarded and their clear deposition having received corroboration from the medical evidence as to

the nature of the injuries suffered by the deceased and also from the dying declaration given by the deceased, the same is acceptable [*Bhagirath v. State of Haryana*, A 1997 SC 234, 243 : 1997 Cri LJ 81]. Evidence of an interested witness cannot be discarded on ground of his interestedness [*Raju v. State of M.P.*, A 1994 SC 1459, 1460 : 1994 Cri LJ 2167]. Evidence of employees of a bank cannot be rejected on ground that they were working under the accused [*P.S. Rao v. State of A.P.*, A 1994 SC 1407, 1409 : 1994 Cri LJ 2102]. Evidence of interested witness must be tested in the light of the probabilities and the previous statements and the surrounding circumstances [*State of Punjab v. Jit Singh*, A 1994 SC 549, 550 : 1994 Cri LJ 1116].

In a case for compensation under s 110A Motor Vehicles Act the Claims Tribunal is not justified in rejecting a testimony on the ground that the witness is interested in the heirs of the deceased [*Ishwar v. Union*, A 1969 D 183; *Masalti v. S*, A 1965 SC 202 **follld**]. In an accident claim, though a direct witness was not examined in the criminal court, his evidence before the Tribunal can be looked into if the same inspires confidence to be accepted that he is a direct witness to the accident [*Sampoth Reddy v. Gudda Meddi Suchi Venkatamma*, A 1989 AP 337, 339]. Miscreants entering shop and on point of revolver threatening accountant *A* and compelling insured *B* to open safe and removing money—In a case for claim under Insurance Act evidence of *A* and *B* cannot be rejected as interested witnesses [*Jagadhatri Bhandar v. Commercial Union Ass Co*, A 1979 C 56].

Investigating Officer as Witness.—The evidence of investigating officer cannot be branded as highly interested on ground that they want that the accused are convicted [*S v. M M Mathew*, A 1978 SC 1571]. Evidence of police officers prose-cution witnesses cannot be discarded in the absence of their hostility to the accused [*Nathusingh v. S*, A 1973 SC 2783]. The evidence of a witness cannot be under esti-mated merely because he is a police officer. [*State of Assam v. Muhim Bar Kataki*, A 1987 SC 98, 102 : 1987 Cri LJ 152; *Parag v. State of Rajasthan*, 1981 Cri LJ 1244, 1251 : (1981) Raj LW 370 (Raj); *Mahadeo v. The State*, 1990 Cri LJ 858, 859 (All) : 1989 All LJ 475]. The evidence of the Investigating Officer regarding the recovery of weapon can be acted upon even if not corroborated by other evidence [*Kadavanathil Baby v. The State*, 1983 Cri LJ 1186, 1192 (Ker) (DB)]. When the Investigation Officer in a motor accident claim case gave evidence that he visited the scene of accident and that the driver of the motor cycle and another were present and they pointed out the scene and on the basis of that he had drawn the rough sketch, that sketch could be relied on [*Dharman v. N C Srinivasan*, A 1990 Mad 14, 19]. The Investigating Officer gave evidence that after arresting the accused he informed him the grounds of arrest. He did not make any entry anywhere about this function. From this omission alone it cannot be said that his evidence is false [*Wilfred Joseph Dawood Lema v. State of Maharashtra*, 1990 Cri LJ 1034, 1039 (Bom)].

There is no rule of law that conviction under Prevention of Food Adulteration Act cannot be based on the sole testimony of a Food Inspector [*Prembalkav v. S*, A 1977 SC 56]. The veracity of evidence of Food Inspector has to be tested on its own intrinsic merit. It cannot be disbelieved merely because a panch witness turned hostile [*S.D. Nagdene v. Sudhakar Ragunath Burange*, 1990 Cri LJ 2452, 2453 (Bom)]. Merely because the panch witness is a Government servant does not mean

that he would be a party to trap and that his evidence can't be accepted [*State of Gujarat v. Vrajlal Arjanbhai Gohel*, 1981 Cri LJ 527 (Guj) : 1980 Cri LJ (Guj) 299]. If the evidence of Grama Rakshis is trustworthy, their evidence need not be rejected on the ground that they are under the administrative control of police authorities [*State of Orissa v. Trinath Dash*, 1982 Cri LJ 942, 947 : 1982 Cut LR (Cri) 20 (Ori)]. The evidence of official witnesses can be acted upon without corroboration when no animus or interestedness is suggested as against them. [*Kewal Singh v. State of Punjab*, 1981 Cri LJ NOC 217 (P&H); *Ajit Singh v. State of Punjab*, 1982 Cri LJ 522, 523: 1981 Chand Cri C 247 (P&H)].

The presumption that a person acts honestly equally applies to police officer [*Gopal Mahadeo v. State of Maharashtra*, 1997 Cri LJ 2425, 2428. See also *Ahir Raja Khima v. State of Saurashtra*, A 1956 SC 217 : 1956 Cri LJ 426]. The statements of police witnesses are entitled to the same weight and the same consideration which is attached to the statement of a member of public. However, such statements must inspire confidence to be relied upon in a particular case [*Gurucharan Singh v. State*, 1993 Cri LJ 1622, 1627 (Del)]. The statements of the police witnesses are entitled to the same weight and the same consideration which is attached to the statement of a member of the public. However, the impugned statement must inspire confidence to be relied upon in a particular case [*Gurucharan Singh v. State*, 1993 Cri LJ 1622, 1627 (Del)]. When there was nothing to show that on account of non-examination of the Investigating Officer the place of occurrence could not be fixed or there were contradictions or omissions which were vital and necessary to be elucidated from the I.O., in absence of any demonstrable prejudice, only apprehensive prejudice and supposed unfairness on account of non-examination of the I.O., cannot be a ground to discard an otherwise reliable and trustworthy evidence [*Shayam Narayan Singh v. State of Bihar*, 1993 Cri LJ 772, 804 (Pat)]. Where the head constable arrested the accused and on search being conducted by him a pistol and the cartridges were recovered from the accused from the accused and it was on his complaint a formal FIR was lodged and the case was initiated, he being complainant should not have proceeded with the investigation of the case. As he was not only complainant in the case but he also carried on with the investigation and examined witnesses under section 161 Cr PC, such practice should not be resorted to so that there may not be any occasion to suspect fair and impartial investigation [*Megha Singh v. State of Haryana*, 1995 SC 2339, 2340]. The evidence of recoveries at the pointing out of the accused can be believed on solitary evidence of a Police Inspector [*Bhimsha Subanna Pawar v. State of Maharashtra*, 1996 AIHC 1, 5 (Bom)]. Evidence of Police Officers that they having perused the case diary prepared by the Investigating Officer and interrogated some of the accused and other persons, found the accused persons were innocent was not legally admissible and therefore, the defence cannot be permitted to adduce such evidence [*Dalip Singh v. State of Punjab*, A 1997 SC 2985, 2988 : 1997 Cri LJ 3647].

—FIR.—The entry in the F.I.R. is after all a summary and summaries are not intended to be exhaustive [*State of Rajasthan v. Sukhpal Singh*, 1983 Cri LJ 1923, 1927 (SC) : 1983 Cri LR (SC) 54]. It is not expected nor it is possible to put down the minute details in the F.I.R. [*Ram Odgar Jha v. State of Bihar*, 1987 Cri LJ 113, 116: (1986) BLT 611 (Pat) (DB)]. The statements made in the First Information Report were inconsistent with the evidence led at the trial and there had been important omissions made in the first information report which would affect the veracity of the case of the prosecution [*Jagabandhu Mahanta v. State*, 1985 Cri LJ 575, 577: (1985) 2 Crimes 648 (Ori) (DB)]. The person on whose first information, the case was registered had given a go-by to his statement by appearing before the

Chief Judicial Magistrate and giving retracted statement. This itself is not sufficient to throw out the case of the prosecution since the first information report is not a substantive piece of evidence in law [*Na Victor Immanvel v. State*, 1991 Cri LJ 2014, 2016 (Mad)]. The fact that the F.I.R. was lodged after a delay of 3 days, that the victim's statement was recorded after a delay of 17 days and that there is no corroboration for the testimony of the injured are sufficient to find the accused as not guilty [*Satbir v. State of Uttar Pradesh*, A 1982 SC 1216: 1982 Cri LJ 1743 (2); *Haradhan Char v. State of West Bengal*, 1981 Cri LJ NOC 158 (Cal); *Karam Singh v. Charan Singh*, 1984 Cri LJ NOC 90: (1984) 1 Chand LR (Cri) 251 (P & H); *R.M. Raghu v. State*, 1988 Cri LJ 1364, 1369: (1988) 1 Ker LT 156 (Ker) (DB); *Balwan v. State*, 1989 Cri LJ 2475, 2477 (Delhi) (DB)]. The first informant was not an eye-witness and there is no evidence to show that the two eye-witnesses had disclosed the name of the assailant to the informant. When these two eye-witnesses stated after they saw the assault, they were given serious threats by the accused and other villagers advised them not to intermeddle with the affairs of the deceased and the accused they cannot be disbelieved on the ground that their names had not been indicated in the F.I.R. [*Pralhad v. State of Maharashtra*, A 1981 SC 1241, 1242 : 1981 Cri LJ 752; *Egbal Baig v. State of A.P.*, A 1987 SC 923, 924 : 1987 Cri LJ 838; *Vijinder Singh v. State*, 1984 Cri LJ NOC 26 : (1984) 1 Crimes 237 (Delhi) (DB)]. When the eye-witness was examined by the police on the same evening, the non-inclusion of the name of that witness can only be attributed to the incompetence and inexperience of the investigating officer [*Inderjit v. State*, (1986) Cri LJ 966, 969 (DB) (Del): (1985) 2 Crimes 424]. The first-informant was not a eye-witness. There was no evidence either that any witness to the occurrence had informed him as to who were the persons who had seen the occurrence. In such circumstances, the evidence of an eye-witness is not to be rejected merely because of the non-mention of his name in the F.I.R. [*Gunduchi Patnaik v. State of Orissa*, 1985 Cri LJ 645, 647: (1985) 1 Crimes 932 (Orissa) (DB); *Narendranath Panigrahi v. State of Orissa*, 1985 Cri LJ NOC 8 (Orissa) (DB); *Rakka Dineshan v. State of Kerala*, 1990 Cri LJ 1361, 1363 (Ker)].

When the witnesses say that when they reached the spot they found the torch burning, the fact that the F.I.R. did not mention the presence of the torch does not mean that the evidence of the witnesses is to be discarded [*Shakti Patra v. State of W.B.*, A 1981 SC 1217: 1981 Cri LJ 645]. When the earlier reports of the occurrence are withheld, there cannot be any conviction [*Nandeswar Sonawal v. State of Assam*, 1985 Cri LJ NOC 60 (Gauhati) (DB)]. Mere omission to report the matter to the police should not be used to discard the testimony of the person from whose house the articles were stolen [*State of Kerala v. Kuttan Mohanan*, 1988 Cri LJ 453, 455 : (1987) 2 Ker LT 54]. The written information about transport of contraband articles which contains the name of the informant cannot be brought on record because there is a danger of that name being leaked out and the informant is likely to suffer harrassment at the hands of the concerned persons. [*Sunil Kumar v. The State*, 1990 Cri LJ 414, 418 (Delhi)]. When the informant omitted to state in the First Information Report about his sustaining bleeding injury on his left cheek, it is a material omission [*Purandar Bhukta v. State of Orissa*, 1991 Cri LJ 1388, 1389 (Orissa)].

A report which is based on an information given by someone else has no value unless the informer who gathered the information is produced and the opposite party given an opportunity to cross-examine him [*Asa Ram v. M.C.D.*, A 1995 Del 164, 169]. Prosecution cannot be disbelieved for want of formal proof of FIR [*Pankaj Naik v. State of Orissa*, 1994 Cri LJ 829, 831 (Ori)]. Where the complaint on the basis of which the FIR was registered was a written document prepared before being

submitted to the Police Station yet it did not mention the two PWs as eye-witnesses, the trial court rightly disbelieved the presence of the PWs as eye-witnesses [*Bhimappa v. State of Karnataka*, A 1993 SC 1469, 1471 : 1993 Cri LJ 1801]. Omi-ssion of a fact in FIR, even if material cannot by itself make the witness deposing about that fact unbelievable at that point [*State of M.P. v. Dhirendra Kumar*, A 1997 SC 318, 321]. The fact that there was delay in recording FIR or preparing the FIR, that the earliest version is not before the court are by themselves, not sufficient to reject prosecution evidence or throw out the prosecution case. The court must take due note this infirmity bearing in mind that the recorded first information might therefore, contain an exaggeration or connection and look for explanation which may be offered by the prosecution. These features put the court on its guard to took for the possible motive and explanation and consider its effect on the trustworthiness or otherwise of the prosecution version [*Sarafat Ali v. State of Assam*, 1993 Cri LJ 1943, 1950 (Gau)].

—**Injured witness.**—As observed by the Division Bench of the Bombay High Court that the injuries at the best may ensure the presence of a witness but that is not enough. He must be truthful witness and should have no reason to falsely implicate accused [*S.G. Sohatre v. State of Maharashtra*, 1997 Cri LJ 454, 459 **Relying** on *Vijay Shankar Misra v. State*, 1984 All LJ 1316]. It is well settled that the evidence of an injured witness can be the sole basis, for either recording or sustaining a conviction. This is because injuries ensure the presence of a witness [*Ramesh Bhagwan Manjrekar v. State of Maharashtra*, 1997 Cri LJ 796, 800 (Bom)] Normally courts should be loath to reject the testimony of an injured witness. However, there is no immutable rule of appreciation of evidence that the evidence of injured witness should be mechanically accepted as gospel truth for injuries may only at the best ensure presence of a witness but are no guarantee of his credibility and truthfulness. It is an elementary norm of appreciation of evidence that before the testimony of even an injured witness can be accepted, it has to pass the test of truthfulness and should be consonance with proba-bilities [*Narayan Kanu Datavale v. State of Maharashtra*, 1997 Cri LJ 1788 (Bom). See also *Vijay Shankar Misra v. State*, 1984 All LJ 1316]. The evidence of an injured witness, who made statement at the hospital shortly after the incident, when corro-borated by the evidence given by other witnesses, can be relied upon [*Kuriakose v. State of Kerala*, 1995 Cri LJ 2687, 2691 (SC)]. Where the presence of injured witnesses at the place of occurrence being absolutely natural and indisputable, and their evidence not rendered improbable on any just count, a Division Bench of Gujarat High Court held that their testimony could not be discarded merely because they were partisan witnesses [*Rotaniya Bhima Bhil v. State of Gujarat*, 1997 Cri LJ 891 (Guj—DB)]. If the testimony of an injured witness inspires confidence, the same by itself can be sufficient for sustaining the conviction [*Bhimsha Subanna Pawar v. State of Maharashtra*, 1996 AIHC 1, 4 (Bom)]. Solitary injured witness even if there is a sole eye-witness of a crime a conviction may be recorded against the accused provided the court which hears such witness regards him as an honest and truthful witness It is true that prudence requires that some corroboration may be sought from the other prosecution witnesses in holding an accused guilty on the testimony of a solitary witness. It is pertinent to mention that the presence of eye-witness, who is also injured at the time of occurrence was beyond question having regard to the fact that he has sustained injuries in the course of the very some transaction at the very time and place of occurrence it is to be held that the facts deposed by him about the deceased victim and his deposition about his own injuries had to be attached great value keeping in view of fact that his presence at the scene of occurrence was natural and his presence near the deceased had been established beyond every shadow of doubt by reason of the fact that he himself had sustained injuries. The aforesaid discussion leads to an irresistable conclusion that deposition of an injured witness must be attached a highest testimonial value. Thus a conviction can be maintained on the sole testimony of an eye-witness if it is of sterling worth [*Jasu v. State of*

Rajasthan, 1995 Cri LJ 1160, 1163 (Raj)]. Where the testimony of the injured witness was consistent and found support from the FIR lodged by him, its trustworthiness cannot be doubted merely because the witness was son of the deceased. There is no reason why he will implicate falsely the accused and leave out the real culprit [*Nathuram v. State of Rajasthan*, 1993 Cri LJ 533, 537 (Raj)]. The testimony of the victim of the occurrence, being the injured witness, can be relied upon provided it is free from doubt and credence can be placed on it. However, a witness who prevaricates easily does not inspire confidence. No implicit reliance can be placed on the statement of such witness [*Kishori Lal v. Mahadeo*, 1993 Cri LJ 1173, 1178 (All)]. When the version of PW before the court that after the occurrence he returned to the scene place and he was there till the police came was falsified by his earlier version before the police wherein he had only stated that he had ran away after the occurrence and there was absolutely nothing to show about his return, his evidence was not reliable even though he was an injured witness [*Mureegan v. State*, 1993 Cri LJ 1259, 1269 (Mad)]. Though presence of an injured witness at the scene of occurrence could not be doubted but when his evidence was in conflict with the medical evidence if would not be safe to convict the accused on his sole testimony [*Kathi Odhabhai Bhimabhai v. State of Gujarat*, A 1993 SC 1193, 1198 : 1993 Cri LJ 187]. It is most unlikely that an injured person would deliberately spare the true assailants and substitute in their place the names of his other enemies out of malice or enmity [*Swaran Singh v. The State of Himachal Pradesh*, 1984 Cri LJ NOC 147 : ILR (1983) HP 621 (HP)].

Stock witness.—Normally, it is expected that the I.O. will take independent panch witnesses and if knowingly he has taken pliable witnesses as panch witnesses the entire raid would become suspect and in such a case it would not be possible to hold that the evidence of police witnesses by themselves would be sufficient to base a conviction [*Mohd. Hussain B. Ramzan v. State of Maharashtra*, 1994 Cri LJ 1020, 1024 (Bom)].

Rape Cases.—Conviction can be maintained on the basis of evidence of prosecutrix without any corroborative evidence [*Sunil Kahar v. State of Bihar*, 1992 Cri LJ 3647 (Pat)]. In rape cases uncorroborated testimony of the prosecutrix can be acted upon [*Chidda Ram v. State*, 1992 Cri LJ 4073, 4074 (Del)]. If the evidence of the prosecutrix was wholly reliable, precious little would turn on innocuous circum-stances like non-examination of the doctor and father of the prosecutrix. Hence an offence under section 376 IPC is squarely brought home against both the accused [*State of Maharashtra v. Savala Sagu Kokare*, 1997 Cri LJ 786, 792 (Bom—DB)]. A prosecutrix in a rape case and her parents would not allow the real culprit to escape and falsely involve an innocent person [*Prithi Chand v. State of HP*, A 1989 SC 702, 705 : 1989 Cri LJ 841]. Non-examination of a deaf and dumb girl of 13 years victim of rape would be cured when there was an eye-witness to the act of rape [*Manga v. S*, A 1979 SC 1194]. In a rape case of the most important aspects in the evidence of the prosecutrix are found to be false and fabricated, the accused cannot be convicted [*Mahendra Kumar Maduli v. State of Orissa*, 1990 Cri LJ (NOC) 27 (Orissa)].

Old or Young Age.—Old age by itself carries no guarantee of truth if the evidence is otherwise untrustworthy [*Jnanada v. Birendra*, A 1939 C 595; *Sirajul Haque Laskar v. State of Assam*, 1989 Cri LJ NOC 214 (Gauhati): (1989) 1 Gauhati LR 485]. The prosecution witness aged 70 years and weak eyesight claims to have seen the accused in the light of a lamp. The lamp is not produced. The evidence of the witness cannot be accepted [*Aktar Hossain v. State*, 1981 Cri LJ (NOC) 32 (Gau)]. When the witness who is an old lady admitted that her vision was not well

and she was also hard of hearing, her version regarding the occurrence which took place in a dark night cannot be safely accepted [*Prafulla Bora v. State of Assam*, 1988 Cri LJ 428, 430 (Gau) (DB)]. When the trial Judge had put preliminary questions to each of the child witnesses and satisfying that they were answering questions intelligently without any fear, proceeded to record the evidence and in the chief examination each of the witnesses had given all the details of the occurrence, and there had been a searching cross-examination and the witnesses withstood the same, there was no reason to doubt their evidence [*Dharam Deo Singh v. State of U.P.*, A 1993 SC 2654, 2276 : 1993 Cri LJ 676].

Evidence of a witness ought not to be doubted on the sole ground that he was only 12 or 13 years of age [*Banubai v. Manilal*, A 1923 PC 62 : 84 IC 696; see *Bhojraj v. Sitaram*, A 1936 PC 60 *ante*]. Boy of 13 years from rural area with mature understanding cannot be treated as a child witness [*Tehal v. S*, A 1979 SC 1347]. In the case of a child witness one broad test is whether there was possibility of any tutoring. When the child witness stated that her elder sister asked her to state in Court that on that night when she was sleeping with her father the accused came and killed her father with a knief, there is some element of tutoring [*Vijay Kumar v. State*, 1981 Cri LJ NOC 138 (Delhi)] if the evidence of a child witness is fully corroborated by other witnesses and it is not shown that the child was tutored, the evidence of the child witness can be accepted [*Lala Chaudhury v. State*, 1988 Cri LJ 1301, 1307 (Cal) (DB)]. In a burning case the child witness did not disclose what he saw immediately to the relations and neighbours who assembled at the spot. The young boy developed a natural instinct or he might have been either influenced by his father or tutored by the relations of the father [*Ramesh Laxman Shendre v. State of Maharashtra*, 1991 Cri LJ 1636, 1640 (Bom)]. There had been no delay in the disclosure by the child witness about the occurrence. The evidence of child witness is also corroborated by medical evidence. So that evidence can be accepted [*Kana Majhi v. State*, 1985 Cri LJ 1876, 1877 (Orissa) (DB)]. The competency of a child witness depends on the capacity of understanding and consistency of the witness. It is also to be seen how far its fits with rest of the evidence and it is a matter of prudence to weigh the evidence of a child witness to be accepted by the Judge [*Babrubahan Jal v. State of Assam*, 1991 Cri LJ 278, 281 (Gau)]. As to the value of evidence of child witnesses see notes to ss 137, 138 *post*.

Natural witness.—Witnesses who were staying in a house just opposite to the house of the accused, and entered the house by breaking open the compound gate and witnessed the occurrence of murder which took place in the house, were natural witnesses [*Om Prakash v. State of Punjab*, A 1993 SC 138, 141].

Partisan witness.—There is no hard and fast rule that testimony of a partisan witness cannot be acted upon without corroboration. If his presence at the place of occurrence cannot be doubted and his evidence is consistent with the surrounding circumstances and the probability of the case strikes the court as true, it can be a good foundation for conviction, more so if assurance is available from medical evidence [*Barkau v. State of U.P.*, 1993 Cri LJ 2954, 2959 (All); *Tameshwar Sahi v. State of U.P.*, A 1976 SC 59 : 1976 Cri LJ 6].

Bad character.—Merely because the witnesses were of bad character their testimony cannot be rejected [*Noor Baksh v. State of U.P.*, 1996 AIHC 1349, 1351 (All)]. Evidence of an eye-witness whose presence on the spot is found natural cannot be rejected on ground that they had bad antecedents [*Ramsanjiwan Singh v. State*, A 1996 SC 3265 : 1996 Cri LJ 2528, 2536]. The evidence of a particular witness cannot be thrown to the wind because the wit-

ness is a person of easy virtue. The courts while dealing with the evidence of such a witness are required to be on their tiptoe and guard [*Shyam Sunder v. State*, 1997 Cri LJ 35, 38 (Del—DB)].

Accomplice witness.—The fact that the testimony of an accomplice was found to be not acceptable in respect of one of the accused persons for want of independent corroboration, should not be taken to introduce any infirmity in her evidence in other respects or create any doubt regarding her reliability as a witness. *Ranadhir Basu v. State of WB*, AIR 2000 SC 908.

Corroboration.—Corroboration means support. It is too well known that need for corroboration for accepting the evidence of any witness arises only and only when the court is not wholly satisfied regarding the credibility of that particular witness. Accordingly, once the judicial mind and conscience is clear and satisfied enough as regard the truthfulness and genuineness of any particular witness, it is indeed not necessary to look for any corroboration. Mind well, corroboration is simply 'rule of prudence' and not one of 'rule of law'. It is entirely a matter of judicial discretion [*State of Gujarat v. Balubhai Madhobhai*, 1995 Cri LJ 2588, 2593 (Guj)]. Evidentiary value of a deposition which is otherwise admissible is not just wiped out in the absence of corroboration. Corroboration is a rule of prudence [*Pathu Lal v. State*, A 1996 SC 3197 : 1996 Cri LJ 2446, 2448]. Witness whose statement is found to be partly reliable and partly unreliable cannot be the basis for seeking corroboration. One witness whose evidence is not wholly reliable, cannot be utilised for the purpose of corroborating another partly reliable witness [*Ayodhya v. State of U.P.*, 1997 Cri LJ 2654, 2666 (All)]. Evidence corroborated by medical evidence as well as other circumstantial evidence is not liable to be discarded [*Tarjinder Singh v. State of Haryana*, A 1994 SC 503, 504].

Non-examination of material witness.—Where the prosecution examined the complainant and other witness who himself was accused in cross-complaint and did not examined other material eye-witnesses prosecution case becomes doubtful [*Ramanlal v. Karthikeyan*, 1994 Cri LJ 3720, 3721 (Mad)]. Non-examination of witnesses whose testimony was essential for unfolding of narrative, if not explained, vitiates the prosecution case [*Ashraf Hussain Shah v. State of Maharashtra*, 1996 Cri LJ 3147, 3149 (Bom)].

Status Or Riches.—Credibility of witness does not depend on his status or riches [*Deonath v. S*, A 1967 B 1; *Kamla v. Ratan*, A 1971 A 304]. Witnesses even of the respectable class and honourable profession are not free from the proclivity to so state facts that their statements suit what they believe to be just rather than represent what has actually taken place [*Kamla Kunwar v. Ratanlal*, A 1971 A 304; *Hazarilal v. S*, A 1980 SC 873]. The only eye-witness was an illiterate or semi-illiterate wage earner belonging to a small village in hill area of a backward district of Orissa. It was not unnatural on his part to keep quiet and lie low for some time and report the incident of a brother killing his younger brother after delay of 9 days. [*Biswamber Meher v. State of Orissa*, 1989 Cri LJ 271, 273: (1988) 2 Crimes 290 (Orissa)].

Search Witness.—Manner of appreciation of panch witness [*S v. Fernandiz*, A 1951 B 468]. When the searching the person of the accused and the formalities of arrest were not performed at the place of arrest and there was not even a witness for the seizure in a place like the capital of the country, the arrest of the accused is only a show and not an arrest in actuality [*Kehar Singh v. State*, A 1988 SC 1883, 1907 : 1989 Cri LJ 1]. The fact that the gun was recovered 20 days after the occurrence is not a circumstance against the accused when the witnesses who were present at the time of recovery of the cartridges were not examined [*Bhullen v. State*, 1981 Cri LJ NOC 93 : 1981 All Cri R 208 (All)]. When there is nothing to disbelieve the evidence of official witness in the case of recovery of illicit liquor, their evidence cannot be discarded merely because there is no other independent witness [*Sukuru Behera v. State*, 1989 Cri LJ NOC 218: (1989) 69 Cut LT 257].

Chance Witness.—Though the chance witness is not necessarily a false witness, is proverbially rash to act upon such evidence [*Ismail v. Momin*, A 1941 PC 11: 193 IC 209; *Gulichand v. S*, A 1974 SC 276; *Bava v. S*, A 1974 SC 902, 906] and his evidence requires cautious and close scrutiny [*Bahal v. S*, A 1976 SC 2032; *Dayaram Singh v. State of M.P.*, 1981 Cri LJ 530 (Madh Pra); *Bhagwati Prasad v. State*, 1994 Cri LJ 2310 (All)]. In the case of a chance witness, if that witness gives sufficient reasons for his presence at the time of occurrence, that evidence can be accepted [*Balraj Yadav v. State of Bihar*, 1990 Cri LJ NOC 90 (Pat); *Maganti Satyanarayana v. State of A.P.*, 1985 Cri LJ NOC 77 : (1985) 1 Andh Pra WR 40 (AP) (DB); *Kapil Singh v. State of Bihar*, 1990 Cri LJ 1248, 1255 (Pat)]. A person who by chance hears an admission of a person is a 'chance witness' [*Low Seng Wah v. P.P.*, 1962 Malayan LJ 107 (Ipoh HC)]. The expression 'chance witnesses' is borrowed from countries where every man's home is considered his caste and everyone must have an explanation for his presence elsewhere or in another man's castle. It is a most unsuitable expression in a country whose people are less formal and more casual. To discard the evidence of street hawkers and street-vendors on the ground that they are chance witnesses, even where a murder is committed in a street, is to abandon good sense and take too shallow a view of the evidence [*Rana Pratap v. State of Haryana*, A 1983 SC 680, 682: 1983 Cri LJ 1272]. When a witness is named in the F.I.R. as eye-witness and his evidence is corroborated by another witness, he cannot be considered as a chance witness. [*State of U.P. v. Anil Singh*, A 1988 SC 1998, 2005: 1989 Cri LJ 88].

Merely because there is no compelling reason for a person to be present at the time of occurrence that by itself need not necessarily mean that his evidence has to be rejected [*Kuzhiyaramadiyil Mahadevan v. State*, 1994 Cri LJ 450, 453 (Ker)]. Only on the ground that the witnesses were chance witnesses their version should not be discarded [*Manorama Swaiin v. Giridhari Swaiin*, 1993 Cri LJ 2595, 2596 (Ori)]. When the house of the witness was in the vicinity of the house of occurrence and he had given plausible explanation for being in the house of occurrence at the time of occurrence, he cannot be called a chance witness [*Barkau v. State of U.P.*, 1979 Cri LJ 2954, 2959 (All)]. Where all the three witnesses belonging to the same village gave reasons as to why they were in the town of occurrence they cannot be termed as chance witnesses. Villagers belonging to the same village move together when they visit the town [*Lakhbir Singh v. State of Punjab*, A 1994 SC 1029, 1031 : 1994 Cri LJ 1374].

Where the witness in question actually saw the accused persons assaulting a man who ultimately died of injuries, his testimony was not rejected merely because he was a chance witness [*Walia (G.S.) v. State of Punjab*, 1998 Cri LJ 2524 (SC)].

Child witness.—In a case of abduction and killing of children, the rejection of the testimony of a child witness who twice escaped the abduction attempt, the testimony being also supported by the child's father, was held to be not proper. The court said that it was also not proper to hold that a child of 11 years would not be able to remember the details of what happened three years ago. *State of Maharashtra v. Damu Gopinath Shinde*, 2000 Cri LJ 2301 (SC).

Hostile Witness.—Merely because a witness is declared hostile his evidence cannot be rejected and it is also well settled that when once a prosecution witness is declared hostile his version cannot be treated as the version of the prosecution [*Keshoram v. S*, A 1978 SC 1096]. If any part of the evidence of a hostile witness is found truthful, the court can rely on such part of the evidence [*Ashokan v. State of Kerala*, 1982 Cri LJ 173, 183 (Ker)]. If truth can be taken out from the evidence of a hostile witness, the court is competent to consider it [*Shankarlal v. State of Madhya Pradesh*, 1982 Cri LJ 254, 255: 1981 MPLJ 736 (MP)]. Merely because the eye-witnesses had not supported the prosecution version, the other evidence of the prosecution could not be rejected. If the prosecution succeeds in proving its case through other evidence and by the surrounding circumstances, the eye-witnesses turning

hostile would not demolish the prosecution version, nor can it be said that investigating officer had not acted impartially in investigating the offence and collecting the evidence [*State of M.P. v. Nisar Ahmad*, 1997 Cri LJ 3055, 3057 (MP)]. A portion of the testimony of a hostile witness can be relied upon if the same inspires confidence [*Madhukar Danur Patil v. State of Maharashtra*, 1996 Cri LJ 1062, 1064 (Bom)]. Testimony of the hostile witness is acceptable to the extent to which testimony of such a witness is corroborated by that of a reliable witness [*State of Maharashtra v. Harishchandra Tukaram Awatade*, 1997 Cri LJ 612 (616) (Bom)]. Mere fact that the witness was declared hostile by the prosecution and allowed to be cross-examined does not make him an unreliable witness so as to exclude his evidence from consideration altogether [*Chandrawati v. State*, 1996 Cri LJ 975, 979 (Del)]. If the prosecution succeeds in proving its case through other evidence and by surrounding circumstances, the eye-witnesses turning hostile would not demolish the prosecution version, nor can it be said that investigating officer had not acted impartially in investigating the offence and collecting the evidence [*State of M.P. v. Nisar Ahmad*, 1997 Cri LJ 3055, 3057 (MP)]. When two accused were carrying the severed head of the deceased, it is rather impossible to conceive that anyone could have interfered with this inhuman and ghastly act of theirs. Reaction of a witness in such a situation may not be uniform and one cannot expect the witnesses to behave in a particular manner. In such a situation from a small village it may not be possible to expect any better evidence than the two eye-witnesses who had turned hostile [*Pandappa Hanumappa Hanamar v. State of Karnataka*, 1997 Cri LJ 2493, 2500 (SC)]. Evidence of an eye-witness cannot be rejected on the basis of vague evidence of hostile witness [*Ram Bhukan v. State of U.P.*, A 1994 SC 561, 563 : 1994 Cri LJ 596]. The court could accept part of their evidence [*Ashok Kumar v. State*, 1983 Cri LJ NOC 147 (Delhi) (DB) : (1983) 2 Crimes 70]. Part of the evidence of a hostile witness can be accepted [*Dulal Chandra Ghosh v. The State*, 1988 Cri LJ 1835, 1839 (Cal)]. Merely because a witness is declared hostile does not mean that his entire evidence gets excluded or rendered unworthy of consideration [*State of U.P. v. Chet Ram*, A 1989 SC 1543, 1548: 1989 Cri LJ 1785; *Dhobi Yadav v. State of Bihar*, 1989 Cri LJ NOC 193 : (1989) BBCJ (HC) 422; *Murugan v. State*, 1991 Cri LJ 1680, 1686 (Mad)]. The evidence of an hostile witness cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof [*Khujji v. State of M.P.*, A 1991 SC 1853, 1857; *Alma v. State of M.P.*, 1991 Cri LJ 1791, 1792 (MP)]. When a prosecution witness turned hostile wholesale to the prosecution, his evidence cannot at all be relied on for any purpose and it has to be eschewed out of consideration [*Sait alias Mubarak Sait v. State*, 1989 Cri LJ 2050, 2052 : (1989) 2 Crimes 616].

It is not quite strange that some witnesses do turn hostile but that by itself would not prevent a court from finding an accused guilty if there is otherwise acceptable evidence in support of the prosecution [*Sheikh Zakir v. State of Bihar*, A 1983 SC 911, 913: 1983 Cri LJ 1285]. When there is ample material to conclude that considerable pressure was exerted on the prosecution witnesses to stay away from the witness box, the non-examination of those witnesses cannot affect the probative value of the evidence of other prosecution witnesses [*Allauddin Mian v. Sharif Mian*, A 1989 SC 1456, 1463: 1989 Cri LJ 1466]. An incident took place in broad day light in front of the houses of two eye-witnesses. Even the hostile witness admitted that these two witnesses were present in their houses, so their evidence can be acted upon [*Devendra Singh v. State of U.P.*, 1990 Cri LJ 879, 883: 1989 All LJ 659 (All)]. The mere allegation that two of the three eye-witnesses were not prepared to support the prosecution case and had been won over by the accused will not be sufficient to dispense with their evidence. Opportunity should have been given to the court to assess their evidence and come to the conclusion [*Sahabjan v. State of U.P.*, 1990 Cri LJ 980, 984 (All)]. None of witnesses were treated as hostile in the Trial Court. In

the appeal, the prosecution cannot contend that a particular statement by its own witness is not binding on it [*Neeraj v. State of M.P.*, 1991 Cri LJ 2549, 2554 (MP)]. When the truthful witnesses mention the presence of other witnesses, who turned hostile, at the place of occurrence, the evidence of those hostile witnesses can also be relied on so far as they are consistent with prosecution case [*Alwa v. State of M.P.*, A 1991 SC 1519, 1521]. Statement of witness supporting prosecution case against nephew in committing court cannot be disbelieved simply because he is declared hostile [*Ananta v. S*, A 1979 SC 1433]. Declaration of a witness to be hostile is no ground itself to reject his testimony in toto. His testimony not shaken on material points in cross-examination cannot be brushed aside [*Syad Akbar v. S*, A 1979 SC 1848].

Trap Witness.—There is no rule of law that even if a witness is otherwise reliable and independent, his association in a pre-arranged raid makes him an accomplice or a partisan witness. Conviction is not untenable on the testimony of such witness merely [*Maha v. S*, A 1976 SC 449]. The Judge must warn himself of danger of convicting on uncorroborated testimony of a trap witness. The corroborative evi-dence must be independent and reliable; touch a material issue which implicates the accused [*Adzhar Bin Ahmad v. Public Prosecutor,* (1996) 4 Malayan LJ 85 (Kangar HC)]. A court may well be justified in acting upon the uncorroborated testimony of a trap witness, if it is satisfied from the facts and circumstances that the witness is truthful [*Prakash v. S*, A 1979 SC 400; *Hazarilal v. S*, 1980 SC 873; *Ram Naryan Yadav v. State of U.P.*, 1990 Cri LJ 973, 980 (All); *Jadunath Khatua v. The State*, 1982 Cri LJ 954, 959 (Ori)]. Where material witnesses to the trap make inconsistent statements in their evidence on material particulars, the evidence of such witnesses becomes unreliable [*Gurcharan Singh v. State of Haryana*, 1994 Cri LJ 1710, 1715 (P&H)]. The evidence of a decoy witness if it is trustworthy can be acted upon and even if corroboration is sought for, it could be only for a general way and not the material particulars [*Suseela v. State*, 1982 Cri LJ 702, 705 : 1982 Mad J J (Cri) 22 (Mad)]. Trap witness in a bribery case requires corroboration [*Darshan Singh v. State of Punjab*, 1989 Cri LJ NOC 177: (1989) 95 Punj LR 71 (P&H)]. In a trap case, the panch witness was not known to the complainant earlier and he was not secured by the complainant. His evidence can be accepted [*State of Gujarat v. Monabhai Jethabhai Vaghela*, 1982 Cri LJ 1317, 1322 : (1982) Guj LJ 271 (Guj)]. When the two trap witnesses, one engineer in the telephone department and the other Income-tax Inspector, were kept moving in the company of the police officials from the beginning to end and were acting under the influence of police official they cannot termed as independent witnesses [*Laxmi Narain Mahton v. State of Bihar, 1983* Cri LJ NOC 163 (Pat) : 1983 BBCJ 393]. The court may, depending on the circum-stances of a case, feel safe in accepting the prosecution version on the basis of the oral evidence of the complainant and the police officers even if the trap witnesses turn hostile or are found not to be independent [*State of U.P. v. Dr G.K. Ghosk,* A 1984 SC 1453, 1457: 1983 All LJ 1160]. In the case of prevention of corruption, the signal was given 10 minutes after the money was handed over to the accused and the recovery of money was made 10 minutes later. there was also change of place, Such evidence cannot be accepted [*State v. Varadrajan*, 1985 Cri LJ 1567, 1571 : (1985) Mad LJ (Cri) 73 (Mad)]. In the bribe giver agrees to give bribe reluctantly and under compulsion, he cannot be treated as abettor or as accomplice [*Prafulachandra Somalal Vasani v. State of Gujarat,* 1998 Cri LJ NOC 20 : (1987) 1 Guj LH 364 (Guj). See "S 133" *post* under heading "*Spy*" *Detective, Decoy, Paid Informer, Trap Witness etc.....*"

Witness Making Statement Under S 164 Cr PC.—The evidence of witness cannot be disregarded merely because his statement was recorded under s 164 Cr PC. It is open to the court to accept his evidence because he may feel tied to his previous statement given on oath [*Balakram v. S,* A 1974 SC 2165 (*Ramacharan v. S,* A 1968 SC 1270: 1968, 3 SCR 354 rel on)]. Evidence of any eye-witness cannot be rejected merely on ground that he did not give many details of occurrence in his statement under s. 161 and s. 164 Cr PC [*Govind v. State of M.P.,* A 1994 SC 826, 829: 1994 Cri LJ 938]. Though the statement of eye-witnesses recorded under s. 164 Cr PC should be viewd with some initial distrust but it is not a rule of law and such evidence cannot be discarded in all cases [*Karwas Pal Singh v. State of Haryana,* A 1994 SC 1045, 1046: 1994 Cri LJ 1392].

—Number. —The direct evidence of the witnesses must be tested and weighed in the same manner whatever the numerical strength may be. It can by no means be laid down as a general maxim that the assertion of two witnesses is more convincing to the mind that the assertion of one witness [*Brahmandeo v. R,* 54 IC 241: 1 PLT 161; see *Vadivelu v. S,* A 1957 SC 614: 1957 SCJ 527]. It is not necessary to multiply witnesses. Where evidence of two eye-witnesses were believed non-examination of another person receiving injuries did not cast any doubt [*S v. Hakim,* A 1980 SC 184; *State of Kerala v. V. Kuttappan,* 1982 Cri LJ 1702, 1705 (Ker); *Rameshwar v. State of U.P.,* 1987 Cri LJ 336, 350: 1988 BLJR 720; *Vahula Bhushan v. State of Taiml Nadu,* A 1989 SC 236, 238 : 1989 Cri LJ 799; *Hiralal Swain v. State,* 1989 Cri LJ NOC 66 (Ori)]. The testimony of sole eye witness cannot be relied on when she had told another witness that the assailant was a stranger though in her evidence she stated that she knew the assailant even before the occurrence [*Rambagas v. State of Madhya Pradesh,* 1984 Cri LJ 1068, 1069: (1983) 2 Crimes 422 (1) (MP) (DB)]. The offense was robbery in a running train in the early hours. The testimony of a solitary witness cannot be discarded merely because no the passenger from the compartment was cited as a witness [*Sher Singh v. State,* 1991 Cri LJ 2612, 2614 (Del).] In respect to an incident giving rise to contempt proceedings, presiding officer's solitary oral testimony is sufficient to sustain the version [*Court v. Bansilal,* A 1979 (NOC) 96 FB (P&H), *Vadivelu v. State of U.P.,* 1992 Cri LJ 3107, 3110 (All)] See s. 134, *post.*

—Reference to Time and Distance.—In India where references to time are generally mere approximations, there is a large margin for honest error [*Ebrahimji v. R,* 15 Bom LR 297: 19 IC 328]. Evidence of village folk cannot be taken with an exactitude regarding time and distance [*Sheo Darshan v. State,* A 1971 SC 1794 : 1971 Cri LJ 1306; *Shivaji v. State,* A 1973 SC 2622 : 1973 Cri LJ 1783; *Ram Sagar v. State,* 1994 Cri LJ 589, 593 (All)]. Where the discrepancies between witnesses as to dates is not unnatural, it far from being necessarily a badge of fraud, is an indication of bona fide [*Virayya v. Adenna,* A 1930 PC 18 : 121 IC 205]. Evidence of witnesses in India cannot be disregarded on ground of discrepancies about time and date because they are mostly illiterate [*Bishwanath v. Dulhin,* A 1968 P 481]. Evidence of village witnesses about the time of occurrence of events cannot be judged with mathematical accuracy [*Jagabandhu v. Bhagu,* A 1974 Or 120]. Merely because there is some variance in the testimony of eye-witnesses about the distance from which the accused had fired is by itself not sufficient to throwout the prosecution case [*Ram Sagar v. State,* 1994 Cri LJ 589, 594 (All)].

—Identification Evidence.—Recognition of known persons in bright moon light is not possible from a distance of 55½ feet [*Anant Ram v. State,* 1985 Cri LJ NOC 11 : (1984) 2 Crimes 772 (All) (DB)]. Identification of accused at a distance of 50 cubits on a moonlit night is not probable [*Rama Chandra Jena v. State of Orissa,* 1985 Cri LJ NOC 64: (1984) 2 Crimes 402 (Ori) (DB)]. It would be scientifically impossible

to clearly identify the assailant and the deceased at a distance of about 300 cubits, even though the witness may be a close relation of the accused and the victim [*Arjun Sahu v. State of Orissa*, 1988 Cri LJ 1086, 1088 : (1987) 1 Crimes 678 (Ori) (DB)]. The deceased and the accused are known to the witness. The occurrence was witnessed from a distance of 50 meters and it was a night previous to the full moon day. Such evidence can be accepted [*Sivaraman Divakaran v. State of Kerala*, 1989 Cri LJ 1501, 1504: (1989) 1 Ker LJ 305 (DB)]. When the accused is not known to the witnesses before the occurrence his identification in the court for the first time is valueless [*State of Orissa v. Ramesh Chandra Mahapatra*, 1983 Cri LJ NOC 191 Orissa: (1983) 56 Cut LT 60]. When the accused was not known to the witness before the occurrence, in the absence of test identification parade, the identification of accused in Court for the first time two years after the occurrence is not acceptable [*Ramkishan v. State*, 1989 Cri LJ NOC 93 (Delhi)]. None of the witnesses gave any identifying marks of the dacoits, *viz* stature of the accused or whether they were fat or thin or fair colour or black. The test identification was also held after the lapse of 3½ months, under these circumstances it would be unsafe to convict the accused [*Wakil Singh v. State of Bihar*, A 1981 SC 1392, 1393: 1981 Cri LJ 1014]. Two of the eye-witnesses were injured in the incident and had the opportunity of seeing the accused persons from a very close distance and if there was no sufficient light, they could have been identified by their voice, by gait and by their features, The occurrence had taken place towards the end of February in an open field at about 5.30 p.m. when it would not be so dark as to make identification impossible. So the evidence regarding the identification of the accused is acceptable [*State of U.P. v. Manoharlal*, A 1981 SC 2073: 1981 Cri LJ 1701]. In the absence of cogent evidence that the two eye-witnesses by reason of visibility of the light at the place of occurrence and proximity to the assailants had a clear vision of the action of each one of the accused in order that their features could get impressed in their mind to enable them to recollect the same and identify the assailants even after a long lapse of time, it would be hazardous to draw the inference that the accused are real assailants [*Bollavaram Pedda Narsi Reddy v. State of A.P.*, 1991 Cri LJ 1833, 1836 (SC); *Sidha Dehury v. State*, 1982 Cri LJ 500, 505 : (1981) 52 Cut LT 512; *Purna Chandra Sahu v. State of Orissa*, 1984 Cri LJ 1407, 1409: (1984) 1 Orissa Law Rev 228 (Orissa); *Joginder Singh Gaggi v. State*, 1990 Cri LJ (NOC) 30 (Delhi); *Habal Shaikh v. State*, 1991 Cri LJ 1258, 1264 (Cal)]. When the only eye-witness did not properly identify the accused and the extra-judicial confession could not be accepted, the uncorroborated testimony of the sole eye-witness is not sufficient to convict the accused [*Heamba Brahma v. State of Assam*, A 1982 SC 1595, 1598 : 1983 Cri LJ 149 (SC)]. When the identifying witness was admitted in the hospital for the injuries and when he became fit he was taken for participating in the identification parade, there is no infirmity on account of the delay in holding the identification parade [*Gambhir Singh v. State of Madhya Pradesh*, 1984 Cri LJ 445, 446 : (1983) 2 Crimes 420 (MP) (DB)]. A person who wears a wrist watch also is certainly in a position to identify the wrist watch as worn by him for some period [*Behari Lal v. State*, 1985 Cri LJ 1507, 1510 (Delhi)]. The fact that the accused belong to the neighbouring village, that the witnesses who came to identify the accused had seen him only from behind while escaping, that the witness who had known the accused did not mention his name in the First Information Report and that the identification took place 4 days after the arrest of the accused speak for itself [*Bali Ahir v. State of Bihar*, A 1983 SC 289, 291: 1988 Cri LJ 484]. When there is no positive finding about the identity of the co-accused either in the proceedings or in the judgment, but the finding rests only on presumption, it cannot be held that the statement recorded in the earlier trial and produced under s. 299 against the accused, can be availed of by the prosecution for

implicating the convicting co-accused [*Malkhan Singh v. State of Madhya Pradesh*, 1990 Cri LJ 2763, 2766 (MP)]. Evidence of a witness identifying six culprits while in the F.I.R. he gave the names of only three accused has got to be rejected [*Laxman Mohanty v. State of Orissa*, 1990 Cri LJ 135 (NOC) (Orissa)]. [See s 9, *post, "Identity of anything or person"*].

—**Acquittal**.—In estimating the value of the evidence given by a witness, the elementary principle must not be overlooked that where there has been an acquittal, the acquittal is conclusive and it would be a very dangerous principle to adopt, to regard a judgment of not guilty as not fully establishing the innocence of the person to whom it relates [*Sarojini v. Haridas*, 26 CWN 113; *R v. Lalit Mohan*, 38 C 559: 15 CWN 593: *Kader v. R*, 16 CWN 69; *Goloke v. R*, 42 CWN 129; see *R. v. Plummer*, 1902, 2 KB 339].

—**Personal Knowledge of Judge**.—A judge cannot import knowledge of facts which has come to him from other sources [*Durga Pd v. Ram Dayal*, 38 C 153]. A magistrate is not justified in importing any personal opinion which he might have had occasion to form regarding the personal character, or the general reputation of witness into his decision of the case [*Jai Narain v. R*, 50 IC 171]. See further s 57, *post, "Personal knowledge of judge"* and s 167, *post, "Judge's knowledge of character of witness"*.

—**Other Cases**.—There is no rule of law that a party is bound by the statement of a witness called by him [*Jalaldin v. Nawab*, 42 PLR 765]. A witness brought under arrest being an unwilling witness, his evidence can have little value [*Veeraju v. Venkayya*, A 1960 AP 222]. Where of two documents between the same parties intimately connected with each other, one is found to be false and fraudulent, the evidence of the parties with regard to the other must be approached with great suspicion and subjected to strictest scrutiny [*Md Ali v. Bismilla*; 35 CWN 324: A 1930 PC 255]. When an attempt is made to charge a dead person's estate on the uncorroborated testimony of a litigant in a matter in which if he were alive he might have answered, the evidence ought to be looked at with great care [*Hira Lal v. Rajkumar*, 12 CLJ 470 (*In re Garnett v. Macunlay*, 31 Ch D 1 **folld**); *Rupchand v. Madan Mohan*, A 1960 C 351; *Nanda Krishna v. Bhupendra*, A 1966 C 181]. Where there is a natural will and there is evidence that the deceased intended to make such a will, the mere fact that the attesting witnesses are not men of any status is not sufficient to discredit their testimony [*Waman v. Sarubai*, 80 IC 641 : A 1924 PC 106]. To suggest that in capital cases stronger evidence or a higher degree of certainty is required than other criminal cases is wrong [*Supdt & Rem of Legal Affairs v. Lalit*, 25 CWN 788: 62 IC 578]. As to how evidence as to receiving stolen property is to be examined, see *Shera v. R*, A 1943 L 5 and notes to s 114 *Illus* (a). An anonymous letter is no evidence of its contents [*Ayyamperumal v. R*, A 1925 M 879]. Very little weight can be attached to evidence of a negative character [*Imambandi v. Motasuddi*, 15 CLJ 621 (on appeal 45 C 878: A 1918 PC 11); *Kanwar v. Amarnath*, A 1975 SC 308]. Doing one's duty is not a reason by itself to reject one's evidence [*P P v. Avvaru*, A 1969 AP 278].

A witness coming without summons should not necessarily be disbelieved [*Rahim v. Khurshid*, A 1975 SC 290]. The evidence of village Ramoshi cannot be disregarded on the ground that he would be under police influence [*Shivji v. S*, A 1973 SC 55]. Confession under sec. 164 cannot be equated to a statement mentioned in sec 3 and so it is not evidence [*R Ravindran Nair v. Supdt of Police*, 1981 Cri LJ 1424, 1428 : 1981 Mad LJ (Cri) 448 (Ker)]. Where the accused is alleged to have killed her husband with an axe in the bed room at night, the failure of the investigating officer

to examine her clothes to see if there were any blood stains or the mere absence of blood marks on her clothes is not a circumstance by itself to raise a reasonable doubt [*Mobeni Mingi v. Union Territory of Arunachal Pradesh*, 1982 Cri LJ NOC 39 (Gau)]. There are three sets of circumstantial evidence namely extra-judicial confession, recovery of dead body at the instance of the accused and the strong motive [*Inder Dass v. State of Rajasthan*, 1985 Cri LJ 1416, 1423 (Raj) (DB)]. When the accused is produced at the police station with blood stained knife and he makes a confession, it is a strong circumstance against the accused [*Ramadass v. State*, 1985 Cri LJ NOC 27 (Mad) (DB)]. When the extra-judicial confession does not disclose the name of the victim it is a weak piece of evidence [*Akanman Bora v. State of Assam*, 1988 Cri LJ 573, 576: (1987) 3 Crimes 68 (Gau) (DB); *Lachhu alias Lachman Majhi v. State of Orissa*, 1990 Cri LJ (NOC) 26 (Ori)].

The number injuries of three deceased persons need or need not necessarily be work of multiplicity of hands. Even a single individual can inflict those injuries at three different times on the same night of occurrence [*James v. State of Kerala*, 1995 Cri LJ 55, 60 (Ker)]. Undelivered notice is not irrelevant. The contents of such notice become the best index of sender's intention or his state of mind which is relevant to determine whether he was or was not ready to perform his part of contract notwithstanding the fact the notices had not been delivered [*Nathu Singh v. Jagadish Singh*, A 1992 All 174]. It cannot be laid down as a principle of general application that whenever there is delay in examination of eye-witnesses, suspicion is to be attached. True it is, the eye-witnesses are to get preference over other unimportant witnesses. But if plausible explanation is offered for the delayed examination, the court has to consider it [*Malik Ram Bhoi v. State of Bihar*, 1993 Cri LJ 984, 988 (Ori)]. When a tussle had been going on between the family of the deceased and accused and the members of the family of the deceased had been nurturing grudge against the accused, in such circumstances the evidence of the interested and partisan ocular witnesses, in absence of any testimony emerging from any independent quarters, has to be weighed in golden scales before the same is relied upon [*Karuppiah v. State*, 1993 Cri LJ 1688, 1698 (Mad)]. The villagers are not expected to have correct estimate of time [*Balbir Singh v. State of Punjab*, A 1994 SC 969 : 1994 Cri LJ 1206]. If the prosecution fails to adduce reliable and satisfactory evidence to discharge its burden it cannot fall back upon the evidence adduced by the accused in support of his defence to rest its case solely thereupon [*Jarnail Singh v. State*, A 1993 SC 755 : 1996 Cri LJ 1139]. Mere matching of the blood group in the wearing apparel of the accused and that of the deceased cannot be said to be a conclusive proof against the accused [*Binder Munda v. State*, 1992 Cri LJ 3508, 3510 (Ori)].

The benefit of doubt should be reasonable and due to such evidence of the prosecution that it does not come upto standard of such proof which rules out the innocence of the accused or the defence produced by the accused is highly probable or plausible so that the version of the defence may also be true [*Kanwar Singh v. State of Rajasthan*, 1996 Cri LJ 4054, 4056 (Raj)]. Failure on the part of the investigating officer to point out the place in the site plan from where the eye-witnesses had seen the occurrence, is not material and it cannot be read in evidence being hit by section 162, Cr.P.C. [*Pyara v. State of Rajasthan*, 1997 Cri LJ 1065 (Raj); **distinguishing** *Savia v. State of Rajasthan*, 1985 Cri LR (Raj) 18 and *Jai Singh v. State of Rajasthan*, (1990) 1 Raj LR 671]. When the so called eye-witnesses were found to be not present at the date, time and place of the incident and to have not seen the incident and there was no other corroborative evidence to establish complicity of the accused, it has to be held that the prosecution failed to prove the

charge against the accused [*Rajinder Singh v. State of Punjab*, 1993 Cri LJ 3336, 3341, 3342 (P&H)]. Where the PWs had actually seen the dastardly act of murder of three persons, might have been in a state of shock, grief and mental imbalance without knowing exactly what to do, there could be nothing improbable if they withdrew themselves from the scene and hid themselves in a nearby sugarcane garden out of fear that they might also be killed [*Arjunan v. State*, 1993 Cri LJ 3113, 3128 (Mad)]. Where the occurrence took place on 12-3-1988 but the eye-witnesses were examined on 20-3-1988 and explanation for the delay in examination was that they had left the village and were examined on their return to the village, though there was no evidence that they were actually absent when the matter was investigated by police immediately after the occurrence, the trial court was justified in not relying on the evidence of those eye-witnesses [*Jayabandhu Behera v. Dinabandhu Kobi*, 1993 Cri LJ 2512, 2514 (Ori)].

As to the question whether the injuries caused were the result of a motor accident or not, even though the doctor opined that the injuries could as well have been caused in a motor accident, as the fractures on the ribs had no corresponding external injuries which should have been in case of motor accident and as only minor damage was noticed on the scooter, the theory of motor accident resulting in the injuries has to be ruled out [*Teja Singh v. State of Punjab*, A 1997 SC 921 : 1997 Cri LJ 1175]. The speeches by the Ministers or Members of the Assembly are inadmissible in court [*S.R. Mehrotra v. State of H.P.*, A 1997 SC 51, 60 (HP)]. The question as to which party is the aggresser in cases of bilateral clash cannot be determined on the basis of number of injuries found on the side of the complainant or the accused person. For recording a finding on this question, all the evidence adduced on behalf of the parties and relevant circumstances have to be taken into consideration. The real onus is on the prosecution party to prove its case, including the manner of occurrence beyond all reasonable doubts, the accused has only to raise a doubt in the mind of the court or to satisfy the court that the defence version disclosed by the accused was a probable version of the occurrence [*Ram Swaroop v. State of Haryana*, 1993 Cri LJ 3540, 3543 (SC)]. FIR lodged spontaneously and promptly rules out the element of consultations and confabulations [*Malook Singh v. State of Punjab*, 1996 Cri LJ 3423, 3425 (P&H)].

It is well settled that where a person on whom fraud is committed is in a position to discover the truth by due diligence, fraud is not proved. It is neither a case of *suggestio falsi*, or *suppressio veri* [*Shri Krishan v. Kurukshetra University*, A 1976 SC 376]. Mere publication of a report of a meeting in a local newspaper is not sufficient corroboration of testimony of a witness about the impugned statement by a speaker at the meeting [*Baburao v. Govind*, A 1974 SC 405]. Where recoveries of weapons at the instance of the accused were attested by police officers and inde-pendent search witnesses the evidentiary value of recoveries is not affected by examining only the police officers [*Dalbir v. S*, A 1977 SC 472]. Where land and groove markings on the bullets are compared by Fire Arms Expert under a micro-scope his evidence cannot be rejected simply because he did not take photographs [*Ramanathan v. S*, A 1978 SC 1204]. Reliance cannot be placed on evidence of photographer of accident when negatives were not produced and developer of negatives was not examined [*Hira v. Bhaba*, A 1977 Gau 31 FB]. The testimony of a witness convicted in a murder case 43 years ago could not be discarded [*Arumuga v. S*, A 1976 SC 2588, or that the witness was once convicted under sec 396 IPC or for possession of opium; *State of U.P. v. Kalyan Singh*, 1984 Cri LJ NOC 155 : (1984) 1 Crimes 666 (All) (DB), or that the witness is a liquor contractor; *Joginder Singh v. State of Punjab*, 1982 Cri LJ NOC 19: 1981 Chand

Cri C 236 (P&H), or that she is a dealer in arrack; *State of Kerala v. Naduvettil Viswanathan*, 1991 Cri LJ 1501, 1503, or because he is not a man of character; *Dalbir Singh v. State of Punjab*, A 1987 SC 1328, 1332: 1987 Cri LJ 1065]. Persons with questionable antecedents are not necessarily untruthful witnesses [*S v. Wassan, A 1981 SC 697*]. In respect of the offence of criminal breach of trust, a Government servant can't be convicted merely on the basis of a private document of another Government servant whose conduct is not flawless [*Himadri Adhikari v. State*, (1986) Cri LJ 337, 340 (DB) (Cal)].

Merely because the accused have a criminal background, in the absence of legal proof they cannot be held guilty. Neither freak inferences nor suspicion can take the place of legal proof [*Dhansar Patra v. State of Orissa*, 1983 Cri LT 130, 133 (Orissa) (DB) : (1982) 54 Cut LT 250]. Absconding by itself is not conclusive either of guilt or of guilty conscience [*Rahman v. S*, A 1972 SC 110] since it could be owing to the apprehension of false implication; *Baun Sahu v. State of Orissa*, 1983 Cri LJ NOC 114 (Orissa) (DB)]. When after the occurrence, the accused concealed themselves away from their normal residence it shows guilty mind [*Paramjit Singh v. The State*, 1983 Cri LJ NOC 108 (Delhi) (DB) : (1983) 23 DLT 338]. The evidence of a prose-cution witness cannot be rejected merely on the ground that he was convicted in a criminal case where nothing is brought in cross-examination to show his conviction [*Varghese v. S*, A 1977 SC 701]. Slip containing entries seized in search of premises being part of things discovered during search can be looked into as evidence if entries therein are carried out into account books seized along with them [*Girdhari v. Asst Collr*, A 1971 SC 28]. Where there is overwhelming evidence led by the accused in a corruption case showing that his father-in-law was a man of affluent circumstances who had left lot of jewels, cash and properties to be shared by his two daughters, there is certainly a preponderance of probability that the property found in the possession of the accused did not belong to him but belonged to his father-in-law [*State of Maharashtra v. Wasudeo Ramachandra Kaidalwar*, A 1981 SC 1186, 1190 (DB) : 1981 Cri LJ 884]. Where the witnesses are not interested and where there is no motive for false implication they must be strong grounds to disbelieve them [*Abdul Razaq v. Nanhey*, A 1984 SC 452, 454 : 1984 Cri LJ 185]. When all the prosecution witnesses are independent persons there cannot be any reason for them to make a wrong statement [*Raya Ram v. State (Delhi) Administration*, A 1988 SC 615, 616 : 1988 Cri LJ 865]. The evidence of the independent witness who has no animus against the accused, that he recorded the statement of the deceased is entitled to great weight [*Nanahau Ram v. State of M.P.*, A 1988 SC 912, 914 : 1988 Cri LJ 936]. Regarding the evidence about the date of birth, the Headmaster of the school gave evidence about the entry in the School Register. When no discrepency was elicited in his evidence and no motive was attributed to him, his evidence can be safely acted upon [*Vijaya Kari v. K Swarnalath*, A 1983 AP 181, 187]. The entry regarding the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of material on which the age was recorded. If it is made on the basis of information given by parents, the entry would have evidentiary value but if it is given by a stranger or someone else who had no special means of knowledge of the date of birth, such an entry will have no evi-dentiary value [*Biradmad Sanghvi v. Anand Purohit*, A 1988 SC 1796, 1807]. The description of age in the heading of the deposition cannot be considered to be an authentic statement of age [*Jata Swain v. Natabar Das*, A 1984 Orissa 26, 28]. An accused person is not to prove his case beyond reasonable doubt and he is not to prove his case with the same strictness and rigour as the prosecution is required to prove a criminal charge [*Sadasiva Tena v. State*, 1983

Cri LJ 521, 526 (Orissa)]. If the accused does not confess and seeks to explain his conduct pleading the right of self-defence, he cannot be convicted on that plea alone [*State of Orissa v. Chakradhar Sahu*, 1983 Cri LJ 532, 535 (Orissa) (DB)]. The statement of a co-accused is not substantive piece of evidence. A charge could not be framed on the basis of such a statement [*Om Prakash Bakshi v. State*, 1989 Cri LJ 1207, 1208 (Cal)]. The accused did not give any plausible explanation as to in what situation he was driving the car in which 10 bladders containing illicit liquor were found. There could be no other conclusion except that he was carrying the illicit liquor in his own car [*Ranjodh Singh v. State of Punjab*, 1989 Cri LJ 1993, 1995 (P&H)].

In a murder trial where the accused pleads self-defence, surer circumstances are better evidence than the statements of eye-witnesses for eye-witnesses may lie but circumstances will never lie [*Bhimsen v. The State*, 1982 Cri LJ NOC 201 : 1982 Srinagar LJ 256 (J&K)]. A private medical practioner issued wound certificate on the basis of x-ray when the names of the injured is written on the cover containing x-ray, absence of names on the x-ray itself will not make it unbelievable [*Gadireddi Sriranchandra Reddy v. State of Andhra Pradesh*, 1982 Cri LJ NOC 204 (AP)]. A large number of people collected at the spot and some of them were not related either to the victim or the deceased. Non-examination of such witnesses is of considerable importance and significance [*Jugal Kishore Laha v. State*, 1984 Cri LJ 360, 365 (Calcutta) (DB)]. The plea of *alibi* can succeed only if it is shown that the accused was so far away at the relevant time that he could not be present at the place where the crime was committed [*Keshab Choudhary v. State of Assam*, 1987 Cri LJ 1742, 1747 (Gau) (DB)]. If the prosecution suppressed the genesis and the origin of the occurrence, the accused is entitled to benefit of doubt [*Hirdey Ram v. State of U.P.*, 1990 Cri LJ (NOC) 51 (All)]. When the independent witness mentioned the names of some of the accused as being mentioned as the assailants while the beating was still in progress, the information conveyed to the witness is admissible as part of the *res gestae* [*Badrudin Karpude v. State of Maharashtra*, 1981 SC 1223, 1226 : 1981 Cri LJ 729]. To implicate a person merely because he is seen running away from the site of the place of occurrence without anything more would be very dangerous pro-position [*Haren Kalita v. State of Assam*, 1981 Cri LJ 1110, 1114 (Gauhati)]. Damaging statements cannot be got rid of merely by stating that they were slips of the tongue [*Mohd Yunus v. Nabi Hussain*, A 1982 Cal 488, 491]. Being summoned for breach of peace is not such a thing as to in any manner tarnish either the image of the veracity of a witness [*Rajinder Kumar Sood v. The State of Punjab*, 1983 Cri LJ 1338, 1342 : ILR (1983) 2 P&H 318]. There is no presumption of perjury against the oral testimony. But before acting upon such testimony its credibility should be tested both intrinsically and extrinsically [*Poosaram v. State of Rajasthan*, 1984 Cri LJ 1848, 1852 : (1984) 1 Cri LJ 352 (Raj)]. A letter written by a witness to the Superintendent of Police after the investigation in the case had started would not at all be admissible in evidence [*Vinod Chaturvedi v. State of M.P.*, A 1984 SC 911, 913 : 1984 Cri LJ 814]. If an expert is to be contradicted by a passage from a book on the subject, that particular passage should be put to him during the cross-examination and he should be asked to explain it [*Krishan Lal v. M.C.D.*, 1985 Cri LJ 285, 291 : 1984 Chand Cri (HC) 531 (Del)]. It is not uncommon for person when they see a ghastly and dastradly murder being committed in their presence that they almost lose their sense of balance and remain dumb-founded until they are able to compose themselves [*Narayan Singh v. State of M.P.*, A 1985 SC 1678, 1680 : 1985 Cri LJ 1862].

In an accident case there was pleading in the written statement that the deceased jumped out of the bus. In such a case no amount of evidence can be looked into on a plea which has not been pleaded [*Mahipalpur Co-op. Society Ltd. v. Smt. Prabhati*, A 1986 Del 94, 97 : 1986 Raj LR 102]. Since the rough notes constitute the first recorded entry of the alleged inflammatory speech it is an important document and in the absence of it, the fair report cannot be given unreserved acceptance [*Balbir Singh v. State of Haryana*, A 1987 SC 1053, 1056 : 1987 Cri LJ 853]. The mere fact that one of the accused was not connected with the dispute between the victim and the other accused is not sufficient to hold that he could not have formed a common intention with the other when he went with the other armed [*Tellu v. State*, 1988 Cri LJ 1062, 1069 : (1987) 2 Reports 522 (Del) (DB)]. Though a particular incidence given in the evidence did not find a place in the pleadings, if it corroborates the opponent's version, it can be considered [*Kiran Mandal v. Smt Mohini Mandal*, A 1989 P&H 310, 314 (DB)]. The police papers filed along with the chalan and sent to the Court of sessions when the case is committed fall within the ambit of documents produced for the inspection of the Court [*Dalp Singh v. State of Rajasthan*, 1989 Cri LJ 600, 608 : 1988 2 Raj LR 207 (FB)]. The practice of drawing up a common set of questions against several accused in a case of joint trial is deprecated [*State of M.P. v. Ramprakash*, 1989 Cri LJ 1585, 1590 (MP)]. When prosecution wanted a person to be arrayed as an accused after the evidence of two prosecution witnesses were recorded, the right of that person to cross-examination would flow only after the witnesses are 'reheard' since the proceedings have to commence 'afresh' as against him [*Ram Niwas v. State of U.P.*, 1990 Cri LJ 460, 463 (All) : 1989 All LJ 72]. A body corporate cannot make oral statements as contemplated by sec 3 [*Godrej Soap Ltd. v. State*, 1991 Cri LJ 828, 831 (Cal)]. Police report cannot be a piece of evidence since it is not tested on the anvil of cross-examination [*Jagdamba Prasad Tiwari v. State of M.P.*, 1991 Cri LJ 1883, 1887 (All)]. Once it is accepted that the eye-witness had slept on the terrace and had sustained injuries in the incident, her evidence regarding the identity of the accused who was quite well known to her cannot be doubted [*State of A.P. v. Dr. M.V. Ramana Reddy*, A 1991 SC 1938, 1947].

When the investigation did not proceed in the desired lines initially only after the C.I.D. took up investigation and so there was delay of 2½ months in recording the statement of witnesses, the testimony of that witness could not be rejected [*Ganesh v. State of Maharashtra*, 1992 Cri LJ 1545, 1550 (SC)]. If the Doctor who conducted autopsy is not able to say how the deceased died, it does not mean that the court, on that score, becomes helpless and the court can come to its own conclusion about the cause of death on other circumstantial evidence [*State of Kerala v. Mani alias Chandran*, 1992 Cri LJ 1682, 1683 (Ker)]. Mere recovery does not establish the guilt of the accused, when there is no other clinching evidence particularly about the presence of the accused in the house of the deceased when the occurrence took place [*Bahuda v. State of Rajasthan*, A 1992 SC 2091, 2093].

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

Illustrations

(*a*) *A* is accused of the murder of *B* by beating him. Whatever was said or done by *A* or *B* or the by-standers at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact.

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

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

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

SYNOPSIS

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COMMENTARY

Principle and Scope.—It has been seen that s 5 lays down the broad rule that evidence may be given of (*i*) *facts in issue* and (*ii*) *relevant facts* and of no others. Under the definition of the word 'relevant' in s 3, 'one fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of the Act relating to the relevancy of facts.' These particular ways of connection which the law regards as relevancy have been described in ss 6-55 which deal with relevant facts. Facts which are not themselves in issue may affect the probability of the existence of facts in issue and be used as the foundation of

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1. Subs. for "Queen" by A.O., 1950. In Pakistan the word "Pakistan" subs. for "Queen" by Ordinance 1 of 1961.

inferences respecting them; such facts are described in the Act as relevant facts [Steph Intro p 13]. In order that a fact may be declared relevant to the issue, it must be connected in any of the ways described in ss 6-55 unless its relevancy falls within the provision of any other statute. Stephen claims to have stated in these sections what kind of facts are relevant to the facts under enquiry as being sufficiently connected with the latter to afford ground for an inference as to their existence or non-existence and ss 5-11 are regarded by him original in this direction.

Facts relevant to the issue have been arranged in the Act in the following manner:—

(*1*) Things connected with the facts in issue as part of the same transaction, occasion, cause, effect, motive, conduct, &c, &c (ss 6-16).

(*2*) Things said about it, *viz*, admissions, confessions (ss 17-31).

(*3*) Statements by persons who cannot be called as witnesses (ss 32-33).

(*4*) Statements under special circumstances (ss 34-39).

(*5*) Things decreed in courts, *viz*, judgments in other cases (ss 40-44).

(*6*) Opinions about it (ss 45-51).

(*7*) Character and reputation of parties concerned (ss 52-55).

—Facts Not in Issue Connected With a Fact in Issue.—This section and ss7, 8, 9 deal with the relevancy of facts, *ie*, the facts which are relevant to the fact in issue [*ante s 3, "Facts in issue and relevancy"*]. They describe the various ways in which facts though not in issue are so related to each other as to form components of the principal fact. There are facts which are so closely or inseparably connected with the fact in issue that they may be said to form part of the same transaction. A transaction may constitute a single incident occupying a few moments or it may be spread over a variety of acts, declarations, &c, occupying a much longer time and occurring on different occasions. They may also occur at the same place or at different places. All these constituent incidents, which though not strictly constituting a fact in issue, accompany and tend to explain or qualify the fact in issue. They form a chain as it were encircling the fact in issue. All these facts are relevant to the fact in issue and therefore admissible in evidence. They are evidentiary facts which render the existence or non-existence of a fact in issue highly probable. It is important to bear in mind that what is admissible under s 6 are facts which are connected with the fact in issue as "*part of the transaction*" under investigation. In order that different acts may consitute the same transaction they must be connected by proximity of time, unity or proximity of place, continuity of action and community of purpose or design [see *Amritalal v. R*, 42 C 957]. Whether the connection is sufficient to make a fact or facts part of the transaction or is too remote must always depend on the circumstances of each case.

The rule formulated in s. 6 is expounded and Illustrated in ss 7, 8, 9, and they should be read together. Relevancy has been described in ss 6-11 and Stephen says that ss 6-11 "are by far the most important and original part of the Act as they affirm positively what facts may be proved, whereas the English law assumes this to be known, and merely declares negatively that certain facts shall not be proved".

There are many incidents, however, which, though not strictly constituting a fact in issue, may yet be regarded as forming a part of it, in the sense that they closely accompany and explain that fact. In testifying to the matters in issue, therefore, witnesses must state them not in their barest possible form, but with a reasonable

fitness of detail and circumstance. These constituents or accompanying incidents are said to be admissible as forming part of the *res gestae*. When they consist of declarations accompanying an act they are subject to three qualifications: (*1*) they must be contemporaneous or almost contemporaneous with the fact in issue and must not be at such an interval as to allow of fabrication or to reduce them to the mere narrative of a past event, though this is subject to apparent exceptions in the case of continuing facts; (*2*) they must relate to and explain the act they accompany, and not independent facts prior or subsequent thereto; and (*3*) though admissible to explain, they are not always taken as proof of the truth of the matters stated, that is, as hearsay [Hals, 3rd Ed, Vol 15 Para 509, p 280].

"If facts form part of the transaction which is the subject of enquiry, mainfestly, evidence of them ought not to be excluded. The point for decision will always be whether they do form part or are too remote to be considered really part of the transaction before the court. Thus in illustration (*a*) it will always be for the judge to decide whether what was said or done by the by-standers before or after the beating was within so short a time as to form part of the transaction. The exclamations of by-standers have been admitted when *immediate*, for they then form part of the *res gestae*. Were they admitted when made after the accused had fled, I apprehend that the court should exclude them as what was formerly called *hearsay or res inter alios*. In *Hollingham v. Head*, 4 CB NS 388, it was pointed out that where a sufficient connecting link can be established between *factum probandum* and *factum probans*, the latter ought to be received in evidence; *Gibson v. Hunter*, 2 H B1 288 is an instructive case on this point" [Nort pp 101-102].

Facts which may be proved, as part of *res gestae*, must be facts other than those in issue. These facts must form part of that very transaction and be thus connected with the facts in issue [*Thakkar Dass v. State of H.P.*, 1992 Cal LJ 2415, 2418 (HP)].

—*Res gestae*.—The subject matter of ss 6, 7, 8, 9 and also of s 14 are treated in English and American books under the head of *Res gestae*. It is necessary to have a clear idea of the term which is frequently found in all books on Evidence and is freely used in judgments. Acts, declarations and incidents accompanying or explaining the transaction or facts in issue or which themselves constitute the facts or transaction in issue are considered as part of the *res gestae* and admitted as original evidence and not hearsay. Thus the exclamations, statements and complaints of an injured party or the complaint of a raped woman [see s 8 *illus* (*j*)] immediately before, during or after the occurrence are relevant. These spontaneous declarations accompanying an act are sometimes called "verbal acts" [see Greenleaf, s 108 and Wig s 1768, s 1772 *et seq*].

The principle of law embodied in Section 6 of the Evidence Act is usually known as the rule of *res gestae* recognised in English law. The essence of the doctrine is that a fact which, though not in issue, is so connected with the fact in issue "as to form part of the same transaction" becomes relevant by itself. This rule is, roughly speaking an exception to the general rule that hearsay evidence is not admissible. The rationale in making certain statement on fact admissible under Section 6 of the Evidence Act is on account of the spontaneity and immediacy of such statement or fact in relation to the fact in issue. But, it is necessary that such fact or statement must be part of the same transaction. In other words, such statement must have been made contemporaneous with the acts which constitute the offence or atleast immediately thereafter. But if there was an interval, however slight it may be, which was sufficient enough for fabrication then the statement is not part of *res gestae* [*Gentela Vijayavardan Rao v. State of A.P.*, 1996 SC 2791 : 1996 Cri LJ 4151, 4154].

In *R. v. Lillyman*, (1896) 2 QB 167, a statement made by a raped woman after the ravishment was held to be not part of the *res gestae* on account of some interval of time lapsing between making the statement and the act of rape. Privy Council while considering the extent upto which this rule of *res gestae* can be allowed as an exemption to the inhibition against hearsay evidence, has observed in *Teper v. Reoinam*, (1952) 2 All ER 447, thus:

> "The rule that in a criminal trial hearsay evidence is admissible if it forms part of the *res gestae* is based on the propositions that the human utterance is both a fact and a means of communication and that human action may be so interwoven with words that the significance of the action cannot be understood without the correlative words and the dissociation of the words from the action would impede the discovery of the truth. I is essential that the words sought to be proved by hearsay should be, if not absolutely contemporaneous with the action or event, at least so clearly associated with it that they are part of the thing being done, and so an item or part of the real evidence and not merely a reported statement."

Section 6 enacts the law that acts, declarations and incidents which constitute or accompany and explain the facts or transaction in issue, are admissible for or against either party as forming parts of the *res gestae*. This section requires that the statements sought to be admitted must have been made contemporaneously with the act or immediately after it and not at such interval of time as to allow any fabrication or to reduce the statement to a mere narative of past events [*Om Singh v. State of Rajasthan*, 1997 Cri LJ 2419 (Raj)].

These declarations in order that they may be admissible as *res gestae*, should be contemporaneous or almost contemporaneous with the transaction in issue, *ie* the interval should not be such as to give time or opportunity for fabrication and they should not amount to a mere narrative of a past occurrence. "The declarations are admitted when they appear to have been made under the immediate influence of some principal transaction, relevant to the issue, and are so connected with it as to characterize or explain it. It should appear that they were made without premeditation or artifice, and without a view to the consequences; that they are the spontaneous utterances, the natural result of the act they characterize or elucidate" [Jones Ev Civil, s 344: see *Noor Md v Imtiaz*, A 1940 O 130]. "The declarations must be calculated to unfold the nature and quality of the facts which they are intended to explain; they must so harmonise with those facts as to form one transaction. There must be a transaction of which they are considered a part; they must be concomitant with the principal act, and so connected with it as to be regarded as the result and consequence of co-existing motives" [Jones, s 348 citing *People v. Vernon*, 35 Cal 49 and other American cases]. These accompanying facts and constituent incidents, which reveal the true nature of the fact in issue and disclose the motives of the parties or establish their connection with the fact under inquiry, are admitted as *res gestae*. The history of the term *res gestae* was traced by PROF THAYER in 15 Am Law Review, 5, 81 (see Wig s 1767).

Declarations that do not satisfy this test are rejected as hearsay. *Res gestae* is an ambiguous and elastic expression and as Phipson says "led to confusion and gave rise to at least four conflicting conceptions, *eg*, *(i)* one which applies the term *res gestae* to the main fact in relation to its constitutent details; *(ii)* one which applies it to the details of such fact merely; *(iii)* one which applies it to the '*surrounding circumstances*' of some central fact, called, in contradistinction, the principal fact; and *(iv)* one which applies it to the total whole composed of both principal fact and

surrounding circumstances" [Phip, 8th Ed p 51]. For an elaborate discussion on the topic of *res gestae*, see Wig ss 1766-1769; 1754 *et seq*. On account of the ambiguity of the expression and the various unwarranted uses to which it has been put, Wigmore considers the retention of the term *res gestae* as "not only entirely useless but even positively harmful". "It is useless, because every rule of Evidence to which it has ever been applied exists as a part of some other well-established principle and can be explained in the terms of that principle. It is harmful, because by its ambiguity it invites the confusion of one rule with another and thus creates uncertainty as to the limitations of both. It ought therefore wholly to be repudiated, as a vicious element in our legal pharaseology. No rule of Evidence can be created or applied by the mere muttering of a shibboleth. There are words enough to describe the rule of Evidence. Even if there were no accepted name for one or another doctrine, any name would be preferable to an empty phrase so encouraging to looseness of thinking and uncertainty of decision". [Wig s 1767].

The facts involved in the determination of the issue are sometimes called the *res gestae*. Facts which form part of the *res gestae*, and are consequently provable as facts relevant to the issue, include acts, declarations, and incidents which themselves constitute, or accompany and explain, the facts or transaction in issue. Facts which explain but do not accompany the facts or transaction in issue are part of the *res gestae*. Care must be taken that the facts sought to be proved as part of the *res gestae* are not in reality what is known as "*res inter alios actae*" [Hals, 3rd Ed, Vol 15, para 480, p 263].

"In America an attempted definition of *res gestae* is that it consists of 'the circumstances, facts and declarations' which grow out of the main fact, are contemporaneous with it, and serve to Illustrate its character [*Pinney v Jones*, 1894, 42 Am SR 209]. Perhaps the best general idea of what is meant by *res gestae* is that this expression includes everything that may be fairly considered an incident of the event under consideration" [Tay s 583]. Strictly speaking *res gestae* means and includes the facts which are directly involved in the determination of the main fact in issue. In another American case [*Lund v. Inhabitants &c.* 9 Cush (Mass) 36, cited in Jones Ev s 358] the rule of *res gestae* has been explained thus:—

> "When the act of a party may be given in evidence, his declarations made at the time are admissible, when they are calculated to elucidate and explain the character and quality of the fact, so connected with it as to consititute one transaction, deriving its credit from the act itself. There must be a main or principal fact or transaction; and only such declarations are admissible which grow out of the principal transaction and serve to Illustrate its character, and are contemporary with, and derive some degree of credit from it. The main transaction is not necessarily confined to a particular point of time, but may extend over a long or shorter period, according to the nature and character of the transaction".

The framer of the Evidence Act has attempted to Illustrate and embody this rule as to *res gestae* in ss 6, 7, 8, 9 and 14. Read as a whole they give a fair and consistent idea of the principle of *res gestae*. A fuller discussion will be found in the commentary under each of these sections. Thus, the statements of the by-standers are admissible as part of the transaction [*v. illus (a)* to s 6]. The statement of law in s 6 is usually known as the rule of *res gestae*, the essence of which doctrine is that the facts which though are not in issue are so connected with the fact in issue as to form part of the same transaction and thereby become relevant like the fact in issue [*Babulal v. W I T Ltd*, A 1957 C 709]. S 6 and the succeeding sections embody the rule com-

monly known as *res gestae*. Acts or declarations accompanying or explaining the transaction or the facts in issue are treated as part of the *res gestae* and admitted as evidence. They are roughly speaking exceptions to the Hearsay rule. The obvious ground of admission of the evidence in *Illus.* (*a*) is the spontancity and immediacy of the act or declaration in question. The facts deposed must form part of the transaction. The statement sought to be admitted must have been made contemporaneously with the act or immediately after it and not at such interval as to allow fabrication or to reduce the statement to a mere narrative of past events [*Chhotka v. S*, A 1958 C 482].

Oridinarily such statements are hearsay, but in proper cases they become relevant by the rule of *res gestae* as an exception to the Hearsay rule. The principle has been thus explained by LORD NORMAND in *Teper v. Reginam*, 1952, 2 All ER 447, 449: 1952 AC 480:—

> "Neverthless the rule (Hearsay) admits of certain carefully safe-guarded and limited exceptions, one of which is that the words may be proved when they form part of the *res gestae*..... It appears to rest ultimately on two propositions—that human utterence is both a fact and a means of communication, and that human action may be so interwoven with words that the significance of the action cannot be understood without the correlative words and the dissociation of the words from the action would impede the discovery of truth".

Illus (*a*) should be taken in conjunction with *illus* (*e*) and (*f*). On the trial of Lord George Gordon for treason, the cries of the mob which accompanied the accused were admitted for showing that his intentions were unlawful and treasonable [*v. s 9, illus* (*f*)]. *Illus* (*b*) to s 6 shows how acts though done in distant places or at different times may form part of the transaction. In illustration of the section Stephen refers to *Jones v Williams*, 2 M & W 326 cited under s 11 *post*. When it is necessary to show a person's state of mind, *eg*, motive and intention or condition of health, such person's delarations are received when they are spontaneous and undesigned and are contemporaneous with the facts they tend to explain or *illus*trate [see also s 14]. Evidence of similar facts not strictly constituting the principal fact in issue, but closely connected with and explanatory of it may also be received as part of the transaction or as a material incident of the transaction [*see post*: *"Similar Facts in Distinct Offences at Distant Places &c"*, and also ss 14 and 15]. The first information report, putting aside wholly the question of its use under s 145 or s 155 if proved, may be of value as one of *res gestae* [*Mahla v. R*, A 1931 L 38; *Azimaddy v. R*, 54 C 237 : A 1927 C 17].

[*Ref Step Dig Art 3; Steph Intro p 68 et seq; Phipson, 8th Ed, pp 51-80; Tay ss 326, 583-589; Wigmore, ss 1745-84; Jones, ss 344-348; Chamberlayne, H B s 838 et seq; Hals, 3rd Ed, Vol 15, paras 480, 509; Vol 10, para 816*].

Facts Forming "Part of the Same Transaction".—Referring to this section Cunningham says: This and the following sections deal with circumstantial or indirect evidence and an attempt is made in them to define the limits of such evidence by describing the connection which must exist between the fact in issue and the fact put forward in proof of it. The sections are not mutually exclusive. Rather it may be said that the propositions laid down in s 6 is illustrated and explained by the 7th, 8th and the 9th sections. A transaction, as the term used in this section, is defined by Sir James Stephen, "as a group of facts so connected together as to be referred to by a single name, as a crime, a contract, a wrong or any other subject of enquiry which may be in issue". The same expression is used in English cases, for

instance, in *R v. Ellis*, 6 B & C 145, where the prisoner was charged with stealing six marked shillings from a till and evidence was tendered of the taking of other money at the same time, it was held that the evidence was admissible on the principle that the several acts of the prisoner in taking the money were parts of the entire transaction. In each case the judge must decide according to the circumstances, drawing the line between the facts which are so connected with the fact in issue as to be part of the same transaction and facts which are beyond that limit. No precise limits can be prescribed. In a simple case the transaction lies within narrow limits of time; in other case it may be spread over a long period [Cunn pp 17-18]. (*See post: "Similar Facts in Distinct Offences at Distant Places &c"*).

To form a particular statement as a part of the same transaction, utterances must be simultaneous with the incident or soon after it so as to make it reasonably certain that the speaker is still under stress of excitement in respect of the transaction in question. In absence of a finding as to whether the declaration by the accused to have killed the deceased was either of the time of commission of the crime or immediately thereafter so as to form the same transaction, such utterances by the accused cannot be considered as relevant under section 6 [*Jadumani Khanda v. State*, 1993 Cri LJ 2701, 2704 (Ori). See also *Hadu v. State*, A 1951 Ori 53]. When the sister of the witness warned her brother to run away as her husband had put fire to her, these words to the witness, who was an eye-witness, are more in the nature of forming part of the same transaction and cause and effect of the fact in issue and thus covered by sections 6 and 7 [*Radhey Shyam v. State of U.P.*, 1993 Cri LJ 3709, 3713 (All)]. Where the accused made a statement to the deceased's brother relating to the motive and commission of the offence after half an hour of the incident, it cannot be said that there was a long interval so as to give an opportunity for any fabrication and therefore, it was admissible under section 6 [*Venkatesan v. State*, 1997 Cri LJ 3854 (Mad)]. The statements pleading for mercy and praying to be let off o the plea of it being his first ever mistake, being statement of the accused made so shortly after the shrieks of the victim and her murder, as to form part of the same transaction, are relevant facts under section 6 and provide tangible and reliable evidence indicating that the accused and none else was responsible for the rape and murder of the victim [*Vinod v. State*, 1994 Cri LJ 2360, 2368 (All)]. Statement of the witness that immediately after the incident the accused was standing at his house with a knife and a rod in his hand was held to be extremely improbable. Such a conduct on the part of the accused can only be compatible with his anxiety to be recognised by the witnesses and to create evidence against himself. This is not normal human conduct [*Subhash Dhondiba Pandit v. State of Maharashtra*, 1996 Cri LJ 4194, 4196 (Bom)].

—Declarations Accompanying Acts Must be Substantially Contemporaneous With the Fact.—The rule of admissibility contained in s 6 can be best understood from Stephen's definition of the term 'transaction' (see para above). The law is well-settled. The rule is sometimes put in this way, that a party is not permitted to make evidence for himself. That law applies to civil cases as well as to criminal cases [*R v. Roberts infra*]. Every fact which is part of the same transaction as the facts in issue, is deemed to be relevant to the facts in issue, although it may not be actually in issue, and although if it were not part of the same transaction it might be excluded as hearsay. Whether any particular fact is or is not part of the same transaction as the facts in issue, is a question of law upon which no principle has been stated by authority and on which single judges have given different decisions [*Chain Mahto v. R*, 11 CWN 266, 270].

Statement of wife "immediate upon the hurt received and before she had time to devise anything to her own advantage" was held admissible [*Thompson v. Trevanion*,

1693. Skin, 402]. Statement by a victim shortly after he sustained injuries that the accused inflicted them is admissible under s 6 [*Krishnaram v. S*, A 1964 As 53]. In an action for injury to a passenger against Tramway Company, remark by a fellow-passenger to a conductor, a few minutes after the collision: "The driver ought to be reported", and the conductor's reply, "He has already been reported, for he has been off the line five or six times to-day", was rejected, the transaction being over, and the remark referring not to the *res*, but to the past acts of driver [*Agassiz v. London Tramways Co*, 1872, 21 WR 199]. A written statement made by the driver of a vehicle after a collision with another, is not part of the *res gestae*, i.e, the collision [*Trustin v. Arnold & Sons* 1915, 84 LJKB 2214; see also *Holmes v. Newman*, 1931, 2 Ch 112]. In a charge of murder, exclamation of deceased, while rushing with the throat cut, out of a house entered by prisoner a minute or two before : "Oh aunt see what Bedingfield has done to me", was rejected, the transaction being over [*R. v. Bedingfield*, 1879, 14 Cox CC 341; see also *R. v. Goddard*, 1882, 15 Cox CC 7 : *Gilbey v Great Western Rly Co*, 1910, 102 LT 202 AC]. In *R. v. Bedingfield*, *sup*, COCKBURN, CJ, is generally considered to have applied the rule too strictly; on the other hand the *dictum* of LORD DENHAM, CJ, in *Rough v. G. W. Rly Co*, 1841, 1 QB 51, that "concurrence of time, though material, is not essential", seems to err in the opposite direction, the weight of authority favouring a substantial though not literal contemporaneity [Hals, 2nd Ed Vol 13, para 620, in, pp-551-52 : 3rd Ed, Vol 15, para 509 and fn p 280; and also 3rd Ed, Vol 10, para 816 fn pp 441, 442; pp 725, 726 notes(*s*)].

For criticism of the *Bedingfield* case, see Wig s 1756. The case was commented on in *R v. Christie*, 1914 AC 545. In Christie's case A was charged with indecent assault on *B* a boy of five. When shortly after the assault *B* and his mother came up to *A*, *B* touching A's sleeve said: "This is the man mum", and then being questioned by a constable "Which man?" described the details of the assault—*Held* that *B's* first statement was admissible as part of the act of identification, but the second statement was not, and that neither was admissible as part of the main *res gestae*, *ie*, the assault. The present day rulings in England and America tend to indicate that the utterance must be spontaneous or natural, and though not precisely contemporaneous must be substantially so. There can be no fixed limit of time; each case must depend upon its own circumstances. An utterance subsequent to the act may be admissible if it is a part of it and not a mere report of a past occurrence.

Wigmore states the rule thus: "Under the present Exception [to hearsay] an utterance is by hypothesis, offered as an assertion to evidence the fact asserted (for example that a car-brake was set or not set), and the only condition is that it shall have been made spontaneously, *ie* as the natural effusion of a state of excitement. Now this state of excitement may well continue to exist after the exciting fact has ended. The declaration, therefore, may be admissible even though subsequent to the occurrence, *provided it is near enough in time to allow the assumption that the exciting influence continued*" (Wig s. 1755).

The declarations must be *substantially contemporaneous* with the fact—*ie*, made either during, or immediately before or after, its occurrence—but not at such an interval from it as to allow of fabrication, or to reduce them to the mere narrative of a past event [*Thompson v. Trevanion, sup*; *R v. Christie*, 1914 AC 545, 556, 566; Phip 8th Ed, p 60; see *R v. Thompson*, 1912, 3 KB 19; *R v. Osborne*, 1905, 1 KB 55]. The statement uttered or the act done must be a spontaneous reaction of the person witnessing the crime and forming part of the transaction. The by-standers' declaration must relate only to that which came under their observation [*Bhaskaran v. State of Kerala*, 1985 Cri LJ 1711, 1713: 1985 Ker LT 122 (Ker) (DB)]. A statement made

by the deceased so shortly after the incident as to become part of the same transaction with it, are relevant [*Kulamani Sandha v. State*, 1991 Cri LJ 599, 602 (Orissa)]. Victim of acid throwing giving out names of accused and his companions immediately after attack at the earliest opportunity before there was time for being tutored—Evidence must be given due weight [*S v. Narahari*, 1962 Cut 303]. When the statement made by the deceased to the witnesses is not spontaneous nor is it contemporaneous but the same was made in answer to a query after sometime of the occurrence, when the witnesses reached the spot, the statements of these witnesses cannot be considered as *res gestae* [*Malkhan Singh v. State of Madhya Pradesh*, 1990 Cri LJ 2763, 2767 (MP)]. Whatever is said by the informant in the F.I.R. or to other witnesses after the occurrence forms part of the same transaction [*Shyam Nandan Singh v. State of Bihar*, 1991 Cri LJ 3350, 3353 (Pat)]. In order that hearsay evidence may be admissible if it forms part of the *res gestae* "it is essential that the words sought to be proved by hearsay, should be, if not absolutely contemporaneous with the action or event, at least so clearly associate with it in time, place and circumstances that they are part of the thing being done, and so an item or part of the real evidence and not merely a report statement" [LORD NORAMAND in *Teper v. R*, 1952, 2 All ER 447]. In this case it was pointed out how slight a separation of time and place is sufficient to render evidence of a statement inadmissible. The statement of an accused to his father some time after the occurrence and his arrest that the shooting was the result of an accident is inadmissible. If the statement had been made just at the time of the shooting, that would have been a different matter [*R. v. Roberts*, 1942, 1 All ER 187 CCA]. (See the cases cited and discussed in Wig ss 1749, 1750). The contemporaneous statements of the workman in a factory at the time of inspection about the identity of the person in charge controlling the business is admissible under ss 6, 11 and 32 as proof of such identity [*Sheo Prasad v. State of U.P.*, 1981 Cri LJ (NOC) 58 (All): 1981 All WC 247]. If there is an interval, however slight, which allows of fabrication, it is not part of *res gestae*, though it may be admissible under s 157 [*Kaneshwar v. R*, ALJ 149]. Statement of a witness who came after the occurrence that he learnt from other witnesses present that the deceased was murdered by B does not form part of the *res gestae* [*S v. Behari*, A 1953 Pu 218].

In a case an attempt was made to enlarge the class of cases in which such evidence is admissible. The plaintiff who had met with an accident, as she alleged, in the course of her employment, sought to give evidence of statements made by her in her own favour to third parties some time after the accident, but it was rejected holding that the principle had no application to a case of this kind [*Jones v. S E & Ry Co*, 1918, 87 LJKB 775]. The statement of an accused person immediately after the occurrence of the crime may also be relevant as showing the existence of a state of mind [see s 14 *post*]. Declarations accompanying acts may be oral or written [*Holmes v. Newman*, 1931, 2 Ch 112]; though this principle will apply less often to declarations explanatory of formal documents, since here the intention must generally be gathered from the instrument itself, and moreover declarations even though part of the *res gestae* cannot be received to contradict or vary the document [*Kirk v. Eddows*, 3 Hare 509, 522]. The declarations though original evidence are no proof of the truth of the facts stated, the existence of which must be established independently [*Perkins v. Vaugham*, 12 LJCP 38; *Lloyd v. Powel & Co*, 1914 AC 733; *R v. Christie*, 1914, AC 545, 553; Phip 8th Ed, p 61].

Oral statements made by the accused to the arresting officer were admissible as they were made by the accused in the circumstances of spontaneity [*Chi Tin Hui v. Public Prosecutor*, (1994) 1 SLR 778 (Singapore CA)].

Where a witness in describing the offence asserted that *B* said : "Those ruffians who a year ago took away Subhashini have again come. Let us be off, caste and honour are at stake"—*held* that it is not admissible. What *B* states at the time of the occurrence in respect of the occurrence itself is *res gestae* under s 6. But a statement however made at the time of an occurrence relating to a previous occurrence which took place a year ago is not *res gestae*. It is not also admissible under s 8 [*Khijiruddin v. R*, 53 C 372: A 1926 C 139 : 92 IC 422].

Hearsay, contemporaneity and identification.—In *R. v. McCay*, (1991) 1 All ER 232, the accused was charged with wounding. He was identified by a witness and the officer in charge took down the number indicated by the witness (persons in the parade were given their identifying numbers. However, at the trial the witness could no longer remember that number and the police officer who was present at the parade and to whom the number was indicated was called to prove the number. The defence objected on the ground that the officer's testimony was inadmissible hearsay. The court of appeal dismissed the objection and held that the evidence was admissible because it was contemporary statement accompanying a relevant act.

This decision has been welcomed. "It strengthens the recent trend of admitting evidence which has probative force. Indeed, in this case the contemporary note of the witness's statement of the number was far superior to any testimony he could have given from memory many months after the event." All ER Annual Review 1991.

Summary of Law as to the Admissibility of Declarations Accompanying Acts.—Some of the cases bearing upon this topic exhibit diversity of opinion, but the following points appear to have been fairly settled:—

(1) The declarations (oral or written) must relate to the act which is in issue or relevant thereto; they are not admissible merely because they accompany an act. Moreover the declarations must relate to and explain the fact they accompany, and not independent facts previous or subsequent thereto [*Agassiz v. London Tramways Co., sup*] unless such facts are part of a transaction which is continuous (see below).

(2) The declarations must be substantially contemporaneous with the fact and not merely the narrative of a past [*Thompson v. Trevanion; R v. Christie, sup; Teper v. R*, 1952, 2 All ER 447].

(3) The declaration and the act may be by the same person, or they may be by different persons, *eg*, the declarations of the victim, assailant and by-standers [see ill (*a*)]. In conspiracy, riot &c the declarations of all concerned in the common object are admissible [see ill (*b*); ill (*f*) to s 9].

(4) Though admissible to explain or corroborate, or to understand the significance of the act, declarations are not evidence of the truth of the matters stated.

Similar Facts in Distinct Offences at Distant Places Intermixed and Blended.—Sometimes acts may form part of the same transaction though occurring at distant places or different times, *eg*, when a man committed three burglaries in one night and stole a shirt in one place and left it in another, evidence of all these burglaries was admitted on the ground that "If several and distinct offences do intermix and blend themselves with each other, the detail of the party's whole conduct must be pursued" [*Per* LORD ELLENBOROUGH, CJ, in *R v. Whiley*, 2 Leach, 983, 985; *R v. Wylie*, 1 B & P (NR) 92, 94; see *R v. Ellis*, 6 B & C 145, *sup*]. On a charge of receiving stolen tin, the fact that on the accused's premises being searched stolen iron and brass were found was held admissible as part of the transaction, though the iron and tin were the subject of other charges [*R v.*

Mansfield, Car & M 140]. If several and distinct offences do so intermix and blend themselves with each other, details of the party's whole conduct must be pursued. Evidence touching circumstances and transactions which are connected with the principal subject-matters of the charges as parts of one and the same transaction is relevant [*R v. Vajiram*, 16 B 414, pp 430-31]. Two distinct offences may be so inseparably connec-ted that the proof of one necessarily involves proving the other, and in such a case on a prosecution for one, evidence proving it cannot be excluded because it also proves the other [*People v. Marble*, 38 Mich 117]. Evidence as to other offences by the accused would be relevant and admissible if there is a nexus between the offence charged and the other offences or the two acts form part of the same transaction so as to fall within s 6. Thus, in a charge for murder of *K* where the prosecution case is that on the day of the incident the accused uttered a threat that he would finish off *K* and thereafter also finish himself off, evidence is admissible to show that the accused tried to kill himself after killing *K* [*Wasu Pillai v. S*, A 1961 B 114]. But the other offences must be connected in some logical or causal relation with the liability sought to be enforced in the proceeding itself. An entirely separate and disconnected offence is not admissible merely because it occurred at or about the same time as the *res gestae* of the offence on Trial [*People v. Lane*, 100 California 379; Chamberlayne HB, s 839].

Illustration (a) [By-standers].—Things said or done by the accused, the victim and the by-standers shortly before or after the act are all relevant, but the court is to decide whether they were said or done within so short a time as to form part of the transaction. The statement uttered or the thing done must be a spontaneous reaction of the person witnessing the crime and must form a part of the transaction. The by-standers' declarations must relate only to that which came under their observation. *"Declarations accompanying acts must be substantially contemporaneous"*. The admissibility depends not on whether the accused was present at the time of the statement or absent, but on whether it was made soon after the occurrence. [*Illus (a)* is to be read with *illus (e)* and *(f)* to s 9]. Statements made in the presence of a person affecting conduct is also relevant under s 8 *illus (g)*. As to complaints made shortly after crime, see s 8 *illus (f) and (k)*. Besides being admissible as part of the transaction, statements referred to in s 6 may be admissible as corroborative evidence under s 157.

A spontaneous explanation by the accused at the moment of the crime is admissible as *res gestae* [*Peters v. S*, A 1959 A 483].

The word "by-standers" in *illus* (*a*) means the persons who are present at the time of the incident, *eg*, beating and not the persons who gather on the spot after it. The remarks made by persons other than the eye-witnesses are only hearsay [*Nasir Din v. R.*, A 1945 L 46 : 1944 Lah 461]. Evidence of witnesses about what the children said or did at the time of killing of their mother is admissible under s 6 [*Sawal v. S.*, A 1974 SC 778]. Where a number of persons came to the spot immediately after a murder and was told by the eye-witnesses who the two culprits had been, their evidence is relevant [*Mahendrapal v. S*, A 1955 A 328; *Bijay Singh v. S*, 1956 Cri LJ 897 : A 1956 MB 170; *Mokbul Ali, Accused v. The State of Assam*, 1984 Cri LJ NOC 45 (Gauhati)]. Where a witness stated that one of the accused went to him after the murder and admitted his guilt and the witness further stated that he went to the spot at once and heard the by-standers talking that four persons had committed the murder the latter portion is not admissible under s 6, *illus (a)* [*Pakhar v. R*, A 1925 L 578: 91 IC 812; see *Jowla v. R, post*, and *Chain Mahto v. R*, 11 CWN 266].

On a charge of arson with intent to defraud, a police constable deposed that after hearing the fire alarm he heard a woman shouting: "Your place burning and you going away from the fire" and immediately after he saw a black car being driven away by a man resembling the accused. The words were spoken some 220 yards from the site of the fire and about twenty-six minutes after the fire started. In cross-examination the constable said that he did not know who or where the woman was. She was not a witness at the trial—*Held* that the evidence was inadmissible as it infringed the rule against hearsay. In order that hearsay evidence may be admissible as part of the *res gestae* it must be contemporaneous with the action or event [*Teper v. R*, 1952 2 All ER 447 : 1952 AC 480; see rule of *res gestae* stated by LORD NORMAND in the same case, *ante*, p60]. It is the leading case on exclusion of statements expressive of any emotion, such as surprise rather than assertive of any fact. The woman did not intend to tell any one that Teper was present. Had there been any evidence that the accused was seen near the fire, the policeman's evidence would probably have been admissible as the object then would have been only to establish the fact that such a statement was made by the unknown woman and not to prove the truth of that statement. There is a distinction between a factum and the truth of a statement. [As to this see notes to s 60 *post : "Meaning of Hearsay"*].

To be admissible a by-stander's statement must have been made as contemplated by s 6 and *illus* (*a*). A statement by one alleged to be witness of a murder, to persons who came to the scene after the murderers had left is not admissible to show that their names were mentioned as murderers, as it was made after the transaction was completed [*Jowala v. R*, 34 PR, Cr 1914 : 27 IC 664]. Statement by a third person made in answer to question and not at the time of the crime is hearsay [*Hadu v. S*, A 1951 Or 53].

Illustration (b).—Different acts done in distant places or at different times may form part of the same transaction. The relevancy of the facts in this illustration depends to a certain extent on the provisions of s 10 where the matter is fully treated.

Illustration (c).—In order to understand the nature of the statement contained in the alleged libel, it is necessary to go to the context and take into consideration other letters between the parties relating to the same subject.

Illustration (d).—To prove delivery of goods by *B* to *A*, intermediate deliveries from *B* to *C*, to *C* and *D* to *A* are Admissible. Each delivery is a link in a chain of facts necessary to establish another fact.

Admissibility Depends on Continuity of the Transaction.—It will appear from what is said above that the declarations or acts are not admissible unless they form part of the transaction in controversy, *ie*, they must be substantially contemporaneous with the fact in issue and must tend to illustrate and explain it. The admissibility of the declaration or act as part of the transaction depends on continuity of action as also proximity of time and community of purpose. The following cases illustrate the rule in this section:—

—**Abduction.**—In a trial for abduction, a witness stated that he had seen three women, who were sleeping in the same *bari* as the complainant and his wife, searching something at dusk. The women were not examined and when the witness was asked what reply one of these gave, the judge rightly excluded the evidence. The alleged search that evening cannot be treated as part of the same transaction as the abduction at night; so s 6 cannot make it admissible and as the women were neither parties to the case nor agents, s 8 is of no help. S 9 is equally inapplicable [*Fazaruddin v. R*, 42 CLJ 111 : 90 IC 433: A 1926 C 105].

—**Adoption.**—In the majority of cases execution of a deed of adoption forms a part of the transaction of adoption itself and is relevant under s 6 [*Punjabrao v. Seshrao*, A 1962 B 175].

—**Felony.**—Generally speaking, it is not competent to a prosecution to prove a man guilty of one felony by proving him guilty of another unconnected felony, but where several felonies are connected together and form part of one entire transaction, the one is evidence to show the character of the other [*R. v. Parbhudas*, 11 Bom HC 90, 94]. *See ante, "Similar facts in distinct offence at distant places &c".*

—**Illegal Gratification.**—Receipt of illegal gratification in the years 1877 and 1878 cannot be proved in order to establish that he received the three sums of money mentioned in the charges for which he was tried. The two sets of transactions are not so connected as would make them relevant to one another. S 6 cannot apply, because the payments of 1877 and 1878 are not so connected with the facts in issue in this case as to form part of the same transaction [*R v. Vyapoory*, 6 C 665, 662: 8 CLR 197].

—**Murder and Dacoity.**—In the absence of any explanation, the presumption arises that any one who took part in a robbery also took part in the murder which constituted part of the same transaction. It has been held that recent and unexplained possession of the stolen property while it would be presumptive evidence against a prisoner on the charge of robbery would similarly be evidence against him on the charge of murder where murder and robbery form parts of one transaction [*R v. Sami*, 13 M 426, 432; *R v. Niamatulla*, 17 CWN 1077; *Wasim Khan v. S*, A 1956 SC 400 : 1956 SCR 191; see s 114, *illus* (*a*) and notes to it *post*].

—**Rape.**—In rape, indecent assault &c cries or complaint to any one made during or immediately after occurrence, is admissible as part of the transaction. Such evidence is also admissible as conduct [see s 8 ill (*j*)]. The statement is admissible not as evidence of the truth of the charge, but as evidence of the credibility of the complainant [*Nga San v. R.*, 19 Cri LJ 155: 43 IC 443; see notes to s 8, *Expln 1* and *"Rape or criminal assault" post*].

Where the raped girl made a statement to her mother after the rape when the culprit had gone away and the girl came home from the scene of occurrence, it is not admissible under s 6 as part of transaction [*Sreehari v. R*, A 1930 C 132: 50 CLJ 524; see also *Ghulam v. R*, A 1930 L 337]. Statement after some time is however admissible under s 157 as corroborative evidence [*Rameshwar v. S*, A 1952 SC 54 : 1952 SCR 377; *Md Afzal v. R*, A 1950 L 151]. See s 8. *illus* (*j*), notes to *Explanation 1* to that section and *"Rape or Criminal assault", post.*

—**Statement of Injured Person, Accused or By-Stander.**—The statement of an injured person made in the presence of the prisoner charged with having voluntarily caused grievous hurt to that person almost immediately after the infliction of the injuries and not denied by the prisoner, falls within s 6 *illus (a)* [*In re Sarat Dhobini*, 10 C 302, 304]. These could be statements which though inadmissible under sec. 32 of the Act are nevertheless admissible under section 6. At any rate, sec. 6 cannot be controlled by sec. 32 of the Act [*C. Narayanan v. State of Kerala*, 1992 Cri LJ 2860, 2868 (FB) (Ker)]. This case has been distinguished in a later case where it has been held that in order to make *statement of a by-stander* admissible, it must have been made, as contemplated by s 6 and *illus* (*a*) to it, at the time the transaction was taking place or so shortly before or after it, as to form part of the transaction. If the transaction has terminated and then the statement is made, the statement is irrelevant. The admissibility is dependant on continuity. In fact it would be dangerous to accept the statement of a by-stander made after the conclusion of the transaction, when an interval has elapsed

disconnecting the thread of the transaction. Sufficiency of connection is the test [*Chain Mahto v. R*, 11 CWN 266, 271. See further *ante*; *"Declarations accompanying acts must be substantially contemporaneous" and "By-standers"*]. In a trial for murder of mother of a child whose cries attracted the passers-by, the witnesses can speak to the nature of the child's cries and even as to what the child said so far as it explains their conduct [*Raban v. R*, A 1938 S 97: 175 IC 324]. Statements accompanying and explaining acts are also admissible under s 8 as conduct (see *post* s 8; *"Statements accompany and explain acts other than statements"*]. Where the act of the deceased intruding into courtyard during dead of the night, victim's identification of the accused, statement of deceased before the death that accused was standing with a gun and his firing the gun at her by proximity of time and space that the statement of the deceased became part of the same transaction, it was held the such statement is admissible under section 6 [*Rattan Singh v. State of H.P.*, A 1997 SC 768]. Where the injured narrated the incident when the knife was still stuck on his back, the testimony of the prosecution witnesses based on the said narration cannot be termed as hearsay evidence but it is a part of *res gestae* under section 6 [*Rabindra Nath Moorthy Naidu v. State of W.B.*, 1996 Cri LJ 2928, 2929 (Cal)]. If a witness survives after making dying declaration his statement relevant and admissible as *res gestae* [*III Addl Sessions Judge, Guntur v. G.V. Rao*, 1996 Cri LJ 703, 709 (AP)].

Where a person saw an assault, made a statement, but died before the trial, the judge granted the permission for the statement to be read to the jury thinking that if something was wrong with the statement the other prosecution witnesses would controver it. The judge has a discretion for such statements to be reproduced under s. 26 of the [English] Criminal Justice Act, 1988. This was held to be a wrong exercise of the discretion. He should have kept in mind the fact that the defence could not have cross-examined the maker of the statement and, therefore, the jury had to be cautioned on that point [*R. v. Cole*, (1990) 2 All ER 108 CA]. Where a person cried out on receiving gun-shot injuries and two persons, who immediately reached the spot, were told by the victim that his nephew had fired at him, the court allowed this evidence as part of *res gestae* being spontaneously connected with the transaction. *Sukhar v. State of U.P.*, (1999) 9 SCC 507.

—Statement to Police.—One *P* went to the police with a written report that certain persons including *M* had committed riot. As soon as the report was read out, *P* informed the police that *M* was not present and that report was written by *J*. Subsequently *M* prosecuted *J* and *P*—*held* that statements made by *P* to police were not admissible against *J* either as a part of confession under s 30 or as a part of the transaction under investigation under s 6 [*Jalpa v. R*, 17 ALJ 760: 50 IC 487]. When the offence under trial is filing false complaint; what happened at the subsequent police investigation of the complaint forms no part of the *res gestae* [*Venkatasubbiah v. R*, 48 M 640: 86 IC 209]. If on *A's* information a criminal proceeding is started against *B* and in the course of investigation into the case *A* makes a statement to the police, in a subsequent prosecution under ss 192, 193 and 221 IPC, it is admissible as *res gestae* [*Jogesh v. Surendra*, 35 CWN 838].

—Unlawful Assembly.—Statements made by members of unlawful assembly of their determination to force their way through a police cordon are evidence of *res gestae* [*Mg Tok v. R*, 3 R 352: 90 IC 918].

—Other Cases.—Statements made by a testator at the registration of the will are admissible [*Muthu Krishna v. Ram Ch*, 37 MLJ 489: 47 IC 611].

"Same Transaction" in ss. 220 and 223 Cr P Code. In s 223 Cr P Code, the word "transaction" is used in a restricted sense and seems to apply only to the theft jointly committed by the two persons and the circumstances attending it. The word is used in a similarly limited sense in *illus (a)* of s 6, though it is used in a more general

sense in the remaining illustrations of that section. [*R v. Fakirapa*, 15 B 488, 496, refd to in *R v. Vajiram, ante*, 16 B 414, 424 where the meaning of the word transaction was discussed]. The expression includes both the immediate cause and effect of an act or event, and also its collocation of relevant circumstances, the other necessary antecedents of its occurrence, connected with it, at a reasonable distance of time, space, and cause and effect [*R v. Ring*, A 1929 B 296]. A good working test of what should or should not be regarded as the same transaction within s 239[1] Cr P Code, is the proximity of time, unity or proximity of place, continuity of actions, and community of purpose or design [*Banga Ch v. Annada*, 35 CLJ 527: A 1922 C 76 (*Amritalal v. R*, 42 C 957 **folld**); *R v. Madhab*, 43 B 147; *R v. Kushai*, 50 C 1004: A 1924 C 389; see also *R v. Datto*, 30 B 59: *Becharam v. R.* A 1944 C 224, 227; *R v. Lockley*, 43 M 411, 413; *R v. Ramsubhag*, 19 CWN 972]; but the main test must be continuity of action and community of purpose [*R v. Locklay, sup*; *R v. Shapurji*, 60 B 148: A 1936 B 154; *Dandapani v. R*, A 1945 P 293; *R v. Ali Hussain*, A 1933 C 308; *Prov Govt v. Dinanath*, A 1939 N 263; *Hirday v. R*, A 1946 P 40]. The condi-tions for admissibility of a statement made by a person who was at the scene of occurrence are the proximity of time, the proximity of the police station and the continuity of action [*Bandela Nagaraju v. State of A.P.*, 1984 Cri LJ 674, 679 : (1983) 2 An LT 374 (Andh Pra) (DB)]. The recovery of the dagger at the instance of the accused soon after the occurrence forms parts of the same transaction. [*Shabir Ahmad Khan v. State of J&K*, 1989 Cri LJ 2486, 2495 (J&K) (DB)]. All these factors depend on the circumstances of each case. Two facts occurring at the same time and place may have no connection between them; and yet two facts separated by a vast distance of time and place may be parts of the same transaction. The primary offence and the offence of destroying evidence of the primary offence may in certain circumstances be parts of the same transaction [*Zahid v. R*, A 1938 A 91; *Ata Md v. R*, A 1950 L 199 FB].

The relevant point of time in the proceeding at which the condition as to sameness of transaction in s 239[1] must be fulfilled, is the time of accusation and not that of the eventual result [*Babulal v. R*, 65 IA 158: 1938 2 Cal 295: A 1938 PC 130]. To ascertain whether a series of acts are parts of the 'same transaction' in s 235[2] it is essential to see whether they are linked together to present a continuous whole. Mere common purpose does not constitute same transaction [*Ram Ch v. R*, A 1939 B 129; *R v. Krishnaji*, 34 Bom LR 590: 138 IC 520; *Keshavlal v. R*, A 1944 B 306. 311]. As to the meaning of "transaction" in s 235[2] Cr P Code see *Mollaya v. R*, 49 M 74; *Choragudi v. R*, 33 M 502; *R v. Sherufulli*, 27 B 135. The fact that the eye-witnesses travelled in the same bus with the victim, that they saw the accused holding the pistol against the victims and saw the victim falling and that they chased the accused all form part of the same transaction [*Hari v. State of U.P.*, 1983 Cri LJ NOC 62 (All) (DB) : 1983 All Cri R 283].

The definition of "transaction" in s 239[1] will equally apply to the expression "the same transaction" in s 235[1]. The expression suggests not necessarily proximity in time so much as continuity of action and purpose [*Ganesh v. R*, A 1931 P 52; *Abdur Rahim v. R*, 32 Cri LJ 611]. As to same transaction in s 235[2] Cr P Code, see *Kamala v. R*, 1938, 1 Cal 98: 41 CWN 1112. Evidence regarding facts in issue disclosed by a transaction can be given under sec 5 where as evidence regarding other facts which must be connected with the facts in issue in a manner

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1. See s. 223 of Act 2 of 1974.
2. See s 220 of Act 2 of 1974.

so as to form part of the same transaction can be given under sec 6 [*Indru v. State of Him Pra*, 1989 Cri LJ 2238, 2242 (DB) (HP)]. A complainant narrated to her three colleagues about all that transpired on a particular date when her superior abused her by cracking indescent jokes. Such a narration is not *res gestae* and inadmissible under sec. 6. [*Smt Chander Kala v. Ram Kishan*, A 1985 SC 1268, 1270 : 1985 Cri LJ 1490]. Unless the statement was made as part of the same transaction in which the explosion took place, it cannot fall within the purview of sec 6. When the transaction consists of different acts, they must be connected together by proximity of time, place and continuity of action or design [*Rajan v. State of Kerala*, 1992 Cri LJ 575, 678 (Ker)]. [See further Sarkar's Cr P Code, 4th Ed 1975, notes under ss 220 & 223].

Evidence of Criminal Acts Other Than Those For Which Indicted.—Although evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment is inadmissible for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried, yet the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental or to rebut a defence which would otherwise be open to the accused. Thus when the several *felonies* are so connected together as to form part of one transaction, evidence of one felony may be given to show the character of the other [Tay s 327 and *R v. Ellis*, 1824, 6 B & C 147 *ante*; *Roupell v. Haws*, 1863, 3 R & F 784; *R v. Rearden*, 1864 4 F & F 76; *R v. Bleasdale*, 1848, 2 C & B 765; *R v. Firth*, 1869 LR 1 CCR 172; and other cases cited there. See *ante*, *"Similar facts in distinct offence, &c"* and ss 14, 15].

S. 7. Facts which are the occasion, cause or effect of facts in issue.—Facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant.

Illustrations.

(*a*) The question is, whether *A* robbed *B*.

The facts that, shortly before the robbery, *B* went to a fair with money in his possession, and that he showed it or mentioned the fact that he had it to third persons, are relevant.

(*b*) The question is, whether *A* murdered *B*.

Marks on the ground, produced by a struggle at or near the place where the murder was committed are relevant facts.

(*c*) The question is, whether *A* poisoned *B*.

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

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COMMENTARY

Principle and Scope.—[Facts Which Are the Occasion, Cause or Effect of Facts in Issue]. This section is expressed in terms much wider than those of s 6 which makes relevant facts forming *part of the same transaction.* It is by no means easy to say always what facts do or do not form part of the same transaction. The chain of events which makes up the transaction may be sometimes difficult of discrimination. Again, facts though not strictly forming part of the transaction may be so closely connected with it that they tend to prove or disprove or explain the transaction under enquiry. So s 7 makes them relevant by embracing a large area of facts. The particular modes of connection as specified in the section are: (*1*) as being the *occasion* of relevant facts in issue; (2) as being their *cause*; or (*3*) *effect*; (*4*) as constituting the *state of things* under which the fact happened; (*5*) as affording an *opportunity* for their occurrence. These modes of connection are really different aspects of causation. In short all facts and events leading up to, accompanying and following the transac-tion in issue which are so inseparably connected with each other as to throw light on the matter in issue and help its proper understanding, are relevant. Sometimes evidence of similar unconnected facts is tendered to prove the fact in issue by showing that fact similar to the one under inquiry have occurred on previous occa-sions; but facts which bear merely general similarity to the main fact are not ordinarily admissible. They are however admissible when they have some specific connexion with the main fact or are parts of the same transaction. The subject will be more fully treated under ss 14 and 15.

Illus (a) has reference to occasion or opportunity. It shows that it is not necessary that *A* should have seen or heard of the money in order to admit the evidence against him that *B* had shown the money or mentioned it to third persons. This illustration has a wider range of facts than *illus* (*a*) to s 6 where the sayings of by-standers are let in as part of the transaction, *illus* (*b*) refers to what is known as "real evidence" [*v. ante s.* 3, Evidence]. It is an instance of facts constituting an effect. A struggle is relevant to show that the murder was the result of violence which the victim resisted. Evidence that there were foot-prints at or near a scene of offence or that the foot-prints came from a particular place or led to a particular place, is admissible [*Sidik v. R*, 1941 Kar 525 : A 1942 S 11]. The marks of foot-prints if traceable may lead to identification of the accused. *Illus (c)* has reference to the state of things under which the poisoning occurred and opportunity. The facts that the accused had taken money and ornaments from the deceased and that the deceased had on the day of murder gone to the accused to demand them are relevant showing occasion, cause or effect of the fact in issue. Statement of the deceased in respect of these circumstances falls within s 32 [*Jainand v. R*, A 1949 A 291: 1944 ALJ 60].

Like a photograph of a relevant incident, a contemporaneous tape record of a relevant conversation is a relevant fact and admissible under ss 7 and 8 [*Yusufalli v. S*, A 1968 SC 147; *R M Malkhani v. S*, A 1973 SC 167; *Ziyauddin v. Brijmohan*, A 1975 SC 1788 (conditions of admissibility stated)]. Tape recorded transcript not put on record at the earliest opportunity should not be admitted [*Lachhamandas v. Deepchand*, A 1974 Raj 79]. (See "*Tape Record*" in s 63(*3*), *post*). Report of the Court of Enquiry under R 75 of Air Craft Rules, 1937 is admissible under ss 5, 7, 9 [*Indian Airlines v. Madhuri*, A 1965 C 252].

The reason for the admission of facts of this nature is that, if you want to decide whether a thing occurred or not, almost the first natural step is to see whether there were facts at hand calculated to produce or afford opportunity for its occurrence, or

facts which its occurrence was calculated to produce. In order, moreover, properly to appreciate a fact, it is necessary to know the state of things in which it occurred [Cunn p 20].

[*Ref Step Dig Arts 8, 9; Steph Intro Ch III; Best, s 453; Phip 8th Ed pp 51-9; Wigmore ss 131-134*].

—**"Which Afforded an Opportunity".**—Opportunity must always be relevant: for no circumstance can be more infirmative of a charge than that the accused had no opportunity of committing the crime. On the strength of this rests the force of a defence founded on an *alibi*. But the judge must be on his guard against jumping hastily from opportunity for, to commission of, a crime. There can be no crime without the opportunity, but there is a wide gulf between opportunity and commission. This is well *illus*trated by a case cited by Best from Starkie [Nort p 104]. The following is the case referred to:—

"A female servant was charged with murder of her mistress. No persons were in the house but the deceased and the prisoner, and the doors and windows were closed and secured as usual. The prisoner was condemned and executed chiefly on the presumption that no one could have had access to the house; but it afterwards appeared, by the confession of one of the real murderers, that they had gained admitance into the house which was situated in a narrow street, by means of a board thrust across the street from an upper window of an opposite house to an upper window of that in which the deceased lived; and that having committed the murder they retreated the same way leaving no traces behind them" [Best, 11th Ed, p 428].

Mere Advantage is Nothing, Though Sometimes a Motive is an Important Element.—"The mere fact, however, of a party being so situated that an advantage would accrue to him from the commission of a crime amounts to nothing, or next to nothing, as a proof of his having committed it. Almost every child has something to gain by the death of his parents, but how rarely on the death of a parent is parricide even suspected [3 Bentham's Jud Ev 187-8]. Still, under certain circumstances, the existence of a motive becomes an important element in a chain of presumptive proof; as where a person, accused of having set fire to his house, had previously insured it to an amount exceeding its value, or when a man, accused of the murder of his wife, has previously formed an adulterous connection with another female, &c. On the other hand, the absence of any *apparent motive* is always a fact in favour of the accused; although the existence of motives, invisible to all except the person who is influenced by them must not be overlooked" [Best, 11th Ed, s 456, p 427].

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

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

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

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

Illustrations.

(*a*) *A* is tried for the murder of *B*.

The facts that *A* murderd *C*, that *B* knew that *A* had murdered *C*, and that *B* had tried to extort money from *A* by threatening to make his knowledge public, are relevant.

(*b*) *A* sues *B* upon a bond for the payment of money. *B* denies the making of the bond.

The fact that, at the time when the bond was alleged to be made, *B* required money for a particular purpose, is relevant.

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

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

The facts that, not long before the date of the alleged will, *A* made inquiry into matters to which the provisions of the alleged will relate; that he consulted[2] [vakils] in reference to making the will, and that he caused drafts of other wills to be prepared, of which he did not approve, are relevant.

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

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

(*f*) The question is, whether *A* robbed *B*.

The facts that, after *B* was robbed, *C* said in *A*'spresence—"the police are coming to look for the man who robbed *B*", and that immediately afterwards *A* ran away, are relevant.

(*g*) The question is, whether *A* owes *B* rupees 10,000.

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

(*h*).The question is, whether *A* committed a crime.

The fact that *A* absconded after receiving a letter warning him that inquiry was being made for the criminal, and the contents of the letter, are relevant.

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

The facts after the commission of the alleged crime, he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things were or might have been used in committing it, are relevant.

(*j*) The question is, whether *A* was ravished.

The facts that, shortly after the alleged rape, she made a complaint relating to the crime, the circumstances under which, and the terms in which, the complaint was made are relevant.

The fact that, without making a complaint, she said that she had been ravished is not relevant as conduct under this section, though it may be relevant—

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1. "Ordinance" substituted in Ceylon.
2. "Proctors" substituted in Ceylon.

as a dying declaration under section 32[3] [clause] (*1*), or

as corroborative evidence under section 157.

(*k*) The question is, whether A was robbed.

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

The fact that he said he had been robbed without making any complaint, is not relevant as conduct under this section, though it may be relevant—

as a dying declaration under section 32[3] [clause] (*1*), or as corroborative evidence under section 157.

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3. "Sub-section" substituted in Ceylon.

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COMMENTARY

Principle and Scope.—There is hardly any action without a motive. The absence or presence of motive and evidence of preparation, opportunity, previous attempt &c, are relevant, as they not only go to show the *mens rea* of a crime, but may also furnish elements in establishing its commission. They are circumstantial evidence. In s 7 it has been laid down that facts which are the occasion, cause or effect of relevant facts, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence are relevant. Sec 8 is an amplification of s 7 embracing a wider circle of facts. In the consideration of the facts embraced by s 7 it may sometimes be important to know whether a man charged with an offence had any interest or motive in its commission. In the consideration of the question whether a man charged with an offence committed it or not, it is important to know whether previous to the act he took measures calculated to bring it about, *ie* whether he did acts constituting preparation. Previous attempt to commit a crime is akin to preparation. Every voluntary act has a motive and the absence of any motive is generally a circumstance in favour of the accused. But although in many cases motive may be found out, there are cases where all attempts to discover motive become fruitless. These acts though apparently motiveless, cannot be really so, but the motive remains invisible to all except the person who is moved by its impelling force. When there is clear proof that a man has committed a crime, motive or previous ill-will becomes immaterial and is not necessary to sustain a conviction. Wigmore says: "Assuming for purposes of argument that every act must have a motive, *ie* a prior conscious impelling emotion (which is not always strictly correct), yet it is always possible that this necessary emotion may be undiscoverable and thus the failure to discover it does not signify its non-existence. The kinds of evidence to prove an act vary in probative strength and the absence of one kind may be more significant than the absence of another, but the mere absence of any one kind cannot be fatal. There must have been a plan to do the act (we may assume); the accused must have been present (assuming it was done by manual action); but there may be no evidence of preparation; or there may be no evidence of presence; yet the remaining facts may furnish ample proof. The failure to produce evidence of some appropriate motive may be a great weakness in the whole body of proof but it is not a fatal one as a matter of law" [Wigmore, s 118]. Preparations, previous attempts, declarations of threat &c come under previous conduct. Absconding, change of mode of life or demeanour, giving false names or addresses, silence &c come under subsequent conduct. Motive must be distinguished from intention. With respect to a certain act, a man's motive may be good, but his intention bad.

Besides motive, the conduct of any party to a proceeding involving statements accompanying and explaining acts other than statements is relevant under the section as evidence of *res gestae* (*ante, s* 6).

Facts Relevant Under S 8.—The facts made relevant under s 8 are:—

(1) Facts showing or constituting *a motive or preparation for any fact in issue or relevant fact*

[In many cases (civil or criminal) it becomes necessary to determine in what mind (*quo animo*) or with what intention was the act under inquiry done. In these cases facts showing motive, intention, ill-will, preparation, previous attempts &c are relevant. *Illustrations (a), (b)* show motive and *illustrations (c), (d)* preparation and previous conduct. It should be noted that facts showing existence of any state of mind or body are also relevant under s 14 when the existence of such state of mind or body is relevant. Within certain limits evidence of facts and occurrences similar to the fact under inquiry are also admissible under s 14 or s 15 to prove intention or knowledge of any person].

(2) (*a*)Conduct (antecedent or subsequent) *of a party* to a proceeding or his agent, (f) in reference to such proceeding, or (ii) in reference to any in issue or relevant fact; and

(*b*) *Conduct* of any person an offence against whom is the subject of any proceeding (*ie.* the *complainant*):

Provided that such conduct influences or is influenced by any fact in issue or relevant fact:

[The conduct of party to a proceeding or his agent in reference to such proceeding at the time when the facts occurred out of which the proceeding arises, or in reference to any fact in issue or relevant fact, or the conduct of the complainant, is relevant; but the condition precedent to its admissibility as "conduct" is that it must directly influence or be influenced by a fact in issue or relevant fact and such conduct does not include action resulting from other causes or circumstances. It must be the essential complement of the act done or refused to be done. Conduct includes antecedent or subsequent conduct involving both actions and statements]. As to what is meant by "conduct" the explanations say that—

(*i*) Mere statements as distinguished from acts do not constitute conduct unless those statements *accompany and explain acts other than statements.* Statements accompanying acts are part of the *res gestae* and therefore they explain the acts and make them intelligible. So they are relevant. [See *illus* (*i*) and (*k*); *R. v. Abdulla,* 7 A 385 and *In re Sarat Dhobini,* 10 C 302 *post*].

(*ii*) When the conduct of any person is in question, statements (*oral or written*) made to him or in his presence or hearing which *affect* such *conduct* are relevant [see *illus* (*f*), (*g*), (*h*)].

[For example, a person being accused by a wounded man as his assailant in the presence of other persons goes away without denying or saying anything in reply. The silence upon the accusation being made is the conduct which is affected. The statements made must have a bearing on the conduct (*ie*, affect the conduct) of the person to whom they are made, otherwise mere statements would not be admissible. See *post "Statements made ..... which affects such conduct".*

—Tape Record.—A contemporaneous tape record of a relevant conversation is admissible under s 8 [*R M Malkani v. S*, A 1973 SC 157; *Yusuffali v. S*, A 1968 SC 147]. Provided the recorded conversation is relevant to the matter in issue and the identification of the voice and the accuracy of the conversation is proved by eliminating the possibility of erasing the recorded tape [*Smt. Joginder Kaur v. Surjit Singh*, A 1985 P & H 128, 131]. Tape recorded evidence, if it is to be acceptable, must be sealed at the earliest point of time and not opened except under orders of court [*C.R. Mehta v. State of Maharashtra*, 1993 Cri LJ 2863, 2868 (Bom)].

—Relevancy of Motive, Preparation or Conduct in Reference to Fact in issue or Relevant Fact.—Preparations and previous attempts are instances of previous conduct of a person charged with the commission of an offence. But under s 8 other conduct also, whether previous or subsequent, of any *party* or of any *agent* to a party in reference to a suit or proceeding, or in reference to any fact in issue or relevant fact is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact. The section further states that the conduct, whether previous or subse-quent, of any person an *offence against* whom is the subject of an enquiry is also relevant, if the conduct influences or is influenced by any fact in issue or relevant fact. Conduct previous or subsequent is relevant as it throws light upon a fact in issue or relevant fact or upon a person's motive, intention, good faith &c. Conduct is chiefly invoked in criminal cases although not forming parts of the same transaction. On a trial for murder, to show the prisoner's possession of the weapon used, the fact that he stole such a weapon sometime previously may be proved [*R. v. Ball*, 6 Cr App R HL 31, 33-34]; and generally all preliminary acts, whether criminal or not, rendering the crime more easy, safe, certain and effective, are receivable as in the nature of preparations [Phip 8th Ed, 127]. The section speaks of conduct (whether previous or subsequent): (*1*) of any party to a suit or proceeding or his agent in reference to such suit or proceeding; (*2*) conduct of the party or his agent in reference to any fact in issue or relevant fact, and (*3*) conduct of any person and offence against whom is the subject of any proceeding, *ie*, the conduct of a complainant, if such conduct influences or is influenced by any fact in issue or relevant fact.

A report to the police made by the deceased against the accused several months before the murder of the deceased is admissible under S.8 as showing the relations between the parties and in support of the motive alleged by the prosecution [*Boota Singh v. P.P.*, 1933 Malayan LJ 195 (CA Federated Malay States)].

—Meaning of Explanations.—Explanation 1.—[See also *post: "Statements accompany ..... other than statements"]. According to Explanation 1 mere statements as* distinguished from *acts [post: "Antecedent and Subsequent Conduct"]* do not constitute conduct unless those statements accompany and explain acts other than statements [see *R. v. Abdulla*, 7 A 385 cited *post*]; but the explanation does not affect the relevancy of statements under any other section of the Act. Provision is made for relevancy of other kinds of statements under other sections of the Act, *eg*, statements forming part of the transaction is s 6; statements by conspirators in s 10; statements showing state of mind or body in s 14, &c. This section admits statements only in so far as they *accompany and explain* acts other than statements. What is relevant under this section is the particular act upon the statement, and the statement and the act must be so blended as to form a part of a thing observed by the witness and sought to be proved [*Rego v. R*, A 1933 N 136]. Declarations can only be used to explain the fact they accompany and not previous or subsequent facts [*Hyde v. Palmer*, 32 LJQB 126]. In *Bateman v. Bailey*, 5 Term

R 512, the court observed: "Whatever the debtors said *before* his bankruptcy is evidence to explain the act". *Illustrations* (*j*) and (*k*) exemplify *Expln 1*.

N said to the police that he had buried the property in the fields. The policemen then followed *N* who went to the place. *N* said that he had buried it there, and with his own hand disinterred the pot in which the stolen property was kept. The two statements are clearly in the nature of a confession. Neither of them is admissible under s 8 as evidence of conduct. Explanation *1* must be read in connection with ss 25 and 26 and it does not render admissible any statement which ss 25 and 26 exclude. The special provision in ss 25 and 26 are not cut down by s 8 [*R. v. Nana*, 14B 260 FB].

Under *Explanation 1 mere statements*, unaccompanied by acts do not constitute conduct. Conduct may be equivocal or insensible without statements explanatory and elucidatory of it. Statements accompanying acts are in fact part of *res gestae* (*ante*, s 6; "*Res gestae*") just as much as the acts themselves. They are often absolutely necessary to show the animus of the actor. They have been styled verbal acts [see *Bateman v. Bailey, sup*; *Hyde v. Palmer*, 3 B & 657; *Bennison v. Cartwright*, 5 B & C 1]. Thus, a payment by a debtor may be explained by his request to apply it to a certain debt. If a debtor leaves home, his intent to avoid his creditors may be shown by what he says when leaving [*Bateman v. Bailey, supra*]. The admissibility of a statement depends not merely on its accompanying an act, but on the light it throws upon an act, which is itself relevant [*Wright v. Tatham*, 7Ad & E 313; Nort pp 106-07].

Explanation 1 points to a case in which a person whose conduct is in dispute mixes up together actions and statements; and in such a case those actions and statements may be proved as a whole. For instance, a person is seen running down a street in a wounded condition and calling out the name of his assailant and the circumstances under which the injuries were inflicted: Here what the injured person says and what he does may be taken together and proved as a whole. But the case would be very different if some passer-by stopped him and suggested some name or asked some questions regarding the transaction, If a person were found making such statements without any question first being asked, then his statements might be regarded as a part of his conduct. But where a statement is made merely in response to some question or suggestion, it shows a state of things introduced, not by the fact in issue but by the interposition of something else, and, hence, it cannot be admitted by way of conduct [*R v. Abdulla*, 7 A 385, 395]. See further *post*: "*Statements accompany ..... other than statements*".

—Explanation 2. [See also *post*: "*Statements made to him.....such conduct*"]. Under *Explanation* 2, when the conduct of any person is in question, statements made to him or in his presence and hearing which *affect* such conduct are relevant. Thus if a man charged with an offence flies away or keeps silent, or absconds after receipt of a letter that enquiry was being made for the criminal [see *illus* (*f*), (*g*), (*h*)]. The statements oral or written have an important bearing upon his conduct. In order that statements oral or written may be relevant under *Explanation 2*, they must *affect* the conduct of the person to whom they are made, *ie* they must have a bearing upon his conduct. Mere statements to a person which do not affect his conduct are not relevant. The statements must also be made to the person or in his presence and hearing. In the latter case it may not be directly addressed to him though unmistakably meant for him. It would seem that all that is necessary is that the statement must be meant for him or addressed to him and must come to his actual knowledge. Where in a case the question was as to the sanity of a testator at the time

of making his will and as to admissibility of certain letters addressed to the testator. But not shown to have been acted upon by him, as evidence of his sanity, TINDAL, CJ observed:

> "In order to determine that question, I conceive that all that was said, written, or done by the testator himself at any time during such period was the most direct and the best evidence to ascertain the state of his understanding; and that the next in degree, because intimately connected with it, would be all that was said to him, written to him, and done to him during the same period, by his friends and others who had access to him, provided always that what was so said, written or done to him by others, is shown to have come to his actual knowledge; but I consider this condition to be indispensible as to the admissibility of this second class of evidence; for, as to what was said by others but not heard by the party whose understanding is the subject-matter of enquiry, or written by others, but which never reached him, or done by others but never known by him to have been, done, it appears to me that such speaking or such writing or such acting, can, amount to no more than an expression of the opinion of the speaker, or the writer, or the actor, and that such opinion, not having been given upon oath and not being subject to cross-examination as to the grounds upon which it was originally formed, or continued, cannot, on that account, be deemed admissible in evidence" [*Wright v. Tatham*, 7 A & E 313, p. 400].

Statements made in the presence of a party are admissible as the groundwork of his conduct. Thus, if a man accused of crime is silent or is guilty of false and evasive responsion, his conduct is, coupled with the statements, in the nature of an admission and therefore evidence against himself. His flight or false responsion would be equivocal *per se*, and might be unintelligible without our knowledge of what led to it. His act upon the statement, and the statement are so blended together, that both form part of the *res gestae* and on this ground again the statement is as receivable as the act. In point of fact, it is the conduct of the party upon the statement being made, that is the material point; the statements themselves are only material as leading up to and explaining that, [Nort pp 106-107]. See *post*: "*Statements and Acts*".

[*Ref Steph Dig Arts 7, 8; Best, ss 91-2, 451-67, 495, 574-76; Phip Ed 60, 126-27. 129-33, 134-46, 151-52; Tay ss 583, 589, 816, 1204-5; Hals 3rd Ed Vol 15, paras 519, 520, 525-526, Vol 10, paras 522-524; Russel on Crimes, 2057, 2062; Jones, ss 138, 139; Wig ss 117-119, 385-406*].

"Conduct" in Reference to Ss 8 and 27. [Pointing out Places and Producing Property].—There is a clear distinction between the conduct of an accused, which is admissible under s 8, if such conduct is influenced by any fact in issue or relevant fact and the statement made to a police officer in the course of an investigation which is hit by s 162 Cr P C. What is excluded by s 162 is the statement and not the evidence relating to the conduct when confronted or questioned by the police officer. For example, the evidence of the circumstance, simpliciter, that an accused led a police officer and pointed out the place where stolen articles or weapons which might have been used in the commission of the offence were found hidden, would be admissible as conduct under s 8. irrespective of whether any statement by the accused contemporaneously with or antecedent to such conduct falls within the purview of s 27 [*Prakashchand v. S*, A 1979 SC 400 (*H P Admn v. Omprakash*, A 1972 SC 975; *Ariel v. S*, A 1954 SC 15; *Shiv*

Bahadur v. S, A 1954 SC 322 and *S v. Vaidyanatha*, A 1958 SC 61 **rel on**)]. Where weapon was merely taken out by accused from beneath his cot and handed over to police without any statement, factum of recovery is barred under s 27 and weapon cannot be relied on as admissible under s 8 [*Bahadul v. S*, A 1979 SC 1262]. Where an accused takes investigation officer and the Panchas to the dealer from whom he purchased weapon of murder the information is inadmissible under s 27 but the evidence of the investi-gation officer and the Panchas that the accused had taken them to the dealer as corro-borated by the dealer is admissible under s 8 as conduct of the accused [*H P Admn v. Omprakash*, A 1972 SC 975]. Hearsay evidence relating to a statement of admission by one of the conspirators could not be admissible even under s 8 if it did not explain any accompanying conduct of that conspirator [*Bhagwandas v. S*, A 1974 SC 898; *Trilochan Joshi v. Union of India*, 1983 Cri LJ NOC 109 Delhi : (1983) 1 Crimes 1025]. The accused on account of a promise of pardon took the police to a certain place and there pointed out and produced ornaments worn by the deceased girl before her disappearance—*Held* that s 27 does not profess to and does not deal with evidence as to conduct or acts of the accused which is admissible under s 8 or any of the preceding sections. Such evidence of conduct is admissible under s 8 irrespective of whether the conduct was or was not the result of inducement offered by the police [*R. v. Mishri*, 31 A 592 FB]. Production of articles by accused is relevant as evidence of conduct and statements accompanying and explaining such conduct are also admissible under s 8 as part of the conduct [see *R v. Rafiquiddin*, 62 C 572: A 1935 C 184; *Jamunia v. R*, A 1936 N 200; *R v. Ganu*, A 1932 B 286; *In re Bandi*, A 1963 AP 87; see also *R v. Nanua*, A 1941 A 145: 1941 All 280]. They are evidence of *res gestae* and are therefore always allowable. S 27 which deals with statements to police officers controls and circumscribes the provisions of s 8 which is concerned with the proof of conduct [*Kalijeeban v. R.* 63 C 1053 : A 1936 C 316; see *post*: *"Statements accompany and explain acts other than statements"*]. A statement of the accused while pointing out buried property that he had concealed the property, though admissible under s 27 is not admissible under s 8 [*R v. Chavadappa*, A 1945 R 292 (*R v. Nana*, 14 B 260 *ante* **reld on**)]. A first information report by an accused is admissible unders 8 as evidence of conduct [*S v. Shiv*, A 1962 Raj 3]. Conduct of accused is relevant against him and not against co-accused [*Desraj v. S*, A 1951 Pu 14].

The evidence of the circumstance that the accused led to the police officer and pointed out the place where the weapon of offence were found hidden would be admissible as conduct under s. 8 irrespective of whether any statement by the accused contemporaneously with or antecedent to such conduct falls within the purview of s. 27 [*V. Ravi v. State of Kerala*, 1994 Cri LJ 162, 171 (Ker). See also *Prakash Chand v. State*, A 1979 SC 400]. The action of the accused in leading the Magistrate and pointing out the place where the dead body was buried would be admissible as conduct under section 8 [*Vasudevan v. State*, 1993 Cri LJ 3151, 3154 (Ker)]. Conduct of the accused in producing watch belonging to the deceased before the police from his house is admissible in evidence. The fact that authorship of concealment of watch was not made in the disclosure statement is not sufficient to render it inadmissible [*Valiyaveetil Ashraf v. State*, 1994 Cri LJ 555, 564 (Ker)]. Where the confession of the accused which lead to the recovery of knife did not contain the authorship of concealment, since in view of the evidence to the effect that the knife was involved in the offence, the said conduct of the accused which lead to the recovery is admissible under section 8 [*V. Viswambharan v. State*, 1994 Cri LJ 1522, 1526 (Ker)].

Illustrations. Illus (*a*) and (*b*) show motive as also *illus* (*d*) and (*f*) to s 43. *Illus* (*c*) and (*d*) refer to preparation: (*d*) also shows previous conduct. *Illus* (*e*) is an example of previous and subsequent conduct of accused in reference to a proceeding. *Illus* (*f*), (*g*), (*h*) are examples of statements (oral and written) made to or in the presence and hearing of a person whose conduct is relevant as affecting such conduct. *Illus* (*i*) refers to subsequent conduct of a party to a proceeding in reference thereto. *Illus* (*j*) and (*k*) are examples of statements accompanying and explaining the conduct of a person an offence against whom is the subject of enquiry, *ie* the complainant.

Besides the illustrations in the Act the following instances as to preparation, previous attempts, &c taken from Phipson's Law of Evidence will be of help in understanding the section: *A* is charged with the murder of *B*. The following facts are relevant to show that *A* committed the crime—(*1*) that a few days before the murder *A* had bought a knife which might have caused the fatal wound. (*2*) That *A* knew of habits of *B* which would enable him readily and secretly to commit the murder [Step Art 9, *illus* (*e*)]. (*3*) That A had been heard to declare that he would be revenged on *B* [*R v. Ball*, 1911 AC 47, 68—*per* LORD ATKINSON : previous acts and words of the accused showing motive and enmity towards the deceased are evidence not only of malice aforethought, but also that the accused killed the deceased]. (*4*) That *A* had made previous attempts on *B's* life [*R v. Donnald*, 2 C & K 308-9*n*]. (*5*) That a few nights before the murder and while *B* was absent, shots were fired at B's house which were represented by *A* to have been fired at himself, but were more probably fired by him to induce a suspicion that assassins were about. [*R v. Patch*, Best, 11th Ed s 455]; (*6*) that both before and after the crime *A* was observed near the spot [*R v. Barnard*, 19 St T 815, 833-4]; (*7*) that footprints corresponding with the impression made by *A's* boots were traceable near the body of *B* [*R v. Beards*, Wills Cir Ev 6th Ed p 218]; (*8*) that blood-stains were found on *A's* clothing which were those of a human being who suffered from anaemia, and that *B* had been attended for anaemia [*R v. Pateman*, 75 JP Jo 317]; (*9*) that after the crime *A* absented himself from home; and (*10*) that he gave inconsistent accounts of his whereabouts on the day of the murder. [See Phip 8th Ed pp 130-31; Best, s 92].

—**Inculpatory Presumptive Evidence in Criminal Cases.**—In addition to the illustrations appended to this section some observations of text-writers will further elucidate it. The principal forms of inculpatory presumptive evidence in criminal cases are reducible to these general heads:

(*1*) Real evidence, or evidence from things.

(*2*) Evidence derived from the *antecedent* conduct or position of the accused. Under this head come motive to commit the offence, means and opportunities of committing it, preparations for the commission of, and previous attempts to commit it, declarations of intention and threats to commit it.

(*3*) Evidence derived from the *subsequent* conduct of the accused. To this class belong sudden change of life or circumstances, silence when accused, false or evasive statements made by the accused, suppression or eloignment of evidence, forgery of exculpatory evidence, evasion of justice, by flight or otherwise, tampering with officers of justice, and fear indicated either by passive deportment or a desire for secrecy.

(*4*) Confessorial evidence.

Each of these has of course its peculiar probative force and infirmative hypotheses [Best 11th Ed, pp 426-427].

—(a) **Motives, Means and Opportunities.**—As to this see notes to s 7, *ante* : *"Mere advantage is nothing &c, &c."*

—(b) **Preparations and Previous Attempts.**—Under the head of *preparations* for the commission of an offence, may be ranked the purchasing, collecting, or fashioning instruments of mischief; repairing to the spot destined to be the scene of it; acts done with the view of giving birth to productive or facilitating causes, or of removing obstructions to its execution, or averting suspicion from the criminal (see the case of *Richard Patch* cited in Best on Evidence, 11th Ed p 428]. *Previous attempts* to commit an offence are closely allied to *preparations* for the commission of it, and only differ in being carried one step further and nearer to the criminal act, of which, however, like the former, they fall short. The probative force, both of preparations and previous attempts, mainfestly rests on the presumption that an intention to commit the individual offence was formed in the mind of the accused, which persisted until power and opportunity were found to carry it into execution. But however strong this presumption may be when the *corpus delicit* has been proved, it must be taken in connection with its peculiar infirmative hypotheses. For instance, the intention of the accused is a psychological question, and may be mistaken; it may have directed towards a different object or he might have purchased instruments of mischief for fighting a duel, &c, &c [Best, 11th Ed, pp 428, 429 *et seq*]. See *Appu v. S*, A 1971 M 194.

—(c) **[Antecedent Conduct]. Declarations of Intention and Threats.**—Next to preparations and attempts, follow declarations of intention and threats to commit the offence which is found perpetrated. Most of the infirmative hypotheses applicable to the former are incident to those now under consideration; and these, besides, have some which are peculiar to themselves. (*1*) The words supposed to be declaratory of criminal intention may have been misunderstood, or misremembered. (*2*) the words may have been uttered through bravado, or with the view of intimidating, annoying, extorting money, or for some other collateral object. By threatening a man you put him upon his guard, and force him to have recourse to such means of protection as the law may be capable of affording to him [Best, 11th Ed, p 430 *et seq*].

Evidence referring to threats given by accused to deceased is admissible [*Vinayak v. S.*, A 1970 Goa 96].

—(d) **[Subsequent Conduct]. Change of Life or Circumstances.**—Among these the first that naturally presents itself to notice, is change of life or circumstances not easily capable of explanation, except on the hypothesis of the possession of the fruits of crime; as, for instance, where shortly after a larceny or robbery, or the suspicious death or disappearance of a person in good circumstances, a person previously poor is found to be in the possession of considerable wealth or the like [Best, 11th Ed, p 432].

—(e) **[Subsequent Conduct]. Evasion of Justice.** By "evasion of justice" is meant the doing of some act indicative of a desire to avoid or stifle judicial inquiry into an offence of which the party doing the act is accused or suspected. Such desire may be evidenced by his flying from the country or neighbourhood; removing himself, his family, or his goods to another place; keeping concealed, &c. To these must be added the kindred acts of bribing or tampering with the officers of justice to induce them to permit escape, suppress evidence; &c. All these afford a presumption of guilt, more or less cogent, according to circumstances [Best, 11th Ed, p 432].

—(f) **[Subsequent Conduct]. Fear Indicated by Passive Deportment, etc.**—The following physical symptoms may be indicative of fear: blushing, paleness,

trembling, fainting, sweating, involuntary evacuations, weeping, sighing, distortions of the countenance, sobbing, starting, pacing, exclamation, hesitation, stammering, faltering of the voice, &c. But there are also infirmative hypotheses, as several of the above symptoms are indicative of disease and characteristic of other emotions such as surprise, grief, anger, &c. [Best, 11th Ed, p 435].

Abscondance.—Mere absconding is not such vital circumstance which can be considered to show that the absconder was having any guilty mind [*Bhagat Bahadur v. State*, 1996 Cri LJ 2201, 2207 (Del)]. Even innocent persons may abscond due to fear of the police or on account of avoiding the humiliation of being involved falsely in a crime *N. Rajendra Prasad Bhat v. State of Karnataka*, 1996 Cri LJ 257, 261 (Karn)]. Disappearance of the accused after the occurrence is a relevant circumstance which in the absence of any plausible explanation, can be taken into consideration as conduct [*Kuldip Sharma v. State*, 1996 Cri LJ 244, 250 (Del)].

Motive.—There must exist a motive for every voluntary act. The term is applied to morals by analogy from the motive power in the physical world. But man is not a mechanical animal; he is the creature of passions and affections; he has reason and choice, and we cannot always assign or detect the motive of a given act. "The common inducements to crime," writes Wills, "are the desire of revenging some real or fancied wrong; of getting rid of rival or an obnoxious connection; of escaping from the pressure of pecuniary or other obligation or burden; of obtaining plunder or other coveted object; of preserving reputation, either that of general character or the conventional reputation of profession or sex; or of gratifying some other selfish or malignant passion." On a trial for murder, CAMPBELL CJ summed up this: "If there be any motive which can be assigned, I am bound to tell you that the adequacy of that motive is of little importance. We know from experience that atrocious crimes have been committed from very slight motives; not merely from malice and revenge, but to gain a small pecuniary advantage and to drive off for a time pressing difficulties." But absence of anv apparent motive is always a circumstance in favour of the accused [Nort pp 108-109; Wills Cir Ev p 59 *et seq*].

The relevance of motive and the inportance or value to be given to it are tersely stated by Shamsul Huda in *Tagore Law Lectures* (1902)—*The Principles of the Law of Crimes in British India*, at page 176, as follows:

> "But proof of the existence of a motive is not necessary for a conviction for any offence. But where the motive is proved it is evidence of the evil intent and is also relevant to show that the person who had the motive to commit a crime actually committed it, although such evidence alone would not ordinarily be sufficient. Under Section 8 of the Evidence Act any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact."

Normally there is a motive behind every criminal act and that is why investigating agency as well as the court while examining the complicity of an accused try to ascertain as to what was the motive on the part of the accused to commit the crime in question. Where the case of the prosecution has been proved beyond all reasonable doubts on basis of the materials produced before the Court, the motive loses its importance. But in a case which is based on circumstantial evidence, motive for committing the crime on the part of the accused assumes greater importance. Of course, if each of the circumstances proved on behalf of the prosecution is accepted by the court for purpose of recording a finding that that it was the accused who committed the crime in question, even in the absence of a proof of a motive for commission of a crime, the accused can be covicted. But the investigating agency as well as the court should ascertain as far as possible as to what was the immediate

impelling motive on the part of the accused which led him to commit the crime in question. In the present case no motive on the part of the appellant to commit the murder of Gulshan has been suggested to establish on behalf of the prosecution [*Tarseem Kumar v. Delhi Admn.*, A 1994 SC 2585 : 1995 Cri LJ 470, 472, 473]. Because different persons react differently under given circumstances. It is difficult to lay down a hard and fast rule as to how and in what manner a person would react and to achieve his motive could go to what extent in the commission of crime under a particular circumstance. It is not possible to measure up the extent of his feelings, sentiments and desire and say as to what compelled him to commit a particular crime. There may be persons who under frustration and on mere trifling domestic matters take decision to commit a serious crime, while others may approach it with cool and calm mind and think more dispassionately before taking any hazardous and serious steps. It all depends as to how a person reacts in a given circumstance and it is he alone who best knows his intention and motive to commit a crime and the extent thereof [*S.C. Bahri v. State of Bihar*, A 1994 SC 2420 : 1994 Cri LJ 3271]. Sometimes motive plays an important role and becomes a compelling force to commit a crime and therefore motive behind the crime is a relevant factor for which evidence may be adduced. A motive is something which prompts a person to form an opinion or intention to do certain illegal act or even a legal act but with illegal means with a view to achieve that intention. In a case where there is clear proof of motive for the commission of the crime it affords added support to the finding of the court that the accused was guilty of the offence charged with. But the absence of proof of motive does not render the evidence bearing on the guilt of the accused nonetheless untrustworthy or unreliable because most often it is only the perpetrator of the crime alone who knows as to what circumstances prompted him to a certain course of action leading to the commission of the crime [*S.C. Bahri v. State of Bihar*, A 1994 SC 2420 : 1994 Cri LJ 3271]. The existence of motive is not *sine qua non* for the success of the prosecution case. Many a times, motive may be known only to the accused and not to others. If there are other pieces of evidence to prove beyond reasonable doubt the guilt of the accused, the court will not be justified in rejecting the case of the prosecution merely on the ground that there is no material as to what was the motive for the accused to commit a murder [*State of Karnataka v. Surendra*, 1995 Cri LJ 3824, 3826 (Kant)].

"Motive in the correct sense is the emotion supposed to have led to the act, and that the external fact is merely the possible existing cause of this "motive" and not identical with the "motive" itself; and the evidentiary question is not whether that external fact is admissible as a motive, but whether it is admissible to show the probable existence of the emotion or motive [Wigmore, s 117].

A motive is that which moves a man to do a particular act. It is that which is in his mind which moves him to act and whether the belief which produces that state of mind is true or false, the motive remains the same and the truth or falsity of the belief is not really in question [*Gangaram v. R*, 62 IC 545: 22 Cri LJ 529]. Motive while it is always a statisfactory circumstance of corroboration when there is convincing evidence to prove the guilt, can never supply the want of reliable evidence, direct or circumstantial, of the crime [*Rannun v. R*, 7 L 84 : A 1926 L 88]. Motive cannot, by itself, sustain a criminal charge although proof of motive may lend assurance to the evidence with regard to the actual occurrence. [*Shyamaghana Bindhanai v. State*, 1987 Cri LJ 952, 954 : (1986) 1 Orissa LR 567 (Ori) (DB)].

Exchange of hot words by the accused two days prior to the incident can be enough motive to kill a person and injure others [*Mangal Singh v. State of Punjab*, 1996 Cri LJ 3258, 3262 (P&H)]. Even if the motive is unnatural and insufficient, still

if the evidence is convincing the motive pales into insignificance [*Balak Ram v. State of Rajasthan*, 1994 Cri LJ 2451, 2462 (Raj)]. Illicit relationship between wife of the deceased and her paramour may provide motive for committing murder of the deceased by his wife and her paramour [*Parimal Mondal v. State*, 1996 AIHC 2614 (Cal)]. Previous strained relationship between husband and deceased wife cannot be said to be a motive for the crime [*Bansidhar Nandi v. State*, 1992 Cri LJ 3927, 3930 (Ori)]. Motive can only support the case but the absence thereof connot undo the direct testimony [*Radhey Shayam v. State of U.P.*, 1993 Cri LJ 3709, 3714 (All)]. When there is a direct evidence of the eye-witnesses to the killing the proof of motive by the prosecution has no significance. Merely because the prosecution has failed to prove the motive it could not be said that the prosecution case must be thrown out. Many time the assailant himself alone knows the reasons of killing and the failure of the prosecution to prove the motive could not be taken into consideration for holding that the prosecution has failed to prove its case against the accused [*Nageshwar Shah v. State*, 1995 Cri LJ 2184, 2187 (Del)]. Motive is not a decisive test for determination of the criminal character of human acts. A man who carries a guilty mind is not punished under the penal law; he is punished for his unlawful actions. The law will judge a man by his actions and not by motions of his mind [*Shankaran v. State*, 1994 Cri LJ 1173, 1180 (Ker)]. Though motive for murder may not be revealed in many cases but if evidence of murder is very clinching and reliable conviction can be based even if the motive is not established. In a case of circumstantial evidence, motive assumes greater importance than in the case where direct evidences for murder are available [*Tanviben Pankaj Kumar Divetia v. State of Gujarat*, A 1992 SC 2193 : 1997 (2) Crimes 109, 131, 132]. Where there were serious misunderstanding between the deceased and the accused because of illicit relationship between the accused and the wife of the deceased which the deceased objected and deprecated, it was probable that the accused had a motive to kill the deceased, but motive by itself cannot be a proof of conspiracy [*Girja Shankar Misra v. State of U.P.*, A 1993 SC 2618, 2621]. Where according to the prosecution because of the enmity between the accused and the deceased the occurrence had taken place whereas according to the defence because of the enmity the case had been foisted against him, motive does not assume any importance as enmity is a double edged weapon [*R. Kulandavelu v. State*, 1997 Cri LJ 2574, 2580 (Mad)]. In order to bring home the guilt to the accused it is not necessary in each and every case to prove the motive. More often than not what motivates a man to cause a particular crime is only within his knowledge. It is a hard nut to crack to find out in each and every case as to what was the motive which led to the commission of a particular crime.

In *Molu v. State of Haryana*, A 1976 SC 2499 : 1976 Cri LJ 1895 the Supreme Court observed:

> "It is well settled that where the direct evidence regarding the assault is worthy of credence and can be believed, the question of motive becomes more or less academic. Sometimes the motive is clear and can be proved and sometimes, however, the motive is shrouded in the mystery and it is very difficult to locate the same. If, however, the evidence of eye witnesses is credit-worthy and is believed by the court which has placed implicit reliance on them, the question whether there is any motive or not becomes wholly irrelevant." [*Raja v. State*, 1997 Cri LJ 1863, 1865, 1866 (Ori)].

Where the positive evidence against the accused is clear cogent and reliable, the question of motive is of no importance. But at the same time it must be impressed that motive behind a crime is a relevent fact and normally prosecution is expected to adduce evidence in respect thereof. Experience shows that one or another motive

moves the culprit to a certain course of action. In cases where prosecution is not able to establish a motive behind the alleged crime it assumes importance especially in cases where the prosecution rests or circumstantial evidence or on witnesses who have an inimical background. Proof of motive on the part of the accused persons to commit an offence satisfies the judicial mind about the likelihood of the authorship but in its absence it is only proper on the part of the Court to have a deeper search. But if the Court is satisfied that evidence adduced oral or circumstantial establishes the charge against the accused, the prosecution case cannot be rejected saying that there was no immediate impelling motive on the part of the accused persons to commit the crime [*Jarnail Singh v. State of Haryana*, 1993 Cri LJ 1656, 1658 (SC)]. Where the deceased had agreed to sell 22 bighas of land to the accused and had taken Rs. 10,000 as advance but later on he had cancelled the contract and returned the advance money to the accused which the accused had accepted, cancellation of the transaction cannot be said to be a motive for the accused to commit murder of the deceased [*Ram Narain Singh v. State of Rajasthan*, 1995 Cri LJ 2847, 2850 (Raj)]. Where lands had been inherited by the deceased and his brothers but the accused persons got the lands recorded in their names, in respect of which cases were pending before the revenue courts and criminal courts and the deceased used to do pairvi in those cases, the court would be justified in proceeding on the assumption that the accused persons had strong motive in assaulting the deceased [*Awdesh v. State of U.P.*, A 1995 SC 375, 376 : 1994 (3) Crimes 283].

Evidence to show alleged motive for crime is admissible even though such evidence suggest the commission of another crime by the accused (see *illus* (*a*) to s 8). Thus in a case of murder, evidence to show that the motive for the crime charged is to conceal another murder committed by the accused is admissible to establish the motive for the murder with which the accused is charged. It is not admissible for showing that the accused was likely to have committed the murder charged [*Natha v. R*, A 1946 PC 187: 73 IA 195: 51 CWN 200].

—Strict Evidence of Motive.—The evidence as to the motives with which a prisoner commits an offence, should be of the strictest kind [*R v. Zahir*, 10 WR Cr 11]. If in a criminal case motive as a circumstance is put forward it must be fully established like any other incriminating circumstances [*Ramgopal v. S*, A 1972 SC 656]. There cannot be any guideline or yardstick to decide what will operate as sufficient motive for commission of a particular crime. It may vary from individual to individual depending on character, psychology and various other factors. [*Dasan v. State of Kerala*, 1987 Cri LJ 180, 183 : 1986 Ker LT 598 (Ker) (DB)]. It is unlikely that double murders would have been committed by one's own relations for committing theft of a watch which was not in working order, a radio valued at Rs. 200/- and some petty articles. [*State of MP v. Deoki Nandan*, 1987 Cri LJ 1016, 1024 : 1987 MP LJ 61 (MP) (DB)]. The accused had strong motive to commit the murder because by eliminating the deceased he could get the property and the wife of the deceased. [*Smt Tara Devi v. State of UP*, A 1989 SC 342, 344]. The fact that as a result of criminal prosecution on a complaint by the complainant, the accused lost his job is a sufficient motive. [*In re Baskar*, 1991 Cri LJ 535, 543 (Mad)]. In a case where the father murdered by his own son, had already executed a will bequeathing his property to the son, when there is no evidence to indicate that the accused did not have good relationship with his father, it cannot be suggested that the father may change the will, and the motive is dislodged. [*Makhan Singh v. State of Punjab*, A 1988 SC 1705, 1707].

—Motive How Ascertained.—Motive, preparation, opportunity &c like most mental or composite facts, are usually provable not by direct testimony, but by

dealing the specific incidents relied on as constituting or amounting thereto, as well as, of course, by the party's own admissions [Phipson, 8th Ed p 127]. Inference as to motive are drawn from such facts and incidents. Evidence as to facts similar to the facts in issue are sometimes admissible to prove motive or intention [see s 14]. Motive cannot be proved by hearsay evidence, *eg* deceased's statement prior to death alleging a motive to the accused as it does not accompany or explain any act of the deceased [*In re Venkatasubba*, 54 M 931: A 1931 M 689]. Where the statements on record and the background of the case showed it, the court said that it was difficult to hold that there was no motive on the part of the accused. *State of Haryana v. Tek Singh*, AIR 1999 SC 1742 : (1999) 4 SCC 682.

—Absence and Want of Proof of Motive.—The failure to establish the motive for the crime does not throw over-board the entire prosecution case. It only casts a duty on the court to scrutinize the other evidence, particularly of the eye-witnesses with greater care [*Nachhittar v. S*, A 1975 SC 118]. The absence of all motive for a crime when corroborated by evidence of independent character of the previous insanity of the prisoner is not without weight [*R v. Shk Mustaffa*, 1 WR Cr 19; see *R v. Bahar*, 15 WR Cr 46, 47; *R v. Sorab*, 5 WR Cr 28, 31; *R v. Gobardhan*, 9 A 568]. Evidence as to motive go a long way in cases wholly dependent on circumstantial evidence [*Shivji v. S*, A 1973 SC 55].

Absence of motive is of great importance in circumstantial evidence and it should be regarded as a circumstance in favour of the accused. Absence of motive would weigh in favour of the accused when the two circumstantial evidences are disbelieved [*Pandran Khadia v. State of Orissa*, 1992 Cri LJ 762, 769 (Ori)]. [*Mahadeb Ghosh v. State*, 1983 Cri LJ 1854, 1859 (Cal) (DB)]. Motive alone is not sufficient to convict accused in case of circumstantial evidence. Along with motive, there should be some further corroborative evidence. In a case of circumstantial evidence motive helps in process of presumptive reasoning [*Chet Ram v. State*, 1997 Cri LJ 1029 (Del—DB)]. The prosecution is not bound to prove motive in cases where direct evidence is reliable and cogent. But where direct evidence is not of that quality absence of motive would have significance [*D.D. Suvarna v. State of Maharashtra*, 1994 Cri LJ 3602, 3617 (Bom)]. Narration of facts of demand of dowry and non-supply thereof is a piece of evidence to prove motive for committing the offence of murder [*State of U.P. v. Ramesh Prasad Misra*, A 1996 SC 2760 : 1996 Cri LJ 4002, 4005]. In a case based on ocular evidence motive is insignificant. But in a case based on circum-stantial evidence motive assumes importance [*S.G. Gundegowda v. State*, 1996 Cri LJ 852, 858 (Kant)]. Prosecution is not bound to prove motive of any offence inasmuch as motive is known only to the perpetrator of the crime and may not be known to others. It does not, therefore, follow that if motive is not proved, the evidence of any witnesses become automatically unreliable [*Bhikari Behera v. State of Orissa*, 1995 Cri LJ 2998, 3000 (Ori)]. If motive is proved that would supply a chain of links but absence thereof is not a ground to reject the prosecution case [*State of Gujarat v. Anirudhsing*, A 1997 SC 2780]. Failure to prove motive does not break the chain when there are other facts and circumstances which conclusively establish the guilt of the accused [*Biren Mandal v. State*, 1996 Cri LJ 3455, 3459 (Del). See also *Mulakh Raj v. Satish Kumar*, A 1982 SC 1175]. Motive is not a decisive test to determine criminal character of human acts [*Shankaran v. State*, 1994 Cri LJ 1173, 1180 (Ker)]. Motive can only support the case but the absence of motive cannot undo the direct testimony [*Radhey Shyam v. State of U.P.*, 1997 Cri LJ 3709, 3714 (All)]. When the eye-witnesses are disbelieved and when it is found that the defence version is equally probable then absence of motive can be considered as an additional circumstance to lend weight to the defence version. [*Dhaneswar Phukan v. State of Assam*, 1984 Cri LJ NOC 161 (Gah) (DB)]. But nevertheless, if the circumstances are such that it can lead only to conclusion of guilt of accused, then absence of motive cannot vitiate the conviction [*Arun v. S*, A 1962 C 504; see also

Rajinder v. S, A 1966 SC 1322; *Debiprasad Padhi v. State*, 1982 Cri LJ 2214, 2221 (Orissa); *State v. Aru Pradhan*, 1985 Cri LJ 161, 164 : (1984) 2 Crimes 198 : (1984) 2 Cut LT 422 (Orissa) (DB); *Bengali v. State of Orissa*, 1985 Cri LJ 580, 582 (Orissa) (DB); *Iswar Singh v. State (Delhi Admn.)*, 1985 Cri LJ 1625, 1633 : (1984) 2 Crimes 127 (Delhi) (DB); *State of A.P. v. Bogam Chandraiah*, A 1986 SC 1899, 1901 : 1986 Cri LJ 1903; *Mahabir Prasad Akela v. The State of Bihar*, 1987 Cri LJ 1545, 1554 (Pat) (DB); *Babu v. State of Kerala*, 1988 Cri LJ NOC 56 (Ker); *Devendra Singh v. State of U.P.*, 1990 Cri LJ 879, 883 : 1989 All LJ 659; *State of Madh Pra v. Mahesh Mohanlal Mali*, 1990 Cri LJ 2483, 2489 (Madh Pradesh)]. Insufficiency of motive is not fatal to the prosecution case. It does not mean that the evidences of fact especially when one of them is an injured witness, must be discarded. [*Rangilal v. State of U.P.*, 1991 Cri LJ 916, 921 (All)]. Clear proof of motive lends additional support to finding of guilt. Absence of proof of motive has this effect only that the other evidence bearing on guilt has to be very closely examined [*Atley v. S*, A 1955 SC 807: 1955 Cri LJ 1653; *S v. Bhola*, A 1969 Raj 219]. Motive plays important role in a case resting on circumstantial evidence and its merits have to be considered on a close examination. [*Haji Mohammed Iqubal Ahmed v. State of Karnataka*, 1990 Cri LJ (NOC) 179 (Kant)]. When the prosecution puts forward a specific case as to motive for the crime, the evidence regarding the same has got to be considered in order to judge the probabilities [*Omwati v. Mahendra Singh*, 1998 Cri LJ 401 (SC)].

Proof of Motive When Not Essential.—Proof of motive or previous ill-will is not necessary to sustain a conviction when court is satisfied about accused being assailant of victim [*Narayan v. S*, A 1971 SC 1656; *R v. Jaichand*, 7 WR Cr 60]. Where direct evidence against accused is clear, cogent and reliable, the question of motive is of no importance [*Atish Behari v. State*, 1996 Cri LJ 270, 271 (Ori); *Krishnaswami v. State*, 1996 Cri LJ 3372, 3374 (Mad); *Mangal v. State*, 1996 Cri LJ 4279 (All); *Bhagirath v. State of Haryana*, A 1996 SC 3431 : 1996 Cri LJ 3499, 3500; *Jale Singh v. State of Rajasthan*, 1996 Cri LJ 1177, 1181 (Raj); *Veerappan v. State*, 1994 Cri LJ 2584 (Mad); *State v. Selvaraj*, 1994 Cri LJ 705, 711 (Mad)]. Motive is not a *sine qua non* for the success of prosecution case so long other evi-dence remains convincing and is not open to reasonable doubt [*Anil Yadav v. State of Bihar*, 1992 Cri LJ 934, 936 (Pat)]. When the positive evidence against the accused is clear, cogent and reliable, motive is of no importance [*Gurcharan v. S*, A 1956 SC 460: 1956 Cri LJ 827; *Appu v. S*, A 1971 M 194; *Shivji v. S*, A 1973 SC 55; *S v. Hari Pd*, A 1974 SC 1740; *Podda v. S*, A 1975 SC 1252; *Ram Sagar v. State*, 1994 Cri LJ 589, 594]. Although proof of motive is a material consideration, it certainly is not indispensably essential in every case [*Walli Md v. R*, A 1949 PC 103; 53 CWN 318; *Yeshwant v. S*, A 1973 SC 337]. When facts are clear, it is immaterial that no motive has been proved. The motive of an act is known to him and him alone and the prosecution can only suggest what is or may be motive [*Hazrat v. R*, 32 CWN 345]. The prosecution is not bound to prove motive of any offence in a criminal case, inasmuch as motive is known only to the perpetrator of the crime and may not be known to others. [*State of Harayana v. Sher Singh*, A 1981 SC 1021, 1023 : 1981 Cri LJ 714]. In a case of murder of the wife by the husband there are many considerations which have to be looked into and it is very difficult to know the exact motive in the circumstances of a given case. [*Nanak v. State of U.P.*, A 1983 SC 1091, 1092 : 1983 Cri LJ 1444; *Charuprava Dei v. Duryodhan Mohanty*, 1983 Cri LJ 1038, 1041 (Orissa)]. Motive is something which is locked up in the heart of the culprit and sometimes it would not be possible to have any trace of it. It cannot be said that since no motive is established, the chain is broken and the prosecution must fail. [*Tulshiram v. State of Maharashtra*, 1984 Cri LJ 209, 212 (Bom) (DB)]. Where the participation of the accused in the crime was established by the evidence of eye-witnesses, the evidence of motive paled into insignificance and could not be a ground to justify his acquittal [*State of UP v. Nahar Singh*, 1998 Cri LJ 2006 (SC)]. If the genesis or the motive was not proved the ocular testimony could not be discarded if otherwise

reliable [*Bahal v. S*, A 1976 SC 2032]. Proof of motive is not corroboration of evidence of an eye-witness [*Dwarka v. R*, A 1931 O 119]. Evidence of motive subsidies into a secondary role when truthful of eye-witness account establishes the guilt. *Murarilal Jivanram Sharma v. State of Maharashtra*, AIR 1997 SC 1593.

Motive Not to be Left Out of Account.—"In estimating probabilities, motives cannot in a general sense, be left out of the account. Where the motive is a pecuniary one, the wealth of the offender is no unimportant consideration" [*Per* PEEL CJ in *R v. Hedger*, 131 (1852) cited in Woodroffe's Evidence, 7th Ed p 140]. Motive though not a *sine qua non* for bringing the offence home, is relevant and important on the question of intention [*Hazrat v. R*, 32 CWN 345]. If the crime is alleged to have been committed for a particular motive, it is relevant to inquire whether the pattern of the crime fits in with the alleged motive [*S v. Hari Pd*, A 1974 SC 1740]. As to the admissibility of the judgment of the criminal court as showing motive or preparation, see *Coll of Gorakhpur v. Palakdhari*, 12 A 1 FB pp 12, 45.

Preparation and Attempt.—*Illustration (d)* is an example of preparation. [See notes *ante*, under the heading *"Preparations and previous attempt*]. As to the difference between *preparation and attempt*, see *R v. Robinson*, 1915, 2 KB 342. Preparations consist in devising or arranging means necessary for the commission of an offence; an attempt is the direct movement towards the commission after preparations are made [Mayne's Cr Law, 4th Ed para 227 p 923; quoted with approval in *Lakshmi v. R*, A 1923 P 307; *Jain v. R*, A 1943 P 82: 21 P 667]. Letters &c found in a man's house after his arrest, are admissible in evidence if their previous existence has been proved [*R v. Amir Khan*, 9 BLR 36 : 17 WR Cr 15]. In a popular sense, assembling to commit dacoity may be an act of preparation for it, but a mere assembling, without further preparation, is not "preparation" within s 399 I P Code [*Ramesh v. R*, 41 C 350: *Jain v. R, ante*].

Things Relevant in Ascertaining the Real Intention of Parties. [Proof of Intention or Motive].—As party's intention may be proved by his own testimony, or by proof of his declarations made out of court at the time when such intention was material [*Brodie v. Brodie*, 1861, 4 LT 307]. It may sometimes be established circumstantially by the party's conduct, whether prior to, contemporaneous with, or subsequent to the act in question. When the act is unequivocal, the proof that it was done may of itself be evidence of the intention which the nature of the act conveys. In such case, the inference is that the person intended the probable consequences of his deliberate act [Hals 3rd Ed Vol 15 para 525 p 290]. Evidence of prior incidents which took place a fortnight ago between the accused and the deceased are admissible where they make the existence of the fact in issue probable and show motive of the accused [*Chhotka v. S*, A 1958 C 482]. The fact that the deceased got the land standing in the name of the accused mutated only in the name of his other son is a strong motive for the accused to develop ill-feeling against the deceased. [*Inder Dass v. State of Rajasthan*, 1985 Cri LJ 1416, 1423 (Raj) (DB)]. When a witness clearly deposes that there was an altercation between the accused and the deceased four days earlier and that the deceased took away the machine part without paying repair charges to the accused, there is nothing improbable and the motive cannot be said to be flimsy in nature. [*Subash v. State of U.P.*, A 1987 SC 1222, 1225 : 1987 Cri LJ 991]. In order to ascertain the real intention of parties to an instrument, evidence of what they have done under it, or circumstances existing at the time of its execution and of the conduct of the parties since its execution is relevant [*Watson v. Mohesh*, 24 WR 176, 177; *Nidhi v. Nistarini*, 13 BLR 416, 420 : 21 WR 386, 387; see also *In re Purmanund*, 7 B 109, 116; *Cheetun v. Chutterdhari*, 19 WR 432; *Radha*

Chowdhurani v. Gireedharee, 20 WR 243, 244]. When the question is whether one of a large number of leases granted by a landlord at about the same time, under similar circumstances and on similar terms, was intended to be a perpetual one, facts relating to acts and conduct of parties indicative of such intention are relevant facts only if they relate to a fairly large number of leases and not otherwise [*Narsingh v. Ram Narain*, 30 C 883].

To judge the real state of a person's mind, the surrounding circumstances and subsequent events can be referred to [*Ganesh v. R*, A 1931 P 52]. Facts showing preparation or motive before the murder are relevant [*H P Admin v. Shiv Devi*, A 1959 HP 3]. Recent possession of stolen property affords a strong presumption that the person in whose possession it is, is either the actual thief or a receiver with a guilty knowledge; the possession long after the theft, by itself, affords but a very slight presumption against the accused [*Ina Sheikh v. R*, 11 C 160 and the English cases therein referred to. See s 114 *illus* (a)]. The conduct of the parties after the transaction of sale is important in order to ascertain the intention of the parties as to when the property should pass [*Bhagan v. Allah Ditta*, 45 PR 1911 : 9 IC 547]. Evidence of defalcations prior or subsequent, whether such defalcations formed the basis of another charge on which the accused may have been acquitted or not, are admissible to prove guilty intent as also to anticipate the defence of the non-existence of such intent [*R v. Stewart*, 97 IC 104 : A 1927 S 28]. On a charge under s 409 PC evidence that the accused had been found using a previously used stamp is relevant as proving *mens rea* [*Adwait v. S*, A 1955 C 608].

[As to the admissibility of opinion on relationship, expressed by conduct, see s 50. As to oral evidence of intention or conduct for varying, contradicting &c the terms of a document, see *post*, s 92].

Conduct [Whether Signs Made, Amount to].—The deceased who shortly before her death was questioned by various persons, as to the circumstances in which the injuries had been inflicted on her, was unable to speak but was conscious and able to make signs. Evidence was offered to prove the questions put and the signs made by her in answer.—*Held, per* PETHERAM CJ that the signs could not be proved as "conduct" within the meaning of s 8 inasmuch as, taken alone, and without reference to the questions leading to them, there was nothing to connect them with the cause of death, and so to make them relevant; while the question could not be proved either under Explanation 2 of s 8 or under s 9, inasmuch as the condition precedent to their admissibility under either of these provisions was the relevancy of the conduct which they were alleged to affect or of the facts which they were intended to explain. The "conduct" made relevant by s 8 is conduct which is directly and immediately influenced by a fact in issue or relevant fact, and it does not include actions resulting from some intermediate cause, such as questions or suggestions by other persons. *Per* MAHMOOD J—that the word *conduct* as used in this section does not mean only such conduct as it directly and immediately influenced by a fact in issue or relevant fact; that the signs made by the deceased were the conduct of "a person, an offence against whom was the subject of any proceeding" and were relevant as such under s 8; and that the questions put to her were admissible in evidence either under Explanation 2 of s 8 or under s 9. The FB held (MAHMOOD J dissenting) that the questions and the signs might be regarded as 'verbal' statements and therefore admissible under s 32 [*R v. Abdulla*, 7 A 385]. Gesticulations of a deaf mute, are not admissible as conduct [5 OC 246]. In this connexion, *see post, s 32(1): "Signs or Motions are Verbal Statements"*.

Antecedent and Subsequent Conduct.—*Illus* (d) and (e) are instances of conduct; and *illus* (e) and (i) are examples of subsequent conduct [See notes *ante*]. For the meaning of the word conduct as used in this section see *R v. Abdulla*, 7 A 385 FB (*ante*), where it has been fully discussed and explained. The conduct or act of the accused are not dealt with in s 27 and are relevant under s 8 whether such conduct was or was not the result of inducement offered by the police [*Misri v. R*, 31 A 592 FB: 6 ALJ 839: *Jamunia v. R*, A 1936 N 200; *R v. Nanua*, 1941 All 280: A 1941 A 145; *Jagadamba v. S*, A 1957 MB 33 cited *ante*]. What the conspirators did, *ie*, their conduct is relevant under s 8 and it is immaterial whether such conduct was previous or subsequent to the carrying out of the objects of the conspiracy (*vide illus* (e) [*Shyam Kumari v. R*, A 1941 Q 130]. Letter or petition written by deceased some months before his death to the Commissioner of Police requesting police protection against apprehended assaults by the accused is admissible [*R v. Manchan*, 34 Bom LR 1087; *Goloke v. R*, 42 CWN 129: A 1938 C 51 (it may also be admissible under s 32(*1*); *Allijan v. S*, A 1960 B 290]. Where joint acts of several persons (*eg*, joint production of articles) are sought to be proved, in order to ask the court to draw an inference from such conduct evidence should be led with some degree of particularity so that it may be possible to draw the necessary inference from the conduct of each person concerned in the act [*Rafiquiddin v. R*, 62 C 572: 39 CWN 368 FB: A 1935 C 184; see *Durlav v. R*, 36 CWN 373 and *post*, s 27 : "*Joint Discovery or Rediscovery*"].

The old enmity on account of election dispute and the recent incident regarding the passage of sullage water regarding which proceedings were pending are sufficient motive [*Gurmej Singh v. State of Punjab*, A 1992 SC 214, 220]. Conduct which destroys the presumption of innocence can alone be considered as material [*Ramesh v. State of Karnataka*, 1994 Cri LJ 3798, 3806. See also *Anant Chintaman Lagu v. State of Bombay*, A 1960 SC 500]. The conduct of PW in not disclosing the commission of the offence to the investigating officer cannot falsify his evidence. It is common knowledge that people are seared to figure as witnesses due to fear that they will be made to go round the court for tendering evidence [*Boddu Murali v. State*, 1993 Cri LJ 2077, 2081 (AP)]. The immediate canduct of a wife who was informed about her husband's death would be first to rush to the scene of offenc. Where evidence shows that she had gane there several hours after the death of her husband when the place of occurrence was very near to her house, her testimony is unreliable [*Shanker Rao v. State of A.P.*, 1993 Cri LJ 3833, 3837 (AP)]. Where the accused after murder of his wife gave information at the police station that she had committed suicide and thereby he gave a version favourable to himself the information so given by him was relevant under section 8, Illustration (c) [*Purkha Ram v. State of Rajasthan*, 1997 Cri LJ 1566, 1569]. Where the accused himself lodges First Information Report, the fact of his giving the information to the police is admissible against him as evidence of his conduct under section 8 of the Evidence Act and to the extent it is non confessional in nature, it would also be relevant under section 21 of the Evidence Act but the confession part of the First Imformation Report by the accused to the police officer cannot be used at all against him in view of ban of section 25 of Evidence Act [*Arun Kumar v. State*, 1996 (2) Crimes 470, 477 (Del)]. Conduct of the accused husband in not making effort to extinguish fire or to take care of his wife at the time of the incident or to accompany her to the hospital strengthens the prosecution case [*Mangat Ram v. State*, 1994 Cri LJ 3454, 3457 (Del)]. The posterior conduct, that is to say, dragging the dead body and laying in the veranda of the neighbour would reveal that he was having a perplexed mind seeking solace somewhere. That does not mean that he was insane [*Shankaran v. State*, 1994 Cri LJ 1173, 1180 (Ker)]. Where the witness stated that after the incident for twenty

minutes he stayed at the place of the incident, but he did not discuss the incident with the informant and others who were present there, his conduct was described as impossible conduct [*Chunni v. State*, 1996 Cri LJ 489, 492 (All)].

A statement made by a person not examined as a witness would be hearsay and is not admissible under s 8 as having affected the conduct of a witness, assuming that such conduct is relevant [*Khijiruddin v. R*, 53 C 372: A 1926 C 139]. In a trial for murder evidence sought to be given that on a previous occasion the accused conspired together, murdered a person and implicated their enemies was not admissible under ss 8, 9, 14, 54. But such evidence may be admitted to explain the conduct of the falsely implicated persons in absconding [*R v. Gangaram*, 22 Bom LR 1274]. The statement of the accused to the witness soon after the publication of the photograph of a dead woman in a newspaper that "people are saying that the photograph is that of *S* (accused's wife) please go and see" and that the accused appeared to be in a disturbed state of mind and tried to go away from the office taking leave, is clearly admissible under the second para of s 8 as showing the conduct and the relevant fact and was an incriminating circumstance against the accused [*Arun v. S*, A 1962 C 504]. Where evidence against a person charged with an offence under s. 147 I P Code is open to doubt, his conduct sometime after the occurrence is not admissible under s 8 [*Enayet v. R*, 54 IC 775]. The fact that accused pointed out the place where the weapon of murder was concealed and that shortly after the crime, he was, when questioned, in a very agitated state of mind, are evidence of conduct within s 8 [*In re Semalai Goundon*, 63 IC 664 : A 1925 M 574]. In a bribe case the conduct of the accused *eg.* hesitating, trembling, perspiring &c, when called upon to produce the money may be taken into consideration [*Gandhi v. S*, A 1960 Mys 111 **following** *Shiv Bahadur v. S.* A 1954 SC 322 : 1954 SCR 1098; *Vaidyanatha v. S*, A 1958 SC 580; *Maha v. S*, A 1976 SC 449]. The fact that the complainant at first said that a certain person was the real culprit is relevant [*Abdul Ghafur v. R*, 25 PWR 1910 Cr]. Where an accused sent up to a magistrate for record of confession changes his mind and makes a statement which is not a confession, it is admissible as evidence of conduct [*Lalji v. R*, 6 P 747: A 1928 P 162].

The state of a man's mind can be judged only by the surrounding circumstances and by what subsequently took place, *eg*, what the accused said after the last offence [*Ganesh v. R*, A 1931 P 52]. A piece of conduct can be held to be incriminatory which has no reasonable explanation except on the hypothesis that he is guilty [*Santokh Singh v. State,* 1998 Cri LJ 218 (J&K)]. The conduct of the sons cannot be evidence of intention of the testator in the matter of revocation of a will, though his own declaration might, under certain circumstances, be admissible [*Surendra v. Sivadas*, 35 CLJ 488 : A 1922 C 182]. The conduct of a husband when his wife was missing to remain tight-lipped, take no action when foul smell was emitting from Navamsa (backyard), refuse to approach the police for assistance to trace his wife, pledge her silver anklets and above all get engaged to another woman within a few days thereafter show the guilty mind of the accused. [*Kanta Chhagan v. The State of Gujarat*, 1982 Cri LJ 110, 1114 : 1982 Guj LH 240 (Guj)]

Illus (i). Accused making a general statement that he had kept a gun in his village, the statement is admissible [*S v. R. Ch*, A 1965 Or 175]. Fact of accused absconding after commission of offence is an incriminating circumstance and is relevant [*Darbari v. S*, A 1970 Or 54].

—Antedating Bond, Projecting Flight etc.—The prisoner's attempt to make evidence for himself by antedating the bond to prove *alibi*, his projected flight by sea, his endeavour to conceal his identity are strong evidence to show that he was

conscious of some great danger impending and that he was actuated by a strong desire to escape; and this conduct is the more important, because so far at least as the execution of the bond is concerned, it was the conduct of a man who was not at the time pursued or even suspected [*R v. Sami*, 13 M 426, 432].

—Cheating and Forgery.—On a charge of cheating, the facts that the accused was financially embrassed and had attempted to cheat on other occasions are relevant to prove motive under s 8 [*Jogesh v. R*, 3 R 11; see however *Gokul v. R*, 29 CWN 483, *post*]. In a case of cheating the subsequent conduct of the prisoner would only be evidence to show the previous dishonest intention [*R v. Heeramun*, 5 WR Cr 5]. On a charge of cheating by importing goods in the port of Karachi by deceiving customs authorities, evidence of previous connected visit of accused to another port for similar object though unsuccessful is admissible under s 8 or 9 [*Mohanlal v. R*, A 1937 s 293]. On a charge of forgery of a sale deed, statements made by the accused before the registrar to support the genuineness of the deed are admissible as explaining conduct [*Natesa v. R*, 1933 MWN 96].

—Demeanour and Conduct.—For the presumption arising from the conduct and demeanour of the prisoner who feigned insanity since his arrest to escape the consequences of his crime, see *R v. Beharee*, 3 WR Cr 23, pp 24, 26.

—Inference from Subsequent Conduct [Running away and Flight].—Criminal intention may be inferred from subsequent conduct of the accused, who having committed lurking house-trespass by night was detected and subjected to very severe treatment, but did not utter a word of protestation of innocence or make any show of remonstrance and when questioned said—"I have committed a fault, pardon me" [*Balmakundram v. Ghanasantram*, 22 C 391]. The fact that accused was seen holding a pistol by the injured immediately after firing and that the accused ran away are relevant [*Malkhan v. S*, A 1975 SC 12]. Different persons are differently constituted and some accused even though innocent deliberately abscond rather than face the ordeal of a criminal trial and some other innocent accused to equally foolish things as make a false admission of guilt or pay off the amount said to have been stolen or embezzled. Such subsequent conduct dispenses with the positive proof of the guilt, the burden of which is on the prosecution. When once this is proved, such subsequent conduct may be utilised as furnishing, further proof of the guilt of the accused [*Chandrika v. R*, A 1930 O 324]. Though the conduct of accused in absconding immdiately after the occurrence of the offence is relevant evidence, it is not conclusive of his guilt because even innocent person may be tempted to such conduct to avoid arrest [*Thimma v. S*, A 1971 SC 1871]. The fact that the accused was absconding for 17 days after the occurrence will lead only to a suspicion. [*Kotari Suri v. State of Orissa*, 1984 Cri LJ NOC 121 : (1984) 1 Orissa LR 199 (Orissa)]. The conduct of an accused absconding for some period is relevant under s 8 and may be indicative to some extent of a guilty mind, but it would be conclusive evidence of his guilt. [*Adikanda Das v. State of Orissa*, 1988 Cri LJ 1884, 1886 : (1987) 3 Crimes 815 (Orissa)]. Under certain circumstances the case against one accused person is certainly strengthened by his running away, but a man who runs away may be, and often is, innocent, and any presumption of guilt which may arise from such a course is usually a very small item in the evidence on which a conviction is based [*R v. Sorab*, 5 WR Cr 28, 30; **refd to** in *R. v. Gobardhan*, 9 A 528, 568]. As to the effect of running away and flight, see *Rakhal v. R*, 2 CWN 81. Failure to put forward any explanation of absconding after occurrence is a point in favour of the prosecution [*Parmeshwar v. R*, A 1941 O 517]. The act of absconding can scarcely be held as a determining link in completing the chain of circumstancial evidence consistent only with the hypothesis of the guilt of the accused [*Matru v. S*, A 1971 SC 1050;

Raghubir v. S, A 1971 SC 2156]. To be an 'absconder' it is sufficient if a person hides himself even in his own house to evade the process of law [*Kartarey v. S*, A 1976 SC 76]. Prosecution cannot benefit from merely suspicious circumstances that the accused did not surrender or was not traceable for nearly one year [*Datar v. S*, A 1974 SC 1193 (*Prakash v. S*, 1969 3 SCC 741 **rel on**)]. Regarding subsequent conduct of the accused in not absconding after occurrence, it was probable that the accused thought that they had obliterated evidence against them by killing all of the three victims and, therefore, did not consider it wise to abscond, lest it may give rise to suspicion against them. Therefore, on the basis of the said subsequent conduct of the accused, the incriminating evidence appearing against them cannot be brushed aside. It was held, in such circumstances, the conviction of the accused was proper [*State of M.P. v. Mukund*, 1997 Cri LJ 534 (MP)].

Letter by Partner.—Letters written by partner immediately after retirement intimating a bank his severance from the firm and his consequent inability to guarantee its accounts is admissible to explain his conduct [*Pramatha v. Bhagwan*, A 1932 C 236: 35 CWN 705: 54 CLJ 516].

—Statement to Police. [Pointing Out Places].—Evidence that the accused gave a false name and pretended ignorance of the scene of offence cannot be admitted as explanatory of conduct [*In re Krishna Iyer*, A 1935 M 479].

Evidence as to the accused's pointing out places while in police custody is not admissible under ss 25, 26; nor can such evidence be treated as evidence of conduct apart from the accompanying statements [*Turab v. R*, 152 IC 473: A 1935 O 1; *R v. Hira*, A 1919 B 162; *Keramat v. R*, A 1926 C 320: 92 IC 439; *Birja v. R*, A 1941 O 563]—CONTRA.—Conduct of accused in pointing out the spot where stolen property was concealed [*R v. Nga Aung*, 35 IC 962 : 1916, 2 UBR 114]. Even though the statements made by the accused were not recorded, the fact that the accused led the police to the tank and brought out the stolen articles from inside the tank is relevant under Sec. 8. [*Bejoy Mondal v. State of West Bengal*, 1984 Cri LJ 518, 520 (Calcutta) (DB)]. The discovery of the pair of slippers and remnants of wearing apparels of the deceased at the instance of the accused. [*Amar Zayek v. State of WB*, 1988 Cri LJ 1293, 1297 : (1988) 1 Crimes 961 (Cal) (DB)]; or in disclosing the places where weapons of assault were concealed [*Babulal v. R*, A 1946 N 120 : 1945 Nag 931; *Mayachar Sha v. State*, 1987 Cri LJ 1948, 1950 (Ori) (DB): (1986) 62 Cut LT 40]; is admissible under s 8. The discovery statement made by the accused is relevant under both sec 8 and sec 27. [*Ghuraiyaa alias Rohini Baiswar v. State of M.P.*, 1990 Cri LJ 1129 (Madh Pra)]. See s 27, *post*. Where an accused charged under s 411 I P Code states to the police that he purchased the property from a certain person and produces a receipt which it was found, he had tried to alter, his conduct can be taken into account [*Mahomed v. R*, A 1934 L 695]. Where a debtor at the time of settlement of account with his creditor tore the latter's accounts and made a false report to the police charging the creditor with having torn out leaves from the book, the contents of the report are not admissible but the fact that he made the report and the general nature of his allegations are admissible as showing his conduct in relation to the alleged offence [*Fazal v. R*, 161 IC 885: A 1936 Pesh 72]. A report at the thana about the death of the deceased by one of the accused of a self-exculpatory nature is admissible under s 8 [*R v. Bhagi*, A 1941 O 359: 194 IC 236]. The evidence of the police officer that the accused went to the police station and gave information about the accident is admissible as showing the conduct of the accused. [*Kantilal Shivabai Thakkar v. State of Gujarat*, 1990 Cri LJ 2500, 2501 (Guj)]. Immediately after the accused murdered his wife, he was taken to the police station with the blood-stained clothes and blood-stained axe in his hand and there he gave a statement admitting the

crime. That admission is admissible. [*Siddappa v. State of Karnataka*, 1991 Cri LJ 458, 462 (Kant)].

"Conduct of a Party Which Influences or is Influenced By any Fact in Issue". —A party to any proceeding includes the accused person in a criminal proceeding. The complainant not being a party is mentioned separately. The para-graph provides for conduct of three kinds: (1) conduct in reference to such suit or proceeding; (2) conduct in reference to any fact in issue therein or relevant thereto, and (3) the conduct of a complainant. Conduct of the last kind must be conduct which influences, or is influenced by any fact in issue or relevant fact. In *R v. Abdulla*, 7 A 385, it seems to have been assumed and rightly that these words also apply to conduct of other two kinds. What is meant by the words, *if such conduct influences or is influenced by any fact in issue or relevant fact*, is that there must be a direct or immediate relation between the conduct and the fact in issue. Conduct which is brought about by some other agency though connected with the facts in issue is not relevant conduct. *Illus* (*e*) and (*f*) and *illus* (*c*) to s 9 show what is meant by relevant conduct. The distinction between conduct and character must not be overlooked. Evidence of conduct with reference to the particular transaction or to connected transaction (ss 14 and 15) is admissible. Evidence of character is relevant in certain cases only [ss 52-55, 155(*4*); Cunn pp 23-24]. The mere fact of an accused person having taken the magistrate to a particular spot and pointing out the several places where the incidents narrated by the approver took place, is not admissible as conduct [*Baghel v. R*, A 1929 L 794]. That piece of conduct can be held to be incriminatory which has no reasonable explanation except of the hypothesis that he is guilty [*Anant Chintaman v. S*, A 1960 SC 500 : (1960) 2 SCR 460].

—"Party"—What it Includes.—The word "party in this section includes not only the plaintiff and the defendant in a civil suit, but parties in a criminal prosecution, as for instance, a prisoner charged with murder. S 8 provides that the term is to include any one against whom an offence is the subject of any proceeding, and the reason why the legislature said this was probably the fact that by a pure legal technicality the Government occupies in criminal matters a position analoguous to that of a plaintiff in a civil suit [*R v. Abdullah*, 7 A 385, 399, 460: 5 AWN 78. See preceding paragraph]. It is doubtful whether the conduct of a witness is relevant under s 8 [*Khijiruddin v. R*, 53 C 372]. Evidence even of the conduct of a deceased conspirator is not admissible under s 8 apart from the authority of *Mirza Akbar v. R*, (A 1940 PC 176). The evidence admissible under the section is the evidence or conduct of a person who is a party to the action [*Sardul v. S*, A 1957 SC 747 : 1958 SCR 161]. A lawyer's statement showing his conduct in giving a particular advice to his client cannot be accepted as the conduct of the client. [*Sankar Mukherjee v. Atulanalu*, A 1987 Cal 115, 118]. Recovery of incriminating document containing a formula of polluted arrack on being pointed out by a partner of the firm. This information is admissible. [*Augustine v. State of Kerala*, 1991 Cri LJ NOC 25 (Ker)].

"Statements Accompany and Explain Acts Other Than Statements" [Explanation 1].—*Illustrations* (*j*) and (*k*) clearly explain the meaning of the Explanation. Statements are relevant under this section when they are the essential complement of the act done or refused to be done. The conduct of the person and the language used by him must be taken together [*R v. Rama Birapa*, 3 B 12 *post*]. The section, however, is to be read with ss. 25 and 26 relating to confessions, and thus while acts done by an accused person amounting to confession may be inadmissible [*R v. Nana*, 14 B 260], when the question is as to the intention with which a person has absented himself, letters written by him about the time of his departure or during his absence are admissible to explain his conduct [*Rawson v. Haigh*, 2 Bing 99]. In

Milne v. Leister, 31 LJ Ex 257, a letter written by the seller of goods to his agent was admitted to prove the name of the person to whom credit had been given. The fact of making a complaint is relevant conduct on the part of an aggrieved person and therefore what he says in regard to the crime of which he complains, also becomes relevant, although his statement is made in the absence of the accused person [*R v. Macdonald*, 10 BLR AP 2]. The accused was heard by those present at the scene of an assault to say: "I am David Glover ..... we will not think twice of shooting you." The statement was held to be relevant because it was capable of proving the truth of the facts stated [*R. v. Glover*, 1991 Cr LR 48 CA]. *Illustrations* (*j*) and (*k*) refer to such cases. In the absence of any complaint, his account of the occurrence subsequently given is not relevant under this section [Cunn p 24].

According to *Explanation 1*, the word "conduct" in this section does not include statements unless those statements accompany and explain acts other than statements: and it is on such a statement that the significance of the act, which it accompanies, in many cases wholly depends [*R v. Jora Hasji*, 11 Bom HC 242]. **Followed** in *R v. Rama Birapa*, 3 B 12, 17, where WEST J, *observed*: "The Government prosecutor has not been able to point out to us any discovery made through information given by the prisoner *Rama* which would make his statement leading to it admissible, nor has he shown that any act done by *Rama* has been so explained by his statement as to receive from those statements a character which otherwise it might not have, and a character of importance for the case in hand so as to make those statements admissible as what is commonly called part of the *res gestae* under s 8 of the Indian Evidence Act. There is hardly any act that a prisoner could do to which a statement relevant to a crime charged against him could not, by a more or less forced connection, be attached. The Evidence Act does not intend to suggest or sanction such process, but to make those statements admissible, and those only, which are the essential complement of acts done or refused to be done, so that the act itself or the omission to act acquires a special significance as a ground for inference with respect to the issue in the case under trial."

Production of articles is evidence of conduct under s 8. Statements accompanying or explaining conduct are also relevant under that section as part of the conduct. In adducing evidence as to the production of articles, evidence as to absence or existence of contemporary statements should also be adduced. Omission in this respect makes the evidence incomplete [*R v. Rafiquiddin*, 39 CWN 368: 62 C 572: A 1935 C 184; see also *R v. Nanua*, 1941 All 280: A 1941 A 145]. Statement of a deceased person which is not admissible under s 32 may be admissible as conduct. When R immediately after receipt of a document complained to some people that he was defrauded by S, the statement is admissible to establish his conduct [*Venkatasubbamma v. Narayanaswami*, A 1954 M 215].

S 8 so far as it admits a statement included in the word "conduct" must be read in connexion with ss 25 and 26 and cannot admit a statement amounting to confession as evidence which would be shut out by those sections as confession [*R v. Nana*, 14 B 260 *ante*; *Turab v. R*, 152 IC 473: A 1935 O 1. As to information by accused leading to the discovery of articles, see s 27]. S 8 embodies in a statutory form the rule of evidence that the testimony of *res gestae* is always allowable when it goes to the root of the matter concerning the commission of the crime. Consequently, verbal statement to a police officer during the time of recovery of articles upon the information of an accused in custody is admissible in evidence [*Kalijeeban v. R*, 63 C 1053: A 1936 C 316—*per* CUNLIFFE, J]. A statement made by a person who has been robbed and fatally assaulted, immediately after the robbery is admissible under s 8 as part of the *res gestae* [*Lalji v. R*, 6 p 747; see *Raban v. R*, A 1938 S 97 *ante*].

Victim of acid throwing giving out the names of accused and his companions immediately after attack before there was any opportunity of being tutored is relevant [*S v. Narhari*, 1962 Cut 303; *Kulamani Sandha v. State*, 1991 Cri LJ 599, 602 (Orissa)]. When the deceased who could not speak made a sign, when questioned as to what happened, this sign is admissible as conduct. [*Shantigir v. State of M.P.*, 1989 Cri LJ NOC 9 : 1988 Cri LR (MP) 16]. Statement by an accused to a witness is not admissible even under s 8 if it does not explain any accompanying conduct of the accused [*Bhagwandas v. S*, A 1974 SC 898]. On a charge of murdering her husband while she was with him during the night, the statement of the accused to her husband's brothers in the morning that she did not know the whereabouts of her husband is not admissible as it did not explain or accompany an act [*Bai Khatija v. S*, A 1962 G 1]. Evidence regarding statement as to the circumstances under which a person executes a document, made a considerable time after the execution, cannot be admitted to prove the facts stated by him [*Narasamma v. Billa Kesu*, 25 MLJ 637]. Admissibility of the resolution of a Committee as a statement accompanying and explaining the conduct of the Committee [See *Laxmi v. Md Shafi*, A 1949 Pu 141].

—Rape or Criminal Assault.—On charges of rape, indecent assault and similar offence upon females and of gross indecency with young males, the fact and particulars of any complaint made by the person outraged directly after the commission of the offence are admissible as evidence for the prosecution not as evidence or corroboration of the fact complained of, but as evidence of the credibility of the complainant's testimony to the facts alleged, and, where consent is a defence, to negative consent [*R. v. Lillyman*, 1896, 2 QB 167 CCR; *R v. Osborne*, 1905, 1 KB 551 CCR; *Beatty v. Cullingworth*, 1896, 60 JP 740; *Gillie v. Posho Ld*, 1939, 2 All ER 196: A 1939 PC 146; *Nga San v. R*, 19 Cri LJ 155: 43 IC 443]. Such statements are not admissible in any other class of case [*Jones v. S E & C Rail Co*, 1918, 87 LJKB 775; *Gillie v. Posho Ld, sup*]. Under the Act her complaint or previous statement is admissible as conduct (*illus j*) and also for corroboration under s 157 [see *Rameshwar v. S*, A 1952 SC 54 : 1952 SCR 377; *Bechu v. R*, A 1949 C 613; *S v. Pichika*, A 1963 Or 58]. Conduct of complainant immediately after rape is of great value and admissible under s 8 [*In re Boya Chinnappa*, A 1951 M 760]. In a rape case it was held that subsequent conduct of the accused in running with the trousers on arrival of the witness indicated his guilt [*State of U.P. v. Padam Singh*, 1996 AIHC 169 (All)]. If a statement or disclosure is made by the ravished girl either to the members of her family or others, it is an evidence of conduct as admissible as the corroboration by section 8, illustration (*j*) and under section 157. In all cases of rape, importance is attached to the subsequent conduct of the prosecutrix [*Bandu v. State*, 1996 Cri LJ 285, 287 (Bom)].

The complaint must have been made at the first reasonable opportunity that offered: thus complaints made on the following day [*R v. Rush*, 1896, 60 JP 777] or three days after the outrage [*R v. Ingrey*, 1900, 64 JP 106] have been rejected—Whether complaint was made quickly as could be reasonably expected depends on the circumstances of each case. Complaint on the day following the rape was held admissible, as although there was earlier opportunity there was no responsible person in whom the prosecutrix could confide [*R v. Cummings*, 1 All ER 551 CCA]. The complaint must have been voluntary, but does not cease to be voluntary merely because it is made in answer to questions, unless the questions are of a leading, suggestive or intimidatory kind [*R v. Ingrey, ante*]. Answers to such inquiries as "Did he assault you? Did he say this and that to you?" will be excluded; while answers to such questions as "What is the matter? Why are you crying?" will be admissible [*R v. Oborne, sup* p. 556].

On charges of rape, indecent assault and similar offences the terms of complaints by the victims to third persons are admissible in evidence subject to certain conditions [Hals 3rd Ed Vol 15 para 520 p 287; see also, Vol 10 para 859 p 468]. The conduct of co-accused, in a case of abduction and rape, in leading the police party to the room of his co-accused and pointing out the same would be admissible under sec. 8. [*Bhubender Parkash v. State*, (1986) Cri LJ 9, 13 (Del) : (1985) 1 Crimes 524].

A statement made by a woman immediately after she is ravished does not form part of the *res gestae* and is not admissible under s 6. S 8 covers the relevancy of conduct if the conduct of a ravished woman is such that she lodges a complaint; then that conduct is relevant. The particulars of the complaint may so far as they relate to the charge, be given in evidence, not as being evidence of the facts complained of but as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness box and as negativing consent on her part [*Kappinaiah v. R*, A 1931 M 233 (*R v. Lillyman, sup* **folld**; **reld on** in *S v. Chakradhar*, A 1964 Or 262)]. Statement of a ravished girl immediately after rape to witnesses who saw her crying and asked her the reason was admitted as an explanation of her act of crying under s 8 as also under s 157 by way of corroboration [*Soosalal v. R*, 82 IC 142: A 1925 N 74; *Harendra v. R*, 44 CWN 830, 834: 1940, 2 Cal 180; *R v. Osborne*, and *R v. Lillyman*, *ibid*, **folld**; *Radhya Sham v. State of J and K*, 1988 Cri LJ 447, 451 : (1987) 3 Crimes 443 (J&K); *Indru v. State of Him Pra*, 1989 Cri LJ 2238, 2241 (DB) (HP)]. Raped girl aged four years crying and disclosing name of accused; there was also evidence of stains of blood and semen on clothes of accused—*Held* admissible [*S v. Hiraman*, A 1965 B 154]. Mere statements of the woman narrating the story to her witnesses should not be taken as complaint and they are inadmissible [*Nga Aya v. R*, A 1938 R 127]. If a raped girl goes to her relatives straight after the occurrence and complains on her own initiative, her conduct would have a direct bearing upon and connection with the occurrence itself, but if she only answers questions, her statement would be merely hearsay [*R v. Phagunia*, 89 IC 1043 : A 1926 p 58]. Statements by raped girl in answer to her mother's questions three days after the occurrence, are not admissible [*R v. Soopi*, A 1930 L 84; see also *Sreehari v. R*, A 1930 C 132: 50 CLJ 524].

It should be borne in mind that in England the complaint of the prosecutrix though behind the back of the accused if made at the earliest possible opportunity is relevant only in cases of rape, indecent assault and other similar offences under the Criminal Law Amendment Act, 1885. 48 & 49 Vic c 69 and only for the purpose of the credibility of the story of the prosecutrix or, for negativing consent. In *R v. Folley*, 60 JP 569, an attempt was made to extend the rule to other cases; but opposite view was taken in the cases cited above. Such evidence has also been received in sexual charges against males. In the case of *R v. Camelleri*, 1992, 2 KB 122, it has been held that in cases of rape and kindred sexual offences, including the commission of an act of gross indecency with a boy of the age of 15 the fact that the victim made a complaint, soon after the offence as well as the particulars of the complaint are admissible. See also *R v. Wanneli*, 1922, 87 JP 48 CCA (boy aged 19). In both these cases observation was made on the advisability of considering some limit as to the age of the male complainant.

Complaint-Illustration (j).—Illustration (j) makes a distinction between a complaint and a statement. While a statement is made relevant only as corroborative evidence under S.157, with regard to a complaint, Illustration (j) demonstrates that the fact of the complaint having been made, the circumstances under which, and the terms in which made are relevant [*Aziz Bin Muhamad Din v. Public Prosecutor*, (1996) 5 Malayan LJ 473 (Melaka HC)].

Previous consistent statement.—In deciding whether a previous consistent statement is admissible, the test is spontaneity, relevance and whether the statement adds any weight to the other evidence in the case. The accused was charged with assault at a public place. Immediately after the incident he complaints to the police that it was he who had been assaulted. He later went to the police station and made a statement which was consistent with that version. The judge allowed evidence of the first statement, but excluded evidence of the second. It was held on appeal that the first statement was spontaneous and showed reaction, the second statement was also spontaneous, but irrelevant, because it added nothing to the reaction as evidence by the first statement [*R v. Tooke*, (1990) 90 Cr App R 417 CA].

As to corroboration of the testimony of the complainant in sexual offences, see *post, s* 134: *"Sexual offences, etc."* and also s 157.

—Distinction Between Statement and Complaint.—*Illus* (*j*) and (*k*) make a sharp distinction between a bare *statement* of fact of rape or robbery and a *complaint*. The latter is an example of statement accompanying and explaining acts while the former is a bare statement. A complaint evidences conduct, a bare statement has no such tendency. The distinction between a complaint and a bare statement is that the former is expressive of feeling, the latter of knowledge [*see Parvati v. Thirumalai*, 10 M 334]. There may be sometimes a difficulty in discriminating between a statement and a complaint. It is conceived that the essential difference between the two is, that the latter is made with a view to redress or punishment, and must be made to some one in authority, the police, fo instance, or a parent, or some other person to whom the complainant is justly entitled to look for assistance and protection. The distinction is of importance; because while a complaint is always relevant, a statement not amounting to a complaint will only be relevant under particular circumstances, *eg* if it amounts to a dying declaration or can be used as corroborative evidence [Nort p 114].

The prosecutor, while travelling by train to Calcutta, discovered the loss of the property, and reported his loss to a railway police inspector at the first station at which the train stopped after he became aware of the theft. The statement was admitted in evidence under s 8 *illus* (*k*) [*R v. Macdonald*, 10 BLR Ap 2].

On the question whether *A* having a dog had knowledge of its mischievous propensities, complaints about the animal to *A's* wife who had charge of his business in *A's* absence are admissible to affect *A* with knowledge [*Gladman v. Johnson*, 36 LJCP 153]. In order to prove that beer supplied to *A* was bad, loss of custom being alleged in consequence; the fact that the customers of *A* after tasting the beer left it or threw it away, complaining of its bad quality is admissible. The complaints are receivable as parts of the *res gestae* [*Manchester Brewery v. Coombs*, (1900) 82 LT 347] not to prove truth but as conduct. Complaints made by prosecutrix in case of rape is admissible though not part of the *res gestae* [*see illustration (j)*].

—Statements and Acts.—'Coduct' may in certain circumstances include statements as well as acts, but in doing so, it still retains the difference between an act and a statement. A statement must consist of words, whether they be spoken, or written, or spelled out as would be done by a mute person by movement of fingers. Acts exclude words and cannot be translated into words [*R v. Nanua*, A 1941 A 145 : 1941 All 280].

—First Information Report.—The first information report against the accused is admissible under s 8 as part of the informer's conduct. It is not however substantive evidence, but can be used only by way of corroboration or contradiction [*Azimaddy v.*

R, 44 CLJ 253 : A 1927 C 17; *Vallon v. S*, A 1957 T-C 207]. The first information report recording the statement of an assaulted person is admissible under s 8. *Illus* (*j*) and (*k*) apply on all fours [*Umrao v. S*, A 1961 MP 45]. As to use of first information report, see notes to s 32(*l*), s 145 and s 157, *post*.

—Other Statements Immediately After Incident. [Dying Declaration].—A dying declaration may be admissible also under s 8 as part of *res gestae*. A statement made by a deceased immediately after the robbery regarding the robbery and also regarding the assault committed in the course of the robbery is admissible though the person cannot be called to depose on oath. Ss 8 and 32 may overlap in some cases, but provide for different and distinct conditions [*Lalji v. R*, 6 p 747 : A 1928 P 162; as to dying declaration, see s 32 *(l) post*].

"Statement Made to Him or in His Presence and Hearing, Which Affects Such Conduct".—[*Explanation 2*]. *Illus (g)* is an example of this explanation. When statements made in a party's presence are tendered against him as *original evidence* (*ie* as being material irrespective of their truth or falsity), *eg* as constituting an offer or acceptance in a case of contract; or as introductory to, or explanatory of, his conduct; or as showing his knowledge or notice of the facts stated:—they are admissible as being in issue or relevant *per se*. But when tendered against him as evidence of the truth of the matter asserted, *ie* as hearsay admissible by exception, they are only receivable if, and so far as, he has, by his speech, silence or conduct admitted their accuracy [*R v. Christie*, 1914 AC 545, qualifying *R v. Norton*, (1910) 2 KB 496 and other cases: Phip 12th Ed p 762].

Statements made in the presence and hearing of a party are admissible in both civil [*Chantler v. Bremley*, 1921, 14 BNCC 14] and criminal proceedings. Such statements are not rendered inadmissible merely by a denial of their truth by the party against whom it is proposed to use them, since the statements are admissible to show the conduct and demeanour of the party when a statement was communicated to him, and the circumstances of a denial may cause it to be disbelieved [*R v. Christie, sup* at p 554]. The question is whether the party in whose hearing a statement is made acknowledges its truth either by his words or conduct. An acknowledgment can be deduced from mere silence [*R v. Christie*, *sup* at p 565], but where a reply cannot reasonably be expected, silence will not justify any inference or assent, for example, where the party was deaf, ignorant of the language, intoxicated, asleep, *in extremis*, or where the statement was made in the course of judicial inquiries, for then the regularity of the proceedings prevents free interposition and contradiction [Hals 3rd Ed Vol 15, para 541, pp 298-99].

"Statements made to the person whose conduct is in question are relevant when they have conduced to the conduct so that without them the conduct would be unintelligible. Such statements would of course include letters addressed to him and shown to have come to his knowledge and to have affected his conduct. The phrase *'affects such conduct'*, used in *Explanation 2* must, it seems, be read as if it were 'likely to affect or has a bearing upon such conduct', for in some cases, *eg* in *illustration* (*g*) the point is that the person addressed takes no action. The other illustrations referring to *Explanation 2* are (*f*) and (*h*). Th saying that 'silence gives consent' must not be taken without qualifications, for it would be a mistake always to infer that a man who does not repudiate an allegation admits the truth of it [*R v. Tilak*, 28 B 479, 491]. A statement may be a mere impertinence and best rebuked by silence, and specially when the observations are not addressed to a man himself, but merely made in his presence, he may be under no obligation to take notice of them [Cunn pp 25-26].

—Statements Made in Presence of Accused Not Contradicted.—Where persons are speaking on even terms and the accused remains silent in the face of a charge the conduct of the accused is relevant and is some evidence to show that he admits the truth of the charge. Similar when the accused attempts to escape when threatened with detention till the arrival of the police [*Parkes v. R*, 1976, 3 All ER 380 (PC) (*R v. Mitchell*, 1892, 17 Cox CC 503, 505 **apprd**)]. A statement made immediately after the offence by the person injured to a third person in the presence of the accused that the accused had done the act complained of which was not denied by him, is admissible under ss 6 and 8 *illus* (*g*) [*In re Sarat Dhobini*, 10 C 302, *ante*; see *Lallubhai v. S*, A 1972 SC 1780]. As to the weight to be attached to silence in such circumstances, see *R v. Feigenbum*, 1919, 1 KB 431; *R v. Tate*, 1908, 2 KB 680; *R v. Whitehead*, 1929, 1 KB 99; see also *Seneviratna v. R*, 41 CWN 65, 78: A 1936 PC 289. See further *post*, s 133—"*Corroboration by Conduct, Demeanour &c.*" The fact that an accused person remains silent when denounced in the presence of witness by the person alleged to have been murdered as his assailant is admissible in evidence. *First*, it affords evidence of identification and *secondly*, it affords the accused person an opportunity, of which however he is not bound to avail himself, either of denying that he was the assailant or of setting up some fact which may afterwards form part of his defence, such as he was acting in self-defence, or under grave and sudden provocation, or that the injuries received were due to accident. The degree of weight to be attached to the silence of an accused in such circumstances depends upon the nature of the case [*R v. Damapala*, 14 R 66: A 1937 R 83 FB: *Ghura v. R*, A 1942 A 47].

There is a divergence of opinion as to whether the silence of the accused is relevant and admissible giving rise to an inference that he accepts the truth of the accusation where the charge is made by a police officer or other person with authority to investigate the crime. In *Hall v. R*, (1971) 1 All ER 322, 324 (PC) **folld in** *Parkes v. R* (1976) 3 All ER 380 PC, it was held that no such inference could be drawn. In *R v. Chandler*, (1976) 3 All ER 105; *Hall v. R*, *sup* was not followed on the ground of not being in the consonance with the principles laid down in *R v. Christie*, *sup* and the earlier authorities and it was held that the accused and a police officer were not necessarily not speaking on equal terms. The police officer does not always have an advantage over someone he is questioning. Where the solicitor of the accused is present they are clearly on equal terms and the conduct of the accused is relevant.

An informer's statement to the police that he purchased opium from the accused is not admissible unless it was made in the presence of the accused [*Ah Sein v. R*, 4 Bur LT 222 : 12 IC 87]. Statement made by a police officer to the complainant in the presence of the accused that he (accused) was going to show the various place connected with the theft was not admissible under *Explanation 2*, because the conduct apart from the accompanying statement was not shown to be relevant and under the circumstances a statement could not be said to affect the conduct of the accused [*Heera Gober v. R*, 21 Bom LR 724: 52 IC 601]. The father of a woman spoke to a doctor who was charged with procuring abortion: "I have here those things which you gave my daughter to procure abortion" to which the doctor made no reply—*held* the statement is admissible [*R v. Crump*, 14 Cox 390]. See Hals 3rd Ed Vol 10, para 870, p 475.

—Silent Acquiescence When Amounts to Admission.—Admission may also be implied from the *acquiescence* of the party. But acquiescence, to have the effect of an admission, must exhibit some act of the mind, and amount to voluntary demeanour or conduct of the party [*Allen v. McKeen*, 1833 1 Summ 314; Tay s 809]. LORD

TENTERDON remarked in *Fairlie v. Denton*, 3 C & P 103: "What is said to a man before his face, he is in some degree called upon to contradict, if he does not acquiesce in it; but he not answering a letter is quite different, and it is too much to say that a man, by omitting to answer a letter at all events admits the truth of the statements that letter contains". There is in general no duty cast upon the recipient of a letter to answer it, and his omission to do so does not amount to any admission of the truth of the statements contained in it. It may, however, be otherwise where the relation between the parties is such that a reply might properly be expected [*per* WILLS J in *Richards v. Gellatley*, LR 7 CP 127 p 131: Tay s 811].

But in regard to admissions inferred from *acquiescence in the oral statements of others* "nothing can be more dangerous than this kind of evidence. It should always be received with caution : and never ought to be received at all, unless the evidence is of direct declarations of that kind, which naturally calls for contradiction; some assertions made to the party with respect to his right, which by his silence he acquiesces in " [*Moore v. Smith*, 12 Serg & R 393 (Am); Tay s 813; see also ss 814, 815]. The *silence* of the party, even where the declarations are addressed to himself, at a time, too when he is at full liberty to reply as he thinks fit, may be, worth very little as evidence of acquiescence, and if he has no means of knowing the truth or falsehood of the statement, the fact that he did not in terms deny it, is almost valueless. In all these cases it must be distinctly remembered, that the statement made in the party's presence or hearing is not evidence against him, but his own conduct in consequence of such statement is the sole evidence. Magistrates often make mistakes on this subject; but it is higly important that the distinction should be observed [Tay s 816].

Silence cannot be treated as an admission unless the occasion be such that a contradiction or explanation may reasonably be expected [*Wiedemann v. Walpole*, 1891, 2 QB 524]. But if the letter is sent under circumstances which *entitle* a reply, the presumption is otherwise [*Edward v. Towels*, 5 M & G 624; *Richardson v. Dunn*, 8 QB 218]. There may be cases in which there is deception by omission; but silence may be treated as deception only when there is duty to speak [*Harendra v. Purna*, 15 CLJ 132: 14 IC 368]. Silence of an accused may in a proper case be taken into account; but even then an accused had always a right to remain silent, if he so wishes and no presumption arises *ipso facto* from the silence [*Ghura v. R*, A 1942 A 47]. It must be remembered that the accused is not bound to give any explanation at all. This fact cannot be used against him [*R v. Basangouda*, 1941 Bom 315 : A 1941 B 139].

Silence in Rape Cases.—The silence of the accused to be relevant should come under *illus* (*b*). *ie* it should be proved that the accusations made by the woman against the man were made in his presence [*Nga Aye v. R*, A 1938 R 127].

Silence in Perjury Cases.—For silence to carry incriminating force in a case of perjury, there must have been circumstances which not only afforded the accused an opportunity to speak but naturally and properly called for declaration, which is said to be absent [*R v. Tilak*, 28 B 479. See also 19 WR 285].

Finding of Letters and Other Incriminating Papers, etc., in One's Possession May Amount to Knowledge of Content.—Letters and other papers found in a party's possession will occasionally in a civil suit, be evidence against him, as raising a *prima facie* inference that he knows their contents and has acted upon them [*Hewitt v. Piggott*, 5 C & P 75]; and they are frequently received in criminal prosecutions, especially those for conspiracy and treason, though their weight, as evidence against the prisoner, will in a great measure depend on the fact, whether answers to them can

be traced, or whether anything can be shown to have been done upon them [*R v. Horne Tooke*, 25 How St Tr 120]. So also the opportunity of constant access at documents may sometimes, by raising a presumption that their contents are known, afford ground for affecting parties with an implied admission of the truth or correctness of such contents [see however, *Hallmark's Case*, 47 LJCh 868]. On similar grounds, books of account which have been kept between master and servant, tradesman and shopman, banker and customer, or co-partners, will occasionally be admitted as evidence even in favour of the party by whom they have been written, provided that the opposite party has had ample opportunities from time to time for testing the accuracy of the entries [*Symonds v. Gaslight and Co.*, 11 Bev 283, 287; Tay s 812].

To be an admission it is not necessary that a document should have been written by a person against whom it is sought to be used; it is sufficient, if it be proved that it has been in his possession and this conduct in reference to it has been such as to create an inference that he was aware of its contents and admitted their accuracy. Unless this be done the document cannot be used as proof of its contents. What conduct would properly give rise to such an inference necessarily depends on the circumstances of each case [*Barindra v. R*, 37 C 467, 504: 14 CWN 1114; see *Jitendra v. R*, A 1937 C 99; *Jhabwala v. R*, 55 A 1040 *post*]. It is necessary to show that accused has in some way identified himself, or in other words, has by any act, speech or writing, manifested an acquaintance with and knowledge of, the contents of all or any of them. The rule would apply more strongly where some of the papers and letters were received and others written by the party against whom they are sought to be used [*Lalit v. R*, 39 C 119, 129]. In order to make the documents (*1*) found at the premises of the Association, and (*2*) found in the possession of individual accused persons when their residences were searched, admissible, one of three conditions has to be satisfied, *viz* (*a*) a document may be proved to be in the handwriting of an accused person by comparison with an admitted or proved specimen of his handwriting, in the light of the testimony of expert witnesses; (*b*) a document may be proved to be in the possession of an accused person; (*c*) a document may be admissible as falling within the scope of s 10 [*Pulin and Others v. R*, 15 CLJ 517]. As to documents, letters &c found in possession, see further s 10, *post*: *"Communications.....Document found in possession"* and s 14 *"Knowledge of Contents &c"*.

Documents which are, or have been, in possession of a party will generally be admissible against him as original *(circumstantial)* evidence to show his knowledge of their contents, his connection with, or complicity in the transactions to which they relate, or his state of mind with reference thereto. They will be further receivable against him as *admissions* to prove *truth* of their contents if he has in any way, *recognised, adopted or acted upon* them [Phip 8th Ed p 242]. See Hals 3rd Ed Vol 15, para 524.

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

Illustrations.

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

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

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

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

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

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

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

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

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

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

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

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

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COMMENTARY

Principle and Scope.—Sections 7 and 8 are generally based upon the theory of causation as a test of relevancy. S 9 deals with facts necessary to explain or introduce relevant facts. Such facts are not of a causative nature, nor can they be strictly said to form part of the same transaction. Facts which explain or introduce a fact in issue though relevant for the purpose stated in the section, such facts do not form part of the *res gestae* (*ante*, s 6) as they do not accompany the facts or transaction in issue. Facts which are explanatory or introductory of a relevant fact are often of considerable help in understanding the real nature of a transaction, in supplying missing links, in leading up to the main fact, or in establishing some connexion throwing light on the fact in issue. "There are many incidents, however, which, though not strictly constituting a fact in issue, may yet be regarded as forming a part of it, in the sense that they accompany, and tend to explain, the main fact. Not only may the probability of an occurrence be tested by considering its attendant circumstances, but these undesigned incidents are often essential to elucidate its true character, to reveal the motive of the parties or to establish their connection with the fact" [Phip 8th Ed p 57]. S 9 makes relevant all such explanatory or introductory facts. They are facts: (i) explaining or introducing a fact in issue or relevant fact [see *illus* (*a*), (*b*), (*d*), (*f*); or (2) supporting or rebutting an inference suggested by a fact in issue or relevant fact [v. *illus* (*e*); *cf s* 11 which is similar]: or (*3*) establishing the identity of anything or person whose identity is relevant; or (*4*) fixing the time or place at which a relevant fact happened; or (*5*) showing the relation of parties to the transaction in question.

Generally speaking all these facts are received under s 9 in *explanation* of a relevant fact or a fact in issue. "It is not, of course, all the incidents of a transaction that may be proved, for the narrative might run down into purely irrelevant and unnecessary detail. Names, dates, places, and the description and circumstances of the parties, though not in issue, are however, always admissible. So, often, the physical conditions under which the main fact happened; or any other matter so intimately connected therewith as to be necessary in order to present the case intelligibly to the jury (*R v. Bond*, 1906, 2 KB 389, 409). The particulars receivable, however, will necessarily vary with each individual case, [Phip 8th Ed pp 57-58]. The concluding portion of the section states that the facts enumerated *"are relevant in so far as they are necessary for that purpose"*. That is the limit within which such explanatory facts may be used.

Facts Necessary to Explain, How Far Relevant.—The facts admissible under s 9 are receivable for or against a party. The illustrations show how facts may be related to each other so as to explain or introduce facts in issue or relevant facts. *Illus* (*d*) and (*e*) show that statements made in the *absence* of the person against whom they are made are also admissible. But it should be remembered that they are admitted not as evidence of the *truth* of the matter, but as *explanatory* or corroborative facts. The

truth of the facts must be established by independent testimony. *Illus* (*e*) and (*f*) also show that the statements though hearsay are admissible by the rule of *res gestae* (see notes to s 6 *ante*).

Commenting of *Illus* (*d*) and (*e*) Norton says:—"It is clear that a very dangerous innovation is introduced whereby persons may suffer in life, persons or property, by statements put into their mouths from behind their backs: a principle which the law of Evidence has hitherto entirely eschewed". Against this remark Cunningham observes: "Whether this is a dangerous innovation is a matter of opinion: the framers of the Act apparently thought otherwise. They may have considered that, though such statements may weigh heavily against a man on some occasions, they might weigh strongly in his favour on others, and that, if evidence of a fact is to be given at all, it is desirable that what was said about it at the time of its occurrence should be proved as well as the other parts of the transaction. At any rate there is no question as to their admissibility under the present section [Cunn p 100].

Taylor explains the principle thus.—A second exception to the general rule that evidence of collateral facts is not usually receivable, is that such evidence is not excluded when such collateral facts raise any fair inference respecting the matter in issue, by either tending to show a prisoner's *identity or to corroborate* the testimony of a witness in some material particular. Thus, on an information for a libel, where the printer swore that he had received the manuscript from the defendant, other libels written by him concerning the same subject were received to, corroborate the statement of the printer [*R v. Pearce*, 1791, Pea 75]. So where a prisoner was charged with robbing the prosecutor of a coat by threatening to accuse him of an unnatural crime, evidence of a similar, but ineffectual attempt on the following evening, when the prisoner brought a duplicate pawn-ticket for the coat, and which ticket was found on his person at the time of his apprehension, was held admissible, as confirmatory of the truth of the prosecutor's evidence respecting what occurred on the former day [*R v. Egerton*, 1819, R & R 375]. So, on a charge of highway robbery, the prosecutor was allowed to rebut an *alibi*, by proving, that shortly before the attack upon him, and near the same spot, the prisoner had robbed another person [*R v. Briggs*, 1839, 2 M & Robb 199]; and even had no such defence been set up, similar evidence would, it seems, have been admissible, as showing at least that the prisoner was in the neighbourhood at the time when the crime was committed [*R v. Rooney*, 1836, 7 C & P 517: Tay s 335]. In a case of bribery mere recovery of money divorced from the circumstances under which it is paid is not sufficient to convict the accused [*Surajmal v. S*, A 1979 SC 1408].

[*Ref Step Dig Art 9; Phip 8th Ed p 57 et seq; Wigmore ss. 441-16; Tay s 335; Jones. s 141 et seq s 451; Hals, 3rd Ed, Vol 15, paras, 521, 522, 586, 592, 740; Vol 10, paras 814-15*].

"Facts Necessary to Explain or Introduce a Fact in Issue or Relevant Fact, etc".—The expression 'facts necessary to explain or introduce', is explained by *illus* (*a*), (*b*), (*d*), (*e*) and (*f*) as also *illus* (*c*) to s 6 and *illus* (*d*) to s 8. *Illus* (*d*), (*e*) and (*f*) are important because they show that the statements made by a person who is not the agent of the person against whom they are to be used and behind his back may be used against him. *Illus* (*f*) is founded on Lord George Gordon's case [21 How St T 513]. But by the other two illustrations like illustration (*a*) to s 6, if it is meant that the person who makes the statement is not called as a witness, are not supported by English authority. When it is shown that goods alleged to be stolen passed from the hands of the accused to *B* and were by *B* handed to *C*, the words spoken by *B* at the time of handing them are obviously material if it is further shown that *B* was the

messenger of the accused, and that the goods were consequently hidden by *C*. Then even without authority on the part of *B* they would explain the action of *C*. In the absence of evidence that the goods were hidden by *C*, the words only serve to explain the conduct of *B* showing how he came to bring the goods to *C*. In this way the statement would be admissible under s 8 *Expln (1)*. In *illus (d)* the statement of *C* is admissible on the same grounds. *Illus (e)* gives the case of a fact which rebuts the inference suggested by another fact which is relevant under s 8 [Cunn pp 27-28].

Ss. 9, 11 read with s 21 amply justify a court in admitting all previous statements made by accused which have a bearing upon the question of his guilt and whether the previous statement is made to a police officer, to a judicial officer, or to a third party is immaterial, if the statement is relevant to the accused's guilt. These sections are not controlled by the Cr P Code. They are corroborative evidence under s 157 [*Madan Garu v. R*, IC 963 : 4 PLT 881]. Where several persons are charged with committing or conspiring to commit a particular dacoity and evidence is tendered to show that prior to the dacoity the accused were intimately associating with the approver and the object of the association was commission of theft and other discreditable acts—*held* that as far as the evidence of close association of approver is concerned corroborating the approver's statement that a conspiracy existed, it is admissible under s 9 [*R v. Wahiduddin*, A 1930 B 157 : 32 Bom LR 324].

"In So Far As They Are Necessary For That Purpose".—The expression is very important meaning that facts referred to in this section introduced in evidence can be used for the purpose in question and no other [*Lakshmandas v. S*, A 1968 B 400].

—Absconding.—If after a crime a person named as a participant absconds; his conduct shows that he is indeed concerned in the crime. Therefore anything which tends to explain his conduct and furnishes a motive other than a guilty conscience is relevant under s 9 [*Gangaram v. R*, 62 IC 545: 22 Bom LR 1274]. See *ante* notes to s. 8.

—Absence of Entry.—Absence of entry of payment in an account book is relevant not under s 34 but under ss 9 and 11 [*Gangaram v. Lachiram*, 19 CWN 611 : 28 IC 705. See s 34, *post "Absence of entries"*].

—Complicity in Previous Murder.—Where certain persons are charged with murder, evidence to show that on two previous occasions they had committed murders and falsely charged and got convicted some others, is not admissible. It does not constitute motive or preparation under s 8 [*Gangaram v. R*, 62 IC 545; see ss 14, 15, *post*].

—Inducing to Break Contract.—'See *illus (d)* and *Brukowshy v. Thacker Spink & Co*, 6 BLR 107.

—Papers, Books, Letters, etc.—Butwara papers (field book or chitta), which describe the various plots, are admissible under s 9 as explanatory of partition paper, which without the chitta might be very difficult to understand [*Shk Jaki v. Dino Bandhu*, 2 IC 367]. Though the charges against the accused were based on only a part of a book but the whole book was given in evidence without objection, the remaining parts of the book may be used to show the intention [*R v. Ganesh Damodar*, 34 B 394]. In a divorce case by a husband against his wife and a co-respondent on the allegation of adultery, letters addressed by the wife to the co-respondent which were never delivered having been intercepted, were put in evidence and counsel for co-respondent had in cross-examination put questions based on the letters—*held* the letters were not evidence against the co-respondent

under s 9, Ceylon Ev Ordinance (which is the same as s 9 Evidence Act), and the mere fact of question having been put in cross-examination did not make the letters evidence [*Vrasapillai v. Ellatamby*, 1926 AC 133: 52 IA 372: A 1925 PC 229]. The intercepted letter is evidence against the writer [*Slade v. S*, A 1946 O 78].

—Value of Similar Premises.—The rateable value of similar premises in the same union is admissible in valuation matters, but the value of such evidence would depend upon the circumstances and degree of closeness with which the two sets of premises resemble one another [*Pointer v. Norwich*, AC 1922, LR 2 KB 741; *Ladies Hosiery and Underwear Ld v. WMA Committee*, 1932 LR 2 KB 679]. In proof of market value (*eg* on rating, compensation &c) evidence of value of similar properties in the same neighbourhood is admissible [*Cartwright v. Sculcoates*, 1990 AC 150]. Such evidence is relevant and admissible under s 9 [*Corpn of Calcutta v. Prov of Bengal*, A 1940 C 47 : 44 CWN 165 : 1940, 1 Cal 168; *Genl Elect Co Ld v. Corpn of Cal*, A 1959 C 413]. But the evidentiary value must depend on the facts of each case and to the extent the premises resemble one another [*Lalchand v. Corpn*, A 1933 C 428]. Substantive evidence of the price paid can be given by the person who have actual personal knowledge of the matter, usually the buyer or the seller and the recitals in a document can be evidence only if they are relevant as admissions or under s 32 [*S v. Mariamma*, A 1969 K 265]. On a question of valuation the award of the Land Acquisition Collector in respect of a neighbouring property is as admissible as that relating to any other transaction by which a transfer for value was made of a neighbouring property [*Prov of Bengal v. Satish*, 73 CLJ 596; see *Gangadhara v. Dy Collr*, 22 MLJ 379; *Asst Dev Officer v. Tayaballi*, A 1933 B 361; *Nageswar Rao v. Dy Collor*, A 1959 AP 52].

—Waging War.—In the trial of a prisoner for the offence of waging war against the Queen, evidence of facts as being explanatory and introductory, was admitted [*R v. Amirkhan*, 9 BLR 36, pp 50, 51 : 17 WR Cr 15].

"Identity of Any Thing or Person".—Identification tests do not constitute substantive evidence. Such tests are primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on right lines [*Matru v. S*, A 1971 SC 1050]. "When a party's indentity with an ascertained person is in issue, it may be proved or disproved not only by direct testimony, or opinion evidence, but presumptively by similarity or dissimilarity of characteristics (*eg*, age, height, size, hair complexion, voice, handwriting, manner, dress, distinctive marks, faculties, or peculiarities including blood group, as well as of residence, occupation, family relationship, education, travel, religion, knowledge of particular people, places or facts and other details of personal history" [Phip 9th Ed p 137; Hals, 3rd, Vol 15, para 521]. The process of constructing an inference of identification consists usually in adding together a number of circumstances, each of which by itself might be a feature of many objects, but all of which together can conceivably, co-exist in a single object only. Each additional circumstances reduces the chances of being more than one object so associated [Wig s 441]. Evidence of persons that they recognised the plaintiff as *R* son of so and so who disappeared several years ago is admissible. Such evidence really relates to their own perception when they saw the plaintiff after his reappearance and the recollection of their past perception of the said person before his disappearance [*Bibhabati v. Ramendra*, A 1942 C 498 SB : 47 CWN 9].

In criminal cases the previous conduct and declaration of the injured or other parties, and their relations with the accused, are often material in fixing the latter's identity [*R v. Ball*, 1911, AC 47, 68; *R v. Clewes*, 4 C & P 221]. In the absence of

cogent evidence that by reason of visibility of light at the place of occurrence and proximity to the assailants the witnesses had a clear vision of the action of each one of the accused persons in order that their features could get impressed in their mind to enable them to recollect the same and identify the assailants even after a long lapse of time, it would be hazardous to draw the inference that the accused are the real assailants [*B. Pedda Narsi Reddy v. State of A.P.*, A 1991 SC 1468, 1472]. The evidence of an eye-witness who also sustained injuries in the incident, regarding the identity of the accused who was quite well known to the witness cannot be doubted [*State of A.P. v. Dr. M.V. Ramana Reddy*, A 1991 SC 1938, 1947]. Where the identity of the *injured person* is in dispute, all facts which tend to establish it are relevant [*R v. Crippen*, 1910, Times, Octo 19-20; Phip 8th Ed p 128]. Sometimes evidence which would be otherwise inadmissible becomes so, either as serving to identify the prisoner, or some article in his possession, as connected with the commission of the crime. Thus, in an indictment for arson, evidence has been admitted to show that property, which had been taken out of the house at the time of the fire, was afterwards discovered in the prisoner's possession [*R v. Rickman*, 2 East PC 1035]. Where gold and silver ornaments belonging to the parents are identified by their daughter, such identification cannot be brushed aside merely on the ground of delay of about four months [*Dusasan Bhai v. State of Orissa*, 1981 Cri LJ 1452, 1456 : (1981) 52 Cut LT 126 (Ori)]. In the case of things which are used daily, identification can be made even without any special identification marks on those things [*Reechchoo v. State of M.P.*, 1981 Cri LJ NOC 110 (MP) (GB) : 1981 LJ 183]. Even if the seized ornaments could be treated to be ornaments in common use, a lady could never make a mistake in identifying the seized six silk sarees. It is matter of common knowledge that ladies have an uncanny sense of identifying their own belongings particularly cannot be rejected for want of prior test indentification [*Earabhadrappa v. State of Karnataka*, A 1983 SC 446, 451 : 1983 Cri LJ 846 (SC)]. Evidence of identification of articles cannot be discarded on the ground that such articles are available in the market [*Mohal Singh v. State of Punjab*, 1983 Cri LJ NOC 34 (P & H)]. If the only description of the stolen watch in the F.I.R. that is of H.M.T. make and it did not mention the brand of the watch, the identity of the watch cannot be held to be established [*Hari Shankar v. State*, 1985 Cri LJ 1700, 1703 : (1985) 2 Crime 437 (Del)]. Identification of material objects in the test identification parade will not be substantive evidence [*Chatru alias Chatrubhuja Bhue v. State*, 1987 Cri LJ 1349, 1350 : (1987) 1 Crimes 110 (Ori) (DB)]. Failure to hold identification of recovered property will not render the evidence of recovery unworthy of acceptance. [*Robert Peter Kadam v. State of Maharashtra*, 1998 Cri LJ 3879, 3882 (Bom)]. The witness maintained that she identified her torch but did not give any reason how she could identify. Such evidence cannot be accepted [*Ghanshyam v. State of M.P.*, 1990 Cri LJ 1017, 1020 (MP)]. So upon an indictment for stabbing, in order to identify the instrument, evidence may be adduced of the shape of a wound given to another person by the prisoner at the same time although such wound be the subject of another indictment [Nort p 119].

If a magistrate speaks to facts which establish the identity of anything they would be relevant, but if he seeks to prove statements of a person (in the instant case of an abducted person) not recorded in compliance with the mandatory provisions of s 164, such evidence though relevant within s 9 will have to be excluded. The memorandum made by the magistrate describing the condition of the house where the victim was confined would be relevant evidence under s 9 [*Deepchand v. S*, A 1961 SC 1527: 1962, 1 SCR 662].

On a charge of committing acts of indecency with boys, on the 16th March, the latter testified to the acts and stated that the accused had made an engagement on the 19th March at the same place and hour to repeat them. He was arrested at the same

place when talking with the boys and powder puffs were found on him. On a search of his house, indecent photos of naked boys were also found. The powder puffs and photographs were admissible as evidence of identity of the accused, of propensity to commit offence of the same kind, of intent &c. [*Thompson v. R*, 1918, AC 211; see also *R v. Twiss*, 1918, 2 KB 853 cited under s 14, *post*]. The statement by the brother of a kidnapped woman that she denounced the accused as one of the abductors is admissible under s 9 as explaining the circumstances of the arrest of the accused and also for establishing his identity [*Nur Md v. R*, A 1944, S 38].

—Photographs for Identification.—Photographs proved by persons who can speak to their accurracy are generally admissible to prove identity of persons [*R v. Tolson*, 1864 4 F & F 103; *Hindson v. Ashby*, 1896 2 Ch 1 CA)], or the configuration of land as it existed at a particular movement [*R v. U K E Tel Co*, 1862, 3 F & F 73 : *Hindson v. Ashby, sup* p 21]. Showing the identifying witnesses two good photographs of the accused before process of identification is improper and conviction cannot be sustained. It is one thing for a police officer in doubt upon the question of arrest to show a photograph to persons in order to obtain clue. But it is most improper to inform a witness beforehand who has to be called as an identifying witness, by the process of making the features of the accused person familiar to him through a photograph. The fair thing is to show a series of photographs and see whether the person expected to give information can pick out the appropriate person [*R v. Dwyer*, 1925, 2 KB 799; see *R v. Gross*, 17 Cr App R 196; *R v. Haslam*, 1925, 19 Cr App R 59; *Laxmipat v. S*, A 1968 SC 938]. If it is desired that a person, who may be a witness, should identify the photograph of an accused person, the proper course is to show that person a number of photographs of different people [*R v. Melany*, 1924, 18 Cr App R 2]. If the intention is to rely on the identification of the suspect by a witness his ability to identify should be tested without showing him the suspect or his photograph, or furnishing him the data for identification [*Laxmipat v. S, sup*]. There is no objection to the police who are seeking for information as to the person or persons who may have committed a crime showing the persons who are able to identity the criminal a photograph or series of photographs to see if they can pick out any one of them who resembles the person whom they think they will be able to identify. What is objectionable is, if a witness has identified an accused person, for the police to try and corroborate the evidence of that witness by showing him or her photograph of the actual person whom they have already identified [*R v. Hinds*, 1932, 2 KB 644: 101 LJKB 762]. Photographs are used and can properly be used for identification. There is an improper way of using photographs and there is a proper way of using photographs [*R v. Wattan*, 1942, 1 All ER 178]. *P* and *C* were charged with murder of a prostitute *D*, of conspiring to rob her and of theft committed in 1914. The trial took place in 1919 after their arrest. Evidence was brought forward to show that *X* and *Y* committed several thefts in the houses of other prostitutes during 1914-1918 under similar circumstances by going about in different names, and a photograph of *X* taken with one of the prostitutes was identified by all the prostitutes as that of *P*—*held* that the evidence is not admissible under s 9 or s 11 to show that *P* and *C* were the same persons as *X* and *Y* [*R v. Panchu Das*, 24 CWN 501 FB : 47 C 671 : 31 CLJ 402].

A superimposed photograph of the deceased over the skeleton of a human body (skull) recovered from a tank is admissible to prove that the skeleton was that of the deceased—Process of superimposition indicated [*Ram Lochan v. S*, A 1963 SC 1974]. There is no objection to the police showing a series of photographs to some of the witnesses and not only one or two in order to seek information as to the person or persons who may have committed a crime. Where photographs have been shown, the

value of only any subsequent identification by the witness will be impaired [*Sharaf Shah v. S*, A 1963 AP 314 (Hals, 3rd Ed, 1955, Footnote (1) at p 439 **relied on**)]. Identification evidence cannot be thrown overboard merely on ground that the photograph of the accused was published in newspaper. Whether the witness was really influenced by such publication should be decided by the court [*Sanjeevan v. State of Kerala*, 1994 Cri LJ 1316, 1318 (Ker)].

Photofit Picture.—The victim of a robbery gave a description of the robber from which a photofit picture was complied. The victim later identified the robber at a confrontation. At his trial the confrontation was ruled inadmissible but the photofit was ruled admissible. It was held that the photofit picture was in a class of its own to which neither the hearsay rule nor the rule against previous consistent statements applies and the judge was correct in admitting it [*R v. Constantinou*, 1990 91 Cr App R 74 CA].

Identification by witness, since deceased.—A judge has a common law discretion to exclude evidence to assure a fair trial, where the only evidence of identification comes from a deceased witness, it can be admitted, but the jury should be warned of the danger [*Scott v. R; Barnes v. R*, (1989) 2 WLR 924 PC].

—Identification Test or Parade.—Nature, essentials and value of identification evidence stated [*Budhsen v. S*, A 1970 SC 1321; *Rameshwar v. S*, A 1972 SC 102]. *Budhsen v. S, sup* does not lay down a rule of universal application that identification evidence is a very weak type of evidence [*S v. Boota Singh*, A 1978 SC 1770]. Where the rickshaw puller stated that he knew the accused persons and even other-wise he was in the company of the accused for about three hours and had witnessed the killing of the deceased at their hands, there was no question of holding any test identification parade [*Romesh Kumar v. State of Punjab*, 1993 Cri LJ 1800, 1801 (SC)]. Where in a robbery case the complainant PW1 had seen in broad day light the accused who with the complainant for some time as he was following her or walking in front of her and also he talked with her and soon after the incident PW2 had shown her a pamphlet containing the photograph of the accused, PW1 had sufficient opportunity to see the accused. The features of the accused were well fixed in the mind of PW1 not only on account of her close observation of the accused at that hour and also on account of her seeing the photo of the accused. Such evidence of PW1 can not be rejected merely on the ground that there is no identification parade held to indentify the accused by PW [*State of Karnataka v. Nagesh*, 1995 Cri LJ 3816, 3818 (Kant)]. The holding of TI parade is obligatory where the accused is not known to the witnesses. *Rajesh Govind Jagesha v. State of Maharashtra*, (1999) 8 SCC 428 : AIR 2000 SC 160. Not holding TI parade is not fatal to the prosecution case where the accused persons were previously known to the eye-witnesses and had been named in the FIR. *Pammi v. Govt. of M.P.*, AIR 1998 SC 1185 : (1998) 2 SCC 700.

It is true that where the identity of the accused is not known to the eye-witness it is incumbent upon the Investigating Officer to get such suspect identified from eye-witness in a test identification parade which not only ensures that the eye-witness's memory regarding the identity of the appellant is tested but also ensures that the investigation is proceeding on the right track and the person arrested is the real culprit. But mere fact that test identification parade has not been promptly would not lead to an inference that the prosecution version should be disbelieved particularly when eye-witness had occasion to see the assailant a number of times prior to the occurrence [*Jugal Mehto v. State (Delhi Admn)*, 1995 Cri LJ 1618, 1621 (Del)]. Where the witness did not know the accused prior to the incident, the failure of prosecution to get accused identified by the witness considerably detracts from the value to be attached to evidence the witness [*S.P. Tigare v. State of Maharashtra*, 1997 Cri LJ 157, 161 (Bom—DB)]. If the accused persons are intimately known to the witnesses from before the incident they

can be recognised by the witnesses by their voice, gait, etc. [*Bhimsha Subanna Pawar v. State of Maharashtra*, 1996 AIHC 1, 8 (Bom)]. Whether there was opportunity for the witnesses to see the accused at the time of incident, whether they could remember by face the accused persons and whether could identify them by such memory in court are relevant considerations [*State of Karnataka v. Rajan*, 1994 Cri LJ 1042, 1055 (Kant)]. Improvements made by the witness regarding description of the accused and clothes worn by him raise a suspicion regarding the identification of the accused by the witness [*Udai Lal v. State of Rajasthan*, 1994 Cri LJ 509, 511 (Raj)]. Where the accused was undergoing treatment in a hospital during the relevant period non-conducting of identification parade is not fatal to the prosecution case [*K. Satyanarayana v. State of A.P.*, 1994 Cri LJ 37, 38 (AP)]. Absence of identification of dead body is not by itself fatal [*Raj Bahadur v. State*, 1996 Cri LJ 2364, 2366 (Del)].

The prosecution witness recognised the accused as dacoit in test identification parade conducted by the Magistrate but he denied to recognise him before the trial court and trembled when the accused stared at him. It was held, that oral testimony of the Magistrate regarding successful identification of the accused would constitute substantive evidence. More so when it was supported by remarks of the trial court regarding demenour of the witness [*Ram Nath Mahto v. State of Bihar*, A 1996 SC 2511 : 1996 Cri LJ 3585, 3586]. Merely because the witness could not identify the co-accused due to darkness his identification of the accused who was already known to him and who gave him blow of dagger cannot be said to be doubtful [*Amichand v. State*, 1996 Cri LJ 2807, 2808 (Del)]. Identification by a witness of an accused who was not known to him prior to the incident is valueless [*Harish Natvarla Mistry v. State of Gujarat*, (1993) 1 Crimes 451 (Guj)]. Where the dying declaration showed that after the firing of shot was heard by the deceased and after he was injured, he turned to that side and saw the accused running away and he identified him and gave particulars of the accused there was no question of any mistake in identification [*Gopal v. State of U.P.*, 1994 Cri LJ 240, 241 (SC)].

Ordering accused to appear in test identification parade [*Pearelal v. S*, A 1961 C 531] or order to show parts of body for identification [*S v. Kathikalu, infra*] does not infringe art 20(*3*) *Constn*. In a later case the Supreme Court held that giving thumb impressions or impressions of foot or palm or fingers or specimen writings or exposing parts of body for purpose of identification are not included in the expression "to be a witness" in art 20(*3*) [*S v. Kathikalu*, 1962, 3 SCR 10 : A 1961 SC 1808]. Evidence of identification in jail or elsewhere is relevant under s 9 [*Kashmira v. R*, A 1949 Pu 361: *Bachhu v R*, A 1930 O 455: *R v. Natha & Ors*, A 1928 L 546: *Nur Md v. R*, A 1944 S 38]—CONTRA : Statements by persons identifying certain individuals being not made on oath and being made in extra-judicial proceedings are no evidence until they are called as witnesses. Even then they are not substantive evidence but can be used only for corroboration or contradiction [*Bhagatram v. R*, A 1934 L 461; *Bindeshri v. R*, A 1927 A 163; *Lal Singh v. R*, A 1925 L 19; *Nagina v. R*, 19 ALJ 947: *Samiuddin v. R*, 32 CWN 616: *Pesh Md v. R*, A 1942 P 319; *In re Kamaraj*, A 1960 M 125; *S v. Shiv*, A 1962 Raj 31]. It is a weak type of Evidence [*Shriram v. S*, A 1975 SC 175]. It can be used only for contradiction [*Kanai v. S*, A 1950 C 413]. In *Nagina v. R, sup*. it was pointed out that if a magistrate or other officer deposes that a particular witness in his presence identified an accused as having taken part in the dacoity, it is nothing more than hearsay evidence. The statement of the particular witness is not made on oath, nor is it made in court. The Magistrate has a discretion to allow the identification of an accused in court where there has been no identity parade [*Barnes v. DPP*, The Times, May 6, 1997 (QBD)].

It will not be safe to place reliance on the testimony of a witness who had seen the accused for less than a minute almost after one year and nine months [*Anoop*

Singh v. State, 1994 Cri LJ 3442, 3446 (Del)]. When the accused was shown to the witness before his identification the accused was justified in declining to participate in test identification parade [*Anoop Singh v. State*, 1994 Cri LJ 3442, 3445 (Del)]. Where the witnesses had seen the culprits from a very close distance mere fact that they were under threat of death it cannot be said that they could not identify the culprits [*Babu Lal v. State of Rajasthan*, 1994 Cri LJ 3531, 3534 (Raj)]. Identification of culprits who are not known to him for the first time in court cannot be relied upon in the absence of corroboration by an earlier test identification parade [*Shyamlal Pradhan v. State of Orissa*, 1996 Cri LJ 1019, 1020 (Ori); *Kanan v. State of Kerala*, A 1979 SC 1127]. Where prior to holding of test identification parade photographs of the suspects were published in a newspaper, the evidentiary value of test identi-fication parade is *nil* [*Fagu Das v. State*, 1996 Cri LJ 2245, 2246 (Ori)]. Mere fact that the witnesses and the accused used to board the same train everyday would not mean that they were known to each other [*Ram Mohan Singh v. State*, 1996 Cri LJ 692, 697 (All)]. If an accused is identified by cogent and proper evidence by other witnesses who were examined before the court, normally identification parades are not resorted to. Identification parade is resorted to as part of investigation to indentify the accused where the prosecution witnesses are not at all able to identify the accused. Therefore, whatever defect in the identification parade or non-conducting of the identification parade for specific purpose of identifying the accused will not be a ground to attack the prosecution [*Subhaya Perumal Pilley v. State*, 1997 Cri LJ 922 (Bom)(DB)]. Although the PW had seen the accused in the police lock-up and had also acquaintance with the accused prior to the TI parade, but since the conviction was not based on the identification parade but on the statements of the PWs made during the trial as eye-witnesses, which were reliable, the conviction cannot be set aside on ground of infirmity in the identification parade [*Mullagiri Vajram v. State of A.P.*, A 1993 SC 1242, 1243 : 1993 Cri LJ 169].

The very fact that all the witnesses even without any margin of error had identified the suspects as culprits, creates a lurking suspicion in the mind of the court as to whether the identifying witnesses took a clue in identifying the suspects put up in the parade with the fetters on their legs [*Tahir Mohammad v. State of Madhya Pradesh*, A 1993 SC 931, 934 : 1993 Cri LJ 193]. The test identification parade may not be necessary if full particulars of the culprits are given in the written statement given by the witness to the police; but when there were no such particulars available and only vague details had been given about the culprits, it was absolutely necessary that the investigating officer ought to have resorted to test identification parade of the accused persons so that the witness could pin point them if they were the same culprits whom he had mentioned in his writing [*Sri Ram Sharma v. State*, 1995 Cri LJ 1116, 1119 (Del)]. Identification depends on several factors like proximity between the identifier and the person identified, visibility condition and similar other factors. There can be no rigid guideline in that regard. Hans Gopal in his Criminal Investigation (5th edn., page 159) has indicated that the distance from which identification would be probable depends on various factors. Circumstances indicated in his book are only approximate indications and they are of but slight value. Where a witness being illiterate had some confusion about distance when he was questioned about the distance in cubit between the witness box and the court veranda but he stated that he was at a distance of 5 ft. when he saw the occurrence, his evidence cannot be faulted on the presumptions ground of improbability of identification [*Malik Ram Bhoi v. State of Orissa*, 1993 Cri LJ 984, 987 (Ori)]. When the PWs had sufficient time and light to see and observe the accused who were inside the house, their substantive evidence in court which had been duly corroborated by their identification accused in

the TI parades held earlier, was dependable and conviction can be based thereon [*Sukumar Jena v. State of Orissa*, 1993 Cri LJ 1354, 1358 (Ori)]. When the accused was brought under custody warrant to jail where TI parade was held, the possibility of prosecuting agency showing him to the identifying witnesses was unbelievable [*Ramesh Chandra Lenka v. State of Orissa*, 1995 Cri LJ 3178, 3179 (Ori)]. Identification parade is necessary whenever the accused is not identified by the witnesses. Where any stage the investigations and trial, identity of the accused was never in dispute, T.I. parade was not necessary [*Francis Xavier Rodrigues v. State*, 1997 Cri LJ 1374, 1376 (Bom)]. Where the entire gang operated for nearly 2¼ hours to complete the assault and dacoity and consequently, the availability of the time and opportunity to the witnesses was quite sufficient and the witnesses thus identified the accused in the TI parade correctly, delay of about 6 weeks in holding the T.I. parade would not render the evidence unreliable [*Munna v. State*, 1993 Cri LJ 3719 (All)]. In case of an accident of a matador van due to rash and negligent driving by the accused driver, who had sped away immediately after the accident, it was quite natural that some had seen the driver and some had not and therefore, identification of the driver only by some of the passengers, who were commuters, and not by all would not be fatal to the prosecution case [*Mandya Rural Police v. Ravi*, 1997 AIHC 3627, 3629 (Kar)]. Where in cross-examination the witness admitted that he had seen the accused persons before the occurrence and did know them though he did not know their names but he could identify them, holding of T.I. parade was not essential [*Ambika Prasad v. State*, 1997 Cri LJ 2853, 2865 (Del)]. In case of total absence of link evidence, the identification evidence given by the witnesses at the trial cannot be made the basis of conviction. Link evidence means evidence to show that accused was not shown to any witness from the time of his arrest till the time of his lodging at the jail [*Khan Singh v. State*, 1997 Cri LJ 2305, 2306, 2307 (All)]. Where all the six witnesses who went to identify the accused at the jail correctly identified the accused without making any mistake, the identification can be said to be too good to be believed, particularly when no *Hulia* or special feature of the accused were disclosed in the FIR by the informant [*Khan Singh v. State*, 1997 Cri LJ 2305 (All). See also *Sheonath Bhar v. State of U.P.*, 1990 Cri LJ 2423 (All)].

The substantive evidence of a witness is his statement in court; but the purpose of identification is to test that evidence and the safe rule is that the sworn testimony of witness in court as to the identity of the accused who are strangers to the witnesses, generally speaking, requires corroboration which should be in the form of an earlier identification proceeding. Where disinterested eye-witness picks out 9 persons out of 46 making 3 correct identifications and 6 mistakes, no reliance can be placed on such identification [*Vaikuntam v. S*, A 1960 SC 1340 : 1960 Cri LJ 1681]. The exception to this rule of corroboration by an earlier identification is where the court can safely rely on it without previous identification [*S v. Maheswar*, A 1964 Or 37]. When the accused was absconding for two years after the occurrence the blame for the delayed test identification parade cannot lie upon the prosecution [*Himangshu Pahari v. State*, (1986) Cri LJ 622, 627 (DB) (Cal)]. The identification of stolen articles by owners or the persons who have the opportunity to see them very often, cannot be discarded merely on the ground that no special identification marks were present on the said ornaments. It is so because such person can identify the articles by feel, touch or various points of difference distinguishing one thing from the other of the same kind, though they may not be able to formulate the reasons, since such identification is based on the untranslatable impressions of their minds [*State of M.P. v. Mukund*, 1997 Cri LJ 534 (543) (MP)]. Where the evidence of identification of ornaments for the first time in the court was not supported by earlier identification parade con-

viction based on such evidence is improper [*Danu v. State*, 1996 Cri LJ 2107, 2109 (Ori)].

Identification parade belongs to investigation stage [*Hasib v. S*, A 1972 SC 283]. Police is not required to hold an identification parade where a suspect had previously been properly and adequately identified by a complainant simply because the suspect continued to dispute the identification [*R. v. Popat*, The Times, April 10, 1998 (CA)]. In cases where the witness did not know the accused previously, the proper course was for an identification parade to be conducted. Confrontation should be confined to exceptional circumstances [*Williams v. Queens*, (1997) 1 WLR 548 (PC)]. For determination of the question whether failure to hold test identification parade is fatal, the material available at the stage of investigation or the opinion of the investigating officer is irrelevant [*Mohammad Saleem v. The State (Delhi)*, 1992 Cri LJ 1959, 1962]. A test identification parade of suspects or stolen article is held where there is doubt about the identity or the evidence of identification needs assurance [*The State v. Kanhu Chran Barik (Accused)*, 1983 Cri LJ 133, 142 (Orissa)]. Whether a witness has or has not identified the accused during investigation is not of itself relevant at the trial. The actual evidence regarding identification is that given by the witness in court. Absence of mention by the witnesses themselves about their identification of the accused during the parade will prejudice the accused in their defence, if the court is to act upon such evidence [*Chandy v. State*, 1981 Cri LJ NOC 70 : ILR (1981) 1 Ker 356]. There is no provision in the Cr P Code entitling the accused to demand that an identification parade should be held at or before the inquiry or the trial [*In re Sangiah*, A 1948 M 113 (*Amar Singh v. R*, A 1943 L 303 and *Sajjan v. R*, A 1945 L 48 : 1944 Lah 236 **dissented from**); *Ram Singh v. Addl Dir*, A 1965 Pu 145]. Failure to hold an identification parade is not necessarily fatal [*Harbhajan v. S*, A 1975 SC 1814, *Jadunath v. S*, A 1971 SC 363, *Appukuttan v. State*, 1989 Cri LJ 2362, 2369 (Ker) (DB)] and does not make inadmissible the evidence of identification in court [*Kanta Pd v. Delhi Admn*, A 1958 SC 350: 1958 SCR 1218].

Test identification parade, if held promptly and after taking the necessary precautions to ensure its credibility, would lend the required assurance which the court ordinarily seeks to act on it. In the absence of such test identification parade it would be extremely risky to place implicit reliance on identification made for the first time in court after a long lapse of time and that too of persons who had changed their appearance [*State of Maharashtra v. Sukhdeo Singh*, A 1992 SC 2100, 2112]. Although there is no right to claim identification parade, if prosecution turns down accused's request for identification it is an important point in his favour [*Shri Ram v. S*, A 1975 SC 175] and the prosecution runs the risk of the veracity of the eye-witnesses being subsequently challenged [*Lajja Ram v. S*, A 1955 A 671, *Madan Mohan Singh v. State of U.P.*, 1986 Cri LJ 1441, 1443 (All) : 1986 All Cri R 103 : 1986 All Cri C 110]. It is held as a rule of prudence, especially when the accused asserts that he is unknown to the prosecution witness [*Awadh v. S*, A 1954 P 483; *Pravash v. S*, A 1951 C 475]. Where an accused is arrested on the spot State is not bound to hold identification parade in absence of request from accused [*S v. Rajju*, A 1971 SC 708, *Lakhvinder Singh v. State*, 1988 Cri LJ 319, 321 (Delhi)]. If the witnesses came to know the names of the accused on the spot and they have also seen the accused on the spot, the absence of test identification parade is not fatal [*Mohbul Ali Accused v. The State of Assam*, 1984 Cri LJ NOC 45 (Gauhati)] and if the accused is in custody up to the time of trial there can be no need of an identification parade [*S v. Dhanpat*, A 1960 P 582].

If the accused is known to the identifying witnesses there is no need to hold parade [*Mehtab v. S*, A 1975 SC 274, *Bijoy Kumar Mohapatra v. The State*, 1982 Cri LJ

2162, 2174 (Ori), *Sidhan v. State of Kerala*, (1986) Cri LJ 470, 472 (Ker), *Sairjit Singh v. State*, 1986 Cri LJ 1910, 1912 (Del) (DB)] and the identification by them is a farce [*Chauhan v. R*, A 1934 O 251 : 148 IC 1192]. When names of the accused are mentioned in FIR an identification parade is not necessary [*Dharamvir v. S*, A 1974 SC 1156]. Where, however, the accused, is not previously known to the witness, identification of the accused soon after arrest is of vital importance in the interest of jusitce and fairplay both to the accused and the prosecution [*Rameshwar v. S*, A 1972 SC 102]. Identification for the first time in court without being tested by a prior identification parade is valueless [*S v. V.C. Shukla*, A 1980 SC 1382]. If a witness did not know the accused before the occurrence and no test identification parade was held to test his power of identification and he was also shown by the police before he identified the accused in Court, his evidence becomes absolutely valueless on the question of identification [*Mohanlal Gangaram Gehori v. State of Maharashtra*, A 1982 SC 839, 842 : 1982 Cri LJ 630 (2), *Hari Nath v. State of U.P.*, A 1988 SC 345, 348 : 1988 Cri LJ 442]. If there are infirmities in the evidence of eye-witnesses their evidence identifying the accused for the first time in court without a prior test identification parade is of no avail [*Mahadeb Ghosh v. State*, 1983 Cri LJ 1854, 1858 (Cal) (DB), *Hazrat Ali v. State of Assam*, 1983 Cri LJ NOC 61 (Gauh); *State of Orissa v. Ramesh Chandra Mahapatra*, 1983 Cri LJ NOC 191 (Ori) : (1983) 56 Cut LT 60]. In the case of robbery identification in court without any test identification parade is of no avail [*Abhimanyu v. State of Orissa*, 1984 Cri LJ NOC 41 : (1984) 57 Cut LT 27 (Ori); *Karim Khan v. State of Orissa*, 1985 Cri LJ NOC 67 (Ori); *Rajiv Kumar v. State*, 1989 Cri LJ NOC 42: (1988) 36 DLT 164 (Del) (DB)]. When the eye-witnesses did not know the accused before the incident it is incumbent that an identification parade is held [*Ram Karan Mal v. State*, 1990 Cri LJ 846, 849 (All) : 1989 All LJ 463]. Absence of identification parade cuts at the root of the prosecution case [*Sadashir Bajrang Sutar v. State of Maharashtra*, 1982 Cri LJ 2056, 2058 : 1981 Ban CR 484 (Bom)]. In a case of day light robbery, if the witness is not able to give the physical features of the accused, his evidence identifying the accused for the first time in court cannot be relied on [*Joginder Singh Jaggi v. State*, 1990 Cri LJ NOC 30 Delhi]. In a case of robbery, the victim identified the accused only in the Court that too after a lapse of 4 months from the date of occurrence. It is not possible to believe that the victim had no occasion to see the accused in the gap of 4 months [*Mohd Abdul Hafeez v. State of Andhra Pradesh*, A 1983 SC 367, 368 : 1983 Cri LJ 689]. When the facial features of the accused are not mentioned in the F.I.R. and the accused is arrested two months after the occurrence it is absolutely necessary to hold an identification parade [*Yog Raj v. State*, 1990 Cri LJ (NOC) 80 (Del); *Radha Bhakta v. State*, 1984 Cri LJ NOC 22 : 1983 Cut LR (Cri) 377 (Ori); *Mohd Abdul Haffeez v. The State*, 1984 Cri LJ NOC 75 (AP)]. In the case of total strangers, it is not safe to place implicit reliance of witnesses who had just a fleeing glimpse of the person identified or who had no particular reason to remember the person concerned, if the identification is made for the first time in court [*State of Maharashtra v. Sukhdeo Singh*, 1992 Cri LJ 3454, 3466 (SC)].

Where the accused charged of rape, was seen walking out of a police station so that there was ample opportunity for the victim of the rape who was outside the police station to see him, a parade in such cases is not likely to locate a good evidence [*R v. Nagah*, 1991 Crim LR 55 CA. But it was held in this and the subsequent case of [*R v. Brown*, 1991 Crim LR 368 CA that where there is a statutory right on the part of the accused to ask for a parade, his right cannot be denied by saying because there has been a street identification by the witness the parade has become otiose. See also [*R v. Nagah*]. The Times, Oct. 3, 1990 CA, advisibility of identification parade when the suspect was held at a police station.

Evidence of a magistrate who conducted identification parade to prove the identity of persons picked out at jail is admissible under s 9 even though the witness who identified in jail may not correctly remember who they were [*Chhutkan v. R*, 90 IC 444 : A 1926 O 36; *Abdul Wahab v. R*, 47 A 39]. The test identification chart must be proved by the Magistrate who recorded it [*Ramadhar Chamar v. State of Bihar*, (1986) Cri LJ 684 (Pat) : (1986) BLJR 335 : 1985 BBCJ (MC) 749]. Identification tests are as a rule not sufficient to form the basis of a conviction [*Ramzan v. R*, A 1929 S 149; *Dindayal v. R*, 81 IC 949 : A 1924 O 295; *Sheonath Bhar v. The State*, 1990 Cri LJ 2423, 2425 (All)], see however *Mathura v. R*, 101 IC 492 : A 1927 O 196]. As to value of identification evidence, see *Md Hussain v. R*, 164 IC 578 : A 1936 Pesh 166; *Gobind v. R*, A 1929 P 517; *Lalsingh v. R*, 5 L 396; *In re Sangiah*, A 1948 M 113; *Pub Pro v. Sankarapandia*, 1832 MWN 427; *Pravash v. R*, A 1951 C 475; *Anwar v. S*, A 1961 A 50].

If the witnesses had no opportunity or sufficient light to identify the dacoits, their evidence identifying the accused cannot be relied on [*Basti Ram v. State of U.P.*, 1982 Cri LJ NOC 164 : (1982) All Cri R 468 (All)]. In the absence of clear materials showing as to how the culprits could be identified at the darkness of the night, the evidence regarding the identification cannot be accepted. [*Sidha Dehury v. State*, 1982 Cri LJ 500, 505 : (1981) 52 Cut LT 512 (Orissa)]. In a case of robbery, the eye-witnesses had ample opportunity to mark the faces and features of the miscreants. It is quite natural that their impression should have become quite vividly sketched on their minds and they were able to identify the accused in court after sufficiently long time [*Jagdish v. State*, 1985 Cri LJ 1621 (Del)]. If two witnesses say that the culprits had covered their faces, the evidence of other witnesses identifying the accused cannot be accepted [*Bijuli v. State*, 1985 Cri LJ 1977, 1980 (Orissa)]. When the accused were shown to the witnesses, before the application for test identification parade was moved, the accused were justified in refusing to take part in the test identification parade [*Oudh Ram v. The State*, 1982 Cri LJ 1656, 1660 (Delhi); *Nawal Kishore v. State*, 1983 Cri LJ NOC 79 Delhi : (1983) 23 DLT 178; *Charan Singh v. The State*, 1988 Cri LJ NOC 28 : (1988) 1 All Cri LR 326 (Del); *Liala Ram v. State*, 1991 Cri LJ NOC 10 (Del)]. No importance can be attached to identification if accused and the witnesses had been in court for hours before the test identification, specially if the accused has any distinguishing mark [*Kanai v. S*, A 1950 C 513]. It is enough if the accused brings on record cogent circumstances to show that he was or could have been shown to prosecution witnesses while, he was in police custody or when he was produced in court for remand [*Tain Singh v. State (Delhi Admn.)*, 1987 Cri LJ 53, 55 (Del)]. If the prosecution did not let in any link evidence that while the accused was brought to the Court from the jail and back to the jail was not shown to any of the prosecution witnesses, the identification evidence loses its value [*Mahendra Singh v. State of U.P.*, 1991 Cri LJ 1381, 1385 (All)]. The allegation that the accused refused to participate in the test identification parade has to be established by examining the Magistrate [*Rajinder Kumar v. The State*, 1983 Cri LJ NOC 3 (Del) : (1983) 23 DLT 42]. Identification of the accused in Court carries weight particularly when the accused refused to participate in the test identification parade [*Sher Singh v. State*, 1991 Cri LJ 2612, 2614 (Del)]. After the arrest of the accused, a recovery was made. So there was every possibility that the accused might have been seen by the witnesses when the recovery was allegedly made under such circumstances, the accused was justified in refusing to join the test identification parade [*Pramod Kumar v. State*, 1990 Cri LJ 68, 70 (Del)]. The mere fact that a witness might have accidently seen photographs of accused in newspapers, parti-cularly in the absence of evidence regarding captions or descriptions given in newspapers, cannot lead to rejection of identification of accused made by witnesses [*Appu v. The*

State, 1990 Cri LJ 2281, 2288 (Ker); *R R Nair v. State of Karnataka*, 1981 Cri LJ (NOC) 39 (Kant)].

Evidence as to identification must be subjected to a close scrutiny whether all the persons identified were previously known to the witnesses or were perfect strangers —the time, state of light, the opportunities, the range and distance, etc, are material circumstances [*Man Singh v. R*, A 1929 A 928].

When sending the accused to judicial custody it is not necessary to order that the accused is to be kept *Ba-Parda* till the identification parade takes place [*S. v. Ranjita*, A 1962 Raj 78 FB]. Admissibility of identification parade conducted by witnesses [*S v. Jamnadas*, A 1963 MP 106].

The fact that eye-witnesses while identifying accused did not say anything with regard to specific part played by him in commission of crime did not render the evidence of identification inadmissible [*S v. K Venkata*, A 1976 SC 2208]. If the eye-witnesses had really observed the accused, they would have given some sort of broad description of the accused when they made their statements to the police [*State v. Shanker alias Raju*, 1988 Cri LJ 780, 784 : (1987) 2 Reports 92 (Del) (DB)]. The accused and the eye-witnesses belong to different villages. The witnesses stated that they are not concerned with the village of the accused. So their evidence identifying the accused cannot be accepted [*Raj Kumar Singh v. State of Bihar*, 1988 Cri LJ 1273, 1275 : (1988) BLJ 257 (Pat) (DB)]. Where evidence of test identification was not demolished by effective cross-examination of the witness and/or by examining own witnesses in rebuttal it should not be rejected merely because the prosecution had not led any evidence that the appellant was kept *'ba parda'* [*Ramanathan v. S*, A 1978 SC 1204]. Validity of identification parade cannot be challenged on the ground of irregularity or delay when the magistrate holding the parade and the police officer conducting the investigation have not been cross-examined in that behalf [*Bharat v. S*, A 1972 SC 2478].

If a witness does not remember having identified the accused at a parade, evidence of another witness that the former had done so is admissible [*R v. Osborne*, (1973) 1 All ER 649]. When the witness fails to identify the accused in court, the evidence regarding the test identification parade is of no assistance to the prosecution [*Ramadhar Thakur v. State of Bihar*, 1988 Cri LJ 264, 265 : 1987 BLJ 642 (Part) (1953 BLJR 703, held no longer good law 1972 Cri LJ 233 (SC)); *Niranjan Singh Roy v. State*, 1990 Cri LJ (NOC) 167 (Cal)]. Where a witness could not be examined in court because he is deaf and dumb, his identification of the accused in the test identification parade is of no value [*Kadungothi Alavi v. State of Kerala*, 1982 Cri LJ 94, 99 : 1982 Ker LT 287 (Ker)]. Villagers living in villages where electricity has not reached as yet, get accustomed to seeing things in the light shed by the lantern. Their eyesight gets conditioned and becomes accustomed to the situation. Their powers of seeing are therefore not diminished by the circumstances that the incident is witnessed in the light shed by the lantern and not electric light [*Machhi Singh v. State of Punjab*, A 1983 SC 957, 958 : 1983 Cri LJ 1457].

Object of test identification parades.—Actual conduct of identification parades Evidence of identification in Court—Evaluation of identification evidence [*In re Kamaraj*, A 1960 M 125]. Evidence of test identification can be used only to corroborate the substantive evidence given by the witnesses in court regarding identification of the accused as the doer of the criminal act [*Sampat v. S*, A 1974 SC 791; *Hasib v. S*, A 1972 SC 283; *Santokh v. Izhar*, A 1973 SC 2190]. Identification parades are held by the Police for the purpose of enabling witnesses to identify the properties which are the subject-matter of offence, or to identify the persons who are

concerned in the offence. The identifying witnesses are explained the purpose of holding the parades [*Ramkrishan v. S*, 1955, 1 SCR 903 : A 1955 SC 104; *Harnath v. S*, A 1970 SC 1619]. If the witness identifying the accused at the test identification parade does not himself give evidence the defence would be deprived of an opportunity of cross-examination as to his opportunity of seeing the accused before brought for identification and if the evidence of the witness suffers from serious infirmities identification cannot improve the situation [*Caetano v. Union*, A 1977 SC 135].

Value of evidence of identification.—In *S.C. Bahri's* case (A 1994 SC 2420 : 1994 Cri LJ 3271) the Supreme Court observed thus:

> "It is well settled that substantive evidence of the witness is his evidence in the court but when the accused person is not previously known to the witness concerned then identification of the accused by the witness soon after his arrest is of great importance because it furnishes an assurance that the investigation is proceeding on right lines in addition to furnishing corroboration of the evidence to be given by the witness later in court at the trial. From this point of view it is a matter of great importance both for the investigating agency and for the accused and a fortiori for the proper administration of justice that such identification is held without avoidable and unreasonable delay after the arrest of the accused and that all the necessary precautions and safeguards were effectively taken so that the investigation proceeds on correct lines for punishing the real culprit. It would, in addition, be fair to the witness concerned also who was a stranger to the accused because in that event the chances of his memory fading away are reduced and he is required to identify the alleged culprit at the earliest possible opportunity after the occurrence. It is in adopting this course alone that justice and fair play can be assured both to the accused as well as to the prosecution. But the position may be different when the accused or a culprit who stands trial had been seen not once but for quite a number of times at different point of time and places which fact may do away with the necessity of test identification parade".

"The evidence of identity must be thoroughly scrutinised, giving benefit of all doubt to the accused; but if after a thorough scrutiny there appears to be nothing on the record to suspect the testimony of the identification witnesses, the Court ought not to feel shy of basing a conviction on such evidence alone, because of the bare possibility that there could be honest though mistaken identification." [*Rameshkumar Soni v. State of Madhya Pradesh*, 1997 Cri LJ 3418 (MP). See *State of M.P. v. Manka*, 1960 MP C 216].

In *Asharfi v. State*, A 1961 All 153 : 1961 (1) Cri LJ 340, the Division Bench of the High Court agreed with the above.

Their Lordships agreed with the above observation made by this Court. After mentioning agreement with the above decision of the Division Bench of this Court it held that 12 questions are apt to arise and must be answered by the Court to its satisfaction before it can accept the evidence. They are as follows:

(1) Did the identifier know the accused from before?

(2) Did he see him between the crime and the test identification?

(3) Was there unnecessary delay in the holding of the test?

(4) Did the Magistrate take sufficient precautions to ensure that the test was a fair one?

(5) What was the state of the prevailing light?

(6) What was the condition of the eye-sight of the identifier?

(7) What was the state of his mind?

(8) What opportunity did he have of seeing the offenders?

(9) What were the errors committed by him?

(10) Was there anything outstanding in the features or conduct of the accused which impressed him?

(11) How did the identifier fare at other test identifications held in respect of the same offence?

(12) Was the quantum of identification evidence sufficient?

No hard and fast rule can be laid down and each case has to be dealt with on its own merits. These questions are of universal application. While acting upon the test identification the Court must satisfy itself with the answers of these questions. If the Court comes to the conclusion that answers to these questions do not convey that the result of the test identification is reliable and the test identification is not in conformity with para 9 of Rule 395 of the Madhya Pradesh Prisons Rules, it cannot be relied upon. On the other hand, if the Court concludes that there is nothing on record to suspect the testimony of identification witnesses the Court can base conviction on the basis of such evidence alone. There is no immutable proposition of law or of practice that it is imperative to hold test identification parade of accused persons who are not known to the witnesses prior to the incident. What weightage should be given to the evidence of identification of witnesses who have identified the accused for the first time in court is a question of fact and no strait jacket formula applicable to all cases can be laid down [*Madhukar Damu Patil v. State of Maharashtra*, 1996 Cri LJ 1062, 1065 (Bom)]. The evidence of identification can only be relied upon if all the chances of suspects being shown to the witnesses prior to their test identification are eliminated. *Ram Charan v. State of Maharashtra*, 1995 (1) All MR 122.

The prosecution has to adduce link evidence to the effect that right from the arrest till being lodged in jail, the faces of the suspects were kept veiled and no one had opportunity to see them. *Asharfi v. State*, A 1961 All 153. Plea that the suspect was shown to the witness does not require to be affirmatively established, it is sufficient if the accused can create a reasonable doubt in the mind of the court [*Vilas Vasantrao Patil v. Choudhry*, 1996 Cri LJ 1854, 1857, 1858 (Bom)]. "Only one identification cannot eliminate the possibility of the painting out being purely through change and for this reason is insufficient to establish the charge" (*See Asharfi v. State of U.P.*, A 1961 All 153 : 1961 (1) Cri LJ 340). This observation would be applicable with all the more rigour in case of the only evidence of solitary identification where the light was also insufficient for he witness to have recognised the accused. However, the above observation should not be construed to mean that the inflexible of law is that under no circumstances conviction cannot be based on a solitary identification. It is only a rule of prudence [*Ravindra Laxman Mahadik v. State of Maharashtra*, 1997 Cri LJ 3833, 3834 (Bom)]. Although test identification parade is a step in investigation, but it is the identification in the court that is an evidence. But the T.I. parade assumes importance particularly if held within a reasonable time after the commission of the offence [*Girja Shankar Misra v. State of U.P.*, A 1993 SC 2618, 2624]. Where the accused was shown to the witness before the T.I. parade, the proceeding of T.I. parade and its outcome carry no evidentiary value [*State of M.P. v. Samaylal*, 1994 Cri LJ 3407, 3412 (MP)].

Evidence of identification must satisfy the tests provided in the definition of 'proved' in s 3—Five points stated on which the court should satisfy itself before acceptance of identification evidence [*Anwar v. S*, A 1961 A 50]. Identification of accused by a witness in court in presence of the accused is substantive evidence, but not the fact that he was able to identify him in a previous parade and admitted the fact in court [*Bhima v. S*, A 1956 Or 177]. The witness properly identified the accused both in the test identification parade and in the Court. It can be safely accepted [*Ramdeo Raj Yadaw v. State of Bihar*, 1990 Cri LJ 1183, 1186 (SC)]. Evidence of identification for the first time in court is inherently weak [*Sharaf Shah v. S*, A 1963 AP 314; *Purna Chandra Sahu v. State of Orissa*, 1984 Cri LJ 1407, 1409 : (1984)1 Orissa Law Rev 228 (Ori); *Jong Singh v. State of Rajasthan*, 1984 Cri LJ 1135, 1138 : 1984 Raj LR 19 (Raj)]. If the accused is stated to have been identified by means of a torch and the torch is produced only in the court for first time, evidence regarding the identification of the accused has to be rejected [*Babulal Musahar v. State of Bihar*, 1990 Cri LJ NOC 65 (Pat)]. A witness's evidence of identification given in court should only be accepted if he identified the same person, whom he had previously picked out in the identification parade in jail [*Mahni v. R*, 82 IC 280 : A 1925 L 137; *Kanan v. S*, A 1979 SC 1127; *Chandran v. State of Kerala*, 1986 Cri LJ 1865, 1873 (Ker) (DB)]. Where witnesses picked out certain men as having taken part in a riot, it is sufficient. It is not necessary that the officer conducting the identification parade should have examined the witnesses as to the part played by each [*Partap v. R*, 92 IC 167 : A 1926 L 310]. Though not necessarily worthless, it is not evidence on which very great reliance can be placed [*Abdul Jalil v. R*, A 1930 A 746; *Jahangiri v. R*, 150 IC 1056 : A 1935 L 230]. Identification evidence of each victim can support the others, in a similar facts case [*R. v. Grant*, (1996) 2 Cr App R 272 (CA)]. Before acceptance of identification evidence it is very necessary that there must be good corroborative evidence [*Pravash v. R*, A 1951 C 475; *Sudhindra v. S*, A 1952 C 422; *Akbar Ali v. State of U.P.*, 1982 Cri LJ NOC 194 : (1982) All Cril R 343 (All); *Shiv Charan v. State of Haryana*, A 1987 SC 1, 2 : 1989 Cri LJ 695]. The corroboration for the evidence identifying the accused can be either from the test identification parade or it may be some other kind [*Rajendar Sharma v. State*, 1982 Cri LJ NOC 177 : 1982 A 11 Cri R 326 (All)]. If the circum-stances of the case exclude the possibility of the villagers arriving at the scene of occurrence before the accused fled away, the evidence of identification loses its significance [*State of Uttar Pradesh v. Jageshwar*, 1983 Cri LJ 686 : A 1983 SC 349, 350]. Value of identification evidence depends on the effectiveness of the precautions taken against the identifying witnesses having an opportunity of seeing the persons to be identified before the parade and also against being provided with any unfair aid or assistance to facilitate identification [*Hasib v. S*, A 1972 SC 283]. The proper course for the police to do is to allow the accused to remain in judicial custody till his identification parade is arranged [*Adesh Kumar v. State*, (1986) Cri LJ 233, 235 : (1985) 28 DLT 126 (Del)]. When the witnesses had no opportunity to see the accused prior to the holding of the test identification parade, their evidence can be accepted [*Kalipado Gope v. State of Bihar*, 1987 Cri LJ 1320 : 1987 BLJ 285 (Pat)]. Value of identification parade depends on the effectiveness and the precautions taken against the identifying witness having an opportunity of seeing the persons to be identified before they are paraded with others and also against the identifying witness being provided by the investigating authority with other unfair aid or assistance so as to facilitate the identification of the accused concerned [*Bollavaram Pedda Narsi Reddy v. State of A.P.*, 1991 Cri LJ 1833, 1837 (SC)]. When accused is on bail and was on several occasions pointed out to

the witnesses, the probative value of test identification parade may be affected [*Pearelel v. S*, A 1961 C 531, 534; *Iqbal Singh v. State*, 1981 Cri LJ 512 (Delhi) : 1981 Chand LR (Cri) 499]. Delay in holding T.I. parade by itself is not sufficient to hold that the identification parade has not been conducted properly [*Jamir v. State of Orissa,* 1998 Cri LJ 1728 (Ori)]. Where the witness had not actually identified the appellant but rather had described the clothing and approximate ages of two young men that he had seen an identification parade would have served no useful purpose. [*D. v. DPP*, 1998 C.L.Y. p. 13].

Where the photograph of the accused was shown to the witness and it was also published in newspapers, the evidence of TI parade was held to be rightly disbelieved by the trial court. *Vijayan v. State of Kerala*, AIR 1999 SC 1086 : 1999 Cri LJ 1638 : (1999) 3 SCC 54. Where the High Court relied upon such evidence, the Supreme Court said that it was in error in so doing. *Ravindra v. State of Maharashtra*, AIR 1998 SC 3031.

Manner of holding T.I. parade.—If the manner of holding identification parade throws suspicion on police, the evidence is not entitled to any weight [*Bhandari v. R*, A 1940 L 281]. Presence of a police constable at identification is most objectionable [*Kartar v. R*, A 1934 L 692], but it may not be so if proper precatuions are taken [*Indra v. R*, A 1936 L 409]. The paper make-up on the participants in the identification parade to cover up the scar mark on the face of the accused is more like a drama than an identification parade and so it is wholly unreliable [*Chaman v. State of U.P.*, A 1992 SC 601, 602]. The presence of the police officer and the public prosecutor in the jail at the time of identification parade will not vitiate it, when no prejudice was caused to the accused [*State of U.P. v. Girja Shankar Misra*, 1985 Cri LJ NOC 79 (Del) (DB)]. As to the procedure to be followed with regard to test identification, see *Nirmal v. R*, 62 C 238, 250 : A 1935 C 513; *Satya Narain v. S*, A 1953 A 385; *S v. Sarua*, A 1954 V-P 42; *Nga Po v. R*, A 1937 R 504. Principles to be observed and precautions to be taken laid down [*S v. Yumnam*, A 1957 Mani 21; *S v. Ram Autar*, A 1955 A 138]. As to duty of magistrate conducting identification proceedings, see *Parbhu v. R*, A 1933 L 946; *Jahangiri v. R*, 150 IC 1056 : A 1935 L 230. In identifying it is of course desirable that the person or thing to be identified is so placed with others that the witness may do it unaided. To secure absolute fairness the rules laid down in England (see next heading) may as far as possible be observed.

There should at least be ten undertrials for each suspect. The proportion of one to five cannot be regarded as satisfactory [*R v. Chhadammi*, A 1936 A 373; see however *S v. Wahid*, A 1953 A 314; *Dalchand v. S*, A 1953 A 123], and of less than 3 to 1 is of little value [*Ram Singh v. R*, A 1943 O 269]. The proper way is to put up each suspect separately for identification mixed with, in any case, not less than nine or ten. Less than that number considerably diminishes the value of identification [*Anwar v. S*, A 1961 A 50]. When the accused had brown eyes and persons with such brown eyes had not been mixed in the parade the evidence of identification had to be rejected [*Chander v. S*, A 1973 SC 1200]. When the accused, a bearded man, with a tape on his neck waited with the witnesses outside the magistrate's court and among five other persons in the parade none was similarly bearded the evidence had to be rejected [*Yeshwant v.* S, A 1973 SC 337]. Where persons between 18 and 26 were paraded with the accused about 16 years old, and the identifying witnesses were waiting outside the thana when the persons were called in for the identification parade and the identifying witnesses identified the accused, the identification was unfair [*Gobardhan v. R*, A 1932 L 308]. The value of identification evidence depends on the factors which minimise the possibility of chance as much as possible. Unless he is mixed with persons having pox marks, the identification could not be valid [*Bridaban v. State of M.P.*, 1981 Cri LJ NOC 187 (MP)]. When the accused who were policemen were allowed to be in their uniform, at the time of test identification parade, such identification is useless [*Bhagguram v. State of Madhya Pradesh*, 1982 Cri LJ 106, 110 (MP)]. If the suspect, according to the

witness, was having a clean shaven head and a shendi and ultimately in the identification parade only one person had a clean shaven head and shendi, the witness did the most natural thing to identify him as the person who was the assailant [*Ganesh Bhagwati Pandian v. State of Maharashtra*, 1985 Cri LJ 191, 194 (Bom) (DB)]. The accused identified at the parade had a scar on his forehead. But when there is no evidence or circumstance indicating that the identification of the accused was on the basis of any such mark and not by observation at the time of occurrence, the evidence about the identification can be accepted [*Mohanan Nair v. State of Kerala*, 1989 Cri LJ 2106, 2109 : (1989) 1 Ker LJ 467].

An accused has no right to disguise or to cover the marks on his face or body in such a way as to deny the prosecution witnesses an opportunity of seeing as much as is necessary for identifying him [*S v. Madanlal*, A 1959 A 504]. The evidence showed that most of the culprits had muffled their faces obviously to screen their identity. In such a case, the identification evidence is not of any use [*Ahmed Sayeed v. State of U.P.*, 1991 Cri LJ 901, 903 (All); *SK Jamir v. State of Orissa*, 1998 Cri LJ 2244 (Ori)]. Exposing parts of the body for purpose of identification does not offend against Art. 20(*3*) Constitution [*S v. Kathikalu*, A 1961 SC 1808 : 1962, 3 SCR 10].

Precautions.—The general precautions as to identification proceedings, the question of concealment of distinctive marks, conditions necessary for acceptable identification evidence and various other relevant matters have been exhaustively discussed in *Asharfi v. S*, A 1961 A 153; see also *Bimal v. S*, A 1969 All 591.

In criminal cases certain precautions should be observed: "The witness should not, however, be asked to identify a person for the first time when he is in the dock; the accused should previously be placed with other persons and the witness asked to pick him out [*R v. Cartwright*, 1914, 10 Cr App R 219]; nor should the witness be asked to identify a prisoner when the prisoner is alone in a room [*R v. Williams*, 1912, 8 Cr App R 84], nor should the witness be asked, "Is that the man?" [*R v. Chapman*, 1911, 7 Cr App R 53]; nor allowed to see the prisoner before an identification parade [*R v. Dickman*, 1910, 5 Cr App R 143]; nor should the suspected person be described to the witness [*R v. Bundy*, 1910, 5 Cr App R 270; Hals, 3rd Ed Vol 10, para 814]. For precaution for concealing the identity of accused prior to parade, see *S v. Ranjita*, A 1962 Raj 78 FB; *Palaniaswami v. S*, A 1968 B 127. When the witnesses were asked to wait outside the court at the time the accused were brought to the court for the test identification parade it is quite probable for, the witnesses to have seen the accused before the parade and so the evidence of identification is valueless [*Ghanashyam Das v. The State*, 1984 Cri LJ 588, 591 : (1984) 1 Crimes 845 (Ori)]. If before the identification parade is held, the accused were taken to the court from the jail a number of times and the witnesses had an opportunity of seeing the accused to be identified, it is enough to vitiate the identification parade [*Govinda Pradhan v. State*, 1991 Cri LJ 269, 272 (Ori); *State v. Pravakar Behera*, 1991 Cri LJ 745, 746 (Ori); *Bhullen v. State*, 1981 Cri LJ NOC 93 (All) : 1981 All Cri R 208; *Md Rosan v. The State*, 1984 Cri LJ NOC 85 : (1984) 1 Crimes 838 (Ori)]. The purpose of identi-fication parade is futile when the accused and the police officials were present at the police station for a photograph; *Kabul v. State of Rajasthan*, 1992 Cri LJ 1491, 1498 (Raj). Prior to an *ad hoc* confrontation identification, a note should be made of the witness's description of the offender [*R. v. Vaughan*, The Independent, May 12, 1997 (CA)]. It is for the prosecution to prove that the TI parade was held and also strictly in accordance with the rules. *Rajesh Govind Jagesha v. State of Maharashtra*, (1999) 8 SCC 428 : AIR 2000 SC 160. Test identification parade in the lock up of the investigation agency has been held to be improper particularly when witnesses were police constables. Conviction based on such evidence was held to be unsustainable. *Ravindra v. State of Maharashtra*, AIR 1998 SC 3031.

Delay in holding T.I. parade.—Memory of witness fades away with the passage of time and it is necessary that the suspects should be identified at the earliest possible opportunity after the occurrence [*Islam Molla v. State of W.B.*, 1996 Cri LJ 724, 726 (Cal)]. Although the deceased had done to death in broad day light, when the witness could not identify the accused at the test identification parade held 20 days afterwards, no sanctity can be attached to his nominating the accused in his statement in the trial Court [*S.P. Tigare v. State of Maharashtra*, 1997 Cri LJ 157, 159-160 (Bom)(DB)]. Merely because the T.I. parade had been held after three and half months, it cannot be rejected when the culprits had been lodged in a jail in one district whereas the identifying witnesses belonged to another district and there was no material on record to show that, in fact, those witnesses had any chance to see the suspects before the identification parade was held.

This case differs from *Wakil Singh v. State of Bihar*, A 1981 SC 1392 : 1981 Cri LJ 1014, where identification was by a single witness and there was no corroborating factor and there had been a delay in holding the T.I. parade and in such circum-stances the Supreme Court held that the possibility of wrong identification due to loss of memory cannot be discounted and as such the benefit of doubt was given to the accused persons [*Pravakar Behera v. State of Orissa*, 1997 Cri LJ 3291, 3292 (Ori)]. Where accused were put on test identification within 24 hours of their arrest the identification cannot be rejected merely on ground that it was not possible for them to identify the culprits after lapse of a period of three months [*Brij Mohan v. State of Rajasthan*, A 1994 SC 739, 743 : 1994 Cri LJ 922]. The fact of conducting identification parade 11 days after producing the accused before the Magistrate does not amount to delay [*State of Karnataka v. Rajan*, 1994 Cri LJ 1042 (Kant)]. It is imperative duty on the part of the I.O. to put up the suspects at T.I. parade without any delay [*Brij Mohan v. State of Rajasthan*, 1994 SC 739, 743 : 1994 Cri LJ 922]. Where the T.I. parade was held after two months of the incident and the accused was identified correctly by five out of eight witnesses but the victims of the dacoity could not identify the accused the identification evidence could not be relied upon [*Rahimal v. State of U.P.*, 1992 Cri LJ 3819, 3821 (All)]. Where no identification parade was held due to non-availability of similar person identification of the accused in court after seven years of the incident cannot be relied upon [*Mohd Isa Khan v. State of U.P.*, 1992 Cri LJ 3987, 3991 (All)]. Where no question was put to the I.O. or the Magistrate regarding the cause of delay in holding the identification parade, the delay of 14 days in holding the identification parade is not fatal [*Ganpat Singh v. State of Rajasthan*, 1994 Cri LJ 1565, 1573 (Raj)]. Delay of about six months in holding the T.I. parade, if not explained, renders the evidence of identification unworthy of credit [*Sri Niwas v. State of U.P.*, 1996 Cri LJ 3965 (All)]. Delay of about 2 months in holding test identification parade renders the indentification evidence doubtful [*Govind v. State of U.P.*, 1996 Cri LJ 445, 449 (All)]. A test identification parade held eight months after the occurrence with no clue given by the identifier in any of his earlier statements to the identity of the culprit is not of much assistance [*Rajkishore Sahu v. State*, 1983 Cri LJ 1715, 1717 (Ori) : (1983) 56 Cut LT 139]. Accused is having pox marks.

Test identification held long after the event is of no value [*Dwarka v. R*, A 1947 P 107; *Hazara v. R*, A 1947 P 157; *Bechu v. S*, 1957 Cri LJ 113; *S v. Wahid*, A 1953 A 314; *Anwar v. S*, A 1961 A 60; *Antar v. S*, A 1979 SC 1188]. The identification was made at the test identification parade about $3^1/_2$ months after the dacoity and in view of such a long lapse of time it is not possible for any human being to remember the features of the accused and he is very likely to commit mistakes [*Wakil Singh v. State of Bihar*, A 1981 SC 1392, 1393 : 1981 Cri LJ 1014]. When there was a long interval of nearly 4 months before the test identification parade was held, it is difficult to accept that in spite of this interval of time, the witnesses were able to have a clear image of the accused in their minds and identify him correctly at the identification parade [*Subash v. State of U.P*, A 1987 SC 1222, 1225 : 1987 Cri LJ 991; *Habal Shaikh v. State*, (1991) Cri LJ 1258, 1264 (Cal)]. Where TI Parade was conducted

after a delay of seven months and no plausible explanation for the delay was given, the parade was held to be of no use [*State of UP v. Ram Swarup*, 1998 Cri LJ 2788 (All-DB)]. Evidence regarding identification in a test identification parade held 13 months after the arrest of the accused cannot be relied on [*Biswanath v. State*, 1983 Cri LJ NOC 202 (Cal) (DB)]. When there is a gap of 10 years between the holding of the test identification parade and the trial, the court can safely rely on the identification in the parade [*Subhas Bhatta Charya v. State*, 1985 Cri LJ 1807, 1812 (Cal) (DB)]. When the test identification parade was held six months after the arrest of the accused and the inordinate delay was, not explained, the evidence regarding the identification parade cannot be accepted [*Puttan v. State of U.P.*, A 1992 SC 1032, 1033]. When there is delay of 3½ months in holding the test identification parade which delay was not explained the evidence regarding the identification parade cannot be accepted [*Kishan Lal Chowdhury v. State of West Bengal*, 1992 Cri LJ 1136, 1138 (Cal)]. The evidence regarding test identification parade held after 57 days has to be rejected when there is no explanation for the delay [*Khalak Singh v. State of M.P.*, 1992 Cri LJ 1150, 1154 (MP)]. In absence of any convincing explanation for delay [*Pritam v. S*, A 1971 Raj 184]; see however *Dhaja Raj v. R*, A 1948 A 241; *Sheonandan v. S*, A 1964 A 139]. It is not a proposition of law that after a lapse of long period, witnesses would, in no case be able to identify the dacoits committing dacoity during the night, but the courts must be extremely cautious in respect of such evidence [*Delhi Administration v. Balakrishan*, A 1972 SC 3]. The delay must be satisfactory accounted for. The explanation that no magistrate was available in Bombay for 5 weeks for supervising the TI parade was held to be not satisfactory. *Rajesh Govind Jagesh v. State of Maharashtra*, (1999) 8 SCC 428 : AIR 2000 SC 160. Where all the three witnesses correctly identified the accused and no question was put to the investigating officer why the parade was held one month after the arrest of the accused, it was held that the evidence of the TI parade could not be rejected in the circumstances. *Vikram Singh v. Raj Singh*, (1999) SCC (Cri) 578. Two months delay was held to be sufficiently accounted for where the investigating officer did keep writing to the magistrate but he could not spare time earlier due to his pre-occupations. *Murarilal Jivanram Sharma v. State of Maharashtra*, AIR (1997 SC 1593.

Light.—The witness first stated that he saw the accused in the light of a torch. Later he mentioned in the light of a lantern. The lantern was not produced before the investigating officer. Such evidence about identification cannot be accepted [*Basudev Yadav v. State of Bihar*, 1988 Cri LJ 1408, 1410 : 1987 BLJ 658 : 1987 Pat LJR (HC) 1122 (Pat) (DB)]. It was a moonlit night and there was a lantern and in the light of lantern the witness and his mother were beaten up by the dacoits. So the witness had a very good opportunity of seeing the faces of the dacoits and he is a reliable witness [*Igambar Singh v. The State*, 1990 Cri LJ 489, 493 (All) : 1989 All LJ 180]. Testimony of an eye-witness cannot be discarded for his failure to mention source of light enabling him to identify the assailants [*State of M.P. v. Samay Lal*, 1994 Cri LJ 3407 (MP)]. If the light available was sufficient for the accused to identify their target such light would also be then sufficient for the witnesses to identify the assailants [*Bhola Singh v. State of Punjab*, 1994 SC 137, 161]. Where the light was enough to enable the assailants to identify the victims it cannot be said that the light was not enough to identify the assailants [*State of U.P. v. Nahar Singh*, A 1998 SC 1328].

Identification by voice.—If the court is satisfied about the identification of persons by evidence of identification of voice alone no rule of law prevents its acceptance as the sole basis for conviction possibilities of mistakes in identifying persons by voice especially by those who are closely familiar with voice could arise only when the voices heard are different from the normal voices on account of the situation or when identical voices are possible from other persons also [*Sainudeen v. State of Kerala*, 1992 Cri LJ 1644, 1646 (Ker)]. Known persons can be recognised by their gait and voice. [*Shyamrao Vishnu Patil v. State of Maharashtra*, 1998 Cri LJ 3446, 3448 (Bom)].

As to identification by voice, see *Arshed v. R*, 30 CWN 166, 169; *Mahni v. R*, A 1925 L 137; *Laijan v. R*, 86 IC 817 : A 1925 A 405. It is never safe to rely on identification by voice [*Nga Aung v. R*, A 1937 R 407; *Abdul Haquq Ali v. State of M.P.*, 1983 Cri LJ NOC 122 (MP) : 1982 Jab LJ 744; *Shayam Deo Singh v. State of Bihar*, 1988 Cri LJ 508, 509 : (1988) 1 Crimes 124 (Pat) (DB)], especially when it is pitch dark [*Bhagtu v. R*, A 1928 L 925; *Tara v. R*, 151 IC 174]. Identification by 'voice and gait' though somewhat risky, but where the accused was known intimately to the identifier may be relied upon [*Kripal v. S*, A 1965 SC 712]. Identification by beared is by no means convincing [*Laijan v. R*, *sup*]. Known persons can be recognised by the timbre of their voice and gait [*State of Maharashtra v. Harishchandra Tukaram Awatade*, 1997 Cri LJ 612 (615) (Bom)].

Who Can Hold Test Identification Parade?—It can be held by panch witnesses (ordinary citizens) or the police or by a magistrate. In the case of identification parade arranged by the police and held in the presence of panch witnesses, the process of identification would be statements made by the identifying witnesses (whether it is identification of person or property) to the panch witnesses and would be outside s 162 Cr P Code, provided the process of identification is carried out under the supervision of panch witnesses and the police have completely obliterated themselves from the parade. When the identification parade is conducted wholly by the police, the evidence of identification of accused or property is hit by the provisions of s 162 Cr P Code [*Ramkishan v. S*, A 1955 SC 104 : 1955, 1 SCR 903; *Santa Singh v. S*, A 1956 SC 526 : 1955 Cri LJ 930]. The entire identification parade is within the command and control of the police officers except the actual identification that is being made, so it is too much to expect the accused to subject the authority holding the identification parade to any detailed cross-examination [*Ismail Amir Shaikh v. State of Maharashtra*, 1985 Cri LJ 273, 278 : (1984) 2 Bom CR 615 : 1985 Bom 201 (Bom) (DB)]. When the purpose of identification is borne in mind (*viz*, that the property identified is the subject of offence or the person is concerned in the offence) it is clear that the identification by finger, touch, nod or assent in answer to a statement which may be express or implied, amounting to a communication of the fact of identification by the identifier to another person and comes within the ban of s 162 [*Ramkishan v. S*, *sup*; *see* Sarkar's Cr P Code, 4th Ed p 228]. As a matter of fact identification parades are invariably held by magistrates and when the police arrange for any such parade before panch witnesses, it is a make-believe affair. Statement by witness recorded by magistrate in identification parade is made under s 164. [*Abdul Aziz v. R*, A 1950 L 167; *Kanailal v. S*, A 1950 C 413; *Shk Pinju v. S*, A 1952 C 491]; it can never be used as substantive evidence, but it can be used for contradiction or corroboration of the same witness [*Bhuboni v. R*, 53 CWN 609 : A 1949 PC 257 : 76 IA 147; *Brijbhusan v. R*, A 1946 PC 38 : 73 IA 1]. When the accused was not identified in the first identification parade, the identification in a second parade held after the lapse of a month is not reliable [*Chandan Singh v. State*, 1985 Cri LJ NOC 39 (Cal) (DB)]. In the absence of identification of the accused in court by a witness his identification in the test identification parade cannot be used for any corroborative purpose [*Moktar Sahani v. State*, 1985 Cri LJ 90, 91 : (1984) 88 Cal WN 922 (Cal) (DB)]. The evidence of an identification parade, in substance, is the statement of some persons of their having recognised the suspects as the persons who had participated in the commission of the crime. Such statement serves only as corroboration. The corroboration assumes importance since identification for the first time in Court is inherently weak evidence and thus is in need of corroboration [*Satrughana Parida v. State of Orissa*, 1991 Cri LJ 846, 856 (Ori) ((1988) 1 OCR 74 **dissented**)]. When a third class magistrate holds identification parade, statements of identifying witnesses made to him are admissible [*In re Narayan*, A 1965 MP 225]. The record of an identification memo cannot be regarded as a record of evidence of witness in a judicial proceeding given on oath and so the presumption under s 80 is not applicable to it [*Ram Sanchi v. S*, A 1963 A

308; approved in *Sheoraj v. S*, A 1964 A 290 FB (*Asharfi v. S*, A 1961 A 153 **overruled**)]. The comment on *Ashrafi's* case is that it is not clear what was intended to be laid down about s 164 Cr P Code, nor does it appear how the observations were necessary for the decision of the case [see *S v. Singhara*, A 1964 SC 358].

Failure to hold T.I. parade.—Observations of *Sajjan Singh v. Emp.*, A 1945 Lah 43 were quoted with approval in *State of U.P. v. Jagnoo*, A 1968 All 333. The observations were:—

> "If, however, the witnesses claim to have known the accused previously, while the accused himself denies this, the claim made by the witnesses cannot be used as a reason for refusing to allow their claim to be put to the only practical test of an identification parade. Even if the denial of the accused is false, no harm is done, and the value of the evidence given by the witnesses may be increased."

The above observation was **dissented** in A 1948 Mad 113. However, the Allahabad High Court expressed the same view [*Prakash Dhobi & Anr. v. State of U.P.*, 1994 (1) Crimes 234 (All)]. Non-holding of T.I. parade would not be fatal to the prosecution case regarding identification of the accused when the incident took place during day time and the FIR mentioning names of all the accused was very promptly lodged and as such there was hardly any time to concoct a false story [*Asha v. State of Rajasthan*, A 1997 SC 2828, 2830 : 1997 Cri LJ 3508]. Absence of test identification parade by itself is not fatal and *ipso facto* it does not bring discredit to the claim of witnesses [*Prem v. State of Maharashtra*, 1993 Cri LJ 1608, 1610 (Bom)]. Evidence of identification in court is not affected for want of evidence of earlier identification in T.I. parade [*George v. State of Kerala*, A 1998 SC 1376, 1384]. In the absence of T.I. parade, the vague and omnibus evidence of the witness that all the four accused persons standing in the dock were the culprits does not inspire confidence [*Trilochan Harijan v. State of Orissa*, 1998 Cri LJ 1887 (Ori)]. The identification of the accused by a witness if had an opportunity to interact with him or to notice his distinctive features lends assurance to his testimony in court and the absence of T.I. parade would not be material [*Ronny v. State of Maharashtra*, A 1998 SC 1252, 1262 : 1998 Cri LJ 1638]. Where no identification parade was held in a rape case and the prosecutrix was examined in court about three years and five months after the occurrence and she did not know the accused previously, her identification of the accused in court was of no value and no conviction can be given on the basis of such identification [*Vijayan v. State*, 1993 Cri LJ 2364 (Mad). See *Chonampara Chellappan v. State of Kerala*, 1979 Cri LJ 1335 and *Kanan v. State of Kerala*, 1979 Cri LJ 919 : A 1979 SC 1127]. Mere non-holding of T.I. parade cannot be a ground for releasing the accused on bail [*Satyavir v. State of U.P.*, 1998 Cri LJ 124 : 1998 AIHC 913 (All)]. Failure to hold T.I. parade even after demand by the accused is not always fatal [*Surendra Nath v. State of U.P.*, 1998 Cri LJ 359 (SC)]. Where the eye-witness mentioned the name of some of the assailants in the FIR which lodged soon after the occurrence failure to hold T.I. parade would not vitiate his evidence [*Pammi v. Govt. of M.P.*, A 1998 SC 1185, 1187]. Failure to hold T.I. parade may not vitiate the trial, it is still a very important element in the evaluation of the credibility of witness in respect of their identification evidence [*Public Prosecutor v. Sarjeet Singh*, (1994) 2 Malayan LJ 290 (Taiping HC)]. For another case on the effects on the prosecution case for not holding the TI parade see *Ramanbhai Naranbhai v. State of Gujarat*, (2000) 1 SCC 358. Where the accused was not known to the prosecutrix (rape victim), nor he was specifically named in the FIR, nor TI parade was held, it was held that it was useless to charge him under S. 376 (rape) or S. 323 (causing hurt). *State of H.P. v. Lekh Raj*, (2000) 1 SCC 247. Failure to hold TI parade even when demanded by the accused or ordered by the Sessions Court is not always fatal to the prosecution case. The witness mentioned the name of the accused in the FIR lodged within 15 minutes of the incident, identification parade was held to be not necessary. *Surendra Narain v. State of U.P.*, AIR 1998 SC 192 : 1998 Cri Lj 359.

Refusal to participate in T.I. parade.—The fact that the accused did not participate in the identification does not in any manner detract the evidence of the prosecution witnesses when ample opportunity existed for the witnesses to identify the assailants who participated in the occurrence [*Sunil v. State of Haryana*, A 1994 SC 1536, 1537 : 1994 Cri LJ 1381]. Where the accused refused to participate in T.I. parade on ground that he was shown to the witness and this fact was admitted by the police constable associated with the investigation the accused justified in refusing to participate in the T.I. parade [*Mangal Singh v. State*, 1996 AIHC 2390, 2391 (Del)].

Identification on the basis of photograph.—Section 22 of TADA provides:

> **"22.Identification of accused.**—Where a person has been declared a proclaimed offender in a terrorist case, the evidence regarding his identification by witnesses on the basis of his photograph shall have the same value as the evidence of a test identification parade."

The above section has been struck down in *Kartar Singh v. State of Punjab*, 1994 Cri LJ 3139 (SC) as being opposed to the fair and reasonable procedure enshrined in Article 21 of the Constitution.

Identification through video tape.—In a Canadian case the defendant was charged with the robbery of a shop. The sales assistant described the robber to the police, and two days after the robbery he was shown photographs of 12 men, and asked if he could identify the perpetrator. He pointed to three of the photographs, one of which was of the accused. The Crown introduced as evidence the store security camera videotape which depicted the robbery. It was held that on establishing that a videotape had not been tampered with, and that it depicted the scene of crime, it would be admissible and relevant evidence. It could be used by the judge in determining whether a crime had been committed, and whether the accused before the court was the perpetrator. It could be such convincing evidence that, on its own, it may demonstrate the innocence or guilt of the accused. The weight which would be given would be determined after the viewing of the tape itself. However, care has to be taken where an identification was based on videotape evidence alone, with reference to the clarity and quality of the video, and the amount of time for which the accused was shown. The evidence was considered to be admissible [*R v. Nikolovski* (1997) 141 DLR 647 (Supreme Court of Canada)].

Precautionary Measures For Identification of Accused.—Identification may be (1) by circumstantial evidence (*i.e.*, tone of voice, body-mark, scar &c) or (2) by direct assertion. There is room for error in both kinds of evidence due to defective perception of imperfect recollection. It is essential that all possible precautions should be taken to eliminate any suspicion of unfairness and to reduce the chance of testimonial error. Complaint is often made against the police or the magistrate in charge of identification parade that the process of identification of accused persons when in custody is held under circumstances which are not fair to the accused and which are not conducive to the elicitation of truth. The Royal Commission on Police Powers and Procedure (1929) in England considered the question. The directions and the recommendations made by the Commission in its report (CMD 3297) can be found at Wigmore s 786a and Sarkar 12th edition p. 92.

In 1969 the rules laid down by the Commission were revised. The main rules after revision are as follows:

(1) The object of an identification parade is to make sure that the ability of the witness to recognise the suspect has been fairly and adequately tested.

(2) Identification parades should be fair, and should be seen to be fair. Every precaution should be taken to see that they are so, and in particular to exclude any suspicion or unfairness or risk of erroneous identification through the witness's attention being directed specially to the suspected person instead of equally to all the persons paraded.

(3) If an officer concerned with the case against the suspect is present, he should take no part in conducting the parade.

(7) The witnesses should be prevented from seeing the suspect before he is paraded with other person.

(8) The suspect should be placed among persons (if practicable 8 or more) who are as far as possible of the same age, height, general appearance (including standard of dress and grooming) and position in life. If there are 2 suspects and they are of roughly similar appearance they may be paraded together with at least 12 other persons. Where, however, the two suspects are not similar in appearance, or where there are more than two suspects, separate parades should be held using different persons on each parade.

(10) The suspect should be allowed to select his own position in the line and should be expressly asked if he has any objection to the persons present with him or the arrangements made. He should be informed that if he so desires he may have his solicitor or a friend present at the identification parade.

(11) The witnesses should be introduced one by one and, on leaving should not be allowed to communicate with witnesses still waiting to see the persons paraded; and the suspect should be informed that he may change his position after each witness left.

(12) The witness should be asked whether the person he has come to identify is on the parade. He should be told that if he cannot make a positive identification he should say so.

(13) If a witness indicates someone but is unable to identify him positively, this fact should be carefully noted by the officer conducting the parade, as should every other circumstance connected with it, whether the suspect or any other person is identified or not.

(14) Photograph of suspects should never be shown to witnesses for the purpose of identification of circumstances allow of a personal identification.

The full text of the rules may be found in the British Home Office Circular No. 9 of 1969 reprinted at Archhold, 38th edn., para 1351-1353.

In view of the serious question of identification raised by two English cases, the Home Secretary set up a committee in May 1974 with Lord Delvin as the Chairman to go into this aspect of the law of evidence. In April 1976 the committee submitted a detailed report. An exhaustive discussion of the points involved in the report would be beyond the scope of the present work but the main recommendations of the Committee could be usefully summarised as follows:

(i) In cases which depend wholly or mainly on eye-witness evidence of identification there is a special risk of wrong conviction. The Trial Judge should be required by statute to—

(a) direct the jury that it is not safe to convict upon eye-witness evidence unless the circumstances of the identification are exceptional or the eye-witness evidence is supported by substantial evidence of another sort;

(b) indicate to the jury the circumstances, if any, which they might regard as exceptional and the evidence, if any, which they might regard as supporting the identification;

(c) if he is unable to indicate either such circumstances or such evidence to direct the jury to return a verdict of not guilty.

The committee gave some examples of exceptional circumstances and thought it advisable to leave the law on this point to be developed by judicial precedent.

(ii) Identification in Court is undesirable and unsatisfactory. Prior identification should be made a condition precedent to identification in Court to be dispensed with

only when the holding of parade would be impracticable *eg*, when the accused refuses to attend or unnecessary, *e.g.* when the accused is already well-known to the witness. If identification in Court is permitted the judge should warn the jury about the weakness of such evidence.

(iii) The object of the Home Office Rule (see *sup*) should be restated as being "to test the ability of a witness to pick out from a group the person, if he is present, whom the witness has said that he has seen previously on a specified occasion". If the trial judge considers that a breach of the rules (or any other piece of misconduct or misfortune) has made the test unsatisfactory the parade or the part of it affected should by statute be treated as a nullity and any evidence that emerges out of it should be excluded.

(iv) The parade had proved a most useful device and the committee did not propose any radical amendment to the procedure.

(v) Once a suspect has made it clear that identity is in dispute and the situation is likely to call for an identification parade, he should be given at the earliest convenient moment a leaflet describing the object and nature of the parade, his rights in respect of it and the possible consequences of his failure to attend.

(vi) Witnesses should be prevented from seeing members of the parade before they are introduced for the purpose of making an identification. They should also, so far as practicable having regard to the circumstances of the case be prevented from talking with each other. The report is printed as the House of Commons papers 338.

After the report in England the Court of Appeal has laid down guidelines the main ones of which are—

(1) Whenever the case of an accused person depend wholly or substantially on the correctness of one or more identification of the accused which the defence alleges to be mistaken the judge should warn the jury of the special need for caution before convicting in reliance on the correctness of the identification.

(2) If the prosecution has reason to believe that there is a material discrepancy between the description of the accused given to the police by the witness when first seen and his actual appearance, it should supply the accused or his legal adviser with particulars of the description the police were first given.

(3) In all cases, if the accused asks to be given particulars of any description, the prosecution should supply them.

(4) The judge should remind the jury of the specific weakness of the identification evidence.

(5) Where the quality of an identification is good the jury can safely be left to assess the value of the identifying evidence even if there is no other evidence in support. If the quality is poor the judge must direct an acquittal unless there is other evidence supporting the identification [*R v. Turnbull*, (1976) 3 All ER 549].

The points above may be usefully considered for some application in this country.

Identification parade : Procedure to be followed.—In *Ramanathan v. State of T.N.*, A 1978 SC 1204 : 1978 Cri LJ 1137 the Supreme Court opined as follows:

> "The holding of a test identification in such cases is as much in the interest of the investigating agency or the prosecution as in the interest of the suspect or the accused. For while it enables the investigating officer to ascertain the correctness or otherwise of the claim of those witnesses who claim to have seen the perpetrator of the crime and their capacity to identify him and thereby fill the gap in the investigation regarding the identity of the culprit it saves the suspect or the accused from the sudden risk of being identified in the lock by the self-same witnesses during the course of the trial. The line up of the suspect

in a test identification parade is therefore a workable way of testing the memory and veracity of witnesses in such cases and has worked well in actual practice."

As per the principles laid down in the above decisions of the Supreme Court, the identification parade is to be conducted taking into consideration the interest of both the investigating agency and the suspect or the accused."

Details of the procedure to be followed while conducting identification parades, by the Judicial Magistrate, have been given in the Manual of Instructions for the Guidance of Magistrate in the Madras State. In clause 10 of Paragraph 22 of the said Manual, it is specifically mentioned, that "any objection by any suspect to any point in the proceedings should be recorded". It is also stated that the Magistrate should make a report in writing of the entire proceedings and send a report to the higher authority. The decisions on this point, rendered by various High Courts, would reveal that it is the duty of the Magistrate to make a note of every objection which is made by an accused at the time of the identification proceedings so that the Court which has to judge the value of identification evidence may take into consideration the objections and in the light of those objections may appreciate the evidence of identification. So, the learned Judicial magistrate, while conducting the identification parade, has to take into consideration all these guidelines, before the identification proceedings are over [*N. Krishnaraya Babu v. State*, 1996 Cri LJ 4484 (Mad)].

The practice of asking persons on an identification parade to speak about their names is undesirable and not to be followed as there is a risk a person might be chosen on the basis of his name even if the witness has doubts about the physical appearance [*Ricketts v. Queen*, (1998) 1 WLR 1016 (PC)].

It was held in *Budhsen v. State of U.P.*, A 1970 SC 1321 : 1970 Cri LJ 1149 that "generally speaking, the Magistrate must make a note of every objection raised by an accused at the time of identification and the steps taken by them to ensure fairness to the accused, so that the Court which is to judge the value of the identification evidence may take them into consideration in the appreciation of that evidence."

In this connection reference may be made to the following observation of the Madras High Court:

> "the Magistrate is duty bound to record the objections raised by the accused/ petitioners at the time of identification parade. But, in this case strangely, even before the commencement of the identification parade, petition has been filed by the petitioners/accused before the learned Magistrate, that the 'identification parade is unwarranted and the accused are reluctant to attend the parade.' This would be preposterous, because the petitioners cannot ask the Court not to conduct the identification parade, or they cannot refuse to participate in the identification parade, for the reasons, stated in their petition. Probably, that was the reason, as to why, the said petition was not entertained by the learned Magistrate, and the same was returned. Suppose, during the identification parade, if the victim or the witnesses do not identify any of the petitioners, then the question of objection does not arise. Therefore, the recording of objection by the learned Judicial Magistrate, regarding the identification parade would only come in the event of identification of the accused by the witnesses concerned." [*N. Krishnaraya Babu v. State, 1996 Cri LJ 4484, 4486 (Mad)*].

According to the instructions contained in Criminal Manual, clause XI, the Executive Honorary Magistrate is supposed to put a question about the opportunity to see culprit at any time subsequent to offence or arrest to identify witness and not to suspect. From the evidence of the Special Executive Magistrate, PW4, the court found that clause XI of the Criminal Manual was substantially complied with. No serious defects could be pointed out in the identification parade conducted in this case. The accused was properly and clearly identified in this case. Hence conviction can be based on such identification [*Pravin Kumar K. Shukla v. State of Mahara-shtra*, 1997 Cri LJ 577 (580) (Bom)(DB)] **distinguishing** *Ramcharan Bhudiram Gupta v. State of Maharashtra*, 1995

Cri LJ 4048; *Vilas Vasantrao Patil v. State of Maharashtra*, (1995) 1 All MR 513]. In a case where a number of persons have participated in the commission of an offence and the witness identify the accused, the likelihood of mistaken identity cannot be ruled out [*K. Satyanarayana v. State of U.P.*, 1994 Cri LJ 37, 38 (All)]. While holding the identification parade, care should be taken to procure dummies of nearly the same age and physique of the accused [*State of Gujarat v. Mahmad*, 1996 Cri LJ 3400 (Guj); *Motilal v. State*, 1988 (1) Guj LH 264]. Every objection made by the accused at the time of identification must be noted by the Magistrate conducting the identification parade. Objection to the conduct of identification parade, even before the commencement of the identification parade is not permissible [*N. K. Krishnaraya Babu v. State*, 1996 Cri LJ 4484, 4485, 4486 (Mad)]. Identification of the accused in the court only, in the absence of any earlier T.I. parade, when at the time of assault the accused were wearing masks and were unknown to the victims, is hardly of any significance to connect them with the crime [*Rampal Pithwa Rahidass v. State of Maharashtra*, 1994 Cri LJ 2320, 2333 (SC)].

The test in either formal or informal identification is whether the admission of the evidence would be unfair. Important factors going to the fairness of the informal identification adopted by the police was that identification was an integral part of the immediate investigation, that it took place very shortly after the commission of the offence and that it took place close to the scene of the offence, and a judge in such a case was therefore entitled to form the view that admission of such evidence would not be unfair to the appellant [*R v. Malashev,* (1997) Crim LR 587 (CA)].

Evidentiary value.—The evidence generated by the test identification parade is not of substantive nature. It is a safe rule of prudence. The evidence is usuable for corroborative purposes. *State of U.P. v. Lekh Raj*, (2000) 1 SCC 247. The evidence is capable of creating belief in the mind of the judge as to the involvement of the person brought before the court. *Rajesh Govind Jagesha v. State of Maharashtra*, (1999) 8 SCC 428. The substantive piece of evidence is identification in court but that also loses its value where the suspect was shown to the witnesses before identification. *Shaikh Umar Ahmed Shaikh v. State of Maharashtra*, AIR 1998 SC 1922.

Identification in Court.—The law is well settled that Identification of an accused in Court is the substantive evidence of the person identifying and his earlier identi-fication in a T.I. parade corroborates the same. In other words, want of evidence of earlier identification in a T.I. parade does not affect the admissibility of the evidence of identification in Court [*George v. State of Kerala*, 1998 Cri LJ 2034 at 2042 : (1998) 1 Scale 411 (SC)]. Mere evidence of identification for the first time in court is not sufficient to sustain the conviction of the accused [*Ramzan v. State of Maharashtra*, 1998 Cri LJ 3547, 3548 (Bom)]. No conviction can be based on identification for the first time in court and that too by a solitary witness. [*Robert Peter Kadam v. State of Maharashtra*, 1998 Cri LJ 3879, 3881 (Bom)]. Identification of the accused by a witness for the first time in court is weak evidence, *State of H.P. v. Lekhraj*, (2000) 1 SCC 247, particularly when made many years after the occurrence, *Vijayan v. State of Kerala*, AIR 1999 SC 1086 : 1999 Cr LJ 1638. But otherwise it is a substantive evidence; *George v. State of Kerala*, AIR 1998 SC 1376 : 1998 Cri LJ 2034; *Raju v. State of Maharashtra*, AIR 1998 SC 275 : 1998 Cri LJ 493. If the accused was known to the witness earlier, the latter having had the opportunity to interact with him and to notice his distinctive features, the identification of the accused by such witness in the court, without participating in TI parade, could be relied upon. *Ronny v. State of Maharashtra*, (1998) 3 SCC 625. Where the accused person was known to the witness by face only and not by name, the evidence of TI parade could corroborate the substantive evidence of identification in the court. *Mohd. Iqbal M Shaikh v. State of Maharashtra*, AIR 1998 SC 2864 : (1998) 4 SCC 494.

Where there was clear evidence to show that the accused persons were shown to the witnesses, the identification of such accused by the witnesses in the Court was held to be meaningless [*Shaikh Umar Ahmed Shaikh v. State of Maharashtra*, 1998 Cri LJ 2534 (SC)].

Where there was no other evidence against the accused except identification, the court said that there is need for caution in a case where the evidence depended solely on identification evidence. The judge also noted the danger of relying on dock (in court) identification in the light of the failure of the prosecution in holding TI parade. The case arose out of robbery and murder in a bus. The identifying witnesses were policemen on duty [*Williams v. R*, (1997) 1 WLR 548 (PC)].

§ For effect of breach of procedural requirements in conducting identification parade, see *Thirumalai Kumar v. Public Prosecutor*, (1997) 3 SLR 434 (Singapore HC).

Failure to identify in court after identification in TI parade.—Where a witness identified the accused in the TI parade but could not do so in the court, it was held that the identification at the TI parade lost its importance. *Vijayan v. State of Kerala*, AIR 1999 SC 1086 : 1999 Cri LJ 1638.

Question of Paternity.—As to resemblance of child, to show paternity, the propriety of the inference rests on the supposed physiological facts that bodily traits may be transmitted by procreation [Wig s 166]. Resemblance of features as evidence of paternity, in cases of bastardy, inheritance or seduction, has been a matter of some controversy, but, where the fact of resemblance has been regarded by the court as having probative value, the production of child for the better apprehension of the resemblance has been treated as proper [Wig s 1154]. In the well-known *Russel* divorce case, photographs of the child were tendered in evidence to show resemblance between the child whose paternity was in question and photographs of the petitioner at a like age and the child was also tendered for inspection by the jury and comparison with the photographs and with the petitioner. HILL J, who admitted the evidence observed that he considered it of little value, if any. He said: "In my view any conclusion drawn from the likeness or unlikeness of the child to the petitioner, whether in general or in the shape of the ears and the colour of the eyes and so forth, would be very unsafe and conjectural" [*Russel v. Russel & Meyer*, 39 TLR 287; see also *Russel v. Russel*, 1924 AC 687]. On the question whether *A* is *B's* child, evidence of personal resemblance or want of resemblance of *A* to *B* was admissible [*Bagot v. Bagot*, 1878, 1 LR Ir 308; *Burnaby v. Baillie*, 42 Ch D 282, 290; *Slingsby v. AG*, 1916, 33 TLR 120, 122]. Photographic evidence in support of the paternity of a child was held to be admissible in divorce proceedings in *C v. C*, (1972) 3 All ER 577. In the *Slingsby* legitimacy case *sup* LORD SHAW observed that evidence as to the likeness of the child to the alleged parents is worthless. While the personal traits are sometimes transmitted by procreation, the features of a child during the first few weeks or months of its existence are very immature and they change during the period. So, in *Flores v. S*, 72 Fla 302 (Am) ELLIS J, said: "The sound rule is to admit the fact of similarity of specific traits, however, presented, provided the child is in the opinion of the trial court old enough to possess settled features or other corporal indications". In several jurisdictions in America blood-grouping tests are allowed as evidencing paternity *only* in a negative way, *ie* to show that a particular person is *not* the father of a particular child. (See Wig ss 165a, 165b. As to blood-grouping tests, see also *post*, s 45: *Blood-grouping Tests*). It was held that the decision of the trial judge upon the personal resemblance of the plaintiff to his deceased father could not be received or acted upon [*Jaswant v. Jetsinghijee*, 2 MIA 424; see *Anand Bahadur v. Dy Commrs*, A 1933 O 242]. Parentage cannot be inferred from family likeness or a facial resemblance nor negatived from such want of resemblance or likeness. A photograph of the admitted person along with a disputed person taken together, or, separately is not admissible under s 9 or any other section for deciding the question of parentage of the disputed person and any conclusion from such comparison of photographs would be very unsafe and conjectural [*Khedia v. Turia*, A 1962 P 420]. One of the questions in issue in a suit as to the pedigree of a certain family being whether one *G* was son of *B* or of one *M* belonging to a totally different family from that of *B*, an attested copy of a *rubkar* in some proceedings long anterior to the suit was tendered in evidence in which *G* was described as the son of *B*—*Held* that the *rubkar* was admissible under this section [*Radhon v. Kanayi*, 18 A 98].

Identity of Tenure.—In a suit by the plaintiffs to recover arrears of rent of certain tenures, the decree obtained against the same defendants by another co-sharer for their share of rent is admissible under s 9, to prove the identity of the tenure [*Surendra v. Brojonath*, 13 C 352, 356].

Former Judgment.—As to the relevancy of former judgment under s 9 on the question of identity, see *Collr of Gorakhpur v. Palakdhari*, 12 A 1 FB 12, 27.

Finger Impressions For Identification.—Where the question was whether the document impugned was or was not presented before the registrar by the complainant, a comparison of the thumb-impression of the person who presented the document with that of the complainant is admissible under this section, if their dissimilarity makes such identity improbable [*R v. Fakir Md*, 1 CWN 33, 34]. As to finger-print, foot-print &c see notes to s 45, *post*.

Bullet-Marks for Identification.—The development of the science of ballistics has made it possible to trace a bullet to the particular weapon from which it was discharged by identifying the marks on the bullet with the physical features of the weapon. (See notes to s 45 *post: "Bullet Marks &c"*).

Motor-car Tyre Marks.—Tread marks of motor car tyres have sometimes been admitted to identify a motor car and to trace crime (see the cases cited in Wig s 417b foot-note).

Illustration (a).—It is to be observed that the factum and not the construction of the will is here the matter in issue. Where the construction is the question, the circumstances which surrounded the testator may be given in evidence without contravening the section which relates to the admissibility and inadmissibility of parol evidence to written documents in order that the court may place itself in the position of the testator where there is a doubt as to his intention. The leading case is *Hiscocks v. Hiscocks*, 3 Mees & W 363. When the question is will or no will, the state of the testator's property and family at the date of the alleged will may afford a point-blank contradiction to its terms, whence the forgery would be most justly presumed. The illustration is intended to exemplify the *"rebuttal of an inference suggested by a fact in issue."*

Illustration (b).—"This applies to the *relation* which the parties stand to one another; it is also explanatory of *introductory* matter leading up to the point in issue. The object with which what would otherwise be collateral matter is receivable here, is to show the *malice or animus* of the libellor; though to go into the full details of a quarrel would be too remote and waste too much time. It is sufficient to show that there was a quarrel [*Simpson v. Robinson*, 12 QBD 511; *Malin v. Andrews*, M & M 336]."

Illustration (c).—"The fact of *absconding* which is admissible under s 8 is in itself equivocal. It may be the result of guilty knowledge or conscience or it may be perfectly innocent. Anything, therefore, that the party absconding, says at the time of the act, is receivable as *explanatory* of a relevant fact. It would also be receivable as part of the *res gestae* and as a declaration accompanying an act. The presumption or inference, arising from the act of absconding is rebutted".

Illustrations (d) and (e).—"It is presumed that the statements made by *C* in the one case, and *B* in the other, are only to be receivable as evidence that such statements made, as declarations accompanying an act, not of the truth of them as affecting *B* or *A* respectively.

Illustration (f).—"This is founded on the well-known case of *R v. Lord George Gordon*, 21 How ST·p 514. In the case put, the cries would be made in the presence of the leader, though they were the cries of third parties, not of himself; his silence would be equivalent to an admission that he accepted and acquiesced in those cries as explanatory of the common objects of himself as well as those whom he led. Under the effect of the next section such cries would be evidence against the accused, even if he was not present, upon proof of a conspiracy between himself and the rioters, joint and common, for the perpetration of a wrongful act" [Nort pp 116-19].

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

Illustration

Reasonable ground exists for believing that *A* has joined in a conspiracy to wage war against the [1][Government of India].

The facts that *B* procured arms in Europe for the purpose of the conspiracy, *C* collected money in [2][Calcutta] for a like object, *D* persuaded persons to join the conspiracy in [3][Bombay], *E* published writings advocating the object in view at [4][Agra], and *F* transmitted from [5][Delhi] to *G* at [6][Cabul] the money which *C* had collected at [2][Calcutta], and the contents of a letter written by *H* giving an account of the conspiracy, are each relevant, both to prove the existence of the conspiracy, and to prove *A's* complicity in it, although he may have been ignorant of all of them, and although the persons by whom they were done were strangers to him, and although they may have taken place before he joined the conspiracy or after he left it.

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1. Substituted for "Queen" by AO 1950. In Pakistan substituted by "Pakistan" by Ordinance 1 of 1961.
2. "Chittagong" in Pakistan; "Colombo" in Ceylon.
3. "Karachi" in Pakistan; "Kandy" in Ceylon.
4. "Multan" in Pakistan; "Galle" in Ceylon.
5. "Lahore" in Pakistan; "Kalutara" in Ceylon.
6. "Negombo" in Ceylon.

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COMMENTARY

Principle and Scope.—In criminal cases, a person cannot ordinarily be made responsible for the acts of others unless they have been instigated by him or done with his knowledge or consent. In civil cases, the principal is bound by the acts of his agent if the latter has implied or express authority from him. Where several persons are jointly interested in a matter, the admission of one of them is receivable against the others when the admission is made in his character of a person jointly interested [see s 18 *post: "Admission of several persons jointly interested"*]. "So far as one person is privy in obligation with another, *ie* is liable to be affected in his obligation under the substantive law by the acts of the other, there is equal reason for receiving against him such admissions of the other as furnish evidence of the act which charges them equally..... As a matter of probative value, the admissions of a person having virtually the same interests involved and the motive and means for obtaining knowledge will in general be likely to be equally worthy of consideration" [Wig s 1077]. On the same principle the admissions of a co-conspirator may be used to affect the proof against the others on the same conditions as his acts when used to create their legal liability [Wig s 1079].

This section lays down that in prosecutions for conspiracy when concert and connexion between the persons charged have been sufficiently established, the statements, acts or declarations of each conspirator, in reference to their common intention are admissible as evidence against the others. This rule is founded on the *identity of interest* existing between the parties. The principle on which s 10 is based

is that of agency. When concert has once been proved, the doctrine applies that each party is an agent for all the others, and acts done by him in pursuance of the common design are admissible against the fellow conspirators [*R v. Shafi Ahmed*, 31 Bom LR 515 : 49 B 642; *R v. Vaishampayan*, 55 B 839, 843]. The principle underlying s 10 is the theory of agency. S 10 confines that principle of agency in criminal matters to acts of co-conspirators within the period during which it can be said that the acts were "in reference to their common intention" [*Sardul v. S*, A 1957 SC 747 : 1958 SCR 161; *Bhagwan & Ors v. S*, A 1965 SC 682]. The *illustration* shows how a number of apparently independent acts by different persons at different times and places may be joined together for the purpose of establishing the existence of a common design as also for proving that the several persons were parties to the conspiracy.

The *"common intention"* refers to the common intention of the conspirators in the future—a common intention existing at the time when the thing was said, done or written. Things said, done or written by one of them *after* the common intention or conspiracy was no longer operating and had ceased to exist is not admissible against a co-conspirator [see *post: "Common intention"*]. The rule of *res gestae* [v. s 6 *ante*] is sometimes made use of when the acts and declarations of a co-conspirator engaged in a common enterprise are receivable against the others, but both Thayer and Wigmore are rightly of opinion "that the rule which says that a man shall be chargeable with the acts and declaration of his agent or fellow-conspirator is not a rule of evidence" and its scope is to be ascertained wholly from the substantive law on those topics [Wig s 1769; see also s 1079].

The principle of admissibility is that the thing done, written or sopken was something done in carrying out the common intention (*ie* the conspiracy). The leading case is that of *R v. Blake*, 1844, 6 QB 126 (*v post*), which shows both what is admissible and what is inadmissible. There, the evidence of entries made by a fellow conspirator in various documents actually used for carrying out the fraud was held admissible. But entries in a document not created for the purpose of the fraud and made by a conspirator after the completion of the fraud, was held inadmissible against the fellow conspirators. The latter document evidenced what had been done and also the common intention with which at the time it had been done, but it was inadmissible against the others as it had nothing to do with carrying the conspiracy into effect, for the common intention had then ceased to operate. See also *R v. Windass*, (1989) 89 Cr App R 258 CA, where the personal diary of one alleged conspirator which contained details of the complicity of both the accused was held to be not relevant against the other. When explaining the law as laid down in *R v. Blake*, *sup* LORD WRIGHT said in *Mirza Akbar v. R*, 67 IA 336 : A 1940 PC 176 : 1940 Lah 612 : 45 CWN 269:—

> "The words written or spoken may be a declaration accompanying an act and indicating the quality of the act as being an act in the course of the conspiracy: or the words written or spoken may in themselves be acts done in the course of the conspiracy. This being the principle, their Lordships think the words of s 10 must be construed in accordance with it and are not capable of being widely construed so as to include a statement made by one conspirator in the absence of the other with reference to past acts done in the actual course of carrying out the conspiracy, after it has been completed. The common intention (in the case in hand) is in the past. In their Lordships' judgment, the words "common intention" signify a common intention existing at the time when the thing was said, done or written by one of them."

The limits of the admissibility of evidence in conspiracy cases have been authoritatively laid down in *Mirza Akbar v. R*, 67 IA 336 where it has been held that s 10 must be construed in accordance with the principle that the thing written or spoken was something done in carrying out the conspiracy and was receivable as a step in the proof of the conspiracy. Their Lordships notice that the evidence receivable must be "in reference to their common intention" and the words "anything said, done or written by any of such persons" are not capable of being widely cons-trued [*Sardul v. S*, A 1957 SC 147 : 1958 SCR 161]. Past transactions unconnected with conspiracy are not admissible in evidence, even if true [*Rameshwar v. S*, A 1965 C 38].

The application of the rule of law embodied in this section is strictly conditional upon there being reasonable grounds to believe that two or more persons have engaged themselves in a joint enterprise, *eg* criminal conspiracy [*Barindra v. R*, 37 C 467]. Only when two persons come together to the pursuit of the unlawful object, there will be a conspiracy [*Khalid v. State*, 1990 Cri LJ (NOC) 176 (Raj)]. The requirements of the section should be always borne in mind. Otherwise there is the danger of falling into the error that under s 10 a person has to be proved to be a conspirator before any act, saying or writing of his can be used as evidence against other accused persons. This section does not say so. All that it requires is that there should be "*reasonable ground to believe*" in the existence of a conspiracy. The concluding words of the section (*viz* "as for the purpose of proving the existence of the conspiracy") also make this clear. When the condition above is fulfilled, *ie* once *reasonable* grounds are made out for belief that two or more persons have conspired to commit an offence, anything done or said by each conspirator in reference to the common design is admissible against each of the others, and this whether the words were spoken or written or the thing was done in their presence or absence, or before or after they entered into the conspiracy, both for proving the existence of the conspiracy as also for showing that any such person was a party to it [*Pulin & Ors v. R*, 16 CWN 1105 : 15 CLJ 517; *Kalil v. R*, 28 C 793; *Kadambini v. Kumudini*, 30 C 983 : 7 CWN 806, 808]. In other words, before the acts, saying or writings of any such person may be used against any other such person or persons, there must be some reasonable ground for believing that there was a conspiracy. The object of this section is merely to ensure that one person shall not be made responsible for the acts and deeds of another until some bond in the nature of agency has been established between them and the acts, words or writings of another which it is proposed to attribute vicariously to the person charged, must be in furtherance of the common design and after such design was entertained [*per* TERRELL CJ, in *Indra v. R*, A 1929 P 145 FB]. S 10 lays down not only the rule applicable in this country so far as leading evidence in cases of conspiracy is concerned, but has to be treated as a part of the statute law in the matter of proof of existence of a conspiracy and the furtherance of its objects [*Jitendra v. R*, A 1937 C 99 SB]. See *post: "There Must be Reasonable Ground that the persons Conspired Together"*.

Section 10 is not applicable to the persons who are not being prosecuted but detained under the provisions of COFEPOSA Act. [*Abhay Tuli v. Lt. Governor*, 1998 Cri LJ 3217, 3221 (Delhi)].

A conspiracy to commit a crime abroad is not indictable in England unless the contemplated crime is one for which an indictment would lie in England [*Board of Trade v. Owen &c*, 1957, 1 All ER 411 HL].

***Prima facie* Evidence of Conspiracy Makes Statements of a Conspirator Evidence Against Co-Conspirators.**—As soon as it is proved that the accused was privy to the general conspiracy, everything done by each of his fellow-conspirators must also be imputed to him as a part of the conspiracy, if it was done to carry out their general purpose [*per* EYRE CJ, in *R v. Hardy*, 24 How St Tr 451]. Conspiracy can be proved by circumstantial evidence [*S.C. Bahri v. State of Bihar*, A 1994 SC 2420 : 1994 Cri LJ 3271]. Once conspiracy to commit an illegal act is proved, act of

one conspirator becomes the act of the other [*Shivnarayan v. S*, A 1980 SC 439]. There should be a *prima facie* evidence that the person was a party to the conspiracy before his acts can be used against his co-conspirator, once such *prima facie* evidence exists, anything said, done or written by one of the conspirators in reference to the common intention, after the said intention was first entertained, is relevant against the others. It is relevant not only for the purpose of proving the existence of conspiracy, but also for proving that the other person was a party to it [*Kehar Singh v. State*, A 1988 SC 1883, 1955 : 1989 Cri LJ 1; *Trilochan Joshi v. Union of India*, 1983 Cri LJ NOC 109 (Delhi) : (1983) 1 Crimes 1025]. The law on the subject was clearly laid down by PATTESON J, as early as 1844 in the leading case of *R v. Blake* [6 QB 126 p 137 : 13 LJMC 131] thus:—"It is laid down that you must establish the fact of a conspiracy before you can make the act of one the act of all but you are not bound to bring the parties into each other's presence; the concert may be shown by either direct or indirect evidence". There was no intention to depart from the law expounded in this case at the time of the codification of the Law of Evidence in India. See also *R v. Baskerville*, 1916, 2 KB 658. The rule is this that if *prima facie* evidence of the existence of a conspiracy is given and accepted, the evidence of acts and statements made by any one of the conspirators in furtherance of the common object is admissible against all [*In re Lilaram*, 81 IC 817 : A 1924 M 805; see *Mirza Akbar v. R*, A 1940 PC 176 *sup* where *R v. Blake* (*ante*) was explained and referred to as the leading authority]. In prosecution for conspiracy, it is a settled rule that general evidence may be given to prove the existence of a conspiracy, before the accused is shown to be connected with it; for here the *corpus delicti* is the conspiracy, and the participation of the accused is an independent matter which may or may not exist. The rule that the acts and declarations of conspirators are evidence against their fellows rests partly on this principle and partly on the law of principal and agent [Best, s 508. See Also *R v. Vaishampayan*, 55 B 839]. Where there was no evidence except the alleged entries in diaries regarding acceptance of illegal gratification and in loose sheets and also no evidence to *prima facie* suggest that the said entries were made in reference to the common intention of the conspirators after it was first entertained, section 10 was not applicable [*L.K. Advani v. C.B.I.*, 1997 Cri LJ 2559, 2577 (Del)]. The evidence about the entries in the account books can only be used against the person who made the account. The evidence can be used against the other accused only if s 10 applies. The application of s 10 however follows and does not precede the finding that there is reasonable ground to believe that a conspiracy exists and certain persons are conspirators [*Seth Chandrattan v. R*, A 1945 S 188 : 1945 Kar 129].

"It is necessary to prove the existence of a conspiracy, and to connect the prisoner with it in the first instance, when you seek to give in evidence against him the declaration of a co-conspirator; and having done so, you are then at liberty to give in evidence against the prisoner acts done by any of the parties, whom you have connected with the conspiracy; but when a party's own declarations are to be given in evidence, such preliminary proof is not requisite, and you may, as in any other offence, prove the whole case against him by his own admission" [*per* PENNEFATHER CJ, in *R v. McKenna*, 1842 Ir Cir Rep 461 cited in Tay s 590 and Nort p. 120].

Proof of the existence of agreement or conspiracy may be given by evidence of any thing done, said or written by any one of the alleged conspirators and other surrounding circumstances [see *post: "Conspiracy How Established"*]. But, as said before, the section provides that the things of which evidence is to be given must have been (*1*) said, done or written *after* the common intention was conceived and (2) in *reference* to that intention. Evidence satisfying these conditions may be given

whenever there is reasonable ground to believe that two or more persons are involved in a conspiracy. But evidence of things said, done or written after the common intention has ceased to exist, is inadmissible. Entries in the diary of one of the Jain brothers referred to certain persons to whom some money was supposed to have been passed in connection with *hawala* transactions. Such entries were held to be not sufficient to establish the existence of conspiracy between Jain brothers and the persons referred to. *CBI v. V.C. Shukla*, AIR 1998 SC 1406 : (1998) 3 SCC 410.

Summary of Law.—The law as contained in s 10 and expounded in authoritative judicial decisions may be summarised thus:—(*1*) "Reasonable ground" to believe in the existence of a conspiracy must be shown as a condition precedent to the admission of acts and declarations of a conspirator against his fellow conspirators, *ie* the existence of a conspiracy must be established by *prima facie* evidence before anything said, done or written by one of the accused can be used against the others.

[*Prima facie* evidence that two or more persons, known or unknown, were acting in concert in furtherance of a common design would be a reasonable ground for believing in the existence of a conspiracy. There may not be direct proof bringing the parties together, but proof of their acts which considered and pieced together would produce a result which is not likely to be produced without a previous design or common purpose is sufficient. (As to how conspiracy may be established, see *post*).

It is not absolutely necessary that evidence of there being reasonable ground for believing in the existence of a conspiracy should be tendered first of all. All that the section says is that the use of the acts and declarations of one conspirator against the others is strictly conditional upon there being proof of the conspiracy. Under s 136 the court has discretion to allow the acts and declarations of the alleged conspirators to be proved first. "It is immaterial whether the *existence* of the conspiracy, or the *participation* of the defendants be proved first, though either element is nugatory without the other." (Wright on Conspiracy, p 72: *R v. Frost*, 9 C & P 129, 140; Phip 8th Ed p. 89; see *post*, *"Order of Evidence"*]. S. 10 can be invoked only where there is a reasonable ground to believe that two or more persons have conspired together to commit an offence. The offence of criminal conspiracy can be proved largely, from inference drawn from acts committed by the conspirators in pursuance of a common desire [*State of Kerala v. Ammini*, 1988 Cri LJ 107 : A 1988 Kerala 1, 17 (Ker) (FB)]. In a charge of criminal conspiracy, although no overt act need be proved to prove the charge, overt acts are still proved, for direct evidence of conspiracy is rarely available. Such overt acts are relied on and proved as forming part of purposes of common design and co-operative conduct thus proving an agreement to commit the offence [*Narain Lal Nirala v. State of Rajasthan*, 1984 Cri LJ 1495, 1500 : (1984) Raj LR 550 (Rajasthan)].

(*2*) The connexion of each of the accused with the conspiracy charged must then be proved, *ie*, that the persons charged were parties to it.

(*3*) The acts, declarations, and writings of each conspirator in *reference* to the common design or intention *after* the time when such intention was entertained by any of the persons are admissible against each of the others and this whether the acts were done or the words were spoken in their presence or absence, or before or after they entered into the combination, both (*a*) for the purpose of proving the existence of the conspiracy, as also for showing (*b*) that the accused were parties to it.

[In other words, in order to prove the existence of the conspiracy or the participation of any person charged with the offence, evidence may be given of anything said, done or written by any of such persons in reference to their common intention after such intention was conceived by any of them. There is a wide range of facts within this category, *viz* the acts and declarations may be of

(*a*) conspirators not charged [*R v. Duguid*, 94 LT 887], or they may have been done or said (*b*) without the knowledge of the party, or (*c*) in the absence of the party against whom they are tendered, or (*d*) before he joined the conspiracy [v. *illus* to the section; *R v. Brandeth*, 32 How St Tr 857; *R v. Murphy*, 8 C & P 297, 311; *R v. Dwyer*, 24 Ir LTR 111], or (*e*) even after he left the conspiracy [v *illus* to the section]. The admissibility of the last items is opposed to the English law on the subject. As to evidence of acts *before* the conspiracy, see *post*].

(*4*) *"Common intention"* signifies a common intention existing at a time when the thing was said, done or written by the one of them. So, things said, done or written by a conspirator *after* the conspiracy had been carried into effect or abandoned and the common intention was no longer operating *ie*, narrative of past acts done in the actual course of carrying out the conspiracy, or statement, or confession, is not admissible against a co-conspirator [*R v. Blake*, 1844, 6 QB 126; *Mirza Akbar v. R*, 67 IA 336 : 45 CWN 269 : A 1940 PC 176].

English and Indian Law. [S 10 is Wider than English Law].—Under the English law on a charge of conspiracy, although statements or acts made by one conspirator or in *furtherance* of the common object are admissible against the others, statements or acts by one not made in pursuance of the conspiracy or not in furtherance of the common purpose, are not admissible against the others, nor are statements made after the termination or abandonment of the conspiracy or the attainment of its object or after the end of his connection with the conspiracy [*R v. Blake*, *sup*; *R v. Whitehead*, 1 Dowl & Ry 367; Tay ss 594-95; Phip p 92; Steph : Art 3]. S 10 has a wider scope than the English law as—(*i*) Under s 10 anything said or done in *reference* to the common intention, although it may be not in support or in *furtherance* of the conspiracy, is relevant against the others. Any act or declaration of a conspirator before another joined the conspiracy or a letter giving an account of the conspiracy is relevant. Thus in *R v. Amiruddin*, 15 WR Cr 25, letter containing an *account* of the conspiracy were admitted even though not written in support of or in furtherance of it. (*ii*) Under the English law statements or acts of other conspirators after one terminates his connection with the conspiracy is not admissible against the latter; but under s 10 they are admissible against him (see illustration).

The words used in this section are *"in reference to"* and not *"in furtherance of"*, as in English law and so they make its scope wider than the rule of English law [see *post*, p. 102]. S 10 renders admissible in cases of conspiracy much evidence which is not otherwise ordinarily admissible under the English law. Its provisions are wider than that of English law. The expression "in reference to their common intention" in s 10 is very comprehensive and is designedly used to give it a wider scope than the words "in furtherance of" in the English Law [*Bhagwan & Ors v. S*, A 1965 SC 682].

The illustration shows the comprehensive nature of the law [*Ram Pd v. R*, A 1927 O 369; *Bholanath v. R*, A 1939 A 567; *R v. Abani*, 38 C 169]. Though the use of words *"in reference to"* appears to give the section a somewhat wider latitude, it should be remembered that the things said, done or written in reference to the conspiracy must have happened *after* the conspiracy was conceived by any one of the persons and that the acts or declarations of a conspirator after *the conspiracy has terminated* and the common intention ceased to operate are not admissible against a fellow-conspirator.

S 10 is not however capable of being widely construed so as to include a statement made by one conspirator with reference to past acts done in the actual course of carrying out the conspiracy, as the "common intention" signifies a common intention

existing at the time when the thing was said, done or written [*Mirza Akbar v. R*, 45 CWN 269 PC].

[*Ref Wright on Conspiracy, pp 68-72; Taylor, ss 590-96; Archbold Cr P, 24th Ed, pp 1411-28; Phipson, 8th Ed pp 89-93; Powell, 10th Ed pp 65-67; Steph Dig Art 3; Russel on Crimes, 7th Ed 191-201, 2097-98; Wig ss 1079, 1769; Jones, s 254; Chamb ss 3243-45; Chamb H B, s 1016; Hals, 3rd Ed Vol 10, paras 569-70; Harrison on Conspiracy.*]

***Prima-facie* evidence of conspiracy from confession of co-conspirator.**—It has been held in *R. v. Lunnon Keith*, (1989) 88 Cr App R 71 CA, that a judge may properly admit a co-conspirator's plea of guilty in order to prove the existence of the conspiracy. In this case 4 persons were charged with conspiracy to steal. One of them pleaded guilty. It was held that the evidence of confession by one was properly admitted to prove the existence of the conspiracy.

What Constitutes Conspiracy.—WILLES J, in *Mulcahy v. R*, 1868 LR 3 HL 306, 317 said:—

> "A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry in into effect, the very plot is an act in itself and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced, if lawful, punishable if for a criminal object or for the use of criminal means."

The definition of WILLES, J, was **approved** in *R v. Leathem*, 1901 AC 405, 528; *R v. Bailsford*, 1905, 2 KB 730, 746 and other cases; see *Crofter &c v. Veitch*, 1942 AC 433, 439, per LORD SIMON; *R v. Newland*, 1953, 2 All ER 1067 and **followed** in *Barindra v. R*, 37 C 467 : 14 CWN 1114; *Nirmal v. R*, 31 CWN 239 among others. In *R v. Purnell*, 1884, 14 Cox 505, FITZGERALD, J, defined it thus:

> "Conspiracy has been aptly described as divisable under three heads: (1) Where the end to be attained is in itself a crime; (2) where the object is lawful, but the means to be resorted to are unlawful; (3) where the object is to do injury to a third party or to a class, though if that injury were effected by a single individual it would be a civil wrong and not a crime."

Conspiracy has therefore the following elements: (*1*) two or more persons; (*2*) an agreement; (*3*) unlawful purpose, or (*4*) the use of unlawful means in the carrying out of an object not otherwise unlawful. The unlawful purpose or the criminal object may be the ultimate aim of the conspirators or one of the means of the achievement of the object, *ie*, the object itself may be an offence or the means used an offence. When the agreement is proved, it is not necessary to prove any overt act in furtherance of the object of the conspiracy. The overt act is the actual concert between the parties. In *R v. Aspinall*, 1876, 2 QBD 48, 58 BRETT, J, said:

> "Now first the crime of conspiracy is completely committed, if it is committed at all, the moment two or more have agreed they will do, at once or at some future time, certain things. It is not necessary in order to complete the offence, that any one thing should be done beyond the agreement. The conspirators may repent and stop, or may have no opportunity, or may be pre-vented, or may fail. Nevertheless the crime is complete; it was completed when they agreed".

Only one overt act by itself would not be sufficient for inferring that there was participation in a criminal conspiracy [*Rameshwar v. S*, A 1965 C 38].

It should be remembered that every agreement is not a conspiracy,—it must be a criminal agreement, and agreement to do something unlawful. In *O'Connel v. R*, 1844, 11 CI & F 155, TINDAL CJ, said: "The crime of conspiracy is complete if two, or more than two, should agree to do an illegal thing; that is to effect something in itself unlawful, or to effect, by unlawful means, something which in itself may be indifferent, or even lawful."

The offence of criminal conspiracy is complete as soon as two or more persons agree to do or cause to be done an illegal act, or an act which is not illegal by illegal means. It is immaterial whether the illegal act is the ultimate object [*Jitendra v. R*, A 1937 C 99 SB; *Kalil v. R*, 28 C 797]. The overt act, in a case of conspiracy consists in the agreement of the parties; and this is the view adopted in the definition of conspiracy in s 120A IP Code. The law does not take notice of the intention or state of mind of the offender and there must be some overt act to give expression to the intention [*Nirmal v. R*, 31 CWN 239 : A 1927 C 265; *Amritalal v. R*, 42 C 957 : 19 CWN 676]. An agreement implies the concert of at least two persons, so that *ex vi termini*, there cannot be a conspiracy of one [*Barindra v. R*, 14 CWN 1114: 37 C 467]. An indictment of information for conspiracy must contain a statement of the facts relied upon as containing the offence in ordinary and concise language with as much certainty as the nature of the case will admit [*Pulin v. R*, 15 CLJ 517].

—Conspiracy Contemplates Something More Than Joint Action.—S 10 cannot be properly applied so as to convict a person by the admission of the evidence of what has been said, done or written by others. A conspiracy within the terms of s 10, contemplates something more than the joint action of two or more persons to commit an offence. If that were not so, s 10 would be applicable to any offence committed by two or more persons jointly with deliberation and this would import into a trial a mass of hearsay evidence which the accused persons would find it impossible to meet [*Nagendra Bala v. R*, 4 CWN 528].

—Abetment by Conspiracy.—Conspiracy is not a substantive offence in India, but is incorporated in the law of abetment of offences. In order to constitute the offence of abetment by conspiracy, there must be a combining together of two or more persons in the conspiracy, and an act or illegal omission must take place in pursuance of that conspiracy and in order to the doing of that thing. It is not necessary that the act abetted should be committed or that the effect requisite to constitute the offence should be caused. Nor is it necessary that the abettor should concert the offence with the person who commits it. It is sufficient if he engages in the conspiracy in pursuance of which the offence is committed [*Kalil v. R*, 28 C 797].

—S 10 and Conspiracy as an Offence Under I P Code.—S 10 has no bearing on the question as to how far a conspiracy to commit an offence or an actionable wrong is an offence under the I P Code. Under the I P Code, which follows the English law of conspiracy only in the cases provided for in ss 311, 400, 401, 402 and 121A of the Code, conspiracy is a mere species of abetment, when an act or illegal omission takes place in pursuance of that conspiracy and amounts to a distinct offence, for each distinct offence abetted by conspiracy [*R v. Tirumal*, 24 M 523, 547 : 2 Weir 304]. An offence under s 120-B consists in the conspiracy without any reference to the subject-matter of the conspiracy [*Nirmal v. R*, 31 CWN 239].

—Conspiracy to Obtain Conviction by Giving False Evidence.—No civil action lies against a witness for giving false evidence, and the fact that the evidence is given in pursuance of a conspiracy to obtain the conviction of the accused person does not make any difference. The only remedy against a false witness is a prosecution for perjury. A mere conspiracy to injure a man without any overt act

resulting in the injury, does not furnish any cause of action. A conspiracy is not actionable unless it results in an act done which itself would give rise to a cause of action [*Templeton v. Lawrie*, 25 B 230]. As to conspiracy to bring false evidence against a person, see *Htin Gyaw v. R*, 6 R 6.

—Conspiracy to Hush up Case by Bribing.—*A* and *B* approached a police inspector to hush up a case against them and *A* offered him Rs. 500 saying that *B* had sent him with the money as formerly proposed. The statement by *A* is admissible also against *B* to prove that *B* had constituted *A* his agent, as also to prove the existence of the conspiracy [*Badri v. S*, A 1958 SC 953: 1959 SCR 1141].

—Conspiracy to Commit Criminal Breach of Trust.—In a case of conspiracy to commit criminal breach of trust, where the charge specified the period of conspiracy, evidence of acts of co-conspirators outside the period is not receivable in evidence. But in such a conspiracy all evidence which would go to show that certain transactions are bogus and not genuine is certainly admissible under other sections of the Act notwithstanding that such evidence may refer to and narrate the acts of the conspirators beyond the period of conspiracy but within reasonable limits [*Sardul v. S*, A 1957 SC 747: 1958 SCR 161].

Criminal Conspiracy Between Husband and Wife.—In England the old common law rule being that the husband and wife are regarded as one person for certain purposes, they cannot be indicted for conspiring together, though both may be charged with conspiracy with a third person (see Kenny Outlines of Criminal Law, 16th Ed p 340; Archbold, 33rd Ed p 22; Phip 9th Ed p 99; Hals 3rd Ed Vol 10, p 292, *note* (*q*) and para 572; see also *Mawji &c v. R*, 1957, 1 All ER 385). There is a dictum of LUSH, J, in *D P P v. Brady*, 1912 KB 89, 92 to the same effect. It is doubted by Wright and Harrison whether the old common law rule would apply to conspiracy in any of its modern forms (Wright, p 59; Harrison, p 76). It is doubtful whether the English common law doctrine that the husband and wife are one person is applicable in India to offences under the Penal Code. In a case of theft of the husband's property by wife the doctrine of conjugal oneness was not accepted and it was held that "there was no presumption of law that the wife and husband constitute one person for the purpose of criminal law" [*R v. Butchi*, 17 M 401; see also *Abdul Khadar v. Taib*, A 1957 M 339].

"Common Intention."—The common intention in s 10 refers to common intention of the conspirators in the *future* and not to the common intention in the past. The word 'intention' implies that the act intended is in the future and the section makes relevant statements by a conspirator with reference to the future while the conspiracy was going on. "In reference to the common intention" means in reference to what at the time of the statement was intended in the future [*R v. Vaishampayan*; 55 B 839 : A 1932 B 56; *R v. Abani*, 38 C 169; *Sital v. R*, 46 C 700 : A 1920 C 300; *Pritam v. R*, 1939 Kar 499 : A 1939 S 185]. The words "*common intention*" signify a common intention existing at the time when the thing was said, done or written by one of them [*Mirza Akbar v. R*, *ante*, (*R v. Vaishampayan* and *R v. Abani*, *sup* **approved**); *see In Re Ramaratnam*, A 1944 M 302 *post*]. Things said, done or written by a conspirator after the conspiracy had ended or ceased to exist would be inadmissible against the others, as there is then no common intention to which the things said &c can have any reference [*Shamsher v. S*, A 1956 P 404 : 34 P 781]. See further below : *"Narrative of past acts &c"*.

"Two or More Persons Have Conspired Together to Commit An Offence".—"Where several persons," writes Russell, "are proved to have combined together for the same illegal purpose, any act done by one of the party, in pursuance of the

original concerted plan, and with reference to the common object, is, in contemplation of law, the act of the whole party; and therefore the proof of such act would be evidence against any of the others who were engaged in the same conspiracy; and further any declaration made by one of the party at the time of doing such illegal act, seems not only to be evidence against himself as tending to determine the quality of the act, but to be evidence also against the rest of the party who are as much responsible as if they had themselves done the act. But what one of the party may have been heard to say at some other time, as to the share which some of the others had in execution of the common design, or as to the object of the conspiracy, cannot, it is conceived, be admitted as evidence to affect them on their trial for the same offence." [Russell on Crimes, 7th Ed, pp 191-201, 2097-98].

—The Acts of One, The Acts of All. [Actual Implication of The Parties Not Necessary].—"Where several wrong-doers conspire to effect an unlawful purpose, the acts done by any one in furtherance of their common purpose is considered to be the acts of all" [*R v. Watson*, 32 How St Tr 7; *R v. Hardy*, 24 How St Tr 704]. These acts are themselves evidence of *corpus delicti*, the conspiracy to be established; they are relevant "for the purpose of proving the conspiracy," as well as the part which each conspirator took in it (*vide*, last part of section); they are part and parcel of the *res gestae*, and when once the common purpose is established, each is an agent for all others in carrying out that common purpose [Nort p 121].

"Same Transaction" in Conspiracy Cases.—If several persons conspire to commit offences, and commit overt acts in pursuance of the conspiracy, these acts are committed in the course of the same transaction which embraces the conspiracy and the acts done under it. The common concern and agreement which constitute the conspiracy serve to unify the acts done in pursuance of it [*Babulal Chokhani v. R*, 65 IA 158: 1938, 2 Cal 295: A 1938 PC 130]. As to "*same transaction*", *see ante*, s 6.

Narrative of Past Acts. [Statement by a conspirator After Arrest as to What Has Been Done After the Conspiracy Has Been Effected].—According to English law the declarations of a conspirator or accomplice are receivable against his fellows, only when they are in themselves acts, or when accompany and explain acts for which the others are responsible; but not when they are in the nature of narratives, description or subsequent confessions. Care, however, must be taken to distinguish between declarations, which are either acts in themselves purporting to advance the objects of the criminal enterprise or which accompany and explain such acts, and those statements (not amounting, of course, to admissions by the accused himself), whether written or oral, which although made during the continuance of the plot, are in fact a mere narrative of the measures, that have already been taken. These last statements are inadmissible. For example a letter written by co-conspirator to a private friend, who unconnected with the plot, giving an account of the proceedings of a society to which the writer and the defendant were proved to have belonged, and enclosing several seditious songs stated to have been composed by the writer, and sung by him at a meeting of the society, has been rejected on the ground that such letter was not a transaction in support of the conspiracy, but merely a relation of the part which the writer had taken in the plot, and, as such, only admissible against himself [*R v. Hardy*, 24 How St Tr 704; Tay pp 402-21]. This section has however a wider scope than that of the English law [see *ante*, p 98] as it is not necessary, to show that the act was done in *furtherance* of the common design, but anything said, done or written by one of the conspirators in *reference* to the common intention is admissible. It should, however, be noted that the common intention must exist at the time when the thing was said, done or written.

It has been observed in a case that narratives coming from conspirators as to their past acts cannot be void to have a reference to their common intention [*R v. Vaishampayan*, 55 B 839]. But as pointed by the Judicial Committee [*Mirza Akbar v. R, sup*] narrative of past acts *after* the conspiracy has been carried into effect is not relevant. Evidence of declarations, acts or writings of a conspirator is admissible against the other conspirators on the principle that the thing done, written or spoken, was something done in carrying out the conspiracy and was receivable as a step in the proof of the conspiracy (*per* PATTESON, J, in *R v. Blake*, 1844, 6 QB 126, 139]. Therefore a statement made by one conspirator (here before the magistrate after her arrest) in the absence of the other with reference to the past acts done in the actual carrying out of the conspiracy, after it has been completed, is not admissible under s 10. The common intention is in the past. The words "common intention" signify a common intention existing at the time when the thing was said, done or written by the one of them. Things said, done or written while the conspiracy was on foot, are relevant as evidence of the common intention, once reasonable ground has been shown to believe in its existence. But it would be a very different matter to hold that any narrative or statement or confession made to a third party after the common intention was no longer operating and had ceased to exist, is admissible against the other party [*Mirza Akbar v. R*, 67 IA 336: 45 CWN 269 (*R v. Abani*, 38 C 169 and *R v. Vaishampayan*, 55 B 839 **approved**); *Balabhadra v. Nirmala*, A 1954 Or 23; *Shamsher v. S*, 34 P 784: A 1956 P 404]. In *Abani's case (sup)* where an accused made a statement to magistrate implicating himself and a large number of co- conspirators, it was held that the statement was not evidence under s 10 against the co-accused as that section is intended to make evidence between different conspirators while the *conspiracy* is going on with reference to the carrying out of the conspiracy. Confessions by accused made after the object of the conspiracy is carried out are not relevant as the common intention was not then existing [*S v. Shankar; A 1957 B 226* (*Mirza Akbar v. R*, A 1940 PC 176 **folld**)].

It has been held, however, that admissions made by a co-conspirator (presumably from the witness box) are admissible. Two persons, *A* and *B* were charged with conspiring to defraud the Govt. by fabricating 3 cash memos on account of alleged medicine purchases and obtaining payment against them. The proprietor of the medical store, *B* admitted that the cash memos were fictitious, but that they were prepared at the instance of *A* for showing them to *A's* father so that *A* could retain a portion of his salary. The Supreme Court held that the fact of the preparation of the cash memos in pursuance of the agreement between *A* and *B* could be used in evidence against both under the section. The Supreme Court also considered the account books of *B* [*Bhagwandas v. S*, A 1974 SC 898]. The statements by one conspirator to another during the period of conspiracy relating to the implementation of that conspiracy and the evidence as to the acts done by him disclosing participation of the other conspirator are relevant [*Tribhuvan v. S*, A 1973 SC 450]. Where the conspirators have been arrested, they cease to be the members of the conspiracy because they should no longer be in a position to do anything in reference to their common intention. The Supreme Court found that the prosecution failed to establish that the accused persons continued to be the members of the conspiracy even after their arrest. *State v. Nalini*, AIR 1999 SC 2640 : 1999 Cri LJ 3124. Post-arrest statements made by a person to police whether by way of confession or otherwise as to the involvement of certain persons in a conspiracy would not attract S. 10. Such confessions, if otherwise relevant, may be taken into account under S. 30 against all the accused persons facing a joint trial for the same offence. *State of Gujarat v. Mohd Atik*, AIR 1998 SC 1686; *Ammini v. State of Kerala*, AIR 1998 SC 260 (retracted confession of a co-accused). In *State of Maharashtra v. Damu Gopinath Shinde*, (2000) Cri LJ 2301 (SC), four accused persons conspired to commit abduction and murder of children. One of them made a confession in which he referred to what the other accused had said and done in reference to their common intention. The confession was held to be usable against all the accused persons.

Acts Amounting to Conduct After the Termination of The Conspiracy.—What the conspirators did, *ie* their act or conduct is relevant under s 8 and it is immaterial whether such conduct was previous or subsequent to the carrying out of the object of the conspiracy [*Shyam Kumari v. R*, A 1941 O 130: 191 IC 446].

Communications Between Different Conspirators By Letters etc. [Document Found in Possession].—S 10 is intended to make evidence communications between different conspirators, while the conspiracy is going on, with reference to the carrying out of the conspiracy. It is no doubt wider than the English law, but it does not put the confession of a co-accused as a communication passing between conspirators or between conspirators and other persons with reference to the conspiracy [*R v. Abani*, 15 CWN 25: 38 C 169]. In *R v. Amir Khan*, 9 BLR 36, 50: 17 WR Cr 15, 23, 24 and in *R v. Amiruddin*, 7 BLR 63: 15 WR Cr 25, 28, 29, letters containing an account of the conspiracy, were admitted in evidence even though not written in support or in furtherance of it. This is contrary to the English rule, but the scope of s 10 is somewhat wider (*ante*).

Accused No. 1 agreed to supply accused 2 only one packet of explosive enough for blowing up a bridge and did so. The attempt by accused 2 on 14-11-1943 was unsuccessful and on 15-11-1943 he wrote to accused 1 for futher explosive—*Held* that the common intention being to use one packet for certain purpose and that intention having been carried out on 14-11-43, it could no longer exist on 15-11-43 so as to make the letter admissible against accused 1 [*In re Ramaratnam*, A 1944 M 302: 1944, 1 MLJ 91 (*Mirza Akbar v. R, ante*, **relied** on)].

So far as documents found in possession of a party are concerned, possession and conduct create an inference that he was aware of its contents; what sort of conduct will properly give rise to such inference must necessarily depend on the facts of each case. Documents found in possession on search or otherwise are admissible if they satisfy any of these conditions, *viz* (*i*) they are in the handwriting of the party concerned and (*ii*) if they fall within the scope and operation of s 10. A document of which the writer is not known, if found in the possession of a conspirator will not itself be admissible for the purpose of proving the truth of its contents against the other accused. The act of possession will be evidence to show that the conspirator in whose possession it was found, had received and preserved it. The execution and authorship of a document is a question of fact [*Jitendra v. R*, A 1937 C 99 SB; see *Jhabwala v. R*, 55 A 1040 *post*]. In order to establish that there was correspondence between the accused and a revolutionary in Berlin, it is not incumbent to show that the letters were in fact written by the latter. It is enough to show that some person in Berlin was in conspiracy with the accused and correspondence was passing between them [*Jhabwala v. R*, 55 A 1040: A 1933 A 690]. As to intercepted letters, see *Jitendra v. R*, A 1937 C 99 SB.

A post-card written by an accused to a co-accused is, if the conditions of s 10 have been complied with, admissible although the accused was under arrest when the card was written, the document not being in the nature of a mere confession [*Abdul Aziz v. R*, A 1932 C 557]. A letter written by a person who had no hand in the forgery to his brother, a stranger to the transaction, is not admissible under s 10 in the absence of evidence that its writer was a conspirator in the fabrication of the will [*R v. Keshav*, 25 Bom LR 248]. See *ante*, s 8; *"Finding of letters and other incriminating papers &c"*.

—Speeches etc. Showing Object of Conspiracy.—Evidence of speeches throwing light on subject of conspiracy—Statements made in speeches, for the seditious nature of which the accused was charged, may be admissible for other purposes, as for instance under s 10 [*In re Chidambaram Pillay*, 32 M 3: 5 MLT 16].

Evidence of Acts Before Conspiracy.—S 10 applies only to things said or done after the time when the common intention was first entertained by one of the conspirators [*Htin Gyaw v. R*, 6 R 6: *Mirza Akbar v. R, ante*]. Evidence that some of the accused ran cocaine and gambling dens, long before the existence of the

conspiracy which was the subject of the charge was held admissible, the prosecution case being that some of the accused were first thrown together by frequenting or running such dens [*Sital v. R*, 46 C 700: 30 CLJ 255: 54 IC 53]. The acts and declarations of other conspirators, before any particular defendant jointed the association, are only receivable against him to prove the origin, character, and object of the conspiracy, and not his own participation therein or liability therefor [*R v. Dwyer*, 24-Ir LTR 111; *O'keefe v. Walsh*, 1903, 2 IR 681, 702; Phip 8th Ed p 89].

Illustration.—The illustration shows how a number of apparently independent acts done by different persons may be pieced together for the purpose of proving the existence of a common design as also for the purpose of implicating the several persons engaged in it. The evidence of any such act may when given, affect only one of such persons charged; it cannot be used against other persons unless and until the fact that they were acting in reference to an object common to all of them, is established [Cunn pp 29-30]. In *Balmokand v. R*, A 1915 L 16, 20, JOHNSTON J, observed that "The way that the words 'and to prove *A*'s complicity in it' come into the illustration are not quite in accordance with common sense or with the section as I read it".

"Anything Said, Done or Written".—Anything "said" would include the statements made, speeches delivered, or declarations made. Anything "done" must be some act done and not merely the intention or knowledge of the person. Anything "written" would include a manuscript, signed or unsigned, written by the person, and matter transcribed by him on a typewriter. But a document of which the writer is not known, found in the possession of a conspirator, would not by itself be admissible for the purpose of proving the truth of its contents as against the other accused. The fact of possession would be evidence to show that the conspirator in whose possession it is found, had received and preserved it [*Jhabwala v. R*, 55 A 1040: 145 IC 481].

There Must be "Reasonable Ground" that the Persons Conspired Together.—(See *ante, "Principle and Scope"*). The operation of s 10 is strictly conditional upon there being reasonable grounds to believe that two or more persons have conspired together to commit an offence. Regard must also be had to the limits within which this class of evidence can be used [*Barindra v. R*, 14 CWN 1114: 37 C 467; see *Kandambiny v. Kumudini*, 30 C 983]. The words "such persons" in s 10 refer to "two or more persons" and consequently the preliminary condition for application of the section is that the prosecution must show that *prima facie* the persons charged had conspired together [*Md Ismail v. R*, A 1936 R 97]. The statement of an accused cannot be used against the co-accused till it has been established that there is reasonable ground to believe that there was a conspiracy between the two persons [*Shaheber Ma v. R*, 18 CLJ 580].

Rejection At a Subsequent Stage of Evidence Admitted under s 10.—A trial judge admitting evidence under s 10 when he has a reasonable ground for belief in the existence of a conspiracy may reject it if at a later stage that reasonable ground of belief is displaced by other evidence. Similarly, the appellate court refusing that belief, must also refuse to admit such evidence which was admitted on the footing of the belief being entertained [*Gill v. R*, 75 IA 41 : 52 CWN 567 : A 1948 PC 128 : 1948, 2 MLJ 6].

—Order of Evidence. [When is *Prima facie* Evidence of Conspiracy to be Given?].—As observed before as a general rule some *prima facie* and satisfactory evidence should in the first instance be given of there being reasonable grounds to believe in the existence of the conspiracy *before* evidence may be given of acts or declarations of the alleged conspirators in order to make them admissible against their fellows. There is however no inflexible rule as to the order of proof in cases of conspiracy. Under s 136 the court has a discretion to allow first evidence of the acts and declarations of the individual accused to show that they were participators in the conspiracy before evidence of the existence of a conspiracy, upon an undertaking that evidence of general conspiracy will be given afterwards. But the better course

undoubtedly is that general evidence of the existence of a conspiracy should be first offered as a preliminary step to the admission of evidence that the individuals charged were parties to it. As Taylor says, the mode of admitting in evidence the acts or declarations before sufficient proof is given of the conspiracy, is seldom permitted in seditious or other general conspiracies, except under particular and urgent circumstances; for, otherwise, the jury might be misled to infer the fact itself of the conspiracy from the declarations of strangers [Tay s 591].

The following observations in the *Queen's case* [1820, 2 B & B 284, 310] are helpful:—"We are of opinion, that on the prosecution of a crime to be proved by conspiracy, general evidence of an existing conspiracy may, in the first instance, be received as a preliminary step to that more particular evidence, by which it is to be shown that the individual defendants were guilty participators in such conspiracy. This is often necessary to render the particular evidence intelligible, and to show the true meaning and character of the acts of the individual defendants, and on that account, we presume, it is permitted. But it is to be observed, that in such cases, the general nature of the whole evidence intended to be adduced is previously opened to the court, whereby the judge is enabled to form an opinion as to the probability of affecting the individual defendants by particular proof applicable to them, and connecting them with the general evidence of the alleged conspiracy; and if upon such opening it should appear manifest, that no particular proof sufficient to affect the defendants is intended to be adduced, it would become the duty of the judge to stop the case *in limine*, and not to allow the general evidence to be received, which, even if attended with no other bad effect, such as exciting an unreasonable prejudice, would certainly be a useless waste of time." See also the remarks of PENNEFATHER, CJ, in *R v. McKenna*, (*ante*).

"Speaking generally, it may be said that the evidence in conspiracy must show two things; an agreement for the alleged purpose, and defendant's participation in it. Either kind of evidence may be given first: for example, a general conspiracy may be proved, and then the prosecution must proceed to show that the defendant was implicated in it; until this is done, the general evidence is only provisionally relevant against a particular defendant [see *R v. Hammond*, 1790, 2 Esp 719]. Alternatively, it is open to the prosecution to give evidence of the acts of particular individuals with a view of proving the general conspiracy, but the acts of one defendant are not evidence against another until it has been shown that they were done in pursuance of a common design" [*R v. Hunt*, 1820, 1 St Tr (NS) 171; Harrison on Conspiracy, p 152]. As observed before, the judge has a discretion in the matter under s 136 and he will be guided by the special circumstances of each case. In *Jitendra v. R*, A 1937 C 99 SB general evidence of existence of conspiracy was given before the proof of particular facts showing that the accused took part in the conspiracy as members thereof.

As Wigmore says, "the general principle affecting the *order of evidence* leaves it ultimately to be controlled by the trial court's discretion, subject to certain provisional rules which obtain unless special considerations overthrow them. In the present application, the rule for conditional relevancy naturally applies; *ie* the statements of *A* being receivable against *B* on the hypothesis that *A* and *B* have conspired, some evidence of the conspiracy must ordinarily be furnished before offering the statements of *A*; in a given case, the trial court's discretion may relax this rule. Where the alleged conspiracy was carried into effect by the acts of a *mob* or other *riotous assembly or seditious society*, the defendant whose instigation and leadership are proved becomes liable for the mob's acts, and thus the conduct and

statements of any and all persons in the mob, whether identified or not, become a proper subject of consideration; and a field of somewhat indefinite extent is opened. But in such cases the utterances of members of the mob or of by-standers may also be receivable (under an exception to the Hearsay rule) for other purposes; and accordingly the precise issue and object of the evidence must be discriminated" [Wig s 1079; see also s 9, *illus (f)*]. As to conditional relevancy, the rule is that if the evidential fact thus put forward has on its face no *apparent connection with the case, an accompanying statement of the connecting facts must be made by* counsel, and a *promise to introduce them* at a later time if they have not already been introduced. This much is indispensable as a safeguard against the indiscriminate use of irrelevant evidence and as a measure to enable the adversary discover any objection that might be appropriate [Wig s 1871]. The following extract from *Parnell Commission's* Proceedings, 1888, 33rd day Times Report, pt 9, p 104 (cited in Wig 3rd Ed Vol 6 (s 1871, p 506) will illustrate the point:—

> The Irish Land League and its leaders being charged with complicity in crime, the doings and admissions of various known criminals were offered, with the purpose of connecting with them the League leaders. Sir Richard Webster, Attorney-General, having asked a witness what one Carey said about Egan, one of the leaders, Sir Charles Russel objected. Sir R Webster: "I think, if your lordships trust me for a moment, you will see that it is in the interests of justice that this man should make his statement. I will undertake to connect it with Egan." Sir C Russel: "I do not think that is a reason". President Hannen: "Well, if the Attorney-General does not fulfil his pledge, I shall strike out what is said." Sir C Russel: "We have had so many of these pledges which have been broken." Sir R Webster: "I beg your pardon; *no* pledges that I have given have been broken". "Sir C Russel: Well—left unfulfilled." Sir R Webster: "Or left unfulfilled!" President Hannen: "Counsel can only say what they anticipate will be the case; if this is not made evidence, I will strike it out".

Conspiracy How Established. [Circumstantial Evidence, Correspondence, Detached Acts etc. etc.].—"A conspiracy need not be established by proof which actually brings the parties together, but may be shown, like any other fact by circumstantial evidence, the detached acts of the different persons accused, including their written correspondence, entries made by them, and other documents in their possession, relative to the main design, will sometimes from necessity be admitted, as steps to establish the conspiracy itself. On this subject it is difficult to establish a general inflexible rule, and each case must in some measure, be governed by its own peculiar circumstances" [Tay s 591]. Conspiracy is a matter of inference, deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them [*R v. Brisac*, 1803, 4 East 164; see also the observation of COLERIDGE J, to the jury in *R v. Murphy*, 1837 8 C & P 297 and *R v. Benoyendra*, 40 CWN 432, 447]. In *R v. Parsons*, 1762, 1 Wm & B1 391, LORD MANSFIELD told the jury that there was no occasion to prove the actual fact of conspiring, "but that it might be collected from collateral circumstances." Where the acts and declarations were in the course of the common purpose and there was independent evidence which proved the existence of a conspiracy, the evidence was admissible [*R. v. Murray,* (1997) 2 Cr App R 136 (CA); *R. v. Gray,* (1995) 2 Cr App R 100 : 1994 CLY 673].

In cases of conspiracy better evidence than acts and statements of co-conspirators in pursuance of the conspiracy is hardly ever available [*Bhagwandas v. S*, A 1974 SC

898]. The proof of conspiracy in law is very largely inferential, but inferences must be supported by solid facts. Evidence of motive is not evidence of conspiracy [*Ekabbar v. R*, 1937, 2 Cal 315: A 1937 C 756]. It may be proved by other than oral evidence; by the evidence of surrounding circumstances and by the antecedent and subsequent conduct of the accused after the commission of the alleged crime [*R v. Annappa*, 9 Bom LR 347; *Kirpan v. R*, 92 IC 419: A 1926 S 171]. The statement of an approver and letters connecting various members may furnish proof of a common purpose [*Bhola v. R*, A 1939 A 567]. In conspiracy direct evidence will be seldom forthcoming and it is necessary to look at the circumstances to see whether conspiracy actually existed [*Gour Ch v. R*, 32 CWN 1004]. Where several persons are charged with the same conspiracy, it is a legal impossibility that some should be found guilty of one conspiracy and some of another. Associations for music, gymnastic exercises, and lathi play, amongst young men living in the same village or attending the same school are ordinary incidents of a village or school life, and could hardly with propriety be proved as forming elements in any alleged scheme of conspiracy to wage war against the State, and all the more so, when they are shown to have been accompanied by a complete absence of secrecy and rather by a courting of publicity [*R v. Lalit Mohan*, 38 C 559: 15 CWN 593].

Same.—In order to connect one association with another, it has to be established that there was an agreement, which is the gist of conspiracy between the members of the parent society and alleged branch. Such inference may be justified by the surrounding circumstances. It is not necessary to establish by direct evidence that the accused persons did enter into an agreement to conspire. The criminality of conspiracy lies in the concerted intention and once reasonable grounds are made out for belief in the existence of the conspiracy amongst the accused, the acts of each conspirator in furtherance of its object are evidence against each of the others; and this, whether such acts were done before or after his entry into the combination, in his presence or in his absence.....The criminality of the conspiracy is distinct from and independent of the criminality of the overt acts. When persons have been taken into custody, and are in a condition which makes it impossible for them to act in aid or furtherance of the conspiracy, the acts of persons who were members of the conspiracy and who are still free to act in pursuance thereof, are not admissible as against them; these acts can no longer be deemed the acts of co-conspirators [*Pulin & others v. R*, 16 CWN 1105: 15 CLJ 517]. In a trial under s 121-A, I P Code where it appears that the members of the conspiracy are members of different organisations or associations, it is not necessary to establish that the different associations are connected with one another. It is sufficient if it is established that the accused persons charged were members of the conspiracy mentioned in the charge [*Jitendra v. R*, A 1937 C 99 SB]. Where there are overt acts on the part of the members of a conspiracy, they are to be looked at as evidence of the existence of a concealed intention. The conspiracy may be closely bound up with overt acts inasmuch as in many cases it is only by means of overt acts that the existence of the conspiracy can be established, but the criminality of the conspiracy is independent of the overt acts [*Jitendra v. R, sup*]. When the proof of conspiracy depends upon proof of the participation of the accused in an overt act which itself amounts to an offence, the proper course is to put the accused on their trial for that offence. The evidence of an accused's association with any of the conspirators would not be enough by itself to convict him of being one of the parties to that conspiracy [*Kalidas v. R*, 39 CLJ 151: 83 IC 513]. When the accused is charged with an offence of conspiracy and acts of

cheating in pursuance of conspiracy, the charge is not bad and it is open to the prosecution to prove such acts in order that from them the existence of the conspiracy may be proved [*Abdur Salim v. R*, 35 CLJ 279 (*Subramania v. R*, 25 M 61 **distd**)]. If one conspirator proposed to another to start a propaganda in future and a pamphlet for the purpose, the pamphlet would be admissible as having reference to the common intention, even though it may contain a narrative of past events [*R v. Vaishampayan*, 55 B 839].

A document written by a dead person describing her conversation with a third person in which it is stated that that person told that among his revolutionary friends was the accused from whom he used to take guidance, is admissible as the statement, if proved, is itself a relevant fact under this section [*R v. Surya*, A 1934 S 221 FB: 147 IC 32].

—Hearsay Evidence in Conspiracy.—It cannot be said that hearsay cannot be admitted under s 10. Any statement made by one conspirator to another indicating in any way the complicity of a third conspirator is a relevant fact [*Shyam Kumari v. R*, A 1941 O 130 (*R v. Surya, sup* **relied on**)].

—There Must be Agreement, But Direct Meeting Not Necessary.—Though to establish the charge of conspiracy there must be agreement, there need not be proof of direct meeting or combination, nor need the parties be brought into each other's presence. The agreement may be inferred from circumstances raising a presumption of a common concerted plan to carry out the unlawful design. So again, it is not necessary that all should have joined in the scheme from the first: those who come in at a later stage are equally guilty, provided the agreement be proved [*per* JENKINS CJ, and CARNDUFF J, in *Barindra v. R*, 14 CWN 1114, 1142: 27 C 467; see *R v. Benoyendra*, 63 C 929: A 1936 C 37; *Nitai v. R*, A 1937 C 433 SB]. Mere casual meeting or meetings or conversations between the parties do not justify the drawing of any inference. Evidence of association to be of any value should suggest some-thing suspicious in such association [*Bachha v. R*, A 1935 A 162]. "There is no such necessity that there should be express proof of a conspiracy; such as proof that the parties actually met and laid their heads together, and then and there actually agreed to carry out a common purpose. Nor is such proof usually attempted. It may be that the alleged conspirators have never seen each other and have never corresponded; one may never have heard the names of the others and yet by the law they may be parties to the same criminal agreement" [*per* FITZERALD, in *R v. Parnell*, 1881, 14 Cox 505; see also *R v. Hunt*, 1820, 1 St Tr (NS) 171].

All the Conspirators Need not Be Convicted or Acquitted.—Where more than two persons are charged with a conspiracy, it does not follow that either all the conspirators must be convicted or they must all be acquitted [*Barindra v. R*, 14 CWN 1114: 37 C 467]. If a defendant is tried alone for conspiracy, he may be convicted although his co-conspirators do not appear, provided it is established that the latter were also guilty [*Beechey v. R*, 85 LJ PC 32]; but if all are tried jointly, one defendant cannot be convicted if the other, or all of the others, are acquitted [*R v. Plummer*, 1902, 2 KB 339; *R v. Manning*, 12 QBD 214].

Where two persons were charged under ss 307/34 and 326/34 of the Penal Code for offences committed in pursuance of an intention common to them and to the petitioner, and also under ss 307/114 and 326/114 for abetment by conspiracy

between themselves, the petitioner, two others named and others unknown were acquitted by jury—*Held* that the acquittal on the conspiracy charges did not conclude the liability of the petitioner for conviction of the same offence, as there were two others named and others unknown who were also alleged to have been members of the conspiracy [*Manindra v. R*, 41 C 754]. As to effect of acquittal of one of two conspirators, [see *Singleton v. R*, 41 CLJ 87 : 29 CWN 260]. Where the conspiracy is one in which three persons only are said to have been participators and two are acquitted, the other is entitled to an acquittal as a matter of course [*Prafulla v. R*, 30 CWN 94; see *Kasem v. R*, 45 CLJ 204: 101 IC 481]. But it does not in the least follow that because a person indicted as a principal is acquitted, another may not be convicted of aiding and abetting [*per* HEWART LCJ, in *Morris v. Tolman*, 1922, 1 KB 166].

Conspiracy Must be Established As Charged.—The object of the conspiracy must be proved as laid. A conspiracy to commit a particular offence or offences having been charged, it is not open to the prosecution to prove a different conspiracy, *eg* in furtherance of a minor offence. Thus on failure to prove a charge of conspiracy to murder, the prosecution cannot ask for a conviction for one or more of the offences alleged to constitute the object of the conspiracy on proof of participation in an overt act, *eg* grievous hurt [*Goloke v. R*, 42 CWN 129; see *O'Counnell v. R*. 11 Cl & F 155].

Cipher Code.—In a trial for sedition, a cipher code was decoded. The code was not to be treated as "the act, word or deed of any particular individual." The fact that it exists, the fact that it sets forth the names and addresses of a substantial number of persons charged, the fact that it was in a peculiar form not likely to be found in any code intended to be used for lawful purposes, &c gives rise to a probability, amounting almost to certainty that the persons named in the code were associated for some unlawful purpose. The code was in itself good evidence for supposing that the persons named had conspired to commit an offence and any other acts or writings of individual conspirators in furtherance of the common design became admissible under s 10 [*Indra v. R*, A 1929 P 145 FB].

Statement of Accused.—Statement of an accused after arrest and not amounting to a confession is not admissible against a co-accused either under s 10 or s 30, but only against himself [*Sital v. R*, 46 C 700: 30 CLJ 255 (38 C 169 and 15 CLJ 517 **folld**)]. Statement of an accused under s 342 Cr P Code during the trial cannot be regarded as a statement by him as a conspirator [*Kunwar v. R*, 9 OWN 1136 : A 1933 O 86].

Incriminating Statement To Police.—S 10 does not apply to incriminating statements made by accused to the police in the course of investigation whether they incriminate themselves or others [*Pritam v. R*, A 1939 S 185 : 1939 Kar 449].

S 10 And Use of Confession of Co-conspirator.—Although s 10 is wider than the English law, it is not intended to make evidence against the other conspirators the confession of co-accused and put it on the same footing as a communication passing between conspirators, or between conspirators and other persons, with reference to the conspiracy. But under s 30, a confession of a co-accused can be looked at although its value cannot be put higher than the statement of an accomplice [*R v. Abani Bhusan*, 38 C 169 : 15 CWN 25; see also *Ram Pd v. R*, A 1927 O 369; *R v. Keshav*, 25 Bom LR 248; *Dengo v. R*, A 1938 S 94: 175 IC 99; *Baliram v. R*, A 1938 N 295—CONTRA : *Satdeo v. R*, A 1936 O 154; *Kunjalal v. R*, 38 CWN 1015]. When

a plea of *alibi* is raised by an accused it is for the accused to establish the said plea by positive evidence. Under Section 11 of the Evidence Act collateral facts having no connection with the main fact except by way of disproving any material fact, proved or asserted can be admitted in evidence. In other words, the facts proved as such which make the existence of the fact so highly improbable as to justify the inference that it never existed, but such fact has to be established by the person who takes the plea [*Brijlal Prasad Sinha v. State of Bihar*, (1998) 4 Scale 25 at 39 (SC)]. A subsequent confession after arrest cannot be admissible against a fellow conspira-tor under s 10 as it has no reference to the "common intention" of the conspirators which is at an end; but if the conditions prescribed are satisfied, it may in a proper case be "taken into consideration" under s 30. In a case before the Judicial Com-mittee it has also been pointed out that a confession after the common intention or conspiracy was no longer operating and had ceased to exist, *ie* after the completion of the conspiracy, is not admissible under s 10 against a co-accused [*Mirza Akbar v. R*, 45 CWN 269 PC. Therefore the contrary opinion in the two cases cited above cannot be treated as good law; see also *Achhay v. R*, 25 P 347: A 1947 P 90]. See however *Bhagwandas v. S*, A 1974 SC 898 and *Tribhuban v. S*, A 1973 SC 450 discussed *ante*: "*Narrative of past acts*".

S 10 and Statement of Approver.—S 10 does not cease to apply to "anything said done or written" by a conspirator simply because that conspirator gives evidence as an approver, although such evidence must be read subject to the rules of prudence and corroboration [*Vishindas v. R*, A 1944 S 1 FB].

Corroboration in Conspiracy Cases.—The rule of practice is that an accused cannot be convicted on the evidence of an accomplice without independent corroboration (see s 133 *post*). This rule is particularly essential in cases of conspiracy to commit crimes. Evidence of a mere agreement by which a conspiracy can be established can easily be concocted or manufactured [*Bachha v. R*, A 1935 A 162]. That is why it is an accepted principle that for the acts and declarations of one conspirator to be receivable in evidence against a fellow conspirator to prove the nature and scope of the conspiracy, there must be independent evidence other than hearsay to show that the letter was a party to the conspiracy [*R v. Governor of Pentonville Prison, Ex p Osman*, (1989) 3 All ER 701 QBD]. The court explained the decision in *R v. Donat*, (1985) 82 Cr App R 173.

Co-trespassers, Joint-tortfeasors, etc.—S 10 applies to a criminal offence as well as to "an actionable wrong," *eg* civil actions of trespass, tort, &c. In actions for trespass the declarations and acts of co-trespassers are subject to the same rules [See Tay s 597]. The admissions of one *joint tortfeasor* are receivable against another, on the same principle and with the same limitations as those of conspirators. This is merely the same doctrine in its application to civil liability for torts [Wig s 1079]. "Although in criminal cases, it is the *agreement* which is the essential element, and in civil ones the resultant *damage* [*Quinn v. Leathem*, 1901 AC 495, 542], yet the acts and declarations of co-trespassers in civil actions [*R v. Hardwick*, 11 East 578, 585], and indeed of all persons combined for a common object, whether civil or criminal [*Pilot Craze*, 52 JP 311], are governed by the same rules. The acts and declarations of joint tortfeasors are not, however, reciprocally admissible unless combination for a *common object* be proved" [*Daniels v. Potter*, M & M 501 **distinguishing** *R v. Hardwick, sup*; Phip 8th Ed p 90]. As to admissions by co-defendants see ss 17, 18 and confession by co-accused, see s 30.

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

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

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

Illustrations

(*a*) The question is, whether *A* committed a crime at [1][Calcutta], on a certain day. The fact that, on that day *A* was at [2][Lahore] is relevant.

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

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

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

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COMMENTARY

Principle and Scope.—This section has been expressed in very wide language, but it does not mean that any and every fact which by a chain of reasoning may be shown to have a bearing, however remote, on any fact in issue or relevant fact, is relevant. That would do away with the theory of relevancy propounded in the previous sections and bring in a mass of collateral facts creating confusion, embarrassment and prejudice. Before a fact can be relevant under s 11, it must be shown that it is admissible [*Munna v. Kameshari*, A 1929 O 113]. Though the terms of the section are wide, they are controlled by the provisions regarding relevancy contained in the other sections of the Act and the fact relied on must be proved according to the provisions of the Act [*Bela Rani v. Mahabir*, 34 A 341; *Sevugan v. Srimathu*, A 1940 M 273]. "All evidence must be logically relevant; that is absolutely essential. The fact, however, that it is logically relevant does not insure admissibility. It must also be legally relevant. A fact which, 'in connection with other facts renders probable the existence' of a fact in issue, may still be rejected, if in the opinion of the judge, and under the circumstances of the case, it is considered essentially misleading or too remote" [Burr Jones, Blue Book, s 136].

The words of the section are no doubt very wide, but in determining relevancy the court in the exercise of a sound discretion should see that the connexion between the fact to be proved and the fact sought to be given in evidence is so close or immediate as to render the co-existence of the two highly probable or improbable. It has been seen that collateral facts are ordinarily excluded and the section embodies one of the instances in which collateral facts may be relevant (*ante*, s 5).

As to whether a judgment is a 'fact' GARTH CJ, in *Gujjulal v. Futtehlal*, 6 C 171, 188 DB held that a judgment was no more than an opinion and the same view was expressed in *Collr of Gorakhpur v. Palakdhari*, 12 A 1 FB [see also the definition of judgment in s 2(*9*), C P Code]. Since s 11 talks about collateral facts only as relevant, a judgment not being a fact, but a mere opinion as to the existence or otherwise of a fact, could not have been intended to be made relevant under it [*Special L A Officer v. Lakshamsi*, A 1960 B 78]. As to admissibility of judgment not *inter partes* as transactions or instances, see s 13 *post*. A rectified trust deed pursuant to the order of the court makes the rectification order relevant under section 11, as the fact in issue in an enquiry before the I.T.O. would be whether on the basis of the rectified trust instrument the assessee trust is entitled to get its income-tax exempted from the relevant provisions of the Income Tax Act. [*I.T. Commr., Kanpur v. Kamla Town Trust*, A 1996 SC 620, 629].

To Make Facts Admissible, They Must Be Relevant under Other Provisions of the Act.—The section should not be widely construed. That an extensive meaning was not in the mind of the Legislature in enacting s 11 seems to be shown by several indications in the Act itself. The illustrations do not go beyond familiar cases in the English law [see *R v. Parbhudas, post*; *Ambika v. Kumud*, A 1928 C 893]. All evidence which would be admissible by English law would be properly admitted under the section [*per* TELANG J, in *R v. Vajiram*, 16 B 414, 430; *Rangayyan v Innasimuthu*, A 1956 M 226]. Fact having merely probative force cannot be offered in evidence under s 11 [*Laxmandas v. S*, A 1968 B 400]. The section is controlled by

some more specific provisions of the Act, *viz* ss 17-39 [*Rangayyan v. Innasimuthu, sup*].

Stephen, the framer of the section, said:—

> "It may possibly be argued that the effect of the second paragraph of s 11 would be to admit proof of such facts as these (*viz* statements as to facts by persons not called as witness; transactions similar to but unconnected with the facts in issue; opinions formed by persons as to facts in issue or relevant facts). It may for instance, be said: *A* (not called as a witness) was heard to declare that he had seen *B* commit a crime. This makes highly probable that *B* did commit that crime. Therefore, *A*'s declaration is a relevant fact under s 11. This was not the intention of the section, as is shown by the elaborate provision contained in the following part of Ch. II (ss 31-39) as the particular classes of statements, which are regarded as relevant facts either because the circumstances under which they are made invest them with importance, or because no better evidence can be got. The sort of facts which the section was intended to include are facts which either exclude or imply more or less distinctly the existence of the facts sought to be proved. Some degree of latitude was designedly left in the wording of the section (in compliance with a suggestion from the Madras Government) on account of the variety of matters to which it might apply. The meaning of the section would have been more fully expressed if words to the following effect had been added to it:—"No statement shall be regarded as rendering the matter stated highly probable within the meaning of the section unless it is declared to be relevant fact under some other section of this Act" [Steph Intro pp 160, 161].

On this explanation of Stephen, Field comments: "The section can hardly be limited as has been suggested to those facts which are relevant under some other provisions of the Act, for this would render the section meaningless". No doubt the section becomes to a certain extent otiose if the relevancy of facts embraced by it is to depend on the provisions relating to relevancy in other sections of the Act; but the question cannot now be regarded as an open one and the interpretation put upon the section in various judicial decisions clearly shows that its provisions must be read subject to the provisions in the other sections. There are instances in the Act of sections overlapping each other, *eg* the relevancy of facts under s 9 'which support or rebut an inference suggested by a fact in issue or relevant fact', is very similar to the facts contemplated by s 11. Other instances may be cited. Stephen himself says: These sections (ss 6-11) enumerate specifically the different instances of the connection between cause and effect which occur most frequently in judicial procee-dings. They are designedly worded very widely, and in such a way as to overlap each other. Thus a motive for a fact in issue (s 8) is part of its cause (s 7). Subsequent conduct influenced by it (s 8) is part of its effect (s 7). Facts relevant under s 11 would, in most cases, be relevant under other section". [Steph Intro p 72]. Norton remarks that perhaps s 11 is introduced *pro majori cautela*, to obviate the argument that the fact to rebut is an irrelevant fact. Some difficulty is however created by the words "Facts *not otherwise relevant*" [Nort p 115]; but as Markby observes: While the seventh section defines the meaning of 'relevancy' in quasi-scientific language, the present section (s 11) contains a statement in popular language of what in the former section is attempted to be stated in specific language. The practical effect of these two sections is to make every relevant fact admissible in evidence [Markby, pp 17, 18].

On Stephen's own admission the language used in para 2 is very wide and since SIR RAYMOND WEST'S judgment in *R v. Parbhudas*, 1874, 11 Bom HCR 90 indi-

cating clearly that the extensive meaning which s 11 is susceptible of was never intended, judicial decisions have restricted its meaning to the sense explained by Stephen (*ante*). The section does not render admissible what would not be admitted under the English law.

Wigmore calls the subject-matter of this section the argument from *Essential Inconsistency* and explains thus: "Its usual logic is that a certain fact cannot co-exist with the doing of the act in question, and therefore that if that fact is true of a person of whom the act is alleged, it is impossible that he should have done the act. The form sometimes varies from this statement; but its nature is the same in all forms. The inconsistency, to be conclusive in proof, must be *essential, ie* absolute and universal; but since in offering evidence, we are not required to furnish demonstration but only fair ground for inference, the fact offered need not have this essential or absolute inconsistency, but merely a probable or presumable inconsistency; and its evidentiary strength will increase with its approach to absolute or essential inconsistency" [Wig s 135].

Admissibility of Collateral Facts to Prove Inconsistency, Probability or Improbability.—The section declares admissible facts which are logically relevant to prove or disprove the main fact or fact in issue. There may be collateral fact which have no connection with the main fact except by way of *disproving* any material fact proved or asserted by the other side, *ie* when they are such as make the existence of the fact so highly improbable as to justify the inference that it never existed (v clause 2). A well-known instance is that of the defence of *alibi* [*v. illus* (*a*)]. Another instance is non-access of husband to prove illegitimacy (s 112). Under cl 2, facts which make a fact in issue or relevant fact so highly probable as to justify an inference that it existed, are also relevant. In other words collateral facts which by way of *contradiction* are inconsistent with the fact in issue or relevant fact, *ie* make its existence impossible or highly improbable; or collateral facts which by way of *corroboration* are consistent with the existence of a fact in issue or relevant fact, *ie* tend to render its existence highly probable, are relevant. In order that a collateral fact may be admissible under the section the requirements of the law are: (1) that the collateral fact must itself be established by reasonably conclusive evidence, and (2) that it must, when established afford a reasonable presumption or inference as to the matter in dispute [*Khaver v. Rukha*, 6 Bom LR 983].

The party may show that by reason of physical or mental inability or absence, it is impossible that the act in question should have been his act [*Moulton v. Aldrich*, 28 Kan 300 (Am)]. In a trial for rape, where a party indicted was an ancient wealthy man turned of sixty, the accused defended himself by showing that he had for many years been afflicted with a rupture so hideous and great as to render sexual intercourse impossible [Best, pp 564-65].

The rule of probability as is sometimes understood by a lay man, *viz* an inference that a man has committed a crime because he is guilty of other crimes of a similar nature, does not of course come within the section. (As to evidence of similar facts, see ss 14, 15; as to Character evidence, see s 54). "There must always be room for the exercise of discretion when the relevancy of testimony rests upon its effect towards making the affirmative or negative of a proposition 'highly probable'; and with any reasonable use of this discretion, the court ought not to interfere, but it appears to me to be as illegal now, as before the Evidence Act was passed, to admit evidence of crime *A* in order to prove the cognate but unconnected crime *B*" [*per* WEST, J in *R v. Parbhudas*, 11 BHCR 90, 94]. The admissibility under s 11 in each case must depend on how near is the connection of facts sought to be proved with

facts in issue, to what degree do they render facts in issue probable or improbable when taken with other facts in the case and to what extent would the admission of the evidence be inconsistent with principles enunciated elsewhere in the Act [*Htin Gyaw v. R*, A 1928 R 118]. The section does not admit collateral facts which have practically no connexion with the main fact [*Rajendra v. Ramganit*, A 1954 P 556 : 33 P 861].

In *Com v. Webster*, 5 Cush 295, 318, SHAW CJ said: "When a fact has occurred, with a series of circumstances preceding, accompanying, and following it, we know that these must all have been once consistent with each other; otherwise the fact would not have been possible. Therefore if any one fact necessary to the conclusion is wholly inconsistent with the hypothesis of the guilt of the accused, it breaks the chain of circumstantial evidence upon which the inference depends; and however, plausible or apparently conclusive the other circumstances may be, the charge must fail. Of this character is the defence usually called an *alibi* ; that is, that the accused was *elsewhere* at the time the offence is alleged to have been committed. If this is true, it being impossible that the accused could be in two places at the same time, it is a fact inconsistent with that sought to be proved, and excluded its possibility" (cited in Wig s 139).

Among probative facts collaterally relevant are those whose existence is inconsis-tent with that of some *res gestae* or directly evidentiary fact. Conduct inconsistent with a present claim may at all times be shown by the adverse interest. Generally speaking, collateral facts whose existence is merely *consistent* with probative or *res gestae* ones possess no marked evidentiary value. Some relation, more directly causal in its nature must be established for such a result. Situations may arise where it may be necessary to use more consistency in an evidentiary capacity. Thus, it may be shown that certain things happened as they might have been expected to happen if one contention or the other before the court were true. The admissibility of any evidence as to the existence of merely consistent facts may fairly be deemed matter of administration, as is commonly said, of 'discretion'. On the other hand, the right of a litigant to prove a fact inconsistent with one directly probative or material in the *res gestae* seems pre-eminently a matter of right, *ex debito justiciae* [Chamb H B s 665].

"Any fact material to the issue which has been proved by the one side may be disproved by the other, whether the contradiction is complete, *ie* inconsistent with a relevant fact under clause (1) or such as only render the existence of the alleged fact highly improbable under clause (2). Again, facts may be put in evidence under clause (2), in corroboration of other relevant facts if they render themselves highly improbable" [Nort p 124].

§ Ref Steph Dig Art 3; Steph Intro 160, 161; Tay ss 322-25; Wigmore ss 135-44; Chamberlayne, ss 1752-54.

***Ali bi.*—[Illustration (a)].**—*Alibi* is not an exception (special or general) envisaged in the Indian Penal Code or any other law. It is only a rule of evidence recognised in S. 11 of the Evidence Act that facts which are inconsistent with the fact in issue are relevant. Illustration (A) given under the provision is worth reproducing in this context:

"The question is whether A committed a crime at Calcutta on a certain date; the fact that on that date, A was at Lahore is relevant."

Another illustration may be seen in *Nishar Ad Fajmohmed Kaji v. State of Gujarat*, (1998) 9 SCC 23 : 1997 (9) JT 67. The accused pleaded that he was away from the scene of the crime because at that time he was under police *bandobast*. The head constable who was posted at the *bandobost* testified that the accused went away from their custody and returned after a few hours. It was held that the testimony of the constable could not be brushed aside. The plea of *ali bi* was consequently not made out.

The Latin word *alibi* means "elsewhere" and that word is used for convenience when an accused takes recourse to a defence line that when the occurrence took

place he was so far away from the place of occurrence that it is extremely improbable that he would have participated in the crime. It is basic law that in a criminal case, in which the accused is alleged to have inflicted physical injury to another person, the burden is on the prosecution to prove that the accused was present at the scene and has participated in the crime. The burden would not be lessened by the mere fact that the accused has adopted the defence of *alibi*. The plea of the accused in such cases need be considered only when the burden has been discharged by the prosecution satisfactorily. But once the prosecution succeeds in discharging the burden it is incumbent on the accused, who adopts the plea of *alibi*, to prove it with absolute certainty so as to exclude the possibility of his presence at the place of occurrence. When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the Court would be slow to believe any counter-evidence to the effect that he was elsewhere when the occurrence happened. But if the evidence adduced by the accused is of such a quality and of such a standard that the Court may entertain some reasonable doubt regarding his presence at the scene when the occurrence took place, the accused would, no doubt, be entitled to the benefit of that reasonable doubt. For that purpose, it would be a sound proposition to be laid down that, in such circumstances, the burden on the accused is rather heavy. It follows, therefore, that strict proof is required for establishing the plea of *alibi*. This Court has observed so on earlier occasions (vide *Dudh Nath Pandey v. State of Uttar Pradesh*, (1981) 2 SCC 166 : (A 1981 SC 911); *State of Maharashtra v. Narsingrao Gangaram Pimple*, A 1984 SC 63). [*Binay Kumar Singh v. State of Bihar*, A 1997 SC 322].

The burden is on the accused to show that he was somewhere else other than the place of occurrence at the time of the incident. [*Amar Singh v. State*, 1996 Cri LJ 3848, 3857 (Del); *George v. State of Maharashtra*, 1996 Cri LJ 3868 (Bom)]. The accused has to establish his plea of *ali bi* by positive evidence. He could not do this in the present case. A collateral fact having no connection with the main fact except by way of disproving any material fact can be admitted in evidence but the fact would have to be established by positive evidence by the person who takes the plea. *Brijlala Prasad Sinha v. State of Bihar*, AIR 1998 SC 2443 : 1998 Cri LJ 3611. *Alibi* is not an exception (special or general) envisaged in the Penal Code or any other law. It is only a rule of evidence recognised in section 11 that facts which are inconsistent with the fact in issue are relevant. [*Binay Kumar Singh v. State of Bihar*, A 1997 SC 322 : 1997 Cri LJ 362, 367, 368 (SC)]. The plea of *alibi* must be proved with absolute certainty so as to completely exclude the presence of the person concerned at the time when and the place where the incident took place. [*Rajesh Kumar v. Dharamvir*, A 1997 SC 2041 : 1997 Cri LJ 2242, 2248]. The fact that evidence is led for proving *alibi* to improbabilise the allegation made in the petition without any express pleading to that effect in the written statement, may be of significance only to assess the probative value of such evidence but the evidence cannot be shut out as irrelevant or inadmissible. [*Ramchandra G. Kapse v. H.R. Singh*, A 1996 SC 817, 823]. An *alibi* the relevancy of which is its entire inconsistency with the hypothesis that the accused committed the crime. As to proof of *ablibi* and duty of court, see *Satyaviar v. S*, A 1958 A 746. The plea of *alibi* postulates the physical impossibility of the presence of the accused at the scene of offence by reason of his presence at another place. The plea can succeed only if it is shown that the accused was so far away at the relevant time that he could not be present at the place where the crime was committed [*Dudh Nath Pandey v. State of U.P.*, A 1981 SC 911, 916 : 1981 Cri LJ 618; *State v. Bipra Samul*, 1982 Cri LJ NOC 214 : (1982) 54 Cut LT 321 (Ori)]. A plea of *alibi* must be proved with absolute certainty so as to completely exclude the possibility of the presence of the person concerned at the place of occurrence [*State of Maharashtra v. Narsingrao Gangaram Pimple*, A 1984 SC 63, 67 : 1984 Cri LJ 4; *Mukter Ahmed v. State*, 1983 Cri LJ NOC 221 (Cal) (DB); *Dalel Singh v. Jag Mohan Singh*, 1981 Cri LJ 667 (Del) : 1981 Rajdhani LR 68]. Even if the evidence of the

accused that on the date of occurrence he had gone to a neighbouring town to purchase a pipe, that will not be sufficient to infer that he would have stayed in that town during the night also when the occurrence took place especially when the town is at a very short distance from that village [*Dharamvir v. State of U P.*, 1990 Cri LJ 839, 845 (All) : 1989 All LJ 454]. The second example is of a fact rendering the hypothetical fact on the other side not positively impossible but highly improbable, as often happens when the question is whether there was time for accused to have gone from the place where he says he was, to the scene and returned again.

When a plea of *alibi* is raised by an accused it is for the accused to establish the said plea by positive evidence. Under Section 11 of the Evidence Act collateral facts having no connection with the main fact except by way of disproving any material fact, proved or asserted can be admitted in evidence. In other words, the facts proved as such which make the existence of the fact so highly improbable as to justify the inference that it never existed, but such fact has to be established by the person who takes the plea [*Brijlal Prasad Sinha v. State of Bihar*, A 1998 SC 2443:(1998) 4 Scale 25 at 39 (SC)].

Illustration (b).—This is a disjunctive hypothetical syllogism. *X* is either *A* or *B* or *C*. But it is not *B* or *C*. Therefore it is *A* [Nort p 124]. *Illustration* (*b*) gives another case which may be this stated in a concrete form: A warder who has been locked up in a jail with four prisoners *A*, *B*, *C* and *D* , is found murdered and it is proved that no other person could have entered the jail, whence it appears that the murder must have been committed by one of the four. Evidence is rendered to show that *B* and *C* were chained up in cells and that *D* was paralysed. This evidence is admissible since it makes it highly probable that *A* committed the murder" [Cunn p 31].

Application [Section Should Not be Widely Construed].—S 11 should not be construed in its widest significance as limited in its effect by s 54 of the Act. So construed, s 11 renders inadmissible the evidence of one crime (not reduced to legal certainty by a conviction) to prove the existence of another unconnected crime, even though it be cognate. Accordingly, the possession by an accused person of a number of documents suspected, is no evidence to prove that he has forged the particular document with the forgery of which he is charged. *Per* WEST, J—S11 of the Evidence Act is no doubt expressed in terms so extensive that any fact which can be a chain of ratiocination, be brought into connection with another so as to have a bearing upon a point in issue, may possibly be held to be relevant within its meaning. But the connections of human affairs are so infinitely various and so far-reaching that, to take this section in its widest admissible sense, would be to complicate evey trial with a mass of collateral inquiries, limited only by the patience and the means of the parties. That such an extensive meaning was not in the mind of the Legislature in enacting s 11, seems to be shown by several indications in the Act itself. The illustrations to s 11 do not go beyond familiar cases in the English Law of Evidence [*R v. Parbhudas*, 11 Bom HCR 90; see *R v. Vajiram*, 16 B 414; *Ambika v. Kumud*, A 1928 C 893; *Special L A Officer v. Lakhamsi*, A 1960 B 78 and also *Gujju Lal v. Fatteh Lal*, 6 C 171 : 6 CLR 439 FB].

S 11 is Generally Controlled by S 32.—As a general rule, s 11 is controlled by s 32 where the evidence consists of statements of persons who are dead or cannot be found; but this rule is subject to certain exceptions. The test whether the statement of a person who is dead or cannot be found is relevant under that section, (presuming that it is in other respects within the intention of the section) although it would not be admissible under s 32 is this : It is admissible under s 11 when it is altogether immaterial whether what that dead man said was true or false, but highly material that he did say it. In these circumstances, no amount of cross-examination could alter the fact, if it be a fact, that he did say the thing, and if nothing more is needed to bring the thing said in under s 11, then the case is outside s 32 [*Sethna v. Mirza Md*, 9

Bom LR 1047; **folld** in *Ambika v. Kumud*, A 1928 C 893; *Thakurji v. Parmeshwar*, A 1960 A 339]. A statement of a relevant fact, which is inadmissible under s 32, will not be admissible under s 11. The terms of s 11 are no doubt wide, but they must be read subject to the other sections, and therefore the fact relied on must be proved in accordance with the provisions of the Act [*Bela Rani v. Mahabir*, 34 A 341: 14 IC 116: ALJ 351; *Munna v. Kameshari*, A 1929 O 113; *Sevugan v. Srimathu*, A 1940 M 273]. In a Mysore case it has however been observed that the statement in *Sethna v. Mirza Md, sup* that s 11 is controlled by s 32 is puzzling. It would mean that before a 'statement' can be relevant under s 11 it must also be relevant under s 32. Ss 11 and 32 cover different fields and there is no question of any overlapping. S 11 deals with 'facts' while s 32 deals with 'statements'. The sweep of s 11 is very wide. Hence there is no justification for the view that it will become otiose if 'statements' within s 32 are excluded from its scope [*Ravjappa v. Nilkanta*, A 1962 Mys 53]. There is nothing in sec. 11 of the Act to suggest that it is controlled by any other section. On the other hand the words used in sec. 11 indicate that the provision is an exception to other general provisions [*C. Narayanan v. State of Kerala*, 1992 Crl LJ 2860, 2868 (FB) (Ker)].

Applicability to Criminal Cases.—S 11 deals with relevant facts. It applies only to criminal cases where the question is whether a fact is relevant and not whether a particular method of proof is admissible under any provision of the Evidence Act [*Soney Lal v. Darbedeo*, 14 P 461 : A 1935 P 167 FB].

"Existence of a Fact".—There is a difference between the existence of a fact and a statement as to its existence. This section makes admissible the existence of facts and not statements as to such existence, unless the fact of making that statement is in itself a matter in issue. Hence if a statement does not fall within s 2 it cannot be admissible even under s 11 [*Naima v. Basant*, 149 IC 781 FB : A 1934 A 406; *Special L A Officer v. Lakhamsi*, A 1960 B 78; *Thakurji v. Parameshwar, sup*]. It has, however, been held in a case that a statement is included in the definition of 'fact' in s 3 [*Ram Bharose v. Diwan*, A 1938 O 26, 29].

Omission of Important Facts.—An FIR is a previous statement which can be only used to corroborate or contradict the maker. The FIR is not substantive piece of evidence but it can be used to contradict its maker during trial [*Dinesh Chandra Dey v. State of Assam*, 1990 Cri LJ (NOC) 158 (Gau)]. Omission of important facts, affecting the probabilities of the case, are relevant in judging the veracity of the prosecution case [*Ramkumar v. S*, A 1975 SC 1026; *Anam Pradhan v. The State*, 1982 Cri LJ 1585, 1596 (Ori); *State v. Makund Harijan*, 1983 Cri LJ 1870, 1871 (Ori) (DB); *Nirmal Kumar Kar v. State of West Bengal*, 1984 Cri LJ NOC 52 : (1983-84) 88 Cal WN 150 (Cal) (DB); *Jagabandhu Mahanta v. State*, 1985 Cri LJ 575, 579 : (1985) 2 Crimes 648 (Ori) (DB); *Pravakar Behera v. State of Orissa*, 1985 Cri LJ NOC 6 : (1984) 58 Cut LT 42 (Ori); *Shyamaghana Bindhani v. State*, 1987 Cri LJ 952, 955 : (1986) 1 Orissa LR 567 (Ori) (DB); *Gandharh alias Gobardhan Pradhan v. State of Orissa*, 1989 Cri LJ NOC 25 (Ori)]. Omissions of important facts, affecting the probabilities of the case, are relevant under sec 11 [1991 Cri LJ NOC 26 (MP)]. When the FIR contains exaggerations and false implications it not only affects the testimony of the mother but also affects the veracity of the entire prosecution case [*Jugal Kishore Laha v. State*, 1984 Cri LJ 360, 365, (Cal) (DB)].

"Highly Probable or Improbable".—The words "highly probable" in s 11, point out that the connection between the facts in issue and the collateral facts sought to be proved must be so immediate as to render the co-existence of the two highly probable [*per* MITTER J, in *R v. Vyapoory*, 6 C 655, 661; *Jhabwala v. R*, 55 A 1040 :

A 1933 A 690; *Special L A Officer v. Lakhamsi, sup*]. The words "highly probable" are of great importance. The admissibility of the particular piece of evidence that is offered is closely connected with, and in fact depends upon the weight to be attached to that piece of evidence if it is taken into consideration. In other words this section makes only those facts admissible which, assuming they are admitted in evidence, will be of great weight in bringing the court to a conclusion one way or the other as regards the existence or non-existence of the facts in question [*In re Indian Companies Act*, 13 MLT 282: 18 IC 997 (*Govt of Bombay v. Merwanji*, 10 Bom LR 907, 914 **refd to**); *Bhuiya v. Ramkali*, A 1971 P & H 9]. By no canons of common sense or construction can it be said that one particular instance, such as the one in this case, render the issue of bad faith and *mala fides* in a totally different transaction 'highly probable'? The words are not 'reasonable probably'. The significant word is 'highly'. That means more than normal standard of probability. The illustrations indicate clearly what is the standard of high probability or high improbability [*Babulal v. W I T Ltd*, A 1957 C 709]. In a charge under the Arms Act the fact that one of the accused was seen showing a revolver to a companion would be relevant as making the fact in issue—possession of the revolver—highly probable [*Saroj v. R*, 59 C 1361 : A 1932 C 474]. The application filed by one accused during investigation mentioning arrest of co-accused and apprehending his own arrest does not have much evidentiary value but it is undoubtedly relevant under sec 11(1) or at any rate it could be considered as a part of the statement of that accused under sec 342 of the Criminal Procedure Code and therefore could be considered by the court for whatever worth it is [*Satbir v. State of Haryana*, A 1981 SC 2074, 2075 : 1981 Cri LJ 1702].

In a case of disputed deed of adoption, the defendant alleged that the deceased executant had taken steps to cancel or nullify it shortly after he came to know of its existence. Evidence offered by him of statements made by the executant in the interval, is relevant under ss 18, 19, 21 and s 11 [*Mir Syed v. Taiyaba*, 26 IC 547]. Even self-serving statements are admissible where they make relevant facts highly probable or improbable, *eg* when a question arises whether a property acquired by an employee was his own property or he was a *benamidar* of the employer, statements made by the employee at the time of the acquisition of the property and subsequently thereto showing that he was the beneficial owner are admissible under s 11, although their value would depend largely upon the character of the person [*Harihar v. Kesho*, 92 IC 454 : A 1925 P 68]. The contemporaneous statement of the workman in a factory at the time of inspection by the Factory Inspector about the identity of the person in charge controlling the business is admissible under ss 6, 11 and 32 as proof of such identity [*Sheo Prasad v. State of U.P.*, 1981 Cri LJ (NOC) 58 (All) : 1981 All WC 247]. The non-existence of a structure in a map filed by plaintiff in a suit between him and defendant is relevant in a subsequent suit in respect of the same property as it made highly improbable the contention of the defendant that the structure had been in existence for 45 years [*Gokul v. Hari*, A 1947 O 98]. In a suit under s 77 Registration Act questions like valuation, absence of necessity of sale &c are not relevant. Such facts do not render execution highly probable or improbable [*Rajendra v. Ramganit*, A 1954 P 556]. The schedule of an award showing that the plainfiff had claimed the money before the arbitrators is relevant when it makes the existence of the claim of the plaintiff highly probable [*Hrishikesh v. Khantamani*, A 1959 C 257].

Facts Inconsistent With any Facts in Issue or Which Make Their Existence or Non-existence Highly Probable or Improbable.—The following are some instances of such facts:—

—Absence of Entry.—of payment in an account book is relevant under ss 9 and 11 [*Gayaram v. Lachiram*, 19 CWN 611; *Imambandi v. Motasuddi*, 15 CLJ 621 (on appeal 45 IA 73 : A 1918 PC 11 : 45 C 878]. Non-existence of entry is relevant under ss 5 and 11 [*S v. Ganeshwara*, A 1963 SC 1850; *Bhaghwandas v. S*, A 1974 SC 898, 901, see also notes under s 34 *post*].

—Admission By Defendant in a Previous Suit And Similar Statement By Another In a Deed.—In a suit brought by the plaintiff against several defendants to prevent encroachments by them in a lane which was the common property of himself and the defendants—*held* that the admission of one of the defendants, in a previous suit to which the other defendants were not parties, as to the common character of the portion of the land between his house and the plaintiff's and also similar statement in a deed put in by another of the defendants to prove his title to his own house, were admissible to establish the common character of the entire lane as alleged by the plaintiff. The fact of common ownership of other parts of the land should be treated as relevant to the issue as to the common character of the entire lane on the principle laid down in s 11 [*Naro Vinayak v. Narhari*, 16 B 125 (*Jones v. Williams*, 1837, 2 M & W 326 **folld**)].

Where the question at issue was whether there was a partition between the plaintiffs and the defendants who were co-owners and whether under the partition the defendants came to be in possession of a specific property in lieu of their shares in all the properties, a petition and a written statement filed by the defendants in certain previous suits admitting the partition and the exclusive acquisition of the specific property were admissible against them under s 11(2) [*Gyannessa v. Mabarakannessa*, 25 C 210 : 2 CWN 91].

—Conspiracy to Give Evidence.—In a prosecution for having conspired to give false evidence against a person, the fact that accused had previously instituted unfounded prosecutions against the same person is admissible under s 11 but not under s 10 or s 14 [*Htin Gyaw v. R*, 6 R 6 : A 1928 R 118].

Evidence of Ownership of Adjoining And Even Distant Lands in Dispute About a Slip of Land.—When the question is whether a slip of waste land, lying between the highway and the enclosed lands of the plaintiff, belonged to him or to the lord of the manor,—the lord may give evidence of acts of ownership on other parts of the waste land between the *same* road and the enclosures of other persons, although at the distance of three miles from the spot in dispute, and although the continuity of the waste was interrupted for the space of some sixty or seventy yards, by the intervention of a bridge and some old houses [*Doe v. Kemp*, 1831, 2 Bing NC 102, recognised by PARKE, B, in *Jones v. Williams*, 1937, 2 M & W 326, where PARKE B, observed:—"I think the evidence offered of acts in another part of one continuous hedge, and in the whole bed of the river, adjoining the plaintiff's land, was admissible in evidence, on the ground that they are such acts as might reasonably lead to the inference that the entire hedge and the bed of the river, and consequently the part in dispute belonged to the plaintiff" [Tay s 323].

Identity of Sender of Telegram.—A letter written by the exporter of certain contraband cocaine, the subject of the charge against the accused, containing a reference to a telegram signed in a different name but bearing the same business address as that of the accused, is relevant under s 11 as showing that the accused was the sender of the telegram, though the letter was intercepted at the post office under an order of the magistrate before delivery [*Booth v. R*, 41 C 545].

—Intention in Transactions of the Same Kind Done at the Same Time.—On the question whether certain leases were perpetual, it was held that the fact, that the intention indicated by the acts and conduct of the parties was to make certain other leases granted at about the same time, under similar circumstances perpetual, would make it highly probable that the same was the intention with regard to the leases in dispute, and that the facts relating to these leases would be relevant facts under s 11(2) [*Nursing Dyal v. Ram Narain*, 30 C 883].

—Newspaper Report.—On a charge of criminal conspiracy, copies of newspapers containing an account of some proceedings found in the possession of an accused are not by themselves evidence of the truth of the facts stated therein unless in connection with other facts they make the existence or the non-existence of the facts mentioned "highly probable or improbable" [*Jhabwala v. R*, 55 A 1040 : A 1933 A 690].

—Partial Delivery of Possession.—The fact in issue was whether possession of certain immovable property under a deed of gift was delivered to make it valid under Mahomedan law. If the possession of movable property covered by the deed was actually delivered, the fact of this partial delivery, being a collateral fact fulfilling all the requirements of law was relevant as making the existence of the fact in issue highly probable [*Sultan v. Rukha*, 6 Bom LR 983].

—Poverty.—In an action for money lent, the poverty of the alleged lender is a very relevant fact, evidence of which is admissible for the purpose of disproving the loan [*Dowling v. Dowling*, 1860, 10 Ir CLR 244, cited in Tay 11th Ed p 235].

—Report to Police.—Where the case was that a forcible re-entry was made on behalf of the lessor, then the fact that a report to the police complaining of use of force was made soon after, is a relevant fact under s 11 [*Habibullah v. Bakht*, 30 IC 292].

—Thumb Impression.—The main question being whether the impugned document was or was not presented before the registrar by the complainant A, a comparison of the thumb-impression of the person who presented the document with that of *N* is admissible under s 11(2), if their dissimilarity makes such identity improbable [*R v. Fakir Md*, 1 CWN 33]. As to finger impression, see notes to s 45 *post*.

—Transfer of Interest Without Alteration in the Terms of Holding, or Rent.—Where it was shown that the interest in a tank had frequently been transferred during a period of more than 60 years without any change in the terms of the holding or the amount of rent paid, it was held that the tenure was permanent and transferable, the fact of transfer being inconsistent with the interest terminable at will [*Nidhikrishna v. Nistarini*, 13 BLR 416 : 21 WR 316].

—Where a Witness Was at a Particular Time.—The statement of a witness for the defence that a witness for the prosecution was at a particular place at a particular time and consequently could not then have been at another place where the latter states that he was and saw the accused persons, is properly admissible in evidence, even though the witness for prosecution may not himself have been cross-examined on the point [*R v. Sakharam*, 11 Bom HC 166].

—Will.—A statement by a donor in his will that a deed of gift executed by him is fictitious is relevant under s 11(*1*) [*Ram Bharose v. Diwan*, A 1938 O 26].

"If By Themselves or In Connection With Other Facts etc. etc."—A statement of a witness as to what he heard from the deceased relating to the cause of his death

or the circumstances of the transaction which resulted in his death, is hearsay and is not admissible under ss 6, 8, 11, and 14; they must be proved in the ordinary way, *viz* by evidence of primary character and not by hearsay testimony [*R v. Surendra*, 5 CWN 574: 28 C 397]. Accused was charged with causing grievous hurt to one of his wives and killing another. The mere fact of the wounded woman stating that accused attacked both had no bearing on the main issue and s 11 does not make it admissible [*R v. Abdul Shaikh*, 23 CWN 933].

Simply because the pleas of suicide and alike have failed at the trial no adverse inference can be drawn against the accused [*Sakharam v. State of M.P.*, A 1992 SC 758, 759].

When the question is whether a person is a habitual cheat, the fact that he belonged to an organization formed for the purpose of habitually cheating in concert, is relevant under s 11 and it is open to the prosecution to prove against each person that the members of the gang do cheat [*Kalu Mirza v. R*, 37 C 91]. As to admission of evidence of conviction on similar charge to prove guilty knowledge and intention, *see R v. Alloomiya*, 28 B 129 and cases cited under ss 14 and 54. Accused, a Mahomedan, was charged with rioting and dacoity. Evidence that on the day next after the occurrence the accused attempted to convert by force a Hindu on pain of assault, is irrelevant notwithstanding that the riots were due to Hindu-Muslim dissensions [*Dargahi v. R*, 52 C 499: A 1925 C 831]. In a prosecution under s 107 Cr P Code, certain findings in regard to satyagraha movement in previous case is admissible under s 11 to show the particular line of action the petitioner would probably take in regard to a procession in a certain religious festival [*Satindra v. R*, A 1928 C 438 : 32 CWN 477].

A deed which is not admissible under s 49 Registration Act for want of registration may be admitted under s 11, if it is inconsistent with any fact in issue [*Sheo Bandhan v. Sahdeo*, A 1930 A 130].

When oral tenancy is denied and the sale deed in favour of persons suing as landlord is alleged to be bogus, the evidence about the nature of the sale deed becomes admissible on the question of existence or non-existence of the oral lease under s 11(2) [*Shk Rashid v. Hussain*, A 1943 N 265]. In a suit for rent, a statement in an order for delivery of possession as to the rent payable is not admissible [*Chandra v. Elim*, 87 IC 512 : A 1926 C 415]. *Batwara* papers are admissible in evidence against strangers only if they can be under s 11 [*Rahimuddin v. Umesh*, 87 IC 694 : A 1926 C 115]. So also *Chittas* prepared by a zemindar [*Abdul Khaleque v. Susil*, 39 CWN 330].

A full horoscope prepared from a short one produced by one who prepared it is admissible so far as date of birth and parentage [*Harbahadur v. Chand*, 48 IC 400 : 21 OC 298]. The history and status of connected families may be admissible in evidence under s 11 to prove that a certain family is one of a group [*Sarada v. Umakanta*, 50 C 370 : A 1923 C 485]. But a statement in a deed as to the school of law by which the family is governed is not admissible unless it comes from a member of a "connected family", *ie* a family which had descended from the same stock as the person in whose favour the evidence is sought to be used [*Sukdeb v. Mritunjoy*, 43 CWN 395]. When the religion of a deceased person is relevant, his declaration as to religion in a will is relevant under s 11(2), s 14 and s 21(2) [*Leong Hone v. Leon Ah*, A 1930 R 42].

In assessing the market value of a land, the price paid in other transactions relating to land in the neighbourhood is admissible, *eg* previous decisions under L A Act are

relevant in a subsequent case where the market value of lands in the same neighbourhood is in issue [*Madan v. Secy of S*, A 1925 C 481 : 78 IC 556 (*Secy of S v. I G S N R Co*, 36 C 967: 14 CWN 134: 36 IA 200 **folld**); *Collr v. Lachhman*, A 1965 HP 18; *Nageswara v. Dy Collr*, A 1959 AP 52—*per* UMAMAHESWARAM J]. [*H Narayaniah v. L A Officer*, A 1981 Kant 26; *Bhanwar Singh v. Union of India*, A 1982 (NOC) 165 Del; *State of Orissa v. Rajendra Panda*, A 1984 Orissa 86, 87; *State of Bihar v. Mosafir Thakur*, A 1984 Pat 40, 42 : 1983 BBCJ (HC) 673; *State of UP v. Nath Hoo*, A 1986 All 172 : 1985 All WC 733]. As regards determination, of "price paid" see *S v. Mariamma*, A 1969 K 265 cited in p 87. Valuation by annual value of produce is not adequate but evidence of witness who had made an offer to purchase the land is relevant and acceptable for arriving at the value [*Raghubans v. Govt*, A 1967 SC 465]. A report of the statistical department of the Govt. on outturn of rice for a certain year prepared on a sample survey basis is not a safe guide for assessing the market value of land under Land Acquisition Act [*Collr v. Rajchandra*, A 1975 SC 1905].

A statement alone by a person who is dead in a petition for guardianship that a certain person was born at a certain time is not admissible under s 11 [*Ramakrishna v. Manindra*, 20 CLJ 302]. But a statement in a petition for probate as to date or death when free from suspicion has been held to be admissible under s 11 if not under s 32(*4*) [*Lachman v. Kamakshya*, A 1931 P 224].

Entry in hospital register of indoor patients is admissible to show the person mentioned in the entry was in the hospital on a certain date [*Amolax Ram v. R*, 43 IC 429].

During the prosecution of an author under s 153A I P Code, the book was proscribed and an application under s 99 (now s 101) Cr P Code was dismissed by the High Court. The HC judgment was admissible under ss 11 and 13 [*Kalicharan v. R*, A 1927 A 654: 25 ALJ 846: 50 A 1057].

Recitals in Documents.—A deed of sale and a mortgage deed though not *inter partes*, containing recitals that a particular land belongs to particular *howla* which is in question, are admissible either under ss 11 or 13, though they are not conclusive or binding evidence and may be very weak or even of no weight at all [*Dwarka v. Mukunda*, 5 CLJ 55]. But in *Abdulla v. Kunj*, 14 CLJ 467, it has been held that where the suit was for ejectment, the fact that the proprietor of a neighbouring piece of land in describing the boundaries of his parcel stated that the land of the predecessor of the defendant was situated on that boundary is not relevant under s 11. Recitals of boundaries in documents between third persons [*Saroj v. Umed*, 25 CWN 1022: A 1922 C 251; *Pramatha v. Krishna*, 28 CWN 1097: A 1924 C 1067; *Roman Catholic &c v. S*, A 1976 Knt 75] or recital by stranger relating to ownership of house [*Bhuriya v. Ramkali*, A 1971 P & H 9] are not admissible under s 11; [See further, note to s 13 under "*Recitals in documents not inter partes*"]. Recitals in document between a stranger and the parties to the suit would not make the existence or non-existence of the fact in issue highly probable or improbable [*Kalappa v. Bhima*, A 1961 Mys 160], unless such recital amounts to admission against the interest of such party [*Pachakhan v. H D Gopalakrishna*, A 1975 Knt 179]. Recitals in a document are not 'facts' within s 11 unless the existence of those recitals is itself a matter in issue [*Ravjappa v. Nilakanta*, A 1962 Mys 53]. Recital in a document not *inter partes* though not binding is admissible under s 11(2) to show that no property was excluded from a previous partition [*Chhatradhari v. Akleshwar*, A 1952 P 382; see also *Rangayyan v. Innasimuthu*, A 1956 M 226].

Where a document has been admitted as evidence of a transaction, the recitals therein are not evidence, specially if they are mere assertions by a person who is alive and who might have been brought before the court as a witness [*Nihar v. Kader*, A 1923 C 290]. Plaintiff brought a suit against his son for recovery of land alleging that it was acquired *benami* in the latter's name. Defendant alleged that it was purchased for him by his grandfather. Plaintiff relied on a mortgage bond executed by him before the purchase in which his father was described as dead—*held* that the statement was admissible under s 11(2), or 32(5), or 21(3), or 159 [*Sayeruddin v. Samiruddin*, A 1923 C 378 : 72 IC 985]. When the question was whether *B* had predeceased *K* a statement by a party in his own favour in an objection petition in a previous land registration proceeding that *B* predeceased *K* is admissible [*Inderdeo v. Deokaran*, A 1955 P 292]. In the case of a house said to have been built over half a century ago, direct evidence as to who constructed it may not be available; and old documents mentioning by whom it was built may be admissible under s 11(2) and s 13(*b*) for what may be worth [*Raghunath v. Bindeshwari*, 82 IC 582 : A 1924 A 526].

In an election case documents such as Pukar register and those relating to prosecution of drivers carrying voters are relevant under s 11 to prove corrupt practice of hiring trucks [*Pratap v. Rajinder*, A 1975 SC 1045].

Previous Judgments.—As a judgment is a mere opinion and not a fact it is not relevant under s 11 [*Special L A Officer v. Lakhamsi*, A 1960 B 78 *ante*]. A finding in a judgment on certain facts in a civil court is not relevant under s 11 before criminal court when it is called upon to give a finding on the same facts. S 11 only refers to certain facts and has no reference to opinions in regard to those facts. Judgments after all are nothing but opinions as to the existence or non-existence of certain facts [*Kashyap v. R*, A 1945 L 23 FB]. Evidence recorded by one forum cannot be read in relation to proceedings emanating from the other one. [*Sangeeta Balkrishna Kadam v. Balkrishna Ramchandra Kadam*, A 1994 Bom 1, 6]. When a previous judgment, not *inter partes*, has been admitted in evidence and on consideration of the same if the court is satisfied that it could form basis for determination of the market value of the land in the case in which it has been admitted, it is unnecessary and rather impermissible to go into the question on what basis or evidence the compensation has been determined therein. What is relevant of the previous judgment of the court is its conclusion or finding, but not the evidence on which the such conclusion or finding has been arrived at. Undoubtedly, it is open to the party, who opposes determination of compensation on the basis of previous judgment, to say that the land dealt with thereunder is not similar to the land covered in the subsequent case. Once, there is no dispute about that fact, it is not open to him to ask for reappraisal or comparison of the evidence considered in the previous judgment with the evidence in the subsequent case. [*Asstt. Collector & L A O, Gadwal v. Pandu Rangaiah*, 1997 AIHC 2741 (2747) (AP) (DB)]. If a judgment is held to render highly probable or improbable what was found by it, no judgment would ever be held irrelevant provided the subject-matter was relevant to the subject-matter in issue [*In re Antonious Raab*, A 1950 B 101]. Judgment and proceedings in a civil court against a vakil out of which a charge of professional misconduct is framed against him are admissible in evidence under s 11, in an enquiry into the latter charge [*Muni Reddi v. Venkata*, 23 MLJ 447].

[*As to whether "fact" includes judgment and whether judgments not inter partes are admissible under this section see notes to s 13 post*].

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

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Principle and Scope.—In the preceding sections (6-11) relevancy in the sense of connection of events as cause and effect has been fully defined. "These sections enumerate specifically the different instances of the connection between cause and effect which occur most frequently in judicial proceedings" [Steph Intro p. 72]. In the following sections (ss 12-55) are given instances of relevant facts as defined above. The whole embraces the entire subject of relevancy. In suits in which damages are claimed, the amount of damages to be awarded becomes necessarily a fact in issue, and so s 12 states in general terms that in suits for damages, facts tending to "determine" the amount of damage are relevant. The class of suits in which damages are claimable and the amount of damages that are appropriate in different kinds of suits, are regulated by the laws under which such suits are brought. The damages awarded upon violation of a right are a remedy prescribed by the substantive law. The kind of facts admissible in actions for damages vary according to the nature of the actions, *eg* for breach of contract, seduction, breach of promise to marry, libel, assault, trespass, &c &c but under s 12 any fact which is of help in determining *i.e.* in increasing or diminishing the amount of damages, is relevant. Damages may be claimed either in an action on tort, or on a contract for its breach [see ss. 54, 55, 73-75, 107, 117-18, 125, 150-52, 154, 180-81, 205, 206, 211-12, 225, 235, 259. Contract Act, ss. 21, 23, S R Act].

Injury to feelings is totally irrelevant in an action on a contract as an element of damages; but in actions on tort, heavy damages may be given on this score [*Hamlin v. Great N Ry Co*, 1 H & N 408 : 26 LJ Ex 20]. In this case it was said: "Generally speaking, the rule is this; in the case of a wrong, the damages are entirely with the jury, and they are at liberty to take into consideration the injury to the party's feelings and the pain he has experienced, as for instance, the extent of violence in an action of assault and many topics, and many elements of damage find place in an action for tort or wrong of any kind, which certainly have no place whatever in an ordinary action on contract" [see *Williams v. Curtis*, 1 CB 841; *Pearce v. Lyons*, 2 Stark 317]. This principle is well illustrated in actions for defamations where the injury to the feelings is always an element of consideration. Where damages are the result of simple *negligence*, mere pecuniary compensation is the ordinary rule [*Wild v. Holt*, 9 M & W 672]. Whether the damage is too remote is for the consideration of the judge. If he is of opinion that it is, facts tending to prove it are not relevant, and should be rejected [Nort pp 125-26].

Damages unless expressly admitted, are put in issue. Evidence tending to increase or diminish damages is, of course, admissible, though not expressly involved in the issue. Thus, in an action for breach of promise of marriage, plaintiff may give evidence of defendant's fortune; for it obviously tends to prove the loss sustained by

the plaintiff; but not in action for adultery [*James v. Biddington*, 6 C & P 589]; nor for seduction [*Hodsoll v. Taylor*, LR 9 QB 79]; nor for malicious prosecution; for it is nothing to the purpose "that damages are taken from a deep pocket" [*Short v. Stoy*, Winton Sum As 1836, *per* ALDERSON B—ROSCOE N P, 18th Ed p 86]. But evidence of the amount of damage which is the *necessary* and *obvious* result of the defendant's breach of contract or of his tort, may be proved, though only alleged generally in the plaint [Nort p 124].

Sec. 73 of the Contract Act indicates the facts which are relevant in estimating the amount of compensation. For instance, knowledge on the defendant's part at the time when the contract was made, of the probable consequences of the breach is relevant, because on proof of that fact, it depends on what principle the damages should be assessed. For the facts which should be taken into account in estimating the measure of damages for breach of contract, see s 73 of the Contract Act. The leading case on the subject is that of *Hadley v. Baxendale*, 9 Ex 341 : 96 RR 742 on which s 73 is founded. As to the law laid down there, see Pollock's Contract, 5th Ed p 402. (See also now *Czarnikow v. Koufos* (*Heron II*), 1969, 1 AC 350]. In actions for breach of promise of marriage, the means of the defendant and his position are facts bearing on the loss which the plaintiff has sustained and therefore may be proved by her. On the other hand, in reduction of damages the defendant may adduce evidence of the plaintiff's conduct and character (see s 55). In action for injury to the person, the position and earnings of the plaintiff are material facts, while the means of the defendant are not generally material [*Hodsoll v. Taylor*, LR 9 QB 79, 82]. In actions for defamation there is a wide range of relevant facts. See *illus* (*c*) to s 6; *illus* (*b*) to s 9, and *illus* (*e*) to s 14. The character of the plaintiff is also relevant (s 55) [Cunn p 33]. In civil cases the fact that the character of any person is such as to affect the amount of damages in relevant [see s 55 *post* and notes].

[*Ref Mayne on Damages; Pollock's Contract, Pollock's Tort; Wig ss 75-80, 209-213; Phip 8th Ed pp 178-79*].

Facts Relevant in Assessing Damages in Special Cases.—Measure of damages for breach of contract to borrow money [*Datubhani v. Abubaker*, 12 B 242]; for breach of an agreement whereby the defendant undertook to discharge a debt due by the plaintiff to a third person [*Dorasinga v. Arunachalam*, 23 M 441]; where an agent in breach of his duty sells the goods of his principal below the limits prescribed by him [*Mancherbhai v. J H Todd*, 20 B 633]; for breach of contract to deliver goods on a certain date, the market price on that day is the standard for the computation of damages [*Shridhar v. Gobardhan*, 26 B 235; *Surjan Mal v. Gian Chand*, A 1921 L 39 : 59 IC 877]; for breach of contract to deliver goods within a specific time when the vendor gives previous notice to the purchaser of his inability to perform the contract [*Mackertich v. Nobo Coomar*, 30 C 477]; where the vendor finds it impossible to perform his contract by reason of events beyond his control [*Jugomohan v. Nusserwanji*, 26 B 744 : 4 Bom LR 504]; where goods of an inferior quality are delivered [*Boisogomoff v. Nahapiet*, 29 C 323 (**reversing** on appeal 29 C 587]; *Ram Ch v. Vasanji*, 45 B 129]; in an action for non-acceptance of goods bargained and sold [*Cohen v. Cassim Nana*, 1 C 264]; in a suit by a purchaser evicted from his holding by reason of the defect in the vendor's title covenanted for by him [*Nagardas v. Ahmed Khan*, 21 B 175; *Gajapathi v. Alagia*, 9 M 89]; for vendor's failure to execute the sale deed within the stipulated time [*Fukeer v. Issur Ch*, 20 WR 481].

Measures of damages where goods entrusted to a carrier are not delivered according to contract—A party cannot be allowed compensation for losses which

might have been reasonably avoided [*I G N & Rly Co Ld v. Eastern A C Ld*, 47 C 1027 : A 1921 C 315 : 61 IC 14]. Anticipatory breach of contract—measure of damages [*Manindra v. Aswini*, 31 CLJ 168]. A purchaser failing to perform his part of the contract of sale, is liable in damages to the seller to the extent of the amount of difference between the contract price and the price which the seller could realise for the article of sale at the time of the breach of the contract [*Pragnarain v. Mulchand*, 19 A 335 : 17 AWN 150].

In a suit for breach of contract of marriage, the fact that a man has merely become the butt of his acquaintances' jests or has experienced a feeling of shame does not constitute an injury for which damages can be awarded [*Ma Ngwe v. Maung Po*, 7 Bur LT 14 : 23 IC 376]. Measure of damages recoverable from the father of a Hindu girl for breach of contract of betrothal [*Purshotamdas v. Mongol Das*, 21 B 23]. In assessing damages in cases of assault and abuse, the defendant's means of life is an element which ought to be taken into consideration [*Joypal v. Mukoond*, 17 WR 280]. Measure of damages for wrongful dismissal of school master [*David v. Supdt of St Anthony's H School*, 12 Bur LT 168 : 63 IC 982 (9 Bur LT 63 **folld**)].

Where the defamatory statement complained of is an imputation of bad conduct towards a woman and truth is pleaded in defence, evidence that the woman herself had made statement to that effect to a number of persons is relevant in assessing damages [*Ma Sein v. Kyaw*, A 1936 R 332]. In awarding damages in a divorce suit the only guide to the amount would be the loss husband had sustained and the damages would be the same whether the co-respondent was a rich or a poor man [*Thomas v. Thomas*, A 1925 C 585 FB : 52 C 379 : 29 CWN 350 (*Keyse v. Keyse*, 11 PD 100 refd to)]. Mode of assessing damages for loss of life in a case under the Fatal Accidents Act (8 of 1885) pointed out [*Nanibala v. Auckland Jute Co Ld*, 52 C 602 : A 1925 C 893].

Evidence of Character Affecting Damages.—As to character as affecting damages, see s 55 *post*.

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

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

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

Illustration

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

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COMMENTARY

Principle and Scope.—On account of its wide terms, this section or s 11 is generally resorted to whenever any attempt to show the relevancy or admissibility of a fact under any other sections of the Act has proved unsuccessful. This section states the facts that are relevant when any "right or custom" is in question and for the purpose mentioned herein. All 'transactions' or 'instances' which by a stretch of imagination can be brought into some connection however remote, with any right or custom in question, are not admissible. Only the transactions and instances enumerated in cls (*a*) and (*b*) are relevant. Generally speaking, the acts of either party in transactions other than the one in issue are not admissible. But there are exceptions and what a party did or said in other transactions may be admissible in order to explain or substantiate the question in issue, *eg* facts showing the existence of a state of mind, *viz* intention, knowledge, good faith, &c [v s 14]; facts forming part of a series of similar occurrences [v s 15] &c, &c. So, a right to ownership may be proved by several acts of possession, and s 13 declares what facts are relevant in proof of any right or custom. Acts of ownership are admissible not as admissions, but as showing possession and thus proving title [*per* PARKE B, in *Jones v. Williams*, 2 M & W 326, 327; **folld** in *Sabran v. Oday*, 1 P 375 : A 1922 P 488]. Proof of transactions by which the right or custom in question was created or assered; or particular instances or user constitute the right or custom. Such acts may be of various kinds, *eg* possession, granting of leases, realization of rents, planting or cutting of trees, payment of taxes, erecting building or repairing property, putting up boundaries, &c, &c. Thus, in order to prove that A owned the whole bed of a river between his lands and *B*'s lands, acts of ownership by him on the bed, banks and fences of the river on *B*'s side but below the latter's land are admissible [*Jones v. Williams, ibid*]. In this case, PARKE B observed:

"Ownership may be proved by proof of possession, and that can be shown only by acts of enjoyment of the land itself; but it is impossible in the nature of things, to confine the evidence to the very precise spot on which the alleged trespass may have been committed; evidence may be given of acts done on other parts provided there is such a common character of locality between those parts and the spot in question as would raise a reasonable inference in the minds of the jury that the place in dispute belonged to the plaintiff if the other parts did."

In *Malcolmson v. O' Dea*, [10 HLC 593; **folld** in *Blandy Jenkins v. Earl of Dunraven*, 1899, 2 CH 121] it was laid down that the true ground of admission of a lease by which any right of property purports to have been exercised is that it shows an act or acts of ownership. "In the absence of direct title-deeds, acts of ownership are the best proofs of title" [*per* JACKSON J, in *Collr of Rajshahye v. Doorga*, 2 WR 212]. Title to real and personal property may be inferred from *acts of ownership* done by the party *for or against* whom they are tendered, *eg* possession, receipts of rents and profits, or the discharge of the burdens, *eg* taxes [*Kirby v. Cowderoy*, 1912 AC 599] and repairs of the property. Similarly, user of an easement is evidence of title thereto, the character of the user determining the extent of the easement [*Cowling v. Higginson*, 4 M & W 245; *Gingell v. Stepney Council*, 1906 KB 408]. "Acts of ownership are receivable not as admissions, but as original evidence, for or against either party. And in rebuttal, proof is admissible of their non-existence; or that they were disputed, or done in the absence of persons interested in disputing them; or in some cases, of acts of ownership done by strangers not claiming through the alleged owner". [Phipson 8th Ed p 113]. Under the head of hearsay are usually classed those cases in which expired leases, grants or other documents of a similar kind actively asserting a right on the part of the maker, have been admitted as evidence of that right in favour of persons claiming under him; they are in fact, *acts of ownership*, and, as such evidence of property [Roscoe N P 18th Ed p 53]. Opinions of persons are also receivable in proof of rights or customs [sec s 32 cl 4 and s 48].

S 13 does not contemplate evidence of any incident or right in the sense of evidence of any grant creating these incidents or rights. It contemplates only certain transactions and instances as evidence of facts relevant to the fact in issue in any particular case, and it makes these transactions and instances relevant for the purpose of establishing any right or incident, thus making such transactions or instances evidence of the fact in issue [*Srish Ch v. Kalachand*, 46 CWN 169 : A 1942 C 445].

A judgment other than a judgment referred to in ss 40-42 may be admissible to prove that a right was asserted or denied under s 13, or to explain or introduce facts in issue or to explain the history of the case [*Mahabir v. Sonmati*, A 1964 P 66].

Relevancy of "Transactions" in Questions Relating to the Existence of Any Right or Custom.—The 'right' and 'custom' referred to in this section are not confined to public rights and customs but include all kinds of rights and customs. The word 'right' in s 13 includes not only incorporeal rights, but it must be understood as comprehending all rights and customs recognised by law including a right of ownership [see *Ranchhoddas v. Bapu*, 10 B 439; *Collr of Gorakhpur v. Palakdhari*, 12 A 1 FB; *Tepu Khan v. Rajani*, 2 CWN 501, 504 and other cases cited *post*]. The illustration shows that the right referred to is not confined to public right only [*Surjoo Narain v. Bissambhar*, 23 WR 311]. The words 'right' and 'transaction' are used in a wide sense. "A transaction in the ordinary sense of the word, is some business or dealing which is carried on or transacted between two or more persons" [*per* GARTH CJ, in *Gujju Lal v. Fatteh Lal*, 6 C 171, 186]. "A transaction as the

derivation denotes, is something which has been concluded between persons by a cross or reciprocal action as it were" [*per* JACKSON J, *ibid*].

Decisions are not unanimous as to whether judgments and decrees in suits not *inter partes* may [*Neamat v. Gooroo Dass*, 22 WR 365; *Lakshman v. Amrit*, 24 B 591; *Collr of Gorakhpur v. Palakdhari*, 12 A 1 FB; *Pearymohan v. Drobomoyi*, 11 C 745; *Tepu Khan v. Rajani*, 25 C 522 FB], or may not [*Gujju Lall v. Fatteh Lall, sup*; *Ranchhoddas v. Bapu*, 10 B 439, 442] come within 'transaction', or whether they may [*Md Amin v. Hasan*, 31 B 143; *Pratap v. Jagadish*, 40 CLJ 331, 363 : A 1925 C 116; *Jianutullah v. Romoni*, 15 C 233; *Ramasami v. Appavu*, 12 M 9; *Byama Dirguj v. Pande*, 3 CLJ 521; *Koondonath v. Dheer*, 20 WR 345] or may not [*Collr of Gorakhpur v. Palakdhari*, 12 A 1, 25 (*per* S TRAIGHT J, "former judgment not itself an instance, but the suit in which it was made is an instance"); *Gujju Lal v. Fatteh Lall*, 6 C 171 FB] be called instances.

It is inherent in s 13 that only a judgment which has become final can be said to be a transaction evidencing a right or instance [*Hiralal v. Hari Narain*, A 1964 A 302]. No judgment can be relevant under s 13 unless it can be called a '*transaction*' or an '*instance*'. In some cases it has been held that although the judgment is not a transaction or instance, the suit in which the judgment was passed is. In *Tepu Khan v. Rajani*, 2 CWN 501, 504, BANERJI J, observed: "If the existence of the judgment is not a transaction within the meaning of cl (*a*) of the thirteenth section, it proves that a litigation terminating in the judgment took place, and the litigation comes well within the meaning of the clause as being a transaction by which the right now claimed by the defendants was asserted. So again, litigation which is evidenced by the existence of the judgment was a particular instance within the meaning of cl (*b*) in which the right of possession now claimed by the defendants was claimed." See also the remark of STRAIGHT J, in *Collr of Gorakhpur v. Palakdhari*, cited *sup*. [For other cases relating to the admissibility of judgments and decrees as transactions or instances see *post*]. Apart from s 13, judgments are relevant for some purposes under other sections [v ss 40-42]. Judgments other than those mentioned in ss 40-42 are admissible under s 43 if the existence of such judgments is a relevant fact or fact in issue.

The decisions show that judgments not *inter partes* though not conclusive are admissible for certain purposes and with certain objects in the subsequent suit [see *post*: "*Admissibility of judgments not inter partes, as transactions or instances*", and "*Judgments, Decrees and Orders*"] but it should be remembered that the Evidence Act does not make a finding of fact arrived at on the evidence before the court in one case, evidence of that fact in another case [*Gopika v. Atal*, 56 IA 119 : 56 C 1003 PC : A 1929 PC 99; see *post*, s 43 "*Objects for which judgments are admissible*"].

Under cl (*a*) the relevancy of transactions is qualified by those transactions only by (and not *in*) which the right or custom was (*i*) created, (*ii*) claimed, (*iii*) modified, (*iv*) recognised, (*v*) asserted, (*vi*) denied or (*vii*) which is inconsistent with its existence. Under cl. (b) the relevancy of instances are restricted to instances *in* which the right or custom was (*i*) claimed, (*ii*) recognized, (*iii*) exercised, or in which the exercise was (*iv*) disputed, (*v*) asserted, or (*vi*) departed from. It should be noted that statements in documents by dead persons which come within cl (*d*) are admissible under s 32(7).

It is by no means always easy to say of a transaction whether it is one *by which a* right in question was created, claimed, etc. In order to make cl (*a*) applicable, the right or custom must be created or claimed or asserted &c, by the transaction; it is not enough if it is a transaction *in which* there is an assertion or claim &c of the right

or custom. The word "*by*" appears in cl (*a*) and not "*in*" and stress must be laid on it [*Bansi v. Mir Amir*, 11 CWN 703: *Venkatarajagopala v. Fota*, 1914 MWN 779: 26 IC 747; *Brajendra v. Mahim*, 31 CWN 32 *post*; *Rangayyan v. Innasimuthu*, A 1956 M 226]. For instance, a sale of land by A to B describing it as rent free is not a transaction by which the rent free right was created or claimed or asserted. The sale-deed is only an assertion of *A*'s competency to transfer the land, *ie* that he had a saleable interest not what was the nature of that interest. A deed conferring the rent free right would be admissible as a transaction by which the right was created. The word "claimed" is used in both clauses, and it means that the right is asserted to the knowledge and in the presence of the party whose right will be derogated by the establishment of the claim and who may have an opportunity either to comply with it or to refuse it [*Brajendra v. Mahim, sup*—CONTRA: *Ashfaqe Ali v. Asharfi*, A 1951 P 641 *post*].

Relevancy of "Particular Instances".—Clause (*b*) speaks of "particular instances" as distinguished from transactions. In *Brajendra v. Mahim, sup* MUKHERJI J, explained the clause thus: "An instance of the creation or modification of a right or custom would be inconceivable apart from the transaction by which it was created or modified and so the words "created" and "modified" are omitted in cl (*b*). There may be a transaction by which there has been the recognition of a right or custom, there may also be particular instances of its recognition, and so "recognised" appears in both clauses. Instead of the words "*by which* the right or custom is asserted or denied, or which was inconsistent with its existence," we have the words "*in which* the right or custom was exercised or in which its exercise was disputed, asserted or departed from." "It is clear that in cl (*b*) instances of assertions or denials of right or custom do not come in, but only instances of its exercise or instances where its exercise was disputed, asserted or departed from. Can any conceivable ground be suggested why if a mere assertion or denial in respect of a right or custom was to be evidence, no evidence of 'particular instances' of such assertion or denial could be given and yet evidence would be admissible in respect of "transactions" in which there has been such assertion or denial? I fail to see any. I am, therefore, of opinion that a transaction or instance *in which* there is a mere assertion or denial of a right or custom does not come within s 13, but only a transaction *by which* the right or custom is asserted or denied."

[*Ref Steph Dig Art 5; Phip 8th Ed pp 113, 115; Best, ss 366-99; Tay ss 123-42, 320, 1683; Roscoe N P 18th Ed pp 38, 53; Powell, 10th Ed pp 106-111*].

Examples.—*A* sues *B* for trespass to land alleged by *A* to be his private free-hold, but over which *B* claims a right of common. Evidence is admissible for *A* (*1*) that his ancestors had granted leases of the land, though only counterparts signed by the lessees are produced [*Doe v. Pulman*, 3 QB 622] also (*2*) that they had erected stones, marked with their initials, to show the boundaries of the lands; evidence being admissible for *B* that *B*'s ancestors had destroyed the stones and protested in the Court Leet against their erection [*Blandy-Jenkins v. Dunraven*, 66 JP 661 cited in Phipson, 8th Ed p 115]. But evidence of an act which is equivocal is not receivable, *eg* the mere habit of walking across the land [*Hanbury v. Jenkins*, 1901, 2 Ch 401].

A sues *B* for trespass upon land between *A*'s farm and the high road, which *B* claims as part of the highway. Evidence is admissible (*1*) for *A*, that he and his tenants had habitually cut grass and willows on the land, grazed their cattle thereon, protecting them by hurdles placed round the swampy parts and turned off the cattle of strangers; and (*2*) for *B*, that strangers had sometimes cut grass and grazed cattle there (although this was not shown to have come to the knowledge of *A* or his

tenants) and that *B*'s servants had frequently deposited road-scrapings and stones for the repair of the highway on the land [*Belmore v. Kent Council*, 1901, 1 Ch 873 cited in Phipson, 8th Ed p 116].

In a suit for recovery of possession of certain *mouzahs*, the defendants pleaded that they and their ancestors were in possession as *ghatwali* tenure from before the Permanent Settlement (1793) at fixed rents without variation and filed judgments and decrees in two suits in 1817 and 1845 instituted against predecessors by a third person who was not the plaintiff's predecessor. One of these suits was for possession and the other for assessment of rent. The same claim was asserted by the then defendants and the defence was sustained. It was held by the Judicial Committee that the judgments and decrees were admissible as showing ancient possession and open assertion of the title now relied upon, by the predecessors of the defendants. It was also admissible to show rate of rent [*Ram Ranjan v. Ram Narain*, 22 IA 60: 22 C 533 PC : 5 MLJ 7]. [This case is no authority for the general proposition that a judgment against *A* in suit by *B* can always be made admissible against *A* in subsequent suit by *C* or another person (see *Benode Lal v. Secy of S*, 34 CWN 1113)].

"Transaction" and "Right" to be Interpreted Liberally.—The terms of this section are practically wide enough to include anything done or said with reference to any custom or right which is in issue, and there are no negative words such as would exclude things done or said by third persons. "Transaction" is a term which appears in several sections and is nowhere defined. The inclination of opinion expressed by the Judicial Committee is in favour of a liberal interpretation of the term. It would thus, it appears, include any series of acts of which it can be said that right is created, claimed &c thereby [see *Dinomoni v. Brojomohini*, 29 IA 24: 29 C 187 PC: 6 CWN 386]. It is now too late to say that a litigation or a suit is not a transaction and that the word right must be interpreted in the somewhat narrow sense in which it was contained in *Gujjulal v. Fattehlal*, 6 C 171. There is no valid justification for attributing any such restricted import to the words 'right' and 'transaction' [*Mahabir v. Sonmati*, A 1964 P 66; see also *post*]. 'Transaction' is not confined to the dealing between two persons inter vivos but includes a testamentary dealing [*Periasami v. Varadappa*, A 1950 M 486]. The term "right", it has also been held, is used in a wide sense. It is not restricted to the class of rights indicated in the illustration and in ss 32(*4*) and 48, as was thought by some judges [Cunn 34].

'Right' Includes Any and Every Right.—The word '*right*' in this section includes not only incorporeal rights (as was held in *Gujjulal v. Fattehlal, sup*), but right of ownership; there are no words in the section which could not be applied to a right of ownership [*Collr of Gorakhpur v. Palakdhari, sup*]. At present the balance of authority favours the extension of the term 'right' to include any and every right known to the law [*Md Amin v. Hasan*, 31 B 143, 151]. Rights and custom in s 13 must be understood as comprehending all rights and customs recognised by the law and therefore including a right of ownership [*Ranchhoddas v. Bapu*, 10 B 439, 442]. The contention that the section refers only to incorporeal rights, whether of a public or of a private nature, is not warranted by any general principle [*Gujjulal's* case, *ante*, *per* MITTER, J, at p 180]. "It is impossible to agree with GARTH, CJ, in 6 C 171 FB; either in the restricted meaning attached by him to the word 'right' as used in s 13 or as to the mode in which he treats the term 'transaction'" [*Collr of Gorakhpur v. Palakdhari, sup*, *per* STRAIGHT, J, p 24; see also judgement of SARJENT, CJ, in *Ranchhoddas v. Bapu, sup*, p 442]. The interpretation placed upon the words "right" and "transaction" in 6 C 171 FB, seems not to have been accepted by the *Privy Council in Bhitto Kunwar v. Kesho Pd*, 24 IA 10 : 19 A 277 and *Ram Ranjan v. Ram Narain*, 22 IA 60: 22 C 533 and its correctness is questioned in *Collr of Gorakhpur v.*

Palakadhari, 12 A 1 FB, in so far as the exclusion of such judgments from being received as evidence under any section is concerned [24 B 591, *per* RANADE, J, 599]. In view of these decisions, says Cunningham, it is clear that the extreme view expressed in *Gujju Lal's* case followed in 11 C 562 and in 13 C 352, cannot be maintained; and that judgment not *inter partes* may in some circumstances and for some purposes be relevant under the Act. In *Tepu Khan v. Rajani*, 25 C 522, 527 FB BANERJI, J, observed: "It has been said that the right spoken of in this section is an incorporeal right. I do not think there is any sufficient reasons for putting this limitation on the meaning of the term as used in the section." The illustrations show that the 'right' mentioned in this section is not a public right only, the right there mentioned being a private one, *viz*, a right to a fishery [*Surja Narain v. Bissambhar*, 23 WR 311, 312]. In a Patna case it has been held that "right" means incorporeal rights [*Ramkishan v. Niranian*, 12 P 285; A 1933 p 285]. Right in s 13 includes a private land. Sale deeds of contiguous lands mentioning ownership of land in dispute is admissible in terms of s 157 [*Abdul Ali v. Harija*, A 1972 Gau 52].

—Public and General Rights.—In speaking of matters of public and general interest, the terms 'public' and 'general' are sometimes used as synonyms, meaning merely what concerns a multitude of persons [*Pim v. Curell*, 1840, 6 M & W 234]. But, in regard to the admissibility of hearsay testimony, a distinction has been taken between them; the term *public* being strictly applied to that which concerns *every member* of the state; and the term *general* being confined to a lesser, though still a considerable, portion of the community. This distinction should be carefully attended to, because in matters strictly public, such, for example as a claim of highway or a right of ferry, reputation from any one appears to be receivable [Tay s 609]. This distinction is of little importance in India where the law merely requires a probability of knowledge in all cases [Nort p 186].

Rights of a public nature.—Questions relating to a right of common existing by immemorial custom, a custom of mining in a particular district, the boundary between hamlets &c, a claim of tolls on a public road, the fact whether road was public or private, a prescriptive liability to repair bridges &c, a claim of highway, right of ferry &c. [For a detailed list see Tay s 613]. *Private rights.*—Questions as to what usage has obtained in electing a school master to a grammar school; whether certain land in dispute had been purchased by a former occupier; whether a party had a private right of way over a particular field &c. [Tay s 614].

"Claimed".—The word 'claimed' implies a demand which involves the presence of the party against whom such demand is made and who may have an opportunity either to comply with it or refuse it [*Brajendra v. Mahim*, 31 CWN 32, 37: A 1927 C 1 : *Srish Ch v. Kalachand*, 46 CWN 169: A 1942 C 445; *Jyoti v. Bharat*, 15 P 260: A 1936 P 543]; but dissenting it has also been held that the claim need not necessarily be made in the presence of the party affected thereby. The view in *Brajendra v. Mahim* was regarded as *obiter* as the document there being *benami* it was held to be no transaction at all [*Ashfaqe Ali v. Asharfi*, A 1951 P 641]. The word 'claimed' denotes a demand or assertion in relation to the thing or attribute as against or from some person or persons, showing the existence of a right to it in the claimant. A bare statement may or may not be a claim according to the attending circumstances in which it is made. Thus, a statement in a *patta* that the land to the west of the land demised under the *patta* belongs to the executant is not 'claim' but a mere recital [*Radha Kr v. Sarbeswar*, 29 CWN 649; A 1925 C 684]. The illustration to s 13 shows that an instance claiming a right means something more than a mere statement of boundaries in a deed or in a plan. A distinction has been drawn between a claim and statement of claim. A plan filed in a previous suit not *inter partes* in which

certain property was not then in dispute describing the property as of the plaintiff's predecessors is not an instance in which the right in dispute was claimed and hence is not admissible in evidence [*Kheman v. Chottu*, A 1939 L 635 (*Radha Krishna v. Sarbeswar, ante* **relied** on)]. The fact that a certain disputed land was claimed as part of an estate in partition proceedings under the Estate Partition Act is a transaction and therefore admissible [*Chatterjea Estates Ld v. Dhirendra*, 40 CWN 82]. Order in an earlier revenue case directing impleading of plaintiff as adopted son of one of the defendants: *held* admissible to show that right as an adopted son was claimed and recognised even though not *inter partes* [*Subbarao v. Venkata*, A 1964 AP 53]. Recitals in an award showing that the plaintiff had claimed the money before the arbitrators are relevant [*Hrishikesh v. Khantamani*, A 1959 C 257].

"Asserted."—A right is not asserted simply because it is recited in a document. It is asserted only when the transaction concerned is itself entered into in exercise of the right [*Kumud v. Bengal*, A 1947 C 209 : 81 CLJ 274]. A *muchlika* executed by tenant in favour of landlord in which the latter was described as adopted son of one *D* is an assertion of right that the tenant was taking lease of land which the landlord can lease out as adopted son of *D* [*Harihar v. Nabakishore*, A 1963 Or 45]. Description of the mortgaged land by the mortgagor in the deed as "in our *Sir* and *Khas* possession" is assertion of the title under s 13 [*Harihar v. Deo Narain*, 1956 SCR 1 : A 1956 SC 305: 35 P 221]. It is not necessary that the right asserted should have been successfully asserted. The mere assertion of right is sufficient to make *solenama* decree &c, admissible [*Ramkumar v. Harnarain*, 92 IC 104; A 1926 C 726]. An assertion may be by a statement as well as by an act and a verbal assertion of a right not accompanied by any act would be receivable if from the attending circumstances it amounts to a 'claim'. [See *Swethachalapathi v. Bomireddipalli*, A 1939 M 432 : 1939, 1 MLJ 602]. The assertion or denial must be by the parties; courts do not assert or deny anybody's rights [*Krishna v. Dhanapati*, A 1957 C 59].

A document in which a right asserted is admissible under s 13 even though it is not *inter partes*. A *kobala* in favour of the tenant which contained the recital that the holding conveyed by the said deed was the homestead land of the executant is admissible as a transaction within s 13 in a suit in which the nature of the tenancy is agitated [*Manmatha v. Rajeswar*, 55 C 355: 32 CWN 184: A 1928 C 315]. Where the mortgagee's right to hold a valid charge on a property was in dispute, and it is found that in a previous suit the right was denied by the plaintiff and asserted by the representative of the mortgagee, the judgment in that suit is relevant [*Md Abdul Karim v. Bishan*, A 1930 A 9: 1929 ALJ 741]. A mortgage executed by *A* and *B* in which *A* admitted that *B* was the adopted son of his deceased brother *C*, constituted evidence of *B*'s assertion of the right that he was the adopted son of *C* and was relevant under s 13 read with s 32(7) [*Harihar v. Nabakishore*, A 1963 Or 45; *Venkataratnam v. Venkatanarayamma*, A 1964 AP 109]. It would be far-fetched application of the section to say that if in a deed of partition between two persons, rights are alleged with reference to the property which either has or has not any reference to the right to partition, these allegations should be considered as a transaction by which the right is asserted [*Narendra v. Sannyasi*, 54 CLJ 353: A 1932 C 398].

—Illustration.—The deed, the mortgage, the grant, all come under cl (*a*): the first is a transaction creating the right and the rest are transactions asserting the right. Particular instances come under cl (*b*). The reason for the admissibility of such instances is thus stated by PARKE B, in *Jones v. Williams*, 1837, 2 M & W 326: "The ground on which such acts are admissible is not the acquiescence of any party. They are admissible of themselves *proprio vigore*, for they tend to prove that he who does

them is the owner of the soil; though if they are done in the absence of all persons interested to dispute them, they are of less weight."

Admissibility of Judgments Not *Inter partes* as Transactions or Instances.—To satisfy the requirements of s 13, the question must be as to the "existence of a *right* or *custom*". It is hardly necessary to say that there is a formidable array of authorities for the general proposition, that judgments not *inter partes* are in certain circumstances and for certain purposes admissible under this section as transactions or instances. It is not easy to reconcile the several conflicting authorities on the point. An attempt is made in the following paragraphs to elicit a definite and consistent principle from them:

Judgments in previous cases although not *inter partes* are admissible in evidence under s 13. The Calcutta High Court up to the case of *Gujju Lall v. Fatteh Lall*, 6 C 171 FB, *held* that such judgments were admissible in evidence [See *Neamat v. Gooroo Das*, 22 WR 365; *Durga Das v. Narendra*, 6 WR 235 and *Omer Dutt v. Burn*, 24 WR 470]. In *Gujju Lall v. Fatteh Lall*, 6 C 171 FB the majority of the Full Bench (MITTER, J, dissenting) held that the word 'right' in s 13 meant only incorporeal rights and that judgments not *inter partes* were inadmissible. This decision was followed in *Mohendra v. Rosomoyi*, 12 C 207. But in *Peary v. Drobomoyi*, 11 C 745, which was a suit for possession of land, a previous judgment not *inter partes* was admitted to show the character of the defendant's possession and the nature of the enjoyment. In *Kausulliah Sundari v. Mukta Sundari*, 11 C 588, the question was whether the land was *zemindari* or rent-paying, and a previous judgment was admitted to show the character of the land. The rulings of the Privy Council in *Ran Bahadur v. Lucho Koer*, 11 C 301: 12 IA 23, and *Ram Ranjan v. Ram Narain*, 22 IA 60: 22 C 533, have materially qualified the Calcutta Full Bench decision. In *Jiaullah v. Inu Khan*, 23 C 693, a previous decree under s 9[1] of the Specific Relief Act was admitted in evidence of possession. In *Tepu Khan v. Rajani*, 25 C 522 FB: 2 CWN 501 it was held that the rule laid down in the cases of *Gujju Lall v. Fatteh Lall*, 6 C 171, and in *Surendra v. Brojonath*, 13 C 352 FB has been materially qualified by the decision of the Privy Council in *Bhitto Kunwar v. Kesho Pd*, 24 IA 10: 19 A 277: 1 CWN 265, *post* and in *Ram Ranjan v. Ram Narain*, 22 IA 60 *post*. In *Tepu Khan's* case, *ibid*, it was observed: "It is clear from the decisions in the PC that under certain circumstances and in certain cases, the judgment in a previous suit to which one of the parties in the subsequent suit was not a party, may be admissible in evidence for certain purposes and with certain objects in the subsequent suit."

The Allahabad High Court in *Collr of Gorakhpur v. Palakdhari*, 12 A 1 FB [**affirmed** in 15 A 261 PC] differed from the ruling of the Calcutta High Court in 6 C 171 FB and held that such judgments were admissible. The Madras High Court in *Subramanyan v. Parameshwaran*, 11 M 116; in *Ramasami v. Appavu*, 12 M 9 and in *Krishnasami v. Rajagopala*, 18 M 73 concurred with the view in *Gujju Lall v. Fateh Lall*, 6 C 171. But in *Hiralal Pal v. Hills*, 11 CLR 528 and in *Thama v. Kondan*, 15 M 378, it was held that judgments not *inter partes* were not conclusive but were admissible in subsequent litigation as a piece of evidence. In *Sundaran v. Thutharappa*, 40 IC 159 it has been held that judgments not *inter partes* will be admissible under s 13 as affording instances of a local custom or usage being recognised. The Bombay High Court held that such judgments were admissible [*Naranji v. Dipa*, 3 B 3] but in a subsequent case they were held inadmissible [*Ranchhoddas v. Bapu Narhar*, 10 B

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1. See now s 6 of Act 47 of 1963.

439]. But later, judgments not *inter partes* were held admissible under ss 11 and 13 as being only relevant and not conclusive [See *Lakshman v. Amrit*, 24 B 591: 2 Bom LR 386; *Govindji v. Chotta Lal*, 2 Bom LR 651: *Dharnidhar v. Dhundiraj*, 5 Bom LR 230].

The Privy Council in *Ram Ranjan v. Ram Narain*, 22 IA 60: 22 C 533, allowed previous judgment to be put in for showing ancient possession and assertion of title. In *Dinomoni v. Brojomohini*, 29 IA 24: 29 C 187, 197: 6 CWN 386, the Privy Council held that orders under s 145 Cr P Code were admissible upon general principles and under s 13. In delivering judgment LORD LINDLEY observed that the words of s 13 were very wide. The facts were that the plaintiff sued for recovery of possession of some land on the allegation that it was reformation in *situ* and also an accretion to her estate. In 1866 disputes were raised by the defendants regarding the possession of the predecessor-in-interest of the plaintiff, as a result of which criminal proceedings were drawn up in which the criminal court found possession in favour of plaintiff's predecessor and passed order confirming his possession. In 1876 there was another criminal proceeding relating to the land by a third party neighbour which was also decided in favour of plaintiff's predecessors. In 1888 there were other criminal proceedings in which the defendant was successful and an order was passed confirming her possession in the disputed land. On the question of the relevency of these criminal proceedings, the Judicial Committee observed:—

> "These police orders (under s 145, Cr P Code declaring that one of the disputants is in possession and is entitled to retain it until evicted in due course of law) are, in their Lordships' opinion, admissible in evidence on general principles as well as under section thirteen of the Indian Evidence Act to show the facts that such orders were made. This necessarily makes them evidence of the following facts, all of which appear from the orders themselves, *viz* who the parties to the dispute were; what the land in dispute was; and was declared entitled to retain possession. For this purpose and to this extent such orders are admissible in evidence for and against every one when the fact of possession at the date of the order has to be ascertained. If the lands referred to in such an order are described by metes and bounds, or by reference to objects or marks physically existing, these must necessarily be ascertained by extrinsic evidence, *ie* the testimony of persons who know the locality. If the order refers to a map, that map is admissible in evidence to render the order intelligible; and the actual situation of the objects drawn or otherwise indicated on the map must, as in all cases of this sort, be ascertained by extrinsic evidence. So far there appears to be no difficulty. Reports accompanying the orders or maps and not referred to in the orders may be admissible as hearsay evidence of reputed possession (Taylor, s 517). But they are not otherwise admissible, unless they are made so by section thirteen of the Indian Evidence Act. To bring a report within that section, the report must be 'a transaction in (*sic*) which the right or custom in question was created, claimed, modified, recognised, asserted or denied, or which was inconsistent with its existence'. These words are very wide and are wide enough to let in the report forming part of the proceedings in 1867, 1876 and 1888. Their Lordships are of opinion that the High Court did not err in receiving the report made in the proceedings of 1876, to the reception of which Mr. Cohen objected". See also *Hasim v. Abjal*, 40 CLJ 30: A 1924 C 1046 and the observation on Dinomoni's case in *Collr of Gorakhpur v. Ramsundar*, 38 CWN 1101, 1115: 51 IA 286: 56 A 468: A 1934 PC 157].

In order to prove a pedigree propounded by the plaintiffs, certified copies of a decree in a former suit and two pedigrees found with it were put in evidence. The

decree recited that the pedigrees had been filed by both the parties and set out according to both pedigrees the descent of *D* from *B* the common ancestor—*Held* that the statements in the decree that the pedigrees were filed is evidence either under s 35 or under s 13 as evidence of course of proceedings in a suit [*Collr of Gorakhpur v. Ram Sundar, sup*].

Relying on *Dinomoni's* case, *sup* it has been held that judgment not *inter partes*, though not conclusive is admissible like any other fact to be weighed in the balance to prove the value of the claim made in the previous suit and the legal effect of the decision [*Gopisundari v. Kherod*, 28 CWN 942: 82 IC 99: A 1925 C 194]. Prior judgments not *inter partes* were also held admissible in another Privy Council case. The question in the suit was whether or not the share in certain villages sued for by the plaintiff was subject to a trust for religious and charitable purposes under a will set up by the defendant who pleaded that the estate had been jointly held by him and the person from whom the plaintiff claimed by inheritance, only for the trust purposes specified in a will by the original owner. Plaintiff stated that the will had been revoked and denied the trust set up. The High Court decreed the claim and the Judicial Committee did the same, on the ground that the will and the trust alleged were not established by evidence. In this case certain prior judgments which were not *inter partes*, but had been passed between parties interested in the trust in question, and contained a reference to the revocation of the will creating the trust, were taken to be admissible in evidence, though such judgments could neither accord any conclusive evidence against the present parties nor bind them as *res judicata* [*Bhitto v. Kesho*, 24 IA 10: 19 A 277: 1 CWN 265]. Another case of admissibility of judgment not *inter partes* as a transaction is that of *Govinda v. Shamlal*, 58 IA 125: 58 C 1187: A 1931 PC 89, *post*. So also as evidence of an assertion of the right claimed [*Kesho v. Bahuria*, A 1937 PC 69: 41 CWN 577: 65 CLJ 241, 252: 16 P 258]. In *Md v. Hasan*, 31 B 143: 9 Bom LR 65, [**approved** in *Kamalammal v. Kumararaja*, 2 MWN 337: 12 IC 423] it has been held that judgments not *inter partes* are admissible only to prove that on a previous occasion there was a dispute about the subject matter, that is, there was an assertion by the plaintiff and the denial by the defendant of the right; but that neither the issues in the judgment can be looked at nor the findings of the judge can be treated as of any legal probative value in the subsequent suit. Thus the later decisions of all the High Courts and the Privy Council concur in holding that judgments not *inter partes* are admissible in evidence under s 13.

In the cases of *Ranjit v. Basant*, 9 CLJ 597: 12 CWN 739 (**folld** in *Md Ehia v. Gania*, 40 IC 838) and of *Gadadhur v. Radhacharan*, 34 C 868, 872, it was held that the decision in a previous suit would be admissible to this extent, namely, to show that on that occasion the title which is subsequently asserted, was alleged. In *Baleswar v. Bhagirathi*, 7 CLJ 563, 576, it has been held that a decree not *inter partes* is admissible in evidence as an instance of a litigation in which the right now in controversy was successfully asserted. In *Abinash v. Paresh*, 9 CWN 402 (**approved** in *Ranjit v. Basanta, sup*) it has been held that judgment not *inter partes* is admissible in evidence, though it is not a judgment in *rem* or one relating to public nature. Rent decrees and judgments obtained by one co-sharer wherein the lands of which the arrears were claimed, were described as *debutter*, were held admissible in evidence under s 13 as proving that the land was all along described in them and treated as *debutter* property [*Madhub v. Sarat*, 15 CWN 126, 135]. In a suit for recovery of joint possession of a tank by plaintiff along with defendants 1 to 3, the defence was that the tank belonged not to them but to defendants 4 and 5—*held* that a decree passed in a damage suit by the predecessor of the defendants 4, 5 against predecessor

of defendants 1 to 3, to which plaintiff was not party and a deed of partition between the predecessors of plaintiff and defendants 1 to 3 were admissible [*Parbutty v. Digpati*, 25 CWN 120 notes]. A judgment not *inter partes* declaring the exclusive right of fishing is relevant under s 13 and s 42 in proceedings in which the right is subsequently denied by a third party [*In re Anya*, 29 Bom LR 715: 102 IC 546: A 1927 B 654]. The position therefore is that although at one time it was held that a judgment not *inter partes* could not be admitted in evidence under any circumstances, the tendency in recent years is to admit such judgments under certain circumstances and for limited purposes under s 43 read with ss 11 and 13 [*Hem Ch. v. Purna Ch.*, 59 CLJ 320: A 1934 C 788].

In a suit for perpetual injunction restraining defendant from interfering with plaintiff's possession, judgment of President of Municipal Council is relevant under s 13 or s 43 as establishing transaction (that permission to make new construction was accorded to plaintiff by Municipal Council) [*Hazarilal v. Alwar &c.*, A 1976 Raj 91]. Certain persons were declared to be the owners of the property in dispute in an earlier proceeding not *inter partes*. The judgment was held to be admissible in a subsequent proceeding again involving the same ownership and in which an injunction was sought against the declared owners by a person who was not a party to the earlier proceedings. *Traumala Tirupati Devasthanams v. K.M. Krishnaiah*, AIR 1998 SC 1132.

—Summary of Law as to Admissibility of Judgments Not *Inter partes*.—The question whether a previous judgment not *inter partes* is admissible under s 13 depends—

First, on whether a judgment or decree can be included within the term 'transaction', or 'instance'. It will be seen from the cases cited above [*ante*] that there are opinions both ways; but in a large number of cases judgments not *inter partes* have been admitted as transaction or instances. The Privy Council decision in *Dinomoni v. Brojomohini* [*ante*] in which orders under s 145, Cr P Code were held admissible and s 13 was expressly mentioned as one of the sections under which such orders were relevant, changed the current of decisions on the point and shook the authority of many of the earlier cases. In *Gujju Lall v. Fatteh Lall*, 6 C 185, 188, GARTH, CJ, said that "to say that the decision of a court of justice is a transaction appears to me a misapplication of the term." Concurring with this view Woodroffe says in his book that "it seems to be an incorrect use of language to describe a judgment as a transaction" [Woodroffe, Ev 8th Ed p 184; 11th Ed p 366] and remarks that "if this view be correct, then as held by the Full Bench in *Gujju Lall v. Fatteh Lall*, a judgment or decree is not admissible at all under this section, though it may be admissible either as a fact in issue or a relevant fact under other sections of the Act" [*ibid*, p 185; 11th Ed p 367]. He thinks that the opinion of the Privy Council in *Dinomoni v. Brojomohini, ante*, "*was obiter*". But since in that case, the Judicial Committee has expressly declared that a judgment or order is admissible under s 13, no useful purpose will be served by a further discussion on the question as to whether or not a judgment of a court comes within the word 'transaction' in s 13. The Judicial Committtee had undoubtedly applied its mind to the language of s 13, when it quoted s 13, as one of the sections under which such judgments are relevant. It is difficult to see how this authoritative pronouncement can be brushed aside as *obiter*. So, as the law stands, it may be said that such judgments are admissible under s 13. In *Gobinda v. Shamlal*, 58 IA 125: 35 CWN 521: 58 C 1187: A 1931 PC 89, the judgment was also held admissible, but it appears that what was regarded as the transaction was "the partition resulting from the 1793 suit".

In *Collr of Gorakhpur v. Ram Sundar*, 38 CWN 1101, 1115: 61 IA 286: A 1934 PC 157, LORD BLANESBURGH observed:—

> "The question whether statements in judgments and decrees are admissible under s 13 read with s 43 is elaborately discussed by Sir John Woodroffe in his new edition of the Evidence Act (1931), p 181 *et seq*. He would hold that they are not admissible at all under s 13; but this view is not in accordance with *Ram*

Ranjan Chakerbati v. Ram Narain Singh, LR 22 IA 60 and *Dinomoni v. Brojomohini*, LR 29 IA 24. At the bottom of p 194, however, the learned author treats judgments as evidence of admissions by ancestors. There are great difficulties about s 13, but *Dinomoni's* case (*sup*) is express authority for the position that "on general principles and under s 13" orders made under the Cr P Code are admissible for the purpose mentioned in the passage quoted at p 191 from the Board's judgment."

The Supreme Court has also held that in a dispute as to the succession to the office of a *mohunt*, a previous judgment in a suit by the former *mohunt* is admissible as a transaction in which a person from whom one of the parties purported to derive his title, asserted his right as a spiritual collateral of the former *mohunt* and on that footing got a decree [*Sital v. Sant*, A 1954, SC 606; see also *Srinivas v. Narayan*, A 1954 SC 379: 1955 SCR 1 cited *post*].

In *Tirumala Tirupati: Devasthanams v. K. M. Krishnaiah*, (1998) 2 Scale 119 at 122 (SC), JAGANNADHA RAO J of the Supreme Court noted the effect of the authorities and said "In *Srinivas Krishna Rao Kango v. Narayan Devji Kango & Others*, [A 1954 SC 379], speaking on behalf of a Bench of three learned Judges of this Court, VENKATARAMA AYYAR, J. held that a judgment not *inter parties* is admissible in evidence under section 13 of the Evidence Act as evidence of an assertion of a right to property in dispute. A contention that judgments other than those falling under sections 40 to 44 of the Evidence Act were not admissible in evidence was expressly rejected. Again B. K. MUKHERJEE, J. (as he then was) speaking on behalf of a Bench of four learned Judges in *Sital Das v. Sant Ram & Others* [A 1954 SC 606] held that a previous judgment not *inter partes*, was admissible in evidence under section 13 of the Evidence Act as a '*transaction*' in which a right to property was 'asserted' and 'recognised'. In fact, much earlier, LORD LINDLEY held in the Privy Council in *Dinamoni v. Brajmohini,* (1902) [ILR 29 Cal 190 (198) (PC)] that a previous judgment, not *inter partes* was admissible in evidence under Section 13 to show who the parties were, what the lands in dispute were and who was declared entitled to retain them. The criticism of the judgment in *Dinamoni v. Brajmohini and Ram Ranjan Chakerbati v. Ram Narain Singh* [1895 ILR 22 Cal 533 (PC)] by SIR JOHN WOODROFFE in his commentary on the Evidence Act (1931, P 181) was not accepted by LORD BLANESBURGH in *Collector of Gorakhpur v. Ram Sunder* [A 1934 PC 157 (61 IA 286)].

Secondly, in order to determine whether a particular judgment not *inter partes* is admissible, the tests laid down, in clauses (*a*) and (*b*) of s 13 have to be applied. If the judgment is taken as a 'transaction', it must be of the character described in clause (*d*) and if an 'instance', it may be an instance of the kind mentioned in clause (*b*). The result of the above decisions appears to be, that under certain circumstances and in certain cases, a judgment in a previous suit to which one of the parties in the subsequent suit was not a party, though not conclusive against him, may be admissible for certain purposes and with certain objects, in the subsequent suit and that *Gujju Lal v. Fatteh Lal* has been considerably modified by *Ram Ranjan v. Ram Narain*, 22 IA 60: 22 C 533; *Tepu Khan v. Rajani*, 25 C 522 FB; *Shamsunder v. Ramkhelawan*, A 1929 P 739 and several other cases; see also *Gopisundari v. Kherod*, 28 CWN 942: A 1925 C 194. As observed in a case before the Judicial Committee, apart from all discussion whether a judgment is or is not a 'transaction' within s 13, a previous judgment not *inter partes* together with the plaint which preceded it are admissible as evidence of the assertion of the right claimed [*Kesho Pd v. Bahuria*, A 1937 PC 69 : 41 CWN 577, 585: 16 P 258]. The judgment of MITTER, J, in *Gujju Lal v. Fatteh Lal* has been generally accepted with regard to the meaning

of the word "right" in this section, as will appear from the observations of GHOSE, J, in *Abinash v. Paresh*, 9 CWN 402, 414: "I am disposed to hold that the Judicial Committee in 22 C 533: 19 A 277: 1 CWN 265 rather adopted the views expressed by MITTER, J, in *Gujju Lal v. Fateh Lal*, 6 C 171 wherein that learned judge held that a judgment though not *inter partes* may be received in evidence either under s 11 or s 13 of the Evidence Act." A decree in a previous suit to which one party in the subsequent suit was not a party is admissible for corroboration of a fact asserted by the party in oral evidence, *viz* that the plaintiffs had asserted a claim over the disputed land at some period [*Ram Lakshman v. Jai*, A 1929 P 749]. The certified copies of decrees for eviction against trespassers are admissible in evidence in favour of the decree holder in a later suit for eviction of another plot in the same holding [*Dukhiram Dey v. Mrityunjoy Prosad*, A 1982 Cal 294, 299]. A previous judgment of the same court not *inter partes* though not binding as *res judicata* and determined in the facts there proved, is still an authority which is entitled to respect, the question raised being the same [*Toomey v. Bhupendra*, A 1929 P 304].

It may therefore be taken to be fairly settled that the judgment in a previous suit though not *inter partes* is admissible in proof of a transaction or particular instance in which the right in question was asserted and recognised or denied (see *Srinivasa v. Narayan, sup*; *Sital v. Sant* and other cases cited, *ante*).

Thirdly, as to the use to which such judgments may be put, it has been held that where a judgment not *inter partes* is admissible under s 13, the findings contained therein cannot be treated as part of the evidence. It is not the correctness of the previous decision, but the fact that there has been a previous decision that is established by the judgment [*Alefian v. Baidyanath*, 70 IC 194: 36 CLJ 9: A 1923 C 240; see *Abdul Latif v. Abdul Huq*, 28 CWN 62: A 1924 C 523; *Tripurana v. Rokkam*, 42 MLJ 324: A 1922 M 71 FB; *Ram Prakas v. Anand Das*, 43 IA 73: 43 C 707: A 1916 PC 256: 24 CLJ 115; *Hara v. Jogendra*, 38 CLJ 186, 188: A 1924 C 526; *Tahilram v. Md Miral*, A 1938 S 132: 176 IC 549 (cases discussed); *Shamdas v. Gurmukh*, A 1945 S 57: 1945 Kar 40]. It is well-settled that although a judgment not *inter partes* may be used in evidence in certain cases, as a fact in issue, or as a relevant fact or possibly as a transaction, the recitals in the judgment cannot be used as evidence in a litigation between the parties [*Kashinath v. Jagat*, 20 CWN 643: 23 CLJ 583; *Asaddar v. Prov of Assam*, A 1944 C 57]. On account of the contrary view expressed in *Purbutty v. Purno*, 9 C 586; *Byathamma v. Ayulla*, 15 M 19; *Thama v. Kondan*, 15 M 378; *Krishnaswami v. Rajagopala*, 18 M 73, the matter was referred to a Full Bench of the Madras High Court, and it was held there following *Kashinath v. Jagat, sup*, that a recital in judgment not *inter partes* of a relevant fact is not admissible in evidence under s 35 or 13 [see *Tripurana v. Rokkam*, 45 M 332 FB: 42 MLJ 324; see also *Abdul Latif v. Abdul Huq*, 28 CWN 62]. As to what facts the judgments are evidence of, see the observations of the Judicial Committee in *Dinomoni v. Brojomohini*, (*ante*); *Jogendra v. Mahim*, 34 CWN 358 *post* and *Ramaji v. Manohar*, A 1961 B 169, 171. A judgment in a case under s 9 (s 6 of Act 47 of 1943) S R Act does not come either under s 41 or under s 42 and it is relevant only under ss 13, 40, 43. The use of which a decree passed in such a suit may be put in a subsequent suit, is only to show that a right to possession was asserted and it was denied and a suit was instituted and it was either decreed or dismissed. It is not a final judgment. The statements in a judgment as to the respective claims which the parties put forward are not evidence at all [*Chaddek v. Sayad*, 85 IC 979: A 1925 C 1046]. In a case where there was an attempt to show relationship of landlord and tenant by the certified copy of an award of a Deputy Collector in a previous litigation between the predecessor in title of the plaintiffs and some persons who were not

shown to be predecessors of the defendants, and in which reliance was placed on certain statements of the Deputy Collector as to the realisation of rents by the plaintiffs in that suit, their Lordship observed: "These statements are not admissible as evidence of rents having realised from the defendants in that suit. The Indian Evidence Act does not make finding of fact arrived at on the evidence before the court in one case, evidence of that fact in another case. Their Lordships also agree that this evidence even if admissible would be of very little weight" [*Gopika v. Atal*, 56 IA 119: 56 C 1003 : A 1929 PC 99; see also *Kesho Pd v. Bahuria*, 41 CWN 577 : 15 P 258 : A 1937 PC 69; *Gobinda v. Shamlal*, 58 IA 125 : 58 C 1187 : A 1931 PC 89; *Gadadhar v. Sarat*, 44 CWN 935; *Gajanfar v. Prov of Assam*, 48 CWN 505; *Ramaji v. Manohar*, A 1961 B 169 and s 43 *post*. "*Objects for which judgments are admissible*". S13 does not tell how relevant facts are to be proved; for that we have to look to other provisions, *eg*, ss 64, 65. Recitals in documents are, however, not admissible except to the extent laid down in *Dinomoni v. Brojomohini*, 29 C 187 : 29 IA 24 and *Govind v. Shamlal*, 58 IA 125 [*U P Govt v. CMT Assn Ld*, A 1948 O 54, 73 : 22 Luck 63].

Relying on *Gopika's* case it has been held by a Full Bench in Nagpur that where a judgment is not *in rem*, or does not fall within ss 40, 41, 42, the fact that the court by that judgment decides a point in a particular way is not relevant for the purpose of the decision of the same point in the subsequent suit [*Shankar v. Kesheo*, A 1930 N 1 FB (*Ramdhan v. Purushottam*, 22 NLR 49 : A 1926 N 109 **overruled**)]. It has been pointed out in this Full Bench case that many contrary decisions of other High Courts have been affected by the Privy Council decision in *Gopika v. Atal, ante*. Similarly, it has been held that in a suit against the Secretary of State for recovery of possession of land as reformation *in situ* appertaining to permanently settled estates, a previous judgment in a similar suit by another person against the Secretary of State in which the defence was the same as now, is not admissible. It is not also admissible under s 11 [*Benode Lal v. Secy of S*, 34 CWN 1113]. It has been observed in a later Nagpur case that in *Shankar's* case, *ante*, the question was referred to the Full Bench in terms wider than that was necessary for the decision of the question then before the court and *pro tanto* the decision is *obiter* [*Maroti v. Jaganhath*, A 1939 N 72].

[*For other decisions on the subject, see post; "Cases illustrative of the admissibility of judgments, orders, &c. and other documents as transactions or instances"*].

Post Litem **Judgments.**—The wording of s 13 in both the clauses is all in the past tense and judgments subsequent to the suit in which they are relied on as evidencing the particular transaction or instances in dispute are not admissible in evidence [*Dasondhi v. Milkhi*, A 1939 L 152; *Jhingur v. R*, A 1931 P 386: 12 PIT 647].

Foreign Judgments.—Foreign judgment not *inter partes* is admissible under s 13 though not binding [*Nataraja v. Subbaraya*, A 1950 PC 34 : 77 IA 33 : 1950 Mad 862].

Custom—Its Elements and Essentials.—A custom is a rule which, in a particular family or particular district, has from long usage obtained the force of law. It must be ancient, certain, and reasonable, and being in derogation of the general rules of law must be construed and proved strictly [*Har Pd v. Sheo Dyal*, 26 WR 55 : 3 IA 259; see also 3 MHCR 50 (57); 75 (77); *Mariam v. Ibrahim*, 22 CLJ 206: 32 IC 851]. A custom is a rule which in a particular family or area, has by long usage obtained the force of law, or in other words custom is a rule or conduct obligatory on those within its scope established by long usage. A valid custom must be of immemorial, antiquity, certain and reasonable, not repugnant to statute law, though it may derogate

from the common law. Thus the custom is to be properly pleaded and proved. He has to prove its existence from time immemorial. The custom must be reasonable, ancient, continuous and certain. It should not be illegal or immoral or opposed to public policy. The party pleading custom has to show that it was acted upon by people. A custom can be proved by the opinion of the living persons who would be likely to know of its existence, if it ever existed. *Adivalu Kirubiyugothi Fathima v. Hassan Ismail*, 1997 AIHC 1818, 1820 (Ker). It is not proper to reject the case of custom simply on the ground that it is not for a sufficient long period. *Homi P Ramina v. Eruch B Desai*, A 1996 Bom 141, 147. "Custom is an unwritten law established by long usage and the consent of our ancestors. If it be universal, it is a part of the common law of the land; if particular, it is then properly a custom" [Field, p 497].

—Essentials of Custom in English Law.—In order to make particular custom good under English law, there are several essentials:—(*1*) It must have been used so long that the memory of man runneth not to the contrary; (*2*) It must have been continued and (*3*) peaceable; (*4*) It must be reasonable; (*5*) It must be certain. It will be void if it be unreasonable and uncertain, or savour too much of arbitrary power; (*6*) It must be compulsory and not left to the option of every person whether he will use it or not; (*7*) It must be consistent with other customs, for one custom cannot be set up in opposition to another [Field, 6th Ed., p. 477]. The English rule as to immemoriality does not apply in this country. (See *post*: "*Length of time to constitute a custom immemorial*").

—Private or Local Customs.—Custom of a private or local character are covered by this section. As the right mentioned has been decided to include both public and private right, there is nothing to exclude private customs [see *Collr of Gorakhpur v. Palakdhari*, 12 A 1, 16]. A local custom differs from a tribal custom and must necessarily bind all the families or the class indicated who reside in the locality where the custom prevails. Where a local custom obtaining in the families of a certain class is pleaded, it is not at all necessary to prove that the custom applies to the particular family under consideration [*Jugdeo v. Bhawani*, 61 IC 920 : A 1921 O 24].

—"Custom" Not Limited to Ancient only.—The word custom is not restricted to ancient custom only, but includes all customs and usages. Where any question of right or custom is to be decided, evidence of usage was held to be admissible under s 48 [*Dalglish v. Guzaffar*, 23 C 427; on appeal 3 CWN 21].

Length of time to Constitute a Custom Immemorial. [The Time of Legal Memory in India].—With regard to the immemoriality of a custom, GREY, CJ, observed in *Jagmohon v. Nimu Dasi*, Montriou's Cases of Hindu Law, 596: "Although in this country we cannot go back to that period which constitutes legal memory in England *viz* the reign of Richard I, yet there must be some limitation without which a custom ought not to be held good. In regard to Calcutta, I should say that the Act of Parliament in 1773, which established the Supreme Court, is the period to which we must go back to find the existence of a valid custom, and that, after that date there can be no subsequent custom, or any change made in the general law of the Hindu unless it be some regulation by the Governor-General-in-Council, which has been duly registered in this court. In regard to the mofussil we ought to go back to 1793. Prior to that, there was no registry of the Regulations, and the relics of them are extremely loose and uncertain. I admit that a usage for 20 years may raise a presumption in the absence of direct evidence of a usage existing beyond the period of legal memory". See *Nalin v. Haripada*, 38 CWN 139. 'Immemorial' means

beyond human memory [*Majid v. Safdari*, 81 IC 1033 : A 1925 O 55]. In *Joy Kr v. Durga*, 11 WR 348, 349, where the question was as to the transferability of certain tenures according to local custom, the judges said: "It is sufficient if there is credible evidence of the existence and antiquity of the custom, and none to the contrary. There is no necessity for the witnesses to fix any particular time from which such tenure became transferable".

The English rule that "a custom in order that it may be legal and binding must have been used so long as the memory of man runneth not to the contrary" does not apply to Indian conditions. It must be ancient, but it will depend upon the circumstances of each case what antiquity must be established before the custom can be accepted [*Subhani v. Nawab*, 68 IA 1, 31: 1941 Lah 154 : A 1941 PC 21; *Panchanan v. Fazlur*, 1942, 2 Cal 427 : A 1942 C 505]. In India a custom need not be immemorial, nor is it conclusive against a claim to a customary right that the practice began by permission or agreement. But the requirement of long usage is essential and the practice must be shown to have continued in such circumstances and for such length of time that it has come to be exercised as of right [*Baba Narayan v. Saboosa*, 47 CWN 923 : A 1943 PC 111 : 1943 Nag 705].

Usage. "Usage a is a fact and custom is a law.—There can be usage without custom, but not custom, without usage. Usage is inductive based on consent of persons in a locality. Custom is deductive making established local usage a law" [Wharton's Law Lexicon, 965]. Usage and custom are now used interchangeably, though custom seems to have been originally confined to local usages immemorially existing [Bouvier's Law Dictionary]. A usage must be established; that is, it must be known, certain, uniform reasonable, and not contrary to law; but it may be of recent origin [Bouvier's Law Dictionary; 2 Greenleaf Ev s 251]. The word 'usage' would at any rate include what people are now or recently in the habit of doing in particular place [*Dalglish v. Gazaffar*, 23 C 427]. There is a great difference between custom and usage, and the latter may be established in a much less period than, for instance, a custom of the transferability of occupancy holding [*Dalglish v. Gazaffar*, 3 CWN 21, 23 : 23 C 427]. Though evidence of usage is admitted ostensibly for the purpose of explaining a written contract or other instrument, a lax habit of admitting such evidence has the effect of explaining document, which is dangerous [Tay s 1190]. Whenever evidence of usage is adduced against any party, he is always at liberty to prove first, the non-existence of the usage—secondly its illegality or unreasonableness—thirdly, that it formed no part of the agreement between the parties [Tay s 1189].

Practice and Custom.—A practice is a succession of acts of a similar kind or in a like employment [Webster's Dictionary]. Practice may be more or less common, but it does not become a custom unless it is consciously accepted having the force of law [*Mirabivi v. Vellayanna*, 8 M 464]. As to the distinction between practice and custom, see *Bai Shirinbai v. Kharsedji*, 22 B 430.

Custom Must be Ancient, Immemorial, Continued, Reasonable, Certain, Definite, Undoubted, Invariable, Uninterrupted and Acquiesced in and Should Be Construed Strictly.—The custom must be ancient, if not immemorial, invariable, certain, continuous and proved to have been established and acted upon for a pretty long time [*Mumtaz v. S Aman*, A 1973 J & K 28 (cases discussed)]. A custom to be valid have been continued and acquiesced in and must be reasonable and certain [*Lala v. Hira Singh*, 2 A 49; *Nityogopal v. Provas*, 24 CWN 309: 56 IC 19]. It should be immemorial in origin, certain and reasonable in nature and continuous in use [*Lakshmidhar v. Rangalal*, A 1950 PC 56 **folld** in *Chidambara v. Vedayya*, A 1967

M 164]. It is sufficient if the right is proved to be reasonable, ancient and exercised openly and peaceably [*Purna v. Durlav*, A 1980 C 10 (cases discussed)]. To be binding it must be unaltered, uniform, constant and definite [*Raturaji v. Pahlwan*, 33 A 196 FB; *Gopal v. Abdul Samad*, 34 CLJ 319; *Krishna v. Atul*, 39 CLJ 612]. General principles to be kept in view in dealing with question on customary law—Propositions stated [*Gokul v. Parvin*, A 1952 SC 231 : 1952 SCR 825]. The reasonableness of the custom was insisted in *Arlapa v. Narsi & Co*, 8 BHC 19 in *Bhagi v. Kisri*, 1 BHC 229 and in *De Souza v. Pestanji*, 8 B 408. The question of reasonableness must be decided from the point of view of those among whom the custom is alleged to exist [*Luchmeeput v. Sadaulla*, 9 C 689]. Reasonableness is to be judged with regard to the state of things at the inception [*Shk Mangree v. Behari*, 6 PLJ 11 : 61 IC 1321]. We are to judge not by the reason of an unlearned man, but by artificial and legal reason warranted by authority of law [*Mahamaya v. Haridas*, 42 C 455: 19 CWN 208; *Jogesh v. Dhakeswari*, 45 CWN 809].

A custom to be good must be definite [*Lachman v. Akbar Khan*, 1 A 440]. It must be shown to be undoubted and invariable [*Jamia v. Pagal*, 1 WR 250, and *Bhagwan v. Balgobind*, 1 BLR 9*n*]. The legal title of customs to recognition depends on their certainty and antiquity [*Ramalakshmi v. Sivananantha*, 14 MIA 570, 586].

Custom cannot be abandoned by non-user, but non-exercise for a long period may be a reason for doubting its existence [*Hamid v. Bhola*, 52 IC 869]. Agreement by co-sharers in *waijib-ul-urz* to abrogate custom of pre-emption is binding [*Bunyad v. Abdul*, 22 OC 20 : 50 IC 800]. One solitary instance or even four modern instances are not sufficient to prove a custom [*Durga v. Raghunath*, 18 CWN 55 (*Sarabjit v. Indrajit*, 27 A 203; *Chandika v. Mana Kuar*, 6 CWN 425: 29 IA 70 relied on)]. The volume of evidence to negative the existence of a custom is very much less than that required to establish one [*Refiullah v. Mumtaz*, A 1927 A 609: 102 IC 586].

Hearsay Evidence to Establish Custom.—After the existence of the custom for some years has been proved by direct evidence, it can only, as a general rule, be shown to be immemorial by hearsay evidence, and it is for this reason that such evidence is allowable as an exception to the general rule [*Rajendra v. Ganganand*a, 52 IA 279: 4 P 788: 30 CWN 109: A 1925 PC 213; *Panchanan v. Fazlur*, 1942, 2 Cal 427: A 1942 C 505].

—Custom Overrides the General Law.—"Immemorial custom", says Manu, "is transcedent law" [See the Chapter in Mayne's Hindu Law]. The rule of custom should prevail in all cases and if any aberrations have to be corrected such correction must take the court in the direction of re-establishing the rule of custom [*Rajendra v. Devendra*, A 1973 SC 268]. In *Collr of Madura v. Muthu Ramalinga*, 12 MIA 397, 436: 1 BLR 12, it has been declared that "clear proof of usage will outweigh the written text of law". See *Tularam v. Shyamlal*, 86 IC 729: A 1925 A 648. Where a custom is proved to exist, it supersedes the general law which however regulates all beyond the custom [*Neel Kristo v. Beer Ch*, 12 MIA 542: 12 WR 21]. Custom when it is ancient, invariable and established by clear and positive proof, overrides the usual law of inheritance [*Kustoora v. Monohur*, WR (1864) 39 and *Ramalakshmi v. Sivananantha*, 14 MIA 570: 17 WR 553. See also *Sartajkuari v. Deoraj Kuari*, 15 IA 51: 10 A 272; **folld** in *Beresford v. Ramasubba*, 13 M 197. See also *Udaya v. Jadablal*, 8 IA 248: 8 C 199]. A custom contrary to Hindu law but always recognised by courts, was maintained [*Nilmabhad v. Chunder Mookhee*, 22 WR 397].

—Nature of Evidence to Establish Custom in Supersession of the General Law.—It is well established that a party has to plead in specific terms, custom and prove it [*Kunjuraman v. Mathevan*, A 1971 SC 1398]. Burden of proving custom

in derogation of general law lies heavily on the party who sets it up [*Md Baqar v. Naim-un-nissa Bibi*, A 1956 SC 548]. Where it is sought to establish the existence of a custom modifying or varying the general law, the kind of evidence that ought to be required is evidence showing that the right claimed by custom was more or less contested and the contest abandoned by some one who, if the custom had not existed, would have been entitled, or evidence showing that generally in the district the custom was followed to the exclusion of persons who, if it had not been for the custom, would presumably have enforced their right under the general law [*Ramanand v. Surgiani*, 16 A 221 : **folld** in *Nanhi v. Gourishankar*, 28 A 187 : 2 ALJ 654]. Special usages modifying the ordinary law of succession should be ancient and invariable; and further they should be established by clear and unambiguous evidence [*Ramalakshmi v. Sivananantha, sup*; **relied** on in *Pushpavathi v. Visweswar*, A 1964 SC 118; *Harihar v. Balmiki*, A 1977 SC 733; *Durga v. Raghunath*, 18 CWN 55: 18 CLJ 559; see also *Vayidinada v. Appu*, 9 M 44 FB]. A custom with regard to the rule of succession in a tribe or family may be proved by general evidence as to its existence by members of the tribe of family who would naturally be cognizant of its existence and exercise without controversy [*Ahmed v. Channi*, 52 IA 379, 383: 30 CWN 506: A 1925, PC 267; *Gokal v. Parvin*, 1951 SCR 825: A 1951 SC 231]. The principles to be kept in view when applying customary law have been summarised in *Gokal v. Parvin, sup*. Where a tenant sets up a custom in derogation of the general law, he must prove that right [*Janki v. Usman*, 62 IC 417]. Oral and documentary evidence of mutations and other transactions in which the custom was recognised or departed from are relevant [*Kehar Singh v. Dewan*, A 1966 SC 1555], although oral evidence is sought to be given about what happened some generation ago, it has to be assessed, with a great deal of care [*Harihar v. Balmiki*, A 1975 SC 733].

—Where Custom Does Not Prevail Over the General Law.—Evidence of the acts of single family, repugnant or antagonistic to the general law will not establish a valid custom or usage enforceable in a court of justice [*Tarachand v. Reeb Ram*, 3 MHC 50; **folld** in *Madhabrav. v. Balkrishna*, 4 BHC 118].

—Custom Limiting the General Law and Duty of the Court.—Where a local custom excluding or limiting the general rule of law is set up, a court should not decide that it exists unless it is satisfied of its reasonableness and its certainty as to extent and application, and is further satisfied by the evidence that the enjoyment of the right was not by leave granted or by stealth or by force, and that it had been openly enjoyed for such a length of time as suggests that originally by agreement or otherwise the usage had become a customary law of the place in respect of the persons and things which it concerned [*Kuar Sen v. Mauman*, 17 A 87 (**reversing** 16 A 178). **Folld** in *Mohidin v. Shivlingappa*, 23 B 666; **approved** in *Palaniandi v. Pathirangonda*, 20 M 389; see *Behari v. Harlal*, A 1934; *Bai Sakar v. Ismail*, 38 Bom LR 1034].

—Convert to Islam and Custom of Inheritance.—Mahomedan law generally governs converts to that faith from Hinduism; but a well-established custom of such converts following the Hindu law of inheritance would override the general presumption. This custom should be confined strictly to cases of succession and inheritance [*Baibaiji v. Bai Santok*, 20 B 53. See also *Md Siddick v. Haji Ahmed*, 10 B 1]. It is more important to look to the positive evidence than to the negative [*Khalil v. Md Mustafa*, A 1928 O 269].

—Custom Does Not Affect the Limitation Act.—No custom can be admitted to override the provisions of the Limitation Act [*Mohan v. Amrat*, 3 B 174].

—Reasonableness of Custom is a Question for the Judge.—The judges are the proper persons to decide whether customs are reasonable [Tay. s 37].

—Unreasonable Customs.—A custom by virtue of which all the inhabitants of a zemindari were alleged to have a prescriptive right to fish in certain *bhils* was treated as invalid on the ground of its being unreasonable although it might be established by evidence [*Luchmeput v. Sadaulla*, 9 C 698: 12 CLR 382, see also *Desouza v. Pestanji*, 8 B 408: 8 BHCR (AC) 19]. Custom that no rent is payable in respect of certain classes of hajabad land on account of inundation is unreasonable and uncertain [*Shib Narain v. Bhutnath*, 45 C 475 : 22 CWN 422].

—Immoral Customs—having tendency to promote prostitution cannot be recognised or enforced as law for that would be directly in opposition to the policy of the law [*Ghasiti v. Umaraojan*, 21 C 149: 20 IA 193; *Chinna v. Tegarai*, 1 M 168, 170]. Custom by which brothel-keeper succeeds to the property of a *nauchi* or slave kept for purposes of prostitution is immoral [*Md Baksh v. Nowazish*, 48 IC 73: 75 PR 1918]. The test of immorality is the sense of community as a whole and not of a section of the people [*Deivanayaga v. Muthu*, 44 M 329, 333; *Balusami v. Balakrishna*, A 1957 M 97].

—Evidence and Proof in Establishing Custom or Right—Plurality of Instances etc. etc.—Custom in India is transcendent law. A custom cannot be established by few instances or instances of recent dates. Observations on the nature of evidence necessary to support custom [*Karkarla v. Raj Venkata*, 29 M 25: 16 MLJ 8: see also *Hasim Ali v. Abdul Rahaman*, 28 A 698 and *Peary Mohan v. Jote Kumar*, 11 CWN 83]. Modes of proving or disproving custom (see *Ramakrishna v. Gangadhar*, A 1958 Or 26). The most cogent evidence of custom is not that which is afforded by the expression of opinion as to its existence, but by the examination of instances in which the alleged custom has been acted upon and by the proof afforded by judicial or revenue records or private accounts or receipts that the custom has been enforced. The acts required for the establishment of customary law ought to be plural, uniform and constant [*Lachman v. Akbar*, 1 A 440; *Debendra v. Pitamber*, A 1927 C 117: 98 IC 43]. In order that an alleged custom may be given the force of law: *First*, the evidence should be such as to prove the uniformity and continuity of the usage, and the conviction of those following it that they were acting in accordance with law and this conviction must be inferred from the evidence. *Secondly*, evidence of acts of the kind, acquiescence in those acts, their publicity, decision of courts, or even of *panchayats* upholding such acts, the statements of experienced and competent persons of their belief that such acts were legal and valid, will be admissible. But evidence of this latter kind will be of little weight, if unsupported by actual examples of the usage asserted [*Gopalayyan v. Raghupatiayyan*, 7 MHC 250; **approved** in *Jugmohan v. Mangaldas*, 10 B. 528]. The rule of majority of shrines is no guide and the particular custom of a particular shrine must be proved [*Committee of Gurudwara v. Md Nawaz*, A 1941 PC 56: 1941 Lah 803: 68 IA 83]. A mere will is not enough for succession as a mohunt in the absence of proof of custom [*Beharilal v. Raghunath*, A 1951, Pu 365]. Any theory of custom or deductions from other customs cannot be made a rule of decision but only any custom applicable to the parties concerned [*Abdul v. Hussein*, A 1917 PC 181: 54 C 450: 45 IA 10]. Custom cannot be extended by analogy. It must be established inductively not deductively and it cannot be established by *a priori* methods [*Saraswathi v. Jagadambal*, A1953 SC 201: 1953 SCR 939].

For observations on proofs by instances, see *Jugmohan v. Mangaldas*, 10 B 528, 543. Where a custom has been established, instances showing that there has been no

right was claimed.....or (2) in which its exercise was asserted. So, in a suit for rent where the defendant pleaded *nishkar* right, mortgage, deeds or decrees not *inter partes* in which the tenant described his interest as *nishkar* are inadmissible as none of the instances evidenced by the documents was an instance in which the *nishkar* right was exercised or its exercise was asserted. Moreover the section does not bring in the statement itself, but only the instance in which the exercise of the right was asserted. S 18-A B T Act also excludes the documents [*Srish Ch v. Kalachand*, 1942, 1 Cal 510: 46 CWN 169: A 1942 C 445]. In another case, however, sub-leases granted by defendant describing his interest as *mokrari* tenant were held admissible under s 13 as evidence of the assertion of *mokrari* title by the lessee. Even if, s 18-A B T Act applied that would simply exclude the documents as evidence against the landlord of the incidents of the tenancy as described therein, not as evidence of the assertion of a claim as to the tenancy being of a particular description [*Dwarkadas v. Parbati*, 46 CWN 770: A 1942 C 486; see *Banwari v. Dwarka*, 29 CLJ 577: 52 IC 825; *Keshava v. Brahmadev*, 13 P 45].

***Post Litem* Instances.**—Under s 13 the instances must be instances prior to the suit in question. *Post litem* instances are inadmissible [*Shankar v. Kailash*, A 1939 L 105]. But a contrary view has been expressed by a single judge bench of the Rajasthan High Court. It was opined that if a judgment is made receivable under section 13(*b*) as a particular instance, it cannot be declared to be inadmissible because it arises out of a subsequent suit. *Qazi Sharaf Ahmed v. Dau Singh*, A 1996 Raj 227, 231.

Cases illustrative of the Admissibility of Judgments, Orders etc. and other Documents as Transactions or Instances.—It has been seen ["*Relevancy of Transactions ..... right or custom*" and "*Admissibility of judgments not inter partes as transactions or instances*" *ante*.] that judgments not *inter partes* are indicative of the circumstances in which judgments not *inter partes* and other documents are admissible in evidence:—

—Judgments, Decrees and Orders.—The word "Transaction" in s 13 includes judgments [*Lakshman v Amrit*, 24 B 591]. Judgements not *inter partes* are admissible as evidence either as transactions or instances [*Md Amin v. Hasan*, 31 B 134: 9 Bom LR 65; *Radhu v. Jyoti*, 36 CWN 866]. In a suit for possession of lands, a judgment not *inter partes* was admitted in evidence [(**following** *Rameshar v. Kunjbehari*, 4 C 633: 6 IA 33); *Peary v. Drobomoyi*, 11 C 745]. Judgments not *inter partes* were held admissible to show that similar grants were resumed by the grantor or his heirs after the death of the grantee [*Syed Md v. Maharaja*, 7 CLJ 90]. Judgments not *inter partes* are relevant when they are produced not to prove an adjudication between third parties, but in order to prove a settlement made by a predecessor in title of the party against whom they are sought to be used [*Krishnasami v. Rajagopala*, 18 M 73]. A finding in a former suit in which the question was tried between all the parties to the present suit, was held admissible under the section although in the former suit the present plaintiffs and the defendants were co-defendants [*Guttee v. Bhukut*, 22 WR 457]. A judgment showing the identity of the suit land with that described in the plaint and sale-certificate, was held admissible [*Anunda v. Gunee*, 25 WR 80]. In a suit between zamindars and mirasdars as to the ownership of poramboke lands, a judgment in a previous suit between the zamindar and certain other mirasdars, was held admissible [*Natesa v. Venkatarama*, 30 M 510: 17 MLJ 518]. The plaintiffs put in an order made in certain proceedings in which was recited a petition by his father asserting his title, and a judgment obtained by his father in which his title was recognised. Neither the defendants nor their predecessors were parties to any of those proceedings—*Held* that the documents were relevant

executed in due course of business to settle disputes between the parties [*Jasoda v. Pundit*, A 1934 P 48]. Transaction by a party, dealing with the property to which he lays claim are important evidence of his title, and sometimes they constitute the only evidence available [*Rama Iyengar v. Mannar*, 23 MLJ 327 : 16 IC 746]. In order to establish that certain land is *zerait* land within s 120 B T Act, a landlord is entitled to rely upon any evidence that may be produced to show assertion of any title on his part and communicated to the tenant whether before 2nd March, 1883, or after that date [*Kesho Pd v. Parmeshri*, 71 IC 902: A 1923 P 276 (*Nilmoni v. Bykant*, 17 C 466 **dissented** from)]. "Statements" cannot be called "instances" though the whole litigation ending with the judgment may be an instance [*Pratap v. Jagadish*, 40 CLJ 331, 363: A 1925 C 116].

X made a statement in a former suit that he was an orphan when adopted. The question then was not whether an orphan could be adopted. Still the statement is admissible in a subsequent suit to prove instance of orphan's adoption [*Brijraj v. Basant*, A 1929 A 50].

"Transaction by Which".—The words of cl (*a*) s 13 are not 'any transaction *in which or in the course of which* a right or custom is created &c or denied'. The words are "any transaction *by which* the right or custom in question was created, &c, or denied"; that is to say, the right must be asserted by the transaction itself. In the present case the *nakdi* nature of the holding was not asserted *by* the deed of gift though it was asserted *in* the deed of gift. Where the question was whether a tenant held lands under the *nakdi* or *bhowli* system and the court based its decision on a statement contained in a *hebanama* executed by the deceased grandfather of the tenant—*held* that the *hebanama* was not admissible under s 32(7) read with s 13(*a*) [*Bansi Singh v. Mir Amir*, 11 CWN 703]. The words being "by which", the nature and scope of transaction is a pertinent consideration. The proposition to be proved is the right claimed or deined in the suit. A transaction by which this right have been asserted or denied &c, is only a material evidencing the proposition (*factum probans*). This *factum probans* itself in its turn may require proof and may thus become an intermediate proposition to be proved [*Asaddar v. Prov of Assam*, A 1944 C 57: 48 CWN 505]. A sale of land described in the sale-deed as *lakheraj* is not an assertion of the rent-free right by the deed. The transaction is one in which the vendor asserted his competency to transfer the property, *ie* he had some saleable interest [*Brajendra v. Mahim*, 31 CWN 32: 99 IC 189: A 1927 C 1, *ante*]. So in an usufructuary mortgage deed, the recital of a revenue-free title is not an assertion of such title [*Kumud v. Bengal*, A 1947 C 209]. For an illustration of the significance of the word '*by*', see *Venkatarajagopala v. Fota*, 26 IC 747: 1914 MWN 779].

Written statements filed in suits are not transactions. Where in the specified boundaries of an adjacent land, the suit land is described as belonging to one of the parties, it is a transaction, but not a transaction in which the right of the party is asserted, claimed or even recognised and hence not admissible in evidence [*Venkatarajagopala v. Fota*, 26 IC 747]. Where in a suit for partition, the widow of a deceased co-parcener puts in a written statement to the effect that a particular plot of land belonged to her husband, such statement is clearly admissible under s 13 [*Rangaswami v. Vaidyalinga*, 33 IC 446]. A settlement deed under which a pro-note is transferred to the plaintiff if admissible as secondary evidence, may be employed to prove the pro-note under s 32(7) read with s 13(*a*) since the deed is a transaction by which a right is asserted [*Subbarayulu v. Vengama*, A 1930 M 742: 124 IC 197].

"Particular Instances In Which".—S 13(*b*) does not bring in particular instances in which the right was asserted. It speaks of the particular instances (*I*) in which the

"Transaction" and "Particular Instances".—*Per* GARTH, CJ—"A transaction in the ordinary sense of the word, is some business or dealing which is carried on or transacted between two or more persons. If the parties to a suit were to adjust their differences *Inter se*, the adjustment would be a transaction; and by a somewhat strained use of the word, the proceedings in a suit might also be called 'transactions'. But to say that the decision of a court of justice is a transaction would be a misapplication of the term" [*Gujju Lall v. Fatteh Lall*, 6 C 171, 186 FB]. In the same case JACKSON, J, (p 185) observed: "It is a misuse of language to call a judgment of a court of justice a transaction". The word transaction, is one of large import and might, although by somewhat strained use of it, be held to be applicable to proceedings in a suit [*Ranchhoddas v. Bapu Narhar*, 10 B 439, 442]. The result of widely construing the word 'transaction' and making it include proceedings in a suit, would be a departure from the English rule of evidence under which judgments, decree and verdicts of juries are admissible only in matters of public interest [*Ranchhoddas v. Bapu, ante*]. *Per* BEAMAN, J, in *Md Amin v. Hasan*, 31 B 143, 153:—"I think, were there no case-law on the subject, no one would hesitate for a moment, upon being asked to bring a judgment of that kind in evidence to prove that a sale-deed was void, to reply that neither the language nor the object of s 13 served the pupose".

The question of admissibility of judgment under s 13 depends on whether or not a judgment falls within the term 'transaction' or 'instance'. In the above cases the opinion was expressed that a judgment cannot be properly described as a 'transaction' but a contrary view was taken in another series of cases [see *ante*, *"Relevancy of transactions in questions relating to the existence of any right or custom", "Summary", and post, "Cases illustrative of the admissibility of judgments &c"*,] and since then judgments and decrees have in numerous cases been held admissible as transactions or instances. In *Gujju Lal v. Fatteh Lal, ante*, MITTER, J, **(dissenting)** said that if the words 'transaction' and 'right' be not largely construed, judgments, decrees, and orders which were, before the passing of the Evidence Act, considered conclusive and which now according to the law of evidence administered in England, are considered, when not pleaded as estoppel, cogent evidence, would be excluded. Where the existence of a right to some immovable property is in question, that right having been asserted and recognised in a previous proceeding of a court of justice, it would not be unwarrantably straining the language of the section to say that the proceeding was a transaction within s 13, for the word "transaction" in its largest sense means "that which is done". The many later decisions in which judgments have been held admissible under s 13 indicate that the preponderance of opinion is in favour of the view expressed by MITTER, J (See *post*; *"Judgments, Decrees and Orders"*]. In *Dinomoni v. Brojomohini*, 29 IA 24 : 29 C 187, orders under s 145 Cr P Code were held to be admissible under s 13 [see *ante*], and it was pointed out that the words used in s 13 were very wide A 'transaction' in law is "any act affecting legal rights....." (Oxford Dic). It includes a will [*Periasami v. Varadappa*, A 1950 M 486].

A 'transaction' in s 13 must be a genuine and *bona fide* transaction, but a *benami* document is a fictitious transaction and no transaction at all and so such a transaction cannot be let in as evidence of a right or custom [*Brajendra v. Mohim*, 31 CWN 32]. A private transaction between persons, who have no power to bind a person whose rights it is sought thereby to affect, is not evidence [*Abdul Ali v. Rejan*, 21 IC 618]. A document containing the admission of third persons, cannot be used as evidence against the parties, but the document can be admissible in evidence as proof of the fact mentioned therein, as evidence of the transaction if it could be shown that it was

rules of Hindu law [*Amana v. Mahadganda*, 22 B 416; see also *Hulas Rai v. Jambu Pd, sup*].

—Customary Right to Cut Wood.—As to customary right of the tenants in the locality to cut wood for fuel, plough-handles, door-posts, &c, and the mode of proving it, see *Sitab Rai v. Dubal Nagisla*, 6 CLJ 210.

—Usage of Trade.—An usage or custom of trade alleged by the parties to a contract must not be inconsistent with the provisions of the Contract Act (9 of 1872) [*Madhav v. Raj Coomar*, 14 BLR 76]. To support a mercantile usage it is not necessary to prove either the antiquity, the uniformity, the capability of being defined with precision and accuracy or the notoriety of custom which in respect of all these becomes a local law. The usage may be still in 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 to their contract [*Jago Mohan v. Manik*, 7 MIA 263, 282—*Per* SIR J COLERIDGE, also cited in Taylor on Evidence 11th Ed s 1158; **folld** in *Pannalal v. Hargopal*, 1 L 80: 55 IC 931]. The usage must be shown to be certain and reasonable [*Arlapa v. Narsi*, 8 BHC (AC) 19] and so universally acquiesced in, that everybody in the particular trade knows at or might know it if he took pains to enquire; it must not be repugnant to or inconsistent with the express terms of the contract [*Volkart Bros v. Vettivela*, 11 M 495 (*Jago Mohan v. Manik, sup*, **folld**; see also *Smith v. Ludha Ghela*, 17 B 129]. The custom of trade must be so universal as to become a part of the contract by operation of law [*Mackenzie Lyall & Co v. Chamroo*, 16 C 702].

—Usage of Transferability of Occupancy Holding.—It is not necessary to fix any particular time from which occupancy holding became transferable. To establish the custom it is sufficient if there is evidence of its antiquity [*Joykissen v. Doorga*, 11 WR 348]. It must be proved that transfers have been made with the knowledge and without the consent of the landlord, who did not make any objection to such transfers [*Ramhari v. Jabbar*, 6 CWN 861 and *Jaganprasad v. Posan Sahu*, 8 CWN 172; **folld** in *Peary v. Jotekumar*, 11 CWN 83]. For nature of evidence necessary to establish a custom or local usage of transferability of occupancy holdings, see *Kumari Dassi v. Sajonikant*, 12 C 184; *Palakdhari v. Manners*, 23 C 179 and *Dinonath v. Nobin Ch*, 6 CWN 181.

In order to establish a custom of transferability subject to payment of customary *nazar*, the evidence must show that the landlord is bound to recognise when *nazar* of the amount or at the rate, determined by custom is tendered. A practice in a zemindary according to which a transferee is recognised provided the amount of *nazar* is satisfactory is not sufficient. A custom which leaves the amount of or rate of *nazar* indefinite must be void for uncertainty [*Mina Kumari v. Ichhamoyee*, 22 CWN 929: 45 IC 747: 27 CLJ 587]. Instances of recognition only upon receiving *nazarana*, cannot go to prove the usage. The usage to be proved is usage of sale without the landlord's consent [*Kailash v. Hari Mohan*, 13 CWN 541: 10 CLJ 110. See also *Radhakishore v. Ananda*, 8 CWN 235 and *Shibo Sundari v. Raj Mohan*, 8 CWN 224].

Fact.—The definition of the term is given in s 3. As to whether a judgment is a fact or not, see *Collr of Gorakhpur v. Palakdhari*. 12 A 1, in which EDGE, CJ, held that judgment as to whether a certain person was or was not the heir to another is neither a transaction nor fact within the meaning of s 13 [6 C 171 **approved**]. [See notes to ss 3 and 11 *ante*].

(*Balgobind v. Badri*, 50 IA 196: 45 A 413: A 1923 PC 70 **relied** on). A custom cannot be defeated by a single instance [*Ekradeshwar v. Janeshwari*, 41 IA 275: 18 CWN 1249: 42 C 582: A 1914 PC 76]. Family custom or *kulachar* must exist from time immemorial and the rule is more strictly enforced than in other cases [*Ambalika v. Aparna*, 45 C 835: 23 CWN 160]. But immemorial usage need not be proved in the case of family custom where the family is of comparatively recent origin [*Umritnath v. Gowreenath*, 13 MIA 542, 549-50]. Custom binding inheritance in a particular family, is recognised in India, and if it is well established in one particular family, the fact that it might not apply to other families will not make it void for uncertainty. Special usages modifying the ordinary law of succession must be (*1*) ancient, (*2*) invariable, (*3*) established to be so by clear and unambiguous evidence [*Mir Abdul v. Bibi Sona*, 45 IA 10 : 45 C 450: 22 CWN 353: A 1917 PC 181 (**folld** in *Durga Devi v. Sambhu*, 51 IA 182 : 29 CWN 106: 5 L 200: A 1924 PC 113)]. Burden of proving a family custom in derogation of the general law is heavily on the person who sets it up [*Md Baqar v. Naimunnissa Bibi*, A 1956 SC 548]. Where a custom prevails in one branch of a family, it is strong evidence to be **relied** on that it applies with equal force to another branch of the same family [*Lal Gojendra v. Lal Mathura*, 20 CWN 876: 1 PLJ 109 (5 CWN 33: 23 A 37 PC **relied** on)]. Evidence of special family custom in one family is no evidence of similar family custom in another except when connection is shown between the families [*Raja Rup Sing v. Rani Baisni*, 11 IA 149: 7 A 1 (9 BLR 274 **apprd**)].

—Primogeniture.—To prove family custom or *kulachar* or lineal primogeniture as the rule of succession to an impartible Raj, oral evidence, decrees (not *inter partes*) relating to disputes in families belonging to the same group and precedence conferred or marked by the titles of honour given to the sons of the reigning Raja in order of seniority, were received as evidence establishing the custom [*Mahesh v. Satrughan*, 29 IA 62: 29 C 343: 6 CWN 459; see also *Nittra Pal v. Jaipal*, 23 IA 147: 19 A 1]. In the absence of a special custom, the rule of primogeniture furnishes a ground of preference [*Subramanya v. Siva Subramanya*, 17 M 316: 4 MLJ 152. See also *Neel Kristo v. Beer Ch*, 12 MIA 523: 12 WR 21: *Bhawani v. Deoraj*, 5 A 542: 3 CWN 121]. Statements contained in petitions by members of a family, recognising the existence of a custom of primogeniture are relevant and admissible as evidence of particular instances in which the custom was recognised as affecting their own rights [*Shyamanand v. Ramkanta*, 32 C 6, 17]. Persons setting up special custom must prove it [*Martand v. Malhar*, 32 CWN 621: 55 IA 45: A 1928 PC 10]. As to proof of custom of primogeniture, see *Narendra v. Nagendra*, A 1929 C 577; *Kameshwar v. Mithilesh*, A 1964 P 150].

—Caste Custom.—A caste custom prohibiting widows from adopting is one, which before the court can give judicial effect to it, ought to be established by very clear proof that the conscience of the members of the caste had come to regard it as forbidden [*Patel Vandravan v. Patel Mani Lal*, 16 B 470]. A custom that a sonless *Jain* widow was competent to adopt a son to her husband without his permission or the consent of her kinsmen, was sufficiently established and that in this respect there was no material difference between the different sets of the *Jains* [*Harnath v. Mandel*, 27 C 379; see also *Hulas Rai v. Jambu Pd*, 37 IA 93: 14 CWN 545]. A custom alleged to exist among the *Kapali Bani* caste according to which a son is not entitled to the partition of ancestral property in his father's life-time and against his father's will—*held* not proved [*Jugmohan v. Mangal*, 10 B 528]. As to the effect of custom excluding daughters from succession, see *Md Kamil v. Imtiaz*, 36 IA 211: 14 CWN 59. By custom the *Jains* are governed in matters of adoption by the ordinary

Waterpark v. Fennel, 7 HL 650); but no such presumption can be made where the practice is traced to a recent agreement [*Bhau Nanaji v. Sundra Bai*, 11 Bom HC 249, 271].

—Custom of Pre-emption.—As to the nature of evidence required to establish a custom of pre-emption, see *Ganga v. Chedi*, 33 A 605. Decrees passed in favour of custom of pre-emption are the most satisfactory evidence and may be admitted to prove its existence [*Gurdyal v. Jhandu*, 10 A 585]. A judgment based upon a compromise or confession although of some probative force cannot be placed on the same footing as one in which a custom was held to be proved or negatived [*Imperial Oil Mills Co Ld. v. Misbahuddin*, 2 L 83: A 1921 L 69]. Effect of prevalence of custom of pre-emption in a locality [*Abudl Hafiz v. Bijai*, A 1951 A 578]. With regard to the admissibility of *Wazib-ur-urz* papers to prove the custom of pre-emption, see *Md Hussain v. Munna Lal*, 8 A 434. See also *Isri Singh v. Ganga*, 2 A 876 FB; *Totaram v. Mohan*, 2 Agra 120; *Deokinandan v. Sriram*, 12 A 234 FB; *Ali Nasar v. Manik*, 25 A 90; *Ram Sarup v. Sital*, 26 A 549; *Madhub v. Tomee*, 7 WR 210. As to subsequent entry in *Wazib-ul-urz* with regard to alleged pre-existing custom, see *Kulsam-un-nissa v. Khaslat*, 17 ALJ 345: 50 IC 179. Extract from *Wazib-ul-urz* recording a custom of pre-emption is *prima facie* evidence of existence of custom [*Kallu v. Kallu*, 43 IC 854 (*Digambar v. Ahmad*, 42 IA 10: A 1914 PC 11 refd to]. As to custom of pre-emption in the *wazib-ul-urz* and Mahomedan law, see *Chand Rai v. Bhagwani Rai*, 17 ALJ 461: 50 IC 90; *Allah Banda v. Matoram*, A 1951 A 850]. As to customary right of pre-emption and its proof; see *Audh v. Gajadhar*, A 1954 SC 417: 1955 SCR 70.

—Family Custom. [Its Essentials and Proof].—It is of the essence of family usages that they should be certain, invariable, and continuous, and well established. Discontinuance must be held to destroy them. In this case, the family custom as to succession by eldest son was put an end to by the acts and conduct of the parties [*Rajkishen v. Ram Joy*, 1 C 186 PC: 19 WR 80]. As to when a family custom may or may not cease, see *Nagendra v. Narendra*, A 1929 C 577. When a family custom is alleged, the testimony must show clearly that it has been submitted to as legally binding and not as a mere arrangement by mutual assent for peace or convenience [*Bhau Nanaji v. Sundrabai*, 11 BHC 249 *ante*. But see *Tarachand v. Reeb Ram*, 3 MHC 50 and *Madhavram v. Bal Krishna*, 4 BHC 113 *ante*]. As to special family custom at variance with the ordinary law of inheritance; see *Nugendurnarain v. Rughoonath*, WR (1864) 20; *Ramalakshmi v. Sivananantha*, 14 MIA 570: 13 MIA 549; *Surendra v. Hiramani*, 12 MIA 81. A single family cannot make a special customary law for itself [*Jowala v. Dharum*, 10 MIA 511]. A family custom as to inter-marriages, being matter of family history, may be proved by declarations made by members of the family [*Nugendurnarain v. Roghoonath, sup*]. A family custom alleged to exist in derogation of the ordinary Mitakshara law, that on extinction of the line of one of several brothers, the descendants of all the other brothers take equally with reference to their nearness to the common ancestors, was held not to be proved by four instances of the custom of comparatively modern date [*Chandika v. Munna*, 29 IA 70 : 24 A 273: 6 CWN 425]. To establish a family custom of descent one at least of two things must be shown; either a clear, distinct and positive tradition in the family that such custom exists, or a long series of instances of anomalous inheritance from the family custom may be inferred [*Heeranath v. Burm Narayan*, 17 WR 316; *Debendra v. Pitamber*, 98 IC 43: A 1927 C 177]. Proof of actual instances of a family custom excluding daughters from inheritance is not necessary (*Ahmed Khan v. Channi Bibi*, 52 IA 379: 6 L 502: A 1925 PC 267 **relied** on): Mention of it in the village *wazib-ul-urz* may be sufficient [*Raja Ajai v. Vijai Kumari*, A 1939 PC 22].

of succession of daughters to the self-acquired properties of their father are not reliable [*Saligram v. Maya*, A 1955 SC 266: 1955 SCR 1191]. The *riwazi-i-am* of Jullundur district was unreliable and could not prove that there was no custom of divorce among the Hindu Jats [*Gurdit v. Angrez*, A 1968 SC 142—cases discussed].

A *wazib-ul-urz* is a village administration paper, prepared by a village official, in which are recorded the statements of persons possessing interest in the village relative to existing rights and customs, and as such they are of considerable value; but statements which merely narrate traditions and purport to give the history of devolution in certain families not even of the narrators, stand in no better position than any other tradition [*Murtaza v. Md Yasin*, 43 IA 269: 38 A 552: 21 CWN 410: A 1916 PC 89]. An unambiguous statement of a custom in a *Wajib-ul-urz* is a most valuable piece of evidence and is much more reliable than oral evidence given after a dispute as to the custom has arisen. But when the *Wajib-ul-urz* contains statement as to custom which would appear to have been concocted by persons in their own interest, it is worse than useless [*Shk Roshan v. Choudhuri*, 52 CLJ 183: 57 IA 29: A 1930 PC 35].

Entries in *wazib-ul-urz* do not bind any one except the proprietors who are parties to them [*Arur v. Dal*, 40 PR 1879; *Singh v. Kala*, 92 IC 1012: A 1946 L 244]. Statements in *wazib-ul-urz* that widows could adopt sons without authority of husbands or simply that widows could adopt, mean the same thing and are sufficient proof of a custom to that effect [*Biswanath v. Jagal*, 50 IA 179 : 28 CWN 790: A 1923 PC 90]. Value of *wazib-ul-urz* as evidence of custom depends on the circumstances under which the entry came to be recorded [*Reghubar v. Gajraj*, 5 OLJ 508 : 47 IC 920]. *Wajib-ul-urz* should be construed so as to conform to the personal law of the parties [*Bahadur v. Anseri*, 48 IC 357]. In order to avoid the binding effect of a custom in a *Wjib-ul-urz*, it must be shown that it has been modified by contract or otherwise [*Ajodhya v. Karan*, 53 IC 550]. When the terms of a *wajib-ul-urz* indicate that the persons who are responsible for dictating them had no definite idea of what the usage was and there is no evidence of any instance in which the alleged custom was observed, the *wajib-ul-urz* is of no value [*Ram Samujh v. Bikramjit*, 50 IC 876: 6 OLJ 142]. It cannot be contended as a matter of law that *wazib-ul-urz*, if unrebutted, is conclusive proof of a custom [*Tilak Ram v. Sitaram*, 30 IC 503]. In pre-emption cases *wazib-ul-urz*, is no doubt evidence and in some cases, evidence of great importance. There is no class of evidence which varies so much in its importance as does a *wazib-ul-urz* [*Zalim v. Radha*, 17 IC 594]. The existence or non-existence of a custom of pre-emption cannot be said to depend upon the construction of *wazib-ul-urz*. *Wazib-ul-urz* is not custom. It is evidence of custom [*Ahmad Syed v. Digambar*, 16 IC 361]. *Wazib-ul-urz* is by itself good *prima facie* evidence of custom and in pre-emption it is not necessary to corroborate it by proof of instances. The evidence afforded by the *wazib-ul-urz* may be rebutted by other evidence [*Digambar v. Ahmed*, 42 IA 10: 19 CWN 393: 37 A 129 : A 1914 PC 11; **folld** in *Sher Md v. Parbhu*, 79 IC 41: A 1924 A 274, where it has been pointed out that this statement of law must be accepted in preference to any previous statement of law in other decisions]. It is settled law that entries in *wazib-ul-urz* relating to custom are not agreements between the members of the proprietary body but are presumptive evidence of the existence of the rules of custom embodied therein, it is for the person who contends that the custom is not as given in the *wazib-ul-urz* to prove his case [*Zaman v. Abdul*, 109 IC 59]. [For other cases, see *post* s 35].

—Presumption of Custom.—The courts will from modern uniform usage presume an indefinitely ancient usage of the like kind in the absence of circumstances leading to a contrary inference (**following** *Shepherd v. Payne*, 12 CBNS 414;

Balmiki, A 1975 SC 733]. In dealing with family custom, the same principle will have to be applied, though in the case of such custom instances in support of the custom may not be as many or as frequent as in the case of customs pertaining to a territory or to the community or to the character of any estate [*Pushpavathi v. Visweswara*, A 1964 SC 118 (*Ramalakshmi v. Sivananantha, sup* **folld**)].

—Books In Proof of Custom.—A book of local history when may and when may not be used to prove a local custom [*Vallabha v. Madhusudanam*, 12 M 495; see also *Collector of Madura v. Muthu Ramalinga*, 12 MLA 397: 1 BLR 1 : 10 WR 17; see *Subhani v. Nawab*, 68 IA 1 : 1941 Lah 154: A 1941 PC 21]. Books are admissible under s 48.

Burden of Proving Custom.—See *post*, notes under ss 101-4.

—Entries in *Riwazi-i-am* and *Wazib-ul-urz* in Support of Custom.—*Wazib-ul-urz* is a village statement of custom as distinct from the district statement of custom called *riwazi-i-am* [*Zaman v. Abdul*, 109 IC 59 (L)]. Entry in *riwazi-i-am* and in the manuals of customary law though unsupported by instances constitutes a strong piece of evidence in support of an alleged custom and shifts the burden of proof on the party challenging its correctness [*Beg v. Alla Ditta*, 44 IA 89: 44 C 749: 21 CWN 842: A 1916 PC 129; *Vaishno v. Rameshri*, A 1928 PC 294: 55 IA 407: 55 MLJ 746; *Basant v. Brijraj*, 62 IA 180: 57 A 494: A 1935 PC 132; *Saide Khan v. Amirunnessa*, 45 IC 966: 94 PR 1918; *Bodhi v. Menda*, 21 OC 334: 49 IC 514; *Ahmed v. Bano*, 3 L 40; *Dhara v. Arusi*, A 1930 L 761; *Kallu v. Kallu*, 43 IC 854; (*Digambar v. Ahmad*, 37 A 129: 41 IA 10: A 1914 PC 11 **folld**); *Jagdeo v. Bhawani*, 61 IC 920: A 1921 O 29; see however *Khuda Buksh v. Fatteh Khatun*, 46 IC 679: 140 PWR 1918; *Sundar v. Jaisri*, 50 IC 50; *Kanchan v. Sarabjut*, 53 IC 740]. In some decisions the above rule in *Beg v. Alla Ditta, ante* was construed as limited to the cases where the particular custom recited in *riwazi-i-am* was in conformity with the general custom of the province. But the Privy Council case does not really warrant the above restriction placed on the rule. An entry in the *riwazi-i-am* even in favour of a special custom is an important piece of evidence and shifts the *onus* on the party challenging. It may be reasonably said that in such a case the burden of proof would be comparatively light in view of the general custom in the province [*Labh v. Mt Mango*, 8 L 281 : A 1927, L 241; *Bhag v. Jai Singh*, A 1929 L 318].

Wazib-ul-urz and *riwazi-i-am* are of great value when attested by ancestors of parties [*Rukman v. Sasi Das*, 71 PR 1916: 32 IC 875]. Recital in *riwazi-i-am* of a particular custom, opposed to general custom and unsupported by instances is insufficient to prove the existence of that custom [*Dewa Singh v. Lehna*, 45 PR 1916: 31 IC 740; *Chuttan v. Hazarilal*, 7 PR 1916; *Buddha v. Fateh*, 4 L 99]. A presumption of correctness attaches to entries relating to custom in *riwazi-i-am*. [*Jai Kaur v. Sher Singh*, A 1960 SC 1118; *Salig Ram v. Munshi Ram*, A 1961 SC 1374; *Kehar Singh v. Dewan*, A 1966 SC 1555]. Value of *riwazi-i-am* of Montogomery discussed [*Chawa v. Ahmad*, A 1927 L 143: 99 IC 692]. A judicial custom though of comparatively recent date may contain evidences of specific instances sufficient to rebut the presumption of correctness of entry in *riwazi-i-am*. The value of such a decision arises from the fact not that it is relevant under ss 13 and 42, as forming in itself a 'transaction'. But that it contains specific instances relating to the relevant custom [*Subhani v. Nawab*, 68 IA 1 : A 1941 PC 21]. Entries in *riwazi-i-am* are to be taken as referring to custom relating to succession to ancestral property unless stated otherwise [*Hurmate v. Hoshiaru*, 25 Lah 228, 235 FB : A 1944 L 21 **relied** on in *Ujagar v. Jeo*, A 1959 SC 1041 : 1959 Supp 2, SCR 781]. The *riwazi-i-ams* of Gurudaspur district in so far as they purport to record the local custom as to the right

cut instance of custom recognised by parties themselves [*Dewan v. Santi*, A 1937 L 228]. A custom becomes law when it receives judicial recognition in such a way as to put the matter beyond the region of evidence [*Girish v. Rabindra*, 61 C 694; *Md Azam v. Mirza*, A 1943 N 84] or when repeatedly recognised in a series of cases [*Banarasi v. Sumat*, A 1936 A 641]. Material customs must be proved in the first instance by calling witnesses acquainted with them until the particular customs have, by frequent proof in the courts, become so notorious that the courts take judicial notice of them [*Effuah v. R*, 162 IC 461: A 1936 PC 147]. Courts should not place greater value on judicial decisions than on the statement of custom in customary law. A judicial decision depends on the evidence produced in the case which may be a badly conducted one [*Balanda v. Suban*, 17 L 232]. Previous decrees and judgments recognising a particular custom are mere documentary evidence and not binding as decisions having the force of law. The judgment may be merely evidence under ss 40, 41, 49, 87 and 32(*4*) or it may be admissible under ss 13 and 43 [*Bai Sakar v. Ismail*, A 1937 B 65]. Where a custom alleged to be followed by any particular class of people is in dispute, judicial decisions in which such customs have been recognised as the custom of the class in question are good evidence of such custom [*Shambhu v. Gayan*, 16 A 379; see 22 WR 397 *ante*]. The Madras High Court attaches weight to decisions of *panchayats* even [see *Gopalayyan v. Raghupatiayyan, ante*). Judicial decisions recognising existence of a disputed custom among the community of one place are very relevant as evidence of the same custom among the same community of another place, but the evidence that the usage has application to the particular case cannot be dispensed with [*Gateppa v. Eramma*, A 1927 M 228: 51 MLJ 757]. Where a custom or usage, whether in regard to a tenure or a contract or a family right, is repeatedly brought to the notice of the courts of a country, the courts may hold that custom or usage to be introduced into the law without the necessity of proof in each individual case. It becomes in the end, truely a matter of process and pleading [*Raja Rama v. Raja of Pittapur*, 45 IA 148: 41 M 778: A 1918 PC 81: 23 CWN 173; *Ujagar v. Jeo*, A 1959 SC 1041; *Banarsi v. Sumat*, A 1936 A 641, 648; *Jugal v. Bishnu*, A 1955 C 419; see *Rampal v. Bajrang*, 3 OWN 73; *Sano v. Purna*, A 1925 N 174]. In deciding questions as to customary law, if there are texts or series of decisions, we should follow them [*Veluthakkal v. Veluthakkal*, 31 MLJ 879]. The ambit or extent of a custom, however, is a matter of proof on which evidence may be given [*Audh v. Gajadhar*, A 1954 SC 417: 1955 SCR 70].

—Proof of Local Custom.—To prove a local custom, the evidence must be precise and conclusive [*Durga Pd v. Durga Kuari*, 20 WR 154]. Local custom is binding on all persons in the local area and differs entirely from family custom [*Raj Kishen v. Ramjoy*, 1 C 186: 19 WR 8; *Satyanarain v. Satya Niranjan*, 28 CWN 351: 79 IC 825: A 1924 PC 5 : 51 IA 37]. It must be pleaded with particularity as to the local limits of the area, and the evidence must be evidence as to the prevalence of the custom in that area [*Satyanarain v. Satya Niranjan, sup*].

—Proof of General Custom.—A general custom cannot be proved by the statements of two individuals; not can it be proved by the evidence of a few antagonistic witnesses [*Jai Krishna v. Raj Krishna*, 1 WR 153]. The burden of proving that a general custom is not recognised in a particular locality lies on the person who makes the allegation [*Sitaram v. Morati*, 57 IC 381].

Proof of Special Custom.—A special custom must have the attributes of antiquity, certainty, and uniformity and it must be consciously accepted as having the force of Law. These conditions must be proved by clear and unambiguous evidence [*Ramalakshmi v. Sivananatha*, 14 MIA 570; *Mura Bibi v. Vellaynama*, 8 M 464; *Har Pd v. Sheo Dayal*, 3 IA 259, 285; *Jogesh v. Dhakeswari*, 45 CWN 809; *Harihar v.*

variance are admissible, no matter if such instances took place after the institution of the suit involving the custom [*Kishan v. Faqir*, A 1928 L 966].

Custom of succession of properties of *math* may be proved by proof of positive tradition in the *math* or by a long series of instances [*Rajendra v. Shyam*, A 1954 P 586]. Except so far as analogy may serve to explain anything that is itself obscure, the customs of other localities are not relevant [*Satyanarain v. Satya Niranjan*, 28 CWN 351: 3 P 183: 51 IA 37: A 1924 PC 5].

Where Evidence of Usage Not Admissible.—Evidence of usage may be adduced to explain what is doubtful but it is not admissible to contradict or vary what is plain [*Blackett v. Royal Ex Ass Co*, 2 C & T 244; *Crofts v. Marshall*, 7 C & P 597].

—Facts Necessary Before a Custom Can be Recognised by Court.—What the law requires before an alleged custom can receive the recognition of the court and so acquire legal force, is satisfactory proof of usage so long and invariably acted upon in practice as to show that it has, by common consent, been submitted to as the established governing rule of the particular family, class or district of country, and course of practice upon which the custom rests, must not be left in doubt but be proved with certainty [*Perumal v. Muthu Ramalinga*, 3 MHC 75, 77]. A custom must be proved by strict evidence that what is sought to be established has existed unaltered and uninterrupted from time immemorial [*Beni Madhab v. Jaikrishna*, 7 BLR 152: 12 WR 495]. To prove or disprove a right or custom, the evidence of a transaction relevant under this section should be one by which (and not in which or in the course of which) the right or custom was asserted or denied [*Bansi v. Mir Amir*, 11 CWN 703]. Nature of evidence required to prove an alleged custom [*Girraj v. Hargobind*, 32 A 123; see also *Har Pd v. Sheo Dayal, ante*; *Gopalyyan v. Raghupatiayyan, ante*]. It is open to a court to infer from long enjoyment not exercised by permission, stealth or force, the existence of a custom [*Sadilal v. M D Ishaq*, 33 A 257].

—Relevancy of Facts Relating to Custom Under Other Sections.—Statements giving the opinion of a person in suppport of a custom or right is relevant under s 32 cl (*4*); a statement contained in any deed, will or other document which relates to any such 'transaction' as is mentioned in cl (*a*) of this section is relevant under s 32 cl (*7*); judgments, orders or decrees if they relate to matters of a public nature are relevant under s 42; the opinion of persons who would be likely to know of the existence of any general custom or right, when the court has to form an opinion as to its existence is relevant under s 48 and the grounds of such opinion are also relevant under s 51. See these sections and the notes thereto.

—Admissibility of Judicial Decisions in Support of Custom And Their Value.—It is well settled that judicial decisions recognising a custom are relevant and admissible notwithstanding that they are not 'inter partes' [*Daniraiji v. Vahuji*, A 1971 G 188 (cases discussed)]. The evidence afforded by decision of the courts in the enforcement of a custom is the most satisfactory [*Gurudayal v. Jhandu*, 10 A 585; *Barkat v. Zulfiqur*, A 1950 L 6; *Mahadeo v. Baleswar*, A 1939 A 626; *Neil v. Devonshire*, LR 8 AC 147; *Kehar Singh v. Dewan*, A 1966 SC 1555]. But a decree which does not bind the parties as *res judicata* is a mere piece of evidence capable of rebuttal. It does not necessarily prove a custom [*Niamat v. Abdul*, A 1930 S 193; *Tulsidas v. Keshav*, A 1926 S 161]. Previous judgments are admissible under s 13 only as instances in which the custom was judicially recognised, but are not conclusive. They are not judgments in *rem* [*Jatan v. Jivan*, A 1933 L 553: *Janat Bibi v. Gulam*, A 1934 L 861; *Balanda v. Suban*, 17 L 232; *Narain v. Malik*, 17 L 133]. A judicial decision recognising a custom cannot have the same importance as a clear-

[*Katasami v. Venkatareddi*, 15 M 12]. Where the question is as to an exclusive right in the design of a label, judgments against other persons on the same allegation are relevant [*Palliram v. R*, A 1931 O 227].

Where succession to the office of *K* the late mohunt is in dispute, a judgment in a previous suit by *K* in which *K* from whom a party to the previous suit purports to derive his title asserted his right as a spiritual collateral of *M* and on that footing got a decree is admissible [*Sital v. Sant*, A 1954 SC 606].

In a suit for declaration of title to the minerals of one of the villages of an estate (called Archa), the defendants contended that they had full proprietary right in the estate under a partition. They relied on a judgment in a suit for partition of the zemindary in 1793 to which the Archa branch had not been parties where it was held that the zemindary was partible—*Held*, that the judgment was admissible under ss 13 and 43 only as establishing the particular partition resulting from the suit, and neither the reasons for the judgment nor any finding of fact other than the transaction itself, is relevant to the present suit [*Gobinda v. Shyamlal*, 58 IA 125: 58 C 1187: 35 CWN 521: A 1931 PC 89; see *Gadadhar v. Sarat*, 44 CWN 935; *Sanveerangouda v. Basangouda*, A 1939 B 313; see *Inayatullah v. Kanshi*, A 1937 L 437]. A judgment not *inter partes* in which the purchase at a revenue sale by the plaintiff's predecessor is recited, is admissible as a transaction [*Nanilal v. Prahlad*, 56 CLJ 369 : A 1933 C 222]. So also a judgment not *inter partes* where the question was whether the tenancy was permanent or not [*Kumud v. Himangshu*, A 1937 C 373].

In a partition suit in which the properties were claimed as self-acquired, the judgment in a previous suit for maintenance by a widow is admissible as an instance of assertion that the properties belonged to the joint family, as the amount of maintenance would depend on the extent of the joint family properties and there was an issue on it [*Srinivas v. Narayan*, A 1954 SC 379: 1955 SCR 1]. Judgment not *inter partes* is admissible in evidence as an instance to prove relationship [*Ramachandra v. Gadadhar*, A 1980 Or 54]. As to admissibility of judgments determining compensation under the Land Acquisition Act in respect of the market value of neighbouring lands, see *Nageswara Rao v. Special Dy Collr*, A 1959 AP 52. Judgment produced as evidence to prove title in regard to the suit property is admissible in evidence even though the plaintiff was not examined in the court [*Tirumala v. K.M. Krishnaiah*, A 1998 SC 1132, 1134].

The fact that the ancestor of a man failed in a contested suit to prove the relationship of his line with the deceased fifty years ago, is evidence against the existence of the right to claim as heirs of the deceased [*Secy of S v. Subbaraya*, 18 MLT 504: 1915 MWN 962 (*Natesa v. Venkatarama*, 30 M 510 **folld**)]. A Judgment not *inter partes* in a previous suit in which it was decided that plaintiff's father was governed by the Benares school against the contention of the defendants that he was governed by the Mithila school, is admissible in a subsequent suit in which plaintiff claimed to be governed by the Benares school [*Chandrachoor v. Bibhuti*, 23 P 763: A 1945 P 211]. When a party sets up a particular right, judgments not *inter partes* in previous cases in which a similar right was asserted are admissible [*Kalu v. Bhagwati*, 60 IC 142; see *Mahendra v. Ballar*, A 1956 As 115 : *Apaya v. Govind*, A 1956 B 625]. Where the question is whether the property is public or private, judgments not *inter partes* holding that the property was public is admissible [*Hari Kishen v. Raghubar*, 97 IC 853: A 1926 O 578]. In a suit for declaration of land as *wakf* previous judgments between different parties holding that other parts of the land were *wakf* are admissible [*Ramlal v. Khusi*, A 1949 Pu 233].

A judgment in a former suit holding that an individual was a minor is not relevant as an instance in which a right was asserted or recognised [*Venkata v. Subbaraya*, 33 IC 142]. Orders for the appointment and discharge of guardian of *A*, a minor, cannot be received in evidence to prove the date of birth of *A* from the recitals contained therein [*Harakumar v. Jogendra*, 38 CLJ 186: A 1924 C 526]. Certain judgments in proof of defendant's minority, under s 13 cl. (*b*), *held* that the judgments were inadmissible, the cases in which they had been passed not being instances in which any right asserted by the defendant was recognised or exercised or in which its existence was asserted, disputed or departed from [*Gayadin v. Dulari*, 6 ALJ 69: 2 IC 839]. Statement of plaintiff's age in a decree to which the defendants or other predecessors were no parties, is not conclusive and binding against defendants [*Nilratan v. Abdul*, 32 CLJ 75: 59 IC 3].

In a suit for rent by *X* against his tenant, the latter pleaded that his landlord was *Y*. A judgment obtained by *X* against *Y* which decided that the title was in *X* is a very strong piece of evidence against the tenant as to who was the landlord [*Purna v. Ramesh*, 87 IC 733: A 1925 C 1212]. A previous judgment of a civil court where the right of the tenant to be in possession was recognised is admissible in the criminal trial against the tenant for the murder of the owner of the land [*Hans Raj v. State of H.P.*, 1985 Cri LJ 1463, 1469: (1985) 1 Chand LR (Cri) 360 (HP) (DB)]. In a question relating to legitimacy, application for mutation to revenue-paying estate is relevant under ss 13, 50 as assertion of the right as a legitimate son. So also a judgment relating to a transaction in which a claim was set up as a legitimate son [*Galstaun v. Mirza*, 73 IC 728: 10 OLJ 263]. A judgment in which the illegitimacy of a person is recognised, is admissible under s 13 where the question of his legitimacy is in issue in a subsequent suit [*Raj Fateh v. Baldeo*, 109 IC 310: A 1928 O 233]. A previous judgment in a suit contesting the right to the then *granthi* to alienate certain shops where it was held that these properties were *wakf* and attached to the *gaddi* and could not be alienated by the *granthi* could only be treated as admissible for showing that at that time also the right of the *granthi* to alienate was called in question [*Indar Singh v. Fateh*, 1 L 540

A judgment not *inter partes* in land acquisition reference and relating to land situate near land in question is not admissible as an instance or one from which the market value of the land in question can be deduced. Such a judgment cannot obviously fall under ss 40-43 under s 11 or s 13 [*Special L A Officer v. Lakhamsi*, A 1960 B 78 (*Madan v. Secy of S*, A 1925 C 481; *Secy of S v. Amulya*, A 1927 C 874 **disstd** from)]. The judgments in earlier land acquisition cases in respect of adjoining lands ought to be treated as pieces of evidence to be used for certain limited purposes for example to show the rate per bigha [*State of U P v. Nath Hoo*, A 1986 All 172, 173: 1985 All WC 733].

A decree between the parties though *ex parte*, which has not been set aside is admissible as a piece of evidence in a subsequent suit between some of the parties although it may not be *res judicate* [*Kiran v. Jagannath*, A 1928 C 472]. *Ex parte* decrees for rent obtained by a landlord against the heirs of a tenant and satisfied by the latter are evidence of the existence of the tenancy at the date of the decree [*Anukul v. Kamala*, A 1923 C 270].

Decision in a case under s 103 and judgment in a case under s 107 B T Act regarding certain other tenants in the same village are relevant under s 13 [*Janki v. Saudagar*, 56 IC 417: A 1920 P 177]. Judgments *inter partes* can be proved in order to prove the conduct of parties or to show particular instances of the exercise of rights, or admissions made by ancestors of parties or how the property was dealt with

previously [*Gopal v. Sitaram*, 97 IC 694: 9 NIL 215]. Proceedings in and documents filed in a previous suit are relevant evidence against a party, not a party to that suit [*Madan v. Kirtiram*, 23 CLJ 578].

A decree for rent obtained by one co-sharer landlord is admissible in a suit by another co-sharer landlord, under s 13 to prove rate of rent [*Byomkesh v. Jagadishwar*, 22 CWN 304; *Kanta v. Gopi*, A 1928 C 355, see also *Sarat Soondary v. Anund*, 5 C 273: 4 CLR 448—CONTRA: *Surendra v. Braianath*, 13 C 352 FB; *Abdul v. Raj Ch*, 10 CWN 1084; *Tepu Khan v. Rajani*, 25 C 522 FB; *Prem Chand v. Offl Trustee*, 27 CWN 56 note]. It is not admissible as the subject-matter of the two suits are not identical [*Kanta v. Gopi*, 32 CWN 100: A 1928 C 353 (*Naresh v. Secy of S, infra* **relied** on)]. Decree obtained by a co-sharer as to his share of a plot of land against a third party is not admissible as evidence of title in a subsequent suit by another co-sharer, but it becomes admissible where a partition of the plot of land has been made by the co-sharers in consequence of the decree [*Naresh v. Secy of S*, 28 CWN 453 PC: 50 C 446 : 50 IA 121: A 1923 PC 1]. In a suit against a tenant the landlord sought to prove the prevailing rate of rent by a finding on the point in a previous suit to which the defendant was not party—*held* that the previous judgment was not admissible [*Raghupat v. Narbadeshwar*, A 1938 P 103 : 166 IC 664]. Judgments not *inter partes* in other standardisation of rent cases are not admissible to fix standard rent [*Gouri v. Anil*, A 1953 C 671].

In a case under s 145 Cr P Code, the only section under which a judgment in a civil suit on a question of title followed by delivery of possession might be said to be admissible is s 13 on the ground that it provides an instance in which the right to be in possession was claimed or recognised [*Hosnaki v. S*, A 1956 A 81]. In an application for registration of trade mark judgments in which parties, facts and trade marks were entirely different cannot be used for deciding whether applicant's mark is identical or deceptively similar to that of opponent [*Prem v. Registrar*, A 1969 C 80].

As to admissibility of other judgments, see notes to s. 11.

—Previous Judgments in Cases Involving Custom, Right etc.—[see also *ante*, "*Admissibility of judicial decisions in support of custom and their value*"]. Judgments in previous suits not *inter partes* were held admissible in evidence under s 13 as evidence of particular instances in which the right or custom was claimed [*Ramasami v. Appavu*, 12 M 9]. In determining a particular right or custom, previous judgments or decrees involving instances in which the right and custom in question had been successfully asserted, are admissible [*Koondoo v. Dheer*, 20 WR 345; *Imam Bibi v. Abdul*, A 1936 L 929]. In support of the plaintiff's contention that the customary *hath* in the paraganah was one of 18 inches certain decrees obtained by the zemindar against other tenants in the same paraganah in suits in which 18 inches had been taken as the *hath* were admissible as they furnished evidence of particular instances in which a custom was claimed [*Jianutullah v. Ramanikant*, 15 C 233]. On the question whether certain maintenance grants were heritable and alienable, old judgments in which the pleadings were set out were held to be admissible under s 13 as instances in which the right in question was claimed, disputed and disallowed [*Bhaya Dirgui v. Pande*, 3 CLJ 521; see also *Parbutty v. Purno Ch*, 9 C 586 and *ante*: "*Admissibility of judicial decisions ..... and their value*"]. Previous decisions on the question of adoption have great evidentiary value under s 13 [*Mahashwar v. Maiana*, A 1964 Or 174]. The fact a custom was not pleaded in litigations between members of the community where it might have been pleaded, is relevant evidence [*Mariam v. Shaikh*, 28 CLJ 306: 48 IC 561]. See also *post*, S 42: "*Judgments relating to the existence of custom*".

Previous judgment in a Criminal Case.—It is admissible as evidence of a particular instance in which the right was claimed, but it is not a conclusive proof of it [*Adhikaraimayam v. Heikrujam*, A 1973 Gau 38].

—Judgment in Terms of Compromise.—Where a suit was disposed of according to a compromise of which the judgment set out the terms in the form of a recital, *held* that the judgment, though not in the form of a decree, was the record of a transaction by which the rights of the parties were recognised, and was therefore relevant as evidence under s 13 [*Roopchand v. Hurkissen*, 23 WR 162]. A judgment based upon a compromise or confession, although of some probative force, cannot be placed on the same footing as one in which after contest as custom was held to be proved or negatived [*Imperial Oil Mills Co Ld v. Misbahuddin*, 2 L 83: A 1921 L 69].

—*Razinama* in Criminal Proceedings.—Criminal proceedings not *inter partes* and agreements entered into between parties not before the court, were held to be admissible in evidence, the Privy Council observing, that the *razinama* in the criminal proceedings, though apparently made between tenants, seems to have been subsequently acted upon, and may be properly used to explain the character of the enjoyment of the property [*Rameshur v. Kunj Behari*, 6 IA 33 : 4 C 633].

—Order in suit for Malicious Prosecution.—In a suit for damages for malicious prosecution, the judgment of acquittal of the criminal court is admissible for the purpose of seeing what the circumstances were which resulted in the acquittal, although the conclusions drawn are not binding or conclusive [*Rai Jung v. Rai Gudur*, 1 CWN 537; see also *Gulab Chand v. Chuni*, 9 Bom LR 1134]. See further s 43 under "*Judgments of Criminal Court when relevant*".

—Plaint and Written Statement.—Plaint and written statement in a previous suit not *inter partes* are relevant evidence in a subsequent suit as assertion of a right [*Chandrachoor v. Bibhuti*, A 1945 P 211; *Harilal v. Amrik*, A 1978 A 292].

—Map, Chitta, Robokari, etc. and Other Documents.—Entries in a *thak* map and its explanatory field book are evidence under s 13 both against proprietors and tenants because they could not have been compiled at all unless the possession of the person holding the plots shown in them had been asserted [*Dowlat v. Khublal*, 22 IC 645 (*Jagadindra v. Secy of S*, 30 C 291 : 30 IA 44 : 7 CWN 193 **foll**d)]. A map prepared by an officer of Government in charge of a *khas mehal* possessed by the Government as a private proprietor, is relevant as evidence of possession or of assertion of a right [*Janmejoy v. Dwarka*, 5 C 287: 4 CLR 574]. Map prepared by private party long before suit for declaration of title is not admissible unless it is proved that it was a transaction by which a right was recognised or asserted [*Sashi Bhusan v. Nawab*, 49 IC 951]. When a map represents a transaction within s 13, *ie* when it is a part of the document of title by which the right was created or claimed it need not be separately proved [*Kedar v. Mahendra*, 54 CWN 671]. A map prepared in a suit between defendant and a third party in which there was no dispute about the present lands is not admissible without examining the maker or otherwise providing its correctness. Ss 11, 13, or 36 is not applicable [*Dwijen v. Naresh*, 49 CWN 791].

A *Chitta* prepared by Government in the capacity of a landlord, though not a public document and does not come under s 83, may yet be used under s 13 as being evidence of instances in which the rights now in controversy were recognised or asserted [*Nobendra Kishore v. Kazi Lutf*, 2 IC 513]. So also a map prepared (in 1872) under direction of Govt acting not in its sovereign capacity, but as landlord of the holding in dispute [*Upendra v. Cal Corpn*, 16 CWN 116]. *Chittas* by Govt for

resumption proceedings are not admissible under s 13 as assertion of right [*Upendra v. Radhagobinda*, A 1927 C 189: 99 IC 85]. *Chittas* prepared by Government for resuming surplus land acquired for roadway are admissible as explanatory of the resumption proceedings [*Graham v. Phanindra*, 19 CWN 1038 (*Ramchunder v. Bunseedhur*, 9 C 741 refd to). As to Govt *Chittas*, see further s 36]. *Chittas* prepared by zemindars in the absence of tenants are admissible in rent suits, but thier evidentiary value depends on the circumstances of each case [*Aptabuddi v. Alla Hafiz*, 88 IC 548; A 1925 C 1104]. *Chittas* are admissible against third parties under s 13 or s 11 [*Abdul Khaleque v. Susil*, 39 CWN 330; *Dwijen v. Naresh, sup*]. A *robokari* (court proceeding) in a case in which certain decree-holders sought to attach the *Mokruree* rights of an ancestor to the defendants in a *Jagir* was held to be relevant under s 13 [*Luchmee v. Raghoobur*, 24 WR 284].

Zemindari papers prepared in the course of business and in due management may be evidence under s 13 if not under s 36 or s 83 in a dispute with reference to which the papers have been prepared. Govt *khas mehal* papers would therefore be admissible when Govt as landlord asserted that a land was not within the *jote* of P, but was in the *khas* possession of the landlord [*Sutu v. Alep*, A 1927 C 576 : 101 IC 792]. Documents containing an assertion of title to and possession of the property in dispute on behalf of predecessor-in-title of the plaintiff were held admissible [*Nityakali v. Sarat*, 51 IC 866]. A statement as to the position of cultivators in an estate and the existence of certain tenancy right made by the manager of the estate appointed by the Collector when an enquiry was being made as to their position, is admissible under s 13 in a suit in which their position is in question [*Shankarrao v. Sambhu*, 1941 Bom 107: 45 CWN 57: A 1940 PC 192].

Report by a local Agent on an enquiry made by him under Bengal Regulation 19 of 1810 whether a temple is public or private is admissible [*Commr v. Kanak Durga*, A 1958 OR 183].

—Road-cess Papers, Partition Papers, etc.—Road-cess papers and a deed of sale are evidence *quantum valebat*. So a decree, although the party against whom it is treated as evidence was no patry to it [*Daitari v. Jugo Bundhoo*, 23 WR 293]. An entry in a road-cess return in which a former proprietor admitted the existence of a *lakheraj* although not binding on the auction-purchaser, is evidence under s 13 [*Monmohini v. Adwaita*, 19 IC 548]. A partition paper prepared under s 57 of the Estate Partition Act (7 of 1876 BC) is admissible under s 13, as a record of a transaction in which the right to certain plots is recognised [*Shk Joki v. Dino Bandhu*, 2 IC 367]. The fact that partition papers are not binding against tenants does not affect their admissibility [*Ghoghar v. Jagarnath*, A 1947 P 475 (*Rudra v. Rameshwar*, A 1916 P 37 **not approved**)]. Absence of the name of predecessor of plaintiff from the category of tenants mentioned in the road-cess return, is evidence against the plaintiff [*Imrit v. Sridhari*, 15 CLJ 7: 17 CWN 108]. *Butwara* proceeding papers are good evidence of title as against the parties to the *butwara* proceedings to rebut the presumption raised by Record of Rights [*Sri Ans v. Jagat*, 38 IC 205 (*Nanda Lal v. Mohunt*, 17 CWN 779 **distd**)]. [As to *Butwara* papers, see further cases cited under s 35]. Statements as to existence of custom in Deputy Collector's report as to the settlement proceedings are admissible under s 13 as recognising a custom [*Krishna v. Ahmadi*, 57 A 588].

—Sale Certificate.—When in execution, the landlords advertised the holding as *mukrari*, they were estopped from afterwards pleading non-permanency and the sale certificate would be strong evidence against them under s 13 [*Khirode v. Janaki*, 17 CWN 248 note: 20 IC 753]. Sale certificate is admissible as a transaction by which

the right to possession of certain lands was recognised [*Basanta v. Jnanendra*, A 1940 C 539: 71 CLJ 504; *Amarnath v. Trilochun*, 76 CLJ 251: A 1943 C 565].

—Letters.—Letters written by Executive Engineer and other officials as agents of Government admitting that a road belongs to the District Board are admissible as instances in which the right of the District Board to the land was recognised [*Secy of S v. D B Rangpur*, A 1939 C 758: 70 CLJ 126].

—Documents in Execution Proceedings.—In a case, in which plaintiff claimed the existence of an under-tenure within a tenure purchased by the defendants, it was *held* that writs of attachment containing statements in support of plaintiff's case were admissible in evidence [*Jogesh v. Rohini*, 21 CLJ 65].

—Police Reports and Orders Under S. 145 Cr P Code etc.—Police reports and orders for possession by magistrates under s 145 Cr P Code are admissible in evidence under s 13, being a "transaction" in which the right or custom was claimed, modified, recognised, asserted or denied [*Dinomoni v. Brojomohini*, 29 IA 24: 29 C 187: 6 CWN 386: 15 MLJ 83 *ante*]. Such orders are admissible against all persons when the fact of possession on the date of the order has to be ascertained. But as between parties to the proceedings they are also admissible as evidence as regards possession before two months of the date of the order [*Jogendra v. Mohim*, 34 CWN 358: 57 C 987]. Such orders are admissible on general principles as well as under s 13 to show the fact that such orders were made [*Hasim v. Abjal*, 4 CLJ 30: 82 IC 392: A 1924 C 1046]. The facts of previous proceedings under s 145 and order thereon must be taken into consideration in a subsequent suit for possession based on the title [*Boroda v. Manmatha*, 41 IC 456]. Order under s 145 Cr P Code set aside by the High Court is admissible to show that possession was claimed by plaintiff who has complained of forcible dispossession [*Devi v. Sisram*, A 1939 L 188]. A judgment in a criminal case in which the plaintiff's assertion of possession was held to be with him, is inadmissible against a person not a party to the criminal proceedings to prove plaintiff's possession at date of judgment, but it is admissible under s 13 to prove the assertion of plaintiff's title to the land at the date of judgment [*Param v. Santosh*, A 1942 P 372].

—Will.—Admissibility of a statement in a will under s 13 presupposes that the will is regarded as a "transaction" and further the right or custom should have been created, claimed &c by it. It has been held that recital in a will that the property dealt with is the testator's [*Periasami v. Varadappa*, A 1950 M 486] or that the tenancy bequeathed is permanent is admissible [*Pramatha v. Champa*, 56 C 275: A 1929 C 473—CONTRA: *Satindra v. Krishna*, A 1917 C 805: 36 IC 882; *Tottempudi v. T*, 27 M 228]. In a suit for partition and adoption, a will was relied upon as evidence of a prior division and adoption [*Virayya v. Adenna*, A 1930 PC 18: 58 MLJ 245: 51 CLJ 136]. Statement in a will that it was testator's self-acquired property is admissible under s 32(*7*) [*Venkatataramayya v. Seshamma*, 1937 Mad 1012, 1019: A 1937 M 538]. As to relevancy of will of a living person, see *James v. Ghulam*, A 1949 PC 151: 1949 Bom 284.

Will not admitted to probate cannot in the absence of proof by attesting witness be admissible under ss 13 (*a*), 32 (*7*) [*Maheshwar v. Sundar*, 22 CLJ 551]. See further notes under s 32 *post*.

—Sale-deeds, Mortgage bonds etc.—Sale deeds have been admitted as transactions and instances in which rights were asserted and recognised [*Sabran v. Odoy*, 1 P 375; *Channoo v. Jung*, A 1957 P 293]. A *Kobala* admitting the right of the plaintiff to an easement is relevant and admissible under s 13 [*Giris v. Kunja*, 26 IC 781]. An

assertion in a *kobata* executed by a tenant in favour of his transferee that his right was a permanent one is admissible under s 13 in a suit by the landlord for ejectment [*Jnanendra v. Nasea*, 36 CLJ 526; *Jogendra v. Subashini*, 45 CWN 590; see also *Raisk v. Prasanna*, 60 CLJ 569: A 1935 C 367; *Kameshwar v Hriday*, 67 CLJ 111: A 1938 C 76; *Sailendra v. Bijan*, 49 CWN 133: A 1945 C 283]. Sale deed executed by third person in favour of plaintiff is admissible in proof of title in a suit for declaration of title against defendant though the recitals in it are not binding on the latter [*Maharaja v. Barkutulla*, A 1946 C 450]. A mortgage containing an assertion of title as owner by mortgagor is relevant under s 13, as evidence of the title asserted. It is also admissible under s 32 (*7*) [*Nallasiva v. Ravan*, A 1921 M 383: 70 IC 389: *Manmatha v. Rajeswar*, 55 C 355: 32 CWN 184; *Ishan v. Ataullah*, A 1937 L 688]. Description of lands by mortgagors in mortgage deed *inter partes* as "in our *sir* and *khas* possession" is admissible as assertion of title [*Harihar v. Deo Narain*, A 1956 SC 305 : 1956 SCR 124].

Statement in *patta* by plaintiff in respect of an adjoining land, that the land in suit belonged to plaintiff's lessor is inadmissible [*Radha Kr v. Sarbeswar*, 29 CWN 469: 86 IC 674; *Kheman v. Chotta*, A 1938 L 635]. An assertion in a mortgage deed executed by the father of the plaintiff and previous *shebait* in favour of the defendant to the effect that the properties were secular property and had been partitioned before, is admissible as evidence of the transaction against the plaintiff, the evidentiary value being very slight [*Sutherland v. Sri Iswar*, 62 CLJ 10]. Plaintiffs as lessees sued for recovery of possession in land. A *patta* executted by one of the plaintiffs a year after their lease in respect of an adjoining plot of land contained a statement that the land in suit belonged to the plaintiff's lessors—*held* that the *patta* not relating to the suit, was not a transaction and was inadmissible under s 13. It was not a "fact" within s 11. It was an admission in his favour under s 21 and is not admissible under any clause of s 32 [*Radha Kr v. Sarbeswar, sup*; *Rangayyan v. Innasimuthu*, A 1956 M 226]. *Kobalas* mortgage-deeds, partition decrees not *inter partes* in which plaintiff and his predecessor claimed the suit land to be *lakheraj* are admissible [*Priyambada v. Priyanath*, 42 CLJ 327; see however *Brajendra v. Mahim*, 31 CWN 32]. Defendants mortgaged the rent-land to the plaintiff stating the rent as Rs. 18. The debt was paid and subsequently the plaintiff sued the defendant for rent at Rs. 24 after purchase of the landlord's interest—*held* that the mortgage bond was admissible on the question of rent under s 13 [*Abdul Munser v. Yakub*, A 1928 C 703]. Certified copies of sale deeds are admissible to prove a custom in the village entitling the *rayats* to transfer houses as the object of producing certified copies is not to prove the original but only to prove instances of transfers [*Narain v. Net*, A 1940 A 535; *Kallu v. Ganeshi*, A 1936 A 119].

Recitals in Documents Not *Inter partes*.—Documents containing recitals that a particular plot of land is included within a particular *howla* though not *inter partes* were held admissible under s 11 or s 13 as a transaction by which the right to hold those plots as part of the *howla* is recognised, although they are not conclusive or binding evidence and may be very weak or even of no weight at all [*Dwarka v. Mukunda*, 5 CLJ 55; see also *Bissesswar v. Harbans*, 6 CLJ 659]. Recitals in sale-deed between strangers are admissible to show ownership of boundary lands [*Katori v. Om Prakash*, A 1935 A 351] so also documents not *inter partes* containing recitals that a particular plot of land belongs to a particular well, are admissible under s 11 (*b*) or s 13 [*Farzand v. Zafar*, 46 IC 119]. In *Ningawa v. Bharmappa*, 23 B 63 recitals of boundaries in sale deeds of adjacent land were held admissible under s 32(*3*) **following** *Leelanund v. Lakhputee*, 22 WR 231, but 22 WR 231 was not a case of recital of boundaries of adjoining lands. It was the case of a statement contained in a

sanad relating to the land itself [see s 32 (2) *post*]. In later dicisions a contrary view has been taken: Thus in *Saroj v. Umed*, 35 CLJ 19: 25 CWN 1022 (**following** *Abdulla v. Kunj Behari*, 16 CWN 252 and *Abdul Ali v. Syed Rejan*, 19 CWN 468) documents not *inter partes* containing recitals of boundaries of other lands were held not admissible in evidence under s 11 or s 13. See also the remarks of GARTH CJ, in *Brojeshwari v. Buddhanudhi*, 6 C 268. In *Abdulla v. Kunj Behari, ante*, it was held that where the suit was for ejectment, the fact that the proprietors of a neighbouring piece of land in describing the boundaries of his parcel stated that the land of the predecessor of the defendant was situated on that boundary, is not relevant.

The authorities were reviewed later and it was held that recitals of boundaries of other lands in documents between third parties are not admissible in evidence either as regards the description of the boundary or as to the nature of the land [*Pramatha v. Krishna*, 28 CWN 1092: 84 IC 420 **following** *Saroj v. Umed sup* and holding *Dwarka v. Mukunda, sup* **superseded**]. The view in *Pramatha v. Krishna, ante*, was affirmed in a large number of cases [see *Chooni v. Nilmadhav*, 41 CLJ 374: 86 IC 734: A 1925 C 1034; *Brojo Mohan v. Gaya*, 30 CWN 760: 97 IC 26: *Kumud v. Dilsook*, 45 CLJ 138: 101 IC 542: A 1927 C 918; *Brajendra v. Mohim*, 31 CWN 32; *Ambika v. Kumud*, A 1928 C 983; *Damodar v. Jadunath*, 91 IC 449 (C): A 1926 J 91; *Abdul Karim v. Chhalle*, 91 IC 688: A 1926 C 479; *Lajpat v. Faiz*, 8 L 651 : 103 IC 889; *Ghulam v. Kalimullah*, 109 IC 728: A 1928 L 428; *Abdul Ghani v. Faqir*, A 1929 L 78: 111 IC 361; *Kanta v. Basudeb*, 39 CWN 311: *Sirsh Ch v. Kalachand*, 46 CWN 169; *Hari Ahir v. Sanghat*, A 1934 P 617; *Sakaldeep v. Sarjug*, A 1961 P 460; *Jagatdwipendra v. Bilash*, 59 C 454; *Jyoti v. Bharat*, 15 P 260; *Bhagwan v. Parbhu*, A 1936 L 1005; *Nanak v. Mian Md*, A 1936 L 114; *Soney v. Darabdeo*, 14 P 461 FB: A 1935 P 167 fall cases reviewed): *Ramautar v. Sheonandan*, A 1962 P 273; *Abdul Rahim v. Fakir*, A 1946 N 40]; *Kalappa v. Bhima*, A 1961 My 160; *Bhuriva v. Ramkali*, A 1971 P & H 9; *Pachakhan v. H D Gopalakrishna*, A 1975 Knt 179]. The opposite view that recitals in documents not *inter partes* describing lands as rent-free, mal, &c are admissible to show the nature of the land is represented in another group of cases [see, *Jnanendra v. Nasea*, 39 CLJ 526 and cases *ante* under "*Sale-deeds, Mortgage bonds*, &c"; *Sabran v. Odey*, 1 P 375 *post*; *Keshava v. Brahmadev*, 13 P 45; *Ashfaque Ali v. Asharfi*, A 1951 P 641; *Kanhaiya v. Bhagwat*, A 1954 P 326; *Kiran v. Srinath*, 31 CWN 135 *post*; *Dwarakadas v. Parbati*, 46 CWN 770; *Tikaram v. Motilal*, A 1930 A 299; *Natwar v. Alkhu*, 11 ALJ 139: 18 IC 752]. The view in the first group of cases that such a document made by a person cannot be made admissible against strangers appears to be supported by the principle of the decision in *Shrinivasdas v. Meherbai*, 44 IA 36: 21 CWN 558: 41 B 300: A 1916 PC 5 that recitals are, strictly speaking, evidence only as against the parties to the deed and those claiming through or under them. *Pattas* (leases) executed in favour of the landlord by his co-sharers after the creation of the tenancy are like third party documents and recitals therein are not admissible as against the tenant who has already acquired his interest from the landlord prior to the execution of those *pattas* [*Ali Hossein v. Jonabali*, 62 CLJ 534].

A mere statement of boundary cannot be classed with any of the verbs in s 13, cl (*a*) "created, claimed, modified, recognised, asserted or denied"; "mentioned" would be the appropriate verb. It is not admissible [*Karuppanna v. Rangaswami*, A 1928 M 105]. A Document relating to land or the boundaries of the land in dispute is not admissible for determining whether a certain party was or was not in possession of the land in dispute at the date of the document [*Abdul Karim v. Challe*, 91 IC 688: A 1926 C 479]. In some cases a distinction was drawn in this way. Where the executants of documents of neighbouring lands (between third parties) are called as

witnesses, the documents are admissible under s 157 as corroborative evidence. But where the executants though alive are not called, they are not admissible under s 11 or s 13 [*Shk Ketabuddin v. Nafar*, 44 CLJ 582: A 1927 C 230: *Ramanandan v. Laley*, A 1933 P 636; *Nrisingha v. Ashutosh*, A 1938 P 494 (*per* MANOHAR LAL J); *Rangayyan v. Innasimuthu*, A 1956 M 226; see also *Mahim v. Kanai*, 33 CWN 1085: A 1930 C 311 (**dissented** from in *Ambika v. Kumud*, A 1928 C 893); *Ghulam v. Kalimullah*, A 1928 L 428; *Lajpat v. Faiz*, 8 L 65]. In a case however a *hibanama* executed by *M* in favour of *K* both predecessors in interest of defendant in which the disputed land was described as *brahmottar* and a sale certificate by which the defendant purchased the land were held admissible [*Kiran v. Srinath*, 31 CWN 135].

Admissibility of recitals in documents not *inter partes* [see *Madanlal v. Durgadatt*, A 1958 Raj 206]. Recitals of boundaries in documents between third parties are not admissible under ss 11 or 13, but they might be admitted under s 32 when conditions laid down there are present [*Abdul Rahim v. Janabali*, A 1923 C 299; *Trimbak v. Ganesh*, A 1923 N 22; *Shk Ketabuddin v. Nafar*, 44 CLJ 582; *Pramatha v. Bejoy*, A 1927 C 234: 49 IC 910—CONTRA: They are not admissible whether executants are dead or alive [*Pramatha v. Krishna*, 28 CWN 1092; *Kumud v. Dilsook*, 45 CLJ 138; *Daulat v. Bishan*, A 1934 L 750]. Documents reciting transfer and sub-leases in all of which there was an assertion that the lease in permanent, are admissible to show that the lease is permanent [*Sukumar v. Nagendra*, A 1940 C 393: 71 CLJ 209].

A statement contained in an order for delivery of possession as to rent payable in respect of land, is not admissible in evidence in a suit between the landlord and the tenant in which the rent payable is in dispute [*Chandra v. Shk Elim*, 87 IC 512: A 1926 C 415].

Documents not *inter partes* showing the dealing of the property by the descendants of the original grantee as rent-free *brdhmottar* and evidencing the transfer of their interests are admissible to prove the title of the grantee [*Kiran v. Srinath*, 31 CWN 135 : 100 IC 453: A 1927 C 210]. Where the question was whether a plot was *mal* or *jote*, an *ekrarnama* by a third person in favour of the plaintiff's ancestor and describing the land as *mal* was held relevant under s 13 [*Sabran v. Odey*, 70 IC 18: I P 325].

Lunacy Proceedings.—Proceedings in lunacy under Act 34 of 1858 are admissible in a subsequent suit to show that the defendant was a lunatic at a particular time [*Padmabati v. Bonomali*, 24 CWN 378: 58 IC 566].

S. 14. Facts showing existence of state of mind, or of body, or bodily feeling.—Facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling, are relevant, when the existence of any such state of mind or body or bodily feeling is in issue or relevant.

[1]*Explanation* 1.—A fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists, not generally, but in reference to the particular matter in question.

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1. These *explanations* were substituted by s 1 (*1*) of the IE (Am) Act, 3 of 1891.

[1]*Explanation* 2.—But where, upon the trial of a person accused of an offence, the previous commission by the accused of an offence is relevant within the meaning of this section, the previous conviction of such person shall be a relevant fact.

Illustrations.

(*a*) *A* is accused of receiving stolen goods knowing them to be stolen. It is proved that he was in possession of a particular stolen article.

The fact that, at the same time, he was in possession of many other stolen articles is relevant, as tending to show that he knew each and all of the articles of which he was in possession to be stolen.

[2][(*b*) *A* is accused of fraudulently delivering to another persons a counterfeit coin which, at the time when he delivered it, he knew to be counterfeit.

The fact that, at the time of delivery, *A* was possessed of number of other pieces of counterfeit coin is relevant.

The fact that *A* had been previously convicted of delivering to another person as genuine a counterfeit coin knowing it to be counterfeit is relevant].

(*c*) *A* sues *B* for damage done by a dog of *B*'s which *B* knew to be ferocious.

The facts that the dog had previously bitten *X*, *Y* and *Z* and that they had made complaints to *B* are relevant.

(*d*) The question is, whether *A*, the acceptor of a bill of exchange, knew that the name of the payee was fictitious.

The fact that *A* had accepted other bills drawn in the same manner before they could have been transmitted to him by the payee if the payee had been a real person, is relevant as showing that *A* knew that the payee was a fictitious person.

(*e*) *A* is accused of defaming *B* by publishing an imputation intended to harm the reputation of *B*.

The fact of previous publications by *A* respecting *B*, showing ill-will on the part of *A* towards *B*, is relevant, as proving *A's* intention to harm *B's* reputation by the particular publication in question.

The facts that there was no previous quarrel between *A* and *B*, and that *A* repeated the matter complained of as he heard it, are relevant, as showing that *A* did not intend to harm the reputation of *B*.

(*f*) *A* is sued by *B* for fraudulently representing to *B* that *C* was solvent, whereby *B*, being induced to trust *C*, who was insolvent, suffered loss.

The fact that, at the time when *A* represented *C* to be solvent, *C* was supposed to be solvent by his neighbours and by persons dealing with him, is relevant, as showing that *A* made the representation in good faith.

(*g*) *A* is sued by *B* for the price of work done by *B*, upon a house of which *A* is owner, by the order of *C*, a contractor.

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1. These *explanations* were substituted by s 1 (*1*) of the IE (Am) Act, 3 of 1891.
2. This *illustration* was substituted by s. 1(2) of the IE (Am) Act, 3 of 1891.

A's defence is that *B's* contract was with *C*.

The fact that *A* paid *C* for the work in question is relevant, as proving that *A* did, in good faith, make over to *C* the management of the work in question, so that *C* was in a position to contract with *B* on *C's* own account and not as agent for *A*.

(*h*) *A* is accused of the dishonest misappropriation of property which he had found, and the question is whether, when he appropriated it, he believed in good faith that the real owner could not be found.

The fact that public notice of the loss of the property had been given in the place where *A* was, is relevant, as showing that *A* did not in good faith believe that the real owner of the property could not be found.

The fact that *A* knew, or had reason to believe, that the notice was given fraudulently by *C*, who had heard of the loss of the property and wished to set up a false claim to it, is relevant as showing that the fact that *A* knew of the notice did not disprove *A's* good faith.

(*I*) *A* is charged with shooting at *B* with intent to kill him. In order to show *A's* intent, the fact of *A's* having previously shot at *B* may be proved.

(*j*) *A* is charged with sending threatening letters to *B*. Threatening letters previously sent by *A* to *B* may be proved, as showing the intention of the letters.

(*k*) The question is, whether *A* has been guilty of cruelty towards *B*, his wife.

Expressions of their feeling towards each other shortly before or after the alleged cruelty are relevant facts.

(*l*) The question is, whether *A's* death was caused by poison.

Statements made by *A* during his illness as to his symptoms are relevant facts.

(*m*) The question is, what was the state of *A's* health at the time an assurance on his life was effected.

Statements made by *A* as to the state of his health at or near the time in question, are relevant facts.

(*n*) *A* sues *B* for negligence in providing him with a carriage for hire not reasonably fit for use, whereby *A* was injured.

The fact that *B's* attention was drawn on other occasions to the defect of that particular carriage, is relevant.

The fact that *B* was habitually negligent about the carriages which he let to hire, is irrelevant.

(*o*) *A* is tried for the murder of *B* by intentionally shooting him dead.

The fact that *A* on other occasions shot at *B* is relevant as showing his intention to shoot *B*.

The fact that *A* was in the habit of shooting at people with intent to murder them is irrelevant.

(*p*) *A* is tried for a crime.

The fact that he said something indicating an intention to commit that particular crime is relevant.

The fact that he said something indicating a general disposition to commit crimes of that class is irrelevant.

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COMMENTARY

Principle and Scope.—This section deals with the relevancy of facts showing the existence of a person's state of mind, or of body or bodily feeling. Facts, it has been seen, are either physical or psychological (v s 3). States of mind are psychological facts, and it is almost impossible to prove such facts by direct testimony, *ie*, the

testimony of a witness regarding another person's mental feelings. They can only be ascertained either by confession of a person's own mental condition or by presumptive inferences from surrounding circumstances of other physical facts. The state of a man's mind is a fact peculiarly within his own knowledge and nothing is more difficult than to probe his mind in order to ascertain what was passing within him when he committed a particular act. States of mind, such as, intention, knowledge, design, good faith, bad faith, negligence, malice, &c, are not capable of perception by the senses, but sometimes they become matters of important consideration by the courts, as the criminality or otherwise of some acts depends on the state of a man's mind or feeling at the time they are committed and such states of mind have got to be proved in certain cases, *eg*, a charge of receiving stolen goods with the *knowledge* that they were stolen. It is no doubt more difficult to prove the state of a man's mind than physical facts, but it is now held that it is not incapable of proof. In *Edgington v. Fitzmaurice*, 29 Ch. D 483, BOWEN, LJ, said: "The state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained, it is as much a fact as anything else" [see Phip 8th Ed p 139; Best, 11th Ed, s 12; Hals, 3rd Ed, Vol 15, paras 510, 523-26; Pollock's Fraud, p 61].

The principle on which S. 14 of Evidence Act is based is that when the intention of the accused is a relevant fact, evidence of similar transactions both prior and subsequent to the alleged offence, is admissible as evidence of intention. Thus the operation of S. 14 is confined to cases where the existence of state of mind or body is in issue. It cannot be extended to other cases where the question of guili or innocence depends upon the actual facts and not upon the state of mind or feelings. *Jag Mohan C Birju v. State*, 1995 (1) Crimes 188, 192 (Del).

Mental condition is a fact—but inference arrived at by a person by a process of ratiocination is not a mental condition and hence not a fact—Guess or calculation of a person is not a fact [*Anant v. S*, A 1967 B 109].

Direct testimony of a man's intention, feeling, &c, is receivable when a man speaks of his *own* mental feelings, but it is obviously often unsatisfactory when available. The most cogent evidence is offered by other external and collateral facts, his statements and acts before or after the fact in issue supplying data for an inference as to intention or guilty knowledge. The principle underlying the section is equally applicable to civil and criminal cases, though the question of intent or knowledge is of much less frequent occurrence in the former class of cases. In criminal cases, intention or motive or the knowledge under which one has acted is always an important element. In some civil cases also, states of mind become important upon questions of fraud, forgery, false representation, negligence, malicious intention, &c. If knowledge or intent becomes relevant in a civil case, the same kind of evidence may be given. [As to overt act and *mens rea*, see Hals, 3rd Ed, Vol 10, paras 505-6: as to *mens rea* in common law and statutory offences, paras 507-10; *Lim Chin v. R*, 1963 AC 160; *Warner v. Metropolitan Police Commr*, 1968, 2 All ER 356 HL; *Sweet v. Parsley*, 1969, 1 All ER 347 HL].

"When the Existence of Any Such State of Mind or Body or Bodily Feeling is In Issue or Relevant".—It has, therefore, been laid down generally in s 14 that when the existence of any state of mind or body or bodily feeling is in issue or relevant, *ie*, whenever it becomes necessary to find out what were the mental feelings of a person with reference to an act—in other words, in what mind (*quo animo*) or with what intention a transaction or act was done by him—under certain limitations, what he said or did in relation to that act or other similar acts, whether *before or*

after, is admissible, if it tends to explain the motive or intention which inspired the act or the knowledge under which he acted. Persons can testify directly about their own mental conditions, such as feelings, motives, intention, knowledge, belief, &c, or physical conditions at a given time; but they cannot ordinarily be allowed to speak directly about the state of mind or body as to that of others as to which they have no direct knowledge, but should state the facts from which their mental or physical condition may be inferred. In England medical evidence to impugn the reliability of an opponent's witness is admissible [*Toohey v. Commrs. of Metropolitan Police*, 1965 AC 606].

The same rule applies when it is material to prove physical condition or bodily feeling. Thus, when a man is charged with passing a forged note with the knowledge that it was forged, evidence is admissible to show that a short time before, he passed another forged note or that other forged notes were found with him at the time of his arrest. So also, in a poisoning case, statements made by the deceased before his death are admissible to prove the state of his health or bodily feeling. *Illustrations* (*e*) to (*f*) deal with various states of mind. *Illustrations* (*l*) and (*m*) refer to states of body. Such evidence (as to bodily feeling), however, is not to be extended beyond the necessity on which the rule is founded. Anything in the nature of narration or statement is to be carefully excluded, and the testimony is to be confined strictly to such complaints, exclamations and expressions as usually and naturally accompany and furnish evidence of a present existing pain or malady [*Per* BIGELOW, J, in *Bacon v. Charlton*, 7 Cush, 586 (Am.)]. It should be remembered that the facts receivable under s 14 are admitted not in proof of the truth of the facts stated, but to show the *existence* of the alleged state of mind or body [*R v. Debendra*, 36 C 573]; but the existence of the fact in issue must always be independently established.

The section gets rid of all technicalities as to the class of cases in which evidence is admissible or the time within which the fact, given as evidence of mental or bodily condition, must have occurred. The only point for the court to consider, in deciding on the admissibility of evidence under its provisions, is whether the fact can be said to *show the existence* of the state of mind or body under investigation [Cunn p 121]. But the operation of s 14 is confined to cases where the *existence of state of mind or body is in issue*. It cannot be extended to other cases where the question of guilt or innocence depends upon *actual facts* and not upon the state of a man's mind or feeling. We have no right to prove that a man committed a theft or any other crime on one occasion, by showing that he committed similar crimes on other occasions [*R v. Vyapoory*, 6 C 655; *R v. Abdul Wahid*, 34 A 93; *Pritchard v. R*, A 1928 L 382; *Gandhi v. R*, 1941 Rang 566: A 1941 R 324; *Goma Rama v. R*, A 1945 B 152, *post*]. Thus, when a man was charged with forgery of promissory note and four others with abetting him, the fact that 150 other papers, alleged to be forgeries or inchoate forgeries were found in the houses of four of the accused was held to be irrelevant [*R v. Parbhudas*, 11 Bom HC 90]. So where the fact to be proved was that the fire at a soap factory in 1940 was intentional and the evidentiary fact tendered in evidence was the fire at a timber mill in 1932, the accused being the principal share holder in both the concerns—*held* that the evidence was inadmissible under ss 14, 11 and 8 [*Gandhi v. R, sup*].

It would appear therefore that the admission of evidence of similar facts is subject to certain limitations. It is important to bear in mind that mere general similarity of facts to the main fact does not make those facts admissible to prove its existence or occurrence, or the identity of its author (see *post*, "*Principle of Rejection of Evidence of Similar Facts*"). Similar facts or occurrences are admissible to prove states of mind, *eg* intention, knowledge, &c, when the question is in what mind was an act

done (see *post*). But here also, as stated in Expln 1, such evidence of similar acts of a person cannot be given with the object of showing a general disposition, habit or propensity to do the act in question: but the state of mind to be proved must have immediate reference to the particular matter in question (see *post* and Expln 1). Evidence of similar facts closely connected with the fact in issue may sometimes be also received as part of the transaction (see s 6 *ante*).

Previous and Subsequent Events to Prove Intention etc.—Both previous and subsequent events may be relevant to prove state of mind, *eg*, intention, knowledge &c. *Illus* (*c*) refers to "previous publication"; *illus* (*j*) refers to threatening letters "previously sent" and *Illus* (*i*) refers to previous shooting. These examples illustrate the question of intention. Intention becomes important when an act is more or less culpable according to the state of the mind of the doer. In *Brent v. Wood*, 1946, 110 JP 317, 318, the LORD CHIEF JUSTICE said:

> "It is in my opinion of the utmost importance for the protection of the liberty of the subject that the court should always bear in mind that, unless the statute either clearly or by necessary implication, rules out *mens rea* as a constituent part of a crime, a defendant should not be found guilty of an offence against the criminal law unless he has got a guilty mind".

They Privy Council agreed with this in *Srinivasmal v. R*, A 1947 PC 135, 139 *infra*.

The principle on which s 14 is based is that when the intention of the accused is a relevant fact, evidence of similar transactions, both prior and subsequent to the alleged offence, is admissible as evidence of intention [*Viz v. R*, 83 IC 889: A 1921 S 57]. On a charge of having sold an article at a price exceeding the controlled price and of abetment, evidence of similar sales to other persons shortly before or after the period covered by the charge is admissible under s 14 to prove intention [*Srinivasmal v. R*, A 1947 PC 135: 51 CWN 900 : 26 P 460]. "Where the gist of the alleged offence is fraud, intent is material, and evidence of other similar offences is admissible to prove intent". [Archbold's Cr Pleadings, 30th Ed p 366]. Evidence of similar facts is also admissible to prove system or to rebut the defence of accident (see s 15).

Where the accused was charged with having received illegal gratification from a person in 1876, proof of similar but unconnected acts receiving gratification from the same person in 1877 and 1878 was held inadmissible and GARTH, CJ, restricted the operation of s 14 to cases where "a particular act is more or less criminal or culpable according to the state of the mind or feeling of the person who does it, as for instance, in actions of slander or false imprisonment, or malicious prosecution" [*R v. Vyapoory*, 6 C 655]. Where the accused was charged with fraudulently transferring three properties to three persons in order to prevent their being seized in execution, evidence of five other similar transfers by the accused on the same day was admissible [*R v. Vajiram*, 16 B 414; *R v. Debendra*, 36 C 573].

Previous attempts to commit an offence are closely allied to preparations for the commission of it [Bentham's Judicial Evidence, p 69]. Preparation and previous attempts for commission of offence are admissible under ss 8 and 14 [*Appu v. S*, A 1971 M 194].

"The question of subsequent intent, to prove *prior* intent, has caused difficulty. Thus in *R v. Cooper*, 1 QBD 19, BRAMWELL B, asked how what happened *after* the act, could be evidence of the defendant's intent in doing it; though this objection is not now tenable (*R v. Mason*, 10 Cr App R 169; *R v. Smith*, 11 Cr App R 229). While

in *O'Brien v. Shell*, 1873 Ir R 7 Eq 255 and *Williams v. W*, 32 Beav 370, declarations of intent after an act were rejected, because the question was said to be 'what was the intention at the time, and not what it was subsequently' the court treating the admissibility of the subsequent intent not as a question of logical relevancy, but as one raising an independent issue" [Phip 8th Ed p 139]. But where intention is under the law immaterial, evidence of intention is not receivable. Thus, where a person has a legal right to do an act, the intention or motive with which it was done is immaterial [*Quinn v. Leathem*, 1901 AC 495, 508-9; *Oakes v. Wood*, 2 M & W 791; *Allen v. Flood*, 1898 AC 1; *Bradford Corpn v. Pickles*, 1895 AC 587]. Intention will not be enquired into when an undischarged insolvent obtains credit without disclosure of bankruptcy [See s 72 Prov Insol Act; *R v. Dyson*, 1894 s QB 176]. Telegrams that passed between the Provincial Government and the Government of India are not admissible to show the state of mind of the Government when certain Ordinances were passed [*Bugga v. R*, 24 CWN lxvii PC (notes of cases)].

State of Mind Must Exist in Reference to the Matter in Issue and Not Generally. [Explanations to The Section].—The general rule stated above is subject to the qualification in *Expl* 1 which is very important, *Expl* 1 says that the state of mind to be proved must show that it exists "*not generally*, but in reference to the particular matter in question" [see *illus* (*a*) and (*b*) *post* Expl 1]. *ie*, the state of mind must be a condition of thought and feeling having distinct and immediate reference to the particular matter in question and not evidence of general disposition, habit and tendency to do the act in question. *Illustrations* (*o*) and (*p*) exemplify the principle. General tendency of accused cannot be proved—Facts must show the state of mind in reference to a particular matter in question [*Lakshmandas v. S*, A 1968 B 400]. The fact that a man is generally or habitully dishonest, malicious or negligent; or that he has a tendency to do criminal acts, has little, if any, bearing on the state of his mind in reference to the particular matter under enquiry and to admit such evidence would be to create prejudice and to let in a mass of matters which instead of affording any help is likely to cause great mischief. Thus, when a surgeon is charged with negligently performing an operation, evidence that in similar other cases he had been negligent or skilful, is inadmissible [*R v. Whitehead*, 1848, 3 C & K 202]; or, when *A* is charged with an unnatural offence with *B*, an admission by *A* that he had committed the same offence with *C* on another occasion and had a tendency to such practices is not admissible [*R v. Cole*, 1810, cited in Phip 8th Ed p 153 from Phill & Arn Ev 10th Ed 508]. The principle is thus explained by WILLES J, [in *Hollingham v. Head*, 4 CBNS 388: 27 LJCP 241]:—

> "Does the fact of a person having once or many times in his life done a particular act in a particular way, make it probable that he has done the same thing in the same way upon another and different occasion? To admit such speculative evidence, would, I think be fraught with great danger. When, the question is one of guilty knowledge, as in a case of charge of uttering base coin or forged notes, such evidence is received as tending to establish a necessary ingredient in the crime; but I am not aware of any other instance. If such evidence were held admissible, it would be difficult to say that the defendant might not, in any case where the question was whether or not there had been a sale of goods on credit, call witness to prove that the plaintiff had dealt with other persons upon a certain credit, or, in an action for an assault, that the plaintiff might not give evidence of former assaults committed by the defendant upon other persons of a particular class for the purpose of showing that he was a quarrelsome individual, and therefore that it was highly probable that the

particular charge of assault was well founded. The extent to which this sort of thing might be carried is inconceivable."

In *Hollingham v. Head, sup*, the question was whether A made a contract with B subject to a certain qualification and it was held that the fact that he had made contracts with other persons subject to the same qualification was *inadmissible*.

Under *Expl* 2, when the previous commission of an offence by a person is relevant within s 14, the previous conviction shall also be relevant. [See *Lakshmandas v. S*, A 1968 B 400 and *post*, "*Explanation* 2"]. It goes beyond the English law.

Rule Relating to Evidence of Similar Facts. [Rules in ss 14 and 15].—When studying s 14, it is well to consider the provision in s 15 which is an application of the rule in s 14. The two sections should be read together for a grasp of the true principle. S 14 deals with the relevancy of facts showing intention, knowledge, &c, when the existence of any state of mind or body or bodily feeling is in issue. Under s 15 when the act in question forms part of a *series* of similar occurrences, evidence of similar facts is admissible to prove intention or knowledge of the person and to rebut the defence of accident, mistake, etc. The Evidence Act does not go beyond the English law in regard to the admissibility of similar facts to prove states of mind [*R v. Parbhudas*, 11 Bom HC 90; *R v. Vyapoory*, 6 C 655, 659]. The subject was exhaustively dealt with and the law in ss 14 and 15 was stated with clearness and precision in *Amritalal v. R*, 42 C 957, pp 997, 998: 19 CWN 676, 692 thus:—

> "Facts similar to, but not part, of the same transaction as the main fact, are not, in general, admissible to prove either the occurrence of the main fact or the identity of its author.
>
> "But evidence of similar facts although in general inadmissible to prove the main fact or the connection of the parties therewith, is receivable, after evidence *aliunde* on these points has been given, to show the state of mind of the parties with regard to such fact; in other words, evidence of similar facts may be received to prove a party's knowledge of the nature of the main fact or transaction or his intent with respect thereto.
>
> "In general, whenever it is necessary to rebut, even by anticipation the defence of accident, mistake, or other innocent condition of mind, evidence that the defendant has been concerned in a systematic course of conduct of the same specific kind as that in question may be given. To admit evidence under this head, however, the other acts tendered must be of the same specific kind as that in question and not of a different character, and the acts tendered must also have been proximate in point of time to that in question".

The English and Indian cases on which the above statement of law was based, were re-examined in *R v. Panchu Das*, 24 CWN 501. 47 C 671 FB by reference to subsequent decisions and it was declared that the law stated above was accurate.

Some of the decisions on the question of the admissibility of previous or similar acts under ss 11, 14 or 15 may appear to be conflicting and perhaps it is so, but it must be remembered that each is a decision on the peculiar facts of the case. In this connection it is worthwhile remembering the observations of BUTT, J, in *R v. Flannagan and Higgins*, 15 Cox CC 403, 408 : "When considering the admissibility of previous acts, I have heard something of the authorities, but first of all and before any authority, I desire to say this: that I think where the authorities are at all in conflict, the safest rule to be guided by is one of common sense."

Principle of Admissibility of Similar Acts and Its Qualification.—The principle on which evidence of similar acts is admissible is, not to show that because the defendant has committed one crime, he would therefore be likely to commit another, but to establish the *animus* of the act, and rebut by anticipation, the defences of ignorance, accident, mistake or other innocent states of mind [*Makin v. A G of New S. Wales*, 1894 AC 57; *R v. Bond*, 1906, 2 KB 389; *R v. Armstrong*, 1922, 2 KB 555; Phip 8th Ed p 159]. In *Makin v. A G of New South Wales, sup*, (**approved** in *R v. Ball*, 1911 AC 47 *post*) LORD HERSCHELL stated the law with great lucidity and two principles were laid down:—

(1) "It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused in a person likely from his criminal conduct or character, to have committed the offence for which he is being tried.

(2) "On the other hand the mere fact that the evidence adduced tends to show the commission of other crimes, does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental or to rebut a defence which would otherwise be open to the accused."

LORD SANKEY with the concurrence of his colleagues characterised the first principle as "one of the most deeply rooted and jealously guarded principles of our criminal law" and "fundamental in the law of evidence as conceived in this country" [*Maxwell v. DPP*, 1935, AC 317, 320].

The application of the second principle (above) has been the subject of some discussion. In a sense a plea of not guilty puts everything in issue which is a necessary ingredient of the offence charged. On this aspect of the question LORD SUMNER stated in *Thompson v. R*, 1918 AC 221:—

"Before an issue can be said to be raised, which would permit the introduction of such evidence so obviously prejudicial to the accused, it must have been raised in substance if not in so many words, and the issue so raised must be one to which the prejudical evidence is relevant. The mere theory that a plea of not guilty puts everything material in issue is not enough for this purpose. The prosecution cannot credit the accused with fancy defences in order to rebut them at the outset with some damning piece of evidence".

The principles laid down in *Makin v. Att-Genl, sup*, were reaffirmed and the above dictum of LORD SUMNER in *Thompson v. R, sup*, was agreed to in *Noor Md v. R*, 1949 AC 182 with the qualification stated below:—

> "The plea of not guilty may be equivalent to saying 'Let the prosecution prove its case, if it can', and having said so much the accused can take refuge in silence. In such a case it may appear (for instance) that the facts and circumstances of the particular offence charged are consistent with innocent intention, whereas further evidence, which incidentally shows that the accused has committed one or more other offences, 'may tend to prove that they are consistent only with a guilty intent. The prosecution could not be said, in their Lordships' opinion, to be 'crediting the accused with a fancy defence' if they sought to adduce such evidence. It is right to add, however, that in all such cases the judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly

directed, to make it desirable in the interest of justice that it should be admitted" [LORD DU PARCQ in *Noor Md v. R*, 1949 AC 182: A 1949 PC 161 (dictum of LORD GODDARD, LCJ, in *R v. Sims*, 1946, 1 KB 531 **disapproved**)].

As to the proper method of approaching the question, KENNEDY, J, in *R v. Bond, sup*, (at p. 398) observed:—

> ".....If, as is plain, we have to recognize the existence of certain circumstances in which justice cannot be attained at the trial without a disclosure of prior offences, the utmost vigilance at least should be maintained in restricting the number of such cases, and in seeing that the general rule of the criminal law of England which (to the credit, in my opinion, of English justice) excludes evidence of prior offences, is not broken or frittered away by the creation of novel and anomalous exceptions."
>
> ".....The admissibility, not merely the weight of the evidence depends upon the evidence of such conduct as would authorise a reasonable inference of a systematic pursuit of the same criminal object....." (p 405).

The limits as to the admissibility of "similar facts" were again fully considered in a House of Lords case. The enquiry was directed to ascertaining whether the principle laid down in *Makin v. Att-Genl, sup*, was extended or modified in later cases. Upon a review of all such decisions it was pronounced that the principle laid down by LORD HERSCHELL remains the proper principle without any need of modification; nor was it modified in any later case. His statement of law was analysed and clarified by indicating that when LORD HERSCHELL speaks of evidence of other occasions "to rebut a defence", he does not require a specific line of defence to be set up before evidence is tendered which would overthrow it. So, the prosecution may adduce all proper evidence including evidence of criminal acts other than those charged without waiting for the accused to set up a specific defence calling for rebuttal, and evidence of similar acts, *eg* to show intention or to rebut a possible defence of accident may properly be admitted, but, though such evidence is strictly admissible, the judge has a discretion to exclude it, if it merely tends to deepen suspicion against the accused and its prejudicial effect is out of proportion to its probative value [*Harris v. D P P*, 1952, 1 All ER 1044 : 1952 AC 694, 707, (dicta of LORD DU PARCQ in *Noor Md v. R, sup* **approved**); see also *R v. Straffen*, 1952, 2 All ER 657]. The discretion of the trial judge in England to rule out relevant and admissible evidence with a view to secure a fair trial and to protect the defence from undue prejudice is now well-established [see *Noor Md v. R, sup*; *Kuruma v. R*, A 1955 AC 197, 203: *R v. Cook*. 1959, 2 All ER 97; *R v. Flynn*, 1961, 3 All ER 58; *Selvey v. DPP*, 1968, 2 All ER 497, HL. It is a conspicuous feature of English Criminal Law].

Harris v. Dpp sup, clearly explains the true meaning of *Makin v. A-G* and establishes two propositions: (*i*) that before evidence of similar acts may be given, it is not required that accused should set up a specific defence calling for rebuttal; (*ii*) that though such evidence is strictly admissible, the judge has a discretion to exclude it, if it is of opinion that it would operate unfairly against the accused by creating grave prejudice or suspicion without being of any real evidential value." For a summary of rules relating to admissibility of similar facts after an examination of all relevant cases, see Cowsen and Carter's Essay on the Law of Evidence, 1956 Ed pp 160-61.

Where in cases of alleged sexual assaults on children, the evidence of a child deals only with the alleged assault on him or her and the defence is that the meeting

between them never took place, evidence of other incidents between the accused and other children is not relevant to determine whether the alleged meeting took place; although evidence of a succession of incidents may properly be admissible to help determine the truth of one incident on questions of identity, intent or guilty knowledge or to rebut a defence of innocent association [*R v. Chandor*, 1959, 1 All ER 702].

The statement of general principles does not seem to present much difficulty, but their application is not so easy. It is obvious that the qualifications attached to them and the peculiar facts of each case may not seldom make it difficult to draw the line and to decide whether a particular piece of evidence on the one side or the other. S 15 *post* is an application of the rule in s 14 and exemplifies it.

Although evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment is inadmissible for the purpose of leading to the conclusion that accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried, yet the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused. (See s 15 *post*). Thus, when *felonies* are so connected together as to form a part of the entire transaction, evidence of one felony may be given to show the character of the other [*R v. Ellis*, 6 B & C 147 *ante*; Tay s 327]. As to the relevancy of facts forming part of the same transaction see s 6 *ante*.

[*Ref Steph Dig Arts 10, 11; Tay ss 326-28, 580-86; Phip 8th Ed pp 71, 74, 134-46, 159; Pollock's Fraud, 61-66; Best, 11th Ed s 255; Powell, 10th Ed pp 113-119; Wigmore, ss 237-242, 300-70; 1718-1724; Jones, 3rd Ed ss 142-147; Chamb ss 3207-3212; Hals, 3rd Ed, Vol 15 paras 510, 523-529; Vol 10, paras 818-20*; *Makin v. Att-Genl of New S. Wales*, 1894 AC 57; *Harris v. DPP*, 1952, 1 All ER 1044; *R v. Bond*, 1906, 2 KB 389; *Noor Md v. R*, 1949 AC 182 : A 1949 PC 161; *R v. Vyapoory*, 6 C 655; *R v. Parbhudas*, 11 Bom HC 90; *R v. Amritalal*, 42 C 957; *R v. Panchudas*, 47 C 671: 24 CWN 501 FB; *s 15 IE Act*].

Scope and Application.—With regard to the application of this section, GARTH, CJ, observed in *R v. Vyapoory*, 6 C 655:—

> "Section 14 seems to me to apply to that class of cases which is discussed in Taylor on Evidence, 6th Edition, ss 318-22—that is to say, cases where a particular act is more or less criminal or culpable, according to the state of the mind or feeling of the person who does it; as for instance in actions of slander, or false imprisonment, or malicious prosecution, where malice is one of the main ingredients in the wrong which is charged, evidence is admissible to show that the defendant was actuated by spite or enmity against the plaintiff; or again, on a charge of uttering counterfeit coin, evidence is admissible to show that the prisoner knew the coin to be counterfeit, because he had other similar coin in his possession, or had passed such coin before or after the particular occasion which forms the subject of the charge. The illustrations to s 14, as well as the authorities cited in Taylor, show with sufficient clearness, the sort of cases in which this evidence is receivable.
>
> "But I think we must be very careful to extend the operation of the section to other cases, where the question of guilt or innocence depends upon *actual facts*, and *not upon the state of a man's mind or feeling*. We have no right to prove

that a man committed theft or any other crime on one occasion, by showing that he committed similar crimes on other occasions."

In the same case MITTERE J, observed: "Under s 14, collateral facts specified herein can be proved if the question be as to the existence of any state of mind".

S 14 does not apply to cases when the question of guilt or innocence depends upon actual facts and not upon the state of a man's mind or feeling [*R v. Abdul Wahid*, 34 A 92 (6 C 655 **folld**; 36 C 573 **dist**); *Gandhi v. R*, 1941 Rang 566]. In *R v. Parbhudas*, 11 Bom HC 90, WEST, J, goes on to point out, that when several offences are so connected that proof of one can be arrived at through evidence going to prove the others, the evidence is not on that account excluded. In *R v. Fakirappa*, 15 B 491, JARDINE J, observed: "I may refer to 11 Bom HC 90, a fully argued case, where MR JUSTICE WEST gives a full and lucid exposition of s 14 of the Indian Evidence Act; to 6 C 655 also fully argued, where that section was considered; and to 9 C 371, where LORD BLACKBURN'S reasoning is discussed and the danger of prejudice to the prisoner pointed out." In *R v. Parbhudas, sup*, p 97, MELVILLE J, remarked: "Where a person is charged with having forged a promissory note, evidence that a number of documents apparently forged, or held in readiness for the purpose of forgery were found in the prisoner's possession was inadmissible." This case has been distinguished in *R v. Nur Md*, 8 B 223, where it has been held that evidence of the possession and attempted disposal of coins of unusual kind is relevant on a charge of uttering such coins afterwards, when the factum of uttering is denied. In *R v. Vajiram*, 16 B 414, it has been held that where the accused was charged under s 206 IPC with fraudulently transferring three properties to three different persons on a certain day, in order to prevent their being seized in execution of a decree, and the prosecution tendered evidence of five other fraudulent transfers of property effected by the accused on the same day, and apparently with the same object this evidence was admissible under ss 14 and 15, to prove either, that all those transfer were parts of one entire transaction, or that the particular transfers which were specified in the charge were made with a fradulent intent [*R v. Parbhudas, sup* **dist**].

In *R v. Debendra*, 36 C 573: 13 CWN 973, where the accused falsely telling one B, that he was the manager of an estate and could procure for him (*B*) a post in the estate, induced to pay him a sum of money as security for the post, but afterwards failed to keep his promise; evidence of instances of similar but unconnected transactions with other persons, before and after the date of the offence charged, was admitted under ss 14 and 15, not to establish the factum of the offence but to prove that the transaction in issue was one of a systematic series of frauds, and that the intention of the accused on the particular occasion in question was dishonest and fraudulent. *Explanation* (*1*) and *illus* (*o*) to s 14 render facts showing the existence of a state of mind relevant only if they establish that such state of mind existed in reference to the particular matter in issue. S 15 is an application of the general rule in s 14 and the words of this section and of *illus* (*o*) to this section and *illus* (*a*) to s 15 show that it is not necessary that all the acts should form part of one transaction but only that they should form part of a *series* of similar occurrences. In this case the English authorities on the point have been referred to, discussed and explained. So in *R v. Parbhudas, sup*, WEST J, said that:—

"On a charge of having dishonestly received stolen properties, the possession by an accused of several other articles deposed to have been stolen, would, no doubt, have some probative force on the question whether he had received the particular articles which he was charged with having dishonestly received, and the receipt or possession of which he denied altogether, yet in the

1st illustration to s 14, it is set forth as a preliminary to the admission of testimony as to the other articles that "it is proved that he was in possession of the particular stolen article." The receipt and possession are not allowed to be proved by other apparently similar instances, only the guilty knowledge .....Illustration (*o*) to the same section makes a previous attempt by the accused to shoot the person murdered, evidence of the accused's intention, but not of the act which caused the death; yet it is certain that in the issue of whether *A* actually shot *B* or not, the fact that he had previously shot at him. Would have some probative force; so, too would proof of a general malignity of disposition that '*A* was in the habit of shooting at people, with intent to murder them', yet this evidence is excluded, even as proof of *A's* intention, either as too remotely connected with the particular intention in issue, or as raising collateral questions, which would not probably be resolved in the case."

The accused were charged under s 4 (*b*) of the Explosive Substances Act and with conspiracy under s 120-B IPC in 1913, evidence of their association with other persons in 1908 and 1911 engaged in *lathi* play and other pursuits (who were convicted of offence under s 121A IPC was held inadmissible [*Amritalal v. R*, 42 C 957, 966]. Another fully argued case is that of *R v. Panchudas, ante*. Evidence of previous association with the object of committing theft and other offences does not show an intention to commit a different offence, *viz*, dacoity, and is not admissible as showing the existence of any relevant state of mind [*R v. Wahiduddin*, A 1930 B 157]. When certain persons were charged under ss 332, 395 read with s 34 IPC but without any charge of conspiracy, confessional statements of the accused of other acts of dacoity and sabotage antecedent and subsequent to the dates of the dacoity charged are not admissible under ss 9, 11, 14 or 15. S 9 did not apply as in the absence of a charge of conspiracy to do all the acts, the previous acts could not be said to be parts of one design. S 11 did not apply as the other acts committed at different times and places were not parts of one transaction. S 14 or 15 also would not apply as what was relevant was whether any of the accused committed the dacoity in question and not whether the offence was committed with any particular state of mind or whether it was accidental or intentional [*Goma Rama v. R*, A 1945 B 152: 46 Bom LR 811].

English and Indian Law Same.—The Evidence Act does not go beyond the English law in regard to the admission of evidence of similar facts except in so far as it renders a previous conviction relevant [*per* MELVILLE, J, in *R v. Parbhudas*, 11 BHC 90; see *R v. Vyapoory*, 6 C 655]. Under English Law Section 7(3) of the Rehabilitation of Offenders Act, 1974 permits evidence of the convictions to be adduced if the court is satisfied that the facts of previous misconduct are sufficiently similar to the facts sought to be proved to be of probative value. [*R. v. Isleworth Crown Court*, (1998) 162 JP 251 (QBD)].

Principle of Rejection of Evidence of Similar Facts. [Res inter alios actae].—Similar facts, though often of cogent moral weight, *ie* logically relevant, are rejected as legal evidence on the grounds of policy and fairness, since they tend to waste time, embarass the inquiry with collateral issues, prejudice the parties with the jury and encourage attacks without notice [*R v. Oddy*, 2 Den CC 269; *Att-Genl v. Nottingham Corpn*, 1904, 1 Ch 673; Phip 8th Ed p 148]. The most important class of facts which are excluded on the ground of *irrelevancy*, comprises the acts and declarations, either of strangers, or of one of the parties to the action in his dealings with strangers. These, in technical language, are denominated *res inter alios actae* [Tay s 317]. In an action to recover goods by his assignees against a bankrupt's creditor, proof of the commission of acts of bankruptcy, by showing that, *other* goods which, about the same time, had been delivered to other creditors before the goods in dispute came into defendant's hands had been got back from them, was rejected [*Backhouse v. Jones*, 1839, 6 Bing NC 65]. Where it was necessary for a brewer to prove that he had supplied a publican with good beer, other publicans were not allowed to show

that, during the same period, as the dealing in question, he had furnished them with beer of an excellent quality, for a man may deal well with some of his customers though not with others [*Holcombe v. Hewson*, 1810, 2 Camp 391; Tay s 318; but *cf Manchester Brewery Co v. Coombs*, 82 LT 347 *ante*] In an action of defamation, where the issues were whether the plaintiff's scholars were "ill-fed, badly lodged, and covered with vermin," although evidence is admissible to show the general treatment of boys at school, a witness may not be asked as to comparative quality of the provisions supplied by the plaintiffs with those consumed in a particular school [*Boldron v. Widdows*, 1824, I C & P 65; Tay s 319].

In a trial for murder of a particular person, evidence that on two previous occasions the accused committed murders themselves but falsely charged other persons and got them convicted is not admissible under s 14 *illus* (*o*) and (*p*) as it amounted to evidence of similar acts and therefore of habit on the part of the accused [*Gangaram v. R*, 22 Bom LR 1274: 62 IC 545]. *P* and *G* were tried in 1919 for murder of a prostitute *D* in 1914 and conspiring to rob her under ss 302, 302/114, 120B, 380/114 I P Code. The prosecution wanted to adduce evidence (*1*) of association of the two accused, (*2*) of their association in cases spoken to by other prostitutes in connection with the charges of theft which they had previously made against them, (*3*) generally of a series of incidents from 1914-18 that they used to go about together under different names to rich prostitutes, followed by their subsequent disappearance and loss of money and ornaments—*held*, that the evidence was not admissible under ss 14, 15 or under ss 9, 11 [*R v. Panchudas*, 24 CWN 501 FB: 47 C 67]. On a charge of murdering a woman by poison, evidence to show that the accused had previously murdered his wife under similar circumstances is inadmissible [*Noor Md v. R*, A 1949 PC 161 : 53 CWN 736].

A person employed as a clerk in charge of renewal of licences for hand-carts received Rs 2 for each such renewal, instead of Re 1-14 the rate. He was charged with cheating and evidence showing that he had taken two annas in excess from persons other than those named in the charge is inadmissible under ss 14 or 15 as the state of the mind of the accused was not involved [*R v. Abdul Wahid*, 34 C 93 (*R v. Debendra*, 36 C 573 **distd**; *R v. Vyapoory*, 6 C 655 **follD**)]. In a charge for having defamed a person by an imputation that he had compelled the accused to pay a bribe, evidence as to complainant having taken bribes on other occasions is inadmissible; but general evidence that he had the reputation of being a bribe-taker is admissible [*Debi Dayal v. R*, 4 L 55]. The fact that the accused offered sweetmeats to other boys and poisoned one of them with *dhatura* is not evidence that he administered poisoned sweetmeats to the deceased [*Kashiram v. R*, 73 IC 262: A 1923 N 248]. In a dacoity case evidence of accused's complicity, with other dacoities or burglaries is not admissible [*Shk Abdul v. R*, 85 IC 830: A 1925 C 887].

Relaxation of The Above Rule. [Evidence of Similar facts When Relevant].—Facts similar to a fact in issue are not, in general, admissible to prove either the occurrence of the fact in issue or the identity of its author. The rule is, however, subject to various exceptions.....When evidence of similar facts is relevant, that is, when there is a nexus between the similar fact and the fact in issue, such evidence may be received to prove either the occurrence of the fact in issue or the identity of its author. Where it is relevant to prove the state of a party's mind, evidence of similar facts may be admissible. Thus such evidence has been received to prove a party's knowledge of the nature of a transaction or his intent with respect thereto. The same principle is applicable to proof of fraud or malice...In general, wherever it is necessary to rebut the defence of accident, mistake or other innocent condition of mind, evidence that the defendant has been concerned in a systematic course of

conduct of the same kind as that in question may be given [Hals, 3rd Ed Vol 15, paras 527, 528, 529; see also Vol 10, title Criminal Law, paras 818-20]. The rule that evidence must be confined to the issues does not, of course, exclude testimony bearing on one or more only of several questions raised by an issue which is of a complex nature [*Brewing Co v. Beaner*, 1893, 40 Am St R 686]. Thus, it may be shown that a defendant was negligent because, to his knowledge, other accidents had previously arisen from the same condition of things [*Blomington v. Legg*, 1894, 42 Am St R 216]. Existence of a nuisance can only be shown by proof of the mischief which the thing complained of has done to *others* of the public, as well as to the plaintiff or prosecutor [*Symmons v. Blake*, 1835, 1 M & Rob, 477; Tay s 298]. Evidence that *other* horses as well as plaintiff's had shied at a particular heap near a highway proves that, that heap is a nuisance [*Brown v. Eastern Counties Ry*, 1889, 22 QBD 391 (CA); *Gordon v. Mackenzie*, 1913 SC 109: 50 SC LR 64].

On a trial in respect of certain fradulent transfers, deliveries &c under s 206 IP Code, evidence of other similar fraudulent transfers was held to be admissible having regard to the English decisions and ss 14 and 15 with the illustrations [*R v. Vajiram*, 16 B 414, 425; see *R v. Debendra*, 13 CWN 973: 36 C 573]. Evidence of previous and similar transactions was admitted on a charge of demanding money by threats [*R v. Boyle & Merchant*, 1914, 3 KB 339]. In a trial under ss 235 and 234 IP Code, of being in possession of counterfeit coins and instruments and materials for counterfeiting coin, evidence of possession of counterfeit coins and instruments at accused's house in another district is admissible [*Misri Gossian v. R*, 61 IC 647].

In a case of conspiracy to commit criminal breach of trust where each of the accused puts forward the defence that he was an unconscious tool in the hands of S, a towering personality about whose criminal intentions he was not aware, it was legitimate for the prosecution to anticipate such defence and to give rebutting evidence under s 14 of other transactions beyond the period specified in the charge in proof of the requisite criminal intention [*Sardul v. S*, A 1957 SC 74: 1958 SCR 161].

In an offence under s 400 IP Code, a previous conviction of dacoity was held relevant under Expl 2 to s 14 to prove that the person charged shared the purpose of the gang [*R v. Naba Kumar*, 1 CWN 146; (refd to in *Mankura v. R*, 27 C 139: 4 CWN 97); *Sharaf Shah v. S*, A 1963 AP 314]. So a previous conviction of theft or an order to give security on the ground of being a habitual thief is admissible against the accused in a charge under s 401 IP Code [*Bonai v. R*, 15 CWN 461; *R v. Tukaram*, 14 Bom LR 373]. Evidence of previous convictions of dacoity and of orders under s 110 Cr P Code is admissible for the purpose of proving habit and association on a subsequent trial under s 400 I P Code [*Ledu Molla v. R*, 52 C 595; see also *Khilawan v. R*, A 1928 O 430]. Such evidence comes within s 14 as showing a disposition on the part of the accused towards the particular conduct alleged against him in the charge (see 46 B 958). But when several persons are charged with belonging to a gang of persons habitually committing dacoity under s 400 IP Code, evidence of the commission by them of offences other then dacoity, *viz*, regarding previous conviction of theft of some of the accused or that they had been ordered to give security for good behaviour, being evidence of bad character, is not admissible under s 14 [*R v. Sher Md*, 46 B 958: 75 IC 67: 25 Bom LR 214: A 1923 B 71; *Public Prosr v. Bonigiri*, 32 M 179; see also *R v. Panchu Das*, 47 C 671. See notes to s 54 *post*, under "*Relevancy of bad character*"].

[*See also notes to ss 6, 8, 11 ante*]

Summary of Law as to Relevancy of Similar Facts.—From what has been stated before and in other sections on the question of relevancy of similar facts, it

would appear that similar facts are generally inadmissible to prove the main fact or transaction or identity or connexion of party with it, or to show a general disposition or habit of doing the act in question. There are, however, some exceptions to the rule and similar facts are within certain limits admissible for certain purposes. The law as to relevancy of similar facts may be summarised thus:—

(*1*) Facts similar to a fact in issue are not, in general, admissible to prove either the occurrence of the fact in issue or the identity of its author.

(*2*) Though evidence of similar facts is in general inadmissible to prove the main fact in issue, when the question is with what mind was an act done, evidence of similar facts may be received to show the state of mind of the parties with regard to such fact, *eg*, intent, knowledge &c.

(*3*) When there is a nexus between the similar fact and the main fact in issue, evidence of similar facts may be given to prove either the occurrence of the main fact or the identity of its author. Thus, when the question is whether an act was accidental or intentional, evidence of similar facts showing a series of such occurrences is admissible to rebut even by antipication the defence of accident or mistake (s 15).

(*4*) When the nature of the case requires cumulative instances, similar facts are admissible to prove the main fact. *eg*, custom, repeated acts of ownership with respect to the same property on question of title (*ante*, s 13), market value of similar properties or transactions (*ante*, s 9, &c, &c).

(*5*) When the main fact is of a continuous nature or when similar facts are closely connected with and explanatory of it, similar facts are admissible as part of the transaction or *res gestae* (*ante*, s 6).

(*6*) Experts can give evidence of similar facts or experiments made, in support of their testimony (s 45; *R v. Palmer, post*).

(*7*) When the doings or habits of animals are in question similar facts are admissible [*Brown v. E C Rly, sup*; see s 52 *post*: "*Character of Animals*"].

Photographs in Indecency Cases.—In a charge against a person of committing acts of gross indecency with a boy, evidence that photographs of nude boys were found in the lodging of the accused was held admissible for showing the practice of the accused just as the possession of the tools of burglar or the apparatus of an abortionist is evidence as showing the possession of appliances and instruments used by persons carrying on that particular kind of business in crime [*R v. Twiss*, 1918, 2 KB 853 (*Thompson v. R*, 1918 AC 221, *ante*, **folld**)]. On a charge of gross indecency, post cards depicting sexual acts found on the accused were admissible as things which a man who is guilty of such offence may well have about him and, might use to rouse his own or his victim's passions for such a purpose [*R v. Gillingham*, 1939, 4 All ER 122].

Statement of Accused.—A statement by an accused person made immediately after the occurrence of the offence is relevant as showing his state of mind, but where the statement is a repetition of what somebody else is alleged to have said to the accused the latter statement must be proved by direct evidence under s 60 [*Kakar v. R*, 81 IC 717: A 1924 L 733]. As to the relevancy of statement of a person against whom an offence is committed, made immediately after the offence see s 6, *ante*.

Intention. [Proof Need Not be Direct—It May be Inferred From Acts, Conduct, Surrounding Circumstances, etc].—The subject of intention has been discussed under "*Commentary*". Illustrations (*e*), (*f*), (*g*), (*h*), (*i*), (*j*) show different

kinds of intention, *viz*, malice, fraud, good faith, bad faith, etc. Illus (*i*) is the case of *R v. Voke*, R & R 551 and (*j*) is that of *R v. Robinson*, 2 East PC 1110. (*a*), (*b*), (*c*), (*d*) refer to guilty knowledge and show how it may be proved.

Intention being a state of mind can never be directly proved as a fact; it can only be inferred from other facts which are proved [*Sinnasamy v. King*, 1951 AC 83, 87]. The intention of a person may be proved by his direct testimony or admission, or by his previous or subsequent conduct and also by evidence of similar facts (*see above*).

It is an universal principle that when a man is charged with doing a wrongful act, without any legal justification, of which the probable consequence may be highly injurious, the intention is an inference of law resulting from the doing of the act. Although there is no presumption that a person intends what is merely a possible result of his action or a result, which though reasonably certain is not known to him to be so, still it must be presumed that when a man voluntarily does an act; knowing at the time that in the natural course of events a certain result will follow, he intends to bring about that result [*Sellamuthu v. Pallamuthu*, 35 M 186]. Generally speaking a man is presumed to *intend the natural consequences of his acts*; and where this presumption is conclusive, no evidence *contra* will be allowed, though it is otherwise where it is disputable [Tay ss 80-3: Phip 8th Ed p 139]. In *Hazrat v. R*, 32 CWN 345, 352, MUKERJI, J, observed that:—

> "The presumption that one must be taken to intend the natural or probable consequences of his acts—a rule of English Criminal Law which was originally but a rule of evidence has now acquired the dignity of a legal axiom, but which it is not always quite easy to apply to the Indian Criminal Law in view of the distinction that the I P Code makes between intention and knowledge. It should not also be forgotten on the question of knowledge that much depends on the intellectual capacity of the actor—a savage often thinks differently from a civilised man."

The court must judge of the prisoner's intention by his act and by all surrounding circumstances of the case, and not infer it from a series of presumptions [*R v. Beharee*, 3 WR 23; see also *R v. Gorachand*, 5 WR Cr 45 : BLR Sup Vol 443]. Where there is a series of speeches or lectures on the topic, all delivered within a short period of time, one may be considered for the purpose of throwing light on the real meaning and intent of another, and on the state of the mind of the speaker with reference to the subject-matter of the other speeches, a principle recognised in illustration (*e*) to s 14 and acted on in cases of prosecution for sedition in all the other High Courts in India [*In re Subramania Siva*, 32 M 3: 5 MLT 1; *Chamupati v. R*, 13 L 152; *Narayan v. P*, A 1918 N 248—CONTRA : *Secy High Court Bar Assen v. R*, A 1932 L 559 : 33 PLR 911]. A period of six months is not long for the purpose [*Om Prakash v. R*, A 1930 L 867]. In a proceeding under s 108 (*b*) [now cl (*a*)] Cr P Code in order to prevent the accused from delivering speeches likely to create communal tension, speeches delivered by him on prior occasions are admissible. They serve to show the existence of a particular state of mind or intent [*Jagannath v. R*, A 1940 N 134: 189 IC 74].

Articles in a newspaper not forming the subject of a charge and appearing in other issues of the same paper, are not admissible to show the intention of the writer in the article complained of, in the absence of proof of his identity [*Manmohan v. R*, 38 C 253, 259]. In a trial for sedition, any writing, *eg*, the copy of a letter written by accused and found in his possession, which was alleged to have been sent with the objected writing is relevant to show accused's intention under ss 9, 14. It is not necessary to prove that such a letter was sent before the copy could be admitted. At

the same time, the writing should be within a resonable time of the particular occurrence in respect of which he is charged [*R v. Spratt*, A 1928 B 77, 78]. The Court has no concern with the rectitude of a man's political views, but it may take cognizance of the fact that he holds certain views; for as a guide to his conduct and intentions these views are more relevant considerations [*Manabendra v. R*, A 1933 A 498]. On a charge of having taken illegal gratification, evidence that the accused had taken bribes on previous occasions is relevant to an issue of intention and therefore admissible [*Shivkali v. R*, A 1944 A 257: 1944 ALJ 419]. On a charge of cheating such evidence has not been admitted [*R v. Abdul Wahid, ante*]. Intention to run a prize competition after the Prize Competitions Act came into force can be inferred from previous conduct [*Mahesh v. S*, A 1964 A 572].

Where a person was charged with assaulting a woman, with intent to ravish, the fact that on former occasions, he took liberties with her was held to be inadmissible in proof of such intent [*R v. Lloyd*, 7 C & P 318]. *A* was charged with burglary with intent to ravish *B*. Evidence that an hour later he entered and had connection with another woman with her consent was held inadmissible to show *A's* intent [*R v. Rodney*, 1913, 3 KB 468]. The drunkenness of person charged with murder may be adduced in evidence to show that he was incapable of the intent [*R v. Doherty*, 16 Cox 306]. A was charged with carnal knowledge of a girl. Evidence that A had connexion with her seven months before the charge was admitted to show intent and guilty knowledge [*R v. Shellaker*, 1914, 1 KB 414].

No conviction can be had for theft unless there is a finding that the accused had an intention to take the property dishonestly out of the person's possession : more so, when the accused set up a *bona fide* claim of right [*Ram Lal v. Hari Charan*, 11 CLJ 410. See *R v. Nobin*, 6 WR 79 and *Khetter v. Indra Jalia*, 16 WR 78; *Alagarasawmi v. R*, 28 M 304: *Chaitan v. Kalachand*, 10 CWN 233n; *Nassib v. Nannoo*, 15 WR 47; *Runnoo v. Kolichurn*, 16 WR Cr 18; 19 WR 75; *In the Matter of Madhab Hari*, 15 C 390n). In a prosecution for lurking house-trespass by night, though the prosecution must prove the existence of some one or more of the intentions mentioned in s 441 IP Code, the proof need not be direct, that is, by the confession of the accused, showing that his intention was one of those mentioned in that section, or by the evidence of witness proving that he admitted to them that such was his intention. It will be enough if it is proved like any other fact and the existence of intention may be proved by the evidence of conduct and of surrounding circumstances [*Balmakand v. Ghansam*, 22 C 391, 405. **Refd** to in *R v. Bhola*, 23 A 124]. When a particular intention is an important ingredient, a conviction without a clear finding of intention is bad [*Sohan v. R*, A 1929 P 520]. Conduct is the best proof of intention [*Khairulla v. Dhanrupmul*, 80 IC 905, 912: A 1925 N 82]. It may perhaps be practicable to employ acts of conduct as exhibiting 'a posteriori' the inward state of mind—as when a person finding his counterfeit coin closely examined by his vendor, attempts to run away [Wig s 301].

The superintendent of police enquired what attitude the accused would take with regard to a procession in a religious festival and he replied that he would take the procession with music past a mosque, irrespective of any prohibitory order. The district magistrate was present there and the conversation between the accused and the district magistrate is admissible to show his intention [*Satindra v. R*, 47 CLJ 444]. The accused in a trial for forgery and conspiracy had previously given evidence in a civil court as to the genuineness of the document—*held* though the statement could not be admitted as confession, it has high evidentiary value upon the question of intention, whether or not they are in conspiracy [*Ambar v. R*, A 1929 C 539].

The intention of a corporate body can be ascertained by the resolution passed or acts done by it [*Gurumurthappa v. Corpn*, A 1962 Mys 92].

—Point of Time in Intent May be Remote.—The evidence to prove the existence of an intention need not be limited to statement by the accused herself, admitting the existence of such an intention in her own mind, or to the evidence of some person who can come forward and swear that he heard the accused say that was his or her intention. The existence of an intention like any other fact, may be proved by evidence of conduct and circumstances, and here there is ample evidence afforded by the conduct of the accused, and the circumstances of the case, to show that her intention in buying these girls was that they should be employed for the purpose of prostitution, although the point of time for such employment may be remote by reason of, their physical incapacity for the purpose [*Dy Legal Rem v. Karuna*, 22 C 164; see *Khettramoni v. R*, 35 CLJ 451; *R v. Papa Sani*, 23 M 159 and *R v. Bhola*, 23 A 124].

—Fraudulent Intention. [Circumstantial Evidence of Great Value in Determination of].—If fraud is proved, the motive of the person guilty of it is immaterial; it matters not that there was no intention to cheat or injure the person to whom the statement was made [*Derry v. Peek*, 14 App Cas 337]. It is a truth confirmed by all experience that fraud is not generally capable of being established by positive and express proofs. It is by its very nature, secret in its movements. In the generality of cases, circumstantial evidence is our only resource in dealing with questions of fraud, and if this evidence is sufficient to overcome the natural presumption of honesty and fair dealing and to satisfy a reasonable mind of the existence of fraud by raising a counter-presumption, there is no reason whatever why we should not act upon it [*per* MITTER, J, in *Mathura v. Ram Ruchya*, 11 WR 482, 483-484: 3 BLR AC 108]. Fraud and dishonesty are not to be assumed upon conjecture, however probable [*Shk Imdad v. Koothy*, WR 24: 3 MIA 1, 18]. Secrecy is also evidence of fraudulent intention [*Joshua v. Alliance Bank*, 22 C 185]. Silence also is evidence of fraud [*Joy Ch v. Sreenath*, 32 C 357: 1 CLJ 23 and *Salamat v. Budh*, 1 A 301, 306].

Design.—The existence of a design or plan is admissible to prove that an act done subsequently was the result of a design or plan. "The acquisition or possession of instruments, tools or other means of doing the act, is admissible as a significant circumstances; the possession signifies a probable design to use" (Wig s 137). The existence of a design can also be evidenced by conduct.

—Knowledge.—It may in connection with the rule that evidence of collateral facts is usually inadmissible, be noted that, where the knowledge, intent, or good faith, of a party is material, evidence may be admitted to prove facts which happened before or after the principle transaction, and which had no direct or apparent connection with such transaction. At first sight, the admission of such evidence may appear to constitute another exception to the general rule. But the *Knowledge, or good faith*, or *intent* of the party being a material fact, the evidence though apparently collateral and foreign to the main subject, really has a direct bearing [Tay s. 338]. On the same principle, the defendant in mitigation of damages, has been allowed to give evidence palliating, though not justifying, his act of publishing a libel, as for instance that he copied it from another newspaper [*Saunders v. Mills*, 6 Bing 213; Tay s 344]. To this rule, that collateral facts are admissible to show *animus* or intent, may be referred the admissibility of evidence respecting the *general character* of the individuals. Such evidence is tendered for the purpose of either raising a *presumption* of innocence or of affecting the *amount of damages*, or of impeaching or supporting the veracity of witness; the first object being chiefly confined to criminal prosecutions, and the

second to civil causes, while the third is equally applicable to both forms of procedure. The word *character* simply means reputation or the general credit which a man has obtained in public opinion [Tay ss 349, 350]. As to 'character', see Expln to s 55 *post*. *Illustrations* (*a*), (*b*), (*d*) refer to guilty knowledge (see *post*).

Statements by an accused implicating a co-accused but not implicating himself though not admissible under s 30, parts of it are admissible as admissions indicating knowledge of the offence [*Wahid v. R*, A 1929 S 250].

—Abetting.—Evidence that the master knew of the servant's illegal exactions and connived at them is relevant to a charge of abetting, under s 14 [*Srinivasmal v. R*, A 1947 PC 135: 51 CWN 900: 26 P 460].

***—Illustration* (*a*) [Receiving Stolen Property and Guilty Knowledge].**—*Illus* (*a*) makes no reservation as to ownership or time; so that it would seem that though the stolen property belonged to other persons than the prosecutor, and without reference to the lapse of time since it was stolen, evidence of its possession may, under the Act be given against the accused. Its weight must in each case be left to the discretion of the court [Nort p 132]. In a similar case in England under s 27(*3*) Theft Act 1968, for the purpose of proving guilty knowledge evidence may be given of the fact that other property stolen within 12 months preceding the date of the offence charged was found or had been in the accused's possession. Under the Evidence Act there is no time limit as to date of possession, but any period long before the date of the offence charged must necessarily affect the weight of the evidence. See also the other presumption under s 114, illus (*a*). Previous conviction would also be relevant irrespective of date (see s 54).

A guilty knowledge is not necessarily, a thing on which direct evidence can be afforded; it is a matter of conscience, and connected with the secret motives of a man's conduct, and it must be inferred from facts [*R v. Shuruffooddeen*, 13 WR Cr 26]. In a case in which the accused is charged with receiving stolen property, it must be clearly proved that he retained the property with guilty knowledge [*R v. Yar Ali*, 13 WR Cr 70; *R v. Burke*, 6 A 224]. In order to sustain a conviction of receiving property stolen at a dacoity, it is necessary to prove that the prisoner knew or had reason to believe that dacoity had been committed, or that the persons from whom he acquired the property were dacoits [*R v. Joggessur*, 7 WR Cr 109 and *R v. Bishoo Manji*, 9 WR Cr 16]. In a case in which *A* was charged with receiving stolen property, evidence that other properties stolen six months before was found in *A*'s possession, was admitted to show *A*'s guilty knowledge [*R v. Jones*, 1877 14 Cox C 3].

As to when legal presumption of dishonest intention arises, see *Ishan Ch v. R*, 21 C 328. Where stolen property is found with a person who admits having received it, it may be fairly presumed that the receipt was a dishonest one, unless the receiver's conduct is satisfactorily explained [*In re Ramjoy*, 25 WR Cr 10]. See further *illus* (a) to s 114 and notes.

—Illustration (b) [Uttering False Coin].—The *illustration* speaks only of *possession* as relevant to prove guilty knowledge. Evidence of *utterings* of other false coins previous or subsequent to the date of the offence charged, or on the same day would also be admissible to prove guilty knowledge [see *illus* (*c*) to s 15]. In *R v. Whiley*, 2 Leach 985, THOMPSON B, said: "As to the cases put by the prisoner's counsel of uttering bad money, I by no means agree in their conclusion, that the prosecutor cannot give evidence of another uttering on the same day, to prove the guilty knowledge. Such other uttering cannot be punished, until it has become the

subject of a distinct and separate charge: but it affords strong evidence of the knowledge of prisoner that the money was bad." Finding in the pocket of a large quantity of false coins of the same mould, each piece wrapped in a piece of separate paper and distributed in different pockets, is relevant to prove guilty knowledge [*R v. Jarvis*, 25 LJMC 30]. Evidence that the accused had *subsequently* uttered a counterfeit shilling of a *different denomination* is admissible to show guilty knowledge, although such uttering was the subject of a separate charge. In this case it was the subject of a separate charge. In this case it was observed: "The uttering of a piece of bad silver, although of a different denomination from that alleged in the indictment, is so connected with the offence charged that the evidence of it was receivable" [*R v. Foster*, 24 LJMC 135. See also *R v. Harris*, 7 C & P 429: *R v. Ball*, 1 Moo CC 470]. Giving false name and address at the time of uttering is also admissible [*R v. Whiley, supra*]. On a charge of making false coins, previous utterings of other false coins are admissible [*R v. Rowlands*, 3 Cr App R 224].

The chief forms of offence connected with forged and other counterfeit documents or money are: (*1*) making the false article; (*2*) possessing it knowingly with intent to utter; (*3*) knowing utterance of it. In the last two, the defendant's knowledge is always in issue; in the first, it is occasionally in issue, as where the act of writing is conceded but an authority is claimed. In all of them the criminal intent, including knowledge and other elements will be in issue [Wig s 309].

—Illustration (c) [Damage by Animal].—The keeper of a domestic animal which ordinarily has no biting or mischievous propensities, *eg* dog, horse, cow, would be liable if he has knowledge that the particular animal kept by him is of a vicious propensity. Complaints about the dog made to *A*'s wife who was in charge of his business [*Glandman v. Johnson*, 36 LJCP 153] or to *A*'s coachman who kept the dog at the stables [*Baldwin v. Casella*, LR 7 Ex 325] are admissible in proof of *A*'s knowledge. *A*'s offer of a pecuniary compensation for the dog's biting another's cattle [*Thomas v. Morgan*, 2 CM & R 496] or a warning by *A* to another to beware of the dog [*Judge v. Cox*, 1 Stark 285] is evidence of knowledge.

—Illustration (d) [Fictitious Payee in Bill of Exchange].—It is the case of *Gibson v. Hunter*, 2 HB 286. See also *R v. Forbes*, 7 C & P 224. On a charge of forging *A*'s name to a bill of exchange, evidence that other bills to which *A*'s name had been forged were found upon the accused when arrested is admissible [*R v. Hough*, R & R 120].

—Knowledge of Contents From Possession of Document.—On the principle stated before (*ante* s 8) possession of documents, books, letters &c, are presumptive proof that the possessor had knowledge of their contents. Knowledge of letters and other things found in a place accessible to him in his own house or apartments, may sometimes be presumed; such as writings connected with the charge, upon a charge of treason; notes or other documents forged or partly forged, upon a charge of forgery; instruments of coining or house-breaking upon a charge of coinage or burglary—[BOSANQUET J, in *Wright v. Tatham*, 7 A & E 313, 364, 376]. Even if a presumption in respect of a document is not available under S. 90 it would be open to the courts to raise a presumption under Ss 4 and 14. [*Ali Hasan v. Matiullah*, A 1988 All 57, 62 : (1988) 14 All LR 174]. The possession of a document is important and often the only circumstance to show that the possessor has by reading it become aware of its contents. Such evidence may be used for other purposes: (*a*) an assent to the documents' contents or an admission of their truth or (*b*) as evidence of his possession of it at a prior time or (*c*) for other evidential purposes (see Wig ss 156, 157, 260). See also s 8 *ante*.

—Knowledge of Law.—The maxim that every one is presumed to know the law is limited to the determination of the civil or criminal liability of the person whose knowledge is in question. It cannot legitimately be made use of when the parties are entirely different and distinct from him [*E I R v. Kally Das*, 26 C 465 (on app 28 C 401: 28 IA 144: 5 CWN 449)]. Where facts are as consistent with a prisoner's innocence as with his guilt, innocence must be presumed; and criminal intent or knowledge is not necessarily imputable to every man who acts contrary to the provisions of law [*R v. Nobokristo*, 8 WR 87].

Good Faith or Bad Faith.—"The relative positions and circumstances of the parties are often material in determining their good or bad faith in a transaction; a higher standard of probity being demanded from either when the other is, *eg*, of weak intellect, intoxicated, illiterate, or acting under duress or fear, or occupies the position of child, ward, client, or patient to the other" [Phip 8th Ed p 142]. See S 111, *post*.

Illustrations (*f*), (*g*) and (*h*) are on the point of good faith. *Bona fides* may always be given in evidence as a defence: necessarily, for where there is *bona fides* there is not fraudulent intent [*Shrewsbury v. Blount*, 2 M & G 475; Nort p 136]. [As to burden of proving good faith, see s 111 *post* and notes. *Cf* the definition of 'good faith' in s 52 I P Code and in the General Clauses Act]. Good faith is a question of fact. It does not require logical infallibility but due care and attention. Good faith must in each case be considered with reference to the general circumstances and the capacity and intelligence of the person whose conduct is in question [*Abdool Wadoor v. R*, 31 B 293, 298]: or upon the information, true or false, on which a man acted [*Shrewsbury v. Blount, sup*; *Dovey v. Corey*, 1901 AC 477].

Where a party believing in the validity of an adoption, has made incorrect representations concerning it, he cannot be charged with misrepresentation or estopped from setting up the true facts of the case [*Gopee Lal v. Chandrabalee*, 11 BLR 391 PC: 19 WR 12]. The state of a party's knowledge as to any matter and the fact that he had reasonable grounds for such belief may be adduced in evidence of the *bone fide* of his belief regarding it. The absence of reasonable grounds of belief in the existence of a fact is relevant evidence of want of honest belief [*Derry v. Peek*, 14 App Cas 337]. *A* and *B* was charged with conspiring to defraud *C* by a deed which falsely represented that *A* owned certain property. *B*'s defence being that he honestly believed the representation but was duped by *B*—*Held* that letters between *A* and *B* (not communicated to *C*) *prior* to the completion of the transaction, and regarding it, in which *A* made similar representations to *B* were admissible in *B*'s favour, but letters between *A* and *B* written subsequently to the transaction and regarding it were inadmissible [*R v. Whitehead*, 1 Dowl & Ry MC 367, 368 cited in Phip 8th Ed p 143]. Allegations of *mala fides* can generally be substantiated by circumstantial evidence [*Aluminium Corpn v. Lakshmi Ratan &c*, A 1970 A 452].

Notice—Actual or Constructive.—"Notice" is defined in s 3 T P Act. It may be actual or constructive. Actual notice involves actual knowledge of the subject of notice which may come from the facts containing the information received from a person, or from possession of or access to documents. Sometimes the law requires the giving of express notice even though there may be actual knowledge. In order to bind one with actual notice it must be definite information given by a person interested in the property, for a person is not bound to attend to vague rumours or to statements by mere strangers [*Barnhart v. Greenshields*, 9 Moo PC 18, 36]. In order that a notification in a newspaper may amount to actual notice to a subscriber, it must

be proved that his attention was drawn to that notification [*Bhairab v. Kalidhan*, 33 CWN 569].

"Contructive notice has been defined as a presumption of knowledge which will not be allowed to be rebutted; and arises in equity, where a party or his agent had had the means of knowledge and might have obtained it, but for his gross negligence or wilful abstention. Thus, claiming under an instrument is constructive notice of its contents; and notice of a deed or trust will be notice of its terms, provided the person receiving the notice had the reasonable opportunity of inspecting a document" [*Pat-man v. Harland*, 17 Ch D 353; *Reeve v. Berridge*, 57 LJQB 265; *Re Nisbett*, 1906, 1 Ch D 386; Phip 8th Ed p 135]. As to the essentials necessary to impute constructive notice, see Sugden's Vendor & Purchaser, 10th Ed Vol 3 pp 471-72 quoted with **approval** in *MacNeil & Co v. Saroda*, 33 CWN 526, 531: *Doorga Narain v. Baney*, 7 C 199 [**following** *Agra Bank v. Barry*, LR 7 HL 135]. "Wilful abstention" is such abstention from search or enquiry as would show want of *bona fides* [*Joshua v. Alliance Bank*, 22 C 185]. The question is not whether the person had the means of obtaining and might by prudent caution have obtained the knowledge in question, but whether the not obtaining it was an act of gross negligence [*Ware v. Egmont*, 4 De GM & G 460; *Bailey v. Barnes*, 1894, 1 Ch 25; *Doorga Narain v. Baney, sup*].

A notice to an agent is notice to the principal under s 299 Contract Act. The principle enunciated in that section is not a mere question of constructive notice or inference of fact but a rule of law which imputes the knowledge of the agent to the principle [*Rampal v. Balbahadur*, 29 IA 203: 25 A 1 : 6 CWN 849: 4 Bom LR 832]. But knowledge of an agent not acquired in the matter for which he was agent cannot be imputed to a principal and used to upset a transaction of a date before the agency commenced [*Chabildas v. Dayal*, 31 B 566 PC: 11 CWN 1109: 34 IA 179].

The doctrine of constructive notice is usually applied when dealing with immovable property like land &c where title can be deliberately investigated, but does not extend to mercantile transactions where possession is everything and there is no time to investigate title [*Manchester Trust v. Furness*, 1895, 2 QB 539; *Greer v. Downs S Co*, 1927 2 KB 28]. As to passengers' tickets, see *Hood v. Anchor Line*, 1918 AC 387; *Harris v. G W Rly*, 1 QBD 515; *Action v. Castle Mail Co*, 73 LT 158; *Robinson v. Rowntree*, 1894 AC 217; *Penton v. S Rly*, 1931, 2 KB 103; *G T. Rly v. Robinson*, 1915 AC 740; *Sugar v. L M & S Rly*, 1941, 1 All ER 172 and cases cited in Phip 8th Ed pp 136-37].

Whether Registration is Notice.—As to whether registration amounts to notice or not there was difference of opinion in the several High Courts. The Calcutta and Madras High Courts held that mere registration of a document is not a sufficient notice, but the Bombay and Allahabad High Courts took a contrary view. The point was set at rest by the Privy Council decision of *Tilakdhari v. Khedan*, 47 IA 239: 26 CWN 619: 48 C 1, where upon a review of all the authorities, it was, held that mere registration is not *per se* constructive notice. The new definition of notice introduced by T P Act, 20 of 1929, has now changed the law by making registration of an instrument affecting immovable property, notice of such instrument.

Negligence or Rashness.—*Illustration* (*n*) is on the point of negligence. Failure to get possession of title-deeds does not necessarily amount to gross negligence where the system of registration exists [*Rangasami v. Annamalai*, 31 M 7. See also *Madras Bldg Co v. Rowlandson*, 13 M 383; *Manindra v. Troylakho*, 2 CWN 750]. For facts relevant to show negligence, mistake or rashness; see *Bromley v. GIPR*, 24 B 1; *Kessowji v. GIPR*, 31 B 318: 11 CWN 721: 34 IA 115; *Shk Mahamed v. BISN Co Ld*,

32 M 95. Railway companies are not common carriers, and where such a company is sued for not carrying safely, they are not liable unless, it is affirmatively proved that there is any negligence, omission or breach of duty [*E I Ry Co v. Kalidas*, 28 C 401 PC: 28 IA 144 : 5 CWN 449 (**reversing** 26 C 465)]. As to presumption of negligence, see s 114 and as to burden or proof, see ss 101-4.

Ill-will or Good-will.—*Illustration* (*k*) is on the point of mental feelings of ill-will or good-will. *Illus* (*e*) shows ill-will as proving intention to injure reputation. In actions for slander or false imprisonment or malicious prosecution where malice is one of the main ingredients in the wrong which is charged, evidence is admissible to show that the defendant was actuated by spite or enmity against the plaintiff [See *R v. Vyapoory*, 6 C 655; *Mody, v. Queen Ins Co*, 25 B 332 PC: 4 CWN 871; *Harish v. Nishikanta*, 28 C 591; *Ramayya v. Sivayya*, 24 M 594; *Madhulall v. Sahai*, 27 C 532; *Hall v. Venkatakrishna*, 13 M 394; *Raghavendra v. Kashinath*, 19 B 717; *Bhim v. Sitaram*, 24 A 363; *Srinath v. Ralti*, 10 CWN 253 FB; *Jung Bahadur v. Gudor*, 1 CWN 537; *Jadubar v. Sheosaran*, 21 A 26]. When the allegation against the accused was that his state of mind was to exterminate the Hindus, he was entitled to lead evidence to show that he did not possess that state of mind [*Habeeb Md v. S*, A 1954 SC 51: 1954 SCR 475].

Appellant was convicted under s 290 I P Code of having made false claims in three suits against certain persons. Three other persons were similarly convicted for bringing false suits against the same defendants—*Held* that evidence relating to suits brought by the appellant other than those specified in the charges were properly admitted under ss 14, 15 for showing ill-will or enmity, but the evidence relating to suits brought by other persons where there was no case of conspiracy, was inadmissible [*Raghunath v. R*, 22 CWN 494: 46 IC 695].

"State of Body or Bodily Feeling".—*Illustrations* (*l*) and (*m*) have reference to bodily feelings. *Illustrations* (*k*), (*l*), (*m*) show that when the existence of a particular state of mind or body of a given person is in issue, statements made by him may be relevant; such a statement, however, unaccompanied by any conduct on the part of the person making it (s 8), can be admitted only so far as it relates to the existence of the mental or physical condition. It cannot be meant that a statement made by a person as to circumstances in which he came to be poisoned should be admissible to prove the act of poisoning in a case in which the sufferer himself could and s 32 (*1*) would thus be inapplicable [Cunn p 49].

Wherever the *bodily* or *mental feelings* of an individual are material to be proved, the usual expressions of such feelings made at the time in question, are also original evidence. If they were the natural language of the affection whether of body or of mind, they furnish satisfactory evidence, and often the only proof, of its existence. And the question whether they were real, or feigned, is for the jury to determine. Thus, the representation by a sick person of the nature and effects of the malady under which he is labouring, and receivable as original evidence, whether they be made to the medical attendant, or to any other person, though the former are naturally entitled to greater weight than the latter, inasmuch as a physician is far more capable than a man acquainted with the symptoms of diseases, of forming a correct judgment respecting the accuracy of the statements [*Aveson v. Lord Kinnaird*, 1805 6 East 188]. But statements by the sick man to the cause of his illness are not admissible, *eg*, a statement by a man who died of blood poisoning that he had been stung by a wasp held inadmissible [*Amys v. Barton*, 1912, 1 KB 40]. So, on a trial for murder by poisoning, statements made by the deceased in conversation shortly before he took the poison, have been received in

evidence for the purpose of proving the state of his health at that time [*R v. Johnson*, 1847 C & K 354]: and on the same ground, in actions or indictments for assault, what a man has said about himself to his surgeon is evidence to show what he suffered by reason of the assault [*Aveson v. Lord Kinnaird, ante*]. When there is a dispute between the wife and the husband about the potency of either of them, their evidence reflected by truth constitutes the cream of evidence and the marshalling of adventitious or extraneous circumstances afford a poor substitute. In the event of diametrically opposite and rival versions of the parties the recourse to medical test resolves the riddle and the medical opinion assumes the acceptable piece of evidence. [*G Venkatanarayana v. Kurupati Laxmi Devi*, A 1985 AP 1, 3 (A 1972 Mys 157 **Dissented**)]. In prosecutions for rape and offence of a similar character, a statement in the nature of a complaint made by the prosecutrix not in the presence of the accused, to a third person may be given in evidence, provided that such statement is shown to have been made at the first opportunity [*R v. Osborne*, 1905 1 KB 551]; but such particulars of the complaint may be given in evidence not as being evidence of the truth of the charge, but as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness box and as also negativing consent on her part [*R v. Osborne, sup*]. It has been suggested that on an indictment for highway robbery, the fact that the prosecutor, a few hours after the attack, complained to a constable of the robbery may be admissible although not the fact that the prosecutor mentioned the prisoner's name [*R v. Wink*, 1834 6 C & P 397], but in view of the opinion in *R v. Osborne, supra*, that the admissibility of complaints is confined to cases of outrage upon women and girls, the law must be considered settled to the contrary [Tay ss 580-581]. As to the rule in this country in such cases see s 8 *illus* (*j*) and (*k*) *ante*.

Explanation 1 [State of Mind Must Exist in Reference to the Particular Matter in Question].—[See also *ante*]. This explanation was substituted for the original explanation by Act 3 of 1891, s 1 (*l*). The sum and substance of this Explanation is that, evidence of general disposition, habit or tendencies is inadmissible, but the state of mind to be proved must be a condition of thought and feeling, having distinct and immediate reference to the particular matter in question [See the observations of GARTH CJ, in *R v. Vyapoory*, 6 C 655 *ante* and of WEST J, in *R v. Parbhudas*, 11 Bom HC 90 *ante*]. "The fact that man is generally dishonest, generally malicious, generally negligent or criminal in his proceedings does not bear with sufficient directness on his conduct on any particular occasion, or as to any particular matter, to make it safe to take it as a guide in interpreting his conduct; what is wanted is a fact which will throw light on his motives and state of mind with immediate reference to the particular occasion or matter. Illustrations (*a*) and (*b*) make this clear. A man is accused of receiving stolen goods with guilty knowledge; if he is merely shown to be generally dishonest, the probability of his having been dishonest in this particular transaction is perhaps increased, but only in a vague and indefinite way; but if at the time, he is found in possession of a number of stolen articles, this fact throws a distinct light on his knowledge and intentions as to the articles of which he is found in possession. It would be dangerous to infer that because a man was generally dishonest, he was dishonest in any single case; but it is not dangerous to infer that a man, who is found in possession of 50 articles, which are shown to have been stolen from different people, came by each and all in a dishonest manner" [Cunn pp 118-119].

In a case of divorce on the allegation of adultery, a letter written by the wife to her paramour is good evidence under s 14 of her feeling towards him at that time [*Niranjan v. Ena*, 47 CWN 251: A 1943 C 146].

When a party who is ignorant of English is sought to be made liable on a contract in English, his mental capacity is not irrelevant. It is incumbent on the opposite party to establish that he signed the contract with an understanding mind [*Hariomal v. Firm Uttam*, A 1942 S 171; see *Omanhene v. O*, A 1937 PC 274].

Explanation 2 **[Relevancy of Previous Conviction Where Previous Commission of an Offence is Relevant].**—This explanation has been substituted for the original one by Act 3 of 1891 s 1 (*1*). The original explanation has been modified owing to the decision of the Calcutta High Court in *R v. Kartick Chunder*, 14 C 721. This explanation is to be read with *illustrations* (*e*) and (*f*) to s 43 and with s 54. The reason for the modification of the original explanation has been clearly explained in *R v. Nabakumar*, 1 CWN 146 *post*, Expl 2 only means that if the prosecution brings forth evidence of a prior offence, then, it may also prove the conviction [*Lakshmandas v. S*, A 1968 B 400].

In regard to previous convictions which by the *Explanation* 2 are declared admissible, there is no limit of time as in the English statute (*ante*, p 161), nor is there any restriction as to the nature of the offence. It is obvious, however, that a previous conviction can only be relevant when the offence previously committed and the offence for which the prisoner is being tried are of a cognate character, and that a previous conviction long before the offence charged cannot be relevant as showing the existence of the particular state of mind of the accused. It may also be observed that conduct such as the previous commission of an offence and not character is within the terms of the section. There are criminal cases in which the bad character of the accused is a fact in issue in which to prove that bad character, a previous conviction may be proved (s 54). But *Explanation 1* to this section shows that evidence of general disposition or reputation is excluded. The evidence whether it relates to the previous commission of an offence or to a previous conviction must show that the *state of mind exists not generally but in reference to the particular matter in question* [Cunn p 48]. Where the facts revealed by cross-examination of the accused about his previous convictions showed the intention of the accused as to conspiracy to steal, the court held that there were no grounds for holding that the cross-examination was improper [*R v. Duncalf*, (1979) 2 All ER 1116 CA]. See note to Explanation 1 *ante*.

—Convictions Subsequent to the Time Specified in the Charge Not Admissible.—*Explanation 2* distinctly states that, where the previous commission of an offence is relevant, the previous conviction of such person should also be relevant. Having regard to the character of the offence under s 400 IP Code, previous convictions of dacoity are relevant under s 14. Convictions previous to the time specified in the charge or to the framing of the charge are relevant under this explanation; but convictions subsequent to the time specified in the charge are not so admissible [*R v. Naba Kumar*, 1 CWN 146].

—Previous Conviction, to Prove Guilty Knowledge.—On a charge of keeping a common gambling house, evidence that the accused had been previously convicted of the same offence was admissible to show guilty knowledge or intention [*R v. Alloomiya*, 28 B 129 : 5 Bom LR 805, JACOB J, **dissenting**]. In England s 27(*3*) Theft Act, 1968 provides that on a charge for handling stolen goods evidence that he had been convicted of theft or of handling stolen goods within the last five years is admissible to prove guilty knowledge.

—Previous Conviction in Theft and Other Cases.—In a prosecution for theft, it cannot be assumed as a matter of course, that a previous conviction for the same offence is relevant in establishing the guilt of the accused. In order that it may be

relevant, it must be strictly shown that this section applies [UBR 1897-1901 Vol 1 p 144]. In a prosecution under s 153-A IP Code, the previous conviction of the accused for a similar offence is relevant [*Shib Sharma v. R*, A 1940 O 310]. A previous judgment convicting the accused under s 379 for harvesting paddy is admissible to prove his dishonest intention at a trial for the same offence in respect of the same land [*Yumlamham v. Thangiam*, A 1961, Man 43]. A previous conviction of theft or an order to give security on the ground of being a habitual thief, is admissible against a person accused under s 401 IPC not as evidence of character but of habits and association [*Bonai v. R*, 38 C 408: 15 CWN 461 (*Mankura v. R*, 27 C 139: 4 CWN 97 **doubted** and **distd**; *R v. Nabakumar*, 1 CWN 146 **folld**); *R v. Tukaram*, 15 IC 811: 14 Bom LR 373; *Bhima v. S*, A 1956 Or 177; *Bachhu v. R*, A 1930 O 455; *Beni v. R*, A 1933 O 355; see *post* notes to s 54]. Former judgment more than 25 years old and convicting accused of dacoity is admissible in a case under s 401 I P Code for showing criminal tendency to commit theft and not habit of committing theft [*Motiram v. R*, A 1925 B 195: 89 IC 527].

Previous convictions for handing stolen goods.—*B* lived with *X*, who had many previous convictions for theft of large sums. Following a burglary *B* was found to be in possession of a good sum of money. She admitted that she received it from *K* and believed that it was derived from stolen goods. Her brother who also had previous convictions for dishonesty was involved in the transferring of the money. These convictions though not of the accused herself were held to be relevant against her as showing her state of knowledge of the source from which the money was raised making her guilty of handling stolen goods [*R v. Barnes*, 1991 Crim LR 132 CA].

Previous convictions for sexual offences.—The accused (appellant here) was a man of low intelligence. He was charged with the offence of indecent assault on a young married woman. The police interrogation revealed his two previous convictions for sexual offences against children. He confessed. But at the trial he advanced an *alibi* defence and claimed that the police had fabricated his confession. The prosecution then sought to question him as to his two previous convictions. This was not allowed because the evidence of previous convictions was not relevant for the purpose of proving that he was guilty of the offence. Such evidence is allowed either to expose a state of mind or to test the extent of credibility. The court said that the fact of the previous sexual offences added little if anything to the issue of the appellant's credibility, especially as those past offences did not involve dishonesty, but their prejudicial effect was considerable because, although they were not sufficiently similar to be advanced as similar fact evidence on the issue of identity, they would lead the jury to conclude that the appellant had committed the offence charged [*R v. Watts*, (1983) 3 All ER 101 CA]. The court applied the dictum of Viscount Sankey LC in [*Maxwell v. DPP*, (1934) All ER Rep at 174].

A headmaster was charged with sexual offences against four female pupils over a period of time. The evidence fell into three categories, those in the school gymnasium, those on bus journeys and those at the swimming pool. Evidence was also led of other incidents within those categories relating to other pupils. It was held that the judge was right is not excluding such evidence. The evidence in each category was relevant in considering the nature of the behaviour of the accused on other occasions [*R v. Shore*, (1989) 89 Cr App R 32 CA].

[*As to previous conviction, see notes to s 54, post*].

S. 15. Facts bearing on question whether act was accidental or intentional.—When there is a question whether an act was accidental or intentional, [1][or done with a particular knowledge or intention], the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant.

Illustrations

(*a*) *A* is accused of burning down his house in order to obtain money for which it is insured.

The facts that *A* lived in several houses successively, each of which he insured, in each of which a fire occurred, and after each of which fires *A* received payment from a different insurance office, are relevant, as tending to show that the fires were not accidental.

(*b*) A is employed to receive money from the debtors of *B*. It is *A*'s duty to make entries in a book showing the amounts received by him. He makes an entry showing that on a particular occasion he received less than he really did receive.

The question is, whethere this false entry was accidental or intentional.

SYNOPSIS

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COMMENTARY

Principle and Scope.—The subject-matter of this section has been discussed at length in the notes to s 14 (*ante*). It deals with the second principle laid down in the well-known case of *Makin v. Att-Genl* (cited *ante*). The section is not an exception but an application of the genereal rule laid down in s 14 [*R v. Debendra, ante*]. It must be read subject to s 14 so far as evidence of state of mind, *eg*,

1. Inserted by S. 2 IE Act (1872) Am Act 30 of 1891.

knowledge and intention are concerned [*Gunwar v. R*, 38 IC 723: 13 NLR 35]. Evidence of *similar* facts is admitted to prove knowledge of the fact under consideration, or a party's intention with respect thereto. Such evidence is received not because a person committing one offence is likely to commit another offence of a similar nature, but to show the intention or knowledge of the person accused of the offence and rebut the defence of accident, mistake or innocent intent &c. [See observations of LORD HERSCHELL in *Makin v. Att-Genl of N S Wales, ante*, s 14; *R v. Armstrong*, 1922, 2 KB 555; *R v. Bond*, 1906; 2 KB 289]. The concept of "similar facts" has been thus explained by the Federal Court of Australia: "Similar fact" evidence is evidence of a tendency or propensity to conduct of the kind alleged. It is circumstantial evidence of a dangerous kind because of the prejudice that it engenders. It will be admitted only if it is of a sufficiently high degree of relevance to outweigh the prejudice. A fact is similar to another whenever the two possess a common characteristic. [*D F Lyons Pty v. Commonwealth Bank of Australia*, (1991) 100 ALR 468, Fed Ct of Australia].

It has also been observed that with respect to similar fact evidence, to be admissible, the evidence must show more than the mere commission of another offence or predisposition to commit an offence and it must otherwise be probative of the events charged or of a fact in issue. See also [*R v. Wells*, (1991) 92 Cr App R 24 CA, where in a case of drug trafficking evidence of "similar facts" was rejected because of lack of striking similarity; [*R v. Maxsfield*, (1978) 1 All ER 134 CA (repeated arsons). [*Newbury v. Smith*, (1991) 101 ALR 54, Fed Ct of Australia]. A similar fact evidence recorded by a computer which monitored the conduct of an employee charged with theft etc., was allowed to be shown by the print-out [*R v. Mather*, 1991 Cr LR 285 CA].

Similar facts under this section should be distinguished from those admissible under s 6 as part of the same transaction (*ante*, s 6).

In the determination of relevancy under s 15 two things should be considered:

(1) Before s 15 may be applied there must be a question whether an act was intentional or accidental, or was done with a particular knowledge or intention. Evidence of similar facts need not be admitted unless the defence of accident, mistake or innocent intent, &c, is raised in substance, or if the intention is manifest. Such evidence is admissible whenever it is necessary to rebut (even by anticipation) a defence of accident or mistake or other innocent conditions of mind.

By the phrase "rebut a defence" it is not meant that a specific line of defence should be set up before evidence of similar acts may be tendered to overthrow it. So, the prosecution may adduce evidence of criminal acts other than those charged without waiting for the accused to set up a specific defence calling for rebuttal, and evidence of similar acts, *eg*, to show intention or to rebut a possible defence of accident may be admitted. But though such evidence is strictly admissible, the judge has a discretion to exclude it, if it merely tends to deepen suspicion against the accused and its prejudicial effect is out of proportion to its probative value [*Harris v. D P P*, 1952, 1 All ER 1044 **affirming** and **explaining** *Makin v. Att-Genl, ante*]. The question has already been discussed under s 14 (*ante*).

(2) The other important thing to remember is that s 15 does not apply unless it is sought to be proved that the act forms part of a *series* of similar occurrences. The section is of no assistance unless it is established that the act forms a part of a *series* of similar occurrences.

It is well-established that unless there is sufficient and reasonable connection between the fact to be proved and the evidentiary fact, that is, unless there is in substance some common link, they cannot form a *series* [*R v. Panchu Das*, 24 CWN 501, 516 FB]. If there is a concurrence of common features in similar acts of the accused, it would naturally point to the conclusion that the various acts were caused by a general plan or design or system. In *Blake v. Albion L Ass Co*, LR 4 CPD 94, 106, LINDLEY J, observed:—

> "I agree that in order to prove that *A* has committed a fraud on *B*, it is neither sufficient nor relevant to prove that *A* committed fraud upon *C*, *D* and *E*. Stopping there, I admit that proposition. But let it be shown that the fraud on B is one of a class of other transactions having common features, then I disagree altogether with that proposition".

The evidence of similar acts may have the object of negativing an innocent intent as in s. 14, but this section goes further. Here, the object is not merely to negative innocent intent, but to prove a pre-existing plan or design and that the act charged is only one of a class or series designed to bring about a certain result with a certain object. To rebut the defence of accident even anonymous acts, *ie*, acts whose authorship is unknown and cannot be attributed to the accused are admissible provided they show system [see *R v. Bailey*, 2 Cox 311; *R v. Roden*, 12 Cox 630 cited *post*]. Wigmore says that though innocent intent—accident, inadvertence or the like—may be negatived by *anonymous* instances of the previous occurrence of the same or a similar thing [Wig s 303], anonymous acts are not available in the use of the class of evidence of Design or System; for the whole purpose of the evidence is to fix a design upon the defendant, as making it likely that he carried it out, and thus it was he who did the act charged [Wig s 304].

—Gist of Law.—The law in s 15 may be summarised thus:—

(*1*) In order to rebut (even by anticipation) a defence of accident, mistake or other innocent intent or to show that an act was done with a particular knowledge or intention, other similar acts by the accused (whether done before or after the subject-matter of the charge) having common features and pointing to a plan or system may be given in evidence in proof of a systematic course of conduct.

(*2*) In order that evidence of similar acts may be given to rebut a defence of accident, mistake, &c, it is not necessary that a specific line of defence should be set up by the accused before such evidence is tendered [*Harris v. D P P, ante*].

(*3*) The other acts must be of the same specific kind as that in question and must also have been sufficiently proximate in point of time to that in question (see below).

(*4*) A single similar act is admissible to prove knowledge or to rebut accident, mistake &c (*post*: "*Application of the section*"). See also the statement of law in *Amritalal v. R (ante) and Makin v. Art-Genl (ante)*.

(*5*) The prosecution was not allowed to bring in the evidence of 5 other burglaries by the accused in the absence of evidence of a system or similar facts [*R v. Marshall*, 1989 Crim LR 819 CA].

Probative value to be weighed against prejudice.—Evidence of similar facts is relevant if probative force outweighed prejudicial effect [*Tan Meng Jee v. Public Prosecutor*, (1996) 2 SLR 422 (Singapore CA)]. A similar test was propounded by the House of Lords in *Boardman v. DPP*, (1974) 3 All ER 887. Their Lordships made a bold and radical reassessment of the law concerning the admissibility of the criminal record and past misdeeds of the accused person. It was held that the

evidence of the past misconduct of the accused is admissible if, and only if, the probative force of the evidence is such as to outweigh its prejudicial effect. Their approach would have no room for a *priori* categories of admissibility. Instead, admissibility is to turn upon the outcome of a weighing exercise.

Application of the Section.—The question under this section will always be for the discretion of the judge, to determine whether there is sufficient and reasonable connexion between the *factum probans* (fact to be proved) offered and the *factum probandum* (evidentiary fact), or whether they are too remote from each other for the *factum probans* to be received. If there is no common link they cannot form a series, and this is the gist of the section [Nort, p 140]. In *R v. Heesom*, 14 Cox 40, LUSH J. said: "To prove the intention you may prove the motive and this is a link in the chain". As a general rule a single similar act is admissible to prove knowledge or intent, or to rebut the suggestion of accident; but a single similar act is not necessarily admissible without further evidence, to show a *systematic course* of conduct [see *R v. Bond*, 1906 2 KB 389: *R v. Cooper*, 3 Cox 547; *R v. Armstrong*, 1922, 2 KB 555: *R v. Hicks*, 1904 39 L Jo 421 cited *post*; see however *R v. Thompson*, 7 Cr App R 276 *post*]. A single similar act being admissible under the section (to prove knowledge or intent), in this sense one evidentiary fact can form a series with the fact to be proved [*Gandhi v. R*, A 1941 R 325: 1941 Rang 566; see also the facts in *R v. Bond*; *R v. Armstrong* and *R v. Thompson*, *post*]. One instance cannot however constitute "a series of similar occurrences" in the ordinary meaning of language [*Mati v. P I Bank Ltd*, A 1946 C 400 **relying** on *Amritalal v. R* and *R v. Panchudas, ante*]. A solitary act or a single instance is the very antithesis of the expression "part of a series of similar occurrences" [*Babulal v. W I Theatres Ltd*, A 1957 C 709].

But where the conduct offered consists merely in the doing of other similar acts, it is obvious that something more is required than that of mere similarity, which suffices for evidencing intent (*ante* s 14). The object here is not merely to negative an innocent intent at the time of the act charged, but to prove a pre-existing design, system, plan or scheme, directed towards the doing of that act. In the former case (or intent) the attempt is merely to negative the innocent state of mind at the time of the act charged; in the present case the effort is to establish a definite prior design or system which included the doing of the act charged as a part of its consummation. The added element then, must be, not merely a similarity in the results, but *such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are individual manifestations*.....It will be seen that the difference between requiring similarity, for acts negativing innocent intent, and requiring *common features indicating common design*, for acts showing design, is a difference of degree rather than of kind; for to be similar involves having common features, and to have common features is merely to have a high degree of similarity. This is another reason why the precedents are so difficult to reconcile; for the courts have not always perceived that there are in truth these two distinct purposes and therefore two distinct tests for such evidence. Nevertheless the distinction is a real one [Wig s 304].

In *R v. Bond*, 1906, 2 KB 389, 414 BRAY J, observed:—

> "A careful examination of the cases where evidence of this kind has been admitted shows that they may be grouped under three heads:
>
> (*1*) Where the prosecution seeks to prove a system or course of conduct.

(2) Where the prosecution seeks to rebut a suggestion on the part of the prisoner of *accident or mistake*.

(3) Where the prosecution seeks to prove *knowledge* by the prisoner of some fact."

Facts of a kind *different* to the main fact or transaction are not however admissible. Thus, were a person—is charged with obtaining a pony and a trap by false pretences, evidence that he had subsequently similarly attained a quantity of oats and fodder from another, was held not admissible to show that his statements as to the pony and trap were false, as the two acts were dissimilar [*R v. Fisher*, 1910 1 KB 149 CCA]. In this case it was said that the falsity of the statement in question is not proved by evidence, that in other cases the person made other false statements, though it did tend to show that he was a swindler, but swindling in a particular manner cannot be shown by swindling in some other manner—*per* CHANNEL J. To admit evidence under this section, the other acts tendered must be—(*a*) of the *same specific* kind as that in question and not of a different character, and further (*b*) the acts must have been *proximate in point of time* to that in question [see *R v. Smith*, 1905, 20 Cox CC 854 : 92 LT 208; *R v Baird*, 113 LT 608; *R v. Debendra*, 36 C 573; *Amritalal v. R*, 42 C 957; *R v. Panchu Das*, 47 C 671]. As to proximity of time, the decision in *R v. Rhodes*, 1899, 1 QB 77 : 15 TLR 37 shows that this question goes rather to the weight to be given to the evidentiary facts than to their admissibility [*Gandhi v. R*, A 1941 R 324 : 1941, Rang 566]. A contrary view appears to have been taken in *R v. Holt*, 8 Cox CC 411 : 30 LJMC 11, but it seems that the decision proceeded upon other grounds *viz*, that the second act was distinct and unconnected [see *R v. Smith, sup* and *R v. Rhodes, sup*].

The facts in *R v. Holt, sup*, were that *A*, a servant of *B*, was charged with obtaining money from *C* upon the false pretence that he was authorised by *B* to collect it. *B* having deposed that he had forbidden *A* to collect money and that *A* had never given any account of his collection, evidence was tendered that within a week after getting money from *C*, *A* had also collected money from *D* by similar false pretence. It was held that this evidence was inadmissible. In *R v. Amritalal, sup*, it was observed that *R v. Holt*, is no longer good authority. Evidence of similar facts may be direct or presumptive or may consist of admission of the party [*R v. Bond*, 1906, 2 KB 389; *R v. Wells*, 123 CCC. Sess Pap 1203], and they may have occurred *before* or *after* the transaction in question, provided there is in substance some common link and they form a *series*.

S 15 is an application of the general rule laid down in s 14 and it is not necessary under it to show that all the acts should form one transaction but if they form part of a series of similar occurrences, such acts may be proved. Where the particular transaction is one of a series of similar frauds, evidence of the other frauds is admissible to prove the intention of the accused in the particular case [*R v. Debendra*, 36 C 573 : 13 CWN 973]. The words of s 15 are wide, for the material word used is 'concerned', but they are not so wide as to admit hearsay evidence of the evidence of facts alleged to have been discovered by the investigating officer in the course of his investigation and not properly proved [*Shewaram v. R*, A 1939 S 209 : 184 IC 474].

Evidence that the accused committed other acts of a similar nature to the act charged may be admitted in order, by showing system, to negative the inference of accident, or to establish guilty knowledge or intention where the accused has been proved to have committed the act charged, or to show that an inference of guilt shuld be drawn from the facts proved which are otherwise susceptible either of an innocent

or guilty interpretation. On like principles, evidence connecting the accused with other similar offences may be admissible if it serves to identify the accused as the person who committed the offence charged. Evidence which merely tends to deepen suspicion, however, does not go to prove guilt. [Hals, 3rd Ed, Vol 10, para 819, p 443].

It is well-established that similar facts which were the subject of prior indictments can be taken into consideration under s 15. This applies also to separate indictments still to be tried [*S v. Kailash*, A 1961 P 451].

[*Ref Step Dig Art 12; Phip 8th Ed pp 159-71; Tay ss 328-48; Hals, 3rd Ed Vol 10, paras 818-20; Archbold Cr Pl 23rd Ed pp 308-12; Wig s 304 et seq; s 14 I E Act*].

Evidence Admissible Under the English Law is Also Admissible Under the Evidence Act.—TELANG J, observed in *R v. Vajiram*, 16 B 414, 433 : "I may point out that in India we have what may be called a legislative approval of the decision of WILLES J, for illustration (*a*) to s 15 is really a statement of the case of *R v. Gray* (*v post*). And I may add, in passing, that illustration (b) to the same section is in principle identical with the case of *R v. Richardson* (*vide post*), the only difference being that *R v. Richardson* was a case of swelling debits and the illustration is a case reducing credits. According to the principle, therefore, stated by COUCH CJ, in *Hamabai v. Bamanji*, 7 Bom HC 64, we are justified in looking to English decisions to elucidate the meaning of the Evidence Act, and evidence which the judges in England have admitted and juries have acted upon must be held to be clearly within the terms of ss 11, 14, 15." ROBERTS CJ, made identical remarks in *Gandhi v. R*, 1941 Rang 566. "I do not see any difference in the law on the subject [*per* CHAUDHURI J, *R v. Panchudas*, 24 CWN 501, 525]. [As to the use of English case-laws as authorities see *ante*, under s 2].

"Accidental or Intentional or Done with a Particular Knowledge or Intention."—It is wrong to say that the section only deals with intention as opposed to accident. The words "or done with a particular knowledge or intention" (added by Act 3 of 1891) must not be overlooked in construing s 15 [*per* CHAUDHURI J, in *R v. Panchudas*, 24 CWN 501, 525 : 47 C 671 FB]. When there is an issue whether the act charged was designed or accidental or done with guilty knowledge, evidence is admissible of a series of similar acts by the accused on other occasions, because a series of acts with the self same characteristics is unlikely to be produced by accident or inadvertence [*R v. Sims*, 1946 KB 531, 537].

There is a distinction between accident and intention. Where a person was tried for burglary on being found in a dwelling house at about 1 a m he gave evidence that he did not recollect how he got into the house and must have acted in a state of automatism. The trial judge allowed the prosecution to cross-examine the accused as to his previous conviction for house-breaking on the ground that his real defence was that his presence in the house was accidental. LORD GODDARD LCJ, observed that it was a confusion of intention and accident. The real defence being that it was not a voluntary act, it was not permissible to cross-examine the accused as to his previous conviction or to give evidence of previous similar events [*R v. Harrison-Owen*, 1951 2 All ER 726]. On the defence of automatism and the onus of proof *cf R v. Charlson*, 1955 1 All ER 859; *Hill v. Baxter*, 1958 1 All ER 193.

Evidence of Similar Acts.—It has been seen that s 15 is an application of the general rule in s 14 and the principle of the admissibility of evidence of similar acts has already been discussed under s 14 (*ante*). Facts similar to the one with which the accused is charged is not generally admissible, because to allow a theft or any other

crime to be proved by showing that the accused committed similar offences on other occasions would be to create rank prejudice. But when there is *prima facie* evidence that the act charged is a part of a series of similar occurrences, then evidence of similar acts is admissible to show that they were done with a certain intent and to rebut the defence of accident, mistake or innocent intent.

Similar surrounding circumstances.—Evidence of similar facts which does not include evidence disclosing the commission of an offence similar to that charged but which relates solely to the surrounding circumstances can be admitted if it is evidence of facts which are strikingly similar to those surrounding the commission of the offence charged. The accused invited three girls to his house telling them that their services were needed for baby-sitting. He showed them pornographic pictures and asked them to pose for photographs in the nude and indecently assaulted them. The witnesses included three earlier girls who were given similar treatment but who were not criminally assaulted. The evidence was admitted because (a) it revealed features which were strikingly similar to the circumstances surrounding the commission of the offence charged and was of positive probative value in determining the truth of the charges against the accused in that it tended to show that he was guilty of the offences charged and (b) because there was no suggestion that it should have been excluded on the ground that its prejudicial effect outweighed its probative value [*R v. Barrington*, (1981) 1 All ER 1132 CA]. The court applied the principles laid down in [*R v. Scarrott*, (1978) 1 All ER 672 CA]. In this case the accused was charged with several various offences against young boys including buggery of one boy, attempted buggery of another boy and indecent assault involving seven boys. Evidence of similar facts was allowed. Such evidence, the court said, has to reveal an underlying link between the matters with which it deals and the allegations. Its admissibility depends not on whether it is capable of corroborating the evidence of the victim or accomplice but on its positive probative value, *i.e.*, on whether, logically considered, it possesses a probative value sufficiently positive to assist the court to determine whether the offence charged against the accused has been committed by him.

In a proceeding against a medical practitioner arising out indecent language and behaving improperly with two female patients with a gap of six days and in both cases the words were strikingly similar although the acts were different, the conduct in one case was held to be relevant to the other [*Landlord v. General Medical Council*, (1989) 2 All ER 921 PC].

Instances of Admissibility or Inadmissibility of Similar Acts.—Following decisions further elucidate the rule embodied in this section:—

—Abduction, Kidnapping etc.—On a charge of having abducted, kidnapped &c some girls for illegal purpose, previous similar acts by the accused are admissible to show intent and part of a series of similar occurrences [*Shamsher v. S*, A 1956 P 404 : 34 P 781].

—Abortion.—On a charge of procuring abortion by use of instruments, evidence that the accused previously and subsequently to the offence charged, had caused other abortions by instruments, was admitted to show intent [*R v. Dale*, 16 Cox 703]. On a similar charge against a doctor who pleaded that the instruments were used for a lawful purpose, *viz*, to examine the woman for leucorrhoea, evidence that (*1*) nine months before the offence charged he had performed a similar, though unsuccessful, operation on another woman with the avowed intention of procuring miscarriage; and (2) had then stated to that woman that he was in the habit of performing similar

operations for the same purpose—was held admissible to show intent and to rebut the defence of lawful operation. It was further held that evidence of (*1*), alone would have been inadmissible [*R v. Bond*, 1906, 2 KB 389, cited in Phip 8th p 171]. In *R v. Bond*, ALVERSTONE CJ, however doubted whether there was sufficient connection between the offence charged and the previous act of which evidence was given to establish a *course* of conduct. Referring to *R v. Dale, sup*, he observed: "If *R v. Dale*, is to be construed to authorise the admissibility of evidence of prior acts of a similar kind where the act is admitted, and the only question is the purpose for which it was done, it goes too far". On a similar charge, evidence that six months prior to the offence alleged, the accused had examined the woman for pregnancy and done something which caused blood to flow and which was followed by miscarriage was held admissible [*R v. Thompson*, 1912, 7 Cr App R 276]. On another charge of procuring abortion, evidence that four months after the offence, the accused had used instruments on another woman for a similar operation, was held inadmissible as two instances cannot be relied upon as proof of a systematic course of action [*R v. Hicks*, 1904, 39 L Jo 421, *per* RIDLEY, J, cited in Phip 8th Ed p 171].

—Arson.—Where the prisoner was tried for arson with intent to defraud an insurance company, evidence that the prisoner had made claims on two other insurance companies in respect of fires which had occurred in two other houses which he had occupied previously and in succession was admitted to show that the fire which was the subject of trial was the result of design [*R v. Gray*, 4 F & F 1102; **approved** in *Makin v. Att-Genl*, 1894, AC 57; see *Nurul Amin v. R*, A 1939 C 335 : 1939, 1 Cal 511]. With reference to Gray's case Sir James Stephen observes in his Digest 10th Ed, p 165 : "I acted on the case in *R v. Stanley*, but I greatly doubt its authority. The objection to the admission of such evidence is that it may practically involve the trial of several distinct charges at once, as it would be hard to exclude evidence to show that other fires were accidental." See the remarks of TELANG, J, on this case in *R v. Vajiram*, 16 B 414 where he takes a contrary view.

Where successive shops of the accused, each insured, were burnt down in three successive years, evidence of previous fires were admissible to show that they were not accidental but designed [*Nurul Amin v. R*, 1939, 1 Cal 511 : A 1939 C 335]. So where a person pleaded accident in case of setting fire, previous abortive attempts (not shown to have been made by him to set fire to the same premises was held admissible [*R v. Bailey*, 2 Cox 311]. Where a man was charged with setting fire to three ricks within sight of each other belonging to separate parties, evidence that immediately after setting fire to *A*'s rick he set fire to the ricks of *B* and *C* was held admissible [*R v. Long*, 6 C & P 179].

G who was managing director of Burmese Soap Co was charged under s 436 read with s 109 IPC and the fact sought to be tendered in evidence was a fire 8 years ago in the Burma Timber Co. of which *G* was the principal shareholder. No question arose then as to the fire being caused intentionally or the claim against the Insurance Co being fraudulent. It was disputed solely on the ground of amount—*Held*, that the evidence was inadmissible as the previous transaction could not have been the subject of a criminal charge and therefore the two transactions were not of a similar nature [*Gandhi v. R*, 1941 Rang 566 : A 1941 R 324].

—Blackmail.—*A*, a newspaper proprietor is charged with demanding money from *B* by threats made through *C*, to attack a company of which *B* was chairman, in *A*'s paper. Evidence that some months previously, a similar threat had been made by *C*, and a sum of money obtained by *C* from *D* to abstain from attacks in *A*'s paper is admissible [*R v. Boyle*, 1914, 3 KB 339].

—Breach of Trust.—Where an accused was charged under s 409 IPC and the defence was that payments were made to wrong persons under misapprehension, evidence of other transactions in which he had misappropriated funds entrusted to him would be irrelevant as such evidence would merely show general dishonesty [*Lloyd v. R*, A 1933 C 136, 142 IC 274]. On a charge under s 408 of misappropriation of Rs 13/9 where the defence has inability to credit on account of pressure of work, another subsequent instance of omission to enter a payment of Rs 15/- was held inadmissible [*Mati v. P I Bank Ltd*, A 1946 C 440].

—Burglary.—Where a man committed three burglaries in one night, and left at one of the houses property taken from another, the three felonies were considered so connected, that the court heard the history of them all [cited by LORD ELLENBOROUGH in *R v. Wylie*, 2 Leach, 985; Tay s 328; see *ante*, "s 6: *Similar facts in distinct offences .....blendea*"].

—Counterfeit Coins.—*A* and *B* were tried together on a charge of delivering to another counterfeit coins, knowing the same to be counterfeit at the time they became possessed of it. *A* confessed that he had got the coins from *B*, and had passed them to several persons at his request.—*Held*, that the confession of *A* was relevant against *B* [*R v. Nur Md*, 8 B 223 (11 Bom HC 90 **distinguished**). See *illus* (*c*) to s 15 and *illus* (*b*) to s 14 and notes *ante*].

—Criminal Negligence.—Where on the death of a boy a doctor was charged with criminal negligence, man-slaughter &c, the prosecution tendered evidence of the symptoms, illness and death of nine other children similarly treated by him; *held*, that the evidence was admissible not as evidence of course of conduct or system, but as evidence of the reactions to the children so as to prove that the injection given was too strong and negative the defence that the boy's death was due to an exceptional reaction to the injection in this case [*Akerele v. R*, A 1943 PC 72].

—Dangerous Practice.—On a charge against a barber for contracting an infectious disease on account of the negligent use of unsterilized razor and other unclean appliances, evidence that two other persons who got the same disease after being shaved by the accused or other barbers, was admitted not in support of the accused's negligence but to show that use of unsterilized razor was a dangerous practice [*Hales v. Kerr*, 1908, 2 KB 601 : 77 LJKB 870].

—Embezzlement.—In *R v. Richardson*, 2 F & F 343, [on which illus (*b*) is based] the prisoner, a clerk, was charged with embezzlement of £2 on three several occasions, by debiting his employers with the payment made by him on their account, but on each occasion making the total too large by £2. At the trial, evidence was tendered, that on a series of occasions before and after those mentioned in the indictment, precisely similar errors were made and advantage taken of them by the prisoner. On the evidence being objected to, WILLIAMS, J, admitted it saying, that to explain motive or intention, evidence is admissible, although it does not otherwise bear upon the issue to be tried. [See also *R v. Proud*, 31 LJMC 71 and *Ramkishen v. R*, A 1928 L 880 : 111 IC 387]. Where the accused was charged for embezzling three specific sums, evidence of collateral offences in respect of other sums is not admissible, there being no question as to state of mind or knowledge or intention [*Pritchurd v. R*, A 1928 L 382]. Evidence of previous act of dishonesty can only be allowed to prevent the accused from pleading that the act of embezzlement charged with was committed without a dishonest intention [*R v. Bakhtawar*, A 1927 L 549 : 28 PLR 313]. Evidence relating to the false entries or falsification of accounts made by the accused during the charge period are admissible to show that they were made wilfully with a intention to defraud the State as they form part of a series of similar

occurrences [*Krishna v. Abdul Subban*, A 1965 Mys 128 (*Amritalal v. R*, 42 C 957 **reld** on)].

—Forgery.—When in a suit for rent, defendant produces receipts which are denied by the plaintiff and makes no attempt to prove them, evidence that in similar suits filed by the plaintiff defendant forged receipts and did not prove them is not admissible [*Kedar v. R*, A 1935 A 521].

—Fraud.—In an action against an insurance company to recover money paid to them in consequence of fraud alleged to have been committed by their agent, with their knowledge and for their benefit, evidence of similar frauds perpetrated on other persons by the same agent, with the knowledge and for the benefit of the defendants is admissible in proof of fraudulent complicity in the case before the court [*Blake v. Albion Life Ass Co*, 1878, 47 LJCP 169; Tay s 340; see also s 328; see *R v. Debendra*, 36 C 573 *ante*]. Where the accused was charged with attempting to obtain money from a person by falsely pretending that a certain article was a diamond ring, the fact that he had previously attempted to obtain money from other persons by false representations as to the genuineness of jewellery is admissible to show his knowledge that the ring was not genuine [*R v. Francis*, 1874, LR 2 CCR 128]. Where a person is charged with obtaining money from three persons by worthless cheques, evidence that he had on a previous occasion obtained a cheque from another by the same means, is admissible as part of a course of conduct to show guilty knowledge and intent and negativing any reasonable belief that the cheques would be met [*R v. Ollis*, 1900, 2 QB 758 CCR]. Where a person is charged with fraudulently obtaining credit for board and lodging from *A*, evidence that shortly before, he had taken lodging at other places and left without paying, is admissible to show a systematic course of conduct negativing honest motive [*R v. Wyatt*, 1904, 1 KB 188].

A is charged with fraudulently obtaining credit from *B* for a motor-bicycle. Evidence that some weeks earlier he had obtained a motor-cycle from *C* and a camera from *D* without paying for them, but under different names as to which no false pretence was alleged by *C* or *D*—held inadmissible to show fraudulent intent, the other acts and methods not being similar to that charged. The two transactions could not properly have been the subject of a criminal charge and therefore they were not transactions of a similar nature with the transaction in question [*R v. Baird*, 1915, 84 LJKB 1785 : 113 LT 608 cited in Phip. 8th Ed p 169]. In a case under s 420 IPC, the question of guilt or innocence of the accused depends upon proof of actual facts and not upon the state of accused's mind. Therefore evidence as to any previous acts of fraud alleged to have been committed by the accused on the witnesses speaking to the fact is clearly inadmissible and cannot be brought in with the aid of s 14 or s 15 [*Gokul v. R*, 86 IC 970 : 29 CWN 483].

On a charge of fraudulent evasion of purchase tax containing six counts, evidence of similar transaction in which the accused took part, although it was not the subject of charge, was admissible [*R v. Patel*, 1951, 2 All ER 29].

—Gambling.—The fact of a previous raid and conviction of certain persons found in a premises under the Gambling Act is quite irrelevant to show that when on a subsequent occasion the same premises were raided and other persons were found with gambling instruments, these persons were engaged in gambling [*Boo Chin v. R*, A 1935 R 233].

—Incest, Indecent Exposure.—*A* and *B* (brother and sister), were charged with incest in 1910. Evidence that at the time charged they occupied the same bed, having been given, further evidence, *viz*, that they had *previously* lived together and had a

child in 1907—was held admissible as showing a guilty passion, and that the proper inference from occupying the same bed was one of guilt, or, which is the same thing that the defence of innocent associations as brother and sister failed [*R v. Ball*, 1911 AC 47, cited in Phip 8th Ed p 154]. *A* is charged with indecently exposing himself in July to *B*, a woman, with intention to insult. On *A*'s denial that he had done the same thing to *B* in previous May, B might give evidence to rebut denial—to show that she was not mistaken in her identification of *A*, that *A*'s act was wilful and not accidental, and that it was done with intent to insult *B* [*Perkins v. Jeffrey*, 1915, 2 KB 702].

Incest and rape of daughters.—The House of Lords have laid down in *R v. P (a father)*, (1991) 3 All ER 337 HL, that the evidence of allegations by one victim in a sexual case is admissible to prove allegations by another if in all the circumstances it is just to admit the evidence. The accused was charged with rape and incest with his two daughters over a long period. The House of Lords upheld the conviction and said that evidence of one victim should be admitted at the trial of an allegation of an offence against another if the essential feature of the evidence was that the probative force in support of the allegations was sufficiently great to make it just to admit the evidence notwithstanding the prejudicial effect to the accused. Their Lordships pointed out that it is necessary to restrict the circumstances in which it becomes so admissible to cases in which there was some striking similarity between the cases [*R v. Brooks*, (1990) 12 Cr App R 36 **overruled**].

—Libel.—In a case of defamation or libel, instances of facts of the plaintiff more or less closely resembling the particular act of misconduct imputed to the plaintiff in the libellous statement are not admissible as evidence [*Nadirshaw v. Pirojshaw*, 15 Bom LR 130 : 19 IC 98].

—Murder, etc.—On a charge against a mother for murdering her child by suffocation in bed, evidence was admitted of the death of four other children of hers in childhood on previous occasions although the causes were not known, to rebut the defence of accident [*R v. Roden*, 1874, 12 Cox CC 630]. *A* was charged with murdering an infant *B* whom she had promised to maintain in consideration of some remuneration from *B*'s mother. The infant's body was found buried in *A*'s garden. Evidence that *A* had received other infants on the same terms who had afterwards disappeared and that some bodies of infants were found buried in the gardens of other houses occupied by A, was admitted to rebut the defence of accident [*Makin v. A G of N S Wales*, 1894 AC 57]. *Makin's case* was applied by admitting evidence of previous murders by the accused of two other girls by strangulation [*R v. Straffen*, 1952, 2 All ER 657]. *A* was charged with murdering *B* his bigamous wife who was found dead in her bath. Evidence that subsequent to *B*'s death, *C* and *D* with both of whom *A* had contracted bigamous marriages, had also been found dead in their baths, under very similar circumstances, and that in all three cases *A* had benefited by their deaths, was admitted to rebut accident or innocent intent [*R v. Smith*, 1915, 11 Cr App C 229].

On a charge of murder and robbery, evidence that the two accused were connected with other charges of theft in town and generally of a series of events from 1914-1918 of going about under false names to rich women who lost ornaments and cash is inadmissible, inasmuch as there was no question of the act being accidental or intentional or forming part of a series of similar transactions [*R v. Panchudas*, 47 C 67 cited *ante* under s 14]. Previous attempts to kill a boy would be admissible to rebut a suggestion of accidental drawing [*R v. Shankaraya*, A 1940 B 365]. Where a person was charged with maliciously shooting another, evidence that the person at another time intentionally shot at the same person is admissible if it be doubtful

whether the shot was accidental or intentional [*R v. Coke*, 1823 R & R 531]. Where the accused pleads that his presence at a spot with arms was accidental, evidence that one or more members of the gang had been concerned in previous and similar offences at the same place is admissible [*Khwaja v. R*, 71 IC 360].

On a charge of murder by knocking down a woman cyclist by deliberately driving a motor car at her, evidence that shortly before the occurrence the accused had knocked down two other women cyclists in a similar way is admissible [*R v. Mortimer*, 25 Cr App R 150].

To Rebut Defence of Automatism.—The accused sought to defend himself against the charge of murder by showing that he was in a state of automatism brought on by alcohol and drugs and that he was mild and affectionate towards the deceased and, therefore, would not have acted as he did but for automatism. The trial judge admitted evidence of violence by the accused towards the victim on previous occasions. The accused appealed arguing that the evidence was wrongly admitted. The Court of Appeal held that the judge was not wrong in admitting evidence of violence by the accused towards the victim on previous occasions. Such evidence whilst not admissible to show propensity to commit crime, was admissible to rebut the defence of automatism [*R v. Smith*, 1989 Crim LR 734 CA].

To rebut the defence of innocence.—In a case before the Privy Council, [*Att-Gen of Hong Kong v. Siu Yuk-Shing*, (1989) 1 WLR 236 PC the accused was charged with the membership of an unlawful society and possession of the insignia and writing relating to the society. He sought to show his lack of knowledge of the significance of the insignia and writing. The prosecution applied for leave to adduce evidence of the accused's previous conviction for membership of the society. Leave was granted and the accused was convicted. His appeal against conviction was dismissed. Their Lordships gave importance to the decision in [*Makin v. AG of New South Wales*, 1894 AC 57].

—Poisoning.—Where four indictments against a woman respectively charged her with poisoning her husband and two of her sons, and with attempting to poison a third son, evidence was tendered on the trial of the first indictment, that arsenic must have been taken by the three sons a few months after their father's death, that all the four parties, when taken ill exhibited the same symptoms; and that the woman, who had lived in the same house with her husband and children, had been in the habit of preparing their meals. The evidence was held clearly admissible for proving, first that the husband (the subject of the indictment that was then being tried) died of arsenic and next that his death had not been accidental [*R v. Geering*, 1894, 18 LJMC 215; Tays s 328]. On a similar charge where the defence was accidental taking of poison, evidence that two other children of hers and a lodger with her had previously died with the same poison was held admissible [*R v. Cotton*, 12 Cox 400; see also *R v. Gurner*, 3 F & F 681]. The charge against *A* was murder of his wife by arsenic. Evidence of a subsequent attempt to poison another person by the same poison was held admissible to negative a defence that the arsenic was secured for an innocent purpose [*R v. Armstrong*, 1922, 2 KB 555].

On a charge of murdering a woman by poison, evidence that accused previously murdered his wife by poison was not relevant to any issue in the case [*Noor Md v. R*, 1949 AC 182 : A 1949 PC 161].

The accused on the 7th June, 1909, administered *dhatura* poison to *A* and *B*, both of whom died from effects thereof; and on the following date he administered the same poison to *C* and *D*, the former got ill and recovered, but the latter died: *Held*,

that the events which occurred on the 7th and 8th June were relevant to the case of charge of murder of *D* as forming incidents in a series of similar transactions occurring about the same time and tending to show system and intention and to negative the idea of accident [*Lala v. R*, 32 PLR 1191 : 12 Cri LJ 125 : 9 IC 731; *Kashiram v. R*, 73 IC 262 : 6 NLJ 144 : A 1923 N 248].

In a case of death due to a lethal dose of *dhatura* where the defence is that there are in the record of medical experience cases in which the drug has been successfully administered for curing guinea-worm, it is open to the prosecution to show that the experiment carried out by the accused himself in exactly similar circumstances had shown that far from being a cure, the drug is a certain killer [*S v. Juggankhan*, A 1963 MP 102].

A and *B* were charged with having administered *dhatura* to certain persons at S with intent to rob. They were not residents of *S*. *B* was found guilty, but the only evidence against *A* was that he was found in possession of *dhatura* months after the *S* incident. Evidence that *A* and *B* were previously connected with other poisoning incidents were held inadmissible. Such evidence might have been admissible to rebut the defence of accident had it been proved that *A* was present at *S* [*Ramsumiran v. R*, A 1942 P 291 : 198 IC 662].

A doctor was charged with murdering a woman by strychnine, evidence of deaths of three other persons with whom the accused was intimate by administration of strychnine and of his attempted administration of the poison to a fourth, was held admissible after connecting those acts with the accused by showing his possession of strychnine and that this was the cause of all the deaths [*R v. Neill Cream*, 166 CCC Sess Pap 1417, 1451 cited in Phip 8th Ed p 167].

—Sexual Assault On Children.—As to admissibility of evidence of similar other incidents, see *R v. Chandor*, 1959 1 All ER 702 noted under s 14 *ante*.

Identity.—Where the issue is one of identity, "similar fact" to be admissible must be evidence which demonstrates a sufficient degree of similarity between the circumstances surrounding the crime charged and the circumstances of the other event to give rise to the real possibility, based on common experience of human affairs, that the person who committed the crime charged was the person responsible for the other event." [*Cheney v. R*, (1991) 99 ALR 360 Fed Ct of Australia].

The court should be sure that the accused had committed the other offences, and should be sure of the same on evidence other than the similar fact evidence [*R v. McGranaghan*, The Times, Nov 1, 1991 CA].

Similar fact evidence should only be admitted to identify a defendent (accused) when it is compellingly strong [*R v. Irons*, The Guardian, Oct 3, 1990 CA].

S. 16. Existence of course of business when relevant.—When there is a question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done, is a relevant fact.

Illustrations

(*a*) The question is, whether a particular letter was despatched.

The facts that it was the ordinary course of business for all letters put in a certain place to be carried to the *post*, and that particular letter was put in that place, are relevant.

(*b*) The question is, whether a particular letter reached *A*. The facts that it was posted in due course, and was not returned through the Dead-Letter Office, are relevant.

SYNOPSIS

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COMMENTARY

Principles and Scope.—This section lays down that whenever it is necessary to prove that an act was done, the existence of a general course of business or office (public or private) according to which it naturally would have been done, is a relevant fact and proof of it is admissible. In well-established offices or firms, books are kept or business is conducted on such settled lines and principles that when the doing of a particular act comes in question, it may be reasonably inferred that the uniformity of the general course was followed in the particular case. When the course of business usually followed is proved the probability is that there was no departure from the common course of business in the particular transaction. In the case of public offices like the post office, where work is carried on with almost mechanical regularity, the probability becomes stronger that the letter was despatched in due course or reached destination.

The reason for the rule was thus stated by SHERWOOD, J, in an American case:—

> "These things being proven (evidence being given of a book-keeper's custom of handing over collateral notes to the teller as indicating that it was done in this instance), the presumption arises therefrom that the usual course of business was pursued in this particular instance. Everyone is presumed to govern himself by the rules of right reason, and consequently that he acquits himself of his engagement and duty..... Whenever it is established that one act is the usual concomitant of another, the latter being proved, the former will be presumed; for this is in accord with the experience of common life. It is simply the process of ascertaining one fact from the existence of another." [*Mathias v. O'Neill*, 94 Mo 527 cited Wig s 92].

The subject-matter of this section party comes under the head of 'presumption'. The expression "course of business" is also used in s 32(2) and s 114. S 114 illus (*f*) lays down that the court may presume that the common course of business has been followed in particular cases. As soon as the course of business is established, there is a presumption that the act in question was done in pursuance thereof. It is a rebuttable presumption [see notes to s 114 illus (*f*)]. Whether the inference should or should not be drawn depends largely on the circumstances of each case.

For instance, there is a good deal of difference between the manner in which business is conducted every day in a railway office or in a big mercantile establishment or Bank or solicitor's office, and in an ordinary landlord's office or a petty grocer's shop. Much also depends on the personal habits of regularity of the individual through whom the business passed. As Wigmore says: There is, however, much room for difference of opinion in concrete cases, owing chiefly to the indefiniteness of the notion of habit or custom. If we conceive it as involving an invariable regularity of action, there can be no doubt that this fixed sequence of acts tends strongly to show the occurrence of a given instance. But in the ordinary affairs of life, a habit or custom seldom has such an invariable regularity. Hence, it is easy to see why in a given instance something that may be loosely called habit or custom should be rejected, because it may not in fact have sufficient regularity to make it probable that it would be carried out in every instance or in most instances. Whether or not such sufficient regularity exists must depend largely on the circumstances of each case" [Wig s 92].

Very often, evidence is offered of facts having no connection with or bearing upon the fact in question, just to lay the foundation for an inference by the court that because a fact similar to the one under enquiry has taken place, it may be presumed that the fact in question has also happened. But evidence of such other facts is clearly inadmissible and no such inference is permissible, unless there exists a general course of business. Thus, to show the terms on which a landlord leased a land to a particular tenant, the terms on which he leased lands to other tenants would be inadmissible [*Carter v. Pryke*, Peake 95]. So, in order to prove the terms of a contract with one person, evidence of the terms of similar contracts with other persons is not admissible (see *Hollingham v. Head, ante*). But when the doing of an act depends on the existence of a custom or usage, evidence of the custom may be given [v ss 13, 32(*4*), 48]. Usage is admissible to prove unexpressed incidents of a contract v. s 92, prov 5). This section includes the course of business both in public (v illus *b*) and private (v illus *a*) offices. As to "Course of business," see s 32(2).

[*Ref. Tay ss 176-83; Phip 8th Ed pp 100-01; Best 11th Ed, s 403; Step Art 13; Roscoe N P p 43; Wig s 92; Chamb ss 1054-1061; Jones, ss 41-57; Hals, 3rd Ed Vol 15, paras, 515, 725, 726*].

Course of Business in Public Office.—Several presumptions are frequently made from the regular course of business in a *public office*. Thus, postmarks on letters, when capable of being deciphered, are *prima facie* evidence that the letters were in the *post* at the time and place therein specified [*Fletcher v. Braddyll*, 1821, 3 Stark 64; *R v. Johnson*, 1805, 7 East 65; *R v. Watson*, 1808, 1 Camp 215]. If a letter properly directed is proved to have been either put into the office, or delivered to the postman [*Skilbeck v. Garbett*, 14 LJQB 338], it is presumed that it reached its destination at the regular time, and was received by the person to whom it was addressed [*Saunderson v. Judge*, 2 H BI 509; Tav s 179].

Course of Business in Private Office.—A similar presumption is sometimes drawn from the usual course of men's private offices and business, where the primary evidence of the fact is wanting [*Doe v. Turford*, 1832 1 LJKB 262]. For example, if a man deals in a particular market, he will be taken to act according to the custom of that market [*Bayliffe v. Butterworth*, 17 LJ Ex 78]. If letters or notices properly directed to a gentleman be left with his servant, it raises a *prima facie* presumption that they reached his hands [*Macgregor v. Kelley*, 18 LJ Ex 391]. The fact too of sending a letter to the post office will in general be regarded by a jury as presumptively proved, if the letter be shown to have been handed to,

or left with, the clerk, whose duty it was in the ordinary course of business to carry it to the post office, and if he can declare that although he has no recollection of the particular letter, he invariably took to the post office all letters that either were delivered to him or were deposited in a certain place for that purpose [*Skilbeck v. Garbett, sup*; *Hetherington v. Kemp*, 1815, 4 Camp 193; *Trotter v. Maclean*, 1879, 13 Ch D 574, 580; Tay ss 181, 182; *Chunilal v. H F Insurance Co*, A 1958 Pu 449; see *illus* (*a*)].

Accuracy of Scientific Instruments.—The working accuracy of scientific instruments is akin to the above presumption. For example, in the absence of evidence to the contrary, a jury would be advised to rely on the correctness of a watch or clock which had been consulted for fixing the time of an event. So, thermometer would be regarded as a sufficiently safe indication of the heat of any liquid in which it has been immersed [Tay s 183]. Other instances would be the correct transmission of communication by telephone or wireless apparatus.

Computer print-out.—The print-out is, or forms part of, a 'device by means of which information is recorded or stored', and is, therefore, a document forming part of a record complied in the course of a Bank's Business and the computer operator is a person who supplied the information and who has personal knowledge of the matters dealt with in the information. Hence, the movements in a customer's account can be proved by the print-out, being a document maintained in the course of business [*R v. Ewing*, (1983) 2 All ER 645 CA].

Existence of Course of Business.—The term "business" has been defined as meaning that which occupies the time and attention and labour of men for the purpose of profit or improvement [*Smith v. Anderson*, 15 Ch D 484]. But in construing a term which has no definite technical meaning, such regard must be had to the object and intent of the statute in which it is found [*Ex Parte Bruell*, 16 Ch D 484]. The expression "*course of business*" must mean the ordinary course of a professional avocation or mercantile transaction or trade or business [*Ningawa v. Bharmappa*, 23 B 63, 66]. A court cannot take as matters of public notoriety the running time of trains between two places on a particular day, the number of mail trains within a given time and other like facts involved in such an enquiry [*Govinda v. Dwarka*, 19 CWN 489: 20 CLJ 455].

Recovery of Balance of Account.—In a suit by a banking firm against another firm for the recovery of the balance of an account between them, it was held that it was reasonable to presume that that which was the ordinary course was pursued in this case [*Dwarka v. Baboo Jankee*, 6 MIA 88, 90].

Posting, Delivery, Postmark etc.—The posting of a letter may be proved by the person who posted it, or by showing facts from which posting may be presumed. Thus, evidence of posting may be given by proving that a letter was delivered to a clerk who in the ordinary course of business would have posted it, or that it was put into a box which is cleared every day by the postman. The postmark on an envelope is *prima facie* evidence as to the time and place of posting,.... Proof that a letter has been posted is usually evidence of its delivery. In contracts entered into wholly by correspondence, the acceptance of an offer made by letter is complete as soon as a properly addressed letter containing the acceptance is posted [Hals 3rd Ed, Vol 15, paras 725, 726].

Proof of posting of a letter raises a presumption that it reached its destination [*Jugal Kishore v. B R Tribunal*, A 1959 B 81]. In the absence of any evidence as to

delivery of the letter to the Post Office or other evidence to connect the letter with the Post Office, no presumption can be drawn as provided in s 114 [*Benarasi v. New India Ass Co*, A 1959 P 540]. An article posted and delivered may be inferred to have been delivered in the course of post. The date of delivery cannot necessarily be inferred from the post mark of the receiving office. Notice sent by post, correctly addressed as evidenced by certificate of posting creates presumption in favour of proper service [*Sontosh v. Chinmoyee*, A 1966 C 615]. Neither sec 16 nor sec 114 compel the court to draw a presumption. The presumption may or may not be drawn. The presumption may be drawn initially but on a consideration of the evidence, the court may hold the presumption rebutted. When the detenue produced only the copy of the certificate of posting but not the letter sent under the certificate, the presumption need not be drawn. [*MST L M S Ummu Saleema v. B B Gujarat*, A 1981 SC 1191, 1194 (DB) : 1981 Cri LJ 889]. The rule applies with special force to registered articles which are delivered only between specified working hours [*Gobinda v. Dwarka*, 19 CWN 489: 29 CLJ 455].

—Postmark.—The use of a postmark in evidence involves at least three distinct principles: (1) That the mark was generally affixed by an officer of the post office concerned. (2) That it is evidence that the cover bearing it was stamped on the date the impression bears. (3) That the postmark is evidence that the place of office mentioned therein was actually the place where it was affixed [*Gobinda v. Dwarka, sup*]. See Hals 3rd Ed, Vol 15 para. 725.

—Posting of Letter and Presumption [Registered Letter and Refusal].—In *Looft Ali v. Pearce*, 1871, 16 WR 223 (a case before the Evidence Act) it was observed that "the letter was forwarded to him by post duly registered and we must presume that it was tendered to him; he cannot therefore take advantage of his refusal to take it". In a later case (where this case was cited with approval) it was held that the proof of the posting of a registered cover containing notice and the production of the cover in court, "that cover containing the notice with an endorsement upon it purporting to be by an officer of the post office stating the refusal by the defendant to receive the document" was sufficient proof of service [*Jogendra v. Dwarka*, 15 C 681]. From the facts of the case it does not appear that there was any evidence of tender by postal peon and refusal other than the endorsement on the cover]. Following this case it has been held that the tender and refusal of a registered cover is sufficiently proved by the endorsement "refused" on it [*Durganath v. Rajendra*, 17 CWN 1073; *Mohan v. Sundar*, A 1949 Pu 245]. It was, however, held in a case that an endorsement of refusal by a postman is not admissible as proof of such refusal raising that presumption. It is at best a record of a statement by the peon and would be admissible under s 32(2) or s 33 if the conditions required by the sections are satisfied [*Gobinda v. Dwarka*, 19 CWN 489: A 1915 C 313 (explnd in *Sushil v. Ganesh*, A 1958 C 251)]. In a later case it was again held that if a summons sent by registered post came back with the endorsement "refused" on it, it is *prima facie* good evidence that the addressee had an opportunity to accept it [*Haripada v. Joygopal*, 39 CWN 934; see *Sailabala v. Atul*, A 1948 C 63; *Jukal Kishore v. B R Tribunal*, A 1959 B 81; *Sarkar Estates Ld v. Kusumika, &c*, A 1961 C 439; *Balbhadar v. Commr I T*, A 1957 Pu 284].

A notice by registered post returned with the endorsement "refused" raises until the contrary is proved two presumptions: (i) under s 114, illus (*f*) that the endorsement was made by the postal peon and was correctly made, and (ii) under s 114 illus (*e*) that official acts have been regularly performed. The presumption is not rebutted by denial on oath by the addressee, unless it is believed by the Court and it is open to the Court to believe or not [*Sushil v. Ganesh*, A 1958 C 251: 62 CWN 193; *Sarkar*

Estates Ld v. Kusumilka &c sup]. "Delivered" in the case of a regd letter does not mean "accepted". A tender of the letter and refusal is as good as acceptance [*Sarkar Eastates Ld v. Kusumika &c, sup*]. Where a notice terminating tenancy sent by registered post by the landlord to tenant in jail is returned with postal endorsement of "refused" or acknowledged by the jail superintendent it can be presumed to have been received by the tenant [*Saeed Ahmed v. Syed Qumar*, A 1973 A 24 (*Gangaram v. Phulwati*, A 1970 A 446 FB fold)]. Decisions like these proceed on the principle enunciated by the Judicial Committee that if a letter properly directed is proved to have been posted, "it is presumed that the letter reached its destination at the proper time according to the regular course of business of the post office; and was received by the person to whom it was addressed. That presumption would appear to their Lordships to apply with still greater force to letters which the sender has taken the precaution to register" [*Harihar v. Ramsashi*, 23 CWN 77, 90: 45 IA 222: 46 C 458; see *Kamakhya v. Khaliq*, A 1927 P 305]. Agreeing with the cases above it has been held that without examination of the postman or other evidence of tender and refusal, the endorsement "refused" is presumptive evidence of due service and the fact of the return of the letter does not in itself rebut the presumption [*Nirmalabala v. Provat*, 52 CWN 659, *Bapayya v. Venkataratnam*, A 1953 M 884; *Gangaram v. Phulwati*, A 1970 A 446 FB—CONTRA: *Vaman v. Khanderao*, A 1935 B 247; *Jankiram v. Damodar*, A 1956 N 266; *Tekchand v. Gulabchand*, A 1957 MB 151]. Once service by 'refusal' is presumed the postman need not be examined. The defendant is to rebut the presumption (*Budha v. Bedariya*, A 1981 MP 76). The presumption arising from s 28 M P Genl Cls Act is mandatory while that drawn with the aid of s 16 and 114 Ev Act is not (*Budha v. Bedariya, sup*). The presumption applies even though addressee's signature on acknowledgment slip is not produced [*Rajani v. Baikuntha*, 39 CWN 1041]. Following *Harihar v. Ramsashi, sup* it has been held that the mere fact that the physical delivery of the letter was made to a person other than the addressee who had no authority to receive the letter would not be sufficient to destroy the presumption of proper service [*Commr of I T v. Malchand*, A 1956 C 537]. S 27 of the Genl Clauses Act, 1897, should be referred to when considering the presumption as to service of registered letters as also s 114 illus (*f*); see *Gangaram v. Phulwati, sup*.

In any case, if a letter is posted and comes back from the delivery post office with the endorsement "refused," it would appear to be a legitimate use of s 32 to admit it as the statement of a postman at least on the ground that he could not be produced without an amount of unreasonable delay or expense, especially when the letter was sent to a distant place. It is open to the addressee to rebut the presumption of delivery in due course.

When the acknowledgment of a registered letter comes back with a signature purporting to be that of the addressee, there is a presumption of the fact of service [*Jagannath v. Amarendra*, A 1957 C 479].

The fact that the letter was returned by the post office as not accepted does not destroy the presumption [*Girish v. Kishori*, 23 CWN 319; see however *Butta v. Govind*, A 1939 P 540]. As to the legal effect of the word "refused" on a registered cover, see *Gopal v. Krishna*, 3 Bom LR 420; *Baluram v. Bai Pamabai*, 35 B 213; *Sher Afzal v. Mohan*, 94 IC 103 : A 1926 P 334. If posting is proved and the cover is returned with a note that the addressee refused to accept, there is a presumption and it is for the other side to rebut it [*Jogendra v. Dwarka, sup*; *Raunag v. Prabh*, A 1930 L 439; *Gobinda v. Dwarka, sup*]. Statement on oath by addressee that such letter was not tendered to him rebuts the presumption [*Appabhai v. Laxmichand*, A 1954 B 159; *Meghji v. Kundanlal*, A 1968 B 387] and in such a case the evidence

of the postman becomes necessary [*Mahmuda v. Ajit*, A 1978 NOC 112 (Goa)]. Defendant's bare denial is insufficient to rebut presumption [*Pakhar v. Kishan*, A 1974 Raj 112].

When correct address and posting is proved there is the ordinary presumption under s 114, ill (*f*) that the letter was delivered in due course [see further notes under s 114, ill (*f*)]. In a case it has been observed that though it is open to the court to raise the presumption, it cannot hold that posting proves delivery or service by post as it is a matter of common knowledge that postal servants are not always diligent [*Ma Me v. Chettyar Firm*, A 1933 R 76: 146 IC 422]. On the facts, proof of posting and endorsement of refusal were held not legally sufficient service [*Kalamua v. Amir Ali*, 45 IC 917]. A person refusing registered letter cannot afterwards plead ignorance of its contents [*Looft Ali v. Pearee, sup*; *Louis Dreyfus & Co v. Himandas*, 50 IC 194: 12 SLR 142].

—Letters Incorrectly Addressed.—A letter to a proposer not correctly addressed could not, although posted, be said to have been put in a course of transmission to him. Press copies of two letters were held inadmissible for the purpose of proving that a notice of allotment of shares had been duly communicated, there being no evidence of the posting of original letters, or of the address they bore [*Ram Das v. Official Liquidator*, 9 A 366]. Where the address was "Mr. Haynes, Bristol," it was held insufficient to raise the presumption [*Walter v. Haynes*, 1824, Ry & M 149, *per* ABOTT cited Tay s 179].

Legislative Provisions.—Under s 3 of the Commercial Documents Evidence Act (30 of 1939) receipt granted by the Posts and Telegraph departments may be presummed to contain accurate statements. By s 94 of Negotiable Instruments Act (?6 of 1881), if a notice is duly directed and sent by post, and miscarries, such miscarriage does not render the notice invalid. See also ss 51, 52 of Indian Com-panies Act (1 of 1956).

Illustration (a) refers to the course of business in a public office or firm as to its posting letters. It is the case of *Skilbeck v. Garbett*, 7 QB 846 cited *ante*, where DENMAN CJ observed (p 849): "if a public servant belonging to the post office takes charge of the letter in the exercise of public duty, it is the same as if it were carried to the office." If a letter be shown to have been handed to or left with the person whose duty it was in the ordinary course of business to carry it to the Post Office, its sending to the Post Office is presumptively proved [*Chunilal v. H F Insurance Co*, A 1958 Pu 440]. **Distinguishing** *Skilbeck v. Garbett, sup* it has been held that the evidence of a general clerk that he made over a cover sealed in his presence to an office peon for posting is not sufficient proof of posting. If the peon had been called and said that though he had no recollection of the particular letter, he invariably carried to the post office all letters made over to him by the clerk, it would have been otherwise [*Bank of Bihar Ld v. T S D Ld*, A 1960 C 475]. It is extremely doubtful if the act of placing a bundle of circulars in the custody of an office peon for posting is equivalent to putting it in a 'certain place' within the illus, especially when the office peon could not be named [*Hulas v. Allahabad Bank*, A 1958 C 644].

Illustration (b) refers to the case of the post office itself. It is the case of *Saunderson v. Judge*, 2 H & L 500. Illus (*b*) only means that each of the facts, *viz*, the posting and non-return from the DLO is relevant. It does not mean that without a combination of these facts no presumption can arise [*Mobarak Ali v. S*, A 1957 SC 857 : 1958 SCR 328].

[1]ADMISSIONS

S. 17. Admission defined.—An admission is a statement, *[*oral or documentary or contained in electronic form*], which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned.

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COMMENTARY

Information Technology Act, 2000

Definition of admission [S. 17].—The definition of the word "admission" in S. 17 included statements whether oral or documentary. It would now include statements whether oral, documentary or contained in an electronic form.

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

Principle and Scope. [Admissions Generally].—An admission is defined in s 17 as a statement (oral or documentary) made by a party or by a person connected with him in any of the ways described in ss 18-23 under certain circumstances, which suggest an inference as to any fact in issue or a relevant fact. Like s 115 this section refers to matters of fact only. The definition is the same as in Steph, Art 15. The statement may be either a denial or admission of a fact and it may be addressed to anyone. Admissions in reference to crimes are generally called 'Confessions'. Ss 17-31 deal generally with the subject of admissions and confessions. The rules as to admissions, statements made by persons who cannot be called as witnesses or account of death, unavailability &c (ss 32, 33), and statement made under circumstances which in themselves afford a guarantee for their truth are an exception to the exclusion of statements as proof of the

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1. In Ceylon, the heading is "Admissions and Confessions"

* **Subs. by the Information Technology Act, 2000.**

matter stated [Steph Intro p 164]. The word 'statement' in ss 17-21, 32, 39 and 145 not being defined, its dictionary meaning of 'something that is stated' (oral or written) should be given to it and it is not necessary that the maker of it should communicate it to another person [*Bhogilal v. S*, A 1959 SC 356: 1959 SCR Supp 1, 317; *Veerbasavaradhya v. Devotees &c*, A 1973 My 280].

The general rule with regard to admissions, which are defined to mean all that the parties or their representatives in certain degrees say about the matter in dispute, or facts, relevant thereto, is that they may be proved as against those who made them, but not in their favour (s 21). The reason of the rule is obvious. If *A* says "*B* owes me money," the mere fact that he says so does not even tend to prove the debt. If the statement has any value at all, it must be derived from some fact which lies beyond it; for instance, *A*'s recollection of his having lent *B* the money. To that fact, of course, *A* can testify but his subsequent assertions add nothing to what he has to say. If, on the other hand, *A* had said, "*B* does not owe me anything," this is a fact of which *B* might make use, and which might be decisive of the case" [*Steph.* Intro pp 164-65]. Admissions, though sometimes strong evidence, are not, however, conclusive proof of the matters admitted (s 31) but what a party himself admits to be true may reasonably be presumed to be so unless it is satisfactorily explained or successfully withdrawn [*Sowcar v. S L Prasad*, A 1978 Knt 25 and so long as they do not operate as estoppels (ss 115-117), persons making admission are at liberty to contradict them or to show that they are untrue or mistaken or made under a misapprehension. Admissions by conduct are dealt with in s. 8. Facts admitted at the hearing, or which the parties agree to admit by writing or which by rules of pleading are deemed to have been admitted (Or 8, r 5) need not be proved, but the court may require such facts to be proved by other evidence (s 58).

It is well settled that a party's admission as defined in ss 17 to 20, fulfiling the requirements of s 21, is substantive evidence *proprio vigare*. An admission, if clearly and unequivocally made, is the best evidence and though not conclusive, shifts the onus on to the maker [*Thiru John v. Returning Officer*, A 1977 SC 1724].

Admissions are either formal or informal. Formal admissions are made for the purpose of the trial and they may be of several kinds (v notes to s 58). Such admissions are not generally received in other proceedings. Informal admissions, whether oral or in writing or by conduct, are made out of court and generally at a time or under circumstances when the persons making it have no idea that they would be used as admissions for the purpose of any litigation. Such admissions though not conclusive, shift the burden of proof. The persons by whom admissions may be made and the ways of making them are enumerated in ss 18-20. An exception to the admissibility of informal admissions in civil cases is to be found in s 23 which says that admissions made upon an express or implied agreement that evidence of them are not to be given, are not relevant. This is known as communications "without prejudice". Admissions on a point of law are generally excluded and are not binding (*post*, p 186). Ss 24-30 deal with confessions in criminal cases. The term admissions has been adopted in the Act both for civil and criminal proceedings, and confession has been treated as a species of the genus admission. Statements made by persons who are dead or otherwise incapacitated from being called as witnesses are admitted in the cases mentioned in ss 32 and 33. The reason is that in the cases in question no better evidence is to be had [Steph Intro p 165]. The general scheme of the law relating to admissions as laid down in ss 17 to 20 and ss 21 to 29 has been discussed in *Appavu v. Nanjappa*, 25 MLJ 329: 29 IC 792.

Once a party accepts his earlier statement, it becomes a substantive piece of evidence of the fact(s) admitted therein in view of Sections 17 and 21. It is a different matter what weightage is to be attached to such a statement. Before using such a statement, it is not required to be put to its maker to provide him an opportunity to explain it when he appears as a witness or by calling him as a witness. The purpose of confronting a

witness with his earlier statement is altogether different, *i.e.*, to test the veracity of his later statement, if it differs from the earlier statement [*Alpana v. Mohanlal*, 1993 Cri LJ 1008 (HP). See also *Bharat Singh v. Bhagirathi*, A 1966 SC 405 and *Union of India v. Mokesh Builders & Financiers Ltd.*, A 1977 SC 409]. Vague allegations about ownership of premises by the tenant in his written statement cannot be deemed to be his admission about contract of tenancy wih the landlord. [*Anurag Misra v. Ravindra Singh*, A 1994 A 174, 181]. Admission in written state-ment regarding possession of the plaintiff over land adjacent to the suit land cannot to read as admission of plaintiff's possession over the suit land. [*Melagiriyappa v. Tumalappa*, A 1996 K 150]. See also *Dolatsinghji v. Khachar*, A 1936 PC 150. Admissions are not conclusive proof of the facts admitted. To arrive at such a conclusion there must be unequivocal admission on which a court can base its decision or that the correctness and reliability of such an admission can be judged from other materials on record coupled with such admission. [*Krishna Chandra Naik v. Nilkantha Mohanty*, A 1996 O 1, 3]. Statements made in an affidavit may be used as admission like statement made by a person in written statement or in another suit. [*Michael Mascarenhas v. John Mascarenhas*, A 1996 K 348, 353]. In a case of alleged short delivery of goods on account of negligence of railway administration, when the Railways admitted booking particulars and issuance of short certificates but pleaded that the short certificates were issued without prejudice and the Railway Receipts bear the remark 'said to contain and whatever loaded was delivered to the claimants at the destination, it was held that the said remark did not amount to admission on the part of the Railways that the said number of goods had in fact been loaded. [*Union of India v. Roop Narayan*, A 1997 R 123].

Simply saying that I am guilty of the charge does not constitute an admission of guilt. [*Sashidhara Kurup v. Union of India*, 1994 Cri LJ 375, 377 (Gau)].

A witness must testify to facts within his personal knowledge, but with regard to admissions the rule does not apply and admissions are admissible against a party though not founded on his personal knowledge. It is clear, however, that the party making the admission must have some knowledge because "if a man admits something of which he knows nothing it is of no real evidential value" [*per* LORD HODSON, in *Comptroller of Customs v. Western Electric*, 1965, 3 All ER 599 PC]. Admissions do not also come within the opinion rule [v s 45 *et seq*. See Wigmore s 1053]. Contents of a document are not provable by oral admission [s 22, *post*]. In the case of documents required by law to be attested, admission of execution does not do away with the proof as to attestation [s 70 *post*]. Admissions are not sufficient proof of certain facts: *eg* (*1*) Marriage, bigamy &c in which cases marriage must be strictly proved [see s 50 notes]; (2) Divorce, adultery &c. S 58 has in general no application in divorce cases [*Over v. O*, 49 B 368]. (*3*) Criminal cases (see s 58 notes). For an example of a statement which does not amount to an admission see *Ravinder Kumar Sharma v. State of Assam*, (1999) 7 SCC 435 : 1999 (6) JT 565.

Grounds for Admissibility of Admissions. [Are they Exceptions to the Hearsay Rule?].—TAYLOR says: "Admissions and confessions are usually treated as exceptions to the hearsay rule, considering them as declarations against interest, and therefore probably true. But in regard to many admissions, and especially those implied from conduct and assumed character, it cannot be supposed that the party, at the time of the principal declaration or act, believed himself to be speaking or acting against his own interest; but often the contrary. Such evidence seems, therefore, more properly admissible as a substitute for the ordinary and legal proof; either in virtue of the direct consent and waiver of the party, as in the case of explicit and solemn admissions, or on grounds of public policy and convenience, as in the case of those implied from assumed character, acquiescence, or conduct. Many admissions, however, being made by third persons are receivable on mixed grounds; partly as belonging to the *res gestae*, partly as made against the interest of the person making them, and partly because of some privity with him against whom they are offered in evidence" [Tay s 723].

Admissions, it has been seen, are statements made out of court by a party or by some one for which he is legally responsible. But all statements made by a party have not the same probative force. If a man makes a statement out of court which goes in his favour, it is of very little value as there is a strong tendency to say things which would serve his purpose. To treat this as evidence for himself would be to offer an inducement to create evidence for himself and open the door to fraud. Hence admissions in one's favour are generally excluded. But the objection disappears when the statement goes against him, for human experience shows that a man is not likely to say things against his advantage or interest unless it were true. It is for this reason that admissions may be proved against the person making it, but not in his favour except in a few cases [v s 21]. "If a person has chosen to talk about a particular matter his statement is evidence against himself" [*per* POLLOCK, CB, in *Darby v. Ousely*, 1 H & N 1, 5]. "A party's own statements are in all cases admissible against himself" [*per* LORD ABINGER, CB in *Slatterie v. Pooley*, 6 M&W 664]. "What a party himself admits to be true may reasonably be presumed to be so" [BARON PARKE, in *ibid* p 669; adopted in *Chandra v. Narpat*, 29 A 184: 34 IA 27; *Nagubai v. Shama Rao*, A 1956 SC 593, 600: 1956 SCR 451; *Jawahar v. Abdul*, A 1956 N 257].

The ordinary idea of hearsay is what is heard out of court from a non-witness [see *post* s 60 notes], and admissions are therefore generally treated as exceptions to the hearsay rule. Admissions are not, however, open to all the objections applicable to hearsay testimony. It is true that they are unsworn statements made out of court like hearsay testimony, but they are statements not of third persons but of a party to the proceeding and for the reason stated about what a party said against his interest may be presumed to be true.

WIGMORE puts the admissibility of admissions on another basis. He is of opinion that not only are admissions not exceptions to the Hearsay rule, but they satisfy the Hearsay rule. He bases the reason for admissibility of admissions on the analogy of contradictory or inconsistent statements by witnesses made on a previous occasion [*cf* s 155 (*3*) and s 145]. When offered *against* the party, admissions have the same logical status as a witness's *self-contradiction*. The party-opponent is discredited when it appears that on some other occasion he has made a statement inconsistent with and contradictory to his present claim against him. The objection to Hearsay is thus met by Wigmore: "The theory of the Hearsay rule is that an extra-judicial assertion is excluded unless there has been sufficient opportunity to test the grounds of assertion and the credit of the witness, by cross-examination by the party against whom it is offered, *eg*, if Jones had said out of court: 'The party-opponent Smith borrowed this fifty dollars,' Smith is entitled to an opportunity to cross-examine Jones upon the assertion. But if it is Smith himself who said out of court: 'I borrowed this fifty dollars,' certainly Smith cannot complain of lack of opportunity to cross-examine himself before his assertion is admitted against him. Such a request would be absurd. Hence the objection of the Hearsay rule falls away, because the very basis of the rule is lacking, *viz*, the need and prudence of affording an opportunity of cross-examination. In other words the *Hearsay rule is satisfied*; Smith had already an opportunity to cross-examine himself or (to put in another way) he now as opponent has full opportunity to put himself on the stand and explain his former assertion. The Hearsay rule, therefore, is not a ground of objection when an opponent's assertions are offered *against* him; in such case, his assertions are termed Admissions. But the Hearsay rule is a ground of objection by the first party when the opponent's assertions are offered in *his favour*; and such statements are then not termed 'admissions'. [Wig s 1048]. Viewed as contradictory statements by witnesses, admissions by party

differ from them in this respect that no warning is necessary as to whether the statements about to be offered were made [Wig s 1051].

PHIPSON summarises the reasons for the reception of admissions thus:—It is some times said (*1*) that a party's admissions are receivable against him as a *waiver of proof* (Tay s 723; Powell 10th Ed p 362). This however, can only apply to admissions voluntarily made with a view to trial (see Or 8, r 5 C P Code), not to those used as evidence, for the latter usually consists of casual statements made before litigation was contemplated, which are not conclusive. (*2*) A second ground suggested is that the declarations, being against interest, are probably true (Tay s 723). This however, seems equally unsatisfactory since statements made against interest are not, by English law, receivable *per se*, but only if the declarant be dead [see s 32 *post*]; and moreover, statements by a party are receivable against him even though, when made, they were, in fact, in his interest. Thus, if *A* states that *B* owes him a debt, and *A* afterwards sues *C* for the same debt, this statement, though in *A*'s interest when made, may be proved against him by *C* as an admission; while conversely, a statement by *A* though against his interest when made, would not be receivable if tendered in his own favour. (*3*) A third and more specious ground sometimes advanced is that furnished by the analogy of contradictory statements by witnesses, *ie*, that admissions are receivable against a party not as evidence of their truth, and so as exceptions to the hearsay rule, but merely as being inconsistent with and so descrediting, the case afterwards set up (Wig ss 1043-1051). (*4*) The most generally accepted ground of reception appears to be that a party's declarations, whether for or against his interest when made, may also be taken to be true as *against himself* [Phip 8th Ed p 213).

[*Ref Tay ss 723-861: Best 11th Ed ss 518-31: Phip 8th Ed pp 212-29; Halsbury, 3rd Ed. Vol 15 paras. 536-548; Steph Art 15-20; Wigmore, ss 1048-1066; Roscoe, N P, 61-79; Jones. ss 235-296; Chamberlayne, s 1232 et seq*].

Admissions and Confessions Distinguished.—In English law, the term admission is usually applied to *civil transactions* and to those matters of fact, in criminal cases, which do not involve criminal intent, the term confession being generally restricted to acknowledgments of guilt [Tay s 724]. The Evidence Act proceeds upon the same principle [*Ambar v. R*, A 1929 C 539]. Sir James Stephen's definition of confession was clarified in *Pakalanarayana v. R*, 43 CWN 473 : 66 IA 66 : 18 P 234 (see s 24, *post*). Confessions therefore are one species of the genus admission *viz*, an admission consisting of a direct acknowledgment of guilt by the accused in a criminal case. All confessions therefore come under admissions, but all admissions are not confessions. The nature of the distinction between an admission and confession has been pointed out in *R v. Babu Lal*, 6 A 509, 530; *R v. Jagrup*, 7 A 646; *R v. Pandharinath*, 6 B 34; *R v. Nana*, 14 B 260 FB; *R v. Nit Madhub*, 15 C 595; *R v. Dabee Pd*, 6 C 580; *R v. Macdonald*, 10 BLR App 2. [As to the distinction between admissions and confessions, see *post notes* to ~~s 24.~~ Ss 24-30 treat of confessions and ss 17-22 and 31 treat of admission].

Statement made by an accused to a police officer belongs to a class called "admissions" (ss 17, 18) and *prima facie* they are evidence against the maker but not in his favour. They are admissible. 'Statement' is a genus, 'admission' is the species and 'confession' is the sub-species [*Sahoo v. S*, A 1966 SC 40; *Azimaddy v. R*, 44 CLJ 253: A 1927 C 17].

Different Kinds of Admissions.—Admissions may be oral and written; and a party may also make admissions by signs or silence. Words addressed to others and writing, are no doubt the most usual forms; but words uttered in soliloquy seem

equally receivable; while of signs, a deaf and dumb person may be called on to plead or advocate his cause, through the medium of an interpreter who can explain his signs to the court. In criminal cases where a person charged with having committed an offence makes no reply, the court may draw an inference from his silence [Best 11th Ed, ss 521, 523]. Admissions may be express, *ie*, in the form of words uttered or written, or implied which is arrived indirectly, *ie*, by inference from conduct or circumstances.

In certain cases conduct may amount to admission, *eg*, demeanour, flight [s 8 *ante*], failure to produce witness or documents or to go to the witness-box [see s 114 illus, (*g*), (*h*)] &c. Suppression of documents involves an admission that the contents were unfavourable to the party suppressing [*James v. Biou and Owen v. Flack*, 1826, 2 Sim & St 206; *Bell v. Frankes*, 1842, 11 LJCP 300; Tay s 804 in]. But strictly speaking the conduct itself cannot be called an admission as admissions are *statements* by persons oral or written. Such conducts are acts not assertions which are of the nature of circumstantial evidence affording materials for inferences.

Silence, may however, sometimes amount to an admission. "When *by a party's silence an assent* is given to the assertion of a third person, that assertion is thereby adopted by the party, and therefore may be used against him as his own statement and admission. It is the statement, however that constitutes the admission; the conduct merely effects its adoption" [Wig s 1052]. Where a statement substantially affecting a person's interests is made to him in writing and the circumstances are such that he would certainly or probably have objected had the statement been incorrect, then his silence can be treated as an admission, that is, as evidence but not as proof, of the correctness of the statement [*Mercantile Bank v. Tahilram*, 8 SLR 112: 27 IC 309]. As to silence see *ante*, Section 8.

The Whole Statement Containing the Admission Must be Taken Together But Judge or Jury Not Bound to Believe in its Entirety.—The first important rule with regard to admission is, that *the whole statement containing the admission must be taken together*; for though some part of it may be favourable to the party, and the object is only to ascertain what he had conceded against himself, and what may therefore be presumed to be true, yet, unless the whole is received, the true meaning of the part which is evidence against him, cannot be ascertained [*Thompson v. Austin*, 1823 2 D & R 361]. A plaintiff cannot be allowed to dissect a written statement. A plaintiff cannot be allowed to avail only those parts of the written statement which are favourable to him and discard the other parts of the written statement which are not favourable to him [*Sunil Chandra Ghosh v. Hamendra Kr Deb*, A 1985 Cal 233, 240]. It is not open to the court to dissect the statement and pick up a part which is incriminating and reject the part which is exculpatory [*Trikam v. S*, A 1969 G 69]. The accused stated that she stabbed the deceased because he outraged her modesty. This statement is inculpatory in part and exculpatory in the other part. But considered as a whole, it did not amount to an extra-judicial confession for the reason that she had justified her action of stabbing the deceased in exercise of her right of private defence [*State of Orissa v. Nirupama Panda*, 1989 Cri LJ 621, 622 : 1988 2 Orissa LR 486]. But though the whole of what he said at the same time, and relating to the same subject, must be given in evidence, it does not follow that all the parts of the statement should be regarded as equally deserving of credit [*Bermon v. Woodbridge*, 1781 2 Doug 788]. This rule *applies equally to written, as to verbal admissions*. Thus, where a defendant has rendered a debtor and creditor account to the plaintiff, which the latter produces in proof of his demand, it will be equally admissible in evidence of the defendant's set-off [*Randle v. Blackburn*, 5 Taunt 245]; though the plaintiff will be at liberty, while relying on the creditor side of the account, to

impeach items which appear on the debtor side [*Rose v. Savory*, 4 LJCP 275; Tay ss 725, 726].

It is settled law that an admission whether amounting to confession or not unless it is separable has to be taken as a whole or not at all [*Md Koya v. Muthukoya*, A 1979 SC 154 (*Hanumant v. S*, A 1952 SC 343; *Palvinder v. S*, A 1952 SC 354 and *Dadarao v. S*, A 1974 SC 388 **rel on**)]. The general rule is that, where a person uses the admission of another as evidence, the whole evidence must be put in. He cannot put in half and exclude the other half. But the judges who have to decide upon the evidence are not bound to believe the whole of the statement [*Nilmoney v. Ramanoogra*, 7 WR 29; *Ishan Ch v. Haran*, 11 WR 525: 3 BLR 135. See also *Shib Nath v. Annada*, 11 CLJ 382; *Syed Ismail v. Hamidi*, 2 Pat LW 658; *Govind v. Chatturbhuj*, 60 IC 483; *Probhoo v. Sheo Nath*, WR 1864, Act X Rul 26; *Baz Bahadur v. Raghubir*, 49 A 707; *Sree Dharum v. Narayana*, 41 MLJ 525; see *Mg Shwe v. Ma Naing*, 1 Bur LJ 248; *Abida Khatoon v. S*, A 1963 A 260]. Statements in certain deeds, relied upon by a plaintiff as an admission, estopping the parties to those deeds from asserting that certain lands were not debutter must be taken as a whole [*Koonwar v. Ram Ch*, 4 IA 52: 2 C 341, 350].

[*Admissions must also be taken as a whole in criminal cases. See s 24 and notes*].

—Admissions in Pleadings.—"The pleadings in a cause are, for the purpose of use in that suit, not mere ordinarily admissions, but judicial admissions [see s 56 *post*]; *ie*, they are not a means of evidence, but a waiver of all controversy (so far as the opponent may desire to take advantage of them) and therefore a limitation of the issue. Neither party may dispute beyond these limits. It follows that a *party* may at any and all times *invoke the language of his opponents pleading on that particular issue* as rendering certain facts *indisputable*" [Wig s 1064]. Pleadings in the cause in which they are made are conclusive upon the parties for obvious reasons. It is not necessary to offer them formally as admissions, nor is there any prohibition in commenting upon them in argument without such offer. In *Tisdale v. R Co*, 166 NY 416, 419, VANN, J, said: "The pleadings are before the court, not as evidence but to point out the object to which evidence is to be directed. While a party sometimes formally reads in evidence the pleadings of his adversary, or some part thereof containing a distinct and unconditional admission, no legal advantage is gained thereby, as the admissions properly-so-called, contained in an adverse pleading admit of no controversy and require no proof." The principle above, however, forbids any resort to a pleading upon *another issue in the same cause*; because the object of each set of pleadings or counts is to raise and to define the separate issues, and any use of the one to aid the other would to that extent defeat this object and prevent the trying of the issue made. It is a purely artificial rule, an exception to the principle, and is rendered necessary solely by the peculiar theory, of common-law pleadings, for its fundamental object is "to separate the law from the facts, and to narrow the latter down to a single issue" [Wig s 1064]. In *Harrington v. Mac Morris*, 5 Taunt 228, 233, MANSFIELD, CJ, said: "It is every day's practice that the defendant's language in one plea cannot be used to disprove another plea, as in the familar instance I have given of trespass and not guilty and a justification pleaded, where the justification would certainly if admissible prove the act, in case the reason of the justification fails."

Admissions in pleadings or judicial admissions stand on a higher footing than evidentiary admissions. The former are fully binding on the maker and constitutes a waiver of proof whereas the latter are not conclusive and can be shown to be wrong [*Nagindas v. Dalpatram*, A 1974 SC 471]. Admissions in pleadings or judicial ad-

missions by themselves can be made the foundation of the rights of the parties [*Satish Mohan Bindal v. State of U.P.*, A 1986 All 126, 128 : 1985 All CJ 507].

The rule that an admission by a party to a suit as against his opponent, must be taken as a whole does not apply to pleadings [*Brojoraj v. Bishonath*, WR (1864), 305]. A defendant's admission in the written statement must be put in and considered together and the court can, in its discretion, attach thereto or to any portion thereof, so much value as seems to it fit [*Radha Churn v. Chundermonee*, 9 WR 290; *Jadunath v. Buroda*, 22 WR 220, see also *Niamatulla v. Himmut Ali*, 22 WR 519]. The averments contained in the written statement could not take place of proof unless the evidence is produced by the owner or insurer. [*National Insurance Co Ltd., Kanpur v. Yogendra Nath Verma*, A 1982 All 385, 387]. A defendant who admits any one fact, in the written statement of the plaintiff, and thereby excludes independent evidence thereof, cannot say that plaintiff has relied upon his statement as evidence, and claim that the whole of it may be read as evidence, in his favour [*Shurfuraz v. Dhannoo*, 16 WR 257]. A plaintiff abandoning his own case, and falling back on the admissions of the defendant is bound to take them as they stand in their entirety [*Tarinee v. Dwarka*, 15 WR 451]. "It is permissible for a tribunal to accept part and reject the rest of any witness's testimony. But an admission in pleading cannot be so dissected, and if it is made subject to a condition, it must either be accepted subject to the condition or not accepted at all" [*Motabhoy v. Mulji*, A 1915 PC 2 : 42 IA 103 : 19 CWN 713, 717 : 39 B 399: *Fatechand v. Juggilal*, A 1955 C 465; *Cal National Bank v. Rangaroon Tea Co.*, A 1968 C 294; *Shivsaran v. Sukhdeo*, A 1937 P 418; *Indermal v. Ramprasad*, A 1970 MP 40; *Ramsurat v. Satraji*, A 1975 P 173]. But if further admission is made which is not conditional or based on such earlier admission the above principle is not applicable [*J McGaffin v. LIC*, A 1978 C 123]. A petition for leave to execute is not a pleading. The mere fact that the tenants did not deny the allegation in the petition will not justify the court to arrive at the conclusion that the averments made in the petition as to payments made by the tenants on foot of the Collector's decree or order are admitted to be correct [*Buluk Chand v. Nathuni*, 2 PLJ 24: 38 IC 85].

An admission in pleadings means the admission of an averment by the opposite party [*Lutufallah v. Md Sidik*, A 1946 S 117]. Party making admission cannot take advantage of it. Party in whose favour it is made may get its benefit' [*Suraj v. Union*, A 1975 C 203]. As to the effect of admissions in pleading in the same suit it is laid down in Or 8, r 5 that "every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability" [see s 31 and s 58 *post*].

—Pleadings in Prior Litigation.—As to admissions by pleadings in prior litigations, the law in England "seems to be that statements which are contained in any pleading though binding on the party making them for all purpose of the cause, ought not to be regarded in any subsequent action as admissions [*Neeson v. Waters*, 1890, 63 LT 328]. It was at one time thought that a party might, by bringing an action on a contract, estop himself from denying the obligatory force of the agreement in a subsequent action against himself. In conformity with this view of the law, a strong opinon was expressed by CHIEF JUSTICE TINDAL, in the case of the *Fishmongers' Co v. Robertson*, 12 LJCP 185, that if a corporation were to enter into an executory contract, which was invalid against themselves for not being under seal, and were then to sue thereon, this would amount to an admission on record, that such contract was duly entered into on their part, so as to be obligatory on them, and such admission would estop them in a cross action, from setting up an objection that it

was not sealed by their common seal. The doctrine thus propounded, has on several occasions been brought under the notice of the courts; but although it is unquestionably based on substantial justice, it has hitherto met with little favour" [*see Copper Miners' Co v. Fox*, 20 LJQB 174 and other cases; Tay s 821]. It is clear that an admission which has been *incidentally or tacitly* made in the pleading in one suit will not stop the party who has made it from denying in another suit, where *precisely the same matter is not litigated*, the fact so admitted [Tay s 822]. Although as a general rule, an admission made in one suit by pleading or omitting to plead, cannot conclusively bind the party in a subsequent suit, an exception to this rule must be recognised where the second action is brought on a judgment recovered in the first [Tay s 823].

Statements in pleadings are not evidence against the party pleading in subsequent proceedings [*Boilead v. Rutlin*, 1848, 2 Ex 665; Hals 3rd Ed Vol 15, para 540]. "Pleadings recorded in one cause are admissible in evidence in subsequent proceedings to prove the institution and subject-matter of such cause but are generally inadmissible even as against parties or privies as proof of the truth of the facts stated therein [Hals, 3rd Ed Vol 15, para 709].

The rule rejecting the pleadings in prior causes as admissions is of considerable antiquity and was based on the theory that the statements were not those of the party, but were merely "pleader's matter" and consisted largely of "suggestions of counsel" and "flourishes of the draftsmen." A bill in Chancery was according to John Wesley "stuffed with stupid, senseless, improbable lies" and Bentham spoke of its as "a volume of notorious lies." Wigmore says that "the objection to the use of bills in Chancery was, not that its words were those of counsel only, but that its allegations were not intended as the sincere statements of either counsel or party, and were merely conventional utterances formally desirable for ulterior purposes" [Wig s 1065]. Under the improved system of pleadings now in vogue [see Or 6, rr 1-13; Or 7; Or 8], most of the objections disappear. At any rate, parties ought to be impressed upon that reckless statements cannot be made now with impunity and that they may recoil on themselves. So in America they are received in various jurisdictions [see Wig s 1066 and footnotes]. "When a statement by a party in a pleading other than in the preceding suit is offered in evidence, the statement is admissible on the same principle as oral admissions, hence it is not necessary that the parties should be the same; and the pleadings of a party may be received against him in a subsequent suit although the parties are different" [Jones 3rd Ed s 272].

After consideration of the above statements of law in Taylor and Halsbury it was held in a case that an admission contained in a plaint or written statement, or in an affidavit or in a sworn deposition given by a party in a prior litigation would be regarded as an admission in a subsequent action though it is capable of rebuttal. As to para 821 of Taylor (*ante*) it was observed that the statement therein had reference to the conclusiveness of admissions [*Sarvabhotla v. Kanala*, A 1939 M 446: 1939 1 MLJ 227; *cf Naro Vinayak v. Narhari*, 16 B 125 *ante*]. The statement in an affidavit in a proceeding under sec 145 Cr PC regarding the subject-matter of the latter proceeding can be used as a piece of evidence against the person making it and not as conclusive evidence [*Janki Ram v. Amir Chand Ram*, A 1984 Pat 191, 194]. Admission in pleading of former litigation is also an admission for all purposes and for all times to come [*Biswsanath v. Laxman*, A 1971 Or 267 (*Narayan v. Gopal*, A 1960 SC 100 **folld**)].

A statement in a pleading cannot be evidence in subsequent proceedings before a court of law unless it amounts to an admission [*Rajkumar v. Gopinath*, A 1971 A

273]. A statement in a plaint in a prior suit admitting payment being made against the interest of the maker is admissible in a subsequent suit not *inter partes* [*Amarnath v. Ralla*, A 1934 L 527]. Statement in a pleading by a party in one litigation can be used against person claiming under that party in another litigation [*Jaiprakash v. Lilabai*, A 1963 B 100]. A Bombay case *held* that an admission by a party in his pleading in one suit is not binding on him in another suit [*Ramabai v. Govt*, A 1941 B 144]; but it has been explained in a later case holding that it is not intended to lay down that an admission on a question of fact in the course of a proceeding cannot be regarded as a good piece of evidence in a subsequent proceeding [*Dattatraya v. Shanker*, A 1960 B 153]. An admission in a plaint signed and verified by a party may be used as evidence against him in other suits. Such admission cannot, however, be regarded as conclusive and party can show it as not true [*Basant v. Janki*, A 1967 SC 341 : 1967, 1 SCR 1 **approving** *Dattatraya v. Shankar, sup*; *Luxmi Narayan v. State Bank of India*, A 1969 P 385]. Failure to deny allegations in the plaint may be treated as an admission for that suit only, but not for the purpose of a subsequent suit [*Diali v. Lachhman*, A 1946 L 256: 48 PLR 21]. The view in *Joy Ch v. Aswani*, 9 CWN 147n that admission in a suit afterwards withdrawn is of no effect was **doubted** in *Chandrakanto v. Rammohini*, A 1956 C 577. In a previous proceeding, the tenant contended that she was the statutory tenant after the death of her husband. Alternatively it was contended that even if one the sons of the deceased had executed an agreement, it must be construed as one executed on behalf of the members of the family. Since this latter contention was put forward only as an alternative, contention, that too by the counsel at the time of arguments, the same can never be treated as an admission of the party [*Jeeth Kaur v. P. Kondalamma*, A 1983 AP 219, 223].

Qualified Statement.—If a qualified statement is made by a party, it cannot be used against him apart from the qualification. An unfair use is not to be made of a man's written statement, by trying to convert into an admission by him that which he never intended to be so [*Baikuntnath v. Chandra*, 1 BLR 133: 10 WR 190; see *Poolin v. Watson*, BLR Sup Vol 904: 9 WR 190; **folld** in *Ranga Rau v. Bhavayammi*, 17 M 473; *Sooltan Ali v. Chand Bibee*, 9 WR 130].

The murder accused wrote in a letter addressed to the parents of the person whom he killed giving this explanation that the deceased had confessed to enjoying sex with his cohabitant and when questioned subsequently by a doctor as to why he wrote such a letter he explained by saying that he had to make up some reason for his behaviour. It was held that his letter as well as subsequent explanation should have been produced together [*R v. McDonald*, 1991 Crim LR 122 CA].

The principle to be followed in such cases was stated by the House of Lords in [*R v. Sharp*, (1988) 1 All ER 65 HR]. Where a statement made out of court by a defendant in criminal proceedings is in part an admission and in part self-exculpatory, the whole of the statement constitutes evidence of the truth of the facts it asserts and both the incriminating parts and the excuses or explanations must be considered in determining where the truth lies although the judge has to keep in mind that the incriminating parts are likely to be true whereas the excuses do not carry the same weight. Their Lordships approved the dictum Lord Lane CJ in [*R v. Duncan*, (1981) 73 Cr App R at 365].

General Statement.—A general statement by a witness that a number of persons admitted having committed a crime is valueless without some indication as to which of the persons made the admission in question [*Sajjan v. R*, 6 L 437: 90 IC 145].

Hearsay in Admissions.—It is doubtful whether admission containing matters stated as *mere hearsay* can be received in evidence. If tendered against the party

making it, they are clearly entitled to very little weight, and unless coupled with a further admission, that he believes them to be true, they would seem, like hearsay declarations against interest to be inadmissible. But it is debatable whether the same rule applies when they are offered in favour of the party making the admission as tending to explain the statement which tells against him [Tay s 737]. An admission made on the basis of what appears as marks or labels is of no more evidential value than the marks or labels themselves [*Comptroller of Customs v. Western Electric*, 1965, 3 All ER 599 PC].

Proof of Admission.—An admission contained in a petition filed in court, if impugned, should be duly proved [*Ashmutoonissa v. Alla Hafiz*, 8 WR 468]. Where a previous admission of a party is sought to be used, the statement must be put in. In order to make an admission by a party admissible, it is not necessary to bring the said fact to the notice of the person making such an admission [*Maimuna Bai v. Rasool Mian*, A 1991 Pat 203, 209]. Court's order referring to the admission is not sufficient [*Molar v. Ram*, A 1927 L 377: 102 IC 198]. Admission cannot be proved by recital in a judgment [*Dundbahadur v. Durga*, A 1953 P 346]. Statements in the account books of a person are admissions made by him. Hence, entries made by Jains in their notebooks could be proved against them and not by them. The prosecution case regarding conspiracy between Jains and others could not be sustained. The mere entries would not create a *prima facie* evidence of conspiracy against others. Conspiracy requires two parties. When there is a *prima facie* case of conspiracy, only then such entries could be admitted against other conspirators. *CBI v. V C Shukla*, AIR 1998 SC 1406 : (1998) 3 SCC 410.

Answers in Legislature.—Answers given by Ministers in the Legislative Assembly to questions on matters allocated to them by the Governor are admissible under ss 17, 18, 20 [*R v. Shibnath*, 48 CWN 1: A 1943 FC 75].

Effect of Admissions and the Weight to be Given to Them.—It is well settled that the effect of an alleged admission depends upon the circumstances it is made [*Prem Ex Servicemen &c v. S*, A 1974 SC 1121]. Admissions are substantive evidence even though the parties are not confronted with the statements. Its weight, however, is a matter of consideration of the court [*Bharat Singh v. Bhagirathi*, A 1966 SC 405; *Union v. Moksh Builders &c*, A 1977 SC 409]. Admissions by persons unless sufficiently explained [*Radhanath v. Ram Pd*, A 1978 NOC 228 (P)] or unsuccessfully withdrawn [*Sowcar v. S L Prasad*, A 1978 Knt 25], binds them. Admission, unless explained, furnishes the best evidence [*Ramji Dagawala & Sons (P) Ltd v. Invest Import*, A 1981 SC 2085, 2093 : (1981) 1 SCC 80 : (1981) 1 SCR 899: (1966) 70 Cal WN 199 **Reversed**)].

Admissions are substantive evidence even though the parties are not confronted with the statements. Its weight, however, is a matter of consideration of the court [*Bharat Singh v. Bhagirathi*, A 1968 SC 405]. Evidence of *oral admissions* ought always to be *received with great caution*. Such evidence is necessarily subject to much imperfection and mistake; for either the party himself may have been misinformed, or he may not have clearly expressed his meaning, or the witness may have misunderstood him or may purposely misquote the expression used. It also sometimes happens that the witness by unintentionally altering a few words, will give an effect to the statement completely at variance with what the party actually said. But where the admission is deliberately made, and precisely identified, the evidence it affords is often of the most satisfactory nature [Tay s 861]. See *also ante*: "*Grounds for admissibility of admissions*."

Express admissions of a party to a suit, or admissions implied from his conduct are strong evidence against him; but he is at liberty to prove that such admissions were mistaken or were untrue, and is not estopped or concluded by them, unless another person has been induced by them to alter his condition; in such a case the party is

estopped from disputing their truth as against that person (and those claiming under him) and that transaction, but as to third parties he is not bound; it is a well-established rule of law that estoppoels bind only privies and parties, not strangers. (Tay s 818); [*Chandra v. Narpat*, 34 1A 27: 29 A 184: 11 CWN 321; *Balmukumd v. Bhagwandas*, 15 Bom LR 209]. Admission by a party must be presumed to be true unless the contrary is shown [*Nathoo v. Durga*, A 1954 SC 355: 1955 SCR 51]. But before this rule can be invoked, it must be shown that there is a clear and unambiguous statement as will be conclusive unless explained. A statement by a party that certain proceedings were fraudulently collusive would not be sufficient without more to sustain such things [*Nagubai v. Shamarao*, A 1956 SC 593: 1956 SCR 451]. Before the right of a party can be considered to be defeated on the basis of an alleged admission by him the implication of the statement must be clear and conclusive. There should be no doubt or ambiguity [*Koteswara v. Sabbarao*, A 1971 SC 1542; *Ramprasad v. Kalyani*, A 1973 Raj 208].

The effect of an admission is to shift the burden of proof to the party making the admission. What a party himself admits to be true may reasonably be presumed to be so and until the presumption is rebutted, the fact admitted must be taken to be established [*Chandra v. Narpat, sup*; *Bhag v. Jai*, A 1929 L 318; *Sadiqa v. Ataullah*, A 1935 L 885; see s 31 *post*; "*Proof of admissions shifts the onus*"] A person is bound by admissions in the document executed by him. The presumption is that the recitals in the document are true and if he seeks to displace it, the onus is heavy on him [*Muneyya & Co v. Varadarajulu*, A 1964 AP 17]. The value of admissions must depend upon the circumstances in which they are made and possible motives for incorrect statements by interested persons should not be ignored [*Mahadeo v. Baleshwar*, A 1939 A 626]. A statement in a document should *prima facie* be accepted as true as against the executant unless it can be shown by independent evidence to be false [*Irshad Ali v. Kariman*, 22 CWN 530: 460 IC 217: 20 Bom LR 790: A 1917 PC 160].

Admission of guilt by Government servant can be used only to corroborate independent evidence led to prove charges against him [*Ram Subkh v. Commr of Police*, A 1967 C 381].

A plaintiff cannot take advantage of a statement made by a defendant which at most amounts to a piece of evidence and not to an admission, but which is found to be untrue, unless it be shown that the status of the plaintiff had been affected or that he had been misled by such statements [*Girish v. Issar*, 3 BLR 337: 12 WR 226]. As to the effect of false statement and misrepresentation in a security bond, see *Bodh Singh v. Ganesh*, 12 BLR 317 PC : 19 WR 356. A court is entitled to disregard an admission if it finds its truth inconsistent with other reliable evidence [*Bhawani v. Hakimullah*, A 1927 A 175 : 198 IC 821]. A gratuitous admission can be withdrawn at any time *Md Imam v. Hussain*, 25 IA 161 : 26 C 81; *Budhu v. Uttam*, 109 IC 26 : A 1928 L 726; *Md Umar v. Kirpal*, 78 PR 1904; *Ishar v. Ansar*, A 1939 A 348]. Mere withdrawal of suit does not destroy effect of admission made therein [*Chandra Kanta v. Rammohini*, 60 CWN 1006].

§ As to the conclusive nature of admissions, see s 31 and notes.

Admissions Under Constraint or Duress.—Admissions made under circumstances of *constraint*, cannot be received when obtained by illegal duress [*Stockfleth v. De Testet*, 4 Camp 11]; but are admissible at least on the trial of civil actions, if the compulsion under which they were made was legal. Thus affidavits sworn by a party in former legal proceedings, answers filed by him in Chancery in a former suit, evidence given by him in an action at law, or his examination taken in bankruptcy, will be evidence against himself in a subsequent cause; and this, too, though his subsequent opponent was a stranger to the prior proceeding—though he himself might, had he thought fit, have, successfully demurred to the questions—though they

were irrelevant to the matter before the court at the time of his examination, and were put to him for the purpose of procuring evidence in an action pending against him—and though he had no opportunity of fully explaining the testimony he had given [Tay s 798]. Admission if in *terrorem*, loses much of its significance [*Md Salie v. Md Hanifa*, A 1976 SC 1569]. Any admission made in ignorance of legal rights or under duress cannot bind the maker [*Shri Krishan v. Kurukshetra University*, A 1976 SC 376]. Admissions made by a party in course of a case in which the charge was wholly baseless and prosecution was started to harass the party are not voluntary and therefore not binding [*Secy of S v. Sarin & Co*, A 1930 L 364].

Conclusiveness of Admissions.—An admission merely as an admission is not conclusive against the person making it; but it may operate as an estoppel under s 115, that is when the person who made the admission is not permitted to deny it [See s 31 *post* and notes]. An admission in a court of law carries great weight but is not conclusive unless it operates as an estoppel [*Bai Devmani v. Ravishankar*, A 1929 B 147]. An admission is conclusive only when it has been acted upon by the party to whom it is made. A statement made in a former suit, in which the court passed a decree opposed to it, is not conclusive [*Jnan Chowdhury v. Doolar*, 18 WR 347]. A statement in a plaint or written statement cannot be construed as an admission to dispense with further proof. It is only a statement of the case upon which the parties intented to rely [*Kullappa v. Subbaraya*, 25 IC 22].

Effect of Admission on a Point of Law.—An erroneous admission on a point of law is not an admission of a thing so as to make the admission a matter of estoppel and the court is not precluded from deciding the rights of the parties on a true view of the law [*Societie Banque v. Girdhari*, A 1940 PC 90 : 187 IC 770; *Jagwant v. Silan*, 27 A 285; *Tagore v. Tagore*, 9 BLR 377, 401 PC : 18 WR 357, 367; *Beni v. Dudnath*, 26 IA 216 : 27 C 156, 162-63 : 4 CWN 274; *Secy of S v. Siba Pd*, 27 CLJ 447 : 45 IC 983; *Hassomal v. Shk Gulam*, 8 SLR 156 : 27 IC 357]. Admission by a party in his pleading on a point of law is not binding [*Banarsi v. Kanshiram*, A 1963 SC 1165]. A party is not bound, generally speaking, by a pleader's admission in an agreement on what is a pure question of law [*Narayan v. Venkatacharya*, 28 B 408; *Krishnaji v. Rajmal*, 24 B 360; *Gulab v. Baiya*, A 1929 N 343; *Surain v. Sunder*, A 1939 L 879; *Dwarbux v. Fatick*, 3 CWN 222; *Abdul Gunnee v. Gourmonnee*, 9 WR 375; *Kamta v. Chait*, A 1934 A 531]. A party is not bound by admission of erroneous opinion on question of law by his counsel [*Shiv Singh v. S T A Tribunal*, A 1969 A 14—case law reviewed]. It has, however, been held in a case that admission of a pleaer whether of law or of fact binds the party [*Nand Kishore v. Ganesh*, A 1929 A 446]. An admission regarding a question of succession based upon custom is not an admission on a question of law and is binding [*Ghulam v. Majid*, A 1928 L 779 : 113 IC 99]. Admission of a witness on the question of succession or customary law is not binding on the party [*In re Mahabir*, A 1963 Pu 66]. Admission about the character of property (*eg* that it is joint family property) is admission on question of law [*Ram Bharosey v. Ram Bahadur*, A 1948 O 125]. See also *post*, s 115: "*Estoppel on a Point of Law*".

[As to admissions by lawyers on question of fact see notes to s 18, *post*].

Admissions to Police.—An admission made to a police officer would be inadmissible as a 'confession' under s 25, but it may be accepted in a civil suit as an admission under ss 17, 18, 21, though it cannot be regarded as conclusive [*Bishendas v. Ram Labhaya*, 106 PR 1915]. See further *post*, s 25: "*Admissions or Statements of Incriminating facts to Police officers not amounting to confessions*".

Admissions in Various Cases.—To constitute an admission, the document need not be written by the party against whom it is used. It is sufficient if it is found in his possession, and his conduct thereto creates an inference that he was aware of its contents and admitted their accuracy but unless this is done, the document cannot be used against him as proof of its contents. It must be shown that the contents of the document or letters were recognised and adopted [*Barindra v. R*, 27 C 467 : 14 CWN 114, see *ante*, s 8 "*Finding of letters.....in one's possession*, and s 10 "*Communications between..... Documents found in possession*"]. The admission of execution of document means not only the signature on the deed but also all requirements, namely, attestation of the will by the witnesses [*Ramanand v. Dy Director*, A 1978 (NOC) 100 (A)]. When there is an admission of the party executing the sale deed and that execution can be used against the party making it, the burden shall be on the party who wants to show that the admission as made is untrue [*Shamsher v. Rustam*, A 1988 Raj 188, 189]. A tabular statement containing entries showing the amount of rent and extent of the holding made in the plaintiff's book and signed by the defendant was held relevant as admission [*Narain Kumari v. Ramkrishna*, 5 C 864 : 6 CLR 286]. A draft deed of partition approved and signed by a party though would not amount to a contract, would be an admission by that party. [*Hema Chandra Gupta v. Om Prakash Gupta*, A 1987 Cal 69, 77 (DB)]. So also a return made to a collector signed by the occupant of certain lands and by the *ticcadar* in which the amount of rent was stated [*Audh Beharee v. Ram Rai*, 18 WR 105].

Where the defendants relied on a horoscope produced by plaintiff's mother and which has been in a public record from a period *ante litem motam*, it was admissible under s 17 to prove the date of the plaintiff's birth [*Rala Goundan v. Raja Goundan*, 17 M 134]. Accounts purporting to have been kept on behalf of a contractor by a servant or agent of the firm, are clearly relevant against the contractor as admission under ss 17, 18 and 21 [*R v. Hanmanta*, 1 B 610, 617]. A letter containing an admission does not require stamp before it can be admitted in evidence [*Sital v. Monohar*, 23 WR 325].

In a suit for rent at enhanced rate, where the defendants raised no objection as to the rates, their conduct and pleadings were held to afford a fair presumption of the admission of the plaintiff's claims [*Thakoor v. Gopal*, 14 WR 4]. The statement of a party to a suit is admissible as evidence against him to prove the contents of a written instrument [*Muttukaruppa v. Rama Pillai*, 3 MHC 158. **Expld** in *Mahalatchemi v. Palani*, 6 M 245]. Where in *batwara* proceedings to which tenants are not parties, the landlords conceded that certain lands were held rent-free by the tenants, it is valuable evidence of the fact [*Chattranath v. Babar Ali*, 86 IC 833 : A 1925 C 626]. A *kabuliat* may be admissible as evidence of title, as being an act of ownership, but its cogency depends upon whether it can be treated as evidence not only for that reason but also because it is an admission [*Jogeswar v. Akhoy*, 19 CLJ 1]. The omission of a claim in a schedule of the debts due to the framer of it, which is given on oath, is an admission that such debt is not due [*Nicholas v. Downes*, 1830, 1 M & Rob 13]. A statement made in a mortgage deed as to the extent of debutter land comprised in certain *moujas* was held to be a deliberate admission made by the mortgagors, and the burden of proving that it was untrue was on them [*Jaroa Kumari v. Lalonmoni*, 17 IA 145 : 18 C 224, 229-30]. S 120(2) B T Act does not exclude as inadmissible evidence that subsequent to 2nd March, 1883 the tenant admitted that the lands let to him were *zerait* lands [*Bindeswari v. Kesho Pd*, 21 CWN 74].

A statement made by the defendant in another suit may be used against him [*Hurrish v. Prosunno*, 22 WR 303; *Jugdeo v. Digambar*, 22 WR 304 note; *Obhoy v. Beejoy*, 9 WR 162 and *Kashee Kishore v. Bamasoonduree*, 23 WR 27]. Also

admission made in a former arbitration proceeding [*Huronath v. Preonath*, 7 WR 249]. The mere fact that a statement of the plaintiff was repeated by the defendant would not make it his admission [*Bans Narain v. Chandrani*, A 1944 A 130]. An admission made in a verified petition and repeated in a verified plaint filed by a person is binding in a subsequent suit on the party who made it [*Girish v. Shamachurn*, 15 WR 437]. Where a person represented to certain witnesses that a certain petition was his and asked them to verify his signature, or to identify him as one of the petitioners, it amounted to a statement on his part and is effective against him [*Mohun v. Chittoo*, 21 WR 34]. A petition filed in the suit was held to be evidence of admission of the title [*Gour Lall v. Mahesh*, 14 WR 484]. A statement in the plaint made by the *putnidar* after his interest had been transferred, is not binding upon the transferee (plaintiff), who was a *pro forma* defendant in that suit and did not challenge that statement [*Jakhomull Mehra v. Saroda*, 7 CLJ 604]. The rough draft of a plaint which had been filed by the alleged previous *karnavan* was put in evidence to prove his admission [*Byathamma v. Avulla*, 15 M 19].

A deposition of the defendant in a previous suit in which he was a witness would be admissible in a subsequent suit against him even if not called as witness, under the sections relating to admission though not under s. 33. An admission of any party has to be read in its entirety and no statement out of context can constitute admission of any fact. The evidence during the cross-examination in the previous suit that the entire 'ancestral property' was acquired during the life-time of the witness's great grand-father-in-law cannot be regarded as an admission that the suit property (in the latter suit) was also ancestral property [*Dharamvati Bai v. Shiv Singh*, A 1991 Madh Pra 18, 22]. A statement in a bill of sale in evidence against those who are parties to it [*Soorjan Bibee v. Achmat*, 14 BLR Ap 3 : 21 WR 414 : *Ali Md v. Shk Maharaj*, 36 CLJ 186]. Execution of pro-note by one defendant does not bind the other [*Tanugunta v. Sangam*, 16 MLJ 185]. In a suit for money against two brothers, the admission of one does not bind the other [*Maina v. Madho*, 24 IC 105]. But admission of one of several persons *jointly interested* is receivable against both (see *post*, s 18). In a case of disputed deed of adoption, the evidence offered by defen-dants as statements made by the deceased executant in the interval of the execution of the deed and his death, expressing the view taken by him of the deed after he had known of its existence, is admissible under the head of admission under ss 18, 19, 21 [*Mir Syed v. Taiyaba*, 26 IC 547]. Acknowledgment of receipt of consideration would under certain circumstances amount to an admission as defined in s 17 [*Gadian v. Veerappa*, 28 MLJ 92 : 26 IC 899]. Postdated cheques in satisfaction of bills amount to acknowledgment of liability irrespective of the fact whether was subsequently dishonoured [*Rajpati v. Kaushalya*, A 1981 P 187]. A plea of particular status taken on the basis of a document is a matter of interpretation of the document and cannot operate as an admission under s 17 [*Makka Lal v. Ganga*, 1940 OWN 1233]. Mere admission of putting signature and thumb marks on a blank sheet of paper [*Thakurlal v. Ram*, 1968 ALJ 480; *Pragnarain v. Brahmadatt*, A 1976 A 23; *Ethirajulu v. K R Chinnikrishnan*, A 1975 M 333] or on a document [*Gitabai v. Dayaram*, A 1970 B 160; *Brijmohan v. Amar*, A 1980 J&K 54] does not amount to admission of execution. Deposit of rent under s 17(*1*) W B Premises Tenancy Act, 1956 does not amount to an admission of the relationship of landlord and tenant under s 17 [*Sk Hossain v. Naubahar*, A 1972 C 446]. Where a person executed a document admitting title of his brother to certain property and alienation by him to a third person the document is relevant when it is relied on by that third person as admission and not as estoppel [*Dattatraya v. Rangnath*, A 1971 SC 2548].

When the customs authorities depend mainly for their decision on admission, they should take the precaution of taking the admission in writing from the appellant [*Ambalal v. Union*, A 1961 SC 264 : 1961, 1 SCR 933].

Admission as to injuries.—On the medical examination of the accused person of the injuries sustained by him, the accused told the doctor that the injuries on his three fingers were the result of biting by his wife when he closed her mouth to silence her. The statement was held to be an admission and, therefore, admissible in evidence. *Ammini v. State of Kerala*, AIR 1998 SC 260 : (1998) Cri LJ 481.

Admissions during Companies Act investigations—English Law.—Admissions made by a person to Department of Trade and Industry inspectors investigating under the Companies Act are admissible in criminal proceedings, despite the absence of a caution [*R v. Seeling*; *R v. Lord Spens*, The Independent, May 3, 1991 CA : (1991) 4 All ER 429].

Admission as to identity of drug.—Where an experienced drug user admits possession of a substance which he himself identifies as a controlled drug, that admission and identification are sufficient to provide *prima facie* evidence of the nature of the substance and of unlawful possession of a controlled drug. An admission in such circumstances is quite different from an admission made by an accused that he has committed a crime, since it is a question of law whether an act of an accused person amounts to the crime charged [*R v. Chatwood*, (1980) 1 All ER 467 CA]. The court approved the decision in [*Bird v. Adams*, 1972 Cr LR 174 DC].

Admission Cannot Pass Title to Land.—It is well-settled that title to land cannot pass by admission when the statute requires a deed [*Ambika v. Ram Ekbal*, A 1966 SC 605; *Jadunath v. Ruplal*, 33 C 967 : 10 CWN 650; *Keshri v. Sukhan*, 17 P 616; see also *Dharam v. Mauji*, 16 CLJ 436; *Narak v. Magoo*, 22 CLJ 380; *Mathura v. Ramkumar*, 43 C 790 : 23 CLJ 26]. An admission could not confer title, but it would only shift the burden to prove want of title in persons in whose favour the admission is made [*Md Imam v. Hussain*, 26 C 81 : 25 IA 161; *Abid Ali v. Secy of S*, A 1951 N 327]. As to distinction between a mere deed of release and conveyance or a contract to convey land, see *Oodey v. Ladoo*, 13 MIA 585.

[1][**S. 18. Admission by party to proceedings or his agent.**—Statements made by a party to the proceeding, or by an agent to any such party, whom the Court regards, under the circumstances of the case, as expressly or impliedly authorised by him to make them, are admissions.

By suitor in representative character.—Statements made by parties to suits, suing or sued in a representative character, are not admissions, unless they were made while the party making them held that character.

Statements made by—

[2][(1) By party interested in subject-matter.—Persons who have any proprietary or pecuniary interest in the subject-matter of the proceeding, and who make the statement in their character of persons so interested; or

[2][(2) By persons from whom interest derived.—Persons from whom the parties to the suit have derived their interest in the subject-matter of the suit, are admissions, if they are made during the continuance of the interest of the persons making the statements.

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1. In Ceylon the first three paras have been numbered sub-secs. "(1)", "(2)", "(3)" respectively.
2. "a" and "b" respectively in Ceylon.

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COMMENTARY

Principle and Scope. [Statements That Rank as Admissions].—Sections 18-20 mention the persons by whom statements as defined in s 17 must be made in order that they may rank as admissions. "Proceeding" in this section may be civil or criminal. A party to a proceeding may be affected by the admission of persons who stand in the following relations:—

(*a*) *Parties' Representatives* (s 18).—A party to a proceeding, whether civil or criminal, is of course bound by his own admissions. A nominal party is affected by the admissions of a real party, who though not on the record, is interested in the subject-matter [Tay s 756; Hals 3rd Ed Vol 15, para 544]. Statements made by parties in a representative character, are subject to the qualification in para 2 of the section that they are not admissions unless they are made while sustaining that character. Thus, a statement by a trustee is not admissible against him when sued as a trustee if they were made before he became a trustee.

An accused is a "party to the proceeding" (see also "party" in s 8, *ante*); but the term does not appear to include the person against whom the offence has been committed. "In a criminal prosecution, the person to whose injury the crime was

done is in no legal sense a party, and his statements are not receivable, except of course, by way of self-contradiction as a witness" [Wig s 1076].

(*b*) *Agents* expressly, or impliedly authorised (s 18). The agency must be fully established and the statements must fall within the scope of the agent's employment. As the rule admitting the declarations of the agent is founded upon his legal identity with the principal, they bind in so far only as the agent had authority to make them (Tay s 605). The rule as to agents does not generally apply in criminal cases.

(*c*) *Persons jointly interested* in the subject matter of the proceedings (s 18) *eg* partners, joint-contractors, co-sharers, co-defendants, &c. In order that admissions of one of them may be received against the other they must be made in the character of a person jointly interested and during the continuance of the interest. The legal identity of interest is of fundamental importance. When two persons have conflicting interests, the admission of one cannot be evidence against the other.

(*d*) *Persons from whom parties have derived their interest or title* (s 18). Admissions by such persons are admissible against persons claiming through them on the ground of *privity*. Such admissions should also be made during the continuance of the interest of the persons making them. Thus, an admission by previous owner after he has ceased to have any interest in the property, is not receivable against the person in possession.

(*e*) *Persons whose position it is necessary to prove* against a party to a suit, when their statements would be relevant in a suit brought by or against them (see s 19). This is a case of admission by strangers to the suit.

(*f*) *References, ie* persons to whom a party to the suit has expressly referred for information or opinion in reference to a matter in dispute (see s 20). This is also a case of admission by a stranger.

Ss 18-21 apply also to admissions in criminal cases. Incriminating statements not admissible as confessions may be admissible under ss 18-21 [*Md Baksh v. R*, A 1941 S 129 : 1941 Kar 257]. See *post*, notes to s 24.

Same: Persons Whose Admissions May be Received.—With respect to the person whose admissions may be received, the general doctrine is that the declarations of a *party to the record, or of one identified in interest with him*, are, as against such party receivable in evidence [*Spargo v. Brown*, 1829, 9 B&C 938]; but if they proceed from a stranger who is still living, they are almost uniformly rejected [*Barough v. White*, 1825, 4 B & C 328, (**expld** in *Lee v. Harrison*, 5 LJCh OS 30)] and though the declarant be dead, they cannot in general be admitted unless upon some of the special grounds stated in s 32 *post*. The admissions of parties to the record are receivable in evidence whether made before or after the party had arrived at full age; and therefore, in an action against an adult for necessaries supplied during his minority, admissions made, and letters written by him while under age, may be proved on behalf of the plaintiff [*O'Neill v. Read*, 1845, 7 Ir LR 434]. The courts, however, now recognise a wide distinction between *nominal* and *real* parties. The nominal plaintiff is never permitted to, in any manner, injuriously affect the rights of the real party [Tay ss 740-741].

The two clauses described in the third para are not mutually exclusive. The first of the two clauses includes all those mentioned in the second and the other persons in addition. When one of several persons jointly interested in the subject-matter makes an admission in regard thereto, that admission can be proved against others; in making it, he may be considered to have acted as agent for the others. This would be

the case as between partners, joint-debtors, or creditors, or joint-tenants (*Kowsulliah v. Mukta*, 11 C 588). It is only on the supposition that either interests are identical that there can be any justice in holding that the statement of one should be used against the other. When two persons have distinct or conflicting interest in the same property, it is clear that the rule cannot be applied [Cunn pp 54-56]. See *post*: *"Admissions of several persons jointly interested"*.

[*Ref Steph Arts 16, 17; Tay ss 756-57, 743-54, 598-601, 602, 605, 787-94; Phip 8th Ed pp 30, 231; Best 11th Ed s 531; Roscoe N P 67-71; Wigmore ss 1078, 1080-87; Jones, ss 235-296; Hals 3rd Ed Vol 15, paras 542-547*].

"Proceeding".—In this section refers to the proceeding in which the matter stated by the party is an issue or is relevant to the issue and not to the proceeding, if any, in which the statement has been made [*Patel v. R*, A 1933 R 292 : 146 IC 653].

"Party to the Proceeding".—Persons who are not parties to record but who are *interested in the subject-matter of the suit* are considered by the law as real parties in interest, and accordingly their admissions have the same weight as though they were parties to the record. For example, there may be received in evidence against their respective representatives, the admissions of the *cestui que trust* of a bond so far as his interest and that of the trustee are identical [*Hanson v. Parker*, 1749, 1 Wils 257; see Tay s 756 and cases cited]. A common form of admission is a statement made by a party in a former suit either in a written statement or in a deposition, and the former suit may or may not have been between the same parties [Field, 6th Ed p 84]. As to "party" in criminal proceeding, see *ante*.

Where several persons are *jointly* interested in a suit, the rule is that the admissions of any one of them are receivable against himself and fellows, whether jointly suing or sued or whether an action is brought in favour of or against any more of them separately; provided the admissions relate to the subject-matter in dispute made by the declarant in his character of a person jointly interested with party against whom evidence is tendered [*Whitecomb v. Whiting*, 1871, 2 Doug 652; *Wood v. Braddick*, 1808, 1 Taunt 105; see *post*: *"Admissions of several persons jointly interested"*]. An admission made by one plaintiff is of considerable evidentiary value against his co-plaintiff though not conclusive [*Tirkha v. Murari*, A 1935 A 720]. Admission of a person could be an admission only if it would be made during the continuance of his interest in the property but once he has parted with his interest his admission is not admissible. [*Chironjilal v. Khatoon Bi*, A 1995 MP 238, 241]. Admission by one of the co-owners that the other co-owner had one third share in the joint properties can be relied upon. [*Raj Kumar v. Official Receiver, M/s. Chiranji Lal Ram Chand*, A 1996 SC 941, 942]. In a suit by children from the first marriage for possession of their father's property, admission made by their deceased father that the defendant, the second wife, was his legally wedded wife and her children were his legitimate children is binding on the children from the first wife. [*Nirmala v. Rukminibai*, A 1994 K 247].

A statement made by a defendant in another suit may be used as an admission within the meaning of this section [*Hurrish v. Prosunna*, 22 WR 303; *Jugdeo v. Digamber*, 22 WR 304 note; *Kashikishore v. Bamasundari*, 23 WR 27. On this point see also *Haronath v. Preonath*, 7 WR 249; *Obhoy v. Bejoy*, 9 WR 162; *Girish v. Shama Charan*, 15 WR 437; *Sheo Surn v. Ramkhelawan*, 14 WR 165; *Bhagwan v. Michoo*, 17 WR 437; *Forbes v. Md Taki*, 5 BLR 529 : 14 WR 28 PC; *Mohun Sahoo v. Chutto Mowar*, 21 WR 34, cited under s 17 *"Admissions in various cases"*].

An admission of a fact on the pleadings by implication is not an admission for any other purpose than that of the particular case [*Amrita v. Rajanikant*, 2 IA 113 : 23 WR 214]. When a fact pleaded in plaint is not specifically denied, but mere ignorance about its existence is pleaded, in such cases unless by necessary implication it amounts to denial of the fact pleaded, mere plea of ignorance amounts to admission of fact [*Roopi Bai v. Mahaveer*, A 1994 Raj 133, 136; *Jahuri Sah v. Dwarka Prasad Jhunjhunuwala*, A 1967 SC 109, **followed**]. An admission in a previous suit in favour of plaintiff—pre-emptor not party to the present suit in not admissible in a suit between plaintiff and present vendees [*Ahmad v. Jawahar*, A 1923 L 16 : 84 IC 257]. An admission made by one of several parties in fraud of the others jointly interested and in collusion with the opponent is invalid as against the others [*Rawstone v. Gandell*, 1846, 15 LJ Ex 291; *Phillips v. Clagett*, 1843, 12 LJ Ex 275]. Admissions made in written statement when required by law to be recorded must, in order to be admissible, have been recorded in accordance with the requirements of the law [*Pogha Mahtun v. Ganesh*, 24 WR 114]. As regards the effect of admissions by a defaulting proprietor at a revenue sale, see *Buzlool v. Prandhun*, 8 WR 222 and *Kuldip Narain v. Govt*, 11 BLR 71. Where property has been devised by will to executors, any admission by parties other than the executors, will not bind the estate of the deceased [*Chander Kant v. Ram Narain*, 8 WR 63].

Admission etc. by Agents.—The declarations, admissions and acts of agents are admissible against their principals on grounds very similar to those which govern the declaration of co-partners. The principal constitutes the agent as his representative in the transaction of certain business. Whatever, therefore, the agent does in the lawful prosecution of that business, is the act of the principal. The rule is one of substantive law and not evidence. It is founded on the legal identity of interest subsisting between the parties. They are original evidence and not hearsay; and being regarded as verbal acts they are receivable in evidence without calling the agent himself to prove them [*Doe v. Hawkins*, 1841, 2 QB 212]. Representations &c of agents being original evidence, they must be distinguished from their mere hearsay admissions; which are only receivable against, but not in favour of, the principal [Phip 8th Ed p 80; Hals 3rd Ed Vol 15, para 546]. The admission or the declaration of the agent binds his principal only when made during the continuance of the agency, in regard to transaction then depending, *et dum fervet opus*. When the agent's right to interfere in the particular matter has ceased, the principal can no longer be affected by his declarations any more than by his acts, but they will be rejected in such case as mere hearsay [see *Fairlie v. Hastings*, 1804, 10 Ves 123 and other cases cited Tay s 602 foot-note]. The declaration or acts of an agent, cannot bind an infant because an infant cannot appoint an agent [Tay, s 605]. In order that the principal may be bound, the act must be within the agent's authority. If it is without the scope of the agent's authority, it will bind the principal even though done against his express instructions [*Watteau v. Fenwick*, 1893, 1 QB 346], or fraudulently and for the agent's sole benefit [*Lloyd v. Grace*, 1912 AC 716; *Lloyds Bank v. Chartered Bank*, 1929, 1 KB 40] or negligently [*Penny v. Wimbledon UDC*, 1899, 2 KB 72], or maliciously [*Citizens Co v. Brown*, 1904 AC 423; Phip 8th Ed p 80].

A statement by an agent whom the court regards as expressly or impliedly authorised to make it, is admissible, even though not on oath [*Govindji v. Chhotu*, 2 Bom LR 651]. If the agent is authorised to write the letter, it matters not whether he signs his own name or the name of his principal [*Mohesh v. Basant*, 6 C 340, 352]. Any party to a suit has the right to repudiate the action of an agent compromising it without his knowledge and consent, before any order of the court is passed accepting the compromise [*Monmohini v. Banga Ch*, 31 C 357, 361 : 8 CWN 197]. Provided

the agent's liability for acts done by him as agent has not ceased, admissions of liability made by him at a time when he ceased to be agent would still be admissible as evidence against his surety. It is not necessary that a statement or admission by the agent, to be admissible against the surety, should have been made by him whilst his agency continued [*Parameswara v. Viyathen*, 25 MLJ 51 : 20 IC 637]. In a partnership suit, the first defendant examined as a witness by the second defendant deposed that the latter was admitted to the benefits of the partnership. A person called by a party as his witness cannot be deemed to be his 'agent' within this section and the admission cannot be proved against the second defendant [*Parbhudas v. Lallubhai*, A 1932 B 117].

—Agency Must be Proved Before Reception of Admission.—Agency may be either general or special; and it may be express (by writing or verbal authority), or it may be implied and inferred from the acts and conduct of the parties. The point to be regarded in this clause is not only the establishment of the agency but that there was authority given sufficient to cover the particular statements relied on as admission [Nort p 144]. The fact of the agency must be proved before the admissions of agents can be received [*Ram Bakhsh v. Kishori*, 3 BLR 273; *R v. Ritbaran*, 4 Pat LW 120 : 46 I C 109; *Purnima v. Nandlal*, 12 PLT 582; *Bhattacharjee v. Sentinel Ins Co*, A 1955 C 594]. By the determination of agency, his authority to make admissions ceases [*Kalee Churn v. Bengal Coal Co*, 21 WR 405]. [See Tay ss 602-605; Phip 8th Ed p 231 *et seq*].

—Statements of Agents, etc. in Criminal Cases.—In criminal cases, statements of agents are not evidence for the purpose of attaching criminality to the principal. "An admission by an agent is never evidence in criminal as it sometimes is, in civil cases. In civil cases, the admission of an agent made in the course of his employment and in accordance with his duty is binding upon the principal. But this has never been extended to criminal cases. When a party is charged with the commission of an offence through the instrumentality of his agent, then it becomes necessary to prove the acts of his agent; and in some cases where the agent is dead, his admission is the best evidence of those acts which can be produced [Nort p 145 quoting Roscoe's Cr Ev; see *R v. Kazim*, 17 WR Cr 49]. An admission will not be evidence against another in criminal proceedings, since the law cannot recognise any partnership or joint interest in wrong, much less in crime [*Grant v. Jackson*, 1793, Peak, R 204; Tay s 751].

A party, however, is not generally criminally responsible for the acts or declarations of others, unless they have been expressly directed, or assented to by him [*Bank of N S Wales v. Piper*, 1897 AC 383]. Thus where an admission of liability on a criminal charge was made to the judge by the counsel of the accused under the latter's instructions but the accused subsequently changed his mind, it was held that a material irregularity had been committed by acting on such evidence [*R v. Harper—Taylor*, 1991 RTR 76 CA]. There are, however, certain exception to this rule, in which an innocent principal may be liable for *quasi*-criminal acts committed in the conduct of various trades by his agents or servants, or even sometimes by strangers [see Phip 8th Ed p 81].

—Statements Made in Representative Character.—Where parties either sue or are sued in a representative character, it may be questionable how far statements made by them *before they were completely clothed with that character*, will be admissible against them, so as to affect the interest of the persons they represent. In one case TINDAL CJ, is reported to have received an admission of a person, who was suing as the assignee, now called the trustee, of a bankrupt, though it was made

before he became such [*Smith v. Morgan*, 2 M & R 257]; but LORD TENTERDEN ruled otherwise [*Fenwick v. Thornton*, 1827 M & M 51] and probably he was correct. For it would be somewhat startling that the assets of a testator and the consequent rights of legatees, might be affected by some inconsiderate statement made by the executor before the death of the testator [*Legge v. Edmonds*, 1855, 25 LJCh 125; Tay s 755]. The representative is distinct from the ordinary capacity, and only admissions made in the former quality are receivable; in particular statements made before or after incumbency are inadmissible. Conversely his admissions as executor or the like would not be receivable against him as a party in his personal capacity [Wig s 1976]. In regard to ancestral property admissions by father would be admissible against the son, the former being the representative-in-interest [*Pratap v. Ganendra*, A 1951 Or 313]. The admissions of the executor of a donor, must be treated as admissions of the donor [*Dwarka v. Chandi*, 1 WR 339]. Any admission by parties other than the executor to the will would not bind the estate of the deceased and the admission of one executor would not bind another, particularly if not made in the character of executor [*Chander Kumar v. Ramnath*, 8 WR 63]. The acts or admissions of one executor cannot bind any surviving executor [*Slater v. Lawson*, 1930, 1 B & Ad 396]. Where a party applies to execute a decree on behalf of a minor, his representative capacity comes to an end by the death of the minor [*Huladhar v. Jadunath*, 14 WR 162].

An admission made by a person in written statement as legal representative of deceased defendant (legatee under her will) in a previous suit is not binding on him in a subsequent suit by him as the reversioner to the estate of deceased *K*, because he was suing not only on his own behalf but on behalf of all reversioners [*Sarvabholla v. Kamala*, A 1939 M 446].

Mahants of Dera Prithi Saheb are nothing more than custodians or managers. Statements by previous Mahants are not binding on present incumbents or worshippers as admissions [*Ram Pd v. Shiromani*, 12 L 497 : A 1931 L 161].

—Admission by Manager of Hindu Joint Family.—The managing member of a joint Hindu family, even though he is not the guardian of his minor brothers, is their agent within the meaning of s 19 of the Limitation Act. A payment of interest by him saves limitation as against his brothers also [*Saroda v. Durgaram*, 37 C 461 : 14 CWN 741]. A manager of a Hindu family may acknowledge debts but cannot revive a debt already barred [*Kumarasami v. Patanagappa*, 1 M 485; *Chinnaya v. Gurunathan*, 5 M 169; *Gopal v. Madhumati*, 14 BLR 21; *Durkor v. Appaji*, 20 B 155]. The admission made by managing member or the father is only admissible as against the other members of the family where he does so on behalf of himself and them in a representative character and is not made to further his own interests. It would not of its own force bind the other members who can always show the incorrectness of the admission [*Nagayaswami v. Kochadai*, A 1969 M 329—case laws discussed]. A manager of a Joint Hindu family is the agent for the other members, and his acts are binding on the other members in the absence of fraud and collusion [*Gansavant v. Narayan*, 7 B 467], for debt contracted by the manager [*Sakharam v. Devji*, 23 B 372], for power of alienation by the manager [*Miller v. Rungo Nath*, 12 C 389], for costs incurred by the manager in protecting joint family property [*Jutadhari v. Rughoobeer*, 9 C 508. See also *Ghukun v. Poran*, 9 WR 483 and *Obhoy Ch v. Pearee Mohun*, 13 WR 75 FB].

The admission by the brother of the party does not bind the party since the brother cannot claim to have any pecuniary or derivative interest from the party [*Sri Chand Gupta v. Gulzar Singh*, A 1992 SC 123, 124].

—"Representative" in s 47 C P Code.—The term representative in s 47 C P Code when taken with reference to the judgment-debtor, does not mean only his legal representative that is, his heir, executor or administrator, but it means his representative-in-interest and includes a purchaser of his interest who, so far as such interest is concerned, is bound by the decree. There is no reason for excluding from its signification an execution purchaser of the judgment-debtor's interest [*Ishan Ch v. Beni Madhav*, 24 C 62 FB: 1 CWN 37 (*Gour Sundar v. Hem*, 6 C 355 and *Golaboo v. Ramdayal*, 8 WR 304 **overruled**); *Veyindra v. Maya*, 43 M 107 FB; *Azhar v. Mohammad*, A 1939 N 183; *Ajodhya v. Brij*, A 1940 P 615; see also *Dwari Baksh v. Fatek*, 26 C 250: 3 CWN 222; *Badrinarayan v. Jaikishore*, 16 A 283; *Gangadas v. Yakub Ali*, 27 C 670; *Gur Pd v. Ram Lal*, 21 A 20; *Laljimal v. Nand Kishore*, 19 A 332; *Haradhan v. Girish Ch*, 8 CLJ 327]. The term "representative" as used in s 47 when taken with reference to the judgment-debtor or decree-holder includes a purchaser of his interest [*Minakshi v. Chinnappa*, 24 M 689, 692; *Abhoy v. Bijoy*, 29 C 873: 7 CWN 54; *Gulzari v. Madhoram*, 26 A 477, where it has been further held that the term representative includes a private purchaser as well as a purchaser at a judicial sale; **folld** in *Imtiazi v. Dhuman*, 29 A 275 and *Ajodhya v. Hardwar*, 9 CLJ 485. See also *Md Mozuffer v. Kishori*, 22 IA 29: 22 C 909, 919, on appeal from 18 C 188]. See *Expln II* added to s 47 CPC by Act 104 of 1978.

Admissions of Several Persons Jointly Interested. [Admissions by Co-defendants or Co-plaintiffs].—The general principles regulating the use of admissions by any of several persons jointly interested are thus stated in Taylor: "Where several persons are *jointly* interested in the subject-matter of the suit, the general rule is that the admissions of any one of these persons are receivable against himself and fellows, whether they be all jointly suing or sued, or whether an action be brought in favour of or against one or more of them separately; provided the admissions relate to the subject-matter in dispute, and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered" [Tay s 743]. These principles were cited with approval and adopted in *Kausulliah v. Mukta*, 11 C 588: see also *Miajan v. Alimuddi*, 44 C 130: 20 CWN 1217 : 34 IC 57; *Kanta v. Makhan*, 39 CWN 277; *Bhura v. Bahadur*, A 1976 Raj 249]. The rule is founded on the legal principle that persons seized jointly are seized of the whole, the admission of either is the admission of the other [*Nagendra v. Lawrence Jute Mill Co. Ld*, 25 CWN 89]. But the statement of one person cannot be regarded as the admission of another person merely on the allegation that the two are in collusion [*Motiram v. Srilal*, A 1934 A 684]. Statement by co-sharer landlord admitting permanency of tenancy is admissible under s 18(*1*) [*Jogendra v. Subashini*, 45 CWN 590]. Admission regarding partition of the joint family property made by one of the beneficiary to the property is admissible in proof of partition asserted subsequently [*Krishnappa Shetty v. Rajivi Shedthi*, 1998 AIHC 2371, 2375 (Karn)].

An *apparent joint interest is obviously insufficient* to make the admissions of one party receivable against his companions, *where the reality of that interest is the point in controversy*. A foundation must first be laid, by showing, *prima facie*, that a joint interest exists. The existence of joint interest which is disputed cannot be established by the admission of one of the parties sought to be charged, but this fact must be established by independent proof [Tay s 753]. It will be seen that in receiving the admission of a party as such, the only question can be *who the party is*. The probative process consists in contrasting the statements of the same person made now as litigant and made formerly elsewhere, and it is in that view that it becomes necessary to define the identity of the person. It follows that the statements of one who is confessedly a distinct person *B* do not become receivable as admissions

against *A* merely because *B* is also a party. In other words, the *admissions of one co-plaintiff or co-defendant are not receivable against another*, merely by virtue of his position as a co-party in the litigation. This is necessarily involved in the notion of an admission, for it is impossible to discredit *A*'s claim as a party by contrasting them with what some other party *B* has elsewhere claimed; there is no discrediting in such a process of contrast, because it is not the same person's statements that are contrasted. Moreover ordinary fairness would forbid such a licence; for it would in practice permit a litigant to discredit an opponent's claim merely by joining any person as the opponent's co-party and then employing that person's statements as admissions. It is plain, therefore, both on principle and the policy, that the statements of a co-party (while usable of course against himself) are not usable as admissions against a co-party [Wig s 1076].

In general, the statement of defence made by one defendant cannot be read in evidence either for or against his co-defendant; neither can be answer to interrogatories of one defendant be read in evidence excepting against himself; the reason being, that, as there is no issue between the defendants, no opportunity could have been afforded for cross-examination [*Jones v. Turberville*, 1792, 2 Ves 11] and moreover, if it were allowed, the plaintiff might make one of his friends a defendant, and thus gain a most unfair advantage [*Wych v. Meal*, 1734, 3 P Wms 311]. But this rule does not apply to cases where the other defendant claims through the party whose defence is offered in evidence; nor to cases where they have a joint interest, either as partners or otherwise, in the transaction. Wherever the admission of the one party would be good evidence against another party, the defence of the former may a *fortiori* be read against the latter [*Van Reimsdyk v. Kane*, 1813, 1 Gall 630, 635 (Am); Tay s 754].

An admission of a respondent is not admissible against a co-respondent [*Hay v. Gordon*, 10 BLR 301: 18 WR 480 PC]. Where both principal and surety are interpleaded as co-defendants, the admission of a principal can seldom be received in evidence against the surety [*Gopal Daji v. Gopal Bin*, 28 B 248]. Where one of several defendants, who were trustees, admitted the receipt of money, the statement cannot be received against others [*Davies v. Ridge*, 1802, 2 Esp 101]. The admission of one defendant will not be evidence against any other in an action for negligence or trespass or other tort [*Daniels v. Potter*, 1830 M & M 501; *Morse v. Royal*, 1806, 12 Ves 362]; "but if they be established to be co-trespassers by other competent evidence, the declaration of the one, as to the motives and circumstances of the trespass will be evidence against all who are proved to have combined together for the common object" [*per* ELLENBOROUGH, LCJ in *R v. Hardwicke*, 11 East 578, 585].

An admission or even a confession of judgment by one of several defendants in a suit, is no evidence against another defendant [*Amrita v. Rojonee*, 15 BLR 10 PC: 23 WR 214; *Kanta v. Makhan*, 39 CWN 277; *Narindar v. King*, A 1928 L 769; *Dinanath v. Syed*, A 1929 L 129; *Rashid-ud-din v. Nazir-ud-din*, A 1929 L 721; *Kishan v. Lachhman*, A 1930 L 238], when he is not represented by him and has independent rights of his own; see also *Luchman v. Tansuk*, 6 A 397, folld in *Azizullah v. Ahmed Ali*, 7 A 353, 359 and *Niamatoolah v. Himmat Ali*, 22 WR 519]. An admission made by one defendant that he had relinquished his share even if it were clearly made in the deed of sale, ought not to affect the other defendants [*Kali Dutta v. Abdul Ali*, 16 IA 96: 16 C 627, 635]. The admission by one of the defendants can neither bind the co-defendants nor be evidence against them [*Amrita v. Rajani*, 2 IA 113; *Chandreshwar v. Chuni Ahir*, 9 CLR 359; *Phuljhari v. Mithai*, A 1971 A 494].

An admission by one of the heirs that he has an absolute right to a property does not affect the other heirs [*Mg Thu v. Mg Shwe*, A 1929 R 272]. An admission made by a co-tenant as to who was the landlord of a holding, is not binding on the other cotenants [*Kali Kishore v. Gopi Mohan*, 2 CWN 166 (distd in *Meajan v. Alimuddi*, 44 C 130; see *Dan v. Brown*, 1925, 4 Cowen 483]. An admission by one *raiyat* as to the rate at which he holds (though against his own interest) is not evidence to prove the rate at which another *raiyat* holds [*Narrohurry v. Narainee*, WR (1864) 23 FB: Marsh 70. But see *Kausulliah v. Mukta*, 11 C 588 (*v. ante*, s 13), where evidence of one co-sharer was held evidence against others. In this case, GARTH CJ, quoting s 525 from Taylor's Ev 1st Ed and **following** *Kemble v. Farren*, 3 C & P 623 and *Lucas v. De la Cour*, 1 M & S 249 held, that one partner or co-partner is considered to be the agent of others, and this rule is enacted, though in somewhat concise form, in s 18 of the Act]. Defendants 2 to 4 after having sold a *jote* to defendant No. 1, which they had obtained under a partition, colluded with the plaintiff and denied the partition. It was held that statements previously made by them admitting partition were admissible [*Gyannessa v. Mobarakunnessa*, 2 CWN 9]. The principle regarding the admissibility of admission of one of several joint owners against the others, has been discussed in the following case where it has been pointed out that the declaration of one of two joint owners is admissible against the others if made at a time after the joint interests came into existence; if made before they became joint owners, the declaration is not admissible. The admission of one co-plaintiff or co-defendant (whether in the same proceeding or in a previous proceeding) is not receivable against another, merely by virtue of his position as a co-party in the litigation. The requirement of the identity in legal interest is of fundamental importance [*Ambar Ali v. Lutfe Ali*, 45 C 159: 21 CWN 996; see *Bhikamal v. Puran*, 69 IC 35: A 1923 L 125; *Brajaballav v. Akshay*, 30 CWN 254: 93 IC 115: A 1926 C 705: *Kanta v. Makhan*, 39 CWN 277; *Ramjhari v. Dayanand*, A 1946 P 278: *Harihar v. Nabakishore*, A 1963 Or 45; *Jagabandhu v. Bhagu*, A 1974 Or 120]. The previous admission must be made by one who was claiming an interst in the property in question and he must fulfil the character of a declarant jointly interested with the party in respect of the property concerned against whom the admissions are sought to be used. Thus, two out of five brothers sued to establish their right to two-fifth share in properties sold in execution of a money decree against another brother *U* and purchased by the defendant, on the allegation that the properties when sold, were the joint family properties of the five brothers. Defendant's case was that the brothers were not joint and that the properties were exclusively owned by *U*.—*Held* that the deposition of another brother *K* in the suit in which the money decree was passed in which he stated that the family was not joint and the properties belonged exclusively to *U* was not admissible [*Nagendra v. Lawrence Jute Mill Co Ld*, 25 CWN 89: 61 IC 544: A 1921 C 197; see also *Dileshwar v. Nohar*, 48 IC 193]. The value of admissions must depend upon the circumstances in which they are made and possible motives for incorrect statement by interested persons should not be ignored. When severel persons are jointly interested in the subject matter of the suit, the general rule is that the admission of anyone of these persons is receivable against himself and others, whether they be all jointly suing or sued or whether an action be brought in favour of or against one or more of them separately, provided the admissions relate to the subject matter in dispute, and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered [*Ambika Devi v. Balmukund Pandey*, A 1981 Pat 111, 114]. A sale deed executed by some of the co-sharers of the property was written by S (a brother and co-sharer) who also signed for one of the executants. The admission of the vendor's share in the deed is binding not only on the representatives-in-interest of *S* but also on the

representatives-in-interest of the brother as the interests of *S* and his brother were then joint [*Bhutnath v. Jagat*, 71 CLJ 200].

An admission of one defendant in a written statement in a suit will not be evidence against other, unless it is made evidence at the trial by examining the defendant [*Seshagiri v. Saduchi*, 29 IC 924 (*Appavu v. Nanjappa*, 25 MLJ 329 **folld**)]. Admission in the pleading of one defendant is in no way admissible against or binding on a co-defendant [*Haji Heyat v. Lachminia*, 2 IC 916 (*Chunilall v. Ramkishen*, 15 C 460 FB; *Raj koomar v. Sahebzada*, 3 C 20 FB: 26 C 793; refd to); *Saidu v. Meher*, 101 IC 589: A 1927 L 356; *Puran v. Tarif*, 13 ALJ 1089: 30 IC 2; *Braham Raj Singh v. Smt Braham Raj Devi*, A 1982 Him Pra 57, 62]. Admission of co-plaintiff or co-defendant is not receivable against another, merely by virtue of his position as a co-party in the litigation [*Ambar v. Lutfe*, 21 CWN 996]. The admission of one defendant contained in a deposition in an earlier suit is not admissible in a subsequent suit against persons who were co-defendants in the earlier suit [*Bibi Kaniz v. Mojibul*, 20 P 855: A 1942 P 230].

—Admission in Plaint When Defendant Becomes a Co-plaintiff.—When a *pro forma* defendant becomes on his own application a co-plaintiff, he adopts all the statements in the plaint which support the cause of action and these statements only. He does not adopt the statements made therein which are not essential to the cause of action as stated in the plaint [*Suraj v. Kalidas*, 41 CWN 500]. As to admissions in pleadings see notes under s 17: *"Admission in pleadings"*.

—When is Admission Admissible?—Admission is not admissible against a person other than the person making it, unless such person can be said to be bound by the admission [*Sitaram v. Santanu*, A 1966 SC 1697]. To render the admission of one person admissible against another, it must relate to some matter in which either both were *jointly* interested, or one was interested *derivatively* through the other; and a *mere community* of interest will not be sufficient. Thus, the admission of a servant of a negligent act, is not evidence against his master [*Johnson v. Lindsay*, 1899, 53 JP 599]. In order that an admission may be relevant, it is necessary to show that the person who made it had an interest at the time when he made the statement [*Jogeswar v. Akhoy*, 19 CLJ 1].

—Admission Must be Made During the Continuance of Interest.—"During the continuance of interest" only mean while the interest was subsisting and before that interest was parted with [*Harihar v. Nabakishore*, A 1963 Or 45]. Admissions in order to be relevant must be made during the continuance of the interest of the person making them. The reason is that it would be inequitable to allow a person who has parted with his interest in the property to divest the right of another claiming under him, by any statement which he chose to make [*Khemunkuree v. Gour*, 5 WR 268; *Ma Shwe v. Ma Da*, 9 Bur LT 152: 33 IC 888; *Jogeswar v. Akhoy*, 19 CLJ 1: 22 IC 714. See also *Clarke v. Brindabun*, 1862 WR, FB 20 : Marsh 75]. Statements by person from whom the parties have derived interest are admissible only when the admissions are of a date prior to the date of the transfer [*Galstaun v. Mirza*, 73 IC 428: A 1924 O 19]. A purchaser is not bound by an admission of his vendor subsequent to the purchase [*Mg Aung v. Mg Swe*, 73 IC 1039: A 1923 R 51].

On the severance of a joint contract by the death of one of the contractors, anything done or said subsequently by the survivor does not bind the personal representative of the deceased [*Atkin v. Tredgold*, 1823, 2 B & C 23]. On an action brought against two persons in partnership as part-owners of a vessel, an admission by one as to matter which was not a subject of co-partnership, but only co-partnership, is admissible against the other [*Jaggers v. Binnings*, 1815, 1 Stark R 64].

An admission by a creditor after transferring his debt to a third person to the effect that the debt or a part of it, had been paid to him before he sold his claim, is not binding on the vendor [*Chanda v. Wasawa*, 202 PLR 1014].

—Admissions by Partners and Joint-contractors.—Whenever any number of persons are associated together in the joint prosecution of a common enterprise of design, as in commercial partnership and similar cases, the act or declaration of each member, in furtherance of the common object of the association, is the act or declaration of all. By the very act of association each partner is constituted the agent of the others for all purposes within the scope of the partnership concern [*Sandilands v. Marsh*, 1819, 2 B & Ald 673; and other cases cited. Tay s 598 footnote], and his act and declarations bind his co-partners and the firm, unless he has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority or does not know or believe him to be a partner. Thus an admission or representation made by one partner concerning the partnership affairs, and in the ordinary course of its business is evidence against the firm [Tay s 598; see Phip 8th Ed pp 227-230 and Jones, ss 250-52; Hals 3rd Ed Vol 15, para 545].

An admission by one partner in his representative capacity would be evidence against the firm [*Bear & Sons Ld v. Rulia*, A 1934 L 625]. With regard to the admission of persons who are jointly interested in the subject-matter of the suit, see the observations of GARTH CJ, in *Kausulliah v. Mukha*, 11 C 588, 590. Under s 21[3] of the Limitation Act, the admission of a partner cannot be used against his co-partners. An acknowledgment of debt or payment of interest under ss 19 and 20[4] Limitation Act will not bind the other partners, unless it is shown that the partner, signing the acknowledgment or making the payment had authority, express or implied, to do so [*Vala Subramania v. Ramanathan*, 32 M 421 and *Premjit v. Dass*, 10 B 358; dist in *Balsukhram v. Kalidas*, 26 B 42: 3 Bom LR 484]. The word "only" in s 21 of the Limitation Act means that the mere writing or signing of an acknowledgment by one partner does not necessarily of itself bind his co-partner, unless it can be shown that he had otherwise power to bind the partner [*Gadu Bibi v. Parsotam*, 10 A 418: 8 AWN 93; see also, *Kariyappa v. Rachapa*, 24 B 493 and *Kalikisore v. Gopi*, 2 CWN 116 *ante*]. Persons interested to the extent of one-fourth share of the superior interest filed a road-cess return and it contained a statement against their interest. Co-sharers of the remaining three-fourths share did not file any similar return—*held* that the return by the one-fourth co-sharers is admissible against the remaining co-sharers [*Chalho v. Jharo*, 39 C 995; see *post*, notes to s 21: *"Road-cess Returns"*].

Admission by Persons From Whom the Parties have Derived Interest.—Admissions of persons from whom the parties to the suit have derived their interest in the subject-matter of the suit are relevant on the ground of *privity between* them.

Admissions of one person are also evidence against other, in respect of privity between them. The term *"privity"* denotes mutual or successive relationship of the same rights of property; and privies are distributed in several classes, according to the manner of this relationship. Thus there are privies in estate—as, donor and donee, lessor and lessee, joint tenants, and successive bishops, rectors and vicars: privies in blood,—as, heir, and ancestor, and co-parceners; privies in representation—as, executors and testators, administrators and intestates; privies in law—where the law,

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3. See now s. 20 of Act 36 of 1963.
4. See now ss. 18 and 19 of Act 36 of 1963.

without privity of blood or estate, takes the land from one and bestows it upon another, as by escheat. All these are more generally classed into privies in estate, privies in blood, and privies in law. The ground, upon which admissions bind those in privity with the party making them is, that they are identified in interest; and of course the rule extends no further than this identity [Tay s. 787; see also ss 788-784, Hals 3rd Ed, Vol 15, para 542].

To render statements by interested persons relevant against one or another, it is not sufficient that the interest be subsequent in point of time, it must have been derived from the person who made the statement sought to be used as admission [*Nund Pandah v. Gyadhur*, 10 WR 89]. Plaintiff and defendant No. 4 were jointly interested in the property in suit. Statement of defendant No. 4 before Revenue Inspector describing defdts. 1-3 as nearest reversionary heirs of one *N* is admissible as an admission by a privy against interest though defendant No. 4 was not examined [*Yaggana v. Kutagulla*, A 1945 M 361: 1945, 1 MLJ 378]. The admissions of a former owner of property after he has ceased to have any interest in it, are not evidence against the party in possession [*Khemunkuree v. Gour*, 5 WR 268]. The statement of a pre-emptor decree-holder after he has transferred the land is not a statement on behalf of the transferee [*Ram Singh v. Gainda*, A 1953 Pu 163]. A purchaser of the rights of Government in a taluk, does not become privy in estate to the defaulting proprietor. He does not derive his title from him and is not bound by his act or laches [*Buzlool v. Prandhun*, 8 WR 222; see *Forbes v. Mir Md*, 5 BLR 529 PC: 12 BLR 210]. An auction-purchaser at a sale for arrears of revenue does not derive his title from the defaulting proprietor, and proceedings between the defaulting proprietor and third parties are not admissible in evidence in a subsequent suit brought by the auction-purchaser as against him [*Radhagobind v. Rakhal*, 12 C 82]. An execution purchaser derives his title by operation of law adversely to the judgment-debtor [*Parbhu v. Mylne*, 14 C 401, 413]. Under a private sale in satisfaction of a decree, the purchaser derives his title through the vendor and cannot acquire a better title than that of the vendor. An execution-purchaser acquires title not through the judgment-debtor but by operation of law adversely to the judgment-debtor and freed from all encumbrances created by him subsequent to the attachment [*Dinendra v. Ram Coomar*, 8 IA 65: 7 C 107; **folld** in *Bashi Ch. v. Enayet Ali*, 20 C 236; refd to in *Gour Sunder v. Hem Ch*, 10 C 355; see also *Vishvanath v. Subrayashivapa*, 15 B 290; *Lalu Mulji v. Kashibai*, 10 B 401, 405]. An execution-purchaser is not bound by what the judgment-debtor may have stated on some previous occasion [*Imrit Koer v. Debee*, 18 WR 200; see *Kooldip v. Govt of India*, 11 BLR 71: 14 MIA 247]. An admission made by one execution-debtor or by a decree against him does not bind a purchaser in execution of a decree of a civil or revenue court [*Rangomonee v. Rajcoomari*, 6 WR 197]. Statements by persons in possession of property affecting their title thereto, are receivable against a party claiming through them by the title subsequent to admission [*Clarke v. Brindabun*, (1862) WR, FB 20 : 1 Ind Jur OS 97]. An admission made by the vendor to a third party in respect of the property sold by him is not binding on the vendee [*Radhey Shyam v. Smt Prem Kanta*, A 1982 Raj (NOC) 244]. A return made to a Collector by an occupant of land, stating the amount of the rent, is an admission as to the amount of rent binding upon all who claim under such occupant [*Audh Beharee v. Ramraj*, 18 WR 105]. The admission of a zemindar that the holding of certain tenants is *mokuraree* at a given rent, is binding on any subsequent zemindar not being an auction-purchaser at a sale for arrears of revenue [*Watson & Co v. Nobin*, 10 WR 72].

The admission of receipt of consideration contained in a mortgage bond is admissible in evidence against subsequent purchaser by private treaty of the interest

of the original mortgagors [*Behari v. Makhdum*, 35 A 194: 11 ALJ 221 (*Brajeshwari v. Budhanuddi*, 6 C 268 refd to; *Manohar v. Sumitra*, 17 A 428 **not folld**; *Rahim Jan v. Imam*, 17 CLJ 173 doubted)]. In a suit on mortgage by a mortgagor and his sons who were members of a joint Hindu family, but were not parties to it, and against the purchaser at an auction sale of the equity of redemption of the interest of the mortgagor,—*held* that the admission made in the mortgage deed and before the registering officer by the mortgagor as to the passing of consideration was admissible in evidence against the purchaser of the equity of redemption [*Bakshi Ram v. Lilla Dhar*, 35 A 353; *Birbal v. Behari*, 76 IC 815 (A)].

Admissions by Persons Standing in Various Relations—Admissions by Creditors.—It is the interest of a creditor to make allegations which would save his case from being time-barred. Having this in view, the mere fact that the statement of receipt of interest is against the pecuniary interest of the persons making the admission cannot be regarded as of great weight [*Ammalu v. Narayanan*, A 1928 M 509].

—Admissions by Guardians.—The declarations of a next friend or guardian will not be receivable in evidence because these persons, since, though the names appear on the record, are not in fact parties to the action, but are regarded for this purpose merely as officers of the court specially appointed to look after the interests of the infant. An admission, however, made by a guardian or next-friend in good faith in a pending suit, for the purpose of that trial only, is governed by other considerations and will be equally admissible with like admissions by the solicitors in the cause [Tay s 742].

Guardians of the person of an infant are not competent to bind the ward by an admission as to his proprietary rights. An admission by a Court of Wards cannot bind or prejudice the infant proprietor [*Banwarilal v. Dwarka*, 29 CLJ 557: 52 IC 825; *Ram Autar v. Raja Md Ali*, 24 IA 107 : 24 C 835].

The guardian of an infant has no authority to bind him by admissions [*Brajendra v. Dacca Munply*, 20 WR 223, 224] or by admission of previous transactions [*Suraj Mukhi v. Bhagavati*, 10 CLR 377, 380 PC], or by signature [*Wajihan v. Kadir Baksh*, 13 C 292], or by personal covenant [*Waghela v. Shk Masludin*, 11 B 551]. But where the minor takes the benefit of the covenant, he is bound by it [*Surendra v. Atul*, 34 C 892: 7 CLJ 87]. The court should take nothing as admitted against an infant party to the suit unless it is satisfied that the admissions are made by some one competent to bind the infant, and fully informed upon the facts of the matter in litigation [*Syed Abdul v. Benee Pd*, 21 WR 228]. When a guardian acting within the scope of his authority and for the benefit of a minor makes an acknowledgment of debt, such acknowledgment is by an agent duly authorised in this behalf and gives a fresh start for the computation of limitation [*Ram Charan v. Gaya Pd*, 30 A 422 FB: 5 ALJ 375]. On this point the High Courts were not unanimous and it was settled by amended s 21(1)[5] Limitation Act, 1908. See also *Sobhanadri v. Sriramulu*, 17 M 221; *Kailasa v. Ponnukannu*, 18 M 456; *Annapagauda v. Sangadyapa*, 26 B 221 (**overruling** *Rannal v. Vadilal*, 20 B 61)].

—Admissions by Insolvents.—Admissions of an insolvent if made after the act of insolvency may be admissible against himself but they cannot furnish evidence against another insolvent or the Official Assignee [*Luchiram v. Radha Charan*, 34 CLJ 107]. Admissions by a debtor before his bankruptcy are admissible to prove the

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5. See now s. 20(1) of Act 36 of 1963.

petitioning creditor's debts [*Coole v. Braham*, 3 Ex 183]. Admissions after insolvency are not evidence against the trustee or the creditors [*Exp Revell, Re Tollemache*, 13 QBD 720; *Re Bottomley*, 84 LJKB 1020]. It has been held that answers on public examination of an insolvent are not admissible even in subsequent stages of the same bankruptcy, against all parties other than himself [*Re Branner*, 19 QBD 572]. Following this case it has been held that the evidence taken in the public examination of an insolvent cannot be used as against a third party to prove or disprove a title [*Jnanendra v. Offi Ass*, 30 CWN 346 (*Madhoram v. Offi Assign*, 27 CWN 611 **considered**)].

—Admissions by Landlords.—Admission made by a landlord is not binding on the tenant. A compromise entered into between proprietors of certain land and others, whereby they become joint proprietors of the land is not binding on the tenants on the land [*Puran v. Dhanpat*, 52 IC 739].

—Admissions by Pleaders, Solicitors and Counsel.—In civil cases the admissions of a solicitor, or of his managing clerk or agent, if made during the actual progress of litigation, are evidence against his client in the same proceeding [*Elton v. Larkins*, 1832, 5 C&P 385; *Doe d Wetherell v. Bird*, 1835, 7 C & P 6; *Blackstone v. Wilson*, 1857, 26 LJ Ex 229]. Indeed, if made for the express purpose of dispensing with proof at the trial, they will generally be conclusive against the client; otherwise they amount merely to *prima facie* evidence of the facts involved [*Holt v. Squire*, 1825, Ry & M 282]. Admissions made before litigation commenced [*Wagstaff v. Wilson*, 1832, 4 B & Ad 339], or casually in mere conversation [*Petch v. Lyon*, 1846, 15 LJQB 393; *Watson v. King*, 1846, 3 CB 608], or to persons other than the opposite party [*Wilson v. Turner*, 1808, 1 Taunt 398] will not, however, bind the client. The rule is sometimes narrower in the case of counsel; for whereas the admissions of a solicitor bind the client if made at any time during the proceedings for which he is retained, those of counsel only bind when made on the particular occasion for which he is instructed [*Richardson v. Peto*, 1 M&G 896; *R v. Greenwich &c*, 15 QBD 54; Hals 3rd Ed, Vol 15, para 547; Phip 8th Ed, p 235]. *Incidental* admissions by solicitors while they are referring to other matters connected with the action (which are generally the result of carelessness), though not regarded as conclusive admissions, are still considered not unfrequently as raising an inference respecting the existence of facts, which the adversary would otherwise have been called upon to prove; and consequently, it is very important that solicitors should exercise great caution in the language they employ while corresponding with their opponents. Thus, where in an action of debt on a bond, the defendant's solicitor had admitted the signature of the attesting witness, this was held, by implication to amount to an admission of the due execution of the instrument [*Milward v. Temple*, 1808 Camp 375; Tay ss 772-73]. Accused is bound by the sworn testimony of his counsel [*Raghunath v. S*, A 1973 SC 1110]. Admission made by counsel stands on much the same footing as those of solicitors. As a general proposition, a consent once given, or an admission made by a counsel under his signature, with the authority of his client, with a full knowledge of the facts and without some egregious mistake, is conclusively binding and cannot afterwards be withdrawn [*Harvey v. Croydon U &c*, 53 LJCh 707; Tay s 783].

On questions of fact parties are bound by admissions made by their lawyers whether made in the course of trial in the court of first instance or in the appellate court. A vakil's general powers in the conduct of a suit include the abandonment of an issue which, in his discretion he thinks inadvisable to press [*Venkata v. Bhashyakarlu*, 29 IA 76 : 6 CWN 641 : 25 M 367]. It is a rule which admits of no qualification that, when counsels take upon themselves the responsibility of making

statements of fact to the court, the court is entitled to assume that those statements are true in every particular, so that it may implicitly rely on them [*Prithwi v. Sukhraj*, 1940 FCR 75 : A 1940 FC 25]. Admission by counsel after deliberation cannot be resiled from merely on the ground that the party or his counsel was not in full possession of facts [*Shiva Pd v. Sris Ch*, A 1943 P 327; *Veeramma v. Appayya*, A 1957 AP 965].

A pleader abandoning an issue of facts in the lower court cannot challenge in appeal [*Ulichi v. Nallamaddi*, 109 IC 178: A 1928 M 900]. When a person engages an advocate or a vakil to conduct his case, it must follow that he authorises him to make binding admissions before the court in the course of his conduct of the case [*Bhutnath v. Ram Lal*, 6 CWN 82]. A party is bound by the admissions of fact made by his pleader [*Kalikanand v. Giribala*, 10 WR 322; *Barkeley v. Chittur*, 5 NWP 2; *Abdul Ghani v. Gourmoni*, 9 WR 375; *Kower v. Sreenath*, 9 WR 485; *Rajendra v. Bijai Gobind*, 2 MIA 253; *Srimati v. Pitambar*, 21 WR 332; *Jahadali v. Ajimunnessa*, 44 IC 18]; but he is not bound by a mistaken consent of the pleader nor is he bound by his admission on a point of law [vide *ante* s 17: "*Effect on admission a point of law*". See *Tagore v. Tagore*, 9 BLR 377, 401 PC: 18 WR 359, 385. 21 A 285; *Ramkant v. Brindabun*, 26 WR 246; *Beni Pd v. Dudhnath*, 26 IA 216: 27 C 156, 161-163: 4 CWN 274; *Dwar Bux v. Fatik*, 26 C 250: 3 CWN 222; *Krishnaji v. Rajmal*, 24 B 360: *Narayan v. Venkatacharya*, 28 B 408 and; *Harihar v. Dasarathi*, 9 CWN 636: 33 C 257]; or an admission made under a misapprehension of facts [*Hickman v. Barnes*, 1895, 2 Ch 638; *Motilal v. Sarup*, A 1937 B 81]; or an opinion expressed by a pleader in the course of argument adversely to a party's claim [*Krishnasami v. Rajagopala*, 18 M 73]. The lawyer's confession at the time of argument before the Special Referee appointed in a suit for damages could not be treated as an admission of fact finding on the dependent [*Food Corporation of India v. Birendra Nath Dhar*, A 1989 NOC 119 (Cal) (DB)]. Admission in order to be binding must be within the scope of the authority conferred by Mukhtearnama [*Sitaram v. Gaya*, A 1923 P 37]. A minor is bound by the admission of fact by his pleader [*Indar v. Karam*, 35 IC 870: 86 PLR 1916].

Admissions contained in the *mere conversation* of a solicitor cannot be received against a client, though they relate to the facts in controversy. The reason being that a solicitor has authority to manage the action in court and to do nothing more [*Petch v. Lyon*, 1846, 15 LJQB 393; *Young v. Wright*, 1907, 1 Camp 141. See other cases in Taylor 11th Ed p 530]. An admission by a solicitor made before suit, will be binding, if it be shown that the solicitor was already retained [*Marshall v. Cilff*, 1915, 4 Camp 133; *Gainsford v. Grammar*, 1809, 2 Camp 9]. A fraudulent admission by a solicitor is not binding [*Williams v. Preston*, (1882) 20 Ch D 672 CA. See other cases cited in Taylor 11th Ed p 531]. Admissions contained in a letter by defendant's solicitor that his client has no defence, may entitle immediate judgment [*Ellis v. Allen*, (1914) Ch 904].

Admissions by counsel stand upon a narrower footing, for while the attorney represents the client throughout the cause, the former represents him only upon the particular occasion for which he is briefed [*Richardson v. Peto*, 1 M & G 96; *R v. Greenwich*, 15 QBD 54; Phip 11th Ed p 333]. Information as to facts obtained from counsel across the bar amount to admission so far as it goes against the interest of party and must form part of record [*Sunder v. Caltex (I) Ld*, A 1969 B 24].

As to whether the statement in a judgment as to the pleader's admission may be challenged, see *Madhusudan v. Chandrabati*, 21 CWN 897: A 1917 PC 30; *R v. Pestanji*, 10 BHCR 75; *Timmalapalli v. Sokalchand*, A 1951 M 796]. If a plaintiff

relies upon any statement by the defendant or his pleader made in a previous litigation between the parties, that statement must be regularly proved [*Monilal v. Umacharan*, 19 CLJ 541].

Suggestions put in cross-examination do not amount to admission [*Trikam v. S*, A 1969 G 69]. A suggestion put to a prosecution witness during the cross-examination by defence counsel cannot be used as an implied admission so as to dispence with proof of the prosecution case. The suggestion to the prosecution in a rape case, that she consented for the sexual intercourse does not mean that the accused admitted the offence but pleaded consent [*Sakariya v. State of M.P.*, 1991 Cri LJ 1925, 1929 (MP)]. Admission made in correction of paper case is admissible on the question of possession in regular suit [*Sahdeo v. Bd of Rev*, A 1980 A 408].

[As to the effect of admission on point of law, see s 17 *ante*, and as to admission by lawyer in criminal case, see notes to s 58 *post*].

Principal and Surety.—The admissions of a principal can sometimes (though only seldom) be received as evidence in action against the surety upon his collateral undertaking [see Tay ss 785-786]. Admission of liability by principal debtor is no proof against surety [*Annapurna Glass Works v. Bimal Bottles*, A 1978 NOC 207 (C)]. In a suit by a creditor to recover the amount of his debt from a person who had become surety for the debtor, an admission of the principal debtor as to the amount of the debt is not evidence as against surety [*Ram Bhajan v. Sheo Pd*, 1907 AWN 293: 5 ALJ 142: 3 MLT 62].

—Statement in a Case Drawn up By an Attorney.—A statement as to pedigree in a case drawn up by an attorney for the opinion of a pleader is admissible in evidence as it must be regarded as a statement of the persons on whose behalf he was acting [*Chandreshwar v. Bisheswar*, 5 P 777: A 1927 P 61].

—Statement Before a Coroner.—A statement on oath by an accused before a coroner at an investigation is admissible at the trial as a statement made by a party to a proceeding under ss 18 and 21 [*R v. Ramnath*, 50 B 111: A 1926 B 151].

—Admissions by Wife.—Admissions by a wife are not in general receivable against the husband [*Wright & Webb v. Annandale*, 1930, 46 TLR 239]. The admissions of the wife bind the husband only where the wife had the authority to make them [*Emerson v. Blonden*, 1794, 1 Esp 142]. This authority does not result by mere operation of law, from mere relation of husband and wife; but it is a question of fact, to be found by the jury, as in other cases of agency; for though this relation in peculiar in its circumstances, from its close intimacy and its very nature, yet there is nothing peculiar in the principles which apply to it. As the wife is seldom expressly constituted the agent, the cases are mostly those of implied authority turning upon the degree in which the husband permitted the wife to participate in the transactions of his affairs [Tay s 770]. Where a husband allowed his wife to control certain property, she was held to be his agent [WR 1864, 318]. So where a wife was authorised to manage a business during her husband's absence, her admissions will be evidence against the husband [*Clifford v. Burton*, 1823, 1 Bing 199]. The admissions of a wife cannot, however, be received in evidence for her husband in any suit between him and a stranger, unless, perhaps in the single event of their constituting part of the *res gestae* [*Walton v. Green*, 1825, I C & P 621; Tay s 767; Hals 3rd Ed Vol 15, para 546]. Admission by wife has been rejected to prove slander of husband [*Tait v. Beggs*, 1905, 2 IR 525].

—Suggestion given by counsel to prosecution witness.—In *Ranonappa v. Emperor*, A 1936 Mad 426 it has been held by a Bench that admissions dispensing

with proof as distinguished from admissions which are evidential are not permitted in criminal trial. In *S.C. Mitra v. State*, A 1950 Cal 435, a Bench of Calcutta High Court has observed as under:

> "In law makes no provision for an admission by counsel in a criminal case. No admission by counsel can relieve the prosecution of the duty of satisfying the court by proper evidence".

In *Oche v. State*, A 1955 NUC (Raj) 2549, a suggestion had been given by a prosecution witness and relying on such suggestion the trial court found the accused guilty, but in appeal it was held by the Rajasthan High Court that the trial court was not justified in using such suggestion as an admission. In *Koli Trikam v. State of Gujarat*, A 1969 Guj 69 a similar question came up for consideration and a Division Bench of the Gujarat High Court held that suggestions but in cross-examination are no evidence at all against the accused and on the basis of such suggestions no inference can be drawn against the accused that he admitted the facts referred to in the suggestion. Similar view has been expressed by the Orissa High Court. [*Jagannath Rana v. State*, 1994(1) Crimes 116 (Ori)].

—Admissions by Member of a Community.—That a certain plot is not a grave yard does not affect the interest of the other members of the community as the admission is to the prejudice of his own individual right and not in a representative capacity [*Changa v. Bhagwan Dei*, A 1949 A 493].

—Admissions in Will of a Living Person.—Scope of admission in the will of a living person—Whether will of a living person can ever be relevant to support a legal claim [*James v. Ghulam*, A 1949 PC 151: 1949 Bom 284].

Statement of Admissions in Judgments.—A statement in a judgment or order as to what had taken place in court is conclusive and an aggrieved party should apply to the same judge for review [*Timmalapathi v. Sokalchand*, A 1951 M 796]. A statement in a judgment as to an admission made before the court of first instance should not be doubted lightly by the appellate court, specially in the absence of an affidavit by the vakil who appeared in the first court. Where a litigant feels aggrieved by such statement in a judgment, the most convenient and satisfactory course is to apply to the judge without delay and ask for rectification of judgment [*Sarat v. Bibhabati*, 34 CLJ 302: A 1921 C 584]. Concession of facts recorded in a judgment must be accepted to be true unless properly challenged. Even mere incorporation of a ground in the memo of appeal is not sufficient challenge [*Nrusinghanath v. Banamali*, A 1970 Or 218]. A judgment in a previous suit not *inter partes* is not admissible in evidence in a subsequent suit to prove an admission said to have been made by one of the parties in the course of that suit. The judgment is no better than any other hearsay evidence of the admission. The proper mode of proving such an admission is by producing a certified copy of the party's pleading or if the admission was made orally, by producing a copy of his deposition or by putting in the witness-box some one who actually heard what was said by him [*Debendra v. Bireshwar*, 20 CWN 648]. See s 35 *post*.

S. 19. Admissions by persons whose position must be proved as against party to suit.—Statements made by persons whose position or liability it is necessary to prove as against any party to the suit, are admissions, if such statements would be relevant as against such persons in relation to such position or liability in a suit brought by or against them,

and if they are made whilst the person making them occupies such position or is subject to such liability.

Illustration

A undertakes to collect rents for *B*.

B sues *A* for not collecting rent due from *C* to *B*.

A denies that rent was due from *C* to *B*.

A statement by *C* that he owed *B* rent is an admission, and is a relevant fact as against *A*, if *A* denies that *C* did owe rent to *B*.

COMMENTARY

Principle and Scope. [Admissions by Strangers to the Suit].—This section and s 20 are exceptions to the general rule laid down in s 18 and they indicate when and under what circumstances admissions other than those of parties to the suit, *ie*, strangers, are receivable. As the illustrations show, the liability of *A* to *B* being dependent on the liability of *C* a stranger, the admission of his liability by *C* which is against his own interest, is relevant in the matter of proof of *A*'s liability to *B*.

This section gives another instance of statement made by third persons and yet ranking as admission. When the liability of *A* who is a party to a suit depends upon the liability of *B*, then a statement by *B* regarding his liability amounts to an admission as well on the part of *A*, and the illustration shows that it is relevant. Thus an admission of the receipt of goods made by a person for whom in regard to such goods a guarantee had been given by the defendant, would avail as an admission made by the defendant. What weight should be given to such statement would of course depend on the circumstances. In England the statement would not be admissible in evidence against the surety except under the conditions stated in s 32(*3*). [Steph Dig Art 17, citing *Smith v. Whittingham*, 6 C & P 78; *Carmarthen & Ry Co v. Manchester & M Ry Co*, LR 8 CP 685; see also *Ex parte Young*, 17 Ch D 668; Cunn 58]. Another instance is the following:—*A* and *B* are jointly liable for a sum of money to *C*, who brings an action against *A* alone. *A* objects that he cannot singly or severally be liable, and that *B* should be joined as a co-defendant, being jointly liable. An admission by *B* to his joint liability is relevant between *A* and *C* [Field, 6th Ed, p 91].

The admission of a third person against his own interest, when it affects his position or liability and when that position or liability has to be proved against a party to the suit, is relevant against the party—*per* SADASIVA AIYAR, J. The object of this section is not to lay down that certain statements are relevant or admissible, but merely to add to the category of persons by whom a statement may be made before it can be considered to be an admission within the terms of the I E Act. The statements referred to in s 19 become admissible only provided that they satisfy the requirements of s 17 as regards their nature and s 21 or any of the following sections as regards their liability—*per* TAYABJI, J. Thus, the admission in the written state-ment of one co-mortgagee of the receipt of the whole mortgage debt is admissible in evidence against the other co-mortgagee [*Appavu v. Nanjappa*, 20 IC 792: 25 MLJ 329]. When a statement is made in a document by a third person alleged to be the agent of the accused, before the document and its recitals can be used against the accused, such agency must be satisfactorily proved [*Kedar v. S*, A 1954 SC 660].

In some cases, the admissions of *third persons, strangers to the suit*, are receivable. These exceptions to the general rule arise when the issue is substantially upon the mutual rights of such persons at a particular time; in which cases the practice is to let in such evidence in general as would be legally admissible in an action between the parties themselves. Thus, the admissions of a bankrupt, made before the act of bankruptcy, are receivable in proof of the petitioning creditor's debt [see *Coole v. Braham*, 18 LJ Ex 105]; but if made after the act of bankruptcy though admissible against himself [*Jarrett v. Leonard*, 1814, 2 M&S 265] they cannot furnish evidence against the trustee, because of the intervening rights of creditors, and the danger of fraud [*Hoare v. Coryton*, 1812, 4 Taunt 560 and other cases; Tay s 759]. "As a general rule, declarations made by a person in possession of real estate as to his interest or title in the property, may be given in evidence against those who derive title under him, in the same manner as they would have been used against the party himself if he had not parted with his possession or interest; on the other hand, it is equally well-settled that no declarations of a former owner of the property, made after he had parted with his interest therein or which are over-reached by the purchase of the party claiming through or under him, can be received in evidence to affect the legal or equitable title to the premises" [*per* WALWORTH C, in *Padgett v. Lawrence*, 10 Paige, 170, 180 (Am) cited Wig s 1082]. When in a registered sale deed executed 33 years before the dispute, a person mentions the name of a woman as his wife, at which time he had no motive to make a false statement, this admission in the sale deed proves conclusively that that woman is the legally wedded wife of the person who made that admission [*Sivalingam v. Sakthivel*, A 1989 Mad 252, 255].

The admissions of person whose position in relation to property in suit it is necessary for one party to prove against another, are in the nature of original evidence and not hearsay, though such person is alive and has not been cited as a witness [*Ali Moidin v. Elayachanidathikombi*, 5 M 239].

Cases.—In a suit by a principal against the agent and his surety, the settlement of accounts between the principal and the agent after the agency had ceased, is admissible against the surety [*Parameswara v. Viyathen*, 25 MLJ 51]. A statement by a servant is admissible against his master under s 19, both for the purpose of deciding whether he is a servant and also as regards his liability as such servant. "Occupying the position of a servant" does not involve as an essential ingredient, acting in the course of his employment [*Moses v. Shk Bakridhone*, 36 CWN 736].

In a title suit, the proceedings in the previous title suit between the present defendant and a third person relating to the land in dispute, are relevant under s 19 [*Jairam v. Lokenath*, A 1930 P 405]. To allege in a plaint that plaintiff-landlord though entitled to whole, claims only half because his predecessor had been getting half for a long time, is an admission in the defendant's favour and does not amount to setting up a custom [*Janki Kaur v. Usman*, 62 IC 417 (8 PLJ 127 **folld**)]. The mere fact that certain admissions made in previous suits constituted a good defence to the suits in which they were made, cannot lead to the conclusion that they were untrue [*Sheo Dayal v. Lalta*, 58 IC 608: 23 OC 184].

In a suit by two brothers to establish their right to a share in a certain property alleged to be the joint property of five brothers, the deposition of another brother in a previous suit against one of the brothers that the property was not joint is not admissible [*Nagendra v. Lawrence Jute Mill Co. Ld*, 25 CWN 89 cited under s 18].

S. 20. Admissions by persons expressly referred to by party to suit.—Statements made by persons to whom a party to the suit has expressly referred for information in reference to a matter in dispute are admissions.

Illustration

The question is whether a horse sold by *A* to *B* is sound. *A* says to *B*—"Go and ask *C*; *C* knows all about it." *C*'s statement is an admission.

SYNOPSIS

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COMMENTARY

Principle and Scope.—This section is the second exception to the general rule laid down in s 18. It deals with one class of vicarious admissions, *ie*, admissions of persons other than the party. When a party refers to a third person for some information or an opinion on a matter in dispute, the statements made by the third person are receivable as admissions against the person referring. The reason is that when a party *refers* to another person for a statement of his views, the party approves of his utterance in anticipation and adopts that as his own. [*Hirachand Kothari v. State of Rajasthan*, A 1985 SC 998, 1001]. The principle is the same as that of reference to arbitration. A position analogous to that of agency is created by the reference. The reference may be by express words or by conduct, but in any case there must be a clear intention to refer, and such admissions are generally conclusive. As ELLENBOROUGH, LCJ, said in *Williams v. Innes*, 1 Camp 364 (from which the illustration is taken):—

> "If a man refers another upon any particular business to a third person, he is bound by what this third person says or does concerning it, as much as if that had been said or done by himself".

It has been held in America that the statement of referee must be one of fact and appear to have been made by one who possesses adequate information on the subject [Chamb s 1354, n 9 and s 1355 citing *Lambert v. People*, 76 NY 220; *Hood v. Reeve*, 14 ECL 700 and other cases]; but in England it has been held immaterial whether the disputed matter be one of law or fact [Tay ss 760-63; Phip 8th Ed, p 237]. An admission similar to admission by reference is an admission by adoption of another's statement *already made*. "By *adoption*, the party may assent to a statement already uttered by another person, which thus becomes effectively the party's own admission" [Wig s 1069]. A reference to a third person, however, does not make the person referred to an agent for the purpose of making general admission. The declarations are not evidence unless strictly within the subject-matter in relation to which the reference is made [*Duval v. Covenhoven*, 4 Wend NY 561; *Allen v. Killinger*, 8 Wall US 480]. Thus, where a defendant stated that a book-keeper would furnish whatever information was contained in the books, the declarations of the book-keeper to the effect that in his opinion certain entries in the book were false to

the knowledge of the defendant were held inadmissible [*Lambert v. People*, *sup*; Jones, s 263].

Here again the person against whom the admission serves is not the author of it but a third person. The case intended is not that of agency, since for statements made by authorised agents provision has already been made in s 18. The case is that in which the person to be affected names another person who may or may not be his agent, as the person who will give the required information. Obviously a person who adopts this course must mean that the answers obtained is to be taken as his answer. He is as much bound by the answer as he would be if he had himself made the statements. The case is similar to that of arbitration [Steph Dig note XIII]. There must be an *express reference for information* in order to make the statement an admission. Thus if *A* says, "I will pay you, if *B* says, I owe it to you," *B*'s statement about the matter will be an admission as against *A* [Cunn pp 58-59]. In the case of an admission under s 20 it may also be shown like all other admissions that it was made by mistake or it is untrue or fraudulent [s 31; *Bhattacharjee v. Sentinel Ins Co*, A 1955 C 594].

S 20 appears to contemplate the existence of three parties, *first*, the party who refers, *secondly*, the party who is referred, and *thirdly*, the party to whom reference is made, the principle being that when one party refers another second party to a third party for information, the first party will be presumed to undertake as his own the information furnished by the third party [*D'Cruz v. Secy of S*, 40 CWN 865; *Bhattacharjee v. Sentinel Ins Co*, *sup*]. The information referred to need not be specially within the knowledge of the person referred to [*Seetaramacharyulu v. Ranganaykamma*, A 1958 AP 304]. A reference to an outside party to decide matters in dispute in a suit and question of costs, is not a reference to a party for information in reference to a matter in dispute within s 20 [*Chabba v. Kallu*, 50 CWN 465: A 1946 PC 72].

[*Ref Tay ss 760-63; Wig ss 1069-71; Phip 8th Ed p 237; Steph Art 19; Ros NP 69; Jones, s 263; Chamb ss 1354-55; Chamb, H B s 545; Hals, 3rd Ed, Vol 15, para 548*].

Admissions by Persons Expressly Referred to [Conclusiveness of Such Statements].—The admissions of a third person are also receivable against, and frequently binding upon, the party who has *expressly referred another to him for information* in regard to an uncertain or disputed matter. Thus, executors who wrote to a plaintiff that if she wished for further information on a certain subject she should apply to a certain merchant in the city, were held bound by the replies of the merchant [*Williams v. Innes*, 1808, 1 Camp 364; Tay s 760]. Whether the answer of a person thus referred to is *conclusive* against the party seems, however, not to have been finally settled. As a general rule it ought to be held that a party who refers to another is bound by that other's statement; for to make a proposition to be bound by what another may say, and after he has spoken to recede from it, is not only dishonest but might be turned to very improper purposes, such as to entrap a witness, or to find out how far the party's evidence would go in support of his case [*per* LORD KENYON, in *Stevens v. Thacker*, 1793, Peake R 187]. In such cases, however, the purposes of justice and policy are sufficiently answered by throwing the burden of proof on the party questioning the statement, and holding him bound unless he can impeach the test referred to by clear proof of fraud or mistake [*Whitehead v. Tattersall*, 1834, 1 A & E 491; Tay s 760A]. These principles apply whether the question referred be one of law or of fact; whether the persons to whom reference is made, have or have not any peculiar knowledge on the subject; or whether the statements of the referee be adduced in an action on contract or in an action for tort. Accordingly where two

parties agreed to abide by the opinion of counsel upon the construction of a statute, the party against whose interest the opinion operated was held bound thereby in a subsequent action [*Price v. Hollis*, 1 M & S 105. See also *Downs v. Cooper*, 1841, 11 LJQB 2; Tay s 761].

In a suit to recover money on an insurance policy, the statement made by the person making the medical reference in his report to the company, should not be treated as statements made by the company's agent [*Oriental Govt S L Ass Co v. Narasimha*, 25 M 183: 11 MLJ 379]. A sued a corporation on an agreement to take his house for £400. The corporation acting on their surveyor's report passed a resolution accepting *A*'s term. Thereafter the corporation repudiated the agreement on the ground of defect in title. *A* tendered the report as evidence that the corporation was aware of the imperfect state of the title—*held* that the report was not admissible [*Cooper v. Metropolitan Bd Works*, 1883, 25 Ch D 472, CA]. The conditions in s 20 cannot be said to be fulfilled when a master calls for a report from a servant regarding the conduct of another servant who is dismissed for misconduct, where there is nothing to indicate that in doing so the master intended to regard the servant's report as conclusive on the matter. In a suit by the dismissed servant, such report is not admissible [*D'Cruz v. Secy of S*, 40 CWN 865].

A fire insurance company simply informed the plaintiff that they had appointed S M & Co as surveyors to assess the loss and requested him to assist them. The surveyor also did not supply a copy of the report to the plaintiff—*Held* that s 20 did not apply [*Bhattacharjee v. Sentinel Ins Co*, A 1955 C 594].

Criminal Cases.—The rule as to referees applies also to criminal cases. Where the accused told a constable that his wife would make out a list of certain property, a list afterwards made out by her was held evidence against her husband [*R v. Mallary*, 1884, 13 QBD 33: 15 Cox 458, Phip 9th Ed p 255].

Agreement to be Bound by Statement of Another.—After the parties had agreed to abide by the statement of a referee they compromised and the referee sent his terms to the court as his statement. It is binding on the parties [*Ramnarain v. Santosh*, A 1952 Pu 344]. Where both parties expressly empowered a referee to make enquiries in the dispute and make a statement to the court s 20 was not applicable but the statement was in the nature of an arbitration award [*Ramijlal v. Ram*, A 1978 A 351].

Plaintiff and defendant signed a statement saying that they shall accept any statement that *G* might make before the court. On *G*'s statement the suit was dismissed and the statement being an admission in a suit by a nominee of a party under s 20 is binding and conclusive [*Himachal v. Jatwar*, 46 A 710: A 1924 A 570: 80 IC 16; *Gian Chand v. Bansi*, A 1961 Pu 31; see *Chinna Venkataswami v. Venkataswami*, 42 M 625; *Keshoram v. Piara*, 71 IC 761: 21 ALJ 209: A 1923 A 443; *Abdul Rahman v. Kalloo*, A 1935 O 118]. Such an admission by the referee operates as an estoppel [*Umra v. Intizami*, A 1939 A 176]. But before the statement had been made by the referee, a party can resile from the agreement [*Tumman v. Sheo Durshan*, 52 A 235; *Gian Chand v. Bansi*, *sup*]. Such an admission made in execution proceedings is binding in a subsequent suit by the unsuccessful party [*Gordhan v. Hussain*, 103 IC 34: A 1927 A 659]. Agreement between parties to abide by decision of Munsif after he had made local inspection is binding [*Sitaram v. Piari Lal*, 47 A 921]. An agreement by a defendant to be bound by statement of plaintiff upon oath, is binding although it does not fall under the Oaths Act [*Md Ashgar v. Imtiaz*, 1898 AWN 200]. Where an agreement was arrived at between the

counsel for parties that if the defendant were to state on oath in a particular Gurdwara that the suit land was not of plaintiff and the defendant had not executed any agreement in favour of plaintiff, the suit be dismissed and in pursuance of the order of the court on the basis of the agreement, the defendant did take oath and the suit was dismissed, it was held that the compromise would be covered by s 20 and the plaintiff would be bound by the statement of the defendant [*Thakur v. Inder*, A 1976 P&H 287; *K.M. Singh v. Secretary, Association of Indian Universities*, A 1992 SC 1356, 1360].

Express Words Not Necessary to Render the Declaration Admissible.—To render the declaration of a person referred to as admission, it is not necessary that the reference should have been made by express words; but it will suffice if the party by his conduct has tacitly evinced an intention to rely on the statements as correct. For instance, if a party questioned by means of an interpreter, gives answer through the same medium, the language of the interpreter is considered as that of the party; and may consequently, be proved by any person who heard it, without calling the interpreter himself [*Fabrigas v. Mostyn*, 1776, 20 How St Tr 122 and other cases cited Tay s 763].

S. 21. Proof of admissions against persons making them, and by or on their behalf.—Admissions are relevant and may be proved as against the person who makes them, or his representative in interest; but they cannot be proved by or on behalf of the person who makes them or by his representative in interest, except in the following cases:—

[1](1) An admission may be proved by or on behalf of the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under section 32.

[1](2) An admission may be proved by or on behalf of the person making it, when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable.

[1](3) An admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission.

Illustrations

(*a*) The question between *A* and *B* is, whether a certain deed is or is not forged. *A* affirms that it is genuine, *B* that it is forged.

A may prove a statement by *B* that the deed is genuine, and *B* may prove a statement by *A* that the deed is forged; but *A* cannot prove a statement by himself that the deed is genuine, nor can *B* prove a statement by himself that the deed is forged.

(*b*) *A*, the captain of a ship, is tried for casting her away.

Evidence is given to show that the ship was taken out of her proper course.

A produces a book kept by him in the ordinary course of his business showing observations alleged to have been taken by him from day to day and indicating that the ship was not taken out of

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1. In Ceylon, "(a)" "(b)" "(c)" respectively.

her proper course. *A* may prove these statements, because they would be admissible between third parties, if he were dead, under section 32, [2][clause] (2).

(*c*) *A* is accused of a crime committed by him at [3][Calcutta].

He produces a letter written by himself and dated at [4][Lahore] on that day, and bearing the [4][Lahore] post-mark of that day.

The statement in the date of the letter is admissible, because, if *A* were dead, it would be admissible under section 32, [2][clause] [(2).

(*d*) *A* is accused of receiving stolen goods knowing them to be stolen.

He offers to prove that he refused to sell them below their value.

A may prove these statements, though they are admissions, because they are explanatory of conduct influenced by facts in issue.

(*e*) *A* is accused of fraudulently having in his possession counterfeit coin which he knew to be counterfeit.

He offers to prove that he asked a skilful person to examine the coin as he doubted whether it is counterfeit or not, and that that person did examine it and told him it was genuine.

A may prove these facts for the reasons stated in the last preceding *illustration*.

SYNOPSIS

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COMMENTARY

Principle and Scope. [Admissions Not Generally Evidence For the Maker].— This section, apart from the exceptions, contains two propositions: *First*, an admission is relevant and may be proved *against* the author of it and his representative in interest. The reason why an admission is considered as good evidence against the maker has already been stated [*v. ante*, s 17]. *Secondly*, the section declares that generally an admission cannot be proved on *behalf* of the person who made it. To allow parties to support their claims by their own admissions would be extremely unsafe and involve reception of hearsay or self-serving testimony. The reason for

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2. In Ceylon "sub-section"
3. In Pakistan "Chittagong"; In Ceylon "Colombo."
4. In Ceylon "Jaffna".

exclusion is obvious and indeed a statement which is advantageous to the maker and which therefore he might desire to prove, is not usually called an admission. If a man might bring evidence to prove statements made by himself and favourable to his own case, nothing would be easier than for a party who had a weak case to strengthen it by making such statement beforehand, or by suborning witnesses to speak to having heard him make such statements. A party's admissions previous to the suit or in letters and documents are relevant under s 21 and can always be used as evidence *against* him even if he has not appeared as a witness in the case. He cannot make any grievance of want of opportunity to cross-examine, because it is his own statements against his interest (see *ante*, *"Grounds for admissi-bility of admission"*, s 17]. Admissions are substantive evidence even though the parties are not confronted with the statement. Its weight, however, is a matter of consideration of the court [*Bharat Singh v. Bhagirathi*, A 1966 SC 405; *Arjun v. Monda*, A 1971 P 215; *Punjab University v. Prem*, A 1971 P&H 177; *Veerbasa-varadhya v. Devotees &c*, A 1973 My 280]. When the party making the previous admission goes into the witness box and makes any statement contradictory to or inconsistent with his previous admission, it attracts the operation of s 145, Evidence Act and it is fair that the previous admission should not be used as evidence against him unless his attention is drawn to it during his cross-examination and the procedure in that section is complied with so that he may have an opportunity to explain the discrepancy or inconsistency; [See further s 145 and *Malek Desraj v. Piara Lal*, A 1946 L 65 FB *post*].

The section does not say that admissions may not be used against persons other than the maker, and is evidently not intended to be exhaustive. Statements which are admissions within ss 19 and 20 are relevant and may clearly be proved against persons other than the makers of them, and similarly it appears that admissions by persons who have a proprietary interest in a certain property may be used against other persons interested in the same property although the latter are not representatives in interest of the persons by whom the admissions were made [Cunn p 61]. The admission of entries made in books of account under s 34 on behalf of a person making them is an exception to the general rule in s 21 [*Mukundram v. Dayaram*, 10 NLR 44: 23 IC 893] and such and other admissions which may be proved on behalf of the maker come under cl (*3*) of the section. Entries in solicitor's books of account regarding object of purchase of property for client are neither inadmissible nor irrelevant nor hearsay under s 21 [*Hariram v. Madan*, A 1929 PC 77: 33 CWN 493]. Statement before police officer is admissible under ss 18-21 as admission in a civil case [*Biswanath v. Dhapu*, A 1960 C 494].

Previous self-serving statements by a party in other proceedings cannot be used as substantive evidence in subsequent proceedings against him [*Krishnawati v. Hansraj*, A 1974 SC 280]. A mere self-serving statement in certain documents by a maker is inadmissible in evidence unless it came within the exceptions in s 21 [*Jagabandhu v. Bhagu*, A 1974 Or 120]. Admission of a party is liable to be considered as substantive evidence, even if party making the admission is not confronted with the statement. [*Murlidhar Bapuji Valve v. Yallappa Lalu Chaugule*, A 1994 Bom 358, 365]. Though an admission is a relevant piece of evidence but it is never conclusive. (*Basant Singh v. Janki Singh*, A 1967 SC 341). It is all the more so in the matter of an assessment to tax which has to conform to Article 265 of the Constitution. So far as an assessment to tax is concerned, it is open to the assessee who made an admission to show that it is incorrect. If he puts forward such a plea, he should be given a proper opportunity to show that it is so. [*Pullangode Rubber Produce Co. Ltd. v. State of Kerala*, (1973) 91 ITR 18 (SC)]. When the assessee contends that he

has committed a mistake in making the admission, it cannot be relied on without first considering the said contention. [*Satinder Kumar v. Commr. of Income Tax*, (1977) 106 ITR 64, 72 (HP)]. Thus while an admission made by an assessee is relevant, it is not conclusive. It is open to the assessee to explain or clarify under what circumstances it was made, or to prove that what was stated did not reflect the true state of affairs. But in the absence of any demur or explanation therefor, an admission is almost conclusive regarding the facts contained therein. [*Dy. Commr. of Sales Tax v. Imperial Trading Co.*, (1990) 76 STC 183 (Ker). Having regard to this state of law it was open. [*Federal Bank Ltd. v. State*, A 1995 Kant 62].

Exceptions.—There are exceptions to the general rule that admissions cannot be proved in favour of persons making them. Admissions may be proved in favour of the maker—(*1*) when it would be relevant as between third persons under s 32 [see *post* cl (*1*)]; (*2*) when it consists of a statement indicating any state of mind or body relevant to the issue made contemporaneously and is accompanied by conduct rendering its falsehood improbable [see *post*, cl (*2*)]; (*3*) when the statements of a party become relevant on other grounds, as when they form part of the act or contract to be proven or when they constitute part of the *res gestae* (*ante* s 6). They are admissible whether they are favourable or unfavourable to his interest [Jones, s 235; see *post* cl (3)].

Contemporary declarations of a mental or physical condition are admitted on the necessity principle because they are almost the only kind of evidence by which the condition of body or mind can be found out. "These expressions [of bodily or mental feelings] are the natural reflexes of what it might be impossible to show by other testimony.....such evidence must not be extended beyond the necessity upon which the rule is founded. It must relate to the present, not to the past. Anything in the nature of narration must be excluded" [SWAYNE, J., in *Travellers' Ins. Co v. Mosley*, 1869, 8 Wall 397; Wig s 1714].

Distinction between s 21 and s 145.—There is a cardinal distinction between the maker of admission by a prior statement and witness who is sought to be discredited by use of his prior statement. In the former case an admission is substantive evidence if it fulfils the requirement of s 21 and there is no necessary requirement of putting it to the maker; in the latter case a prior statement is used to discredit the witness by putting to him as required by s 145 [*Biswanath v. Dwarka*, A 1974 SC 117 (*Bharat v. Bhagirathi*, A 1966 SC 405 **folld**)].

Admissions May Be Proved Against Makers.—Being declarations against interest admissions are good evidence against the maker (*ante s* 17). Although admissions may be proved against the party making them, it is always open to the maker to show that the statements were mistaken or untrue except in one case in which they operate as estoppel [see ss 31 and 115].

Confessions being a species of admission are relevant evidence against the maker unless they are rendered inadmissible by circumstances declaring them invalid, *eg*, ss 24, 25 26 [*In re Arunachala*, 55 M 717; *Sidheswar v. R*, A 1934 A 351; *Bakhshan v. R*, 16 L 912]. Statement of an accused person as witness in a previous case is admissible against him under s 21 to prove admissions of relevant facts [*R v. Banarasi*, 46 A 254: 77 IC 829]. Evidence given by an accused in London during extradition proceedings containing an admission by him is admissible against him at his trial here under s 21 [*R v. Wheeler*, 112 IC 50: A 1929 S 15].

Admissions in Criminal Cases Or to the Police. [Oral Confession or Confession Recorded But Not Under S 164, Cr P Code].—When the accused in a

dacoity case points to a window by which the dacoits effected entrance and committed dacoity, the admission can be proved against him [*Sucha v. R*, A 1932 L 488]. A statement by the accused amounting to an admission that he was present at the crime and that he was accompanying the persons who committed the crime and which is otherwise exculpatory, although inadmissible against the other accused, is admissible for what it is worth against the maker under s 18, *vide* illustrations (*c*) and (*d*) to s. 21 [*Nga Ba v. R*, A 1936 R 131; *Allahwarayo v. R*, 1939 Kar 800: A 1940 S 53]. A person falsely reported to the police that two persons caused the death of his child. He made a statement before a magistrate which was recorded under s 164, Cr P Code. He was convicted under s 211, I P Code. The statement was admissible under s 21 [*Nankhoo v. R*, A 1939 P 358]. An admission by the accused in a criminal case that he was driving the truck at the time of the accident, is not substantive piece of evidence but lends support to the testimony of witnesses that he was owner of the truck [*Maina v. Niranjan*, A 1976 Raj 71]. A concession on a question of fact binds the party but not a concession on a question of law. Only voluntary and direct acknowledgement of guilt is a confession but when a confession falls short of actual admission of guilt it may nevertheless be used as evidence against the person who made it or his authorised agent as an admission under S. 21 [*C.B.I v. V.C. Shukla*, A 1998 SC 1406 : 1998 Cri LJ 1905; *Dilip Singh Mohan Singh v. S.J. Mansha*, A 1995 Guj 1, 3]. The Executive Magistrate is competent to record the statement of an accused person during inquest and if proved that the same was voluntary it could be used as a confession or admission under section 21. [*M. Yellappa v. State of Karnataka*, 1993 CrLJ 388, 391 (Kar)]. "A statement contained in FIR furnished by one of the accused in the case cannot, in any manner, be used against another accused. Even as against the accused who made it, the statement cannot be used if it is inculpatory in nature nor can it be used for the purpose of corroboration or contradiction unless it maker offers himself as a witness in the trial. The very limited use of it is as an admission under section 21 against its maker alone unless the admission does not amount to confession". [*B.A. Ramaiah v. State of A.P.*, A 1997 SC 496, 499]. As to extra-judicial confessions, see *post* s 24].

Ss 21-27 do not suggest that statements which would be admissible in civil cases as admissions are not admissible in criminal cases. Statements made to magistrate holding an enquiry by persons who are not even under arrest but who subsequently become accused are admissible against them as admissions under s 21 [*In re Titus & Ors*, A 1941 M 720]. The statement of an accused made before a Magistrate previous to the starting of the investigation of the case is admissible in evidence and is relevant under sec. 21 even though it is not admissible as a confession [*State of Orissa v. Ghanashyam Mohanty*, 1987 Cri LJ 1008, 1011 : (1987) 63 Cut LT 409 (Ori) (DB)]. An oral confession by an accused person not being open to exception under ss 24, 25, 26 is an admission by an accused person and is a relevant fact and may be proved at his trial, under s 21 and therefore such a confession made to a magistrate is relevant and may be proved by the evidence of the magistrate [*Feroz v. R*, 45 IC 843: 11 PR 1918 Cr; *Buta v. R*, 52 PR 1887 Cr; *Nazir v. R*, A 1925 L 557; *Baghel v. R*, A 1929 L 794; *Tangedupalle v. R*, 45 M 230; *Jograj v. R*, A 1930 L 534; *In re Natesan*, A 1960 M 443]. The observations in *Legal Rem v. Lalit*, 46 C 167 appear to be in favour of such admission. The Privy Council has later ruled that statement under s 164, Cr P Code which does not amount to a confession can be used against the maker as admission under ss 18-21 [*Ghulam v. R*, 54 CWN 464: 52 Bom LR 508]. Even under s 21 an admission is relevant and may be proved against the maker when it consists of the statement of the existence of any state of mind relevant or in issue made at or about the time when state of mind is in existence and is accompanied by conduct rendering its falsehood improbable [*Arun v. S*, A 1962 C 504]. In *Pakala*

Narayana v. R, 66 IA 66: A 1939 PC 47, the Privy Council observed that "an admission of a gravely incriminating fact is not of itself a confession". Thereore there is no bar to the admissibility of an admission in a criminal case even though it may be to the police. So, it has been held that an admission in a first information report is admissible [*Ram Singh v. S*, 1952, 2 Raj 93; *S v. Shio*, A 1962 Raj 3]. The contours of S.21 are not bounded by limitations of the person being in the custody of a police officer. An admission of a fact however incriminating, but not by itself establishing the guilt of the maker of such admission would not amount to confession [*State of Kerala v. Ammini*, A 1988 Ker 1, 10 (FB) : 1988 Cri LJ 197]. Informations to the police not amounting to confessions are, however, clearly admissions and can therefore be proved as such under s 21, whether they lead to the discovery of any fact or not. Any statement not amounting to a confession does not come within the prohibitions in ss 25 and 26 and can be proved as an admission without recourse to s 27 [*Deoman v. S*, A 1960 A 1, 14 FB (**superseded** on another point by *Deoman v. S*, A 1960 SC 1125 : 1961, 1 SCR 14)]. After committing the murder the accused went to the police station and gave a report. In the first information report the accused narrated as to in what manner he committed the murder and how the murder was committed by him. No part of it can be separated and treated as admission. The entire statement appears to be a confession and no part of it can be used as admission under sec. 21 [*Banarsi Dass v. State of Punjab*, 1981 Cri LJ 1235, 1238 (P&H)]. If a statement falls short of a plenary acknowledgement of guilt, it would not be a confession even though the statement is of some incriminating fact which taken along with other evidence tends to prove the guilt of the accused, such a statement is only an admission but not a confession [*Chandran v. State of Kerala*, 1986 Cri LJ 1865, 1876, (Ker) (DB)]. See further *post* s 26; *"Oral Confession before Magistrate, &c."*

Written Admission.—Petition filed by two accused before a magistrate admitting commission of crime is admissible under s 21 although not recorded in accordance with ss 164, 364 (now 281) Cr P Code *P. v. Ram Naresh*, 1939 All 377: A 1939 A 242; *Cf Ghulam v. R*, *sup*]. A partnership form and declaration signed by the plaintiff firm filed in the Stock Exchange is admissible against the plaintiff [*Sohanlal v. Bilas*, A 1954 C 179]. Written admissions by accused persons before customs authorities that goods were smuggled by them are admissible [*Valladhdas v. Asst Collr*, A 1965 SC 481].

Statement before Police.—A statement made to the police by a person when he was not an accused and which does not connect him with the offence is admissible as an admission when the person subsequently becomes an accused [*Abdul Ghani v. R*, A 1931 L 763]. Report of accident to the police by driver under s 89, Motor Vehicles Act stating that the accused was driving the vehicle is admissible [*Jawan Singh v. S*, A 1963 G 111]. Statement made by B to the police in a theft case against *A* may be used against *B* in a subsequent proceeding [*Pattammal v. Muniswami*, A 1966 M 392 (*R v. Tribobhan*, 9 B 131 **relied on**)].

Whether Previous Admission Should Be Put Before Use.—An admission cannot be used against a party unless it is put to him and an opportunity afforded to him to explain it, if it is capable of explanation [*Safiquddin v. Mahbub*, A 1930 L 714; *Ghulam v. Nagina*, 123 IC 278: A1930 L 991; *Molar v. Ram Pd*, A 1927 L 377 : 102 IC 198; *Muharram v. Barkat*, A 1930 L 695; *Charandasi v. Kanai*, A 1955 C 206: 58 CWN 980; *Ram Pratap v. S*, A 1963 P 153—CONTRA: *Ramkeshwar v. Baldeo*, A 1936 P 588; *Channoo v. Jang*, A 1957 P 293]. The principle is the same as in the case of contradiction by previous inconsistent statement under s 145 *post*. See also *Upendra v. Bhupendra*, 21 CWN 280; *Bal*

Gangadhar v. Srinivas, 42 IA 135: 39 B 441. The defendant is entitled to explain informal admissions at the trial [*Ruby Investments (Pte) Ltd. v. Candipark Pte Ltd.*, (1989) 3 Malayan LJ 396 (Singapore HC)]. A Full Bench in Lahore *held* that—(*1*) A party's previous admission is relevant under s 21 and can be used against him if he has not appeared in the witness box at all. (*2*) A party's admission can be used against him even in cases where he appears as a witness but makes no statement inconsistent or contradictory to that admission and a denial of that admission is not involved. Such a case is outside the ambit of s 145. (*3*) When a party in the witness box makes a statement inconsistent with his previous admission, it cannot be used against him unless his attention is drawn to it in accordance with the procedure laid down in s 145 [*Malek Desraj v. Piara Lal*, A 1946 L 65 FB: 47 PLR 391; **followed** in *Parasram v. Champalal*, A 1957 MB 118; *Ram Ch v. Rajendra*, A 1957 Or 104; *Ramkishan v. Kausal*, A 1958 P 294; *Janki v. Koshalyanandan*, A 1961 P 293; *Harihar v. Nabakishore*, A 1963 Or 45]. The rule applies to admissions in a document as well as oral admissions [*Baldeo v. Nemi*, A 1950 Pu 291]. **Dissenting** from *Malek Desraj v. Piara Lal*, *sup*, it has been held that a previous admission is admissible without being put to the witness [*Ajodhya v. Bhawani*, A 1957 A 1 FB : *Ulfat v. Zubaida*, A 1955 A 361: *Channoo v. Jang*, A 1957 P 293; *Venkatlal v. Kanhaiyalal*, A 1963 MP 155; *Veerbasavaradhya v. Devotees &c*, A 1973 My 280]. The Supreme Court has held "the admissions duly proved are admissible evidence irrespective of whether the party making them appeared in the witness box or not and whether that party when appearing as witness was confronted with those statements in case it made a statement contrary to those admissions." [*Bharat v. Bhagirathi*, A 1966 SC 405 **followed** in *Arjun v. Monda*, A 1971 P 215: *Punjab University v. Prem*, A 1971 P&H 177].

It would seem that ordinarily an admission is evidence against the maker without anything more. The question of putting it arises only when the maker comes to the witness-box and when it is intended to be utilised for the purpose of s 145. In cases where the maker of admission is dead or does not appear as a witness, the question of confrontation does not arise.

Admissions in Bigamy and Divorce Cases.—Admission of marriage by accused in not evidence of it for proving marriage in an adultery or bigamy case. The essential ceremonies constituting second marriage must be proved [*Kanwal v. HP Administration*, A 1966 SC 614 (*R v. Pitambar*, 5 C 566 FB; *R v. Kallu*, 5 A 233 **followed**); *Boloram v. Surjya*, A 1969 As 90]. In a petition for divorce against the wife on the allegation of adultery, the husband filed a discretion statement stating his own adultery. In a subsequent petition for divorce by the wife that discretion statement can be used as evidence against the husband [*Bavis v. B*, 152 LT 545: 1935 P 86; see *Over v O*, 49 B 368]. Admissions by wife in her letters can be used against her, but cannot be used in her favour [*Mahendra v. Sushila*, A 1965 SC 364].

Admissions in Documents Requiring Registration.—A compromise agreement which operates as a lease requires registration although embodied in a decree. Statements in such unregistered compromise are however admissible as admissions [*Sailesh v. Bireshwar*, A 1930 C 559].

Admissions in Plaint.—An admission in a plaint filed by the predecessor in interest of a party is admissible under s 21 and can be proved by the production of the plaint itself [*Debprasanna v. Harikishan*, 41 CWN 1089: A 1937 C 515]. Statement in the plaint of value for purpose of jurisdiction may be taken as an admission under ss 21-23, but it does not amount to an estoppel unless it fulfils the condition in s 115 [*Gobindbhai v. Dayabhai*, A 1937 B 326]. Statement in a plaint

filed by a third party must be proved in the usual way [*Lakshman v. Takim*, 28 CWN 1033]. See *ante*, s 17 *"Admission in pleadings"*.

Representative-in-Interest.—The expression has not been defined in the Act, but it evidently means *privies*. For the meaning of the word privies, see *ante* notes to s 18 *"Admissions by persons from whom the parties have derived interest"* and the cases cited there. The phrase "representative-in-interest" means the person who has derived his title from the author of the statement. See s 18 Cunn p 61]. As to "representative" in s 47 C P Code, see *ante*, s 18. Where in a mortgage suit, the mortgagor admits a prior mortgage, the purchaser of the property in execution of the mortgage-decree, is bound by the prior mortgage [*Harbhagat v. Narayanrao*, 78 IC 338: A 1924 N 208]. Admission of execution is good evidence against the representatives of the executant. But the mere fact that *B* purchased his plot from the executant of another sale deed in favour of *S* would not make *B* a representative of the executant inasmuch as *vis-a-vis S*'s plot *B* is not his representative [*Bulaki v. Shk Chotu*, A 1942 N 84]. In a joint Hindu co-parcenary, a son is not the representative-in-interest of his father [*Jagmohan v. Ranchhoddas*, A 1946 N 84].

Recitals of payment contained in the mortgage deed are relevant as admissions not only as against the parties making the admissions but also against their representatives-in-interest [*Gadian v. Veerappa*, 28 MLJ 92: 26 IC 899] and as against those who derive their interest from the executant [*Newal v. Bakhtawar*, 10 ALJ 390; see notes to s 18 *ante*]. Admission of the receipt of consideration contained in a mortgage deed is admissible in evidence against the representative-in-interest of the original mortgagors [*Behari v. Makhdum*, 35 A 194 (*Brajeshwari v. Budhanuddi*, 6 C 368; *Newal v. Bakhtwar*, 10 ALJ 390 **followed**; *Monahar v. Sumitra*, 17 A 428 **not followed**; *Bisheswar v. Harbans*, 6 CLJ 659; *Ghurphekni v. Purmeshwar*, 5 CLJ 653 and *Rahim v. Imam*, 17 CLJ 173 **doubted**); *Bakshi Ram v. Liladhar*, 35 A 353; *Birlal v. Vehari*, 73 IC 815 (A)].

Admission is not binding upon a person who does not claim through the maker of it. Thus, the admission of a widow that her husband and his brother had reunited after partition, is not binding upon the daughter who claims her title through her father [*Kaliammal v. Sundarammal*, A 1949 M 84]. A receipt for money is an admission against the person receiving it; but it is not an admission against a person not claiming through him [*Nazir Abbas v. Raje*, A 1949 N 60].

Admission Cannot be Proved on Behalf of the Maker.—It has been seen that a person's admission is only evidence against himself and those who claim under him (Best, s 519 *ante*). A self-serving statement in his own favour cannot be allowed to affect the interest of his adversary. The entry in the counterfoil of the receipt book maintained by the landlord is an admission in favour of the landlord himself and cannot be used against the tenant [*Idandas v. Anant Ramachandra Phadke*, (1982) 1 SCC 27 : 1982 SC 127, 128 : 1982 Mah LJ 328].

A recital in a will which suggests an inference as to a fact in issue cannot be proved by or on behalf of the person who made it or his representative-in-interest [*Nalam Pattabhirama v. Mandavilli*, 26 CWN 273: A 1922 PC 102; see *Bhagban v. Ram Praparna*, 22 IA 54: 22 C 843]. Neither the declaration of a donor nor the declaration of the donee made in their own favour can be admitted in evidence against the person disputing the gift [*Md Hydar v. Motilal*, A 1928 O 414 (*Ehtisham v. Jamna*, 48 IA 365; A 1922 PC 56 **followed**)]. An entry by a debtor on the back of a bond that nothing was due on that date on accounts is an admission in his own favour [*Gurditta v. Nabi Baksh*, 93 IC 996: A 1926 L 381].

Clauses (1), (2) and (3) specify those cases in which an exception is permitted to the general rule and admissions may be proved by or on behalf of the person making them. The exceptional cases are explained by illustrations (*b*), (*c*), (*d*) and (*e*), in all of which there is some ground of probability that the statement is true.

Exceptions to the Rule in S 21—Clause (1): [Statements Relevant Under S 32]. *Illustrations* (*b*) and (*c*) which relate to the first exception give instances to which may be added the illustrations appended to s 32. The effect of the clause read with s 32(*7*) is to render admissible, for the purpose of proving any right or custom, an instrument in which the right or custom is recognized or asserted, although the parties to the instrument are alive and the instrument is of recent date. It is obvious that to such evidence no substantial weight can be attached [*Hurro Noth v. Nittanund*, 10 BLR 263; Cunn p 62]. This clause will be fully considered in connection with s 32 with which it should be read. Such admission although in favour of the party making it, is received on the principle of "Necessity" and "Unavailability" as the person being dead, or unavailable, no better evidence can be had.

A reversioner is not a person who claims through a widow or may be deemed to be her representative-in-interest. Hence, a road-cess return filed by a Hindu widow is admissible in favour of the reversionary heir under s 32(*3*) [*Lachmi v. Jagmohan*, 18 CLJ 633]. Where the plaintiffs sought to establish their pedigree by proving *inter alia* that *A* and *B* were brothers—*held* that a statement to that effect by one of the plaintiffs in a deposition given long before the controversy in suit arose, was admissible in evidence under s 21 cl (*1*), s 32 cl (*5*) and s 157 [*Jadunath v. Mahendra*, 12 CWN 266]. Any statement as to rent payable for a holding in a sale-certificate obtained by a person as purchaser of it in execution of a decree against the former tenant, being in the nature of an admission by him or his predecessor in title, cannot be used as evidence on his behalf, as such statement does not come within the exception to s 21 [*Ramani v. Mahant*, 31 C 380]. A recital in a writ of attachment is not admissible in favour of the maker and as against persons who claim under an independent title [*Mohuruddin v. Sumera*, 15 IC 540 (*Ramani v. Mahanth*, 31 C 380 **followed**)].

In a suit against an insolvent and the Official Assignee for the sale of the mortgaged property, the plaintiff desired to prove the evidence of a witness, whom he had told before the adjudication, that the documents relating to the property had then been deposited with him as a security by the defendant—*Held* that the evidence was not admissible in his favour under this section [*Miller v. Madho Das*, 23 IA 106: 19 A 76].

Statements as to the date of birth of a person contained in his deposition and in affidavits filed by him are admissible under s 21(*1*) and read with s 32(*5*) if made by a person having special means of knowledge, whether personal or hearsay [*Ramanathan v. Murugappa*, 33 IC 968: 916 MWN 208].

The statement of area in the sale-certificate obtained by a landlord-purchaser in execution sale against tenant is not a statement in his own favour but one against his proprietary interest within s 32 and covered by s 21(*1*) and may be used in evidence in favour of the landlord [*Manik v. Jogindra*, 24 IC 283 (*Barhamdeo v. Ramnarain*, 19 CLJ 182 refd to)]. Entries of payments made by a creditor in the *Samadaskat* book belonging to the debtor fall within s 32 and although they are admissions in his own favour, they are not excluded by s 21 [*Jethibai v. Putlibai*, 14 Bom LR 1020]. Letters written to wife making reference to a settlement and telling and asking her to do certain acts to forward the settlement is admissible under s 21 as it is a statement admissible under s 32(2) [*Ramamurthi v. Subba Rao*, A 1937 M 19 : 167 IC 30].

Where the question was whether *B* was married to *G*, statement in documents executed by *B* describing herself as the wife of *G* is admissible in her favour under s 21(*1*) read with s 32 [*Bashiran v. Md*, A 1941 O 284].

—Road-cess Returns.—An exception to the rule laid down in the clause is to be found in s 95 of the Bengal Cess Act (9 of 1880 BC) which enacts that—"Every return filed by or on behalf of any person under the provisions of that Act, shall be admissible in evidence against such person, but *shall not be admissible* in his favour." S 95 is absolute in its terms that a road-cess return shall not be admissible in favour of the person who filed; it is immaterial whether it is sought to be put in evidence directly to prove an admission or indirectly when considered with other evidence [*Ram Kumar v. Harnarain*, 92 IC 104 : A 1926 C 727; see *Md Mahmood v. Satar*, 11 C 407]. But the prohibition in s 95 applies only in regard to the admissibility of the road-cess returns in *favour of the persons filing it*. They may be adduced in evidence if otherwise it is admissible under the Evidence Act. Thus they can be used in evidence by a stranger against another [*Shk Intiaz v. Dinanath*, 43 CLJ 425; see *Lachmi v. Jagmohan*, 18 CLJ 633], or in favour of parties who were not the persons who filed them [*Ram Pd v. Lala Sham*, 6 CLJ 22]. The provisions of s 95 Cess Act are not exhaustive. They merely limit the application of s 21 Evidence Act and exclude road-cess returns when sought to be admitted in favour of the person by or on behalf of whom they have been filed. So road-cess returns filed by a *thiccadar* or temporary lessee is admissible in favour of the zemindar who cannot be regarded as a person by or on behalf of whom the return was filed or one who claims through the *thiccadar* [*Mahendra v. Ajodhya*, 39 C 1005; *Chalho v. Jharo*, 39 C 995]. In a suit by plaintiff for enhancement of rent of *talukdari tenure*, road-cess returns filed on behalf of another fractional shareholders, though not conclusive, are admissible as a basis on which to ascertain the assets of the taluk and to fix a fair and equitable limit of enhancement [*Hem Ch v. Kali*, 30 IA 177 : 30 C 1033 : 8 CWN 1; see *Nassirun v. Gouri Sunkar*, 22 WR 192: 23 WR 293: 26 C 838].

Road-cess returns are admissible only against the maker [*Swarnamoyi v. Sourendra*, 43 CLJ 14 : 89 IC 747]. Road-cess returns filed by the tenant defendant were used in favour of the plaintiff and so they were held inadmissible [*Pramode v. Binayak*, 27 CWN 548]. A road-cess return, signed by one of the plaintiff's vendors and the defendant, was filed by the plaintiff's vendors—*held* that it was evidence against the plaintiff and it is nonetheless evidence merely because by admitting it as evidence against the plaintiff, it becomes evidence in favour of the defendant [*Beni Madhub v. Dinabandhu*, 3 CWN 343]. S 95 of the Cess Act restricts the provisions of s 21 and makes the exceptions to that section inapplicable to the case of road-cess returns in favour of one idol when there is one shebait for both idols. A road-cess return cannot be used under any circumstances in favour of the person making it, but it can be used by others for a purpose not directly connected with the statement made in the return. The genesis of s 95 is traceable to a tendency on the part of landlords to describe lands though in the occupation of tenants, as in their *khash* possession, for some possible ulterior purpose. A statement therefore that certain land is in the *khash* possession of the landlord is of doubtful accuracy and ought not to be used in his favour when made in a return by invoking the aid of s 32 or some adjective law [*Chandra Mohan and Ors v. Kinaram and Ors* (SUHRAWARDY and CHOTZNER, JJ, unreported case decided on 5th February, 1924, reversing a decision of the officiating Subordinate Judge, 3rd Court, Midnapur)].

The Road Cess Act does not stand in the way of admission of road-cess return filed by entire body of landlords and the statements made by all the proprietors can be used by one of them against the others [*Mahabir v. Bhadal*, A 1927 P 561].

—Clause (2): [Statement of the Existence of any state of Mind or Body etc].— The exception in this clause making an admission receivable in favour of the party making it is in respect of a person's state of mind or body when it is in question; but when such statement is sought to be proved in favour of the declarant it must be accompanied by conduct rendering the falsehood improbable. The existence of facts showing the state of body or mind is also admissible under s 14, but that section merely declares that such facts are relevant. Under cl (*2*) such facts or statements may be proved on behalf of the maker in spite of the general prohibition that admissions are not receivable in favour of the declarant. *Illus* (*m*) to s 14 shows that statements by *A* as to the state of his health made at the time of his life insurance is relevant in an action on the policy in which the question as to the state of his health at that time is in issue. It is equally admissible in a suit by a plaintiff desiring to prove his title, although it is a statement by a person from whom the plaintiff got his title. *Illus* (*d*) and (*e*) show the meaning of conduct accompanying a statement. It is the conduct of the person making the statement and as to such conduct see further s 8. In *Mutual Life Ins Co v. Hillman*, 145 LS 285, GRAY, J, said:—

> "Letters from him to his family and to his betrothed were the natural if not the only attainable evidence of his intention..... A man's state of mind or feeling can only be manifested to others by countenance, attitude or gesture, or by sounds or words, spoken or written..... The existence of a particular intention in a certain person at a certain time being a material fact to be proved, evidence that he expressed that intention at that time is as direct evidence of the fact as his own testimony that he then had that intention would be."

> In *Phillips v. Kelly*, 29 Ala 628, RICE CJ, said: "In cases where the existence of pain in any particular part of the body is in its very nature incapable of proof except by the declarations of the sufferer, his declarations of its existence must, from necessity, be admitted as evidence of its existence, if its existence at the time such declarations were made, be a material question" [see Wig ss 1718-24; 1725-30].

The rule laid down in this section must be taken subject to the special provisions relating to the confessions of accused in ss 24, 25 and 26 of the Act and ss 164 and 281 Cr P Code. Were it otherwise, confessions and statements of accused persons not recorded in accordance with the requirements of ss 164 and 281, might be proved as admissions relating to the confessions of accused in ss 24, 25 and 26 of the Act and ss 164 and 364 Cr P Code. Were it otherwise, confessions and statements of accused persons not recorded in accordance with the requirements of ss 164 and 364, might be proved as admissions by the accused, and the wholesome provisions elaborately laid down in those two sections practically reduced to a nullity [*R v. Bhairab*, 2 CWN 702]. Statements made by a co-accused to the police are inadmissible as evidence of the accused's guilt, for they could at the most be regarded as admissions by the co-accused, which could possibly be used against himself, but could not be proved and used against the accused [*R v. Akbar*, 34 B 599]. Declaration as to a person's religion in his will is admissible under s 14 and s 21(*2*) [*Leong Hone v. Leon Ah*, 7 R 120 : A 1930 R 42]. The document effecting a transfer which is attacked as fraudulent preference, is admissible in such a proceeding under s 21 [*Kasinath v. Offl Assignee*, A 1931 A 142].

—Clause (3): [Statements Relevant Otherwise Than as Admissions].—With reference to this clause an admission may be provable on behalf of the person making it by being relevant (otherwise than as an admission) under s 6 or some one of the sections following [Field p 94; *see ante, "Commentary"*], for instance as part

of the *res gestae* or as a statement accompanying a particular conduct; but a statement which is inadmissible under the general rule cannot be made admissible under clause (*3*) [*Paschand v. R*, A 1930 O 441]. Clause (*3*) provides that a fact which is relevant under s 8 cl (*1*) and s 11 cl (*1*), as inconsistent with a relevant fact, *eg* the establishment of a prisoner's innocence by circumstances incompatible with the facts on which his guilt has been sought to be established, or under s 14, as evidencing intention, knowledge or good faith, shall not be rejected simply because it assumes the form of admission by the party who made it. *Illustrations* (*d*), (*e*), sufficiently exemplify this clause. The case provided in s 27 proceeds partly on the principle of this clause [Nort p 152].

An admission may be proved on behalf of the maker if it is relevant otherwise than as an admission. Thus in the case of a house built over half a century ago, old documents mentioning by whom it was built may be admissible under s 11(*2*) and s 13(*b*) [*Raghunath v. Bindeswari*, A 1942 A 526 : 62 IC 582; see *Harihar v. Kesho*, A 1925 P 68]. So *zemindary* papers regularly kept in the course of business being admissible under s 34 may be proved on behalf of maker [*Rajbali v. Partappur Co Ld*, A 1940 P 622 : 19 P 398]. Where the question at issue was whether there was a partition between the plaintiff and some of the defendant co-owners, and whether under that partition the defendants came to be in possession of a specific property in lieu of their shares in all the properties, a petition and a written statement filed by the defendants in certain previous suits admitting the partition and the exclusive acquisition of the specific property were admissible against those defendants under ss 11 cl (*2*) and 21 cl (*3*) [*Gyannessa v. Mobarakannessa*, 25 C 210 : 2 CWN 91]. The statement of *A* in a previous proceeding that *B* was a tenant of the property in dispute, is an admission and can be used when in the later proceeding he denied that fact [*Dukhiram Dey v. Mrityunjoy Prosad*, A 1982 Cal 294, 300]. The statement made by a party in a duly sworn affidavit filed in a proceeding under sec 145, Criminal Procedure Code concerning the subject-matter in dispute in a later proceeding can be used in the later proceedings as a piece of evidence against that party and not as conclusive evidence against that party [*Janki Ram v. Amir Chand Ram*, A 1984 Pat 191, 194]. There is considerable doubt as to the correctness of the view that in a suit for possession by plaintiff against the defendant, the admission by the defendant in a prior litigation that the property has been mortgaged to the plaintiff is inadmissible and cannot be considered [*Daulat v. Bishan*, A 1935 L 279].

A recital as to the passing of consideration contained in the mortgage-bond is admissible evidence against the transferee of the mortgage under s 21 [*Narain v. Bhika*, 21 IC 841]. One of several defendants took part in *batwara* proceedings and a map was prepared and certain measurements taken which supported the title of the plaintiff—*Held* they were admissible in evidence though not binding as an admission on the defendants who claimed under an independent title [*Abdul Hamid v. Brojendra*, 90 IC 643 : A 1926 C 290]. A statement by a deceased donor in his will that a deed of gift executed by him was fictitious is admissible under s 21(*3*) [*Ram Bharose v. Diwan*, A 1938 O 26].

S. 22. When oral admissions as to contents of documents are relevant.—Oral admissions as to the contents of a document are not relevant, unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document

under the rules hereinafter contained, or unless the genuineness of a document produced is in question.

COMMENTARY

Principle and Scope.—The contents of a document are provable by the production of the document itself (ss 62, 64) except where secondary evidence is admissible under ss 65 and 66. This section therefore lays down that the contents of a document cannot be proved by oral admissions unless—(1) the party proposing to give such evidence can make out a case for admission of secondary evidence under s 65, or (2) the genuineness or the forgery of the document itself is in question. In the latter case oral admission of a party that it is or is not genuine is admissible if the document is produced although such admission involves a statement as to the contents of it. Written admission of the contents of a document stands on a different footing and is admissible under s 65(*b*).

The rule in this section has altered the law as laid down in *Slatterie v. Pooley*, 1840 M & W 664, 669 : 10 LJ Ex 8, according to which the oral admission of a party as to the contents of a document is admissible, even when the document might have been produced as evidence against him when such contents are directly in issue. The rule formulated in that case is an exception to the general rule that the contents of a document must be proved by the production of the document itself (or by secondary evidence in case of loss) and not by oral evidence. "The reason", observed PARKE B, in the above case, "why such statements or acts are admissible without notice to produce, or accounting for the absence of the written instrument, is that they are not open to the same objection which belong to parol evidence from other sources, where the written evidence might have been produced; for such evidence is excluded from the presumption of its untruth, arising from the very nature of the case, where better evidence is withheld; whereas, what a party himself admits to be true may reasonably be presumed to be so. The weight and value of such testimony is another question." "According to *Slatterle v. Pooley*, *sup* what *A* states as to what *B*, a party has said respecting the contents of a document which *B* has seen is admissible, whilst what *A* states respecting a document which he himself has seen, is not admissible although in the latter case the chance of error is single, in the former, double,"—*Per* REPORTER in *Boulter v. Peplow*, 1850, 9 CB 501, no [cited in Tay 11th Ed p 310 *fn*]. In spite of the fact that *Slatterie v. Pooley*, *supra*, has held the field in England since 1840, the decision has not been looked upon with much favour by all the judges and attempts have been made to apply it with modification [see Wig S 1256]. In *Boulter v. Peplow*, 9 CB 493, 501, MAULE, J, said: "It (*Slatterie v. Pooley*) is certainly not very satisfactory in its reasons. What the party himself says is not before the jury; but only the witness's representation of what he says." *Slatterie v. Pooley* was **disapproved** in the Irish case of *Lawless v. Queale*, 1845, 8 Ir LR 382 which was an action for use and occupation. At the trial one of the plaintiff's witnesses, after proving the occupation of the premises by the defendant, acknowledged in cross-examination the existence of a written agreement; and the court held that this agreement must be produced though the defendant had admitted that he was a tenant at a particular rent. In criticising *Slatterie v. Pooley*, *sup*, PENNEFATHER CJ, observed in *Lawless v. Queale*, 8 Ir LR 382, 385:—

> "The doctrine laid down in that case is a most dangerous proposition; by it a man might be deprived of an estate of £10,000 per annum derived from his ancestors through regular family deeds and conveyances, by producing a witness, or by one or two conspirators, who might be got to swear that they

> heard the defendant say that he had conveyed away his interest therein by deed, or had mortgaged, or had otherwise encumbered it; and thus by the facility so given, the widest door would be open to fraud, and a man might be stripped of his estate through this invitation to fraud, and dishonesty. It is said that it is evidence against the person himself who made this admission, and that there is no danger of untruth in what a man admits against himself. Supposing the admission is to be proved, is there no danger of mistake or misconception of the terms of a written instrument? It may be long and difficult; one part or clause may explain or qualify another; an unprofessional or ignorant man may be led to believe it may be so-and-so, whereas the real and true meaning may be the reverse or something very different..... Is there no danger of untruth or misrepresentation, when used against the party making the admission? That is the ground put by PARKE B, and in which I cannot agree, when I know by experience how easy it is to fabricate admissions, and how impossible to come prepared to detect the falsehood. Why are writings prepared at all but to prevent mistakes and misrepresentation? And why, having taken that precaution, with such writing at hand and capable of being produced, is the same to be laid aside and inferior and less satisfactory evidence resorted to?"

To meet the two opposing views, Wigmore suggests a solution: "When an admission of the contents is testified to, let production be dispensed with; but if the fact of the admission is '*bona fide*' disputed by the opponent and some testimony to that effect is put in by him, then let production be required or the document's absence be accounted for" [Wig s 1255]. The rule in *Slatterie v. Pooley* has been disapproved in other Irish cases [*Gosford v. Robb*, 1945, 8 Ir R 217; *Parsons v. Purcell*, 1894, 12 Ir LR 90], and it may be questioned that though what a party himself admits may reasonably be presumed to be true, there is no such presumption in favour of the truthfulness of the evidence by which such admission is sought to be proved [*Sanders v. Karnell*, 1 F and F 365].

This section does away with the rule in *Slatterie v. Pooley*, and adopts the view expressed in the Irish case of *Lawless v. Queale* [see *Raghubar v. Bhikya*, 12 C 69, 79]. The result of this section taken with s 65 (*b*) is that the contents of a document may be proved by the written admission of the person against whom it is to be used but cannot be proved by oral admission, except when for one of the reasons stated in s 65, the document itself is not forthcoming [*Shk Ibrahim v. Parvata*, 8 BHC 163]. The circumstances under which a party is entitled to give secondary evidence of the contents of a document are to be found in ss 65 and 66 *post*.

This section does not bar the reception of admissions which the parties or their agents agree to make at the hearing [see s 58].

[*Ref Tay ss 410-414; Best, 11th Ed, ss 525-26; Phip 8th Ed, pp 218, 528; Powell, 10th Ed, pp 374, 384; Wig, ss 1255-1257.*]

"Unless the Genuineness of a Document Produced is in Question".—Where the question is, not what are the contents of a document, but whether the document itself is genuine—that is, in the handwriting of the party whose writing or signature it is alleged to be, evidence may, of course, be given to prove or disprove the forgery. This may be effected in a variety of ways: by the party (ss 21, 70); by an attesting witness (s 68); by the oath of witnesses acquainted with the handwriting; by experts (s 45); or by comparison of handwritings (s 73); or unless the genuineness of a document produced is in question. The effect of the last clause of this section seems to be, that if such a document is *produced*, the admission of the parties to it, that it is or is not genuine, may be received [Nort. p. 153].

Written Admission.—is admissible under s 65(*b*) as secondary evidence of the contents of the document [*Jaigopal v. Divl Forest Officer*, A 1953 P 310, 312; see notes to s 65 *post*].

Cases.—In a suit to recover the balance of rent due under a lease, it has been held that the plaintiff might, so far as regards the proof of the terms of the lease, recover on the defendant's admission without the payment of the stamp duty and penalty [*Muttu Karuppa v. Rama Pillai*, 3 MHC 158. This was decided before the present law. See also *Mahalachmi Ammal v. Palani Chetty*, 6 MHC 245; *Vishram v. Shankariah*, A 1957 AP 784]. A plaintiff's admission made not in the pleadings, but in a deposition, of the contents of a document, was held to be merely secondary evidence and not to supply the place of the document itself [*Shk Ibrahim v. Purvata*, 8 BHC 163, 165]. Where a plaintiff sues for a sum due upon a settlement of account and instead of producing his account produced evidence to prove the admission of the debt by the defendant, it is a very dangerous thing to rest a judgment upon verbal admissions of a sum due, without very clear evidence, especially when there are other means of proving the case, if a true one [*Sheo Pd v. Juggernath*, 10 IA 79 : 13 CLR 271. **Followed** in *Raghubar v. Bhikya*, 12 C 69, 79]. When the original contract is available before the Special Referee appointed to ascertain the quantum of damages, there is no question of letting in secondary evidence *i.e.*, oral evidence regarding the contract [*Food Corporation of India v. Birendra Natt Dhar*, A 1989 NOC 119 (Cal)(DB)].

As to the admissibility of oral evidence of admission by defendant of contents of pro-note in proof of original consideration when the suit is on the pro-note and it is inadmissible for insufficiency of stamp, see notes to s 91 *post*. "*Admissibility of oral evidence in proof of original consideration when the bill or note is inadmissible &c.*"

*[*S. 22A. When oral admission as to contents of electronic records are relevant.—Oral admissions as to the contents of electronic records are not relevant, unless the genuineness of the electronic record produced is in question.*]

Information Technology Act, 2000

Oral admissions as to contents of electronic records [S. 22A].—A new section has been added so as to provide that oral admissions as to the contents of electronic records are not relevant unless the genuineness of the electronic record produced is in question.

S. 23. Admissions in civil cases when relevant.—In civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given.

Explanation.—Nothing in this section shall be taken to exempt any [1][barrister, pleader, attorney or vakil] from giving evidence of any matter of which he may be compelled to give evidence under section 126.

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* **Ins. by the Information Technology Act, 2000.**

1. In Burma "legal practitioner" substituted by AO 1937. In Ceylon "advocate or proctor" substituted.

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COMMENTARY

Principle.—In civil cases if an admission of liability is made by a party upon an express condition that evidence of such admission should not be given, that it was made for the purpose of buying peace and settling disputes by compromise instead of legal proceedings; or if an admission is made under circumstances from which the court can infer that the parties agreed together that evidence of it should not be given, such admission is not relevant and is protected by this section. In *Hoghton v. H*, 15 Beav 278, ROMILLY, MR, thus explains the reason for the rule: "For if parties were to be afterwards prejudiced by their efforts to compromise, it would be impossible to attempt an amicable arrangement of difficulties." It seems that the exclusion of such evidence has sometimes also been defended on the analogy of a contract. In *Walker v. Wilsher, post*, LINDLEY, LJ, said: "I think they ('without prejudice') mean, without prejudice to the position of the writer of the letter if the terms he proposes are not accepted. If the terms proposed in the letter are accepted a complete contract is established, and the letter, although written without prejudice operates to alter the old state of things and to establish a new one." But Wigmore criticises the contract theory and says that "the true reason for excluding an offer of compromise is that it *does* not ordinarily proceed from and *imply a belief that the adversary's claim is well founded*, but rather a belief that the further prosecution of that claim, whether well founded or not, would in any event cause such annoyance as is preferably avoided by the payment of the sum offered; in short, the offer implies merely a desire for peace, not a concession of wrong done" [Wig s 106]. "The essence of an offer to compromise is that the party making that offer is willing to submit to a sacrifice and to make confession" [*per* BAYLEY, J, in *Thompson v. Austen*, 1823, 2 Dowl & Ry, 358, 361]. The rule of privilege which applies to communications in the course of settlement negotiations is not absolute despite Section 23 [*Boss v. Penang Port Sdn Bhd,* (1996) 5 Malayan LJ 511 (Pulau Pinang HC)]

The law favours overtures, the object of which is to put an end to litigation. Confidential overtures of pacification, and any other offers or propositions between litigating parties, expressly or impliedly made *without prejudice*, are excluded on grounds of public policy [*Cory v. Bretton*, 1830, 4 C & P 462; *Healy v. Thatcher*, 1838, 8 C & P 388; *Paddock v. Forrester*, 1842, 3 M & G 903]. For without this protective rule it would often be difficult to take any step towards an amicable compromise or adjustments and as LORD MANSFILED has observed, all men must be permitted to buy their peace, without prejudice to them, should the offer not succeed; such offer being made to stop litigation, without regard to the question whether anything is due or not. If, therefore, the defendant on being sued for £100, should offer the plaintiff £20, and at the same time state that such offer was made "*without prejudice*", this is not admissible in evidence, for it is irrelevant to the issue; it neither admits nor ascertains any debt, and is no more than saying that he would give £20 to be rid of the action. An offer made, "*without prejudice*" cannot be looked at even upon a question of costs [*Walker v. Wilsher*, 1889, 23 QBD 355]. So, the giving of a small sum in order to obtain the release of right, cannot be considered as an acknowledgment that a right existed; it amounts only to this: "I give you so much for not seeking to disturb me" [*Underwood v. Ld Courtown*, 1804, 2 Sch. & Lef. 67; Tay s 795; see also s 774]. The reply to any offer "without prejudice" is also protected.

Scope and Exceptions.—The rule, however, is strictly confined to case where there is a dispute or negotiation, and suggestions are made for the settlement thereof. Where this is not the case, apart from some special relation existing between the sender and the recipient, the sender of a letter cannot impose on the recipient any condition as to the mode in which it may be used, by marking it "without prejudice" or "private" or

"private and confidential". Thus the rule has no application to a document which in its nature may prejudice the person to whom it is addressed, where, for example, a letter addressed to a creditor is of itself an act of bankruptcy. Where the privilege exists, it covers not only the particular letter itself but also all subsequent parts of the same correspondence on both sides, notwithstanding that they are not expressed to be "without prejudice", unless there is a clear break in the chain of correspondence to show that the ensuing letters are open. Moreover, where a letter offering terms, but not stated to be "without prejudice" is followed by another saying that the communications between the parties are to be "without prejudice", the former letter is protected [Hals, 3rd Ed, Vol 15, para 728].

In order that any admission may be shut out under the section there (1) must be an express condition to that effect (*eg*, communication marked "Without prejudice"), or (2) though nothing was expressly said, there must exist circumstances which make it clear that it was so agreed and the offer was made only with a view to get dispute amicably settled at a sacrifice (see *Thompson v. Austen, post*). In the absence of any express, or strongly implied restriction as to confidence, an offer of compromise is clearly admissible as some evidence of liability [*Wallace v. Small*, 1830 M & M 466; *Watts v. Lawson*, 1830 M&M 447].

This section applies to civil cases and does not apply to criminal cases. See s 29 *post*. As to admissions in criminal cases, see s 58 *post*.

[*Ref Tay ss 774, 795-97; Wig ss 1061-62; Ross N P 62; Steph Art 20; Powell, 10th Ed, pp 249-54; Jones, s 291; Phip 8th Ed, p 216; Chamb ss 1463- 1464; Hals, 3rd Ed, Vol 15, paras 727-729*].

"Without Prejudice".—The words "*without prejudice*" simply mean this: "I make you an offer, if you do not accept it, this letter is not to be used against me" [*per* JAMES, LJ] or "they are tantamount to saying, I make you an offer which you may accept or not, as you like; but, if you do not accept it, my having made it, is to have no effect at all" [*per* MELLISH, LJ, *In re River Steamer Co, Mitchell's Claim*, LR 6 Ch App 822, p 832]. For the meaning of the expression, see also *Woodward v. E C & L&B Rail Co*, 1 Jur (NS) 899, *per* WOOD, VC; *Kurtz & Co v. Spence & Sons*, 57 LJCh 238, *per* KEKEWICH, J, and *Hari Kr v. Gupta*, A 1949 A 440. An offer of compromise the essence of which is that the party making it is willing to submit to a sacrifice, or to make a confession, will be rejected, though nothing at the time was expressly said respecting its confidential character, if it clearly appears to have been made under the faith of a pending treaty, into which the party has been led by the confidence of an arrangement being effected [*Thompson v. Austen*, 2 Dowl & Ry 361; *Waldrige v. Kennison*, 1794, 1 Esp 144, cited in Tay s 195]. A letter written with regard to an action and marked "*without prejudice*" was only privileged for the purposes of that action [*Stretton v. Stubbs*, 10 CWN 42*n*]. The "without prejudice" letter is admissible to see if there was a *bona fide* dispute between the parties or if a settlement had been arrived at between them [*Aluminium Industries v. Cookermate,* (1990) 2 CLJ (Johore Bahru HC)]

In a suit for money, the defendant pleaded limitation. In reply, the plaintiff relied on an acknowledgment of debt by the defendant on a post card, in which he promised to pay Rs. 30 to plaintiff and acknowledged his liability to pay any sum that may be due. The post card was marked *"Without prejudice"—Held*, that the post card was inadmissible in evidence. *Per* CANDY, J—"I doubt whether the post card was inadmissible. To exclude it from evidence, it would be necessary to hold that the words "*without prejudice*" amounted to an express condition that the card should not be used in evidence against the writer. In England, apparently the card would have been admissible" [*Madhavarav v. Culabhbai*, 23 B 177; (*In re Daintrey*, LR 1893, 2 QB 116 refd to)]. It has been held in a case that s 23 does not cover cases of letters merely because they bear the inscription "without prejudice". At best it shows desire on the part of one party to have the privilege, but the other party must also agree to respect the privilege [*Lucknow Imp Trust v. Jaitly & Co*, A 1930 S 105].

Where a letter was sent by an attorney to the opposite party, containing an offer to "purchase peace" and headed "*without prejudice*", it cannot be given in evidence; nor the reply, though not guarded in a similar manner [*Paddock v. Forrester*, 1842, 3 M & G 903]. A letter marked "*without prejudice*" protects subsequent [*Paddock v. Forrester*, 3 M & G 903; *Re Harris*, 44 LJ By 33; *Indian Rubber &c Co v. Chapman*, 1897, 20 BWCO 1841 and previous letters in the same correspondence [*Peacock v. Harper*, *infra*; *Oliver v. Nautilus Co*, 1903; 2 KB 639 CA]. When a letter offering terms but not marked "*without prejudice*," is followed by another saying that the communications are "*without prejudice*," the former is protected [*Peacock v. Harper*, 26 WR 109]. The court may look at a document written "*without prejudice*" for the purpose of deciding the question of its admissibility [*Re Daintrey*, *sup*]. An offer by the Government without prejudice as to the price of a property sought to be acquired under the Land A Act, is not admissible in the proceeding for acquisition [*Ranzor v. Secy of S*, 92 IC 319 : A 1926 L 509].

Waiver.—The privilege of "without prejudice" communication can be waived [*Lim Tjoen Kong v. A.B. Chew Investments,* (1991) 3 Malayan LJ 4 (Singapore CA)]. The privilege can be waived with the consent of both parties to the negotiations and in the case of a single communication made without prejudice, the better opinion appears to be that the consent of both writer and recipient must be given before the letter can be read [*Walker v. Wilsher*, 23 QBD 335, where the contrary opinion expressed in *Williams v. Thomas*, 2 Drew & Sm 29, is **disapproved** [Hals 3rd Ed Vol 15, para 729].

Compromise, Arbitration, etc.—The evidence as to negotiations of compromise and the statements made during such negotiations are generally *without prejudice*. It is ordinarily against public policy to admit such evidence. The statements made in the compromise petition even if treated as valid admissions, cannot be treated as evidence when the compromise fails [*Bauribandhu Mohanty v. Suresh Chandra Mohanty*, A 1992 Ori 136, 139]. The Judgments of the lower courts being based considerably on such evidence, the conviction was set aside [*Bhanjaram v. R*, 11 CWN 26*n*]. Evidence relating to proposals of compromise ought not to be allowed to go in as evidence of guilty knowledge against the accused [*Abbas Peada v. R*, 25 C 736]. Plaintiff sued defendants for rents and defendants pleaded payment. The material evidence was that of plaintiff's pleader who deposed that he had two interviews with one of the defendants, once about a month *before* the suit when a settlement was suggested *viz*, diminution of interest and again on the day of the institution of the suit when the pleader was asked to make a compromise—*Held* that as there was admittedly no express condition that evidence of the interviews should not be given, and it could not be inferred from the circumstances that the parties had so agreed, the evidence could not be excluded under s 23. It could be used even against the other defendants, all of them being jointly liable to the plaintiff as the representative-in-interest of their father [*Meajan v. Alimuddin*, 44 C 130 : 20 CWN 1217].

Where a person offers to accept a smaller amount as a matter of compromise, that offer is not an admission as to the proper amount due to him [*Chandrika v. BBCIR Co*, 39 CWN 552 : A 1935 PC 59 : 154 IC 945]. Nothing which passes between the parties to a suit in any attempt at arbitration or compromise should be allowed to effect the slightest prejudice to the merits of the case as it eventually comes to be tried before the court. No presumption can be raised against a party to a suit from his refusal to withdraw from the determination and submit to arbitration [*Mahabeer v. Dhujjo*, 20 WR 172]. S 23 precludes the court from making use of the admissions contained in the petition of compromise which was entered into and subsequently cancelled because the agent of one had no authority to enter into it [*Ilahia v. Makhan*, 83 PR 1877].

The rule applies with especial force to negotiations between husband and wife for reconciliation when litigation is imminent [*per* DENNING, LJ, in *Mc Taggart v. M*, 1948, 2 All ER 754; see however *Bostock v. B*, 1950, 1 All ER 25 (**doubted** by DENNING, LJ, in *Mole v. M*, 1950, 2 All ER 328]. Divorce—Letter by husband to probation officer is privileged [*Mole v. M, sup*]; so also statement by wife to a Vicar as conciliator [*Henley v H*, 1955, 1 All ER 590]. Letter, containing admission of cruelty and seeking apology written during the period of negotiations of compromise in a petition under s *9* of the Hindu Marriage Act, may be inferred to be a privileged document [*Surjit v. Gurcharan*, A 1973 P&H 18].

An admission before an arbitrator is admissible in evidence, although it is for the court dealing with the facts to attach whatever weight it thinks proper. The rule in s 23 does not apply to such admissions [*Punjab v. Ramavatar*, 4 PLJ 676 : A 1920 P 841; *Gangaram v. Pooran*, A 1954 MB 58; see *Meajan v. Alimuddin, sup*—CONTRA: *Firm Gulab v. Chhotey*, A 1936 A 157]. They are admissible in the absence of an express agreement that evidence of the statements was not to be given [*Bulaki v. Bhagat*, 95 IC 363 : A 1926 L 548].

Privilege continues after settlement.—Without prejudice negotiations which have led to a settlement between the parties remain privileged even after the settlement and cannot be disclosed either by the parties or by any third person. Admissions made to reach a settlement with a different party (sub-contractor in this case) within the same litigation, are also inadmissible whether or not a settlement was reached with that party, The general public policy that applies to protect genuine negotiations from being admissible in evidence also applies to protect those negotiations from being disclosed to third parties [*Rush & Thompkins v. Greater London Council*, (1988) 3 WLR 939 HL].

Explanation.—The explanation to this section will be fully considered under s 126, which should be read in conjunction with it. It refers to the obligation on the part of legal practitioners to answer questions regarding professional communications made in furtherance of an illegal purpose or as to any fact observed in the course of employment showing that any crime or fraud has been committed since their employment.

S. 24. Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding.—A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

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COMMENTARY

Principle and Scope.—This and the following sections deal with the admissibility of confessions by accused persons in criminal cases. For a clear exegesis see *Aghnoo v. S*, A 1966 SC 119. The ground of reception is the same as that of 'admissions', *viz*, that what a man voluntarily says against his interest is likely to be true (*ante*, s 17). In order to render a confession admissible, it must be perfectly *voluntary*. Before a confessional statement can be acted upon, it must be shown to be voluntary and free from police influence [*Davendra v. S*, A 1978 SC 1544]. A voluntary confession although false is admissible. If a confession is voluntary but false, the judge must admit it in evidence and put it to the jury with proper directions as to its falsity for the purpose of appraisement of its worth. If the confession is true, but the court

doubts its voluntariness, it must be excluded [*R v. Panchkari*, 52 C 67; *In re Tadipamula*, A 1959 AP 419]. Even if the confession is held to be voluntary, it must also be established that it is true and for this purpose it would be necessary to examine the confession and compare it with the rest of the prosecution evidence and the probabilities of the case [*Sarwan v. S*, A 1957 SC 637, 644 : 1957 Punj 1602].

S 24 has been stated in the form of a rule of exclusion. Its wording shows that *prima facie* a confession is to be deemed relevant without formal proof of voluntariness [*In re Boya*, A 1942 M 49 : 1941, 2 MLJ 1070; *In re Navanithammal*, A 1939 M 3; *R v. Balvant*, 11 Bom HCR 137]. It becomes irrelevant if it is found subsequently that it was not voluntary but was obtained by certain non-validating circumstances, *eg*, threat, torture, inducement, promise &c, proceeding from a person in authority. So long as the conditions which invalidate a confession and make it untrustworthy are not brought to light, a confession is regarded as relevant. To make it irrelevant strict proof of the existence of the non-validating causes is not necessary; it becomes so if it "*appears*" to the court from the surrounding circumstances to have been caused by inducement &c. The word "appears" connotes a lesser degree of assurance than what is required in the case of "proof" as defined in s 3. (See *post, Confession When Irrelevant*"). S 24 is therefore a rule of exclusion because it declares that a confession in certain circumstances is irrelevant. A decision that a confession is not irrelevant is not necessary under s 24. The admission of a confession makes it evidence. It is open to the defence to object to it on the ground that it is excluded by s 24. Till then there is no need to pronounce a formal decision on the question of relevancy [*In re Navanithammal*, A 1939 M 3: 1938, 2 MLJ 1065].

This exclusionary form of the rule by which every confession put in is assumed to be relevant until it is challenged and found to have been obtained by any improper means is liable to create some confusion as there is nothing in the section to indicate who is to prove the voluntary character of the confession when the question arises. Inexperienced judges or magistrates may be led to think that as a confession has *prima facie* been made relevant, a person challenging its voluntariness takes upon himself the burden of such proof. That is not so. It has long been settled in England that before a confession is admitted the prosecutor must prove affirmatively to the satisfaction of the judge that it was voluntary and not obtained by any improper means [*R v. Thompson*, 1893, 2 QB 12, 16; *Ibrahim v. R*, 1914 AC 599 : 18 CWN 705 : A 1914 PC 155]. Some earlier cases here agreed with this view and the Supreme Court has also held that "the principle laid down in that case (*R v. Thompson, sup*) is well settled" [*Hemraj v. S*, A 1954 SC 462 : 1954 SCR 1133; see further *post*]. Two principles are involved in s 24: (1) Only a confession made voluntarily is admissible against its maker. (2) In case of any doubt, it is for the prosecutor to prove that the confession was free and voluntary and not obtained by improper means. Perhaps a statement of the law in a positive form would have made things clearer than the form of a rule of exclusion.

The mere fact that a confession is made to a person in authority does not render it involuntary or inadmissible; it must be further shown that it was caused by any inducement, threat or promise (see the case of *Ratan Gond v. S*, A 1959 SC 18 : 1959 SCR 1336]. Where a confession is proved to be voluntary, the mere fact that the accused confessed in the hope of pardon will not render it inadmissible in the absence of evidence that any police officer or person in authority did or said anything which could possibly be construed into holding out a hope of pardon [*R v. Sher*, A 1933 L 388]. Confession generating from an idle hope to get lenient treatment or pardon is not inadmissible. The hope must be directly inspired by some one in

authority [*Samiruddin v. R*, 32 CWN 616]. The question whether a confession is voluntary or not must be determined by the judge, it being a question of admissibility. It is a serious error of law to leave the question to the jury [*Khiro v. R*, 33 CWN 1112; see *post*].

To make a confession relevant under the section it must be shown—

(*1*) that it was *made* and that by an *accused person* (*post*: "*Made by an accused person*", and

(*2*) that it is voluntary.

In order to make it a foundation for conviction, it must be further shown—

(*3*) that it is *true*.

Any inducement in the nature of a promise or of a threat proceeding from a person in authority, affects its voluntary character and vitiates a confession. A prisoner may be led to confess a crime from various motives, *viz.*, inducement, torture, threat, promise, hope, desire to benefit others, weariness of life, desire to injure others by implicating them etc. Confessions which are not voluntary are rigidly excluded. The reason for the rejection is that when confessions are caused by inducement, threat or promise offered by a person in authority, there is the danger of the accused falsely implicating himself. The law is so strict that a confession not voluntary is rejected even if it be true. As BEAMAN, J, observed: 'If it appears to the judge that the confession has been improperly induced, no matter how true it may be, he is bound to exclude it" [*R v. Bhagi*, 8 Bom LR 697 : 4 Cri LJ 332]. Again, though only a voluntary confession is admissible, a confession which is voluntary is not necessarily true and *vice versa* [*Kasimuddin v. R*, 39 CWN 27, 31].

In *R v. Mansfield*, [1881 14 Cox CC 639], WILLIAMS, J, said: It is not because the law is afraid of having truth elicited that these confessions are excluded, but because the law is jealous of not having the truth". It is not that the law presumes the statements to be untrue, but from the danger of receiving such evidence judges have thought it better to reject it for the due administration of justice [*R v. Baldry*, 2 Den CC 430, 455; see also *R v. Ibrahim*, 1914 AC 599, 614: 18 CWN 705: A 1914 PC 155]. It is abhorrent to notions of justice and fair play and is also dangerous to allow a man to be convicted on the strength of a confession unless it is made voluntarily and unless he realises that anything he says may be used against him [*Aher Raja v. S*, A 1956 SC 217 : 1955, 2 SCR 1285]. The court cannot ignore the exculpatory part and rely only on the inculpatory part. [*Kasim Babumiya Shaikh v. State of Maharashtra*, 1996 AIHC 18 (Bom)].

Although a confession by an accused improperly obtained is wholly inadmissible, statements in it which are relevant for the purpose of s 27 (Discovery of facts in consequence of information received from the accused) are admissible. S 27 is a proviso not only to s 26, but it cuts down the operation of ss 24 and 25 as well (see *post*, s 27).

The use of a confession does not violate the privilege against self-crimination in art. 20(*3*) of the Constitution. The doctrine of protection against self-crimination applies to testimonial *compulsion* and one of the tests of the relevancy of a confession is whether it is voluntary or not. Even the use of a retracted confession found to be voluntary does not contravene art 20(*3*) [see *Kalavati v. S*, 1953 SCR 546 : A 1953 SC 131]. If an accused offers to testify on his own behalf (s 315(*1*) Cr P Code) and is led to confess when giving replies to criminating questions, that would

not also infringe art 20(*3*) as by volunteering to take the witness-stand the privilege was impliedly waived (see notes to s 132 *post*).

In *Ibrahim v. R*, 18 CWN 705, 713 : 1914 AC 599, LORD SUMNER observed that "Even the rule which excludes evidence of statements made by a prisoner when they are induced by hope held out, or fear inspired by a person in authority, is a rule of policy".

> PARKE B, in *R. v. Baldry*, 2 Den CCR 430, p 445: "By the law of England, in order to render a confession admissible, it must be perfectly voluntary and there is no doubt that any inducement in the nature of a promise or of a threat held out by a person in authority vitiates a confession. The decisions to that effect have gone a long way".
>
> In the same case LORD CAMPBELL: "The rule seems to be this : If there be any worldly advantage held out to the accused to be obtained by confession, or any harm threatened to him if he refuses to confess, any statement made by him in consequence of any such inducement must be rejected. The reason for this rule I take to be, not that the law supposes that what is said after such inducement is false, but that the prisoner may have said something under a bias, and that it is not a purely voluntary confession".

In the same case POLLOCK CB: "The ground of exclusion is that it would not be safe to receive a statement made under any influence or fear".

The principle upon which a confession is treated as sometimes inadmissible is that *under certain conditions it becomes untrustworthy as testimony*. The principle is the same as that upon which statements based on memoranda, or testimony given while intoxicated, or testimony given upon the suggestion of a leading question, are treated as dubitable and may under circumstances be excluded ..... The circumstances which thus call for the rejection of a confession are usually described as involving either *a promise* or *a threat*. Thus a promise of certain pardon, when attached to a confession, may conceivably make a confession, irrespective of its truth, seem more desirable than silence with its contingencies; or a threat of instant hanging by a mob, unless a confession is forthcoming, may conceivably make the contingencies of a confession more desirable than the certain consequences of a silence. The principle, then, upon which a confession may be excluded is that it is, under certain conditions, *testimonially untrustworthy* [Wig s 822]. Another reason for the exclusion of such confession is as, Taylor says, the danger of encouragement to the police and other persons engaged in the pursuit of evidence to extort confessions by torture, etc. in the hope of professional advancement. (See Taylor ss 862, 874). In their anxiety to obtain a character for activity and zeal they are likely to oppress and torture prisoners for obtaining confessions or to magnify slight grounds of suspicion into sufficient proof. This is known in America as "sweat-box" or "third degree" methods. "It appears to be well-known that the police was in the habit of extorting confessions by illegal and improper means; they find that no enquiry is made of them as to the truth of such charges but they are merely told that they must obtain convictions" [*per* PETHERAM, CJ, in *R v. Ramanund*, 1885 AWN 221]. The reports show that many confessions are induced by improper means; and that innocent people often accuse themselves falsely, is known to the reader of any book on evidence [*per* JARDINE, J, in *R v. Dada Ana*, 15 B 452]. Ss 25, 26, 27 have been framed with the object of checking the tendency of the police to extort confessions. Answers given by the accused in the course of examination under section 313 Cr PC are not evidence but they may be taken into consideration both for and against the

accused, *i.e.*, his statement can be taken into consideration in judging his innocence or guilt.

Where the confessional statement made before the Magistrate contradicts the statement of the accused made under section 313 Cr PC, the confessional statement cannot be said to be true and trustworthy. [*Mahiram Bora v. State of Assam*, 1993 Cri LJ 3742, 3743, 3744 (Gau)]. Where there is a seeming disparity between the time of making the confession as spoken to by the witnesses and the time mentioned by the police on the strength of station records, it was held that much should not have been made of disparity as there could be a possibility of making an error in recording the time A.M. for P.M. At any rate, it is not proper to jettison otherwise sturdy piece of evidence of extra-judicial confession on the ground of such a rickety premise. [*State of A.P. v. Gangala Satyer Meerthy*, A 1997 SC 1588 : 1997 Cri LJ 774 (777)].

The incentive to procure confession by putting the accused to the rack is so strong and so many confessions are obtained by torture or unlawful pressure or brain-washing methods, that in the opinion of BERTRAND RUSSELL, the world-famed thinker, a confession should in no circumstance be admitted in evidence. Says he in his "Power":—

> "The gist of the matter is that a policeman is promoted for action leading to the conviction of a criminal, that the courts accept confession as evidence of guilt, and that, in consequence, it is to the interest of individual officers to torture arrested persons until they confess. This evil exists in all countries in a greater or lesser degree. In India it is rampant ..... For the taming of the power of the police, one essential is that a confession shall never in any circumstances, be accepted as evidence."

Confession Must not be prompted by Inducement, Threat or Promise.— Whether a particular confession attracts the frown of s 24 has to be considered from the point of view of the accused as to how the inducement, threat or promise proceeding from a person in authority would operate in his mind [*Satbir v. S*, A 1977 SC 1294]. Any attempt by person in authority to bully a person into making a confession or any threat or coercion would at once invalidate it if the fear was still operating on his mind at the time he makes the confession [*Aher Raja v. S*, A 1956 SC 217 : 1955, 2 SCR 1285]. If the accused was handcuffed when he expressed his willingness to show the place is sufficient to show that the disclosure was made under duress, pressure or threats given by the police [*Shankar Raji Banglorkar v. State of Goa*, 1992 Cri LJ 3034, 3038 (Bom)]. Confession made by a delinquent officer to his superior after administration of oath by him though not so empowered when pleaded to be taken under duress is clearly inadmissible [*Brijbasilal v. S*, A 1979 SC 1080]. Conviction on basis of confession made to Customs Officer on coercion was not sustained [*Sevantilal v. S*, A 1979 SC 705]. The inducement, etc, must proceed directly or indirectly from a person in authority, but the section does not say anything as to the person to whom it is to be directed. It is enough if it reaches the accused, no matter how or through what channels. If the inducement is offered not personally to the accused, but to some one on his behalf the result would be the same.

When the inducement proceeds from a person *not in authority* and a confession is made to him, it is admissible. It should be noted that a confession does not become inadmissible merely because it is made to a person in authority. It is inadmissible only when it is elicited by him by improper inducements. So a confession made to a person in authority may be admissible, if it is not induced by him [*R v. Gibbons*, 1 C & P 97; *R v. Tylor*, 1 C & P 129]. But a confession though made to a third person

will be rejected if induced by a person in authority [*R v. Boswell*, 1842 Car & M 584: *R v. Blackburn*, 6 Cox 333; see also *post*: "*Proceeding from a person in authority*"].

It is impossible to lay down any rule as to what constitutes inducement or threat, or promise. The admissibility or rejection of a confession rests solely on the discretion of the judge, which must necessarily vary with circumstances. A look into the reported decisions will show that it is by no means easy to say what language constitutes inducement, threat, etc, the dividing line being sometimes so thin. For instance, confessions induced by the following expressions have been admitted: "You had better be careful what you reply" [*R v. Day*, 147 CCC Sess Pap 960]; "Be sure to tell the truth" [*R v. Court*, 7 C & P 486]; "Why have you done such a senseless act?" [*R v. Ibrahim*, 1914 AC 599: 18 CWN 705]; but rejected when induced by the words: "It would have been better, if you had told first" [*R v. Walkley*, 6 C&P 175]; "You had better tell me about the corn that is gone" [*R v. Rose*, 18 Cox CC 717]; "Now be cautious in your answers to the questions I am going to put about this watch" [*R v. Fleming*, 1 Arm M & O 330 Ir]. "It will be the right thing for him to make a clean breast of it" [*R v. Thompson*, 1893, 2 QB 12]. A mere caution is harmless, but a caution under certain circumstances may bring in with it threats or hope or fear. Simple exhortation to tell the truth [*R v. Moore*, 2 Den CC 523] or a confession elicited by moral or religious exhortation or admonition by a chaplain, [*eg*, in *R v. Sleeman*, 2 Dears. 249: "Don't run your soul into more sin but tell the truth." See also *R v. Gilham*, 1 Moo CC 186] will not be rejected. In *R v. Garner*, 2 C&K 920, 925, ERLE, J, has stated the principle thus:—

> "It does not turn upon what may have been the precise words used, but in each case, whatever the words used may be, it is for the judge to consider, before he admits or rejects the evidence, whether the words used were such as to convey to the mind of the person addressed, an intimation that it will be better for him to confess that he committed the crime, or worse for him if he does not."

As to what constitutes inducement, threat or promise see *post*, "*Confession caused by inducement, threat or promise etc.*" Whether advice to admit the charge given father to his son in the presence of a police officer would taint a confession see *Aziz Bin Muhamad Din v. Public Prosecutor,* (1996) 5 Malayan LJ 473 (Melaka HC)].

Confession When Irrelevant. ["Appears to Have Been Caused"].—This is a very important section as also one of the most difficult to apply. In so far back as 1881. CHIEF JUSTICE SHERWOOD *said* [in *S v. Paterson*, 73 Mo 695, 705 (Am)] that "there is no branch of the Law of Evidence in such inextricable confusion as that relative to confessions". The section contains a very wholesome provision, *viz*, the total rejection of a confession, if upon a review of facts and sourrounding circumstances it "*appears to the court*" that it is not perfectly voluntary but emanated from some inducement or promise or threat, however, slight, proceeding from a person in authority. A confession proceeding from such a feeling of mind or from hope that it would be better to confess in order to obtain pardon or lenient treatment, affects the voluntary nature of a confession. The court is charged with the delicate task of probing the facts which were passing in the mind of the accused at the time of making the confession.

It should be remembered that in coming to a decision on the point, it is not necessary that there should be positive proof of improper inducement or threat or promise. Such a requirement would nullify the object of the section as it would be absurd to expect in most cases positive proof of the inducement etc. The section has therefore been advisedly worded in a manner which admits the exercise of the fullest

discretion by the court from suspicion to positive evidence. It has accordingly been laid down that the confession shall be rejected, "if the making of the confession *appears*" to the Court "to have been caused by any inducement, etc." The word "*appears*" indicates a lesser degree of probability than "proof" as defined in s 3. Under the terms of the section, a well-grounded suspicion based on the facts and surrounding circumstances may exclude a confession. [See *R v. Panchkari*, 29 CWN 300 and cases *infra* as also *post*]. The word "*appears*" gives effect to the whole scheme of the section. It is not meant, however, that the requirements of the prudent man which have been adopted in s 3 as an appropriate concrete standard to measure proof, should be wholly departed from in considering the voluntary or involuntary nature of a confession. That standpoint is ingrained in human nature. All that is meant is that as "proof" of inducement or threat is difficult or in many cases impossible of attainment at that stage and in a matter of this nature, the discretion of the court is unfettered by the concrete standard of proof which is necessary in other cases. The court is free to form its conviction from a scrutiny of the evidence and surrounding circumstances, even if the basis of such a conviction be not what is strictly called "proof". In forming its opinion, the court is to determine the absence or presence of inducement, promise, etc, or its sufficiency and how or in what measure it worked on the mind of the accused. If the inducement, promise or threat is "sufficient in the opinion of the court, to give the accused person grounds which would *appear* to him reasonable for supposing that by making it he would gain any advantage or avoid any evil &c" it is enough to exclude the confession. The words "*appear to him*" in the last part of the section refer to the mentality of the accused. (See *post*. "*Appears to the court to have been caused*" and *Pyarelal v. S*, A 1963 SC 1094 *post*).

The same safeguard is to be found in s 164 Cr P Code, where the Legislature insists that no magistrate shall record a confession made by an accused person in police custody, unless, upon enquiry "he has reason to believe" that it was made voluntarily. It is imperative that a magistrate before recording confession should satisfy himself by proper questioning that the statement about to be made is spontaneous and voluntary (see Sarkar's Cr P Code. 4th Ed 1975, s 164). So, if upon, a consideration of all the circumstances it *appears* to the magistrate that it was not made voluntarily, he must not record it.

No Conflict With S 80.—It may be apprehended that as under s 80 when a confession is taken in accordance with law there is a presumption of the truth of any statements as to the circumstances under which it was taken, the word "*appears*" in the first part of s 24 indicating a lesser degree of probability than "proof" (*R v. Basvanta*, 25 B 168) creates an inconsistency. There does not appear to exist any good reason for making such a supposition. For as pointed out in a case, having regard to the wording of s 24 and also to the presumption under s 80, the true view is that a confession duly recorded by a magistrate with the proper certificate appended to it will be admitted in evidence subject to the provisions and restrictions contained in s 24 that under the latter section a well-grounded conjecture, reasonably based upon circumstances disclosed in the evidence, is sufficient to exclude the confession, because it would be idle to expect the accused to prove the inducement, threat or promise, for in most cases such proof cannot be available [*R v. Panchkari*, 29 CWN 300 : 52 C 67; see *Nayeb v. R*, 28 CWN 659, 664: 61 C 399; *Ruggha v. R*, 23 ALJ 821 FB: A 1925 A 627; *R v. Jamuna*, A 1947 P 305; *Bhukhin v. R*, A 1948 N 344].

It may be further pointed out that there is no presumption of voluntariness under s 80. When the formalities prescribed have been observed and the confession has been "taken in accordance with law", the presumption under s 80 is that the document is

genuine and accordingly the confession proves itself (see *post* "*Burden of proof*"). When a document purporting to be a confession taken by a magistrate is put in, the presumption is that the document is genuine and the signature is that of the magistrate purporting to sign it. It is genuine in that sense; but it may be that in recording the confession all the provisions of law were not fully complied with, *eg*, the magistrate may not have made a real endeavour to ascertain the voluntary nature of the confession by appropriate questions [see *R v. Pohp Singh*, 10 A 174]. S 80 does not render admissible any particular kind of evidence. It simply dispenses with formal proof and gives legal sanction to the maxim *omnia praesumuntur*. The question of *admissibility* of confession is to be decided on a reference to s 24. See further, *post*: "*Appears to the Court to have been caused*".

[*Ref Taylor, ss 862-906; Best ss 551-53; Phipson 8th Ed pp 248-60; Wigmore, ss 815-867; Archbold Cr Pleadings, 24th Ed pp 391-400; Russel on Crimes, 7th Ed 2155-2212; Joy on Confession; Steph Arts 21-24; Wills Cir Ev 6th Ed 108-28; Powell, 10th Ed pp 94-104; Hals, 3rd Ed, Vol 10, paras 866-874; Chamb ss 1472-1614*].

Gist of Law in S 24.—(*1*) The language used in s 24 shows that *prima facie* a confession duly recorded as required by law is to be deemed relevant. (See *post*: "*Prosecution to Show Voluntariness of Confession*"). It being assumed that the confession of an accused is generally relevant, it is stated in this section in what circumstances it may become irrelevant and inadmissible. It becomes irrelevant when in the opinion of the court it "appears" to have been caused by an inducement, threat or promise—(*a*) which emanated from a *person in authority* over the accused; (*b*) which had *reference to the charge* against the accused; and (*c*) which gave the accused *reasonable grounds for supposing* that by confessing the crime he was to gain some temporal advantage or to avoid a temporal evil.

(*2*) Mere exhortations to tell the truth do not exclude subsequent confessions, though, of course, the accused might be urged "to tell the truth" in such a way or tone as to give him clearly to understand that the best thing he could do to avoid harm would be to confess, and a confession so obtained might fall within the scope of this section (Steph Dig Art 21; see also *post*).

(*3*) The offer of the slightest inducement or promise or threat affects its voluntary character and vitiates the confession.

(*4*) The word "*appears*" in the phrase "appears to the court" should be given its full and natural import. It indicates a lesser degree of probability than "proof" as defined in s 3 and it was inserted in the section as a safeguard in the interest of the accused, for in most cases positive proof of inducement, torture &c is seldom, if ever, available. So, a well-grounded suspicion of inducement, threat, &c, reasonably based upon the facts and circumstances is sufficient to exclude a confession if the making of it "*appears* to the court" to have been so caused (see *ante* as well as *post*).

(*5*) The burden of proving the voluntary nature of the confession lies on the prosecution (see *post*: "*Burden of Proof*").

(*6*) A confession does not become inadmissible merely because it is made before a "person in authority". (*See Ratan Gond v. S*, A 1959 SC 18 : 1959 SCR 1336). It is inadmissible only when it is obtained by him by the offer of inducement, hope, threat, &c, Again, a confession generating from mere imagination or an idle hope to get lenient treatment or pardon, is not inadmissible, as it is a voluntary confession.

(*7*) If the confession is true but involuntary, it must be excluded.

[S 24 would apply even if the person who is said to have made the confession was not an accused at the time he made it. It is sufficient if he ultimately comes to be an accused with reference to the charge [*R v. Cunna*, 22 Bom LR 1247; *Muthu Kumaraswami v. R*, 35 M 397, 575; *Smith v. R*, 43 IC 605. See *post*, "*Made by an accused person.*"]

The substantive law of confession is contained in ss 24-30 of the Evidence Act and the adjective law in ss 163, 164, 463 Cr P Code. Subsidiary matters relating to the subject are dealt with in ss 80, 114, 133, Evidence Act and in ss 306, 307, 313, 315(*1*), Cr P Code. A confession admitted by the court as voluntary can be excluded at a subsequent stage if it transpires that it is involuntary or defective in any way [see *R v. Dasrath*, A 1945 B 265 FB]. It has been observed in a case that when a magistrate rightly or wrongly excludes a confession, it cannot be taken into consideration in revision [*Billu v. R*, A 1930 S 168. It is difficult to understand why a confession should not be ruled relevant by a higher court, when it has been improperly rejected by the lower court and *vice versa*].

Function And Duty of Court Under S 24.—In scrutinising a case from the point of view of s 24, the court will have to perform a threefold function: (*1*) It will have as a court to determine the sufficiency of the inducement, threat or promise as affording certain grounds; (*2*) it will have to clothe itself with mentality of the accused to see whether the ground would appear to the accused reasonable for a supposition that he would gain any advantage or avoid any evil; (*3*) it will have to judge as a court if the confession *appears* to have been caused in consequence of the inducement, threat or promise. The use of these vague expressions has been deliberately made with the object of securing absolute fairness in the matter of admitting confessions in judicial proceedings [*per* MUKHERJI, J, in *R v. Panchkari*, 29 CWN 300, 306: 52 C 67 : 86 IC 414]. Searching questions should be put by the court to such witnesses as had anything to do with the confession. The first question that ought to strike is: Why is the accused making the confession? In whose custody the accused was,—the circumstances in which the question of confession first arose,—how the accused expressed his willingness to make a confession and such other points should be ascertained. Similar questions arise regarding retraction [*Nasir v. R*, 55 A 919]. When once the voluntary character of a confession is challenged by the defence, the judge would make a thorough enquiry [*Kalicharan v. R*, A 1933 C 835 FB : 145 IC 863; see also *R v. Kashinath*, 8 Bom HCCr 126].

Where there is any evidence of inducement, it is no answer to say that the confession is voluntary, because it must be voluntary if the person confessing is acting under the inducement. S 24 requires the judge to decide whether it appears to him that there was any inducement. Where the admissibility of a confession depends upon a conclusion as to the truth about conflicting evidence antecedent to the making of the confession and tending to show that it is liable to rejection under s 24, the trial judge must make up his mind upon this issue and decide the question of admissibility before relying upon the contents of the confession. The learned judges in explaining the law observed:—"It is necessary to repeat once more as emphatically as this court can do, that sessions judges must try and master the simple rules for dealing with this question" [WALSH and SULAIMAN JJ, *Fate Chand v. R*, 86 IC 1001 : A 1925 A 605]. It does not matter how many true facts are mentioned in the confession. The first thing to be considered is whether it is relevant or not and not whether it is true or false. What has to be considered is whether it was voluntary or was caused by some inducement [*Sarju v. R*, A 1935 A 882]. In the United States a trial judge has to make his own determination as to the voluntariness of an accused's confession before

permitting it to be admitted in evidence [*Jackson v. Denno*, 378 US 368]. Effect of violation of this rule [*Sigler v. Parker*, 396 US 482].

How to Proceed When Objection is Taken to a Confession that it is Not Voluntary.—When objection is taken to the admission of a confession on the ground that it has been induced by threats, it is not permissible for the judge to decide the issue by reference to the depositions. The proper course is for the judge to hear evidence on that issue in the absence of the jury, and upon that evidence rule whether the confession should be admitted or not [*R v. Chadwick*, 24 Cr App R 138]. When the question of voluntariness of a confession arises, the accused is entitled to give evidence in support of the objection [*R v. Cowell*, 1940, 2 KB 49 : 2 All ER 599; *R v. Hammond*, 1941, 3 All ER 318. S 315(*1*) Cr P Code also enables the accused here to examine himself as a witness for the defence.

When an accused retracts a confession on the allegation of gross torture by the police resulting in bodily injury, it is the bounden duty of the trying magistrate to take immediate steps to have him examined by a competent doctor. The tendency on the part of magistrates and judges to regard themselves as mere recording machines was deprecated and the attention of the local Government was drawn to the matter [*Gurdit v. R*, A 1939 L 66]. When complaint is made against the police for ill-treatment, the court should by putting further questions find out whether the confession was voluntary [*Barhma v. R*, A 1947 O 95].

The decision of the judge is only as to the admission of the confession and not to its weight. So, although admitted, the defence can cross-examine and give evidence about matters not accepted by the judge in order to destroy or minimize the weight of the confession [*R v. Murray*, 1951, 1 KB 391].

What is a "Confession".—The expression "confession" has not been defined in the Evidence Act. Stephen in his Digest of the Law of Evidence, Art 21, defines it thus: "*A confession is an admission made at any time by a person charged with crime, stating or suggesting the inference that he committed the crime.*" This definition was adopted by MAHMOOD J, in *R v. Babu Lal*, 6 A 500, 539 and in *R v. Nana*, 14 B 260, 263 [see also *R v. Meher Ali*, 15 C 589; *R v. Cunna*, 22 Bom LR 1247: 59 IC 324 : *R v. Pandharinath*, 6 B 34; *R v. Bhairab*, 2 CWN 702, 707; *Muthu Kumaraswami, v. R*, 35 M 397 [judgment of ABDUR RAHIM, and SUNDARA AYYAR JJ, at pp 489, 583]; but not by STRAIGHT J, in *R v. Jagrup*, 7 A 646 : 1885 AWN 131, who held (when interpreting s 30) that only statements which are direct acknowledgments of guilt should be regarded as confessions and it cannot be construed as including a mere inculpatory admission which falls short of being an admission of guilt. Similar opinion was also expressed by CHANDAVARKAR J, in *R v. Santya Bandhu*, 11 Bom LR 633, *post*. As to Stephen's definition, STRAIGHT J, in *R v. Jagrup, sup*, said that "it was written in view of a proposal for preparing a Code of Evidence for England, and it can scarcely be regarded therefore as an authority to guide me in construing an Act passed by the Legislature of this country in 1872, though I may add that I do not find anything in Mr Justice Stephen's definition at variance with the view I take".

It must be said that the view taken by STRAIGHT J, is in accord with reason and authority. Confessions have in various authoritative decisions been held to be direct or express acknowledgments of guilt. When carefully analysed, Stephen's definition does not appear to be at variance with the view. It, however, includes both 'plenary' and 'not plenary' confessions. Direct acknowledgment of guilt, *eg*, 'I killed' is a plenary confession. A confession is not plenary when the inculpatory statements although they fall short of actual admissions of guilt, nevertheless give rise to a

presumptive inference of their truth, and they are, therefore, as Best says, in the nature of circumstantial evidence (Best 11th Ed s 524). It is important to remember that not *every* inculpatory statement is a confession but only such as falls short of being an admission of guilt, and from which an inference of guilt follows [see *Hakiman v. R*, 20 PR 1905 : 51 PLR 1905 : *R v. Bhairab*, 2 CWN 702, 707]. Perhaps it would be more correct to say that the incriminating fact in order to be a confession should directly suggest the guilt of the crime charged. In any case a "not plenary" confession cannot strictly come within the term "confession", as it is not a direct acknowledgment of guilt or at any rate an admission of substantially all the facts that constitute the offence.

As GRANGR J, said in *State v. Novak*, 109 Ia 717: 79 NW 465 (Am):—

> "Inaccurate use of such words as 'confessions', 'admissions' and 'declarations' has led to some confusion in the cases; but, on authority and reason, there is a clear distinction between a confession and an admission or declaration, unless the admission or declaration has within it the scope and purpose of a confession, in which its distinctive feature, as an admission or declaration, is lost in the term 'confession'. A confession is a voluntary admission or declaration by a person of his agency or participation in a crime ..... To make an admission or declaration a confession it must in some way be an acknowledgment of guilt."

Phipson remarks, that if the words "*at any time*" (in Stephen's definition) include statements made *before* the crime, they seem to be too wide, since such statements, *eg* as to his motives and intentions, his preparations or his references to prior relevant crimes, (see ss 6, 7, 8, 9, 14, 15) are admissible or not, irrespective of the above limitations (Phip 8th Ed p 248). In *S v. Reinhart*, 26 Or 466 (Am) BEAN J, said: "A 'confession' in a legal sense is restricted to an acknowledgment of guilt made by a person *after an offence* has been committed, and does not apply to a mere statement or declaration of an independent fact from which such guilt may be inferred."

According to Wigmore: "A confession is *an acknowledgment in express words*, by the accused in a criminal case, *of the truth of the guilty fact charged or of some essential part of it*. It is to this class of statements only that the present principle of exclusion applies." In this sense, therefore, there are in particular three things which fall without the meaning of the term "confession" and are thus not affected in any way by the present rules, namely;—(*1*) *Guilty conduct*: The accused's conduct, therefore, consisting of fleeing from arrest, concealing the traces of crime, fabricating evidence, suppressing testimony, and other behaviour indicative of a guilty consciousness, falls without the present rules. (*2*) *Exculpatory statements*, denying guilt, cannot be confessions. This ought to be plain enough, if legal terms are to have any meaning and if the spirit of the general principles is to be obeyed. (*3*) *An acknowledgment of a subordinate fact, not directly involving guilt*, or in other words not essential to the crime charged, is not a confession. (*4*) Of course the present rules of exclusion have no application to a confession *made in open court before* judge or jury on the trial of the issue [Wig s 821].

—Meaning of Confession Settled.—Although judicial opinion was not unanimous as to the exact meaning of 'confession', the reported cases show that Stephen's definition was up to 1939 generally accepted and acted upon. The words "suggesting the inference that he committed the crime" in that definition (*ante*), created some difficulty and confusion in realising the true import of the term 'confession'. The position has now been clarified by a pronouncement of the Judicial Committee in *Pakala Narayana v. R*, 66 IA 66 : A 1939 PC 47 : 43 CWN 473 481-82 : 18 P 243.

(relied on by the Supreme Court in *Palvinder v. S*, A 1952 SC 354, 357: 1953 SCR 94, 104 : 1953 CrLJ 154, *Om Prakash v. S*, A 1960 SC 409, 412 and *Veera v. S*, A 1976 SC 1167); where LORD ATKIN said:—

> "No statement that contains self-exculpatory matter can amount to a confession, if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed. Moreover, a confession *must either admit in terms the offence, or at any rate substantially all the facts which constitutes the offence*. An admission of a gravely incriminating fact, even a conclusively incriminating fact, is not of itself a confession, *eg* an admission that the accused is the owner of and was in recent possession of the knife or revolver which caused a death with no explanation of any other man's possession. Some confusion appears to have been caused by the definition of confession in Art 22 of Stephen's "Digest of the Law of Evidence" as 'an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed that crime'. If the surrounding articles are examined it will be apparent that the learned author, after dealing with admissions generally, is applying himself to admissions in criminal cases, and for this purpose defines confessions so as to cover all such admissions..... The definition is not contained in the Evidence Act, 1872, and in that Act *it would not be consistent with the natural use of language to construe confession as a statement by an accused 'suggesting the inference that he committed, the crime'*."

By this authoritative definition, a confession must either be an express acknowledgment of guilt of the offence charged certain and complete in itself, or it must admit substantially all the facts which constitute the offence. To distinguish a confession from an admission one test would be whether the statement confessing guilt is alone sufficient to convict the person charged with the commission of the offence; if it is, it is a confession. If however, it falls short of a plenary acknowledgment of guilt but the statement is of some incriminating fact or facts which taken along with other evidence tend to prove his guilt; it is an admission. In *Om Prakash v. S, sup* (p 413) the Supreme Court observed: "Their Lordships of the Privy Council has laid down that unless there be a plenary admission of guilt, the facts must be interpreted reasonably and an admission of all the facts which constitute the offence should be present".

The following do not fall within the meaning of confessions:—

(*i*) Self-exculpatory or self-defending statements negativing the offence charged.

(*ii*) A gravely incriminating fact; even a conclusively incriminating fact.

(*iii*) Admissions of other incrimination facts or circumstances suggesting the inference of commission of crime.

(*iv*) Guilty conduct, eg absconding, destroying or concealing traces of crime &c.

'Confession', is a statement made by an accused which must either admit in terms of the offence, or at any rate substantially all the facts which constitute the offence. The dictionary meaning of the word 'statement', is "act of stating; that which is stated; a formal account, declaration of facts etc.". The word 'statement' includes both oral and written statement communication to another is not however an essential component to constitute a 'statement'. An accused might have been overheard uttering to himself or saying to his wife or any other person in confidence. He might have also uttered something in soliloquy. He might also keep a note in writing. All

the aforesaid nevertheless constitute a 'statement'. If such statement is an admission of guilt, it would amount to a confession whether it is communicated to author or not. Therefore extra-judicial confession need not be addressed to any particular person. What weight to be attached to such evidence or statement is however a different matter. [*Luku Paike v. State of Orissa*, 1995 Cri LJ 1207 (Ori)]. The fact that the accused told to the prosecution witness that the bite mark was produced as a result of the bite by the deceased while she was strangulated does not constitute confession. But this statement would be admissible under section 21. [*N. Rajan v. State*, 1994 Cri LJ 322, 326 (Ker)]. Statement of the accused that he was in the company by other accused cannot be construed as his involvement in the crime. [*Valiya Veetil Ashraf v. State*, 1994 Cri LJ 555, 561 (Ker)].

The expression "confession" is not defined in the Indian Evidence Act. Before the decision by the Judicial Committee in *Pakala Naraina Swamy v. Emperor*, A 1939 PC 47 : (1939) 40 Cri LJ 364 the Courts in India adopted the definition of "confession" as given in Article 22 of Stephens Digest of the law of evidence. According to that definition 'confession' is an admission made at any time.

The above observations received approval of the Apex Court of the country in *Palvinder Kaur v. State of Punjab*, A 1952 SC 354 : 1953 Cri LJ 154 and *State of U.P. v. Deoman Upadhyaya*, A 1960 SC 1125 : 1960 Cri LJ 1504. In *Aghno Nagesia v. State of Bihar*, A 1966 SC 119 : 1966 Cri LJ 100 the expression 'confession' was defined by the Apex Court of the country and also the manner of its use by the prosecution as under at Page 123, of A:

"Shortly put, a confession may be defined as an admission of the offence by a person charged with the offence. A statement which contains self exculpatory matter cannot amount to a confession, if the exculpatory statements is of some fact which, if true, would negative the offence alleged to be confessed. If an admission of an accused is to be used against him, the whole of it should be tendered in evidence and if part of the admission is exculpatory and part inculpatory, the prosecution is not at liberty to use in evidence the inculpatory part only. (See *Hanumant Govind v. State of M.P.*, 1952 SCR 1091 at p. 1111 : A 1952 SC 343 : 1953 Cri LJ 129 at p. 350 and 1953 SCR 94 : A 1952 SC 354. The accused is entitled to insist that the entire admission including the accused is entitled to insist that the entire admission including the exculpatory part must be tendered in evidence. But, this principle is of no assistance to the accused where no part of his statement is self exculpatory and the prosecution intends to use the whole of the statement against the accused."

Section 24 of the Evidence Act excludes proof of confession made by an accused if it appears to the Court to have been caused by an inducement, threat or promise from a person in authority. Then, Section 25 says that no confession made to a Police Officer shall be proved as against a person accused of an offence. Section 25 also excludes confession by accused while in custody of police unless it be made in the immediate presence of a Magistrate. On behalf of the appellant, therefore, it is contended that the entire disclosure made on telephone is a confession to a Police Officer and is not provable against the appellant. It is true that a confession made to a Police Officer under any circumstances is not admissible in evidence against him. It covers a confession made when he was free and not in police custody, as also a confession made before any investigation has begun. The expression "accused of any offence" covers a person accused of an offence at the trial whether or not he was accused of the offence when he made the confession [See *A. Nagesia's* case (*supra*)]. However, if any information is given by the accused himself, the fact of his giving the information is admissible against him as evidence of his conduct under Section 8

of the Evidence Act. If the information is a non-confessional statement, it is admissible against the accused as an admission under section 21 of the Evidence Act and is relevant, but a confessional information to a police officer cannot be used against the accused in view of section 25 of the Evidence Act. [*State of Rajasthan v. Vinod Malhotra*, 1997 Cri LJ 1488, 1496, 1497 (Raj)]. Search list containing accused's signature amounts to confession [*Public Prosecutor v. Chew Yoo Choi*, (1990) 2 Malayan LJ 444 (Kuala Lumpur HC)].

If the self-exculpatory matter in a confession is of some fact which if true would negative the offence alleged to be confessed, it cannot amount to a confession [*Pakala Narayana v. R*, 66 IA 66; *Palvinder v. S*, A 1952 SC 354 : 1953 SCR 94; *Jasoda v. Sailendra*, A 1957 C 372]. The court can discount exculpatory statement while accepting the confession [*Ong Kin Hong v. Public Prosecutor*, (1990) 3 Malayan LJ 76 (Singapore CCA)]. A confession must relate to the particular crime charged. Any admission which is not connected with any of the ingredients of the offence charged (*eg* confessional statements relating to other dacoities previous to the dacoity which is the subject of charge) would not amount to a confession [*Goma Rama v. R*, A 1945 B 142]. When the confessional statement contains the narration of events other than the alleged incident, it cannot be relied upon [*Rajkishore Sahu v. State*, 1983 Cri LJ 1715, 1716 (Orissa) : (1983) 56 Cut LT 139]. Admissions made in answer to the charge are not admissible where the accused claims trial [*Ujaanak Undol v. R*, 1956 SCR 54 (SC Sarawak)].

A statement, either oral or written, whether communicated or not, admitting guilt is a confession of guilt [*Sahoo v. S*, A 1966 SC 40]. Acceptance of offer of compositions does not amount to admission of guilt [*Re, Lim Chor Pee*, (1991) 2 Malayan LJ 154 (Singapore HC)].

For meaning of 'confession' see also *Lim Young Sien v. Public Prosecutor*, (1994) 2 SLR 257 (Singapore CA); *Abdul Rashid v. Public Prosecutor*, (1994) 1 SLR 119 (Singapore CA).

Confession and Admission.—Much of the confusion relative to the exact meaning of the word 'confession' is the result of failure to distinguish between 'admission' and 'confession'. A statement or a declaration of an independent fact from which guilt may be inferred is not a confession. It is an admission of a particular fact pertinent to the issue and evidence of that fact, but it is not 'confession'. The distinction drawn between admission and confession in criminal law is a substantial one [see *post* "*Distinction between Admission and Confession*"]. Confession involves a voluntary acknowledgment of guilt. To make an admission or a declaration, a confession, it must amount to a clear acknowledgment of guilt. The following observations of HOLLOWAY J, in an American case puts the matter clearly :

> "The distinction between a confession and an admission, as applied in criminal law, is not a technical refinement, but based upon the substantive differences of the character of the evidence deduced from each. A confession is a direct acknowledgment of guilt on the part of the accused, and, by the very force of the definition, excludes an admission, which, of itself, as applied in criminal law, is a statement by the accused, direct or implied, of facts pertinent to the issue, and tending, in connection with proof of other facts, to prove his guilt, but of itself is insufficient to authorise a conviction" [*State v. Guie*, 56 Mont 485, cited Wig s 821].

Distinction Between Admission and Confession. [What the Latter Includes]. —The term *confession* in s 24 means a confession made by an accused person which it is proposed to prove against him to establish an offence. For such a purpose, a confession might be inadmissible, which yet for other purposes would

be admissible as an admission under s 18 against the person who made it (s 21) in his character of one setting up an interest in property, the object of litigation, or judicial enquiry and disposal [*R v. Tribhuban*, 9 B 131, 134]. It would thus appear that a confession is a species of which admission is the genus [*Aghnoo v. S*, A 1966 SC 119]. In other words, all admissions are not confessions but all confessions are admissions. Only voluntary and direct acknowledgment of guilt is a confession. But when a confession falls short of actual admission of guilt, and is not taken down according to law, it may nevertheless be used as evidence against the person who made it, as an admission under s 21 [see *R v. Nilmadhab*, 15 C 595 FB, where PETHERAM CJ, observed as follows: "If the contents of the document did not amount to a confession, the document (recording the confession) would be relevant as an admission under s 21 of the Evidence Act"]. The Evidence Act *draws a distinction between admissions and confessions* [as pointed out in *R v. Macdonald*, 10 BLR Ap 2; *R v. Dabbee Pd*, 6 C 530; *R v. Pandharinath*, 6 B 34; *R v. Nana*, 14 B 260; *R v. Babulal*, 6 A 509; *R v. Jagrup*, 7 A 646: 15 C 389; *R v. Nilmadhub*, 15 C 595 FB and *Ambar v. R*, A 1929 C 539] and the nature of the distinction was considered in these cases. In *R v. Santya Bandhu*, 11 Bom LR 633, the distinction between an admission and confession has been thus explained: "The word "*confession*" as used in the Act, must not be construed as including a mere inculpatory admission, which falls short of being an admission of guilt. The terms of section 30 do not countenance the construction of a statement into a confession by a process of inferential reasoning. It is one thing to make statements giving rise to an inference of guilt and another thing to confess a crime; see also *R v. Jagrup*, 7 A 646. The contrary view in *R v. Bhairab*, 2 CWN 702, 707, was based on Stephen's definition of 'confession'. Confession as now explained in *Pakala Narayan v. R*, (*ante*) endorses the opinion of *R v. Jagrup and R v. Santya Bandhu, sup.*

Admission in a civil suit that a document is genuine cannot in the forgery case be regarded as confession at all [*Ambar v. R*, A 1929 C 539]. An admission explained away is like a retracted confession [*R v. Bukhtawar*, A 1927 L 540]. When an accused was asked by a magistrate whether he had stolen a mare and he was arrested while riding it and he replied "yes," it was a composite question and the answer did not amount to a confession [*Harni v. R*, A 1927 L 650].

Confession is an admission by an accused person in a criminal case. The making of a counterfeit coin is not a *statement* and hence evidence of persons who say that the accused made counterfeit coins in their presence is not barred by ss 24-26 [*Brijnandan v. R*, A 1931 A 9 : 133 IC 154].

When a Captain told the accused to make a clean breast and the latter replied: "If I do, I shall implicate clerks, Mahomedans &c." it was held to be confession [*Smith v. R*, 43 IC 605. The decision is based on Stephen's definition]. A statement of a man who takes particular care at any stage to show that he did not take part in the offence, does not amount to a confession [*Shyam v. R*, 156 IC 978].

When a person admits that he was in the company of dacoits, but never says that he committed dacoity, the statement is not a confession [*Adhik v. R*, A 1942 P 156].

How Far Confession is Relevant Against Maker.—"As regards the question, whether and how far a confession may be evidence against the person making it, I should like only to add that what s 21 makes relevant is an admission and while an admission includes a confession, the confession must still be an admission within the meaning of s 17 Evidence Act, before it can be held to be relevant under s 21" [*per* BISWAS J, in *Nitai v. R*, A 1937 C 433, 444-45 SB].

"Made by an Accused Person".—The expression does not mean a person accu-sed *in the proceeding before the court.* The meaning is that the person must be "an accused person" at the time of the confession [*per* SUNDARA AYYAR, J, in *Muthu Kumaraswami v. R*, 35 M 397, 575; see also *R v. Jadab*, 4 CWN 129]. The section will apply only to a confession made by a person who was at that time an accused person. [*P S Barkathali v. Director of Enforcement*, A 1981 Ker 81, 84]. The words "accused person" in ss 24-26 include any person who subsequently becomes an accused, provided that at the time of making the statement, criminal proceedings were in prospect [*Smith v. R*, 19 Cri LJ 189 : 43 IC 605; *R v. Bhagwandass*, 1941 Bom 27 : A 1941 B 50; see also *Pakalanarayana v. R*, 43 CWN 473, 481-82 : 18 P 234 : A 1939 PC 47] and it does not predicate a formal accusation against him at the time of making the statement sought to be proved as a condition of its applicability. [*The Deputy Director Enforcement Directorate Madras v. P Mansoor Mohamed Ali Jinnah*, 1989 Cri LJ 2138, 2149 : 1989 Mad LW (Cri) 337]. Formal accusation or custody is not necessary [*In re Hiran Miya*, 1 CLR 21]. S 24 would apply even if the person who is said to have made the confession was not an accused at the time he made it. It is sufficient if he ultimately comes to be an accused with reference to the charge. Though the statements of an approver may be given in evidence against him under s 339(*2*) [now s 308(*2*)] Cr P Code, it cannot be said that the operation of s 24 is excluded [*R v. Cunna*, 22 Bom LR 1247 : A 1920 B 270]. Other decisions also hold that the words include a person who subsequently becomes an accused [*S v. Memon*, A 1959 B 534; *Amin v. S*, A 1958 A 293; *Surjan v. R*, 48 Cri LJ 651 : 230 IC 431; *Viran Wali v. S*, A 1961 J&K 11]. A statement made by a person to a customs officer making an enquiry under s 108 Customs Act is not a statement made by an accused person [*Percy v. S*, A 1971 SC 1087; *Romesh v. S*, A 1970 SC 940]. "Accused person" in s 24 and the expression "a person accused of any offence" in ss 25 and 27 have the same connotation and describe the person against whom evidence is sought to be led in a criminal proceeding. No formal accusation is predicated [*S v. Deoman*, A 1960 SC 1125 : 1961, 1 SCR 14; see notes to ss 25 and 27, *post*].

A confession though made during the course of investigation in another case is relevant [*Pub Pro v. Kandikatla*, A 1943 M 661; *In re Kamakshi*, A 1943 M 89 : 1943 Mad 456].

In the case of a bride burning, a confession was made before the village panchayat by a large number of persons of whom the accused was only one. Who among them had burned the bride was not mentioned. Such confession was held to be not capable of being used against any person specifically. It was not a confession in any sense of the word. *Kishan Lal v. State of Rajasthan*, AIR 1999 SC 3062.

Confession by Signs.—"Under this head we may group direct admissions of guilt in the form of affirmative gestures, nods or signs made in response to leading questions or to questions which assume the guilt of the person addressed. An affirmative nod in response to direct accusation of crime is no less a confession than an oral statement. If the accusation is coupled with a threat or a promise, evidence of the nod or gesture should be rejected as an attempt to accomplish by indirection what cannot be done directly. Actions speak louder than words. Express gestures often manifest more clearly the emotion of the mind that the most forcible and vehement language. A direct confession by an act is therefore inadmissible whenever the spoken or written word would be excluded" [Underhill, Cr Ev s 141]. Acknowledgment of guilt by signs or gestures may strictly come within confession as they may be regarded as verbal statements [see *R v. Abdulla*, 7 A 385 FB; *Chandrasekhar v. R*, 1937 AC 220 : 41 CWN 513 PC and notes to s 32 *post*].

Deaf and dumb persons, if not mentally defective, convey their thoughts by signs or motions and are competent witnesses. So other persons may at times express themselves by signs. But the danger of interpreting signs or gestures as confessions lies in the fact that the maker may not be able to communicate intelligence to another person and is liable to be misunderstood. The other person may not also be able to convey his meaning to the accused by signs or words intelligible to him. People of all

nationalities do not convey the same idea by the same signs or motions. Moreover there is the danger of making acknowledgments of guilt in answer to leading question imperfectly understood. In this connection it may be mentioned that dying declaration under s 32 (v *post*) communicated by signs are admissible. In any case, if signs or motions indicative of acknowledgment of guilt are regarded as confessions, the indication must be positive and definite and proceed from a thorough appreciation of its meaning. Thus, where an accused not shown to know English is asked in broken English whether he committed rape and he nods and *salams* in reply, it did not amount to confession for he might have completely misunderstood the questions and conveyed a quite different statement [*R v. Soopi*, A 1930 L 84].

Confession Induced by Hypnotism or Drug.—Confession made while talking in sleep though not legal evidence may furnish indicative evidence (see section 29, *post*). It is doubtful whether a confession by a person who narrates his former experiences under a state of hypnotism or mesmerism can be accepted as legal evidence. Scopolamine Hydrobromide—(popularly called truth serum) is a drug which induces a state of unconsciousness while retaining mental faculties. It is claimed that during this unconsciousness the answers given by the subject to his past doings are correct. The drug is being experimented in America by medical men and crime detection laboratories (see Wig ss 841a, 998).

Confessional FIR.—A statement in an FIR can normally be used only to contradict its maker as provided in section 145 of the Evidence Act or to corroborate his evidence as envisaged in section 157 of the Act. Neither is possible in a criminal trial as long as its maker is an accused in the case, unless he offers himself to be examined as a witness. [*B.A. Ramaiah v. State of A.P.*, A 1997 SC 496 : 1996 Cri LJ 4463]. In *Nisar Ali v. State of U.P.*, A 1957 SC 366 Kapur, J. speaking for three-Judge Bench observed:

> "A first information report is not a substantive piece of evidence and can only be used to corroborate the statement of the maker under s. 157. Evidence Act, or to contradict it under s. 145 of that Act. It cannot be used as evidence against the maker at the trial if he himself becomes an accused, nor to corroborate or contradict other witnesses. In this case, therefore, it is not evidence."

However another bench of two judges in *Faddi v. State of M.P.*, A 1964 SC 1850 has stated that if the FIR given by the accused contains any admission as defined in section 17 of the Evidence Act there is no bar in using such an admission against the maker thereof as permitted under section 21 of the Act, provided such admission is not inculpatory in character. In the Judgment their Lordships distinguished *Nisar Ali's* case (A 1957 SC 366) (*supra*) in the following lines (at p. 1853 of A):

> "But it appears to us that in the context in which the observation is made and in the circumstances, which we have verified from the record of that case, that the Sessions Judge had definitely held the first information report lodged by the co-accused who was acquitted, to be inadmissible against Nisar Ali and that the High Court did not refer to it all in its judgment, this observation really refers to a first information report which is in the nature of a confession by the maker thereof. Of course, a confessional first information report cannot be used against the maker when he be an accused and necessarily cannot be used against a co-accused."

However, a caution has been struck by the Supreme Court in *Aghnoo Nagesia v. State of Bihar*, A 1966 SC 119 that when the statement in the FIR given by an

accused contains incriminating materials and it is difficult to sift the exculpatory portion therefrom the whole of it must be excluded from evidence. The legal position, therefore, is this:

> "A statement contained in the FIR furnished by one of the accused in the case cannot, in any manner, be used against another accused. Even as against the accused who made it, the statement cannot be used if it is inculpatory in nature nor can it be used for the purpose of corroboration or contradiction unless its maker offers himself as a witness in the trial. The very limited use of it is as an admission under section 21 of the Evidence Act against its maker alone unless the admission does not amount to confession." [*B.A. Ramaiah v. State of A.P.*, A 1997 SC 496 : 1996 Cri LJ 4463, 4465].

Judicial and Extra-Judicial Confession.—Confessions may be divided into *judicial* and *Extra-Judicial. Judicial confessions* are those which are made before the magistrate or in court, in the due course of legal proceedings; and it is essential that they be made of the free will of the party, and with full knowledge of the nature and consequences of the confession. Of this kind are the preliminary examinations taken in writing by the magistrate pursuance to statute; and the plea of guilty to an indictment, made in open court. Either of these is sufficient by itself to support a conviction, though followed by a sentence of death, they both being deliberately and solemnly made under the protecting caution and oversight of the judge. Even on trials for treason, or misprision of treason, where the law in its clemency affords to the accused unusual protection, a "willing confession without violence in open court,". renders it unnecessary to call witnesses in support of the charge [Tay s 856; see also *Sumitra v. R*, A 1940 N 287 : 190 IC 273; *R v. Bhattan*, 12 WR Cr 49; *R v. Balwant*, 11 Bom HC 137]. A Judicial confession recorded by a magistrate proves itself under s 80.

S 164 of the Cr P Code, deals with the mode of recording confessional statements of the accused made during *investigation*, or at any time afterwards, but before the commencement of the preliminary enquiry or trial. S 281 deals with examination of accused in *inquiries and trials*. See also s 313. S 463 is intended to cure any formal defect in recording the confession by taking oral evidence. S 80 of the Evidence Act provides that every document purporting to be a confession or statement by an accused and purporting to be signed by a magistrate is presumed to be genuine.

Extra-judicial confessions are those which are made by the party elsewhere than before a magistrate, or in court; this term embracing not only express confessions of crime, but all those admissions and acts of the accused from which guilt may be implied. All voluntary confessions of this kind are receivable in evidence, on being proved like other facts [Tay s 867]. The evidence of extra-judicial confession in the very nature of things is a weak piece of evidence [*Jagta v. S*, A 1974 SC 1545; *S v. Bhajan*, A 1975 SC 258]. It is not open to any Court to start with a presumption that extra-judicial confession is a weak type of evidence. It would depend on the nature of the circumstances, the time when the confession was made and the credibility of the witnesses who speak to such a confession. [*Narayan Singh v. State of M.P.*, A 1985 SC 1678, 1680 : 1985 Cri LJ 1862].

Extra-judicial confessions should be proved in the same way as other admissions or statements by the evidence of the persons to whom they were made or who heard them made or by the documents (if any) in which they were recorded. Like judicial confessions made before a magistrate, an extra-judicial confession may also be obtained by coercion, promise of favour, false hope, &c. It has the further infirmity that in most cases owing to the absence of any writing the exact words by the

accused cannot be known and the witness may have misunderstood or may not have remembered or reported accurately. For this reason extra-judicial confessions are not considered of much value unless the witness reporting can be depended upon from all points of view and the acknowledgment of guilt is clear and unequivocal.

Before a confession is relied upon, it must be clear whether it is to be put in the category of judicial or extra-judicial confessions. The confession in this case was before the members of the Panchayat. *Kishan Lal v. State of Rajasthan*, (1999) Cri LJ 4070 : AIR 1999 SC 3062.

—To Whom Extra-Judicial Confession May be Made.—An extra-judicial confession may properly be made to any person, or collection or body of persons. It is not even necessary that the statement should have been addressed to any definite individual. It may have taken the form of a prayer. The great majority of confession of guilt are naturally received by persons in authority, upon the arrest of the accused or while he is in custody. In the case of criminal breach of trust by the accused-employee of State Transport Corporation, the accused is alleged to have made a confession to his superior and that superior officer was examined after the entire prosecution evidence was over. That confessional statement was never handed over to the police during the investigation. This confession cannot be accepted since it was given in consideration of saving his job and it had also been retracted. [*Jitendra Nath Bose v. State*, 1991 Cri LJ 922, 938 (Cal)]. Though it is in connection with confession so made that the voluntary character of the statement is most carefully scrutinised, no reason exists why the officer should not testify as to what has been said to him. The prosecuting magistrate or even the trial judge are equally competent as witnesses to the making of a voluntary confession by one accused of crime [Chamb H B, s 614]. Extra-judicial confessions are admissible under s 21.

The extra-judicial confession made by accused before the Administrative Officer of the village and in the presence of Administrative Officer of another village, before he was arrested by police, is admissible and valid in its entirety. [*Arjunan v. State*, 1993 Cri LJ 3113, 3131 (Mad)]. A confession made by a person at an *arrack* shop consuming some liquor to another customer who came there by chance at that very time was held to be not reliable. *C.K. Raveendran v. State of Kerala*, (2000) 1 SCC 225 : AIR 2000 SC 369. That the accused should take shelter in the house of his brother-in-law and make a clean breast of things could not be ruled out. The delay of 20 days in recording the statement of the person to whom the confession was made was properly explained. He had no motive to implicate the accused falsely. The confession was held to have been rightly accepted. *Ram Khilari v. State of Rajasthan*, AIR 1999 SC 1002 : 1999 Cri LJ 1450.

An extra-judicial confession to made to one who is not a person in authority and which is free from any suspicion as to its voluntary character and has also a ring of truth in it, is admissible in evidence and deserves to be acted upon. [*Poolin Haldar v. State*, 1996 Cri LJ 513, 520 (Cal)]. Extra-judicial confession made before stock witness who was casually knowing the accused is not acceptable. [*Tarseem Kumar v. Delhi Admn.*, A 1994 SC 2585, 2590]. Extra-judicial confession alleged to have been made to a person, who was a stock witness of police and knew the accused only casually being a resident of a locality where the accused was living about 14 years earlier, is not reliable. [*Tarseem Kumar v. Delhi Admn.*, A 1994 SC 2585 : 1995 Cri LJ 470, 476]. Extra-judicial confession must be addressed to somebody and not the way one goes on shouting in the street that he/she had killed someone. Where the accused had not made a confession to the witness, who was a child witness aged 14 years, but on the other hand, the witness had heard the accused while passing by that way giving out to have killed the deceased, it cannot be considered as an extra-judicial confession. [*Jadumani Khanda v. State*, 1993 Cri LJ 2701, 2703 (Ori)]. Where the witness before whom the extra-judicial confession was said to have been made by the accused, was neither relative of the accused nor had he any intimate relations with the accused, and therefore

there was no question of making a clean breast of the guilt by the accused before the witness, the evidence of the extra-judicial confidence does not inspire confidence. [*Jailash v. State of Rajasthan*, 1995 Cri LJ 3111, 3117 (Raj)]. Where joint confession was made by all the accused persons to a person with whom they had no intimacy and it was not disclosed as to who out of the accused persons disclosed the facts relating to the occurrence because all of them could not state at the same time the same words and no reason was given for the confession and for the person selected for that purpose, confession to such a person who was not even sure about the place where the accused persons contacted him is devoid of any credibility. [*Niranjan Lal v. State of Haryana*, 1995 Cri LJ 248, 252 (P&H)].

The fact that a statement made to the police was heard by other persons present only incidentally will not make it an extra-judicial confession. Even if it be so regarded, it will be excluded by s 26 [*Abdul Kader v R*, 50 CWN 88 : A 1946 C 452]. Extra-judicial confession made by the accused before the military authorities can be relied on if the same is made voluntarily and without any threat or coercion [*State of Maharashtra v. Vinayak Shivajirao Pol*, 1998 Cri LJ 306 (Bom)]. Extra-judicial confession made by the accused to his real elder brother soon after the incident is reliable. The fact that the dead body was lying in the room of the accused is corroborative to the fact of extra-judicial confession [*Mayaram v. State of MP*, 1998 AIHC 368 (MP)].

The persons accused of murder had no particular relationship or connection with the chairman of the Market Committee for the purpose of confessing before him with a request that he should produce them before the police. The Chairman did not communicate it to the widow of the deceased though living nearby and though he said that he had informed the IO, but the IO had not used that information anywhere. It was held that these circumstances showed that the person in question had not made any confession. *Surinder Kumar v. State of Punjab*, AIR 1999 SC 215 : 1999 Cri LJ 267. See also *Dwarkadas Gehanmal v. State of Gujarat*, (1999) 1 SCC 57 : 1998 (8) JT 100, the person to whom confession was made did not disclose it anywhere for 5 days, he also suspected the *bona fides* of the accused in reference to his wife, held confession unnatural.

—Effect of Extra-Judicial Confession.—Whether, on ordinary indictment for felony or misdemeanour, *extra-judicial confessions*, *uncorroborated* by any other proof of the *corpus delicti*, are of themselves sufficient to justify a conviction of the prisoner, has been gravely doubted. In each of the English cases usually cited in favour of the sufficiency of this evidence, some corroborative circumstances will be found [*R v. Eldrige*, 1821, R & R 440, and other cases cited in Tay s 868, fn]. In the United States, the prisoner's confession, when the *corpus delicti* is not otherwise proved has been held insufficient to warrant his conviction; and this opinion certainly best accords with the humanity of the criminal law, and with the great degree of caution applied in receiving and weighing the evidence of confessions in other cases. Moreover it seems countenanced by approved writers on this branch of the law (Tay s 868 and Greenleaf, 14th Ed, s 217 citing various American authorities; see also Wig ss 2070-2071).

If the evidence about extra-judicial confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive for attributing an untruthful statement of the accused; the words spoken to by the witness are clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it the extra-judicial confession can be accepted and can be the basis of a conviction. [*State of U.P. v. M K Anthony*, A 1985 SC 48, 57 : 1985 Cri LJ 493]. In extra-judicial confessions, court should require the witness to give the actual words used by the accused as nearly as possible [*R v. Soobjan*, 10 BLR 332; *Sultan v. R*, 151 IC 984 : A 1934 S 119; *Gaya Pd v. S*, A 1957 A 459; *Heramba Brahma v. State*

of Assam, A 1982 SC 1595, 1598 : 1983 Cri LJ 149 (SC) : (1982 Cri LJ (NOC) 127 (Gau) **Reversed**); *Baldev Raj v. State of Haryana*, A 1991 SC 37, 39; *Arjun Sahu v. State of Orissa*, 1988 Cri LJ 1086, 1089 : (1987) 1 Crimes 678 (Ori) (DB); *Bhanwar Singh v. State*, 1988 Cri LJ 1054, 1056 : (1987) 2 Raj LR 233 (Raj) (DB); *Santosh v. State of Kerala*, 1991 Cri LJ 570, 581 (Ker)]; but it is not an invariable rule [*Mulk Raj v. S*, A 1959 SC 902; *Moti Gouduni v. State*, 1982 Cri LJ 2342, 2345 (Orissa)], and the court may hold the confession proved even in cases where the evidence gives the substance of the statement of the accused if the court believes it. But a mere general statement that an accused had confessed is too uncertain [*Nur Ali v. R*, 5 L 140 : A 1924 L 498; *Krishna v. S*, A 1958 P 166]. There is no rule that the extra-judicial confession is not to be accepted if the witnesses give the substance of it and not the actual words. It is the substance of the extra-judicial confession which really matters [*Inder Dass v. State of Rajasthan*, 1985 Cri LJ 1416, 1421 (Raj) (DB)]. Confession if oral must be assessed carefully and voluntary nature of confession must also be considered before it can be acted upon. In this case confession before village munsif not relied upon [*Veeral, In re*, A 1970 M 289]. Extra-judicial confessions must be proved by evidence of the most reliable character [*R v. Jugia*, 17 P 369 : A 1938 P 308]. Where a prosecution witness stranger to the accused deposed that he made the disclosure about the extra-judicial confession that the accused committed a mistake by killing his brother for the first time in the police station and that he never told about this to any one else though he met a number of persons on the date of occurrence, it was unsafe to rely on his evidence [*Lakhanpal v. S*, 1979 SC 1620]. The conduct of the witness to whom the confession was made, in keeping silent all the time before he swore affidavit reflects adversely on his 0credibility [*Dharambir v. The State*, 1982 Cri LJ NOC 4 : 1982 Chand LR (Cri) 31 (Delhi)]. Admission of guilt to villagers may be as strong evidence as confession before a magistrate and requires no corroboration [*R v. Badal*, A 1928 O 393 : 112 IC 897; *Seo Ratan v. R*, A 1928 O 157; *Munnu v. R*, A 1931 O 415]. The extra-judicial confession first made before witnesses and then before the villagers can be accepted [*Belerian Mini v. State of M.P.*, 1985 Cri LJ 1394, 1396 (MP) (DB)]. When the accused is produced at the police station with bloodstained knife and he makes a confession, it is a strong circumstance against the accused [*Ramdass v. State*, 1985 Cri LJ NOC 27 (Mad) (DB)]. When the accused was surrounded by 200 to 300 people when he gave extra-judicial confession, it cannot be considered to be voluntary and it cannot be relied on without corroboration [*Sasanka Sekhar v. State*, 1990 Cri LJ (NOC) 168 (Cal)]. When the extra-judicial confession come through 6 witnesses having no reason to falsely implicate the accused and it was corroborated by circumstantial evidence, it can be taken that the confession is of voluntary character [*Jarina Khatun v. State of Assam*, 1992 Cri LJ 733, 735 (Gau)]. If the person before whom the confession is made is a close relative of the person making confession, or has possibility of being in his confidence, the same can be a piece of evidence to be utilized against the accused [*Arjuna Pradhan v. State*, 1992 Cri LJ 3614, 3616 (Ori)]. But evidence of such confession must be as closely scrutinised as all other evidence in a case of murder [*Tauli v. R*, A 1929 O 272]. Confession made while not in police custody to a respectable and reliable person without undue influence is very reliable [*Sheo Balak v. R*, 99 IC 232 (O) : A 1926 J 179; *Bharosa v. R*, A 1941 N 86]. When the witnesses who gave evidence about the extra-judicial confession are reliable and the words spoken by them are clear, unambiguous, such evidence is sufficient to convict the accused [*Mathur Lohar v. State*, (1986) Cri LJ 877, 883 (DB) (Cal)]. Confession to person not in authority is admissible even though a promise was made not to tell the police [*Pohlu v. R*, A 1943 L 312]. Extra-judicial confession to a doctor is admissible [*R v. Kommoju*, 19 P 301]. In the absence of evidence that the two witnesses to whom the extra-judicial confession is alleged to have been made were in the confidence of the accused, it is unlikely that the accused would have blurted out before them that they had killed the deceased

[*Harihar Paik v. State*, 1985 Cri LJ 432, 434 : (1985) 1 Crimes 196 (Orissa) (DB)]. Extra-judicial confession made before a respectable person of the town can be accepted [*Manjit Singh v. State of Punjab*, 1991 Cri LJ 2265, 2267 (P&H)].

In some cases lesser weight has been attached to extra-judicial confessions as it is impossible to ascertain the exact words used [*Des Raj v. R*, A 1928 L 858 : 29 PLR 486]. Little if any importance should be attached to an extra-judicial confession before a *panchayet* [*Nazir v. R*, 9 CWN 474] or to another convict in jail [*Hawaldar v. R*, A 1932 O 324]. A Gramsakhi is a police officer and so the extra-judicial confession made in his presence is not admissible [*Ratna Munda v. State*, 1986 Cri LJ 1363, 1365 (Orissa) (DB)]. Excepting in rare cases, the value of extra-judicial confession is not very high [*Udhan v. R*, A 1939 A 685]. They are to be regarded with caution, but it does not follow that they are always to be rejected [*Md Baksh v. R*, A 1941 S 129]. As to value of extra-judicial confession, see *Tauli v. R*, A 1929 O 272. The weight of an extra-judicial confession against the co-accused is not very great and could only be taken into account if it is adequately corroborated [*Ramzan v. R*, 157 IC 1054]. Extra-judicial confession made by one of the accused charged with conspiracy to widow of another conspirator who was helping her husband in making spears and other weapons is not acceptable [*Kanan v. S*, A 1979 SC 1127].

Law does not require that the evidence of an extra-judicial confession should in all cases be corroborated [*Piara v. S*, A 1977 SC 2274; *Ouseph v. State of Kerala*, 1983 Cri LJ NOC 206 (Ker) (DB)]. The true rule appears to be that it is a question of fact to be decided on the circumstances of each case. It is not an inflexible rule that in no case can a conviction be based solely on extra-judicial confession. But in cases of homicide and other grave offences it is not safe to convict only on such evidence without corroboration [*In re Venkatayalaparti*, A 1951 M 350: 1950, 2 MLJ 264; *Lachman Gouda v. The State of Orissa*, 1982 Cri LJ 929, 930 : (1981) 52 Cut LT 32 (Orissa); *Buty v. State of Orissa*, 1982 Cri LJ 938, 942 : (1982) 53 Cut LT 130 (Orissa); *Chakidhar Paharia v. State of Assam*, 1989 Cri LJ NOC 200 (Gauhati) (DB)]. Evidentiary value of extra-judicial confession depends on reliability of witness who gives the evidence. [*Kanhu Majhi v. State*, 1998 Cri LJ 3729 (Ori)]. The confessional statement is not a long narration. The substance of the statement is that the accused killed his wife and threw the dead body in the drain. There is no circumstances to raise any suspicion. So it can be **relied** on [*Baldev Raj v. State of Haryana*, 1990 Cri LJ 2643, 2645 (SC)] and such corroboration must concern the *corpus delicti* (see Wig, Greenleaf and Tay refd to above). An extra-judicial confession, if voluntary, can be relied upon along with other evidence for conviction [*Mulk Raj v. S*, A 1959 SC 902; *S v. Machindra*, A 1964 Or 100]. It can be acted upon if found to be voluntary and true and must be accepted as a whole [*In re Ramayee*, A 1960 M 187]. An extra-judicial confession to a close relative to whom the accused would go for advice may be believed [*In re Muthu Karunga*, A 1959 M 175; *Kachhwa v. State of Rajasthan*, 1986 Cri LJ 306, 308 (Raj) (DB) : 1985 Raj LW 97 : 1985 Cri LR (Raj) 121]. There were some verbal differences as to what the accused told the witnesses and as to under what circumstances he made the statement. There was nothing to show that the accused had previous association with those witnesses and that he could repose confidence in them and make an extra-judicial confession involving him in a crime of murder. Under such circumstances, it would not be legal and proper to accept their evidence. [*State v. Aru Pradhan*, 1985 Cri LJ 161, 172 : (1984) 2 Crimes 198 : (1984) 2 Cut LT 422 (Orissa) (DB)]. When the evidence gives an indication that the accused who is an unsophisticated and illiterate lady, had been threatened whereafter she had allegedly made a confessional statement, the evidence regarding the extra-judicial confession cannot be accepted [*Lakshmi Jain v. State*, (1986) Cri LJ 513, 516 (DB) (Orissa) : (1986) 1 Crimes 321]. The confession alleged to have been made to a person who lives 80 or 90 miles away, that too after the lapse of 2 weeks cannot be accepted as true. [*Nirmal Singh v. State of HP*, 1987 Cri LJ 1644, 1651 (HP) (DB) : (1987) 14 Cri LT 109]. The person to whom the accused is alleged to have made the extra-judicial confession is neither related to the accused nor

belonged to the same village. There is nothing to show that they were ever friendly with each other. So it is highly improbable that the accused would rush to that person to make a confession [*Kishan Lal v. State*, 1991 Cri LJ 742, 743 (Delhi)]. An extra-judicial confession made to one who is not a person in authority and which is free from any suspicion as to its voluntary character and has also a ring of truth in it is admissible and deserves to be acted upon [*Thimma v. S*, A 1971 SC 1871: 1970, 2 SCC 105]. In prosecution for the murder of his wife a constable made extra-judicial confession (the only evidence to connect accused with the death of his wife) to the uncle and cousin of the wife, the Inspector and Commandant that he had killed his wife, the uncle and the cousin not being persons in authority confession made to them did not suffer from any legal infirmity and held reliable [*Darshan v. S*, A 1975 SC 898]. As a rule of caution, courts usually require some material corroboration to an extra-judicial confession. In this case the extra-judicial confession was found to be corroborated and true [*Ratan Gond v. S*, A 1959 SC 18: 1959 SCR 1336; see *Ram Singh v. S*, A 1967 SC 152; *In re Man Singh*, A 1959 MP 267]. If corroboration of extra-judicial confession is required it is only for abundant caution. If the court is satisfied that the confession was voluntary conviction can be founded on it [*Maghar v. S*, A 1975 SC 1320 (*Shiv Bahadur v. S*, A 1954 SC 322 **relied** on)].

It was held that an extra-judicial confession to a magistrate is wholly excluded in view of the decision in *Nazir Ahmed v. R*, 63 IA 372: A 1936 PC 253: 17 L 629 [*Ibrahim v. R*, A 1937 L 208; *R v. Kommoju*, 19 P 301; *Rishi v. S*, A 1955 P 425] but this view does not appear to be correct as the Privy Council only lays down that when a confession is made to a magistrate "during an investigation" it is inadmissible unless recorded in full compliance with the procedure in s 164. So, it has been held that when, an accused goes to a magistrate not investigating the case and confesses murder (which is itself the first information of the crime) s 164 does not apply and it is admissible even though the formalities prescribed by s 164 have not been observed [*In re Nainamuthu*, A 1940 M 138: 41 Cri LJ 322 (*Nazir Ahmed v. R, ante*, distd); *In re Ramachandran*, A 1960 M 191; see also *Arunachala v. R*, A 1932 M 500 : 33 Cri LJ 586; see further notes to s 26; "*Oral confession before magistrate &c.*"]. A private person includes a judicial officer in his private capacity [*In re Gopinath*, 11 WR Cr 69]. The probative value of extra-judicial confession depends upon the veracity of the witness to whom it was made. It can be considered as substantive evidence if there are assuring circumstances and material. *State of Punjab v. Gurdeep Singh*, (1999) 7 SCC 714. A similar opinion was expressed in *Kavita v. State of T.N.*, AIR 1998 SC 2473 : 1998 Cri LJ 1624. The court said that it was somewhat difficult to believe that the appellant was conscious when she was taken out of the well and became unconscious after making the confessional statement. The version of the appellant was that she became unconscious after falling into the well and that she regained her consciousness only in the hospital. The Court said that her version seemed to be more probable.

Probative Force of Confessions.—Oral confession of guilt ought like admissions in civi cases (vide *ante*, s. 17: "*Effect of Admission and the Weight.....them*"), *to be received with great caution*. Macaulay has remarked: "Words may easily be misunderstood by an honest man. They may easily be misconstrued spoken ludicrously may be apprehended seriously. A participle, a tense, a mood, an emphasis, may make the whole difference between guilt and innocence" (History of Eng Vol I Ch 5, p 583). For not only does considerable danger of mistake arise from the misapprehension or malice of witnesses, the misuse of words, the failure of the party to express his own meaning, and the infirmity of memory (see *Earle v. Picken*, 5 C & P 542*n*; *R v. Simons*, 6 C & P 540); but the zeal which generally prevails to detect offenders, especially in the cases of aggravated guilt, and the strong disposi-tion which is often displayed by persons engaged in pursuit of evidence, to magnify slight grounds of suspicion into sufficient proof,—together with the character of the witnesses, who are sometimes necessarily called in cases of secret and atrocious crime,—all tend to impair the value of this kind of evidence, and sometimes lead to its rejection, where, in civil actions, it would have been received [Tay s 862]. There is yet another reason why caution should

be employed in receiving and weighing confessions. The statements though made as deposed to, may be *false*. The prisoner, oppressed by the calamity of his situation, may have been induced by motive of hope or fear to make an untrue confession; and the same may have arisen from a morbid ambition to obtain an infamous notoriety, from an insane or criminal desire to be rid of life, from a reasonable wish to break off old connexious, and to commence a new career, from an almost pardonable anxiety to screen a relative or a comrade, or even from the delusion of an overwrought and fantastic imagination [Tay s 863]. All reflecting men are now generally agreed that *deliberate and voluntary confession of guilt, if clearly proved*, are among the most effectual proofs in the law; their value depending on the sound presumption, that a rational being will not make admission prejudicial to his interest and safety, unless when urged by the promptings of truth and conscience [*R v. Warickshall*, 1783, 1 Lea C C 263; *Lambe's* Case, 1791, 2 Les 554; see observations in *Purnananda v. R*, A 1939 C 65, 74]. Such confessions, therefore, so made by a prisoner to any person, at any time, and in any place, are at common law receivable in evidence, while the degree of credit due to them must be estimated by the jury according to the particular circumstances of each case [Tay s 865]. A mere wrong or incomplete description of the way in which the accused brought about the victim's death does not affect the confession [*In re Bangaru*, A 1940 M 699: 1940 MWN 543; *In re Bandi*, A 1963 AP 87].

There is no doubt that convictions can be based on extra judicial confession but it is well settled that in the very nature of things, it is a weak peace of evidence. It is to be proved just like any other fact and the value thereof depends upon the veracity of the witness to whom it is made. It may not be necessary that the actual words used by the accused must be given by the witness but it is for the Court to decide on the acceptability of the evidence having regard to the credibility of the witnesses [*Kavita v. State of Tamil Nadu*, (1998) 4 Scale 246 at 248 (SC)].

Extra-judicial confession can form the basis of conviction if the witness before whom the accused allegedly made the confession appears to be unbiased and not inimical to the accused. Word by word repetition of the statement of the accused should not be insisted upon. [*Turuku Budha Karkaria v. State*, 1994 Cri LJ 552, 554 (Ori)]. Though the extra-judicial confession is a weak type of evidence but it can be used for corroboration of other material on record. Therefore, the extra-judicial confession of the accused cannot be brushed aside. [*Chhinder Singh v. State of Rajasthan*, 1993 Cri LJ 1616, 1620 (Raj)]. The extra-judicial confession should be taken as a whole. [*Chhittar v. State of Rajasthan*, A 1994 SC 214, 215 : 1994 Cri LJ 245. Where the PW himself asked the accused as to why he killed his father and the accused replied that he did it because his father used to quarrel, and thus the accused had replied the question asked by the PW who had assumed that the accused had killed his father and on that assumption he had asked the question, this cannot be considered to be an extra-judicial confession of the accused. [*S.V. Chalke v. State of Maharashtra*, 1993 Cri LJ 3364, 3367 (Bom)]. It is true that the extra-judicial confession, if found credible and cogent and believable can form the sole basis of conviction. But the confession in presence of police is of no evidentiary value and does not constitute legal evidence. [*Dharani Pradhan v. State*, 1997 Cri LJ 2973, 2974 (Ori)]. Where the prosecution had relied on the extra-judicial confession of the accused which was said to have been made by him in the presence of witnesses including the first informer but this version was not found in the FIR, the rejection of evidence of extra-judicial confession by the sessions Judge, held, proper. [*Udiya v. State of Rajasthan*, 1997 Cri LJ 516 (519) (Raj)]. Where from the deposition of a witness had not transpired that he had spoken about the confession of the accused about murdering the deceased but he had specifically stated that the accused had admitted before him that he had a quarrel and he had confined the deceased in his Jhumpa and he would not allow anybody to open the same before the police would be called, and the other witness had specifically stated about the said confession and in the FIR lodged by the uncle of the deceased, the injuries caused by

lathis on head and other parts of the body had been specifically mentioned and the nature of the injuries stated to have been disclosed in the confession stood corroborated from the medical evidence, the accused can be convicted on the basis of extra-judicial con-fession. [*Balu Ram v. State of Rajasthan*, A 1995 SC 1943, 1945]. An extra-judicial confession not put to the accused while examining him under section 313 Cr PC cannot be taken into consideration. [*Vijay Kumar v. State*, 1996 Cri LJ 2429, 2434 (Del)]. Conduct of the accused sometime after the murder took place in shouting that nobody would be able to save the deceased not only amounts to extra-judicial con-fession but also is a relevant fact for the purpose of corroboration of the prosecution case. [*Poolin Haldar v. State*, 1996 Cri LJ 513, 520 (Cal)]. Extra-judicial confession stricken with pressure followed by assault is not reliable. [*Kausar Ali v. State*, 1996 Cri LJ 1745, 1747 (Cal)]. Where the version as per the extra-judicial confession is inconsistent with the medical evidence it cannot be acted upon. [*Chittar v. State of Rajasthan*, A 1994 SC 214, 215 : 1994 Cri LJ 245]. The evidence of extra-judicial confession in the very nature of the things is a weak piece of evidence. In order to accept such evidence, it must be plausible and must inspire confidence. To offer a piece of reliable evidence it must pass the list of re-production of exact words, the reason or motive for confession and person selected in whom the confidence is reposed. [*State of M.P. v. Diwana*, 1995 Cri LJ 3002, 3006 (MP)]. Variation between minor details in confession and other evidence would not affect the acceptability of the confession [*Vinayak Shivajirao Pol v. State of Maharashtra,* A 1998 SC 1096].

From the standpoint of reason a confession may be subject to grave infirmative considerations, among others that it is extremely improbable that a person should accuse himself of s serious crime [*S v. Prorter*, 1897, 32 Oregon 135]. It may have been made from some false hope of benefit or fear of injury and still be false [*Bullock v. S*, 1900, 65 NLJ 557]. The mind of the criminal may be excited or diseased or morbid. The confession may be in the nature of an offer of compromise to the prosecution [*Chamb H B*, s 608]. Judges are by no means agreed as to the judicial value of confessions. Courts have treated them as a class, a species of evidence, about which, as a whole, it was safe to dogmatise. Upon the one hand, the claim has been freely and enthusiastically made by those who must have assumed that all confessions were the reasoned and deliberate act of the person accused, that such statements are of the first rank in probative force and, therefore, entitled to the most marked consideration. To other courts, regarding the various infirmative considerations attending their use, confessions have presented an entirely different forensic aspect. They are, it is said, to be cautiously received, always distrusted and never accredited with much probative force. There are, for example, many cases known where persons have confessed to crimes they did not commit or as in the case of the witchcraft delusion to crimes which could not have been committed by any one. The general rule is that each confession should be weighed by its own circumstance [Cham H B 612]. If the circumstances show that the confession was made out of fear or due to misguidance, the evidence about the extra-judicial confession cannot be accepted [*Uma Bewa v. The State*, 1982 Cri LJ NOC 74 : (1981) 52 Cut LT 109 (Orissa)]. In moments of distress a person may wrongly make some utterances without understanding the implication of it and the person to whom those statements are made may deduce any meaning which he may wish to give [*Aklu Baraik v. State of Assam*, 1983 Cri LJ 1578, 1579 (Gauhati) (DB)]. Though it is quite natural that after a person confesses that he has committed murder he would be assaulted, that by itself would not vitiate the extra-judicial confession [*Krishna Ch. Sautra v. State*, 1986 Cri LJ 2077, 2081 (Cal) (DB)]. There must be other evidence and confession is only one element in the consideration of other facts proved in the case and then it can be put into scale and weighed with other evidence [*State of Madh Pra v. Mahesh Mohanlal Mali*, 1990 Cri LJ 2483, 2491 (Madh Pra)].

A confession, if voluntarily and truthfully made is an 'efficacious proof of guilt'. It is an important piece of evidence and therefore, it would be necessary examine whether or not

the confession was voluntary, true and trustworthy unless the court is satisfied that the confession is voluntary, it cannot be acted upon and no further enquiry as to whether it is true and trustworthy need be made. *Shivappa v. State of Karnataka*, A 1995 SC 980, 981, 982. Confession before a person with whom the offender has not even visiting relationship is not acceptable. *Bansidhar Nandi v. State*, 1992 Cri LJ 3927, 3929 (Ori). If the person to whom the confession is made is a close relative of the person making confession, or has possibility of being in his confidence, the same can be relied upon. *Arjuna Pradhan v. State*, 1992 Cri LJ 3614 (Ori). Where the witness to whom the alleged extra-judicial confession was made disclosed the same to the police after three days though she was with the police for two days in connection with some other case no reliance could be placed on such confession. *Balvinder Singh v. State of Punjab*, A 1996 SC 607 : 1996 Cri LJ 883, 887. Inconsistent testimony of witnesses as to the substance of confessional statement made by the accused renders the extra-judicial confession unreliable. *Virendra Kumar v. State*, 1996 Cri LJ 231, 237 (Del). Where the alleged confession was made before a panchayat but on the panchnama neither the signatures of the accused nor the signatures of any relations of the accused were obtained and the panchnama was kept back from the police for a pretty long time, it was held that the extra-judicial confession was unreliable. Presence of the I.O. in the village also throws a lot of suspicion regarding the veracity of the prosecution case. *Virender Kumar Yadav v. State*, 1996 Cri LJ 231, 239 (Del). Confession made before a person who was not in such a position that all the accused would be willing to repose their confidence in him does not inspire confidence. *Sukhvinder Singh v. State of Punjab*, 1996 Cri LJ 632, 635 (P&H). In order to render the confession worthy of belief regard must be had to (i) the person to whom it was made (ii) the connection, if any, of the accused with him (iii) the reason for the accused to make such confession and (iv) the circumstances in which it was made. *Pradibta Kumer v. State of Orissa*, 1996 Cri LJ 375 (Ori). Where the accused alleged to have confessed before the brother of the deceased, neither exact words nor the words substantially stated by the accused reproduced; the knowledge of the witness in regard to the death of the deceased was not clear, the presence of the accused in front of his own house and confession in the manner to the accused was highly improbable, it was held that the extra-judicial confession of the accused was not acceptable. *Ghasiram Lakra v. State of Orissa*, 1997 Cri LJ 939 (Ori). Where in the extra-judicial confession the accused only stated that he had committed rape of one woman and had murdered her and the witnesses to whom he made this statement were strangers to him and it was not the case of the prosecution that the accused had approached those witnesses and had sought their help from harassment of the police, in absence of any material to corroborate such extra-judicial confession, no reliance can be placed on the same. *Palani v. State*, 1993 Cri LJ 1679, 1688 (Mad).

The evidence of extra-judicial confession, though a weak type of evidence but it can form the basis for conviction if the confession made by the accused is voluntary, true and trust-worthy. It can be acted upon if the evidence of the person, before whom the extra-judicial confession has been made by the accused, inspires confidence. Where the witness before whom the extra-judicial confession was said to have been made by the accused, was neither relative of the accused nor had he any intimate relations with the accused and therefore there was no question of making a clean breast of the guilt by the accused before the witness, the evidence of the extra-judicial confidence does not inspire confidence. *Kailash v. State of Rajasthan*, 1995 Cri LJ 3111, 3117 (Raj). A confessional statement cannot be rejected simply because it was alleged by the accused such confessional statement was fabricated. *Wariyam Singh v. State of U.P.*, A 1996 SC 305, 308. An extra-judicial confession made to a *Sarpanch* was held to be not usable as a good corroboration of the dying declaration. *Balbir Singh v. State of Punjab*, AIR 1999 SC 3227 : 1999 Cri LJ 4076. Where a military sepoy confessed to his superiors in the presence of four of his fellow sepoys that he killed his wife, beheaded her and disposed of the parts in two different wells, and one sepoy appeared as a witness, the statement was held to be capable of supporting conviction being further verified by recovery from the wells. *Shivajirao*

Pal v. State of Maharashtra, (1998) 2 SCC 233. A confession of participation in a decoity made to a *Mukhia*, of the town was held to be rightly received by the trial court in evidence. *State of Bihar v. Anirudh Thakur*, AIR 1998 SC 921.

Wigmore says : "The real explanation lies in the mixture of good and bad qualities likely to be present in all attempts to use confessions. We must separate (*1*) the confession as a *proved fact*, from (2) the *process of proving* an alleged confession.

(*1*) Now, assuming the making of a confession to be a completely proved fact—its authenticity beyond question and conceded,—then it is certainly true that we have before us the highest sort of evidence.

(2) But how do we get to believe in the fact of a confession having been made? Always and necessarily by somebody's testimony. And what is our experience of that sort of testimony on which we are asked to believe that a confession was made? A varying and sometimes discouraging experience. Paid informers, treacherous associates, angry victims, and over-zealous officers of the law,—these are the persons through whom an alleged confession is oftenest presented; and it is at this stage that our suspicions are aroused and our caution stimulated. Suppose a judge is offered from the lips of a single witness a detailed and complete avowal of guilt, attributed to the accused, and suppose the accused denies absolutely the fact of confession; suppose the judge now to think to himself, "Here is a confession which, if authentic, would make this man's guilt clear beyond doubt. But do you expect us to take it as authentic, against his denial, on the word of this man alone, who has such and such strong motives for inventing it or for misinterpreting what was said? Must be not listen to him with the greatest doubt and suspicion?" Then, would it not be natural for the judge, in commenting on such evidence to the jury, to say: "What you have heard here from this man about a supposed confession is to be taken with caution; for that is the weakest and most suspicious kind of evidence." This is a natural and proper attitude, and it is precisely that of the authorities above quoted. They were thinking, not of the *confession as evidence* of the act, but of the *testimony to the alleged confession* [Wig s 866].

Opposite opinions have been freely expressed regarding the probative value of confessions. While it has been declared by most competent authorities that confe-ssions are of the most satisfactory kinds of proofs, equally distinguished judges and authors have emphatically expressed that they should always be viewed with distrust and the greatest caution should be exercised in placing reliance on them. A voluntary confession of guilt proceeds only from penitence and remorse or a desire to make reparation for the crime and it usually comes from a person who commits a crime in a fit of passion or for what he imagines a righteous cause; but experience of human nature shows how few people are actuated by such feelings and it has been found in numerous cases in this country that confessions have been made as a result of inducement or threat or torture or hope of some preferment or a desire to implicate others. Most of these so-called confessions are retracted at the trial causing endless embarrassment and anxiety. If human beings have so great a tendency not to acknowledge or avow many petty offences or acts of indiscretion, how can it be easily believed that they will confess the guilt of so heinous an offence as a murder from a feeling of penitence? Have not we seen perpetrators of the most atrocious crimes persisting in denying guilt and proclaiming their innocence even when being led to the gallows by hangmen? Cases are not also wanting where untrue confessions have been made with a desire to save one from the gallows. Hallucinations or delusions of a morbid mind or overstrung feelings are not also wanting. Yet there may be a state of mind when a person confesses a crime regardless of consequence, as when a husband under the influence of an ungovernable impulse hacks the paramour in bed with his wife and gives himself up by acknowledging the crime. Satisfaction for what he regards just retribution gives relief to his tormented mind and he also finds glory in proclaiming himself as the avenger. When the confessional statement showed that the accused made the confession out of repentance, it could be accepted as entirely free and voluntary

[*Smt. Bani Bhattacharya v. State*, 1989 Cri LJ (NOC) 4 (Cal) (DB)]. A woman jumped into a well with her two children. After she was rescued, she made a statement that she jumped into the well since her mind was not working properly. Since this is a voluntary statement made to the gathering it can be relied on to bring home the charge [*Basanti v. State*, 1989 Cri LJ 415, 418 : (1988) 2 Crimes 424 (Orissa)]. The accused was caught red handed. Praying for apology or begging pardon by the accused indicates that he really did commit the act of burning his wife and he was repenting for the same [*Ramesh Laxman Shendre v. State of Maharashtra*, 1991 Cri LJ 1636, 1643 (Bom)].

A confession clearly proved by unimpeachable testimony and without the slightest doubt as to its voluntary nature is certainly the highest kind of evidence, as human beings are not likely to face the consequences of confessions by a false statement affecting their lives or liberty. This conclusion naturally follows from the standpoint of common sense and reason, but as we have to depend on another's testimony as to the actual words used by the prisoner and as men are led to confess crimes from so many motives, the real difficulty lies in believing in the fact of a confession having been made or that it was freely and voluntarily made. In *Respublica v. Fields*, 1822 Peek R 140 (Am) the court said:—

> "How easy it is for the hearer to take one word for another, or to take a word in a sense not intended by the speaker; and for want of an exact representation of the tone of voice, emphasis, countenance, eye, manner, and action of the one who made the confession, how almost impossible is it to make third persons understand the exact state of his mind and meaning! For these reasons such evidence is received with great distrust, and under apprehension of the wrong it may do".

It is well to remember the authoritative and oft quoted observations of MR. JUSTICE FOSTER as to why confessions are to be regarded as "the weakest and most suspicious of all evidence": "Proof may be too easily procured; words are often misreported—whether through ignorance, inattention or malice, it matterth not to the defendant, he is equally affected in either case; and they are exremely liable to misconstruction: and withal, this evidence is not in the ordinary course of things to be disproved by that sort of nagative evidence by which the proof of plain facts may be, and often is, confronted" [Fost C L 243]. The general rule therefore is that each confession has to be weighed by its own peculiar circumstances by the jury. Joy says: "It appears inaccurate to give all kinds of confession the same confidence or to treat them alike with distrust. Like all other kinds of admissions, they admit of all shares of certainty and probability, from a solemn estoppel by matter of record to the slighest presumption arising from the most casual, suspicious or doubtful expressions" [Joy, Confessions, 109]. Confessions must be taken as a whole (see *post*, "*Confession to be taken as a whole.*")

Although out of the two *pancha* persons to whom the confession was made, only one was examined, the confession was held to be reliable in itself. It was also corroborated by another independent witness. *Prasad Ramakant Khade v. State of Maharashtra*, 1999 (8) JT 302 : (1999) 8 SCC 493.

Delay in recording.—Delay in recording an extra-judicial confession made to a person who was wholly unconnected with the police threw a spell of suspicion on its value. *State of Punjab v. Gurdeep Singh*, 1999 (6) JT 514 : (1999) 7 SCC 714.

Corroboration of Confession.—It is well settled that a confession, it voluntarily and truthfully made, is an efficacious proof of guilt [*Shankaria v. S*, A 1978 SC 1248: *R v. Jhurra*, 7 WR Cr 41]. If the confession is believed by the court to be true, no question of corroboration can arise [*Birey v. S*, A 1953 A 785; *R v. Dhani*, 52 IC 881; *Sheo Pd v. R*, 52 IC 50]. The fact that the accused made an extra-judicial confession to the informant finds a place in the F.I.R. shows that such confession is true, [*Mal Singh v. State of Rajasthan*, 1983 Cri LJ 1411, 1419 (Raj) : 1983 W LN 268]; *Badhna Khana v. State of Assam*, 1988 Cri LJ 1412, 1414 (Gau) (DB); *Hemchandra Navak v. State of*

Assam, 1989 Cri LJ 2058, 2061 (Gau) (DB)]. Confession of an accused is substantive evidence and a conviction can be based solely on it [*S v. Balchand*, A 1960 Raj 101]. There is no legal bar to a conviction being on a voluntary confession if believed to be true, but the rule of prudence requires that whenever possible it should be corroborated by independent evidence. The rule of prudence does not require that each and every circumstance mentioned in the confession with regard to the participation of the accused in the crime must be separately and independently corroborated, nor is it correct that confession can only be corroborated by facts and circumstances discovered after the confession was made. When in accordance with the confessional statement recorded by the Magistrate, the dead body was recovered from a room of the deceased's house after removing the earth on the pointing out of the place by the accused where the corpse was buried by the accused herself, the confessional statement was held to be correct [*Manguli Devi v. State of Orrisa*, A 1989 SC 483, 485 : 1989 Cri LJ 823]. The extra-judicial confession was followed by recovery of dead body. The recovery itself is corroboration of the confession [*Safiuddin Mondal v. The State*, 1984 Cri LJ NOC 140 (Cal) (DB)]. A confession can be made in the court of the committing magistrate or it may be made even during a trial and materials already in possession of the police may well be used for the purpose of corroboration [*Hemrai v. S*, 1954 SCR 1133: A 1954 SC 462; *Balbir v. S*, A 1957 SC 216: 1957 Cri LJ 481]. In order to sustain a conviction on the basis of a confessional statement it is sufficient that the general trend of the confession is substantiated by some evidence would tally with the contents of the confession [*Madi Ganga v. State of Orissa*, A 1981 SC 1165, 1167 : 1981 Cri LJ 628]. As to the nature and extent of corroboration, see further notes to s 133 *post*.

As confessions are not always true, they must be checked, more particularly in a murder case, in the light of the whole of the evidence on the record in order to see if they carry conviction. It would be dangerous in the extreme to act on a confession put into the mouth of the accused by a witness having a motive for implicating some one, and uncorroborated from any other source [*White v. R*, A 1945 PC 181 : 47 Cri LJ 575]. When the main features of the confession and approver's evidence are consistent, the confession can be accepted [*Ujir Ali Sk v. State*, 1988 Cri LJ NOC 50 (Cal)]. A confession should not be accepted merely because it contains a wealth of detail. Unless the main features of the story are shown to be true, it is unsafe to regard mere wealth of uncorroborated detail as a safeguard of truth [*Muthuswami v. S*, A 1954 SC 4 : 1953 SCJ 619]. The court should carefully examine the confession and compare it with the rest of the evidence in the light of the surrounding circumstances and probabilities of the case [*Naresh Kumar Sharma v. The State*, 1988 Cri LJ NOC 4 : (1987) 3 Crimes 275 (Cal)].

A confession cannot be rejected merely because the medical evidence was that death might have been caused in another way [*R v. Bangaru*, A 1940 M 699]. An admission by *A* and *B* that the crime charged against them was committed by *C* and *D*, and that whatever share they had in it was under compulsion, is not a confession on which any person ought to be convicted [*R v. Kristo Mondal*, 7 WR Cr 8]. In a case involving a sexual offence a conviction based on uncorroborated evidence is not illegal. However, the Judge must warn himself of the dangers of convicting on such evidence [*Aziz Bin Muhamad Din v. Public Prosecutor*, (1996) 5 Malayan LJ 473 (Melaka HC)]. When the confessional statements made by the accused get ample corroboration not only in the recovery of the foreign currency and documents from his person but also from the pass books and other documents seized in his residence, it can be acted upon [*FR. Mario v. Director of Enforcement, New Delhi*, 1982 Cri LJ 461, 464 (Goa, Daman and Diu)]. As to retracted confession, see *post*.

Corroboration of extra-judicial confession.—It is true that there is neither any rule of law nor of prudence that evidence furnished by extra-judicial confession cannot be relied upon unless corroborated by some other credible evidence. The, courts have considered the evidence of extra-judicial confession, a weak piece of evidence. If the evidence about extra-judicial confession comes from the mouth of witness/witnesses who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive for attributing an untruthful statement to the accused, the words spoken to by the witness are clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it, then after subjecting the evidence of the witness to a rigorous test on the touchstone of credibility, if it passes the test, the extra-judicial confession can be accepted and can be the basis of a conviction. In such a situation to go in search of corroboration itself tends to cast a shadow of doubt over the evidence. If the evidence of extra-judicial confession is reliable, trustworthy and beyond reproach the same can be relied upon and a conviction can be founded thereon. [*Riyasat v. State of U.P.*, 1993 Cri LJ 2834, 2843 (All)].

If the foundation of the accused of the prosecution hinges upon extra-judicial confession, that too, retracted, such an extra-judicial confession requires corroboration in materials particulars, besides the same being, found to be true voluntary and reliable, before every criminal liability is fastened upon the accused.

Where the evidence relatable to the making of extra-judicial confession by the accused is not at all safe to be relied upon for any purpose whatever.

The question of looking forward to corroborative pieces of evidence cannot arise for consideration *Manian v. State*, 1995 Cri LJ 2165 (Mad). Corroboration of extra-judicial confession by medical evidence is sufficient. *Jillela Madhu v. State of A.P.*, 1994 Cri LJ NOC 320 : 1994(3) Cri 714 (AP). It is true that the extra-judicial confession, if found credible and cogent and believable can form the sole basis of conviction. But the confession in presence of police is of no evidentiary value and does not constitute legal evidence. *Dharani Pradhan v. State*, 1997 Cri LJ 2973, 2974 (Ori). In absence of any evidence to corroborate the extra judicial confession, no reliance can be placed on the same, it being a weak piece of evidence to convict the accused. *Palani v. State*, 1993 Cri LJ 1679, 1688 (Mad). See also *Heramha Brahma v. State of Assam*, A 1982 SC 1595 : 1983 Cri LJ 149; *Jagta v. State of Haryana*, 1974 Cri LJ 1010, 1014; *Makhan Singh v. State of Punjab*, A 1988 SC 1705. Voluntary confession of the accused as to killing of the deceased by mistake given immediately after incident to deceased's mother, corroborated by relatives can be safely acted upon. *Ram Lal v. State*, 1994 Cri LJ 736, 740 (J&K). If the evidence of extra-judicial confession is reliable, trustworthy and beyond reproach, the same can be relied upon and a conviction can be founded thereon. *D.B. Valvi v. State*, 1996 Cri LJ 174, 179 (Bom). There is no legal bar to convict an accused on the basis of voluntary confession. But it is settled law that the rule of prudence requires that whenever possible, the confession should be corroborated by independent evidence. *Naga Reddy v. State of A.P.*, 1994 Cri LJ 2545, 2553 (AP).

"Appears to the Court to Have Been Caused." [see also *ante*. "*Appears to have been caused*"]. The *word* "*appears*" was inserted to provide a safeguard in the interest of the accused. It connotes less positive proof. If it "appears" to the court from the circumstances that a confession is not voluntary it must be rejected. Such circumstances should be presumed to exist in cases where an accused person in police custody makes a confession [*R v. Saw Min*, 1939 Rang LR 97 : A 1939 R

219]. A confession becomes irrelevent when in the opinion of the court 'it appears' to have been caused by an inducement, threat or promise. Mere exhortions to tell the truth do not exclude the confession. In order to attract the bar, it should be such as to lead the accused to suppose that by making it he would gain any advantage or avoid any evil of any temporal nature in reference to the proceedings against him [*Budhwara Bai v. State of Madhya Pradesh*, 1991 Cri LJ 3054, 3058 (MP)]. To reject a confession it is not necessary that there should be positive proof to establish that the confession had been obtained by use of threat, persuasion etc. Anything from the barest suspicion to positive evidence would be sufficient for a confession being discarded [*Ruggha v. R*, 89 IC 903 FB: A 1925 A 627; *R v. Panchkari*, 57 C 67; and cases *ante*]; but this does not mean that there is any presumption against the voluntary nature of a confession [*Sucha v S*, A 1951 Pu 283]. The word "appears" means "seems" and imports a lesser degree of probability than proof. The standard of a prudent man is not completely displaced, but the stringent rule of proof is relaxed, though it does not warrant a court's opinion based on pure surmise. A *prima facie* opinion based on evidence and circumstances may be adopted as the standard laid down [*Pyarelal v. S*, A 1963 SC 1094; *Abraham v. S*, A 1965 K 175].

It is not necessary for the defence to establish conclusively that there was inducement or threat. It is sufficient if the circumstances afford reasonable grounds for believing that there was such an inducement or threat [*Mohsena v. R*, 43 CWN 893: A 1939 C 610; *R v. Thakur*, 1943, 1 Cal 487: A 1943 C 625]. The inference may be suggested by the confession itself or by the evidence adduced by the accused or by the surrounding circumstances which the court is bound to take into consideration, but the conclusion cannot be reached on surmise or conjecture [*Budhoo v. R*, A 1928 L 676: 108 IC 387; *R v. Dewan Kahar*, A 1923 P 13: 72 IC 961]. It might no doubt be difficult, in some cases very difficult, but it is not always impossible to substantiate the allegation of inducement. The word used is not 'proved' but 'appears' which is not as strong an expression as 'proved'. So it is possible for an accused to show without proving his allegation by evidence, that the circumstances under which a confession was made would justify an inference that it was obtained by threat or inducement [*Khiro v. R*, 33 CWN 1112: 57 C 649: A 1929 C 726]. If there is any conflict as to the manner in which the confession was obtained, the accused should be given the benefit of doubt [*Rahaman v. R*, A 1930 L 88]. When it is doubtful to the judge whether an explanatory statement by the accused was not given as a result of inducement, it should not be admitted in evidence [*Joymangal v. S*, 59 CWN 993; *Abraham v. S*, A 1965 K 175].

"Grounds Which Would Apply to Him."—These words towards the end of the section refer to the state of the mind of the accused to whom inducement &c may have been offered. It is the duty of the court to place himself in the position of the accused and to form an opinion as to the state of his mind in the circumstances of a case [*Pyarelal v. S*, A 1963 SC 1094].

Burden of Proof. [Who is to Show the Voluntary Nature of Confession?].—Before any confession can be received in evidence, it must be shown to have been *voluntarily* made; for in the words of EYRE CB, (in *R v. Warickshall*, 1783, 1 Lea C C 263) "a confession, forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit is to be given to it; and therefore it is rejected." Now the important question is who is to show the voluntary nature of the confession?

Taylor says: "The material question, consequently, is whether the confession has been obtained by the influence of hope or fear; and the evidence to this point, being

in its nature preliminary, is addressed to the judge, who will require the prosecutor to show affirmatively, to his satisfaction, that statement was not made under the influence of an improper inducement, and who in the event of any doubt subsisting on this head will reject the confession [*R v. Warringham*, 1851, 2 Den C C 447; *R v. Thompson*, 1893, 2 QB 12: 62 LJ MC 93; Tay s 872].

The test by which the admissibility of a confession may be decided is laid down by CAVE J, in *R v. Thompson, sup* after considering the authorities as follows: "A simple test,..... is it proved affirmatively that the confession was free and voluntary, *ie* was it preceded by any inducement to make a statement held out by a person in authority? If so, and the inducement has not been clearly removed before the statement was made, evidence on the statement is inadmissible". In *R v. Warringham, sup* PARKE B, addressed the prosecution thus: "You are bound to satisfy me that the confession which you seek to prove against the prisoner was not obtained from him by improper means."

In *R v. Basvanta*, 25 B 168, 171 (**followed** in *R v Bhagwandas*, 1941 Bom 27: A 1941 B 50) the opinion was expressed that the law in s 24 did not appear to be the same as in England in spite of the use of the word "appears" which indicates a lesser degree of probability than positive "proof". The same is the opinion of Field who says: "However, that (the law in England) may be, the law in India is not identical with the English law on the point [*R v. Basvanta, sup*] and it seems that judicial confessions at any rate are (if properly recorded) held to be voluntary until contrary is shown" (Field's Ev 6th Ed p 98). Field's opinion that a confession duly recorded is presumed to be voluntary is evidently based upon the terms of s 80, but that section does not justify any presumption of voluntariness (*v infra*). Woodroffe also observes: "It is however to be observed that if the word "*appears*" is to be placed in opposition to the term "*proof*", there may be discrepancy between the terms of this section and the eightieth section in the case of recorded confessions which are presumed to be voluntary until disproved to be so. Perhaps, therefore, it would be more correct to say, that as under s 3, prudence is to determine whether a fact exists or not, the use of the word "*appears*" while requiring proof, indicates that a lesser degree of such proof is required in this that in other cases" (Woodroffe, 10th Ed p 370).

It is submitted that no question of discrepancy between s 24 and s 80 arises at all as there is no presumption of *voluntariness* of a confession under s 80. That section merely says that if the formalities prescribed by law are observed, there is a presumption that the confession was "duly taken" and the confession proves itself without the necessity of calling the magistrate who recorded. But its voluntariness is quite another thing and there is no presumption as to the free and voluntary nature of the confession [See *R v. Thakur*, 1943, 1 Cal 487 : A 1943 C 625; *Based v. R*, A 1950 C 331].

The true position as stated in many cases is that having regard to s 24 (where the word "appears" has been used) and the presumption under s 80, a confession duly recorded by a magistrate with proper certificate appended to it will be admitted in evidence subject to the restrictions in s 24 that under the latter section a well-founded conjecture reasonably based upon circumstances disclosed in the evidence though it does not amount to "proof", is sufficient to exclude the confession because it would be idle to expect the accused to give positive proof of inducement, threat &c for in most cases such proof is difficult [*R v. Panchkari*, 52 C 67: 29 CWN 300; *Nayeb v. R*, 38 CWN 659, 664; *R v. Jamuna*, A 1947 P 305; *R v. Saw Min*, A 1939 R 219; *Ruggha v. R*, 23 ALJ 821 FB: A 1925 A 627].

Prosecution to Show Voluntariness of Confession. [When Does Question of Onus Arise?].—It has already been seen that under s 24 a confession recorded by observing the formalities enjoined by s 164 Cr P Code is *prima facie* relevant when put in and its wording shows that it is a rule of exclusion saying that a confession becomes irrelevant only when the making of the confession appears to the court to have been caused by improper means [see *In re Boya*, A 1942 M 49 : 1941 2 MLJ 1070; *In re Navanithammal*, A 1939 M 3]. "The scheme of the Evidence Act is to treat confessions *prima facie* as relevant or provable under the category of admissions and to provide under ss 24, 25 and 26 the circumstances under which they are not relevant or provable... In the case of an ordinary confession, there is no initial burden on the prosecution to make out the negative, *viz*, that the confession sought to be proved or admitted is not vitiated by the circumstances stated in the section. It is the right of the accused to have the confession excluded and equally the duty of the court to exclude it even '*suo motu*', if the vitiating circumstances 'appear' " [*per* JGANNADHADAS, J, in *Bala Manjhi v. S*, A 1951 Or 168, 177-78]. Thus far the question of burden of proof hardly arises. Therefore a confession duly recorded being *prima facie* relevant, the question of excluding it as irrelevant or of the onus of proving its voluntary nature does not seem to arise so long as there is no doubt in the mind of the court, or the confession is not objected to or assailed by evidence or circumstances indicating that it was obtained by inducement, threat, torture &c., and no one other than the accused is in position to know better the existence of such facts. Whenever any sort of doubt creeps into the mind of the court or when the question of voluntariness is raised by the accused, the better and sounder opinion certainly is that it is for the prosecution to show affirmatively to the complete satisfaction of the court the voluntary nature of the confession as laid down in the English cases noted above. The burden of proving beyond reasonable doubt that a confession is voluntary lies upon the prosecution [*Desa Bin Hashim v. Public Prosecutor,* (1995) 3 Malayan LJ 350 (Kuala Lumpur FC)].

In *R v. Thompson*, 1893 2 QB 12 : 9 TLR 435 (which **followed** *R v. Warringham, sup*) CAVE, J, said (with the concurrence of LORD COLERIDGE, CJ and HAWKINS, DAY & WILLS, JJ):—

> "I prefer to put my judgment on the ground that it is the duty of the prosecution to prove, in case of doubt, that the prisoner's statement was free and voluntary, and that they did not discharge themselves of this obligation."

In *Ashutosh v. R*, 26 CWN 54 (**relying** on *R v. Thompson*) it was also held that if it appears to the court that there is reason to suspect that the confession was obtained by improper means, the prosecution must show that the confession was freely made; see also *R v. Panchkari,—sup*. In *Hemraj v. S*, 1954, SCR 1133: A 1954 SC 42, the Supreme Court observed that "the principle laid down in that case (*R v. Thompson*) is well-settled". *R v. Thompson*, being approved by the Supreme Court the position is that ordinarily a confession duly taken in accordance with law would be relevant; but in case of any doubt or when challenged, it is for the prosecution to show affirmatively to the satisfaction of the court that the confession was voluntary. If there is the slighest doubt or suspicion about its voluntary nature, the scale will be turned in favour of the accused *ante* : "*Appears to have been caused*" and the burden is on the prosecution to show that it was voluntarily made. It has been held that the burden of proving voluntariness of confession is on prosecution. There is no onus on accused [*Krishna v. S*, A 1958 P 166; see *Bala Manjhi v. S*, A 1951 Or 168, 170 FB].

It seems that the approach to the question of admissibility of a confession in England is not exactly the same as in India. Under the English law no statement of

the accused is admissible unless the prosecution shows affirmatively to the satisfaction of the court that it is voluntary; but here a confession duly recorded under s 164 is *prima facie* relevant, although the ultimate requirement that in case of doubt the prosecution is to prove the voluntary nature of the confession, is the same as in England. Even if it is assumed that there is any burden on the accused, it is the lightest possible and shifts on the prosecution in no time, as the word used being "appears" and not "proved," a well-founded suspicion is sufficient to invalidate the confession.

In *Ibrahim v. R*, 1914 AC 599: A 1914 PC 155: 18 CWN 705, 712, LORD SUMNER said:—

> "It has long been established as a positive rule of English Criminal Law, that no statement made by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale. The burden of proof in the matter has been decided by high authority in recent times in *R v. Thompson*, 1893, 2 QB 12."

A statement by an accused person is not admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement in the sense that it has not been obtained either by fear of prejudice or hope of advantage exercised or held out by a person in authority [*R v. Voisin*, 1918 KB 531]. It is for the prosecution to establish that the statements were made freely and voluntarily and not under the influence of improper inducement [*Sparks v. R*, 1964, 1 All ER 727 PC].

As already indicated the English authorities point that the burden of proving the voluntary nature of a confession lies on the prosecution. "In giving evidence of such admissions or confessions it lies upon the prosecution to prove affirmatively to the satisfaction of the judge who tries the case that the admissions were not induced by any promise of favour or advantage or by the use of fear or threats or pressure by a person in authority" [Halls 3rd Ed, Vol 10, para 860]. "It is now settled that it lies upon the prosecution to establish, and not upon the accused to negative, this element, it being the duty of the prosecution to satisfy itself thereon before putting the statement in" [Phip 8th Ed, p 249].

Wigmore (s 860) has summarised the law thus: "On this question (Burden of proof) five distinguishable attitudes are found represented in the rulings:

(*1*) The original English rule was that the *prosecution* (offering the confession) *must show* that it was made *voluntarily i.e.*, without any improper inducement from the person receiving the confesion; and this rule is accepted in most American jurisdictions [*Thompson's* Case, 1783, 1 Leach 328; *R v. Warringham*, 1851, 2 Den CC 447, PARKE, B; *R v. Thompson*, 1893, 2 QB 12, 18].

(*2*) The English judges occasionally went still further, with a rule that where the accused had been in charge of a *person in authority* other than the one to whom the confession was made, the prosecution must show the absence of an inducement from the *former* as well as from the *latter* [*R v. Courtenay*, 2 Cr & D 62; *R v. Swatkins*, 4 C & P 549].

(*3*) The view has also found representatives that the prosecution must, not merely in the above circumstances, but in all cases, show the absence of an inducement from any *one else* and *not merely from the person receiving the confession* [*State v. Garvey*, 1876, 28 La An 925]. This is an absurd extreme.

(*4*) A few jurisdictions [in America] regard the confession as '*prima facie*' *admissible*, and require the defendant to show that the alleged improper inducement existed. This is the practical and natural rule; for if there is any reason to object to the confession, no one can know it better than the defendant. Of course, he should be admitted to testify to this question of fact preliminary to the court's ruling, without waiving his privilege. [Under s 24 also a confession is *Prima facie relevant* (*ante*)].

(*5*) A modern English ruling takes a middle path and seems to receive the confession unless attacked by evidence of an improper inducement, and then in case of doubt leaves upon the *prosecution the burden of convincing* the court of the admissibility [*R v. Thompson*, 1893, 2 QB 12, 18, CAVE J, ("in case of doubt"); *R v. Trenholme*, 1920 61 DLR 316 Que]." The Supreme Court approved *R v. Thompson, sup*, in *Hemraj v. S*, A 1954 SC 462 : 1954 SCR 113.

Rejection of Confession Once Admitted.—Though a confession has been admitted by the judge as voluntary, it is open to him to withdraw it from the jury if it transpires at any subsequent stage that it is not voluntary or is defective in any way [*R v. Dasrath*, A 1945 B 265].

Whether the Confession is Voluntarily Made or Not and so Admissible or Inadmissible is a Question For the Judge. [Jury to Determine Truth or Falsehood—Proper Charge to Jury].—Under s 298,[1] Cr P Code, it is well settled that the determination of all matters of fact on which the admissibility of evidence depends is the province of the judge. Questions relating to the admissibility of evidence are questions of law and must be determined by the judge. It is therefore for the judge to decide whether an alleged confession was made voluntarily [Hals 3rd Ed Vol 15 para 499] and is admissible, and he must do this independently of the jury. If the statement is admitted then the question of its probative value or effect is for the jury [*Chan Wai-Keung v. R*, 1967, 1 All ER 948 PC; *R v. Murray*, 1950, 2 All ER 925; Hals 3rd Vol 10 para 863]. In order to determine this it may be necessary to go over before the jury the testimony that the judge has heard when deciding whether the statement was voluntary [*Chan Wai—Keung v. R, sup*]. A judge sitting without a jury decides all questions of both law and fact. In *Burton v. S*, (1895) 107 Ala 108 (Am): 18 So 285, (**relied** on in *Badan v. R*, 40 CWN 794) COLEMAN J, said:—

> "Whether voluntarily made or not, we hold is a question of law, to be determined by the court from the facts, as a condition precedent to their admission. Having been declared competent and admissible, they are before the jury for consideration. The jury have no authority to reject them as incompetent. But the jury are the sole judges of the truth and weight to be given to confessions, as they are of any other facts. In weighing the confessions, the jury must take into consideration all the circumstances surrounding them, and under which they were made, including those under which the Court declared, as matter of law, they were voluntary. In weighing confessions, the jury necessarily consider those facts upon which their admissibility, as having been voluntarily made, depends. While there is no power in the jury to reject the confessions, as being incompetent, there is no power in the court to control the jury in the weight to be given to facts. The jury may, therefore, in the exercise of their authority, and within their province, determine that the confessions are untrue, or not entitled to any weight upon the grounds that they were not voluntarily made. The court passes upon the facts merely for the purpose of determining their competency and admissibility. The jury pass upon the same facts, and in

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1. Omitted in Act 2 of 1974, the jury trial being abolished.

connection with other facts, if there are other facts, in determining whether the confessions are true, and entitled to any, and how much weight. The Court and jury each have a well-defined and separate province. It follows that although the jury may come to the conclusion that the confessions were not voluntary, yet if, from extrinsic evidence, or from their character and the circumstances, the jury are satisfied that they are true, the jury should act upon them."

Confession made by the accused after seizure of documents from his premises shows voluntariness of the confession. Retraction of the confession during personal hearing in trial after 9 years of making the same cannot make the confession inadmissible. *S.P. Sarangapani v. Astt. Director, Enforcement Directorate, Madras*, 1996 Cri LJ 4120, 4124 (Mad). See also *Saleem Khan v. Deputy Director, Enforcement Directorate*, (1985) 5 SCC 146. Once a confession is found to be involuntary, the other question as to its truth and genuineness will not arise for consideration at all. *Arumugham v. State*, 1994 Cri LJ 520, 529 (Mad). Though judicial confession is not voluntary one but where the same was obtained after a prolonged custody of the accused for more than 14 days in police station, no reliance can be placed on the basis of the judicial confession particularly when it was not corroborated by material particulars. *Palani v. State*, 1993 Cri 167, 1685 (Mad).

In a case where the judge had admitted a confession "provisionally" leaving it to the jury to determine whether it was or was not voluntarily made, it was held to be a serious error of law to leave the question of admissibility to the jury. It is for the judge to determine whether the confession is voluntary and for the jury to determine whether it is true or false [*Khiro v. R*, 57 C 649: 33 CWN 1112: A 1939 C 725; *R v. Kesari*, 11 Bom LR 332; see also *R v. Panchkari*, 52 C 67]. If a Judge, having admitted a confession as voluntary on evidence given on a *voir dire*, later decided in the light of subsequent evidence that the statement was not voluntary, he could disregard the confession [*Neo Ah Soi v. Public Prosecutor*, (1996) 1 SLR 534 (Singapore HC). *Goh Joon Tong v. Public Prosecutor*, (1995) 3 SLR 305 and *R v. Watson*, (1980) 1 WLR 991, **followed**]. So also a direction to the jury that "it is your duty to decide whether the confession is true or not and in order to do so you will have to form an independent judgment as to whether the confession was obtained under undue influence or not", is to leave the question of admissibility to the jury and is a misdirection [*Nayeb v. R*, 38 CWN 659; see also *Kashim Ali v. R*, 38 CWN 586: A 1934 C 651]. In another case of the same year, the judge after telling that it is for him to decide the question of voluntariness said: "I have decided that it was voluntary..... You should take all these points as settled and then decide what value should be attached to the confession and whether the accused was telling the truth when he made it." This was held to be a serious misdirection inasmuch as he withdrew from the jury an issue of fact relating to the truth of the confession. For although the judge has to decide the question of voluntariness in its bearing on admissibility, still after the confession is admitted, the jury are entitled and must be allowed to consider for themselves the question of voluntariness in its bearing upon the truth of the confession. To tell the jury that after the judge had decided that the confession was voluntary they were to take the question as settled and to decide on that basis whether the confession was true and what value to be attached to it, is a serious misdirection [*Kasimuddin v. R*, 62 C 312: 39 CWN 27: A 1934 C 853. This case was **followed** in *Kishori v. R*, 39 CWN 986 where the judge gave identical direction: "You are bound by my decision on this point" (voluntariness)].

The question as to what should be the proper charge on the question of voluntariness must have perplexed judges even after the decisions above. In a later case the judge in his direction said: "It is for me to decide whether the confession

was made voluntarily and once I have admitted into evidence, no person here can urge before you that it was not voluntarily made". This was held to be misdirection. The court consisting of three judges relying on the judgment of COLEMAN J, in the American case of *Butron v. State, supra* held that whether a confession is made voluntarily or not is a question of law to be determined first by the court from the facts as a condition precedent to its admission; but after it has been admitted, the jury are the sole judges of the truth and weight to be given to it. In weighing the confession the jury must consider the facts and surrounding circumstances including those under which the court declared the confession voluntary and it is entirely within their province to determine that the confession is untrue or not entitled to any weight on the ground that it was not voluntarily made [*Badan v. R*, 63 C 883: 40 CWN 794]. In this case DERBYSHIRE CJ, observed that *Burton v. S*, (*ante*) contains correct statement of law with regard to the function of the judge and jury). *Burton v. S, ante*, was also **relied** upon in *R v. Bhakta*, 63 C 1087: 40 CWN 669. The same view has been taken in Patna **following** *Badan v. R, ante* [*Suker Dosadh v. R*, A 1941 P 303 : 20 P 547]. A direction to the jury to decide first whether the confession was voluntary and then to decide whether it was true is also a misdirection, because a confession may be involuntary and still true. The jury has not to consider only the volitional character of the confession as detached from its credibility as the judge has to do, but it has primarily to determine its truth and as a part of it to consider whether it was voluntary [*R v. Dasrath*, A 1945 B 265 FB: 47 Bom LR 145 (*Badan v. R, sup* **relied** on)]. Onus of establishing that the confession was obtained by exercising coercion or through inducement would be on the accused [*S. Krishna v. State of Karnataka,* 1998 Cri LJ 785 (Kant)].

Admissibility is a question for the judge. It is not the province of the jury. On the other hand if the judge considers the confession admissible, it is his duty to point out to the jury that the fact that he considers the confession admissible does not necessarily mean that it is true and it is for them to make up their minds and in doing so they should naturally be guided to a large extent by their opinion on the question whether the confession was voluntary or not [*Baldeo v. R*, A 1933 C 187 : 142 IC 639]. Where co-accused's confession was erroneously admitted reviewing court must base its judgment on its own reading of the record and on what seems to it to have been the probable impact of confession on minds of average jury [*Gleen v. S*, A 1970 USSC 15].

Wigmore says:—"In determining admissibility—

(*1*) The *judge must hear the defendant's evidence* (including evidence from cross-examination of the prosecution's witnesses) upon the issue of voluntariness: although under the heterodox rule this could logically be dispensed with;

(2) The *jury*, during the hearing of this evidence, *may be withdrawn*, as is proper during all proof and arguments upon question of admissibility;

(*3*) But, when a confession is ruled to be admissible, the same evidence and *all other circumstances affecting the weight of the confession* may be introduced for the jury's ultimate consideration" [Wig s 861].

Summary of Law as to the Duties of judge and Jury about Confession [Charge to Jury].—The admissibility of a confession being a question of law it has to be determined first by the court from the fact given in evidence (including cross-examination of prosecution witnesses and also accused's evidence, if offered, as he is now a competent witness under s 315(*1*) Cr P Code). But after a confession is admitted by the Court as voluntary the jury become the sole judges of its truth or

falsehood and the weight to be given to it. When weighing the confession, the jury are entitled and must be allowed to consider for themselves afresh whether the confession was voluntarily made and in doing so, they have necessarily to consider all the facts and surrounding circumstances including those upon which the court declared the confession voluntary. It is a serious misdirection to tell the jury that the question of voluntariness having once been decided by the judge by admitting the confession, it must be accepted as final and that the jury are to determine only the truth of the confession and/or the weight to be given to it, for it would be withdrawing from the jury an issue of fact. The truth or falsity of a confession cannot be considered apart from the question of its voluntariness. In the end it really comes to this that after the judge has decided the question of law and admitted a confession as voluntary, the jury are entitled to consider afresh the same facts (and other facts, if any) with a view to determine for themselves whether the confession was voluntarily made and to reject it from consideration if they think that it was not so made, or was untrue. So, in spite of the judge's ruling on admissibility, the acceptance or rejection of a confession ultimately falls within the province of the jury.

It follows from the foregoing rules that—

(*1*) The admissibility of the confession is a question for the judge.

(*2*) Upon a consideration of the evidence and the circumstances, the judge preliminarily decides on the voluntariness or otherwise of the confession.

(*3*) If his answer is in the negative, the confession is excluded as a matter of law.

(*4*) If his answer is in the affirmative, the confession goes to the jury.

(*5*) The jury have to measure the confession by the same facts (and others, if any) upon which it was declared admissible by the judge and to determine whether the confession is true and entitled to any, and how much weight and value. It is therefore within their province to determine that the confession is untrue or is not entitled to any weight as being involuntary.

(*6*) Although the jury may determine that the confession was not voluntary, yet if, they are satisfied from the evidence that it is true, they should act upon it.

Grant of Copy of Confession.—Statement recorded under s 164 Cr P Code are public documents and the court is bound to issue copies thereof [*Bashiruddin v. R*, A 1932 A 327: 139 IC 330: see *Mahammad v. R*, 147 IC 390 FB: A 1934 A 81; *Mathayyan v. R*, A 1945 M 85; *Shankar v. R*, A 1954 A 779]. S 207 Cr P Code requires that a free copy of the confession shall be supplied to the accused before inquiry or trial.

"Confession Caused by Inducement, Threat or Promise etc."—It is difficult to lay down any hard and fast rule as to what constitutes inducement, the question is one for the discretion of the judge, and his decision will vary in each particular case. What language is sufficient to constitute an inducement, whether by threat or promise, has been the subject of many decisions, some not altogether satisfactory [Nort pp 161-162]. The current rules or test for determining what kind of inducement suffices to exclude, are three: (*1*) Was the inducement of a nature calculated under the circumstances to induce a confession irrespective of its truth or falsity? (*2*) Was there a threat or a promise, a fear or a hope? (*3*) Was the confession voluntary? The first test is, upon principle, the only rational and correct one. The third test is practically colourless and unserviceable when the nature of the inducement is in question, and is almost always translated secondarily, before application, into terms of one of the other two tests. [Wig s 831]. The questions that arise in this connection are:

(*i*) Was the inducement likely to produce an untrue or involuntary confession? and

(*ii*) Did the inducement in fact operate upon the mind of accused? and

(*iii*) Did the inducement proceed from a 'person in authority'?

The position in which the accused stands to the person who makes the inducement or causes the inducement to be made has an important bearing on the first question. A promise or threat made by an indifferent person, who has officiously interfered without any kind of authority, will never operate to induce a confession made to any other person who has not himself sanctioned the inducement [*R v. Gibbons*, 1823, 1 C & P 97; *R v. Hardwick*, 1811, 1 C & P 98*n*].

Every threat, inducement or promise even emanating from the person in authority is not hit by s 24. In order to attract the bar, it should be such as to lead the accused to suppose that "by making it he would gain any advantage or avoid any evil of any temporal nature in reference to the proceedings against him" [*Percy v. S*, A 1971 SC 1087]. What is important is that the mere existence of threat &c is not enough, but in the court's opinion the said threat &c shall be sufficient to cause a reasonable belief in the mind of the accused that by confessing he would get an advantage &c. The criterion is the reasonable belief of the accused [*Pyarelal v. S*, A 1963 SC 1094; *Rajkishore v. S*, A 1969 Or 191]. If a confession "proceeds from remorse or a desire to make reparation for the crime, it is admissible; if it flows from hope or fear excited by a person in authority, it is inadmissible" [*per* CAVE J, in *R v. Thompson*, 1893, 2 QB 12, 15].

No police officer or other person in authority shall offer or cause to be offered any inducement &c (s 163 Cr P Code).

A promise or threat, must reasonably imply that the prisoner's position with reference thereto will be rendered better or worse according as he does or does not confess. It need not, however, be *express*, but may be implied from the conduct of the person in authority, the declarations of the prisoner, or the circumstances of the case; nor need it be made *directly to the prisoner*; it is sufficient if it may reasonably be presumed to have come to his knowledge, providing, of course, it appears to have induced the confession [*R v. Thompson*, 1893, 2 QB 12—Phip 8th Ed p 250]. The coercion may be physical as well as mental [*S v. Miranda*, 384 US 436]. A perfectly innocent expression, coupled with acts or conduct of the person in authority together with the surrounding circumstances may amount to an inducement, etc. [*R v. Panchkari*, 29 CWN 300: 52 C 67]. Whether simple caution or admonition to the accused to tell the truth, constitutes an inducement or not has been the subject of several English decisions [see the cases cited in Tay ss 872, 879, 880. See also *ante*, "*Principle and Scope*"] If acts are proved which suggest that an inducement of some kind, although outside the terms of s 24 was in fact, given, the court may well refuse to accept the confession as voluntary [*Kalijiban v. R*, 63 C 1053: A 1936 C 316]. If a man is told by a person in authority that if he gives a true account of the matter, he will be pardoned, that is a continuing offer, the thread of which continues unbroken until it is accepted by the confession which completes the bargain, unless there is some circumstances which breaks it so as to show that the inducement no longer operates and that the person confessing has no longer any hope of gaining anything from the authorities by making the confession [*Fateh Chand v. R*, 86 IC 1001: A 1925 A 606]. When a confession was taken at extraordinary length describing in the greatest possible detail a whole series of crimes and it further appeared that it was probably induced by threat or promise, the confession should not be admitted without a thorough

enquiry that it has been made voluntarily [*Kalicharan v. R*, A 1933 C 835 FB: 145 IC 863]. Here administration of oath cannot be said to tantamount to a threat [*In re Pariti*, A 1942 M 654].

When a magistrate deposes that the statements made before him were made freely, that the accused willingly signed the statements when drawn up, that at the time the confession was made no policeman was present, that the hand-cuffs were removed and that he told that he was a magistrate and only truth should be stated—*Held* that the confession was not otherwise than voluntary [*Daulat v. R*, 2 LLJ 653]. After he was duly cautioned by the magistrate, the accused made a confession saying "I want to make a clean breast of everything for the reason that, if I serve the Government in any way, the Government may take pity on me"—*Held* that the confession was not inadmissible. The hope must be directly inspired by some one in authority. It is not enough for the accused to entertain an idle hope [*Samiruddin v. R*, 32 CWN 616: A 1928 C 500]. Where the evidence of the appellant showed real inducements an acknowledgment by him of a caution that he was not obliged to say anything is no indication that the inducements no longer continued to operate [*Spank v. R*, 1964, 1 All ER 727 PC]. Some minutes after a Subadar was shot, the accused a soldier in the army who was in custody and in bonds, was asked by the officer commanding the detachment: "Why have you done such a senseless act?"—not thereby meaning to convey a threat or inducement. The accused replied that he was being abused by the deceased three or four days and that without a doubt he had killed him—*Held* that the words of the officer though formally a question were really an exclamation of dismay and the statement of the accused was admissible [*Ibrahim v. R*, 1914 AC 599: A 1914 PC 155: 18 CWN 708]. See further *post*: "*Instances as to what sort of language constitutes inducement or threat.*"

Accused made a confession implicating three persons in a murder. He was given a pardon and examined as a Crown witness. He repeated the story which was disbelieved and the three were acquitted. The investigating police officer was tried for receiving a bribe from the accused, and in the trial the accused deposed that the confession was made by him under an inducement offered to him by the officer and that the murder was really committed by him and two others whose names he was not willing to disclose. The accused was then tried for murder and the confessions as well as the previous statements made by him at the former trials were given in evidence against him—*Held* that the confession made by the first accused in the first murder trial was inadmissible against him under s 24 [*R v. Cunna*, 22 Bom LR 1247]. S being arrested on suspicion at Etah made a confession before a magistrate admitting his complicity in certain dacoities at Etah and also in a dacoity committed previously at Majhaula. He was also identified by a witness as having been concerned in the dacoity at *M*. *S* was tendered pardon in connection with the Etah dacoities and made a full statement of facts which did not contain any reference to the *M dacoity*. *S* was subsequently tried in respect of *M dacoity*—*Held* that the confession previously made in respect of the *M* dacoity may be put in evidence against him [*R v. Sardara*, 46 A 236 FB: A 1924 A 220].

A confession was made by accused to a witness. The judge did not reject it because he did not disbelieve it, but he assumed that it was made under the belief that the accused would gain some advantage. It was not a confession made by promise or fear [*R v. Chandaya*, A 1929 M 92]. A confession made by the accused because he thought it best that by doing so he hoped to avoid the discovery of his entire scheme of conspiracy to misappropriate the large assets of an Insurance Co, is not involuntary [*Dalmia v. Delhi Admn*, A 1962 SC 1821 : 1962, 2 Cri LJ 805]. That before the committing magistrate no question under s 342 (now s 313) Cr P Code

was put to the accused with regard to his confession would not show that the confession was involuntary [*Subramania v. S*, A 1958 SC 66 : 1958 SCR 428]. The fact that he was told falsely that his associate had confessed is, while relevant, insufficient to make an otherwise voluntary confession inadmissible [*Frazier v. Cupp*, 394 US 731].

A confession not caused by inducement or promise is not inadmissible simply because there was a race for pardon [*Rahmat v. R*, 113 IC 65 (L)]. No analogy exists between confession from an accused by inducement and the case of an approver. If it were so, practically all approvers' evidence would be inadmissible [*Ismail v. R*, A 1925 N 337: 88 IC 283]. A statement made to a magistrate on account of a threat by police to put accused's women-folk to trouble is inadmissible. So also a statement made as the result of an inducement by the police which caused him to believe that he would get a free pardon. A confession made by an accused person under fear, which was encouraged by police-officer in a subtle way in the hours that elapsed before the accused reached the magistrate is inadmissible [*R v. Anant*, 32 CLJ 204: 60 IC 417]. A statement in writing by the accused, which contains an allegation from which it is to be inferred that the statement of which it forms a part was not made voluntarily, is inadmissible [*R v. Taranath*, 37 C 735]. Where the confession itself contains statement that it was made under threat, it must go against the prosecution [*Abdul Subhan v. R*, 1939 ALJ 866: A 1940 A 46].

A railway travelling auditor having discovered defalcations in the amount of the prisoner who was a booking clerk of the Railway company told him that "you had better pay the money than go to jail," and added that "it would be better for you to tell the truth"; after which the prisoner was brought before the Traffic Manager, in whose presence he signed a receipt, and admitting having received a sum of Rs. 826-8.—*Held*, that the words used by the travelling auditor constituted an inducement to the prisoner to confess, proceeding from a person in authority and the receipt was inadmissible in evidence on his trial [*R v. Nowroji*, 9 BHCR 358]. A village magistrate said to an accused who requested him not to report against him, "there is a hue and cry against you, if you speak the truth, we would consult the head constable and arrange" and thereupon the accused made a confession—*Held* that the arrangement promised was to save the accused from prosecution, the confession was therefore irrelevant [*Thandraya v. R*, 26 M 38]. As to exhortation to speak out the truth, see *post*.

A statement made under promise of pardon is no evidence against the prisoner [*R v. Radha Nath*, 8 WR 53; *R v. Ashgar Ali*, 2 A 260]. Various words and expressions have been held to amount to an inducement, threat or promise. See Phipson's Ev 8th Ed pp 255-60 and Archbold's Cr Pleadings 24th Ed pp 392-395 where several cases have cited.

Confession of two co-accused mutually contradictory and clearly unspontaneous ought not to be placed before the jury [*Mohsena v. R*, 43 CWN 893]. A police-officer acts illegally and improperly in offering any inducement to an accused person to make any disclosure or confession [*R v. Dharam Dutt*, 8 WR Cr 13]. A magistrate acts without due discretion when, as a prosecutor, he holds out promises to prisoners as an inducement to them to confess [*R v. Ramdhun*, 1 WR Cr 24]. An admission made by the accused was rejected, because it appeared to have been obtained by a police officer by persuasion and promises of immunity [*R v. Bishu Manji*, 9 WR Cr 16]. Confessional statement could not be relied on if it is not voluntary and free from police influence. [*Indra Mohan Brahma v. State of Assam*, 1982 Cri LJ NOC 127 (Gau)]. Statements by accused to excise officers made at excise barracks after arrest

and detention are inadmissible as not being voluntary [*Batasimoni v. R*, 53 C 706]. Where accused confesses and tells the magistrate that he does so because the sahib told him to tell the truth and he would be released, the confession is vitiated by inducement [*Dinanath v. R*, 45 B 1086: 60 IC 1006: 24 Bom LR 338]. A confession with the explanation that he had been told by the *daroga* that he would be made an approver, is not admissible [*R v. Khetal*, 45 A 300].

Presistent questioning by the police of an accused in custody or pressing him to make a statement is highly improper and such operation may negative the impression that a statement is voluntary and it would be a breach of Order No. 583 of the Standing Orders of the Madras Police [*Public Pros v. Munigum*, 1941 Mad 503: A 1941 M 359]. Where the accused was in the hands of a number of police officers when the magistrate was sent for, and he under orders of the deputy superintendent of police took the accused about ten yards away and recorded the confession—*Held* that it was not voluntary [*In re Krishna Iyer*, A 1935 M 479]. In a case of theft from a post office, H made cretain statements to the sub-inspector upon which some letters and currency notes were recovered from a certain place. He told that *P* took out the registered letters and handed them over to him. The evidence was that *H* was kept in charge of a head-constable and he was being questioned by the sub-inspector for three or four hours after which he broke down. The confession was inadmissible. It could not be used against *P* as it was to a great extent self-exculpatory [*R v. Pramatha*, 30 CLJ 503]. The fact that the accused made the confession after prolonged interrogation does not mean that there was inducement or threat [*Amar Layek v. State of WB*, 1988 Cri LJ 1293, 1299 : (1988) 1 Crimes 961 (Cal) (DB)]. A court of appeal is not precluded from inquiring into the nature of a confession, to see whether it was voluntary or not, because the recording magistrate attached a certificate under s 164 Cr P Code. When it appeared that the accused was illegally confined in a solitary confinement for a fortnight, the police had access to him, pressure was brought to bear upon him by his father and the district magistrate, his father was illegally arrested and detained in *hajat* for a long time without any charge and the confession was subsequently retracted as soon as the accused was produced in court—*held*, such a confession was not voluntary and not admissible in evidence [*Santosh v. R*, 9 CLJ 663: 13 CWN 861]. Where a magistrate who was taken by the sub-inspector to witness the accused discover the dead body, took charge of the investigation and taking the accused away recorded his confession in instalments and the sub-inspector took a note of what the accused had stated to the magistrate, the conduct of the sub-inspector and magistrate was so abnormal that it cast a good deal of doubt as to the genuineness of the confession [*Akbar Badr v. R*, A 1938 L 594: 40 PLR 890]. As to confession after prolonged police custody, see further *post*: "*Questioning About the Length of Police Custody and Removal of Police influence*."

Considering the physical and mental states in which an accused was, the confession made by her after repeated questioning was held not voluntary [*Viranwali v. S*, A 1961 J&K 11]. The evidence disclosed that the accused was tied up with the leg of a cot and he was not in mental equilibrium. So the possibility of extracting the confession from the mouth of the accused is not ruled out. [*State of Assam v. Manik Chandra Dey*, 1989 Cri LJ 1495, 1500 : (1988) 3 Crimes 362].

In some retracted confessions, although the grounds in the retraction, *eg*, ill-treatment, etc, were found to be unfounded, they were held irrelevant as the questions put to the accused and other circumstances led the court to doubt their voluntary nature [*R v. Panchkari*, 29 CWN 300 : 52 C 67]. Where promises or threats have been once used of such a nature as to render a confession inadmissible, all subsequent admissions of the same or the like facts, will be

rejected, unless from the length of time intervening, from proper warning of the consequences, or from other circumstances there be good reason to presume, that the delusive hope or fear which influenced the first confession, has been effectually dispelled [See Tay s 878 and the cases in the foot-note]. If the effect caused by the inducement or threat is shown to have been removed, a confession subsequently made will be admitted (See s 28).

—Production of Document as Result of Inducement.—Documents belonging to the accused which were evidence of a tax fraud were produced by him as a result of there being read to him an extract from Hansard containing the promise stating that when the person committing fraud fully discloses the past frauds, the Board of Inland Revenue will not institute criminal proceedings, but will accept a pecuniary settlement—*Held* that the documents were inadmissible against him as they were produced as a result of inducement or promise. The accused's conviction for having conspired to cheat and defraud the Government was accordingly reversed [*R v. Barker*, 1941, 3 All ER 33: 1941, 2 KB 381]. Mr GOTLIEB in an article in the Law Quarterly Review (1959, Vol 72) regards it clearly an unsatisfactory decision on which to base a wide exclusionary rule when disovery of subsequent facts in consequence of the statement in an inadmissible confession have been held to be admissible in various English cases. (See Mr. GOTLIEB'S comment in the notes to s 27 *post* under: "*Theory of Confirmation by Subsequent Facts*", *post*.

—Non-operation of Threat or Inducement.—When threats are made but the accused makes the statement deliberately uninfluenced by the threats, s. 24 does not apply [*R v. Anandrao*, 49 B 642 : 27 Bom LR 1034 (*R v. Basvanta*, 25 B 168 **followed**)]. A confession which is the direct outcome of an understanding that there was a reasonable prospect of receiving a pardon is not legal. But where after such a confession the accused makes a statement under s 364 Cr P Code in which after stating that he has now no hope of obtaining a pardon, he affirms the previous confession, it may be used, certainly as against the person making it, and possibly also against his co-accused [*R v. Tara*, 45 a 633].

The Tribunal has to see whether before recording the confessional statement the positive authoritative influence of the customs officers was completely removed from mind of the accused and also whether the accused had sufficient time to relieve himself of the impact of the events before he made the confessional statement. [*Manindra Chandra v. Customs, Excise & Gold (Control) Appellate Tribunal*, 1992 Cri LJ 1190, 1196 (Cal)].

Confession without inducement.—A confessional statement was made by the person while in the custody of the Intelligence Officers of the Narcotic Intelligence Bureau. He made no complaint of any threat or pressure when produced before the Magistrate who recorded his statement under S. 313, Cr P.C. The statement was held to be of voluntary nature. *Pon Adithan v. D D Narcotic Control Bureau*, AIR 1999 SC 2355 : 1999 Cri LJ 3663.

—Onus of Proving Inducement.—Where an accused when retracting a confession alleged ill-treatment and inducement by police to extract the confession, the onus is on him to prove such ill-treatment and inducement [*R v. Kabili*, 22 CWN 809: 47 IC 811]. In the absence of evidence that a confession of an accused person has been induced by illegal pressure, it is not to be so presumed. A confession is inadmissible only if the court considers it to have been induced by illegal pressure [*R v. Balvant*, 11 BHCR 137]. The English Court of Appeal has provided the following point-form guidance over this matter: "whether a confession was made as the result of an improper inducement, it is inappropriate to consider the transaction in "contractual" terms of offer and acceptance. The court should (i) identify the thing done; (ii) ask whether it was likely to render unreliable any hypothetical confession, and finally (iii) decide whether the prosecution has proved beyond reasonable doubt that the confession did not result from the things said and done" [*R v. Barry*, The Times, December 11, 1991 CA].

Information in Confession Leading to Discovery of Facts is Admissible Even Though it was Improperly of Non-voluntarily Obtained. (See *post*, s 27).

"Having Reference to the Charge Against the Accused Persons".—In order to exclude a confession the inducement must have *reference to the charge* and must be such as might reasonably induce the person to whom it is addressed to suppose that by making a confession he would gain some advantage or avoid some evil of a temporal nature in referernce to the criminal proceedings then going on against him. It is not however necessary that at the time the inducement is offered, the charge against the accused should have been actually made [*R v. Luckhurst*, 23 LJMC 18 *post*]. The offer of a merely collateral advantage of a temporal nature without reference to the consequences of the prosecution, does not affect the admissibility of the confession. Thus an offer to abstain from an examination of the person of a woman [*R v. Cain*, 1839, 1 C & D cc 37—CONTRA: *R v. Bowden*, cited Tay. s. 880]; to strike off the prisoner's handcuffs [*R v. Green*, 6 C & P. 655]; to let him see his wife [*R v. Lloyd*, 6 C & P 393]; or to give a glass of spirit [*R v. Sexton*, 3 Russ C&M 462] have been held unobjectionable. The last mentioned case has not been approved by some authorities [see Ros. Cr Ev 38; Russell on Crimes, 6th Ed 482n].

Where the accused persons made confessions of guilt before their caste *punchayat* who threatened them to excommunicate for life if they would not confess, s 24 could not be pleaded for the threats had no reference to the charge against the accused persons, but related to caste proceeding [*R v. Mohan*, 4 A 46. But see *R v. Hicks*, 10 BLR App 1, where a confession made under threat for a purpose other than to extort confession was held irrelevant. Field, however, doubts the correctness of this decision]. If the inducement be made to one charge, it will not generally affect the confession as to a totally different charge [*R v. Warner*, 3 Russ Cr 452n], unless the two crimes charged form parts of the same transaction [*R v. Hearn*, 1 Car & M 109].

In England, however, it has now been decided by the House of Lords that to render the confession inadmissible the inducement need not relate to the charge or the contemplated charge [*Commrs of C&E v. Harz and Power*, 1967 1 All ER 177].

"Proceeding From a Person in Authority".—If the promise or threat be made by any one *having authority* over the prisoner in connexion with the prosecution—as, for instance, by the prosecutor, the master or the mistress of the prisoner, when the offence concerns such master or mistress, the chairman of the company which is prosecuting him, the constable, or other officer, having him in custody a magistrate, or the like—the confession will be rejected as not being voluntary. The same rule will perhaps prevail, though the inducement was not actually offered by the person in authority, if it were held out by any one in his presence, and he by his silence sanctioned it being made [Tay. s 873]. "Person in authority" means some one engaged in the *arrest, detention, examination, or prosecution* of the accused, or by some one acting in presence, and without the dissent, of such a person" [Thip 11th Ed p 354, citing *R v. Pountney*, 7 C & P 302 and other cases]. A 'person in authority' is one who is engaged in the apprehension, detention or prosecution of the accused or one who is empowered to examine him [*Dhuleswar Behera v. The State*, 1982 Cri LJ 2346, 2348: (1982) Cut LR (Cri) 62 (Orissa)]. There is no statutory definition of the words "person in authority"; but it is well settled that the words have reference to a person who has authority to interfere in the matter under enquiry. In this case the definition given is the same as in Phipson, *supra*, [*Suntokhi v. R*, 12 P 241 SB: A 1933 P 149]. If the inducement is made by a person not in authority in the presence of a person in authority, and is acquiesced in by the person in authority, the confession made in consequence of such an inducement is just as inadmissible as if it

had been made by the person in authority [Hals, 3rd Ed, Vol 10, para 862]. If a father finds that his son has committed a crime and puts pressure on him by using strong language to disclose the truth and the son thereafter makes a statement incriminating himself, it cannot be said that a confession was exhorted since the father is not a "person of authority" as envisaged in sec. 24 [*Biswamber Meher v. State of Orissa*, 1989 Cri LJ 271, 274 : (1988) 2 Crimes 290 (Orissa)]. Where the police patel was one of the entire party and he had not protested when the others offered inducement to the accused the inducement could be said to have proceeded from the police patel and confession is in admissible under s 24 [*Punja Mava v. S*, A 1965 G 5]. An inducement offered not personally by the person in authority but with his sanction or an inducement not to the accused personally, but to some one on the accused's behalf is equally inadmissible. It has to be seen whether the confession was made to a person in authority and there was inducement, threat or influence [*Abdul Hye v. State of Assam*, 1983 Cri LJ NOC 93 (Gauhati)].

The expression "person in authority" has a wider meaning than the actual prosecutor. A travelling auditor in the service of a Railway Company, who induced the booking clerk to make confession, was held to be a person in authority. In this case SARGENT, CJ, said: "The test would seem to be, has the person authority to interfere with the matter? And any concern or interest in it, would appear to be held sufficient to give him that authority, as in *R v. Warringham*, 2 Den CC 147n, where PARKE, B, held that the wife of one of the prosecutors, and concerned in the management of their business, was a person in authority; and we find the rule so laid down in Archbold's Criminal Practice" (*R v. Navroji*, 9 Bom HC 358]. So, a manager of a company [*R v. Attur*, A 1982 S 64], or a superior officer [*Bhagabati v. R*, 60 C 719] is a person in authority over a clerk. A Captain holding a subordinate rank in the army who went with the police to search accused's shop was held to be a person in authority [*Smith v. R*, 43 IC 605 (**following** *R v. Warringham, ibid* and other cases]. A person in authority should be one who, by virtue of his position, wields some influence over the accused. It is not necessary that he should have authority to interfere in regard to the charge [*Nannhu v. S*, A 1960 MP 132]. "Person in authority" must be liberally construed. Even a superior officer of an accused is a person in authority [*Viran Wali v. S*, A 1961, J & K 11]. The expression includes the prosecutor [*Asutosh v. R*, 26 CWN 54; *Gunga v. R*, A 1945 C 360: 76 CLJ 149]. Where a third person was sent by the police to make the accused confess by an inducement that he would be dealt with leniently if he confessed, it proceeded from a person in authority [*Bulaki v. R*, A 1938 L 476].

The accused confessed his guilt to the medical officer of his regiment, who told the accused, when he was under his treatment in the hospital, that it would be better for him to tell the truth, as to how he came about certain wounds—*Held* that the medical officer is not a person in authority in respect of any proceedings which might be contemplated or taken against the accused [*R v. Md Baksh*, 8 Bom LR 507: 4 Cri LJ 49]. A confessional statement before the Asst. Registrar of Co-operative Societies is an inquiry held by him is not necessarily inadmissible [*In re Pariti*, A 1942 M 654].

Where the accused confessed in the hope that he or someone close to him might benefit thereby, the Court of Appeal held that it is for the judge to decide in such a case whether the voluntariness of the confession was destroyed or not. The judge should understand the principle and spirit behind the requirement that if a statement by an accused is to be admissible in evidence against him, the prosecution must show it to be a voluntary statement in the sense that it was not obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority,

remembering that 'voluntary' in ordinary parlance means 'of one's own free will' [*R v. Rennie*, (1982) 1 All ER 385 CA].

Once it is found that a statement was procured by inducement, the burden is on the prosecution to show that the complainant was not a person in authority [*Gunga v. R, sup*].

Instances.—The following have been held to be persons in authority: A police patel [*R v. Rama Birapa*, 3 B 12]; a police constable [*R v. Luchoo*, 5 NWP 86]; a village magistrate who was acting as such in regard to enquiry [*Thandray v. R*, 26 M 38]; a magistrate or a sessions judge [*R v. Asghar Ali*, 2 A 260; *R v. Uzeer*, 10 C 775]; an honorary magistrate [1 WR 24]; zemindar and honorary magistrate [*Debendra v. R*, 101 IC 881: A 1927 P 257]; honorary magistrate acting as *zaildar* [*Hashmat v. R*, A 1934 L 417]; members of a *salish* [*R v. Aushil*, 20 CWN 512]; the head of a *muth* [*Sanatan v. S*, A 1953 Or 149], a *zaildar* [*Karan v. R*, 34 IC 642]; a *zaildar* under a big estate [*Taule v. R*, A 1929 O 272]; *lambardar* [*Muhammadar v. R*, 81 IC 555: A 1922 L 263] a *mukhia or zileadar* [*Ramdin v. R*, A 1948 A 101]; a village patel [*Nannhu v. S*, A 1960 MP 132]; a Food Grain Inspector [*Abu v. R*, A 1948 O 81]; *Mukhia*, *Sarpancha* and *Panch* made under the Bihar Panchayat Raj Act [*Ratan Gond v. S*, A 1959 SC 18: 1959 SCR 1336]; President of Village Vigilance Committee [*Sathalavadan v. R*, A 1939 M 515 : 183 IC 561]; a servant of a big landlord [*Md v. R*, A 1936 L 264]; a zemindar directly connected with the investigation by the direction of the police [*Nawab v. R*, A 1932 S 55]; the Chief Secretary [*Pyarelal v. S*, A 1963 SC 1094]. Whether a mere landlord and a member of the Union Board is a person in authority [*Bhakta v. R*, 63 C 1089]. A zemindar or *lambardar* was held not a person in authority when there was nothing to suggest that any inducement or promise was made [*Jiwan v. R*, A 1936 A 470]. The oral confession made to a *Sarpanch* cannot be acted upon when the *Sarpanch* did not bother to record that confession [*Ukabhai Becharbhai v. State of Gujarat*, 1985 Cri LJ NOC 61 : 1984 Guj LH 66 (Guj) (DB)].

A *punchayat* assuming an authority and leading the accused to believe that he had that authority is a person in authority. Too restricted a meaning should not be placed on the words "person in authority" [*Nazir Jharudar v. R*, 9 CWN 474]. A *punchayat* is a person in authority. But a confession before the *punchayat* who only told the accused to speak the truth is however admissible [*R v. Jasha*, 11 CWN 904]. Collecting and assistant *punchayats* are "persons in authority" when they have taken an important part in the enquiry. The belief that the persons to whom the accused made a confession were "persons in authority" is not sufficient. A confession proceeding from an assurance by an assistant *punchayat* that the accused would be let off if he disclosed everything, is inadmissible [*R v. Ganesh*, 50 C 127: 74 IC 264; *Kunja v. R*, 8 P 289; *R v. Aushi*, 23 CLJ 477: 20 CWN 512]. A belief that a person is in authority is clearly not sufficient. A co-villager who does not exercise any influence or authority [*R v. Kutub*, A 1930, C 633: 57 C 488] or a prominent or influential person in the village [*Pub. Pro. v. Venkatamma*, A 1932 M 748; *Md Ali v. S*, 59 CWN 1023] is not such a person. *Punchayetdars* are private detectives helping the police and are not persons in authority [*Mulimayandi v. R*, 76 IC 829: 45 MLJ 845 (*R v. Fernad*, 4 Bom LR 785 **(followed)**)]. The members of a *punchayet* sitting to consider whether the two persons who committed a murder should be excommunicated from their society was held not to be persons in authority [*R v. Mohan*, 4 A 46]. Vakil's clerk is not a person in authority [*R v. Ram Avadh*, 88 IC 514 : A 1925 O 597]. So also an *inamkhor* [*Ghulam Md v. R*, A 1929 L 558]. A *Mukhia* of a village is a person in authority, but where an accused volunteered to make a confession if he could get some assurance from the *Mukhia* that he would do his best to help him, the

confession is not inadmissible [*R v. Har Piari*, 44 A 57 : A 1926 A 737]—CONTRA: A *Mukhia* is not a person in authority [*Bhojo v. R*, A 1934 S 172].

The prosecutor [*R v. Jenkins*, Russ & Ry 492]; his wife [*R v. Upchurch*, 1 Moo CC 465]; his attorney [*R v. Croydon*, 2 Cox 667]; the master or mistress of the prisoner, if the offence has been committed against the persons or property of either but otherwise not [*R v. Moore*, 2 Den 522]; a magistrate whether acting in the case or not [*R v. Gillis*, 11 Cox 69; *R v. Clewes*, 4 C & P 221]; the magistrate's clerk [*R v. Drew*, 8 C & P 140]; a coroner [*R v. Waltho*, 1905 Times, June 17], have been held to be persons is authority. But the mere fact that the person is a possible witness for the prosecution does not make him a person in authority [*Deokinandan v. R*, 1968, 2 All ER 346 PC]. It is doubtful whether a private person, to whose temporary custody the accused has been committed by a constable, is a person in sufficient authority. (The affirmative is maintained in *R v. Enoch*, 5 C & P 539; *R v. Winsor*, 4 F & F 363, the case of a female searcher: Ros Cr Ev 44—CONTRA : *R v. Sleeman*, Dears 249; *R v. Vernon*, 12 Cox 153). [Phip 8th Ed p 250].

Statement Under s 164 Cr P Code Other Than Confession.—S 164 Cr P Code does not exclude confession otherwise admissible. It merely provides for the manner in which confession made during a police investigation should be recorded [*In re Arunachala*, 55 M 717]. There is nothing in s 164 forbidding a magistrate from recording a statement (other than confession), if the accused chooses to make one before he is placed on trial. Such statement, if voluntary, is admissible and relevant to the probability or improbability of his guilt [*Madan Garu v. R*, 73 IC 963 (*R v. Bhairab*, 2 CWN 702; 9 P 224 **dissented from**)]. "Statement" in s 164 is not limited to a statement by a witness but includes that made by an accused and not amounting to a confession. Such statements which must be recorded by the magistrate are admissible and he cannot be permitted to give oral evidence of statement not recorded by him [*Legal Rembr v. Lalit*, 49 C 169: 25 CWN 788; *Abdul Rahim v. R*, 41 CLJ 474: A 1925 C 925; *Karu v. R*, A 1937 N 254; *Md Baksh v. R*, A 1941 S 129; *R v. Golam*, 4 P 327: A 1925 P 536]. Agreeing with this the Supreme Court held that once investigation has started, any confessional statement made by the accused is also required to be recorded under s 164 and the magistrate cannot give oral evidence of it [*Shiv Bahadur v. S*, A 1954 SC 322 : 1954 SCR 1098]. Approving the cases of *Abdul Rahim, Md Baksh and Gulam Md, sup*, the Privy Council held that a statement under s 164 *ibid* not amounting to a confession can be used against the maker as an admissible under ss 18-21 [*Ghulam Hussain v. R*, 54 CWN 464: 52 Bom LR 508; *Pingal Khadia v. S*, A 1969 Or 245].

If an incomplete *chalan* is sent up and the evidence available is recorded by a magistrate, the statement made by the accused is not a statement made under s 164 but a statement recorded under 364 (now s 281) [*Bhaikhan v. R*, 68 IC 841: A 1922 I 189].

As to confessions not recorded under s 164 Cr P Code, see *post* s 26. Where the accused appeared before a magistrate and stated that he had killed his concubine and he took down the statement—*Held* that it was not a statement under s 164 as the magistrate was not investigating the case, but was itself the first information and therefore properly admitted in evidence [*Nainamuthu v. R*, 1939 MWN 1132: A 1940 M 138].

Confession in Petition to Magistrate.—is admissible under s 21 [*R v. Ram Naresh*, A 1939 A 242 *ante*]; but where an accused admitted commission of offence and the magistrate noted it on the application for remand without complying with s 164 Cr P Code, it is not admissible [*R v. Saw Min*, A 1939 R 219].

Confession During Trial.—A confession can be made even during a trial. It may also be made in the court of the committing magistrate [*Hemraj v. S*, A 1954 SC 462: 1954 SCR 1133]. Evidence with regard to oral confessions made after witnesses were recalled should be excluded [*Trilochan Joshi v. Union of India*, 1983 Cri LJ NOC 109 (Delhi): (1983) Crimes 1025].

Confession Recorded by Presidency Magistrate.—As the Cr P Code did not apply to the police in the town of Calcutta, s 164 did not apply to a confession recorded by a presidency magistrate [*R v. Panchkari*, 29 CWN 300] but it could be proved by the evidence of the magistrate [*R v. Nilmadhav*, 15 C 595 FB]. The amendment of s 164 Cr P Code by insertion of the words " or under any other law for the time being in force" by the Cr L Am Act, 46 of 1952, changed the position. New Cr P Code 1973 has made the Code applicable to the police in Calcutta.

Confession by Approver. [Statement After Pardon Under s 308 Cr P Code].—An approver's disclosure is in its very nature the result of an inducement or promise; but should it appear that it was extorted by undue duress such as threat or violence, to that extent s 24 would be applicable and the confessional statement is to be ruled out of evidence. S 308(2) can only contemplate a true and full disclosure upon the inducement or promise of pardon, and not a disclosure induced as a result of undue pressure. Such a statement is not necessarily excluded by s 24. S 339(2) [now s 308(2)] makes by necessary implication such a statement an exception to the general rule in s 24 [*Ramnath v. R*, A 1928 L 320 : 9 L 608 (*R v. Sultan*, 5 ALJ 691 **followed**); see also *R v. Cunna*, 59 IC 324: 22 Bom LR 1247]. A statement under s 339 (2) [now s 308 (2)] Cr P Code can in no case include a confessional statement made by an accused before the tender of pardon unless it was recorded with the strict procedure provided by ss 164 and 364 (now s 281) Cr P Code [*Horilal v. R*, A 1940 N 218: 1941 Nag 372; *Miral v. R*, A 1943 S 166]. Thus, *U* was tendered a pardon after her statement and treated as an approver against *J* who was committed to sessions; *U* resiled from her statement and was placed on trial with the other accused—*U*'s statement having been made before the pardon, was inadmissible [*R v. Jagat*, 22 C 50, 73]. Approving *Horilal's* case it has been held that when an approver accepts the tender of pardon his statement legally recorded under s 164 Cr P Code will be admissible in evidence against him at a subsequent trial after forfeiture of pardon for violation of its terms [*Rambharose v. R*, A 1944 N 105 FB]. Confessions by approvers are not substantive evidence, but may be used only for the purpose of contradicting or corroborating their depositions in Court [*per* BISWAS J, in *Nitai v. R*, A 1937 C 433, 445 SB].

It is illegal for a magistrate to convert an accused person into a witness except where a pardon has been lawfully granted [*R v. Hanmanta*, 1 B 610; *R v. Ashgar*, 2 A 260—He may be a competent witness even though illegally pardoned [*Subramania v. R*, 25 M 61, 68]. Before an accomplice can be a competent witness, the prosecution must be withdrawn and accused discharged [*Banu v. R*, 33 C 1353; see however *Dy Legal Rem. v. Banu*, 5 CLJ 224].

—Tender of Pardon Whether Amounts to Inducement or Not.—The mere fact that a prisoner makes a confession with a view to, and in the hope of, being permitted to give evidence for the State is not sufficient to exclude the confession as evidence against him. To exclude the confession it must be shown that a hope of pardon was held out by some one in authority and that the prisoner acted upon the hope he held out [As to tender of pardon see ss 306, 307, 308 Cr P Code].

Local Government has no power to offer conditional pardon [*Banu v. R*, 33 C 1353]. The tender of a pardon by a Local Government, though of doubtful validity in

law, can in no way be regarded as an inducement or threat illegally held out to accused persons to disclose or withhold any matter within his knowledge [*Dy Legal Rembr v. Banu*, 5 CLJ 224]. When the Govt. notified that persons giving evidence in a bribery case against a judge would not be prosecuted, such evidence is admissible [*Har Fd v. R*, 45 A 226, 229; see *Anant v. R*, A 1925 N 313].

The mere fact that the accused wished to earn pardon by turning approver is not sufficient to show that inducement was held out [*Ram Singh v. R*, A 1943 O 269]. A statement made by a prisoner under a promise of pardon, is no evidence against him, after his escape from custody and subsequent arrest [*R v. Radha Nath*, 8 WR Cr 53]. If the deposition be regarded as a confession, it was clearly inadmissible against the co-accused, it having been made after the tender of pardon [*R v. Jagat Ch*, 22 C 50, 73]. Accused made an incriminating statement and was sent to jail, bail being refused. Suddenly a change came and he was let off at a nominal bail and made a second statement more detailed and just the sort that the police wanted to have. Under the circumstance, it was difficult to believe that he was not offered a pardon. The second statement was inadmissible in evidence [*R v. Anant*, 32 CLJ 204: 60 IC 417].

Confession Made Outside India.—When a confession is made outside India all that has to be seen is whether there is anything in the substantive or natural law to vitiate it [*Bhan v. R*, A 1932 L 367]. A confession made to a magistrate of an Indian State is admissible [*R v. Sundar Singh*, 12 A 595 (**followed** in *R v. Nagla Kala*, 22 B 235); see also *R v. Shafi Ahmad*, 49 B 642: 27 Bom LR 1034; *R v. Hulasi*, A 1933 A 286: 144 IC 157; *In re Panchanatham Pillai*, 52 M 529: 52 MLJ 628]. Such confession need not have the certificate introduced in s 164 (*3*) Cr P Code by the Amending Act, 18 of 1923, [now s 164(*4*)] as s 29 Evidence Act has not been similarly amended [*Lall Singh v. R*, A 1938 A 625: 1938 ALJ 943].

Statement of Confession Before Coroner.—An incriminating statement voluntarily made by an accused, a suspect, before the coroner in inquest proceedings is not inadmissible [*R v. Azim*, A 1928 B 52]. It has been held in another case that a statement made on oath before a coroner after being warned is admissible against him under s 26 or as admission under ss 18 and 21 [*R v. Ramnath*, 50 B 111 : 93 IC 690; *R v. Bhagwandass*, 1941 Bom 27: A 1941 B 50, see also *R v. Azim*, A 1928 B 52—CONTRA: *R v. Kazi Dawood*, 50 B 56: 93 IC 225].

Confession to Excise Officer.—[See *post*, s 25, *"Meaning of the Expression 'Police Officer'"*].

"And Sufficient in the Opinion of the Court to Give the Accused Grounds".—The nature and character of power which a court trying a criminal case exercises in admitting in or excluding from evidence a confession under s 24 is described by WEST, J, as discretionary. "It was a discretion", said WEST J, "which was left to the court to which the evidence was tendered, and it was only in the exceptional case when the court above had reason to believe that the practice had been obviously abused, and that there had been an entire want of discretion in receiving the confession that they could interfere" [*R v. Vijialakshmi*, Unrep Cr C 163, 164 cited in *R v. Narayan*, 32 B 111, 126]. See the principle stated by EARLE, J, in *R v. Garner*, 2 C&K 920, 925 quoted *ante*, under *"Confession must not be prompted by inducement..... promise"*. S 24 leaves it entirely to the court to form its own opinion as to whether the inducement, threat or promise was sufficient to lead the prisoner to suppose that he would derive some benefit, or avoid some evil of a temporal nature by confessing [*R v. Navroji*, 9 BHCR 358, 367].

As the admission or rejection of a confession rests wholly in the discretion of the Judge, it is difficult to lay down particular rules, *a priori*, for the Government of that discretion; and the more so, because much must necessarily depend on the age, experience, intelligence and character of the prisoner, and on the circumstances under which the confession was made. Language sufficient to overcome the mind of one, may have no effect upon that of another; a consideration which may serve to reconcile some contradictory decisions when the principal facts appear similar in the reports, but the lesser circumstances, though often very material in such preliminary enquiries, are omitted [Tay s 884].

Instances as to What Sort of Language Constitutes Inducement or Threat. [Exhortation to Speak Out Truth].—[See also *ante: Confession caused by inducement, threat or promise"*]. Confession obtained by such words as these have been held to be inadmissible:—"Unless you give me a more satisfactory account, I will take you before a magistrate" [*R v. Thompson*, 1 Lea CC 291; *R v. Luckurst*, 23 LJMC 18]; "If you will tell me where my goods are, I will be favourable to you" [*R v. Cass*, 1784, 1 Lea 293*n*]; "I only want my money, and if you give me that, you may go to the devil" [*R v. Jones*, 1809 Rus & Ry 152]; "If you will not tell all you know about it, of course we can do nothing" [*R v. Patridge*, 1836, 7 C & P 551]; "You are under suspicions of this, and you had better tell all you know" [*R v. Kingston*, 1830, 4 C & P 387]: "The watch had been found and if you do not tell who your partner was, I will commit you to prison" [*R v. Parratt*, 4 C & P 570]: "You had better split, and not suffer for all of them" [*R v. Thomas*, 6 C & P 333]; "It will be better for so and so (naming the prisoner) to speak the truth" [*R v. Thompson*, 2 QB 12].

Confessions have been rejected in consequence of such expressions as the following having been used:—"It will be better for you to speak the truth" [*R v. Garner*, 1848, 1 Den CC 329]: The inspector tells me that you make house-breaking tools: if so, you had better tell the truth, it will be better for you" [*R v. Fennel*, 7 QBD 147]; "It is of no use to deny it for there are the man and boy who will swear they saw you do it" [*R v. Mills*, 6 C&P 147]: "Now, be cautious in the answers you give me to the questions I am going to put to you about this watch" [*R v. Fleming*, 1842, 1 Arm M & O 330 (Ir)]. The judges have however, of late years come to the conclusion that some of the cases of this class have gone too far in the direction of mercy, and three of them have been overruled [*R v. Baldry*, 1852 Den CC 430 **overruling** *R v. Harris*, 1844, 1 Cox CC 106; *R v. Drew*, 1837, 8 C&P 140 and *R v. Morton*, 1843, 2 M & Rob 514. In *R v. Morton*, the words used were "anything" you can say in your defence we shall be ready to hear]. So anxious was the court at one time to exclude evidence of confessions, that exhortations, not to tell lies, but to *speak the truth*, have been deemed likely to induce a *false* acknowledgment of guilt; and, consequently, confessions made after exhortations have more than once been rejected [*R v. Shepherd*, 7 C&P 579; *R v. Enoch*, 5 C&P 539; *R v. Laugher*, 2 C & Kir 225; *R v. Bate*, 11 Cox CC 686]. But this paradoxical opinion is now happily exploded [*R v. Reeve*, 1872 LR 1 CCR 362; *R v. Holmes*, 1 C & Kir 248; *R v. Court*, 7 C&P 486 (Tay s 884)]. As confessions following advice to tell the truth were formerly usually excluded, WILLES J, (in *R v. Reeve*, *sup*) said disapprovingly: "It seems to have been supposed at one time that saying 'tell the truth' meant in effect 'tell a lie' ". The weight of authority in America is against the exclusion of confessions under such advice [see Wig s 832].

Mere exhortation to speak out the truth or explain cannot of itself amount to an inducement or threat [*R v. Jasha*, 11 CWN 904] within the section. Whether a statement by the person in authority that if the whole truth did not come out he would

hand over the inquiry to the police, appears to be a threat or not is a question of fact [*Pyarelal v. S*, A 1963 SC 1094]. But words like these when addressed to a subordinate or to a person over whom the speaker has some authority coupled with the tone or manner in which they are said may amount to a threat or the offer of an inducement for some kind of advantage. In this country also the expression "you had better tell the truth" has in several cases been regarded as a threat or promise unless the words are qualified in some manner [*Hashmat v. R*, A 1934 L 417; *R v. Uzeer*, 10 C 775; see cases below]. The mere bald assertion by the accused that he was threatened, tutored or that inducement was offered to him, cannot be accepted as true without anything more to substantiate it [*Kasu Bhai v. State of H.P.*, 1992 Cri LJ 3251, 3259 (HP)].

"If you are guilty, do confess; it will perhaps save your neck; you will have to go to prison; pray tell me if you did it" [*R v. Upchurch*, 1 Moo CC 465]; "If you do not tell me all about it, I will send for a constable" [*R v. Richards*, 5 C&P 318]; "It would have been better if you had told at first" [*R v. Walkley*, 6 C&P 175]; "It will be best for you if you tell how it was transacted" [*R v. Warringham*, 2 Den 447]; "Speak the truth; it will be better for you if you do" [*R v. Rose*, 78 LT 119]; "You had better pay money than go to jail—it would be better for you to tell the truth" [*R v. Navroji*, 9 Bom HC 358; *R v. Attur*, A 1932 S 64]; "The truth had come out and you had better say what you know" [*Kunja v. R*, A 1929 P 275: 8 P 289]; "If you confess the truth nothing will happen to you" [*R v. Mt Luchoo*, 5 NWP 86; see *Faiz Ahmad v. R*, A 1936 855]; "Tell me what really happened and I will take steps to get you off" [*R v. Rama Birapa*, 3 B 12]; "If you confess to the magistrate, you will get off" [*R v. Ramdhan*, 1 WR Cr 24, 1864]; "I will get you released if you speak the truth" [*R v. Dhuram Dutta*, 8 WR Cr 13]; "If you speak the truth, we will speak to the constable and arrange" [*Thandraya v. R*, 26 M 38]; "Tell me what you knew about it. If you will not, I can do nothing for you and I will send for the constable" [UBR (1907-1910) 147]. Pointing to the policemen: "You speak the truth [*Mor Phalai v. R*, A 1933 S 409]. "You need not be afraid if you do so" [*In re Annika*, A 1942 M 237].

Confession after a supervisor had said that if he told the truth he would let him go, otherwise he would take him to the police, is one obtained by inducement [*Gunga v. R*, A 1945 C 360]. Confession under an exhortation to speak the truth implying an inducement that he will escape penalties is inadmissible [*Yeshodi v. R*, 99 IC 858: A 1927 N 43].

Instances as to What Sort of Language Does Not Constitute Inducement or Threat.—"But sure to tell the truth" [*R v. Court*, 7 C&P 486]; "Have you my rings? Be a good girl and tell the truth" [*R v. Stanton*, 6 Cr App R 198]; "You had better as *good boys*, tell the truth" [*R v. Reeves*, LR 1 CCR 362]; "I should advise you that you will answer truthfully, so that if you have committed a fault you may not add to it by stating what is untrue" and having shown a letter which the accused denied having written, added "Take care, we know more than you think we know" [*R v. Jarvis*, LR 1 CCR 96]. "I must know more about it" [*R v. Reason*, 12 Cox 228]; "You would not have told so many lies, if you had not done it" [*R v. Thornton*, 1 Lew 49]. "As an universal rule, exhortation to speak the truth ought not to exclude a confession [*per* ERLE J, in *R v. Moore*, 2 Den CC 523; see also 1894 PR 9; *R v. Jasha*, 11 CWN 904; *In re Karumuri*, A 1948 M 324]. So also saying "Make a detailed statement" after the making of a short confession [*Gian v. R*, 1937 Lah 481: A 1937 L 399]. The words "you had better" seem to have acquired a sort of technical meaning [*per* KELLY CB in *R v. Jarvis*, LR 1 CC 96] but if the phrase is accompanied by other words and circumstances importing threat or fear, it may cease to be unobjectionable [See cases cited in the foregoing paragraphs]. Confession of guilt after being asked

twice or thrice to produce the articles, is not the result or persuasion [*Srimanta v. S*, A 1960 C 519].

The words "I need to take a statement from you" by a police officer, or even words covering a suggestion that a person might have to accompany police officers to the station because they needed a statement from him when he got there, were not an inducement in any way relating to the charge or accusation [*R v. Joyce*, 1957, 3 All ER 623].

"You can't be in any more trouble than you are in now" is not enough to make the confession involuntary where the defendant had received partial warnings of his constitutional rights; he was a mature individual of normal intelligence and the questioning was of short duration [*Frazier v. Cupp*, 394 US 731].

Advantage to be Gained or the Evil to be Avoided Must be of a Temporal Nature in Reference to the Proceedings Against him.—The inducement must have reference to escape from the charge. Therefore, any inducement having reference to future state of reward or punishment, does not affect the admissibility of a confession. It will be received, therefore, if it is made in consequence of spiritual exhortations of a clergyman [*R v. Gilham*, 1 Moo CC 186] or any other person [*R v. Wild*, 1 Moo CC 452; Nort p 164]. It may be laid down as a general rule that in order to exclude a confession, the inducement, whether it assumes the shape of a promise, a threat, or a mere advice, must *relate to the actual charge*, and be such as is calculated to influence the prisoner's mind with respect to his escape from the charge. A confession will be received although induced by *spiritual exhortations* whether of a clergyman [*R v. Gilham, sup*] or of any other person [*R v. Wild, infra*].

Instances of Confessions by Spiritual, Moral or Other Sorts of Exhortations Held Admissible.—A prisoner under fourteen charged with murder was told, "Now kneel down, I am going to ask you a very serious question, and I hope you will tell me the truth in the presence of the Almighty"; a statement made in consequence was held admissible [*R v. Wild*, 1 Moo CC 452]. "I am very sorry for you, you ought to have known better. Tell me the truth whether you did it or not". The defendant replied, "I am innocent". Whereupon the other said "Don't run soul into more sin, but tell the truth" [*R v. Sleeman*, 1853 Dears CC 249]. "You had better as good boys tell the truth" [*R v. Reeve*, 1872 LR 1 CCR 362]. "I should tell you that besides being in the presence of my mother and myself you are in the presence of two police officers"..... "Take care, we know more than you think we know" [*R v. Jarvis, sup*]. Confessions made in consequence of the above exhortations were held admissible [Tay s 872]. A confession in consequence of an inducement or threat is broadly speaking inadmissible. But a merely moral exhortation by a person in direct authority is in no way objectionable [*R v. Akhileshwar*, 4 P 646: 89 IC 961].

Verification Proceedings.—Verfication proceedings undertaken with a view to test the accuracy of the statements in a confession was very strongly condemned in a case. PRINSEP J, observed that "its real object seems to be to add fictitious weight to a confession" [*R v. Radha Halwai*, 7 CWN 220]. They cannot be regarded as corro-boration and are open to criticism in other respects [*R v. Nanigopal*. 38 C 559]. In a later case it was said that although the verification of a confession is not wholly illegal, statements made by the accused to the verifying magistrate in the course of the verification proceedings and not recorded under s 164 Cr P Code are not admissible in evidence. In this case TEUNON J, observed that "in connection with such proceedings the main concern of the courts would seem to be to ensure that evidence not strictly admissible is not admitted". HUDA J, observed that verification in the presence of the accused

leads itself to very great abuse and should be avoided [*Amiruddin v. R*, 45 C 557: 22 CWN 213; see in this connexion *Abdul Rahim v. R*, A 1945 L 105 FB *post*]. **Referring** to *Amiruddin's* case it has been held that if the magistrate seeks to prove statement of an abducted person describing the details of the house where he was confined and not recorded under s 164 Cr P Code, they are inadmissible. But the memorandum prepared by the magistrate describing the condition of the house where he was confined and the evidence given by him on the basis of that memorandum is relevant under s 9 [*Deepchand v. S*, A 1961 SC 1527: 1962, 1 SCR 662]. Verification report by magistrate is not inadmissible if the magistrate himself is examined. Such evidence may be of help in ascertaining whether the accused is familiar with or ignorant of the localities of which he has spoken or in furnishing clues to further inquiries [*Jitendra v. R*, A 1937 C 99 SB : 169 IC 977; *Shyam v. R*, A 1941 O 130].

When after recovery of stolen properties from the accused he pointed out the places from where they were stolen, it amounts to confession and is inadmissible [*S v. Parkash*, A 1956 Pu 224]. It has however been held that notes made by a magistrate while accused pointed out several places narrated by the approver do not amount to confessional statement and is not inadmissible [*Baghel v. R*, A 1929 L 794].

Retracted Confession.—As very rightly observed by STRAIGHT J, the retraction of confession is—

> "An endless source of anxiety and difficulty to those who have to see that justice is properly administered..... I have said, and repeat now, it is incredible that the extraordinarily large number of confessions, which come before us in the criminal cases disposed of by this court, either in appeal or revision, should have been voluntarily and freely made in every instance as represented..... the retraction follows almost invariably as a matter of course" [*R v. Babulal*, 6 A 509, 542, 543].

It is unfortunate that in this country confessions should be as plentiful as retractions at the trial. They go to show that most of these confessions do not proceed from any feeling of penitence and remorse as they should, but that they have their origin in inducement threat, torture, hope or any other non-validating cause. In *R v. Thompson*, 1893, 2 QB 12, 18 [refd to with approval in *Dy Legal Rem v. Karuna*, 22 C 164, 172 and *Dikson v. R*, A 1942 P 90, 93] CAVE J, said:

> "I would add that for my part I always suspect these confessions which are supposed to be the off spring of penitence and remorse and which nevertheless are repudiated by the prisoner at the trial. It is remarkable that it is of very rare occurrence for evidence of a confession to be given when the proof of the prisoner's guilt is otherwise clear, and satisfactory, but when it is not clear and satisfactory, the prisoner is not infrequently alleged to have been seized with a desire, born of penitence and remorse, to supplement it with a confession—a desire which vanishes as soon as he appears in a court of justice".

—Rules as to Use of Retracted Confession.—With regard to retracted confession the rules that appear to have obtained judicial recognition and are spread over a large number of cases are:—

(*J*) A confession is not to be regarded as involuntary or unlawfully induced merely because it has been retracted at the trial.

[In arriving at a conclusion the court has to take into consideration not only the reasons given for making the confession or retracting it, but all the circumstances of the case].

(*2*) (*a*) As against the maker, a retracted confession may form the basis of conviction, if believed to be true and voluntarily made.

(*b*) But the better point of view is that a retracted confession must be regarded with suspicion and as a rule of practice and prudence it is unsafe to base a conviction on retracted confession alone without independent corroboration. The use of such a confession is a matter of prudence rather than of law.

(*3*) As against a co-accused, although a retracted confession may be taken into consideration, the rule is now firmly established that its value against a co-accused is practically nil and that it cannot form the basis of a conviction without substantial and independence corroboration both as to the crime and the criminal.

(*4*) Far more corroboration would be demanded than the testimony of an accomplice on oath. [See also *post*].

Support for the above propositions will be found in the decisions cited below:

Use Against Maker. [Retracted Confession may Form the Basis of Conviction Against Maker, But as a Rule of Prudence and Caution there Should be Corroboration].—That a retracted confession, if voluntary, is evidence against the maker has been held long ago [*R v. Mongora*, 6 WR Cr 40 (1866); *R v. Jema*, 8 WR Cr 40 *R v. Petta Gazi*, 4 WR Cr 16; *R v. Balwant*, 11 BHCR 157]. In law it is open to convict on a retracted confession. But usually the courts require some corroboration [*Sarwan Singh v. S*, A 1957 SC 637: 1957 Punj 1602; *In re Kodur*, A 1957 AP 758]. *Subhash Chandra v. State of Punjab*, 1981 Cri LJ (NOC) 43 (P & H), *Joytolal Kemprai v. State of Assam*, 1983 Cri LJ NOC 205 (Gauhati)]. A retracted confession can be the legal basis of a conviction if the court is satisfied that it was true and was voluntarily made. But ordinarily corroboration is required. If the retracted confession is found to be voluntary, corroborated in material particulars in regard to the number and nature of injuries inflicted on the deceased by the medical evidence, it can be acted upon [*Phatik Chandra Gogoi v. State of Assam*, 1988 Cri LJ 24, 27 (Gauhati) (DB)]. It is not a rule of law, but is only a rule of prudence. It cannot even be laid down as an inflexible rule of practice or prudence that in no circumstances such a conviction can be made without corroboration [*Pyarelal v. S*, A 1963 SC 1094; folld in *Abdul Ghani v. S*, A 1973 SC 264]. The court must first be satisfied that it was voluntarily made and then it should carefully examine the confession and compare it with the rest of evidence, in the light of the surrounding circumstances and probabilities of the case [*Shankaria v. S*, A 1978 SC 1248, *Jogu Yadaia v. State of Andhra Pradesh*, 1981 Cri LJ (NOC) 64: (1980) IAP LJ (HC) 313].

There is no prohibition under the Evidence Act to rely upon the retracted confession to prove the prosecution case or to make the same basis for conviction of the accused. The practice and prudence require that the court could examine the evidence adduced by the prosecution to find out whether there are any other facts and circumstances to corroborate the retracted confession. It is not necessary that there should be corroboration from independent evidence adduced by the prosecution to corroborate each detail contained in the confessional statement. The court is required to examine whether the confessional statement is voluntary; in other words whether it was obtained by threat, duress, or promise. If the court is satisfied from the evidence that it was voluntary, then it is required to examine whether the statement is true. If the court, on examination of evidence finds that the retracted confession is true, that

part of the inculpatory portion could be relied upon to base conviction. However the prudence and practice require that court would seek assurance getting corroborator from other evidence adduced by the prosecution. *K.I. Parrumy v. Asst. Collector (HQ) Central Excise Collectorate, Cochin*, 1997 (1) Crimes 210, 224, 225 (SC). Retracted confession made before Magistrate, even if voluntarily, requires corroboration, *Indrajit Deb v. State of Tripura*, 1995 Cri LJ 2715, 2720 (Gauh). The court can convict the accused on the basis of even retracted extra-judicial confession but the court usually require some corroboration. The corroboration must not only be of general nature but must also be in respect of material particulars. *Baboo Ram v. State*, 1996 Cri LJ 483, 486 (All). Where evidence of the witness before whom confession was made is found unreliable conviction based solely on retracted extra-judicial confession is not proper. *Shankaram Shankar Bansode v. State of Maharashtra*, A 1994 SC 1594, 1595 : 1994 Cri LJ 2189. A confession which is properly and legally recorded does not lose its worth merely because the accused retracted from it as wisdom dawned on him later. *Valiyaveetil Ashraf v. State*, 1994 Cri LJ 555, 563 (Ker). An accused may be convicted on his retracted confession if the court is satisfied of the truth of the confession [*Public Prosecutor v. Mustari Bin Suri,* (1989) 2 Malayan LJ 77 (Singapore HC)].

It is a rule of practice not to rely upon a retracted confession without corroboration, but it cannot be laid down as an inflexible or absolute rule of law that a confession made and subsequently retracted by a prisoner, cannot be accepted as evidence of his guilt without independent corroborative evidence [*R v. Raman*, 21 M 83; *R v. Gangiya*, 23 B 316; *Bhabananda v. R*, CLJ 213: A 1933 C 747 SB; *R v. Krishna*, A 1933 B 230; *R v Biseswar*, 26 CWN 1010: 71 IC 497; *Bhagwan v. R*, A 1930 P 289; *Kesava v. R*, A 1929 M 837: 53 M 160; *In re Rajagopal*, A 1944 M 117; *Behari v. R*, 60 IC 789 : A 1922 P 492; *R v. Paragi*, 9 OWN 321; *Mushaheb v. R*, 9 OWN 327; *R v. Ramsahai*, 9 OWN 96], and a prisoner may be convicted solely on his retracted confession if the jury believe it to be true [*R v. Kutub*, 57 C 488; *R v. Gharya*, 19 B 728; *R v. Maiku*, 20 A 133; *Manohar v. R*, A 1946 A 15; *Mohar v. R*, 96 IC 647 (L): A 1926 J 104; *Majhi v. R*, A 1927 L 682: 104 IC 247; *R v. Kehri*, 29 A 234: *Partap v. R*, 6 L 415: A 1925 L 605: *In re Arunachala*, 55 M 717; *R v. Sher*, A 1933 L 338; *Mathura v. R*, A 1935 O 354; *Nga Po v. R*, A 1937 R 264; *R v. Bhagwandass*, 1941 Bom 27: A 1941 B 50; *Suker Dosadh v. R*, 20 P 547: A 1941 P 303; *Ghulam v. R*, A 1942 L 271]. It is unsafe to convict the accused solely on the basis of retracted confession [*Gendra Brahma v. State of Assam*, 1981 Cri LJ 430 (Gauh)]. Where the only direct evidence against the accused is his retracted confession, the fact should be pointed out to the jury and if they believed it, it was open to them to found a conviction [*R v. Kauser*, A 1944 C 249].

When the confessions by two accused are retracted, the proper approach is to consider each confession as a whole and use it against the maker if the court comes to the unhesitating conclusion that it is voluntary and true [*Balbir v. S*, A 1957 SC 216].

The Evidence Act nowhere provides that a retracted confession cannot be taken into consideration against the confessing accused or co-accused [*Ram Parkash v. S*, A 1959 SC 1 : 1959 SCR 1219]. The Act makes no distinction whatever between a retracted confession and unretracted confession and both are equally admissible and may be taken into consideration against the accused though it may be that less weight would be attached to a retracted confession [*Gour Ch v. R*, 32 CWN 1004: A 1929 C 14; *Gangaram v. R*, 62 IC 545: 22 Bom LR 1274; *In re Kodur*, A 1957 AP 758]. A retracted confession though admissible must be regarded with the utmost suspicion—a stronger suspicion than that which attaches to the confession of an approver who

gives evidence in court [*Sheonarain v. R*, 8 P 262: A 1929 P 212] and if the court is satisfied that it was voluntarily made and is true, it is bound in the absence of coercion by the police, to act on that belief so far as the person it is concerned [*Bihar v. R*, 60 IC 789: A 1922 P 492; *Kalijiban v. R*, 63 C 1053]. When a pardoned approver resiles from his statement, it should be treated as a confession and a conviction might follow on it without corroboration [*Puran v. R*, A 1938 L 135].

Although as a matter of law, a conviction can be based on retracted confession, yet as a settled rule of practice, prudence and caution, it has been held in numerous cases that it is unsafe, to convict an accused person on his retracted confession standing by itself without independent and full corroboration [*Puran v. S*, A 1953 SC 459: 1953 Cri LJ 1925; *Balbir v. S*, A 1957 SC 216; *Sarwan Singh v. S*, A 1957 SC 637: 1957 Punj 1602; *Bhabananda v. R*, 57 CLJ 213 SB: A 1933 C 747; *R v. Jadub*, 27 C 295: 4 CWN 129; *R v. Biseswar*, 26 CWN 1010; *R v. Amanulla*, 12 BLR Ap 15: 21 WR 49; *R v. Mahabir*, 18 A 78; *Sher Md v. R*, 104 IC 630 : A 1927 L 765; *Shk Shafi v. R*, A 1930 N 259; *Bhukhin v. R*, A 1948 N 344; *Maksud Ali v. R*, 60 IC 56 : A 1921 P 377; *Kunja v. R*, 8 P 289; *Miran v. R*, A 1929 L 597; *Pala v. R*, A 1928 L 329: 107 IC 614; *R v. Hosnabai*, 56 B 542; *Shangara v. R*, A 1932 L 557; *R v. Sambhu*, 54 A 350; *Martin v. R*, A 1934 L 89; *Nahnun v. R*, A 1934 L 715; *Dikson v. R*, A 1942 P 90; *R v. Bhagwandass*, 1941 Bom 27: A 1941 B 50; *Purnananda v. R*, 1939, 1 Cal 1: A 1939 C 65: *Arjuna v. S*, A 1953 SC 411: 1951 Cut 464]. It can be used only in support of other evidence [*Mohan Wahi v. State*, 1982 Cri LJ 2040, 2043 : (1982) 22 DLT 138 (Delhi); *Sukamani Mundani v. The State*, 1984 Cri LJ NOC 150 (Orissa); *State of Orissa v. Adikanda Swain*, 1987 Cri LJ 603, 605: (1986) 1 Orissa LR 464 (Ori) (DB)]. It is not necessary that a retracted confession should be corroborated in each material particular, but it is sufficient if there be general corroboration of the important incidents [*S v. Boota Singh*, A 1978 SAC 1770].

The absolute rule of law laid down in *R v. Rangi*, 10 M 295 and *R v. Bharmappa*, 12 M 123 that a retracted confession must be supported by independent corroborating evidence was dissented from in *R v. Gharya*, 19 B 728 holding that the use of such a confession is a matter of prudence rather than of law (see also *R v. Raman*, 21 M 83, 88; *Khuban v. R*, A 1930 A 29; *Motiram v. R*, 75 IC 152; *Sanwaldas v. R*, A 1929 S 253; *R v. Gangia*, 23 B 316. The later decisions in all jurisdictions are to the same effect.

When a retracted confession is to be used against the maker the corroboration required is not necessarily in the full sense of the word. It is more in the sense of s 157 than in the sense of s 114 *illus* (*b*) [*Ismail v. R*, A 1946 S 43]. As to the nature of corroboration see *post*, p 253. If the reasons given for withdrawing the confession are on the face of them false [*Kesava v. R*, A 1929 M 837; *Brahmayya v. R*, 1941, 1 MLJ 386; *In re Rajagopal*, A 1944 M 117], or when accused fails to give any reason for confessing [*In re Madda*, A 1949 M 817] there may be conviction without corroboration. "A retracted confession must be looked upon with greater concern unless the reasons given for having made it in the first instance (not for retraction as erroneously stated in some cases) are on the face of them false. Once the confession is proved statisfactorily any admission made therein must be satisfactorily withdrawn or the making of it explained as having proceeded from fear, duress, promise or the like from some one in authority. A retracted confession is a weak link against the maker and more so against the co-accused"—*per* HIDAYATULLA J, in *Haroom Haji v. S*, A 1968 SC 832. *Shrishail Nageshi Pare v. State of Maharashtra*, 1985 Cri LJ 1173 : A 1985 SC 866, 867 (DB). Apart from the general rule of prudence, where the circumstances cast a suspicion on the genuineness of the retracted confession, it

would be sufficient to require corroboration [*Muthuswami v. S*, A 1954 SC 4: 1953 SCJ 621; see *Pangambam v. S*, A 1956 SC 9: 1956 Cri LJ 126].

The use to be made of such confession is a matter of prudence rather than of law [*Rama Kariyappa v. R*, A 1929 B 327; *R v. Gharya, ante*], the business of the court being to make up its mind in accordance with the dictates of common sense whether it is safe to believe the confession or not [*Jawan v. R*, 30 PR 1914 Cr: 25 IC 634; *Mt Aimna v. R*, A 1931 L 196]. The weight to be attached to retracted confession must depend upon whether the court thinks that it was induced by the consideration that the confession was untrue, or by realization it had failed to secure the benefits the hope of which inspired it [*Bhuboni v. R*, 53 CWN 609: A 1949 PC 257: 76 IA 147]. The weight to be given to a retracted confession must depend on the circumstances under which the confession was originally made and the circumstances under which it was retracted including the reasons given for its retraction. It is unsafe to rely on and act on a retracted confession unless the court comes to the unhesitating conclusion that it is true, that is to say, usually unless the confession is corroborated by credible independent evidence [*R v. Biseswar*, 26 CWN 1010: 71 IC 491; *R v. Raman*, 21 M 83].

A mere bald assertion that the prisoner was threatened, tutored or that inducement was offered cannot be accepted as true without more [*Hemraj v. S*, A 1954 SC 462: 1954 SCR 1133].

A mere subsequent retraction of confession is not enough in all cases to make it appear to have unlawfully induced and it is necessary to examine not only the prisoner's statement as to how he came to make it, but all the circumstances [*R v. Balvant*, 11 Bom HC 137; *R v. Basvanta*, 25 B 168; *Partab v. R*, 6 L 415; *Ibrahim v. R*, A 1937 L 208; *Abdul Gafoor v. R*, A 1941 N 145; see also *R v. Ram Vayer*, 19 M 482, where the confessions were corroborated by witness]. Nor will mere retraction deprive it of its voluntary character [*Sheo Pd v. R*, 52 IC 50], or make it inadmissible unless the accused gives sufficient reasons how he made it [*Raj Bahadur v. R*, A 1927 O 17: 98 IC 106; *Sheoraton v. R*, A 1929 O 167; *Nanney v. R*, A 1931 O 412; *Ram Singh v. R*, A 1943 O 169]. Such a conlusion can only be arrived at from the evidence on the record or from the surrounding circumstances and not upon conjecture [*Mohar v. R*, 96 IC 647: 27 PLR 387: A 1926 J 104]. An accused cannot get rid of a statement merely by saying that he retracts it. If torture by police is alleged, the fact of torture must be supported by evidence [*Purnananda v. R*, A 1939 C 65, 74 SB: 1939 1 Cal 1]. A judge should in the first instance see whether a retracted confession is voluntary or has been improperly induced. The mere fact that a prisoner puts in a plea of not guilty and denies having made the confession or explains having made it by an allegation of police torture, is enough in itself to put the judge upon enquiry. And he, then, has to decide before admitting the confession at all, or allowing it to be looked at, whether it has been improperly induced. That is a question for the court, *ie* the judge to answer *in limine*. If upon weighing all the circumstances, the prisoner's denial and probabilities, it appears to the judge that the confession has been improperly induced; no matter how true it may be, he is bound to exclude it. It then becomes evidence and liable to be appreciated and weighed with the rest of the evidence in the usual way [*R v. Bhagi*, 8 Bom LR 697; *Sheoratan v. R*, 151 IC 298 : A 1934 O 418].

Where a court came to the conclusion that the confessions must be taken to be voluntary and true, because there was no evidence of ill-treatment by the police, and the confessions had been repeated before the committing magistrate nearly a month after they had been made and recorded, the court said: "There is undoubtedly a great

deal of force in that reasoning, but where a confession is retracted, it is, we think, the duty of a court that is called to act upon it, especially in a case of murder, to enquire in all the material points and surrounding circumstances and satisfy itself fully that the confession cannot but be true [*R v. Durgaya*, 3 Bom LR 441, 444 : see *R v. Rama Kariyappa*, A 1929 B 327]. It is the duty of the sessions judge on appeal to enquire into the allegations of maltreatment, and coercion with regard to confession and to see whether the confession made by the accused before the magistrate was made under such circumstances as to preclude its admissibility in or diminish its value in evidence [*R v. Kashinath*, 8 Bom HC Cr 126; see also *Sukhia v. R*, 3 All ER 101 Cr]. As to retracted confession, see *Ragha v. R*, A 1925 A 627 FB : 89 IC 903. Unless there is something in the evidence which conflicts with a confession, there is no reason why the confession should not be acted upon though retracted at a later stage [*Gangaram v. R*, 62 IC 545 : 22 Bom LR 1274; see *Khudiram v. R*, 9 CLJ 53]. In considering whether certain confessions are admissible or not, the judge is not confined to the grounds of confession as contained in the retraction or to the objections as to the admissibility by the accused, but he should look into all the circumstances in order to judge whether that confession is admissible or not. A judge is not concerned with the truth or falsity of a confession [*R v. Panchkari*, 52 C 67].

A confession made before a magistrate in the expectation of a pardon and retracted before the sessions judge has considerable weight, if such a confession is re-affirmed in the grounds of appeal [*Autar v. R*, A 1931 O 74].

Where a girl of 15 suddenly charged with a serious offence was in police custody for sometime and made a confession which she subsequently retracted on the allegation of police torture, the conviction was set aside [*Motijan v. R*, 6 CWN 380]. A retracted confession containing nothing of value except admission of his own guilt by accused, does not justify conviction [*R v. Narain*, A 1931 O 83]. In a case of poisoning, recovery from the viscera and vomit of various articles stained with the poison was held to be sufficient corroboration [*Aishan v. R*, 15 L 310].

A confession made after considerable time in police custody and subsequently retracted, ought not to be accepted without corroboration [*Rusna Teli v. R*, 54 IC 881; *Mobarak v. R*, 23 CWN 886; *R v. Maqbool*, 7 Luck 511 : A 1932 O 317]. The retracted confession was wholly disbelieved and rejected in the well-known Midnapore conspiracy case [*Santosh v. R*, 9 CLJ 663 : 13 CWN 861]. A confession retracted at the earliest possible moment after the accused got out of the influence of the police was held inadmissible [*Mala v. R*, 1933 MWN 723]. The retraction of a confession made in the form of questions put during the cross-examination of the investigating officer and also as answers given in the examination under Sec. 313 Cr. P.C. is belated [*Durga Ruhi Das v. State*, 1986 Cri LJ 1620, 1624 (Cal) (DB) : (1986) 2 Crimes 441]. Where a confession was recorded by a magistrate in jail with a police officer in the next room and was subsequently retracted, it could not be acted upon unless sufficiently corroborated [*Shk Sohali v. R*, 11 CLJ 273]. Where there was misconduct of the police and the confessions were retracted, it was held that the prisoner could not be convicted on the retracted statements [*Safaruddin v. R*, 2 CLR 132]. Accused making confession before the Magistrate and retracting the same before the Sessions Judge. The retraction being belated cannot be accepted [*Taiman Rana v. State of Assam*, 1982 Cri LJ NOC 25 (Gau)].

Confession Under Sea Customs Act.—A confession voluntarily made by an accused charged under s 167(*81*) Sea Customs Act, 1878 (Ch 14 Customs Act, 1962) to the Customs Officer, though retracted, is admissible and requires corroboration [*In re Sathakathullah*, A 1965 M 94; See also *Haroom v. S*, A 1968 SC 832]. Statement

under s 171-A, Sea Customs Act did not stand at par with a confession [*Hira v. S*, A 1971 SC 44]. S 24 is not a bar to admissibility in evidence of statement made to Customs Officer on summons issued under s 108 Customs Act, 1962 [*Percy v. S*, A 1971 SC 1087 (*Romesh v. S*, A 1970 SC 940 **followed**)].

Use Against Co-accused. [There Must be Corroboration Both as to the Crime and the Criminal].—Except a few earlier cases the preponderance of opinion is in favour of the view that although a retracted confession may be taken into consideration against a co-accused (v s 30), its value is exceedingly weak and there can be no conviction without the fullest and strongest corroboration on material particulars. Corroboration in the full sense implies corroboration as to the factum of the crime and as to identity. Support for this proposition will be found in the cases cited below.

A retracted confession may be taken into consideration, not only as against person making it, but also as against persons jointly tried with the confessing accused for the same offence. The amount of credibility of retracted confession, depends upon the circumstances of each particular case [*R v. Maikulal*, 20 A 133 (**followed** in *R v. Kehri*, 29 A 434), see also *Ram Parkash v. S*, A 1959 SC 1; 1959 SCR 1219; *R v. Mahabir*, 18 A 78; *R v. Rangi*, 10 M 295; *Partap v. R*, 93 IC 978 : A 1925 L 605; *Ataya v. R*, 5 PR 1911; *Karm v. R*, 26 PR 1916; *Jawan v. R*, 30 PR 1914; *Safaruddin v. R*, 2 CLR 132; *Musaheb v. R*, A 1932, O 321; *Sardara v. R*, A 1930 O 667; *Sheonarain v. R*, 8 P 262 : A 1929 P 221; *R v. Mangru*, 16 P 612 : A 1938 P 108; *Nga Pyaung v. R*, A 1934 R 30]. It is not safe to convict persons solely on a retracted confession of a co-accused which does not implicate the confessor to the same extent as the co-prisoners [*R v. Upendra*, 46 IC 842 : 1918 PHCC 175]. It was held in a few cases that a retracted confession is evidence and there is no provision in s 30 by which a confession is to be receivable in one way against one person and in another way against another [*R v. Kehri*, 29 A 434; *Aimna v. R*, A 1931 L 196]. But the rule is now firmly established that a retracted confession cannot be used against a co-accused without substantial and independent corroboration both as to crime and the criminal [*Ram Parkash v. S*, *sup*; *Kasimuddin v. R*, 39 CWN 27 : 62 C 312; *Barnabas v. R*, A 1934 P 586; *Sher Md v. R*, 104 IC 630 : A 1927 L 765; *Debendra v. R*, 101 IC 881 : A 1927 P 257; *Surjan v. R*, A 1932 L 298; *Nasir v. R*, A 1933, A 31; *Ghulam v. R*, A 1942 L 271; *Ismail v. R*, A 1946 S 43]. It cannot be used to support the evidence of the other accomplices and also cannot be made the foundation of conviction [*Hussain v. Dalip Singhji*, A 1970 SC 45]. A retracted confession should carry practically no weight as against a person other than the maker; and the very fullest corroboration would be necessary in such a case—far more than would be demanded for the sworn testimony of an accomplice on oath. A conviction on an uncorroborated and retracted confession of an accomplice is improper and bad [*Yasin v. R*, 28 C 689; *Nazim v. R*, 5 CWN 670; *R v. Lalit*, 38 C 559; *Kasimuddin v. R*, 62 C 312; *Kamsala v. R*, A 1937 M 755; *R v. Mangru*, 16 P 612 : A 1938 P 108; *Moyez v. R*, 40 CLJ 55; *Basiruddi v. R*, 45 MLJ 613; *In re Manicka Padayachi*, A 1921 M 490; see also *Safaruddin v. R*, 2 CLR 132; *Wajid v. R*, A 1930 O 412; *Sheoratan v. R*, A 1933 O 167 : 114 IC 771; *Nga Po v R*, A 1933 R 320; *Nga Lu v. R*, A 1933 R 73; *Nasir v. R*, A 1933 A 31; *Jahangir v. R*, 150 IC 1056 : A 1935 L 230; *Sheoratan v. R*, A 1934 O 418; *Kanshi v. R*, 15 L 491 : A 1934 L 873; *R v. Bhagwandass*, 1941 Bom 27 : A 1941 B 50; *Ghulam v. R*, A 1942 L 271; *Dikson v. R*, A 1942 P 90; *Naga Po v. R*, 4 R 45 : 95 IC 71]. Unless the other evidence against the co-accused will stand on its own legs, his conviction on the retracted confession cannot stand [*R v. Haripada*, 49 CWN 719; *Nurul v. R*, A 1949 Dacca 20; *Kanai v. S*, A 1950 C 413; *Ramkrishna v. S*, A 1952 C 231].

There can be no absolute rule of law that a retracted confession cannot be acted upon without material corroboration. But as a matter of prudence and caution which has sanctified itself into a rule of law a retracted confession cannot be made solely the basis of conviction unless it is corroborated. But it does not necessarily mean that each and every circumtance in the confession regarding the complicity of the accused must be separately and independently corroborated, nor need corroboration come from and circumstances discovered after confession was made [*Subramania v. S*, A 1958 SC 66 : 1958 SCR 428; *Balbir v. S*, A 1957 SC 216 : 1957 Cri LJ 481; *Hemraj v. S*, 1954 SCR 1133 : A 1954 SC 462]. As a matter of prudence and practice a court would not ordinarily act upon a retracted confession to convict a co-accused without the strongest and fullest corroboration as to the crime and the connexion of the co-accused with it [*Ram Parkash v. S*, A 1959 SC 1 : 1959 SCR 1219. In this case the retracted confession was found to be voluntary and it was corroborated in material particulars regarding the general story told by the co-accused and the recovery of the ornaments of the deceased from the mistress of the accused].

A retracted confession should practically carry no weight as against a person other than its maker [*R. v. Biseswar*, 26 CWN 1010; *Pala v. R*, A 1928 L 329 : 107 IC 614; *Latafat v. R*, A 1928 C 745; *Indar v. R*, A 1931 L 408; *Kalijiban v. R*, 63 C 1053]. Its value against a co-accused is exceedingly weak and unless it is materially corroborated, no conviction should be based [*Maksud v. R*, 60 IC 56 : A 1921 P 337 (*R v. Jadab*, 27 C 295; *R v. Mahabir*, 18 A 78 **followed**); *Debendra v. R*, 101 IC 881 : A 1927 P 257; *Jawan v. R*, 30 PR 1914; *Pala v. R*, A 1928 L 329; *R v. Sambhu &c*, A 1932 A 228; *Jainand v. R*, A 1949 A 291].

When an accused retracts a confession and does not implicate himself in the murder though he stated he was one of the conspirators, *held* it could not be taken into account against co-accused. As against the person making it, it is certainly admissible [*Hayat v. R*, 68 IC 401 : A 1922 L 119].

Nature of Corroboration.—Material corroboration means such corroboration as shows that an accused had not only some reason to commit an offence, but that he did as a matter of fact, commit the same : mere evidence of motive cannot by itself be sufficient corroboration [*Tufani v. R*, 15 CLJ 323]. The corroboration should be (*i*) as to the factum of the crime and (*ii*) as to the identity of the persons [*Serajuddin v. S*, A 1953 As 203]. Though corroboration may be necessary as regards co-accused, it is not necessary that the corroborative evidence should by itself be sufficient to support a conviction [*Mohar v. R*, 96 IC 647 (L) : A 1926 J 104]. It ought to be of the kind that not only confirms the general story of a crime but also unmistakably connects the accused with the crime [*R v. Jawai*, 70 PLR 1818 : 44 IC 179]. The nature of the corroboration depends on the facts of each case [*R v. Mangru*, 16 P 612 : A 1938 P 108]. Retracted confession must be much more corroborated than evidence of accomplice taken on oath. In this case the court observed :

> "The law with regard to a retracted confession is well settled so far as this court is concerned. It has been laid down in a long series of cases of which it is necessary only to refer to the cases of *Yasin v. R*, 28 C 689 and *R v. Lalit*, 38 C 559 that a retracted confession should practically carry no weight as against the person, other than the maker, because it is not made on oath, is not tested by cross-examination, and its truth is denied by the maker himself who has lied on one or the other occasions and the very fullest corroboration would be necessary in such a case, far more than would be demanded for the sworn testimony of an accomplice on oath" [*Moyez v. R*, 40 CLJ 551 : 84 IC 712].

Where confessions by certain persons which led to the arrest of some other persons were retracted but corroborated by the evidence of the approver, the retracted confession taken behind the back of the accused who had no opportunity of cross-examining the persons who made them were not sufficient corroboration of the approver's story [*Debi Dayal v. R*, 11 ALJ 73 : 18 IC 672]. Corroboration of retracted confession of accused must come from independent witnesses and not from the evidence of an accomplice [*Kashem v. R*, 36 CWN 874; *R v. Biseswar*, 26 CWN 1010; *Latafat v. R*, A 1928 C 745, 747; *Inder v. R*, A 1931 L 408; see further *post*, s 133] unless the circumstances are exceptional [*Achhay v. R*, A 1947, P 90].

Where corroborative evidence does not show beyond reasonable doubt that accused is guilty, he should be given the benefit of doubt [*Bhagwan v. R*, A 1930 P 289]. Where retracted confession stands unrebutted and there is nothing to show that accused had any reason for naming other men falsely and his story fits in exactly with the facts known or proved and is corroborated sufficiently by material evidence against the co-accused it may be a strong piece of evidence against the co-accused [*Hazari v. R*, A 1930 O 353]. Corroboration by production of weapons, etc. may warrant conviction [*Arjun v. R*, A 1930 L 257]. Where the sole evidence is the retracted confession, it must be taken as a whole and not in part [*Durjan v. R*, A 1930 A 192]. It is sufficient for a conviction although certain parts of the confession are not found to be true [*Nawab v. R*, A 1929 O 381]. See also notes under s 133 as to corroboration of accomplice evidence.

Where there are two sets of evidence neither of which can alone be accepted without corroboration, they cannot, each in its turn be taken to corroborate the other, and the two acts of evidence cannot be joined together so as to justify any court taking action on such evidence. Evidence brought under s 288, Cr P Code cannot be accepted as proper corroboration of a retracted confession [*R v. Jadub*, 4 CWN 129].

—Summary of Law as to Retracted Confession.—(See also *ante*). Upon a review of the cases cited before, the position appears to be as follows:—The opinion once held (*eg, R v. Rangi*, 10 M 295; *R v. Bharmappa*, 12 M 124 &c) that there can be no conviction solely on a retracted confession without independent corroboration is not now adhered to. A retracted confession is always open to great suspicion, but a confession cannot be regarded as involuntary merely because it has been retracted afterwards. Every case must be judged by its peculiar and special circumstances.

As against the *maker*, there can be legal conviction solely on a retracted confession if the unhesitating conclusion is that it is voluntary and true; but as a rule of practice and prudence, it has been held in numerous cases that it is unsafe and unwise to act on a retracted confession alone without independent corroboration.

As against the *co-accused* the value of a retracted confession is almost nil and it has been firmly established that as a matter of prudence and practice there can ordinarily be no conviction without the fullest corroboration both as to the crime and the criminal.

Mere statement of the accused before the court that he was innocent would not amount to retraction of extra-judicial confession [*Pakkirisamy v. State of T.N.*, 1998 Cri LJ 89 (SC)].

The true rule appears to have been stated in a case where it has been held that if a judge believes that a confession made by a prisoner, although subsequently withdrawn, contains a true account of that prisoner's crime, the judge is bound to act so far as the prisoner is concerned, on that confession, which he believes to be true. When a confession is not supported by the evidence of witnesses, a judge must

examine carefully to see whether it gives details which indicate that it is a natural narrative of what took place in the presence of the man making it, and it is not at variance with any evidence in the case which is believed, and is not merely a parrot-like repetition of a story put into the man's mouth. The amount of credibility of a retracted confession depends on the circumstances of each particular case [*R v. Maiku Lal*, 20 A 133; see also *R v. Bhagwandas*, A 1941 B 50 : 1941 Bom 27; *Ram Parkash v. S*, A 1959 SC 1 : 1959 SCR 1219].

Where the prosecution alleged that a defendant had made an oral confession, but the defendant denied making it and also argued that, even if he had made a confession, it would have been inadmissible, the judge ought first to determine the question whether any confession would have been inadmissible on the ground of being involuntary. Only if the judge ruled in favour of the prosecution on that first question should be then consider whether the confession had actually been made. In the present cases, both defendants had been deprived of the right to challenge the admissibility of an alleged confession, in circumstances where that confession was an important part of the prosecution's case [*Thongjai v. R; Chun-Kong v. R*, (1997) 3 WLR 667 (PC)]. The court **applied** *Ajodha v. The State* (1981) 2 All ER 193, PC.

—Retracted Confession and Accomplice Evidence.—It is an error to equate a retracted confession with accomplice evidence. The standards of corroboration are quite different. In the case of a retracted confession one need only find out whether the early statement was voluntary and true or not. In such a confession general corroboration is sufficient but it is absolutely necessary that an accomplice evidence must be corroborated in material particulars [*Subramania v. S*, A 1958 SC 66 : 1958 SCR 428; *Darbari v. S*, A 1970 Or 54].

—Direction to Jury in the Case of a Retracted Confession.—Failure of a judge to make a correct and clear distinction between the use of a retracted confession against the maker and as against a co-accused in his charge to the jury is a clear misdirection and vitiates the trial [*In re Ibrahim*, 42 CLJ 496 : 88 IC 458; *Haripada v. R*, 49 CWN 719]. In the case of a retracted confession a direction to jury that they may convict the maker on it, if believed to be true even though not corroborated in material particulars is a misdirection in the absence of the usual caution that it is unwise to do so. As against a co-accused a direction that they should not convict him unless the retracted confession is corroborated by independent evidence on material particulars is also a misdirection. The proper direction is that the value of the confession is practically nil and that unless the other evidence against the co-accused is substantially that which will stand on its own legs and justify a conviction, the retracted confession itself should not be in any way used to support the conviction [*Haripada v. R, sup*]. Merely telling that the retracted confession is of little evidentiary value against co-accused is not sufficient; the jury should be told that no conviction can be based upon it alone [*Kanai v. S*, A 1950 C 413].

The question which should be put to the jury regarding retracted confessions is not whether they are corroborated by independent evidence, but whether having regard to the circumstances under which they were made and retracted—having regard to all the circumstances connected with the confessions, whether it was more probable that the original confessions or the statements retracting them were true. An omission on the part of the judge to put this question to the jury amounts to a misdirection [*R v. Raman*, 21 M 83]. It is grave misdirection to tell the jury that "the retracted confession stands generally corroborated on the following points by independent evidence to which reference has been made already." The judge should explain to the jury what is meant by corroboration, but it is entirely for the jury to decide whether

all or any of the circumstances relied on as corroborating the confession were in fact established, and further whether they sufficiently corroborate the confession [*Abdul Rahim v. R*, A 1945 L 1110; see also *post*, s 133: *"Absence or presence of corroborative evidence to be pointed out"*].

Contradiction.—A retracted confession though can be used to contradict the person making it, it not being substantive evidence cannot be used to contradict co-accused's confession [*Baliram v. R*, A 1939 N 295].

Confession to a Magistrate. [Various Classes].—Confessions to a magistrate may be divided into the following classes:—

(*1*) Confession recorded by observance of all the formalities prescribed by ss 164 and 281 Cr P Code (see next heading).

S 164 relates to a confession made to a magistrate "in the course of investigation" or at any time afterwards but before the commencement of the inquiry or trial. So a confession recorded after the close of investigation and submission of final report is not admissible under the section [*S v. Ram Avtar*, A 1955 A 138; *Bachchan v. S*, A 1957 A 184; see Sarkar's Cr P Code, 4th Ed s 164]. Nevertheless a confession may be made in the court of the committing magistrate or it may be made even during a trial [*Hemraj v. S*, 1954 SCR 1133 : A 1954 SC 462].

(*2*) Confession purporting to be recorded under ss 164 and 281 but imperfectly without fulfilment of any of their provisions and which are curable under s 463 Cr P Code (*see post: Curing of Irregularities under s 463 Cr P Code"*).

(*3*) Oral confession before a magistrate (see notes to s 21 *ante*, and *post* notes to s 25: "*Oral Confession &c*").

(*4*) Confession recorded by a magistrate but not under s 164 Cr P Code (see notes to s 21 *ante*, and to s 25 *post*: *"Oral Confession &c"*).

—Mode of Recording Judicial Confession Under S 164 Cr P Code. [Their Admissibility and value].—Where a confession is made before the magistrate is the course of the investigation or at any time before the commencement of the inquiry or trial, it must be recorded in the manner prescribed by ss 164 and 281 Cr P Code, 1898 (now s. 281 has been omitted). "Statement in s 164 *ibid* includes statement of witness and also of the accused whether the latter amounts to confession or not [*Supdt & Legal Rem v. Lalit*, 25 CWN 788; *Abdur Rahim v. R*, A 1925 C 926 : 41 CrLJ 474; *Golam Md v. R*, 4 P 327; *Shiv Bahadur v. S*, A 1954 SC 322 : 1954 SCR 1098]. Recording a confession is a very solemn act and the magistrate must see that the requirements of s 164 are fully satisfied [*Sarwan Singh v. S*, A 1957 SC 637 : 1957 Punj 1602]. Neither s 164 nor s 281 of 1898 mentions the word "accused", but s 164 applies to all sorts of confessions, whether they are made by a person who is accused of an offence or not [*Karam Elahi v. R*, A 1947 L 92 : 48 PLR 382]. S 164 applies only to statements recorded in the course of an investigation under Ch 14 (now Ch 12) [*R v. Shafi Ahmed*, 49 B 632, 652] and such investigation is not concluded until a final report under s 173 Cr P Code is submitted [*Lal Khan v. R*, A 1948 L 43]. S 164 applies to a statement by accused arrested and brought before a magistrate in Calcutta in pursuance of an investigation started in Burdwan [*R v. Garib*, 30 CWN 454]. It does not apply to a statement during an enquiry under s 202 [*Satnarain v. R*, 10 CWN 51]. S 164 includes confessions taken by a magistrate who afterwards holds an enquiry or trial [*Barindra v, R*, 37 C 467 : 14 CWN 1114 (*R v. Anuntram*, 5 C 954 and *R v. Yakub*, 5 A 253 declared obsolete and *In re Behari Hadji*, 32 C 1085 **distd**)]; see also *R v. Lal Sheikh*, 3 CWN 387].

[For detailed instructions about the recording of a confession, see further Sarkar's Cr P Code 4th Ed notes under s 164].

S 164 Cr P Code shall be read together with ss 24, 25, 26 and 29 Evidence Act and so read the following result follows:

(a) A confession shall not be made to a police officer.

(b) A person in police custody desiring to make a confession must do so in the presence of a magistrate.

(c) The magistrate shall not record it unless he is, upon enquiry, satisfied that it is voluntary.

(d) He shall record it in the manner laid down in s 164 Cr P Code.

(e) And only when so recorded it will become relevant and admissible [*R v. Saw Min*, 1939 Rang LR 97 : A 1939 R 219]. See also *Nazir Ahmed v. R*, 62 IA 372 *post*]

For guidelines about recording of confessions under TADA see *Kartar Singh v. State of Punjab*, 1994 Cri LJ 3139, 3207.

Due importance must be given to confessions recorded by a judicial officer who has observed all the formalities required by law. *Valiyaveetil Ashraf v. State*, 1994 Cri LJ 555, 562 (Ker). Before recording a confession the Magistrate is obliged to put questions to the accused to satisfy himself that the confession was voluntary. *Preetam v. State of MP*, A 1997 SC 445 : 1996 Cri LJ 4458, 4459. Confessional statement recorded by a person in authority in the presence of a police officer is inadmissible in evidence. *N. Nagarajan v. State of TN*, 1996 Cri LJ 1007, 1009 (Mad). The time of 15 to 20 minutes for reflection is not sufficient, *Pralhad v. State*, 1996 Cri LJ 2558, 2564 (Bom). It would be appropriate if the Judicial Magistrates follow the guidelines issued criminal manual for their guidance for recording of confessions for avoiding any chances of miscarriage of justice. *Pralhad v. State*, 1996 Cri LJ 2558, 2564 (Bom). Where though the Magistrate explained to the accused that he was not bound to make a confession and that if he did so, it might be used against him, but the Magistrate did not put questions to the accused to satisfy himself that the confession was voluntary, which amounted to flagrant violation of section 164(2) Cr PC, the confession cannot be entertained as a piece of evidence, much less a reliable one. *Preetam v. State of MP*, A 1997 SC 445, 446. Where the Magistrate had not questioned the accused for verifying whether he was making the confession voluntarily, the confession was not voluntary and therefore, it cannot be relied on despite the fact that it was not retracted at the earliest opportunity. *Naresh v. State*, 1997 Cri LJ 3793, 3798, 3801 (All).

It is incumbent upon the magistrate to explain to the person produced for record of confession: (*a*) that he is not bound to make a confession at all; (*b*) that if he does so, it may be used as evidence against him and further; (*c*) he must before recording it ascertain by proper questioning whether it was being made voluntarily [*R v. Kommoju*, 19 P 301; *Punia v. R*, A 1946 P 169; *Nazir Ahmed v. R*, 40 CWN 1221 : A 1936 PC 253 : 63 IA 372]. Law is well settled that besides putting the compulsory questions the magistrate must put all possible questions to explain that he would not be afraid of any extraneous pressure, threat, promise or inducement and that there must be clear endeavour on the part of the magistrate to explain the position to the accused so that he would feel a free man [*Pingal v. S*, A 1969 Ori 245]. Every question put and answer given must be recorded, the whole must be read over and if necessary interpreted to the prisoner, and it must be signed by him and by the

magistrate. The magistrate, too must certify that the statement was taken by him in person and that it contains a full and true account of what was said. And furthermore, s 164 requires a memorandum to be added to the effect that the confession was, in the belief of the magistrate, voluntarily made and that it was read over to the prisoner and admitted by him to be correct. The highly responsible certificate as to voluntariness can best be given after the magistrate has recorded the statement and observed the demeanour of the accused [*In re Kakana*, A 1953 M 74].

The memorandum need not be in the handwriting of the magistrate himself [*R v. Tukaram*, 57 B 336 FB : A 1933 B 145]. A confession does not become inadmissible merely because the memorandum has not been made in the exact form required [*R v. Anga Valayan*, 22 M 15; see however *Ram Singh v. R*, A 1943 O 269]. A Coroner while taking down a confessional statement is not required to comply with the formalities laid down in s 164 Cr P Code [*R v. Dasrath*, A 1945 B 265 FB : 47 Bom LR 145]. The addition of a note to the certificate attached to the confession stating what the magistrate did after the accused was produced, does not invalidate the confession [*R v. Chavadappa*, A 1945 B 292]. A thumb mark affixed to a confession is not a signature [*Sadanand v. R*, 32 C 550].

The word "record" means write down and not merely file. Where an accused gave a signed statement to the police and handed over the same to the magistrate saying it was his confession, it is not admissible [*Rambaran v. R*, 55 A 425]. A statement by deceased under s 164 before a [2]third class magistrate is not relevant as he is incompetent to record it, but it is relevant under s 32(*1*) [*Chadgi v. R*, A 1930 L 60]. A confession was recorded after complying with the necessary formalities, but just when the magistrate proceeded to apend his certificate, the accused resiled. It was no confession [*Arjan v. R*, A 1930 L 257]. The High Courts have laid down rules for the guidance of magistrates recording confessions. These rules should be followed with punctiliousness and care. It has been held that a contravention of the Circular Orders of the High Court in recording confessions would not render the record bad if otherwise the confessions are voluntary [*R v. Panchkari*, 29 CWN 300; see also *Public Pros v. Surabu*, 33 M 413; *Kamsala v. R*, A 1937 M 735]. The rules approved by the Judges in England and issued to the police at the request of the Home Secretary, for cautioning the accused when questioning him may be usefully consulted (see the rules reproduced in Phip 11th Ed para 805 and 1964, 1 All ER 237. As to the Judges' Rules, see also s 25 *post*). Mode of recording judicial confession and principles to be followed [*Gurubaru v. R*, A 1940 Or 67].

When the directions contained in the Cr P Code are complied with, there is under s 80 a presumption of accuracy as to the circumstances in which the confession was taken. The words '*may record*' in s 164 appear to have been used as before recording it is the magistrate's duty to ascertain by proper questioning whether the confession is voluntarily made. The section is permissive in this sense, but if it is found to have been voluntarily made, it is obligatory on the magistrate to record the confession [*per* SHAH, J, in *R v. Maruti*, 21 Bom LR 1065 : 54 IC 465]. The word '*may*' denotes that whether a magistrate will record a confession is a matter of duty and discretion and not obligation. Thus, a magistrate would not be obliged to record any confession made to him, if for example, it were that of a self-accusing mad man or for any other reason the magistrate thought it to be incredible or useless for the purposes of justice, *eg.*, when he is not satisfied about its voluntary nature. But if he does record, it must be done in accordance with the provisions laid down in ss 164 and 364 (now s 281)

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2. Third class magistate abolished in Act 2 of 1974.

Cr P Code [*Nazir Ahmed v. R*, 63 IA 372 : A 1926 PC 253 : 40 CWN 122]. S 164 certainly is not intended to make the magistrates instruments of the police for the purpose of recording statements at their desire irrespective of the desire of the persons produced for the purpose of making statements; and it is easy to concieve circumstances under which a magistrate would be fully justified in refusing to record the statement of a person accused or not accused who is produced by the police for the purpose, although the statement was not a confession. A magistrate is at liberty to endeavour to ascertain from him whether he is "disposed to make a statement of his own free will" and until it appears that he is so disposed, he is at liberty to bring to his notice that he is not under any obligation to make a statement and that any statement that he does make may be used against him [2 PR 1893]. 'It would be particularly unfortunate if magistrates were asked at all generally to act rather as police officers than judicial persons" [*Nazir v. R, sup*].

When there is a certificate under s 164(*4*) there is a presumption that the precautions in the section have been duly taken [*Majhi v. R*, 104 IC 274 (L)]. A confession not bearing a certificate cannot be admitted under s 80 [*R v. Radhi*, 7 CWN 220]. A confession upon which the necessary certificate is not recorded at the time, or at least on the day the confession was recorded, cannot be admitted in evidence [*R v. Daji Narsu*, 6 B 288]. When a confession was recorded on solemn affirmation in contravention of s 5 (now s 4) Oaths Act, it was held admissible as it did not occasion any miscarriage of justice [*Karam Ilahi v. R*, A 1947 L 92].

When there is no statutory inhibition for using such confession on the premise that it was not recorded during the investigation of the particular offence which is under trial there is no need or reason for the Court to introduce a further fetter against the admissibility of the confessional statement. It often happens that a confessor would disclose very many acts and events including different facets of his involvement in the preparation, attempt and commission of crimes including the acts of his co-participators therein. But to expel every other incriminating disclosures than those under investigation of a particular crime from the ambit of admissibility is not mandated by any provision of law [*State of Gujarat v. Mohammed Atik,* A 1998 SC 1686 at 1688 : 1998 Cri LJ 2251 : (1998) 2 Scale 633].

Direction by the magistrate while remanding the accused to judicial custody that he should be kept away from the police was not an indication that the confession recorded thereafter was not voluntary. The fact that the magistrate started recording the confession immediately after the accused was produced before him would not create a presumption of involuntariness, nor the fact that four days after his release on bail he went back upon his confession. Omission to ask the accused whether he was promised pardon for becoming approver was inconsequential to the fact whether the confession was voluntary. *Ammini v. State of Kerala*, AIR 1998 SC 260 : 1998 Cri LJ 481.

—Inadmissibility of Confession Not Recorded in Accordance With Ss 164 and 281 Cr P Code. [*Nazir Ahmed v. R*, "63 IA 372].—*In Gurubaru v. R*, A 1949 Or 67, seven directions have been laid down for observance before recording confessions. But while every endeavour should be made to conform to them, they are not mandatory [*Bala Majhi v. S*, A 1951 Or 168 FB]. Ss 164 and 281 must be looked at and construed together, and it would be an unnatural construction to hold that any other procedure was permitted than that which is laid down with such minute particularity in the sections themselves. The accused was said to have made a con-fessional statement to a magistrate of which he made rough notes which were des-troyed and later on dictated to a typist a memorandum from those rough notes which had been destroyed. The memorandum was signed by the magistrate and there was a certificate by him as to the voluntariness of the statement—*held* that the memorandum was inadmissible in evidence and oral evidence of the magistrate is not also admissible to prove the confession. S 164 Cr P Code is not meant to

allow evidence to be put in a form in which it can prove itself under s 74 or s 80 Evidence Act. It is a section conferring powers on magistrates and delimiting them. If oral evidence be allowed in such a case, all the precautions and safeguards laid down by ss 164 and 281 would be of such trifling value as to be almost idle. The effect of ss 164 and 281 Cr P Code is clearly to prescribe the mode in which confessions are to be dealt with by magistrates, when made during an investigation, and to render inadmissible any attempt to deal with them by allowing oral evidence [*Nazir Ahmed v. R*, 63 IA 373 : 40 CWN 1221 (This case was relied on by the SC in *Shiv Bahadur v. S*, 1954 SCR 1098 : A 1954 SC 322; *Deep Chand v. S*, 1962, 1 SCR 662 : A 1961 SC 1527 and *S v. Singhara*, A 1964 SC 368]. This case has overruled all the earlier cases in so far as they held that a confession not recorded by observance of the requirements of ss 164 and 281 Cr P Code is admissible and could be proved by the oral evidence of the magistrate and the defects or irregularities cured under s 463 Cr P Code [*viz, Abdulla v. R*, 14 L 290 FB : A 1933 : 716; *Bhakshan v. R*, 16 L 912 : A 1936 L 247; *R v. Md Ali*, 56 A 302 FB : A 1934 A 81; etc]. Non-compliance with the provisions of ss 164 & 281 makes a confession before a magistrate inadmissible [*Sharif v. R*, A 1944 S 113; *Ondi Boro v. R*, A 1948 C 193; *In re Thothan*, A 1956 M 425]. Admission of guilt recorded in the recovery memorandum at the time of search is not admissible as confession [*Mahfuz v. S*, A 1953 A 110]. A confessional statement of the accused noted by the magistrate in the order-sheet is inadmissible [*Balkrishna v. Murlidhar*, A 1948 N 245]. No reliance can be placed on a confession not containing a note as required by s 164(*3*) Cr P Code [*Jagmal v. R*, A 1948 A 211]. When the dying declaration of accused recorded by a magistrate which contained a confession becomes inadmissible under s 32 on account of his survival, it cannot be admitted as a confession as it was not recorded in conformity with s 164 Cr P Code [*Babbu v. S*, A 1594 A 633].

Before making a confession the accused took the magistrate to various places connected with the outrage and pointed out various spots which were marked on two plans. In pointing out the spots the accused must have told the magistrate what had occurred there, otherwise the spots could never have been marked. According to the judge's notes the magistrate pointed out to the jury the spots where the accused said he fired the shots. The statements which are of a confessional nature and the plans are inadmissible as no record of them was made in accordance with s 164 Cr P Code [*Abdul Rahim v. R*, A 1945 L 105 FB (*Nazir Ahmed v. R*, 63 IA 372 **relied** on); see *ante; "Verification Proceedings"*].

—Confession Must Not be Recorded Before Ascertaining Whether it was Being Made Voluntarily.—The provision in s 164 Cr P Code that a magistrate before recording a confession must ascertain and satisfy himself upon questioning whether it is voluntary is mandatory. Where there is no questioning with a view to find out whether it was being made voluntarily, the magistrate has no jurisdiction to record a confession [*Nazir Ahmed v. R, sup*; *R v. Kommoju*, 19 P 341; *R v. Bahawala*, 6 L 183]. There must be a real endeavour to find out by questioning whether he confessed voluntarily [*Bhukhin v. R*, A 1948 N 344]. As LORD ROCHE observed in *Nazir Ahmed's case, sup:* "Where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all." This was approved in *S v. Singhara*, A 1964 SC 358.

The magistrate must ascertain whether the statement about to be made is spontaneous and voluntary. He should not record unless he believes that the person produced has come voluntarily and is making a statement of his free will. He should also question the person making it in order to ascertain whether it is made voluntarily. In a case the magistrate said that the accused made the statement of his own accord, but he did not say, nor was it mentioned in the memorandum, that he asked the accused whether he was making it voluntarily. It was held that s 164 Cr P Code makes it imperative before recording a confession, to question as to whether it is made voluntarily and the defect being one of substance it could not be cured by s 533 (now s 463) [*Farid v. R*, 2 L 325 : 65 IC 613]. *Farid's* case was **followed** in *Neki v. R*, 76 IC 180 : A 1924 L 624; *Khusi v. R*, 81 IC 627 : A 1924 L 481 and *R v.*

Panchkari, 52 C 67 : 29 CWN 300 : *In re Karunthambi*, A 1950 M 579; see *Ram Babu v. R*, A 1938 P 60; *R v. Azimuddin*, 57 IC 462 : A 1927 C 17; *R v. Ramsidh*, A 1938 P 352; *Punia v. R*, A 1946 P 169]. While it is imperative that the magistrate must satisfy himself of voluntariness by putting questions, mere failure to record the questions does not invalidate the confession [*Ranbir v. R*, A 1932 L 204; *Suka v. S*, A 1951 Or 17—CONTRA: Questions and answers must be recorded, *R v. Ramsidh*, A 1938, P 352; *Baldeo v. R*, A 1947 P 281; *Bala Majhi v. S*, A 1951 Or 168 FB]. See further, Sarkar's Cr P Code, 4th Ed, Notes to s 164.

—Need of Warning and Questioning in Order to Determine Voluntariness.— Before amendment by Cr P Code (Am) Act, 1923 of s 164 it was held that it is however no part of the duty of a magistrate to warn the accused that anything he may say will go in evidence against him [*R v. Uzir*, 10 C 755; see notes to s 29 *post* under *"Want of warning or caution"*]. Sub-section (2) of s 164, now requires that "a magistrate shall before recording any such confession, explain to the person making it that he is not bound to make a confession and that if he does so it may be used as evidence against him." This is in effect a provision as to warning. Irrespective of previous warning, it must be given on the day confession is actually recorded [*In re Karunthambi*, A 1950 M 579; *R v. Kommoju*, 19 P 301] and if recording is continued on another day, a fresh warning is necessary [*Punia v. R*, A 1946 P 169—CONTRA: *In re Ramana*, A 1953 M 74].

Omission to warn under r 85 Madras Cr Rules of Practice that it is not intended to make the accused approver, is fatal to admissibility [*In re Madithati*, A 1951 M 331]; it has however been held in a case to amount to serious defect, affecting the value of the confession [*In re Govinda*, A 1937 M 31]; but if provision as to warning has in substance been complied with, a confession cannot be rejected merely because of a technical breach.

The object of putting the set questions in Rule 85 is to enable the magistrate to be quite sure that the statement was voluntary and if the same result can be had by other questions the confession cannot be rejected merely because a formal question was not asked [*Kamsala v. R*, A 1937 M 755 : 1938 Md 348 : *In re Ramaswami*, A 1952 M 411]. As to whether the provision as to warning in s 164(2) is directory or mandatory, see *R v. Jamuna*, A 1947 P 305 and as to the inconsistency between this provision and s 29, see notes to s 29, *post*. It has been held that in the absence of anything to the contrary it may be presumed that warning was given [*R v. Tukaram*, 57 B 336 FB : A 1933 B 145].

It is necessary that warning should be given immediately before recording confession. Where a magistrate gives several hours to think over the question and then records confession, it is proper [*Dur Md v. R*, A 1930 S 305]. After warning, sufficient time to reflect should be given. Fifteen minutes is not sufficient [*Punia v. R, sup*]. Three hours' time was sufficient. *Henry Westmuller Roberts v. State of Assam*, 1985 Cri LJ 1079 : A 1985 SC 823, 830 : (1983 Cri LJ 146 (Gau) affirmed)]. When a prisoner is given time for reflection, the time allowed should be noted [*Khanum v. R*, A 1930 L 171].

An enquiring or trying magistrate is quite competent to record the statement of an accused under s 313 Cr P Code without giving the warning required under s 164 Cr P Code. Hence a confession recorded by an enquiring magistrate is not rendered inadmissible merely because the final police report under s 173 Cr P Code has not been put in and the warning under s 164 has not been given [*Lal Khan v. R*, A 1948 L 43 (*Sullah v. R*, A 1928 L 724 **dissented from**)]. See further Sarkar's Cr P Code, 4th Ed, notes to s 164.

—Nature of Questioning.—It would be going too far to say that a magistrate recording a confession should not ask a single question. But it is equally certain that his position is merely that of a recording magistrate and he is in no sense an investigating officer. He may clear up ambiguities, but he would be wholly unjustified in extracting questions which the accused had not spoken of his own accord. He is bound to record every question he asks [*Hasan Ali v. R*, 88 IC 729 : A 1926 A 22]. The questioning must not be of an inquisitorial nature [*Neharoo v. R*, A 1937 N 220] and answers to leading questions renders the confession involuntary [*Bhukin v. R*, A 1948 N 344]. It is improper to ask question with a view to pin persons down to certain statements in order to proceed criminally or to incriminate himself and others [*Kali Singh v. R*, 7 CLJ 246; *Bajrangi v. R*, 4 CWN 49; *R v. Hawthorne*, 13 A 345; *R v. Behari*, 6 CLR 431; *Gya Singh v. Mohamed*, 5 CWN 864]. But the mere fact that a statement in a confession was elicited by a question put by the magistrate recording it, does not make it irrelevant as a confession [*Barindra v. R*, 14 CWN 1114; see notes to s 29 *post*, under *"Confession in answer to questions."*]

The questions need not be in any special form, but they must be designed to ascertain and satisfy himself that the confession was being voluntarily made [*R v. Kommoju*, 19 P 301 : A 1940 P 163 : *Majhi v. R*, 104 IC 247 : A 1927 L 682]. Among others such questions may be asked: Are you making your statement entirely of your own free will and not as a result of anything any one has said to you? What is your motive for making a statement which must incriminate you? [*R v. Kommoju, ante: Dikson v. R*, A 1932 P 90]. With a view to find out whether the confession is voluntary, he must put appropriate questions. The importance of this can seldom be over-estimated. The questioning must be in pursuance of a real endeavour to find out the object of it, the requirement not being satisfied by putting a few formal questions. He need not however, enquire as to the motive in making a confession [*R v. Panchkari*, 52 C 67 : 29 CWN 300; see also *Bajrangi v. R*, 4 CWN 49; *R v. Bhutnath*, 7 CWN 345; *R v. Narayan*, 25 B 543; *Thein Mg v. R*, 4 Cri LJ 198; *Jagjiban v. R*, 13 CWN 861; *R v. Kadar Ghulam*, 8 Bom LR 950; *Kandhai v. R*, 15 Cri LJ 633, *Jiubodhan v. R*, 18 Cri LJ 623; *R v. Yakub*, 5 A 253; *Ragho Laya v. R*, 18 Cri LJ 721; *Sardar v. R*, A 1937 N 257]. There must be materials on record to show that the Magistrate had exercised his judicial mind to get the real motive or impelling factors which prompted the accused to make the confession [*Mobeni Mingi v. Union Territory of Arunachal Pradesh*, 1982 Cri LJ NOC 39 (Gau)]. Where there is nothing in the statement to show that besides the usual and stereotyped questions any serious attempt has been made by the magistrate to find out whether the statement was voluntary or otherwise, the court should hesitate to accept his certificate at its face value. It is his duty to satisfy himself that the confession is in fact voluntary and to record the questions and answers which point to such a conclusion [*R v. Sambhu*, 54 A 350]. It is no part of his duty to ask questions with a view to reconcile the statements of the accused with other co-accused. But if the statement is ambiguous, he should ask questions with great caution in order to clear up the ambiguity [*Abdul Jalil v. R*, A 1930 A 746]. Where the question required under s 164(2) is not put and the memorandum required to be made was not so made, the confession is not admissible [*R v. Hosnabai*, 56 B 542].

—Questioning About the Length of Police Custody and Removal of Police Influence.—The period of detention in police custody before making a confession is always an important fact to be carefully considered [*Dhaman v. R*, A 1937 S 251]. The questioning about the length of such custody becomes all the more important when accused is produced from long police custody. It is the duty of the magistrate

recording a confession to ask first of all: "How long has the accused been in the custody of the police?" [*R v. Narayan*, 25 B 543 : 3 Bom LR 122]. The precaution is very wise and salutary, but failure to do so is not an irregularity invalidating the confession [*Abdul Ghani v. R*, A 1931 L 763]. The magistrate should enquire from what custody the accused came and to what custody was he sent back [*Punia v. R*, A 1946 P 169]. The length of police custody has a material bearing on the question whether the confession is voluntary or not [*Jogjiban v. R*, 13 CWN 861 : 9 CLJ 663; *R v. Bhagwandas*, 1941 Bom 27 : A 1941 B 50; *Gurubaru v. R*, A 1949 Or 67].

Illegal or prolonged detention in police custody has been condemned in many cases and in some it has been held that it may lead to a presumption of inducement or ill-treatment affecting the voluntary character of the confession [see *R v. Sagal*, 21 C 642, 660; *R v. Gobardhan*, 9 A 528 : *Jogjiban v. R*, 13 CWN 861; *R v. Narayan*, *sup*; *Amir Khan v. R*, 7 CWN 457 : *R v. Mahabir*, 18 A 78 : *R v. Abba Bin*, 1 Bom LR 357; *Abdul Sattar v. R*, 17 L 460; *Mobarak v. R*, 23 CWN 886; *R v. Karu Gowala*, 101 IC 479 : A 1927 P 429; *R v. Lalitmohan*, 38 C 559 : 15 CWN 593; *Rusna Teli v. R*, 54 IC 81]. If the record does not show the length of police custody before confession, the sessions judge should examine the magistrate and satisfy himself on the point [*R v. Narayan*, *sup*]. Prolonged police custody immediately preceding the confession is sufficient, unless properly explained, to stamp it as involuntary [*Nathu v. S*, A 1956 SC 56 : 1956 Cri LJ 152; *Ganesh Prasad Singh v. State of Orissa*, 1987 Cri LJ 1345, 1349 : (1986) 2 Orissa LR 514 (Ori)]. Where before recording confession accused had spent 4 days in judicial custody after being kept in remand for 15 days he was not under the influence of investigating agency for at least 4 days and confession was held voluntary [*Abdul Razak v. S*, A 1970 SC 283 (*Nathu v. S*, *sup*, **dist**)].

Delay in producing before the magistrate prisoners who are willing to have confession recorded affects the value of the confession. They must be produced before a magistrate and whether the statement is satisfactory or inconsistent, is not a question with which the police are concerned [*R v. Panchkari*, 29 CWN 300 : 52 C 67; *Abdul v. R*, A 1940 A 46]. Where magistrate after recording the confession hands it over to the police officers, it contravenes s 164 Cr P Code [*R v. Indar*, A 1931 L 408]. The confessing accused must invariably be sent to the judicial lock-up and on no account be returned to police custody [*Surat v. R*, A 1938 L 292; *Jahana v. R*, A 1937 L 98]. A confession cannot be rejected merely because the accused was not assured by the Magistrate that he would not be sent back to police custody in the event of his not making a confession [*Nakula Chandra AICH v. State of Orissa*, 1982 Cri LJ 2158, 2161 : (1982) 54 Cut LT 195 (Ori)]. Where confession was made three days after police custody and accused was again remanded to that custody, it was not voluntary [*R v. Pancham*, 8 L 810].

It has, however, been held that an accused cannot be said to have been compelled to be a witness against himself [under art 20(*3*) Constn] simply because he made a statement while in police custody without anything more. Though the fact of police custody in conjunction with other circumstances disclosed in evidence in the particular case would be a relevant consideration in an inquiry whether or not accused had been compelled to make the impugned statement. The mere questioning of an accused by a police officer, resulting in a voluntary statement which may ultimately turn out to be incriminatory, is not compulsion [*S v. Kathi Kalu*, A 1961 SC 1808 : 1962, 3 SCR 10].

No police officer should ordinarily be allowed to be present at the time of recording a confession. Most confessions are extorted by the police by torture, threat

or inducement and a free atmosphere should be created so that prisoners brought before a magistrate may feel that they are free to make or not to make any statement. Magistrates should therefore remove their handcuffs and order out the police at the time of recording confession [*Daulat v. R*, 2 LLJ 653; *Dikson v. R*, A 1942 P 90]. When accused are handcuffed and a constable stands guard, confession recorded was held to be under police influence [*Bhukhin v. R*, A 1948 N 344].

Where a confession was taken by magistrate in jail with a police officer in the next room and was subsequently retracted, it was held that such confession could not be acted upon unless supported by very good corroboration [*Shk Sohali v. R*, 11 CLJ 272]. It is the duty of the magistrate to remove all police influence, to warn that the statement will be used against him, to give him time to reflect and to satisfy that the statement was a voluntary one. When this is done, the mere fact that some police officers at or soon after his arrest told him to confess is no proof that the accused was forced to make the statement [*Kamsala v. R*, A 1937 M 755 : 1938 Mad 348]. Magistrates have the power to exclude the police or any others. They should not however do so when such exclusion will render the statements of witnesses incomplete by the prosecution not having adequate materials [*Pullamma v. R*, 1932 MWN 625]. See further Sarkar's Cr P Code, 4th Ed notes to s 164.

—Time and Place of Recording Confession.—A confession should be recorded in open court and during the court hours unless there are exceptional reasons to the contrary. Further, it is necessary that a confessing accused should not be returned to the custody of the police [*Jahana v. R*, 38 PLR 791 : A 1937 L 98; *Amar v. R*, A 1937 L 746; see *R v. Leyatt*, 48 Cri LJ 794; *Hemraj v. S*, A 1954 SC 462 : 1954 SCR 1133; *Ram Ch v. S*, A 1957 SC 381 : 1957 Cri LJ 559]. The doors of the Court room where the confession was being recorded, were not closed. Police officers were present outside the Court and the possibility of their overhearing the confession, or at any rate the accused believing that they could overhear it cannot be ruled out. These circumstances must clearly detract from the confession being voluntary and genuine, particularly in the context of the subsequent retraction of this confession [*Harikishan v. State of Haryana*, 1990 Cri LJ 385, 389 (P&H)]. The Calcutta and Madras High Court rules also require that confessions should be ordinarily recorded in open court during court hours and not at home. These rules should be followed with punctiliousness and care [see *R v. Panchkari*, 29 CWN 300, 310-11; *Azimuddy v. R*, 31 CWN 410; *In re Karunthambi*, A 1950 M 579]. Recording on Sunday and not during court hours is a defect of form [*In re Karunthambi*, *sup*]. It is improper to record confession in jail without adequate reason [*Hemraj v. S*, *sup*; *Ram Ch v. S*, *sup*] and if so recorded the reason should be noted. There is no law forbidding record of confession on a holiday and at a place other than the court house [*Khanum v. R*, A 1930 L 171]. See further Sarkar's Cr P Code, 4th Ed, notes to s 164.

—Form and Language in Which Confession Should be Recorded.—S 281 Cr P Code requires that every question and answer should be recorded in full in the language in which the accused is examined or if not practicable, in the court-language. Confession not recorded in accordance with s 164(2) [now (4) and (5)] read with s 281 and which is retracted is of no value [*Harphul v. R*, 75 IC 762 : A 1923 L 429]. The mere absence of questions in the record of a prisoner's statement does not render it inadmissible [*R v. Sagambur* 12 CLR 120; *Nawab v. R*, A 1927 L 285; *Ranbir v. R*, A 1932 L 204; *Suka v. S*, A 1951 Or 71—CONTRA; *Baldeo v. R*, A 1947 P 281; *Bala Majhi v. State*, A 1951 Or 168].

The provision directing that questions and answers shall he recorded in full applies only to the body of the confession [*Abdul Ghani v. R*, A 1931 L 763]. S 281 only

lays down that every question asked and answer given must be recorded in full, but it does not compel a magistrate proceeding under s 164 to put a series of questions and record the answers. Such procedure is ordinarily to be deprecated. The confessing person should be left to narrate his story as a whole without any unnecessary interference and allowed to give all details that he remembers and wishes to describe [*Genna v. R*, A 1932 L 180]. Record of confession in a narrative form and not in the form of questions and answers would not affect its admissibility if the accused had not been prejudiced by the error [*In re Munshi Sheikh*, 8 C 616; see also *R v. Bhairon*, 3 A 338]. The confession recorded by the Magistrate was recorded in the form of questions and answers. The record showed that the accused was virtually cross-examined and whatever he said was in answer to leading questions put by the Magistrate. The confession has to be rejected. [*State of M.P. v. Dayaram Hemraj*, A 1981 SC 2007 : 1981 Cri LJ 1688 : 1981 Supp SCC].

The provisions of ss 164 and 281 are imperative as to the language in which a confession is to be recorded and s 463 does not contemplate or provide for any non-compliance with the law in this respect [*Jainarain v. R*, 17 C 862; see also *R v. Viran*, 9 M 224 (**followed** in *R v. Bhairab*, 2 CWN 702); *Farid v. R*, 2 L 325]. Where answers are given in one language and taken down in another, it is doubtful whether the defect could be cured by s 463 [*R v. Nilmadhab*, 15 C 595 FB]. In *Jainarain v. R*, *sup* it was further held that it is for the prosecution to establish that it was not practicable to take down the answers in the language in which they were spoken. When the committing magistrate said that he recorded the statement in [3]English, as he could not write Bengali well and had no *mohurar* with him at the time, *held*, *that it* was a sufficient compliance [*R v. Razai Mea*; 27 C 417 (17 C 862 **distd**). *Jainarain v. R*, was **followed** in *R v. Bhairab*, 2 CWN 702; **doubted** in *Lalchand v. R*, 18 C 549 and **dissented** from in *R v. Visram*, 21 B 495 and *R v. Raghu*, 23 B 221]. In some cases it has been held that if the confession is recorded in [3]English although the magistrate has knowledge of the language of the accused recorded in English although the magistrate has knowledge of the language of the accused, the defect is cured by s 463 Cr P Code [see *Deo Dat v. R*, 45 A 166: *R v. Kommoju*, 19 P 30; *Mendai v. S*, A 1952 A 486].

Where the statement made by an accused in Manipuri language and communicated to the magistrate in Bengali, was recorded in English and there was also a record in the Manipuri language and both the records differed, it was held that the Manipuri document should be regarded as the proper record [*R v. Sagal Samba*, 2 IC 642]. It is not necessary that examination of an accused given in a foreign language should be recorded in that language [*R v. Vambial*, 5 C 826]. Omission to have recorded in the vernacular, the questions asked in the examination does not necessarily render the examination irrelevant [*Titu Maya v. R*, 8 C 618 foot-note: 1 CLR 1 (referred to in *Fikoo Mahto v. R*, 14 C 539); *Abdul Ghani v. R*, A 1931 L 763]. Omission to record confession in the language used by the accused may be overlooked, if it has not injured the accused in his defence [*Nawab v. R*, A 1927 L 285: *Rattiram v. R*, 7 PR 1899 Cr]. See further, Sarkar's Cr P Code, 4th Ed notes to s 164.

Defects or Irregularities in Confession and Their Curing Under S 463 Cr P Code.—S 463 aims at curing the irregularities or errors committed in recording confessions or statements under s 164 or s 281 Cr P Code, by examination of the person who recorded them. Decisions are not unanimous as to whether a strict

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3. English has been omitted in s. 164 of 1973 code.

compliance with the provisions of ss 164 and 281 is imperative to render a confession admissible or whether all omissions to fulfil the requirements of those sections may be cured by s 463. The better opinion appears to be that where the defect is one of *form* merely and not *substance*, it is curable by s 463, otherwise not. In a Calcutta case the section was explained thus:—

> "That section, as I understand it, means only this that where a confession or other statement of an accused is *duly made, ie made in accordance with law*, but in recording it, those provisions have not been fully complied with, oral evidence is admissible to prove that the confession or other statement was duly made; or in other words, when the defect in recording the confession or other statement of an accused person is one *not of substance but of form only*; as for instance when the magistrate had through inadvertence omitted to state in the certificate that the statement was taken in his hearing though it was so taken or when he has omitted to sign the certificate through mere inadvertence, oral evidence may be taken to remedy the defect by proving that the statement recorded was duly made" [*per* BANERJEE, J, in *R v. Bhairab*, 2 CWN 702, 714 (*R v. Viran*, 9 M 224; *Jai Narain v. R*, 17 C 862 refd to); see also *Partap v. R*, 6 L 415].

In many other cases it has been held that the provisions of ss 164 and 281 are mandatory and s 463 will not render a confession admissible where no attempt has at all been made to conform to them [*per* PARKER, J, in *R v. Viran*, 9 M 224, 227]. The important thing is not the formal writing which may not always be perfect in the hurry of the work, but whether the magistrate applied his mind to the question, *viz* whether the confession was being voluntarily made and decided it in the affirmative after proper questioning [17 PR 1915: 16 Cri LJ 354, see *Bhaikhan v. R*, 68 IC 841: A 1922 L 189]. The words "duly made the statement recorded" mean that the statement was made in accordance with and subject to the provisions of s 164 [*Khemna v. R*, 6 L 58] Thus, if the statement is recorded after the magistrate told the accused that he was not bound to make any confession at all, but omitted to embody the fact in the certificate, it is curable. But if the explanation had not in fact been made the statement was not "duly made". A general statement that all precautions were taken is too vague and s 463 cannot be appealed to [*Partap v. R*, 6 L 415; see *Rao v. R*, 88 IC 599: A 1925 L 367; *Bahawala v. R*, 6 L 183]. If the accused's statement that he committed the murder is not recorded by the magistrate under s 164, his oral evidence is inadmissible [*Supdt & Legal R v. Lalit*, 25 CWN 788; see *R v. Gulabu*, 35 A 260]. Questioning the accused before recording the statement in order to satisfy that it was voluntary is imperative and if the record does not show it, the defect is of substance and cannot be cured [*Baldeo v. R*, A 1947 P 281; *Farid v. R*, 2 L 325; see *R v. Sambhoo*, 54 A 350]. Where record does not show that the magistrate informed the prisoner that he was a magistrate or questioned him regarding voluntariness, the defect is fatal [*Prag v. R*, A 1930 O 449; *Ranbir v. R*, A 1932 L 204; *Punia v. R*, A 1946 P 169]. Where a second class magistrate not specially empowered purports to record a confession, his oral evidence to prove the confession is not admissible. S 463 is also of no avail [*S v. Singhara*, A 1964 SC 358 (*Nazir Ahmed v. R*, 63 IA 372 **follo**)].

Where there is a substantial compliance with the requirements of s 164(2) Cr PC, reliance can be placed on ss 29 and 30 and any non-compliance with the provisions of s 164 Cr PC may be regularised by application of s 463 Cr PC [*Shanti v. S*, A 1978 Or 19 FB]. Where all the provisions of s 164 have been duly complied with, but there is failure to append the certificate [*Jograj v. R*, A 1930 L 534; *Annamalai v. R*, 1932 MWN 714], or if the certificate is not in the magistrate's hand [*Salu v. R*, A 1933 S

165], s 463 applies. Where certificate of warning was not appended, the certificate being in the old form before amendment of s 164, defect is curable [*Aimna v. R*, A 1931 L 196; see *Kheman v. R*, 6 L 58]. If the warnings given are not recorded but their substance or the confession is not signed by the accused or the magistrate did not ask in so many words whether it was voluntary although he satisfied himself of it, the confession is not inadmissible [*R v. Arajaddin*, 40 CWN 872]. Where questions have in fact been put and answered in order to determine voluntariness, but they are not recorded, oral evidence may be given [*Bala Majhi v. R*, A 1951 Or 168 FB].

The opposite view appears to have been taken in Bombay holding that neither the language nor the object of s 463 appears to justify the view that its scope—is limited to any particular kinds of non-compliance; there is also no justification for the distinction (drawn in *Jai Narain v. R*, 17 C 862 *ante*) between "omissions to comply with the law" and "infraction" or "direct violation"—*per* STRATCHEY, J, [*R v. Visram*, 21 B 495: see also *R v. Raghu*, 23 B 221, *per* PARSONS, J]. To the same effect is the case in *R v. Deo Dat*, 45 A 166: see also *R v. Anta*, 1892 AWN 60. Following the Bombay decisions it has been held that omissions to write the questions and answers can be cured by s 463, which applies not only to omissions but also to infractions of law. "Such statement" in s 463 refers to the statement regarding which the magistrate gives evidence [*Rama Kariyappa v. R*, A 1929 B 327].

In Patna a confession recorded did not show that the accused had been warned and it did not also in clear terms show that the accused had been asked whether the statement was voluntary. The deputy magistrate deposed that the above requirements were complied with. It was held that the confession was admissible [*Ramai v. R*, 3 P 872 (*Farid v. R*, 2 L 325 **dissented from**); see also *Muksud v. R*, 60 IC 56: A 1921 P 337: 2 Pat LT 733; *Rahwat v. R*, 113 IC 65 (L) and *Drummond v. R*, A 1933 L 311]. Similar view was also taken in a later Allahabad case holding that the language of s 463 is intended to cover every case in which any of the provisions of s 164 or 281 has not been complied with (*eg* omission to record the preliminary questions, or want of signature of the magistrate or the accused in the confession) and in all such cases the defect or irregularity may be cured by further evidence of the magistrate that the confession was duly made [*Md Ali v. R*, 56 A 302: A 1934 A 81 FB]. [It may be pointed out that the particular omission in *R v. Visram*, 21 B 495 *ante*, was the recording of questions and answers in English although the accused deposed in *Marathi*. The magistrate deposed that he could not himself have recorded the statement in *Marathi*. In *R v. Raghu*, 23 B 221, there was omission in taking the mark or signature of the accused. It would appear that in both these cases the defects were of *form* and not of *substance*. In several cases it has been held that where it is impracticable, the statement need not be recorded in the accused's own language; see *R v. Nilmadhab*, 15 C 595 FB: *R v. Sagal*, 21 C 642; *R v. Razai Mia*, 22 C 817; *Lalchand v. R*, 18 C 549: *R v. Vaimbilee*, 5 C 826; 16 CPLR 122; 1899 PR 7; *Fekoo v. R*, 14 C 539].

The view expressed in the previous editions of this work that *R v. Visram, ante*, and similar other cases above cannot be taken as authorities for the broad proposition that each and every violation of the directions of law in ss 164 and 281 Cr P Code may be remedied by s 463 Cr P Code has found judicial recognition in *Nazir Ahmed v. R*, 63 IA 372: A 1936 PC 253: 40 CWN 1221, where LORD ROCHE observed that "the reasoning of his (BANERJEE J's) judgment (in *R v. Bhairab*, 2 CWN 702 *ante*) is lucid and cogent".

—S 463 Cr P Code 1898 Does Not Apply Where Provisions of SS 164 and 281 Cr P Code, 1898 Have Not at all Been Complied With. [*Nazir Ahmed v. R*,

63 IA 372].—It would appear from the cases above that there are authorities both ways—one group holding that non-compliance of any of the provisions of ss 164 and 281 renders the oral evidence of the confession inadmissible and it is only defects of form and not of substance that can be cured under s 463 (*R v. Bhairab*, 2 CWN 702; *Jainarain v. R*, 17 C 862: *Amiruddin v. R*, 45 C 557; *R v. Viran*, 9 M 224; *Farid v. R*, 2 L 325; *Allahlad v. R*, 33 PLR 25; *Bala Majhi v. S*, A 1951 Or 168 FB &c]. While another group maintaining that s 463 lets in oral evidence of the magistrate in every case in which any of the provisions of s 164 or 281 has not been complied with [*R v. Visram*, 21 B 495; *Md Ali v. R*, 56 A 302 FB: A 1934 A 81; *Abdullah v. R*, 14 L 290 FB: A 1933 L 716; *Bhakshan v. R*, 16 L 912; *Tangedupalle v. R*, 45 M 230 &c]. In this state of things the matter arose in a case before the Judicial Committee. It was conceded in this case that the magistrate neither acted nor purported to act under s 164 or s 281 Cr P Code and consequently, it was held that no question of the operation of s 463 Cr P Code arose and no opinion was expressed on the point. But it was generally laid down that a confessional statement can be recorded only in the manner prescribed in ss 164 and 281 Cr P Code and can be proved only by such record. A confessional statement not recorded in accordance with the procedure laid down in those sections is inadmissible in evidence and cannot be proved orally by the magistrate. S 463 has no application where the magistrate neither acted nor purported to act under s 164 or s 281 and nothing has been tendered in evidence as recorded or purporting to be recorded under either of these sections [*Nazir Ahmed v. R, sup*]. In view of these observations of the Judicial Committee and their express approval of the reasoning in the case of *R v. Bhairab*; *R v. Viran &c* (*ante*) in the first group where s 463 has been held to apply to defects of form only and not of substance, the latter group of cases should be deemed to have been impliedly superseded. In the application of the many earlier decisions care should be taken to see how far they have been affected by *Nazir Ahmed v. R, sup* where it has been observed that "it is for obvious reasons most undesirable that magistrates and judges should be in the position of witnesses in so far as it can be avoided." This observation has been **approved** by the Supreme Court in *Kashmira v. S*, A 1952 SC 159: 1952 SCR 526; **followed** in *Bisipati v. S*, A 1969 Or 289].

In a case decided after *Nazir Ahmed v. R*, it has been held that if questions are put by the magistrate but the actual questions and answers are not recorded, the defect can be cured under s 463 by the evidence of the magistrate [*Md Din v. R*, 1937 Lah 658: A 1938 L 200]. In another case the oral evidence of the magistrate was held inadmissible as the confession was not recorded with due care and formality. In this case the required certificate was not given [*Neharoo v. A*, A 1937 N 220: 1937 Nag 268]. This case was distinguished in a subsequent Nagpur case where the certificate under s 164(*4*) Cr P Code was partly complied with. It was held that s 463 applied [*Baliram v. R*, A 1939 N 295]. Where the certificate required was not appended but the magistrate deposed that he had satisfied himself about the voluntariness of the confession and gone through formalities—the confession was held admissible [*Kartar v. R*, A 1938 L 556: 40 PLR 854]. But not where the necessary questions are not put. If questions are not put at all, prejudice would arise in this way, that if the questions had been put the accused might have pleaded ill-treatment or undue influence and then the confession would not have been recorded at all [*Sardar v. R*, A 1937 N 257; see also *Ram Babu v. R*, A 1938 P 60 (questions not asked regarding voluntariness)]. Oral proof by a magistrate of a confession which he could have recorded is inadmissible [*Akbar Badr v. R*, A 1938 L 594 (*Nazir Ahmed v. R, sup* **followed**)]."

The Supreme Court held that a statement cannot be said to have been "duly made" (within s 463 Cr P Code) unless the procedure in s 164 had been followed. S 463, therefore, permits oral evidence to be given that procedure in that section had actually been followed though the record produced does not show on the face of it that that was so. If the oral evidence establishes that the procedure had been actually followed, then only can the record be admitted. S 463 really emphasises that the procedure in s 164 has to be followed [*S v. Singhara*, A 1964 SC 358. This case really adopts the view in *Nazir Ahmed v. R*, 63 IA 372: A 1936 PC 253 which approved the reasoning in *R v. Bhairab, ante* and supersedes *R v. Visram*, 21 B 495 and other cases where a contrary view was expressed].

The true rule, therefore, appears to be that in cases where no attempt has been made to comply with the requirements of ss 164 & 281 Cr P Code or there has been omission to comply, the confession is not admissible. Where such attempt has been made but there is a formal defect in the procedure or a slip through inadvertence then it will become curable under s 463. Where therefore the accused when produced before a magistrate for remand makes a statement admitting the commission of the crime and he records it without making an attempt to comply with ss 164 & 281 and the magistrate is examined as a witness, the statement is inadmissible [*R v. Saw Min*, 1939 Rang LR 97: A 1939 R 319; *R v. Kommoju*, 19 P 301; *Punia v. R*, A 1946 P 169; *Maroti v. R*, A 1940 N 230; *Shamla v. R*, A 1941 N 17: *Bakht v. R*, A 1949 L 235]. Want of warning on the day confession is actually recorded is a defect of substance [*In re Karunthambi*, A 1950 M 579]. Omission to take accused's signature is not necessarily fatal to its admissibility [*Shamla v. R*, A 1941 N 17; 1940 NLJ 497]. Where the memorandum required by s 164 was not appended and confessions were recorded on forms prior to the amendment of the section in 1923, they were held inadmissible [*Ram Singh v. R*, A 1943 O 269]. As to the distinction between irregularity and illegality, see *Kottaya v. R*, A 1947 PC 67: 74 IA 65. See further Sarkar's Cr P Code, 4th Ed notes to s 164.

—**Summary.**—The true position now appears to be that—

(*1*) a confession (in the course of an investigation) can be recorded only in the manner laid down in ss 164 and 281 Cr P Code;

(*2*) It can be proved only by that record;

(*3*) If all the provisions of s 164 or s 281 have been complied with [*eg* care has been taken to ascertain whether the confession is voluntary, necessary questions have in fact been put with that object, the required warning has been given &c, &c], but through omission or inadvertence one or other of these things have not been recorded the error or irregularity would be curable by the magistrate's oral evidence provided that the error or defect has not prejudiced the accused in any way. In other words, a defect only of form can be cured but not of substance:

(*4*) Where the formalities have not been observed at all [*eg* warning has not been given, questions have not in fact been put, no endeavour has been made to find out whether the confession is voluntary, or no certificate has been appended &c], the confession is inadmissible and oral evidence of the magistrate cannot be admitted to cure the defect.

Oral Confession before Magistrate or Confession Other than that Recorded Under s 164 Cr P Code.—As to the admissibility of such confessions see notes to s 21 *ante*, and to s 26 *post*: "*Oral Confession before Magistrate &c.*"

Confession of Two Crimes—Admissibility on Trial For One.—Confession of accused that he murdered his wife and child held admissible on trial of murder of the child [*R v. Evans*, 1950, 1 All ER 610].

Use of Confession Made in One Case in Another Case.—The confession of a prisoner in one case in which he was convicted cannot be used against him in another case unless they are deposed to on oath by the person who took them down or by some one who heard them [*R v. Munger*, 10 WR Cr 56].

Confession In Appellate Court.—A person who was convicted of a crime wrote a letter to his friend confessing it, which the prison officials forwarded to the friend after keeping a copy. The copy was held admissible in appeal and not privileged [*R v. Robinson*, 1917, 2 KB 108].

Confession to Be Taken as a Whole.—Like admissions (see s 17 *ante*), the whole confession must be taken together, although it may contain statements favourable to the accused. "If evidence of a confession by an accused is given on behalf of the prosecution, the whole of the confession must be used. The prosecution must take the whole of it together, and cannot select one part and leave another [*R v. Jones*, 1827, 2 C & P 629]..... If, however, part of a statement tends to show the guilt of the accused and part of it to show his innocence, the jury may, if they choose, believe the part which is against him and disbelieve that which is in his favour" [*R v. Higgins*, 1829 C & P 603; Hals 3rd Ed Vol 10 para 871]. The rule that the *whole of what the prisoner* said on the subject at the time of making the confession, should be taken together, is the dictate of reason, as well as of humanity. The prisoner is supposed to have stated a proposition respecting his own connexion with the crime; but it is not reasonable to assume, that the entire proposition, with all its limitations, was contained in one sentence, or in any particular number of sentences, excluding all other parts of the conversation. Unless the whole is considered, the true meaning of the part which is evidence against him cannot be ascertained [Tay s 870].

Admission whether amounting to confession or not cannot be split up. It must be used either as a whole or not at all [*Hanumant v. S*, A 1952 SC 343; 1952 SCR 1091; If a confessional statement is accepted, it should be accepted *in toto* [*Nitai Singha v. State of Assam*, 1990 Cri LJ 2385, 2387 (Gau)]; *Aghnoo v. S*, A 1966 SC 119]. It is true that the statement of the accused recorded under section 313 Cr PC has to be accepted and rejected as a whole but if any exculpatory part is alleged by the accused and that is found to be false after close scrutiny of the evidence on record then of course, the inculpatory part of such statement can be accepted. Where the accused persons had stated in their statement under S. 313 Cr PC that they availed the deceased in order to save the honour of a member of the defence party, who was injured by the complainant party but on scrutiny of evidence on record, the case of infliction of injuries to the deceased by the accused persons in self defence of the person of the said member of the defence party, as set out by the accused had been disbelieved, the other part of their statement that they caused the injuries voluntarily to the deceased can be accepted and acted upon for recording a conviction against them. *Jamuram v. State of Rajasthan*, 1995 Cri LJ 1333, 1344 (Raj). When an accused person makes two statements, one amounting to guilt and the other repudiating it; if one statement is to be taken against the prisoners, the other ought also to be taken as much as it is worth in his favour [*R v. Clewes*, 4 C & P 221; *R v. Higgins*, 3 C & P 603; *R v. Steptoe*, 4 C & P 397; *R v. Bishoo Manjhi*, 9 WR Cr 16; *R v. Soobjan*, 10 BLR 332; *R v. Nittya Gopal*, 24 WR Cr 80; *R v. Chaka Khan*, 5 WR 70; *R v. Budhu*, 8 WR Cr 38; *Goloke v. Magistrate of C*, 25 WR Cr 15; *R v. Soonaoolah*, 25 WR Cr 23; *Pika Bewa v. R*, 39 C 855; *Wafadar v. R*, 21 C 955;

Srinivasa v. R, A 1928 M 493; see *In re Kamakha*, 9 MLT 316; *In re Kaitri*, 88 IC 455: A 1925 M 1069; *R v. Chinnaya*, 187 IC 481: 1940 MWN 169]. The court cannot rely on the portion of confession implicating the accused and disregard another portion simply because it would go against prosecution story [*Abdul v. R*, A 1940 A 46]. In the absence of any reliable evidence in support of the prosecution case an accused cannot be held guilty by using only his admission that he had caused injuries to the deceased and leaving out of consideration the circumstances in which he is alleged to have caused the injuries to the deceased [*State of Orissa v. Chakradhar Sahu*, 1983 Cri LJ 532, 535 (Ori) (DB)].

If a confession is found to be false in part, *viz*, as to the justifying motives for an offence, it does not follow that the rest of it relating to the commission of the crime must be rejected [*Pulin v. R*, 40 C 873]. If the court is satisfied as to its voluntary nature, it may take into consideration such parts of the confession as it may consider true [*Rama Kariappa v. R*, A 1929 B 327].

The confession must be used *literation et vertim* [*Jageo v. R*, 98 IC 740: 15 ALJ 15; see *Nga Ba v. R*, 38 IC 767; *Hasnu v. R*, 53 IC 145 (N)]. A confession must be read or accepted as a whole unless there is evidence to contradict any portion thereof in which case such portion may be rejected [*Waryam v. R*, A 1926 L 554; *Nihalu v. R*, A 1940 L 157]. Where, however, a caution had been given and a three-hours' interrogation followed, CHANNEL, J, admitted the first part [*R v. Knight*, 1905, 20 Cox 711—CONTRA: *R v. Booth*, 5 Cr App R 177, where, however, the facts were not so strong—Phip 6th Ed, p 268]. In *R v. Clewes, sup*, a man was tried for a murder committed twenty-four years ago and his confession amounted to this that he was present at the murder but went to the place without any previous knowledge that a murder was intended and took no part in it. LITTLEDALE, J, held that the statement must be taken as a whole and so taken it did not amount to an admission of guilt. "It is a rule of law," said LORD ELLENBOROUGH, "that when evidence is given of what a party has said or sworn, *all of it is evidence* (subject to the consideration of the jury, however, as to its truth) coming as it does, in one entire form before them: but you may still judge to what parts of the whole you can give credit, and also whether that part which appears to confirm and fix the charge does not outweigh that which contains the exculpation" [*Lord Cochrane's* trial before LORD ELLENBOROUGH, quoted in Wills Ev 6th Ed, p 116].

Although a confession must be taken as a whole, and considered along with the admitted facts of the case, the court is at liberty to disregard any statement contained in the confession which it disbelieves [*Kamoda v. R*, 46 IC 705: 19 Cri LJ 785 (N); *R v. Shanker*, A 1934 O 222; *Nirbhay v. R*, A 1926 O 618; *R v. Bhagwandas*, 1941 Bom 27: A 1941 B 50; *R v. Jate Uram*, A 1940 P 541]. If any part of a confession is relied upon by a court and there is no evidence to disprove another part of it, the whole confession must be accepted; but this is not the case where part of it is proved to be false by other evidence [*R v. Nanua*, 1941 All 280: A 1941 A 146]. The rule being that confession should be taken as a whole, effect must be given to that portion which indicates that the maker acted under pressure [*Ghulam v. R*, A 1942 L 271]. Where the confession is not full, the court is at liberty to use it as it stands and make a deduction of the guilt of the accused, while rejecting portions of it which are false [*Mata Din v. R*, A 1930 O 113]. [See *ante*, under "*Probative force of confessions*"].

If after the whole statement of the prisoner is given in evidence, the prosecutor can contradict any part of it, he is at liberty to do so, and then the whole testimony is left to the jury for their consideration, precisely as in other cases, where one part of the evidence is contradictory to another; for it is not to be supposed that all the parts of a

confession are entitled to equal credit. The jury may believe that part which charges the prisoner, and reject that which is in his favour, if they see sufficient grounds for so doing. If what he said in his own favour is not contradicted in evidence offered by the prosecutor, nor improbable in itself, it will generally be believed by the jury; but they are not bound to give weight to it on that account, but are at liberty to judge of it like other evidence by all the circumstances of the case [*Greenleaf*, s 218].

Where there is other evidence, a portion of the confession may, in the light of that evidence, be rejected while acting upon the remainder with the other evidence. But where there is no evidence to show affirmatively that any portion of the exculpatory statement in the confession is false, the court must accept or reject the confession as a whole and cannot accept only the inculpatory element while rejecting the exculpatory element as inherently incredible. Thus, where a confession comprises two elements: *viz*, an inculpatory one *ie*, (*a*) an account of how the accused killed the woman; and an exculpatory one *ie*, (*b*) an account of his reasons for doing so; and the inculpatory part commands belief and the exculpatory part is inherently incredible, the court must accept or reject the confession as a whole [*R v. Balmakund*, 52 A 1011 FB: A 1931 A 1: 32 Cri LJ 362: (38 IC 740 **approved**; *R v. Sarah Jones*, 1827 C&P, 629 **folld**); *Manohar v. R*, A 1946 A 15; *Kala Md v. R*, A 1939 L 534].

The principles enunciated in *R v. Balmakund, sup*, governing acceptance or rejec-tion of confession as a whole or in part have been acted upon in a large number of cases [see *Jamma v. R*, A 1932 L 438; *Sanlaydo v. R*, A 1933 R 204; *Fazl v. R*, A 1933 L 665; *In re Santhanakrishna*, A 1933 M 888; *Man v. R*, A 1933 A 401; *Banta v. R*, A 1933 L 232; *R v. Nga San*, A 1933 R 326: *Pathasi v. R*, A 1934 L 673; *Shafi v. R*, A 1934 L 620; *Sher Gul v. R*, A 1935 L 671; *Noukar v. R*, A 1937 S 212; *Varand v. R*, A 1944 S 137; *Hasnu v. R*, 53 IC 145; *Alibux v. R*, A 1947 S 36; *Ghulam Nabi v. R*, A 1938 L 850: 40 PLR 265; *Jagmal v. R*, A 1948 A 211; *Bhima v. S*, A 1956 Or 177; *Budhugouda v. S*, A 1965 Or 170] and the Supreme Court has by concurring with Balmakund's case held that in the absence of any other evidence to show affirmatively that any portion of the exculpatory statement is false, the confession and admission must either be accepted as a whole or rejected as a whole and the court is not competent to accept only the inculpatory part while rejecting the exculpatory part as inherently incredible [*Palvinder v. S*, 1952 SC 354 : 1953 SCR 94; *Aghnoo v. S*, A 1966 SC 119]. Where the exculpatory part of the statement is not only inherently improbable but is contradicted by other evidence the inculpatory part can be accepted and piecing the same with other evidence conviction can be based [*Nishikant v. S*, A 1969 SC 422: 1969, 2 SCR 1033 (*Hanumant v. S*, A 1952 SC 343 and *Palvinder v. S*, A 1952 SC 354 **distd**); **folld** in *Hira v. S*, A 1971 SC 44; *Bhagwan v. S*, A 1976 SC 1797]. If the F.I.R. given by the accused contains confessional statement as well as admission of incriminating facts, it is not admissible [*Metropolitan Sessions Judge v. Bolem Srinivasa Rao*, 1992 Cri LJ 3027, 3031 (AP)].

It is well settled that where a confession or an admission is separable there can be no objection to taking one part into consideration which appears to be true and reject the other part which is false [*Keshoram v. S*, A 1978 SC 1096 (*Nishikanta v S, sup* rel on)]. So where there is evidence to show that the exculpatory part is false, the court can ignore it and convict the accused on the inculpatory part of his confession [*Sultan v. R*, A 1945 L 91: 47 PLR 11; *State of Orissa v. Bhuben Chirgun*, 1981 Cri LJ 1461, 1466 : (1981) 52 Cut LT 276; *Rajesh Thakur v. State*, 1988 Cri LJ 1477, 1483 (Cal) (DB)], or where some of the facts in a statement under s 313 Cr P. Code were proved to be untrue by prosecution evidence they were rejected, but the court

took into consideration other facts admitted in that statement [*Virendrajit v. S*, A 1953 SC 247: 1993 SCJ 328]. Though it may be unsafe to act upon a confession as basis for the conviction in respect of murder, there is no reason why it should not be taken into consideration in convicting for kidnapping and extortion where it lends assurance to such a conclusion [*Ram Ch v. S*, A 1957 SC 381 : 1957 Cri LJ 559].

It is true that a confession must be accepted or rejected as a whole if it is to be relied on—the part which implicates as well as the part which exculpates, though the part which exculpates, may appear inherently incredible because there is no evidence to prove that the part which exculpates is false. But by 'evidence' is meant not only direct evidence but circumstantial evidence, and when considering the truth or falsity of a confession or its parts, the judge must not leave out of his considerations those probabilities and those presumptions which may properly arise from evidence on record, regard being had to the common course of natural events and human conduct to which s 114 refers [*Jado Rahim v. R*, A 1938 S 202 (*R v. Balmakund and Noukar v. R, ante*, **expld**)]. It was held in Patna that there is no justification for the rule that in the absence of other evidence the whole of the given confession must be accepted as a statement of truth in its entirety. Court may disregard that part of statement which it deems untrue [*R v. Itwa Manda*, A 1938 P 258 SB : 175 IC 300; but see *Palvinder v. S*, A 1952 SC 354 *sup* where the Supreme Court held that it is not competent to accept only the inculpatory part while rejecting the exculpatory part]. An exculpatory statement of the accused giving rise to a plea of self-defence, when distinct and separate from the statement relating to the cause of death of the accused could be considered on merits [*Ahman v. R*, A 1937 L 243]. A statement that contains a self-exculpatory matter cannot amount to a confession, if the exculpatory statement is of some fact which, if true, would negative the offence alleged to be confessed [*Jaisingh Madakami v. State*, (1986) Cri LJ 117, 118 (Ori) (DB) : (1985) 1 Ori LR 627].

Mental condition of the person confessing.—The court has to take into account the mental condition of the person at the time the confession was made and the decision should be taken upon the medical evidence rather than the judge's own assessment [*R v. Silcob*, The Times, Dec. 6, 1991 CA]. Without such proper assessment the judge should not permit the evidence to go before the jury [*R v. Moss*, (1990) 91 Cr App R 371 CA]. See further on this point under the heading "English law", *supra*.

When considering the circumstances that existed at the time of the confession, the test is objective; not what the officers thought about the mental condition of the accused but what his mental condition actually was. Had his mental condition been considered in this case, it was inevitable that the officers should have ensured the presence of an independent mature person. On facts, it was found that the accused was aged 42 with a mental age of eight. His appeal against conviction on the basis of admissions was allowed. [*R v. Everett*, 1988 Crim LR 826 CA].

S. 25. Confession to police officer not to be proved.—No confession made to a police officer shall be proved as against a person accused of any offence.

SYNOPSIS

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COMMENTARY

Principle and Scope.—Ss 25, 26, 27 were embodied in the Evidence Act with some alterations from s 148 of the Cr P Code of 1861 (Act 25). Confessions extorted by the police by oppression and torture or inducement are not of infrequent occurrence even now and it is to guard against this evil that the section has been enacted. S 25 is broadly worded and it absolutely excludes from evidence against the accused a confession made by him to a police officer *under any circumstances* (while in their custody or not). The section applies to confession to any police officer though he may not be acting as such. As observed by Stephen in his Introduction to the Evidence Act (p 165) the section was inserted "in order to prevent the practice of torture by the police for the purpose of extorting confessions from persons in their custody, in the hope of professional advancement". Markby also remarks in his Evidence (p 27) that "the idea is that by rendering the confession inadmissible in evidence, the temptation is taken away." The object is to "prevent confessions obtained from accused persons through any undue influence being received as against them" [*per* GARTH, CJ, in *R v. Hurribole*, 1 C 207, 215]. "The Legislature had in view the malpractices of police officers in extorting confessions from accused persons in order to gain credit by securing convictions and those malpractices went to the length of positive torture" [*per* MAHMOOD, J, in *R v. Babulal*, 6 A 509, 523].

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1. In Ceylon there is sub-section (2), *viz.*
"(2) No confession made to a forest officer with respect to an act made punishable under the Forest Ordinance, or to an excise officer with respect to an act made punishable under the Excise Ordinance, shall be proved as against any person making such confession".

The policy behind ss 25 and 26 is to make it a substantive rule of law that confessions whenever and wherever made to the police, or while in the custody of the police to any person whomsoever unless made in the immediate presence of a magistrate, shall be presumed to have been obtained under the circumstances mentioned in s 24 and therefore inadmissible, except so far as is provided by s 27 *post*. S 26 makes admissible a confession by a person made in the immediate presence of a magistrate while in the custody of the police—it may be to the magistrate himself or to any other person. But under s 25 a confession to the police is *in all circumstances* inadmissible. Thus, a confession to a police officer even in the presence of a magistrate is inadmissible [*Ariel v. S*, A 1954 SC 15, 19: 1954 Cri LJ 230].

Section 25 of the Evidence Act is broadly worded and it absolutely excludes from evidence against the accused a confession made by him to a police officer under any circumstances (while in custody or not) confession in section 25 does not mean only of crime under investigation, it is not limited only to confessions of offences with which the accused is charged thus where the accused is charged with murder, a confession to the police of a lesser offence (culpable homicide not amounting to murder) is also in admissible as has been held in *Ali Gohar v. R*,.A 1941 S 134. Likewise, if A says to a police officer I noticed B murdering X while I was murdering Z", his confession that he murdered Z cannot be proved. *Amar Singh v. State of M P*, 1995(4) Crimes 448, 450 (MP). The confession made while in custody is not to be proved against the accused as the proviso to sections 25 and 26 of the said Act does not permit it unless it is made before a Magistrate and also that the statement of the accused leading to discovery cannot be used against co-accused. *Kamal Kishore v. State (Del. Admn.)*, 1997 (2) Crimes 169, 173 (Del). The statement given by an accused involving himself in the crime and also implicating third person cannot be proved legally in the court as it will be conflicting with sections 25 and 26. If such evidence or confession cannot be proved then the occasion for utilising that statement against another person does not arise. Anant *Kumar v. State of M P*, 1993 Cri LJ 1498, 1500 (MP). In a preventive detention matter evidence is not to be of the nature which needs conviction of an accused in a criminal case. Even retracted confession made to the police can be made the basis of detention. *Ram Baboo v. State of U P*, 1993 Cri LJ 3701, 3703 (All). Where the accused himself was the complainant and informed about the incident to the police and later confessed his crime by putting everything in writing in his own hand before the investigating officer, it is not possible to consider it a device document to circumvent section 25. *Rajan Johnsonbhai Christy v. State of Gujarat*, 1997 Cri LJ 3702, 3708 (Guj). The statement made by the accused before police officer confessing guilt is entirely inculpatory in character and there is no scope of cutting out any exculpatory portion therefrom. The inculpative statement made by the accused even though it forms part of the first information statement in the case is inadmissible in evidence. *Mandesan v. State of Kerala*, 1995 Cri LJ 61, 62 (Ker). The strict rule of section 25 is not applicable to departmental enquiry against a government employee. *Kuldip Singh v. State of Punjab*, A 1997 SC 79, 82.

The words "a person" mean "any person". A confession made to a police officer is inadmissible not only against the person making it but is also inadmissible against the other accused. A statement of a confessional nature made by a witness to a police officer is a confession of an accused person within s 25. Such a statement is inadmissible even as corroborative evidence [*Muthu Kumaraswami v. R*, 35 M 397]. This rests on the broad rule of law that confession could be used only against the person making it. Although confession by an accused to a police officer or when in

police custody is inadmissible, statements in the confession which are relevant for the purpose of s 27 are admissible.

This section totally excludes from evidence a confession made by an accused to any police officer. The word 'confession' has nowhere been defined, but as the definition in Stephen's Digest (see *ante*, s 24: "*What is a 'confession'*") held the field for a very long time, incriminating statements by the accused to the police suggesting the inference of commission of the crime were also held inadmissible (see *post*: "*Admissions or Statements.....not amounting to confession*"). 'Confession' has since 1939 been held by the Judicial Committee to mean a direct acknowledgment of guilt and not the admission of any criminating fact however grave or conclusive [*Pakalanarayana v. R*, A 1939 PC 47]. It follows, therefore, that the admission of an incriminating fact to the police not being a 'confession' is not now inadmissible. (See *post*: "*Admissions or Statements....not amounting to confession*").

Statement made by an accused person after his arrest is inadmissible. But whether in a particular case a person was under actual arrest at a given moment of time is a question of fact [*Pendakwa Raya v. Kang Ho Soh*, (1992)1 Malayan LJ 360 (Shah Alam HC)]. A confessional statement was held to be clearly inadmissible as it was made before a police officer after the start of investigation. *Ballu Das v. State of Bihar*, 1998 (7) JT 452 : (1998) 8 SCC 130.

S 27 qualifies not only s 26 but cuts down the operation of ss 24 and 25 as well (see *post*, notes to s 27). S 25 covers a confession made to a police officer before any investigation has begun or otherwise not in the course of an investigation [*Pakala Narayana v. R*, 66 IA 66: A 1939 PC 47: 18 P 234] or after investigation [*Hussaina v. R*, A 1936 L 380]. Person making confession need not be an accused at the time nor need have been in police custody [*Debiram v. S*, A 1962 Pu 70]. The special provisions in ss 25 and 26 being unambiguous are not cut down by s 8 [*R v. Nana*, 14 B 260, 266]. S 25 prohibits the use of a confession to the police *against* the accused, but not when it is sought to be proved for him (*post*).

[In England a confession will not be excluded merely because it has been obtained by questions by the police before arrest [*R v. Dougal*, 67 JP 325; *R v. Kershaw*, 18 TLR 357; *R v. Best*, 1909, 1 KB 692; *R v. Liebling*, 2 Cr App R 315], even though put to enable them to determine whether or not to arrest [*R v. Knight*, 20 Cox 711; *R v. Booth*, 5 Cr App 711; *Lewis v. Harris*, 110 LT 337]. And the better opinion is that confession made in answer to questions by the police put to the accused, even when in custody, are in strict law admissible, provided there was no promise or threat used [*Rogers v. Hawken*, 19 Cox 122; *R v. Best*, 1909, 1 KB 692; *Ibrahim v. R*, 1914 AC 599: 18 CWN 705 PC: A 1914 PC 155; *R v. Gardner*, 1915, 85 LJKB, 206; Phip 8th Ed, p 251]. On the question whether a statement should not have been excluded from evidence on the ground of its having been made by a person in custody in answer to question put by a person having authority over him and having custody of him through his subordinates, *held* on a review of all English authorities that the English law on the point is still unsettled, some judges being of opinion that such a statement is admissible in evidence without exception, whilst others treat its exclusion from evidence as a matter for the judge's discretion depending largely on his view of the impropriety of the questioner's conduct and the general circumstances of the case [*Ibrahim v. R, sup*]. Though legally admissible under the law of England, confessions in answer to questions by police officer are always looked upon with suspicion, and judges have, as a salutary rule of practice, refused to admit such evidence unless they are thoroughly satisfied that no pressure of any kind was put upon the prisoner. In *R v. Hested*, 18 Cox 16, HAWKINS, J, said that the police have no right to put questions to a prisoner in

custody which may tend to convict him, even after cautioning him. In *Rogers v. Hawken*, 9 Cox 122, CAVE, J, defined the duty of a policeman under these circumstances to be "to keep his mouth shut and ears open." As to the English law regarding the admissibility of statements by accused persons to police officers or persons in authority, see *Ibrahim v. R, sup*].

Ss 25, 26, 27 differ widely from the law of England, and were inserted in the Act of 1861 (Cr P Code) in order to prevent the practice of torture by the police for the purpose of extorting confession from persons in their custody, in the hope of professional advancement [Steph Intro p 165]. The ground of exclusion in these sections is not irrelevancy. It is, that it is necessary to protect persons charged with crimes from being exposed to ill treatment by the police, who in their zeal to procure a conviction would be tempted to endeavour to extort a confession. The idea is that by rendering the confession inadmissible in evidence, the temptation is taken away. [Markby Ev p 27]. A few recent United States Supreme Court cases illustrate the utility of this section. The court has invariably refused to allow confessions obtained through violence etc. [See *Beecher v. Alabama*, 389 US 35; *Sims v. Georgia*, 389 US 404; *Brookes v. Florida*, 389 US 413]. Further, the US Supreme Court has categorically held that a confession is deemed to be involuntary where it is obtained by way of custodial interrogation in an atmosphere created for no purpose other than to subjugate the individual. Unless adequate protective devices are employed to dispel the compulsion inherent in custody no statement obtained can be taken to be of free choice [*Miranda v. Arizona*, 384 US 436]. The very fact of custody appears to be enough.

The obvious intention of ss 25, 26 was to deter the police from extorting confessions, by rendering such confessions absolutely inadmissible [*per* STUART, J, in *R v. Pancham*, 4 A 198, 204]. S 25 is limited in its application to statements which are confessions but the same policy forbids the use against the accused of any other statements to the police by whomsoever made in the course of investigation. [See s 162 Cr P Code; *Naresh v. R*, 46 CWN 180, 185]. It is pitiable if an alleged confession made to a police officer spoken to by him is accepted as substantive evidence in violation of sec 25 to convict him [*Paulose v. State of Kerala*, 1990 Cri LJ 100, 103 (Ker)].

Same: Object of the Rule. [Its Applicability].—The reason which influenced the Legislature in excluding a confession made to a police officer will appear from the following extract from the first report of the *Indian Law Commissioners:*—

> "The Police in the province of Bengal are armed with very extensive powers. They are prohibited from inquiring into cases of a petty nature, but the complaints in cases of the more serious offences are usually laid before the Police Darogah, (now sub-inspector or inspector), who is authorised to examine the complainant, to issue process of arrest, to summon witness, to examine the accused and to forward the case to the magistrate, or submit a report of his proceedings according as the evidence may, in his judgment, warrant the one or the other course. The evidence taken by the Parliamentary Committees on Indian Affairs during the sessions of 1852 and 1853, and other papers which have been brought to our notice, abundantly show that the powers of the police are often abused for purposes of extortion and oppression; and we have considered whether the powers now exercised by the public might not be greatly abridged.....*In one material point we propose a change in the duties of the police* by the adoption of a rule *prohibiting any examination whatever of an accused party by the police, the result of which is to constitute a written*

document. This of course, will not prevent a police officer from receiving any information which any one may voluntarily offer to him; but the police will not be permitted to put upon record any statement made by a party accused of an offence."

The object of the section, the history of the previous legislation and the conduct of the police generally, have been fully discussed and explained in *R v. Babu Lal*, 6 A 509, in the judgment of MAHMOOD, J. The police are suspect and often extort confessions by inducement, undue influence, torture and oppression; and it is with a view to prevent the abuse of their power that ss 25 and 26 have been enacted, not that confession to police is not relevant. The police oppression and torture with a view to extort confession have been the subject of discussion in several reported cases, and it is needless to refer to all of them separately. Unhappily such cases are not infrequent even now [see *In re Titus*, A 1941 M 720]. In order to eradicate the evil altogether, BERTRAND RUSSELL suggests that for the taming of the power of the police it is essential that a confession shall never be accepted as evidence (*ante* 24).

In the case of *Santosh and others v. R*, 9 CLJ 663: 13 CWN 861, generally known as the Midnapore Conspiracy Case, the conduct of the police was the subject of much comment and criticism. In that case the confession was held inadmissible for the following reasons:—Where it appeared that an accused person was illegally confined in a solitary confinement for about a fortnight, that the police had access to him, that pressure was brought to bear upon him through his father, mother and brother, that the desirability of a confession was pressed upon him by the district magistrate as a means of saving himself and his relatives from threatened pains and penalties, that his father was illegally arrested and detained in *hajat* for a long time without any charge; that he made a confession which was recorded without legal precautions and in the immediate presence of an officer who was the head of the police and was officially and personally interested in the case and put incriminating questions to the accused and helped in amplifying the confession, and finally that the confession was retracted as soon as the accused was produced in court,—such confession was held not voluntary. The reason for the exclusion of confession to a police officer, has also been fully stated in *R v. Bepin Behari*, 2 CWN 71, 74.

Under s 25 a confession made to a police officer is absolutely inadmissible in evidence, without any limitation or qualification. That this is the true meaning of the section will appear from the following observations of GARTH, CJ, in *R v. Hurribole*, 1 C 207:—

> "A confession made to a police officer *under any circumstances*, is not admissible in evidence against him and that s 26 is not intended to qualify the plain meaning of s 25; but means that no confession made by a prisoner in custody, to any person other than a police officer, shall be admissible, unless made in the immediate presence of a magistrate. *It is an enactment to which the court should give the fullest effect*, and I see no sufficient reason for reading s 26 so as to qualify the plain meaning of s 25."

If a police officer before arresting a person examines him and records his statement, it amounts to confession and is inadmissible [*R v. Jadab*, 4 CWN 129].

A liberal interpretation should be given to the section. Thus, a confession made to a person in the presence of a police officer who asked him to take the confession in such a way as to be his agent or where the confession takes place under such circumstances that the police officer is in such proximity as to make his presence likely to affect the mind of the accused, has been held to be in substance a confession

to a police officer [*R v. Har Piari*, 49 A 57: A 1928 A 737]. Magistrates have therefore been directed in many cases not to allow police officers to remain in the vicinity at the time of recording the confessions, and to enquire about the length of police custody (see *ante*, s 24).

RECOMMENDATIONS OF THE LAW COMMISSION. In view of the changed set-up since independence it was claimed by the police officers all over India that the police should be shown a greater measure of confidence and statements or confessions made to the police should be made admissible in evidence. The Law Commission was unable to accept the suggestion that the provisions in ss 25 and 26 of the Evidence Act should be modified so as to make confessions to the police admissible. In its view officers of the status of Deputy Superintendent of Police and above must be trusted and confession made to them may be accepted in evidence. This relaxation must necessarily be restricted to the cases in which such officers themselves investigate crimes.

In this connexion it may be observed that a section of the thinking people in England is of the opinion that statements or confessions made to the police during the questioning of accused persons should not be made admissible in evidence as under the existing law there. Speaking generally, though the British "Bobby" has a good reputation, the discreditable conduct of some members of the police force from time to time in their zeal to secure conviction evoke much public comment. A disclosure in 1963 of the use of third degree methods by the Sheffield CID to extort confession shocked the public. The Home office tribunal's finding was that three defenceless victims were subjected to "deliberate, unprovoked, brutal and sustained assaults". In an address to Yorkshire magistrates in 1963, LORD SHAWCROSS, the eminent lawyer and former Attorney-General criticised the "kid glove" methods of interrogating suspects. He suggested that the police sometimes found themselves unduly handicapped by the Judges' Rules (as to the Judges' Rules, see 1964 1 All ER 237; Phip 11th Ed Para 805 and also notes to s 27, *post*) governing the questioning of suspects. Alternatively he suggested that Britain might with advantage adopt something like the procedure under the Indian Evidence Act.

The Guardian (formerly the Manchester Guardian) in an editorial approving the idea of following the Indian model, described its gist as giving the police unlimited powers to question a suspect, unhampered by the Judges' Rules observed in the English procedure, but prohibiting statements or confessions made by suspects to the police from being heard in evidence at the subsequent trial proceedings; they can be used by the police only as clues which will lead them to further evidence; and to be admissible as evidence a confession must be made before a magistrate.

Mr. Dingle Foot, the Solicitor-General at one time, told the Society of Labour lawyers in 1963, that one of the troubles was confusion about police powers. Not all confessions on which convictions were obtained were voluntary; he suggested that Britain should follow the procedure in the Indian Evidence Act, 1872, which restricts the use in court of confessions to a police officer.

Same: Admission or Other Statement to Police Not Excluded. [Test as to Whether a Statement is Admission or Confession].—S 25 does not exclude all statements by an accused to the police; it shuts out confessions only. There is a distinction between admissions and confessions which are statements either directly admitting guilt or substantially all the facts constituting the offence [*ante*, s 24: "*Confession and Admission*"]. The general rule in the section is further subject to that which admits statements leading to the discovery whether they amount to confession or not (see s 27). A useful test as to the admissibility of statements made to the police

is to ascertain the purpose to which they are put by the prosecution. If the prosecution rely on the statements as being true, then they may, and probably in many cases will be found to amount to confession. If, on the other hand, they are relied on not because of their truth but of their falsity and as a circumstance thereby tending to prove the guilt of the accused, they are admissible as admissions [*R v. Kangal*, 41 C 601; see *R v. Md Ibrahim*, 5 Bom LR 312; *Hussain Bibi v. R*, 93 IC 248: A 1926 S 151: *Adho v. R*, A 1925 S 257]. This test was recommended and applied in *In re Elukuri*, 1937 Mad 358: A 1937 M 209, *infra*.

The section excludes a confession to the police, but not any other matter unconnected with the confession, *eg* a statement by the accused of his presence at the scene of occurrence of the ill-will that existed against the deceased [*In re Madegowda*, A 1957 Mys 50].

Silent video-recording by police.—Three persons were charged with murder. In order to search the knife from under the sea, they re-enacted the scene of the way in which at the place they had thrown the knife. This part which led to the discovery of the knife was shown to the judge through the video-recording (silent). The judge admitted the evidence. But the Privy Council held that it was wrongly admitted. Their Lordships said that the video was all part of the confession evidence to the police; since the prosecution had failed to prove that the confession was voluntary the whole of the evidence relating thereto was inadmissible [*Lam Chi-Ming v. The Queen*, (1991) 2 WLR 1082 PC].

Earlier to this the Privy Council gave the following ruling on this point in [*Li Shu-Ling v. R*, (1988) 3 All ER 138 PC]. Where a defendant voluntarily agreed to demonstrate how he committed a crime, a video-recording of the re-enactment would be admissible in evidence as a confession provided that the defendant has been given a proper warning that he need not take part in the video-recording and has agreed to do so voluntarily. However, the video-recording ought to be shown to the defendant as soon as practicable after it has been completed and he ought to be given the opportunity to have recorded any comments which he might wish to make. Video-recording should be made reasonably soon after his confession. In this case, two days' time was held to be quite reasonable.

"Confession" in this Section Does Not Mean Confession Only of the Crime Under Investigation.—The prohibition in s 25 is general. Confession in s 25 is not limited only to confessions of offences with which the accused is charged. Thus where the accused is charged with murder, a confession to the police of a lesser offence (culpable homicide not amounting to murder) is also inadmissible [*Ali Gohar v. R*, A 1941 S 134: 1941 Kar 292; *Padan Pradhan v. State*, 1982 Cri LJ 534, 537: 1982 Chand LR Cri. 116 (Ori)]. If A says to a police officer "*I* noticed *B* murdering *X* while *I* was murdering *Z*" his confession that he murdered *Z* cannot be proved [*Kodangi v. R*, 61 MLJ 60: A 1932 M 24]. So, when in the course of an investigation against the accused relating to receipt of stolen goods, a false coin is found in his box which he said was used for the purpose of weighing and he is charged under s 266 I P Code, a statement to the police officer that he knew the coin to be false is inadmissible on the principle that the confession made to a police officer in the course of investigating crime *A*, although it relates to crime *B*, is equally inadmissible [*In re Elukuri*, A 1937 M 209].

"A Police Officer".—The prohibition in the section is absolute and there is no reason to suppose that police officer must be restricted to the investigating police officer or a police officer acting as such [*R v. Mallagowda*, A 1917 B 130: 18 Cri LJ 981; *Jagjit v. S*, A 1956 Kutch I].

"Accused of Any Offence."—"Offence" has been defined in s 3(*38*) Genl Clauses Act, 1897. The phrase "accused of any offence" also occurs in art 20(*3*) Constitution and there it has been held to mean a person against whom a formal accusation relating to the commission of an offence has been levelled (*eg* an information to the police) which in the normal course may result in prosecution [*Sharma v. Satish*, A 1954 SC 300: 1954 Cri LJ 865: 1954 SCR 1077]. The expressions "accused person" in s 24 and "a person accused of an offence" in s 25 have the same connotation and describe the person against whom evidence is sought to be led in a criminal proceeding. No formal accusation is predicted. The words "accused of any offence" in s 27 are also similarly descriptive [*S v. Deoman*, A 1960 SC 1125: 1961, 1 SCR 14]. A confession made by a person to a police officer when he is not accused of any offence (*eg* when proceeded under s 109 Cr P Code) is not inadmissible [*Ramlal v. R*, A 1942 O 246; *R v. Ramdayal*, A 1950 A 134; see *Karukandu v. R*, A 1940 P 410; *In re Madegowda*, A 1957 Mys 50]. See notes to s 24, *ante*, and s 27, *post*.

"As Against a Person Accused" [Confession Under s 25 Not Inadmissible for All Purposes].—All that s 25 lays down is that the confession shall not be used as *against* a person making it. It does not lay down that such a confession shall be inadmissible for all purposes. So the confession may be used for the purpose of arriving at a conclusion as to whether the subsequent judicial confession should be believed or not [*Gulab v. R*, 75 IC 693: A 1923 L 315]. The confessional statement made to a police officer constituted a relevant material which the detaining authority is entitled to take into consideration for passing an order of detention against the maker of the statement [*Suman v. State of Tamil Nadu (FB)*, 1986 Cri LJ 1662 (Mad) (DB) (1985 Cri LJ 1115 **overruled**)]. A confession made to a police officer may be proved against the maker for other purposes as his admission with regard to any property in a civil suit, although it cannot be proved to establish his offence [*R v. Tribhoban*, 9 B 131; *Mahanta v. Hetram*, A 1954 Pu 27]. In the course of a police enquiry in a theft case against *A*, one *B* made a statement that she had been intimate with *A* and lived with him as his wife. Later on in a proceeding for maintenance against her husband *C* the statement can be used against her under s 21 and s 25 is also no bar [*Pattammal v. Munuswami*, A 1966 M 392 (*R v. Tribhoban, sup* **relied** on)].

"Shall Not be Proved as Against a Person Accused." [Admissibility in His Favour].—S 25 prohibits only the use of a confession when it is sought to be proved *against* the accused (*ie* in support of prosecution); but not when it is used *for him*. Thus the explanation for murder in a confession by the accused to the police in a first information report may be relied on to prove motive or provocation with a view to extenuate the offence or sentence [*Hasil v. R*, A 1942 L 37; *Lalkhan v. R*, A 1948 L 43; *In re Mottai Thevar*, A 1952 M 586: 1951, 2 MLJ 605] or to prove self-defence. S 162 Cr P Code does not apply to it [*Guruswami v. R*, A 1939 M 780].

S 25 does not preclude one accused person from proving a confession made to a police officer by another accused person tried jointly with him. Such a confession cannot be proved as *against* the confessing person or his co-accused, but it may be proved simply as evidence on *behalf* of the other [*R v. Pitambar*, 2 B 61, 64]. A confession which is inadmissible against the person making it, ought a *fortiori* to be inadmissible against another implicated by it [*R v. Hari Singh*, 12 Bom LR 899]. Statement of an accused at the police station against the co-accused is inadmissible and cannot be used against the co-accused [*Kala v. R*, A 1933 L 167]. Three persons were jointly tried for rioting. In a counter information lodged by one of them to the police, there was an admission that all the three persons were present at the occurrence. The statement cannot be regarded as a confession under s 25 and is

admissible against the person making it, but it is not admissible as against the two others [*Shk Hazir v. R*, 11 CLJ 301].

Statements of Witnesses to the Police in the Course of an Investigation.—As to the admissibility of such statements, see s 162 Cr P Code and Sarkar's Cr P Code, 4th Ed notes under s 162 Statement made to a police officer during investigation does not become admissible merely because he is dead, [*Amar Singh v. State*, 1996 Cri LJ 1582 (MP)].

Meaning of "Police Officer."—"The term 'police officer' should be read not in any strict technical sense, but according to its more comprehensive and popular meaning" [*per* GARTH, CJ, in *R v. Hurribole*, 1 C 207, 215; **approved** in *Amin Shariff v. R*, A 1934 C 580 : 61 C 607; *Fernandez v. S*, A 1953 C 219 : 57 CWN 107; *Om Prakash v. S*, 53 PLR 157 : A 1951 Pu 387 and also by the Supreme Court in *S v. Barkat Ram*, A 1962 SC 276 : 1962, 3 SCR 338; *Raja Ram v. S*, A 1964 SC 828 and includes an officer vested with the powers of police by law whether he is called a police officer or by any other name and exercises other functions also under other provisions of law [*Nanoo v. R*, 51 B 78 FB : A 1927 B 4; *Amin Shariff v. R*, 61 C 607 FB : A 1934 C 580]. The primary test for determination of Police Officer is whether the officer concerned under the Special Act has been invested with all the powers exercisable by an officer-in-charge of a Police Station under Ch 12 of Cr P Code *qua* investigation of offences under that Act, including the power to initiate prosecution by submitting a report (charge sheet) under s 173 [*Balkishan v. S*, A 1981 SC 379 : 1980 Cri LJ 1424 (cases discussed)]. An assistant superintendent having the powers of a district superintendent of police cannot cease to be a police officer simply because he is also a magistrate [*Jas Bahadur v. R*, A 1930 R 227; *Nwa Ka v. R*, 7 Bur LR 100]. The expression not only applies to officer of regular police force but it applies to every police officer; such as police *patel* [*R v. Rama Birapa*, 3 B 12]. 'Police officer' in s 25 is wider than the term in s 1, Police Act, 1861 [*R v. Akia*, 23 NLR 23 : A 1927 N 222]. 'Police officer' is used in its usual and more comprehensive meaning and includes police officers of Indian States [*R v. Nagla Kala*, 22 B 235; *Salam v. R*, 14 NLR 192 : 43 IC 111; *Radhe v. R*, 12 P 46 SB : A 1932 P 293].

The following persons have been held to be police officers within the meaning of this section:—Deputy Commissioner of Calcutta Police [*R v. Hurribole, sup*]; Police Patel in Bombay [*R v. Bhima*, 17 B 485]; Police Patel in Berar [*Mechi v. R*, A 1925 N 340 : 86 IC 32—CONTRA: *R v. Akia*, 101 IC 589 : A 1927 N 222]; Police *darogah* [*R v. Puncham*, 4 A 198]; Police sub-inspector [1 CLR 21 and 19 WR Cr 51; *R v. Dabee Pd*, 6 C 530]; Police constable [*R v. Macdonald*, 10 BLR Ap 2; *R v. Pitambar*, 2 B 61; *R v. Pandharinath*, 6 B 34; and *R v. Babulal*, 6 A 509 FB]; Police head-constable [5 NWR 86; *R v. Jora Hasji*, 11 Bom HC 242]; *Chowkidar* [*Jangli v. R*, A 1934 O 19; *R v. Pancham*, 8 Luck 410; *Birja v. R*, A 1941 O 563; *Panchu v. R*, A 1943 C 615—CONTRA: *Ghunnai v. R*, A 1934 A 132]; Police *chowkidar* [*R v. Salemuddin*, 26 C 539 : 3 CWN 393 (**dissenting** from *R v. Bepin*, 2 CWN 71 and *Nazir Jharudar v. R*, 9 CWN 474)]; *Lambardar and Safedposh* [*Mustafa v. R*, 35 PLR 359—CONTRA : *Nathu v. R*, A 1934 L 870; *R v. Santo*, A 1944 L 339]; A member of the frontier constabulary [*Khwaja v. R*, 71 IC 360]; Member of Central Reserve Police Force [*Jagjit v. S*, A 1956 Kutch 1]; A Police *Muharrir oghi* [*Abdul v. R*, 144 IC 160 : A 1933 Pesh 38]; A village *chowkidar* under Act 16 of 1873 [*Deokinandan v. R*, 1936 All 85 : A 1936 A 753 FB]. A *chowkidar* though a police officer within s 25 Ev Act is not so within s 54 Cr P Code [*Jangi v. R*, A 1944 A 117]. *Dafadar* [*Kuru v. R*, A 1940 P 410]. A village police officer *eg* a *chowkidar* under Village Administration Act of 1872 [*R v. Jagia*, 17 P 369 : A 1938 P 308; *Punia v. R*, A 1947 P 146]. Civic

guard, but not while he is not on duty [*Ibrahim v. R*, A 1944 L 57]. A Home Guard on duty is a police officer. So an extra judicial confession made before a Home Guard on duty is hit by section 25 [*State of Orissa v. Dubuga Tubud*, 1989 Cri LJ 1566, 1568 : (1989) 67 Cut LT 116]. A special officer of the Commercial Tax Dept empowered under the Hoarding and Profiteering Prevention Ordinance [*In re Someshwar*, A 1946 M 430]; Ward Rationing Officer [*Om Prakash v. S*, A 1951 Pu 387].

An excise officer under the Assam Opium Prohibition Act is a police officer [*Ahmed Noor v. S*, A 1972 Gau 7]. An *abkari* officer *eg* an excise inspector is a police officer as the Legislature has substantially conferred all powers of police officer upon *abkari* officers [*Nanoo v. R*, A 1927 B 4 : 51 B 78 FB (*Pereira v. R*, 28 Bom LR 674 **overruled**); *R v. Dinshaw*, A 1929 B 70; *Rajmal v. R*, A 1934 N 136; *Ramkaran v. R*, A 1935 N 13]. In Calcutta the question was answered both in the negative [*Rukmali v. R*, 22 CWN 451; *Ah Foong v. R*, 22 CWN 834; *Harbhanjan v. R*, 31 CWN 667; *Turu v. R*, 52 CLJ 177; *Matilal v. R*, 36 CWN 163] and if, the affirmative [*Ibrahim v. R*, 35 CWN 601], but the conflict has been set at rest by a later Full Bench endorsing the affirmative view [*Amin Shariff v. R*, 38 CWN 930 : 61 C 607 FB]. The same view has been taken by a Full Bench in Sind [*Bachoo v. R*, A 1938 S 1 FB]. In Patna it has been held that an excise officer is not a "police officer" though invested with the powers of police as s 25 was intended to apply to police officers alone [*Radha Kishun v. R*, 12 P 46 SB : A 1932 P 293]. So also in Madras [*Public Pros v. Marimuthu*, A 1938 M 460; *Mahalakshmayya v. R*, 1932 MWN Cr 69; *Doraiswami v. R*, 1934 MWN Cr 67]. Lahore [*Ramchand v. R*, A 1945 L 10] and Rangoon [*Mg San v. R*, 7 R 771; *R v. Wazir*, 44 IC 588; see however *Jas Bahadur v. R*, 8 R 52 : A 1930 R 227 where an assistant superintendent to the Pokkoku Hill who was invested with police powers was held to be a police officer].

In a later Madras case an Excise officer invested with the powers of a police officer under s 20A Opium Act has been held to be a police officer [*Pub Pro v. Paramasivan*, A 1953 M 917]. A Prohibition Sub-Inspector [*In re Venkata*, A 1948 M 116; *In re Vasamsetti*, A 1953 M 1004 : 1952, 1 MLJ 658; *In re Vadivel*, A 1952 M 299; *Srinivasa v. S*, 1954 MWN 659; *Pub Prov v. Ranga Reddy*, A 1957 AP 81] or Forest Range Officer [*Richard v. Forest R Officer*, A 1958 M 31; *Forest Range Officer, Chungathara II Range v. Aboobacker*, 1989 Cri LJ 2038, 2040 : (1989) 1 Ker LT 871] is not a police officer.

The words "police officer" are not to be construed in a narrow way, but in a wide and popular sense; but not so wide as to include persons on whom only some of the powers exercised by the police are conferred. What is pertinent is not the totality of the powers but the kind of powers which enable a police officer to exercise. The test would be whether the powers are such as would facilitate the obtaining of a confession from a suspect or a delinquent. A confession by a person accused of offence under the Bihar & Orissa Excise Act and recorded by an Excise Inspector is inadmissible under s 25 [*Raja Ram v. S*, A 1964 SC 828 (*Nanoo v. R; Amin Shariff v. R; R v. Hurribole; P P v. Paramasivam; Ibrahim v. R, sup* **approved**; *Radha Kishun v. R*, A 1932 P 293 SB : 12 P 46 **overruled**)].

The duties of customs officers are very much different from those of the police and their possessing certain powers similar to those of police officers for detecting and smuggling goods would not make them police officers. Customs officer making enquiry under s 107 or s 108 Customs Act is not a police officer and person against whom enquiry is made is not an accused person [*Percy v. S*, A 1971 SC 1087; *Romesh v. S*, A 1970 SC 940; *Illias v. Collr*, A 1970 SC 1065. *Hazari v. Union*, A

1973 SC 62; *S v. Barkat Ram*, A 1962 SC 276 : 1962, 3 SCR 328 (**follld** in *Vallabhdas v. Asst Collr*, A 1965 SC 481; *Asst Collector of Customs v. Tilak Raj*, A 1969 D 301); *Fr Mario Pires v. Director of Enforcement, New Delhi*, 1982 Cri LJ 461, 463 (Goa, Daman & Diu); *Roshan Beevi v. Joint Secretary to Govt. of Tamil Nadu*, 1984 Cri LJ 134, 148 : A 1984 NOC 103 : 1983 Mad LW Cri 289 (Mad) (FB); *State (Collector, Central Excise) v. Papas Kumar Shome*, 1985 Cri LJ 871, 874 : (1984) 2 Crimes 190 (Ori); *Union of India v. Ashok Sukhadeo Singh Charan*, 1991 Cri LJ 2359, 2373 (Bom). No opinion was expressed in *Barkat Ram's* case on the question whether officers of departments other than the police on whom the powers of an officer of a Police Station under Chapter 14 Cr P C have been conferred are 'police officers' or not]. Confessional statements recorded by a customs officer are not hit by s 25 or art 20(3) of the Constn [*Harbansingh v. S*, A 1972 SC 1224]. Statement made to a customs officer by an accused under the Foreign Exchange Regulation Act is not hit by s 25 [*Issa Yacub v. S*, A 1961 Mys 7]. An Enforcement Officer investigating an offence under Foreign Exchange Regulation Act is not a police officer [*Abdul Rajak Haji Mohammed v. Union of India*, 1986 Cri LJ 2018, 2023 (Bom) : (1986) 88 Bom LR 158; *K T Subramaniam v. Dy. Director, Enforcement Directorate, Madras*, 1987 Cri LJ 483, 486 : (1986) 99 Mad LW 754 (Mad) (DB); *The Deputy Director, Enforcement Directorate Madras v. P. Mansoor Mohamed Ali Jinnah*, 1989 Cri LJ 2138, 2149 : 1989 Mad LW (Cri) 337]. An intelligent officer of Narcotic Control Bureau does not possess all the powers of the Officer-in-charge of a police station and so a confessional statement made to him is admissible in evidence [*Abdul Razzak v. Sudip Kr. Dutta Gupta*, 1989 Cri LJ 2007, 2010 (Cal); *Mangalsingh Bhansingh Rathod v. State of Gujarat*, 1989 Cri LJ 460, 466 : (1988) 3 Crimes 874 (Guj); *Kirpal Mohan Virmani v. B.D. Mishra, Intelligence Officer*, 1989 Cri LJ NOC 199 : (1989) 37 Delhi LT 362; *R.N. Kaker v. Shabir Fidahusein*, 1990 Cri LJ 144, 152 (Bom) : (1989) 1 Bom Cr 503 L; *Rajkumar Karwal v. Union of India*, A 1991 SC 45, 56]. The principles of section 25 by anology will have to be applied even in respect of preventive detention under the Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drug Offenders, Goondas, Immoral Traffic Offenders and Slum Grabbers Act [*Seetha v. Govt. of Tamil Nadu*, 1985 Cri LJ 1115, 1117 : 1984 Mad LW (Cri) 182 (Mad) (DB)].

The confessional statement made before customs officers is admissible as such officers are not police officers for the purposes of section 25. [*Banshidhar Maharana v. State of Bihar*, 1993 Cri LJ 1310, 1314 (Pat)]. A senior reserve police officer appointed under the State Reserve Police Force Act, though is a police officer under the Bombay Police Act and an officer-in-charge of a police station, he is in charge only for the purpose of maintaining law and order and tranquillity in the society and the powers of investigation envisaged in Chapter XII of the Cr PC have not been invested with him and section 25 of the Evidence Act with not get attracted. [*State of Gujarat v. Anirudhsing*, A 1997 SC 2780, 2786, 2787]. Customs Officers are not police officers. [*Supt. of Custom & Central Excise Nager coil v. R. Sundar*, 1993 Cri LJ 956 (Mad)]. The Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) is a special Act and authorities of the Narcotics Bureau/Department cannot be equated with the Police Officers. The statements recorded by the authorities of the Narcotics Department cannot be said to be inadmissible in evidence. The court therefore held that the statement could not be rejected at the time of framing of charges.

In *R. N. Kaker v. Shabir Fidahussain*, 1991 (2) EFR 583 it was held that the statement made before the authorities of the Narcotics Department is admissible in evidence is not hit either by Section 25 of the Evidence Act or by Section 161, Cr

PC. The Intelligence Officer of the Narcotic Control Bureau is not a 'police officer' and hence confessional statement recorded by such an officer is admissible in evidence. [*Nandi Francis Nwazov v. Narcotics Control Bureau*, 1995 Cri LJ 665, 669 (Del)]. Police Patel exercising powers under Bombay Village Police Act, 1967 can be termed as police officer [*Vijaysingh D Thakur v. State of Gujarat*, 1996 Cri LJ 2932, 2934 (Guj)]. An IPS Officer working on administrative *post* not authorised to conduct investigation in any case cannot be said to be a police officer [*Seethamaniyan v. State of Kerala*, 1996 Cri LJ 3038, 3041 (Ker)].

Statement made to Dy Suptd of Customs & Excise under Central Excises and Salt Act, 1944 is not hit by s. 25 unless and otherwise the accused successfully takes advantage of s 24 [*Badaku v. S*, A 1966 SC 1746 (*S v. Barkat Ram, sup* **folld**; *Raja Ram v. S, sup* **dist**; conflict of views in *Nanoo v. R, sup* and *Radha Kishun v. R, sup* **not resolved**); **folld** in *P P v. Avvaru*, A 1969 AP 278; *S v. Budhram*, A 1969 Raj 48].

In Ceylon excise officer and forest officer are included by addition of sub-section (2).

A village Munsif in Madras is not a police officer [*R v. Samipapi*, 7 M 287]. A *panchayet* is not a police officer [*R v. Jasha*, 11 CWN 904]. Rule 195 of Madras Cr Rules of Practice is not a rule of law but merely a rule of guidance. A confession recorded by a village magistrate after the police investigation has begun is admissible [*Kuppathan v. R*, A 1927 M 974]. A *Kotwar* or village watchman in the C P is not a police officer and a confession to him is admissible [*Bhagwatin v. R*, 57 IC 88; *Sukhwaria v. R*, 76 IC 291; *State of M.P. v. Premlal*, 1987 Cri LJ 204, 209 (MP) (DB)]. So also a *Mukhia* [*Ram v. R*, A 1935 A 549]. A sub-divisional officer is not a police officer [*Srikant v. R*, A 1934 P 256]. A village headman in Burma is not a police officer, but the weight to be attached to a confession to him will depend on the part taken by him in the elucidation of the crime and other circumstances [*Nga Myin v. R*, 81 IC 540 FB : A 1924 R 245]. A confession not in writing to an honorary magistrate who was also the *zaildar* while he was taking part in an investigation in the absence of police and subsequently repeated before him and a police officer is admissible [*Wadhawa v. R*, 76 IC 819 : A 1923 L 389(2)]. Food Grain inspector is not police officer [*Abu v. R*, A 1948 O 81]. Sub-Divisional Magistrate is not a police officer [*Srikant v. R*, A 1934 P 256]. A confession made to a member of the Village Defence Party is not hit by section 25 [*Akanman Bora v. State of Assam*, 1988 Cri LJ 573, 577 : (1987) 3 Crimes 68 (Gau) (DB); *Ramjan Ali v. State of Assam*, 1988 Cri LJ NOC 53 : (1988) 1 Crimes 254 (Gau)]. The confession made before the officer of Railway Protection Force is admissible [*State of Orissa v. Kapildeo Singh*, 1983 Cri LJ NOC 188 (Ori); *State by Public Prosecutor v. Sankaran*, 1983 Cri LJ NOC 208 Mad : 1983 Mad LW (Cri) 219; *State of Kerala v. M Ramadasan*, 1989 Cri LJ (NOC) 110 : (1988) 1 Ker LT 270]. Statement made before Security Forces, under the Unlawful Activities (Prevention) Act, 1967 who have no powers of the police is not hit by section 25 [*Kapbuaia v. Union of Territory of Mizoram*, 1984 Cri LJ NOC 189 (Gau)].

Record of Partial Statement to Police.—Where the accused after the crime ran to the police station and made a confession and the court recorded that statement up to the point when he said that he cut his wife, the proper course would have been not to have recorded the statement at all [*Guruswami v. R*, 1931 MWN 725].

"Made to a Police Officer".—The main expression to be construed is "made to" and not in the presence of the police officer. There must be some communication to a police officer (direct or indirect). When a statement was made to all the persons present it would not cease to be a statement made to the police officer [*Punja Mava v. S*, A 1965 G 5 (*Ghunnai v. R*, A 1934 A 132 held to be

obiter)]. Letter addressed to Sub-Inspector written and signed by the accused stating that he murdered his wife found near dead body—*Held* that as the letter was not written in the presence of police officer, confession was not 'made to police officer' [*Sitaram v. S*, A 1966 SC 1906 (SARKAR, CJ, & MUDHOLKAR, J—CONTRA : BACHAWAT, J)].

What are "Confessions" Made to Police Officers.—A statement by the accused to a police officer voluntarily that he had committed the murder and that the instrument of murder was in a place named, was a confession and therefore, inadmissible [*R v. Shk Taleb*, 10 CLJ 13; *Godha v. R*, A 1933 L 899 : 146 IC 648]. But handing over of certain articles to the police is not confession. It is admissible under s 2 as conduct [*R v. Nanna*, 1941 All 280 : A 1941 A 145 *ante*]. Where the confession to the magistrate is nothing but a repetition with comment of such a confession to the police, it is equally inadmissible [*R v. Anandrao*, 49 B 642 : 89 IC 1946].

Statement to the police that the axe is one with which the murder had been committed does not lead to any discovery within s 27, nor is the alleged statement of the accused that the blood-stained *dhoti* and shirt belonged to him. They are hit by ss 25 and 26 [*Prabhoo v. S*, A 1963 SC 1113].

Where a house was searched and the accused put his signature on the recovery list, it is not admissible against him in a case in which the possession of the house is in question, as it would be an incriminating statement of the nature of a confession to the police [*Behari v. R*, A 1927 L 343 : 100 IC 707]. Statement relating to confession of guilt made to the police in the recovery list is inadmissible [*Gunda v. S*, A 1954 A 127]. A statement made by one of the accused to the police that a bundle of ammunition produced by him had been given to him by two other accused, is inadmissible [*R v. Sher Md*, 46 B 861 : 25 Bom LR 214].

A *panchanama* in which the *panchas* called by the police as well as the accused signed and which contained a confession of the crime is inadmissible [*Narayan v. S*, A 1957 SC 737 : 1958 SCR 283].

Although statements to a police officer by each of the several accused separately do not amount to a complete confession, nevertheless when such statement taken together show that the accused were engaged in a criminal conspiracy to commit an offence, they amount to confessions to a police officer [*In re Koganti*, A 1938 M 893].

As a confession made to a police officer cannot be proved as against an accused, a statement by the police to that effect should not be allowed to go into the record [*R v. Radhe*, 7 CWN 220; see however *Legal Rem v. Chema*, 25 C 413 : 2 CWN 257]. Report made to a police officer amounting to a confession is inadmissible [*Sikandar v. R*, 36 PR (Cr) 1918 : 48 IC 883]. A statement by the accused to the police that a mark found in the *dhoti*, which he was wearing at the time of the occurrence, was blood-stained, was *held* under the circumstances (*viz*, the distance he was from the place of the murder and his prevarication as to the nature of the mark), to be of an incriminating character, from which an inference might possibly be, though no necessarily, drawn [*R v. Kangal*, 41 C 601]. In a dacoity case, statement by the investigating police officer that the accused pointed out the route taken by him and his comrades and the place where they divided the booty are unquestionably confessional and are clearly not admissible [*Shk Abdul v. R*, 85 IC 830 : A 1925 C 887]. Statement of accused taken by police before his arrest is a confession and irrelevant under s 25 [*R v. Jadab Das*, 27 C 295 : 4 CWN 129]. A

police officer should not be allowed to make statements before the assessors that one of the accused admitted before him his guilt [*Paimullah v. R*, 16 CWN 238].

Confession to police officer and reference to the conduct of the accused, *viz*, that he trembled and showed signs of fright, with a view to make them admissible under s 8, are not admissible [*Ariel v. S*, A 1954 SC 15 : 1954 Cri LJ 230]. A confession made to a police officer in the presence and hearing of a private person is inadmissible under this section [*R v. Pancham*, 4 A 198, 201]. Every statement to a police officer is not a confession and statements which are not of incriminating nature are admissible [*Misri v. R*, A 1934 S 100]. Admissions or statements of incriminating facts, even a gravely incriminating fact, to the police not amounting to a confession are not barred under section 25. [*Dr. Sanat Kumar Basu v. State of West Bengal*, 1984 Cri LJ 931, 935 (Cal) (DB)]. Confession made to police by an accused is admissible to prove ownership of property in respect of which he is accused [*Ganpat v. Bani*, 55 IC 62]. Admission made to a police officer may be accepted as an admission in a civil suit under ss 17, 18, 21 [*Bishendas v. Ram Labbhaya*, 106 PR 1915].

Admissions or Statements of Incriminating Facts to Police Officers Not Amounting to Confessions.—When the statement of accused to a police officer does not amount to a confession but an admission, it may be proved against him [see *R v. Md Ibrahim*, 5 Bom LR 312; *Pritam v. R*, A 1939 S 185; *R v. Macdonald*, 10 BLR Ap 2; *R v. Kangal*, 41 C 601 : 26 IC 161; *R v. Dabee Pd*, 6 C 530 : 7 CLR 451; *R v. Nabadwip*, 1 BLR 15 : 15 WR Cr 71]. Thus, a statement by an accused in police custody to the Doctor that injuries on his person were caused by the murdered person amounts to admission of fact, though incriminating [*Kanda v. S*, A 1972 SC 66]. Where an accused police officer stated to his subordinate that he heard rumour about murder and that people approached him, forced certain amount on him and asked him to hush up the matter, the statement is admissible except the confession as to acceptance of bribe [*Safdar v. R*, A 1941 L 83 : 193 IC 878]. A statement by the prisoner to the constable who arrested him that some of the property was given him by his sister and that he had bought the rest was admitted, the court re-marking that there was a distinction in the Act between 'confession' and 'admission' [*R v. Macdonald*, 10 BLR Ap 2; see *ante*, "*Admission and Confession distinguished*"].

A first information report by the accused to the police which is in the nature of an information or charge against persons and in no sense a confession, is admissible [*Dal Singh v. R*, 44 IA 137 : 44 C 876 : A 1917 PC 25; *Bodhan v. R*, A 1948 A 223]. So where the accused went to the *thana* himself and lodged a first information narrating the events preceding the commission of the murder and stating that he had severely hacked his wife, *held* that the narrative of the antecedent events is admissible as admissions not amounting to confessions but not the statement that he had hacked his wife [*Legal Rem, v. Lalit*, 49 C 167 : 25 CWN 788. The principle of the decision (*ie*, separation of the portion not connected with the confession) in this case was doubted in *R v. Harnam*, 59 B 120 but **approved** in *Bharosa v. R*, A 1941 N 86]. But before admitting the innocuous portion care must be taken to see that it is not so connected with the confessional statement as to be inseparable from it [see *R v. Kommoju*, A 1940 P 163 : 19 P 301; *Akal v. A*, A 1948 P 62]. Such portion of a statement by a person subsequently accused of an offence is also admissible as an admission. Thus a statement by a person in first information that some unknown thief had cut his crop and he had given him a blow with a *bhala* made long before he was made an accused, is admissible as an admission [*Akal v. R, sup*]. When in a statement by an accused as FIR the confessional part is separable from the rest, it can be used as an admission under s 27; but if the statement is treated as one made by the accused

to a police officer in the course of an investigation, it is hit by s 162 Cr P Code [*Lachhuman v. S*, A 1964 P 210]. In *R v. Harnam, sup* it was held that where a confession shows opportunity and motive for the offence, it seems impossible to say that the portion which deals with opportunity and motive can be treated as no part of the confession. It was approved in *Ramsajiwan v. S*, A 1964 A 447.

Although any non-confessional statement by an accused to the police can be proved against him, a statement which forms part of a whole narrative ought not to be torn from its context. If the narrative as a whole is in nature of a confession and therefore inadmissible, the prosecution should not be allowed to single out stray passages containing admissions [*Dowdall v. R*, A 1936 N 103]. A self-exculpatory report by the accused to the police is admissible [*R v. Bhagi*, A 1941 O 359].

For the purpose of s 25 and the following sections a "confession" as such should be carefully distinguished from a statement amounting to an admission, or of any incriminatory fact. So long, a wide construction was put upon the term "confession" by adopting the definition of Stephen (*ante*, s 24: "*What is a confession*") and admissions of incriminating facts to the police were excludable; but in *Pakala Narayana v. R*, 66 IA 66 : A 1939 PC 47 (decided in 1939), the Judicial Committee in supersession of Stephen's definition held that "an admission of a gravely incriminating fact, even a conclusively incriminating fact, is not of itself a confession", nor is an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed that crime (see *ante*, p 226). So, statements by an accused which do not strictly come within the definition of "confession" are not excluded by ss 25 and 26. It was held in several earlier cases that incriminating statements to the police are also inadmissible under ss 25 and 26—*eg*, a statement by an accused in police custody containing an admission of criminating circumstances [*R v. Jhavicharan*, 19 B 363; *R v. Kangal*, 41 C 601), or a statement in self-exculpation which nevertheless contains an admission of criminating circumstance [*R v. Pandharinath*, 6 B 34, 36-37; *R v. Anandrao*, 49 B 642], or an explanation containing an incriminating statement [*Umer Daraz v. R*, A 1925 S 237]. These and similar cases appear to be based on Stephen's definition of 'Confession' which was superseded by the Privy Council in *Pakala Narayana v. R, sup*. It would follow, therefore, that incriminating statements by the accused to the police falling short of a 'confession' cannot now be excluded. An admission of a gravely incriminating fact or even a conclusively incriminating fact not amounting to confession, is accordingly admissible. If such a statement is made prior to investigation, it is not also hit by s 162 Cr P Code [*Sital v. S*, A 1956 C 82 : 1956 Cri LJ 509: **relied** on in *S v. Memon*, A 1959 B 534].

LORD ATKIN'S definition of the term 'confession' in *Pakala Narayana v. R*, (*ante*, s 24 "*Meaning of confession settled*") was **relied** upon in *Palvinder v. S*, 1953 SCR 94, 104 : A 1952 SC 354, 357 and was again approved and quoted in extenso by the Supreme Court in *Om Prakash v. S*, A 1960 SC 409, 411 : 1960 Cri LJ 514. Accordingly the position in law now is that admissions or statements of incriminating facts (even a 'gravely' or 'conclusively incriminating fact') to the police not amounting to a confession are not banned by ss 25 and 26. The observation of the Supreme Court, therefore, in a case that "they were incriminating statements made to a police officer and were hit by ss 25 and 26 of the Indian Evidence Act" [*Prabhoo v. S*, A 1963 SC 1113, 1115] is not clearly understood. With great respect, it is submitted, that the observation, which does not appear to be a satisfactory one, is likely to be misconstrued or misapplied by the courts.

In conspiracy cases a preliminary enquiry by the CID as to the existence of a conspiracy is not an investigation under s 156 Cr P Code. Statements made by accused to witnesses at this stage are not in the nature of confessions but are admissions and s 25 does not apply to them [*In re Rangarajulu*, A 1958 M 368].

Statements made by an accused to police officers pointing the places where the offence was committed by others, or where he concealed himself thereafter, the houses to which he went for assistance, whether regarded as information leading to discovery, or as statements made by him as part of his defence are admissible in evidence as admissions. So, where the accused told the police that certain other persons had killed the deceased, described the occurrence and stated that he was seized by them but escaped and concealed himself in a field and that he went to the houses of several people for assistance against the murderers but was turned away as a madman are admissible [*R v. Kankal*, 41 C [illegible]ment of accused to a sub-inspector of police that they were in the fight (cau[illegible]eath of the deceased) and that the deceased made an attempt to interfere wi[illegible]izure of the cattle, is admissible as an explanatory statement of the circumst[illegible]nder which the cattle was seized [*Jatal v. R*, A 1923 L 232 : 81 IC 347]. Stat[illegible]t by the accused to the police that an article produced by suspected men did not [illegible]ong to them but to the deceased, would amount not to a confession but to an admission [*Shua Din v. R*, 5 LLJ 128]. If no incriminating article is recovered in pursuance to confessional statement, the statement would be hit by Sec. 25 [*Hari Shankar v. State*, 1985 Cri LJ 1700, 1703 : (1985) 2 Crimes 437 (Del)]. A statement made to a police officer which does not lead to any recovery is not admissible [*Amin Chand v. State*, 1987 Cri LJ 1034, 1037 : (1987) 3(1) IJ REP 103 (Del)]. A witness had deposed that the police knew the fact that the dead body was in the shape of a skeleton. Once a fact is discovered from other sources there can be no fresh discovery even if the relevant information is extracted from the accused and the courts have to be watchful against the ingenuity of the investigating officer in this respect so that the protection afforded by secs 25 and 26 is not whittled down by the mere manipulation of the record of the case diary [*Balkar Singh v. State of U.P.*, 1990 Cri LJ 77, 85 (All)].

In this connexion, s 27, *post*, under which also so much of information by an accused to the police as relates distinctly to the facts thereby discovered is evidence whether amounting to confession or not.

Confession in First Information is Inadmissible But Admission is Not.— Where the accused himself gives the first information report, the fact of his giving the information is admissible against him as evidence of his conduct under s 8. If the information is non-confessional, it is admissible against him as an admission under s 21. But a confessional FIR by the accused to the police cannot be used against him in view of s 25 [*Aghnoo v. S*, A 1966 SC 119 (*Faddi v. S*, A 1964 SC 1850; *Nisar v. S*, A 1957 SC 366 and *Dal Singh v. R*, 44 IA 137 : A 1937 PC 25 **reld** on); *Khatri v. S*, A 1972 SC 922; *R v. Harnam*, 59 B 120 : 36 Bom LR 1117; *Nur Md v. R*, 90 IC 148 : 26 Cri LJ 1492; *Mohammada v. R*, A 1948 L 19; *Lal Khan v. R*, A 1948 L 43; *S v. Shiv*, A 1962 Raj 3]. If the first information report made by an accused person contains facts relating to motive, preparation and opportunity to commit the crime, with which he is charged, and the facts recited therein are self-inculpatory in the sense that the narrative describing the relations between the accused and the deceased gives the motive for the crime with which the accused is charged, the whole statement must be treated as a confession made to a police officer and would be hit by sec. 25 [*Banarsi Dass v. State of Punjab*, 1981 Cri LJ 1235, 1238 (P&H)]. The whole of the first information report need not be excluded, merely the confessional part [*Legal Rem v. Lalit*, 49 C 167 *sup*; *Bharosa v. R*, A 1941 N 86 : 1940 Nag 679;

see next heading]. Parts of the information separable from the confession are admissible [*Ram Singh v. S*, ILR 1952, 2 Raj 93; *S v. Balchand*, A 1960 Raj 101]. Confessional part of the statement made before the police should not be considered as admissible evidence [*Kantilal Shirabhai Thakkar v State of Gujarat*, 1990 Cri LJ 2500, 2501 (Guj)]. The separability test is misleading, and the entire confessional statement is hit by s 25 and save and except provided by s 27 and save and except the formal part identifying the accused as the maker of the report, no part of it could be tendered in evidence [*Aghnoo v. S. sup*]. A report not containing a confession is admissible against the accused [*Gopaldas v. R*, A 1945 S 132; *Mohammada v. R, sup*; see next heading]. There is no bar to a confession in first information being used in favour of accused [*Lal Khan v. R, sup*; *In re Mottai Thevar*, A 1952 M 586]. Where accused went to the police station with a blood-stained spear and admitted having killed the deceased, all that is admissible is that he brought with him a blood-stained spear [*In re Mottai Thevar, sup*]. A first information by the accused to the police that as the deceased was about to steal and attack him, he fired in self-defence and deceased was killed, is neither a confession nor a first information [*Jashoda v. Sailendra*, A 1957 C 872].

A first information report which has been written at the instance of a person who is accused of an offence is inadmissible in evidence unless some recovery in pursuance to the statement is made and that part only is admissible in evidence. [*Ram Beti v. State*, 1996 Cri LJ 1512, 1513 (All)]. Where the accused murdered his wife at midnight in his house and went to the police station and made a confessional statement before the S.I., the entire confessional statement was hit by section 25 and it was not possible to rely on that part of the statement in which the accused had stated that, that night after taking the food he and his wife and the child slept in the house, for, that ultimately would be a vital link in the chain of circumstances that night in the house there were none else than the accused, his wife and the child and consequently there was no question of anyone else entering into the house to commit the murder of the deceased. This portion of the information would certainly offend the bar created under section 25. [*M Yellapa v. State of Karnataka*, 1993 CrLJ 388 (Karn), see also *Banarsi Das v. State of Punjab*, 1981 Cri LJ 1235; *Harnam Kishan v. Emperor*, A 1935 Bom 26 : 1936 Cri LJ 539 and *Aghnoo Nagesla v. State of Bihar*, A 1966 SC 119 : 1966 Cri LJ 100]. Evidence given by a police officer, who lodged the FIR that the accused made a confession to another police officer, who was on duty at the place of occurrence, is a hearsay evidence and therefore, the statement made in the FIR is not a substantive evidence to corroborate the evidence of the other police officer before whom the confession was alleged to have been made and therefore, that piece of evidence stands excluded. [*State of Gujarat v. Anirudhsing*, A 1997 SC 2780].

If an FIR is not a confession but contains admission by accused it is admissible under s 21 [*S v. Shiv*, A 1962 Raj 3: *Ram Singh v. S, sup*: see also notes to s 21] where the person who lodged the FIR is himself subsequently accused of the offence and tried, his FIR is an admission by him of certain facts which have a bearing on the question to be determined, *viz.*, how and by whom the murder was committed, or whether the statement of the accused in court denying the correctness of the prosecution witnesses is correct or not; the FIR is admissible to prove his admissions which are relevant under s 21. It is not barred either by s 25 or s 162 Cr P Code [*Faddi v. S*, A 1964 SC 1850 (*Dal Singh v. R*, 44 IA, 137; *S v. Shiv*, A 1962 Raj 3; *S v. Balchand*, A 1960 Raj 101; *Allahdia v. S*, 1959 ALJ 340 rel on)].

A confessional FIR was held to be relevant but the inculpatory part had to be excluded from it. *State of Karnataka v. K. Yarappa Reddy*, 1999 (8) JT 10 : (1999) 8 SCC 715.

Presence of Police Officer and Confession to Another.—If a confession is made to a crowd of people including a police officer it does not become inadmissible

[*Ghunnai v. R*, A 1934 A 132—CONTRA : *Punja Mava v. S*, A 1965 G 5; *Alluri Ramayya v. State of Maharashtra*, 1987 Cri LJ 1172, 1173 : (1987) 1 Cri LC 340 (Bom) (DB); *Mihir Adhikary v. State*, 1983 Cri LJ 1559, 1563 (Cal)(DB) : (1983) 2 Crimes 499]. So also a confession in the presence of a *chowkidar* [*Maharam v. R*, A 1948 A 7; *Bal v. R*, A 1914 O 414] if the *Chaukidar* has not in any way influenced the accused [*R v. Shankar*, A 1934 O 222]. The evidence of a police officer who overheard a prisoner's statement made to another person in another room whilst in police custody was held admissible [*R v. Saguna*, 7 WR Cr 56]. Confession by an accused in a judicial lock-up to a fellow-prisoner is not inadmissible because a policeman who is to guard the lock-up was present [*Imamdin v. R*, A 1934 L 75]. Decisions like these must not be taken to mean that a confession to a private person in the presence or hearing of a police officer is always admissible. The test would be whether the police officer or his presence had anything to do with the making of the confession. After examining two witnesses to identify the accused, the police officer claims to have left for further investigation leaving the victim with another witness to whom the injured is alleged to have made the extra-judicial confession. Nothing prevented him from taking the victim to a Magistrate to record dying declaration. So his version that he left the victim to make further investigation has been given to get over the effect of sections 25 and 26 [*Kishore Chand v. State of Him. Pra.*, 1990 CriLJ 2289, 2294 (SC)].

Writings.—Taken down from the accused by the police for comparison with a disputed document are not admissions within ss 25 and 26 [*R v. Ramrao*, 56 B 304]. As to whether taking the writing or finger impression of an accused for the purpose of comparison and use against him as evidence contravenes art 20(*3*) of the Constitution, see notes to s 73 *post*.

Making Counterfeit Coin.—Where the police entered the premises of the accused and at their direction the accused made with the materials found there, a counterfeit coin, this evidence is not inadmissible as the making of a counterfeit coin is not a 'statement' [*Brij Nandan v. R*, A 1931 A 9].

English Law.—Under English law also confessions made to police officers can be excluded if their evidence would have an adverse effect on the fairness of the trial even though they had not been obtained by oppression and were also not likely to be unreliable. Acting upon this principle in [*R v. Mason*, (1987) 3 All ER 481 CA], the Court of Appeal held that the evidence of a confession obtained by playing a fraud upon the accused and his counsel had to be excluded. The fraud played was that he and his lawyer were falsely told that the fragment of a bottle found near the site of the arson carried the finger impression of the accused upon this the accused confessed. The Court of Appeal pointed out that if the trial judge had taken into consideration the deceit practised on the accused and his solicitor, he would have been bound to exclude the confession.

A confession brought about by oppression is also irrelevant. Questions which are deliberately asked with the intention of producing a disordered state of mind could amount to oppression. But the mere fact that questions addressed to the suspect triggered off halucinations and flights of fancy is not indicative of oppression [*R v. Miller*, (1986) 3 All ER 119 QBD].

The Court of Appeal has observed that for the purposes of s. 76(2)(*a*) of the [English] Police and Criminal Evidence Act, 1984 the word 'oppression' denotes the exercise of authority or power in a burdensome, harsh or wrongful manner, or injust or cruel treatment or the imposition of unreasonable or injust burdens, in circumstances which would almost always entail some impropriety on the part of the

interrogator. In this case the appellant was arrested on a charge of obtaining property by deception and interviewed by the police while in custody for over the following two days. She initially exercised her right to say nothing despite repeated questioning but when one of the police officers told her that her lover had been having an affair with another woman for the last three years, she at once confessed to the charge. It was held that such a confession could not be said to have been obtained by oppression [*R v. Fulling*, (1987) 2 All ER 65 CA].

S. 26. Confession by accused while in custody of police not to be proved against him.—No confession made by any person whilst he is in the custody of a police-officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

[1]*Explanation.*—In this section "Magistrate" does not include the head of a village discharging magisterial functions [2][in the Presidency of Fort St. George[3] * * * or elsewhere], unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, 1882.[4]

SYNOPSIS

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COMMENTARY

Principle and Scope.—The section also aims at the mischief contemplated in the preceding section (*ante* s 25, Commentary). It re-enacts the provisions of s 149 of the

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1. *Explanation* inserted by s 3 IE Act (1872) Am Act 3 of 1891.
   In Ceylon instead of the Explanation there is sub-sec (2), *viz*, "(2) No confession made by any person in respect of an act made punishable under the Forest Ordinance, or the Excise Ordinance, whilst such person is in the custody of a forest officer or an excise officer, respectively, shall be proved as against such person, unless such confession is made in the immediate presence of a Magistrate".
2. In Burma and Pakistan the words "in the Presidency of Fort St. George or in Burma or elsewhere" have been omitted by the Burma AO 1937 and Pakistan AO 1949.
3. The words "or in Burma" which occurred after the words "Fort St. George" were omitted by AO 1937.
4. See now the Code of Criminal Procedure, 1973 (Act 2 of 1974).

Cr P Code of 1861 with some verbal alterations [*R v. Babulal*, 6 A 509 FB; *Muthu Kumaraswami v. R*, 35 M 397, 456]. It has been seen that s 25 makes inadmissible a confession made by the accused to the police. S 26 goes further and enacts that a confession made by a person while he is in the custody of the police to a *third person* (of course other than a police officer) is also inadmissible, unless made in the immediate presence of a magistrate. The reason is that a person in the custody of the police is presumed to be under their influence and it provides opportunities for offering inducement or extorting confession; but the presence of a magistrate is a safe-guard and guarantees the confession. While s 25 applies to confessions made to the police, s 26 applies to confession (when in police custody) made to persons other than the police.

The law is imperative in excluding what comes from an accused person in the custody of the police, if it incriminates him [*R v. Mathews*, 10 C 1022]. It does not matter whether the arrest of the person by the police was legal or illegal. The policy appears to be that any statement in the nature of a confession made by an accused while in the custody and control of a police officer should be excluded. The policy would be defeated if it were held that the section would not apply when the arrest was illegal [*R. v. Jagia*, 17 P 369]. S 26 is not intended to qualify the plain meaning of s 25, but means that no confessions made by a prisoner in custody to any person other than a police officer shall be admissible unless made in the immediate presence of the magistrate [*R v. Hurribole (ante), In re Hiron Miya*, 1 CLR 21]. S 26 includes any statement made by a person whilst in custody of the police and appear to apply to such statements to whomsoever made, *eg*, to a fellow-prisoner, a doctor or a visitor. Such statements are not covered by s 162 Cr P Code [*Pakala Narayana v. R*, 18 P 234 : 43 CWN 473 : A 1939 PC 47 : 66 IA 66 **folld** in *Mahabir v. S*, A 1972 SC 1331]. The general rule applicable to confessions made by prisoners whilst in police custody is contained in s 26 and the proviso in s 27 refers to an exception to that rule [*R v. Commer*, 12 M 153; see also *R v. Jora Hasji*, 11 Bom HC 242]. S 27 qualifies not only s 26 but also ss 24 and 25 as well [see *post*, s 27].

The section goes further than the last in guarding accused persons against unfair advantage being taken of their position. In the absence of a magistrate, the fact of police custody renders a confession inadmissible. A man may be in custody without having been formally arrested; it is sufficient that he cannot go where he likes. Custody does not cease when the accused after arrest is allowed to drive in a carriage with a private person escorted by police [*R v. Lester*, 20 B 165 *post*; *Rechoda v. Atchenah*, 3 MHC 318]. If a confession is made to a magistrate while the accused is in police custody it is admissible, as it is in the immediate presence of the magistrate [*Nazir v. R.*, A 1925 L 557 : 91 IC 806]. But though admissible, the fact that the accused was in police custody detracts to a large extent from its evidentiary value [*R v. Moti*, A 1953 A 792]. S 26 does not make the admissibility of the confession dependent upon the knowledge of the accused as to the identity of the magistrate. It does not matter that the accused does not know that he is produced before a magistrate. The main consideration is the presence of the magistrate and the making of the confession in his presence [*Jograj v. R*, A 1930 L 534].

The words "no confession", it would seem, include not merely a confession of the offence then under inquiry, but also of any other offence.

Difference Between S 25 and S 26.—Under s 25 a confession made to any police officer *under any circumstances* (while in custody or not) is absolutely excluded and is not admissible against the accused. It covers a confession made to a police officer before any investigation has begun or otherwise not in the course of an investigation.

S 26 is not intended to qualify in any way the prohibition plainly laid down in s 25. It goes beyond s 25 and says that a confession by a person in police custody to any other person (*eg*, to a fellow-prisoner, a fellow-passenger, a spectator, a visitor, a doctor &c) is also inadmissible unless made in the immediate presence of a Magistrate. The presence of a magistrate is regarded as equivalent to removal of police influence, and so though in police custody, a confession to a third person in the immediate presence of the magistrate is admissible.

S 25 applies to all confessions to police officers, and s 26 applies only to confessions to whomsoever made (other than police officers) by a person while in public custody, in the immediate presence of a magistrate [*cf R v. Babulal*, 6 A 509 FB].

"Any Person".—These words include a person whether he is an accused person or not [*Ram Bharose v. R*, A 1944 N 105 : 1944 Nag 274].

"In the Immediate Presence of a Magistrate."—This may be to the magistrate himself [*Sidheswar v. R*, A 1934 A 351] or to any other persons, *eg*, a follow-prisoner a spectator, a doctor &c; but not to a police officer, as a confession to a police officer in the immediate presence of a magistrate is also hit by s 25 [*Ariel v. S*, A 1954 SC 15 : 1954 Cri LJ 230].

A confession recorded by a Magistrate holding an inquest and not empowered under S. 164 Cr PC to record confession is admissible in evidence [*M. Yelappa v. State*, 1993 (1) Crimes 781 (Karn), see also *In re Ramaswamy*, A 1953 Mad 138; *Public Prosecutor v. Shaik Ibrahim*, A 1964 AP 548]. The extra-judicial confession though recorded inside the police station, contents disclosed long before to witnesses before they were reduced to writing and hence it is hit by section 26 of the Evidence Act. [*State of A P v. Gongula Satya Murthy*, A 1997 SC 1588 : 1997 Cri LJ 774, 777]. Where the accused were in police custody and no Magistrate was present there admission of the accused is not admissible in evidence. [*M.V. Mahesh v. State of Karnataka*, 1996 CrLJ 771, 779 (Kant)]. The strict rule of section 26 is not applicable to a departmental enquiry against a govt. employee. [*Kuldip Singh v. State of Punjab*, A 1997 SC 79].

Confession to Private Person in the Presence of Police.—A confession made to a police officer in the presence and hearing of a private person is not to be considered as made to the latter, and is therefore excluded by this section. The prohibition must be strictly applied [*R v. Pancham*, 4 A 198]. The mere presence of a constable at the time of making the confession does not involve its total exclusion, but it certainly detracts from the evidentiary value [*Barnobas v. R*, A 1934 P 586]. A person while in the custody of the police and consequently under the influence of the police, made a confession to a third person, such confession is incapable of proof, unless made in the immediate presence of a magistrate [*R v. Babu Lal*, 6 A 509 FB—*per* STRAIGHT, J, p 545]. If an extra-judicial confession is made to certain villagers when the accused is in the custody of a *chowkidar*, it is inadmissible [*R v. Pancham*, 8 Luck 410 : 143 IC 846]. Where an accused at the time of being arrested by a village headman at the instance of the police makes a statement that he has committed a murder, it is very near to a statement made by a man in police custody [*Sit Ro v. R*, A 1936 R 455]. See p 276 *ante*: "*Presence of Police Officer and Confession to another.*"

Admissibility of Confessions or Admissions of Criminating Circumstances by Accused in Police Custody.—An admission of a fact however incriminating, but not by itself establishing the guilt of the maker, would not amount to confession within

the meaning of ss 24 to 26 [*Kanda v. S*, A 1972 SC 66]. A statement by the accused to a dafadar after arrest that he was asked by *R* to commit theft is inadmissible [*Karu Kandu v. R*, A 1940 P 410]. But a person charged under s 109 Cr P Code is not accused of any offence and so his statement to the police is not a confession and therefore not affected by s 26 or by s 162 Cr P Code [*R v. Ram Dayal*, A 1950 A 134].

Statement of sub-inspector that accused showed the superintendent different places is inadmissible [*Shamlal v. R*, A 1929 N 350]. Accused was convicted of theft on the evidence of an accomplice treated as corroborated by a police officer and complainant, by the deposition that accused pointed out the house which he had entered on the night of the offence and the various places in the house connected with the offence. The evidence was really evidence of confession while in police custody and is inadmissible under ss 25, 26 [*R v. Hira Gober*, 21 Bom LR 724 : 52 IC 601; *Dhaman v. R*, A 1937 S 251; *Turab v. R*, 152 IC 473 : A 1935 O 1; *Birja v. R*, A 1941 O 563; see however *Kalijeeban v. R*, 63 C 1053].

A statement which would not have been admissible against an accused if made by himself, would not under s 26 become admissible against him when made by a co-accused when in custody. Where the sessions judge told the jury that they may use as evidence against the accused a statement made behind their back and not tested by cross-examination, the court directed a re-trial [*In re Sankappa*, 3 MLT 270 : 18 MLJ 66]. Where the jury were misdirected by being told that confessions to the police while in their custody if followed up by the production of stolen property were admissible, a new trial was ordered [*In re Acchabba*, 3 MLT 263]. A sessions judge who only remarks that the evidence of admissions made by the appellant in the presence of the police inspector and other cannot be safely acted upon, does not seem to be aware of the provisions of ss 25 and 26 which lay down that such confessions shall not be proved [*In re Ippari*, 3 MLT 333: 7 Cri LJ 398].

As to the admissibility of incriminating statements not amounting to confession made by the accused to the police, see *ante* notes to s 25.

The Miranda exclusionary rule of USA (1966, 384 US 436) that custodial interrogatories are inherently coercive finds expression in s 26, although the Indian provision confines it to confession which is a narrower concept than self-crimination [*Nandini v. P L Dani*, A 1978 SC 1025].

Confession to Presidency Magistrate.—Though s 165 Cr P Code did not formerly apply in Calcutta it was held that a confession by an accused in police custody recorded by a Presy Magistrate is not excluded by s 26 when it is proved by the magistrate [*R v. Nilmadhav*, 15 C 595 FB].

Non-compliance With S 164 Cr P Code.—It has been recently held by the Supreme Court that confession made in the immediate presence of a magistrate is not admissible under s 26 if not also recorded in the manner laid down in s 164 Cr P Code [*Ariel v. S*, A 1954 SC 15: 1954 Cri LJ 230; see also *Bala Manjhi v. S*, A 1951 Or 168 FB]. With great respect, it is submitted that such a proposition does not appear to be in accordance with law, nor was any of the many decisions to the contrary (see next heading) referred to or discussed. The obligation to record a confession under s 164 arises only when it is made to a magistrate "*in the course of an investigation*" under Ch 14 (now Ch 12) of the Cr P Code (see s 164 *ibid* and *Nazir Ahmad v. R*, 40 CWN 1221, 1228: A 1936 PC 253: 63 IA 372) and not when it is made to him at any other time or on any other occasion. It is possible that it was overlooked that in the instant case before the Supreme Court the confession was

made to the magistrate not in the course of an investigation, nor was the accused then in the custody of the police. The magistrate's presence was secured as a reliable witness to the trap laid for the accused. Immediately after the bribe was paid, the magistrate and the police accosted the accused, when on a search being made the money was found in his pocket and the accused confessed his guilt to the magistrate. Such an oral confession to a magistrate (not made in the course of an investigation) being not required by law to be reduced to writing, s 91 Ev Act is no bar to its proof by the oral evidence of the magistrate. In any case its reception as an extra-judicial confession or as an admission under s 21 can hardly be questioned. The authorities cited in the next heading show that an oral confession of this kind is admissible under s 21 and s 26. (An exactly similar case is that of *Chhutkannoo v. R*, A 1949 Or 84 *infra*).

As observed in a case s 26 makes no distinction between an oral confession or a written confession, but embodies a rule of substantive law that a confession made by a person in the immediate presence of a magistrate is admissible even though he may be in police custody (see *Jograj v. R*, A 1930 L 534 *post*). It may also be pointed out that a confession "made in the immediate presence of a magistrate", may be to the magistrate himself or to any other person in his immediate presence and in the latter case the question of recording it under s 164 Cr P Code cannot arise at all as the confession was not made to the magistrate.

Oral Confession Before Magistrate. [Confession Other Than That Required to be Recorded Under S 164 Cr P Code].—The object of s 26 being to prevent the abuse of their powers by the police, confessions made by accused while in police custody are inadmissible, unless made in the immediate presence of a magistrate. But if a man in police custody volunteers a statement to a person in the position of a magistrate, it can be used as evidence against him [*R v. Manmohon*, 24 WR Cr 33]. When a magistrate kept a memorandum of an oral confession made to him in order to help his memory, the oral confession is admissible under s 26 even though he did not record it [*Ram Singh v. R*, A 1933 L 513]. An oral statement made in the presence of a sub-inspector and a constable who had taken the accused under arrest to a magistrate on leave, is not admissible [*Nathu v. R*, A 1929 A 855 : 118 IC 46]. A statement made by the accused at the dock before the magistrate amounting to a clear confession is admissible although he was at that time in the custody of the police [*R v. Pakriswami*, 1930 MWN 1240]. A confession of guilt to a magistrate at an interview in jail is not inadmissible because a police officer was present [*Rayalugadu v. R*, 1931 MWN 723].

Oral confession to a magistrate can be proved under s 26 [*Sucha v. R*, A 1932 L 488] even though not recorded according to s 164 Cr P Code [*Allah v. R*, A 1933 L 956; *Itwari v. R*, A 1933 O 432; *Matiram v. R*, A 1933 L 998; *Bakshan v. R*, 16 L 912; see however *Rishi v. S*, A 1955 P 425]. A question arose in some cases whether a confession made by an accused before a magistrate not reduced to writing may be proved by oral evidence, and it has generally been answered in the affirmative. An oral confession which is not open to any exception under ss 24, 25, 26 is a relevant fact as an admission under s 21 and may be proved against the accused by the oral evidence of the magistrate [*Feroz v. R*, 45 IC 843 : 11 PR 1919; see *Nazir v. R*, A 1925 L 557; *Baghel v. R*, A 1929 L 794; *Jograj v. R*, A 1930 L 534; *Nga Thein v. R*, A 1936 R 350; *R v. Maroti*, 54 IC 465: 21 Bom LR 1065 (*per* HAYWARD, J—CONTRA, SHAH, J)]. An extra-judicial confession before a magistrate is a matter which he is not required by law to be reduced to writing and in this respect differs from examination of accused under s 281 Cr P Code [*Buta v. R*, 52 PR 1887].

S 164 Cr P Code does not make it obligatory on a magistrate holding an investigation or a preliminary enquiry under s 159 Cr P Code to record in writing a confession made by an accused and it is provable by his oral evidence [*Tangedupalle v. R*, 45 M 230: A 1922 M 40]. The obligation to record a confession in writing under s 164 comes in when an accused is brought before a magistrate in the course of an investigation for the purpose mentioned therein. Under s 313 the magistrate may examine the accused at any stage with a view to enable him to explain any evidence against him, and under s 281 statement made by accused when examined by him must also be recorded in writing. But when a confession or an incriminating statement is made before a magistrate by an accused in police custody who is not brought with a view to record his confession, but for some other purpose (*eg*, a remand), it can be proved by the magistrate's oral testimony. In the absence of any provision of law it is not obligatory upon him to record it. As it is not a matter required by law to be reduced to writing s 91 does not apply to it [see *Jograj v. R*, A 1930 L 534 : 129 IC 289]. It has been held by the Judicial Committee that s 91 is no bar to the admission of oral evidence of a confession made to a magistrate which he was not bound to record under ss 164 and 364 (now s 281) [*Nazir Ahmad v. R*, 40 CWN 1221, 1227: A 1936 PC 253]. See also *ante*, s 21 : "*Admissions in Criminal Cases—Oral Confession, &c*".

S 26 is concerned only with confession made in the immediate presence of a magistrate though the accused may be in police custody. It may be to a third person or to the magistrate. Therefore, a confession made to a magistrate himself is obviously made "in the immediate presence of the magistrate" under s 26 [*Siddheswar v. R*, A 1934 A 351]. S 26 makes no distinction between an oral and a written confession, but embodies a rule of substantive law [*Jograj v. R, sup*]. The admissibility of a confession under s 26 is dependent on whether it was made in the immediate presence of a magistrate and the section does not say that it should be recorded in writing. It does not appear that the cases cited above in which an oral confession to a magistrate or in the presence of a magistrate has been held provable by his evidence been affected by *Nazir Ahmed v. R*, A 1936 PC 253: 17 L 629: 40 CWN 1221 where it has been held that ss 164 and 281 prescribed the only mode in which confessions are to be *recorded* and render inadmissible any attempt to deal with them in any other way. As observed by LORD ROCHE (in *Nazir Ahmed v. R, sup*) "the effect of the statute is clearly to prescribe the mode in which confessions are to be dealt with by magistrates *when made during an investigation*". *Nazir Ahmed's* case therefore decides this much that if a magistrate records a confessional statement "in the course of an investigation," it must be done by observing all the formalities of ss, 164 and 281 and if not thus recorded it cannot be proved by the magistrate's oral evidence, s 164 does not exclude confession otherwise admissible. [See also *Sardar v. R*, A 1937 N 257; *Amar v. R*, A 1937 L 746]. *In re Natesan*, A 1960 M 443, it has been observed that *Nazir Ahmed's* case may require reconsideration in the light of *Slaney v. S*, 1955, 2 SCR 1140 : A 1956 SC 116.

But what about confessions not made in the course of a police investigation and which are not required by law to be recorded under s 164 Cr P Code? It should be noted that s 164 comes into play only when "in the course of an investigation" an accused is formally brought before the magistrate for the purpose of recording his confession.—S 164 is confined to statements and confessions *in the course of an investigation* under Ch 14 (now Ch 12) before the commencement of the enquiry or trial (see *Karam Ilahi v. R*, A 1947 L 92). But a confession or admission of guilt may be made by an accused to a magistrate on occasions other than when he is brought for a formal record of his confession (*eg*, when he is brought for a remand, or during

a preliminary enquiry under s 159 Cr P Code, or when a magistrate visits the jail &c). Such confessions are not required to be reduced into writing under s 164 and their relevancy under other provisions of the Evidence Act cannot be affected. If it be regarded as a confession to one in his capacity as a magistrate, it may be relevant as an extra-judicial confession. If the statement to the magistrate does not amount to a confession but an admission of an incriminating fact, it is still admissible as an admission under s 21. This view finds support from a recent case where the Privy Council observed: "The fact that an admission is made to a magistrate while he is functioning under s 164 Cr P Code cannot take it outside the scope of the Evidence Act" [*Ghulam v. R*, 54 CWN 464 PC : 52 Bom LR 508]. Thus, oral evidence of admission of offence by an accused to a magistrate (not in the course of an investigation) but when he went to trap the accused while committing the offence is admissible [*Chhutkannoo v. R*, A 1949 O 84] and in other cases also it has been pointed out that *Nazir Ahmed's* case, *sup* relates to a confession to a magistrate in the course of an investigation and an oral confession to a magistrate made after the crime but before investigation does not come within it [*In re Nainamuthu*, A 1940 M 138 : 1940 Mad 428: *In re Ramchandran*, A 1960 M 191; *In re Natesan*, A 1960 M 443; see also *Arunachala v. R*, A 1932 M 500].

The opinion expressed above by the writer as to the effect of the PC decision in *Nazir Ahmed v. R*, being "in complete agreement" with the view taken in a case, "judicial endorsement" was given to it by quoting several lines from this book. It was held in this case that when a magistrate not empowered to record a confession under s 164 Cr P Code records a confession during an inquest by him under s 176 *ibid*, it is nevertheless admissible [*Ramaswami v. S*, A 1953 M 138, 141 : 1952, 2 MLJ 814 : see however *In re Thothan*, A 1956 M 425].

As observed earlier (*ante*) the broad proposition laid down by the Supreme Court in *Ariel v. S*, A 1954 SC 15 *ante* that a confession under s 26 made in the immediate presence of a magistrate is inadmissible unless recorded under s 164 Cr P Code, is not in accord with the many decisions cited above, nor was any of them cited and discussed. As such a proposition would affect the correctness of these decisions, the sooner the point is clearly settled in a fully argued case the better. As the ruling stands it should apply only to a confession made in the immediate presence of a magistrate and in the course of an investigation.

There is however no difference between a confession recorded under s 164 Cr P Code and an oral confession in the precaution to be taken in ensuring that the confession is voluntary. The mere presence of the magistrate would not *ipso facto* make it voluntary [*In re Krishna Iyer*, A 1935 M 479]. The same weight cannot ordinarily be attached to an oral confession as to one formally recorded with all necessary precautions under s 164 [*Karam v. R*, 16 L 454].

What Constitutes "Custody" and its Effect.—"Custody" has the same meaning in ss 26 and 27 (see *post* s 27: "*Custody of a police officer*"). Custody does not necessarily mean custody after formal arrest, but includes a state of affairs in which the accused can be said to have come into the hands of a police officer or have been under some form of police surveillance or restriction on his movements by the police [*Gurdial v. R*, A 1932 L 609; *Rodpal v. Ramji*, A 1933 L 609; *Allah Ditta v. R*, A 1937 L 620; *Hakam v. R*, A 1940 L 129: 1940 Lah 242; *Rechoda v. Atchenah*, 3 MHC 318; *R v. Pancham*, A 1933 O 192; *R v. Jogia*, A 1938 P 308; *R v. Mg Lay*, A 1934 R 173: 1 R 609; *Maharam v. R*, A 1948 O 7; *Babbu v. S*, A 1954 A 633; *In re Mannem*, A 1957 AP 729; *Paramhansa v. S*, A 1964 Or 144; *Mihir Adhikary v. State*, 1983 Cri LJ 1559, 1564 (Cal) (DB) : (1983) 2 Crimes

499]. Thus, if the accused person is present before the police and cannot depart at his own free will, it is sufficient custody [*Rechoda v. Atchenah, sup*]. A person, under arrest, on a charge of murder was taken in a conveyance from the place where the alleged offence was committed to another place, and a friend drove with her in the tonga, a mounted policeman riding in front; during a short absence of the policeman, who went to the neighbouring village to procure a fresh horse, the accused made certain statements to the friend with reference to the alleged offence—*Held* that notwithstanding the temporary absence of the policeman, the accused was still in the custody of the police and that the witness should not be asked as to what the prisoner said to him [*R v. Lester*, 20 B 165; see *R v. Jogia*, 17 P 369; *Birja v. R*, A 1941 O 563]. After examining two witnesses to indentify the accused, the police officer claims to have left for further investigation leaving the victim with another witness to whom the injured is alleged to have made the extra-judicial confession. Nothing prevented him from taking the victim to a Magistrate to record dying declaration. So his version that he left the victim to make further investigation has been given to get over the effect of secs. 25 and 26 [*Kishore Chand v. State of H.P.*, 1990 Cri LJ 2289, 2294 (SC)]. The immediate presence of the custodian is not necessary. A person in the immediate presence of a magistrate with the police outside to see that he does not escape cannot be said to be not in the custody of the police simply because they cannot be seen [*Rambharosa v. R*, A 1944 N 105]. In order to amount to "custody", limitation must be imposed on the liberty of the confession either directly or indirectly by the police [*Pharho v. R*, A 1932 S 201]. The crucial test is whether the accused is a free man when he makes the confession or his movements are controlled by the police either by themselves or by some other agency employed by them [*Ram Singh v. S*, A 1959 A 518; *Mohammad Dwara Rawther Ismail v. State of Kerala*, 1982 CriLJ 2102, 2108 (Ker)]. Confession to a superintendent of *post* offices to whom the accused was taken temporarily by the police, left there for three hours and was again removed to the lock-up is inadmissible [*R v. Sheo Ram*, A 1928 L 282 : 108 IC 398]. Confession inside a hospital where the accused was taken by a policeman is inadmissible although the policeman stayed outside and was out of hearing [*R v. Nallangowda*, 42 B 1: 19 Bom LR 683; *Hassan Pari v. R*, A 1941 Pesh 22]. The statement made by the accused after his arrest to the Doctor as to how he sustained the injuries is inadmissible [*Diraviam in re* : 1985 Cri LJ NOC 63: 1984 Mad LW (Cri) 163 (Mad) (DB)]. As soon as an accused or suspected person comes into the hands of a police officer, he is in the absence of clear evidence to the contrary "in custody" within ss 26, 27. The idea of free detention is hypocritical [*Mg Lay v. R, sup*]. The section applies even if the arrest by the police officer is illegal [*R v. Jogia, sup*]. To constitute custody of police, some sort of custody is sufficient under s 26 [*R v. Kamalia*, 10 B 595]. Where accused is merely invited to explain certain circumstances, it is not "custody" [*R v. Pir Md*, 85 IC 833: A 1921 S 145]. Confession to village people in the presence of *chaukidar* is not inadmissible as his mere presence does not constitute custody [*Muharam v. R*, A 1948 A 7; *R v. Shankar*, A 1934 O 222].

Information was laid before the police by *Z* that *A*, *B*, *C* and others had a fight with one another and that after killing *C* they had concealed the body. Subsequently *A* went to the police and gave information that *A*, *B* and *C* &c had a quarrel and that *C* was lying injured in a field. In a trial of *A*, *B* and others for murder of *C*, *A*'s statement to the police is admissible (under s 18) against him but not his co-accused, as *A* was not charged with any offence and not in custody under ss 25 and 26 when he made the statement to the police. S 162 does not disturb this position [*Rajkumar v. R*, A 1928 P 473: 111 IC 721].

The custody of the keeper of a jail in an Indian State who is not a police officer does not become that of a police officer, merely because his subordinates, the warders of the jail, are members of the police force. In the absence of any suggestion of a close custody inside the jail such as might possibly occur when a prisoner is watched and guarded there by the police officer investigating the offence, this section does not preclude such a jailor from giving evidence of what the accused told him while in jail [*R v. Totya Bin*, 20 B 295].

A confession made before the deputy-commissioner of police in Calcutta, who is also magistrate and Justice of the Peace is inadmissible [*R v. Hurribole*, 1 C 207]. Confession while in the custody of mashirs is not admissible [*Haroon v. R*, A 1932 S 149]. The mere standing by of the magistrate when the confession is being made to the police is not sufficient to make the confession admissible [*R v. Domain*, 12 WR Cr 82].

Accused in police custody confessed to the court-inspector who produced him before court and confession was recorded in the presence of the court-inspector—*Held* that it was not voluntary and therefore inadmissible [*Neki v. R*, 76 IC 180: A 1924 L 624; see *Shk Sohali v. R*, 11 CLJ 273]. Where a magistrate hands over the accused to a police officer in attendance outside and records the confession after he has been with the police officer for a few minutes, the procedure is not proper and reduces considerably the value of the confession [*Indar v. R*, A 1931 L 408]. See also s 24, *ante*: "*Questioning about the length of Police custody &c*".

"Police Officer" and "Magistrate".—There is nothing in s 26 that limits its operations to magistrates specially empowered under s 164 Cr P Code [*Noukar v. R*, A 1937 S 212]. The words "a magistrate" mean any magistrate and not merely the magistrate having jurisdiction [*R v. Vahala*, 7 Bom HC 56]. The words "*police officer*" and "*magistrate*" in s 26 include police officers and magistrates of Indian States as well as those of India [*R v. Sunder*, 12 A 505; *R v. Nagla Kala*, 22 B 235: *Badan v. R*, 2 PR 1909: 7 PWR 1909; see *Gobind v. R*, 17 NLR 113: 69 IC 257]. Confessions made to magistrates in England or in foreign country are not excluded, *eg*, confession to "*Judg'd instruction*" [*Panchanatham v. R*, A 1929 M 487 : 56 MLJ 628].

A village magistrate in the presidency of Madras is not a police officer [*R v. Sama Papi*, 7 M 287]. A deputy commissioner of police in Calcutta was held to be a police officer [*R v. Hurribole*, 1 C 215 (*per* GARTH CJ)]. Confession before an administrator (who is not a magistrate) in Portuguese territory is not admissible [*R v. Bhabli*, 26 Bom LR 706 : 87 IC 20: A 1924 B 480]. In the Punjab, honorary magistrates exercise their powers under the Cr P Code and a confession made to such a person is hit by s 26 [*Hasmat v. R*, A 1934 L 417].

For the purpose of s 26 a Coroner shall be deemed to be a magistrate (s 20, Coroner's Act, 4 of 1871). Statement before a Coroner after being warned is admissible against the maker as a confession under s 26 or as an admission under ss 18 and 21 [*R v. Ramnath*, 50 B 111; *R v. Bhagwandass*, 1941 Bom 27: A 1941 B 50—CONTRA : *R v. Kazi Dawood*, 50 B 56]. A Coroner recording a confession is not required to observe the formalities of s 164 Cr P Code [*R v. Dasrath*, A 1945 B 265 FB: 1945 Bom 614].

As to meaning of "police officer", see ante, s 25.

Confession When Admissible and When Inadmissible.—The evidence of a policeman who overheard a prisoner's statement made in another room, in ignorance of the policeman's vicinity and uninfluenced by it, was held legally admissible [*R v.*

Sagina, 7 WR Cr 56]. A confessional statement regarding the place where a dead body was buried while in police custody to a magistrate is controlled by this section and not by s 176 Cr P Code and is admissible [*Noukar v. R*, A 1937 s 212]. When a magistrate is present at a police investigation his evidence as to what happened there is not admissible [*Gajrani v. R*, A 1933 A 394].

Statements containing incriminating matter and made to a magistrate by the accused when in the custody of the police cannot be admissible as an admission unless they be shown to be voluntary [*R v. Bhairab*, 2 CWN 702, 708].

A confession made to a police officer by an accused person when he was neither accused nor arrested, is relevant [*R v. Meher Ali*, 15 C 589; *R v. Debee*, 6 C 530: 7 CLR 54]. If an accused person while in police custody gives information to the police as complainant in another case, his statement as such informant cannot be used as evidence against him on his trial [*Mannu Shk v. R*, 21 C 392].

Explanation.—The Explanation was added by s 3 of Act 3 of 1891, to meet the decision in *R v. Ramaniiyya*, 2 M 5, in which it has been held that a village munsif in the Madras Presidency is such a magistrate as is contemplated by this section. The effect of the addition of the Explanation is to alter the law as laid down in the above decision.

S. 27.[1] How much of information received from accused may be proved.—Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

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1. In Ceylon sub-sec. (2) has been added as also s 27-A, *viz.*

"(2)Sub-section (1) shall also apply mutatis mutandis, in the case of information received from a person accused of any act made punishable under the Forest Ordinance, or the Excise Ordinance, when such person is in the custody of a forest officer or an excise officer, respectively".

"27A. In sections 25, 26 and 27, the terms "forest officer" and "excise officer" shall have the same meanings as are respectively assigned to those terms in the Forest Ordinance, and the Excise Ordinance".

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COMMENTARY

Principle and Scope.—S 27 is by way of a proviso to ss 25 and 26 and a statement even by way of confession made in police custody which distinctly relates to the fact discovered is admissible in evidence against the accused [*Delhi Admn v. Balkrishan*, A 1972 SC 3; *Md Inayatullah v. S*, A 1976 SC 483]. Confession caused by inducement, threat or promise is inadmissible under s 24 and the danger of admitting confessions made to police officers or to any other person when in police custody has been provided against in ss 25 and 26. But although such confessions improperly obtained are inadmissible under the law, they may lead to the discovery of facts, things, documents &c, in consequence of some information contained in the confession made by the accused in custody. The section permits the proof of all kinds of information whether contained in a confession or not and therefore goes beyond

the provisions of ss 25 and 26. When the information contained in the statements (whether amounting to a confession or not) made by an accused person in police custody are confirmed by the finding of some object or fact, the danger disappears; for the discovery of the stolen goods, the instrument of crime, the dead body, the clothes which the deceased were wearing or any other material thing, which are capable of being perceived by the senses demonstrates conclusively that these portions at least of the confessions cannot have been false. In such a case so much of the information given by the accused as relates distinctly to the fact thereby discovered becomes relevant under s 27. The word "it" in the phrase "Whether it amounts to a confession or not" refers to information. The words of s 27 were bodily lifted from Leach's Crown Law (quoted *post*) except that for "relates strictly" the words used are "relates distinctly" which also occur in Taylor s 902 (see *post*). Two essential requirements for the application of s 27 are that (1) the person giving information must be accused of any offence and (2) he must also be in police custody [see *Babulal v. R*, 6A 509 FB; *In re Ramaiah*, A 1956 Andhra 66: *Debiram v. S*, A 1962 Pu 70]. The expression "accused of any offence" bears no technical meaning and no formal accusation is required. It is descriptive of the person against whom evidence is sought to be led (see *post*).

Section 27 of the Indian Evidence Act is founded on a principle that even though the evidence relating to the confessional or other statements made by a person while he is in the custody of a police officer, is tainted and therefore inadmissible, if the truth of the information given by him is assured by the discovery of a fact, it may be presumed to be untainted and is therefore declared provable in so far as it distinctly relates to the fact thereby discovered. Even though Section 27 is in the form of a proviso to Section 26, the two sections do not necessarily deal with evidence of the same character. The bar imposed by Section 27 is concerned with the proof of information whether it amounts to a confession or not, which leads to discovery of facts. By Section 27, even if facts are disposed of as discovered in consequence of information received, only that much of the information is admissible as distinctly relates to the fact discovered. By Section 27 of the Evidence Act deals with the information and the facts discovered by the accused. Section 27 is an exception to Sections 25 and 26. It will be expedient to mention the conditions attracting the provisions of Section 27 of the Evidence Act. The conditions necessary for invoking the aids of Section 27 can be enumerated as under :

(i) There must be discovery of fact albeit relevant fact, in consequence of the information received from a person accused of an offence.

(ii) The discovery of such fact must be deposed to.

(iii) At the time of the receipt of the information the accused must be in police custody.

(iv) That only so much of the information as relates distinctly to the fact, thereby discovered is admissible.

It can be very well concluded that allowed to be proved is the information, such part thereof, as related distinctly to the fact thereby discovered. The word "distinctly", means "directly", "indubitably", "strictly" and "unmistakably". As per the settled proposition of law a statement made by the accused should be split up and so much of the statement that is the immediate cause of discovery will be a legal evidence under Section 27 of the Evidence Act.

For the applicability of Section 27 two conditions are prerequisite, (i) the information must be such as caused discovery of the fact, (ii) the information must

relate distinctly to the fact discovered so much of such information, whether, it amounts to a confession or relate distinctly thereby discovery may be proved. It also assumed that there should be a statement first and it would be followed by the discovery and if there was first discovery followed by the statement such statement would be inadmissible. It is also settled proposition of law that the statement of the accused must be volunteered. It should not be given by prompt or threat with any pointed question. It is found from the evidence on record that on the aforesaid two *panchanamas*, even if they are presumed to be proved. It is incumbent upon the prosecution to prove as to who, what statement leading to the discovery, permissible under Section 27, in case of joint statement, was made. In the present case the prosecution failed to point out as to who made, what statement, which led to the discovery or the place of the complainant. Prosecution cannot place reliance on such joint statement against the accused under the provisions of Section 27. In view of the provisions of Section 27 of the Evidence Act, which is in form of proviso to Sections 24, 25 and 26. A joint statement made by the accused is not *per se* inadmissible in the evidence but it is very very weak piece of evidence on which any reliance can be placed by the prosecution. In case of joint statement by the accused, like one on hand, it would be very difficult to come to the conclusion which of the two accused persons gave any specific and definite information to the police and *panchas* which related distinctly to the discovery of the place of complainant from where the offence of house breaking was committed. In this of the matter the aforesaid discovery evidence cannot be used against the accused persons in order to connect them with the crime in question beyond doubt. [*Meghaji Godadji Thakare v. State of Gujarat*, 1993 Cri LJ 730 (Guj)]. The conditions prescribed in section 27 for unwrapping the cover of ban against admissibility of statement of the accused to the police have been satisfied. They are (1) A fact should have been discovered in consequence of information received from the accused. (2) He should have been accused of an offence. (3) He should have been in the custody of a police officer when he supplied the information. (4) The fact so discovered should have been deposed to by the witness. If those conditions are satisfied, that part of information given by the accused which led to such discovery gets denuded by the wrapper of prohibition and it becomes admissible in evidence. It is immaterial whether the information was supplied in connection with the same crime or a different crime. [*State of Rajasthan v. Bhup Ram*, 1997 (1) Crimes 62, 66 (SC)]. The first condition necessary for bringing the section into operation is the discovery of the fact in consequence of the information received from a person accused of an offence. The second is that the discovery of such a fact must be deposed to. The third is that at the time of receipt of this information the accused must be in police custody. The last but the most important condition is that only "so such of the information" as relates distinctly to the fact thereby discovered is admissible. According to this provision only that part of the statement which was the immediate and direct cause of the fact discovered would be legal evidence. [*The State of Manipur v. Shri Warepam Khomdonbi Singh*, 1993 (3) Crimes 143, 146 (Gau)].

The provisions of Section 27 are based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true and consequently the said information can safely be allowed to be given in evidence because if such an information is further fortified and confirmed by the discovery of articles or the instrument of crime and which leads to the belief that the information about the confession made as to the articles of crime cannot be false. [*S.C. Bahri v. State of Bihar*, A 1994 SC 2420 : 1994 Cri LJ 3271]. In *Nari Santa v. Emperor*, [A 1945 Pat 161] the accused was charged for the theft and it is said that in the course of investigation the accused produced certain articles

and thereafter made a confessional statement and it was in these facts and circumstances it was held that there was no disclosure statement within the meaning of Section 27 as the confessional statement was made only when the articles were already discovered having been produced by the accused. In *Abdul Sattar v. Union Territory*, A 1986 SC 1438, recovery of wearing apparels of the deceased have been made at the instance of the accused more than three weeks after the occurrence from a public place accessible to the people of the locality and, therefore, no reliance was placed on the disclosure statement and recovery of the wearing apparels of the deceased. The above two decisions were distinguished in *S.C. Bahri's* case [*supra*] wherein soon after his arrest the [accused took the Police Officer while in custody to the place where according to him he had thrown the dead body of the deceased wrapped by the incriminating articles. Those articles were not found lying on the surface of the ground but they were found after unearthing the ground. Those articles were neither visible nor accessible to the people but were hidden under the ground. They were discovered only after the place was pointed out and it was unearthed by the labourers. No fault therefore could be found with regard to the discovery and seizure of the incriminating articles. Broadly speaking there are four conditions, before S. 27 is applied, 1st that the accused must be in the custody of a police officer, 2ndly he must give an information to the police, 3rdly there must be discovery of an instrument and 4thly the information must relate distinctly to the fact discovered [*Ramua v. State of U P*, 1992 Cri LJ 3972, 3976 (All)].

Section 27 represents loosely what is known as the doctrine of confirmation by subsequent fact. The rationale for admissibility of that part of statement which is subsequently by discovery of a material fact is that it must be reliable [*Public Prosecutor v. Chin Moi Moi,* (1995) 1 SLR 297 (Singapore HC)].

"The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence" [SIR JOHN BEAUMONT, in *Pulukuri Kottaya v. R*, 51 CWN 474: A 1947 PC 67: 74 IA 65: *Ram Kishan v. S*, 1955, 1 SCR 903: A 1955 SC 104, 116]. S 27 provides an exception to the prohibition imposed by the preceding sections. By s 27 information, even if amounted to a confession and was made to a police officer *under any circumstances* may be proved, or rather so much of it may be proved as relates distinctly to the fact thereby discovered (see *post, "Application of the Section"*). So much of the information as strictly relates to the discovery of facts is admissible even though the confession is elicited by improper inducement [see *R, v. Gould, post* and *"Information Leading to Discovery is Admissible Irrespective of &c, post*]. It should be noted that mere discovery of fact as a result of information from accused does not make it admissible unless its relevancy is established by other evidence showing the connection between the fact discovered and the offence charged and the accused (*see* post : *"Mere Discovery of Fact is Not Relevant &c"*). In this connexion it should be noted that production of articles and statements accompanying or explaining such production are also evidence of conduct under s 8. That section is concerned with the proof of conduct and is controlled by s 27 [see s 8, *ante* and *Kalijeeban v. R*, 63 C 1053]. S 27 is not repugnant to art 20(3) Constitution [*In re Govinda Reddy*, A 1958 Mys 150].

The words *"so much of such information.....* as relates *distinctly* to the fact thereby discovered" are very important and the whole force of the section is concentrated on them. As WEST, J, illustrates in *R v. Jora Hasji*, 11 BHCR 242: "For instance a man says, 'you will find a stick at such and such a place. I killed Rama with it'. A policeman in such a case, may be allowed to say he went to the place

indicated and found the stick, but any statement as to the confession of murder would be inadmissible". So, when a person in custody informs the police : "I will produce a knife concealed in the roof of my house", it leads to the discovery of the fact that the knife is concealed in the house of the informant to his knowledge. But if to the statement the words be added "with which I stabbed A", these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant [*Pulukuri Kottaya v. R*, infra]. In this case while explaining the principle underlying s 27, SIR JOHN BEAUMONT observed:—

> "Clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate ..... That ban (imposed by the two preceding sections) was presumably inspired by the fear of the Legislature that a person under police influence might be induced to confess by the exercise of undue pressure. But if all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect", [*Pulukuri Kottaya v. R*, A 1947 PC 67: see further observations cited, post: *"Facts discovered"* see also *Ramkishan v. S*, A 1955 SC 104, 116: 1955 1 SCR 903: 1955, Cri LJ 196].

This judicial pronouncement on a vexed question has not come too soon, for although the weight of authority had swung in favour of the strict interpretation put by the Judicial Committee in the instant case (see *Legal Rem v. Lalit*, 49 C 167; *Amiruddin v. R*, 45 C 557; *Sukham v. R*, 10 L 283; *R v. Ganu*, 56 B 172 and cases *post*, under *"Extent of Information admissible"*), a wider interpretation, admitting the whole statement including confession of guilt and other incriminating statements, was adopted in some jurisdictions (see *Re Athappa Goundan*, A 1937 M 618: 1937; Mad 695 and cases *post*). That view has now been held to be wrong and the law has been put on a uniform and satisfactory basis.

Before S.27 can be invoked it must be proved that a fact was discovered in consequence of the information furnished by the accused [*Public Prosecutor v. Chin Moi Moi,* (1995)1 SLR 297 (Singapore HC)]. The trial court must always be mindful of the authenticity and weight of the information which led to discovery of a fact [*Public Prosecutor v. Chin Moi Moi,* (1995)1 SLR 297 (Singapore HC)]. There must be clear evidence to indicate that the accused did give the alleged information to the police which led to the discovery of certain other facts [*Public Prosecutor v. Basri Bin Salihin,* (1994) 2 Malayan LJ 476 (Kuala Lumpur HC)].

Ss 148-150, Cr P Code of 1861 contained provisions now covered by ss 26-27 Evidence Act and under those sections confessions to a police were not barred if they led to discovery of facts. Stephen, the framer of the Act, says that he took s 27 verbatim from s 150 of the Cr P Code of 1861: "Admissions in reference to crimes are usually called confessions. I may observe upon the provisions relating to them that ss 25, 26 and 27 were transferred to the Evidence Act verbatim from the Code of Criminal Procedure, Act 25 of 1861" (Stephen : Introduction to the Evidence Act, p 165, 1892 Ed being reprint of the 1872 Ed). The original s 150 Cr. P. Code (1861) also referred to "a person accused of any offence" but made no distinction between a person in police custody and a person not in police custody. In s 150 as amended by Act 8 of 1869, the words "or in the custody of a police officer" were inserted after the words "a person accused of any offence". When the Act was enacted in 1872, s 150 was transferred to the Evidence Act by omitting the word "or" and putting a comma instead. (The effect of the alteration, how it most likely occurred and the

historical background of s 27 have been discussed *post*). The history and origin of s 27 have been fully discussed in *R v. Babulal*, 6 A 509 FB which contains a thorough exposition of the provisions of ss 25-27.

The general rule that statements made by an accused to the police during an investigation cannot be proved does not affect the special exception in s 27. Statements admissible under that section can still be proved: but all other statements are shut out [*Syamo v. R*, 55 M 903 FB]. LORD RADCLIFFE in an appeal to the Privy Council from Ceylon applying the maxim of *interpretation generalia specialibus non-derogant* quoted with approval the words "The General rule..... still be proved" [*R v. Ramaswamy*, 1965 AC 1]. When a statement is barred by ss 24, 25 and 26 and the bar is not removed by s 27, s 39 cannot be invoked for letting in the statement under the garb of an explanation [*Sukhan v. R*, A 1929 L 344 FB]. So far as the admisibility of the words deposed to is concerned, they are governed by s 27 and not s 39 [*Karam v. R*, A 1929 L 338: 10 L 283]. The section recognises the principle that portion of a statement or confession may be admitted under certain circumstances [*Legal Rem v. Lalit*, 49 C 167]. If however, the inadmissible confession be *not confirmed* by the finding of the property, no proof either of the statements or acts can be received; for the influence which produces a groundless confession may equally produce groundless conduct [*R v. Jenkins*, R&R 492; Phip 8th Ed p 255]. If no incriminating article is recovered in consequence of disclosure statement, it would not be protected under Sec. 27. [*Harishankar v. State*, 1985 Cri LJ 1700, 1754: (1985) 2 Crimes 437 (Del); *Amin Chand v. State*, 1987 Cri LJ 1034, 1037: (1987) 3(1) IJ Rep 103 (Del)]. The mere discovery by the accused cannot be said to be of any legal consequence, if it is not preceded by the informative statement on the part of the accused [*Devidas v. State of Maharashtra*, 1982 Cri LJ 2189, 2193 (1981) Bom Cr 577 (Bom); *Sambhu Bora v. State of Assam*, 1987 Cri LJ 1027, 1032 (Gau) (DB)].

HIDAYATULLAH, J, has suggested the advisability of following the practice in English law of cautioning a prisoner in custody by the police before he makes any statement under s 27 that it may be used against him and has referred to the rules framed by the Judges of the K B Division for the guidance of the police reproduced in Halsbury, 3rd Ed. Vol 10, para 865, p 470 and also cited the recommendations of the Royal Commission on Police Process and Procedure (1928-29) Cmnd 3297 [see *S v. Deoman*, A 1960 SC 1125, 1146: 1961, 1 SCR 14]. 'Revised Judges' Rules made by the judges of the Queen's Bench Division came into force on January 27, 1964. These rules deal with the admissibility of evidence at the trial of any person of answers and statements which are only voluntarily made by him to police officers and to provide guidance to police officers in the perfomance of their duties. The Revised Judges' Rules will be found in 1964, 1 All ER pp 237-240. (See also Phip 11th Ed para 805 *et seq*). Under the former and the revised Judges' Rules it was and is permissible to question under caution a person in custody about offences other than those with which a person is charged [*R v. Buchan*, 1964, 1 All ER 502].

The Judges' Rules have not the force of law as the court still has discretion to admit the evidence [*R v. Smith*, 1961, 3 All ER 972]; but no cross-examination of the prisoner is permissible [*R v. Winkel*, 1911, 76 JP 191; *R v. Smith*, *sup*]. The rules are not mandatory. They are rules of conduct only, directed to the police [*R v. Ovenell*, 1968, 1 All FR 933]. They apply to all professional investigators but to no one else [*R v. Nichols*, 51 Cr App R 233]. In LORD SHAWCROSS'S opinion, however, the police are unduly handicapped by the Judges' Rules when questioning suspects. He appears to be in favour of giving unrestricted powers to the police when questioning

suspects, but suggests the adoption of the provisions of the Indian Evidence Act under which no statement or confession to the police is admissible (see s 25, *ante*).

Statement leading to discovery.—Even before his arrest if any information is given by the accused leading to the discovery, it shall be presumed that the accused was constructively in police custody and therefore, that part of information leading to the discovery be comes admissible in evidence [*State of Rajasthan v. Vinod Malhotra*, 1997 Cri LJ 1488, 1497 (Raj)]. When the recovery *panchnama* of the sticks, the alleged crime articles, had no mention that the sticks had any marks of blood, the evidence of recovery of the sticks cannot constitute incriminating evidence against the accused. [*Narayan Kanu Datavale v. State of Maharashtra*, 1997 Cri LJ 1788, 1793 (Bom)]. Where information received at the police station, as recorded in daily *Rojnamcha*, was that some unknown person informed on telephone from a stated place that at the stated address one person had murdered four persons, even assuming that the informant was the accused, the whole of the statement/ information was non-confessional and no part of it suggested that the informant committed the crime. It was admissible in evidence. [*State of Rajasthan v. Vinod Malhotra*, 1997 Cri LJ 1488, 1498 (Raj)]. The discovery of dead body as a result of the statement made by the accused as contemplated by section 27 is an important factor which would support the prosecution case regarding *corpus delicti*. The fact discovered includes not only the physical object produced but also the place from which it is produced and the knowledge of the accused as to this. [*Vasudevan v. State*, 1993 Cri LJ 3151, 3154 (Ker), see also *Mohd. Inayatullah v. State of Maharashtra*, A 1976 SC 483 : 1976 Cri LJ 481]. Unless the witness who spoke about the actual confession of the accused and the recovery, has spoken about the very words uttered by the accused, it has no evidentiary value. [*S P T Karuppiah v. State*, 1992 (1) Crimes 353, 360 (Mad)]. Disclosure statement of the accused need not be recorded by the I.O. on a separate sheet of paper along with his signature. Recording of the disclosure statement in the case diary is not illegal. [*Bhaakua Kampa v. State or Orissa*, 1996 Cri LJ 350, 353 (Ori)]. Discovery statement of the accused and recovery of revolver in pursuant thereto is an important circumstance against the accused which can be taken into consideration. [*Ved Prakash v. State of Haryana*, A 1996 SC 2791 : 1996 Cri LJ 4156, 4157]. Recovery of articles before arrest of the accused does not come within section 27. [*Karam Singh v. State of U P*, 1994 Cri LJ 3446, 3450 (All)]. Mere fact of recovery cannot be used as substantive evidence [*Harish Natvarlal Mistry and Ors. etc. v. State of Gujarat*, 1993 (1) Crimes 451, 482 (Guj)]. Mere recovery of bloodstained clothes does not connect the accused with the offence and moreso when the alleged stains could not be established as of human blood [*Ganga Singh v. State of U.P.*, 1998 Cri LJ 3362, 3365 (All)].

The fact of production of the alleged weapon of offence by the accused himself has to be proved by the contents of the seizure memo which fact cannot be proved by the inhibition contained in section 27. [*Yog Raj v. Romal Singh*, 1997 Cri LJ 1958, 1960 (J&K)]. Mere recovery of weapon of offence is of no consequence nor can it be said to be a circumstance to bring home the guilt against the accused. [*State of H P v. Parkash Chand*, 1997 Cri LJ 1979 (HP)]. The evidence regarding recovery of blood stained clothes belonging to the accused on the disclosure made by him has to be examined in the background of the witnesses on whom it is difficult to place any reliance on them when they are found to be stock witnesses of the police. [*Tarseem Kumar v. Delhi Admn.*, A 1994 SC 2585 : 1995 Cri LJ 470, 476]. Evidence of recovery based on hostile witness is not acceptable. [*Pallepu Venkati v. State of A P*, 1996 Cri LJ 1458 (AP)]. In case of robbery, recovery of a wrist watch, which was of common pattern, at the instance of the accused, the evidence regarding such recovery was an afterthought when in the FIR there was no mention that the deceased was having a wrist watch which was found missing. The wrist watch was not such a valuable commodity that the accused would keep it concealed in his house. [*Niran-*

janlal v. State of Haryana, 1995 Cri LJ 248, 253 (P&H)]. When the accused was already arrested and was not living in his house which remained open and the police searched the house twice but could not find anything incriminating, subsequent recovery of incriminating article was not inspire confidence. [*Kheraj Ram v. State of Rajasthan*, 1995 Cri LJ 3113, 3118 (Raj)]. In absence of any evidence to show that the shots fired were from the pistol recovered, and to show that the shots were matched with the test shots from the pistol seized, the recovery of the pistol was inconsequential. [*Bhani Ram v. State of Rajasthan*, 1995 Cri LJ 3165, 3168 (Raj)]. Where the accused did not furnish the information to the Investigating Officer, rather just pointed out the weapon *viz.*, the axe with which the alleged murder was committed and on that pointing out the axe was taken out, it cannot be admissible under section 27. [*Sakal Deep v. U P State*, 1993 Cri LJ 551, 555 (All)]. The fact that the accused had pointed out the person from whom the purchased knife, the weapon of offence, though nothing had been recovered from him, cannot come under section 27 but the conduct of the accused could be considered under section 8. [*Mohan v. State*, 1997 Cri LJ 22, 25, 26 (Mad)]. Document relating to the statement made by the accused must be brought on the record. [*Joge Gopal Joge & Anr. v. State*, 1994 (2) Crimes 819 (Ori)].

The court can reject the evidence of recovery of blood stained clothes and knife at the pointing out of the accused if there is no evidence to indicate that after seizure such articles were sealed and till being sent to the Chemical Examiner they were kept throughout in a sealed condition. [*Ashraf Hussain Shah v. State of Maharashtra*, 1996 Cri LJ 3147, 3148 (Bom)]. In the absence of recovery which can sustain the test of section 27 conviction under S. 20(h)(ii) of the NDPS Act, 1985 cannot be sustained. [*Pradeep Premchand Kumar Laxman Kumar v. State of Goa*, 1994 (2) Crimes 598 (Bom)].

Witnesses were necessary at the time when the discovery was being effected though the statement leading to the discovery was not made in the presence of the witnesses nor overheard by him. *State of H.P. v. Jeet Singh,* AIR 1999 SC 1293 : (1999) Cri LJ 2025.

Misuse of S 27 by the Police.—S 27 has frequently been misused by the police and courts should be vigilant about the circumvention of its provisions. The protection afforded by the wholesome provisions of ss 25 and 26 is sought to be whittled down by the police by their ingenuity in manipulating the record of the information given by the accused in the case-diary in such a manner as to make it appear that it led to the discovery of some facts although the police might have made such discovery from other sources. When a fact is once discovered from information received from another source, there can be no discovery again even if any information relating thereto is subsequently extracted from the accused. A devise sometimes adopted by the police is to stage a scene and take the accused to the place where the things discovered lay buried or hidden and require him to make a search for them at the spot indicated to the accused, or sometimes the articles are first produced before the accused and thereafter statements purporting to have been made by him about the so-called discovery are recorded. Court should be watchful that the protection afforded by ss 25 and 26 should not be dependent on the ingenuity of the police officer in composing the narrative conveying the information relating to the alleged discovery of a fact. For an instance of ingenious conversion of incriminating statements to a police officer which were hit by ss 25, 26 into one leading to the discovery of some facts from information said to have been given by the accused, see *Prabhoo v. S*, A 1963 SC 1113. It has been observed that "It has become the normal device of the investigating agency to turn an ordinary recovery into a discovery in order to utilise the provisions of s 27" [*Amin v. S*, A 1958 A 293, 300]. In invoking S. 27 the court should be very vigilant to ensure the credibility of evidence by the police because this provision is so vulnerable to abuse [*Pang Chee Meng v. Public*

Prosecutor, (1992) 1 Malayan LJ 137 (SC Malaysia)]. In an old case, JACKSON, J, commented on the prevailing tendency to disregard the provisions of s 27, perceptible in several cases and to have recourse, although not justified by facts, to the proviso in s 27 [*R v. Ramcharan*, 24 WR Cr 36]. When a corpse is discovered by the police in an open field where they went on information given by the accused there was no discovery as the result of the statement by the accused [*In re Kalu Singh*, A 1964 MP 30]. A discovery made in consequence of a confession extracted by illegitimate means is inadmissible [*Md Desa Bin Hashim v. Public Prosecutor,* (1995) 3 Malayan LJ 350 (Kuala Lumpur FC)]. The Court has to see that the information furnished by the accused person which is supposed to have led to discovery was voluntary. The mere discovery cannot lend assurance of reliability to the information. *Ramni v. State of M.P.,* 1999 (7) JT 247 : (1999) 8 SCC 649.

S 27 Qualifies Ss 24, 25 and 26. [Information, Must Come From Person in Police Custody].—S 27 is not artistically worded [*Pulukuri Kottaya v. R*, A 1947 PC 67; see also the remarks of STRIGHT, CJ, in *R v. Babulal*, 6A 509, 546 FB]. It is unsatisfactory that although an independent section, it opens with a proviso and in the order that its true scope may be understood, it is necessary to know which of the preceding sections does it qualify—s 26 only, ss 25 and 26 or all the three preceding sections (24-26) which lay down general rules excluding confession? The majority of the Full Bench in *Babulal's* Case held that s 27 is a proviso not only to s 26 but also to s 25 [*R v. Babulal*, 6 A 509—*per* MAHMOOD, J, **dissenting** that s 27 is a proviso to s 26 only and no other, LORT WILLIAMS, J, agreed with this opinion in *Legal Remem v. Bhajoo*, 34 CWN 106, 111] and KHOSLA, CJ, is of the same opinion in *Debiram v. S*, A 1962 Pu 70]. The Supreme Court has also observed that s 27 is an exception to ss 25 and 26 [*Ram Kishan v. S*, A 1955 SC 104, 115: 1955, 1 SCR 903; *Chinnaswamy v. S*, A 1962 SC 1788, 1793]. In *R v. Commer*, 12 M 183 also it was held that the proviso in s 27 is an exception to the rule in ss 25 and 26.

The question was debated in several other cases and it now appears to be well-settled that s 27 qualifies not only s 26 but cuts down the operation of ss 24 and 25 as well [*Misri v. R*, 31 A 592 FB: 6 ALJ 893; *R v. Nagachi*, 2 LBR 168; *R v. Ganu*, 56 8 172; *Bulaki v. R*, A 1928 L 476; *Jamunia v. R*, A 1936 N 200; *Neharoo v. R*, A 1937 N 220; *Amiruddin v. R*, 45 C 557 : 22 CWN 213; *Durlav v. R*, 59 C 1040: 36 CWN 37: A 1932 C 297; *Adhik v. R*, A 1942 P 156; *R v. Christian*, A 1947 P 152; *Mathura v. R*, A 1946 P 210 : 24 P 671; *Gaya Pd v. S*, A 1957 A 459]. S 27 seems therefore, to be a proviso also to s 24 in so far as the vitiated confession is confirmed by the discovery of some fact. In *Pakala Narayana v. R*, 43 CWN 473, 481 : A 1939 PC 47, LORD ATKIN while considering the effect of s 162 Cr P Code observed that s 27 seems to be intended to be a proviso to s 26, but he did not say that it is a proviso to s 26 only, nor was the question necessary for the purpose of the decision in that case; see also the remarks in this connexion in *Mathura v. R and R v. Christian, sup.* In *S v. Deoman*, A 1960 SC 1125, 1145: 1961, 1 SCR 14 HIDAYATULLAH, J, observed that s 27 "has rightly been held as an exception to ss 24-26 and not only s 26".

The object of the proviso in s 27 was to provide for the admission of evidence which but for the existence of the section could not in consequence of the preceding sections be admitted in evidence [*R v. Misri, ante*]. It would appear that under s 27, as it stands, in order to render the evidence leading to the discovery of any fact admissible, the information must come from any accused in the *custody of the police.* The requirement of police custody is productive of extremely anomalous results and may lead to the exclusion of much valuable evidence in cases where a person (who is subsequently taken into custody and becomes an accused) after committing a crime meets a police officer or voluntarily goes to him or to the thana and states the circumstances of the crime which lead to the discovery of the dead body, weapon or any other material fact, in consequence of the information thus received from him. This information which is otherwise admissible becomes inadmissible under s 27 if

the information did not come from a person in the custody of a police officer or did come from a person not in the custody of a police officer. The absurdity of the situation was thus commented upon by RANKIN, J:

> "But although it is now well held that it (s 27) is an exception to ss 24 and 25 there are elements of paradox in that condition. The first consequence is that a part of the statement may be given in evidence although it is under s 24 induced by threat or promise if some thing has been discovered in consequence of that part of the statement. The present case illustrates another matter. What was said in this case was said to the police. It was therefore, not allowed to go in evidence by s 25 and the consequence of holding that s 27 is not a mere exception to s 26 is this; that in a case like the present where the confession was made to the police, if the man was at liberty at the time he was speaking, what he said should not be admitted in evidence even though some thing was discovered as a result of it. It cannot be admitted in evidence because the man was *not* in custody, which of course is thoroughly absurd. There might be reason in saying that if a man is in custody, what he may have said cannot be admitted, but there can be none at all in saying that it is inadmissible in evidence against him because he is not in custody. Yet this is the consequence of saying that s 27 is more than a proviso to s 26. It is, however, well held by authority that, that is so; and until the Legislature takes the matter in hand, the paradox expressed in the present case will continue to be the law". [*Durlav v. R*, 36 CWN 373, 377: 59 C 1040 (**relied** on in *Bharosa v. R*, A 1941 N 86; *Mathura v. R*, *sup*].

Some solution to the difficulty above is to be found in the view taken in a few cases that a person who goes to a police officer and voluntarily states the circumstances of a crime accusing himself of committing it, submits himself to the custody of a police officer within s 46(*1*) Cr P Code [see *Legal Remem v. Lalit*, 49 C 167; *Suntokhi v. R*, 12 P 241: A 1933, P 149. (These two cases were **relied** on in *S v. Deoman*, A 1960 SC 1125); *Bharosa v. R*, A 1941 N 86; *Jalia v. R*, A 1951 L 278; *In re Ramchandran*, A 1960 M 191; *S v. Menon*, A 1959 B 534; *In re Bandi*, A 1963 AP 87; *Paramhansa v. S*, A 1964 Or 144; see *post*, p 297]. MACK, J, *in Re Mottai Thevar*, A 1952 M 586, 588 expressed the desirability of amending ss 25, 26, 27 Evidence Act and s 162 Cr P Code. Where no offence was registered against the person when he was taken to police station for interrogation, nor there was any accusation against him at the time, it was held that he was not in the custody of the police when he made the disclosure statement. Section 27 was not applicable. The recovery effected could not, for purposes of S. 27, be said to have been made in consequence of a statement. *Manoranjan Singh v. State of Delhi,* AIR 1998 SC 2811 : (1998) 3 SCC 523.

Whether S 27 Violates Art 14 of the Constitution On Account Of The Discrimination Between "Person in Custody" and "Not in Custody".— Allahabad FB held that inasmuch as s 27 creates an unjustifiable distinction between a "person in custody" and "person out of custody", it violates art 14 of the Constitution and is accordingly void [*Deoman v. S*, A 1960 A 1 : 1959 ALJ 651—*per* MUKERJI and SRIVASTAVA, JJ—CONTRA: DESAI, J]. Overruling this decision the Supreme Court by a majority held that s 27 is *intra vires* and does not contravene art 14 as the distinction between persons in custody and persons not in custody is not arbitrary or artificial. Cases of persons not in custody who give information to the police leading to the discovery of facts are of rare occurrence and so "that rule (in s 27 about the admissibility of statements of persons in custody) is not to be deemed unconstitutional because of the possibility of abnormal instances to which the Legislature might have, but has not extended the rule". With regard to person not in custody who "approaches a police officer investigating an offence and offers to give information leading to the discovery of a fact" the Supreme Court observed (agreeing with the earlier decisions like *Legal Rem v. Lalit*, 49 C 167 and *Suntokhi v. R*, A 1933 P 149 cited *ante*) that he may appropriately be deemed to have surrendered himself to the police under s 46, Cr P Code" [*Deoman v. S*, A 1960 SC 1125: 1961, 1 SCR 14].

The legal position therefore remains as inconsistent as ever in spite of the decision of the Supreme Court, *viz*, that while information given by a person in police custody leading to the discovery of a fact may be proved, such information, coming from a person not in custody is not provable though both satisfy the same test of relevancy provided in s 27, *eg*, the discovery of a fact.

Although the Supreme Court has rehabilitated s 27, the paradox in the above proposition of law to which the pointed attention of the Legislature was drawn by RANKIN, J, in so far back as 1931 (*Durlav v. R, sup*) remains unresolved and it continues to be the law.

The majority judgment of the Supreme Court has brushed aside cases of persons not in custody as "an uncommon or abnormal class of cases" and also taken the refuge of s 46 Cr P Code in order to make statements of such persons admissible, but as pointed out by SUBBA RAO, J, (in his dissenting judgment) that class of persons is not so uncommon as suggested. He cited some instances from decided cases and rightly observes that "when a statement made by an accused not in the custody of police is statutorily made inadmissible in evidence, how can it be expected that many such instances will fall within the ken of the courts. If the ban be removed for a short time, it will be realised how many such instances will be pouring in the same way".

As to the applicability of s 46 Cr P Code to the case of the statement of a person not in custody when he gives information to a police officer leading to the discovery of a fact, by deeming that person to have submitted himself to custody, so much depends on the nature and extent of the information, the circumstances under which it is given, the actual words of the statement made and various other factors, that it is hardly possible to regard the observation of the Supreme Court as a general proposition of law. Whether or not such a person can be deemed to have submitted himself to custody must depend on the particular facts and circumstances of each case.

In this connexion the historical background of s 27 may be usefully recalled. The law corresponding to s 27 was formerly contained in s 150 of the Criminal Procedure Code, 1861, which made no distinction between a person in custody or not in custody. It simply contained the words "information received from a person accused of any offence" which was wide enough to apply to persons in custody and not in custody. S 150 of the Cr P Code of 1869 also made no distinction between the two classes of persons. It made the language wider by the addition of a few more words to the original phrase by making the whole to read as follows: "information received from a person accused of any offence, *or in the custody of a police officer*". By the addition of the last eight words in the Code of 1869, there was no change in law; only it made clear that the section applied both to persons in and out of custody. Thereafter, we find that section of the Cr P Code transferred verbatim to the Evidence Act of 1872 as s 27 by dropping only the word "*or*" in the above phrase.

It is therefore perfectly clear that till the enactment of the Evidence Act, 1872, the corresponding sections in the Cr P Code of 1861 and 1869 applied equally both to persons in custody and not in custody. It is therefore manifest that the intention of the Legislature was all along to make the discovery of a fact admissible irrespective of whether the information came from a person in custody or not in custody.

That being the undoubted position, the question becomes pertinent how is it that s 27 as found in the Evidence Act, 1872, contains the phrase "information received from a person accused of any offence, in the custody of a police officer", while in the corresponding section of the Cr P Code 1869 the word "*or*" existed between the

words "accused of any offence" and "in the custody of a police officer". If the deletion of the word "*or*" by the Legislature was deliberate, it must have been done for very substantial reasons. No possible reason is however conceivable when the information coming from any person whether in custody or not in custody satisfied the same test of relevancy in s 27, *viz.* the discovery of a fact in consequence of information received from the accused. S 27 is based on the theory of confirmation by discovery of subsequent facts, *viz.* that when any material fact has been discovered in consequence of information received from the accused, so much of the information as relates distinctly to the fact discovered may be proved because this part at least of the information being confirmed by such discovery cannot have been false and may be safely accepted as true. It is worthwhile considering what may be the vital reason which prompted the Legislature to introduce this discrimination between a person in custody and a person out of custody by dropping the word "*or*" when transferring the section bodily from the Cr P Code to the Evidence Act in 1872.

DESAI, J, entertains no doubt whatsoever that the discrimination in s 27 between a person in custody and a person not in custody is accidental. He is of the firm opinion that when s 150 of the Cr P Code was bodily transferred as s 27 of the Evidence Act in 1872, the draftsman who copied s 150 accidentally omitted the word "or" with the result that the phrase "a person accused of any offence, or in the custody of a police officer" in s 150, Cr P Code reads as "a person accused of any offence, in the custody of a police officer". If "or" has been deleted deliberately, the comma just before it also should have been deleted (see **dissenting** judgment of DESAI, J, in *Deoman v. S*, A 1960 A 1).

What DESAI, J, has said is perhaps the most likely explanation of the disappearance of the word "or" from the above phrase. It is difficult to conceive of any other cogent reason for the omission of the word "or" from the original section 150 of the Cr PCode when it was bodily transferred to the Evidence Act as s 27. It did absolutely no harm; for the test of admissibility under s 27 being the discovery of a fact from the information given by the accused, it was immaterial whether the information came from a person in custody or a person not in custody. Besides we have the authority of Stephen, the framer of the Evidence Act, that s 150 was transferred "verbatim" from s 150 Cr P Code [see Stephen's Intro to the Evidence Act p 165, 1862 Ed *ante*]. It is idle to imagine that the Legislature had any animus against persons in custody and wanted to be lenient to persons not in custody. As RANKIN, J, commented: "..... which of course is thoroughly absurd. There might be reason in saying that if a man is in custody, what he may have said cannot be admitted; but there can be none at all in saying that it is inadmissible in evidence against him because he is not in custody" (see *ante*).

The accidental omission of a vital word or clause in a statute is not without precedent. With a view to make statements leading to the discovery of a fact provable against the accused, the exception enacted in s 27 of the Evidence Act had to be engrafted on s 162 of the Cr P Code of 1882, as s 162 contained a general prohibition against the use of any statement made by the accused in the course of an investigation. When the Cr P Code was re-enacted in 1898 this very necessary exception was somehow dropped. Long after it, in 1939 a conflict arose between the provisions of s 27 Evidence Act and s 162 Cr P Code on account of the decision of the Privy Council in *Pakala Narayana v. R*, 66 IA 66: 43 CWN 473, that words " any person" in s 162 Cr P Code in their ordinary meaning would include an accused person, while the majority of the High Courts had so long held that s 162 did not apply to statements made by accused persons at all. On account of the above PC

decision some courts held that s 162 Cr P Code had overridden s 27 of the Evidence Act. The Legislature had therefore to intervene to remedy the lacuna by restoring by Act 15 of 1941 the words which were omitted from s 162 of the Code of 1898, *viz*, "or to affect the provisions of s 27 of that Act". It may also be that the omission of the words "or" in s 27 went unnoticed all these years because in most cases the courts have to deal with the discovery of a fact due to information coming from a person in custody. There was also no art 14 of the Constitution before Independence and the question of discrimination between an accused in custody and not in custody did not therefore arise.

No section has perhaps raised so much controversy and doubt as s 27 and several judges have recommended the redrafting of ss 24-27. That formidable task is not likely to be undertaken in the near future as it would require a jurist of the eminence of Sir James Stephen. The validity of s 27 has no doubt been restored by the high authority of the Supreme Court, but no amount of casuistry can conceal the fact that s 27 does in fact make a discrimination between a person in custody and one out of custody. So long as s 27 is not redrafted, the better and simpler course for the Legislature would be to restore the word "or" with a comma before it, between the phrase "from a person accused of any offence" and "in the custody of a police officer" in s 27 as it existed in s 150 of the Cr P Code of 1869. It has been held in a case that one way to get rid of the inconsistency created by the words "in the custody of a police officer" would be to disregard the words altogether as superfluous and the other way is to read the words "even if" before that expression [*S v. Memon*, A 1959 B 534].

Theory of Confirmation by Subsequent Facts. [Information Leading to Discovery is Admissible Irrespective of Whether it Was or Was not Improperly or Illegally Obtained].—Disclosure statement of accused at whose instance guns are recovered from places which could not be known to others is admissible under s 27 [*Narpal v. S*, A 1977 SC 1066]. "When, in *consequence of information unduly obtained from the* prisoner, the property *stolen* or the instrument of the crime, or the body of the person murdered, or any other material fact, *has been discovered*, proof is admissible that such discovery was made conformably with the information so obtained. The prisoner's statement as to his knowledge of the place where the property or other article is to be found, being thus confirmed by the fact, is shown to be true and not to have been fabricated in consequence of any inducement. It is, therefore, competent to prove that the prisoner stated that the thing would be found by searching a particular place, and that it was accordingly so found; but it would not, in such a case of a confession improperly obtained, be competent to inquire whether he confessed that he had concealed it there [*R v. Warickshall*, 1783, 1 Lea CC 263 and other cases]. So much of the confession as relates distinctly to the facts discovered by it may be given in evidence, as this part at least of the statement cannot have been false" [*R v. Butcher*, 1798, 1 Lea 265n; Tay s 902]. The fundamental theory upon which confessions become inadmissible is that when made under certain conditions they are untrustworthy as testimonial utterances. If now a circumstance appears which indicates that the law's fear of untrustworthiness is unfounded, and counteracts the significance of the improper inducement by demonstrating that after all it exercised no sinister influence, the confession should be adopted. This is the theory of Confirmation by Subsequent Facts, which has been in vogue ever since there has been any doctrine about excluding confessions. That theory is that where, in consequence of a confession otherwise inadmissible, *search is made and facts are discovered which confirm it* in material points, the possible influence which through caution has been attributed

to the improper inducement is seen to have been nil, and the confession may be accepted without hesitation [Wig s 856].

This section relates to cases in which the statement has been improperly obtained, as by a policeman, while in custody of the police, or by illegal inducement, and is therefore not receivable. Nevertheless, so much of such statement as relates to any discovery relevant to the case made in consequence of such information, may be received though the rest is excluded. The leading case is that of *R v. Warickshall, sup.* Thus, where a prisoner has been improperly induced to state that the stolen property would be discovered in a particular place, and it is so found, what he said leading to the discovery, will be receivable against him [*R v. Butcher, sup*; *Neharoo v. R*, A 1937 N 220]. But if the search be ineffectual, the statement cannot be received [*R v. Jenkins*, 1822 R&R 492].

An accused, charged with burglary, confessed after an improper inducement by a police constable that he had thrown a lantern into a pond. The confession was not admitted, but the fact that a lantern was found there is admissible [*R v. Gould*, (1840) 9 C & P 364]. Some cases decided before the Evidence Act are no longer good law in so far as they held that statements made in consequence of improper inducement are not admissible even though such statements lead to discovery of fact (see *R v. Dhurum*, 8 WR Cr 13; *R v. Bishoo*, 9 WR Cr 16; *R v. Luchoo*, 5 NWP 86). Confession made under pressure or inducement is inadmissible under s 24. But statement leading to discovery of weapon though involuntary would be admissible under s 27 [*In re Kataru*, A 1940 M 136; *Shera v. R*, A 1943, L 5: 203 IC 602; see however *R v. Poligadu*, 1939 MWN 873: A 1940 M 12; *R v. Lakshmudu*, 1941 MWN 956: A 1942 M 237]. Information given by accused leading to discovery does not become inadmissible because the police already knew the place where the weapon could be found [*Karan v. S*, A 1973 SC 1385] or the police officer violates jail rules by interviewing accused in Jail [*In re Dhundru*, A 1943 M 315], or executive orders by questioning the accused for six hours [*Papiah v. R*, A 1940 M 136: 1939 MWN 1134: 186 IC 484]. Irregularities committed by the officer in preparing the identification memo do not ipso facto invalidate the identification of the accused unless such irregularities have a direct bearing on the identification of accused. [*Manji v. State of Rajasthan*, 1996 Cri LJ 788, 790 (Raj)].

In an article in the Law Quarterly Review (1956 Vol 72) entitled "Confirmation by Subsequent Facts", Mr A GOTLIEB has discussed the law on which s 27 is based and reviwed all relevant cases. He appears to be of the opinion that the law on the subject is in a state of confusion due to "conflicting authorities, inadequate reporting and the limited number of modern cases".

Briefly stated, the result of the cases analysed by him has been classified by Mr. GOTLIEB under five heads:—

(1) Subsequent facts are admissible but they cannot in any way be connected with the confession [*R v. Warickshall, sup*; *R v. Mosey*, 1784, 1 Leach CC 265n; *R v. Cain*, 1839, 1 C&D 36, 37 and other cases].

(2) Evidence can be given of subequent facts and that they were discovered as a result of a statement made by the accused. [This was the law interpreted by East (2 Pleas of the Crown, 1803, p 658) and accepted by many later writers].

(3) Evidence may be given of subsequent facts and so much of the confession as strictly relates to them. [This statement of existing law is found in Stephen (Dig Art 23), Phipson (9th Ed p 273), Taylor (12th Ed p 569), Cockle (Cases on Evidence, 8th Ed p 197) and more cautiously by Archbold (Pleadings &c 32nd Ed p 399)]. S 27

Evidence Act is based on the law in Leach's note in *R v. Warickshall* and *R v. Lockhart* (see *post*).

(4) Subsequent facts and the whole confession that led to their discovery are admissible. (The only case that at all suggests so wide a rule of admissibility is *R v. Garbett*, 1847, 2 C&K 474, although Wigmore and Baker following him, argue that it is the most logical and desirable view to take).

(5) Subsequent facts are not admissible. [The only case that supports this view is *R v. Barker*, 1941, 2 KB 381 (cited *ante*, under s 24), but it is clearly an unsatisfactory decision on which to base a wide exclusionary rule. First, the court did not even mention the previously decided cases which held that subsequent facts discovered through inadmissible confession are admissible. Second, the court also said that the general rule as to the admissibility of subsequent facts (whatever that may be) was still valid].

Mr. GOTLIEB, in the end, says that "on balance, evidence discovered through inadmissible confessions ought also, as a general rule, to be received" and summarises his conclusions as follows:—

> "The problem of how to treat evidence discovered through an inadmissible confession is a difficult one chiefly because of a lack of consistent approach in English law on how to treat improperly obtained confessions and evidence got through illegal searches and seizures. It is submitted that, as a general rule, evidence discovered through confessions ought to be admissible, whether or not the confession is excluded. At the same time the Judge should have a discretion* to exclude such evidence when it is obtained in particularly unfair circumstances. But it is doubtful if any part of the confession ought to be admissible, even though confirmed by the discovery of evidence made in consequence of the confession as the reasons for excluding improper confessions are complex and not based on a presumed untrustworthiness".

Cowen and Carter in "Essays on the Law of Evidence" (see Ch II) point out that the whole basis of this theory emerges from the view taken by Wigmore and others fighting under his banner "that the *exclusive* reason for the exclusion was the danger of receiving false testimony". If one gives any weight at all to the other views (see *ante* s 24) then this theory is perhaps not so justifiable. They conclude "that precisely the same consideration ought to prevail in the attitude to be adopted towards the admissibility of evidence of facts discovered as a result of improperly obtained confessions" as towards the admissibility of the confession themselves. "The temptation to resort to improper methods in the hope of obtaining a 'lead' to a profitable line of investigation may be just as strong as the temptation to do so in the hope of obtaining a direct admission of guilt. Indeed, it may be even stronger for ..... evidence of a fact subsequently discovered, which is clearly true and perhaps not known by the jury to have been discovered as a result of the use of improper methods, will tend to be very effective".

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* Such a discretion has been well-established as the result of a broad view taken in some recent English cases. In *Harris v. DPP*, 1952 AC 694, 707 which deals with the admissibility of evidence of similar facts, it was held that though such evidence is strictly admissible, the judge has a discretion to exclude it, if its prejudicial effect on the accused is out of proportion to its probative value. See also *Noor Md v. Ram* 1949 AC 182, 191-92; *Kuruma v. R*, 1955 AC 197, 203: *R v. Cook*, 1959 2 All ER 97; *R v. Flynn*, 1961, 3 All ER 58. In *Selvey v DPP*, 1968, 2 All ER 497, a case under s 1(f)(ii) of Criminal Evidence Act 1898 after a review of the authorities the House of Lords has reiterated this view.

Does the Discovery of a Fact on Information Obtained From an Accused Non-voluntarily Affect its Admissibility by Reason of Art 20 (3) Constitution?—A question arose whether the discovery of the body of the victim at the instance of the accused who was made to confess to the Police by third degree methods is hit by art 20(*3*) of the Constitution; but its consideration became unnecessary on account of the finding that the evidence of discovery of the body from the information given by the accused was worthless [*Dhoom v. S*, A 1957 A 197]. The same question arose in a later case and although on the facts the court found that the discovery of the articles of the deceased was in consequence of information voluntarily given by the accused, it held that if such information had been received as the result of pressure on the accused, the fact discovered would have been hit by art 20(*3*) as being evidence against himself obtained by compulsion [*In re Madugula*, A 1957 AP 611]. The observation is purely *obiter* as after the finding that the information was given voluntarily, it was not necessary for the purpose of the decision. There is a similar *obiter* in *S v. Basanta*, A 1959 Or 33. In a few other cases it has been held that discovery of a fact on information from an accused obtained by third degree methods violates Art 20(3) [see *Amin v. S*, A 1958 A 293; *Radhakishin v. S*, A 1960 Pu 294; *Amrut v. S*, A 1960 B 488].

The question may arise again and it is worth while discussing the soundness of the views in the above decisions. All things considered, it would seem that the discovery of a material fact (*eg* the body of the deceased, or some ornament which the deceased was wearing, or a blood-stained weapon, or a blood-stained cloth worn by the deceased or the accused, or the stolen articles of the deceased &c, &c) in consequence of any information from the accused obtained non-voluntarily or by improper inducement does not come within the mischief of art 20(*3*) for the following reasons among others:—

(*i*) The principle upon which s 27 is founded is that the discovery of a fact in consequence of an information received from the accused may be proved even though it may have been improperly or non-voluntarily obtained under ss 24-26, such as by inducement, threat, promise &c. The reason is that assuming that the confession or the statement was obtained by improper means which made it inadmissible, that part of it which relates distinctly to the fact discovered cannot be false for it is confirmed or guaranteed by the discovery or some material fact perceptible by the senses. If the discovery of such a fact due to information non-voluntarily obtained from an accused is to be regarded as equivalent to "compelled testimony" by an accused within art 20(*3*) (though mere discovery of a fact may not be relevant against him; see *post* p 310), it would be taking out the bottom of s 27 and its retention in the Act would be useless.

(*ii*) The English common law rules that no accused shall be compelled to incriminate himself has its counterpart in art 20(*3*) of the Constitution. That rule was also adopted in the Fifth Amendment of American Constitution. S 27 is also identical with the existing law in England and it is also the law which prevails in most States in America. When, therefore, the discovery of any fact in consequence of information in an inadmissible confession (induced by threat, promise or hope) is held admissible by the English courts, it is not easy to see why the same rule of admissibility will not apply to such discovery of fact here, when the law in s 27 is the same in both countries.

The English law on the point has been thus stated: "Even if a confession is inadmissible in evidence, yet facts the knowledge of which has been obtained by means of such an inadmissible confession may be proved on behalf of the pro-

secution [*R v. Warickshall, post*; *R v. Griffin*, 1809 Russ & Ry 151 and other cases]. If a prisoner makes a statement describing where articles connected with a crime are to be found and the articles are found in consequence of the statement, the finding of the articles may be proved, although the statement itself may be inadmissible" [*R v. Lockhart, post*; *R v. Gould*, cited *ante*; Hals 3rd Ed Vol 10; para 871, p 476].

S 27 was lifted bodily from the law stated in Leach's note in *R v. Warickshall*, 1783, 1 Leach CC 263, 265 (4th Ed 1815) and *R v. Lockhart*, 1785, 1 Leach CC 386: 168 ER 295, where it is said:—

> "But it should seem that so much of the confession as relates strictly to the fact discovered by it may be given in evidence, for the reason of rejecting extorted confession is the apprehension that the prisoner may have been thereby induced to say what is false; but the fact discovered shows that so much of the confession as immediately related to it is true".

The words "*relates distinctly*" in s 27 were adopted from Taylor, s 902 (see *ante*).

In *R v. Warickshall, sup* the accused made a confession which was inadmissible as it was induced by promise of favour. But in consequence of the information in the confession, the goods stolen were found concealed between the sackings of her bed. The discovery of the articles was held to be admissible, though the confession had to be excluded. NARES, J, (present BARON EYRE) said [1 Leach, CC pp 263-64]:

"Confessions are received in evidence or rejected as inadmissible under a consideration whether they are or are not entitled to credit ..... This principle respecting confessions has no application whatever as to admission or rejection of *facts*, whether the knowledge of them be obtained in consequence of an extorted confession, or whether it arises from any other source; for *a fact*, if it exists at all, must exist invariably in the same manner, whether the confession from which it is derived be in other respects true or false. Facts thus obtained, however, must be fully and satisfactorily proved, without calling in the aid of any part of the confession from which they may have been derived".

Two years later (in 1785) was decided *R v. Lockhart, sup* where the prisoner was accused of stealing jewels. He confessed to the theft and said that he gave the jewels to one *G*. The confession being improperly obtained was not admitted, but it was held that *G* could depose that he got the jewels from the prisoner. The principle is that when in consequence of any information improperly or non-voluntarily obtained from an accused, there is a discovery of some material fact, *eg* the property stolen, or the body of the person murdered, the fact discovered is admissible though not the inadmissible confession (see also *R v. Gould, sup*; *R v. Butcher sup*; *Neharu v. R*, A 1937 N 220; Tay s 902.

Confession caused by inducement, threat or promise is inadmissible under s 24. But when any information in such confession leads to a discovery of facts which confirm it in material particulars, the discovery cannot be held to be false. S 27 is based on the theory of confirmation by subsequent discovery of facts [*Bhagirath v. S*, A 1959 MP 17].

(*iii*) The observation of SUBBA RAO, CJ, *In re Madugula*, A 1957 AP 611, 616 *sup* that the fact discovered as the result of a non-voluntary information "must be excluded from evidence for otherwise in effect the accused would be compelled to be a witness against himself", does not, it is submitted with respect, show a correct appreciation of the core of the matter. The mere discovery of a fact as a result of information by the accused (given voluntarily or non-voluntarily) does not of itself

make it relevant evidence, far less evidence against the accused. It is not even relevant under s 27. To make it admissible it must further be shown by other legal evidence that the articles discovered were in some way connected with the offence charged and the guilt of the accused (see *Ram Pd v. R*, A 1949 N 277; *In re Ravipudi*, A 1948 M 261; *In re Periyaswami*, A 1950 M 714; *Sainambu v. S*, A 1953 M 564; *Md Jamsher v. S*, 1956 B 186 and cases cited *post "Mere Discovery of Fact is not Relevant"*). The discovery of the fact being itself no evidence against the accused, it can in no sense be called "compelled testimony" within Art 20(*3*). S 27 does not also make the fact discovered relevant. It merely says that "it may be proved", which of course means that if other legal evidence is forthcoming connecting the accused with the fact discovered and his complicity in the crime, it may then be proved. The position was made sufficiently clear by SIR JOHN BEAUMOUNT in the follwing passage in *Pulukuri Kottaya v. R*, A 1947 PC 67, 71]:

> "The difficulty, however great, of proving that a fact discovered on information supplied by the accused is relevant fact can afford no justification for reading into s 27 something which is not there, and admitting in evidence a confession barred by s 26. Excepting cases in which the possession, or concealment of an object constitutes the gist of the offence charged, it can seldom happen that information relating to the discovery of a fact forms the foundation of the prosecution case. It is only one link in the chain of proof, and the other links must be forged in manner allowed by law".

(*iv*) It should be remembered that s 27 is an exception not only to ss 25 and 26 [*Ramkishan v. S*, A 1955 SC 104: 1955, 1 SCR 903] but also to s 24 (see *ante*, *"S 27 qualifies ss 24, 25, and 26"*) and also the judgment of HIDAYATULLAH J, in *S v. Deoman*, A 1960 SC 1125, 1145. There, information leading to discovery of a fact in any confession or statement although non-voluntary, is provable, if the other conditions in s 27 are satisfied.

It should be observed in this connexion that under the plain words of s 27 so much of the information given by an accused person whether voluntarily or non-voluntarily, (as s 27 is a proviso not only to ss 25 and 26 but also to s 24) leading to the discovery of a fact may be proved irrespective of whether it is incriminatory or not. The crucial point is that only that portion of the information which relates strictly to the discovery of a fact is admissible and the rest is to be discarded. If, therefore, the information relating to the discovery of a fact is obtained non-voluntarily, what is banned by the section is not discovery of the fact itself but so much of the confession or statement accompanying the information which is of a confessional nature. The discovery of a dead body or the clothes worn by the deceased or a weapon as the result of some information given by the accused, whether voluntarily or under pressure, considered by itself is not self-incriminatory at all. The articles discovered will be relevant only if they are further proved by other evidence to have been used in the commission of the offence charged [*Pulukuri Kottaya v. R*, A 1947 PC 67 *sup*]. The reason for rejecting a confession or a self-incriminatory statement to the police obtained by compulsion is that the accused may have been induced to say what is false, but the discovery of a fact as the result of the information even though obtained improperly is quite another thing and what is made relevant under s 27 is the fact of discovery itself and nothing more.

As to art 20(*3*) Constitution *vis-a-vis* s 27, the Supreme Court observed that: "If the self-incriminatory information has been given by an accused person without any threat, that will be admissible in evidence and that will not be hit by the provisions of cl (*3*) of art 20 of the Constitution for the reason that there has been no compulsion.

It must therefore be held that the provisions of s 27 are not within the prohibition aforesaid unless compulsion has been used in obtaining the (self-incriminatory) information" [*S v. Kathi Kalu*, A 1961 SC 1808, 1815-16 : 1962, 3 SCR 10]. The basic theory of relevancy in s 27 is the discovery of a fact in consequence of information received from the accused whether obtained voluntarily or non-voluntarily and this of course is quite different from any "self-incriminatory information" by the accused whether given voluntarily or under compulsion. *Kathi Kalu's* case (*sup*), therefore, does not touch the question of discovery of a fact as the result of any information from the accused obtained, whether voluntarily or non-voluntarily. It merely decides that a "self-incriminatory information" compulsorily obtained from an accused in custody comes within the prohibition in art 20(*3*). That must necessarily be so, as any statement obtained from an accused under compulsion must affect its voluntary nature. A self-incriminatory statement of a confessional nature obtained by compulsion, threat or inducement is, of course, also hit by the provisions of s 24.

Voluntariness of statement.—Disclosure statement cannot be said to be voluntary if the prosecution fails to explain injuries found on the person of the accused. [*Bhagat Bahadur v. State*, 1996 Cri LJ 2201, 2207 (Del)]. Where the recoveries allegedly made pursuant to the disclosure statements of the accused found to be involuntary in character and the prosecution never made any effort to produce any evidence to establish that the recovered wearing apparel was stained with the blood of the deceased or that it belonged to the blood group of the deceased, despite the fact that various clothes profusely stained with blood of the deceased, had been taken into possession during investigation and no attempt had been made to get them compared through the serologist, the accused was entitled to benefit of doubt. [*Chuni Lal v. State of H P*, 1995 Cri LJ 1393, 1400 (HP)]. Where at the time of pointing out the accused was handcuffed it cannot be said that the recovery was voluntary, and not result of duress, threat or pressure by the police authorities. [*D.D. Suvarna v. State of Maharashtra*, 1994 Cri LJ 3602, 3616 (Bom)].

Delay.—unexplained delay of 5 days in making discoveries renders the evidence of discovery weak. [*Ahmad v. State of Maharashtra*, 1994 Cri LJ 274, 278 (Bom)]. Extra-judicial confession leading to discovery of incriminating articles made by the accused after 12 days of the incident before village Administrative Officer who was not best friend of the accused is not reliable. Position of a village Administrative Officer is not different from a police officer. [*Annamalai v. State*, 1996 Cri LJ 535, 539 (Mad)]. Prolonged police custody immediately preceding the making of the disclosure statement makes it doubtful [*State of H.P. v. Raj Kumar*, 1994 Cri LJ 894, 900 (HP)].

Limitations of the Section.—S 27 has prescribed two limitations for determining how much of the information received from the accused is provable against him: (*1*) The information must be such as has caused discovery of the fact, *ie* the fact must be the consequence, and the information the cause of its discovery. (2) The information must 'relate *distinctly*' to the fact discovered. Both the conditions must be satisfied. The word 'relate' means 'to have reference to' or 'to connect'; and the word "distinctly" means clearly, unmistakably, decidedly or indubitably. Only that portion of the information is provable which was the immediate or the proximate cause of the discovery of the fact. Anything, which is not connected with the fact as its cause, or is connected with it, not as its immediate or direct cause, but as its remote cause, does not come within the ambit of the section [*Sukhan v. R*, 10 L 283: A 1929 L 344 FB]. In order to bring an information by the accused within s 27, the information must have had the direct effect of leading to the discovery of the stolen property [*In*

re Ramaswami, 54 IC 479: 11 LW 81]. The fact discovered must be *relevant* to the case in which the evidence is sought to be given. Thus *G* charged with the murdering of *C* by poison stated to the police officer that he administered to the deceased a drug and that he had applied the same drug to a sore on the leg of *H*. The police officer went to *H* and he produced some arsenic as the drug given by the accused—*Held* that the evidence is inadmissible [*Gokul v. R*, P 611 : A 1928 P 22]. S 27 has nothing to do with the question as to whether the fact is or is not relevant and that question must be determined with reference to the other provisions of the Evidence Act [*Sukhan v. R, sup*].

[*Ref Tay ss 902-03; Phip 8th Ed p 225; Steph Dig Art 22; Russell on Crimes, 7th Ed 2196-99; Joy on Confession, 81-88; Wig ss 856-59; Hals 3rd Ed Vol 10 Para 871*].

Requirements for the Application of the Section.—The conditions necessary for the application of s 27 are:—

(*1*) The fact of which evidence is sought to be given must be *relevant* to the issue. (S 27 has nothing to do with question of relevancy. The relevancy of the fact disovered must be established according to the rules relating to relevancy of other evidence connecting it with the crime in order to make the fact discovered admissible).

(2) (*a*) The fact must have been *discovered*—(*b*) discovered in *consequence of some information* received from the accused (and not by the accused's own act).

(*3*) The person giving the information must be *accused* of any offence.

(*4*) He must be in the *custody* of a police officer [see *ante & post*].

(*5*) The discovery of a fact in consequence of information received from an accused in custody *must be deposed to*.

(*6*) And thereupon that portion only of the information which *relates distinctly (or strictly)* to the fact discovered can be proved. The rest is inadmissible. See *Md Inayatullah v. S*, A 1976 SC 483]. For the applicability of sec 27 two conditions are pre-requisite namely (1) the information must be such as has caused discovery of the fact; and (2) the information must 'relate distinctly' to the fact discovered [*Earabhadnappa v. State of Karnataka*, A 1983 SC 446, 449: 1983 Cri LJ 846 (SC)].

Gist of Law in S 27.—The law in—s 27 as expounded and applied in various authoritative decisions may be summarised thus:—

(*1*) S 27 is not only a proviso to s 26 but cuts down the operation of ss 24 and 25 as well (see *ante*). So, although a confession by accused caused by inducement, threat or promise &c, or a confession to the police or when in police custody is inadmissible, the ban imposed by the above sections is lifted if his statement contains any information leading to the discovery of a fact (*eg*, the property stolen, the weapon of crime, the body of the deceased, &c from some place of concealment. Such discovery of a fact is admissible even though the information was obtained non-voluntarily (see *ante*).

(2) *"Fact"* in s 27 means some material or concrete fact capable of being perceived by the senses and not any psychological or mental fact (see next heading).

(*3*) The condition necessary to bring s 27 into operation is that (*a*) discovery of a fact in consequence of some information received from a person accused of any offence and (*b*) in custody of a police officer must be deposed to.

(*4*) And thereupon only that part of the statement (*ie*, "so much of the information") as relates distinctly or directly to such discovery becomes admissible. The rest must be totally excluded (*post, "Extent of Information Admissible"*).

[It is to be noted that mere discovery of fact by reason of information from accused is not relevant unless it is further shown by other evidence that the article discovered is in some way connected with the offence charged and the accused (*see post*).

(*5*) When a discovery is made in consequence of information received from more than one person care should be taken to ascertain who among them first made the statement leading to discovery, as for the purpose of admissibility it is essential to establish that fact. (*i*) The statement made by the individual is admissible and it is evidence against him only. (*ii*) When it is found that the statement was made by several persons simultaneously (a rare case), it is admissible against all. (*iii*) When it cannot be determined clearly and satisfactorily who first made the crucial statement, it is no discovery within the section and the joint information or joint production is not admissible against any one (see *post*). The fact discovered should not then be regarded as having been "discovered" from the joint statement of all the accused.

(*6*) A fact previously discovered by the police from other sources cannot be regarded as discovered when the same information is received again from the accused with the object of making his statement admissible (see *post*). Any statement in order to be admissible must be made before and not after the discovery (see *post*).

"Fact".—Fact as defined in s 3 includes both physical and psychological facts (*ante*, s 3). But it appears that the discovery of 'any fact' referred to in this section does not include mental or psychological fact, *eg*, knowledge, *ie*, the mental act of becoming aware of something or intention. The word 'fact' is used in the sense of physical or material fact which can be perceived by the senses and the discovery of such facts alone can eliminate the fear of the confession being induced by improper inducement and confirm the truth of the information received from the accused. The word 'fact' does not refer to mental fact [*Sukhan v. R*, 10 L 283; FB: A 1929 L 344] and means some concrete or material fact to which the information directly relates [*R v. Ganu*, 56 B 172: A 1932 B 286; *Kartar v. S*, A 1952 VP 42]. In Taylor s 902, of which s 27 is a paraphrase, the words "*material fact*" have been used.

In Madras only the opinion is divided. In a case the majority of a Special Bench held that the discovery of a witness to the crime or an act of the accused furnishing evidence, in consequence of information given by the accused, is discovery of fact [*R v. Ramanuja*, 58 M 642 : A 1935 M 528, *per* CORNISH and BURN, JJ—CONTRA : LAKSHMANARAO, J, that fact means a concrete or material fact]. The majority opinion has been adopted in some cases [*Ramamurthy v. R*, A 1941 M 290: 1940, MWN 163; *Rami Reddi, v. R*, A 1941, M 238; *Pub Pros v. India &c*, A 1954 M 433; *In re Hanumantha Rao*, A 1957 M 456 (*per* KRISHNA RAO, J]; but the contrary view has been taken in other cases [*Ramasami v. R*, A 1920 M 109; *Palaniandi v. R*, A 1934 MWN 601; *In re Hanumantha Rao*, A 1957 M 456 (*per* UMAMAHESWARAM, J].

The view in *R v. Ramanuja, supra*, does not fit in with the reason of the rule in s 27 for the admissibility of a confessional statement to the police which is otherwise inadmissible, *viz*, confirmation of truth by subsequent discovery of fact. Discovery of a material or concrete fact capable of physical perception can alone prove conclusively that the information in consequence of which the discovery was made is true and not fabricated. Although the question was not specifically raised or discussed, the later Privy Council case of *Pulukuri Kottaya v. R*, A 1947 PC 67

(which **approved** the above cited decisions in *R v. Sukhan* and *R v. Ganu sup*), appears to have impliedly confirmed the view taken in those that 'fact' refers to material or concrete fact, when SIR JOHN BEAUMONT observed:—

> "..... normally the section is brought into operation when a person in police custody produces from some place of concealment some *object*, such as a dead body, a weapon or ornaments, said to be connected with the crime of which the informant is accused".

—"Fact Discovered".—Much of the difficulty felt in grasping the real import of the section should disappear if the meaning of the expression "fact discovered" is correctly understood. In *Pulukuri Kottaya v. R*, 74 IA 65: A 1947 PC 67, 70: 51 CWN 474, SIR JOHN BEAUMONT observed:—

> "It is fallacious to treat the "fact discovered" within the section as equivalent to the object produced: the fact discovered embraces the place from which the object is produced, and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added "with which I stabbed *A*", these words are inadmissible since they do not relate to the discovery of the knife in the house of informant". [**Relied** on in *Udaibhan v. S*, A 1962 SC 1116; *Prabhoo v. S*, A 1963 SC 1113; *Md Inayatullah v. S*, A 1976 SC 483; see also *post; "Discovered"*].

It would appear from the above statement of law that s 27 comes into operation when some material object is produced from somewhere in consequence of some information given by the accused: but the fact discovered includes not merely the object found but also the place where it lay and the accused's knowledge as to the place. The knowledge of the accused as to the place indicates that the discovery was due to the information received from him *ie*, he is the informant as contemplated in the section. It seems to have no reference to any other mental or psychological fact. In other words, the fact discovered must be such that the proof of its existence does not depend on the credibility of the accused or any other person, but is confirmed by the production of the object itself which can be perceived by the senses. That alone is the reason for the reception of the statement even if it be contained in a confession, for the discovery of the material object proves conclusively that that portion of the statement at least cannot be false.

There was theft in the shop where the accused was working as an employee. He tried to run away on seeing the police. The police recovered the stolen property from a house on his pointing out the house. This was held to be an incriminating evidence against him and he could not escape from its consequences by saying that the house belonged to his brother-in-law and not to him [*Pentapati Veerababu v. State of AP*, 1998 Cri LJ 2505 (AP)].

Information to be admissible must be related to the fact discovered as 'cause and effect' [*HP Admn v. Om Prakash*, A 1972 SC 975]. It is fallacious to treat the 'fact discovered' as equivalent to the object produced. The fact discovered embraces the

place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctively to this fact. [*Pulukuri Kottaya v. Emp.*, A 1947 PC 67; *Manjeet Singh v. State*, 1996 AIHC 2390, 2391 (Del)]. In the absence of any disclosure statement recovery of weapon itself becomes meaningless *M S Sheshappa v. State of Karnataka*, 1994 Cri LJ 3372, 3381 (Kant), see also *Bhimappa Jinappa v. State of Karnataka*, A 1993 SC 1469 : 1993 Cri LJ. 1801. Statement regarding a fact which was not in exclusive knowledge of the accused and was self evident to the police is not admissible. [*Vijay Kumar v. State* 1996 Cri LJ 2429, 2435 (Del)].

"Accused of Any offence".—These words also occur in art 20(*3*) of the Constitution (see notes to s 24 *ante* and s 25 *ante*). To attract the section an essential requirement is that the informant must be a person accused of an offence [*Babulal v. R*, 6 A 509, 531 FB; *In re Ramaiah*, A 1956 AP 56; *Debiram v. S*, A 1962 Pu 70]. It was held in some cases that a statement of a person who went to the police station that "I went to the west facing room and finding my wife sitting, wounded her and she became senseless" which led to the discovery of the corpse was held to be inadmissible on the ground that as the informant had not up to that time been accused of any offence, he was not an 'accused' [*Deonandan v. R*, 7 P 411: A 1928 P 491; *Jalla v. R*, A 1931 L 272; *Chetu v. R*, A 1948 L 69]. Disagreeing, it has been held in Bombay that "accused" in ss 24 and 27 must be interpreted in the same manner. It does not mean that a person must be an accused when he gives the information, but would include a person if he subsequently became an accused when his statement is sought to be used against him [*S v. Menon*, A 1959 B 354]. The Supreme Court has also held that "accused person" in s 24 and "a person accused of an offence" in ss 25 and 27 have the same connotation. The expression is descriptive of the person concerned against whom evidence relating to information given by him is sought to be proved against him in a criminal proceeding [*S v. Deoman*, A 1960 SC 1125 : 1961, 1 SCR 14]. Where a person was neither named in FIR nor had he been named by any witness nor any property had been recovered from his possession, the statement given before police by a co-accused involving himself as well as implicating that person in the crime cannot be proved in the court. It will be conflicting with sections 25 and 26. It such evidence or confession of the co-accused cannot be proved then the occasion for utilising that statement against another person does not arise. [*Anant Kumar v. State of MP*, 1993 Cri LJ 1499, 1500 (MP)].

The term "accused of an offence" cannot be narrowly construed. The accusation may come from any source and in any manner and even from the offender himself. It is not that a person cannot be the accused unless his name is in the FIR. Such a person who is arrested by the police during investigation is an accused person within s 27 [*In re Srinivasulu*, A 1958 AP 37]. Oral accusation is not necessary. The moment suspicion attaches to a person or where any evidence points to his guilt and he is taken in custody and interrogated on that basis, he becomes a person accused of an offence. It is immaterial that his name was not mentioned in the FIR [*Amin v. S*, A 1958 A 293]. Recovery of articles at the instance of persons who are not accused is of no avail [*Trilochan Joshi v. Union of India*, 1983 Cri LJ NOC 109 (Del): (1983) 1 Crimes 1025].

"Custody of a Police Officer".—'Custody' has the same meaning in ss 26 and 27 (see *ante*, s 26: "*What constitutes custody and its effect*"). "Custody" as contemplated under S. 27 does not mean formal custody but includes such state of affairs in which the accused can be said to be in the hands of the Police Officer, even under some surveillance [*Bibhachha Baitharu v. State of Orissa*, 1998 Cri LJ 1553 (Ori)]. It has

been seen that in order to render the statement admissible under s 27 the informant must be in the custody of a police officer (*ante*). So, where shortly after a crime two persons (who subsequently became accused) went to a constable and handed over two weapons, their statement to the police is not admissible as s 27, has no application to a confessional statement to a police officer before the person concerned has come into custody [*In re Peria Guruswami*, A 1941 M 765: 1942 Mad 77; see also *Durlav v. R*, 36 CWN 374]. It has however been held by a Full Bench in Patna that when a person voluntarily goes to a police officer and states the circumstances of a crime accusing himself of committing it, he submits himself to the custody of a police officer within the meaning of s 46(*1*) Cr P Code and is therefore in the custody of a police officer within s 27 Evidence Act [*Suntokhi v. R*, 12 P 241: A 1933 P 149; **relied** on in *Bharosa v. R*, A 1941 N 86; *In re Man Singh*, A 1959 MP 267; see also *Jalla v. R*, A 1931 L 278: 131 IC 93. This view was also taken in an earlier Calcutta case [*Legal Remem v. Lalit*, 49 C 169]. *Suntokhi v. R*, and *Legal Rem v. Lalit, sup* were **relied** on in *S v. Deoman*, A 1961 SC 1125: 1961, 1 SCR 14.

Where after arrest the police officers interviewed the accused and were with him for a considerable time and walked with him to the place where the accused pointed out the place where cocaine might be found, it is custody [*Sudam v. R*, A 1933 C 148]. Interrogation by the police and leading them to a place producing certain articles are submission to police custody [*Bakshia v. S*, A 1960 B 263]. Since it may be that after being interrogated for a number of days, the accused had blurted out that he would tell where he had concealed the axe, such information cannot be dubbed as doubtful [*Baldev Singh v. The State*, 1982 Cri LJ 1087, 1092 : 1982 Kash LJ 194 (J&K)]. Immediately after arrest, the accused was admitted as in-patient in the hospital and thereafter he was in judicial custody. The next day after police custody was given the recovery was made. So the recovery evidence cannot be discarded merely because the recovery was made 36 days after the arrest [*State of Maharashtra v. Vithal Pandurang Bhagat*, 1985 Cri LJ 664, 676 (Bom) (DB)]. Merely because the investigating officers might have interrogated or questioned the accused, a number of times, during the course of investigation, that would not render the statement made by the accused involuntary or a statement extracted from the accused by mentally torturing him [*Jodha Khoda Rabari v. State of Gujarat*, 1992 Cri LJ 3298, 3369 (Guj)].

Whether an accused is in custody or not is a question of fact [*Hakam v. R*, 1940 Lah 242]. 'Custody' does not mean formal custody but includes any sort of surveillance or restriction or restraint by the police [*Maharani v. R*, A 1948 A 7; *Chhotey v. R*, A 1954 A 687; *Aishan v. R*, 15 L 310]. An accused not formally arrested when giving information, but arrested prior to his going to the spot where articles were hid, is to be deemed in police custody [*Jamunia v. R*, A 1936 N 200]. It follows from decided cases that (*1*) custody need not be formal arrest; (2) in the case of mere suspects not formally charged with any offence or arrested under any section of the Cr P Code, their presence with the police under some restraint amounts to custody [*Allah Ditta v. R*, 1937 Lah 106: A 1937 L 620]. It has been further held that although s 27 is restricted to persons in custody of police, it also applies to persons in actual police custody although that custody had been ordered by the magistrate [*Ram Babu v. R*, A 1938 P 60: 18 PLT 964]. Since the police custody obtained after the expiry of 15 days is illegal, the recovery of any articles in pursuance to any statement made during such custody has no value [*Kanuppaswami v. State*, 1989 Mad LW (Cri) 100: 1989 Cri LJ NOC 217 (Mad) (DB)]. A person while in custody for breach of trust in regard to a cycle, confessed that he had sold another cycle to another person and as a result of it, that cycle was

discovered. The confession is not admissible under s 27 because the accused was under arrest not in connexion with the theft of the cycle which was discovered [*In re Kamakshi*, A 1943 M 89: 1943 Mad 456]. Although according to the Police Inspector on accused's arrest he had given a confession pursuant to which the crime articles were recovered, but considering the fact that the accused was detained in the police station for one week prior to his alleged date of arrest, no significance could be attached to the alleged confession and recovery since it could not be said that any fact was discovered in consequence of information received from him as contemplated under section 27. [*Rajendran v. State*, 1993 (3) Crimes 974, 982 (Mad)].

"Whether it Amounts to a Confession or Not" [Application of the Section: How Much of Confessional Statement is Admissible].—The section is difficult of application and this is evidence by the numerous inharmonious decisions bearing upon its interpretation. It would appear that courts have on many occasions been led to admit all statements made by the accused whenever there was some discovery of facts. But the limitations laid down in this section (*ante*, "*Limitations of the Section*") should always be borne in mind and the conditions preparatory to admission must be examined with scrutiny before ruling in favour of wholesale admission.

Discovery of facts, however important and significant, does not render admissible all that the prisoner said in connexion with the discovery. The information received from him may have set the police in motion and led to the discovery of some facts. In one sense the sum total of the information is the cause of the discovery. But the wording of the section ("*so much* of such information ..... as *relates distinctly* to the fact thereby discovered") puts us on our guard and indicates clearly that the information has got to be dissected. The irrelevant portion must be excluded. The relevant portion even is not admissible in its entirety, for the ground of admission under the section is not relevancy. The information should be split up—that part of the information which leads *distinctly* or *immediately* to the discovery of facts and that part of it which does not in itself lead to any discovery. The former only is admissible under the section, the reason being that the finding or discovery of facts having confirmed the prisoner's statements relative to those facts, that portion at least of the statement cannot have been false. As to the rest, it is strictly excluded as coming within ss 25, 26 which discard with the utmost rigour statements of a self-incriminatory or confessional nature made to the police. Vigilance in this matter is most important so that the wholesome provisions in ss 25 and 26 are not whittled down in any way. In *Bhika v. R*, A 1943 B 458, BEAUMONT CJ, observed:

> "This court has pointed out over and over again that a statement that the accused has committed a murder does not fall within s 27 because it is a statement not required to lead up to the production of the property. It is quite enough to say that he would show the property belonging to the deceased". (See also the observations of the same Judge in *Pulukuri Kottaya v. R, (ante)* while sitting in the Judicial Committee).

As pointed out in a case, the protection given to the accused should not be dependent on the ingenuity of the police officer or the folly of the prisoner in composing the sentence which conveys the information [*Sonaram v. R*, 10 P 153; *Phulna v. R*, A 1935 N 46]. For instance, if a prisoner says to the police that he throttled the child, removed the bangles from its person, buried it at a certain place and then sold the bangles to *A*; and the dead body and the bangles are thereby discovered, the police officer can only depose that the dead body is lying at a certain place and that he had sold the bangles to *A*,—the rest is inadmissible. This is the

restricted interpretation of the section which has been adopted in many cases holding that s 27 must be strictly construed [*Sukhan v. R*, 10 L 283 FB; A 1929 L 344; *Amiruddin v. R*, 45 C 557; *Legal Rem v. Lalit*, 49 C 167; *Legal Rem v. Bhajoo*, 34 CWN 106; *Abdul Kader v. R*, 50 CWN 88; *Satish v. R*, 1944 2 Cal 76: A 1945 C 137: *Ganu v. R*, 56 B 172; *Bhika v. R*, A 1943 B 458; *R v. Salve*, A 1934 B 233; *Namdeo v. R*, A 1944 B 331; *R v. Pancham*, 4 A 198, 204; *R v. Babulal*, 6 A 509, 544 FB] and which has now been declared to be correct by the Privy Council in *Pulukuri Kottaya v. R, ante*. In some cases a wider interpretation was put favouring the admission of the statements wholesale (*In re Athapa Goundan*, 1937 Mad 695 FB: A 1937 M 618 and cases *post*), but they have been superseded.

The phrase "whether it amounts to a confession or not" is in one sense unhappy and is liable to be misunderstood as it may seem to favour the idea of a wider interpretation and it may be logically argued that it also includes a confession involving direct acknowledgment of guilt or any self-incriminating statement suggesting participation in the crime. The object of the section, the ground upon which proof is admissible of the discovery of a fact in consequence of information obtained from the accused (see *ante* p 290), the previous history of the rule, the use to which it has been put during this long period both here and in England, and the safeguard provided in ss 25, 26, preclude the idea that the Legislature ever intended to admit statement to the police containing an actual confession of crime. This lax interpretation would at once nullify the wholesome provision in ss 25 and 26 and render them nugatory. It would offer a strong temptation to the police to drag in statements of a confessional nature along with the information leading to the discovery of a fact.

The expression "*whether it amounts to a confession or not*" appears to mean no more than this that if in the course of a confession to the police acknowledging guilt for the crime, any information is given which *distinctly* relates to the discovery of a fact and that fact is actually discovered by search made in consequence of the information, that portion only of the information which resulted in such discovery may be deposed to even though the sum total of the statement made amounts to a confession which is wholly excluded by one or other of the preceding sections. (See the observations of BHAGWATI, J, since made in *Ram Kishan v. S*, A 1955 SC 104, 116: 1955, 1 SCR 903, which are to the same effect). For, statements made along with the information given regarding the discovery of a fact, may in many cases being in its train self-incriminatory facts which amount to a confession or lead to an inference of guilt. Statements other than those that relate distinctly to the discovery of a fact must be rigorously excluded. This seems to be the correct and rational view of the section. It also appears to be the view prevailling in England and America (*post*, next heading) where no part of the inadmissible confession due to inducement, threat or promise is received, but only the fact of discovery in consequence of the accused's information.

In a recent case the Supreme Court observed: "S 27 allows that part of a statement made by the accused to the police 'whether it amounts to a confession or not' which relates distinctly to the fact thereby discovered to be proved. Thus, even a confessional statement before the police which relates to the discovery of a fact may be proved under s 27" [*Chinnaswamy v. S*, A 1962 SC 1788, 1793]. When statement of the accused leads to recovery of the weapon, whether the information furnished by the accused amounts to confession or not is immaterial [*Kunjan Nadar v. State*, 1990 Cri LJ NOC 6 (Ker) : 1989 Ker LT 806]. Torn away from its context and the special facts of the case in hand, it is submitted with great respect that the rule in s 27 appears to have been formulated in very wide terms and is liable to be misconstrued.

What may be proved under s 27 is not the inadmissible confession to the police or any part of it which is hit by ss 25 and 26, but only so much of the information as relates "distinctly", *ie*, positively or undeniably to the fact actually discovered. Admission of the confessional statement to the police would at once nullify the safeguards provided in ss 25 and 26. As pointed out by WEST, J:

> "The words in s 27 of the Evidence Act 'whether it amounts to a confession or not' are to be read as qualifying the word '*information*' in the immediately preceding context, not the words 'so much'; and the effect is that although ordinarily a confession of an accused while in custody would be wholly excluded, yet, if in the course of such a confession, information leading to the discovery of a relevant fact has been given, so much of the information as distinctly led to this result may be deposed to though as a whole the statement would constitute a confession which the preceding sections are intended to exclude" [*R v. Jora Hasji*, 11 Bom HC 520].

What, therefore, may be proved under s 27 is not the statement of the accused amounting to a confession of guilt or any other statement of a like nature but only that part of the information (*ie*, 'so much of it') as relates distinctly to the discovery of a particular fact. As WEST, J, says in another case "a confession of murder made to a police constable is not at all confirmed by the prisoner's saying 'that is the place where I killed the deceased'" [*R v. Rama Birapa*, 3 B 12, 17], or when a man says "you will find a stick at such and such a place, I killed Rama with it". A policeman in such a case may be allowed to say, he went to the place indicated and found the stick, but any statement as to the confession of murder would be inadmissible [*R v. Jora Hasji*, 11 BHCR 242]. As illustrated by SIR JOHN BEAUMONT: "Information supplied by a person in custody that 'I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge..... But if to the statement the words be added 'with which I stabbed A', these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant" [*Pulukuri Kottaya v. R*, A 1947 PC 67, 70]. If when giving information the accused makes a compound statement, the judge should divide the sentence into what are its component parts and only admit the part which has led to the discovery of the particular fact [*R v. Ganu*, 56 B 172: A 1932 B 186 (**apprd** in *Pulukuri Kottaya v. R, sup*)]. To revert to the Supreme Court case cited above, it was actually decided there that, where in a burglary case the accused in custody makes a statement that he would point out the place "where he had hidden them (the ornaments)" and it led to the discovery of the stolen ornaments the whole of the statement including "where he had hidden them" are admissible [*Chinnaswamy v. S*, A 1926 SC 1788]. The word "hidden" is on a par with the word 'concealed' in the illustration in [*Pulukuri Kottaya v. R, sup*]. Composite disclosure statement relating to all the weapons used for the commission of the crime cannot be said to be a confession which can be admitted under section 27. [*Gopalakrishnan v. State*, 1996 Cri LJ 2438, 2441, (Ker)].

S 27 does not operate to make admissible a confession which would be otherwise irrelevant under s 24. It would make admissible only that part of the confession in consequence of which a fact deposed to was discovered [*Hashmat v. R*, A 1934 L 417]. By s 27 information even if it amounted to a confession and was made to a police officer under any circumstances could be proved as against the accused, or rather so much of it could be proved as related distinctly to the fact thereby discovered [*R v. Misri*, 31 M 592, 598 FB: 6 ALJ 839].

Wigmore, the great American author on Evidence says : "The confession, *ie.*, the expressed avowal of the accused's acts, was entirely excluded; and only this much effect was given indirectly to the underlying principle, namely, it could be shown that certain facts had been discovered by a search made in *consequence of a statement made* for "something said" or "information given" by the accused. No principle appears to have been offered to justify or to explain this distinction; but it became the settled law of England, and was followed without question in some of our own jurisdictions" [Wig s 858]. The words "*relates distinctly*" have been adopted in the section from Taylor s 902 (*v ante*) of which s 27 is merely a paraphrase. Phipson uses the words "*strictly relates*" (8th Ed p 255) which are also found in Leach's Crown Law (see Leach's notes in *R v. Warickshall* and *R v. Lockhart*, quoted *ante*).

If anything, the word "distinctly" is a stronger term than "strictly" (see *post* "*Distinctly*"). It has been pointed out by LORD-WILLIAMS J, in a case that the practice in England now is and doubtless was at the time of the passing of the Evidence Act to adopt the stricter interpretation above. He further pointed out that s 27 cannot be construed according to its natural meaning and "if their natural meaning were given to the words of the section regardless of their parentage and history, I am satisfied that the result would be contrary to the intention of the legislature. It would be so wide as to render s 26 practically useless" [*Legal Rem v. Bhajoo*, 34 CWN 106, 111: A 1930 C 291].

The crucial question appears to be not what has set the police in motion or led to the discovery of facts, but *how much of the information was the direct or the immediate cause of the discovery*. If the other statement of a confessional nature be so intermixed with the information leading to the discovery of facts that they cannot be separated, it is apprehended that the whole statement should be excluded. The later decision of the Judicial Committee in *Pulukuri Kottaya v. R*, (*ante*) in 1947 pronouncing against the wider interpretation adopted in several earlier cases has resulted in the fulfilment of the prediction made in the former editions of the work that the stricter interpretation would in course of time be adopted in all jurisdictions in this country.

Inculpatory parts of the statement before the police are also admissible provided only that they distinctly relate to the facts discovered. *State of H.P. v. Jeet Singh,* AIR 1999 SC 1293 : 1999 Cri LJ 2025.

Admission But Not Confession Leading to Discovery of Facts.—If the statement (leading to discovery of facts) does not amount to a confession, the prohibitions in ss 25 and 26 do not apply to it and it can be proved as an admission without recourse to s 27 [*Deoman v. S*, A 1960 A 1 FB; **superseded** in *S v. Deoman*, A 1960 SC 1125: 1961, 1 SCR 14 on the point that s 27 does not contravene art 14 of Constitution]. See *ante* notes to s 25.

"Information".—The word 'information' includes statements which fall short of confession as well as statements which amount to confession [*R v. Babulal*, 6 A 509, 537 FB *per* MAHMOOD J]. 'Information' cannot be used as synonymous with 'statement.' Information as distinct from 'statement' connotes two things, *viz* a statement or other means employed for imparting knowledge possessed by one person to another, and the knowledge so derived by the other person [*Karam v. R*, A 1929 L 338]. In his dissenting judgment in *Sukhan v. R, sup* FORD J, observed that "throughout all the authorities dealing with s 27, the words 'statement' is used interchangeable with the word 'information'. Mere pointing out of complainant's house is neither an information nor a statement [*Dhaman v. R*, A 1937 s 251; see *R v. Hira Gober*, A 1919 B 162]. The information leading to discovery must come from the accused and nobody else. Where information comes from accused's brother though the actual excavation is done by the accused, anything said in the matter by the accused is not admissible [*In re Addanki*, A 1939 M 266]. The information must be the accused's own statement in his

own language [*Naresh v. R*, 46, CWN 180]. Where two persons are charged of murder and the information given by one leading to the discovery of the murder weapon is capable of two interpretations, *i.e.* (*i*) he was the person who concealed the weapon, or (*ii*) that he had knowledge of the place where it was hidden, the accused could not be convicted on the basis of such information [*Pohalya v. S*, A 1979 SC 1949]. When the statement of the accused can be interpreted in two ways, one that he had knowledge where the weapon was hidden, and two, he had hidden the weapon, the interpretation which is favourable to the accused has to be adopted [*Jogen Fangso v. State of Assam*, 1981 Cri LJ NOC 226 (Gau)].

Where the I.O. had not stated as to what were the information given by the accused it was laid down that the statement of accused leading to alleged recovery of stolen articles cannot take the place of substantive evidence. *N. Rajendra Prasad Bhat v. State of Karnataka*, 1996 Cri LJ 257, 262 (Karn); In *Vijayakumar v. State*, ILR 1994 Kant 491, it was held:

> "Section 27 says that so much of the information that distinctly leads to the discovery of a fact alone is admissible in evidence and it is exception to sections 25 and 26 of the Evidence Act. Therefore so much of the information as leads to discovery of a fact must be proved like any other fact and recording in the deposition or the prosecution leading evidence of an investigating officer that he recorded a particular statement as per certain record made by him and exhibited cannot take place of substantive evidence."

The court further observed: "It may also sometimes happen that even if a witness states what exactly was recorded in his own words, the Sessions Judge may find it a short cut to take down only as stated as per certain exhibits without taking down what exactly was the information given by the accused which could fall under section 27 of the Evidence Act. Such a practice is wholly deprecable". The above case was **followed** in *M. Abbas v. State of Karnataka*, 1996 Cri LJ 317.

Articles delivered by another house owner on the information provided by the accused were held to be discovered at the instance of the accused. *Prasad Ramakant Khade v. State of Maharashtra,* 1999 (8) JT 302 : (1999) 8 SCC 493.

"Confession".—[See *ante* s 24]. Confession in s 27, does not necessarily mean a complete confession of guilt but includes any incriminating statement [*Kuram v. R*, A 1929 L 338].

"Relates to".—means ordinarily "is connected with" or "have reference to" [*Legal Rem v. Bhajoo, sup*].

"Distinctly".—means "directly, indubitably, strictly, unmistakably". The phrase "distinctly" relates "to the fact thereby discovered" and is the linchpin of the provision [*Md Inayatullah v. S*, A 1976 SC 483]. It means clearly, unmistakably, decidedly or indubitably [*Sukhan v. R, supra*]. 'Distinctly' is used in some sense other than 'directly'. The word 'distinctly' is meant to exclude certain things and to limit and confine the information which may be proved within definite limits and not necessarily to include everything which may relate to that information [*Karam v. R, sup*]. "Distinctly" means "clearly" or "definitely" or "positively" or "undeniably" or "undoubtedly" [Oxford Dictionary, refd to in *Legal Rem v. Bhajoo, sup*].

"Thereby".—The word 'thereby' in "fact thereby discovered" refers to that portion of the information only which may be held to be the proximate cause of the discovery [*per* PAL J, *Naresh v. R*, 46 CWN 180]. The reasonable construction is that in addition to the fact discovered, so much of the information as was the immediate cause of its discovery is legal evidence [*R v. Commer*, 12 M 153].

"Discovered".—"Fact discovered" is not equivalent to the object produced, it embraces the place from which the object is produced and the knowledge of the accused as to this (*ante*: *"Fact Discovered"*; *Pulukuri Kottaya v. R*, A 1947 PC 67, 70: 74 LA 65: 51 CWN 474; **reld** on in *Udaibhan v. S*, A 1962 SC 1116; *Prabhoo v. S*, A 1963 SC 1113; *Md Inayatullah v. S*, A 1976 SC 483"). The word 'discovered' is used in a peculiar sense. Thus when a man confesses to the police that he murdered another person, the fact that he murdered is not discovered by the statement. The test is that the fact discovered must be discovered in the sense, that the proof of the existence of that fact no longer rests on the credibility of the accused's statements but rests on the credibility of the witnesses who depose to the existence of that fact. The fact discovered must be such as the police had not previously discovered from other sources. The discovery must be in the sense that the knowledge of the existence of the fact was first of all derived from the information given by the accused [*Karam v. R, sup*]. Katarana is recovered from accused under seizure memo in which it is recited that accused made the statement that he would show the katarana with which he assaulted the deceased. The first part in the seizure memo would be inadmissible because the fact that accused assaulted deceased is not discovered in pursuance of the information given. It would be a confessional statement to police hit by s 25 [*Babboo v. S*, A 1979 SC 1042]. If a fact is previously discovered by the police, s 27 does not apply [*Chiraghdin v. R*, A 1934 L 786]. This is so even if the accused is the first person to inform the police [*Harnarain v. R*, A 1934 L 313]. A statement leading to the discovery of facts recorded after the discovery was made, apparently by getting the accused to repeat the information which he had given at an earlier stage and had been acted upon is inadmissible [*In re Krishna*, A 1935 M 479]. Accused told police the name and whereabouts of person to whom he handed over stolen articles. As police already knew that the person had the articles there was no discovery of any fact deposed to by the accused and hence not admissible [*Jaffer Hussain v. S*, A 1970 SC 1934]. The opinion in an earlier case that a statement by the accused to the police after the discovery was already made as to the place where the stolen property was concealed is admissible [*Janki v. R*, 11 CLJ 182] does not appear to be good law; see also *Satish v. R*, A 1945 C 137.

Two guns said to have been used in dacoity and taken on loan by two accused were, on information given by the accused, recovered from persons who were both licence holders—*held* that there was no discovery within this section [*Bala v. R*, A 1933 N 252]. See *post* : *"What is or is not Discovery of Fact"*.

—Discovery Must be in Consequence of Information From Accused. [Statement After Discovery Inadmissible].—Although it is not necessary that the informant himself should personally discover the property, but the discovery must be due to the information given by him. Thus, where after an accused who gave information that his co-accused had buried the spear at a certain place failed to find it out, and his co-accused produced it, the discovery was not due to the information given by the accused and his statement is inadmissible. It comes within s 26 [*In re Nandivada*, A 1940 M 744: 1940 1 MLJ 758]. Where articles are first produced and then confessional statements are made, the statements do not lead to discovery and are inadmissible [*Nuri Santa v. R*, A 1945 P 161 (*R v. Jora Hasji*, 11 BHCR 242 **appld**); see also *R v. Kamal Fakir*, 17 WR Cr 50]. So where an accused after production of an axe from a place said that it was the weapon with which the deceased was killed, the statement being made after discovery is inadmissible [*R v. Christian*, A 1947 P 152].

Discovery not on account of any information from accused but as a result of search by Customs Officer is not relevant merely because—the accused signed the

documents acknowledging recovery [*Barkat Ram v. S*, A 1959 Pu 287]. If the investigating officer is bound to see and take possession of some articles in the normal course of investigation, such recovery cannot be turned into discovery in order to use s 27 against the accused [*Amin v. S*, A 1958 A 293]. The information must be the cause of the discovery and not the basis of confirmation of an already known fact [*Public Prosecutor v. Basri Bin Salihin*, (1994) 2 Malayan LJ 476 (Kuala Lumpur HC)]. The information must relate to a fact which was not otherwise known to the police [*Public Prosecutor v. Basri Bin Salihin*, (1994) 2 Malayan LJ 476 (Kuala Lumpur HC)].

An information received from the accused which has led to discovery does not cease to be the information causing the discovery simply because such discovery was facilitated by other assistance as well. When a fact is once discovered in consequence of information received from some source, any further information subsequently received from any other source cannot be said to be the information whereby the fact is discovered. The mere plurality of information received before discovery shall not necessarily take any of these informations out of the section. In suitable cases it is possible to ascribe to more than one accused the information which leads to the discovery [*Naresh v. R*, 46 CWN 180]. Once a fact is discovered from other sources there can be no fresh discovery even if relevant information is extracted from the accused and court has to be watchful that the protection of ss 25 and 26 is not whittled down [*Thimma v. S*, 1970, 2 SCC 105: A 1971 SC 1871]. After the first statement of accused leading to discovery, a second statement by him is inadmissible [*Chetu v. R*, A 1948 L 69]. The accused made an extra-judicial confession to the person who lodged the F.I.R. that he had buried the dead body in a particular place and that fact was also mentioned in the F.I.R. The subsequent confession to the police about the burying the dead body at a particular place is not admissible since that fact had already been mentioned in the F.I.R. [*Inder Dass v. State of Rajasthan*, 1985 Cri LJ 1416, 1422 (Raj) (DB)]. When the Investigating officer admitted that after recording the statment from a witness to whom the accused had made an extra-judicial confession, he knew that the bodies were buried in the field but he felt that information was not sufficient, it cannot be said that the place from where the bodies were recovered was such a place about which knowledge could be attributed to the accused and none else [*Makhan Singh v. State of Punjab*, A 1988 SC 1705, 1708].

Discovery of property in open place accessible to the public on information given by an accused and his pointing it out unaccompanied by any explanation, would lead to the presumption that he had secreted it [*In re Murugan*, A 1958 M 451]. What is not covered cannot be discovered. The weapon kept in an open place in the corner of a house which did not belong to the accused cannot be the subject matter of discocovery [*Sadashiv Bajarang Sutar v. State of Maharashtra*, 1982 Cri LJ 2056, 2059 : 1981 Bom Cr 484 (Bom)]. When the place from where the weapon of the offence was recovered is accessible to one and sundry, the recovery could not connect the accused with the crime [*Abdul Haque Ali v. State of MP*, 1983 Cri LJ NOC 122 (MP) : 1982 Jab LJ 744] In a case recovery is said to have been made more than 3 weeks after the occurrence. It was admitted that the place from where the two things are said to have been recovered was a public place and appeared to have been very much accessible to people of the locality. Under such circumstances, it is difficult to believe that these two things had been so concealed that they were not noticed and were available to be collected from the very place such a long time after [*Abdul Sattar v. Union Territory Chandigarh*, A 1986 SC 1438, 1439 : (1986) Cri LJ 1072]. Accused took out the dagger concealed in bushes in a public park. The statement of the accused regarding the concealment has to be accepted [*Dhani v.*

State, 1990 Cri LJ (NOC) 53 (Del); *Mathew Abbin v. State of Kerala*, 1991 Cri LJ NOC 16 (Ker)]. Evidence of recovery of the pistol at the instance of the accused cannot by itself prove that he who pointed out the weapon wielded it in offence. The statement accompanying the discovery is woefully vague to identify the authorship of concealment, with the result that the pointing out of the weapon may at best prove the accused's knowledge as to where the weapon was kept [*Dudh Nath Pandey v. State of UP*, A 1981 SC 911, 915 : 1981 Cri LJ 618; *Khagendra Gohan v. The State*, 1982 Cri LJ 487, 491 : (1981) Cut LR (Cri) 286 (Ori); *Mayachar Sha v. State*, 1987 Cri LJ 1948, 1950 (Ori) (DB) : (1986) 62 Cut LT 40]. When the knife and shirt were not sent for forensic examination to find out if it contained any stain of blood their recovery proves nothing [*Subhas Debnath v. State*, 1985 Cri LJ 1373, 1375 (Cal) (DB)]. The actual discovery need not be by the accused himself. It can be by the police officer or any third person at the direction of the police officer [*Dasan v. State of Kerala*, 1987 Cri LJ 180, 188 : 1986 Ker LT 598 (Ker) (DB)]. Since match boxes are commonly kept by people and easily available the evidence regarding the recovery of match-box from the accused does not inspire confidence [*Gopal Krishnan v. State of Himachal Pradesh*, 1990 Cri LJ (NOC) 143 (HP)]. When the same person who is related to the deceased, claims to have been present at the time of recovery on two different dates, his evidence has to be discarded [*Ram Singh v. State of Punjab*, 1992 Cri LJ 805, 809 (P&H). Recovery from a house not in the exclusive possession of the accused, especially when the accused did not point out the place where the watch was kept and when the brother of the accused produced the watch, the evidence regarding the recovery cannot be accepted [*Khalak Singh v. State of M.P.*, 1992 Cri LJ 1150, 1156 (MP)].

See *ante*: "*Discovered*" and *post*: "*What is or is not Discovery of Fact*".

—Discovery After Information From One and Like Information From Others. [Joint Discovery or Discovery After Joint or Simultaneous Information].—When a fact is discovered in consequence of information received from one of several persons charged with an offence, and when others give like information, the fact should not be treated as discovered from the information of them all. It should be deposed that a particular fact has been discovered from the information of *AB* and this will let in under s 27, only as much of the information as relates distinctly to the fact thereby discovered [*R v. Ramcharan*, 24 WR Cr 36; *R v. Shivputraya*, A 1930 B 244; *R v. Beshya*, 2 Bom LR 1089. In *R v. Ramcharan, sup*, JACKSON J, commented upon a prevailing tendency to disregard the provisions of s 27, perceptible in several cases, and to have recourse, although not justified by facts, to the proviso contained in s 27 of the Act]. **Following** *R v. Ramcharan*, it has been held that in such case the fact should be treated as discovered from the information of the first [*Adam Khan v. R*, 101 IC 488: A 1927 L 739; see also *Ram Singh v. R*, 34 IC 993: 7 PR 1916; *Budha v. R*, 64 IC 502: A 1922 L 315; *Rangiah v. R*, 1932 MWN 113; *Durlav v. R*, 36 CWN 373; *Poshaki v. S*, A 1953 A 526; *In re Kattameedi*, A 1940 M 710]. The section must be very strictly construed. Where one of several accused agreed to point out a place where a fact would be discovered, the section does not cover similar statements of the other accused [*Kudaon v. R*, A 1925 N 497 : 91 IC 236].

When all the accused jointly pointed out the place of blood-stain and there was a discovery, it is not admissible unless it can be shown who made the discovery first [*Faquira v. R*, A 1929 L 665: 30 PLR 397]. S 27 ought to be construed strictly. The use of the singular "a person" is significant. It was used designedly because the joint statement of a number of persons cannot be said to be an information received from any particular one of them. Facts discovered in consequence of joint information cannot be used as against any one of them [*Puttu v. R*, A 1945 O 235; *Oudh Ram v.*

The State, 1982 Cri LJ 1656, 1664 (Del); *Kanura Vanadi Changaiah v. State of AP*, 1985 Cri LJ 1822, 1823: (1985) 1 ANLT 325 (AP) (DB)—CONTRA: 'A person' cannot mean that information should be by a single person [*Nathu v. S*, A 1958 A 467].

Where all the accused went together with the police and took out the property from the place where it was buried at one and the same time, but there was no evidence that they or any of them said before where it was buried, it was no discovery within s 27 [*Dito v. R*, A 1931 S 154: see *Peria Guruswami v. R*, A 1941 M 765; *Karuppa v. S*, A 1960 K 238]. On a joint trial of four accused, before an accused can be convicted on the basis of a confession made by them, there must be evidence that it was the particular accused who made the crucial statement or that he was responsible for the discovery of the relevant facts [*R v. Shk Mahboob*, A 1942 M 532(1)]. In a suitable case it is possible to ascribe to more than one accused the information which leads to the discovery [*Rangiah v. R*, 1932 MWN 113; *Naresh v. R, sup*].

In the case of discovery after joint information, the statement made by the first individual may be treated as evidence against him only, but it is not allowable to use in evidence the statements of the other persons. The fact discovered should not be treated as having been discovered from the joint information of all the prisoners [*Durlav v. R*, 59 C 1040].

In the case of joint production, where joint acts are sought to be proved, evidence should be given with some degree of particularity in order to enable the court to draw the necessary information from the conduct of each one of the persons concerned [*Rafiq-ud-din v. R*, 39 CWN 368: 62 C 572]. As long ago as 1884, STRAIGHT J, strongly emphasised that the strictest precision should be enjoined on the witness and it is the right of each accused to have the witness required to depose to the exact words he alone used (*post*, "*Mode of recording statements &c*"). The importance of this principle was reiterated in *Durlav v. R*, and *R v. Rafiq-ud-din, sup*. There may be difficulties in deciding in all cases which particular accused first made the statement leading to the discovery, but for the purpose of admissibility it is essential to establish the fact. Where there is evidence that the statement was made first by one person, it is admissible against him alone: when there is evidence that the statement was made by several persons simultaneously, then the information is admissible against all; unless such satisfactory and clear evidence of the one or the other is forthcoming on the point, the information would not be admissible against any one [*Abdul Kader v. R*, 50 CWN 88: A 1946 C 452: *Gurubaru v. R*, A 1949 Or 67; *R v. Shk Mahboob*, A 1942 M 532]. **Disagreeing** from most of the cases cited above, a Patna case has held that statements by two or more accused made one after the other leading to discovery are admissible [*Moti Lal v. S*, A 1959 P 54].

Simultaneous statements are not *per se* inadmissible if discovery is made in consequence thereof [*Chhote Lal v. S*, A 1955 N 71: 1955 Nag 169; *Ranchhod v. S*, 1956 MB 104: A 1956 MB 262]. Two or three persons may simultaneously or jointly furnish information to a common discovery. When there is discovery on the information given by several persons jointly, the mere fact that their statements appeared in the case diary in a certain order is no guarantee that they were made in that order [*Nathu v. S*, A 1958 A 467].

It would appear from the above cases that judicial opinion is not agreed on the point. The question as to what should be the rule of admissibility when statements relating to discovery are made by several accused simultaneously or otherwise, arose but it was left undecided by the Supreme Court with the *obiter* that some of the

decided cases (that it is only the information which is first given that is admissible and once a fact is thus discovered, it cannot be rediscovered from information given by another accused) have perhaps gone further than is warranted by s 27, as in the instant case the court was satisfied that "the initial pointing out" was done by a particular accused [*Lachhman v. S*, A 1952 SC 167: 1952, 2 MLJ 100]. So the conflict of opinion remains unsettled in spite of the *obiter* of the Supreme Court.

The police should not mix up individual statements by two persons into one composite statement, it being impossible to say how much of the statement was made by one of them and how much was made by the other [*In re Peria Guruswami*, A 1941 M 765: 1942 Mad 77].

Re-Discovery.—It was held in a case that when the police already knew from prosecution witnesses where accused had hidden the deceased's jewels and on subsequent information given by the accused discovered them, the discovery was due to the information given by the accused as the knowledge of the witnesses was derived from the accused [*In re Chundre*, A 1943 M 315]. There must be a recovery in pursuance to the information furnished by the accused and that information should not have been previously known to the police [*Joy Job v. C.I. of Police*, 1990 Cri LJ (NOC) 124 (Ker)]. But the other view is that a fact already known to the police cannot be re-discovered on the statement of an accused so as to make such incriminating conduct as the pointing out of a place admissible [*Wahid v. R*, A 1929 S 250; see *Dasu Ram v. S*, A 1952 Raj 20; *In re Gundia*, A 1959 AP 387]. Incriminating admission to the police in the description of places are not admissible as places already known cannot be said to have been "discovered" [*Shamlal v. R*, A 1929 N 350]. The Supreme Court has now held that discovery of hidden incriminating articles said to have been recovered by the accused is inadmissible if the police already knew where they were hidden [*Aher Raja v. S*, A 1956 SC 217: 1955, 2 SCR 1285; see *Nathu v. S*, A 1958 A 467]. Section 27 cannot be used to re-discover a discovered fact [*Sukhvinder Singh & Ors. v. State of Punjab*, 1994 (2) Crimes 904 (SC)]. The disclosure statement is inadmissible in evidence of the police was possessed of the information before the statement of the accused was recorded. [*State of HP v. Raj Kumar*, 1994 Cri LJ 894, 900 (HP)]. Where the place of occurrence was already known to the police before recording of the disclosure statement, the pointing out of the place of occurrence by the accused and the memo prepared in that respect was not admissible in evidence. [*Sunil Kohar v. State of Bihar*, 1992 Cri LJ 3674, 3680 (Pat)]. Where the accused was taken into custody only after he pointed out the weapon, the recovery of such weapon does not attract section 27 [*Romua v. State of UP*, 1992 Cri LJ 3972, 3976 (All)].

Where in consequence of an information received from an accused, the police discovered the stolen property from the place in which it was concealed, that fact would not justify the police to replace the property in the place whence it was discovered, and to ask the other accused to produce the property, because under this section, there could be no further discovery as against the other accused persons [*R v. Beshya*, 2 Bom LR 1089; see *Noor Md v. S*, A 1959 K 46]. If a police officer knowing beforehand what the accused will say calls witnesses for corroboration of the accused's statement, the discovery was not in consequence of the statement made by accused and the statement is inadmissible. The procedure was a farce [*Pub Pros v. Bheemanipati*, A 1939 M 15: 180 IC 590].

Statements Accompanying Discovery are Also Admissible as Conduct.—Where arms are dug out on information given by the accused and at such time various conversations take place between the accused and the police they are

admissible as proof of conduct under s 8 [*Kalijeeban v. R*, 63 C 1053; *Jamunia v. R*, A 1936 N 200; *R v. Rafiq-ud-din*, 62 C 572]. The discovery statement made by the accused is relevant under both the sections 8 and 27. [*Ghuraiyaa Alias Rohini Baiswar v. State of MP*, 1990 Cri LJ 1129 (MP)] See *ante*, s 8.

Admissibility of Discovery of Fact Apart From S 27.—S 27 allows proof of such part of the information as relates distinctly to the fact discovered. If the police officer wants to prove the information, the court would have to consider whether it relates distinctly to the fact discovered. If he does not want to prove the information, s 27 does not come into operation. Thus, when the police officer stated that in consequence of certain information given by accused No. 1 he took him and accused No. 2 to Itawa and leaving accused No. 2 there the party proceeded to Bhagwasi with accused No. 1 and that the accused No. 1 pointed out there Baliram who at the instance of accused No. 1 dug out from the mud floor of a house a box containing revolvers, the evidence is admissible against accused No. 1 without attracting the operation of s 27. The police officer did not seek to prove the information which he got from accused No. 1 [*Ram Kishan v. S*, A 1955 SC 104: 1955, 1 SCR 903: 1955 Cri LJ 196].

Admissibility of Statement of One Accused Under S 27 Against Other Accused.—The whole of the statement admissible under s 27 against one accused when it is the immediate cause of the discovery of some relevant fact could be taken into consideration against the other accused as in s 30 [*R v. Sankappa Rai*, 31 M 127 : 18 MLJ 66; *In re Athappa Goundan*, 1937 Mad 695: A 1937 M 618; see also *Shivabai v. R*, 50 B 683; *R v. Periyaswami*, 54 M 75]. A statement by an approver to the police at the time of the arrest giving the names of other persons who had joined in the offence can be used against the latter only under s 27. The use is merely this, that when direct evidence is given against the accused at the trial, it is open to the defence to check such evidence asking whether the name of a particular person was mentioned or not at the time. It becomes evidence to test the consistency of the approver's story and it is information which leads to the discovery of the accused, but it is no evidence of the guilt of the accused [*Subedar v. R*, 77 IC 890: A 1924 A 207; see though *Salam v. R*, 43 IC 111 where it has been held that the discovery of a person who is afterwards proved to be a dacoit is not the discovery of a fact within s 27]. Where as the result of information given by the accused another co-accused is found by the police, the statement by the accused as to the whereabouts of the co-accused is admissible under s 27 as against the co-accused [*Ismail v. R*, A 1946 s 43].

Statement made by one accused involving another accused cannot be admitted when they do not in any way relate to the facts discovered thereby [*Abdul Basha v. R*, A 1941 M 316: 1940 Mad 1028]. In Calcutta it has been held that statements admissible under s 27 can be used only against the maker and not the other accused [*Satish v. R*, A 1945 C 137]. Even if it be held to be admissible, its evidentiary value is very low [*Narayan v. R*, A 1947 N 57].

When a dagger is recovered in pursuance of confession of accused No. 2, it is not admissible against No. 1 even if the accused's ownership of the dagger is taken to be established [*S v. Kunnummal*, A 1963 K 54; *Kansa Behera v. State of Orissa*, A 1987 SC 1507, 1510 : 1987 Cri LJ 1857; *Mahendra Mandal v. State of Bihar*, 1991 Cri LJ 1030, 1036 (Pat)].

Mode of Recording Statements Leading to Discovery Alleged to Have Been Made by Accused to the Police.—[In *R v. Babulal*, 6 A 509, p 549 FB, STRAIGHT, J, said:—

> "I have more than once pointed out that it is not a proper course, where two persons are being tried, to allow a witness to state "they said this" or "they said that" or 'the prisoner then said'. It is certainly not likely that both the persons should speak at once, and it is the right of each of them to have the witness required to depose as clearly as possible to the exact words he individually used.....The strictest precision should be enjoined on the witness, so that there may be no room for mistake or misunderstanding."

The point was again stressed in *Durlav v. R*, 59 C 1040; *R v. Rafiq-ud-din*, 62 C 572 and *Poshaki v. S*, A 1953 A 526. The point emphasised by STRAIGHT J, is very important as unless precaution is taken to see that the witness when deposing says clearly what words were actually used by each accused individually for himself, it would be difficult to determine with any degree of certainty which particular accused first made the crucial statement leading to discovery and thereby affect the admissibility of the statement (see *ante*). The exact information given by the accused while in custody which led to the recovery of the articles has to be proved. If the information is not recorded, the exact information must be adduced through evidence [*Baldev Khes v. State of Orissa*, 1992 Cri LJ 2059, 2061 (Ori)]. In the absence of recording of the exact words and any corroboration available from the independent sources as regards the information given, the solitary statement of the investigating officer would be risky to be relied upon to exclusively form the basis of conviction [*Banifas Samad v. State*, 1992 Cri LJ 2271, 2275 (Ori)]. If evidence otherwise confessional in character is admissible under sec 27 it is obligatory upon the Investigating Officer to state and record who gave the information; when he is dealing with more than one accused, what words were used by him so that a recovery pursuant to the information received may be connected to the person giving the information so as to provide incriminating evidence against the persons [*Mohd Abdul Hajeez v. State of Andh Pra*, A 1983 SC 367, 369 : 1983 Cri LJ 689; *Phusu Kairi v. State of Assam*, 1986 Cri LJ 1057, 1069 (Gauh) (DB); *State of Kerala v. Ammini*, A 1988 Ker 1, 12 (FB)]. The absence of signatures or thumb impression of an accused on the disclosure statement recorded under section 27 detracts materially from the authenticity and the reliability of the disclosure statement. *Jackaran Singh v. State of Punjab*, A 1995 SC 2345, 2347. Failure to join independent witness at the time of recovery renders the recovery suspicious. *Satish Kumar v. State*, 1996 Cri LJ 265, 270 (Del). At the time of interrogating the accused and for making the recoveries a sincere effort must be made by the I.O. to join independent public witness. Failure to join independent witness renders the recovery suspicious. *Satish Kumar v. State*, 1996 CrLJ 265, 270 (Del). Exact information furnished by the accused while in police custody which led to the recovery must be proved. *Joge Gopal Joge & Anr. v. State*, 1994 (2) Crimes 819 (Ori).

When the alleged statement by the accused was not recorded, the mere fact that the accused was taken to the place of occurrence where the dead body was lying is not enough to bring the case within sec. 27 [*Ramlal Lohar v. State of Assam*, 1981 Cri LJ 1734, 1735 (Gau); *Bejoy Mondal v. State of West Bengal*, 1984 Cri LJ 518, 520 (Cal) (DB)]. Statements made by accused to police officers which are or may be provable under s 27 should be clearly and carefully recorded. They should be recorded in the first person, that is to say, as far as possible in the actual words of the accused. They should not be paraphrased [*In re Athappa Goundan*, 1937 Mad 695: A 1937 M 618; *In re Ramamurthy*, A 1941 M 290; *Naresh v. R*, 46 CWN 180: 1942, 1 Cal 436; *Pub Pros v. Pasala*, A 1945 M 202; *Pub Pro v. Venkoba*, 1937 MWN 73; *Chenna v. R*, A 1940 M 710; *Gaya Pd v. S*, A 1957 A 459; *Nathu v. S*, A 1958 A 467]. No judge should allow one word more to be deposed to by the police than is

absolutely necessary to show how the fact discovered is connected with the accused [*R v. Babulal, sup*; *R v. Adu Shikdar*, 11 C 635, 641]. The accused made a statement to a police officer who got it repeated before *panchayetdars*, and an incomplete record was made of what the police officer thought would be admissible. It is the first statement to whomsoever made leading to discovery of fact that is admissible. The police, if they desire to record a statement must record it as given without mutilation leaving it to the court to decide what evidence is admissible [*Chenna v. R*, 1940 Mad 254: A 1940 M 710]. Practice of the police recording wholesale confession running to several pages incorporating most incriminating statements against a co-accused and getting it attested by witnesses, condemned [*S v. Md*, A 1963 K 54; *S v. Karunakaran*, 1960, 2 Ker LR 247]. The practice of police officers giving evidence of statements not made to them in the first instance was also condemned in *Pub Pros v. Subba*, 1938 MWN 1118: A 1939 M 15.

Confession to Police Attested by Persons.—A confession recorded by the police which led to the discovery of stolen articles although attested by persons present, satisfies s 27. Such a statement is an exception to s 162 Cr P Code [*Pub Pros v. Garla*, A 1943 M 710; see however *S v. Md* and *S v. Karunakaran, sup*]. The practice of the police in Madras is to have a *panchayatnama* reducing in writing the information given by the accused and attested by witnesses. It is not substantive evidence, but can be used for corroborating or contradicting or refreshing the memory of the persons who participated in it [*Pub Pro v. India &c*, A 1954 M 433; *Seetharama v. R*, A 1939 M 766]. Where recoveries of weapons at the instance of the accused were attested by police officers and independent witnesses but only police officers were examined to prove them any serious infirmity in the evidence furnished by the recoveries did not occur as it was at best only a corroborative piece of evidence [*Dalbir v. S*, A 1977 SC 472]. Any eye-witness should not be associated with recovery memos, because that partakes of an attempt to make the witness omnibus [*Narpal v. S*, A 1977 SC 1066]. The law does not require that the discovery statements should be witnessed by anyone. It is during the investigation of the case on interrogation that the accused makes a discovery statement. It is not expected of the Investigating officer to keep the witnesses in attendance in the hope that the accused may make a discovery statement or to rush up to call the witnesses to witness the discovery statement of the accused [*Parag v. State of Rajasthan*, 1981 Cri LJ 1244, 1250 : (1981) Raj LW 370 (Raj)]. Merely exhibiting the relevant seizure lists the requirement of the law is not fulfilled. The fact of discovery must be proved like any other fact to invoke the aid of Sec. 27 by producing in Court the articles discovered pursuant to the information gathered from the statement of the accused [*Bhanda Garh v. State of Assam*, 1984 Cri LJ 217, 220 (Gau)]. The whole purpose to associate two independent and respectable inhabitants of the locality is to instil confidence in the prosecution version so that there may be no scope to a doubt that in fact the article recovered was planted [*Prem Chand v. State of Punjab*, 1984 Cri LJ 1131, 1134 : Chand Cri C 57 (Punjab-Har)]. The fact that the witnesses for the disclosure statement and the seizure memo are not witnesses of the locality, is, not by itself sufficient to reject their evidence [*Shabir Ahmad Khan v. State of J&K*, 1989 Cri LJ 2486, 2494 (J&K) (DB)]. If there is no evidence that the acccused gave any information to the police about any *paijamas* or that he was present at the time of recovery of the same from another person, the discovery of *paijamas* cannot be used against the accused [*Mulayam Singh v. State of Madhya Pradesh*, 1990 Cri LJ 2562, 2564 (Madh Pra)]. The mere fact that a panch witness was a witness to all the *Panchnamas* prepared by the Investigating Officer is by itself not sufficient to discard his evidence [*Khujji v. State of MP*, A 1991 SC 1853, 1860].

Was S 27 Overridden by S 162 Cr P Code Before the Latter's Amendment In 1941? —S 162 as amended by the Cr P Am Act 1923 ran thus:

> "(*1*) No statement made by *any* person to a police officer in the *course* of an investigation under this chapter shall, if reduced into writting, be signed by the person making it; nor shall any such *statement or any record thereof*, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made."

The first proviso refers to the contradiction of a prosecution witness by the accused under s 145 Evidence Act by his previous statement in the police investigation and the second proviso gives the court a discretion to exclude from the copy of the statement given to the accused any part, the disclosure of which is not essential in the interest of justice.

In *Fanindra v. R*, 36 C 281 (a decision before the amendment) a distinction was drawn between the *writing* excluded by s 162 and the statement embodied in the writing. The present section does away with the distinction and excludes both. Some earlier cases held that s 162 Cr P Code overrode s 27 and no information obtained by the police from the accused could be proved [*Bawa Rowther v. R*, A 1925 R 101; *R v. Nga Kyaing*, 94 IC 706: A 1926 R 112; *Bhagia v. R*, A 1927 N 203-CONTRA: *Sheobalak v. R*, A 1928 N 108]. Thereafter it was decided in a large number of cases that s 162 does not extend to statements by *accused*, but the prohibition there applies to statements made by *witnesses* during the course of an investigation, whereas s 27 applies to information by an *accused* leading to the discovery of any fact [see *Azimuddy v. R*, 54 C 237; *R v. Nga Tha Din*, 4 R 72 FB; *Ranniui v. R*, 7 L 84; *Jagwa v. R*, 5 P 63; *Gurditta v. R*, 104 IC 444: A 1927 L 713; *Badri v. R*, 92 IC 874: A 1926 P 20; *Bahadur v. R*, 7 L 264; *Umer Daraz v. R*, 86 IC 410: A 1925 S 237; *Hussaini v. R*, 93 IC 248: A 1926 S 151; *Gola v. R*, A 1929 N 17 FB: *R v. Fauzdar*, 55 A 463]; but disagreeing with this view it was held in Madras that the words "*any person*" in s 162 were wide enough to include a statement made by a person accused of the offence under investigation [*Syamo v. R*, 55 M 903 FB; see also *Chinna v. Talukanta*, 51 M 967 FB: A 1928 M 1028]. In another group of cases the admissibility of the statement by an accused was made to rest on the ground that s 27 being quite independent it was not superseded by s 162 Cr P Code [*In re Semala Goundan*, A 1925 M 574; *In re Granadhe*, 86 IC 208: A 1925 A 253; *Gola v. R, sup*; *Chinna v. Talukanta, sup*].

In this state of things the question arose incidentally in a case before the Judicial Committee which exploded the majority view in *Azimaddy v. R*, and other cases cited *ante* that the words "*any person*" in s 162 do not apply to statement by accused. While holding that the words "any person" in their ordinary meaning would include any person though he may ultimately be accused, the Privy Council left undecided the point whether s 162 Cr P Code *pro tanto* repealed the provisions of s 27, as in the case in hand the declarant was not in the custody of the police and no alleged discovery was made in consequence of the accused's statement. It simply decided that s 162 was a bar to the admissibility of the statement in question as that section includes statements even by an accused [*Pakala Narayana v. R*, 66 IA 66 : 43 CWN 473, 481; see also *R v. Ramaswamy*, 1965 AC 1 (an appeal from Ceylon)].

After the above pronouncement by the Judicial Committee that the words "*any person*" in s 162 included an accused person, the question was considered afresh and it was held in several jurisdictions that s 27 Evidence Act being a "special law" was not affected by s 162 Cr P Code [see *In re Subbiah*, A 1939 M 856; *In re Kapa* A

1939 M 840; *In re Subbaraya*, A 1941 M 659; *R v. Mayadhar*, A 1939 P 577; *Adhik v. R*, A 1942 P 156; *Biram v. R*, 1941 Bom 333: A 1941 B 146; *Motilal v. R*, A 1940 N 66: *Bharosa v. R*, A 1941 N 86; *Ramaayat v. R*, A 1942 R 62], while a contrary view was taken in some other High Courts [*see Hakam v. R*, A 1940 L 129 FB: *Baldeo v. R*, A 1940 A 283 FB; *Naresh v. R*, A 1942 C 593: 46 CWN 180]. On account of this divergence of opinion the Legislature had to intervene and make the position perfectly clear by adding the words "*or to affect the provisions of section 27 of that* (Evidence) *Act*" to *sub-sec* (2) of s 162 Cr P Code by the Cr P Code (2nd Am) Act, 15 of 1941].

Statement Made to Police under s 162 Cr P Code.—Statements made by witnesses under s 162 Cr PC in the course of investigation cannot be used as substantive evidence. The use of statements under ss 27, 32 and 145 explained [*Hazarilal v. S*, A 1980 SC 873].

Extent of Information Admissible. ["So Much of the Information as Relates Distinctly to the Fact Thereby Discovered May be Proved"].—The extent of information admissible depends on the nature of the fact discovered. As emphasised by the Judicial Committee, "the fact discovered" is not equivalent to the object produced. "The fact discovered embraces the place from which the object is produced, and knowledge of the accused as to this and the information must relate distinctly to the fact" (*ante*: "*Fact Discovered*"). When a confession as a whole is excluded whether by reason of s 24, 25 or 26, so much of the information given by the person making the confession when the accused was in custody as distinctly relates to the discovery of a fact becomes admissible. When the accused himself produced the articles said to be discovered, so much of the information as set the police in motion and led to the discovery is admissible [*Amiruddin v. R*, 45 C 557: 22 CWN 213: 44 IC 321]. As emphasised by STRAIGHT J, in two of his decisions:-

> "It is manifest that the prohibition laid down in these two sections (ss 25, 26) must be strictly applied, and any relaxation of it in accordance with the proviso to s 27 should be sparingly admitted, and only to the extent of so much of the accused's statement as directly and distinctly relates to the fact alleged to have been discovered in consequence of it" [*R v. Pancham*, 4 A 198, 284; *R v. Babulal*, 6 A 509, 544 FB].

Under s 27, not every statement made by the accused while in police custody connected with the production and the finding of the property, that is admissible. Those statements only which lead immediately to the discovery of property, and in so far as they do lead to such discovery, are properly admissible. Whatever be the nature of the facts discovered, that fact must in all cases be itself relevant to the case; and the connection between it and the statements made must have been such that statement constituted the information through which the discovery was made, in order to render the statement admissible. Other statements connected with the one thus made evidence, and so immediately, but not necessarily or directly connected with the fact discovered, are not to be admitted, as this would rather be an evasion than a fulfilment of the law, which is designed to guard prisoners accused of offences against unfair practices on the part of the police [*R v. Jora Hasji*, 11 Bom HC 242]. The Magistrate can legitimately rely on the entries in the Case Diary disclosing that the accused had volunteered to point out incriminating articles for considering the request of the Police for remand of the accused to their custody to enable it to recover the articles provided that necessary safeguards are provided to avoid coercion or duress [*Narain Pasi v. State of UP*, 1989 Cri LJ 2552, 2556: 1989 All WC 1060]. The entries in the CD do not appear to be consistent with the statement of the

witness. The Inspector did not take any neighbour of that place at the time of recovery. He did not give any copy of recovery memo to the accused. In the map he has not shown the pit from where the goods were recovered. He did not seal the goods before taking them to police station. These facts show that the evidence regarding the recovery is suspicious [*Balkar Singh v. State of UP*, 1990 Cri LJ 77, 83 (All)].

That portion of the information which is the direct or immediate cause of the discovery of some material and concrete object is admissible because its truth is guaranteed by the discovery. But the narrative connected with the information or any explanation as to how the object came to be there, or what any other person said or did must be rejected. As observed by SIR JHON BEAUMONT "information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered" [*Pulukuri Kottaya v. R*, A 1947 PC 67, 70].

Statement made by an accused may be proved so far as it relates to any material fact discovered in consequence, even though the police were—present when it was made [*In re Nainamalai*, 14 LW 418: 69 IC 377]. The confession must be made antecedent to and not subsequent to the discovery [*R v. Kamal Fakir*, 17 WR Cr 50; see *Nari Santa v. R*, A 1945 p 161 *ante*]. The Evidence Act intends to make only those statements admissible, which are the essential complements of acts done or refused to be done, so that the act itself or the omission to act acquires a special significance as a ground for inference with respect to the issues in the case under trial. It is important that this should be borne in mind, as otherwise prisoners will, by the exercise of the commonest ingenuity, be entirely deprived of the safeguard which the Legislature intended to throw round them in ss 24 to 26. In this case WEST J, observed:-

> "A confession of murder made to a police constable is not at all confirmed by the prisoner's saying 'that is the place where I killed the deceased', and when, starting from the pointing to a ditch or a tree, a long narrative of transactions, some of them altogether remote from any connection with the spot indicated, is allowed to be deposed to as confessed by a prisoner, the intention of the Evidence Act is not fulfilled but defeated" [*R v. Rama Birapa*, 3 B 12, 17].

If the accused makes a compounded statement, the judge should divide it into its component parts and only admit that part which has led to the discovery of the particular fact and reject the rest. Thus, where the accused said: "I will produce the share received in such and such a dacoity"—the facts that there was a dacoity, that the accused took part in it and that he got part of the property are not admissible, but the statement as to where the property is will be [*R v. Ganu*, 56 B 172: A 1932 B 186 (**approved** in *Pulukuri Kottaya v. R*, A 1947 PC 67); *Namdeo v. R*, A 1944 B 331: 46 Bom LR 546; see also *R v. Sukhan, infra*]. Statement of the accused that he had placed the deceased's cloth in a pit which he dug and took out is admissible [*Pershadi v. S*, A 1957 SC 211 : 1957 Cri LJ 328].

If the police officer has recorded a long statement, it is for the court to see what portion should be allowed to be proved [*Mangal v. R*, A 1948 N 78]. Although as series of statements are made to the police in one sentence, the court should dissect and admit only such portion as directly leads to the discovery of the thing [*R v. Salve*, A 1934 B 233]. The principle that portions of a statement in confession leading to the discovery may be admitted is recognised in s 27 [*Legal Rem v. Lalit*, 49 C 167]. The view that the section must be strictly construed and only such portion of a confession or statement as relates *distinctly* to the discovery of some relevant fact can be admitted and not the whole has also been taken in many other cases [see

Amiruddin v. R, sup; *Kader v. R*, 50 CWN 88; *Satish v. R, sup*; *In re Mutthandi*, A 1942 M 444; *Legal Rem v. Bhajoo*, 34 CWN 106]. A statement which contains a confession of guilt as also supplies information in consequence of which a discovery is made is not admissible in its entirety, but only so much of it can go in as relates distinctly or immediately to the discovery. S 27 must be strictly construed and care should be taken to see that the purpose and object of ss 25 and 26 and the safeguard provided in s 27 are not rendered nugatory by a lax interpretation (*Legal Rem v. Bhajoo sup*).

[In Madras and in some cases in other jurisdictions a wider interpretation was put upon the section holding that the whole statement accompanying the discovery is admissible even though it contained an acknowledgment of guilt or other incriminatory statements (see *Re Althappa Goundan*, A 1937 M 618: 1937 Mad 695 FB; *In re Sogiamuthu*, 50 M 274: A 1926 M 638; *In re Nainamalai*, 69 IC 377: A 1921 M 679; *Surendra v. R*, 16 ALJ 478: 47 IC 659; *Udhan v. R*, A 1939 A 685; *Lalji v. R*, 6 P 747; *Sonaram v. R*, 10 P 153; *Puran v. R*, A 1947 P 162; *Shivabai v. R*, 50 B 683: A 1926 B 513; *Manjunathaya v. R*, 26 MLJ 352: 24 IC 845; *Magan v. R*, A 1934 N 71; *Jamunia v. R*, A 1936 N 200; *Neharu v. R*, 1937 Nag 268: A 1937 N 220; *Motilal v. R*, A 1940 N 66; *Bahadur v. R*, A 1925 S 289: 88 IC 7). Since the pronouncement by the Privy Council (in *Pulukuri Kottaya v. R, ante*) in favour of the stricter interpretation, these cases among others of the kind have been superseded in so far as they decided in favour of wholesale admission. The practice of introducing wholesale confessions to the police under the guise of recovery under Sec. 27 is deprecated. [*G. Gabriel v. State of Kerala*, 1982 Ker LT 772 : 1983 Cri LT 94, 98 (Ker) (DB)].

Prominent among the overridden cases is *Re Athappa Goundan, sup* in which the accused made a statement producing two bottles, a rope and a cloth gag and the Full Bench after a lengthy discussion on the question held that the whole statement that he and another killed the deceased by gagging and that they buried all the articles at a certain place were admissible. In arriving at the decision, the consideration that weighed was that as the articles produced (*ie* 'the fact discovered') were not in themselves of an incriminating nature their production would be irrelevant unless they were shown to be connected with the murder, and there was no evidence to connect the accused with the crime apart from the confession. In rejecting this reasoning the Judicial Committee observed (in *Pulukuri Kottayu v. R, ante*):—

"The Lordships are unable to accept this reasoning. The difficulty, however great, of proving that a fact discovered on information supplied by the accused is a relevant fact can afford no justification for reading into s 27 something which is not there, and admitting in evidence a confession barred by s 26.

Except in cases in which the possession, or concealment, of an object constitutes the gist of the offence charged, it can seldom happen that information relating to the discovery of a fact forms the foundation of the prosecution case. It is one link in the [chain of proof, and the other links must be forged in manner allowed by law".]

How Much of Information May be Proved.—A statement by an accused to a police officer amounting to a confession is inadmissible, but where it forms part of a confession it is admissible under s 27 if a fact is deposed to as discovered in consequence of the information [*Azimaddy v. R*, 54 C 237]. So, a police officer can depose that the accused went to him and stated that his wife was lying wounded with a sword on the bed; but the further statement that he had severely hacked his wife is not admissible [*Legal Rem v. Lalit*, 49 C 167: 25 CWN 788]. In a trial for the murder of a boy whose body was found in a well, the accused said during investigation, "I

had removed the *karas*, had pushed the boy into the well, and had pledged the *karas* with Alla Din"; and in consequence of this statement the *karas* were recovered from Alla Din—*Held* that the statement that the accused had pledged the *karas* subsequently recovered, is only admissible and the rest is not admissible [*Sukhan v. R*, 10 L 283 FB: A 1929 L 344 (**approved** in *Pulkuri Kottaya v. R*, 51 CWN 474 PC]. Where the accused said: "I buried the shirt, which was my share of the stolen property, under the *beri* tree." The fact that the accused buried the shirt or the fact that it was his share of stolen property is not 'discovered' within s 27 and is not admissible [*Karam v. R*, A 1929 L 338; see *Gurdit v. R*, 44 IC 967: 52 PLR 1918; *Kawa v. R*, 155 PLR 1908; *Sula Khan v. R*, A 1926 L 138: 89 IC 901; *Manalal v. R*, A 1925 O 1; *Gaya Pd v. S*, A 1957 A 459]. In some cases however it was held that statement that he had buried the dead body [*Manum v. R*, A 1930 L 530: 121 IC 728; *Nawab Din v. R*, A 1933 L 516; *Saifal v. R*, 95 IC 603: 27 PLR 580] or burnt the deceased's clothes [*Shivabai v. R*, 50 B 683: A 1926 B 513] at a certain place where they were found was held admissible. In a prosecution under the Arms Act where a gun was discovered as the result of the statement: "I have buried the gun at such and such a place", the whole statement was held admissible [*R v. Chokhey*, A 1937 A 497: 1937 All 710; *S v. Mohinder*, A 1953 Pu 81], or a statement "I put the bomb in *R*'s office; I will show it to you" in consequence of which the bomb was found there [*R v. Namdeo*, A 1944 B 331: 46 Bom LR 546], or "I threw the pistol into the ditch" [*Chhotey v. S*, A 1954 A 687].

The question not unoften arises to what extent decisions like these have been affected by the stricter interpretation put on the section in 1947 by the Privy Council in *Pulukuri Kottaya v. R, ante*. The proper procedure would be to dissect the statements said to have been made by the accused while giving the information or producing the objects from place of concealment and to admit only such portions as relate *distinctly* or *immediately* to the discovery, *eg* "I will point out the knife" or "the dead body lying in such and such a place" or "certain property of the deceased will be found hidden or buried in such and such a place", but not such further statements as: "It was the knife with which the deceased was stabbed or killed by me" or that "I stole and buried the property" or that "I removed and buried the dead body" or that "It was my share of the booty in the dacoity" &c. In other words, only that portion of the statement which was the *immediate* or direct cause of the discovery may be proved; the rest must be rigidly excluded. A witness stated that the accused offered to point out the place where the dead body was and on being questioned as to who had buried, he said that he had done so. The latter statement is inadmissible [*R v. Turazi*, 55 IC 685]. As SIR JOHN BEAUMONT observed in *Pulukuri Kottaya v. R*, A 1947 PC 67, 70:—

"Normally the section is brought into operation when a person in police custody produces from some place of concealment some object, such as a dead body, a weapon, or ornaments, said to be connected with the crime of which the informant is accused.

> (It is) argued that in such a case the 'fact discovered' is the physical object produced, and that any information which relates distinctly to that object can be proved. Upon this view information given by a person that the body produced is that of a person murdered by him, that the weapon produced is the one used by him in the commission of a murder, or that the ornaments produced were stolen in a dacoity would all be admissible. If this be the effect of s 27, little substance would remain in the ban imposed by the two preceding sections on confessions made to the police, or by persons in police custody". See also further observations quoted *ante*.

The extent of information admissible will depend on the exact nature of the fact discovered to which such information is required to relate. *N. Rajan v. State*, 1994 Cri LJ 322, 326 (Ker). So much of the information as leads to discovery of a fact must be proved like any other fact. Unless the facts incorporated in the mahazar are spoken to by a particular witness in order to making of mahazar it does not amount to substantive evidence. *R. Vijayakumar & Kumar v. State*, 1994 (2) Crimes 323 (Kar). Only that portion of the disclosure statement pertaining to the concealment of the weapon of offence which is admissible under section 27 is required to be proved and exhibited in court and not other portions of the confessional statement which normally police should not record but they usually do while recording the disclosure statement. *Babu Lal v. State*, 1995 Cri LJ 3772, 3774 (Del). The information contemplated under S. 27 Evidence Act must relate distinctly to the fact thereby discovered. The information is allowed to be proved only if that condition is satisfied. True S. 27 particularly removes the ban placed on the reception of confessional statements under S. 26. But the removal of the ban is not of such an extent as to absolutely undo the object of S. 26. *Mangal Singh v. State*, 1995 (1) Crimes, 290, 291 (Del).

In *Pulukuri Kottaya v. R*, the statement "I hid it (a spear) and my stick in the rick of "*V*" was held admissible and it appears that on this analogy the whole of the statements like "I have buried &c" [*Pub Pro v. Oor Goundan*, A 1948 M 242; *Khadem v. R*, A 1950 M 108; *Pershadi v. S*, A 1957 SC 211: 1957 Cri LJ 328; *Balbir v. S*, A 1957 SC 216, 226: 1957 CLJ 481]; "I sold &c" [*Velingiri v. R*, A 1950 M 613; *Pub Pro v. India &c*, A 1954 M 433]; "I concealed; I have hidden &c" [*Rama Shidappa v. S*, A 1952 B 299 FB; *S v. Santappa*, A 1956 B 217; *Mathur v. S*, A 1956 B 393; *Bakskhia v. S*, A 1960 B 263; *Vali Isa Md v. S*, A 1963 G 135; *Bhagirathi v. S*, A 1965 Or 99]; "I threw &c" [*Chhotey v. S*, A 1954 A 687] along with the other statement as to the place where the thing was to be found, have been admitted as showing possession or knowledge of the whereabout of the object. That the accused had extracted gold from the articles and had hidden it under a tree is admissible [*Chunilal v. S*, A 1964 HP 27]. Though the discovery of the pair of slippers and remnants of wearing apparels of the deceased was made at the instance of the accused, if the accused did not make any statement leading to that discovery, Sec. 27 cannot be invoked. [*Amar Layek v. State of WB*, 1988 Cri LJ 1293, 1297 : (1988) 1 Crimes 961 (Cal) (DB)].

Where an accused makes a statement that he had kept gun in his village, it is admissible even though place of discovery is not specifically mentioned [*S v. Ram Ch*, A 1965 Or 175]. When the information contained in the statement of the accused does not disclose the exact place where the weapon was kept concealed by him even if the weapon is recovered it cannot be stated that the same was recovered in pursuance of the information furnished by the accused, so as to make it an admissible piece of evidence. [*Paramasivam v. State*, 1990 Cri LJ 1491, 1494 (Mad)]. The very fact that it took about half an hour for about 8 or 10 persons to find out the chadar worn by the deceased reveals that the alleged information given by the accused did not specifically indicate the exact place where the chadar was to be found and so the evidence regarding the recovery on the basis of the information said to have been given by the accused does not inspire the confidence of the Court. [*State of Orissa v. Nursingha Charan Barik*, 1990 Cri LJ 1676, 1684 (Ori)].

Where in a burglary case the accused made a statement to the police that he would show the place "where he had hidden them (the ornaments)" and "would point out the place" where they were and the statement led to the discovery of the stolen ornaments. *Held* that the whole of the statement relates distinctly to their discovery

and is admissible. It is clear that if the words "where he had hidden them" are excised, the remaining statement that he would show the place, would be completely meaningless. The words "where he had hidden" though they may show possession of the appellant would not prove the offence for after recovery of the articles the prosecution has still to show that they are connected with the crime, *ie* they are stolen property [*Chinnaswamy v. S*, A 1962 SC 1788 (*Pulukur Kottaya v. R*, 74 IA 65 **relied** on)].

It would appear from the above cited cases that no general rule can be laid down as to the admissibility of statements like these and as observed by the Privy Council in *Pulukuri Kottaya v R, ante*,—

"the extent of the information admissible must depend upon the exact nature of the fact discovered to which such information is required to relate."

In that class of cases in which the possession or the concealment of a thing is the gist of the offence charged, words like "I hid", "I buried", "I pledged", "I sold" &c may be admissible in proper cases. As observed by SIR JOHN BEAUMONT (in *Pulukuri Kottaya v. R, sup*):

> "Except in cases in which the possession, or concealment, of an object constitutes the gist of the offence charged, it can seldom happen that information relating to the discovery of a fact forms the foundation of the prosecution case. It is only one link in the chain of proof and the other links must be forged in the manner allowed by law".

In *Sukhan v. R*, 10 L 283 FB: A 1929 L 344 *sup* of the statement "I had removed the *Karas*, had pushed the boy into the well and had pledged the *karas* with Alla Din"—only the pledging of the *karas* subsequently recovered was held admissible; and in *R v. Ganu*, 56 B 172, of the statement "I will produce the share I received in such a dacoity"—the place where the property was found was only held admissible and not the facts that there was a dacoity, that the accused took part in it and that he got a part of the property. These two cases (approved by the Privy Council in *Pulukuri Kottaya v. R*) clearly indicate that not a word more than what is related distinctly to the discovery of the fact is admissible. In other words only that portion of the narrative or information is provable which is the immediate or proximate cause of the discovery of the fact. The judge should discard the rest and refuse to record it.

Statement of the accused that he had buried the body of the deceased in the mud in a tank into which he also threw the knife and his pointing out the place from where a human skeleton and a knife were recovered was held to be admissible [*Ram Lochan v. S*, A 1963 SC 1074]. The dead body was recovered from a tank where the police party was taken by the accused himself. Pursuant to his statement made to the police officer and also pursuant to the gestures by him in pointing out the place from where the two gunny bags, containing the limbs of the deceased were recovered, the case comes squarely within the meaning of Sec. 27. [*Kaju v. State*, 1985 Cri LJ 368, 374 : (1984) 88 Cal WN 990 (Cal) (DB)]. The statement of the accused that the dead body dressed in violet petticoat that it was put inside two gunny bags and was concealed in septic tank is admissible if the recovery of the dead body was made with the same above mentioned description. [*Parimal Banerjee v. State*, (1986) Cri LJ 220, 225 (DB) (Cal)]. Evidence regarding discovery of dead body has to be carefully scrutinised when the investigating officer is found to have fabricated evidence. [*State of U.P v. Aziz Ahmed*, 1983 Cri LJ NOC 167 (All) (DB)]. Confessional statement and recovery of the dead body and articles in pursuance to the statement are strong circumstances towards the guilt of the accused. [*Chakidhar Paharia v. State of*

Assam, 1989 Cri LJ NOC 200 (Gauh) (DB)]. The statement that accused had killed his brother with an axe would be clearly inadmissible. The words "I removed and buried the dead body in the field" and the fact of discovery as the result of this information could be proved [*Punja Mava v. S*, A 1965 G 5].

There appears to be a distinction between a statement that "it is lying hidden or buried at a certain place" and "I hid or buried it at a certain place." For instance in the case of a dead body, a statement of the latter kind involves a confession of concealing evidence or conniving at such being done (s 201 IP Code): or the statement "I stole and buried or concealed" or "the stolen property was hidden at a certain place", includes a confession of theft and it might also be hit by s 25 or 26. In the application of the rule it should never be lost sight of that that part of a statement wherein the accused admits his guilt in regard to an offence is inadmissible as it does not in any sense relate distinctly to the discovery of any fact. In any case, it would seem that the admissibility of words like "I hid" or "I buried" involves nothing more than the discovery of the fact that the thing was lying in a particular place to the knowledge of the accused. The connection (if any) of the thing produced with the crime alleged to have been committed by the accused must be proved by other evidence (see *Pulukuri Kottaya v. R, ante* and next heading). An attempt has been made to explain the difference between "I have kept the ornaments inside that bush" and "the ornaments are kept or will be found inside that bush" [*Bhagirath v. S*, A 1959 MP 17].

Where the accused after committing the murder went to the police station and made a confession of guilt stating that he would show the place of occurrence and the instrument &c the admissible portion was merely the statement. "I shall show the place where *V* fell and the date tree where the *kaizar* and stick were kept" [*In re Bandi*, A 1963 AP 87]. When the maker of the F.I.R. is the accused himself, no part of the confessional statement is admissible except to the extent it is admissible under Sec 27. [*Tulshiram v. State of Maharashtra*, 1984 Cri LJ 209, 211 (Bom) (DB); *Moiranthem Tomba Singh v. State of Manipur*, 1984 Cri LJ 536, 540 (Gauh) (DB)]. When giving information leading to the discovery of a rifle, the accused's further statement that he would point out the rifle from which he fired is inadmissible [*Shankar Rao v. S*, A 1958 Mys 1].

The portions of the information by the accused that he had pledged the gold earrings with *H* which he got after murdering *B*, that he removed bangles from the person of *B*, that he had used blood-stained napkin during the commission of the crime, that he assaulted *B* with tangia, were all inadmissible as all the information was related to the "past user, or the past history of the object produced" as observed by the Privy Council [*Paula Nayak v. S*, A 1963 Or 93; *Pulukuri Kottaya v. R*, A 1947 PC 67 relied on]. When the fact whether the deceased was wearing ear-rings is doubtful, the recovery of the ear-rings on the alleged confession of the accused cannot be accepted. [*Jit Singh v. State of Punjab*, 1988 Cri LJ 39, 41 : (1988) 2 Reports 77 (P&H) (DB)].

Where in consequence of the information supplied by the accused to the police officer some firearms were recovered from a place shown by the accused, the discovery of the firearms at the instance of the accused is admissible [*Pakhar v. S*, A 1958 Pu 294]. Guns and daggers have an ancient origin and one does not have to hunt for an accused to discover them. The discovery, mostly and really, is as regards the authorship of concealment. Conduct and concealment are incriminting circumstances and their discovery becomes relevant and admissible under sec 27 [*State of Uttar Pradesh v. Jageshwar*, A 1983 SC 349, 350 : 1983 Cri LJ 686].

Information by accused leading to recovery of stolen jewels is admissible [*Mansha v. R*, 86 IC 347 : A 1925 L 371]. Recovery of jewels of the deceased on the statement of the accused is an important piece of evidence. [*State (Delhi) Admn v. Surinder Pal Jain*, 1985 Cri LJ NOC 117 (Del) (DB)], but any statement of an accused cannot be proved when he gave no clue which led to the discovery of stolen property [*R v. Jai Singh*, 12 PR 1900 Cr: 1900 PLR 56 Cr]. Unless in fact any lawful seizure of any object is made the mere statement under Sec. 27 can prove nothing. In the statement, the accused is said to have stated that the articles had been kept by him in the house of *A*, the examination of *A* is absolutely necessary. [*State of M.P. v. Ramprakash*, 1989 Cri LJ 1585, 1590 (MP)]. So much of a confession to police as leads directly to the discovery of certain articles is admissible, but a further statement for instance that they were stolen properties is inadmissible [*Mannalal v. R*, A 1925 O 1: 75 IC 753]. Where there is direct evidence, even the seizure of the weapon is not very material. [*Paradumansinh Kalubha v. State of Gujarat*, A 1992 SC 881, 885].

The law in the section has been put on the same basis as the common law in England *ante*. The English law has thus been stated in Tayor

> "If the *prisoner himself delivers up the goods stolen*, the fact that this was done upon inducements to confess held out by persons in authority, will afford no ground for rejecting his declarations, contemporaneous with the act of delivery, and explanatory of its object, though they may amount to a confession of guilt [*R v. Griffin*, 1809 R&R 151; *R v. Jones*, 1809 id 152]. But whatever he may have said at the same time, not qualifying or explaining the act of delivery, must be rejected. And if,—notwithstanding the prisoner's confession, thus improperly induced, and any acts done by him in furtherance of the discovery,—the search for the property or person in question be ineffectual, no proof of either the confession or the acts can be received. The confession is excluded, because, being made under the influence of a promise, it cannot be relied upon; and the acts done under the same influence, not being confirmed by the finding of the property or person, are open to the same objection. The influence which may produce a groundless confession may also produce groundless conduct." [*R v. Jenkins*, 1822 R&R 492; Tay s 903].
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> As to the rule that so much of the confession as relates *distinctly* to the fact discovered, may be given in evidence, LORD ELDON laid it down somewhat more strictly, saying, in *Harvey's case*, 1800, 2 East PC 658, that, where the knowledge of any fact was obtained from a prisoner, under such a promise as excluded the confession from being given in evidence he should direct an acquittal, unless the fact proved would itself have been sufficient to warrant a conviction, without any confession leading to it (Tay 11th Ed p 614 fn).

Mere Discovery of Fact is Not Relevant—Its Relevancy Must be Established by Other Evidence.—If the other evidence is satisfactory and adequate, the fact that the court has considered that it is not safe to rely on the evidence regarding recovery does not detract from the merits of the evidence of the eye-witnesses which has been considered to be beyond reproach. [*Gurnel Singh v. State of Punjab*, A 1988 SC 2249, 2252 : 1989 Cri LJ 299]. Recoveries were made as per information furnished by the accused and such recoveries have been proved by independent testimony which corroborate the evidence of the Inspector of Police. The ornaments recovered were identified as those belonging to the deceased. These recoveries are acceptable. [*Santhosh v. State of Kerala*, 1991 Cri LJ 570, 581 (Ker)]. The short span of time within which the recovery was made, the peculiarity of the place wherefrom the recovery was made, the manner and volume of recovery make the evidence regarding

the recovery acceptable. [*Subhas Bhattacharya v. State*, 1985 Cri LJ 1807, 1816 (Cal) (DB)]. Discovery evidence, by itself is subsidiary and cannot sustain a conviction. It is a valuable piece of corroborative evidence [*Dinkar v. S*, A 1970 B 438]. Therefore, the mere discovery of a fact by reason of information by accused is not relevant under s 27. To make the information admissible it must further be shown by other evidence that the articles discovered were connected with the offence charged and the guilt of the accused [*Ram Pd v. R*, A 1949 N 277; *In re Ravipudi*, A 1948 M 261]. In other words as emphasised in the Privy Council case, the articles discovered will be relevant only if they are proved by other evidence to have been used in the commission of the offence. As observed by SIR J OHN BEAUMONT: If the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant" [*Pulukuri Kottaya v. R*, 74 IA 65: A 1947 PC 67]. It is not correct that only the innocuous portion of the information is admissible. The extent of the statement admissible does not depend on its being corroborated or not by other evidence. The only limitation is that the extent must relate distinctly to the facts discovered subject to its relevancy being proved by other evidence [*In re Sheikh Khader*, A 1950 M 108]. The mere fact of discovery of weapon with blood stains without any evidence to connect the accused with the crime is of no consequence [*In re Periyaswami*, A 1950 M 714; *Sainambu v. S*, A 1953 M 564; *Md Jamsher v. S*, A 1956 B 186]. [*Basudeb Sahu v. State*, 1985 Cri LJ NOC 29 : (1983) Cut LR (Cri) 340 (Ori); *Jaisingh Madakami v. State*, (1986) Cri LJ 117, 119 (ON) (DB) : (1985) 1 Orissa LR 627; *Ratna Munda v. State*, 1986 Cri LJ 1363, 1366 (Ori) (DB); *Kachhwa v. State of Rajasthan*, (1986) Cri LJ 306, 309 (Raj) (DB) : 1985 Raj LW 97 : 1985 Cri LR 121; *D.P. Misal v. State of Maharashtra*, 1987 Cri LJ 1512, 1522 (Bom) (DB)]. Though the gun was recovered from the house of the accused and sent to the Ballistic expert, the pellets recovered were not sent to him. There is no evidence that the shot was fired from this gun. So the mere recovery of the gun will not help the prosecution. [*State of Orissa v. Chandra Pentia*, 1981 Cri LJ 1060, 1062 (Ori) : (1981) 51 Cut LT 310]. The circumstance regarding the recovery of the weapons after the arrest of the accused recedes to the background if no bloodstains particularly of human origin have been found on any of the weapons. [*State of Karnataka v. Dastagirsab*, 1981 Cri LJ 1157, 1159 : (1981) 1 Kant LJ 498]. When the weapons recovered did not contain any blood-stain, they cannot be connected with the crime. [*Waikhom Angamba v. State of Manipur*, 1982 Cri LJ 1346, 1354 (Gau)]. The recovery of the weapon was made two weeks after the occurence and the weapon was embedded in the sandy river bed, when exposed, blood would clot and stick to the surface and need not necessarily disappear altogether when submerged in sand and water. The recovery of a chopper stained with human blood is proved. The possession of the weapon and its concealment by the accused are the necessary inferences and in the absence of plausible explanation such possession and concealment would be incriminating circumstances pointing to the guilt of the accused. [*Dileep Kumar v. State of Kerala*, 1985 Cri LJ 114, 118 : 1984 Ker LJ 672 (Ker) (DB)]. The dagger was recovered next day after the occurence. It had bloodstain belonging to the blood group of the deceased. So the evidence regarding the recovery has to be accepted. [*Ishwar Singh v. State (Delhi Admn)*, 1985 Cri LJ 1625, 1631 : (1984) 2 Crimes 127 (Del) (DB)]. The recoveries were made long after the arrest of the accused. The bloodstains on all the articles were disintegrated and it was not possible to find whether it is human blood or not. So recovery evidence cannot be accepted. [*Kishore Chand v. State of H.P.*, 1990 Cri LJ 2289, 2295 (SC)]. When the confession is corroborated by medical evidence and recovery of the dead body from a tank, it can be accepted. [*Sarkar Mardi v. State of West Bengal*, 1992 Cri LJ 367, 370 (Cal)].

To make the confession of a prisoner not made in the presence of a magistrate, admissible in evidence, the fact discovered in consequence of the information, must be one which, of its own force, independently of the confession would be admissible in evidence. The discovery of a fact which save for the confession would be altogether indifferent, cannot take a confession out of the excluding rule [*In re Choda Atchenah*, 3 MHC 18].

So, mere discovery of a fact, *eg* a weapon is not of much relevance unless it can be proved to be connected with the crime against the accused by other evidence. Sec. 27 is based on the doctrine of confirmation by subsequent facts. The facts discovered must have a direct link to the commission of crime. [*Jang Singh v. State of Rajasthan*, 1984 Cri LJ 1135, 1139 : 1984 Raj LR 19 (Raj)]. As the Privy Council observed in *Pulukuri Kottaya v. R, sup*:

> ".....It can seldom happen that information leading to the discovery of a fact forms the foundation of the prosecution case. It is one link in the chain of proof, and the other links must be forged in manner allowed by law", (see *ante*).

Thus where after a burglary the accused pointed out the place where he had hidden the ornaments and they were recovered, that fact though it may show possession of the accused would not prove the offence for after recovery of the articles, the prosecution has still to show that they are connected with the crime [*Chinnaswamy v. R*, A 1962 SC 1788; *Pulukuri Kottaya v. R, sup* **relied** on)].

Where two axes were discovered at the instance of the accused but only one of them carried blood staines of human origin and the serologist was not able to certify human blood on the other, even so it was held that their connection with the crime was not disrupted by that reason alone. It would be far-fetched to say that the blood on the other axe could have been of animal origin. *State of Rajasthan v. Teja Ram*, AIR 1999 SC 1776.

What Is or Is Not Discovery of Fact.—(See also *ante*: "*Fact Discovered*"). It has been seen that what is strictly admissible is proof of the discovery of any fact in consequence of information received from the accused and not a whit more. So, any self-incriminatory statement or whatever else may have been said by the accused at the time of giving the information by way of introduction or narrative or explanation must be rigorously excluded and the police officer should not be allowed to say one word more than what was essential to the discovery of the fact cutting out all that the accused may have said regarding his complicity or own act in the affair (*ante*). The following cases will illustrate the principle of the rule.

Under s 27 it is legitimate to record that an accused said: "I will point out certain property" if such statement leads to discovery; but it is not legitimate to record as evidence that an accused said: "I will point out certain property which I obtained as share of the booty in the dacoity" [*Gurdit v. R*, 52 PLR 1918 : 44 IC 967]. Statement to the police while producing the materials used in committing the offence is inadmissible as it is not a statement in consequence of which a fact is discovered [*Annika v. R*, A 1942 M 237]. So also the preamble in a confessional statement which has no relation to the discovery [*Veerana v. R*, A 1939 M 593].

Incriminating statement to the police that the axe is one with which the murder had been committed does not lead to any discovery of fact, nor is the alleged statement of the accused that the blood stained shirt and *dhoti* belonged to him [*Prabhoo v. S*, A 1963 SC 1113].

Statement that he purchased poison pasted in arrow when producing arrow is inadmissible, though the production of the arrow containing poison is relevant [*Bhukhin v. R*, A 1948 N 344]. Statement of the accused producing bottle containing arsenic that the other accused gave it her for safe custody, is neither confession nor admissible under s. 27 [*In re Vokkaligara*, A 1952 M 533].

The accused pointed out the place in the pond where the bundle of stolen ornaments was recovered. The further statement that he had buried the things there is not admissible [*Kawa v. R*, 155 PLR 1908 : 21 PWR 1908 Cr]. Of the statements that he (accused) would point out the place where the corpse or bombs had been buried and that he buried it, the latter is inadmissible [*Sulakhan v. R*, A 1926 L 138: 89 IC 901: *S v. Rangrao*, 53 Bom LR 834 *ante*; see however *R v. Chavadappa*, A 1945 B 292 decided before *Pulukuri Kottaya v. R, sup*].

Of the statements that he stole the money and that the money was in a heap of rubbish, the first is inadmissible and the second admissible [*Manjunathaya v. R*, 26 MLJ 352 : 24 IC 845]. Of the statement I had stolen the amount from the Bank and will produce the amount, the only part admissible is the latter part [*Mareppa v. R*, A 1947 B 90]. A statement to the police that "I shall produce the *lathi* with which I killed *I*" [*Illahi Bux v. R*, A 1929 S 175] or "produce the hatchet with which the murder was committed" [*Alibux v. R*, A 1947 S 36] is not admissible. Where accused stated to the police "I will point out the spot where I committed the murder" and pointed out, the words "I committed the murder" are not admissible [*Tara Singh v. R*, 19 IC 817; 11 PR 1915].

Accused made a statement to the police as to his throwing a *darri* and *gandasa* into the canal. The police recovered the articles from a neighbouring village having discovered from a boy the fact that they had been found out in the place pointed out by the accused—*Held* that there was immediate connexion between the statement and discovery and it was admissible [*Kapur v. R*, 98 PLR 1918: 50 IC 481]. A statement of the accused that he and another hid the ornaments belonging to the deceased in a particular place [*Narayana v. R*, 1932 MWN 801 : A 1933 M 233] or that he had hidden a chain and given a gold *kevti* to a person was held admissible [*R v. Punjab*, A 1929 S 245]. In a murder case both the accused informed the police that they each had separately concealed pieces of rope. Evidence disclosed that the dead body was carried with the help of ropes. The statement leading to discovery of ropes is admissible [*Pingal v. S*, A 1969 Or 245].

Of the statement: "We all beat *B* and *S* to death.—The remaining persons *P*, *K* and *N* ran away. *D* who was in our party received blows on his hands. He had a spear in his hands. He gave it to me then. I hid it and my stick in the rick of *V* in the village. I will show if you come. We all did this at the instigation of *P*"—only the passage "I hid it (a spear) and stick in the rick of *V* in the village. I will show if you come", is admissible and the rest is inadmissible. The spear and the stick will be relevant only when they are proved by other evidence to have been used in the commission of the offence [*Pulukuri v. R*, 74 IA 65: A 1947 PC 67]. Of the statement "I had cut the belly as under with the knife. There was a silver waist cord on the corpse. I removed it and gave it to *B*. I have buried in my sugar cane garden the knife with which *A*'s neck was cut. If you come with me I shall take and give it"—the only portion admissible is "I have buried in my sugar cane garden the knife. If you come with me I shall take and give it" [*Pub Pros v. Oor Goundan*, A 1948 M 242; 1947, 2 MLJ 427 see *In re Vodde*, A 1948 M 104; *In re Shk Khader*, A 1950 M 108]. As to the admissibility of statements like, "I hid," "I burried, "I stole" & see *ante*: "*How much of information may be proved*".

In a case arising out of child sacrifice, the statement of the accused was that the dead body of the child was carried on a motor cycle up to a particular spot. A broken piece of glass which was a part of the tail lamp of the motor cycle was recovered from that place. That was the discovery of a fact and the information given by the accused leading to the discovery was relevant. The recovery of a Brass pitcher (kalash) used for collecting the blood of children, even if denied by the accused persons, was a useful evidence to supply a missing link in the chain of circumstances. *State of Maharashtra v. Damu Gopinath Shinde,* (2000) Cri LJ 2301 (SC).

Only statements bearing *directly* on the recovery of property are admissible. Where *A* stated that he handed on the property to *B* and *B* stated that he handed on to *C* and *C* to *D* and *D* to *E* and recovery was made from *E*, the statements of *A*, *B*, *C*, *D*, have no direct bearing on the recovery and cannot be admitted [*Magan v. R*, A 1934 N 71]. Of the statement: "I gave the dynamo to accused No. 2....I got the stolen dynamo back from him and sold it to PW 4", the words "I sold it to PW 4" are only admissible as it led to the discovery of the sale to PW 4 [*In re Vellingiri*, A 1950 M 613]; so also the statement "I kept the watch with N" [*Md Hyas v. S*, A 1950 A 615]. Statement to the police in the nature of a confession showing the place in the jungle where sexual intercourse took place is inadmissible [*Ramani v. R*, A 1935 C 146]. Where a confession was held by the lower court to be corroborated by the accused having pointed out to the police the places where certain acts were committed—*Held* that the evidence was not admissible under s 27 because no facts were discovered in consequence of the information [*Gaung Gyi v. R*, 8 Cri LJ 62 : 14 Bur LR 233: 4 LBR 244].

Accused was charged with having strangled a woman to death. It was alleged that on the next day he bought a coir mattress from a shop, had it carried to his house by a coolie and put the dead body in a parcel made of the mattress and sent it by railway. The accused made certain statements to the police with reference to the purchase of the mattress which were otherwise corroborated by prosecution witnesses—*held* that the statement made by the accused amounted to a confession, but they were rendered admissible in law because they led to the discovery of relevant facts, *viz* the purchase of a coir mattress by the accused from a witness and the engagement of another prosecution witness to carry the mattress to his house [*R v. Ramanujam*, 58 M 642 FB: A 1935 M 528]. Relying on this case it has been held that if a complainant is discovered as a result of a statement by accused, the statement is admissible; for the material fact discovered is the theft from the complainant [*In re Pasupulati*, A 1943 M 418. *Ramanujam's case* appears to have been affected by *Pulukuri Kottaya v. R, ante*, in which the true meaning of the "fact discovered" has been explained (*ante* p 296). The discovery of a person who is afterwards proved to be a dacoit is not a discovery of fact within s 27 [*Salam v. R*, 43 IC 111; see *Palaniandi v. R*, 1934 MWN 601 *ante*]. Where the accused first conducted the police officer to a spot where he found blood stains and then the accused stated that the body was kept there, the discovery of blood stains was not in consequence of the statement [*Kalu Khan v. S*, A 1957 Or 102]. Where a pant and a bush-shirt were recovered alongwith the ring at the instance of the accused, the court said that such recovery was not admissible because it was not probable that while committing dacoity, the accused had taken away clothes alongwith the gold ring and buried them in the courtyard of the house. *Shambhu Dayal v. Subhash Chandra,* AIR 1998 SC 1732. Similarly, the mere recovery of a knife and a pair of gloves from an open paddy field without any attempt having been made to hide them was held to be not relevant. *Virghese v. State of Kerala,* (1998) SCC (Cri) 890.

Discovery by Information and Discovery by Act.—S 27 makes admissible the discovery of any fact in consequence of any *information* given by an accused and so on a strict interpretation of the word 'information' it has been held in a few cases that the production of any article by the accused himself (and not by the police as a result of any information by him) is not admissible. A person accused of murder of a girl gave to a police officer a knife saying that he committed the murder with it. He also said that he had thrown down the girl's anklets at the scene of the murder and on the following day he went to the place of murder accompanied by the police officer and pointed out the anklets—*held* that those statements were confessions; that no fact was discovered in consequence of any information derived from such statements and consequently they were excluded by s 25. It was the accused's own *act*, and not from any *information* given by him that the discovery took place [*R v. Pancham*, 4 A 198]. This decision of STRAIGHT J, was elucidated by him in the later case of *R v. Babulal*, 6 A 509, 544 FB. To the same effect is the decision in *R v. Kamalia*, 10 B 595 which followed it.

But the other and the majority view is that the statement of the accused is admissible whether the accused himself produced the article or the police did so on the basis of information from him. *Kamalia's case* was overruled by a later Full Bench where in the course of the police investigation relating to some stolen property the accused being asked by the police said: "Yes...I will point out. I have buried it in the fields." He then took the police to the spot where the property was concealed and with his own hand disinterred the earthen pot in which it was kept—*Held* that the accused's statement that he had buried the property in the fields was admissible under s 27, as it set the police in motion and led to the discovery of the property. With reference to the argument that the discovery was not in consequence of the information given to the police, but by the accused's own act on the spot, and therefore s 27 was inapplicable, SARGENT CJ, observed: "It is clear, however, that it was upon the information which the statement gave to the police that they accompanied the accused to the spot where the earthen pot was disinterred by the accused containing the property, and it is equally clear that, if it had not been for this information, the property would not have been discovered, and it is, in accordance with the ordinary use of such terms to say that the discovery of the property in this case was "in consequence" of the information.....Where the statement made by the accused is of such a detailed description as to enable the police themselves to discover the property, or only of such a nature as to require his assistance in discovering the exact spot where the property is, cannot in our opinion affect the question" [*R v. Nana*, 14 B 260, 264 FB].

Following *R v. Nana, sup* it has been held in Calcutta that if the statement of the accused in the custody of the police is a necessary preliminary to the fact thereby discovered, it is admissible under this section; it is immaterial whether the statement is sufficient to enable the police to make the discovery by themselves, or is only of such a nature as to require further assistance of the accused to enable them to discover the fact [*Dy Legal Rem v. Chema Nasva*, 25 C 413: 2 CWN 257]. *Nana's case* was **followed** also in *Manjunathaya v. R*, 26 MLJ 252: A 1914 M 61; *Saiful v. R*, 95 IC 603 (L). *Rama Shidappa v. S*, A 1952 B 299; *Ram Richhapal v. S*, A 1954 Pu 97 FB (all cases reviewed); *S v. Lehna*, A 1953 Pu 101; *R v. Huzuri*, 2 SLR 27: 10 Cri LJ 239; see also *In re Sogiamuthu*, A 1926 M 638. In this connexion it may be noted that the act of the accused in taking the police to a certain spot and producing certain articles from there as a result of promise of pardon is admissible under s 8 as conduct [*R v. Misri*, 31 A 592 FB; see *ante*, s 8, "*Conduct in reference to ss 8 and 27*"].

In a Madras case the accused told the police officer that he would show the spot where he threw the knife with which he killed the deceased. When accused was taken to the spot no knife was found. The police officer broadcasted that whoever had taken the knife should return it. Then *A* came forward and stated in the presence of the accused that he had picked up the knife from the spot mentioned by the accused at which he had seen it being thrown and that he had himself thrown it away at some other place. The knife was produced by *A* from that place—*Held* that the statement of the accused to the police is admissible since it led to the discovery of: (*1*) the fact that a knife had been seen to be thrown away and was later found by *A* at the spot indicated, and (*2*) the knife itself. It was the statement of the accused that led the party to the scene and the subsequent discoveries were in consequence of the information received from him [*In re Ramamurthy*, A 1941 M 290: 193 IC 347. The decision is based on the comprehensive meaning given to "fact" in *R v. Ramanujam*, A 1935 M 528 FB and it is doubtful whether this and similar cases are good law in view of the meaning given to "fact discovered" in *Pulukuri Kottaya v. R (ante)*.

A police officer deposed that the accused told him that he robbed a person of Rs. 48 whereof he had spent Rs. 8 and had Rs. 40 and that he then got that Rs. 40 from his wife and made it over to the officer. This statement was held inadmissible on the ground that it did not lead to the discovery of any fact. It was laid down that no court should allow one word more to be deposed to by the police officer detailing a statement made to him by an accused in consequence of which he discovered a fact,

than is absolutely necessary to show how the fact that was discovered is connected with the accused so as in itself to be a relevant fact against him. S 27 was not intended to let in a confession generally [*Adu Shikdar v. R*, 11 C 635 (*R v. Pancham*, 4 A 198; *R v. Babulal*, 6 A 509 FB **commented** on]. *Adu's* case was **followed** in *R v. Commer Sahib*, 12 M 153 where the test laid down is: "Was the fact discovered by reason of the information, and how much of the information was the immediate cause of the fact discovered and as such a relevant fact" [4 A 198 & 11 Bom HC 242 **approved**]. Where accused confessed taking part in a theft and handed over stolen articles and also some sale proceeds, there was no discovery by information and statement is inadmissible [*Ram Padarath v. S*, 1950 ALJ 738].

—Disclosure Accompanying Statement.—A distinction should be made between cases where a discovery is made in consequence of an information given and a disclosure by an accused accompanying a statement. Where an accused while describing to the police the murder and the part played by the other accused almost simultaneously produces earrings worn by the deceased, the discovery cannot be said to have been due to any information given by the accused and the statement is inadmissible [*In re Singampilli*, A 1941 M 306; *In re Annika*, A 1942 M 237]. After arrest, the accused stated that the revolver given to him by *P* was buried by him in his father-in-law's house. The accused took the police to the place and dug out the weapon. The discovery was not simultaneous; it was in consequence of the information given by the accused [*Pub Pro v. Kandikatla*, A 1943 M 661]. Since the local people were in a violent mood in a liquor tragedy case, the accused could not be taken to the place of recovery. The investigation is not improper. [*Augustine v. State of Kerala*, 1991 Cri LJ NOC 25 (Ker)].

Pointing Out Places.—When after recovery of stolen property from accused's possession, he points out the places from where the articles were stolen, it amounts to inadmissible confession and has nothing to do with discovery [*S v. Parkash*, A 1956 Pu 224: 1956 Cri LJ 1347]. Disclosure statement pointing out the place of occurrence, which was already known to the police is not admissible [*Vinod Kumar Vaidh v. State*, 1992 Cri LJ 3674, 3680 (Del)]. As to the production of articles by accused as evidence of conduct, see *ante*, notes to s 8. Where blood stained weapon and other articles were recovered from an open place and the *panch* witness turned hostile held, such recovery does not inspire confidence. *Jai Singh v. State of Rajasthan*, 1994 Cri LJ 1639 (Raj). Where the place of concealment was within the exclusive knowledge of the accused the confession which relates distinctly to the discovery of the said fact is admissible. The fact that the room in question was occupied by others also is inconsequential. *N. Rajan v. State*, 1994 Cri LJ 322, 327 (Ker). The fact that the place wherefrom the alleged weapon of assault was seized was an open space, freely accessable to all, rules out acceptability of the evidence. *Dharani Pradhan v. State*, 1997 Cri LJ 2973, 2974 (Ori). Where the weapon of attack was discovered and found at the instance of the accused from an open place (door-frame of the wall of the house) and it was not found concealed, it cannot be held to be a discovery under section 27. *S.V. Chalke v. State of Maharashtra*, 1993 Cri LJ 3364, 3369 (Bom). Where the place from where the recovery under section 27 was made was an open place which was accessible to at least labourers of the farm and thorough search was being made for the deceased and before making the recovery of the articles of the pointing out of the accused, the Investigating Officer had been at the scene of occurrence for about one and half hours, it cannot be said that nobody knew about the articles lying at the place from where the same were allegedly recovered. Therefore, in such case exclusive knowledge of the articles lying at the place of the alleged recovery cannot be attributed to the accused. *Puran Lal v. State of UP*, 1997 Cri LJ 3813, 3819 (All). From the statement of the accused that the weapon of offence *viz.*, the revolver was "concealed at Dadar, Come on. I will point out the place and revolver", it cannot be concluded the recovery pursuant to it could clothe the appellant with conscious possession of the revolver and the cartridge. That statement is capable of an interpretation that hte accused had the knowledge about the

concealment of the revolver at the particular place from where it was got recovered and not that he had concealed the same. *R B Killedar v. State of Maharashtra*, 1995 Cri LJ 2632, 2633 (SC). Where the blood stained knife was recovered at the pointing out of the accused from an open space on the footpath, it would not be safe to accept the evidence of the said recovery. *Ganpat Kisan v. State of Maharashtra*, 1995 Cri LJ 792, 794 (Bom); see also *Trimbak v. State of MP*, A 1954 SC 39 : 1954 Cri LJ 335. Where the crime article, (hockey) was recovered from the room of the accused and was not lying hidden anywhere and a casual search of the room by the police would have yielded the said article, this recovery of the article cannot be linked to the accused. Section 27 of the Evidence Act could make such disclosure statement of the accused in custody admissible which leads to discovery of a material fact but if a material fact is self evident to the police, the disclosure statement of the accused of such material fact becomes inadmissible. In case a particular material fact is in exclusive knowledge of the accused and he makes a disclosure statement pertaining to the same while leads, to recovery of such material fact, then and then only such disclosure statement of the accused is admissible in evidence. *Vijay Kumar & Anr. v. State*, 1995 (4) Crimes 189, 196, 197 (Del). Where the weapon of offence was found lying in the house and thus had already been recovered by the police and was not recovered on the information or at the instance of the accused, it cannot be said to be a discovery made under section 27. *Suresh Kumar v. State of Rajasthan*, 1995 Cri LJ 1853, 1858 (Raj). When the knife was recovered from the throny bushes, was an open place and accessible to all and sundry, the *panch* witness stating that he was sitting in the jeep from where throny bushes were not visible, he further stated that the brother of the deceased was his friend, it was held that in view of these infirmities evidence of recovery could not be accepted. *S.G. Sohatre v. State of Maharashtra*, 1997 Cri LJ 454 (457) (Bom) (DB). There is nothing unnatural on the part of the accused in keeping their share of the stolen articles concealed in the residence of one of the accused *Brij Mohan v. State of Rajasthan*, A 1994 SC 739, 744 : 1994 Cri LJ 922.

The fact discovered need not necessarily relate to the discovery of object used in the commission of the offence *i.e.* it can relate to the place where the accused concealed the object or to the fact that the accused knowledge of the existence of the object [*Public Prosecutor v. Basri Bin Salihin,* (1994) 2 Malayan LJ 476 (Kuala Lumpur HC)].

Place of discovery.—Where the recovery of articles connected with the crime was made from a place open and accessible to others, the evidence was held to be not vitiated thereby. The test is not whether the place is accessible to others but whether it is ordinarily visible to others. *State of H.P. v. Jeet Singh,* AIR 1999 SC 1293 : 1999 Cri LJ 2025. Where the place of concealment of *charas* was already within the knowledge of the police, it could not be said that the discovery was on the basis of information given by the accused, though he led the police party to the place. The place of concealment was the stem of a coconut tree at an open place. It could not be said that the article was put at that place only by the accused. *Krishna Mohar Singh Duggal v. State of Goa,* 1999 (8) JT 115 : (1999) 8 SCC 552.

Unsigned Statement.—An unsigned statement has been held to be not admissible. The prosecution of the accused was for killing his wife by strangulating her with a shoe lace. He made this statement to the police and brought out the shoe lace from his shoe where he was keeping it under concealment. The court rejected the evidence of the statement because it did not carry the signature of the maker. The only evidence, the court said, that could be put on record was the discovery of the lace from the accused with which death was caused [*Fellix Joannas v. State of Karnataka,* (1998) Cri LJ 2479 (Kant)]. The court **followed** the Supreme Court decision in *Jackaram Singh v. State of Punjab,* (1995) Cri LJ 3992 : (1995) A SCW 3483, where it was observed that the absence of signature or thumb impression of the accused on the disclosure statement recorded under s. 27 detracts materially from its authenticity.

S. 28. Confession made after removal of impression caused by inducement, threat or promise, relevant.—If such a confession as is referred to in section 24 is made after the impression caused by any such inducement, threat or promise has, in the opinion of the Court, been fully removed, it is relevant.

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COMMENTARY

Principle and Scope.—This section expressly forms an exception to the law provided by s 24 and its proper position in the Act should have been immediately after it [*R v. Pancham*, 4 A 198, 201; *R v. Babulal*, 6 A 509, 539 FB]. It has been seen that a confession caused by inducement, threat, &c is inadmissible (v s 24); but if it is proved to the complete satisfaction of the judge that the impression created by the original inducement or promise or threat has been wholly removed, *eg* by lapse of time or by a duly administered caution from a superior authority or by any other circumstance, a confession subsequently made becomes admissible. Such a confession after removal of the original impression caused by inducement is placed on the footing of a voluntary confession. This section therefore lays down the condition under which a confession rendered irrelevant by s 24 may become relevant under s 28. The removal or termination of the inducement must be clearly established by the prosecution and the judge must be of the clear opinion that no trace of the original inducement or threat lingered. It is presumed to have continued till the contrary is shown. It is conceived that the inducement can be put an end to by the same person who originally offered it, or by any other person, or by subsequent events and circumstances which have the effect of wiping away the original impression. The circumstances showing that the inducement once offered has been completely negatived, must necessarily vary with the peculiar facts of each case and it is not possible to lay down any general principle. Nor do particular decisions based on special facts afford much help. The burden of proving that the original impression has been completely removed is on the person who desires to have the second confession declared relevant.

—Impression by Inducement Must be Wholly Removed.—In *R v. Sherrington*, 2 Den CC 123, PATTESON J, said:-

> "There ought to be strong evidence to show that the impression under which the first confession was made, was removed before the second confession can be received. I am of opinion in this case, that the prisoner must be considered to have made the second confession under the same influence as he made the first, interval of time being too short to allow of the supposition that it was the result of reflection and voluntary determination."

A magistrate told a prisoner that if he confessed, he would do all he could for him. The accused subsequently confessed to a turnkey who did not caution him and the confession was rejected [*R v. Cooper*, 5 C & P 535]. Before a subsequent confession

is received, it must be clearly established that the influence exercised by the former inducement has been wholly removed. If the judge is of opinion that the previous inducement was still working in the mind of the accused and he expected some temporal advantage, the confession will be rejected (See *R v. Hewett*, 1 Car & M 534; *R v. Ganesh*, 50 C 127; *R v. Rue*, 34 LT 400 cited *post*).

Where promises or threats have been once used of such a nature as to render a confession inadmissible, all *subsequent* admissions of the same or the like facts will be rejected, unless from the length of time intervening, from proper warning of the consequences, or from other circumstances, there be good reason to presume, that the delusive hope or fear which influenced the first confession has been effectually dispelled. Accordingly where the prior confession had been made by at gun point by a wounded accused a written confession made 5 days later is not voluntary [*Beecher v. Alabama*, 389 US 35]. Where, however, it appears, to the satisfaction of the judge that the improper *influences were totally done away with before* the confession was made, the evidence will be received [*R v. Cheverton*, 1862, 2 F&F 833]. Thus, where a magistrate told a prisoner that if he was not the man who struck the fatal blow and would disclose all he knew, respecting the matter, he would use his influence to protect him; but on subsequently receiving a letter from the Secretary of State refusing mercy, he communicated its contents to the prisoner, it was held that a confession which the prisoner afterwards made to the coroner, who had also cautioned him was clearly voluntary and as such it was admitted [*R v. Clewes*, 1830, 4 C&P 221; Tay s 878].

—Did the Inducement Exist? Was it Brought to an End?.—Wigmore says "There are two kinds of cases in which the question may be raised. In the one kind, the inquiry is: Did the inducement, for the person in hand, ever come into existence at all? In the other kind, the inquiry is: Was the inducement, for the person in hand, brought to an end before the confession was made? Very few cases of the first sort are presented for decision..... The important thing to note, however, is that unless the inducement was held out, directly or indirectly to the *person in question*, it cannot exclude the confession. In such a case the person on hearing of it may choose to allow it to affect him, and to hope or to fear that it will be applied to him by the promisor; but thus he is himself responsible by free choice for its effect, and not the promising person, who cannot be said to have held out any inducement to him. The case is that of a person who hears of a *fellow-prisoner* being offered an inducement and conceives the hope that it will be applied to him also; this would not exclude the confession [1849, *R v. Jacobs*, 4 Cox, CC 54].

"As to the second inquiry, five questions may arise; (*1*) *Must it be shown* clearly that an improper inducement, once offered, was brought to an end? (2) Are there any situations in which this showing will be regarded as impossible, and thus the *inducement, once made, vitiates any future confession* of that person? (*3*) Can the *same person* who has offered the inducement possibly put an end to it so as to make admissible a confession afterwards made to himself? (*4*) Are confessions made subsequently, but to a *person different* from the one offering the inducement, to be treated as not made under the inducement, or must it be shown to have been negatived by the second person? (*5*) *What suffices*, in gneral, to end an inducement?

"(*1*) The first of these questions has always been answered affirmatively; the general principle is universally conceded that the *subsequent ending* of an improper inducement *must be shown, ie* it is assumed to have continued until the contrary is shown.

(2) There is nothing permanently *irrevocable* in an improper inducement; whether it has been brought to an end is, as all concede, always open to inquiry.

(3) Yet it seems never to have been decided specifically whether the *same person may* thus put an end to an inducement of his own creating. There is no reason why he cannot.

(4) There is on principle no reason for assuming that a promise or a threat made by one person will be treated by the accused as equally to be attributed to some *other person* who has had no share in the other's conduct and shows no power or inclination to corroborate his promise or threat. Nevertheless, the inducement may on the facts prove to be in effect the second person's as much as the first one's. It should thus be a question to be determined in each case: no general rule can be laid down.

(5) The circumstances which make it clear that the *inducement* had been *entirely negatived* must of course vary with the facts of the case. It is in the words of an English judge 'merely a question of degree'. It is impossible to lay down a general rule, and it is useless to employ individual rulings as precedents". [Wig ss 853, 854, 855].

[*Ref Steph Art 22: Tay s 878; Phip 8th Ed, pp 253, 258-60; Greenleaf, s 221; Wig ss 853-55; Joy on Confession, 69*].

"In the Opinion of the Court."—In all cases it is for the court to weigh all the facts and circumstances and to come to a definite conclusion whether the impression caused by the inducement, threat or promise has been totally removed. Before admitting the evidence, the court must be thoroughly satisfied that there is no trace of the improper influence, and it has been totally done away with. When once a confession had its origin in a threat or inducement, it is evident that the court must require very strong and reliable evidence to form the opinion that the impression has been thoroughly affected.

"If the impression produced by the promise or threat is clearly proved to have been removed—*eg*, by lapse of time, by any intervening caution given by some person of superior (but not of equal or inferior), authority to the person holding out the inducement—a confession subsequently made will be strictly receivable. Conversely, if the effect of a caution has worn off, the confession may be rejected" [*R v. Knight*, 20 Cox 711; Phip 11th Ed p 358]. Where the judge is satisfied that the influence has really ceased, the evidence will be admitted [*R v. Cheverton*, 2 F&F 833, *ante*; *R v. Richards*, 5 C&P 318, *post*]. Where a prisoner has been duly cautioned by the magistrate in pursuance of 11 and 12 Vict c 42, s 18, anything then said is evidence against him though there has been a previous promise or threat held out [*R v. Bate*, 11 Cox C C 686]. In India the magistrate is not bound to give any warning to the accused. But s 164 Cr P Code as amended by Act 18 of 1923, requires a caution that he is not bound to make any statement. A confession otherwise admissible does not become inadmissible because the accused person was not warned that he was not bound to make a confession and that the evidence of it might be given against him [*Jotish Roy v. The State*, 1982 Cri LJ 269, 271 : 1982 53 Cut LT 12 (Ori)] [see s 29, *post* : "*Want of Warning or Caution.*"]. Where a prisoner confessed some months after the promise, and after due warning, his confession was received. Warning by a person of *superior authority*, after inducement held out by one of *inferior* authority, will purge the confession of its taint and make it admissible. As to inducement by superior and want of warning by inferior officer, see *R v. Cooper*, 5 C&P 535 *ante* [Nort p 167].

Removal of Impression Caused by Inducement, Threat or Promise.—"Fully" means thoroughly, completely, entirely. When once improper inducement or threat has been established, there is a presumption of its continuance and it is for the prosecution to prove that the impression was fully removed [*Bhagirath v. S*, A 1959 MP 17; *Sobha v. S*, A 1959 MP 125]. A confession made by accused to a police constable on being assured that nothing would happen to her, was repeated to the committing magistrate after due caution; but before the sessions judge she stated that not knowing whether her new-born child was dead or alive she buried it and that the police constable had pressed and threatened her—*Held* that the court was not prepared to say that the confession was made after the impression caused by the promise of the police constable had been fully removed [*R v. Luchoo*, 5 NWR 86. Refd to by MAHMOOD J, in *R v. Bubulal*, 6 A 509, 537 FB]. Where a travelling auditor found certain defalcations in the accounts of a booking clerk and by telling him that he had better pay the money than go to jail, induced the latter to confess and sign a receipt for the amount misappropriated by him, before the Traffic Manager, it would be impossible to hold that the impression had removed in the short interval which elapsed between the conversation at the prisoner's house and the signing of the receipt [*R v. Navroji*, 9 Bom HC 358, 370].

A female servant being suspected of stealing money, her mistress on Monday told her "you will be forgiven if you confess." On Tuesday, she was taken before a magistrate, but was discharged without having confessed. She was rearrested on Wednesday, when the police superintendent told her in the presence of her mistress, "You are not bound to say anything but if you do, your mistress will hear you." But (not knowing that her mistress had promised to forgive her), he did not tell her that if she made a statement it might be given in evidence against her. The prisoner then made a confession—*Held* that the statement was not receivable in evidence, as the promise of the mistress must be considered as operating on the prisoner's mind at the time of the statement especially as the interval was so short, but that if the mistress had not been present it might have been otherwise [*R v. Hewett*, 1 Car & Marsh 534].

A is charged with the murder of *B*'s child. *B* having asked *A* if she had anything to do with the disappearance of the child, *A* cried and said, "If you won't send for the police I will tell the truth." *B* promised not to hurt her or send for the police if she told the truth, and *A* then confessed. Afterwards *C* a neighbour of *B*'s took *A* into room, and on questioning her *A* repeated the confession—*Held*, the first confession was inadmissible, and the second confession was so connected therewith as to be also so, although *C* was not in authority and held out no inducement [*R v. Rue*, 34 LT 400 cited in Phip 9th Ed p 277]. A child who was charged with theft was told by her mistress, "If you do not tell, I will send for a constable in the morning to take you to the magistrate." The child did not say anything then and the next morning the constable was sent for and she made a confession to him on her way to the magistrate. The confession was held admissible, inasmuch as the inducement, *viz* the promise that the constable should not be sent for, was at an end, since he had been sent for [*R v. Richards*, 5 C & P 318]. Where an accused confessed to the *punchayet* before arrest on 1-1-22 and was kept in custody by the villagers till the arrival, next day, of the police who sent him after formal arrest to the magistrate, who recorded his confession on the 4th—*Held* that the improper influence had continued and the confession was inadmissible [*R v. Ganesh*, 50 C 127 : 74 IC 264]. In the instant case the requirements of s 28 were held not to have been satisfied [*Vali Isa Md v. S*, A 1963 G 135].

S. 29. Confession otherwise relevant not to become irrelevant because of promise of secrecy, etc.—If such a confession is otherwise relevant, it does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him.

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COMMENTARY

Principle and Scope. [Confession Induced by Trick or Fraud].—It has been seen that a confession caused by any inducement, threat or promise *relating to the charge* and proceeding from a person in authority (s 24) or a confession to the police (s 25) or when in police custody to any person other than a magistrate (s 26), is inadmissible. If the confession is otherwise, *ie* if it is not obtained by any inducement, threat, or promise having reference to the charge against the accused person proceeding from a person in authority, or if the confession is not tainted with any other cause making it invalid or untrustworthy it does not become irrelevant merely because it was made under—

(*1*) a *promise of secrecy*, or

(2) in consequence of a *deception* or artifice practised on the accused, or

(3) when he was *drunk*, or

(*4*) because it was elicited in answer to *questions*, or

(*5*) because *no warning* was given that he was not bound to say anything and that whatever he might say might be used as evidence against him.

It is well-established that any breach of confidence or of good faith, or the practice of any artifice does not exclude a confession. The five non-invalidating origins of a confession are not exhaustive. Confessions obtained under promise of secrecy, deception, drunkenness, &c though admissible may sometimes affect their weight. The inducement or threat which invalidates a confession operates on the mind of the accused and raises some hope of temporal benefit in connection with the charge, but a confession obtained by any sort of deception is not the result of any inducement although the means may be reprehensible. Deception may assume the form of false representation or any other fraud or trick (see *R v. Derrington; R v. Burley, post*).

The rule as to admission in civil cases laid down in s 23 has no application to criminal cases. As regards confession, if it is found to be true, there is no limitation or bar to its use against the person confessing, nor is its admissibility affected by reason of any agreement or promise not to reveal it or because it was obtained by practice of deception, *eg* a false representation that his associates have already confessed implicating him. The ground of reception is that in these cases no promise or prospect of a temporal benefit or advantage in reference to the charge is held out. Inducement relating to any *collateral* matter unconnected with the charge does not make the confession inadmissible, for it has not the effect of inducing the accused to believe that his position with reference to the charge will be rendered better or worse according as he confesses or does not confess. The only point for consideration is whether the confession is voluntary or not. The general principle is that the illegality of the source of evidence of the use of deception or immoral practice in obtaining it does not affect its reception (see *ante*; s 5: "*Evidence illegally obtained is admissible*").

> SELDEN J, in *People v. McMahon*, 1857, 15 NY 386 (Am), said: "It is because it is in its nature unreliable and not on account of any impropriety in the manner of obtaining it, that the evidence is excluded." In *Balbo v. People*, 1880, 80 NY 469, ANDREWS J, said: "The fact that the arrest was illegal has no relevancy, if the confession was voluntary."
>
> NARES J, and EYRE, B in *R v. Warickshall*, (1 Leach Cr Law 208) said: "It is a mistaken notion that the evidence of confessions and facts which have been obtained from prisoners by promises or threats is to be rejected from a regard to public faith; no such rule ever prevailed. The idea is novel in theory and would be as dangerous in practice as it is repugnant to the general principles of criminal law. Confessions are received in evidence or rejected as inadmissible, under a consideration whether they are or are not entitled to credit."

Wigmore says: "(*a*) A confession is not excluded because of any *breach of confidence* or of good faith which may thereby be involved. Thus, so far as a promise, whether of secrecy, or favour, or of other action, or a misrepresentation of facts, has been the means of obtaining the confession, the exclusion that might ensue would in no way rest on the mere fact that a promise has been broken, a confidence violated, or a deception deliberately planned and carried out. (*b*) A confession is not excluded because of any *illegality* in the method of obtaining it, or in the speaker's situation at the time of making it. The general principle—that the illegality of the source of evidence is no bar to its reception—is well established, and it is not for any such reason that confessions are rejected" [Wig s 823]. "Since the exclusion of confessions is not due to any principle of public faith or of private pledge of secrecy, it follows that the use of a *trick or fraud* (however reprehensible in itself) does not of itself exclude a confession induced by means of it. So far as the trick involved a promise which would tend to produce an untrue confession, it would operate to exclude—not, however, because it was a trick (*ie* because the representations were false), but because even if true its tenor would have stimulated a confession irrespective of guilt. The principle is and always has been conceded" [Wig s 841].

It has been suggested that if the word "such a confession" are construed to mean a confession made under circumstances referred to in ss 24-27, it would read to a repugnancy between s 29 and the preceding sections. For if an accused makes a confession to a magistrate under a promise of secrecy made by him, it would be shocking to commonsense that it would not be irrelevant under s 24 in spite of such promise. S 29 therefore refers to such confessions only as are not governed by or

contemplated in the preceding sections, or in other words to extra-judicial confessions. S 29 was meant to dispel doubts with regard to extra-judicial confessions made under circumstances similar to those which make judicial confessions inadmissible and with respect to confessions relevant otherwise than as confession: for example, as admissions under conditions not requiring proof of guilt [*per* Ray J, in *R v. Jamuna*, A 1947 P 305]. This view was **dissented** from in *Rangappa v. S*, A 1954 B 285.

The above interpretation may appear somewhat plausible but if the object was to apply s 29 to extra-judicial confessions only, it could have been made plain without using the words "such a confession" which unmistakably refer to the confession in the previous section. Moreover s 29 merely codifies the English law on which it is based. The principle of exclusion of a confession is its involuntariness and not that there has been any breach of confidence or the violation of a promise of secrecy or practice of deception. So, when an accused makes a confession after a false representation by another that his co-accused has disclosed his (accused's) guilt, its admissibility is not affected whether the trick was played by the police or the magistrate or by any other person, however reprehensible such conduct may be from a moral point of view. The principle of s 29 is that if a confession to whomsoever it may have been made is otherwise shown to be relevant, it does not become irrelevant merely because of a promise of secrecy or the practice of deception, &c.

[*Ref Tay ss 881-82: Steph Art 24: Best 11th Ed s 529: Phip 8th Ed p 251: Wig ss 823, 841*].

"Merely Because."—Apart from the deception practised, the confession must be "*otherwise relevant.*" It has been held by the Judicial Committee that a confession not recorded strictly in accordance with the provisions of ss 164 and 364 is inadmissible [*Nazir Ahmed v. R*, 63 IA 372: A 1936 PC 253: 17 L 629]. So a confession inadmissible under s 164 is not admissible under other provisions of the Evidence Act, ss 21 and 29 [*Sardar v. R*, A 1937 N 257].

Promise of Secrecy.—A confession obtained from the accused by a promise of secrecy is relevant. *A*, a fellow-prisoner, said to *B*, who was in custody for murder : "I wish you should tell me how you murdered the boy, pray speak." *B* replied. "Will you be on your oath not to mention what I tell you?". *A* promised on his oath and then *B* confessed. *B*'s confession was admitted in evidence [*R v. Shaw*, 1934 6 C & P 372: *Com v. Knapp*, 9 Pick 507 (Am)]. So in *R v. Thomas*, 1836, 7 C & P 345, where the witness promised the accused that what he said should go no further, the confession was received. In *R v. Md Baksh*, 8 Bom LR 507: 4 Cri LJ 49, the accused made his confession of guilt to the commissioned officer of his regiment, who stated to the accused that he had already obtained information from another person and promised secrecy if he told the truth—*held* that the confession was admissible under s 29.

Deception.—Where a confession is obtained by artifice or deception, it is admissible in evidence. A turnkey promised to post a letter given to him by a prisoner and addressed to prisoner's father. The letter contained a confession, and the turnkey sent it to the prosecutor instead of posting it as promised. It was held a voluntary confession and the way it came into the prosecutor's possession was immaterial [*R v. Derrington*, 1826, 2 C&P 418]. A confession was made by a prisoner after a representation to him by a constable in the jail that his accomplice had been taken into custody, which was not a fact. Afterwards on being called as a witness for the prosecution the prisoner denied all knowledge of the case. The confession was admitted against him when he was afterwards tried for the offence

himself [*R v. Burley*, 1 Phillips & Arn on Ev (10th Ed) 420: 2 Starkie Ev 2nd Ed 12n. afterwards confirmed by all judges]. The following note appears in Tay s 881 in: "The case is only reported very briefly in a footnote in Starkie on Evidence, and it is not clear how far the prisoner was actually inclined to make the confession by the false statement". In an American case where the confession was obtained by untruly telling the prisoner that he had been actually seen to do the criminal act with which he was charged, it was held to be inadmissible [*Cook v. S*, 1893, 40 Am St R 756; cited in Tay s 881 with approval]. The mere use of artifice to obtain a confession does not make the confession inadmissible, but a confession so obtained has very little weight [Hals, 3rd Ed, Vol 10, para 876].

A confession made by the prisoner before the assistant magistrate was obtained by the police officer by practising deception upon the accused, saying that the prisoner's brother-in-law had given out that he (prisoner) was guilty—*Held* that the confession was not excluded by s 29, though the practice of obtaining it by deception is not to be approved [*R v. Ram Churn*, 20 WR Cr 33].

Recordings of conversations in an interview room between the accused and his family made using a hidden microphone without informing the accused or formally recording the "bugging" have been held to be admissible. [*R v. Ali*, The Times, Feb 19, 1991 CA].

Where detectives operating under cover of innocent dealers in drugs approached the accused and persuaded him to sell drugs to them and to make arrangements for future deliveries. The evidence thus discovered was held to be relevant against the accused. [*R v. Edwards*, 1991 Crim LR 44 CA].

Where the signature of the accused is obtained by telling him that the document is of one character and it turns out to be a confessional statement, it would become a question for the judge to decide whether the statement could be said to be voluntary [*Ajodha v. The State*, (1981) 2 All ER 193 PC]. The court applied a dictum of Lord Sumner in *Ibrahim v. R*, (1914-15) All ER Rep at 877].

A tape recording of a defendant made without his knowledge may be admitted even though there is an element of entrapment so long as the conversation itself is not unfairly conducted. Two persons were charged with conspiracy to commit false accounting. A witness took part in a conversation with one of them which the police tape-recorded without his knowledge. The tape recording was held to be properly admitted *R v. Jelen; R v. Katz*, (1990) 90 Cr App R 456 CA.

Unlawful searches and seizures.—Where certain articles constituting obscene literature were seized under an invalid search warrant and the accused person admitted that the articles were in his possession for publication for gain, the articles were held to be relevant in evidence because the law is not much conerned with the manner in which a piece of evidence is obtained. [*R v. Adams*, (1980) 1 All ER 473 CA]. The court followed [*R v. Sang*, (1979) 2 All ER 1222 and distinguished *Spicer v. Hold*, (1976) 3 All ER 71]. See also [*R v. Gill and Ranunna*, (1989) Crim LR 358 CA], where the conspirators plotting to kill Rajiv Gandhi in 1985 in England were brought to the surface by agents provocaters.

A judge at a criminal trial has a discretion not to allow evidence to be called by the prosecution which would be unfair or oppressive but the discretion to exclude evidence should be exercised only in exceptional cases. The fact that the evidence has been obtained in an irregular manner is not of itself a sufficient ground for the exercise of the discretion in favour of the accused.

The accused in this case was arrested for the theft of a sandwich from a public house. Before he was charged his house was searched and cannabis and cannabis resin were found. He was then charged with the unlawful possession of these articles. He contended that his house was searched without his consent and without a warrant. Inspite of this irregularity the evidence was held to be admissible. [*Jeffery v. Black*, (1978) 1 All ER 555 QBD].

In *R v. Wright*, The Times, April 27, 1989 CA, a headmaster was charged with buggery and offences of indecency. The judge gave the prosecution leave to adduce in evidence the copy of a book which went some way to proving that he was a homosexual. He was convicted by the judge. The Court of Appeal quashed his conviction. He had not used the book in his defence and so it was irrelevant.

Overheard Statement.—What the accused has been overheard muttering to himself, or saying to his wife or to any other person in confidence, will be receivable in evidence [*R. v. Simons*, 6 C & P 540] though the wife, solicitor and counsel of the prisoner will not be themselves allowed to reveal what he has said to them [Tay s. 881]. What a prisoner is overheard to say to another person or to himself is receivable in evidence against him, but such evidence is not always reliable [*R v. Simsons, sup* at p 541, *per* ALDERSON, B; *Earle v. Picken*, 5 C&P 542; Hals, 3rd Ed, Vol 10, para 867]. The wife or the legal adviser is not allowed to depose to the fact on the ground of privilege (see *post* ss 122, 126].

A confessional soliloquy is a direct piece of evidence but it may be used only for corroboration [*Sahoo v. S*, A 1966 SC 40].

The evidence of a police man, who overheard a prisoner's statement made in another room, and in ignorance of the policeman's vicinity and uninfluenced by it is not legally inadmissible [*R v. Sagina*, 7 WR Cr 56].

Statement Made While Talking in Sleep.—What a person has been heard to say while talking in his sleep, seems not to be legal evidence against him, however valuable it may be as indicative evidence; for here the suspension of the faculty of judgment may fairly be presumed complete. The point arose in the case of *R v. Elizabeth Sippets*, Kent Summ, Ass 1839, where TINDAL, CJ, was inclined to think the evidence not receivable. See also *per* ALDERSON, B, in *Gore v. Gibson*, 13 M & W 623 : 9 Jur 140, 142. Such a phenomenon may often be of the utmost importance as indicative evidence. Best quotes the following case from Mr Arbuthnot's Reports of Criminal Cases in the Court of the Foujdaree Adalut of Madras, p 61:-Five prisoners, *D*, *N*, *V*, *T* and *C*, were tried in 1834 for the wilful murder of one *P*. The deceased having been found murdered and much mutilated, the head lying on an ant-hill away from the rest of the body. Suspicion fell on one *W*, with whom he was on bad terms. *W*'s answers when questioned on the subject not being satisfactory, he was kept under surveillance, in the house of a neighbour, and in the course of the following night was heard to talk in his sleep allowing the following expressions to escape him: "*D*, catch hold of the hands. *N* cut off the head. *T*, *C* and *V* catch hold of his legs, come, we may go home after we have deposited the head on the top of an ant-hill". These words having been next morning reported to the authorities, *W* was taken into custody and taxed with the murder, which he at once confessed, criminating the prisoners, whose names had been mentioned by him in his sleep, and who on being apprehended, likewise confessed their guilt. The prisoners were convicted chiefly on their own confession and left for execution [Best, 4th Ed, pp 663-664 foot-note; 11th Ed, p 514].

Confession in sleep was also excluded in America [(1861), *People v. Robinson*, 19 California 40], but soliloquy at night while on a couch, admitted, *semble* admissible even though made while asleep [1891, *S v. Morgan*, 35 W Va 260, cited in Wig s 500]. Confession to a clairvoyant held inadmissible [1913, *S v. Strong*, 83 NLJ 177 cited in Wig Vol 1, p 924].

Drunkenness.—In *Eskridge v. S*, 25 Ala 33; (Am) CHILTON CJ, said: "It does not follow necessarily that, because the party was much intoxicated, his reason was so far dethroned as to disable him from comprehending the effect of his admissions or from giving a true account of the occurrence to which they had reference". Where the prisoner is made drunk, it is sort of deception or artifice, but whether he be made drunk for the purpose or with the motive of getting a confession, or made the confession while he has made himself drunk, it is receivable. In *R v. Spilsbury*, 7 C & P 187, COLERIDGE, J said: "I am of opinion that a statement made by a prisoner while he was drunk is not therefore inadmissible; it must either be obtained by hope or fear. This is matter of observation for me, upon the weight that ought to attach to his statement when it is considered by the jury" [Nort p 168].

A confession made while *intoxicated* is governed by general principles of testimonial capacity, and is therefore usually held admissible [Wig s 499]; it is only where the intoxication is produced by a person desirous of obtaining a confession that its trustworthiness becomes really doubtful [Wig s 841]. A confession must be judged with reference to the time of its utterance; the mere fact of intoxication at the time does not of itself exclude the confession; but it has been held in some States of America that *drunkenness induced for the purpose of securing* a confession may in the circumstances exclude the confession [1903, *McNutt v. S*, 68 Nebr 207 (liquor given by the sheriff who then questioned the accused, held inadmissible; 1886, *McCabe v Com*—, Pa—, 8 Atl 54), *semble* (a confession under the influence of liquor given by an officer to make the accused talk) Wig s 499].

Unsoundness of Mind.—The acts of persons of unsound mind are not in general binding but this is subject to some exceptions which will be found collected in the case of *Molton v. Camroux*, 1848, 2 Exch 487; **affirmed** on error 4 Exch 17 (Best 11th Ed, p 514 foot-note).

Interrogation.—[Confession in Answers to Questions].—This section lays down that a confession does not become inadmissible merely because it is elicited in answers to questions put to the accused, whoever may be the interrogator, excepting of course to the police, as under ss 25, 26 no confession made to the police is admissible. In England this limitation does not exist and a confession in answers to questions by the police is in strict law admissible (*v ante* s 25). In *R v. Nabadwip*, 1 BLR Cr 20, 25, *R v. Ellis*, 1 Ry & M 432 was cited. Under s 313 Cr P Code the court has power to examine the accused at any stage of an inquiry of trial without warning. The mere fact that a statement in a confession was elicited by a question put by the magistrate recording it, does not make it irrelevant as a confession. But the fact may be very material to an enquiry as to whether the confession is voluntary or not [*Barindra v. R*, 14 CWN 1114: 37 C 467]. An accused person cannot be said to have been compelled to be a witness against himself within art 20(*3*) Constitution simply because he made a statement while in police custody without anything more. But that fact in conjunction with other circumstances disclosed in evidence in the particular case would be a relevant consideration in an inquiry whether or not the accused had been compelled to make the impugned statement. The mere questioning of an accused by a police officer, resulting in a voluntary statement, which may ultimately

turn out to be incriminatory, is not 'compulsion' [*Kathi Kalu v. S*, A 1961 SC 1808 : 1962, 33 SCR 10].

Best observes that the function of tribunals are primarily and essentially *judicial* and not *inquisitorial*. Admitting the *special* interrogation of accused persons might in some cases extract truth which otherwise would remain undiscovered, the law is fully justified in rejecting the use of such engine, if on the whole prejudicial to the administration of justice. That sort of interrogation, even when conducted with the most honest intention, must in order to be effective, assume the shape of cross-examination, and consequently involve the judge in an intellectual contest with the accused—a contest unseemly in itself, dangerous to the impartiality of the judge and calculated to detract from the moral weight of the condemnation of the accused, though ever so guilty. In gladiatorial conflicts of this kind, the practised criminal has a much better chance of victory than an innocent person embarrassed by the novelty and peril of his situation. But where the judge is dishonest or prejudiced, the danger increases immeasurably. By artful questioning and working on their feelings weak-minded individuals can be made to confess or impliedly admit almost everything; and to resist continued importunities to acknowledge even falsehood requires a mind of more than average firmness. In short, judicial interrogation, however, plausible in theory, would be found in practice a *moral torture*, scarcely less dangerous than the physical torture of former times, and like it, unworthy of a place in the jurisprudence of an enlightened country (Best, 11th Ed, pp 542-43].

The courts have on numerous occasions emphasised that s 313 Cr P Code is misapplied or abused if the questions are of an inquisitorial or cross-examining character in order to force the accused to confess or to make incriminating admissions [see *Hussein v. R*, 6 C 96; *Hurry Churn v. R*, 10 C 140; *Alimuddin v. R*, 52 C 552; *Tahasimuddin v. R*, 44 CWN 396; *Md Yasin v. R*, A 1954 P 437; *Umar Din v. R*, 2 L 129; *Tara Singh v. S*, A 1951 SC 441, 443: 1951, SCR 729; see Sarkar's Cr P Code, 4th Ed, notes under s 313]

In *R v. Knight*, 20 Cox 711, a post office clerk was subjected to severe cross-examination by a detective for six hours at a stretch although he was given the usual caution. The confession was held inadmissible and CHANNELL, J, stated:—

> "When he (a police officer) has taken any one into custody, and also before doing so when he has already decided to make the charge, he ought not to question the prisoner. A magistrate or a judge cannot do it, and a police officer has certainly no more right to do so. I am not aware of any distinct rule of evidence, that if such improper questions are asked, the answers to them are inadmissible, but there is clear authority for saying that the judge at the trial may at his discretion refuse to allow the answer to be given in evidence, and in my opinion that is the right course to pursue".

In *R v. Pramatha*, 30 CLJ 503, where some letters and currency notes were stolen from a post office after a fire, the accused who was kept in charge of a head-constable was questioned by the sub-inspector for three or four hours after which he broke down and confessed. The confession was held inadmissible.

Want of Warning or Caution.—The section lays down that a voluntary confession does not become inadmissible *merely because* the maker was not warned before that it might be used against him as evidence. A voluntary confession is evidence, to whomsoever it may have been made, though it does not appear that the prisoner was warned that what he might say would be used against him, or even if it appears that he was not so warned [*R v. Thornton*, 1 Moo CC 27; *R v. Coote*, LR 4 PC 605; *R v.*

Voisin, 1918, 1 KB 531; *R v. Godinho*, 7 Cr App R 12; see also Tay as 881 A, 882]. It is, however, no part of the duty of a magistrate to tell an accused person that anything he might say will go as evidence against him [*R v. Uzir*, 10 C 775, 777]. The question was considered before in *R v. Nabadwip*, 1 BLR Cr 15: 15 WR Cr 71 and it was held that the law or practice outside the presidency-town in India never required that an accused person should be warned that he is not bound to make a confession. This section has practically followed that decision and there is no provision in Evidence Act that the accused should be cautioned by the magistrate before making a confession [see also 5 Mad HC App 9 and 16 WR Cr 21].

Sub-sec (*3*) of s 164 (as amended by Cr P Code Amendment Act of 1923 [how sub-s (*2*)] requires that "A magistrate shall before recording any such confession, explain to the person making it that he is not bound to make a confession and that if he does so it may be used as evidence against him". This in fact is a warning. But it is a special provision for magistrates recording confessions under s 164 Cr P Code *in the course of an investigation*. It cannot therefore apply to confessions elicited by persons in the circumstances mentioned in s 29 and which are otherwise relevant. S 164 is a special enactment applying only to certain statements made in the particular circumstances contemplated by s 164. It cannot override the general provisions of s 29 except where these circumstances bring the section into operation [*R v. Ramnath*, 93 IC 690: A 1926 B 151; *Bala Majhi v. S*, A 1951 O 168 FB]. The failure to comply with s 164 Cr P C or with High Court circulars will not render the confession inadmissible in evidence if it does not violate any of the conditions operative under ss 24 to 28 which however impairs the evidentiary value of the statements and the court has to consider whether they can be accepted as true [*Dagdu v. S*, A 1977 SC 1579]. Where there is substantial compliance with the requirements of s 164 Cr P C, reliance can be placed on ss 29 and 80 and any non-compliance with provisions of s 164 Cr P C may be regularised by application of s 533 (now s 463) Cr P C (In this case essential principles indicated) [*Shanti v. S*, A 1978 Or 19 FB]. If a confession is otherwise shown to be relvant under ss 24-28 the mere fact that no warning was given under s 164(*2*) Cr P Code will not by itself make it necessarily inadmissible [*Rangappa v. R*, A 1954 B 285; *R v. Nanua*, 1941 All 280; A 1941 A 145; *Kholli v. S*, A 1951 Or 78; *Ram Singh v. S*, ILR 1952, 2 Raj 93; *In re Mannem*, A 1957 AP 729; *Dhula v. S*, A 1957 Raj 141]. S 164 *ibid*, is in this respect in conflict with s 29 but on a question of admissibility the latter prevails [*In re Vellamoonji*, 55 M 711; *Khitali v. R*, A 1933 O 404], though there is this infirmity that the pre-requisites of a valid confession are wanting and it has to be found out how far the confession can be acted upon [*In re Karunthambi*, A 1950 M 579]. As s 29 has not been amended along with s 164(*3*) *ibid*, confessions are still admissible although they do not conform with that section [*Lal Singh v. R*, A 1938 A 625: 1938 ALJ 943].

It would seem that the absence of any provision as to warning is proper in the law of Evidence as s 29 applies to a confession to whomsoever made and not to a magistrate only. It covers extra-judicial confession made to any one. But so far as a magistrate is concerned although s 29 does not prescribe any warning, the procedural rule requires that a warning in the terms laid down in s 164 Cr P Code should be administered when an accused is formally brought before him "in the course of an investigation" for the recording of his confession. For a magistrate it is a sound rule of practice to give the accused clearly to understand when he is brought by the police for recording a confession, that he has nothing to hope for any promise of favour and nothing to fear from any threat which may have been holden out to him to induce him to confess and that whatever he shall say may be given in evidence against him. Such a warning is an important element in determining the voluntary nature of the

confession. As to confessions which are not required by law to be recorded, whether by a magistrate (see *ante* notes to s 26 pp 280, 282) or by any other person, warning is not imperative.

The language in which the section is couched, *viz.* "If a confession is otherwise relevant, it does not become irrelevant *merely because, &c, &c*" clearly indicates that it would be better and safer for magistrates to warn the accused. Under the section a confession does not become irrelevant simply or *merely because* no warning was given, but it may become so if the want of warning coupled with other facts affect its voluntary nature. In considering the relevancy of confession in the light of this section, judges ought to pay special attention to the intention of the legislature in using the words "*merely because*". The question whether an accused person was warned is relevant for the judge to consider in deciding whether the confession was voluntary [*R v. Voisin*, 1918, 1 KB 531]. [As to how a confession is to be recorded, see s 24, *ante*].

Under s 163(2) Cr P Code, no police officer or other persons shall prevent, by any caution or otherwise, any person from making, in the course of any investigation under Chapter XII, any statement which he may be disposed to make of his own free will. S 313 of the same Code empowers the court at any stage of an inquiry or trial *without previous warning* the accused, to put such questions to him as the court considers necessary, &c, &c. See also s 246(2) Cr P Code.

> [In England when trying indictable offences, a magistrate is, after examination of all prosecution witnesses, bound to caution the accused in the following terms: "Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you will say will be taken down in writing, and may be given in evidence against you upon your trial". Indictable Offences Act, (11 & 12 Vict c 42, s 18, specially preserved by the Criminal Ev Act s 1 (*h*)].

In re Kannammal, 92 IC 695: A 1926 M 570 COURTS-TROTTER CJ, pointed out the extreme desirability of magistrates following the above practice of English courts of warning an accused when inviting his explanation under s 313 Cr P Code.

S. 30. Consideration of proved confession affecting person making it and others jointly under trial for same offence.—When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court [1][may] taken into consideration such confession as against such other person [1][as well as against the person who makes such confession].

[2][*Explanation.*—"Offence", as used in this section, includes the abetment of, or attempt to commit, the offence].

Illustrations

(*a*) *A* and *B* are jointly tried for the murder of *C*. It is proved that *A* said—"*B* and *I* murdered *C*". The Court [3][may] consider the effect of this confession as against *B*.

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1. In Ceylon "shall not" substituted and the words "as well as .... confession" omitted.
2. This *Explanation* was inserted by s 4 of the IE Act [1872] Am Act, 3 of 1891.
3. In Ceylon "shall not" substituted.

[4][(*b*) *A* is on his trial for the murder of *C*. There is evidence to show that *C* was murdered by *A* and *B*, and that *B* said—"*A* and *I* murdered *C*".

This statement may not be taken into consideration by the court against *A*, as *B* is not being jointly tried].

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COMMENTARY

Principle and Scope.—This section is entirely new. It makes a departure from the common law of England [*Bhuboni v. R*, A 1949 PC 257, 260: 76 IA 147]. Under the

4. Illustration (*b*) omitted in Ceylon.

of co-accused when may be taken into consideration. See *Public Prosecutor v. Nordin Bin Johan,* (1983) 2 Malayan LJ 221 (Kuala Lumpur FC); *Public Prosecutor v. Yeoh Teck Chye,* (1981) 2 Malayan LJ 176 (Kuala Lumpur FC); *Indran v. Public Prosecutor,* (1985) 2 Malayan LJ 408 (Seremban HC)].

Confessional statement of a co-accused per se is not evidence. Where evidence against the co-accused is sufficient to base conviction, the confesional statement of co-accused may be treated as a corroboration for believing that evidence. *Brija Panda v. State of Orissa*, 1996 Cri LJ 904, 905 (Ori). The confessional statement of accused while in custody and his disclosure statement leading to discovery cannot be used against the co-accused. *Kamal Kishore v. State*, 1997 Cri LJ 2106, 2108 (Del). Confession of co-accused can not be treated as substantive evidence. In dealing with a case against the accused person, the court cannot start with the confession of a co-accused. It must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assistance to the conclusion of guilt if the judicial mind is about reach on the said other evidence. In other words..... Confession by a co-accused can be pressed into service only when the court is inclined to accept other evidence and feel the necessity of seeking for an assurance is support of its conclusion deducible from the said evidence. [*Balbir Singh v. State of Orissa*, 1995 Cri LJ 1762, 1764 (Ori)]. In a case of causing death of a person by administering poison, when the only evidence against the deceased's wife was the statement of her son by which he admitted having mixed poison in the flour of his father at the instance of his mother, this evidence could be read against her under section 30. However, the evidence under section 30 could not be a substantive evidence and could be used only to corroborate the other substantive evidence if available against any particular accused. *Rajendra v. State of UP*, 1997 Cri LJ 2700, 2702 (All), see also *Haricharan Kurai v. State of Bihar*, A 1964 SC 1184; *Bhuboni Sahu v. King*, A 1949 PC 257. Statement of co-accused recorded under section 108 of the Customs Act can be used as substantive evidence. *Naresh J Sukhwani v. Union of India*, A 1996 SC 522, 523. An accused should be permitted to cross examine a co-accused about a previous inconsistent confession provided that the confession was relevant to the accused's own defence [*R. v. Myers,* The Times, July 31, 1997 (HL)].

—**Summary.**—On the whole, this section has introduced an innovation of a very serious character which is liable to cause miscarriage of justice if not properly understood and applied. The law before the Evidence Act of 1872, was that an accused person's confession was relevant only against himself and not against his fellow-prisoners [*R v. Kally Churn*, 6 WR Cr 84; *R v. Bussiruddi*, 8 WR 35; *R v. Durbaroo*, 13 WR Cr 14]. But under s 30 where two persons are jointly tried, for the same offence a confession by one of the prisoners may be used against the other. Thus the provisions of the section are not only different from the previous Indian law but also opposed to the principles of English law. PHEAR J, and GLOVER J, have called the provisions of this section as "*dangerous material* [see *ante* and *post*]. This section may no doubt, prove a dangerous weapon in the hands of inexperienced magistrates or judges, but a careful consideration of the numerous decisions in which its principles have been expounded should enable everyone to grasp its true meaning and scope and to realise that it should be applied with the greatest caution and strictness. It should always be borne in mind that the section does not make a confession '*evidence*' within the meaning of s 3. It has given the court merely a discretion to *take it into consideration* along with other evidence in the case. The legislature has advisedly and very cautiously used the words "*may take into consi-*

deration", *ie* in a proper case it can lend assurance to other evidence; but if there is no other evidence in the case. The confession alone cannot form the basis of conviction. [See *post*, "*May take into consideration such confession*", *and* "*Summary of Law as to what is meant by may take into consideration*"].

Section to be Strictly Construed. [Confession Must Implicate the Maker Substantially to the Same Extent as Others].—It has been held over and over again that this section must be *very strictly construed*. "S 30 of Act 1 of 1872, introducing as it does an entirely new, and I am inclined to think, rather dangerous element into the conduct of criminal trials, ought to be construed with great strictness [*R v. Jaffer Ali*, 19 WR Cr 57, *per* GLOVER J. See also *R v. Malappa*, 14 Ind NS 19; *In re Marudamuthu*, A 1931 M 820: 54 M 788] and "with the greatest caution and with care to make sure that we do not stretch it one line beyond its necessary intention" [*per* REILLY J, In *Pariyaswami v. R*, A 1931 M 177 (*ante*)]. In another case GLOVER J, laid down "that neither can the statement of one prisoner be taken as evidence against another prisoner under s 30 unless the parties are admittedly in *pari delicto*, that is when the confessing prisoner *implicates* himself to the full, as much as his co-prisoner whom he is criminating" [*R v. Baijoo*, 25 WR Cr 43: *R v. Belat Ali*, 19 WR Cr 67; see also *R v. Naga*, 23 WR 24; *Sivaswami v. R*, 9 MLT 138]. WEST J, in *R v. Daji Narsu*, 6 B 288 observed—

> "Where a person admits guilt to the fullest extent, and exposes himself to the pains and penalties provided for his guilt, there is a guarantee for his truth, and the legislature provides that his statement *may be considered* against his fellow-prisoners charged with the same crime".
>
> STRAIGHT J, in *R v. Jagrup*, 7 A 646: "What was intended with regard to s 30 of the Evidence Act, was that where a prisoner, to use a popular phrase, makes a clean brest of it, and unreservedly confesses his own guilt, and at the same time implicates another person who is jointly tried with him for the same offence, his confession may be taken into consideration against such other person—as well as against himself, because the admission of his own guilt operates as a sort of sanction which to some extent, takes the place of an oath, and so affords some guarantee that the whole statement is a true one. But where there is no full and complete admission of guilt, no such sanction or guarantee exists and for this reason, the words 'confession' in s 30, cannot be construed as including a mere inculpatory admission which falls short of being an admission of guilt". [See also *Sheroo v. R*, 81 IC 891: A 1925 N 78; *Sheo Ambar v. R*, 77 IC 1098; *Jainand v. R*, A 1949 A 291].
>
> STRAIGHT J, in *R v. Ganraj*, 2 A 444 (*R v. Belat Ali*, 10 BLR 453: 19 WR 67 follo): "The test s 30 intended should be applied to a statement of one prisoner proposed to be used in evidence as against another is, to see whether it is sufficient by itself to justify the conviction of the person making it of the offence for which he is being jointly tried, with the other person or persons against whom it is tendered. In fact to use a popular and well understood phrase, the confessing prisoner must '*tar himself and the person or persons he implicated, with one and the same brush*".

Ganraj's case has been **followed** in *R v. Mulu*, 2 A 646 and *Bhadreswar v. R*, A 1928 C 418 : 109 IC 351. The cases of *R v. Ganraj* and *R v. Mulu, ante*, were explained in a later decision where it was pointed out that all that is required to make the confession admissible against a co-accused is that it shall *substantially implicate* its maker in regard to the offence for which he and his co-accused are charged. Admission of actual guilt is not necessary. The admission may establish constructive

guilt only [*Suka Raut v. R*, 75 IC 705 : 4 PLT 505; see also *R v. Bhagwandass*, 1941 Bom 27: A 1941 B 50]. The Supreme Court has also held that unless the maker implicates himself substantially to the same extent as the other co-accused, the confession cannot be used against the latter [*Balbir v. S*, A 1957 SC 216: 1957 Cri LJ 481; *Rema v. S*, A 1965 Or 31].

Where a person seeks to clear himself, at the expense of other persons jointly tried with him his statement could not be taken into consideration against such other persons. The statement must amount to a distinct confession of guilt. Statements however criminating made by a prisoner in self-exculpation or to reduce his guilt to something lower than what is alleged against the other and against himself, should not be taken into consideration against anybody but himself [*Noor Bux v. R*, 6 C 279: 7 CLR 385; *Jogendra v. R*, A 1934 C 724; *R v. Gostho*, A 1936 C 407; *R v. Daji Narsu*, 6 B 288; *R v. Jagrup*, 7 A 646; *Bishnu Dutt v. R*, 2 ALJ 53: 2 Cri LJ 22; *Kunja v. R*, 8 P 289]. A statement of an accused that he went under pressure and fear of imminent death, that he took no part in the dacoity, that he stood outside the house and at the end went away, is self exculpatory and not a confession. Even if it be considered against the maker, it could not be considered against the other accused [*Bhadreswar v. R, sup*]. An explanation exculpating one's self from his alleged share of the offence is not a confession [*Abdul Jalil v. R*, A 1930 A 746; *Dito v. R*, A 1931 S 154]. The object sought by the rule of law is a safeguard for sincerity and for information, and this safeguard equally subsists in the case supposed as where the confession implicates both in an identical act [*R v. Nur Md*, 8 B 223].

S 30 is not limited to cases where the confessing accused directly implicates another accused, but extends to cases, where the confession indirectly affects a co-accused [*R v. Shivabai*, 50 B 683: 28 Bom LR 1013]. Merely because a confession by an accused is not a complete and detailed confession up to hilt, it cannot be rejected against the co-accused [*Lakhan v. R*, A 1924 A 511].

—"And a Confession Made By One of Such Persons Affecting Himself and Some Other of Such Persons".—In order that it may be taken into consideration the confession must affect both the person confessing and the other accused [*R v. Santya Bandhu*, 11 Bom LR 633]. Before its use against a co-accused it must appear that the confession implicates the confessing person substantially to the same extent as it implicates the person against whom it is to be used in the commission of the offence for which the prisoners are being jointly tried [*R v. Belat Ali*, 19 WR Cr 67: 10 BLR 453; *Sheroo v. R*, A 1925 N 78; *Bigna v. R*, 94 IC 258: A 1926 P 440; *Diwan v. R*, 91 IC 1002: A 1926 N 229]. He must implicate himself as "fully and substantially" as he does his co-accused [*R v. Sambhu*, 54 A 350: A 1932 A 162; *Jainand v. R*, A 1949 A 291; *Ram Bharose v. R*, A 1949 A 132; see *ante*: "*Section to be strictly construed*"].

There is a difference of opinion as to whether for the purpose of s 30 a confession should implicate the maker and other accused in one of the offences or in all the offences for which they are being jointly tried (see *post*: "*For the Same Offence*"); but in any case it is not required that the confession should claim for its maker the leading or major part in the crime [*R v. Sadasibo*, A 1929 P 35; *Md Sabir v. R*, 1950 ALJ 140: 1950 All 1132; *Dhanapati v. R*, A 1949 L 156]. Confession of an accused made to Narcotic Officer cannot be used to supplement evidence against other accused in the same trial [*Tan Siew Chay v. Public Prosecutor*, (1993) 2 SLR 14 (Singapore CA)]. There is nothing in s 30 which suggests that if the confession minimizes the guilt of the maker and exaggerates the guilt of the other, it is inadmissible against the co-accused. The section says that it must "affect" both. It

does not say that the confession must affect both equally [*Mirza Zahid v. R*, A 1938 A 91]. Also "affecting both equally" does not necessarily mean both the accused should have taken indentical parts in the crime. The Explanation makes it clear that abetment and attempt are included in the term "offence". (*Cf* Expln 4 to s 108 I P Code). The important point is to see whether the accused has given a full and true account of the crime and has unreservedly confessed his own share of the guilt (see "*Summary*", in next heading).

When the statement of an accused is more of an exculpatory nature than of an admission of guilt, it is inadmissible against his co-accused [*Batan v. R*, 86 IC 219: A 1925 I 334; *Amina v. R*, A 1931 L 196; *Shamla v. R*, A 1929 N 350]; so also statements implicating his fellow-prisoners but exculpating himself [*R v. Keshub Bhoonia*, 25 WR Cr 8]. Where the principal blame is on others, the statement is self-serving and is inadmissible [*Sheo Charan v. R*, 90 IC 385: A 1926 N 117]. But in a case it has been held that when the statements do not incriminate himself, parts of it are admissible against the maker as admission indicating knowledge of offence for purpose of s 386 IPC [*Wahid v. R*, A 1929 s 250].

Under s 30, the statement of facts made by a prisoner, which amounts to a confession of guilt on his part, may be taken into consideration so far, and so far only, as that particular statement of fact itself extends against the other prisoners who are being tried, as well as himself for the offence which is thus confessed [*R v. Mohesh*, 19 WR Cr 15: 10 BLR 455 note; *Nirmal v. R*, 31 CWN 239]. When the inherent quality of a statement is not a confession, it cannot be used against the co-accused. Thus, when a woman and her paramour were charged with poisoning some persons, the statement of the woman that the co-accused gave her the drug and assured her that the drug mixed with food would make her husband and mother-in-law sunmissive to her, is a self-exculpatory statement and not admissible against the co-accused [*Shaheber Ma v. R*, 18 CLJ 590]. A statement of an accused person that he and co-accused struck the deceased in exercise of right of private defence, is one of an exculpatory nature and is in no sense a confession. It cannot be taken into consideration against a co-accused [*Maulu v. R*, 85 IC 371: A 1925 L 532]. In the following cases it has been held that statements exculpating the maker and implicating his fellow-prisoners do not come within this section [*R v. Mohesh*, 19 WR Cr 16; *R v. Jaffer Ali*, 19 WR Cr 57; *R v. Belat Ali*, 19 WR Cr 67; *R v. Amrita Govinda*, 10 Bom HC 479; *R v. Kukree*, 21 WR Cr 48; *R v. Bunwari*, 21 WR Cr 53; *R v. Naga*, 23 WR Cr 24; *R v. Keshub*, 25 WR Cr 8; *R v. Baijoo*, 25 WR Cr 43; *R v. Ganraj*, 2 A 444; *R v. Mulu*, 2 A 646; *Noor Bux v. R*, 6 C 279; *R v. Daji Narsu*, 6 B 288 and *Bishan Dutt v. R*, 2 ALJ 53].

When there are confessions by two accused and one of them tries to throw the main blame on the other, though it cannot be used against the other accused, the two confessions cannot be condemned out of hand or *in limine* as untrue because of the differences in them. They have to be tested by the other evidence in the case [*Balbir v. S*, A 1957 SC 216: 1957 Cri LJ 481]. Accused must unreservedly confess his own guilt and implicate another who is jointly tried with him. *Joge Gopal & Anr. v. State*, 1994 (2) Crimes 819 (Ori). The statement given by an accused involving himself in the crime and also implicating third person cannot be proved legally in court as it will be conflicting with sections 25 and 26. If such evidence or confession cannot be proved then the occasion for utilising that statement against another person does not arise. The admissibility of such evidence under section 30 depends upon the fact that the confession made by such person affecting himself and some other of such persons is proved. The result is that if the confession cannot be proved and has not

been proved then the question for reliance of such statement against another person while framing charge does not arise. *Anant Kumar v. State of M.P.*, 1993 Cri LJ 1499, 1500 (MP).

—Summary of Law as to What is Meant by a Confession "affecting himself" and others.—It is abundantly clear from the relevant cases on the point, that in order that the statement of an accused may be taken into consideration against his co-accused tried jointly for the same offence, it must implicate himself substantially to the same extent as others, and must expose himself to the same risk along with the fellow-prisoners (*ante*, p 325); otherwise the confession cannot be taken into consideration under this section. If the statement implicates him as fully as the others or in a greater degree, it is then only that it can afford a sort of safeguard for truth. If the statement criminates the maker partially or in a lesser degree, or throws the main burden of the blame on others, it cannot be used against his co-accused. Statements however criminating made in self-exculpation or in mitigation of guilt are self-serving statements and are not admissible. A statement falling short of actual admission of guilt would be a mere inculpatory admission and not a confession at all within the meaning of s 30 (next heading). All that the section requires is that it must be a "confession" and that the statement of the confessing prisoner must implicate himself *substantially to the same extent* as it implicates the others.

It appears that the real test is not whether the confessing accused ascribes to himself a major or minor part in the crime, but whether when implicating his co-accused he gives a full and true account of the crime and unreservedly confesses his own share of the guilt, *ie* implicates him as fully and substantially as his co-accused. It may be that the part assigned to him was not a leading or major one, but in any case there must be a confession to the fullest extent of whatever part he took in the commission of the crime. It is in this sense that the confession must "affect them both equally". It is only a statement of this kind that can be said to implicate the confessing accused "substantially to the same extent" as it implicates the others. When there is no full and complete confession of his own guilt and the part taken by him in the crime, but an embroidered story spun out with the object of clearing himself or reducing his own guilt at the expense of others, it is nothing but an explanation of an exculpatory nature of a self-serving statement.

Confession is s 30. ["Confession Made by One of Such Persons"].—It will be noticed that the section applies to confessions and not to statements which do not admit the guilt of the confessing party [*Bhuboni v. R*, A 1949 PC 257, 260: 76 IA 147]. The word "*confession*" must not be construed as including a mere inculpatory admission, which falls short of being an admission of guilt. It is one thing to make statements giving rise to an inference of guilt and another thing to confess a crime [*R v. Santya Bandhu*, 11 Bom LR 633, *ante*, p 227]. It has been held authoritatively that a confession must admit in terms the offence or at any rate substantially all the facts which constitutes the offence. An admission of a gravely incriminating fact is not a confession: nor can a self-exculpatory statement can amount to a confession (*ante*: "*Meaning of Confession*" and *Pakala Narayana v. R*, 43 CWN 473: A 1939 PC 47). If the statement does not affect the maker or only ascribes to him a part not sufficient by itself to justify his conviction for the offence for which he is being jointly tried, it is not a confession within s 30 [*Jainand v. R*, A 1949 A 291; *Ram Bharose v. R*, A 1949 A 132]. Confession in s 30 cannot be restricted to an unretracted confession, as once a confession is proved it may be taken into consideration [*R v. Gangappa*, 38 B 156].

The word "confession" in s 30 cannot mean a confession of any offence in the world nor even of any minor offence included in the offence for which the accused

persons are being tried, nor of any offence connected with that offence, nor of any other offence which may be disclosed by the evidence, but only of *the very offence for which they are being jointly tried*: 'offence' always including under the explanation to the section abetments and attempts. The word "confession" in the section is to be read as if it were followed immediately by the words "of that offence". So in a charge of murder where one accused says that, the other accused killed *R* and then compelled him by a threat to assist in disposing the body the contention that it is a statement which the court is at liberty to take into consideration against the other accused because it was a confession, not indeed of murder but of causing the evidence of murder to disappear, an offence under s 207 I P Code, must be negatived [*Periyaswami v. R*, 54 M 75: A 1931 M 177]. Opinions on the point are not, however, unanimous. As to whether for the purpose of admissibility against a co-accused the confession must be in respect of the same "offence" or "offences" for which they are being jointly tried, see *post*, "*For the Same Offence*".

Confessional Statement Under S 27.—A confessional statement under s 27 comes within s 30 and may be taken into consideration against a co-accused [*In re Pullannagari*, A 1941 M 238; see also *In re Athappa Goundan*, 1937 Mad 695 FB: A 1937 M 618. It goes without saying that such statement must also implicate the co-accused to the same extent as the maker]. Where the first accused makes a confession to a police officer which led to the discovery of certain jewels of the murdered woman, and also a blood-stained brick which, the first accused stated, the second accused had used to beat her with and in consequence of which she died—*held* that the statement of the first accused could not be taken into consideration against the second accused [*In re Abdul Basha*, 1940 Mad 1028: A 1941 M 316]. Under s 30 a confession by an accused person which is not the immediate cause of the discovery of stolen property in the house of another accused, cannot be considered against such other accused [*Sankappa v. R*, 31 M 127 : 18 MLJ 66]. See *ante*, s 27.

—Confession of Co-accused Made Before or in the Course of Trial.—Opinions are divided as to whether the "confession" referred to in this section is a confession made before the commencement of the trial or at the trial. GARTH CJ, seems to have been of the opinion that confession under s 30 should not be one made at the trial, for the word 'proved' in that section must refer to a confession made beforehand [*R v. Ashutosh*, 4 C 483: 3 CLR 270 FB, refd to in *R v. Tangavalad*, 14 Ind Jur NS 516]. A telephonic talk between an accused and a co-accused in the presence of police is not admissible evidence against the co-accused [*Khalid v. State*, 1990 Cri LJ (NOC) 176 (Raj)].

In a case for theft, *J* made a formal confession under s 164 Cr P Code in which there was not a word against *M* who was being tried with him. *J* was not made an approver but was put upon his trial together with the receiver of stolen property. Witnesses were examined and there was no evidence implicating *M*. When the statements of accused were taken under s 364 (now s 281) Cr P Code, for the first time made a statement implicating *M* and it was treated as a confession admissible against *M*—*Held* this is not admissible against *M*. What is contemplated in s 30 is formal proof by the prosecution of a confession *previously* made and not a statement made in the dock by one accused against the others is a joint trial. The expression "proving a confession" in s 30 is inapplicable to the procedure where the judge asks questions and an accused person gives explanation under a special section (s 313 Cr P Code) provided for the purpose. To prove a confession made by a person, evidence must be tendered at the trial that on some previous occasion he did in fact make a confession and that is the only thing which is contemplated by s 30 [*Mahadeo v. R*,

76 IC 1025: 45 A 323 (*R v. Chinna*, 23 M 151 **dissented** from)]. The view in *Mahadeo's* case had found acceptance in other cases [*Govinda v. R*, A 1929 M 285: 118 IC 512; *In re Marudamuthu*, 54 M 788: A 1939 M 820; *Sumitra v. R*, A 1940 N 287; *Kunwar v. R*, 9 CWN 1136]. As to the difference between a confession made before trial and one made by the accused during examination under s 313 Cr P Code see *Sumitra v. R, sup.*

A contrary opinion appears to have been expressed in an earlier Madras case, but the point was not fully considered [*per* AYLING J, *In re Bati Reddi*, 38 M 302 : 22 IC 157]. In a few other cases also it has been held that a confession recorded according to law is a confession within s 30 whether made before or during the trial [*Ganpat v. R*, A 1931 N 169; *Dial v. R*, 16 L 651]. A later Madras case held that a confession to be admissible under s 30 need not be made before the enquiry begins. A confession made by a co-accused for the first time in the preliminary enquiry in open dock is admissible against the co-accused [*In re Velu Naicken*, A 1939 M 737: 1939 2 MLJ 202]. In Bombay also it has been held that the statement of accused taken after the close of the prosecution case under s 313 Cr P Code implicating himself and the other co-accused would be admissible against the co-accused, although very little value can be attached to it [*Cooper v. R*, A 1930 B 354: 32 Bom LR 747]. But if the confession is made when each accused is examined by the judge separately by making the other accused withdraw, it is not admissible against the co-accused [*R v. Lakshman*, 6 B 124; see *R v. Chandranath*, 7 C 65; *R v. Bepin Biswas*, 10 C 970].

The view taken in the former group of cases appears to be more correct as the words "is proved" may legitimately be taken to refer to statements made on a previous occasion and 'proved' afterwards at the trial and further, as pointed out, in some cases (*Sumitra v. R, supra*) the statement of accused under s 313 Cr P Code comes at the end of the prosecution evidence.

Statement of Accused Not Amounting to Confession.—Statement of an accused after arrest not amounting to confession is not admissible in evidence against a co-accused either under s 10 or s 30, but only against himself [*Sital v. R*, 46 C 700: 30 CLJ 255; *Taju Pramanick v. R*, 25 C 711: 2 CWN 369] and the judge should warn the jury that it cannot be considered against the co-accused [*Md Yunus v. R*, 50 C 318]. Statement by accused exculpating himself but only admitting his presence at the place of occurrence can only be treated as admission of the fact of his presence. The statement does not amount to confession and hence his statement against co-accused cannot be used as evidence against them [*Chintamani v. S*, A 1970 Or 100; *Khalak Singh v. State of MP*, 1992 Cri LJ 1150, 1156 (MP)]. A person undergoing imprisonment made a statement before a magistrate implicating the petitioner in the offence for which he was convicted. While he was examined as a witness, he denied the implication. The statement to the magistrate is inadmissible [*Bijji Khan v. Ram*, 54 IC 893: 18 ALJ 87].

"Is Proved".—The confession of a prisoner which affects himself and some of his co-prisoners charged with the same offence, becomes admissible against another prisoner when "*duly proved*" [*R v. Ashutosh*, 4 C 483: 3 CLR 270; *R v. Lakshman*, 6 B 124; *R v. Chandranath*, 7 C 65: 8 CLR 35 and *R v. Bepin Biswas*, 10 C 970. In the last three cases the judge examined each accused in the absence of the other, making the latter to withdraw from the court during the examination of the former, and the confessions were held inadmissible on the ground that they were made during the absence of the co-prisoners, that they were not proved in any way, nor opportunity was given to them to know what had been said against them]. Where a confession is sought to be used against a co-prisoner, he has a right to demand that it be strictly

proved and shown to have been taken and recorded as prescribed by law (ss 164, 313, 281 of the Cr P Code) [*R v. Chandra*, 24 WR Cr 42]. The word "proved" must mean proved before the case for the prosecution comes to an end ; either proved in the course of the prosecution case or proved in some proceeding previous to the trial. A confession of accused No. 1 made from the dock in the magisterial proceedings admitting his own guilt and accusing accused No. 2 cannot be admitted as against accused No. 2 [*Nawab v. R.* A 1925 L 35: *Dial v. R*, 16 L 651; *In re Marudamuthu*, A 1931 M 820 : 54 M 788; see however *In re Velu Naicken*, A 1939 M 737].

"Are Being Jointly Tried".—A confession by an accused person may be taken into consideration and used as evidence not only against himself but also against a co-accused tried jointly with him for the same offence [*R v. Kehri*, 29 A 434: *Radhe v. R*, 75 IC 701: A 1924 N 27]. The words "*tried jointly*" *mean legally* tried jointly, and not simply tried jointly as a matter of fact. The confession of an accused jointly tried in fact with another cannot be used against the other, if, from any cause, such as the absence of legal commitment the prisoner alleged to have confessed has to be thrown out from the proceedings [*R v. Jagat*, 22 C 50]. To make a joint trial legal, the accusation must be a real one and not merely an excuse for a joinder of charges which otherwise cannot be joined [*Mallu v. R*, 49 M 74; *Sanyashi v. R*, A 1937 C 269]. When the accused is not tried jointly with the other accused he can be called as a witness [*R v. Durant*, 23 B 213 (*R v. Bradiaugh*, 15 Cox 217 **refd** to)].

There is a difference of opinion as to whether the joint trial for the same "offence" includes "offences" (see *post*: "*For the Same Offence*").

—Whether Joint Trial Ends with Plea of Guilty by One Accused.—*A* and *B* were charged with murder; *A* pleaded guilty but was not convicted or sentenced till the conclusion of trial of *B*. After *A* pleaded guilty, his trial, in the sense of a trial of his guilt or innocence ended, though the question of sentence which was a different matter, remained—*Held*, that after *A* had pleaded guilty, he could not be treated as being jointly tried with *B*. *A*'s confessions were therefore inadmissible against *B*. It is in this narrow sense that the word "*trial*" would seem to be employed in this section [*R v. Pahuji*, 19 B 195; **followed** in *R v. Keramat*, 38 C 446: 16 CWN 49]. Similar view was also taken of the words "*jointly tried*" in *R v. Pribhu*, 17 A 524; *Shankar v. R*, 93 IC 241 : A 1926 A 318; *Venkatasami v. R*, 7 M 102; *R v. Bala Patel*; 5 B 63; *R v. Paltua*, 23 A 53; *R v. Lakshmayya*, 22 M 491; *R v. Kolu Patel*, 11 Bom HC 146; *Subrammanya v. R*, 25 M 61, 69; *R v. Chand Valad*, 14 Ind Jur NS 125; *R v. Kheoraj*, 30 A 540 and in *Md Yusuf v. R*, 35 CWN 490: 58 C 1214. In all these cases it has been held that when one of two to more persons jointly charged pleads guilty, his confession is not evidence against the others; that his trial comes to an end with his plea of guilty and that it is unfair to defer convicting the accused persons who plead guilty merely in order that their confessions may be considered as against the other accused persons, who are being tried with them]. In *Md Yusuf v. R sup*, LORT-WILLIAM S, J, observed:—

> "The practice sometimes adopted in India where there is a joint trial, of refusing to accept the plea of guilty and proceeding to try the accused in order that his confession may be taken into consideration against his co-accused under s 30 is illegal and an abuse of process of the court".
>
> "Where an accused person has pleaded guilty and the court is prepared to convict on that plea, it is contrary to the spirit of the law to postpone the conviction so that the person who had pleaded guilty may technically be said to be tried jointly for the same offence". [RICHARDS & KARAMAT HUSAIN JJ, in *R v. Kheoraj*, 30 A 540, 542].

When a person has pleaded guilty, he ceases *ipso facto* to be an accused person. Still more certain is it that he ceases to be an accused when he is convicted. It is however always desirable to pass sentence completely before calling one accused in a joint trial to give evidence against his co-accused. But this course is not essential [*Md Yusuf v. R sup*; see also *Swami v. S*, A 1957 M 379].

In another group of cases, the contrary view has been taken that the trial does not necessarily come to an end with a plea of guilty, until the accused has been convicted or acquitted or discharged [*R v. Chinna*, 23 M 151 (**dissenting** from 22 M 491); *per* FULTON J, in *R v. Annya*, 3 Bom LR 437; see also *Kesho v. R*, 40 IC 742: 20 OC 136; *Shankar v. R*, A 1926 A 318: 93 IC 241]. In an earlier Calcutta case also it was held that the court may for sufficient reasons refuse to accept the plea of guilty by one accused and continue to try him jointly with the other accused and then in the trial take his confession into consideration against the other accused [*Sukhdeb v. R*, 13 CWN 552].

It has been held in England that if one accused pleads "guilty" and the others "not guilty", the proper course is to postpone sentence on the man pleading guilty until the others have been tried in order that the court may be able to assess properly the degree of guilt of each. This does not however apply where a man who pleads guilty is going to be called as a witness. In such a case he should be sentenced there and then so that there can be no suspicion that his evidence is coloured by the fact that he hopes to get a lighter sentence [*R v. Payne*, 1950, 1 All ER 102 CCA].

Where before a magistrate in a statement under s 313 Cr P Code, certain accused confessed their crime and implicated their co-accused and further under s 246(2) pleaded guilty to the charges—*held* that it was not necessary to try the co-accused separately in order to enable the confessions to be used *against* them under s 30 [*In re Bati Reddi*, 38 M 302 (22 M 491 **dissented** from)]. Three accused persons were sent up for an offence and one of them when questioned said he was guilty and subsequently pleaded guilty after the charge had been framed. He however prayed for production of witnesses as to character and was not sentenced at once—*Held* that his confession was admissible against the co-accused under s 30. So far as warrant cases are concerned, 'trial' includes the whole of the proceedings and the hearing of evidence and not merely the concluding stage of the proceedings after the framing of charge [*Fakhruddin v. R*, 6 L 176 : A 1925 L 435]. In a warrant case, the co-accused need not be forthwith convicted after confession and removed from the dock. He is still to be deemed jointly tried with the others [*Ram Kishan v. R*, A 1928 L 880: 111 IC 387]. *In re Bati Reddi, supra*, a distinction was drawn between trial before a magistrate and a trial before a sessions court and it was pointed out by AYLING J, that it is in sessions trial only, where the plea is recorded at the outset of the trial, that the trial may be said to begin after the plea. As to similar interpretation of the word 'trial', see *Venkatachinnaya v. R*, 43 M 511 FB; *Sahib Din v. R*, 3 L 115: 66 IC 827. In Nagpur also it has been held that a distinction must be drawn between sommons and warrant cases on the one hand and sessions cases on the other. In sessions cases if the accused pleads guilty he must forthwith be convicted. But in a warrant case it is discretionary with the magistrate to defer conviction after a plea of guilty and use his own confession against the other accused [*Amdumiyan v. R*, 1937 Nag 315: A 1937 N 17 FB]. It is submitted that this also would be against the spirit of law.

G and *S* were tried on charges under s 120-B, IP Code of conspiring to commit offences under s 4-B and s 5 Explosive Substances Act and under s 19-F Arms Act and also under substantive charges under the same sections. *G* pleaded guilty to the substantive charges under the Explosives Act and Arms Act and not guilty to the

charges of conspiracy and *S* not guilty to all the charges. Both *G* and *S* made confessions. The two persons were in possession of some articles at different times and places—*Held* that so far as the charges of possession were concerned, *G* and *S* were not being tried jointly for the same offence and the confession of *G* was not admissible against *S* for the purpose of these charges. The expression "same offence" in s 30 means the identical offence and not an offence of the same kind. The illustration to s 30 which was added in 1891 makes the meaning quite clear. As regards the charge of conspiracy, the two accused were tried jointly for the same offence and for the purpose of these charges the confession of *S* was admissible against *G* and that of *G* against *S* and could be taken into consideration [*Gour v. R*, 32 CWN 1004]. One out of several accused persons who were being jointly tried for an offence under s 193 IPC pleaded guilty and made statement implicating himself and other accused. The magistrate, however, did not convict him merely upon his plea of guilty, but upon the evidence and upon the statement made by him. He also took into consideration the confession of this accused as against the others—*Held* that he would not have exercised a sound discretion in convicting the confessing accused at once on the strength of his own statement alone [*R v. Dip Narain*, 37 A 247]. Persons against whom proceedings are being jointly taken under s 117 Cr P Code in one and the same enquiry cannot be said to be on their joint trial for the same offence under s 30 [*Sarju v. R*, 41 A 231 : 43 IC 654].

This section applies only to cases in which the confession is made by a prisoner tried at the same time with the accused person against whom the confession is used. But confessions of prisoners who were tried previously and simultaneously with an accused person were held to be inadmissible [*R v. Shk Buxoo*, 21 WR Cr 65].

"For the Same Offence." [Whether "Offence" Includes "Offences"].—The two persons must be tried for, or for abetment of or attempt to commit the *same offence*. The test whether they are tried for the same offence is whether the two persons are accused of an offence of the same definition arising out of single transaction; it is then only that the confession of one may be used against the other, though it inculpates himself through acts separable from those ascribed to his accomplice and capable therefore, of constituting a separate offence from those of the accomplice [*R v. Nur Md*, 8 B 223; see also *R v. Malappa Bin*, 14 Ind Jur NS 19]. "Same offence" means identical offence and not an offence of the same kind [*Gour v. R, sup*; *Kundan v. R*, A 1948 S 65].

In a case before the English Court of Appeal *L* and *T* were driving separate cars too fast. *L* overtook *T*, lost control and collided with an on coming car. *L*'s passenger was killed. The prosecution alleged that *L* and *T* were racing and charged. Both drivers for causing death by reckless driving. L pleaded guilty. But *T* denied racing. At *T*'s trial the prosecution were allowed to adduce *L*'s guilty plea in evidence. [*R v. Turner*, 1991 Crim LR 57 CA].

Explaining in an earlier case the scope of the words "same offence" the House of Lords laid down that for offences to be regarded as the same they have to be the same in all material respects and capable of being amalgamated into a joint charge. If further particulars of the dangerous driving alleged in the counts against, the accused and *L* had been given, they would have alleged against the accused an offence which was factually different from that alleged against *L* and the two accused could not have been jointly charged. [*Commr of Police v. Hills*, (1978) 2 All ER 1105 HL].

Where three persons were tried jointly, one for murder, another for abetting it, and the third for concealing evidence of it. The confession of the third accused to the offence charged against him, cannot be used as evidence against the other two

associates as it was not a joint trial for the same offence [*R v. Amrita Govinda*, 10 Bom HC 497; see *R v. Bala Patel*, 5 B 63]. The absconding accused had given a confessional statement. There is no bar to consider that confessional statement along with other reliable evidences, which alone will be considered as sufficient proof of guilt of the accused. This confessional statement can be treated as a good piece of evidence [*Ramashish Rai v. State of Bihar*, 1989 Cri LJ 336, 356: 1988 BLJR 720].

Where *A* and *B* were being jointly tried, the first for murder and the second for abetment of it, and the charge against the former was altered during the trial, to one of abetment of murder, a confession by *A* was held to have been rightly taken into consideration against *B*; the original and the amended charges were so nearly related to each other that the trial might, without any unfairness, be deemed to have been a trial on the amended charge from its commencement [*R v. Govind Babli*, 11 BHCR 278]. Where four persons were jointly tried, one for receiving stolen property under s 411 IP Code and the other three for theft under s 380 I P Code—*Held* that the magistrate committed an error of law in admitting the confession of the three accused against the one who was charged with the offence of receiving stolen property [*Bishnu v. R*, 1 CWN 35; *In re David*, 5 CLR 474]. Where accused was being tried for cheating, the statement of other accused in another proceeding against the accused cannot be used against him [*Rijhumal v. R*, A 1937 S 218]. Statements made by one set of prisoners criminating another set of prisoners, where each individual prisoner made a case for himself on which he was free from any criminal offence, ought not to be taken into consideration against the prisoners of the second set where the two sets although tried together, were tried upon totally different charges [*R v. Bunwari*, 21 WR Cr 53].

Opinions vary as to the meaning of the word "offence" in some cases the view taken is that "offence" includes "*offences*" and so the confession must implicate the maker in all the offences he and the other accused are being jointly tried. Thus, when *A* is charged along with *B* and *C* for sodomy and murder and *A* states that all the three committed sodomy but that *B* and *C* only committed the murder, *A*'s confession is not admissible against *B* and *C* even so far as the offence of sodomy is concerned, though it is admissible against himself [*Md Sabir v. R*, 1950 ALJ 140: 1950 All 1132]. So in charge of murder where one accused stated that the other accused killed and then under threat compelled him to help in disposing the body (s 207 I P Code), the confession cannot be used against the co-accused [*Periyasami v. R*, 54 M 75], or where at the same trial *P* was being tried for rape of a girl and *H* for her abduction (s 366 I P Code), the confession of *P* is not admissible against *H* [*Naresh v. R*, 42 CWN 814 : A 1938 C 479]. Where two persons were jointly tried, one under s 372 and the other under s 373 I P Code and neither was charged for abetting the other, the confession of one is not admissible against the other [*Dy Legal Rem v. Karuna*, 22 C 164; see *R v. Hiralal*, 19 AWN 53]. Similar view has been taken in other cases [see *R v. Ganraj*, 2 A 444: *In re Govindu*, A 1937 M 321; *In re Gangavva*, A 1946 M 124; *Jainand v. R*, A 1949 A 291; *Tikaram v. R*, A 1939 N 309; *Syed Hussain v. R*, 1937 MWN 1233].

CONTRA: In another group of cases it has been held that if a confession implicates the maker and the other accused in one of the offences, but does not implicate himself in the other offence, it may be taken into consideration against the other accused so far as the former offence is concerned. Thus, where a co-accused puts the blame for murder entirely upon the others, but implicates himself and the others as regards robbery only, it is admissible against the others so far as robbery but, inadmissible as regards murder [*Mia Khan v. R*, A 1923 L 293]. So where two accused are jointly tried for the major offence of murder, they are also tried jointly

for the minor offence under s 328 I P Code [*In re Manicka Padayachi*, A 1921 M 490: 72 IC 497], and the same view has been taken in other cases [*Mirza Zahid v. R*, A 1938 A 91; *Mongal v. R*, 17 L 547: *Shivabai v. R*, 50 B 683]. As the section should be interpreted strictly, it would seem that the former view that the confession must implicate the maker and the other accused in all the "offences" for which they are being jointly tried is the sounder one.

Death After Confession.—Where an accused who was being jointly tried died sometime before the judgment and his confession was put on the record—*held* that it was admissible against his co-accused and could be used only for corroborating the other evidence on the record and not as substantive evidence [*Haroom v. S*, A 1968 SC 832 (*Ramsarup v. R*, 41 CWN 183: A 1937 C 39 **approved**)]. Confession of a person who is dead and had never been brought to trial is not admissible [*Dengo v. R*, A 1938 S 94: 175 IC 99].

A statement of a deceased co-accused under Section 32(3) of the said Act can at best be considered as a relevant fact which by itself cannot be the sole basis of a charge. Even a confession of a co-accused being tried jointly, by itself, cannot be the basis of a charge as it being of nature of accomplice evidence is very weak evidence and requires corroboration and further that to be of any use against the accused it must have been made before the criminal proceedings were started as has been held in *Janu v. R., Sup.* reported as A 1947 Sind 122 : (1947) 48 Cri LJ 74. A confession of a co-accused is very weak evidence and must be corroborated. On a trial for forgery where one of the accused had made a statement before the inquiring Magistrate died before the trial, it was held to be inadmissible since its maker had already rendered himself liable to criminal prosecution at the time it was made as held in *R. v. Keshav* reported as (1899) 23 Bom LR 248. In *Kunjalal v. R.* reported as (1934) 38 CWN 1015, also a confession made after he had rendered himself liable to criminal prosecution was held not to be admissible under Section 32(3) of the Evidence Act.

So far as use of such statement as contemplated under Section 32(3) of the Evidence Act is concerned the pecuniary or proprietary interest would be admissible as a relevant fact and may be taken into consideration by Court, but it will not be safe to base any charge solely on or use such confessional statements against the alleged accomplice without adequate corroboration thereof by other cogent evidence as would be clear from what is discussed hereinafter. The language of the provisions is also suggestive of the fact that such statement should have been made before commencement of the proceedings. The confessional statement of the *deceased* co-accused would be inadmissible under Section 30 of the Evidence Act because a joint trial would no longer be possible after his death. Section 30 itself provides an exception to the rule in making such confessions admissible/relevant against co-accused because strictly speaking it would not be covered by the definition of "evidence" under Section 3 of the Evidence Act, Sec. 32 (3) cannot be read as a further exception to that exception to the rule provides under Section 30, to confessions under Section 32(3) it is not possible to cross-examine the co-accused who made the confession and test the veracity of his statement and being evidence of very weak nature a charge cannot be based on this alone.

In *Karas Din v. Emperor* reported as A 1929 Lahore 338 : (1929) 30 Cri LJ 385 while dealing with section 30 of the Evidence Act, a Division Bench of Lahore High Court had laid down that although a confession of one co-accused may be taken into consideration against another under the provisions of S. 30 it would be unsafe, if not illegal to rely on it without further corroboration in material particulars."

In *Periyaswami Moopan v. Emperor* reported as A 1931 Madras 177, it was observed that "where there is evidence against the co-accused sufficient, if believed, to support his conviction, then the kind of confession described in Sec. 30 may be thrown into the scale as an additional reason for believing that evidence."

This is the position under Section 30 of the Evidence Act where all the accused are being tried together. The situation could not be better where joint trial is not possible on account of death of the co-accused who had made the confession. It is for that reason also that provisions of Section 32(3) of the said Act alone, in the absence of independent legal evidence, could not be invoked to base or sustain a charge on the solitary confessional statement of a deceased co-accused. Furthermore, in *Achhay Lal Singh v. Emperor* reported as A 1947 Patna 90 : (1947) 48 Cri LJ 242 the Division Bench of that High Court had held such confession to be inadmissible. It was held as follows:—

"The principle underlying S. 32(3) is that when a person makes a statement rendering himself liable to criminal prosecution the statement is likely to be a true statement. The section can therefore have no application to a statement of a person against whom there is already in existence evidence which would inevitably lead to his prosecution and might by itself lead to his conviction. Consequently, where a person makes a confessional statement incriminating other accused but dies before the commencement or completion of the inquiry his statement is inadmissible either under Section 30 or Section 32(3) of the Evidence Act, in a trial of the other accused."

"It is unsafe to take into consideration the retracted confession of a co-accused against other accused persons unless it is corroborated by reliable evidence in material particulars. An approver's evidence has always been regarded as tainted *ab initio* and, therefore, such evidence should not be taken into consideration as corroborative evidence of another piece of tainted evidence, *i.e.*, a retracted confession, unless the circumstances are exceptional : (28) 15 A 1928 Cal 745 and (33) 20 A 1933 Cal 6, **followed.**"

Any doubts on this point have since been set at rest by Privy Council and Hon'ble Supreme Court. In the case of *Haricharan Kurai v. State of Bihar*, reported as A 1964 SC 1184, their Lordships with approval cited the following passage from the case of *Bhuboni Sahu v. The King* reported as A 1949 PC 257 (260), where Sir John Beaumont, who spoke for the Board, observed:

"*a confession of a co-accused is obviously evidence of a very weak type.* It does not indeed come within the definition of "evidence" contained in S. 3 of the Evidence Act. It is not required to be given on oath, nor in the presence of the accused, and it cannot be tested by cross-examination. It is a much weaker type of evidence than the evidence of an approver, which is not subject to any of those infirmities. Section 30, however, provides that the Court may take the confession into consideration and thereby, no doubt, makes it evidence on which the court may act; but the section does not say that the confession is to amount to proof. Clearly there must be other evidence. The confession is only one element in the consideration of all the facts proved in the case; it can be put into the scale and weighed with the other evidence." *Peoples Union for Civil Liberties (Delhi) v. Central Bureau of Investigation*, 1997 Cri LJ 3242, 3250, 3251 (Del).

Confession in Proceeding Under S 110 Cr P Code.—In a proceeding under s 110 against several persons, the confession of one is not admissible against the other

co-accused, the provisions of s 30 not being applicable to a case like the present [*Amirulla v. R*, CWN 408—CONTRA : *Richpal v. R*, A 1934 A 927].

Confession of co-accused under TADA.—Section 15 of TADA provides that the confessional statement recorded under Section 15 of the TADA shall be admissible in the trial of such person or co-accused, abettor or conspirator for an offence under this Act or Rules framed thereunder, provided the co-accused abettor or conspirator are tried in the same case together with the accused.

In *Kartar Singh v. State of Punjab*, (1994) 2 JT (SC) 423 : 1994 Cri LJ 3139 (para 261) the Supreme Court made the following observation:

"As the Act now stands after its amendment consequent upon the deletion of S. 21(1)(c), a confession made by a person before a police officer can be made admissible in the trial of such person not only as against the person but also against the co-accused, abettor or conspirator provided that the co-accused, abettor or conspirator is charged and tried in the same case together with the accused, namely, the maker of the confession. The present position is in conformity with S. 30 of the Evidence Act."

The confessional statement recorded under Section 15 of the TADA is admissible against the co-accused or abettor or conspirator provided an accused is tried with other co-accused abettor or conspirator in the same trial in respect of offence under TADA. Such confessional statement of the co-accused or by the co-accused is not admissible against the accused if he is not tried for any offence under TADA.

It was pointed out that the observation in *Kartar Singh's* case was not the decision of the court about the admissibility of the confessional statement recorded under section 15 of TADA against an accused when such accused is tried with other co-accused abettor or conspirator but such accused is not charged for any offence under TADA. *Baba Peer Paras Nath v. State of Haryana*, A 1996 SC 2818 : 1996 Cri LJ 4139.

Thus under s. 15 of TADA, the confession of the accused constituted substantive evidence whereas under S. 30, Evidence Act, it is only one piece of information which can be taken into account against the others not confessing accused. As to this differential treatment the Supreme Court observed that it had to be presumed that the Parliament was aware of the interpretation placed by the courts including the Privy Council and the Supreme Court on Section 30 of the Evidence Act, 1872 but chose to frame section 15 differently. On the language of S. 15(1), it was clear that the intention of Parliament was to make the confession of an accused substantive evidence both against the accused as well as the co-accused. *State of T.N. v. Nalini*, AIR 1999 SC 2640 : 1999 Cri LJ 3124.

Confession in Proceeding Under S 340 Cr P Code.—When a person against whom a proceeding under s 340 is pending makes a confession, it is a confession within s 30 and is admissible against a co-accused [*Annaji v. R*, A 1924 B 455: 26 Bom LR 614 : 87 IC 593].

First Information by Accused Not Amounting to Confession.—While a first information is valuable corroborative evidence of the testimony of a person who makes it, it cannot by itself support a conviction when the maker himself is an accused person and cannot therefore be examined as a witness. Where, however, a first information report made by an accused himself contains an admission which does not amount to a confession, the admission is admissible in evidence against the accused person [*Kaku v. R*, 63 IC 822], but it cannot be treated as evidence against any co-accused [*Mohammadar v. R*, A 1938 L 19]. See also *ante*, s 25: "*Confession in first information.....*"

Use of Confession in One Case, in Another Case.—In a case under s 110 Cr P Code against petitioner, the confession made by a person who was the co-accused of the petitioner in a dacoity case but not in the present case is inadmissible [*Mafizuddin v. R*, 25 CWN 239 : 61 IC 793]. The confession of an accused tried previously would be rendered inadmissible. [*Ananta Dixit v. The State*, 1984 Cri LJ 1126, 1128 : (1984) 57 Cut LT 429 (Ori)].

"The Court".—(See *ante*, s 3) The word "court" in s 30, means not only the judge in a jury trial but includes both judge and jury [*R v. Ashutosh*, 4 C 483].

"May Take into Consideration Such Confession."—With respect to the words "*may take into consideration*", JACKSON J, observed:—

> "The section does not provide as has been repeatedly pointed out by this court, that such confession is evidence; still less does it say, that it may be the foundation of a case against the person implicated. The legislature very guardedly says that it *may be taken into consideration* and I think that the obvious intention of the legislature in so saying was that, when as against any such person there is evidence tending to his conviction, the truth or completeness of this evidence being the matter in question, the circumstance of such person being implicated by the confession of one of those who are being jointly tried with him should be taken into consideration as bearing upon the truth or sufficiency of such evidence" [*R v. Chandra*, 25 WR Cr 43].

The confession of an accused person is not evidence against a co-accused in the sense that conviction on that alone could be supported. It could only be "taken into consideration" under s 30, that is to say, it can lend assurance to the other evidence [*per* JENKINS CJ, and CARNDUFF J, in *Barindra v. R*, 14 CWN 114: 37 C 467]. It does not indeed come within the definition of evidence in s. 3. It is not given on oath, nor in the presence of the accused and cannot be tested by cross-examination [*Bhuboni v. R*, 63 CWN 609 : 76 IA 147, 155: A 1949 PC 257; *Kashmira v. S*, A 1952 SC 159: 1952 SOR 526; *Ram Ch v. S*, A 1957 SC 381]. The court has discretion to exclude a confession by an accused altogether from consideration against the co-accused, if it is so disposed [*Gobarya v. R*, A 1930 N 242]. The test as to whether the confession of an accused person can be used as against his co-accused is, whether the person making such confession could have been convicted on that confession of the crime with which he and his co-accused were charged [*Chunilal v. R*, 60 IC 660; *R v. Ganraj, ante*]. The confession cannot take the place of evidence against the co-accused; nor can it be added to supplement evidence otherwise insufficient. "*May take into consideration*" goes no further than this : Where there is evidence against the co-accused sufficient, if believed, to support a conviction, then the kind of confession described in s 30 may be thrown into the scale as an additional reason for believing that evidence [*Periya-swami v. R*, 54 M 75]. Confession of a co-accused may be taken into consideration in deciding whether it is safe to rely on the approver's evidence [*In re Rajagopal*, A 1944 M 117]. A confession by an accused implicating several people none of whom has been mentioned in the first information report, is worthless as against any but the maker [*Ghura v. R*, A 1942 A 47].

In accord with the opinion above it was stated in *Bhuboni v. R, sup* that the correct view is that "the confession of a co-accused can be used *only in support of other evidence* and cannot be made the foundation of a conviction". As to how far and in what way the confession of an accused can be used "in support of other evidence", it has been held that the proper way to approach is first, to marshall the evidence against the accused excluding the confession altogether, and see whether, *if it is believed*, a confession could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the judge is not prepared to act on the other evidence as it stands even though, *if believed*, it would be sufficient to sustain a conviction. In such an event the judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept [*Kashmira v. S*, 1952 SCR 526: A 1952 SC 159 (*R v. Lalit Mohan*, 38 C 559; *Periyaswami v. R*, 54 M 75 **relied** upon); **followed** in *Nathu v. S*, A 1956 SC 56: 1956 Cri LJ 152; see also *Ram Ch v. S*, A 1957 SC 381: 1957 Cri LJ 559; *Raju v. S*, A 1953 B 297; *Bhalukar v.*

S, A 1957 Or 172; *In re Kodur*, A 1957 AP 158; *Subba Rao v. S*, 1955 And LT Cr 99].

Bhuboni's case was also elaborated in a Calcutta case pointing out that a co-accused's confession can be used only to support their evidence, *ie* to corroborate other evidence; it might assist in coming to the conclusion that the other evidence is true and therefore the accused is guilty. But it is entirely a different thing to say that there can be a conviction if the confession is corroborated by other evidence; that is an incorrect statement of law. In short the conviction must be based on the other evidence; the confession can only be used to help to satisfy that the other evidence is true [*Gunadhar v. S*, A 1952 C 618].

—Statement Under Customs Act.—Statements made in answer to a notice under s 171-A of Sea Customs Act are not confessions under s 164 of Cr P Code. But they may be received against the maker as also against a co-accused jointly tried if after special scrutiny it is found that they were made voluntarily and not under threat or promise from some one in authority [*Haroom v. S*, A 1968 S 832].

—Confession of a Co-accused is Not "Evidence".—The words "*may take into consideration*" in this section evidently mean that the confession referred to in this section is not to have the force of a sworn evidence [*R v. Nirmal*, 22 A 445]. Such confession of co-accused is not 'evidence' [*Bhuboni v. R; Kashmira v. S, sup*]. The words mean "may treat as evidence". But the weight to be attached is a different matter [*Aun Hla & Ors v. R*, 9 R 404 FB: A 1931 R 235]. In a case PHEAR J, observed:—

> "Until the passing of the Evidence Act, such a dangerous material as this could not be used as evidence as against another accused person, and even by that Act, the legislature only bestowed a *discretion upon a court to take into consideration* such confession against such other person who makes such confession" [*R. v. Sadhu Mandal*, 21 WR Cr 69]. In another case, the same judge said: "And it is obvious that confession of co-prisoners are characterised by a very serious infirmity as regards the prisoners against whom they are sought to be used under s 30. In addition to the infirmity inherent in an accomplice's testimony, they are neither sanctioned by an oath nor can they be tested, developed and explained by cross-examination ..... it is, we conceive, generally unsafe to use materials of this character against persons under trial without carefully bearing in mind its special infirmity of character" [*R v. Naga*, 23 WR Cr 24].

S 30 is an exception, and its wording shows that the confession is merely to be an element in the consideration of the other evidence. Unless there is something more, a conviction of an accused solely on the confession of a co-accused will still be a case of no evidence and bad in law [*Anonymous*, 7 Mad HC Ap 15: 2 Weir 740; *Giddigadu v. R*, 33 M 46; *R v. Khandia*, 15 B 66]. The words "*take into consideration*" mean "take into consideration for the purpose of arriving at a conclusion of fact", and though a co-accused's statement is not technically evidence, within the definition given in s 3, it may still be used *quantum valebat* for the basis of a reasonable inference [*R v. Bayaji*, Bom HC Cr Ruling, 18th Nov 1886: 14 Ind NS 384].

R v. Asutosh, 4 C 483, 490 and *R v. Kehri*, 29 A 434 excepted, it has also been held in many cases in various jurisdictions that the words "may take into consideration" are not equivalent to saying that such confession is to take the place of proof [see *R v. Khandia*, 15 B 66; *Kasimuddin v. R*, 39 CWN 27: 62 C 312; *R v. Chandra*, 25 WR

Cr 42; *R v. Lalit Mohan*, 38 C C 559; *R v. Ambigara*, 1 M 163: 2 Weir 740; *Giddigadu v. R*, 33 M 46; *Periyasami v. R*, 54 M 75; *R v. Bhawani*, 1 A 664; *R v. Nirmal Das*, 22 A 445; *Debendra v. R*, 101 IC 887: A 1927 P 257; *Kalwa v. R*, 48 A 409: A 1926 A 377; *In re Rajagopal*, 1944 Mad 308: A 1944 M 117 FB; *In re Thiagaraja*, A 1946 M 271. See also *R v. Timava*, 1876 Ratanlal Un CC 108; *Necha v. R*, 109 IC 801: A 1928 N 213; *Hira v. R*, A 1933 N 249; *In re Singampilli*, A 1941 M 306; *Rohini v. R*, A 1942 C 426] and this view that a confession of co-accused is not "evidence" at all as defined in s 3 (in *Laxman v. R*, A 1937 B 31) has been reiterated by the same Judge while sitting in the Judicial Committee [*Bhuboni v. R*, 53 CWN 609, 613: A 1949 PC 257 and also agreed to by the Supreme Court [*Kashmira v. S*, A 1952 SC 159, 160: 1952 SCR 526; *Nathu v. S*, A 1956 SC 56; *Haroom v. S*, A 1968 SC 832].

Under s 30 a confession of a co-accused has to be regarded as amounting to evidence in a general way. Though it may be regarded as evidence in a generic sense, the fact remains that it is not evidence as defined by s. 3. In dealing with the confession of a co-accused, the court must begin with other evidence produced by the prosecution and after it has formed its opinion as to the quality and effect of that evidence, then it is permissible to trun to the confession in order to receive assurance to the conclusion of guilt. The confession of a co-accused cannot be treated as substantive evidence [*Haricharan v. S*, A 1964 SC 1184 (*R v. Lalitmohan*, 38 C 559; *Kashmira v. S*, 1952 SCR 526 **relied** upon). In this case *Ram Prakash v. S*, 1959 SCR 1219 in which some observations were, however, made which did not seem to recognize to distinction between the evidence of an accomplice and the statements in the confession made by an accused person, was explained)].

The confession of a co-accused cannot be used as a substantive piece of evidence. [*Pub Pros v. Shk Ibrahim*, A 1964 AP 548]. When the substantive evidence is not sufficient to establish a *prima facie* case, the confession cannot be used against the co-accused. It may only be taken to lend assurance to any relevant evidence bearing on the accused's complicity in the crime. It can in no case be used to fill up gap in the prosecution evidence [*Maroti v. R*, A 1940 N 230: 188 IC 146]. There is an overwhelming preponderance of authorities in favour of the proposition that such confession alone is of too weak a character to form the basis of conviction. The words "may take into consideration" connote the idea that there must be other materials beside the confession of a co-accused to form the basis of a conviction. As pointed out in a Nagpur case, the self-inculpatory confession of an accused implicating his co-accused is a fact upon which alone the conviction of his co-accused cannot be legally based. Nor can such a confession, even if it be corroborated by other evidence which is sufficient by itself to sustain the conviction of the non-confessing accused form a legal basis for his conviction, but if there is any other relevant matter implicating the co-accused, the judge is permitted by s 30 to consider the confession along with the said matter and as a result of such consideration to convict the accused [*Gobarya v. R*, A 1930 N 242 FB: see also *Periyaswami v. R*, 54 M 75, *ante*].

In a case JENKINS CJ, observed:—

> "S 30 provides, that when more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and, some other of such persons is proved, the court may take into consideration such confession as against such other person as well as against the person who makes such confession. The language of the section is guarded, and the history of this Act leaves me in no doubt that this section was designedly

framed in these terms. While admissions, a word which embraces confessions, are by s 21 *relevant*, and may be proved as against the person making them, all that s 30 provides is, that the court *may* take them into consideration as against other persons. This distinction of language is significant and it appears to me that its true effect is, that the court can only treat a confession as lending assurance to other evidence against a co-accused. Thus to illustrate my meaning, in the view I take, a conviction on the confession of a co-accused alone would be bad in law. This reading of the section appears to me to gain confirmation from the language of s 5. Further, I think, that only can be taken into consideration which is a confession, in the true sense of the term, of the offence for which persons are then being jointly tried. But, in addition to this, the confessions which I am now dealing, have been retracted, so that, to place any reliance on them against the co-accused would be most unsafe" [*R v. Lalit and others*, 38 C 559, 588: 15 CWN 598; see *Nitai v. R*, A 1937 C 433 SB].

The controversy as to whether such confession is 'evidence' has thus been met by MACLEOD CJ, in *R v. Gangappa*, 38 B 156, 174:—

> "It seems to be immaterial whether such a confession is called 'evidence' or 'matter'. If anything that a court may take into consideration to enable it to come to a conclusion whether the guilt of the accused is proved, can be called evidence, then the confession is evidence, but that part of it which affects another accused is not evidence as defined by the Act, and the fact that it is included in the magistrate's record of what the confessing accused admitted against himself which is relevant, in my opinion make no difference".

According to this decision therefore such a confession can be called 'evidence', only if the word 'evidence' is used in a wider sense as meaning 'any matter which the court may take into consideration'. It really supports the view taken in the Calcutta, Bombay and Madras cases &c noted above. In this case MACLEOD CJ, expressed surprise that s 30 which has given rise to so much discussion, and so much conflict of judicial opinion, as to its real meaning, should have continued to exist without amendment.

Not sufficient to frame charge.—The confession of a co-accused cannot be used to frame a charge against the other accused unless there is some other evidence for the purpose. *Suresh Budharmal Kalani v. State of Maharashtra,* AIR 1998 SC 3258 : (1998) 7 SCC 337.

—Summary of Law as to What is Meant By "May Take Into Consideration". — The law as expounded and clarified in numerous judicial decisions may be stated thus:—

(*1*) The confession of a co-accused is not technically "evidence" and has not the force of sworn testimony, or rather it is not substantive evidence in the sense that a conviction on that alone can stand (*ante*).

(2) The section has merely given the court a *discretion* to use it against a co-accused when the condition as to its "affecting" himself and the other accused is fulfilled (*ie* the confessing accused must implicate himself as fully and substantially as his co-accused; *ante*). It has full discretion to exclude the confession altogether from consideration against the co-accused, if from the facts and circumstances the court is disposed to take that view (*ante*).

(*3*) The limits within which the confession may be used against a co-accused is clearly and pointedly indicated by the expression "*may take into consideration*"—words which have been designedly used and which go no further than this if there is other relevant evidence tending to prove the guilt of the accused, the confession may then be used *only in support of other evidence, ie* to corroborate other evidence. But it is an altogether different thing to say that there may be a conviction if the confession of a co-accused is corroborated by other evidence; that is wrong. The

wording of the section shows that the confession is merely to be an element in the consideration of the other evidence in the case. In other words, the confession cannot be made the foundation of a conviction (*ante*).

(*4*) If there is no other evidence, or if the other evidence in the case is insufficient to establish a *prima facie* case against the accused, the confession must be excluded altogether and cannot be taken into consideration against a co-accused. The confession cannot be added to supplement evidence otherwise insufficient and in no case can it be used to fill a gap in the prosecution evidence.

(*5*) The section should be applied with the greatest strictness and caution, as it is an exception to the fundamental principle of criminal law that a confession is evidence only against the maker.

(*6*) When used, the evidentiary value of the confession of a co-accused is extremely weak and a conviction solely on it uncorroborated in material particulars is not sustainable in law (*see post*).

Support for the above propositions will be found in *Bhuboni v. R*, A 1949 PC 257; *Kashmira v. S*, 1952 SCR 526; *Nathu v. S*, A 1956 SC 56; *Ram Ch v. s*, A 1957 SC 381; *Haroom v. S*, A 1968 SC 832 and in many cases cited earlier.

Confession to be Accepted or Rejected in Whole. (See *ante* s 24).

Retracted Confession.—The Evidence Act nowhere provides that a retracted confession cannot be taken into consideration against the co-accused or the confessing accused [*Ram Parkash v. S*, A 1959 SC 1 : 1959 SCR 1219]; but this confession can be used only in support of other evidence and cannot be made the foundation of a conviction [*Hussain v. Dalipsinghji*, A 1970 SC 45; *Bhuboni v. R*, A 1949 PC 257: 76 IA 147 **relied** on. A court could not ordinarily act upon a retracted confession to convict a co-accused without the strongest and fullest corroboration as to the crime and the connection of the co-accused with it [*Bhuleswar Behera v. The State*, 1982 Cri LJ 2346, 2347: (1982) Cut LR (Cri) 62 (Ori)]. See further notes to s 24, *ante*.

Confession of a Co-accused Must be Corroborated to Sustain a Conviction.—There is nothing in s 30 which prevents the court from convicting after taking the confession of a co-accused into consideration, but the rule has been firmly established that the confession of a co-accused uncorroborated by any other evidence is not alone sufficient to sustain a conviction. It is a rule of practice which has all the reverence of law [*R v. Gangappa*, 38 B 156: 15 Bom LR 975; *R v. Kehri*, 29 A 434; *Manohar v. R*, A 1946 A 15]. To the same effect is the decision of the PC in *Bhuboni v. R*, *sup*. In some cases, the rule is regarded as one of law, that is to say, a conviction based solely on the confession of a co-accused and not corroborated *aliunde* by independent evidence in material particulars is bad in law [*R v. Ashutosh*, 4 C 483 FB; *Manki v. Amir*, 2 CWN 749; *R v. Lalit*, 38 C 559: *Nikunja v. R*, 5 CWN 294; *Kher Singh v. R*, 59 IC 913; *In re Kuppan*, 5 MLT 355: 9 Cri LJ 308; *R v. Ambigara*, 1 M 163 : 2 Weir 740; *In re Litaram*, 81 IC 817: A 1924 M 805; *Ram Kariyappa v. R*, A 1929 B 327: *R v. Ramchand*, 1 A 675; *Ah Phut v. R*, A 1930 R 402; see also cases cited *ante*; "*Confession of a co-accused is not evidence*"]. The rule that confession of a co-accused must be corroborated to sustain a conviction has been put in this way by HORWILL J:—

> "It rather puts the cart before the horse. It is not that the confession of one accused must be corroborated by other evidence before it can be accepted against a co-accused; but rather there must be a basis of substantial evidence to

which the confessional statement may be added. If there is substantial evidence against the accused and there remains some lingering doubt, the confession of the accused may be taken into account to set that little doubt at rest" [*In re Muthandi*, A 1942 M 444; 201 IC 461].

"It rather puts the cart before the horse. It is not that the confession of one other prisoners have not had the opportunity of cross-examining him [*R v. Krishnabhat*, 10 B 239; see also *R v. Khandia*, 15 B 66]. Where the confession of an accused person was not corroborated by any independent evidence, the conviction of the co-accused was set aside [*R v. Dosajiva*, 10 B 231; *Man Singh v. R*, A 1929 A 928; *In re Makky*, A 1943 M 278]. The confession of a co-conspirator, being the confession of a co-accused, can only be looked at under s 30. It can be taken into consideration if there is independent evidence to corroborate it [*R v. Abani*, 15 CWN 25; *In re Kuppan*, 5 MLT 355: 9 Cri LJ 308]. As to the difference between the confession of a co-accused and the testimony of an accomplice, see *post*, p. 338. The invariable rule in the Madras High Court is that unless a confession is corroborated in material particulars and direct testimony, it should not be basis of conviction [*In re Ramaswami*, 54 IC 479].

Confessions of prisoners tried jointly for the same offence, when used as evidence against others, stand by themselves, and of little weight unless corroborated by other testimony. A tainted evidence is not made better by being doubled in quantity [*R v. Jaffer Ali*, 19 WR Cr 57; *R v. Mohesh*, 19 WR Cr 16; *R v. Malapa Bin*, 11 Bom HC 196; *R v. Koonjo*, 20 WR Cr 1; *R v. Sadhu Mundal*, 21 WR Cr 69; *R v. Naga*, 23 WR Cr 24; *R v. Ram Saran*, 8 A 306; *R v. Ganapabhat*, 14 Ind Jur NS 20; *Takanath v. R*, 10 CWN xvi].

Absence of any direction to the jury as to how they should treat and the weight they should give to the evidence of an accused as against his co-accused seriously prejudiced the accused and conviction should be set aside [*Biram v. R*, 50 CLJ 467: A 1930 C 139; see *R v. Sadhu*, Mundal, *sup*]. See *post*, notes to s 133.

—Nature and Extent of Corroboration.—In *R v. Sabit Khan*, 43 B 739: 51 IC 657, SHAH J, said:—

> "The limitation laid down as to the use to be made of the confession of the accused against a co-accused is not created by the High Courts, but is based upon what they hold to be the true meaning of the provisions of the Evidence Act and if I may respectfully add, upon sound sense. The rule as I understand it, requires that before acting upon such confession, the court should insist upon independent corroboration from other evidence in the case in material particulars, particularly as to the identity of the accused".

Unsupported by other evidence, it however should be taken as evidence of the very weakest kind, being simply a statement of the third person not made upon oath or affirmation. In the same case, *per* JACKSON J,—"Such confession will not legally suffice, when corroborated by other facts of which evidence is offered, unless those facts, if believed to exist, they would of themselves suffice to support a conviction" [*R v. Ashutosh*, 4 C 483 p 494: 3 CLR 270; see also *Gobarya v. R*, A 1930 N 242 FB]. The remark of JACKSON J, has not been approved in some cases on the ground that to so hold would be to render s 30 superfluous. Confession of co-accused is sufficient for conviction if substantially corroborated by good evidence from other sources; but it is not necessary that such corroborative evidence should by itself be sufficient to support the conviction. What corroboration is sufficient, must depend on the nature of each particular case [*R v. Sadashibo*, A 1939 P 35 : 19 PLT 801 (dictum

of SCROOPE J, in *R v. Debendra*, A 1927 P 257 **not followed**: *Uggappa v. R*, A 1929 M 498; *R v. Kehri*, 29 A 434].

A was charged under ss 409, 411 and 380, I P Code and *B* was charged with abetting them. Both were tried together. *A* was convicted upon his own confession and plea of guilt. He implicated *B* in it. The confession of *A* implicating *B* was used against *B*, who was convicted under s 409 read with s 109 I P Code—*Held* that *B's* conviction for abetment was bad in the absence of any corroboration of *A's* confession, and treated as a substantial part of the evidence against him on the second charge [*Nikunja v. R*, 5 CWN 294].

Where the person making the confessional statement was an accessory present at the commission of the crime, the statement, if sufficiently corroborated, can be used against the co-accused [*Jasoda v. R*, 53 IC 69]. Evidence of motive by itself is not a corroboration of any of the incidents of a crime [*Hiralal v. R*, 7 IC 1012 : 11 Cri LJ 554; *Sheo Ambar v. R*, 77 IC 439: A 1925 O 295]. Mere identification of an accused by a confessing co-accused who admittedly knew him is absolutely no corroboration [*Dungar v. R*, A 1926 A 603 : 95 IC 938]. Where the other evidence was to the effect that the accused was seen going on the night of the murder towards the place where the deceased lived and that there was general enmity between them, the evidence is insufficient to justify the conviction of the non-confessing accused [*Gobarya v. R*, A 1930 N 242 FB]. Where confession of a co-accused is corroborated by other evidence, it matters not whether, in proving the case at the trial, the confession precedes the other evidence or the other evidence precedes the confession [*R v. Sabit Khan*, 43 B 739]. The confession of a co-accused cannot be treated as substantive evidence and can be pressed into service only when the court is inclined to accept the other evidence and feels the necessity of seeking for an assurance in support of its conclusion of guilt which the judicial mind is about to reach on the said other evidence. [*Bijoy Kumar Mohapatra v. The State*, 1982 Cri LJ 2162, 2175 (Orissa), *Indra Mohan Brahma v. State of Assam*, 1982 Cri LJ NOC 127 (Gau); *R.K. Khanna v. State of Bihar*, 1989 Cri LJ NOC 89 (Pat); *Smt Paru Mrugesh Jaikrishna v. Collector of Customs Preventive Deptt Bombay*, 1988 Cri LJ 963, 967: (1988) 1 Bom L R 428 (Bom)]. Where the evidence of the approver is rejected against one accused, it should not be accepted even against the other accused though to some extent it is corroborated by independent testimony [*R v. Rai Singh*, A 1933 L 871].

The confession of one co-accused could not be said to be corroborated by the confession of the other accused [*R v. Gangappa*, 38 B 156; *R v. Sabit Khan*, 43 R 739, *Rama Kariyappa v. R*, A 1929 B 327; see *post*, s 133 : *"Accomplices do not corroborate each other"*]. A confession of one co-accused cannot be said to be corroborated by the confession of another accused as against an accused who has not confessed at all; but the confession of one co-accused may furnish the corroboration of the confession of another accused as against the latter and *vice-versa* [*Gangaram v. R*, 60 IC 780 : A 1921 M 105]. The mere fact that the statement of the co-accused was used as corroboration of another part of the finding about guilt, is not a ground for setting aside the conviction [*Sheodatt v. R*, A 1929 P 64].

There is no rule as to what would constitute sufficient independent corroboration in a particular case. That must depend on the circumstances of that case. First, the evidence which is supposed to afford independent corroboration must be itself reliable and not doubtful evidence which is reliable in consequence of the confession; otherwise it will not be independent corroboration. Secondly, the value of retracted confession; of a co-accused is very low [*per* SHAH J, in *R v. Sabit Khan, ante*]. As to retracted confession, see *ante*, s 24: *"Retracted confession"*.

—The Corroboration Must be Both as to the Identity of the Persons Affected and *Corpus Delicti*.—The confessions of co-prisoners require independent corroboration regarding the identification of the persons whom they charge as well as to the existence itself of any crime and the circumstances which constitute the participation of the accused tried in the offence charged [*R v. Budhu*, 1 B 475; *R v. Malapa Bin*, 11 Bom HC 196; *R v. Ram Saran*, 8 A 306; *R v. Bepin*, 10 C 970; *Esur Singh v. R*, 1 PR 1868 Cr; 31 PR 1866 Cr; 21 PR 1866 Cr; see also *R v. Mohesh*, 19 WR Cr 16 and *R v. Sadhu Mundal*, 21 WR Cr 69, *sup*]. Statements by two co-accused in confessions subsequently retracted, when corroborated in material particulars by other evidence was held insufficient to support the conviction [*R v. Baru*, 19 M 482]. See cases under s 133, *post* on the subject of corroboration of accomplice evidence.

Difference Between the Confession of a Co-accused and the Testimony of Accomplice and Their Respective Value.—The confession of a co-prisoner in s 30 cannot stand higher in probative force than the testimony of an accomplice given before the court under the sanction of an oath and capable of being tested by cross-examination; and when notwithstanding the provisions of s 133; *illus* (*b*) to s 114 says that "the court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars", the cautious wording of s 30 clearly indicates that the intention of the legislature is that the confession of a co-accused alone is not legally sufficient to uphold a conviction [On this point see *R v. Mohesh*, 19 WR Cr 16; the observation of GARTH, CJ, in *R v. Ashutosh*, 4 C 483, *ante*. See also *Lakshmayya v. Pandaram*, 22 M 491; *In re Kuppan*, 5 MLT 355: 9 Cri LJ 380: *R v. Dosajva*, 10 B 231; *Allah v. R*, A 1933 A 956: *Me Hein v. R*, A 1933 R 134; *R v. Sadashibo*, A 1939 P 35; *In re Karuppan*, A 1941 M 267; *Krishnalal Naskar v. The State*, 1982 Cri LJ 1305, 1310 (Cal)]. Confession of a co-accused stands on a lower level than accomplice evidence because the latter is at least tested by cross examination whilst the former is not [*Haroom v. S*, A 1968 SC 832]. The evidence of an accomplice is substantive evidence and as a matter of law sufficient for a conviction whether corroborated or not, although it is usual to require corroboration. But under s 30 the confession of an accused can only be "considered" against his co-accused along with the other evidence in the case and a conviction based solely on it is a case of "no evidence and bad in law" [*Giddigadu v. R*, 33 M 46; *R v. Sadashibo, sup*; *R v. Abani*, 15 CWN 25: *R v. Govinde* 9 CPLR Cr 35: *Necha v. R*, 109 IC 801: A 1928 N 215: *R v. Karim Bux*, 9 CPLR Cr 37; *Harrom v. S, sup*]. The difference between the confession of a co-prisoner and the testimony of an accomplice, has been pointed out in *R v. Ashutosh* and *R v. Dosajiva, sup*.

Singapore.—In Singapore section 30 should be given a wider and different interpretation to that taken in India. There exist crucial differences between the Indian law and that of Singapore. The plain meaning of section 30 is that the confession of a co-accused may be made part of the substantive evidence against the accused in the same manner it forms part of the evidence against the confessing co-accused. It is trite law that an accused person may be convicted solely on the basis of his confession [*Chin Seow Noi v. Public Prosecutor*, (1994)1 Malayan LJ 135 (Singapore CA)].

English law.—Under English law also such confessions are admissible. But s 74(1) of the Police and Criminal Evidence Act, 1984 goes further still and provides that the fact that a person other than the accused had been convicted of an offence is admissible in evidence for the purpose of proving, where to do so is relevant to any issue on those proceedings, that that person committed that offence. Thus it is not

necessary for such evidence to be admitted that there should be a joint trial [*R v. Robertson; R v. Golder*, (1987) 3 All ER 231 CA].

—Summary.—The result of the decisions on the question appears to be that the confession of a co-accused is not treated the same as the testimony of an accomplice in s 133. The confession of a co-accused stands on a different footing to the testimony of an accomplice as the latter is taken on oath and tested by cross-examination. A higher probative value may therefore naturally be given to accomplice evidence for this reason, at least in theory.

Again the confession of a co-accused cannot be called substantive evidence as it is not 'evidence' within the definition in s 3 (see *ante*). It may only be '*taken into consideration*' along with other evidence in the case and it cannot alone form the basis of a conviction. S 30 is no carte blanche for use of confession by one person as substantive evidence against another person, even if the other conditions are satisfied. The limited use of such a confession, permitted by the section against others, is that it can only be taken 'into consideration'. [*State of Kerala v. Ammini*, 1988 Cri LJ 107: A 1988 Kerala 1, 16 (FB)].

It seems, however, that from a practical point of view there is not much to choose between the confession of a co-accused and the evidence of an accomplice. Being participators in crime, both are infamous persons and although it is not strictly illegal to base a conviction on the testimony of an accomplice, it has been *held* in countless decisions that it is unsafe and dangerous to do so. *illus (b)* to s 114 distinctly says that "the court may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars". The opportunity of cross-examination in the case of accomplice evidence, is however of immense value in testing the truth or otherwise of such evidence, and in this sense accomplice evidence may be treated as having a higher probative value from the legal point of view. But ultimately the question remains the same, and in each case it has to be determined upon a consideration of the facts and surrounding circumstances whether it has withstood all the tests of truth.

In *Pratap v. R*, A 1926 A 105 : 96 IC 127, it has been *held* that the confession of an accused, in so far as it implicates other persons besides himself, must be treated as very little, if at all, superior in value to that of an accomplice who has received a pardon, and therefore where the court has a witness belonging to each of these classes, the question necessarily arises, as a matter of logic, whether, unless both these witnesses survive every test which can reasonably and might properly be applied to witnesses so that in the result one can say with confidence that either of them has swerved in substance from the truth, the problem remains the same, or whether tainted evidence is made better in quality by being doubled in quantity.

In *R v. Gangappa*, 38 B 156, 173, MACLEOD, CJ, says: "that confession of a co-accused stands on quite a different footing to the testimony of an accomplice, which the Evidence Act treats as having a higher probative value than similar evidence according to English law". Referring to this remark, SCOTT, CJ, said: "MACLEOD, CJ, went too far when he said that 'the confession of a co-accused stands on a quite different footing to the testimony of an accomplice, according to English law'. There is no difference between the law in England and the law in India, except with regard to corroboration of accomplice by accomplice evidence. As regards the confessions of co-accused, the Indian law has no counterpart in England, but for the purpose of admissibility such confessions stand on the same footing as accomplice evidence and their weight must depend on the circumstances of each case" [*R v. Sabit Khan*, 43 B 739]. Both decisions however agree that the confession of one co-accused could not

be said to be corroborated by the evidence of the other co-accused. In a later case BEAUMONT, CJ, said that he was not altogether in agreement with some of the views expressed in the above two cases. It is a fallacy to say that the confession of co-accused can be dealt with on the same basis as the evidence of an accomplice. The ordinary way of dealing with accomplice evidence is to treat the evidence of an accomplice as the foundation of the prosecution story, and then to see how far there is corroboration of matters which affect the accused and tend to show that the evidence is true against him. But one cannot take the confession of a co-accused as the basis of the prosecution case. It is not given on oath and there is no right of cross-examination. It is not evidence at all as defined in s 3 Evidence Act [*Laxman v. R*, A 1937 B 31]. SIR JOHN BEAUMONT while sitting in the Judicial Committee reiterated that the confession of a co-accused "is a much weaker type of evidence than the evidence of an approver" [*Bhuboni v. R*, 53 CWN 609, 613; see also *Kashmira v. S*, A 1952 SC 159, 160 : 1952 SCR 526 *ante*].

In a case it has been pointed out, the word in s 114 *illus* (*b*) being "may" and not "must", in spite of all that has been said to the contrary in law, the evidence of one accomplice stands on the same footing as any other evidence [*R v. Mathews*, A 1929 C 822].

Explanation.—The Explanation was added by s 4 of Act 3 of 1891. It has rendered *R v. Jaffer Ali*, 19 WR Cr 57; *Badi v. R*, 7 M 579 and *R v. Alagappa Badi*, 2 Weir, 742 obsolete. In these cases it was *held* that where two persons are jointly tried, one for committing an offence and the other for abetting it; they were not tried for the same offence within the meaning of s 30, and the confession made by one co-accused could not be used against the other. Under the *Explanation*, "Offence" now includes abetment or attempt to commit the offence. *Cf Explanation* 4 to s 108 I P Code.

S. 31. Admissions not conclusive proof, but may estop.—Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provisions hereinafter contained.

SYNOPSIS

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COMMENTARY

Principle and Scope.—This section deals with the *effect of* admissions with regard to their conclusiveness. It means that admissions, whether written, oral, or implied from conduct or assumed character are not conclusive of the matters

admit-ted *ie* although they are good evidence against the party making them or his representatives in interest, the matter is not concluded and he is at liberty to prove that they were made under a mistake of law or fact, or were untrue or were made under threat, inducement or fraud, unless they operate as estoppels under the provisions contained in ss 115-17 (which relate to civil matters); that is, unless his opponent has been induced to alter his condition and to act upon those admissions. An estoppel is a sort of conclusive admission. An admission is a piece of evidence which can be used against the party making it. But if such a statement is made by *A* to *B* under such circumstances that *B* was justified in acting on it and altering his position, it may amount to an estoppel creating a new and substantive right for *B*. The doctrine of estoppel will be fully considered under s 115. It is the essence of an estoppel that a party is wholly estopped or precluded from contradicting his former representation or conduct. The weight of admissions depends on the circumstances under which they were made. So a party may explain the circumstances in order to show that they were made under a misapprehension of facts or were untrue or in order to lessen their importance. The other side may also prove circumstances tending to enhance the weight or creditability of admissions. It is a well-known principle in law that what is admitted by a party to be true must be presumed to be true unless the contrary is shown and though not conclusive it is decisive, but it is open to the party to show that it is wrong [*Ajit v. Nandini*, A 1975 Or 185]. "It sometimes happens that persons make statements which serve their purpose or proceed upon ignorance of the true position; and it is not their statements but their relations with the estate, which should be taken into consideration in determining the issue" [*Venkatapathiraju v. Venkatanarasimha*, A 1936 PC 264 : 41 CWN 7 : 63 IA 397, see *Harkishen v. Pratap*, A 1938 PC 189 : 42 CWN 1021].

As to admissions in criminal cases, see s 58, *post*.

With regard to the conclusiveness of admissions, the policy of the law favours the investigation of truth by all expedient methods; and the doctrine of estoppel by which further investigation is precluded, being an exception to the general rule and being adopted only for the sake of general convenience, and for the prevention of fraud, is not to be extended beyond the reasons on which it is founded [Tay s 817]. As BAYLEY, J, said in *Heane v. Rogers*, 1829 B & C 577, 586:—

> "There is no doubt but that the express admissions of a party to the suit, or admissions implied from his conduct, are evidence and strong evidence—against him; but we think that he is at liberty to prove that such admissions are mistakes or were untrue, and is not estopped or concluded by them, unless another person has been induced by them to alter his condition; in such a case the party is estopped from disputing their truth with respect to that person (and those claiming under him) and that transaction; but as to third persons he is not bound. It is a well-established rule of law, that estoppels bind only parties and privies, not strangers."

An admission (unless amounting to an estoppel) may be shown by the party against whom it is tendered to be untrue; or to have been made under a mistake of law or fact; or to have been uttered in ignorance, levity or an abnormal condition of mind. Thus an admission made by a party when drunk is not of such weight as one made when sober, but it is still admissible [*R v. Hedges*, 3 Cr App R 262 : *R v. Saw Min*, A 1939 R 219; cf s 29 IE Act]. On the other hand, the weight of the admission increases with the knowledge and deliberation of the speaker, or the solemnity of the occasion on which it was made [Phip 8th Ed, pp 215-16; Tay ss 854-61].

Wigmore considers that the term "admissions" indicates confusion of nomenclature. He says that "the receipt of any statement by an opponent, as evidence in contradiction and impeachment of his present claim, in the loose and usual phraseology as "admissions," should better, with a view to discrimination and clearness, be designated Quasi-Admissions. The true admission, in the fullest sense of the term is another thing, and involves a totally distinct principle. It concerns a method of escaping from the necessity of offering any evidence at all. A quasi-admission of the present sort, being nothing but an item of evidence, is therefore *not in any sense final and conclusive*. The opponent, whose utterance it is, may none the less proceed with his proof in denial of its correctness; it is merely an inconsistency which discredits, in a greater or lesser degree, his present claim and his other evidence.... An Estoppel, *ie*, a representation acted on by the other party, by creating a substantive right does oblige the estopped party to make good his representation,—in other words, but inaccurately, it is conclusive. So, too, but for an entirely different reason, a Judicial admission is conclusive, in the sense that it formally waives all rights to deny, for the purposes of the trial, *ie*, it removes the proposition in question from the field of disputed issues. But statements which are not estoppels or judicial admissions have no quality of conclusiveness, and on principle cannot have [Wig ss 1058, 1059].

[*Ref Tay ss 817-19; 854-61) Phip 8th Ed, pp 215-16; Powell, p 364; Best, ss 529-30; Wig ss 1058, 1059; Greenleaf, s 204; Jones, s 296; Chamb, s 1387; Hals, 3rd Ed, Vol 15, para 436*].

Admissions are Not Conclusive Proof of the Matters Admitted.—"Conclusive proof" is defined in s 4 (*ante*). As explained above an admission which does not operate as an estoppel, is not conclusive. The person against whom it is proved is at liberty to show that it was mistaken or untrue [*Bhaskar v. Rambha*, A 1974 Or 74]. An admission is not conclusive proof by itself. To draw an adverse inference on the basis of what a party is stated to have admitted, the admission must be unequivocal, comprehensive and go the whole-hog, on the point at issue [*M.M Chetti v. C Coomaraswamy*, A 1980 M 212].

An admission is not conclusive as to the truth of the matters stated therein. Its weight depends on the circumstances under which it is made. It can be shown to be erroneous or untrue, so long as the person to whom it was made has not acted upon it to his detriment, when it might become conclusive by way of estoppel [*Nagubai v. Shama Rao*, 1956 SCR 451: A 1956 SC 593; *Avadhkishore v. Ram*, A 1979 SC 861; *Narayan v. Sucheta*, A 1970 B 312; *Bihar State Bd &c v. Harkishun*, A 1971 P 363]. An admission is the best evidence that an opponent can rely upon, and though not conclusive is decisive of the matter unless successfully withdrawn or proved erroneous [*Narayan v. Gopal*, A 1960 SC 100: 1960, 1 SCR 773; *Bhola v. Man Matun*, A 1965 A 258; *Wasiq v. Director &c*, A 1974 A 46]. In an agreement with the Government, the plaintiff was alleged to have made a certain admission regarding his status and the status of the defendant. Such an admission, if any, would not be a bar to a suit by the plaintiff for a declaration as to his status and as between the parties it will be necessary to consider whether the alleged statement amounts to the admission claimed and if so, to consider its evidential value along with other evidence as S 31 expressly provides that admissions are not conclusive [*Thakore Saheb v. Khachar*, 63 IA 248: 60 B 634: A 1936 PC 150]. Admissions by tenants in a *muchlika* do not necessarily show *Kudivaram* right in landlord, nor are they necessarily inconsistent with the tenant's claim to occupancy rights [*Lakshmanna v. Venkateswarlu*, A 1949 PC 278 : 76 IA 202]. A wrong admission made in ignorance of legal rights has no binding effect [*Munia v. Manohar*, A 1941 O 429; *Amrit v.*

Sadashiv, A 1944 B 233: Admissions even by a lawyer made to the Special referee appointed to ascertain the quantum of damages is not conclusive proof. [*Food Corporation of India v. Birendra Nath Dhar*, A 1989 NOC 119 (Cal) (DB), see *ante*, s 17: *"Effect of admission on a point of law"*].

An admission is good evidence against the makers of a conveyance [*Ambar Ali v. Lutfe Ali*, 21 CWN 995]. Admission in a document by a *pardanashin* lady is not conclusive [*Bholananth v. Mrittunjay*, 59 CLJ 532].

A party is not concluded by his own admission unless they have been acted upon by the opposite party to whom it was made. If treated merely as admissions not acted upon it may be proved by the party who made them that they were not true [*Brojendra v. Chairman &c*, 20 WR 223; *Jnan v. Doolar*, 18 WR 347; see *Ayetun v. Ram Sebuk*, 12 WR 156; *Yashvant Puttu v. Radhabai*, 4 B 312]. Those admissions which either have been made without any intention of being acted upon, or which have not been acted upon, or by which the situation of the opposite party has not been prejudiced or altered, though receivable in evidence against the parties making them, are not conclusive [see *Howard v. Hudson*, 1853, 22 LJQB 341; *White v. Greenish*, 1861, 11 CB, NS 209; *Foster v. Mentor Life Assur Co.* 1854, 23 LJ QB 145; *Carr v. Lond & N West Ry Co*, 1875 LR 10 CP 307; *Conventry v. Gt Eastern Ry Co*, 1883, 11 QBD 776 (Tay s 854 fn)].

Admission by co-defendant of plaintiff's title is not sufficient proof of plaintiff's title [*Saidu v. Meher*, A 1927 L 356]. An admission by a Hindu father that he built a house with money which was his son's self-acquisition, does not relieve the son from proving what the amount was [*Ajit v. Aswatha*, 40 CWN 75].

It is open to a mortgagor to deny payment of the money, the receipt whereof is formally acknowledged under his hand and to show the real truth of the transaction [*Ram Saran v. Pran Peari*, 13 MIA 551 : 15 WR 14]. An admission before a Registrar, of the receipt of purchase-money attested by his endorsement, though evidence of the strongest kind is not conclusive [*Md Haneef v. Mozhur*, 15 WR 280]. Admission by a party in a previous suit of the execution of a deed does not prevent him from contesting the validity of the transaction and showing that it was colourable and real [*Ashrafunnissa v. Giridhari*, 19 WR 118; see also *Bodh v. Ganesh*, 12 BLR 317: 19 WR 356]. A party claiming under another who has made admissions to a transaction to which that other was a party, is at liberty to prove that the admissions were made with a fraudulent purpose and were not true and to show the real nature of the transaction [*Sreenath v. Bindoo*, 20 WR 112; *Lootfoonnissa v. Goor Surun*, 18 WR 485]. So even when the object of a *benami transaction* is to obtain a shield against a creditor, the parties are not precluded from showing the real nature of the transaction [*Debi Chowdhurani v. Bimola*, 21 WR 422] Admissions made in compromise petition in a prior criminal case which was wholly illegal and inadmissible did not create an estoppel [*Jagnarain v. Ram*, A 1979 A 71]. As to estoppel between parties in *pari delicto*, see s 115, *post*.

If the defendants in a boundary suit accepted a particular map in a previous suit as correct, it amounts to an admission not conclusive against them in the boundary suit, and it stands upon a different footing from the decree in the previous suit [*Gordan S & Co v. Bejoy*, 8 WR 29]. Statement of a party before the expiry of ten days from the date of submission of an award that he had agreed to an award is merely an admission that he had no objections to it being urged. But it is not conclusive and he can therefore file objection explaining his mistake of fact, or law [*Srikishen v. Relumal*, 34 IC 845: 9 SLR 183; *Kamta v. Uman*, 76 IC 33: A 1924 O 344]. The plaintiff's mother during his minority, entered into a compromise, which he

(plaintiff) after attaining majority accepted by granting certain rent receipts signed by him—*Held*, that his admissions, though evidence against him, were not conclusive [*Dharmaji v. Gurrar*, 10 Bom HC 311]. Statement of Arbitrator under s 20 Arbitration Act, 1940 would not always amount to estoppel under s 31 [*Ramjilal v. Ram*, A 1978 A 351 (*Chhabba v. Kallu*, A 1946 PC 72 **relied** on and *Akbari v. Rehmat*, A 1933 A 861 SB **distd**)].

Proof of Admission Shifts the Onus.—An admission shifts the onus on the person admitting, on the principle that what a party himself admits may reasonably be presumed to be true [*Kishori v. Chaltibai*, A 1955 SC 504: 1959 Supp 1, SCR 698]. Admissions do raise an estoppel and shift the burden of proof on to the person making them or his representative-in-interest [*Avadhkishore v. Ram*, A 1979 SC 361]. An admission in a previous suit, though not allowed the effect of an estoppel, casts upon the person, who made it the burden of proving that what was then deliberately asserted was not the fact [*Forbes v. Mir Md*, 14 WR 28: 13 MIA 438; see *Rajkrishna v. Barabani Coal Concern Ltd*, 62 C 346; *Trailakhya v. Kenaram*, 61 CLJ 551; *Ajit v. Aswatha*, 40 CWN 75; *Md Moizuddin v. Nalini*, A 1937 C 284]. An admission by donor that possession had been delivered to the donee casts a heavy burden on the donor to show that the statement was untrue and false [*Jamilunnisa v. Md Zia*, 1937 All 609: A 1937 A 547; see *Shk Md Mumtaz v. Zubaida*, 16 IA 205: 11 A 460: *Md Sadiq v. Fakhr Jahan*, 59 IA 1: 6 Luck 566: A 1932 PC 13]. It is for the party making the admission to explain it away [*Secy of S v. Vidyabati*, A 1929 L 748; *Shk Serajuddin v. Johur*, 53 CLJ 222; *Nanilal v. Nutbehari*, 38 CWN 861; *Dukharám v. C C Corpn Ltd*, 184 IC 521: A 1940 O 35]; but in the absence of any explanation why the false admission was made, it would require very strong and clear evidence to rebut the conclusion which may be drawn from it [*Hunsakoer v. Sheogobind*, 24 WR 431].

The husband of the widow admitted that the property was the joint property of himself and his brother; and in a suit by the brother against the widow for contribution, it was held that though the admission of the widow's husband did not operate as an estoppel, yet it was a weighty piece of evidence to be rebutted by the widow [*Sreenath v. Monmohini*, 6 WR 35; see also *Chandra Kumar v. Chaudhuri*, 34 IA 27: 29 A 184: 11 CWN 381, *post*]. What a party admits to be true may reasonably be presumed to be so, and until the presumption is rebutted, the fact admitted must be taken to be established [*Vir v. Harnam*, 1 L 137; *Abadi v. Mumtazuddin*, A 1934 A 662].

A plaintiff cannot take advantage of a statement made by a defendant, which is found to be untrue, unless it is shown that the *status* of the plaintiff had been affected or that he had been misled by it. At most such a statement may amount to a piece of evidence and not an admission [*Girish v. Ishan*, 3 BLR 337: 12 WR 226. See also *Shk Komuruddi v. Maunai*, 16 WR 220]. The plaintiff had in several cases admitted that his mother was the owner and in two suits brought by her for rent, she based her claim upon a purchase from him, he having acted as a *mooktear* and signed her name. The lands were sold in execution of a decree against the mother. In a suit by the plaintiff to recover the lands on the allegation that he had mortgaged them to his mother—*held*, that the admissions may be taken as evidence against him but cannot have the effect of an estoppel, as the admissions were not made to his opponents (purchasers) who were not in any way misled by them or had purchased the lands in reliance on them [*Chunder v. Pearee*, 5 WR 209. See also *Mohunt v. Nil Komul*, 4 CWN 283 and *Oodoy Kumar v. Ladoo*, 13 MIA 585].

[Admissions Can Be Shown to be Untrue and Mistaken].—Express admissions of a party to a suit or admissions implied from his conduct are strong evidence against him; but he is at liberty to prove that such admissions were mistaken or were untrue and he is not estopped or concluded by them, unless another person had been induced by them to alter his condition. In such a case the party is estopped from disputing their truth as against that person (and those claiming under him) and that transaction, but as to third parties he is not bound; it is a well-established rule of law that estoppels bind only privies and parties and not strangers. In a suit for property to which the plaintiff alleged he was entitled by inheritance from his natural father, the defence was that he had been adopted into another family and was therefore no longer his natural father's heir, and his contention was supported mainly by the plaintiff's admissions made in deeds and other documents signed by him, to none of which, however, the defendant was a party—*held*, that there was no estoppel, the defendant being no party to the deeds, and it was open to the plaintiff to adduce rebutting evidence to prove that the statements were untrue [*Chandra Kumar v. Chaudhuri*, 34 IA 27: 29 A 184: 11 CWN 321; *Nagubai v. Shama Rao*, A 1956 SC 593: 1956 SCR 451; *Radhanath v. Krishna*, 40 CWN 722; *Ajit v. Aswatha*, 40 CWN 75; *Bengal Y M Z Co v. Niritya*, A 1937 C 159; *Md Moizuddin v. Nalini*, A 1937 C 284; *Abdul Karim v. Rashiduddin*, A 1931 O 246]. An erroneous admission does not bind the persons making it [*Mangru v. Shivanand*, A 1923 A 575] and such an admission in an application accompanied by an affidavit may be withdrawn [*Sitaram v. Uir Baksh*, A 1931 L 6]. Admission cannot be used against a person without giving him an opportunity to explain or withdraw it [*Bombay A Co. v. Ramchand*, A 1953 N 154].

The doctrine that a person is always at liberty to prove that his admissions were founded upon mistake unless his opponent has been induced by them to alter his condition, is applicable to mistakes in respect of legal liability as to those in respect of matters of fact [*Newton v. Liddiard*, 1848, 18 LJQB 53. See also *Gopee v. Chundrabalee*, 19 WR 13 and *Yasvant Puttu v. Radhabai*, 14 B 312].

An admission by one in a written statement that certain properties standing in his name belonged to all the members must be presumed to be true until it is explained or shown to be untrue [*Aminaddi v. Tajaddin*, 59 C 541]. The burden is heavy on the party making it to prove that an admission was untrue [*Bai Devmani v. Ravishankar*, A 1929 B 147; *Union v. Maqsood*, A 1963 B 110]. When execution of sale deed is established, it is for the defendant to show that the admission of receipt of consideration is incorrect [*Davindar v. Luchmi*, A 1930 L 985]. Recital as to delivery of possession in a deed of gift is not conclusive and further evidence is admissible [*Johara v. Suberia*, A 1964 M 373].

Where in a petition there is an inadvertent admission as to the nature of certain property, it is open to both sides to give evidence as to whether the person who made the admission was or was not acquainted with the incidents of the property when he made the statement [*Dinabandhu v. Mannulal*, 52 IC 443]. There might be a withdrawal of any gratuitous admission, unless there is some obligation not to withdraw it, and a mere consent to the entry of the name of another in the revenue paper does not create any such obligation [*Kali Pd v. Thakur*, 23 IC 965 (*Chokhey v. Jote*, 13 CWN 274: 36 IA 38: 31 A 73 refd to): *Ishar Fatima v. Anwar*, A 1939 A 348]. Rival admissions of parties cancel each other and leave the matter at large [*Kedarnath v. Prahlad*, A 1960 SC 213, 217: 1960, 1 SCR 861; *Bhawarlal v. Mathura*, A 1962 MP 141].

Admission by Non-traverse.—The doctrine of admission by non-traverse was not strictly applicable in India as will appear from the following cases: [*Ananda Chowdrani v. Shib Ch*, 9 MIA 287, 305: 2 WR 19; **followed** in *Deo Nandan v. Meghu*, 11 CWN 225: 5 CLJ 181; *Sadhu Singh v. Ramanugraha*, 9 WR 83: *Natha v. Jodha*, 6 A 406; *Bhuban Ch v. Ram Dyal*, 14 WR 25; *Hamidulla v. Genda Lal*, 17 WR 171; *Prabhu Das v. Sheo Nath Rai*, WR (1964 Act X) 27]. A high standard of pleading cannot be expected in this country. Where defendant in a suit for possession did not specifically deny plaintiff's allegation that the property sued for formed the portion of a certain tank, it should not be taken as constructive admission [*Naja Mia v. Abdul Kadar*, 45 IC 878 (C)]. In the courts of law in India, where the pleadings are less technical, there is merely an admission by implication in the denial of the legal effect imputed to the fact alleged: and it has been repeatedly held that an admission of a fact in the pleadings by implication is not an admission for any other purpose than that of the particular issue and is not tantamount to proof of the fact. An admission or even a confession of judgment by one of several defendants is no evidence against another defendant [*Amrita v. Rajani*, 15 BLR 23: 23 WR 214 PC; **followed** in *Luchman v. Tansukh*, 6 A 395 and *Azibullah v. Ahmad*, 7 A 353]. In some cases, no doubt following the English rule of pleadings it was held that where facts are alleged by the plaintiff and not denied in the defendant's written statement put in issue at hearing, it might be presumed that the defendant did not deny those facts [*Appaji Patil v. Apa*, 26 B 735. Similar view was also taken in *Chandi Charan v. Mobarak Ali*, 12 WR 460 and in *Ahmehdee Begum v. Debi Persaud*, 18 WR 287; *Yeknath v. Gulab*, 1 Bom HC 85]. The Code of Civil Procedure (Act 5 of 1908), has, however adopted the English rule of pleadings by enacting that *" every allegation of fact in the plaint, if not denied specifically or by necessary implication or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability"* (see Or 8 r 5). But the legislature has added a proviso to Or 8 r 5 which is the same as the proviso to s 58 of the Evidence Act in order to modify the rigour of the rule. This rule of admission by non-traverse has been further extended in cases in which the defendant does not file written statement by conferring on the court a discretion to treat the allegation in the plaint as admitted and to pronounce judgment [see Or 8, r 5(2) C P Code as inserted by C P Code (Am) Act 104 of 1976]. In a case the Privy Council held that where a statement by a plaintiff is not admitted by the defendant, the plaintiff, if he ignores the point, does so at his peril, for the defence puts him to prove his title [*Ullman & Co v. Cesan Lenba*, 13 CWN 82 PC: 4 IC 318]. In this connection see also proviso to rule 4 of Or 12 of the C P Code of 1908.

As to admission by non-traverse, see also s 58, *post* and as to admission in pleadings see *ante*, s 17.

Admissions by Conduct.—Admission may be implied from the conduct of the party. Thus an attempt by a plaintiff to suborn false witnesses is cogent evidence in the nature of an admission by conduct, that his cause is an unrighteous one [*Moriarty v. LC&D Ry*, 39 LJ QB 109]. So, the suppression of documents is an admission that the contents were deemed unfavourable to the party suppressing them. The entry of a charge to a particular person in a tradesman's book, or the making out of a bill of parcels in his name, is an admission that the goods were furnished on his credit. The omission of a claim in a schedule of the debts due to the framer of it, which is given on oath, is an admission that it is not due; though whether it amounts to a conclusive admission may be a matter of some doubt. Payment of money is an admission against the payer, that the receiver is the proper person to receive it; but not against the receiver, that the payer was the person who was bound to pay it [Tay s 804; see also

ante, s 17]. Admission inferred from acquiescence, from waiver, from silence, &c, &c are all admissions arising from conduct and as to the effect of such admissions, see Tay ss 804-816. As to when silence amounts to admission, see *ante*, s 8: *"Silent acquiscence when amounts to admission"*. A statement by a dead person may be admissible as conduct under s 8 [see *Allijan v. S*, A 1960 B 290 and other cases cited under s 32.

Delay in prosecuting alleged legal rights may amount to an admission that such rights do not exist [*Jagarnath v. Md Hossain*, 14 BLR 386 and *Rajendra v. Jogendra*, 14 MIA 67].

Admissions May Operate as Estoppels Under the Provisions Hereinafter Contained.—As to admissions creating estoppels, see *post*, ss 115-17

Admission to be Taken as Whole. (*ante*, s 17).

Effect of and Weight to be Given to Admissions. (*ante*, s 17).

Various Forms of Admissions. (*ante*, s 17)

Effect of Admissions by Co-defendants or Co-Plaintiffs. (*ante*, s 18).

Effect of an Admission on a Point of Law. (*ante*, 17).

STATEMENTS BY PERSONS WHO CANNOT BE CALLED AS WITNESSES

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

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

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

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

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

(*4*) **or gives opinion as to public right or custom, or matters of general interest;**—When the statement gives the opinion of any such person, as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware and when such statement was made before any controversy as to such right, custom or matter has arisen.

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

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

(*7*) **or in document relating to transaction mentioned in section 13,** [2]**[clause] (a);**—When the statement is contained in any deed, will or other document which relates to any such transaction as is mentioned in section 13, [3][clause] (*a*).

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

Illustrations.

(*a*) The question is, whether *A* was murdered by *B*; or [4]*A* died of injuries received in a transaction in the course of which she was ravished. The question is, whether she was ravished by *B*; or

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

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

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1. These words were inserted by s 2 I E Act, (Am) Act, 18 of 1872.
2. Word "Clause" omitted in Ceylon.
3. In Ceylon "paragraph" substituted.
4. In Ceylon "whether" inserted after "or".

(*b*) The question is as to the date of *A*'s birth.

An entry in the diary of deceased surgeon regularly kept in the course of business, stating that, on a given day he attended *A*'s mother and delivered her of a son, is a relevant fact.

(*c*) The question is, whether A was in [5][Calcutta] on a given day.

A statement in the diary of a deceased [6][solicitor], regularly kept in the course of business, that on a given day the [6][solicitor] attended *A* at a place mentioned, in [5][Calcutta], for the purpose of conferring with him upon specified business, is a relevant fact.

(*d*) The question is whether a ship sailed from [7][Bombay] harbour on a given day.

A letter written by a deceased of a merchant's firm, by which she was chartered to their correspondents in London, to whom the cargo was consigned, stating that the ship sailed on a given day from [7][Bombay] harbour, is a relevant fact.

(*e*) The question is, whether rent was paid to *A* for certain land.

A letter from *A*'s deceased agent to *A* saying that he had received the rent on *A*'s account and held it at *A*'s orders, is a relevant fact.

(*f*) The question is, whether *A* and *B* were legally married.

The statement of a deceased clergyman that he married them under such circumstances that the celebration would be a crime, is relevant.

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

(*h*) The question is, what was the cause of the wreck of a ship.

A protest made by the Captain, whose attendance cannot be procured, is a relevant fact.

(*i*) The question is, whether a given road is a public way.

A statement by *A*, a deceased headman of the village, that the road was public, is a relevant fact.

(*j*) The question is, what was the price of grain on a certain day in a particular market. A statement of the price, made by a deceased [8][banya] in the ordinary course of his business, is a relevant fact.

(*k*) The question is, whether *A*, who is dead, was the father of *B*.

A statement by *A* that *B* was his son, is a relevant fact.

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

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

(*m*) The question is, whether, and when *A* and *B* were married.

An entry in a memorandum book by *C*, the deceased father of *B*, of his daughter's marriage with *A* on a given date, is a relevant fact.

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

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5. In Ceylon "Colombo" substituted.
6. In Ceylon "proctor" substituted.
7. In Pakistan "Karachi" and in Ceylon "Galle" substituted.
8. In Ceylon "broker" substituted and the word "his" omitted.

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COMMENTARY

Principle and Scope. [Exceptions to the Hearsay Rule].—It has been seen that as a general rule hearsay evidence is excluded and the best evidence must always be given. For a recapitulation of the pros and cons of the rule see *Myers v. DPP*, 1964, 2 All ER 881 HL. But there are important exceptions to the rule. The first exception is that by which admissions made by a party are used as evidence against the party making it (*ante*, s 17 *et seq*). Some other exceptions are to be found in the group detailed in this section. In these cases, the direct oral evidence of the fact (v s 60) as also the opportunity for testing the truth of such evidence by cross-examination is dispensed with, because when a person is dead or incapable of giving evidence or cannot be found, no better evidence can be had in the circumstances than the statement (oral or written) which he may have made relating to the relevant fact under inquiry before the occurrence of his death or incapacity. The test of cross-examination being unavailable, the probability of the statement being trustworthy has been made to depend upon other safeguards which are enumerated in the eight paragraphs of the section. The character of the statement and the subject to which it refers indicate that it is reasonable to expect the highest degree of truth possible in the circumstances and the incentive or desire to falsify the statement is practically non-existent. All these cases are regarded as exceptions to the Hearsay Rule. It has been said, however, that "the whole development of the exceptions to the hearsay rule is based on the determination of certain classes of evidence as admissible or inadmissible and not on the apparent credibility of particular evidence tendered [*per* LORD REID in *Myers v. DDP, sup*]. The expression *Hearsay* being very vague and misleading it has been purposely excluded from the Evidence Act (*v. post*, s 60).

The exceptions to the Hearsay Rule embodied in this section are with regard to statements or declarations by persons since deceased, *viz*, (*1*) Declarations relating to cause of death; (*2*) Declarations made in course of business or duty; (*3*) Declarations against interest; (*4*) Declarations as to public rights; (*5*) Declarations as to pedigree; (*6*), (*7*) Declarations by testators in their wills, &c; (*8*) Declarations by sev eral persons expressing feelings. These declarations may be oral or written and are, unlike admissions, receivable either for or against the parties. If the statements made by deceased persons do not come within any of the clauses of s 32, the document is not admissible [*Sarat Sundari v. Ramkinkar*, 68 CLJ 416: A 1939 C 244]. S 32 is not exhaustive. A dying declaration made by a person who is dead as to cause of his death or as to any of the circumstances of the transaction which resulted in his death, in cases in which cause of his death comes in question, is relevant under Section 32 of the Evidence Act and is also admissible in evidence. Though dying declaration is indirect evidence being a specie of hearsay, yet it is an exception to the rule against admissibility of hearsay evidence. Indeed, it is substantive evidence and like any other substantive evidence requires no corroboration for forming basis of conviction of an accused. But then the question as to how much weight can be attached to a dying declaration is a question of fact and has to be determined on the facts of each case [*Ram Bihari Yadav v. State of Bihar*, 1998 Cri LJ 2515 at 2517, 2518 (SC)]. If a statement by a dead person is admissible under any other provision, *eg* as conduct under s 8, it is admissible [*Allijan v. S*, A 1960 B 290; see *R v. Goloke*, 1938, 1 Cal 290: A 1938 C 51; *R v. Manchankhan*, 34 Bom LR 1087].

S 32 imposes restrictions upon the admissibility of statements made by persons who cannot be brought before the court to give their own evidence. The whole scope and object of the section centre upon securing the highest degree of truth, possible in the circumstances, for the statement. It follows that where the person tendering such a statement is indifferent as to its truth or falsehood, there is nothing to bring that section into play. As a general rule s 11 is controlled by s 32 [*Sethna v. Mirza Md*, 9 Bom LR 1047: see *ante* s 11].

The general ground of reception of such evidence is that in the cases in question no better evidence is to be had [Step Intro p 165]. Such statements are admitted on the principle of Necessity. The person whose statement is offered being dead or not available, no better evidence can be had. Before reception of this kind of evidence, the first condition of admissibility, *viz* death, etc must be proved to the satisfaction of the judge. Death may be presumed under s 108. It must next be shown that it is the declaration of the person who is alleged to have made it. If it is in writing, by whom and under whose direction it was written. The credit of a deceased declarant may be impeached or confirmed in the same manner as that of any other witness on cross-examination [Steph Dig Art 135]. "The dying declaration being in effect a testimonial statement made out of court, the declarant is open to impeachment and discrediting in the same way as other witness, so far as such a process is feasible. Thus, impeachment by bad testimonial *character* is allowable, or by conduct showing a *revengeful or irrelevant state of mind* at the time, or by *conviction of crime*, or by prior or subsequent *inconsistent statements*. So also he may be corroborated by evidence of similar *consistent statements*, so far as this is allowable by the principles of that subject" [Wig s 1446].

The person whose statement is sought to be admitted must also be a competent person within s 118. Although incompetency excludes dying declarations (see *post*) it does not exclude a declaration against interest [*Gleadow v. Atkin*, 1 C&M 410]; so, want of personal knowledge would be fatal to the former, but not, it has been held, to the latter [*Crease v. Barrett*, ICM&R 919; see **however**, *Tucker v. Oldbury*, UDC 1912, 2 KB 217; *Lloyd v. Powell*, 1913, 2 KB 130, 137; Phip 8th Ed p 271].

Where a witness has been fully examined and cross-examined, s 32 has no application and if the witness happens to die before the completion of the suit, it is not open to either party to apply for admission of a statement made by him in a previous suit [*Sahadeo v. Kusum*, 5 Pat LJ 164: 46 IC 929].

The prohibition in s 162, Cr P Code regarding statements to the police does not apply to statements falling within s 32(*1*) Evidence Act.

This section is to be read with s 21(*1*). An exception to the rule laid down in that clause is to be found in s 95 of the Road Cess Act (9 of 1881 B C), which lays down that returns filed by or on behalf of any person shall be admissible in evidence against him but shall not be admissible in his favour. See however, *Ram Pd v. Lala Sham*, 6 CLJ 22 and other cases noted *ante*, under "*Road-cess Returns*', in s 21(*1*). S 10-A Dekkhan A R Act does not override this section [*Gurunath v. Mollappa*, A 1950 B 340].

S 32 is quite different from s 33. The former relates to a statement, whether made in evidence or not, by a deceased person as to the cause of his death or made in the course of business or against his interest, &c; the latter relates to a previous statement made by a deceased witness in any judicial proceeding between the same parties, provided that it was subject to cross-examination.

[Necessity Principle for Admission of Statements of Persons Who Cannot be Called as Witnesses].—As to the principle of the exceptions to the hearsay rule under which the statements and declarations referred to in this section are admitted, Wigmore says: "The purpose and reason of the Hearsay rule is the key to the exceptions to it. The theory of the Hearsay rule is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination. But this test or security may in a given instance be superfluous; it may be sufficiently clear, in that instance, that the statement offered is free from the risk of inaccuracy and untrustworthiness so that the test of cross-examination would be a work of supererogation. Moreover, the test may be impossible of employment—for example, by reason of the death of the declarant—, so that, if his testimony is to be used at all, there is a necessity for taking it in the untested shape. A perception of these two principles (a Necessity for the evidence and a Circumstantial Probability of Trustworthiness) and their combined value has been responsible for most of the hearsay exceptions.

(*1*) "The scope of the first principle may be briefly indicated by terming it the Necessity principle. The person whose assertion is offered may now be dead, or out of the jurisdiction, or insane, or otherwise unavailable for the purpose of testing.

(*2*) "The second principle which is termed Circumstantial Guarantee of Trustworthiness, is in the nature of a practical substitute for the ordinary test of cross-examination. We see that under certain circumstances the probability of accuracy and trustworthiness of statement is practically sufficient, if not quite equivalent to that of statements tested in the conventional manner.

"The following different classes of reasons underlie the exceptions: (*a*) Where, the circumstances are such that a sincere and accurate statement would naturally be uttered, and no plan of falsification be formed. (*b*) Where, even though a desire to falsify might present itself, other considerations, such as the danger of easy detection or the fear of punishment would probably counteract its force. (*c*) Where, the statement was made under such conditions of publicity that an error, if it had occurred, would probably have been detected and corrected" [Wig ss 1420-22].

The exception to the Hearsay Rule in s 32(*1*), [Dying Declaration] rests on reason *b* (fear of divine punishment); those in cl (*2*), [Entries in the Course of Business, &c] rest on reasons, *a, b, c*; those in cl (*3*), [Declarations against Pecuniary Interest] rest on reason as that in cl (*4*) [Opinion as to Public Right, &c] rest on a, b, c; those in cls (*6*) and (*5*), [Declarations about Pedigree] rest on *a* and *c*; those in (*8*), [Expressions of Feelings] rest on reason *a*.

In England this class of evidence was formerly, admitted only when the declarant was *dead*. But as the grounds of reception are impossibility of the production of the declarant and convenience, the inclusion of the three other exceptions ("cannot be found"—"incapable of giving evidence—" "attendance cannot be procured without delay or expense") appears to be an improvement and is in keeping with the spirit of the rule.

Other Exceptions to the Hearsay Rule Under English Law.—The rule has been very rigidly applied in England (*Myers v. DPP*, 1964, 2 All ER 881 HL). Myers' case is clear authority for the view that the exceptions to the hearsay rule cannot be extended judicially to include labels and markings and a label concerning the place of manufacture inscribed on goods is inadmissible as evidence of that fact [*Patel v. Comptroller of Customs*, 1965, 3 All ER 593 PC]. The better view seems to be that

there is "no reason why at some stage the courts should decide that evolution was now complete and that thereafter no further change must occur, however, great the absurdity or injustice" [*per* LORDS PEARCE and DONOVAN **dissenting** in *Myers*' case].

There have, however, been notable exceptions created by statute. *Myers*' case was overruled by the Criminal Evidence Act, 1965 (see Phip 11th Ed, para 841), which provides that in any criminal proceedings where direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall, on production of that document, be admissible as evidence of that fact if—

(a) the document forms part of a trade or business record compiled in the course of the trade or business from information supplied directly or indirectly by persons with personal knowledge or reasonably supposed to have personal knowledge, and

(b) the informants are not available as witnesses or cannot reasonably be expected to be able to recollect the facts (s 1).

In estimating the weight of such evidence all the circumstances must be taken into account and in particular whether the information was supplied contemporaneously with the facts and whether the informant or other persons concerned with the keeping of the record had any incentive to conceal or misrepresent (s 3).

By the Criminal Justice Act, 1967, provided certain conditions are satisfied, a person's written statement is admissible in criminal proceedings as evidence of the truth of its contents.

The Civil Evidence Act, 1968 (c 64 of 1968) (set out in Phip 12th Ed, para 2210 *et seq*), surely the most revolutionary piece of legislation on the law of evidence in recent times, makes the rule against first-hand hearsay a matter of mere historical interest in England as far as civil proceedings are concerned. Abolishing the common-law exceptions it makes hearsay admissible *only* by means of statutory provisions or by agreement (s 1). By s 2 first-hand hearsay is admissible subject to certain rules of court (s 8) which lays down a requirement of notice giving the opposite party an opportunity to serve a counter-notice for calling the person whose statement is being tendered and he had to be presented unless he cannot be found with reasonable diligence. Statements contained in a document are admissible as evidence of the facts stated if the document is compiled by a person acting *under a duty* in the course of any trade, business, profession etc from information supplied directly or indirectly by a person with personal knowledge whether acting under a duty or not (s 4). Statements in a document produced by a computer are similarly admissible, under certain conditions (s 5). S 9 recognizes a few common law exceptions to the rule—admissions, published works dealing with facts of a public nature, public documents and records, reputation, pedigree and public or general right. Notwithstanding anything contained in ss 2-7 or any rules of court in s 8 statements tending to establish reputation or family tradition are admissible as evidence of the facts stated for the purpose of proving good or bad character, or for proving or disproving pedigree or the existence of the marriage, or for proving or disproving the existence of any public or general right or identifying any person or thing [s 9(*3*)]. If the maker is not called as a witness then other evidence *eg*, his previous or subsequent inconsistent statements, going to his credibility is admissible (s 7). If the maker is called as a witness the statement admitted by virtue of s 2 or 4 is not capable of acting as corroborating evidence [s 6(4)]. S 6(1) contains provisions which allow documents to be proved by copies.

'Document' is fairly extensively defined (s 10). In estimating the weight the court shall pay attention to all the circumstances including whether made contem-

poraneously or not and whether the maker had any incentive to conceal or misrepresent [s 6(3)]. The judge has a discretion to allow the evidence if all the requirements are not complied with but no discretion to exclude except in the case of a failure to call the maker after the counter-notice.

S 20 repeals the provisions in the Evidence Act, 1938 constituting exceptions to the hearsay rule.

The rule is retained in cases of second-hand hearsay.

The Civil Evidence Act, 1972 (c 30 of 1972) (set out in Phip 12th Ed, para 2229 *et seq*, has further extended the provisions of the Civil Evidence Act, 1968 making it applicable to statements of opinion. It has made hearsay evidence of opinion admissible in the same way as hearsay evidence of facts is under the Civil Evidence Act, 1968 (except in so far as it concerns statements produced by computers). In the case of records admissible under s 4 of the 1968 Act the opinion in question must be that of the person who originally supplied the information from which the record was compiled (s 1). Where it is desired to put in hearsay evidence of any expert's findings the reports containing those findings are not subject to the rules made under s 8(2) of the 1968 Act [S 2(2)]. It has been declared that for civil cases non-expert opinion may be received as evidence of the facts intended to be conveyed by that expression of opinion [s 3(2)]. A previous decision of the superior court on a question of foreign law which is reported in a citable form may be tendered as evidence of that law and will be presumed to be correct statement of law until the contrary is proved [s 4(2)-(5)].

Ref Dying declarations; Tay ss 714-22; Phip 11th Ed, para 1051-64; Steph Art 26; Best, s 505; Powell, 10th Ed, pp 70-76; Roscoe Cr Ev 13th Ed, pp 29-34; Arch Cr Pl, 23rd Ed, pp 321-24; Wigmore, ss 1430-52; Hals, 3rd Ed, Vol 15, para 567.

Declarations made in course of business or duty: Tay ss 697-713; Phip 11th Ed, paras 941-956; Steph Art 27; Best, s 501; Powell, 273-78; Roscoe N P 59-61; Wigmore, ss 1517-61; Hals, 3rd Ed, Vol 15, paras 555-559.

Declarations against interest: Tay ss 668-695; Phip 11th Ed, paras 901-927; Steph Art 28; Best, s 500; Powell, 265-72; Roscoe N P 55-59; Wigmore, ss 1455-77; Greenleaf, s. 148; Hals, 3rd Ed, Vol 15, paras 551-554.

Declarations as to public rights: Tay ss 607-634; Phip 11 Ed, paras 971-1001; Steph Art 30; Best, s 497; Powell 291-99; Roscoe N P 48-51; Wigmore, s 1598; Hals, 3rd Ed, Vol 15, Paras 560-563.

Declarations as to relationship or pedigree: Tay ss 635-57; Phip 11th Ed, paras 1011-1040; Steph Art 31; Best, s 498; Powell, 299-304; Roscoe N P 44-48; Wigmore, ss 1480-1503; Hals, 3rd Ed, Vol 15, paras 564-566.

Declarations in Wills, etc: Tay s 648; Phip 11th Ed, paras 1071-1097; Steph Art 29; Ros N P 55; Wigmore, s 1736; Hals, 3rd Ed, Vol 15, paras 568-570.

Test of Admissibility Under S 32.—of statements against interest made by persons are: (*1*) The deceased must have had personal knowledge of the facts he was stating; (2) the facts stated should have been to the immediate prejudice of the deceased; (*3*) the statement must have been to the knowledge of the deceased, contrary to his interest; and (*4*) the interest must be either pecuniary or proprietary [*per* SESHAGIRI AIYAR, J, in *Ramanathan v. Murugappa*, 33 IC 969 (1913, *Lloyd v. Powell*, 2 KB 130 **followed**)]. Statement of a relevant fact admissible under s 32, will not be admissible under s 11. The terms of s 11 are no doubt wide but they must be

read subject to the other sections of the Act. If the fact relied on is a statement made by a person who is not called or cannot be called, it cannot be admitted unless it comes within the purview of subsequent sections, for examples s 32 and s 33 [*Bela Rani v. Mahabir*, 34 A 341; *Sevugan v. Srimathu*, A 1940 M 273].

A plaint in a suit for arrears of rent is admissible in proof of the fact that the landlord did sue on a certain allegation but cannot be admitted in proof of the contents thereof, *eg*, a statement in it by a landlord, unless the conditions laid down in s 32 are established. There is a distinction between admissibility of a document as evidence of a transaction and admissibility of document in proof of a statement contained therein. The distinction though refined is of a fundamental character [*Lakshman v. Takim*, 28 CWN 1033 : A 1924 C 558]. This case was distinguished in *Debaprasanna v. Harikishan*, 41 CWN 1089 which was the case of a plaint by the predecessor in interest of a party.

Effect of Admissibility Under S 32.—Where a document can be brought under s 32, by proof of death of the person who prepared it or other facts contemplated by the section, it can be used not only as corroborative but as independent evidence [*Charriter v. Kailash*, A 1918 P 537 : 3 PLJ 306]. Evidence admitted under this section is substantive evidence [*In re Karuppan*, A 1916 M 1211 : 16 Cri LJ 759].

The law under s 32(2) does not require corroboration as under s 34 [*Dukha v. Grant*, 16 CLJ 24 (*Zakeri v. Sakina*, 28 B 294 **followed**). See further *post*, s 34]. The language of the two sections differs materially [*Abdul Wahid v. Nagendra*, 44 CWN 993, 996].

Admissibility as Against Strangers.—A recital in a document is admissible in evidence as against parties who are not parties to the document, only where the conditions laid down in s 32 are fulfilled [*Ramsarup v. Bhagwat*, 57 IC 194; *Reajaddi v. Ganga Charan*, 53 IC 863]. See *post, "Recitals of Boundaries of Adjoining Lands in Sale deeds, &c"*,

Affidavit.—An affidavit may contain an admission or constitute a statement for the purpose of s 32 or s 145 [Cunn 11th Ed p 3]. Statements in an affidavit by wife of accused that he heard from his grandfather that he was born in England of English parents and married in India in 1861, are purely hearsay. Before s 32 can be applied, the statements must be free from all inherent weaknesses [*Thomas v. R*, 53 C 746]. Affidavit of a dead person not subjected to cross-examination is not admissible under s 32 [*Doraisami v. Balasundaram*, A 1927 M 507 : 52 MLJ 477]. The only basis of making the affidavit of a living person admissible is that it should be regarded as a statement in writing complying with the conditions of s 32 [*Marneedi v. Masimukula* A 1949 M 689].

"Statements".—As to the meaning of 'statement', see *Bhogilal v. S*, A 1959 SC 356: 1959 Supp 1, SCR 310 (*ante*, s 17).

"Written or Verbal."—Oral declarations against interest are equally receivable as written, although the weight of the one may be much greater than that of the other class [*R v. Birmingham*, 31 LJMC 63; *Bewley v. Atkinson*, 13 Ch D 283, 297-8; see Norton, 9th Ed p 183]. The oral statement of a deceased person against his own interest was admitted in evidence [*Jagnut v. Haji*, 12 Ind Jur NS 54]. Shortly before her death, the deceased who was unable to speak but was conscious and able to make signs was questioned by various persons as to the circumstances in which the injuries were inflicted on her—*held* by the Full Bench (MAHMOOD J, dissenting), that the questions and the signs taken together might properly be regarded as verbal statements made "by a person as to the cause of his death" and therefore admissible.

Verbal means, by words. It is not necessary that the words should be spoken. If the term used in the section were "*oral*" it might be that statements must be confined to words spoken by mouth. But the meaning of '*verbal*' is something wider. *Per* MAHMOOD J,—"To me *verbal* cannot mean more than by means of word or words. Nodding the head or waving the hands is not a word" [*R v. Abdullah*, 7 A 385 FB]. The Privy Council has held that nod of assent in answer to a question is a verbal statement [*Chandrasekhara v. R*, A 1937 PC 24: 41 CWN 513 *post;* see *"Signs and motions are verbal statements"*].

"Made by 'a Person'."—Statements in *patta* executed by three sisters two of whom were dead and one was living are admissible, for each of the sister executed the *patta* and each of them made the statements in it, and the statements were as much the statements of each sister who is dead as the statements of the sister who is living. The argument that "person" under the General Clauses Act shall include "persons" is of no avail [*Chandra Nath v. Nil Madhab*, 26 C 236: 3 CWN 88; *Natabar v. Nimai*, A 1952 Or 75]. There is a distinction between 'a person' in s 32 and "any particular person" in s 90. The former includes a person whose identity cannot be traced and who cannot therefore be found [*Dogar v. Sunam*, A 1944 L 58: 45 PLR 441].

"Who is Dead".—See *post*, section 33: *"When the Witness is Dead"*.

"Cannot Be Found."—See same heading under section 33 *post*. The unavailability of a witness on account of his being "kept out of the way by the adverse party" contemplated in s 33 is not provided for in s 32, but it is conceived that a witness in the circumstance is one who "cannot be found" within s 32.

"Incapable of Giving Evidence."—See same heading under s 33 *post*.

"Or Whose Attendance Cannot Be Procured Without an Amount of Delay or Expense, etc".—The reason of the rule is that all judicial investigations should be completed within a reasonable time, otherwise all such investigations may be protracted to an embarrassing and dangerous length; [see notes to s 33]. As to what kind of expense is contemplated by this section and by s 33, see the judgment of WHITE J, *In re Pyari Lal*, 4 CLR 504, 509 and *R v. Lukhun*, 21 WR Cr 56. The mere fact that a witness lives far away (Rangoon) is no ground for receiving his statement in a letter to the plaintiff by finding that he cannot be procured without unreasonable delay or expense [*Kadappa v. Thirupathi*, A 1925 M 444: 86 IC 576]. But when a doctor was away in England, his report was allowed to be proved by other evidence [*Ruppa v. Rakshpal*, A 1953 A 520]. When the discretion is not properly exercised by the court by not enforcing attendance of witnesses, the statements admitted under cl (3) should be eliminated from consideration [*Nanigopal v. Abdul Hamid*, A 1959 As 200].

The burden of proving that the witness was really so far away as is contemplated by the section is on the prosecution and it is a criminal burden of proof. Thus where on a trial for theft from a tourist, the judge admitted in evidence the out of court statements made by the tourist and his companion, it was held that the judge had wrongly admitted the statements since there was no evidence that the tourists were outside the UK or that it was not practicable to call them except at high expense and delay [*R v. Case*, 1991 Crim LR 192 CA]. See also [*Henriques v. The Queen*, (1991) 1 WLR 242 PC]. Where no evidence was offered about the pathologist whose report was contested as to where he was and whether he would be able to return; it was only stated that he was out of the country. Whether it is reasonably practicable to secure

the attendance of a witness must be examined in the whole background of the case. [*R v. Bray*, (1989) 88 Cr APP R 354 CA].

Overseas witness.—In England the court has jurisdiction under RSC Ord 38 r 3 to order that an overseas witness can give evidence to an English Court by means of a television linkage, [*Garcin v. Amerindo Investment Advisors*, The Times, June 12, 1991].

"Relevant Facts."—(*v.* notes to ss 3, 5 for the meaning of the words "facts," "facts in issue," "relevant"). It was held in a case that evidence under s 32 can only be given of relevant facts and not of statements of facts in issue [*Patel Vandravan v. Patel Mani*, 15 B 565]. But see the later case of *Jadav v. Pushpabai*, A 1944 B 29: 45 Bom. LR 924. A fact in issue is always a relevant fact and there is no reason for excluding from the operation of s 32(4) statements relating to facts in issue. If they were to be excluded much valuable evidence hitherto considered admissible would be unavailable as will be apparent from the illustrations to s 32 and also the definitions of 'facts in issue' and 'relevant facts' [*per* RAHIM J, in *Raghubhusana v. Vidyavaridhi*, 34 IC 875]. See also *Biro v. Atmaram*, 64 IA 92: A 1937 PC 101 where it has been held that it is immaterial whether the statement was relevant to the issue in respect of which it was made.

Onus.—The onus of establishing the circumstances that would bring a statement within any of the exceptions in s 32 lies on the party wishing to avail itself of the statement [*Abdul Gani v. R*, 1943, 1 Cal 423: A 1943 C 465: 47 CWN 332]. As to the onus of proving death, *see post: "Conditions necessary for the reception of dying declaration"*, p 356.

CLAUSE (1):

Dying Declaration. [English Law].—In cases of homicide, statements made by a person, since deceased, are admissible to prove the cause and circumstances of the man's death. Such statements are called 'dying declarations'. But such statements under the English law should be made when he was in "settled, hopeless expectation of imminent death"—a phrase used by WILLES J, in *R v. Peel*, 2 F&F 21 and approved by many other English judges who have used similar expressions [see *per* CHARLES J, in *R v. Gloster*, 16 Cox 471; *per* TINDAL CJ, in *R v. Hayward*, 6 C & P 160; *per* KELLY CB, in *R v. Jenkins*, LR 1 CCR 92]. Their admissibility rests on the principle that a sense of impending death produces in a man's mind the same feeling as that of a conscientious and virtuous man under oath—*Nemo moriturus praesumuntur mentiri*. "The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind induced by the most powerful considerations to speak the truth; a situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice" [*per* EYRE CB, in *R v. Woodcock*, (1787) 1 Leach 500, 504—the leading case approved in *R v. Perry*, 1909, 2 KB 697, 701]. "Dying declarations ought to be admitted with scrupulous, and I had almost said with superstitious care" [*per* BYLES J, in *R v. Jenkins, ibid*]. The constant reiteration of the words "I am dying" by a woman who had taken poison was *held* to be insufficient "as the expression of the real idea of impending death" [*R v. Abbot*, 67 JP 151] but "I am dying, look to my children", was *held* sufficient [*R v. Goddard*, 15 Cox 7]. [For other English cases see Archbold's Criminal Pleadings, 24th Ed pp 381-85; Tay ss 714-22; Phipson Ev 11th Ed para 1051 *et seq*]. The Indian law on the subject differs materially from the English rule (v *post*).

Distinction Between English and Indian Law.—Under the English law, it is essential to the admissibility of dying declarations, *first*, that the declarant should have been in *actual danger of death* at the time when they were made; *secondly*, that he should have had a *full apprehension of his* and *lastly, danger;* that *death should have ensued*. These three things must be proved to the satisfaction of the judge, before a dying declaration can be received: Both in England and America, evidence of this description (dying declarations, is not admissible in any civil case [Tay ss 714-22; Wig

ss 1430-52] and in criminal cases it is not admissible upon charges other than *homicide*; or as to homicides other than that of the *declarant*. The latter part of this limitation was somewhat infringed in *R v. Baker*, 2 M & Rob 53. In *R v. Hind*, 8 Cox 300, in which *R v. Baker, sup* was cited, POLLOCK CB, *held* adopting the doctrine of *R v. Mead*, 2 B&C 605, that the true rule confined the declarations to charges involving the homicide of the *declarant* [Phipson Ev 11th Ed para 1054]. These restrictions do not appear in s 32. It is not required that the maker should be in expectation of imminent death, nor is it restricted to cases of homicide only. It is admissible also in civil cases [see *Vinyak v. S*, A 1970 Goa 96]. The Supreme Court has stated the distinction in the following words:

Now we proceed to examine the principle of evaluation of any dying declaration. There is distinction between the evaluation of dying declaration under the English Law and that under the Indian Law. Under the English Law, credence and the relevancy of a dying declaration is only when person making such statement is in hopeless condition and expecting an imminent death. So under the English Law for its admissibility, the declarant should have been in actual danger of death at the time when the declaration is made, and that he should have had a full apprehension of his danger and the death should have ensued. Under the Indian law the dying declaration is relevant whether the person who makes it was or was not under expectation of death at the time of declaration. Dying declaration is admissible not only in the case of homicide but also in civil suits. Under the English law, the admissibility rests on the principle that a sense of impending death produces in a man's mind the same feeling as that of a conscientious and virtuous man under oath. The general principle on which this species of evidence are admitted is that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak only the truth. If evidence in a case reveals that declarant has reached this state while making declaration then within the sphere of the Indian law, while testing the credibility of such dying declaration weightage can be given, of course depending on other relevant facts and circumstances of the case. *Kishan Lal v. State of Rajasthan,* (1999) Cri LJ 4070 at p. 4074 : AIR 1999 SC 3062.

—Summary.—Thus under the Act—

(1) A dying declaration is relevant whether the person who made it was or was not, at the time when it was made under expectation of death that is, it is immaterial whether there existed any expectation of death at the time of the declaration. In a Calcutta case it has been observed that the necessity of recording a dying declaration arises only when the hopes of life are given up [*Upendra v. R*, 52 CLJ 425; *Tehal v. S*, A 1979 SC 1347". It is common sense that there is no need to record dying declaration until that stage is reached or it is apprehended that a person will not survive].

[*In re Shk Tinoo*, 15 WR 11 and *R v. Ujrail*, 2 NWP 12, it was held that before a dying declaration was admitted it should be proved that the person making it knew that he was dying or believed himself to be in danger of approaching death. It was decided under s 29 of Act 2 of 1855 which was similar to the English law with the exception that the declarant might have entertained hope of recovery].

(2) The admissibility of dying declaration is not confined to the case of homicide only, but it would be admissible, whatever the charge may be, provided the cause of death comes under enquiry: *Illustration* (*a*) shows that in a charge of rape, a woman's dying declaration is admissible as to the circumstances of the transaction resulting in her death. In England a dying declaration is not admissible to prove rape [*R v. Newton*, 1 F & F 641], or robbery [*R v. Lloyd*, 4 C&P 233].

(3) A dying declaration is admissible in this country in civil suits, under the terms, *"whatever may be the nature of the proceeding in which the cause of death comes into question."* Thus in a suit for damages for death caused by a railway accident due to the negligence of the company, the declaration of the passenger killed, as to the cause of his death is admissible. *Illustration* (*a*) shows that it is receivable in civil as well as in criminal cases.

These are the principal points of distinction between English and Indian laws. Therefore, Eglish authorities should be very cautiously referred to in deciding cases. A dying declaration under the Act assumes a character very widely different from what it is under the English law, as it is relevant under it whether the person who made it was or was not when it was made under expectation of death [*R v. Premananda*, 52 C 987: 29 CWN 738; *R v. Digambar*, 19 WR Cr 44. In *R v. Bisso Ranjan*, 6 WR Cr 75 (decided under s 29 of Act 2 of 1855 and s 371 of Act 25 of 1861), it was held, that the rule of English law restricting the admissibility of dying declarations to cases of homicide had no application in India]. The nature of proceeding in which the cause of death comes into question need not necessarily be a charge of murder or homicide. It may be a charge of a different nature or it may be a civil action [*Parmanand v. R*, 1941 Nag 110: A 1941 N 340; *Lalji v. R*, 6 P 747].

It is submitted that although the Act has made a great departure from the English law in regard to the conditions of admissibility of dying declarations, the greatest caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth and the principles of English law should be adhered to as far as possible. Nothing short of a settled, hopeless expectation of imminent death in the mind of the declarant, would induce an English judge to admit such evidence. Even a sense of impending death does not always rouse the same feelings in every one and there may be persons who cannot get rid of the passions of anger or revenge even in the moment of death. Thus in *R v. Crockett*, 4 C&P 544, the dying declaration was—"that damned man has poisoned me." If such are the feelings of a person when he is at the moment of death, how unreliable may be the statements of one who is not expecting death. It should also be borne in mind that such statement is not on oath, neither can there be any cross-examination. Moreover the statement is generally made at a time when exhaustion and strong physical pain deaden all feelings and confuse the declarant's intellectual powers. When dying declarations are received, their weight must depend greatly on the circumstances under which they are made. Their credibility and value will also vary with the circumstances of each particular case and the nature of the record made [see *post: Weight and Degree of Credit to be Attached to Dying Declaration"*].

Principle governing dying declaration.—Statement written or verbal of relevant facts made by a person who is dead is called a 'dying declaration'. Dying declaration is an important piece of evidence and conviction can be based solely on the dying declaration. In the present days when there is spate of dowry deaths, dying declaration has assumed much importance. *Sant Goyal v. State of UP*, 1995 Cri LJ 312, 320, 321 (All).

The principle on which the dying declarations are admitted in evidence is indicated in legal maxim:

"Nemo moriturus praesumitur mentire" i.e., a man will not meet his Maker with a lie in his mouth."

Truth sits on the lips of dying man as said by Mathew Arnold:—

"The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced and the mind induced by the most powerful consideration to speak the truth; situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of Justice" (See Eyre C.V. in *R v. Woodcock*, (1789) 1-Leach 500).

Under the English Law, it is essential to the admissibility of the dying declaration that the declarant must have entertained a settled hopeless expectation of death, death being imminent or impending, but he need not have been expecting immediate death. The fact that the deceased believed that his death was impending may be shown by

the statements made by him at the time, or by evidence that his physical condition or the nature of wounds, injuries inflicted upon him were such that he must have so believed (See Halsbury's Laws of England Vol. 11 IVth Edn. Page 255). Indian Law does not put such restrictions in Section 32 of the Indian Evidence Act. It is not required under Section 32 of the Indian Evidence Act that the maker should be in expectation of imminent death, nor is it restricted to cases of homicide only. It is thus immaterial whether there existed any expectation of death at the time of dying declaration. Before a dying declaration may be admitted, it must be proved that the person who made it is dead. When a person making a dying declaration survives his statement cannot be admitted u/s. 32 of the Indian Evidence Act but may be relied on u/s. 157 to corroborate or u/s. 145 of the said Act to contradict his statement in Court. A dying declaration which records every word of a dying man unattended by interested person is a most valuable evidence. It is absolutely necessary for the protection of society that the dying declaration should be received otherwise an accused person could not be held liable for the commission of a crime, particularly in such a case as is the present one where a woman is burnt inside the house of her in-laws.

The dying declaration is entitled to great weight. The Court has to satisfy itself that the dying declaration is of such a nature as to inspire full confidence in the court in its correctness. The court has to be on guard that the statement of the deceased was not as a result of either tutoring, prompting or a product of imagination. The Court has to be further satisfied that the deceased was in that state of mind and had a clear opportunity to observe and identify the assailants. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration as has been held by the Supreme Court in a catena of cases. Statements by deceased as to the cause of his death are admissible not only against the person who actually caused the death, about also against other person concerned in the transactions which resulted in his death. [*Sant Gopal v. State of UP*, 1995 Cri LJ 312, 320, 321 (All)].

The recollection of the last words spoken by a dying man to a witness who is at the scene or arrives shortly thereafter and hears a dying declaration may properly be received in evidence [*Ong Her Hock v. P.P.*, (1987) 2 Malayan LJ 45 (Singapore CA)].

Dying declaration if found acceptable alone can form the foundation for a conviction. The General rule is that all oral evidence must be direct *viz.*, if it refers to a fact which could be seen it must be the evidence of the witness who says he saw it; if it refers to a fact which could be heard, it must be the evidence of the witness who says he heard it, if it refers to a fact which could be perceived by any other sense, it must be the evidence of the witness who says he perceived it by that sense. Similar is the case with opinion. These aspects are elaborated in S. 60. The eight clauses of S. 32 are exceptions to the general rule against hearsay just stated. Clause (1) of S. 32 makes relevant what is generally described as dying declaration, though such an expression has not been used in any statute. It essentially means statements made by a person as to the cause of his death or as to the circumstances of the transaction resulting in his death. The grounds of admission are : firstly, necessity for the victim being generally the only principal eye-witness to the crime, the exclusion of the statement might defeat the ends of justice and, secondly, the sense of impending death, which creates a sanction equal to the obligation of an oath. The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn

and so lawful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of justice. These aspects have been eloquently stated by Eyre LCR in *R. v. Wood Cock* (1789) 1 Leach 500.

The situation in which a man is on death bed is so solemn and serene when he is dying that the grave position in which he is placed, is the reason in law to accept in veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Besides, should the dying declaration be excluded it will result in miscarriage of justice because the victim being generally the only eye-witness in a serious crime, the exclusion of the statement would leave the Court without a scrap of evidence.

Though a dying declaration is entitled to a great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the Court also insists that the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of deceased was not as a result of either tutoring, or prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailants. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. *State of Orissa v. Simanchal Gouda*, 1997 Cri LJ 1816 (Ori).

In *Paniben v. State of Gujarat*, A 1992 SC 1817 : 1992 Cri LJ 2919 (**Followed** in *Vithal Sadashiv Gaikwad v. State of Maharashtra*, 1994 Cri LJ 2035, 2042 and *Surjeet Kaur v. State of MP*, 1994 Cri LJ 1886, 1890) the principles governing dying declaration were summed up as under:

(i) It is neither a rule of law nor of prudence that a dying declaration cannot be acted upon without corroboration [*Mannu Raja v. State of MP*, (1976) 2 SCR 764 : A 1976 SC 2199 : 1976 Cri LJ 54];

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base a conviction on it, without corroboration [*State of UP v. Ram Sagar Yadav*, A 1985 SC 416 : 1986 Cri LJ 836; *Ramavati Devi v. State of Bihar*, A 1983 SC 164 : 1983 Cri LJ 221; *Ajit Singh v. State of Punjab*, 1998 Cri LJ 3460 (P&H)];

(iii) The Court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination and the deceased had opportunity to observe and identify the assistants and was in a fit state to make the declaration [*Rama Chandra Reddy v. Public Prosecutor*, A 1976 SC 1994 : 1976 Cri LJ 1548];

(iv) Where a dying declaration is suspicious it should not be acted upon without corroborative evidence [*Rasheed Beg v. State of M P*, (1974) 4 SCC 264 : A 1974 SC 332 : 1974 Cri LJ 1548];

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected [*Kake Singh v. State of MP*, A 1982 SC 1021 : 1982 Cri LJ 986];

(vi) A dying declaration which suffers from infirmity cannot form the basis of a conviction [*Ram Manorath v. State of U P*, 1981 SCC (Cri) 281 : 1981 Cri LJ 168];

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected [*State of Maharashtra v. Krishnamurthi Laxmipati Naidu*, A 1981 SC 617 : 1981 Cri LJ 94];

(viii) Equally, merely because it is a brief statement it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth [*Surajdeo Oza v. State of Bihar*, A 1979 SC 1505 : 1979 Cri LJ 1122];

(ix) Normally the Court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye-witness has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail [*Nanahau Ram v. State*, A 1988 SC 912];

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon [*State of U P v. Madan Mohan*, A 1989 SC 1519 : 1989 Cri LJ 1485];

Some other recent decisions needing notice are : *Surinder Kumar v. State of Haryana*, A 1992 SC 2037 : (1992 Cri LJ 3660). This was also a case of bride burning and the deceased had suffered 70% burns. Dying declaration of the deceased was challenged on the basis of the evidence of Doctor admitting the deceased in the hospital and recording that the deceased had suffered burn injuries while cooking. The evidence was held not sufficient to discredit dying declaration. In *Surajmal v. State of Punjab*, A 1992 SC 559 : (1992 Cri LJ 520), the Medical Officer had during cross-examination stated that he was not sure if the prosecution version of the incident was correct and hence he did not attest the statement. This statement was used to submit that dying declaration was unreliable. The Court rejected the submission and held this 'sporadic admission' of Medical Officer could not in any way affect the veracity of the statement in dying declaration. Similarly, in *Gangotrising v. State of U P*, A 1992 SC 948 : (1992 Cri LJ 1290), the challenge to an otherwise proper dying declaration was made on the basis of statement of Medical Officer that the patient had told him that some unknown person had shot at him. Since the Court found that the dying declaration was recorded by an Executive Magistrate and there was no evidence of tutoring, the same could not be rejected only because of the aforesaid state of Medical Officer.

It may therefore, be taken to be well established that though the Court would subject the dying declaration to a close scrutiny to ascertain whether it was honest and truly the statement made by the deceased, it would not reject the same on extraneous consideration such as admissions made by Medical Officer during cross-examination or the like. Indeed once the Court holds that the dying declaration contains the statement of the deceased as to the cause of death and if the same was recorded before any one had the opportunity to tutor the deceased, the same will be accepted and relied upon. *Surjeet Kaur v. State of M P*, 1994 Cri LJ 1886, 1891; *Jaspal Singh v. State*, (1994) 1 Crimes 126 (MP). A dying declaration has got sanctity and a person giving the dying declaration will be the last to give untruth as he stands before his creator. There is the legal maxim "*Nemo Moriturous Praesumitur Mentire*" meaning, that a man will not meet his Maker with lie in his mouth. In Woodroffe and Amir Ali, "Law of Evidence" 14th Edition, Vol. 11 at page 970 it appears : "when a man is dying, the grave position in which he is placed is held by law to be a sufficient ground for his veracity, and therefore the tests of oath and cross-examination are dispensed with. A dying declaration is to be recorded in *Ipsissuima verba i.e.* exact words of the person giving the declaration. That is why the practice of a questions and answers has been adopted. But when it is an oral

dying declaration, then difficulty arises as to what exact words had been spoken. Therefore, the court has to consider each case in the circumstances of the case. What value should be left to court who will, on assessment of the circumstances and the evidence and materials on the record, will come to a conclusion about the truth or otherwise of the version, be it written, oral, verbal or by signs or gestures. *Qaiyam Main v. State of Bihar*, 1993 Cri LJ 1756, 1770-1772 (Pat). The dying declaration is a substantive evidence only for the reason that a person in acute agony is not expected to tell a lie an in all probability it is expected from such person to disclose the truth and it is also a settled principle of law now that the dying declaration is a substantive evidence and an order of conviction can be safely recorded even on the basis of dying declaration if the court is fully satisfied that the dying declaration made by the deceased was voluntary and reliable and the author recorded the dying declaration as stated by the deceased. The apex court also laid down the principle on this point that for relying upon the dying declaration the court must be cautious that the dying declaration was voluntary and further it was recorded correctly and above all the maker was in a fit health mentally and physically to make such declaration. *Dinesh Rajak & Ors. v. State of Bihar*, 1996 (2) Crimes 466, 468 (Pat).

Whether corroboration necessary.—The practical effect of the difference between the English common law and the provision in s. 32 as pointed out in *Pius Jasunga S/o Akumu v. R*, (1954) 21 EACA 331], was again emphasised by the Privy Council in [*Nembhard v. The Queen*, (1982) 1 All ER 183 PC]. Their Lordships said that it is important to notice that is the countries concerned the admissibility of a dying declaration does not depend on the common law test, that is, on the deceased having at the time a settled hopeless expectation of impending death. Their Lordships cited s. 32(1) of the Indian Act and emphasised that the weight to be attached to a dying declaration admitted by reference to s. 32 would necessarily be less than that attached to a dying declaration admitted under the common law rules. Accordingly, it may not be surprising that courts dealing with such statements have felt the need to exercise even more caution in the use to be made of them than is the case where the common law test is applied. The facts of this case were that the accused was charged in Jamaica with the murder of a police officer. The evidence for the prosecution was that the deceased had been shot at the gate of his home and that there were no witnesses, but that when his wife heard the shots and ran out to him he told her that he was going to die, that she was going to lose her husband. He named the appellant as one who shot him. He died a few hours later. The trial judge admitted the evidence of the wife as a dying declaration. There was no other evidence which implicated the appellant. He appealed saying that it was dangerous to convict without supporting or corro-borating evidence. Rejecting this contention their Lordships of the Privy Council said that there is no rule of law or practice whereby a special warning about the need of corroborative evidence. Where the only evidence implicating the accused consisted of a dying declaration. Their Lordships observed as follows: "some attempt was made by counsel to argue by analogy that the comparatively recent example of the decision in [*R v. Turnbull*, (1976) 3 All ER 549 : 1977 AC 224], justified the definition of a new rule as to the need for corroboration in the area of dying declaration. But their Lordships accept neither the analogy nor its application in the present case. *Turnbull* does not purport to change the law. It provides the most valuable analysis of the various circumstances which common sense suggests or experience has shown may affect the reliability of a witness's evidence of identi-fication and make it too dangerous in some of the circumstances postulated to base a conviction on such evidence unless it is supported by other evidence that points to the defendant's guilt."

The necessity of corroboration arises only when the declaration suffers from some infirmity. The statement of the dying woman was that her husband poured kerosene on her person and set her afire. It was recorded by the head constable. It was held

that the finding of the High Court that there was no evidence to prove that the accused husband was at home at the time was patently wrong. *State of Maharashtra v. Mehtabi,* (1998) 8 SCC 618.

Whether Dying Declaration is "Evidence".—The dying declaration is only a piece of untested evidence and must, like any other evidence, satisfy the court that what is stated therein is the unalloyed truth and that it is absolutely safe to act upon it [*Priyalal v. S*, A 1970 A & N 137]. Dying declarations are not depositions, but sometimes they may become relevant as depositions. As to this see s 8, *illustrations* (*j*), (*k*) and s 14, *illustrations* (*l*), (*m*) and notes thereto, *ante*. The opinion rule has no application to dying declarations [Wig s 1447]. Dying declarations can be used by either party [Wig s 1452]. A dying declaration recorded by a magistrate is 'evidence' and can be admitted without proof under s 80 [*Surajballi v. R*, A 1934 A 340]. Dying declarations are not depositions unless made in the presence of the accused and recorded by a magistrate [*R v. Samiruddin*, 8 C 211; *Gouridas v. R*, 36 C 659; see however *R v. Somra*, 16 P 593 and *post: "Recording of Dying Declarations and Mode of Proof"*].

Dying Declaration Admissible Against Whom.— Statements by deceased as to the cause of his death are admissible not only against the person who actually caused the death of the deponent, but also against other persons concerned in the transaction which resulted in the deponent's death, in cases in which the cause of that person's death comes into question [*Nag Hla v. R*, A 1936 R 187; *In re Subbu Thevan*, 2 Weir. 750; *Ulahannan v. S*, A 1955 TC 104—CONTRA : The dying declaration of one person is not a relevant fact with respect to the question about the death of another person [*Kunwarpal v. R*, A 1948 R 170]. The words "*comes into question*" in s 32 (1) connote that the cause of death should come into question directly and not indirectly. Where in a fight between two parties there were several deaths on both sides and cross-cases for death of persons of either party were started, the dying declaration of one cannot be used against members of his own party even if the question is which party was the aggressors and who acted in self-defence [*Saudagar v. R*, A 1944 L 377: 46 PLR 135]. Where the dying declaration was found to be "fraught with untruths" it cannot be used against other accused [*Jit Singh v. R*, A 1949 Pu 334].

"Statement Is Made By a Person as to the Cause of his Death or as to Any Circumstances of the Transaction Which Resulted in his Death."—Such statements are known as "dying declarations," *ie*, statements made by a dying person as to the injuries which have brought him or her to that condition, or the circumstances under which those injuries came to be inflicted. If a man is shot dead by a revolver, a statement by the deceased as to the firing of the shot or the circumstances under which it came to be fired, would be admissible. This statement must be made when he is dying from the result of the injury which caused his death, otherwise it is not a dying declaration. But a statement made by the deceased several days before the occurrence resulting in his death, is not dying declaration [*Autar v. R*, 81 IC 964: 4 L 451]. Statement of deceased two days before death furnishing a background or motive for the crime is inadmissible [*Nimoo v. S*, A 1955 C 559]. Verbal statement of the deceased giving out at the spot where he was injured the names of his assailants is admissible, but before it can be relied upon the statement should be consistent [*Thakur v. S*, A 1955 A 189]. When the statement of the deceased is with regard to the cause of his death made shortly before his death to a person who saw him in the police lock up with bleeding injuries it is clearly admissible as a dying declaration. [*State v. Sunil Biswas*, 1990 Cri LJ 2093, 2101 (Cal)]. The transaction resulting in death cannot possibly mean any fact or series of facts which have no direct or organic relation to death. Statements made by the deceased long before the incident of murder are inadmissible [*Rego v. R*, A 1933 N 136; see also *Harendra v. R*, A 1938 C 125: 66 CLJ 196]. The test or relevancy is not what the final finding in the case is, but whether the cause of death of the person making the statement comes into

question in the case. The expression "any of the circumstances.....resulted in his death" is wider than the cause of his death [*S v. Ram Pd*, A 1953 P 354]. It was pointed out that the words "resulted in his death" do not mean "caused his death" [*Chinnavalayan v. S*, 1939, 1 MLJ 246]. A statement by a witness that a week before his death the deceased told him of a rumour that Rs. 5,000 had been offered for his head is hearsay [*Ram Kr v. S*, A 1952 C 231].

LORD ATKIN in *Pakala Narayana Swami v. Emperor*, A 1939 PC 47 : (1939 (40) Cri LJ 364) observed while discussing the scope of S. 32(1) thus:

"It has been suggested that the statement must be made after the transaction has taken place, that the person making it must be at any rate near death, that the "circumstances" can only include the acts done when and where the death was caused. Their Lordships are of opinion that the natural meaning of the words used does not convey any of these limitations. *The statement may be made before the deceased has any reason to anticipate being killed.* The circumstances must be circumstances of the transaction; general expressions indicating fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of the death will not be admissible..... Circumstances of the transaction is a phrase no doubt that conveys some limitations. It is not as broad as the analogous use in "circumstantial evidence" which includes evidence of all relevant facts. It is on the other hand narrower than "*res gestae*" Circumstances must have some proximate relation to the actual occurrence..... It will be observed that "the circumstances are of the transaction which resulted in the death of the declarant."

The Supreme Court has placed reliance on this decision of the Privy Council in *Sharad v. State of Maharashtra*, A 1984 SC 1622 : 1984 Cri LJ 1738. One of the propositions laid down by the Supreme Court there is this:

"Section 32 is an exception to the rule of hearsay and makes admissible the statement of a person who dies, whether the death is homicide or a suicide, provided the statement relates to the cause of death, or exhibits circumstances leading to the death. In this respect, as indicated above, the Indian Evidence Act, in view of the peculiar conditions of our society and the diverse nature and character of our people, has thought it necessary to widen the sphere of S. 32 to avoid injustice."

K.T. Thomas, J. of the Kerala High Court while speaking on behalf of the Full Bench in *State v. Ammini*, (1987) 1 Ker LT 928 : 1988 Cri LJ 107 observed that the Supreme Court in A 1984 SC 1622: 1984 Cri LJ 1738 adopted the interpretation that the expression "any of the circumstances of the transaction which resulted in his death" is wider in scope than the expression "the cause of his death". In the light of the said decision of the Supreme Court, motive factor available in the statement of the deceased *cannot be discarded as a remote circumstance, if it is otherwise intimately connected with the circumstances of the transaction which resulted in his death.* The statement of the deceased must disclose that the circumstances specifically narrated by him have some direct or proximate bearing on the causes contributed in the transaction which ultimately resulted in his death. The deceased need not say or apprehend that he would be killed by the person whose conduct was referred to in his statement. At the time of giving the statement, there was no chance of having any inclination in the mind of the deceased that such person would do away with his life for the circumstances disclosed by him. Such circumstances shall only be intimately connected with the circumstances of the transaction which resulted in his death [*Sooraj v. State*, 1994 Cri LJ 1155, 1162 (Ker)]. A statement cannot be admitted as dying declaration unless it relates to the actual transaction which resulted in death and not to previous events which are not part of the same

transaction [*Haji Salleh v. P.P.*, (1931-32) FMSLR 229 (CA Federated Malay States)].

The phrase 'circumstances of the transaction' cannot be accorded a wide construction because it would load to hearsay being too readily admitted. The circumstances must have some proximate relation to the actual occurrence [*Yong Kong Tai v. Salim Bin Jalal*, (1997) 2 Malayan LJ 380 (Johor Bahru HC)]. In a suit for damages for death caused by a road accident the declaration of the passenger killed 'as to the cause of his death' is admissible [*Yong Kong Tai v. Salim Bin Jalal*, (1997) 2 Malayan LJ 380 (Johor Bahru HC)].

Section 32(1) of the Evidence Act renders a statement relevant which was made by a person who is dead in cases in which cause of his death comes into question, but its admissibility depends upon one of the two conditions : Either such statement should relate to the cause of his death or it should relate to any of the circumstances of transaction which resulted in his death. The collocation of the words in section 32(1) "circumstances of the transaction which resulted in his death" is apparently of wider amplitude than saying "circumstances which caused his death". There need not necessarily be a direct nexus between "circumstances" and "death". It is enough if the words spoken by the deceased have reference to any circumstance which has connection with any of the transactions which ended up in the death of the deceased. Such statement would also fall within the purview of section 32(1) of the Evidence Act. In other words, it is not necessary that such circumstance should be proximate, for, even, distant circumstance can also become admissible under the sub-section, provided it has nexus with the transaction which resulted in death. *Rattan Singh v. State of Himachal Pradesh*, A 1997 SC 768 : 1997 Cri LJ 833, 834. It is fundamental to the provision in para 1 of section 32 of the Evidence Act that there must be death. The statement must relate to cause of death or to any of the circumstances of the transactions which resulted in death when the cause of death comes into question. If the deceased is not proved to have died as a result of the injuries received in the incident propounded by the prosecution, her statement cannot be said to be statement as to cause of her death or to any of the circumstances which resulted in her death. Where the injury alleged to have been caused by the accused to the deceased was not shown to have proximal connection with deceased's death, the statement of the deceased made to PWs cannot be said to be a statement as to the cause of death or as to any of the circumstances which resulted in her death. Evidence given in this behalf by the PWs was hearsay and was not relevant under section 32(1). *Imran Khan v. State of M P*, 1995 Cri LJ 17, 22, 23 (MP). Statements which do not relate to cause of death of its maker or to any of the circumstances of the transaction which resulted in his death two months after the incident cannot be termed as dying declaration. *Satwa Wadoke v. State of Maharashtra*, 1996 Cri LJ 4028, 4031 (Bom). Letters written by the deceased disclosing the circumstances under which she committed suicide are admissible in evidence under S. 32 [*Ram Kumar v. State of M.P.*, 1998 Cri LJ 952 (MP)].

When deceased informed the police about the contemplated dacoity and was shot dead while pursuing the dacoits, the oral statements made by him from the time of informing the police to the time of his death are relevant [*Lekha v. R*, 9 OWN 977]. A petition sent to the sub-divisional officer by the deceased about a week before his death stating that he seriously apprehended danger to his life at the hands of certain persons does not appear to be inadmissible under s 32 (*1*). It is certainly admissible under s 8 [*Goloke v. R*, 42 CWN 129: A 1938 C 51; *R v. Manchankhan*, 34 Bom LR 1087; *Allijan v. S*, A 1960 B 290]. A previous statement that the accused was threatening to kill the deceased is also not inadmissible [*In re Ramamurthy*, A 1941

M 290]. A statement of the deceased to other caste members before the attack but after the incident earlier in the morning that he was threatened that all *Bagris* would be finished off today is admissible, not about the cause of his death, but as a circumstance of the transaction which resulted in his death [*In re Kalu Singh*, A 1964 MP 30]. While making applications for police protection at the time of sowing the deceased expressed apprehension of trouble from her brother-in-law and had mentioned threats having been given to her by them. The prosecution case not being that the murder was committed because of the complaints the making of the complaints does not constitute 'motive' within s 8. They are however admissible under s 32(*1*) [*Dinkar v. S*, A 1970 B 438]. A petition of complainant may be admissible in evidence as a dying declaration of the complainant under s 32(*1*) [*Gouridas v. R*, 36 C 659: 13 CWN 680]. The statement of a person sent to the police in a dacoity case does not become admissible when that person later died since it is not the statement as to the cause of death of any person. [*Dhira Choudhury v. State of Assam*, 1982 Cri LJ 572, 576: 1982 Cri LC 373 (Gau)].

"His death" means the death of the person whose statement is sought to be admitted. A mother left home leaving her daughters *B* and *A*. On return, finding *A* alone she enquired abourt *B* and *A* made certain statements to her mother concerning the accused and later to others. *A* died before her statements could be recorded in a judicial proceeding—*Held* that her statement is not admissible as it related not to her death, but to her sister *B*'s death [*Ratan Gond v. S*, A 1959 SC 18: 1959 SCR 1336]. A woman made a statement to the village Munsif which was recorded in writing that *P* killed her husband when he found her with *P*. She committed suicide the same evening—*Held* that the statement is not admissible as the woman's death did not come into question, nor is it admissible under s 35 [*In re Peria*, A 1942 M 450; *Kappanaiah v. R*, A 1931 M 233].

When there is natural death of informant long after the event but before commitment proceedings, FIR is not admissible under s 31(*1*) [*S. v. Chakradhar*, A 1964 Or 262]. See *post: "Cases in which Dying Declarations held Inadmissible."*

The phrase *"circumstances of the transaction"* conveys some limitation. It is not as broad as the analogous use in "circumstantial evidence" which includes evidence of all relevant facts. It is on the other hand narrower than *"res gestae"*. Circumstances must have some proximate relation to the actual occurrence: though in certain cases they may be related to dates at a considerable distance from it (*eg*, the distance in a case of prolonged poisoning from the date of the actual fatal dose). The natural meaning of the words "circumstances of the transaction" does not convey the limitation that the statement must be made after the transaction has taken place or that the person making it must be at any rate near death. The statement may be made before the cause of death has arisen, or before the deceased has any reason to anticipate being killed. The circumstances must be circumstances of the transaction; general expressions indicating fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of the death will not be admissible. But statements made by the deceased (in the present case to his wife) that he was proceeding to the spot where he was in fact killed, or as to his reasons for so proceeding (that the accused's wife had written to him to go and receive payment of his due), or that he was going to meet a particular person, or that he had been invited by such person to meet him, would each of them be circumstances of the transaction, and would be so whether the person was unknown or was not the person accused. Such a statement might indeed be exculpatory of the person accused [*Pakala Narayana v. R*, 66 IA 66: 43 CWN 473, 478-79: A 1939 PC 47; **relied** on in *Dukhi Dei v. S*, A 1965 Or 33].

When the deceased is not proved to have died as a result of injuries received by him in the incident where he is alleged to have been killed, his statement relating to that incident cannot be said to be as to the cause or the circumstances of the transaction which resulted in his death [*Moti Singh v. S*, A 1964 SC 900]. The statement must relate to the injuries which have brought the victim to that condition or the circumstances under which those injuries came to be inflicted. If the deceased has given more than one statement, we have to find out where there is consistency in the substantial part of the version given by the deceased. [*Ramesh Laxman Shendre v. State of Maharashtra*, 1991 Cri LJ 1636, 1642 (Bom)]. So far as the transaction is one in which the death resulted, the assault by the accused on the deceased which resulted in injuries which developing the infection resulted in his death would undoubtedly be a circumstance of the transaction and the statement being regarding such circumstance is clearly admissible under sec. 32(1). [*Kulamani Sandha v. State*, 1991 Cri LJ 599, 601 (Ori)].

Statements of the deceased to *K* that he was going to release his cow confined by the accused made shortly before the quarrel over the recovery of the cow during which the accused struck the deceased which resulted in his death, is admissible [*Satish v. S*, 58 CWN 160: A 1954 C 379]. It is immaterial whether the circumstance is distant or near and both are embraced by the expression "the circumstances" in sec. 32(1). But it must be a circumstance of the transaction which resulted in his death. By no streatch of reasoning, can it be said that what the deceased told his wife that he would come back for lunch is a circumstance of the transaction which resulted in his death [*C. Narayanan v. State of Kerala*, 1992 Cri LJ 2860, 2867 (FB) (Ker)]. Where the prosecution case is that the accused wanted to do away with the deceased because she was made pregnant by him, the statement of the deceased to the witness of her such condition through him is relevant [*Thanuvan v. S*, A 1955 TC 87]. Letters written by a woman to her relations five to eight months before her suicide stating the cruel conduct of her husband's people though relevant to show the state of her mind, are not admissible, as the connexion between them and her death were not sufficiently close to make them the circumstances of the transaction resulting in her death [*Gokul v. S*, A 1950 C 306]. The girl had written letters to her father about the torture suffered by her in her husband's house. The fatal assault was made a long time thereafter. Even then if the circumstances of the torture appearing in the writings of the deceased come into existence after the initiation of the torture, the same would be held to be relevant under sec. 32 (1). [*Manohar Lal v. State of Punjab*, 1982 Cri LJ 1373, 1377 (P&H); *State of Haryana v. Anil Kumar*, 1984 Cri LJ NOC 118 (P&H) (DB); *Smt. Padmabai v. State of M P*, 1987 Cri LJ 1573, 1576 (MP) : 1987 Cur Cri J (MP) 54]. The statements alleged to have been made by the deceased about harassment or ill treatment or cruelty will also assume importance. Letters, if any, that have been written by the deceased to her relations or friends touching the harassment or cruelty also have got a material bearing. [*P. Bikshapathi v. State of A.P.*, 1989 Cri LJ 1186, 1194 : (1988) 2 ALT 946].

The statement of a deceased person (who did not himself charge the accused with having wounded him) that another person who had died was stabbed by the accused is inadmissible [*Fakir v. R*, 17 PR 1901 Cr]. One *P*, a police informant, was killed in a skirmish between the police and some dacoits. The statement of *P* as to the circumstances of his death implicating certain persons in the dacoity is not admissible against the accused as the object of the trial is to ascertain who were the dacoits who attacked *B, Y* and *P*'s death did not come into question in it directly [*Nga Te v. R*, 20 IC 990].

Motive.—Section 32(1) is wide enough to include statement of the deceased regarding motive behind the criminal act in question. *State of UP v. Ramesh Prasad Misra*, A 1996 SC 2766 : 1996 Cri LJ 4002, 4005. A statement of the deceased prior to her death alleged to contain a reference to the motive of the accused is not admissible as it is not a statement as to the cause of her death, nor is it admissible under s 8(*1*) where it is not shown to have accompanied or explained any act of the accused [*In re Venkata Subba*, 54 M 931: A 1931 M 689; *Dinkar v. S*, A 1970 B 438; see also *Pub Pros v. Munigan*, A 1941 M 359]. Statements suggesting motive must be excluded even if the accused does not object to it [*In re Baggam*, A 1941 M 101]. *Venkata Subba, sup*, was distinguished in a later case in Patna where a statement in the dying declaration that the accused had assaulted him "on account of enmity caused by my acting as a wizard" was held admissible as a statement as to the circumstances which resulted in his death [*R v. Somra*, 16 P 593: A 1938 P 52]. It was also **distinguished** in *Allijan v. S*, A 1960 B 290 holding that complaint to police two months before death expressing apprehension of death by accused is admissible. Further statement of the deceased mostly relating to the motive aspect of the case and to the cause of her death is not a dying declaration within the meaning of section 32. *Venkappa K Chowdhri v. State of Karnataka*, A 1996 Cri LJ 15, 18 (Kar).

Conditions Necessary For Reception of Dying Declaration.—Before the statement may be admitted it must be proved that the person who made it is dead; and the burden of proving death is upon the person who wishes to prove the dying declaration. This is clear from s 104 and *illustration* (*a*) to that section. But when a person making a dying declaration chances to live, his statement cannot be admitted as dying declaration under s 32, but it may be relied on under s 157 to corroborate or contradict his statement in court [*R v. Rama Sattu*, 4 Bom LR 434: *Bishundhari v. R*, 1941 PWN 622; *Vallon v. S*, A 1956 TC 207]. Statement made in expectation of death by surviving injured cannot be termed as dying declaration. It can be used to corroborate the witness. *Naresh Rai v. State of Bihar*, 1994 Cri LJ 978, 988 (Pat). When a person who made the dying declaration has survived and has not been examined in the case, the court is prevented by law not to receive it [*Tahsildar v. S*, A 1958 A 255]. A "dying deposition" comes on the record under s 160 and not as a written statement made by a deceased under s 32(*1*) [*Nag Mya v. R*, A 1936 R 42].

Where declarant survives.—Where the declarant survives, the declaration cannot be admitted as a dying declaration. But it can be used for corroborating the testimony of the person in court under S. 157 or for contradicting him under S. 155. *Ramprasad v. State of Maharashtra,* AIR 1999 SC 1969 : 1999 Cr LJ 2889.

—Competency of Person.—A dying declaration must be that of a person competent to testify as a witness under s 118. Therefore the dying declarations of lunatics or children of tender age who are incompetent to testify, are not admissible. In *R v. Pike*, (1829) 3 C & P 598, the declaration of a child who on account of the extreme young age (four years) could not understand the doctrine of a future state, was not admitted (see Tay. s 717 for other cases]. In *R v. Perkins*, 9 C & P 395, the declaration of a boy of ten was held admissible. As to competency of a child witness to testify, see s 118 *post*.

First Information.—Statement recorded by a police officer as FIR is admissible as dying declaration if the maker thereof dies. *Rajendra Singh v. State*, 1996 Cri LJ 1560, 1563 (Raj). FIR lodged by the deceased giving details of the incident can be used as dying declaration. *Pancham Yadav v. State of U P*, 1994 Cri LJ 848, 853 (All). The dying declaration which was recorded by the Sub-Inspector of Police after obtaining certificate of fitness from the doctor and registered as FIR, cannot be rejected when there were no circumstances on record to infer that the FIR was given on account of some deliberation or prompting and there was no material on record to show that the contents of the dying declaration were false or incorrect. *Lakhan Lal v. State*, 1995 Cri LJ 2699, 2703 (Pat). Where the difference between the recitals contained in the Emergency Police Register entry and the FIR, which were in the form of dying declarations, adversely affected the weightage to be attached to both the documents and there was no mention in another dying declaration recorded by the Psychiatry Registrar in hospital that the entries contained therein were made pursuant to the information furnished by the informant and

therein it was mentioned that the informant was not in a position to recognise his assailants which meant that he must have been inconscious, the dying declarations cannot be relied upon. *State of Maharashtra v. Ahmed Gulam Nabi Shaikh*, 1997 Cri LJ 2377, 2384 (Bom). Where after making the first information report, the victim succumbs to his injuries it can be treated as a dying declaration and is admissible unders. 32(*1*) [*Munnu v. S*, A 1976 SC 2199]. The first information report against an accused is admissible under s 32(*1*) as a declaration as to the cause of the informant's death [*Azimuddy v. R*, 44 CLJ 253; *Gajjan v. R*, A 1931 L 103]. But if the complainant who had been belaboured died a natural death (and not because of the injuries caused) s 32 is not applicable [*Umrao v. S*, A 1961 MP 45]. It is not substantive evidence and can be used only to corroborate or contradict the maker, but in case of death it is admissible under s 32(*1*) as substantive evidence [*Kapur v. R*, A 1930 L 450: 31 PLR 83; *Vallon v. S*, A 1956 TC 207]. Where the informant disappears after filing the first information and there is no proof of his death, it is not admissible [*Inchan v. R*, A 1943 C 647]. Statement made by deceased at police station by way of FIR could not be said to have been made to Investigating Officer. Recording of dying declaration by Investigating Officer deprecated [*Munnu v. S*, A 1976 SC 2199]. As to use of First Information, see further s 157 *post*.

Where the injured died during the trial and the FIR was treated as a dying declaration, but the prosecution made no effort to establish the cause of death or the existence of any connection between the death and the injury in question, the time of death remaining unknown, the statement in the FIR was held to be not admissible as a dying delcaration. *Sukhar v. State of U.P.*, (1999) 9 SCC 507.

Delay in recording.—The delay of two days in recording the statement was held to be excusable, it being due to the unfitness of the injured person to make the statement during that period. *G.S. Walia v. State of Punjab*, AIR 1998 SC 2857 : (1998) 5 SCC 150.

Signs or Motions are Verbal Statements.— (See *ante*, *"Written or Verbal*). Any adequate method of communication, whether by words or by *signs or otherwise*, will suffice provided the indication is positive and definite, and seems to proceed from an intelligence of its meaning [Wig s 445]. In *Mockabee v. Com*, 78 Ky 382 (Am), HINES, J, said: Dying declarations are not necessarily either written or spoken. Any method of communication between mind and mind may be adopted that will develop the thought, as the pressure of the hand, a nod of the head or a glance of the eye." In 1903, *R v. Louie*, 10 Br C 1, 3, 9, nodding the head, held sufficient. In *Godfrey v. S*, 1858, 31 Ala. 321, the declarant merely nodded his head to questions by friends, his mind being also weak and lethargic at the time; rejected, because it did not appear that he understood their words or could know what they understood as his meaning. In *Jones v. Com*, 1919, 186 Ky. 283, (case of murder) answers by shaking the head for "no", admitted. In *Com v. Casey*, 1853, 11 Cush 420, pointing with a finger, so as to convey a meaning clearly held sufficient. In *People v. Madas*, 1911, 201 NY 349, deceased had a tube in his windpipe and could not articulate; answers by nods admitted [cited in Wig s 1445, in vol 3, pp 178-79]. Dying declaration recorded on the basis of nods and gesture is admissible. *Meesala Rama Krishan v. State of AP*, 1994 (2) Crimes 114 (SC); see also *A.P. Chandrasekera v. King*, A 1937 PC 24; *Darpan v. Emp.*, A 1938 Pat 153; *Gajendra v. State*, 1973 Cri LJ 1058 (Ori). Where three persons stated that the deceased had clearly conveyed to them through gesture that the accused persons were his assailants, the fact that this was not recorded in writing or that no further statement of the deceased or of the witnesses was taken down thereafter would not in any manner be good enough to discredit the validity of this evidence. *Pandian K. Nadar v. State of Maharashtra*, 1993 Cri LJ 3883, 3893 (Bom); see also [*Vaghari Madha Kama v. State*, A 1956 Sau 83 : 1956 Cri LJ 1240].

Signs made by a dying woman in answer to questions put to her as to the circumstances under which the injuries were inflicted on her, were admitted as verbal statements as to the cause of her death within the meaning of this clause, as she was then unable to speak but was conscious and able to make signs [*R v. Abdulla*, 7 A

385 FB; *Manchand v. R*, 5 L 324; *R v. Motiram*, 1937 Bom 68: A 1936 B 371; *Vaghari v. S*, A 1956 Sau 83; *Shamtigir v. State of MP*, 1989 Cri LJ NOC 9 : 1988 Cri LR (MP) 16]. Nodding the head and making signs are verbal statements [*Ranga v. R*, 5 L 305: 84 IC 552]. Some cases held that such signs were admissible under s 8 and not s 32 [see the judgments of BROOMFIELD, J, in *R v. Motiram*, and of MAHMOOD, J, in *R v. Abdulla*, *ante*]. A nod of assent in answer to a question whether a certain individual had inflicted the fatal cut made by a person unable to speak but fully conscious and able to understand what was said, clearly constitutes a verbal statement. The case closely resembles the case of a person who is dumb and is able to converse by means of a finger alphabet. Evidence of this character must be received with caution. Evidence as to other signs made by the accused may necessarily be given in order that it might be understood in what circumstances and context the vital question came to be asked and to be answered. But answers to questions of a leading character may be of little weight. Evidence of signs of an ambiguous character ought not to be admitted at all and in many cases though admissible might be of little weight, [*Chandrasekhara v. R*, A 1937 AC 220: 53 TLR 137: 41 CWN 513: A 1937 PC 24]. It is essential that what actually took place should be truly recorded and the statement should show on the face of it the questions put and the nature of the signs made in reply [*Buta v. R*, 2 PR Cr 1886: 9 PR 1900]. A witness stated that replies were given by signs only. The signs were not described more particularly than by stating that they were by waving of the hands and movement of the head. It is very doubtful whether such dying declaration can be admitted. It was not the function of the recorder to record merely his interpretation of the signs, but he should have recorded the precise nature of the signs, leaving the interpretation to the court [*Darpan v. R*, A 1938 P 153].

A wounded woman was unable to speak and could not be given oath. On being asked about her assailant, of three persons who were standing near her, she distinctly pointed but her husband—*held* that reply made by sign in answer to question put, taken together with the question, amounted to a verbal statement. Questions however should not be put in a form suggesting that the injury was homicidal [*R v. Sadhu* 49 C 600: 26 CWN 414: 77 IC 993]. When a person with his throat cut made certain gestures in reply to questions put by the police, they were admissible. The interpretation of the signs or gestures is for the court alone, and the opinion of witnesses as to what they understood by signs is not evidence [*Chandrasekhara v. R, sup*; *Chandrika v. R*, 3 Pat LT 771: 1 P 401; *Sudama v. R*, A 1949 N 405].

Dying Declaration of Accomplice.—As the testimony of an accomplice is admissible against his fellows, the dying declarations of a *felo-de-se* are admissible against one indicted for assisting the deceased in his self-murder [*R v. Tinckler*, 1781, 1 East PC 354]. And on the same ground, when a husband is charged with the murder of his wife, or a wife with the murder of her husband, the dying declaration of the deceased will be received [*R v. Woodcock*, 1788, 1 Lea 500: Tay s 717]. It has been held that where the deceased is an accomplice the declaration should be corroborated [*R v. Sadler*, 1911, 75 JPJ 256]. As dying declarations are only admissible under the English law where the death of the deceased is the subject of the charge, it would seem that the only case in which the dying declaration of an accomplice can be given in evidence against the prisoner, is where the prisoner is charged with assisting in the self-destruction of the accomplice [2 Russ Cr (7th Ed), 2085]. In *R v. Jessop*, 16 Cox 204, on an indictment charging with murder the survivor of two persons who had agreed to commit suicide together, FIELD, J, admitted statements by the deceased made when purchasing poison in the absence of the prisoner, on the ground that the acts and words of the deceased in carrying out a

pre-arranged plan were evidence against the prisoner. Dying declarations in *favour* of the party charged with the death are admissible in evidence, as they may have an influence on the amount of punishment [*R v. Scaife*, 2 M & Rob 551; Arch Cr Pleading, 24th Ed p 384].

Recording of Dying Declarations and Mode of Proof.—Dying declarations may be oral or written (see opening words of section), although in most cases such statements are made orally before death ensues and is reduced to writing by some one, *eg*, a magistrate, a doctor, a police officer &c. If it is recorded, no oath is necessary, the accused need not be present, nor is the presence of a magistrate absolutely necessary, although to assure authenticity it is usual to call a magistrate, if available, for recording the statement of a man about to die. When a person whose evidence is required is in imminent danger of death, his statements should be recorded by a magistrate exercising judicial functions. There is no requirement of law that a dying declaration must necessarily be made to a Magistrate. What evidentiary value or weight has to be attached to such a statement, must necessarily depend on the facts and circumstances of each particular case. When none of the witnesses including the Police Officer who recorded the statement could be attributed with any kind of ill-feeling against the accused, their evidence cannot be rejected. [*Ramawati Devi v. State of Bihar*, A 1983 SC 164, 166 : 1983 Cri LJ 221]. It is not prudent to base conviction on a dying declaration made to Investigating Officer, particularly when it is not signed by the declarant or the witnesses [*Balakram v. S*, A 1974 SC 2165]. Dying declaration recorded by doctor is of great value [*Abdul Majid v. S*, A 1976 SC 1782]. When the injured was admitted in the hospital the doctor found his condition bad and after sending a slip to the police, he himself recorded the dying declaration and the victim died eight hours thereafter. The declaration can be accepted as free from falsehood and concoctions. [*Namo Bara v. State of Assam*, 1981 Cri LJ (NOC) 72 (Gau)]. When the Magistrate who was sent for was out of town, the Doctor himself recorded the dying declaration. It can be accepted. [*Khusali v. State*, 1991 Cri LJ 3244, 3247 (All)]. The entry in the injury report that the injured was burned by her brother-in-law can be construed as a dying declaration. [*Ashok Kumar v. State of Rajasthan*, 1990 Cri LJ 2276, 2280 (SC)]. When in a wife burning case, the dying declaration was recorded by the Doctor and it was not attested by the persons present, it could not be relied on. [*Surendar Singh v. State*, 1990 Cri LJ (NOC) 170 (Delhi)]. A dying declaration to a doctor not recorded is admissible if proved by his evidence [*Sital v. S*, A 1956 C 82]. A dying declaration cannot be said to be unsafe to rely on merely because it is recorded by a Head Constable and not a magistrate [*Vinayak v. S*, A 1970 Goa 96]. When two dying declarations are made, one before the police officer and the other before the Magistrate and both contain same set of facts they can be accepted [*Smt. Lela Devi v. State*, (1986) Cri LJ 658, 662 (Del) (DB) : (1986) 2 REC Cri R 116]. Dying declaration should be short, concise and to the point. It is not desirable to have the dying declaration in cyclostyled form [*Adevappa Nagappa v. State of Karnataka,* 1998 Cri LJ 584 (Kant)]. The statement of the deceased cannot be summarised but has to be given word for word as given by the dying person [*Yong Kong Tai v. Salim Bin Jalal,* (1997) 2 Malayan LJ 380 (Johor Bahru HC)]. Omission to record the actual words of the deceased is a fatal defect [*Toh Lai Heng v. R,* 1961 Malayan LJ 53 (Singapore CA)].

The statement commonly known as 'dying declaration' constitutes such an important evidence in criminal cases that it can form the sole basis of conviction. Therefore, as far as possible the dying declaration should be recorded in the manner provided in Rules 3 to 10 of Chapter 13-A of the Punjab and Haryana High Court

Rules and Orders, 1966, Vol. III. The procedure of recording dying declarations should normally not be deviated and it is only in emergent and unavoidable circumstances that departure from these rules may still not vitiate the authenticity of a dying declaration. *Surinder Paul v. State of Punjab*, 1997 Cri LJ 1745 (P&H). Non-recording of the dying declaration by the Executive Magistrate itself shall not detract from the prosecution version, when the police officer who recorded the dying declaration was not shown either to be interested for some reasons to exaggerate the prosecution version or inimically disposed towards the accused. *Surinder Paul v. State of Punjab*, 1997 Cri LJ 1745, 1750 (P&H). Where the dying declaration was recorded by doctor, in view of non availability of Magistrate, wherein name of the accused was mentioned but merely because in the 'injury certificate' it was noted by the doctor that the injuries were caused by 'some persons', it cannot be said that the deceased was not aware as to who had caused the injuries. The entry in the injury certificate does not necessarily amount to a statement. At that stage the doctor is required to fill up that column in a normal manner and it is not the duty of the doctor to enquire from the injured patient about the actual assailant and the enquiry would be confined as to how he received the injury. *P. Babu v. State of AP*, A 1994 (1) SCC 388 : 1993 Cri LJ 3547, 3550 (SC). Where dying declarations were recorded by a doctor and thereafter by a police officer as there was no time to send intimation to the Magistrate for recording the dying declaration, merely because the Magistrate not recorded the dying declaration, those recorded by the doctor and the police officer which were proved to be truthful, cannot be held inadmissible. *Mavari Surya Satyanarayana v. State of A P*, 1995 Cri LJ 689, 693 (AP). In the absence of independent witnesses the dying declaration can be avoided, unless it is satisfactorily explained to the Court appreciating the evidence that it was not possible to associate independent person in the recording of the dying declaration. *State of HP v. Vinod Kumar*, 1995 Cri LJ 3134, 3137 (HP). A dying declaration which has been recorded by a Magistrate and in proper form stands on a much higher footing than a dying declaration recorded by a police officer or a dying declaration which depends upon oral testimony. *Kalawati v. State of Rajasthan*, 1994 Cri LJ 691, 697 (Raj). Dying declaration recorded by an Executive Magistrate who does not enjoy the powers of a Metropolitan or Judicial Magistrate is admissible in evidence. *State of U P v. Nawab Singh*, 1996 Cri LJ 934, 939 (All). Absence of any police officer or relation of the declarant at the time of recording of the dying declaration excludes the possibility of tutoring by any interested person. *Madhuri Kishan v. State*, 1996 Cri LJ 4017, 4020 (Ori). Dying declaration recorded by an Executive Magistrate in the presence of the doctor in the form of questions and answers and in the language of the declarant can form the basis of conviction of the accused. *Sajida Begum v. State of Assam*, 1996 Cri LJ 4352, 4353 (Gau). When the SDM who recorded the dying declaration stated that he translated each and every sentence spoken by the witness each time and did not translate the entire statement in one go, there was no need to finally again recount the entire statement before its maker and ask for its correctness. If the entire statement had been first heard in Hindi and thereafter translated by the S.D.M., need for explaining it to the maker could be there. When every sentence uttered by the maker is translated every time, there is no such need. Therefore, absence of endorsement by the SDM that after recording the statement he had explained the same to the maker of the statment and the maker had accepted the same as correct would be in consequential. *Ram Dhar v. State*, 1997 Cri LJ 292, 297 (Del). Where the dying declaration was made by the deceased while in conscious state and was recorded by the Magistrate and Head Constable and contained cogent and consistent version that accused poured kerosene upon the deceased and set him on fire, non-examination of the concerned doctor is not fatal to the prosecution case and the dying

declaration cannot be discarded on the sole ground that the Magistrate did not put a direct question whether the deceased was capable of giving a statement. *Vakati Lavakishore v. State of AP*, 1997 Cri LJ 285, 290, 291 (AP). Merely because the statement of the deceased is recorded by police officer, it cannot be discarded or thrown away. *Ram Singh v. State (Delhi Admn.)*, 1995 Cri LJ 3838, 3841 (Del).

The declaration should be taken down in the language in which it is made using as far as possible the exact words of the declarant (see *post*) and if it is not a continuous statement but was elicited in answer to questions, the exact questions and answers should be noted. The dying declaration should be recorded in question and answer form. The Court can judge whether any leading question was put to elicit a certain answer [*Lick Rashid Khan v. Union of India*, 1992 Cri LJ 2644, 2646 (Cal)]. When the dying declaration is recorded in the language of the declarant the same acquires added strength and raliability [*Najjam Faroque v. State*, 1992 Cri LJ 2574, 2575 (Cal)]. An injured man who is waiting to be operated on should not be subjected to anything like a third degree cross-examination by the magistrate recording his declaration, but he should ask him such simple questions as may be of some value [*R v. Mg Po Thi*, A 1938 R 282]. [See *post: "Subject Matter of Dying Declaration"*]. Dying declarations are not depositions unless made in the presence of the accused [*R v. Samiruddin; Gouridas v. R, post*] and must be proved by the testimony of the person who was present at the time it was made.

The person who records a dying declaration must be satisfied that the deceased was in a fit state of mind [*Lallubhai v. S*, A 1972 SC 1776; *K Ramachandra v. P P*, A 1976 SC 1994; *Barij Raj Singh v. State*, 1983 Cri LJ 1916, 1921 (A11) (DB) : (1983) 1 Crimes 813; *Urgen Sherpa v. State of Sikkim*, 1985 Cri LJ 1988, 1993 (Sikkim); *State of U P v. Chet Ram*, A 1989 SC 1543, 1530; 1989 Cri LJ 1785; *Umakanta Mahanta v. State*, 1991 Cri LJ 2024, 2031 (Ori)]. The injury was on the back of the neck and had not cut the vocal chord. So the deceased was in a condition to speak when the witnesses arrived. So the statement of these witnesses immediately can be accepted [*Sarbeshwar Pragnait v. State of Bihar*, 1989 Cri LJ 1516, 1518. (Pat)]. Where the doctor certified that the patient was in a fit condition to give a dying declaration the fact that the pulse was not palpable and blood pressure unrecordable and the patient was in a gasping condition would not necessarily show that no declaration could be recorded [*S v. Harpal*, A 1978 SC 1530; *Shanmugaiah v. State*, 1991 Cri LJ NOC 17 (Mad); *Amrik Singh v. State of M P*, 1984 Cri LJ NOC 165: 1984 Cur Cri J 1 (Madh Pra) (DB)]. According to the Doctor death must have been instantaneous. From this alone it could not be said that the deceased would not be in a position to speak anything after the assault on him and before his death [*Budhia Singh v. State*, 1983 Cri LJ 1020, 1022 (Ori) (DB)]. The dying declaration was recorded within 3 hours after the incident. The Doctor also certified about the fitness of the deceased to make a statement and he also asserted that the deceased made the statement voluntarily without any fear, persuasion or pressure. The declaration can be accepted [*Kishan Lal Sethi v. Jagan Nath*, 1990 Cri LJ 1500, 1501 (SC)]. The medical opinion that a person who received particular fatal injuries cannot survive more than 10 to 30 minutes could not wipe out the direct testimony of number of witnesses that the injured chanced to live after receiving the injuries and was in a conscious state to make the oral dying declaration [*Nanahav Ram v. State of M P*, A 1988 SC 912, 914: 1988 Cri LJ 936]. When the Doctor on duty was not available, the statement of a Doctor not attached to the hospital that the victim was in a fit condition to make a statement, can be accepted [*Ashok Kumar v. State*, 1983 Cri LJ NOC 147 (Del) (DB) : (1983) 2 Crimes 70]. The oral dying declaration supported by the evidence of eye-witnesses cannot be rejected merely because the fit condition of

the injured to make the statement was not spoken to by the Doctor [*Dayaram Singh v. State of M P*, 1981 Cri LJ 530 (Madh Pra); *Dhobi Yadav v. State of Bihar*; 1989 Cri LJ NOC 193: (1989) BBCJ (HC) 422]. When the injuries are fatal and time passed before the arrival of witnesses, it becomes doubtful if the deceased could be said to be in fit state to speak out or to reply to query of questions [*Bilaluddin v. State of Assam*, 1992 Cri LJ 161, 163 (Gauh)].

Witnesses should not be allowed to prove a dying declaration as if it is a substantive piece of evidence. The relevant fact to be proved is the statement made by the deceased and that statement is not the document made by the magistrate, but the verbal statement made by the deceased person. The only way of proving a declaration is by the oral evidence of some witness, who heard it made and who can refresh his memory by referring to the note made by him and read over by him at or about the time the statement is made. A declaration made by a person in expectation of death in the absence of the accused and recorded in a language different from one in which it is made, by an officer who is not examined in the case cannot properly be used as evidence against the accused [*per* TAYLOR J, in *R v. Mathura*, 6 CWN 72 (**approved** in *Kunjlal v. R*, 67 IC 57: A 1924 L 12); see also *Nga Mya v. R*, A 1936 R 42]. The usual method is to examine the person who recorded the statement, or to examine some person or persons who were present at the time and heard the statement being made [*Tafiz v. R*, 50 CLJ 584: A 1930 C 228]. The declaration of a dying person, albeit made on solemn affirmation before a magistrate, who was not, however, the committing magistrate, and signed by him, is not admissible without legal proof that the deceased made such a declaration [*R v. Fata Adaji*, 11 Bom HC 247]. Since it was felt that it would not be possible to secure the presence of the Doctor who examined the prosecutrix in a rape case without undue delay, the handwriting and signature of that Doctor were permitted to be proved by another Doctor who had worked with the other Doctor for about 2 years who knows the handwriting and signature of that other Doctor [*Prithi Chand v. State of Him Pra*, A 1989 SC 702 704 : 1989 Cri LJ 841]. But see *Walia (GS) v. State of Punjab*, 1998 Cri LJ 2524 (SC) where the delay in recording the dying declaration was sufficiently explained.

Where the dying declaration was said to have been reduced into writing by a constable, but the scribe of the document was not examined at the trial and the defence therefore, had no opportunity to cross-examine him, no reliance can be placed on such document. [*Govind Narain v. State of Rajasthan*, 1997 Cri LJ 2598, 2602 (SC)]. When the dying declaration was recorded by a doctor and another doctor identified the signature that doctor, non-examination of that doctor (who recorded the dying declaration) will not make the dying declaration inadmissible. [*Mavari Surya Satyanarayana v. State of AP*, 1995 Cri LJ 689, 692 (AP)]. When the constable who recorded the dying declaration was not examined at the trial and the defence, therefore, had no opportunity to cross-examine him, no reliance can be placed on the said dying declaration. [*Govind Narain v. State of Rajasthan*, A 1993 SC 2457, 2462 : 1993 Cri LJ 2598]. Where the contents of the dying declaration recorded by the Executive Magistrate showed that the same was not voluntarily recorded, the trial court had rightly rejected it on the ground that neither the doctor who gave certificate of fitness nor the Executive Magistrate had been examined. Though in appropriate cases where justice warrants the appellate court is vested with the power to adduce additional evidence, but when the dying declaration is found to be not voluntary, the Executive Magistrate can only prove the dying declaration and the doctors can only state that the deceased was in a fit mental conditions to make it. [*Nandkishore v. State of Maharashtra*, 1995 Cri LJ 3706, 3711 (Bom)]. Where the medical evidence

showed that the deceased, after receiving the fatal injury, could not speak upto two or four hours and not beyond that recording of alleged dying declaration after four to five hours raises suspicion. [*Shrawan Kumar v. State of Rajasthan*, 1994 Cri LJ 314, 315 (Raj)]. Where the victim was admitted into the hospital at 2.30 p.m. and the dying declaration was recorded at 5.10 p.m., the delay was negligible. [*Bathala Subbarayudu v. State of AP*, 1994 Cri LJ 446, 449 (AP)].

When a dying statement is taken by the magistrate in the absence of the accused, the writing cannot be treated as a deposition and cannot be admitted; the precise statement must be proved in the ordinary way by the magistrate or some other person who heard it made [*R v. Samiruddin*, 8 C 211; *Panchudas v. R*, 34 C 698; 11 CWN 666; *Gouridas v. R*, 36 C 659: 13 CWN 680; *In re Krishnama*, 53 M 678]. So, the statement of a wounded person recorded by a sub-inspector and attested by witnesses should be proved in the way indicated in *Samiruddin's* case [*R v. Daulat*, 6 CWN 921]. When the officer recording the statement had died, the assistant surgeon who was present proved the statement [*R v. Balaram*, 49 C 358: 71 IC 685; see also *Parmanand v. R*, A 1940 N 340]. When proving a dying declaration the magistrare need not repeat the record *seriatim* in his evidence; it is sufficient merely to refer to the record and testify to its correctness [*Sulaiman v. R*, A 1941 R 301: 1941 Rang 258; *Pratap v. R*, 7 L 91 : 92 IC 167; *Kapur v. R*, A 1930 L 450].

Without deciding whether *Gouridas v. R*, and *R v. Balaram*, *ante*, were wrongly decided in so far as they purport to take a view different from *R v. Samiruddin, R v. Mathura* and *R v. Daulat, ante*, the High Court directed proof of the contents of record of dying declaration, if not impossible, in the manner laid down in *R v. Samiruddin, ante* [Sarat *Ch v. R*, 52 C 446: 88 IC 860]. *Samiruddin's* case was again considered in a case and it was held that the law is not that the written record cannot be used at all, but that it is not to be used without first examining as a witness the person who heard the statement made [*R v. Somra*, 16 P 593: A 1938 P 52].

In a case a dying declaration made before a magistrate who records it has been held to be 'evidence' and provable under s 80 without the magistrate being called. It was observed that *Gouridas v. R*, and *Tafiz v. R*, *ante* did not refer to s 80 [*Surajbali v. R*, 56 A 750: A 1934 A 340]. Relying on *Surajbali* it has been held in Rangoon that s 32 is not governed by s 33, the presumption given by s 80 cannot be limited to cases of evidence recorded where the accused had an opportunity of cross-examination. Consequently where the magistrate is empowered to record the statement, it is not necessary for him to prove that he took the statement and the fact that the accused was not present when the dying declaration was recorded makes no difference in this respect [*Sulaiman v. R, sup*, all cases reviewed]. It does not appear that the law requires that dying declaration should be recorded in the presence of the accused and further such a requirement would render a dying declaration unavailable in many cases as the accused may not have been arrested and/or brought in the presence of the person whose dying declaration is being recorded.

When the person recording knows the language in which the statement is made, it must be recorded in the same language. Declaration in Hindi recorded in English and interpreted to the maker in Hindi was held inadmissible [*Shirinath v. S*, A 1957 B 223]. In the Punjab dying declarations made in Punjabi are recorded in Urdu and it is no ground for rejection [*Bakshish v. S*, A 1957 SC 904: 1958 SCR 409; see *Hariram v. S*, A 1965 Raj 130]. Dying declaration was given in Hindi. The Sub-Inspector who knows Hindi and Marathi recorded it in Marathi. That will not affect the evidentiary value of declaration [*State of Maharashtra v. Gopichand Uttamchand Keswani*, 1985 Cri LJ 784, 787: 1985 Cri LR (Mah) 79 (Bom) (DB)]. The fact that the language

used in a dying declaration is chaste while that used in F I R has some words colloquially spoken by villagers, is not of much significance [*Barati v. S*, A 1974 SC 839]. When the language of the declaration was open to two interpretations it would be proper to accept the interpretation favourable to the accused [*S v. Wazir*, A 1978 SC 315]. Whether the statement of a dying man recorded by another is read over to him or not or whether it is signed by him makes no difference. If it is read over or signed, it only makes its evidentiary value stronger [*Krishnama v. R*, A 1931 M 340]. When a dying declaration is recorded by a clerk under supervision of a magistrate, he can prove it [*Jangir v. S*, A 1951 Pepsu 111]. The dying declaration of a deceased person should form part of the sessions record [*R v. Syamber*, 9 WR Cr 2 and *In re Chintamanee*, 11 WR Cr 2].

The courts below had rejected the evidence of certain witnesses on the ground that it was hearsay only and had not complied with s 32. The Privy Council saw no reason to differ from the view [*Shafiqunnissa v. Shaban*, 30 IA 217: 26 A 581: 9 CWN 105: 6 Bom LR 750].

Dying Declaration recorded by Magistrate.—Where a dying declaration was recorded by the Magistrate after being satisfied about the identity of the woman who declared that her husband had set her on fire and after being satisfied of her fitness to make the statement, the statement was held to be admissible though on the medical side it was signed by a trainee nurse because of non availability of the doctor [*Ram Bihari Yadav v. State of Bihar,* 1998 Cri LJ 2515 at 2519 (SC)].

Recording of dying declaration by Police Officer.—The practice of the I.O. himself recording the dying declaration should not be encouraged. It is against the mandatory provisions as contemplated under Rule 6.22 of the Rajasthan Police Rules, 1965. *Bashir Shah v. State of Rajasthan*, 1994 Cri LJ 2526, 2531 (Raj); see also the following cases:—*Munna Raja v. State of M P*, A 1976 SC 2199; *Khushal Rao v. State of Bombay*, A 1958 SC 22; *Ramavati v. State*, A 1983 SC 164; *Navratan v. State*, 1985 Cr LR (Raj) 644; *State v. Lichma Devi*, 1986 (1) WLN 106; *Kishore v. State*, 1988 Cr LR (Raj) 376; *Pratap v. State of Rajasthan*, 1989 (1) PLR 594. Recording of dying declaration by the I.O. should not be encouraged. In case the doctor is available he should also remain present which such a statement is recorded [*Bhag Singh v. State of H P*, 1994 Cri LJ 1398, 1403 (HP)]. A dying declaration recorded by a police officer is not bad if there is no time or facility available for recording of the same in a better mode. However, in that case, the police officer must conform to the requirement of the relevant rules and instructions, if any. [*Kalawati v. State of Rajasthan*, 1994 Cri LJ 691, 696 (Raj)]. Legally, there may be no bar against recording of dying declaration by the Police Officer, however, it is safe as well as prudent to get it recorded through independent persons or the same be recorded in their presence and attested by them. In case this course in not followed, the dying declaration requires strict corroboration before it is accepted in evidence.

It may be true that there is no legal bar against Police Officer recording the dying declaration of the deceased, but in case it is recorded by any other independent person, the allegations of embellishment, concoction and pressure exercised on the deceased by the police for recording the dying declaration can be avoided, unless it is satisfactorily explained to the Court appreciating the evidence that it was not possible to associate independent person in the recording of the dying declaration. [*State of H P v. Vinod Kumar*, 1995 Cri LJ 3134, 3137 (HP)]. Where the doctor explained that because of the extensive burn injuries on the body including two hands, he could not take left hand or right hand impression of the deceased, though there was nothing which prevented him to get the statement attested either by the investigating officer

who was present, or by any of the medical staff or in the worst case by the relations of the deceased, the dying declaration suffered from infirmity. [*Niru Nanhar Beck v. State of Orissa*, 1995 Cri LJ 2412, 2414 (Ori)]. Where the dying declaration was recorded by a Sub-Inspector and no thumb impression or signature of the deceased was taken nor was it attested by the doctor no reliance could be placed on such dying declaration. [*Maniram v. State of A P*, A 1994 SC 840 : 1994 Cri LJ 946, 947]. Where the Head Constable, on getting message from doctor that a person with gunshot injuries had been admitted in the hospital, rushed to the hospital and after making entry in the police register and obtaining certificate from the doctor about the condition of the injured, he took statement of the injured for the purpose of registering a case and without having intention to record the statement as dying declaration and also genuinely made attempt to get dying declaration recorded by a Magistrate, but the Magistrate was not available, simply because the doctor did not listen the statement made by the injured, it cannot be held that the statement recorded by the Head Constable was unfounded and cannot be relied on. [*Bhagirath v. State of Haryana*, A 1997 SC 234, 242 : 1997 Cri LJ 81]. Where the dying declaration of the deceased, who was in a fit condition was recorded by the Investigating Officer because of non-availability of Magistrate and it received corroboration from the evidence of the eye-witness, accused can be convicted on the basis of such dying declaration, even though it was not recorded in question answer form. [*Hasti Devi v. State of Rajasthan*, 1997 Cri LJ 2787 (Raj)].

A dying declaration made to a police officer, should under the provisions of this section be signed by the person making it [Bengal Police Code p 377. See also Bengal Police Manual p 379]. Although a dying declaration recorded by a police officer during the course of investigation is admissible it is better to take recourse to better and more reliable methods of recording a dying declaration and the one recorded by the police officer may be relied upon if there was no time or facility available for adopting better method [*Dalip Singh v. S*, A 1979 SC 1173 (*Munnu v. S*, A 1976 SC 2199 **folld**)]. If in the process of investigation the investigating officer records the statement of a dying man it becomes relevant. [*Dilli Rao v. State of Bihar*, 1986 Cri LJ 1483, 1487 (Pat) (DB)]. Soon after the occurrence when the deceased and the accused were found grappling and the police caught hold of them, the deceased told the police party in the presence of witnesses that the accused killed him. The statement is admissible. [*Shabir Ahmad Khan v. State of J&K*, 1989 Cri LJ 2486, 2493, (J&K) (DB)]. It does not mean that if the investigating officer merely relies upon a Dying Declaration recorded by him in the presence of a Doctor, it has to be ignored by the Court simply on the ground that a Magistrate was not associated with the taking such statement when the time factor permitted him to do so associated. [*Thakur Dass v. State of HP*, 1992 Crl LJ 2415, 2420 (HP)]. Where a dying declaration was recorded by a police official who was not examined nor the original version of the declaration was on record, the declaration was held to be not admissible. An entry in the case diary about the original declaration was not regarded as evidence [*Ram Bihari Yadav v. State of Bihar*, 1998 Cri LJ 2515 at 2518 (SC)].

When on receiving a wireless message, the investigating officer goes to the hospital which is 92 km from the police station and is in another District, his recording the dying declaration without getting it recorded by a Magistrate cannot be found to be a fault. [*State of Punjab v. Amarjit Singh*, A 1988 SC 2013, 2017 : 1989 Cri LJ 95]. Under the relevant rules applicable to Delhi area, the investigating officer is not to scribe the dying declaration. Unless the dying declaration is in question and answer form it is very difficult to know to what extent the answers have been

suggested by question put. [*State (Delhi Admn) v. Laxman Kumar*, A 1986 SC 250, 258 : (1986) Cri LJ 155 (SC); *Sardar Singh v. State*, 1990 Cri LJ (NOC) 142 (Del)].

The statement of the deceased to the IO which should have been recorded as a dying declaration was taken by him as a complaint in a routine manner. After death, the same was treated as a dying declaration. The testimony of other witnesses was not suffering from any infirmity. The irregularities committed by the IO could not be allowed to be used for the benefit of the accused person. The court said that the prosecution evidence should be examined *de hors* such omissions to find out whether such evidence is reliable or not. *Paras Yadav v. State of Bihar,* AIR 1999 SC 644 : 1999 Cri LJ 1122. In another case also a statement was treated first as a complaint and then converted into a dying declaration when death took place after a gap of four days. Because of a property dispute, the relatives called the woman into their house and then consigned her to flames after pouring kerosene on her. The dying declaration was held to have been rightly accepted. *Jai Prakash v. State of Haryana,* 1998 (5) JT 308 : (1998) 7 SCC 284.

Recording of dying declaration in question answer Form.—The recording of dying declarations in question-answer form is not always necessary. A dying declaration therefore, if otherwise reliable and trust-worthy need not be discarded merely on the ground that it is not recorded in question-answer form. *Ram Dhar v. State*, 1997 Cri LJ 292, 297 (Del—DB). See also *Ganpat Mahadeo Mane v. State of Maharashtra*, 1993 Cri LJ 298; *Padmaben Shamalbhai Patel v. State of Gujarat*, 1991 A SCW 464. The Supreme Court has not laid down, in any of the cases, that unless the dying declaration is in question-answer form, it could not be accepted. To the same effect, *Harjit Kaur v. State of Punjab,* AIR 1999 SC 2571; *Ram Bihari Yadav v. State of Bihar,* AIR 1998 SC 1850 : (1998) 4 SCC 517, question-answer form not necessary when the statement consists of only a few sentences and is in actual words of the deceased.

Having said this in *Ram Bihari Yadav v. State of Bihar*, 1998 Cri LJ 2515 at 2517, 2518 (SC) the Supreme Court continued : "Having regard to the sanctity attached to a dying declaration as it comes from the mouth of a dying person though, unlike the principle of English law he need not be under apprehension of death, it should be in the actual words of the maker of the declaration. Generally, the dying declaration ought to be recorded in the form of questions-answers but if a dying declaration is not elaborate but consists of only a few sentences and is in the actual words of the maker the mere fact that it is not in question-answer form cannot be a ground against its acceptability or reliability. The mental condition of the maker of the declaration, alertness of mind, memory and understanding of what he is saying, are matters which can be observed by any person. But to lend assurance to those factors having regard to the importance of the dying declaration, the certificate of a medically trained person is insisted upon. In the absence of availability of a doctor to certify the above-mentioned factors, if there is other evidence to show that the recorder of the statement has satisfied himself about those requirements before recording the dying declaration there is no reason as to why the dying declaration should not be accepted. However, it is pointed out by Shri Kalra that in a recent case in *State of Orissa v. Parsuram Naik*, (1997) 11 SCC 15 : (1997 A SCW 3675), this Court has declined to rely upon the dying declaration as it was not certified by the doctor that the maker of the declaration was in full senses and was medically fit to make a statement. There the accused was charged with committing the murder of his wife by burning her at her parental house. The dying declaration was recorded by the doctor who, however, did not certify that she was in full senses and was medically fit to make a statement. The maker of the declaration died within fifteen minutes of the recording of the statement. On the facts of that case, the High Court did not consider it safe to rely upon the dying declaration and acquitted the accused. This court, in the appeal against acquittal having regard to the fact that she had sustained extensive burn injuries and died within fifteen minutes of the recording of the statement, took the view that she might not be in a proper and fit condition to make a statement as regards her cause of death and agreed with the High Court that exclusive reliance could not be placed on such a dying declaration to hold the husband guilty of committing her murder." [1998 Cri LJ 2515 at 2517, 2518].

Though Magistrate should record dying declaration in question and answer form so as to avoid confusion, but merely on the ground that the dying declaration was written in narrative form, it cannot be discarded. Recording the substance of the answer given by the person making the dying declaration does not attach any infirmity. [*Rajendra Singh v. State*, 1997 Cri LJ 2668 (All), see also *Tehal Singh v. State of Punjab*, A 1979 SC 1347; *Padamaben Shamalbhai Patel v. State of Gujarat*, 1991 SCC (Cri) 275 and *Ganpat Mahadeo Mane v. State of Maharashtra*, A 1993 SC 1180]. Dying declaration would not go bad merely because the magistrate did not record it in the form of questions and answers. It is axiomatic that what matter is the substance and not the form. Questions put to the dying man would have been formal and hence the answers given are material. Criminal courts may evince interest in knowing the contents of what the dying person said and the question put to him are not very important normally that part of the statement which relates to the circumstances of the transactions which resulted in his death gets the sanction of admissibility. Hence it is improper to throw such statement over board on a pediantic premise that it was not recorded in the form of questions and answers. [*State of Rajasthan v. Bhup Ram*, 1997 (1) Crimes 62, 65 (SC)]. Recording of dying declaration in the form of questions and answers is not a must. However, it is preferable. [*Pearilal Rana alias Peara & anr. v. State of WB*, 1992 (1) Crimes 1167, 1169 (Cal)]. Where the dying declaration was not recorded in question and answers' form and no certificate of doctor was obtained, the dying declaration becomes suspicious [*Pammi Bai v. State of MP*, 1996 Cri LJ 2769, 2772 (MP)]. Dying declaration recorded by the *Tehsildar* not in question and answers form and without ascertaining from the doctor as to whether the deceased was in fit condition to make it is not reliable [*Venkappa K Chowdhri v. State of Karnataka*, 1996 Cri LJ 15, 17 (Kant)]. The dying declaration should be recorded in question answer form [*Roop Chand v. State*, 1996 Cri LJ 4284, 4285 (All)]. Failure to record dying declaration in question and answer form does not reduce its probative value. [*Rajendra Singh v. State*, 1996 Cri LJ 1560, 1566 (Raj)].

Satisfaction about mental fitness of deceased.—It is duty of the Magistrate to satisfy himself before recording the dying declaration that the declarant was in a fit mental state. Certificate of doctor is not sufficient. [*Krishna Chandra v. State*, 1996 Cri LJ 1507, 1509 (All)]. Failure on the part of the Magistrate to put a formal question as to the state of mind of the deceased is not fatal. But prudence requires that the Magistrate should take such a precaution. [*Mandala Bhadraiah v. State of AP*, 1994 Cri LJ 1275, 1279 (AP)]. The evidence of the doctor that the deceased was in extreme pains coupled with the fact that she had suffered 90% of burns raises a very serious doubt regarding her capacity to make a valid dying declaration. [*Ganjan Singh v. State of Maharashtra*, 1996 Cri LJ 2921, 2926 (Bom)]. The fact that the deceased was seriously injured does not mean that he was unconscious and unable to make statement [*Rokad Singh v. State of M P*, 1994 Cri LJ 994 (MP)]. When the medical expert states that he has put certain questions to the deceased and she was found to be conscious, then in that case, it is not possible to disbelieve him more particularly when his evidence on the point has not been challenged in his cross-examination. [*Anwar Noormohmad Suicha v. State of Gujarat*, 1993 (2) Crimes 513, 515 (Guj)]. Mentioning of the fact in the MLC that there was loss of consciousness immediately after receiving the stab injuries makes it doubtful that the deceased had made any dying declaration. [*Vinod Bhalla v. State of M P*, 1992 Cri LJ 3527, 3679].

Mere fact that the deceased suffered. 100% burns and her general condition was poor is no reason to discard the evidence of doctors who recorded the dying declaration and certified that she was in a fit state of mind and was able to make the dying declaration [*Chandrawati v. State,* 1996 Cri LJ 975, 978 (Del)]. Where it is proved by the independent testimony of the Magistrate that the declarant was fit to make statement non-examination of the doctor on question of fitness of the declarant is not fatal [*Gurbachan Singh v. State of Haryana*, 1996 Cri LJ 3051, 3060 (P&H)]. By mere fact that the concerned doctor who gave certificate of fitness, was not examined, does not detract the testimony of the Magistrate who recorded the dying declaration [*Rajendra Singh v. State*, 1996 Cri LJ 1560, 1566 (Raj)]. Statement of the deceased cannot be rejected merely because of serious burn injuries on her person unless it is shown that the deceased was unable to make a statement [*Om Parkash v.*

State of Punjab, A 1993 SC 138 : 1992 Cri LJ 3935, 3938]. Where the deceased received fourteen injuries, out of which one injury was sufficient in the ordinary course of nature to cause death and the medical officer specifically stated that after receiving the said injury on the parietal region, he must have immediately become unconscious, the alleged dying declaration was held a tainted piece of evidence [*Ram Narain v. State of Rajasthan*, 1994 Cri LJ 2513, 2519 (Raj)].

The correct and ideal situation would require a proper certificate from the doctor and an endorsement that the patient is not only conscious but is in a fit condition to record the dying declaration. In the absence of such a certificate a dying declaration may be rendered heavily suspect [*Vithal Sadashiv Gaekwad v. State of Maharashtra*, 1994 Cri LJ 2035, 2039 (Bom)]. Infirmities in the oral dying declaration regarding state of deceased to make dying declaration and unnatural conduct of the witnesses to whom the declaration was allegedly given by the deceased which was disclosed to the police after 2 days of the death of the deceased render the oral dying declaration unreliable [*Ramsai v. State of M P*, A 1994 SC 464 : 1994 Cri LJ 138, 139]. Merely because the deceased had 80% burn injuries it cannot be inferred that she was unable to speak [*Kamlesh Rani v. State of Haryana*, A 1998 SC 1534]. Dying declaration not bearing the certificate of the doctor that the deceased was in a mentally fit condition to make the statement is not reliable [*Irappa v. State of Karnataka*, 1998 Cri LJ 1806 (Kant)]. The law requires that the exact words used by the deceased should be made available to the court. Though the evidence of dying declaration is accepted on the ground that a dying man will not tell a lie, but the dying declaration, which does not contain the note of the doctor that the deceased was in a fit condition to make the statement, and which is not in the question and answer form and recorded by the investigating officer himself, raises the suspicion regarding the truthfulness of the statement allegedly made by the deceased. [*Mohd. Zakir v. State of Rajasthan*, 1995 Cri LJ 2837, 2841 (Raj)]. In the ordinary course, the members of the family including the father were expected to ask the victims the names of the assailants at the first opportunity and if the victim was in a position to communicate, it is reasonably expected that he would give the names of the assailants if he had recognised the assailants. Where the deceased was alive at least up to half an hour after the assuilt and it was not borne out from the evidence that the injuries were so grave and the condition of the patient was so critical that it was unlikely that he could make any dying declaration and there was no occasion to hold that the deceased was not in a position to identify the assailants because it was nobody's case that the deceased did not know the deceased persons, it is quite likely that on being asked the deceased would name the assailants. [*Prakash v. State of M P*, A 1993 SC 65, 70]. A dying declaration which does not bear certificate of the doctor that the deceased was in fit state of mind cannot be made the basis of conviction [*Sita Ram v. State of Rajasthan*, 1998 Cri LJ 287 (Raj)].

Though there were serious burn injuries on the person of the deceased, a housewife, but as she survived for about 12 days, it cannot be said that merely because of the burn injuries, she was not in a position to make any statement. [*Om Prakash v. State of Punjab*, A 1993 SC 138, 140]. Simply because the deceased had hundred percent burns injuries of second degree and third degree it cannot be presumed that deceased was not physically and mentally fit to give statement. [*Hans Raj v. State of Rajasthan*, 1995 Cri LJ 1004, 1011 (Raj), see also *Suresh v. State of M P*, 1981 Cri LJ 755 : A 1987 SC 860]. Where the dying declaration was not recorded in accordance with Rule 13-A of the Punjab and Haryana High Court Rules and the Magistrate had left it to his stenographer to scribe the statement and even failed to note the time when the dying declaration was recorded by him, the dying declaration

was not reliable. [*State of Punjab v. Sitar Devi*, 1997 Cri LJ 2210, 2214 (P&H)]. Where the dying declaration was recorded by the Magistrate after recording a certificate from the doctor that the deceased was in a fit state of mind to make the statement, it will be wholly unjustified to hold that simply because the Magistrate did not put a direct question to the deceased as to whether she was in a fit state of mind to make the statement, the dying declaration was required to be discarded. [*G.R. Ghyare v. State of Maharashtra*, 1993 Cri LJ 3414, 3420 (SC)]. Normally, in the absence of the requisite certificate from the doctor that the patient was in a fit condition to make a statement, court would be reluctant in accepting the dying declaration. But there may be indications quite inherent from the record of the case that the deceased was in a position to make a statement. Where the patient's case paper produced by the doctor does not show that the deceased was either in such a bad or such a low physical or mental condition or for that matter that he had been administered any sedatives or drugs that would impair his mental faculties and apart from non-obtaining of the doctor's endorsement regarding fitness of the patient there was nothing in the cross-examination of the Special Executive Magistrate who had recorded the dying declaration or the police officer that would justify rejecting the declaration, the same has to be accepted. [*Pandian K. Nadar v. State of Maharashtra*, 1993 Cri LJ 3883, 3891 (Bom)]. When the dying declaration was properly recorded after the doctor certified about fitness of the deceased, non-examination of the doctor would not vitiate the proceedings. [*Nayuloncha Krishna v. State of A P*, 1997 Cri LJ 2834, 2838 (AP)]. Where the deceased had sustained 100% burn and the report of the post mortem disclosed that most of her organs including the brain were congested and the evidence of the doctor showed that she was in great pain and agony when she was brought to the hospital, it would be difficult to believe that she would be in a position to tell the names of the hospitals where she had been taken including the postal zone number of the first hospital as also the exact time of her arrival at the second hospital. In view of such wealth of details and extremely coherent nature of the dying declaration, it was difficult to believe that the deceased, even if conscious, could have made such a statement [*Deepak Baliram Bajaj v. State of Maharashtra*, 1993 Cri LJ 3269, 3272 (Bom)]. Where according to the doctors the injured not in a speaking condition when he was brought to the hospital, and their evidence ran counter to the evidence of the police officer who claimed to have recorded the dying declaration, the dying declaration cannot be relied upon. [*Swaminathan v. State*, 1993 Cri LJ 2379, 2397 (Mad)]. Where the deceased had received multiple injuries but there was no injury in the head region and the doctor had certified about his fit mental state and he had given cogent, coherent and direct answers to the Magistrate who had recorded his statement, the dying declaration could form the basis of conviction. [*Baijnath v. State of U P*, 1997 Cri LJ 1691 (All)]. Where both the alleged dying declarations contained no endorsement of the doctor about the physical condition and mental fitness of deceased to make such statements while the victim sustained 60-66% burn injury, such statements cannot be relied upon. [*Kishori Das v. State of W B*, 1997 Cri LJ 315, 320 (Cal)]. Where the evidence of the doctor was that the deceased, despite the injuries found on her person, was in a position to speak for about 10-15 minutes of the assault on her, and as her mother-in-law who was in the ground floor had immediately come hearing cries, time taken could not have been more than 5-6 minutes, it cannot be held that the deceased was not in a position to make dying declaration. [*State of M P v. Dhirendra Kumar*, A 1997 SC 318]. Where the injured became semi-conscious after sustaining the injuries and he remained throughout unconscious it is not possible to believe that an elaborate statement can be given by him to the I.O. [*Jagdish Kumar v. State of U P*, 1996 Cri LJ 3966, 3968 (All)].

The omission on the part or the Magistrate to put a specific question in that regard or an endorsement to that effect by the Doctor, does not constitute any infirmity to doubt the mental capacity to make the statement [*Balum Bhaskara Rao v. State of AP*, 1985 Cri LJ 32, 41 : (1985) Mad LJ (Cri) 113 : (1984) 2 AN LT 94 (AP) (DB)]. If this cannot be arranged for, and it becomes necessary for some other person to record the dying declaration, it should, if possible, be made in the presence of the accused or of attesting witnesses. The evidence of the Doctor who recorded the dying declaration that the deceased was capable of deposing and was in her senses and she had started going into coma can be accepted to prove the dying declaration. [*Suresh v. State of MP*, A 1987 SC 860, 861 : 1987 Cri LJ 775].

Medical certificate should be not only that the person was in a state of consciousness but also that he was in a fit condition of mind to make the statement. A declaration was held to be not safe for evidence purposes where the doctor only noted at the end of the writing that the patient was conscious at the time. *Paparrambaka Rosamma v. State of A.P.,* 1999 (6) JT 585 : (1999) 7 SCC 695. It has also been held that a medical certificate is a rule of caution only and that voluntary and truthful nature of the declaration can be established otherwise also. In a case of wife and child burning allegedly by the husband and mother-in-law, the medical endorsement of consciousness or fitness was not there at the foot of either of the two declarations. Both the declarations, one to the police and the other to the magistrate, were consistent and corroborated each other. The declarations were found to be truthful, reliable and voluntary and were found to be sufficient to support conviction. *Koli Chunilal Savji v. State of Gujarat,* (1999) 9 SCC 562. It has also been held that the certificate of the doctor about the mental fitness of the declarant should not be insisted upon where no doctor was available and the person recording the statement was satisfied about the mental fitness. *Ram Bihari Yadav v. State of Bihar,* AIR 1998 SC 1850 : (1998) 4 SCC 517. Where the judicial magistrate testified in the court that he had satisfied himself about the mental condition of the deceased and the answers given by the deceased showed her cognitive faculties were not impaired, it was held that such declaration should not have been discarded though the magistrate had not recorded on the paper itself the fact of his satisfaction about the mental condition of the deceased. *Vajrala Paripuranchary v. State of A.P.,* AIR 1998 SC 2680. The medical certificate of 100% burn injuries created doubt about the genuineness of the thumb impression. *State of Punjab v. Gian Kaur,* AIR 1998 SC 2809.

An inference of inability to make the statement was drawn where the deceased had sustained a number of injuries. *Mohar Singh v. State of Rajasthan,* AIR 1998 SC 2912 : (1998) 9 SCC 654.

S 162 Cr P Code and Dying Declaration.—S 162(2) Cr P C in express terms excludes from its purview statements falling under s 32(*1*). In this case dying declaration was held to be relevant [*Tapinder v. S*, A 1970 SC 1566; *Hazarilal v. S*, A 1980 SC 873]. So the statement of the deceased to the police is admissible as a dying declaration even if death took place much later [*Rajindra v. S*, A 1960 Pu 310; *Kishan v. S*, A 1963 Pu 170; *Harej Ali v. State of Assam*, 1981 Cri LJ 1745, 1749 (Gau)]. Statement of injured recorded under section 161 CrPC by the I.O. becomes a statement relating to the cause of death of that man if he subsequently dies. [*Budhi & Ors. v. State of U P*, 1994 (1) Crimes 966, 968 (All)].

Cases in Which Dying Declarations Held Admissible.—A statement by the deceased that he had been beaten by the accused is admissible without proof that at the time when the statement was made, the deceased was conscious of any fatal effect of such beating [*R v. Blechyanden*, 6 CLR 278]. Dying declaration of a deceased is admissible on a charge of rape when the cause of the death is the subject of the enquiry [*R v. Bissoranjan*, 6 WR 75]. In a case of murder, the statement made by the deceased in the presence of his neighbours and of a head constable was admitted [*R v. Digamber*, 19 WR Cr. 44]. Statement of the deceased that the accused inflicted injuries is admissible under s 32(2) [*Krishnaram v. S*, A 1964 As 53]. When a girl of about 10 years makes two dying declarations and the answers given to questions put by doctor made it evident that age did not handicap her in making the statements, they can be relied upon [*Nooruddin v. S*, A 1965 A 40].

Section 32(1) is an exception to the rule of hearsay and makes admissible the statement of a person who dies, whether the death is homicide or a suicide, provided the statement relates to the cause of death, or exhibits circumstances leading to the death. Where the main evidence consists of statements or letters written by the deceased which are directly connected with or related to the

death or which reveal a tell-late story, the said statement would clearly fall within the four corners of section 32 and therefore, admissible. [*Mithailal v. State of Maharashtra*, 1993 Cri LJ 3580, 3585 (Bom)]. In *Satish Chandra v. State*, A 1954 Cal 379 : 1954 Cri LJ 1015, statement of the deceased that he was going to the accused to released his cow which the accused had confined, made shortly before the quarrel over recovery of the cow, during which the accused struck the deceased, which resulted in his death, is held admissible. In *Thenuvan Ratnakaran v. State*, A 1955 TC 97 : 1955 Cri LJ 857 it has been held as under:—Where the prosecution case is that the accused wanted to do away with the deceased because she was made pregnant by him, the statement of the deceased to the witness of her such condition through him is relevant. Oral and written statements made by the deceased regarding harassment/cruelty by her in laws on account of dowry demand are admissible under S. 32(1). [*Suresh Reghunath Kochare and Anr. v. State of Maharashtra & Anr.*, 1993 (2) Crimes 545, 548 (Bom)]. If the injured is not proved to have died as a result of the injuries sustained by her in the incident her statement that the accused was unhappy with her for not bringing enough dowry is not admissible under this section. [*Imran Khan v. State of M P*, 1994 (2) Crimes 174 (MP)]. When the doctor who prepared the post mortem report had died and the report had been brought on record by the Head Clerk, the report was admissible under Section 32. [*Shayam Narayan Singh v. State of Bihar*, 1993 Cri LJ 772, 812 (Pat)]. Where the voluminous evidence in the form of letters sent by the deceased lady to her brothers expressing her plight *viz.* constant torture, beating, non-supply of food and other necessities, showed that it ultimately resulted in her death, the statements which she made in the letters were admissible under Section 32 [*Mithailal v. State of Maharashtra*, 1993 Cri LJ 3580 (Bom)]. Where the dying declaration has received corroboration from medical evidence and blood stained articles recovered from the accused persons, no explanation was given by them about the finding of extensive stains of human blood in their examination under section 313 Cr PC, hence dying declaration is admissible under section 32 of the Evidence Act [*Meharban v. State of M P*, A 1997 SC 1528 : 1997 Cri LJ 766 (768)]. When there is no inconsistency between the eye-witnesses and the dying declaration conviction solely on the basis of the dying declaration is not bad [*Bhola Turha v. State of Bihar*, 1998 Cri LJ 1102 (SC)]. Dying declaration would not lose its value on ground that the deceased died long after making the dying declaration [*Najjam Faraghi v. State of WB*, 1998 Cri LJ 866 (SC)].

Unlike English law, s 32(*1*) is not confined to cases of statements made as to the case of a person's death but extends to statements made by a person "as to any of the circumstances of the transaction which resulted in his death" and so a statement made even before the deceased received any actual injuries is admissible [*R v. Shivabhai*, 50 B 683]. In a trial for robbery, statement before death regarding the circumstance of robbery is relevant even though death was caused remotely by the wounds received at the robbery [*Nga Ba v. R*, A 1935 R 418].

On a charge of causing grievous hurt, two (among others) witnesses, one of whom was the person assaulted, were examined and the prisoners were committed for trial. The person assaulted having subsequently died, charges of murder and of culpable homicide not amounting to murder were added at the sessions trial. The deposition of the deceased witness was admissible under s 32(*1*) or under s 33 [*R v. Rochia*, 7 C 42: 8 CLR 273]. The fact that the declarant lingered a few days after making the statement, does not deprive it of its character as a dying declaration [*Thakura v. Ram*, 113 IC 177: A 1929 L 64]. Statement of a deceased person that she was confined in the house of accused, that a person was keeping watch, that another accused had raped her on account of which she became pregnant and that they were getting ready to give her some drug to miscarry is admissible [*Wahed v. R*, A 1929 S 250]. A dying declaration is not inadmissible by reason of the fact that the magistrate recording it was not empowered under s 164 Cr P Code. But it must be proved in the usual way by the evidence of the magistrate. The presumption under s 80 does not arise in such a case [*Chadgi v. R*, A 1930 L 60; *Rahman v. R*, A 1932 L 14: *Sulaiman v. R*, 1941 Rang 258: A 1941 R 301; *Md Sarfaraj v. S*, 1952 Cri LJ 1425; *Kuruvilla v. S*, A 1955 TC 243]. The Magistrate who recorded the dying declaration did not obtain any certificate in writing from the Doctor that the injured was in a fit state to make a statement. The statement was not also recorded in a question and answer form. So the dying declaration cannot be accepted [*Smt. Madhu Balo v. State (Delhi Admn)*, 1990 Cri LJ 790, 793 (Del)].

Where a son-in-law was set on fire by his wife and her father and the dying declaration before the investigating officer and doctor was found to be reliable and consistant taken with the fact that the medical evidence was, that he was in full senses and able to speak clearly, the evidence was

accepted. The evidence of a witness to the effect that the deceased was under the influence of drink was rejected [*Mange Ram v. State, Delhi Administration,* 1998 Cri LJ 2269 (SC)].

A person suffered from multiple gunshot injuries. In his last statement he did not give the details of the incident. He gave only the names of the assailants. The statement was made by him immediately after the incident. The court said that such declarations could not be regarded as impossible [*Shashidhar Singh v. State of MP,* 1998 Cri LJ 2676 (MP-DB)].

A dying declaration was supposed to have been recorded by the special executive magistrate. He did not disclose in his evidence before the court that he was not able to write personally because of tremor in his hands and that he got it written by a constable. The court said that that could not be taken to mean that the declaration was suspicious. Similarly, non-mentioning of the time of recording would not affect the genuineness of the declaration particularly when there was nothing to show that the magistrate was not telling the truth. *Shripatrao v. State of Maharashtra,* (1995) 5 Scale 206.

A dying declaration recorded by the assistant sub-inspector of police could not be proved, but the one recorded by the magistrate was proved and evidence of circumstances was also lending assurance to it. Conviction on that basis was held to be not wrong. *Ram Bihari Yadav v. State of Bihar,* AIR 1998 SC 1850 : (1998) 4 SCC 517.

A dying declaration is not to be excluded only because the endorsement of the doctor was made not on the paper containing the dying declaration but on a separate application. *Harjit Kaur v. State of Punjab,* AIR 1999 SC 2571. The injured woman in this case had made two declarations, one to a police officer, and the other before a magistrate. In the one she stated that the burn injuries were of accidental origin. She might have meant to save her-in-laws but the circumstances did not warrant the truth of the statement. The other statement was found to be more probable and natural. It was held that this declaration was not to be rejected only because the earlier statement was found to be not correct.

A dying declaration disclosing the name of the assailant made to the doctor who gave the first preliminary treatment and whose testimony could not be shaken was held to be reliable. *Nishar Ahmed Fajmohmed Kaji v. State of Gujarat,* 1997 (9) JT 67 : (1998) 9 SCC 23.

Where the dying declaration recorded by the judicial magistrate showed discrepancy regarding the place of murder, it was held that the value of such declaration has to be judged in the light of the preceding utterances of the deceased. *Vajrala Paripurnachary v. State of A.P.,* AIR 1998 SC 2680.

Where the declarant knew the accused from before and he named him in the dying declaration, it could be expected that he must have done so with certainty. *Bholaprasad v. State of Maharashtra,* 1998 (7) JT 618(2) : (1998) 9 SCC 353. Where multiple injuries were caused and the injured died on account of pulmonary embolism brought about by prolonged bed rest and treatment, it was held that the death was the natural consequence of the injuries and the statement of the injured person related to the cause of his, death. *G.S. Walia v. State of Punjab,* AIR 1998 SC 2857 : (1998) 5 SCC 150.

Cases in Which Dying Declarations Held Inadmissible.—The statement of a deceased person is irrelevant unless the cause of the death of the person making such statement comes into question [*Naba v. Russick,* 10 C 1047]. A dying declaration ought not to be admitted unless it is proved that the death of the declarant was caused or accelerated by the wounds inflicted by the accused or that it was a transaction which resulted in his death [*R v. Rudra Bin,* 25 B 45: 2 Bom LR 331]. A man shortly after an injury made a statement relating thereto was later discharged from hospital but died of fever after a few days. There being nothing to show that his death was due to the injury inflicted, his statement is inadmissible [*Abdul Gani v. R,* A 1943 C 465: 1943, 1 Cal 423]; so also in the case of death one month after injury [*In re Maliappa,* A 1962 Mys 82]. After the incident the deceased lodged a non-cognizable report under sec. 323 I P C, the same can be read as dying declaration. But when the said complaint was lodged with delay which delay was not explained, it cannot be relied on [*Mahmood Ilahi v. State of U P,* 1990 Cri LJ 850, 855 (All): 1989 A 11 LJ 468]. S 32 refers to actual cause of death or to the transaction resulting in death. If a woman is raped and commits suicide three days later by drowning herself, a state-ment by her to her mother-in-law immediately after the rape is not admissible [*Kappinaiah v. R,* A 1931 M 233; *In re Peria,* A 1942 M 450]. Where the deceased's wound was so serious that it was very

doubtful whether he could utter a single word, the alleged oral dying declaration to witnesses should be discarded [*Ratan v. R*, A 1933 O 333]. The doctor who held the autopsy of the deceased in his statement did not state that at the time when the deceased was burnt he was conscious or could give any coherent statement. The deceased was burnt and a good part of the brain was also burnt and the possibility is that he must have become unconscious. Besides burnt injuries the doctor also found many injuries caused by lathis. The victim did not at all mention about the injuries caused by lathis. The cumulative effect of these circum-stances is that the deceased would not have made any dying declaration [*Kake Singh Alias Surendra Singh v. State of M P*, A 1982 SC 1021, 1022 : 1982 Cri LJ 986].

Where the statement is made in a language not known to the recording magistrate the evidence of the interpreter is indispensible. [*Narajan Singh v. P.P.*, 1949 Malayan LJ 122 (CA Federated Malay State)]. A report to the police made by the deceased against the accused several months before the murder is not admissible as dying declaration [*Boota Singh v. P.P.*, 1933 Malayan LJ 195 (CA Federated Malay States)].

If the vital organs of the deceased were completely smashed, it is impossible that he was in a fit state of mind and body [*Darshan Singh v. State of Punjab*, A 1983 SC 554, 556 : 1983 Cri LJ 985 (SC)]. The deceased's mouth, oesphagus and pharynx were found choked (full of food particles) according to the medical report which obviously made it impossible for the deceased to speak. So he would not have been in a position to make a dying declaration [*Harda v. State of M P*, 1989 Cri LJ 1058, 1062 (MP)]. When the deceased was in a semi-conscious state when he made the statement and he was talking incoherently, the possibility that his imagination might have played with him in giving out the names of the assailants, cannot be ruled out [*Niron Chatterje v. State of West Bengal*, 1983 Cri LJ NOC 180 (Cal) (DB); *Kumar Malik v. State of Orissa*, 1990 Cri LJ (NOC) 75 (Ori)]. After the Doctor said that the injured will not survive, the investigating officer did not ask the Doctor to record the dying declaration but sent him away and himself recorded the dying declaration. The Doctor was also not examined to speak about the mental and physical condition of the injured when he made the statement. From these facts it is evident that the dying declaration cannot be acted upon [*Atul Gandhia v. State of Assam*, 1990 Cri LJ 1049, 1053 (Gau)]. The prosecution has to satisfy that the injuries did not adversely affect the normal understanding or power of recollection of the dying man [*U Kring Rimon v. State of Meghalaya*, 1982 Cri LJ NOC 51 (Gau)]. When there is no trustworthy evidence to show that the deceased was capable of talking or that in fact he talked, and when there is no injury corresponding to the weapon mentioned in the declaration and when the dying declaration does not recite that the declarant admitted it to be correct and when it was not recorded in the presence of two or three witnesses unconnected with the police department as required under M.P. Police Regulations, such a declaration cannot be acted upon [*Bhagatram v. State of M P*, 1990 Cri LJ 2407 (Madh Pra)]. When the dying declaration was recorded by the Investigating Officer three days after the incident and the injured died 2 weeks thereafter and there is no explanation why the Doctor or nurse were not brought when the statement was recorded and according to the Doctor after sustaining such injury the patient would remain in comatic condition, such a dying declaration cannot be accepted [*Jamiruddin Molla v. State*, 1991 Cri LJ 356, 359 (Cal)]. For similar cases in which dying declaration cannot be relied upon on the ground that the wound was so serious as to render the victim incapable of making any declaration, see *Dharam v. R*, A 1938 L 268; *Anant v. R*, A 1938 L 262; *Guardial v. R*, A 1949 Pu 228. The victim who has received 80% burn injuries must have been in a state of acute shock and physical pain and could not have been alert enough to give a statement specially after having been given an injection of pethidine [*Kaushlaya v. The State*, 1989 Cri LJ 157, 161: (1987) 3 Crimes 747 (Del)]. The wife who was burnt had 95% burn injuries was given a morphin injection. In such circumstances the certificate of the Doctor that the deceased was in a fit state to make a statement is doubtful [*Smt. Amrik Kaur v. State*, 1990 Cri LJ (NOC) 10 (Delhi)]. When the Doctor said that the victim could not have survived to make declaration, the declaration made to the son of the victim himself cannot be acted upon without independent evidence corroborating the fact stated in the declaration [*Dilip Kumar Roy v. State*, 1988 Cri LJ NOC 71 : (1988) 3 Crimes 530 (Cal)]. When the dying declaration made to the informant was not mentioned in the F I R and the Doctor's evidence is that the victim would have survived only for 10 to 30 minutes after the attack, the evidence regarding the dying declaration is doubtful [*Sambhu Bora v. State of Assam*, 1987 Cri LJ 1027, 1032 (Gau) (DB)].

The statement of a dying dacoit as to the circumstances of dacoity resulting in his death giving the names of his associates, is not admissible in evidence. *Dannu Singh v. Emp.*, A 1925 All 227 : 26 Cri LJ 547.

The statement of an accused being inadmissible will not become admissible merely because he is dead [*Amarsingh v. State*, 1996 Cri LJ 1582, 1584 (MP)]. Only intimation of accident and injuries from the hospital to the concerned Magistrate and police cannot be treated as dying declarations. When neither the doctor nor the deceased ever intended them to be used as dying declarations and hence no precautions which are required for recording a dying declaration were taken [*Vakati Lavakishore v. State of A P*, 1997 Cri LJ 285, 288 (AP)]. Where the person who made the dying declaration was alive and in his statement under section 313 Cr PC nothing had been stated by him about his dying declaration, such dying declaration has got no value [*Qaiyum Mian v. State of Bihar*, 1993 Cri LJ 1756, 1773 (Pat)]. Where the maker of the dying declaration chanced to survive, his statement is not admissible as dying declaration. It can be admitted in evidence as a previous statement of the maker for corroboration under section 157 or for contradiction under section 145 with respect to his evidence in court. [*Phundi v.State of M P*, 1993 Cri LJ 1881, 1882].

A statement of a witness of what he heard from the deceased, when it does not relate to the cause of his death or the circumstances of the transaction which resulted in his death, is hearsay and is not admissible; they must be proved in the ordinary way *viz* by evidence of a primary and not *hearsay* testimony [*R v. Surendra* 28 C 397: 5 CWN 574]. A statement made to sub-inspector of police just before death is not evidence [*Lachmilal v. R*, A 1922 P 40 : 65 IC 1002]. A statement of a deceased person to a doctor as to who would be his successor on his death, in case of his not having a son is not admissible [*Prayag v. Shivaprasad*, 42 CLJ 208, 408: 95 IC 385: A 1926 A 429]. The statement of a dying dacoit as to the circumstances of the dacoity resulting in his death is not admissible against the other dacoits [*Dannu v. R*, A 1924 A 227, 85 IC 643].

The dying declaration of a woman who sustained hundred percent burn injuries was not accepted because of inherant contradictions one of which was that according to the statement her thumbs were completely burnt yet her thumb impression appea-red on the statement [*State of Punjab v. Gian Kaur*, 1998 Cri LJ 2061 (SC)].

A dying declaration was not admitted because the scribe did not certify that he recorded the correct statement, certification by doctor was also not there and the language of the statement did not seem to be that of the victim [*Rajendra Singh v. State of Rajasthan*, 1998 Cri LJ 2126 (Raj-DB)]. Two declarations were made separately each to the two brothers of the deceased. There were contradictions in them. One brother filed the FIR on that basis but did not tell of the other dying declaration. None of the other persons present at the time of the statements was examined. It was held that the statements could not be relied upon to record a finding of guilty. *Heikrujam Chaoba Singh v. State of Manipur*, 1999 (8) JT 125 : (1999) 8 SCC 458.

Where there was no evidence to show that the person who was the victim of the attack knew his assailants, the dying declaration in which those persons were named could not be regarded as a clinching evidence of the fact that it referred to the persons accused. *Vijayan v. State of Kerala*, AIR 1999 SC 644 : 1999 Cr LJ 1638.

The medical evidence showed that the brain functioning of the injured persons must have become impaired because of brain injuries. The court held that even if they were able to speak something by straining themselves, it would be unsafe to place reliance upon their dying declarations. *State of Rajasthan v. Reja Ram*, AIR 1999 SC 1776.

Weight and Decree of Credit to be Attached to Dying Declarations. [Caution in Their Use].—"Though these declarations, when deliberately made under a solemn sense of impending death, and concerning circumstances wherein the deceased is not likely to be mistaken, are entitled to great weight, it should always be recollected that the accused has not the power of cross-examination,—a power quite as essential to the eliciting of the truth as the obligation of an oath can be;—and that where a witness has not a deep sense of accountability to his maker, feeling of anger or revenge, or, in the case of mutual conflict, the natural desire of screening his own misconduct, may affect the accuracy of his statements and give a false colouring to the whole transaction. Moreover, the particulars of the violence to which the deceased has spoken are likely to have occurred under circumstances of confusion and surprise, calculated to prevent their being

accurately observed, and leading both mistakes as to the identity of persons, and the omission of facts essentially important to the completeness and truth of the narrative" [Tay s 722]. It is absolutely necessary for the protection of society that dying declaration should be received, for otherwise a premium would be held out for the commission of crime ..... and it must sometimes occur that the only testimony, often the only direct testimony against an accused, is to be found in the dying declaration. But at the same time, we must receive this evidence with a certain degree of caution ..... The effects of the wound itself may dim his memory, or weaken or confuse his intellectual powers. The very suddenness of the attack may have rendered him mistaken in his identification of the assailant; the darkness, the disguise, may tend to the same result; although where the mental powers are not affected by the wound or its consequences, it may be very true that the circumstances of the attack, however sudden, have made an indelible impression on the suffered; and a just providence has, perhaps, determined that this should be so, as one of the most mysterious instruments for the discovery of the crime ..... The weight to be attached must vary with the circumstances of each particular case. The deceased may have stated his inferences from facts, concerning which he may have drawn a wrong conclusion, or he may have omitted important particulars, from not having his attention called to him ..... It cannot also be concealed that animosity and resentment are not likely to be felt in such a situation. The passion of anger, once excited, may not have been entirely extinguished, even when all hope of life is lost [Nort pp 176-77]. "The rule (relating to dying declaration) is in many ways remarkable. It has worked, I am informed, ill in India, into which it has been introduced together with many other parts of the English law of Evidence. I have heard that in the Punjab, the effect of it is that a person mortally wounded frequently makes a statement bringing all his hereditary enemies on to the scene at the time of his receiving the wound thus using his last opportunity to do them an injury" (Stephen's History of the Cr Law in England). It would be hardly safe to convict on the uncorroborated dying declaration, specially in the Punjab [*Bakshish v. R*, A 1925 L 549 : 86 IC 826].

It is a serious error not to tell the jury that a dying declaration has to be admitted and relied upon with some degree of caution as the matter is not liable to cross-examination [*Waugh v. R*, 54 CWN 503 PC; *Sashi v. R*, 34 CWN 792; *Dalbahadur v. S*, A 1954 As 60; *Sital v. S*, A 1956 C 82]. A dying declaration has to be very closely scrutinised as it cannot be tested by cross-examination. A dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances. A dying declaration properly recorded by a competent magistrate as far as practicable in the words of the maker stands on a much higher footing than a dying declaration which depends upon oral testimony. The law has been clearly and explicitly enunciated in the form of 6 propositions [*Kushal Rao v. S*, A 1958 SC 22 : 1958 SCR 552 **folld** in *Harbans v. S*, A 1962 SC 439; *Tapinder v. S*, A 1970 SC 1566; *K Ramchandra v. P P*, A 1976 SC 1994]. Dying declaration cannot be equated with the evidence of accomplice or a retracted confession [*Kushal Rao v. S, sup*].

A dying declaration is relevant under the Act whether the person who made it was or was not at the time when it was made, under expectation of death and the weight to be attached to it depends not upon the expectation of death which is a guarantee of its truth, but upon the circumstances and surroundings under which it was made and very much also upon the nature of the record that has been made of it. Hence it becomes almost always a question of fact as to whether it should be relied upon or not [*R v. Premananda*, 52 C 987 : 29 CWN 738; *R v. Akbar Ali*, A 1933 B 479; *Inayat v. R*, 16 L 589; *Md Arif v. R*, A 1941 P 409; *S v. Kanchan*, A 1954 A 153; *Kishan v. S*, A 1963 Pu 170].

Each case of dying declaration has to be considered on its own facts in the back-ground of the circumstances in which it is made. It is incumbent on the court to bear in mind the capacity and the opportunity of the person making the declaration to observe the incident and to identify the guilty person, his faculty to remember the facts observed and to reproduce them and various other things. Where the dying declaration has not been recorded in the words of the maker, the court has to subject it to proper scrutiny—Tests to be applied and duty of court indicated [*Kishan v. S*, A 1963 Pu 170].

Too much reliance cannot be placed on hearsay statements in dying declarations [*R v. Sukhu*, 76 IC 388 (S)]. Deceased's statement to the doctor just before death though admissible requires corroboration for a conviction [*Bullu v. R*, A 1929 P 249]. When a man is in hospital four days

after the occurrence, and a month before he dies makes a statement, it carries no more weight than if he made it in the witness-box and rather less, because he has never been cross-examined. Before accepting it as true it is incumbent upon the court to see how far that statement is corroborated [*Arumuga v. R*, A 1931 M 180 : 59 MLJ 876; see *Pichamma v. R*, 1930 MWN 1211]. The evidence regarding the dying declaration must be very carefully and critically scrutinised as the accused has no opportunity to challenge such statement by way of cross-examination [*Madkami Baja v. State*, (1986) Cri LJ 433, 436 (DB) (Ori) : (1985) 1 Orissa LR 421 : (1985) 1 Crimes 1063]. When there is absolutely no doubt that the deceased had a good opportunity of knowing who the assailant was and there is no possible reason for his falsely accusing the alleged assailant, it is quite safe to convict on his dying declaration, but where recognition was difficult, it is not safe to convict merely on such declaration [*Nga Po v. R*, A 1946 R 324]. Great weight has to be attached to a dying declaration where the deceased had a clear opportunity to observe and identify his assailants and where it was made in a fit state of mind free from the taint of tutoring and prompting and at the earliest opportunity [*Mange Ram v. State*, 1990 Cri LJ (NOC) 183 (Del)]. A dying declaration does not become less credible if a number of persons are named as culprits [*Harbans v. S*, A 1962 SC 439 : 1962 Supp SCR 104 (*Khurshaid v. R*, A 1941 L 368 **overruled**)]. The deceased had told the witness that he was going with his brother and did not specify the name of the accused. No attempt was made by the prosecution to prove that besides the accused who is the cousin brother of the deceased the deceased has no other cousin brother. So the above statement is not admissible under sec. 32(1) [*Parag v. State of Rajasthan*, 1981 Cri LJ 1244, 1256 : (1981) Raj LW 370]. The fact that the deceased who was seriously injured did not disclose the names of the assailants before the witnesses who removed him to the hospital or to the doctor is not sufficient to discredit his dying declaration [*State of Gujarat v. Rabavi Pancha Punja*, 1981 Cri LJ NOC 170 : 1981 22 Guj LR 426 (Guj)]. The fact that in a burning case, the woman who was alive for 8 days after the incident did not tell anybody that her husband set fire on her and the doctor did not say that the woman was not in a position to speak and she made an oral dying declaration to her uncle after 8 days, cast doubt about the truth of the dying declaration [*State of Assam v. Mafizuddin Ahmed*, A 1983 SC 274, 277 : 1983 Cri LJ 426 (SC)]. When the evidence of two prosecution witnesses, is different from the facts stated in the dying declaration, their evidence has got to be rejected [*State of U.P. v. Madan Mohan*, A 1989 SC 1519, 1521 : 1989 Cri LJ 1485]. Failure to mention the name of one of three accused does not make the dying declaration unreliable [*Ashok Kanaujiya v. State*, 1989 Cri LJ NOC 79 (DB) (All)]. The dying declaration did not give the name of the assailant's father and his place of residence, correctly. This circumstance leads to the conclusion that the truth of the dying declaration is not free from doubt [*Sudhir Kumar Shukla v. State*, 1990 Cri LJ 119, 123 (All)].

Dying declaration made at a time when the person making the same was well aware that the accused was named as the assailant [*Muzaffar v. R*, 99 IC 332 (L) : A 1926 J 141; *In re Rushingappa*, A 1955 AP 105], or when a person prompts the deceased to give out names [*Bishen v. R*, A 1926 L 496] is unreliable. It is essential that the person who made the statement was in possession of his faculties to enable him to make such a declaration and that he should be free from any prompting or external influence [*Awadhesh Rai v. State of Bihar*, 1981 Cri LJ (NOC) 13 (Pat) : 1980 BLJ 500 : 1981 BLJR 33]. The brief made soon after the incident, the injured being fully conscious and composed, in the absence of any evidence of tutoring or false implication can be safely acted upon [*Waikham Angamba Singh v. State of Manipur*, 1982 Cri LJ 1346, 1353 (Gau); *Pcerusingh v. State of M.P.*, 1987 Cri LJ 1781, 1783 (MP) (DB); *Hari Pabandha v. The State*, 1988 Cri LJ 1614, 1621 (Cal)]. Unauthorised persons should not be permitted to crowd round when the declaration is being made and every possible step should be taken to ensure that no influence is brought to bear on the declarant and that he is not prompted or aided in any way when making the statement [*Nem v. R*, A 1934 A 908]. Dying declaration can have hardly any evidentiary value when declarant was in the midst of friends and relatives right since the time of incident until it was recorded [*Balakram v. S*, A 1974 SC 2165]. When the victim was having 60% burn injuries and the younger brother of the victim was also present at the time of making the declaration, conviction cannot be based on such declaration without corroboration [*Ram Bai v. State of Madhya Pradesh*, 1990 Cri LJ (NOC) 107 (Madh Pra)]. When sufficient time intervenes between the assault and the declaration and the relatives were interested in tutoring the declarant, it should not be believed [*Varand v. R*, A 1944 S 137; *Munwa v. S*, A 1957 A 466]. Great weight must naturally and necessarily be attached to a dying declaration recorded very shortly after the occurrence [*Mahadev Pradhan v. State of Orissa*, 1990 Cri LJ (NOC) 47 (Ori); *Sharad*

Birdhicchand Sarda v. State of Maharashtra, 1984 Cri LJ 1738 : A 1984 SC 1622 (SC); *Ghuraiyas Alias Rohini Baiswar v. State of MP*, 1990 Cri LJ 1129, 1133 (Madh Pra)]. In the post-mortem report the deceased was referred as 'stout built male' and out of all the injuries one injury was fatal. The fact coupled with the fact that F I R was filed within reasonable time after the death of the deceased will show that it was the deceased who disclosed the names of the accused as the assailants [*Dulu Gogai v. State of Assam*, 1991 Cri LJ 199, 202 (Gau)]. When the deceased had bitter enmity against two other accused and the third accused was not an important person, the fact that the deceased categorically stated that it was the third accused who shot at him, shows that the declaration given by him was not a tutored one [*Gangotri Singh v. State of U.P.*, A 1992 SC 948, 950]. When the deceased made a dying declaration before his parents immediately after the occurrence and after reaching the hospital he made another dying declaration in the presence of Doctors and there was no discrepancy between the two declarations, that evidence can be accepted [*Durga v. State*, 1992 Crl LJ 780, 733 (Del)]. Mere mention in the dying declaration that on the day of occurrence the accused had quarrelled with the deceased and latter's mother-in-law too had harassed her would not *per se* be sufficient to hold that the accused had adequate motive to commit the murder of his wife [*State of Punjab v. Narinder Kumar*, 1992 Crl LJ 2192, 2194 (P&H)]. Merely because some friends and relatives happened to be with the deceased before the statement was recorded it cannot be thrown out as tutored [*Habib Usman v. S*, A 1979 SC 1181]. When the eye-witness is on the side of the dying declaration it is quite probable that he was instrumental in getting the dying declaration recorded [*Munna v. State*, 1982 Cri LJ 389, 392 : 1981 All Cri R 461 (All)]. When the evidence of the eye-witness was disregarded and the evidence of the persons to whom the dying declaration was made suffered from material contradictions, it cannot be acted upon [*Bhagwan Das v. S*, A 1957 SC 589 : 1957 SCJ 515]. One person who made the dying declaration implicating the policeman for assaulting him was in the custody of the police when he made the statement and so nobody could have tutored him to make the statement and so this dying declaration can be accepted without any corroboration [*State of Uttar Pradesh v. Ram Sagar Yadav*, A 1985 SC 416, 419 (1986) Cri LJ 836]. It is perfectly permissible to reject a part of the dying declaration if it is found to be untrue and if it can be separated [*Nandkumar Matha v. State of Maharashtra*, 1988 Cri LJ 1313, 1316 : (1987) 89 Bom LR 370 (Bom) (DB)]. When the statement of the deceased while she was being taken in a hospital in a taxi is inconsistent with the recorded dying declaration, the declaration cannot be accepted as true [*Bijoy Kumar Sen v. The State*, 1988 Cri LJ 1818, 1824 (Cal)]. The court to be on guard against the statement of the deceased being a result of either tutoring, prompting or a product of imagination of the dying person. The court must be satisfied that the deceased was in a fit state of mind to make the statement after the deceased had a clear opportunity to observe and identify his assailant and that he was making the statement without any influence or rancour [*State of Punjab v. Savitri Devi*, A 1983 Punj 305, 307 (FB); *Masaddar Ali v. State of Assam*, 1990 Cri LJ 1333, 1336 (Gau)]. Tests to determine whether the dying declaration is truthful are : (1) Declaration to Magistrate is preferable to an oral declaration, (2) opportunity of dying man of observation, (3) capacity to remember unimpaired, (4) a consistent statement, (5) an early statement and (6) no tutoring [*Lick Rashid Khan v. Union of India*, 1992 Cri LJ 2644, 2666 (Cal)].

A dying declaration recording the very words of the dying man unassisted by interested persons is most valuable evidence. But if parts are supplied by interested persons or police officers, it is a "touched up" declaration with no value [*Dial v. R*, A 1934 L 850]. Where the first information report and the eye-witnesses mentioned the names of all the accused as having assaulted the deceased without assigning any leading part to three of them, but the dying declaration did not implicate three per-sons, held it was safer to rely on the dying declaration [*Ram Damodar v. R*, A 1939 O 33]. The dying declaration could not be discarded merely on the ground that it does not give precise description of all the instruments of offence and also the precise description of the manner in which the injuries were inflicted and that it is not consistent with medical evidence while substantially it is corroborated by medical evidence [*Dalbir Singh v. State of Punjab*, A 1987 SC 1328, 1331 : 1987 Cri LJ 1065; *The State v. Abinash Dutta*, 1982 Cri LJ 400, 404 (Gauhati); *Ramji Singh v. State of Bihar*, 1987 Cri LJ 875, 878 (Pat) (DB)]. Where first dying declaration was found to be true the fact that details given in the second dying declaration might not have been given by the victim did not detract in the least from the truthfulness of the statement in the first dying declaration [*Surat v. S*, A 1977 SC 705 : 1977 CrLJ 347].

A dying declaration amply corroborated not only by the eye-witnesses but also by circumstantial evidence and medical evidence cannot be ignored or discarded merely because it did not mention the name of a certain person and that it did not account for the injuries on the accused [*Ghurphekan v. S*, A 1972 SC 1172]. A dying declaration cannot be ignored merely on the ground that it did not include any statement as to how the accused had received the injuries [*State of Maharashtra v. Krishnamurti Laxmipati*, 1981 Cri LJ 9 : A 1981 SC 617, 624]. The dying declaration supported by the evidence of eye-witnesses can be accepted though there is variance in the evidence regarding the motive [*Hari v. State of U.P.*, 1983 Cri LJ NOC 62 (All) (DB) : 1983 A 11 Cri R 283].

Time gap between statement and death.—It has been held that a time gap between the statement and death does not destroy the evidentiary value of the statement. The statement does not lose its credibility if the declarant chances to live longer than anticipated. *Najjam Faraghi v. State of WB*, AIR 1998 SC 682 : (1998) 2 SCC 45. The court referred to *Kanchy Komuramma v. State of A.P.*, (1995) SCC (Cri) 31 : (1995) Supp 4 SCC 118.

Reliability of dying declaration [Latest Case Law].—A dying declaration can form the sole basis of conviction though courts look for corroboration from different circumstances since the same cannot be tested by cross-examination. Such decla-ration being made under solemn sense of impending death, the deceased is usually not likely to convict any mistake, and therefore the same is given great weight. But at the same time a court has the duty to scrutinise the same since the accused has no right of getting the statement tested by cross-examination [*State of Madhya Pradesh v. Mohan Lal & Ors.*, 1996 (2) Crimes 206, 209 (SC)]. Once the Court is satisfied that the testimony regarding the dying declaration recorded by any officer who may or may not be competent officer, inspires its confidence and does not leave any shadow of doubt, the court can act upon and rely upon the dying declaration alone and need not require any corroboration. [*Amir Jamal Khan v. State of Maharashtra*, 1995 Cri LJ 1956, 1961 (Bom)].

For placing reliance on the dying declaration, a strict screening of the statement is required to be made because it is not a statement made on oath and its veracity can-not be tested on cross-examination. Before acting on the dying declaration it should, therefore, be ensured that the dying declaration made by the deceased should be of such a nature as to inspire confidence of the court regarding its correctness and fur-ther that it is not a result of tutoring or prompting. The Investigating officer being interested in the success of the investigation, the dying declaration recorded by him has to be scrutinised very, cautiously and if after a close scrutiny of the dying decla-ration the court is satisfied that it is truthful then conviction can be based on it. When the medical evidence was clear that the deceased was in a fit condition to give state-ment and the death took place after four hours of the incident, then it cannot be said that the deceased was not in a fit state to give the statement. [*Babura v. State of Rajasthan*, 1993 Cri LJ 2696, 2701 (Raj)].

The quick loss of blood may dim the memory of the injured or it may weaken and confuse his intellectual power. Where the deceased sustained stab injuries and cause of death was excessive bleeding from his injuries, the very expression in his dying declaration that he did not remember as to at what place and by whom the injury was caused to him, only indicates that he was loosing memory, even if he was conscious, because of the excessive bleeding, in such circumstances the dying declaration would not be reliable. On the other hand, the other dying declarations which were recorded earlier in point of time, when the mental powers of the deceased were not affected and his capacity to remember was not impaired and the condition of the injured was in process of deterioration, would be reliable. [*State of M P v. Nisar Ahmad*, 1997 Cri LJ 3055, 3058 (MP)]. Oral dying declaration is a weak type of evidence and ordinarily insufficient for a conviction. [*State of Maharashtra v. Ahmed Gulam Nabi Shaikh*, 1997 Cri LJ 2377, see *Bhagwan Das v. State of Rajasthan*, A 1957 SC 589]. When in the F I R itself PW had mentioned about the earlier dying declaration with necessary details and nothing significant had been elicited in his cross-examination

and the doctor who examined the deceased did not categorically state that the deceased would have been unconscious immediately after receipt of the injuries and could not have been in position even to speak that the accused persons had attacked him and beat him, the conviction of the accused under section 302 IPC has to be upheld. [*Vishram v. State of MP*, A 1993 SC 250, 252 : 1993 Cri LJ 304].

Where the declarant was surrounded by a host of his well-wishers, friends and relations right till before the arrival of the Magistrate who recorded his dying declaration, it was quite likely that those persons availed every possible opportunity to tutor and brain wash the deceased and in the circumstances, it would be difficult to hold that the statement was an untutored version given by the deceased at the time, the statement was recorded in anticipation of his death. [*Raj Bahadur v. State of UP*, 1993 Cri LJ 86, 93 (All)]. When the doctors positively stated that the deceased was conscious when she gave her statement merely because she had 80% burns it cannot be inferred that she was not in a position to speak [*Kamlesh Rani v. State of Haryana,* 1998 Cri LJ 1251, 1252 (SC)]. When as soon as the deceased regained consciousness his statement was recorded by the S.1. Police and there was nothing on record to show that in between the recording of the statement of the deceased by the police and the dying declaration recorded by the Magistrate anyone was allowed to go near the deceased, some further details given by the deceased before the magistrate, on being asked as to whether he had anything more to say, could not be treated as an improve-ment. [*Pratapaneni Ravi Kumar v. State of AP*, A 1997 SC 2810, 2813 : 1997 Cri LJ 3505]. Where the statements of the deceased in the dying declarations were corroborated by the report of the Forensic Laboratory and the dying declarations were consistent, conviction could be based on such dying declarations. [*Batto v. State*, 1997 Cri LJ 1201 (Del)]. If after careful scrutiny the court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it basis of conviction, even if there is no corroboration. [*State of Orissa v. Simanchal Gauda*, 1997 Cri LJ 1816, 1820, 1821 (Cal)]. Conviction of the accused solely on the basis of dying declaration is not illegal [*Bhola Turha v. State of Bihar,* A 1998 SC 1515]. If there are more than one dying declaration they should be consistent particularly in material particulars [*Kalyan Balasaheb Barungale v. State of Maharashtra,* 1998 Cri LJ 1859, 1863 (Bom)].

A dying declaration which is inconsistent and unreliable on material points cannot form sole basis of conviction of accused [*Abdul Hameed v. State*, 1994 Cri LJ 872, 875 (All)]. Where the deceased who was conscious and capable of making statement stated voluntarily that his own son injured him and there was no possibility of tutoring or prompting the dying declaration could be acted upon [*Bellana Kannam Naidu v. State of AP*, 1994 Cri LJ 1146, 1148 (AP)]. If any close relations or friends were present just before or while recording the dying declaration, the court can draw an inference that it may be a product of tutoring [*Lingaiah v. State of AP*, 1994 Cri LJ 1242, 1246 (AP)]. Where in her first dying declaration the deceased implicated her mother-in-law but in her second and third dying declaration she implicated both her husband and mother-in-law in the absence of any corroborative evidence it was not safe to rely on such inconsistent dying declaration. [*State of Gujarat v. Khumansingh Karsan Singh*, A 1994 SC 1641]. Where the deceased answered the relevant question in a coherent manner and the doctor also certified that he was in a conscious state and good mental condition, the dying declaration is reliable. Minor infirmities are immaterial. [*Nawab Ali Jhinnu v. State of UP*, A 1994 SC 1607, 1609 : 1994 Cri LJ 2191]. No conviction can be based on a dying declaration which was neither signed by the deceased nor contained date and time of its recording and prosecution failed give any explanation for the same [*State of UP v. Shishupal Singh*, 1994 SC 129, 130]. Rejection of ocular evidence and dying declarations by giving undue impor-tance to some trivial contradictions between evidence of witnesses and version of dying declaration is improper [*State of Maharashtra v. Rajendra Garbad Patil*, A 1994 SC 475 : 1994 Cri LJ 145, 148]. There can be no reason for not acting upon the dying declaration of the deceased wherein she

gave a fair and vivid account of the pouring of the kerosene oil and her being set on fire by the accused [*Shanti Behal v. State (Delhi Admn)*, 1994 Cri LJ 2043, 2052 (Del)]. Where the dying declaration stated that the deceased was stabbed twice while the medical evidence showed that there was only one stab injury, the dying declaration was not reliable. [*State of Kerala v. N. Moideenkutty Haji*, 1994 Cri LJ 1250, 1252 (Ker)]. A dying declaration to a police officer containing full account of an incident can be made basis for con-viction if the same is found reliable and trustworthy [*Rajendra Singh v. State*, 1996 Cri LJ 1560, 1564 (Raj)]. The fact that the dying declaration was made in the presence of accused persons does not affect its reliability [*Gopa Ram v. State of Rajasthan*, 1996 Cri LJ 2987, 2990 (Raj)]. Where the dying declaration made in the presence of a Magistrate and doctors and is supported by independent witnesses minor discrepancy as to the time of recording the same is not so significant as to discard the prosecution version [*Jaswant Kaur v. State of Punjab*, 1996 Cri LJ 3073, 3079 (P&H)]. Where the Sub-Inspector recorded the statement of the injured in the hospital but he did not submit it in the court nor supplied a copy thereof to the accused, such dying declaration is not entitled to any credence [*Chakiri Saidulu v. State of AP*, 1994 Cri LJ 3782, 3786 (AP)]. Mere fact that the dying declaration made soon after the incident does not contain detail version of the occurrence is no ground to disbelieve it. [*Ramesh v. State (Delhi Admn.)*, 1996 Cri LJ 309, 315 (Del)]. The statement of the declarant that it was the accused who had hit him fatally would at best fix the accused as the author of the fatal injury, but that by itself is not a corroborative factor to establish the murder charge having regard to the plea of self defence taken by the accused of self defence [*Harish Kumar v. State of MP*, A 1996 SC 3433 : 1996 Cri LJ 3511, 3515]. Conviction can be based solely on the testimony of a dying declaration [*Wadapally Venkanna v. State of AP*, 1992 (3) Crimes 716, 719 (AP)]. It is not the requirement of law that the person making the dying declaration should make an elaborate and exhaustive statement so as to cover each and every aspect of the incident and narrate the whole history of the case. Where the deceased who had suffered 90 per cent burns, must have been under a severe stress and agony and she was talking in a low voice which indicated that she was able to speak with some difficulty, it was not possible for her to make a very detailed statement covering the minutest details which could not be expected under the facts and circumstances of the case. However, when on a reading of the statement as a whole, it appears that it was clear and specific and did not suffer from any infirmity, it is acceptable [*Charipalli Shankararao v. Public Prosecutor A.P.H.C.*, A 1995 SC 777, 781]. Discrepancy in dying declaration as to number of persons participating in commission of the crime is immaterial if there was evidence of eye-witnesses and other corroborative evidence against the accused-[*III Addl. Sessions Judge, Guntur v. G.V. Rao*, 1996 Cri LJ 703, 708 (AP)].

For a dying declaration to provide the basis for conviction, the same has to be beyond any reproach. Where the statement made by the deceased as dying declaration was inconsistent with the depositions of the material witnesses and it was also not signed by the doctor who was present at the time of recording the statement, the dying declaration cannot be said to be beyond any reproach and therefore, conviction cannot be based on what had been recorded in the dying declaration. [*Jagga Singh v. State of Punjab*, A 1995 SC 135, 137]. There is no requirement of law that a dying declaration must necessarily be made to a Magistrate. What evidentiary value or weight has to be attached to such statement must necessarily depend on the facts and circumstances of each particular case. (See *Ramawati Devi v. State of Bihar*, A 1983 SC 164). Where, therefore, an attempt was made to procure the services of a Magistrate for recording the dying declaration but Magistrate was not available and the dying declaration had to be recorded by the Head Constable, the same is acceptable. [*Charipalli Shankararao v. Public Prosecutor, A.P.H.C.*, A 1995 SC 777, 781]. In case of alleged oral dying declaration made before the witnesses, the variation in the testimony of those witnesses as regards the assault by lathis and the participation of all the accused in the commission of the crime renders it unsafe to rely on them to hold that the dying

declaration as alleged by the prosecution had been made by the deceased to those witnesses. [*Govind Narain v. State of Rajasthan*, A 1993 SC 2457 : 1993 Cri LJ 2598, 2602]. So far as the alleged oral dying declaration made to her brother and mother of the deceased it obviously has no semblance of credibility or reliability because even the mother of the deceased did not support her son who spelled out the alleged dying declaration in his examination-in-chief. The mother of the deceased has not stated a word about her daughter having told her that her husband poured kerosene oil on her and on her own two children and set them on fire at their residence. On the other hand the brother of the deceased stated that his sister told him in the hospital that her husband had poured kerosene oil on her and her children and set them on fire at her house. There is no proof of fitness of the deceased to make such a statement. The mother of the deceased does not even say that the deceased was in a position to talk to them when she visited her in the hospital along with her son. It is also not clear as to when the mother and brother actually visited the deceased in the hospital. Therefore, this alleged oral dying declaration of the deceased implicating the accused is liable to be rejected. [*Ram Singh v. State*, 1997 Cri LJ 372, 374 (Del)(DB)]. Apart from the fact that it is extremely improbable that the deceased was in a condition to speak at 9.15 p.m., the evidence of the police constable to whom the deceased is said to have made the oral dying declaration to be highly discrepant. Police constable has tried to make improvements in his statement in the trial court regarding the oral dying declaration; whereas in paragraph 5 of his statement in the trial court he stated that deceased told him that the accused alone had assaulted him, in the FIR he has mentioned that deceased informed him that the accused and two other had attacked him. Held, in such circumstance, the oral dying declaration could not be accepted. [*Ramesh Bhagwan Manjrekar v. State of Maharashtra*, 1997 Cri LJ 796 (799) (Bom)]. Before acting upon the dying declaration, it should, therefore, be ensured that the dying declaration made by the deceased should be of such a nature as to inspire confidence of the court regarding its correctness and further that it is not a result of tutoring or prompting where the dying declaration had neither been recorded by a magistrate nor by a doctor but the investigating officer himself though in the presence of the doctor and after taking his opinion that the injured is in a fixed condition to give the statement. The investigating officer being interested in the success of the investigation and therefore dying declaration recorded by him has to be scrutinized very cautiously and if after a close scrutiny of the dying declaration the court is satisfied that the dying declaration made by the injured is truthful then the conviction can be based on such dying declaration. [*Babura v. State of Rajasthan*, 1993 (3) Crimes 357, 362 (Raj)].

A dying declaration was made within two hours of the incident. The deceased clearly explained the circumstances in which he came to be injured at the instance of the accused (appellant). There was no inconsistency between the declaration and the evidence on record. It was held that the court below was justified in relying upon the dying declaration in convicting the accused. *Pt L Bhola Turha v. State of Bihar*, AIR 1998 SC 1515 : (1998) Cri LJ 1102.

Whether to be Taken in Part or in Whole.—Where the deceased in his dying declaration had disclosed the name of one Budhna as his assailant but had not disclosed the parentage and address of Budhna and there were more than one Budhna or Budhan Mian in that locality, it was difficult to connect the said Budhna with the appellant and therefore, conviction on that basis was not proper. [*Kale Mian v. State of Bihar*, 1997 Cri LJ 1848, 1850 (Pat)]. Where an integral part of the dying declaration was false, the residual part cannot be accepted, on the principle that *falsus uno falsus omnibus* is not a rule applicable to our country. The rationale behind this is that unlike ocular evidence, a dying declaration cannot be tested on the anvil of cross-examination. Once the court is convinced that an integral part of the dying declaration is false inasmuch as, an accused person has been falsely named therein, the principle that truth sits on the lips of the dying man on which is founded the rationale of accepting a dying declaration cannot be pressed into service for salva-

ging the residual portion of the dying declaration. In other words same dying declaration cannot be accepted against a co-accused. In *Thurukanni Pompiah v. State of Mysore*, A 1965 SC 939 : 1965 (2) Cri LJ 31 the Supreme Court observed:

> "...If the court finds that the declaration is not wholly reliable and a material and integral portion of the deceased's version of the entire occurrence is untrue, the court may, in all the circumstances of the case, consider it unsafe to convict the accused on the basis of the declaration alone without further corroboration."

In cases wherein the part of the dying declaration which is not found to be correct is so indissolubly linked with the other part that it is not possible to sever the two parts, the court may be justified in rejecting the whole. In cases where two parts may be severable and the correctness of one part does not depend upon the correctness of the other part the court can act upon a part which is found to be correct and trustworthy if it is corroborated in material particulars by the other evidence on record dispite the fact that another part has not been proved to be correct [*Godhu v. S*, A 1974 SC 2188].

Dying declaration in bride burning cases : Caution.—Where there is a background of unhappiness, marital discord, violence, accusations against fidelity and the like and where it is highly suggestive of the fact that the deceased wife has been the victim of harassment, torture, and character assassination over a period of time and consequently can never be favourably disposed towards the husband, the Court would have to put itself on guard. In such cases the principle "*nemo moriturus praesumitur mentire*" the principle which governs the credibility that is attributed to dying declarations, namely that a dying person would not normally tell a lie, does require serious examination. Having regard to the mental disposition of the victim one cannot rule out the possibility on the part of the same persons to implicate, purely out of a sense of vendetta, the husband who has been responsible for prolonged and protracted ill-treatment. Cases are quite common where the wife is virtually pushed to a position of utter desperation and which results in an attempted suicide and at a later point of time when questions are put one cannot completely eliminate the possibility of false implication, if the background has been extremely hostile, and the victim feels guilty of having attempted the suicide. That aspect therefore does require serious examination. Conversely, it would certainly appear correct that if, over a period of time, statements made to different persons both oral and in writing consistently set out the same version and if that version does find support from the evidence of other witnesses also, then a Court could safely act on what is contained in the dying declarations [*Vithal Sadashiv Gaikwad v. State of Maharashtra*, 1994 Cri LJ 2035, 2043].

Where in a case of bride burning, within a span of one and half hour of the incident which took place at 7.30 p.m., the deceased was shifted to hospital where she made a statement before the doctor which was recorded in the Accident Register and the Munsif Magistrate recorded the dying declaration of the deceased at about 10.40 p.m. implicating her mother-in-law alone, the time lag in recording the dying declaration can be said to be not much to entertain any doubt with regard to tutoring of the deceased. It being a case where the deceased was brought to the hospital from her parents-in-laws's house, it cannot be said that her parents alone were present near her and that they tutored her to implicate the accused in the crime. [*Yazali Venkataratnam v. State*, 1993 Cri LJ 3240, 3242 (AP)]. The dying declaration of the deceased wife without implicating her husband, a police officer, cannot be consi-dered to be destructive of the other evidence *viz* letters written by her to her relatives over a period of time when she was in full possession of her mental faculty and when she communicated her feelings with a degree of frankness, though clandestinely, to her relatives that she was single mindedly determined to end her life because of cruelty of her husband. She did not implicate her husband because the evidence showed that she was virtually terrified of her husband and that he made full use of his position as a police officer. [*State of Maharashtra v. Vasant Shankar Mhasane*, 1993 Cri LJ 1134, 1141 (Bom)]. Where the deceased woman alleged to have made two oral

dying declarations, one to her brother and the other to her mother and while her brother deposed that she had told him that her husband had poured kerosene oil on her and her two children and set them on fire, her mother did not support this version and it was not clear as to when the brother and mother actually visited the deceased in the hospital and moreover, there was no proof of fitness of the deceased to make such statement, the alleged declarations of the deceased implicating the accused was liable to be rejected. [*Ram Singh v. State*, 1997 Cri LJ 372, 374]. Where the witness stated that when he reached the place of incident on hearing the cries of the deceased, he found her with burn injuries over her body, she was conscious and was disclosing to the ladies who had surrounded her that her husband had burnt her by pouring kerosene oil, the trial court rightly did not accept this dying declaration on the following grounds: (a) the witness was the only person who deposed about it; (b) that none of the woman before whom it was made was examined by the prosecution; and (c) it was in derogation with other oral dying declarations as well as FIR and the statement recorded by the Special Executive Magistrate. [*State of Maharashtra v. Uttum Karbhari Dhage*, 1997 Cri LJ 2513, 2516 (Bom)]. Where the deceased suffered 100% burn injuries and the upper layer of the skin on the entire body was burnt and peeled off, the fact that all the same thumb impression was present on the third dying declaration casts a doubt on the prosecution case and the further facts that the declaration was recorded six hours after the deceased was declared fit and that even a signature of doctor or any nurse or other independent person was not obtained on the statement destroy the credibility of the statement of the Magistrate about the fitness of the patient to make a dying declaration and as such the conviction of the accused cannot be based on such dying declaration. [*Meharban v. State of MP*, A 1997 SC (Supp.) 1528 : 1997 Cri LJ 786]. Where the injuries on the deceased-wife of the accused, motive, earlier conduct and subsequent conduct of the accused commulatively show and prove that the accused in the person, who caused the burn injuries resulting the death of the deceased, this was deliberate and intentional act of the accused, there were no inconsistencies or contradictions in dying declarations, it was held that the judgment of the sessions Judge is perfectly based on the evidence and proper appreciation of the evidence. Hence, the conviction of the accused was held proper. [*Rajendra Kumar v. State of UP*, 1997 Cri LJ 1120 (All)(DB)]. Where immediately after the deceased was admitted in the hospital, she narrated to the doctor who examined her, that her husband poured kerosene upon her body and set on fire, she was admitted in the hospital within half hour of the incident, the doctor immediately telephoned the police, the information was entered into station diary by the duty officer, and the Executive Magistrate was requisitioned to record her state-ment, he recorded her statement after ensuring that she was conscious and in the fit state to make the statement, the Supreme Court held, in such circumstances, the dying declaration made before the doctor and the Magistrate prove the prosecution case beyond reasonable doubt and could be relied upon to convict the accused husband. [*Kumbhar Dhirajlal Mohanlal v. State of Gujarat*, A 1997 SC 1537 : 1997 Cri LJ 769 (771)].

Where a married woman was admitted in the Burn Ward with 95% burn injuries and the statement recorded by the medical officer was without any signature, thumb impression or attestation and it was contradicted by the second medical officer who stated she was not in a fit condition to make the statement, the declaration was held to be not capable of supporting conviction all by itself *Jai Karan v. State of Delhi*, 1999 (7) JT 514 : (1999) 8 SCC 161 : (1999) 81 DLT 859. In another case of wife-burning, the burn injuries were found to superficial and not constituting the cause of death. Two declarations were recorded one after the other after a gap of time. Death took place more than two months after admission into the hospital. In the meantime, there was the delivery of a dead-child and some skin grafting. The two declarations contained contradictions. The High Court was held to be wrong in relying on such evidence. *Kishan Lal v. State of Rajasthan*, AIR 1999 SC 3062.

The dying declaration of the dying married woman was taken down by the Naib Tehsildar. The evidence of the doctor was that she was fully conscious despite 70% burn injuries. The post mortem report was that she was burnt to the extent of 80% and could have remained capable of speaking only for an hour or two after the incident. It was held that a report prepared after death could not supersede the opinion which was formulated by the doctor when the injured was brought to the hospital. Other witnesses also deposed that her husband had set her on fire. The conviction was upheld. *Rammoo v. State of M.P.*, (1999) SCC Cri 345.

The doctor to whom the burn-injured woman was taken for treatment testified that immediately on coming there she told him that her husband had poured kerosene on her clothes and set her ablaze. The doctor made a note of it in case papers. His testimony thus received support from the contemporaneous document. He had no reason to depose against the accused, husband. Reliance on the evidence thus created was held to be justified. *Shripatrao v. State of Maharashtra*, (1999) 5 Scale 206 : (1999) 6 JT 264 : (1999) 4 Crimes 97 : (1999) 7 Supreme 361 : (1999) 7 SLT 136 : (1999) 9 SRJ 148.

The fact that the statement of the deceased dowry victim woman was recorded by the SDM because of the agitation of her relatives could not lead to the inference that the officer holding that position had acted under pressure or that he had taken a false thumb impression. *Harjit Kaur v. State of Punjab*, AIR 1999 SC 2571.

In a bride burning case the incident occurred at 4 a.m. and the dying declaration was recorded by the magistrate at 9 a.m. It was held that there was no inordinate delay in recording the dying declaration. *Koli Chunilal Savji v. State of Gujarat*, (1999) 9 SCC 562 : 1999 Cr LJ 4582.

Where there were material contradictions in the two declarations made in a bride-burning case, the declarations were held to be not reliable. *Dandu Lakshmi Reddy v. State of A.P.*, (1999) AIR (SC) 3255 : 1999 Cri LJ 4287, where a married woman dying of burn injuries had made two oral dying declarations to her two sisters, but the testimony of the two sisters showed omissions and contradictions. The conviction on the basis of such evidence was set aside. *Ramesh Prasad v. State of Bihar*, (1999) 6 Scale 1 : (1999) 7 JT 115 : (1999) 9 SLT 165: (1999) 9 SRJ 463 : (1999) 9 Supreme 29.

Where three declarations were made of which the first was to the ASI and was found to be unreliable. The second was before the executive magistrate which was without any infirmity and was also getting support from the third oral declaration to the brothers of the injured woman. The second and third declarations were held to be reliable. *Ravi Chander v. State of Punjab*, 1998 (8) JT 211 : (1998) 9 SCC 303. See also *Babu Ram v. State of Punjab*, AIR 1998 SC 2808 : (1998) 9 SCC 495, here also both the dying declarations of the 60% burnt woman, first to the judicial magistrate and second to the police party, were found to be reliable.

The doctor's certificate that despite 80% burns, the dying woman was in a fit position to make her statement was held to be a positive evidence of fitnesses ruling out all inferences to the contrary. *Kamlesh Rani v. State of Haryana*, AIR 1998 SC 1534.

Three dying declarations were recorded. The first was recorded by the judicial magistrate after ascertaining the physical and mental fitness. In this declaration she clearly named her husband (appellant) who set her on fire. Some doubts arose from the last declaration and on that basis the father of the accused was given the benefit of doubt. It was held that it did not mean that the dying declaration was not genuine. It also did not have any effect upon the genuineness and truthfulness of the first declaration. *A. Sreerama Murthy v. State of A.P.*, AIR 1998 SC 3040.

Value of dying declaration.—Under Section 32(1) of the Evidence Act statements made by a person since dead as to the cause of his death or the circum-stances of the transaction which resulted in his death are admissible in evidence. Their admissibility rests on the principle that a sense of impending death produces in a man's mind the same feeling as that of a conscientious and virtuous man under oath—'*Nemomoriturus prasumitur mentire*'. The general principle on which these species of evidence are admitted is that they are declarations made in extremity, when the maker is at a point of death and when every hope of this world is gone and when even motive to falsehood is silenced, and the mind induced by the most powerful considerations to speak the truth a situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by positive oath administered in a Court. [*Madhuri Kishan v. State*, 1996 Cri LJ 4017 (Ori)]. In *Ram Nath Madhoprasad v. State of MP*, A 1953 SC 420 : 1953 Cri LJ 772 it was observed:

"It is settled law that it is not safe to convict an accused person merely on the evidence furnished by a dying declaration without further corroboration because such a statement is not made on oath and is not subject to corss-exami-nation and because the maker of it might be mentally and physically in a state of confusion and might well be drawing upon his imagination while he was making the declaration."

The aforesaid decision was taken note of and considered in *Khushal Rao v. State of Bombay*, A 1958 SC 22 : (1958 Cri LJ 106) where the Court held that the obser-vation quoted above is in the nature of *obiter dicta*. In the facts and circumstances of the case, the Court though found the dying declaration to be not true, but their Lord-ships, on consideration of the relevant provisions of the Evidence Act, laid down the law as under:—

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

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

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

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

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

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

The ratio laid down in *Khushal Rao's* case, (1958 Cri LJ 106) (*supra*) has been **followed** in a catena of later decisions. (See *State of Uttar Pradesh v. Ram Sagar Yadav*, A 1985 SC 416 : 1986 Cri LJ 1836); *Padmaben Shamalbhai Patel v. State of Gujarat*, 1991 (1) JT (SC) 205 and *State of Orissa v. Bansidhar Singh*, (1996) 2 SCC 194.

A dying declaration is not a deposition in court. It is neither made on oath, nor in the presence of the accused. Its credence cannot be tested by cross-examination. Those inherent weaknesses of a dying declaration would not justify any initial presumption to be drawn that the declaration contains only the truth. *Dandu Lakshmi Reddy v. State of A.P.*, AIR 1999 SC 3255 : (1999) 7 SCC 69. Where a conviction is based solely on a dying declaration, the court has to carefully consider the statements of the witnesses supporting it, *viz.*, the magistrate who recorded the statement and the medical officer who examined the injured person. *Paparambaka Rosamuna v. State of A.P.*, 1999 (6) JT 585 : (1999) 7 SCC 695. A dying declaration was recorded by the magistrate in the presence of the doctor who certified that the injured person was in a fit condition to make the statement. The High Court was held to be not right in excluding the declaration from evidence. The statements of eye-witnesses were corroborating the declaration. *Chandra Narain Yadav v. Shibjee Yadav*, 1999 (9) JT 365 : (1999) 6 SCC 63.

Suicidal death.—Statements made by persons who are dead are admissible as evidence of relevant facts because their evidence cannot in any other manner come on record. This is so by rule of necessity. The only rider in Section 32(1) is that they should relate to the 'cause of his death' or "the circumstances of the transaction which resulted in his death". The word used is 'death'. The 'death' may be homicidal or suicidal and, therefore, the word 'death' includes suicidal death. The expression "any of the circumstances of the transaction which resulted in death" is wider than the expression earlier used in the same clause 'cause of his death'. The former expression does convey some limitation. It is not as broad or analogous to circum-stantial evidence which includes evidence of all relevant facts. It has been used in

some narrower sense, to the circumstances which have some proximate relation with the actual occurrence. If there is a close connection between certain circumstances and the death, they are relevant and are admissible in evidence under Section 32(1) of the Evidence. [*Deepak v. State of MP*, 1994 Cri LJ 767, 771, 772 (MP)].

In cases of suicidal deaths where the question before the Court is whether there was any instigation, inducement or abetment in commission of suicide or whether there was any offence committed against the deceased, before committing suicide by her, the only evidence that may be made available is in the nature of her dying declaration. To hold that such dying declaration of the deceased in a case of suicidal death is not a relevant fact would be negation of justice and clear mis-interpretation of the provisions of Section 32(1) of the Evidence Act. [*Deepak v. State of MP, (supra)* see also *Emperor v. Faiz*, A 1916 Lahore 106 : (1916 (17) Cri LJ 438)]; *Parmanand Ganga Prasad v. Emperor*, A 1940 Nagpur 340 : (1941 (42) Cri LJ 17)].

In *Deepak v. State of MP (supra)* modesty of the deceased was outraged by two accused persons and she was also intimidated that she would be defamed by society. After a short interval she immolated herself. The statement, therefore made by her before her death, containing narration of the incident which resulted in her suicidal death is clearly, according to the relevant fact, because the question before us is to ascertain the cause of her committing suicide. *Kappinaiah v. Emperor*, A 1931 Mad 233 (2) : 32 Cri LJ 751. Suicide was committed three days after rape and it was not a circumstance in the same transaction resulting in her suicidal death. In *Re, Peria Chelliah Nadar,* (1942 (43) Cri LJ 810 (Mad)) statement of deceased wife was held inadmissible in trial of murder of her husband.

To be Admissible Dying Declaration Must be Complete.—The statement as offered must not be merely a part of the whole as it was expressed by the declarant; it must be complete as far as it goes. But it is immaterial how much of the whole *affair of the death* is related, provided the statement includes all that the declarant wished or intended to include in it. Thus, if an interruption (by death or by an intruder) cuts short a statement which thus remains clearly less than what the dying person wished to make, the fragmentary statement is not receivable, because the intended whole is not there, and the whole might be of a very different effect from that of the fragment; yet if the dying person finishes the statement he wishes to make, it is no objection that he has told only a portion of what he might have been able to tell [Wig s 1448; see Tay s 721 *post*]. In respect to that which it purports to cover, a dying declaration must be complete [*S v. Cronin*, 1894, 64 Conn 293].

Administration by no means requires that the extra-judicial statement must, in order to be admissible, be a full account of the entire *res gestae*, properly so called of the fatal meeting. What is demanded is that the declarant should be shown, or rationally assumed, to have said all which he intended to say on the topic which he has spoken about. No modification which the speaker regarded as essential to the accuracy of his statement can properly be omitted. Should there be any reasonable ground for believing that some such qualification has failed to appear, the dying declaration will be rejected as incomplete [Chamb H B s 899]. Law does not require that the maker of the dying declaration must cover the whole incident or narrate the case history. The whole of the statement must be laid before the court, without tampering in order that the court may assess its evidentiary value [*Mannu v. S*, A 1976 SC 2199]. Substance of the maker written in words of the writer makes no infirmity. Wealth of detail does not necessarily lead to the inference of the declaration being fabricated [*Tehal v. S*, A 1979 SC 1347]. All necessary questions asked by the doctor were answered. Last question as to what more the deceased

wanted to say could not be answered as he became semi-unconscious—*held* last question was in nature of formality and the dying declaration was not incomplete [*Kusa v. S*, A 1980 SC 559]. Where in a dying declaration by a lady burnt to death by her husband, her statement that even if she was dying her husband should not be beaten could not be exculpative of the accused [*Vaswani v. S*, A 1980 SC 1270]. Absence of names of eye-witnesses would not by itself introduce an infirmity in dying declaration [*Rabi v. S*, A 1980 SC 1738]. The dying declaration gave a very detailed and graphic narration of the entire history of the case, starting from the motive, the enmity and minutest features of the assault excluding the individual acts committed by the accused. It is impossible to believe that the deceased even if conscious would have made such a detailed statement. This statement smacks of concoction of falsification. The wife of the deceased or the doctor have not attested it. For these reasons the dying declaration has got to be excluded [*Mohar Singh v. State of Punjab*, A 1981 SC 1578, 1579 : 1981 Cri LJ 998 (SC) (DB)]. Brevity of a dying declaration containing a few words would not warrant its rejection on that ground. A dying person with fatal injuries must be in severe agony [*Purna Chandra Singh v. State of Orissa*, 1985 Cri LJ 248, 253 : (1984) 2 Crimes 361 (Ori) (DB)]. In the dying declaration, the deceased has categorically mentioned the name of his own son as assailant; has also stated that he was stabbed twice with knife; the motive for stabbing him; the time and place at which he was stabbed. The declaration is to be accepted as true even though there is no medical opinion that the deceased was in a fit condition to make the statement [*Mohd. Azeezuddin v. State of A.P.*, 1985 Cri LJ 336, 341 (AP) (DB)]. An incomplete dying declaration is inadmissible. So, when it could not be completed because of coma setting in, it is inadmissible [*Waugh v. R*, 1950 AC 203 : 54 CWN 503 PC]; it must either go in as a whole or not at all. If it is inadmissible, no portion should be allowed to go [*Tafiz v. R*, 50 CLJ 584 : A 1930 C 228]. But although death may stop the answer to further questions, if the statement so far made by the deceased implicates the accused quite categorically and definitely, the dying declaration though otherwise not complete is admissible [*Abdul Sattar v. S*, A 1956 SC 168 : 1956 Cri LJ 334]. A dying declaration is not complete unless complete names and address of the person are given in the dying declaration. Therefore, only because the deceased before his death uttered two first names, which tallied with the first names of the accused persons, the prosecution story that the accused persons were the culprits cannot be accepted. [*Kajal Sarkar v. State of Assam*, 1993 Cri LJ 3869, 3872, 3873 (Gau)].

Subject-matter of Dying Declaration. [It must be *Ipsissima Verba*].—The dying declarations of the deceased are admissible *only as to matters to which he would have been competent to testify, if sworn in the cause.* They must therefore, in general narrate facts only, and not mere opinions [*R v. Sellers*, Carr Cr L 233]; and they must be confined to what is relevant to the issue. But it is not necessary that the examination of the deceased should have been conducted after the manner of interrogating a witness in the cause, though any departure from this mode may affect the credibility of the declarations. Therefore in general, it is no objection to their *admissibility*, that they were made in answer to leading questions [*R v. Smith*, 1865 10 Cox CC 82], or obtained by earnest solicitations [*R v. Fagent*, 1835, 7 C&P 238]. But where a statement, readily written was brought by the father of the deceased to a magistrate, who accordingly went to the deceased and interrogated her as to its accuracy, paragraph by paragraph, it was rejected, the judge observing that in the state of languor in which dying persons generally are, their assent could be easily got to statements which they never intended to make, if they were but ingeniously interwoven by an artful person with statements which were actually true"; and adding, "the magistrate should not have trusted to the relation of a third person, but

should have taken down the deceased's declaration from her own lips or at least should have had it taken down in his presence" [*R v. Fitzerald*, 1841 Ir Cir R 168—*Per* CRAMTON J]. In a more recent case [*R v. Smith*, 1901, 17 TLR 552 **relying** upon *R v. Mitchell*, 1892, 17 Cox CC 503], the principle that the statement must be in the actual words of the deceased and the questions and answers both given, if the statement be in answer to questions, were reaffirmed [Tay s 720]. Whatever the declaration may be, *it must be complete* in itself, for if the dying man appears to have intended to qualify it by other statements, which he is prevented by any cause from making, it will not be received. Again, it has been held in one case, that if the statements were *committed to writing* at the time it was made, this writing must be produced, or its non-production accounted for; and that neither a copy nor parol evidence of the declaration can be admitted in the first instance to supply the omission [*R v. Gay*, 1835, 7 C&P 230; Tay s 721]. In *R v. Mitchell, ibid*, it has been laid down by CAVE J, that—

> "a declaration should be taken down in the *exact* words which the person who makes it uses, in order that it may be possible from those words to arrive at precisely what the person making the declaration meant. Where a statement is not the *ipsissima verba* of the person making it, but it is composed of a mixture of questions and answers, there are several objections open to its reception in evidence, which it is desirable should not be open in cases in which the person has no opportunity of cross-examination. In the first place, the questions may be leading questions, and in the condition of a person making a dying declaration there is always very great danger of leading questions being answered without their force and effect being fully comprehended."

In *R v. Mitchell, ibid*, CAVE J, expressly **dissented** from *R v. Mann*, 49 JP 743. But in *R v. Bottomley*, (1903), 38 LJ Newsp 311 : 115 LTJ 88, LAWRENCE J, **followed** *R v. Mann* in preference to *R v. Mitchell*; and see *R v. Whitemarsh*, 62 JP 680, 711. In *R v. Corbett*, (1903) Queensland St Rep 246, GRIFFITH CJ, said that *R v. Mitchell*, unsettled what had before been the law and **followed** *R v. Smith*, 34 LJMC 135 (*ibid*) saying further, that it was not essential that a dying declaration should be proved by writing, [Arch Cr Pleading 24th Ed pp 384-85]. In *R v. Fitzpatrick*, 1910, 46 Ir LTR 173 CCCR the judges six in number ruled that the form of question and answer only affected *weight* and not admissibility.

R v. Mitchell, ibid, was quoted with approval in a case where the dying declaration was not relied upon and it was pointed out that in such circumstances, the form of the declaration should be such that it would be possible to see what was the question and what was the answer, so as to discover how much was suggested by the examining magistrate and how much was the production of the person making the statements [*R v. Premananda*, 52 C 987 : 29 CWN 738]. It is essential that the questions and answers put should be recorded and leading questions should be avoided [*Shirinath v. S*, A 1957 B 223]. The desirability of keeping a *verbatim* record of questions put and answers given has been emphasised [*Premananda and Shirinath, sup*; *Rambira v. R*, A 1943 P 397 : 22 P 338]. Unless one is certain about the exact words used, no reliance should be placed. A suggestion that the deceased said something by mistake cannot be entertained [*Ramnath v. S*, A 1953 SC 420 : 1953 Cri LJ 1772]. A dying declaration is not reliable when it does not record what the deceased wanted to say but records what he says on the suggestion of the recorder [*Keshav v. S*, 1971, 1 SCC 513]. Dying declaration should be taken in the exact words of the declarant. It should be *ipsissima verba* of the person making it. It is not necessary that it should be in the form of questions and answers. Leading questions are open to objection [*Majan v. S*, A 1970 A & N 121]. Dying declaration should preferably be in question and answer

form [*Rabi v. S*, A 1980 SC 1738]. While the rule of *ipsissima verba* is a very salutary one, it is not essential that in every case the actual words should be repeated by each witness to enable the court to find out the import or meaning of the declaration [*Prem Narain v. S*, A 1957 A 177].

It must be shown that the deceased himself dictated the statement and that he did not make the statement in answer to any questions (except such a question as "Will you please state what it is you wish to be written down?") and there must be a guarantee that the dictation has been taken down correctly. Usually the best way to establish this is to show that the dictated statement was read over to the deceased and admitted by him to be correct [*Nga Mya v. R*, A 1936 R 42 : 160 IC 597; (*R v. Gay, ante* **relied** on)]. It is of paramount importance that the actual words of a dying declaration are reproduced before the court as far as it is practically possible. When not recorded in the words of the maker, the court should subject it to a proper scrutiny [*Kishan v. S*, A 1963 Pu 170]. Dying statement which is not in deceased's own words but a mere note of the substance of what he said is unsafe for conviction [*R v. Sikandar*, A 1930 A 532]. When the dying declaration is not a continuous narrative of facts but elicited in answers made to them to questions put, the document should clearly set out the exact questions put and the answers [*R v. Mathura*, 6 CWN 72].

Persons recording dying declaration should bear in mind that the object being to get from the person the cause of death or the circumstances which resulted in death, long statement of incidents before the actual assault in the nature of First Information Report should not be included. They are likely to give the impression of not being made unaided [*Bakshish v. S*, A 1957 SC 904 : 1958 SCR 409]. Mere fact that the investigating officer was recording the dying declaration after narrating a few facts as to the manner he came to the spot would not throw any doubt regarding the authenticity or veracity of the dying declaration [*Prem Kumar v. State*, 1989 Cri LJ 1106, 1110 (Del)]. The question whether the statement of one dying person can be a relevant fact with respect to the death of another will depend upon (*a*) whether it was made in the *centinum* of a narration describing the final occurrence concerning the declarant; (*b*) whether it is directly concerned with an event which took place in the presence, sight or hearing of the declarant; (*c*) whether that event has some proximate relation to the actual final occurrence; and (*d*) whether the declaration would become unintelligible or distorted of the narration of that event is blotted out from the declaration [*Kashinash Tukaram Jadhav v. State of Maharashtra*, 1984 Cri LJ 1447, 1453 : (1984) 1 Bom Cr 563 (Bom)(DB)].

Corroboration of Dying Declaration.—It is well settled that there is neither a rule of law nor a rule of prudence which has hardened into a rule of law that a dying declaration cannot be acted upon unless it is corroborated. Dying declaration can be accepted even if it is not corroborated by other evidence [*Mritunjoy Thakurta v. State of West Bengal*, 1989 Cri LJ NOC 191 (Cal) (DB)]. The court must not look for corroboration unless it suffers from any infirmity [*Munnu v. S*, A 1976 SC 2199; *Gopal v. S*, A 1972 SC 1557; *Lallubhai v. S*, A 1972 SC 1776; *Vithal v. S*, A 1978 SC 519]. Once the court comes to the conclusion that the declaration is a truthful version, there is no question of further corroboration [*Kushal Rao v. S*, A 1958 SC 22 : 1958 SCR 552; *Tarachand v. S*, A 1962 SC 130; *Harbans v. S*, A 1962 SC 439 : 1962, 2 SCJ 662; *Tapinder v. S*, A 1970 SC 1556; *Jaswant v. S*, A 1979 SC 190; *Kusa v. S*, A 1980 SC 559; *Pompiah v. S*, A 1965 SC 939 (In this case the dying declarations suffered from infirmity and held that it could not be relied upon without further corroboration); *Surinder Kumar Malhi v. State of H.P.*, 1985 Cri LJ 1436, 1438 : (1985) 1 Chand LR (Cri) 439 (HP) (DB)]. When the articles found at the

scene of crime do not support the facts stated in the dying declaration, the declaration cannot be relied on without independent corroboration [*Prabhu Dayal Gupta v. State*, (1986) Cri LJ 383, 390 (DB) (Del) : (1986) 1 Crimes 3]. *In re Guru Swami*, A 1940 M 196 FB; *S v. Kaushalya*, A 1965 Or 38; *Legal Remem v. Ram Ajodhya*, A 1965 C 348; *Bava v. S*, A 1968 G 296; *Ram Kumar v. S*, A 1970 Raj 60].

It should be remembered that it is admitted on the Necessity principle, for in a case of secret murder no direct evidence other than the statement of the victim can be expected. But the evidentiary value of a dying declaration varies very much in accordance with the circumstances in which it was made and generally speaking a declaration not made in immediate expectation of death and not made in the presence of the accused should not be acted upon without reliable corroboration [*R v. Akbar Ali*, 58 B 31 : A 1933 B 479]. Section 32 does not require a statement to be made in expectation of death [*Bharat v. State of Rajasthan*, 1981 Cri LJ 1474, 1475 : (1980) Raj LW 112 (Raj); *Tellu v. State*, 1988 Cri LJ 1062, 1066 : (1987) 2 Reports 552 (Del)(DB)].

Relying on the dying declaration alone the conviction can be maintained. No corroboration is necessary if the dying declaration is believed to be truthful one and not vitiated in any other manner. Court must not look out for corroboration unless it comes to a conclusion that dying declaration suffered from any infirmity by reason of which it is necessary to look out for corroboration. The Court as a matter of prudence has to gauge whether the statement of the deceased was the result of either tutoring, prompting or product of his imagination. A dying declaration is admitted in evidence on the principle of necessity. The fact that it is not tested by cross-examination on behalf of the accused necessitates the obligation on the Court to scrutinize these aspects. A dying declaration is an independent piece of evidence like any other piece of evidence—neither extra strong nor weak—and can be acted upon without corroboration if it is found to be otherwise true and reliable, conviction based on the evidence of doctor that the deceased was capable of deposing and was in a fit condition and senses at the time of recording of statement would not be lightly interfered with. Doctor is an independent witness and there is no reason for him to depose falsely.

Section 32 of the Indian Evidence Act, 1872 is an exception to the general rule that hearsay evidence is excluded. The exceptions embodied in this section are with regard to statements or declaration by persons since deceased. One of such exceptions is the declaration relating to the cause of death. The general ground of reception of such evidence is that in the cases in question no better evidence is to be had. Such statements are admitted on the principle of necessity. In cases of homicide, statements made by a person, since deceased, are admissible to prove the cause and circumstances of the man's death. Such statements are called 'dying declarations'. In certain cases, English Judges have observed that such statements should be made when the person is in "settled, hopeless expectation of imminent death". For the first time, the phrase was used by WILLES, J. in *R. v. Peel*, 2 F & F 21. Their admissibility rests on the principle that a sense of impending death produces in a man's mind the same feeling as that of a conscientious and virtuous man under oath—*Nemo moriturus praesumitur mentire*. As observed by EYRE CB, in *R. v. Woodcock*, (1987) 1 Leach 500 :

".....the general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind induced by the most powerful considerations to speak the truth, a situation so

solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of Justice." [*Malik Ram Bhoi v. State of Orissa*, 1993 Cri LJ 984, 986, 987 (Ori)].

Conviction can be based on a dying declaration even if there is no corroboration [*Ramesh v. State of MP*, 1996 Cri LJ 2656, 2658 (MP)]. Dying declaration does not require corroboration provided the court is satisfied that it is true. Reliability of the dying declaration should be subjected to close scrutiny [*Udayankar Sahu v. State of Orissa*, 1996 Cri LJ 3379, 3380 (Ori)]. It is unsafe to place reliance on uncorroborated oral dying declaration where the prosecution failed to establish identity of the accused. [*Pyarelal v. State of MP*, 1993 Cri LJ 958, 962 (MP)]. Dying declaration recorded by a police officer in the presence of a doctor and a witness in view of imminent likelihood of death is admissible in evidence. No corroboration is needed. [*Balbir Singh v. State*, 1994 Cri LJ 1079, 1085 (J&K)]. A dying declaration can form the sole basis for conviction without any corroboration if the same is true and correct version of a dying man and is not stated to have been made under any doubtful circumstances. It is like any other prosecution evidence and subject to scrutiny. Corroboration is not sought for because it is a weak piece of evidence, but corroboration is sought for because it suffers from certain infirmity. [*Niru Nanhar Becck v. State of Orissa*, 1995 Cri LJ 2412, 2414 (Ori)]. When a person who had made a statement, may be in expectation of death, is not dead, it is not a dying declaration and is not admissible under section 32 [*Maqsoodan v. State of U.P.*, A 1983 SC 126, 129 : 1982 All LJ 1524 : 1983 Cri LJ 218 (SC); *Gunanidhi Sundara v. State of Orissa*, 1984 Cri LJ 1215, 1217 : (1984) 1 Crimes 948 (Ori)]. It has also been held in other cases that a dying declaration may require corroboration according to the circumstances of the case and the nature of the evidence of it [see *Bullu v. R*, A 1929 P 249; *Arumuga v. R*, A 1931 M 180; *Pichamma v. P*, 1930 MWN 1211; *Bhikari v. R*, A 1934 O 405; *Naimuddin v. R*, 40 CWN 1377 : 1937, 1 Cal 475 : A 1936 C 793—*per* CUNLIFFE, J; *Md Arif v. R*, A 1941 P 409; *Ramamurthy v. R*, 1940 MWN 163 : A 1941 M 290; *Nga Po v. R*, A 1936 R 324; *Karim v. R*, 9 Cri LJ 156; but there is no absolute rule that it must be corroborated]. Though some special considerations arise in the assessment of dying declarations, such evidence must be considered as the evidence of any witness. First the court has to make sure what the statement of a dead man actually was. Next, the court has to be certain about the identity of the person named in the dying declaration [*Harbans v. S, sup*]. In the case of oral dying declarations, the witnesses should be able to give the exact words used by the deceased. [*Tila Gouda v. State*, 1983 Cri LJ NOC 125 (Ori) : (1983) 55 Cut LT 145]. It is almost improbable, if not impossible for the witnesses to remember the exact words of the deceased after lapse of almost a year and the dying declaration cannot be discarded on that ground [*Narpatsingh v. State of Rajasthan*, 1990 Cri LJ 2720, 2729 (Raj)]. The dying declaration was made to the brother of the deceased. That brother did not mention about the declaration in his statement to the police. But at the request he had said that his brother told him that he was stabbed by the accused. So the non-mention of the declaration in his statement to the police can only be taken as an omission [*Asan Tharagil v. State of Kerala*, 1981 Cri LJ 1165, 1168 : 1981 Mad LJ (Cri) 425 (Ker)].

The evidence with regard to the dying declaration as testified by three witnesses did not suffer from any infirmity and it is found to be wholly truthful and without any element of embellishment or distortion, their evidence can be relied upon [*Appn v. State of Kerala*, 1990 Cri LJ 36, 38 (Ker); *Kachhwa v. State of Rajasthan*, (1986) Cri LJ 306, 309 (Raj) (DB) : 1985 Raj LW 97 : 1985 Cri LR 121; *Kothapalli Jayakar v. State of A.P.*, 1981 Cri LJ NOC 94 (AP)]. When the evidence of the witnesses is not

consistent about the dying declaration their evidence cannot be accepted [*State of Orissa v. Pitabas Naik*, 1982 Cri LJ 1163, 1166 (Ori); *Jagdish Lal Malhotra v. State*, 1984 Cri LT NOC 53 : 1983 Chand Cri C 558 (Del) (DB); *Edward John v. State*, 1991 Cri LJ 310, 314 (Del)]. When a statement is recorded by an investigating officer on the next day of the occurrence and it is in keeping with the detailed version of the occurrence given in the F.I.R., it was be said that the statement contains an embellished version of the occurrence [*Gangotri Singh v. State of U.P.*, 1981 Cri LJ NOC 190 (All)]. Sometime the witnesses have a tendency of exaggerating a fact. So it would be improper and illegal to reject the dying declaration on the basis of the dying declaration not being in complete harmony and consonance with the oral statements [*Preetam Singh v. State of U.P.*, 1985 Cri LJ 10, 14 : 1985 All Cri C 63 (All) (DB)]. The omission by the deceased to state that the other deceased was beaten on the head after being stabbed cannot be a ground to hold that the evidence of prosecution witness which is otherwise consistent with the version of the deceased in regard to the entire attack against both the deceased is false or doubtful [*Puligujju Dasaratharamaiah v. State of Andhra*, 1991 Cri LJ (NOC) 25 (AP)].

Failure to caution the jury that a dying declaration was not made on oath and was not subject to cross-examination and that ordinarily it is unsafe to convict a person on the statement of a dead person amount to misdirection [*Hussain Shk v. S*, A 1953 C 383; *Rasid Molla v. R*, A 1948 C 102; *Lalu v. S*, A 1960 C 776].

Where the deceased is an accomplice the declaration should be corroborated [*R v. Sadler*, 1911, 75 JPJ 256]. A dying declaration is never tainted piece of evidence as that of an accomplice and it cannot be urged that one dying declaration cannot go to corroborate another [*Najjam Faroqui v. State*, 1992 Cri LJ 2574, 2577 (Cal)].

More than one Dying Declaration.—In a case where there are more than one dying declaration, comparison of all dying declarations for assessing the extent of incrimination is not necessary. [*Chakiri Saidulu v. State of AP*, 1994 Cri LJ 3782, 3789 (AP)]. Where there were three dying declarations—one recorded by the doctor, the second recorded by police constable and also attested by the doctor and the third recorded by Executive Magistrate and endorsed by the doctor, and none of the dying declarations suffered any infirmity and were corroborated by medical evidence and other circumstantial evidence, conviction can be based upon them and merely because the third dying declaration was not in question answer form, its value would not be detracted. [*Ganpat Mahadeo Mane v. State of Maharashtra*, A 1993 SC 1180, 1181 : 1993 Cri LJ 298]. If there one more than one are dying declaration they should be consistent particularly in material particulars. Where there was no such consistency and one of the dying declaration indicated that the incident was a suicide, it is not possible to just pick out one statement and base the conviction of the accused on the sole basis of that declaration. [*Kamla v. State of Punjab*, A 1993 SC 374 : 1993 Cri LJ 68, 72]. All what is required to be seen is that the dying declaration should represent a truthful version of the incident and in case where there are more than one dying declaration then there should be consistency, particularly in material particulars, in all the dying declarations. A dying declaration satisfying the above test can be the sole basis of conviction. [*Virender Singh v. State*, 1997 Cri LJ 3098, 3102 (Del)]. In a case of alleged bride burning where the dying declarations made before the doctor, magistrate and police were contradictory with each other and the various materials given therein were not supported by any corroboration and in the circumstances of the case the theory of suicide had not been completely ruled out, it cannot be concluded that the dying declarations were voluntary or true disclosures of the deceased. It was therefore not safe to convict the accused on the basis of such dying declarations alone. [*In Re : Basith*, 1997 Cri LJ 3232, 3241 (Mad)].

Where though the dying declaration was recorded by a doctor of the hospital, another doctor of the same hospital stated that the dying declaration was recorded in his presence and that the patient was quite conscious and in a fit condition to give the statement and accordingly the deceased gave answers to the questions put to her, it means that though the other doctor had attested the dying declaration as a witness, he was also a competent and identified the signature of the doctor who recorded the statement. Therefore, non-examination of the doctor who recorded the statement will not make the dying declaration inadmissible [*Maveri Surya Satyanaryana v. State of AP*, 1995 (2) Crimes 585, 587 (AP)]. Where there were two dying declarations—in one the deceased had given all the details of the occurrence and the version was natural and there were no inherent infirmities and the declaration was duly recorded by a doctor and was signed by two other doctors who were attending on the injured in the hospital and there was also a certificate appended that the deceased was fully conscious and mentally alert and remained so till the recording of the statement was complete—whereas the other dying declaration which was alleged to have been made by the deceased stating that she committed suicide, was reduced in writing by a person and was attested by *sarpanch* and bore the right hand thumb impression of the deceased—the first dying declaration recorded by the doctor was preferable as the most valuable piece of evidence, the second one being not proved by any competent witness. [*Harbans Lal v. State of Haryana*, A 1993 SC 819, 824, 825 : 1993 Cri LJ 75, 80]. If there are more than one dying declarations they should be consistent particularly in material particulars. Where four dying declarations made by the deceased were inconsistent, court cannot just pick out one of the statements and base the conviction of the accused solely on that dying declaration. [*Kamla v. State of Punjab*, A 1993 SC 374, 378, 379 : 1993 Cri LJ 68, 72]. Where the first dying declaration was recorded by doctor in the hospital and the second one was recorded two days after the incident before police officer and the statements in both the declarations were consistent and appeared to be honest and the same were corroborated by the medical evidence, the same can be relied upon. [*Chinnamma v. State of Kerala*, 1995 Cri LJ 1711, 1713 (Ker)]. Where the need to record the first dying declaration by the doctor arose because the police, though sent for, had not arrived and the condition of the victim was deteriorating, though according to the doctor, the deceased was in a position to speak, there was no reason to disbelieve the doctor. On this statement alone, the conviction of the accused can be maintained. Apart from this when a subsequent dying declaration recorded by police contained details pertaining to the motive and the manner of the occurrence, these cannot be termed to be improvements in the from what the statement, was before the doctor, the material base of the prosecution case remaining the same. Conviction can be maintained in the circumstances. [*Sarwan Singh v. State of Punjab*, 1995 Cri LJ 3630 (SC)]. In *Kamala v. State*, A 1993 SC 374 : 1993 Cri LJ 68] the deceased had made 4 dying declarations revealing inconsistencies *vis-a-vis* naming the culprit. In *State of Gujarat v. Khumansingh*, A 1974 SC 1614 the deceased wife first alleged that her mother-in-law had burnt her and in the subsequent dying declaration, after meeting with her father, she implicated her husband also. Under these circumstances the Supreme Court opined that the inconsistency between the two dying declarations suggested possibility of tutoring. The above cases were distinguished by the Andhra Pradesh High Court for simple reason that in neither of the two dying declarations the deceased has alleged that the accused had poured kerosene oil on her and set her to fire. No allegation for making an attempt to murder had been made in those dying declarations. Under these circumstances the second dying declaration could not be excluded from being considered. The second dying declaration established the fact that she ended her life because she was fed up due to cruelty and harassment

practised by the accused persons for not bringing more dowry from her father [*Nallam Veera Satyanandan v. State of AP*, 1996 Cri LJ 4034]. If there are more than one dying declarations one first in time should be preferred. [*Smt. Paniben v. State of Gujarat*, 1992 (1) Crimes 1181, 1185 (Guj)].

CLAUSE (2)

Statements and Entries in the Ordinary Course of Business.—This is the second exception to the general rule of hearsay that derivative or second-hand proofs are not receivable in evidence. The entries are also receivable on the principle of Necessity. The witness being dead or unavailable, it is the best evidence the nature of the case admits of. [See the principle stated in Wig s 1521]. The ground of admission is that a statement or entry made in the ordinary course or routine of business or duty may be presumed to have been done from disinterested motive and may therefore be taken to be generally true. Under the English law: (*1*) the declarations or entries must have been in the discharge of a *duty to a third person* [*R v. Worth*, 4 QB 132; *Massey v. Allen*, 13 Ch D 558; *Hope v. Hope*, 1893 WN 20]; (*2*) the declarations or entries must have been made *contemporaneously* with the occurrence of facts recorded [*Doe v. Turford*, 3 B&A 890; *Mercer v. Denne*, 1905, 2 Ch 538; *Rayan v. Ring*, 25 LR Ir 185; *Doe v. Beviss*, 1848, 18 LJCP 128], *ie* the entries should have been made at or near the time when the facts occurred [*Price v. Torrington, infra*]; (*3*) the entries or declarations must have been made by one who had *personal knowledge* of the facts; and (*4*) the entries are evidence of the facts which it was the deceased's duty to record and they are not evidence of other connected matters which they may contain in addition to those facts. In other words the entries cannot be admitted to prove collateral facts [*Chambers v. Bernasconi*, 1 CM & R 347: 3 LJ Ex 373; *Ryan v. R*, 1889 15 ILR 185. The restrictions above have now been relaxed in civil proceedings by the Civil Evidence Act, 1968 (see *ante*, "*Other exceptions to the hearing rule under English law*"].

These restrictions have not been retained in cl (2) of the section. (See *post* separate heads). The only thing necessary for admissibility under the Act, is that the statements or entries must *relate to a relevant fact*. So, the declarant may not have personal knowledge of the facts, or the entries may not have been contemporaneous with the facts recorded; or the entries may relate to collateral fact or facts which it was not the duty of the deceased to record. The entries may be made by the person himself or he may cause it to be made by another. S 32(2) does not impose the limitation that the entry should have been made before the dispute arose. It is enough if it was made in the ordinary course of business [*Sitaji v. Bijendra*, A 1954 SC 601].

The reason of the exception has been thus stated by Taylor:—"The considerations which have induced the courts to recognise this exception appear to be principally these—that, in the absence of all suspicion of siniser motives, a fair presumption arises that entries made in the ordinary routine of business are correct since, the process of invention implying trouble, it is easier to state what is true than what is false; that such entries usually form a link in a chain of circumstances which, mutually corroborate each other; that false entries would be likely to bring clerks into disgrace with their employers; that as most entries made in the course of duty are usually subject to the inspection of several persons, an error would be exposed to speedy discovery; and that as the facts to which they relate are generally known but to few persons, a relaxation of the strict rules of evidence in favour of such entries may often prove convenient, if not necessary, for due investigation of truth [*Poole v. Dicas*, 1835, 1 Bing NC 653]. The rule is very commonly, but inaccurately stated to be that all entries, 'made in the ordinary course of business', are admissible. But this

is not so, and entries gratuitously made by a man, even in the ordinary course of business, merely for his own satisfaction, and not in the discharge of any duty, will not be admissible in evidence after his death [*Hope v. Hope*, 1893 WN 20 (CA); Tay s 697].

One of the leading cases on this subject is *Price v. Lord Torrington*, 1703, 1 Smith's LC 277, 290: 1 Salk 285. This was an action for the price of beer sold and delivered. In order to prove delivery, the plaintiff produced as evidence, a book containing an account of the beer delivered by the plaintiff's drayman, and which it was the duty of the drayman to sign duly. The signature and the death of the drayman, who personally knew of the items of delivery, were proved. The entries were held to be good evidence for the plaintiff. This decision has since been followed in many cases [see *Doe v. Turford*, 1832, 1 LJKB 262 : 3 B&A 890].

The statement may be verbal or written. Oral statements, answering of course all other requisite conditions are equally receivable; the evidence however commonly appears in a written form [see *Sussex Peerage Case*, 11 Cl&F 113; *Stapylton v. Clough*, 2 E&B 933 and *Edie v. Kingsford*, 14 CB 759, 763; Best, 11th Ed s 502]. The effect of the statement as to weight may be different in the two cases but both are equally receivable or relevant. the words, "*and in particular*" in this clause seem to point to the superior force of written over verbal statement [Nort p 177].

A statement to which signatures are appended that a document is a copy of the original is admissible when made by a deceased person in a document relating to a relevant fact and also as an admission [*Seethaya v. Subramanya*, A 1929 PC 115: 56 IA 146]. To make entries made in a book of accounts relevant the conditions in the section must be strictly satisfied [*Ramaswami v. Ramanathan*, 22 IC 627].

S 32(2) relates only to relevancy of evidence, not to the manner of its proof. Before a relevant statement is admitted, its authorship must be proved in the ordinary way [*Nagaraja v. Koothappan*, A 1941 M 602]. It has however been held in a case that it is not necessary that the names of the persons who made the entries must be known before the expression "who cannot be found" can be applied to them [*Dogar v. Sunam*, A 1944 L 58].

Post mortem report of a doctor who went abroad and whose handwriting and signature were proved by another doctor, is admissible [*Rambalak v. S*, A 1954 P 62]. The report of a Commissioner who died after filing his report is admissible [*Luxmi Narayan v. State Bank of India*, A 1969 P 385]. The injury report and post mortem report prepared by doctor are relevant and can be used as evidence against the accused after having been proved to be in his handwriting. [*Lakhu Singh v. State of Rajasthan*, 1997 Cri LJ 3638, 3641 (Raj)].

Illustrations (*b*), (*c*), (*d*), (*g*), (*i*) refer to this clause; see also *illus* (*c*) to s 21 which is of the same nature as *illus* (*g*).

"Ordinary Course of Business".—This requirement has been variously expressed: "In the ordinary course of business" [PARK & TAUNTON, JJ, in *Doe v. Turford, ante*]; "In the usual course and routine of business" [TINDAL, CJ, in *Poole v. Dicas, ante*]; "In the regular course of business" [ROMILLY, MR, in *Rawlins v. Rickwards*, 28 Beav 373]. The phrase "*in the ordinary course of business*" is apparently used to dictate the current routine of business which was usually followed by the person whose declaration it is sought to introduce. The rule laid down extended only to statements made during the course, not of any particular transaction of an exceptional kind, such as the execution of a deed a mortgage, but of business or professional employment in which the declarant was ordinarily or habitually enga-

ged. The business referred to may be of a temporary character [*Sheonandan v. Jeonandan*, 13 CWN 71; *Gurucharan v. Mafijuddin*, 65 CLJ 603: A 1938 C 150].

The particulars set out in s 32(2) though not exhaustive, may fairly be taken as indicating the nature of the statements made in the course of business. The expression "*course of business*" is to be found also in ss 16, 34 and 114. The expression, *in the ordinary course of business*, in this clause, must mean in the ordinary course of a professional avocation [*Ningawa v. Bharmappa*, 23 B 63], or the current routine of business which was usually followed by the person whose declaration it is sought to introduce [*Abdulla v. Ma E Kin*, 11 IC 854]. In a proceeding for fixation of fair rent counterfoils made in the ordinary course of business are admissible to prove date of construction of building [*P K Rukmini v. Venkateswara Silk &c*, A 1972 My 143]. The entries in a diary maintained in a solicitor's office amount to a contemporaneous record maintained in the ordinary course of business and are admissible under s 32 and under s 157 as corroborative factor but they would not be admissible for showing the truth of their contents [*Md Yusuf v. D*, A 1968 B 112]. It has been held that "in the course of business" means in the way that business (which may be of a purely private or trivial nature) is conducted. It has no connexion with a course of business which suggests a series of acts or business.

A letter written by a dead person in the ordinary course of business comes within cl (2) [*Hoare Miller & Co v. Union*, 65 CWN 1206]. Letters written by a party to his wife making reference to a settlement and asking her to do certain acts to forward the settlement, such as by telling his uncle that he would execute a mortgage in his favour was filed to prove family settlement and it was held relevant under s 32(2) [*Ramamurthi v. Subba Rao*, A 1937 M 9]. In s 34 the phrase used is "regularly kept in the course of business" [v. s 34, *post*]. Disruption of a joint family is an event in which the ladies have also a say. Thus an important event in the history of a family communicated by the husband to his wife or by an elder to a younger even in the ordinary course of conversation is a statement made in the ordinary course of business [*Devisingh v. Phulma*, A 1961, HP 10].

"The entry must have been in the way of *business*. This may be defined to mean a course of transactions performed in one's habitual relations with others and as a material part of one's mode of obtaining a livelihood. It would probably exclude, for instance, a diary of doings kept merely for one's personal satisfaction; but it would not exclude any regular record that was helpful, though not essential nor usual in the same occupation as followed by others. There is, therefore, no special limitation as to the nature of the occupation" [Wig s 1523]. There is nothing in s 32(2) which requires any formal proof that certain papers were kept as a fact in the ordinary course of business [*Baidnath v. Manku*, 29 IC 219]. Where account books are admitted in evidence before the Commissioner as having been kept in the ordinary course of business by persons deceased, it is in the discretion of the court to hold, that they are sufficient evidence of the transaction to which the entries relate without further proof [*Daji v. Narayan*, 10 Bom LR 811]. Where the representative of the purchaser went for the inspection of goods in the ordinary course of business and reported to the purchaser the statement is admissible [*M V. Mfg Co v. K J Mills*, A 1969 C 496]. A receipt stating the disputed property as one of the boundaries to an adjacent plot, executed by a deceased person in the ordinary course of business and consisting of an acknowledgment written or signed by him of the receipt of money is admissible [*Ahmad v. Jamal*, A 1928 O 248].

Deposition of a *patwari* in an inquiry under Reg 7 of 1822 does not come within s 32 [*Deonandan v. Dwarka*, 109 IC 136 : A 1928 P 429]. A statement made by a

person since deceased, to his wife, that the defendants had asked him to lend them money and that he had lent them money on an "on demand" note was inadmissible. But if it had been proved that he was in the habit of consulting his wife before giving loans, the letter would have been written in the ordinary course of business [*Abdulla v. Ma E Kin*, 11 IC 854]. An endorsement on the cover of a registered letter that the cover had been tendered to the addressee on a certain day and had been refused by him, is at best a record of a statement by the peon and would be admissible either under s 32(2) or s 33, if the requirements of those sections are fulfilled [*Gobinda v. Dwarka*, 20 CLJ 455: 19 CWN 489]. The executants and attestors of a mortgage bond were all dead. Against the marks of the executants there was the statement by the deceased bond-writer that they were marks of the executants. The statement in writing of the deceased bond-writer was relevant under s 32(2) [*Haria v. Manakchand*, 11 NLR 9 : 27 IC 866]. In order to prove that a certain reply notice had been signed and sent by the first defendant, plaintiff's *Kariasthan* deposed that he was told by the writer of the notice that he wrote it at the request of the first defendant. The writer was dead. It was not alleged that the writer made the statement in the ordinary course of the writer's business—*held* that it did not come under s 32(2) [*Kolagorah v. Kannoth*, 1915 MWN 793]. A *post mortem* report of a doctor who has since died is admissible in evidence as a statement made in the ordinary course of business and in discharge of professional duty [*Mohan v. R*, 85 IC 647: A 1925 A 413].

Certificates issued by the Manchester Ch of Commerce that there was a national coal strike and consequent stoppage, &c are not admissible under s 32(2) as they are not certificates issued in the ordinary course of business, or one written by a person who is dead [*Girdhardas v. Kerawala*, 93 IC 622: 28 Bom LR 232 : A 1926 B 253]. Report of a mukhtear regarding possession in a previous case between plaintiff and defendant in which the mukhtear was appointed as arbitrator is not admissible under this clause [*Gurucharan v. Mafizuddin*, 65 CLJ 603: A 1938 C 150].

—Whether Entries Should be in Discharge of Duty.—In England the rule is that to be admissible, any entry by a deceased person must have been made in pursuance of some *duty* and so entries gratuitously made by a man, even in the ordinary course of business, merely for his own satisfaction will not be admissible [Tay ss 697, 700; Hals, 3rd Ed, Vol 15, para 555, p 305]. So the certificate of a surgeon given in pursuance of a contract but not in discharge of duty was held inadmissible [*Simon v. Hogarth &c*, 154 LT 63]. No such restriction appears in the wording of the section, but it is difficult to say for certain whether any departure from the English rule was clearly intended. In most cases such entries are made in pursuance of one's duties. When a man is ordinarily or habitually engaged in any business or work, it becomes his duty to make entries in the discharge of his routine of business. Entries made in the ordinary course of business are therefore mostly made in the discharge of duty. Norton says: "Though the Act is silent, courts will prudently act in abiding by the English decisions when the points arose" [Nort p 178]. According to Wigmore, the limitation regarding "duty" is a reminiscence of the early history and is needlessly strict [Wig s 1524]. It does not survive in America.

—Entries by Professional Men.—Professional men also, for the due performance of the work they are engaged to do, may be under an obligation to their clients to ascertain and record facts, so as to render their records of those facts admissible after their death as having been made in the course of duty [see *Mellor v. Walmsley*, 1905, 2 Ch 164 CA]. The existence of such a duty in any particular case must depend largely upon the nature and terms of the engagement; but in general there is no duty upon a solicitor to record transactions carried out by him for his clients [*Hope v. H*,

1893 WN 20, 21, CA; *Mercer v. M*, 1924, 2 IR 50 CA; but *cf Doe d Patteeshall v. Turford*, 1832, 3 B&Ad 890; *Rawilns v. Rickards*, 1860, 28 Beav 370], nor upon a medical man, who is in private practice and not in partnership, to keep records of his patients' symptoms or treatment, [*Dawson v. Dawson & Heppenstall*, 1905, 22 TLR 52] so as to render such statement by these professional men admissible upon the principle in question [*Hals*, 3rd Ed, Vol 15, para 557].

—Contemporaneous With the Transaction.—According to the English rule the entries, to be admissible, must also have been made *contemporaneously* with the acts to which they relate, which does not mean immediately at the time of occurrence but within so short a time after as may be reasonably considered part of the transaction. [Tay s 704; Hals, 3rd Ed, Vol 15, para 558]. If business be done in the morning and the entry be made in the evening of the same day [*Price v. Torrington, sup*; *Ray v. Jones*, 2 Gale, 200], or perhaps even in the following morning [*Ingraham v. Bockins*, 9 Serg & R 285 (Am) cited in Tay s 704] it will be sufficient. The rule is the same in America [Wig s 1526]. The requirement of contemporaneousness is not to be found expressly in cl (2), but an entry after a long interval must affect its weight, for in order to ensure a fairly accurate recollection of the transaction, it is necessary that the record should be made at the earliest possible moment. It is then that there is the circumstantial guarantee of its trustworthiness. Further, any reliable habit of making entries in books "kept in the ordinary course of business, or in the discharge of professional duty" necessarily implies their being made contemporaneously which would of course seem within a resonable time. Contemporaneousness is also not expressly stated in the case of entries in books of account relevant under s 34.

—Personal Knowledge.—Under the English rule, the maker of the entry should have also *personal knowledge* of the statements contained therein [Tay s 700]. The rule is strictly adhered to. There is no similar restrictions as to personal knowledge in the Act, which simply requires that entries in accounts should, in order to be relevant, be regularly kept in the ordinary course of business; and although it may no doubt be important to show that the person making or dictating the entries had, or had not personal knowledge of the facts stated, this is a question which according to the rule here affects the value and not the admissibility of the entries [see *R v. Hanumanta*, 1 B 610, 616. The contrary opinion in *Maroti v. Mahadeo*, A 1947 N 106 that personal knowledge is required cannot be regarded as good law as nowhere does cl (2) say so, nor was attention drawn to *Hanumanta's* Case].

The rule of personal knowledge cannot but fail to cause hardship in many cases or to present practical impossibility. Suppose you come to purchase an article from a salesman who reported the fact to the book-keeper of the shop who made the entry of the sale or that the book-keeper posted the entry of sale in the day-book by reference to the counterfoils of the cash-memos issued. If personal knowledge were insisted upon, the entry would not be receivable as the book-keeper had no such knowledge. The difficulty with which the rule is beset is discussed at length in Wigmore s 1530. He says: "Now the ordinary conditions of mercantile and industrial life in some offices do in fact constantly present just such a case of practical impossibility. Suppose an offer of books representing transactions during several months in a large establishment. In the first place, the employees have in many cases changed and the former ones cannot be found; in the next place, it cannot always be ascertained accurately which employee was concerned in each one of the transactions represented by the hundreds of entries; in the third place, even if they would be ascertained, the production of the scores of employees, to attend court and identify in tidious succession the detailed items of transactions would interrupt and derange the work of the establishment and the evidence would be obtained at a cost practically

prohibitory; and finally, the memory of such persons when summoned, would usually afford little real aid. If unavailability of impossibility is the general principle that controls, is not this a real case of unavailability? Having regard to the fact of mercantile and industrial life, it cannot be doubted that it is. In such a case, it should be sufficient if the books were verified on the stand by a supervising officer who knew them to be the books of regular entries kept in that establishment. No doubt much should be left to the discretion of the trial court; production may be required for cross-examination, where the nature of the controversy seems to require it" [Wig s 1530]. The dispensing with the strict rule of personal knowledge in cl (2) is therefore an improvement. But the means or opportunities of the writer's knowledge must nevertheless be important in some cases and explored in cross-examination and failure to show it cannot but affect the weight of evidence, though not its admissibility.

—Collateral Matter.—Lastly, under the English law, entries by dead persons made in the course of business are not admissible to prove any collateral fact. In *Chambers v. Bernasconi, ante*, LORD DENMAN said: "..... the statement of other circumstances however naturally they may be thought to find a place in the narrative, is no proof of those circumstances". This limitation does not also appear in cl (2), which simply requires that the statement or entry must relate to relevant fact and must have been made in the ordinary course of business. "It would appear to make no difference, so far as the question of admissibility is concerned whether, this fact is connected with performance of duty or is merely an independent collateral matter. Whether this fact naturally finds a place in the narrative, what is the nature of its connection with the fact of the statement of which was matter of duty; and whether this connection was such as to raise a presumption of accuracy of information or observation, must however, be questions of importance in estimating the weight due to such evidence when it relates to collateral matters merely" [Field]. See also *post*: "*Collareral or Connected Facts in the Statement Against Interest*"

Absence of Entry.—The absence of an entry, where an entry would naturally have been made if a transaction had occurred, should ordinarily be equivalent to an assertion that no such transaction occurred and therefore should be admissible for that purpose [Wig s 1513; see *post*, s 34, "*Absence of entries*"].

Entry of Memorandum of Account Books, Registers and Other Documents.—Though entries in accounts are not alone sufficient to charge any person with liability under s 34, and corroboration is required under that section, accounts or entries in papers which are relevant under s 32(2) do not as a matter of law require corroboration; the judge, however, is not bound to believe them without corroboration and that is a matter in which he must exercise his own judicial discretion. When entries in accounts are relevant under both the above sections, the necessity of corroboration required by s 34 does not apply, in so much as they are also relevant under s 32 cl(2) [*Rampayara Bai*, 28 B 294: 6 Bom LR 50; *Rami v. Firm Bahadur*, 62 IC 946; *Chaturbhuj v. Sarada*, 11 P 701: *Eranna v. Setty & Co*, A 1960 AP 331; see *post*, s 34]. Where entries in account book are relevant under s 32(2) and person producing has no personal knowledge, court may require corroboration [*Maroti v. Mahadeo*, A 1947 N 106]. As to what is a book, see *post*, s 34.

Entries of payments made to a creditor in the *samadaskat* book belonging to the debtor fall within s 32 and although admissions in his own favour they are not excluded by s 21 [*Jethibai v. Putlibai*, 14 Bom LR 1002]. Entries to be admissible under s 32(2) need not necessarily be against the pecuniary interests of the persons making them [*Ambalavana v. Gowri*, A 1936 M 871]. Entry in deceased's account

book regarding the birth of a daughter and expenses incurred is relevant [*Mirabai v. Kaushalyabai*, A 1949 N 235].

A register of marriage kept by the *istahad*, since deceased who celebrated the marriage, in which was entered the amount of the dower, was held to be admissible as evidence of the sum fixed within s 32(2) [*Zakeri v. Sakina*, 19 IA 157: 19 C 689]. Registers and maps prepared by persons who are dead or whose whereabouts are unknown are admissible under s 32 read with s 13 [*Rajendra v. Lalmohan*, A 1936 P 462].

Reg 20 of 1817 does not impose upon the *daroga* any duty of keeping a register of *chowkidari chakran* lands. From the precise and uniform character of the entries as to such lands appearing in a register kept-under the Regulation, there would be no doubt that they were made under proper direction in the ordinary course of business though outside the statutory duty of the person who made them. The entries are admissible under s 32(2), and not under s 35 [*Sheonandan v. Jeonandan*, 13 CWN 71]. Although *teishkhana* papers may not be public documents, they may be some evidence under s 32(2) [*Sham Golam v. Sajinath*, 12 CWN cliv. See however *Baijnath v. Sukhu*, 18 C 534; *Samar v. Juggal*, 23 C 366, noted under s 74]. A revenue surveyor's reports, though admissible under s 32(2), have very little probative value when not signed by the transferor and not supported by evidence of persons who purport to sign them as witness [*Mg Po v. Mg My*, 27 IC 777].

A registered document more than thirty years old which was a sale-deed of a land and made in the ordinary course of business by the landlord was held admissible in a subsequent suit, in which the ownership of that adjoining land was in issue [*Natwar v. Alkhu*, 11 ALJ 139: 18 IC 752]. A deed of conveyance which purported to bear the mark of the defendant and which was duly attested by four witnesses all dead was tendered. The defendant, however, denied the execution and said that the mark put to it was not hers. A witness who knew the handwriting of one of the witnesses swore that the signature of that witness was genuine—*Held* that the deed was admissible under s 32(2) [*Abdullah Paru v. Gannibai*, 11 B 690 (*Whitelocke v. Muserove*, 1 Cr & M 511 **follD**); *Lahini v. Bala*, 77 IC 798: A 1923 N 227]. In a suit to recover the loss sustained by the plaintiffs on the sale of goods consigned to them by the defendant for sale by the plaintiff's London firm, it was held that the account sales were good *prima facie* evidence to prove the loss, unless and until displaced by substantive evidence by the defendant, as otherwise it would be impossible to carry on mercantile transactions with merchants in distant parts [*Barlow v. Chuni Lal*, 28 C 209].

Where entries in *jamabandi* papers began over 70 years before the action was tried the presumption was that the person making them was dead and could not be called; and as they were made in the ordinary course of business by the landlord's agent, they were relevant without corroboration as evidence against the tenants under s 32(2) [*Dukha v. Grant*, 66 CLJ 24: 16 IC 467]. So also entries in *chittas* and *khatians* by a deceased *amin* [*Abinash v. Pratul*, 55 C 1070]. Where papers 45 years old were proved to have come into a party's hands as purchasers and there was nothing to show that the papers were in the hands of any one living, the court may presume that the writer was dead [*Jabbar v. Monmohan*, 55 C 1216: A 1929 C 110]. Merely because account books are not corroborated or they were prepared by the landlord in the absence of tenants, is no ground for dismissing them summarily from consideration [*Manmohan v. Harinath*, 47 CLJ 457: A 1928 C 408].

On a charge of forging a railway receipt for the purpose of obtaining possession of certain goods sent from Delhi to Calcutta; a letter from the consignee at Delhi to his

partner at Calcutta was not admissible in evidence under s 32(2) [*R v. Tarini*, 9 BLR Ap 42].

A statement by a person who is dead, in a petition for guardianship, that a certain 0person was born at a certain time, is not admissible under s 32 [*Ramkrishna v. Monindra*, 20 CLJ 302: 27 IC 30]. A sale certificate is not admissible under s 32(2) [*Ambika v. Kumud*, A 1928 C 893]. A letter written by a Dy Commissioner in 1882 proposing that a certain person's estate should be taken over by the Court of Wards seems to be admissible under s 32(2) on the question of such person's conversion to Islam [*Keolopati v. Amar*, 44 CWN 66 : A 1939 PC 249.

—Dakhilas or Rent-receipts, etc.—Rent-receipts were held inadmissible in evidence without proof of handwriting of the parties who granted them or its genuineness [*Umesh Ch v. Bama Dasi*, 7 WR 15; see *Lachmipat v. Umanath*, 10 WR 490; *Kailash v. Umanath*, 11 WR 170; *Lachmipat v. Jangali*, 9 WR 147; *Odiat v. Mihiuddin*, 9 WR 421; *Dumiani v. Uttam*, 13 WR 462]. *Dakhilas* filed by a *rayat* and not disputed or denied by the landlord cannot be presumed to be genuine; the *rayat* must prove them in the usual way; but it cannot be expected that the *rayat* should, in every case, summon all the agents of his landlord who gave the receipts. He can himself swear that they were granted by landlord's *gomasta* and are genuine, or can give other *prima facie* evidence to prove their genuineness [*Kirtibas v. Ramdhan*, 7 WR 526: BLR Sup Vol 658; see *Ganganarain v. Sharoda*, 12 WR 30; *Bharat v. Ganaganarain*, 14 WR 211; *Ram Jadu v. Lucki Narain*, 8 WR 488]. *Dkhilas* tendered by a party may be accepted as undisputed documents, where the opposite party is not prepared to deny their genuineness [*Indra v. Goluck*, 12 WR 350]. When a tenant produces rent-receipts and says that he received them on payment of rent, this is sufficient [*Surjya v. Beneshwar*, 24 C 251; *Madhub v. Paramatha*, 20 WR 265]. The same view was taken in *Abdul Samad v. Gunendra*, 82 IC 974: A 1925 C 452; see also *Raj Md v. Banoo*, 12 WR 34; and *Amir Baksh v. Yusuf Ali*, 22 WR 489]. The fact that certain *dakhilas* were not produced in a previous criminal case, between the parties is not good reason for refusing to admit them in a suit, although it would be one of the considerations going to affect their value [*Sorman v. Molla Abdul*, 57 IC 949].

Before admission of *Talab-baki papers* it is to be shown that the person making the statement is dead and the entries are made by him in the ordinary course of business [*Umed Ali v. Habibulla*, 47 C 266: 56 IC 38]. So also *Jamawashilbaki* and *Jamabandhi* papers which when admitted under s 32 do not require corroboration [*Dukhu v. Jagadish*, A 1926 DC 350: 90 IC 564; *Abdul Wahid v. Nagendra*, 1940, 2 Cal 559; A 1940 C 524] and *Chowhuddibandi* paper [*Gadadhar v. Sarat*, 44 CWN 935: 72 CLJ 320]. When such papers are admissible under s 32(2), they do not necessarily require corroboration as required by s 34. See s 34 *post*, "*Entries are independent evidence when the maker is dead*".

—Road-cess Papers.—Statements by deceased tenants in road-cess returns filed by them regarding the assets of the tenancy are admissible though not conclusive, to show that the claim of enhancement could *prima facie* be supported on the ground that the existing rate was not fair and equitable [*Hem Ch v. Kali Pr*, 39 IA 177: 30 C 1033: CWN 1]. See, *ante*, s. 21: "*Road-cess Returns*".

—Cancelled Will.—is admissible under s 32(2) if it is used in support of a statement made by the testator in the interest of others, *eg* sons and against his own interest [*Chouda v. Rai*, A 1939 N 274].

—Family Pedigree.—A family pedigree in books kept by a family chronicler would be admissible under s 32(2) as books kept in the ordinary course of business by a professional man or a person whose business it was to keep such a book [*Mohun v. Dalpat*, 46 B 753: 24 Bom LR 289; *Sitaji v. Bijendra*, A 1954 SC 601]. See notes *post*, under cl (*6*). Entries in books of Hardwar priests if proved to have been made *ante litem motam* are valuable in establishing a pedigree table [*Ram Singh v. Daulat*, 23 IC 550: 171 PLR 1914].

—Chowkidari or Police Diary.—Entries relating to the births, deaths in a place in the diary of a deceased *chaukidar*, not by himself but by some other person, are inadmissible unless it is proved that it was duty of that person in the ordinary course of business to make the entries [*Chandrama v. Ram Gayan*, 67 IC 57: A 1922 P 111]; but they may be so under s 157 or s 159 [*Nainakoer v. Gobardhan*, 2 PLJ 42: 37 IC 424]. Entries in birth and death register are admissible under s 35 [see *post* notes to s 35 under "*Registers of Births and Deaths*"]. Entries made by a police officer in his diary as regards statements made by villagers during an investigation are admissible after his death [*R v. Abdul Aziz*, A 1932 A 442].

CLAUSE (3):

Declarations Against Interest.—Such statements are received on the ground that what a man says against his interest is in all probability true. The principle is the same as that of Admissions (*ante*, s 17). The principle of admissibility is that in the ordinary course of business a person is not likely to make a statement to his own detriment unless it is true [*Dal Bahadur v. Bijai*, A 1930 PC 79: 57 IA 14]. But the above sanction does not arise unless the party knows the statement to be against his interest [*Ramrati v. Dwarika*, A 1967 SC 1134 (*Savitri v. Ramran*, A 1950 PC 1: 76 IA 255: 54 CWN 233; *Ward v. H S Pitt*, 1913, 2 KB 130 and *Tucker v. Oldbury*, 1912, 2 KB 317 **reld** on)]. So, when making a statement a party did not suppose that he was exposing himself to a suit for damages, it cannot be admitted in evidence [*Savitri v. Ramran, sup*]. Under the English law, oral or written declarations by deceased persons, are admissible between third persons only when they are against their *pecuniary* [*Sussex Peerage Case*, 11 Cl & F 86] or *proprietary interest*. But declarations, though against interest, in other respects, *eg* of a penal kind, are not admissible.

The law as embodied in clause (*3*) makes a departure from the English rule, and the restriction that the declarations should only be against the *pecuniary or proprietary interests*, has been withdrawn. Cl (*3*) comprises three kinds of declarations against interest: (*1*) pecuniary interest: (*2*) proprietary interest: (*3*) personal liberty or property. Thus a statement rendering the maker liable to criminal prosecution, or payment of damages is admissible under the Act [see *post*: "*Statements which expose to criminal prosecution, &c*"]. *Illus* (*e*) and (*f*) refer to cl (*3*). The English rules do not require that the declarations should have been made contemporaneously with the facts [*Doe v. Turford*, 3 B&A 890; *Smith v. Blakey*, LR 2 QB 326] nor that the declarant should have *personal knowledge of them* [*Crease v. Barrett*, 1 CM&R 919; *Percival v. Nanson*, 7 Ex 1]. In *Percival v. Nanson*, ALDERSON B, said: "An entry in an attorney's bill of service of notice on *A B* would be evidence of a service, although such notice being generally served by an attorney's clerk, the attorney probably had no personal knowledge of the service". In the same case, POLLOCK CB, said: "If an *accoucheur* puts down in his book the name of a lady whom he had delivered and debits himself with the payment, such entry would be evidence of the name, although, he may have known nothing of her name except from the information of others". In *Lloyd v. Powell*,

1913, 2 KB 133, 137 CA (**reversed** on other grounds, 1914 AC 793) on the other hand, the CA decided that personal knowledge is essential to the admissibility of such statements. Phipson criticises the decision as unsatisfactory and remarks that *Crease v. Barrett* and *Percival v. Nanson, sup* were not brought to the attention of the court [Phip 11th Ed para 908]. The Act also does not require that the statements should be contemporaneous with the facts or that the declarant should have personal knowledge of them. The statements when admissible against the maker, are also admissible against his representative [*Rani Srimati v. Khagendra*, 31 IA 127 : 9 CWN 74: 31 C 871].

In order to render a person's statement admissible under cl (*3*), it must be *against interest*, which may be pecuniary of proprietary or of any other kind, *eg*, status. The test in that it must in some way or other injuriously affect the interest of the party making it, including a statement which would have exposed him to a criminal prosecution or to a suit for damages. The facts stated must of course have been against the actual interest *at the time of the statement* and the declarant must also have had *knowledge* of that fact, otherwise the safeguard for its trustworthiness would disappear. The knowledge would have to be inferred from surrounding circumstances [*Ramrati v. Dwarika*, A 1967 SC 1134]. The statement may be either *verbal* or *written*, though the former may be entitled to less weight than the latter. The declaration need not have been made contemporaneously with the facts, nor is it necessary that the declarant should have had personal knowledge. The statement may be received not only in favour of the person making it and his representatives, but also in favour of, or against strangers. Not so with a mere admission [s 17] which is not receivable in favour of the maker or his representatives, nor against any person other than the maker of his representatives [s 18]. As to whether the declaration against interest is to be made *ante litem motam*, Wigmore says: "It is sometimes said that the statement [as in other hearsay exceptions; see clauses (*4*), (*5*), (*6*) of s 32] must have been made before litigation began. But this is only saying that the declarant's partisan attitude during litigation must be regarded as counter-balancing the interest prejudiced by the fact stated. This, however, might not be so in a given instance, and each case should be judged on its merits" [Wig s 1467]. When a declaration against pecuniary or proprietary interest is admissible, the whole of the statement is admissible, and not that portion only which goes against the declarant's interest.

The admissibility of a declaration against interest must be judged at the time when it is tendered in evidence, and a declaration by a deceased person which appears to be against the pecuniary interest of the declarant is admissible even though the obligation recognised by the declaration is only a moral and not a legal or contractual obligation [*Coward v. M I Bureau*, 1962, 1 All ER 531].

Higham v. Ridgway.—"The leading case on the subject of declaration against interest is *Higham v. Ridgway*, 10 East 119: 2 Sm L Cas 327 (11th Ed) where the books of a deceased man-midwife were put in to prove the birth of a child on a particular day. It was material for the plaintiffs to prove that one Fowden was not yet of age on April 15, 1789. The defendant gave evidence tending to prove Fowden's birth on a day prior to April 15, 1768. The plaintiff gave evidence tending to prove that Fowden was born on the same day as one Fallows whose birthday was April 22nd. This was done by production of the books of one Hewitt a man-midwife who delivered Mrs. Fowden and who used to make regular entries of all matters relating to his business. Hewitt died 20 years ago and his son John Hewitt who produced the books, proved his father's death and his handwriting. There were two entries under date the 22nd April, 1768 which ran thus:—

"22 April, 1768.

38[9] Richard Fallow's wife, Bramhall, Filius circa hor, 9, matutin: cum forcipe, etc. paid."

Then following in the same page the entry in question, without any intervening date]

"Wm Fowden junr's[10] wife filius circa hor 3 post merid nat etc."	79[11]		
"Wm Fowden jur 1768. Aprilis 22 Filius natus, etc. wife	1	6	1
26th Haustus purg	0	15	0
Pd 25 Octr, 1768"	2	1	1

The entries were tendered to show the precise day of the birth of Fowden and were objected to. They were held admissible. LORD ELLENBOROUGH, CJ, said:

> ".....I think the evidence here was properly admitted, upon the broad principle on which receiver's books have been admitted; namely, that the entry was made in prejudice of the party making it. In the case of the receiver, he charges himself to account for so much to his employer. In this case the party repelled by his entry a claim which he otherwise would have had upon the other for work performed, and medicines furnished to the wife: and the period of her delivery is the time for which the former charge is made; the date of which is the 22nd of April; when, it appears by other evidence, that the man-midwife was in fact attending at the house of Wm Fowden. If this entry had been produced when the party was making a claim for his attendance it would have been evidence against him that his claim was satisfied".

It will be seen that the argument that the entry was against the interest of the party making it, strictly applied to "Pd 25th Octr 1768" and not to 22nd April 1768, which was a collateral or connected fact. But LORD ELLENBOROUGH ruled that the whole entry was admissible and observed:

> "It is idle to say that the word *paid* only shall be admitted in evidence without the entry, to see what the demand was, which he thereby admitted to be discharged. By the reference to the ledger, the entry there is virtually incorporated with and made a part of the other entry, of which it is explanatory".

The entry was held to be admissible not only in proof of that fact but also in proof of the *date* of the child's birth (*post.* "*Collateral or Connected facts &c*"). *Illustration* (*b*) is founded on *Higham v. Ridgway, sup.* In a case MUKHERJEA, J, said that it is extremely doubtful if the legislature at all intended to incorporate *Higham v. Ridgway*, in its entirely in s 32 and the case was intended as illustrative of what is meant by "ordinary course of business" in cl (*2*). Recitals in documents between third persons are not admissible under s 32 (*3*) [*Ambika v. Kumud*, A 1928 C 893]. It

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9. The figures 38 referred to the ledger.
10. This was the designation at the time of the father of Wm Fowden jun in question.
11. These figures referred to the ledger, the entry in which follows.

is, however, not clear what is precisely meant by the above observation, but a perusal of the judgments of ELLENBOROUGH, CJ, LE BLANC, J, and BAYLEY, J, in *Higham v. Ridgway*, shows that the entry in the man-midwife's book was held admissible on the sole ground that it discharged another person of a claim which he had against him and was to his immediate prejudice. There is no indication that there was any doubt whether the entry was made in the ordinary course of business. LE BLANC, J, observed:

> "I do not mean to give any opinion as to the mere declarations or written entries of a midwife who is dead, respecting the time of a person's birth, being made of a matter peculiarly within the knowledge of such a person; it is not necessary now to determine that question; but I would not be bound at present to say that they are not evidence. But here the entries were made by a person who, so far form having any interest to make them, had an interest the other way; and such entries against the interest of the party making them are clearly evidence of the fact stated, on the authority of the case of *Warren v. Greenville*, and of all those cases where the books of receivers have been admitted.....".

Norton says: "Such entries are not the less receivable, because the same fact may be proved by evidence of another description. For instance, in *Higham v. Ridgway*, the evidence of the entry of the *accoucheur* would not have been rejected, because the evidence of a midwife, who was present at the delivery, might have been forthcoming; though this may seem at first to militate against the rule that the best evidence shall alone be received. [Nort pp 181-82].

"The most ordinary cases in which evidence against interest is tendered are those in which persons have charged themselves *pecuniarily* with the receipt of money. Thus, for instance, if I write in my account book or in my memorandum, that I have received Rs. 100 from *A*, *B* such entry will be evidence, in the event of my death, lunacy, absence, &c. Entries against interest need not be contemporaneous; that is, they need not have been made at the date of the transaction to which they refer. A man is as little likely to make an entry against his own interest a year after the event as at the moment of its occurrence. The accuracy of the entry does not therefore, depend upon the memory, as in the case of entries made in the course of business and herein is the difference between entries against interest, and entries in the course of business". [Nort pp 179-80]. The distinction which exists between the two classes of cases, is thus stated by PARKE B:—

> "that in the case of an entry against interest, proof of the handwriting of the party, and of his death, is enough to authorize its reception; at whatever time it was made it is admissible; but in the other case (of an entry made in the course of business), it is essential that it was made at the time it purports to bear date; it must be contemporaneous entry" [*Doe v. Turford*, 1832, 3 B&Ad 890: **approved** in *Poole v. Dicas*, 1835, 4 LJCP 196; Tay s 704].

The rule that entries made in the course of business must be made contemporaneously with the facts have not been adopted in cl (2) [see notes to cl (2) *ante*:"*Contemporaneous with the transaction*"].

Declarations against pecuniary interest have been held admissible although the declarant would have been incompetent as a witness [*Gleadow v. Atkin*, 1 C&M 410; Phip 11th Ed, para 910].

[On the subject see Taylor, ss 668-95; Best, 11th Ed, s 500; Phipson 11th Ed, paras 901-927].

—**"Against Interest".**—In *Taylor v. Witham*, 3 Ch D 605: 45 LJ Ch 798, JESSEL MR, said:—

> "What is the meaning of being against interest? I adopt the view of Mr. Baron Parke in *R v. Lower Heyford*, 2 Sm LC 313 (12th Ed), that it must be *prima facie* against his interest, that is to say, the natural meaning of the entry standing alone must be against the interest of the man who made it. Of course, if you can prove *aliunde* that the man had a particular reason for making it, and that it was for his interest, you may destroy the value of evidence altogether, but the question of admissibility is not a question of value. The entry may be utterly worthless when you get it, if you show any reason to believe that he had a motive for making it, and that though apparently against his interest, yet really it was for it, but that is a matter for subsequent consideration when you estimate the value of the testimony".

"By declaration against *proprietary* interest we mean statements made by a party while in possession of an estate, asserting a more limited interest in the land, and in disparagement of some higher title to it. These declarations are evidence for or against strangers..... When a party in possession of land admits that he holds a less estate than the fee-simple, as for instance, that he is a tenant in tail, for life, for a term of years, or at will, he manifestly cuts down his own interest in the land; he cuts down his title; and it is not likely that a man would do this if he really had a larger interest than he claimed or stated [Nort 9th Ed, pp 179-80].

The declarations must also have been against interest *at the time* they were made; it is not enough that they might possibly turn out to be so afterwards [*Smith v. Blakey*, LR 2 QB 326; *Tucker v. Oldbury*, UDC 1912, 2 KB 317 CA; *Lloyd v. Powell & Co*, 1913, 2 KB 130 CA—Phip 11th Ed para 904; Tay s 670; Wig s 1466]. The statement must have been made consciously, with the knowledge that it was against his interest. [*T.S. John v. State of Kerala*, 1984 Cri LJ 753, 756: (1983) Ker LT 156 (Ker)]. When a statement is to the immediate advantage of the maker the fact that more remotely it was against his own interest does not make it admissible [*Hollaram v. Dwarka*, A 1939 S 145]. When a statement is *partly against one's interest* and partly self-regarding, the former part is admissible. Thus a statement by a predecessor of the defendant that the land had been given in order that the income might be applied for the worship of the grantee's family idols and also of the image established by the plaintiff's ancestor, was admissible against the defendant to prove that the land was given for the purpose of the image, but not in his favour to prove that it was given for the worship of defendant's family idols [*Bejoy v. Kalipada*, 17 CWN 1013: 18 CLJ 347]. Statement by dead person in a deed that he separated himself from the other coparceners is against interest [*Bhagawati v. Dulhin*, A 1952 SC 72: 1951 SCR 603]. Statements by deceased persons not being against proprietary or pecuniary interest must be disallowed [*Unchinaya v. Ukhay*, 14 R 11]. Statement by the deceased in a previous suit in which she challenged that her husband adopted the defendant is admissible under s 32(*3*) as it affected her interest but it is not admissible under s 32(*5*) though she had special knowledge about the existence of relationship of adoption as it was not made before the dispute raised [*Savitri v. Bhaskar*, A 1872 Or 148]. In order to determine whether a statement is against interest, the statement itself and not the nature of the transaction is to be looked at. For instance, a deed of gift is merely an assertion that the property given is donor's property. It is not a statement against the donor's pecuniary or properietary interest [*Markhu v. Saharai*, A 1940 P 16]. The statement of a deceased person against his pecuniary or proprietary interest may be admissible against third persons, provided the reference to such third

persons is not foreign to that portion of the statement which is against the interest of the declarant [*Mohammed v. R*, 89 IC 252: 26 Cri LJ 1308]. An isolated piece of paper or memorandum made by the deceased for his own information about his property not made in ordinary course of business and which contains nothing against his pecuniary interest is not admissible [*Sabhagibai v. Pirkash*, 1940 Kar 334: A 1939 S 173].

—Collateral or Connected Facts in the Statement Against Interest.—Statements against interest are evidence not only of the precise fact against interest, but of all other facts which they contain, *ie* of all *connected facts* (though not against interest) which are necessary to explain, or are expressly referred to by the declaration—and whether contained in the same or other documents [*R v. Birmingham*, 1 BS 763: *R v. Exeter*, LR 4 QB 341, 345: *The Swiftsure*, 82 LT 389; *Peck v. P*, 21 LT 670].

An entry in a private account book of *A* (deceased) ran thus:—

(*1*) "1872, Oct 1, *JW* paid me three months' interest £20". It was followed by other entries on another page:—

(*2*) "1872 Jan *JW* acknowledged loan to this date,	...	...	£2,000
1872 March Interest	...	...	£20
July Interest paid me	...	...	£20
Oct Interest paid me	...	...	£20
Dec Paid interest	...	...	£20
			£80

1872 Dec 27. Paid off £20. Left £1,980".

To prove that *A* lent *JW* £2,000, the entries in (*1*) were held admissible as being *prima facie* against interest, though collaterally proving *JW's* debts: and in (*2*) the entries against interest being sufficiently connected with those in *A*'s favour to render the latter also admissible [*Taylor v. Witham*, 3 Ch D 605]. The whole entry in *Highham v. Ridgway* (*ante*) was also admissible in proof of collateral or connected facts.

The rule that statements connected with the precise statement against interest and which are necessary to explain it are also admissible, has been accepted here. In a suit by the plaintiffs for a declaration that a house standing in the name of their mother was purchased out of her *joutak* property, the evidence of a plaintiff that in the course of a quarrel between her mother (deceased) and father (the defendant) she overheard her mother saying : "I have mortgaged this property because I have purchased it out of my own ornaments given to me by my father at the time of my marriage" was held admissible although the latter portion of the statement was in favour of the maker [*Sisir v. Jajneswar*, 42 CWN 359; see also *Leelanund v. Lakhputee* and *Bhagwati v. Dulhin*, cited *infra*]. "But *disconnected facts*, though contained in the same document or statement are inadmissible [*Doe v. Bevise*, 7 C&B 456; Phip 11th Ed para 911, 926; Powell Ev pp 307, 313; Taylor ss 677, 680]. Entries in evidence of collateral and independent matters, which though forming part of the declaration, are not in themselves against the interest of the declarant, are admissible. But it is not that because a document contains entries against interest, it will be admissible in proof of independent matters which appear as separate item, unconnected with such entries and which, consequently need not be read in order to explain them [*per* LORD LYNDHURST, in *Rudd v. Wright*, 1832, 4 Y&C Ex 294; Tay s 680; see

also *Knite v. Waterford*, 1840, 4 Y&C 294; *Kinglake v. Beviss*, 18 LJCP 128]. Subject to the limitation expressed above, so much of the entries as are necessary to explain to what they refer are admissible [see the observations of ELLENBOROUGH CJ, in *Higham v. Ridgway*: "It is idle to say &c....." *ante*]. The test appears to be whether the declarations connected with the particular statement against interest from an integral and essential part of the whole and whether they are so connected as to make them necessary to explain the statement against interest. "Since the principle is that the statement is made under circumstances fairly guaran-teeing the declarant's sincerity and accuracy, it is obvious that the situation guaran-tees the correctness of whatever he may say under that influence. In other words, the statements may be accepted, not merely as to the specific fact against interest, but also as to *every fact contained in the same statement*" [Wig s 1465]. In *Smith v. Blakey*, LR 2 QB 326, BLACKBURN J, said: "[It is] admissible not merely as evidence of the precise fact which is against interest, but of all matters involved in or knit up with the statement". In *Davies v. Humphreys*, 6 M&W 153 PARKE B, said: "The entry of a payment against the interest of the party making it, has been held to have the effect of proving the truth of other statements contained in the same entry, and connected with it ....." [see *Leelanund v. Lakhputee*, 22 WR 231 *intra*]. So, a statement by a dead person in a deed that there was separation of himself and between all the other coparceners is admissible in entirety, the latter portion being a connected matter and integral part [*Bhagwati v. Dulhin*, A 1952 SC 72: 1951 SCR 603].

Relevancy of Statement Against Interest.—A statement by a deceased in a deed that he is governed by the Mitakshara law is against his proprietary interest in the properties possessed by him and is admissible inasmuch as it implies that he is not the sole and absolute owner but a coparcener with limited rights [*Sukdeb v. Mritunjoy*, 43 CWN 395]. When an owner of land admits that it is in the possession of a tenant, the statement is against and in derogation of his proprietary interest and is admissible [*Abdul Aziz v. Ebrahim*, 31 C 965; *Barho v. Megh Nath*, 2 CLJ 5*n*]. Declarations made by persons in disparagement of title to land are admissible, if they were made whilst the declarant was in actual possession of the property [*Ramdas v. Ajudhiadas*, 63 IC 685].

A statement made by the former zamindar many years previously regarding the rent of *ghatwali* tenures, in the recital of a mortgage-deed ("original rent Rs. 74, increased rent Rs. 101") was held admissible as a statement against proprietary interest even though it contained a statement in his favour, *viz* the reference to the increased rent payable to the maker of the statement. It was *held* that the document must be taken as a whole and cannot be divided into parts. In the course of their judgment, COUCH CJ, and AINSLIE J, said:—

> "It is true that in one part of it there is what may be said to be not against his interest but in his favour, namely, the amount of the original rent and increased rent payable to him. But when a document of this kind is tendered in evidence it is not to be divided into parts, and the part which is in favour of the person making it rejected, and that which is against his interest accepted. The question is whether, taking the document as a whole, it is against the interest of the proprietary right of the person making it". [*Leelanund v. Lakhputte*, 1874, 23 WR 231].

Following this case, where in a suit by *B* to recover possession of certain land, the defendants denied *B*'s title, a registered mortgage-deed of adjacent land by *N* in

which the western boundary of the land was recited as *B*'s land was admissible as a statement against the pecuniary or proprietary interest of the mortgagor [*Ningawa v. Bharmappa*, 23 B 63]. *Ningawa's case* was dissented from and it was held that the principle of *Leelanund's case* cannot be extended to recitals of boundaries of adjoining lands between third persons. That case was not a case of recitals of boundaries of adjoining lands, but it was the case of a statement contained in a *sanad* relating to the land itself. The principle laid down in *Leelanund's case* is that if as a whole it is against the interest of proprietary right of its author, such parts of it as are in his favour cannot be rejected [*Ambika v. Kumud*, A 1928 C 803 : 110 IC 521]. *Leelanund's case* was dissented from in Madras and it was held that under s 32(*3*) it is the statement and not the document containing the statement which must be against the proprietary interest of the person making it [*Karuppanna v. Rangaswami*, A 1928 M 105 (*Re Paddapanai*, 8 IC 268: 1910 MWN 668; *Venkataraja v. Narasayya*, 26 IC 747: 1914 MWN 779 **folld**)]. *Ningawa's case* was followed in *Thyagaraja v. Narayana*, A 1940 M 450. Wigmore says that, "It is not merely the statement that must be against interest, but the facts stated. It is because the fact is against interest that the open and deliberate mention of it is likely to be true. Hence the question whether the *statement* of the fact could create a liability is beside the mark" [Wig s 1462].

A statement made in a deed of conveyance or mortgage-deed that the transferor was owner of the land conveyed or mortgaged and that he was either extinguishing his interest in the land by an absolute sale or placing a restriction on it by way of mortgage, is one against the pecuniary or proprietary interest of the person making it; consequently the statement as a whole is admissible in evidence under s 32(*3*); but such statement is not admissible under s 32(*2*) as it is not made in the course of business [*Abdulla v. Kunj*, 14 CLJ 467]. This view was not accepted in a later decision and it was held that a description of boundaries in a document between third parties cannot be said to be statement against the proprietary interest of the person making it and is not admissible under s 32 [*Pramatha v. Krishna*, 28 CWN 1092: 84 IC 420; *ante*, p 146].

In a suit to recover possession of a house, the defendants counter-claimed a sum spent by their father in building a portion of it. A statement made by the defendant's father in his will as to the amount spent by him and also upon a memo of expenses written by him at the same time were held not admissible as the former was not a statement against interest and the latter was not made in the ordinary course of business [*Harivaidya v. Ambabai*, 44 B 192: 55 IC 316]. Statements against his own interest by a testator in a cancelled will is admissible [*Jagannath v. Rai*, A 1939 N 273]. To prove adverse possession against a person, a statement in the will of another that the former left the place more than 20 years before is not admissible [*Bhagbhari v. Khatun*, 80 IC 118: A 1921 S. 177]. A recital in a document by a person conveying his share as to how the defendant became vested with the remaining share is not admissible [*Arjun v. Jujesthi*, A 1954 Or 52].

A statement by a Hindu widow in a prior suit that she mortgaged a property for her husband's *sradh* expenses is admissible in a suit by the reversioners to recover the property from the mortgage-purchaser in an auction sale. The whole statement should be taken as one [*Sitaram v. Khublal*, 5 P 168: 84 IC 13]. A Hindu widow adopted a son long after the death of her husband and the reversioners sued after her death challenging the power of adoption. Reliance was placed on the statement of the widow in the proceeding in which the son's name was mutated. It was held that the principle of admissibility under s 32(*3*) is that in the ordinary course of business a person is not likely to make a statement to his own detriment unless it is true. But this

sanction is of no use in the case of a Hindu widow who after a long enjoyment of her husband's property, desires at the end to pass it on to her relations and for this purpose goes through the form of adopting her brother's grandson, to effectuate which she is bound to allege authority of her husband [*Dal Bahadur v. Bijoy*, 57 IA 14: 52 A 1 : 34 CWN 369]. In a suit to redeem a house and a garden, part of the property covered by a deed of heirship executed by a Hindu widow in favour of plaintiff's father, and which property was mortgaged by the widow's husband, the defendent denied the plaintiff's right to redeem on the ground that neither he nor his father was heir of the mortgagor. The deed of heirship was admissible under s 32(*3*) as it was manifestly a declaration by the widow against her proprietary interest, for by it she divested herself of her widow's interest in the property [*Hari Chintamani v. Moro Lakshman*, 11 B 89]. In a suit by the successors of the trustee of a mosque to redeem certain mosque properties, a statement in a previous compromise decree in a suit against the trustee that the properties in question belonged to the mosque, is admissible under s 32(2) [*Venkatasubhiah v. Jumma Mosque*, A 1941 M 666: 1941 MLJ 754].

The evidence of a deceased person in a proceeding under the Land Registration Act would be admissible in evidence under s 32(*3*), when the statement was against the pecuniary or proprietary interest of the defendant, even in a suit which related solely to a question of title [*Shyamananda v. Rama Kanta*, 32 C 6]. Statement of respondent's predecessor-in-title who is dead against his interest before Settlement Officer was admissible under s 32(*3*) and it being recorded in a *quasi* judicial proceeding can be proved by a certified copy thereof [*Kopparam v. Udaysankar*, A 1981 AP 34]. Statement in a deed of gift by a widow that the properties mentioned therein were gifted away by her father-in-law and her husband attract the terms of sub-ss (*3*) and (*7*) [*Purnanand v. Purnanandam*, A 1961 AP 435]. Documents showing transfer of property by *B* as guardian of *A* and describing him as his son are admissible under ss 32(*3*) and (*5*) [*Jagabandhu v. Bhagu*, A 1974 Or 120]. A statement in a mortgage executed by *A* and *B* admitting that *B* was the adopted son of *A*'s deceased brother *C* is relevant under s 32(*3*) and s 32(*5*) [*Harihar v. Nabakishore*, A 1963 Or 45]. So the previous deposition of the deceased father of the appellants stating relationship and facts which were against his interest is admissible. S 32 is not controlled by s 33 [*Aboobucker v. Sahib Khatoon*, A 1943 S 12]. A statement made by a deceased *sapinda* as to the circumstances under which he received a sum of money in connection with the adoption is admissible as made against his pecuniary or proprietary interest [*Danokoti v. Balsundara*, 36 M 19: 18 IC 989]. Defendant published a libel in a newspaper in the course of a letter making certain imputations against plaintiff alleged to have been orally communicated to him by a deceased person. The alleged statement of the deceased person is not admissible in justification of the truth of the libel [*Nadirshaw v. Pirojshaw*, 15 Bom LR 160]. Where contents of document clearly show that the executant admitted receipt of consideration, such admission is admissible after death of executant under s 32(*3*) [*Sushila v. Durju*, A 1977 Or 178]. A statement by the executant of a pro-note who is dead, in a sale-deed that a particular sum is due to him as consideration for the pro-note is admissible under s 32(*3*) to prove consideration [*Kalyan v. Jagannath*, 78 IC 1033: A 1925 A 130; *Babhnaji v. Ratanlal*, A 1934 N 106]. An admission by a dead person that certain monies deposited by him in the name of another belonged to him is inadmissible as against the letter in favour of a person claiming through the person making the deposit as it is an admission by the depositor in his own favour [*Hirabai v. Dhanjibai*, 102 IC 145: A 1927 B 433]. The statement of a person in a mortgage bond that he is separated from a joint family of which he was a coparcener and that he has no further interest in joint property or assets left by his father would be

admissible after his death under s 32(*3*) [*Bhagwati v. Dulhin*, A 1952 SC 72: 1951 SCR 603]. So also such a statement in the deceased's will [*Appalanarasimham v. Udalama*, A 1959 AP 407]. A statement by a deceased Hindu in his will that his son is separate from him is not admissible for showing severance of joint family tie between him and his son as it is a self-serving statement [*Manglomal v. Padibai*, A 1936 S 217]. When a legacy was left to *A* "to be expended as I have directed", a statement by A since deceased, as to what those directions were is not against his pecuniary or proprietary interest [*Re Gardner's Will*, 1936, 3 All ER 938]. A statement by a plaintiff as a witness to the effect that her father told her that he had mortgaged the land in suit to the defendant is inadmissible under s 32 [*Mi Nga Ma v. Naga Talok*, 29 IC 607]. Statement by a husband, who died before the suit was brought as to his deceased wife's state of mind against his own interest was held admissible [*Fawke v. Miles*, 1911, 27 TLR 202].

Attestation by co-sharers to the mortgage-deed of another co-sharer is an acknowledgment that they had no right in the property and is admissible as a statement against interest [*Gnanamuthu v. Vellu*, A 1924 M 542: 79 IC 2]. A statement of area in the sale-certificate of land purchased by landlord in execution of a money decree against tenant, was not a statement in the landlord's favour but one against his interest within s 32 [*Manik v. Jogindra*, 24 IC 283]. Admission of one co-plaintiff or co-defendant that the land conveyed was limited by certain boundaries, is admissible against the other under s 32(*3*) [*Ambar Ali v. Lutfe*, 21 CWN 996]. When no other evidence is adduced in a case except written admission in pleadings relevant under s 19 or 32 it is advisable that such records should be marked as exhibits and then referred to as evidence in the judgment of the court [*Appavu v. Nanjappa*, 25 MLJ 329: 20 IC 729]. Road-cess return filed by a Hindu widow is admissible in favour of the reversionary heir under s 32(*3*) [*Lachmi v. Jagmohan*, 18 CLJ 633. See notes to s 21 (*1*) *ante*. "*Road-cess Returns*"].

During a preliminary enquiry, held under Merchant Shipping Act (5 of 1883), for the purpose of investigating into a collision case, statements by the officers of the defendant's vessel admitting responsibility for the accident were admissible on the grounds *inter alia* that the attendance of the officers could not be procured without an unreasonable amount of delay or expense, and their statements were against their interest [*Asiatic Steam N Co v. Bengal Coal Co*, 35 C 751]. A person in possession of his wife's property after her death made a declaration that he took a life-interest under her will but destroyed the will. In the probate proceedings subsequent to his death, the legal presumption arising from possession being that he was owner in fee, a declaration that he had only a life-estate was one against proprietary interest and therefore admissible [*In re Adams Benton v. Powell*, 1922 P 240: 127 LT 528].

To prove the terms of a lost lease, an entry in a rent-book by a deceased landlord that he had "agreed to grant a lease for 31 years at £96 rent, and accept the old rent £84 for one year in consequence of the potato famine", *held* admissible as against pecuniary interest because of abatement of first year's rent, although the entry proved an increase in the new rent; and admissible against proprietary interest because the agreement to grant a lease tended to fetter the landlord's absolute ownership [*Connor v. Fitzerald*, 11 LR Ir 106].

Under this section statements are admissible against a party, if they are admissible against the interest of the person through whom he claims [*Rani Srimati v. Khagendra*, 31 IA 127: 31 C 871 : 9 CWN 74]. Statements in a deed by a deceased judgment-debtor after his property has been attached that he had endowed the

attached property, are not admissible against the opposite party or assignee from him [*Harihar v. Siri Gurunath*, A 1930 P 610].

Declarations against interest are admissible although the declarant had no personal knowledge of the facts stated, but spoke or wrote merely from hearsay [*Taylor v. Witham*, 1876 LR 3 Ch D 605; *Percival v. Nanson*, 1851, 7 Ex 1]. Statement of a witness that his grandfather used to say that there was a partition is admissible under s 32(*3*) and not hearsay [*Jaitram v. Narottam*, A 1929 N 131].

Recitals of Boundaries of Adjoining Lands in Sale-deeds, etc.—The statement as to the ownership of a piece of land given as a boundary in a sale-deed in a suit between the pruchaser and the third person in which the ownership of that land so given as a boundary was in question, is not an admission but is relevant as a statment against interest [*Kangali v. Beni*, 34 IC 534 (*Leelanud v. Lakhputtee*, 22 WR 231; *Abdullah v. Kunjbehary*, 14 CLJ 467 **folld**)]. Recitals as to boundaries in documents not *inter partes* are inadmissible under ss 11, 13(*a*), 32(*3*) and 32(*7*) [*V A. Amiappa v. A Chettiar*, A 1972 M 154]. Recitals in documents not *inter partes* are *ordinarily* irrelevant unless they can be brought within the conditions of s 32. Statements in documents not *inter partes* limiting the interest of the excutants by declaring the boundaries of certain land, fall within s 32(*3*) and are admissible if the conditions necessary to bring s 32 into operation are proved [*Reajaddi v. Ganga*, 53 IC 863; also *Trimbak v. Ganesh*, 68 IC 314: A 1923 N 22; *Abdul Rahim v. Jonabali*, 68 IC 329: A 1923 C 299; *Thyagarajan v. Narayana*, A 1940 M 450]. *Ningawa v. Bharamappa*, 23 B 63 *ante*, decided in favour of admissibility of recitals of boundaries of adjoining lands, but it has been dissented from in *Ambika v. Kumud*, A 1928 C 893 and *Karuppanna v. Rangaswami*, A 1928 M 105 *ante*. It has been held in some cases that s 32(*3*) does not make the statement in a document between third parties admissible against a party in suit, for it can be used only against the person against whose interest it is made and not against the whole world [*Brojomohan v. Gaya*, 30 CWN 761: 45 CLJ 55; *Saroj v. Umed*, 25 CWN 1022; *Hari Ahili v. Sanghat*, A 1934 P 167 and other cases cited under s 13 *ante*: "*Recitals in documents not inter partes*"]. A statement of boundaries in a deed between third parties who are dead at the time the statement is sought to be put in evidence, is not generally admissible in evidence either under s 32(*2*) and (*3*) or any other section. It may be admissible only if it is shown (*1*) that at the time the statement was made it was contrary to the interest of the maker and (*2*) that at the time it is sought to be used it is a statement of a relevant fact [*Soney v. Darabdeo*, 14 P 461: A 1935 P 167 FB (*Lalu v. Sahdeo*, 36 IC 610 **overruled**); *Subudhi v. Raghu*, A 1962 Or 40; *Ramautar v. Sheonanadan*, A 1962 P 273]. It is also necessary that the person making the statement must be aware that it is against his interest [*Roman Catholic &c v. S*, A 1976 Knt 75 (*Soney v. Darbdeo sup*, **folld**; *Savitri v. Ram*, A 1950 PC 1 and *Ramrati v. Dwarika*, A 1967 SC 1124 **rel** on—cases discussed)].

Statement of Persons Before Being Executed.—When a person just before he was about to be hanged makes a statement to a magistrate that the approver who had retracted the confession was involved in the crime, it is admissible under s 32(*3*) [*Sh Shafi v. R*, A 1930 N 259 (*Umara v. R*, 6 L 45; A 1925 PC 52 : 52 IA 121 **relied** on)].

Statement to Police by Accomplice and Subsequent Death.—Where an accomplice incriminated himself and the appellant by a statement to the police about the crime and subsequently died, it was admitted in evidence under s 32(*3*) [*Umra v R, sup*].

Recitals in Decree.—Where the recitals in a compromise decree set out the terms of the arrangement between the parties and do not embody the statement of the

parties as to their rights in the subject-matter of the litigation, the recitals cannot be used as evidence under s 32(*3*) [*Jagadis v. Harihar*, 40 CLJ 39: A 1924 C 1042].

Statements Which Expose to Criminal Prosecution or Suit for Damages.—This rule appears to depart from the law laid down in the *Sussex Peerage* case, 11 Cl&F 113, where in order to prove the marriage of the Duke of Sussex and Lady Augusta Murray, statements made by the clergyman, since deceased, who had married them at Rome, were tendered in evidence, on the ground that they were clearly against his interest, inasmuch as they related to an act which rendered him *liable to prosecution* while living or which, at least, he believed to be *illegal*. The statements were rejected. But it may well be thought that a declaration by which a man makes himself liable to a criminal prosecution, or payment of damages, offers as good a guarantee for its truthfulness, as one simply against his pecuniary or proprietary interest. Illustration (*f*) is particularly pointed to this case; it illustrates the difference between the *Sussex Peerage* case quoted above and the change now introduced [Nort p 184].

The words "*would have exposed him*" will no doubt be construed to mean "would have exposed him at the time that the statement was made". It could never have been intended that a statement made after the risks had passed away, as for example, after a suit for damages had become barred by limitation, or after the expiry of two years within which prosecution for offences under the Indian Christian Marriage Act must be instituted (s 76, Act XV of 1872), should be admitted merely because, if made some months or weeks earlier, it would have exposed to a criminal prosecution or to a civil suit for damages. This view has since been supported by the Calcutta High Court and is generally adopted by modern authorities [Field, 6th Ed p 136]. The decision referred to is that of *Nicholas v. Asphar*, 24 C 216. The rule must necessarily be the same as in the case of statement against proprietary or pecuniary interest, for if the statement did not expose the maker to a criminal prosecution or a suit for damages *at the time* it was made, the influence for trustworthiness would not operate. Further, the person at that time must have had knowledge that he was exposing himself to a suit for damages [*Savitri v. Ramran*, A 1950 PC 1 : 76 IA 255 *ante*].

In a divorce suit in India by the husband a letter written to him by the co-respondent who lives in England admitting adultery with the respondent is admissible [*Cockman v. C*, A 1934 A 618 SB]. A woman stated to her paramour *D* that she had witnessed a murder and to the police in the course of an investigation ten days after the act. She then died before the enquiry. *D* deposed to the statement of his mistress before the committing magistrate and then disappeared—*Held* that both statements were relevant under s 32(*3*) as the woman had exposed herself to a criminal prosecution by not giving information about the offence [*Ajodhi v. R*, 56 IC 582 : 16 NLR 30]. A confession by an accused admitted under s 32(*3*) can be used against his co-accused, but it being of the nature of accomplice evidence require corroboration [*Janu v. R*, A 1947 S 122].

A confession to be admissible under s 32(*3*) must have been made before criminal proceedings were started [*Janu v. R, sup*]. On a trial for forgery one of the accused who had made a statement before the enquiring magistrate died before the trial. It was inadmissible, since its maker had already rendered himself liable to criminal prosecution at the time it was made [*R v. Keshav*, 23 Bom LR 248]. The section is inapplicable to a statement of a person against whom there is already evidence which would inevitably lead to his conviction [*Achhay v. R*, A 1947 P 90 : 25 P 347]. A confessional statement made by a deceased conspirator after he had rendered himself

liable to criminal prosecution is not admissible under s 32(*3*) [*Kunjalal v. R*, 38 CWN 1015].

CLAUSE (4)

Opinion as to the Existence of Any Public Right or Custom or Matter of Public or General Interest.—This is the fourth exception to the Hearsay rule, by which declarations of opinion of deceased persons are admissible in proof of any public or general right or custom, or matter of public or general interest. Such evidence is received because it is highly improbable that in matters involving ancient rights of public or general nature, a person would mislead to misrepresent things or would succumb to bias. Such rights can hardly be established by direct proof, the only evidence available being in the nature of tradition or reputation. Reputation evidence of this kind is competent as well against a public right as in its favour [*Drinkwater v. Porter*, 7 C&P 181]. In *Wright v. Doe*, 4 Bing NC 528, ALDERSON B, said:—

> "The general interest which belongs to the subject would lead to immediate contradiction from others, unless the statement proved were true; and the public nature of the right excludes the probability of individual bias, and makes the sanction of an oath less necessary".

In order that *opinion* may be admissible, cl (*4*) requires three things:—

(*1*) The right or custom must be of a *public* or general nature (see s 48) or, it must be any matter of *public or general interest*. Declarations of opinion as to *private rights* are inadmissible [Cl (*7*) *post*, deals with both public and private rights and customs. But cl (*2*) admits statement giving *opinion* as to existence of public right or custom and further it embraces both verbal and written statements. Cl (*7*) admits only written statements and includes other forms of evidence, *viz*, statements in wills, deeds, leases, maps, &c].

(*2*) The declarant must be a person who "would have been likely to be aware" of the existence of the right in question. In other words he should be a person of competent knowledge. This does not mean special study or experience. All that is required is that he should have a personal and reliable knowledge as to the existence of the public right or custom in question. The test is whether the deceased person expressing the opinion was likely to have had knowledge. Such knowledge may be by means of oral tradition handed down from *Mahant to Chela* [*Ram Pd v. Gurdwara*, A 1931 L 161].

> In *Crease v. Barrett*, 1 CM&R 829, PARKE, B, said: "In a matter in which all are concerned, reputation from any one appears to be receivable; but of course it would be most worthless, unless it came from persons who were shown to have some means of knowledge, as by living in the neighbourhood".

(*3*) The third restriction is that the declaration must have been made *ante litem motam, ie*, before the date at which the controversy as to such right, custom or matter arose, which subsequently culminated in a suit. The reason is thus stated by DAMPIER, J, In *R v. Cotton*, 3 Camp 444, 446:—

> "When there was no existing dispute respecting them, these declarations are considered as disinterested, dispassionate and made without any intention to serve a cause or mislead posterity; but the case is entirely altered *post litem motam*, when a controversy has arisen respecting the point to which the declarations apply. Declarations then made are so likely to be produced by interest,

prejudice or passion, that no reliance can safely be placed upon them, and they would more frequently impose upon the understanding that conduce to the elucidation of the truth. It has, therefore, been wisely decided that evidence of reputation arising *post litem motam* shall not be admitted".

[On this subject see Taylor s 607 *et seq*; Best, 11th Ed, s 497; Phipson, 11th Ed, para 971 *et seq*; Powell, p 291 *et seq*].

In civil proceedings in England question relating to the admissibility of declarations as to public or general rights must now be considered in the light of the relevant provisions of the Civil Evidence Act, 1968.

Illustration (*i*) exemplifies this clause. S 49 refers to the opinion of living witness on usages, tenets, etc (see *post*, s 49).

Foundation of the Rule.—The admissibility of hearsay evidence respecting matters of public and general interest appears to rest on the following grounds:—that the origin of the rights claimed is usually of so ancient a date and the rights themselves are of so undefined and general a character, that direct proof of their existence and nature can seldom be obtained and ought not to be required; that in matters, in which the community are interested, all persons must be deemed conversant; that as common rights are naturally talked of in public, and as the nature of such rights much lessens the probability, if it does not exclude the possibility, of individual bias, what is dropped in conversation respecting them may be presumed to be true; that the general interest which belongs to the subject would lead to the immediate contradiction from others, if the statements proved were false; that reputation can hardly exist without the concurrence of many parties unconnected with each other who are all more or less interested in investigating the subject: that such occurrence furnishes strong presumptive evidence of truth; and that it is this prevailing current of assertion which is resorted to as evidence, for to this every member of the community is supposed to be privy, and to contribute his share [Tay s 608]. As to the admissibility of hearsay testimony in regard to public and general rights, see Tay s 609, quoted *ante*, s 13 "*Public and General rights*". If, however, the rights in dispute be simply general, that is, if those only who live in a particular district, or adventure in a particular enterprise, are interested in it, hearsay from persons wholly unconnected with the place of business would be not only valueless, but probably altogether inadmissible. Competent knowledge in the declarant is an essential pre-requisite to the admission of his testimony and although such knowledge is presumed when the matter is of public concernment, yet in other matters some particular evidence of such knowledge is generally required [Tay s 609].

Many instances of questions involving matters of public or general interest are given in Taylor, *eg*, the limits of a town, the extent of a parish, the boundary between countries, parishes, hamlets, or manors, a claim of toils on a public road, the fact whether a road was public or private &c, &c, (see Tay s 613). Instances of private rights are to be found in Tay s 614. In the case of ancient declaration, *eg*, *Wakf*, direct evidence of user is of very little value. What must be of greater value is not direct evidence, but evidence of facts and circumstances as leading to the inference one way or the other [*Busoid v. Newaz*, 33 CWN 439]. The question of the limits of a particular revenue *mehal* is not a matter of public right or public or general interest within s 32(*4*) and a map prepared in a previous case showing the limits of such a *mehal* is not admissible [*Kesho v. Bahuria*, 41 CWN 577: A 1937 PC 69: 16 P 258]. In view of this Privy Council decision some documents were ruled out and it was observed by VARADACHARIAR, J, in *Sevugan v. Srimathu*, A 1940 M 273:—

"The decisions referred to in para 613 of Taylor on Evidence would support the view that they may be admissible even under cl (*4*) of s 32, as statement relating to a matter of public or general interest, namely village boundries. But in view of the observations of their Lordships of the Judicial Committee in *Kesho Pd v. Bahuria, supra*, as to the scope of this clause, we do not feel ourselves at liberty to follow the English cases".

In *R v. Inhabitants of Bedfordshire*, 4 E&B 541 : 14 Jur 208, LORD CAMPBELL, explained the law as follows:—

"The law of England lays down the rule, that on the trial of issues of fact before a jury, hearsay evidence is to be excluded as the jury might often be misled by it; but makes exception where a relaxation of the rule tends to the due investigation of truth and the attainment of justice. One of these exceptions is, where the question relates to matters of public, or general interest. The term 'interest' here does not mean that which is 'interesting' from gratifying curiosity, or a love of information or amusement, but that in which a class of the community have a pecuniary interest or some interest by which their legal rights or liabilities are affected. The admissibility of the declarations of deceased persons in such cases is sanctioned, because these rights and liability of ancient and obscure origin, and may be acted upon only at distant intervals of time; because direct proof of their existence, therefore, ought not to be required; because in local matters in which the community are interested, all persons living in the neighbourhood are likely to be conversant; because common rights and liabilities being naturally talked of in public, what is dropped in conver-sation respecting them may be presumed to be true; because conflicting interest would lead to contradiction from others if the statements were false; and thus a trustworthy *reputation* may arise from the concurrence of many parties uncon-nected with each other, who are all interested in investigating the subject. But the relaxation has not been and ought not to be, extended to questions relating to matters of mere private interest, for respecting these, direct proof may be given and no trustworthy reputation is likely to arise. We must remark, however, that, though a private interest should be involved with a matter of public interest, the reputation respecting rights and liabilities affecting classes of the community cannot be excluded, or this relaxation of the rule against the ad-mission of the hearsay evidence would often be found unavailing".

From the rule of *lis mota* three propositions follow: (*1*) that declarations will not be rejected in consequence of their having been made *with the express view of preventing disputes*; (*2*) that declarations are admissible, if no dispute has arisen, though made in *direct support of the title* of the declaration; (*3*) that the mere fact of the declarant having stood, or having believed that he stood in *pari jure* with the party relying on the declaration, will not render his statement inadmissible [Tay s 630].

Opinion of General Reputation And Not of Particular Facts Within the Declarant's Knowledge.—The evidence admissible under the fourth clause is a "statement (which) gives the *opinion*" of the declarant, *ie*, of general reputation which his position has naturally brought within his knowledge and not of *facts* within the declarant's knowledge. As the subject-matter of inquiry is public right or custom or matter of public or general interest, the statement must be founded not on the individual opinion or knowledge of the person, but on the concurring opinions of many others of the community who are equally interested in the matter, and which

opinion having thus accumulated and grown through generations, furnishes strong presumptive evidence of its trustworthiness.

"Reliance is placed, not on the credit due to the assertion of a single individual, but is sanctioned by the concurrent opinion and assent of indefinite numbers. In such cases a presumption exists that the truth of the fact is known and faithfully communicated". [Starkie, p 46]. "The facts for which such an opinion or reputation can be taken as trustworthy must be such facts as have been of interest to *all members of the community* as such, and therefore have been so likely to receive general and intelligent discussion and examination, by competent persons, that the community's received opinion on the subject cannot be supposed to have reached the condition of definite decision until the matter had gone, in public belief, beyond the stage of controversy and had become settled with fair finality" [Wig s 1598].

The necessity for competent knowledge in the declarant may serve to explain and reconcile the inadmissibility of *reputation* in regard to *particular facts*. Upon general points such evidence is receivable, because of the general interest which the community have in them; but particular facts, not being equally notorious, may be misrepresented, or misunderstood, and may have been connected with other facts, by which, if known, their effect might be limited or explained. Reputation as to the evidence of such particular facts is therefore rejected. Thus, if the question be whether a road be public or private, declarations by old persons since dead, that they have seen repairs done upon it, will not be admissible [*per* PATTERSON, J, in *R v. Bills*, 7 LJQB 43); neither can evidence be received that a deceased person planted a tree near a road and stated at the time of planting it that his object was to show where a boundary of the road, was when he was a boy [*R v. Bliss, sup*; Tay s 617]. Taylor s 617 was quoted with approval in a case and it was held that in the case of *Mahants*, even if they have had knowledge by means of oral tradition handed down from *Mahant* to *Chela*, the opinion as to matters of public interests would be relevant but not particular facts [*Ram Pd v. Shiromani*, 1931 L 161].

An independent and responsible witness who lived in the locality of the premises ever since his boyhood is entitled to speak of the reputation of the premises as quarters for prostitution and brothel keeping and the importance of such evidence lies in the fact that it was the evidence of reputation under s 32(*4*) which went back to the period not only when it was let out but even prior thereto. The evidence relating to the reputation of a house, by a person who resides in a part of the same house as a shop-keeper saying what type of people visits there is also admissible as cogent evidence [*Pranballav v. Tulsibala*, A 1958 C 715: 63 CWN 258].

Opinion as to Matter of Public or General Interest.—Declarations by deceased persons of competent knowledge, made *ante litem motam* are receivable to prove ancient right of public or general nature. [See Hals 3rd Ed, Vol 15, paras 560-63]. The reason is that where the matter is of public concernment, all the Queen's subjects are presumed to have knowledge of it [Tay ss 546, 811]. In a suit for a declaration that a mosque and lands attached to it belong to the *wakf* of a particular person, transactions in respect of neighbouring lands containing declarations *ante litem motam* as describing the property as "Masjidbari of Shahzadi Misri Begum" are admissible though hearsay [*Busoid v. Newaz*, 33 CWN 439: A 1929 C 533]. Recitals of boundaries of plots in a document do not consitute the opinion of the executant of the deed as to the existence of a public right or custom and are not admissible to prove it [*Ramsaran v. Narayan*, A 1954 C 125].

—Public and General Right.—Public rights concern all members of the State and therefore common to all—*eg*, rights of highway, ferry, etc. General rights affect a

lesser portion of the community, yet a large number of population, *eg*, boundaries of a village or a town. The distinction between *public* and *general* rights is of some significance in England, as in the case of *public rights*, all being concerned may generally be presumed competent, so that the absence of peculiar knowledge goes, strictly speaking, to weight and not admissibility; but in the case of *general rights* the competency of the declarants must be proved [*Crease v. Barrett*, 1 CM&R 919, 928; *Mercer v. Denne*, 1905, 2 Ch 538, 560; *Assheton-Smith v. Owen*, 75 LJCh 181, 188, 192; see Phip 11th Ed p 406]. But cl (*4*) of this section requires some knowledge in all cases.

Prescriptive rights which belong to certain tenants of manor by virtue of their individual grants, and not to all the tenants are not general rights and reputation from any deceased inhabitant or tenant is not admissible. Such rights are mere rights of private prescription [*Earl of Dunraven v. Lelwellyn*, 15 QB 791: 19 LJQB 388. See the remarks of PARKE, B, in this case].

Norton gives the following examples of matters of public and general interest:—(*a*) A boundary between villages; (*b*) the limits of a village or town; (*c*) a right to collect tolls on a public road; (*d*) a right claimed by corporation to trade to the exclusion of others; (*e*) a right to pasturage of waste lands: (*f*) liability to repair roads or plant trees; (*g*) right to watercourses, tanks, and ghats for washing; (*h*) rights of common and the like.

Ss 37, 38, 42 and 48 relate to the admissibility of evidence in matters of public and general interest, in addition to this clause. As to Public and General rights, see also *ante*, s 13.

—Meaning of the 'Right' in This Clause.—S 13 speaks of "right or custom" and s 32 (*4*) speaks of "public right or custom". "Right" is not restricted to incorporeal rights but to all kinds of rights known in law (*ante*, s 13: "*Right includes any and every right*").

This clause is inapplicable to a document purporting to deal with rights of private individual as against the public, in which the interests of the individual form the subject-matter of the statement; nor is it possible to say that the statement of opinion in the judgment could, within the meaning of the concluding words of the clause, be regarded as made before any controversy as to such matter had arisen [*Heiniger v. Droz*, 25 B 433: 3 Bom LR 1].

—Reputation Evidence is Competent, Both For And Against Public-Right.—In a suit by a zemindar to recover certain forest tracts from Government, the plaintiff relied on certain accounts (called *Ayakut* accounts) as furnishing proof of inclusion of the said tracts within the limits of his zemindary.—*Held* that inasmuch as they were from time to time prepared for administrative purposes by village-officers and were produced from proper custody and otherwise sufficiently proved to be genuine, they were admissible as evidence of reputation. No distinction can be drawn between evidence of reputation to establish and to disparage a public right [*Siva Subramaniya v. Secy of S*, 9 M 285. See *Drinkwater v. Porter, ante*].

Crown.—Declaration as to general or public rights is admissible for or against the Crown, as well as an ordinary party [*A-G v. Emerson*, 1891 AC 649].

Evidence is Admissible to Prove Only a Fact in Issue And Not Merely a Relevant Fact.—To prove an alleged custom as to adoption among the *Kedwa Kumbi* caste, a statement signed by several witnesses to the effect that widow of that caste cannot adopt, according to the custom of the caste, without the express autho-

rity of her husband was held to be inadmissible, as under s 32(*4*) evidence can be given of statements of relevant facts and not to facts in issue [*Patel Vandravan v. Patel Mani*, 15 B 365]. This case has been **dissented** from in *Raghubhusana v. Vidyavaridhi*, 34 IC 875 where it has been held that statement of a deceased person relating to a fact in issue is admissible under cl (*4*); see also *Biro v. Atmaram*, 64 IA 92: A 1937 PC 101. The question whether under s 32 statements of facts in issue are relevant arose in *Jadav v. Pushpabai*, A 1944 B 29 but no opinion was expressed.

Existence of "Custom".—In a suit to determine the right of succession as between sons and co-wives, a letter of the Collector to the Board of Revenue containing a summary of the statements by zemindars as to the rights of inheritance to zemindari in the same district was held inadmissible [*Ramalakshmi v. Sivanatha*, 14 MIA 570: 12 BLR 396: 17 WR 553].

Proof of a custom, whereby the zemindar of a village is entitled to one-fourth of the purchase money when a house is sold privately, is not proof of a similar custom in respect of sales in execution of decrees [*Kalian v. Bhagirathi*, 6 A 47]. Statement of deceased as to existence of family custom [*Amina v. R*, A 1933 O 236], of local usage [*Ram Subhag v. Sheo Sahai*, A 1933 A 376] is admissible. Opinion of a living author as to the existence of a public custom recorded in a book is admissible when the expenses of calling him as a witness would be unnecessarily high [*Somar v. Budhu*, A 1937 P 463].

Neither cl (*4*) nor cl (*5*) of s 32 justifies the admission of hearsay evidence upon the question whether a man was, at the time of his death, joint with, or separate from other members of his family, nor can the grounds of the opinion of a deceased person as to the existence of a custom, even if stated to a witness be, as such, proved under that section [*Parbati v. Chandrapal*, 8 OC 94 (*Garuradhwaja v. Saparandhwaja*, 27 IA 238 : 5 CWN 33: 23 A 37 refd to)]. As to custom see s 13 *ante*.

Statement Must Be Before the Controversy.—Statement of deceased in deed before controversy is admissible [*Khagum v. Md Ali*, A 1955 AP 209]. Statements of deceased persons have not the sanction of oath, and the persons making them cannot be cross-examined. It is necessary therefore that such statements should not be made under a bias *ie*, after a controversy had arisen. Statements after controversy are equally inadmissible under s 49 [*Pratap v. Jagadish*, 40 CLJ 331: 82 IC 886; *Parbhu v. Jitendra*, A 1948 O 307]. The opinion must be the expression of independent opinion based on hearsay and not repetition of hearsay. The weight of the evidence would depend on the position and character of the witness and of the persons on whose statements he has formed his opinion [*Garuradhwaja v. Sabarandhwaja, sup*]. Evidence oral or documentary, as to statements of a deceased person as to the custom in a family is not admissible, if it appears that such statements were made after a controversy as to custom has arisen [*Ekradeswar v. Janeshwari*, 41 IA 275, 284: 18 CWN 1249: 42 C 582].

Assertion of private right to negative public right.—Statement made by great grandson's son of original grantee in *inam* proceedings—Statement made *ante litem motam* must be given great weight [*Mazhar Ali v. Gulam*, A 1958 AP 8].

Form of Declaration.—Declarations as to public or general rights may be oral or written and may be in any form or manner, *eg*, declarations as to public rights may be made in old leases or deeds between parties [*Brett v. Beales*, 1829, M&M 416; *Plaxton v. Dare*, 10 B&C 17], in wills (see cl 7, *post*); in maps (s 36), in orders, judgments, decrees (s 42). "Statements of facts in issue, or relevant or deemed to be relevant to the issue, made in public maps or charts generally offered for public sale

as to matters of public notoriety, such as the relative position of towns and countries and such as are usually represented or stated in such maps or charts, are themselves deemed to be relevant facts, but such statements are irrelevant, if they relate to matters of private concern or matters not likely to be accurately stated in such documents" [Steph. Art 35]. Depositions in an ancient suit for possession of a fishery, as between two private claimants have been held admissible in a subsequent suit involving the right of the public as against the descendants of one of them [*Devonshire v. Neill*, 2 LR Ir 132].

CLAUSES (5) & (6)

Matters of Pedigree or Family History or Family Tradition.—These are the 5th and 6th exceptions to the Hearsay rule. The two clauses may be conveniently considered together as covering the whole subject of pedigree evidence. Declarations by deceased relations, made *ante litem motam*, are admissible to prove matters of pedigree. Such declarations are receivable on the ground of necessity, better evidence of the facts being often unobtainable, and partly because the peculiar means of knowledge possessed by the declarant, and his absence of interest to misrepresent, clothe the declarations with a *prima facie* probability of truth. To constitute a "matter of pedigree" there must be a genealogical question actually in issue in the proceedings, and the declarations must relate either directly thereto, or at all events to some incident of family history required for the proof of such issue [Hals, 3rd Ed, Vol 15, para 564]. In *Whitelocke v. Baker*, 13 Ves 514, LORD ELDON said:—

> "Declarations in the family, description in wills, descriptions upon monuments, description in Bibles and registry books, are all admitted upon the principle that they are natural effusions of a party who must know the truth and who speaks upon an occasion when his mind stands in an even position without any temptation to exceed or fall short of truth".

While under the English law declaration made by deceased persons are admissible only when a question relating to pedigree is in issue or in other words to prove "matters of pedigree", under this section such declarations are admissible to prove the facts contained in them *on any issue* ..... It has pointed out by PETHERAM CJ, that the law in India regarding the admissibility of statements of deceased persons relating to the existence of any relationship by blood, marriage or adoption, is different from the law of England and the effect of this section is to make a statement, made by such a person, relating to the existence of such relationship, admissible to prove the facts contained in the statement on any issue. Not only are such statements admissible in proof of relationship upon any issue, whether of pedigree or not, but they are also admissible in cases other than of pedigree to prove the commencement of the relationship in point of time or the date of the birth of the person in question [*Dhanmull v. Ram Ch*, 24 C 265: 1 CWN 270; see *Ram Ch v. Jogeswar*, 20 C 758]. Blood relation does not mean statutory next of kin, but a person who stands in lawful descent from a common ancestor [*per* RUSSEL, J, in *Lanyon v. L*, 1927, 2 Ch 254]. S 32(*5*) is much wider than the common law rule in England. A statement in a deposition relating to the existence of any relationship, made by a deceased person, is admissible in evidence though it was made in a case in which the issue was the same as in the case in which it is sought to be proved [*Gokul v. Baldeo*, A 1928 P 113: 7 P 90]. A statement whether an ancestor of the person making the statement was related as an elder uncle or brother or a younger uncle or brother is a statement as to "relationship" within cl (*5*) [*Kanhaiya v. Ram Dei*, A 1944 O 162]. The phrase "existence of relationship" includes the non-existence of

relationship. So the statement in a deed that a person died issueless is admissible [*Suba Raut v. Dindayal*, A 1941 P 205: 191 IC 674].

The Act does not contain any express provision making evidence of general reputation admissible as proof of relationship [*Lakshmi v. Venkata*, A 1937 PC 201: 168 IC 881: 39 Bom LR 1005]. It has been held that evidence of a tradition in the family that an ancestor of the defendants had established deities and granted the plaintiff an annuity in perpetuity for their worship, charging upon the defendant's estate is hearsay and not admissible [*Srish v. Rakhalananda*, 68 IA 34: 45 CWN 435: A 1941 PC 16].

In civil proceedings in England question relating to the admissibility of declarations as to pedigree must now be considered in the light of the Civil Evidence Act 1968.

Persons Whose Declarations are Admissible and Their Competency.—Declarations to be admissible under this head must have been made by blood-relations of the family, or by their consorts, and not by persons who are merely related to the latter and not to the former, nor a *fortiori* by friends, neighbours, or servants of the family, or the family solicitors. Declarations by illegitimate relations are usually inadmissible under this rule, on the principle that a bastard, being *filius nullius* can have no relations; though an admission by a deceased person of his own illegitimacy would always be evidence against his representatives as an admission ..... No very strict rule applies to the competency of the declarants. Thus it is not essential that they should have had personal knowledge of the facts stated; it is sufficient if they spoke merely from what they heard in the family, though if the hearsay was avowedly derived from strangers it will be rejected. (Hals 3rd Ed Vol 15, para 565; Tay ss 635, 643].

It should be noted that s 32 does not apply when the person making the statement is not dead or otherwise incapable of giving evidence [*Mehir v. Md Ali*, 84 IC 927 : A 1925 L 63].

The rule under this section is different from the English law. Statements of persons other than blood-relations, are also admissible under the fifth clause when the persons making the statements had special means of knowledge as to the existence of any relationship, *eg* deceased relatives, servants, dependants, family friends (*Mahima v. Mathoora*, 9 WR 151; *Sangram v. Rajan*, 12 IA 183: 12 C 219; *Garuradhwaja v. Saparandhwaja*, 27 IA 238: 23 A 37; *Bejai v. Bhupindra*, 22 IA 139: 17 A 456; *Shamlall v. Radha*, 4 CLR 173 and other cases cited *post*). Before a pedigree can be admitted under cl (*5*) it must be proved that it was either prepared by the deceased or that the deceased had that personal knowledge and belief which must be presumed in any statement of the deceased person which is admissible in evidence [*Md Azim v. Md Saadat Ali*, A 1931 O 177; *Mata Baksh v. Ajodhia*, A 1936 O 340]. The restriction as to special knowledge is not to be found in the sixth clause. It is enough if the statement relating to the existence of relationship between *deceased persons* appears in any will, family pedigree, tombstone, &c. So a family pedigree which may not be admissible under cl (*5*) for want of special means of knowledge on the part of the maker, may sometimes be admissible under cl. (*6*). But it should be noted that the fifth clause refers to the existence of relationship between *any persons* (dead or alive) whereas the sixth clause refers to the relationship between *deceased persons* only. Under both the clauses the statement must have been made *ante litem motam*, *ie* before the controversy arose.

Clause (5) should be compared with s 50 and the difference in the language of this clause and s 50 should be noted. S 50 makes opinion expressed by *conduct* in cases of pedigree relevant. Under s 60, an opinion must be proved by the persons who held the opinion. This section among other things provides for cases where these persons cannot be called.

The declaration of an illegitimate member of the family would be receivable under this clause, if for instance, he lived with and was treated as a member of the family; *aliter*, if he was kept apart from the family, and his existence and connection ignored or kept secret. The knowledge from position, &c must be proved *aliunde*, independently of what the declaration may state, before the contents of the declaration can be listened to [*Monkton v. Att-Genl*, 2 Russ & M 156; Nort p 189]. In England declarations by illegitimate relations are excluded on the ground that they do not belong to the family [Tay s 636]; but Wigmore calls it "a mere juggling with legal rules." The question is not whether the illegitimate child is or is not the legal heir; but the question is was he likely to know of the alleged fact of the family history [Wig s 1492].

Difference Between Clauses (5) and (6).—The following distinctions may be drawn between the two clauses:

CLAUSE (5)	CLAUSE (6)
(*i*) Refers to statement relating to the existence of relationship between any person living or *dead*.	(*i*) Refers to statement relating to the existence of relationship between *deceased persons only*. Thus it does not embrace the case of a statement of relationship between a living person and a dead person.
(*ii*) Declarant should have had *special means of knowledge*.	(*ii*) There is no such restriction as to special means of knowledge. It is enough if the statement is made in a will or deed relating to the affairs of the family to which the deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait, &c no matter by whom it was made.
(*iii*) The evidence is the declaration of a *person* deceased or whose attendance cannot be secured.	(*iii*) The evidence is that of *things*, *eg* genealogical tables, tombstone, family portraits, coffin-plates, hatchments, rings armorial bearings, mural tablets, &c.
(*iv*) Applies to statements both *verbal* or *written*.	(*iv*) Applies only to statements contained in any deed, will &c *ie* statement must be *written*.

In both the clauses there is one common point, *viz* the statement must have been made before the controversy, *ie ante litem motam*. The element to be avoided is a bias in the mind of a declarant; and this is sufficiently probable if a dispute or controversy is in progress, even though it may not have reached the stage of legal proceedings [Wig s 1483]. "The 'lis' would surely have dated at least from the time when the parties have respectively assumed a hostile attitude....a suit is not necessary

to constitute 'lis" [*per* WILLES J, *Butler v. Mountgarret*, 6 HLC 641]. To obviate bias, the declarations must have been made *ante litem motam*, which means not merely before the commencement of legal proceedings, but before even the existence of any actual controversy, concerning the subject-matter of the delcarations. So strictly has this requirement been enforced that the fact that such a dispute was unknown to the declarant, or was fraudulently begun with a view to shutting out his declarations, has been held immaterial.....Declarations made in the obvious interests of the declarant will, generally speaking, be rejected. [Hals 3rd Ed Vol 15, para 562]. See *Md Azim v. Md Saadat Ali*, A 1931 O 177.

As to what are questions relating to "the existence of relationship by blood, marriage or adoption" the law under the Act is very different from the law in England which is stricter. There hearsay evidence is confined to the proof of the pedigree and does not apply to proof of the facts constituting pedigree, *eg* birth, death, marriage, &c [*ante*: "*Matters of Pedigree &c*"]. *Illustration* (*k*) exemplifies clause (*5*) and *illustrations* (*l*), (*m*) exemplify cl [*6*]. These illustrations indicate that a declaration or statement is relevant not only to prove matters of pedigree or what is known as "genealogical purpose," *eg* relationship, marriage, adoption, legitimacy, paternity, &c but it is also relevant to prove time, place or date of birth, death or marriage, order of birth, parentage, &c when such questions are in issue [see *Ram Ch v. Jogeshwar*, 20 C 758; *Dhanmull v. Ram Ch*, 24 C 265; *Oriental G S L Ass Co v. Narasinha*, 25 M 183; *Krishnama v. Veeravalli*, 38 M 166; *Naima v. Basant*, A 1934 A 406, 407, 409; *Mahadeo v. Ghulam*, A 1947 A 161 and other cases cited *post*]. This law appears to be otherwise in England [see *Haines v. Guthrie*, 13 QBD 818; *R v. Erith*, 8 East 839]; but it has been remarked by Phipson that as it is not easy to define what are "matters of pedigree," or "genealogical purpose," hearsay evidence of locality, date and place of birth, &c may sometimes be admitted to elucidate matters of strict pedigree, but such incidents will be rejected when although inferentially tending to prove, they are not immediately connected with the question of pedigree or are not required for some genealogical purpose. [Phip 11th Ed p 421].

"Special Means of Knowledge".—Proof of competent knowledge must be given before admission of the evidence under cl (*5*). The burden of proof is upon the party who offers such evidence (s 104). It is not necessary that the declarant should have had personal knowledge of the facts stated; indeed, if this were otherwise, the main object of relaxing the hearsay rule would be frustrated, since most family information is obtained at secondhand. It is sufficient, consequently, if his information purported to have been derived from other relatives, or from general family repute or even simply from "what he has heard," provided such "hearsay upon hearsay" does not directly appear to have been derived from strangers [*Shedden v. A G & Patrick*, 30 LJP & M 217; *Lovat Peerage*, 1885, 10 App Cas 763 : Phip 11th Ed p 424]. "The declarant must *appear to have had fair knowledge, or fair opportunities* for acquiring knowledge, on the subject testified to. It is of course *not* to be expected that *personal observation* shall be demanded, *ie* that only from those who were present at the birth, wedding or death, shall hearsay statements be received; this would be to misconceive the theory of the Exception. That theory is that the constant (though casual) mention and discussion of important family affairs, whether of the present or of past generations, put it in the power of members of the family circle to be fully acquainted with the original personal knowledge and the consequent tradition on the subject, and that those members will therefore know, as well as any one can be expected to know, the facts of matter" [Wig s 1486]. In *Monkton v. Att-Genl*, 2 Rus&M 165, BROUGHAM LC, said:—

"The declarations tendered may either refer to what the party knew of his own personal knowledge, or, as is much more frequently the case, to what he had heard from others to whom he gave credit."

The Act uses the words "special means of knowledge" and not "personal knowledge". So, persons who by reason of their position, association or intimacy with the family are likely to know the facts or have had opportunities to know the facts, are competent persons and the line need not be drawn at relatives, *eg* old servants, priests, family physicians, dependants, intimate friends, etc. Care is to be taken however to exclude "hearsay upon hearsay" derived from strangers. The cases cited below indicate what class of persons comes under the rule.

Statements made by deceased persons are relevant when they relate to the existence of any relationship between persons as to whose relationship the person making the statement had special means of knowledge and when the statement was made before the question in dispute was raised. For this purpose, and to the extent specified in s 32(*5*), statements of deceased relatives, servants and dependants of the family were held admissible in evidence [*Garuradhwaja v. Saparandhwaja*, 27 IA 238: 23 A 37: 5 CWN 33]. Witnesses should not be permitted to give their testimony as to matters which could not be within their own knowledge without first stating the source of their information. They should be required to prove the statements relied upon with proper particularity and with due attention to the requirement that the person making the statement had special means of knowledge [*Lakshmi v. Venkata*, A 1937 PC 201: 168 IC 881]. It is not necessary that the special means of knowledge of the witness should be of a particular character. It is for the court to decide whether the witness had such special means of knowledge [*Ramakrishna v. Chinna*, 26 IC 110]. In India the rule is wider than in England where it applies to blood-relations and their consorts. [Hals 3rd Ed Vol 15 para 565]. It is a question of fact as to whether the person who made the statement had special means of knowledge [*Ramkrishna v. Tirunarayana*, A 1932 M 198]. In the case of an old member of the family, special knowledge may be presumed [*Md Asad v. Sadiq*, A 1943 O 91; *Prabhakar v. Sarubai*, A 1943 N 253].

"Before the Question in Dispute Was Raised." [***Ante Litem Motam***].—The condition of *ante litem motam* involves the idea that the dispute, if any, on the former occasion must not be the same in substance as the dispute in the later suit. In other words the statement now sought to be used will not be excluded if it merely related to some other matter foreign or collateral to the matter in controversy on the former occasion [*Subbiah v. Gopala*, A 1936 M 808; *Bindeshwari v. Ramraj*, A 1939 A 61]. In order to make a statement inadmissible on this ground, the same thing must be in controversy before and after the statement is made [*Kalka v. Mathura*, 35 IA 166: 30 A 510, 523]. The expression "before the question in dispute was raised" means not only before actual litigation in which the dispute is to be decided but before any controversy regarding the subject-matter of that statement was raised [*Kalidindi v. Chintalapati*, A 1968 SC 947; *Rupkishore v. Patrani*, 50 A 152; *Savitri v. Bhaskar*, A 1972 Or 148; *Motilal v. Sardar*, A 1976 Raj 40]. When the question is whether the plaintiffs are next reversioners, statements made by deceased relations as to the relationship of the plaintiffs with the last male owner are not excluded under s 32(*5*) even though they are made after the plaintiffs had asserted their claims on previous occasions after the death of the last male owner [*Jainath v. Danpal*, A 1947 Q 164].

In a suit the question was whether plaintiff's father *M* was *bandhu* of *J*. In proof of his pedigree, plaintiff wanted to rely on the previous statements of *M* in a suit by the Secretary of State claiming the property of *J* as escheat—*held* that as the question of

alleged relationship of *M* with *J* was in controversy in the previous suit, the statements of *M* were not admissible [*Brijmohan v. Kisun*, A 1938 A 443: 176 IC 441]. Statements as to the existence of a relationship made by witnesses in previous judicial proceeding between the parties or their representatives in interest at a time after the question in dispute arose, are not admissible in evidence when the witnesses are dead. They are admissible, if at all, under s 33 provided the questions in issue are substantially the same [*Bhagwan v. Mahesh*, 40 CWN 360 PC].

Contemporaneousness.—The declarations need not refer to contemporaneous events; statements as to matters occurring six generations before have been received [*Monkton v. Att-Genl*, 2 Rus & M 157-8; *Davis v. Lowndes*, 6 M&G 525; Phip 11th Ed p 424], for as LORD BROUGHAM said, such a restriction "would defeat the purpose for which hearsay in pedigree is let in by preventing it from ever going back beyond the lifetime of the person whose declaration is to be adduced in evidence—it would even render inadmissible the statement of a deceased person as to the maiden name of his own grandmother" [*Monkton v. Att-Genl, sup*; Tay s 639].

Indirect and Negative Evidence.—It is not necessary that the declaration should be *direct or express*; it is sufficient if they speak of the rights and benefits to which the party would be entitled by virtue of his birth and relationship; thus the status of a member of the family might be conveyed by saying that "he would have the property and be a gentleman" [*Isaac v. Gompertz*, cited Hubback 651; *Doe v. Randall*, 2 M &P 20]. And the evidence may be *negative* as well as positive, *eg* the omission of particular persons from mention or benefit in family wills and settlements, and (specially in proving the exhaustion of remoter members of the family) unanswered advertisements and ineffectual enquiries [*Greaves v. Greenwood*, 2 Ex D 289; Phip 11th Ed p 424; *cf* the presumption of death of persons in s 108 not heard of for seven years].

Statements Admissible Under Cl (5).—S 32(*5*) embraces every statement made by a deceased person as to relationship if—(*1*) he had special means of knowledge and (*2*) it was made *ante litem motam*. These are the only prerequisites to its admission, and it does not affect its admissiblity whether it was made in a judicial proceeding or otherwise or if made in a judicial proceeding that it was not relevant to the matter in issue in respect of which the statement was made [*Biro v. Atma Ram*, 64 IA 92 41 CWN 645: A 1937 PC 101]. A document executed subsequent to the dispute cannot be relied upon for ascertaining the relationship [*Chakicherla v. Atmakuru*, A 1973 AP 149]. The following are instances of statements regarding relationship held admissible under cl (*5*):—

—Statements Made By Deceased Persons or Their Deceased Relations, etc.—Statement by a deceased woman as to the name of her mother and other relations (except her husband) is admissible in a charge under s 314 I P Code [*Wahid v. R*, A 1929 S 250]. When the author of a document was not traceable and the witness did not know the language of the document, the document could not be proved [*S v. Babulal*, A 1965 Raj 90; *Chirutha v. Neelkanta*, A 1957 K 106]. A statement by a deceased *sapinda* as to the circumstances under which he received a sum of money in connection with an adoption is admissible as it relates to the existence of relationship by adoption [*Danakoti v. Balsundara*, 36 M 19: 18 IC 989]. Statement as to relationship by a person having special means of knowledge made in the written statement of a previous suit is admissible [*Sarvabhotla v. Kamala*, A 1939 M 446]. As there are so many heirs under the Hindu law, a statement by the deceased in a deed that there was no person in his family alive, near or remote, cannot be construed as meaning that deceased left no heir [*Secy of S v. Kanhaiya*, A 1941 O 337]. A

statement by a deceased person that he was adopted when he was four years old into another family is admissible [*Golab v. Fadali*, 68 IC 566: A 1921 N 153]. Statement of the deceased adoptive mother relating to adoption in the deed of adoption is admissible [*Punjabrao v. Sheshrao*, A 1962 B 175]. Statement of an adoptive father in an earlier revenue case that plaintiff was adopted by him and who was unable to depose on account of infirmity is admissible [*Subbarao v. Venkata*, A 1964 AP 53]. Document transferring property by *B* as guardian of his adopted son *A* is admissible [*Jagabandhu v. Bhagu*, A 1974 Or 120]. Declaration by a person as to his parentage is admissible [*Santu v. Tara*, 85 IC 407: A 1925 O 537]. A document containing a statement of a deceased person as to the mode of succession obtaining in a particular family is admissible [*Patinharkaru v. Raman*, 24 IC 519]. Reference to relationship of donee with donor's husband in final order for mutation giving effect to gift is admissible [*Fazal Huq v. Said Nur*, A 1948 L 113]. Statement by *A* who is dead in gift deed to *B*, which is untainted by undue influence, that the later is his wife, is entitled to proper weight [*Vaikuntam v. Puppala*, A 1971 Or 49]. Statement by a *muzumdar* that the estate should be handed over to *X*, as the sole heir of a zemindar, is admissible, as made by a person having special means of knowledge [*Krishna v. Rama Sami*, 40 M 871: 33 MLJ 277].

Statements made by deceased members of the family about certain facts of family history and statements regarding the seniority of members of the family are admissible. The clause should be liberally construed [*Krishnapal v. Rajkuar*, A 1927 O 278]. For the purpose of proving relationship, statements of deceased relatives, servants, dependants, &c are admissible. It is a question of fact as to whether the person had special means of knowledge [*Ramakrishna v. Tirunarayana*, 55 M 40]. There can be direct evidence about relationship by blood. But if the witness has no direct knowledge, he can give evidence about the statements relating to the existence of any relationship by blood between two or more persons heard by him from persons who made such statements, provided those persons had special means of knowledge about it [*Sheojee v. Prema*, A 1964 P 187]. Statement of a deceased person as to his relationship with another who died more than 80 years ago though admissible has little evidential value unless the source of information is disclosed [*Jagadish v. Said Ahmad*, 50 CWN 477: A 1946 PC 59]. It is the duty of a party producing a witness on the question of pedigree to elicit from him, if it is a fact, that he heard from a person deceased so as to fulfil the requirements of s 32(*5*) [*Chunna v. Lala Mukal*, A 1934 A 117]. A statement as to relationship made by an attorney in the discharge of his duty and within the scope of his authority must be regarded as a statement by the persons on whose behalf he was acting and is admissible [*Chandreshwar v. Bisheshwar*, 5 P 777]. A statement relating to his own relationship made by a person in his will or mortgage executed by him is admissible under cl (*5*) and cannot be rejected because it related to his own relationship. Such construction would make *illus* (*k*) to the section wrong [*Mullangi v. Venkatasubbammah*, 25 MLJ 373: 19 IC 740]. Evidence of statements made by the deceased family priest as to the relationship of the members of the family may be given under this clause. The section is wide enough to include the family priest, among persons who can be said to have special means of knowledge [*Sham Lall v. Radha*, 4 CLR 173; *Anandi v. Nandlal*, 46 A 665].

—Joint Statement by Persons Some of Whom are Dead.—A statement in a *patta* relating to the existence of any relationship in a document signed by several persons, some only of whom are dead, is admissible as the statement in the document was as much the statement of the persons who were dead as of the person who was alive [*Chandra v. Nilmadhab*, 26 C 236: 3 CWN 88]. It is admissible although others

who are alive have not been examined [*Bindeshwari v. Ramraj*, A 1939 A 61; *Natabar v. Nimai*, A 1952 Or 75]. So, a pedigree signed by a person on his own behalf and on behalf of his two brothers is admissible even if the person signing is dead and the other two persons are alive, if the statement was made *ante litem motam* [*Dolgobinda v. Nimai*, A 1959 SC 914: 1959 Supp 2 SCR 814 **approving** *Chandra v. Nilmadhab, sup*].

—Statements on the Question of Age, Birth, Death, Order of Birth, etc.—Sub s (5) cannot be construed literally and a statement regarding the age of the person concerned cannot be said to be not one relating to the existence of any relationship by blood or marriage or adoption. Statement by *A* in his will that he was 19 years old was admissible to establish that he was major and competent to execute the will [*Kalidindi v. Chintalapati*, A 1968 SC 947—case law discussed]. In order to prove the date of the plaintiff's birth evidence of the plaintiff and one of his witnesses as to statements made to them by relatives of the plaintiff, since deceased, relating to the date of the plaintiff's birth, was held admissible under s 32(*5*) [*Ram Ch v. Jogeshwar*, 20 C 758 (*Haines v. Guthrie*, 13 QBD 818 **not folld**)]. The recital of the date of birth in a guardianship application is not by itself admissible in evidence. It may be so, if the conditions in s 32(*5*) are fulfilled, for instance, if the person making the statement is dead, &c [*Prahlad v. Ramsaran*, 38 CLJ 213: 81 IC 680; see also *Harakumar v. Jogendra*, 38 CLJ 186, 188: 71 IC 336; *Kishorilal v. Adhar*, A 1942 C 438]. The record of a case under Act 8 of 1890 which contained a statement of defendant's age in a petition by his deceased aunt for her appointment as guardian is admissible [*Ram Kr v. Manindra*, 19 CWN 645: 18 IC 595]. Statement as to date of death of the testator in an application for probate is admissible under s 11 if not under s 32(*5*) [*Lachman v. Kamakshya*, A 1931 P 224]. Where a statement regarding the age of the plaintiff was made by his deceased sister, it was admissible under s 32(*5*), the date of birth being the commencement of a relationship by blood, and therefore, relating to the existence of such relationship [*Oriental G S L A Co v. Narasinha*, 25 M 133. Quoted with **approval** in *Md Syedol v. Veohoolyark*, 43 IA 256: A 1916 PC 242: 21 CWN 257: **folld** in *Parbati v. Chandrapal*, 8 OC 94 and in *Bappu Raju v. Kondu Raju*, 9 MLT 220]. Entry of date of birth in a school register made on the mother's statement is admissible [*Bhim v. Magaram*, A 1961 P 21]. Statement as to age of adopted son by adoptive mother is admissible [*Naima v. Basant*, A 1934 A 406 FB]. A statement in will made by the father describing his adopted son, aged so and so as the sole beneficiary, is admissible under cls (*5*) and (*6*) to prove the age [*Krishnama v. Veeravalli*, 38 M 166: 24 MLJ 517: 19 IC 452]. Such a statement is admissible provided it was not made in the interest of the testator and in view of a litigation [*Chandreshwar v. Bisheshwar*, 5 P 777: A 1927 P 61].

A declaration in a will that *K* predeceased *B* is admissible. The existence of a relationship also includes the commencement of that relationship and so statements of deceased are admissible to prove birth, age, majority, minority, or the order of birth. Such statements are also admissible to prove parentage, names of relations, date of death of member as death implies the termination of relationship [*Mahadeo v. Ghulam*, A 1947 A 161].

An entry in a book containing a record of births, deaths and marriages in the family kept by the father of a person is admissible under s 32(*5*) of the Straits Settlement Evidence Ordinance which corresponds with this section [*Md Syedol v. Veohoolyark, sup*]. So also entry regarding the birth of sons in father's pocket book [*Kalaram v. Fazal*, A 1941 Pesh 38]. Statement by a deceased father in a previous suit as to the approximate age of his son is also admissible [*Abdus Subhan v. Nusrat*, A 1937 O 170]. Where evidence showed a practice to make entries of dates of births

for obtaining the opinion of astrologers, *held* that under the Straits S Ordinance, 3 of 1918 (which is identical with the Evidence Act), the books were admissible, if the parol evidence concerning them were accepted [*Chauah Hooi v. Khaw Sim*, 19 CWN 787: A 1915 PC 45]. Entry as to age in school register based upon the statement of deceased father is admissible under s 32(*5*) [*Manna v. Kumeshwari*, A 1929 O 113]. Statements as to date of birth of a person contained in his deposition and in affidavits by him are admissible under s 21(*1*) read with this clause, if made by a person having special means of knowledge, whether personal or hearsay [*Ramanathan v. Murugappa*, 33 IC 969]. Statements made by a deceased person are admissible under s 32(*5*) not only to prove "relationship by blood, marriage or adoption" but also date of birth on the same principle [*Patinharkuru v. Raman*, 24 IC 519 (*Dhanmull v. Ram Ch*, 1 CWN 265: 24 C 265; *Oriental G S L A Co v. Narasimachari*, 25 M 183 **folld**)]. Entry as to age in school register—Matriculation certificate and result gazette are relevant pieces of evidence and slight evidence to the contrary may displace them [*Bhagwan v. Harchand*, A 1971 P&H 65].

—Statements in Plaints etc.—Statement as to relationship in pleadings in a prior suit between alleged relations is admissible in later litigation [*Jan Md v. Karam*, A 1947 PC 99: 1947 Lah 399: 51 CWN 77]. The plaint in a former suit verified by a deceased member of the family and as such having special means of knowledge, was admitted under this clause to prove the order in which certain persons were born and their ages [*Dhanmull v. Ram Ch, sup*]. So also the statement as to relationship in grounds of appeal [*Kanhaiya v. Ram Dei*, A 1944 O 162; see *Ramakrishna v. Tirunarayana*, 55 M 40]. Statements relating to relationship in a plaint in a former suit are not admissible unless it is proved by independent evidence that the maker had special means of knowledge. There is the further condition of *ante litem motam* [*Subbiah v. Gopalo*, A 1936 M 808]. Plaintiffs claimed property as legal heir of *F* deceased. Defendants denied the relationship and plaintiffs adduced in evidence a plaint in a suit by *F* against the plaintiffs—*Held* it was admissible [*Mauladad v. Abdul Sattar*, 39 A 426 : 15 ALJ 349].

—Statements in Books of Heralds, Pandas, Priests, etc.—*Bhats* are heralds who are interested in keeping family record which is evidence if it comes from proper custody [*Kartick v. Gossain*, 25 CWN 908: 66 IC 984]. Entries in a *Bhat's* books of genealogy are admissible, but if it is a copy of an older book which is in existence but not produced, secondary evidence is not admissible [*Hazarilal v. Hargobind*, 48 IC 375]. Evidence of *Hardwar purohit* is admissible on a question of family pedigree [*Fauza v. Alla*, A 1931 L 722]. Book maintained by various members of a family of hereditary bards and containing entries of domestic events relating to the family, is admissible [*Ananda v. Nandlal*, 46 A 665]. But when such entries are on leaflets of different sizes and stitched books containing blank pages, they must be taken with great caution [*Balak v. Nana*, A 1930 L 579]. *Panda's* books are admissible under cl. (*5*) & (*6*) only if evidence is led to prove the identity, handwriting and signature of the writer [*Hazura v. Mohindar*, A 1937 L 599; *Nanhi v. Badlu*, A 1940 L 245]. Entries in *Panda's* register or note-books are admissible in evidence upon a question of family pedigree but they should be received with caution and subjected to severe scrutiny in order to guard against the possibility of fabrication [*Collr of Farrukabad v. Gajaraj*, 15 IC 625: *Amritsaria v. Prabh*, 89 IC 989: A 1926 L 157; *Dukh Haran v. Dulpin*, A 1963 P 390]. Papers, books, and statements of a family priest are admissible in evidence to prove relationship [*Bura v. Nanak*, A 1925 L 281: 84 IC 912]. In a case the defendants pleaded limitation and asserted that the widow died in 1895. A register of *purohit* giving dates of anniversaries of his clients and among them of the said widow as 14th Dec 1898 was not of such a

character as to enable the Judicial Committee to pronounce affirmatively that the entry was in 1898 and in the ordinary course of the business of the *purohit* [*Malraju v. Koppuravuri*, 26 Bom LR 563: 46 MLJ 541: A 1924 PC 136]. The affidavit of a Pandit mentioning the performance of marriage ceremony, long after the dispute about the fact of marriage arose is not relevant [*Mrs Sudershan Karir v. The State*, A 1988 Del 368, 371]. As to *panjis* written by family *panjikars*, see *Sitaji v. Bijendra*, A 1954 SC 601.

—Statements in Genealogical Tables or on Questions of pedigree.—The statement in a genealogical table filed by a member of a family who is dead, regarding the descendants of another member of the family, before any dispute arose as to the latter is relevant and admissible in evidence under s 32(*5*) [*Shyamananda v. Ramakanta*, 32 C 6]. It must be shown that the statements in the pedigree were made by a person who had special means of knowledge of relationship. Statements merely copied from a genealogical table made by another is not admissible [*Jhobali v. Sakhi*, 79 IC 335: A 1923 P 585]. Every link in the chain of relationship in genealogical table has to be proved [*S M Dawood v. Abu Bakker*, A 1972 M 228]. The plaintiff relied upon a pedigree, not stated in any document produced that had existed in the family before the suit. The genealogy was, however, identical with one which his father had more than once asserted, alleging title to two *maujahs* of the Raj estate. The Rajah called upon to answer in proceedings at settlement, had not given a direct denial to the alleged relationship. On the contention that there were steps in the pedigree, as to which the evidence did not include proof of statements made by a deceased person who had means of knowledge—*Held* that the evidence both oral and documentary, was sufficient to prove that the plaintiff was related to the deceased Rajah [*Bejal v. Bhupendra*, 22 IA 13: 17 A 456]. In order to prove that the relationship between the applicants' great-great-grandfather and the great-great-grandmother of the deceased was that of full brother and sister, a *kursinama* (genealogical table), made by the ancestress of the deceased, by the pen of *gomasta*, alleged to have been filed in a previous suit, and a certified copy of a deed of exchange corroborating the *kursinama* to relationship were produced by the applicants—*Held* that the *kursinama* was admissible [*Shahjadi v. Secy of S*, 34 IA 194: 34 C 1059: 9 Bom LR 1192].

A pedigree filed for purpose of *khewat* more than thirty years ago is admissible under s 32 (*5*) when all signatories are dead [*Mahadeo v. Suraj*, A 1934 O 210]. Statement contained in genealogical table put in during an *inam* inquiry by some of the members of the family of the parties to the suit, not signed by any of them but signed by their pleader is admissible [*Ramakrishna v. Tirunarayana*, 55 M 40: A 1932 M 198]. A pedigree filed before a settlement court did not contain the signature of the co-sharers or the settlement officer. The *khewat* was a part of the record and attested by the co-sharers. *Held* that the pedigree was admissible [*Baijnath v. Rajju*, 12 OLJ 571]. Where it was found that a pedigree was prepared by a person who was neither a member of the family nor an official bound to record such pedigree, that there was no evidence that it had been signed by any member of the family, that its contents were adopted by the members of the family who were privy to its preparation, and that upon its basis the entries in the *khewat* were recorded—*Held* that the pedigree was relevant under s 32(*5*) though the entries were not of great value [*Ram Din v. Kayestha Pathshala*, 25 IC 823]. Where the plaintiffs sought to establish their pedigree by proving inter alia that *A* and *B* were brothers, *held*, that a statement to that effect, made by one of the plaintiffs, in a deposition given long before the controversy in suit arose, was admissible in evidence [*Jadunath v. Mahendra*, 12 CWN 266].

A person to prove his pedigree adduced the evidence of some of his kinsfolk which the Judicial Committee held to be admissible in quality, and derived special weight from the fact that the Hindu boys are taught the names of their ancestors up to the seventh degree as a matter of necessity; such evidence, it was pointed out could come only from the person's relative and would be of no value if it came from strangers [*Debi Pd v. Rani Radha*, 31 IA 160: 32 C 84: 9 CWN 161].

—Statements in Horoscope.—A horoscope prepared by a person who is dead and who had special means of knowledge and whose handwriting is proved is admissible [*Ganganand v. Ramewsar*, 102 IC 449: A 1927, P 271; *Nirmala v. Kamala*, 36 CWN 838: *Nani Gopal v. Trustees*, A 1938 C 43]. Horoscopes are not evidence by themselves but they could be used for refreshing the memory or as statements of a deceased person under s 32 [*Ambika v. Lal Bahadur*, A 1924 O 353]. A statement about the date of the son's birth by a father at the time of preparing a horoscope is admissible under s 32(*5*) as it was the date of commencement of relationship [*Annamalai v. Annamalai*, 52 IC 456: 10 LW 67]. See *Bidyadhari v. Pran Gopal, post*. Original horoscopes though admissible under s 32(*5*) their evidentiary value is very little [*Bharat v. Gopinath*, A 1941 A 385; *V M Namboothiri v. K K Kuruvilla*, A 1957 K 103; *Parasram v. Dayaldas*, A 1965 HP 32; *Govt v. Hari Rao*, A 1978 M 42]. Horoscope made subsequently to time of birth but before the question in dispute was raised is admissible [*Govt. v. Hari Rao*, A 1978 M 42].

—Statements on Question of Adoption.—The term "adoption" in cl. (*5*) is not to be interpreted in a restricted sense. The relationship between a *mohunt* and his *chela* is a relationship by adoption within this clause. A statement in a will that *A* has one *chela B* and has no other *chela* is one relating to the existence of a relationship and is admissible [*Achyutananda v. Jagannath*, 21 CLJ 96: 20 CWN 122]. A statement as to the term of commencement of a relationship is so indissolubly associated with the existence itself of the relationship that it may be regarded as a statement which relates to the existence of that relationship within the meaning of *cl* (*5*). *Obiter in ibid*]. A dispute about adoption was referred to a *punchayat* whose report was recorded in the Collector's office, whence it was produced. A minute local enquiry was clearly shown to have been made into the history of the family before a competent local tribunal, and the litigants were also proved to have signed the report to the effect that each acquiesced in what was therein stated—*Held* that the report of the *punchayat* was strong evidence in matters of family pedigree [*Ajab Singh v. Nanabhan*, 28 IA 121: 25 B 1: 3 CWN 130]. Statement as to relationship between the adoptive parent and the adoptee made by the adoptive parent's deceased sister is admissible [*Ma Nyun v. Ma Kyin*, A 1941 R 276]. Evidence of incidents bearing on adoption and its invalidity would be allowed subject to careful scrutiny as to value [*Haridas v. Manmatha*, A 1936 C 1]. Where in a dispute as to the validity of an orphan's adoption a custom of such adoption was sought to be proved, the copy of a statement of a dead person regarding his own adoption in a previous case not *inter partes*, was held admissible [*Panna v. Chiman*, A 1947 L 54].

—Statements on Question of Legitimacy.—Statement in a document by a deceased executant that defendant was his legally married wife is admissible [*Subarana v. Arjuno*, A 1951, Or. 337; *Zamin v. Azimunnissa*, A 1933 A 329]. On the question as to who were the legitimate heirs of a Mahomedan woman certain documents were produced from the *wasiqa* (pension) office, in which she described certain persons as her heirs. The statements made by her as to who were her heirs, at a time when the present controversy was not in contemplation and recorded by a *wasiqa* (pension) officer, were admissible to prove the relationship [*Baker Ali v. Anjuman Ara*, 30 IA 94: 25 A 236: 7 CWN 465 (*Anjuman Ara Begam v. Sadik*, 2 OC

115, in which the word marriage in cl(*5*) was held to include *Mutu* marriage, was **overruled**)]. A person claiming as an illegitimate son, must establish his alleged paternity, like any other disputed question of relationship and can rely upon statements of deceased persons under s 32(*5*) for opinion expressed by conduct under s 50 and also upon such presumptions of fact as may be warranted by the evidence [*Gopalasami v. Aruna Chellam*, 27 M 32]. The witness deposed regarding the marriages of the members of their own families. They had, therefore personal knowledge about the relationship between the two spouses and it being a direct evidence was not required to satisfy the provisions of sec 32 [*Smt Shankuntala Devi v. Amarnath*, A 1982 Punj 221, 223].

—Statements as to Reputed Common Descent.—The applicants were held in the absence of evidence to the contrary, to have sufficiently proved their title, as reversionary heirs to the estate of the deceased, by oral evidence of reputed common descent, relevant under s 32(*5*), and by documentary evidence that the widow of the deceased, had recognised, long before the suit, that her husband's heirs are entitled to succeed her, and that she was not prepared to contest the claim of the appellant's predecessors to be such heirs [*Bahadur v. Mohur*, 29 IA 1: 24 A 94: 6 CWN 169: 4 Bom LR 233].

STATEMENTS HELD INADMISSIBLE UNDER CLAUSE (5)

Statements By persons Not Having Special Means of Knowledge.—Statement recorded in prior settlement proceedings as made by a deceased person employed therein as *mooktear* by certain members of the family was held to be inadmissible, as it appeared that his only means of knowledge were from his being entrusted as such *mooktear*, he not having been a member of the family, nor intimately connected with it, nor having had any special means of knowing its concerns [*Sangram v. Rajan*, 12 IA 183: 12 C 219]. *Inam* statement concerning a family made by a person who is neither a member of the family nor connected with it by marriage, nor having any special means of knowledge are inadmissible [*Kandalam v. Sathuluri*, 48 MLJ 467: 88 IC 646]. S 32(*5*) does not apply to statements made by interested parties in denial, in the course of litigation, of pedigrees set up by their opponents [*Narani v. Chandi*, 9 A 467: 7 AWN 18]. Certificate of guardianship is inadmissible under cl (*5*) to prove age when the guardian is alive [*Kishori v. Adhar*, A 1942 C 438; *Muktipada v. Akelma*, A 1950 C 553].

—Hearsay Statements.—Evidence to support emigration of a Hindu family from one province to another, of witnesses who have heard it from deceased members of the family, is not admissible under cl (*5*) or cl (*6*) [*Ram Ch v. Ramabai*, A 1930 N 267]. The plaintiff, the son of a deceased zemindar, sued his widow and brothers *A* & *B* for possession of the zemindari which was impartible. The defence was that the plaintiff was illegitimate, and in order to prove plaintiff's illegitimacy, *B* filed two petitions purporting to have been signed and sent to the Collector of the district by *B* in 1871 referring to plaintiff's mother as concubine—*Held* that the contents of the petitions to the Collector presented by a person who does not offer himself as a witness and swear to its truth, were not admissible in evidence [*Parvathi v. Thirumalai*, 10 M 334]. On a question of relationship, the statements of certain witness who were supposed to be speaking from information derived from others, and who did not however, state the names of the persons from whom they derived their information, nor at what period of time derived it, were held to be inadmissible [*Shafiquannisa v. Shaban*, 30 IA 217: 26 A 581: 9 CWN 105]. Evidence of a family barred to prove relationship is inadmissible as it relates

to events long before the deponent's birth and is therefore hearsay [*Ghulam v. Miraj*, A 1938 L 303]. Oral evidence by a person of the relationship of two parties based on information in a pedigree prepared by the father, without production of the pedigree, is not admissible [*Seshammal v. Kuppanaiyyangar*, 91 IC 462: A 1926 M 475]. When the status of the accused was in question, an affidavit by his wife containing what she heard from her grandparents is inadmissible as hearsay [*Thomas v. R*, 53 C 746: 98 IC 248]. Hearsay evidence is not admissible under s 32 (*5*) to prove the case of fosterage, inasmuch as, even if it be assumed that connection by fosterage can amount to "relationship" in any sense of the term, the relationship is not "by blood, marriage or adoption" [*Mirza Suraiya v. Qudsia Begum*, 24 IC 643; *Mohanlal v. Tulsan*, A 1928 L 824; 109 IC 774].

—Questions of Pedigree.—Where a deceased person had filed a genealogical table purporting to have been made by a person since dead it was held inadmissible since it was not proved to have been prepared under the personal knowledge and belief of the deceased person. The genealogical table was filed on behalf of *G*, in a claim made by him for certain villages. The Privy Council observed: "His (*G's*) relation to the document is therefore something entirely different from the personal knowledge and belief which must be found or presumed in any statement of a deceased person which is admissible in evidence. For ought that appears the genealogical table in question might never have been seen or heard of by *G* personally, but have been entirely the work of his pleader" [*Jagatpal v. Jogeshar*, 30 IA 27: 25 143: 7 CWN 209]. Pedigree table relied on in a suit of 1864 was held to be inadmissible [*Jagnahar v. Sadhu*, A 1934 L 283]. Pedigree found with certified copies of decrees are admissible not as evidence of relationship under s 32(*5*) but under s 35 and s 13 [*Collr of Gorakhpur v. Ramsundar*, 61 IA 286: 56 A 468: 38 CWN 110: A 1934 PC 157]. In a suit on a promissory note to which the only defence was minority, a statement made by the defendant's father (who died after this event but before legal proceedings had been contemplated) to a witness as to the age of his son, was held inadmissible, as the question of age was not a question of pedigree [*Bepin v. Sreedam*, 13 C 42; but see *Ram Ch v. Jogeswar and Dhunmull v. Ram Ch, ante*].

—Marriage.—Statement written and signed by a priest that the essential ceremonies of marriage were duly performed does not come within cl (*5*) [*Jadav v. Pushpabai*, A 1944 B 29]. On the question of marriage, see also the proviso to s 50 *post*.

—Statements Made Not Before the Dispute.—On a question of legitimacy of the plaintiff who was born in 1911, a written statement filed by the husband of his mother in a maintenance case by her against him in 1915 denying paternity is not admissible under s 32(*5*) as it was not made before the dispute as to plaintiff's paternity arose [*Karapaya v. Mayandi*, 13 R 234: 38 CWN 427: A 1934 PC 49]. Statements with regard to relationship made in settlement proceedings at a time when the title to a portion of a *taluqa* was under enquiry are not admissible in a subsequent litigation not *inter partes* [*Mata Baksh v. Ajodhia*, A 1936 O 340]. Statements regarding the fact of adoption of the party in the present suit made in previous suits in which the question of adoption was directly in issue are not admissible in the present suit as they were not made before the question in dispute was raised [*Ramkrishna v. Tirunarayana*, 55 M 198: A 1932 M 198]. Statement made in a document subsequent to the dispute cannot be relied upon for ascertaining relationship [*Chakicherla v. Atmakuru*, A 1973 AP 149].

CLAUSE (6)

Statements Made in a Will or Deed Relating to Family Affairs or Pedigree, or Upon Tombstones, Family Portraits, etc.—The clause does not impose any restriction as to special means of knowledge as in cl (*5*). The difference between the two clauses has been noted before (*ante*). It is highly improbable that a person would make any statement in a deed, will, family portrait or upon tombstone, &c without full knowledge or without being satisfied as to its truth. Declarations under this head may be made in any form *eg* oral statements, family correspondence, recitals in wills and settlements, entries in almanacs, family Bibles, prayer books, missals, horoscopes, inscriptions on tombstones, coffin-plates, rings, pedigrees, hatchments, armorial bearings, &c.

Entries in a family Bible are receivable not on the ground of the sacred nature of the volumes but because of the custom of using them as family registers. They are admissible even without proof that they have been made by a relative; for as this book is the ordinary register of families and is usually accessible to all its members, the presumption is that whole family have more or less adopted the entries contained in it, and have thereby given them authenticity [Tay ss 648, 650; Hals 3rd Ed Vol 15, paras 558-570]. In *Sturla v. Freccia*, 5 AC 623, 641 LORD BLACKBURN said:—

> "It has been established for a long while that in questions of pedigree....the statements of deceased members of the family made *ante litem motam*, before there was anything to throw doubt upon them are evidence to prove pedigree. And such statements by deceased members of the family may be proved not only by showing that they actually made the statements, but by showing that they acted upon them, or assented to them or did anything that amounted to showing that they recognised them. If any member of the family, as a person who presumably would know all about the family, had stated such and such a pedigree, that evidence would be receivable, its weight depending upon other circumstances."

The above quoted rule of evidence was quoted with approval by the Judicial Committee holding that it is in accord with s 32(*6*). Thus, a very elaborate genealogical tree with a series of biographical notes compiled by the deceased's grandfather's brother in 1875 was held admissible [*Abdul Ghafur v. Mt Hussain*, 58 IA 188: 12 L 336: A 1931 PC 45; see *Sitaji v. Bijendra*, A 1954 SC 601]. Under the English law the admission of hearsay evidence in pedigree cases is confined to the proof of the pedigree and does not apply to proof of the facts which constitute a pedigree, such as birth, death and marriage, when they have to be proved for other purposes. The Indian law is not so strict as laid down in s 32 [*Naima v. Basant*, A 1934 A 466 FB: 149 IC 781].

Clause (6) does not embrace the case of a statement of relationship between a deceased person and a living person [*Ramnarain v. Monee Bibee*, 9 C 613, 614].

ADMISSIBILITY OF STATEMENTS UNDER CL (6)

Ante Litem Motam.—Statements tendered under the clause must also have been made *ante litem motam* [*Bahadur v. Mohan*, 29 IA 1: 24 A 94: CWN 169: 12 MLJ 56; *Kalidindi v. Chintalapati*, A 1968 SC 947].

—Statements Made in Documents.—To prove relationship of the parties the plaintiffs relied on a certified copy of a *kararnama* entered into by the plaintiff and an ancestor of one of the defendants, which had been set aside as against the defendants in a former suit—*Held* that though the document was set aside on other grounds, the relationship therein set forth might be considered, and though the

evidence was partly hearsay, such evidence was admissible on question of pedigree [*Timma v. Daramma*, 10 M 362]. The testator's statement in his will that defendant is his adopted son is admissible but it is not conclusive and the burden of proving adoption lies heavily on him [*Banwarilal v. Trilok*, A 1980 SC 419]. S 17 (*b*) of the Registration Act does not render a passage in will inadmissible, if the words of it do not purport or operate to extinguish an interest, in the present or in the future, but states only past facts. Such a statement would, if proved, be admissible also under s 32(*6*) [*Chamanbu v. Multan*, 20 B 562]. The incidental mention of a child's age in the recital of a will is no proof of the exact age of that child. The proceedings after the devisor's death granting a certificate to the guardian of the girl are merely proof of her being a minor at that time and do not disclose what her exact age then was [*Nilmoni v. Tahrunnissa*, 8 WR 371].

—Statements in Horoscopes.—A horoscope which plaintiff said had been given to him by his mother, and had been seen by the members of the family and used on the occasion of the marriage was produced. He was unable to say by whom the horoscope or an endorsement on it had been written—*Held* it was not admissible under s 32(*6*) [*Ramnarain v. Moni Bibee*, 9 C 613. **Followed** in *Satis Ch v. Mohendra*, 17 C 849, in which the plaintiff relied upon a horoscope to prove his age, in a suit to set aside a decree on the ground of minority, but the horoscope was held inadmissible as it was not shown that the attendance of the person who made it could not be procured]. Both these cases have been **doubted** in *Raja Goundan v. Raja Goundan*, 17 M 134. In *Bidyadhari v. Pran Gopal*, 5 CWN 148 note, the horoscope was admitted not *qua* horoscope but as a statement under cl (*5*) either of the family astrologer or a statement adopted by the father of the defendant. A later case held that one ground of decision in 17 C 849, *viz* that the question of age was not one either of relationship, blood, marriage or adoption is no longer good law [*Nanigopal v. Trustees &c*, A 1938 C 43]. A horoscope is not admissible unless its correctness is vouchsafed by the person who made it or one who had special means of knowledge [*Krishnamachariar v. Vereravalli*, 38 M 166: 24 MLJ 517: 19 IC 152]. A horoscope is receivable under s 32 cl (*5*) and not cl (*6*) but the party making it must have had special means of knowledge [*per* SESHAGIRI AIYAR J, in *Ramanathan v. Murugappa*, 33 IC 969: 1916 MWN 208; see *ante*]. A full horoscope prepared from a short one was produced in evidence by its maker—*Held* so far as date of birth and parentage is concerned the horoscope represented what was stated to the witness who had prepared it before the dispute had arisen and could be used both as a corroborative or rebutting evidence [*Harbahadur v. Chand Raj*, 21 OC 298: 48 IC 400]. A statement of date of birth in a horoscope is not relevant under s 32. Any statement of a date of birth given in an horoscope is not a relevant fact under s. 32 [*Savitri Bai v. Sitaram*, A 1986 Madh Pra 219, 220 : 1986 MPLJ 25]. It can be used to help in proving the date only under s 159 or 160 [*Shankergir v. Chinnuji*, 71 IC 140: A 1923 N 164]. See also *ante*: "*Statements in horoscope*".

—Family Pedigree in Books of Pandas etc.—A family pedigree kept in the ordinary course of business by a family chronicler and prepared by him from time to time from the information supplied by the members of the family is admissible under s 32(*2*) and also under s 32(*6*) as having been kept by a person engaged by the members of the family to keep a record of the family events before them [*Mohan v. Dalpat*, 46 B 753: 67 IC 235; *Anandi v. Nandlal*, 46 A 665]. *Panjis* by family genealogists are admissible without showing who made the statements there [*Sitaji v. Bijendra*, A 1951 P 356 on appeal A 1954 SC 601]. It is the business of *mirashi* who is a hereditary family bard to acquaint himself with the details of family history, whose glories recount in song on ceremonial occasions, and the fact that he must

speak from hearsay does not render his evidence valueless, where pedigree is to be proved [*Abdul Ghafar v. Mt Hussain*, 58 IA 188: A 1931 PC 45; *Khadam v. Md Hussain*, A 1941 L 73].

On pedigree question, statements by deceased members of family made *ante litem motam* are evidence not only by showing that they actually made them, but by showing that they acted upon them or assented to them or recognised them [*Mangal v. Manphul*, A 1961 Pu 251]. Pedigree prepared by a family bard is admissible [*Ratni v. Harwant*, A 1949 Pu 158—CONTRA: *Ghulam v. Miraj*, A 1939 L 303 *ante*]. Presumption of correctness extends to pedigree tables prepared at the time of settlement under s 31(2)(*d*) of Punjab Land Revenue Act [*Mangal v. Manphul, sup*].

—Family Pedigree by Tradition Or in Other Documents.—The words "family pedigree" should be construed to mean a "pedigree of the family". The words "family pedigree" in cl (*6*) should not be construed according to the standard adopted by courts in England in regard to pedigree of English families. People of England and India widely differ in their habits of thoughts, modes of expression and indeed in their entire system of family life. A pedigree bringing one down from the remotest ancestor to the generations living contemporaneously with person in whose time it is prepared is admissible [*Jang v. Arjun*, A 1928 O 125; see *Kanhaiya v. Ram Dei*, A 1944 O 162]. In India unless the pedigree in a document is shown to be a statement of some member of the family or maintained in the family as a family pedigree, it is inadmissible under cl (*5*) or (*6*) [*Kanhaiya v. Ram Dei, sup*]. An European may be presumed to know his own birthday as a matter of course [*Ramanathan v. Murugappa*, 33 IC 969: 1916 MWN 208].

When the question of relationship arises between people among whom accessible records of births and deaths are not maintained, nor are such events preserved in written family memorials, it is necessary to depend on oral tradition, and though this requires close scrutiny, the tradition ought not to be regarded as weak and unsatis-factory merely because it may in one or two respects fail to satisfy the strict conditions that would be necessary for proving a pedigree whose records and docu-ments could be used. In this case a pedigree was prepared by the plaintiff from oral traditions narrated by his father [*Sabz Ali v. Khair Md*, 49 IA 74: 3 L 48: A 1922 PC 139]. Pedigrees which were not ancient family records handed down from generation to generation and added to as a member of the family died or was born, but were drawn upon particular occasions for a specific purpose by members of the family must be treated as mere declarations made by the persons who respectively drew them up or adopted them. To make a statement inadmissible on the ground that it was made *post litem motam*, the same thing must be in controversy before and after the statement was made. Such of them as were made *post litem motam* are inadmissible in evidence [*Kalka v. Mathura*, 35 IA 166: 30 A 510: 13 CWN 1]. The expression "family pedigree' is used in a very broad sense, and is not strictly confined to the description of the term in the Privy Council case of 30 A 510, *ante*. A pedigree table produced by a member of a family who said that he received it from his father, who adopted it twenty years ago was held admissible as the declaration of witness's deceased father [*Nam Deo v. Ganoba*, 86 IC 847: A 1925 N 271]. In a suit for possession based upon the right of inheritance, the plaintiffs produced a pedigree to show they were the collateral heirs of the last male owner. The statements in the pedigree were held inadmissible in evidence on the ground that no proof was adduced that the persons by whom it was drawn up were within any of the descriptions in s 32 [*Surjan v. Sardar*, 27 IA 183: 23 A 72: 5 CWN 49].

Where the persons supplying the family names to the compiler of a family pedigree are not proved to be dead, it will not be admissible [*Mehr Dad v. Md Ali*, 84 IC 927: A 1925 L 63]. Where a deceased person had filed a genealogical table purporting to have been made by a person since dead, and it was exhibited on his behalf, *held* that the table was inadmissible since it was not proved to have been prepared under the personal knowledge and belief of the deceased person [*Jagatpal v. Jogeswar*, 30 IA 27: 25 A 143: 7 CWN 209].

Where plaintiffs filed a family pedigree extracted from a settlement record and it was signed by some persons named in the pedigree—*Held* that the document might be treated not as a "family pedigree" admissible under s 32(*6*)), but as a statement made by deceased persons likely to be acquainted with the facts as to the existence of certain relationship. Where in a previous suit, the plaintiff's deceased predecessors-in-interest filed a pedigree but no final decision was made thereon—*held* that the plaintiffs were entitled in a subsequent suit to rely on that pedigree as being the statement of their predecessors-in-interest as to the existence of the relationship set forth in the pedigree [*Bhupati v. Khelal*, 21 IC 274]. Mention of a common ancestor of the parties in the pedigree filed at the time of the settlement is evidence that the property descended from the ancestor, but it cannot be alone conclusive [*Sandhi v. Mt Dani*, 96 IC 349 (L)].

Genealogical table put in at the time of settlement is not admissible as it was not established that it was prepared by a member or the family or an official whose duty it was to record it or that any member of the family was privy to its preparation or that its contents were admitted by members of the family [*Koshi v. Ram*, 19 OC 321; *Surajbali v. Tilok*, 36 IC 66]. If the settlement pedigree amounts to statement of deceased persons who as members of the family had special means of knowledge, it is admissible under s 32(*5*) [*Sarfaraz v. Mt Rajana*, A 1929 O 129]. Unless it is shown that the person who files a pedigree had special means of knowing relationship between parties, it cannot be received in evidence [*Bhimma v. Sunder*, 9 OLJ 86]. See however *Jahangir v. Sheoraj*, 37 A 600: 13 ALJ 817 where a family pedigree produced by one who stated that he got it from his grandfather without proof as to who made it, was held admissible under cl (*6*) and also see *Sitaji v. Bijendra*, A 1951 P 356 on appeal A 1954 SC 601. The same view appears to have been taken in *Anandi v. Nandlal*, 46 A 665; but the entries were proved to be in the handwriting of the father and the grandfather of the witness and further the admissibility of the entries was not disputed. **Disagreeing** with *Jahangir v. Sheoraj, ante*, it has been held in Lahore that unless as definite person is indicated as the author of the statement intended to prove, the conditions in cls (*5*) and (*6*) are not fulfilled [*Hazura v. Mohindar*, A 1937 L 599]. When a case of a party is based on genealogy consisting of links, it is incumbent on the party to prove every link thereof and even if one link is found to be missing then in the eye of the law the genealogy cannot be said to have been fully proved [*State of Bihar v. Sri Radha Krishna Singh*, A 1983 SC 684, 691].

The words "family pedigree" do not necessarily include such a pedigree as is in possession of a member of the family concerned, nor do they indicate that the actual possession need be with the family concerned. In order that a "family pedigree" be admissible, it is not essential that all the writers of the pedigree should have special means of knowledge [*Lahanu v. Motiram*, 63 IC 968]. Where a pedigree satisfies the conditions of s 32(*6*) and s 90 and the relationship described therein is corroborated by other evidence, a presumption arises of its genuineness [*Jagdeo v. Vithoba*, A 1928 N 20 : 105 IC 8]. It is valid to presume after the death of a person that a pedigree filed by his general agent in a suit to which the deceased was a party was

filed under his instructions, and such pedigree, if other conditions be satisfied, would be admissible in evidence in subsequent litigation [*Balbhaddar v. Sripal*, 48 IC 308: 21 OC 251].

A pedigree filed in a settlement court for the preparation of *khewat* cannot be put in evidence as a family pedigree under cl (*6*). It can be only admitted under s 32(*5*) when proved that it represents a statement as to the existence of a certain relationship by blood or marriage made by persons who had special means of knowledge. The mere fact that the document is more than 30 years old will not make it admissible. It must be shown that it is admissible under cls (*5*) and (*6*) [*Mathura v. Bhulan*, 15 OC 364: 14 IC 339].

A pedigree was filed before the settlement court in 1871 after being signed by the *patwari* and two *lambardars*, both of whom appeared in the pedigree itself and were dead. It was signed by the settlement officer as having been attested or verified before him—*Held* that the pedigree should be accepted as a public document [*Sarju De v. Ram Harakh*, 18 IC 250]. Pedigree prepared for purposes for settlement which is the basis of the entries in *khewat* is relevant under s 35 if prepared in discharge of public duty [*Baijnath v. Bahadur*, 91 IC 583: A 1926 O 101].

It will always be a matter of great difficulty to prepare pedigrees in a country like India where there is no official register of births and deaths, where records of a family may be few and where it is essential to depend for information upon the uncertain testimony of family traditions; men's lives are swiftly forgotten and the memory of survivor often fails. It is, therefore, not a matter of surprise to find that pedigrees prepared in India and which may be accepted as honestly prepared are none the less not in actual agreement in every detail. Out of two conflicting pedigrees, the one though brought to light later in point of time, but which was supported by verbal evidence and accepted by competent authorities was accepted in preference to that which was originally produced many years ago and contained the statement that it was all the pedigree that was then known made by the person who was the person most likely to have knowledge [*Doddawa v. Bennepagowda*, A 1925 PC 199: 86 IC 326]. A pedigree which had been subjected to investigation many years prior to the institution of the litigation in which it was questioned and which had been previously relied upon by competent authorities and which is supported by oral evidence can safely be accepted as correct [*Md Azim v. Md Saadat*, A 1931 O 177].

A passage in a District Gazetteer describing lineage of one of the leading families of the district cannot supply the want of a pedigree [*Balamakund v. Biswanath*, 52 IC 851]. As to the inference to be drawn from Mahomedan pedigrees showing the eldest son on the right side and the relative value of oral and documentary eivdence, see *Abdul Karim v. Rashiduddin*, A 1931 O 246. There is no general rule that where numbers are not given it cannot be held that the pedigree intended to give the relative seniority of the brothers [*Jadunath v. Bisheshar*, A 1939 O 17]. Where genealogical tables are made by members of a family, there is a natural tendency to proceed from the eldest to the youngest provided they know the order of birth. This is all the more so in families governed by the rule of lineal primogeniture [*Kanhaiya v. Ram Dei*, A 1944 O 162, see also *Lal Harihar v. Bisheshwar*, 3 Luck 326: A 1928 O 307].

CLAUSE (7)

Statements in Deed, Will or Other Documents Relating to Transactions Mentioned in S 13 Cl (a).—This clause makes admissible statements contained in any deed, will or other document which relates to any such transaction as is

mentioned in cl (*a*) of s 13. [See *ante*]. It does not include "particular instances" in cl (*b*). The phrase "which relates to any such transaction" qualifies the word 'statement' and not 'deed' will or other document' [*A Rangaswami v. A Subramania*, A 1975 M 141].

The transaction referred to in s 13 cl (*a*) is "any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted, or denied, or which was inconsistent with its existence", and so the statements referred to in this clause are admissible in proof or disproof of such transaction. S 13 applies to both *private* and *public rights* as well as *private* and *public customs* (see s 13 *ante*) and this section therefore also applies to such rights and customs. Cl (*4*), *ante*, deals with oral and written statements relating to the existence of *public* right or custom or matters of public or general interest. The seventh clause, however, includes *private* rights or customs and further, unlike the fourth clause, it does not admit *oral* evidence of reputation in the cases to which it refers. It only admits "statement contained in any deed, will or other document" relating to any transaction by which a right or custom was created, claimed, &c, &c and therefore it applies only to *written* statements. The opening words of the first paragraph of s 32 "written or verbal" do not apply to cls (*6*) and (*7*). It has been seen that as to public rights and customs, the evidence admissible under the fourth clause is statement (both verbal and written) of *opinion* as to the existence of such rights; but reputation or tradition as to public and general rights is not confined to only such statements. So they may be proved under the seventh clause by other statements in support of such rights in deeds, wills, leases, maps, etc. Under the English law reputation evidence is not generally admissible in questions concerning matter of *private* right and this section makes a departure from it in this respect. In some jurisdictions in America proof of reputation may be received in proof of private boundaries [Jones, s 304; Wig ss 1563-68]. In *Smith v. Powers*, 15 NH 563 (Am) PARKER CJ, said: "The declarations of a person deceased, who appeared to have had means of knowledge and no interest in making the declarations are competent evidence upon a question of boundary, even in a case of private right."

The exception under the English law is in the case of ancient documents which are admissible as acts of ownership on question of *private* as well as public right. Private rights under that law can only be proved by evidence of *ancient possession*. Ancient documents in proof of acts of ownership should be distinguished from such documents tendered as evidence of reputation or tradition. The letter may consist of recitals in deeds or "other documents" as to matters of public or general interest. Ancient documents are those that are thirty years old (s 90). They prove themselves and they must be produced from proper custody. This clause does away with the distinction observed in English law between ancient documents and documents less than thirty years old, by which only the former is admitted in proof of *private* rights. The words "*any* document" include both ancient and modern. A statement therefore in any deed, lease, map, &c or other document, however modern, is admissible under the seventh clause. Modern possession is capable of proof by living witnesses, and though the clause admits recitals and statements in modern documents they will however, be regarded of little value unless supported by the testimony of witness. But this goes to the weight of the evidence and not admissibility. In *Hurronath v. Nittanund*, 10 BLR 263 (cited *post*) the document admitted was executed eighteen months before the institution of the suit. The effect of the clause is that a statement of a relevant fact contained in any document which is admissible under s 13(*a*) would be itself a relevant fact, if the party making the statement were dead, or could not be found or were incapable of giving evidence or whose attendance could not be

procured without an amount of delay of expense, &c. A statement by a deceased donor in his will that a deed of gift executed by him was fictitious is admissible under cl (*7*) [*Ram Bharose v. Diwan*, A 1938 O 26].

Although it is perfectly true that the mere production of an ancient document, unless supported by some corroborative evidence of acting under it, or of modern possession, would be entitled to little, if any weight, still there appears to be no strict rule of law, which would authorize the judge in withdrawing it altogether from the consideration of the jury:—In other words, the absence of proof of possession under the document affects merely the weight and not the admissibility of the document [*Malcolmson v. O'Dea*, 1863, 10 HLC 593, 614; Tay s 665].

"This rule is sometimes stated with qualification, provided that possession is proved to have followed ancient documents, or that there is some proof of actual enjoyment in accordance with the title to which the documents related; and certainly in the case of property allowing of continuous enjoyment, without proof of actual exercise of the right, any number of mere pieces of paper or parchment purporting to be leases or lincences, ought to be of no avail ..... It is to be observed that the present section includes any deed, will etc. so that the rule as to *ancient possession* is extended and enlarged; for now a statement in any relevant document, however, recent, though not more than thirty years old will be admissible" [Nort p 192].

See note to s 13(*a*),

Transactions (See *ante* s 13).

Admissibility of Statement in Deed, Will or Other Documents Which Relate to any Transaction by Which the Right or Custom in Question Was Created, Claimed etc.—To prove or disprove a right or custom, it is not enough to adduce evidence of a transaction, in which or in the course of which, the right or custom was asserted or denied. The transaction will be relevant under s 13(*a*), if it be only by which the right or custom was asserted or denied. Where the question was whether a tenant held lands under a *nakdi or bhowli* system of rent, and the court based its decision on a statement contained in a *hibanama* executed by the deceased grandfather of the defendant—*held* that the *hibanama* was not admissible in evidence under s 32(*7*) [*Bansi v. Mir Ali*, 11 CWN 703]. Cl (*7*) does not allow introduction of parol evidence [*Dwarka v. Lalchand*, A 1965 SC 1549]. In a suit to establish a family custom, a deed containing a recital of the custom which was executed before the suit by the present plaintiffs as well as by a plaintiff who had died after the suit, and also by a considerable majority of the family, but in which the defendant was not a party was held admissible though the plaintiffs could not themselves be called as witnesses; but that it was not entitled to any weight, and that the alleged custom must be proved *aliunde*, against the defendant [*Hurro Nath v. Nittayanand*, 10 BLR 263]. Statements made by deceased persons after the controversy had arisen and therefore inadmissible under s 32 are not admissible under s 48 or s 32(*7*) [*Amina v. Khalil*, 8 Luck 445: A 1933 O 246]. Statements made before the sub-registrar by the deceased attestors to a will are admissible under s 32(*7*) taken with s 168 [*Sudarsana v. Seetharamamma*, 1933 MWN 1148]. Documents which would be admissible against persons through whom one claims, cannot be objected to on the ground that they are *res inter alios actae* and do not come within any of the classes of evidence enumerated in s 32 of the Act, if they would be admissible against persons through whom such parties claimed [*Rani Srimati v. Khagendra*, 31 IA 127 : 31 C 871: 9 CWN 740].

Statement of adopter in adoption-deed that his two sons were suffering from leprosy is admissible to decide validity of adoption [*Nagammal v. Sankarappa*, 54 M 576: A 1931 M 264]. Statement by widow who is dead, in a will and a deed of adoption that she had authority from her husband to adopt are admissible [*Chitra v. Padhanuni*, A 1975 Or 24]. It is also admissible under cl (*3*) being against interest [*Andhi v. Rajeshwar*, A 1972 P 325]. Statements in mortgage-deeds made by a deceased mortgagor as to the ownership of the property comprised in the mortgage are admissible in evidence under s 32(*7*) and can be acted on if corroborated by other oral evidence [*Visalakshi v. Dorasinga*, 29 IC 974]. In a suit by reversioners of *B* (the husband of *S*) against *A* the certificate purchaser of the property, a statement as to the date of death of *S* in a mortgage by *M* (the possessor at the time of the certificate sale) was held admissible under s 32(*7*) [*Khudiram v. Amodebala*, A 1948 P 426]. When a mortgagor is dead, a deed of mortage, containing an assertion of title as mortgagor as to how he got the title is evidence under s 32(*7*) [*Nallasiva v. Ravana*, A 1921 M 383]. Declaration in a deed of gift that the properties mentioned therein were already gifted by her father-in-law and her husband attract the terms of sub-ss (*3*) and (*7*) [*Purnananda v. Purnanandam*, A 1961 AP 435]. In a suit for possession by the plaintiff, the report of a *muktear* who was appointed an arbitrator in a previous criminal case between the plaintiff and the defendant regarding the land that the land was in the possession of the plaintiff, is admissible under cl (*7*) as the plaintiff in that case asserted his right to the land [*Gurucharan v. Mafizuddin*, 65 CLJ 603: A 1938 C 150].

In a suit for possession of land as plaintiff's *brahmattar*, the will of purchaser in title showing recital of *brahmattar* title is not admissible under this section read with s 13(*a*) [*Satindra v. Krishna*, 36 IC 882—CONTRA: *Pramatha v. Champa*, 56 C 275; *Periasami v. Varadappa*, A 1950 M 486]. Statements of fact in the deceased's will tending to show that the properties were his self-acquisitions are admissible under cl (*7*) but being self-serving statements they should be carefully scrutinised [*Venkataramayya v. Sheshamma*, 1937 Mad 1012 : A 1037 M 538; *A Rangaswami v. A Subramania*, A 1975 M 141; see also *Nagammal v. Sankarappa*, 54 M 576: A 1931 M 264; *Appasami, v. Ramu*, 61 MLJ 887: A 1932 M 267]. A recital in a will of testator's age which was not made by him but by the persons present at the time of the will and which was written by the scribe is not relevant under cl (*7*) [*Gnaprakasam v. Parasakthi*, 1940 MWN 983: A 1941 M 179]. A mere statement in a will as to status and not relating to any transaction does not fall within cl (*7*) or cl (*5*) [*Hollaram v. Dwarka*, A 1939 S 145]. Statements by a deceased person in a family settlement deed to the effect that there was separation between himself and his brothers is not admissible in evidence [*Rajnarain v. Maharaj*, A 1937 O 133]. Where the question is whether a tenancy is a permanent one, statements by previous dead tenants as to the permanent character of the tenancy in documents of transfer are admissible [*Jogendra v. Subashini*, 4 CWN 590: 1941, 2 Cal 44: A 1941 C 541].

As to *recitals* in document, see s 13, *ante*.

CLAUSE (8)

Statements by Several Persons Expressing Their Feelings Relevant to the Matter in Question.—This clause lays down that statements made by a *number of persons*, expressing feelings or impressions, *ie* opinions, relevant to the matter in question are admissible when such persons are dead or incapable of giving evidence or whose attendance cannot be secured and they may be proved by the testimony of other persons. Such statements are admitted as part of the *res gestae* (*ante* s 7). Expression of feelings by an *individual* comes under s 14 (see *ante* s 6) and this

section deals with the expression of feelings by "number of persons" or aggregate of individuals. The ground of reception is necessity and convenience, as it is hardly possible to produce all the persons composing the crowd. The meaning of the clause is that when a number of persons assemble together to give vent to one common statement, which statement expresses the feelings or impressions made in their *mind* at the time of making it, that statement may be repeated by the witnesses and is evidence [*R v. Ram Dutt*, 23 WR Cr 35].

Illustration (*n*) exemplifies this clause. It is the well-known case of "Beauty and the Beast" [*Du Bost v. Beresford*, 2 Camp 512]. This was an action for damages for destroying a picture; the impression produced upon the mind by the picture was allowed to be proved on the defence, by witnesses who swore to the exclamations and declarations of other spectators of the picture in their presence, such spectators not being themselves put into the witness-box. In that case the plaintiff, a painter, had painted one Mr. Hope and his wife Mrs Hope. The former was extremely plain and the other very handsome. Whereupon the plaintiff exhibited it in public with the title of "Beauty and the Beast". The defendant Beresford, the brother of Mrs Hope, cut the picture to pieces and therefore the action was brought to recover damages. The defence was that the picture was a libel, calculated to bring the defendant into public ridicule, and he was therefore justified in destroying it. To prove this, witnesses were called who swore to the impression produced by the picture on their own minds, *viz* that it was intended to be a representation of the defendant and his wife, and to *the statements of recognition by other speactators*. The evidence was received. What the witness said as to his own feelings was in the nature of original evidence, what he reported the bystanders to have said was in the nature of hearsay. Now the latter is receivable as *relevant* [Nort pp 192-93]. LORD ELLENBOROUGH held that "the declarations of the spectators, while they looked at the picture in the exhibition room, were evidence to show that the figures portrayed were meant to represent the defendant's sister and brother-in-law" [During their testimony, "witnesses on the part of the plaintiff ..... added, that all the company who visited the exhibition expressed their sense of the strong likeness of the figures to Mr. and Mrs Hope"; Thayer, Cases on Ev p 594]. *Du Bost v. Beresford* appears to be more a case of opinion evidence. In a case in America where notice of the rottenness of a tree's roots was in issue, and to show knowledge by the city the evidence mentioned was offered, KNOWLTON J, observed: "The acts of persons in looking at the roots were an important part of the evidence. From this it might be inferred that they noticed the decayed conditions of the roots. The remarks made at the time rendered it certain that the view of the roots gave notice of the defect to those who then saw them" [*Chase v. Lowell*, 151 Mass 422, cited in Wig 266].

Another instance of the admission of this kind of evidence was where, on a prosecution for conspiring to procure large meetings to assemble for the purpose of inspiring terror in the community, a witness may be called to prove that several persons not examined at the trial had complained to him that they were alarmed at these meetings and had requested him to send for military assistance [*R v. Vincent*, 1840, 9 C&P 275; *Redford v. Birley*, 1822, 3 Stark 88; Tay s 579].

With regard to illustration (*n*), Markby observes: "I may observe that the case does not belong to s 32 at all. The evidence would be equally admissible whether the bystanders could be called or not as witnesses". Then he shows it by an example [Markby, p 34]. Taylor appears to consider the statements admissible as they are the "natural or inseparable concomitants of the principal facts in the controversy" [Tay ss 576, 579; see also s 14, *ante*]. Wigmore says that the remarks of the spectators that "Doe ought to bring an action against the painter Roe", are admissible circumstan-

tially as revealing that the picture was believed by them to represent Doe, though as assertions of what Doe ought to do or what Roe had done, the remarks would be inadmissible as hearsay [Wig ss 1715, 266]. Cunningham says: Compare *illustration (f)*. It will be observed that in the sub-clause as in the *illustration*, the reference is made to a number or crowd of persons. If these persons were known to the witness and could be called, his statement could not be admitted under the section. If they were not known or could not be found, it is not easy to see how the fact that there were many of them is material [Cunn p 95]. Whether it must be shown that *all* the persons who expressed their feelings or impressions are dead or cannot be found &c, evidence will be admitted of what any one of them said, is a question which does not appear to have arisen [Field 6th Ed p 144].

The statement of a police officer who goes about from place to place and collects information from different persons which he afterwards puts in second-hand before the court, cannot be received as evidence under s 32(*8*) [*R v. Ram Dutt*, 23 WR Cr 35].

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

Provided—

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

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

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

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

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COMMENTARY

Principle and Scope.—This section lays down the conditions under which secondary evidence of the testimony of a witness given in a former proceeding, civil or criminal, is rendered admissible in a subsequent proceeding or in a later stage of the same proceeding. It is based on the rule that the best evidence available must always be produced. Previous depositions of witnesses are therefore admissible in subsequent proceedings when the witnesses cannot be produced (*eg* for death, incapability of giving evidence, &c) or when their production would involve unreasonable delay or expense. The question of their admissibility under this section depends not as in s 32 on the intrinsic character of the statement and its subject-matter, but on the circumstances in which they were made. When it is wholly beyond the power of a party to produce a witness on account of his death or incapacity to give evidence or being kept out of the way by the other side or when his presence cannot be obtained without an unreasonable amount of delay or expense, his previous deposition is admissible in a subsequent judicial proceeding in proof of the facts stated therein, when *all* the following conditions are fulfilled:—

(*1*) that the evidence was given in a *judicial proceeding* or before any person authorised by law to take it;

(2) that the first proceeding was between the *same parties* as the second proceeding or between representatives in interest of the parties to the second proceeding; in other words, the party to the first proceeding should have been a

representative in interest of the party to the second proceeding and not *vice versa* [See *post*, "*Proviso* (*1*)"]. The identity of parties in the two proceedings must be substantial and not nominal;

(*3*) that the party against whom the deposition is tendered had a right *and* full opportunity of cross-examining the deponent when the deposition was taken;

(*4*) that the issues involved are the *same* or *substantially the same* in both proceedings;

(*5*) that the witness is *incapable* of being called at the subsequent proceeding (on account of death, or incapability of giving evidence, or being kept out of the way by the other side, or an unreasonable amount of delay or expense).

The object of S. 33 is that the evidence recorded in an earlier proceeding cannot be relied upon and the witness who gave the evidence must be examined in the subsequent proceedings for the purpose of establishing the truth of the fact [*D.P. Anand v. State of T.N.*, 1998 Cri LJ 724 (Mad)].

The admission of such evidence is sometimes thought (*1*) to form an exception to the Hearsay rule (Steph Art 32; Best, 11th Ed s 496, Gulson on Proof s 334); but since both oath and cross-examination were present, the essential requirements of that rule may be said to have been satisfied. Its *weight*, however, is of course affected by the loss of the demeanour of the witness. (*2*) Dr Wharton (s 177) bases its admission on the consideration that the parties and the issue being the same, and full opportunity of cross-examination having been allowed, the second trial is virtually a continuation of the first [Phip 11th Ed p 585]. Wigmore is of opinion that the statement being admitted because it has already been subjected to cross-examination, it satisfied the hearsay rule [Wig s 1370]. But although such deposition is admissible under this section as secondary evidence, any statement in such deposition which ought not to have been received in evidence in the former proceeding in inadmissible [*Roe d Pellat v. Ferrars*, 1801, 2 Bos & P 542, 548; *Small v. Nairne*, 1849, 13 QB 840]. It is doubtful whether s 33 applies to a party. It speaks of witness [*Satyaranjan v. Haripriya*, 53 CWN 569].

The conditions mentioned above, must *all* be fulfilled, before a previous deposition can be admitted in evidence. The absence of any of them will render the evidence inadmissible. The occasions enumerated regarding the incapability of calling the witness are the same as in s 32 with the addition of the witness being kept out of the way. In England, if the witness is beyond the jurisdiction of the court, the deposition will be admitted in civil cases only [*Fonsick v. Agar*, 1806, 6 Esp 92; *Varicas v. French*, 2 C&K 1008]. Proof of diligent but unsuccessful search will probably also admit the evidence in civil cases but not in criminal cases [*Falconer v. Hanson*, 1 Camp 171; *Wiedeman v. Walpole*, 1891, Times, June 15; *R v. Scaife*, 20 LJ MC 229; *Lord Morley's case* 1666 Kel 53, 55 HL : Hals 3rd Ed Vol 15 para 713 p 400; Phip 11th Ed p 587; Wig s 140].

S 33 deals with statements of persons who cannot be called as witnesses, and does not restrict or override the provisions relating to admissions in Evidence Act [*Union v. Moksh Builders &c*, A 1977 SC 409].

In the absence of proof of the conditions in s 33 the importing in bulk of deposition of witnesses in a civil suit of depositions of witnesses in criminal trial is a serious irregularity. They could not be used even to support the evidence the witnesses gave in the civil suit [*Bal Gangadhar v. Shrinivas*, 42 IA 35: 39 B 441 : A 1915 PC 7]. When a court in its discretion admits previous statement under s 33, the

appellate court will not interfere unless it was exercised arbitrarily [*Banwari v. S*, A 1956 A 385].

The section makes no distinction between civil and criminal cases. Before admission, court must decide judicially that proper effort has been made to secure the presence of the witness. It is wrong to admit his previous deposition without waiting for the return of *sub poena* on him [*Ghulam v. R*, 10 L 837]. It any of the conditions mentioned above is absent, the evidence will not be admitted under this section, but former depositions may be received as admissions [see *Soojan Bibee v. Achmet Ali*, 21 WR 414 cited *post*] or to contradict previous statements at the subsequent trial [see s 145 and notes *post*], or to prove matters of public right or matters of pedigree [see s 32 cls (*4*), (*6*)].

The burden of proving that the witness is dead or cannot be found, &c is on the party who wishes to give the evidence (s 104). The court shall under s 80 presume the genuineness of a document purporting to be a record or memorandum of evidence or any part of the evidence given by a witness in a judicial proceeding &c, &c. The previous deposition should have been taken in accordance with the procedure laid down by law (see *post*).

It should be noted that the requirement in s 32(*5*) of the statement being made before the question in dispute was raised is not to be found in s 33. So a statement as to the existence of a relationship made by a witness in a judicial proceeding between the parties or their representatives in interest at a time after the question in dispute arose may be admissible under s 33 if the questions in issue were substantially the same [*Bhagwan v. Mahesh*, 40 CWN 360 PC].

Where a witness dies after examination-in-chief and before cross-examination or where the examination cannot be completed on account of death, illness &c s 32 does not apply. Such unfinished testimony is admissible though its probative value is very small. (See *post*, s 138; "*Death, Illness &c*").

Unavailability of Witness to be Strictly Proved.—The power under s 33 must be exercised with great caution. It is essential that a court in admitting previous deposition should either in its judgment or preferably in a separate order, record its reasons for doing so [*Nga Nye v. R*, 76 IC 817: 1 R 572; *Nga Chit v. R*, A 1939 R 225]. Death [*Arabinda v. S*, A 1953 C 206] or incapability to give evidence must be proved strictly. In a civil case a party can if he chooses waive the proof, but in a criminal case strict proof ought to be given [*Chainchal v. R*, A 1946 PC 1 : 72 IA 270; *Aminual Haque v. R*, 5 DR 1; *Bismillah v. S*, A 1959 Raj 21]. The sessions judge ought to take evidence and record proceedings before he arrives at a judicial decision that his presence could not be secured [*Indar v. R*, A 1930 L 1041; *Satish v. R*, A 1945 C 137: 1944, 2 Cal 76; *Mokshed v. R*, A 1930 C 756; see *Ghulam v. R, sup*]. The mere fact that a witness did not appear when cited by plaintiff or that he appeared as a witness on behalf of defendant on the occasion but was not examined, it being found that he was not kept out of the way by the defendant, would not make s 53 applicable. The deposition given in a case under s 145 Cr P Code by one of the defendants as a witness for the other defendant cannot be admitted as the defendant had no opportunity to cross-examine him [*Brajaballav v. Akshay*, 30 CWN 254: 93 IC 115]. A verbal application by the public prosecutor is not a sufficient ground for admitting previous deposition under s 33 [*Mokshed v. R*, A 1930 C 756; *In re Annavi*, 39 M 449 : 28 IC 518; *Indar v. R*, A 1930 L 1041], nor a mere statement by the public prosecutor. The court ought to take evidence and decide judicially that the witness could not be found [*Indar v. R, sup*; *Kala v. R*, A 1944 L 206; *Bismillah v. S, sup*]. The court must come to a definite finding whether the postponement of the trial

in order that the witness might be produced was unreasonable in the circumstances [*R v. Gajendra*, 1943 1 Cal 405: 47 CWN 27: A 1943 C 222].

Relevancy of Evidence in Previous Proceeding.—With regard to the admissibiliy of secondary evidence of oral testimony, Taylor says: The broad proposition as to this will be recollected, that such proof is only admissible where the production of primary evidence is out of the party's power. Subject to this it may be stated as a general rule, that where a witness has given oral testimony under oath in a judicial proceeding, in which the adverse litigant had the power to cross-examine, the testimony so given, will, if the witness himself be incapable of being called, be admitted in any subsequent suit between the same parties, or those claiming under them, provided it relates to the same subject, or substantially involve the same material questions. In order to render admissible secondary evidence of the testimony of a witness, it must be proved that the witness was duly sworn in some judicial proceeding, to the authority of which the party, against whom his testimony is offered, was legally bound to submit, and in which he might have exercised the *right of cross-examination*; for if this were not the case, the preposterous consequence would follow, that secondary evidence of testimony might be received under circumstances that would exclude the testimony itself. If therefore, it should appear that depositions were taken, either by parties not legally authorized to take them, or without sanction of an oath or affirmation, or in the absence of the party against whom they are offered, when as in most criminal investigations, his presence was requisite, they cannot be received. But although it is necessary that the party, against whom depositions are offered in evidence, should have an opportunity of being present at the examination and of cross-examining the witness, yet it is by no means requisite that he should have exercised that power and if notice has been given to him of the time and place of an examination on commission, and he neither intimates a wish to cross-examine, nor applies to the court to enlarge the time for that purpose, it will be presumed that he has acted advisedly and the depositions will be received [Tay s 464-66].

[*Ref Steph Art 32; Tay ss 464-69, 546-49; Best 11th Ed, s 496; Phip 8th Ed, pp 430-34; Roscoe N P 201-202; Powell, p 278; Wig s 1373-89, Unavailability of Witness—Wig ss 1402-1418; Jones, ss 682, 683; Chamb ss 1619-1675; Hals, 3rd Ed, Vol 15, paras 713-14*].

Oral Testimony.—This section embodies the law as to depositions taken in a former proceeding being admissible upon a subsequent occasion. It specifies what evidence is receivable. This is, whatever is delivered by a witness either in (*a*) judicial proceeding, or (*b*) before any person authorized by law to take the evidence. *Oral evidence*, therefore, is as receivable as when it has been reduced to a formal deposition. If the oral deposition can be proved to the satisfaction of the judge, it is as admissible as a written deposition of the judge. But it is of course open to much observation, inasmuch as memory is treacherous, while a written record of what is said abides. Some forcible remarks on the superiority of written over oral testimony will be found in the case of *Bunwaree v. Het Narain*, 7 MIA 156: 4 WR 128. One mode of proof of such deposition is the production of the judge's notes, or the oath of some one who was present and heard the evidence delivered. In Lord Palmerston's case, the evidence was rejected, because the witness could give the *effect* only, and not the words. But it may be doubted whether such minute particularity is requisite, for the very words could seldom be remembered after a lapse of time [Nort p 194]. The testimony, if oral, may be proved from memory or notes or by any one who swears to its accuracy, *eg* judge, counsel or reporter; but not, unless at least by consent, by the judge's notes [Phip 11th Ed p 587; Tay s 546]. *Cf* s 63 (*5*).

S 33 Cannot Be Used For Contradiction.—Under s 33 the deposition of a witness in a previous proceeding is admissible as substantive evidence if certain conditions exist; but it cannot be used even with consent merely for the purpose of contradicting the statement of another person in such proceeding [*Bobba Bhavamma v. Bobba Ramanna*, 78 IC 176 : A 1924 M 537].

S 33 and S 326 Cr P Code.—A witness died after transfer of a case under s 350 of Cr P Code, 1898 (now s 326) and when the trial was commenced before the second magistrate accused demanded resummoning and rehearing of the witness as he had such a right under a proviso to s 350. The deposition of the witness was admitted under s 33, and it was held that the general provisions of s 33 were in no way affected by s 350 [*Lekal v. R*, A 1927 L 332 (*Sahib Din v. R*, 3 L 105: A 1922 L 48 **dissented**)]. The proviso to s 350 giving such right was omitted by Cr PC (Am) Act, 1955 and there being no such provision in s 326 of 1973 Code the conflict between s 33 and s 326 of Cr PC does not arise.

Statements under s. 161 CrPC.—The statements of an injured person against the accused under S. 161, CrPC was rightly held to be not relevant under S. 33, Evidence Act. *Sukhar v. State of U.P.*, 1999 (7) JT 537 : (1999) 9 SCC 507.

Waiver.—Benefit of s 33 may be waived. Consent of parties may make admissible the evidence given in a previous judicial proceeding between them in a case in which the conditions prescribed by that section do not exist [*Jainab Bibi v. Hyder Ali*, 43 M 609 FB: 56 IC 957; *Nityananda v. Binayak*, A 1955 Or 129; see *Radhakishan v. Kedar*, 80 IC 874 : 46 A 815—CONTRA *Ayyavu v. Secy of S*, A 1942 M 528; *Ponnaswami v. Singaram*, 41 M 731; *Sundar v. Sham*, 81 IC 235; *Abdool Gaffoor v. Govind*, A 1918 R 284; *Ghulam v. R*, 10 L 837]. If by consent or without objection the court admits evidence not strictly admissible under s 33, the appellate court cannot exclude it [*Lakshman v. Amrit*, 24 B 591; *Lakshmidevamma v. Pobhisetti*, 140 IC 518: A 1927 C 1107; *Ayyavu v. Secy of S, sup*; *Modi Nathubhai v. Chhotubhai*, A 1962 G 86].

When a trial in the original side of the High Court is continued by another judge owing to the death of a judge consent of parties may make evidence given before the former judge admissible before the latter judge [*Dalim v. Nandarani*, A 1970 C 292]. Where there are cross cases, they should not be heard at the same time and the evidence in one case should not be considered in coming to a conclusion on the other [*Garibulla v. Sardar*, 81 IC 557: A 1924 C 813; see *Sheikh Bahatar v. Nobadali*, 28 CWN 487]. See also : "*Waiver of Objection, or Consent*", *ante* s 5.

Criminal Cases.—There can be no waiver in a criminal case and incapability must be strictly proved [*Chainchal v. R*, 50 CWN 201: A 1946 PC 1 : 72 IA 270]. Consent of accused cannot cure the irregularity in exhibiting the deposition of witnesses in a previous trial without examining them *de novo* [*Kottam v. Umar*, 46 M 117: 69 IC 636]. S 33 must be complied with. Want of objection or consent of accused does not make any difference [*Ghulam v. R*, 10 L 837 : A 1929 L 542; *Kottam v Umar*, 46 M 117; *Annavi Muthriyam v. R*, 39 M 449; *Sajjan v. R*, 6 L 437; *Mokshed v. R*, A 1930 C 756; *Savlimiya v. R*, A 1944 B 338; *Gaya v. S*, A 1954 A 59; *Kesar v. S*, A 1954 Pu 286]. As to criminal cases, the general principle is that a prisoner can consent to nothing. (See *ante* s 5 and s 58 *post*).

"Judicial Proceeding".—[See *ante* s 1]. A proceeding before a judge or magistrate who has no pecuniary jurisdiction is not a judicial proceeding and evidence taken in such a proceeding is not admissible under s 33 [*Sankappa v. Keraga*, 54 M 561: 132 IC 122]. Evidence taken in a proceeding which is subsequently found to be without jurisdiction is not a judicial proceeding and is inadmissible [*In re Rami Reddi*, 3 M 48; *Buta v. R*, 7 L 396; *Sudhindra v. S*, 56 CWN 835 : A 1953 C 339]. Investigation by Insepctor of Mines is not a judicial proceeding

[*Bhurangya Coal Co v. Sahebjan*, A 1956 P 299]; so also settlement proceedings [*Krishna v. Ahmadi*, 57 A 588].

Identity.—Before a certified copy of a deposition may be admitted it is necessary to prove the identity of the person who gave the deposition [*Brajaballav v. Akshaya*, 30 CWN 253. (See *post* s 80)].

"Before Any Person Authorised By Law to Take it".—In general, the principle is clearly accepted that testimony taken before a *tribunal or officer* not empowered to compel or not in practice *employing cross-examinations* as a part of its procedure is inadmissible; and conversely, the kind of tribunal is immaterial and the testimony is admissible if in fact cross-examination was practised under its procedure [Wig s 1373]. See Tay s 465 (*ante*).

The deposition must have been made in a judicial proceeding before a person legally authorised to take evidence, in other words, before a court, as defined in s 3, or before an arbitrator (s 4 Oaths Act), or commissioner (Or 26). An affidavit duly made in a pending suit or a deposition taken before a committing magistrate in the presence of the accused may thus be used as evidence at the trial [*R v. Amanulla*, 12 BLR Ap 15]. The evidence of a witness given in a proceeding pronounced to be *coram non judice* (without jurisdiction), cannot be used under s 33 if the witness is dead, on a retrial before a competent court [*In re Rami Reddi*, 3 M 48; *R v. Bharma*, 11 B 702; 2 Weir 756; *Buta v. R*, 7 L 396: 97 IC 752]. Depositions taken by the British Consul at Zanzibar who held a preliminary inquiry in a murder case were held admissible in the trial before the Bombay High Court. British Consul at Zanzibar is a person authorized by law to take deposition, though he cannot enforce the attendance of witness at Bombay [*R v. Dossaji Hosein*, 3 B 334]. A special registrar is a person authorised by law to record the statements of witnesses in an enquiry under s 74 of the Registration Act [*Jeheto Shk v. Jaibannessa*, 20 IC 661 : 18 CWN 605]. A will was registered after the death of the testator. In a subsequent suit, the attesting witnesses having died their depositions recorded before the Registrar are admissible [*Kamjula v. Mangamuri*, 1943 Mad 462: A 1943 M 332]. Evidence recorded for the purpose of proceedings under the Fugitive Offender's Act can be admitted under ss 32 and 33 in proceeding under the IP Code against the same accused [*Wheeler v. R*, A 1928 S 161]. A special Judge under Ordinance 2 of 1942 is not authorised to take evidence. Nor are proceedings before him judicial proceedings [*R v. Ajit*, A 1945 C 159 : 78 CLJ 217].

—**Coroner.**—In Stephen's Digest Art 142n it is remarked that "as the statute says nothing about the conditions on which they (depositions before Coroners) may be received, their admissibility depends on the common law principles regulating testimony in former trials. In criminal cases they have been rejected when taken in the absence of the accused [*R v. Rigg*, 4 F & F 1085; *S v. Campbell*, I Rich 124]. It has recently been held that coroners' depositions are to be treated upon the same footing as those taken before magistrate [*R v. Butcher*, 64 JP 808—*per* DARLING, J]. But this was denied by GRANTHAM, J, in *R v. Cowle*, 71 JP Rep 152, who held them admissible if proof were given that (*1*) they were signed both by the deponent and the coroner: (*2*) the accused had full opportunity of cross-examination: and (*3*) the deponent be dead [Phip 11th Ed p 707]. According to Taylor, the medieval rule of admitting deposition before coroner taken in the absence of the accused and without cross-examination may now be regarded as obsolete. [Ref Tay ss 492, 493; Powell pp 287, 512: Arch Cr Pleading, 1910 p 167; Russell on Crime, 7th Ed p 2244]. The practice of putting in by consent the deposition of a witness taken before the coroner on an enquiry into the death of plaintiff's son was condemned [*Calmenson v.*

Merchant's W Co, 1921, 90 LJPC 134]. In America such testimony is inadmissible if cross-examination is wanting [Wig s 1374]. It has also been held here that inquiry before a coroner, not being a proceeding between the prosecutor and the accused, such deposition is inadmissible [*R v. Md Yusuf*, A 1933 B 479].

[See the Coroners Act (4 of 1871). The Coroners Madras Act (5 of 1889), ss 174, 175, 176 of the Cr P Code].

Description on Top of Deposition.—The deposition taken in a former proceeding is admissible upon a subsequent occasion, under the conditions specified in the section. But words descriptive of the witness put at the head of the deposition, *eg*, age, &c form no part of it and cannot be used as evidence to prove the facts stated [see *Maqbulan v. Ahmed*, 31 IA 38: 26 A 108 : 8 CWN 241; *Lakshman v. Takim*, 28 CWN 1033: 80 IC 357; *Ramgahan v. Ramdasi*, A 1933 P 627]—CONTRA : Name, parentage, age, residence and profession of a witness form part of the deposition on solemn affirmation and not part of the pleading and it is not inadmissible [*Chotan v. R*, 7 P 361: A 1928 P 420].

Statements made by deceased as to his age in previous cases, *eg*, when asked by court before taking deposition or in bonds &c, are admissible [*Jadunath v. Bisheshar*, A 1939 O 17 (*Maqbulan v. Ahmed, sup* **expld**)]. Entry in heading of deposition that witness is a Burmese Buddhist has no-probative effect to prove religion [*Ma Tin v. Ma E*, A 1938 R 81]. Witness when examined stated his age to be 24, but the judge made a note (under Or 18, r 12) that he appeared to be 18 or 19. It is no part of evidence [*Md Hasan v. Abdul Hamid*, 50 IC 341 (C)].

Statement by Living Person in Previous Judicial Proceeding.—*M* instituted a suit against *F* for restitution of conjugal rights, *B* who alleged that *F* was his wife, was also impleaded as a defendant. Both *F* and *B* denied *F's* marriage with *M*. A statement by *F* in a prosecution of *B* under s 498 IP Code was relied on by *M* in the present suit. *B* was not examined as a witness—*Held* that the statement was not admissible [*Md Khan v. Pattan*, 12 PLR 1919].

Previous Deposition Should Have Been Recorded in the Manner Laid Down by Law.—In order to make the former deposition admissible it must have been recorded in the manner prescribed by law. The mode of recording evidence in civil cases is to be found in Or 18 rr 4-17A C P Code 1908; and in criminal cases in ss 263, 264, 273-84, 291, 299 Cr P Code and under s 80 there is a presumption of genuineness of documents containing records of such evidence. The provisions of s 360 (now s 278) Cr P Code is mandatory [*Jyotish v. R*, 36 C 955; *Brahmadeo v. R*, 62 IC 584: A 1921 P 149]. If a statement of the complainant before enquiring magistrate is not read over under s 360 (now s 278) Cr P Code s 33 does not apply [*R v. Phagunia*, 89 IC 1043: A 1926 P 58]. Where the law requires the deposition to be reduced into writing, no evidence shall be given except the written deposition or secondary evidence of its contents when secondary evidence is admissible (see s 91). The court, before admitting depositions under s 33 must be first satisfied that they were duly recorded in compliance with s 360 (now s 278) Cr P Code [*Durghai v. R*, 52 C 499. On this point see further notes to s 80, *post*]. In *Elahi Bux v. R*, 45 C 825, it has however been held that deposition not taken in accordance with law, might be provable otherwise than by s 80 *eg*, by the evidence of the judge himself. As to the effect of irregularities in recording deposition, see further notes under s 80, *post*.

Mutilated Deposition.—The fragmentary condition of the record produced under s 33 would deprive it of all weight [*Gobinda v. Sham Lal*, 58 C 1187: A 1931 PC 89 : 58 IA 125].

UNAVAILABILITY OF WITNESSES.—"When the Witness is Dead".—Before the deposition of a witness is put in as evidence, his death must first be strictly proved, unless it is admitted on the other side and the reading of the deposition is not objected to [*R v. Gogalo*, 4 BLR AP 50 : 12 WR Cr 80]. The fact of death, must, however, be affirmatively established to the satisfaction of the presiding judge by clear, positive and convincing testimony [*Johnson v. Com*, 1902, 70 SW 44 (Am)]. Where a person's deposition had been taken 60 years previously, it was held that there was no presumption of his death and the court refused to admit such deposition in evidence in the absence of any proof of search having been made for the deponent or any account of him [*Benson v. Olive*, 1732, 2 Str 920; *Manby v. Curtis*, 1815, 1 Price 225; Tay s 199]. For presumption as to life and death, see ss 107 and 108, *post*.

In order to make the deposition of a dead witness admissible, the party tendering should have summoned him before his death [*Subramanya v. Lakshminarasamma*, A 1958 AP 22]. Where the evidence was recorded in the absence of the accused who could not be arrested because he was absconding and records showed that the witnesses were subsequently summoned but the summons came back with the report that the witnesses had died, it was of the witnesses held that preconditions of S. 33 were complied with and, therefore, the depositions already on record could form the basis of conviction. *Nirmal Singh v. State of Haryana,* AIR 2000 SC 1410 : 2000 Cri LJ 1803.

—"Cannot be Found".—"If a party cannot find a witness, then he is, as it were dead to him; and his depositions in a cause between the same parties may be read, provided that he endeavoured to find him, but could neither see him, nor hear of him. The same amount of diligent search would be requisite here, as in cases where it is sought to prove the signature of an attesting witness. The section, applying equally to criminal as to civil cases, seems to abolish the distinction which in English law exists in civil and criminal cases as to the admissibility of a deposition of a witness who cannot be found" [*Lord Moreley's* case, 6 How, St Tr 771; Norton p 195. As to the English rule in criminal cases, see Commentary, *ante*, p 401]. The court must be satisfied that there has been no collusion and that the search has been *bona fide* [Wig s 1405]. It is not sufficient for him to show simply that he is ignorant as to where the witness is. He must go further and prove affirmatively to the court that he has used due diligence [*State v. Riddle*, 1904, 179 Mo 287; *State v. Evans*, 1877, 65 Mo 574, Am)]. Where there is nothing to show that witness could not be found after diligent search and reasonable exertion, his former deposition is inadmissible [*R v. Lakhi Narayan*, 24 WR Cr 18, 19].

The words "cannot be found" are general and do not only apply to persons whose names had been found but who could not be found subsequently. They include persons whose names could not be known [*Dogar v. Sunam*, A 1944 L 58]. Mere unavailability or incapability of the witness is not enough. All the other conditions in the section must exist [*Chakauri v. Suraj*, 2 ALJ 91]. Evidence of a medical witness whose whereabouts were unknown was properly admitted under s 33 [*Bakhshish v. S*, A 1957 SC 904: 1958 SCR 409]. Where it was shown that a person examined before a committing magistrate suddenly disappeared, that summons could not be served upon him personally and that inquiry had been made for him in his native village, but without result—*Held*, that his previous deposition was properly admitted [*R v. Rochia*, 7 C 42 : 8 CLR 273; see *Jati v. R*, A 1929 C 765 : 33 CWN 918; *Abbas v. R*, 35 CWN 143]. Witnesses examined before the committing magistrate not appearing after issue of fresh summonses, the sessions judge used their previous evidence—*Held* he ought to have compelled the attendance of the witnesses by issuing warrants [*R v. Dost Md*, AWN (1905) 202: 2 Cri LJ 518]. The fact that a witness had gone to a place not far away for training for a short period [*Savlimiya v. R*, A 1944 B 338], or that she was in another district [*Bahera v. S*, A 1950 Or 202] is no sufficient ground. Departure for Pakistan was accepted as a ground [*Gurdial v. R*, A 1949 Pu 228].

A woman told her paramour *D* that she had witnessed a murder. She then died before the enquiry. *D* deposed to the statement of her mistress before the committing magistrate and then disappeared—*Held* that *D's* statement of what she had told him is relevant and admissible [*Ajodhi v. R*, 16 NLR 30 : 56 IC 582]. Where the only evidence was the statement of a police officer that search had been made for a witness but he could not be found, that a warrant was also issued and that he was a man of another district, but no warrant was produced and there was no evidence of any attempt to serve it, or, if so, of what was done for the purpose—*Held* that sufficient ground had not been established for admission of his previous deposition under s 33 [*R v. Kangal*, 41 C 601]. When a police constable deposed that an unsuccessful attempt was made to produce the witness, a further attempt should be made to enforce the attendance of the witness [*Dwarka v. R*, 25 OC 142]. The statement before a committing magistrate can be transferred to the sessions record under[2] s 288 Cr P Code, 1898 only if the person is examined before the sessions judge. His statement will be admissible under s 33, only if the judge holds that he is incapable of giving evidence [*R v. Natha*, A 1934 L 212; see *Legal Rem v. Forhad*, A 1934 C 766], or cannot be procured [*Khem v. R*, A 1925 L 319; *R v. Natha*, A 1934 L 212].

—Absence From Jurisdiction.—When the witness is out of the jurisdiction, it is impossible to compel his attendance, because the process of the trial court is of no force without the jurisdiction, and the party desiring his testimony is therefore helpless [Wig s 1404].

—"Is Incapable of Giving Evidence."—The words "incapable of giving evidence" are the same as those used in s 32, and were held to denote incapacity of a permanent character, and not of a momentary or temporary character, by two considerations: (1) If cases of casual or temporary illness were intended, there would have been no occasion for the words ("whose attendance.....unreasonable"); and (2) the court has no discretion as to admitting deposition when the witness is proved to be incapable of giving evidence. Such a witness is in the same category of one "who is dead" or "cannot be found" [*In re Pyari Lal*, 4 CLR 504]. Disagreeing with this a later case held that on the construction of the entire s 33 and from reference also to s 32 it appeared that the incapacity contemplated is not necessarily a permanent one and that something short of permanent incapacity might satisfy the words of the section [*In re Ashgar*, 6 C 774 : 8 CLR 124; *Bhim v. Magalam*, A 1961 P 21]. In England the words used in the statute (Indictable Offences Act, 11&12, Vic c 42, s 17) are "dead or so ill as not to be able to travel," and it has been held there that the illness need not be of a permanent or more than temporary nature but where it is temporary, the judge may in his discretion postpone the hearing till recovery [*R v. Tail*, 2 F&F 553; *R v. Wilson*, 12 Cox 622]. The view in *R v. Ashgar, sup*, appears to be more in consonance with reason and convenience. To hold that the illness should be of a permanent character in the strict sense would be to push the meaning beyond reasonable limits. A person may not be stricken with illness of a permanent character but may yet be incapable of attending court and giving evidence. The court is the sole judge as to the degree of illness [*R v. Noakes*, 1917, 1 KB 581] and if in its opinion the illness is serious and there is physical incapability of locomotion, it will excuse the attendance of the witness, or if there is any possibility of recovery within a reasonable time and an adjournment can be conveniently granted, it will postpone the trial.

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2. Omitted in Cr. P. Code, 1973.

It is not absolutely necessary to examine a qualified medical practitioner who grants a certificate of illness before the evidence of a witness can be accepted under s 33 [*Alijan v. R*, 31 CWN 908 : A 1927 C 679]. It is not essential that illness should be proved by the medical attendant [*R v. Naokes, sup*, but see *R v. Cohen*, 34 LJ 623]. Incapacity must be proved and proved strictly. The evidence of process-server that he found the witness ill is insufficient, but relying on *R v. Naokes, ibid*, it has been held that evidence of a medical man is not necessary in all cases [*Chainchal v. R*, 50 CWN 201 : A 1946 PC 1 : 72 IA 270]. Admission of accused's counsel that a witness is ill cannot be accepted in a criminal case [*Mitter v. S*, A 1950 C 435; see s 58 *post*].

Where witness proves shy and speechless in the sessions court, s 33 does not apply [*Motiram v. R*, 75 IC 152 : A 1923 B 170]. If a man becomes insane after giving his deposition, it is as if he were dead, and his deposition is receivable [*Doe v. Powell*, 7 C&P 617; *R v. Griswell*, 3 TR 720]. A person may be incapacitated by bodily illness. If the nature of the illness is such as to preclude reasonable hope of his appearing in court on any future occasion, it will justify the reception of his deposition in criminal cases [*R v. Cockburn*, 1 Dear & B 203 : *R v. Hogg*, 6 C&P 176] as well as in civil cases [*Jones v. Jones*, 1 Cox Ch R 184]. So if a man be permanently bed-ridden. Temporary illness is rather a ground for postponing a trial till the witness can appear [Nort p 196; Tay ss 472-73; *Hari Pd v. S*, A 1953 A 660]. A person very old and blind and unable to move comes within the section [*Bhim v. Magaram*, A 1961 P 21]. A prosecution witness was not cross-examined. After charge he was too ill to attend court and could not answer interrogatories. His previous evidence is admissible although the weight depended on circumstances [*Mangal v. R*, A 1929 L 840 (*Maharaja Kolhapur v. Sundaram*, A 1925 M 497 **relied** on)].

The following degrees of illness have been held *sufficient*: travelling would have endangered life [*R v. Day*, 6 Cox 55]; the deponent could travel but not complete the object of his journey, as he had a tendency to softening of the brain; and was so ill and nervous that examination and cross-examination would confuse and nullify his evidence, and would in his condition be dangerous to life [*R v. Wilson*, 8 Cox CC 453]. The following have been held *insufficient*; the deponent had been seized with a bowel complaint on the morning of the trial and was too ill to travel [*R v. Harris*, 4 Cox 440; *R v. Bull*, 12 Cox 311; the deponent was very old and so nervous that the doctor considered that her attendance in the court and examination as a witness would be dangerous to her [*R v. Farrel*, 12 Cox 605; *R v. Thompson*, 13 Cox 181]; the witness a policeman, saw the deponent in bed and "was told he had fever" [*R v. Welton*, 9 Cox 297; *R v. Cohen*, 34 L Jo 623; Phip 11th Ed p 704].

With regard to the admissibility of the deposition of a woman who is daily expecting her confinement or who is confined, there is a difference of opinion. Some judges have admitted the deposition of a woman, who when the trial took place had been or was about to be confined [*R v. Stephenson*, 31 LJMC 147]. But other judges think that a confinement (which after all is but a natural state) is not "illness" within the meaning of the statute [*R v. Wilton*, 1858, 1 F&F 309] and they consider that a postponement ought to be applied for. Although advanced pregnancy is not necessarily "illness" yet it is a condition which may very well be accompanied by symptoms rendering the woman unfit to travel and which may amount to illness [*R v. Croucher*, 1862, 3 F&F 285; Tay s 481; cases cited Phip 11th Ed, p 704].

—"Is Kept Out of the Way By the Adverse Party".—The proposition that if a witness be kept out of the way by the adverse party, his former statements on oath will be admissible, rests partly on the authority of several decisions in the civil and

the criminal courts [*Lord Morley's* case, 1666 Kel J 55; *R v. Harrison*, 1692, 12 How St Tr 851; *Green v. Gatewick*, 1673 Bull N P 243; *R v. Guttridge*, 1840, 9 C&P 473], partly on the analogies furnished by one or two statutes; but chiefly on the broad principle of justice, which will not permit a party to take advantage of his own wrong. In a case where three prisoners were indicated for felony, and a witness for the prosecution was proved to be absent through the procurement of one of them, the court held that his deposition might be read in evidence as against the man who had kept him of the way but that it could not be received against the other two men [*R v. Scaife*, 1851, 20 LJMC 229; Tay s 472 fn]. Such deposition is admissible in civil proceedings only, if the witness is either out of the jurisdiction or cannot be found after diligent search. In England neither of the above grounds will let in the deposition in criminal cases [*R v. Scaife, sup*; *R v. Austin*, 7 Cox 55; *R v. Hagan*, 8 C&P 167; Phip 11th Ed, p 587].

—"If His Presence Cannot be Obtained Without Delay, etc."—The provision as to the admission of previous deposition of a witness on the ground that his presence cannot be obtained without an amount of delay or expense, &c, were to be sparingly applied, with great caution and certainly not in a case where the witness was alive and his evidence reasonably procurable. It is only in the extreme cases of expense and delay or in special case that a personal attendance of a witness should be dispensed with, and the evidence given by him before the committing magistrate referred to [*R v. Mulu*, 2 A 646; *R v. Mowjan*, 20 WR 69; *Mokshed v. R*, A 1930 C 756; *G Bulliswamy v. C Annapurnamma*, A 1976 AP 270; see observations of PHEAR, J in *R v. Lakhan*, 21 WR 56].

Depositions made during the preliminary enquiry under the Merchant Shipping Act (5 of 1883) in a case of collision, by the officers of the defendant's vessel were held to be admissible [*Asiatic Steam N Co v. Bengal Coal Co*, 35 C 751]. Where a prosecution witness is examined and cross-examined before charge and leaves for England and accused requires him to be cross-examined, the court may act under s 33 [*Nga Ba v. R*, A 1927 R 248 : 104 IC 637].

The deposition of a deputy magistrate taken by the committing magistrate to regularise the recording of some statement of the accused cannot be used by the sessions judge under s 33 without calling the deputy magistrate [*Noshai & Ors v. R*, 5 C 958; see *R v. Lakhi Narain*, 24 WR Cr 19; *R v. Pershad*, 22 WR Cr 36]. In a murder case it is improper to apply s 33 when the principal witness who had joined the army was stationed at Muttra and available [*In re Nadar*, A 1944 M 319 : 1944 Mad 687]. It is improper to use s 33 when the failure of a witness to appear is due to the failure of the prosecution to issue summons in good time [*Nasib v. R*, A 1943 L 89]. A medical certificate that the sub-inspector should have rest for a week was held insufficient for admission of his deposition [*R v. Gajendra*, 47 CWN 271 : A 1943 C 222]. So also the ground that it would be expensive to retain the assessors until a witness is summoned [*Lal v. R*, A 1943 L 118]. The amount of expense put at Rs. 500 by the judge, being not unreasonable under the circumstances, the deposition of certain important witnesses who were not cross-examined by the accused and on whom the prosecution case rested could not be admitted [*R v. Burke*, 6 A 224; see also *R v. Belat Ali*, 19 WR Cr 67; *R v. Gunraj*, 2 A 444]. As to the kind of expense contemplated by this section and when the expense and delay should be considered reasonable or unreasonable, see *R v. Pyari Lal*, 4 CLR 504. A witness was brought to Rangoon from Calcutta on two different occasions and examined and cross-examined—*held* that the difficulty and expenses involved in calling such a witness were sufficient to make his evidence admissible [*Fernandez v. R*, A 1934 R 434].

A deposition made by a person, wherein he denied on oath, that he had presented a certain petition in court, which purported to be from him, was held inadmissible as the person might have been brought into court [*Bhooban Moyee v. Umbica*, 23 WR 343]. Evidence taken under commission issued by a presidency magistrate, cannot on the trial of the same case at the High Court sessions be admissible under s 33 on the ground of expense of attendance, especially when absurd views were propounded regarding expense [*R v. Jacob*, 19 C 113; see *R v. Dabee Pd*, 6 C 532].

—Other Cases of Unavailability.—The witness' *imprisonment* for crime supposing him not to be disqualified for infamy, is no reason for excusing his non-production; for his production can presumably be obtained by order of court [Wig s 1407]. Inability on the part of a witness to attend a trial owing to the requirements of *official duty*, will usually be deemed sufficient for receiving the secondary evidence of his former testimony [*Noble v. Martin*, 1828 7 Mart NS 282]. The validity of the excuse rests with the trial court [Chamb HB s 628].

PROVISO (1): "That the Proceeding Was Between the Same Parties or Their Representatives in Interest."—An important condition of the admissibility of former deposition in subsequent judicial proceeding is that the previous proceeding in which the evidence was originally given must have been between the same parties, (*ie* the parties to the second proceeding) or between persons who are representatives in interest of the parties to the second proceeding, *ie* the party to the first proceeding must have represented in interest the party to the second proceeding. The use of the past tense "*was*" indicates that "*the proceeding*" refers to the first proceeding. The words "their representatives in interest" are not very happy. They do not mean that the parties in the second proceeding in which evidence is tendered must be the representatives in interest of the parties in the first proceeding, but that the parties to the first proceeding should have been representatives in interest of the parties to the second proceeding. In this respect this proviso is not in accordance with the English law. It exactly inverts the requirements of the English law which requires that the parties to the second proceeding should legally represent the parties to the first proceeding or be their privies in estate and this inversion should not be considered accidental [see *Krishnayya v. Venkatakumara*, 60 IA 336 : 38 CWN 1 : A 1933 PC 202].

Under the English law the former deposition is admissible in a subsequent proceeding between the same parties or between the parties who represent the parties in the former proceeding or are their privies in estate, when the deponent is dead, insane, or too ill or kept out of the way by the opposite party, &c, &c. "The admissibility of this evidence seems to turn, rather on the right to cross-examine, than upon the precise identity, either of the parties or of the points in issue in the two proceedings, provided they are substantially the same. Consequently, the evidence taken in the first trial is admissible on a second trial if, although the two trials be not between the same parties, the second trial is between persons who legally represent the former parties or are either privies in estate" [Tay s 467]. The same statement of law is to be found in Hals 3rd Ed Vol 15 para 713. The general principle appears to be that the issues and parties or privies must have been substantially the same. "Unless *the issues were then the same* as they are when the former statement is offered, the cross-examination would not have been directed to the same material points of investigation and therefore could not have been an adequate test for exposing inaccuracies and falsehoods. Unless, furthermore, the parties were the same in motive and interest, there is a similar inadequacy of opportunity" [Wig s 1386]. "The requirement of identity of parties is after all only an incident or corollary of the requirement as to identity of issue. It ought, then to be sufficient to inquire *whether*

the former testimony was given upon such an issue that the party-opponent in that case had the same interest and motive in his cross-examination that the present opponent has; and the determination of this ought to be left entirely to the trial judge. (*1*) It is well settled that the former testimony is receivable if the difference of parties consists merely in a difference of *nominal parties* only, or in an addition or subtraction on either side of parties not now concerned with the testimony. (2) It is well settled that the former testimony is receivable if the then party-opponent, though a different person, had the *same property-interest* that the present opponent has [Wig s 1388].

The first proviso requires that the party to the first proceeding should have represented in interest the party to the second proceeding in relation to the question in issue in the first proceeding to which "the facts which the evidence states" were relevant. It covers not only cases of privity in estate and succession of title, but also cases where both the following conditions exist,—*viz* (*1*) the interest of the relevant party to the second proceeding in the subject-matter of the proceeding is consistent with and not antagonistic to the interest therein of the relevant party to the first proceeding, and (2) the interest of both in the answer to be given to the particular question in issue in the first proceeding is identical. There may be other cases covered by the first proviso, but if both the above conditions are fulfilled, the relevant party in the first proceeding may be described as representative in interest of the party to the second proceeding. Whether there was a party to the first proceeding who was a representative in interest of a party to the second proceeding within the above meaning must depend on the circumstances of each case [*Krishnayya v. Venkatakumara*, 60 IA 336 : 38 CWN 1 : 57 M 1 (*Mrinmoyee v. Bhubunmoyee*, 15 BLR 1 : 23 WR 42; *Rajkumari v. Nrityakali*, 12 CLJ 434; *Lanka Lakshmana v. Lankavardhanamma*, 42 M 103 **superseded**); *Narasayyamma v. Rattamma*, A 1957 AP 378; *Subramanya v. Lakshminarasamma*, A 1958 AP 22].

In determining whether a party is the legal representative of another, regard must be had to the state of affairs when the evidence is sought to be admitted. Thus, where the defendant in a subsequent suit was a natural son of the plaintiff in the previous suit and claimed in the subsequent suit not as the natural son of the plaintiff but as adopted son of a third person, the depositions in the previous suit are not admissible [*Krishnayya v. Raja of Pittapur*, A 1928 M 994 FB]. The vague expressions "representatives in interst" must at least include privies in estates. Partners and joint contractors are each other's agents for the purpose of making admissions against each other in relation to partnership transactions or joint contracts and must be regarded as "privies in estate" [*Chandreshwar v. Bisheswar*, 5 P 777 : A 1927 P 61]. The phrase "representatives in interest," is not for all purposes synonymous with the expression "the person claiming under" in s 11 C P Code [*Ramakrishna v. Tirunarayana*, A 1932 M 198]. S 33 cannot be applied without any reference to the subject-matter of the two suits. The same title must come into question in each case. The words "representatives in interest" clearly show that we have to consider the interest involved in each case and they must be the same or similar. Without reference to the subject-matter it cannot be predicted that one is the representative in interest of another [*Krishna Rao v. Sardar*, A 1927 M 733]. The parties may be differently arrayed in the two proceedings, that is, the plaintiff in the former suit may be defendant in the latter. The evidence of a witness who had testified in a suit wherein *A* and several others were plaintiffs and *B* defendant, was, after his death, held admissible in a subsequent action relating to the same matter, brought by *B* against *A* alone [*Wright v. Doe d Tatham*, 1834, 1 A & E 3]. In order to satisfy the requirements of s 33, the two suits must be brought by or against the same parties or their

representative in interest at the time when the suits are proceeding and the evidence is given [*Sitanath v. Mohesh*, 12 C 627; *Raghubhusana v. Vidyavaridhi*, 34 IC 875]. As to parties, see *Gangaram v. R*, A 1925 N 172. Where the interests are identical, and when the object of the litigation is to advance a common claim, previous evidence can be received under s 33 in a subsequent proceeding even against persons not parties to the previous litigation [*Patinharkuru v. Raman*, 24 IC 519].

T's daughter *A* filed a suit for declaration that *V* was not the adopted son of *T*. In a prior suit by *V* against *P*, a debtor of *T*, *T's* defence was that *A* was not an adopted son. The witnesses examined by *V* in that suit were dead—*Held* that the depositions were admissible as *P* represented *T's* estate in the same way as *A* was representing it in the present suit [*Narasayyamma v. Rattamma*, A 1957 AP 378].

The admissions of a person, whose position in relation to the property in dispute it is necessary for one party to prove against another, are in the nature of original evidence and not hearsay, though he is alive and has not been cited as a witness [*Ali Moidin v. Kombi*, 5 M 239]. A statement by the deceased *nazir* in a miscellaneous petition is not admissible for showing an admission or confession alleged to have been made to him by one of the accused as neither the prosecutor nor the Crown were parties to the miscellaneous petition [*R v. Waman*, 27 B 626 : 5 Bom LR 599].

In 1874, six persons were charged with murder, one of them absconded during the trial of the rest who were convicted. In 1886 the absconder was apprehended and at his trial, the deposition of the witnesses (all of them except one were dead) who were examined before the magistrate at the former trial were held not admissible, the prisoner not having been a party to the former proceedings, and not having then had an opportunity of cross-examining the witnesses [*R v. Ishri*, 8 A 672]. A prosecution was instituted by *S* against *N* at the instance and on behalf of *F* for criminal trespass and assault on his own behalf. *S* gave evidence in support of these charges. *F* subsequently brought a civil suit, against *N* under s 9 (s 6 of Act 43 of 1963) of the Specific Relief Act. *S* died before the institution of the civil suit, during the trial of which the deposition of *S* in the criminal case was tendered in evidence on the question of possession—*Held*, that *S* being dead, the proceeding being between the same parties and the issue being substantially the same, the deposition of *S* was admissible [*Foolkissory v. Nobin Ch*, 23 C 441]. *R* charged *A* with breach of trust and *S* gave evidence in support of the charge. *A* being acquitted, *R* was tried for making a false charge and *S* for perjury—*Held* that *S* was merely a witness and not a party in the breach of trust case; the evidence taken in former proceedings was not admissible in the case against him [*In re Rami Reddi*, 3 M 48]. The accused was tried for having abetted the forgery of a receipt filed in a civil case by the defendant. *K*, the person whose signature was forged died before the trial and his deposition in the civil suit was not admissible against the accused who appeared only as a witness in the case [*Kadhe Mal v. R*, 42 A 24 : 52 IC 394].

Where an added defendant's defence is the same as that of the original defendant and no objection was made to the evidence already taken before he was added, he was not entitled to take the objection in appeal and s 33 had no application [*Rangasami v. Sundarajulu*, 31 MLJ 472 : 35 IC 52].

In a subsequent suit by the mortgagee on a bond, the depositions of the attesting witnesses who were then dead and who were examined by the Registrar in a previous proceeding under s 74 Registration Act in regard to the same bond were held admissible [*Jeheto v. Jaibannessa*, 20 IC 661 : 18 CWN 605]. For the purpose of s 33, a purchaser of the equity of redemption is a representative in interest of the mortgagor [*Ma Shwe La v. Mg K Yin*, 26 IC 111]. Statements of deceased witnesses

relating to legitimacy of a person before a revenue officer in a mutation proceeding are admissible in a suit in a civil court by a party to the mutation case. But they are not admissible if the suit in the civil court is between persons not parties to the mutation proceedings [*Mumtaz-un-nisa v. Wazir*, 65 IC 308].

Criminal Cases.—The rule applies equally to criminal cases. So a deposition taken on a charge either of assault and robbery, or of stabbing, or of doing grievous bodily harm, can after the death of the witness, be read upon a trial for murder when the two charges relate to the same transaction [*R v. Smith*, 1817 Russ & Ry 339 and other cases in Tay s 467].

PROVISO (2): "That The Adverse Party Had (Both) the Right and Opportunity to Cross-examine".—The party against whom the witness is produced in the previous proceeding is the adverse party and not the person who produced the witness and had the advantage of having examined the witness. The adverse party is the party against whom the evidence was given against his interest. [*V.M. Mathew v. V.S. Sharma*, A 1996 SC 109, 110, 111]. The Supreme Court in *V.M. Mathew's* case (*supra*) considered the effect of second proviso to section 133 in the following words:

> "Take an instance where *ex parte* proceedings were taken against the defendant, he had no right and opportunity to cross-examine the witness. If the same evidence is sought to be used, he is certainly an adverse party in the previous proceeding and since he had no right and opportunity to cross-examine that witness, the same evidence cannot be used against the defendant in the subsequent proceeding. In other words, the proviso lays down the acid test that statement of a particular witness should have been tested by both parties by examination and cross-examination in order to make it admissible in the later proceeding. Thereby it seeks to protect the rights against whom the previous proceeding might have gone *ex parte* who had no right and opportunity to cross-examine the witness. For the same reason, it would also protect the co-plaintiffs and co-defendants who may have a right but no opportunity to cross-examine the witness since it was produced by one of the co-plaintiffs or co-defendants on their side but that evidence went against their interest. It is, therefore, clear that a person who examined the witness should not be permitted, in the subsequent proceeding between the same parties, to raise the objection that the statement which was recorded in the previous proceeding on his behalf should not be admissible because he had no right and opportunity to cross-examine him. It would also be unfair that the person producing a witness in the previous proceeding should be able to utilise the evidence recorded in his favour in the previous proceeding as evidence in the subsequent proceeding, while the adverse party should be denied of the same right of using the same statements favourable to him which went against the party producing the witness in the previous proceeding. Although it is necessary that the party against whom depositions are offered in evidence, must have had an opportunity of cross-examining the witness, yet it is not required that he should have exercised that power. If a party has a right of cross-examination at a particular stage of proceedings, and there is opportunity of exercising that right, it is equivalent to actual cross-examination. If the opportunity is not availed of the inference is that the opposite party thought it would be futile to challenge the testimony. In *Cazenove v. Vaugham*, 1913, 1 M&S 4, 6, ELLENBOROUGH LCJ, said:
>
> "But if the adverse party has had liberty to cross-examine and has not chosen to exercise it, the case is then the same in effect as if he had cross-

examined. Here, then the question is whether the defendant had an opportunity of cross-examining" [see also Tay ss 464-66, quoted *ante* p 403].

"*Adverse party*" in the first proceeding is used to distinguish that party from "the party who calls the witness". A party calling a witness does not become an "adverse party" because that witness's evidence is hostile to him [*Makhan v. R*, A 1948 S 122. **Approved** in *V.M. Mathew v. V.S. Sharma*, A 1996 SC 109]. The proviso obviously protects the right of the "adverse party in the first proceeding" and not the right of the person who produces and examines the witness [*Poonam Chand v. Motilal*, A 1955 Raj 179. **Approved** in *V.M. Mathew's* case (*supra*)]. A contrary view has been expressed by the Kerala High Court. It has been held that the words "adverse party" in the proviso refer to the party against whom the evidence is sought to be used. [*V.M. Mathew v. V.S. Saramma*, 1996 AIHC 973].

If a deposition is proved to have been taken in the presence of the accused, the law will presume that he had full opportunity of cross-examination [*R v. Peacock*, 1871, 12 Cox CC 21] but this presumption may be rebutted by proof, *eg* that he did not understand the language [*R v. Jones*, 49 JP 728]; or that the notice was so short that he had no time to instruct solicitor or consider questions [*R v. Harris*, 82 JP 196; Phip 11th Ed p 702]. The party must have had *both the right and the opportunity of* cross-examining [*Dal Bahadur v. Bijoy*, A 1930 PC 79; *Mulkhraj v. Delhi Admn*, A 1974 SC 1723]. In a proceeding relating to the mutation of the name of an adopted son, the question as to whether the widow had power to adopt being not the real issue, cross-examination of the widow on the point was irrelevant. The reversioners sought to cross-examine, but the objection was upheld and in spite of this, the cross-examination appeared still to filter through the objection. In a subsequent suit by the reversioners challenging the power to adopt, the statement of the widow in the mutation case is not admissible, as the party never had the opportunity or the right to cross-examine upon it [*Dal Bahadur v. Bijoy*, 34 CWN 369 : A 1930 PC 79 : 57 IA 14 : 52 A 1]. In this case the question of the application of the second proviso was not in issue before the Judicial committee of the Privy Council. It was further pointed out that the Division Bench of the Calcutta High Court in *Brajabhallav v. Akshay*, 30 CWN 254 : A 1926 Cal 705 and the single judge of the Madras High Court in *Sundara v. Gopala*, A 1934 Mad 100 have not considered the effect of the second proviso in proper perspective. [*V.M. Mathew v. V.S. Sharma*, A 1996 SC 109, 111]. Evidence of a witness who was fully cross-examined before the charge was framed but could not be examined after framing of the charge due to his death can be read against the accused. [*S.K. Abdul Awal v. State*, 1993(1) Crimes 611, 616 (Cal)].

The opportunity of cross-examination involves two elements: (*1*) notice to the opponent that the deposition is to be taken at the time and place specified, and (2) a *sufficient interval of time* to prepare for examination and to reach the place. But whether or not the time allowed was supposedly insufficient or was precisely the time required by the statute, the *actual attendance* of the party obviates any objection upon the ground of insufficiency, because then the party has actually had that opportunity of cross-examination for the sake of which the notice was required [Wig s 1378]. It is enough if the adverse party had the opportunity to cross-examine on the occasion [*Gouri v. Dowring*, A 1934 P 413 : 13 P 735; *Tawahar v. R*, A 1946 O 26; *Sundara v. Gopala*, A 1934 M 100]. Opportunity to cross-examine does not mean effective cross-examination by a counsel [*Bora, In re*, A 1952 M 165] nor does it imply the actual presence of the cross-examining party or his agent before the court [*R v. Ram Ch*, 19 B 749, 758].

When the relatives of the deceased lady had deposed to what they saw and observed that the deceased was extremely unhappy with her husband over a period of time, that she complained of harassment and cruelty at the hands of her husband which was not sporadic but incessant and that there were injury marks on her person and when their evidence was more than corroborated by the repeated threats addressed to them in the chits from the deceased indicating that she was driven to suicide, there can be no merit in the contention based on section 33, that except for the dying declaration of the deceased which did not implicate her husband, court was precluded from relying on other material, in absence of the another being available for cross-examination. [*State of Maharashtra v. Vasant Shankar Mhasane*, 1993 CrLJ 1134, 1141 (Bom)]. Where a witness had deposed before the trial court prior to framing of the charge but he was not available to the prosecution thereafter, his evidence will be admissible but having regard to the fact that he was subsequently not available for cross-examination, that will have to be approached with a degree of caution. [*Turner Morrisons Co. v. K.N. Topuria*, 1993 CrLJ 3384 (Bom)]. Where in a private complaint by Food Inspector alleging adulteration of milk, the accused had not cross-examined the Food Inspector nor had he right to cross-examine him and he having died subsequently it became impossible to cross-examine, the accused cannot be convicted on the sole statement of the Food Inspector which was recorded by the prosecution before the charge stage by invoking section 33. [*Nandram Khemraj v. State of M.P.*, 1995 CrLJ 1270, 1274 (MP)].

Where a prosecution witness was examined before a committing magistrate but was not cross-examined, and could not be found or died before the case came on for sessions trial, the deposition was admissible as the accused had the right and opportunity of cross-examining him, notwithstanding the omission of their pleader to avail of that right [*Mulkhraj v. Delhi Admn*, A 1974 SC 1723; *R v. Vasvanta*, 25 B 168 : 2 Bom LR 761. The same view was taken in *Azimuddy v. R*, 54 C 237; *Gurudin v. R*, A 1935 N 8]. Where only eye-witness a young boy the son of the deceased was examined at the time of preliminary enquiry but subsequently at the time of sessions trial was not traceable, conviction of death sentence was confirmed on his evidence [*Bortt, In re, sup*]. Though there cannot be any objection to act on the evidence of such witness alone, in murder cases the court should seek for some corroboration [*Chintamani v. S*, A 1970 Or 100]. A sub-inspector who took the dying declaration, died after he was examined in the committing court. His evidence is admissible in the sessions court as it could not be said that the other side had no opportunity to cross-examine [*Tafiz v. R*, 50 CLJ 584 : A 1930 C 228]. Unless a witness has been cross-examined or re-examined or unless such examination has been declined, his evidence cannot be considered except in the circumstances in s 33 [*Phani v. Sibakali*, A 1952 C 218]. The deposition of a witness who had died and whom the accused had an opportunity to cross-examine in the previous trial is admissible in a *de novo* trial [*Muthiah v. R*, A 1932 M 559 : 139 IC 203].

Mere physical presence is not equivalent to opportunity. There must be something more than that. In this case the witness died a few days after he was examined and in the circumstances the accused had no opportunity [*Abdul Rahman v. R*, A 1946 L 275 : 48 PLR 39]. This proviso will prevent a co-defendant from using in a subsequent proceeding the evidence of a witness produced by another co-defendant. In order to make the deposition admissible under s 33 there must be evidence that the accused person did, in fact, have the right and opportunity of cross-examining [*R v. Mowian*, 20 WR 69; see *R v. Etwari*, 21 WR Cr 12; *R v. Ram Ch, infra*]. Where defendant in earlier summary suit for eviction was examined and cross-examined, his statement is admissible in subsequent suit under s 33 although scope of cross-

examination in earlier proceedings was limited because of Portuguese CPC [*Sadassiva v. Jose*, A 1976 Goa 11].

When the witness is examined under S 202 Cr PC by the committing magistrate the cross-examination of such witness by the accused is not possible and hence his evidence should not be admitted under S 33 by the trial judge [*Amarnath v. S*, A 1969 A 489]. When the accused has no right to cross-examine, the fact that he was allowed to cross-examine a witness does not make his evidence admissible under s 33 [*R v. Mathews*, A 1929 C 822; *Laxmi Narayan v. R*, A 1931 A 621; *Mitter v. S*, A 1950 C 435; *Arabinda v. S*, 57 CWN 69: A 1953 C 206; *Brahmachari v. Anath*, 57 CWN 954 : A 1954 C 395; *Sanatan v. Dasarathi*, A 1959 C 677]; but the opposite view has been taken in some cases [*Mangal v. R*, A 1929 L 840 : 118 IC 647; *Varisi v. R*, 46 M 449; *Menon v. Krishna*, 49 M 978; *Ramyad v. R*, A 1920 P 149; *Banwari v. S*, A 1956 A 385]. In *Banwari v. S, sup* it has been held that the Evidence Act deals with the right of cross-examination and under s 137 of the Act examination of a witness means also his cross-examination and there is nothing in s 252 (now 244) Cr P Code to suggest that the accused has no right to cross-examine a prosecution witness. It is only a special provision to remove a possible doubt or by way of abundant precaution. Without deciding the question under s 256 [now s 246(*4*)] Cr P Code, it has been held that when the court gives permission to cross-examine, it amounts to "right" and when it is exercised, s 33 is applicable [*R v. Daya Shankar*, A 1950 A 167]. If the cross-examination of a witness is reserved by the committing magistrate of his own accord, it should not be admitted in sessions court [*R v. Mahrab*, A 1930 S 54].

Under Cr P Code, 1973 in sessions trial and warrant cases on police report witnesses are examined only after charge is framed and the accused has to cross-examine them immediately thereafter and there is no right to reserve cross-examination but the court has discretion to defer cross-examination [see ss 231 and 242(*3*)]. In warrant cases otherwise on police report witnesses are examined before charge and accused has right to cross-examine them then or after charge is framed [see ss 244, 246(*4*)-(*6*)].

For the deposition taken on commission in criminal cases see s 288 of 1973 Code. Sub-s (2) thereof provides that any deposition so taken, if it satisfies the conditions prescribed by s 33, may also be received in evidence at any subsequent stage of the case before another court. Yet there may be circumstances where although a prisoner has the right, he has not the opportunity, *eg* when the witness is at a great distance and the prisoner cannot go to the place and is too poor to employ a pleader [*R v. Ram Ch*, 19 B 749, 757].

In a murder case the magistrate refused to allow the defence pleaders to appear and cross-examine the witnesses who made the depositions, and committed the accused to the sessions court where the witnesses denied all knowledge of the facts to which they had formerly deposed. The sessions judge disbelieving the statements made in his court, used the previous depositions as evidence in the case and convicted the accused of murder. *Held* that the depositions were admissible. The judges observed: "It does not appear that the pleaders made any attempt to cross-examine the witnesses, for they might have suggested to the accused the proper questions to be put to the witnesses; nor in fact are we disposed to think that at that stage of the proceedings, cross-examination, if resorted to, would have been of any benefit to the accused" [*In re Dhane Mondol*, 6 CLR 53].

The deposition of a civil surgeon or other medical witness taken and attested by a magistrate in the presence of the accused who having opportunity of cross-examining

the witness, did not avail themselves of it, was held admissible [*R v. Jhubbo*, 8 C 739 : 12 CLR 233].

As regards evidence recorded against an absconding accused see s 229 of Cr P Code, 1973 the wording of which provision has been brought in conformity with that of s 33. When the evidence against an absconding accused is recorded in his absence under s 512 (now s 299) Cr P Code, the fact that he absconded should be alleged, tried, and established, before the deposition is recorded [*Ghurbein v. R*, 10 C 1097; see also *R v. Walling*, 1 CWN lxxx]. Evidence of witness examined in an enquiry by sub-registrar under s 41 (2) of the Registration Act as to the genuineness of a Will is admissible in a subsequent suit between the the same parties raising an issue as to the genuineness of the Will, if the witnesses are dead and the adverse party at the enquiry before the sub-registrar had an opportunity of cross-examining them [*Lanka Lakshmanna v. Vardhan*, 42 M 103 : 35 MLJ 657 : 49 IC 638]. Accused as defendant in a money suit produced a receipt alleged to have been granted by the plaintiff, which was declared to be a forgery. When he was prosecuted, the deposition of the plaintiff in the civil suit, who had died before the trial was admissible [*Debi Singh v. R*, 52 IC 385 (A) : 20 CrLJ 625]. In a previous proceeding between plaintiff and defendant under s 145 Cr P Code, the deposition of *U* (a co-defendant in the subsequent suit) who was examined for the defendant is inadmissible in the subsequent suit as defendant has then no opportunity to cross-examine *U* [*Brajabhallav v. Akshay*, 30 CWN 254].

Same: [Failure of Cross-Examination].—"There may have been an adequate opportunity of cross-examination, so far as depends upon the nature of the tribunal or the state of the issues and parties; yet the required opportunity may nevertheless practically have failed, through circumstances connected with the *conduct of the examination*. These circumstances may be distinguished under six heads:

(*1*) The witness's *death* or *illness* intervening to prevent or curtail cross-examination. Where the witness's death or lasting illness would not have intervened to prevent cross-examination but for the *voluntary act* of the witness himself or the party offering him—as, by a postponement or other interruption brought about immediately after the direct examination, it seems clear that the direct testimony must be struck out. Upon the same principle, the same result should follow where the illness is but temporary and the offering party might have recalled the witness for cross-examination before the end of the trial. But, where the death or illness prevents cross-examination under such circumstances that *no responsibility* of any sort can be attributed to either the witness or his party, it seems harsh measure to strike out all that has been obtained on the direct examination. Principle requires in strictness nothing less. But the true solution would be to avoid any inflexible rule, and to leave it to the trial judge to admit the direct examination so far as the loss of cross-examination can be shown to him to be not in that instance a material loss. Courts differ in their treatment of this difficult situation; except that, by general concession, a cross-examination begun but unfinished suffices if its purposes have been substantially accomplished. Where, however, the failure to obtain cross-examination is in any sense attributable to the *cross-examiner's own consent or fault*, the lack of cross-examination is of course no objection—according to the general principle that an opportunity, though waived, suffices". [Wig s 1390].

[Where a prosecution witness was examined before the magistrate but was not cross-examined and died before the trial in the sessions court began, his previous deposition was held admissible as the accused had the right and opportunity of cross-examination although it was not availed of (*R v. Basvanta*,

25 B 168; *Azimuddy v. R*, 54 C 237). So, where a witness died after examination-in-chief and part of the cross-examination was finished, her deposition could not be admitted as the evidence was not complete. For, it might be argued that a subsequent cross-examination would have destroyed to a great extent the effect of the evidence in chief (*Narsingh v. Gokul*, 50 A 113 : 25 ALJ 775 : A 1928 A 140). Where witness is partially cross-examined, evidence is inadmissible unless subsequent illness is strictly proved (*Mitter v. R*, A 1950 C 435)].

"(2) The witness's *refusal* to answer on cross-examination or the *party's* prevention of his answer. Where the witness, after his examination-in-chief, has *refused* to submit to cross-examination, the opportunity of thus probing and testing his statements has substantially failed and his direct testimony should be struck out. On the circumstances of the case the refusal or evasion of answers to one or more questions only need not lead to this result." [Wig s 1391].

[The defendants were willing to have attended on Saturday but the witness would or could not attend on that day. He appeared before the commissioner at 5 o'clock on Monday and was examined-in-chief. Cross-examination commenced and was proceeding at 7 o'clock which appears to be the usual time for the commission to rise. Witness said that he could not attend on next day and was going abroad the day following. He said he was willing to remain half-an-hour. Defendant's counsel said he could not finish in half-an-hour and thereupon the commissioner rose.—*Held*, that the evidence was not admissible. The provision as to right and opportunity to cross-examine means an effectual cross-examination complete and not partial. If that was not so, witness might, after a few preliminary questions, decline to appear upon a subsequent date [*Boisagonoff v. Nahapiet Jute Co Ltd*, 5 CWN ccxxx; see *Narsingh v. Gokul*, 50 A 113 : 25 ALJ 775 : A 1928 A 140)].

"(3) The witness' answering the direct examination '*non-responsively*', *ie* without dealing with the subject of the question. When a deposition is taken on *written interrogatories* filed beforehand, and the witness in an answer to a *direct* interrogatory departs from the subject of the question, the cross-examiner may be virtually deprived of cross-examination, because by not anticipating this answer he will not have framed his cross-interrogatories to probe the witness on that subject. This objection is obviously applicable to written interrogatories only; but to that extent it has a just foundation" [Wig s 1392].

"(4) The framing of the direct examination so as to prevent adequate cross-examination. A direct interrogatory may be so *general* or '*sweeping*' as to enable the witness, while responsively answering, to range over a variety of topics whose tenor the cross-examiner cannot by possibility have anticipated. In this way, he may be substantially deprived of his right" [Wig 1392].

"(5) The lack of interpretation of testimony of an alien, deaf-and-dumb, etc. (*a*) Where the cross-examination is hampered by the *witness's organic defects of speech, hearing* or the like, the admissibility of the testimony should be left entirely to the trial judge. The same principle applies to an *accused* who is *deaf* or *dumb* or *blind*. (*b*) Where the witness testifies in a *foreign language*, or when *the opponent is an alien* not well knowing the language of the forum, the opponent is entitled to understand, so as to be able to cross-examine the witness. Hence *the furnishing of an interpreter* becomes essential to the right of cross-examination" [Wig s 1393]. [As to the necessity of an interpreter in such cases, see the observations of LORD READING CJ, in *R v. Lee Kun*, 1916, 1 KB 337-39, where a Chinese was convicted of murder

of one Clara Thomas and appealed to quash the conviction on the ground that being ignorant of the English-language, he did not understand the evidence for the prosecution, which was not translated to him].

"(6) Sundry circumstances preventing adequate cross-examination, (*a*) The *party's own absence from the court-room* during cross-examination can hardly be deemed to injure his opportunity of cross-examination; for his appearance by counsel gains him the benefit of the right. (*b*) Whether there has been substantially adequate cross-examination where a deposition *written down in the accused's absence* has been *afterwards read over to him* by the magistrate in the witness' presence with liberty then to cross-examine, is a question that has been several times discussed in England. It would seem that, under the circumstances of a given case such an opportunity might be adequate" [Wig s 1394]. As to this see notes to s 80 *post*.

Unfinished Testimony.—On this subject SHAW CJ, said: "No general rule can be laid down in respect to unfinished testimony. If substantially complete, and the witness is prevented by sickness or death from finishing his testimony, whether *viva voce* or by deposition, it ought not to be rejected, but submitted to the jury, with such observations as the particular circumstances may require. But if not so far advanced as to be substantially complete, it must be rejected" [*Fluuer v. Rice*, 4 Gray (Mass), 343]. See further *post* ss 137, 138: "*Death, illness &c between examination in Chief and Cross-Examination.*"

PROVISO (3): "That the Questions in Issue Were Substantially the Same etc."—"The admissibility depends upon the precise identity of either of the parties (*ante* prov 1) or on the question in issue. It is enough if the points in issue are substantially the same. Thus: "If in a dispute respecting lands, any fact comes directly in issue, the testimony given to that fact is admissible to prove the same point in another action between the same parties or their privies, though the last suit relates to other lands [*Doe v. Foster*, 1834, 1 A&E 791n; *Llanover v. Homfray*, 1880, 19 Ch D 244]. In criminal cases, a deposition taken on a charge either of assault and robbery, or of stabbing, or of doing grievous bodily harm, can, after the death of the witness, be read upon a trial for murder, where the two charges relate to the same transaction [*R v. Smith*, 1817 R&R 339; *R v. Lee*, 1864, 4 F&F 63; *R v. Dilmore*, 1852, 6 Cox CC 52; *R v. Beston*, 1855, 24 LJMC 5; *R v. William*, 1871, 12 Cox CC 101]; and indeed, if this were not the law, the depositions of the deceased, would in all cases of homicide, be most improperly excluded" [Tay s 467]. "If the point in issue, though very similar, was so far different in the two proceedings, that the witness, who was called to prove or disprove the issue in the former, need not have been fully cross-examined in regard to the matters in controversy in the latter; his deposition, if tendered on the second trial, will be excluded; and on this ground a deposition taken on a charge of assault was afterwards rejected on an indictment for wounding" [Tay s 468].

It must be established that the questions in issue were substantially the same in the first as in the second proceedings. It is not necessary however that any specific issue need have been raised but the matter must have been in issue between them [*Sarvabhotla v. Kamala*, A 1939 M 446; *Raghubhusana v. Vidyabaridhi*, 34 IC 875]. Whether the questions at issue are substantially the same, depends upon whether the same evidence is applicable, although different consequences may follow from the same act. By "*the questions in issue*", referred to in s 33, being required to be *substantially the same* it is not intended that in a case where the person injured dies subsequently to the inquiry before the magistrate, his evidence is not to be used in

the session court because in consequence of his death, other charges are framed against the accused [*R v. Rochia*, 7 C 42 : 8 CLR 273].

Although the Act in using the word "*questions*" in the plural, seems to imply that it is essential that all the questions shall be the same in both proceedings, to render the evidence admissible, that is not the intention of the law. The principle involved in requiring identity of the matter in issue, is to secure that in the former proceeding the parties were not without the opportunity of examining and cross-examining to the very point upon which their evidence is adduced in the subsequent proceeding. And though separate proceedings may involve issues, of which some only are common to both, the evidence to these common issues given in the former proceeding, may (on the conditions mentioned in the s 33 arising) be given in the subsequent proceeding. Thus, if in a dispute respecting land, any fact comes directly in issue, the testimony given to that fact is admissible to prove the same point in another action between the same parties or their privies, although the last suit relates to other lands [*In re Rami Reddi*, 3 M 48]. Where the scope of the earlier summary suit for eviction under Portuguese CPC was limited to issue of possession only in the subsequent suit for declaration of title and recovery of possession s 33 would be applicable [*Sadassiva v. Jose*, A 1976 Goa 11].

In a prosecution for criminal trespass and assault, the deposition of the complainant, in support of those charges, was admitted in evidence in a subsequent civil suit under s 9 of the Act 1 of 1877 (s 6 of Act 43 of 1963), between the same parties to prove the question of possession, he having died before the civil suit [*Foolkissory v. Nobin*, 23 C 441]. A revenue officer was convicted on a charge of receiving bribe from certain rayats, who gave evidence for the prosecution. He subsequently prosecuted those rayats for having conspired to bribe him, and their depositions in the previous case would be admissible in evidence against them [*R v. Samiappa*, 15 M 63].

Explanation.—This Explanation has been inserted for the purpose of excluding the objection which arises when the depositions are taken in criminal cases, that they cannot be used on a subsequent proceeding for want of mutuality or reciprocity, because the Queen is prosecutor in all criminal proceedings [Nort pp 197-98]. "The effect of the Explanation seems to be that a deposition taken in a criminal trial may be used in a civil suit, and conversely, provided, that the conditions of the section are fulfilled" [Field, 6th Ed p 148]. In the absence of proof of circumstances specified in s 33 the importing in bulk of previous depositions is a serious irregularity [*Bal Gangadhar v. Shrinivas*, 39 B 441 : 19 CWN 720 : A 1915 PC 7 : 42 IA 135].

It is not a principle of universal application that if the police or the magistracy act on information given by a private individual without a formal complaint or application for process, the Crown and not the individual becomes the prosecutor [26 M 362 distinguished]. The answer to the question who is the "prosecutor" must depend upon the whole circumstances of the case. The mere setting the law in motion is not the criterion; the conduct of the complainant before and after making the charge must also be taken into consideration. Nor is it enough to say the prosecution was instituted and conducted by the police, that is again a question of fact. Theoretically all prosecutions are conducted in the name and on behalf of the Crown, but in practice this duty is often left in the hands of the person immediately aggrieved by the offence, who, *pro hac vice*, represents the Crown. In India, under s 495 (now s 302) Cr P Code a private person may be allowed to conduct a prosecution and "any person conducting it may do so personally or by pleader"; and where it is permitted, this is obviously an element to be taken into consideration in judging who

is the prosecutor, and what are his means of information and motives [*Gaya Pd v. Bhagat*, 30 A 525]. In *Foolkissory v. Nobin, sup* the certified copy of deposition given in a criminal case was used in a subsequent civil suit between the same parties.

Evidence Retracted.—A conviction based solely on evidence given by the witnesses before the committing magistrate and retracted by them at the trial is unsustainable [*Sher Dil v. R*, 17 RR (Cr) 1919 : 53 IC 696 (*Umar v. R*, 51 PR Cr 1887; *R v. Jeochi*, 21 A 111; *R v. Dwarka*, 28 A 683 **folld**)].

Previous Depositions may be Admissible Otherwise Than Under S 33, *eg* as Admission.—S 33 does not apply to the deposition of a witness in a former suit when the witness is himself a defendant in the subsequent suit, and the deposition is sought to be used against him, not as evidence given between the parties one of whom called him as a witness, but as a statement made by him, which would be evidence against him whether he made it as witness or on any other occasion. It is used against him as an admission. The sections of the Act which do apply are the sections relating to admission. The sections of the Act which do apply are the sections relating to admissions [*per* COUCH, CJ, in *Soojan Bibi v. Achmat*, 12 BLR Ap 3 : 21 WR 414; see also *Ali Md v. Shk Moharaj*, 36 CLJ 186]. It is admissible against him alone and not against other defendants [*Ambika v. Ram Ekbal*, A 1966 SC 605]. In *Exp Hall*, 19 Ch D 583, JESSEL, MR, observed: "Any statement made by a man on oath may be used against him as an admission." In a case it has been held that the deposition of one *M*, the predecessor in interest of the defendants, in which it was admitted that the disputed property was the joint family property is admissible against the defendants as an admission although it did not fulfil all the requirements of s 33 [*Asita Nath Basu & Ors v. Jadunath Datta & Ors.*—D. N. MITTER, J, 13-6-1928; appeal from appellate decree No. 1663 of 1927, **unreported**]. If, however, the accused had decided to testify in order to overcome the impact of an illegally procured confession then, whether he had made a knowing decision to testify or not, his testimony is tainted by the same illegality that rendered the confessions themselves inadmissible [*Harrison v. US*, 392 US 219]. The general principle that the witness must be shown unavailable for testifying in court does not apply to party's use of his *party-opponent's deposition*—for the simple reason that every statement of an opponent may be used against him as an admission without calling him, the opponent's sworn statement though called a deposition is no less an admission than any other statement of his. A party's statements offered in his *own favour*, are of course not admissions, and hence there is no reason why a party should be allowed to put in his own deposition instead of taking the stand [Wig s 1416 ; see also s 1409].

Evidence taken in a previous judicial proceeding can be made admissible in a subsequent proceeding by consent of parties [*K P Co, Bank v. Dulhanbibi*, A 1966 SC 1072]. Previous deposition of witness may be admissible for purpose of s 145 [*Venkatappa v. Gopavarapu*, A 1953 M 1000].

A transcript of evidence given by a witness at the original trial of an accused person is admissible as evidence at a retrial of the same person on the same charge if the witness is too ill to travel to court for the retrial because in such circumstances the transcript falls within the well-established exception to the hearsay rule. [*R v. Thompson*, (1982) 1 All ER 907 CA].

Affidavit.—The principle of admissibility being the right and opportunity of cross-examination, it is perfectly clear that a mere affidavit is inadmissible [Wig s 1384]. Affidavit is not admissible under s 33 [*Mir Abdul v. Bibi Sona*, 8 IC 897]. An affidavit is not evidence under s 33, but it may become evidence when the opposite party has had an opportunity to cross-examine and has not contradicted it [Cunn 11th

Ed. p 3]. Affidavit of a dead man not subjected to cross-examination is not admissible under s 33 [*Doraiswami v. Balasundram*, A 1927 N 507].

Miscellaneous Cases.—Defendants were convicted of murder of *L* by the Faridkot court and after their release they were sued by plaintiffs for compensation for death of *L*. The depositions of witnesses taken in the Faridkot court were inadmissible and s 33 did not apply [*Bishen Das v. Ram Labhaya*, 106 PR 1915]. An *ex parte* decree was passed in a mortgage suit and the bond was proved by the sole surviving attesting witness. The *ex parte* decree was set aside and the suit was reheard. The attesting witness had died—*Held* that his deposition was not admissible under s 33 [*Raj Mangal v. Mathura*, 13 ALJ 881].

STATEMENTS MADE UNDER SPECIAL CIRCUMSTANCES

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

Illustration

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

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

COMMENTARY

Information Technology Act, 2000

Entries in books of account [S. 34].—The words "entries in the books of account" would also include books maintained in an electronic form.

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

Principle and Scope.—Under the English common law entries in a person's books of account in support of his claim were not generally admissible in his favour without proof that the writer was dead and that it was his duty to make the entries, on the principle that a man ought not to be allowed to make evidence for himself by writing things behind the backs of others. Entries in books of account are admissible when they are against interest; [see Best, 11th Ed, s 503 : Tay s 709 : Phip 8th Ed, pp 213-14; ROSCOE, N P, p. 59]. Thus, if *A* sues *B* for price of goods sold, an entry in *A's* shop-books debiting *B* with the goods is not evidence *for A* to prove the debt [*Smyth v. Anderson*, 7 CB 21]; but in such a suit by *A*, an entry in *A's* shop-books debiting *C* and not *B* with the goods is evidence *against A* to disprove the debt [*Storr v. Scott*, 6 C&P 241]. Gradually the rule was relaxed and the statute 7 Jac 1, c 12 which applied specifically to shop-books enacted that the shop-books shall not be admissible against a customer above one year before the bringing of the action. Phipson says that: "In the main, however, and notwithstanding the above statutory recognition, the higher courts, applying the doctrine that "*a man cannot make evidence for himself*") began very soon to exclude the declarations of parties in their own favour, whether generally, or in the specific form of shop-books; though where the entries were made not by the party himself, but by his clerk, their admissibility appears to have survived until the beginning of eighteenth century, provided always that they were supplemented by the clerk's oath" [Phip 8th Ed, p 215].

The common law rules have now been made less rigid by the addition of Or 30, r 7 of the Supreme Court Rules (added by R S C, August 1894, r 1) which says: "On the hearing of the summons, the court or a judge may order that evidence of any particular fact, to be specified in the order, shall be given by statement on oath of information and belief, or by production of documents or entries in books, or by copies of documents or entries or otherwise as the court or judge may direct." Things were facilitated further by the passing of the Evidence Act, 1938 (See now Civil Evidence Act, 1968, *ante*, s 32). In the United States, the admissibility extends to entries made by the party himself, in his own shop-book, at least to contemporaneous entries forming part of the *res gestae* [Tay s 709; Greenleaf, s 188; *Anchor Milling Co v. Walsh*, 1819, 32 Am St R 600]. This limitation (that the party must have been his own book-keeper) has been enforced even in modern times. But the tendency has been to lose sight of it,—a result partly due to the legislation on the subject (as to American statutes on the subject, see Wigs s 1519 fn), which in many jurisdiction has expressly provided in the same statutory passage for the admission of a party's books and also of books kept by a deceased clerk [Wig s 1538]. The principle of admissibility of parties' account books show a recognition of the two traditional features of hearsay exceptions in general, *viz*, the Necessity principle and the Circumstantial Guarantee of Trustworthiness [Wig s 1536; see *ante*, s 32].

To make the entries relevant and admissible under section 34 of the Evidence Act it must be shown : (a) that the said entries are in books of account; (b) the said books of account are being regularly kept in the course of business; (c) the said entries alone be not sufficient enough to charge any person with liability. Thus as per the requirement of law the prosecution in order to make the entries in the said diaries and the loose sheets admissible in evidence must show that the same fall within the ambit of an account book within the meaning of section 34 of the Evidence Act.

The term 'account' has been defined in Words & Phrases, Permanent Edition, Vol. 1A, pages 336-338. The word 'account' means (a) claim or demand by one person against another creating a debtor-creditor relation." (b) "Account" is a formal statement in detail of

transactions between two parties made contemporaneously with the transactions themselves. It must be some thing which will furnish, to a person having a right thereto, information of a character which will enable him to make some reasonable test of its accuracy and honesty and it arises out of contract or some fiduciary relation."

The term 'book of account' has been defined in Words & Phrases, Permanent Edn. Vol. VA at page 185.

"A book of account is a record of sales or other transactions involving credits and debts, and a book containing minutes of cash paid, only, is not properly a book of account. "A diary is not admissible in evidence under the rule admitting books which are used in the regular course of business and kept by the party as 'books of account'."

Thus an account presupposes the existence of two persons such as a seller and a purchaser, creditor and debtor. The alleged diaries which do not contain the debits and credits can at the most be described as a memorandum kept by a person for his own benefit which will enable him to look into the same whenever the need arises to do so for his future purposes [*L.K. Advani v. C.B.I.*, 1997 Cri LJ 2559, 2574, 2575 (Del)].

S 34, which is in conformity with the law of France and America, is a reproduction of the Roman law, under which the production of a merchant's or tradesman's books of account regularly and fairly kept in the usual manner, was deemed presumptive evidence (*semi pleno probatio*) of the justice of his claim; and in such cases, the supplementary oath of the party (*juramentum suppletivum*) was admitted to make up the *plena probatio* necessary to a decree in his favour [Tay s 712; Cunn 10th Ed, p 175]. The rule in this section is an exception to the general rule as to admission in s 21. Stephen says in his Introduction (p 165):

> "We have admitted entries in books kept in the ordinary course of business. We have also made admissible written acknowledgments of the receipt of money, goods, securities,..or property of any kind, and documents used in commerce. Declarations which under the English law are only admitted because they have been made against interest will, by the effect of our rules, be excluded, unless they have been made in the ordinary course of business. The test of pecuniary interest is exceedingly difficult of application, and appears to us to be of little value as a test of truth." (Fifth Report). In certain cases statements are made in circumstances which in themselves are a strong reason for believing them to be true, and in these cases there is generally little use in calling the person by whom the statement was made. The sections which relate to them are 34-38."

The admission of entries under s 34 on behalf of a person making them is an exception to the general rule laid down in s 21. The principle is to admit only such statements recorded by a party in his own behalf as by their nature and circumstances are ordinarily beyond his power to tamper with undiscovered, to the purposes of a particular case [*Mukundaram v. Dayaram*, 23 IC 893 : 10 NLR 44].

Entries made in the stock register of a society seized and produced before the court not proved by the prosecution with reference to the maker of the said entries cannot be safely relied upon by the court. [*N. Nagarajan v. State of T.N.*, 1996 CrLJ 1007, 1009 (Mad)]. Correct and authentic entries in books of account cannot fix liability upon any person unless there is independent evidence of their trustworthiness [*CBI v. V.C. Shukla*, A 1998 SC 1406 : 1998 Cri LJ 1905]. Managing director or managing partner of a firm is bound to make full and true disclosure to other part-

ners. Presumption of genuineness of books of account is available to him. [*Y. Venkanna Chowdry v. G. Lakshidevamma*, A 1994 Mad 140, 158]. Ordinarily collection of sheets of papers bound together with the intention that such binding shall be permanent and the papers used collectively in one volume can be said to be a book of account under section 34. Unbound sheets, of paper, in whatever quantity, though filed in with one continuous account, are not a book of account within the meaning of section 34. It is again a corroborative evidence; it must be supported by some other evidence. [*Dharam Chand Joshi v. Satya Narayan Bazaz*, A 1993 Gau 35, 37]. The certified copy of ledger account maintained in regular course of business is admissible under section 34 and can only be used as a piece of evidence corroborating any substantive evidence on record indicating liability if any. [*State Bank of India v. Ramayanapu Krishna Rao*, A 1995 SC 244, 246]. An exercise book, which contained some entries and slips of papers but there was no page number in it and each and every entry was not proved by any witness, cannot be admitted in evidence without proving the entries made in it. The exercise book would not come within the definition of section 34. [*State v. Jainmaniek Nasmel Giri*, A 1995 Gau 23, 31].

Entries in Books Are Corroborative Evidence.—This section is in effect a reproduction with some alteration of s 43 of Act 2 of 1885 which ran thus: "Books proved to have been regularly kept in the course of business, shall be admissible as *corroborative* but not as independent proof of the facts stated there." To make account books admissible under that section it was therefore necessary to give some other substantive evidence in support of the fact sought to be established. The present section does away with that drawback. Under s 34 entries in books of account relating to a matter in issue, regularly kept, are relevant though not corroborated by other evidence; but though admissible, *the entries alone are not sufficient to charge any one with liability, ie*, no decree can be passed on the basis of the entries alone, but there must in addition be some independent evidence of the transactions relating to the entries. The entries are therefore only corroborative evidence.

In *Belaet v. Rash Beharee*, 22 WR 549, MARKBY, J, observed that the language of the old Act differed materially from that of the present Act and the only limitation in s 34 is that statements contained in documents of this kind shall not alone be sufficient to charge one with liability. "It appears to me that this change of expression has made substantial alteration in the law." He further observed that the present section substitutes "regularly kept" for "proved to have been regularly kept," but it seems that on ordinary principles proof would still be required that the books kept in the regular course of business [see *Paramananda v. Deb Narayan*; *Dwarkadas v. Janki Das*; *Imambandi v. Motasudi*; and *Hingu v. Heramba, post*) except in those cases in which it is rendered unnecessary by the admission of the parties. It has, however, been held in a case that by the change in the language, the legislature dispensed with the necessity of any formal proof that the books were kept in the regular course of business. It is a matter of intrinsic evidence as to whether the books are regularly kept in the course of business [*R v. Narbada*, A 1930 A 38]. There may be cases where an entry in a books would be admissible under s 34 without the need of corroboration, *eg*, when a person is not sought to be made liable on it [*Aktowli v. Tarak*, 17 CWN 774, 778].

The view in *Belaet's* case, *supra*, was not accepted in some cases and it was held that entries in books of account are not independent evidence but they may be used as corroborative evidence when there is other evidence of the facts sought to be proved [*Surnomoyi v. Johur Md*, 10 CLR 585; *Aktowli v. Tarak*, 17 CWN 774 : 16 CLJ 328]. The view in *Aktowli v. Tarak, ante*, in so far as it appears to decide that

books of account are inadmissible unless they are corroborated, was dissented from in a later case where it has been held that they are admissible though uncorroborated, but they are not sufficient to charge one with liability, *ie*, they do not establish the facts required to be proved unless corroborated by other evidence [*Gopeswar v. Bejoy*, 32 CWN 580]. The view that entries in books of account though admissible are not independent evidence but only corroborative evidence and not alone sufficient to charge a person with liability has been affirmed in many cases [see *Faizuddi v. Agnikumar*, 71 IC 300 : A 1924 C 370; *Umed v. Habibullah*, 47 C 266; *Jonab v. Sivakumari*, A 1927 C 855 : 46 CLJ 253; *Yeshuvadian v. Subba*, 52 IC 704; *Ram Payarabai v. Balaji*, 28 B 294; *Dwarakadas v. Sant Baksh*, 18 A 92]. Entries in books of account are admissible, not only for refreshing the witness's memory but also as corroborative evidence of the story which he tells [*Bhoy Hong Kong v. Ramanathan*, 29 C 334 : 29 IA 43]. The concluding words of the section, "*shall not alone be sufficient evidence to charge any person with liability.*" indicate that such evidence cannot be treated as independent evidence. The use of entries in account books must therefore be as corroborative evidence. So if an entry therein is proved to have been made in the ordinary course of business, it is material corroboration of witnesses speaking to the fact [*Lal Mohun v. Tazimuddin*, 49 IC 756]. In *Jaswant v. Sheo Narain*, 21 IA 157, the Judicial Committee observed:—

> ".....It must be confessed that to forge elaborate accounts extending over six years, or even to insert new sheets in such accounts would be a most dangerous undertaking and to make the different books correspond exactly would be a task of almost insuperable difficulty. But there is even better test of the genuineness than the correspondence of the books with themseleves, and that is their *correspondence with other evidence*."...

In *Ganga Pd v. Inderjit*, 23 WR 390 PC a case decided under the former Act, the Judicial Committee observed: "Their lordships are of opinion that the books being (as is admitted) at most corroborative evidence, the mere general statement of the banker, where the fact of the payments was distinctly put in issue, to the effect that his books were correctly kept, was not sufficient to satisfy the burden of proof that lay upon him, particularly as with respect to many of the disputed items he had the means of producing much better evidence."

A person cannot be allowed to make independent evidence for himself by making entries in his own books behind the back of others. Entries in books of account are therefore not evidence *per se*. They may be used for the purpose of refreshing memory (s 157) and also for corroborating the witness's evidence. But when entries are made in the presence of the adverse party and not denied by him or when they are signed by him after adjustment of account, they become evidence of the nature of admission. The entry offered in evidence must be original, subject to the rule of production of secondary evidence when the original cannot be had (*v post*, ss 64, 65).

Same: [Rule in S 34 and What it Requires].—S 34 therefore lays down two things. (*1*) that all entries in books of account regularly kept in the course of business are relevant and therefore admissible whenever they refer to a matter into which the court has to enquire. Such books are not inadmissible because they are not corroborated. Thus, an entry is relevant notwithstanding that the person who made the entry and who is alive has not been examined to prove the transaction to which the entry relates (v *illus*); (2) that such entries though admissible are not alone sufficient to charge a person with liability unless there is some other independent evidence of the transaction [*Gopeswar v. Bejoy*, 32 CWN 580 : 55 C 1167 : A 1926 C 854; see *post*: "*But such statements alone shall not be sufficient, &c*"]. Whether the

defendant takes objection or not, the plaintiff relying on account books must prove (*1*) that the books are kept in regular course of business; (*2*) the particular entries and (*3*) must give some corroborative evidence. If it is sought to use the entries as substantive evidence under s 32, sufficient evidence should be given for the purpose [*Paramananda v. Deb Narayan*, 49 CWN 308 (*Hingu v. Heramba*, 13 CLJ 139; *Imambandi v. Motasuddi*, 13 CLJ 621 **relied** on).]

Same : [Entries are Independent Evidence When the Maker is Dead].— Zemindari papers or account books can, however, be used as independent evidence if relevant under s 32(2), *ie* when the persons making the entries are dead [*Charittar v. Kailash*, 44 IC 422 (P); *Rani v. Firm Bahadur*, 62 IC 946]. Accounts which are relevant under s 32(2) do not as a matter of law require corroboration; the judge, however, is not bound to believe them without corroboration and that is a matter of judicial discretion. Where entries are relevant under both s 32(2) and s 34, the necessity of corroboration required by s 34 does not apply; but the judge is not bound to act on it without corroboration if he in his discretion thinks it necessary [*Rampayarabai v. Balaji*, 28 B 294 : 6 Bom LR 50 (**folld** in *Dukha v. Grant*, 16 CLJ 24); see also *Eranna v. Setty & Co*, A 1960 AP 331; *Daji Aboji v. Gobin*, 10 Bom LR 811; *Aktowli v. Tarak, ante*; *Abdul Wahed v. Nagendra*, 44 CWN 993 : 1940, 2 Cal 559 : A 1940 C 524; *Rani v. Firm Bahadur*, 62 IC 946; *Charitter v. Kailash*, 3 PLJ 306; *Umed Ali v. Habibullah*, 47 C 226; *Manmohan v. Harinath*, A 1928 C 408; *Jonab v. Siva Kumari*, A 1927 C 855]. The latter part of s 34 applies only to such entries as are relevant under s 34 and not under s 32(2) [*Gopeswar v. Bejoy*, 32 CWN 580].

It may, however, appear anomalous that while an entry which is relevant under s 32(2) [*ie* by a dead person] may be taken as independent evidence and may be sufficient to charge one with liability without corroboration, if believed to be true, a similar entry relevant under s 34 by a person who is available as a witness, is not sufficient to charge one with liability without other independent evidence. On this question, MUKHERJI J, expressed himself thus in *Gopeswar v. Bejoy, sup* pp 584-5:—

> "The only material difference as between an entry relevant under s 34 and one relevant under s 32(2) is that in the former case the person who made the entry may be available as a witness while in the latter case he is not. I find it very difficult to appreciate on what ground the legislature could intend to exempt entries relevant under s 32(2) from the disability that it imposes on entries relevant under s 34 by the second part of that section, and personally I have always felt inclined to take the view that such entries, no matter whether they are relevant under one section or under the other, are not to be considered as *alone* sufficient to charge any person with liability. The other view, however, namely that the latter part of s 34 applies only to such entries as are relevant only under s 34 and not under s 32(2) is backed by the high authority of SIR LAWRENCE JENKINS CJ, in the case of *Ram Pyarabai v. Balaji*, 28 B 294 and has been accepted as correct in other cases (*eg Daji Abaji v. Gobin*, 10 Bom LR 811, *Dukha v. Grant*, 10 CLJ 24 and *Aktowli v. Tarak*, 17 CWN 774) and it is perhaps too late to contest it. If this other view is adopted it should be held that it was intended by the legislature that where the maker of the entry is available as witness, the entry alone will not be sufficient proof to charge a person with liability but, where the maker is not available as a witness but the entry is relevant by reason of one or other of the conditions mentioned in the opening paragraphs of s 32 being present, there is no statutory obligation to look for anything else to found the liability."

As to entries *cf* s 548 of the Indian Companies Act (1 of 1956); Or 7, C P Code. As to admissibility in evidence of certified copies of entries in Bankers' books see s 4 of the Bankers' Books Evidence Act, 18 of 1891.

[*Ref Tay ss 709-15; Best 11th Ed ss 501, 503; Phip 8th Ed pp 213-14; Roscoe N P 59-60; Wig ss 1530-61; Greenleaf, s 118 et seq; Chamb s 3051 et seq; Jones, ss 567-77; Hals 3rd Ed Vol 15 para 733*].

"Entries in Books of Account": [Form of Books].—An entry in an account book is an admission by the maker thereof in his own favour and it is accepted as evidence only if it strictly complies with the requirements of being kept regularly and in the ordinary course of business [*B Siddalingappa v. M C Mohan*, A 1978 Knt 19]. The principle of admissibility is the same as in the case of entries by deceased persons "in the ordinary course of business." which has already been considered [v s 32(2) *ante*]. Here there is the same circumstantial guarantee of trustworthiness. The expression "regularly kept in the course of business" is for all practical purposes the same as "in the ordinary course of business." It is enough to say that any form of books if regularly kept as "book of account" answers the description. Loose sheets or scraps of paper are obviously very unsatisfactory and can hardly be called books of account. They can be easily manufactured. An individual memorandum or a casual entry does not satisfy the requirement. There must be a system or regular habit of making entries in the course of business. The system need not be elaborate and the nature of the business determines in most cases the form of books to be kept. The pettiest shop-keeper may have his rough and crude way of keeping accounts. It will nevertheless be received although it may not carry always much weight.

"No particular form of books of account is generally prescribed, although books are far more satisfactory when kept in the form of daily entries of debits and credits in a day book or journal..... but the book should be such a regular and usual account book as explains itself and as appears on its face to create a liability in an account with the party against whom it is offered, and not to be a mere memorandum for some other purpose. Hence mere loose sheets of papers are not admissible and a single entry does not constitute an account book..... The account books of an illiterate labourer as well as those of a tradesman or banker are admissible in evidence, if within the statutory conditions, the purposes of which are to secure authenticity and credibility in respect to the evidence, rather than to prescribe the form of it" [Jones s 570]. Loose sheets of account have not the some probative force as books of account regularly kept [*Mahasay v. Narendra*, A 1953 SC 431 : 17 Cut LT 73].

It must be shown to be in a *book*, that *book* must be a *book of account*, and that account, must be one *regularly kept in the course of business*. The term *book* in s 34 signifies a collection of sheets of paper bound together with the intention that such binding shall be permanent and the papers used collectively in one volume. Unbound sheets of paper, in whatever quantity, though filled up with one continuous account are not a book of account within s 34. A book which merely contains entries of items of which no account is made is not a "book-of account" [*Mukundaram v. Dayaram*, 23 IC 893 : 10 NLR 44]. "Book implies of collective unity of sheets even at the time of entries come to be made. Beyond these two ideas, it is not necessary that it should consist of a particular number of sheets or that it should be bound in a particular way [*Ambalavana v. Gowri*, A 1936 M 871]. Spiral pads and spiral note-books are "books" but not loose sheets of papers contained in the file. Spiral note-book is "book of account" [*CBI v. V.C. Shukla*, A 1998 SC 1406 : 1998 Cri LJ 1905]. A firm's books come into existence and are kept not for the purpose of a mere statistical

record of transactions and payments or of prices and rates. They are essentially a statement in figures of the firm's business as a whole so shaped as to bring out the precise results of all transactions in rights and obligations and in profits and losses and the principles on which they set off one set of figures against another and attribute and distribute the results, are as much part of the books as the figures themselves, though no written statement of them is anywhere set out [*Kaikhusroo v. Bombay Co*, A 1927 PC 210 : 46 CLJ 214].

—"Regularly Kept in the Course of Business".—Regularly or systematically means that the accounts are kept according to set of rules or a system, whether the accountants have followed the rules closely or not. The system need not be elaborate or reliable. The roughest memoranda of accounts generally kept according to the most elementary system, though often departing from it, are admissible, but would of course, have no weight [*Kesheo v. Ganesh*, 95 IC 128 : A 1926 N 407]. Account books kept from day to day and balance struck at the end of each day should be held as regularly kept. The system need not be elaborate [*Balmukand v. Jagannath*, A 1963 Raj 212]. The words "regularly kept" are not synonymous with "correctly kept" [*Gulab v. Bhagwan*, A 1932 O 225; see *Parasram v. Champalal*, A 1957 MB 118]. It would not be correct to say that an entry must necessarily be made in the book of accounts at or about the time the related transaction takes place so as to enable the book to pass the test of "regularly kept" [*CBI v. V.C. Shukla*, A 1998 SC 1406 : 1998 Cri LJ 1905].

What S 34 demands is a book of account regularly maintained in the course of business. A ledger by itself could not be a book of account of the character contemplated by Sec. 34. [*Sachindra Prasad Chakravarty v. Ahmed Ali*, A 1988 Gauhati 33, 39 (DB) : (1988) 1 Gauhati LR 90]. Account books not in the regular course of business are not necessarily forged, though they may not be acted upon in convicting a person [*Rameshwar v. R*, A 1927 P 47]. This section simply requires that entries in accounts should be regularly kept in the course of business. The existence or non-existence of personal knowledge of the person making or dictating the entries is a question which affects the value, not the admissibility of the entries [*R v. Hanumanta*, 1 B 610]. Mere delay in making entries does not indicate that books are not regularly kept in the course of business [*Dy Commr v. Ram Pd*, 27 C 118 : 26 IA 254 : 4 CWN 147]. Merely because the ledger produced before the court contained blank pages cannot lead to the conclusion that the entries made therein are wrong since a ledger is usually kept for the whole year and there are bound to be blank pages in the ledger. [*Jain Plastic Industry v. Gopi Chand*, A 1990 Del 51, 55]. Activities carried on continuously in an organised manner with set purpose to augment one's own resources are "business" [*C.B.I. v. V.C. Shukla*, A 1998 SC 1406 : 1998 Cri LJ 1905].

Entries in an account book written by the agents of a party are relevant as admission against that party [*Nanilal v. Nutbehari*, 38 CWN 86]. A person used to enter all his receipts and advances made to his *amlah* first in a *khatta* book. The *amlah* used to submit *furds* embodying the expenses incurred by him and these were used to be regularly checked by him. He used to prepare his monthly and other accounts from the *khatta* book and the *furds*—*Held* that these accounts, having been regularly kept in the course of business were admissible under this section even though the *khatta* book itself was not produced [*Peary v. Narendra*, 32 C 582 : 9 CWN 421].

Where the defendant contended that a portion of the consideration money mentioned in the bond had not been paid, and in proof called for the plaintiff's account books, they must be admitted *in toto* and those items which were in favour of the plaintiff could not be rejected for want of corroboration [*Rajeshwari v. Rai Kishen*,

14 IA 142 : 9 A 713]. Ledger account kept in the regular course of business unless proved to be wrong is *prima facie* the account book for ascertaining the liability of the defendant. [*Himatsingka &c v. Haranath*, A 1965 As 10]. Books of account professing to record facts relating only to the particular transaction in question, are less reliable than a book in which the same is recorded in common with other transactions in the ordinary course of business [*Bhoy Hong Kong v. Ramanathan*, 29 IA 43 : 20 C 334 : 6 CWN 401]. Plaintiff sued for the amount due on several *hundis*. The main question was whether the *hundis* were genuine or false and the High Court found the *hundis* genuine. Plaintiffs relied on their account books as corroborating direct testimony. The books were tested by reference to entries corresponding with other independent evidence and the Privy Council affirmed the decision [*Jaswant v. Sheo Narain*, 21 IA 6 : 16 A 157]. In the case of several accused persons, an entry in the account book of one that he paid rent on behalf of another, is not evidence against the other [*In re Samachari*, 45 MLJ 728]. When the question is whether the accused was present at a meeting of an unlawful association and a document purporting to be a register of attendance maintained by that unlawful association is produced to prove the presence of the accused at the meeting, it is necessary to show by oral testimony that the register in question was in fact kept for the purpose recording the names of the persons who were present at the association's meetings [*Bawa Sarup v. R*, 7 Lah LJ 264 : A 1925 L 299].

Explaining in *CBI v. V.C. Shukla*, AIR 1998 SC 1406 : (1998) 3 SCC 410, the import of the words "regularly kept" the Supreme Court observed that whether books have been kept regularly depends upon the nature of the occupation. The system of accounting and contemporaneity in making entries may be different from trade to trade. In every case the contemporaneity of the transaction cannot be linked with the time of entry. Whether books are kept regularly and whether they are not so kept does not make a difference as to their admissibility as relevant evidence but only as to their probative value.

The Supreme Court explained in this very case (*supra*) three different concepts, namely, "books of account", "course of business" and "regularly kept". The words "account", "books of accounts", "business" and "regularly kept" are expressions of general import. Such words must receive a general construction. The words of S. 34 have to be given their ordinary, natural and grammatical meaning.

The Supreme Court explained the ingredients of the two parts of the section (*supra*). The first part speaks of the relevancy of the entry as evidence. The second part speaks in a negative way of its evidentiary value of charging a person with liability. In order to make an entry relevant it must be shown that the entry has been made in a book, that the book is a book of account, and that it has been regularly kept in the course of business. The fulfilment of these requirements makes the entry relevant but not necessarily sufficient to charge any person with any liability. Such entries are only corroborative evidence. Independent evidence in support of the entries would be required to fasten liability upon the head of any person. Applying these principles to the facts of the case, the Supreme Court held that entries in the Jain Hawala Diaries, though admissible under S. 34, were of no probative value because their truthfulness was not supported by any independent evidence. But the court said that a file containing loose sheets of paper could not be regarded as a book and, therefore, such sheets were not admissible evidence under S. 34. "Book" means a collection of sheets of paper or other material, blank, written or printed, fastened or bound together, so as to form a material whole. "A book of account" involves either addition or subtraction or both of these operations of arithmetic.

—Time of Making Entries. [Contemporaneousness].—The entry need not necessarily be made exactly at the time of occurrence; it is sufficient, if made within a reasonable time, so that it may appear to have taken place while the memory of the fact was recent, or the source from which a knowledge of it was derived, was unimpaired. The law fixed no precise instant when the entry should be made. The Judicial Committee in *Dy Commr v. Ram Pd*, 26 IA 254 : 27 C 118 : 4 CWN 147 (**disapproving** *Munchershaw v. New Dharamsey S&W Co*, 4 B 576) observed that it would be giving a much too limited meaning to s 34 if it be held that "books of account regularly kept in the course of business" mean books entered up from day to day or from hour to hour as

transactions take place. If it were correct, merchants' and bankers' books regularly kept would in many cases be excluded. The time of making the entries may affect their value but should not, if not made from day to day or from hour to hour, make them entirely irrelevant. [See also *Chandreshwar v. Biseshwar*, 101 IC 289, 313 : 5 P 777 : A 1927 P 61]. Though for purpose of admissibility an entry need not be contemporaneous with the transaction, it is obvious that entries made casually once a week or a fortnight cannot inspire the same confidence as entries from day to day or hour to hour [*Hingu v. Heramba*, 13 CLJ 139, 142].

Accounts prepared at considerable intervals from memory or possibly inadequate materials cannot be treated as proof of actual income and expenditure although they may be useful in cases where they corroborate other evidence [*Rajagopala v. Subammal*, A 1928 M 180]. Entry made in 1917 is not relevant on the question whether a person had taken a loan in 1916 [*Ramaji v. Manohar*, A 1961 B 169].

"The entries should not be a recital of past transactions, but an account of transactions as they occur. It is very clear that there is no principle on which shop-books should be received as evidence, where the entries are not made at or about the time of the transaction. If not so made, the entries are no part of the register. They are mere independent declarations of the party in his own favour [*Bentley v. Ward*, 116 Mass 333; *Griesheimer v. Tanenbaum*, 124 NY 650]. A reasonable construction will be given to the requirement and it is not indispensable that the entries should be made immediately or upon the same day" [*Kamm v. Rees*, 177 Fed 14 and cases cited in Jones, p 889]. Thus, the rule has been declared: "The law fixes no precise instant when the entries should be made. It is not to be a register of past transactions, but of transactions as they occur [*Davie v. Lloyd*, 38 Colo 250]. It is evidence that much depend upon the nature of the transactions and the general mode of carrying of the business" [Jones s 572]. "The entry must have been fairly contemporaneous. But no unvarying limitation need be fixed; the entry must merely have been made near enough to indicate a likelihood of accuracy; and thus each ruling must depend chiefly on the circumstances of the case" [Wig s 1550]. So, though contempo-rancousness is much to be desired, no inflexible rule can be laid down. The matter must be left solely to the discretion of the trial judge who is to decide upon a consideration of the nature of the business, the number of men employed, the mode of conducting it, and the time and manner of entries, whether the delay was or was not unreasonable or consistent with the regular course of business.

—Mode of Proof of Books of Account. [Not Only Correctness But Each Entry Has to be Proved].—There is no presumption of correctness attaching to the entries in books [*Ahmad Din v. Pratap*, A 1939 L 438]. Where a witness merely said that the books were in his custody; no question was put as to who wrote them, nor was there any evidence as to who collected rents or when or by whom the entries were made, the books are inadmissible [*Aktowli v. Tarak*, 7 CWN 774, 775]. Where all that was proved was that the books were in the handwriting of his father and the books were not even examined in detail, and the particular entries upon which the plaintiff relied were not selected and exhibited, it was held that the entries ought to have been pointed out and proved and evidence should also have been given in detail as to the character of the books themselves, MOOKERJEE J, observed:—

> "The proper procedure to follow, therefore, is as laid down by their Lordships of the Judicial Committee in *Dwarka Dass v. Janki Dass*, 6 MIA 88, 98 to call the clerk who has kept the accounts or some person competent to speak to their genuineness, to prove that the books have been regularly kept and that they are generally accurate. But this is not all that is necessary; s 34 makes the entries relevant if they are entries in a book of account regularly kept in the course of business. It is, therefore, not sufficient merely to prove the correctness of the book, the entries themselves have to be proved unless indeed the necessity for such proof is removed by the admission of the opposite party" [*Hingu v. Heramba*, 13 CLJ 139, 142 : 8 IC 81].

Mere proof of the existence of certain entries in books is not sufficient. The law requires proof not only of account books generally, but of each item [*Mathilda v. Gaebele*, A 1926 M 955 : 96 IC 429; *Dwarka v. Sant Baksh*, 18 A 92]. Where the transactions are numerous and extend over many years it is not necessary to prove each item, but only specific disputed entries [*Kakaram v. Thakurdas*, A 1962 Pu 27]. It is essential to establish that the books have been regularly kept in the course of business

and it is not sufficient to prove the correctness of the books; the entries themselves have to be proved [*Imambandi v. Motasuddi*, 15 CLJ 621 (on appeal 45 C 878 ; A 1918 PC 11 : 45 IA 73); *Aswathanarayanaiah v. Sanjeeviah*, A 1965 AP 33; *Bahadur v. Padom*, A 1933 L 384]. Books of account must be held to have been proved even in the absence of its writer on proof of its proper maintaining and keeping [*Ramjanki v. Juggilal*, A 1971 SC 2551]. The transactions can be proved independently of the writer of the entries by one who had knowledge of the transactions [*Hagamilal Firm v. Bhuralal*, A 1961 Raj 52; *Vastulal v. Offl Liq*, A 1962 Raj 118]. It has however been held in some cases that where the writer of the account books is alive but has not been examined, they cannot be said to be duly proved [*Gajendra v. Shankar*, A 1935 O 16; *Lachmi v. Musaddi*, A 1942 O 155; *Kakaram v. Thakurdas, sup*]. These rulings appear to be unduly strict in view of the provisions of s 67 of the Act. But in any case, the objection as to the mode of proof must be taken in the trial court and not in appeal [*Kakaram v. Thakurdas, sup* **relying** on *Gopal v. Sri Thakurji*, A 1943 PC 83 : 1943 Kar 69 : 47 CWN 607].

The following observations in *Mukundaram v. Dayaram*, 10 NLR 44 : 23 IC 893 are helpful:—

> "There is frequently a confusion in the subordinate courts as to how an account book should be proved and used under s 34 aforesaid. It is common practice to call a witness and examine him, as to the particular item sought to be proved, by getting him, as it were, to read them out to the court, sometimes when he has no personal knowledge concerning them and they are not in his handwriting; meanwhile, it is taken for granted, without formal proof that because the book is the *khata* or *rokur* of some firm, it is regularly kept. The question whether or not a book is regularly kept is one of fact, to be proved (if not admitted), according to the circumstances of each case.
>
> Where an entry is properly admitted it is mere waste of time to have its contents repeated out of the mouth of a witness who merely reads it and cannot supplement it with his personal knowledge. Use of an entry to refresh memory is one thing—its proof as substantive evidence under s 34 is another; but this distinction is constantly lost sight of by judges and practitioners. A clerk called as a witness may depose: 'I remember paying out Rs. 100 as a loan to the defendant sometime last year. Having now refreshed my memory from an entry made at the time in my master's cash book, I can state that the date was the 15th June, 1910.' That is not a case of evidence under s 34 of the Evidence Act. But suppose the account book had been produced and the entry tendered in evidence, then the deposition of the clerk might have been in these terms: 'I knew the defendant. I remember that he came to my master's shop and borrowed some money last year. I cannot remember the amount lent or the date of the loan though I saw the money paid. I also saw another clerk make an entry of the loan in my master's cash day book. This book (Ex A) shown to me is that in which the entry was made. It is regularly kept. Transactions are entered as they occur and the book is totalled and balanced every day and entries carried into a ledger once a week. This book (Ex B) is the ledger for last year and the entry of defendant's loan should be in it.' Upon this testimony, the court would be justified in admitting the entries tendered by the plaintiff and using them to corroborate the witness, and prove the amount and date of the loan. It would be waste of time and to miss the point of s 34 to get the witness to give oral evidence of the contents of the entries by reading them out. Once they are qualified for admission under s 34, the court itself can read them and use their contents for its information."

—Honest Appearance of Books.—The appearance of the book of entries must be honest, no suspicion of false dealing must be apparent. But the trial court's determination of this ought to be final [Wig s 1551]. Unfastened portion of a book, with leaves mutilated or missing [*Harold v. Smith*, 33 SE 540]; entries all on the last page of a book having many pages blank and many torn out [*Robinson v. Hoyt*, 39 Mich 405, cited Wig s 1551] excluded. "Book entries are not necessarily excluded because there may be alterations or erasures or mistakes, such as those in the name of the party. These are matters which may be explained to the satisfaction of the court. But if the entries show that they were all made at the same time, though relating to separate transactions, or if by reason of alterations or erasures or other cause they have a suspicious and fraudulent appearance, and are not explained, they should be

rejected" [Jones s 576]. A debit entry at the end of a page showed sale of certain goods written closely in a cramped though it could have been written on the next page. The total amount debited was also written in different ink. The circumstances detracted from the value of the entry [*Venkata Mallaya v. Ramaswami & Co*, A 1964 SC 818].

—Nature of Entry.—"First, the entry must purport to record the whole of the transaction as alleged; in other words, a mere *order-book* or an *entry of an order*, not showing the delivery of the alleged goods or the rendering of the alleged services, could not be received. Next as to the *mode of recording*, any material or means will suffice. The entry must, however, be fairly intelligible; it must distinctly communicate the facts alleged; this requirement being satisfied, and kind of marks, capable of being interpreted, will suffice" [Wig s 1556]. "Although regularly prices ought to be specified, yet the book is not necessarily inadmissible, even if measures, weight, price and quality are not given in connection with the items charged, though, of course, the book in such case furnishes no evidence as to matter omitted" [Jones s 570].

"But Such Statements Alone Shall Not Be Sufficient to Charge Any Person With Liability."—It has been seen (*ante*) that entries in books of account regularly kept in the course of business though relevant are corroborative evidence and mere production and proof of an entry is not by itself sufficient to charge any one with liability, *ie* there must be some other independent evidence to prove the transaction [*Abdul Huq v. Firm Shivaji*, 71 IC 259 : A 1922 L 338; *Jodhamal v. Ditta*, A 1925 L 242; *Nanak v. Parmeshri*, 35 PLR 539; *Ramaswami v. Ramanathan*, 22 IC 627; *Rampayarabai v. Balaji*, 28 B 294; *Lal Ch v. Tej*, A 1940 O 385; *Khunni v. Dwarka*, A 1930 A 710; *Ganesh v. Firm M R*, A 1924 L 540: *Sorabiee v. Koonmarjee*, 1 MIA 47 : 5 WR 29; *Srikishen v. Harikishen*, 5 MIA 432; *Dwarka v. Sant Baksh*, 18 A 92; *Himatsingka &c v. Haranath*, A 1965 As 10; *Jainarain v. Zubeda*, A 1972 A 494; *Shubhkaran v. Durga*, A 1972 G 208; *Sajjanraj v. Mehta Commercial Co*, A 1973 G 57; *Vasireddi v. Srirama Motor &c*, A 1977 AP 164; *V K Abraham v. N K Abraham*, A 1978 M 56].

Ledger can be taken into consideration and would become relevant under sec. 34 only when there is corroborative evidence on record in support of the entries made therein or in support of the transaction between the parties [*Mohanlal Bodji Raj v. Dwarka Nath Kuldeep Kumar*, A 1985 J & K 85, 86 : 1985 Kash LJ 341]. No decree can therefore be obtained by merely proving certain entries in plaintiff's books. It will have to be shown further by some independent evidence that the entries represent honest and real transactions and that the moneys were paid in accordance with those entries. No particular form or kind of evidence in addition is required. Any relevant facts which can be treated as evidence would be sufficient corroboration, if true [*Yesuvadiyan v. Subba Naicker*, 52 IC 704; *Beni v. Bisan*, 89 IC 371 : A 1925 N 445]. The entries, though relevant, are, however, not by themselves sufficient to charge any one with liability. The entries in *A's* account books though in his own favour is a piece of evidence which may be taken into consideration along with the evidence of *A* that the amount was paid by *A* to *B*. To this limited extent entries in the account books are relevant and can be proved [*S v. Ganerwara*, A 1963 SC 1850]. Mere entries in bank's books of account or copies thereof are not sufficient to charge a person with liability except where the person concerned accepts correctness of entries [*Chandradhar v. Gauhati Bank Ltd*, A 1967 SC 1058; *Allahabad Bank v. Bharat Vegetable Products*, A 1979 NOC 15(C)]. Mere entries in books of account are not sufficient evidence of entrustment so as to substantiate a breach of trust [*Dadarao v. S*, A 1974 SC 388].

Material for corroboration may take the shape of vouchers, receipts or other documentary evidence or sworn oral testimony [*Kallu v. Bhawani*, A 1925 A 742 : 88 IC 383] depending on the circumstances of each case [*Shubhkaran v. Durga*, A 1972 G 208]. In a suit for money on account of sale of goods, the proof of the entries in the ledgers, challans and corresponding bills alone is not sufficient to pass a decree and there must be some other evidence in support of the claim [*Rukmanand Ajitsaria v. Usha Sales Pvt. Ltd.*, A 1991 Gau (NOC) 108]. Because one item covering a small fraction of the account has been proved, the mere inclusion of a number of other items in that same account is not in law sufficient to render the defendant liable [*Abdul Ali v. Puran*, 82 PR 1919]. The various items in the books must be specially proved [*Dwarka v. Sant Baksh*, 18 A 92; see *ante*].

"The practice of admitting such evidence had its origin in a kind of 'moral certainty' and that such is the general course of business that no proofs could be furnished of the frequent small transactions between men without resorting to the entries which they themselves have made in this form of account. It is doubtless in view of considerations of this kind, as well as the opportunity afforded to interested and unscrupulous parties to manufacture testimony in their own behalf, that the courts have sometimes refused to receive book-entries in evidence, so long as more satisfactory evidence could be produced" [Jones s 575]. Though mere production of account book is not sufficient to charge one with liability; still with regard to admissions (v s 17) *ie* entries against pecuniary interest, the law dispenses with all proof except that the book has been kept by or under authority of producer [*Mathilda v. Gaebele*, 96 IC 429 : A 1926 M 955]. An entry which is relevant under this section may also be admissible as independent evidence, *eg* when it is against the pecuniary interest of the person making it [*Ningawa v. Bharmappa*, 33 B 63].

Before a witness can be allowed to put in collection papers under s 34 he must give evidence which is both admissible in law and reliable in fact. It is not sufficient that he is "able to say something" [*Brajanath v. Bimalendu*, A 1947 C 217]. Where plaintiffs can easily produce independent and trustworthy evidence in support of entries in account books, it would be wrong in principle to accept them as sufficient proof uncorroborated by any evidence other than a vague statement that the entries speak for themselves [*Gangaram v. Kaka Ram*, 22 IC 40 : 47 PLR 1914].

Where reliance is placed on entries by a dead person under s 32(2) and they are also relevant under s 34, no corroboration is required by law, but the judge is not bound to believe them without corroboration [*Rampayarabai v. Balaji*, 28 B 294; *Dukhu Mondal v. Grant*, 16 CLJ 24; *Gopeswar v. Bejoy*, 32 CWN 580; *Abdul Wahed v. Nagendra*, 44 CWN 993; *Umed Ali v. Habibullah*, 47 C 266; *Monmohan v. Harinath*, A 1928 C 408 : 47 CLJ 457]. See *ante*: "*Entries are independent evidence &c.*"

Corroborative evidence is best afforded by person who was present and who says that the transactions in the entries actually took place in his presence. But where the transactions are numerous it would be hardly reasonable to expect him to recollect and prove each and every item. In such cases the genuineness of the account books would be the determining factor. When the dispute is confined to some particular items only, specific evidence should be insisted upon to prove those transactions [*Ramgobind v. Gulab*, A 1941 P 430 : 20 P 273 (*Ganesh v. Firm M R*, A 1924 L 540 **expld**)]. The section does not require any particular form of corroborative evidence. Where a witness gives evidence in support of entries, but there is no cross-examination as to his personal knowledge of the facts stated, it is sufficient corroboration [*Narain v. Firm Ghasi*, A 1938 A 353; *Balmukund v. Jagannath*, A

1963 Raj 212; *Dwarka v. Sant Baksh*, 18 A 92]. Plaintiff's own statement on oath in support of entries can be sufficient to fix the defendant with liability [*Jodha Mal v. Ditta*, A 1925 L 242; *Kakaram v. Thakurdas*, A 1962 Pu 27]. Certified copies of statement of account under s 4 Bankers' Books Evidence Act corroborated by affidavit of a person are sufficient to charge the debtor with liability [*Kalipada v. Mahaluxmi Bank Ltd*, A 1961 C 191]. *Talab-baki* papers are not sufficient evidence to charge one with liability [*Umed Ali v. Habibullah*, 47 C 266 : 31 CLJ 68]. Two firms conducted a joint business by an agent appointed by both. In a suit by one of the firms for recovery of their share of the loss, the account books of the plaintiffs were not sufficient for a decree, in the absence of evidence showing that the sums mentioned in the books as having been paid to the agent were really applied by him for the purpose of such business [*Seth Lakshmi v. Seth Indra*, 13 MIA 365 : 13 WR 36 : BLR 31].

Books of account being corroborative evidence, where the fact of payments by a banking firm is distinctly in issue, the mere general statement of the banker that his books were correctly kept, was not sufficient [*Ganga Pd v. Inderjit*, 23 WR 300 PC; see *Srikishen v. Harikishen*, 5 MIA 432].

Rebutting Presumption.—Books of account (*ékwal hudabandi papers*) are admissible under s 34 to rebut presumption, *eg* under s 50 B T Act. Rebutting presumption is not in itself to charge any person with liability [*Gopeswar v. Bejoy*, 32 CWN 580 : A 1928 C 854 (*Belaet v. Rashbehary*, 22 WR 549 **folld**; *Aktowli v. Tarak*, 17 CWN 774 **dissented** from); see also *Nirod Kr v. Prodyot*, 32 IC 794]. So also under s 32(2) [*Manmohan v. Harinath*, A 1928 C 408 : 47 CLJ 457].

Person Calling for Account Books Is Bound by All Entries.—If a tenant called for the production of the papers of the landlord, he is bound by all the entries found therein [*Shib Pd v. Promotho*, 10 WR 193]. So if an account book is called for by the opponent the book must be admitted in toto [*Rajeswari v. Bal Kishen*, 14 IA 142 : 9 A 713]. See also s 163 *post*.

Absence of Entries.—(See also notes to ss 11 and 35). Although this section makes an entry in a book of account relevant, such book is not, by itself, relevant to disprove an alleged transaction by the absence of any entry concerning it [*R v. Girish*, 10 C 1024]. **Refd** to in *Ram Pd v. Lakpati*, 30 C 231, 247 : 7 CWN 162 : 5 Bom LR 104, where LORD DAVEY observed:—"The Act applies to entries in books of account, but no inference can be drawn from the absence of an entry relating to any particular matter." This remark must be taken to apply to s 34. Absence of entry may, however, be relevant under ss 9 and 11 [see *Ali Nasar v. Manik*, 25 A 90; *Pragdas v. Dawlatram*, 11 B 157; *In re Juggun Lall*, 7 CLR 356; *Debendra v. Arun*, A 1925 C 64; also *Gangaram v. Lachmiram*, 19 CWN 611 : 28 IC 705; *Sagur Mull v. Manrai*, 4 CWN ccvii; *Tarakumar v. Arun*, 36 CLJ 389 : 74 IC 383; *Kasam v. Haji Jamal*, 76 IC 327 : A 1924 N 22, where absence of entry was held relevant. See also *R v. Wenham*, 1866 Cox CC 222 cited in Tay s 1639 where it has been held that absence of the name of any person from the Law List is evidence until the contrary be made to appear]. In the case of *Imambandi v. Motasuddi*, 45 C 878 : A 1918 PC 11 : 45 IA 73 it has also been held that absence of entry in account book is relevant under s 9 or s 11. Non-existence of entry in books of account are relevant under ss 5 and 11 [*S v. Nageswara*, A 1963 SC 1850]. When account books are put in to show absence of entry of payment there is no question of charging the defendant with liability by an affirmative entry [*Babulal v. Kamala*, A 1954 C 145]. "In some jurisdictions in America it has been held that absence of entries should be regarded as in effect a statement that no such goods or services had been received and therefore admissible.

Where, however, the book is offered by the opponent, the absence of an entry of the transaction as claimed may properly be regarded as an admission that there was no such transaction" [Wig s 1556].

The mere omission of a party to carry forward into his new account, a balance against himself existing in a former one, can constitute no evidence in his own favour. To prove the existence of the balance, such omission might be considered in connection with other evidence in the case [*Mulka v. Tekaeth*, 14 WR 24 PC].

Degree of Credit to be Given to Books of Account.—"The courts have frequently expressed the opinion that evidence of this character is quite unsatisfactory, and that it should be subjected to close scrutiny. It has been said that the practice of admitting such evidence had its origin in a kind of "moral necessity," and that "such is the general course of business that no proof could be furnished of the frequent small transactions between men without resorting to the entries which they themselves have made in this form of account" [*Field v. Thompson*, 119 Mass 151]. It is doubtless in view of considerations of this kind, as well as of the opportunity afforded to interested and unscrupulous parties to manufacture testimony in their own behalf, that the courts have sometimes refused to receive book entries in evidence, so long as more satisfactory evidence could be produced [Jones, s 575]. In India it has been expressly laid down in s 34 that book entries shall not alone be sufficient evidence to charge any person with liability. The plaintiff must show further by some independent evidence the payment of money, the delivery of the alleged goods or the rendering of the alleged service [see *ante*, "*But such statements alone shall not be sufficient, &c*", p 424]. Account books in which balance are not struck for six days running would not inspire confidence [*Uttam v. Hakim*, A 1932 L 417]. A number of blank spaces left in the *rokarbahi* fully justify the inference that it is unreliable [*Charan v. Lal*, A 1939 L 412]. Discrepancies in entries cannot be contended if no opportunity was given to the opposite party to explain them [*Arvi C C S Ltd. v. Dhondi*, A 1940 B 289].

The rule in section 34 is subject to the salient proviso that such entries shall not alone be sufficient evidence to charge any person with liability except where the person concerned accepts correctness of entries. [*Pit Ram Singh v. Vimla Devi*, A 1992 Raj 149, 153]. Entries in books of account corroborated by Branch Manager and other bank officials are sufficient proof of loan transaction. [*State Bank of India v. Yumnam Gouramani Singh*, A 1994 SC 1644, 1646]. Entries in books of account, regularly kept in the course of business, are relevant but they alone are not sufficient to charge any person with liability. [*Y. Venkanna Chowdry v. G. Lakshidevamma*, A 1994 Mad 140, 159].

—When Some Entries Turn False.—Account books are sufficiently discredited if a certain number of entries therein are proved to be bogus by independent evidence which precludes the possibility of error or accident [*Seth Maganlal v. Darbari*, 47 CLJ 222 : A 1928 PC 39 : 30 Bom LR 296 : 107 IC 113].

Different Kinds of Books—*Jumma-wasil-baki, Talab-baki* Papers, etc.—*Jumma-wasil-baki* papers are yearly accounts showing the total rent demandable for the current year, the balance of previous years, the amount collected during the year and balance due [Field, 6th Ed. p 156]. A *jumma-wasil-baki* is not a rent-roll within s 88 B T Act. The rent-roll mentioned in that section is the *jammabandi*, a permanent document [*Rajani Sundari v. Hara Sundari*, 41 IC 501]. There are several headings in these papers, showing different kinds of collections and they are prepared by reference to another collection papers after the close of the Bengali or Fasli year. *Jumma-wasil-baki* papers are at the best corroborative evidence, and not independent

evidence [*Bejoy v. Bheeko*, 10 WR 291; *Kheeromonee v. Bejoy*, 7 WR 533; *Mahima Ch v. Purna Ch*, 11 WR 165; *Surnomoyi v. Jahur Mohomed*, 10 CLR 545; *Roushan Bibee v. Hurry*, 8 C 926; *Ram Lall v. Tara Sundary*, 8 WR 280; *Shib Pd v. Promotho*, 10 WR 193; *Shk Nowazi v. Lloyd*, 8 WR 464; *Akhil Ch v. Naya*, 10 C 248 where it has been also held that they may be used to refresh memory at the time of giving evidence].

It was held by MARKBY, J, that although entries in account are not alone sufficient to charge any one with liability, documents admissible under this section, are sufficient to answer a claim set up to exemption from what would be the ordinary liability of a tenant, *eg*, in suit for enhancement of rent, to rebut a presumption of fixity of rent from uniform payment of rent for 20 years no corroboration was needed, inasmuch as it could not be maintained that the statements were used as evidence to charge any person with liability [*Belaet v. Rashbehary*, 22 WR 549 (**followed** in *Gopeswar v. Bejoy*, 32 CWN 580); see *Nirod Kr v. Prodyot*, 32 IC 794—CONTRA : Rebutting presumption of fixity of rent has the result of charging a person with liability [*Surnomoyi v. Johur*, 10 CLR 545; *Aktowli v. Tarak*, 17 CWN 774].

Collection papers are not evidence *per se*, and can only be used when they are produced by the person who has collected rents in accordance with them and he may merely use them for the purpose of refreshing his memory [*Md Mahmud v. Safar*, 11 C 407, 409]. The court should not treat as independent evidence, rent-collection papers which are not proved by the persons who are alleged to have made the collection [*Faizuddin v. Agnikumar*, 71 IC 300 : A 1924 C 370]. The only use of collection papers is therefore as corroborative evidence when there is independent evidence of the fact of collection by the persons who realised or saw realisation. They are not evidence *per se*. Collection papers may however, be admissible as independent evidence, if relevant under s 32(2), *ie*, when the persons making the entries are dead &c (*ante*).

Whether as corroborative evidence or as independent evidence, the evidentiary value of such papers is very weak. It was pointed out in a case that *jumma-wasil-bāki* papers are private memoranda made for the zemindar's own use and by his servants and must be looked upon with great suspicion, for nothing can be easier to supplement defective oral evidence by the production of a document which can be manufactured at any time and to any pattern [*Allyat v. Juggut*, 5 WR 242]. As to the lesser weight of *talab-baki* papers. See *Umed Ali v. Habibullah*, 47 C 266 : 31 CLJ 68 where it has been held that they are not sufficient evidence to charge any person with liability.

—*Jummabundi* Papers.—*Jummabundi* papers show the quantity of the lands held by each cultivator, its different quantities, the rate of rent of each kind of land, the total rent for all the land of that particular kind in each cultivator's possession, and lastly the grand total for all the land of every kind held by him [Field, 6th Ed, p 158].

Jummabandis under Reg 7 of 1882 showing enhancement of rent are admissible as corroborative evidence but are not in themselves substantive evidence [*Deonarayan v. Dwarka*, 109 IC 136: A 1928 P 429]. *Jummabundi* papers can never be treated as independent evidence of any contested fact [*Chammarnee v. Ayenullah*, 9 WR 451; *Gujjo Koer v. Ahmed*, 6 BLR App 62 : 14 WR 474; *Gujjo Koer v. Syed Aaley*, 1 WR 494]. *Jummabundi* papers, without the personal testimony of the *putwaree* who filed them are valueless [*Pundit Bhugwan v. Sheo Mongul*, 22 WR 256; see also *Dhanukdhari v. Toomy*, 20 WR 142. These cases were decided under Act 2 of 1855].

Jummabundi papers filed by a *malik* in *batwara* proceedings, to which the tenant is not necessarily a party, cannot be used as evidence against such tenant in a suit for arrears of rent [*Kishore v. Purson*, 20 WR 171].

Signatures of ryots in a *jummabundi* are regarded as an admission of the correctness of its contents [*Watson & Co v. Mahendra*, 23 WR 436]. In order to make the enhanced rent stated in a *jummabundi* settled under Reg 7 of 1822, binding upon a tenant, there must be either an assent to that enhancement or else there must be a compliance with the provisions of the Rent-law with regard to enhancement of rent [*Akshaya v. Shama Ch*, 16 C 586. See also *Md Inayat v. Karamtullah*, 12 A 301 FB: 16 AWN 131 : *Enayetoolah v. Nobo Kumar*, 20 WR 207; *Reazooddin v. McAlpin*, 22 WR 540]. Entries in the *Jamabandi* do not constitute conclusive evidence of title to the property in favour of the person recorded therein [*Laxmi Sahu v. Ganeshi Sahu*, A 1990 Pat 201, 205]. At the best, a rebuttable presumption of correctness attaches to such entries [*Nilkantha v. Thambal*, A 1970 Man 50]. Entry of land as *parjaut* in the *jummabandi* is admissible and of great weight in determining the nature of the tenure of the land [*Shrilal v. Kesho*, 87 IC 368 : A 1926 A 83]. A *jummabundi* prepared by landlord though not binding on tenant is admissible as evidence of area [*Shib Sahay v. Bejoy*, 6 P 157: A 1926 P 197].

—***Isamnavisi* Papers.**—These are returns by the police respecting *ghatwali* lands, stating the name of the holder of the lands and the amount of rent payable by him. These papers are admissible in evidence and are entitled to some weight. These papers are merely corroborative and not independent evidence. As to the value of these papers, see *Farraquharson v. Wwarka*, 14 MIA 259: 16 WR 29 PC; *Erskine v. Govt*, 8 WR 158; *Ferguson v. Govt*, 9 WR 158.

—*Chittas*.—*Chittas* of landlords are admissible in evidence although their value is to be determined in the particular circumstances of each case [*Sarat v. Sarala*, 105 IC 61: A 1928 C 63. As to Govt *chittas*, see s 35].

—**Cannongoe Papers.**—Canoongoe papers are good evidence in question of pergunna rates, standard measurement and the like [*Nand Dunpat v. Tara Chand*, 2 WR (Act X) 12; see also *Kherromonee v. Bejoy Gobind*, 7 WR 533; *Dwarkanath v. Tara Sundari*, 8 WR 517].

—**Factory Books.**—Factory books cannot be used as independent primary evidence of the payments to which the entries refer [*R v. Hardeep*, 23 WR Cr 27].

—**Hatchitta Books** is a document kept specially as a security for the vendor and in the absence of fraud is binding upon him [*Gopimohan v. Abdul Raja*, Ind Jur NS 358].

—**Banker's Books.**—For Banker's books special provision has been made in the Banker's Books Evidence Act (18 of 1891 amended by Act 12 of 1900), whereby certified copy of an entry in such a book is admissible in evidence [see *Appendix* C at the end of this book].

Hospital records.—A person's medical record kept by a national health service hospital is not 'a record relating to any trade or business' within the meaning of s 1(*1*)(*a*) of the [English] Criminal Evidence Act, 1965. The services provided by such a hospital do not carry the commercial cannotation of the services described in the section. Such records would have to be proved by the maker of a particular record by personal appearance before the court [*R v. Caryden*, (1978) 2 All ER 700 CA].

Overseas Police Record.—Statements complied by an overseas police officer in the course of an investigation have been held to be a part of a record. They can properly be admitted in evidence. [*R v. Iqbal*, (1990) 1 WLR 750 CA].

Records of bills of lading.—Under the English Act coted above the bills of lading and cargo manifest have been held to be business records since they are written documents which contain the history of the transactions to which they relate, *i.e.*, where the goods come from, the method of transport, the name of the ship in which they are transported etc and, therefore, such a record is relevant for proving a theft. [*R v. Jones*; *R v. Sillivan*, (1978) 2 All ER 718 CA].

Copies of or extracts from books. —Original account books have to be produced for the inspection of the court. Copies or extracts are in the nature of secondary evidence and before they can be received in evidence, proper foundation would have to be laid under S. 65 for reception of secondary evidence. *Ishwar Dass Jain v. Sohan Lal,* (2000) 1 SCC 434 : AIR 2000 SC 426.

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

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COMMENTARY

Information Technology Act, 2000

Record [S. 35].—The word "record" in S. 35 has been expanded to include electronic records also.

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

Principle and Scope.—When it is the duty of a public officer to make some entries in any public or other official book, it is admissible in evidence to prove the truth of the facts entered as well as the fact that the entries were made by the officer. The rule is thus stated by Stephen in the Digest, Art 34: "An entry in any record, official book of register kept in any State, or at sea, or in any foreign country, stating for the purpose of being referred to by the public, a fact in issue or relevant, or deemed to be relevant thereto, and made in proper time by any person in the discharge of any duty imposed upon him by the law of the place in which record, book or register is kept, is itself deemed to be a relevant fact". "The principle is that it should be a public enquiry, a public document, and made by a public officer" in performance of a public duty or a duty specially enjoined by the Law [*per* LORD LACKBURN, in *Sturla v. Freccia*, 5 App Cas 623, 643; see *Lilley v. Pettit*, 1946, 1 All ER 593 and *Joannou v. Demitriou*, 1952, AC 84]. The reason why an entry made by a public servant in a public or other official book, register, or record stating a fact in issue or a relevant fact has been made relevant is that when a public servant makes it himself in the discharge of his official duty, the probability of its being truly and correctly recorded is high [*Brijmohan v. Priyabrat*, A 1965 SC 282; *Ram Pd v. S*, A 1970 SC 326].

Section 35 requires the following conditions to be fulfilled before a document can be held to be admissible under this section : (1) The document must be in the nature of an entry in any public or other official book, register or record, (2) it must state a fact in issue or a relevant fact and (3) the entry must be made by a public servant in the discharge of his official duties or in performance of his duties especially enjoined by the law of the country in which the relevant entry is kept. (See *State of Bihar v. Radha Krishna Singh*, A 1983 SC 68). Where there is no evidence that the entries were made by the *Patwari* in *Khasras* and *Khatauni* in the manner prescribed under the rules and he issued certified copies, particularly when the evidence is of after the commencement of the lis, to eliminate the element of concoction, the *Patwari* ought to have been examined to prove the correctness of the entries made by him. [*Sita Ram v. Ram Charan*, A 1995 MP 134, 137].

"To be a public document it must be made for the purpose of the public making use of it. Its object must be that all persons concerned in it may have access to it" [*per* GODDARD, LCJ, *Lilley v. Pettit*, 1946, 1 All ER 593, 596; see *Thrasyvoulous v. Papa Christopros*, 1952, 1 All ER 179 *post*]. The ground of reception is that it is the *public* duty of the person who keeps the register to make such entries after *satisfying himself of their truth*; it is not that the writer makes them contemporaneously, or of his own knowledge, for no person in a private capacity can make such entries [*Deo v. Andrews*, 15 QB 756, *per* ERLE, J; Phip 11th Ed p 459].

To render a document admissible under S. 35, the entry relied on must be one (i) recorded in any public or other official book, register or record; (ii) it must be an

entry stating a fact in issue or a relevant fact; and (iii) it must be made by a public servant in discharge of his official duty [*Public Prosecutor v. Lai Kon Ching*, (1994) 3 Malayan LJ 621 (Taiping HC)].

Personal knowledge of the public officer was held to be required in *Ambabavan v. Minakshy*, 28 MLJ 217 : 26 IC 841 and a similar dictum of GARTH, CJ, in *Saraswati v. Dhanpat*, 9 C 431 (which was not assented to by FIELD, J) that s 35 relates to that class of cases where a public officer enters some *actual fact*, which is *known* to him was dissented from in *Sashi v. Girish*, 20 C 940 which **relied** on *Lekhraj v. Mahapal*, 5 C 744 : 7 IA 63. A later decision held that personal knowledge is not required [*Graham v. Phanindra*, 19 CWN 1038]. There are practical difficulties in the employment of the rule as to personal knowledge in all cases. As Wigmore says, certain kinds of official statements are clearly intended by the law to be based upon actual personal observation. For example, a notary is authorised to certify that some one "personally known" to him "personally appeared" before him and acknowledged a deed. But there are nevertheless may classes of public offices in which the work must be *apportioned amony subordinates*; the chief officer, on which the general duty directly rests, retaining only a supervising function, and rarely doing in person the acts of recording, returning or certifying. It would be impossible and inconsistent in law of Evidence to refuse equal recognition to such official statements [see Wig s 1635].

In order to make an entry admissible under this section, it should be shown that the entry purporting to state the fact was made (1) by a public servant in the discharge of official duty, or (2) by one in the performance of a duty specially enjoined by law. Public servant is defined in s 21 I P Code. The Civil and Criminal P Codes and other laws empower the High Court and other bodies to prescribe register, books, records, &c and books like these are prescribed by law. In the case of persons other than public servants the duty must be specially enjoined by the law of the country in which such book, register &c is kept, *eg* Colonial or Foreign Registers &c.

The principle on which s 35 is based is that the law reposes such confidence in public officers entrusted with public duties, that it is presumed that they will discharge their duties with accuracy and fidelity. The scope of this exception to the Hearsay rule is often designated by the term "public documents". Wigmore objects to the term saying that it is inadequate and misleading. "Public" may signify "open to all," "capable of being known or observed by all," or "having an interest for persons in general," or it may signify "made or done by an officer of the government". The word "official" more accurately signifies the essence of the principle dominating the exception. The word "document" is also ambiguous in so far as it suggests also other rules quite distinct from the Hearsay rule. To documents or writings, as such, applies the rule regarding the production of the original, the modes of authentication, &c. For these reasons Wigmore prefers the term "official statements" [see Wig s 1630]. The term "public document" has appropriately not been used in this section. It speaks of entry in "public or other official book, register or records". In interpreting s 35, decision on common law in England coult not be of much help because under s 35 the documents admissible are not only public documents, but also records of official acts [*Bakshiah v. S*, A 1967 SC 752]. The acts or records of acts of public functionaries are dealt with in s 74 as "Public Documents".

Statement of fact in previous judgment not *inter partes* and not admissible under ss 40-43 does not become relevant merely because it contains a statement as to a fact in issue or relevant in the suit and to such a judgment s 35 does not apply [*Khedia v. Turia*, A 1962 P 420].

Foundation For Reception of Entries in Public Record.—*Sturla v. Freccia, sup* LORD BLACKBURN defined "public documents" as "a document that is made for the purpose of the public making use of it, and being able to refer to it..... where there is a judicial or quasi-judicial duty to enquire". The section does not say that the entries should have been contemporaneous with the fact. But an entry made more than a year after the event was rejected [*Doe v. Bray*, 8 B&C 813]. The entries are evidence of the particular facts which it was the duty of the officer to record, but entries of matters which it was *not* his duty to record are not evidence. As to what facts the public registers are evidence of, it has been said with regard to the law in

England that it is doubtful how far a register can be received to prove *incidental* particulars concerning the main transaction, even where these are required by law to be included in the entry. If such particulars are necessarily within the knowledge of the registering officer, they will doubtless be admissible [*Doe v. Barnes*, 1 M&R 386], otherwise they seem not to be evidence unless expressly made so by statute [*Huntley v. Donovan*, 15 QB 96; *R v. Clapham*, 4 C&P 29; Phip 11th Ed para 1130].

The terms of this section do not appear to lay down any such restriction. An entry in any public record, it says, stating "a fact in issue or *relevant fact*" is in itself a relevant fact, Statements of collateral and incidental facts connected with the entry regarding the facts in issue or main transaction, are therefore also admissible. There is, however, nothing in the language of the section to prevent its being given a still wider interpretation, *viz* that a public register is evidence of *all* facts required by law to be entered by a public servant in the discharge of his duty [see *Muthu Ramalinga v. Perianayagum*, 1 IA 209, 239; *Madhav v. Deonak*, 21 B 695, and other cases cited *post*]. But a statement in an official document which is shown to be outside the duty might not be admissible [*Bhaiya v. Beni Mahto*, 22 CWN 439: A 1917 PC 197]. Entries in official book of register are provable by production of the book or register or by certified copies.

Official Registers or books kept by persons in public offices and similar documents of public nature, are generally admissible in evidence, although their authenticity be not confirmed by the usual test of truth, namely, the swearing, and the cross-examining, of the persons who prepared them. They are entitled to this extraordinary degree of confidence, partly, because they are required by law to be kept, partly, because their contents are of public interest and notoriety, but principally, because they are made under the sanction of an oath of office, or, at least under the sanction of official duty, by accredited agents appointed for that purpose. Moreover, as the facts stated in their entries are of a public nature, it would often be difficult to prove them by means of sworn witnesses. To render any document admissible in evidence as an *official register*, it must be one which the *law requires to be kept for the public benefit* [Tay ss 1591-92; see also Best, 4th Ed s 219 pp 301-302, cited in *Samar v. Jugal*, 23 C 366, 367]. Taylor s 1591 was quoted in *Ghulam v. Secy of S*, 52 IA 201: 6 L 269: 30 CWN 101, 104: A 1925 PC 176, in support of the reason for reception of such evidence and LORD CARSON observed that—

> "In many cases, indeed in nearly all cases, after a lapse of years, it would be impossible to give evidence that the statements contained in such documents were in fact true, and it is for this reason that such an exception is made to the rule of hearsay evidence".

Two reasons are judicially sanctioned as justifying the exception to the Hearsay rule in this section: (*1*) The presumption that public officers do their duty. When it is part of the *duty of a public officer* to make a statement as to a fact coming within his official cognizance, the great probability is that he does his duty and makes a correct statement. (2) It has also been suggested by some English judges that a second circumstance forms an essential part of the sanction for receiving such hearsay statements, namely, the circumstance of *publicity* [Wig s 1632].

"Public or Other Official Book".—The words "public or other official" must be read as referring to "register or record" as well as to "book". By those words it is not meant that any book which is official, but not public, shall come within the section. And probably the words *"specially enjoined by the law of the country"* must be read as referring to a public servant as well as "other person" [Cunn p 101]. This provision would be confined to statutory books and registers, and similar records and

cannot be looked at for the purpose of giving meaning and colour to the provisions of sec. 74 [*Ram Jethmalani v. Director, CBI CQIA-I, New Delhi*, 1987 Cri LJ 570, 578, (Del)]. A doubt was expressed in one case as to whether the provisions of s 35 can be taken to apply to an entry in a public register or record kept outside India [*Punnamal v. Sundaram*, 23 M 499: 10 MLJ 310]. But in view of the words "by the law of the country in which such book, etc is kept", it seems tolerably clear that foreign documents are not excluded. But evidence with regard to foreign law under which the book or record was kept would be necessary [Cunn p 104]. S 35 applies to foreign records [*Maharaja v. Krishnabai*, 50 B 716]. A similar rule prevails with respect to the reception of foreign and colonial registers. Such registers or extracts from them are only admissible on proof that they are required to be kept, either by the law of the country to which they belong or by the law of this country [Tay s 1593]. Answers to the questions in Wilson's Manual is admissible under s 35 [*Subhani v. Nawab*, 68 IA 1 : 1941, Lah 154 : A 1941 PC 21]. War diaries of 6 Bombay Pioneers and Chief Engineer, Burcops are records of official acts and hence admissible [*Bakhshish v. S*, A 1967 SC 752].

[*Ref Tay ss 1591-95; Steph Art 34; Phip 8th Ed pp 332-47; Roscoe N P 125-31, 211-18; Best, 11th Ed, s 219; Hals, 3rd Ed, Vol 15, para 571; Wigmore, ss 1631-58, Greenleaf, s 483 et seq; Jones, 508 et seq*].

Register, Return and Certificate.—(*1*) *A register or record* differs from a return or report in that it comprises in a single volume a series of homogeneous statements, recorded by entries made more or less regularly; it differs from certificate in that it is kept in the official custody, (*2*) *A return or report* differs from a register in that it is a single document, is made separately for each transaction as occasion arises. The return differs from the certificate in that it is preserved in official custody. A further distinction, within this class, between a *return* proper and a *report* is that the former deals with something personally done or observed by the officer, while the latter records the results of his investigations as to something that has occurred out of his presence, (*3*) A *certificate* differs from a return in that it is not preserved by the official, but is given out by him to an applicant for the latter's use. It differs from a register in that it is not a series of entries in a single volume [Wig s 1637].

There are many instances in which apart from this section entries in public books or copies of them or certificates are by special enactments made admissible in evidence. For instance copies of entries given under s 57 of the Indian Registration Act (16 of 1908): copy of entry regarding a birth, death or marriage given under ss 9 and 35 of Act 6 of 1886; registers of marriage under Parsee Marriage and Divorce Act (s 8, Act 3 of 1936); Indian Companies Act 1 of 1956 (ss 84, 193, 246 and 548); Registers of Patent & Designs under ss 20(3), 46(3), 71 of Act 2 of 1911; s 19 Societies Registration Act, 21 of 1860; &c, &c.

Sub-registrar's endorsement on a deed registered by him is evidence of the facts stated in it under s 60 of the Registration Act [*Anandi v. Narayan*, 17 Bom LR 49 : 27 IC 478; *Abdul Gafur v. Kamaluddin*, 49 A 689]. Endorsement by sub-registrar that a person presented a document for registration and admitted execution is relevant [*Ganpatrao v. Nagorao*, A 1940 N 382]. The certificate endorsed by a registering officer upon a document is evidence that all the provisions of the Registration Act have been duly performed, and is no evidence of an admission made by the executant [*Raj Mangal v. Mathura*, 13 ALJ 881].

Public Servant.—'Public servant' in s 35 must be interpreted in the same way as a public document in s 74(*1*)(iii), *viz* as including the servant of an Indian or foreign State. S 35 therefore applies to foreign record. A School master is a public

servant [*Maharaj v. Krishnabai*, 50 B 716: 99 IC 307: A 1927 B 11. See s 78 : (6) *post*].

How Much of an Official Document is Admissible.—Where a register is clearly an official document it is admissible under s 35. In the absence of anything to show that any particular part of it was in excess of the official duty by reason of which it came into existence, and that in consequence that part might not be admissible, it is admissible under s 35 [*Bhaiya v. Beni Mahto*, 22 CWN 439: A 1917 PC 197 : 20 Bom LR 712].

Entry Should Be By Proper Officer.—The entries must be by, or under the direction of, the person whose duty it is to make them at the time [*Doe v. Bray*, 8 B&C 813]. Thus, where entries in the books of a public office had been made, not by some specific person in the discharge of his official duty, but indiscriminately by any of the clerks in the office, they were rejected [*Henry v. Leigh*, 3 Camp 499; Phipson, 11 th Ed p 461]. It must be shown that the document was prepared by a public servant in the discharge of official duty or by any other person in pursuance of duty especially enjoined by the law [*Gauri v. R*, A 1930 O 26].

"Discharge of Official Duty".—Whether a given statement was made under an official duty will depend chiefly upon the nature of the office, the subject of the statement, and the form of its making: (*1*) It is clear that *no express statute or regulation* is needed for creating the authority or duty to make the statement. The existence of the duty, and not the source of its creation, is the sanctioning circumstance. (*2*) The subjective influence of the official duty being the essential justifying circumstance, it follows that an official statement by a *foreign officer* is equally admissible with one made by a domestic officer. (*3*) A *supposed duty, though non-existent* suffices. (*4*) The statement—whether by register, certificate, report, or the like—is admissible only so far as duty exists to make statements on the *specific subject-matter*. Hence a statement as to matters not covered by the duty is inadmissible. (*5*) The statement must be in *writing*. (*6*) If a duty exists to record certain matters when they occur, and if no record of such matters is found, then the *absence of any entry about* them is evidence that they did not occur. (*7*) It is sometimes maintained that a statement otherwise admissible is to be excluded where there existed for the *declarant a special interest or motive to misrepresent*. (*8*) The person having the duty and the person making the statement must, on principle be identical. Therefore a statement made *by another person acting instead of the officer* having the duty will be inadmissible; for it is not made under the duty of office. But duty may be delegated, and such a delegation re-creates the duty with equal efficacy [Wig s 1638]. There is no legal requirement that the public or other official book should be kept only by a public officer but all that is required is that it should be regularly kept in the discharge of official duty [*Umesh Chadra v. State of Rajasthan*, A 1982 SC 1057, 1060: 1982 Cri LJ 994].

It is not required that the duty should be prescribed by any statute. It is sufficient if it is prescribed by rules under the authority of an enactment [*Shyam v. Collr*, A 1946 PC 103, 108: 1946 Kar 111 (book maintained under rules authorised by Court of Wards Act); *Bishnath v. R*, A 1948 O 1]. Reports made by CID Officers of election meetings held by candidate were made by public servants in discharge of their official duties and relevant [*Kanwarlal v. Amarnath*, A 1975 SC 308].

A single document may be a public record within this section [*Raman v. Secy of State*, 11 MLJ 315]. It does not follow that every report regarding a fact from a public servant to his official superior in pursuance of directions from the latter, is admissible in evidence to prove such fact. Thus the report of a *tehsildar* to the

Collector that the charities referred to have not been begun by a certain officer is not admissible under s 35 [*Mallikarjuna v. Secy of S*, 35 M 21 : 14 IC 401]. Documents merely kept with official record but not prepared in discharge of duty are not admissible [*Parbhu v. Jitendra*, A 1948 O 307]. Entry made by a public servant in the discharge of his official duties though relevant does not raise any compulsive presumption [*Abdullah v. S*, A 1972 Raj 272].

Inspection of Public Document.—See notes to s 74 *post*.

First Information.—First information taken down under s 154 Cr P Code, amounts to an entry by a public servant in the discharge of his official duty and falls within s 35. But is is not a substantive evidence and is not evidence of the facts which it mentions. It can be used merely by way of previous statement for corroboration (s 157) or contradiction (s 145) and not any further [*Hasib v. S*, A 1972 SC 283; *Chittar v. R*, 47 A 280; *Mohan v. R*, 85 IC 647 : A 1925 A 413; See also *R v. Ram Sugh*, (1897) AWN 47; *Autar Singh v. R*, 17 CWN 1213 : 21 IC 882; *Nga Tun v. R*, A 1934 R 60; *Afsar Sheikh v. R*, 15 CWN 198; *Rahenuddin v. R*, A 1944 C 323; *Badaruddin v. R*, 50 CWN 531; *Sankaralinga v. R*, 53 M 590; *Miyana v. S*, A 1962 G 214]. It attracts the operation of s 35 even though not signed by the maker of the information [*Chettiar v. R, sup*; *Ratanchand v. S*, A 1960 B 146]. See further notes under ss 145, 157 *post*.

Statement to Police Officer Under s 162 or S 154 Cr P Code.—Statement of a witness to a police officer under s 162 though reduced to writing is not "record" within s 35. Moreover it is not necessarily a part of the official duty of a police officer to prepare a document of this nature [*Isab v. R*, 28 C 348: 5 CWN 65; *Natabar v. S*, 59 CWN 78; *Sunil v. S*, A 1963 C 431]. In a case SUNDRA AYYAR J, **dissented** from the above view that a record made by an investigating officer of statements made to him is not prepared in the discharge of his official duty [*Muthu Kumaraswami v. R*, 35 M 397]. If allegation are in the nature of a complaint, the police officer must record them as information under s 154 Cr P Code and the writing will attract the operation of s 35 [*per* MULLICK, J, *Gansa v. R*, 2 P 517 : 73 IC 561].

Information supplied to magistrate's court.—Neither the depositions of the witness, nor his statements were a record where the deposition was merely an information supplied to the magistrate's court and written down by the clerk and the mere fact that the statement was directed to a police officer instead of being written down by the person making the statement did not make the statement a record complied by a police officer [*R v. O'Loughlin*, (1980) 3 All ER 431 CCC].

Road-cess Returns.—See *ante* s 21.

ENTRIES IN PUBLIC BOOKS, RECORDS, REGISTERS ETC THAT COME UNDER THIS SECTION

The following are instances of relevancy of entries in various records, registers &c made in performance of official duty:—

Registers etc.—Entries in public register kept in the Survey Office are relevant although it is copy of a previous register which had become untidy [*Graham v. Phanindra*, 19 CWN 1038]. Entries in a register made by a Collector, under Act 7 of 1876 BC containing the name of the estate, its *tauji* number, the names of the proprietors or managers and other particulars regarding the estate, are entries made in an official register kept by a public servant under the provisions of a statute and admissible for what they are worth [*Sashi v. Girish*, 20 C 940 (*Saraswati v. Dhanpat*, 9 C 431 **dissented** from; *Lekhraj v. Mahapal*, 7 IA 63 : 5 C 744 **relied** on)]. Persons

asserting that *kist* dates in *tauji* ledger are wrong must rebut the presumption [*Ananga v. Kalidas*, A 1947 C 283]. Register of tenures prepared by Special Commissioner under the Chota Nagpur Tenures Act (2 of 1869 BC) and published in the *Calcutta Gazette* is conclusive evidence of all matters recorded therein [*Pertap v. Masi*, 22 C 112]. Quinquennial registers in the Bengal Presidency [*Udoy Moni v. Bisshonath*, 7 WR 14], or Quinquennial papers prepared by Revenue authorities from 1795 to 1899 under the provisions of Regulation 48 of 1783 are admissible [*Secy of S v. Wajid Ali*, 34 CLJ 141]. Quinquennial register of 1795 is admissible to rebut presumption under s 50(2) B T Act [*Hem v. Binayak*, A 1925 C 1037 : 86 IC 538].

Entry in *mouzawari* register is admissible under s 35 for what it is worth [*Secy Cant Com v. Satish*, 57 IA 339 : A 1931 PC 1 : 35 CWN 173]. Registers of Minpaidari villages are official documents and are admissible [*Bhaiya v. Beni Mahto*, 22 CWN 439 : A 1917 PC 197]. Registers of *chakran* lands at the time of the Decennial Setttlement are public records [*Collr of Burdwan v. Shk Imdad*, WR (1864) 358]. The statement made by a survey officer in a village register of lands, that the name of a certain person was entered as occupant would be admissible if relevant, but it would not be admissible to prove the reasons for such an entry as facts in another case [*Govindram v. Raghu*, 8 B 543]. Village note prepared by a settlement officer is evidence but there is no presumption [*Bhagwan v. Lachumun*, A 1925 P 754: 90 IC 579].

An entry by an Assistant Collector under s 5 of Reg 5 of 1827, constituting a declaration against a person's title is an official act [*Malapa v. Mariapa*, 10 BHC 187; see also *Bhagoji v. Bapuji*, 13 B 75]. *Parepatraks* give an idea year by year how much land has been under crop and how much left fallow. They are admissible [*Sitaram v. Himatrao*, 90 IC 38]. The registration of a tenure in the common registry under s 39 of Act 11 of 1859, is *prima facie* evidence of the existence of the tenure [*Lukhynarain v. Gorachand*, 9 C 116: 12 CLR 89]. Decision of Imam Commissioners in Imam Register has great evidential value as to the nature and quantum of right and interest in land unless it is displaced by actual and authentic evidence in individual cases [*Arunachellam v. Venkatachelapthi*, 46 IA 204: 43 M 253, 263: A 1919 PC 62; *Secy of S. v. Vidya Sri*, A 1942 PC 21 : 42 M 893 : *Periaswami v. Sundaresa*, A 1965 SC 516: *Narayan v. Gopal*, A 1960 SC 100: 1960, 1 SCR 773; *Krishnamacharlu v. Vijayasarathy*, 48 MLJ 467; *Thirulakshmi v. Spl Tahsildar*, A 1974 M 182; *Valluri v. Dosapati*, A 1976 AP 295]. Entries in 'Yadast Bogatta' cannot be preferred to those in Inam Fair Register [*Valluri v. Dosapati, sup*]. There is no doubt that the entries in Iman Register cannot displace actual or authentic evidence in individual cases [*Poohari v. Commissioner*, A 1963 SC 510]. Where authentic evidence in unavailable, utmost importance is attached to the information in Imam Register [*Sankaranarayan v. Bd of Commrs*, A 1948 PC 25 : 74 IA 230; *Arunachellam v. Venkatachellapathi*, 46 IA 204: 43 M 243, A 1919 PC 62].

Entries in a village crime note-book are admissible [*Amdumiyan v. R*, A 1937 N 17 FB; *Manik v. Krishna*, 28 NLR 127]. *Katardhar* papers under Punjab Land Reservation Act are public documents under ss 35, 36 [*Shams-ud-din v. Ganesh*, A 1929 L 328]. Entries in the registers kept under the U P Land Rev Act (3 of 1901) are admissible [*Kesho v. Bahuria*, A 1937 PC 69 : 16 P 258 : 41 CWN 577]. So also entries in the register of powers of attorney kept in the registration office [*Pattu v. Nirmal*, 43 CWN 907]; entries from the register of rent suits [*Basanta v. Jnanendra*, A 1940 C 539: 71 CLJ 504]. *Fahrist-tabdilat* under s 47 Land Rev Act showing *nazarana* entries is admissible. Mere fact that an entry has been made in a wrong column does not invalidate it [*Devi Singh v. Dharma*, A 1944 N 314].

Sale register prepared and kept by the Corporation of Calcutta under the rules framed under the Municipal Act is admissible under s 35. The weight to be attached to the entries is another matter [*Corpn of Cal v. Jnanendra N Mukherji*, App No 9 of 1921 of the Judge Court of Small Causes at Sealdah, Civil Rule No 749 of 1921 decided on 11th April 1922; WOODROFFE & B B GHOSE, JJ]. *Khewat khasra* and register of immovable property kept by Municipality are public documents [*Munpl Bd v. Mamtaz*, A 1948 A 309; *Dukhiram Dey v. Mrityunjoy Prosad*; A 1982 Cal 294, 299].

Where in the Collector's office the practice is to maintain a book containing copies of letters sent by Collector to various subordinate officers, the book of copies is itself an official register under s 35 [*Sevagan v. Srimathu*, A 1940 M 273]. Printed index register of lands given on lease by the Government in the City of Ahmedabad is public document [*Secy of S v. Chimanlal*, 1942 Bom 357: A 1942 B 161].

A special condition (that a Mahomedan wife under certain circumstances might divorce her husband) is a matter which under the provisions of Bengal Act 1 of 1876 it is the duty of the Mahomedan Marriage Registrar to enter in the register; and therefore a copy of the entry is legal evidence [*Khadem v. Tajimannissa*, 10 C 607, see also *Zakeri v. Sakina*, 19 IA 157 : 19 C 689]. Entries in prescription register in Government dispensary by a compounder is admissible [*De Cruz v. D*, A 1927 O 310 : 103 IC 512]. So also is jail register [*Rama Rao v. R*, A 1940 O 1]. Entries in the register of motor vehicles should be proved either by the production of the register or a duly authenticated copy of the material part of the register. A statement by the Commissioner of Police in answer to a letter cannot be accepted in proof of the ownership of a car [*Baijnath v. Cropn of Cal* 35 CWN 1147]. Entry in a register of vehicles maintained by a municipality is admissible, but it can have very little corroborative value without independent evidence of how it came to be made [*Baijnath v. Jaimangal*, A 1937 P 56]. Entries in the marking book made by a forest guard checked and initialled by another officer is admissible [*Barikrao v. R*, A 1943 N 139].

—Registers of Births and Deaths.—Entry in a register of births, deaths and marriages is by statute *prima facie* but not conclusive evidence. Therefore when a husband has proved impossibility of access to wife for a certain period, an entry signed by his wife of birth of a child during the period is *prima facie* evidence of the date as well as fact of the birth and incidentally of the wife's misconduct. The court may however require Corroboration. [*Brierley v. B*, 1918 P 257: 119 LT 343]. Entries in birth register should be given preference over medical evidence. [*State of Gujarat v. Inayathusen Mohmadmiya*, 1996 CrLJ 3225, 3228 (Guj)]. The Birth Register extract obtained from Municipality is a valuable piece of evidence as regards age of a person. Merely because name of the person concerned was not mentioned in the document, is not sufficient to discard it because at the time the entries were made the child would not have been named. [*Anandhan v. State*, 1995 CrLJ 632, 633 (Mad)]. The Registrar who acts or purports to act in pursuance of the provisions of the Registration of Births and Deaths Act, 1969 or any rule or order made thereunder, is deemed to be a public servant within the meaning of section 21 IPC, as laid down in section 26 of the Juvenile Justice Act, 1986. Therefore, the certificate of date of birth of the juvenile accused entered in the Birth Registered under the 1969 Act was admissible under section 35 of the Evidence Act as it fully satisfied the three conditions: (i) the entry of the date of birth relied on was made in the Register of Births and Deaths, a public record; (ii) it is an entry stating a fact in issue or a relevant fact; and (iii) it was made by a public servant in discharge of his official duty. [*Anita v. Atal Bihari*, 1993 CrLJ 549, 551 (MP)].

Entry of date of birth made pursuant to the direction of a magistrate under s 13(3) Registration of Births and Deaths Act, 1969 is not conclusive evidence [*H Subbarao v. LIC*, A 1976 Knt 231]. Birth register is an official register kept by a public servant in the discharge of official duty and is relevant [*Gehimal v. Karummal*, 10 SLR 38: 35 IC 551; *Chakravarthi v. Pushpavathi*, A 1926 M 895; 95 IC 1005]. Certified Copies from school register and affidavit by father amount to evidence [*Md Ikran v. S*, A 1964 SC 1625]. Presumption of correctness attaches to entries in birth and death registers and heavy onus lies on the party disputing the presumption [*Bishwanath v. Dulhin*, A 1968 P 481; *Bujhawan v. Shyama*, A 1964 P 301; *Gopichand v. Bedamo*, A 1966 P 231; *Rajindra v. Chandunarain*, 1970 2 SCC 277]. Its evidentiary value is much greater than horoscope [*Bharat v. Gopi*, A 1941 A 385]. Though Birth and Death Register is relevant, not every entry but only such entries as are made in discharge of official duty are admissible [*S v. Kamaruddin*, A 1956 N 74]. Copy of birth certificate by the CEO Chandernagore Municipal Corporation is automatic evidence as a public document under conjoint effect of ss 35 and 77 and also conclusive unless disproved [*Dalim v. Nandarani*, A 1970 C 292 (*Nanhak v. Baijnath*, A 1935 P 474; *Anil v. Saliendra*, 69 CWN 593 **rel** on)]. Certified copy extract from register of birth maintained by municipality is admissible to prove contents of such public document [*Vanajakshamma v. P Gopala Krishnan*, A 1970 My 305]. But the certified copy of entry itself is not sufficient to establish the reliability of the contents of the register in all cases [*Muhammed v. Sulekha*, 1981 Cri LJ (NOC) NO (Ker)].

Where the father's name is entered as *A* son of *B* the entry is not admissible with reference to *A*'s parentage [*Nagayaswami v. Kochadai*, A 1969 M 239—case laws discussed]. When does the registering officer exceed his duty in respect of an entry of an illegitimate child in birth register [*Tatayya v. Nakuraju*, A 1958 AP 611]. The entry regarding date of birth in the Register of births is a *prima facie* piece of evidence but it is not conclusive in nature. Such a birth entry which attributes parentage of the child to a man outside the lawful wedlock does not carry any presumption of its correctness unless there is direct evidence as regards the informant or else the person who is entered as the father of the child admits its paternity [*Prakash Chander v. Smt Parmeshwar*; A 1987 P&H 37, 44 : (1986) 90 Pun LR 581].

Entry in *Hat Chita* book showing the birth of a child cannot be ingnored merely because child's name was not given [*Jaladhar v. Malati*, A 1971 Or 230]. A mere entry in a birth-register that a daughter was born to A without any statement as to his identity is sufficient to prove birth date [*Saidunnisa v. Ruqya*, A 1931 A 307]; but the connexion of the identity of the person with the entry must be established by other evidence [*Hemanta v. Allianz &c Ltd*, A 1938 C 120; *Ahamad v. Meyappa*, 1939 MWN 976 : A 1940 M 285; *Biseswar v. R*, A 1949 Or 22; *Manikrao v. Deorao*, A 1955 N 290; *S v. Kamaruddin*, A 1956 N 74; *Paryanibai v. Bajirao*, A 1963 B 25; *Bansiram v. Jitram*, A 1964 Pu 231]. Entries in registers of births, deaths or marriages cannot be positive evidence unless the identity of the persons is fully proved [*Hemanta v. Allianz &c sup*].

Extract from register of death under Madras Act 3 of 1899 (Regn of births and deaths) is admissible under s 35 [*Ramalinga v. Kotayya*, 33 MLJ 60: 41 M 26 : A 1913 M 451]. Register of births and deaths kept at the police station is a public document [*Shk Tamijuddin v. Shk Tazu*, 22 CWN 822 : A 1919 C 721 : 46 C 152; *Shibdeo v. Ram Pd*, A 1925 A 79 : 46 A 637 (all cases reviewed); *Sivakami v. Kooliyandi*, A 1934 M 13, *Manikrao v. Deorao*, A 1955 N 290], and it is not necessary to prove who made the entries and what his source of information was [*Dasi v. R*, A 1947 A 429; *Bujhawan v. Shyama*, A 1964 P 301; *Ghula v. Shyamlal*, A 1974 P 68]. If the mother's name only is

given, the informant should be examined as to the omission of the father's name [*Manicka v. Ammakanu*, A 1942 M 129]. Register of deaths maintained under para 367 of Police Regulation is an official register [*Zaib-un-nessa v. Hasrat-un-nessa*, 22 OC 124 : 52 IC 162 : *Shibdeo v. Ram*, Pd, 46 A 637]. Such register is ordinarily conclusive as to date of death [*Rangappa v. Rangaswami*, A 1925 M 1005 : 88 IC 249; *Bagaimmal v. Kamalammal*, A 1965 M 205; *Nanak v. Baijanth*, A 1935 P 474]. But if the court comes to the conclusion that the register was prepared in a casual way, it is open to it to reject it [*Kalipada v. Sashi*, A 1930 C 636]. Entry in death register is not conclusive evidence of date of death. Fact that certificate was admitted in evidence without objection does not alter the position [*Swarnalata v. Krishna Iron &c*, A 1974 C 393 (*P C Purushothama v. Perumal* A 1972 SC 608 **followed**)]. Kotwal's diary of report of death is admissible [*Bani v Zamaji*, A 1927 N 326]. It is not safe to rely on such register for proving religion [*Guruswami v. Irulappa*, A 1934 M 630]. An entry in a death register maintained by a Municipal Board under s 298(2)(*j*)(*b*) of U P Municipal Act is admissible under s 35 not merely to prove the death of the particular person but also other relevant facts appearing on the record [*Komul v. Gurcharan*, A 1938 A 242 : 175 IC 263]. Municipal register of births and deaths is admissible [*Abdul Rahim v. Abdul Jabbar*, A 1950 C 377; *Jai Bhagwan v. Gutoo*, A 1934 O 167 : *Anwari v. Baldra*, A 1936 A 218; *Shamlal v. Munilal*, A 1972 P & H 199 (extract)].

Where only a leaf from the *Hat Chita* book of death register and not the whole book was produced by the *chaukidar* recording the same it was admissible [*Dasarath v. Gura*, A 1972 Or 78]. Entry in a *chaukidar's* register of births and deaths is not admissible, where it neither purports nor is proved to be signed by the station-writer, the register not being directed to be kept by any law [*Md Jafar v. R*, 54 IC 166 : 22 OC 250; see also *Sheo Balak v. Gaya Pd*, 20 ALJ 601; *Dasi v. R*, A 1947 A 429]. Entry in the register of a deceased *chaukidar* not shown to have been made by the deceased is inadmissible under s 35 [*Sheo Balak v. Gaya*, 77 IC 52 : 20 ALJ 601]. Birth entry by somebody else at request of an illiterate *chaukidar* is inadmissible [*Brij Mohan v. Priyabrat*, A 1965 SC 282; *Joginder v. Balbir*, A 1974 P&H 31; *Jaladhar v. Malati*, A 1971 Or 230]. In the absence of reliable evidence as to who made the entry as to death in *chaukidar's hathchitta* and in what circumstances, it cannot be said that the conditions laid in s 35 have been fulfilled [*Sanatan v. R*, A 1945 P 489 : 26 PLT 225]. Entries of births and deaths in *kotwar* books have been held admissible [*Srikishen v. Jagoba*, A 1937 N 264]. As to entries in the diary of deceased *chaukidar*, see *ante*, s 32. Entries in a village register of births and deaths kept under the order of Board of Revenue are admissible [*Ramalinga v. Srigiriraju*, 41 M 26]. The entry in the death register maintained by *Gram Sevak* of a *Gram Panchayat* pursuant to the discharge of public duty cast upon him under the Panchayat Raj Act, is admissible in evidence as well as relevant. [*Smt Manni Devi v. Ramayan Singh*, A 1985 Pat 35, 37].

Indian registers of baptisms [*Queen's Proctor v. Fry*, 4 PD 230], marriages [*Ratcliffe v. R*, 1 S&T 467], and deaths kept under authority of the E I Company and are now deposited in the office of the Secretary of State for India. Registers of Marriages compiled by the Secretary of State for India from periodical reports transmitted to him by the various religious denominations in India—These registers of certificates are admissible *per se* [*Westmacott v. W*, 1899 P 183; *Braid v. B*, 25 TLR 646; *De Gruyther v. De G*, 1900 Times Nov 2 : Phip 11th Ed pp 468, 768]. The death certificate issued by a respected person of the place does not satisfy the requirements of sec. 35 [*Smt Raj Rani v. Chief Settlement Commissioner, Delhi*, A 1984 SC 1234, 1237].

—Revenue and Settlement Records.—Mutation of a property in the revenue record does not create or extinguish title nor has it any presumptive value on title.

[*Sawarni v. Inder Kaur*, A 1996 SC 2823, 2825; *Durga Das v. Collector*, A 1996 SC 2786]. Mutation entries do not convey or extinguish any title and those entries are relevant only for the purpose of collection of land revenue. [*Balwant Singh v. Daulat Singh*, A 1997 SC 2719, 2723]. An entry in the revenue record showing possession of the land in question of a particular person is not conclusive of ownership. It gives rise only to a rebuttable presumption. *Vishal Singh v. State of M.P.*, (1998) 9 SCC 90 : AIR 1998 SC 308. In the absence of any other document of title record of rights raises presumption of ownership and possession in favour of the recorded persons. [*Md. Zurat Azad Khan v. Tajati Adhikari*, A 1996 Ori 204, 210]. The entries in the Record of Rights regarding the factum of partition is a relevant piece of documentary evidence in support of the oral evidence to prove the factum of partition. [*Digambar Adhar Patil v. Deveram Girdhar Patil*, A 1995 SC 1728, 1729]. Mutation entries are inadmissible in evidence and cannot be relied upon. [*Pakhar Singh Atwal v. State of Punjab*, A 1995 SC 2185, 2186]. Entries in revenue records being the paradise of the *patwari*, creation of records may be a camouflage to defeat just and legal right or claim and interest of the tiller of the soil. [*Baleshwar Tiwari v. Sheo Jatan Tiwary*, A 1997 SC 2089]. Pencil entry in the *Khasra girdwari*, in absence of verification/attestation thereof by any revenue officer, cannot be relied on. [*Sohan Singh v. Gulzari*, A 1997 HP 12, 15].

Where the *Bandobast Missal* and *Khasra* entry referring the disputed tank as artificial tank were not rebutted by the landowners it was held that the said tank was artificially constructed embankment. [*Jayaprakash v. State of Maharashtra*, 1996 AIHC 1328, 1331 (Bom)]. Revenue records, *eg* assessment rolls, as made in Burma are relevant evidence under s 35, though they are not enough to prove a fact, *eg* partition [*Mg Po v. Ma E Mai*, 74 IC 47: A 1923 R 57]. Entries in revenue records are not conclusive, but their importance in a case for possession cannot be denied [*Mg Sin v. Mg So*, A 1931 R 40]. The certified copies of revenue extracts are not conclusive of title or right to the land. Such an entry is only prime evidence of possession and a right to hold the land title [*K G Krishna Murthy v. Balappa*, A 1985 Andh (NOC) 6]. Entries in revenue record, that a person is an occupancy tenant is final and conclusive [*Murti Mandir Mani Ram v. Bhagat Ram*, A 1985 (Him Pra) (NOC) 234]. Entries in supplementary revenue record though relevant under s 35 are not in themselves sufficient to prove a mortgage [*Ko Po Mg v. Ma Mein*, 77 IC 380: A 1924 R 135 : 1 R 562: *Mg Tun v. Mg Khan*, 84 IC 987: A 1925 R 61 : 2 R 441]. Mortgage cannot be said to be *non est* for not making entry in revenue record [*Madna v. Raghunath*, A 1976 HP 41]. Entry in *Khasra* under C P Land Rev Act, 1917 is presumed to be correct [*Shikharchand v. Digambar Jain &c*, A 1974 SC 1178]. Unless *Khasra Girdwari* entries are shown to be false or suspicious they must be given the weight they ordinarily deserve [*Khiali v. Sant*, A 1972 P&H 393]. Though *Khasra Girdwari* record is admissible under s 35 statutory presumption of correctness of record of rights and *jamabandis* under s 44 of Punjab Land Rev Act does not extend to it [*Gurcharan v. Prithi*, A 1974 SC 223].

Entries in *jamabandi* fall within the zone of record of rights and a presumption of truth is attached thereto, whereas entries in *khasra-girdawari* do not fall within the description or record of rights but they constitute a relevant fact under sec. 35 since they are recorded by a public servant in the discharge of his official duty [*Sant Ram v. Faquiroo*, A 1985 HP 10, 12: 1984 Sim LC 283]. The presumption of correctness in entries in revenue records apply only to genuine entries, which are open to attack on the ground of fraud or forgery [*Vishwa v. Fakhrul*, A 1976 SC 1485]. Entries in assessment rolls are relevant [*Mg Po Lun v. Ma E Mai*, 1 Bar LJ 111]. Entries in Deara Survey Records are a valuable piece of evidence under s 35 [*Akubali v. Najemali*, 50 CWN 382 : A 1946 C 326]. Entry in revenue register regarding alienation is a relevant fact [*Mg Hlaing v. Mg Chit*, 76 IC 449: A 1923 R 195 : 1 R 135]. A *pyat paing* (survey register) duly proved is admissible [*Ko Mg v. Mg Ba*, A

1926 R 204]. Hand-written pedigree prepared under a form prescribed by the Court of Wards is admissible [*Shiam Pratap v. Baisni*, A 1940 A 353]. Presumption of correctness attaches to settlement pedigree tables [*Mangal v. Manphul*, A 1961 Pu 251] and entries in *jamabandi* under s 46 H P Land Rev Act [*Lilawati v. Paras*, A 1977 HP 1]. Entries in revenue records are relevant, but they are not evidence of title [*Ramanna v. Sambamoorthy*, A 1961 AP 361]. Entry in revenue records alone is not sufficient to show separation of joint family [*Baboo v. Bechni*, A 1974 P&H 343 (*Atmaram v. Umar*, A 1940 L 356 **rel** on)]. Entry in 'Hassab Partah Deh' in column of tenant does not prove adverse possession [*Pasul v. Ghani*, A 1973 J&K 53].

Entries in revenue records and settlement records since 1852 in which plaintiff's family has been shown as holding land, their caste being described as *Khagyat Mohal*, are admissible on question of pedigree [*Ghulam Rasul v. Secy of S*, 52 IA 201 : 6 L 269 : A 1925 PC 170]. Settlement orders and *akhir rubkars* are admissible to show that *sanad* was granted to persons named therein [*Parbhu v. Jitendra*, A 1948 O 307]. Entries in revenue records showing certain land to be thoroughfare is relevant [*Meghraj v. Munpl. Com*, A 1936 L 921]. Accounts prepared by a revenue officer showing that he found after enquiry that 90 acres were cultivated should be acted upon to prove cultivation of 90 acres [*Narayanasami v. Chintalapati*, 22 MLJ 393 : 14 IC 1007]. Entry in the revenue papers as an under-proprietor is of no avail to him for establishing title as an under-proprietor when other evidence does not show that status [*Ram Rup v. Debi Pd*, 5 OLJ 513 : 41 IC 754]. The entries made in the mutation register by the Patwari in the discharge of his public duties or the orders passed thereon by the Revenue Officer would be a relevant piece of evidence under section 35 if they contain any fact in issue or a relevant fact [*State of Punjab v. Pohu*, 1986 P & H 143, 148 : 1985 Punj LJ 583 (FB)]. When the official who made the report in mutation proceedings is related to a party, the presumption about the official acts is not available [*Pem Choden Bhuliani v. Rinchen Dorjee*, A 1986 Sikkim 22, 28].

Papers of the Canal Department are evidence of possession [*Ramraja v. Deonarain*, 24 P 379; *Isar Nonia v. Karinam*, A 1958 P 353].

Record of Rights is admissible under s 35 [*Fazlar v. Golam*, 30 CWN 689 : 96 IC 659] as also entries in draft record of rights [*Haridas v. Kishan*, A 1952, C 393 : 1949, 1 Cal 433 (*Pratap v. Jagadish*, 40 CLJ 331 : *Nisikanta v. Brojendra*, A 1928 C 298; *Adu v. Hiralal*, 33 CWN 196; *Chand v. Bhagwati*, 2 P 814 **relied** on); *Roy &c v. Nanibala*, A 1979 C 50]. Entries in Record of Rights are presumed to be correct until the contrary is shown [*Shankarrao v. Shambhu*, A 1940 PC 192 : 1941 Bom 107; *Jatindra v. Sushilendra*, A 1965 C 328; *Bapumacha v. Gokul*, A 1975 Gau 47]. If there be conflict between old and new record of rights the later entry will be presumed to be correct unless shown to be wrong [*Mahavir v. Shashi*, A 1981 C 74; *Hrishikesh v. S*, A 1978 C 556 (*Durga Singh v. Tholu*, A 1963 SC 361 ref)].

Admission of opponent contained in *khanapuri* proceedings which preceded the finally published Record of Rights is admissible [*Khedu v. Konka*, A 1939 P 591]. Entries in a survey record or *khewat* raise a presumption of correctness but it may be rebutted [*Kamakhya v. Abhiman*, 13 P 589 : 39 CWN 41 : A 1934 PC 182 : 61 IA 383]. A survey *khesra* not in conflict with the Record of Rights is admissible [*Abdul Baqi v. Fakhrul*, A 1937 P 333; *Murli v. Sheo Kishore*, A 1950 P 432]. Entries in settlement records are *prima facie* evidence [*Azmat v. Bishun*, 25 CWN 650: 29 CLJ 607]. Such entries are presumed to be correct but the Record of Rights by itself does not furnish any evidence of title. It is proof of title in so far as it is based on possession [*Cromartie v. Iswar Radha*, 62 CLJ 10]. Entry in record of right that property is *kabilzadi* is admissible [*Harihar v. Sheo Pd*, A 1954 P 173]. Definition of

shares in *khewats* or other revenue papers affords by itself a very slight indication of title [*Nageshar v. Ganesha*, 47 IA 57 : 42 A 308 : A 1920 PC 46; *Durga v. Ghanshiam*, A 1948 PC 210 : 53 CWN 118; *Nirman v. Rudrapratab*, 53 IA 220, 227 : A 1926 PC 100; *Ramanna v. Sambamoorthy*, A 1961 AP 361].

An entry in the Record of Rights operates in the same way between landlords of neighbouring estates as between landlord and tenant or between landlords of the same estate or between tenant and tenant [*Bibi Wakilam v. Deo Nandan*, 5 PLJ 681 : 59 IC 298]. Remarks recorded by a settlement officer about a village after inspection is admissible [*Sheo Bahadur v. Bishunath*, A 1927 O 74 : 99 IC 876]. Remarks by a Settlement Officer that certain names are entered as proprietors in a sanad is admissible [*Parbhu v. Jitendra*, A 1948 O 307]. As to presumption from entries in Record of Rights, see notes to s 114, *post*. Summary settlements have not the same value as a regular settlement [*Saddu v. Mani*, A 1931 L 139].

Settlement records prepared under Reg 7 of 1822 are relevant under s 35 [*Raghunandan v. Bibhuti*, 39 C 304 : 12 IC 147]. Revenue records are not conclusive evidence of facts recorded. The presumption is rebuttable [*Gurdit v. Mt Bhago*, 26 PLR 673; *Vassandmal v. Hiromal*, A 1947 S 94]. As to value of entries in revenue register when the origin of the entries is not known, see *Pirtha v. Md Ali*, 94 IC 188: A 1926 O 427. Though entries in survey records may not be sufficient evidence to prove that a certain land is *poramboke*, they are good evidence where the only question is as to the extent of *poramboke* land [*Kalayi Narayana v. Secy of S*, 29 IC 154: 2 LW 413].

Entries made in settlement *khewats* even if they do not come under s 102 B T Act are relevant under s 36 [*Pratap v. Jagadish*, 40 CLJ 331 : 82 IC 886]. Pedigrees prepared for purposes of settlement are relevant under s 35 [*Baijnath v. Bahadur*, 91 IC 583 : A 1926 O 101; *Sarju v. Ram Harakh*, 18 IC 250]. Family traditions recorded by a settlement officer as stated by a person without special knowledge is of no value [*Mata Baksh v. Ajodhia*, A 1936 O 340]. *Fard bachh* prepared under the Punjab Land Rev Act by *patwari* are public documents [*Malik v. Khusal*, A 1931 L 605].

Where the settlement officer was directed under Reg 7 of 1822 to ascertain the real nature and extent of interests held, more specially where the several papers may hold interests, in the same subject-matter of different kinds and degrees, entries in *khewats* and *khuttians* would be admissible to prove the existence of disputed mortgage [*Skinner v. Chandan*, 31 A 247: 6 ALJ 197. See *Mi Sa v. Nga Pyan*, UBR (1905)]. Rates of rent appearing in *rubkars* of Collectors under Bengal Land Revenue Settlement Reg 7 of 1822 are relevant [*Deonarayan v. Dwarka*, 109 IC 136: A 1928 P 329]. *Jummabundi* prepared by a Deputy Collector engaged in settlement work under Reg 7 of 1822, was held to be a public document within the meaning of s 74 [*Taru Patur v. Abinash*, 4 C 79; **dissented** from in *Ram Ch v. Bunseedhur*, 9 C 741. See also *Akshaya v. Shama Churn*, 16 C 586 and *Md Inayat v. Md Karamatullah*, 12 A 301 FB]. Statements of facts by a settlement officer in the column of remarks in the *dharepatrak*, but not his remarks for the same, even though they may consist of statements of collateral facts which it was no part of his duty to enter into, are admissible in evidence [*Madhav v. Deonak*, 21 B 695]. The presumption of correctness of entries will not prevail where there was a decision by court long before publication of record of rights [*Kazi Mohammad v. Sibram*, A 1967 C 10].

—***Batwara* or Partition Papers.**—Keshra [*Jagan v. Gaya Mun*, A 1937 P 567] or *batwara* kehsra [*Triloke v. Uman*, A 1922 P 447 (38 IC 491 **followed**); *Kali v. Matru*, 15 P 584], or *khasra girdwaris* [*Md Din v. Fateh Din*, A 1934 L 698] or *abadi khesra* [*Phakkar v. Pragji*, A 1935 O 268] are admissible in evidence. *Batwara Khesra* is

generally prepared by *amin* on the admission of both landlord and tenant, and as such is very valuable evidence in subsequent disputes. But *khesra* prepared not on the basis of admissions of all the parties, but on information supplied by one of them and without enquiry is absolutely valueless in evidence and is inadmissible [*Golab v. Syed Salka*, 36 IC 513]. Area given in settlement map is more reliable than area in *khasra* [*Laharam v. Gurumukhrao*, A 1927 N 204].

Records of existing rent and other assets of an estate published under s 48 Bengal Estates Partition Act are admissible [*Chatterjee Estates Ltd v. Dhirendra*, 40 CWN 821]. Entries in *batwara* papers prepared under the Bengal Estates Partition Act are some evidence of the existence of relationship of landlord and tenant and also some evidence as to the rents payable, in a suit for rent [*Jatindra v. Isaf*, 53 IC 19; see however, *Nandalal v. Mohant*, 17 CWN 779: 18 IC 143; *Sadhusaran v. Ambika*, 68 IC 676, and other cases *post*]. Entries in registers maintained by Cantonment authorities under Cantonment Act 3 of 1924 are not presumed to be true [*Phiroze v. H C Vashistha*, A 1980 B 9].

Entries in partition papers prepared under Act 5 of 1897 as to amounts of rent payable by tenants are evidence in the same way as entries in the Record of Rights. *Prima facie* they are evidence against the tenant, though it may not be very valuable [*Janki v. Kirtarnath*, 13 CWN 93: 4 IC 316]. But such entries are in no way binding upon persons not parties to the *batwara* proceedings. So far as strangers are concerned, the only way in which they can be treated as evidence would be under s 11 [*Rahimuddin v. Umesh*, 87 IC 694: A 1926 C 115]. *Batwara* records are mere evidence under s 35 as official records but such evidence is weak [*Satish v. Kalicharan*, 29 CWN 221; *Gocool v. Jamal*, 55 C 680]. The *batwara* record is not conclusive. Even when the question is between co-sharer and landlords, a subsequent settlement record must prevail over the earlier partition record [*Benode v. Ramani*, 38 CWN 268]. Certified copies of papers in the Collectorate which *prima facie* appear to be the record of a partition made under Reg 19 of 1834 between the predecessors of the parties to a suit are good and admissible evidence quite apart from s 35 [*Khettranath v. Md Alla Baksh*, 23 CWN 48: 45 IC 921].

The *batwara* map and *batwara* chitta prepared by partition *amin* under s 54 of the Bengal Estates Partition Act proved to have been accurately prepared or to have been accepted or acted upon by the landlord are independently of s 35 admissible against the landlord for the purpose of proving what lands were held by what tenants [*Dinanoth v. Nawab Ali*, 49 IC 984; *Matiwar v. Dhanu*, 59 IC 963]. Entries in *batwara* papers are valuable pieces of evidence [*Chattar v. Babar*, 29 CWN 333: 86 IC 835: A 1925 C 635]; but it is for the court to determine in each case whether the evidence is so valuable as to rebut the presumption of correctness of Record of Rights [*Jugdeo v. Bulaki*, 63 IC 226: A 1921 P 275]. Writs of attachment issued in 1792 and 1797 and prepared when the Collector took possession of a *zemindari* for non-payment of revenue and *batwara* papers are admissible to prove the non-existence of tenures. Much weight cannot be attached to a partition paper in the absence of detailed information as to the history of the document, *ie*, when was it prepared, by whom, in whose presence and for what purpose [*Tarakumar v. Arun*, 36 CLJ 389: 74 IC 383: A 1923 C 261]. *Batwara* map prepared in a partition proceeding between the proprietors of an estate is no evidence against tenants if it was prepared after the creation of their tenancy [*Banamali v. Satis Ch*, 56 IC 138].

The *hakikat chowhuddibundi* (boundary) papers were made on Government form in pursuance of a Government request and to afford the Government for their purpose satisfactory information upon various questions to which they furnished

answers. Those papers gave description of the different *mauzas* with their different boundaries and in the absence of any corrections whatever made in the statements and of any documents forthcoming from the Government showing that the returns were questioned, they must as between the Government and the *zemindars* (plaintiffs) be accepted as *prima facie* accurate [*Haradas v. Secy of S*, 26 CLJ 590 : A 1917 PC 86; *Rajnandini v. Manmatha*, 44 CWN 1079: A 1941 C 223; see also *Secy of S v. Kalika*, 15 CLJ 281]. Reliance can be placed upon hand-sketches drawn up by parties on the basis of the information derived from quinquennial papers and *hakikat chowhuddi-bundi* papers [*Secy of S v. Wajid Ali*, 34 CLJ 141].

Rubkari.—Recital of *ekrarnama* and its terms in ancient public document like *Rubkari* furnishes strong evidence of the existence and genuineness of the *ekrarnama* and its terms [*Biswambhar v. S*, 1954 SCR 842: A 1954 SC 139: 1954 SCJ 219].

—*Wajib-ul-arz* or *Riwaz-i-am* **Papers.**—*Wajib-ul-arz* is a part of the settlement record and a statutory presumption of correctness attaches to it [*Avadhkishore v. Ram*, A 1979 SC 861]. Though an entry as to title in a *wajib-ul-arz* or record of rights does not create a title, it gives rise to a presumption in its support, which prevails until its correctness is successfully impugned [*Dakas Khan v. Ghulam*, 45 C 793: 28 CLJ 441. 48 IC 473: A 1918 PC 4; *Inder v. Raghbir*, A 1978 P&H 98 FB]. *Ikrarnama or sharait-wajib-ul-arz* is one of the important documents of the record-of-rights [*State of Punjab v. Subash Chander*, A 1991 P&H 134, 137 (1987 Pun LJ 393 **Reversed**)]. Value of entries in *wajib-ul-arz*—The views of Revenue authorities as to the effect of a grant or the intention of the Government is not binding on civil courts [*Rajindar v. Sukhi*, A 1957 SC 286: 1956 SCR 889]. Evidentiary value of a *wajib-ul-arz* in deciding whether the right to a particular mineral vested in the State Government or not [*Premchand v. S*, A 1972 P&H 50]. Entries in *wajib-ul-arz* or village administration papers made in a settlement proceeding under Reg 7 of 1882 recording the kind of custom in question, were held admissible under s 35 to prove the custom [*Lekhraj v. Mahapal*, 7 IA 63 : 5 C 744].

A *wajib-ul-arz* is an official record, of more or less weight according to circumstances, but still an official record of the local customs of the districts in which it is recorded. But a settlement officer should not receive a mere expression of the views of a proprietor or enter it upon the record, relating to the village [*Uman v. Gandharap*, 15 C 20: 14 IA 127]. Entries in *wajib-ul-arz* are admissible under s 35 even if made under misconception of official duty [*Prem v. Harihar*, A 1946 O 163]. Statements in *wajib-ul-arz* when not ambiguous are sufficient evidence of custom [*Balgobind v. Badri*, 50 IA 196: 29 CWN 465: 45 A 413: A 1923 PC 70; refd to in *Sher v. Dost*, 78 IC 45: A 1925 L 231: **followed** in *Hubraji v. Chandrabali*, A 1931 O 891] and is conclusive unless rebutted [*Bajrang v. Ram*, A 1943 O 29]. Entry as to custom in village note is admissible [*Bidya v. Surkhur*, A 1931 P 263]. *Wajib-ul-arz* prepared pursuant to the directions in Oudh Cir No. 20 of 1863 when properly used afford most valuable evidence of custom and are much more reliable than oral evidence given after the event. On the other hand, they at times contain statements which would appear to have been concocted by the persons making them in their own interest and are therefore to be disregarded being worse than useless [*Roshan Ali v. Ashgur*, A 1930 PC 35 : 57 IA 29]. Entry in a *wajib-ul-arz* paper was not exhaustive regarding the exclusion of collaterals [*Walayat v. Sher Ali*, 19 PR 1917]. Entry in *wajib-ul-arz* is not conclusive [*Hamid Fatima v. Bhola*, 52 IC 869].

An entry in a *wajib-ul-arz* is admissible in proof of customs of exclusion of daughter under s 35 and its validity does not depend on whether it has been verified by the

proprietor of the village or not [*Mehdi v. Abdul*, 101 IC 820: A 1927 O 608]. Entries in *wajib-ul-arz* made and authenticated by the signatures of the officers who made them are admissible in evidence under this section in order to prove a family custom of inheritance, or under s 48 as the record of opinions as to the existence of such custom by persons likely to know it [*Lali v. Murlidhar*, 33 IA 97 : 28 A 488 : 10 CWN 730; see also *Ram Sarup v. Sital Prasad*, 26 A 549: 1 ALJ 279. See also *Parbati v. Chandrapal*, 8 OC 94]. The weight of such entry must vary with the circumstances of each case, *eg* the source of the knowledge of the person dictating [*Prem v. Harihar, sup*]. In the case of discrepancy in the *khasra* and *wajib-ul-arz* the latter prevails [*Ramji v. Tanyabapu*, A 1940 N 178; *Manturabai v. Ithal*, A 1954 N 103].

A *wajib-ul-arz* prepared and attested in the form and manner prescribed by the Board of Revenue, is *prima facie* evidence of the existence of any custom of pre-emption which it records, open to be rebutted by any one disputing the custom [*Isri Singh v. Ganga*, 2 A 876; **followed** in *Md Hussain v. Munna*, 8 A 434: 6 AWN 166; in *Deokinandan v. Sriram*, 12 A 234 and in *Ali Nasar v. Manikchand*, 25 A 90: AWN (1902) 207]. In *Garuradhwaja v. Saparandhwaja*, 27 IA 238: 23 A 37: 5 CWN 33, it has been held that such papers are no doubt admissible as evidence, but they are not sufficient to outweigh the evidence afforded by the actings of the parties and actual descent of the estate. In *Md Imam v. Husain*, 25 IA 161: 26 C 81 it has been held, that although as an official village record it is always admissible in evidence, yet its weight may be very slight or considerable according to circumstances.

An entry contained in a *wajib-ul-arz* prepared under the provisions of Act 19 of 1873, is *prima facie* evidence of its accuracy [*Skinner v. Chandan*, 31 A 347: 6 ALJ 197]. A statement in a *wajib-ul-arz* made by a zemindar is not a statement narrating a tradition, but it is a statement by a person possessing an interest and an existing right in a village and is *prima facie* evidence that he is entitled to the right recorded therein [*Md Faujaz v. Behari*, 15 ALJ 893 FB: 40 A 45]. A *Wajib-ul-arz* bearing the signature of settlement officer and prepared on the information furnished by *zemindars* is admissible under s 32(*4*) and s 35 [*Baijnath v. Rajju*, 12 OLJ 571]. [As to entries in *wazib-ul-arz*, see also notes to s 13, *ante*].

The *riwaz-i-am* is a public record prepared by a public officer in discharge of his duties under Government rules and is clearly admissible in evidence [*Basant v. Brijraj*; 62 IA 180: 57 A 494: 39 CWN 1057 : A 1935 PC 132]. Statements of customs in *riwaz-i-am* are by themselves strong evidence even if instances are not cited [*Nidh Kaur v. Gian Singh*, A 1938 L 55]. Presumption of correctness of *riwaz-i-am* may be rebutted if it is shown that the class of persons adversely affected, *eg* females and others had no opportunity to appear before the revenue authorities—Value of entries in *riwaz-i-am* [*Gokal v. Parvin*, 1952 SCR 825: A 1952 SC 231: *Subhani v. Nawab*, A 1941 PC 21: 68 IA 1]. A judicial decision, though of comparatively recent date may be sufficient to rebut the presumption of correctness of *riwaz-i-am* [*Subhani v. Nawab, sup*]. Certified copy of *riwaz-i-am* may be of high evidentiary value [*Badri narayan v. Nagarmal*, A 1959 B 241]. In a conflict between the *riwaz-i-am* and Rattigan's Digest, the former ordinarily prevails [*Jaikaur v. Shersingh*, A 1960 SC 1118: 1960, 3 SCR 975; *Salig Ram v. Munshi Ram*, A 1961 SC 1374: 1962, 1 SCR 470; *Kehar Singh v. Dewan*, A 1966 SC 1555]. Though there is a presumption of correctness in favour of *riwaz-i-am* the quantum of evidence necessary to rebut the presumption varies with the facts of each case [*Saligram v. Maya*, A 1955 SC 266 : 1 SCR 1191 : 1955 SOJ 248].

—Statements in Judgments, Decrees and Orders etc.—Where the decree in a former suit of 1818 against the defendant's predecessor in title contained an abstract

of the pleadings in the case, the abstract was admitted to prove an admission made by the defendant's predecessor in title, under s 35 [*Parbutty v. Purno*, 9 C 586; **followed** in *Bhaya v. Pande*, 3 CLJ 521, where it has been held, that receipts in judgments and decrees are admissible in evidence under s 35 and also under s 13; **followed** in *Thama v. Kondan*, 15 M 378 and in *Krishnaswami v. Rajagopala*, 18 M 73; **applied** in *Byathamna v. Rajagopala*, 15 M 19 and **dissented** from in *Subramanayam v. Paramaswaram*, 11 M 116 and **doubted** in *Sunder v. Fatehmulu*, 1 CWN 513; *Rani Sundar v. Haribala*, 37 IC 911]. In *Gopal v. Sitaram*, A 1927 N 19: 97 IC 694 it has been held that judgments are admissible under s 35. A statement amounting to an admission by the predecessor in title of the opposite party contained in a judgment is evidence under s 35 [*Krishnaswami v. Rajagopala*, 18 M 73, 78; **followed in** *Bihar Bd &c v. Madan*, A 1919 P 23] and the Judicial Committee observed that "there is much to be said for this view of s 35" [*Collr of Gorakhpur v. Ramsundar*, 61 IA 286: 56 A 468: 38 CWN 1101: A 1934 PC 157; see *Ramaswami v. Subbaraya*, A 1948 M 388; *Chandulal v. Pushkar*, A 1952 N 271].

Where certified copies of a decree and two pedigrees found with it are produced by the parties, the court may presume that the pedigrees were the pedigrees filed by the parties in the previous suit and they are admissible. The statement in the decree that the pedigrees were filed is evidence under s 35 as an entry in a public record or under s 13 as evidence of the course of proceedings [*Collr of Gorakhpur v. Ramsundar, sup*]. Relying on this Privy Council decision it has been held that an entry in the order sheet of service of notice would be admissible under s 35 as evidence of the fact of service [*Gaibandha Loan Office Ld v. Saiyadunnessa*, 46 CWN 967: 1943, 1 Cal 22: A 1943 C 114]. Where a judgment constitutes the only official record of an oral admission, it is admissible [*Subbaraya v. Sellamuthu*, A 1933 M 184]. Statement of court that a person admitted the claim of another in a case before it, is relevant under s 35 as it forms part of the record [*Rudrapratap v. Nirmal*, 74 IC 225: A 1923 O 61].

A recital in a public record as to a statement made by a public servant with reference to a particular statement of the grant by the Government may be admitted under s 35 as proving that the public servant made the statement that he is stated to have made, if the fact that he made such a statement is a relevant fact. But such recital would not be admissible under s 48 in a case where a specific right claimed by a particular individual, and not a general right, is being dealt with [*Sankaracharya v. Manali*, 51 IC 876].

—Order-Sheet.—Order sheet of a certificate case under Public Demands Recovery Act, 1913, recording that notice under s 7 was served, is admissible under s 7 [*Gaibandha Loan Office Ltd v. Saiyadunnessa, sup*]. So, entry in order sheet of service of notice under Or 21, r 22 is evidence of service [*Aswini v. Karamat*, A 1948 C 165]. As to presumption of service of notice, see s 114, *illus* (*e*) and notes, *post*.

—Books, Gazetteers and Reports.—Wilson's Manual on questions of customary law in the Punjab is admissible under s 35 [*Subhani v. Nawab, ante*]. Sifton's settlement report is admissible [*Somar v. Budhu*, A 1937 P 463]. There can be no objection to refer to settlement reports or District Gazetteers, whether they are strictly speaking evidence or not under s 35 [*Jogesh Ch v. Makbul*, 47 C 979: 25 CWN 857: 60 IC 894]. Reports and Gazetteers are not strictly evidence of the truth of all the statements contained in them, although they may be read for what they are worth [*Garuradhwaja v. Saparanadhwaja*, 23 A 37, 49: 27 IA 238; *Kali Pr v. Nagendra*, 44 CWN 873, 884]. Probative value of Settlement Reports in regard to title or division of shares [*Durga Pd v. Ghanashyam*, A 1948 PC 210: 53 CWN 118;

Tirtha v. Lal Sadananda, A 1952 Or 99]. Any entry with regard to a custom in a particular locality contained in a book compiled by an officer under the direction of Government, is admissible under s 35 [*Tularam v. Shyam*, 86 IC 729: A 1925 A 648]. So also the Manual of Customary law published officially in accordance with the *riwaz-i-am* [*Basant v. Brijraj*, 62 IA 180: 57 A 494: A 1935 PC 132]. Entry of the marriage in the Administration Report of the Court of Wards is evidence under s 35 [*Ari Chettiar v. Rama Reddiar*, 9 MLJ 214].

With regard to the reports of Collectors under ss 10&11 of Madras Reg 7 of 1817, as to existence of a customary right, the Privy Council observed:—"When reports of public officers express opinion as to private rights of parties, such opinions are not to be regarded as having judicial authority or force. But being the reports of the public officers made in the course of duty and under statutable authority, they are entitled to great consideration, so far as they supply information of official proceeding and historical facts, and also in so far as they are relevant to explain the conduct and acts of the parties in relation to them and the proceedings of Government founded upon them" [*Muthu Ramalinga v. Perianayagum*, 1 IA 209, 239 : 3 Sar 341; *Mathewson v. Secy of S*, 3 P 673, 682; *Chandulal v. Pushkar*, A 1952 N 271]. In order to prove that a certain Raja had authority to appoint a *mahant*, the plaintiff produced a report made by the *Kotwal* in 1840 on a reference to him by the political agent for enquiry in connection with the appointment of a certain *mahant* by the said Raja—*Held* that the report was a public record of a public enquiry and was admissible [*Baldeo v. Gobind*, 36 A 161].

Documents (report &c) coming from official sources recording statements as to adoption made to officials before disputes had arisen were held of great weight [*Arjuno v. Modonmohono*, A 1940 PC 153: 1940 ALJ 671: 1940 Kar 349]. Although official reports are valuable and in many cases the best evidence of facts therein, opinions therein expressed should not be treated as conclusive in respect of matters requiring judicial determination [*Martand v. Malhar*, 55 C 403, 406: 32 CWN 621: A 1928 PC 10: 55 IA 45; see *Muktakeshi v. Midnapore Z Co Ld*, A 1934 P 309]. Report of a Collector containing a family tree on the question whether an estate should be taken by the Court of Wards is admissible [*Ramakrishna v. Tirunarayana*, A 1932 M 198]. Report of an officer under s 202(*1*) Cr P Code is admissible [*Jagdat v. Sheopal*, 104 IC 287: A 1927 O 323]. Report by a magistrate relating to rights of villagers on the complaint of a tenant is admissible [*Maheswar v. Sailendra*, A 1951 Or 327].

The words "an entry" in s 35 are not intended to apply to opinion of public officers in the course of inquiries under s 202 Cr P Code or Or 26. Such opinions are not sufficient to prove the truths of the assertions made therein without test of cross-examination [*Ghanaya v. Mehtab*, A 1934 L 890]. Police reports under s 107 Cr P Code come within s 35 and are admissible where the handwriting is identified [*Md Salim v. Ramkumar*, A 1928 A 710: 110 IC 657]. Report of Revenue Inspector that delivery of property was effected in pursuance of the court's order is in discharge of his duty [*Sathappa v. Thayyanayaki*, A 1942 M 698].

—Electoral Roll.—Electoral roll being a public document is admissible in evidence and it is not necessary to prove source of information on the basis whereof fact stated in the roll were recorded. [*Raghunath Behera v. Balaram Behera*, A 1996 Ori 38, 43].

Gazette Notification.—Statement in a gazette notification that an Act has been assented to by the President is proof of that fact [*Narayana v. S*, A 1953 Or 185]. The Gazette of the Bombay Presidency, Vol. III published in 1879 is admissible under

section 35 read with section 81. [*Bala Shankar Mana Sankar Bhattjee v. Charity Commr. Gujarat*, A 1995 SC 167, 175].

—Correspondence.—Copies of actual letters made in registers of official correspondence kept for reference and record are admissible under s 35 [*Krishna Thevar v. Ramaswami*, 40 M 871: 33 MLJ 277: A 1918 M 889; **approved** in *P C Purushothama v. S Perumal*, A 1972 SC 608, 614]. Copies of correspondence from a Government Officer to his superior in due performance of official duty are evidence under s 35 [*Lionel Edwards Ltd v. S*, A 1967 C 191]. It must always be a question of drawing a line between records and correspondence which do and those which do not fall within the scope of the section [*Ramakrishna v. Tirunarayana*, A 1932 M 198]. Remarks made in a letter passing between officials are not evidence under s 35 [*Ghulam v. Samundar*, A 1936 L 37].

—Army List, Medical Register, Calendar, etc.—Army list or Gazette purporting to be published by authority of Government, Law list or Roll of solicitors kept at the office of the Law Society, Medical Register published by the General Council of Medical Education are admissible to prove the names of persons and their rank or qualification. University and College books are admissible to prove degrees conferred and other collegiate proceedings. University calendars are not admissible to prove the truth of the particulars contained therein [Phipson 11th Ed p 475].

The absence of a person's name in a law list published by authority, is *prima facie* evidence, until the contrary be made to appear, to show that such person is not qualified to practice [*R v. Wenham*, 1866, 10 Cox CC 222, cited in Taylor 10th Ed 1179 foot-note].

—School Records, University Certificates, etc.— School certificates are admissible [*Liladhar v. Mabibi*, A 1934 N 44] as also Matriculation certificate [*Hrishikesh v. Sushil*, A 1957 C 211; *Jagadananda v. Rabindra*, A 1958 C 533: *Anadi v. Rabindra*, A 1962 C 265]. Age as recorded in the school certificate can be relied on. [*Mahendraprasad Singh v. State of Bihar*, A 1995 Pat 162, 165]. Entry in admission register is a very important piece of evidence. [*Raghunath Behera v. Balaram Behera*, A 1996 Ori 38, 43. See also *L. Debi Pd. v. Tribeni Devi*, A 1970 SC 1286]. Admission registers are admissible in evidence [*Maniyamkandi Kunhira-man v. Machil Parambath Vanaja*, A 1998 Ker 24]. Entries in school record made by the Headmasters in discharge of their official duties can be regarded as pieces of circumstantial evidence and not as direct evidence of the date of birth. Failure to prove that the date of birth entered in the horoscope was the correct date of birth would not increase the evidentiary value of the entries of the date of birth in school record [*Tara Devi v. Sudesh Chaudhary*, A 1998 Raj 59]. A school certificate or an admission form is not a conclusive evidence of the age of a person. [*Chidda Ram v. State*, 1992 CrLJ 4073, 4075 (Del)]. School admission register cannot be regarded as the sole clinching factor for determination of age. [*Bishnudas Behera v. State of Orissa*, 1997 CrLJ 2207, 2209 (Ori). See also *Pravakar Pati v. Ajaya Kumar Das*, 1996 CriLJ 2626]. School leaving certificates, procured belatedly and containing contradictory assertions, produced in support of claim for alteration in date of birth entered in service record, were not reliable. [*Union of India v. Kantilal Hemantram Pandya*, A 1995 SC 1349, 1351].

Even if rules do not specifically mention about the caste for the purpose of alteration and correction when the name, date of birth and religion can be corrected and altered on the ground either a wrong entry or subsequent changes, it stands to reason that any entry relating to caste in the admission register should also be permitted to be changed in case of error or mistake. [*Kerala Pattika Jathi Samrek-*

shana Samithy v. State (FB), A 1995 Ker 337, 347]. Where the date of birth given in the school certificate was based on the date mentioned in the transfer certificate, but the name of the school from which the transfer certificate was obtained itself was absent from that certificate, no reliance can be placed on such school certificate. [*Jagtar Singh v. State of Punjab*, A 1993 SC 2448 : 1993 CrLJ 2886]. What is stated in School Admission Register as to the age of a student cannot be treated to be correct since the guardians understate the age of their children than the real one at the time of admission in the school. [*Brij Mohan Singh v. Priya Brat Narain Sinha*, A 1965 SC 282; *Ram Murti v. State of Haryana*, A 1970 SC 1020; *Manoranjan v. State*, (1992) 5 OCR 200 **followed** in *Pravakar Pati v. Ajaya Kumar Das*, 1996 CrLJ 2626 (Ori). When there is conflict between the expert opinion and school leaving certificate as regards the age of the girl, the accused is entitled to the benefit of doubt [*Pravakar Pati v. Ajaya Kumar Das*, 1996 Cri LJ 2626, 2627, 2628 (Ori)]. Unproved and unexhibited school certificate cannot be treated as evidence [*Rammurti v. S*, A 1970 SC 1029]. Certified copy of "transfer certificate" granted to a pupil by the headmaster of a Government School (Indian State) is admissible to prove age [*Maharaj v. Krishnabai*, 50 B 716: 99 IC 307: 28 Bom LR 1225; *Indian Cotton Co v. Raghunath*, A 1931 B 178: 33 Bom LR 111].

On a question of age of a girl, certified copies from school register and affidavit by father stating date of birth and statement of the girl to the police amount to evidence [*Md Ikram v. S*, A 1964 SC 1625]. It is not necessary to examine its author especially when the entry is proved by the Headmaster of the school [*Harpal Singh v. State of H.P.*, A 1981 Cri LJ 1 : A 1981 SC 361, 362]. Entries in school register or vaccination register as to age are relevant [*Legal Rem v. Forhad*, A 1934 C 766; *Aga Jan v. Kesheo*, A 1940 N 217; *Kalaram v. Fezal*, A 1941 Pesh 38]. Evidentiary value of entries as to age in school admission registers [*Abdul Majeed v. Bhargavan*, A 1963 K 18]. Entry as to age in school register based on the statement of deceased father is admissible [*Munna v. Kameshri*, A 1929 O 113; *Manick v. Krishna*, A 1932 N 117; *Latafat v. Onkar*, A 1935 O 41; *Vishnu v. Kuruvilla*, A 1957 K 103]. But entries in school register by employees in school other than Government or State school is not admissible under s 35 [*Hoak v. Ma E*, 1940 Rang 481: A 1940 R 191; *Gopalan v. Kannan*, A 1959 K 12; *Seshagiri v. R*, 1936 MWN 111; *Anantram v. S*, A 1975 P&H 198]. Entry of birth date in non-Govt school's General Register kept under Bombay Primary Education Rules, 1949 is admissible under s 35 but does not prove the age [*Samsuddin v. S*, A 1970 G 178 (*Bhim v. Magaram, sup* **dist**)]. Entry in any record of even a private school run under the Education Code of any State Govt is admissible [*Radhakrishana v. Bhushan*, A 1971 J&K 62].

Under the Educational Rules every school whether Government or Private is obligated to maintain register of admissions with the prescribed particulars and such records can be considered as official records admissible under sec 35 [*Vijaya Kari v. K. Swarnalatha*, A 1983 AP 181, 189]. In the case of a private school no presumption of authenticity can be raised with regard to this document particularly when it is not maintained in the regular course of business [*Sahib Singh v. State*, 1991 Cri LJ 687, 689 (Del)]. Register of admissions kept by Municipal High School is admissible [*In re Sriram Reddi*, A 1960 AP 253]. Such registers are public documents which could be proved by secondary evidence [*Subbarao v. Venkata*, A 1964 AP 53]. Entry in School Register as required by the Bihar & Orissa Education Code is admissible [*Bhim v. Magaram*, A 1961 P 21]. It is however very common to understate the age when entering a school in order that the boy may not be too old for Government Service [*Md Hassan v. Safdar*, 14 L 473; *Bansiram v. Jitram*, A 1964 Pu 231]. The court of fact cannot ignore this fact when assessing the value of the entry [*Brijmohan*

v. Priyabrat, A 1965 SC 282]. Such entries are of little value [*Asanand v. Gian*, A 1936 L 588; *Anantram v. S*, A 1975 P&H 198], specially when there is nothing to show on whose statement the entry was made [*Janaki v. Jyotish*, A 1941 C 41: 45 CWN 141; *Jagannath v. Motiram*, A 1951 Pu 377; *Radhkrishna v. Bhusan, sup*].

Where the basis on which entries in the school record were made has not been proved, no reliance can be placed on such school record [*Rakesh v. State of Rajasthan*, 1998 Cri LJ 1434, 1439 (Raj)]. Entry in voters' list carries greater weight than the school register [*Nazir Hussain v. State*, 1998 Cri LJ 1720 (Cal)]. Whether the person had special means of knowledge when stating the age does not affect the admissibility under s 35 though it may affect its value [*Aga Jan v. Kesheo*, A 1940 N 217]. Date of birth in the school certificate from school register unlike birth register cannot be relied upon with implicit faith when doubt has been cast by medical evidence [*Raunki v. S*, A 1970 P&H 450].

For the purposes of the Juvenile Justice Act, 1986, it has been held that the entry in the High School certificate of the date of the birth of the accused is presumed to be correct. Burden lies on the party who is challenging it to prove his challenge. The Court also held that entries in the electoral roll showing the age of the person concerned can not be relied upon to determine the age of the juvenile [*Mayank Rajput v. State of UP*, 1998 Cri LJ 2797 (All)].

—Process-Server's Report, see *post* s 74.

—Certificate at Foot of Confession.—A certificate by a magistrate as to the voluntariness of a confession is good *prima facie* evidence. It is not conclusive and facts which may lead the court to think that the confession was not voluntary can be proved [*Nar Singh v. R*, 73 IC 257: 25 OC 22]. As to the mode of recording confessions, see *ante* s 24. As to presumption in a record of confession, see s 80.

—Other Entries.—Peon's return in execution proceedings being an official record made by a public servant in the discharge of his official duty is admissible in evidence [*Heramba v. Surendra*, 53 IC 20: A 1919 P 465. (See notes to s 74 *post*). Guardianship certificate under G&W Act is admissible in proof of age [*Mohan v. Md Adil*, 89 IC 69: 12 OLJ 453]. Entry made on a certified copy indicating the date of completion is relevant under s 35 but on an enquiry as to the correctness of such an entry the report of the copyist is not legal evidence without examining him as a witness [*Nizam v. Md Ikbal*, A 1928 L 643: 108 IC 619]. Summary of evidence by registrar under rule 72 of the Madras Registration Rules is admissible [*Sudarsana v. Seetharamamma*, 1933 MWN 1148]. Copies of *shajra* and *khasra* of municipal committee are admissible under s 35 [*Jassaram v. Puran*, A 1938 L 440: 40 PLR 693]. Entries in the Service Book of a Govt servant cannot be lightly challenged [*Kashinath v. Kapila*, A 1952 Or 285]. Entries in the Ledger Account of the High Commissioner in London is admissible [*Ghulam Ahmed v. Govt*, A 1960 J&K 136]. Khatauni papers (returns) made under U P Land Rev Act are admissible [*National Investment &c v. Mahendra*, A 1960 C 724]. Entry in an electoral roll that '*A*' is wife of '*S*' is admissible [*Linga v. Ajodhya*, A 1974 Or 107 (*Kirtan v. Thakur*, A 1972 Or 158 FB **follld**)]. It is not necessary to call in evidence the author thereof or the person supplying the information to prove its genuineness [*Ganesh Swain v. Nakadi Swain* A 1983 Ori 279, 280].

Writ petition filed by a govt. employee towards fag end of his service seeking correction of his date of birth entered in his Service and Leave Record or Service Register with the avowed object of continuing in service beyond the normal period of his retirement, should not be entertained. [*Burn Standard Co. Ltd. v. Dinabandhu*

Majumder, A 1995 SC 1499, 1504]. Although no strong pre-sumption of correctness arises from the entries in Municipal *Khasra* but all the same they are evidence of facts mentioned therein according to section 10 of Bihar and Orissa Municipal Survey Act (1 of 1920) and therefore its evidencing value has to be considered along with other material on record. [*Lal Babu Yadav v. Ram Bilash Rai*, A 1997 Pat 131].

ENTRIES IN RECORDS ETC THAT DO NOT COME UNDER THIS SECTION

Registers. S 35 relates to that class of cases where a public officer has to enter in a register or other books some actual fact, which is known to him; as for instance, the fact of a death or a marriage. The record of the names of the proprietors of revenue-paying estates by the Collector, under Bengal Act 7 of 1876 is not evidence of the fact of proprietorship under s 35; it is a record of right and not of act [*Saraswati v. Dhanpat*, 9 C 431: 12 CLR 12 (8 C 853 **explained**)—CONTRA : *Sashi v. Girish*, 20 C 940 *ante*]. Registration of name under the Land Registration Act is evidence of possession, but not evidence at all of title as a proprietor so registered [*Shyama v. Md Zarip*, 9 CLJ 91; *Ram Bhusan v. Jebli Mahto*, 8 C 853]. Revenue records are not evidence of the title, for they are kept for fiscal purposes and it is no part of the duty of the revenue officer to record title. But when the facts recorded are facts which it is the duty of the revenue officer to record, then his record is evidence of those facts under s 35 [*Bibi Sahebzadi v. Sayad Mir*, 9 SLR 143: 32 IC 548].

Perganah and *Kanungoe* registers are not kept punctually and are not admissible to prove an omission of an entry therein as to *lackheraj* [*Bipradas v. Monorama*, 22 CWN 396: 45 C 574: 47 IC 49]. *Teishkhana* registers, prepared by a *patwari* under rules framed by the Board of Revenue under s 16 of the Reg 12 of 1817, is not a public document nor is the *patwari* preparing the same a public officer [*Baijnath v. Sukhu*, 18 C 534. **Followed** in *Samar v. Jugal*, 23 C 366, where it has been held that *teishkhana* papers prepared by *patwaris* under s 16 Reg 12 of 1817, not being papers of the description contemplated by s 35, are inadmissible]. Reg 20 of 1817 does not impose on the *daroga* any duty of keeping a register of *chowkidari chakran* lands,—s 35 does not cover such entries, but they are admissible under s 32(2) [*Sheonandan v. Jeonandan*, 13 CWN 71]. The fact of a person's name being entered in the Collector's book as occupant of the land, does not necessarily of itself establish that person's title or defeat the title of any other person [*Bajoji v. Bapuji*, 12 B 75]. Certified copy of an entry from a book in the Collectorate made on the footing of a return by a landlord prescribed by s 48 of Regn 8 of 1793 and s 15 of Regn 7 of 1799 does not come under s 35 [*Tarak v. Prasanna*, 28 CWN 679: 78 IC 719].

A *hissawari* in consequence of a demand by Collector under s 30 Land Regn Act is not a public register or record and is inadmissible. It would be admissible if it were proved to have been made by the person by whom it is said to have been signed [*Tunha v. Bandhu*, A 1919 P 323: 59 IC 8]. Levy demand register prepared under executive orders for the purpose of issuing food grain levy demands cannot be relied upon for proving possession unless the official responsible for preparing the levy demand notices are examined [*Thunga v. Vishalakshi*, A 1975 Knt 111]. Where a person's name is recorded in *bhuinhary* register prepared by the revenue authorities under Bengal Act 2 of 1869—*Held* that such a register was not conclusive evidence of the title of the person whose name was recorded herein, as a co-sharer in the *mokraree* [*Kirpal v. Sukurmoni*, 19 C 91].

A mortgage cannot be proved by production of entries in authorised maps or authorised revenue registers. The fact of entries is a relevant fact, but their production in proof of mortgage is inadmissible under s 91 [*Maung Tun v. Maung Khan*, 84 IC

987: A 1925 R 61 (*Mg Hlaing v. Mg Chit*, 1 R 135 **dissented** from)]. Entry in vaccination register regarding father's name of illegitimate child three years after birth is not admissible under s 35 or s 157 [*Kanniappan v. Kullammal*, A 1930 M 194: 1929 MWN 696]. An extract from register of applications in respect of minors and lunatics as to the age of a person is not admissible under s 35 [*Gokhulanand v. Baldev*, 86 IC 681: A 1924 P 796]. Municipal registers of *thanas* and *khanasumari* are not admissible [*Magan v. Harbans*, A 1936 L 965].

—Books of the Calcutta Corporation.—Certified copy of entries in the "Inspection Book of Lands and Buildings" is not admissible [*Jitendra v. Makhan*, 61 CWN 175]. Entries in the assessment register under s 143 Cal Municipal Act is at best hearsay evidence and not admissible [*Durgabala v. Nityananda*, 59 CWN 367].

—Revenue and Settlement Records, etc.—*Thakbast khasra*, preliminary to survey of a village is a rough register and statements entered in it have no evidentiary value unless it is proved that the persons adversely affected had notice of it and opportunity to controvert it, but knowingly acquiesced in the statement before the *amin* [*Jagdeo v. Baldeo*, 49 IA 399: 36 CLJ 499: 2 P 38: A 1922 PC 272]. This case was explained in a later case holding that it was not intended in *Jagdeo's* case to lay down that *thak* statements could never have any evidentiary value, still less they were inadmissible in evidence; but only that they were of no evidentiary value when, as in the case they dealt with matter outside the scope of the survey [*Krishna v. Dhirendra*, 56 C 813: 49 CLJ 112: A 1929 PC 50: 56 IA 74]. An entry in a *paimaish* (survey measurement) account alone is not sufficient evidence to establish a right which is denied [*Keshavan v. Basudevan*, 7 M 75]. *Khasra paimaish* of a municipality or police records of levy of punitive tax is not a record of title but a mere record of survey which carries no presumption of correctness of ownership [*Kartar v. Mehr*, A 1934 L 885]. *Rasabandi* or *chowkidara* papers are not admissible under s 35 [*Thakar v. Ghanaya*, 94 IC 125: A 1926 L 452].

A record plan of a municipality is not admissible as a public document under s 35 or s 74 [*Gouri v. R*, A 1930 A 26]. Government resumption *chittas* are nothing more than documents prepared for the information of the Collector and are not conclusive evidence against private persons for the purpose of proving that the lands described therein are or are not of a particular character in tenure [*Ram Ch v. Banshidhar*, 9 C 741 (*Junmajoy v. Dwarkanath*, 5 C 287 referred to]. **Followed** in *Dwarka v. Taritamoyi*, 14 C 120 and in *Girindra v. Rajendra*, 1 CWN 530, where it has been held that resumption chittas are not evidence without resumption proceedings]. Village notes and a list of *jalkar* rights which purport to have been prepared by a settlement officer are not admissible in evidence when not satisfactorily proved [*Kedar v. Amrit*, 88 IC 676: A 1925 P 567].

Entry in draft record of rights is not admissible [*Ambar v. Lutfe*, 21 CWN 996: 45 C 159; *Sarup v. Srikant*, 55 IC 922 (P); see however *Chand v. Bhagwati*, A 1924 P 248: 2 P 814]. It is admissible only for showing what was the entry before the final publication [*Hardeo v. Kapil*, A 1928 P 353: 108 IC 417]. A *parcha* slip granted to an individual in the course of survey proceedings is not a public document and is inadmissible in evidence [*Ram Bhagwan v. R*, 47 IC 82]. Order of Revenue Officer in mutation proceeding based on untrue piece of evidence has no evidentiary value in civil suit [*Dayaram v. Dwalatshah*, A 1971 SC 681].

—*Batwara* or Partition Papers.—A *batwara khasra* measurement paper prepared under s 54 of Bengal Act 8 of 1876 cannot come within s 35 as it is not an official book, register or record [*Perma Roy v. Kishore Roy*, 25 C 90. **Followed** in *Iswar Ch v. Taranath*, 1 IC 807]. A *batwara khasra* is not a 'record' within s 35 and

entry therein of the name of tenant in possession is not admissible to prove the fact of tenancy. It can be put in under s 13 to show the history of the land before the creation of the tenancy [*Sadhusaran v. Ambika*, 68 IC 676; see also *Drobo Moyee v. Dharma Das*, 10 WR 197. But see *Golabchand v. Syed Salka*, 36 IC 517: 5 Pat LW 6; *Dinanath v. Nawab*, 49 IC 984]. *Butwara khasra* prepared under Bengal Estates Partition Act is not a record within the meaning of s 35 and is inadmissible [*Nandalal v. Mohunt*, 17 CWN 779: 17 CLJ 462 (*Perma v. Kishen*, 25 C 90 **folld**)], but on proper proof it may be evidence under s 18 or s 13 [*Ram Sarup v. Ram Narain*, 7 P 85: A 1929 P 32. See *Jatindra v. Isof*, 59 IC and other cases noted, *ante*]. *Batwara barwada* prepared under Ch 8 of Estates Partition Act by deputy collector and signed by him, is admissible [*Ramsarup v. Ram Narain*, 7 P 85: A 1929 P 32; *Ghoga v. Jagarnath*, A 1947 P 475]. The measurement papers prepared by a *batwara ameen* deputed by the Collector to make a partition do not come within this section [*Mahi Chowdhury v. Dhiro*, 6 CLR 139]. In the absence of any explanation of the circumstances under which the entries were made, statements in *khasra* do not constitute admission [*Ahmadkhan v. Hurmuzi*, 8 OLJ 27: 61 IC 177]. Mere entry in settlement *khasra* of *qubristan* and *masjid* could not be regarded that entire area was in use since time immemorial as graveyard [*Ram Pd v. Magan*, A 1981 A 52].

Certificate of Guardianship, Sale, etc.—A certificate of guardinaship is no evidence of minority under s 35 for it is neither a book nor a record kept by any officer in accordance with any law [*Satish v. Mohendra*, 17 C 849; *Naima v. Basant*, A 1934 A 406 FB; *Gunjra Kuar v. Ablak Pande*, 18 A 478; *Hen Ch v. Bhaboo Pd*, 2 CLJ 69n; *Saidunnissa v. Ruqya*, A 1931 A 307; see also *Harihar v. Edul*, 5 PLJ 460; *Harakumar v. Jogendra*, 38 CLJ 186: 71 IC 336; *Prahlad v. Ramsaran*, 38 CLJ 213; *Kishori v. Adhar*, A 1942 C 428—CONTRA : *Mohan v. Md Adil*, 89 IC 67: A 1926 O 88; *Ameer v. Md Ezaz*, A 1929 O 134; *Rajkumar v. Vijayakumar*, A 1969 A 162]. But entry of ward's age in the Administration Report of the Court of Wards is evidence [*Arichetar v. Rama Reddiar*, 9 MLT 214] and guardian's former verified application containing ward's date of birth is admissible under s 157 [*Harchand v. Dewan*, A 1929 A 550]. A sale certificate or a sale proclamation is not "a public or other official book, register or record" within s 35 and is much the same as a certificate of guardianship which has been held not to answer the description. It is only a statement of the parties [*Ambika v. Kumud*, 110 IC 521: A 1928 C 893].

A certificate of Manchester Chamber of Commerce testifying to the existence of a strike of coal miners is not a public record within s 35 and is equally inadmissible under s 32(2) [*Girdhar v. Kerawala*, 93 IC 622: 28 Bom LR 232: A 1926 B 253]. Certificate of age of private patient is not relevant as a public record under s 35 [*Venkata v. Subbaraya*, 33 IC 142].

—Reports and Other Entries.—Where a report is given by a responsible officer, which is based on evidence of witnesses and documents and had a statutory flavour in that it is given not merely by an administrative officer but under the authority of a statute, its probative value would indeed by very high so as to be entitled to great weight. [*State of Bihar v. Sri Radhu Krishna Singh*, A 1983 SC 684, 698]. Proceeding of confidential enquiry by an assistant settlement officer containing an opinion on *ex parte* investigation is inadmissible under s 35 in a subsequent suit [*Baldeo v. Sheoraj*, 56 IC 907]. Report by a *tehsildar* in response to the requisition by the Collector is not admissible [*Malikarjuna v. Secy of S*, 35 M 21] or a report to a magistrate under s 157 Cr P Code [*Miyana v. S*, A 1962 G 214]. Tahsildar's report recording holding of cattle fair at a place is not admissible [*S v. Ramsri*, A 1976 A 121]. The District Judge asked the Collector to say which

of three persons was fittest to be appointed guardian of a minor and the latter called for a report from the *kanungo*. *Kanungo's* report is not evidence [*Subhag v. Raghunandan*, 30 A 282]. Secretarial notes by Ministers or others [*Biswabhusan v. S*, A 1952 Or 289] or opinions expressed by Government officers in Secretariat correspondence without personal enquiries are inadmissible in evidence [*Ghulam v. Samundar*, A 1936 L 37].

Letter written by a Dy Commissioner in 1882 proposing that a certain estate should be taken over by the Court of Wards does not come under s 35 [*Keolapati v. Amar*, 44 CWN 66: A 1939 PC 249].

The report of the Special Commissioner is not admissible in evidence as it does not come within any of the provisions of the Evidence Act [*Leelanand v. Lakhpati*, 22 WR 231]. List of suspects drawn up by the police is not admissible [*Bawa Sarup v. R*, 88 IC 22: A 1925 L 299] nor certified copy of police report [*Hasta v. R*, A 1937 L 593]. Report of a magistrate deputed to make a local inquiry is not evidence of possession of a party although the report is in his favour [*Mohan v. Deonarain*, A 1945 P 453]. Report made by the sadar *kanungo* in a letter of administration case is not admissible under s 35 or s 13 [*Abinash v. Sarashibala*, 27 CWN xxxii (*n*)].

Order of detention under R 26(1)(b) of D I Rules are not public record [*Harkishan v. R*, A 1944 L 33: 212 IC 321]. Report of the Court of Enquiry under R 75 of Aircraft Rules, 1937 does not attract s 35. Nor is it evidence under ss 2, 3 of the Commercial Doc Ev Act, 1939 [*Indian Airlines Corpn v. Madhuri*, A 1965 C 252]. Transcript of newspapers containing statements of chief minister that big landlords in Goa are few is not relevant [*Lakshmibai v. Union*, A 1979 Goa 21]. If the statement as to age at the heading of a deposition was made by the witness after the witness was already put on oath and then proceeded to make the deposition, the description of age is very much part of the evidence [*Meno Ranjan Dasgupta v. Suchitra Ganguly*, A 1989 Cal 14, 22 (DB)].

—Recital in Judgments.—(See *ante*, *"Statements in Judgments, Decrees, Orders etc"*). A recital in a judgment of a matter incidentally mentioned is not evidence of what is said there [*Bhupa v. Jai*, 32 ALR 763]. A recital in a judgment not *inter partes* of a relevant fact is not admissible under s 35 [*Tripurana v. Rokkam*, 45 M 332: 66 IC 280 FB; *Ambika v. Kumud*, A 1928 C 893. See s 13, *ante*]. Recital in the order of a president Union Board is not admissible [*Doraiswami v. Kanniappa*, A 1931 M 487].

—Absence of Entry.—S 35 does not make the *public book*, evidence to show that a particular entry has not been made in it [*In re Juggan Lal*, 7 CLR 356; *In re Rama Rao*, A 1960 AP 441; see *R v. Girish*, 10 C 207 and *Ali Nasar v. Manik*, 25 A 90 : 22 AWN 207]. But absence of entry may be relevant under s 9 or s 11 of the Evidence Act on the ground that the public servant would not have omitted any transaction to be entered in the book. But the absence of entries may be capable of other explanation, such as, he was not enjoined to enter every transaction or was negligent or had some motive in omitting it [*In re Siram Reddi*, A 1960 AP 253; *In re Rama Rao, sup*; see *ante*, s 34, p 425: *Absence of Entries*"].

S. 36. Relevancy of Statements in maps, charts, and plans.—Statements of facts in issue or relevant facts, made in published maps or charts generally offered for public sale, or in maps or plans made under the

authority of [1][the Central Government or any State Government], as to matters usually represented or stated in such maps, charts or plans, are themselves relevant facts.

SYNOPSIS

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COMMENTARY

Principle and Scope.—This section mentions two kinds of maps, *viz.*, (*i*) published maps or charts generally offered for *public* sale; and (*ii*) maps or plans made under the *authority of Government*. It should be read with s. 83 under which there is a presumption of accuracy of maps made by authority of Government. The court may refer to standard dictionaries for the meaning of words or to approved and accredited works on matters of *public* history, literature, &c, for ascertaining notorious facts of public nature (s 57). Such books are generally admissible as in the nature of public documents to prove ancient facts of a public nature. The *first class of maps, ie*, published maps offered for public sale may be called *quasi*-public documents and are received in evidence on almost identical grounds to prove geographical facts, *eg*, positions of towns, &c. "Public maps, generally offered for public sale, have been admitted to show matters of general geographical notoriety, such as the relative situations of towns or countries" (Halls, 3rd Ed, Vol 15, para 724). The publication being accessible to the whole community and open to the criticism of all, the probabilities are in favour of any inaccuracy being challenged and exposed (Field, p 166). The admissiblity of the *second class of maps, ie*, maps made under authority, rests upon the ground that such documents contain the results of inquiries made under competent public authority and concerning matters in which the public is interested [Tay s 1767].

Maps prepared by private persons and not under authority of Government are irrelevant unless generally offered for public sale [*Ram Kishore v. Union*, A 1966 SC 644].

To render inquisitions, reports, surveys and other similar documents admissible in evidence as public documents, it must appear that they were made for the

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1. Substituted successively by AO 1937, AO 1948 and AO 1950.
In Pakistan, the words "the Central Government or any Provincial Government" have been substituted by AO 1949.
In Burma, the original word "Government" stands.
In Ceylon, the original word "Government" stands.

purpose of the public making use of them and being able to refer to them, for the fact that the public are interested in the documents and are in a position to challenge or dispute them, if inaccurate, invest them with a certain amount of authority [Tay s 1769A: Phip 9th Ed, p 369]. Wherever the office of Government surveyor has been created, the officer has an *implied authority of office* to make returns of his official surveys, and his returns are therefore admissible. The admissibility depends upon the authority; hence, on the one hand, the returns of the Government surveyor are admissible to evidence only those matters which he is authorised to do; and on the other hand, a private person's survey if made under special warrant or if otherwise sanctioned by proper authority, may become admissible [Wig s 1665].

This section does not say that the authority under which a map is prepared must be an authority given by a statute. It is enough if the inquiry is of a public nature and the survey is made for a public purpose. It should be noted that every map prepared under authority of Government or by a Government officer for private purpose, *eg*, particular suit is not admissible under this section. It must be for a *public* purpose and by a public inquiry. The presumption of accuracy under s 83 applies only to maps made under authority for a *public* purpose, *eg*, a cadastral survey of a district. See also 87. The expression "published maps generally offered for sale" may be compared with that applied to the treatises of experts mentioned in s 60. See also s 57. Maps and surveys in India for revenue purposes are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible as valuable evidence of the state of things at the time they were made. Therefore unless a map is shown to be wrong, it may be properly judicially received in evidence as correct when made [*Bibi Wakilam v. Deo Nandan*, A 1921 P 268: 59 IC 298].

[*Ref Tay ss 1767-73; Steph Art 35; Phip 8th Ed pp 328, 348, 350 et seq; Hals, 3rd Ed, Vol 15, para 724; Ros N P 194-200; Wig s 1665; Jones s 305*].

"Statements of Facts in Issue or Relevant Facts" in Maps.—The words "statements of facts" in the beginning of the section evidently mean statements of general geographical facts, *eg*, physical features, boundaries, situation, relative position of countries, districts, towns, villages, topographical description, distance, &c, &c, usually stated in maps.

As regards public maps or charts offered for public sale, this section refers to the physical features of the country, &c, and as regards maps or plans made under the authority of the Government, the section refers not only to such features but also to boundaries of villages, estates and fields [Whitley Stokes, Anglo-Indian Codes Vol II, p 878]. In *R v. Orton*, cited in Stephen's Dig of Ev Art 35, maps of Australia were received to show the situation of various places where the defendant was alleged to have lived.

In *Koomoodinee v. Poorno*, 10 WR 300 (decided under Act 2 of 1855) it was held that "Government survey maps are evidence, not only with regard to the physical features of the country depicted, but also with regard to the other circumstances which the officers deputed to make the maps are specially commissioned to note down; and that an ordinary Government survey map was for this reason evidence as to the boundaries of any plots or estates which stand under a separate number in the Collector's books. Further than this, they are not evidence as to rights of ownership". Any note made on a map by a public servant under a special direction may perhaps appropriately come under s 35 as an entry in the discharge of his official duty. *In re S S Drachenfels*, 27 C 800, 871, a chart of the river Hooghly with the notes thereon

was held admissible. The court said: "The chart is issued under the authority of Government and the notes thereon may be referred to as authoritative;" [see also *Soshee Mookhee v. Bissessuree*, 10 WR 343]. *Ex parte* statement in survey maps should be regarded merely as corroborative proof and not as primary proof [*Kamakhya v. Surendra*, A 1928 P 284].

"Offered for Public Sale".—Map withdrawn by Government and whose sale is stopped is not admissible. Rennel's map published in 1914 is one of such maps [*Gadadhar v. Sarat*, 44 CWN 935]. Private maps offered for public sale though not irrelevant do not get the benefit of a presumption of accuracy [*Ram Kishore v. Union*, A 1966 SC 644].

Public and Private Maps.—The distinction between public and private maps should be remembered. Neither s 36 nor s 83 has any application to maps prepared for private purposes, that is, for the purpose of any particular suit or by any Government officer for the purpose of settlement, etc. The following observation in *Kanto v. Jagat*, 23 C 335, will clearly show the distinction:—

> "A map prepared by an officer of Government, in the course of proceedings for the settlement of land forming the silted bed of a certain river, is not one admissible in evidence under ss 36 and 83 of Act I of 1872; but it is a map whose accuracy must be proved by the party producing it, before it can be admitted in evidence".

Value of Information in Maps.—Accuracy as to the boundaries and other information in a map must depend upon the source from which the information is obtained. Where sufficient evidence as to informants is not forthcoming and it is acknowledged that corrections have been made in the map from time to time, contents of such map cannot be relied upon as authoritative [*Akpandja v. Egblomesse*, A 1939 PC 143: 182 IC 56].

Maps Made Under Authority of the Government.—As to the second kind, that is, maps prepared under the authority of Government, the revenue survey and *thak* maps are examples. But maps and plans prepared for any private purposes, for the purpose of any suit or made by a Deputy Collector for settlement of land, do not come within this section and s 83 does not raise any presumption in favour of their accuracy. The general principle upon which the second kind of maps referred to in this section are admitted has been thus stated by the Judicial Committee in *Jagadindra v. Secy of S*, 30 IA 44: 30 C 291: 7 CWN 173: –

> "Maps and surveys made in India for revenue purposes, are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible as valuable evidence of the state of things at the time they are made. They are not conclusive and may be shown to be wrong; but in the absence of evidence to the contrary they may be judicially received in evidence as correct, when made" [see also *Kali Pr v. Hemanta*, 79 IC 1038: A 1924 C 977; *Secy of S v. Wazed Ali*, 34 CLJ 141; *Anand Hari v. Secy of S*, 3 CLJ 316; *Mazharul v. Gopal*, 84 IC 488 : A 1924 P 719].

Wilkin's plan of 1887 and Smarts' plan of 1909-10 being made under the Calcutta Survey Act, are admissible as evidence of possession, but in a question regarding boundary, evidence of possession has a great value as regards the question of title [*Debendra v. Surendra*, 31 CWN 419: A 1927 C 345]. Irrigation *khasra* and the corresponding map of the villages prepared at the time of construction of canals may be relied on as evidence of the fact that the lands are held by the persons who are recorded therein as to holding them [*Mathura v. Rama*, 14 P 824]. Parker's map is

not a published map generally offered for public sale, nor is it made under the authority of Government within s 36. It has to be proved to be accurate under s 83 [*Kesho v. Bahuria*, 41 CWN 577: A 1937 PC 69: 16 P 258]. As to value of Rennell's map, see *post*, s 83.

In 1871 a detailed survey of the Multan city was made and a special *khasra* prepared showing the plots owned by the Government. No notification for the preparation was made by Government and no settlement was in progress. It was not clear under what authority the survey was ordered. The work was done by *patwaris*, but it was outside their regular circle duty. They were specially deputed to do this work and got special reward—*Held* that the maps and plans were made by the authority of the Government for a public and not a private purpose [*Rahimatullah v. Secy of S*, 63 PR 1913: 18 IC 799]. Printed maps of different wards of a city coming from the Commissioner's office and Collector's private office are admissible under ss 83, 36 and 87 of the Act [*Secy of S v. Chimanlal*, A 1942 B 161: 1942 Bom 357]. In a certain proceeding before a Collector the question was whether certain land was the property of the owners of a certain *mouzah* or whether it was land which formed part of no settled estate and to which the Government was therefore entitled. A map prepared by a *kanungo* in that proceeding did not fall under s 35 or s 36 [*Tarini Charan v. Fakrannissa*, 15 IC 459].

As to superimposition of maps to determine change of locality, see *Secy of S v. Jatindra*, 52 IA 160: 52 C 417 : 29 CWN 1: A 1925 PC 97.

Survey Maps—Evidentiary Value of.—*Thak* and survey maps are valuable evidence of the state of things at the time they were made. But it cannot be presumed as a matter of law that the state of things described in those maps existed at the time of the Permanent Settlement. The question what lands were included in the Permanent Settlement, is a question of fact and not of law which may or may not be satisfactorily proved by subsequent survey maps. The onus of proving that any particular lands were included in the Permanent Settlement is not shifted by the production of survey and *thak maps* [*Secy of S v. Wajid Ali*, 34 CLJ 141 : see *Prafulla v. Secy of S*, 24 CWN 639: 57 IC 29]. It is not permissible for a court to act on the assumption that in 1793, a state of things existed different from what appeared from any evidence before the court [*Secy of S v. Upendra*, 36 CLJ 336: 71 IC 849]. In a suit by a proprietor for a declaration that the resumption and assessment of lands so shown in the revenue survey map are illegal. Government cannot be said to be held bound by their admission in the map [*Birendra v. Secy of S*, 39 CWN 1000]. As to the value of revenue survey maps for purposes of comparison, see *Soudamini v. Secy of S*, 38 CLJ 47: 50 C 822: 77 IC 707; and as to evidentiary value of revenue survey map as to location of land in bed of public navigable river, see *Tarakdas v. Secy of S*, 39 CWN 994: A 1935 PC 125. Where the position of a streamlet as shown in the revenue survey map was at a considerable distance from the present position but there was no evidence that any change of position had actually taken place, the map could not be trusted [*Chandan v. Chiman*, 44 CWN 205 : A 1940 PC 3 : 1940 Kar 15].

S 36 does not require that the authority under which a map is prepared must be an authority given by statute. (The words used in the section are authority of Government). A topographical survey map of 1869, in which the boundary line between two *purgunnahs* is given, is admissible in evidence under s 36, the presumption being that they were so entered in pursuance of instructions received. Assuming that topographical survey maps are not prepared for revenue purposes, they are official documents prepared by competent persons, and with such publicity and notice to

person interested, as to be admissible as valuable evidence of the state of things, at the time they were made. They are not conclusive and may be shown to be wrong, but in the absence of evidence to the contrary, they may be properly and judicially received in evidence as correct when made [*Gajhoor v. Kotwar*, 11 CWN 230: 9 CLJ 415].

A survey map is not made under the authority of an enactment but is purely an executive act. But the proceedings of the survey authorities have been recognized by the legislature. Further, the rules made for the guidance of the survey authorities are embodied in a Manual issued by the Board of Revenue and some of these rules contain matters addressed by way of instruction and direction to the parties interested in the measurement. A survey map is not direct evidence of title, but it is a good evidence of possession according to the boundary demarcated thereupon [*Nobo Commar v. Govind*, 9 CLR 305, *per* FIELD, J]. Where the lands are culturable and definite acts of possession such as filling, sowing, etc, can be exercised over them, the presumption of actual possession raised by the survey map would be stronger than where the land is wholly unfit for cultivation [*Radhakishun v. Shyamdas*, A 1933 P 671].

The *thak* and survey maps afford important evidence of possession at the time they were made, and, as evidence of possession is evidence of title, they afford also valuable evidence of title. In case of disagreement between the *thak* and survey maps, the one that necessarily agrees with the local land marks is to be followed [*Nawab v. Gopinath*, 13 CLJ 625; see also *Abid Hossein v. Dowcurry*, 6 CWN 629]. A survey map is good evidence of possession but it is not necessarily evidence of title. Whether a *thak* or survey map raises a presumption of title must be determined on the facts of each case [*Ramanandan v. Joygobind*, 75 IC 955 : A 1924 P 213: *Moizuddi v. Ishan*, 15 CWN 706; *Shamlal v. Luchman*, 15 C 353]. It is not conclusive and may be shown to be wrong [*Jagadindra v. Secy of S*, 30 C 291]. The Gangetic survey cannot be very strong evidence of possession and cannot have the same value as evidence of title as the revenue survey map. Hence when there is a conflict between the Gangetic survey map and a later cadastral survey map, the latter must be given preference [*Radhakishun v. Shyamdas, sup*].

Revenue survey maps are evidence of title and possession. They are not conclusive and map be shown to be wrong, but in the absence of evidence to the contrary, they may be properly and judicially received in evidence as correct when made [*Mirza Shamsher v. Kunj Behari*, 12 CWN 273 : 7 CLJ 114; *Brindaban v. Gopal*, A 1928 P 36 : 104 IC 514]. In some cases the evidence of survey maps may be sufficient proof of title. But each case must be decided upon its own merits. A survey map is evidence of possession at the particular time at which the survey was made; coupled with other evidence it may raise a presumption that the land belonged to the estate at the time of the Permanent Settlement [*Shamlal v. Luchman*, 15 C 353; see also *Umat Fatima v. Bhojogopal*, 13 WR 50; *Ram Das v. Mohesh*, 19 WR 202; *Narain Singh v. Narendra*, 22 WR 296; *Kashi Kinker v. Bama Sundari*, 23 WR 27 *per* PHEAR, J; *Charu v. Zobeda*, 25 WR 54]. As to the value of survey maps as evidence of title, see *Secy of S v. Radha Kishore*, 43 IA 303 : 44 C 328 : 21 CWN 291 : A 1916 PC 141. Where survey proceeding, conducted in the presence of both parties, declared land to be included in the *zemindari* of a person, a plaintiff suing to recover possession of that land as included with his own *zemindari*, must prove by counter evidence at what precise time, if ever, he or any one from whom he claims, was in possession of the lands [*Prahlad v. Budha Singh*, 2 BLR 111 : 12 WR 6 PC].

In a case relating to a boundary dispute, a survey map, if not conclusive, is evidence of an important character which ought to be looked to and considered [*Gadadhar v. Tara*, 15 WR 3]. Survey maps are evidence, not only with regard to

the physical features of the country depicted, but also with regard to the other circumstances which the officers deputed to make the maps, are specially commissioned to note down [*Kumudini v. Purna*, 10 WR 300]. A survey map is not sufficient, in the absence of other satisfactory proof of title or of long antecedent possession, to establish the plaintiff's right to the land or to disturb the defendant's possession [*Collr of Rajshahye v. Durga Sundari*, 2 WR 210]. Plaintiff having failed to prove possession by his vendor at any time, the mere fact that the land is shown as part of his holding in the revenue map is not sufficient to establish his title [*Aung Hla v. Ton Gyi*, 35 IC 432 : 9 Bur LT 242]. Unless it can be proved that the person against whom a *thak* or survey map is attempted to be used expressly consented to the delineation, or admitted the correctness of such maps, they have no binding effect [*Kristo v. Secy of S*, 3 CWN 99]. Survey maps or *kistwari* maps prepared under the authority of Government are evidence of possession, and therefore, also of title [*Sashi Mookhee v. Bissessuree*, 10 WR 343; *Chaudhury v. Abdul*, 64 IC 326]. Where there has been a Government survey, the survey map must be taken as evidence; and where one of the parties has taken settlement according to the survey boundary, the fact must be taken into account unless explained away [*Radha Chowdhurani v. Giridhari*, 20 WR 243]. An award of survey authorities is not conclusive evidence as to title [*Lalit v. Narain*, 1 WR 333. See also *Kailash Ch v. Raj Ch*, 12 WR 180]. Although the testimony of a survey map is not conclusive, it should not be disregarded unless there is clear and direct evidence to the contrary [*Prosunna v. Land Mort Bank*, 25 WR 453].

The presumption of law is that, in the absence of evidence to the contrary, the survey maps prepared for public purposes by responsible officers of Government are entitled to more reliance, than maps prepared for private purposes in a private suit [*Mathura v. Shib*, 12 CWN 334]. An entry in a *thak* map that it was prepared in the presence of the representatives of certain parties is admissible in evidence [*Bidhu-mukhi v. Jitendra*, 10 CLJ 527]. When parties consent to be bound by the boundary line in survey map as conclusive, they cannot question its correctness [*Raghunath v. Rameshwar*, A 1922 P 87].

Where plaintiffs claimed that a large tract of land formerly under the Ganges formed part of their permanently settled *zemindari*, three sets of documents were relied on, *viz*, plan of a survey conducted by Major Rennell between 1764 and 1773; the *hakikat chowhuddibundi* papers and the Government survey map made in 1859— *held* that they were all admissible [*Haradas v. Secy of S*, 26 CLJ 590 : A 1917 PC 86: 43 IC 361 : 20 Bom LR 49 : **distd** in *Tarakdas v. Secy of S*, 39 CWN 994 : A 1935 PC 125]. This case is no authority for saying that because a certain rivulet is not shown in Rennell's map, that map is evidence of its non-existence. As regards Rennell's map a party cannot rely upon a statement made by a person who was not before the court (*eg*, statement of settlement officer in *diara* proceedings) and whose statements could not be tested. If he wanted to rely upon this piece of evidence, he should have produced the map before the court and asked it to form an opinion upon it [*Benode v. Secy of S*, 34 CWN 1113 : A 1931 C 239].

As to the relative value of *thak* and survey map as evidence, see *Abid Hossein v. Dowcurry*, 6 CWN 629; *Srinath v. Secy of S*, 36 CLJ 345 : 50 C 276; *Sashi v. Ramjas*, 83 IC 205 : A 1924 P 402; *Keshabji v. Sashi*, 96 IC 1027 : A 1926 P 385.

***Thakbust* Maps—Evidentiary Value of.**— There are three kinds of *thak* maps: (*a*) eye-sketches in which no actual measurements are made; (*b*) maps in which rough magnetic bearings were used and rough linear measurements made; and (*c*) maps made from careful magnetic bearings and careful linear measurements. When there is a difference between the revenue survey map and *thakbust* map of the first or second kind, the survey map prevails [*Sashi Bhusan v. Ramjas*, 3 P 85].

Thakbust maps are good evidence of possession, but the value of that evidence varies enormously. In the case of a *thak* map containing definite land marks and undisputed boundaries signed by the parties and their agents representing land which has been brought under cultivation and is in the possession of the riayats whose names are known or can be ascertained from the *zemindari* papers, a *thak* map is very valuable evidence of possession. But the value of such map is greatly diminished when there are natural land marks delineated thereupon, that the land was jungle at the time of the measurement; that the boundaries are not discoverable from a mere inspection of the map; and that neither the *zemindars* nor their agents, by their signatures admitted the correctness of the *thak* [*Jaytara v. Md Mubareck*, 8 C 975 : 11 CLR 399]. *Thak* maps have always been considered as good evidence, and although their value depends upon accuracy, there is no presumption that they must be inaccurate [*Krishna Kalyani v. Braunfield*, 20 CWN 1028 : 36 IC 184]. There is a *prima facie* presumption of accuracy of *thak* and survey maps. It may be shown to be incorrect by the admission of parties or adjudication by a court or by evidence intrinsic or extrinsic to the map [*Taramoni v. Gopal*, 65 IC 182]. *Thakbust* maps are evidence of possession at the time the survey is made, but they are also some evidence of title though not conclusive [*Satkari v. Secy of S*, 22 C 252. See also *Mohima v. Wise*, 25 WR 277 and *Pogose v. Mukund*, 25 WR 36]. It has been held in a case that the *thak* authorities had nothing to do with title or possession and no deduction as to title or possession can legitimately be drawn from *thak* maps. No inference can be drawn from *thak* as to whether a particular river was included in the grant of Permanent Settlement [*Debendra v. Secy of S*, 31 CWN 473 : A 1927 C 403].

The object of the *thak* map being to delineate the various estates borne on the revenue-roll of the district, the entry in a *thak* map, that certain lands formed part of a certain estate, becomes a relevant fact under this section and such entries in *thakbust* maps are evidence on which a court may act. It is open to a court to hold that the same state of things existed at the time of the Permanent Settlement [*Abdul Hamid v. Kiran*, 7 CWN 843; **follD** in *Bidhumukhi v. Jitendra*, 10 CLJ 527 (*Jaraokumari v. Lalonmoni*, 17 IA 145 : 18 C 224 **distd**)]. It is no part of the duty of revenue officers conducting the *thakbust* operations to record the prescriptive rights. As to value of *thakbust* maps, see *Chattrapal v. Lees*, 72 IC 648 : A 1923 P 558. The *thak* map affords good substantial evidence of the linear distances between the successive marking points of the boundary lines. The map by its nature does not pretend to be anything more as regards the relative angular distances, or positions, of the different points, than a sketch outline just sufficient to connect them and to indicate roughly their situations on the ground [*Burn v. Achumbit Roy*, 20 WR 14].

A *thakbust* map is not only evidence, but very good evidence, as to what the boundaries of the property were at the time of the Permanent Settlement and also as to what they admittedly were at the time of the *thakbust* survey [*Shama Sundari v. Jagabandhu*, 16 C 186]. The *thakbust* map is a rough sketch, or at most, an unscientifically prepared plan showing the number and approximate position of the *thak* marks or *dhuis* for the guidance of the revenue surveyor who followed after, and who, having picked up and verified the *thak* marks in the *thak* map, prepared the revenue map by accurate observation with scientific instruments. The revenue map must therefore be accepted as showing the result of the *thak* survey even more accurately than the *thakbust*. The signature of the revenue surveyor on a *thak* map means merely that he has satisfied himself that the boundary had been correctly picked up on the ground and correctly surveyed on the revenue survey map [*Keshabji v. Sashi*, 96 IC 1027 : A 1926 P 386].

An entry in a *thakbust* map cannot be said to be insufficient to entitle a court of fact to hold that the disputed lands were really included in a particular estate at the time of the Permanent Settlement [*Fazlar v. Nabendra*, 17 CWN 151 : 15 IC 341; see however *Ramnandan v. Jaigobind*, 2 P 839]. Where the question was as to the quantity of *debutter* land in a village, a *thakbust* map made at a revenue survey by an *amin* who had no authority to determine what lands were *debutter*, but only to lay down, and to map boundaries, could not be treated as raising a presumption of correctness within s 83 or the question as to the amount of the *debutter* land in one of the villages mapped [*Jaraokumari v. Lalonmoni*, 17 IA 145 (**dist.**, in *Bidhumukhi v. Jitendra*, 10 CLJ 527)]. The presence at the preparation and the signing by the parties or their agents, of a *thakbust* map, may fairly be taken to be an admission by the parties of the boundary lines between adjoining villages—*Held* under the circumstances of the case, that the evidentiary value of the *thakbust* map and the survey maps produced on behalf of the plaintiff was greater than that of the survey maps produced on behalf of the defendants [*Danne v. Dharani*, 35 C 621]. As to the value of *thak* maps prepared before regular survey and *thak khasras*, see *Jagdeo v. Baldeo*, 27 CWN 925 : A 1922 PC 272 : 49 IA 399.

The *thakbust* map in Bihar was only a rough and ready survey in 1844 as a preliminary to the regular survey in 1845. The surveyors had no authority to record any irrigation rights and such notes on *thakbust* maps carry no presumption and are not evidence. Such a map does not raise any presumption of correctness under s 83 and the entries in *thakbust khasra* have no evidentiary value [*Harihar v. Janak*, 21 PLT 873].

***Chittas* and Their Admissibility.**— As to the admissibility in evidence of the Government *chittas*, see the following cases: *Saraswati v. Ambika*, 24 WR 192; *Mohiram v. Bisshambar*, 24 WR 450; *Md Fedye v. Ozeooddin*, 10 WR 340; *Radha Charan v. Anand*, 15 WR 444.

Proof of Maps Published Under Authority.— Documents referred to in this section are public documents within the meaning of s 74 and they can be proved by the production of certified copies under ss 77 and 79 of the Evidence Act [see *Gopeenath v. Anund Moyee*, 8 WR 167]. This section should be read with ss 83 and 87 of the Evidence Act, under which the court shall presume the accuracy of the maps.

Value of Maps and *Chittas* Made by the Government For a Particular Purpose.— A map prepared by an officer of Government while in charge of a *khasmahal* does not come under this section, the possession of Government being only that of a private proprietor. Such a map, would, however be admissible under s 13 [*Junmejoy v. Dwarka*, 5 C 287 : 4 CLJ 574]. **Applied** in *Ram Ch v. Bunseedhur*, 9 C 741, where it has been held that Government *chittas* made for its private use are not admissible in evidence against private parties for proving the character or tenure of the lands described therein; see also *Upendra v. Radha Gobinda*, A 1927 C 189. A map produced by Government is not admissible unless made under authority [*Electric Supply Co v. S*, A 1958 C 85].

The particular papers of Collectorate partition showed a certain land to have been allotted to *A*, but the attached map showed it to have been allotted to *B*. As the map merely delineates the plots allotted, the partition papers should prevail [*Anil v. Rash Mohan*, 28 CWN 46]. A map made for the purposes of a partition which affected the public revenue is admissible for what it is worth [*Abdul Hamid v. Brojendra*, 90 IC 643 : A 1926 C 290]. A map prepared by an officer of Government in the course of proceedings for the settlement of land forming the silted bed of a certain river, is not one admissible under ss 36 and 83; but is a map, whose accuracy must be proved by the party producing it, before it can be admitted in evidence [*Kanta v. Jagat*, 23 C 335]. A *mahalwari* map which is more than 30 years old is entitled to the benefit of presumption under s 90 and is relevant under this section [*Madhabi v. Gaganendra*, 9 CWN 111, 113].

Maps How Far Admissible on General Principles.— Reports and maps referred to in orders under s 145 Cr P Code, 1882, are admissible in evidence on general principles. If the land referred to in such orders are described by such metes and bounds, or by reference to objects or marks physically existing, these must necessarily be ascertained by extrinsic evidence, *ie*, the testimony of persons who know the locality. If the orders refer to a map, that map is admissible in evidence to render the order intelligible; and the actual situation, of the objects drawn or otherwise indicated in the map must, as in all cases of this sort, be ascertained by extrinsic evidence [*Dinomoni v. Brojomohini*, 29 IA 24 : 29 C 187 : 6 CWN 386]. When a map represents a transaction and is a part of and necessary to explain or understand the document, it becomes admissible under s 13 on proof of the document without separate proof of the map [*Kedar v. Mahendra*, 54 CWN 671; *Joseph v. Makkaru*, A 1960 K 127].

Map Prepared By Commissioner Appointed for Local Investigation.—A map prepared by a commissioner who makes a local investigation is evidence by itself under the C P Code (Or 26, r 10). It is evidence by itself only in the particular suit in which the enquiry was ordered [*Dinabandhu v. Nistarini*, 12 CLR 50]. But it may be admitted in evidence even in other suits when it is properly proved by examining the persons who prepared it [*Sarat v. Sarala*, 105 IC 61 : A 1928 C 63]. Site plan prepared for the purpose of a case has very little probative value on the question of title. Entries in such maps in support of title of a municipal board are admissions in favour of the board and are not relevant [*Gauri v. R*, A 1930 A 26]. To admit a map without calling the maker thereof amounts to admitting hearsay. Mere proof of the map by itself is only proof of the fact that the map was prepared by the maker thereof. It is no proof of the correctness of its contents. The fact that a particular person prepared a map, cannot without or apart from and independent of the proof of the correctness of its contents, have any bearing on the matters in issue in the case. A map attached to a decree is effective only so far as it relates to matters in issue in the suit. The rest of the map cannot be regarded in law as part of the decree at all [*Dwijen v. Naresh*, 49 CWN 791 : A 1945 C 492].

S. *37. Relevancy of statement as to fact of public nature contained in certain Acts or notifications.—When the Court has to form an opinion

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* PAKISTAN.—After the words "Act of Parliament" read "of the United Kingdom or in any Act of the Central Legislature or of any other legislative authority in the Provinces constituted by any laws for the time being in force or in a Government notification or notification by the Crown Representative appearing in the Official Gazette or in any printed paper purporting to be the London Gazette or the Government Gazette of any Dominion, colony or possession of His Majesty, is a relevant fact".

BURMA.—The section as modified by AO 1937 and AO 1948 reads thus:—

"When the Court has to form an opinion as to the existence of any fact of a public nature, any statement of it, made in a recital contained in any Act of Parliament of the United Kingdom of Great Britain and Ireland, or in any *enactment in force at any time in the Union of Burma or India or Pakistan* or in notification of the Government appearing in the Gazette, or in any printed paper purporting to be the London Gazette or the Government Gazette of any colony or possession of the Queen, is a relevant fact."

CEYLON.—The section reads:—"When the court has to form an opinion as to the existence of any fact of a public nature, any statement of it made in a recital contained in any Act of Parliament, or in any Ordinance, or in any proclamation or notification of the Government appearing in the Government Gazette, or in any printed paper purporting to be the London Gazette or the Government Gazette of any colony, dominion, dependency or possession of the British Crown, or to be the Gazette issued by the Local Government of any part of such colony, domination, dependency or possession, is a relevant fact".

as to the existence of any fact of a public nature, any statement of it, made in a recital contained in any Act of Parliament [1][of the United Kingdom] or in any [2][Central Act, Provincial Act or a State Act or in a Government notification or notification by the Crown Representative appearing in the Official Gazette or in any printed paper purporting to be the London Gazette or the Government Gazette of any Dominion, colony or possession of His Majesty, is a relevant fact.]

[3][* * *]

COMMENTARY

Principle and Scope.—This section says that statements and recitals of facts of a public nature in statutes, ordinances, proclamations, &c or in Government notifications in Government Gazettes are admissible in evidence in order to prove the existence of those facts. The section is silent as to the distinction between public and private Acts. The facts as to the existence of which the Court has to form an opinion must be of a *public nature*. The expression "matters of public nature" is also to be found in s 42, *post*. The grounds of admissibility are the same as in ss 35 and 36, viz that the facts stated are of public notoriety and they have been recorded by competent public servants in the official discharge of their duties. The Government Gazettes are of course evidence of facts of *public nature* contained therein, but not of facts of private nature. Thus a notification in the Gazette regarding acquisition of land for public purpose comes under this section, but not a notification or advertisement by a private person appearing in a Government Gazette though it may concern the public. S 57 deals with the judicial notice of statutes by courts; s 78 with the mode of proving notification and s. 81 with the presumptions concerning Gazettes. The Acts and notifications are *prima facie* evidence but not conclusive. As to definition of "Central Act", see s 3(7) Genl Clauses Act, 10 of 1897. Documentary evidence regarding partition of joint family property would prevail over oral evidence. [*V.S. Nagaraja Shetty v. M.N. Krishna*, 1996 AIHC 2904 (Kar)].

Statutes, State papers, and other writings of a cognate character, will generally be admissible, either as *prima facie* or as conclusive proof of the facts directly stated in them, if duly authenticated and if their contents be pertinent to the issue. In many cases they will even be received as *prima facie* evidence of matters stated in them by way of introductory *recital*. Thus, where certain *public statutes* recited that great outrages had been committed in a particular part of the country, and a public proclamation was issued, with similar recitals, and offering a reward for the discovery and conviction of the perpetrators these were held admissible and sufficient evidence of the existence of those outrages, to support the averments to that effect in an information for a libel on the Government in relation thereto [*R v. Sutton*, 4 M&Sel 532]. So a recital of a state of war, in the preamble of a public statute, is good evidence of its existence and the war will be taken notice of without further proof, whether this nation be or be not a party to it [*R v. De Berenger*, 15 RR 415]. But recitals in a Public Act are not conclusive evidence.

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1. Inserted by AO 1950.
2. Original words were substituted successively by the Repealing and Amending Act, 10 of 1914; AO 1937; AO 1948; AO 1950 and Part B State (Laws) Act, 1951.
3. Omitted by the Repealing and Amending Act, 10 of 1914.

Therefore, where the schedule of the Municipal Corporation Act described a place as an existing Borough, proof was admitted to show that this description was false. A private statute, though it contains a clause requiring it to be judically noticed as a public one, is not evidence at all against strangers either of notice or of any of the facts recited [Tay s 1660]. Wigmore advances some arguments against the reception of recitals in statutes. He says that the parties against whom they may be used are not parties to the prior proceeding; the statements concern matters not within the personal knowledge of the declarants; the results deal not with legislative proceedings, but with extrinsic facts and that unless there is an official duty to investigate and obtain adequate information, the statements should not be received [Wig s 1662].

Recitals of facts in statutes are not conclusive. "A *recital* of a fact in a *statute*, though it may on some conditions be admissible as an official statement, is not conclusive testimony. The legislature's recitals are commonly intended merely as explanations of motives and purposes, and not as determination of controverted fact. They could not without gross injustice, be made evidentially conclusive, and this is generally conceded. As a contract, or an estoppel, or otherwise, the recital may be binding, but that would not be due to a rule of Evidence" [Wig s 1352].

[*Ref Tay ss 1527, 1591, 1660, 1662-66; Best s 219; Steph Art 33; Phip 8th Ed pp 328-31*].

Government Gazette.—Before the publication of the Gazette of India, notifications of the Home Government were published in Gazettes of Local Governments. The Gazette of India was first published in 1863 (Official Gazettes Act, 31 of 1863). As to presumption as to Gazettes, see s 81. In the *Wahabi* trials, official letters, published in the Gazette of India and the Calcutta Gazette, were used as evidence regarding the subject of hostility between British Government and certain Mahomedan fanatics on the frontier [*R v. Amiruddin*, 7 BLR 63 : 15 WR Cr 25].

As to sufficiency of notice of dissolution of partnership in the Calcutta Gazette, under s 264 of the Indian Contract Act (19 of 1872), see *Chundee v. Edulji*, 8 C 678 pp 682-83 : 11 CLR 225, where it has been held that *Official Gazette* is not necessarily the only proper medium of publication (*Juggernath v. Maclachlan*, 6 C 681 **overruled**), and the question of the sufficiency of the notice, whether public or otherwise, is one rather of fact than of law. It is only the factum of proclamation or publication in the Gazette or other prescribed modes of publicity which alone would give such an order or decision, the indicia or the necessary stamping of a notification. Till then it would remain merely an order or decision and it may not travel beyond the knowledge of its author and might well remain completely cloistered. The issuance of a notification is in the eye of law either notice or imparted knowledge of its contents to the citizens in general [*Kashmiri Lal v. State of Punjab*, A 1984 Pun & Har 87, 89 : (1983) 85 Pun LR 741].

Puri Gazetter of O'Malley of 1908 was relied on as evidence providing historical material and the practice followed by a Math and its head [*Srinivas v. Suranjan*, A 1967 SC 256].

Under the Documentary Evidence Act 1868 (31 & 32, Vic c 37) amended by the Documentary Evidence Act 1882 (45 & 46, Vic c 9) production of the Official Gazette is *prima facie* evidence of any proclamation, order, or regulation issued before or after the passing of the Act by His Majesty, the Privy Council or any of the principal departments of the State (s 2).

S. 38. Relevancy of statements as to any law contained in law-books.—When the Court has to form an opinion as to a law of any country, any statement of such law contained in the book purporting to be printed or published under the authority of the Government of such country and to contain any such law, and any report of a ruling of the Courts of such country contained in a book purporting to be a report of such rulings, is relevant.

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COMMENTARY

Principle and Scope.—When it is necessary to form an opinion as to the law of *any* country, (*i*) statements of such law in books published under the authority of the Government of that country and (*ii*) books purporting to contain the reports of cases (whether published under authority or not) decided by the courts of any country, are relevant. The words 'any country' no doubt include this country, though they principally refer to other countries, as under s 57 the courts are bound to take judicial notice of the laws in force in this country. As to facts of which courts must take judicial notice see s 57.

The ground of admissibility is the same as in the preceding sections. Statements of law in Acts, Reports, etc published under authority are made by authorised agents in the course of office duty and the facts are of public notoriety. Moreover their publication under authority affords a guarantee of their accuracy. Reports of law cases of any country (including India) not published under authority are also admissible as they purport to contain the decision of courts and on account of their publicity and constant use they are open to criticism and the probabilities are in favour of their accuracy. The unofficial or private law reports purport to print judgments of superior courts reported by gentlemen of the Bar with a summary of the decisions called head-notes.

The provisions of s 3 of the Indian Law Reports Act (18 of 1875) that a court is not bound to hear a case not reported in the authorised reports is not consistent with s 38 which makes relevant the report of a ruling contained in a private law journal. The matter needs examination for the removal of the anomaly.

Cases Printed in Unauthorised Reports or Unreported Cases.—The words *"and any report of a ruling of the courts of such country contained in a book purporting to be a report of such rulings is relevant"* in s 38, go to show that reports of cases published in private journals, *eg* Calcutta Weekly Notes, Madras Law Journal, Bombay Law Reporter, Allahabad Law Journal, &c, &c though not published under the authority of Government, are relevant. S 3 of the ILR Act 1875, merely says that no court shall be bound to hear, cite or receive as an authority binding on it, the report of a case other than a report published in the authorised Reports, but it does not prohibit the reception of reports of cases published in other journals if it is satisfied about their accuracy. As a matter of fact such Reports are being very frequently referred to by the courts every day. The view that regard being had to s 3 *ibid*, an unreported case or ruling is not to be treated as an authority

[*Mahbul v. Rakhal*, 4 CWN 732], was dissented from and it was pointed out that s 3 was framed to constitute a monopoly if the judge so desired, for the authorised Law Reports. It does not prevent the court from looking at an unreported judgment of other judges of the same court [*Md Ali v. Nazar Ali*, 28 C 289 : 5 CWN 326].

The excessive number of private law journals in India and the unhealthy competition between them promoting indiscriminate reporting of numerous common-place or unreportable cases in order to increase their bulk, have grown into an evil causing difficulty to both judges and lawyers, especially when decisions on pure questions of fact are reported and needs checking. Some sort of executive control by withdrawing the facilities now offered by the High Courts to the private law journals in the matter of supply of copies of judgments, or of access to records, should they disregard the direction of a Council of Law Reporting as to the judgments recommended for being reported, may have a salutary effect. But neither principle nor policy can justify the suppression of private law journals by securing a monopoly for "authorised" reports. Nor would it be legal; the public have a right to publish, discuss and criticise judgments.

The question was gone into fully by the Lord Chancellors' Committee on Law Reporting (presided over by MR JUSTICE SIMONDS afterwards LORD SIMONDS). They rejected the proposal unanimously and in their Report (1940) observed:

> "It ignores, as we think, the fundamental fact that the law of England is what it is, not because it has been so reported but because it has been so decided..... It is the privilege, if not the duty of a member of the Bar to inform the court, whether as counsel engaged in the case or as *amicus curiae*, of a relevant decision whether it has been reported or not. So it is the duty of a Judge to follow the decision of a competent court whether reported or not; it may well be that there has not been time to report it.....
>
> In our view such proposals are fundamentally wrong. They strike as we think, at the basis of a principle which is one of the pillars of freedom, that the administration of justice must be public. The decisions of the court must be open for publication, discussion and criticism."

There seems to be a confusion of ideas as to the authority of cases published in unofficial law reports and some of the views expressed are opposed to fundamental priniciples as will appear from the following cases;

In a case, a ruling, reported in the Calcutta Law Journal and Calcutta Weekly Notes was not taken notice of [*Gobindasami v. Perumal*, A 1927 M 327]. Cases published in the unauthorised reports have no binding force as authorities [*Ma Shop v. Mubarak*, 7 R 361 : A 1929 R 273; *Bisheshwar v. R*, 6 CWN 1007]. A court is not bound to follow a decision not published in the official law reports, though respectful and careful consideration should be given to decisions unofficially reported [*Md Mustafa v. Wamanrao*, 19 NLJ 301]. A judge who has no access to all published reports should refuse to exercise his judgment when one such report is brought to his notice. It may be that in another unpublished judgment the opposite view has been taken [*Haji Karim v. Rahman*, A 1932 N 137]. Courts should only fall back on unofficially reported cases when they can find no officially reported ruling on the point in issue [*Bandeally v. Peer Md*, A 1933 R 75]. A court should follow the authorised reports of the decision of its own High Court rather than the unauthorised reports [*Mg Chit v. Ma Pwa*, A 1934 R 39 : 148 IC 908]. When there is a conflict between the decisions of the same High Court, one of which is officially reported and the other unofficially, the court should follow the former [*Chettyar Firm v. Mg Sein*,

9 R 561 : A 1931 R 279]. Unauthorised reports are on the same footing as unreported cases [24 OC 329 : A 1921 O 226].

The law expressed in the decision of a competent court is an authority which every judge has a duty to follow, not because it has been so reported (in an official or private journal), but because it has been so decided. So, whether such a decision is reported or not, its binding authority is the same. The reasonable view would therefore be that it being the decision and not the opinion of the court, nor the report of it that makes the precedent (see *Vinayak v. Moreshwar*, 1944 Nag 342 : A 1944 N 44), if the court is satisfied about the accuracy of the judgment placed before it whether published in an official or unofficial report or whether it is a certified copy, the judge has a duty to follow it. The most that can be said is that the report of a case published in an authorized report carries with it a guarantee of its accuracy. The Indian Law Reports Act is little more than an addendum to s 78 Evidence Act. An officially certified copy of a judgment of the High Courts is bound to be treated in the same way as an officially reported judgment [*Vinayak v. Moreshwar, sup*].

"All reports made by gentlemen of the Bar and published on their responsibility, are equally regular. There is no superiority in the reports of the Council of Law Reporting. Counsels are as much entitled to cite the one as the other [*The Master of the Rolls*," TLR Vol 3 p 640; May 20, 188]. A party relying on a judgment or other in the reports of cases should be asked to produce a copy of the same [*Sourindra v. Siromoni*, 28 C 171 : 5 CWN 307].

The words in the section being "contained in a *book* purporting to be a report of such rulings," it would seem that strictly speaking, the report of a case appearing in a newspaper is not relevant. But if the report is an authenticated one and is published in a newspaper of established reputation, there is no reason why it should not have the same authority as a report published in a private law journal. In a case counsel relied on a judgment published only in the *Statesman* and COSTELLO J, allowed the report of the judgment to be placed before him observing "it has been said on high authority that the position of the *Statesman*, is similar to that of the *Times*." [*Statesman*, Calcutta, 18th Feb 1928]. The view of the author was approved in *S v. Sardar*, A 1969 C 451. Cases reported in reputed newspapers are found to be cited in several well-known English law books.

In *Shuja-ul-mulk v. Umirulumara*, 48 M 846 : A 1926 M 20, DEVADOSS J, said: "The Indian Law Reports Act has no application to the Privy Council and therefore the courts are at liberty to refer to an unauthorised report of the decisions of the Privy Council and if they are satisfied that it is a correct report, they are bound to follow it." An unreported judgment is not any the less an authority simply because it has not been reported, nor is it so because it has been published in any Report other than the Indian Law Reports. All that is necessary is that the court should be satisfied about its correctness or authenticity. It has been held that in the case of a conflict between a reported and an unreported judgment, the proper course is to follow the former [*Trustees P D v. Venkatachalam*, 92 IC 709 : A 1926 M 321].

Authority of Rulings.—A judge can distinguish, but cannot disregard an unreported ruling of the High Court [*R v. Ganesh Ch*, 1 CWN 1]. But a judge is bound to follow the ruling of the High Court to which he is subordinate [See *Korban v. Sharoda*, 10 C 82, 84; *Korban v. Pitumbari*, 13 CLR 256; *Swami Rao v. Kashinath*, 15 B 419; *Balaji v. Sakharam*, 17 B 555; *Hajee Mahamed v. Swee Cheang*, 25 C 488 : 1 CWN 172; *Mahadeo v. Jagannath*, 13 P 303]. A Division Bench must follow the Full Bench decisions [*Anantram v. Khushal*, A 1927 A 244]. Decision of a Division Bench is binding on the other Division Benches

unless they are satisfied that it is incorrect and unless a reference is made to the Full Bench [*Ramnagina v. Bishwanath*, A 1934 P 85; *Mahadeo v. Jagannath, sup*; *Ram Jivan v. Phoola*, A 1976 SC 844]. A single judge of the High Court is bound by the decision of the Division Bench even though it is not reported [*Vinayak v. Moreshwar*, A 1944 N 44, 46]. If a single judge of a High Court is inclined to differ from the view of earlier single judge he has to refer the matter to larger Bench [*Eknath v. S*, A 1977 SC 717; *Shri Bhagwan v. Ramchand*, A 1965 SC 1767]. In the case of conflicting decisions of various High Courts, each court must follow its own *curcus curiae* [*Satyanarayana v. Venkata*, 100 IC 365 : A 1927 M 533]. The refusal of a single judge of a High Court to follow a full Bench decision is deprecated [*Kamalammal v. Venkatalakshmi*, A 1965 SC 1349]. In case of difference of opinions in decisions of Supreme Court, High Court is to follow the opinion expressed by larger Bench [*Mattulal v. Radhelal*, A 1974 SC 1596; *Union v. K S Subramanian*, A 1976 SC 2433; *S v. Ramchandra*, A 1976 SC 2547].

Foreign Law.—The words "any country" include India, Pakistan, Burma, Ceylon, England and other foreign countries. This section is to be read with s 84, in which there is a presumption in favour of the genuineness of the books, which are relevant under this section of the Act. The two sections refer to foreign law and their effect is, that proof of foreign law may be obtained directly from books and without the aid of expert witnesses who according to English practice are required for the purpose. Even when an expert is examined (under s 45) and produces the authorities on which he bases his opinion, the court is at liberty to examine those authorities and put its own construction on them. An unauthorized translation of the *Code Napoleon* was held under this section not to be relevant to prove French Law [*Christian v. Delanney*, 26 C 731 : 3 CWN 614; see Cunn p 108]. Attested copy of Burma Gazette is not admissible in proof of foreign law [*Raman v. Ramgopal*, A 1954 Raj 135].

The difference between the English law and the Act is this that under this section books containing statement of foreign laws (published under the authority of Governments of those countries) may be directly referred to by the court; but according to English Law, the foreign law must be proved by calling experts or professional persons to give their opinions on the subject [see Taylor 10th Ed s 1423 p 973; Phipson, 8th Ed p 382; s 45 *post*]. Opinion of experts upon a point of foreign law is relevant [see s 45]. The English courts cannot take judicial notice of foreign law, which in this connexion includes the law of Scotland, Commonwealth countries, British Colonies and possessions; for foreign laws are usually matters of evidence requiring proof as questions of fact [see *Guaranty Trust Co v. Hannay & Co*, 1918, 2 KB 623, 667 CA; *Beatty v. B*, 1924 1 KB 807, 814 CA; *Lazard Bros & Co v. Midland Bank Ltd*, 1933 AC 289, 297, 298 HL; Hals 3rd Ed Vol 15 para 610]. As to proof of foreign law, see S 45 *post*.

As to facts of which court must take notice see s 57.

Under s 38, the Ceylon Insolvency Ordinance might be looked at to decide the question of defendant's liability as the basis of a contract [*Deivanayagam v. Muthukumaraswamy*, 14 IC 560]. Although the court may take judicial notice that the law set out in a book published by a foreign Government is the law in force at the relevant time, what the whole law of a foreign Government is at a particular point of time cannot be proved except by calling an expert under s 45 [*Jagadish v. IT Commrs*, A 1956 C 48].

HOW MUCH OF A STATEMENT IS TO BE PROVED

*[***S. 39. What evidence to be given when statement forms part of a conversation, document, electronic record, book or series of letters or papers.***—When any statement of which evidence is given forms part of a longer statement, or of a conversation or part of an isolated document, or is contained in a document which forms part of a book, or is contained in part of electronic record or of a connected series of letters or papers, evidence shall be given of so much and no more of the statement, conversation, document, electronic record, book or series of letters or papers as the Court considers necessary in that particular case to the full understanding of the nature and effect of the statement, and of the circumstances under which it was made.*]

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COMMENTARY

Information Technology Act, 2000

When statement has to be proved in part only [S. 39].—The original S. 39 has been substituted with a new declaration. The reason for recasting the provision is to accommodate the words "electronic records".

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

Principle and Scope.—This section is based on the rule as it prevails in England. When any statement of which evidence is to be given forms part of a longer statement, or of a conversation or is contained in a document which forms part of a book, letter, &c, evidence should be admitted of so much of the statement, conversation, document, letter, &c, as are necessary to explain or to understand the statement. In the absence of any such restriction, much time would be wasted and matters which would be otherwise inadmissible would be let in. Moreover, justice requires that an unfair use should not be made of a man's statement shorn of its context. If a party makes a qualified statement, it cannot be used against him apart from the qualification or explanation attached to it. The rule is therefore founded on justice and convenience. So, when a particular entry in an account book or a diary or a paragraph in a newspaper, or a part of a conversation or some out of a series of letters have been put in evidence by a party, the other side is not entitled to use as evidence distinct entries, paragraphs, letters, &c unconnected with the entries relied on by his opponent. The court has been given discretion to admit so much of the statement, conversations, &c as may be necessary to understand or qualify it.

Taylor states the rule thus: Though the whole of a document may, as a general rule, be read by one party when the other has already put in evidence a partial extract, this rule will not warrant the reading of *distinct entries* in an account-book, or distinct paragraphs in a newspaper, unconnected with the particular entry or paragraph relied on

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* **Subs. by the Information Technology Act, 2000.**

by the opponent; nor will it render admissible bundles of proceedings in bankruptcy, entries in corporation-books or a series of copies of letters inserted in a letter-book, merely because the adversary has read therefrom one or more papers, or entries or letters. If, indeed, the extracts put in expressly refer to other documents, these may be read also, but the mere fact that the remaining portions of the papers or books may throw light on the parts selected by the opposite party will not be sufficient to warrant their admission; for such party is not bound to know whether they will or not; and moreover, the light may be a false one [Tay s 732]. The same rule prevails in the case of a *conversation*, in which several distinct matters have been discussed. If a part of a conversation is relied on as an admission, the adverse party can give in evidence only so much of the same conversation as may explain or qualify the matter already before the court. For example, a witness who has acknowledged on cross-examination, that he has heard the plaintiff admit on oath that he had repeatedly been insolvent, cannot be asked in re-examination whether the plaintiff had not, on the same occasion, expressly stated that the money was given to him, and not lent [Tay s 733].

ABBOT CJ, in the *Queen's case*, 2 B&B 297, said thus about the rule as to re-examination:

> "I distinguish between a conversation which a witness may have had with a party to the suit, whether civil or criminal, and a conversation with a third person. The conversations of a party to the suit, relative to the subject-matter of the suit, are in themselves evidence against him in the suit; and if a counsel chooses to ask a witness as to anything which may have been said by an adverse party, the counsel of that party has a right to lay before the court the whole, which was said by his client in the same conversation, not only so much as may explain or qualify the matter introduced by the previous examination, but even matter not properly connected with the part introduced upon the previous examination, provided only that it relates to the subject matter of the suit; because it would not be just to take part of a conversation as evidence against a party, without giving to the party at the same time the benefit of the entire residue of what he said on the same occasion."

This statement of the rule was however qualified in *Prince v. Samo*, 7 Ad & E 627, where it was held that a witness of the plaintiff cross-examined as to the assertions of the plaintiff in a particular conversation, could not be examined as to other *unconnected* assertions of the plaintiff in the same conversation, although connected with the subject of the suit [ROSCOE, N P, 18th Ed, p 184].

In *Prince v. Samo, ante* DENNAN LCJ, said: "My opinion was that the witness might be asked as to everything said by the plaintiff, when he appeared on the trial of the indictment that could in any way qualify or explain the statement as to which he had been cross-examined, but that he had no right to add any independent history of transactions wholly unconnected with it..... Upon the whole, we think it must be taken as settled that proof or detached statement made by a witness at a former time does not authorize proof by the party calling that witness of all that he said at the same time, but only of so much as can be in some way connected with the statement proved..... We cannot assent [to the above passage of the opinion in the *Queen's* case"].

Opponent May Put in the Remainder.—The opponent, against whom a part of an utterance has been put in, may, in his turn complement it by putting in the remainder, in order to secure for the tribunal, a complete understanding of the total tenor and effect of the utterance. There is much opportunity for difference of opinion whether the *proponent* in the first instance *must* put the whole. But there is and could be no difference of opinion as to the *opponent's* right, if a part only has been put in, himself to *put in the remainder.* In the definition of the limits of this right, there may be noted three general corollaries of the principle on which the right rests, namely: *(a) No utterance irrelevant to the issue is receivable; (b) No more of the remainder of the utterance that concerns the same subject, and is explanatory of the first part, is*

receivable; (c) The remainder thus received merely aids in the construction of the utterance as a whole, and is not in itself testimony [Wig s 2113].

With regard to *letters*, it has been held that a party may put in such as were written by his opponent, without producing those to which they were answers, or calling for their production; because, in such a case, the letters to which those put in were answers are in the adversary's hands, and he may produce them, if he thinks them necessary to explain the transaction. This is the strict rule, but in practice if a party reads a letter from his opponent and is in possession of a copy of his own letter to which the opponent's is an answer, he is expected to read both. If a plaintiff puts in a letter written by the defendant on the back of which is something written by himself, the defendant is entitled to have the whole read; and where a defendant laid before the court several letters between himself and the plaintiff, he was allowed to read a reply of his own to the letter of the plaintiff, it being considered as part of an entire correspondence [Tay s 734].

Discretion of Judge in Limiting the Quantity to be Admitted.—Whether the statement be in a civil or criminal proceeding (admission or confession), the whole of it which contains the statement must be read and taken together for thus alone can the whole of what the person making the statement intended to convey be certainly arrived at. It would be an unfair practice to extract what is against the interest of the declarant, while the very next sentence might contain a material qualification. On the other hand, great prolixity and waste of time might occur, if the whole of long rambling statements were to be introduced simply on the ground that the whole of the document or conversation must be before the court. The judge is therefore constituted, in every case, the referee, by whose decision is limited the quantity of the document, etc, containing the statements which shall be put in evidence. His discretion is to be guided by the principle of letting in so much, and so much only, as makes clear "the nature of the effect of the statement and the circumstances under which it was made." Thus if the statement be contained in a *conversation*, it by no means follows that the court should admit the entire conversation. The court would exercise a sound discretion in admitting only so much as explains or qualifies the statement. *Prince v. Samo* (*ante*) is the leading case on this point [Nort pp 203-04].

This section must be taken to refer to statements which are admissible under ss 17, 18, 19, 34 to 38, as also statements used for purposes of cross-examination. The documents referred to by a witness to refresh his memory do not strictly come within the section, but the same principle has been applied to them [Cunn p 109].

How Much of a Statement is to Be Proved.—The case of *Pulin v. Watson*, 9 WR 190, goes not further than to lay down that an unfair use is not to be made of a man's written statements, by trying to convert into an admission by him, that which he never intended to be an admission [*Baikuntanath v. Chandra*, 1 BLR AC 133 : 10 WR 190]. If the special diary is used to refresh his memory by the police officer who made it or is used by the court to contradict such officer, then the accused or his agent is in law entitled to see only the particular entry used and so much of the special diary as in the opinion of the court is necessary in that particular matter to the full understanding of the particular entry so used and no more. In such cases, the court ought to exercise a sound judicial discretion and should not be influenced by a mere arbitrary fancy [*R v. Mannu*, 19 A 390, 405 FB]. Although the entries in books of account are relevant to the extent provided by s 39, yet such a book is not by itself relevant to raise an inference from the absence of any entry [*Kamalapathi v. Bejoy*, 3 IC 291]. Because a document is admissible for a certain purpose all recitals, statements and references therein cannot be used as proof of the facts to which they

relate [*Tikaram v. Motilal*, A 1930 A 299; see however *Shk Ketabuddin v. Nafar*, 44 CLJ 582 : A 1927 C 230]. As to how much of an *admission or confession* can be proved, see *ante* ss 17 and 24.

Statement Barred Under Other Sections is Not Admissible Under This Section.— When a particular statement is barred by s 27, it cannot be let in under s 39 under the garb of an explanatory statement; s 39 cannot be invoked for letting in a confession in respect of which the bar under ss 24, 25, 26 has not been removed by s 27 [*Sukhan v. R*, 10 L 283 FB : A 1929 L 344]. If the accused wishes to challenge the veracity of the statement that it was on his information that the thing was discovered, he may ask the deponent to depose to the exact words. Then under s 39 so much of the statement made by him can be given in evidence as the court considers necessary in that particular case to the full understanding of the nature and effect of the statement. But so far as the admissibility of the words deposed to is concerned, they are still governed by s 39 [*Karam Din v. R*, A 1929 L 338].

JUDGMENTS OF COURTS OF JUSTICE WHEN RELEVANT

S. 40. Previous judgments relevant to bar a second suit or trial.— The existence of any judgment, order or decree which by law prevents any Court from taking cognizance of a suit or holding a trial, is a relevant fact when the question is whether such Court ought to take cognizance of such suit or to hold such trial.

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COMMENTARY

Principle and Scope. [Relevancy of Judgments].— Sections 40-44 deal with the relevancy of judgments of courts of justice. When the Act was in the Bill stage, it was complained by some that the provisions relating to judgments were meagre. The reply of Sir James Stephen to his critics was that "it may appear meagre to those who take their notions of the Law of Evidence from works like Mr Taylor's; but that it contains everything which properly belongs to the subject. Its utter absence of arrangement and classification on every subject is the great reproach of the law of England..... It is of great importance to draw the line distinctly between what properly belongs to the subject (of Evidence) and what does not. It is for this reason that the sections about judgments are drawn in their present form, and that certain

topics connected with judgments which are often dealt with by writers on evidence, are omitted from the Bill" [Steph Speech on March 12, 1872]. For instance, the subject of res *judicata* properly belongs to procedure and the law is contained in the C P Code. S 40 touches the question only to this extent that it makes a previous judgment relevant in order that the adjective law or law of procedure may be given effect to by showing that the existence of a previous judgment is a bar to a second suit. "The only questions connected with judgments which do appear to me to form part of the Law of Evidence properly so called, are dealt with in ss 40-44, of the Bill. These sections provided for the cases in which the fact that a court has decided as to a given matter of fact relevant to the issue may be proved for the purpose of showing that the fact exists. This no doubt is a branch of the law of Evidence" [Steph Speech].

S 40 enacts that the existence of any judgment, order or decree which by the law, that is, by the provisions of the Civil Procedure Code or Criminal Procedure Code (*ie* judgments in support of a plea of *res judicata*, in civil case or of *autre fois acquit* or *autre fois convict*, in criminal cases, constitutes *res judicata*, that is, bars a second suit or trial is a relevant fact, and to have the effect, the judgment must be *inter partes*. S 40 has nothing to do beyond admissibility of the judgment. The question of *res judicata* is to be determined under the separate adjective law.

S 40 simply renders admissible judgments which operate as pleas in bar of the action of the kind as plea of *res judicata* or otherwise, under some other rule of law. That section has nothing to do with questions of evidence beyond the admissibility of the judgments, because a plea of *res judicata* is not a plea as a matter of evidence, but only a plea barring the action as a matter of procedure as distinguished from the rules of evidence [*Collr of Gorakhpur v. Palakdhari*, 12 A 1 FB *per* MAHMOOD J, p 44].

S 40 does not lay down that the judgment must prevent the court from taking cognizance of the entire suit as against all the parties. If the judgment prevents the court from taking cognizance of the suit so far as it relates to some of the parties thereto, then also s 40 would apply [*Bholanath v. Manmatha*, 45 CWN 420].

S 41 deals with what is usually called judgments *in rem*, that is, judgments which are conclusive not only against parties to them, but against all the world. The section does not however, give any definition of the term judgment *in rem*, but only enumerates four classes of judgments.

S 42 deals with the admissibility of judgments relating to matters of public nature, though not between the parties or privies, without making any distinction between the words *"public"* and *"general,"* which is sometimes made in England. But such judgments, orders or decrees are not conclusive proof of that which they state.

S 43 says that judgments other than those mentioned in ss 40-42 are irrelevant unless the *existence* of such judgments is a fact in issue or is relevant under some other provisions of the Act, *eg* under ss 8, 11, 13, 54 Expl (2) &c.

S 44 says that when any judgment, order or decree has been received under ss 40-42, the adverse party may show that it was obtained by fraud or was delivered by a court without jurisdiction. Judgments vitiated by fraud can therefore be challenged under s 44 without bringing a suit to set them aside.

As to the particular judgment which may be put in if admissible, when appeal is taken against a decree, the decree of the lower court gets merged in the decree of the appellate court and so the judgment of the trial court is not the final adjudication on the points in issue and cannot be referred to [*Benode Lal v. Secy of S*, 34 CWN 1113].

General Rules Applicable to Judgments.—There are certain general rules which apply to all judgments. They are:—

(*1*) All judgments are conclusive of their existence as distinguished from their truth. A judgment is a solemn transaction publicly recorded by the court and it affords conclusive proof of the fact that there was a litigation between some parties at a certain time which terminated in a certain way; but it does not make all the recitals in the judgment part of the evidence in the subsequent action [*Abdul Latiff v. Abdul Huq*, 28 CWN 62; *Kashinath v. Jagat*, 20 CWN 643]. If the object is to prove the *existence* of a judgment, its date or its *legal* consequences, its production is conclusive evidence of the facts against all the world, whether parties, representatives or strangers [*Abinash v. Paresh*, 9 CWN 402]. The judgment merely establishes the fact that there has been a judgment, but it does not prove its correctness [*Baidyanath v. Alifian*, 36 CLJ 9]. These and other cases have been cited and discussed in *Ram Kripal v. Munibati*, 1958 P 477. Judgment is admissible for proving the factum of previous suit and the circumstances in which it was decided [*Shyam v. Hira*, A 1972 HP 135]. So far as regards the truth of the matter decided, a judgment is not admissible against one who is a stranger to the suit [*Kesho v. Bahuria*, 41 CWN 577 : A 1937 PC 69 : 16 P 258. As to the objects for which judgments are admissible, see *post*, s 43]. In other words, the law attributes unerring verity to the *substantive*, as opposed to the *judicial* portions of the record. In the substantive portion, the court records or attests its own proceedings and acts. In the judicial portion, on the contrary, the court expresses its judgment or opinion on the matter in question, and in forming that opinion it is bound to have regard only to the evidence and arguments adduced before it by the respective parties. Such a judgment, therefore, with respect to any third person, who was neither a party nor privy to the proceeding in which it was *pronounced*, is only *res inter alios, judicata*; and hence the rule that it does not bind and is not in general, evidence, against any one who was not a party or privy [Tay s 1667; Phip 11th Ed, p 533; Best 11th Ed, s 590; Steph Art 40].

(2) All judgments are conclusive of their truth in favour of the judge. A judgment of a court of competent jurisdiction is conclusive for the purpose of protecting the judge who pronounced, and the officers who enforced it, when acting within the scope of their authority. The rule is founded on public policy [Tay ss 1669-72; Steph Art 45]. *Cf* Judicial Officers' Protection Act (18 of 1850).

(*3*) A domestic judgment *in rem* is in civil proceedings conclusive evidence for or against all persons, whether parties, privies or strangers, of the matters actually decided (Tay ss 1680-81). S 41 has reference to such judgments *in rem*. It confers conclusiveness on four classes of judgments, *viz*, those pronounced by a competent court in the exercise of probate, matrimonial, admirality or insolvency jurisdiction. These judgments affect the *status* of a person or thing and they are made conclusive for or against all the world on the principle that public policy requires that question of status should not be left in doubt. "It is an adjudication which not only declares the *status* of the person or thing adjudicated on, but actually renders the *status* of the person or thing such as it declares to be" [Tay ss 1672-75].

(*4*) A judgment in *personam* of a competent court is conclusive proof, in subsequent proceedings between the same parties or their privies, of the *matters actually decided*, as well as of the *grounds of the decision* where these can be clearly discovered from the judgment itself [Phip 11th Ed, p 549; Step Art 14; Best 11th Ed, ss 589-95]. Judgments in *personam*, though generally binding upon the parties and privies thereto, may be used as against third persons, for the purpose of proving conclusively against them, in the absence of fraud against them, the relationship

between the parties and of the extent of the relation, though the judgments cannot be used in favour of such third persons [*Abinash v. Paresh*, 9 CWN 402]. But see judgments in *personem* not *inter partes* are not at all admissible in evidence. The recitals in a judgment like findings given in appreciation of evidence made or arguments or genealogies referred to in the judgment would be wholly inadmissible in a case where neither the plaintiff nor the defendant were parties. [*State of Bihar v. Sri Radhakrishna Singh*, A 1983 SC 684, 714]. An exception to the rule that no one shall be affected by judgments to which he was not a party or privy, exists in favour of judgments upon matters of a *public nature*. But though such judgments are admissible they are not conclusive proof of that which they state. This rule is enacted in s 42.

(*5*) Judgments are never evidence of collateral matters. No judgment is evidence of the truth of any matter not *directly decided, or a necessary ground of the decision*; thus, it is never evidence of facts which merely came collaterally in question, or were incidentally cognizable, or can only be inferred by argument from the decision [Phip 11th Ed, p 537]. A judgment furnishes no proof whatever of collateral facts, even though, as between parties to such judgment themselves, such facts must have been proved [*per* GEIDT, J, in *Abinash v. Paresh, sup*].

(*6*) All judgments are impeachable on certain grounds, *eg*, that they were passed by courts *without jurisdiction* or that they were obtained by *fraud or collusion* (s 44). Judgment may also be impeached on the ground that they were not *final* or they are *not on merits* [Tay s 1718; Phip 11th Ed pp 535-537].

Relevancy of Previous Judgments to Bar a Second Suit or Trial.—This section simply declares that if the law (civil or criminal) gives to a judgment, order or decree, the effect of precluding the court from taking cognizance of or trying a subsequent cause, then such judgment, order or decree is a relevant fact. The object of the admissibility of previous judgment, order or decree is to enable the court to give effect to the adjective law or law of procedure on the subject. The section has nothing to do beyond the admissibility of judgments. The plea of *res judicata* belongs to the province of procedure. The section does not say that such judgment, order or decree would be conclusive, but it simply says that the existence of such judgment, etc, is only a relevant fact. The only cases in which a judgment is conclusive are those mentioned in s 41. S 40 applies to a case in which the court has jurisdiction to decide a matter and one party says that it should not do so because that matter has been decided before [*Lakhan v. Ramdas*, A 1929 C 374 FB: 118 IC 857]. The doctrine of *res judicata* rests upon the maxim *Nemo debet bis vexari pro una et eadem causa*—No man ought to be troubled twice for one and the same cause. The leading case on the point, is that of the *Duches of Kingston*, 2 Smith LC 680. Where the decree-holder obtains possession otherwise than by execution of the decree it amounts to satisfaction of the decree for possession and if the decree-holder is dispossessed thereafter he gets a fresh cause of action for filing a second suit on the basis of his dispossession [*Ramsarup v. Puran*, A 1971 P&H 106 (*Lakhrani v. Dhanraj*, A 1916 A 261 on appeal A 1916 A 163 folld)].

The judgments of courts in any trial are relevant for particular purposes and not otherwise within the contemplation of Ss. 40 to 43 of the Evidence Act. The judgments of Criminal Courts or the Findings supported by reasons are by themselves not binding on civil courts non would be conclusive of the facts of the involved therein for the purpose of determination of the similar facts in issue in a civil case which has to be gone into on evidence adduced before it to be independently decided. The rule is not that the judgment of the criminal court has

to be ignored altogether but it should not be relied as conclusive proof for deciding the disputes in a civil suit. Such judgments and findings of criminal courts although by themselves may not constitute the proof of the facts in issue in a civil case, they still holds the feild of proof by corroboration. The rule requires further elaboration within the true concept of the binding nature on persuasive nature of the decisions of a criminal court in civil cases. In view of the concept of proof beyond reasonable doubt of an offence in a criminal court, the acquittal of an accused may be for various reasons including a technical flaw and the benifit of doubt, whereas the conviction for an offence beyond reasonable doubt. In a civil case, the proof of a fact or fact in issue being one based on the probability would not be that stricter as in the case of proof of a offence beyond reasonable doubt. Therefore, broadly stated the acquittal of accused for an offence in a criminal case is not relevant or binding on the civil court whereas the conviction may be not only relevant but also has a stronger probative force of fact in issue in a civil court to record a finding not within the meaning of having force. [*Sardar Prahlad Singh v. Syed Ali Musa Raza*, 1997 AIHC 3122, 3133].

The conditions under which a former judgment, order or decree will prevent any civil or criminal court from taking cognizance of a suit or holding a trial, do not belong to the law of Evidence. They are contained in the Codes of Civil and Criminal Procedure, *viz*, ss 10-13; Or 2, r 2 of Act 5 of 1908: ss 298 and 300 of the Cr P Code of 1973.

The present section is evidently intended to refer to judgments *inter partes* and not to the judgments mentioned in s 41, for which no provision is made in the Code of Civil Procedure. In any case in which a question at issue is concluded by a previous judgment between the same parties, that judgment is admissible [see *Gujju Lall v. Futteh Lall*, 6 C 171 FB]. The present section does not apply to a case in which the court by which the judgment was given should not have tried the second suit. In such a case there is no *res judicata* and so the question may arise whether a judgment in a former suit between the same parties and relating to the same matter is, although not conclusive, admissible in evidence [Cunn p 112].

S 10 of the C P Code of 1908 provides, for stay of suit if the matter, in issue in the suit is also directly and substantially in issue in a previously instituted suit between the same parties or between parties under whom they or any of them, claim litigating under the same title, where such suit is pending in the same or any other court.

The next section which deals with the question of *res judicata* is s 11 of the C P Code of 1908.

S 13 of the C P Code of 1908 deals with the effect of foreign judgment, which shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or privies, litigating under the same title except in the cases specified in clauses (*a*), (*b*), (*c*), (*d*), (*e*) and (*f*) of the section.

Or 2, r 2, C P Code, 1908 provides that every suit shall include the whole of the plaintiff's claim, and if he omits to sue in respect of any portion of his claim, he shall not afterwards be entitled to sue in respect of the portion so claimed. The former judgments may therefore be relevant under s 40 of the Evidence Act for showing that the claim subsequently advanced forms part of a former claim, or that the remedy for which the plaintiff now sues is one for which the plaintiff might have sued in a former suit in respect of the same cause of action.

The same principle applies to criminal law. An accused person may under s 300 Cr P Code bar proceedings against himself by showing that he has been previously acquitted or convicted by a competent court on the same facts as those in respect of

which he is being prosecuted. The judgment of the court by which he was acquitted or convicted, would be relevant under s 40 of the Evidence Act [see Cunn 11th Intro p xxviii]. As to the mode of proving a previous conviction or acquittal see s 298 of the Cr P Code. See also ss 14 and 54 of the Ev Act.

The provisions as to the conclusiveness of an entry in the settlement officer's record are contained in s 17 of the Bombay Khoti Act (1 of 1880).

Res Judicata.—The object of *res judicata* belongs properly to procedure and is regulated by the provisions of the C P Code. S 11 CP Code is not exhaustive. The binding force of a judgment in a proceeding between the parties depends not upon s 11 but upon the general principles of law [*Kalipada v. Dwijapada*, 57 IA 24: 34 CWN 201: A 1930 PC 22; *Ram Kripal v. Rup Kumari*, 11 IA 37: 6 A 269]. A judgment, which is relied on by a party in a subsequent suit in support of the plea of *res judicata*, becomes relevant and can be read in evidence [*Ibne Hasan v. Smt Hasina Bibi*, A 1984 All 216, 219 : 1984 CJ 141 (A 1927 All 494 and A 1971 All 439 **overruled**)]. The previous judgments are relavant to bar a second suit or trial. In other words the earlier judgment operates as *res judicata* [*Nachhittar Singh v. Smt Jagir Kaur*, A 1986 Punj & Har 197, 199 : (1985) 288 Punj LR 593].

Though the rule of *res judicata* may be traced to an English source, it embodies a doctrine in no way opposed to the spirit of the law as expounded by the Hindu commentators. Vijnaneswara and Nilkanta include the plea of a former judgment among those allowed by law, each citing for this purpose the list of Katayana, which describes the plea thus: "If a person, though defeated at law, sue again, he should be answered. "You were defeated formerly'. This is called the plea of former judgment. And so the application of the rule by the courts in India should be influenced by no technical consideration of forms but by matter of substance within the limits allowed by law [*Sheoparsan v. Ramanandan*, 20 CWN 738: 43 C 694: 43 IA 91 : A 1916 PC 78; *Kalipada v. Dwijapada, sup*]. In Katyayana, *res judicata* is spoken of as *Purba Nyaya* or former judgment. The doctrine seems to have been recognized much earlier in Hindu jurisprudence judging from the fact that both the *Smritichandrika* and the *Virmitrodaya* base the defence of *Prag Nyaya* (former decision) on the following text of Harita who is said to have flourished in the 9th century BC: "The plaintiff should be non-suited if the defendant avers: 'In this very affair, there was litigation between him and myself previously' and it is found that plaintiff had lost the case." There are texts of Parasara and Mayukha to the same effect [*Lachhmi v. Bhulli*, 8 L 384 FB].

MAHMOOD, J, in *Sitaram v. Amir Begum*, 8 A 324, has clearly explained that the principles of the law of *res judicata* belong to the province of adjective law. In a very long and lucid judgment, he made the following observations:—

> "The plea of *res judicata*, as a bar to an action, belongs to the province of adjective law, but difference of opinion prevails among the jurists as to whether the rule belongs to the domain of procedure or constitutes a rule of the Law of Evidence as furnishing a ground of estoppel. In England and also in America, the rule is usually dealt with as belonging to the Law of Evidence, for, there, judgments in *personam* which operate as *res judicata*, are as often treated as falling under the category of estoppels by record. SIR FITZ JAMES STEPHEN, the distinguished jurist who framed the Indian Evidence Act, and whose views have been accepted by the Indian Legislature in framing this section of the Act, adopted, what seems to be, the only logical and juristic classification by treating the rule of *res judicata*, as falling beyond the proper region of the Law of Evidence, and as appertaining to procedure properly so called."

Although discussions on the subject of *res judicata* are beyond the proper regions of the Law of Evidence, yet the main features of the law of *res judicata* are explained below with reference to the leading cases. It should, however, be borne in mind that as an estoppel shuts out inquiry into the truth, it is necessary to see that the principle of *res judicata* is not unduly enlarged [*Raicharan v. Kumud*, 25 C 271: 2 CWN 297].

The doctrine of *res judicata* as embodied in s 11 of the C P Code is not exhaustive. The section does not cover all cases of estoppel by judgment [*Sayam v. Secy of S*, 36 M 141; *Peari v. Durlav*, 18 CWN 954]. The addition to s 11 by C P Code (Am) Act 104 of 1976 of Expl vii has made statutory *res judicata* applicable to execution proceedings in its full amplitude, and of Expln III has provided that the decision of a court of limited jurisdiction would operate as *res judicata* in a subsequent suit notwithstanding the lack of competence to try it. As to *res judicata*, see Sarkar's C P Code, 6th Ed. 1979.

Distinction Between *Res Judicata* and Estoppel.—The rule of estoppel is not a rule of substantive law, in the sense that it does not declare any immediate right of claim. It is a rule of evidence, but capable of having the greatest effect on the substantive rights of the parties. *Res judicata* ousts the jurisdiction of the court; while *estoppel* does no more than shut the mouth of a party. To put it colloquially and compendiously, *estoppel* never means anything more than that a person shall not be allowed to say one thing at one time and the opposite of it at another time; while *res judicata* means nothing more than that a person shall not be heard to say the same thing twice over in successive litigations [see *Cassamally v. Currembhoy*, 36 B 214 and *Bhaishankar v. Mororji*, 36 B 283]. The law of *res judicata* does not compel the court trying the latter suit to hold, without trial, that the decision in the earlier suit was correct; it merely estops the parties to the earlier suit and their privies from showing that it is incorrect. The Judge trying the latter suit must give effect to the decision, but he is not bound to hold that it is right [*Vabswara v. Muthukrishna*, 21 MLJ 57: 9 IC 686; *Kalicharan v. Sheobux*, 17 CLJ 93: 16 CWN 783]. A plea of estoppel by *res judicata* can prevail even where the result of giving effect to it will be to sanction what is illegal in the sense of being prohibited by statute [*Chagan v. Bai Harkha*, 33 B 479 : 11 Bom LR 345; *Basangouda v. Basalingappa*, A 1936 B 301]. It has been pointed out in a later case that in neither of the two cases *supra* was there any question of the court itself being held bound to take any action contrary to the express words of a statute [*Bai Suraj v. Haribhai*, A 1943 B 54; see *post*, s 115: "*Principle of Estoppel cannot override the provisions of a statute*"].

—Conditions Necessary to Constitute *Res Judicata*.—(*1*) The matter which the court is forbidden to try under s 11 C P Code must have been heard and decided in the former *suit* as distinguished from a proceeding or application. (*2*) Not only is the court forbidden to try a suit but also an *issue* in a suit which has been heard and decided in a former suit. (*3*) The matter in the subsequent suit was directly and substantially or constructively in issue in the former suit. (*4*) There must be identity of parties in both the suits. (*5*) The parties in the subsequent suit have litigated under the same title in the former suit. (*6*) The court which decided the former suit was competent to try the subsequent suit with reference to the value and the subject-matter. (*7*) The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided in the former suit.

To give effect to the plea of *res judicata*, the court must be satisfied that the ground of legal right on which the plaintiff sues was a point raised and opened for a decision and that it was finally dealt with by the judgment and decree therein [*Udaiya v. Katama*, 2 Mad HC 131; **affirmed** in 10 WR 1 PC; see also *Amriteswari*

v. Secy of S, 24 IA 33: 24 C 504: 1 CWN 249; *Parsotam v. Narbada*, 26 IA 175: 21 A 505; *Dhani Ram v. Bhagirathi*, 22 C 692; *Sheosagar v. Sitaram*, 24 IA 50: 1 CWN 297: 24 C 616; *Bhagwati v. Ranikali*, 66 IA 145: A 1939 PC 133: 43 CWN 67]. On the subject of *res judicata* see Sarkar's C P Code, 6th Ed. 1979.

—***Ex parte* Decree.**—Where an issue was raised and finally decided the rule of *res judicata* applies, though the decree was *ex parte* [*Hara Ch v. Bepin*, 13 CLJ 38; *Gauhar v. Samiruddin*, 18 CWN 33]. In the absence of fraud or irregularity a decree obtained *ex parte* is binding for all purposes as a contested decree [*Beer Ch v. Hurrish*, 3 C 383; *Raj Kumar v. Alimuddi*, 17 CWN 627; *Hiranmoy v. Ramjan*, 20 CWN 48; *Lala Gobind v. Baldeo*, 226 PLR 1914: *Rajwant v. Ram Ratan*, 42 IA 171: 20 CWN 35: 37 A 485: A 1915 PC 99; *Madhu Manjaree v. Jhumar*, 1 CWN 120; *Motilal v. Nripendra*, 2 CWN 172; *Atarennessa v. Golabdi*, 14 CWN 100*n*].

—Decision in Rent Suits.—A decision in a rent suit by the landlord against his tenant for rent in arrears, is not, *res judicata* in a subsequent suit by the same plaintiff for establishment of title, not only against the tenant but also against the person whose title as landlord the tenant-defendant had set up in the previous suit [*Dwarka v. Ram Chand*, 26 C 428 FB : 3 CWN 266. See also *Nittyanund v. Ram Narain*, 6 CWN 66: *Md Afsaruddin v. Beer Ch*, 8 C 470; *Ran Bahadur v. Luchho Koer*, 11 C 301: 12 IA 23; *Harihar v. Karamat*, 9 CLJ 493: *Srihari v. Kshitish*, 24 C 569; *Khatar v. Sadaraddi*, 34 C 922]. It is not *res judicata* if the question of title is decided incidentally [*Durgapada v. Manindra*, 63 IC 762; *Mani Md v. Dhane Md*, 17 CWN 76: *Prabhu v. Sundar*, 16 CLJ 41; *Sonaullah v. Durga Kanta*, 50 IC 598]. But where the question of title was directly and substantially in issue the question is *res judicata* [*Panchu v. Chandra*, 14 CLJ 220; *Sreenath v. Kaser*, 18 CWN 116 : *Parbati v. Mathura*, 16 CWN 877 : 40 C 29; *Gobind v. Taruck*, 3 C 145 FB: *Radha Madhab v. Monohar*, 15 IA 97: 15 C 756; *Kasiswar v. Mohendra*, 25 C 136; *Sahadeb v. Ram Rudra*, 10 CWN 820].

Decree in a previous rent suit for a certain sum claimed for a certain period, which did not decide the question or rate or rent is not *res judicata* in a subsequent suit [*Manindra v. Upendra*, 36 C 604 : 9 CLJ 343, see also *Madhusudan v. Brae*, 16 C 300 FB]. *Ex parte* decree for rent in which no issue was raised as to rate of rent is not *res judicata* [*Nafar v. Bhusi*, 65 IC 581(C); see also *Jatindra v. Sambhu*, 4 CWN 43; *Ayyaperummal v. Ramaswami*, 29 MLJ 326; *Beni Pd v. Rajkumar*, 6 CWN 589; *Kali Ray v. Pratap*, 5 CLJ 92 (*Ghaneshyam v. Padmanand*, 9 CWN 610: 82 C 336 **dissented** from); *Kishun v. Kalpati*, 3 PLJ 372: 45 IC 316. See however *Sowcar v. Polegar*, 82 IC 990: A 1925 M 378); *Shib Ch v. Latchi Priya*, 29 CWN 253]. In suits for rent, the causes of action for successive periods are different and in order to apply the doctrine of *res judicata* it must be shown that the question of right or liability not merely for the period in the previous suit but for all times or once for all was directly and substantially in issue and was tried and determined [*Gnanada v. Nalini*, 30 CWN 593].

***Res judicata* Between Co-defendants, *Pro forma* Defendants and Co-plaintiffs.** —A judgment in a previous suit is not *res judicata* as between co-defendants, unless there was conflict of interest between them and the judgment determines the real rights and obligations of the defendants *inter se*. Such previous judgment is not *res judicata* when the plaintiff in the subsequent suit was only a nominal party in the prior suit [*Balambhat v. Narayanbhat*, 25 B 74; *Saroda v. Kailash Bashini*, 17 CWN 128; *Zemindar v. Prop of Kolanka*, 2 M 23: 5 IA 260; *Jumma v. Kumaranissa*, 3 A 152; *Dhian v. Bilaskuar*, 42 Pr 1912; *Chittar Mal v. Ram Narain*, 12 ALJ 603; *Bhagwant v. Tejkuar*, 8 A 91; *Ramaniya v. Narayana*, 18 M 374; *Ram Ch v.*

Narayan, 11 B 216; *Govind v. Sri Govind*, 24 C 330; *Bapa v. Bhawani*, 22 B 245; *Nazir Khan v. Mangili*, 231 PLR 1912; *Mir Khan v. Rahman*, 33 PLR 1914; *Chajju v. Umrao*, 22 A 386; *Magniram v. Mehdi*, 31 C 95: 8 CWN 30; *Yusuf v. Durgi*, 30 M 447; *Kandiyil v. Zamorin*, 29 M 515; *Gurdeo v. Chandrikah*, 36 C 193: 5 CLJ 611; *Aghore v. Kamini*, 11 CLJ 461]. There must be (*1*) a conflict of interest between the co-defendants; (2) the necessity to decide the conflict in order to give the plaintiff appropriate relief: (*3*) the co-defendants must be necessary parties and (*4*) a final decision in the question [*Iftikhar Ahmed v. Meharban*, A 1974 SC 749; *Munni v. Triloke*, 35 CWN 661: A 1931 PC 114: 58 IA 158; *Chandulal v. Khalilar*, 1942, 2 Cal 229: 46 CWN 729: A 1943 C 76; see further Sarkar's C P Code, 6th Ed 1979].

—Plea of *Res judicata* How to be Determined.—In order to determine a plea of *res judicata*, the judgment must be looked at for the purpose of finding out whether a matter was directly and substantially in issue in the previous suit and whether it was actually decided in that suit. Decree is usually insufficient to show what was really heard and finally decided [*Kali Kr v. Secy of S*, 16 C 173 : 15 IA 186; *Magniram v. Mehdi*, 31 C 95: 8 CWN 30; *Sri Raja Rau Lakshmi v. Inuganti*, 25 IA 102: 2 CWN 337: 21 M 344; *Niamut v. Phadu*, 6 C 319; *Shib Charan v. Raghunath*, 17 A 174; *Jagatjit v. Sarabjit*, 18 IA 165; 19 C 159; *Bhikabhai v. Bai Bhuri*, 27 B 418; *Ranjit Singh v. Basanta*, 12 CWN 739; *Panchu v. Chandrakanta*, 14 CLJ 220]. The judgment or order of the magistrate under s 145 Cr PC does not operate as *res judicata* between the parties [*Niranjan v. Kasturi*, A 1971 P&H 4 (*Bhinka v. Charan*, A 1959 SC 960 **folld**)].

Applicability of This Section to Criminal Cases.—The principle of *res judicata* applies to criminal proceedings. It is different from the principle of *autrefois acquit* or double jeopardy as embodied in s 300 of Cr P Code. Where an issue of fact has been decided by a competent court and a finding has been reached in favour of an accused, it would constitute a *res judicata* against the prosecution, not as a bar to the trial and conviction of the accused for a different or distinct offence, but as precluding the reception of evidence to disturb the finding of fact in issue, provided, however, (*1*) that the parties are the same and (2) the fact in issue proved or not is identical with what is sought to be reagitated in subsequent trail [*Sambasivam v. P P*, 1950 AC 458: 54 CWN 695 PC; *Pritam Singh v. S*, A 1956 SC 415; *Manipur Admn v. Bira Singh*, A 1965 SC 87; *Piara v. S*, A 1969 SC 961; *Mohar v. S*, A 1968 SC 1281]. The effect of acquittal on a lawful charge is not only that the person acquitted cannot be tried again for the same offence but that the verdict is binding and conclusive in all subsequent proceedings between the parties. The maxim "*res judicata pro veritate accipitur*" is no less applicable to criminal than to civil proceedings [*Sambasivam v. P P*, 1950 AC 458: 54 CWN 695 PC]. Where there has been acquittal, the guilt of the accused in respect of the offence of which he was acquitted is not open to further question or discussion; and it would indeed be a very dangerous principle to adopt, to regard a judgment of not guilty as not fully establishing the innocence of the person to whom it relates [*R v. Lalit & Ors*, 38 C 559, 578 : 15 CWN 593; *Kader Sundar v. R*, 16 CWN 69; *Goloke v. R*, A 1938 C 51, 70: 42 CWN 129].

As to the mode of proving an acquittal and conviction, see s 298 Cr P Code.

As to the admissibility of judgments of criminal courts in civil cases and *vice versa*, see notes to s 43.

Foreign Judgment.—As to the conclusiveness of foreign judgments see s 13 of the C P Code and the following cases: *Balaram v. Kamini*, 4 WR 108; *Shreehuree v. Gopal*, 15 WR 500; *Kassim v. Isuf*, 29 C 509: 6 CWN 829; *Gudaru v. Moradugulu*,

30 M 292; *Ramanathan v. Kalimathu*, 37 M 163; *Sama v. Annamalai*, 7 M 164; *Collr of M v. Harbans*, 21 A 17; *Gurdayal v. Raja of Faridkot*, 22 C 222: 21 IA 171; *Moazzim v. Raphael*, 28 C 641; *Srinivasa v. Venkata Varada*, 28 M 238; *Ingenopl, v. Wing O and Co Ltd.*, A 1928 PC 82.

As to the relevancy of judgments not inter partes, see notes to s 13 *ante*.

Evidence of Acquittals.—To what extent acquittals in other cases arising out of the same set of facts was in question in [*Hui Chi-ming v. R*, (1991) 3 All ER 897]. The prosecution case was that a man called Ah Po organised a gang to go out with him to find a particular person and to kill him on to inflict serious injury on him. The gang killed another man under mistaken identity. Ah Po was tried for murder. He was acquitted of murder but convicted of manslaughter. Later his companion, the appellant in this case, was tried for murder. The prosecution case was that he joined the gang with knowledge of its aim. He cited the evidence of the acquittal of the gang leader on murder charge. The trial judge excluded the evidence and the Privy Council upheld his decision. Lord Lowry was of the view that the acquittal in the earlier case was nothing but an opinion (of the jury) on the facts in that particular case and cannot be used to influence decision on facts in other trials. He cited *Hollington v. F Hewthorn & Co Ltd*, [1943] 2 All ER 35 where the irrelevance of the outcome of earlier trials was emphasised.

This decision has been criticised on the ground that relevance is a matter of logic and common sense. Evidence is relevant to an issue of fact if it can lead to an inference concerning the existence or non-existence of the facts in question. Irrelevant facts are excluded not because of some legal rule but because they are of no use. [*See All ER Annual Review*, 1991, p 169].

In [*R v. Hay*, (1983) 77 Cr App R 70], the accused made one confession about two unrelated offences of arson and burglary. He was tried first on an arson charge but was acquitted. At his subsequent burglary trial, the accused sought to adduce evidence of his earlier acquittal, but the trial judge refused permission. On appeal it was held that his earlier acquittal should have been allowed to be proved because it went to show that his confession was untrue. The evidence had a bearing on the credibility of the police officers who obtained the confession of the accused.

In [*R v. Cooke*, (1986) 84 Cr App R 286], *A*, *B* and *C* were alleged to have made admissions to the same constable. *B* and *C* were tried for robbery and acquitted. Later, *A* was tried for robbery and convicted. His conviction was quashed on appeal because the trial judge wrongly excluded the evidence of the acquittal of *B* and *C*. Here also the evidence of acquittal reflected the credibility of the constable who obtained the confession.

It appears that some exceptional feature is needed before it will be considered relevant to give evidence of what happened in earlier cases arising out of the same transaction. A more reasoned approach is provided by the decision in [*R v. Edwards*, (1991) 2 All ER 266]. The accused was charged with robbery. The prosecution produced evidence of his confession to the police about which the accused said that it was fabricated by the two police officers concerned. It was held that the defence should have been given the opportunity, as they demanded, to cross-examine the two police officers as to the earlier cases in which also there were allegations of fabricated confessions resulting in acquittals. For another case on the same subject matter see [*R v. H (Joseph Robert)*, (1990) 90 Cr App R 440 CA].

Evidence of Convictions.—The conviction of a co-accused is admissible if it is relevant to one of the evidential issues of the case. In [*R v. Grey*, (1989) 88 Cr App R 375 CA], *A*, *B* and *C* were charged with burglary. *A* pleaded guilty. At the trial of *B* and *C* the occupier of premises gave evidence of seeing one white and two coloured youths near the house at 2 p.m. A neighbour gave evidence of seeing three similar youths carrying bags at the house at 3.45 p.m. who ran away on being challenged. Three youths of similar description were arrested at 4 p.m. The trial judge allowed the crown to put in *A*'s plea of guilty and evidence of *A*'s shoe-print in the house. There was a strong circumstantial case for linking *A* with *B* and *C*. It was held that whether or not the three originally seen in the garden were the same as those arrested later, the fact that one of them was proved by his plea to be one of the burglars was plainly relevant to the issue of whether or not the other two were involved.

Such evidence is, however, admissible as showing the background and circumstances but not as proof of guilt. [*R v. Mattison,* 1990 Crim LR 117 CA]. Even as such it becomes useful on occasions. Certain persons including C and F were charged with robbery. A witness identified *C* at a parade and possibly *F* also. *F* pleaded guilty. These two facts taken together left no doubt about *C* and *F* as participants making *F*'s guilty plea relevant against *C*. [*R v. Castle*, 1989 Crim LR 567 CA].

S. *41. Relevancy of certain judgments in probate, etc., jurisdiction.—A final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant.

Such judgment, order or decree is conclusive proof—

that any legal character which it confers, accrued at the time when such judgment, order or decree came into operation;

that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment, [1][order or decree] declares it to have accrued to that person;

that any legal character which it takes away from any such person ceased at the time from which such judgment, [1][order or decree] declared that it had ceased or should cease;

and that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, [1][order or decree] declares that it had been or should be his property.

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* In Ceyloan paras 1 & 2 of the section have been numbered as sub-secs. (1) & (2) respectively and the remaining four paras have been designated (*a*), (*b*), (*c*) and (*d*) respectively.

1. Inserted by s. 3 of the Indian Evidence Act, (Am) Act 18 of 1872.

SYNOPSIS

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COMMENTARY

Principle and Scope. [Judgments in *rem*].— Ordinarily a judgment binds only the parties to it. It is known as a judgment in *personam*. The judgments for which provision is made in this section are usually called judgments *in rem*, a phrase which denotes certain judgments which are conclusive not only against the parties to them but also against all the world. A judgment *in rem* is not defined in the Act. It is defined by Bower as one "which declares, defines or otherwise determines the status of a person, or of a thing, that is to say, the jural relation of the person or thing, to the world generally" (Spencer Bower on *Res Judicata*, 1st Ed p 132). In cases before the passing of the Evidence Act there was a tendency to regard decisions by competent courts on legitimacy, adoption and like matters as judgments *in rem* binding on strangers. The subject was ably discussed by HOLLOWAY J, in *Yarakalamma v. Anakala*, 2 Mad HCR 276, where the history of judgment *in rem* is fully discussed. He summed up thus:—"The result seems to be that the rule which makes a judgment conclusive only against the parties and those who claim under them is subject to certain exceptions which are the offspring of positive law, and the reasons for the exception may be generally stated to be both in English and Roman law that the nature of the proceedings, by which there is a fictitious, though generally not unjust extension of parties, renders it proper to use the judgment against those not formally parties." This case was **followed** in *Kanhyalal v. Radha Churn*, 7 WR 338: BLR Sup Vol 662 FB and the other leading cases are *Jogendra v. Fanindra*, 14 MIA 367: 11 BLR 244; *Amedbhoy v. Vullebhoy*, 6 B 703; *Katama Nachiar v. Raja of Shivagunga*, 9 MIA 539.

This section is based upon the judgment of PEACOCK CJ, in *Kanhyalal v. Radha Churn, sup*. "For the sake of simplicity, and in order to avoid the difficulty of defining or enumerating judgments *in rem* we have adopted the statement of law by SIR BARNES PEACOCK in *Kanhyalal v. Radha Churn*, 7 WR 338." [See the Report of the Select Committee in the Gazette of India, 1st July 1871, Part V p 273]. Only the four classes of judgments mentioned in this section, *viz* the final judgments of Courts of Probate, Matrimony, Admiralty and Insolvency are conclusive against the world as judgment *in rem*. The principle of the conclusiveness of judgment *in rem* as regards *persons* is, that public policy for the peace of society requires that matters of social status should not be left in continual doubt (Tay s 1676).

A judgment *in rem* has been defined to be "an adjudication pronounced, as its name indeed denotes, upon the *status* of some particular subject-matter, by a tribunal having competent authority for that purpose." In general, therefore, a judgment *in rem* furnishes *conclusive* proof of the facts adjudicated, as well against *strangers* as against parties; but this rule does not extend either to criminal convictions which are subject to the same rules of evidence as ordinary judgments *inter partes*. Inquisitions in lunacy, inquisitions *post mortem*, or other inquisitions, which though regarded as judgments *in rem*, so far as to be admissible in evidence of the facts determined against all mankind, are considered as not exclusive evidence [Tay s 1674]. Though, for the reasons just given, the above definition of a judgment *in rem cannot* be considered perfect, yet it would be extremely difficult, if not impossible, to enunciate any other, which would be open to fewer objections (Tay s 1675). See the list of judgments *in rem* given in Taylor 11th Ed pp 1138-39. Commentary referred to in *Sriram v. Prabhudayal*, A 1972 Raj 180, 184.

Although an order adjudicating a person as insolvent is a judgment *in rem*, it is conclusive only as regards the statuts but not as regards the grounds on which the order is based. Hence the finding on which it is based is not binding on third parties in subsequent proceedings [*Radha Kishan v. Gangabai*, A 1928 S 121 (*Ballantyne & Co v. Mackinnon*, 65 LJQB 616 **relied** on); *Sahasrabudhe v. Kilachand*, A 1947 N 161; *In re Advocate*, 54 M 601; *Sukuma Dhibar v. Smt. Anjali Dasi*, (1983) 2 DMC 260 : 1983 Cri LJ 36, 38 (Calcutta)]. Though it be necessary as a step to making a declaration, which will operate *in rem* to find a fact, that finding will not bind third parties in subsequent proceedings [*In re Venkataramanayya*, A 1931 M 441: 54 M 601 SB (*Kanhya v. Radha*, 7 WR 338, 343 **folld**)]. A judgment in a suit under s 92 C P Code binds the entire world [*Surajgir v. Brahma*, A 1946 A 148, 149: *Hassannullah v. R M T Bd*, A 1948 M 134; see however *Anjuman v. Latafat*, A 1950 A 109]. Previous judgments based on *razinamah* cannot be said to be a judgment *in rem* and could be no bar to a subsequent suit. None of ss 41, 42 or 43 would be applicable. S 41 is exhaustive and embodies the law relating to judgments *in rem* in India [*Rahmat v. Babu Zahra*, 14 PR 1912: 14 IC 486]. A right to recover a debt (in insolvency) or a chose in action be deemed to be a *'specific thing'* [*In re Venkataramanayya*, 54 M 601 SB]. A decision rendered in proceeding arising out of a creditor's suit cannot be brought under s 41 [*Gopalkrishna v. Subbaraya* A 1972 M 269]. Where the foreign judgment of divorce by mutual consent was pronounced by a court of competent jurisdiction and the grounds of divorce were not opposed to public policy in India presumption of conclusiveness is available to the parties. [*Raj Andre Sales de Andrade v. State of Goa*, 1996 AIHC 99 (Bom)].

"Final Judgment etc."—'Final' means the judgment, order or decree of such a court by which the grant is actually issued. An order merely stating that letters of administration are granted on condition that applicant executes the usual bond is not final [*Harilal v. Sarat*, 43 CWN 824; *Satya v. Hrishikesh*, A 1959 C 795].

"Competent Court." *ie*, a court having jurisdiction over the parties and subject-matter [*Satya v. Teja*, A 1975 SC 105]. It is only under sections 41 and 42 when the judgment is relevant that even a third party can show that the same was delivered by a Court not competent to deliver it or that it was obtained by a fraud or collusion. [*Nachhittar Singh v. Smt. Jagir Kaur*, A 1986 Punj & Har 197, 199 ; (1985) 288 Punj LR 593]. Court in s 41 is not restricted to a court of this country, but includes a foreign court provided it is competent to pronounce a judgment such as is contemplated by the section [*Messa v. M*, A 1938 B 394: 1938 Bom 529; *Chanmalappa v. Abdul Wahed*, 35 B 139, 145; *Viswanathan v. Abdul Wajid*, A 1963 SC 1; *Satya v. Teja, sup*]. A judgment of the British Indian Association not filed in the court of the

Financial Commissioner within six months of the passing of the Oudh Estates Act cannot be treated as a decision of a competent court and is not relevant under ss 40-43 [*Md Asad v. Sadiq*, A 1943 O 91].

"Legal Character".—Means something equivalent to status, The legal character assigned to a person announces to all the world what the legal status of the person in question is. The term must be narrowly construed, for it must be remembered that an action *in rem* is not an action against a thing but an action availing against all the world [*In re Venkataramanayya*, 54 M 601 SB; *Sriram v. Prabhudayal*, A 1972 Raj 180]. A declaration of a legal right is a different thing from a declaration of a legal character. The word "character" means status; it is some thing more than a mere right. The declaration of a person's right operates as against a particular person or a group of persons against whom the right is claimed, whereas a man's status is some thing which defines his position not in relation to any particular person or group of persons but in relation to the rest of the world. To say that a person is not a partner of a firm is not to declare his status or legal character, it is merely to declare his position with respect to the particular firm [*Punjab N Bank v. Balikram*, A 1940 C 225: 190 IC 537]. The status of a person means his "personal legal condition" to the exclusion of his "proprietory relation". An adjudication of adoption will in law amount to a declaration of status; but the claim to succession is not a matter of status in this sense [*Duggamma v. Ganeshayya*, A 1965 Mys 97].

When is a Judgment Conclusive.—A judgment *in rem* is not conclusive if it relates to a matter which need not have been controverted or which was not material or which came collaterally into question or which was only incidentally cognizable. The principle is that in order to be a judgment *in rem* binding on the world, there must be a finding on status which is not only the foundation of the judgment but necessary for it [*Messa v. M, sup*; discussed in *Re Antonius Raab*, A 1950 B 101].

Probate Jurisdiction.—The courts exercise testamentary and intestate jurisdiction under the Succession Act (39 of 1925 Part IX).

Effect of Probate and Letters of Administration.—The probate granted by a competent court is conclusive of the validity and contents of such will and the appointment of executor, until it is revoked, and no evidence can be admitted to impeach it, except in proceedings in the Probate Division, for its revocation [*Allen v. Dundas*, 1789, 3 TR 125; *Daropti v. Santi*, A 1929 L 483; *Babulal v. Haribaksh*, 13 PR 1918; *Venkataratnam v. Ram Mohana*, 31 MLJ 277; *Kishore Bai v. Ranchhodia*, 38 B 427; *Harmusjee v. Bai Bhanbaijee*, 12 B 164; *Hemangini v. Sarat*, 34 CLJ 457; *Rallabundy v. Yanamandra*, 79 IC 44: A 1924 M 578]. A judgment in probate proceedings regarding the genuineness of a will or its due execution and attestation is a judgment *in rem* [*Saroda v. Govind*, 12 CLJ 91, 97: 6 IC 912: *Ramani v. Kumud*, 7 IC 126; *Phenki v. Manki*, A 1930 P 618; *Surinder v. Gian*, A 1957 SC 875; *Schultz v. S*, 1853, 10 Guttan 358]. Letters of administration granted on the basis of will by High Court of Birmingham conclusively proved execution of the will and could not be reopened in civil court [*Darshan v. Kuldip*, A 1979 P&H 250]. The grant of a probate operates as a judgment *in rem* and would be binding on all persons including one whose intervention by *filing* a *caveat* was refused on the ground of want of *locus standi*. He can, however, maintain an appeal from the order [*Malati v. Dhanapati*, A 1964 C 41; *Nabin v. Nibaran*, A 1932 C 734]. The title conferred on the executor by the will and the probate which is relevant evidence under s 41 is given effect to by s 228 Succession Act [*Blackwood & Sons Ld, v. Parasuraman*, A 1959 M 410].

The judgment in a proceeding under the Guardian and Wards Act on the question of the genuineness of a will is not *res judicata* in an investigation in the probate court

as to the *factum* of the will propounded in the court [*Chinnasami v. Hariharabhadra*, 16 M 380]. So a decision as to the proof of a will given by a civil court can in no circumstances operate as *res judicata* in proceedings taken in probate court regarding the will [*Jerbanoo v. Pootamai*, A 1955 B 447].

A finding not essential to the judgment in a probate action does not operate as a finding *in rem*; but all that is essential to the decision that the executor was entitled to the probate must be taken to have been conclusively determined and therefore probate is the conclusive proof of the due execution of the will [*Chandreshwar v. Bisheshwar*, 5 P 77: A 1927 P 61]. A decree of the court of probate granting probate and declaring the domicile of the testator, is not, as judgment *in rem*, conclusive as to domicile, unless the declaration was essential to the grant [*Concha v. C*, LR 11 App Cas 541]. The grant of probate is the decree of a court which no other court can set aside except for fraud or want of jurisdiction [*Kamallochun v. Nilrutton*, 4 C 360; see also *In re Nilmony*, 6 C 429 and *Mayho v. Williams*, 2 NWP 268].

"Probate of a will," it was said in the House of Lords, is also conclusive evidence that it was executed in due form according to the law of the country where the testator was domiciled at the time of his death [*Whicker v. Hume*, 1858, 7 HLC 124]. The grant of a probate by a foreign court and its subsequent revocation by that court is not a judgment *in rem* and a court in India can still hold that the will left is true [*Fatmakani v. Shk Dawood*, A 1936 M 197].

Where a question of relationship of parties has been decided in a previous probate proceeding, a subsequent suit between the same parties involving the same question is barred [*Dwijapada v. Kalipada*, A 1927 C 421: 31 CWN 898; **affirmed** in *Kalipada v. Dwijapada*, 57 IA 24: 34 CWN 201: A 1930 PC 22; *Shiv Narain v. Mst Raji*, A 1982 Raj 119, 123]. An order granting letters of administration to a person is conclusive proof of the representative title of the grantee against all debtors of the deceased and all persons holding property which belonged to the deceased [*Jagannath v. Ranjit*, 25 C 354]. But it does not operate so as to preclude the starting of criminal proceedings on a matter appearing in the case but which was not in issue in the proceedings relating to letters of administration [*Mali Muthu v. R*, 4 R 251: 97 IC 1054].

In an application for probate the only question for determination is whether the will is genuine or not and it is not the province of the court to determine any question of title, with reference to the property covered by the will [*Arunmoyee v. Mohendra*, 20 C 888 see also *Behary v. Jogomohun*, 4 C 1; *Ochwaram, v. Dolutram*, 28 B 664; 6 Bom LR 966; *Birajnath v. Chunder*, 19 A 458]. From a refusal to grant probate, it does not follow that the will was found not to be genuine. A finding that, on the evidence on the record, the due execution of a will had not been proved, should not be treated as a final decision upon the genuineness or otherwise of the will and will not preclude a fresh application on the part of the executors, when they are in a position to support it with more complete proof [*Gunesh v. Ram Ch*, 21 B 563]. The court refused probate to executors on the ground that the testator was not of a sound disposing mind. The testator's widow then filed a regular suit against the executors *de son tort* for recovery of possession and the will was again set up in defence—*Held* that s 41 was not applicable to the judgment of the probate court, and that the judgment operated as *res judicata* [*Kalyan v. Sitabai*, 38 B 309 FB: 23 IC 325].

This section applies to probates granted prior to the passing to the Hindu Wills Act as well as to those granted after it [*Girish v. Broughton*, 14 C 861]. The Recorder's court has the same powers in respect to the grant of probates to the estates as the High Court, before and after the passing of the Indian Succession Act. It cannot grant

administration to the estate of a Hindu, Mahomedan or Buddhist which would interfere with their laws of inheritance and succession [*In re Fackeroodeen*, 1 WR 413].

Letters of administration, with a copy of the will annexed, may be equivalent to probate, but neither is of itself sufficient to prove a will, the genuineness of which is contested [*Teen Couree v. Hureehur*, 8 WR 308]. Judgment of the probate court is inadmissible in evidence in a proceeding under s 193 I P Code for perjury committed in the testamentary suit [*Oates v. R*, 38 CLJ 163]. On the question of truth, validity, genuineness and due execution of a will, the decision of the probate court is a judgment in rem. The decision of the ordinary, civil court, dealing with the same issue, would not constitute judgment in rem. [*Alagammai v. Rakkammal*, A 1992 Mad 136, 138].

Secondary Evidence of Probate.—Parol evidence and even evidence of conduct is admissible to prove grant of probate when the document is lost, destroyed or cannot be produced [*Satya v. Hirishikesh*, A 1959 C 795: 63 CWN 615].

Guardianship Proceeding.—Order passed in guardianship proceedings is not judgment *in rem*. It may be admissible only to prove that an order had in fact been made, but not to prove its contents [*Muktipada v. Akelma*, A 1950 C 533]. Decision under Guardian and Wards Act as to age is not a judgment *in rem* [*Husaina v. Sahib*, 7 IC 506]. An order appointing a guardian under the Guardian and Wards Act does not come under ss 40, 41 and 42 [*Venkata v. Akkappa*, A 1941 M 569]. When the father was not a party to the guardianship proceedings, the orders passed in those proceedings are inadmisible under s 41 [*Manicka v. Amma Kannu*, A 1942 M 129].

Matrimonial Jurisdiction.—The civil courts, other than the High Court exercise matrimonial jurisdiction under the provisions of the following acts:—*viz* (*a*) Indian Divorce Act (4 of 1869) relating to the divorce of persons professing the Christian religion; (*b*) Indian Christian Marriage Act (15 of 1872); (*c*) Parsi Marriage and Divorce Act (3 of 1936); (*d*) Convert's Marriage Dissolution Act (21 of 1866); (*e*) Dissolution of Muslim Marriage Act (8 of 1939); (*f*) Special Marriage Act (43 of 1954); Hindu Marriage Act (25 of 1955). As to the matrimonial jurisdiction of the High Courts, see Letters Patent, 1865 Cl 35.

A valid marriage causes the relationship of husband and wife to exist, not only as between the parties to it, but also as respects all the world; a valid dissolution of a marriage, whether it be by the act of the husband, as in the case of repudiation by a Mahomedan husband, or by the act of a court competent to dissolve it, causes that relationship to cease as regards the whole world [*Kanhya v. Radha*, 7 WR 338]. A judgment of a court given in the exercise of matrimonial jurisdiction (under the Hindu Marriage Act, 1955) falls under s 41 and would be conclusive against the whole world [*Siddaiah v. Penchalamma*, A 1963 AP 158; *Suhas v. Manmohan*, A 1971 B 183]. In divorce proceedings a finding against the petitioner or respondent in a previous suit, may be given in evidence, though between different parties [*Ruck v. Ruck*, 1896 P 152 : 65 LJP 87]. Sentences concerning marriage and divorce when pronounced in the country where the parties are *bona fide* domiciled, will be regarded in the courts of England as conclusive facts adjudicated, otherwise the rights of mankind would be very precarious [*Roach v. Graven*, 1748, 1 Ves Sen 159. See also *Sinclair v. Sinclair*, 1798, 1 Hagg Cons 297; *Shaw v. Gould*, 1868, 37 LJ Ch 433 (HL)].

A decree for dissolution or for nullity of marriage by a competent court being a judgment affecting status is a judgment *in rem* [see *Salvesen v. Administrator &c*,

1927 AC 61 : 137 LT 571; Hals Simond's Ed Vol 7 p 117; *Iravva v. Shivappa Shiddalingappa Angadi*, A 1987 Kant 241, 244 : I LR (1987) Kant 1955]. Decree dissolving marriage under Madras Act, 6 of 1949 is a judgment *in rem* [*Sunanda v. Subbarao*, A 1957 AP 424]. The judgment in matrimonial case for restitution of conjugal rights, though not a judgment in rem, is binding the parties in personam and admissible without further proof. [*Sangawwa v. Shankarappa*, A 1992 Kant 211, 215]. A decree by a High Court confirming a decree of nullity of marriage is a final decree and it is under s 41 conclusive proof that the woman's previous marriage was a nullity [*Caston v. Caston*, 22 A 270. A decree of divorce obtained by the husband in a foreign court by fraud or by making a false representation as to a jurisdictional fact will not be valid and binding on a proceedings for maintenance under s 488 (now s 125) Cr PC [*Satya v. Teja*, A 1975 SC 105]. As to judgment without jurisdiction, see *Abdul Kadar v. Doolan Bibi*, 37 B 563 *post*.

A judgment in a suit for restitution of conjugal rights is not a judgment *in rem* [*Ma Po v. Ma Shin*, 11 R 198]. The findings of a judgment in a suit for restitution of conjugal rights are relevant in subsequent suit for dissolution of marriage though they do not operate as *res judicata* [*Santhammal v. Thangaraj*, A 1975 Knt 23]. A judgment in suit under s 42. Specific Relief Act (s 34 Act 47 of 1963) that the plaintiff was no longer the wife of the defendant is not a judgment *in rem* [*Khambata v. K*, 36 Bom LR 1021].

Admiralty Jurisdiction.—As to the admiralty jurisdiction of the High Courts, see Cl 32 of the Letters Patent of 1865 for the Calcutta High Court, and the corresponding clauses of the other Letters Patent for the other High Courts. As to the admiralty jurisdiction of the mofussil courts see 12 & 13, Vict Cap s 88. It is with reference to vessels condemned as *prizes* more especially that questions concerned with admiralty jurisdiction arise, such a sentence of condemnation by a competent court being usually conclusive upon all the world [Field 6th Ed, p 181].

The sentence of a foreign court of admiralty condemning a ship as enemy property, is conclusive evidence in favour of the under-writers against the warrant of neutrality [*Geyer v. Aquilar*, 1898, 7 TR 681]. The decision of the Admiralty court restoring the certificate of an officer of a ship which had been suspended, is a judgment *in rem* in so far as the status and certificate of that officer is concerned [*Yoosaf v. S S Ellora*, A 1939 S 349 : 1940 Kar 53].

As to admiralty jurisdiction, see *In re*: "*Falls of Ettrick*" 22 C 511.

Insolvency Jurisdiction.—The High Courts exercise insolvency jurisdiction under their respective Charters. For the Calcutta High Court, see clause 18 of the Letters Patent of 1865 and for the other High Courts, the corresponding clauses of their respective Letters Patent. Other courts exercise the jurisdiction under the Presidency Towns Insolvency Act, 3 of 1909 and the Provincial Insolvency Act, 5 of 1920.

An order adjudicating a person insolvent is a judgment *in rem* and is conclusive as regards the status only [*Radhakishan v. Gangabai*, A 1928 S 121; *Sahasrabudhe v. Kilachand*, A 1947 S 161] and is a judgment *in rem* only in respect of matters arising before insolvency court [*Amar Kaur v. Shiv Karan*, A 1965 Pu 206].

A stranger to a bankruptcy proceeding whose property is seized by the receiver in bankruptcy may apply under s 68 of P I Act 1920 for return of the property. The adjudication bars a subsequent suit in civil court as it amounts to conclusive proof within s 41 [*Pitaram v. Jajhar*, 33 IC 798; see also *Bhairo v. P C Dass*, 17 ALJ 787; *Irshad v. Gopinath*, 41 A 378; *Musummat v. Mathura*, 40 IC 102; *Narayan v. Hara-*

datta, 16 NLR 201; *Bajirao v. Bansilal*, A 1963 B 212]. Even where an insolvency court fails to make any declaration under the last paragraph of s 41, the estoppel against an opposing creditor arises, as the estoppel is not limited to the provisions of s 41 [*Radha Kishan v. Gangabai, sup*; *Ram Narain v. Durga Dat*, 13 IC 568]. An order of an insolvency court refusing to adjudicate a person insolvent on the ground that he was not a partner in a firm adjudicated insolvent, is not a judgment *in rem* within s 41. As to whether judgment of insolvency court refusing to adjudicate a person bankrupt is a judgment *in rem*, see *Offl Ass, Madras v. Offl Ass, Rangoon*, 46 MLJ 580 : A 1924 M 662 : 83 IC 174 (**relied** on in *Venkataramanayya v. Pantulu*, A 1931 M 441 SB: *Punjab N Bank v. Balikram*, A 1940 C 225). A final order of an insolvency court may have the effect of a judgment *in rem* though not *inter partes* [see *Bansi v. Anandi*, A 1935 P 273].

Lunacy Proceedings.—Although an order in lunacy is not a judgment which is conclusive under s 41, it is still binding upon the parties thereto and those who claim under them [*Subba Naickar v. Solaippa*, 56 M 904].

Other Cases Where Judgment as to Status of Persons is Relevant.—This section does not expressly mention Courts-martial, but Courts-martial other than Courts-martial convened under the Army Act are included in the operation of the Act. (See s 1 *ante*).

Order made upon a contributory under the Indian Companies Act is conclusive evidence that the monies ordered to be paid are due and all other pertinent matters stated in such order are to be taken to be truly stated as against all persons and in all proceedings whatsoever [Cunn p 116].

A foreign judgment declaring a person to be adopted son of a Hindu widow is binding on the courts in India in a suit relating to the widow's property. Such a declaration by a foreign court affecting status is regarded as analogous to a judgment *in rem* [*Nataraja v. Subbaraya*, 1939 Mad 507 : A 1939 M 693].

Judgment in rem Whether Conclusive in Criminal as well as in Civil Proceedings.—A judgment *in rem* will under this section be conclusive in a criminal as well as in a civil proceeding. But whether a judgment *in rem* is conclusive in a criminal proceeding, is a matter of some doubt under the English law. [See Tay s 1680].

Judgment on Questions of Legitimacy, Adoption and the Like.—The notion that judgments on questions of legitimacy, adoption and the like were judgments *in rem* was done away with in *Yarakalamma v. Anakala* (*ante*: "*Principle and Scope*"). The section enumerates four classes of judgments, which alone are to be conclusive.

The judgment on the status of adoption is not a judgment *in rem* [*Arjun v. Mathura*, A 1928 A 395]. In the Full Bench case of *Kanhya Lal v. Radha Churn, ante*, PEACOCK, CJ, observed as follows:—

> "It is clear that there are no judgments *in rem* in the mofussil courts and that as a general rule, decrees in those courts are not admissible against strangers either as conclusive, or even as *prima facie* evidence. If a judgment in a suit between *A* and *B*, that certain property for which the suit was brought belonged to *A* as the adopted son of *C*, were a judgment *in rem* and conclusive against strangers as to the fact and the validity of the adoption, the greatest injustice might be caused."

This statement of law in *Kanhya's* case, *sup*, was relied on in *Appa v. Woman*, A 1941 PC 85 : 1942 Bom 75 : 69 IA 64 : 74 CLJ 471. The legal characters mentioned

in s 41 do not include the state of being a partner [*Radhakishan v. Gangabai*, A 1928 S 121].

Judgment of Rent Controller.—Fixing standard rent for a particular tenancy is not a judgment *in rem* [*Scott v. Residence Ltd*, A 1956 C 606].

S. 42. Relevancy and effect of judgments, orders or decrees, other than those mentioned in section 41.—Judgments, orders or decrees other than those mentioned in section 41 are relevant if they relate to matters of a public nature relevant to the enquiry; but such judgments, orders or decrees are not conclusive proof of that which they state.

Illustration

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

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

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COMMENTARY

Principle and Scope.—This section follows the English law on the matter and is another exception to the general rule that persons not parties or privies to a judgment shall not be affected or prejudiced thereby. In matters of *public nature, eg*, customs, prescriptions, trusts, etc, previous judgments whether between the same parties or other parties are admissible as evidence of reputation on matters of general interest or public rights. On account of their public nature an exception is made to the general rule which excludes *res inter alios actae* [*Bai Baiji v. Bai Suntok*, 20 B 53; *Madhub v. Tomee*, 7 WR 210]. But such judgments are not conclusive proof of that which they state. They are relevant not as *res judicata*, but as evidence [*Gujjulal v. Futteh Lall*, 6 C 171, 191]. The matter must be of a public nature; thus in a suit between *A* and *B* the question being whether *A* had a private right of common over certain land, a decision in a previous suit between strangers, as to such right, is not admissible as evidence of reputation [*Williams v. Morgan*, 15 QB 782].

The law has been stated thus in Taylor:—The exception [to the rule that judgments *inter partes*, are not admissible either for or against strangers in proof of the facts adjudicated] is allowed in favour of verdicts, judgments and other adjudications upon subjects of a *public* nature, such as customs, prescriptions, tolls, boundaries between parishes, counties, or manors, rights of ferry, liabilities to repair roads, or sea-walls, moduses, and the like. In all cases of this nature, as evidence of reputation will be admissible, adjudications—which for this purpose are regarded as a species of

reputations—will also be received, and this too, whether the parties in the second suit be those who litigated the first or be utter strangers. The effect, however, of the adjudication, when admitted, will so far vary, that, if the parties be the same in both suits, they will be bound by the previous judgment; but if the litigants in the second suit be strangers to the parties in the first, the judgment, though admissible, will not be conclusive [Tay s 1686].

This section like s 32(*4*) and s 48, lays down an exceptional rule for cases in which matters of public nature are in question. A judgment, not coming within the last section, may be relevant as such against persons who were not parties to the proceedings in which it was given, when it relates to matters of a public nature. The term "*public*" is strictly applied to that which concerns every member of the State; the term "*general*" being confined to a lesser though still a considerable portion of the community [see notes under s 32(*4*)]. The right of way in the illustration to the section is claimed by the public at large. The right to use the well mentioned in the illustration to s 48 is claimed for a particular village and is therefore a general right. The distinction between "*public*" and "*general*" is not preserved in s 32(*4*) or in s 48. Under this section, though it refers to *matters of a public nature only*, it is apprehended that judgment is relevant when it relates to a right or custom which concerns a section of the community and not the public at large. This section is in accordance with the law as stated in Taylor [Cunn pp 116-17].

As to the admissibility of judgment, and report under s 133 of the Cr P Code, see *Surjamani v. Shk Pandab*, 15 CLJ 36n. It is only under sections 41 and 42 when the judgment is relevant that even a third party can show that the same was delivered by a court not competent to deliver it or that it was obtained by a fraud or collusion. [*Nachhittar Singh v. Smt Jagir Kaur*, A 1986 Punj & Har 197, 199 : (1985) 2 Punj LR 593]. When Privy Council of an erstwhile State of Jamkhandi held in an earlier proceeding that Shivalingayya was duly nominated and installed as Padayya, a contrary conclusion arrived at in the subsequent proceeding by High Court cannot be confirmed. Even though the judgment of the Privy Council did not bind the plaintiff on the principle of *res judicata*, it was definitely a relevant circumstance to be taken note of because of what has been stated in section 42 [*V. Shankarayya v. N.S. Pattadadevan*, A 1995 SC 2187, 2189].

Relevancy of Judgments Relating to Matters of a Public Nature.—Judgments relating to matters of a public nature are relevant under this section, not as *res judicata*, but as evidence, whether between the same parties or not [*Gujjur Lall v. Futteh Lall*, 6 C 171, 174, 191 FB; *Collr of Gorakhpore v. Palakdhari*, 12 A 1 FB; *Totaram v. Mohan*, 2 Agra 120; *Bai Baiji v. Bai Santok*, 20 B 53; see 15 CLJ 36n]. Except in matters of general interest or public rights, a verdict in a previous suit to be admissible, must be between the same parties or parties through whom the parties actually in litigation claim [*Doorga Das v. Narendra*, 6 WR 232; see also *Madhub v. Tomee*, 7 WR 210].

In a suit brought by the trustees of a temple to recover from the owners certain lands in certain villages, money claimed under an alleged right as due to the temple, judgments in other suits against other parties in which claims under the same right had been decreed in favour of the trustees of the temple, are relevant as relating to matters of a public nature [*Rama Sami v. Appavu*, 12 M 9]. Though not *inter partes* judgments as to whether there was a private trust are of abundant evidentiary value [*Secy of S v. Badsha*, 44 M 778 : A 1921 M 248 FB; *Narayanaswami v. Balasundaram*, A 1953 M 750].

A decree in a former suit was held admissible as a piece of evidence under s 42 throwing light on the ownership of certain village in dispute [*Shree. Ganesh v. Keshavrao*, 15 B 625, 635]. An order passed during settlement operations in exercise of powers as a Collector recognizing the rights of *gujars* of three villages to graze their cattle in the disputed land relates to a matter of public nature within s 42 [*Tula v. Sadh*, A 1962 HP 28]. Judgment relating to *wakf* property is relevant in a suit not between the same parties though not conclusive [*Misbahuddin v. Vidyasagar*, 36 PLR 106 : A 1935 L 64]. In a suit for recovery of certain villages from the defendant, a former judgment in a suit in which the cousin of a former manager sued him (defendant) for partition of certain villages, included in this suit, was held admissible as being a decision upon a question of public right, which is, as reputation, admissible in evidence, though not conclusive [*Nallathambi v. Nella Kumara*, 7 Mad HCR 306].

Judgments Relating to the Existence of Custom.—Where a custom is in dispute, judicial decisions recognising such customs are good evidence of their existence [*Shimbu v. Gayan*, 16 A 279; see also *Har Nath v. Mundal*, 27 C 379, 391, where decisions regarding the existence of a disputed custom were held relevant as evidence of the existence of the same custom amongst the *Jains* of other places. These decisions are with regard to customs of certain communities and not with regard to the public at large]. The proceedings before a settlement officer recording a custom in accordance with which certain cesses were leviable were held to be important evidence, though not of a conclusive nature [*Lala v. Hira Singh*, 2 A 49; see also *Akbar Khan v. Sheoratan*, 1 A 373; *Sheobaran v. Bhairo*, 7 A 880]. Proof of a custom, whereby a zemindar is entitled to a fourth of the purchase-money whenever a house is privately sold in the village [*Kalian v. Bhagirathi*, 6 A 47]. Where a co-owner of village lands seeks to establish his right to certain shares in such lands, as one of such co-owners, the existence of judgment *inter partes*, in a suit brought by another co-owner for periodical allotments of lands, was held to be cogent evidence of the existence and validity of the custom [*Venkata v. Subbo Row*, 2 Mad HCR 1].

A judicial decision of comparatively recent date (or pronounced after the controversy) is also admissible not because it is relevant under s 13 and s 42 as forming in itself a "transaction by which the custom was recognised, &c", but as containing a number of specific instances relating to the relevant custom [see *Subhani v. Nawab*, A 1941 PC 21 : 68 IA 1 : 1941 Lah 154; *Amarchand v. Shankari*, A 1956 Raj 51].

In dealing with case of a family, decisions in previous litigations between members of that family which raise the question of caste are relevant. If the judgment is evidence, the recitals in the judgment of the evidence of witnesses are also relevant [*Maharaja of K v. Sundaram*, 48 M 1 : A 1925 M 497]. A judgment as to the transferability of similar tenures in an adjoining village of the same pergannah is admissible as evidence of usage under s 42 [*Dalglish v. Guzuffer*, 23 C 427]. Decisions as to rates of rent in previous suits are admissible in evidence of local usage, though the tenant in the particular case was no party to those suits [*Easwara v. Pungavanachari*, 13 M 361]. Decrees obtained by the landlord against other tenants of same *pergannah*, were admitted in evidence, to prove the standard of measurement, although the tenant against whom they were tendered in evidence was not a party to those decrees [*Jinutullah v. Ramani*, 15 C 233]. Judgements not *inter partes* regarding in nature and incidents of certain kinds of tenures (*Ghatwali* tenures in Birbhum) were taken into consideration [*Nilmoni v. Tara Nath*, 9 C 295 PC : 12 CLR 361 : 9 IA 174].

Previous judgments between other parties are admissible to prove custom of pre-emption [*Bai Baiji v. Bai Santok*, 20 B 53]. The most satisfactory evidence of an enforcement of a custom of pre-emption, is a final decree based on the custom [*Gurdayal v. Jhanda*, 10 A 585 and *Luchman v. Akbar*, 1 A 440]. Conflicting decisions of subordinate courts were held not to establish that the custom of the right of pre-emption under the Mahomedan law prevailed among the Hindus of Chittagong [*Inder Narain v. Md Naziruddin*, 1 WR 234]. As to admissibility of judicial decisions in support of custom and of previous judgments in cases involving custom, see *ante* s 13.

As to proof of custom or right, see notes under ss 13, 32(*4*) and 48.

—Status, etc.—When a question of status is in issue, judgments and orders between parties in mutation cases, succession certificate cases, rent suits, suits for possession, &c are admissible [*Jumilal v. Mt Halki*, A 1924 N 387]. Evidence of criminal proceedings and a *razinamah* come to between other parties was admitted in support of a presumption to legal right to enjoy the water in dispute [*Rameshur v. Koonj Behari*, 6 IA 38 : 4 C 633].

Judgments Not Relevant.—Defendants were convicted of murder of *L* by the Faridkot Court. After their release plaintiffs sued them for compensation for death of *L*. The judgment of Faridkot Court is inadmissible. The morbid interest of a section of the public in the details of a murder trial cannot constitute such trial "a matter of public nature" within s 42 [*Bishen v. Ram Labhaya*, 106 PR 1915]. Where the plaintiff sought a perpetual injunction restraining the defendants from importing or selling any watches similar in appearance to the watches he sold and with the same design, a copy of the judgment of Swiss Court against a third party was held inadmissible under the section [*Heiniger v. Droz*, 25 B 433 : 3 Bom LR 1]. A judgment deciding a question of adoption is not admissible between third persons as evidence of the truth of the matter decided therein [*Guru Mahadeo v. Jagatraj*, 71 IC 929 : A 1924 P 298]. The fact that a judgment is relevant under s 42 would not render remarks made incidentally about another property which was not then in dispute admissible. The proper way to prove it is to produce the witness who stated this [*Banwari v. Sheochand*, A 1923 L 384 : 85 IC 795].

Observation in a judgment relating to a different matter though connected cannot bind a third party and the judgment itself cannot be evidence against him [*Narasimha v. Offl Assignee*, A 1930 M 751]. Although judgments not *inter partes* may be used as evidence in certain circumstances as a fact in issue or relevant fact (see notes to s 13 *ante*) the recitals in a judgment cannot be used as evidence in a litigation between the parties [*Kasi v. Jagat*, 20 CWN 643 : 23 CLJ 583].

Inquest Report.—It is questionable how far an inquest report is admissible except under s 145 Ev Act [*Pandurang v. S*, A 1955 SC 216]. Mere recitals in the inquest report cannot by itself be regarded as substantive evidence [*Raghava v. S*, A 1965 K 44]. Coroner's Inquisition is not a judgment, much less a judgment *inter partes*. Nor does it relate to matters of public nature and is inadmissible in evidence [*R v. Bhagwandas*, A 1946 B 184 : 47 Bom LR 997].

S. 43. Judgments, etc other than those mentioned in sections 40 to 42, when relevant.—Judgments, orders or decrees, other than those mentioned in sections 40, 41 and 42, are irrelevant, unless the existence of

such judgment, order or decree is a fact in issue, or is relevant under some other provisions of this [1][Act].

Illustrations

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

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

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

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

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

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

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

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

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

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

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

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

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COMMENTARY

Principle and Scope. [Relevancy of Judgments Not Mentioned in Ss 40-42].— In the previous sections, judgments the existence of which bars a second suit (s 40), judgments which are conclusive against all the world (s 41) and judgments relating to matters of a public nature though between strangers (s 42) have been declared relevant. S 43 states the general rule that all other judgments not *inter partes* are irrelevant. There is an important qualification to this rule. A judgment may not be admissible for proving the truth of the particular points which it decides, but it may be admissible for other purposes, as for instance when its existence is a fact in issue, or when it is relevant under the rules of relevancy contained in the other provisions of the Act, *eg* ss 8, 11, 13, 54 Expl (2), &c. Thus where *A* has been tried and acquitted of a crime against *B*, and afterwards sues *B* for malicious prosecution, the judgment

1. In Ceylon "Ordinance" substituted.
2. Illus (*b*) has been omitted in Ceylon and the other illustrations have been designated (*b*) to (*e*).
3. These *Illustrations* were added by s. 5 of I E Act (1872) Am Act 3, 1891.

is conclusive evidence of *A's* acquittal and is relevant for that purpose, but it is not relevant as proof that *A* was innocent, or that *B* was prosecutor, or was actuated by malice [*Legatt v. Tollervey*, 14 East 302]. S 43 therefore declares that all judgments, orders or decrees, other than those specified in the preceding three sections (40, 41 and 42), are themselves irrelevant, that is, not admissible in evidence, *unless the existence of the judgment, order or decree itself is a fact in issue or is relevant under some other sections of this Act*, [*S P E, Madras v. K V Sundaravelu*, A 1978 SC 1017]. This section (43) therefore, subject to the exceptions mentioned in the latter part, excludes prior judgments, and so in effect declares that in deciding a question which has been decided in a suit between other parties, the court shall not be guided by the judgment in the former suit of finding therein contained. Such prior judgment is not admissible to prove the truth of the facts therein stated, *eg* any opinion as to the nature of a person's liability, it may be relevant only to prove the existence of the judgment itself [*Jakati v. Borkar*, A 1959 SC 282 : 1959 SCR 1384]. Since section 43 is not included in section 44 collusive decree will still be relevant to support the plea of estoppel if the ingredients of estoppel are made out. [*Ibne Hasan v. Smt. Hasina Bibi*, A 1984 All 216, 219 : 1984 All CJ 141 (A 1927 All 494 and A 1971 All 439 **Overruled**)].

The object behind enacting section 43 appears to be two fold : (*1*) to treat every case a class by itself so that the judgment delivered in one case may not be availed of by parties to another case; and (*2*) to maintain the independence of courts by preventing the parties from submitting before the court hearing their case the judgments of other courts. The exception to this rule are judgments which are relevant under Article 141 or 227 of the Constitution as binding precedents or the judgments which are relevant under sections 41 and 42 of the Evidence Act or which are necessary to be taken into consideration when plea of *res judicata* is raised. [*Gopal v. State of Rajasthan*, 1997 CrLJ 2162, 2166 (Raj)]. Unless existence of judgment is face in issue such judgment is irrelevant. [*A Manuswami v. R. Setharaman*, A 1995 Mad 375, 379]. Finding of the court that decree in respect of some portion of the property was vitiated by fraud would not operate as *res judicata* in a subsequent suit in respect of other portion of the property. But the earlier judgment is admissible under section 13 as the transaction was same. [*N. Subhakaran v. K. Rajamony*, 1996 AIHC 1024, 1026 (Ker)].

Judgment of a High Court in writ proceedings is binding and conclusive between the parties unless reversed. As regards persons not parties it becomes a valuable precedent [*Bhupendra v. S*, A 1960 Or 46]. Judgment in counter case is not relevant. [*Deo Narayan Rai v. State of Bihar*, 1988 Cri LJ NOC 1 : 1988 BBCJ (HC) 86 (Pat)]. Where the accused was charged for criminal misappropriation findings against him in departmental proceedings would be irrelevant under s. 43 [*Jagdish Chandra v. State of Rajasthan*, 1998 Cri LJ 1902 (Raj)].

There is no provision in the Act by which the actual decision or the findings arrived at in a previous judgment can be used as evidence to decide the points which are in issue in a particular case. Such a decision may operate as *res judicata* or be relevant under ss 40-42 to prove assertion of a right, &c but otherwise it is no better than a mere opinion expressed on the issues in a particular case and opinion is relevant in those cases only in which it is specially referred to in the Act and in no others [*Purnima v. Nandlal*, 12 PLT 582; *Ramparekha v. Ramjhari*, A 1933 P 690; *Hitendra v. Rameswar*, A 1925 P 625]. Statement of facts in a previous judgment is not admissible under s 43 in a subsequent case to decide any points in issue [*Khubnarain v. Ram Ch*, A 1951 P 340]. See further *post*: "*Objects for which Judgments are Admissible.*"

Evidence of verdict at an earlier trial is not admissible at a later trial arising from the same facts, unless there is some exceptional feature. It is not an abuse of process to indict an accomplice for murder despite the principal's acquittal of murder and conviction of manslaughter. [*Hui Chi-Ming v. R,* The Independent, Sept 19, 1991 PC : (1991) 3 All ER 897 PC].

The latter portion of this section, that is, the words "*unless the existence of such judgment, order or decree is a fact in issue, or is relevant under some other section of this Act*" require some explanation. In *Gujja Lal v. Fateh Lall*, 6 C 171 FB GARTH CJ, has thus explained the section:—

> "The cases contemplated by s 43 are those where a judgment is used not as *res judicata* or as evidence more or less binding upon an opponent by reason of the adjudication which it contains. But the cases referred to in s 43 are such, I conceive, as the section itself illustrates, *viz* when the fact of any particular judgment having been given is a matter to be proved in the case. As for instance, if *A* sued *B* for slander, in saying that he (*A*) had been convicted of forgery, and *B* justified it upon the ground that the alleged slander was true, the conviction of *A* for forgery would be a fact to be proved by *B* like any other fact in the case, and quite irrespective of whether *A* had been actually guilty of the forgery or not. Thus, I conceive, would be one of the many cases alluded to in s 43."

Thus, for example, where it is proposed to discredit a witness or to contradict his testimony by proving that he gave different testimony on a former trial, the judgment in the former case will, notwithstanding that the parties to it were strangers to the subsequent suit, be admissible for the purpose of laying the foundation for the evidence of the former statements [*Clarges v. Sherwin*, 1699, 12 Mad 343; *Foster v. Shaw*, 1821, 7 Serg & R 163; *Whatson v. Little*, 1860, 29 LJ Ex 267; see further s 145 *post*]. Again in an action by *A* against his servant for negligence in regard to *C*, the judgment obtained by *C* against *A* is relevant for showing the amount of damages recovered but it is not admissible in proof of the servant's negligence [*Green v. New River Co*, 4 TR 590]. The cases contemplated by s 43 are such it itself illustrates, *viz* where the fact of any particular judgment having been given is a matter to be proved in the case. A former judgment which is not a judgment *in rem* nor one relating to matters of public nature is not admissible in a subsequent suit either as *res judicata* or as proof of the particular point which it decided unless between the parties or those claiming under them [*Hitendra v. Rameswar*, 87 IC 489 : A 1925 P 625].

If the object be merely to prove the *existence of the judgment, its date, or its legal consequences*, the production of the record, or the proof of an examined copy, is conclusive evidence of the facts against all the world. This rests on the ground that a judgment is a public transaction of a solemn character, which must be presumed to be faithfully recorded. Therefore, if a party indicted for any offence has been acquitted, and sues the prosecutor for malicious prosecution, the record is conclusive evidence for the plaintiff to establish the fact of acquittal, although the parties are necessarily not the same in the action as in the indictment [*Legatt v. Tollervey*, 1811, 14 East 302]; but it is no evidence whatever, that the defendant was the prosecutor, even though his name appear on the back of the bill, or of his malice, or of want of probable cause; and the defendant, notwithstanding the verdict, is still at liberty to prove the plaintiff's guilt..... The same doctrine will apply to other cases, where the party has a remedy over, as for contribution, or the like [Tay s 1667].

Where a judgment is not *in rem*, nor relevant to matters of public nature, nor between the parties to a subsequent suit, the fact that the court by that judgment

decides a point in a particular way, is not relevant under s 13 for the purpose of the decision on the same point in the subsequent suit [*Shankar v. Ganesh*, A 1930 N 1 FB]. It has been observed in a later Nagpur case that the reference to the Full Bench in *Shankar's* case was in terms wider than that was necessary for the purpose of the decision in the case and *pro tanto* it is *obiter*. A judgment is not admissible to prove the truth of the fact which it states. But where the right of a party has already been concluded by a previous judgment, the fact can be proved by production of the judgment since in such a case the existence of the judgment itself is relevant [*Maroti v. Jagannath*, A 1939 N 72 : 1938 NLJ 466]. The finding in a privy Council judgment not *inter partes* that a village was a fixed place is not admissible [*Midnapore Z Co v. Bijay*, A 1941 C 1].

"Or is Relevant Under Some Other Provisions of this Act".—The words "*or is relevant under some other provisions of this Act,*" are clearly an exception to the first part of this section, and they clearly show that there are other provisions in this Act, under which judgments not *inter partes are relevant*; for instance, under ss 8, 11, 13 and 54 Expl (2), judgments not *inter partes* are relevant. The cases quoted above and *illus* (*d*), (*e*) and (*f*) clearly show the meaning of the last words of this section. [See the judgment of MITTER, J, in *Gujju Lall v. Fatteh Lall*, 6 C 171 FB and *Lakshman v. Amrit*, 24 B 591]. If the law as laid down in *Gujju Lall v. Fateh Lall* be correct, then the latter portion of the section should be simply useless. The existence of a judgment will sometimes be a relevant fact under some of the provisions of the Act as to relevancy. For instance, the fact that *A* has obtained a decree of ejectment against *B*, may be the motive for *B's* murdering *A*; or it may be necessary, for the purpose of proving *A's* position, to show that he suffered judgment to go by default against him at a particular time: or the fact of *A's* having prosecuted *B* for slander may explain the relations of the parties, and their state of mind on a subsequent occasion, or the judgment may itself be a fact in issue, as where *A* sued *B* because through *B's* fault *A* has been sued and cast in damages. In any such case, judgment will be a relevant fact" [Cunn Intro p xxx].

It may be argued that if the defendant in a suit by *A* puts forward a defence which is negatived and in a subsequent suit by *B* on the same matter against the defendant he takes an identical defence, he may be met by the judgment in the suit against him by *A*. The previous judgment is, however, not admissible and the argument is met by *illus* (*a*) of s 43 [*Benode v. Secy of S*, 34 CWN 1113]. *Illustration* (*d*), (*e*) and (*f*) are instances of judgments being relevant, otherwise than under the three preceding sections. Judgments are admissible as a means of proving a transaction or instance in which a given right is claimed, recognised or denied [see notes under s 13]. The Income-tax and wealth-tax assessment orders are not admissible in evidence under sections 40 to 42 but they are definitely admissible in evidence as they contain admissions with regard to shares which the parties were having in the property in question. [*Chiranjilal v. Bhagwan Das*, A 1991 Delhi 325, 332].

A judgment not *inter partes* is admissible in evidence in certain circumstances and in certain cases, if the existence of such judgment is a relevant fact or fact in issue [*Sham Sunder v. Ram Khelawan*, A 1929 P 739]. A judgment in a suit not *inter partes* holding that a partition of a certain estate was proved is admissible under s 13 and s 43 as establishing a particular transaction, in which the partibility of the estate was asserted and recognised. But the reason of the judgment on any finding is not relevant [*Govind v. Shamlal*, 58 IA 125 : 58 C 1187 : A 1931 PC 89]. A judgment of President of Municipal Council not *inter partes* is relevant under s 13 or s 43 as establishing transaction that permission to make new construction was accorded by Council [*Hazarilal v. Alwar Nagar Parishad*, A 1976 Raj 91]. Under s 43 read with

ss 11 and 13 judgments not *inter partes* can be rightly admitted in evidence and used for certain limited purposes and taken into consideration along with other evidence in the case. But they do not operate as *res judicata*; nor can the basis of the judgments be discussed [*Hem Ch v. Purna Ch*, 59 CLJ 320 : A 1934 C 788]. Judgment in previous suit against a widow is admissible to ascertain whether the decree was passed against her as representing her husband's estate and also to ascertain the nature of the suit [*Vinayak v. Md Hanif*, A 1954 N 11].

A judgment not *inter partes* though not *res judicata* may be admissible under s 43 read with s 8 as valuable proof of title [*Abdul Majid v. Tukaram*, 101 IC 744, 774 : A 1927 N 359]. In a suit by a landlord against a tenant, a previous judgment containing a finding as to the prevailing rate of rent in a suit to which the defendant was not a party is not admissible under ss 40-44 [*Raghupat v. Narbadeshwar*, A 1938 P 103].

The decision of an income-tax-officer that an assessee is separate from his joint family is irrelevant in a civil suit [*Nandkumar v. Kaluram*, 19 NLJ 287]. A statement of opinion by the judge in a previous judgment not *inter partes* is no evidence in a subsequent case [*Harnath v. Mohan*, A 1929 L 123]. Former judgment not *inter partes* does not operate as a bar to the trial of a suit though they may be received as evidence in the case. In a suit by the plaintiff against Government for recovery by emoluments of a certain office, Government pleaded as a bar to the suit a former judgment in which plaintiff's claim to the office against certain contesting claimants was negatived, though Government was not a party to it—*Held* that it was open to the plaintiff to re-assert his title to the office inspite of the former judgment [*Secy of S v. Syed Ahmed*, 44 M 778 : A 1921 M 248 FB]. In a suit against the defendant, who was a lessee from *N*, a usufructuary mortgagee of the share of one *R*, for a declaration that he had no right to recover profits the lease having terminated by the redemption of the mortgage; defendant pleaded an arrangement with *R* and produced the judgment of the mortgage suit between himself and *R*—*Held* that it was admissible under s 43 [*Md Ahmad v. Masihullah-khan*, 28 IC 387 : 13 ALJ 317]. Previous decisions under Land Acquisition Act are relevant in a subsequent case where the market value of lands in the same neighbourhood is in issue [*Madan v. Secy of S*, 78 IC 557 : A 1925 C 481]. In Land Acquisition case judgments not *inter partes* would be relevant if they relate to similarly situated properties and contain determination of value on dates fairly proximate to the relevant date [*Improvement Trust v. H Narayanaiah*, A 1976 SC 2403; *State of U.P. v. Nath Hoo*, A 1986 All 172, 174 : 1985 All WC 733]. In a suit by plaintiffs for a declaration that a sale is not binding on them the land being ancestral, the judgment in a previous suit by the plaintiffs but not *inter partes* that the property was ancestral is not irrelevant. It is only admissible for showing that on a former occasion alienation of a part of the property was questioned on the ground that it was ancestral [*Partap v. Mothu*, 96 IC 998 : 27 PLR 544].

Previous judgments are sometimes admissible even against strangers [*Gopi Sundari v. Kherod*, A 1925 C 194]. As to admissibility of judgments between third parties, see *Harihar v. Kesho*, A 1925 P 68.

Objects For Which Judgments are Admissible.—S 43 expressly contemplates cases in which judgments could be admissible under other sections of the Act, which are not admissible under ss 40, 41 and 42. The cases referred to in s 43 are such, as the section itself illustrates, *viz*, when the fact of any particular judgment having been given is a matter to be proved in the case—*per* GARTH, CJ. The decree referred to in *illus* (*d*) of s 43 can only be relevant under ss 7, 8 or 11 of the Act. In all these sections, the word used is "fact"; consequently, it follows that the word "fact" as

defined in the Act itself includes decree and judgments. Besides, the definition itself is comprehensive enough to include them—*per* MITTER, J, [*Gujju Lall v. Fatteh Lall*, 6 C 171 FB]. The reason upon which the judgment is founded are no part of the transaction which was asserted and recognised and cannot be so regarded nor can any finding of fact there come to, other than the transaction itself, be relevant to prove partition in a subsequent suit [*Gobinda v. Shamlal*, 58 IA 125 : 35 CWN 521 : 58 C 1187 : A 1932 PC 89]. Such a judgment or decree is admissible to prove the fact that a decree was made between certain parties and for finding out what lands had been decreed [*Gadadhar v. Sarat*, 44 CWN 935].

A judgment in a land acquisition case determining compensation is a judgment in *personsa* and not a judgment *in rem*. Only the existence of the judgment will be relevant and not its contents [*Mariam v. S*, A 1980 K 176 (*Improvement Trust v. N Narayanaiah*, A 1976 SC 2403 **relied** on]. Judgments not *inter partes* are inadmissible to prove the fact stated therein [*Coca-cola Co. Ltd v. Pepsi-cola Ltd*, A 1942 PC 40 : 202 IC 203]. Judgments not *inter partes* can only be regarded as evidence of transactions but are not admissible as proof of title [*Radhu v. Jyoti Pd*, 36 CWN 866]. They are admissible as evidence of assertion of right claimed. The rule that so far as regards the truth of the matter decided, a judgment is not admissible evidence against one who is a stranger to the suit has long been accepted as a general rule [*Kesho v. Bahuria*, 65 CLJ 241, 252: 41 CWN 577 : 16 P 258 : A 1937 PC 69; see *Gopika v. Atal*, 56 IA 119 : 56 C 1003 : A 1929 PC 99; *Gobinda v. Shamlal*, 58 IA 125 : 35 CWN 52 : 58 C 1187]. If judgments are admissible only under ss 43 and 13, they must be rigidly restricted to proving the transaction or instance, meant, but the issues and the findings cannot be looked at [*per* BEAMAN, J, in *Md Amin v. Hasan*, 31 B 147, 158, 159]. The production of a previous judgment merely establishes the fact that there has been a judgment, but it does not prove the correctness of the previous decision [*Baidyanath v. Alefjan*, 36 CLJ 9 : 70 IC 194; see however *Gopi Sundari v. Kherod*, A 1925 C 194].

In a document accused confessed misappropriation of 3 items of money. In a judgment in a previous case relating two items, confession was found not to be voluntary and accused was acquitted. In subsequent case relating to third item the judgment is admissible to show the issue in question in that case and the decision thereof. In the circumstances of the case the document was found to be of little evidentiary value and should not form sole basis for conviction [*Brijbasilal v. S*, A 1979 SC 1080]. Previous conviction for encroachment of municipal land does not prove encroachment in subsequent prosecution for non-demolition [*In re Ram Ch*, A 1948 M 502]. The general principle is that the mere existence of a judgment, its date and its legal consequences, are conclusively proved by its production, but it furnishes not proof whatever of collateral facts, even though, as between the parties to such judgment themselves, such facts must have been proved [*per* GEIDT J, in *Abinash Ch v. Paresh*, 9 CWN 402]. A decree for confirmation of possession in favour of a party is not conclusive that the party was in possession at the date of the decree. A judgment generally is admissible to show its date and legal consequences [*Raghunath v. R*, 15 P 336].

Under s 43, judgments other than those mentioned in s 40 or s 41, or s 42 are of themselves irrelevant, unless the existence of the judgment is relevant under some other provisions of the Act. They are irrelevant in the sense that they can have any such effect or operation as is mentioned in those recited sections *qua* judgments, orders and decrees, but it must not be taken to make them obsolutely inadmissible when they are the best evidence of something that may be proved *aliunde*. Under s 43, the question is, "Is the existence of the judgment and decree a fact in issue, or is

it relevant under some other provisions of the Evidence Act?" [*Collr of Gorakhpur v. Palakdhari*, 12 A 1 FB]. Judgments *qua* judgments and an expression of opinion of the courts which pronounced them are no relevant at all except under ss 40 to 42 [*Gopalkrishna v. Ammalu*, A 1972 K 196]. A judgment setting aside the transfer of a holding is a fact in issue in pre-emption proceedings under s 26-F. B T Act and therefore admissible though not *inter partes* [*Basanta v. Durga*, 1939, 1 Cal 558: 43 CWN 549: A 1939 C 432]. A judgment between the plaintiff and third parties is not admissible though the facts found therein may support plaintiff's title disputed in the present suit [*Harihar v. Kesho*, A 1925 P 68]. A judgment granting additional rent owing to increase of land though not *inter partes* is evidence only regarding the time when reformed land became fit for possession [*Abdul Latif v. Habibullah*, 69 CLJ 28 : A 1939 C 354].

The fact that a judgment is admitted in evidence in order to prove that there was a litigation which terminated in a certain way does not make all the recitals in the judgment part of evidence in the subsequent action [*Abdul Latiff v. Abdul Huq*, 28 CWN 62: 81 IC 667]. A judgment *inter partes* which contains a recital of pleadings might be admissible in a subsequent suit to prove acknowledgment contained in the pleadings in the previous suit. Recitals in a judgment *inter partes* is admissible if it refers to a point in issue [*Udamanthala v. Parameshwara*, A 1925 M 1019 : 55 IC 996]. Recitals in a judgment not *inter partes* cannot be used in evidence in another litigation [see *Kashi v. Jagat*, 20 CWN 643; *Tripurana v. Rokkam*, 45 M 332 *ante*; *Asa v. Mansha*, A 1930 L 237; *Sarada v. Umakanta*, 50 C 370].

A previous judgment produced not to prove an adjudication between third parties, but to prove a statement amounting to an admission made by a predecessor in title of the opposite party is relevant under s 35 [*Krishnasami v. Rajagopala*, 18 M 73; *Ramaswami v. Subbaraya*, A 1948 M 388]. In *Collr of Gorakhpur v. Ram Sundar*, 38 CWN 1101, 1115: A 1934 PC 157: 61 IA 286, the Judicial Committee observed that there was much to be said for this view of s 35. But the recitals in a judgment are no evidence whatsoever to prove the exact admission made by a party or a witness unless the whole of the statement it recited therein [*India v. Commr of I T*, 22 P 55: A 1943 P 169; *Ram Prakas v. Anand*, 43 IA 73: 43 C 707 : A 1916 PC 256].

Substance of pleadings narrated in the judgments may furnish evidence of the allegation made by the parties on that occasion [*Kailash v. Bijoy*, 72 IC 680: A 1923 C 18—CONTRA: *Chhadek v. Sayad Ali*, 95 IC 880, 881 (C)]. The summary of the written statement in the judgment of a previous suit was referred to for the purpose of ascertaining whether the defendants repudiated the alleged tenancy in the previous suit. But it has been held that the finding of fact arrived at on the evidence by the court in one case, is not evidence of the same fact in another case where the parties are not the same [*Gopika v. Atal*, 56 IA 119: 56 C 1003: A 1929 C 99, 101]. Judgment is not admissible to prove that plaintiff filed a false case [*Miyana v. S*, A 1962 G 214].

When judgments are sought to be used (for purposes other than *res judicata*) to show the conduct of the parties, or to show particular instances of the exercise of a right, or admissions made by ancestors, or how the property was dealt with previously, they may be used under s 11 or s 13 as exceptions recognized under s 43 as relevant evidence [*Lakshman v. Amrit*, 24 B 591]. In a suit to establish an *itmamee* right to certain lands, certain transcript decisions of the civil court, in which a former holder of the tenure of the person who was said to have created the right was a party, were held to be admissible under s 43, not as conclusive, but as of such weight as the court might think they ought to have [*Niamut Ali v. Gooroo Dass*, 22 WR 265].

An order of the Board of Revenue is not evidence in a case before the civil court, but the latter would not make a decree in dissonance with a decision of the Board without due weight [*Manno v. Munshi*, 43 IC 393 : 3 Pat LJ 188]. In a redemption suit, a judgment in a previous pre-emption suit in which the document was found to be sham, is admissible although not conclusive [*Chhiddu v. Desraj*, 21 ALJ 793].

Judgement of Criminal Court When Relevant and Irrelevant in Civil Cases and *vice versa*.—Decision of a criminal case cannot be relied on as one binding in a civil action. Equally the findings in a civil proceeding are not binding on a subsequent prosecution founded upon the same or similar allegations [*Krishnan v. Adaikalam*, A 1966 M 425—case law discussed]. The judgment in the criminal court would not be relevant in the claim petition under the Motor Vehicles Act. The judgment in the claim petition would not be relevant in the criminal case for establishing the guilt of the accused. [*Raja Ram Garg v. Chhanga Singh*, A 1992 All 28, 30]. The standard of proof for imposing liability is widely different between the civil and criminal courts and while in a civil suit a defendant can be made liable on probabilities or the action decided on a mere consideration of the burden of proof in the absence of other evidence, no accused can be convicted on such uncertain grounds. [*Narayanan v. Mathan Mithai*, A 1982 Ker 238, 241]. A person denied execution and accused another of having forged the pronote. A judgment obtained by him on that note, would according to s 43, have been inadmissible unless that section was construed as widely as it was contended that s 13 should be construed [*R v. Parbhudas*, 11 Bom HC 90, 95].

A judgment of a criminal court convicting the accused in an accident case would be *prima facie* evidence of rash and negligent driving. [*Mohinder Kumar v. Smt. Devi*, A 1990 Delhi (NOC) 40]. In a civil suit the decisions in criminal cases relating to the subject matter of the suit cannot be relied upon [*Harihar v. Janak*, A 1941 P 118; *Mangal v. Maiku*, A 1937 O 251]. The order of a criminal court disallowing costs of a witness in a proceeding under s 145 Cr P Code, is not *res judicata* in a civil suit for recovery of the costs [*Nemai v. Ajahar*, 8 CWN 178]. The finding in a civil proceeding are not binding in a subsequent prosecution founded upon the same or similar allegations. It is the duty of the criminal court to form its own view independently [*R v. Nazir Ahmed*, A 1945 PC 18: 71 IA 203]. A finding on certain facts by a civil court in an action in *personam* is not relevant before the criminal court when it is called upon to give a finding on the same facts, and *vice versa* [*Kashyap v. R*, 1944 Lah 408: A 1945 L 23 FB]. Only judgments *in rem* as defined in s 41 have a binding effect on criminal courts [*Mansharam v. Chetanram*, A 1945 S 32].

In a suit for damage for assault, the previous conviction of the defendant in criminal court is not evidence of the assault. The *factum* of the assault must be proved in the civil court [*Ali Buksh v. Shk Samiruddin*, 4 BLR, AC 31: 13 WR 477; *In re Jagga Rao*, A 1935 M 563. See *Mg Pim v. Ma The*, 2 R 549]. A civil court is not bound to adopt the view of the criminal court as to the genuineness or otherwise of a document [*Bishonath v. Hurro Gobinda*, 5 WR 27. See also *Doorga Das v. Doorga Churn*, 6 WR Civ R 26; *Juggat v. Babu Lal*, 5 WR Cr 50; *Nittyanund v. Kashee*, 5 WR 26; *Oomanath v. Raghunath*, Marsh 43: 1 Hay 75]. A plea of guilty in a criminal court may, but a verdict of conviction cannot, be considered as evidence in a civil case [*Shumbhoo v. Madhoo*, 10 WR 56].

In England the Civil Evidence Act 1968 makes evidence of previous conviction admissible in subsequent civil proceedings (see "*Previous conviction Relevant .....*" in s 54 *post*).

In a suit for damages on account of a charge brought in the criminal court, the plaintiff must prove malice and want of reasonable and probable cause for the accusation, and the proceedings in the criminal court are not admissible as evidence in the civil court [*Aghore v. Radhica*, 14 WR 339; *Kutumba v. Venkataramayya*, A 1951 M 344; *Jogendra v. Lingaraj*, A 1970 Or 91; see also *Keramatulla v. Gholam*, 9 WR 77]. A judgment of criminal court is admissible to the extent of *factum* of charge and conviction [*Perumal v. Devarajan*, A 1974 M 14]. The order of the criminal court is admissible to prove acquittal, but the conclusions drawn are not binding, though the judgment may be looked at for seeing the circumstances which resulted in acquittal [*Rai Jung v. Rai Gudar*, 1 CWN 537]. The judgment of a criminal Court acquitting the accused in an accident case is not conclusive and the finding therein need not be considered by the Motor Accidents Claim Tribunal. [*APSRT Corporation v. Saavaji Aruna*, A 1990 Andh Pra 162, 163]. In deciding a suit for damages for malicious prosecution the duty of the civil court is to consider the evidence independently from the judgment of the criminal court and to come to its own finding if there is reasonable and probable cause and ss 43, 13 or 11, did not apply to the case [*Gulab v. Chuni*, 9 Bom IR 1134; *Pedda Venkatapathi v. Balappa*, 56 M 641; *Marupaudi v. Parvathaneni*, A 1951 M 344; *Shubrati v. Shamsuddin*, 50 A 713; see however *Jadubar v. Sheo Saran*, 21 A 26]. It would be only in those exceptional cases where the circumstances which resulted in the acquittal of the plaintiff became relevant that the judgment could be looked at by the court [*Dhanjishaw v. Bombay Munply*, A 1945 B 320: 47 Bom LR 304].

Where in a proceeding to revoke a probate the question was of intestacy in respect of the interest in favour of the son if he was the murderer of the testator, the judgment of the criminal court convicting him of the crime is no proof of the fact. The judgment is relevant only to show that there was a trial resulting in the conviction and sentence of the son. The question of murder by him is to be decided on evidence [*Anil v. Latika*, 1955, 2 SCR 270: A 1955 SC 566: 1955 SCJ 578]. A judgment of acquittal is irrelevant in a civil suit based on the same cause of action, just as a judgment of conviction is irrelevant in a subsequent civil suit on facts on which the conviction is based [*Onkarmal v. Banwarilal*, A 1962 Raj 127]. In a criminal prosecution for defamation, the judgment of a civil court dismissing the suit for damages for defamation is not admissible as it is a judgment in *personam* [*Ramanamma v. Appalanarasayya*, 55 M 346].

In a proceeding under s 145 Cr P Code, the magistrate could not go behind the decision of the civil court by ignoring the decree, though the court passing it had no jurisdiction over the land. It was immaterial that the delivery of possession was symbolical only [*Abhoy v. Basu*, 27 CWN 267]. In a proceeding under s 145 Cr PC previous judgment of civil court about possession can be used as a piece of evidence of possession quantum valebat [*Ramkawal v. Dudhanath*, A 1969 P 317 (*Abdul Shakur v. Abu Sayeed*, A 1925 P 593 **reld** on)]. Fact of previous proceedings under s 145 and the order thereon must be taken into consideration in a subsequent suit for possession based on title [*Baroda v. Manmatha*, 41 IC 456]. Orders of magistrates under s 145 Cr P Code are admissible in evidence on general principle, and also under s 13 to prove certain facts [*Dinomoni v. Brojomohini*, 29 IA 24: 29 C 187: 6 CWN 386]. It is admissible as evidence of the fact as to who was declared entitled to possession and these orders are admissible against all persons when the fact of possession on the date of order has to be ascertained. But as between the parties, such order is also admissible as evidence as regards possession before two months of the date of the order [*Jogendra v. Mohim*, 34 CWN 358].

A judgment in a criminal case is admissible to show what order was made, who the parties to the dispute were, what the land in dispute was and who was held entitled to possession [*Krishna v. Md*, 21 CWN 93: 31 IC 789; *Mohunt v. Irshad*, 22 CLJ 525; *Ramadhar v. Janke*, A 1956 P 49]. In subsequent proceedings for succession, the judgment of the criminal court is only relevant to show that the claimant was convicted and sentenced under s 304 PC. The points whether the case falls under s 304 or within ss 299 and 300 PC are to be determined by the civil court on evidence. In this case against conviction by criminal court under s 304 it was held that the claimant was guilty of murder and excluded from succession [*Biro v. Banta*, A 1980 P&H 164 (*Anil v. Latika*, A 1955 SC 566 **rel** on)]. A finding regarding possession of land in previous judgments of civil courts though *inter partes* is by no means conclusive on the question in a subsequent criminal proceeding for offence under ss 143, 379 and 109 I P Code. It is only a piece of relevant evidence [*Trailokhya v. R*, 59 C 136]. A judgment under s 144 Cr P Code is not evidence of possession of the party in whose favour the proceeding may have terminated [*Mohan v. Deonarain*, A 1945 P 453: 24 P 379; *Sheopujan v. Kesho*, 2 P 919]. In a suit for declaration that the plaintiff was not married to defendant, report of Government hand-writing expert in criminal case arising out of complaint by plaintiff's father for alleged forgery of certificate could be used as evidence in the suit [*Altaf Husssain v. Nasreen*, A 1978 A 515]. On a charge under s 447 I P Code, a criminal court is not entitled to disregard the decree of a civil court declaring rights to the identical property in dispute [*Varadaraja v. Swami*, A 1948 M 49].

The decision of a criminal court does not operate as *res judicata* in a civil suit in respect of the same cause of action. In a suit by a father for compensation for the loss of his daughter's services in consequence of her abduction, the judgment of the criminal court convicting the defendant did not prevent the civil court from determining whether or not the defendant did abduct the plaintiff's daughter as alleged [*Ram Lal v. Tularam*, 4 A 97]. On a charge of forgery, the judgment of the civil court holding that the document was a forgery, was held inadmissible [*Gagan v. R*, 6 C 247: 7 CLR 74; *Oates v. R*, 76 IC 416: 38 CLJ 163; see also *Tarapada v. Kalipada*, 28 CWN 587].

It will be opposed to fundamental canons of justice and public policy to treat the judgements of the criminal court binding on a Motor Accidents Claims Tribunal, trying a claim arising out of a motor accident involving injury or death [*Jullundur Municipality v. Romesh*, A 1970 Pu 137].

A judgment of a civil court cannot be given in evidence in a criminal prosecution for establishing the truth of the facts upon which it is rendered. Whatever may be the nature of the decision of the civil court, the magistrate ought to decide the question of the accused's criminality by himself—*per* RAMPINI J. Contrary view was taken by GHOSH J, who observed that he was not prepared to say that the decision in a civil court would not be admissible in evidence in a criminal case, if the parties were substantially the same and the issues in the two cases identical [*Raj Kumar v. Bama Sundari*, 23 C 610. See also *Manjanadi Debi v. Ram Dass*, 4 CWN 176 *note*].

Miscellaneous.—In suits brought to set aside alienation made by Hindu widows and other persons who have not an absolute and complete interest in the property alienated, the question is often raised whether or not the alienation was made for necessary purposes. In order to prove such necessity, decrees are frequently produced, without evidence being given of the circumstances under which the debts

were contracted, for the recovery of which those decrees were obtained. Upon the principle above stated, it might appear that such decrees though good evidence of the amount paid, are not evidence, at least on behalf of the alienors, of the facts constituting the necessity [See Field 6th Ed pp 184-85 and the cases cited therein]. When a proceeding of a tribunal or a court relied on by one party in support of his claim, it is open to the opposite party to show that proceeding is not either of a competent tribunal or a court or that it was obtained by fraud or collusion. [*M N Paul v. State of Kerala*, A 1982 Ker 38, 40].

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

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COMMENTARY

Principle and Scope. [Avoidance of *Res Judicata* by Showing Fraud or Collusion].—This section lays down that when one of the parties to a suit or other proceeding tenders, or has put in evidence, a judgment, order or decree under ss 40, 41 and 42, it is open to the party against whom it is offered to avoid its effect on any of the three grounds specified in the section, without having it set aside, *viz* (*a*) the incompetency or want of jurisdiction of the court by which the decree was passed; (*b*) that the judgment was obtained through fraud; or (*c*) that it was obtained by collusion. The section applies to both civil and criminal proceedings [*Bhagwandas v. Patel & Co*, 1940 Bom 403: A 1940 B 131]. S 44 provides for impeaching not only the judgments between the parties but also judgments regarding public matters and

judgments *in rem* [*Shah Gulam v. Shah Abdul*, A 1959 AP 212]. Apart from s 14 C P Code, a foreign judgment can be challenged under this section on the ground of fraud, [see *Satya v. Teja*, A 1975 SC 185]. Norton remarks: "I do not see why the same rule ought not to apply to the case of a judgment, &c tendered under s 43" [Nort p 218]. The principle laid down in s 11 of C P Code is substantially modified by s 44 and the principle of *res judicata* does not apply if a previous decree is proved to have been obtained by fraud [*Sri Radha v. Wajid Ali*, 36 IC 746: 19 OC 334; *Krishna v. Ramamurti*, 16 M 198; *Laxmi v. Md Shafi*, A 1949 Pu 141; *Khirod v. Banshidhar*, A 1978 Or 111]. S 44 is an exception to s 11 CPC [*Vellappan v. Peter*, A 1979 K 194]. Not only a party to the decree but also a stranger can show that the decree is a nullity on account of fraud etc. [*Hariram v. Rameshwar*, 49 CWN 354].

But it is important to remember that the provisions of s 11 are mandatory, and the ordinary litigant who claims under one of the parties to the former suit can only avoid its provisions by taking advantage of s 44 which defines with precision the grounds of such avoidance as fraud or collusion, or by showing want of *bona fides* in the prosecution of the previous suit. It is not for the court to treat negligence, or gross negligence, as fraud or collusion, unless fraud or collusion is the proper inference from the facts [*Venkata Seshyya v. Kotiswara*, 64 IA 17 : 1937 Mad 263: 41 CWN 257: A 1937 PC 1]. The rule as to fraud applies equally, whether the judgment or decree impugned was passed by an inferior court or a superior court. Whenever it is shown that a judgment which is relevant was obtained by fraud, every court will treat it as a nullity as in the words of DE GREY CJ, "fraud vitiates the solemn proceedings of the courts of justice" [*R v. Duchess of Kingston*, 20 How St Tr 355, 544]. But some limitation must be put upon the section, *eg* if a decree is obtained by *A* against *B*, *B* cannot bring an action to set aside that decree on the ground that it was obtained by perjured evidence, although a decree procured by false evidence is none the less a fraudulent act. If that were allowed parties would go on bringing such cross-actions *ad infinitum* and there would be an end of *res judicata*. Fraud contemplated in this section is an extrinsic act unconnected with matter adjudicated upon, *ie some* fraud by which a litigant is prevented from appearing and placing his case before the court at the trial (*post*). "It is a jurisdiction to be exercised with care and reserve, for it would be highly detrimental to encourage the idea in litigants that the final judgment in a suit is to be merely a prelude to further litigation [*per* JENKINS CJ, in *Nanda v. Ram Jiban*, 41 C 990, 998]. In order to sustain an action to impeach a judgment, actual fraud must be shown; mere constructive fraud is not, at all events after long delay, sufficient [*Patch v. Ward*, 3 Ch 203].

The Privy Council in *Talluri Venkata Seshayya v. Thadikonda Kotiswara Rao*, A 1937 PC 1, has laid down that section 44 cannot be extended to cases of gross negligence. But in the said case the Privy Council had observed that the court cannot treat negligence, or gross negligence, as fraud or collusion, unless fraud or collusion is the proper inference from the facts. In other words in cases where an inference of fraud or collusion can be drawn from the negligence or gross negligence of the next friend of a minor, it would be permissible for the minor to avoid the judgment or decree passed in the earlier proceeding by invoking section 44 without taking resort to a separate suit for setting aside the decree or judgment [*Asharfilal v. Koili*, A 1995 SC 1440, 1444]. In a proceeding under s. 125 Cr PC the wife specifically denied that she was gain fully employed and thus was able to support herself. Even if she was employed no dishonesty or deceit could be attributed to the wife to attract the provisions of section 44 [*Asha Anil Deshmukh v. Anil Mahadeoro Deshmukh*, 1996 Cri LJ 2751, 2753 (Bom)].

A litigant, who approaches the court, is bound to produce all the documents executed by him. If he withholds a vital document in order to gain advantage on the

other side then he would be guilty of playing fraud on the court as well as on the opposite party [*S.P. Chengalvaraya Naidu v. Jagannath*, A 1994 SC 853, 855].

Grounds on Which Judgments May be Avoided.—Whenever a judgment is offered in evidence against a stranger, he may avoid its effects, by furnishing distinct proof that it was obtained by *Fraud* or *Collusion*. To borrow the language of LORD CHIEF JUSTICE DE GREY, "Fraud is an extrinsic collateral act, which vitiates the most solemn proceedings in courts of justice. LORD COKE says it avoids all judicial acts, ecclesiastical or temporal". In applying this rule, it matters not whether the judgment impugned has been pronounced by an inferior tribunal, or by the highest court of judicature in the realm, but in all cases alike it is competent for every court, whether superior or inferior to treat as a nullity any judgment which can be clearly shown to have been obtained by manifest fraud. Whether an innocent party would be allowed to prove in one court that a judgment against him in another court was obtained by fraud, is a question not equally clear, as it would be in his power to apply directly to the court which pronounced the judgment to vacate it; but, however, this point may be ultimately determined; this much is evident, that a guilty party would not be permitted to defeat a judgment by showing that, in obtaining it he had practised an imposition on the court; for it would be an outrage to justice and common sense, if a person would thus avoid the consequences of his own fraudulent conduct [Tay s 1713].

In England therefore a party to a suit would not be allowed to defeat a judgment by showing that in obtaining it he had practised an imposition upon the court. The section does not appear to put any such restriction, its language being general. But the rule that a party can set up his own fraud or collusion in nullifying a previous judgment has its limitations (see *post*: "*Can a party plead his own fraud?*").

The rule that a person participating in a fraud will not be allowed to set it up as a defence has its exceptions, *eg* in cases where the act done is against public policy. The rule also does not hold good against persons who claim through the party defrauding, if they are the persons sought to be defrauded [see *Barkatunnissa v. Fazl*, 26 A 227 and other cases cited *post* p 482]. The rule that fraud can only be proved by an innocent party does not however apply to probate and divorce cases [Phipson 11th Ed p 536].

[*Ref Tay ss 1712-17; Steph Art 46; Best 11th Ed s 595; Phip 8th Ed p 400; Hals 3rd Ed Vol 15 Paras 383-84; Kerr on Fraud, 4th Ed s 325 et seq*].

Same: [Application].—S 44 is permissive and not prohibitive. It allows a party to avoid a judgment by proving fraud or collusion, but it does not destroy his substantive right which exists independently of the Act [*Mahes v. Manindra*, 45 CWN 508; *Iftkhar v. Beant*, A 1946 L 233 FB] and so s 44 does not purport to enumerate the grounds on which a decree can be attacked by a separate suit [*Shaminath v. Ramjas*, 34 A 143: 13 IC 80 : 9 ALJ 1; see *Tribeni v. Rampujan*, A 1970 P 13]. The application of the rule in s 44 is limited only to cases in which a decree is treated as relevant under ss 40, 41, 42. None of these sections has any application to execution proceeding. So it is not open to the judgment-debtor to take exception to the execution of a decree upon the allegation that it has not been passed by a court of competent jurisdiction [*Biswanath v. Bhagwandin*, 14 CLJ 648]. In another case however, where a transferee from judgment-debtor of his equity of redemption applied for setting aside the sale of the mortgaged property on the ground that the execution proceedings had been carried on by fraud, it was held that it was quite competent to raise the question under s 44 and give evidence in support [*Ramdhani v. Topi Bibee*, 18 CLJ 264; see also *Shewa v. Bhawarilal*, A 1973 B 139]. Relying on

Biswanath's case it has been held that s 44 does not apply to judgments admissible under s 43 [*Venkata v. Akkappa*, A 1941 M 569].

It is now well-recognised that ordinarily an execution court cannot go behind the decree and its validity cannot be challenged there. It cannot go into the question that the decree was obtained by fraud [*Dattatraya v. Purshottam*, 46 B 635; *Biswambhar v. Aparna*, 39 CWN 490 FB]. In an eviction proceeding, the objector who was a party to the petition under O 21 R 97 CPC had *locus standi* to challenge the validity of the eviction order. [*Joginder Singh v. Smt Nirmal Naini Mehra*, A 1986 Del 305, 312]. But where a decree is of a court which apparently has no jurisdiction, pecuniary or territorial, the executing court may refuse to execute [*Gorachand v. Prafulla*, 19 CWN 948 FB; see *Jnanedra v. Rabindra*, 37 CWN 401, 405: A 1933 PC 61: 60 IA 71; *Uttam v. Wasudeo*, A 1946 N 311]. See further, Sarkar's C P Code 6th Ed notes to s 38.

Under s 44, where a decree obtained by fraud is sought to be used against a person, he is entitled to show the nature of the decree notwithstanding the fact he has not previously taken steps for its cancellation. But he cannot be permitted to challenge the decree unless he sets out specifically the circumstances which constituted the alleged fraud on him and on the court [*Pulin v. Satya*, 70 IC 548: A 1923 C 79]. A decree of divorce of a foreign court is open to attack on grounds specified in s 44 [*Satya v. Teja*, A 1975 SC 105].

A decree *in rem* even of foreign court (*eg* a decree of divorce) which is relevant under s 41 can be contested by any one not a party, also on the ground of fraud or collusion which does not go to the jurisdiction of the court. The law in s 44 goes beyond the English law in this respect [*Sita Devi v. Gopal Saran*, A 1928 P 375: 111 IC 762; *Bhagwandas v. Patel & Co*, A 1940 P 131].

Onus.—The onus of proving collusion or fraud on the part of his predecessors in previous suits is on the party who alleges it [*Venkata Seshayya v. Kotiswara*, 64 IA 17: 1937 Mad 263: A 1937 PC 1; *Hafiz v. Swarup*, A 1942 1].

"Order".—Where in a suit for rent by an administrator, the tenant raised the plea that the letters of administration had been obtained by fraud and misrepresentation, it is doubtful whether letters of administration can be regarded as an order within the meaning of this section [*Ambica v. Kala Chand*, 10 CWN 422].

Incompetency or Want of Jurisdiction.—Every species of judgment will be rendered inadmissible on proof that the court which pronounced it had no jurisdiction. 'Jurisdiction' is the authority by which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision [*Hridoy v. Ram Ch*, 24 CWN 723, 732: 31 CLJ 482; *Gorachand v. Profulla*, 52 C 166 FB]. The words "not competent" in this section refer to a court acting without jurisdiction [*Kettilamma v. Kelappan*, 12 M 228]. The competency of a court and its jurisdiction, are synonymous terms. They mean the right of court to adjudicate in a given matter [*Sardar v. Anaruyal*, 21 B 205]. S 44 refers to lack of inherent jurisdiction in the court and not to its territorial jurisdiction which can be waived [*Hiralal v. Kalinath*, A 1955 A 569 on appeal A 1962 SC 199; *Beerarpa v. Yesrvantrao*, A 1972 My 338; see also *Bahrein Petroleum Co v. P J Pappu*, A 1966 SC 634 and further *post* s 115; "*Waiver and Estoppel*"].

A party to a decision could get rid of that judgment and order only under s. 44 by showing that the court was not competent to render the judgment or pass the order. [*Ram Prasad v. State of Uttar Pradesh*, A 1988 All 309, 315 (DB): 1988 All WC 1082]. The plea of want of jurisdiction can be raised at any stage unless there is a bar

of *res judicata* or equitable estoppel [*Sheo Tahal v. Binayek*, A 1931 A 689]. As to objection regarding want of territorial jurisdiction, see s 21 C P Code. Under s 99 C P Code, no decree shall be reversed or modified for any error or irregularity not affecting merits or jurisdiction.

The mere fact that a court competent to hear and decide a suit, decides it wrongly on a question of limitation, does not make the decree a nullity. It has never been and could not be held that a court which erroneously decrees a suit which it should have dismissed as barred by limitation, *res judicata*, etc acts without jurisdiction and is not competent to deliver its decree [*Nathu Ram v. Kalian*, 26 A 522: 1 ALJ 217; *Ramesh v. Moomraj*, 45 CLJ 24; see also *Caston v. C*, 22 A 270, 279 FB: 20 AWN 59]. Want of jurisdiction must be distinguished from irregular or erroneous exercise of jurisdiction. If a court has jurisdiction to take cognizance of any matter before it, but decides it erroneously or exercises its jurisdiction irregularly, its judgment is not a nullity till it is set right by an appropriate proceeding in a proper court. Jurisdiction does not depend on the correctness of a decision. A power to decide necessarily carries with it a power to decide erroneously as well as rightly. But if a court has not the jurisdiction to determine a matter, and assumes it, its judgment is a nullity. In the latter case, there being want of jurisdiction the whole proceeding is *cooram non judice* and void. The law is stated in Hals 3rd Ed Vol 15 para 384 p 205 thus : "The absence of a condition necessary to found the jurisdiction to make an order, or give a decision, deprives the order or decision of any conclusive effect; but it is otherwise where the order is good on its face and the court adjudicating has jurisdiction to determine the existence or not of the condition, and the party denying its existence has neglected his opportunity of raising the objection at the hearing".

S 44 has nothing to do with the competency of the former court to try the subsequent suit. It is concerned only with the competence of the former court to try the former suit and with such competency of that court as a fact—Whether s 44 is subject to s 11 C P Code [*Hickie v. Offl Trustee*, A 1954 C 506].

This section empowers the court to ignore orders issued by courts without authority [*Keshav v. Amarchand*, 57 B 456]. An order made without jurisdiction is absolutely null and void; such an order may be shown to be a nullity in any proceeding when reliance is placed upon it, although no formal and direct proceeding has been taken to have it vacated or reversed [*Gulab Sao v. Choudhury*, 2 CLJ 384: 9 CWN 956; *Peary v. Secy of S*, 39 CLJ 454, 458].

A judgment delivered by a court not competent to deliver it, *eg* by a court which had no jurisdiction over the parties, or the subject-matter of the suit, is a mere nullity [see *Kalka v. Kanhya*, 7 NWP 99; *Sukram v. Crowdy*, 19 WR 284; *Ganesh v. Ram Nidhi*, 22 WR 361: *India S&W Co Ltd v Climax I S*, 50 B 1: 91 IC 847]. When an offence is tried by a court without jurisdiction, the proceedings are void, and the offender if acquitted, is liable to be retried [*R v. Hussein*, 8 B 307]. A decree passed by a court having jurisdiction is not void but voidable where it is passed under a misapprehension or is brought about by fraudulent proceedings [*Shk Ismail v. Rajab*, 30 M 295: 17 MLJ 165].

A suit for restitution of conjugal rights in the High Court was dismissed for want of leave, but it was held that the defendant was not the legally wedded wife of the plaintiff. In a subsequent suit by plaintiff, *held* that the former decision was by a court not competent within s 44 [*Abdul Kader v. Doolan*, 37 B 563].

"Judgment, Order or Decree" Obtained by Fraud.—The term "fraud" has not been defined in the Act. The definition of fraud is only to be found in s 17 of

the Contract Act (9 of 1872). According to Story, "Fraud properly includes all acts, omissions, and concealments, which involve a breach of legal or equitable duty, trust or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken by another" [Story, Eq Jur s 252]. A person does a thing fraudulently if he does it with intent to defraud. Two elements are necessary: deceit, *ie* to say, some one is deceived, and injury or loss to the same person [*Biswambar v. Nilambar*, A 1930 C 263: 33 CWN 997]. Two kinds of fraud are mentioned *viz* (*1*) *Actual* or positive fraud which includes cases of the intentional and successful employment of any cunning, deception, or artifice, used to circumvent, cheat or deceive another [Story, Eq s 186]. (2) *Constructive* or legal fraud includes such contracts or acts as though not originating in any actual evil design or contrivance to perpetrate a fraud yet, by their tendency to deceive or mislead others, or to violate private or public confidence, are prohibited by law [Story, Eq]. It is in connection with the subject of actual or positive fraud that Story mentions frauds in verdicts, judgments, decrees and other judicial proceedings [Story, Eq s 6].

S 44 lays down not only a rule of law relating to evidence, but also a rule of procedure. It makes the same provision for impeaching on the ground of fraud judgments *inter partes* and judgments *in rem* or judgments relating to public matters [*Rajib v. Lakhan*, 27 C 11: 3 CWN 660; *Parbati v. Gajraj*, A 1937 A 28]. A person not an actual party to the fraud may set up a fraud as an answer to a decree [*Srirangammal v. Sandammal*, 23 M 216].

A decree of a superior court can be declared *void* by an inferior court on the ground of fraud [*Sarthakram v. Nundo Ram*, 11 CWN 579, referred to in *Abdul Huq v. Abdul Hafez*, 14 CWN 116n: 11 CLJ 636]. A party to a proceeding is never disabled from showing that a judgment or order has been obtained by the adverse party by fraud [*Manchharam v. Kalidas*, 19 B 812, 826]. Decree obtained by practising fraud both on defendant as well as court is nullity [*Palewal v. Gohil*, A 1980 (NOC) 50 (G)]. The nullity of a judgment or decree obtained by fraud upon a court though it has not been set aside or reversed, may be alleged in a collateral proceeding [*Hare Kr v. Ramesh*, 6 PLJ 373: 62 IC 962].

If a previous decree obtained by fraud deprives a stranger of his right to certain property, a suit by him in regard to it is maintainable without first bringing another suit for getting the decree set aside. Under s 44 he can impeach it, if it is sought to be used against him as evidence [*Aswini v. Banamali*, 21 CWN 594]. A mortgaged certain property to *B*, who instituted a suit on his mortgage and obtained a decree therein. Subsequent to such decree, *A* sold the property to a third party *C*. *B* having attempted to execute his decree against the property in hand of *C*, the latter instituted a suit against *A* and *B* for a declaration that the property was not liable to satisfy the decree, as the mortgage transaction was a fraudulent one, and the decree was obtained by fraud and collusion. In such suit *B* contended that *C* having purchased subsequently to the decree was absolutely bound by it—*Held*, that having regard to the terms of s 44, it was perfectly open to *C* to prove that the decree had been obtained by fraud and collusion [*Nilmony v. Alimunissa*, 12 C 156]. Where plaintiff in an ejectment suit relies on his title as a purchaser in a court sale, it is open to the defendants in possession to show that the purchase was procured by fraud [*Gnaniar v. Krishna*, 23 IC 1]. Entry in a record of rights operates as a decree under s 11 of Reg 3 of 1872 (Sonthal Parganas, Settlement) and it is open to the plaintiffs to urge under s 44 that it was obtained by fraud (*Mir Mazaffar v. Kali Pd*, 18 CWN 271: 19 CLJ 29].

Probate or Letters of Administration.—The question has arisen in some cases as to whether a probate can be collaterally challenged under s 44 in another suit or proceeding on the ground of fraud. GREAVES J, observed that "having regard to the wide terms of s 44, it is not possible to say that it is not open to a court other than the court from which a grant was issued in cases of fraud or collusion to deal with the matter and decide whether the grant has been obtained by fraud or collusion". He however added that the better course would be to stay the suit to enable an application to be made for revocation of the grant [*Rakshab v. Tarangini*, 25 CWN 207: 62 IC 448]. In an earlier case BANERJI J, observed that a probate is not a "judgment, order or decree" and a probate does not require to be "proved". In this view s 44 would not apply [*Rajib v. Lekhan*, 27 C 11 : 3 CWN 660].

In a case MARKBY J, described the grant of probate as a decree of the court. Without any reference to s 44 it was held that the greatest confusion would arise if the validity of the will could be questioned in a civil suit and that no court other than the probate court can revoke the grant [*Kamal v. Nilruttan*, 4 C 360]. In Patna it has been held that the probate does not amount to any adjudication, but it only recites the fact that an adjudication has been made. Hence it is not a decree and as s 44 does not apply, no evidence can be allowed to prove that the will was a forgery [*Rajkishore v. Promode*, A 1944 P 182: 22 P 756]. In Bombay it has been held that in an application under s 476 (now s 340) Cr P Code although the criminal court has no jurisdiction to revoke the probate of a will, it has full jurisdiction to decide that it was a forgery. Under s 44 it is open to the party offering evidence of forgery to prove that the probate decree was obtained by fraud [*Bhagwandas v. Patel & Co*, 1940 Bom 403: A 1940 B 131].

Can a Party Plead his Own Fraud?—This section is wide enough to allow a party to set up his own fraud or collusion in procuring the former judgment in order to defeat it,—certainly a startling proposition [*Ahmedbhoy v. Vallibhoy*, 6 B 703, 716—*per* LATHAM J]. Although the words "any party" are wide enough to cover the party who is himself a party to the fraud, it is now an established principle of law that a party to fraudulent and collusive decree has always been held to be bound by it and is estopped from raising in a subsequent suit the question of his own fraud [*Chenvirappabin v. Puttapbin*, 11 B 708. See also *Rangammal v. Venkatachari*, 18 M 378, on appeal 20 M 323; *Varadarajulu v. Srinivasulu*, 20 M 333; *Yaramati v. Chundru*, 20 M 326; *Goburdhan v. Ritu*, 23 C 962; *Bankabehari v. Raj Kumar*, 27 C 231: 4 CWN 289; *Kumar Row v Nukamma*, 31 M 485: 18 MLJ 546: 4 MLT 331; *Kishorebai v. Ranchhodia*, 38 B 427; *Kondi v. Chunilal*, A 1929 B 1]. On the same principle a collusive decree binds the parties and the representatives thereto [*Sahib v. Bahari*, A 1927 A 494: 101 IC 765; *Darbari v. Mahbul*, A 1927 A 538: 101 IC 513; *Parameswaran v. Aiyappan*, A 1959 K 206]. In all these cases it has been laid down that a party to a fraudulent and collusive decree when that fraud is effected, cannot alleged his own fraud to escape from the consequences of the decree. The case of *Param Singh v. Laljumul*, 1 A 403 in which opposite view was taken has been dissented from in 11 B 708, on the grounds, that it is not supported by any other Indian case, that it is against the principles of the English cases on the point and that it is also opposed to the general principles of *res judicata* [; see *ante*, under *principle and Scope*]. If the fraud is practised by both parties either of them cannot impeach the judgment on the ground that it was collusively procured [*Shripadgouda v. Govindgouda*, 1941 Bom 160: A 1941 B 77; see *Raoji v. Ratansi*, 54 B 696]. As to estoppel in cases of parties in *pari delicto*, see s 115 *post*.

Where a person suffered a fraudulent and collusive decree to be passed against him on the basis of a *wakf* with the intention of restricting the inheritance to the

property to his descendants so as to debar his collateral heirs from successions, the latter class of his heirs are not precluded in a suit by them from setting up the fraudulent character of the decree [*Barkatunnisa v. Fazl Haq*, 26 A 272]. When parties act together and perpetrate fraud, the duty of the court is not to assist either party [*Shk Villayet v. Misram*, 72 IC 92; see also *Raghupati v. Nrisingha*, 36 CLJ 491].

Fraud in Judgments Can Be Challenged Without Setting Them Aside.—Under s 44 a party can, in a collateral proceeding in which fraud may be set up as a defence, show that a decree or order obtained by the opposite party against him was passed by a court without jurisdiction or was obtained by fraud or collusion and it is not necessary to bring an independent suit for setting it aside [*Bansi v. Dhapo*, 24 A 242; *Rajib v. Lekhan*; 17 C 11 : 3 CWN 660; *Parbati v. Gajraj*, A 1937 A 28; *Prayag v. Siva*, 42 CLJ 280, 428: A 1926 C 1; *Hare Krishna v. Umesh*, 6 PLJ 373: A 1921 P 193; *Aswini v. Banamali*, 21 CWN 594; *Manchharam v. Kalidas*, 19 B 821, 826; *Ranganath v. Govind*, 28 B 639; *Jamiruddin v. Khadejanessa*, A 1929 C 685: 114 IC 407; *Bhagwandas v. Patel & Co ante*; *Bishunath v. Mirchi*, A 1955 P 66; *Vijaya v. Padmanabham*, A 1955 AP 112 (see also *ante*). So also a compromise decree obtained by fraud [*Bomareddi v. R*, 30 IC 639; *Abdul Hakim v. Panchi*, 32 IC 849]. Every court, whether superior or inferior, can treat as a nullity the decree of another court obtained by fraud [*Barkatunnissa v. Fazal Huq*, 26 A 272; see also *Nistarini v. Nundlal*, 26 C 891 (on appeal 30 C 369 and 33 C 180 : 32 IA 193)]. It was contended in a case that if this view is accepted there would be no limitation for setting aside a decree and art 96[1] of the Limitation Act would be nugatory. It was held that in spite of the anomaly, the plain words of s 44 allow a party to show that a judgment was obtained by fraud [*Prayag v. Siva Pd*, 42 CLJ 280, 428: 92 IC 385. See also *Ahmedbhoy v. Vullebhoy*, 6 B 703; *Manchharam, v. Kalidas*, 19 B 821, 826]. The Limitation Act does not apply to defence [*Bhola v. Nagendra*, A 1928 C 810; *Bishunath v. Mirchi*, A 1955 P 66]. A certificate of sale of land obtained by fraud is a nullity and it can be challenged collaterally by way of defence without bringing a suit to set it aside [*Bishunath v. Mirchi, sup*; *Sukhi v. Prayag*, A 1959 P 508].

The right as given by s 44 has not been fettered by an limitation. A decree or order can be challenged on ground of fraud in a collateral proceeding without bringing a suit for setting aside the decree of order [*Tribeni v. Rampujan*, A 1970 P 3 (*Bishunath v. Mirchi, sup* **folld**)]. But is a suit for setting aside a decree on the ground of fraud is time-barred, s 44 cannot save it [*Ekawari v. Jadunandan*, A 1974 P 191 (*Bishunath v. Mirchi, sup* **distd**)]. In *Nistarini v. Nundo Lal*, 30 C 369 a consent decree was treated as a nullity. In a suit by a decree-holder under Or 21 r 63[2], the opposite party can establish that the decree was obtained by fraud or collusion [*Vijaya v. Padmanabham, sup*].

Nature and Kind of Fraud Contemplated By This Section.—The nature and kind of fraud contemplated by this section should be borne in mind. In *Md Golab v. Md Sulliman*, 21 C 612, 619, PETHERAM CJ, after reviewing some English decisions, observed:

> "The principle upon which these decisions rest is that where a decree has been obtained by a fraud practised upon the other side, by which he was prevented from placing his case before the tribunal, which was called upon to adjudicate upon it in the way most to his advantage, the decree is not binding

1. See now art 59 of Act 36 of 1963.
2. Or 21, r 63 has been omitted by CPC (Am) Act, 1978, see now Or 21, r 58.

upon him, and may be set aside....., but I am not aware that it has ever been suggested in any decided case; and in my opinion it is not the law that because a person against whom a decree has been passed alleges that it was wrong and that it was obtained by perjury committed by, or at the instance of the other party, which is of course the fraud of the worst kind, that he can obtain a re-hearing of the questions in dispute in a fresh action by merely changing the form in which he places it before the Court, and alleging in his plaint that the first decree was obtained by the perjury of the person in whose favour it was given. To so hold would be to allow defeated litigants to avoid the operations not only of the law which regulates appeals, but of that which relates to *res judicata* as well."

[*Md Golab v. Md Sulliman, ante* was **approved** in *Abdul Huq v. Abdul Hafez*, 14 CWN 695; *Munshi Mosuful v. Surendra*, 16 CWN 1002; *Nanda Coomar v. Ram Jiban*, 18 CWN 681; *Nalini v. Hari*, 29 CWN 325; *Sarat v. Mecher*, 29 CWN li; *Muktamala v. Ram Ch*, 31 CWN 258; *Balkuntha v. Prahlad*, 30 CWN 560; *Kunja Behari v. Krishna*, 1940; 2 Cal 477: A 1940 C 489; *Papavinasam v. Dalvani*, A 1963 K 26 and **dissented** from in *Lakshi Churn v. Nur Ali*, 15 CWN 1010 and referred to in *Tikaram v. Daulatram*, 32 A 145].

As observed by SIR JOHN ROLT LJ, in *Patch v. Ward*, 1867 LR 3 Ch 203 the fraud must be actual positive fraud, a meditated and intentional contrivance to keep the parties and the court in ignorance of the real facts of the case and obtaining the decree by that contrivance; constructive fraud is not sufficient; see also *Md Hashim v. Iffat Ara*, A 1942 C 180; *Bishen v. Wasawa*, A 1926 L 177 *post*. Fraud must be *established* by cogent evidence and suspicion cannot be accepted as proof [*Hansraj v. Deradoon &c*, A 1940 PC 98: 1940 Kar 216; *Narayanan v. Offl Ass*, A 1941 PC 93]. Fraud, like any other fact may be proved by circumstantial evidence, but mere want of good faith cannot establish it [*Laxmi v. Md Shafi*, A 1949 Pu 141]. It is now well established that a decree cannot be set aside as fraudulent on the allegation that it was obtained by perjured evidence, or that the claim was false. It must be shown that plaintiff was prevented by some fraud or contrivance from appearing and placing his case before the court, *ie*, the alleged fraud must be an *extrinsic* act (see below). JAMES LJ, in *Flower v. Lloyd*, LR 10 Ch D 327, observed as follows:—

"Where is litigation to end, if a judgment obtained in an action fought out adversely between two litigants *sui juris* and at arm's length could be set aside by a fresh action on the ground that perjury had been committed in the first action or that false answers had been given to interrogatories, or a misleading production of documents, or of a machine, or of a process had been given? There are hundreds of actions tried every year in which the evidence is irreconcilably conflicting, and must be on one side or other wilfully and corruptly perjured. In this case, if the plaintiffs had sustained on this appeal the judgment in their favour, the present defendants in their turn, might bring a fresh action to set aside that judgment on the ground of perjury of the principal witness and subornation of perjury; and so the parties might go on alternately *ad infinitum*.....Perjuries, falsehoods, frauds, when detected must be punished and punished severely, but in their desire to prevent parties litigant from obtaining any benefit from such foul means, the Court must not forget the evils which may arise from opening such new sources of litigation, amongst such evils not the least being that it would be certain to multiply indefinitely the mass of those every perjuries, falsehoods and frauds."

The decision of *Venkatappa v. Subba*, 29 M 179 that a suit lies to set aside a decree obtained by perjury and suppression of evidence was overruled in *Kadirvelu v. Kuppuswami*, 41 M 743: 34 MLJ 590. The former view was supported by some English cases *viz Abouloff v. Oppenheimer* (1882), 10 QBD 295 and *Vadala v. Lawes*, 25 QBD 310, where the decision in *Flower v. Lloyd* (1878), 19 Ch D 327 has been questioned. In *Munshi Mosuful v. Surendra*, 16 CWN 1002, *Flower v. Lloyd* was relied on and it was pointed out that it has not been superseded by *Abouloff v. Oppenheimer* and *Vadala v. Lawes, sup* which are both cases of foreign judgments which stand on a footing of their own. [For other cases see *post*].

Constructive fraud is not sufficient [*Bishen v. Wasawa*, A 1926 L 177]. In order that a decree whether made *ex parte* or by consent or after contest, apparent or real, may be attacked for fraud, the fraud must be actual positive fraud, a meditated and intentional contrivance to keep the parties in ignorance of the real facts of the case and to obtain a decree by that contrivance [*Nanda Kumar v. Ram Jiban*, 18 CWN 681: 19 CLJ 457: 41 C 990; *Janki v. Lachmi*, 37 A 535]. "In order that fraud may be a ground for vacating a judgment, it must be a fraud that is extrinsic or collateral to everything that has been adjudicated upon and not one that has been or must be deemed to have been dealt with by the court" [Rule in *Duchess of Kingston's Case*, 20 How St Tr 544 stated in *Chinnaya v. Ramanna*, 38 M 203; see also *Logadopalti v. Kotla Ramanana*, 25 MLJ 228].

Fraud bearing on jurisdictional facts vitiates all judicial acts whether *in rem* or in *personem* [*Satya v. Teja*, A 1975 SC 105].

Distinction Between Fraud Attempted and Fraud Perpetrated.—A distinction exists between those cases in which the fraud is only attempted but not carried into effect, and those in which it has actually been carried into effect. In the former case a party attempting to commit fraud is not precluded from maintaining an action to set aside the fraudulent transaction, but in the latter case he is not allowed to take advantage of his own wrong and is precluded from maintaining an action to set aside the fraudulent transaction, actually carried into effect; [see *Goburdhan v. Ritu*, 23 C 962; *Jadunath v. Ruplal*, 33 C 967; *Honappa v. Narsappa*, 23 B 406; *Pether Perumal v. Muniandy*, 35 C 551: 12 CWN 562: 35 IA 98 and cases in notes under s 115 "*Law recognizes no Estoppel as between parties in pari declicto*"].

Procedure to be Adopted for Setting Aside a Fraudulent and Collusive Decree.—The most natural course for a party to a judgment who seeks to impeach it for fraud is by an application to the court which pronounced the judgment, to set it aside or to bring a regular suit [see *Rajib v. Lekhan*, 27 C 11: 3 CWN 660; *Mewa v. Bhujan*, 13 BLR Ap 11; *Ashutosh v. Tara Pr*, 10 C 612; *Eshan v. Nundomani*, 10 C 357; *Karamali v. Rahimbhoy*, 13 B 137 on appeal 15 B 594; *Nistarini v. Nundalal*, 26 C 907; *Ramgopal v. Prasanna*, 2 CLJ 508: 10 CWN 529; *Biraj Mohini v. Chintamoni*, 5 CWN 877; *Rakhalmoni v. Adoita*, 30 C 613: 7 CWN 419; *Fool-coomari v. Woodoy*, 25 C 649; *Virupakshappa v. Shidappa*, 23 B 620; *Surendra v. Hemangini*, 34 C 83; *Barmadeo v. Baranashi*, 3 CLJ 119 and *Sarbesh v. Hari Doyal*, 14 CWN 451: 11 CLJ 346].

In order to attack a compromise decree on the ground of fraud, collusion, undue influence &c the regular mode would be a suit [*Gulab v. Badshah*, 13 CWN 1197; *Mirali v. Rehmoobhoy*, 15 B 594; *Galstaun v. Pramatha*, 33 CWN 833; *Girdharan v. Bholi*, A 1941 P 574; *Nathumal v. Raghubar*, A 1926 A 50]. One who is not a party to the consent decree cannot sue to set it aside. All that he can do is get a declaration that the decree did not affect his right [*Bisambhar v. Nilambar*, 33 CWN 997; *Fateh v. Narsing*, 22 CLJ 383]. In a deed creating religious trust two views were possible.

Consent decree based on one view passed cannot be challenged in subsequent suit on ground of fraud and collusion [*Jodugopal v. Pannalal*, A 1978 SC 1329]. A decree which is fictitious does not require to be set aside [*Sashi Kumar v. Chandra*, 35 CLJ 348; *Surendra v. Kaligopal*, 22 CWN 367].

S 44 does not enable an individual creditor to bring a suit to set aside a transaction contained in a decree on the ground of fraudulent transfer or preference. It refers to a decree [*Arvi C C S Ld v. Dhondiram*, A 1940 B 289].

A person against whom an *ex parte* decree has been passed may apply under Or 9 r 13 or apply for a review of judgment under s 114 or prefer an appeal under s 96 C P Code. He may also maintain a suit for setting aside the decree on the ground of fraud even after the rejection of his application under Or 9, r 13 [*Prannath v. Mohesh*, 24 C 546 (**affirmed** in 28 C 475 PC : 5 CWN 757); *Dwarka v. Lachman*, 21 A 289; *Ram Narain v. Sheo Bhanjan*, 27 C 197; *Sadho v. Golab*, 3 CWN 375; *Khagendra v. Prannath*, 29 IA 99: 29 C 395: 6 CWN 437; *Debendra v. Prasanna*, 5 CLJ 328; *Golap v. Indra*, 13 CWN 493; *Balkissen v. Tapessur*, 17 CWN 219; *Janki v. Thakur*, 75 IC 243; *Kunja Behari v. Krishna*, 1940, 2 Cal 477: A 1940 C 489]. A suit lies even if no application is made under Or 9 r 13 [*Abdul v. Md*, 21 C 605; *Nga Yein v. Nga So*, 34 IC 264]. A suit lies for setting aside a decree and a sale thereunder on the allegation of suppression of summons [*Nagendra v. Parbati*, 20 CWN 819]. But if in a suit to set aside an *ex parte* decree the only fraud alleged is non-service of summons, and the plaintiff had unsuccessfully applied to set aside the decree under Or 9 r 13—*held* that the suit is not maintainable [*Puran Chand v. Sheo Dat*, 29 A 212: 4 ALJ 51; **followed** in *Narsing v. Rafiquan*, 37 C 197: 14 CWN 507; *Niadar v. Raunak*, 29 A 608; *Khirode v. Astullabu*, 20 CWN 845; *Yogamba v. Arumuga*, 20 MLT 126: 36 IC 128; *Musthan v. Mohendra*, 1 R 500: 76 IC 794; *Laganmani v. Ramgobind*, A 1942 P 357]. These decisions proceed on the ground that if fraud in respect of which the decree is sought to be set aside, *viz* suppression of summons, was properly in issue in the application under Or 9 r 13 and was determined upon, it operates as *res judicata* and a second suit is not maintainable [see also *Jangal v. Laljit*, 60 IC 124: A 1921 P 12: 6 PLJ 1 (29 IA 99 **dissented** from); *Chandra v. Aswini*, 45 IC 250].

Forum of Suit to Set Aside Fraudulent Decree.—A suit to set aside a decree on the ground of fraud may be brought in the court within whose jurisdiction the fraud was perpetrated or within whose local jurisdiction the defendant ordinarily resides or personally works for gain [*Abdul Huq v. Abdul Hafez*, 11 CLJ 636: 14 CWN 116n]. A suit is maintainable at Cawnpore to have decree of a court in Calcutta declared to be void on the ground of fraud. It is competent for every court, superior or inferior to treat as nullity any decree of any tribunal, if it is established that it was obtained by fraud or collusion [*Banka Behari v. Pokha*, 25 A 48: 22 AWN 179. See however *Umrao v. Hardeo*, 29 A 418 where several cases have been discussed]. A suit to set aside a decree on the ground of fraud lies in a court to which the decree was transferred for execution [*Raj Kumar v. Raj Keshwar*, 41 IC 161].

The High Court has jurisdiction to set aside a decree of a mofussil court on the ground of fraud [*Nistarini v. Nanda Lal*, 30 C 369: 7 CWN 353]. A munsif can set aside a decree passed by a subordinate judge [*Shib Lal v. Paras*, 86 PLR 1917]. A suit to set aside a decree on the ground of fraud lies in a court inferior to that which passed the decree provided the subject-matter is otherwise within the jurisdiction of that court [*Pilla Kakkadu v. Chandrayya*, 24 MLT 254. See also *Arunachala v. Sabapathy*, 41 M 213: 41 IC 937; *Firm of Ramlal v. Salig Ram*, 7 PWR 1921: 59 IC 2].

Perjured Evidence or False Claim is No Ground For Setting Aside a Decree.—The mere fact that a decree has been obtained by false evidence [*Kasiswar v. Amiruddin*, 23 CWN 133: 47 IC 14; *Musthan v. Mohendra*, 1 R 500: 76 IC 794; *Baikuntha v. Prahlad*, 30 CWN 560], or by suppression of evidence or production of wrong evidence [*Shriniwas v. Narayanrao*, 76 IC 551: A 1923 B 379; see however *Bhikaji v. Balvant*, A 1927 B 510] is not a sufficient ground for setting it aside. The point for consideration is whether the party against whom the decree was prevented by fraud from placing his case before the court. Although it cannot be shown that the court was mistaken (in the former suit), it may be shown that it was misled. A decree cannot be set aside merely on the ground that it has been procured by perjured evidence [*Manindra v. Hari*, 24 CWN 133; *Munshi Mosuful v. Surendra*, 16 CWN 1002; *Chatta v. Bai Radha*, 4 PLJ 187: 50 IC 451; *Kripa Sindhu v. Nandu*, 56 IC 615: 1 PLT 239; *Jangal v. Laljit*, 1 PLT 735: 60 IC 124: see observations of JAMES LJ, in *Flower v. Lloyd, ante*], that the claim is dishonest or false. The fraud must be an extrinsic collateral fact [*Mahant v. Lakshmi*, 1 PLT 386; *Janki Koer v. Mahabir*, 58 IC 317; *Ram Narain v. Tooki*, 58 IC 182: 5 PLJ 259; *Jagannath v. Bahuram*, 62 IC 594; *Musthan v. Mohendra*, 1 R 500; *Punjab C S v. Punjab C B*, 92 IC 322: A 1926 L 96; *Muktamala v. Ram Ch*, 31 CWN 258; *Kunja Behari v. Krishna*, 1940, 2 Cal 477: A 1940 C 489; *Syed Md v. Iffat Ara*, 74 CLJ 261].

Undue Influence.—A suit is maintainable for setting aside a decree based on an agreement alleged to have been entered into by the exercise of undue influence. S 44 does not enumerate the grounds on which a decree can be attacked by a separate suit [*Shami Nath v. Ramjas*, 34 A 143 (1895, 2 Ch 273 **follD**)].

Fraud.—Fraud in s 44 refers to the fraud practised against the court by any one party, or it may also imply a fraud against any party to the proceedings. "Collusion" is used apparently in a different sense [*Sripadagouda v. Govindagouda*, 1941 Bom 160: A 1941 B 77]. See *ante* p 483: "*Nature and kind of fraud contemplated by this section.*"

Negligence etc.—The principle of s 44 was applied to cases of gross negligence (*eg* gross negligence of a guardian *ad litem* of a minor on account of which a decree is passed) in *Kari Bapanna v. Sunkari*, 45 MLJ 324: 74 IC 218 and *Mathura v. Rama*, 14 P 824, but the Judicial Committee has later on held that the principles relating to negligent conduct of a former litigation cannot be extended to cases of gross negligence unless fraud or collusion is the proper inference from the facts [*Venkata Seshayya v. Kotiswara*, 64 IA 17: 41 CWN 257: A 1937 PC 1 (**follD** in *Tarit v. Sridrar*, 74 CLJ 13); *Krishnadas v. Vithoba*, A 1939 B 66 FB; *Laxmi v. Md Shafi*, A 1949 Pu 141; *S v. Dhir*, A 1972 Raj 241]. Even gross negligence may not amount to any *mala fide* conduct and cannot be a ground for setting aside the previous decision binding between the parties [*Kothandarama v. Sellammal*, A 1959 M 524]. It cannot be shown under s 44 that a compromise on which the judgment is based is vitiated by mutual mistake [*Krishna v. Dhanapati*, A 1957 C 59].

In Calcutta, Allahabad, Madras, &c it has been held that a suit is maintainable for setting aside a decree on the ground of gross negligence of guardian *ad litem* and neither s 44 nor s 11 C P Code bars such a suit [*Mahesh v. Manindra*, 45 CWN 508: *Siraj v. Md Ali*, 54 A 646 FB; *Chandulal v. Ragam*, 45 M 425 : A 1922 M 273; *Egappa v. Ramanathan*, 1942 Mad 526: A 1942 M 384: *Kamakshya v. Baldeo*, A 1950 P 97 FB; *Ifikhar v. Beant*, A 1946 L 233 FB; *Narayanan v. Gopalan*, A 1960 K 367].

Collusion.—Collusion has been defined to be a deceitful agreement or compact between two or more persons to do some act in order to prejudice a third person or for some improper purpose. This is the wider sense. Collusion in judicial proceedings is a secret arrangement between two persons that the one should institute a suit against the

other, in order to obtain the decision of a judicial tribunal for some sinister purpose. It may be of two kinds:—(*1*) when the facts put forward as the foundation of the judgment of the court do not exist; (2) when they exist, but have been corruptly preconcerted for the express purpose of obtaining the judgment. [Wharton's Law Lexicon]. Collusion implies what is called "no battle but a sham fight" [*Ahmedbhoy v. Vallebhoy*, 6 B 703]. "Collusion" is not the appropriate term to apply to the obtaining of a decree by a fraud on the court. The term suggests the court was implicated in the matter [*Bindeswari v. Thakur*, 63 IA 53 : 40 CWN 289 : A 1936 PC 46]. A conspiracy of silence by which a decree was obtained cannot be described as 'collusion' in the sense in which it is used in judicial proceedings [*Kondi v. Chunilal*, A 1929 B 1]. The distinction between fraud and collusion lies in this, that a party alleging fraud in the obtaining of a decree against him is alleging a matter which he could not have alleged in answer to the suit; whereas a party charging collusion is not alleging new matter. He is endeavouring to set up a defence, which might have been used in answer to the suit and he cannot be allowed to do so consistently with the principle of *res judicata* [*Varadarajulu v. Srinivasulu*, 20 M 333, 338].

A stranger can avoid a decree by proof of collusion. But a party to a collusive decree and his representatives cannot escape its consequence [*Venkatarammanaa v. Viromma*, 10 M 17; **folld** in *Chenvirappa v. Puttapa*, 11 B 708; *Kuma Row v. Nukamma*, 31 M 485: 18 MLJ 576; *Sahib v. Bahari*, A 1927 A 494; *Chauhana v. Gaya Pd*, A 1971 A 439] except possibly when some other interest is concerned that can be made good only through his [*Kondi v. Chunilal*, A 1929 B 1]. A party to a decree or a person claiming through such party can under sec 44 be allowed to avoid the effect of the decree on grounds of fraud or collusion and assert that the said decree cannot be relied on for the purpose contemplated by sec 40 thereof which includes providing the basis for the plea of *res judicata* in view of the inclusion of sec 40 in sec 44. [*Ibne Masan v. Smt Hasina Bibi*, A 1984 All 216, 219: 1984 All CJ 141 (A 1927 All 494 and A 1971 All 439 **over ruled**). The meaning of sec 44 is that if collusion is proved between the parties to a previous suit then the judgment in that suit which is relevant under sec 40 cannot act as a bar. [*Nachhittar Singh v. Smt Jagir Kaur*, A 1986 Punj & Har 197, 200 : (1985) 2 Punj LR 593]. Secret combinations amongst bidders at execution sales not to bid against each other are instances of collusion [see *Hari Bal Krishna v. Naro Moreswar*, 18 B 342; *Doorga v. Sheo Pd*, 16 C 194; *Md Mirza v. Savvassi*, 23 M 227: 27 IA 17; *Satis v. Porter*, 9 CLJ 244 : 36 C 226; *Gobind v. Shyam Lal*, 1 CLJ 85. See however *Ambika v. Sitaram*, 6 CLJ 111 and *Jyoti v. Jhoreemull*, 36 C 34 : 13 CWN 87].

Other proceedings.—S 44 includes not only a suit but other proceedings, such as proceedings under s 47 of the C P Code 1908 [*Asaban v. Ananda*, 14 CWN 823].

OPINIONS OF THIRD PERSONS WHEN RELEVANT

S. *45. Opinions of experts.—When the Court has to form an opinion upon a point of foreign law, or of science or art, or as to identity of handwriting [1][or finger impressions], the opinions upon that point of

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* In Ceylon the words "or genuineness of handwriting" have been added after "identity" wherever they occur and the words "plain impressions or foot impressions", after "finger impressions" wherever they occur.

1. Added by s 3, I E Act, 5 of 1899. For discussion in Council as to whether "finger impressions" include "thumb impressions" *see*, Gazette of India, 1898, Pt VI p 24.

persons specially skilled in such foreign law, science or art, [2][or in questions as to identity of handwriting] [1][or finger impressions] are relevant facts.

Such persons are called experts.

Illustrations.

(*a*) The question is, whether the death of *A* was caused by poison.

The opinions of experts as to the symptoms produced by the poison by which *A* is supposed to have died, are relevant.

(*b*) The question is, whether *A*, at the time of doing a certain act, was, by reason of unsoundness of mind, incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law,

The opinions of experts upon the question whether the symptoms exhibited by *A* commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do, or of knowing that what they do is either wrong or contrary to law, are relevant.

(*c*) The question is, whether a certain document was written by *A*. Another document is produced which is proved or admitted to have been written by *A*.

The opinions of experts on the question whether the two documents were written by the same person or by different persons, are relevant.

SYNOPSIS

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COMMENTARY

Principle and Scope.—The plain meaning of section 45 is that the Court in order to form an opinion upon a point of foreign law, or of science, or art, or as to identity of handwriting, or finger impressions can treat the opinion upon that point of person specially skilled in such foreign law, science or art, or in questions as to identity of handwriting, or finger impressions as relevant facts. In other words, the opinion of persons specially skilled in such foreign law, science, or art, or questions as to the identity of handwriting or finger impression, called experts therein, are relevant facts. The opinion of such experts is admissible in evidence as relevant facts by virtue of section 45 of the Evidence Act [*State v. S.J. Choudhry*, A 1996 SC 1491 : 1996 Cri LJ 1713, 1715]. Medical evidence, as is well-settled, is a opinion evidence given by an expert and deserves respect by the Court. Such evidence cannot be brushed aside without any justifiable reason. This is, however, not to say that opinion expressed by an expert is always binding upon the Court. Evidence of an expert, like any other witness, has to be appreciated in accordance with law and accepted only if found trustworthy. An opinion evidence of an expert after its acceptance by the Court

becomes the decision of the Court and ceases to be a opinion evidence of the expert. Under the circumstances, evidence of an expert also has to be interpreted like any other evidence. In so doing the effort should be made to explain the same and correlated with evidence of eye-witnesses. It is only when that the two become irreconciable that the question of accepting one or the other arises and not otherwise [*Rokad Singh v. State of M.P.*, 1994 Cri LJ 494, 499 (MP)]. The opinions or beliefs of third persons are as a general rule irrelevant and therefore inadmissible, and witnesses are to state *facts* only, *ie* what they themselves saw or heard or perceived by any other sense (s 60) and not to draw inferences from what they see [*Babuli v. S*, A 1974 SC 755].

It is the function of the judge and jury to form their own conclusion or opinion on the facts stated. Thus the opinion or the impression of a witness that it appeared to him from the conduct of a mob that they had collected for an unlawful purpose is not admissible to prove the object of the assembly [*Jogi Raut v. R*, 105 IC 234 : A 1928 P 98]. "A witness examined as to facts ought to state those only of which he has had personal knowledge. It has been said that a witness must not be examined-in-chief as to his *belief or persuasion*, but only as to his *knowledge* of the facts. As far as regards mere belief or persuasion which does not rest upon a sufficient and legal foundation, this position is correct,—as where a man believes a fact to be true merely because he heard it said to be so" [Starkie, 173]. "Opinions, in so far as they may be founded on no evidence or illegal evidence, are worthless and, in so far as they may be founded on legal evidence, tend to usurp the functions of the tribunal whose province alone it is to draw conclusions of law or fact" [Phip 11th Ed p 503].

Expert witness may give opinion evidence but the court is free to draw its own conclusions [*Kulasingam v. Thambipillai*, (1997) 1 Malayan LJ 288 (CA Kuala Lumpur)]. Expert evidence to determine the amount of drugs the accused had been using during the period before his arrest can be considered by the court [*Garnam Singh v. Public Prosecutor*, (1994) 2 Singapore LR 243 (Singapore CA)]. An expert must be skilled. He need not be so by special study. He may be so by experience [*Leong Wing Kong v. Public Prosecutor*, (1994) 2 Singapore LR 54 (Singapore CA)].

There are however cases in which the court is not in a position to form a correct judgment without the help of persons who have acquired special skill or experience on a particular subject, *eg* when the question involved is beyond the range of common experience or common knowledge or when special study of a subject or special training or special experience therein is necessary. In such cases the help of experts is required. In these cases, the rule is relaxed and expert evidence is admitted to enable the court to come to a proper decision. Under this head comes, matters of science, art, trade, handwriting, finger-impressions and foreign law. The rule admitting expert evidence is founded on Necessity.

"The instances in which the witness' opinion is excluded by this principle are roughly classed into two groups. *First*, all witnesses whether testifying on observed data of their own or on data furnished by others, may state their inferences so far only as they have some *special skill* which can be applied to interpret or draw inferences from these data. *Secondly*, witnesses having *no special skill*, who have had *personal observation* of the matter in hand, may, as a result of their personal observation, have drawn inferences or made interpretations which the tribunal could equally well make from the same data of personal observation, if laid before them: and thus if it is possible to detail these data fully for the tribunal, the witness' own inferences are superfluous" (Wig s 1918). This mode of examination (as to belief or opinion), however chiefly prevails on questions of *science or trade*, where, from the

difficulty and occasional impossibility of obtaining more direct and positive evidence, persons of skill, sometimes called *experts*, are allowed not only to testify to acts but to give their opinions in evidence [Tay s 1416].

When an expert is dead or cannot be found, his opinion may be proved by the production of his book (see s 60).

With regard to the examination of documents in the custody of the court by experts there is a variance of practice. In Madras it has been held that the examination must be carried out in the court [*Narasimhan v. Narayan*, 1968, 2 MLJ 48] whereas in Orissa it may be sent to the expert [*Balaram v. Achutananda*, A 1975 Or 125].

[*Ref Tay ss 1416-25, 1445; Phipson 8th Ed pp 378-82; Best, 11th Ed ss 513-16; Wigmore, s 1917 et seq; Hals 3rd Ed Vol 15 paras 587-591; Roscoe N P Ev 177-78; Powell Ev 9th Ed pp 37-55; Wills Cir Ev 6th Ed pp 154-77; Rogers Expert Testimony ss 121-44; Lawson's Expert Opinion and Evidence; Ames on Forgery; Ram on Facts; Moore on Facts*].

It is unsafe to base a conviction wholly on expert opinion without substantial corroboration [*Mohd Isa Khan v. State of U.P.*, 1992 Cri LJ 3987, 3993 (All); See also *Ram Chandra v. State of U.P.*, A 1957 SC 381 and *Megan Bihari Lal* case, A 1977 SC 1091]. The court is not bound to follow blindly the opinion of the experts [*Law Society of India v. Fertilizer and Chemicals Travancore Ltd.*, A 1994 Ker 308, 367]. Experts give evidence and do not decide the issue [*Metropolitan Properties Co. Ltd. v. London*, (1968) 1 All ER 354; *R. v. Lanfear*, (1968) 1 All ER 683; *R. v. Smith*, (1974) 1 All ER 376]. Expert evidence unsupported by any reason may be ignored in the circumstances of the case [*Haji Mohammad Ekramul v. S*, A 1959 SC 488]. The court accepted the evidence of a wife as to the paternity of a ten months' old child, in spite the unanimous opinion of several doctors [*Bowden v. Bowden*, 62 SJ 105]. In *Octovious Steel & Co. v. Endogram Tea Co. Ltd.*, A 1980 Cal 78 it has been laid down that although a medical certificate unsupported by a doctor's affidavit is admissible in every case, the court cannot act on it unless it contains the relevant particulars on which the court seeks to arrive at a finding the court can direct production of the concerned doctor to explain some of the queries in order to form a substantive satisfaction about the authenticity of the medical certificate [*Archana Devi v. Kaji Majibur Rahaman*, A 1996 Cal 118, 119]. Expert opinion does not help the court in interpretation [*Forest Range Officer v. P. Mohammad Ali*, A 1994 SC 120, 125]. In borderline cases it would not be proper to solely rely on the medical evidence [*M.A. Ajij v. State*, (1972) 38 Cut LT 1238].

Difference Between an Expert and an Ordinary Witness.—An expert is one who has acquired special knowledge, skill or experience in any science, art, trade or profession. Such knowledge may have been acquired by practice, observation, research or careful study. The differences between the testimony of an ordinary witness and an expert are:—

(*1*) An expert's evidence is not confined to what actually took place but he can *give his opinion on facts*, *eg* a medical man may give his opinion as to the cause of a person's death or injuries or effect of a poison, on facts stated by other witnesses at the trial, although he may not have personally attended the patient and observed things for himself.

(2) He can speak to *experiments made by him behind the back of the other party*.—The reason for the rule is that the court or the opposite party may legitimately enquire into the grounds upon which an expert's opinion is based, and the latter is entitled to give an account of experiments performed by him for the

purpose of forming his opinion (s 51). In every case in which opinions of experts are admissible, the grounds of such opinions may be inquired into, either in chief, or as is more usual in cross-examination; and facts and experiments, even though not themselves relevant to the issue, are also receivable in corroboration or rebuttal of the opinion [*Birrell v. Dryer*, (1884) 9 App Cas 345. Halsbury, 3rd Ed Vol 15 para 590]. Thus, on a charge of arson, evidence of experiments made subsequently to the fire is admissible to show the manner in which the fire originated in the building [*R v. Heseltine*, 12 Cox 404]. The object is to weigh the value of the expert evidence, so as to make sure that it is not founded on rumour or hearsay or unsupportable grounds.

(*3*) He may *cite text books* of accredited authority in support of his opinion and may refresh his memories by reference to them (see s 159).

(*4*) He may state facts relating to *other cases* bearing similarity to the cases under enquiry, in order to support his opinion. Evidence of such other transactions, which are inconsistent with the opinions of experts may also be given (see s 46). Thus, in *Palmer's* case, several eminent doctors who were not present at the death, gave their opinion that Cook's death was due to strychnine poisoning although no strychnia was found in the stomach, as that poison acts by absorption. They gave evidence of tetanic contractions attending the death of three other persons poisoned by strychnia, in order to show that the symptoms were the same in Cook's case. [For a report of the trial of *R v. Palmer*, see Stephen's Genl. View of the Cr Law of England, 2nd Ed pp 231-72. *Illus* (*a*) to s 46 is similar to Palmer's case].

Whether a book is obscene under s 292 PC must be judged by the court. It does not depend on oral Evidence of a writer or art critic [*Ranjit v. S*, A 1965 SC 881].

When an expert is asked to give opinion on facts admitted or proved at the trial, but not observed by him, it is the opinion of a 'pure expert'; *eg* when a medical man is asked to state his opinion as to the disposing capacity of a testator who makes a will during an illness which terminates fatally. Such evidence is not of much value when compared with the evidence of doctors who attended the patient [*Gopessur v. Bissessur*, 16 CWN 265; see *Monosseh v. Shapurji*, 10 Bom LR 1004 *post*]. It is settled law that an expert may not be asked purely speculative or hypothetical questions having no foundation in the evidence; in other words before the expert is entitled to give evidence on the hypothesis, sufficient foundation for it must be laid by due evidence [*Govt of Bombay v. Merwanji*, 10 Bom LR 907].

Where the accused was convicted of the murder of his cohabitee, an evidence of a psychiatrist as to the likelihood of there having been a suicide pact was rejected. The psychiatrist had not treated the accused before the offence and had not treated the victim also. His evidence was not relevant to the questions of fact. [*R v. Wood*, 1990 Crim LR 264 CA]. It has also been held that a psychiatrist's evidence is not admissible on the point as to how a person with an abnormal personality is likely to react to the stresses and strains of life, if that person is not suffering from a mental illness. [*R v. Weightman*, (1991) 92 Cr App R 291 CA].

When the defence wishes to investigate a medical abnormality and its effects upon the mental processes of the accused, expert medical evidence is admissible. But medical evidence is inappropriate where the court's task is objective, *i.e.*, to determine the intent of an ordinary man, unaffected by any medical condition, physical or mental, permanent or temporary. [*R v. Toner*, The Daily Telegraph, Mar 11, 1991 CA].

Exceptions to the Opinion Rule. [Opinions of Ordinary Witnesses When Receivable].—It has been seen that the opinions of ordinary persons, *ie* non-experts

are irrelevant. It is one of the fundamental rules of the law of Evidence. The impressions or inferences of ordinary witnesses are excluded as superfluous, because the court and the jury are quite competent to draw their own conclusions when the facts personally observed by the witnesses are narrated. There is also room for erroneous impressions or opinions. Moreover different persons are likely to form different impressions from the same facts and such opinions are bound to embarrass the trial. The above general rule, however, has exceptions and in certain class of cases, opinions of ordinary witnesses are not only helpful, but they have to be admitted out of necessity. There are things, events or circumstances which no language can adequately describe and the best account is from the impressions or opinions which the witnesses formed. Thus GIBSON J, in *Cornell v. Green*, 10 S&R 16 (Am) said:—

> "It is a good general rule that a witness is not to give his impressions, but to state the facts from which he received them, and thus leave the jury to draw their own conclusions; and whenever the facts *can* be stated, it is not to be departed from.... I take it that wherever the facts from which a witness received an impression are too evanescent in their nature to be recollected, or are too complicated to be separately and distinctly narrated, his impressions from these facts become evidence."

The rule is thus stated by FOSTER CJ, in another American case (*Hardy v. Merrill*, 56 NH 241):—

> "The ground upon which opinions are admitted in such cases is, that from the very nature of the subject in issue, it cannot be stated or described in such language as will enable persons, not eye-witnesses, to form an accurate judgment in regard to it. How can a witness describe the weight of a horse? or his strength? or his value? Will any description of the wrinkles of the face, the color of the hair, the tones of the voice, or the elasticity of step, convey to a jury any very accurate impression as to the age of the person described? And so, also, in the investigation of mental and psychological condition....—the opinion of the observer is admissible from the necessity of the case; and witnesses are permitted to say of a person, 'He seemed to be frightened'; he was greatly excited'; 'he was much confused'; 'he was agitated'; 'he was pleased'; 'he was angry'" [cited Wig s 1918].

The opinions of non-experts may accordingly be received as to,—the disposition or temper of animals [*Mattisen v. S*, 55 Ala 224; *Sydleman v. Beckwith*, 43 Conn 9]; matters of colour, weight, light, darkness, the state of the weather, and similar facts [*Bass Furnace Co v. Glasscock*, 82 Ala 452; *Gallatin v. Corning Irr Co*, 163 Cal 405; *Critanovitch v. Bomberg*, 169 Iowa, 736]; measurement [*Gardner v. Metro St R C*, 223 Mo 389]; the state of feeling existing between persons [*Tobin v. Shaw*, 45 Me 331]; the appearance of individuals [*Robinson v. Exempt Fire Co*, 103 Cal 1]; the age of persons [*Bell v. Bearman*, 37 Okl 645]; a person was intoxicated [*Harbison v. Lemon*, 23 An Dec 376]; looked as though he had slept [*S v. Marceaux*, 50 La Ann 1137]; that parties on a bed seemed to have sexual intercourse [*Bizer v. Bizer*, 110 Iowa, 248]; that a man and woman were intimate [*S v. March*, 40 Atl 836]; that defendant seemed sincere in making confession [*Horn v. S*, 73 Pac 705]. In the following instances, the evidence was excluded that a woman was in a delicate condition [*S v. Reinheimer*, 109 Iowa, 624]; that his conduct seemed natural and genuine [*People v. Smith*, 172 NY 210]; that he treated her very affectionately [*State v. Brown*, 86 Iowa, 121]; that a person was shamming [*Cole v. Lake Shore &c*, Ry Co, 95 Mich 77]; that plaintiff was at the time of the accident in possession of his

faculties [*Cragg v. Los Angeles Trust Co*, 154 Cal 663—cited Jones, 3rd Ed pp 543-53 where a large number of cases has been collected].

In certain cases a witness is allowed to state his opinion, where it is scarcely possible to do more than draw inferences of fact from appearances or surrounding circumstances. Thus the opinions of ordinary witnesses are sometimes received on questions of age. Where the opinion or belief of a witness is, or becomes, relevant to the issue before the court as evidencing his good faith or the state of his mind, he may give evidence thereof [*Mansell v. Clements*, 1874 LR 9 CP 139]; but his evidence as to his own sanity is not always received, nor may he testify as to the sanity of another, unless he speaks only to matters of fact such as conduct, or is a witness expert on this subject. Similarly, a witness may be allowed to state his opinion as to the affection existing between one person and another [Hals, 3rd Ed, Vol 15, para 596].

Witnesses may state that their belief as to the identity of persons, whether present in court or not; and they may also identify absent persons by photographs produced and proved by any competent testimony, not necessarily, of course, that of the photographer, to be accurate likenesses [*R v. Tolson*, 4 F&F 103; *Hindson v. Ashby*, 1896, 2 Ch 1, 21-22, 27; Phip 11th Ed p 526; Hals, 3rd Ed, Vol 15, para 592].

By the great weight of authority, the opinions of ordinary witnesses are received on the question of the sanity or insanity of an individual, on the obvious ground that it is often impossible for witnesses in such cases adequately to describe to the court or jury the actions, looks, or symptoms which properly constitute the basis for determining the question [*Conn Mut Life Ins Co v. Lathrop*, 111 US 612 and other cases cited Jones, s 364]. The opinions of non-professional witnesses, however, are not admissible in such cases, unless such opinions are based upon their own knowledge and observation of person's appearance, and it is generally held that before giving an opinion the witness must state the facts and circumstances on which his opinion is based [*Atwood v. Atwood*, 84 Conn 169 and cases in Jones, s 365]. Opinion as to *sanity* and opinion as to general testamentary or criminal *capacity* are entirely distinct. The latter sort of opinion is admissible (when it is) because a question of law may be involved, and witnesses' conclusions are not needed on such points [Wig s 1937].

The circumstances under which opinions of ordinary witnesses are received are well stated in an American case thus:—

> "Court and text-writers all agree that upon question of science and skill, opinions may be received from persons specially instructed by study and experience in the particular art or mystery to which the investigation relates. But without reference to any recognized rule or principle, all concede the admissibility of the opinions of non-professional men upon a great variety of unscientific questions arising every day in every judicial inquiry. These are questions of identity, handwriting, quantity, value, weight, measure, time, distance, velocity, form, size, age, strength, heat, cold, sickness and health, questions also concerning various mental and moral aspects of humanity, such as disposition and temper, anger, fear, excitement, intoxication, veracity, general character and particular phases of character, and other conditions and things, both moral and physical, too numerous to mention ..... Opinions of witnesses derived from observation are admissible in evidence when, from the nature of the subject under investigation, no better evidence can be obtained" [*Hardy v. Merrill*, 56 NH 227 cited Jones, s 366].

As to the admissibility of opinions of non-professional witnesses, see Rogers, 2nd Ed, pp 9-13.

When Expert Evidence is to be Admitted. ["Science or Art" to be Construed Widely].—Under this section expert evidence is admissible when the court has to form an opinion upon a point of foreign law, or of science or art or as to identity of handwriting or finger impression. It will be seen that this section speaks of expert evidence on matters of "*science or art*", and does not specifically mention "*trade*" or "*skill*". The word "science" is a broad term and it is not always easy to determine what is or not a subject of scientific inquiry. The English and American authorities on the subject, show that the tendency is to widen the scope of the term "science or art" as much as possible. The decisions show that expert evidence has frequently been admitted on matters not of pure science or higher science or pure art. There is no reason to suppose that the Legislature intended to make a departure from the English law on the subject. In English and American text-books the words used are "science, art and trade" or "skill" and under this phrase is included the knowledge, evidence or skill of medical men, engineers, artists, surveyors, valuers, accountants, engravers, naturalists, mechanics, artisans, masons, blacksmiths, shopkeepers, farmers, railroadmen, etc. It is therefore submitted that the words "science or art" in this section are to be widely construed. The words "skill" has however been used in defining the term "expert" and this may be taken to include skill in trade or any business or employment. In short the phrase "science or art" is not to be constructed in a narrow sense. All subjects in which peculiar skill and judgment or experience or special study is necessary to the formation of an opinion, come with the tem. In Hals, 3rd Ed Vol 15 para 587 it is stated: "Under this head are included matters of science, art and trade."

For meaning of the word "Science" see also "Typewriting Specimens" *infra*.

The words "Science or art" include all subjects on which a course of special study or experience is necessary to the formation of an opinion (Steph Dig Art 49) and it is not necessary "that a speciality to enable one of its practitioners to be examined as an expert, should involve abstruse scientific conditions" [*Story v. Maclay*, 3 Mon (Ky) 480, 483]. "Art, in its legal significance, embraces every operation of human intelligence, whereby something is produced outside of nature; and the term 'science' includes all human knowledge which has been generalized and systematized, and has obtained method, relations and the forms of law" [*per* DAVIS, J, in *Atchison &c, R R Co v. U S*, 15 Ct of Claims 140]. So that while it may be laid down that the opinions of experts are limited to matters science, art or skill, yet this limitation is not applied in any rigid or narrow sense [*Clifford v. Richardson*, 18 Vt 620, 627]. As PIGOT CB, said [in I Ir R, Com L 211, 218] "the subjects to which this kind of evidence is applicable, are not confined to classified and specified professions. It is applicable wherever peculiar skill and judgment applied to a particular subject, are required to explain results, or trace them to their causes" [Rogers, 2nd Ed, s 7, p 25].

In order to make things clearer it would be better if the words "or of science or art" in s 45 are substituted by the words "or of science, art, skill or trade or others of like kind" by amending the section so that expert opinion on many matters on which the court requires special help may not be excluded.

"On questions of science or skill, or relating to some art or trade, persons instructed herein by study or experience may give their opinions; such persons are called experts. Every business or employment which has a particular class devoted to

its pursuit is an 'art' or 'trade'" [Lawson's Expert and Opinion Evidence]. To introduce expert evidence it is not sufficient that the witness may know more of and may better understand the subject of inquiry, but the subject of inquiry must relate to some science, art, profession or trade in which persons instructed therein by study and experience may be supposed to have more skill and knowledge than other persons (97 NY 511). The words "science or art" are to be constructed widely [*Sidik v. R*, A 1942 S 11; *Mahadeo v. Vyankammabai*, A 1948 N 287]. The test to be applied by the Judge in deciding whether expert opinion should be given is whether the point to be decided involved special acquaintance with particular subject, or whether it is a mere question of legal or moral obligation about which one person is as good a judge as another. A professional man in a matter not studied by him as a speciality, is regarded as an ordinary observer [*Sheo Tahal v. Arjun*, 56 IC 879: 1 PLT 136].

The Supreme Court of New Hampstead has classified the cases under three heads, and declares that the experts may give their opinions:

1. Upon questions of science, skill or trade, or others of like kind.

2. When the subject-matter of inquiry is such, that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it, without such assistance.

3. When the subject-matter of investigation so far partakes of the nature of a science, as to require a course of previous habit or study, in order to the attainment of a knowledge of it [*Jones v. Tucker*, 41 NH 546, cited in Rogers, s 6 2nd Ed p 22].

It is difficult to state exactly what particular matters or topics come within the subject of expert testimony. The most comprehensive and accurate rule appears to have been stated in *Muldowney v. Illinois C R R Co.*, 36 Iowa, 472 (cited in Rogers, 2nd Ed p 22) thus:—

> "The opinion of witnesses possessing peculiar skill is admissible whenever the subject-matter of inquiry is such, that inexperienced persons are not likely to prove capable of forming a correct judgment upon it, without such assistance; in other words, when it so far partakes of the nature of science, as to require a course of previous habit or study in order to the attainment of a knowledge of it, and that the opinions of witnesses cannot be received when the inquiry is into a subject-matter, the nature of which is not such as to require any particular habits of study in order to qualify a man to understand it. If the relations of facts and their probable results can be determined without especial skill or study, the facts themselves must be given in evidence, and the conclusions or inferences must be drawn by the jury."
>
> The same statement of law is contained in Tay ss 1418, 1419. As to instances, see s 1417.

In reference to the identification of voice it has been held that if given by a properly qualified expert, evidence of voice identification is admissible, even if the resulting opinion was based on a view held by a minority of the relevant profession [*R v. Robb*, The Times, Feb 6, 1991 CA].

Medical men are constantly allowed to give their opinions on such medical questions as to the causes of disease and death, the effect of poisons, the nature of wounds, the conditions of gestations [*Gardner Peerage*, Le Merchants' Report, 169-76]; the proper treatment of complaints, the effect of hospitals upon the healthy conditions of neighbourhood [*Metro Asylum D v. Hill*, 47 LT 29; *Att-Gen v. Nottin-*

gham Corp, 1904, 1 Ch 673] and upon the sanity or conditions of mind of persons [*R v. M'Naghten*, 10 CL&F 200 *post*], etc.

The evidence of commercial and professional men is frequently allowed on matters with which they are peculiarly acquainted. Thus a stockbroker has been allowed to give evidence as to the course of business of bankers [*Adams v. Peters*, 2 Car&K 723]; a grocer's assistant as to the cause of losses in the grocery trade [*M'Fadden v. Murdock*, 15 WR 1079]; ship-owners and merchants, as to the meaning of words in charter-parties [*Robertson v. Jackson*, 15 LJ CP 28]; an architect as to depreciation of property by a nuisance [*Gauntlet v. Whitworth*, 2 Car&K 720]: an engineer as to the cause of the choking of a harbour [*Folkes v. Chadd*, 3 Doug 157], or strength and construction of vessels [*The Robin*, 1892 P 95]; as assurance broker as to the proper method of drawing a policy [*Chapman v. Watton*, 10 Bing 57]; an accountant as to the manner in which company should deal with depreciation and profits [*Bond v. Barrow H Steel Co*, 1902, 1 Ch 353]; businessmen, experienced in steel and iron companies, on the same question; underwriters as to the materiality of facts in marine insurance [*Richards v. Murdock*, 10 B&C 527; but see *Carter v. Boehm*, 1 Sm LC 491]; a person experienced in the business of life insurance as to the average duration of lives and the value of annuities [*Rowley v. London & N W Rly Co*, LR 8 Ex 221], an engineer as to the effect of a personal injury on the fitness for duty on an engineer [*Johnstone v. G W Rly Co*, 1904, 2 KB 250]; a builder as to the safe construction of a staircase [*Crafter v. Metro Rly Co.*, LR 1 CP 300]; a surveyor as to the value of an estate [*Att-Genl v. Cross*, 3 Mer 524]; or as to the amount of money necessary to put a house into proper state of repair; a farm valuer, as to the value of crops, stacks, ricks, etc; an expert in forestry, as to the object with which trees had been planted [*Weld-Blundeel v. Wolseley*, 1903, 2 Ch 664]; artists as to the genuineness of pictures or other works of art [*Whistler v. Ruskin*, Times, Nov 26th and 27th 1878; *Belt v. Lawes*, Times, Dec 12th and 16th 1882]; nautical men and Brethren of Trinity house as to whether the obstruction to a harbour was caused by a neighbouring sea wall (*Folkes v. Chadd, ante*); military officers, as to military practice [*Bradley v. Arthur*, 4 B&C 295-311]; antiquaries as to ancient handwriting [*Tracy Peerage Case*, 10 Cl&F 154, 191] and post-office clerks [*Abbey v. Lill*, 5 Bing 299], and even persons in the habit of receiving letters [*Woodcock v. Houldsworth*, 16 M&W 124], as to post-marks [Powell, 10th Ed, pp 41-43; for other instances, see Tay s 1417; Phip; 8th Ed p 381]. A haulage contractor who owns several lorries and fits a large quantity of tyres is an expert on the quality, use and usage of tyres [*Globe Co v. Master*, 157 IC 12]. The study of customs and manners of tribes and caste &c may come within "science or art" [*Mahadeo v. Vyankammabai*, A 1948 N 287]. The question as to whether the paper on which a document is written has been torn out from a copy is an expert opinion. In order to establish the identity of the papers, the colour, the thickness, finish or surface, watermark, wove or laid style, cutting, size, ruling, fluorescence have to be looked into. In a given case only some of the things may enable the expert to give an opinion [*Parag v. State of Rajasthan*, 1981 Cri LJ 1244, 1253, 1254 : (1981) Raj LW 370].

Persons who are goldsmiths by profession are able to find out whether a piece of metal is gold or not by the colour of the streak produced by rubbing it on a touchstone used by them even though their assessment of its parity may not be exact. It may not be a scientific way of proving that the metallic bars were gold bars. [*Asst Collr of Central Excise, Calicut v. V P Sayed Mohamed*, A 1983 SC 168, 171 : 1983 Cri LH 225 (SC)]. The deceased, the executor of a Will, was deaf and dumb and he conveyed his wishes and intention through signs and gestures which were ascertained with the help of the Principal of the School for Deaf and Dumb. The evidence of the

Principal of School for Deaf and Dumb is admissible as expert evidence when he has given testimony in the form of questions and answers. [*Krishan Singh v. Nichhattar Singh*, A 1983 Punj 373, 376].

The technical adviser, Food Corporation of India, gave an opinion in food adulteration case in respect of maida, as follows. It is possible that if eggs were present, they could develop into white living insects in two days time. If this expert evidence is to be rejected on the basis of any passage in a book, the particular passage should be put to the expert during the cross-examination and he should be asked to explain the same [*Krishnan Lal v. M.C.D.*, 1985 Cri LJ 285, 291: 1984 Chand Cri C. (HC) 531 (Del)].

Subject On Which Expert Evidence May Not Be Admitted.—The rule is well established that the opinion of experts cannot be received in evidence in cases where the subject-matter of inquiry is such that it may be presumed to lie within the common education, moving in the ordinary walks of life [*New Eng Glass Co v. Lovell*, 7 Cush 319 and many cases cited in Rogers, 2nd Ed s 8], or which does not require any peculiar habits or course of study in order to qualify a man to understand it. Thus, evidence is inadmissible to prove that one name [*North C&M Brewery Co v. Brewery Co*, 1899 AC 83], or one trademark [*Bourne v. Swan & Edgar*, 1903, 1 Ch 211] so resembles another as to be calculated to deceive. To put it briefly, a witness may not, on other than scientific subjects be asked to state his opinion upon a question of fact which is the very issue for the jury, as, for instance, whether a drive is *careful*; a road *dangerous*; or an assault for homicide *justifiable* (Tay s 1419 quoting Greenleaf, s 441). Experts will not be allowed to give their opinions upon the construction of documents, for this, being a matter of law, is a question solely for the court [*Grove v. Bulawayo*, The Times 30th March 1898]; nor upon matters of legal or moral obligation, nor upon what would probably have happened had the parties acted in one way rather than another, or as to the probable cause of an injury which occurred to cattle while in railway truck [Hals 3rd Ed Vol 15 para 588; Phip 11th Ed p 517]. Experts may explain local or technical terms in a particular trade or profession, but not technical legal terms (see s 98).

In the early days of British rule there were "expert advisers" (muftis, maulvis, pandits &c) on questions of Hindu or Mahomedan law. But expert opinion in such questions are not now admissible [*Masjid Sahidganj v. Gurudwar*, 67 IA 251 : 44 CWN 657 : 1940 Lah 49: A 1940 PC 116; see *Amarnath v. A*, A 1948 L 126; *Sabitri v. Savi*, 12 P 359]. Evidence of person calling himself an expert in matter of cantonment land is not admissible [*Ramdas v. Secy of S*, A 1930 A 587]. Where the opinion of expert is based on reports of facts, those facts, unless within the expert's own knowledge, must be proved independently [*Pacific Tin Consolidated Corpn. v. Hoon Wee Thim*, (1967) 2 Malayan LJ 35 (Kuala Lumpur FC)].

Expert opinion by way of opinion of businessman is not admissible on the question as to whether a mark, or a combination of marks, resembles that on other goods and is likely to deceive purchasers, the reason being that that is the very question which the court would have to decide [*Macdonald & Co v. Holland & Moss*, 41 IC 539: 10 SLR 175; see *Swadeshi Mills Ltd v. Juggi Lall*, 49 A 92 : 23 ALJ 975].

"It is only where the matter inquired of lies within the range of the peculiar skill and experience of the witness, and is one of which the ordinary knowledge and experience of mankind does not enable them to see what inferences should be drawn from the facts, that the witness may supply opinion as their guide" [*Kennedy v. People*, 39 NY 245]. So that the testimony of experts is inadmissible in regard to matters upon which one individual can form a judgment as well as another, both

having equal knowledge of the circumstances [*Hart v. Hudson R B Co*, 84 NY 56, 60, 61 cited in Rogers, 1883 Ed p 13]. Thus, a physician could not testify as to the possibility of a rape having been committed in a particular manner described by the prosecutrix, as it was a question of mere relative strength or mechanical possibility, which an athlete or a mechanic could have answered as well as a physician, and every man upon the jury as well as either [*Cook v. S*, 24 N J Law 843]. The question of what is the proximate cause of an injury is not a question of science, or of legal knowledge, but is a fact to be determined by a jury from surrounding circumstances [*Milankee &c R R Co v. Kelogg*, 94 US 469]. Detectives could not be asked as to whether it was possible to commit a robbery in the manner charged [*People v. Morrigan*, 20 Mich 1]. Whether a street-crossing is unsafe or dangerous is not a question of science or skill, upon which it is proper to receive the opinion of witness [*City of Parsons v. Lindsay*, 26 Kan 426, 432]. What are the chances of a man falling out of a window on the fourth floor of a house is not a question for a medical expert [*Rajanikbai v. New India Ass Co*, A 1956 B 633]. In a claim under Workmen's Compensation Act, the loss of earning capacity is not a matter for medical opinion [*Kalidas v. Mondal*, A 1957 C 660], but medical evidence as to physical capacity is an important factor in the assessment of loss of earning capacity [*Bengal Chamber of Commerce v. Md Hossain*, A 1969 C 378 (*Kalidas v. Mondal, sup* **folld**)]. As to other instances see Rogers, 2nd Ed ss 8-13.

It is extremely difficult to determine always whether the facts are, as SHAW, CJ, said in *New England Glass Co v. Lovell, ante*, "of such a nature that it may be presumed to be within the common experience of all men of common education moving in the ordinary walks of life." Hence the difficulty of ascertaining in many cases whether expert evidence is or is not admissible. Wigmore says that "the only true criterion is: On *this subject* can a jury from *this person* receive appreciable help? In other words, the test is a relative one, depending on the particular subject and the particular witness with reference to that subject, and is not fixed or limited to any class of persons acting professionally" (Wig s 1923)].

"Experts".—This term has been broadly defined in the Act as "person specially skilled." Rogers defines an "expert" in any science, art or trade, as one who, by practice and observation, has become experienced therein. "The term 'expert' seems to imply both superior knowledge and practical experience in the art or profession; but generally nothing more is required to entitle one to give testimony as an expert, than that he has been educated in particular art or profession" [Greenleaf Ev s 440].

MAULE, J, says: "All persons I think, who practise a business or profession which requires them to possess a certain knowledge of the matter in hand are experts, so far as expertness is concerned." [*Vander Donckt v. Thelluson*, 8 CB 812].

AMES, CJ, of Rhode Island says: "Knowledge of any kind, gained for and in the course of one's business as pertaining thereto, is precisely that which entitles one to be considered an expert, so as to render his opinion founded on such knowledge, admissible in evidence" [*Buffum v. Harris*, 5 RI 250—Rogers, 2nd Ed p 3].

One who has studied a subject carefully falls within the definition, though he has never practised it (Tay s 1416 in citing Greenleaf). The witness must have made a special study of the subject or acquired a special experience therein [*U S Shipping Board v. St. Albans*, A 1931 PC 189]. The assistant mint master of Calcutta is an expert witness and may be examined on commission [*Mt Gilli v. R*, A 1925 O 616 : 88 IC 848]. A person in his capacity as Commissioner and Administrator of the Municipality gaining knowledge pertaining to the value of land in different parts of the city and house properties is entitled to be considered an expert on such matters

[*Collr, Jabalpur v. Ahmed*, A 1971 MP 32]. Knowledge on any particular subject need not be acquired professionally. It is for the court to decide whether a witness has sufficient knowledge or expertise to qualify as an expert [*Commercial Union Assurance Co. v. Lee Siew Khuan*, (1992) 2 Malayan LJ 541 (Singapore HC)]. An Excise Inspector who had put in 21 years service as such and had tested lacs of samples of liquor could be treated as an expert [*Srichand v. S*, A 1974 SC 639]. See *ante*: "*When Expert Evidence is to be Admitted.*"

Where the productivity of an apple orchard was to be assessed and the District Horticulture Officer was produced as an expert witness, the court said that he could not be regarded as an expert because he had no scientific study or research in assessing the productivity of an apple crop. Such person must be skilled and should have adequate knowledge of the subject. The court explained the principles of judging the credibility of the evidence of an expert. *State of H.P. v. Jai Lal,* AIR 1999 SC 3318 : (1999) 7 SCC 280.

Expert witness—Duty of Court.—The Court has to be vigilant when witnesses, particularly expert witnesses, are in Court and where the prosecutor fails to put relevant questions the answers to which will help the Court to come to a correct conclusion in regard to the matters relevant to the enquiry, the Court has a duty to see that the particulars are elicited. Where the prosecutor, either on account of ignorance or otherwise fails to put relevant questions to an expert witness, the trial Judge has the duty and right to put such questions to the witness, not with a view to help one side or the other, but merely to help the Court in arriving at a correct conclusion in regard to matters in dispute on the medical aspects of the case. The Sessions Judge has also the duty to ensure that the doctor, who conducted post-mortem examination is shown the weapon if it is available, or where it is not available, the description of the weapon is put to him and is asked whether such weapon could or could not cause any of the injuries. Where the prosecutor fails to discharge his duty adequately the trial Judge has also the duty to elicit from the medical witness the nature and gravity of the injuries sustained, for without such data it may be often difficult for the Court to come to a conclusion [*Kabiraj Tudu v. State of Assam*, 1994 Cri LJ 432, 437, 438 (Gau)].

In *Kartarey v. State of U.P.*, A 1976 SC 76 : 1976 Cri LJ 13, the Supreme Court observed at page 18 of Cri LJ:

> "We take this opportunity of emphasising the importance of eliciting the opinion of the medical witness, who had examined the injuries of the victim, more specifically on this point, for the proper administration of justice, particularly in a case where injuries found are forensically of the same species, *e.g.*, stab wounds, and the problem before the Court is whether all or any of those injuries could be caused with one or more than one weapon. It is the duty of the prosecution, and no less of the Court, to see that the alleged weapon of the offence, if available, is shown to the medical witness and his opinion invited as to whether all or any of the injuries on the victim could be caused with that weapon. Failure to do so may sometimes, cause aberration in the course or justice."

The above observations have been quoted with approval in a later decision of the Supreme Court in *Ishwar Singh v. State of UP*, A 1976 SC 2423 : 1976 Cri LJ 1883.

The Supreme Court in *Ram Chander v. State of Haryana*, A 1981 SC 1036 : 1981 Cri LJ 609 **quoted** with **approval** the following observations of LORD JUSTICE DENNING in *Jones v. National Coal Board*, (1957) 2 All ER 155:

> "The Judge's part in all this is to hearken to the evidence, only himself asking questions to witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocate behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies."

Relying on these observations the Supreme Court in *Ram Chander's* case stated at page 609 of Cri LJ:

> "The adversary system of trial being what it is there is an unfortunate tendency for a judge presiding over a trial to assume the role of a referee or an umpire and to allow the trial to develop into a contest between the prosecution and the defence with the inevitable distortions flowing from combative and competitive elements entering the trial procedure. If a Criminal Court is to be an effective instrument in dispensing justice, the presiding judge must cease to be a spectator and a mere recording machine. He must become a participant in the trial by evincing intelligent active interest by putting questions to witnesses in order to ascertain the truth."

After referring to Ss. 165 and 172(2) of the Criminal Procedure Code the Supreme Court observed (at page 610 of Cri LJ):

> "With such wide powers the Court must actively participate in the trial to elicit the truth and to protect the weak and the innocent. It must, of course, not assume the role of a prosecutor in putting question".

The Court proceeded to observe further (at page 610 of Cri LJ):

> "We may go further than Lord Denning and say that it is the duty of a judge to discover the truth and for that purpose he may ask any question, in any form, at any time, of any witness or of the parties, about any fact, relevant or irrelevant (s. 165 Evidence Act). But this he must do, without unduly trespassing upon the functions of public prosecutor and the defence counsel without any hint of partisanship and without appearing to frighten or bully witnesses. He must take the prosecution and the defence with him. The court, the prosecution and defence must work as a team whose goal is justice, a team whose captain is the judge.

In case of large scale corruption by employees of Irrigation department in connection with jungle clearance work, an officer of the department, who was entrusted to assist the investigation, having regard to his special knowledge with regard to the entrustment of jungle clearance work, can be said to be an 'expert' by virtue of his special knowledge, though in the strict sense of the term the may not be so [*M.S. Reddy v. State Inspector of Police*, ACB, 1993 Cri LJ 558 (AP)]. It cannot be laid down as a rule of universal application that a witness having departmental experience cannot state that the liquid seized is illicitly distilled liquor. It would all depend upon the facts of a particular case. In fact in *Suma Das v. State of Orissa*, (1993) 6 OCR 612, it had been observed that from the small and test a liquid can be held to be illicitly distilled liquor. An officer who has acquired sufficient experience as an official of the Excise Department can in a given case tender evidence in that regard [*Huding Singh v. State*, 1995 Cri LJ 1128, 1130 (Ori)].

Expert advising both sides.—A handwriting expert, on being approached by the plaintiff on the authenticity of a document, advised him that the document was not genuine. In discussing his fee for the advice, the expert stated that it was a rule with him not to give advice to both sides in an action. Subsequently the defendant also approached him for advice on the same document and fogetting the earlier advice to the plaintiff, he advised the defendant also that the document was not genuine. On realising that he had advised both sides he told the defendants that he would accept no further instructions from them. The defendants summoned him. The plaintiffs objected. The judge ruled that the expert was compellable witness and ought to give evidence as to his opinion on

the document. It was held by the Court of Appeal that the court was entitled to compel an expert witness to give evidence both of the facts he had observed and of his opinion on those facts, subject only to any claim to legal professional privilege by the expert in respect of communications between him and a party's lawyers. Accordingly, on principle the court was entitled to have before it the document in question and the expert's opinion on it and the defendants were therefore entitled to summon him. The expert's statement to the plaintiff that it was his practice when consulted by one side in a case not to assist the other side, did not amount to an express contract to that effect. Nor the plaintiff had established that it was an implied term of the contract that on advice to them the expert would not assist the defendant. Even otherwise, a contract by which a witness binds himself not to give evidence before the court on a matter on which the judge could compel him to give evidence is contrary to public policy and unenforceable [*Harmony Shipping Co SA v. Davis*, (1979) 3 All ER 177 CA]. The medical experts should come to the court to assist the court in coming to correct conclusion. They should not come to help the party which calls them [*Shaik Ahmad v. State of A.P.*, 1996 Cri LJ 2582, 2585 (AP)].

Expert—Witness of All.—There is no reason why a scientific witness should not be a witness of one or more or all of the parties to a suit. To a professional man it matters not which party calls him [*Lila v. Bejoy*, 41 CLJ 300 : 87 IC 534]. Party can examine a private expert on his own behalf without appointment by court [*Dhuri Sat v. Kishun*, A 1965 P 29].

Competency of Expert.—When calling expert evidence, the prosecution must first establish the expertise of the witness [*Public Prosecutor v. Lin Lian Chen*, (1991) 1 Malayan LJ 316 (Kuala Lumpur HC)]. It is the duty of the judge to decide whether the skill of any person in the matter on which evidence of his opinion is offered is sufficient to entitle him to be considered an expert. It is the judge who is to decide the question of competency or fitness [*Bristow v. Secqueville*, 19 LJ Ex 289; *R v. Silverlock*, 1884, 2 QB 766; see *Sheo Tahal v. Arjun*, 56 IC 879 *ante*. [*Balkrishna Das Agarwal v. Smt. Radha Devi*, A 1989 All 133, 141 (DB)]. An expert, in order to be competent as a witness, need not have acquired his knowledge professionally; it is sufficient, so far as the admissibility of the evidence goes, if he has made a special study of the subject, or acquired a special experience therein [*R v. Silverlock, sup*]. Thus, hospital students, dressers, and unqualified practitioners may be permitted to testify as medical experts; and accountants who are conversant with the business of life insurance as actuaries. So foreign law has frequently been proved by witnesses who, though not professional lawyers, followed some occupation which gave them experience of the law in question [Hals 3rd Ed Vol 15 para 589].

In *Baldev v. Urmila*, A 1979 SC 879 evidence, about pregnancy of wife at the time of marriage, of woman assistant surgeon who had not specialised in gynaecology but whose knowledge of midwifery as an obstetrician was proved to be of high order in the case itself was accepted. "The opinion of scientific men upon proven facts may be given by men of science within their own science" [LORD MANSFIELD in *Folkes v. Chadd, ante*]. "The question is—is he peritus: is he skilled, has he adequate knowledge? [LORD RUSSELL in *R v. Silverlock, ante*; approved in *U S Shipping Bd v. "St Albans"*, A 1931 PC 189]. Unless the evidence of the chemist is so inherently incredible that no reasonable person can believe it to be true, such evidence should be accepted as *prima facie* evidence [*Public Prosecutor v. Lam San*, (1991) 3 Malayan LJ 426 (SC Malaysia)].

Complaint has been made that in England not only physicians, surgeons and apothecaries, beyond whom it should not be extended, but hospital dressers, students and quacks have been permitted to act as medical witness. But must the judge, before receiving the testimony of a man, institute a preliminary enquiry as to whether he comes within the definition of a "quack"—one of the most uncertain words in the language, and the correctness of the application of which to particular individuals must ever, to a certain extent, be a matter of opinion. Besides, it would be at variance with the free-spirit of our laws to place the lives and liberties of all persons accused of offences in the hands of a privileged class, by prohibiting them from availing themselves of the testimony of others who have studied and practised the subject in question [Best, 11th Ed s 516].

A person need not always be a professional expert. Thus the evidence of a solicitor who had given study and attention to handwriting and "had on several occasions professionally compared evidence in handwriting" was admitted [*R v. Silverlock, sup*] An expert need not be qualified professionally to be accepted as an expert [*Commercial Union Assurance Co. v. Lee Siew Khuan*, (1992) 2 Malayan LJ 541 (Singapore HC)]. Defendant's solicitor qualified himself as an expert by carefully studying every letter of the disputed will for 128 hours and eventually succeeded in satisfying the judge that the will was a forgery [*Dahibhai v. Soonderji*, 31 B 430 *post*].

As expressed by MR JUSTICE DOE, the rule is as follows:—

> "When a witness is offered as an expert three questions necessarily arise: (*1*) Is the subject concerning which he is to testify, one upon which the opinion of an expert can be received? (*2*) What are the qualifications necessary to entitle a witness to testify as an expert? (*3*) Has the witness those qualifications? The first two questions are matters of law; the third is a matter of fact" [Rogers Expert Testimony s 17, 1883 Ed p 25].

An expert's testimony is not admissible without asking any question as to what claims he has to the character of an expert. The law requires that there should at least be a profession of special qualifications on the part of a person who comes forward to depose to matters lying beyond common knowledge [*Rowley v. L&N W Rly Co*, LR 8 Ex 221] though he need not in every case be a professional expert [*per* WEST, J, in *Timangavda v. Rangangavda*, Regular App No 24 of 1877 printed in the note to *Hari Chintaman v. Moro*, 11 B 89, 101]. Law does not permit any assumption without evidence on material point of competence of the expert [*Rajkishore v. S*, A 1969 C 321]. A constable claiming to be expert in testing liquor but no evidence about nature of training and qualification—such evidence is neither legal nor sufficient [*S v. Madhukar*, A 1967 B 61].

In America, for the purpose of determining the competency of the witness, a preliminary examination takes place, in which the witness may be asked to state his acquaintance with the subject-matter in reference to which his opinion is desired, and what he has done to qualify himself as an expert in that particular department of inquiry. The court is also at liberty to examine other witnesses as to whether he is qualified to draw correct conclusions upon questions relating to the science or trade in relation to which he is to be examined [Rogers Expert Testimony, 2nd Ed s 17]. In France experts are officially delegated by the court to inquire into facts and report upon them; and they stand on a much higher footing than either ordinary or scientific witnesses among us [Best, 11th Ed s 515].

After a witness has been admitted to testify as an expert, evidence cannot be given of the opinion of other experts in the same science, that the witness is qualified to draw correct conclusions on the science on which he has been examined. If that were allowed, another witness might then be called to give his opinion as to the capacity of him just examined to form a correct opinion on the degree of weight which was due to the testimony of the first, and so on [Rogers, 2nd Ed p 85]. Evidence of one expert as to the qualifications of another cannot be called corroborative evidence (see ss 156, 157). *Cf* also s 153 which excludes evidence to contradict answers which is relevant only in so far as it tends to shake the credit, of a witness by injuring his character. If competency and credit are considered to be the same thing, counter evidence of one expert as to the qualification of another expert is excluded. S 155 says that the credit of a witness may be impeached by the evidence of persons who testify that they, from their knowledge of the witness believe him to be unworthy of credit, but this refers to evidence reflecting on the witness' character for veracity, *ie* general reputation for untruthfulness. It has been however, held competent in America for one expert to testify as to the skill of another, where the knowledge of the witness was derived from personal observation, as distinguished from an opinion based on such expert's general reputation. In this case, one expert was allowed to testify as to the correctness of the tests used by another expert in testing for arsenic (*Laros v. Com*, 84 Pa St 200, 209. Rogers, 2nd Ed 5 37 p 86]. The want of skill or qualification may however be shown by cross-examination. The opinion of an expert has very little value unless the grounds are known (see s 51). Questions may be asked in cross-examination as to the grounds and reasons of his opinion or his previous acquaintance with the subject-matter in order to test his competency or to test and impeach his skill.

"The fact that the expert was not in a fit state of mind or health to form a proper opinion; or is interested or corrupt; or has expressed a different opinion at different times, may be elicited in cross-examination, or, if denied, independently proved [*Alcock v. Royal Ex As*, S 13 QB 292; *Gosling v. Alexander*, 1902, 1 LR 139] And when a theory advanced by an expert was very extraordinary, he was allowed to be cross-examined by his own side [*R v. Cook*, 147 CCC Sess Pap 466, *per* DARLING J"; Phip 11th Ed p 510]. We find no test laid down, by which we can determine with mathematical precision, just how much experience a witness must have had, how expert, in short, he must be, to render him competent to testify as an expert [*Forgery v. First Nat Bank*, 66 Ind 123, 125]. But it is for the court to decide within the limits of a fair discretion whether the experience of the supposed expert has been such as to make his opinions of any value [*McEwen v. Bigelow*, 40 Mich 215, 217]. Mere opportunities for special observation have been insufficient in some cases to render a witness competent to testify as an expert [Rogers, 2nd Ed s 19 p 51].

It is essential however to distinguish the rule of qualification founded on the experience of the witness and that which permits him to advise the court with an opinion. Every witness must be fit or expert in the matter upon which he gives his supposed knowledge. In some cases, *viz* when the witness is "expert" in the narrower sense, his competency must be specially shown. The question however whether besides deposing to facts he is to be permitted to express his opinion is another matter. In such case therefore it must be asked, is the matter one upon which the witness is sufficiently qualified by experience; and if he is, is it a matter upon which the witness is permitted to assist the court with his opinion? [*Gopessur v. Bissessur*, 16 CWN 265, 285].

The competence of an expert has to be challenged in the trial court [*Srichand v. S*, A 1974 SC 639]. No reliance can be placed on the opinion of an expert which lacks

objectivity expected professional skill and accuracy [*State of Goa v. Desiderio Menezes*, 1996 AIHC 3177, 3183 (Bom); *Govt. of Goa v. Jagannath Vaomon Khaolap*, 1996 AIHC 3258 (Bom)].

Inquiries and Reports Ordered By Court.—In addition to the scientific evidence adduced by the parties, the court, for its own guidance and information, may (in cases other than criminal proceedings by the Crown) and even without the consent of the parties [*A-G v. Birmingham &c Board*, 1912 AC 788], order independent inquiries and reports to be made, or experiments to be tried either in or out of court [*Marconi v. British Co*, Times, Dec 15, 1910], by experts of its own selection and may act on such reports [Administration of Justice Act, 1956, s 15 and or 40, r 12; see *Colls v. Home Stores*, 1904 AC 179, 192 and cases in Phip 11th Ed p 508]. It appears that this is not ordinarily permissible under the Act though there are exceptions, *eg* in ss 292, 293 Cr P Code. The opinion obtained should be properly proved and the party affected should be given an opportunity of cross-examining him [see *post*, "*Mere Certificate of Medical man or expert*"]. In a case here it was held that the proper course in ordinary circumstances, in cases of infringement of copyright is to get the opinion of experts who might be appointed Commissioners to investigate and report on the matters in issue [*Sitanath v. Mohini*, 81 IC 754 : A 1924 C 595; see also *Gopaldas v. Jagannath*, 1938 All 307 : A 1938 A 266].

Mode of Examination of Experts And its Scope.—[Hypothetical Questions]. —The form of the question to an expert must be hypothetical. Hypothetical questions should not be put to non-experts. It is not possible to lay down any inflexible rule as to the form of hypothetical questions. Opinions or inferences must be based on certain premises. These premises may come to the witness' knowledge from personal observation, *eg* when a medical man has examined the body and performed autopsy, or, they may be supplied to him by the testimony of others. Here the premises must be stated hypothetically and accurately in order to obtain his opinion on the hypothetical data. Hypothetical questions should generally be based on facts proved in the case by testimony. Hypothetical questions may also be based on facts assumed for the time being to be true, but the premises must afterwards be supplied by the testimony of others. The danger of such assumption is that the jury or the witness might be misled and take as proved what is merely an assertion on the part of the lawyer. If the premises are afterwards found to be untrue, the opinion of the witness must be rejected. A classical form of the hypothetical question was stated by SHAW CJ, in *Woodbury v. Obear*, 7 Gray 471 (Am) thus:—

> "If certain facts, assumed by the question to be established by the evidence, should be found true by the jury, what would be his opinion, upon the facts thus found true, on the question at issue?"

In hypothetical questions the premises upon which the witness is to give his opinion should be stated with particularity. Thus, if the question be "Upon all the evidence given, what is your opinion on a certain point?"; it is not possible to fix in the mind all the mass of facts narrated by a number of witnesses. If the specific facts proved or assumed to have been proved are stated clearly, it enables the witness or the court to determine on what premises the opinion is based. No hard and fast rule is possible, but what is needed is that the facts should be stated fairly, clearly and precisely.

Expert opinion even on admitted or proved facts will differ, and then the court has to decide which opinion it will rely on. But when the facts themselves are not admitted, the court has first to come to a conclusion on the evidence as to what facts have been proved, and then apply to such facts the various expert opinions which

have been offered. But if it is not a point of science or art, the court or jury can form an opinion without expert evidence, though the line, where there no longer remains a point of science or art on which the court has to form an opinion, is not very clearly defined [*Monosseh v. Shapurji*, 10 Bom LR 1004].

"If there is no testimony in the tending to prove the facts assumed in the hypothetical question, such question is improper. The facts must be proved or offered to be proved, and if there is no evidence to prove such facts, or if the facts assumed in the interrogatory are wholly irrelevant to the issue, the question should be excluded. If the foundation for the evidence is removed there is of course no basis for the superstructure. The question is not necessarily to be rejected by the court although the facts assumed by counsel to be true are not proved, or although the question does not state the facts as they actually exist. The facts are generally in dispute; and it is sufficient if the question fairly states such facts as the proof of the examiner fairly tends to establish, and fairly presents his claim or theory. It cannot be expected that the interrogatory will include the proofs or theory of the adversary, since this would require a party to assume the truth of that which he generally denies. Nor should a question be rejected because it does not include all the facts, unless it thereby fails to present the case fairly" [Jones s 371 and cases cited].

The evidence of a medical man, who has seen and has made a *post-mortem* examination of the corpse of the person touching whose death the enquiry is, is admissible: (*1*) to prove the nature of the injuries which he observed, (*2*) as to the manner in which the injuries were inflicted, and (*3*) as to the cause of the death. As a matter of fact it is essential he should be questioned as to the character of the injury [*Thangaswami, In re*, A 1963 M 476]. A medical man who has not seen the corpse and has not made the *post-mortem* examination is in the position of an expert witness who could give nothing but opinion evidence. The proper mode of eliciting such evidence is to put to the witness hypothetically the facts which the evidence of the other witnesses attempted to prove and to ask the witness's opinion on those facts. The general rule as to evidence of this kind, is that the question must be put to the witness hypothetically, *ie*, put in this way:—

> "Assuming such and such facts to be true, what is your opinion on the matter?" "Assuming such and such an injury, an injury of such and such a kind to have been inflicted, what is your opinion as to the nature of the weapon by which it was possibly or probably inflicted?" [*Per* FIELD, J, in *Roghuni v. R*, 9 C 455, 461 : 11 CLR 69].

The proper mode of eliciting such opinion is to put the signs observed at the *post-mortem* to the witness (who has not seen the corpse), and to ask what, in his opinion, was the cause of death on the hypothesis that those signs were really present and observed [*R v. Meher Ali*, 15 C 589]. Even a doctor not examining the patient is entitled to give opinion on his death as an expert by answering all hypothetical questions if the hyptheses are correctly put to him [*Bai Diva v. Silver Cotton, &c*, A 1956 B 424].

As an expert is not allowed to draw inferences or conclusions of fact from the evidence, his opinion should be asked upon a hypothetical statement of facts [*Strong v. Kean*, 13 Ir LR 93 and cases cited in Rogers, 2nd Ed, p 64]. SHAW, CJ, well stated the law as follows in *Dickenson v. Fitchbury*, 13 Gray, (Mass) 546, 556:—

> "In order to obtain the opinion of a witness on matters not depending upon general knowledge, but no facts not satisfied of by himself, one of two modes is pursued; either the witness is present and hears all the testimony, or the

testimony is summed up in the question put to him; and in either case the question as put to him hypothetically, whether if certain facts testified of are true he can form an opinion, and what that opinion is."

Counsel in framing the hypothetical question, may base it upon the hypothesis of the truth of all the evidence, or on a hypothesis especially framed on certain facts assumed to be proved for the purpose of the enquiry [*Gotlieb v. Hartman*, 3 Colo 53]. The question is not improper simply because it includes only a part of the facts in evidence [*Stearns v. Field*, 90 NY 640]. And if framed on the assumption of certain facts, counsel may assume the facts in accordance with his theory of them, it not being essential that he should state the facts as they actually exist [*Cowley v. People*, 83 NY 464; Rogers, 2nd Ed, p 65]. As FOLGER, CJ, says in *Cowley v. People, sup*:—

> "The claim is that a hypothetical question may not be put to an expert, unless it states the facts as they exist. It is manifest, if this is the rule, that in a trial where there is a dispute as to the facts, which can be settled only by the jury, there would be no room for a hypothetical question. The very meaning of the word is that it supposes, assumes something for the time being. Each side, in an issue of fact, has its theory of what is the true state of facts, and assumes that it can prove it to be so to the satisfaction of the jury, and so assuming, shapes hypothetical questions to experts accordingly. Such is the correct practice."

"Hypothetical questions may be so put as to require the witness to decide upon the evidence, to determine which side preponderates, and to find conclusions from the evidence, in order to reconcile conflicting facts. Such questions though hypothetical, are as clearly improper as if they directly sought the opinion of the witness on the merits of the case" [Rogers, 2nd Ed, s 28, p 69].

The following illustration of the hypothetical question, the question being the one propounded by the defence to the experts in the trial of Guiteau charged with the murder of President Garfield is cited from Rogers' book on Expert Testimony, 2nd Ed, (p 73):—

> "Assuming it to be a fact that there was a strong hereditary taint of insanity in the blood of the prisoner at the bar; also that at about the age of thirty-five years his own mind was so much deranged that he was a fit subject to be sent to an insane asylum; also that at different times after that date during the next succeeding five years, he manifested such decided symptoms of insanity, without simulation, that many different persons conversing with him and observing his conduct, believed him to be insane; also that in or about the month of June, 1881, at or about the expiration of the said term of five years, he became demented by the idea that he was inspired of God to remove by death the President of the United States; also that he acted on what he believed to be such inspiration, and as he believed to be in accordance with the Divine will in the preparation for, and in the accomplishment of such a purpose; also that he committed the act of shooting the President under what he believed to be a Divine command which he was not at liberty to disobey, and which belief made out a conviction which controlled his conscience and over-powered his will as to that act, so that he could not resist and the mental pressure upon him; also that immediately after the shooting he appeared calm and as if relieved by the performance of a great duty; also that there was no other adequate motive for the act than the conviction that he was executing the Divine will for the good of his country—assuming all these propositions to be true, state whether, in your opinion, the prisoner was sane or insane at the time of shooting President Garfield?"

Expert Opinion On Facts Stated by Other Witnesses. [How Far Expert Can Be Asked the Very Question Which the Court or Jury Have to Decide].—An expert may give his opinion on the facts of the case as proved by other witnesses at the trial [*R v. Wright*, 1821 R&R 456; *Fenwick v. Bell*, 1 C&K 312]. So a physician, who has not seen the particular patient, may after hearing the evidence of others at the trial, be called to testify as to the general effects of the symptoms described by them and their probable consequences in the particular case [Roscoe, N P Ev 18th Ed, p 175, 176 citing Peak, Ev 208]. In *R v. M'Naghten*, 1844, 10 CI&F 200, 212 : 8 ER 718, TINDAL, CJ, said:—

> "The question lastly proposed by your Lordships is 'Can a medical man, conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious at the time of doing the act that he was acting contrary to law, or whether he was labouring under any and what delusion at the time?" In answer thereto, we state to your Lordships that we think the medical man, under the circumstances supposed, cannot in strictness be asked his opinion in the terms above-stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide, and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But where the facts are admitted or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in the general form, though the same cannot be insisted on as a matter of right."

M'Naghten's case, decided in 1844, still occupies the leading place on the subject and inspite of attempts to enlarge the scope of the rule in respect of the defence of "irresistible or uncontrollable impulse" [see *Sodeman v. R*, 1936, 2 All ER 1138; *R v. Flavell*, 1926, 19 Cr App R 141; *R v. Kopsch*, 1925, 19 Cr App R 50; *Att-Genl &c v. Brown*, 1960, 1 All ER 734; and Report of the Committee in 1922-24 presided over by LORD ATKIN], the present law in England to establish a defence of insanity is what was laid down in *M'Naghten's* case. It was relied on and explained in *Baswantrao v. R*, A 1949 N 66 (which contains much valuable information on the subject) where two questions have been formulated for guidance: (1) Do facts *A*, *B* and *C* show insanity? (2) Do facts *A*, *B* and *C* show that the prisoner was insane? The first is permissible but not the second.

Accused after a savage attack on the murdered person went to a police station, said he was giving himself up for murder and gave a detailed account of how he had done the act. The defence set up was insanity. A medical witness for the defence was asked in cross-examination whether the accused's conduct immediately after the murder indicated to him that at the time of the murder the accused knew (i) the nature of the act he was doing and (ii) that his conduct was contrary to the law of the land. The answer to both the questions was "Yes". *Held* that the questions were rightly admitted [*R v. Holmes*, 1953, 2 All ER 324]. Where the only cause alleged for an unconscious or involuntary act is defect of reason from disease of the mind within the M'Naghten rules, there is no room for the alternative defence of automatism [*Bratty v. Att-Genl*, 1961, 3 All ER 523 HL].

In a case [*R v. Frances*, 4 Cox CC 57], ALDERSON and CHESWELL, JJ, refused to allow a witness to be asked whether, from all the evidence he had heard, both for the prosecution and defence, he was of opinion that the prisoner at the time he commit-

ted the act was of unsound mind, and said that the proper mode is to ask what are the symptoms of insanity, or to take particular facts, and assuming them to be true, ask whether they indicate insanity on the part of the prisoner [Wills, Cir Ev 6th p 157]. Where, however, a medical witness has examined or attended such person, he may give his opinion as to the state of mind of the person [*R v. Richards*, 1 F&F 87]. Where the sanity of a testator was in issue, a letter purporting from the testator was proposed to be shown to a medical witness, and such witness asked whether the writer of such a letter could be of sound mind; MARTIN B, held this could not be done, but that when the letter had been proved to be in the testator's handwriting, the witness might be asked if it were a rational letter [Powell, 9th Ed pp 38-9]. The question whether the accused was of unsound mind at the time of the commission of the act, or by reason thereof he was incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law, are questions of fact to be decided by the court or the jury. But in arriving at a finding, opinion of an expert in mental diseases is relevant [*Deorao v. R*, A 1946 N 321]. The Supreme Court of Massachusetts said:—

> "The object of all questions to experts should be to obtain their opinion as to the matter of skill or science which is in controversy, and at the same time to exclude their opinions as to the effect of the evidence in establishing controverted facts. Questions adapted to this end may be in a great variety of forms. If they require the witness to draw a conclusion of fact, they should be excluded" [*Hunt v. Lowell G L Co*, 8 Gray 169].

The following question has been held to be improper, for the reason that it practically put the expert in the place of the jury: "Form the facts and circumstances stated by previous witnesses, and from those testified to by still other witnesses, relating to the homicide, and from defendant's conduct on the trial, is it your opinion that the defendant was sane or insane when he committed the act?" [*S v. Felter*, 25 Iowa 67, 74]. For the same reason an engineer has not been allowed to answer the question whether "the plaintiff in oiling that pulley, could have been injured unless he was careless" [*Buxton v. Somerset P W*, 124 Mass 446]: "So it has been held improper to ask: "In your opinion as a canal boatman, did Mr C in any way omit or neglect to do anything which he might have done to save his boat?" He could be asked whether certain acts assumed to be proven were seaman-like and proper, but he could not be allowed to express an opinion as to what was or was not done as a matter of fact [*Carpenter v. Eastern T Co*, 71 NY 574]. And in an action against a physician for neglect and non-attendance in a case of frost-bite, it has been held that a medical witness, to whom the evidence was read, could not be asked: "From the evidence before the court, to what do you ascribe the loss of the plaintiff's fingers and toes?" [*Key v. Thompson*, 2 Hannay, NB 224—Rogers, 2nd Ed s 26 pp 62, 63].

Questions should be so framed as not to call on the witness for a critical review of the testimony given by the other witnesses, compelling the expert to draw inferences or conclusions of fact from the testimony, or to pass on the credibility of the witnesses, the general rule being that an expert should not be asked a question in such manner as to cover the very question to be submitted to the jury. As expressed in one of the opinions, "a question should not be so framed as to permit the witness to roam through the evidence for himself, and gather the facts as he may consider them to be proved, and then state his conclusions concerning them"[1] [*Dolz v. Morris*, 17 NY Sup Ct 202; Rogers, 2nd Ed p 61].

Phipson has summarized the law thus after reviewing numerous decisions: The cases are conflicting as to how far an expert may be asked the *very question which*

the judge or Jury have to decide; but the weight of authority appears to be as follows: —(*i*) Where the issue involves other elements besides the purely scientific, the expert must confine himself to the latter, and must not give his opinion upon the legal or general merits of the case; (*ii*) Where the issue is substantially one of science or skill merely, the expert may, if he has *himself* observed the facts, be asked the very question which the jury have to decide, (*iii*) If, however, his opinion is based merely upon facts proved by *others*, such a question is improper, for it practically asks him to determine the truth of their testimony, as well as to give an opinion upon it; the correct course is to put facts to him *hypothetically* and not *en bloc* asking him to assume one or more of them to be true and to state his opinion thereon; where however, the facts are not in dispute, it has been said that the former question may be put as a matter of convenience, though not as of right [Phip 11th Ed pp 518-19].

Mere advice to the court is outside the opinion rule and inadmissible. When a testimony is given not after hearing the evidence but on a copy of the deposition, it does not in itself make the evidence inadmissible, but the better course to follow is that the expert should hear the evidence as to which he is asked his opinion [*Gopessure v. Bisessure,* 16 CWN 265, 285]. For a case in which the judge was held to have been wrong in calling expert testimony, see *Bindessuree v. Doma,* 9 WR 88.

Like other witnesses, experts may be cross-examined as to credit and competency (see ss 146-55).

Experts Not to Express Opinion on Facts in Issue or to State Result of Opinions. —"Clearly it is not the province of the expert to act as judge or jury. Hence all questions calling for his opinions should be so framed as not to call upon him to determine controverted questions of fact, or to pass upon the preponderance of testimony. Thus it would be obviously improper to ask the witness to state his opinion upon all the testimony in the case as to any given question, if the truth of part of such evidence were in dispute. When the question is so framed as to call upon the expert to determine on which side the evidence preponderates or to reconcile conflicting statements, he is in effect asked to decide the merits of the case which is duty wholly beyond his province" [Jones, s 372 and cases cited]. It is not the duty of an expert to reconcile conflicting evidence [*Luning v. S,* 1 Chandler, (Wis) 178]. Expert should put before court all the materials which induce him to come to the conclusion, so that court, although not an expert, may form its own judgment on those materials [*Ajitrai v. Vasumati,* A 1969 G 48 (*Titli v. Jones,* A 1934 A 273 56 A 428 **rellied** on]. Opinions must be supported by reasons and it is the reasons and not *ipse dixit* which is of importance [*Palaniswany v. S,* A 1968 B 127].

Depositions of expert witnesses as to the result of their opinions, and as to the effect of them, do not come within the domain of expert evidence at all. For instance, in copyright cases while expert witnesses may give evidence of similarities, omissions, coincidences, &c they cannot be permitted to say that defendant did copy from plaintiff's books [*Decks v. Wells,* 142 IC 815 : 64 MLJ 193 : A 1933 PC 26]. "An expert cannot usually be asked to express an opinion upon any of the issues, whether of law or fact, which the court or jury have to determine; but this rule is not applicable to some points of foreign law, or to all cases of insanity as a defence to accusations of crime (see *R v. Holmes,* 1953, 2 All ER 324, where medical expert was allowed to say that accused knew the nature of the act and that it was contrary to law). In other cases the witness may explain terms of science or art, or inform the court if a word or phrase used differs from its popular meaning, indicate the meaning of symptoms, and generally enlighten the court on the technical aspects of the case [*per* NEVILLE J, in *Joseph Crosfield & Sons Ld v. Techno Chemical Laboratories Ltd,*

1913, 29 TLR 378; *Richmond v. R*, 1914, 111 LT 273"; Halsbury, 3rd Ed Vol 15 para 588]. In all cases in which opinion evidence is receivable, whether from experts or not, the grounds of his opinion may properly be inquired into [*Public Prosecutor v. Lee Beng Siang*, (1992) 2 Malayan LJ 120 (Muar HC)].

When Questions Need Not Be Hypothetical.—There are exceptions to the general rule requiring that on the direct examination the opinions of experts should be asked upon an assumed state of facts. *First*: A distinction is taken between cases in which there is a conflict of evidence upon the material facts, and those in which no such conflict exists. In the former class of cases the question must be framed hypothetically, but in the latter class there is no such necessity. *Second*: It is not necessary to assume a state of facts in those cases in which the expert is personally acquainted with the material facts in the case [Rogers, 2nd Ed s 31 pp 74, 75]. Thus, a medical man who has not personally seen the accused or examined his symptoms cannot be asked from a perusal or consideration of the conflicting evidence in the case as to whether in his opinion the accused was sane or insane at the time of the commission of the act; for that would be asking him to draw a conclusion of fact which it is for the court to decide [see *R v. M'Naghten*, 10 CI&F 200 *ante*]. But if the medical man has personally attended or visited a patient, be can give his opinion as to the state of the mind of the person. Here no assumption of facts is necessary and that is no room for a hypothetical question. Thus a medical man who had personally examined the uterus of a deceased woman was allowed to be asked: "What, in your opinion, caused the death of the person from whom the uterus was taken?" [*S v. Glass*, 5 Oregon, 73].

Reference to Text-Books By Experts.—An expert may site text-books of accredited authority in support of his opinion and may refresh his memories by reference to them (see s 51 and s 159). Passages from well-known scientific works may be read during trial, as evidence of opinions of experts [*Hurry Churn v. R*, 10 C 143; see also the penultimate para of s 57 *post*, and notes thereon]. Certain passages from a book were allowed to be read in a case of salvage reward. The testimony of witness called and examined in court is more reliable and of far more use than hypothetical statements in a book, the authority of which is uncertain [see *In re "The Drachenfels"*, 27 C 860]. In cases where skilled witnesses are called to pronounce their opinion on some scientific question of fact, is to be decided by the judge alone [Tay s 1423; Phip 11th Ed p 514]. They state that their opinions are formed in part upon consulting books written by their professional brethren.

In English law an expert may refer to text-books to refresh his memory or to correct or confirm his opinion, *eg* a doctor to medical treatises; a valuer to price lists, &c. Such books are not evidence *per se*; though if he describes particular passages as accurately representing his views, they may be read as part of his own testimony [*Concha v. Murietta*, 40 Ch D 543; Phip 9th Ed p 409]. In India the opinions expressed in books of authors who are dead or cannot be produced are themselves evidence [see s 60 prov 1 *post*].

When an expert witness is asked to express his opinion on a question, the primary facts on which the opinion is based have to be proved by admissible evidence given either by the expert himself or some other competent witness. However, once such facts are proved, the expert witness is then entitled to draw on the works (including unpublished works) of others in his field of expertise as a part of the process of arriving at his conclusion, provided he refers to that material in his evidence so that the cogency and probative value of his conclusion can be tested by reference to that material. Reliance on the work of others and references to it in evidence do not

infringe the hearsay rule. [*R v. Abadom*, (1983) 1 All ER 364 CA], **following** [*English Exporters (London) Ltd v. Eldonwall Ltd*, (1973) 1 All ER 726 and [*R v. Turner*, (1975) 1 All ER 70].

If an expert refers to the results of research published by a reputable authority in a reputable journal, the court will ordinarily regard those results as supporting any inference fairly to be drawn from them, unless or until a different approach is shown to be correct. Such articles would be admitted in evidence so that the court may view them and give such weight to factual assertions in them as it may think fit. [*H v. Schering Chemicals Ltd*, (1983) 1 All ER 849 QBD]. An earlier authority on the subject is [*Seyfang v. G D Searle & Co*, (1973) 1 All ER, opinion at pp. 292-293].

Foreign Law.—Under the Act, foreign law may be proved (1) by the evidence of a person specially skilled in it and (2) also by direct reference to books printed or published under the authority of the foreign Government (see *ante*, s 38 and notes). The latter mode of proof is not allowed in England. The English courts do not take judicial notice of the laws of foreign States or Colonies [*R. v. Governor of Brixton Prison*, 1907, 1 KB 696]. In the Privy Council, however, colonial statutes will be judicially noticed. As to colonial statutes, see Colonial Statutes Evidence Act, 1907 (7 Edw E c 16). According to English rule the ordinary method of proving a point of foreign law is by calling witness skilled in the law of that country. Foreign law, though regarded as a question of fact, is to be decided by the judge alone [Tay s 1423; Phip 11th Ed p 514]. As to the law and practice relating to proof of foreign law, see judgment of ATKIN LJ, in *Buerger v. N Y Life Ass Co*, 1927, 86 LJKB 930. A man cannot be accepted as competent to prove foreign law unless he is a practising lawyer, or has held some official position which presumes a knowledge of that law or has special knowledge of that law acquired from practical experience. A judge, barrister, advocate, or attorney will be competent, but not a merchant unconnected with the law though possibly acquainted with it [*Sussex Peerage Case*, 1844, 11 Cl&F 85, 114, 115, 117, 124: *Vander Doncket v. Thelluson*, 8 C&B 812]. "While it is true that witness called to prove foreign law may refer to any passages in the code of their country as containing the law applicable to the case, court is at liberty to look at those passages and to consider what is their proper meaning" [*per* VISCOUNT SANKEY in *De Beeche v. South Am Stores*, 1935 AC 148, 158, 159].

It is not enough to show that the man in fact knows the law on the point, he must be one who from his training may be expected to know the law [*Perlak Petroleum v. Deen*, (1924) 1 KB 111]. In *Vander Donckt v. Thelluson (sup)*, however, a stock-broker of Belgium was allowed to depose on the Belgian law of bills of exchange (probably because the point related only to mercantile usage). Knowledge obtained from mere study is not sufficient qualification. *In re Todd Shand v. Kidd*, 1854, 19 Beav 582, a solicitor practising in Scotland gave evidence on a point of Scotch law but it was not accepted and evidence of an advocate was required. It was held that an Egyptian, residing in Egypt but not specially conversant with the marriage law of Egypt cannot prove it [*R v. Naguib*, 1917, 1 KB 359 CCA]. In England, Indian law is to be treated as foreign law. An affidavit of a barrister was regarded as "far from being a reliable statement of Indian law" [*R v. Secy of S*, 1941, 2 All ER 546, 553]. Evidence of New York lawyers as to the effect of foreign law on common English words is admissible [*Camille v. Inland RC*, 1954, 2 All ER 466]. Expert evidence given by the Consul-General for China relating to custom in China as to divorce can be accepted in evidence to prove the validity of the divorce [*Re Sim Siew Guan*, 1932 Malayan LJ 95 (HC Straits Settlement)].

A witness deposing on foreign law may refer to accredited authorities on the subject for refreshing his memory [*Nelson v. Lord Bridport*, 8 Beav 527, 538; *Sussex Peerage Case, ibid*, at p 116]. On any point on which law of any part of His Majesty's dominions is different from that in which the court is situated, the court may also without relying on the testimony of experts remit a case to one of the superior courts within that part of His Majesty's dominions for opinion, under the British Law Ascertainment Act, 1859 (22 & 23 Vic c 63 s 1). The law of Bengal was ascertained under this Act by a case remitted to the Supreme Court of Bengal (*Login v. Princess of Coorg*, 30 Beav 632].

Where foreign law is laid down in an elaborate manner in a foreign code, the court should interpret it without outside opinion however eminent [*Palaniappa v. Nagappa*, A 1930 M 146: 123 IC 600]. Although court may take judicial notice of foreign law under s 38, what the whole law of a foreign country is at a particular time cannot be proved except by calling an expert [*Jagadish v. I T Commrs*, A 1956 C 48 *ante*]. Opinion of experts on foreign law is allowed, but Shia law of marriage is not foreign law nor is it science or art and expert opinion is not admissible [*Aziz Banoo v. Md Ibrahim*, 47 A 823: 23 ALJ 768]. Foreign law on a particular topic is a question of fact to be proved by evidence. Evidence was given of decisions of Mysore High Court in the case of partnership with an abkari licence of Mysore [*Khoday v. Swaminadha*, 92 IC 112: A 1926 M 218]. Though a foreign judgment cannot bind the parties to a suit in India, judicial decision of a foreign State as to the law or custom of that country is sufficient cogent evidence [*Suganchand v. Mangibai*, 1942 Bom 467: A 1942 B 185]. Expert evidence as to Jewish personal law is admissible it being foreign law here [*Jacob v. J*, 48 CWN 513: A 1940 C 90; *Kathleen v. Jacob*, A 1955 NUC (C) 4847]. Where there is no common ground between the expert witnesses for the opposing parties on the position in foreign law, the court should apply its own mind with the assistance of the opinion of expert witnesses, to the question [*Swee Hong Exim Pte Ltd. v. Saigon Shipping Co.*, (1994) 3 Singapore LR 76 (Singapore HC)].

Ossification test and opinion of radiologist regarding age.—The court is not right in preferring the opinion of the radiologist to the positive evidence furnished by the birth register, school admission register and evidence of girl's father. It cannot be reasonably expected to formulate a uniform standard for the determination of the age by the extent of ossification and the union of epiphysis in bones [*Chathu v. P. Govindan*, A 1958 Ker 21 : 1958 Cri LJ 637]. Opinion of doctor regarding age of a rape victim based on ossification test cannot outweigh the consistent oral and documentary evidence regarding her age [*Jitmohan Lohar v. State*, 1997 Cri LJ 2842 (Ori)]. Ossification test is not a sure test as to the age of the prosecutrix. It gives only an approximate age which may vary by two years on either side [*Chidder Ram v. State*, 1992 Cri LJ 4073, 4075 (Del)]. Medical evidence being only opinion evidence entries in birth register should be given preference [*State of Gujarat v. Inayathusen Mohmadmiya*, 1996 Cri LJ 3225, 3228 (Guj)]. Mere opinion of the doctor about the age of a person without ossification test is of no consequence [*Hiralal v. State of Haryana*, 1994 Cri LJ 2471 (P&H)]. If the authorities have any doubt about the medical certificate regarding age was given by Civil Surgeon, Govt. doctor, after ossification test, then they should have examined the doctor, but when they have not found that the report was not given by the doctor after ossification test, non-examination of the doctor cannot be a ground for not relying upon the said document [*Haribans Singh v. State of Bihar*, 1997 AIHC 2028, 2029 (Pat)]. Where the age of the rape victim was fixed by the doctor only by clinical examination and ossification test or other pathological tests were not performed, it was held that the assessment of age so made was on fragile premises. *Kamal Kishore v. State of H.P.*, (2000) Cri Lj 2292 (SC).

Anthrecene Powder and Ultra-Violet Rays.—For nature of expert evidence when anthrecene powder and ultra-violet rays are used for detecting crime, see *Ramsing v. S*, A 1960 G 7.

Ballistic Experts, Bullet Marks etc.—It is possible for experts in the science of Ballistics to trace a bullet or cartridge to the particular weapon from which it was discharged, by the application of certain tests and the use of a "comparison microscope". The science of ballistics may be availed of to get information about other important facts with varying degrees of probability, *eg* the distance from which a shot was fired, when approximately was the weapon last fired, &c. "The general fact of ballistics is that no missiles discharged from the same or different fire-arms bear the same trace-marks. This general truth was until recently unknown and disputable; judicial opinion now recognizes it as a conceded fact of which judicial notice may be taken" [Wig s 417a]. For a description of the technique used in ballistics, see 1924. *Evans v. Commonwealth*, 230 Ky 411 cited in Wig s 417*a*.

Opinion of the ballistic expert about pin marks of cartridges cannot be rejected merely on ground that he has not taken photographs of the cartridges concerned [*S.G. Gundegowda v. State*, 1996 Cri LJ 852, 867 (Kant)]. Report of ballistic expert is admissible in evidence without calling him as witness [*Balak Ram v. State of Rajasthan*, 1994 Cri LJ 2451, 2461 (Raj)]. In cases where injuries are caused by fire arms, the opinion of the ballistic expert is of a considerable importance where both the firearm and the crime cartridge are recovered during the investigation to connect an accused with the crime. Failure to produce the expert opinion before the trial court in such cases affects the creditworthiness of the prosecution case to a great extent [*Sukhwant Singh v. State of Punjab*, A 1995 SC 1601, 1606]. Where the Court held that it is not necessary to examine a ballistic expert in each and every case, particularly when the direct evidence is of an unimpeachable character and the nature of the injury disclosed by the postmortem report is clearly consistent with that direct evidence [*Kartik Harijan v. State of Orissa*, 1995 Cri LJ 2019, 2021 (Ori)]. Seizure of empty cartridges, in absence of Ballistic Expert's report, is inconsequential [*Bhani Ram v. State of Rajasthan*, 1995 Cri LJ 3165, 3168 (Raj)].

Where it was clearly stated by the ballistic expert that he had fired six live cartridges from the rifle in question before recording his opinion that the empty cartridge recovered from the spot was fired from the said rifle and that opinion was not at all challenged in the trial court as well as in the statement of the accused under section 313 Cr PC, it could not be stated that the said opinion of the expert could not be believed or accepted [*Surat Singh v. State*, 1995 Cri LJ 3189, 3194 (Del)]. Where the medical evidence is to the effect that the solitary wound could be caused by a blunt object, evidence of an alleged eye-witness that deceased was assaulted with a knife and thereafter by rod cannot be relied upon [*Subhash Dhondiba Pandit v. State of Maharashtra*, 1996 Cri LJ 4194, 4196 (Bom)]. Till the guns are sent for ballistic examination and a report is obtained that they are in working order, recovery of guns cannot connect the accused with the crime [*Lakhasingh v. State*, 1994 Cri LJ 2952 (Raj); *Somsingh v. State*, 1984 WLN (UC) 15]. Report of the ballistic expert that cartridges recovered from the house of the deceased had been fired from the guns of the accused can be used to corroborate the prosecution version that the accused had fired the gun [*Bhola Singh v. State of Punjab*, A 1994 SC 137, 141].

R.L. Gupta, in his book "Ballistic Fire Arms and Jurisprudence" 3rd Edn. pages 232 and 233 has observed that scorching is also called burning or charring. It can appear only when the fire is made from a very close distance of 6" or within the limits of a normal person's arms length. At ranges greater than a few feet these

features are not longer present. As such, charring is not possible if one is hit from a distance of more than 400 feet. This also the view of Modi in his book "Medical Jurisprudence and Texicology", 20th Edn. pages 227 and 228 and Taylor in his book "Principles and Practice of Medical Jurisprudence" 10th Edn. page 441 [*Mani Ram v. State of Rajasthan*, 1994 Cri LJ 3770, 3778 (Raj)].

Blackening of skin below the injury (as shown by the medical report), does not necessarily mean that the firing was from a close range. *Mohan Singh v. State of M.P.*, AIR 1999 SC 883 : 1999 Cri LJ 1334, or that the wound was self-inflicted. *Pammi v. Govt of M.P.*, AIR 1998 SC 1185 : (1998) 2 SCC 700.

Armourer.—The expert, *viz.* an armourer, who has a special training in the subject, need not make a test firming for ascertaining whether or not a rifle is capable of firing [*Sukh Pal v. State of Haryana*, A 1995 SC 578].

Where the prosecution case is that the accused shot the deceased with a gun, but it seems more likely that the injuries were caused by a rifle than by a gun and also that the shot must have been fired by more than one person and there were other infirmities in the evidence, it is only by the evidence of a ballistic expert that it could have been ascertained whether the injuries attributed to the accused were caused by a gun or a rifle and such evidence alone could settle the controversy as to whether they could possibly have been caused by a fire-arm being used at such a close range as is suggested in the evidence [*S v. Mahinder*, A 1953 SC 415]. There is however no inflexible rule that in every case of murder with a lethal weapon the prosecution can succeed in proving the charge by examining a ballistic expert. Where the direct evidence is of an unimpeachable character and the nature of the injuries disclosed by post-mortem notes is clearly consistent with direct evidence, the examination of an expert may not be essential. Whether it is essential to examine a ballistic expert must depend upon the circumstances of each case. In a case where a person took care to keep the gun with himself for over a week before surrendering it, it would be useless to examine an expert for it is extremely unlikely that traces of its use had not been removed by him [*S v. Gurbachan*, A 1963 SC 340].

Where the victims were killed by gunshot wounds by the accused and no rifles were recovered and the prosecution case was not that the wounds were caused by the revolver which was recovered, the Supreme Court held that there was no need to examine any ballistic expert [*S v. Jaidev*, A 1963 SC 612]. Value of opinion of fire-arm expert after test that a particular cartridge found was fired from the pistol produced by the accused [*Kalua v. S*, A 1958 SC 180: 1957 SCR 187]. The opinion of the ballistic expert that the empty cartridge has been fired from a particular gun has to be discarded when the expert did not give any reason for giving that opinion. [*Santokh Singh v. State of Madhya Pradesh*, 1988 Cri LJ 1583, 1586 (MP); *Gopal Singh Garkha v. State of U.P.*, 1991 Cri LJ 1235, 1239 (All)].

Agreeing with the observations in Major Hatcher's "Fire-Arms Investigation, Indentification and Evidence", the court held that "the skin wound of entrance always corresponds in size to the diameter of the bullet used. It is very common for the aperture of entrance to appear smaller than the diameter of the bullet, but this is an illusion, since the wound invariably admits a projectile similar to the one which caused it. The small appearance is due to elasticity and shrinkage of the skin". It is also a fact that the wound of exit is usually larger than of entrance. In this case the court held that the accused did not shoot the deceased as the latter was shot with a bullet fired from a 303.303 bore rifle and not a 500.500 bore rifle, the only weapon attributed to the accused by the prosecution witnesses [*Tahsildar v. S*, A 1958 A 255]. When the exit wound was not only smaller in dimension than the entry wound but was also smaller in dimension than the size of the cartridge the court concluded that the injuries could not be gun shot wounds [*Salim Zia v. S*, A 1979 SC 391].

In a case the Supreme Court placed reliance under the heading "Burning of the Wound" (in Taylor's Medical Jurisprudence, Vol 1, 10th Ed p 441): "It is impossible

to state rules as to the precise distance from which it is possible to produce marks of burning, for this depends on the quantity and nature of the powder, the method of charging and the nature of the weapon. It is unusual, however, to get marks of burning beyond a yard or a yard and a half with a shot gun, or at more than half a yard with a revolver" [*Santa Singh v. S*, A 1956 SC 526: 1955 Cri LJ 930].

The main principle of forensic ballistics is to establish whether a given bullet or cartridge was used in a particular weapon. It is now possible not only to tally the cartridge fired with the gun used but a number of other important facts can be decided though with varying degrees of probability. Among these are the distance from which a shot was fired, the approximate time when the weapon was last fired and other questions of similar nature. Unless the test cartridge is sent to the court so that it could be satisfied of the identity of the thumb-print of the gun on the breech face of both the cartridges and unless the data collected by the expert or the enlarged photos taken be produced for verification by the court, it ought not to accept the expert's opinion without satisfying itself of its correctness. Fire-arms can be broadly divided into two main classes: (1) smooth bore arms and (2) rifle arms including revolvers, automatic and self-loading pistols and machine guns. The barrel of the second class being furnished with spiral grooves imparts spin to the bullets. But shots discharged from a smooth bore firearm scatter over an area that increases roughly according to the distance of the target from the gun, and besides these missiles do not bear the individual characteristics of the barrel so effectively as in the rifle arm. That is the reason why the pellets from a shot gun, though can be measured, weighed and subjected to chemical analysis cannot establish the identity of the gun that fired them though in the case of bullets from a rifle arm the identification of bullets is possible with the help of a microscope and experts' services [*In re Kodur*, A 1957 AP 758 (*In re Balija*, A 1941 M 88; *Harendra v. R*, A 1931 C 441; *Fakir Md v. R*, A 1936 B 151 refd to)]. Evidence of Ballistic Expert that the cartridges could not have been fired through any other firearm because every firing pin, firing pin scrape and breech face mark has its own individuality could be relied upon [*Kartar v. S*, A 1977 SC 349].

The opinion of an expert who has compared the land and groove markings on the bullets under a comparison microscope cannot be rejected simply on the grounds that he has not taken photographs [*Ramanathan v. S*, A 1978 SC 1204]. Unless there were rifling marks in the bullets and which were not defaced by the entry in the bodies of the victims, no expert could ordinarily and generally give an opinion. In the circumstances of the instant case, the non-obtaining of the opinion of the Ballistic expert could not shake the prosecution case [*Chatar v. S*, A 1976 SC 2474]. It would need super-human ability to come to a conclusion about injury caused by gun fire without seeing the injury but by merely looking at the description of the injuries or even the photographs given by the doctors [*Mohan v. S*, A 1975 SC 2161].

Blood Grouping Tests.—In cases of disputed paternity blood grouping tests are resorted to in some countries by grouping the bloods of the child, the mother and the alleged father. In the present state of science these tests have only a negative value inasmuch as they may exclude a certain person as the possible father but it cannot be said that a particular man is the father [see Wigmore 3rd Ed Vol 1, s 165a, p 610]. There is no doubt that a person of full age and capacity cannot be ordered to undergo a blood test against his will. The court has no such power [*W v. W*, 1963, 2 All ER 841; see also s 21(*1*) Family Law Report Act, 1969]. Although the view found approval with some of the Law Lords in *S v. McC*, 1970, 3 WLR 366, LORD MACDERMOTT cogently pointed out "I know of no reason why the High Court should not in a case order a party who is *sui juris* to submit to a blood test". Medical inspections are frequently ordered and "there can be no valid distinction in principle

between a blood test and a clinical examination" (at P 377). As a matter of fact the position is different in the US and a number of State enactments authorise courts to order adults to submit to blood tests. Other considerations prevail to make it different in the case of children. On the trial of an issue as to the legitimacy of a child, it is in the interests of the child and also of justice that the court should have before it all the best evidence available, including modern scientific evidence as provided by blood tests which might resolve the issue conclusively; and that the interests of the child are best served if the truth is ascertained [*S v. McC*, 1970, 3 WLR 366 HL; *BRB v. JB*, 1968, 2 All ER 1023]. It remains a question of some nicety whether the court should be in a position to order the blood test of a non-consenting adult to serve the interest of the child. As to evidence of blood-groups to test paternity, see Hals, 3rd Ed Vol 12 para 421 note (*c*).

There is no provision in Indian law for the admissibility of blood grouping tests. Also no one can be ordered to give blood for the purpose unless he or she consents to it [*Venkateswarlu v Subbayya*, A 1951 M 910; *Subbayya v Bhoopala*, A 1959 M 396; *Ramchandra v. Shankar*, A 1968 B 388]. When court has no power to order giving of blood, there cannot be any adverse inference from refusal to give blood [*Ramchandra v. Shankar, sup*].

Code Words.—Opinion of a police officer that particular words in a slip were code words, is not admissible [*Harakchand v. S*, A 1954 MB 145]. See *Harilal v. R*, A 1937 B 385 *infra*.

Copyright.—In case of infringements of copyright, the court should be reluctant to sit as experts and to decide without the aid of expert evidence [*Sitanath v. Mohini*, 81 IC 754: A 1924 C 595].

Dog Tracking Evidence.—The evidence of tracker dogs has been admitted in Scotland and Canada. But in USA there are conflicting decisions (see Am Juris, 2nd Ed, Vol 29; p 429, para 378). Dog-tracking evidence is admissible in England and in criminal trials, it is often used by the prosecution. There are certain safeguards which need to be borne in mind in such cases. The position as it obtained formerly is illustrated in the following passage from the case of *R. v. Montgomery*, 1866 NI 100 :

> "there are three objections which are usually advanced against the reception of such evidence. First, since it is manifest that the dog cannot go into the box and give his evidence on oath, and consequently submit himself to cross-examination, the dog's human companion must go into the box and report the dog's evidence, and this is clearly hearsay. Secondly, there is a feeling that in criminal cases the life and liberty of a human being should not be dependent on canine inferences. And, thirdly, it is suggested that even if such evidence is strictly admissible under the rules of evidence, it should be excluded because it is likely to have a dramatic impact on the jury out of proportion to its value."

Subsequently, however, the position has been quite unambiguous and has changed drastically. What the Courts have insisted upon is that the evidence must pass the test of scrutiny and reliability as in the case of any other evidence. The following guidelines must, however, be borne in mind :

(a) That there must be a reliable and complete record of the exact manner in which the tracking was done to the extent, therefore, in this country, a *panchnama* in respect of the dog tracking evidence will have to be clear and complete. It will have to be properly proved and will have to be supported by the evidence of the handler.

(b) It will be essential that there are no discrepancies between the version as recorded in the *panchnama* and the evidence of the handler as deposed to before the court.

(c) The evidence of the handler will have to independently pass the test of cross-examination.

(d) Material will have to be placed before the court by the handler, such as the type of training imparted to the dog, its past performance, achievements, reliability, etc., supported, if possible and available, by the documents [*Babu Magbul Shaikh v. State of Maharashtra*, 1993 Cri LJ 2808, 2811 (Bom)].

It is also to be noted that there are some breeds of dogs and some strains which are specially utilised for hunting and tracking because of their abnormally high talents, if the dog belongs to one of these categories and if it is shown to the court that it has been specially trained for purposes of detection, not only would the dog-tracking evidence will be admissible, but it will have to be relied upon as being evidence of a very high calibre.

The tracker dog's evidence cannot be likened to the type of evidence accepted from scientific experts describing chemical reactions, blood tests and the actions of bacilli, because the behaviour of chemicals, blood corpuscles and bacilli contains no element of conscious volition or deliberate choice. In the present state of scientific knowledge evidence of dog tracking, even if admissible is not ordinarily of much weight [*Abdul Razak v. S*, A 1970 SC 283]. The genuineness of the evidence of dog tracking need not necessarily be tested in the restricted terms of availability or non availability of a drawn *panchanama* supported by the testimony of the dog handler. What appears to be relevant and material is that with regard to the dog tracking evidence the testimony of the dog handler should inspire confidence of the court so as to be accepted as a genuine and valid evidence given by the prosecution. The Courts should be satisfied and free to accept any test of scrutiny of such evidence so as to enable them to reach to the conclusion that such evidence is reliable and free from doubt as corroborative evidence of the various other circumstances placed or made available by the prosecution in support of their case [*Ashok Gavade v. State of Goa*, 1995 Cri LJ 943, 954 (Bom). See also 1993 Cri LJ 2808 : 1993 (3) BCR 309 which has been affirmed on this aspect by the Bombay High Court see also *Abdul Razak Murtaza Dafadar v. State of Maharashtra*, A 1970 SC 283 : 1970 Cri LJ 373]. Evidence relating to movements of tracker dogs cannot be rejected as inadmissible and in approprite cases it is open to the court to consider it. Its reliability, of course, depends upon the acceptibility of the testimony of persons who manned the dog and those who witnessed the movements and conduct of the animal [*Bhadran v. State of Kerala*, 1995 Cri LJ 676, 679, 680 (Ker)].

While complete and implicit reliance cannot be placed with regard to the identification only on the dog tracking evidence, judicial notice must be taken of the fact that the training skills and special skills and special qualities that are found in the police dogs are now universally being recognised as being of such a high calibre that in cases such as detection of explosives, drugs etc. they are found superior and more effective than the most sophisticated instruments. For the purpose of tracking down a criminal, special faculties, qualities and skills of the dogs are aspects of which serious note must be taken. Where police rely on such evidence, courts would be more than fully justified in accepting it provided that it passes the test of complete scrutiny [*Pandian K. Nadar v. State of Maharashtra*, 1993 Cri LJ 3883, 3895 (Bom)].

Foot prints.—The science of identification of foot prints is not a fully developed science and therefore, if in a given case evidence relating to the same is found satisfactory it may be used only to reinforce the conclusions as to the identity of a culprit already arrived at on the basis of other evidence [*Mohd. Aman v. State of Rajasthan*, A 1997 SC 2960, 2963 : 1997 Cri LJ 3567]. Marks of shoes of the accused found on the spot is not sufficient to connect the accused with the crime [*State of Haryana v. Ved Prakash*, A 1994 SC 468, 469 : 1994 Cri LJ 140].

Gambling.—It is impossible to say that gambling is either an art or science. But a prosecution witness might give evidence that he had a long experience among people who indulged in gambling, and from that experience to be supported by instances, he was satisfied that a system or code prevailed among such persons, and he might then express an opinion that the slips in question had a certain meaning. He is not, however, entitled to express the opinion that unintelligible documents found in a room must be the record of gambling transactions [*Harilal v. R*, 1937 Bom 670: A 1937 B 385]. In order to prove that articles seized are instruments of gaming it is not necessary to examine an expert in each and every case [*S v. Jaganbhai*, A 1966 SC 1633].

House-breaking.—When the police noticed that there was sameness in the *modus operandi* in the house-breakings and came to the conclusion that it must have been the work of a gang, the opinion as to the existence of the gang is relevant [*Amdumiyan v. R*, A 1937 N 17 FB].

Illicit Liquor.—An Excise Inspector can give expert opinion on illicit liquor [*Srichand v. S*, A 1974 SC 639; *Gobardhan v. S*, A 1959; *Ramkaran v. R*, A 1935 N 13].

Land.—In determining market value of land the opinion of experts is often valuable, sometimes necessary. But such evidence is most often required where there are structures or other improvements [*S v. Mariamma*, A 1969 K 265]. A valuation surveyor, having made careful and appropriate inquiries, so far as necessary, is in our judgment fully entitled to rely on what reasonably appears to him to be reliable information. So is an expert. Both will be concerned to satisfy themselves that an allegedly comparable transaction in fact took place, that there was not some special factor which produced a typical result and that an allegedly comparable transaction was in truth comparable. These matters are likely to be explored in court when evidence is given [*Abbey National Mortgages v. Key Surveyors*, (1996) 3 All ER 184 (CA)]. In reaching the above conclusion the court was fortified by reference to a ruling given by PHILLIPS J in *Banque Bruxelles Lambert SA v. Eagle Star Insurance Co. Ltd.*, (26th February 1993, unreported). That was a valuation case, and it was argued for the valuer that the claimant lenders should be put to strict proof of any comparables upon which they relied. PHILLIPS J **distinguished** *English Exporters (London) Ltd. v. Eldonwall Ltd.*, (1973) 1 All ER 726 : (1973) Ch 415, and held:

> "The unchallenged evidence has established that competent valuers make valuations on the basis of market intelligence which is hearsay, as one would expect. They do not and cannot apply the hearsay rule to the material they take into consideration. It seemed and still seems to me that in considering whether (the valuer's) valuation was or was not negligent, I not only may but must have regard to the hearsay material that a competent valuer could and should have had regard to when performing the valuation. That of course requires proof of the hearsay material that would have been available to such a valuer but such proof is a very different exercise from that which (counsel for the valuers) has contended is necessary."

The true position is in our opinion, that both a valuer and a valuation expert may have regard to market intelligence, but it is, of course, open to anyone challenging the valuation to seek to show, for any one of a number of possible reasons, that the intelligence relied on was unreliable, or should not have provided a guide to the case in question. [*Abbey National Mortgages v. Key Surveyors*, (1996) 3 All ER 184]. Where the material date for determination of compensation under Land Acquisition Act was of the year 1972 but the experts inspected the property in the year 1990, their evidence cannot be taken into consideration [*Special Land Acquisition Officer, Bombay v. Vishanji Virji Mepani*, A 1996 Bom 366, 371].

Hair.—Where hairs were found in the hands of the deceased, by giving sample of hairs an accused does not become a witness against himself [*Neeraj Sharma v. State of U.P.*, 1993 Cri LJ 2266, 2269 (All)].

Identity of seized articles.—The opinion of the Forensic Sciences Laboratory on the identity of the articles siezed and the authenticity of the packet were held to be relevant. A minor lapse in the deposition of a police officer could not provide a ground to hold that the seal on the packet was a different one or that the material seized was different from that examined by the laboratory. *Sarjudas v. State of Gujarat*, 1999 (8) JT 118 : (1999) 8 SCC 508.

Nautical Assessors.—The advice of nautical assessors is expert evidence admissible in Admiralty Courts on all issues of fact or about seamanship. The court is not bound to follow their advice, but obviously great attentions must be paid to their opinion [*Asiatic S N Co v. Arabinda*, A 1959 SC 597: 1959 Supp 1 SCR 979]. When the court has the assistance of nautical or other assessors, expert evidence on matters within the sphere of the assessors is generally inadmissible [*The Kestrel* 1881, 6 PD 182; *The Assyrlan*, 1890, 63 LT 91 CA; Hals 3rd Ed Vol 15 para 588].

Trade mark.—In the case of infringement of trade mark similarity in the mark is a matter for the court and evidence as to opinions of witness is inadmissible [*Swadeshi Mills Ltd v. Juggi Lal*, 49 A 92: 24 ALJ 975; see *Mocdonald & Co v. Holland & Moss*, 41 IC 539]. But the opinion of the Registrar, who has expert knowledge, regarding deceptive similarity, should not be disturbed lightly although he may be proved wrong [*Krishna Chettiar v. Ambad & Co*, A 1970 SC 146].

Telephony.—Evidence of expert witness on matters regarding telephony is admissible [*Bacharaj v. Bombay Telephone Ltd*, A 1939 S 245]. As to communications received by telephone or dictaphone, see notes to s 60 *post*.

Typewriting Specimens.—The word 'science', occurring independently and in addition to the word 'handwriting' in section 45, is sufficient to indicate that the opinion of a person specially skilled in the use of typewriters and having the scientific knowledge of typewriters would be an expert in this science; and his opinion about the identity of typewriting for the purpose of identifying the particular typewriter on which the writing is typed is a relevant fact under section 45 of the Evidence Act [*State v. S.J. Choudhry*, A 1996 SC 1491 : 1996 Cri LJ 1713, 1715 **overrules** *Hanumant v. State of M.P.*, A 1952 SC 343]. The meaning of the word 'science' as understood ordinarily with reference to its dictionary meaning must be attributed to the word as used in section 45 of the Indian Evidence Act. *S.J. Choudhry, supra.*

Some of the meaning given in dictionaries are:—

The *Oxford Encyclopedic English Dictionary*: "Science.....a systematic and formulated knowledge, esp. of a specified type or on a specified subject (political science). b. the pursuit or principles of this..."

The New Shorter Oxford English Dictionary Vol. 2: "Science.....2a. Knowledge acquired by study acquaintance with or mastery of a department of learning.....3a. A particular branch of knowledge or study; a recognized department of learning...."

Collins Dictionary of the English Language: "Science n. 1. the systematic study of the nature and behaviour of the material and physical universe, based on

observation, experiment, and measurement, and the formulation of laws to describe these facts in general terms. 2. the knowledge so obtained or the practice of obtaining it. 3. any particular branch of this knowledge: the pure and applied sciences. 4. any body of knowledge organized in a systematic manner. 5. skill or technique....."

It is clear from the meaning of the word 'science' that the skill or technique of the study of the peculiar features of a typewriter and the comparison of the disputed typewriting with the admitted typewriting on a particular typewriter to determine whether the disputed typewriting was done on the same typewriter is based on a scientific study of the two typewritings with reference to the peculiarities therein; and the opinion formed by an expert is based on recognised principles regulating the scientific study. The opinion so formed by a person having the requisite special skill in the subject is, therefore, the opinion of an expert in that branch of the science. Such an opinion is the opinion of an expert in a branch of science which is admissible in evidence under Section 45 of the Indian Evidence Act. *S.J. Choudhry supra.*

There cannot be any doubt that the opinion of an expert in typewritings about the questioned typed document being typed on a particular typewriter is based on a scientific study of the typewriting with reference to the significant peculiar features of a particular typewriter and the ultimate opinion of the expert is based on scientific grounds. The opinion of a typewriter expert is an opinion of a person specially skilled in that branch of the science with reference to which the Court has to form an opinion on the point involved for decision in the case. On a plain construction of section 45 giving to the word 'science' used therein its natural meaning, this conclusion is inevitable; and for supporting that conclusion, it is not necessary to rely on the further reason that the word 'handwriting' in Section 45 would also include typewriting. *S.J. Choudhry, supra.*

In '*Questioned Documents*', Second Edition, by Albert S. Osborn in the Chapter of "questioned typewriting" this aspect is considered and, therein at page 598, it is stated thus:

"The principles underlying the identification of typewriting are the same as those by which the identity of a person is determined or a handwriting is identified. The identification in either case is based upon a definite combination of common or class qualities and features in connection with a second group of characteristics made up of divergences from class qualities which then became individual peculiarities.

The mathematical principles outlined in the fourteenth chapter show how remote is the possibility of coincidence of even a few scars or deformities on a person, and coincidence of scars and deformities are as remote with typewriters as with persons."

In *'Photographic Evidence'* by Charles C. Scott, Second Edition, Volume 1, under the heading "Typewriting Identity or Non-identity of Typing" it is stated thus:

"But even as the nationality of an individual may be perplexing but does not in any way hamper the determination of his personal identity by means of his finger prints, his handwriting, or other reliable indications, so also the fact that it is often difficult to determine the make of a typewriter used in typing a document does not lessen the reliability of the scientific determination that a certain typewritten document was typed on a particular machine regardless of its make. By the use of the proper microscopes and test plates the document examiner often can determine the question and by the use of photographic comparison charts he can demonstrate his findings, usually with unimpeachable certainty.

From a comparison of the typewriting on a document which is a subject of controversy with specimens known to have been made on a certain typewriter it is usually possible to determine whether or not that typewriter was used in typing the subject document, provided the subject document contains sufficient typewriting and the specimens from the known machine are of a suitable kind. This is true because every typewriter when it comes off the assembly line is an individual and writes exactly like no other typewriter. When a typewriter is brand new the differences between it and other typewriters coming off the assembly line at the same time are extremely minute and elusive, but theoretically at least there are identifying differences that can be discovered by microscopic examination and demonstrated photographically. Furthermore, the more a typewriter is used the more individualistic it becomes; and the easier it is to identify its typewriting. In some instances through overuse, misuse, or abuse a typewriter develops so many peculiarities that its typing can be identified readily with the naked eye." (p. 636)

In '*Law of Disputed and Forged Documents*' by J. NEWTON BAKER, while dealing with the basic principles of identification of Typewriting generally it is stated:

".....Since typewriting possesses individuality it can be compared and identified in the same manner as handwriting....." (page 453)

Therein while discussing individuality of typewriting, it is stated thus:

"The individuality of the typewriter is established by the character of its type impressions on the paper. These characteristics of typewriting can be analyzed, compared and differentiated and can be positively identified as those of a particular typewriter. This individual comparison and identification of characteristics may establish the genuineness or forgery of a typewritten instrument and when admitted in evidence is sufficient proof.

The occurrence of similar irregularities in typewriting in two or more machines is practically impossible. The rule that the typewriter creates for itself a certain distinctive character of writing which identifies one certain machine from all other machines is well established. To prove that two instruments were written on a particular typewriter similar coincidences of characteristics must be shown in both instruments, and these coincidences considered collectively must demand a single conclusion." (pages 451-452)

In "*Typewriting Identification (Identification System for Questioned Typewriting)*" by Bill Prior Bates, the conclusion of the principles is stated thus:

"Conclusion

TYPEWRITING identification is based on the same principle underlying handwriting identification, or any other thing which has a great number of possible variations.

The identification of a typewritten document can be likened to the identification of a particular person. A person may be identified in general by his sex, size, features etc., and in addition, for example, by a radical mastectomy scar. A typewriter may be identified in general by characteristics such as type design and size, possessed by all machines of a specific make and Model, and in addition, for example, by a flaw in the serif on the letter E.

No opinion as to identity should be based upon only a few dissimilarities (or similarities). It is the combination of measurements and characteristics which all together make up the conclusion.

When good, clear specimens are available in sufficient amount for a scientific identification of the twelve points of comparison, it is possible to show with absolute certainty that a document was, or was not, produced by a particular machine.

The mathematical probability of the same combination of these characteristics divergent from the norm appearing in two machines is practically nil. The evidence of the twelve points of comparison can be conclusive proof." (page 59)

A Bench of five Judges of the Supreme Court in *S.J. Choudhry* case, 1996 Cri LJ 1713 **overruled** the decision in *Hanumant v. State*, A 1952 SC 343 and concluded thus:

It is, therefore, clear that the examination of typewriting and identification of the typewriter on which the questioned document was typed is based on a scientific study of certain significant features of the typewriter peculiar to a particular typewriter and its individuality which can be studied by an expert having professional skill in the subject and, therefore, his opinion on that point relates to an aspect in the field of science which falls within the ambit of section 45, of the Indian Evidence Act.

"In the present case, even without resort to the word 'handwriting' in Section 45 to include typewriting therein, in the view we have taken, the word 'science' is wide enough to meet the requirement of treating the opinion of a typewriter expert as an opinion evidence coming within the ambit of Section 45 of Evidence Act. We may, however, add that the long accepted practice of judicial construction which enabled the reading of the word 'telegraph' to include 'telephone' within the meaning of that word in Acts of 1863 and 1869 when telephone was not invented, would also be available in the present case to read 'typewriting' within the meaning of word 'handwriting' in the Act of 1872. This is so because what was understood by handwriting in 1872 must now in the present times after more than a century of the enactment of that provision, be necessarily understood to include typewriting as well, since typing has become more common than handwriting and this change is on account of the availability of typewriters and their common use much after the statute was enacted in 1872. This is an additional reason for us to hold that the opinion of the typewriter expert in this context is admissible under section 45 of the Indian Evidence Act." As the words "science or art" have been given a very broad interpretation in many cases (*ante: "Science or Art to be construed widely"*), it is not easy to see why the evidence of experts on typewriter impressions does not come within the words unless the absence of its specific mention in the section (as in the case of handwriting or finger impression) is considered a bar. But there is also no mention of foot-prints or telephony and the evidence of foot-print or telephonic experts has been held admissible. So also of ballistic or medical experts who too have been mentioned in s 45. Skill in any trade, business or employment should make a person an "expert" within the meaning of s 45 as held in English and American authorities (*ante* pp 491-93).

Even prior to the Supreme Court decision in *Hanumant* case *supra* it was observed by the court that the evidence as to the fact that the typewriters used in the typing of various exhibits had certain defects or peculiarities which were clear from the typing of those exhibits could be given by an expert. The court was entitled to draw its own conclusion from the whole evidence including that of the expert [*Manabendra v. R*, A 1933 A 498: 35 Cri LJ 768; see also *Jhabwala v. R*, A 1933 A 690: 34 Cri LJ 967). In another case it was held that the court may ask the witness points in favour of the view whether the two documents have or have not been typewritten on the same

machine, but it must come to its own conclusion [*Bachcha v. R*, A 1935 A 162: 36 Cri LJ 684].

The claim of experts that typewriters cannot be matched and that every typewriter has its own peculiarities or defects of impression which are as individual as a person's handwriting, has been established in many cases in America. It is also a fact that two typewriters do not wear alike and each develops its own peculiarities or faults of alignment. On this point see cases cited in Wigmore, s 2024 foot-notes and 22 Corpus Juris Secundum, 1223. In *Lyon v. Oliver*, 1925, 316 Illinois 292 : 147 NE 251, expert evidence was admitted to prove that a letter was typewritten on a machine not made till after the date of the letter, Mitchell in his book. The Expert Witness, says (pp 130-31): "With regard to typewriting, it may be mentioned briefly that each machine has its own idiosyncracies by which it may be recognised, and observations made by the writer have proved that letters written upon the same typewriter at intervals of a year will exhibit corresponding peculiarities."

Water Mark on Cartridge Paper.—Where the Deputy Controller of Stationery who is the head of the department gave evidence that cartridge paper bearing a particular water mark was issued on a certain date under his orders, the evidence is admissible as he is competent to give evidence from his own knowledge of it [Calcutta High Court Cr Revision Nos 681 and 1049 of 1959—*S M Basu v. S R Sarkar and P N Talukdar v. S R Sarkar*, decided on 18-3-1960—*per* BOSE J, (*R v. Jaffarul*, 59 C 1046 : 36 CWN 514 **distd** as the evidence there was that of an office assistant who spoke only from an entry not made by him and privilege was also claimed].

Workmen's Compensation Cases.—The law in this country is somewhat different from the law of England as regards using the services of experts for the purpose of determining workmen's compensation cases. S 20 of the Workmen's Compensation Act gives greater latitude to the Commissioner [*Ali Akbar v. Java Bengal Line*, 1937, 2 Cal 714 : A 1937 C 697].

Special Rules of Evidence in Cr P Code.—Deposition of Medical Witness Without Being Called.—Under s 291 of the Cr P Code of 1973. "(*1*) The deposition of a civil surgeon or other medical witness, taken and attested by a magistrate in the presence of the accused, or taken on commission under Chapter 23B, may be given in evidence in any inquiry, trial, or other proceeding under this Code, although the deponent is not called as a witness.

(2) The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine such deponent as to the subject-matter of his deposition."

The record should show that the deposition was taken and attested in accused's presence, or it must be proved by evidence. There is no presumption under s 80 or s 114 *illus* (e) [*R v. Riding*, 9 A 720; *R v. Jhubboo*, 8 C 739; *Bajrangi v. R*, 4 CWN 49; *Kachali v. R*, 8 C 129; *R v. Poph Singh*, 10 A 174. See also s 33, *ante*]. S 509 (now s 291) does not preclude the sessions judge from calling the civil surgeon as a witness and this should be done when the deposition taken by magistrate is deficient [*Roghuni v. R*, 9 C 455]. A copy of a letter from the civil surgeon addressed to the judge containing his opinion is inadmissible [*R v. Samiruddin*, 8 C 211; *Budhu v. R*, A 1925 C 538; *Bechun v. Jhuri*, A 1936 C 363]. Nor is the report of a medical man [*Raghuni v. R, sup*; *R v. Jadab Das*, 4 CWN 129; *R v. Ram Sarup*, 6 CWN 98, *R v. Ramaswami*, 40 Cri LJ 496] or his certificate [*Ahilya v. R*, 47 B 74; *Panchanan v. Bhaggu*, A 1950 C 261; *Sris v. Annapurna*, A 1950 C 173] or the inquest report

[*Surjan v. S*, A 1956 SC 425] admissible, though it may be used to refresh his memory.

S 509 (now s 291) is not intended to be applied when the medical witness is present in court [*In re Rangappa*, 59 M 349] or is called and examined [*Bharosey v. R*, A 1947 O 41—CONTRA: *Hashmat v. R*, A 1947 L 377]. S 509 (now s 291) is confined to the evidence of a medical witness as such. It does not apply to the recording of a dying statement by a doctor [*Warris v. R*, A 1940 O 209]. The section does not permit the use of that portion of testimony which relates to non-medical matters [*Nand v. R*, A 1943 L 101]. S 509 (now s 291) is subject to the condition that the accused should have been given full opportunity to cross-examine the witness [*Shivadin v. R*, A 1923 P 116]. The unexibited report of chemical examiner is a document which proves itself under section 293 Cr PC and does not require to be formally proved by any witness [*Shatrughan v. M.P.*, 1993 Cri LJ 120, 123 (MP)]. Once a document is properly admitted the contents of the documents would stand admitted in evidence and if no objection has been raised with regard to its mode of proof at the stage of tendering in evidence such a document, no such objection could be alleged to be raised at any later stage of the case or in appeal [*Amarjit Singh & Anr. v. State (Delhi Admn.)*, 1995 (1) Crimes 777, 786 (Del)].

Deposition of Medical Witness How Recorded.—In recording evidence of a medical witness, it is improper to simply record that the injuries were fully detailed in the medical certificate instead of taking his statement [*Bhag Singh v. R*, 26 PLR 343]. A medical expert ought to be examined orally in the presence of the accused. Statements made by him in some other trial are inadmissible [*Sardara v. R*, 26 PLR 80].

Reports of Certain Govt Scientific Experts and Officers of Mint etc etc.—Under s 292 Cr P C the reports of certain gazetted officers of the Mint or of Indian Security Press (including the office of the Controller of Stamps and Stationery) upon any matter duly submitted to them for examination and under s 293 Cr P C reports of certain Govt scientific experts, namely: (*a*) any Chemical Examiner or Asst Chemical Examiner to Govt; (*b*) Chief Inspector of Explosives; (*c*) Director of Finger Print Bureau; (*d*) Director, Haffkeine Institute; (*e*) Director, Deputy Director and Asst Director of a Central Forensic Science Laboratory or a State Forensic Science Laboratory; (*f*) Serologist to the Govt are admissible in evidence without calling them as witness though the court may summon and examine them if it thinks fit. Unlike, in the case of the Serologist, examination of a medical witness, except in a case covered by sec. 291 Cr.P.C. is not dispensed with by law [*Bhanda Garh v. State of Assam*, 1984 Cri LJ 217, 220 (Gau)]. The word 'any' covers an 'additional chemical examiner' and the addition was made to meet the case in 10 C 1026. The word used being "may", the use of the report by the court as evidence is discretionary. Cf S 19A of the Coroner's Act. (See further Sarkar's Cr P Code, 4th Ed). An inadequate report should not be admitted in evidence unless the officer submits a full and satisfactory report or has been examined in support of it [*Gaya v. R*, A 1934 O 62].

Under section 45 an opinion of an expert on science or art etc. is relevant piece of evidence. Senior Scientific Assistant (Chemistry), Central Forensic Science Laboratory, although not falling in the categories of the officers enumerated in section 293 Cr PC yet he is an expert in science and thus his opinion would be relevant piece of evidence in view of section 45 [*Amajit Singh v. State (Delhi Admn.)*, 1995 Cri LJ 1623, 1628 (Del)]. A Public Analyst by pleading ignorance of the freezing point test, which is a generally accepted test to ascertain the presence of

excess or added water in the sample milk, having exposed his superficial knowledge of the subject, the ground mentioned by him under section 51 in support of his opinion as an expert, to be admissible under section 45 fell short of court satisfaction [*Dilip Singh v. State of Rajasthan*, 1997 Cri LJ 2461, 2465 (Raj)]. Where the expert evidence is based on the notes prepared in exercise of official duty but copies of such notes were not supplied to the accused it was held that such notes could not be relied upon [*Vithal Mahadeo Patil v. State*, 1996 Cri LJ 1796, 1801 (Karn)]. Where the samples taken out from the seized contraband remained with the police officer for three days without being noted down anywhere in the records and thereafter sent to the chemical analyser and there was no satisfactory explanation to exclude possibility of tampering with them during period of three days, the certificate of the chemical Analyser that the said samples contained herein must be discarded [*Mohd. Hussain B. Ramsan v. State of Maharashtra*, 1994 Cri LJ 1020, 1024 (Bom)]. In *Dhula v. State of Rajasthan*, a Division Bench of Rajasthan High Court observed that Forensic Science Laboratory report in regard to blood stains present on the weapon of offence cannot be used against the accused unless it was put to accused in his statements under section 313 Cr.P.C. and was given an opportunity to explain it [*Dhula v. State of Rajasthan*, 1997 Cri LJ 609 (Raj)].

The certificate of the Imperial Serologist touching the matter of blood-stains is admissible [*Perumal v. SIR*, 1937 Mad 764 : A 1937, M 407]. So under s 14(2) Bengal Food Adulteration Act, 5 of 1919, the certificate of the public analyst is evidence without formal proof, but there is no presumption that it is accurate [*Legal Remem v. Kshitish*, 1939, 2 Cal 495: A 1939 C 667].

The original report signed by the Chemical Examiner who examined the matter submitted is evidence [*R v. Bishumbhar*, 15 WR Cr 49: *Md Shafi v. R*, A 1949 L 240] and not its copy [*S v. Karu*, A 1954, P 131]. Mere statement of opinion is not enough. The report of the chemical examiner must contain the grounds on which he arrives at his opinion [*Gajrani v. R*, A 1933 A 394].

The report of an excise analyst of a Government distillery does not come within s 510 (now s 293) [*Bansi Lal v. R*, 52 N 686: A 1928 B 241]. So also report of Municipal Analyst [*Suleman v. R*, A 1943 B 445]. The report of the public analyst can be used as evidence [*State v. Dinesh Kumar*, 1986 Cri LJ 1527, 1529 (Del) (DB) : (1986) 1 FAC 194 : (1986) 2 REC. Cri. R. 476]. When the report of chemical examiner was not tendered in trial court its perusal by the appellate court without recording an order under s 428 (now s 391) Cr P Code was wrong [*Wali Md v. R*, 21 ALJ 869]. Weight due to the chemical examiner's report [see *Hassenulla v. R*, A 1924 C 625: 83 IC 485: *Aishan v. R*, A 1934 L 150; *Gaya v. R*, A 1934 O 62; *Behram v. R*, A 1944 B 312]. The danger of the provisions of s 510 (now s 293) Cr P Code which allow the report to be used as evidence without subjecting the chemical examiner to cross-examination was pointed out in some cases [*Happu v. R*, 32 ALJ 173; *Ujagar v. R*, A 1939 L 149 : 1939 Lah 206] and so sub-s (2) was added to s 510 by Act 26 of 1955. When reports of the Chemical Examiner and Imperial Serologist contradict each other, the prosecution should explain the difference and mere production of the report proves nothing [*Tulsiram v. S*, A 1954 SC 1: 1954 SCJ 612]. If report of chemical examiner on blood-stained earth found in the place of occurrence along with the earth is not produced in court in contravention of usual practice the defence version may be true [*Lakshmi v. S*, A 1976 SC 2263].

Mere Certificate of Medical Man or Expert.—A certificate granted by a Professor of Anatomy in a Medical College as regards bones is not admissible unless proved by the evidence of the person giving it [*R v. Ahilya*, 24 Bom LR 803 : 47 B

74]. A doctor's certificate relating to the illness of a witness is not by itself evidence at all. It is hearsay [*Sarada v. Nhattiyala*, A 1935 M 659; *Sris v. Annapurna*, A 1950 C 173]. The correctness of the statement in the certificate has to be proved by an affidavit or oral testimony in court by the doctor concerned or by some other evidence [*Petlad T R &c v. Dyes & Chemical &c*, A 1960 SC 1006, 1007 : 1960, 2 SCR 906]. Medical certificates are not themselves admissible in evidence. They must be proved by the testimony of persons giving them [*Richards v. Sandars & Sons*, 1912, 5 BWCC 382; *Ali Akbar v. Java Bengal Line*, 1937, 2 Cal 714 : A 1937 C 697; *Perumal v. SIR*, 1937, Mad 764: A 1937 M 407; *Coral v. Gonslaves*, A 1953 M 858; *Ahmedabad Munply v. Shantilal*, A 1961 G 196; *Govindrajulu v. Lakshmi*, A 1961 M 159; *Gopi v. Madanlal*, A 1970 Raj 190].

The plea of the Doctor that the out-patient register was not traceable cannot be thrown away outright. It is common knowledge that in small places the out-patient registers are not kept with proper care and attention. Absence of any indication that the patient was unable to move is not fatal to the plea of illness. No medical officer indicates in the certificate the exact condition of the patient [*Nityananda Majhi v. Sipra Das* A 1986 Orissa 102, 103; (1985) 2 Ori LR 272]. In the absence of any challenge by the other side, the medical certificate should be accepted as correct unless the court feels that its contents are on the face of it false or at least it is doubtful. [*Navnital v. Hasmukhlal*, A 1988 Guj 34, 36 : 1987 (2) Guj LR 1134]. When the doctor who issued the post-mortem certificate is not examined, the cause of death cannot be established [*Dhobi Yadav v. State of Bihar*, 1989 Cri. LJ NOC 193 : 1989 BBCJ (HC) 422; *Bindu Mahto and Hazan v. State of Bihar*, 1989 Cri. LJ NOC 107 (Pat) (DB)]. The certificate of the Principal, Medical College, without more is not evidence that the preparation seized is not a medicinal preparation [*S v. Bhausa*, A 1962 B 229]. Report of a doctor about the age of a girl made in an affidavit by another person but without the report of the doctor before the court is not admissible [*Md Ikram v. S*, A 1964 SC 1625]. Opinion of Radiologist cannot be considered as conclusive [*Taiyab Shaikh v. The State*, 1988 Cri. LJ NOC 1 : (1988) 1 Cal HN 243].

The report of a public analyst is not admissible without examining the analyst [*Raghunath v. Kurseong Municipality*, 76 IC 394: A 1923 C 561; *Rajkishan v. S*, A 1960 A 460]; so the report of a handwriting expert without examining him as a witness [*Parwat v. Sukdev*, A 1956 B 617]. Report of Govt expert on handwriting not supported even by an affidavit is inadmissible [*Peary v. Kidar*, A 1923 A 601]. Court obtaining the opinion of an expert as to date of a stamp of a finger-print expert cannot base its judgment on it without having the opinion formally proved and without giving an opportunity of cross-examining the person [*Ram Autar v. Baldeo*, 11 P 782; *Tasaduq v. Basawan*, A 1933 P 159; *Bhurey, v. Karan*, A 1935 A 142]. When opinion of expert has been admitted without objection without his examination, no objection could be taken in revision [*Karam Din v. Ata*, A 1934 L 230]. Report of Director, Finger Print Bureau, can be treated as evidence without examining him and if the opinion is based on observations leading to a conclusion it can be accepted, but in case of any doubt the court may examine him [*H P Admn v. Omprakash*, A 1972 SC 975].

Homicide or suicide.—The fact that the body of the deceased with a ligature mark around the neck was found on the cot and not hanging completely was held to demolish the theory of suicide completely. *Ram Kumar Madhusudan Pathak v. State of Gujarat*, AIR 1998 SC 2732. Where the opinion in the post-mortem report was that the death in question was homicidal and not suicidal and such opinion was accepted by the courts below, it was held that the Supreme Court could not take a different view. *Najjam Faraghi v. State of W.B.*, AIR 1998 SC 682 : (1998) 2 SCC 45.

Medical opinion on time of injury.—The testimony of a doctor on the point of time at which injuries were caused or, in other words, as to the duration of injuries, can never be absolutely certain. *Ram Swaroop v. State of U.P.*, AIR 2000 SC 715.

Waiver.—When a party does not object to the report of a finger-print expert, he cannot be allowed to say in appeal that the evidence is inadmissible without proof [*Din Md v. Sain*, A 1927 L 396: 100 IC 922].

Medical Opinion And its Value.—"The opinion of physicians and surgeons may be admitted to show the physical condition of a person, the nature of a disease, whether temporary or permanent, the effect of disease or of physical injuries upon the body or mind, as well as in what manner or by what kind of instruments they were made, or at what time wounds or injuries of a given character might have been inflicted, whether they would probably be fatal, or actually did produce death, the cause, symptoms and peculiarities of a disease, and whether it would be likely to cause death, the probable future consequences of an injury, when consequences anticipated are such as in the ordinary course of events may be reasonably expected to happen, and are not merely speculative or possible. While it is improper to ask a physician how certain wounds or injuries were actually given, as this would be trespassing upon the province of the jury, he may be asked by what kinds of weapons wounds of a given description might be caused, or whether wounds of a given character were caused before or after death" [Jones, s 378 and cases cited]. See also *"Mode of Examination of Experts and its Scope" (ante).*

Opinion of medical men based on hearing the evidence of other witnesses without observing facts is not of much value. Thus opinions of doctors based mostly on prescription and on their general knowledge of the course of a disease are always indirect evidence and not of much weight when compared with the evidence of doctors who personally attended the patient [*Hari Singh v. Lachmi*, 59 IC 220: 12 PLR 1921]. If the oral evidence leads to a positive conclusion one way or the other the opinion of experts have to yield or have to be accepted or rejected in accordance with the finding arrived at on appraisal of direct oral evidence [*Brij Basi v. Moti Ram*, A 1982 All 323, 331]. Doctors are experts in their own right and when they examine a person and give opinion it does not normally mean that their evidence is not correct. The question will be whether such evidence will be deemed to be sufficient [*State (Delhi Admn.) v. Sube Singh*, 1985 Cri LJ 1190, 1192 : (1984) 2 Crimes 109 (Del) (DB)]. A medical witness called in as an expert is not a witness of fact. His evidence is really of an advisory character given on the facts submitted to him [*Sunil v. S*, A 1954 C 305]. Even where a doctor has deposed in Court, his evidence has got to be appreciated like the evidence of any other witness and there is no irrebuttable presumption that a doctor is always a witness of truth. [*Mayur Panashai Shah v. State of Gujarat*, A 1983 SC 66, 67 : 1982 Cri LJ 1972].

When medical men who attended the patient during his illness give their testimony as to the bodily or mental state of the deceased, their evidence is not that of experts but of men who has observed relevant facts and whose evidence derives an enhanced value from the circumstances that they had favourable opportunities, peculiar facility and obvious incentive for accurate observation and that their training would fit them to appreciate and describe what they observed [*Goppessur v. Bissessur*, 16 CWN 265, 273]. In a case where everything depends upon the medical evidence, it must be given *viva voce* before the jury. BUCKLAND, J, observed that the doctor conducting the *post-mortem* should he required to record the length of time which in his opinion has elapsed since death took place [*Debendra v. R*, A 1929 C 244]. It would not be possible for a doctor to say with mathematical precision as to when actually the death had taken place prior to the autopsy and merely because he has in terms, stated that death had taken place within forty hours, the evidence of the three eye-witnesses that they had witnessed the occurrence at a particular hour on a date is not to be brushed aside. [*State v. Aru Pradhan*, 1985 Cri LJ 161, 166 : (1984) 2 Crimes 198 : (1984) 2 Cut LT 422 (Ori) (DB)]. The evidence of the Doctor who conducted the *post-mortem* that the deceased would have survived only one hour after the attack and might not be able to talk as he was in a state of shock due to heavy loss of blood from the injuries, cannot be held conclusive as he has stated that the deceased was a 'stout build man'. [*Dulu Gogai v. State of Assam*, 1991 Cri LJ 199, 202 (Gau)].

The evidence of the Doctor who conducted the post-mortem is not conclusive because he is not sure whether the shock which caused the death of the deceased was

due to the burns caused on him or due to the fracture of the left side 7th and 8th ribs which in turn caused the collapsing of the left lung [*State of Karnataka v. Dhulappa*, 1981 Cri LJ 1545, 1548 (Karn)] Evidence of an expert cannot outweigh direct evidence [*Dulal Chandra v. Gunadhar Patra*, A 1998 Cal 150].

The opinion of the doctor who had actually examined the injured person and had himself examined him should be preferred to the opinion of the other doctor which was only based on the injury report and the X-ray report without even looking to the X-ray plate [*Tanviben Pankajkumar Devetia v. State of Gujarat*, A 1997 SC 2193 : 1997 Cri LJ 2535, 2550]. Although the serologist's report indicated that blood found on shirt and baniyan was human blood, but when the said clothes were found to be the belongings of the accused, they cannot be said to be sufficient to connect the accused with the crime of murder [*Basheer v. State*, 1993 Cri LJ 2082, 2173 (Mad)]. A doctor is expected to note the time of attack, manner of attack or about other particulars. The doctor is expected to record the name of the person. There is no harm if the doctor is reporting whether the injured sustained injury by a known or unknown person. Such a practice will help both the prosecution and the accused and that can be followed [*Basheer v. State*, 1993 Cri LJ 2173 (Mad)]. Contused lacerated wound on left side of the head cannot be said to have been self-inflicted injury [*Babu Bhika Jadhav v. State of Maharashtra*, 1996 Cri LJ 3952 at p. 3955 (Bom)].

The doctor who had held the post-mortem examination had occasion to see the injuries of the deceased quite closely and in absence of any convincing evidence that he had deliberately given a wrong report, his evidence is not liable to be discarded [*Tanviben Pankajkumar Divetia v. State of Gujarat*, A 1995 SC 2193 : 1997 Cri LJ 2535, 2551]. In the case of conflicting opinions of the handwriting expert produced by the defence and the Govt. Examiner of Questionable Documents, when the opinion of the latter was found to be more scientific and dependable, it would be safe to rely on the same. There is natural tendency on the part of the expert to support the view of the person who had called him [*Raj Mohammad v. State of H.P.*, 1995 Cri LJ 810, 817 (HP)]. It is the duty of the prosecution, and no less of the court, to see that the alleged weapon of the offence, if available, is shown to the medical witness and his opinion invited as to whether all or any of the injuries on the victim could be caused with that weapon. If the weapon is not available then the description of the weapon should be given to the medical expert to ascertain the aforementioned facts. This is the duty of the Public prosecutor conducting the case. But, in case he fails to do that, it becomes the responsibility and duty of the trial court to elicit from the medical expert about the aforementioned facts because failure to do so may some times cause aberration in the course of justice [*K. Mallikarjuna State of A.P.*, 1995 Cri LJ 3100, 3111 (AP)].

When the occurrence had taken place during night time, the witnesses cannot be expected to have noticed whether sharp edge or blunt edge of the axe was used in inflicting a blow on the head of the deceased. Therefore, even though one of the witnesses had deposed at one stage that the accused had dealt a blow with sharp edge of the axe while the other witness had not stated so, the statement of the doctor who conducted the post-mortem that the injuries found on the deceased could be caused by blunt edge of the axe, cannot be said to be in conflict with the oral evidence [*Ranmal Samat v. State of Gujarat*, A 1993 SC 1676, 1677 : 1993 Cri LJ 1734]. When in the observation of the doctor, who was aged 42 years, and had considerable experience, the injury on the body of the deceased was an incised wound his opinion cannot be ignored merely on ground that he had not examined the injury with a lens but had only expressed a general opinion [*Vishnu Daga Pagar v. State of Maharashtra*, 1997 Cri LJ 2430, 2435 (Bom)].

The doctor who held the post-mortem examination had occasion to see the injuries of the deceased quite closely. In the absence of any convincing evidence that the doctor holding post-mortem examination had deli-berately given a wrong report, his evidence is not liable to be discarded [*Tanviben Pankajkumar Divetia v. State of Gujarat*, 1997 (2) Crimes 109, 130 (SC)]. Whether the injuries attributed to the accused were caused by a gun or by a rifle, is to be ascertained by the evidence of duly qualified expert and not by an eye-witness who had neither expertised knowledge nor he ever used any rifle or gun [*Ganpat Ram v. State of Rajasthan*, 1995 Cri LJ 1466, 1474 (Raj)]. Where one doctor had actually examined the injured person and had noted the injuries himself but another doctor gave his opinion only on the basis of the injury report and X-ray report without looking to the X-ray plate, the opinion of the former would be more reliable [*Tanviben Pankajkumar Divetia v. State of Gujarat*, A 1997 SC 2193 : 1997 Cri LJ 2535]. In absence of any convincing evidence that the doctor who had held post-mortem examination and had thus occasion to see the injuries of the deceased quite closely, had deliberately given a wrong report in his evidence regarding time of death of the deceased is to be preferred to the expert opinion of the doctor who had based his opinion only on the post-mortem report and notes on that report as also taking into consideration the presence of rigor mortes, lividity, coolness and report of injuries found on the person of the deceased [*Tanviben Pankajkumar Divetia v. State of Gujarat*, A 1997 SC 2193 : 1997 Cri LJ 2535]. Even when a single edged knife is stabbed into the body, both ends of the wound may appear to be sharply cut due to tearing of the skin at the blunt edge [*V. Viswambharan v. State*, 1994 Cri LJ 1552, 152 (Ker), See also *George v. State*, (1990) 1 Ker LJ 177 (Ker)].

Certificates of doctor regarding injuries caused to the accused cannot be rejected on ground that they were on plain papers and not on printed form [*Ammini v. State of Kerala*, 1998 Cri LJ 481 (SC)]. Where probable time of death of the deceased was given by the doctor who performed the autopsy it cannot be said that there was no definite evidence as regards time of death [*Lekhraj v. State of Gujarat*, 1998 Cri LJ 396 (SC)].

Evidence of the victim that the injuries were caused by the blunt side of the axe, cycle chain and stick cannot be rejected merely because the doctor admitted of the possibility of his injuries being caused by a fall. [*State of Maharashtra v. Datta Maruti Salagar*, 1998 Cri LJ 3756, 3758 (Bom)].

Medical evidence from text books showing time of death from appearance of blisters on dead body is not of value [*In re Chenna*, A 1940 M 710]. It would be very difficult for the Doctor to give nature of injury from a bare look at the photograph of the injury. [*Ram Mehar v. State*, 1988 Cri LJ NOC 57 (Del)]. Medical opinion as to the time of death on *post-mortem* examination based on the degree of digestion of stomach contents is unreliable. It depends on many factors affecting one's digestion and also upon when the deceased took his last meal and what articles of food were taken [*Lachhman v. S*, A 1952 SC 167: 1952 SCR 839; see *Dhanna v. S*, A 1951 Raj 37; *Aziz Khan v. S*, A 1964 P 158]. In *R v. Ahmed Ali*, 11 WR Cr 25 NORMAN, J, observed as follows:—

> "The evidence of a medical man or other skilled witnesses, however eminent, as to what he thinks may or may not have taken place under a particular combination of circumstances, however confidently he may speak, is ordinarily a matter of mere opinion. Human judgment is fallible, human knowledge is limited and imperfect. New and previously unobserved phenomena, which till they have been recorded, are supposed to be impossible, are constantly being noticed. It would have been easy to convict the first man who crossed the Atlantic in a steam-ship of perjury had he told his tale in court, if the opinions of skilled witnesses, who at the commencement of this century, believed such a feat impossible, could have been accepted as sufficient proof of the falsehood of the statement." Quoted with approval in a case of handwriting [*G v. R*, 1 R 290].

It is well settled that the medical jurisprudence is not an exact science and it is indeed difficult for any Doctor to say with precision and exactitude as to when a particular injury was caused and in the instant case as to the exact time of sexual intercourse with prosecutrix [*Pratap v. S*, A 1977 SC 1307]. In the case of rape by four persons on medical examination it is not possible to say about the number of persons committing rape on a girl [*Balwant Singh v. State of Punjab*, A 1987 SC 1090, 1083 : 1987 Cri LJ 971].

It is the duty of a medical expert called to prove insanity at the time of the commission of the crime, but who is sane at the time of the trial, to offer to keep the accused under his observation. He cannot base his opinion on the summary of the evidence at the trial [*Baswantrao v. R*, A 1949 N 66].

The court accepted the evidence of a wife as to the paternity of a 10 months child in spite of the unanimous opinion of several doctors [*Bowden v. B*, 42 LJ 402 cited Phipson 11th Ed. p 511]. Where medical evidence is neither definite nor unanimous, one body of it being to the effect that the circumstances pointed to the application of external force and the other that they pointed to suicide, it is misdirection to tell the jury that they are at liberty to prefer one view to the other or to put aside all the medical evidence and form their own conclusion on the facts. The question in such a case is whether the evidence of the medical experts, taken as a whole, points so clearly in the direction of homicide that direct evidence establishing the impossibility thereof (*eg*, as in this case an *alibi* of the accused) must be rejected as untrue [*Seneviratne v. R*, A 1936 PC 289: 41 CWN 65]. Before a court can place reliance on the opinion of an expert, it must be shown that he has not betrayed any bias and the reasons on which he has based his opinion are convincing and satisfactory [*State of Maharashtra v. Sukhdeo Singh*, 1992 Cri LJ 3454, 3469 (SC)]. Where medical evidence is conflicting and the trial judge after carefully and dispassionately weighing the respective theories comes to a clear conclusion in fact, it would not be proper or safe or in accordance with sound practice to reverse it in appeal [*Dias v. Augustin*, 162 IC 426: A 1936 PC 154]. When medical evidence ran counter to the evidence of eye-witnesses it would not be proper for the court to rely upon the oral evidence of the eye-witnesses unless there is some circumstantial evidence to support it [*Raj Kishore v. S*, A 1969 C 321 (*Surjan v. S*, A 1956 SC 425; *Lachhman v. S*, A 1952 SC 167 **reld** on)].

The Doctor who has examined the deceased and conducted the post-mortem is the only competent witness to speak about the nature of injuries and the cause of death. Unless there is something inherently defective the court cannot substitute its opinion to that of the Doctor [*Mafabhai Nagarbhai Raval v. State of Gujarat*, A 1992 SC 2186, 2188]. Medical findings are the acid test of judging the truthfulness of the evidence of eye witnesses. [*Kapil Kumar v. State of Assam*, 1983 Cri LJ NOC 66 (Gau) (DB)]. The evidence was that one accused armed with a sword and another with a Bhusa attacked the deceased. The Doctor found only one injury caused by a straight sharp cutting heavy weapon. The Doctor's evidence is to be accepted in preference to that of the eye-witnesses [*Gagan Chandra Pattanaik v. State of Orissa*, 1990 Cri LJ (NOC) 39 (Ori)]. In a case of finding the evidence of the victim reliable and trustworthy in respect of the weapons used, the medical opinion of the doctor who has given out two alternative possibilities cannot override the trustworthy evidence of the victim [*Balraj Yadav v. State of Bihar*, 1990 Cri LJ (NOC) 90 (Pat)]. Medical evidence is hardly conclusive and decisive, because it is primarily an evidence of opinion and not of fact [*Seneviratne v. R, sup*]. To rely upon the medical evidence as decisive is to render the other evidence entirely fruitless [*Anant Chintaman v. S*, A 1960 SC 500: 1960, 2 SCR 460; *Arun v. S*, A 1962 C 504].

Eye-witnesses' account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence including medical evidence, as the sole touchstone for the test of such credibility. [*State of U.P v. Krishna Gopal*, A 1988 SC 2154, 2160 : 1989 Cri LJ 288]. Medical experts should have regard primarily to the facts and not draw upon their imagination; otherwise the administration of justice would depend upon their individual idiosyncrasies and become unstable and unworkable [*Yunus Ali v. R*, 32 CWN 783]. It is well settled that positive evidence in a case is that of the eye-witnesses and the evidence of a medical expert is merely an opinion corroborating the same. The value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. Unless the medical evidence goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by the eye-witnesses, the testimony of eye-witnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence [*Solanki Chimanbhai Ukabhai v. State of Gujarat*, A 1983 SC 484, 487 : 1983 Cri LJ 822].

The opinion of the doctor that both the injuries were caused by sharp weapon like knife or dagger is corroborated by the evidence of eye-witnesses. The fact that the weapon was not produced in the court would not negative the opinion of the Doctor. [*B.V. Danny Mao v. State of Nagaland*, 1989 Cri LJ 226, 231 : (1988) 3 Crimes 351 (Gau)]. If he gives opinion regarding the nature of injuries, the manner of receiving injuries, the weapons through which the injuries have been received, it becomes a corroborative piece of evidence to the testimonies of witnesses of fact. [*Nagina Sharma v. State of Bihar*, 1991 Cri LJ 1195, 1223 (Pat)]. If the evidence of the expert is sufficiently corroborated by independent witnesses, such evidence is not liable to be rejected. [*Adithala Immnanuel Raju v. State of Orissa*, 1992 Cri LJ 243, 248 (Ori)]. In case of conflict of opinion between two equally competent medical witnesses the opinion which supports the direct evidence should be accepted [*Piara v. S*, A 1977 SC 2274; *Purna Palai v. State*, 1987 Cri LJ 1406, 1408 : (1987) 2 Crimes 257 (Ori) (DB); *Gandharh Alias Gobardhan Pradhan v. State of Orissa*, 1989 Cri. LJ NOC 25 (Ori)].

The negative evidence of the Medical Board regarding the nature of the weapon cannot efface the positive evidence of the Doctor who has first seen the deceased and who had also done the *post-mortem* on the body of the deceased. [*Munir Ahmad v. State of Rajasthan*, A 1989 SC 705, 709 : 1989 Cri LJ 845]. The evidence of a Doctor, examined by the defence, who is more qualified than the Doctor examined by the prosecution, cannot be accepted since he has only more teaching experience than practical experience. [*State (Delhi Admn.) v. Surinder Pal Jain*, 1985 Cri LJ NOC 117 (Del) (DB)]. Where the opinion of a medical witness is contradicted by another medical witness, both of whom are equally competent to form an opinion, the opinion of that expert should be accepted which supports the direct evidence of the case. [*Sam Antony Danasekaran v. State*, 1992 Cri LJ 474, 487 (Mad)]. Where it is proved beyond doubt by evidence of eye-witnesses that murder was committed by firing gun shots, the inconsistency between the opinion of expert and prosecution story relating to distance from which shots were fired carries no weight [*Karnail v. S*, A 1971 SC 2119; **folld** in *S v. Sughar*, A 1978 SC 191]. The evidence of eye-witness is that the accused fired the shot with a gun. The Ballistic expert stated that the injuries could have been caused only by firing with a country-made pistol. The evidence of eye-witness has to be rejected. [*Shiv Kumar v. State*, 1985 Cri LJ NOC 76 : (1984) 2 Crimes 960 (All) (DB)].

The medical officer stated that if shots are fired from a distance of over 4 feet, the two injuries could have been caused. He did not say if the two injuries could be caused by a

single shot. The ballistic expert vacillated and stated that the possibility of the 2 injuries being caused by two shots is not ruled out. So when the expert evidence is obscure and oscillating, it is not proper to discredit the direct testimony of the eye-witnesses. [*Anvaruddin v. Shakoor*, 1990 Cri. LJ 1269, 1273 (SC)]. When there are alleged eye-witnesses of physical violence said to have caused death, the value of medical evidence is only corroborative [*Sunil v. S*, A 1954 C 305]. Assessment of evidence when there is a conflict between medical evidence and the testimony of other witnesses [*Thakur v. S*, A 1955 A 189]. When there is over-whelming evidence of eye-witnesses, the medical evidence which is contrary to that of eye-witnesses can be discarded. [*Naran Pradhan v. State of Orissa*, 1983 Cri LJ NOC 31 (Ori) (DB) : (1982) 54 Cut LT 527; *Patel Harilal Mohanlal Jivani v. State of Gujarat*, 1985 Cri LJ NOC 45 : 1984 Guj LH 46 (Guj) (DB); *Sarbeswar Malik v. State*, 1986 Cri LJ 1721, 1725 (Ori) (DB); *Ram Karan Mal v. State*, 1990 Cri LJ 846, 849 (All): 1989 All LJ 453]. In contradiction between medical testimony and alleged eye-witnesses regarding fatal injury medical testimony to be preferred [*Purshottam v. S*, A 1980 SC 1873]. When the eye-witnesses cannot be said to be absotutely disinterested, the medical evidence has to be accepted in preference to that of the eye-witnesses. [*Baldev Singh v. The State*, 1982 Cri LJ 1087, 1094 : 1982 Kash LJ 194 (J&K); *Amin Chand v. State of H.P.*, 1985 Cri LJ 1450, 1452 : (1985) 2 Chand LR (Cri) 78 : (1985) 2 Crimes 25 (HP) (DB); *Balgopal Panda v. State*, 1990 Cri LJ 1848, 1854 (Ori)]. If the apparent difference between ocular evidence and medical evidence is attributable to any acceptable reason which is capable of compromising the two apparently different versions, other acceptable ocular evidence should not normally be rejected. [*Dasan v. State of Kerala*, 1987 Cri LJ 180, 185 : 1986 Ker LT 598 (Ker) (DB)].

When there is consistency between the ocular evidence and medical evidence about the nature of the weapon and injuries in an occurrence which took place during night, the ocular evidence need not be rejected. [*Motilal v. State of Madhya Pradesh*, 1990 Cri LJ (NOC) 125 (Madh Pra)]. The evidence of the Doctor that the injuries could have been inflicted 24 to 48 hours before the post-mortem, which gives a big margin, can be rejected if it is not in conformity with the evidence of the eye-witness and other circumstances. [*Balavantappa v. State of Karnataka*, 1983 Cri LJ NOC 29 (Kant) (DB)]. When the eye-witnesses' account is found credible and trust-worthy, medical opinion pointing to alternate possibilities is not accepted as conclusive. [*R Jagdish Murty v. Bal Ram Mohanty*, 1992 Crl LJ 996, 1000 (Ori)].

The most legitimate, valuable, and wonderful application of scientific evidence is on charge of poisoning, where poison is extracted from a corpse by means of chemical analysis [Best 11th Ed s 514]. The means which scientific witnesses have had of forming a judgment are not sufficiently enquired into in our court. To say nothing of those palpable cases where the course of study has been so short, or the experience so limited, that the judge ought to reject the witness altogether; or of those where, though the evidence must be received, it is clear that little confidence ought to be reposed in the opinion given. The most able physician or surgeon may know comparatively little of the mode of detecting poisons, or of other intricate branches of medical jurisprudence; so that a chemist or physiologist, immeasurably his inferior in every other respect, might prove a much more valuable witness in a case where that sort of knowledge is required (Best 11th Ed s 516). The fact that a witness is a physician does not necessarily qualify him to testify as an expert concerning the presence of poison in the human system, since he may be wholly lacking in the requisite knowledge of chemical science (Jones, s 379). As to the biological or precipitin test for blood, see Wills Circumstantial Evidence, 6th Ed p 163 *et seq* and as to another test based on experiments by Border and Uhlenhuth, see pp 511-12 of the same book.

Where the general condition and state of health of a person is in issue and it is sought to prove that he was unable to write on account of a disease, isolated extracts from medical works ought not to be preferred to evidence of a medical man examined with reference to the symptoms deposed to by the witnesses [*Sheo Bahadur v. Beni*, 51 IC 419: 6 OLJ 178]. A judge is not entitled to discard the direct evidence of credible and unimpeachable witnesses deposing to things observed with their own eyes, merely upon the opinion of a medical witness that those things could not have been done [*Wair Ali v. R*, 1889 AWN 74; *Basappa v. S*, A 1961 Mys 21]. Evidence of a doctor who saw the testator two days after the execution of the will cannot be accepted against the positive testimony of competent and disinterested witnesses who prove testamentary capacity at the time of execution [*Suryanarayanamurthi v. Suramma*, 52 CWN 35: A 1947 PC 169].

Where there is strong direct evidence of the place of a certain murder, but no blood was detected by the chemical examination of the earth, leaves, etc, taken from the alleged place of occurrence, the negative effect of the chemical examiner's report was not sufficient to rebut the strong evidence as to the place of occurrence [*Hassenullah v. R*, 28 CWN 561]. The particular provisions regarding the admissibility of the reports of the Chemical Examiner or Assistant Chemical Examiner provided under Sec. 293 (4) (a) of the Criminal Procedure Code are plainly applicable to override the general provisions contained in sec. 45 and any document purporting to be the report of such as expert can as a whole be used as evidence [*Bhagan Das v. State of Punjab*, 1982 Cri LJ 2138, 2144 : (1982) 9 Cri LT 240 (Punj & Har)]. Medical evidence as to the presence of semen on a woman's loin cloth is not a sure test that she consented to an inter-course [*Ghulam v. R*, A 1925 L 94]. The opinion that absence of external injury would prove absence of force used against the prosecutrix is the personal opinion of the Doctor, unrelated to the medical science in which she claims to have special knowledge [*Vinod Kumar v. State of Madhya Pradesh*, 1987 Cri LJ 1541, 1543 : (1987) 1 Crimes 631 (MP)]. Where there is testimony of a considerable body of trustworthy and respectable witnesses who were able to observe facts and draw inferences for themselves, the opinion of medical men as to what should have been the probable state of the testator should not outweigh and prevail over such testimony [*Saradindu v. Sudhir*, 50 C 100]. It is duty of the prosecution and no less of the court to obtain opinion of medical witness as to whether all or any of the injuries on the victim could be caused with the alleged weapon of the offence [*Kartarey v. S*, A 1976 SC 76; **folld** in *Ishwar v. S*, A 1976 SC 2423].

The best person to give an opinion about the nature and shape of the weapon of the offence used is the Medical Officer who conducted the autopsy. When he says that the injuries on the deceased could have been caused with a Pharsa or some other sharp-edged weapon, the Court cannot substitute its own opinion resting on conjectural premises [*State of U.P. v. Shanker*, A 1981 SC 897, 904 : 1981 Cri LJ 23]. Injury report of a medical man is an admissible piece of evidence in proof or disproof of the theory of accident [*Bisipati v. S*, A 1969 Or 289]. Where the *post-mortem* report that death was caused by 'asphyxia due to throttling' is supported by the evidence of expert the High Court is not justified in the circumstances of the case in drawing on its own medical knowledge that asphyxia is also possible in the case of poisoning [*S v. Manglya*, A 1972 SC 1797]. Decomposition of the dead body would not have affected the fractures noticed by the Doctor who conducted the *post mortem* [*Ratna Munda v. State*, 1986 Cri LJ 1363, 1364 (Ori) (DB)].

In England medical evidence to impugn the reliability of an opponent's witness is admissible [*Toohey v. Commrs of Metropolitan Police*, 1965 AC 606].

Expert evidence has two aspects, the data evidence and the opinion evidence. While it is undoubtedly true that data evidence cannot be rejected if it is inconsistent to oral evidence, yet, so far as opinion evidence is concerned, it is only an inference drawn from the data and that evidence would not get precedence over the direct evidence unless the inconsistency between the two is so great as to obviously falsify the oral evidence [*Arshad v. State*, 1996 Cri LJ 2893, 2899 (AP)]. In *Purushottam v. State*, A 1980 SC 1873 the Supreme Court rejected the ocular evidence which was in conflict with the medical evidence as to the number and nature of injuries found on the person of the victim. In *Chimanbhai v. State*, A 1983 SC 484 it was posited that unless the medical evidence completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by the eye-witnesses, the testimony of eye-witnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence.

When the evidence of the eye-witnesses is found to be credible, and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive.

As Bantham said "Witnesses are the eyes and ears of justice". Hence the importance and the primacy of the quality of the trial process. Eye-witnesses' account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the prosecution version; consistency with the account of other witnesses held to be creditworthy; consistency with undisputed facts; the credit of the witnesses; their performance in the witness-box; their power of observation, and similar other relevant factors. The probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation. Medical evidence is not invariable *vis-a-vis* the ocular evidence. (See *State of U.P. v. Krishna Gopal*, A 1988 SC 2154). It would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eye-witnesses' account which had to be tested independently and not treated as the variable keeping the medical evidence as the constant [*Markanda Naik v. State*, 1993 Cri LJ 3328 (Ori)]. The opinion of the doctor as to how an injury was caused cannot override unimpeachable testimony of eye-witness in case there is any inconsistency between them [*Darshan Singh v. State of Haryana*, A 1997 SC 364, 366].

Where direct evidence is cogent, reliable and unimpeachable, the medical evidence cannot override [*State of Maharashtra v. Vithal*, 1993 Cri LJ 2285, 2291 (Bom)]. Medical evidence is not conclusive proof of age. When there is conflict between medical evidence and documentary evidence benefit of doubt should be given to the accused [*S.K. Belal v. State of Orissa*, 1994 Cri LJ 467, 473 (Ori)]. If the evidence of the eye-witness is found to be unreliable it cannot be given preference over the medical evidence [*Boddapati Venkatramaiah v. State of A.P.*, 1996 Cri LJ 3749, 3757 (AP)]. Where two persons were stabbed to death by the accused persons, the injuries as per medical evidence were caused by sharp edged weapons and the eye-witnesses corroborated the prosecution case failure of the prosecution to seek opinion of the doctor with regard to particular weapons cannot result into rejecting the prosecution case [*Prem Chand v. State*, 1996 Cri LJ 1217, 1222 (Del)]. But see *Ilam Singh v. State of U.P.*, 1976 Cri LJ 1883 and *Kartarey v. State of U.P.*, 1976 (1) SCC 172]. Medical evidence as to how the injury was caused cannot override unimpeachable testimony of eye-witness [*Darshan Singh v. State of Haryana*, A 1997 SC 361 : 1996 Cri LJ 4438, 4440].

Where the eye-witnesses' account is found credible and trustworthy, medical opinion painting to alternative possibilities is not accepted as conclusive. It would be erroneous to accord undue primacy to the hypothetical answers, of medical witnesses to exclude the eye-witnesses' account which had to be tested independently and not

treated as the variable, keeping the medical evidence as the constant. If the evidence of the witness is totally inconsistent with the medical evidence, this is a vital defect and unless reasonably explained, is sufficient to discredit the evidence of the witness. Medical evidence like any other evidence has to be decided on the touchstone of acceptability and reliability [*Kanhaisingh Nayak v. State*, 1993 Cri LJ 2812, 2814 (Ori). See also *State of U.P. v. Krishna Gopal*, A 1988 SC 2154 : 1989 Cri LJ 288; *Ram Narain v. State of Punjab*, A 1975 SC 1727 : 1975 Cri LJ 1500; *Amar Singh v. State of Punjab*, A 1987 SC 826 : 1987 Cri LJ 706]. Even though according to the eye-witnesses, the victims were unconscious as a result of the injuries caused to them but the medical evidence showed that victims were not unconscious at the time of their examination, medical evidence cannot be said to be inconsistent with the ocular evidence on such ground when the injuries were deep and on vital parts and it was possible that victims had fallen unconscious but gained consciousness subsequently [*Ramkishore Patel v. State of M.P.*, 1997 Cri LJ 207, 210, 211 (SC)].

It is trite that where the eye-witnesses' account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. Witnesses are the eyes and ears of justice and hence the importance and primacy of the quality of the trial process. It is erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eye-witnesses' account which has to be tested independently and not treated as the 'variable', keeping the medical evidence as the 'constant' [*Kedar Behera v. State*, 1993 Cri LJ 378 (Ori); See also State of *M.P. v. Krishna Gopal*, A 1988 SC 2154 : 1989 Cri LJ 288]. Where the evidence of the accused inflicted three cuts with the billhook on the neck, but only one incised injury was noted by the doctors on the neck of the deceased, looking at the width of the injury as 10 cm extending from left clavicle up to the nape of the neck having a depth of 19 cm involving blood vessels and also the 5th cervical vertebra, there was no difficulty in countenancing the possibility of multiple blows with a billhook resulting in one injury. Hence, there was no conflict between ocular testimony and medical evidence [*Periasami v. State of T.N.*, 1997 Cri LJ 219 (222) (SC)].

Some variation between the prosecution story and medical evidence should not be a ground for rejection of the prosecution case. The court has to find out the truth and proceed accordingly. The courts have to proceed further and make genuine efforts within the judicial sphere to search out the truth and not stop at the threshold and give benefit of doubt the moment some ground for doubt creeps in. *Mohan Singh v. State of M.P.,* AIR 1999 SC 883 : 1999 Cri LJ 1334; *State of Haryana v. Ram Pal,* (1999) 9 SCC 83.

Sufficient weightage should be given to the findings in the *post mortem* report as compared with observations in text-books, but this does not mean that each and every statement of the medical witness should be accepted on its face value even when it is self-contradictory. *Mohd. Zahid v. State of TN.,* AIR 1999 SC 2416 : 1999 Cri LJ 3699.

The opinion of an expert is not binding on the court. The court has to formulate its own opinion. The medical opinion was that two successive blows with a sharp weapon could not have fallen on the same *situs*. No reasons were given in support of the opinion. The court held that in the circumstances of the case the prosecution version that the injury was caused by two strikes could not be doubted. *State of Haryana v. Bhagirath,* AIR 1999 SC 2005 : 1999 Cri LJ 2898. Where a conflict arose between the occular evidence and medical evidence because the eye witness who was seated with the deceased on the same rickshaw testified to a gun shot injury at the back and medical evidence showed injury in the chest, the court reconciled the conflict by holding that the witness might have seen the exist wound at the back and might have believed that the deceased was hit at the back. *Surendra Narain v. State of U.P.,* AIR 1998 SC 192 : 1998 Cri LJ 359. Another case in which the court reconciled the conflict because a conflict of that kind could have naturally arisen in the circumstances, it was held that the eye-witness account could not have been

discarded for that reason alone. *State of Bihar v. Ram Padarth Singh,* AIR 1998 SC 2606. Where the witness testified to infliction of two *kirpan* injuries by one assailant and one knife injury by the second assailant and the medical evidence was that all the three injuries could be by a knife and none by *kirpan,* it was held that the High Court made no error in holding that the medical evidence corroborated the eye-witness account. *Sail Singh v. Mohinder Pal,* (1998) SCC (Cri) 383. See also *State of Bihar v. Ram Padarth Singh,* AIR 1998 SC 2606, reconciliation between occular and medical evidence as to whether the thigh injury was caused at the back or front. Other similar reconciliations were made in *Surjan Mehto v. State of Bihar,* (1998) SCC (Cri) 886; *Adya Singh v. State of Bihar,* AIR 1998 SC 3011.

In a conflict between the eye-witness account and medical evidence, the testimony of the eye-witness has to be preferred unless the medical evidence is so conclusive as to rule out even the possibility of truth in the eye-witness version. *State of U.P. v. Harban Sahai,* 1998 (3) JT 443 : (1998) 6 SCC 50.

On the question whether the death was homicidal or suicidal, the medical evidence was that the death was caused by smothering and the report of the chemical examiner was that some poison was also administered to the deceased, there were injuries on legs also, it was held that the death was homicidal. This finding was also supported by the fact that the deceased was last seen with the accused. *State of H.P. v. Jeet Singh,* AIR 1999 SC 1293 : 1999 Cri LJ 2025.

Where the allegation was that the death in question was caused by burning, but there were no burn injuries on the palms of the deceased, the court said that it must have been a case of suicide. *Pavankumar Parasnath Trivari v. State of Gujarat,* (1999) SCC (Cri) 352.

Time of Death.—The Supreme Court in a quite number of cases determined time of death of deceased relying on nature of the contents of the stomach or intestine. Reference may be made to one such decision in *Ram Narain Singh v. State of Punjab,* 1975 Cri LJ 1500. The Supreme Court held that "medical evidence of Dr. Walia shows that undigested food was found in the stomach of the deceased and according to him deceased must have taken his food only five minutes before his death or at the most within half an hour of his death. Doctor's evidence, therefore, clearly shows that he must have taken his food at 8 p.m. which is also the usual time when the villagers take their food. Relying on this circumstance, Supreme Court came to the conclusion that the incident must have taken place at about 8 p.m. and it belied version of the two eye-witnesses that the occurrence took place in their house at about 6.30 p.m." From the aforesaid decision of the Supreme Court it appears that if in the stomach of dead man undigested food material is found, it must be presumed that he died at the most within about half an hour since he took his food last. Therefore, the contents of stomach/intestine of a dead man must contain undigested food material if he dies within half an hour after he took food [*Bimal Sinha v. State of Tripura,* 1996 Cri LJ 3437 (Gau)]. Likewise the Supreme Court in *Raghunandan v. State of U.P.,* 1974 Cri LJ 453 determined the time of death/occurrence on the basis of nature of the contents of the stomach/intestine that case. The nature of the contents of the stomach or intestine rendered immense assistance to the Supreme Court to determine or at least estimate the time of death of the deceased. In *Charan Singh v. State of Punjab,* 1974 Cri LJ 1253 it was held by the Supreme Court as under:

"The first information report about the present occurrence was lodged promptly and this is apparent from the fact that a copy of the first information report was received by the Judicial Magistrate concerned at Ludhiana at 8.12 p.m. the same evening. We are not impressed by the suggestion that the occurrence took place not at 5 p.m. but much earlier. According to the post-mortem examination reports, the stomach of each one of the two deceased persons was empty at the time of the post-mortem examination. Normally a vegetable diet containing mostly farinaceous food as usually taken by an Indian does not leave the stomach completely within six to

seven hours after its ingestion (see page 151 of Modi's Medical Jurisprudence and Toxicology. Sixteenth Edition). If the occurrence had taken place at 2 or 3 p.m. as suggested on behalf of the accused appellants the mid day meals usually taken by the villagers at about 11 p.m. would still be in their stomachs and the same would be have been empty at the time of the post-mortem examination. The fact that the stomach of each of the deceased persons was empty lends assurance to the prosecution version that the occurrence took place at about 5 p.m."

From the above discussion it is evident that stage of digestion of the food material or the nature of the contents of the stomach or intestine can be the basis to estimate time of death or the time of occurrence depending upon the circumstances of the case [*Bimal Sinha v. State of Tripura*, 1996 Cri LJ 3437 (Gau)]. The presence or absence of food at the time of post-mortem in relation to the time of death is based on various factors and circumstances such as the type and nature of the food consumed, the time of taking the meal, the age of the person concerned and power and capacity of the person to digest the food [*S.C. Bahri v. State of Bihar*, A 1994 SC 2420 : 1994 Cri LJ 3271]. Presence of semi-digested food in the stomach of the deceased belies the stand of the eye-witnesses that the decease had not eaten anything [*State of Karnataka v. Babu*, A 1994 SC 31, 32 : 1994 Cri LJ 18]. Rigor mortis is an important factor for assessing the time of death [*Indradeo Rai v. State of Bihar*, 1992 Cri LJ 4005, 4013 (Pat)]. Stomach contents cannot be determined with precision at the time of death. Merely because the illiterate witnesses stated that the food was taken immediately before the occurrence cannot by itself be a circumstance to discredit their evidence on the basis of medical evidence regarding the presence of semi-digested food [*Sardul Singh v. State of Punjab*, A 1994 SC 672 : 1994 Cri LJ 626, 628]. Medical evidence is only an evidence of opinion and is hardly decisive. The statement of PW that the deceased had taken his meals at about 10.30 a.m. and the occurrence had taken place to about 12-12.30 in the noon, cannot be taken to have been contradicted by the evidence of the doctor who opined that digestion began in 1 or 1½ hours. From this it cannot be made out that had the occurrence taken place at 12.30 noon, the deceased would have had his meals before 11.00 a.m. as semi-digested food was found in the stomach of the deceased [*Mani Ram v. State of Rajasthan*, A 1993 SC 2453, 2455].

Hypothetical medical evidence as to the time of death cannot be made basis to reject the evidence of the eye-witness [*S.G. Gundegowda v. State*, 1996 Cri LJ 852, 866 (Kant)]. Where the prosecution care that about 10 hours had elapsed when the post-mortem was conducted is supported by the stamped witnesses whose presence at the place of occurrence is established, the opinion of the doctor that the death was 12 hours before the post-mortem as rigor mortis were found in the four limbs of the deceased is not significant [*Mangal Singh v. State of Punjab*, 1996 Cri LJ 3258, 3262 (P&H)].

Where the allegation against the accused was that although he had not inflicted direct physical injury on the woman, she suffered many unpleasant nervous systems caused by fright and anxiety. The court said that such matter being of psychological nature the opinion of a psychiatrist was necessary before going further with the trial. *R v. Morris*, (1997) Independent, 24 October (Court of Appeal) : The court **followed** *R v. Chan-Fook*, (1994) 99 Cr App R 147.

Medical evidence and confessional statement.—The accused in his confessional statement said that he killed his wife by strangulation and cut off her head. The post-mortem report mentioned hemorrhage by cutting off the head as the cause of death. The court said that in the circumstances of the case, the non-mentioning of strangulation in the post mortem report did not have the effect of falsifying the confessional statement. *Vinayak Shivaji Rao Pal v. State of Maharashtra*, AIR 1998 SC 1096 : (1998) 2 SCC 233.

Duty of expert witness in medical negligence claim.—In a case concerning medical negligence, it has been held that where an expert witness would not have acted in the way in which the defendant medical practitioner did, the expert witness should make it clear in his report whether the medical practitioner acted the way in

which a responsible body of medical practitioners possessing the appropriate skills would have accepted it as proper. The court may prefer the opinion of one expert over that of another [*Sharpe v. Southend Health Authority,* (1997) Times, May 9].

Motor Accident cases—Where the injured person himself sues as plaintiff evidence of medical men must be led if he claims damages for loss of expectation of life. Where the suit is brought by the administrator of the injured person who is dead the fact of death obviates to some extent the necessity of medical evidence that the accident has shortened the person's life [*Vinod v. Ved*, A 1970 MP 172—cases discussed].

It is not for the doctor to certify the income of the deceased unless it could be a matter of personal knowledge with him. *Gurmit Kaur v. State of Haryana,* (1999) 9 SCC 212.

Age.—Age may be proved by various means including the statement of a witness of his own age and the opinion of a witness as to the age of another person; but when age is in issue, stricter methods of proof may be required [Hals, 3rd Ed, Vol 15, para 522].

A certificate that *A* was 21 by a doctor who formed his opinion "judging by his appearance, his voice and his teeth" is worthless. It is in truth not a certificate but only an assertion of opinion [*Md Syedol v. Vehoolyark*, 43 IA 246 : 21 CWN 257: 39 IC 401 : A 1916 PC 242; *R v. Qudrat*, A 1939 A 708; *Nathu v. R*, A 1931 L 401; *Laimayum v. Manipur Admn*, A 1962 Man 5]. Opinion of the Doctor about the age of the kidnapped person based on superficial examination and observation and not on any scientific data cannot take the place of legal proof [*Nirmal Mangal v. State of Orissa*, 1990 Cri LJ (NOC) 110 (Ori)]. Medical evidence as to age is from its very nature based on conjectures and cannot be relied on to determine with precision the exact age of a person [*Zaida v. Roshnai*, A 1928 L 250 : 113 IC 53; see *Nasrullah v. R*, A 1934 O 32; *Bishnath v. R*, A 1948 O 1]. One can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side [*Jaya Mala v. Home Secretary, Govt of J&K*, A 1982 SC 1297, 1299 : 1982 Cri LJ 1777]. Medical evidence as to age cannot stand against municipal register of births properly kept [*Zaitoon v. R*, A 1946 S 132]. Entry in school register is not reliable with implicit faith as against medical evidence [*Raunki v. S*, A 1970 P&H 450]. When the medical evidence shows that the accused is about 18 years old, he cannot be said to be apparently a juvenile [*Bechan v. State of U.P.*, 1990 Cri LJ 2524, 2525 (All)]. It is not right to prefer the opinion of a radiologist as to age to the positive evidence of parents, and the school admission register [*Chathu v. Govindan*, A 1958 K 121]. Whilst simultaneous disclosure of experts' reports on quantum of damages would be appropriate in some medical negligence cases, there are other cases in which an order that the plaintiff's report be disclosed in advance of the defendant's may be justified [*Rayment v. Ministry of Defence*, 1998 CLY 7 (QBD)].

Weight has to be given to the Doctor's evidence regarding the age of the girl based on x-ray report even though the prosecutrix gives contradictory statements regarding her age [*Abdul Maflib v. State of Assam*, 1983 Cri LJ NOC 177 (Gau)]. The evidence of the parents of the girl who was raped was that the girl was aged 13 years. According to the radiologist her age was 15-16 years. It can be safely taken that the girl was below 16 years of age. [*Puran Singh v. State of Rajasthan*, 1985 Cri LJ NOC 54 : 1984 Raj LW 357 (Raj)]. The ossification of bones test is necessary for determining age [*Laimayum v. Manipur Admn, sup*]. The ossification of bones test, however, is no certain guide for determining age as various factors may hasten or delay osseous changes. Sciagrams are now admitted in proof of age. The ossification test is regarded as a good test for ascertaining age. Though ossification test is a surer test, the opinion of a doctor based on other factors should not be lightly brushed aside [*Anam v. S*, A 1954 Or 33]. Ossification test may be a surer test basis than the opinion of a medical expert, but it cannot be regarded as conclusive [*Kishori v. S*, A 1957 Pu 78]. The test of age on the basis of epiphyses, namely the extent of fusion of bones is scientific [*Raunki v. S*, A 1970 P&H 450].

Handwriting, Proof Of.—Handwriting may be proved by the evidence of a person familiar with such writings (s 47) or by the testimony of an expert competent to make the comparison on a scientific basis (s 45) or by the Court by comparison with a writing made in its presence or admitted or proved to be the writing of the person [*Fakhruddin v. S*, A 1967 SC 1326]. In a suit for money on account of sale of goods, the ledgers, challans and corresponding bills can be proved by the opinion of a handwriting expert. [*Rukmanand Ajitsaria v. Usha Sales P Ltd*, A 1991 Gauhati (NOC) 108].

It is unsafe to part with the document in custody of the court for sending it to handwriting expert, private or Govt for his opinion. It is proper and desirable to permit the expert examine it in the presence of court official. He may however, be permitted to take photographic copies [*Doraiswamy v. Paravammal*, A 1976 M 66—cases discussed]—CONTRA : documents may be sent to expert for examination [*Balaram v. Achutananda*, A 1975 Or 125]. When the defendant did not deny his signature in the disputed document and he applied for expert evidence at a late stage, that prayer can be rejected. [*N.E. Electricity Power Corporation Ltd. v. M/s Lakhi Enterprise*, A 1992 Gau 42, 46].

Handwriting Expert.—In order to reply on the evidence of an expert the court must be fully satisfied that he is a truthful witness and also a reliable witness fully adept in the art of identification of handwriting in order to opine whether the alleged handwriting has been made by a particular person or not [*Kanchansingh v. S*, A 1979 SC 1011]. Persons who have made the peculiarities of handwriting their special study have been examined to their belief. Whether the writing of an instrument was in a feigned hand, and also as to whether two documents, supposed to have written in a disguised hand were written by the same person [*Goodtitle v. Braham*, 1792 4 TR 497]. So, antiquaries have been called to fix, by conjecture the date of ancient handwriting [*Tracy Peerage*, 1843 10 Cl & F 154, 191: Tay s 1417]. By nature and habit, individuals contract a system of forming letters which give a character to their writing as distinct as that of the human face [Lawson p 277]. In *Scott v. Crerar*, 11 Ontario 541, 554, CAMERON, CJ, said:

> "Writing is a thing that is tangible, and almost everyman who can write has a character that those, who are acquainted with it can readily recognise, and though it may, by expert penman, be imitated, as a general rule, its individuality is easily established. A man has a peculiar voice and may be identified by it; it is his own; and though, like the features of the human face, there is a general resemblance in the voices of all mankind, there are marked differences which indicate its possessor very clearly."

The fact that personality enters into the handwriting, and becomes an unconscious and dominant habit which establishes an identity to every handwriting as absolutely as does physiognomy to the person, is the basis on which evidence as to handwriting is admitted and acted upon in courts [Ames p 17].

The features that go to make up the human physiognomy are but few when compared with the various forms of the fifty-two letters of the English alphabet, large and small, not to mention their equally various relations, proportions, shades, spacing, initials, terminals crosses, dots, etc. That all these various features when woven into the fabric of handwriting could be coincident throughout two habitual handwritings is absolutely impossible; the characteristic distinction thus inevitably stamped upon one's writing are beyond the powers of numbers to enumerate. The number of different positions in which the twenty-six letters of the alphabet alone may be placed is 4,032,914,611,265,046,555,840,000 using the fifty-two letters (large and small), with their changed forms and other differences, as above stated, it will be obvious that the personalities of an habitual handwriting are quite beyond the power of enumeration to express [Ames p 19]. It is also an undisputed fact to be remembered that the same person never writes twice exactly alike. This is true to such an extent that one of the infallible tests of forgery of a disputed handwriting or signature is that it coincides word for word, line for line, and dot with dot, with another the genuineness of which is admitted. Although a person's handwriting varies as to its precise detail, yet in its general habitual characteristics it is the same as several peas may vary in size, color, smoothness and outline, yet inevitably and unmistakably retain every characteristic that identifies them as peas and distinguishes them from pebbles or any other object of similar size and form [Ames p 28].

A fine or stub pen, haste or deliberation, good or bad health, sitting or standing, drunk or sober, may radically change the appearance and quality of writing, as may the condition of health or age, change or impair the personal appearance of the writer; but it might as well be claimed that these abnormal circumstances make a new person as that they make a new handwriting [Ames p 28]. There are four main movements employed in the formation of figures and letters: (*1*) *Finger movement, ie* the movement produced by the muscular action, that is the extension and contraction of the thumb, first and second fingers, the hand and

arm remaining stationary except for lateral motion. (*2*) *Wrist movement* is the name give to the writing in which the motion is produced mostly by the wrist. Women generally employ the wrist movement, in their writing. Such writing is usually angular. (*3*) *The forearm movement* is the one that is generally adopted by persons who have to do considerable amount of writing work. This is less tiresome to the writer than the other movements. (*4*) *The raised arm or whole arm movement* is the action of the arm when raised and used from the shoulder. This is the mode used for ornamental or flourishy letters and rubrics and is sometimes seen in the headings and on covers of large ledgers and account books, and addresses on large envelopes. These movements again are subdivided according to the various degrees of combinations of each of the above movements as the simple finger movement, the advanced finger movement, the combined finger and wrist movement, the combined finger and forearm movement, and sometimes a whole-arm movement is united with one or more of the others [Ames 43-44]. It is common knowledge that to enable an expert to give an opinion on handwriting signatures have to be magnified to an equal extent, superimposed and lines drawn to find out the angles to measure the lengths of the various strokes, to find out their taperings and so on [*Chakrapani v. Chandoo*, A 1959 MP 84].

In the famous Tichborne trial, COCKBURN, CJ, in his charge to the jury said:—

> "Manifold as are the parts of difference in the infinite variety of nature in which one man differs from another, there is nothing in which men differ more than in handwriting; and when a man comes forward and says, "You believe that such a person is dead and gone; he is not, I am the man', if I knew the handwriting of the man supposed to be dead, the first thing I would do would be to say 'sit down and write' that I may judge whether your handwriting is of the man you assert yourself to be; if I had writing of the man with whom identity was claimed, I should proceed at once to compare with it the handwriting of the party claiming it. For that reason I shall ask you to carefully look at and consider the handwriting of the defendant and to compare it with that of the undoubted Roger Tichborne and with that of Arthur Orton" [*R v. Castro*, 762, quoted in Woodroffe, 8th Ed p 430].

[Besides the opinions of experts, there are two other modes prescribed by ss 47 and 73 for proving handwriting; see notes to those sections].

Experts are allowed to compare a disputed handwriting with any writing proved to the satisfaction of the judge to be genuine (see s 73 which is analogous to s 8, 28 and 29 Vic c 18). The statute, 28 and 29 Vic c 18, s 8 lays down in express terms that the comparison by a witness of the disputed writing for the purpose of giving an expert opinion must be with any writing proved to the satisfaction of a judge to be genuine and though this condition is not expressly laid down in s 45 which is only a general section as to the admissibility of expert evidence, yet it is clearly indicated in the *illus* (*c*) to the section. This rule was taken for granted in the earliest case of *Phoodee Bibee v. Govind*, (22 WR 277). The evidence of a handwriting expert is inadmissible if there is no comparison with handwriting proved beyond doubt or admitted in open court in the presence of the party affected [*Suresh v. R*, 39 C 606 : 16 CWN 812]. In s 73 also the requirement is that comparison must be made with a writing admitted to be genuine or proved to be so. Opinion of expert based solely on photograph of handwriting, has been held admissible [*Shriniwas v. R*, A 1952 N 226; see however *Mc Cullough v. Munn*, 2 IR 194 CA cited under s 73. Carbon copies of signature, particularly copies made on carbon paper, could not generally be relied upon for purpose of comparison [*Nityand v. Rashbehari*, 89 CLJ 204, 207].

Experts may also without comparison, but from the general knowledge of the subject give their opinion as to whether the writing is in a feigned or natural hand [*R v. Coleman*, 6 Cox 163; Phip 11th Ed p 513; Best s 246; Hals 3rd Ed Vol 15 para 591].

On question of handwriting, not only specialists, but post-office officials, lithographers and bank clerks have been permitted to testify as experts [*R v. Coleman*, *sup*; Phip 11th Ed p 513]. A solicitor who had for several years given considerable attention and study to handwriting was allowed to give evidence as an expert [*R v. Silverlock*, 1864, 2 QB 766]. The defendant's solicitor being unable to procure the services of an expert in handwriting, himself carefully studied every letter of the disputed will for 128 hours and eventually succeeded in satisfying the judge, that the will was a forgery, as alleged by his client. In

assessing costs, he was given special remuneration for the special work [*Dahibai v. Soonderji*, 31 B 430: 9 Bom LR 819]. In the Parnell Commission Enquiry, Russell, who appeared for Parnell, by his deep thinking, intense study and close observation of a letter, exposed one of the most daring forgeries ever committed. The forger Pigot disappeared after his cross-examination, confessed the forgery in a letter and blew his brains out. The cross-examination of Pigot is a marvel of advocacy and the reader is referred to O'Brien's Life of Russell (Edn 1902 pp 225-240) for an account.

In a case, WEST J, observed that the opinion of an expert is not properly admissible, without asking any question from which it may be shown what claims he may have to the character of an expert [*Timangave v. Rangangavda* reproduced in the Note to *Hari Chintaman v. Moro*, 11 B 89, 101]. The opinion of a handwriting expert, when he is not called as witness and subject to cross-examination, is inadmissible in evidence [*Padma Priya v. Dharamdass*, 15 CWN 728; see *ante* "*Mere Certificate of Medical man or Expert*"].

Opinions of experts in handwriting are useful in so far as the appearance on which they rely are disclosed and can thus be supported or criticised, whereas an opinion formed by the judge in the privacy of his own room is subject to no such check. In this case the method adopted by the judge, without submitting the question to the assessors was held not proper [*Barindra v. R*, 14 CWN 1114 : 37 C 467]. When the character of the signature is such that a court is convinced that it is not genuine, it can act upon it. But when witnesses have positively affirmed that a testator did execute a will, the court will be slow to declare it a forgery in the absence of other evidence confirming its conclusion [*Lila v. Bejoy*, 41 CLJ 300 : 87 IC 534]. There may be cases in which the handwriting is of such peculiar character that the conclusion as to identity of the writer is irresistible. In this case it was held that evidence was not enough to prove beyond reasonable doubt that the accused was the writer of the threatening anonymous letters [*Kali Charan v. R*, 6 ALJ 184]. To base a conviction upon the opinion of an expert in handwriting is, as a general rule, very unsafe [*Srikant v. R*, 2 ALJ 444; **folld** in *Kali Charan v. R*, 6 ALJ 184: 9 Cri LJ 498; *Lalta v. R*, 11 Cri LJ 114; *In re Venkata Row*, 36 M 159; *Prabh v. R*, A 1932 L 490]. As to the value of expert opinion on handwriting see next para and *Srikant v. R*, 2 ALJ 444; *In re Venkata Row*, 36 M 159; *Hari Singh v. Lachmi, supra*; *Panchu v. R*, 1 CLJ 385.

Value of Expert Opinion On Handwriting.—Expert opinion must always be received with great caution, but perhaps none so with more caution than the opinions of handwriting experts. These gentlemen stand in an impregnable fortress of their own and invariably give emphatic opinions. They talk in terms of pseudo science and try to create an impression by talking glibly of pen-pressure, pen-hold, pen-scope, pen-pause, pen-presentation, pen-lift, hand-movement, irregular movement, angle of pen, retouchings, joinings, change of pivot, under-stroke, cross-bar, loops of many kinds, embellishments, terminals and numerous other things not easily intelligible to laymen. Almost all of them have a favourite theory of their own which they tend to apply with a firm conviction. They are a type of remunerated witnesses and like others of that class have an unconscious bias in favour of the party engaging them. Moreover, their opinions are previously ascertained and they are brought only when they are favourable to the party calling. The fact that they know beforehand why they have been called and what the party calling wishes to be proved, detracts to a great extent from the weight to be given to their opinion. Some handwriting experts do not even hesitate to claim infallibility. In the case of a disputed will, a handwriting expert who was examined on the caveator's side to prove that it was a forgery, affirmed that his opinion on the subject of that will was absolutely infallible. The court, of course, rejected his testimony and said that he was making a claim which was wholly untenable [*Hari Singh v. Lachmi*, 59 IC 220, 226; 3 Lah LJ 110]. In *Jadunath v. Bisheshar*, A 1939 O 17, 22 the court stigmatised one of these experts as a "dishonest expert"—"one who without any regard for the truth is ready to give any evidence which would support the case of the person who has engaged him."

The expert evidence must always be received with great caution and perhaps none so with more caution than the opinion of handwriting expert [*Bhargav K. Salunkhe v. State of Maharashtra*, 1996 Cri LJ 1228, 1232 (Bom)]. In a catena of decisions of Supreme

Court has pointed out that it would be risky to found a conviction solely on the evidence of handwriting expert and before acting upon such evidence the court must always try to see whether it is corroborated by other evidence, direct or circumstantial; See *Magan Behari Lal v. State of Punjab*, A 197~ SC 1091; *Ram Chandra v. State of U.P.*, A 1957 SC 381; *Ishwari Pd. v. Md. Isa*, A 1963 SC 1728; *Shashikumar v. Subodh Kumar*, A 1964 SC 529; *Fakhruddin v. State of M.P.*, A 1967 SC 1326. The same view is also taken in the judgments of English and American Courts. *Vide Gurney v. Longlands*, (1822) 5 B & Ald 330 and *Matter of Alford Foster's Will*, 34 Mich 21. The Supreme Court of Michigan pointed out in the test mentioned case:

> "Every one knows how very unsafe it is to rely upon one's opinion con-cerning the niceties of penmanship—Opinions are necessarily received, and may be valuable, but at best this kind of evidence is a necessary evil."

Bombay High Court in *Bhargav K. Salunkhe's case* (*supra*) did not subscribe to the extreme view expressed by the Supreme Court of Michigan, but there can be no doubt that this type of evidence is, by its very nature, weak and infirm and cannot of itself for the basis for a conviction. When the handwriting expert mentioned in his report that the disputed signatures cannot be said to have been made by the accused on account of poor skill of the writer and the disputed matter being too limited in extent, no conviction can be based merely on the basis of his opinion [*Dalpat Singh v. State of Rajasthan*, 1996 Cri LJ 3921, 3923 (Raj)]. The expert's evidence may or may not be relied upon, but in a case where the positive ocular testimony proves a particular fact which stands unshattered in the cross-examination then such expert's evidence would not take place of the positive proof and therefore, the court will have to come to its own conclusion as to whether reliance is to be placed on the positive ocular testimony or the handwriting expert's evidence which is based on the comparison of the disputed signatures with the standard signature [*Jamunabai v. Surendra Kumar*, A 1995 MP 274, 281]. The evidence of handwriting expert is a rather weak type of evidence and the courts do not generally consider it as offering conclusive proof and, therefore, safe to rely upon the same without seeking inde-pendent and reliable corroboration [*S. Gopal Reddy v. State of A.P.*, A 1996 SC 2184 : 1996 Cri LJ 3237, 3246]. Where in a case of cheating and forgery, the Bank Manager, the Accountant of the Bank as also the persons who introduced the accused to the Bank authorities categorically deposed that they fully knew the accused who had put down his signature in their presence and that the signatures were of the accused and none else, it was not necessary for the prosecution to have got compared the signatures of the accused from handwriting expert [*Satrangi Lal v. State of Haryana*, 1995 Cri LJ 969, 973 (P&H)].

These experts generally have in memory a catalogue of cases in which their opinions, confirmed by other evidence, were found acceptable by court and they recite them in commendation of their superior skill, but more by way of advertise-ment. They do not of course give the instances in which their opinions were rejected. Weight to be attached to the opinion of the expert depends on its reasonableness and scientific quality and not on length of practice of expert. [*Ram Prasad v. Shyam Lala*, A 1984 (NOC) 77 (All)]. It is well settled that handwriting expert's opinion must always be received with great caution and that it is unsafe to base a judgment purely on expert opinion without substantial corroboration [*Magan v. S*, A 1977 SC 1091; *Srikant v. R*, 2 ALJ 444; *In re Venkata Row*, 36 M 159; *Kalicharan v. R*, 6 ALJ 184; *Lalta v. R*, 11 Cri LJ 114; *Girdhari v. R*, 86 IC 993; *Gobindjee v. Smith*, A 1928 P 568; *Inder v. R*, A 1931 L 408; *Saqlain v. R*, A 1936 A 165; *Sudhindra v. S*, A 1952 C 422; *Ram Ch v. S*, A 1957 SC 381: 1957 Cri LJ 559; *in re Abhayanand*, A 1959 P 328, *Ram Gopal v. State of Himachal Pradesh*, 1983 Cri LJ NOC 10 (HP): 1982 SIM LC 225; *Ajodhya Prasad Misra v. State of Orissa*, 1985 Cri LJ 1401, 1406 : (1985) 1 Ori. LR 326 (Ori); *Joseph v. Aleyamma*, A 1991 Ker (NOC) 28 (Ker)]. This rule has been universally acted upon and it has almost become a rule of law. In *Gurney v. Langlands*, 1822, 5 B&Ald 330, 332, ABBOTT CJ, said: "I think it much too loose to be the foundation of judicial evidence, either by judges or juries". The unsupported evidence of experts in hand-writing will not avail against the denial on oath of the alleged writer himself [*Paquin v. Turcotte*, QR 35 SC 266; *Ethier v. Labelle*, QR 33 SC 39; *Deschenes v. Langlois*, QR 15 KB 388; Canadian cases cited in Best, on Ev 11th Ed p 240].

It is dangerous to place implicit reliance on the evidence of handwriting experts. But when such evidence is supported by the evidence of witnesses thoroughly conversant with the disputed handwriting reliance may be placed on it [*Dy Commr v. Chandra*, A 1947 O 180 FB]. Where there is direct and trustworthy evidence of persons who saw the testator sign, it is not necessary to rely on expert evidence [*Kameswara v. Suryaprakasa*, A 1962 AP 178]. It is wise to be slow in acting on the opinion of the handwriting expert, if there are other materials to prove the signature, the opinion evidence can be sidelined. [*V.S. Abdul Sattar Shah v. Supdt. of Police CBI/SPE, Cochin*, 1987 Cri LJ 1670, 1672 (Ker) : 1987(2) Ker LT 19]. Normally it is unsafe to treat expert handwriting opinion as sufficient basis for conviction. It may, however, be relied upon when supported by various items of internal and external evidence [*Ram Ch v. S, sup*]. When the handwriting expert could not give any opinion about the disputed signature, the accused cannot be convicted on the basis of the evidence of other witnesses. [*P.N. Baruah v. State of Assam*, 1989 Cri LJ NOC 146 (Gau)].

Expert's evidence is only a piece of evidence and external evidence [*Ram Ch v. S, sup*; *Ramnarain v. S*, A 1973 SC 2200; *Siddheswar v. Bhabasundari*, A 1978 C 4]. Expert's evidence is only a piece of evidence which has to be considered along with the other pieces of evidence. Which is the main evidence and which is the corroborative one depends on the facts of each case [*Guntaka v. Busetti*, A 1954 AP 39; *B.K. Kutty v. The State*, 1984 Cri LJ 1289, 1297 : (1984) 2 Crimes 183 (Ori); *Natabar Behera v. Bata Krishna Das*, A 1987 Orissa 7, 11 (DB) : (1986) 2 Orissa LR 137]. Expert evidence of handwriting can never be conclusive, because it is, after all, opinion evidence [*Ishwari Pd v. Md Isa*, A 1963 SC 1728]. Expert's evidence as to handwriting being opinion evidence, can rarely, if ever, take the place of substantive evidence. Before acting on such evidence it is usual to see whether it is corroborated either by clear direct evidence or by circumstantial evidence [*Sashi Kumar v. Subodh Kumar*, A 1964 SC 529; *In Re M.A. Anthony*, 1982 Cri LJ NOC 32 : 1981 Mad LW (Cri) 134 (Mad); *Dolagobinda Das v. State of Orissa*, 1983 Cri LJ NOC 116 (Ori)].

Justice does not rely solely upon the opinion of the expert and even if experts are unable to give a definite opinion, justice must exercise itself and come to a conclusion and give a definite finding. [*Debendra Chandra Mondal v. Ratan Mitra*, A 1984 Cal 316, 317]. When there is any suspicion in the signature in a Will, the evidence of the attestor can be corroborated or contradicted by the expert opinion [*Sumangala T. Pai v. Sundaresa Pai*, A 1991 Ker 259, 264]. Sole evidence of an handwriting expert is not normally sufficient for recording a definite finding [*S. v. Vinaya*, A 1967 SC 778; *Sunil v. LIC*, A 1976 C 224]. Examination by handwriting expert is not necessary in every case [*Srichand v. S*, A 1967 SC 450; *S v. Vinaya, sup*] and no adverse inference can be drawn for not obtaining expert's opinion [*Srichand v. S, sup*]. If nothing is elicited during the cross-examination of the Handwriting Expert to throw any doubt on his testimony, his evidence can be accepted [*State of Orissa v. Sapneswar Thappa*, 1987 Cri LJ 612, 616 (Ori)]. Handwriting can be proved by other means also [*S v. Vinaya, sup*]. Forming an opinion about genuineness of handwriting without considering the evidence of expert or the opinion of one familiar with the hand-writing of the alleged writer is illegal and improper [*Jogendra v. Joykanta*, A 1971 A&N 168 (*Fakhrúddin v. S*, A 1967 SC 1326; *Galstaun v. Sonatan*, A 1925 C 485; *Azmat v. Shiam*, A 1947 A 311 **rel** on]. Court has power to compare the signatures and come to its own finding irrespective of a report of an expert [*Pranendra v. Central Bank*, A 1978 C 55].

Having due regard to the imperfect nature of the science of identification of handwriting, the approach should be one of caution. Reasons for the opinion must be carefully probed and examined. All other relevant evidence must be considered and

in appropriate cases, corroboration may be sought. In cases where the reasons for the opinion are convincing and there is no reliable evidence throwing a doubt, the uncorroborated testimony of a handwriting expert may be accepted [*Murarilal v. S*, A 1980 SC 531]. Evidence of experts is opinion evidence. The opinion is to be supported by reasons. The court has to evaluate the same like any others evidence. The reasons in support of the opinion, if convincing, make the opinion acceptable. There is no place for the *ipse dixit* of the expert. It is for the court to judge whether the opinion has been correctly reached on the date available and for the reasons stated [*The State v. Kanhu Charan Banik (Accused)*, 1983 Cri LJ 133, 143 (Ori) (DB)]. When the books which all to be compared are before the court, the court could have examined, on its own motion such experts for ends of justice [*Govt. of West Bengal v. Nitya Gopal Basak*, 1985 Cri LJ 202, 204 : 1985 Arbi LR 137 (Cal)]. For evidentiary value of opinion of handwriting expert see *Fakhruddin v. S*, A 1967 SC 1326 case law ref; **followed** by *Ramnarain v. S*, A 1973 SC 220.

At the most, expert opinion on handwriting can raise a suspicion as to the genuineness of a document, but it is of no moment unless confirmed by other evidence. It is certain that all such proof is even in its best form precarious, and often extremely dangerous. "Many persons", it has been well remarked, "write alike; having the same teacher, writing in the same office, being of the same family,—all these produce similitude in writing, which in common cases, and by common observers is not liable to be distinguished. The handwriting of the same person varies at different periods of life; it is affected by age, by infirmity, by habit". In *Eagleton v. Kingston*, 8 Ves 476, Lord Eldon gave a remarkable instance of the uncertainty of this kind of evidence. A deed was produced at a trial, purporting to be attested by two witnesses one of whom was Lord Eldon. The solicitor for the party setting up the deed who was a very respectable man had every confidence in the attesting witness and had in particular compared the signature of Lord Eldon to the document with that of pleadings signed by him and yet Lord Eldon declared that he had never attested a deed in his life [Best 11th ED s 247; Will Cir Ev p 235]. In *R. v. Follet*, (1912) 47 LJ 34 (cited in Phip 6th Ed p 386] the Recorder of London went to the length of stating that in forgery cases, the practice of calling experts in handwriting had been discontinued in consequence of the grave mistakes they had made.

Lawson in his book on Expert and Opinion Evidence says: "The evidence of the genuineness of the signature based upon the comparison of handwriting and of the opinion of experts is entitled to proper consideration and weight. It must be confessed, however, that it is of the lowest order of evidence or of the most unsatisfactory character. We believe that in this opinion experienced laymen unite with the members of the legal profession. Of all kinds of evidence admitted in a court, this is the most unsatisfactory. It is so weak and decrepit as scarcely to deserve a place in our system of jurisprudence" [Lawson's Expert Ev]. The Supreme Court of Michigan said:

"Every one knows how very unsafe it is to rely upon any one's opinion concerning the niceties of penmanship. The introduction of professional experts has only added to the mischief instead of palliating it, and the results of litigation have shown that these are often the merest pretenders to knowledge, whose notions are pure speculations. Opinions are necessarily received, and may be valuable, but at best this kind of evidence is a necessary evil" [*Matter of Alfred Foster's Will*, 34 Mich 21, 25].

In the following cases amongst others the opinion of a particular handwriting expert was not accepted [*Suresh v. R*, 16 CWN 812: 39 C 606; *Srikant v. R*, 2 ALJ 444; *Jalaluddin v. R*, 15 IC 979: 147 PLR 1912; *Ishar Das v. Ram* 18 PWR Cr 1908 : 8 Cri LJ 75; *In re Venkata Row*, 36 M 159; *Lalta v. R*, 5 IC 355; 11 Cri LJ 114; *Punjab N*

Bank Ld v. Mercantile Bank Ld, 7 IC 98]. The comparison of handwriting is not a perfect science. Deviations in signatures can arise due to material variations and various other causes. [*Mrs Veenu Mandu v. Narinder Kumar Handa*, A 1984 P&H 99, 101; *Piara Singh v. Jagtar Singh*, A 1987 P&H 93, 95: (1986) 90 Pun LR 478].

In many cases, the clear evidence of non-experts who depose to the fact is more cogent than the evidence of experts who merely form conjectures. Thus where an attesting witness swore clearly and distinctly that a deed was executed in his presence by *R* and his wife, both of whom he knew, this evidence was held not to be counter-balanced by the evidence of experts who expressed an opinion that the signature purporting to be that of *R* was not in the character of his handwriting [*Newton v. Ricketts*, 9 HLC 262; Powell Ev 9th Ed p 502]. Under S 63 (a) Succession Act, in order to say that a will has validly been executed it is not necessary that it should contain the signature of the testator; but on the other hand it is enough if the testator affixes his mark or some other person signs the document in the presence of the testator and under his direction. In such circumstances the opinion of an expert that the singnature seen on the will is not that of the testator is not a relevant fact [*R Saraswathy v. P. Bharvathy Ammal*, A 1989 Ker 228, 231]. In *Turner v. Hand*, 3 Wall, Ir 88, 115 (Am), GRIER J, said "Opinions with regard to handwriting are the weakest and least reliable of all evidence as against the direct proof of execution of an instrument". Conclusions based on mere comparison of handwriting must at best be indecisive and yield to positive evidence in the case [*Kishore v. Ganesh*, A 1954 SC 316: 1954 SCR 919; *Ranjit v. S*, A 1963 P 262; *Bhagwan v. Maharaj*, A 1973 SC 1346]. When a person who has put his signature in the disputed document was undergoing treatment and was stated to be in a serious condition, the marginal dissimilarity in signature is inevitable [*Society of Sacred Transfiguration v. MSNP Thilaga Moorthi*, A 1987 Mad 17, 21(DB): (1986) 99 Mad LW 683].

The comparison of handwriting by an handwriting expert, unlike the case of comparison of a finger print, can at best provide a tentative method of judging the authorship of the signature and the safe course is to test such a comparison with the surrounding circumstances [*Hokhete Sema v. Kaito*, A 1982 Gau (NOC) 113]. The evidence of a handwriting expert, unlike that of finger-print expert, is generally of a frail character and its fallibilities have been quite often noticed. The court should, therefore, be wary to give too much weight to the evidence of handwriting expert [*Bhagwan v. Maharaj*, A 1973 SC 1246; *Gulab Chand v. Satya Vrat*, A 1983 All 54, 56, *Tul Mohan Ram v. State*, 1981 Cri LJ NOC 223 (Del)]. After all it is only the opinion of a person who calls himself an expert. As to the fallibility or unreliability of expert evidence on handwriting unless confirmed by other positive evidence, see *Ram Ch v. S*, A 1957 SC 381; *Kishore v. Ganesh, sup*; *Govardhan v. Ahmadi Begam*, A 1953 Hyd 181; *Abhayanand v. S*, A 1957 P 328; *Annapurnamma v. Sankararao*, A 1960 AP 359; *S v. Kailash*, A 1961 P 451; *Tilakdhari v. Jagat*, A 1961 P 76; *Onnamalai Ammal v. Sithapathe*, A 1961 M 90 : 1961, 1 MLJ 33; *Kameshwara v. Suryapraksha*, A 1962 AP 178; *Ala Uddin v. Sishir Kumar Dutta*, A 1989 Gau 42, 43. The art of forming opinion by comparison of handwriting is essentially empirical in character and error is seldom inseparable from such opinions [*Kameswara v. Suryaprakasa, sup*].

With regard to the claim made by some handwriting experts that by a chemical test it can be definitely stated whether a particular writing was of a particular year or period, Osborne in his book on 'Questioned Documents' (p 464) says: "the chemical tests to determine age also, as a rule, are a mere excuse to make a guess and furnish no reliable data upon which a definite opinion can be based". This opinion was relied upon in *Sashi Kumar v. Subodh Kumar*, A 1964 SC 529.

In evaluating the evidence of a handwriting expert on the question of the genuineness of the alleged signature, the following facts must be kept in view: (*1*) very few people sign in the same manner on all occasions; (*2*) expert opinion on the genuineness of a signature should be received with great caution especially in a case where there is positive evidence of persons who saw the person sign; (*3*) all the tests evolved by the experts in the matter of comparison of handwriting and signature are merely tentative in character, and (*4*) opinion evidence is weak evidence [*Onnamalai Ammal v. Sithapathi, sup*]. The expert is not acting as judge or jury. His real function is to put before court all the materials together with versions which induce him to come to the conclusions [*Kumaran Nair v. Bhargavi*, 1988 Cri LJ 1000, 1003 : (1987) 2 Ker LT 644 (Ker)]. If the two signatures in the two pages of will vary so substantially, their comparison with the specimen signature looses its significance [*A Chandrabati v. Laxmidevi*, A 1991 Orissa 289, 294].

Where a handwriting is brought into question, it is rare that any one thing can determine the point at issue. It is usually determined by a more or less extended series of things, the presence or absence of which creates the decisive preponderance of evidence [Ames on Forgery p 100]. Mere resemblances between two writings in hand-movement or curve or pen-pressure or such other things are not at all sufficient to create the conviction that they are written by one and the same person. Comparisons in these matters are not of much moment. It is the many peculiarities, or eccentricities of a man's handwriting or spelling, or his mannerisms, if there are any, that afford good materials for comparison. The peculiarities must be of such a striking nature that a conclusion as to the identity of the writer becomes irresistible. *In re Venkata Row*, 36 M 159, 165, SUNDARA AIYYAR J, said: "I am quite prepared to concede that there may be cases in which the peculiarities in the handwriting of a person are so numerous and striking and there are so many mannerisms of the forger that he has been unable to avoid in committing his forgery that the court might well come to the safe conclusion on expert evidence alone that the writing is that of a particular person". An instance of detection of forgery by peculiarities in spelling and in half-crossing of "t" in "to", is to be found in *Creswell & others v. Jackson & another*, cited in detail in Wills Cir Ev 6th Ed pp. 454-55. One of the most useful tests in a case of forgery is to see whether a clear dissimilarity of habit can be traced through the documents tendered. If there exists such a dissimilarity, then it is difficult to say that the same person wrote them all [*Mawhan v. Gokul*, 62 IC 882].

The most important things are to examine the general characteristics, formation of letters, fixed pen-habits and mannerisms and discern the identity of the writer. It is not the form alone, nor any one feature, but a combination of all its qualities that impress us. This total individuality has to be taken into account in arriving at a decision. A correct conclusion in any case is based only upon a combination of common qualities and individual characteristics in sufficient number, so that it is reasonable to say that they would not all accidentally coincide in two writings by different writers [*Jitendra v. R*, A 1937 C 99 SB]. An expert's opinion is accepted by the court when the reasons given are both apparent and convincing. The expert's has also announced that he had noticed all the characteristics, though he had not specified them in the report. The dissimilarities noticed by him would be sufficient to hold against the defence [*Palamia Pillai v. State*, 1991 Cri LJ 1563, 1580 (Mad)]. In examining a disputed document the true test is not the extent of the similarities observed when compared with genuine documents, as forged documents usually are good imitations, but the nature and extent of the dissimilarities noticed. It is these differences which expose the true character of the document in question [*Raviappa v. Nilkanta*, A 1962 Mys 53]. The importance of writing characteristics is recognised

by all handwriting experts and it is sound because two different persons have not got the same movements naturally, and in fact there are some advanced movements that a writer of a poor class cannot attain [*Jadunath v. Bisheshar*, A 1939 O 17]. The opinion of handwriting expert on glaring similarities would not be of much value. In any serious attempt the forgers achieve some similarities and may even bring about glaring similarities. [*Mrs. Maria Piedade D' Souza v. M. Narayanaswamy*, A 1984 NOC 139 (Kant) : (1983) 2 Kant LJ 135].

In the matter of recognizing handwriting, an abundant source of mistakes is, that many persons write very much alike; so much so, that it is often difficult to distinguish one person's handwriting from that of another [Ram on Facts, 53]. It is not difficult to forge the handwriting of almost any person, so that it may be impossible for even the most acute and experienced judge to discriminate between the false and the true [*Sarojini v. Haridas*, 26 CWN 113]. "And it is too true that persons may be found willing for a sufficient consideration, to swear to any statement of facts" [*per* GRIER J, in *Turner v. Luciani*, 1 Bal (US) 49]. A court is not to surrender its own opinion to that of experts who are called before it, but with such help as the experts can afford, it must form its own opinion on the subject in hand [*in re U an Advocate*, 13 R 518; *Musa Goolam, v Khoo Soo*, 157 IC 82; *Durga Pd v. S*, A 1952 N 289]. The rejection even in *toto* of an expert's opinion would not exonerate the court from the duty of coming to an independent finding on the question of an authorship of handwriting; the court has to examine the opinion and come to its own decision [*Jitendra v. R*, A 1937 C 99 SB]. The court is competent to use its own eyes for deciding whether certain hand-writing placed before it are similar or not. The opinion of experts is only a piece of evidence. The opinion of the judge is the decision in the case [*Udhab v. R*, 65 IC 426; *Sunil v. LIC*, A 1976 C 224; *Pranendra v. Central Bank*, A 1978 C 55].

To come to a decision to find out the identity in a particular writing, there is not only a provision for examining an expert under sec 45 but also that the evidence of any other person acquainted with the handwriting would be relevant under sec 47 [*Shriniwas Pansari v. Dr Hari Prasad Mehra*, A 1983 Pat 321, 325]. Where a case depends upon a comparison of the handwriting, the court is competent to use its own eyes for the purpose of deciding it. In such a case, the court cannot accept the expert's evidence like an automation [*Parsad v. Jasoda*, A 1937 P 328; *Abhayananda v. S*, A 1959 P 328]. The fact that an expert cannot read or write the language in which a signature or writing is made will not make him incompetent as an expert [*Saqlain v. R*, A 1936 A 165; *Parbati v. Manasi*, A 1977 Or 139], but it must detract from the value which would otherwise be attached to his evidence [*Ramsewak v. R*, A 1933 P 559]. When both sides have produced handwriting experts in support of their cases their evidence is of little help [*Md Ziaullah v. Rafiq*, A 1939 O 213]. Opinion of any one should not be preferred on conjectural reasons [*Sohanlal v. Lala*, A 1981 A 62]. The two experts examined by the two parties for comparison of the signature of the testator in the will, found that there are variations in the disputed signatures. This evidence coupled with further evidence that the testator was in the habit of writing letters which varies in the formation and shape, was accepted to find that the will is genuine [*Smt Manorama Srivastava v. Smt Saroj Srivastava*, A 1989 All 17, 32]. Experts would generally depose in favour of the party producing them [*Suresh Kumar v. Mema Ram*, A 1991 P&H 254, 255].

Determination of age of handwriting.—The science of handwriting is not an accurate one and there is likelihood of errors creeping in, when a handwriting expert gives his evidence and therefore, such evidence should be received with caution. What is the evidentiary value of a handwriting expert and whether or not in

conjunction with the other evidence available, the evidence of the expert supports the case of the plaintiff, are matters for decision by the trial judge [*Uppu Jhansi Lakshmi Bai v. J. Venkateswara Rao*, A 1994 AP 90, 92]. Osborn on "Questioned Documents" at page 464 says "There are those also who pretend to say how old a writing is by merely examining it with a hand magnifier or a microscope. This always is an exhibition either of ignorance or of dishonest presumption. The chemical tests to determine age also, as a rule, are a mere excuse to make a guess and furnish no reliable data upon which a definite opinion can be based as can easily be demonstrated by fair tests on docments of known age".

The learned author also expressed the view ".....By recording the color as first seen, any observer with good eyesight can on second view answer the question whether an ink is still undergoing a change in color. This kind of an ink examination often furnishes conclusive evidence that a document is not as old as it purports to be.

It is important to know that the color of the ink on a suspected document, if it is promptly examined, may thus be the means of showing that the document is not genuine. If a writing of this kind purports to have been written long before and it can be shown that the ink has not yet reached its final depth of color, and it actually goes through those changes that are characteristic of ink during the first months or year of its history, it is only necessary to prove this fact to invalidate the document."

The Supreme Court in *Shashi Kumar Banerjee v. Subodh Kumar Banerjee* quoted with approval the observation of Osborn and held:

> "Finally we may point out that the expert admitted in his evidence that it was only by a chemical test that it could be definitely stated whether a particular writing was of a particular year or period. He also admitted that he applied no chemical tests in this case. So his opinion cannot on his own showing have that value which it might have had if he had applied a chemical test. Besides we may add that Osborn on "Questioned Documents" at page 464 says even with respect to chemical tests that the chemical tests to determine age also, as a rule, are a mere excuse to make a guess and furnish no reliable data upon which a definite opinion can be based'. In these circumstances the mere opinion of the expert cannot override the positive evidence of the attesting witnesses in a case like this where there are no suspicious circumstances".

The passage from the decision of the Supreme Court extracted above is not an authority for the proposition that that the evidence of the handwriting expert should not be brought on record for the purpose of determining the age of the disputed handwriting [*Uppu Jhansi Lakshmi Bai v. J. Venkateswara Rao*, A 1994 AP 90, 92].

Science of handwriting not an exact science.— The science of handwriting is not an exact science unlike the science of fingerprints. Even experts tend to commit errors in giving their opinions on the genuineness of the signatures and handwriting. Even in genuine writing, at times, the penhesitates or even stops especially when the author is under great physical or mental strain. Sometimes, it would be difficult for an expert to examine even the genuineness of different writings, each having its own individuality, but all by the same author. It requires intelligent comparison to differentiate the genuine signature from the forged one. [*Vandavasi Karthikeya v. S. Kamalamma*, A 1994 AP 102].

Osborn says : "As the psychologists explain it, 'likeness and difference co-exist in all things not utterly unlike', so that intelligent comparison for the purpose of classification must always include analysis and reasoning..... A writing or a document, having in mind all the various qualities, elements, features, tendencies,

variations and conditions in writings and in documents that have heretofore been discussed. A simple questioned signature should thus be investigated with all these varied qualities under consideration, and until it has thus been scrutinized a signature has not really been examined. "Questioned Documents" by Albert S. Osborn Second Edition, p. 238".

Relying the above passage of Osborn the Andhra Pradesh High Court held:

Great care and caution should be exercised especially when the court is not assisted by the evidence of an expert in determining the genuineness of a signature or handwriting. Even while calling experts, it is now admitted by all authorities that if one cannot get a competent man, it is better not to adduce any expert evidence at all [*Vandavasi Karthikeya v. S. Kamalamma*, A 1994 AP 102].

Comparison of Handwriting by Court.—This subject has been discussed fully in the notes under s 73 *post: "Comparison of Handwritings by the Court"*.

Modes of proving handwriting.—It has been held that the modes indicated in sections 45 and 47 are not exhaustive. The court may take into account other external and internal circumstances. The court gave this illustration. Where a letter is posted by a person and the sender and the sendee happen to be the same person, there would be an inference, without resorting to the provisions of sections 45 and 47, that the sender was the author of the letter. *Gulzar-Ali v. State of H.P.*, 1997 (8) JT 564 : (1998) 2 SCC 192.

Opinion on Marks.—(See *post* s 47: "*Handwriting Whether it includes Mark*").

Finger impressions.—Attention to the subject of finger impressions was first drawn in 1923 by Purkenje, a physiologist of Breslau. Sir William Herschell of the Indian Civil Service introduced it into Hooghly, a district in Bengal, The subject was afterwards investigated by Galton who arrived at remarkable results. "Identification by finger-prints has become a most important branch of criminal investigation, and has proved to be of signal service both in the detection of crime and the identification of the offender. The system is new, and had only just been introduced into this country when the last edition of the work was published, and it is only quite lately that the conclusive nature of the evidence that it affords has been appreciated in courts. It may be said now to have established its claim to admission and to trustworthiness. The processes, and specially the admirable system of classification, make it perfectly simple to those who understand its technology. Despite an appearance of complication, the system appears to be easily mastered by any person of intelligence in the course of few months or even weeks" (Wills Cir Ev p 191].

> "The inner part of the hand and the sole of the feet are traversed in all directions by lines of varying lengths, some representing depressions, others elevation of the skin surface, many of them being grouped into pattern which, though seemingly complex, can be outlined with exactness. The most conspicuous are the creases caused by the folding of skin. The less conspicuous but much more numerous lines are the papillary ridges which appear over the whole surface giving it an appearance that may be likened to that of a newly ploughed field with its ridges and furrows, or to sand which the water in receding from has left ribbed. The ridges are studied with microscopic pores, the mouths of the ducts of the glands which secrete perspiration are located below the epidermis. They grow with the growths of the body, and are most marked in hands that do some work, though liable to lose their sharpness of definition and even to become partially obliterated on those parts of the hands where from continued pressure callosities form. This may be noticed in labourers and artisans whose hands have become hardened by the use of tools or other implements of their trades. Injuries do not, necessarily, obliterate the ridges. An ulcerated sore eating so deeply into the flesh as to destroy the sweat glands would certainly destroy the ridges, and from the surface of a lasting scar ridges disappear. A cut leaves across the ridges a

permanent thin mark which when the impression is taken on paper, shows as a white space, somewhat similar to a crease. The late SIR FRANCIS GALTON has investigated on the persistence of the ridges throughout the period of human life and in the following words records the results of his examination of many sets of prints taken at different times, and covering the interval from childhood to boyhood, from boyhood to early manhood, from early manhood to middle age and from middle age to extreme old age : "As there is no sign except in one case of change during any of these four intervals which together almost wholly cover the ordinary life of man, we are justified in inferring that between birth and death there is absolutely no change in say 699 out of the 700 numerous characteristics of the markings of the fingers of the same person such as can be impressed by him whenever it is desirable to do so. Neither can there be any change after death up to the time when the skin perishes through decompo-sition; for example, the marks on the fingers of many Egyptian mummies and on the paws of stuffed monkeys still remain legible. Very good evidence and careful inquiry is thus seen to justify the popular idea of the persistence of finger impressions" [Henry on Finger Prints, 4th Ed pp 16-19].

The words "finger impressions" were added to the present section by Act 5 of 1899, on account of the decision of the Calcutta High Court in *R v. Fakir Md* reported in 1 CWN 33, where it has been held that the comparison of thumb-impressions must be made by the court itself; and that the opinion of an expert was not admissible under s 45. The reasons for the addition of the words "finger impressions" will appear from the Statements of Objects and Reasons (see 3 CWN xxxiv). Under this section as amended by Act 5 of 1899, expert evidence may be given of finger impressions [*R. v. Sahdeo*, 3 NLR 1: 5 Cri LJ 220]. Tests indicated for identification of thumb impressions [*Kamla v. Ratanlal*, A 1971 A 304]. Science of identifying thumb impression is an exact science and does not admit of any mistake or doubt [*Jaspal v. S*, A 1979 SC 1708].

Evidence on finger impressions is now admissible, but the person giving his opinion, as in other cases, must be shown to be an expert. The comparison is to be made with finger impression proved beyond doubt or admitted. For purpose of comparison, the court may direct finger impression to be taken of any person present in court. [See Identification of Prisoners Act (33 of 1920), s 5 and s 73 *post; Sheo Narain v. Rawat*, A 1986 Punj & Har 174, 175 : 1984 Har Rent R 540].

S 73 has also been made applicable to finger impressions by I E Act, 5 of 1899 and so in order to ascertain whether a finger impression is that of the person to whom it purports to be; any finger impression admitted or proved to be the finger impression of that person may be compared with the one which is to be proved although that finger impression has not been produced or proved for any other purposes. The court may direct finger impression to be taken of any person present in court in order that it may compare the finger impression with any finger impression alleged to be the finger impression of such person (see notes to s 73).

Palm Impressions.—Palm impressions come within s 45 and opinions of experts to similarity or dissimilarity of photographs of palm impressions are admissible [*R v. Babulal*, 52 B 223 : A 1928 B 158; see *post: "Foot-marks or Foot-prints"*]. In Ceylon s 45 has been amended to include palm impressions.

Report of Finger-print Expert.—The report of a finger-print expert is inadmissible unless he is called as a witness and subjected to cross-examination [*Pitain v. Baboo Singh*, A 1924 N 183; *Wadhawa v. Jai Kishan*, A 1928 L 427: 106 IC 493]. Report of Director, Finger Print Bureau, can be treated as evidence without examining him, but in case of any doubt the court may examine him [*H P Admn v.*

Omprakash, A 1972 SC 975; see *ante*, "*Mere Certificate of Medical man or Expert*"].

Value of Finger-prints—Duty of Court.—Although finger-prints sometimes afford valuable evidence of identity as in *R v. Castleton*, (1909) Cr App Rep 74 as was pointed out in the case of *R v. Fakir* (*ibid*) and *R v. Abdul Hamid* (*post*), great caution must be exercised in arriving at a conclusion by comparison of thumb-impressions, and the positive evidence of witnesses who were undoubtedly present and were eye-witnesses to the transaction should not be lightly brushed aside. In this case there was diversity between what purported to have been the thumb impression taken in the registration book (the original document being lost) as compared with specimens of thumb-impression taken in court and it was held that the evidence of the finger-print expert was by no means conclusive [*Baidyanath v. Allef Jan Bibi*, 36 CLJ 9: 70 IC 194].

It is most unsafe without any corroborative circumstances, to convict a person of a serious crime solely and entirely upon similarity of thumb-mark or figner-prints [*Bazari v. R*, 68 IC 958 : I P 242; *Basgit v. R*, 6 P 305; see also *Panchu v. R*, 1 CLJ 385; *Jassuram v. R*, 4 L 246 : 77 IC 423; *Singri v. R*, 27 IC 900 (M); *Hari Singh v. Lachhmi*, A 1921 L 126; *Golap Chandra Mahanta v. State of Assam*, 1989 Cri LJ NOC 95: (1988) 3 Crimes 114]. It is not safe to convict one on the mere result of critical examinations of thumb-impressions made by an expert. Though the classification of finger impressions is science requiring much study, and though it may require an expert in the first instance to say whether any two finger impressions are identical, yet the reasons which guide him to this conclusion are such as may be weighed by any intelligent person with good powers of eyesight. The term "*expert*" in comparing finger impressions explained [*R v. Abdul Hamid*, 32 C 759: 9 CWN 520]. These cases were not followed in a Madras case where it was held that a court cannot refuse to convict a person on the evidence of finger-print, merely on the ground that it is unsafe to convict upon such evidence. There is nothing in the so-called science of finger-prints or the qualifications of an expert in it which deter the court from applying its own magnifying glass or its own eyes and its own mind to the evidence and verifying the results submitted to it by the witness. The arguments in finger-print cases rest on a simple deduction from a number of observations of the similarities and differences between the finger-prints in question [*R v. Virammal*, 46 M 715: 69 IC 374 (32 C 759 : 1 P 242 **not folld**); *Fakir v. R*, A 1947 S 177; see also *R v. Fakir Md*, 60 B 187 : A 1936 B 151; *Sarada v. R*, A 1930 L 667]. In a later Madras case, a magistrate not being satisfied with the opinion of a finger-print expert gave the accused the benefit of doubt. It was held that the court was not bound to accept the evidence of an expert even though there were no special reasons for not accepting it. It was proper for the magistrate to satisfy himself by personal examination of the finger-prints even though he was not an expert [*Pub Pros v. Gopal*, A 1941 M 551]. In another case the judge felt the necessity of examining the finger-print expert at the appellate stage and set aside the conviction on such opinion as he could not give satisfactory reasons for the opinion [*In re Godavarthy*, A 1960 AP 164].

The court has to rely on the expert on two distinct points: (*i*) on the question of similarity between the marks which is a question of fact on which the court can and should with the assistance of the expert satisfy himself and (*ii*) on the point, which is one for expert opinion, whether it is possible to find the finger-prints of two individuals corresponding in as many points of resemblance as are shown to exist between the impression found in the case before the court and those of the accused [*R v. Fakir Md, sup*; *Bhaluka v. S*, A 1957 Or 172].

Expert opinion on finger-prints has the same value as the opinion of any other expert, *eg* medical opinion, &c; in each case the evidence is only a guide to judge of its value. The court is at liberty to use its own discretion and to affirm or differ from the expert opinion. In this view, as has been repeatedly held, it is not safe to convict upon the sole testimony of an expert [*Basgit v. R*, 6 P 305: 104 IC 626]. In *Mohini v. R*, 46 C 635: 54 IC 50, the jury accepted the expert's evidence though cautioned by the sessions judge, and conviction was also based on expert testimony in *Pub Pro v. Kandasami*, A 1927 M 696: 50 M 462; *Re Castleton*, 1909, 3 Cr App Rep 74. It cannot be laid down as a rule of law that it is unsafe to base a conviction on the uncorroborated testimony of a finger-print expert. The true rule seems to be one of caution, that is to say that the court must not take the expert's opinion for granted but it must examine his evidence in order to satisfy itself that there can be no mistake and the responsibility is all the greater when there is no other evidence to corroborate the expert [*Harendra v. R*, 35 CWN 863 : A 1931 C 441, 442; *Golam v. R*, A 1950 C 66; *R v. Virammal*, 46 M 715; *S v. Karu*, A 1954 P 13].

It is the duty of the expert to give reasons for his conclusion. It is not enough to say with a magnifying glass that there are 2 or 3 common ridge characteristics. Comparisons should be made by making enlargements on screen. An equality in the number of ridges between the core and delta is one of the sure criteria for comparison. A similarity in the type cannot be a certain index. It is the duty of the court to scrutinize the evidence of the expert or make a comparison of the impression personally—Method of comparison indicated [*In re Godavarthy*, A 1960 AP 164]. In *Diledad v. R*, 113 IC 68 : A 1929 L 210, ADDISON, J, expressed the view that comparison of thumb impressions has become an exact science and great weight attaches to the evidence of an expert. On the 17th of August, 1904, a thief entered No 30, St Peter's Square, Hammersmith, and before leaving, helped himself to a glass of wine. On the tumber used, the thief left two finger prints, and these were subsequently found, upon search in the record at New Scotland Yard, to be identical with two of the finger-prints of one George Gage, a notorious criminal. Gage was subsequently arrested and committed for trial. He pleaded guilty, and was sentenced to four years' penal servitude. The case is reported at length in the *Daily Telegraph* of the 21st October, 1940 [Henry's Finger Print, p 62]. The evidence of finger print expert can be acted upon without corroboration as the science of identifying thumb-impressions has developed to such an extent that it does not admit of any mistake or doubt [*Padmanava Mohapatra v. State*, 1983 Cri LJ NOC 238 (Ori)].

A court should be very chary in accepting the evidence of a finger-print expert as to the age of a thumb-mark when it is markedly opposed to the date on the document, so long as no serious extraneous testimony controverts that date [*Ramlakhan v. Dharmadeo*, 97 IC 335: A 1926 P 575]. A jury is not bound to accept the opinion of an expert upon thumb-impressions without corroboration of their own intelligence as to the reasons which guided him in his conclusions [*R v. Abdul Hamid*, 32 C 759: 9 CWN 520]. The question as to the identity of thumb-impression on two or more documents, for the purpose of ascertaining whether the thumb-impressions are of one and the same person, is eminently a matter for the jury and not for the judge [*Panchu v. R*, 1 CLJ 385].

In order to prove the previous convictions and identification of the accused which were denied by him, the prosecution produced certain finger impression slips, which were compared with the accused's finger impressions by an expert who declared that the accused must be the man whose finger impressions were on the slips. He did not personally know the accused and had not himself taken the impressions on the slips—*Held*, that the previous convictions of the accused stated on slips were not

proved by mere production of such slips [*Hulost v. R*, 4 LBR 125: 7 Cri LJ 406; see *Ramdas v. R*, 21 CWN 469].

If a finger-print expert has not been cross-examined as to the ground of his opinion and as to the test applied, the value and weight of his evidence cannot be diminished by applying to it considerations to which the witness's attention was not directed [*Sarwar v. R*, 55 IC 273]. The opinion of an expert recorded for the purpose of a civil though proved in criminal case, is not admissible [*Jassu Ram v. R*, 4 L 246; *Ganda v. R*, A 1928 L 921]. Use of report of finger print expert as evidence without examining him where the accused did not apply for his examination is in order [*Phoolkumar v. Delhi Admn*, A 1975 SC 505]. It is the duty of the prosecution to prove that the specimen writings are of the accused and only then the question can arise as to whether the opinion of, the handwriting expert should be relied upon or not [*State of Rajasthan v. Dr. J.P. Sharma*, 1982 WLN 60 : 1983 Cri LJ 858, 864 (Raj)]. The science of comparison of scalp hairs has not yet reached perfection like the science of comparison of finger prints [*Himangshu Pahar v. State*, 1986 Cri LJ 622, 628 (DB) (Cal)].

Where the first photographs of fingerprint impressions were not found to be clear enough to enable the expert to come to any definite conclusion and, therefore, second impressions were taken by the photographer, it was held that the photographer's evidence that he was able to take better photographs on the second occasion could not be disbelieved by the court unless he was exposed in cross-examination. *Ammini v. State of Kerala,* AIR 1998 SC 260.

Foot-marks or Foot-prints.—The fact that foot-marks corresponding to that of the accused was found near the spot of occurrence is relevant. Evidence of skilled persons who are in a position to identify foot-mark is admissible in England and America. It is an instance of identifying traces circumstantially. Wigmore says: "For foot-marks and boot-marks there is also a double step of inference, *viz* from the mark found to the presence of the maker at the time of the act, *ie*, a Trace-inference, and from the combination of the features in the mark found to the person bearing the same combination of features, *ie* an Identity-inference ..... No doubt a witness to identify foot-marks should be required to specify the features on which he bases his judgment of identity; and then the strength of the inference should depend on the degree of accurate detail to be ascribed to each feature and of the unique distinctiveness to be predicted of the total combination. Testimony not based on such data of appreciable significance should be given no weight" [Wig s 415; see also ss 151a, 660; 3 Chamberlyne's Ev s 1874n 1 and Phip 8th Ed pp 127, 130-31]. In a murder case a witness was called to prove comparison of shoes and shoe marks; PARKE, J, asked him if he had looked at the soles of the shoes and examined them with the foot-marks before he put the shoe in the mark; the witness answered in the negative, PARKE, J, desired the jury to reject the whole inquiry relating to identification by shoe-marks [*R v. Shaw*, 1830, 1 Lew, Cr C 116, cited in Wis s 660].

Though foot-prints are not recognised in s 45, evidence of foot-print experts have been admitted with the caution that there should be other evidence to bring home the offence to the accused [*In re Oomayan*, A 1942 M 452: *Fullaya v. R*, A 1941 M 88; *In re Mylaswami*, A 1937 M 951; *R v. Babulal*, 52 B 223; *Sidik v. R*, A 1942 S 11; *Ganesh v. S*, A 1955 As 51; *Fakirchand v. S*, A 1955 MB 119—CONTRA: If it is to be used, court must satisfy itself by a comparison, *Paramban v. R*, A 1951 M 737]. In *S v. Karu*, A 1954 P 131: 1954 Cri LJ 201 expert evidence about a blood stained foot-print and in *Ramkaran v. S*, 1958 Pat LR 246 about a foot-print on a *chadar* was considered without reference to any section of the Act. Mere fact that foot-marks tally with those of accused's shoes is not sufficient. There may be a large number of the size of the accused's shoes [*Bhikka v. R*, A 1943 B 458]. Identification by foot-prints is a rudimentary science and much reliance cannot be placed on it. It can be relied upon along with other evidence pointing to identity [*Pritam v. S*, A 1956 SC 415: 1956 Cri LJ 805]. The word 'science' is wide enough to include evidence of foot-print expert. Conviction was sustained on the evidence of PW 1 and a foot-print expert [*Basudeo v. S*, A 1959 P 534].

In Ceylon s 45 has been amended to include foot impressions.

Expert Evidence on Commission.—The evidence of an expert when given on commission is very considerably reduced in value [*Nur Din v. R*, A 1928 L 533].

Use of Scientific Treatises by Court.—[See *post* s 57 and s 60 proviso (*1*) and notes].

Expert evidence on witness's state of mind or reliability.—As regards the admissibility of expert evidence to deal with a witness's state of mind or reliability it was observed in *R v. Turner*, 1975 All ER 70, 74 as under:

> "An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help then the opinion of an expert is unnecessary ..... jurors do not need psychiatrists to tell them how ordinary folk who are not suffering from any mental illness are likely to react to the stresses and strains of life..... The same reasoning applies to..... admissibility on the issue of credibility. The jury had to decide what reliance they could put on the appellant's evidence. He had to be judged as someone who is not mentally disordered. This is what juries are empanelled to do. And the law assumes that they can perform their duties properly. The jury in this case did not need, and should not have been offered the evidence of the psychiatrist to help them decide whether the appellant's evidence was truthful".

There have been cases where medical evidence has been ruled admissible to attack the reliability of a prosecution witness (*Toohey v. Metropolitan Police Comr.*, (1965) 1 All ER 506 : (1965) AC 595; or to cast doubt on the reliability of confessions by the defendant (*R. v. Raghip*, (1991) Times, 5 December and *R v. Ward*, (1993) 2 All ER 577 : (1993) 1 WLR 619.

In *R v. MacKenney*, (1981) 76 Cr App R 171 it was held that a psychologist with no medical qualifications could not be called to give evidence as to whether a defendant was suffering from any disease, defect or abnormality of mind, but that psychiatric evidence might, in a proper case, be permissible to show that a witness was incapable of giving reliable evidence.

However, in both *R v. Raghip and R v. Ward* the court accepted that psychological evidence could be deployed to show that a confession was unreliable.

In *R v. Raghip* FARQUHARSON LJ said:

> "The state of psychological evidence before us... is such as to demonstrate that the jury would have been assisted in assessing the mental condition of Raghip and the consequent reliability of the alleged confession..... we consider that the psychological evidence as deployed before us was required to assist the jury and would have been admissible at Raghip's trial."

In *R v. Ward*, (1993) 2 All ER 577 at 641, (1993) 1 WLR 619 at 690-691 GLIDEWELL LJ said:

> ".....we conclude on the authorities as they now stand that the expert evidence of a psychiatrist or a psychologist may properly be admitted if it is to the effect that a defendant is suffering from a condition not properly described as mental illness, but from a personality disorder so severe as properly to be categorised as mental disorder..... In our view, such evidence is admissible on the issue whether what a defendant has said in a confession or admission was

> reliable and therefore likely to have been true. We emphasise that the occasions on which such evidence would properly be admissible would probably be rare. This decision is not to be construed as an open invitation to every defendant who repents of having confessed and seeks to challenge the truth of his confession to seek the aid of a psychiatrist."

Thus, in a proper case, evidence from a psychiatrist or psychologist may be admissible to show that a witness is unreliable or a confession is unreliable. But Mr Jones points out that there is no case in which psychiatric or psychological evidence has been admitted to boost, bolster or enhance the evidence of a witness for the Crown or indeed of any witness. He submits that it is for the jury to asess the reliability and persuasiveness of witnesses and it cannot be right to allow evidence, however expert, to suggest to the jury that they should believe a witness of fact.

Reference may be made to a Canadian case, *R v. Kyselka*, (1962) 133 CCC 103. The headnote reads:

> "In a rape trial, where the complainant was mentally retarded, the Crown called a psychiatrist who testified that a person of her mental classification, which was a mental age of 10-11 years, was likely to be a truthful witness because such a person would lack the imagination to fabricate. Held, that such evidence was inadmissible. While the credit of a witness may be impeached by the opposite party, a party cannot call witnesses to testify to the credibility or truth of his own witnesses".

The Crown cannot call a witness of fact and then, without more, call a psychologist or psychiatrist to give reasons why the jury should regard that witness as reliable.

If the defence propose to call an expert witness to say that a witness of fact for the Crown should be regarded as unreliable due to some mental abnormality outwith the jury's experience, then, depending on the precise issue, it may be open to the Crown to call an expert in rebuttal, or even (anticipating the defence expert) as part of the prosecution case. It may even be open to the Crown to rebut by expert evidence a case put only in cross-examination that a prosecution witness is unreliable in a particular respect arising from mental abnormality. Much may depend upon the nature of the abnormality and of the cross-examination. If such evidence is admitted, great care would need to be taken to restrict the expert opinion to meeting the specific challenge and not to allow it to extend to 'oath-helping' [*R v. Robinson*, (1994) 3 All ER 346, 352].

Value of Expert Evidence in General and Degree of Credit to be Attached to it.—Perhaps the testimony which least deserves credit with a jury is that of *skilled witnesses*. These gentlemen are usually required to speak, not to facts, but to *opinions*; and when this is the case, it is often quite surprising to see with what facility, and to what extent, their views can be made to correspond with the wishes and interests of the parties who call them. They do not, indeed, wilfully misrepresent what they think, but their judgment becomes so warped by regarding the subject in one point of view, that, when conscientiously disposed, they are incapable of expressing a candid opinion. Being zealous partisans, their belief becomes synonymous with faith as defined by the Apostle, and it too often is but "the substance of things *hoped for*, the evidence of things *not seen*". To adopt the language of LORD CAMPBELL, "skilled witnesses come with such a bias on their minds to support the cause in which they are embarked, that hardly any weight should be given to their

evidence" [*Tracy Perrage Case* (1843) 10 Cl&F 154, 191; Tay s 58]. In *Middlings P Co v. Christian*, 4 Dillon, 448, 459, MILLER J, said:—

> "My own experience both in the local courts and in the Supreme Court of the United States is, that whenever the matter in contest involves an immense sum in value, and when the question turns mainly upon opinions of experts, there is no difficulty in introducing any amount of them on either side".

The infirmity of expert evidence consists in this that it is mostly matters of opinion and is based on facts detailed by others or assumed facts or opinion against opinion and experts are selected by parties by ascertaining previously that they will give an opinion favourable to the party calling them. Expert evidence is however, of value in cases where the courts have to deal with matters beyond the range of common knowledge and they could not get along without it, *eg* in matters of scientific knowledge or when the facts have come within the personal observation of experts.

The evidence of an expert is not conclusive [*Kamla v. Ratanlal*, A 1971 A 304 **following** *Ishwari Pd v. Md Isa*, A 1963 SC 1728; *Devi Pd v. S*, A 1967 A 64; *Public Prosecutor v. Mohammed Kassim*, (1977) 1 Malayan LJ 64 (Ipoh HC)]. It is for the court to assess the weight of the evidence and come to its own conclusion [*Wong Swee Chin v. P.P.*, (1981) 1 Malayan LJ 212 (Kuala Lumpur FC); *Chin Seu Wah v. P.P.*, 1958 Malayan LJ 154 (Penang HC); *Ang Chwee Keong v. R*, 1955 Malayan LJ 26 (Penang HC)]. The court should not form a conclusion on a matter which can only be properly concluded with the aid of expert evidence [*Syed Abu Bakar v. P.P.*, (1984) 2 Malayan LJ (Kuching FC)]. Where an expert witness is called to give evidence in court, his report should only be used to corroborate his evidence [*Public Prosecutor v. Lin Lian Chen*, (1991) 1 Malayan LJ 316 (Kuala Lumpur HC)].

An expert is fallible like all other witnesses and the real value of his evidence consists in the logical inferences which he draws from what he has himself observed, not from what he merely surmises or has been told by others. Therefore in cross-examining him, it is advisable to get at the grounds on which he bases his opinion. There is special difficulty in dealing with the evidence of expert witnesses. Such evidence must always be received with caution; they are too often partisans—that is, they are reluctant to speak quite the whole truth, if the whole truth will tell against the party who had paid them to give evidence. At the same time such witnesses are in a position of advantage; for they have had that special training and experience which the judge and jury are without; and the absence of which renders necessary the presence of such witness. Expert witnesses are far too prone to take upon themselves the duty of *deciding* the questions in issue in the action, instead of confining themselves to stating fairly and clearly their real opinion on the matter. Their duty is merely to assist the court by calling its attention to, and by explaining, matters the true significance of which would not be clear to persons who have received no scientific training, or have had no special experience in such matters [see *Hennessy v. Keating*, 25 RPC 125; *Birmingham S A Co v. Webb*, 24 RPC 27; Powell Ev 9th Ed pp 46, 502].

In assessing the relative value of the testimony of expert witnesses, as compared with witnesses of fact, their demeanour, their type, their personality, and the impression made by them upon the trial judge, *eg* whether they confined themselves to giving evidence, or acted as advocate—may powerfully and properly influence the mind of the judge who sees and hears them in deciding between them. When the trial judge comes to a clear conclusion in fact after carefully and dispassionately weighing the respective theories, it would not be proper or safe or in accordance with sound practice to reverse such finding in appeal [*Dias v. Augustus*, 162 IC 426: A 1936 PC 154].

The Supreme Court observed in a case that the observation of the High Court that there is a natural tendency on the part of an expert witness to support the view of the party who called him, could not be downgraded. Many so-called experts have been shown to be remunerated witnesses making themselves available on hire to pledge their oath in favour of the party paying them. *Gulzar Ali v. State of H.P.,* 1997 (8) JT 564 : (1998) 2 SCC 192.

After giving a wide latitude for *bona fide* opinions, however unfounded or fantastical—there can be no doubt that testimony is daily received in our courts as "scientific evidence" to which it is almost profanation to apply the term, as being revolting to commonsense, and inconsistent with the commonest honesty on the part of those by whom it is given. In truth witnesses of this description are apt to presume largely on the ignorance of their hearers with respect to the subject-matter of examination, and little dread prosecution for perjury [Best 11th Ed s 514]. *Templeton v. People*, [3 Hun (N Y) 357; **affirmed** 60 N Y 543], DANIELS J, said:—

> "The evidence of witnesses who are brought upon the stand to support a theory by their opinions, is justly exposed to a reasonable degree of suspicion. They are produced, not to swear to facts observed by them, but to express their judgment as to the effect of those detailed by others, and they are selected on account of their ability to express a favourable opinion, which there is great reason to believe, is, in many instances, the result alone of employment, and the bias arising out of it. Such evidence should be cautiously accepted as the foundation of a verdict, and it forms a very proper subject for the expression of a reasonably guarded opinion by the court. That is often necessary to prevent the jury from being led astray, by giving too much weight to evidence really requiring to be suspiciously watched, and which in many instances has induced unwarranted verdicts, discreditable to the administration of justice, as well as exceedingly detrimental to the public interest".

Rogers says: "It is not surprising to find the courts saying that, as this kind of evidence is fraught with danger, it ought to be received with caution, at least in cases where the testimony does not relate to precise scientific facts, or to the necessary conclusions which result from facts stated, but consists in mere matter of opinion as to the probable inferences which are to be drawn from certain facts, or is speculative and theoretical in its nature" [Rogers, s 199 2nd Ed p 450]. See the observations of JESSEL MR, in *Abinger Ltd v. Ashton*, LR 17 Eq 373-74; of STIRLING LJ, in *Bailey v. Clark*, 1902, 1 Ch 670; and of LORD COTTENHAM in *Re Dyce Sombre*, 1 M&G 116, 128 and also *Aitken v. McMeckan*, 1895 AC 310, 315-16; *Perera v. P*, 1901 AC 354, 359 as to the lesser weight of expert evidence. As to the weight of expert testimony, see Rogers, ss 197-207 2nd Ed pp 443-92.

The evidence of an expert witness has to be tested like that of any other witness, for even expert witnesses are liable to make mistakes [*Baines v. Ram Sahai*, A 1940 L 505]. The court is not bound to accept the evidence of an expert, *eg* a finger print expert, even though there are no special reasons for not accepting it [*Pub Pros v. Gopal*, A 1941 M 551: 195 IC 183]. The expert should not give an opinion on matters outside the field of his expertise [*Public Prosecutor v. Lin Lian Chen*, (1991) 1 Malayan LJ 316 (Kuala Lumpur HC)]. The expert's role is to explain to the court the application of necessary scientific or medical criteria so as to enable the court to come to its own judgment by the application of these criteria to the facts proved in evidence [*Sek Kim Wah v. P.P.*, (1988) 1 Malayan LJ 348 (Singapore CA)]. It is unwise to reject semi-expert opinion. The court should adapt itself to the circum-stances of the country and take advantage of such knowledge as may be available [*R. v. Majana*, 1957 SCR 14 (SC Sarawak)]. The evidence of skilled witness, however eminent, as to what he thinks may, or may not have taken place under a particular combination of circumstances, however confidently he may speak, is ordinarily a matter of mere opinion. Human judgment is fallible. Human knowledge is limited and imperfect. An expert witness

however impartial he may wish to be, is likely to be unconsciously prejudiced in favour of the side which calls him. The mere fact of opposition on the part of the other side is apt to create a spirit of partisanship and rivalry, so that an expert witness is unconsciously impelled to support the view taken by his own side. Besides it must be remembered that an expert is often called by one side simply and solely because it has been ascertained that he holds views favourable to its interests [*Hari Singh v. Lachmi*, 59 IC 220 : 3 Lah LJ 110; *Diwan v. R*, A 1933 L 561]. Opinion of the Imperial Serologist is entitled to great weight [*Ghir v. R*, A 1933 O 265].

An opinion of an expert witness not based on any well-defined inexorable laws of nature cannot be taken as decisive, especially when there is direct evidence opposed to it [*Pleydell v. R*, 96 IC 461 (L)]. In the circumstances of a case, the court may refuse to rely on the evidence of an expert unsupported by any reasons [*Haji Md v. S*, A 1959 SC 488 : 1959 Supp 1 SCR 922]. In a case, the expert evidence of brokers as to the value of property was held to be of no value [*Secy of S v. Sarala*, 5 L 227: A 1924 L 548]. Where the so-called experts give no data in support of their opinions as to value of land, they should be rejected [*Pribhu v. Secy of S*, A 1931 L 364]. Where experts contradict each other, their evidence carries no weight [*Sadiaa v. Ata*, A 1933 L 885; *Molar v. Dindayal*, A 1974 P&H 302]. The value of an opinion given by an expert depends to a large extent upon the materials put before him and the nature of the questions that are put to him [*In re Sattar*, A 1939 M 283]. The reliance to be placed on it must necessarily depend on the facts and circumstances of the particular case [*Ladharam v. R*, A 1945 S 4 : 1944 Kar 305]. It cannot be suggested that because an expert's evidence was accepted in one case it must be accepted in every other case [*Baswantrao v. R*, A 1949 N 66].

It has now become axiomatic that medical evidence can be used to repel the testimony of eye-witnesses only if it is so conclusive as to rule out even the possibility of the eye-witness's version to be true. A doctor who conducted post-mortem examination or examined an injured person is usually confronted with such questions regarding different possibilities or probabilities of causing those injuries or post-mortem features which he noticed in the medical report. But the answers given by the witness to such questions need not become the last word on such possibilities. After all he gives only his opinion regarding such questions. But to discard the testimony of an eye-witness simply on the strength of such opinion expressed by the medical witness is not conducive to the administration of criminal justice [*State of UP v. Harban Sahai*, (1998) 3 Scale 178 at 181 (SC)]. The court **followed** *Piara Singh v. State of Punjab*, A 1977 SC 2274; *Manga v. State of Haryana*, A 1979 SC 1194; *Ramdev v. State of Uttar Pradesh*, 1995 Suppl (1) SSC 547].

Conclusions adverse to the accused should not be drawn by relying upon passages in text-books for discrediting opinion without putting the passages to the expert [*Sunderlal v. S*, A 1954 SC 28 : 1954 Cri LJ 257; *Bhagwan Das v. S*, A 1957 SC 589: 1957 SCJ 515].

Corroboration of Expert Evidence.—There is nothing in the Act which requires the evidence of an expert to be corroborated [*Ladharam v. R, sup*]. As a matter of fact courts do not ordinarily base their decisions on expert evidence only, unless it is supported by other evidence external and internal, except that greater reliance is placed on evidence of finger-print experts.

Whole of the report including covering letter.—Where an expert who is going to be called as a witness sends a letter with his report which contains matter detrimental to one side's case (report in favour of employer, but letter suggesting possible negligence in the employer in the accident causing injury to employee) the substance of the letter would have to be disclosed [*Kenning v. Eve Construction*, (1989) 1 WLR 1189 DC].

Experts cannot admit facts.—Experts have no implied or ostensible authority to admit facts in any form. On behalf of the party engaging him. Carnell Computer [*Technology v. Unipart Group*, (1989) 45 Build LR 100].

Expert opinion need not state facts.—There is no rule of evidence of common law that, except in a straightforward uncomplicated case where the fact are admitted and readily identified, the opinion of an expert is admissible only when the premises, *i.e.*, the facts upon which his or her opinion is based, are expressly stated [*Trade Practices Commission v. Arnotts*, (1990) 92 Aust LR 527 Fed Ct of Australia].

Court's duty to reject non-expert opinion.— The judge is responsible for assuring that evidence that wrongly purports to be expert evidence is not admitted even though there is no objection from counsel of the defence. A medical orderly's opinion as to the instrument with which injury was caused was accordingly held to be wrongly admitted [*R v. Inch*, (1990) 91 Cr App R 51, Court Martial Appeal].

Court may act without expert opinion.—Where a victim of buggery was over 21 but simple minded and the accused had put in the defence of consent and, therefore, the issue was whether because of his mental handicap, he had the capacity to give consent, no expert evidence supporting mental handicap, it was held that it was open to the prosecution to argue mental handicap without the support of expert, by inviting the jury to consider complainant's evidence and demeanour [*R v. Robbins*, 1988 Crim LR 744 CA].

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

Illustrations.

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

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

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

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

COMMENTARY

Principle and Scope.—The meaning of this section is, when the opinion of an expert is relevant, any fact (not otherwise relevant) which supports or is inconsistent with that opinion is also relevant. In other words, the opinion of an expert is open to corroboration or rebuttal. [*Cf* s 11]. The subject matter of this section has been dealt with in the notes to s 45.

Facts, although otherwise relevant, as well as the result of experiments made either out of court with special reference to the trial, or even before the court itself may be given in evidence in corroboration, illustration, or rebuttal of the opinion. So, on cross-examination, the witness may be asked whether he has not expressed opinions inconsistent with his present testimony; and if he deny the fact, it may be independently proved [Phipson 8th Ed p 386].

Illus (b) is taken from the case of *Folks v. Chadd*, 1872, 3 Doug 157, which is to be found in Taylor, s 337. The point in dispute in this case was whether a sea-wall had

caused the choking up of a harbour, and engineers were called to give their opinions as to the effect of the wall, and proof, that other harbours on the same coast, where there were no embankments had begun to be choked about the same time as the harbour in question, was admitted, as such evidence serves to elucidate the reasoning of the skilled witnesses. *Illus* (*a*) is similar to Palmer's case (see note to s 45 *ante*).

This section is an exception to the rule excluding evidence of collateral facts where the question is a *matter of science*, and where the facts proved, though not directly in issue, tend to illustrate the opinion of scientific witnesses. *Illus* (*b*) exemplifies the point. So, if a point in dispute were whether a defendant was or was not on a certain occasion, in his right mind, it is clear that, after proof given by a medical man, or admission made by a counsel, that madness was often of an hereditary character, evidence tending to show that none of the defendant's ancestors or near relations had been insane, would be admissible in support of the negative proposition. So, on a question of disputed paternity, once proved as a matter of science that children are apt to inherit the features or general appearance of their parents and then, as a matter of course, evidence will be received of personal resemblance between the party in question and his alleged father [*Bagot v. Bagot*, 1878, 1 LR Ir 308; Tay s 337]. See *ante* s 9:"—*Question of Paternity*".

This section and the preceding section should be read with the first proviso to s 60 under which opinions of experts expressed in any treatise commonly offered for sale and the grounds on which such opinions are held, may be proved by the production of such treatise, if the author is dead or cannot be found or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the court regards unreasonable. The testimony of eye-witnesses is always preferable to medical evidence unless the medical evidence completely rules out the version given by the eye-witnesses. The medical evidence, *i.e* total absence of contusion etc., on the body of the deceased completely rules out the version given by the eye-witnesses that the deceased was hit and injuries were caused by 'lathis'. [*Ram Karam Mal v. State*, 1990 Cri LJ 846, 849 (All) : (1989) 11 A LJ 463].

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

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

Illustrations.

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

B is a merchant in [1][Calcutta] who has written letters addressed to *A* and receive letters purporting to be written by him. *C* is *B's* clerk, whose duty it was to examine at file *B's*

1. Pakistan "Chiftagong" and in Ceylon "Colombo" substituted.

correspondence. *D* is *B's* broker, to whom *B* habitually submitted the letters purporting to be written by *A* for the purpose of advising with him thereon.

The opinions of *B*, *C* and *D* on the question whether the letter is in the handwriting of *A* are relevant, though neither, *B*, *C* nor *D* ever saw *A* write.

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COMMENTARY

Principle and Scope.—[Opinion Evidence of Non-Experts].—S 45 makes relevant the opinion of experts or persons skilled in some special branch of learning or trade or profession. But the opinion of ordinary witnesses are also sometimes admissible, *eg* in matters respecting the identity of persons and things, handwriting, and other matters (*ante* pp 489-90). In such matters, positive evidence not being available, evidence of opinion of belief is admissible. In *Fryer v. Gathercole*, 13 Jur 542, the witness could not swear about the identity of a certain pamphlet but swore that she "believed" the document produced to be the same in question. Her evidence was admitted. POLLOCK CB said:—

> "The witness could say no more than this "I believe the copy of the pamphlet produced to be the same with that which I received from the defendant ..... As has been truely argued, there are many cases of identification where the law would be rendered ridiculous if positive certainty were required from witnesses. The evidence in the case was therefore properly received: any objection to it goes merely to its value".
>
> In the same case PARKE B, said: "In the identification of a person you compare in your mind, the man you have seen with the man you see at the trial. The same rule belongs to every species of identification".

The opinions of ordinary witnesses are admissible as to identity, handwriting and various miscellaneous matters. On a question of identity, a witness may state his belief or opinion as to persons or things, and so may testify to his belief that the prisoner in the dock is the person they saw committing a crime; or that a photograph, which is produced, is the likeness of some absent party; and in a case in which infringement of copyright in a picture is alleged, evidence of infringement may be given by a person who knew the original picture, although the original picture itself is not produced [Hals 4th Vol 17 para 88]. As to opinions of ordinary witnesses, see also notes to s 45.

Opinion Evidence of Non-Experts as to Handwriting.— This section deals only with the question of identification of handwriting. By it handwriting may be proved by the opinion of any person who is acquainted with the handwriting of the man alleged to have written the document. The section differs from s 45 in this, that under

that section the witness must be specially skilled in the art of distinguishing the writings; that is, he must be an expert as defined there. But under s 47 any person other than an expert, who is acquainted with the handwriting of another, may give his opinion as to identity of handwriting. A person may be acquainted with the handwriting of another person in three ways, *viz*, (*1*) when he has seen that person write; (*2*) when he has received communication purporting to be written by that person in answer to documents purporting to be written by himself, although neither of them saw each other write; (*3*) when in the ordinary course of business documents purporting to be written by that person have been habitually submitted to him. This kind of non-expert evidence is in most cases better than expert evidence, if the person deposing to it is disinterested and has in any of the ways above acquired a good knowledge of the character of one's handwriting or signature. But the strength of such evidence varies with the degree of a person's knowledge of the handwriting of another, *i.e.*, the opportunities he had of seeing him write or the number of times he has received and read correspondence written by him, or the length of time which has passed after he saw the last writing. But whether the witness asserts firmly or otherwise, his statement is a mere opinion based upon a comparison in the mind between the disputed writing and an example formed by his previous experience. An expert's comparison is between a disputed writing and an admitted or proved handwriting by one who has never before seen persons write. Opinion evidence is hearsay and becomes relevant only if the conditions laid down in s 47 is first proved [*Rahim Khan v. Krurshed*, A 1975 SC 209]. The opinion evidence of non-expert, becomes good evidence to go by, if the acquaintance of such witness with the signature of the executor is well proved within the meaning of s 47, Expln [*Dalim v. Nandarani*, A 1970 C 292].

> PATTESON, J, in *Doe v. Suckermore*, 5 A&E 703: "To my mind I confess the knowledge of the general character of a person's writing which a witness has acquired incidentally and unintentionally, under no circumstances of bias or suspicion, is far more satisfactory than the most elaborate comparison of even an experienced person called by one side or the other with a particular object".
>
> In the same case LORD DENMAN: "The clerk who constantly reads the letters, the broker who has been consulted upon them, is as competent to judge whether another signature is that of the writer of the letters as the merchant to whom they were addressed. The servant who has habitually, carried letters addressed by me to others has an opportunity of obtaining a knowledge of my writing, though he never saw me write, or received a letter from me".

The knowledge of the witness must not have been acquired or communicated with a view to the specific occasion on which the proof is offered. In *R v. Crouch*, 4 Cox 163, MAULE, J, said: "Knowledge obtained for such a specific purpose, and under such a bias is not such as to make a man admissible as a *quasi-expert* witness". (See also *Doe v. Suckermore, sup*; *R v. Richard*, 13 Cr App 140: Best, 11th Ed, s 236). Witnesses should declare their belief as to handwriting though once LORD KENYON held that a person who acknowledging his inability to form a belief, merely stated that the paper produced was like the handwriting of the individual by whom it purported to have been written, was admissible [*Garrells v. Alexander*, 1801, 4 Esp 37]. This case—though recognised by LORD WYNFORD, has been questioned by Lord Eldon [*Eagleton v. Kingston*, 1803, 8 Ves 476], and apparently with reason. It may be very true, that witnesses are occasionally pressed too much to form a belief; and some allowance should certainly be made for the over-caution of a scrupulous witness, but though it may be very proper to receive the testimony of a person, who, declining to express a decided belief, will yet declare that he is of *opinion*, or that he

thinks, the paper is genuine; yet it is going a step further when the witness will only state that the handwriting is like; a statement which may be perfectly true, but yet within the knowledge of the witness, the paper may have been written by an utter stranger (Tay s 1868). If his opinion rests upon extrinsic circumstances, *eg*, the probabilities of the case, or the character or conduct of the supposed writer, and not on his actual knowledge of the handwriting, it will be rejected [*Da Costa v. Pym, Peake*, Add Cas 144; Phipson, 11th Ed, p 528].

"The knowledge of a person's handwriting may have been acquired in both or either of two ways. The first is having seen him write; and though the weight of the evidence, which depends upon knowledge so obtained, must of course vary in degree according to the number of times that the party has been seen to write, the interval that has elapsed since the last time, the circumstances, whether of hurry or deliberation, under which he wrote, and the opportunities and motives which the witness had for observing the handwriting with attention; yet the evidence will be admissible, though the witness has not seen the party write for twenty years (*R v. Horne Took*, 25 How St Tr 71, 72) or has seen him write but once, and then only his surname" (*Doe v. Suckermore, sup, per* PATTESON, J; Tay s 1863).

"The second way in which the knowledge of a person's handwriting may be acquired, is by the witness having seen, in the ordinary course of business, documents, which by some evidence, direct or circumstantial, are proved to have been written by such person" (Tay s 1864).

[*Ref Tay ss 1862-68; Steph Art 50, 51; Phip 11th Ed p 528; Best 11th Ed ss 234-37; Rogers Expert Testimony, 2nd Ed, ss 122, 123; Lawson's Expert Opinion, 277; Powell, 9th Ed, p 54; Wig ss 693-709; Jones, 3rd Ed, ss 545-49*].

Different Kinds of Handwriting.—A document in the handwriting of a party is said to be an autograph or holograph; where it is in the handwriting of another person, and is only signed by the party, the signature may be called "onomatic", where it is signed by a cross or other symbol, "symbolic" (Best, 11th Ed, s 232).

Mode of Proving Handwriting.—In order to prove identity of handwriting any mode not forbidden by law can be resorted to. Two modes are indicated in sections 45 and 47. There can be other modes through which identity of handwriting can be established [*Gulzar Ali v. State of H.P.*, JT (1997) 8 SC 564]. The ordinary methods of proving handwriting are:—

(*1*) by calling as a witness a person who wrote the document or;

(*2*) saw it written or signed or;

(*3*) who is qualified to express an opinion as to the handwriting by virtue of s 47;

(*4*) by a comparison of the handwriting as provided by s 73;

(*5*) by admission of the person against whom the document is tendered [*Barindra v. R*, 14 CWN 1114, 1138: 37 C 467; *Sarojini v. Haridas*, 26 CWN 112: 34 CLJ 373; *Balakram v. Md Said*, 77 IC 872: A 1923 L 695; *Khijiruddin v. R*, 53 C 372];

(*6*) by expert evidence under s 45 (expert opinion is only relevant, but it is for the court to determine whether a writing is genuine or not);

(*7*) by internal evidence afforded by the contents of the document [*Mobarik v. S*, A 1957 SC 857: 1958 SCR 328; see notes to s 67 *post*]; and

(*8*) if signature or handwriting is to be proved by circumstantial evidence, the court should be satisfied that the circumstantial evidence irresistibly leads to the

inference that the person in question must have signed or written it [*Baru Ram v. Prasanni*, A 1969 SC 93: 1959 SCR 1403]. Where a document is proved to be executed by proving the signatures or thumb impression of the executant and proved to have been attested by witnesses by proving their signatures or thumb impression, it is not necessary to also prove the handwriting of the person who has written. Proof of execution of a document or where it is required to be attested, proof attestation also, are sufficient to make the contents of it admissible [*Smt. Noon Jahan Begum v. Abrar Ahmad Khan*, A 1982 All 149, 150].

These modes of providing handwriting should be considered in the light of the recent Supreme Court decision that testimony as to handwriting can be based not only upon the examination of the originals but also on that of photographs which can now be received in evidence to prove authorship, besides the contents of the documents provided that there is no trick photography and the photograph is above suspicion and the original cannot be obtained [*Laxmipat v. S*, A 1968 SC 938]. Phipson seems to have taken the contrary view (11th Ed, p 142) but Wigmore has observed". It is generally conceded that a photographic copy of handwriting may be used instead of the original, as far as the accuracy of the medium is concerned" (3rd Ed, Vol III s 797).

The simplest and the most satisfactory method is to call the writer himself when available, but it is not absolutely necessary to call him as the testimony of one who saw him write is also primary evidence. GRESHAM, J, while instructing the jury said:—

> "The testimony of a witness who speaks from his own personal knowledge is more satisfactory and convincing than the testimony of another who speaks to matters which lie in opinion only. If a witness swears that he was present and saw a party sign a disputed instrument in writing, his evidence ought to outweigh the statement of another (both witnesses being equally credible) who testifies that he is acquainted with the handwriting of the alleged signer and that he does not believe the signature is genuine". [*Risely v. Indianapolis &c R Co*, J Biss, USA 408, 20 Feb Cas No. 11, 859].

The opinion of witnesses as to the identity of the writing of a person with which they are acquainted would be relevant under s 47 though they are not experts [*In re First Grade Pleader*, 18 PR 1915: 28 IC 722; *Jagannath v. R*, 101 IC 493: A 1927 L 724].

Where a skilled witness swears to his belief that a particular writing is that of a certain individual, he does not pledge himself to anything beyond the fact that the handwriting is in his own opinion precisely similar to that of the said individual and nothing further than this can be guaranteed to the court where one writing is compared with another [*Girish v. Bhagwan*, 13 WR 191]. In *Lalit Mohan v. R*, 22 C 313, 322, the court observed:—

> "It was contended that the evidence to show that the post-card and the letter were in the handwriting of the accused is extremely meagre. We do not think that there is much force in this contention. There is the employer of the appellant and other persons who say that the post-card and the letter are in the handwriting of the accused. All of them do not say that they have seen the accused write, but they say that, in the course of business, they have seen his handwriting; and viewing the matter in the way in which such matters ought to be viewed by reasonable men, we do not think it would be right to hold that this

evidence does not prove that the post-card and the letter were in handwriting of the accused".

Opinion of handwriting expert or other witness is not conclusive. The court must come to its own conclusion [*Chandreshwar v. Ram Ch*, A 1973 P 215 (*Ishwari Pd v. Md Isa*, A 1963 SC 1728; *Fakhruddin v. S*, A 1967 SC 1326 **rel** on), *Kumaran Nair v. Bhargavi*, 1988 Cri LJ 1000, 1003 : (1987) 2 Ker LT 644 (Ker)].

Whether Handwriting Includes Marks.—The word "signing" means the writing of the name of a person so that it may convey a distinct idea to somebody else that what the writing indicates is a particular individual whose signature or sign it purports to be. A "mark" is a mere symbol and does not convey any idea to a person who notices it—very often, probably even to the person who made it [*Nirmal v. Saratmani*, 25 C 911, 915].

In *Sayer v. Glossop*, 12 Jur 546, PARKE B, said: "I think you may prove the identity of the party by showing that this mark was made in the book and that mark is in his handwriting". In *George v. Surrey*, 1 M&M 516 a witness who was called to prove the endorsement on a bill of exchange by a person by making a mark, stated that he had frequently seen the person sign instruments by making his mark and pointed out some peculiarities. The evidence was admitted by TINDAL, CJ.

Marks cannot however strictly be called handwriting as there is no formation of letter. As marks have for the purpose of some Acts been included within signature, persons may no doubt be called to depose that they saw the executants affix their marks and as marks in this sense come within 'handwriting', opinion evidence may also be admissible, though it seems it would serve no useful purpose. A mark is a sort of symbolic writing. A cross or a dot is the commonest form of mark, and crosses or dots are so alike each other that they are hardly identifiable. Dots are also commonly used in India as marks. Marks are therefore difficult of recognition or proof and unless some peculiar or special symbol is adopted as a mark, it is doubtful whether it can properly be the subject of opinion evidence. Illiterate persons often use the same ordinary mark. In *S v. Tice*, 30 Oregon, 457, the Oregon Court observed:—

> "Considering the manner in which marks of persons incapable of writing their own signatures are usually made by merely touching the pen while the scrivenor forms the character, it is a matter of doubtful propriety whether any person ought to be allowed as a matter of evidence, to testify such a mark as a handwriting,; but the mark of some person by reason of methods of their own adoption in its formation, and in its inherent peculiarities might be capable of identification".

The method of proving handwriting by some one who is familiar with the handwriting of executant is not available when the executant is a marksman [*Ponnuswami v. Kalyanasundara*, 57 M 662]. Generally, where a mark, on inspection appears to have nothing in its construction to distinguish it from the ordinary marks used by illiterate persons to authenticate their assent to written instruments, it is not the subject of opinion evidence [*Spinkle v. Crock*, 17 Pa St 159]. Testimony of the marksman himself denying the genuineness of his marks, twenty or thirty years having elapsed since it was made, was declared to be entirely insufficient to establish the fact of forgery [*Hutcheson v. Meazell*, 64 Tex 604]. In a case in America a son who had frequently seen his father affixing a mark in the shape or cross was allowed to prove the execution of a document, the court remarking "in some instances the peculiarity may be as strong as that which marks the characters of one who can

write, and in other instances not perhaps so great, yet in all, we apprehend, would be found something distinct and peculiar, which would enable one who had frequently seen the party make his marks to know it" [*Strong v. Brewer*, 17 Ala 706, 710, *per* DARGAN, CJ]. In one case the witness was allowed to state in his cross-examination that his father could not write or sign his name, but used to make a mark, the mark of a plough,—that he had no paper with him that bears his father's mark, and that the paper then shown to him did not bear his father's mark [*Yeshwadabai v. Rama Chandra*, 18 B 66, 74]. The question has occasionally been raised whether one can testify at all from the present basis to the genuineness of a *marksman's mark—ie*, whether there is any constancy of peculiarity in the mark of an illiterate which can serve as a type or standard. There should be no hard and fast rule; the discretion of the trial court should control [Wig s 693]. See *post* ss 67, 68.

As to execution or attestation by mark, see *post* notes to s 68.

"Acquainted With the Handwriting".—Under the Act acquaintance with one's handwriting may be in three ways: (*1*) seeing a person write; (*2*) knowledge by correspondence; (*3*) habitual submission of documents purporting to be written by a person in the ordinary course of business. The value of such evidence depends not merely upon the fact that the witness has seen the party write, or has corresponded with him, but also upon the extent of the opportunities he has had of becoming familiar with the handwriting in question, and upon his own habits of accurate observation. [Wills, Cir Ev 228]. But this observation of writing is very rarely made. Commonly you see a man in the act of writing, but you do not observe the manner in which he forms his letters; and if evidence of handwriting depended on such observation, it could very seldom be given. But writing can be sufficiently well known in other ways: as for instance, if you have received numerous letters from a person, and you have sufficient reason to believe he wrote them. This reason and belief are essential, because one person may, and often does, write letters for another [Ram on Facts, 53].

It must be proved that the witness is acquainted with the handwriting in question [*Rahim Khan v. Khurshed*, A 1975 SC 290; *Jasoda v. Janak*, 4 P 394: A 1925 P 787; *Bhupendra v. Eknarain*, A 1965 P 332; *S v. Ghulam*, A 1965 P 393]. In a suit for money an account of sale of goods, the ledgers, challans and corresponding bills can be proved by a person acquainted with the handwriting of the person who has written these records [*Rukmanand Ajitsaria v. Usha Sales P Ltd.*, A 1991 Gau (NOC) 108]. If in a proof of a document a witness says in examination-in-chief that he is acquainted with the writer's handwriting. It may be sufficient. It may not be necessary for a non-expert witness to state in examination-in-chief as to the mode in which the knowledge of the handwriting was acquired, it being open to the cross-examination counsel, to probe into the matter in the cross-examination [*Shankerappa v. Sushilabai*, A 1984 Kant 112, 118]. As rightly stated in Taylor (s 1863 citing *Moody v. Rowell*, 1835, Pick 419) "the witness need not state in the first instance how he knows the handwriting, since it is the duty of the opposite party to explore on cross-examination the sources of his knowledge, if he is dissatisfied with the testimony as it stands. Still, the party calling the witness may interrogate him, if he thinks proper, as to the circumstances on which his belief is founded". Taylor was approved in the following cases saying that it may often be expedient that the matters referred to in the explanation should be elicited in the examination-in-chief [*Shankarrao v. Ramji Harjivan*, 28 B 58 : 5 Bom LR 663; see *Shyam v. Beni*, A 1942 P 449; *Jagadish v. R*, A 1938 P 497; *Pusaram v. Manmal*, A 1955 Raj 186—CONTRA: *Hardevi v. S*, A 1969 SC 423].

When a witness without saying straight off that the signature on a document is that of a particular person proceeds to compare it with the signatures in his own book, the evidence is not admissible [*Rajmal v. Islam*, A 1958 Raj 6].

Evidence of a person acquainted with the handwriting of another is much more valuable than that of a handwriting expert [*Ramanlal v. S*, A 1951 C 305]. The credior who had himself seen the debtor writing the disputed signatures may prove the handwriting [*Girja Pd v. Sardarlabh*, A 1977 P 241]. The degree of his acquaintance will affect the value, though not the admissibility of his evidence [*Saqlain v. R*, A 1936 A 165]. Where the fact to be proved is a signature and witness merely says that the signature is of the person concerned, there is no proper evidence of the facts required to be proved under s 47 [*Surendra v. Mirza Md*, 63 IA 85 : 40 CWN 226 : A 1936 PC 15]. When the evidence of the pharmacist was not questioned and he stated that he was acquainted with the handwriting or the Doctor who issued the injury report, that evidence is sufficient [*Rameshwar Prasad Srivastava v. State of UP*, 1984 Cri LJ 996 998: 1984 All Cri 170 (All)].

"When He Has Seen That Person Write" [*Ex visu scriptionis*].—The rule with respect to proof "*ex visu scriptionis*" is clear and settled; namely that a person who has ever seen the supposed writer of a document write, so as to have thereby acquired a standard in his own mind of the general character of the handwriting of that party, is a competent witness to say whether he believes the handwriting of the disputed document to be genuine or not. He having seen the party write but once [*William v. Worrall*, 8 C&P 390], no matter how long ago [*R v. Horne Tooke*, 25 How St Tr 71, 72; *Eagleton v. Kingston*, 8 Ves 474, *per* LORD ELDON] or even only his surname [*Lewis v. Sapio*, 1 M&M 39] is sufficient to render the evidence admissible; the weakness of it is a matter of comment for the jury. [Best 11th Ed, s 234]. "But it ought to be remembered, that the unwise liberality of these rules is explainable by the history of the law. It was the product of a time when this mode of knowledge was the only orthodox one, when even the second mode (*'ex scriptis olim visis'*) was just obtaining acceptance and when the third mode (*'ex scripto nune viso'*) was not recognised at all; so that the paucity of recognised modes of proof upon a subject so common and so important forced the judges to concede a looseness in applying the primary and orthodox mode. This laxity the courts of to-day would do well to abandon, now that the strees of necessity does not exist" [Wig s 696].

It would be very unsafe to consider the execution of a deed efficiently proved by the testimony of a witness who identifies the grantor's signature from knowledge of his handwriting acquired by seeing him write his name twice or thrice, a year or two before the trial [*Moore v. Livingstone*, 28 Barb N Y 543, 561]. Much reliance cannot be placed on the evidence identifying signature when the witness had seen executant writing only once or twice, more so when the signature was made before witness was born [*Dhani v. Neem*, A 1972 Raj 9]. The weight and value of non-expert opinion evidence to handwriting depends in some degree upon the frequency with which the witness have had occasion to notice and carefully observe the handwriting and how recent their opportunities for noticing the same have been [*Green v. Terwillinger*, 56 Bed 384, 401]. Such evidence is an opinion of the basis of familiarity resulting from the frequent observation and experience [*Ala Uddin v. Sishir Kumar Dutta*, A 1989 Gau 42, 43]. This kind of evidence admits of every possible degree from the lowest presumption to the highest moral evidence. It may be so weak as to the unsafe to act upon, or so strong as in the mind of every reasonable man to produce conviction [*Hopper v. Ash*, 15 Ala 457, 462]. "It is not enough that he has been the person, as in the proof in this case, write but once and then under circumstances showing that the attention of the witness was not specially directed to the peculiarities of the penmanship. It would be dangerous

in a criminal case to rely on such vague and unsatisfactory evidence" [*U S v. Grow*, 1 Bond US 51, 55]. There are very many persons in India who, if they can be called literate, are literate in the sense that they can only scrawl their names somehow with difficulty by irregular alphabets and have done so only on a few occasions in their lives. The rule should be cautiously applied to the evidence of witnesses who say that they are acquainted with the handwriting of such persons.

In view of the circumstances in a case it has been observed that it is not impossible for a person unable to read and write certain characters to know and to recognise and prove the handwriting of another in those particular characters, if he had the occasion to see the latter write [*Ram Ch v. Jaithmal*, A 1934 A 990]. Witness ignorant of English language is competent to prove pronote executed in English [*Bhanwar v. Ahmed* A 1977 Gau 27].

Acquaintance With Handwriting Without Seeing a Person Write [*Ex scriptis olim visis*, *ie*, seeing known genuine documents].—Here the document has come to the observation of the witness without his seeing any person in the act of writing it. Hence the main source of controversy is the sufficiency of his grounds for believing that the person in question was *genuinely the writer*. The various circumstances that may be regarded as affording adequate ground for such a belief may be—(*1*) Express admissions, (*2*) implied admissions, *ie, any conduct which amounts to recognition* by the person in question of the genuineness of the writing received, (*3*) exchange of correspondence [Wig ss 699-702]. One is deemed competent to testify to the handwriting of another person, when he has received letters or documents purporting to have been written by that person in answer to those written by himself, or under his authority, and addressed to that person. In such case there is a presumption that the letter or document is genuine. It has sometimes been held that the receipt of letters purporting to come from another, which have been acted upon as such will render the testimony of the person so receiving them competent to prove the handwriting [*Tharpe v. Gisburne*, 2 Car&P 21]. But the decisions generally establish the proposition that the rule is not changed by the mere fact that the one receiving the letters has acted upon them, although such acts may be a part of a chain of evidence from which the acknowledgment or approval of the supposed author may be inferred. In order to bind the alleged writer he must recognize or ratify such instruments or letter. But it is well settled that the mere receipt of letters or papers, standing alone, is not evidence that they were written by the person whose name they bear [*Hightower v. Ogletree*, 114 Ala 94 and cases cited Jone, s 547].

> "[The requirement is that] transactions have taken place between them upon the faith that letters purporting to have been written or signed by him have been so written or signed"—*per* COLERIDGE, J. "The letters forming one side of a correspondence do not prove the handwriting because addressed to a particular person, that person's evidence may be requisite to show that *A* had in some way recognized the letter bearing *A's* signature and was therefore probably the individual who wrote them; but this is quite different from a knowledge of the handwriting, whether they proceeded from *A* or any other". [*per* DENMAN, LCJ in *Doe v. Suckermore*, 5 A&E 705].
>
> *Batchelor v. Honeywood*, 2 Esp 715, KENYON, LCJ: "If persons are in the habit of corresponding and letters are received from one to the other, upon which any transaction takes place that may enable the party to swear to his correspondent's handwriting". Knowledge derived from family correspondence may be sufficient to qualify a member of the family to testify as to the genuineness of handwriting [*Tuttle v. Rainey*, 98 NC 513; *Johnson v. Bee*, 100 SE 486].

There may be other modes by which a person may be acquainted with another's handwriting although he has not seen him write or has not corresponded with him. Thus LORD DENMAN said: "The servant who has habitually carried letters addressed by me to others has an opportunity of obtaining a knowledge of my writing, though he never saw me write, nor received a letter from me" [*Doe v. Suckermore, sup*]. The main point of consideration in such cases would be sufficiency of his grounds for believing that the handwriting is that of the person in question. If a person receives a letter purporting to come from another, that by itself does not lead to any presumption that it was written by that person. But if he receives from that person a letter *in answer* to his and the contents are such that that person only could have knowledge of them, it may form the basis of the presumption. And it becomes firmer if any transaction takes place on the basis of such correspondence. It may however be that a letter purporting to come from a person is written by another by the authority of the person whose name is used. On this question Rogers says: "But as ordinary persons write their own letters, unless the letters indicate the contrary, the courts have established the principle that a witness who has never seen the party write is competent to testify if he has through correspondence acquired a knowledge of such party's handwriting [Rogers, 2nd Ed s 122].

"Habitually".—'Habitually' means 'usually', 'generally' or 'according to custom'. It does not refer to the frequency of the occasion but rather to the invariability of the practice. The evidence of a record-keeper who files English papers in the ordinary course of official business about the handwriting of a person whose paper he has so filed on over 7 or 8 occasions is relevant [*R v. Ponde*, 27 Bom LR 1032 : 89 IC 1042]. Identification of handwriting from a single letter would be hardly sufficient under this section [*Hemraj v. Ramcharan*, A 1934 N 204].

Comparison of Handwritings. (See *post*, s 73 and notes).

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

Information Technology Act, 2000

Opinion as to digital signature [S. 47A].—A new section has been added so as to provide for relevancy of expert opinion on the genuineness of a digital signature. The new provision says that when the court has to form an opinion as to the digital signature of any person, the opinion of the certifying authority which has issued the Digital Signature Certificate is a relevant fact. A "certifying authority" means a person who has been granted a licence to issue a digital signature certificate under S. 24 of the Information Technology Act, 2000.

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

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

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

Illustrations.

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

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* Ins. by the Information Technology Act, 2000.

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COMMENTARY

Principle and Scope.—On matters relating to the existence of any *general* custom or right, opinions of persons who would be likely to know of its existence, are relevant, as such evidence is the best possible under the circumstances. The persons contemplated by this section are, so to speak, the depositaries of customary law, just as the text-books are depositaries of general law [*Jugmohan v. Mangaldas*, 10 B 528, 543]. General reputation is admissible to prove public rights under the same limitations as hearsay on this subject [Phipson, 11th Ed, p 506]. The expression 'general custom or right' has been explained in the *Explanation*. The word public has not been used in the expression as in s 32(*4*), but it is obvious that there was no intention, to make any distinction, between 'public right' and 'general right' or 'public custom' and 'general custom' and both classes would come under the section. Right or custom includes all kinds of right, or custom, *eg*, right to pathway, past-urage, water-course, tanks, local customs, usage of transferability of a holding, trade customs, &c. Opinions of living persons likely to know about the existence of such and other rights or customs are relevant. The section contains another exception to the general rule that the 'opinions' of individuals are not admissible in proof of facts. By and large a custom has got to be recognised by the community as a whole. The mere statement by a witness that he saw the plaintiff using the defendant's Pond for watering his own crop on his own land does not amount to evidence of custom recognised by the community [*Smt. Radha Krishna Kandolkar v. Tukaram Pundalik Homkhandi*, A 1991 Bom 119, 123].

This section deals with opinion evidence (as opposed to direct or positive evidence of a *living* person given by the witness himself as to the existence of a general right of custom [*Mg On v. Mg Shwe*, 1 LBR 80]. If such opinion is recorded in a book it is also admissible under s 48 although the author is living [*Somar v. Budhu*, A 1937 P 463]. S 13 deals with all kinds of rights, public, general and private and s 32(*4*) refers to the opinion evidence of persons who are dead or cannot be called as witnesses.

The distinction between s 32(*4*) and this section is this: (*a*) S 32(*4*) makes relevant statements of opinions, regarding public rights or customs, made by persons, who are *dead* or who cannot be found or have become incapable of giving evidence; the present section refers to the evidence of a *living* witness produced before the court, sworn and subject to cross-examination. (*b*) Again s 32(*4*) speaks of any public right or custom or matter of public or general interest; but in this section the word "public" does not appear. This does not however make much difference, as the terms "Public" and "general" are used in this Act as synonymous. [See notes under ss 13 and 32(*4*)]. Moreover, the *Explanation* adopts the sense in which the term "general" is used by Taylor and other English writers. (c) The present section also differs from s 32(4) inasmuch as the admissibility of opinion as evidence under this section is not subject to the condition that the statement was made before the controversy arose.

Competency of Person Whose Opinion is Relevant.—It will appear from the above that this section lets in reputation evidence as to the existence of any custom or right like s 32(*4*), although in the present case it is the opinion of a living person. But as in s 32(*4*), reputation evidence should not be repetition of mere hearsay; it should be the opinion of a person of competent knowledge. The expression used in both sections as to the requirement of qualification is identical, *viz.* "likely to be aware" [s 32(*4*)] or "likely to know" [s 48]. It does not appear to be absolutely necessary that the person stating his opinion should have personal knowledge of the existence of the right or custom although such knowledge supported by instances would be most

satisfactory. The experiential qualification should be insisted upon where available, because anybody who has experience of the custom from his connection with the matter by living in the neighbourhood or being a member of the community in question, is more competent than others. Failing this, evidence founded on information derived from reliable persons who were in a position to know of the existence of the custom or right would also be relevant under the *section* see *Sariathullah v. Prannath*, 26 C 187; *Daniraiji v. Vahuji*, A 1971 G 188]. The weight of his evidence would naturally depend on the position and character of the witness and of the persons on whose statements he has formed his opinion but he cannot be confined to instances in which he had personally foreseen the usage or custom exercised as a matter of fact. [*Balwinder Singh v. Sm Gurpal Kaur*, A 1985 Delhi 14, 20 : 194 Rajdhani LR 658]. But it must be the expression of independent opinion based on such information and not mere repetition of hearsay. The test is whether the person giving his opinion was likely to have had reliable knowledge,—which may be personal or otherwise. The witness's qualification must be examined from the specific point of view. The data on which such knowledge is based are therefore very important. Opinion founded on mere reputation on hearsay would be of no worth. See s 51 under which the grounds on which opinions are based are also relevant.

"Ordinarily speaking, such a witness must, in his examination-in-chief, speak to *facts* only, but under this section he will be allowed to give his *opinion* as to the existence of the general right or custom. He will not be confined to instances in which he has personally known the right or custom exercised as a matter of fact. Custom is not a matter to be submitted to the senses. It is made up of an aggregated repetition of the same fact, whenever similar conditions arise; and though a bare opinion is worth nothing without ascertaining the *data* on which it is founded; yet it is always to be remembered that s 51 is to be read with this section, and that the grounds for the witness's opinions are sure to be elicited in cross-examination, even if they should not be elicited in the examination-in-chief, or demanded by the judge. A boundary between villages; the limits of a village or town; a right to collect tools; a right to trade to the exclusion of others; a right to pasturage of waste lands; liability to repair roads, or plant trees; right to water-courses, tanks, ghats for washing; rights of common and the like, will be found the most ordinary in mofussil practice" [Nort p 22].

Opinion as to Existence of Any General Custom or Right.—(For the meaning of the word "right" see *Gujju Lal v. Futteh Lal*, 6 C 171, 180, 187 and *ante* s 13). A living person may state his opinion on the existence of a family custom and may state as grounds thereof information derived from deceased persons, but it must be the expression of independent opinion and not repetition of hearsay [*Amina v. Khalil*, A 1933 O 246]. The opinions of responsible members of the family as to the existence of a family custom and the grounds of their opinion, though generally in the nature of a family tradition, are clearly admissible [*Raja Ajai v. Vijai Kumari*, A 1939 PC 22: 1939 Kar 98]. Answers in Wilson's Manual on questions of customary law are clearly admissible under s 48 [*Subhani v. Nawab*, 68 IA 1 : 1941 Lah 154: A 1941 PC 21]. So also answers to questions *Riwaz-i-am* [*Rawa v. Taro*, A 1951 Pu 239].

On the question of the existence of a special custom in a clan excluding daughters from inheritance, *wazib-ul-arz* or village administration papers made in pursuance of Reg 7 of 1821 were held admissible under s 35. *Semble*—Even if such papers were treated as the recorded opinion of those likely to know the custom, they would be admissible under s 48 [*Lekhraj v. Mahpal*, 7 IA 63 : 5 C 744]. In a later case it was definitely held that entries made in the *wazib-ul-arz* are admissible in evidence under s 48 as the record of opinions as to the existence of family custom of inheritance by persons likely to know it [*Mussamat Lall v. Murli Dhar*, 33 IA 97: 28 A 488: 10 CWN 703; see *Beg v. Alla Ditta*, 44 IA 89 : 44 C 749 : A 1916 PC 129]. As to evidence of custom recorded in *Wazib-ul-arz*, see notes under ss 13, 35 pp 134, 436. For the meaning of the word "custom", its elements and essentials and a full treatment of the subject, see notes under s 13 p 129 *et seq*. Opinion as to non-

transferability of '*dwami-thicka*' in Sifton's settlement report is admissible [*Somar v. Budhu*, A 1927 P 463].

A tribal or family custom excluding a daughter or sister from inheritance in favour of collaterals may be proved by general evidence of members of the tribe or family who would naturally be cognizant of its existence. No specific instances need be proved. [*Ahmad Khan v. Channi Bibi*, 52 IA 379: A 1925 PC 267 : 30 CWN 506; **folld** in *Hubraji v. Chandrabati*, A 1931 O 89]. As to evidence of general custom excluding daughters and their issues from inheritance, see, *Barjrangi v. Manokarnika*, 35 IA 1 : 30 A 1: 12 CWN 74]. As to evidence of custom, see *Lachman v. Akbar Khan*, 1 A 440; *Bai Baiji v. Bai Santok*, 20 B 53.

In a suit by a landlord for ejecting the purchaser of an occupancy holding and avoiding the sale thereof, regard should be had to the provisions of s 48 in determining the question as to the existence of a custom or usage permitting the tenant to transfer the holding. Distinction between custom and usage pointed out [*Dalglish v. Guzuffer*, 23 C 427]. In a similar case it was held that the statements of persons who are in a position to know of the existence of the custom or usage of transferability in the locality are admissible under s 48. For instance, a person who had been in the habit of writing out deeds of sale, or one who had been seeing transfers frequently made, would certainly be in a position to give his opinion whether there was a custom or usage in that particular locality. In order to establish usage, it is not necessary to require proof of its existence for any length of time [*Sariatullah v. Prannath*, 22 C 184, 187]. A recital in a public record as to a statement made by a public servant with reference to a particular statement of the grant by the Government would not be admissible under s 48 where a specific right claimed by a particular individual and not a general rule, is being dealt with. It may be relevant under s 35 [*Sankaracharya v. Manali*, 51 IC 876]. In order to ascertain the customary rate of interest on *hundi*, the opinion of persons familar with the usage is admissible [*Har Narain v. Bihari*, A 1932 L 582].

The opinions of witnesses as to the effect in law of the practice in the business firms of crediting amounts to charities and temples in their books and the rights of the beneficiaries of such charities, &c are both inadmissible and useless [*Sooniram v. Alaga Nachiar*, 42 CWN 1125 : A 1938 PC 259].

Explanation.—The Explanation to this section excludes private rights from the operation of this section. Opinion or reputation evidence is not admissible to prove such rights, they must be proved by facts, such as acts of ownership [Norton p 227]. The Explanation to this section adopts the sense in which the term "general" is used by the English writers [Field p 195]. See notes under "*Commentary.*"

For the meaning of the terms, public and general rights—see notes to ss 13 and 32(*4*).

[1]**S. 49. Opinions as to usages, tenets, etc., when relevant.**—When the Court has to form an opinion as to—

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

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

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1 In Ceylon paras 2, 3, 4 have been designated (a), (b) and (c) respectively.

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

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

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COMMENTARY

Principle and Scope.—This section makes relevant the *opinions* of third persons as to usages, tenets, etc. Under it, persons having "special means of knowledge" of the usages, tenets, doctrine, &c of any body of men or family, or of the constitution and government of any religious or charitable foundation, or of the meaning of words or terms used in particular places or by particular classes of people, are allowed to give their opinions on these matters. Usages include usage of trade, agriculture, mercantile custom, &c and all other usages of any body of men or family, *eg* primogeniture, *kulachar, deshachar &c.* Proof of *facts* relating to customs or usages comes under s 13 and this section deals only with *opinion.* Expert opinion on legal principles of Hindu or Mohamedan Law is not admissible [*Masjid Sahidganj v. Gurudwara*, 44 CWN 957, 964: 67 IA 251:A 1940 PC 116].

In commercial transactions any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to it may be proved provided that such incident would not be repugnant to, or inconsistent with the express terms of the contract (see s 92 proviso 5, *post*). As to the meaning of unintelligible words, technical expressions, &c see also s 98 *post.* The opinion admissible under this section must be that of persons having special means of knowledge, *ie* experienced and competent men. This section must be read with s 51. This section refers to the opinion of a living witness which may be based on the statements of dead persons or other sources. S 32(*4*) deals with the opinion of dead persons (*ante*). Opinion of a dead person cannot be proved except under s 32 [*Pratap v. Jagadish*, A 1925 C 116]. The latter section refers to opinion as to public right or custom, but this section has a wider scope. By s 60 para 5, if the oral evidence refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds.

Under this section a witness may give his opinion upon:—(*a*) *Usage of any body of men.* This will include usages of trade and agriculture; mercantile usage and any usage common to a body of men. (*b*) *Tenets of any body of men.* This will include any opinion, principle, dogma or doctrine which is held or maintained as truth. It will apply to religion, politics, science, &c (*c*) *Usages of a family.* Such for instance as the custom of primogeniture in the families of ancient zemindars; any peculiar course of descent; the usage of Indian convert families and the like. Custom is of two kinds, *kulachar* or family custom, *deshachar* or local custom. *Tenets of a family*—this sufficiently explains itself. (*d*) *The constitution and government of any religious or charitable foundation.* (*e*) *Meaning of words or terms used in particular districts or by particular classes* [Nort p 228]. By s 98, evidence may be given with reference to

a document to show the meaning of technical, local and provincial expressions, abbreviations and of words used in a peculiar sense. For this purpose the opinions of persons having special means of knowledge on the subject would be valuable. The judge may also refer to Dictionary as to the meaning of words (s 57).

This section deals with *usages* apparently intended to cover cases in which the persons concerned do not form considerable class of persons, so as to justify the application of the term "general.". The section therefore includes cases to which s 32(*4*) could not be applied (Cunn p 131). In dealing with the caste of a family, evidence given in previous litigations between members of the family is relevant [*Maharaja of Kolhapur v. Sundram*, 48 M 1].

Proof of Usage.—"Usage is proved," says the court in Massachusetts, "by witnesses testifying of its existence and uniformity from their knowledge, obtained by observation of what is practised by themselves and others in the trade to which it relates. But their conclusions or inferences as to its effect, either upon the contract or the legal title, or rights of parties, are not competent to show the character or force of the usage" [*Haskins v. Warren*, 115 Mass 514, 535 cited in Rogers, 2nd Ed s 117 p 271]. It is held that witness is competent to testify as to usage whose only knowledge of it is derived from his own business, if that has been sufficiently extensive and long continued [*Hamilton v. Nickerson*, 13 Allen (Mass) 351]. The testimony of those engaged in a particular business as they never heard of such a usage, is admissible [*Evansille &c R R C v. Young*, 28 Ind 516]. It has been held in England that a London *stock-broker* is a competent witness as to the course of business of London *bankers* [*Adams v. Peters*, 2 C&K 722]. And it is to be observed that a person may be competent to testify as to the usage which prevails in a certain business, without himself being engaged in that business. So that when the question was as to the custom of the New York banks in paying the cheques of dealers, it was held proper to call as witnesses persons who were not employed in banks. "Although not employed in banking business, the witnesses were dealers with the banks, and had knowledge of the ordinary course of dealing with them. There is no necessity for showing a man to be an expert in banking in order to prove a usage. He should know what the usage is, and then he is competent to testify, whether he be a banker, or employed in a bank, or a dealer with banks. There is no reason why a dealer should not have as much knowledge on such a subject as a person employed in a bank" [*Griffin v. Rice*, 1 Hilton, N Y 184 cited in Rogers, 2nd Ed s 117 pp 272-73]. "Since it is necessary that there should be knowledge of the usage either actual or presumptive, before parties are bound thereby, it frequently becomes important to show that the usage is general in its character. In most cases it may not be possible to prove actual knowledge of the usage: and in such cases the usage must be shown to be so notorious and general that notice may be presumed. It is, of course, not necessary to the validity of usage that it should exist throughout the whole country" [Jones s 466].

In *Garuradhwaja v. Saparnadhwaja*, 27 IA 238: 23 A 37 : 5 CWN 33 the Judicial Committee observed:

> "By s 49 when the court has to form an opinion (*inter alia*) on the usage of any family, the opinions of persons having special means of knowledge thereon are relevant. But by s 60 if oral evidence refers to an opinion, or the grounds on which that opinion is held it must be the evidence of the person who holds that opinion. Their Lordships think it is competent for a living witness to state his opinion on the existence of a family custom and to state as the ground of that opinion, information derived from deceased persons and the weight of the evidence would depend on the position and character of the witness and of the persons on whose statements he has formed the opinion. But it must be expression of independent opinion based on hearsay, and not mere repetition of hearsay".

This case was relied on in *Chandrachoor v. Bibhuti*, A 1945 P 211 : 23 P 763 and *Pratap v. Jagadish*, 40 CLJ 331, 362: 82 IC 886 : A 1925 C 116 and it was held that statements made by deceased persons as to the usages of family after the controversy had arisen are inadmissible both under s 32(*4*) and s 49.

Usage and Custom.—The word 'usage' at any rate would include what the people are now or recently in the habit of doing in a particular place. It may be that this particular habit is only of very recent origin, or it may be one which has existed for a long time. If it be one regularly and ordinarily practised by the inhabitants of the place, where the tenure exists, that would be usage within the meaning of s 183 of the B T Act[2] 8 of 1885 [*Dalglish v. Guzuffar*, 23 C 427; **folld** in *Sariatullah v. Prannath*, 26 C 184. See also *Leong Wing Kong v. Public Prosecutor*, (1994) 2 Singapore LR 54 (Singapore CA).]. Interpretation of *wazib-ul-arz* accepted by certain members of a family is admissible in evidence when custom applicable to that family as entered in *wazib-ul-arz* is in question [*Sharfuddin v. Niamat*, 87 IC 8 : A 1925 O 688]. To prove a custom, opinions of persons having special means of knowledge are relevant under s 49 [*Baijnath v. Rajju*, 12 OLJ 571]. As to Customs and Usage—see, notes and the cases under s 13.

Constitution and Government of any Religious or Charitable Foundation.—Where the founder of a charity had described the object of his munificence as "godly preachers of Christ's Holy Gospel" evidence was admitted to show that a religious sect of Protestant Trinitarian Dissenters existed who bore that name and that the founder was herself a member of that sect [*Shore v. Wilson*, 9 Cl&F 355: *Cf* "*Contemporanea Expositio*", *post* s 98]. As to religious or charitable foundations under Statutes, see Beng Reg 19 of 1810; Mad Reg 7 of 1863, Religious Endowments Act (20 of 1863).

"Special Means of Knowledge."—"Special means of knowledge" does not necessarily mean that the person should be himself engaged in a particular business or be a member of an establishment or that the means of his knowledge should be confined to his own experience. All that is required is that he had opportunities for acquiring knowledge of an usage or custom and that he acquired the necessary knowledge; [see *Griffin v. Rice, sup*]. It has been held that evidence which represents the opinion of persons having special means of knowledge based on information derived from deceased members of the family is admissible under ss 49 and 60 [*Sarabjit v. Indrajit*, 27 A 203: 2 ALJ 720]. Where witnesses, as members of a family, have special means of knowledge, as to the usage of the family, their evidence will be relevant under this section in so far as the existence of such usages is concerned [*Shyamananda v. Ramakanta*, 32 C 6]. Where plaintiff as sister claimed to inherit self-acquired properties of her brother under a special custom, general evidence as to its existence by members of the tribe or family who would naturally be cognisant of its existence and exercise without controversy is admissible [*Ahmad Khan v. Channi Bibi*, 52 IA 379: 30 CWN 506: 6 L 502: A 1925 PC 267].

The weight of evidence would depend upon the position and character of the person claiming special means of knowledge and his evidence must be the expression of an independent opinion formed on what he has known or heard. Repetition of hearsay is still hearsay [*Tulsiram v. Ram Prasanna*, A 1956 Or 41: 1955 Cut 653].

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2. B.T. Act has been repealed.

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

Provided that such opinion shall not be sufficient to prove a marriage in proceedings [1][under the Indian Divorce Act, or in prosecutions under sections 494, 497, or 498 of the [2]Indian Penal Code].

Illustrations.

(*a*) The question is, whether *A* and *B* were married.

The fact that they were usually received and treated by their friends as husband and wife, is relevant.

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

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COMMENTARY

Principle and Scope.—The essential requirements of the section are (1) the court has to form an opinion as to the relationship of one person to another; (2) the opinion expressed by conduct as to the existence of such relationship is a relevant fact; (3) but the person whose opinion is relevant must be one who as a member of the family or otherwise has special means of knowledge on the particular subject of relationship [*Dolgobinda v. Nimai*, A 1959 SC 914]. For analysis and explanation of the section see also *Ulla v. Malli*, 1967, 33 Cut LT 740 and *Mahadeb v. Sova*, A 1973 Or 1. The offered item of evidence is 'the conduct', but what is made admissible in evidence is 'the opinion', the opinion as expressed by such conduct [*Chandu v. Khatemonnessa*, 1942, 2 Cal 299, 309: A 1943 C 76, 80—**approved** in *Dolgovinda v. Nimai*, A 1959 SC 914: 1959 Sup 2 SCR 814; *Bishwanath v. Dulrin*, A 1968 P 481]. The opinion may be of a member of the family or an outsider: it is enough if he has special means of knowledge on the subject. But the opinion must be expressed by *conduct, ie* external facts or events of the nature indicated in the illustrations to the section and not a mere statement of an opinion held by the witness or what another person may have said on the question of relationship. The last would not be admissible except under the conditions in s 32(5). The fact of existence or non-existence of relationship

1. In CEYLON, substitute the following: "for divorce, or in prosecution under section 24 of the Kandyan Marriage Ordinance, and sections 362 (B), 362 (C), and 362 (D) of the Penal Code."
2. In PAKISTAN, "Pakistan" substituted for "Indian". In BURMA, "Indian" omitted.

need not as under s 60 be proved by the direct testimony of the person holding the opinion. A witness need not confine his testimony to his own conduct as expressive of his own opinion with regard to the relationship; he may also extend it to the conduct of others [*Amar v. Chhaju*, A 1973 P&H 213 FB].

If a witness has no direct knowledge of the existence of relationship between two or more persons, he can give evidence about the statements relating to the existence of such relationship heard from persons who had special means of knowledge and such statements were made before the question in dispute was raised, if they are dead or cannot be found within s 32(*5*) [*Sheojee Tiwary v. Prema*, A 1964 P 187 (*Sitaji v. Bijendra*, A 1954 SC 601; *Dolgobinda v. Nimai, infra* **reld** on)].

As s 50 makes relevant opinion expressed by *conduct, ie* external facts, it may be proved by the evidence of the person holding the opinion or by other persons acquainted with such facts evidencing conduct. Evidence as to the conduct of other members of the family made admissible under the section may be given either by the person whose conduct is in question or by a stranger who has special means of knowledge. In either case, the witness is to state facts, observed by him and the opinion he has formed thereon: but it must be the expression of independent opinion and not mere repetition of hearsay [see *Garuradhwaja v. Swaparnadhwaja*, 23 A 37 PC (*ante*)]. The contrary view expressed by HUTCHINS J, in *R v. Subbarayan*, 9 M 9 *viz* "that proof of the opinion, as expressed by conduct, may be given seems to imply that the person himself if not to be called to state his own opinion but that, when he is dead or cannot be called, his conduct may be proved by others", is therefore open to objection. It has since been held by the Supreme Court (disagreeing with the opinion of HUTCHINS J,) that s 60 which provides that the person who holds an opinion must be called to prove that opinion does not necessarily delimit the scope of s 50 in the sense that opinion expressed by conduct must be proved only by the person whose conduct expresses the opinion. Conduct as an external perceptible fact may be proved either by the person himself whose opinion is evidence or by some other person acquainted with the facts which express such opinion [*Dolgobinda v. Nimai*, 1959 Sup 2 SCR 814: A 1959 SC 914; *Fulkalia v. Nathuram*, A 1960 P 480; *Bishwanath v. Dulthin*, A 1968 P 481; *Virsa v. Biswanath*, A 1971 P&H 362; *Champa v. Madho*, A 1980 P 103].

The word "relationship" embraces all kinds of relationship, although the words "by blood, marriage or adoption" have not been added after it by Act 18 of 1872 as in the case of s 32 cls (*5*), (*6*). The illustrations make it clear. This section makes relevant the evidence admissible in English law as "family conduct", but its scope appears to be more restricted than the English rule as it does not contain any provision making evidence of general reputation admissible as evidence of relationship (see *post*). The opinion made relevant is "opinion, *expressed by conduct*," *ie* a conduct which is the expression in outward behaviour of the opinion entertained as to relationship. When such conduct is tendered in evidence the court should subject if to a scrutiny and see whether the conduct is based on the opinion held by the person..... Evidence showing that the boy was treated for a long time as the adopted son when there was no controversy is sufficient to prove adoption although evidence of actual giving and taking is not forthcoming [*Balinki v. Gopa Kr*, A 1964 Or 117].

According to English law, evidence of general reputation is admissible to prove relationship, *eg* pedigree, marriage &c. Thus evidence of general reputation is admissible in proof or disproof of marriage [*Doe v. Fleming*, 4 Bing 266; *Evans v. Morgan*, 2 Cr&J 453; Phip 11th Ed p 506]. In the case of marriage the repute and conduct need not be confined to the family, reputation among and treatment by, friends and neighbours being receivable [*Doe v. Fleming, sup*; *Re Thompson*, 91 LT

680; Phip 6th Ed p 312]. On a question whether *A* and *B* were married, the fact that they were always visited and received as man and wife by respectable people in the neighbourhood, is admissible [Tay s 578; Step Art 53]. In most of the cases the marriage has been proved by evidence of certain specific facts, such as the parties being received into society as man and wife, being visited by respectable families in the neighbourhood, attending church and public places together, and otherwise demeaning themselves in public, and addressing each other, as persons actually married [*Kay v. Duchess de Vienna*, 1811, 3 Camp 123 and other cases].

The absence of evidence regarding sampradan and Saptapati will not negative the evidence of other witnesses about the marriage [*Sadhu Mondal v. Sarathi Bala Mandal*, 1985 Cri LJ 979, 981 (Cal)]. Still, though some of these circumstances are receivable, as amounting to acts of admission by the parties themselves, those, which are merely evidence of the treatment of the parties by third persons, cannot be admissible on any principle that would not equally include the declarations of strangers. The acts, like the words, merely show the opinions entertained by persons not called as witnesses; and though it may be said, that what a person does is usually better evidence of his opinion than what he says, yet this is an observation which goes rather to the weight than to the admissibility of the evidence. Accordingly, general evidence of reputation in the neighbourhood, even when unsupported by facts, or when partially contradicted by evidence of a contrary repute [*Lyle v. Ellwood*, 1874 LR 19 Eq 98] will be receivable in proof of marriage [Tay s 578] S 50 does not appear to admit evidence of general reputation (see *post*, heading below).

S 50, however, does not state as to how the conduct or external behaviour which expresses the opinion has to be proved. For this purpose one has to turn to s 60 [*Balaram v. Jayakrushna*, A 1972 Or 141].

Conditions of Relevancy.—In order to admit evidence three conditions must be fulfilled: (*1*) The person must be proved to have special means of knowledge. (*2*) (*a*) The opinion alone is evidence; (*b*) the opinion as expressed by conduct only is evidence; or in other words, (*i*) conduct only can be given in evidence; (*ii*) from the conduct given in evidence, the court is to see whether it is the result of any opinion held by the person. (*3*) The opinion which is relevant must be the one as to the existence of the relationship [*Chandu v. Khatemonnessa*, 1942, 2 Cal 299: 46 CWN 729: A 1943 C 76; **apprd** in *Dolgobinda v. Nimai*, A 1959 SC 914; **relied** on in *Ramadhar v. Janki*, A 1956 P 49]. The opinion made relevant is opinion expressed by conduct which is the expression in outward behaviour of the opinion entertained as to relationship [*Ramadhar v. Janki, sup*].

—Opinion. Opinion means something more than mere retailing of gossip or of hearsay; it means judgment or belief, that is, a belief or a conviction resulting from what one thinks on a particular question. The "belief" or conviction may manifest itself in conduct or outward behaviour which indicates the existence of the belief or opinion [*Dolgobinda v. Nimai, sup*].

A person can give evidence of what he has been told and what he learned about his own ancestors, provided what he says is an expression of his own independent opinion (even though it is based on hearsay derived from deceased, not living persons) and is not merely a repetition of the hearsay opinion of others and provided the opinion is expressed by conduct. Whether he got the information before the dispute or not would affect its weight and not admissibility [*Sitaji v. Bijendra*, A 1954 SC 601; *S M Dawood v. Abu*, A 1972 M 228]. What is said in *Sitaji's* case about a member of the family is also true of one who although not a member of the family has special means of knowledge about the relationship of parties. The words

"or otherwise" clearly contemplates such a case [*Ramadhar v. Janki*, A 1956 P 49]. Reading s 50 along with s 60 evidence of persons, though not members of the family, having special means of knowledge with regard to the conduct of a member of the family in relation to the persons whose relationship is in issue is admissible [*Ganesh v. Jadunandan*, A 1969 P 82 (*Ramadhar v. Janki, sup*; *Bhogal v. Bibi Nabihan*, A 1963 P 450; *Dologobinda v. Nimai, sup* **expld**].

—"Existence of Relationship." [Non-existence].—The section speaks of "evidence of such relationship" and it is not clear whether it includes the non-existence of relationship. When opinion evidence as to existence of relationship has been made relevant, it is difficult to see on what principle can negative opinion or opinion as to non-existence of relationship can be excluded when the court has to come to a decision as to the existence of relationship of one person to another. In Wigmore, s. 1603 (3) some cases are cited in which negative evidence was received. The phrase "existence of relationship" is also to be found in s 32(*5*) and (*6*) and it has been held that existence includes non-existence [*Suba Raut v. Din Dayal*, A 1941 P 205].

General Evidence of Repute in Proof of Relationship.—It is doubtful whether general evidence of repute is admissible under this section to establish relationship, as the section speaks of "*opinion expressed by conduct.*" In *Mi Me v. Mi Shwe Ma*, 39 IA 57 : 39 C 492, 503 : 16 CWN 529 : 14 Bom LR 204, however, the Judicial Committee held that in the absence of direct proof, consent to a marriage may be inferred from the conduct of parties or established by *reputation*. This decision was considered in a Madras case in which it was pointed out that the evidence which was accepted by the Privy Council was evidence of family conduct and it was held that s. 50 enacts a rule different from that prevailing in England. It is limited to opinion expressed by conduct and there is no other provision in the Act under which evidence of general repute would be receivable to prove relationship. The evidence to prove relationship is of the kind described in s 32(*5*), (*6*), (*7*) and s 50 [*Seshammal v. Kuppanaiyyangar*, A 1926 M 475: 91 IC 462; *Srish Ch v. Rakhalananda*, 45 CWN 435: 68 IA 34: A 1941 PC 16 and also *Chandu v. Khatemonnessa, sup* where the question has been dealt with at some length]. S 50 makes relevant the evidence admissible in English law as "family conduct", but evidence of general reputation admissible in that law to prove relationship is not admissible under the section [*Ramadhar v. Janki*, A 1956 P 49]. Agreeing with *Lakshmi Reddi v. Venkata*, A 1937 PC 201 the Supreme Court held that s 50 does not make evidence of mere general reputation (without conduct) admissible as proof of relationship [*Dolgobinda v. Nimai, sup*; **folld** in *Balaram v. Jayakrushna*, A 1972 Or 141].

Evidence of general reputation which is a cumulation of perception, testimonies heard and gathered and reduced to an assertion in court, is not admissible [*Chandu v. Khatemonnessa, sup*]. Section 50 does not make evidence of mere general reputation admissible as proof of relationship. [*Sitaram Nai v. Puranmal Sonar*, A 1985 Ori 171, 176 (DB)]. So it has been held that the evidence of witnesses that a certain man and a woman were regarded as man and wife by the members of the community does not come within s 50, not being opinion expressed by conduct as to the existence of such relationship of any person who as a member of the family or otherwise has special means of knowledge [*Lakshmi v. Anandi*, A 1933 A 130; *Parvin v. Gokal*, A 1949 Pu 35]; but evidence that the younger brother of the woman used to call the man as *Jija* (sister's husband) is covered by s 50 [*Parvin v. Gokal, sup*]. What people think may be expressed in words or by conduct. If there is a rumour or gossip that two persons are married, it is inadmissible. On the other hand the fact that they were received and treated by their friends as husband and wife is admissible. [*Ningu Vithu*

Bamane v. Sadashiv Ningh Bamane, A 1987 Bom 27, 31 : 1986 Mah LJ 186; *Khageswar Naik v. Domuni Bewa*, A 1989 Ori 10, 12]. Hence such statements as "I learnt that they were living together as man and wife," or "they were man and wife" are not receivable [*Mg Maung v. Ma Sein*, 1940 Rang 562: A 1940 R 181]. Mere opinion about relationship based on repute unsupported by conduct is not admissible; but it is not necessary that all instances of family conduct should be stated. The quantum of evidence must depend on the facts of each case [*Natabar v. Nimai*, A 1952 Or 75]. The evidence must be of an opinion, as expressed by conduct regarding existence of such relationship. Neighbours, co-villagers and friends having frequent intercourse can gather special means of knowledge of such relationship. Such opinion is not relevant unless it is expressed by conduct which means an overtact [*Baruni Behera v. Padan Behera*, A 1987 Ori 187, 189].

That the proof as to whether there was a marriage between two parties is to include a consideration of the character and conduct of various relatives and an estimate is to be formed as to whether on the whole these relatives prefer the tie of concubinage to that of marriage is a wrong doctrine regarding proof of marriage. The evidence on the subject should not be allowed as it is without competence [*Mohabbat v. Ibrahim*, 56 IA 201 : 33 CWN 645 : 10 L 725 : A 1929 PC 135].

In a case however it has been held that where the question is as to the legitimacy of a certain type of marriage, much may be gathered from the treatment accorded to the alleged wives and from the way in which they speak of themselves in official documents and petitions and legal proceedings in which they were parties. Evidence of this kind is conduct admissible under s 50 (*Illus b*) as it shows the repute in which such marriage is held in the family [*Maharaja of Kolhapur v. Sundram*, 48 M 1: A 1925 M 497; *Shivalingiah v. Chowdamma*, A 1956 Mys 17]. But treatment accorded to the alleged wives seems to be as much evidence of repute as of conduct of the persons who received them or mixed with them as such. The dividing line between conduct and repute in such cases appears to be so thin as to be imperceptible. At any rate the circumstances of their behaving themselves in society as man and wife, &c may be received as acts of admission by the parties themselves. The existence or non-existence of relationship between two persons may also be presumed under s.114 from the conduct of other members of the family or strangers, towards them (see s 114). The proviso enacts that in divorce cases or in cases of adultery, bigamy, etc. where marriage is an ingredient in the offence, mere *opinion* evidence by conduct is not sufficient to prove it. In these cases the *fact* of the marriage must be strictly proved.

Evidence of notoriety of adoption must be the evidence of a number of people who owing to their circumstances are in a position to say what the attitude was of the alleged adoptive parents towards the claimant. A mere statement that an opinion was held by the witness or other persons does not come within the scope of s 50, the only provisions under which evidence of repute is admissible [*Mg Mya v. Mya*, A 1936 R 518]. The evidence of a firm servant as to the adoption ceremony and as to the fact of *A's* calling *B* and *B's* wife as father and mother respectively was admissible [*Jagabandhu v. Bhagu*, A 1974 Or 120].

Family Conduct, Family Tradition and Repute.—This section is founded on s 649, of Taylor which is as follows:—"*Family conduct*, such as the tacit recognition of relationship, and the distribution and devolution of property,—is frequently received as evidence from which the opinion and belief of family may be inferred, and as resting ultimately on the same basis as evidence of family traditions.—For, since the principal question in pedigree turns on the parentage

or descent of an individual, it is obviously material, in order to resolve this question, to ascertain how he was treated and acknowledged by those who sustained towards him any relations of blood or of affinity. Thus, in the *Berkeley Peerage Case* (1811, 4 Camp 416), SIR JAMES MANSFIELD remarked, that, "if the father is proved to have brought up the party as his legitimate son, this amounts to a daily assertion that the son is legitimate." So, the concealment of the birth of a child from the husband (*Hargave v. H*, 1848, 2 C&Kir 701).—the subsequent treatment of such child by the person who, at the time of its conception, was living in a state of adultery with the mother.—and the fact that the child and its descendants assumed the name of the adulterer, and had never been recognised in the family as the legitimate offspring of the husband, or that the alleged father had never recognised the child as his, and that the mother had never so put the child forward (*Poulett Peerage*, 1903 AC 395),—are circumstances that will go so far to rebut the presumption of legitimacy, which the law raises in favour of the issue of a married woman [*Goddright v. Saul*, 1791, 4 TR 356; *Marris v. Davis*, 1837, 5 Cl & Fin 163: *Banbury Peer*, 1811 App ne, to Le Marchant's Rep of *Gardener Peer* 389, 432, 433: *R v. Mansfield*, 1841, 1 QB 444: *Townshend Peer*, 1943, 10 Cl & F 289: *Atchley v. Spring*, 1864, 33 LJ Ch 354]. Again, if the question be whether a person, from whom the claimant shows his descent, was the son of a particular testator, the fact that all members of the family appear to have been mentioned in the will, but that no notice is taken of such person, is strong evidence to show either that he was not the son, or at least that he had died without issue before the date of the will [*Tracy Peerage*, 1843, 10 Cl & Fin 100; *Robson v. Att Gen*, 1843, 10 Cl & Fin 500, *per* LORD COTTENHAM]; and if the object be to prove that a man left no children, the production of his will, in which notice is taken of his family, and by which his property is bequeathed to strangers or collateral relations, is cogent evidence of his having died childless" [*Hungate v. Gascoigner*, 1846, 15 LJCh 382—Tay s 649].

The tradition and repute prevailing in the family as to any genealogical event must also be proved and will be received as presumptive evidence thereof. So, family conduct and treatment—*eg* the tacit recognition of relationship; the distribution of property; the omission of particular persons from mention or benefit in family wills and settlements [*Greaves v. Greenwood*, 2 Ex D 289]—are admissible as showing acknowledgment or the reverse by the family, though such facts fall, more properly, under the head of original evidence, than of hearsay, since they are not used as declarations to prove the truth of the matter stated, but merely as relevant conduct, nor are they confined solely to matters of pedigree. As to repute, treatment, and recognition by *strangers*,—in the case of marriage, the repute and conduct need not be confined to the family, reputation among, and treatment by, friends and neighbours being receivable. A witness deposing to the existence of such a general reputation must not, however, state what some particular individual has said on the subject; and if it appears that his testimony is based merely on the declarations of such person, the evidence ceases to be admissible as general reputation, and can only be received if the declarant was a deceased member of the family [*Shedden v. A G*, 30 LJ P&M 217; Phip 11th Ed p 427].

Taylor (s 584 in 1872) might have been the material source of s 50. But the language used in the section makes the Indian law much restricted [*Chandu v. Khatemonnessa, sup*]. On a question whether a particular amount was paid to the plaintiffs and their ancestors as *britti*, the history of the origin of the deities and their wordship which came to the plaintiffs as a tradition in the family from father to son was held inadmissible [*Srish Ch v. Rakhalananda*, 68 IA 34: 45 CWN 435:

A 1941 PC 16]. Family tradition has however been held admissible on question affecting custom (see *Raja Ajai v. Vijai Kumari*, A 1939 PC 22: 43 CWN 585: 1939 Kar 98).

The section may be considered in connection with s 114. The fact of relationship or non-relationship between two given persons may be inferred from the manner in which other members of the same family behave towards them, or from the manner in which the two persons behave towards each other, evidence of either kind may raise the presumption for which s 114 provides (Cunn p 132).

[*Ref Tay ss 578, 649; Steph Art 53; Phip 8th Ed pp 122-23, 305-06, 378; Jones s 315: Wig ss 1602-607, 2083; Greenleaf, s 106*].

Matrimonial offences.—In adultery cases the complainant has to provide strict proof of the marriage. The mere fact that they had been living together as husband and wife giving birth to their progeny would not do in a prosecution for matrimonial offences. And, as for s. 50 of the Evidence Act, the fact that the man and woman spoke of each other as husband and wife, that others coming into their life in the passing or to endure also took them as husband and wife, proves nothing more than conduct, and conduct alone is no substitute of strict proof. In a prosecution under s. 497 of the Penal Code the question of marriage must be proved strictly. In such a case admission by an accused in his statement under s. 313 of the Code of Criminal Procedure that the woman was the legally wedded wife of the complainant will not be of any avail to the prosecution if it otherwise fails to prove marriage between the complainant and the woman whose body stands violated [*Brij Lal Bishnoi v. State*, 1996 Cri LJ 4286, 4288 (Del)].

As far back as in the year 1928 it was held by WORT, J. in *Ganga Patra v. Emperor*, AIR 1928 Pat 481 : 29 Cri LJ 1045:

> "In cases of that kind where the relationship of husband and wife comes into question it is necessary to prove strictly that relationship and that that matter is always in issue whatever the defence in the petition or the prosecution may be. I mention that because the learned Government Pleader suggests that even though the strictest proof is not given in this case, it is unnecessary by reason of the fact that there was a tacit admission on the part of the accused that the woman was the wife of the complainant. I cannot, however, accede to that proposition of law. If it is conceded, and I think it must be conceded, that in a prosecution under this section the question of marriage must be proved strictly then any inference, tacit or otherwise, will not avail the prosecution if they fail to prove strictly the marriage between the complainant and the woman whose chasity has been violated."

Similarly in *Empress v. Kallu*, 1883 ILR 5 All 233 and *Morris v. Miller*, (1767) 4 Burr 2057 it has been held that admission of marriage by the accused is not evidence of it for the purpose of proving marriage in an adultery or bigamy case and significantly both these judgments were approved by the Supreme Court in *Kanwal Ram v. H.P. Administration*, AIR 1966 SC 614 : (1966 Cri LJ 472) at page 615. Of course, in the case before the Supreme Court the admission had been alleged to have been made by the accused in the written statement. It was observed:

> ".....It is clear that in law such admission is not evidence of the fact of the second marriage having taken place. In a bigamy case, the second marriage as a fact, that is to say. the ceremonies constituting it must be proved....."

In *Priya Bala v. Suresh Chandra*, AIR 1971 SC 1153, the above observations in *Kanwal Ram's* case AIR 1966 SC 614 : 1966 Cri LJ 472 were **approved** and **followed.**

Resemblance.—Evidence of resemblance of a child to the putative father is admissible [*Imambandi v. Motasuddi*, 15 CLJ 621 (*Wright v. Hicks*, 15 Georgia 160: 60 Am Dec 687; *In the matter of Jessup*, 1889, 81 Cal 408: 62 LRA 594; *Shorten v. Fudd*, 1895, 56 Kan 43: 54 Am St Rep 587 refd to)].

The opinion rule cannot avail to exclude testimony to resemblance, because matters of identity, similarity and the like are well settled to be not obnoxious to that rule [Wig s 166. See *ante*, s 9: "*Identity of anything and person*" and "*—Question of paternity*"].

Opinion Expressed by Conduct When Relevant.—Every presumption ought to be made in favour of marriage, where there had been a lengthened cohabitation, specially in a case where the alleged marriage took place so long ago that it is difficult to get a trustworthy account of what actually occurred. Sufficiency and insufficiency of father's acknowledgment, explained in this case [*Abdul Razak v. Age Md*, 21 IA 56: 21 C 666; see also *Khajooroonissa v. Rowshanjan*, 2 C 184: 3 IA 291]. Continual cohabitation and acknowledgment of parentage by a consecutive course of treatment will establish marriage and legitimacy amongst Mahomedans [*Khoja Hedayet v Raijan*, 3 MIA 295 and *Mahatata Bibi v. Prince Ahmed*, 10 CLR 293]. Where long cohabitation of a person's mother with his father is established by oral as well as documentary evidence, the presumption of lawful wedlock arises [*Milkhi Ram v. Milkhi Ram*, A 1996 HP 116, 119]. Acknowledgment and repudiation of legitimacy, both being conduct, are admissible under s 50 [*Sheodhar v. Jagdhar*, A 1964 P 316]. The doctrine of acknowledgment is inapplicable if paternity of a child is known [*Aizunnissa v. Karimunnissa*, 23 C 130]. Acknowledgment in face of proof of the fact that there was no marriage is of no avail [*Habibur v. Altaf*, 48 IA 144: 48 C 856: A 1922 PC 159; *Mohabbat v. Md Ibrahim*, 56 IA 201: 33 CWN 645: A 1929 PC 135]. Omission to mention an alleged son in a grant by a *zemindar* may afford an inference that he was not the son of the *zemindar* or was not recognized so by him at that time [*Muthuswamy v. Venkataswara*, 12 MIA 203: 11 WR 6 PC].

Where the legitimacy of the defendant in possession of the property is questioned by a party who has strict legal right to question his legitimacy, the defendant should be allowed to invoke against the claimant every presumption which reasonably arises from the long recognition of his legitimacy by members of the family or other persons [*Rajendra v. Jogendra*, 14 MIA 67: 15 WR 41]. Where an Oudh talookdar treated his daughter's son in all respects as his own son, he must be held to be his heir [*Maharaja Pertap v. Maharani Subhao*, 3 C 626: 4 IA 228. See also *Umrao Begum v. Irshab*, 21 IA 163: 21 C 997]. A person claiming as an illegitimate son, must establish his alleged paternity like any other disputed question or relationship and can rely upon statements of deceased persons under s 32(*5*), upon any opinion expressed by conduct under s 50, and also upon such presumption as may be warranted by the evidence [*Gopalasami v. Arunachellam*, 27 M 32]. The mere statement of A that B was the son of the defendant is not based on any conduct as conduct alone can be given in evidence [*Sonam Tsering v. Kunzarg Sherb*, A 1982 Sikkim 26, 32]. Where in a transaction with a third party, *A* described *B* as his son, acknowledgment of sonship is complete [*Nabakanta v. Mahatab*, 20 WR 164]. Under s 50 conduct of parties is very strong evidence regarding the factum of adoption [*Mullangi v. Venkatasubbamah*, 25 MLJ 373: 19 IC 740].

Where the question is whether one person is related to another in any degree, the facts that according to the religious usage the names of particular persons are usually recited or omitted during the performance of ceremonies, and the observance of pollution are instances of conduct within s 50 [*Ramakrishna v. Chinna*, 26 IC 110]. On a question whether certain persons are members of a joint family the opinion expressed by conduct of persons other than members of the family who had special means of knowledge are also relevant [*Sriram v. Gourishankar*, A 1961 B 136]. On the question as to whether the plaintiff's husband was the son of *K*, the evidence of plaintiff's elder brother who gave her away in marriage and *K's* barbar who acted as barbar in the marriage ceremony are relevant and admissible [*Mahadeb v. Sova*, A 1973 Or 1].

Where witnesses give no pedigree table, but state vaguely that they are related to the parties and, therefore know that the parties are related in fifth degree, they are not admissible under s 32(*5*) or s 50 [*Mohan v. Tulsan*, 109 IC 774: A 1928 L 824]. Where the statement of a witness giving the pedigree is found to be admissible under s 32(*5*), but he deposes to facts which establish such treatment as is contemplated by s 50, it should be admitted to that extent [*Chunna v. Mukat*, A 1934 A 117].

Special Means of Knowledge.—Evidence of witnesses who have no special means of knowledge and whose evidence is hearsay, about the name of the grandfather of the deceased is not admissible because that is not opinion expressed by conduct [*Dukh Haran v. Dulpin*, 1963 P 390]. If a person fulfils the conditions laid down in the latter part of sec. 50 *i.e.* if he is a person who as a member of the family or otherwise has special means of knowledge on the particular subject of relationship, then what is relevant is his opinion expressed by conduct. 'Opinion' means something more than mere retailing of gossip or of hearsay; it means judgment or belief, *i.e.* a belief or a conviction resulting from what one thinks on a particular question. [*Sauney Majhi v. Debi Devi*, A 1985 Orissa 22, 26 (DB)]. A person who lives 100 or 150 cubits away from the suit land cannot be considered to have knowledge about the relationship between two persons since the property is a Calcutta property and not a property in the mofussil where the residents generally know the other residents. [*Dukhiram Dey v. Mrityunjoy Prosad*, A 1982 Cal 294, 298]. In a proceeding under s 488 (now s 125) Cr P C unlike proceedings for bigamy or divorce opinion expressed by conduct of persons who had special means of knowledge on the subject may suffice to prove the fact of marriage [*Vanajakshamma v. P Gopala Krishna*, A 1970 My 305 (*K J B David v. Nilamoni*, A 1953 Or 10; *Bebi Bai v. Y Japamoni*, 1967 MLJ (Cr) 311: 1967 KLT 1122 **rel** on)]. Evidence of a witness who has no special means of knowledge about the relationship is not admissible [*Shankali Dhal v. Nilamani Dei*, A 1994 Ori 298, 300].

Proviso.—The proviso applies only to cases coming under the Indian Divorce Act and the prosecution under ss 494, 495, 497 or 498 Penal Code. The proviso was inserted because strict proof of marriage was required in original prosecutions and also in proceeding under the Indian Divorce Act [*Bhagavathy v. Ramankutty*, A 1976 K 34]. The only effect of the proviso is that on the basis of opinion evidence alone, the court cannot hold in a prosecution under s 494 PC that the factum of marriage has been proved [*Rabindra v. Prativa*, A 1970 Tri 30]. In cases of bigamy, divorce, and petition for damages by reason of adultery, however, stricter proof is required. Thus on a charge of bigamy, the prisoner's admission of a former valid marriage, or his marriage certificate coupled with evidence of cohabitation, though without testimony of any witness present at the marriage, or in the case of a Jewish Marriage, even such testimony without the production and proof of the marriage contract itself is sufficient (Phip 8th Ed p 278). The first of these exceptions rests on the ground that a

prosecution for bigamy being of a penal nature, require strict proof; and the second exception, upon the necessity of care being taken to prevent parties from setting up pretended marriage for civil purposes [Tay s 172].

The reference to Indian Divorce Act should be read as applicable to any proceedings for divorce, *eg* under the Special Marriage Act, 43 of 1954, the Hindu Marriage Act, 25 of 1955 &c.

The proviso would mean that the proof of fact of marriage is not to depend on opinion or conduct evidence in proceedings for divorce or bigamy, adultery &c [*Muttala v. Subbalakshmi*, A 1962 AP 311]. The provisions of this section show, that where marriage is an ingredient in an offence, as in bigamy, adultery, and the enticing away of a married woman, the fact of the marriage must be strictly proved [*R v. Pitambar Singh*, 5 C 566 FB: 5 CLR 579 (*R v. Wazir*, 8 BLR App 63 **overruled**); **folld** in *R v. Arshed*, 13 CLR 125; see also *Gopal v. R*, A 1925 R 328; *Prahlad v. R*, A 1930 C 447]. The fact must be proved in the regular way. The mere opinion expressed by conduct will not be sufficient. The evidence of the complainant and here mother as to the marriage, if believed is sufficient [*R v. Subbarayan*, 9 M 9]. In the case of bigamy, the witnesses did not speak of the ceremonies that were gone though in the performance of the marriage of the defendant with another girl. If that is so the evidence that the defendant married a girl, brought her to his house and they lived as husband and wife is not sufficient to bring the case within the requirements of sec. 50. [*Laxmi Sahuani v. Maheswar Sahu*, A 1985 Orissa 11, 18: 1984-1 Orissa LR 578 (DB)]. The court should require some better evidence of the marriage than the mere statement of the complainant and the woman [*R v. Dal Singh*, 20 A 166]. In *Raghuput v. R*, A 1927 O 140 : 100 IC 535 the evidence of the woman, her father-in-law and the headman was considered sufficient. In divorce cases marriage should be proved strictly and in general a certificate of marriage should be produced [*Premchand v. Hira*, A 1927 B 594]. In criminal cases, the facts constituting a valid marriage should be proved in accordance with s 50 [*R v. Kalu*, 5 A 233 and *R v. Dal Singh*, 20 A 166. See *Bhagu v. R*, 27 IC 837: 17 Bom LR 75; 3 OC 342; *Phikku v. R*, A 1925 O 701: 89 IC 464]. In criminal cases, the mode of proving a Mahomedan marriage has been pointed out in *Badal Aurat v. R*, 19 C 79.

Proviso is not applicable to contempt proceedings [*Bhonrilal v. Kaushaliya*, A 1970 Raj 83]. There is a presumption against the legislature that it enacts laws with a complete knowledge of all existing laws pertaining to the same subject, and the failure to bring an amendment to s. 50 corresponding to the amendment to ss. 304B and 498A I.P.C indicates that the intent was not to repeal existing legislation. [*Vadde Rama Rao v. State of Andhra Pra*, 1990 Cri LJ 1666, 1671 (AP)].

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

Illustration.

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

COMMENTARY

Principle and Scope. [Relevancy of Grounds of Opinion].—The opinion of an expert (s 45) or any other person competent to give his opinion under ss 47, 48, 49 loses its value unless the grounds on which the opinion is based are known. Mere

opinion is of no help or value. It has therefore been laid down that wherever the opinion is relevant, the grounds on which such opinion is based are also relevant. This section is therefore a necessary corollary to the preceding sections by which opinion evidence has been made admissible. The soundness or otherwise of the opinion expressed must depend to a large extent on the reasons on which the opinion is held. If the grounds are known, the value of the opinion may be increased or lessened. An expert whose special knowledge on a subject is derived from a study only of standard authorities is not incompetent to testify, but if it is found that that study was made solely for the purpose of deposing in the case in question, and that it was not in the line of his profession, he becomes incompetent to testify. Or, if it is found that his opinion is not based solely on the study he had to make in the pursuit of his calling or profession, but also on his own experience or actual observation, that opinion necessarily acquires a higher value. Persons who pretend to be experts without any special skill or experience may be exposed by questioning him about the grounds of his opinion.

S 46 covers to a certain extent the ground taken by this section. By that section any facts which support or are inconsistent with the opinion of an expert are relevant; so that evidence of *other* facts as observed or proved by *other* persons is admissible if it supports or contradicts an expert's opinion. The section however refers to the ground on which the opinion is held by the person who gives his opinion, and it applies to a "living person". In every case, the grounds of opinion may be inquired into in order to find out whether it is based on reason or mere hearsay, humour, conjecture, prejudice or on any unscientific or untenable data. They furnish an important test of the value of expert evidence. This is done in examination-in-chief or as is more usual, in cross-examination.

> CHALMERS J, in *Wood v. S*, 58 Miss 743: "Whether the witness be an expert or non-expert, the grounds of his belief and his opportunities of observation may always be elicited; and, whether the witness be of the one class or the other, his testimony should be rejected by the court where it consists of a mere declaration of opinion with neither learning, observation, nor acquaintance to support it".

Opinion Must Be Founded on Good Reasons Supported By Facts.—LORD MANSFIELD in *Carter v. Boehm* (1 W Bl 593), 3 Burr 1905, 1918: "Great stress was laid on the opinion of the (insurance) broker. But we all think the jury ought not to pay the least regard to it. It is mere opinion, which is not evidence. It is opinion after an event. It is opinion without the least foundation from any previous precedent or usage. It is an opinion, which, if rightly formed, could only be drawn from the same premises from which the court and the jury were to determine the cause".

WASHINGTON J, in *Harrison v. Rawan*, 3 Wash CC 587: "The mere opinions of the witnesses are entitled to little or no regard, unless they are supported by good reasons, founded on facts which warrant them in the opinion of the jury. If the reasons are frivolous or inconclusive, the opinion of the witnesses are worth nothing".

"Opinion is no evidence, without assigning the reason of such opinion" [DUNCAN J, in *Rambler v. Tryon*, 7 S&R 94]. "It is true that the mere opinion of witnesses who have not the aid of science to guide them would not have any weight in such a case, and would be generally inadmissible unless sustained by facts showing the opinion to be true ..... I find that the witnesses generally said they thought the slave to be unsound, and if they had stopped there such testimony ought to have been rejected; but they go on to fortify their opinion with facts showing some foundations for them,

and hence they were admissible and were to be compared with the facts by the jury" [O'NEALL J, in *Seibles v. Blackhkead*, 1 McMull, 57: cited Wig s 1917]. "Neither judge not jury can know what credence to give to a mere opinion, unless the reasons on which it is founded are set forth. The opinion of an expert may be contradicted by showing that at another time he had expressed a different opinion [*Sanderson v. Nashua*, 44 NS 492], and he may be asked as to the grounds upon which the change of his opinion is brought about [*People v. Donovan*, 43 California 162]. While the inquiry into the grounds and reasons of the opinion of an expert is more frequently made on the cross-examination of the witness, yet there is no objection to its being made on the direct examination [*Diskenson v. Fitchburg*, 13 Gray, 546, 557—Rogers, 2nd Ed p 84].

Where an expert was called and asked if he concurred in the statement of another expert witness, and if not, to state wherein he differed, the court held this method of examination to be erroneous. The Court said:—

"The mode sought to be adopted in eliciting the opinion of this witness, may have the merit of being expeditious, but it might be attended with some unfairness towards the witness himself, as well as to the opposite party. Witnesses called upon to testify professionally should be left free to give their own individual opinion upon the facts involved unconnected with, and untramelled by the opinions of others who may have been examined". [*Horne v. Williams*, 12 Ind 324; Rogers, s 37 2nd Ed pp 86, 87].

In *Collier v. Simpson*, 5 C&P 73, TINDAL CJ, laid down the doctrine, that an expert could be asked whether in the course of his reading he had found so and so laid down, and that his judgment and the grounds of it could be founded in some degree on books as a part of his general knowledge. And the authority of that case has been recognised and followed in America [Rogers s 19 2nd Ed p 46]. Although on questions of professional skill an expert may state in a general form what would be the proper course to pursue under the circumstances proved, he may not be asked what his own couduct would have been under such circumstances; though the fact that he has acted in accordance with his opinion may always be proved to enhance its weight [see Phip 8th Ed p 385 and the case cited].

The opinion of an expert witness is admissible in evidence not only when it rests on the personal observation and enquiry of the witness himself or on facts within his knowledge, but also when it is founded on the case as proved by other witnesses at the trial; and under s 51, when the opinion is admissible, the grounds on which it is based are also admissible. But it is settled law that an expert may not be asked purely speculative or hypothetical questions having no foundation in the evidence; in other words, before the expert witness is entitled to give evidence on the hypothesis, sufficient foundation for it must be laid by due evidence *aliunde* of the facts assumed [*Govt of Bombay v. Merwanji*, 10 Bom LR 907. See also *Secy of S v. Pilling & Co.*,26 B 1: 28 IA 121. See s 45 *ante*: "*Mode of examination of experts and its scope*"].

The opinion of an expert would carry little weight unless it is supported by a clear statement of what he noticed and on what he based his opinion. The mere mention that certain kind of tests known as Binet and Simon tests were applied and certain results were obtained, might be relevant as a piece of evidence, but would not be conclusive [*Titli v. Jones*, 56 A 428]. An excise sub-inspector giving opinion on illicit liquors must state his grounds so that the court may come to its own conclusion as to its correctness [*Ramkaran, v. R*, A 1935 N 13; *Gobardhan v. S*, A 1959 A 53; *Paltu v. S*, A 1961 MP 5].

[*Ref Steph Art 64; Phip 8th Ed p 385; Rogers, s 37 2nd Ed p 83; Lawson, 231; Wig ss 1917, 1922*].

CHARACTER, WHEN RELEVANT

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

SYNOPSIS

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COMMENTARY

Principle and Scope. [Character Evidence Generally Irrelevant].—This section and the three that follow deal with the relevancy of Character evidence. The Explanation to s 55 states what is meant by the term "character". It includes both "reputation" and "disposition", *ie* the general credit which a person has obtained in the estimation of the public or the people in the neighbourhood. Character may refer to the character of the parties to a litigation or the character of their witnesses. The expression "any person concerned" may include both witnesses and parties, but obviously it refers to the parties. The section deals with the relevancy of character evidence in civil cases. The character of a party to a civil suit is not relevant to the decision of an issue arising in that suit and so character evidence in regard to the subject matter of the suit is prohibited.

This section does not deal with the evidence of character in reference to the veracity of a witness which includes a party examined as a witness. As to *witnesses*, their character may always be impeached to test their veracity or to shake their credit by injuring their character (see s 146). Ss 138, 140, 145, 148, 154 provide for impeaching the credit of a witness by cross-examination [see *Guntaka v. Busetti*, A 1954 AP 39]. The *Credibility* of a witness is always in issue and for this purpose, the opposite party can deliberately challenge it in cross-examination by asking whether he has committed any crime or been guilty of immoral conduct. But if he gives a denial, no evidence can be given to contradict him (s 153).

As to character of *parties*, there is a difference between character in civil cases and character in criminal cases. Evidence of character, good or bad, is generally irrelevant in civil cases unless character is of the substance in issue. Character is of no moment when the issue is whether a contract was entered into or not, or whether there was payment of money or consideration. In action for seduction the character of the female for chastity is directly in issue and may be impeached either by general evidence of misconduct or proof of particular acts (; see Best 11th Ed s 258). When a person's general character is *in issue*, evidence may of course, be given of his general character, whether in civil or criminal proceedings. But where character is not in

issue in any civil case, evidence of character cannot be given under this section with a view to show that any conduct imputed to him is probable or improbable. It is the settled policy of the law to reject character evidence of parties in civil cases in proof or disproof of any act attributed to him. To admit character evidence would be to surprise the parties and to create a prejudice or bias for or against a person and to protract trials to an embarrassing length by the introduction of a mass of minor issues clouding altogether the main fact in issue. The rule therefore is that each transaction is to be determined by its own circumstances and not by the character of the parties. A fact involving grave moral turpitude may seriously affect the reputation of a person, but it is irrelevant on the question of existence or non-existence of a fact in a civil case. As observed in an American case:—

> "The general character is not in issue. The business of the court is to try the case and not the man. A very bad man may have a righteous cause" [*Thompson v. Church*, 1 Root 312].

Not only evidence of general character excluded, but evidence of character in relation to particular instances, is also not admissible. No doubt it is always open to the Judge to make his own estimate of the character of the parties or witnesses from the facts and circumstances placed before him and to base on it his opinion as to the probability or improbability of the conduct attributed to them or as to whether their evidence is worthy of belief.

Evidence of character should always be distinguished from evidence of previous conviction as also from previous acts of misconduct. As to when previous conviction becomes relevant; see s 54, *expln* (2); s 153, *Exception* 1; s 43, *illus* (*e*); s 14(2), and notes thereto.

Exceptions to the Rule.—There are however exceptions to the rule that character is irrelevant unless it is in issue:—

(*1*) CHARACTER AS AFFECTING DAMAGES.—In suits for damages, though character is not directly in issue, character evidence is admissible in mitigation of damages, *eg* breach of promise, seduction, adultery, defamation (see ss 55 and 12). Evidence of good character is not however admissible in aggravation of damages as there is always a presumption in favour of good character. Such evidence is admissible only to rebut evidence of bad character if given by the defendant [*Jones v. J*, 18 LT 243; *Naracott v. N*, 33 LJP & M 61].

(*2*) CHARACTER OF ACCUSED.—In criminal cases the fact that the accused bears a good character is always relevant (s 53), though general evidence of bad character is not admissible. Evidence of bad character becomes admissible in reply, only when accused gives evidence of good character. It is not admissible by the prosecution in the first instance [s 54].

(*3*) CHARACTER OF PROSECUTRIX.—In indictments for rape and other sexual offences, evidence of general immoral character of the prosecutrix is admissible [vide s 155 cl (*4*) and s 54 *post*].

(*4*) CHARACTER OF WITNESSES.—Character of witnesses, whether party or not, may be impeached to shake their credit [s 146; see also ss 153, 155]. Plaintiff may be discredited by answers elicited in cross-examination that his antecedents were bad [*Guntaka v. Busetti*, A 1954 AP 39]. It is not open to the Crown to adduce evidence of good character to boost the testimony of prosecution witnesses in response to evidence from the defence alleging misconduct on the part of those witnesses. [*R. v. Hamilton*, 1998 CLY 27 (Crim Div)].

(*5*) CHARACTER OF ANIMALS, PLACES AND THINGS.—When the doings of animals are in issue, it is relevant to prove the general character or habits of the species, or of the particular animals, as well as doings of the same, or similar animals

on other occasions [Phip 11th Ed p 239; Wig s 201]. If it is material to show the time of an accident that a horse had the habit of shying, instances may be proved of such shying both before and after the time of the accident [*Todd v. Rowley*, 8 Allen (Mass) 51: see *Brown v. Eastern Counties Ry*, 22 QBD 391, *ante* s 14]. The condition or character of a place or thing may sometimes be proved by showing its condition or character at other times [Phip 11th Ed p 218]. Thus to show the dangerous condition of a dock that other drownings had occurred thereat [*Moore v. Ransom*, 14 TLR 539 CA] or to prove the disorderly character of premises, convictions against former occupiers are receivable though the present one is admittedly respectable [*R v. Miskin*, 1893, 1 QB 275].

—DOGS. In a case of house trespass a police officer took trained police dogs to the place where a man was suspected to have climbed over the wall. He allowed them to smell that place and then he took them to a group of eight persons including the accused. He stated that one of the dogs pointed to the accused but the other dog did not do so as it was ill that day. The fact which the prosecution sought to establish was that the smell of a certain person who had been in one place was the same as that which the dog pointed out. *Held* that the behaviour of a dog is not admissible in evidence [*Said Ali v. R*, A 1940 Pesh 47]. Such evidence is however admissible in America on certain conditions. "It is conceded by most courts that the fact that a well-trained and well-tested bloodhound of good breed, after smelling a shoe or other article belonging to the doer of a crime, has tracked definitely to the accused is admissible to show that the accused was the doer of the criminal act. Nevertheless in actual usage, this evidence is apt to be highly misleading, to the danger of innocent men" [Wig s 177 and cases cited].

(*6*) CHARACTER AS AFFECTING STATE OF MIND.—It seems doubtful how far one person's character is admissible as evidence of another's state of mind. On a charge of homicide, the bad character of the deceased (*R v. Biggin*, 1920, 1 KB 213), and previous assaults by the latter (*R v. Hopkins*, 10 Cox 229), have been received to show that the prisoner had reasonable grounds for apprehending violence [Phip 11th Ed p 237]. So, in America, evidence of the character of and threats by, the deceased is admissible on a plea of self-defence [Phip 6th Ed p 190 referring to Whart, Cr Ev ss 69-84, 306, 758 and Wig ss 63, 110, 246-48]. In actions for homicide or assault where the issue of self-defence was raised, testimony has been sometimes received as to the quarrelsome or turbulent or violent character of the accused. Such evidence may be admitted when it is shown that the accused had knowledge of the fact, when it rests in doubt as to who was the aggressor. Under these circumstances such evidence throws light upon the intention of the accused and the reasonableness of his acts and may tend to establish his innocence or the degree of guilt [*Fields v. S*, 47 Ala 603 and other cases cited Jones s 156]. As to relevancy of facts showing intention, &c see *ante* s 14. It has been held in England that in actions for malicious prosecution or false imprisonment, the bad character of the plaintiff is not admissible to show reasonable and probable cause on the part of the defendant [*Newsam v. Carr*, 2 Stark, 69; *Cornwall v. Richardson*, Ry&M 305; *Downing v. Butcher*, 2 M&Rob 374; Phip 11th Ed p 237]. In America however it has been held that on the questions that he had probable cause and acted without malice and also in mitigation of damages, the defendant may show the general bad reputation of the plaintiff [*Colhoun v. Bell*, 136 La 149]. There is high authority for the view that in actions for malicious prosecution of a criminal action, the plaintiff may in the first instance prove his own good character. This is an exception to the general rule that in civil cases proof of good character cannot be received untill it is attacked; and

such testimony is deemed relevant in such cases as bearing directly on the issue of probable cause [*Murphy v. Davids*, 181 Cal 706 and other cases cited Jones, s 157].

Character Evidence.—(1) A party's character is *usually of no probative value*. Where the issue is whether a contract was made or broken, whether money was paid or property improved by mistake, whether goods were illegally converted or a libel published, there is no moral quality in the act alleged, or at any rate any moral quality that may have been present is ignored by the law; and moral character can therefore throw no light on the probability of doing or not doing. In torts involving violence or actual fraud, such a moral quality may appear; but, apart from these, it is (almost without exception) either non-existent or immaterial. (2) There is additionally a complex reason of Auxiliary Policy equally sufficient for exclusion. Admission of character evidence would cause *undue prejudice, unfair surprise*, and *confusion of mind* and the main controversy would be lost sight of in a great mass of minor issues [Wig ss 64, 29a].

As to character, Stephen says in his Introduction (pp 167, 168): "Evidence of character is, generally speaking, a make-weight, though there are two classes of cases in which it is highly important: (*1*) Where conduct is equivocal, or even presumably criminal. In this case, evidence of character may explain conduct and rebut the presumptions which it might raise in the absence of any such evidence. A man is found in possession of stolen goods. He says he found them and took charge of them to give them to the owner. If he is a man of very high character this may be believed. (*2*) When a charge rests on the direct testimony of a single witness and on the bare denial of it by the person charged. A man is accused of an indecent assault by a woman with whom he was accidentally left alone. He denies it. Here a high character for morality on the part of the accused would be of great importance."

In general, in actions unconnected with character, evidence as to the character of either party to a suit is inadmissible, being foreign to the point in issue, and only calculated to create prejudice. For the same reason where particular acts of misconduct are imputed to a party, evidence of general character is excluded; but it is otherwise where general character is put in issue [*Doe d Farr v. Hicks*, *Per* BULLER J, cited Esp 5, Ros NP 18th Ed p 86]. Where a party's character is not directly in issue in the proceedings but is merely tendered in proof of some other fact, it is as a general rule excluded—not because it may not in strictness by logically relevant, but for reasons of policy and fairness, since no litigant can be prepared to protect himself against imputation made without previous notice, and which may range over the whole of his career. In civil cases, evidence as to character, though character is not directly in issue, is admissible in two classes of cases; (*1*) to impeach the credit of witnesses; and (2) in reduction of damages [Hals 3rd Ed Vol 15 paras 530, 532].

As evidence of general character can, at best, afford only a glimmering light when the question is whether a party has done a certain act or not, its admission for such purpose is exclusively confined to criminal proceedings. A distinction, however, (has been taken) between cases where particular acts of misconduct are imputed to a party; and those where *his general conduct is put in issue*; and though evidence of character is rejected in the former, it has several times been admitted in the latter class of cases [*Doe v. Hicks*, *per* BULLER J, cited in *Doe v. Walker*, 1801, 4 Esp 50]. Thus in an action for libel contained in an answer to inquiries respecting the character of a governess, where the language complained of stated that the defendant parted with the plaintiff "on account of her incompetency, and her not being ladylike or good tempered", general evidence was given of her competency, good temper and

manners, by witnesses who were her personal friends [*Fountain v. Boodle*, 1842, 3 QB 5; Tay ss 354, 355].

Character of "Any Person Concerned".—The expression "any person concerned" is wide enough to include any person, but here it refers to the character of the parties to the suit and not to the character of witnesses, and represents the old state of the law, according to which, in actions unconnected with character, the character of either of the parties is irrelevant, and evidence introduced with the sole object of exposing the character of a party to the view of the court, is excluded [Nort p 230]. See *ante*; "*Principle and Scope*".

[*Ref Taylor ss 349-63; Steph Art 56; Best ss 257-64; Phip 8th Ed pp 173-79; Wills Cir Ev 6th Ed pp 272-79; Wigmore ss 52-80; Jones ss 148-58*].

"Character".—The meaning of the term "character" as used in this and in ss 53 and 54 has been defined in the explanation to s 55. That section must be read in connection with s 52. See notes to s 55.

"Except in So Far As Such Character Appears From Facts Otherwise Relevant".—In civil cases, evidence of general character of a party is not admissible. But when relevant facts are proved in support of the points in issue, and they in addition raise inferences as to the character of the parties, they become relevant for the purpose for which they are given in evidence as well as for the purpose of showing the character of the parties. (Nort p 230). When character is not in issue, general evidence of character is excluded. Where a will was impeached for fraud, the defendant was not allowed to prove his good character in answer [*Goodright v. Hicks*, BNP 296 cited in Phip 11th Ed p 228].

A person's character is not relevant in civil cases to show the doing or not-doing of an act by him. 'But there are two other ways in which character may be involved,—one an evidential question, the other not. (*i*) Whether a person's character is *evidentiary for any other purpose*, *eg* a wife's character to show that the husband's alienation of affection was a natural consequence. This use is less usual. (2) Whether a person's character is under the legal principles and the pleadings of the case *one of the issues* in it, *eg* the character of a plaintiff in defamation, either as expressly brought in issue by a plea of truth, or as issuable in the assessment of damages; the character of an employee as involving the employer's liability to a fellow-servant for the selection of incompetent employees; the character of a house charged with being used for immoral traffic; and so on. Here no evidentiary use is made of the character; it merely plays a part in the legal issues of the case, and the nature of the litigation must be looked to in determining whether character is so involved (Wig s 54). As to character as an issue in the case, see Wig ss 69-79. In civil cases evidence of a party's character, though not directly in issue, may be admissible in reduction of damages.

Character in Actions for Fraud.—The doctrine has been announced in a few cases that, if a party is charged with fraud or other act involving moral turpitude and the charge is based only on circumstantial evidence, he may rebut the charge by proof of good character [*Henry v. Brown*, 2 Heisk (Tenn) 213 and other cases cited in Jones s 154]. Greenleaf says: "And generally in actions of tort, wherever the defendant is charged with fraud from mere circumstances, evidence of his general good character is admissible to repel it [Greenleaf s 54].But this view is contrary to the weight of authority and does not seem to be based upon a recognizable principle of the law of Evidence. Instances are constantly arising, both in actions on tort and contract, where the motives of parties are called in question; but this fact does not in any legal sense, render the general character of such parties relevant to the issue. It is

a far safer rule that, in conformity with general rules of evidence in civil cases, each transaction should be ascertained by its own circumstances and not by the character of the parties [*Quinalty v. Temple*, 176 Fed 167 and other cases cited Jones s 154]. The view stated is that which now prevails and many illustrations might be given in which such evidence has been held inadmissible, although fraud and other misconduct is imputed [Jones s 155]. A few illustrations may be given from American cases. The evidence has been held irrelevant in actions to set aside the probate of a will on the ground of fraud [*Potter v. Webb*, 6 Greenl (We) 14]; for assault and battery [*Markey v. Angell*, 47 Atl 882]; for embezzlement [*Adams v. Elseffer*, 132 Mich 100]; for fraudulent conveyance of property [*Van Sickle v. Shenk*, 150 Ind 413]; for malicious prosecution [*Rogers v. Lamb*, 3 Blackf (Ind) 155]; for procuring a deed by fraud [*Norris v. Stewart*, 105 N C 455]. For other cases, see Jones, *s 155* fn. The Indian law is not otherwise. Where character is not in issue or relevant to the issue, character evidence is excluded.

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

COMMENTARY

Principle and Scope.—In criminal cases general evidence of good character of the accused is always relevant and admissible in favour of the accused, though general evidence of bad character is not admissible. Evidence of bad character of accused is wholly irrelevant and is admissible only in reply, *ie*, when accused has given evidence of good character and also in cases where character is itself a fact in issue [v. s 54]. Ss 53 and 54 should be read together. Such evidence of good character is admitted for the purpose of showing that it was unlikely that he should have committed the offence charged. So in *R v. Rowton*, Leigh & C 520, 540 : 10 Cox CC 25, WILLES, J, said:—

> "It is a mistake to suppose that because the prisoner can only raise the question of character, it is therefore a collateral issue. It is not. Such evidence is admissible because it renders it less probable that what the prosecution has averred is true; it is strictly relevant to the issue".

In some cases evidence of general good character of the accused may explain his conduct or suggest an inference as to his guilt or innocence. Evidence of good character is of no help or use unless there is some legitimate doubt as to the guilt of a person. ELLENBOROUGH, CJ, in *R v. Davison*, 1803, 31 How ST 99, p 217:—

> "Evidence of character is only of weight where the other evidence is in even balance, or where there is a fair and reasonable doubt of the prisoner's guilt".

In criminal proceedings a man's character is often a matter of importance in explaining his conduct and in judging his innocence or criminality [*Habeeb Md v. S*, 1954 SCR 475 : A 1954 SC 51]. Good character of accused is relevant in establishing credibility of accused as witness [*Tsang Kai Mong Elke v. Public Prosecutor*, (1994) 1 Singapore LR 651 (Singapore CA)]. It becomes of great importance in weighing the probabilities in doubful cases; that is, when any reasonable doubt arises as to the guilt of the prisoner, evidence of good character may turn the scale in his favour. When, however, the evidence against the accused is such as to clearly establish his guilt, no importance can be attached to evidence of good character [*R v.*

Turner, 1664, 6 How St Tr 565, p 613]; unless the object is to plead in favour of a lenient sentence, or possibly the opposite. Norton cites the case of an Irish who summed up thus: "Gentlemen of the jury, there stands a boy of most excellent character, who has stolen six pairs of silk stockings", when evidence was given as to the good character of a boy who had been clearly found guilty of theft [Nort p 231]. In *R v. Davison, sup*, ELLENBOROUGH, CJ, said to the jury:—

> "If you do not know which way to decide, character should have an effect. But it is otherwise in cases which are clear. If it could be permitted to operate where a crime is clearly proved, it would always be brought forward; because there is hardly any one who has not at some time maintained a good character.....If the evidence were in even balance, character should make it preponderate in favour of a defendant; but in order to let character have its operation, the case must be reduced to that situation".

Wigmore is of opinion that the broad rule now being that accused's character is "always admissible" in criminal cases, the above limitations do not exist. "Whether, when admitted, it should be *given weight* except in a doubtful case, or whether it may suffice of *itself to create a doubt*, is a mere question of the weight of evidence, with which the rules of admissibility have no concern" [Wig s 56]. Character evidence under this section must be confined to evidence of *general* character or general reputation and not the *individual opinion* of the witness (; see Expln to s 55) and also not character with reference to *particular instances, unless* a question of intention is involved. The worst criminal may have done meritorious acts at some period of life. It should be noted that under the law in the Act character includes *both reputation and disposition*, whereas under English law it is confined to reputation only [*vide Expln* to s 55 which should be read with this section].

General Evidence of Good Character in Criminal Cases.—A man's character is often of importance in explaining his conduct and judging of its innocence or criminality. Many acts which standing alone, would be suspicious, are freed from all suspicion, when we come to know the circumstances and the character of the person by whom they are done. Sir James Stephen gives, as an instance, the case of *B* being found in possession of *A's* watch, and stating, by way of explanation, that he found it and was keeping it to give it to *A*. The value of this explanation would depend entirely on the character and position of the person who gave it. As it stands, it is worth very little, but given by an intimate friend of *A* and a man of respectable character, it would effectually dispel any suspicion of a guilty intention. Evidence of good character accordingly, is always admissible, provided of course that it is appropriate to the particular nature of the offence charged. Evidence of bad character is also admissible, but only in the case and subject to the limitations provided in the next following section [Cunn Intro xxxiii].

When the point at issue is whether the accused has committed a particular criminal act, evidence of his general good character is obviously entitled to little weight, unless some reasonable doubt exists as to his guilt; and, therefore, in this latter event alone will the jury be advised to act upon such evidence. The inquiry, too, must be confined to the *general* character of the prisoner, and must not condescend to *particular facts*; for although the common reputation, in which a person is held in society, may be undeserved, and the evidence in support of it must, from its very nature, be indefinite, some inference varying in degree according to circumstances, may still fairly be drawn from it, since it is not probable that a man, who has uniformly sustained a character for honesty or humanity, will forfeit that character by the commission of a dishonest or a cruel act. But the mere proof of isolated facts can

afford no such presumption. "None are all evil", and the most consummate villain may be able to prove that on some occasions he has acted with humanity, fairness or honour. In all cases, too, when evidence is admitted touching the general character of the party, it ought manifestly to bear reference to the nature of the charge against him: as, for instance, if he be accused of theft, that he has been reputed an honest man: if of treason, a man of loyalty. It should also relate to the same period as the supposed offence; for as LORD HOLT once remarked, in *R v. Swendsen*, 14 How St Tr 596: "A man is not born a knave, there must be time to make him so; nor is he presently discovered after he becomes one". Subject to these observations, evidence of the defendant's general good character is admissible in all prosecutions whether for felony or misdemeanour [Tay s 351].

In criminal cases involving punishment as distinguished from penalty [*A G v. Bowman*, 2 B&P 532], the accused is allowed to prove his general *good character* (though not specific instance thereof) either by cross-examination of the witnesses for the prosecution, or in chief by his own testimony or that of independent witnesses. It has been held, however, that such evidence does not stand on precisely the same plane as that concerning the relevant facts going to prove or to disprove the issue, but that the jury only is entitled to take into consideration the good character of the defendant when, weighing the other evidence, one view of that evidence would be favourable to the accused [*R v. Broadhurst*, 13 Cr App R 125, CCA; Phip 11th Ed. p 229]. When the accused in a bribery case produces satisfactory evidence of good character, the improbability of his acting in the manner alleged must be taken into account [*R v. Khurshid*, A 1947 L 410]. [*Ref Tay s 357; Wig s 55; Phip 11th Ed, p 229; Best 11th Ed, s 261*].

A senior lawyer filed an affidavit certifying the good character of the accused. The latter was an assistant public prosecutor. The Supreme Court held that the evidence was of no use in the circumstances of the case. There was other evidence. *Rasam Abdulla Hafiz v. State of Maharashtra,* AIR 1998 SC 1451 : 1998 Cri LJ 1422.

S. [1]54. Previous bad character not relevant, except in reply.—In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant.

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

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

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COMMENTARY

Principle and Scope.—It has been seen from the preceding sections that general evidence of good character, is always relevant in criminal cases, and the accused is always entitled to tender such evidence. Not so, with regard to general evidence of bad character. This section embodies the rule that evidence of bad character cannot *in the first instance* be given for the prosecution and against the prisoner. When character is not in issue, to admit character evidence in proof or disproof of other issues would be to cause surprise and to create a prejudice or bias for or against a person. In *R v. Rowton*, Leigh & C 540 : 10 Cox CC 25: 34 LJMC 57, WILLES, J, said:—

> "It (character evidence) is strictly relevant to the issue; but it is not admissible on the part of the prosecution because (as my brother Martin says) if the prosecution were allowed to go into such evidence, we should have the whole life of the prisoner ripped up, and, as has been witnessed elsewhere, upon a trial for murder you might begin by showing that when a boy at school the prisoner had robbed an orchard, and so on through the whole of his life; and the result would be that the man on his trial might be overwhelmed by prejudice, instead of being convicted by that affirmative evidence which the law of this country requires. The evidence is relevant to the issue, but is excluded for reasons of policy and humanity; because although by admitting it you might arrive at justice in one case out of a hundred, you would probably do injustice to the other ninety-one".

A magistrate looking into the confidential police record of the accused and allowing his judgment to be influenced thereby violates the fundamental principles of criminal jurisprudence [*Gaya v. R*, A 1946 O 233].

(*1*) Just as every person is assumed to be sane, he is also assumed to be of normal moral character. An accused starts with a presumption of innocence. His bad character is not relevant unless he gives evidence of good character in which case by rebuttal, evidence of bad character may be adduced [*Ramlakhan v. S*, A 1977 SC 1936]. With a view to rebut the presumption sought to be raised by giving evidence of good character, the prosecution may also cross-examine the defence witnesses as to character (see s. 140). By offering evidence of good character, the accused challenges or invites an inquiry and thereby enables the prosecution to give evidence of his bad character. When an accused offers evidence of good character, that character must concern the specific trait involved in the charge and the counter evidence by the prosecution must also relate to the act charged [see *post*: "*Kind of Character*"]. Evidence of bad character in the first instance by the prosecution instead of leading towards establishment of guilt; would only injure the accused by

creating a prejudice against him. For, a man's guilt is to be established by proof of the facts and not by proof of his character [*R v. Turburfield*, 10 Cox 1; *Amrita v. R*, 42 C 958, 1021]. Evidence of character, when property admitted goes to the credibility of the witness [*R v. Longman*, 1968, 2 All ER 761].

(2) Evidence of bad character becomes also admissible, when it is itself a fact in issue (*v Expln 1*). The section has no application when the bad character of any person is itself a fact in issue, *eg*, when one is charged under the preventive sections of the Cr P Code. When evidence of bad character becomes relevant either on account of the tender of evidence of good character by the accused or on account of bad character being itself a fact in issue, a previous conviction becomes relevant as evidence of bad character (*v Expln 2*). Where upon the trial of a person accused of an offence, the previous commission of a similar offence becomes relevant for the purpose of showing existence of any state of mind, *eg*, criminal knowledge or intention, the previous conviction also becomes relevant (see s 14 *Expln 2* and notes and the statement of law by LORD HERSCHELL in *Makin v. Att-Gent* quoted *ante*: "*Principles of admissibility of similar acts and its qualification*") S 54 as it stood before its amendment by s 6 of Act 3 of 1891 departed from the rules of English law and treated previous conviction of any offence as relevant in *all cases*. The amendment was in consequence of the decision in *R v. Kartick Ch*, 14 C 721 (see notes *post* under the heading "Explanation 2").

S 54 does not override ss 8, 9, 11, 14 and 15—case law ref [*Lakshmandas v. S*, A 1968 B 400]. S 54 does not relate to the manner of proof of previous convictions, and relates only to the proof of previous convictions in certain cases [*Pokar v. R*, A 1941 S 173: 1941 Kar 398].

On charges of rape or attempt to ravish, evidence may be given of the general bad character of the prosecutrix [see s 155(*4*)].

Evidence of Bad Character Becomes Admissible to Rebut Evidence of Good Character.—This section as it now stands (after amendment by Act 3 of 1891), is taken from Taylor s 352 which runs as follows: Although the defendant, from motives of humanity, is allowed this reasonable indulgence, (that is, allowed to give evidence of his general good character in all prosecutions whether for felony or misdemeanour), the prosecutor cannot in the first instance, have recourse to the same loose testimony for the purpose of establishing the guilt of the accused; but if with a view to raising a presumption of innocence, witnesses to character are called for the defence, the counsel for the Crown may then rebut this presumption, by cross-examining the witnesses, either as to particular facts, or, if they deem it essential, as to the grounds of their belief. Evidence of general bad character will also be admissible, though it is seldom resorted to in practice. Moreover, in most trials for felony, and in some for misdemeanour, if defendant endeavour to establish a good character, either by calling, witnesses himself, or by cross-examining the witnesses for the prosecution, the prosecution have a right to prove the specific fact that the prisoner has actually been convicted previously [Tay s 352].

Where, however, character is tendered in proof or disproof of some other issue, it is, in general, even though logically relevant, excluded on grounds of public policy and fairness, since its admission would surprise and prejudice the parties by taking up the whole of their careers which they could not possibly come into court prepared to defend without notice, [*R v. Rowton, sup*]. Thus in criminal cases, to prove that the defendant committed the crime charged, evidence may not be given either that he (*1*) bore a bad *reputation* in the community [*R v. Rowton, sup*] or (*2*) had a disposition to commit crimes of that kind (*ibid*); or (*3*) had no other occasions committed

particular acts of the same class evincing such a disposition [*Ibid*, per WILLES J, at P 67; Phip 11th Ed p 228]. [As to evidence of particular similar facts, see ss 14, 15 *ante* and also *post*].

After a defendant has attempted to show his good character in his own aid, *prosecution may in rebuttal* offer as evidence his bad character. The true reason for this seems to be not any relaxation of the principle just mentioned, *ie*, not a permission to show the defendant's bad character, but a liberty to refute his claim that he has a good one. Otherwise a defendant, secure from refutation, would have to clear an unscrupulous license to impose a false character upon the tribunal [Wig s 58].

The fact that the accused has a bad character is not irrelevant under s 54 when the evidence relating to it is given for the purpose of showing that the accused had a bad character and was therefore likely to commit offences of the kind for which he has been convicted [*Daulat v. R*, 2 LLJ 653]. Objection being taken that evidence in the nature of bad character was admitted to the prejudice of the accused, the Supreme Court held that the evidence which disclosed certain unpleasant things about the accused was examined by the Court in order to ascertain the motive of the murder and not for proving guilt [*Mangal v. S*, A 1957 SC 199: 1957 Cri LJ 325]. The object of s 54 is to lay down that evidence of bad character including a previous conviction is, as a rule irrelevant "to help to establish an accused's guilt", but not to lay down that it may not be taken into account in passing sentence [*Suban v. R*, A 1929 M 306]. Under s 236 Cr P C in sessions trials and s 248(*3*) Cr P C in warrant cases no enquiry about the charge of previous conviction for the purpose of enhanced punishment shall take place until after the accused has either been convicted or found guilty. The principle underlying this provision, *viz*, that knowledge of previous conviction should be excluded when weighing the evidence is also to be found in s 54 [*Mg E Gyl v. R*, 81 IC 106: A 1924 R 106].

As to the mode of proving a previous conviction see s 248 Cr P Code. The Court should not act upon admission of accused [*Dayaram v. R*, A 1929 L 768]. Previous conviction or the identity of the accused cannot be proved by the mere production of conviction slip [*R v. Shk Abdul*, 43 C 1128; *Pakar v. R*, 1941 Kar 308: A 1941 S 173]. As to proof of previous conviction by finger-print, see *Ramdas v. R*, 21 CWN 469.

[*Ref Tay ss 349-63; Steph Arts 56, 57; Best, ss 256-83; Wigmore, ss 52-80; Phip 11th Ed pp 229-36; Ros Cr Ev, 86-7*].

Kind of Character.—Under the English law, evidence of character of accused, whether for or against him, must bear reference to the trait involved in the charge against him, *eg*, honesty in charges relating to dishonesty; chastity or morality in regard to women in charges of rape. Evidence of honesty or that he paid his bills regularly would be irrelevant on a charge of rape or cruelty. In *R v. Rowton*, Leigh & C 520, 537, MARTIN, B, said that it must be "good character with respect to the species of crime charged against him". The law under the Act does not appear to be otherwise. It should also relate to a period of the supposed offence [*R v. Swendson*, 14 How St Tr 596]. In *Dover's Trial*, 6 How St Tr 539, 552, (cited Wig s 59) a case of seditious publication—a witness testified that the defendant was a faithful member of the train-band. HYDE, LCJ, said:—

> "Do not mistake yourself, The testimony of your civil behaviour, going to church, appearing in the trained bands, going to Paul's, being there at common service,—this is well. But you are not charged for this. A man may do all this,

and yet be a naughty man in printing abusive books, to the misleading of the king's subject".

When, however, "an accused puts his character in issue' he must be regarded as putting the whole of his past record in issue. He cannot assert his good conduct in certain respects without exposing himself to inquiry about the rest of his record so far as this tends to disprove a claim of good character" [*per* LORD SIMON in *Stirland v. DPP*, 1944 AC 315, 324].

Where the honesty of the accused was a principal fact in issue because he was charged with false accounting and obtaining money on forged instrument and, therefore, the prosecution had the right to lead evidence as to his character, and they tried to expose him by questioning him about the contents of his legal aid application, it was held that his legal-aid application ought not to be used for the purpose of cross-examining him as to his credit because that application was not an evidence in the case. Since it could not be said that if the cross-examination had not taken place the jury would still have convicted him, he was entitled to be acquitted. [*R v. Stabbs*, (1982) 1 All ER 424 CA].

The accused woman was charged with affray and assault occasioning actual bodily harm. She confirmed in evidence that she had never been convicted of an offence of violence. This amounted to an evidence of good character and the prosecution sought to counteract it by questioning her about her pending trial for an offence of violence. It was held that the evidence of a pending trial was improper because that is still not an evidence of bad character. [*R v. Smith Lioanne*, 1989 Crim LR 900 CA].

Where one accused person put his character in issue as against that of his co-accused in a cut-throat defence and failed to give evidence, it was held that his co-accused was entitled to cross-examine prosecution witnesses about the defendant's character including establishing the criminal record of the accused. [*R v. Douglass*, 1989 RTR 271 CA; *Lui Mei Lin v. The Queen*, (1989) 2 WLR 175 PC].

Questioning the character of prosecution witness.—Where an accused person attacks witnesses for the prosecution and suggests that they are not reliable, he is not there by putting his own character in issue, since he is not stating directly or indirectly, any thing about his own character, and accordingly there is nothing, so far as his character is concerned, which the prosecution is entitled to rebut either by cross-examination or by independent evidence. [*R v. de vere*, (1981) 3 All ER 473 CA]. The court added that where an accused person states from the dock that he is of good character he is putting his character in issue and at common law the judge may allow in the exercise of his discretion the prosecution to call evidence to the contrary. The court followed [*R v. Gadbury*, (1838) 8 C&P 676 and [*R v. Butterwasser*, (1947) 2 All ER 415].

See also *post*, S 55: "*Kind of Character*".

Explanation 1: [When Bad Character is Itself a Fact in Issue]. According to this Explanation the section does not apply to cases in which the bad character of any person is itself a fact in issue, *ie* when the charge itself implies the bad character of the accused. In other words, the bad character of a man is relevant, when he is charged under some of the preventive sections of the Cr P Code, that is to prove that he is a man of dangerous character within the meaning or s 110 (*g*) of the Code of Cr Procedure or that he is likely to commit a breach of the peace. Bad character is also relevant in prosecutions under the Criminal Tribes Act (Act 27 of 1871). This explanation is to be read with Chap VIII of the Cr P Code under which persons of bad or dangerous character may be called upon to give security for keeping the peace

for good behaviour. In such cases in the interest of fair trial it is desirable that a trial judge should know that the accused person is of bad character, and, therefore, it is permissible for the trial judge to have before him during the trial the antecedents of an accused who is of bad character, so that the judge can, *e.g.*, then prevent cross-examination of crown witnesses that will let in the character of the accused [*R v. Ewing*, (1983) 2 All ER 645 CA].

Explanation 2: [Previous Conviction When Relevant].—This section as it stood originally ran thus. "*In criminal proceedings, the fact that the accused person has been previously convicted of any offence is relevant*; but the fact that he has a bad character is irrelevant unless ....." (The remaining portion was the same as now, up to *Expln. 1*). So the previous section while it excluded evidence of bad character in the first instance, treated previous conviction of *any* offence as relevant in *all* criminal cases, with a view to prejudice the accused or to suggest an inference as to his guilt with regard to the offence charged. The reason for this departure from the salutary rule of English law as given in the First Report of the Select Committee was that the authors of the Act were unable to see why a prisoner should not be prejudiced by such evidence when true. In spite of the clear wording of the former section, evidence of previous conviction was not admitted in *Roshun Dosad v. R*, 5 C 768, where it was held that except under very special circumstances, the proper object of using previous conviction is to determine the amount of the punishment to be awarded should the prisoner be convicted of the offence charged. As to previous convictions see also *R v. Shiboo*, 3 WR Cr 38: *R v. Phul Chand*, 8 WR Cr 11; *R v. Thakoordas*, 1 WR Cr 7, which were decided before the passing of the Evidence Act. Under the section as it then stood, a Full Bench of the Calcutta High Court held, in *R v. Kartick*, 14 C 721 that evidence of previous conviction was in all cases admissible, to prove the guilt of the accused so long as the section remained unaltered. It was in consequence of the decision that the section was amended by Act 3 of 1891. *Expln 2* to s 14 was also substituted by Act 3 of 1891. The present section is in accordance with the English rule (v *ante*) and also the view expressed in *Roshun Dosad v. R, sup.* See further, *post.*

"Unless Evidence Has Been Given That Accused Has a Good Character".—The words "*unless evidence has been given*" do not mean that unless evidence of good character has been given by his own or others' *independent testimony*. The prosecution is invested with the right to offer evidence of bad character when the accused elicits evidence of good character by cross-examination of the prosecution witnesses [*R v. Gadbury*, 8 C&P 676; *R v. Shrimpton*, 2 Den CC 396]. But a prisoner cannot be said to be endeavouring to establish a good character merely because a witness whom he called, voluntarily and probably against the prisoner's own desire, made a statement as to his good character and that does not entitle the prosecution to question the prisoner as to his previous conviction [*R v. Redd*, 1923 KB 104]. A statement not voluntarily made by an accused but extorted by repeated question in cross-examination cannot be treated as evidence given by accused of his good character and does not justify the prosecution in letting in evidence of his previous convictions [*R v. Beecham*, 1921, 3 KB 464]. Evidence of good character may be rebutted by the prosecution by cross-examination [*Stirland v. DPP*, 1944 AC 315, 327] or by independent evidence.

Where an accused has not put his character in issue, but has merely attacked the character of the prosecutor in cross-examination, evidence cannot be called by the prosecution to prove that he is a man of bad character [*R v. Butterwasser*, 1947, 2 All ER 415 CCA]. Where an accused, charged with indecent assault on a respectable married woman in her house, called a witness and examined her about his character

in regard to women, quite apart from the case, held he was properly cross-examined as to his bad character. There is no such thing as putting half your character in issue [*R v. Winfield*, 1939, 4 All ER 164].

—Evidence of Bad Character by Prosecution by Cross-examining the Accused.—In England the competency of the accused to appear as a witness for the defence under the Cr Evidence Act 1898 has introduced changes in the law dealing with his cross-examination. He may now under s 1(*f*) of the Act be asked questions tending to show that he has committed or been convicted of offences other than the offences with which he is charged, if he gives evidence of his good character or makes imputation on the character of the prosecutor or his witnesses; in the latter case the character of the prosecutor or his witnesses is not, however, a relevant fact under this section. In a charge of manslaughter with intention to procure miscarriage, the prisoner went into the box and gave evidence of good character. Thereupon he was asked by the prosecution whether on a previous similar charge he was acquitted and he replied in the affirmative—*held* that as the prisoner had given evidence of good character, he could be asked question tending to show that he had committed or been convicted of or been charged with the offence, but subject to the consideration that the question asked of him must be one which was relevant and admissible in the case of an ordinary witness. The rule that evidence of bad character may be given when evidence of good character has been tendered is subject to the consideration that the evidence sought to be given must be one which is relevant and admissible. Evidence cannot be given which is irrelevant or has nothing to do with the issue which the court was endeavouring to decide. The fact that the prisoner had been acquitted on a previous charge of murder or manslaughter was not relevant and did not send to destroy his credibility as a witness. The questions and answers were therefore inadmissible and the conviction was quashed [*Maxwell v. DPP*, 1936 AC 309].

Even if the defence necessitates imputation on the character of the prosecution witnesses the accused still exposes himself and there is no rule that the judge must exercise the discretion in his favour [*Selvey v. DDP*, 1968, 2 All ER 497 HL].

S 315(*1*) Cr P Code which permits the accused to examine himself as a witness for the defence puts the law on a par with that in England and so he can be cross-examined like any other witness (See Sarkar's Cr P Code, 4th Ed s 315(*1*)). He can therefore be cross-examined about his previous commission or conviction on a similar charge in order to rebut evidence of his good character when offered. As to criminating questions to the accused, see notes to s 132 *post*.

—Previous Bad Character Not Relevant Except in Reply.—Evidence of bad character is not admissible in the first instance [*R v. Behari*, 7 WR 7]. Evidence of character and previous conduct of a prisoner being matters of prejudice, and not direct evidence of facts relevant to the charge, ought not to be allowed to go to the jury [*R v. Bykant*, 10 WR Cr 17; see also *R v. Kulum*, 10 WR Cr 39 and *Mi Myin v. R*, 5 LBR 4: 2 IC 249]. A statement elicited from prosecution witness in cross-examination under s 154 as to the opinion of another witness about the bad character of accused is not evidence of bad character, when the statement was elicited with the collateral object of showing that the witness was resiling from his former statement before the committing magistrate [*Nitai v. R*, 1939, 1 Cal 337]. Where evidence of bad character (*viz* that statement of approver that accused used to go about together committing theft and burglary) and previous conviction has been admitted contrary to s 54, the judge should warn the jury that they should exclude the evidence from their minds [*Kailash v. R*, 48 CLJ 481]. Evidence as to general dishonesty of character is

not admissible for the purpose of raising a presumption of dishonesty in the particular case under trial [*Naga v. R*, UBR (1908) and 2nd Qr Evidence, p 1]. The complaint was that the accused came to the complainant and attacked him by complaining that he had made report to the police—*Held* that evidence of a police officer that the accused was under police surveillance is not admissible under s 54 [*Phekan v. R*, A 1931 P 345: 133 IC 449]. As to the improper admission of the previous bad character of the accused, see *R v. Gopal Thakur*, 6 WR Cr 72].

The prosecution may rebut evidence of good character, either by cross-examination or by independent testimony [*R v. Gadbury, sup*; *R v. Shrimpton, sup*]. The accused's witness may (though this is not usual) be cross-examined as to their means of knowledge, grounds of belief, or suspicions of misconduct on his part, since the last named are integral parts of character [*R v. Wood*, 5 Jur 225; Phip 8th Ed p 175]. Evidence of previous conviction amounts to evidence of bad character and is not admissible unless and until accused produces evidence of good character [*Teka Ahir v. R*, 5 PLJ 706: 60 IC 331].

In a warrant case tried under Ch XIX Cr P Code, when the accused leads evidence of good character by way of defence, the prosecution cannot as of right lead rebutting evidence, for no such privilege is conferred by the Code. But court may allow such rebutting evidence in its discretion, if it thinks just [*Ramaswami v. Ramalinga*, A 1930 M 448]. Same is also the position with regard to sessions trial under Ch XVIII.

Opinion of Reputation etc.—The opinion of an excise officer that an accused charged with illicit sale and possession of cocaine had the reputation of being a dealer in cocaine on a very large scale is inadmissible [*Batasimani v. R*, 53 C 707 : 30 CWN 854]. History sheet kept in policestation is not admissible in proof of man's character as it is based on hearsay [*Kamal v. S*, A 1959 C 342].

Relevancy of Bad Character or Previous Conviction When "Bad Character is Itself a Fact in Issue".—There appears to be some divergence of opinion whether evidence of previous conviction of dacoity alone would be relevant in a charge under s 400 Penal Code or whether previous conviction of any other offence, *eg* theft, burglary, binding down under s 110 Cr P Code &c would also be relevant. Previous commission or conviction of the offence of dacoity was held admissible in such a case under s 14, Expln 2, but not convictions subsequent to the time specified in the charge [*R v. Naba Kumar*, 1 CWN 146]. Evidence that the accused had committed crimes other than dacoities were however excluded in a charge under s 400 PC [*Pub Pro v. Bonigiri*, 32 M 179: 5 MLT 100; see *R v. Sher Md*, 46 B 958]. But in a case under s 401 PC it was held that where the other evidence has established association for habitually committing theft, evidence of previous conviction whether for offence against property or for bad livelihood has always been admitted not as evidence of character, but of *habits*. Of such evidence, convictions for bad livelihood would be more cogent than isolated theft [*Bonai v. R*, 38 C 408 : 15 CWN 461 (*Mankura v. R*, 27 C 139 **doubted** and **distd**; *R v. Naba Kumar, sup* **folld**); see also *Lelu Mollah v. R*, 52 C 595; *R v. Parbhudas*, 11 Bom HC 90; *Khilawan v. R*, A 1928 C 430; *R v. Kasem Ali*, 47 C 154; *Motiram v. R*, A 1925 B 195; *Beni Madho v. R*, A 1933 O 355; *Bachhu v. R*, A 1930 O 455; *Amdu Miyan v. R*, A 1937 N 17 FB; *Bhima Shaw v. S*, A 1956 Or 177]. The majority view appears to be that in a charge under s 400 PC previous conviction is admissible for proving habit and association. As habit is equivalent to character, character is itself a fact in issue in a charge under s 400 PC [see *Bhima Shaw v. S, sup* where cases reviewed]. In cases under ss 400 and 401 PC the general bad character of the accused is not a fact in issue. The fact in issue is a

particular trait of bad character, *viz* association for habitually committing robbery or theft. Evidence can be given of that particular trait, but not of general bad character, *eg* that the accused is a murderer or a cheat [*Bai Chaturi v. S*, A 1960 G 5].

In the absence of direct evidence, the purpose of association may be established by proof of acts from which this may be reasonably inferred [*Pir Baksh v. R*, A 1923 L 327]. As to the amount of evidence necessary to substantiate a charge under s 400 I P Code, see *Kader v. R*, 16 CWN 69; *Bhima Shaw v. S, sup*. Evidence showing the bad character of the accused, or his participating in the commission of offences other than the offence with which he is charged is not rendered inadmissible by s 54 if it is otherwise relevant [*Saroj v. R*, 59 C 1361].

In order to establish the guilt of the accused of joint possession of cocaine, evidence of previous conviction of trafficking in cocaine and that a history sheet had been opened by the police against him as a suspect, is not admissible under s 54 [*Rahim v. R*, A 1928 O 215]. Previous conviction must be proved strictly and in accordance with law. Although general statements, *eg* accused are all pick-pockets and that every one is afraid of them, may not be wholly inadmissible, no court should act on such evidence without testing the statements and obtaining particulars [*R v. Sheikh Abdul*, 43 C 1128].

> [In England where a prisoner is indicted not only for an offence but also for being a "habitual criminal", the court proceeds to the trial of the second charge after conviction on the first, and on that trial the court may, if it thinks fit, permit evidence to be given of the prisoner's general character and repute as a part of the case for the prosecution (Prevention of Crimes Act, 1908, 8 Edw VII, c 59 s 10; see *R v. Turner*, 1910, 1 KB 346: Powell Ev 10th Ed p 121). S 10(*5*) of that Act runs thus: "Without prejudice to any right of accused to tender evidence as to his character and repute, evidence of character and repute may, if the court thinks fit, be admitted as evidence on the question whether the accused is or is not leading persistently a dishonest or criminal life". In a prosecution under s 4 of the Vagrancy Act, 1824, 5 Geo IV, c 83, general evidence of bad character may be given to prove intent].

For the purpose of s 116 Cr P Code, the fact that the person is a habitual offender may be proved by evidence of general reputation and otherwise; [see s 116(*4*) Cr P Code]. Hearsay amounting to evidence of general repute, is admissible for the purposes of the proceedings under Chap VIII Cr P Code [*R v. Raoji Ful*, 6 Bom LR 34; see Sarkar's Cr P Code, 4th Ed s 110]. Such evidence of general repute must necessarily consist largely of 'hearsay'. Thus, a witness may depose "I believe the accused to be a habitual thief, and that is what persons of the neighbourhood generally say about him". This is admissible [*R v. Kumera*, A 1929 A 650: 51 A 275]. Evidence of cases in which the accused is suspected is not evidence of general repute within s 117 (now s 116) [*Raham Ali v. R*, 20 IC 231; *Rajnarain v. R*, A 1927 A 394], but it does not necessarily follow that such evidence is not admissible for other purposes [*R v. Kumera, Sup*].

Evidence of previous conviction is relevant in proceedings under s 109 Cr P Code [*Ramlal v. R*, A 1942 O 246]. A charge under s 110(*f*) [now (*g*)] Cr P Code, cannot be proved by general reputation but can only be proved by the evidence of the facts charged [*Kalai v. R*, 29 C 779: see also *Rup Singh v. R*, 1 ALJ 616; *Wahid v. R*, 11 CWN 789; *Parasulla v. R*, 13 CWN 244; *Akhoy v. R*, 5 CWN 249; *R v. Indar*, 40 A 372; *Ranga Reddi v. R*, 43 M 450 : 38 MLJ 97]. When a person in solely charged under s 110(*f*) [now (*g*)] of the Cr P Code, evidence of general repute is inadmissible to prove that he is a desperate and dangerous character. A provision of law which is

an exception to the general rules of evidence must be only applied to the case to which it is confined by the legislature. No argument can therefore be adduced from the admissibility of evidence of general repute under s 117 (now 116) of the Cr P Code [*Muthu Pillai v. R*, 34 M 255]. A person may be allowed to depose that the accused has a general reputation as a habitual thief or robber, but he should not be allowed to state that the accused is a 'bad character' or has the reputation of being a 'bad character' [*R v. Kurwa*, A 1928 A 357]. But when the statement that he is a 'bad character' is immediately followed by saying that he habitually commits theft, it becomes admissible as evidence of general repute. A witness can say that he himself suspects an accused person of having committed a certain offence, although evidence cannot be given that the accused has been suspected by other persons [*R v. Kumera, sup*]. The general reputation of a man amongst the community may no doubt be evidence in inquiries under s 110 Cr P Code [*Mg Maung v. Ma Sein*, A 1940 R 181: 1940 Rang 562]. In a prosecution under s 110 it is not necessary that witnesses who speak to the general reputation must be residents of the same place and a stranger could find out what the general reputation of a person is [*In re Perne*, 1938 Mad 720: A 1938 M 591; *Sahdeo v. R*, A 1942 O 356].

When a person is called upon to furnish security to keep the peace, evidence of general repute cannot be made use of to show that such person is likely to commit a breach of the peace. It is only in the case of a person who is a habitual offender, that the fact of his being so may be proved by general repute [*R v. Bidyapati*, 25 A 273; see also *Rai Isri v. R*, 23 C 621]. This case has been distinguished in *Chintaman v. R*, 12 CWN 299, where it has been held that the evidence of general reputation coming from the people of the villages where dacoities had taken place, is certainly to be treated as evidence of general repute.

On a charge of keeping a common gambling house under the provisions of the Bombay Act (4 of 1887), previous convictions under the same Act are relevant to prove the intention and knowledge which the offence charged involves [*R v. Alloo-Miya*, 28 B 129 : 5 Bom LR 805]. In a case under ss 325, 395, 402 I P Code, evidence of previous conviction in order to show the state of mind is not relevant [*Teka Ahir v. R*, 5 PLJ 705: 60 IC 331].

Order under s 118 (now 117) Cr P Code is not admissible against a person proceeded against under s 110 Cr P Code as such order is not a "conviction" within *Expln* 2 [*R v. Kurwa, sup*; *R v. Kumera, sup*] but it is admissible on other grounds. The fact that a person has been bound over may be stated and proved as one of the grounds on which the witnesses to general repute believe the accused to be habitual offender [*R v. Kumera, sup*].

Where accused are not charged with belonging to any gang, but with committing or conspiring to commit a particular dacoity, evidence to show previous association with approver for commission of theft and other discreditable acts is not admissible to show the character of the accused, their bad character not being in itself a fact in issue [*Wahiduddin v. R*, A 1930 B 157].

Cross examination as to previous conviction.—It is permissible to cross-examine in respect of convictions both of a similar kind and in some circumstances where the offences may tend to show a disposition to commit offences of this sort. Section 1(*f*) of the 1898 Act specifically states he may be asked about other offences and his bad character if the provisos are satisfied. The purpose of the cross-examination is to attack his creditworthiness as a witness and not to seek to show that he has a disposition to commit the offence in question, though in some cases it may have that incidental effect. It is not to be excluded for that reason alone.

As to the nature of the questions that may properly put the court laid down the following propositions in *R v. McLeod*, (1994) 3 All ER 254, 267:

(1) The primary purpose of the cross-examination as to previous convictions and bad character of the accused is to show that he is not worthy of belief. It is not, and should not be, to show that he has a disposition to commit the type of offence with which he is charged: see *Vickers*, *Khan* and *Barsoum*. But the mere fact that the offences are of a similar type to that charged or because of their number and type have the incidental effect of suggesting a tendency or disposition to commit the offence charged will not make them imporper : *Powell, Owen and Selvey*.

(2) It is undesirable that there should be prolonged or extensive cross-examination in relation to previous offences. This is because it will divert the jury from the principle issues in the case, which is the guilt of the accused on the instant offence, and not the details of earlier ones. Unless the earlier ones are admissible as similar fact evidence, prosecuting counsel should not seek to probe or emphasise similarities between the underlying facts of previous offences and the instant offence.

(3) Similarities of defences which have been rejected by juries on previous occasions, for example false alibis or the defence that the incriminating substance has been planted and whether or not the accused pleaded guilty or was disbelieved having given evidence on oath, may be a legitimate matter for questions. These matters do not show a disposition to commit the offence in question; but they are clearly relevant to credibility.

(4) Underlying facts that show particularly bad character over and above the bare facts of the case are not necessarily to be excluded. But the judge should be careful to balance the gravity of the attack on the prosecution with the degree of prejudice to the defendant which will result from the disclosure of the facts in question. Details of sexual offences against children are likely to be regarded by the jury as particularly prejudicial to an accused and may well be the reason why in *R v. Watts*, (1983) 3 All ER 101, the court thought the questions impermissible.

(5) If objection is to be taken to a particular line of cross-examination about the underlying facts of a previous offence, it should be taken as soon as it is apparent to defence counsel that it is in danger of going too far. There is little point in taking it subsequently, since it will not normally be a ground for discharging the jury.

(6) While it is the duty of the judge to keep cross-examination within proper bounds, if no objection is taken at the time it will be difficult thereafter to contend that the judge has wrongly exercised his discretion. In any event, this court will not interfere with the exercise of the judge's discretion save on well-established principles.

(7) In every case where the accused has been cross-examination as to his character and previous offences, the judge must in the summing up tell the jury that the purpose of the questioning goes only to credit and they should not consider that it shows a propensity to commit the offence they are considering.

Exception to the Rule That Evidence of Accused's Bad Character is Inadmissible in Criminal Cases. [Admissibility of Previous Conduct or of Similar Facts].—Evidence cannot be given for the prosecution to prove that the defendant is of bad character or has a propensity to commit criminal acts of the same nature as the offence charged merely for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried [*Makin v. A-G*, cited under s 14

ante]. On the other hand, the mere fact that evidence adduced tends to show the commission of other crimes does not render it inadmissible if it is relevant to an issue before the jury, and it may be relevant if it bears upon the question whether the acts alleged to constitute the crime charged were designed or accidental or to rebut a defence which would otherwise be open to the accused. It is not necessary that a specific line of defence should be set up before evidence is tendered which would overthrow it [(*Noor Md v. R*, 1949 AC 182 cited under s 14 *ante*); Hals 3rd Ed Vol 10 paras 818-20 and the cases cited in the footnote at p 442; Vol 15 paras 527-29 (see also *ante* s 14)].

It has been seen that evidence that the accused committed acts similar to that which form the subject matter of the charge is admissible not to show that because he has committed one crime, he would therefore be likely to commit another crime of the same nature, but to prove intention, knowledge, good faith &c of the accused with regard to the act or to rebut (even by anticipation) the defence of accident, mistake &c and to show that the act charged formed part of a series of similar occurrences. (see *ante* notes to ss 14, 15). The above is an exception to the general rule that evidence of bad character of the prisoner is inadmissible. The object of the admission of other transactions is only to show guilty knowledge, fraudulent intent, malice, etc. It should be remembered that general evidence of bad character is not admissible to show the accused's state of mind at the time of the commission of the offence charged, or for the raising of a presumption or general inference from such bad character. But evidence that the accused has been previously convicted of the same offence is admissible to show guilty knowledge or intention [*R v. Alloomiya*, 5 Bom LR 805, 821].

In cases of crime where it is thought desirable by the prosecution to give evidence of previous conduct of similar character to the suggested crime, before the jury, the intention of s 54 is not infringed and evidence pointing to directly similar conduct is admissible. S 54 refers to specific evidence of bad characrer not confined to acts similar to the crime which was being investigated, which may influence the jury on the question of motive which is dealt with the same conviction. Such a motive must be the same kind of motive that in all probability actuated the mind of the accused or may have actuated his mind in committing the crime for which he is being tried [*Raikhon v. R*, A 1936 C 469]. Though evidence of bad character is not admissible to prove disposition to commit the crime, the prohibition does not in any way affect evidence which is required to prove motive for the crime or which is otherwise relevant [*Jagwa v. R*, 93 IC 884: 5P 63: A 1926 P 232].

Evidence of Previous Conviction When May be Put in—Its Object.—Records of previous convictions should not be put in until the close of the trial. Such convictions can only be used in determining the measure of punishment should the accused be convicted [*R v. Shiboo*, 3 WR Cr 38: *Roshun Dosad v. R*, 5 C 768; see also *In re Ramanjulu*, 2 Weir 264; *R v. David*, 6 Bom LR 548: *R v. Ismail*, 39 B 326]. Admission of evidence of previous conviction, before accused is called upon for defence is not an illegality or irregularity [*Dehri v. R*, 50 C 367].

The imposing of sentence is a matter of discretion, it is not a matter of proof. That is, it is a matter within the sphere not of evidence but of penology. S 54 is a part of the law of evidence, not a part of the penal law: it regulates what is relevant for the purpose of proof at the enquiry or trial, not what is relevant for the purpose of deciding whether a long or short sentence should be imposed [*R v. Ismail*, 39 B 326: 16 Bom LR 934. **Approved** in *R v. Nga Ba*, A 1928 R 200: 6 R 391 FB where the object and use of s 54 have been fully discussed and in *Suban v. R*, A 1929 M 306].

In criminal proceedings, facts which tend to reduce the seriousness of the offence, and therefore affect the sentence, may be given in evidence before a verdict is taken: but on the other hand, facts tending to aggravate the sentence. Such as a previous conviction, can as a rule, only be proved after the jury has found the prisoner guilty [Powell, 9th Ed p 31]. After conviction, moreover, it is customary for the prosecution to call witnesses as to the prisoner's general character and reputation for the information of the court in determining the sentence to be passed [see *R v. Nuttall*, 73 JP 30: *R v. Whiteman, ibid*, 102 and *R v. Edwards. ibid* 286; Powell 9th ED P 135]. New Cr P Code. 1973 has made it obligatory for the courts to hear the accused on the question of sentence [*vide* ss 235(2) and 248(2)].

In a case the police resorted to the ingenious device of producing a photo of the accused which bore the number he had on his jail clothes and which indirectly went to show his previous conviction. It was held that indirect evidence of *previous* conviction is as inadmissible as any direct statement [*R v. Dwyer*, 1925, 2 KB 799].

—Previous Conviction May be Relevant Otherwise Than Under This Section.—Evidence of previous conviction may be given where the accused is liable to enhanced punishment; see ss 211, 236, 248(3), 298 of the Cr P Code; s 75 I P Code; Indian Articles of War (Act 5 of 1869) Art 117. It is also relevant under s 14(2) Evidence Act (see *illus b*); s 43 Evidence Act, (*illus e*); and under s 8 of the Evidence Act as showing the motive for the fact in issue (see *illus f* of s 43). See *Saroj v. R, 59 C 1361 ante*.

[In England it is expressly provided that in a prosecution for handling stolen goods, evidence of previous conviction for theft or for handling stolen goods within the last five years may be admitted in order to prove guilty knowledge [s 27(3) Theft Act 1968]: S 1(2) Official Secrets Act 1911 and s 15 Prevention of Crimes Act 1871 also provide for the admission of evidence of previous convictions. The Civil Evidence Act 1968 (s 11) makes a deep inroad in this branch of the law by enacting that the conviction of a person for a criminal offence may, in subsequent civil proceedings between any parties, be accepted unless the contrary is proved by any person seeking to refute it. It provides further that in defamation actions between *any parties* such proof of a previous conviction is *conclusive* evidence that that person committed the offence (s 13). See also s 1 Previous Conviction Act, 1836, 6&7 Will IV s 111; s 37 Coinage Offences Act, 1861, 24&25 Vic c 99].

Character of Prosecutor if Relevant.—The general character or reputation of the complainant is as a rule immaterial in criminal cases and no evidence can be given of it. But there is an exception to this rule. Where a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was generally of immoral character [see s 155(4) *post*; *R v. Tissington*, 1 Cox 48. See also *R v. Robins*, 2 M& R 512 and other cases cited *post*, under s 155(4). The immoral character of the accused even if it is true is of little consequence since even whore is entitled to protect herself from attacks of an intending rapist. [*State of Orissa v. Nirupama Panda*, 1989 Cri LJ 621, 623: 1988-2 Orissa LR 486]. The prosecutor can however be cross-examined as to credit like any other witness but his answers cannot be contradicted with a few exceptions (s 153 *post*). "The admissibility on a *rape* charge of the complainant's *character for chastity or unchastity* is generally conceded; and her *habits as a prostitute* are usually regarded as equivalent to a general trait of character. The same doctrine should apply to a *charge of enticement for prostitution*, because the question is whether the woman went of her own impulses or yielded to persuasion. It should also apply in rape where the woman is *under the age of consent*, and in a charge of mere *assault with intent* to commit rape, or of *indecent assault*, or the like, not

because it is logically relevant, but because a certain type of feminine character predisposes to imaginary or false charges of this sort (Wig s 62).

"The character of the prosecutor is not in general a matter relevant to the issue, unless he is also a witness and his credibility is impeached; but it seems it is open to the defence to show, if there is any doubt as to the truth of the charge, that the prosecutor in instituting the prosecution has been influenced by unworthy motives" [Hals 3rd Ed Vol 10 para 826]. In charges of rape the prosecutix may be cross-examined as to other acts of immorality with the prisoner (see notes to s 155(*4*) *post*).

In libel actions where the defendant is alleged to have injured plaintiff's reputation, defendant is entitled to give general evidence of plaintiff's bad reputation or to cross-examine him to the same end [*Laidman v. Hearsay*, 7 A 906 cited under s 138—CONTRA: *Debbrata v. Krishna*, A 1954 P 84].

In a trial on charge of burglary, the prosecution relied on the evidence of three police officers who stated that the accused had admitted his guilt to them. But the accused denied any conversation with them. The prosecution was granted leave to cross-examine him as to his previous convictions on the ground that the nature and conduct of the defence were such as to involve imputations on the character of the witnesses for the prosecution. The court of Appeal upheld the permission. By putting the truth of the police witnesses in issue, the accused had exposed himself to the risk of being cross-examined as to his previous convictions [*R v. Britzman; R v. Hall*, (1983) 1 All ER 369 CA].

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

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

SYNOPSIS

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1. Inserted by s 7 of I E Act (1872) Am Act, 3 of 1891.

COMMENTARY

Principle and Scope.—It has been seen that under the fifty-second section, the character of a party is irrelevant in civil cases, unless character is of the substance of the issue. In suits in which damages are claimed, the character of the person claiming damages sometimes becomes very material in assessing the amount of damages to be awarded, for in defamation and other cases damages depend on the character of the plaintiff. In such cases damages are always in issue and as character *affects* the question of damages by either increasing or reducing the amount, it becomes relevant (see also s 12 *ante*). Character as affecting damages in such suits does not properly belong to the law of Evidence, but to the law of Damages, because character or reputation evidence is here admitted not for rendering probable or improbable the conduct or act attributed, but for something else. The object is to ascertain the amount of damages by an inquiry into reputation. Character, however, is not relevant in every case of tort claiming damages, *eg* the amount of damages claimed for being bitten by a dog or for an injury caused by a railway accident, does not depend on the character of the plaintiff. The section makes relevant only the character of the person claiming the damages and not of the defendant, although the character of the latter may also sometimes be relevant for determining the amount of damages. Thus under the English law, in an action for damages on account of adultery or for seduction of wife or daughter, evidence of general bad character of the wife or daughter or of particular acts of immorality or indecorum is admissible in mitigation of damages [*Verry v. Watkins*, 7 C&P 308; Tay s. 356]. In such cases what is really sought is compensation for the pain which the plaintiff had to suffer for disgracing his family and ruining his domestic happiness and so the damages should be commensurate with the pain which will vary according as the character of the wife or daughter has been previously unblemished or profligate. Such evidence although not admissible under this section is certainly admissible under other sections of the Act (see s 12) as damages being a fact in issue, evidence of bad character may diminish its amount. On a claim of damages from an alleged adulteror, the co-respondent may prove, in mitigation of damages, that the petitioner has been guilty of notorious infidelity, has turned his wife out of doors; has refused to maintain her; or has otherwise been guilty of dissolute conduct; for, in such cases, a man can scarcely complain of the loss of that society upon which he himself placed so little value. In action for breach of promise of marriage a similar rule prevails [Tay s. 358]. There may be cases in which the plaintiff's character is directly in question. A man of bad character cannot claim the same amount of damages as a man of good reputation.

In civil cases, good character being presumed, may not be proved in *aggravation* of damages; but the party attacked may repel general evidence of bad character by general evidence of good character, or meet evidence of specific acts of impropriety by disproof of such acts, though not by evidence of general good character [*Jones v. James*, 18 LT 243; *Narracott v. N*, 33 LJP & M 61]. Bad character is admissible in chief in *mitigation* of damages in four cases, provided that it would not, if pleaded, amount to a justification, *viz* (*i*) Defamation; (*ii*) Breach of promise; (*iii*) Seduction; (*iv*) Petition for damages for adultery [Phip 11th Ed p 237; Tay ss 356-63].

[*Ref Tay ss 355-63; Powell, 9th Ed pp 136, 137; Steph Art 57; Mayne on Damages 7th Ed title 'Character'; Odger's Liber and Slander; Phip 11th Ed p 237; R v. Rowton, 34 LJMC 57; Wig ss 52-74, 1608-15*].

Character Evidence in Questions of Damages. [Defamation, Seduction, Breach of Promise of Marriage, etc].—As to defamation the subject was fully considered in *Scott v. Sampson*, 51 LJQB 380 and CAVE, J, pointed out that the

question fell into three classes. (*1*) Evidence of reputation; (*2*) Evidence of rumours of and suspicions to the same effect as the defamatory matter complained of; and (*3*) Evidence of particular facts tending to show the character and disposition of the plaintiff. The court decided that evidence of classes (*2*) and (*3*) is not admissible, and as to these the law may be considered to be settled. As to reputation, CAVE J, said ..... "He complains of an injury to his reputation and seeks to recover damages for that injury; and it seems most material that the jury who have to award those damages should know, if the fact is so, that he is a man of no reputation. 'To deny this would', as was observed by Starkie on Evidence, 'be to decide that a man of the worst character is entitled to the same measure of damages with one of unsullied and unblemished reputation. A reputed thief would be placed on the same footing with the most honourable merchant, a virtuous woman with the most abandoned prostitute. To enable the jury to estimate the probable quantum of injury sustained, a knowledge of the party's previous character is not only material but seems to be absolutely essential' [this passage from Starkie, LORD COLERIDGE CJ, read to the jury with approval in *Wood v. Cox*, 1888, 4 TR 653] .....On principle, therefore, it would seem that general evidence of reputation should be admitted, and on turning to the authorities it would be found that it has been admitted in a great majority of those cases, and that its admission has been approved by a great majority of the judges who have expressed an opinion on the subject" [Tay s 355A]. [For a summary of the law on the subject see Tay ss 355D, 355E].

In actions for defamation therefore plaintiff's bad character, *i.e.*, poor reputation is admissible in mitigation of damages and evidence of his previous conviction is admissible as being cogent evidence that he had a bad general reputation, provided that the connections are in the relevant sector of the plaintiff's life and have taken place recently enough to affect his current reputation. [*Goody v. Odhams Press Ltd*, 1966 3 All ER 369]. As Wigmore says "the meat of the argument is that a person should not be paid for the loss of that which he never had".

In actions for defamation, evidence of the plaintiff's general good character is held irrelevant even though a justification is pleaded [*Cornwall v. Richardson*, 1825 Ry & M 305]. Where the libel charged the plaintiff with incompetency as a surveyor, he was not allowed to travel out of the record by showing that he had at other times acted competently in that capacity [*Brine v. Bazalgette*, 3 Ex 692]. In an action for seduction, evidence of the bad character of the person seduced is admitted in reduction of damages, but the evidence must refer to a time prior to the seduction [*Verry v. Watkins*, 7 C & P 308]. It is a defence to an action for breach of promise of marriage that the plaintiff at the date of the promise was a woman of general immoral character, unless the defendant was then aware of this. So, proof, that the plaintiff, after the promise, became unchaste will release the defendant [*Jones v. James*, 18 LT 243; Powell, 9th Ed p 136].

In actions of criminal connection, the defendant could adduce evidence of the wife's bad character for chastity, and even of particular acts of adultery committed by her before her intercourse with him; for by bringing the action, the husband put her general behaviour in issue. So in seduction, the defendant may show the previous bad character of the person seduced. But even in such cases it has been held that the plaintiff cannot give evidence of the good character of the wife or daughter until evidence has been offered on the other side to impeach it [*Bamfield v. Massey*, 1 Camp 460]; and if such evidence be not general, but go only to a specific instance, it has been ruled that the plaintiff cannot, in reply, give evidence of general character but must be restricted to disproof of the specific instance. So, in an action for slander imputing dishonesty to the plaintiff, he cannot adduce evidence in the first instance of good character [Ros NP 18th Ed pp. 86, 87]. [As to seduction, see Tay s 356 quoted *ante*, p. 553].

In libel cases in England, general evidence of plaintiff's bad character is controlled by the provision of r 37 of Or 36, R.S.C.

Where the gist of the action was damage to the plaintiff's character, the defendants were entitled to show that the plaintiff was a person whose reputation would not be damaged by a particular libel in question. In mitigation of damages the defendants can give evidence of the plaintiff's bad character, but not evidence of rumours and suspicions of bad character [*Englishman v. Lajpat Rai*, 37 C 760 : 14 CWN 713 (*Scott v. Sampson, ante*, **refd** to)]. In the case referred to it was held that in an action for libel, evidence of plaintiff's bad character is admissible in mitigation of damages; but evidence of rumours before the publication of the libel that plaintiff had committed the offences charged or that he was in the habit of committing offences of a like nature is inadmissible. In *Scott v. Sampson, ante*, the innuendo charged by the statement of claim was that the libel complained of meant that plaintiff had systematically abused his position as a dramatic critic and a journalist for the purpose of extorting money, and a justification was pleaded, so that plaintiff's general character in this regard was in issue, and not merely a question whether he had been guilty of a particular act of misconduct [Tay s 355B].

In action for breach of promise the bad character of the plaintiff is clearly in issue. If the plaintiff has been guilty of criminal intercourse with another, and such fact is unknown to the defendant at the time of the contract, he may prove it as a defence. The same is true if without his fault she becomes unchaste after the promise and if without the fault of the defendant, the plaintiff by her subsequent indelicate conduct injures her reputation, this may be shown in mitigation of damages. So if the plaintiff prior to the promise was a person of poor character, the fact is relevant in mitigation of damages. But if she has been seduced first by the defendant under promise of marriage, he cannot be heard to prove her bad character [Jones, 3rd Ed s. 151]. In actions for seduction and criminal conversion, the character of the woman seduced is in issue. In such actions one element of damage is the wounded sensibility of the injured party, and another is the loss of society of the daughter or wife. Hence the damage is manifestly less if the daughter or wife was a person of disparaged fame before the wrong. In such cases evidence is admissible not only of general bad character for chastity, but of specific acts of intercourse with other men, even though such former acts of unchastity were not known to the defendant or the public. In action of this kind it has been held that the bad character of the husband or father, bringing the action is relevant to the issue when it affects him in his marital relations or in the character in which he sues. But in other cases in actions for seduction brought by the father, such evidence has been rejected [Jones, 3rd Ed s. 152].

Evidence of Good Character in Aggravation of Damages.—A plaintiff cannot give evidence of general good character in aggravation of damages, unless counter-proof has been first offered by the defendant, for, until the contrary appear, the presumption of law is already in his favour. In an action for seduction, where evidence was produced for the defence to prove that the girl had previously had a child by another man. LORD ELLENBOROUGH would not allow a question to be asked respecting her general good character for chastity, but restricted the plaintiff to the proof that the specific charge made by the defendant was false [*Bamfield v. Massey*, 1 Camp 460 : Tay s 362].

Explanation—"Character" Includes Both Reputation and Disposition.—According to the *Explanation* the term "character" in ss 52, 53, 54 and 55 includes both *reputation* and *disposition*. In England however, according to the common law it includes reputation only though in the special case of the Evidence Act 1898 it seems

to accommodate both concepts [*per* LORD SIMON LC, *Stirland v. D P P*, 1944, 2 All ER 13, 17]. The term "character", saya Taylor as here used is not—as some able judges have considered it to be—synonymous with "disposition", but it simply means "reputation", or the general credit which a man has obtained in public opinion. A witness therefore, who is called to speak to character—unlike a master who is asked for the character of his servant, cannot give the result of his personal experience and observation, or express his own opinion but in strict law, he must confine himself to evidence of mere general repute [Tay s. 350]. "Character and reputation are as distinct as are destination and journey. Nevertheless the occasional use of the single term 'character' for both actual disposition and reputation of it, and the circumstance that the reputation is the most usual way of evidencing this actual disposition has sometimes led even careful judges to define reputation and actual disposition, for all purposes of evidence, as the same, and to intimate that reputation alone is the thing involved" [Wig. s. 52].

"Character" as is commonly understood is, distinct from reputation. It may mean actual moral disposition [*Malindi v. R*, 1966, 3 All ER 285]. Strictly speaking, character means actual disposition, *ie.*, the inherent qualities of a person or the sum of his traits and not the "reputation" which a man has obtained in the estimation of others. According to Webster "character" means "the peculiar qualities impressed by nature or by habit on the person, which distinguish him from others; these constitute his real character. The qualities which he is supposed to possess constitute his estimated character or reputation" (Webster's Dictionary). DURFEE, C.J., in *State v. Wilson*, 1885, 15 RI 180 : 1 Atl 415 (cited Wig s. 1608) said: "Doubtless there is a distinction observed by careful writers between 'character' and 'reputation'; 'character' (where the distinction is observed) signifying the reality, and 'reputation', merely what is reported, or understood from report, to be the reality, about a person or thing." What the law admits as character evidence is not real character, *ie.*, particular traits but the reputed character, *ie*, the opinion formed by others of a person, which is known as reputation. Reputation, therefore, is only one of several modes of proving character, though commonly it is said that 'character' and 'reputation' are the same. In *Bucklin v. S*, 1851, 20 Oh 23, CALDWELL, J, said:—

> "..... a man's character may really be good when his reputation is bad, and, on the other hand, his reputation may be good when his character is bad. But, as we have before intimated, the terms when used in connection with this subject are generally used in contradiction to this distinction,—the term 'general character' being used in legal significance, as it is frequently used in common parlance, to express the opinion that has generally obtained of a person's character, the estimate the community generally has formed of it. When you ask a witness, then, in this sense of the term, what a man's general character is for truth and veracity, he is called on to answer as to what opinion is generally entertained and expressed of him by those acquainted with him."

It has been held in England that character means only general reputation and it is this evidence which is admissible and not disposition. So reputation is character. This evidence of reputation is a form of hearsay and is admitted on the ground of necessity. Under the Act character includes both reputation and disposition.

The accused was charged with five counts of obtaining property by deception. He pleaded his good character. The prosecution cross-examined the appellant about a recent civil action against him in the county court, the purpose being to show that the appellant was of dishonest disposition. The appellant was convicted on all five counts and appealed. It was held that bad character encompassed both reputation and

disposition. The court said that the following propositions applied : (1) any cross-examination of an accused designed to show that he was unworthy of belief, and which did not arise from evidence relating to the indictment, before the jury, related to character in the sense of disposition and so fell within the prohibition, (2) if such leave was given, both the judge and the prosecutor had a discretion to limit the use which was to be made of it, and a duty to use that discretion to avoid unfair suggestions of propensity or prolonged inquiry into issues of only marginal relevance. The appeal was allowed [*R v. Carter*, (1996) JP 207 (CA)].

Section Based on Dissentient Judgments in R v. Rowton.—The leading English case is that of *R v. Rowton*, (1885) 34 LJMC 57, according to which character is confined to general reputation only. In that case the accused who was tried for indecent assault gave evidence of good moral character upon which the prosecution by way of rebuttal gave evidence of a person who said that he had no knowledge of the opinion of the neighbourhood, but his own opinion and that of his brothers who were pupils of the defendant was that the accused was "a man capable of the grossest indecency and the most flagrant immorality." It was held by the majority of the judges (eleven) including COCKBURN, CJ, (ERLE, CJ, and WILLES, J, **dissenting**) that the opinion of a witness based on his personal experience of the disposition of the prisoner is inadmissible. This case has been much criticised by SIR JAMES STEPHEN, who said:—

> "One consequence of the view taken is that a witness may with perfect truth swear that a man who to his knowledge has been a receiver of stolen goods for years has an excellent character for honesty, if he has had the good luck to conceal his crime from his neighbours. It is the essence of successful hypocrisy to combine a good reputation with a bad disposition. The case is seldom, if ever acted on in practice. The question always put to the witness to character is: "What is the prisoner's character for honesty, morality or humanity" as the case may be, nor is the witness ever warned that he is to confine the evidence to the prisoner's reputation. It would be no easy matter to make the common run of witnesses understand the distinction" (Steph. Dig. note xxv, p. 179).

Though according to *R v. Rowton, ante*, character is confined to 'reputation' only and not 'disposition,' the rule, as Taylor observes, "appears to rest rather on authority than on reason and would probably have been rejected long ago by the courts, had it not been for two causes. First, the rule, in practice, is seldom strictly enforced; and, next, it has to a certain extent been modified by the judges" (Tay s 350; see also Phip 11th Ed pp 227-30; Wig s 56). Thus, in *R v. Davidson*, 31 How St Tr 99. LORD ELLENBOROUGH held that the personal experience of a witness, or his opinion founded upon his personal experience was admissible.

STEPHEN however, in including '*reputation*' and '*disposition*' within the definition of character in this section, has made a deliberate departure from the law of England. There is no doubt that the inclusion of 'disposition' also within 'character' is in consonance with practice and reason as the distinction between 'reputation' and 'disposition' is seldom if ever adhered to. It is an improvement and has simplified matters. A man with a very good reputation may have a very bad disposition, and both go to make up real character. On the other hand, a man may have a good disposition without any general character in the sense of reputation. If a man's reputation or the general credit he has among the public or a community is only taken account of, his real character, *ie* the particular traits in his disposition which are permanent and settled, is withheld and it is these traits which are of help in forming an estimate of his true character. The inclusion of 'disposition' in the definition is

therefore based on the reasons given by ERLE, CJ, and WILLES, J, in their dissenting judgments in *R v. Rowton, supra*. ERLE CJ, in the course of his judgment said:—

> "What is the principle on which evidence of character is admitted? It seems to me that such evidence is admissible for the purpose of showing the disposition of any party accused, and basing thereon a presumption that he did not commit the crime imputed to him. Disposition cannot be ascertained directly; it is only to be ascertained by the opinion formed concerning the man, which must be found either on personal experience or on the expression of opinion by others; whose opinion again, ought to be founded on their personal experience. The question between us is whether the court is at liberty to receive a statement of the disposition of a prisoner, founded on the personal experience of the witness, who attempts to give evidence and state that estimate which long personal knowledge of an acquaintance with the prisoner has enabled him to form. I think that each source of evidence is inadmissible. You may give in evidence the general rumour prevalent in the prisoner's neighbourhood, and according to my experience, you may have also the personal judgment of those who are capable of forming a more real, substantial guiding opinion than that which is to be gathered from general rumour. I have never seen a witness examined to character without an enquiry being made into his personal means of knowledge of the character ..... Suppose a witness to character were to say—'This man has been in my employ for twenty years, I have had experience of his character; but I have never heard a human being express an opinion of him in my life. For my own part, I have always regarded him with the highest esteem and respect, and have had abundant experience that he is one of the worthiest man in the world.' The principle the LORD JUSTICE (COCKBURN, CJ) has laid down, would exclude his evidence; and that is the point, where I differ from him. To my mind personal experience gives cogency to the evidence; whereas such a statement as 'I have heard some person speak well of him' or 'I have heard general report in favour of the prisoner', has a very slight effect in comparison."

In the same case WILLES, J, said:

> "I apprehend that the man's disposition is the principal matter to be enquired into and that his reputation is merely accessory, and admissible only as evidence of disposition ..... The judgment of the particular witness, is superior in quality and value to mere rumour. Numerous cases may be put in which a man may have no general character—in the sense of any reputation or rumour about him—at all, and yet may have a good disposition. For instance, he may be of a shy, retiring disposition and known only to a few; or again, he may be a person of the vilest character and disposition, and yet only his intimates may be able to testify that this is the case. One man may deserve that character (reputation) without having acquired it, while another man may have acquired without deserving it. In such case the value of the judgment of a man's intimates upon his character becomes manifest. In ordinary life, when we want to know the character of a servant, we apply to his master. A servant may be known to none but members of his master's family; so the character of a child is known only to his parents and teachers, and the character of a man of business to those with whom he deals ..... According to the experience of mankind, one would ordinarily rely rather on the information and judgment of a man's intimates than on general report, and why not in a court of law?"

A witness to reputation may however testify to *negative* as well as *affirmative* evidence on the subject, *eg*, that he has never heard anything against a person. As

ERLE, CJ, said in *R v. Rowton, ante*: "The best character is that which is least talked of." And COCKBURN, CJ, in the same case said: "Negative evidence, such as "I never heard anything against the character of the man," is the most cogent evidence of a man's good character and reputation, because a man's character is not talked about till there is some fault to be found with. It is the best evidence of his character that he is not talked about at all." In this connection Wigmore says: "But it is obvious that this form is no sufficient indication for a reputation of *bad character*. Moreover, so far as the answer 'I never heard his character discussed' implies that the witness has not had opportunities for learning what the reputation was, he is not a qualified witness to reputation" [Wis s 1614].

Reputation includes both character and disposition and the disposition is not the less proven because it appears on the face of the facts deposed to by the plaintiff or is a proper inference from those facts [*Englishman v. Lajpat Rai*, 37 C 760 : 14 CWN 713].

Evidence of Reputation or Disposition should be General.—The Explanation makes it clear that evidence may be given only of *general* reputation and *general* disposition and not of *particular* facts. Nor can a witness express his own opinion based on personal experience and observation. The opinion must be as to the general reputation prevailing among the community as a whole in the neighbourhood where the person whose character is in question resides [; see notes to s 53, *ante*; Tay s 351 quoted *ante*]. The witness's knowledge of reputation should therefore be based on his residence in the place or in its neighbourhood and not on mere inquiry by a visit to the place where the person whose reputation is in question resides. "That cannot be evidence. ..... If this was allowed, when it was known that a witness was likely to be called, it would be possible for the opposite party to send round to persons who had prejudices against him and from thence to form an opinion which was afterwards to be told in court to destroy his credit" [KENYON, CJ, in *Mawson v. Heartsink*, 4 Esp 102].

Only general evidence of character or reputation can be given and not, for instance evidence of a particular conviction [*Samarthmal v. R*, A 1932 N 158]. A man's general reputation is the reputation which he bears in the place in which he lives amongst all townsmen. If it is proved that a man who lives in a particular place is looked upon by his fellow-townsmen, whether they happen to know him or not, as a man of good repute, that is strong evidence that he is a man of good character. On the other hand, if the state of things is that the body of his fellow-townsmen, who know him, look upon him as a dangerous man, and a man of bad habits, that is strong evidence that he is a man of bad character; [see *Rai Isri v. R*, 23 C 621]. Under the Act, unlike in England, evidence can be given both of general character and general disposition. Disposition means the inherent qualities of a person, reputation means the general credit of the person amongst the public [*Bhagwan Swarup & Ors v. S*, A 1965 SC 682]. S 55 allows evidence of general reputation and of general disposition, but not of particular facts or traits. The principles of law in a criminal prosecution for defamation are not different in this matter. In either case loss of reputation is the foundation for an action or prosecution [*Harbhajan v. S*, A 1961 Pu 215].

In the case of 'disposition,' however, the opinion of a witness founded on personal experience as well as the expression of opinion by others is receivable; (see the observations of ERLE, CJ and WILLES, J, in *R v. Rowton, ante*). A cogent source of knowledge of general disposition of a man is our personal experience and observation. Moreover, when a witness speaks to the general reputation or disposition of a person, his personal experience naturally becomes the subject of

inquiry when he is asked in cross examination as to his means of knowledge of the character. "It is commonly said that the reputation must be *general*; that is the community as a whole must be agreed in their opinion, in order that it may be regarded as a reputation. If the estimates vary, and public opinion has not reached the stage of definite harmony, the opinion cannot yet be treated as sufficiently trustworthy. On the other hand, it must be impossible to exact unanimity; for there are always dissenters. To define precisely that quality of public opinion thus commonly described as 'general' is therefore a difficult thing .....There is on this subject often an attempt at nicety of phrase which amounts in effect to mere quibbling, because the witness ordinarily will not appreciate the discriminations; such requirements of definition should be avoided as unprofitable" [Wig s. 1612].

CAMPBELL, J, in *Pickens v. State*, 61 Miss 566 : "General reputation consists in what is generally thought of one by those among whom he resides and with whom he is chiefly conversant. 'Common opinion'; 'that in which there is general concurrence'; 'the prevailing opinion in that circle where one's character is best known'; 'what is generally said by those among whom he associates and by whom he is known'; 'common report among those who have the best opportunity of judging of the habits and integrity', 'common reputation among his neighbours and acquaintances',—are so many forms of expression by which an effort has been made to define wherein consists general reputation" (cited Wig. s 1612).

"The reputation must involve the general opinion, not a partial or fragmentary one. Nevertheless that opinion may exist as a general one, entertained by the community as a whole, although no utterance by the general mass of its members, or even by a majority of them, has been made. In other words, a general reputation may by inference be believed to exist, although the utterances actually heard by the witnesses and used as the basis of his inference, may be and usually are those of a representative minority only" [Wig s 1613]. "He may have heard a sufficient number express themselves to be willing to say he knows the general concurrence in one view of a number great enough to be regarded as a fair index to the community. One may know the general reputation of Sargent S Prentiss as a matchless orator, although he has heard a small proportion of those who felt the thrill of unrivalled eloquence say what they thought of him [*per* CAMPBELL, CJ, in *Pickens' v. S*, 61 Miss 567]. The general reputation must prevail in the *neighbourhood* where the person resides.

Thus, BRACE, J, in *Waddington v. Hullett*, 92 Mo 533 said "(The witness) must be able to state what is generally said of the person by those among whom he dwells or with whom he is chiefly conversant,—not by those among or with whom he may have sojourned for a brief period, and who have had neither time nor opportunity to test his conduct, acts or declarations, or to form a correct estimate of either. A man's character is to be judged by the general tenor and current of his life, and not by a mere episode in it."

Kind of Character.—Evidence of reputation or disposition must be confined to particular traits which the charge is concerned about [*R v. Swendsen*, 14 How St Tr 559, 596]. Thus, it would be useless to offer evidence of a prisoner's reputation for honesty on a charge of cruelty, or of his mild disposition on a charge of theft. Reputation for honesty would be relevant on a charge of theft: a merciful disposition on a charge of cruelty. Where evidence of character is offered, it must be confined to general character; evidence of particular acts, *eg*, of honesty, or benevolence, or the like, cannot be received [*J'Ansen v. Stuart*, 1 TR 754; Norton, p 234]. But a disposition of a man may be made up of many traits, some good and some bad, and

only evidence in regard to a particular trait with which the witness is familiar would be of some use [*Bhagwan Swarup & Ors v. S, sup*].

Reputation to be Distinguished From Rumour or Hearsay.—"Reputation, being the community's opinion, is distinguished from mere rumour in two respects. On the one hand, reputation implies the definite and final formation of opinion by the community; while rumour implies merely a report that is not yet finally credited. On the other hand, a rumour is usually thought of as signifying a particular act or occurrence, while a reputation is predicted upon a general trait of character, a man's reputation, for example, may declare him honest, and yet today a rumour may have circulated that this reputed honest man has defaulted yesterday in his accounts" [Wig s 1611].

> CAVE, J, in *Scott v. Sampson*, LR 8 QBD 491: "It would seem that such evidence (or rumour and suspicions), is not admissible, as only indirectly tending to affect the plaintiff's reputation. If these rumours and suspicions have in fact affected the plaintiff's reputation, that may be proved by general evidence of reputation. If they have not affected it, they are not relevant to the issue. To admit evidence of rumours and suspicions is to give any one who knows nothing whatever of the plaintiff, or who may even have a grudge against him, an opportunity of spreading, through the means of the publicity attending judicial proceedings, what he may have picked from the most disreputable sources and what no man of sense who knows the plaintiff's character would for a moment believe in."

If the evidence is of those persons who are living in the locality where the reputation is prevailing and people talk of their beliefs about him, it is admissible. But if the evidence is of a man who does not know of the reputation himself but heard it from others, it will be hearsay and inadmissible [*Firangi v. R*, A 1933 P 189 : 143 IC 687; **relied** on in *Baso Rai v. R*, A 1948 P 84]. 'Character', 'Reputation' and 'Rumour' explained [*Harbhajan v. S*, A 1961 Pu 215].